



Volume 21 (2023) | ISSN 1932-1821 (print) 1932-1996 (online)  
DOI 10.5195/taxreview.2023.213 | <http://taxreview.law.pitt.edu>

## ESSAYS

YOU'VE GOT TO SPEAK OUT AGAINST THE MADNESS: THE  
MYTH OF TAX NEUTRALITY

*Leo P. Martinez*



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# ESSAYS

## YOU'VE GOT TO SPEAK OUT AGAINST THE MADNESS\*: THE MYTH OF TAX NEUTRALITY

*Leo P. Martinez*\*\*

### INTRODUCTION

We live in interesting times. These days, there appears to be no shortage of those willing to preach that up is down, black is white, and water is not wet. This list should include the claim that racism is a thing of the past and that laws—especially tax laws—are neutral. We know this is not so.

My recent work has tried to broaden tax policy debate so that it is more accessible. Thus, this Essay is painted with a broad brush and will follow three threads. First, it begins with a brief explanation as to how seemingly neutral laws, even tax laws, are not neutral. Second, it explores how unfairness is allowed to lurk in the neutral tax regime. Third, it summarizes approaches to making the tax system fair. The conclusion is that we must all “speak out against the madness.”

### I. NEUTRALITY IS NOT NECESSARILY NEUTRAL

Characterization of the Internal Revenue Code as neutral is tempting. After all, the Internal Revenue Service does not ask for demographic data regarding race, ethnicity, or sexual orientation, and no Code section is overtly

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\* CROSBY, STILLS, AND NASH, *Long Time Gone*, on CROSBY, STILLS, AND NASH (Atl. Recs. 1969).

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discriminatory.<sup>1</sup> How then could the Code be other than neutral and fair? As shown by scholarship done in the last thirty years and by contributors to this symposium, we know the Code is not neutral<sup>2</sup> and that it tends to favor wealthy, high-income earners who are predominantly white.<sup>3</sup>

Anatole France, the 1921 Nobel Prize winner for literature, described law as having that “majestic equality . . . which forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”<sup>4</sup> France’s insight was to recognize that seemingly neutral laws can have dramatically different effects on different subpopulations. Legislation will always have winners and losers. Taxes are no exception.

## II. IMPEDIMENTS TO FAIRNESS

Beyond the intellectual laziness induced by the appearance of neutrality, why does the myth of the Code’s neutrality persist? There are several factors that combine to lull us into complacency. These factors include the Code’s complexity, the play in the joints of fairness, the zero-sum nature of taxation, the lack of information, and bad actors.

### A. Complexity

The Code is “a sprawling tapestry of almost infinite complexity.”<sup>5</sup> Complexity is sometimes required to account for unintended consequences

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<sup>1</sup> Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 6–37 (2019).

<sup>2</sup> Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751; DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021); see David A. Brennan, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336, 337 n.5 (2004) (surveying literature to date); Bearer-Friend, *supra* note 1, at 41 (surveying recent literature).

<sup>3</sup> BROWN, *supra* note 2; Jesse Eisinger et al., *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021), <https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax>; Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J.L. & SOC. POL’Y 265, 279 (2020); see Elise Gould, *State of Working America Wages 2018*, ECON. POL’Y INST. (2019).

<sup>4</sup> ANATOLE FRANCE, *THE RED LILY* 91 (Winifred Stephens trans., Univ. Press 1924) (1894).

<sup>5</sup> *United States v. El Paso Co.*, 682 F.2d 530, 534 (1982), *cert. denied*, 466 U.S. 944 (1984).

of Code provisions that are exploited by clever tax practitioners. Complexity is often also needed to address specific, arguably abusive, situations and to ensure fairness among taxpayers.<sup>6</sup>

Unfortunately, complexity can mask disparate effects. For example, § 116 formerly allowed every taxpayer a \$200 dividend exclusion.<sup>7</sup> The first \$200 derived from dividends was tax-free; dividends that exceeded \$200 were taxed at ordinary rates. In 2002, § 1 of the Code was amended to bring dividends within capital gains tax rates taxed at a maximum 20%.<sup>8</sup> The mechanism that makes this change is labyrinthian (more on this point below), and it attracted little notice when it was signed into law.

Several years ago, Warren Buffett quipped that he paid tax at lower rates than his secretary.<sup>9</sup> His secretary is subject to tax on wages—potentially taxed as much as 37%. Buffett’s capital gains and dividend income are taxed at a 20% rate. Taxpayers who derive their income from capital gains and dividends are overwhelmingly white.<sup>10</sup> This disparate effect is masked by the complexity of § 1.

