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# TAKING CRITICAL TAX THEORY SERIOUSLY—A COMMENT

CHARLES O. GALVIN\*

Professor Zelenak has provided an excellent analysis of the developments in the tax policy discussions of feminists and critical race theorists.<sup>1</sup> My response will be brief and, I hope, to the point.

A tax system should be neutral in its effect on each citizen's decisionmaking. Therefore, assuming a democratic ideal of a free society with equal opportunity for all, the framers of tax policy should strive for a system that is blind as to gender and color. I agree with Professor Zelenak that any attempt to tailor the system to meet the criticisms of feminists or racial groups rapidly becomes a nightmare of dilemmas that are just not resolvable. One needs only to observe lifestyles of friends, colleagues, neighbors, and relatives, and one becomes keenly aware that to design a tax regime to meet the gender and race considerations of each case would create a statutory maze of confusion many times worse confounded than the current system. Furthermore, trade-offs between different feminist goals make simple solutions impossible.<sup>2</sup> A better course is to achieve neutrality by the attainment as nearly as possible of a pure Haig-Simons comprehensive model or a pure consumed income model.<sup>3</sup>

The Haig-Simons model requires that assets be marked to

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1. See Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998).

2. In particular, the goal of changing gender roles may be inconsistent with improving the lives of women as they are. See *id.* at 1528 & n.44 (discussing Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996)).

3. The literature concerning the two models is enormous. See, e.g., DAVID F. BRADFORD ET AL., *BLUEPRINTS FOR BASIC TAX REFORM* (2d ed. 1984); Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145 (1992).

market<sup>4</sup> each year and to the date of transfers by gift or at death.<sup>5</sup> Such a requirement for all assets would be impractical, but not for readily marketable assets, for which gains and losses could be calculated with relative ease.<sup>6</sup> Assets not readily marketable would be marked to market at sale or other disposition, or at gift or death.<sup>7</sup>

A consumed income model would tax income only as consumed; savings and investments would be retained in qualified accounts until withdrawn for consumption. Amounts retained in qualified accounts when transferred by gift or at death would be treated as if withdrawn for consumption and would be taxable. Thus, if Taxpayer has zero net worth at birth and has \$100x income, including gifts and bequests during lifetime, Taxpayer will account for the entire amount under the Haig-Simons model in the years received or earned, or, under a consumed income model, as consumed or transferred at time of gift or death. In the case of either model *all* income is accounted for, and the wealth transfer tax system would be eliminated. The loss of revenue from the latter would be more than offset by the complete accountability for all income from birth to death.<sup>8</sup>

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4. Generally, market value is the price at which a willing buyer will buy and a willing seller will sell, neither being under compulsion to act. In the case of securities and commodity exchanges, the market price is the published quotation.

5. See Robert M. Haig, *The Concept of Income—Economic and Legal Aspects*, in THE FEDERAL INCOME TAX 1, 7 (Robert M. Haig ed., 1921), reprinted in AMERICAN ECON. ASS'N, READINGS IN THE ECONOMICS OF TAXATION 54 (Richard A. Musgrave & Carl S. Shoup eds., 1959); HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).

6. See Thomas L. Evans, *The Evolution of Federal Income Tax Accounting—A Growing Trend Towards Mark-to-Market*, 67 TAXES 824, 825 (1989); David J. Shakow, *Taxation Without Realization: A Proposal for Accrual Taxation*, 134 U. PA. L. REV. 1111, 1118-20 (1986); Jeff Strnad, *Periodicity and Accretion Taxation: Norms and Implication*, 99 YALE L.J. 1817, 1866-68 (1990).

7. Thus, assuming a non-readily marketable asset cost \$100 and is sold five years later for \$600, the gain of \$500 would be allocated \$100 per year to each intervening year and the tax would be recalculated for each such year and paid in the year of sale. For assets held for a long term, some form of "short cut" method might be employed, as in the throw-back rule for complex trusts. See I.R.C. §§ 665-668 (1994 & West Supp. 1998).

8. See Charles O. Galvin, *To Bury the Estate Tax, Not to Praise It*, 52 TAX NOTES 1413, 1414 (1991); Robert B. Smith, *Burying the Estate Tax Without Resurrecting Its Problems*, 55 TAX NOTES 1799, 1804-05 (1992); Charles O. Galvin, *Burying the Estate Tax: Keeping Ghouls Out of the Cemetery: A Reply to Professor Smith*, 56 TAX NOTES 951, 951 (1992); see also Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 371-75 (1993) (discussing policy and technical issues likely to arise in designing and implementing a death-time gains tax); Charles O. Galvin, *Taxing Gains at Death: A Further Comment*, 46 VAND. L. REV. 1525, 1525-26 (1993) (arguing for repeal of the current wealth-transfer tax system and for the replacement of the system with taxation of gains at the time of gift or death); Joseph M. Dodge, *Further Thoughts on Realizing Gains and Losses at Death*, 47 VAND. L. REV. 1827, 1828 (1994) (arguing for and discussing issues relevant to a deemed-realization rule at time of gift or death).

