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## Introduction to Feminist Judgments: Rewritten Tax Opinions

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**FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS**

**BRIDGET J. CRAWFORD & ANTHONY C. INFANTI, EDS.**

**DRAFT WORKING PAPER DATED APRIL 10, 2017**

## **Feminist Judgments: Rewritten Tax Opinions**

Could a feminist perspective change the shape of the tax law? Most people understand that feminist reasoning has tremendous potential to affect, for example, the law of employment discrimination, sexual harassment, and reproductive rights. Few people may be aware, however, that feminist analysis can likewise transform tax law (as well as other statutory or code-based areas of the law). By highlighting the importance of perspective, background, and preconceptions on the reading and interpretation of statutes, *Feminist Judgments: Rewritten Tax Opinions* shows what a difference feminist analysis can make to statutory interpretation. This volume, part of the *Feminist Judgments Series*, brings together a group of scholars and lawyers to rewrite tax decisions in which a feminist emphasis would have changed the outcome or the court's reasoning. The volume includes cases that implicate gender on their face (like medical expense deductions for fertility treatment or gender confirmation surgery as well as special tax benefits for married individuals), as well as cases that require a more nuanced understanding of history, politics and economics (such as the tax treatment of tribal lands and the business expense deduction). This book opens the way for a discussion of how viewpoint is a key factor in statutory interpretation.

Bridget J. Crawford is a Professor of Law at the Elisabeth Haub School of Law at Pace University.

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## Preface

Could a feminist perspective change the shape of the tax law? To begin to answer this question, we brought together a group of scholars and lawyers to rewrite, using feminist perspectives, significant tax cases from the United States Tax Court, federal Circuit Courts of Appeals, and the United States Supreme Court. Some of them implicate gender on their face—questions about the deductibility of fertility expenses or the use of gender in actuarial tables, for example—but others implicate gender less obviously, such as a case involving the ability of state and local governments to tax Indian land, or the ability of a businessman to take a deduction for the repayment of certain debts. This book challenges the belief that statutes are neutral. Most people understand that feminist reasoning has tremendous potential to affect, for example, the law of employment discrimination, sexual harassment, and reproductive rights. Few people may be aware, however, that feminist analysis can likewise transform tax law (as well as other statutory or code-based areas of the law). By highlighting the importance of perspective, background, and preconceptions on the reading and interpretation of statutes, *Feminist Judgments: Rewritten Tax Opinions* shows what a difference feminist analysis can make to statutory interpretation.

This volume, like all of the books in Cambridge University Press's *Feminist Judgments Series*, demonstrates that judges with feminist viewpoints could have changed the law, based on the precedent and law in effect at the time of the original decision. Or, even if the desired result could not be achieved under the current law, this volume shows how a powerful dissent can serve to draw attention to the fact that the tax law operates in many cases to the disadvantage of women, racial minorities, LGBT taxpayers, and other historically subordinated groups. Together, the opinions and commentaries in this volume illustrate the importance of diversity of

perspectives on the bench so that judges do not approach their work with a uniform worldview influenced by the same set of preconceptions and privileges. For judges, lawyers, students, and members of the general public, reading these critical opinions helps to expose the ways in which judges—and, in turn, the development of the law—are subtly influenced by preconceptions, existing power hierarchies, prevailing social norms, and “conventional” wisdom. This book argues that the tax law is not neutral, but rather shaped by the society that produces and applies it. At the same time, this book holds out the hope that the tax system can be reformed to be an instrument of greater justice and equality for all people.

## Acknowledgments

This book of *Feminist Judgments: Rewritten Tax Opinions* would not have been possible without the support of Cambridge University Press, which so enthusiastically endorsed a series of books following the publication of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016). The larger U.S. Feminist Judgments project is intellectually indebted to the women who created the Women’s Court of Canada and the U.K. Feminist Judgments Project, which inspired similar projects throughout the world.

We are grateful to the Kathryn M. Stanchi and Linda Berger for their leadership and guidance. We wish to thank the members of our Advisory Panel, who embraced the project with enthusiasm and helped us think about the book’s organization, limitations, and challenges. Our editor John Berger provided guidance and assistance throughout the publication process.

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Each of us would like to thank the many colleagues, students, friends, and family members who have supported our work on this project. Bridget Crawford thanks Horace Anderson, Catharine MacKinnon, Vanessa Merton, Dan Renkin, Michelle Simon, and the members of the Women’s Association of Law Students at the Elizabeth Haub School of Law at Pace University. Anthony Infanti thanks the University of Pittsburgh School of Law for its financial support of his work on this project and his family for their support and understanding during his many hours of work on this project. We both thank all of our contributors for their

enthusiasm and many hours of work and dedication (and numerous rounds of editing!) that have brought this project to life

## Chapter 1

### Introduction to the *Feminist Judgments: Rewritten Tax Opinions* Project

Bridget J. Crawford and Anthony C. Infanti

How would judicial opinions change if the judges used feminist methods and perspectives when deciding cases? That is a question that various groups of scholars, working around the globe and mostly independently of each other, have taken up in a series of books of “shadow opinions”—literally rewritten judicial decisions—using precedents, authorities, theories, and approaches that were in existence at the time of the original decision to reach radically different outcomes and often using saliently different reasoning. This global sociolegal movement toward critical opinion writing originated when a group of lawyers and law professors who called themselves the Women’s Court of Canada published a series of six decisions in 2008 in the *Canadian Journal of Women and the Law*. Inspired by that project, scholars have produced similar projects in the United Kingdom,<sup>1</sup> Australia,<sup>2</sup> the United States<sup>3</sup> and Ireland.<sup>4</sup> Other projects well under way involve New Zealand law<sup>5</sup> and international law.<sup>6</sup> Nascent projects are under consideration in India and Scotland as well.