### *B. The Play in the Joints of Fairness*

Fair means different things to different people.<sup>11</sup> The range of opinion on the subject provides a sense of the difference. Some suggest that the Code

<sup>6</sup> TAX POL’Y CTR., WHY ARE TAXES SO COMPLICATED? (2020); *see also* JOINT COMM. ON TAX’N, JCX-49-15, COMPLEXITY IN THE FEDERAL TAX SYSTEM 6 (2015), <https://www.jct.gov/publications/2015/jcx-49-15/>.

<sup>7</sup> I.R.C. § 116 (repealed 1986).

<sup>8</sup> *Id.* § 1(h)(11); *see* Donald R. Nichols & Willaim F. Wempe, *Regressive Tax Rates and the Unethical Taxation of Salaried Income*, 91 J. BUS. ETHICS 553 (2010).

<sup>9</sup> Chris Isidore, *Buffett Says He’s Still Paying Lower Tax Rate Than His Secretary*, CNN (Mar. 4, 2013, 11:20 AM), <https://money.cnn.com/2013/03/04/news/economy/buffett-secretary-taxes/index.html>.

<sup>10</sup> Eisinger et al., *supra* note 3; *see* ELISE GOULD, STATE OF WORKING AMERICA WAGES 2018, at 1, 4 (2019); *see also* Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. (2019), <https://www.federalreserve.gov/econres/scfindex.htm> (white households are more likely to own stocks and other investment assets).

<sup>11</sup> Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 43 (1996); *see also* Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 418, 438–39 (2004).

is too progressive—that is, it has gone too far in taxing the rich at high rates.<sup>12</sup> Others argue that a progressive tax system “may be necessary in order to preserve [a dynamic, merit-based society].”<sup>13</sup>

Going further, maximum tax rates have ranged from 90% to 37% over the last 50 years. Was a 90% rate unfair? Is a 37% rate fair or unfair? Is a 37% rate on wage income unfair compared to a 20% rate on dividend and capital gains income? This is more than enough to ask the penultimate question of whether fairness is determinate or not.

### C. Taxation Is a Zero-Sum Game

Senator Russell B. Long’s quip, “Don’t tax you, don’t tax me, tax the fella behind the tree,”<sup>14</sup> recognizes that the crafting of tax laws involves the shifting of tax burdens to others.<sup>15</sup> If one subpopulation (you or me) pays less, another subpopulation (the fella behind the tree) pays more. Hence, the distribution of the tax burden is a giant zero-sum game.

The existence of this zero-sum game would be palatable if all taxpayers had equal opportunity to influence tax legislation. We know this is not the case. Money talks and lobbyists’ ability to influence legislators and legislation is legendary.<sup>16</sup> The poor and the historically underrepresented fare

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<sup>12</sup> Howard Gleckman, *Is It Time to Rethink the Scale and Progressivity of the Tax System?*, TAX POL’Y CTR. (Oct. 25, 2016), <https://www.taxpolicycenter.org/taxvox/it-time-rethink-scale-and-progressivity-tax-system> (asking “is the US tax code . . . too progressive?”).

<sup>13</sup> Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, “Globalization,” and the New Millennium*, 4 FLA. TAX REV. 731, 732 (2000) (“[S]cholars must make a more candid and forceful case for progressivity as a means of redistribution . . .”).

<sup>14</sup> THE NEW YALE BOOK OF QUOTATIONS 499 (Fred R. Shapiro ed., 2021); see Michael D. Martinez, *Don’t Tax You, Don’t Tax Me, Tax the Fella Behind the Tree: Partisan and Turnout Effects on Tax Policy*, 78 SOC. SCI. Q. 895, 904 (1997).

<sup>15</sup> Martinez, *supra* note 14, at 895, 899 (discussing the need for revenue from a political perspective).

<sup>16</sup> JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 4 (1987) (discussing the influence of lobbyists).

poorly in this battle.<sup>17</sup> This has the effect of unfairly skewing the burden and the benefits of the tax system.

#### *D. Lack of Information on Race and Ethnicity*

The lack of data is a significant problem in accounting for racial disparities in the Code. The U.S. Government Accountability Office (GAO) attributes the dearth of taxpayer demographic data to legal restrictions placed upon the IRS. Current law permits the IRS to collect taxpayer data only when it is in furtherance of administering the tax code.<sup>18</sup> The GAO recommends that the Treasury Department borrow relevant data from other agencies, such as the Census Bureau, to better understand the effects of the Code on diverse households.<sup>19</sup>

The IRS's stance is a bit frustrating. Without demographic data, it is not easy to identify the disparate effects of the Code with precision—despite the IRS's legal authority and technological resources to collect and analyze such information.<sup>20</sup> Without data, accountability is diminished.<sup>21</sup> Only by knowing that problems exist can they be addressed.

#### *E. Bad Actors*

The factors above are always in play and often work in concert with one another. Tax rates that appear to be neutral are obfuscated by complexity and are the result of intense lobbying—all within a system in which absolute fairness or unfairness tends to be indeterminate. The indeterminacy is exacerbated by the lack of data.

