Tax Law and Politics

Of course, it is widely understood and recognized—both within and without the academy in the United States—that tax is bound up with politics. The 2016 presidential campaign and last fall’s hurried tax legislation make the politics of taxation clear. Looking back to the 2016 presidential campaign, those running for the top spot on the Democratic and Republican tickets all issued tax plans and, on the two sides, they widely diverged.

On the Democratic side, Bernie Sanders and Hillary Clinton both focused on taxing the wealthy more, though they differed on the questions of how and how much. Among other things, Clinton would have imposed a surtax on the very wealthy, increasing the tax on both their ordinary income and capital gains; created a 30% minimum tax on the wealthy; placed a cap on itemized deductions; and returned the estate tax to 2009 levels. Bernie Sanders would have added four new tax brackets (two of which would have been higher than Clinton’s combined top rate plus surtax, with the highest nearly ten percentage points higher)—plus what is, in essence, a 2.2% healthcare surtax; eliminated the capital gain preference for wealthy taxpayers; limited the deductions of wealthy taxpayers; increased the estate tax (twenty percentage points higher than Clinton); and ended the deferral of income parked offshore by U.S. corporations. Talk of these (and other) tax increases was necessitated by the campaign promises that both of these candidates made, which would have involved increased (and in Sanders’s case, hugely increased) federal spending. Sanders, for example, promised free college tuition, paid family leave, and universal health care—all big-ticket items.

In contrast, the dwindling group of candidates on the Republican side tried to outdo each other in giving tax cuts—mostly to the very wealthy, but with something thrown in for those of more modest or even low incomes as well. Donald Trump proposed to lower the top individual rate from 39.6% to 25% and the top corporate rate from 35% to 15%. He proposed reducing the number of deductions (on the theory that they are unnecessary given his huge proposed tax cut) and eliminating the estate tax (or, as he and most Republicans call it, the
“death” tax). Marco Rubio perplexingly decried attempts to enact a European-style VAT but espoused a tax plan that would essentially have moved the United States from an income- to a consumption-tax base. Rubio would have taxed business income only once—at the entity level, and at a reduced rate of 25%—with immediate expensing for all investments. He would have eliminated the taxation of interest income in addition to dividends and most capital gains; eliminated most deductions; and moved to a territorial system for taxing the offshore income of U.S. businesses. Individuals would have been subject to progressive rates of up to 35% (returning to the top rate when President George W. Bush left office). Rubio would also have eliminated the estate tax. Ted Cruz was likewise a fan of the consumption tax. He would have imposed a flat tax of 10% on individuals and 16% on businesses. He would have eliminated most deductions for individuals (except the cherished charitable contributions and mortgage interest deductions—the same as Marco Rubio) and allow immediate expensing of investments by businesses. Like the other Republicans, Cruz would have eliminated the estate tax.

During the campaign, an article in *Forbes* magazine reviewed the Tax Policy Center’s economic analyses of these three tax plans. All three of these tax plans involved tax cuts of what the article called “history-making size.” The lion’s share of the tax “relief” would have gone to those at the top-end of the income scale. The average tax cut for the top 1% would have ranged from $163,000 (or 10.4% of income) under Rubio’s plan to $400,000 (or 26% of income) under Cruz’s plan, with Trump in the middle at a cut of $275,000 (or 17.5% of income). In contrast, middle-income taxpayers would have seen cuts ranging from 2.5% of income (from Rubio) to 4.9% of income (from Trump), with Cruz in the middle at 3.2%. For the lowest-income taxpayers, the cuts would have been under 2% of income. Naturally, these tax cuts—largely targeted at the wealthy—would have required either ballooning of the national debt or steep cuts in federal spending to compensate for the loss of revenue (just as the 2017 Tax Cuts and Jobs Act will now require).

All five of these tax plans, especially when grouped together on the two opposing sides, show us how tax can be political—an unsurprising assertion given that tax ranked as one of the major issues in the 2016 and, it seems, all the U.S. presidential campaigns during my lifetime. But the grouping of these tax plans also shows us how the two opposing camps see the role of tax in American society differently. The Democratic candidates see taxes as playing a redistributive role. For them, raising taxes on the wealthy by increasing tax rates and closing loopholes serves both as a means of directly reducing the income and wealth inequality that have reached alarming levels in American society and as a way to fund programs to help those who have been left behind and to shore up the
disappearing middle class. The Republicans see taxes as a burden that inhibits growth and stifles job creation. Tax cuts are a means of limiting or reducing the size of a bloated federal government while providing “relief” to the beleaguered. These are very different visions of the role that taxes play in American society, with both sides firmly contending that their view of how to improve American society and return it to its “glory days” is correct.