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<sup>1</sup> See *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE* (Rosemary Hunter et al. eds., 2010).

<sup>2</sup> See *AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW* (Heather Douglas et al. eds., 2015).

<sup>3</sup> See *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

<sup>4</sup> See *NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY* (Máiréad Enright et al. eds., 2017).

<sup>5</sup> See *New Research Project to Look at New Zealand Judgments from a New Angle*, ADLS (Oct. 16, 2015), <http://www.adls.org.nz/for-the-profession/news-and-opinion/2015/10/16/new-research-project-to-look-at-new-zealand-judgments-from-a-new-angle/> (describing FEMINIST JUDGMENTS PROJECT AOTEAROA).

<sup>6</sup> See *Feminist International Judgments Project: Women’s Voices in International Law*, U. LEICESTER, <http://www2.le.ac.uk/institution/researchimages/feminist-international-judgments-project-women2019s-voices-in->

What all of these projects have in common is that they involve rewriting judicial opinions that, up until this point, have mostly, if not entirely, been grounded in questions of constitutional interpretation. The Women’s Court of Canada, for example, focused their attention on section 15 (the equality clause) of the Canadian Charter of Rights and Freedoms (for a discussion of section 15 in this volume, see Kathleen Lahey’s contribution in Chapter 2). The U.S. project, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, examined twenty-five key cases on gender ranging from 1873 to 2015, most of which involved the interpretation of constitutional rights.

This book approaches the question posed at the start of this chapter from a different perspective; that is, it concerns the rewriting of judicial opinions in an area of law that is largely governed by statute and in which constitutional arguments play a relatively small role. This book thus takes the sociolegal movement of critical opinion writing in a new, hitherto uncharted direction. The book is also—and quite appropriately in view of the tax system’s key and keystone role in society—the first in a series of U.S.-based *Feminist Judgments* books to be published by Cambridge University Press. Future volumes in the series are expected to take up other areas of law and a variety of state and federal court decisions organized around different subject matters.

### **The Appeal of Critical Opinion Writing**

Critical opinion writing, as a form of scholarship, has tremendous appeal to us—and given the number of completed, ongoing, and nascent projects around the world, it obviously appeals to others in different countries and across a variety of areas of law, too. But why? For us,

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international-law (last visited Mar. 31, 2017) (describing *FEMINIST INTERNATIONAL JUDGMENTS* (Troy Lavers & Loveday Hodson eds., forthcoming)).

critical opinion writing is appealing because it represents a multidimensional and iterative challenge to preconceived notions about law's subjects and objects as well as about how law is created and interpreted and how it develops. Critical opinion writing challenges not only the law and the legal system to open its vistas but also represents particular challenges to those who write and rewrite judicial opinions and to those who read and consume those opinions.

Critical opinion writing challenges the rewriter—professors and practitioners who are mostly accustomed to analyzing, applying, and critiquing judicial opinions rather than writing them from the ground up—by forcing the critic/consumer to place herself in the shoes of the judge/opinion writer. With views colored by the path that history has taken since the original opinion was written but confined to sources available at the time the original opinion was drafted, the rewriter finds that she must wrestle with and resolve the issues and conundrums that judges routinely face. Thought must be given to achieving a just result in the case at hand while taking a broader view of how the case fits into the general framework and structures of the law so as not to prematurely stymie future legal development or foreclose it altogether. This move of placing the critic/consumer of judicial opinions into the role of the judge provides the opinion rewriter with a new lens for viewing and interpreting judicial opinions when she returns to her life as a critic/consumer of judicial opinions. This experience should provide the rewriter with a new appreciation for the difficulty of crafting good judicial opinions and increase her empathy for the role played by judges.

At the same time, critical opinion writing challenges judges themselves by highlighting the contingent nature of the opinions that they write and their role in the process of making law. Imagining an alternative path for the law—whether by directly displacing the majority opinion in a case or by laying the groundwork for taking a different path in the future through an imagined

concurring or dissenting opinion—challenges the aura of neutrality and objectivity conveyed by the tone that judges generally use when writing their opinions, as well as the notion that it is not so much the person as the judicial office pronouncing judgment. The rewritten opinions thus pointedly show that, however nostalgic the analogy, deciding cases is about much more than being a baseball umpire who simply calls balls and strikes, as some have contended.<sup>7</sup> Through the act of producing work in the form of a judicial opinion (rather than the more typical law review article or essay critiquing an opinion), the opinion rewriter demonstrates that judges possess no monopoly on articulating what the law ought to be, much less on purporting to correctly interpret the law or to set the law on a path toward furthering the cause of justice and the flourishing of society. The commentaries provided alongside the rewritten opinions underscore this challenge by explaining just how the rewritten opinions differ from the original and by imagining what a different path for sociolegal history might have looked like. Taken together, the opinions and commentaries in this volume also help to make the case for ensuring that there is a diversity of backgrounds on the bench so that judges do not approach their work with a uniform worldview influenced by the same set of preconceptions and privilegings and can thus helpfully challenge and question each other’s perspectives.

For those who read these rewritten opinions (and we hope that some sitting judges will be among the readers of this volume), critical opinion writing may help to expose the ways in which judges—and, in turn, the development of the law—are subtly influenced by preconceptions, endemic privilegings and power hierarchies, and prevailing social norms and “conventional” wisdom. Especially when compared with the original opinions, the rewritten opinions concretely demonstrate how opening oneself to different and differing viewpoints that bring to the surface

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<sup>7</sup> Bob Egelko, *Roberts Deftly Evades Attempts to Pin Him Down*, S.F. CHRON., Sept. 15, 2006, at A4.



and call into question how underlying subjective experiences and perspectives can influence the current interpretation and application of the law—as well as its future development—in ways that benefit society as a whole. Naturally, the commentaries included with each rewritten opinion in this volume facilitate this process, but, in the end, there is no substitute for comparing the original and rewritten opinions side by side and examining them for yourself. Whether you are a student of tax law, a practitioner, a judge, or merely an interested taxpayer, actively engaging in this process of questioning judicial decision making can help to sensitize readers of judicial decisions to the multiple (and sometimes insidious) influences on any decision maker. For those judges among our readers, this process can go far toward ensuring that these influences do not inappropriately creep into their own opinion writing.

