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## Rebranding Tax/Increasing Diversity

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## Rebranding Tax/Increasing Diversity

# REBRANDING TAX / INCREASING DIVERSITY

ALICE G. ABREU & RICHARD K. GREENSTEIN<sup>†</sup>

“You don’t pay taxes. They take taxes.” Chris Rock

## ABSTRACT

Why is the tax bar so white? This question has gone unasked for far too long and in this Article we offer one possible answer. We believe that answer lies in the unexamined implications of the concept of tax expenditures. We therefore connect four things: (1) tax expenditures, (2) the way in which the acceptance of the concept has enshrined the notion that taxation should be synonymous only with raising revenue, (3) the consequent relegation of social values to an outsider status, and (4) the lack of diversity in the tax bar. Our claim is that a field of law that regards a single goal—in this case, raising revenue—as its proper objective, is likely to attract to it a more monolithic group of individuals than a field of law that is concerned with promoting multiple and diverse social values.

Over time the useful descriptive concept of tax expenditures has evolved into a prescription that the tax system be purged of objectives other than the raising of revenue. Tax expenditures have come to be viewed as undeserving interlopers into what would otherwise be a pristine revenue-raising machine. That view devalues the role of social policy in the tax system and, as a consequence, has obscured and constrained the nature of the tax law. This normative perspective on the tax system is not only incorrect but may be contributing to the lack of racial and ethnic diversity in the tax bar by constricting the group of individuals who may be attracted to tax. Given that available data shows that law students who are members of racial and ethnic minorities are more likely than others to state that they want to “change or improve society” and engage in “socially responsible work,” we suggest a link between the lack of racial and

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ethnic diversity in the tax bar and the normative legacy of tax expenditures, which casts the normative tax system as unconcerned with anything other than raising revenue.

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#### INTRODUCTION

Tax gets a bad rap. It is generally thought to be coercive, burdensome, complicated, unpleasant, and boring. The annual ritual of filing tax returns underscores the taking aspect of taxation by reminding even those who receive refunds that money has been taken from them. This view of tax—that it is about taking—is not only inaccurate and incomplete, but it may have had two related, significant, deleterious, but unexamined effects. First, viewing the tax system only as an instrument of taking may contribute to the creation of a tax bar that is more white and less diverse than the bar in general. Second, the relative lack of diversity in the tax bar may contribute to the existence of a tax system that disproportionately favors a relatively nondiverse population of taxpayers at the top of the income distribution over more racially and ethnically mixed taxpayers at the bottom of that distribution.

In this Article we attempt to examine the first of these effects by offering an answer to a question that has gone unasked for far too long: Why is the tax bar so white?<sup>1</sup> We then invite a brief thought experiment aimed at the second effect: If the tax bar were more diverse, might the

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1. Our asking this question assumes that the question is an important one. Scholars, including one of us, have previously articulated a number of reasons why racial and ethnic diversity in particular practice areas as well as in the bar as a whole is important. See, e.g., David B. Wilkins, *Social Engineers or Corporate Tools?: Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 137, 140–49, 153 (Austin Sarat ed., 1997); Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575, 591–93 (2001), reprinted in CRITICAL TAX THEORY: AN INTRODUCTION 109, 113–115 (Anthony C. Infanti & Bridget J. Crawford eds., 2009); Alfred Dennis Mathewson, *Commercial and Corporate Lawyers 'n the Hood*, 21 U. ARK. LITTLE ROCK L. REV. 769, 769–70, 772–75 (1999); Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117, 140–41 (2004). We believe that the importance of diversity is by now so self-evident that it does not require further elaboration.

tax legislation recently enacted by Congress and signed by President Trump favor a more diverse population of taxpayers overall?<sup>2</sup>

