

Mitt Romney, the 47% Percent, and the Future of the Mass Income Tax

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I. INTRODUCTION

No event in the presidential campaign of 2012 received more attention or generated more commentary than the surfacing of a video—on the website of Mother Jones magazine—of Republican nominee Mitt Romney complaining (to a May 2012 gathering of wealthy donors) about the 47% of the population not subject to the federal income tax:

There are 47 percent of the people who will vote for the president no matter what There are 47 percent who are with him, who are dependent upon government, who believe that they are victims, who believe that government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing, to you name it. . . . These are people who pay no income tax. Forty-seven percent of Americans pay no income tax.¹

As a Washington Post reporter observed a few weeks after the release of the video, Romney's "remarks pierced the national consciousness . . . and became a defining element of Romney's candidacy."² In bemoaning the high percentage of households not subject to the federal income tax, Romney was echoing numerous conservative commentators and politicians, who had vociferously objected that 47% was far too high, ever since the statistic first came to their attention in 2010.³

Before the release of the Romney video, it was an open question whether the complaints of the conservative critics could gain enough traction with the general public—and ultimately with Congress—to result in legislation significantly increasing the federal-income-taxpay-

¹ Full Transcript of the Mitt Romney Secret Video, Mother Jones (Sept. 19, 2012, 4:00 AM), <http://www.motherjones.com/politics/2012/09/full-transcript-mitt-romney-secret-video>.

² Philip Rucker, Romney: "47%" Remarks Were "Completely Wrong," Wash. Post, Oct. 5, 2012, http://www.washingtonpost.com/politics/decision2012/romney-47-percent-remarks-were-completely-wrong/2012/10/05/a346beaa-0ed8-11e2-a310-2363842b7057_story.html.

³ The background to Romney's remarks is described in detail in Part II.

ing percentage of the population. In the aftermath of the video, the population coverage of the federal income tax is dead as a political issue for the foreseeable future. It is quite possible that the coverage of the income tax will rise to comfortably above 60% in the next few years,⁴ but not because it is a political imperative that the income tax cover a substantial majority of the population.

The release of the video made the 47% statistic the topic of national conversation for several news cycles, thus moving the policy discussion out of the right-wing echo chamber it had occupied since 2010.⁵ It was no surprise that the consternation of some conservatives over the 47% figure was not shared by moderates and liberals. What was surprising was that a number of conservative commentators—many of whom had not previously weighed in on the issue, but who were induced to do so by the release of the video—also did not share the consternation. After the video, advocates of increased coverage of the income tax can no longer credibly claim that they will prevail if only they can get the public's attention; the public has focused on the issue, and it turns out the public does not care.

A proponent of increasing the coverage of the income tax would not have chosen the release of the Romney video as the catalyst for a national conversation. In the video Romney's implicit disapproval of the fact that 47% of the population was not subject to the income tax was inextricably bound up with his unveiled contempt for the nearly half of all Americans he viewed as lazy moochers. The negative reaction to this aspect of Romney's remarks—among both commentators and the public—was intense and widespread (and richly deserved). As a logical matter, whether the 47% of the population not subject to the income tax deserves anyone's contempt is a separate question from whether the income-taxpaying percentage of the population ought to be increased. But just as Romney's remarks had conflated the two issues, much of the reaction to the remarks also failed to separate the questions. Because Romney was so obviously and offensively wrong in his disdain, he also was viewed as wrong on the policy question of the optimal coverage of the income tax. If, somehow, criticism of the low coverage of the income tax had captured the nation's attention in a different way—without being associated with Romney's scorn for nearly half the population—opinion leaders and the public might have been more receptive to the criticism. The release of the video extinguished, perhaps for a generation, whatever chance there

⁴ Urban-Brookings Tax Pol'y Ctr., Table T13-0228, Tax Units with Zero or Negative Income Tax Liability Under Current Law, 2004-2024 (Aug. 29, 2013), available at www.taxpolicycenter.org/number/displayatab.ctm?DocId=3987.

⁵ The reaction to Romney's remarks is described in detail in Part III.

may have been to convince the public that the criticism was well-founded.

This Essay puts Romney's remarks in the context of their causes and consequences—first by describing the 2010 origins and subsequent development of the 47% critique in conservative circles, and then by describing the reactions to the remarks (of both opinion leaders and the public, and across the political spectrum). The Essay also situates the 47% critique in the context of related conservative critiques of federal tax-and-transfer policies—in particular, criticism of the fact that about half the population receives direct government benefits in any given year, and studies concluding that 60% to 70% of Americans are “net takers” who receive more value from the government than they pay in taxes.⁶ Although the goals of the Essay are primarily descriptive (of the several critiques and of the reactions to them) and predictive (of the unpromising political future of the critiques), the author's own normative views may intrude from time to time.

II. THE ORIGINS OF THE 47% CRITIQUE⁷

In June 2009, Robertson Williams of the Tax Policy Center (TPC) published a short article in *Tax Notes*, reporting TPC's estimate that 47% of United States households would owe no federal income tax for 2009.⁸ For some of the nonincome-taxpaying households, income was so low that no one in the household was required to file a return. For many other households, however, returns were filed but no income tax was owed. Of the 140.5 million individual income tax returns filed for 2009, 58.6 million—almost 42% of all returns—were nontaxable.⁹ Most nonincome-taxpaying households had one or more members who were income tax filers—but filers who were not also income taxpayers. These nonpaying filers typically achieved nonpaying status through the use of tax credits, especially the refundable earned income tax credit and the partly refundable child tax credit.¹⁰ For millions of the nonpaying filers, their income tax liability was not merely zero; it was negative.

⁶ These related critiques are explained and discussed in Part IV.

⁷ Portions of this Part are based on Lawrence Zelenak, *Learning to Love Form 1040: Two Cheers for the Return-Based Mass Income Tax 27-35* (2013).

⁸ Robertson Williams, *Who Pays No Income Tax?*, 123 *Tax Notes* 1583 (June 29, 2009). TPC later revised its 2009 figure. It now estimates that half of all tax units, 50%, had zero or negative income tax liabilities for 2009. Tax Policy Center, note 4. Despite the later revision, the initial 47% figure has always been the figure associated with this issue in the public debate, as indicated by Mitt Romney's citation of the 47% statistic.

⁹ Justin Bryan, *Individual Income Tax Returns, 2009*, IRS, *Stat. Income Bull.*, Fall 2011, at 5, 34, tbl.2 (2011).

¹⁰ IRC § 32 (EITC), § 24 (CTC).

As Williams explained in his article, the high percentage of non-income-taxpaying households was largely due to temporary credit provisions introduced by 2009 legislation; without the temporary credits only 38% of all households would have had income tax bills of zero or less than zero.¹¹ Although Williams did not mention the fact in his article, the first year of the recession—2008 rather than 2009—had been the year of the dramatic increase in the percentage of non-income-taxpaying households. From 38.4% in 2007 the nonpaying percentage jumped to 49.9% in 2008,¹² partly because of recessionary declines in household income and partly because of one-time “recovery rebates” provided for by the Economic Stimulus Act of 2008.¹³

Although the one-year increase from 2007 to 2008 was remarkable for its magnitude, it was also part of a long-term trend. The IRS Statistics of Income Division does not attempt to count nonfiling households, but it does track the relative numbers of taxable and nontaxable returns. The percentage of individual income tax returns with positive tax liabilities had fallen significantly over the past few decades—from 81.5% in 1986 to 58.3% in 2009.¹⁴ Major legislative milestones contributing to the trend included the Clinton-era introduction of the child tax credit and increase in the magnitude of the earned income credit, as well as the George W. Bush-era increase in the child credit from \$500 to \$1000 per child.¹⁵

The Williams article attracted little attention when it first appeared. That changed, however, as Tax Day 2010 approached and the mainstream media began its seasonal search for income tax stories of interest to a broad audience. On April 7, 2010, Williams’ nine-month-old *Tax Notes* article furnished the lead for an Associated Press story: “Tax Day is a dreaded deadline for millions, but for nearly half of U.S. households it’s simply somebody else’s problem.”¹⁶ The story immediately went viral. On the Fox News Network that evening, former Republican Senator (and future presidential candidate) Rick Santorum told host Greta Van Susteren, “Look, what we have is a situation that Thomas Jefferson warned us about from the very beginning. When you have—when you reach the point where people feel like they don’t have to pay anything and they’re getting money out of

¹¹ Williams, note 8, at 1583.

¹² Tax Policy Center, note 4.

¹³ Pub. L. No. 110-185, § 101, 122 Stat. 613, 613-17 (2008).

¹⁴ Adrian Dungan & Michael Parisi, Individual Income Tax Rates and Shares, 2010, IRS, Stat. Income Bull., Winter 2013, at 18, 20, fig.A (2013).

¹⁵ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13131, 107 Stat. 312, 433-35 (EITC expansion); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 201, 115 Stat. 38, 45-47 (CTC expansion).

