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A Taxing Feminism

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FORTHCOMING IN
THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES
(DEBORAH L. BRAKE, MARTHA CHAMALLAS & VERNA WILLIAMS EDS.)

CHAPTER 34

A TAXING FEMINISM

Anthony C. Infanti & Bridget J. Crawford

Taxation has always been a feminist issue. In 1848, women’s rights advocates gathered at Seneca Falls and issued a Declaration of Sentiments against the laws and ideologies that contributed to women’s subordinate status.¹ “We hold these truths to be self-evident: that all men and women are created equal,” the Declaration began.² The Declaration proceeded to denounce laws that prohibited women from voting, owning property, or being treated as separate legal persons from their husbands.³ To add further injury, the drafters wrote, “After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.”⁴ With this tax rhetoric, the early women’s rights advocates borrowed from the colonial slogan “No taxation without representation” in an effort to highlight the injustices women faced.⁵

In the years after the gathering at Seneca Falls, many prominent woman suffragists refused to pay their taxes to protest the ongoing denial of the franchise to women.⁶ Some protestors forfeited property or went to jail for their failure to pay; they believed that tax laws

¹ *The Declaration of Sentiments, Seneca Falls Conference, 1848*, MOD. HIST. SOURCEBOOK, <https://sourcebooks.fordham.edu/mod/senecafalls.asp> (last updated Nov. 1998).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Carolyn C. Jones, *Dollars and Selves: Women’s Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265, 267.

⁶ *Id.* at 268, 275–80.

were the powerful, tangible symbol of women’s political, social, and economic status in an unfair society.⁷

Attacking Facially Discriminatory Laws

From the nineteenth century to the present, tax cases have had a special ability to illuminate injustice; they have a way of reducing inequality to dollars and cents. Consider, for example, that almost fifty years after women won the right to vote, the tax law again became a focal point of advocates for women’s rights. In 1968, an unmarried Colorado man named Charles Moritz took a \$600 deduction on his federal income tax return for expenses paid in connection with the care of his elderly mother who lived with him.⁸ At the time, § 214 of the Internal Revenue Code permitted taxpayers who were gainfully employed to deduct expenses associated with the care of certain dependents, but the deduction was available only to “a taxpayer who is a woman or widower, or is a husband whose wife is incapacitated or is institutionalized, for the care of one or more dependents.”⁹ The U.S. Tax Court upheld the Internal Revenue Service’s denial of the deduction to Moritz on the ground that “deductions are solely matters of legislative grace” and the statute, by its terms, afforded relief only to single persons who were widowers or women, but not to single, never-married men like him.¹⁰ Thus, the Tax Court ruled that Moritz owed an additional \$296.70 in tax that he would not have had to pay had he been female.¹¹

Luckily for Moritz, tax attorney Martin Ginsburg happened to be reading the Tax Court’s advance sheets and persuaded his wife—also an attorney, but not typically a fan of tax cases—to

⁷ *Id.* at 268–69, 275–80.

⁸ *Moritz v. Comm’r*, 55 T.C. 113 (1970), *rev’d*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

⁹ I.R.C. § 214 (1968); *see* Revenue Act of 1964, Pub. L. No. 88-272, § 212, 78 Stat. 19, 49.

¹⁰ *Moritz*, 55 T.C. at 114–15.

¹¹ *See* Brief for Petitioner-Appellant at 2, *Moritz*, 469 F.2d 466 (No. 71-1127).

read the decision.¹² Five minutes later, Ruth Bader Ginsburg and Martin Ginsburg had decided to represent Moritz on a pro bono basis and appeal his case to the U.S. Court of Appeals for the Tenth Circuit.¹³ At least in part because of the impressive brief, which Martin Ginsburg later said was “90% Ruth’s,”¹⁴ the Tenth Circuit reversed the Tax Court, finding that disallowing Moritz’s claimed deduction based on his sex was “an invidious discrimination and invalid under due process principles.”¹⁵

The Ginsburgs’ work on *Moritz* led to Ruth Bader Ginsburg’s work writing the brief in *Reed v. Reed*, the first successful sex discrimination challenge decided by the U.S. Supreme Court on equal protection grounds.¹⁶ (*Reed* was briefed after, but actually argued and decided before *Moritz*, which languished for more than a year in the Tenth Circuit after argument.¹⁷) In fact, the Tenth Circuit in *Moritz* relied upon the decision in *Reed* when deciding in Moritz’s favor.¹⁸ The Supreme Court’s decision in *Reed* was the first to articulate a heightened level of scrutiny (however unspecified) for sex-based classifications in the law.¹⁹ In her capacity as director of the ACLU Women’s Rights Project, Ruth Bader Ginsburg went on to represent

¹² Martin D. Ginsburg, ABA Tax Section Distinguished Service Award Presentation 1–2 (May 5, 2006), <https://www.americanbar.org/content/dam/aba/administrative/taxation/awards/dsa/ginsburgremarks.pdf>.

¹³ *Id.* at 2 (“I went next door, handed the advance sheets to my wife, and said, ‘Read this.’ Ruth replied with a warm and friendly snarl, ‘I don’t read tax cases.’ I said, ‘Read this one,’ and returned to my room. No more than 5 minutes later—it was a short opinion—Ruth stepped into my room and, with the broadest smile you can imagine, said, ‘Let’s take it[.]’ And we did.”).

¹⁴ *Id.*

¹⁵ *Moritz*, 469 F.2d at 470.

¹⁶ See *Reed v. Reed*, 404 U.S. 71 (1971) (finding unconstitutional an Idaho statutory preference for a male administrator of a decedent’s estate); Wendy Webster Williams, *Justice Ruth Bader Ginsburg’s Rutgers Years: 1963–1972*, 31 WOMEN’S RTS. L. REP. 229, 249–50 (2010); Lila Thulin, *The True Story of the Case Ruth Bader Ginsburg Argues in “On the Basis of Sex,”* SMITHSONIAN MAG. (Dec. 24, 2018), <https://www.smithsonianmag.com/history/true-story-case-center-basis-sex-180971110/>.