We believe that an answer to the question of why the tax bar is so white lies in the unexamined implications of a concept known to virtually every tax scholar, practitioner, and student: tax expenditures. Tax expenditures are “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability,”<sup>3</sup> and “may be viewed as alternatives to other policy instruments, such as spending or regulatory programs.”<sup>4</sup> Stanley Surrey, who has been called “the greatest tax scholar of his generation,”<sup>5</sup> developed the concept in the 1960s, thereby revolutionizing the way tax scholars and policy makers think about tax.<sup>6</sup> It is now so embedded in tax policy discourse that nearly every major tax casebook introduces it at an early point.<sup>7</sup> Furthermore, the statutory requirement that the Treasury

2. Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017). Although the legislation included the short title “Tax Cuts and Jobs Act,” and is often referred to by that name, the name was stricken by the Senate Parliamentarian immediately prior to the Senate’s passage of the final bill. Andrew Morgan, *Tax Plan Hits Procedural Roadblock in Senate Courtesy of the Parliamentarian*, JURIST (Dec. 20, 2017, 12:20 AM), <https://www.jurist.org/news/2017/12/tax-plan-hits-procedural-roadblock-in-senate-courtesy-of-the-parliamentarian-1>.

3. Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and The Budget Reform Act of 1974*, 17 B.C. L. REV. 679, 683 (1976) (quoting Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(A)(3), 88 Stat. 297, 299 (1974)). This legislation requires the Treasury Department and the Congressional Budget Office to publish annual lists of tax expenditures. As the Joint Committee on Taxation has explained:

The Joint Committee staff issued reports prior to the statutory obligation placed on the CBO and continued to do so thereafter. In light of this precedent and a subsequent statutory requirement that the CBO rely exclusively on Joint Committee staff estimates when considering the revenue effects of proposed legislation, the CBO has always relied on the Joint Committee staff for the production of its annual tax expenditure publication. See Pub. L. No. 99-177, sec. 273, codified at 2 USC 601(f).

JOINT COMM. ON TAXATION, 115TH CONG., ESTIMATES OF FEDERAL EXPENDITURES FOR FISCAL YEARS 2017–2021, at 2 (2018).

4. OFFICE OF TAX ANALYSIS, U.S. DEP’T OF THE TREASURY, TAX EXPENDITURES 1 (2017), <https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2019.pdf>.

5. Erwin N. Griswold, *In Memoriam: Stanley S. Surrey: A True Public Servant*, 98 HARV. L. REV. 329, 331 (1984).

6. See *id.* Stanley Surrey is one of the deities of tax. As another tax deity, Erwin Griswold, observed, “By common consent he was the greatest tax scholar of his generation.” *Id.* Stanley Surrey was not only a Harvard Law School Professor and author of one of the early tax casebooks, which contributed to making tax a part of the standard law school curriculum, but he was also Assistant Treasury Secretary for Tax Policy from 1961–1969. *Id.* at 330.

7. See, e.g., DEBORAH A. GEIER, U.S. FEDERAL INCOME TAXATION OF INDIVIDUALS 7, 104–05 (3d ed. 2016) (introducing tax expenditures briefly in chapter one and more thoroughly in chapter three); MICHAEL GRAETZ & DEBORAH SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 41–42 (7th ed. 2013); WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 9–10 (14th ed. 2006); PAUL R. MCDANIEL ET AL., FEDERAL INCOME TAXATION: CASES AND MATERIALS 345–48 (6th ed. 2008) (Tax expenditures are discussed in a stand-alone chapter, immediately before the material on deductions.); RICHARD SCHMALBECK & LAWRENCE ZELENACK, FEDERAL INCOME TAXATION 24–27 (2d ed. 2007); THEODORE P. SETO, FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 65, 95 (1st ed. 2013). But see JAMES J. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS 928 (17th ed. 2013) (one sentence statement, which does not appear until the end of the book in a chapter on tax policy and does not use the term tax expenditures, but does describe the general concept).

Department and the Congressional Budget Office produce an annual Tax Expenditure Budget enshrines the concept.<sup>8</sup> It was, without question, a brilliant and transformative insight.<sup>9</sup> However, the concept of tax expenditures has a dark side, which may be contributing to the relative lack of diversity in the tax bar.