¹⁶ Stephen Ohlemacher, Nearly Half of U.S. Households Escape Fed Income Tax, Associated Press Fin. Wire, Apr. 7, 2010, available in LexisNexis News file.

the Treasury for nothing, then there's no end to the amount of government that people want."¹⁷ Similar observations followed from numerous commentators on the right. Mark Steyn of the *National Review* complained,

By 2012, America could be holding the first federal election in which a majority of the population will be able to vote themselves more government lollipops paid for by the ever shrinking minority of the population still dumb enough to be net contributors to the federal treasury. . . . [T]he remorseless shriveling of the tax rolls is a cancer at the heart of republican citizenship.¹⁸

Flat tax proponent and radio talk show host Neal Boortz chimed in: "Barack Obama believes that wealth is distributed, not earned. His oft-stated goal is to use our tax code to place wealth in the hands of those he feels to be deserving, not in the hands of those who actually earned it. The 47 percent of us who pay no income taxes think this is a mighty wonderful idea."¹⁹

Scott Hodge of the Tax Foundation had been decrying the decreasing coverage of the income tax for years. He used the spotlight on the 47 percent estimate as an occasion to reiterate his critique: "The real issue is that millions of Americans no longer have any skin in the game and are becoming inoculated from the basic cost of government. To them, government seems free and politicians can easily convince them to support more and more spending because someone else is going to pay the tab."²⁰

Even the couldn't-be-more-middle-of-the-road editors of *USA Today* expressed concern: "It's not healthy for society if somewhere between a third and half of all potential tax filers don't help share the cost of most of government, from defense to highways to national parks. Everyone above the poverty level should have at least a minimal stake in financing the nation."²¹

Conservative complaints about the declining percentage of income-taxpaying households did not originate with the 2010 tax season. Both

¹⁷ Who Pays Taxes?, Fox News Network Transcript: Fox on the Record with Greta van Susteren, (Apr. 7, 2010, 10:22 PM), available in LexisNexis News file.

¹⁸ Mark Steyn, Tax Season, Nat'l Rev. Online (Apr. 10, 2010, 7:00 AM), <http://www.nationalreview.com/articles/229517/tax-season/mark-steyn>.

¹⁹ Neal Boortz, Tax System Tool for "Social Justice," Atlanta J. Const., Apr. 17, 2010, at A13.

²⁰ Scott A. Hodge, Why More Americans Pay No Income Tax, CNN.com (Apr. 15, 2010, 9:46 AM), <http://www.cnn.com/2010/OPINION/04/15/hodge.non.taxpayers/>.

²¹ Editorial, When 47% Don't Pay Income Tax, It's Not Healthy for USA, USA Today, Apr. 16, 2010, at 10A.

the warnings of Scott Hodge that the growing number of nontaxpayers threatened the “fabric of our democracy,”²² and the grumblings of the editors of the *Wall Street Journal* about the “lucky duckies” who paid no income tax, predated the 2010 tax season by years.²³

In the aftermath of the 2010 tax season and the going viral of the 47% statistic, however, the decreasing and inadequate coverage of the income tax was transformed from the hobbyhorse of a few to a core grievance of many on the right. Examples abound, but a few will suffice here. Interviewing Obama economic advisor Gene Sperling on Fox News in 2011, Steve Doocy posed the question, “Gene, you say it’s not class warfare and you say millionaires and billionaires are going to have to . . . pay their fair share. But there are—what is it, 47 percent of Americans pay zero federal income tax? So what’s fair about that?”²⁴ In a 2011 op-ed in the *Wall Street Journal*, conservative economist Michael J. Boskin warned that “[b]ig exemptions can create a majority paying nothing and voting more spending at the expense of a taxpaying minority.”²⁵ Candidates for the Republican presidential nomination joined the chorus. In the speech announcing his candidacy, Rick Perry proclaimed, “We’re dismayed. We’re dismayed at the injustice that nearly half of all Americans don’t even pay any income tax.”²⁶ Candidate Michele Bachmann set an ambitious goal for the coverage of the income tax: “Only 53% of the American people pay any federal income tax, 47% of the American people pay zero federal income tax, that’s not fair. Everyone benefits from this magnificent country, everyone needs to pay something, even if it’s only \$10.”²⁷

²² See, e.g., Scott A. Hodge, Tax Found., Putting a Face on America’s Tax Returns 8-9 (2005) (“While some may applaud the fact that millions of low- and middle-income families pay no income taxes, there is a threat to the fabric of our democracy when so many Americans are not only disconnected from the cost of government but are net consumers of government benefits. The conditions are ripe for social conflict if these voters begin to demand more government benefits because they know others will bear the costs.”)

²³ Editorial, The Non-Taxpaying Class, *Wall St. J.*, Nov. 20, 2002, at A20 (“And as fewer and fewer people are responsible for paying more and more of all taxes, the constituency for tax cutting, much less for tax reform, is eroding. Workers who pay little or no taxes can hardly be expected to care about tax relief for everybody else. They are also that much more detached from recognizing the costs of government.”)

²⁴ President Obama’s Jobs Plan: An Economic Boost or More Politics as Usual?, Fox News Network Live Event (Sept. 9, 2011, 7:05 AM), available in LexisNexis News file.

²⁵ Michael J. Boskin, The GOP Candidates Square Off on Taxes, *Wall St. J.*, Nov. 3, 2011, at A19.

²⁶ Texas Republican Governor Rick Perry Announces Presidential Candidacy, CNN Live Event, (Aug. 13, 2011, 1:07 PM) available in LexisNexis News file.

²⁷ Bachmann: I Would Create “Millions of Jobs,” CNN Wire, (Nov. 4, 2011, 5:24 PM), available in LexisNexis News file.

Expressions of unhappiness over the 47% statistic were not limited to media figures and politicians. In October 2011 commentator Erick Erickson and two associates established a Tumblr blog, “We Are the 53%,” on which members of the (slim) income-taxpaying majority could post their pictures, tell their stories, and complain about the injustice of it all.²⁸ Many took advantage of the opportunity.²⁹ The blog featured the slogan, “Those of us who pay for those of you who whine about all of that . . . or that . . . or whatever.”³⁰

Writing in November 2011, Ramesh Ponnuru—a rare conservative who argued, prior to the controversy over the Romney video, that the widespread conservative concern about the income-taxpaying percentage was misplaced—observed that conservative “alarm” over “how many people were not paying income taxes” had grown to the point that the 47% figure was “now one of the most widely known statistics on the right.”³¹ Having been deeply immersed in the conservative world in which the 47% statistic was so often cited and decried—not least by his rivals for the Republican nomination, to whom he was exposed in a seemingly endless series of televised debates—Mitt Romney came to know the figure by heart and to know that invoking and lamenting the figure would always play well with his base. Hence the remarks captured on the video.

²⁸ We Are the 53%, <http://the53.tumblr.com>; see generally Shaila Dewan, 99 Percenters and 53 Percenters Face Off, *Economix*, N.Y. Times Blog (Oct. 11, 2011, 9:13 PM), <http://economix.blogs.nytimes.com/2011/10/11/99-percenters-and-53-percenters-face-off/> (providing background information on “We Are the 53%”).

²⁹ From the stories posted, it seems likely that many of the self-proclaimed 53 percenters were actually 47 percenters, without realizing it. Given the way in which refundable credits—the cause of nontaxpaying status for many filers—are presented on Form 1040, confusion of this sort is probably widespread. Zelenak, note 7, at 34. Form 1040 labels refundable credits (most significantly, the EITC and the refundable portion of the CTC) as tax “payments” and locates them in the same part of the form as actual payments of withholding and estimated tax. Many recipients of refundable credits—including, perhaps, some of the contributors to “We Are the 53%”—may mistakenly believe that the checks they receive from the IRS are refunds of overwithholding and that they are income taxpayers. For a more detailed discussion of this issue, see *id.*, at 131 nn.102-05.

³⁰ We Are the 53%, note 28 (ellipses in original).

³¹ Ramesh Ponnuru, *The Freeloader Myth*, Nat’l Rev. Online (Nov. 28, 2011, 4:00 AM), <http://www.nationalreview.com/articles/283265/freeloader-myth-ramesh-ponnuru>. Shortly after the release of the Romney video, conservative commentator Irwin M. Stelzer offered a similar comment about the pervasiveness of the 47% statistic in conservative circles: “Romney’s 47 percent remark was . . . an expression of a belief so deeply held, and so thoroughly validated in the circles in which Romney travels, that it required no fact-checking.” Irwin M. Stelzer, *Not a Gaffe*, *Wkly. Standard* (Sept. 22, 2012, 12:00 AM), http://www.weeklystandard.com/blogs/not-gaffe_652869.html.