¹⁷ Williams, *supra* note 16, at 247 n.127; Thulin, *supra* note 16.

¹⁸ *Moritz*, 469 F.2d at 470.

¹⁹ *Reed*, 404 U.S. at 76–77.

plaintiffs in six sex discrimination cases before the Supreme Court.²⁰ Both *Moritz* and *Reed* are representative of Ginsburg’s liberal feminist approach that propelled these early cases: challenge laws that treat women and men differently by exposing the way that the law relies on gender stereotypes. *Moritz*, *Reed*, and other cases ultimately led to the establishment of an intermediate scrutiny standard for cases involving discrimination on the basis of sex.²¹ The road to greater gender equality thus was paved with a tax case. In 1993, Ruth Bader Ginsburg was appointed as an Associate Justice of the Supreme Court.²²

Examining Disparate Impact of Tax Laws

At the same time that the *Moritz* case was working its way through the appeals process, Grace Blumberg, then a recent law school graduate, published a law review article critiquing the Internal Revenue Code’s bias against working women.²³ In the context of a comparative study of the income taxation of working wives and mothers, Blumberg showed how the joint federal income tax return created a disincentive for wives—who, as a matter of “contemporary social reality,” were considered the secondary earner in a married couple—from working, by effectively “stacking” the wife’s income on top of her husband’s and thus taxing her income beginning with her husband’s marginal (i.e., highest) rate of tax.²⁴ Blumberg also drew attention

²⁰ See *Duren v. Missouri*, 439 U.S. 357 (1979) (challenging sex-based exemptions from jury service); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (finding unconstitutional a law permitting widows but not widowers certain Social Security survivor benefits); *Edwards v. Healy*, 421 U.S. 772 (1975) (challenging sex-based exemptions from jury service); *Weinberg v. Wiesenfeld*, 420 U.S. 636 (1975) (finding unconstitutional a law that only allowed surviving children but not widowers to obtain Social Security survivor benefits); *Kahn v. Shevin*, 416 U.S. 351 (1974) (property tax exemption for widows but not widowers held constitutional); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating Air Force’s policy of automatically granting spousal benefits to married male service members but requiring married female service members to prove the financial dependency of their spouses).

²¹ *Craig v. Boren*, 429 U.S. 190 (1976).

²² *About the Court: Current Members*, U.S. SUPREME CT., <https://www.supremecourt.gov/about/biographies.aspx> (last visited June 16, 2020).

²³ Grace Blumberg, *Sexism in the Code: A Comparative Study of the Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971).

²⁴ *Id.* at 49; see *id.* at 50–54.

to how the joint return, by aggregating a married couple's income and effectively splitting it between them for tax purposes, rewarded one-earner couples with a lighter tax burden and increasingly penalized two-earner couples (with the maximum tax penalty being visited on couples where the husband and wife had equal earnings).²⁵ Blumberg further critiqued the lack of adequate deductions for childcare and housework as disincentives for women's paid labor.²⁶

“If the right to work is understood as a fundamental individual right, every individual should be afforded a neutral context in which to make a decision about work.”²⁷ The problem with the tax law, Blumberg pointed out, was that it was not gender neutral in operation. To the contrary, the tax laws “inequitably and insensitively treated working wives” and gave voice to a social policy that “a married woman ought to stay at home unless her family is virtually destitute, that is, in danger of becoming or presently a public charge. The apparent basis for this policy is the belief that the family is better off, that is, more stable or cohesive, and, perhaps, that the wife also benefits from enforced domesticity.”²⁸ Married women were making tax-influenced decisions about whether to work outside the home, and thus their behavior was being distorted by the tax law. Blumberg's arguments were designed to appeal to traditional tax scholars who believe that tax laws should not distort labor choices.²⁹

The Development of Feminist Tax Scholarship

Although tax matters remained in the muted background of the feminist agenda throughout the 1970s and 1980s,³⁰ a critical mass of feminist scholarship in taxation began to

²⁵ *Id.* at 54–59.

²⁶ *Id.* at 62–74.

²⁷ *Id.* at 90.

²⁸ *Id.* at 91, 92–93.

²⁹ For a more recent articulation of these distortion concerns, see Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

³⁰ For examples of feminist tax scholarship from this period, see Pamela B. Gann,

emerge in the 1990s. The concerns raised in this scholarship tended to cluster into one of several areas: (1) the tax law's structural incentives against women's participation in the paid labor force; (2) specific provisions of the tax law that appear neutral on their face but have a disproportionately negative impact on women; and (3) tax policies that are consistent with or challenge feminist theories of justice. It is not possible to name all of the legal scholars who contributed to the growing body of feminist tax scholarship, and so this chapter necessarily is limited to citing only representative samples of the work from this period.³¹

The Emergence of a Critical Voice

Two books published in the late 1990s helped to shape the next decade of feminist tax scholarship. Mary Louise Fellows and Karen Brown's *Taxing America* assembled a group of authors to examine race and gender dimensions of the income tax law.³² Notable contributions to this book include Lily Kahng's chapter, *Fiction in Tax*, which explores the history of the joint income tax return and the legal "fiction" on which it relies; namely, the notion that husbands and wives are one for tax purposes.³³ Dorothy Brown's *The Marriage Bonus/Penalty in Black and White* exposed how black couples and white couples experience the tax implications of marriage differently, finding that black couples were likely to experience the marriage penalty more frequently than white couples.³⁴ Brown found this to be due to a combination of (1) employment discrimination that brought the earnings of black men and black women closer to parity than the

Abandoning Marital Status as a Factor in Allocating Income Tax Burdens, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

³¹ For a further sampling, see CRITICAL TAX THEORY: AN INTRODUCTION (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

³² TAXING AMERICA (Karen B. Brown & Mary Louise Fellows eds., 1996).

³³ Lily Kahng, *Fiction in Tax*, in TAXING AMERICA, *supra* note 32, at 25–44.