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<sup>17</sup> KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* 208–09 (1990).

<sup>18</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104553, *TAX EQUITY: LACK OF DATA LIMITS ABILITY TO ANALYZE EFFECTS OF TAX POLICIES ON HOUSEHOLDS BY DEMOGRAPHIC CHARACTERISTICS* (2022).

<sup>19</sup> *Id.*

<sup>20</sup> Bearer-Friend, *supra* note 1, at 1 (noting the exclusion of race data from tax documents despite the IRS having the authority and resources to collect such information).

<sup>21</sup> *Id.* at 46.

It is not easy to discern whether tax rates that favor wealthy, primarily white taxpayers, at the expense of poorer, diverse taxpayers, is the result of the work of bad actors. Complexity and opacity prevent meaningful inquiry into the problem. As Professor Alice Abreu has observed, “[T]ax systems often act invisibly, they may be even more dangerous than systems that act overtly and thus invite more immediate scrutiny and resistance.”<sup>22</sup>

The tax system is not immune from abuse by bad actors. In a forthcoming work, *Taxation and Slavery in Colonial America*, Professor Anthony Infanti chronicles how the tax system abetted the system of slavery in the seventeenth and eighteenth centuries.<sup>23</sup> The book deftly demonstrates how the economics of slavery was intertwined with the system of taxation. Professor Infanti shows that an ostensibly neutral tax system enabled the system of slavery to thrive.<sup>24</sup> This lesson remains applicable today.

### III. FIXING WHAT’S BROKEN—SPEAKING AGAINST THE MADNESS

Highlighting racial inequities in the Code is a useful task because exposure is the best avenue for promoting discourse with respect to whether inequities in the application of the Code are justified or justifiable.<sup>25</sup> Addressing inequities is challenging.

#### A. Education and Speaking Against the Madness—A Two-Step Process

My academic career has included teaching the basic income tax course. I’ve taken pride in educating a generation of English, history, sociology, and political science undergraduate majors about the workings of the Code.

After 2002, I incorporated the extensive revision of § 1 (discussed above) into my course. It was always tough sledding. Thus, at a tax academic conference some years ago, I inquired of my colleagues whether any of them

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<sup>22</sup> Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. L. REV. 575, 577 (2001).

<sup>23</sup> ANTHONY C. INFANTI, *TAXATION AND SLAVERY IN COLONIAL AMERICA* (forthcoming 2024).

<sup>24</sup> *Id.*; see also Am. Tax Pol’y Inst., *Race, History, Taxation and Behavior*, Vimeo (2023), <https://vimeo.com/806107528/5b733bc8b7> (explaining the substance of the author’s own forthcoming publication).

<sup>25</sup> See Leo P. Martinez, *Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration*, 20 HARV. LATINX L. REV. 101 (2017).

did a deep dive into § 1. The answer was a nearly unanimous no; my colleagues had nearly all made the decision that the foray into § 1 was not worth valuable class time. Although I stubbornly clung to my ways, my colleagues had a point. The result, however, is that not many future lawyers are exposed to the mechanics of § 1 and the unfairness of subjecting wage income to the highest rates of taxation while allowing capital gains and dividend income to be subject to favorable capital gains rates. We tax academics must speak out against the madness.<sup>26</sup> This is the first step of a process of education.

The second step of a process of education is more difficult to accomplish. This involves the education of voters, as well as legislators, about the intricacies of the Code—a daunting task. Although there are a number of grassroots organizations that have made efforts in this direction,<sup>27</sup> whether these groups are gaining traction is open to question. Sadly, it might take even greater wealth disparity and greater inequality baked in the Code before voters awaken to the madness.

### *B. Speaking Out Is the Right Thing*

In addition to being elusive, the word fair, in the context of taxes, has a moral component. My friend, Professor Emerita Margaret Montoya, who is not a tax academic, has eloquently observed that “budgets are moral documents; budgets, including tax expenditures, expose and reveal our lawmakers’ values and commitments.”<sup>28</sup> Professor Montoya’s statement recognizes that the Code is a moral document, and how we go about raising

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<sup>26</sup> See Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1 (2008) (noting the favorable treatment of carried interest).

<sup>27</sup> See, e.g., *Racial Wealth Divide Initiative & Projects*, PROSPERITY NOW, <https://prosperitynow.org/racial-wealth-divide-initiative> (last visited Sept. 21, 2023) (a nonprofit organization that aims to advocate for tax policies that address wealth inequality, racial disparities, and economic mobility); see also CTR. ON BUDGET AND POL’Y PRIORITIES, <https://www.cbpp.org/> (last visited Sept. 21, 2023) (supporting the preservation and expansion of tax credits that provide targeted assistance to low-income taxpayers); *JPMorgan Chase Institute*, JPMORGAN CHASE & CO., <https://www.jpmorganchase.com/institute> (last visited Sept. 21, 2023) (a think tank and research organization that analyzes the impact of tax policy on consumer behavior).