III. THE VIDEO IS RELEASED, THE NATION REACTS

Before the release of the Romney video, it was unclear whether the critiques of the 47% statistic might eventually inspire legislation aimed at greatly increasing the income-taxpaying percentage of the population. The argument in favor of a mass income tax (applicable to a substantial majority of the population) as a promoter of fiscal citizenship has a long and bipartisan history. In an August 1941 letter to Robert Doughton (chairman of the House Ways and Means Committee) urging the conversion of the income tax from a class tax to a mass tax, President Franklin Delano Roosevelt remarked:

[T]he overwhelming majority of our citizens want to contribute something directly to our defense and . . . most of them would rather do it with their eyes open than do it through a general sales tax In other words, most Americans who are in the lowest income brackets are willing and proud to chip in directly even if their individual contributions are very small in terms of dollars.³²

Nor was the argument limited to wartime. In October 1945, just after the end of World War II, the *New York Times* editorialized that the fiscal citizenship case for a mass income tax continued to apply:

[I]t is . . . important to have as wide an income tax as possible. It makes no difference whether the amount collected from those in the lower income tax brackets is a nominal sum. What is important is that the great majority of voters be kept aware at all times that they are making a contribution toward every dollar that the Federal Government spends.³³

And as noted earlier, in 2010 the nonconservative editors of *USA Today* had voiced their agreement with the conservative critics, asserting that the exemption of almost half the population from the income tax was “not healthy for [the] USA.”³⁴

All of this has echoes of the New Testament parable approving of the widow’s mite³⁵—echoes the appeal of which should extend beyond conservative circles. In short, before the release of the Romney

³² Roosevelt and Doughton Letters and Morgenthau’s Note, *N.Y. Times*, Aug. 3, 1941, at 33.

³³ Editorial, *Taxes in a Democracy*, *N.Y. Times*, Oct. 17, 1945, at 16.

³⁴ Editorial, note 21.

³⁵ Mark 12:41-44; Luke 21:1-4.

video it seemed possible that the conservative critics of the 47% figure could persuade many moderates and liberals to join their cause.

The coverage of the income tax could have been increased by enactment of economically significant measures—for example, reducing or eliminating refundable credits, reducing standard deduction and personal exemption amounts, and eliminating the partial exclusion from gross income of Social Security retirement benefits. Anything dramatic along these lines would probably have been too harsh to have a serious chance of enactment. But legislation designed to increase the coverage of the income tax would not necessarily have involved worsening the economic situations of the bottom half of the income distribution; the income-taxpaying percentage could have been raised significantly without changing anything of substance, simply by removing the most important refundable credits—the EITC and the CTC—from the income tax and replacing them with economically similar (or even identical) direct subsidy programs administered by some agency other than the IRS.

The motivation for such a change would have been largely symbolic, and it was certainly arguable that any symbolic benefits would have been outweighed by the administrative disruption. But it was also arguable that the symbolic benefits of widespread income-taxpayer status were sufficient to justify the administrative complications. Eric Toder of the Urban Institute, writing in 2010 on the TPC's blog, *Tax Vox*, had tentatively agreed:

Perception matters. Tax wonks can argue until they are blue in the face that these programs [for example, the EITC and CTC] are spending and that recipients of these subsidies are really paying positive taxes before getting their benefits. I totally agree with this logic, but it's a tough sell. . . . So we may have to reconsider how we provide benefits to low-income and other households.³⁶

As Toder suggested, in 2010 it was a close call whether the symbolic benefits of high income tax coverage eventually would lead to the shifting of low-income subsidies from the tax system to some nontax method of administration. In light of the strongly negative response to the Romney video—not only among moderates and liberals, but also (as detailed below) among conservatives—it is a close call no longer. In the aftermath of the Romney video, the percentage of

³⁶ Eric Toder, *Was Don Alexander Right: Should We Stop Using the IRS to Run Social Programs?*, *Tax Vox Blog* (Apr. 19, 2010, 7:07 PM), <http://taxvox.taxpolicycenter.org/2010/04/19/was-don-alexander-right-should-we-stop-using-the-irs-to-run-social-programs/>.

households subject to the federal income tax is not likely to be an important political question again, at least not for decades.

Public opinion polling following the release of the video produced mixed results. In a Fox News national poll of registered voters, taken within a few days of the release of the video, 79% of respondents answered “yes” to the question, “Do you believe all Americans should be required to pay some amount of federal income taxes, even if it is as little as one percent of their income?”³⁷ On the other hand, a nearly simultaneous Pew Research Center survey of registered voters found that, among the two-thirds of voters aware of Romney’s comments describing 47% “of the population as dependent on government and paying no taxes,” 55% had a negative reaction while only 23% reacted positively.³⁸ Similarly, in an ABC News/Washington Post survey of national adults, asking “do you have a favorable or unfavorable impression of Romney’s recent comments about people who don’t pay income taxes,” 54% indicated an unfavorable impression, compared with 32% who reported a favorable impression.³⁹ And in a Public Religion Research Institute (PRRI) survey taken a few days after the election, a mere 10% of respondents thought that “people who have incomes of less than \$30,000 a year pay . . . too little . . . taxes,” compared with 45% who thought the low-income tax burden was too high and 37% who thought the burden was about right.⁴⁰

All of these survey questions have serious deficiencies from the standpoint of anyone trying to discern how the American public really feels about 47% of households not paying any federal income tax. The Fox News survey comes closest to asking the right question, but the results may have been highly sensitive to the failure of the question to point out that requiring everyone “to pay some amount of federal income taxes” would mean imposing income tax on those with below-subsistence income. A 1986 Roper Poll (commissioned by H&R Block) asked a question very similar to the 2012 Fox News poll, except that it mentioned the poverty issue: “As a matter of public policy, do you think that everyone who receives an income should pay

³⁷ Dana Blanton, Fox News Poll: 79 Percent Say All Americans Should Pay Income Taxes, FoxNews.com (Sept. 27, 2012), <http://www.foxnews.com/politics/2012/09/27/fox-news-poll-7-percent-say-all-americans-should-pay-income-taxes/>.

³⁸ Romney’s “47%” Comments Criticized, But Many Also Say Overcovered, Pew Research Ctr. (Oct. 1, 2012), <http://www.people-press.org/2012/10/01/romneys-47-comments-criticized-but-many-also-say-overcovered/>.

³⁹ Jon Cohen, Most Are Negative About Mitt Romney’s “47 Percent” Comments, The Fix Blog (Sept. 26, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/09/26/public-also-critical-of-romneys-campaign-47-comments/>.

⁴⁰ Public Religion Research Inst., Post-Election American Values Survey 2012 (Nov. 15, 2012), <http://publicreligion.org/research/2012/11/american-values-post-election-survey-2012/>.

some tax—even if it’s only one dollar— or do you think that people below the poverty level should not have to pay tax?”⁴¹ A clear majority (59%) thought that no tax should be imposed on people below the poverty level. Perhaps there has been a dramatic change in public attitudes between 1986 and 2012, but it seems more likely that the 79% result in the Fox News poll is an artifact of the question’s not focusing attention on the poverty issue. The Pew and ABC News/*Washington Post* surveys both asked for reactions to Romney’s remarks, without distinguishing between Romney’s disapproval of the limited coverage of the income tax and his contempt for 47% of the population. Some unknown percentage of those expressing disapproval of Romney’s remarks may have agreed with his tax policy critique, but disagreed with his disdain. Finally, the post-election PRRI survey asked about overall tax burdens rather than about the federal income tax in particular; if the question had focused on the income tax perhaps more than 10% of respondents would have opined that those with incomes below \$30,000 were undertaxed.⁴² In short, despite the several survey questions inspired by the release of the Romney video, there is no satisfactory recent public opinion data on the optimal coverage of the federal income tax.

Among pundits, some of the reactions to the Romney remarks were along predictable ideological lines. When they focused on the tax analysis (rather than on Romney’s disdain for 47% of the population), liberal and moderate commentators made two major arguments: (1) that the nontaxable status of the 47% was attributable to several specific provisions of the Code, all of which constituted good tax policy, and (2) that the taxpaying percentage is much higher if one abandons the myopic focus on the federal income tax and instead considers all federal taxes.

On the first point, the liberal and moderate commentators relied heavily on a 2011 TPC paper (issued, of course, well in advance of the Romney video), “Why Some Tax Units Pay No Income Tax.”⁴³ Analyzing the data for 2011—for which year the paper estimated that 46% of households would owe no federal income tax—the paper concluded that half of the no-income-tax households would owe no tax even if all tax expenditures were repealed; the provisions designed to

⁴¹ Roper Poll for H&R Block, Apr. 12-19, 1986, available at <http://webapps.ropercenter.uconn.edu>, USROPER.86TAX.R12.

⁴² On the other hand, given the prominence of the income tax in the public consciousness and the reference in the question to “incomes of less than \$30,000,” many of the respondents may have taken the question to be about the federal income tax in particular.