³⁴ Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA, *supra* note 32, at 45–57.

earnings of white men and white women and (2) differences in wage labor participation that resulted in the wife's wages constituting a greater percentage of the average black couple's income than the average white couple's income.³⁵

The next year, Edward McCaffery's *Taxing Women* explored how federal tax policy decisions from the 1930s and 1940s that favored "traditional" family structures—a working husband with a stay-at-home wife—have persisted even as society has changed.³⁶ McCaffery built on his prior work exploring how gender bias in the tax code manifests not only in the joint return but also in the earned income tax credit, the disaggregation of spousal income for Social Security purposes, the tax treatment of childcare, and fringe benefit rules that favor full-time employees.³⁷ As McCaffery put it in the introduction to *Taxing Women*:

Tax law changes were put in place to foster and reward this single-earner household. These changes were left in place, all but unexamined, as the system kept growing. The tax system's strong bias in favor of single-earner families now sits uneasily under modern conditions. It pushes against stable families at the lower-income levels, against working wives at the upper-income ones, and, by limiting satisfactory options, against the many families in between. ...

Meanwhile, ... [t]he mainstream tax policy academy legitimated the structure of tax with a rhetoric of fairness, neutrality, and common sense. An emergent feminist voice was barely heard, even when its cries were consistent with basic economic principles.³⁸

Nancy Staudt's article, *Taxing Housework*, published just before McCaffery's book, analyzed the tax policy decision to exempt household labor from the income tax base.³⁹ Staudt proposed including the value of that labor in income both to affirm the value of labor provided in

³⁵ *Id.* at 49–53.

³⁶ EDWARD J. MCCAFFERY, *TAXING WOMEN: HOW THE MARRIAGE PENALTY AFFECTS YOUR TAXES* (1997).

³⁷ *See, e.g.*, Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993).

³⁸ MCCAFFERY, *supra* note 36, at 1.

³⁹ Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

the home and to provide women who work in the home with economic security in retirement, while tempering the impact of her proposal by suggesting the creation of a household income tax credit to offset the resulting tax burden on low-income households.⁴⁰ Echoing cultural feminists' emphasis on the value of women's caretaking work,⁴¹ Staudt offered a sophisticated and practically oriented proposal to offset the bias she identified, while taking into account class-based differences among taxpayers.

Extending the investigation of structural tax policy choices on women's market participation, Mary Louise Fellows examined the tax law's treatment of childcare expenses in *Rocking the Tax Code*, demonstrating how the "tax law facilitates class, gender, and race subordination and how it could be designed to disrupt it."⁴² Fellows expanded the focus beyond traditional tax policy goals and concepts and, more importantly, beyond the purchaser of childcare (who is usually the focus in debates over the tax treatment of childcare) to the wages and working conditions of those who supply childcare services (who normally remain invisible in these debates).⁴³ Fellows put forward policy options that aimed to simultaneously erase the public-private divide in tax law and disrupt both the economic exploitation and the class, gender, and race hierarchies in the market for childcare services.⁴⁴

Unique among tax scholars writing at the time, Wendy Gerzog used feminist legal theory to illuminate the otherwise-hidden gendered aspects of the estate and gift tax marital deduction.⁴⁵ In *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, Gerzog

⁴⁰ *Id.* at 1618–40.

⁴¹ See, e.g., ROBIN WEST, *CARING FOR JUSTICE* (1997).

⁴² Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 *YALE J.L. & FEMINISM* 307, 308 (1998).

⁴³ *Id.* at 312–55.

⁴⁴ *Id.* at 385–93.

⁴⁵ Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 *UCLA WOMEN'S L.J.* 301 (1995).

criticized the wealth transfer tax laws' reliance on the concept of "qualified terminable interest property," which allowed the wealthier spouse (typically the man) to receive a full marital deduction (and thus tax-free treatment) for transfers to the less wealthy spouse (typically the woman), even for transfers that remained fully under the husband's control.⁴⁶ In other words, the law favored male interests by allowing a full marital deduction—usually available only for outright transfers to a spouse—for transfers in trust that the husband continued to control, "based on the fallacy that decisions by the husband are decisions of the marital unit."⁴⁷ Gerzog observed that the statute was gender neutral on its face, but the law itself "can only be explained as a gender-biased, paternalistic, and degrading treatment of women."⁴⁸

Building on her earlier work on the language of tax policy, in 1997 Marjorie Kornhauser continued her work on anti-progressive tax rhetoric.⁴⁹ A year earlier, a group of scholars had argued that the views of theorists purporting to speak for marginalized communities should be empirically tested to determine whether they were truly representative of community views, in part because a survey that those scholars had created showed that women did not support progressive taxation at rates significantly higher than men, which, in their eyes, undermined Kornhauser's earlier reliance upon "a feminist 'ethos of care'" in arguing in support of progressivity.⁵⁰ In responding to this empirical study, Kornhauser emphasized that feminist theories are valuable tools for critiquing the tax laws.⁵¹ Kornhauser warned against overreliance on empirical work, emphasizing that quantification has a veneer of neutrality but has its own

⁴⁶ *Id.* at 301.

⁴⁷ *Id.* at 310.

⁴⁸ *Id.* at 305.

⁴⁹ Marjorie E. Kornhauser, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 AM. U. L. REV. 151 (1997); see Kornhauser, *supra* note 30.

⁵⁰ Kornhauser, *supra* note 49, at 153; William J. Turnier et al., *Redistributive Justice and Cultural Feminism*, 45 AM. U. L. REV. 1275 (1996).

⁵¹ Kornhauser, *supra* note 49, at 161–62.

inherent methodological flaws, particularly when studying taxpayers' self-reported views of concepts like progressivity in the tax laws.⁵² "Science," she wrote, "is not the only truth, nor even an absolute truth; rather, like all areas of human knowledge, it is tentative and evolving."⁵³ For that reason, feminist theory is a touchstone for tax analysis as equally illuminating as history, economics, or empirical work, according to Kornhauser.⁵⁴

While other feminist scholars pursued questions about the structure, bias, and rhetoric of the tax laws as applied to women, tax scholar Patricia Cain began drawing attention to the tax discrimination faced by same-sex couples. In the 1990s, same-sex couples were not permitted to marry in any state, and even had they been, they would not have been recognized as married for federal income tax purposes.⁵⁵ Cain, already the author of a robust body of feminist scholarship, brought that expertise to her analysis of the tax treatment of same-sex couples as a form of gender discrimination.⁵⁶ This topic is one to which Cain and other scholars would devote significant attention in the next decade as the battle for marriage equality heated up.