<sup>28</sup> Margaret E. Montoya, *Threats Demand Our Action*, ALBUQUERQUE J. (Mar. 24, 2013), [https://digitalrepository.unm.edu/law\\_facultyscholarship/410/](https://digitalrepository.unm.edu/law_facultyscholarship/410/).



taxes is a moral proposition. She is not alone in this view.<sup>29</sup> Economists have described this moral perspective based on a sense of secular egalitarianism.<sup>30</sup> Whether the moral view is a religious one or a secular one, we end in the same place—the system of taxation must be fair.

How we go about raising taxes also has a practical side. A core tenet of tax policy is that taxes have to be perceived as fair. To the extent taxes are not fair, we invite noncompliance.

### C. Potential Solutions

The bottom line is that tax policies and provisions with racially disparate impacts must be reformed.<sup>31</sup> Reform requires political action and the will to act. Accordingly, it is useful to outline an approach to deal with the Code's shortcomings:

1. *Expanding awareness.* Wide awareness of the problem is the starting point of reform. This will require the targeted education of voters, legislators, and budding lawyers.
2. *Code reform.* Reforming the Code should begin with an examination of the largest tax expenditures in the Code, with an eye toward eliminating disparate impact.<sup>32</sup> Choosing the largest tax expenditures has the twin virtues of being race-blind and of offering the largest return.<sup>33</sup>

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<sup>29</sup> See Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671 (2006); see also Susan Pace Hamill, *Moral Reflection on Twenty-First Century Tax Policy Trends*, 52 CUMB. L. REV. 1 (2022).

<sup>30</sup> See Nichols & Wempe, *supra* note 8.

<sup>31</sup> 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 (2017); see also Lawrence A. Zelenak, *Examining the Internal Revenue Code for Disparate Racial Impacts*, 168 TAX NOTES FED. 1807 (2020).

<sup>32</sup> Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 981 (2011) (“[B]y offering tax breaks to taxpayers who engage in favored activities, [which] Congress ‘spends’ by foregoing collection of taxes that otherwise would be due.”); Gregg D. Polsky, *Rationally Cutting Tax Expenditures*, 50 U. LOUISVILLE L. REV. 643, 644 (2012) (asserting that tax expenditures are effectively direct spending programs that encourage certain behaviors).

<sup>33</sup> Others have suggested different approaches. See, e.g., Chuck Collins et al., *The Ever-Growing Gap: Failing to Address the Status Quo Will Drive the Racial Wealth Divide for Centuries to Come*, INST. FOR POL’Y STUD. (Aug. 8, 2016), <https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap>

3. *A determination of unfairness.* A determination that a particular Code provision is discriminatory and a prescription for reform would ideally be made by an expert, neutral party. These neutral experts might include those who work with the House Committee on Ways and Means, the Senate Committee on Finance, or the Joint Committee on Taxation.<sup>34</sup> Another possibility is to emulate regulatory oversight performed by the Office of Information and Regulatory Affairs that does cost-benefit analysis of all regulations.<sup>35</sup>

### CONCLUSION

Lawmakers must have the will to address problems. The will to do good is encouraged by an educated population of taxpayers. We, as tax academics, have a distinct role to play in making some of our scholarship accessible to a much broader audience. This effort is very much a work-in-progress.

The historian Henry Louis Gates reminds us that the Lost Cause movement in the mid-nineteenth century sought to rewrite history so as to minimize the white supremacist undercurrents of the Civil War in what he describes as “a take-no-prisoners social media war.”<sup>36</sup> Professor Gates reminds us that the fight against the madness continues.

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-CFED\_IPS-Final-2.pdf (expanding Code progressivity); *see also* Anju Chopra et al., *A Downpayment on the Divide: Steps to Ease Racial Inequality in Homeownership*, PROSPERITY NOW (Mar. 2017), <https://prosperitynow.org/sites/default/files/PDFs/Federal%20Policy/Downpayment-on-the-Divide.pdf> (targeting Code provisions dealing with homeownership).

<sup>34</sup> Leo P. Martinez, *Structural Impediments to Tax Reform: The Environment as Case Study*, 14 FLA. TAX REV. 45, 52 (2013).

<sup>35</sup> *Id.* at 53.

<sup>36</sup> Henry Louis Gates Jr., *Who's Afraid of Black History?*, N.Y. TIMES (Feb. 17, 2023), <https://www.nytimes.com/2023/02/17/opinion/desantis-florida-african-american-studies-black-history.html>.