⁴³ Rachel Johnson, James Nunns, Jeffrey Rohaly, Eric Toder & Robertson Williams, *Why Some Tax Units Pay No Income Tax* (July 2011), available at <http://www.urban.org/uploadedpdf/1001547-Why-No-Income-Tax.pdf>.

exempt subsistence-level income from tax—the standard deduction and personal and dependency exemptions—were by themselves sufficient to exempt 23% of all households from the income tax.⁴⁴ The exempt status of the other half of the nontaxable households depended on various tax expenditures. Most significantly: “Of the 38 million tax units made nontaxable by the addition of tax expenditures, 44 percent are moved off the tax rolls by elderly tax benefits and another 30 percent by credits for children and the working poor.”⁴⁵

Writing in *Forbes*, for example, left-of-center commentator Rick Ungar defended the policies behind the provisions responsible for the 47% figure. On personal and dependency exemptions, the standard deduction, and the partial exclusion of Social Security retirement benefits, Ungar remarked: “[M]ost Americans appear to believe that we are on the right course choosing to allow these [very low-income] people to survive on their fairly meager earnings or benefits without the obligation to pay income taxes.”⁴⁶ On the EITC and the CTC, he wrote: “The [EITC] was . . . heavily supported by President Ronald Reagan who called the EITC, “*the best antipoverty, the best pro-family, the best job creation measure to come out of Congress.*”⁴⁷ Other liberal and moderate commentators made the same or similar points.⁴⁸

On the second point, liberal and moderate commentators again relied on data from the TPC, which had estimated that even during the recession year 2009 only 17.4% of all households paid neither income tax nor payroll tax, and only 28.7% of households had a zero or negative sum of income tax and payroll tax liabilities.⁴⁹ For example, following the release of the Romney video the liberal Center on Budget and Policy Priorities released a paper, emphasizing that “only about 17 percent of households did not pay any federal income tax or payroll tax in 2009, despite the high unemployment and temporary tax cuts

⁴⁴ Id. at 1.

⁴⁵ Id. at 2.

⁴⁶ Rick Ungar, *The Real Truth Behind the 47 Percent—Why Aren't These People Paying Federal Income Taxes?*, *Forbes* (Sept. 19, 2012, 11:59 AM), <http://www.forbes.com/sites/rickungar/2012/09/19/the-real-truth-behind-the-47-percent-why-arent-these-people-paying-federal-income-taxes/>.

⁴⁷ Id. (emphasis in original).

⁴⁸ See, e.g., Annie Lowery, *Behind the “People Who Pay No Income Tax,”* *Economix*, *N.Y. Times Blog* (Sept. 17, 2012, 10:23 PM), <http://economix.blogs.nytimes.com/2012/09/17/the-reasons-behind-the-people-who-pay-no-income-tax/> (“The pool consists mostly of the poor, of relatively low-income working families and of old people. The tax code is specifically designed to reduce the burden on them.”).

⁴⁹ Urban-Brookings Tax Pol’y Ctr., *Table T11-0173, Tax Units with Zero or Negative Tax Liability, 2004-2011* (June 14, 2011), available at www.taxpolicycenter.org.

that marked that year.”⁵⁰ Similarly, the editors of the *Boston Globe* noted that “[e]ighty-two percent of households, including most of those that pay no income tax, are subject to the Social Security and Medicare payroll taxes.”⁵¹

Along with the predictable criticisms of Romney’s remarks from moderates and liberals, there were some equally predictable defenses of those remarks from conservatives. On his Fox News show, Sean Hannity described Romney’s video remarks as “one of his sharpest critiques yet of President Obama and the entitlement society that he enables,” and declared that “fiscally conscious Americans are applauding Governor Romney’s statements.”⁵² Writing in the *Atlanta Journal-Constitution*, the Tax Foundation’s Scott Hodge opined that Romney had “ignited an overdue conversation about who should pay and how much our lawmakers should use the IRS to deliver social benefits.”⁵³ In *USA Today*, conservative blogger (and law professor) Glenn Harlan Reynolds remarked, “I’d like to see a system where everyone pays some minimum amount of tax—enough to notice, say 2%-5% of gross income. And that amount should go up noticeably when the federal government spends more, and go down noticeably when it spends less.”⁵⁴ Writing in *National Review Online*, Michael Walsh was of the same view: “What [Romney] ought to do is step up and embrace the basic division in our nation, including the fact that nearly half the country pays no income tax. Acknowledge it—and then explain why, morally, this is not a good thing. Why having no skin in the game while at the same time demanding a say in the proceedings at the federal level is fundamentally undemocratic.”⁵⁵ Rock musician and outspoken conservative Ted Nugent declared in the *Washington Times* that “Mitt Romney hit the bull’s-eye with his comments regarding the 47 percent of Americans who do not have any skin in the game as it pertains to paying federal income tax. . . . If you

⁵⁰ Chuck Marr & Chye-Ching Huang, *Misconceptions and Realities About Who Pays Taxes* (updated Sept. 17, 2012) at 1-2, available at www.cbpp.org/files/5-26-11tax.pdf (emphasis in original).

⁵¹ Editorial, *Behind Romney’s Words: Stereotypes and Assumptions*, *Bos. Globe*, Sept. 19, 2012, at A12.

⁵² Analysis with David Limbaugh, Joe Trippi, Fox News Network, Fox Hannity, (Sept. 18, 2012, 9:00 PM), available in LexisNexis News file.

⁵³ Scott A. Hodge, *Flawed Policies Leave Too Few on Tax Rolls*, *Atlanta J. Const.*, Oct. 3, 2012, at A14.

⁵⁴ Glenn Harlan Reynolds, *With Liberty and Taxes for All*, *USA Today* (Oct. 1, 2012, 2:56 PM), <http://www.usatoday.com/story/opinion/2012/10/01/taxes-romney-47-iredistribution/1604089/>.

⁵⁵ Michael Walsh, *Mitt’s Gettysburg Moment*, *Nat’l Rev. Online* (Sept. 18, 2012, 7:11 AM), <http://www.nationalreview.com/corner/322409/mitts-gettysburg-moment-michael-walsh>.

truly seek ‘fair,’ then everyone should have some federal income tax skin in the game.”⁵⁶

But there was also a surprise. Before the Romney video captured the nation’s attention, conservatives had either joined in the chorus of complaints that too few people had to pay the federal income tax, or had said nothing. With one notable exception,⁵⁷ there were no prevideo conservative voices saying that the 47% statistic was no cause for concern. With the furor over the video, many conservatives who had not previously commented on the statistic decided to weigh in. And when they did—here is the surprise—a great many of them concluded that there was nothing wrong with nearly half of American households paying no income tax.

To be sure, many of the conservative critics of Romney’s remarks focused not on the tax policy question, but on Romney’s scorn for the 47%; these critics noted both that there were many staunch Republicans in that group, and that most of the 47 percenters were anything but lazy moochers. On the first point, William Kristol, for example, called the remarks “stupid and arrogant,” in large part because of Romney’s disregard of the fact “that a good chunk of the 47 percent who don’t pay income tax are Romney supporters.”⁵⁸ On the second point, R.R. Reno offered a realistic hypothetical of a hardworking low-wage couple with two small children, explained that they would owe no income tax under current law, and opined, “it’s an insult to suggest that someone working more than 2,000 hours per year at a necessary and unpleasant job is somehow mooching off the ‘producer class.’”⁵⁹

Other conservative commentators, however, focused on the tax policy question and also disagreed with Romney’s view. In the *New York Times* “Campaign Stops” blog, Ross Douthat advised Romney to tell voters the following:

Whatever shape tax reform ultimately takes, under my administration, no middle or working class American will pay a penny more in taxes than they do today. Not a penny more. . . . I promise to create a tax credit [following the also-promised repeal of Obamacare], worth thousands of dollars,

⁵⁶ Ted Nugent, *Mitt Romney Was Right About the 47 Percent—Americans Are Too Dependent on Fedzilla*, Wash. Times, Sept. 28, 2012, at B01.

⁵⁷ Ponnuru, note 31.

⁵⁸ William Kristol, *A Note on Romney’s Arrogant and Stupid Remarks*, Wkly. Standard (Sept. 18, 2012, 9:16 AM), http://www.weeklystandard.com/blogs/note-romney-s-arrogant-and-stupid-remarks_652548.html.