Expanding What Counts as "Feminist" Issues

In the 1990s, the contours of the campaign for the right of same sex-couples to marry began to take shape—albeit haltingly—in several states. Challenges met with varying success, until Massachusetts became the first state to recognize same-sex marriage following the 2003 decision in *Goodridge v. Department of Public Health*.⁵⁷ When at least one mainstream tax

⁵² *Id.* at 154–59.

⁵³ *Id.* at 160.

⁵⁴ *Id.*

⁵⁵ See *Boyter v. Comm'r*, 668 F.2d 1382, 1385 (4th Cir. 1981) (deferring to state law in determining who is married for federal tax purposes); 1 U.S.C. § 7 (1996) (defining "marriage" for purposes of federal law as "only a legal union between one man and one woman as husband and wife").

⁵⁶ *E.g.*, Patricia A. Cain, *Same-Sex Couples and the Federal Tax Law*, 1 LAW & SEXUALITY 97 (1991); Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471 (1997).

⁵⁷ 798 N.E.2d 941 (Mass. 2003); see *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004). Although Hawaii was on the path to be the first state to recognize same-sex marriage after a landmark

scholar expressed doubt that the failure to recognize same-sex couples harmed them for federal income tax purposes,⁵⁸ scholars like Anthony Infanti responded with a robust critique of the Internal Revenue Code’s “unequal and discriminatory treatment” of same-sex couples and its adoption of society’s “revulsion” toward lesbian and gay people.⁵⁹ Cain, Infanti, and Nancy Knauer all worked (and, even after the advent of marriage equality throughout the United States, continue to work) to expose the heteronormative underpinnings of the tax laws.⁶⁰ All of their work is undergirded by the belief that “the most effective and inclusive feminism takes into account the way that many intersecting identities can make the quest for justice more complex and elusive, given the structure of both the law itself as well as the meaning of equal protection as interpreted by twenty-first-century courts.”⁶¹ In other words, feminist tax scholarship is not just about women, but about justice for all people.

In the second decade of the twenty-first century, tax scholars who self-identify as feminists have broadened their inquiry beyond the areas of traditional interest to feminist tax scholars. There is a vibrant body of feminist tax scholarship on wide-ranging subjects such as

1993 decision from the Hawaii Supreme Court, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), an amendment was later added to the Hawaii Constitution that placed the power to define marriage in the hands of the state legislature and effectively validated the challenged marriage law before a final decision could be reached in the case. *Baehr v. Miike*, No. 20371, 1999 WL 35643448 (Haw. Dec. 9, 1999).

⁵⁸ Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1779 (1998).

⁵⁹ Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 765, 779 (2004).

⁶⁰ E.g., Patricia A. Cain, *The New York Marriage Equality Act and the Income Tax*, 5 ALB. GOV’T L. REV. 634 (2012); Anthony C. Infanti, *The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation*, 89 WASH. L. REV. 1185 (2014); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998).

⁶¹ Bridget J. Crawford & Anthony C. Infanti, *Introduction*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 3, 9 (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

reproductive technology,⁶² gender identity,⁶³ student loan indebtedness,⁶⁴ health care,⁶⁵ human rights,⁶⁶ and even tax-exempt organizations.⁶⁷ Again, the trend in feminist tax scholarship is to recognize the interconnectedness of gender equality with other social justice movements.⁶⁸

“A Critique from the Margin”⁶⁹

As the discussion thus far demonstrates, feminist analysis is far from new to tax law. The rich history of feminist contributions to the tax literature might seem to call into question tax law’s placement among the “emerging areas” of feminist engagement identified by this *Handbook*’s editors. Yet, a long history of feminist contributions to the tax literature should not be confused with wide acceptance or embrace of those contributions either in academic discourse or in the everyday drafting of tax legislation and regulations. It is in this sense that tax law might be considered an “emerging area” of feminist influence on the law and warrant this chapter’s placement within this *Handbook of Feminism and Law in the United States*.

⁶² Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of Magdalin v. Commissioner for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283.

⁶³ E.g., Anthony C. Infanti, *LGBT Taxpayers: A Collision of “Others,”* 13 GEO. J. GENDER & L. 1 (2012); Katherine Pratt, *The Tax Definition of “Medical Care:” A Critique of the Startling IRS Arguments in O’Donnabhain v. Commissioner*, 23 MICH. J. GENDER & L. 313 (2016).

⁶⁴ Victoria J. Haneman, *The Collision of Student Loan Debt and Joint Marital Taxation*, 35 VA. TAX REV. 223 (2016).

⁶⁵ Francine J. Lipman & James Owens, *Irresponsibly Taxing Irresponsibility: The Individual Tax Penalty Under the Affordable Care Act*, 23 GEO. J. ON POVERTY L. & POL’Y 463 (2016).

⁶⁶ E.g., Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination and Human Rights*, 2017 WIS. L. REV. 491; TAX, INEQUALITY, AND HUMAN RIGHTS (Philip Alston & Nikki Reisch eds., 2019).

⁶⁷ See David A. Brennen, *Bob Jones University v. United States*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 61, at 150; Elaine Waterhouse Wilson, *Commentary on Bob Jones University v. United States*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 61, at 140.

⁶⁸ E.g., Kristin Kalsem & Verna Williams, *Social Justice Feminism*, 18 UCLA WOMEN’S L.J. 131 (2010); see Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 127 (2007) (describing coalition building as a hallmark of third-wave feminism).

⁶⁹ Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677 (2000).