But this is all what I would call politics with a small “p” rather than politics with a big “P.” Here, I am making a distinction similar to the one that is made between democrats with a small “d”—that is, those who believe in democracy or espouse democratic views—as opposed to Democrats with a big “D”—that is, those who are members of the Democratic political party. Tax is a subject of small “p” politics because it is viewed as a pocketbook issue—everyone cares about how much is left at the end of each pay period and how much money they are expected to pay over to the federal government every April 15th. But, as we have also begun to see in comparing the visions of the candidates, tax also has a lot to say about the direction that we would like to take our society in.

It is when we start talking about tax as being political in the big “P” sense that we begin to see a deeper and closer connection between tax and society. Picking up on this insight, my current book, Our Selfish Tax Laws: Toward Tax Reform That Mirrors Our Better Selves, looks at the relationship between “self” and “other” in U.S. tax law, attempting to change how we think about taxes and to open people’s minds and make them more receptive to outsider perspectives on tax law and tax reform. Put differently, I hope to shift people away from thinking about tax as just an economic or pocketbook issue and help them to see that tax law reflects who and what we are as a society—both now and as we aspire to be in the future. Once people realize that tax law has not only a revenue-raising but also an expressive function, they might just see that the picture that tax law paints of us as a society is not all that flattering or inclusive. This move also helps people who are on the “inside” (i.e., those with power and privilege) to see that they have a stake in listening to and heeding outsider perspectives—and in reforming tax law in a way that acknowledges and values those outsider perspectives.

Critical Tax Theory

In the United States as well as in other countries (most notably, Canada, Sweden, and the United Kingdom but others as well), a group of legal academics who have been influenced by the critical legal studies, critical race, feminist, and queer theory movements have strived to explore taxation as a social and political institution, revealing what is often a complex and discomfiting view of the tax
laws. For several decades now, critical tax scholars have produced academic work that examines the ways in which the tax laws have disparate impacts along the lines of race, ethnicity, class, gender and gender identity or expression, sexual orientation, immigration status, and disability. These “tax crits” have painted a picture of a tax system in which those with power and privilege act as if these lines of difference do not exist; that is, as if almost no one else existed at all except for themselves. Unsurprisingly, when they have drawn attention to the generally ignored tax treatment of marginalized groups, critical tax scholars have been met with openly hostile responses from “mainstream” tax academics who have historically given little thought to the impact of the tax laws on these groups and who make it clear that they do not wish to be faced with—let alone be asked to address—the resulting questions and problems now either.

Here, I will provide but a few examples from the U.S. strain of this rich and varied literature in order to give a sense of the work that has been done by critical tax scholars in uncovering the disparate impact of the tax system on traditionally subordinated groups:

- Beverly Moran and William Whitford have examined significant tax benefits in the areas of wealth, homeownership, employee benefits, and marriage and concluded that “members of the black community receive, on average, fewer of the tax benefits we have studied than the average member of the white community.”¹ Their study, though far from exhaustive, painted a picture of a facially neutral system that is actually significantly skewed along racial lines.

- Dorothy Brown has examined two tax benefits for children—the less generous Earned Income Tax Credit (or EITC, as it is more commonly known) and the more generous Child Tax Credit—and concluded that the only plausible explanation for the differential treatment of children under these two credits is race. In other words, the less generous benefits afforded by the EITC can only be explained by its rhetorical labeling as a form of welfare and the fact that, contrary to empirical data, the recipients of the EITC are perceived as being overwhelmingly African American.²

• Nancy Staudt has explored how the debate over the income tax’s progressivity implicitly reaffirms the worth, value, and contributions of the wealthy while viewing the poor “as having nothing of value to contribute to society.”\(^3\) She explained how the approach taken by “traditional tax theorists ha[s] enabled relatively wealthy individuals to participate in society as full citizens” but has “virtually bound the poor to a subordinate position in society.”\(^4\)