⁵⁹ R.R. Reno, *Absurd Republican Rhetoric, First Thoughts: A First Things Blog* (Sept. 18, 2012), <http://www.firstthings.com/blogs/firstthoughts/2012/09/absurd-republican-rhetoric/>.

to help people who don't get insurance through their employers.⁶⁰

The first of Douthat's suggested pledges would prevent a decrease in the 47% figure, and the second would be sure to increase it. Writing in the *National Review* Reiham Salam argued:

Even if we do focus exclusively on federal income-tax liability, it is not clear that there is a strong conservative case for dramatically shrinking the 47 percent. . . . Half of these households have no federal income-tax liability because they report very low incomes. Most of the rest rely heavily on Social Security benefits, which are partly excluded from taxable income, or receive tax credits aimed at raising the disposable income of low-income workers with children. Which of these provisions would we really want to change? Republicans have championed the earned-income tax credit (EITC) as an anti-poverty tool that emphasizes labor-force participation, and the program is rightly regarded as a success.⁶¹

Other conservative commentators made similar points.⁶²

Romney eventually announced his agreement with his conservative critics, presumably because his advisers told him that the video was undermining his support among independent voters.⁶³ After having defended his remarks for a few weeks, on Fox News he told Sean Hannity, with reference to the 47% remarks, "In this case, I said something that's just completely wrong. . . . My life has shown that I care about 100 percent."⁶⁴ Note the repudiation of the entirety of his remarks. Although his emphasis was on repudiating the contempt ("I care about 100 percent"), Romney called his comments "completely wrong." He might have apologized for the disdain while continuing to insist, as a matter of tax policy, that it was important for Congress to

⁶⁰ Ross Douthat, What Mitt Should Tell the 47 Percent, Campaign Stops, N.Y. Times Blog (Oct. 2, 2012, 11:15 PM), <http://campaignstops.blogs.nytimes.com/2012/10/02/what-mitt-should-tell-the-47-percent/>.

⁶¹ Reiham Salam, Who Are the 47 Percent?: Mitt's Simplistic Take on a Complicated Problem, Nat'l Rev., Oct. 15, 2012, at 18, 18.

⁶² For useful collections of conservative critiques of Romney's remarks (on both the contempt issue and the tax policy issue), see Michael Warren, Conservatives Agree: Romney's Wrong, Wkly. Standard (Sept. 18, 2012, 11:10 AM), http://www.weeklystandard.com/blogs/conservatives-romneys-wrong_652581.html; Katie Glueck, The Right's Many Attacks on Mitt Romney, Politico (Sept. 19, 2012, 9:46 PM), <http://www.politico.com/news/stories/0912/81419.html>.

⁶³ Rucker, note 2 ("Privately, Romney's advisers acknowledged that the comments were causing serious damage to his efforts to win over independent voters").

⁶⁴ Id.

pass legislation to reduce the 47% figure. But he did not. Instead, he repudiated the tax policy position along with the contempt. Perhaps he had concluded that the tax policy critique was a political loser in its own right—which would have been a plausible enough conclusion, given the new evidence that even many conservatives rejected the critique. Or perhaps he simply thought he needed to make a simple and unqualified confession of error, and that apologizing for the disdain while defending the policy critique would be too subtle a distinction for the electorate. In any event, Romney (that is, the Romney of the video) did the tax policy critique no favors by packaging it with his scorn for nearly half the population.

IV. THE 47% CRITIQUE FELLOW TRAVELERS: THE 49% PERCENT CRITIQUE AND THE 60% CRITIQUE

At the same time the 47% critique was in the ascendancy in conservative circles, two related conservative critiques were struggling to gain traction. One critique—call it the 49% critique—concerned the percentage of the population receiving benefits from one or more selected government programs, as determined by the Census Bureau. The Bureau's selected programs included both non-means-tested benefits (among them Social Security, Medicare, veterans' benefits, and unemployment compensation), and means-tested programs (including housing subsidies, food stamps, Temporary Assistance for Needy Families (TANF), and Medicaid).⁶⁵ When the Census Bureau released a table showing that 49.1% of the population had received benefits from one or more of the selected programs in the first quarter of 2011,⁶⁶ Phil Izzo of the *Wall Street Journal* trumpeted the fact in a May 2012 blog entry under the headline, "Number of the Week: Half of U.S. Lives in Household Getting Benefits."⁶⁷ Izzo lamented the political implications of this statistic: "Cutting government spending is no easy task, and it's made more complicated" by the new Census Bureau data.⁶⁸ Izzo was not completely alone in his unease. A few months earlier, Veronique de Rugy of the Mercatus Center of George Mason University had expressed similar concerns about similar Census Bureau data (also rounding to 49%) for the third quarter of 2010: "The

⁶⁵ U.S. Census Bureau, Survey of Income and Program Participation, Economic Characteristics of Households in the United States 2011 tbl. 2 (People by Receipt of Benefits from Selected Programs: Monthly Averages, First Quarter (January, February, March) 2011), <http://www.census.gov/programs-surveys/sipp/publications/tables/hsehld-char.html#2011>.

⁶⁶ Id.

⁶⁷ Phil Izzo, Number of the Week: Half of U.S. Lives in Household Getting Benefits, Real Time Economics, Wall St. J. Blog (May 26, 2012, 5:00 AM), <http://blogs.wsj.com/economics/2012/05/26/number-of-the-week-half-of-u-s-lives-in-household-getting-benefits/>.

⁶⁸ Id.

more people receive government assistance, the more difficult it will be to reform these programs. The majority of future federal spending will be to finance this growing nation of dependents.”⁶⁹ This critique, however, was not nearly as widespread in conservative circles as the 47% critique of the income tax.

In his video remarks Romney seemingly conflated the two critiques, perhaps confused by the closeness of the 47% and 49% figures. In addition to complaining about the “47 percent of Americans [who] pay no income tax,” he also bemoaned the “47 percent . . . who are dependent upon government . . . who believe that government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing, to you name it.”⁷⁰ In the ensuing national conversation about the video, the 47% critique received considerably more attention than the 49% critique—in part, perhaps, because Romney’s use of the magic number for the income tax critique rather than the magic number for the benefits critique pushed the conversation in that direction. In any event, the 49% critique received no more support in the national conversation than did the 47% critique, and Romney eventually repudiated it (along with the entirety of his video remarks) in his “just completely wrong” confession of error to Sean Hannity.⁷¹

A powerful response to Romney’s (misnumbered) 49% critique came from Suzanne Mettler and John Sides in the Campaign Stops blog of the New York Times.⁷² They reported on the results of a 2008 survey of the Cornell Survey Research Institute, asking Americans if they had ever used any of twenty-one social policies provided by the federal government. The survey asked only about “tangible benefits that accrue to specific households”; national defense, the interstate highway system, and the like, were excluded. On the other hand, the survey asked about both “direct social benefits in the form of checks, goods or services paid for by the government,” and “submerged” benefits in the form of tax expenditures (such as the home mortgage interest deduction and the income-tax exclusion for employer-provided health insurance). Almost all—96%, of those surveyed—indicated they had taken advantage of one or more of the policies during their lives; the average was five policies. Even if “submerged” benefits were not considered, a large majority (82% of Democrats and 64% of

⁶⁹ Veronique de Rugy, *A Nation of Government Dependents?* (Feb. 6, 2012), available at <http://mercatus.org/publication/nation-government-dependents>.

⁷⁰ Romney Video, note 1.

⁷¹ See Rucker, note 2.

⁷² Suzanne Mettler & John Sides, *We Are the 96 Percent*, Campaign Stops, N.Y. Times Blog (Sept. 24, 2012, 8:51 PM), <http://campaignstops.blogs.nytimes.com/2012/09/24/we-are-the-96-percent/>.

Republicans) reported having received one or more direct social benefits. Mettler and Sides drew the obvious moral from their data: “Instead of dividing us, our experiences as both makers and takers ought to bind us in a community of shared sacrifice and mutual support.”⁷³ The narrow single-quarter (not even single-year) perspective of the Census Bureau data suggests that social benefits may divide the nation into nearly equal warring camps of makers and takers. But if, from a lifetime perspective, nearly everyone is a beneficiary of government social programs, then the divisiveness problem disappears. Moreover, since it is not plausible that 96% of Americans receive more in benefits than they pay in taxes, it becomes clear that the receipt of social benefits does not automatically put one in the net taker category.

Distinguishing net takers from net taxpayers was the project of the exponents of the other related critique—call it the 60% critique. Fiscal incidence analysis undertakes the borderline-quixotic task of measuring the overall distributional impact of governmental tax-and-spending policies. Although it has been around since the 1940’s,⁷⁴ and although it has been institutionalized through the issuance by government agencies of fiscal incidence analyses in a few countries (including, most prominently, annual reports for the United Kingdom for the past fifty years⁷⁵), it has never caught on in a big way in the United States. There has been, however, an increased (although still modest) interest in fiscal incidence studies in the United States in recent years, with most of the attention coming from scholars associated with two conservative organizations—the Tax Foundation and the Heritage Foundation.

Two significant U.S. fiscal incidence studies appeared in 2007. One, by Edward N. Wolff and Ajit Zacharias,⁷⁶ has no connection to a con-

⁷³ *Id.*

⁷⁴ For an important early study, see Tibor Barna, *Redistribution of Incomes through Public Finance in 1937* (1945). For a review of the history of fiscal incidence studies, see Andrew Chamberlain & Gerald Prante, *Who Pays Taxes and Who Receives Government Spending? An Analysis of Federal, State and Local Tax and Spending Distributions, 1991-2004*, at 6-10 (Tax Found., Working Paper No. 1, Mar. 2007).