A Blinkered Worldview

Conventional (also referred to as “traditional” or “mainstream”) tax scholarship adopts a predominantly economic perspective on tax law and policy that imbues the work of tax scholars with “the hard, ‘scientific’ character of economic analysis.”⁷⁰ In *Who Cooked Adam Smith’s Dinner?*, Katrine Marçal accurately (if unintentionally) summed up the general attitude of mainstream U.S. tax academics when she described the “crux of economics”: “When we participate in the market, we’re all assumed to be anonymous. That’s why the market can set us free. It doesn’t matter who you are. Personal traits and emotional ties don’t have a place here. The only thing that matters is your ability to pay.”⁷¹ With such a narrow focus on the economic dimension of individuals,⁷² there is little room in conventional tax scholarship for feminist or other critical perspectives that explore the impact of tax law on individuals marginalized based on, for example, gender or gender identity, race or ethnicity, sexual orientation, class, disability, or immigration status.

Like economists who “isolate a single variable within an economic model that encompasses several variables ... to simplify the world to be able to predict it,”⁷³ mainstream tax academics reduce complicated human beings and their interactions with each other to a single economic variable—income in income tax analyses or wealth in transfer tax analyses. As Nancy Knauer explains with implicit reference to the income tax:

The three classic pillars of tax policy—equity, efficiency, and ease of administration—aim to design a system of taxation that fairly apportions the

⁷⁰ Michael A. Livingston, *Radical Scholars, Conservative Field: Putting “Critical Tax Scholarship” in Perspective*, 76 N.C. L. REV. 1791, 1795–96 (1998); *see id.* at 1794; Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J.L. & SOC. POL’Y 206, 226 (2014).

⁷¹ KATRINE MARÇAL, *WHO COOKED ADAM SMITH’S DINNER?: A STORY ABOUT WOMEN AND ECONOMICS* 19 (Saskia Vogel trans., 2016).

⁷² Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1200–03 (2008); Knauer, *supra* note 70, at 208, 209–10.

⁷³ MARÇAL, *supra* note 71, at 21–22.

burdens of citizenship, minimizes tax distortions in economic behavior, and simplifies the task of compliance and administration. 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. 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 evaluate the potentially disparate impact of taxation on the members of these groups.⁷⁴

The conventional approach to tax scholarship thus simplifies the world in order that its tax rules might be reformed, replaced, or abandoned through tidy academic analyses—analyses that lack any real consideration of how existing or proposed tax rules might affect the multidimensional, flesh-and-blood people on whom those rules are intended to operate. Conveniently (for those with power and privilege), this singular focus on the economic dimension of individuals has a sanitizing effect, as it not only expurgates “uncomfortable discussions of racism, sexism, heterosexism, and disability discrimination”⁷⁵ from mainstream academic tax analysis but also more insidiously operates to “render[] any mention of these subjects in a tax context immediately suspect.”⁷⁶

In this way, the work of mainstream tax academics normalizes the discrimination that is embedded in tax law and renders it “more generally and widely acceptable by making it seem as if the tax laws are unconnected with social concerns and merely dictated by the play of impersonal market and economic forces that are beyond our control.”⁷⁷ In turn, politicians of all stripes “pick up on this rhetorical thread and weave it into the tapestry of popular political discourse when they focus tax reform discussions on encouraging economic growth.”⁷⁸ Taken

⁷⁴ Knauer, *supra* note 70, at 209–10 (footnotes omitted).

⁷⁵ Infanti, *supra* note 72, at 1201.

⁷⁶ *Id.* at 1253.

⁷⁷ ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 141 (2018).

⁷⁸ *Id.*

together, this academic and political fixation with economics serves to “reinforce[] the tax laws’ privileging of the already privileged”⁷⁹ and has left little space for feminist or other critical contributions to take hold and effect positive change in the law.

A Marginalized Scholarship

Given the narrow worldview that shapes and influences conventional tax discourse, it should come as no surprise that mainstream tax academics’ reception of feminist and other critical tax scholarship has been described as “contentious,”⁸⁰ being characterized by a “stiff and sustained resistance”⁸¹ or even “a visceral reaction that in some cases blocks intellectual engagement.”⁸² Some mainstream tax scholars seem to have taken critical tax scholarship as “a radical affront,”⁸³ with the body of critical tax scholarship having been “derided by mainstream tax scholars for being trendy, divisive, and less than rigorous.”⁸⁴ Even so, “the largest numbers [of tax academics—not to mention those outside the academy] have simply ignored the critical tax endeavor, leaving women’s and minorities’ concerns somewhat peripheral to the broader tax subject.”⁸⁵ In these ways, critical tax scholarship has been both “dismissed as ‘mere critique’”⁸⁶ and itself subjected to “scathing critiques.”⁸⁷

⁷⁹ *Id.* at 143.

⁸⁰ Livingston, *supra* note 70, at 1815.

⁸¹ Knauer, *supra* note 70, at 226; *see also* Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575, 590 (2001) (“substantial resistance”); Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837, 1846 (1998) (“open resistance”).

⁸² Karen B. Brown et al., *The Past, Present, and Future of Critical Tax Theory: A Conversation*, 10 PITT. TAX REV. 59, 64 (2012).

⁸³ *Id.* at 63.

⁸⁴ Knauer, *supra* note 70, at 227.

⁸⁵ Michael A. Livingston, *Women, Poverty, and the Tax Code: A Tale of Theory and Practice*, 5 J. GENDER RACE & JUST. 327, 330 (2002).

⁸⁶ Knauer, *supra* note 70, at 228 (quoting Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1524 (1998)).

⁸⁷ Abreu, *supra* note 81, at 591 n.41.