• Francine Lipman has highlighted the plight of undocumented workers who lack a voice in American government but are subject to tax on their worldwide income, who pay payroll taxes on their wages even though they lack access to Social Security benefits, and who are generally denied access to the tax benefits for low-income families despite the general consensus that low-income families should not pay income or payroll taxes in the United States.\(^5\)

• Edward McCaffery has demonstrated how a host of tax provisions influence decisions whether to marry, whether to have a one- or two-earner household, and whether the secondary earner should work full or part time. He has showed how: (1) the influence of the tax laws on these decisions varies at different class levels, (2) the tax laws tend to foster the creation of certain types of families, and (3) the tax laws further the marginalization of women in the workplace.\(^6\)

• Patricia Cain and I have separately written about the explicit and unabashed discrimination against same-sex couples that existed in the tax laws until the U.S. Supreme Court’s 2013 decision in United States v. Windsor, which finally required the federal government to recognize same-sex marriages for federal tax purposes.\(^7\) And, even after that decision, my own work has continued to explore how the

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\(^4\) Id.
heteronormativity of our laws (and, more particularly, of our federal tax laws) and entrenched privilege continued to result in the treatment of different-sex couples more favorably for tax purposes than similarly situated same-sex couples.⁸

If nothing else, critical tax scholars depict a privileged group that demonstrates concern only for itself—and a concomitant and clear disregard of how the tax laws might adversely impact the variety of American “others.” Moreover, the work of critical tax scholars has shown that this selfishness of the privileged not only touches the many tax benefits in the U.S. Internal Revenue Code but also penetrates into the basic structure of our federal tax system.

*Shouting into the Wind*

Despite having created a large volume of important work, critical tax scholars seem to spend most of their time shouting into the wind. If those with power and privilege gave little thought to “others” when creating the tax laws, they seem to manifest even less desire to discuss means of redressing the inequitable tax treatment of these groups when it is brought to light. As Professor Nancy Knauer has explained, critical tax scholars have experienced a less than welcoming reception of their work:

The efforts of critical tax scholars to bring an outsider perspective to tax policy and question the base premise of taxpayer neutrality have often been met with stiff and sustained resistance from mainstream tax scholars who write primarily from an economics or public welfare perspective. As a result, critical tax theory has remained essentially a critique—a view from the margin that can both inform and illuminate—but it has failed to find a wide audience among tax scholars or application for its insights within tax policy.⁹

The aim of *Our Selfish Tax Laws* is to rectify this situation. If we have learned anything from the first decades of the critical tax project, it is that making the tax system’s quiet role in furthering subordination and discrimination more transparent is not nearly enough. Why is this the case? In keeping with the general selfishness that individuals exhibit when engaged in tax planning and compliance, the chilly reception experienced by critical tax scholars probably stems from the

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privileged group’s lack of a perceived stake in these discussions. After all, comfortably ensconced in a tax system that benefits them and those like them, why should the privileged undertake difficult conversations about race, ethnicity, class, gender and gender identity or expression, sexual orientation, immigration status, and disability—not to mention the difficult work of reforming the tax system to make it fair in a far more comprehensive sense? Where is the benefit to them?

To date, critical tax scholars in the United States have not generally made the case for why those with power and privilege should listen to the concerns that they are raising and redress the problems that they identify. Often, critical tax scholars create descriptive work that identifies problems with the tax system and then make a general call for change—or they simply write in the hope of raising awareness of the unseen impacts of the tax system on marginalized groups. At other times, they do create more prescriptive work that offers concrete suggestions or solutions. In either case, though, they seem to do no more than hope that empathy for the plight of disadvantaged groups and an appeal to general notions of fairness will serve as sufficient motivation to spur change.

Moreover, the work of critical tax scholars tends to focus on the impact of discrete tax law provisions on marginalized groups and not on the structure of the federal tax system as a whole, a topic that is (or should be) of concern to us all. Even proposals to broadly incorporate critical perspectives into tax policymaking—for example, by creating a race or diversity expenditure budget similar to the annual tax expenditure budget, or by mandating required diversity impact assessments—would still ultimately operate at the level of discrete tax provisions. Assailing this approach, “mainstream” tax scholars have chastised critical tax scholars for their failure to undertake a holistic analysis of the tax treatment of an allegedly disadvantaged group. Though a tally of a given group’s tax benefits and tax detriments is a woefully short-sighted and misguided way of looking at the critical tax project, it is vitally important to simultaneously interrogate how our tax system operates on both a microlevel and a macrolevel; that is, how it operates upon each of us separately and upon all of us as a whole.