### **Goals of the Project**

This volume, *Feminist Judgments: Rewritten Tax Opinions*, is unique primarily for two reasons. First, its focus is on an area of law that most people do not associate with feminism or gender equality. Second, as mentioned earlier, this volume focuses on an area of law that is largely controlled by statutes and in which constitutional arguments typically play a relatively small role. But just as the volume that gave rise to this series, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, showed how feminist analysis can transform decisions of the nation’s highest court, so, too does this volume show how feminist analysis can transform tax law (as well as other statutory or code-based areas of the law) by highlighting the importance of perspective, background, and preconceptions on the reading and interpretation of statutes. As William Eskridge argued in *Dynamic Statutory Interpretation*, with the passage of time, the perspective of anyone interpreting a law “diverges from that of the statute as a result of changed circumstances which give rise to unanticipated problems, developments in law and the

statute's evolution, and different political and ideological frameworks.”<sup>8</sup> In Eskridge's view, statutes are just as much subject to interpretation as the common law and the Constitution are—and understanding this fact is crucial to understanding how the modern regulatory state operates.<sup>9</sup> This book of rewritten tax opinions similarly stands on the foundational belief that statutes are susceptible to multiple interpretations, and who is doing the interpreting matters greatly.

Within the scholarly tax community, there historically has been great resistance to bringing noneconomic “perspectives” to bear in the analysis or interpretation of tax law (whether those perspectives are based on critical race theory, feminism, queer theory, or other “outsider” approaches to the law). Instead, “mainstream” scholars have traditionally viewed tax law as closely aligned with the “science” of economics. From this perspective, the core questions addressed by tax law cut across all lines of difference in society—save those of income or, for those working in the transfer tax area, wealth—and are thus unaffected by concerns relating to race, ethnicity, gender and gender identity/expression, sexual orientation, socioeconomic class, immigration status, and disability. For this reason, “mainstream” tax scholars resist the notion that these “social” concerns play any part in our “neutral” tax laws and greet the critical tax scholars who raise these concerns through work that draws attention to the differential or discriminatory impact of tax laws on traditionally subordinated groups either with hostility or, more commonly, a cold shoulder.

For scholars and laypeople alike, tax is considered to be an arcane and technical subject, but all can agree that taxes have a direct impact on the pocketbook. Taxes impact each of us in terms of how much of our salary we take home from work each pay period, how much we pay

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<sup>8</sup> WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 11 (1994).

<sup>9</sup> *Id.* at 1–2.

for items at the grocery store, how much it costs us to purchase and own a home (due to the deductibility of home mortgage interest and property taxes and transfer taxes levied at the time of purchase or sale), and how much it costs us to transfer the property that we accumulate during our lives to family and friends either by gift or inheritance, just to name a few examples. It is thus unsurprising that tax is often seen as linked more closely with economics than law. In keeping with this view, the dominant mode of analyzing tax law focuses on people as little more than the sum of their financial transactions. That is, “mainstream” tax analysis homogenizes taxpayers so that all lines of difference (save those of income or wealth) are fully erased or ignored. Obviously, this thinking leaves no room to conceive of the possibility of a feminist tax judgment. But what the dominant mode of analysis ignores—and what this volume highlights—is the fact that tax statutes are rarely determinative on their own. Approaching the critical tax project from a different vantage point, this volume shows that the context in which parties and courts operate influences the understanding, interpretation, and application of statutes.

### **Methodology**

When *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* was still in its editing phase, we recognized the potential for extending that book’s methodology to our area of shared expertise—taxation. Our plans for this book began when we assembled a list of eight tax cases culled from our own knowledge and scholarship. We were interested in cases that implicated gender on their face (such as those involving medical expense deductions for certain fertility-related expenditures or gender confirmation surgery) as well as cases that require an understanding of the way that tax issues function in different historical, political, and economic settings (such as the state taxation of land set aside for American Indians). In composing our initial list cases that might be ripe for feminist rewriting, we did not limit cases to

any particular court or jurisdiction, mostly because very few tax cases make it all the way to the Supreme Court and also because decisions issued by the U.S. Tax Court and other lower courts play a large role in the development and practice of tax law.

In order to benefit from the input of colleagues with different areas of tax expertise, we assembled a diverse and distinguished group of a dozen leading tax scholars as our Advisory Panel to help evaluate the cases on our list as especially deserving (or not) of feminist rewriting and to suggest other cases. This Advisory Panel consists of Alice G. Abreu, Patricia A. Cain, Joseph M. Dodge, Mary Louise Fellows, Wendy C. Gerzog, Steve R. Johnson, Marjorie E. Kornhauser, Ajay K. Mehrotra, Beverly I. Moran, Richard L. Schmalbeck, Nancy Staudt, and Lawrence A. Zelenak. We received much valuable feedback from the Advisory Panel and expanded the list of potential cases to twenty-four. We then issued a public call for authors, allowing prospective authors to indicate their preferences for rewriting an opinion or writing a commentary on any of the cases on the list of twenty-four. Prospective authors were further invited to suggest cases that were not on our list, too.