Around the same time that the *North Carolina Law Review* devoted an entire issue to (at times, openly hostile) critiques of critical tax theory,⁸⁸ like-minded tax scholars began to hold a “Critical Tax Conference,” at first sporadically and then annually starting in 2000.⁸⁹ Despite its name, this conference “intentionally encouraged a focus beyond the anti-subordination principle that initially drove critical tax theory. Its organizers have encouraged attendance of all tax scholars who are interested in cross-disciplinary work and in the identification of a broad range of hidden biases, influences, and unintended effects of the law or proposed reforms to it.”⁹⁰ This capacious view of the contributions that should be welcomed at the conference provided an ostensibly salutary opportunity for conversation between critical and mainstream tax scholars. Nonetheless, over the years, the conference increasingly became just another opportunity for mainstream tax scholars to present their work, and the occasional critical tax presentation made at the conference too often generated negative responses.⁹¹

In the face of hostility to critical tax scholarship, Marjorie Kornhauser was given some pause when she was labeled a “feminist tax scholar”—despite her self-identification as both a tax scholar and a feminist.⁹² This pause spurred self-reflection on Kornhauser’s part that led to an examination of the citation pattern of a critical tax article that she had written. Kornhauser compared the citation pattern of that article, which “explicitly applie[d] feminist theory to the issue of progressive income tax,”⁹³ with the citation pattern of a more traditional law review article that was published in the same year, on the same general topic (i.e., progressivity of the

⁸⁸ Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C. L. REV. 1519 (1998).

⁸⁹ Brown et al., *supra* note 82, at 65.

⁹⁰ *Id.* at 65–66.

⁹¹ See Dorothy A. Brown, *Tales from a Tax Crit*, 10 PITT. TAX REV. 47, 47 (2012).

⁹² Marjorie E. Kornhauser, *A Taxing Woman: The Relationship of Feminist Scholarship to Tax*, 6 S. CAL. REV. L. & WOMEN’S STUD. 301, 301 (1997).

⁹³ *Id.* at 302; see Kornhauser, *supra* note 30.

income tax), by similarly well-established tax scholars, and in a similarly ranked journal.⁹⁴

Interestingly, Kornhauser found that while both articles had a similar number of citations, the pattern of citations differed markedly: “On the positive side, the perceived feminist aspect of [Kornhauser’s] article made it a much more widely cited article outside the tax area. On the other hand, [Kornhauser] believe[d] that this very aspect is the reason it was less likely to be cited within the tax field, and when it was cited it was sometimes cited more for these feminist aspects than for its traditional tax aspects.”⁹⁵ This led Kornhauser to conclude that “[t]he term feminist tax scholarship is a double-edged sword Its power to enrich both tax and other disciplines is limited by a potential for marginalization—of being read only for its feminist angle, or worse, being dismissed because of its feminist angle.”⁹⁶ Despite being based on an unscientific analysis of citation patterns in an extremely limited data set, Kornhauser’s speculation is fully in keeping with the general marginalization of critical tax scholarship that continues to this day.⁹⁷

Emerging from the Academic Shadows

Reflecting at the turn of the twenty-first century on the role that tax law and scholarship might play in addressing the feminization of poverty at a conference organized by the University of Iowa College of Law’s *Journal of Gender, Race & Justice*, Michael Livingston noted: “It is also important to remember that many of today’s conservative policies originated in academic discussions and that future choices will likewise be circumscribed by today’s theoretical debates. These factors suggest that there is at least something to be gained from an academic

⁹⁴ Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905 (1987).

⁹⁵ Kornhauser, *supra* note 92, at 317.

⁹⁶ *Id.* at 321–22.

⁹⁷ *E.g.*, Edward Kleinbard, *Critical Tax Thinking*, at slides 3–4 (Univ. S. Cal. Legal Studies Research Paper No. 19-10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373965; see Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You’ve Got to Speak Out Against the Madness)*, 28 BERKELEY LA RAZA L.J. 49 (2018).

reconsideration of women’s and poverty issues in the tax arena. Progress in the intellectual area might have real impact on the policy process, if not immediately then several years or decades down the road.”⁹⁸ This message encouraging patience and perseverance among those in the tax scholarly community who are focused on issues of social justice reminds us that change—even when it seems to come quickly—typically is preceded by much time and toil laying the groundwork for that change to occur. It appears that we are now beginning to see the fruits of the labor, patience, and perseverance of the critical tax scholars who have spent the past several decades laying the groundwork for creating a more just tax system that furthers the shared enterprise of permitting all members of our society to lead full and rewarding lives.

Encouragingly, critical tax perspectives have begun to find resonance outside of tax academia. As Nancy Knauer has observed:

Despite [its] inauspicious reception, many of the insights of critical tax theory now find support in international practices such as gender mainstreaming and gender-sensitive budgeting. 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 (DOMA). 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.⁹⁹

Critical tax perspectives have also begun, albeit slowly, to seep into the general tax policy discourse in the United States. For instance, under the leadership of its managing director Caroline Bruckner, the Tax Policy Center at American University’s Kogod School of Business produced an important report in 2017 regarding the impact of tax law on women-owned businesses.¹⁰⁰ The report, *Billion Dollar Blind Spot: How the U.S. Tax Code’s Small Business*

⁹⁸ Livingston, *supra* note 85, at 335.

⁹⁹ Knauer, *supra* note 70, at 229–30 (footnotes omitted).

¹⁰⁰ It is worth noting that the Kogod Tax Policy Center’s mission is not particularly focused on marginalized groups, as critical tax theory is; rather, the Kogod Tax Policy Center more broadly “seeks to

Expenditures Impact Women Business Owners, demonstrated the misalignment between several small-business tax expenditures and the types of businesses that women business owners operate.¹⁰¹ The report found that “Congress and stakeholders have a billion dollar blind spot when it comes to understanding how effective small business tax expenditures are with respect to women-owned firms. This blind spot is primarily attributable to an absence of existing tax research on women-owned firms and indicates Congress doesn’t have the information necessary to make evidence-based tax policy decisions with respect to women-owned firms.”¹⁰²

Importantly, the results of this research reached the halls of Congress. Bruckner testified regarding the report’s findings before the House Committee on Small Business in 2017 and again before the Senate Committee on Small Business and Entrepreneurship in 2018.¹⁰³ Then, in 2019, Bruckner testified before the House Budget Committee on the report’s findings as part of that committee’s review of the impact of the 2017 Tax Cuts and Jobs Act.¹⁰⁴ The staff of the House Budget Committee then included a summary of Bruckner’s testimony in its report on the hearing that was posted on the committee’s website for wider dissemination.¹⁰⁵ Although this may seem

increase public understanding of the nation’s tax laws, and to spur balanced, productive dialogue on the status of current tax law, the challenges of tax compliance and planning, and the potential impact of tax reform, with a focus on ‘average’ Americans and small and mid-size businesses.” KOGOD TAX POL’Y CTR., <https://www.american.edu/kogod/research/taxpolicy/> (last visited June 16, 2020).