Finding a Way Forward

Our Selfish Tax Laws attempts to fill that gap and explains why the treatment of the “other” in our tax laws is personally relevant to each of us—regardless of whether we consider ourselves to possess power and privilege or to be part of a group that has been marginalized or subordinated. Rather than considering how specific tax provisions impact different marginalized groups, the book looks at the tax laws more generally by using this unique body of law as a
mirror that allows us to see our collective American “self.” Once we see our collective reflection in our tax laws—a reflection that we may very well not be pleased to see—we should all be moved to question whether this is an accurate picture of who we are and whether we aspire to be something different or better as a society.

My purpose is thus nothing less than to change the way that Americans look at our tax system. In the United States, taxes are conventionally seen as an important “pocketbook” issue—a view that strongly influences the acceptability of the selfishness that pervades tax planning and compliance. But we must come to recognize that taxes are much more important to us than that. The U.S. tax system does much more than just impact the amount of money we take home at the end of each pay period. It also serves an expressive function by communicating who and what we, as Americans, value. In other words, tax is not merely a matter of economics; it is also a cultural phenomenon. Accordingly, I hope to shift the frame in which we view taxes—from one of personal burdens and marginalized groups asking for “special treatment” to one in which we are all invested in a shared undertaking and together have a stake in tax reform, because the structure and operation of our tax system reflects on each and every one of us individually as well as on all of us together. Thus, where others have focused on implementing changes to individual provisions to improve the fairness and inclusivity of the tax system, what I am talking about is something far broader—changing how we think about and consider questions regarding the overall structure and design of our tax system.

Reframing the Debate

In part, this will entail a shift in the framing of critical contributions to academic and policy discussions of our tax laws. To date, critical tax scholars (myself included) have put forward what appear to be merely group-based grievances, explaining how the tax laws adversely impact low-income individuals, racial or ethnic minorities, immigrants, women, members of the LGBT community, immigrants, and the disabled. Critical tax scholars have generally operated on the assumption that uncovering injustice would be enough to warrant remedying that injustice. But experience has taught us that this has not been enough to spur remedial action. Instead, critical tax scholars will need to both identify and uncover the problems with our tax laws and frame them in a way that gives us all a reason to care about reforming the structure and design of our tax system.
The burgeoning social psychology research on intergroup “prosocial” (that is, helping) behavior supports this approach by showing that in-group members generally help out-group members not out of feelings of empathy but largely in anticipation of some type of personal or group-based reward. This research also shows that, “to the extent that a reluctance to help out-group members originates from negative out-group attitudes or a mere tendency to favor the in-group, it could be very effective if group members were made aware of the fact that, at a higher level, they all belong to the same inclusive group.”\(^{10}\) The work in this area suggests a strategy for motivating those with wealth, power, and privilege (i.e., the in-group) to work cooperatively with marginalized groups (i.e., out-groups) in seeking to improve our tax system. The strategy involves a combination of (1) fostering empathy for members of traditionally subordinated groups by emphasizing our commonalities as Americans and (2) underscoring the personal benefit to those with power and privilege of this law reform project, which is aimed at creating a fair and inclusive tax system that embraces all Americans. This strategy also has the potential for creating a virtuous feedback loop in which cooperation among the groups toward the common goal of improving our tax system further cements the shared identity of the previously separate groups and leads to additional cooperative action.

This strategy provides a way of thinking about tax that does not focus on individual grievances but on how we can work together to ensure that we are all able to live full and rewarding lives. In the United States, this approach should be particularly resonant now that we are moving away from looking at America as a “melting pot” in which we all become (or aspire to become) part of a homogeneous majority (though some seem to be actively trying to drag us back to this assimilationist past now). The melting pot metaphor has increasingly been displaced by the idea of America as a “mosaic.” Rather than expecting assimilation, we celebrate the power and advantages of recognizing “diversity” and fostering “inclusion”—that is, we look to retain our individual identities while still belonging to a larger collective whole.