With the goal of choosing the most qualified and diverse authors, and taking into account the input of our Advisory Panel, we narrowed our selection to eleven cases. Eight of the cases came from the list of twenty-four; three were suggested by the intended authors. Most of the contributors to this volume are tax specialists (whether academics or practitioners), but some have nationally recognized expertise in a substantive specialty that underlies the tax law focus of the chosen case. We are proud that our contributors represent a range of expertise and experience. The authors include nationally recognized senior tax experts, well-known feminist scholars, specialists in other substantive areas of the law, junior scholars, a law dean, a practicing attorney, and colleagues whose primary teaching work occurs in the clinical setting. We sought

diversity of gender, sexual orientation, race, perspective, expertise, and status in the academy, consistent with an active commitment to a volume that would represent many viewpoints and voices. In addition, we have included a chapter written by Canadian feminist tax scholar Kathleen Lahey immediately following this introduction in order to provide an important comparative/international context for the rewritten opinions in this volume.

### **What Is a Feminist Judgment Anyway?**

In our call for participation, we explicitly stated that we, as volume editors, conceive of feminism as a broad movement concerned with justice and equality, and that we welcomed proposals to rewrite cases in a way that brings into focus issues such as gender, race, ethnicity, socioeconomic class, disability, sexual orientation, national origin, and immigration status. In keeping with the stance taken in the compilation and editing of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*,<sup>10</sup> we did not instruct authors on what we believed to be a “feminist” interpretation of the cases or confine them to any certain method or process for completing their work. From our perspective, this book is squarely within the tradition of critical tax theory, scholarship that we have described as sharing one or more of the following goals: “(1) to uncover bias in the tax laws; (2) to explore and expose how the tax laws both reflect and construct social meaning; and (3) to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements.”<sup>11</sup> To be sure, feminism has been historically motivated by concern for equality for women, but the most effective and inclusive feminism takes into account the way that many intersecting identities can

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<sup>10</sup> Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to FEMINIST JUDGMENTS*, *supra* note 3, at 3.

<sup>11</sup> Anthony C. Infanti & Bridget J. Crawford, *Introduction to CRITICAL TAX THEORY: AN INTRODUCTION*, at xxi (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

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. We did and do welcome a diversity of viewpoints about feminism's goals and practices and how they manifest themselves in judicial opinions.

### **Guidelines for Opinions and Commentary**

The purpose of *Feminist Judgments: Rewritten Tax Opinions* is to show (not describe) how certain tax cases could have been decided differently if the judges had brought to bear a more gender-sensitive viewpoint. Authors were free to draw on their own understandings and interpretations of feminist theories and methods, but they were limited to rewriting their opinions based on the law and facts in existence at the time of the original decision. This is a key feature of all of the books in the *Feminist Judgments Series*. One of the underlying claims of this particular volume is that statutory interpretation, like decisions on constitutional questions, is affected by judicial experiences, perspectives, and reasoning processes. Opinion authors were free to rewrite the majority opinion, or add a dissent or concurring opinion. Of the eleven feminist judgments in this book, seven are rewritten majority opinions, three are dissents and one is a concurrence. Some authors enjoyed the exercise of re-envisioning the original opinion from the ground up, had they been on the deciding court. Other authors found it easier to react to a majority opinion with which they disagreed and therefore chose to write a dissent. Of the eleven rewritten cases in the book, six are Supreme Court decisions, one is a federal circuit court opinion, and four are Tax Court opinions.

What these feminist tax judgments collectively demonstrate is that incorporating feminist theories and methods into tax cases is consistent with judicial duties and accepted methods of interpretation. The cases combat the notion that tax law is a pseudoscientific subdiscipline of

economics in which application of the law is foreordained by economic principles or precepts. Instead, the body of rewritten cases shows that tax law is a product of the larger political, social, and cultural context in which it operates. Rather than being dictated by the plain language of statutes or the abstract (and perhaps unknowable) “will” of Congress, tax law decisions are contingent on the interpretational context brought to bear by the judge and the parties. Seen in this light, it becomes clear that the history and development of tax law does not follow a linear path but can take (and could have taken) a multiplicity of different paths.

From a practical perspective, opinion authors were limited to 10,000 words, regardless of whether they were writing reimagined majority opinions, dissents, or concurrences, as appropriate to the court. Commentators had the difficult task of explaining, in 4,000 words or less, what the original court decided, how the feminist judgment differs from the original judgment, and what practical impact the feminist judgment might have had. Each opinion and commentary went through at least three rounds of editing with us, and opinion writers and commentators also shared their thoughts with each other throughout the process. In fact, many pairs of opinion writers and commentators worked quite closely and cooperatively through the rounds of editing, with the commentary writers incorporating points in their commentaries at the request of the opinion writers and with opinion writers receiving comments on their opinions from the commentary writers. The members of our Advisory Panel also graciously read and gave comments on each draft opinion, ensuring that the authors received feedback from multiple sources. The ultimate decision to accept or reject feedback, however, remained with the authors. There are several cases in the book that, had we been the authors or commentators, we might have taken a different tack or reached a different conclusion. And in some cases, opinion writers and commentators saw issues differently. In any event, we did not press authors to reach the

conclusions we ourselves would have reached or force concordance between opinion writers and commentators. Instead, we celebrate these multiple viewpoints as consistent with the richness and complexity of feminist thought.

### **Organization of Cases and Writing Conventions**

The eleven cases in the book span the date range of 1903 to 2013. They implicate a wide range of issues including gender difference, the basic meaning of equality, medical expense deductions, marriage, divorce, trusts, income tax filing status, Indian rights, business deductions and eligibility for tax-exempt status. We considered a variety of different organizational frameworks for the cases, attempting to group them by common themes or subject matter. Ultimately, however, because many of the cases involve multiple issues, it was difficult to settle on any one coherent organizing framework. For that reason, we decided to present the cases in chronological order. By presenting cases from oldest to most recent, we (hopefully) have eliminated any of our personal bias in the way we may view the cases and allow readers to develop their own sense of how the opinions relate to each other and how various courts' style, language, and reasoning have evolved over more than a century.