Furthermore, under either of these “pure” models, corporate income would be attributed to shareholders in accordance with the description in *Blueprints for Basic Tax Reform* or some variant thereof.<sup>9</sup> Under either model, a low flat rate tax (depending on where one sets the basic exemption, or zero bracket) or a very low graduated rate structure would produce the same revenues as the present system.<sup>10</sup>

But how far removed is all the above discussion from the real world? The Commissioner’s Statistics of Income reflect that out of about 115 million individual return filers—singles, marrieds, and heads of households—approximately 80% reported adjusted gross income under \$50,000, and over 90% of filers reported under \$75,000.<sup>11</sup> What does this tell us? It tells us that the vast majority of our fellow citizens live from paycheck to paycheck. They do not have large portfolios of municipal bonds, growth stocks, 401(k) plans, and the like. They are not involved in real estate developments, oil and gas, mining, and other ventures. Indeed, they are already in a Haig-Simons mode or consumed income mode, whichever one wishes to apply. Their income is cash received and reported in the year earned, and their cash after taxes is expended in the same year on consumables. They have no itemized deductions because most of these filers use the standard deduction, which becomes more or less a zero bracket.

Under either of the models I have described above, and assuming the same rate structure, the tax results to this large group of filers would remain almost unchanged. I fail to see how tinkering with rules as applied to this group would produce dramatic gender or racial equality.

The Tax Foundation has found that with respect to all federal, state, and local taxes, a typical two-earner couple with two dependent children paid an overall effective tax rate in 1980 of 40.7% on median income of \$26,879, and that for 1994 the effective rate was 39.5% on a median income of \$53,354. For each of the intervening years—1981 to 1993—the effective rate did not vary as much as three percentage

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9. See BRADFORD ET AL., *supra* note 3, at 63-69; U.S. DEP’T OF THE TREASURY, REPORT ON INTEGRATION OF THE INDIVIDUAL AND CORPORATE TAX SYSTEMS: TAXING BUSINESS INCOME ONCE 15-16 (1992); AMERICAN LAW INST., FEDERAL INCOME TAX PROJECT: INTEGRATION OF THE INDIVIDUAL AND CORPORATE INCOME TAXES 50-57 (1993).

10. See COMMISSION TO REVISE THE TAX STRUCTURE, REFORMING THE FEDERAL TAX STRUCTURE 55-60, 90-91 (1973).

11. See Therese M. Cruciano, *Individual Income Tax Returns, Preliminary Data, 1994*, IRS. STAT. INCOME BULL., Spring 1996, at 6, 18 tbl.1.

points from 40%. Thus, the empirical data demonstrate that for this typical median income family the progressivity at the federal level offsets regressivity in state and local taxes, producing essentially an overall flat tax.<sup>12</sup>

To be sure, like Professor Zelenak, I believe that the joint return regime can be unfair.<sup>13</sup> Why not a rule like that of the community property jurisdictions: what each spouse earns belongs half to the other. Then let the spouses file as separate singles. Or use traditional common-law rules: each spouse's income belongs to that spouse, and let each file as a separate single. Or if it is a one-earner household, let the joint return rule apply if the parties so elect.<sup>14</sup> These same patterns could be applied to Social Security; that is, during marriage, whatever its duration, Social Security credits would accumulate to each spouse on a shared basis. Alternative to these proposals are persuasive arguments for taxing the family as a unit.<sup>15</sup>

Like Professor Zelenak, I find the critical race theorists' criticisms unconvincing.<sup>16</sup> Lower-income, middle-income, or higher-income African-Americans, Hispanics, Asians, Native Americans, or other groups all struggle with the human predicament. To try to solve particular problems through the Internal Revenue Code would present a daunting challenge no lawmaker should or could take on.

Professor Zelenak does a great service in raising and articulating these issues of tax scholarship so well. The debate on issues in this area, perhaps neglected for too long, should continue not merely for the benefit of tax scholars, but especially for the practical use of tax policymakers.

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12. See Chris R. Edwards, *Typical American Family Pays 40 Percent of Income in Taxes*, 66 TAX NOTES 735, 736 (1995) (1994 figures estimated).

13. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 363-72 (1994).

14. See, e.g., Zelenak, *supra* note 1, at 1573.

15. See Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1594-95 (1977).

16. See Zelenak, *supra* note 1, at 1561-74.