⁷⁵ The most recent study is Office for Nat’l Statistics (UK), *The Effects of Taxes and Benefits on Household Income, 2012-13* (2014) available at http://www.ons.gov.uk/ons/dcp171778_367431.pdf; see also Office for Nat’l Statistics (UK), *Fifty Years of the Effects of Taxes and Benefits on Household Income* (2013), available at <http://www.ons.gov.uk/ons/rel/household-income/the-effects-of-taxes-and-benefits-on-household-income/index.html> For the most recent equivalent Australian study, see Austrl. Bureau of Stat., 6537.0—Government Benefits, Taxes and Household Income, Australia, 2009-10 (2012), available at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/FA33862EE0D34EEECA257A750014E5DF/\\$File/65370_2009-10.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/FA33862EE0D34EEECA257A750014E5DF/$File/65370_2009-10.pdf)

⁷⁶ Edward N. Wolff & Ajit Zacharias, *The Distributional Consequences of Government Spending and Taxation in the U.S., 1989 and 2000*, 53 *Rev. of Income and Wealth* 692 (2007).

servative think tank. Wolff and Zacharias attempt a comprehensive analysis of the distributional effects of U.S. taxation and spending, taking into account all levels of government (federal, state, and local), for the years 1989 and 2000. In addition to including government spending in the form of cash and in kind transfer programs, they also allocate the benefits of most other government spending (such as police, fire protection, and highways, but not including national defense) among households.⁷⁷ For both years studied, they find that “net government expenditure was positive for the bottom six income deciles and negative for the top four.”⁷⁸ Thus, the overall effect of government tax-and-spending policies was redistribution of economic resources from the top 40% of the income distribution to the bottom 60%. They conclude that the distribution of the benefits of government spending, rather than the distribution of the tax burden, is responsible for the progressivity of the overall system: “[T]ransfers (especially Social Security and Medicare) are extremely progressive, public consumption (especially expenditures on education and health) is very progressive but less so than transfers, and . . . taxation is neutral or even regressive.”⁷⁹

Despite their attention to the redistributive effects of tax-and-spending policies, Wolff and Zacharias argue that the matter of ultimate interest is not the extent and direction of redistribution of resources, but the final (after tax-and-spending) distribution: “While the distribution of government spending and taxation is interesting in itself, such a picture is insufficient since ultimately what matters is the distribution of economic well-being, after accounting for government spending and taxation.”⁸⁰ On this point they find that post tax-and-transfer inequality increased from 1989 to 2000, and that the inequality-reducing effects of government policies decreased.⁸¹

The other 2007 fiscal incidence study—covering tax and spending at all levels of government in the United States from 1991 to 2004—by Andrew Chamberlain and Gerald Prante, both staff economists at the Tax Foundation, was released as “Tax Foundation Working Paper No. 1.”⁸² The methodology of Chamberlain and Prante is broadly similar to that of Wolff and Zacharias, although in contrast with the disregarding by Wolff and Zacharias of spending on national defense and certain other public goods, Chamberlain and Prante allocate spending

⁷⁷ Id. at 699-700 tbl.1.

⁷⁸ Id. at 714.

⁷⁹ Id.

⁸⁰ Id. at 696. For a book-length argument in support of the same position, see Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002).

⁸¹ Wolff & Zacharias, note 76, at 708-09.

⁸² Chamberlain & Prante, note 74.

on public goods equally across households.⁸³ Like the authors of the other study, Chamberlain and Prante focus on the cost to the government of providing benefits to households; they do “not attempt to measure households’ utility-based valuations of tax burdens or government spending received.”⁸⁴ Their paper’s conclusions are generally in line with those of the other 2007 paper. According to Chamberlain and Prante, when taxing and spending at all levels of government in 2004 is taken into account the bottom three quintiles of the income distribution received \$1.527 trillion more in benefits of government spending than they paid in taxes, and the top two quintiles paid \$1.031 trillion taxes in excess of the benefits they received.⁸⁵ In sharp contrast to Wolff and Zacharias, Chamberlain and Prante display no interest in the distribution of after-tax-and-spending economic well-being. Their sole concern in the study is with redistribution; their study pays no attention to the ultimate distribution after the redistribution has occurred.

A nation with a clear majority of net takers seems like something to which the Tax Foundation might object, but the focus of the Chamberlain and Prante paper is much more on technical analysis than on policy critique. Although they make the (undeniably correct) point that “the current practice of judging the fairness of policy based on tax distributions alone is clearly inadequate,”⁸⁶ and they complain of the “information gap” resulting from the fact that “no federal agency currently produces a comprehensive distributional analysis of spending,”⁸⁷ nowhere in the paper do they suggest that there is anything wrong with 60% of the population receiving more from government than they pay in taxes.

The Tax Foundation’s policy agenda is more overtly expressed, however, in a “Special Report” co-authored by Chamberlain, Prante, and Scott Hodge, issued in connection with the Chamberlain and Prante study.⁸⁸ The Report’s Executive Summary warns, “Lawmakers who ignore the distribution of government spending risk making policy judgments based on an incorrect set of facts about the United States.”⁸⁹ In an accompanying “Frequently Asked Questions,” the

⁸³ *Id.* at 25-26.

⁸⁴ *Id.* at 14.

⁸⁵ *Id.* at 31-32. The difference between the \$1.031 trillion figure and the \$1.527 trillion figure is attributable to deficit spending.

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 5.

⁸⁸ Scott A. Hodge, Gerald Prante & Andrew Chamberlain, *Who Pays America’s Tax Burden, and Who Gets the Most Government Spending?* (Tax Found. Special Rep. No. 151, 2007), <http://taxfoundation.org/article/who-pays-americas-tax-burden-and-who-gets-most-government-spending>.

⁸⁹ *Id.* at Executive Summary.

Tax Foundation expresses the hope that the Chamberlain and Prante study will “encourage official agencies like the Congressional Budget Office and the U.S. Treasury to start producing official estimates of the distribution of government spending as well as taxes.”⁹⁰ But even the Special Report does not make any criticism of the nation-of-mostly-takers revealed by the study—despite what one might have expected from Hodge given his repeated objections to the inadequate (in his view) coverage of the federal income tax.

In 2008 the conservative Heritage Foundation released its own fiscal incidence study by Robert Rector and Christine Kim.⁹¹ Like the other two studies, this study considers taxes and spending at all levels of government in the United States (for 2004 in the case of this study),⁹² and uses a “cost of services” approach to valuing government benefits (rather than attempting to determine the utility of benefits to recipients). It allocates “population-based services” (such as roads, police, and fire protection) among households,⁹³ but does not allocate “pure public goods” (such as national defense and scientific research).⁹⁴ On the dividing line between net beneficiaries of government and net taxpayers, the findings of Rector and Kim are broadly consistent with the other two studies. They report that the bottom three quintiles of the income distribution received \$1 trillion more in government benefits and services than they paid in taxes, with the \$1 trillion net transfer financed partly by net taxes paid by the top two quintiles and partly by deficit spending.⁹⁵

Rector and Kim appear to differ with Wolff and Zacharias on one important point. Whereas Wolff and Zacharias attribute almost all redistribution to the progressivity of government spending,⁹⁶ Rector and Kim reach the opposite conclusion: “The rough equality in benefits and services received combined with the asymmetry in taxes paid generates a substantial redistribution of economic resources from higher to lower income households.”⁹⁷ The disagreement appears, however, to be about framing rather than substance. Rector and Kim focus on dollar amounts of benefits and taxes across the income distri-

⁹⁰ Tax Found., *Frequently Asked Questions About the Tax Foundation’s Fiscal Incidence Study*, <http://taxfoundation.org/article/frequently-asked-questions-about-tax-foundations-fiscal-incidence-study> (last visited Oct. 13, 2014).

⁹¹ Robert Rector & Christine Kim, *How the Wealth Is Spread: The Distribution of Government Benefits, Services and Taxes by Income Quintile in the United States* (Heritage Found., White Paper, 2008).

⁹² *Id.* at 7.

⁹³ *Id.* at 16.

⁹⁴ *Id.* at 17.

⁹⁵ *Id.* at 20.

⁹⁶ Wolff & Zacharias, note 76, at 714.

⁹⁷ Rector & Kim, note 91, at 19.

bution, while Wolff and Zacharias focus on benefits and taxes as percentages of income in the several quintiles. If taxes are (very, very roughly) flat in percentage terms across quintiles, and benefits are (very, very roughly) flat in dollar amounts across quintiles, then Rector and Kim will see benefits as distributionally neutral and taxes as progressive, while Wolff and Zacharias will see taxes as distributionally neutral and benefits as progressive. In any event, when taxes and benefits are considered together, the two reports reach similar conclusions on the overall distributional effects of taxation and government spending.

Like Chamberlain and Plante in their Tax Foundation paper, Rector and Kim mostly stay away from political argument and discussion. When they do mention politics, their commentary is notable for its even-handedness: “One suspects the estimated net transfer of a trillion dollars between income classes is somewhat larger than the sum imagined by liberals and smaller than that imagined by conservatives.”⁹⁸ A reader determined to find a partisan subtext might find their terminology—describing the lowest three quintiles as in “fiscal deficit” and the top two quintiles as in “fiscal surplus”⁹⁹—to be a bit loaded, but any partisan flavor to the paper is no more than a hint. Like Chamberlain and Plante, Rector and Kim do not even suggest that there is anything inherently objectionable in most people being net beneficiaries of government.