¹⁰¹ CAROLINE BRUCKNER, KOGOD SCH. OF BUS. TAX POLICY CTR., BILLION DOLLAR BLIND SPOT: HOW THE U.S. TAX CODE’S SMALL BUSINESS EXPENDITURES IMPACT WOMEN BUSINESS OWNERS 7 (2017), https://www.american.edu/kogod/research/upload/blind_spot_accessible.pdf.

¹⁰² *Id.*

¹⁰³ *Expanding Opportunities for Small Businesses Through the Tax Code: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 115th Cong. 26–36 (2018) (statement of Caroline Bruckner, Managing Director, Kogod Tax Policy Center); *Small Business Tax Reform: Modernizing the Code for the Nation’s Job Creators: Hearing Before the H. Comm. on Small Bus.*, 115th Cong. 10–12, 13–14, 36–43 (2017) (statement of Caroline Bruckner, Managing Director, Kogod Tax Policy Center).

¹⁰⁴ *Hearing on 2017 Tax Law: Impact on the Budget and American Families: Hearing Before the H. Comm. on Budget*, 116th Cong. 42–50 (2019) (statement of Caroline Bruckner, Managing Director, Kogod Tax Policy Center).

¹⁰⁵ *Real-World Effects Prove the GOP Tax Law Was the Wrong Policy at the Wrong Time*, HOUSE COMM. ON BUDGET (Mar. 6, 2019), <https://budget.house.gov/publications/report/real-world-effects-prove-gop-tax-law-was-wrong-policy-wrong-time>.

like a very small step, the fact that legislators did not simply ignore or dismiss out of hand research illuminating the gendered dimensions of business-related tax reforms is an important indication that lawmakers are finally beginning to open their minds to the gendered dimensions of tax law.

Nongovernmental organizations in the United States also seem to be waking up to the importance of tax law in discussions of gender inequality. In November 2019, the National Women’s Law Center (NWLC) produced a series of reports on the theme of “Tax Justice Is Gender Justice” (but with the far catchier tagline “Tax the Patriarchy”).¹⁰⁶ The three reports—*The Faulty Foundations of the Code*,¹⁰⁷ *Reckoning with the Hidden Rules of Gender in the Tax Code*,¹⁰⁸ and *A Tax Code for the Rest of Us*¹⁰⁹—were the product of a truly collaborative effort. In the early stages of planning this project, NWLC contacted critical tax scholars (including both of the authors of this chapter) to gauge their receptivity to the project and to obtain their advice and expertise as the contours of the project were brought into focus. Then, draft reports were written by teams of authors that included NWLC staff, representatives from other policy organizations, and academics. Before finalizing the reports, NWLC brought together the authors

¹⁰⁶ *Resource: Gender and the Tax Code*, NAT’L WOMEN’S L. CTR. (Nov. 13, 2019), <https://nwlc.org/resources/gender-and-the-tax-code/>; Melissa Boteach, *Five Reasons We Need to Tax the Patriarchy*, NAT’L WOMEN’S L. CTR. (Dec. 20, 2019), <https://nwlc.org/blog/five-reasons-we-need-to-tax-the-patriarchy/>.

¹⁰⁷ ARIEL JUROW KLEIMAN ET AL., NAT’L WOMEN’S LAW CTR., *THE FAULTY FOUNDATIONS OF THE CODE: GENDER AND RACIAL BIAS IN OUR TAX LAWS* (2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/11/NWLC-The-Faulty-Foundations-of-the-Tax-Code-Accessible-FINAL.pdf>.

¹⁰⁸ KATY MILANI ET AL., NAT’L WOMEN’S LAW CTR., *RECKONING WITH THE HIDDEN RULES OF GENDER IN THE TAX CODE: HOW LOW TAXES ON CORPORATIONS AND THE WEALTHY IMPACT WOMEN’S ECONOMIC OPPORTUNITY AND SECURITY* (2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/11/NWLC-ReckoningTheHiddenRules-accessibleNov12.pdf>.

¹⁰⁹ MELISSA BOTEACH ET AL., NAT’L WOMEN’S LAW CTR., *A TAX CODE FOR THE REST OF US: A FRAMEWORK & RECOMMENDATIONS FOR ADVANCING GENDER & RACIAL EQUALITY THROUGH TAX CREDITS* (2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/11/NWLC-GCPI-Tax-Code-for-the-Rest-of-Us-Nov14.pdf>.

of the reports along with a broader group of policy researchers and critical tax scholars for a day-long meeting to provide feedback on the drafts and to help to shape the final reports. As of this writing, just months after the release of the reports, any judgment regarding their influence would be premature; however, it is worth noting that the reports have already garnered significant attention from the press.¹¹⁰

The intersection of taxation and gender issues has also taken on an unprecedented salience in public discourse. For example, *Cosmopolitan* magazine proclaimed 2015 as “The Year the Period Went Public,”¹¹¹ at least in part because of the popular “Stop Taxing Our Periods! Period.” online petition against the “tampon tax”—the sales tax imposed on menstrual products in over thirty states.¹¹² In 2019, the ACLU issued a legislative toolkit and briefing paper on menstrual equity, both of which are designed to assist advocates in efforts to repeal the tampon tax.¹¹³ The tampon tax is a constituent part of what the popular press now calls the “pink tax”: taxes on menstrual products, gender-based pricing discrimination for substantially similar items (think blue razors versus pink razors), and the wage gap itself.¹¹⁴ New York Governor

¹¹⁰ Andrew Keshner, *Tax Rules Have Been Largely Written by Rich, White Men—And It Shows, Researchers Say*, MARKETWATCH (Nov. 18, 2019), <https://www.marketwatch.com/story/3-ways-the-tax-code-can-burden-women-and-the-poor-while-helping-out-wealthy-men-2019-11-15>; Annie Lowrey, *Tax the Patriarchy*, ATLANTIC (Nov. 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/tax-patriarchy/601864/>; Maura Quint, *Taxes Are a “Women’s Issue,” Too*, MS. (Nov. 21, 2019), <https://msmagazine.com/2019/11/21/taxes-are-a-womens-issue-too/>.