Surrey's foundational idea was straightforward: some provisions of the Internal Revenue Code (the Code) operate as spending provisions.

They serve ends . . . which are similar in nature to those served in the same or other areas by direct government expenditures in the form of grants, loans, interest subsidies, and federal insurance or guarantees of private loans. The interplay is such that for any given program involving federal monetary assistance, the program may be structured to use the tax system to provide that assistance—where it will usually be called a “tax incentive”—or structured to use a direct government expenditure. As a consequence of history, design, lack of analysis, and similar factors our present tax system is replete with these special provisions, or tax expenditures, under which many existing govern-

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8. See I.R.C. § 632(e)(2)(E); Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 355 (1970) [hereinafter Surrey, *Federal Income Tax Reform*]; Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706–07, 713, 730 (1970) [hereinafter Surrey, *Tax Incentives*]; see generally STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 1–49 (1973) [hereinafter SURREY, *PATHWAYS*] (describing the Tax Expenditure Budget and its uses). The U.S. Department of the Treasury's 2016 Tax Expenditure Budget was issued on September 28, 2016, and contains 167 distinct tax expenditures grouped in various categories. OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, *TAX EXPENDITURES 1–2* (2016), <https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2016.pdf>.

9. Although the concept of tax expenditures has not been without critics, we believe that tax scholars generally accept Surrey's insight that some tax provisions further spending, not taxing, policy. See J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437, 444 (2008); Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J.L. & SOC. POL'Y 206, 216–18 (2014); Kyle D. Logue, *If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Transition Debate*, 67 U. CHI. L. REV. 1507, 1507–08 (2000) (reviewing DANIEL SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* (2000)). Nevertheless, some scholars have questioned the concept's underlying assumptions (such as the assumption of income as the proper tax base) as well as the specific methodology pursuant to which the Tax Expenditure Budget is compiled. See JOINT COMM. ON TAXATION, 110TH CONG., *A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS* 29–38 (2008) (describing and analyzing critiques of tax expenditure analysis); Edward D. Kleinbard, *Tax Expenditure Framework Legislation*, 63 NAT'L TAX J. 353, 372–78 (2010) (setting out a new approach to tax expenditure analysis, which was adopted by the Joint Committee on Taxation during his tenure as Chief of Staff, but which was subsequently abandoned); see also Leonard E. Burman, *Is the Tax Expenditure Concept Still Relevant?*, 56 NAT'L TAX J. 613, 625 (2003); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1199–1201 (2006); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1155–56 (1988); Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 973–76 (1986); Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1165–67 (1993) [hereinafter Zelinsky, *James Madison*]. Scholars who favor the use of tax expenditures for the promotion of social policies generally do so on efficiency grounds. See Marjorie E. Kornhauser, *Cognitive Theory and the Delivery of Welfare Benefits*, 40 LOY. U. CHI. L.J. 253, 254, 254–55 n.6 (2009).

ment assistance programs are specially structured to use, or simply just use, the tax system rather than the direct expenditure route.<sup>10</sup>

Because such provisions are functionally equivalent to spending provisions, Surrey believed that the transparency of the tax system would be enhanced by a “full accounting” of how the Code was being used as an instrument for government spending.<sup>11</sup>

But Surrey’s straightforward goal of making clear how and to what extent the tax system was actually spending evolved into something far different. There are two parts to this evolutionary story. The first part of the story tells how tax lawyers, scholars, and policy makers came to “treat tax expenditures as extraneous to the fundamental purposes of the tax law: accurately measuring income and collecting revenue.”<sup>12</sup>

The second part of the story tells how the perception of tax expenditures as extraneous to the objective of raising revenue morphed into the more general view that the promotion of social values<sup>13</sup> is not a proper goal of the tax system. According to this view, the problem with tax expenditures is that they aim to promote social values (like home ownership), through various forms of tax subsidies.<sup>14</sup> Under this view, social values should be addressed through spending programs developed elsewhere in the legislative process.<sup>15</sup> The argument is that using the tax law to advance social values corrupts taxation by diverting it from what is thought to be its proper focus: the raising of revenue.<sup>16</sup> Social values, in short, are grime in what would otherwise be a pristine revenue-raising machine.<sup>17</sup>

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10. Surrey, *Federal Income Tax Reform*, *supra* note 8, at 354.