To the best of my knowledge, the Heritage Foundation has never used the Rector and Kim study (or any other fiscal incidence studies) as the jumping-off point for an argument that too many Americans have a “net taker” relationship to government. The Heritage Foundation publishes an annual “Index of Dependence on Government,” which rounds up most of the usual suspects in the conservative critique of big government. The 2012 report, for example, deplors the too-high percentage of people who do not pay any income tax, as well as the 21.8% of the population defined by the report as dependent on government (because of their receipt of certain types of government benefits).¹⁰⁰ The report concludes: “Perhaps the greatest danger is that the swelling ranks of Americans who enjoy government services and benefits for which they pay few or no taxes will lead to a spreading sense of entitlement that is simply incompatible with self-government.”¹⁰¹ A lamenting of the 60%-net-takers finding of Rector and Kim would have fit perfectly with the spirit of the “Index of Depen-

⁹⁸ Id. at 24.

⁹⁹ Id. at 2.

¹⁰⁰ William W. Beach & Patrick D. Tyrrell, Heritage Found., *The 2012 Index of Dependence on Government 6* (income tax), 27 (dependent on government) (2012).

¹⁰¹ Id. at 28.

dence on Government,” would have been based on Heritage Foundation research, and would have packed more rhetorical punch than a lamenting of the dependent status of a mere 21.8% of the population. Yet the 2012 report says nothing about the work of Rector and Kim, or about any other fiscal incidence study. This is a bit of a puzzle.

What explains this dog that did not bark? Perhaps Heritage concluded that the battle had already been lost—that the 60% figure was (ironically enough) too high to be used to good political effect. It is one thing to stir up resentment against 21.8% of the population. But stirring up resentment against 60% of the population is not a promising electoral strategy. Complaining that the government makes most people better off may not serve as an effective rallying cry against current policies. Another possible concern may have been the realization that under a utility-based measure of the benefits of government spending (rather than the “cost of services” approach used in the fiscal incidence studies), the likely result would be that all five quintiles would be net beneficiaries of government. After all, as Justice Holmes remarked, “Taxes are what we pay for civilized society.”¹⁰² The “taxpayer surplus” benefits of civilization should be sufficient to make even (or especially) the richest taxpayers net beneficiaries of government taxing and spending. There is, of course, no rational basis for objecting to the fact that government makes everyone better off; nor is there any political payoff to stirring up resentment against 100% of the population.

In the aftermath of the Romney video, the Tax Foundation finally went where the Heritage Foundation had feared to tread (and where even the Tax Foundation itself had previously feared to tread). In an October 4, 2012 entry on the Tax Foundation’s blog, Scott Hodge cited a Congressional Budget Office (CBO) estimate¹⁰³ of “how much the average household in each quintile pays in total federal taxes compared to the total amount of federal transfer income they receive.”¹⁰⁴ The CBO estimate was not a comprehensive fiscal incidence study, both because it considered only federal taxes and transfers, and because it did not consider government spending other than transfer programs. A key finding, however, would have been familiar to readers of fiscal incidence studies—that the bottom three quintiles re-

¹⁰² *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

¹⁰³ Cong. Budget Office, *The Distribution of Household Income and Federal Taxes, 2008 and 2009* (July 2012), www.cob.gov/publications/43373/.

¹⁰⁴ Scott A. Hodge, *60 Percent of Households Now Receive More in Transfer Income Than They Pay in Taxes*, Tax Pol’y Blog (Oct. 4, 2012), <http://taxfoundation.org/blog/60-percent-households-now-receive-more-transfer-income-they-pay-taxes>.

ceived more in transfers than they paid in taxes. Hodge sounded the alarm:

Mitt Romney was ridiculed for his comments on the “47 percent” and the issue of dependency, but CBO’s report illustrates that at least the bottom 60 percent of households now receive more in federal transfer income than they pay in total taxes and that it may not be long until 80 percent of Americans are net beneficiaries of transfer income. This raises an obvious and troubling question: Is it reasonable or fiscally responsible to ask the top 20 percent of households to pay for the government benefits of the other 80 percent of households?¹⁰⁵

But no one took up his cry. Despite the Tax Foundation and Heritage Foundation fiscal incidence studies in 2007 and 2008, the 60% critique—in sharp contrast with the 47% critique—has never achieved anything close to canonical status in conservative circles, perhaps for the reasons suggested above. Whatever slim chance the 60% critique might have had to achieve political significance was destroyed by the Romney video. Similar in spirit to the 47% critique, but weaker in its political appeal, the 60% critique was on life support before the release of the video. After the release of the video and the national rejection of the 47% critique, the 60% critique had no hope of survival, with or without Hodge’s attempt at resuscitation.

V. WHAT MIGHT HAVE BEEN

Despite the 79% support for a universal income tax in the Fox News Poll,¹⁰⁶ in the aftermath of the Romney video it appears that the income-taxpaying percentage of the population is of minimal political significance. The release of the video widened the conversation beyond the right-wing echo chamber where the deprecation of the 47% figure had arisen, revealing that the issue resonated only with conservatives—and only with some conservatives at that. In addition to revealing latent opinion, the video also shaped opinion by associating concern about the income-taxpaying percentage with Romney’s disdain for half the population. After the revelation and shaping of opinion by the video, it seems very likely that, for some indefinite future, the percentage of the population covered by the federal tax is destined to be a political nonissue.

¹⁰⁵ *Id.*

¹⁰⁶ Fox News Poll, note 37.

From the selfish point of view of a tax policy wonk, there is reason to regret the nonissue status of the coverage of the income tax. If things had turned out differently—if public opinion had demanded a federal income tax paid by 60%, 70%, or 80% of the population—tax policy challenges would have abounded.

One challenge would have been to determine whether many people mistakenly believe they are income taxpayers (and vote accordingly), and to decide whether it is acceptable public policy to take advantage of that misapprehension. If the coverage of the income tax had emerged as a hot button political issue, the understanding—or misunderstanding—of refundable credits by their recipients would have become a key question for empirical study and for normative analysis. When low-income working parents file tax returns and receive checks from the government representing the refundable EITC and CTC to which they are entitled, do they understand the checks as transfer payments, or do they erroneously believe the checks are simply refunds of overwithholding on their wages?

There is reason to suspect that many or most of the recipients do not understand the checks as transfer payments. The presentation of the two credits on Form 1040 reads as if designed to disguise the character of the credits as transfer payments, by creating the misimpression that the credits are no different from withholding and estimated tax. On the back of the 2013 Form 1040, in the section labeled “Payments,” the EITC appears on line 64a and the CTC on line 65; they immediately follow (in the same “Payments” section) withholding and estimated tax (lines 62 and 63). I am aware of no empirical study focused on the question of whether recipients of refundable credits mistakenly believe that the credits are refunds of overwithholding, and so mistakenly believe themselves to be income taxpayers. However, recent interview-based studies of EITC recipients (focused on issues other than the understanding of the EITC as transfer payment or as a refund of excessive withholding) are suggestive. In her study of the EITC as an imperfect safety net against financial shocks, Sara Sternberg Greene quotes an interviewee: “I can’t complain! I mean it’s somethin’, you know, it’s somethin’. I mean you could *get back* nothing.”¹⁰⁷ Implicit in “get back” is the assumption that the check from the IRS represents a refund of overwithholding. In another paper (arising out of the same larger interview-based study of EITC recipients), Jennifer Sykes and co-authors claim (unfortunately, without supporting quotations from interviews) that “the credit is included in

¹⁰⁷ Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. Rev. 515, 539 (2013) (emphasis added).

one's tax refund check and is not a separate disbursement from the government, muddling respondents' sense of whether it represents a transfer or is merely wages that have been over-withheld."¹⁰⁸

To a large extent, the arguments for having the income tax cover the substantial majority of the population are based on the claimed benefits of most people *believing* they are income taxpayers, rather than of most people *actually being* income taxpayers. Consider, for example, Scott Hodge's concern that as the coverage of the income tax declines "politicians can easily convince [those without income tax liabilities] to support more and more spending because someone else is going to pay the tab."¹⁰⁹ From Hodge's perspective, someone who wrongly believes himself to be an income taxpayer, and who votes accordingly, should be just as good as someone who actually is an income taxpayer.

This suggests a possible win-win agreement between those (like Hodge) who want a clear majority of the population to vote like income taxpayers, and those who, on substantive distributional grounds, favor an income tax applying to only about half the population. If the tax in fact applies to only half the population, but most people think the tax applies to them (because of the widespread misunderstanding of the nature of refundable credits), then everybody should be happy. Or should they? Obviously, there are possible normative objections to the intentional misleading of a large segment of the American public, no matter how laudable the policy goals of those doing the misleading or taking advantage of the misleading. If the coverage of the income tax had become an important political issue, there might have followed a fascinating debate over whether the key question was the actual coverage or the perceived coverage of the tax, and over the morality (or lack thereof) of fostering a misunderstanding of the nature of refundable credits. Given the 47% tape and its aftermath, however, the prospects for such a debate are dim.