A few words are also in order regarding some of the conventions used in writing the opinions and commentary included in this volume. In the opinions, for the sake of clarity, we asked authors to refer to the Internal Revenue Service as either the "IRS" or "Commissioner" (rather than "petitioner" or "respondent"). We also asked the opinion writers to refer in the text of their opinions to the Internal Revenue Code for the first time as "Internal Revenue Code § 61" without reference to a date (which will vary in each case depending upon the tax year or years at issue). After the first mention, opinion authors were permitted to either refer to the Internal Revenue Code as "Code § 61" or, where there are repeated references and it is clear from the



context what they are referring to, simply as “§ 61.” Similarly, we asked opinion authors to refer in the text of their opinions to the Treasury Regulations as “Treasury Regulations § 1.61-1” for the first time and, after the first mention, permitted them to refer to the regulations simply as “Reg. § 1.61-1.” All citations in the opinions follow the “blue pages” rules in *The Bluebook* system of citation that are normally used by judges and practitioners.

In the commentary, again for the sake of clarity, we asked authors to refer to the Internal Revenue Service as the “IRS.” We also asked the commentary writers to refer in the text of their commentaries to the Internal Revenue Code for the first time as “Code § 61” and, after the first mention and where it was clear from the context what they were referring to, permitted them to refer to the Internal Revenue Code simply as “§ 61.” Similarly, we asked commentary authors to refer to the Treasury Regulations as “Reg. § 1.61-1.” Readers should thus assume that all references in the commentary to “Code” and “Reg.” refer to the Internal Revenue Code and Treasury Regulations, respectively. All citations in the commentary follow the regular “rules” in *The Bluebook* system of citation that are normally used in law reviews.

## **Feminist Theories and Methods**

### **A. Formal Equality vs. Substantive Equality**

Out of the important sex discrimination cases brought before the Supreme Court in the 1970s emerged what might be called a “formal equality” approach to sex discrimination. *Reed v. Reed*,<sup>12</sup> decided in 1971, was the first time that the Supreme Court ruled that a law violated women’s rights to equal protection under the Fourteenth Amendment. That case involved an Idaho statute that accorded an automatic preference for a male administrator of a decedent’s

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<sup>12</sup> 404 U.S. 71 (1971) (rejecting legal preference for male administrator of decedent’s estate as between two equally related individuals).

estate, given two individuals equally related to the decedent. Then-attorney (now Justice) Ruth Bader Ginsburg wrote the brief on behalf of the *Reed* plaintiff, successfully arguing that the Idaho law was unconstitutional. Unfortunately, she did not persuade the Court to apply to gender discrimination cases the strict scrutiny that applied in racial discrimination cases.<sup>13</sup> In *Frontiero v. Richardson*,<sup>14</sup> Ginsburg was amicus curiae for the plaintiff in a case that challenged the Air Force's automatic allocation of spousal benefits to married male service members, but required married female service members to show that their husbands were dependent on them before receiving a spousal benefit. Eight of the justices agreed that the Air Force's policy was unconstitutional, but they could not agree on the appropriate level of scrutiny under which to evaluate the law. Thereafter it became likely that gender discrimination claims always would be subject to "intermediate scrutiny," not strict scrutiny.

For many feminists, removing formal obstacles to women's participation in all aspects of political, social and economic life was the primary goal. Yet others became dissatisfied with this formal equality approach, and instead sought substantive equality between women and men. The underlying rationale is that in cases where women and men are not equally situated (e.g., pregnancy), treating the sexes the same operates in fact as a form of discrimination against women, by denying them the care they need.<sup>15</sup> This problem is illustrated by the case of *Geduldig v. Aiello*, in which the Supreme Court found that the exclusion of pregnancy from the

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<sup>13</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (outlawing segregation in public schools).

<sup>14</sup> 411 U.S. 677 (1973).

<sup>15</sup> See, e.g., Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 6 (2011) ("But what about all those situations in which the sex inequality is real, so the sexes are situated unequally? The more pervasive the reality of sex inequality is, the fewer outliers will be permitted in reality, so the more that reality will look like a sex-based difference, mapping itself onto (the social idea of) sex as such, which it will be increasingly rational for law to ignore as it ascends the tiers of scrutiny.").

California state disability plan did not violate the Equal Protection Clause, on the grounds that the classification made by California was between “pregnant women and nonpregnant persons.”<sup>16</sup>

The debate about formal equality versus substantive equality echoes clearly in two of the feminist judgments in this book. In her rewrite of the majority opinion in *Manufacturer’s Hanover Trust Co. v. United States*,<sup>17</sup> Mary Heen considers the use of gender-based mortality tables in calculating the value of reversionary interests for estate tax purposes. She rejects the use of gender-specific tables, seeking formal equal treatment for women and men. In contrast, in her dissent in *Clack v. Commissioner*,<sup>18</sup> Wendy Gerzog closely examines the problems created by a gender-neutral statute, in regards to the estate tax marital deduction for certain transfers. Gerzog concludes the opposite of Heen—that is, that gender-neutrality in the estate tax marital deduction is masquerading as de facto sexism. Thus, Gerzog is primarily concerned with substantive (as opposed to formal) equality between men and women.

### **B. Antisubordination/Dominance Feminism**

Another significant concern of some feminists is the way that law reinforces power imbalances. Of differences between men and women, Catharine MacKinnon writes:

[A]n equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality is at the root a question of hierarchy, which—as power

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<sup>16</sup> 417 U.S. 484, 497 n.20 (1974).