11. Stanley S. Surrey & William F. Hellmuth, *The Tax Expenditure Budget—Response to Professor Bittker*, 22 NAT’L TAX J. 528, 528–29 (1969). As Surrey and Hellmuth explain, “On November 15, 1967, Mr. Surrey, in a speech entitled ‘The United States Income Tax System . . . the Need for a Full Accounting,’ developed the concept of ‘tax expenditures’ and a ‘tax expenditure budget.’” *Id.* at 528 (alteration in original). The speech was to Money Marketeers in New York City when Surrey was serving as Assistant Treasury Secretary for tax policy. *Id.* at 528 nn.\* & 1.

12. Linda Sugin, *Tax Expenditures, Reform, and Distributive Justice*, 3 COLUM. J. TAX L. 1, 4 (2011).

13. Social values are “those things that are widely thought to be important in a community.” Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 WASH. U. JURIS. REV. 1, 1 (2015). What those widely shared values are is an empirical question. In the case of federal income taxation, equity, efficiency, and administrability form the traditional core of the set of values widely shared among those who think about tax matters. *See generally id. passim.*

14. *See* Surrey, *Tax Incentives*, *supra* note 8, at 705, 716–19.

15. *See id.* (arguing that tax incentives are generally inferior as a means of achieving social goals).

16. *See id.* at 728.

17. Although there has been some dissent from this characterization, that dissent has not perceptively changed the general view that social or humanitarian values are extraneous to the function of the tax system. *See* J. Clifton Fleming, Jr., *Some Cautions Regarding Tax Simplification*, in TAX SIMPLIFICATION 227, 230 (Chris Evans et al. eds., 2015) (arguing that using tax expenditure analysis to support elimination of humanitarian subsidies from the Code on the grounds that they add complexity is a “misuse” of that analysis, which only requires accounting for the costs).

It is right here—in the idea that the tax law is not a proper tool for promoting social values—that we find the possible link between tax expenditures and the lack of diversity in the tax bar. As we will describe, there is data suggesting that law school graduates who are members of racial and ethnic minority groups are disproportionately drawn to practice areas in which they can engage in “socially responsible work”<sup>18</sup>—i.e., areas that afford opportunities to “change or improve society.”<sup>19</sup> For such individuals who are interested in pursuing goals such as the alleviation of poverty, the promotion of home ownership, affordable childcare, or clean energy, a field of law from which social values have been exiled would seem to be a field with little or nothing to offer. More generally, a field of law that regards a single goal—in this case, raising revenue—as its proper objective, is likely to attract to it a more monolithic group of individuals than a field of law that is concerned with promoting multiple and diverse social values.<sup>20</sup>

To be clear, we do not claim that the concept of tax expenditures is useless, nor do we aim to debate its contours or proper measurement. Our claim is simply that over time scholars and policy makers have transformed the concept of tax expenditures, which Surrey introduced to promote descriptive accuracy, into a normative prescription for a tax system that is purged of objectives other than the raising of revenue. In other words, tax expenditures have come to be viewed as undeserving interlopers into what would otherwise be a pristine revenue-raising machine. That has, in turn, created a normative monolith—a tax system designed to do no more than raise revenue according to ability to pay—which devalues the role of social policy in the tax system and has therefore obscured and constrained the nature of the tax law. We believe that this normative view of the tax system is not only incorrect but may be contributing to the relative lack of racial and ethnic diversity in the tax bar.