¹¹¹ Anna Maltby, *The 8 Greatest Menstrual Moments of 2015*, COSMOPOLITAN (Oct. 13, 2015), <https://www.cosmopolitan.com/health-fitness/news/a47609/2015-the-year-the-period-went-public>.

¹¹² *No Tax on Tampons: Stop Taxing Our Periods! Period.*, CHANGE.ORG (Oct. 10, 2015), <https://www.change.org/p/u-s-state-legislators-stop-taxing-our-periods-period> [<https://perma.cc/D38W-DR4G>]. For a discussion of state sales tax regimes, see Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 449–56 (2019).

¹¹³ ACLU & PERIOD EQUITY, *THE UNEQUAL PRICE OF PERIODS: MENSTRUAL EQUITY IN THE UNITED STATES* (2019), <https://www.aclu.org/report/unequal-price-periods>; ACLU NAT’L PRISON PROJECT & PERIOD EQUITY, *MENSTRUAL EQUITY: A LEGISLATIVE TOOLKIT* (2019), <https://www.aclu.org/report/menstrual-equity>.

¹¹⁴ See, e.g., Ewan Palmer, *What Is the “Pink Tax?” New York Lawmakers Could Soon End Discriminatory Pricing of Women’s Products*, NEWSWEEK (June 10, 2019), <https://www.newsweek.com/new-york-pink-tax-pricing-women-products-1443149>; Press Release,

Andrew Cuomo announced his intention to eliminate the “pink tax” in 2020, and so legislation in this area is expected.¹¹⁵ Although it is too soon to predict the trajectory of either the tampon tax in particular or the pink tax in general, taxation is a current focal point for gender-equality activism and legal reform.

The nascent recognition that tax law is an important contributor to gender discrimination in the United States is simultaneously long overdue and a welcome development. Of course, a few decades of critical tax scholarship cannot, by itself, successfully loosen the grip of patriarchy over the tax code. Tax law is closely tied to the society that creates it.¹¹⁶ As a result, uprooting and eradicating deeply embedded gender discrimination—for example, and perhaps most prominently, the heteropatriarchal joint federal income tax return based in and on the privileging of marriage in U.S. tax law and society—can only be successfully accomplished as part of a broader movement for social change. That feminist tax work is beginning to have influence on policy matters and even public discourse—phrases like “pink tax” and “tampon tax” are now well-understood when just a few years ago they were not—demonstrates the continued vitality and importance of feminist tax perspectives, not to mention the need for feminist scholars outside of tax law to actively engage with and understand these perspectives.

Conclusion

The halls of tax academia have proven less than hospitable to the work of critical tax scholars because of mainstream tax scholars’ tendency to view taxpayers as the sum of their

Congresswoman Carolyn B. Maloney, Earn Less, Pay More: The State of the Gender Pay Gap and “Pink Tax” in 2018, <https://maloney.house.gov/sites/maloney.house.gov/files/Pink%20Tax%20report%20FINAL.pdf>.

¹¹⁵ Press Release, Governor Andrew M. Cuomo, Governor Cuomo Unveils Tenth Proposal of 2020, State of the State: Eliminating the Pink Tax (Dec. 22, 2019), <https://www.governor.ny.gov/news/governor-cuomo-unveils-10th-proposal-2020-state-state-eliminating-pink-tax>.

¹¹⁶ See generally Infanti, *supra* note 77.

economic transactions. Where mainstream tax scholars see taxpayers as one-dimensional balance sheets, critical tax scholars see them as multidimensional people with identities that may give rise to privilege and/or to subordination both inside and outside the tax system. While there is still hope that critical perspectives will seep more broadly into both mainstream tax and feminist scholarship, the influence that critical tax perspectives have begun to have outside of academia—for instance, in think tanks and policy organizations that are better positioned to disseminate this work to legislators and the public at large—may prove to be far more consequential in achieving positive changes in our tax system in the long run. An observation made by Michael Livingston in closing his remarks at the *Journal of Gender, Race & Justice* conference on women and poverty (mentioned earlier) provides relevant context for, and an important lesson in support of, this contention now:

A bit of history may be relevant at this point. Thirty years ago, conservative think tanks began to think about public policy in a detailed but unified way. They began to consider how various aspects of the liberal state, including tax, welfare, and various other policies, interacted to undermine traditional values and replace them with a state-centered, liberal creed. By developing expertise in numerous areas, but with a unifying philosophy, conservative think tanks were able to affect public policy in a more extensive manner than anyone had deemed possible. I suspect that most participants in this symposium would prefer that the conservatives had just stayed home. But in procedure, if not substance, there is much to be gleaned from them. Those who wish to reverse the feminization of poverty, together with other relics of the past two generations, would do well to learn from their example.¹¹⁷

There is a long and rich history of feminist tax scholarship, despite the frustratingly difficult time that feminist and other critical tax perspectives have had in penetrating the mainstream of legal thought. Fortunately, it seems that others outside of academia have been paying attention to the work being done by critical tax scholars, as they have patiently laid the intellectual foundation for a fundamental shift in how we all see and interact with our tax system.

¹¹⁷ Livingston, *supra* note 85, at 336–37.

If there is to be any hope for making inroads in the shaping and reshaping of tax policy by bringing feminist and other critical tax perspectives to bear, it is through the emerging partnerships between critical tax scholars and those working in think tanks and the public policy sphere who, together, might just be “able to affect public policy in a more extensive manner than anyone had deemed possible.”¹¹⁸

¹¹⁸ *Id.* at 337.