<sup>17</sup> 75 F.2d 459 (2d Cir. 1985).

<sup>18</sup> 106 T.C. 131 (1996).

succeeds in constructing social perception and social reality—derivatively becomes a categorical distinction, a difference.”<sup>19</sup>

Power differences between races, classes, and along other lines also are feminist concerns, as policies that are neutral on their face can reinforce existing hierarchies and oppressions.<sup>20</sup>

The feminist judgment written by Danshera Cords in *Cheshire v. Commissioner*<sup>21</sup> is a reimagined majority Tax Court opinion that grants innocent spouse relief where the original court did not. Cords’s feminist judgment is deeply informed by a feminist understanding of power dynamics in intimate relationships. In this way, the *Cheshire* feminist judgment builds on the work of feminist theorists like Catharine MacKinnon who expose the way that power imbalances—particularly, but not exclusively, between men and women—are built into human relationships and then become entrenched in law and culture.<sup>22</sup> By putting the woman at the center of the analysis, Cords reaches a different opinion about the wife’s income tax liability for substantial omissions by her husband.

In his rewrite of *United States v. Rickert*,<sup>23</sup> the oldest of the cases included in this volume, Grant Christensen reaches the same result as the U.S. Supreme Court did in its original opinion, denying a state’s ability to tax improvements and personal property on Indian land that was held in trust by the U.S. government for individual Indian allottees. But Christensen importantly

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<sup>19</sup> Catharine A. MacKinnon, *Difference and Dominance*, in FEMINISM UNMODIFIED 40 (1987). In her early writings, Professor MacKinnon called this the “dominance approach,” but she has explained that “it’s as much about subordination as dominance.” Emily Bazelon, *The Return of the Sex Wars*, N.Y. TIMES MAGAZINE, Sept. 10, 2015, at 56, available at [http://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html?\\_r=0](http://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html?_r=0).

<sup>20</sup> Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-10 (1986).

<sup>21</sup> 115 T.C. 183 (2000), *aff’d*, 282 F.3d 326 (5th Cir. 2002).

<sup>22</sup> See generally MacKinnon, *supra* note 19, at 32–45.

<sup>23</sup> 188 U.S. 432 (1903).

rejects the Supreme Court’s paternalistic approach in doing so—an approach that was infused “with its racist and classist assumptions that Indians were uncivilized and incapable of managing their own affairs, and therefore had to be managed like children, or like women in those days, by privileged white men who knew better” (to borrow the words of Chloe Thompson in her excellent and eye-opening commentary on this rewritten opinion). Instead, Christensen honors and embraces the agency and autonomy of individual Indians and Indian tribes in ways that protect them from infringement by state and local governments. Rewriting a case without an obvious link to gender, Christensen (and Thompson in her accompanying commentary) also show how feminist reasoning and methods can apply outside of cases that directly implicate gender.

### **C. Intersectionality, Antiessentialism, and Multiple Identities**

One important branch of feminist legal theory that emerged in the 1990s was a critical focus on “women” as a monolithic category, without recognition of differences of race, class, immigration status, sexuality, or other significant identity categories. Angela Harris, for example, writes against what she calls “gender essentialism”—“the notion that there is a monolithic ‘women’s experience’ that can be described independently of other facets of experience like race, class and sexual orientation.”<sup>24</sup> Kimberlé Crenshaw similarly critiques any feminism that ignores the fact that gender may be only one axis of a woman’s oppression, when in fact oppression may intersect along the axes of gender and race, for example.<sup>25</sup>

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<sup>24</sup> Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

<sup>25</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

In his rewritten concurring opinion in *Bob Jones University v. United States*,<sup>26</sup> David Brennan demonstrates the power of intersectional analysis. *Bob Jones University* concerned the revocation of two educational organizations' tax-exempt status because they had adopted and enforced racially discriminatory policies (founded upon what were presumed to be sincerely held religious beliefs) concerning interracial dating, interracial marriage, and the "mixing of the races." The original U.S. Supreme Court opinion in *Bob Jones University* explored only the racially discriminatory aspect of these policies and affirmed the denial of tax-exempt status to the two organizations because the Court found there to be an established public policy against racial discrimination in education. The original opinion left open the question of whether other forms of discrimination might similarly result in the revocation of tax-exempt status. Brennan's opinion begins to fill that gap by highlighting the differential impact of the schools' policies on African-American women's freedom of association—with attendant, and potentially harsh, economic consequences for them. Brennan makes the case that, at the time *Bob Jones University* was decided, there was already an established public policy against gender discrimination in education and that gender discrimination was thus an additional ground for denying tax-exempt status to these two schools. In his concurrence, Brennan shows how the harms of discrimination are compounded and can be "especially burdensome" when multiple axes of discrimination (here, race and gender) intersect.

#### **D. Autonomy and Agency**

An emphasis on the ability of women—and all people—to make decisions about their own bodies is an important feminist commitment. For some feminists, that manifests as a concern about ability to control whether and when to become pregnant, or resistance to

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<sup>26</sup> 461 U.S. 574 (1983).

government interference with women’s bodies through forced sterilization or forced caesarean sections.<sup>27</sup> It is also a fundamental methodological commitment of many feminists to engage in what Katharine Bartlett has called “feminist practical reasoning,” which includes taking a broad approach to the facts of each particular case.<sup>28</sup> Two rewritten opinions in this book both accentuate the autonomy or agency of the taxpayer, in ways that the original opinions did not, and also provide a factually rich context for the cases. In his rewrite of *O’Donnabhain v. Commissioner*,<sup>29</sup> which concerned a transgender woman’s ability to deduct costs related to her gender confirmation surgery as a medical expense, David Cruz takes great care to respect the taxpayer, Rhiannon O’Donnabhain, as a human being. Cruz puts the issue of respecting O’Donnabhain front and center by not only using the correct gender and pronouns to refer to her but also by including an explanation of this move in the text of his decision, rather than relegating it to a footnote as the original majority Tax Court opinion did. Cruz further humanizes O’Donnabhain by generally referring to her by name, rather than adopting typical Tax Court convention that would have dictated referring to her as either “petitioner” or “taxpayer.” Moreover, Cruz demonstrates sensitivity to the larger implications of labeling O’Donnabhain as suffering from a “disease,” despite the attraction of doing so as an expeditious means of giving her and others access to the tax deduction that might bring gender confirmation surgery within financial reach.