Nevertheless, we believe the situation can be remedied. The tax system we actually have is not just a revenue-raising machine and is not actually devoid of social values. On the contrary, the tax system is actually replete with social values. Increasing the diversity of the tax bar and reaping the systemic benefits that would follow should begin with the normative embrace of tax expenditures as proper parts of a tax system. From that, a view of the tax system as the promoter of social values should follow, making tax an attractive area of specialization even for lawyers for whom the promotion of social values is a principal concern.

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18. See GITA Z. WILDER, NAT'L ASS'N FOR LAW PLACEMENT, RACE AND ETHNICITY IN THE LEGAL PROFESSION: FINDINGS FROM THE FIRST WAVE OF THE AFTER THE JD STUDY 5, 48 tbl.26, 66 (2008).

19. *Id.* at 51.

20. Although we have confined our discussion of diversity to participation by racial and ethnic minorities, we are optimistic that some of our conclusions might extend to members of other minority groups as well, so that by embracing the promotion of social policies the tax bar will become more diverse and inclusive in an even broader sense.



In this Article we connect four things: (1) tax expenditures, (2) the way in which the general perception of tax expenditures has enshrined the notion that taxation should be synonymous with raising revenue, (3) the consequent relegation of social values to an outsider status, and (4) the lack of diversity in the tax bar.

In Part I we offer a brief intellectual history of tax expenditures. First, we show how the Constitution and the congressional architecture, both of which separate oversight of the taxing from the spending functions of government, as well as the frame of the Code, contribute to a view of the tax system as separate from the spending system. We then trace the evolution of the concept of tax expenditures, showing that its core division of tax provisions into proper and impostor has isolated social values, thereby reinforcing the notion that concern for such values is alien to a sound tax system. Finally, we call into question this view of the proper relationship between taxation and social values by showing that even if taxation *were* just about raising revenue, it would not be devoid of social values. Indeed, we show that even if the Code were drained of tax expenditures, the remaining provisions would deeply implicate social values. Consequently, the promotion of social policies should not be regarded as alien to the objectives of the tax system.

In Part II we turn to the question of the lack of racial and ethnic diversity in the tax bar. We begin by using available data to show that the tax bar is very white. This reflects not only the relative whiteness of the bar in general but is striking in comparison to the bars in other fields of law. We then draw on various studies to suggest possible reasons for this depressed diversity. Those studies reveal that law students who are members of racial and ethnic minorities are more likely than others to state that they want to “change or improve society” and engage in “socially responsible work.” That, in turn, suggests a link between the lack of racial and ethnic diversity in the tax bar and the normative legacy of tax expenditures, which casts the tax system as unconcerned with social change, improvement, or responsibility. In Part III we examine contemporary perceptions of tax practice to make some modest but concrete suggestions for ameliorative action that we believe should begin the practice of rebranding tax so that the brand reflects the substance—the richness and diversity of the tax law itself. We conclude by inviting consideration of whether increased diversity in the tax bar might affect the shape of the tax system.

## I. TAXING AND SPENDING: THE CONCEPT OF TAX EXPENDITURES

### A. *The Constitutional and Congressional Architecture*

The link between taxing and spending is much more than a pejorative characterization flung by politicians. It is enshrined in the Constitution, which in one clause gives Congress both powers: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises,

to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>21</sup> The link is also captured by the concept of fiscal policy, which has been defined as “the use of government spending and taxation to influence the economy.”<sup>22</sup> It emphasizes what is often thought to be the fundamental purpose of taxation: the compulsory transfer of assets from the private sector to the public sector for redeployment in pursuit of the public good. Justice Holmes made the link explicit when he observed nearly ninety years ago that “[t]axes are what we pay for civilized society.”<sup>23</sup>