Apart from intentionally misleading recipients of refundable credits into believing they are income taxpayers, another possibility—at least for the incorrigibly optimistic—would have been a campaign of education and persuasion, to convince the public that there was really nothing wrong with an income-taxpaying figure of 50%, or even lower. Such a campaign might have explained that the income tax is far from the only tax, and that the percentage of net taxpayers (taking all taxes into account) is much higher than the percentage of federal income taxpayers.¹¹⁰ The campaign also might have explained that a

¹⁰⁸ Jennifer Sykes, Kathryn Edin, Katrin Kriz & Sarah Halpern-Meekin, *The EITC and Dignity for the Working Poor* (unpublished paper, on file with the author).

¹⁰⁹ Hodge, note 20.

¹¹⁰ For example, the TPC estimated that in 2009—the year with respect to which the famous 47% statistic first applied—only 24% of households had no net federal tax liability

net federal income tax liability is not necessary to the existence of the “skin in the game,” which is supposed to produce resistance to increased government spending (motivated by resistance to the prospect of tax rate increases to finance the spending). An across-the-board increase in income tax rates would harm not only net income taxpayers; it would also harm the recipients of refundable credits, who would see decreases in the amounts of their checks from the IRS as a result of the increased rates.¹¹¹ There is more. The campaign might have argued that for civics purposes net taxpayer status is better determined on a multi-year basis than on a single-year basis, and have explained that a very substantial majority of the population can claim net taxpayer status—even in an analysis limited to the federal income tax—over a twenty-year period.¹¹²

Finally, and perhaps most ambitiously, the campaign might have tried to persuade the public to think about the fiscal duties of citizenship in a new way. Although it may be entirely appropriate, in the name of fiscal citizenship, to require payment of income tax by everyone who can afford to pay something toward the support of the federal government, low-wage parents with children cannot afford to do so. Their civic obligation should not be to pay income tax but to work to support themselves and their children. In defense of the current system, in which low-wage parents file income tax returns not to pay tax but to claim transfer payments based on the EITC and the CTC, I have previously argued:

The government would then have a corresponding obligation to make up any difference between the wages the workers are able to earn and the amount necessary to support their families at a decent standard of living. Under this view, the filing of a tax return—reporting one’s family responsibilities and the wages one earned in satisfaction of those responsibilities, as well as claiming the refundable credits representing the government’s side of the bargain—represents the satisfaction of a low-wage parent’s duty to the government. It is thus an exercise in fiscal citizenship, despite

(taking into account income and payroll taxes). Urban-Brookings Tax Pol’y Ctr., Table T09-0333, Tax Units with Zero or Negative Tax Liability, 2009-19 (July 1, 2009), available at www.taxpolicycenter.org.

¹¹¹ For a more detailed explanation of this point, see Zelenak, note 7, at 29-30.

¹¹² Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, Efficiency and Tax Incentives: The Case for Refundable Tax Credits, 59 *Stan. L. Rev.* 23, 68 (2006) (estimating that, of all the households with a negative federal income tax liability for at least one year in a twenty-year period, 75% would have a positive federal income tax liability over the entire two-decade span).

the absence of any cash transfer from the parent to the Treasury.¹¹³

I doubt that this collection of arguments would have changed the minds of a public concerned about the 47% statistic, but it would have been fun to try. And if the arguments had failed, the tax policy wonks then could have addressed a different challenge—how to increase the income-taxpaying percentage to well above 50%, without changing the substance of federal tax-and-transfer policy, by developing an effective way of administering the substance of the EITC and CTC as nontax direct subsidy programs. Again, I am not sure it could have been done, but it would have been a stimulating challenge.

VI. CONCLUSION: THE FUTURE COVERAGE OF THE INCOME TAX

As things now stand, there is no public discontent in need of quelling by either persuasion or redesign of the tax-and-transfer system. There are two reasons—each independently sufficient—why public discontent with a low income-taxpaying percentage is not likely to be an issue in the next few years. The first, as has been detailed here, is the post-Romney-video lack of concern (among both opinion leaders and the general public) over the income-taxpaying percentage. The second is that, as the economy slowly improves, the income-taxpaying percentage of the population is expected to rise to and remain at levels comfortably above 50%—despite the lack of new legislation aimed at increasing the income-taxpaying percentage. According to the TPC's estimates, the percentage of tax units with zero or negative individual income tax liabilities fell sharply from 2010 to 2011, from 47.9% to 42.7%.¹¹⁴ Although the TPC shows a slight rebound for 2013—to 43.3%, from 41.8% in 2012—after that it predicts (assuming the continuation of current law) small but steady decreases through 2024, when the non-income-taxpaying figure will be a modest 34.3% of all tax units.¹¹⁵

If the TPC is right in its predictions, this supplies a second reason the income-taxpaying percentage is not likely to play a major role in the national discourse in the next few years. Much of the concern about the 47% figure was based—sometimes explicitly, sometimes implicitly—on the figure's too-close approach to the tipping point of 50%. Even those who continue (post Romney video) to believe in the perils of a non-income-taxpaying percentage near, at, or above the tipping point are not likely to be troubled by a nonpaying percentage

¹¹³ Zelenak, note 7, at 32.

¹¹⁴ Tax Policy Center, note 4.

¹¹⁵ *Id.*

closer to one-third than to one-half (and falling). Of course, some future Congress might consider enacting legislation that would reverse the trend predicted by the TPC, returning the nonpaying population to near or above 50%. Given what the reaction to the Romney video revealed about national attitudes, that future Congress need not worry much about a negative public response to an increase in the nonpaying percentage.

The TPC's predictions are significantly affected by the TPC's debatable decision not to take into account the premium assistance credit (PAC) that became effective in 2014.¹¹⁶ This new refundable credit is available to a taxpayer whose household income does not exceed 400% of the federal poverty level, who is neither covered by Medicaid nor eligible for affordable employer-sponsored health insurance, and who purchases health insurance through a state-based health insurance exchange.¹¹⁷ In its tax expenditure estimates issued in early 2013, the Staff of the Joint Committee on Taxation (JCT) put the cost of the new credit, for 2014 through 2017, at \$307.7 billion—of which \$237.5 billion will take the form of refunds, while only \$70.2 billion will serve to reduce precredit income tax liabilities.¹¹⁸

One might suppose that a new refundable credit of that magnitude would cause a significant increase in the percentage of the population not burdened by the income tax, especially in light of the JCT Staff's estimate that more than three-quarters of the dollar amount of the credit will be delivered as refunds. Yet the TPC's predictions show a slight decrease in the nonpaying percentage between 2013 and 2014 (from 43.3% to 41.4%).¹¹⁹ The TPC decided that the PAC was so different in its substance and administration from other tax expenditures (even from other refundable credits) that it would be misleading to include the PAC in the analysis of the income-taxpaying percentage.¹²⁰ In the view of the TPC, the PAC more closely resembles nontax direct subsidies than it resembles other tax credits; like the nontax

¹¹⁶ IRC § 36B.

¹¹⁷ For more detailed information on the new credit, see Lawrence Zelenak, *Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance Subsidies*, 65 *Tax L. Rev.* 723 (2012).

¹¹⁸ Staff of the Joint Comm. on Tax'n, *Estimates of Federal Tax Expenditures for Fiscal Years 2012-2017* at 39, 41 (2013). In its most recent estimates, the Joint Committee staff puts the cost of the new credit at \$318.1 billion for 2014-2018, of which \$275.3 billion will take the form of refunds and only \$42.8 billion will reduce precredit income tax liabilities. Staff of the Joint Comm. on Tax'n, *Estimates of Tax Expenditures for Fiscal Years 2014-2018*, at 31, 34 (2014), available at <https://www.jct.gov/publications.html?func=startdown&id=4663>.

¹¹⁹ Tax Policy Center, note 4.

¹²⁰ The TPC has not offered any official explanation of its decision, but the explanation in the text is based on informal communications from TPC staff members to the author.

direct subsidies it resembles, the PAC should not be reflected in the estimates of the coverage of the income tax.

Not long ago (before the release of the Romney video, to be precise), the TPC's decision would have generated controversy, perhaps even some outrage. The conservative critics of the inadequate (in their view) coverage of the income tax would have accused the TPC of making its decision to disregard the PAC not on the merits, but out of a desire to conceal the extent to which the PAC will erode the income-taxpaying percentage. So far, however, there has been no such outcry. Whether the TPC (or anyone else) includes or excludes the PAC from an estimate of the income-taxpaying percentage appears to be a matter of little or no political significance. We have Mitt Romney to blame or thank for that.