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<sup>27</sup> See, e.g., Rosalind Pollack Petchesky, *Abortion and Woman’s Choice: The State, Sexuality, and Reproductive Freedom*, in *FEMINIST JURISPRUDENCE: CASES AND MATERIALS* 413–16 (Cynthia Grant Bowman et al. eds., 4th ed. 2011).

<sup>28</sup> See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849–58 (1990).

<sup>29</sup> 134 T.C. 34 (2010), *acq.*, 2011-47 I.R.B. 789.

A similar approach can be found in Jennifer Bird-Pollan’s rewrite of *Magdalin v. Commissioner*.<sup>30</sup> Bird-Pollan affirms reproductive autonomy by rejecting the prevailing approach of sharply circumscribing the ability to deduct medical expenses associated with assisted reproductive technology in a way that effectively limits the deduction to different-sex married couples suffering from fertility problems. Bird-Pollan instead extends the deduction to all taxpayers—gay or straight, married or unmarried—by embracing the notion that reproduction is a function of the bodies of both men *and* women, whether they are married or not. Bird-Pollan’s opinion also opens the door to breaking down stereotypical gender roles in parenting by facilitating reproduction and parenting outside of the different-sex married couple.

### **E. Women’s Experiences and Intimate Relationships**

It is not surprising that much of feminist scholarship is devoted to women’s experience.<sup>31</sup> And because women are, in the view of Robin West, “profoundly relational,”<sup>32</sup> one subject of feminist legal analysis is marriage as an organizing principle in private and public life. Regardless of one’s position on women as more or less “relational” than men, though, marriage and women’s legal status within marriage has long been a subject of feminist critique.<sup>33</sup> In this volume, the tax consequences of marriage—as well as the questions about the primacy of

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<sup>30</sup> 96 T.C.M. (CCH) 491 (2008), *aff’d* 2010-1 U.S. Tax Cas. ¶ 50,150 (1st Cir. 2009).

<sup>31</sup> MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4–5 (3d ed. 2013) (describing feminist commitment to studying women’s experiences as an outgrowth of the “consciousness-raising groups of the late 1960s and early 1970s, where women were encouraged to express their subjective responses to everyday life and discovered that ‘the personal was political,’ in the sense that their personal problems also had a political dimension”)

<sup>32</sup> Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 210 (2000).

<sup>33</sup> See, e.g., DECLARATION OF SENTIMENTS (1848), in FEMINIST JURISPRUDENCE, *supra* note 27, at 3–6 (listing grievances of women gathered at first women’s rights conference held in Seneca Falls, New York in 1848, including the fact that married women were treated as “civilly dead”).



marriage in the administration of the tax system—are key considerations of several of the included feminist judgments.

In *United States v. Davis*,<sup>34</sup> Patricia Cain’s feminist dissent takes on the Supreme Court’s outdated view of marriage and takes a position that would ultimately become the law in 1984, recognizing that divorcing couples often have functioned as a single economic unit, not as arm’s-length bargainers. In Ann Murphy’s dissent in *Lucas v. Earl*,<sup>35</sup> she, too, takes on marriage, but in a slightly different way than Cain does. Murphy would force the tax law to recognize the validity of the income-splitting arrangement entered into by a married couple, emphasizing that the wife is an equal (if not superior) financial partner to the marriage.

Ruthann Robson approaches marriage from a different vantage point in her rewrite of the landmark decision in *United States v. Windsor*,<sup>36</sup> which overturned section three of the federal Defense of Marriage Act (DOMA) and required the federal government to legally recognize same-sex marriage for the first time. In reaching the same decision as the majority in *Windsor*, Robson draws on the narrative feminist method by focusing on the lives and lived experiences of the lesbian couple at the center of the tax controversy (rather than approaching DOMA’s impact on same-sex couples at a more general or abstract level). But even in the context of telling the extraordinary story of these two women’s lives and affirming the legal recognition of their relationship, Robson actively resists and calls for the overturning of the entrenched privileging of marriage in tax law and the recognition of a wider array of human relationships.

These judgments relating to marriage are informed by a focus on women’s experience and consideration of how the law reproduces patterns of dominance of men over women, two

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<sup>34</sup> 370 U.S. 65 (1962).

<sup>35</sup> 281 U.S. 111 (1930).

<sup>36</sup> 133 S. Ct. 2675 (2013).

classic moves in feminist legal theory.<sup>37</sup> As Cain herself has previously written, “legal scholarship is not feminist unless it is grounded in women’s experience.”<sup>38</sup> The opinions in *Davis*, *Lucas*, and *Windsor* live up to that definition.

### **F. Uncovering Implicit Male Bias**

Martha Chamallas has identified uncovering implicit bias and male norms in the law as one of the “opening moves” of feminist theory.<sup>39</sup> Chamallas is referring here to a commitment to uncovering the way that laws that appear neutral on their face are actually based on and embody male experiences or male ideals. Making this very move, the feminist judgment written by Mary Louise Fellows in *Welch v. Helvering*<sup>40</sup> revisits the classic question broached in every basic income tax course regarding what constitutes a deductible “ordinary and necessary” business expense. In that rewritten Supreme Court majority opinion, Fellows questions the extent to which one’s conception of the business world is based on a male model of doing business.