Although the link between taxing and spending could result in a holistic view of the tax system, so that the taking and the giving (and hence, the receiving) are seen as part of one system—a system of fiscal policy—they are not.<sup>24</sup> Instead, the tax system is generally thought to be concerned with one objective, raising revenue (taking),<sup>25</sup> and is usually considered separately from the system of spending (giving), which is generally thought to be animated by a multiplicity of objectives and social values. The Constitution itself reflects this separation.<sup>26</sup> First, not only does the Constitution restrict the power to tax,<sup>27</sup> but it places specific

21. U.S. CONST. art. I, § 8, cl. 1. This is sometimes referred to as the “taxing and spending clause.” *United States v. Richardson*, 418 U.S. 166, 170 (1974); *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

22. Mark Horton & Asmaa El-Ganainy, *Fiscal Policy: Taking and Giving Away*, INT’L MONETARY FUND, <http://www.imf.org/external/pubs/ft/fandd/basics/fiscpol.htm> (last updated July 29, 2017); see Narayana R. Kocherlakota, *Monetary and Fiscal Policy Overview*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 164, 164 (Steven Durlauf et al. eds., 2d ed. 2008).

23. *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). A version of this quote is engraved above the entrance to the IRS headquarters at 1111 Constitution Ave., Washington, D.C.: “Taxes are the price we pay for a civilized society.”

24. The link between taxing and spending is so attenuated that most taxpayers do not know what their tax dollars are spent on, although the degree to which they know varies by income level, geographic location, age, and gender. Casey Bond, *One in Five Americans Know Where Their Income Tax Dollars Go*, GOBANKINGRATES (Mar. 17, 2014), <https://www.gobankingrates.com/personal-finance/federal-income-tax-receipt> (reporting on the results of a GoBankingRates 2014 study that showed that just over 20% of Americans either strongly agreed or agreed with the proposition that they knew how their tax dollars were used, with only 8.5% strongly agreeing). That most taxpayers do not know what their tax dollars are spent on suggests that they are not making the link between the taking and giving functions of taxation.

25. Former IRS Commissioner Larry Gibbs captured this nicely when he described the prevailing view of the tax system when he first began to practice tax law:

When I began in 1963, the practice of tax was very much about federal tax law, whose primary purpose was simply to raise revenue to help fund the annual costs of operating our federal government, largely by taxing the incomes of individuals and businesses, and to a large extent by following certain principles of taxation.

These federal tax law principles often originated in the textbooks used to teach tax in law schools and business schools across the country in order to answer questions like: What is income? Whose income is it? When should the income be taxed? What are the expenses to produce income that should be deductible, and when and how should such expenses be deducted?

Lawrence B. Gibbs, Speech, *Great Plains Federal Tax Institute: 50th Anniversary Dinner in Omaha, Nebraska, on November 29, 2012*, 46 CREIGHTON L. REV. 139, 140 (2013).

26. U.S. CONST. art. I, § 8, cl. 1.

27. Article I provides that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I, § 9, cl. 4.

restrictions on the origin of “Bills for raising Revenue,” which alone are subject to the constraint that they begin in the House of Representatives.<sup>28</sup> Congressional exercise of the power to spend is subject to no such chamber-specific constraint. Second, by providing that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,”<sup>29</sup> the Constitution restricts Congress’s power to spend in a way that differs from the way it restricts Congress’s power to tax. By placing different constraints on the exercise of the congressional powers to tax and to spend, the Constitution underscores the distinction between taxing and spending.

The congressional architecture reflects and reinforces the constitutional separation between taxing and spending: raising revenue through taxation is within the purview of the House Committee on Ways and Means and the Senate Committee on Finance, but spending is handled by the Budget and Appropriations Committees of both chambers.<sup>30</sup> That

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This restriction required ratification of the Sixteenth Amendment to permit an income tax, which had been held to be a direct tax and thus subject to apportionment. See *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 607–08 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI.