First steps

In Our Selfish Tax Laws, I aim to provide critical tax scholars with the intellectual underpinning for reframing their tax policy contributions in a way that will have broader impact. At the same time, because I am writing for far more than

\(^{10}\) Esther van Leeuwen & Susanne Täuber, The Strategic Side of Out-Group Helping, in THE PSYCHOLOGY OF PROSOCIAL BEHAVIOR: GROUP PROCESSES, INTERGROUP RELATIONS, AND HELPING 81, 96–97 (Stefan Stürmer & Mark Snyder eds., 2010).
just critical tax scholars, I hope that the product of my work will also ease the reception of critical contributions by “mainstream” tax scholars in the academic arena and by others inside and outside academia as they listen to and participate in debates over tax policy. Overall, the book explains (1) why all Americans have a direct stake in what our tax laws say about us collectively, (2) why we as Americans should listen to those with the knowledge and expertise to uncover and give voice to the problems with our tax system that traditionally subordinated groups experience, and (3) why we as Americans should all work together to offer and enact solutions to these problems. Or, put in terms of the social psychology research I mentioned earlier, the project will demonstrate how it is possible to foster empathy by appealing to our shared identity as Americans while simultaneously underscoring the benefits to us all of reform aimed at achieving a tax system that is inclusive of, and fair to, everyone in the United States.

To do this, I bring my other area of scholarly interest, comparative legal theory, into the critical tax project. I describe the basis in comparative legal theory for regarding law as a mirror of society and the nascent sense among tax comparatists that the tax laws are, in fact, used as a means of reflecting who we are and wish to be as a society. I venture further than previous tax comparatists, however, and assert that we can see the reflection of our society not only in the now ubiquitous tax expenditures in the Internal Revenue Code but also in the architecture of the Code’s “normal” or “structural” provisions.

To demonstrate that our tax laws do actually serve as a mirror of society, the book undertakes two comparative case studies in the context of the income tax: one focusing on the tax expenditures related to housing and the other on the “normal” or “structural” provisions of the income tax regarding the taxable unit. These case studies compare the treatment of housing tax expenditures and the taxable unit in the United States with their treatment in several other countries, exploring the extent to which these tax provisions differ across countries and do so in ways that reflect the societies that created them. In this way, the book lays the intellectual groundwork for shifting how we as Americans think about our tax system by demonstrating that our tax system does send messages that are uniquely about us as Americans.

After establishing that our tax laws act as a mirror of American society, the book pointedly raises the question of what collective image we see of ourselves in that mirror. Who is the “taxpayer” and what does he look like? It is here that the work of critical tax scholars becomes vitally important. Over the course of the past several decades, critical tax scholars have used their knowledge and skills to reveal hidden aspects of the tax laws that we can now use to piece together the
multidimensional image of Americans and American society that we have (consciously or unconsciously) inscribed in our tax laws. Building upon the work of these critical tax scholars, the book looks to our tax laws and sketches an image of those who are included as part of the American “self”—those “authentic” Americans who are given full membership in our community—as well as identifies a variety of “others”—those who in one or more ways do not meet this putative American ideal and are afforded something less than full membership in our society.

Finally, the book concludes by highlighting its importance to extant and nascent tax reform projects. Our Selfish Tax Laws is about much more than just getting critical tax scholars to reframe how they package their ideas and tax reform proposals. It is about changing the way that we all think about and relate to our tax system. We all already understand that tax is important, but it seems that we nonetheless miss a very large part of the reason why tax is important. Tax is not merely a political issue with a small “p”; that is, it is not just a pocketbook issue that affects the balance in our bank account or how much income we have left in our paycheck at the end of the pay period. Tax is also a political issue with a big “P”; that is, it is a cultural phenomenon—a means of expressing who we are, what we value, and what we aspire to be. It is not only a mirror of our current collective self but can be used to project an image of our best selves and what we hope our society will become. My hope is that this book will begin to open people’s minds and entice them to engage in the conversation that critical tax scholars have been having—largely among themselves—for the past several decades. It is time that we all started talking about what our tax system says about us and thinking hard and debating how we would like to change that system to ensure that it better and more accurately reflects the society that we have now and the society that we hope to achieve in the future.