Fellows’s reimagined feminist majority opinion sharply departs from the approach taken in Justice Benjamin Cardozo’s iconic original opinion by drawing upon feminist practical reasoning, a method also adopted by David Cruz in *O’Donnabhain* and Jennifer Bird-Pollan in *Magdalin*, as noted above.<sup>41</sup> Fellows refuses to approach the question of deductibility abstractly and instead takes a more contextualized approach to determining whether an expense is ordinary and necessary. She dives into the facts presented to the Court and demands more—to the point of not actually rendering a decision in the case before the Court but rather sending the case back to

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<sup>37</sup> CHAMALLAS, *supra* note 31, at 4–5, 11–12.

<sup>38</sup> Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20 (1991).

<sup>39</sup> CHAMALLAS, *supra* note 31, at 8.

<sup>40</sup> 290 U.S. 111 (1933).

<sup>41</sup> See *supra* note 28 and accompanying text.

the lower court for further fact finding that will facilitate a more nuanced and individualized decision of the question. In providing guidance to the lower courts on remand, Fellows also breaks with convention in her opinion by drawing liberally from literature (in particular, Mary Shelley's *Frankenstein*) to support her dismantling of the public/private hierarchy that is implicit in the allowance of a deduction for business expenses and the general disallowance of deductions for personal expenses. Fellows also draws on outsider perspectives to inform her interpretation of the phrase "ordinary and necessary" in order to open the way to innovation in business at a time of severe economic crisis while simultaneously avoiding the reinforcement of, and provision of tangible financial support to, businessmen's already privileged lives (along lines not only of gender but also of race, class, etc.)

### **G. Additional Resources**

In describing some of the feminist theories and methods that writers of these feminist judgments employ, we have detailed only a small number of the multiple perspectives, concerns, and methods that comprise the rich field that is feminist legal theory. We have not mentioned socialist feminism,<sup>42</sup> postmodern feminism,<sup>43</sup> third-wave feminism,<sup>44</sup> pragmatic feminism,<sup>45</sup>

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<sup>42</sup> See, e.g., Cynthia Grant Bowman, *Recovering Socialism for Feminist Legal Theory in the 21st Century*, 49 CONN. L. REV. 117 (2016).

<sup>43</sup> See, e.g., Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992).

<sup>44</sup> See, e.g., Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007).

<sup>45</sup> See, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

queer theory,<sup>46</sup> or cultural feminism,<sup>47</sup> to name just a few other perspectives. For those who want to learn more about feminist legal theory generally, we recommend Martha Chamallas's book, *Introduction of Feminist Legal Theory*.<sup>48</sup> For those curious about feminist legal theory as applied to feminist judgments in particular, the first two chapters of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* provide a great deal of background and context.<sup>49</sup>

## Conclusion

The opinions and commentaries in this book reveal three important claims. First, tax law is political. Second, statutes are just as subject to interpretation as constitutional provisions. And third, incorporating feminist methods or theories into the interpretive process of judicial decision making can lead to results that may (or may not) vary from a decision that does not incorporate that perspective. Yet, as the rewritten opinions in this volume make clear, a feminist lens almost always leads to different reasoning and emphasis in a judicial opinion. It is thus important that the judiciary includes individuals with a variety of perspectives, including feminist ones. As the contributors to this volume demonstrate, both men and women can have feminist perspectives. In that sense, this volume should not be reduced to an argument for more women on the bench—although gender diversity is most certainly a desired goal for other reasons—because a judiciary

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<sup>46</sup> See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989); Diana Majury, *Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context*, 7 CAN. J. WOMEN & L. 286 (1994).

<sup>47</sup> See, e.g., NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 57–76 (1978) (marking the beginning of gender difference as infancy).

<sup>48</sup> See *supra* note 31.

<sup>49</sup> See *supra* note 3.

that looks more like all of the citizens that it serves will increase public confidence in the integrity of the system.<sup>50</sup>

By showing how perspective makes a difference in judicial decision making in tax cases in particular, we hope to illustrate to students, fellow academics, lawyers, and judges that there are many areas where the selected mode of analysis—in this case, feminism—can be just as important as legislative history and statutory language to the outcome of the case. We imagine that this book might be a useful tool in law school courses that focus on statutory interpretation or substantive tax law. Beyond the classroom, we hope that the text makes a substantive and practical contribution to critical tax theory by demonstrating that a focus on historically subordinated groups makes a difference in outcome. As we have argued previously, “a complete study of tax law and policy requires an understanding of the historical, social, political, and cultural contexts in which the tax laws operate.”<sup>51</sup> To that list, we add that a robust understanding of tax law also requires an understanding of the perspective of the deciding judges, and that a feminist perspective tends to lead to outcomes that take seriously the issues, concerns, and experiences of traditionally disempowered people, with an emphasis on achieving and furthering the cause of social justice.

For feminists without significant tax backgrounds, we invite you to read this book to understand just how important the tax system is in achieving a fairer, more equal, and more inclusive society. For tax experts without familiarity with feminist theory, we invite you to consider how fundamental principles like gender equality can be incorporated into almost any

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<sup>50</sup> See SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* 6 (2013).

<sup>51</sup> Infanti & Crawford, *supra* note 11, at xxii.

tax analysis. For those who are experts in both feminist legal theory and taxation, welcome home.

This volume represents a collaboration among more than thirty individuals. As an academic collaboration, the book is itself a feminist exercise in bringing multiple voices together to push the boundaries of our understanding and inspire new ways of thinking. We hope you are as stimulated by this book as we are. Enjoy!