28. U.S. CONST. art. I, § 7, cl. 1.

29. U.S. CONST. art. I, § 9, cl. 7.

30. The House Ways and Means Committee has jurisdiction over revenue measures. As the Committee itself puts it, “[t]he Committee on Ways and Means has the responsibility for raising the revenue required to finance the Federal Government. This includes individual and corporate income taxes, excise taxes, estate taxes, gift taxes, and other miscellaneous taxes.” *Committee Jurisdiction*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON WAYS AND MEANS, <https://waysandmeans.house.gov/committee-jurisdiction> (last visited Oct. 14, 2018). Similarly, the Senate Finance Committee “concerns itself with matters relating to: taxation and other revenue measures.” *Jurisdiction*, U.S. SENATE COMMITTEE ON FIN., <https://www.finance.senate.gov/about/jurisdiction> (last visited Oct. 14, 2018). The Budget committees of both chambers serve a different function. As the House Budget Committee explains:

The basic framework that is used today for congressional consideration of budget policy was established in the Congressional Budget and Impoundment Control Act of 1974 (the Budget Act). This act provides for the annual adoption of a concurrent resolution on the budget as a mechanism for setting forth aggregate levels of spending, revenue, the surplus or deficit, and public debt. The Budget Act also established standing committees in both chambers of Congress with jurisdiction over, among other things, the concurrent resolution on the budget.

*About*, HOUSE BUDGET COMMITTEE, <https://budget.house.gov/about> (last visited Oct. 14, 2018) (footnotes omitted). The Senate Budget Committee was also established by the 1974 Budget Act and “is responsible for drafting Congress’ annual budget plan and monitoring action on the budget for the federal government.” *Budget*, U.S. SENATE, [https://www.senate.gov/reference/reference\\_index\\_subjects/Budget\\_vrd.htm](https://www.senate.gov/reference/reference_index_subjects/Budget_vrd.htm) (last visited Oct. 14, 2018). The House Appropriations Committee was created in 1865, after the appropriations function, which had been within the jurisdiction of the Ways and Means Committee, was removed from that committee. See *About the Committee*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON APPROPRIATIONS, <https://appropriations.house.gov/about> (last visited Oct. 14, 2018). The Senate Appropriations Committee “writes the legislation that allocates federal funds to the numerous government agencies, departments, and organizations on an annual basis. Appropriations are generally limited to the levels set by a Budget Resolution drafted by the Senate Budget Committee.” *Committee Jurisdiction*, U.S. SENATE COMMITTEE ON APPROPRIATIONS, <https://www.appropriations.senate.gov/about/jurisdiction> (last visited Oct. 14, 2018). For a more detailed description of the unique role played by the appropriations committees in the actual spending by the federal government, see ROGER H. DAVIDSON ET AL., CONGRESS AND ITS MEMBERS, 413–15 (16th ed. 2018). Numerous scholars have taken this division of responsibility as part of their

architecture, which separates taxing from spending, emphasizes the idea that in taxing and spending the government is doing different things: it is taking with one hand, but it is giving with another, and the subjects of the taking and of the giving are not necessarily the same, nor are the amounts. The creation of the Joint Committee on Taxation, which has no counterpart on the spending side or in any other congressional function, emphasizes the uniqueness of taxation and its separation from spending.<sup>31</sup>

There is also the notorious tax statute: the Internal Revenue Code, whose very name and structure places the collection of revenue at the core. Thus the Code begins with subtitle A, the very first provision of which imposes a tax—a remission to the state—on the taxable income of individuals, estates, and trusts in section 1,<sup>32</sup> and then imposes a tax on the taxable income of corporations in section 11.<sup>33</sup> Subtitle B contains the transfer taxes, and subsequent subtitles impose the social security and payroll taxes as well as a variety of excise taxes on alcohol, tobacco, and other items.<sup>34</sup> And although the Code does contain provisions for refunds and credits, those provisions also use the terminology of taxation, that of taking—not of spending. For example, even section 32, the earned income tax credit (EITC), provides that “[i]n the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to . . .”<sup>35</sup> The language is all about taxing; not a word about spending.

Yet it is widely acknowledged that the EITC is not a taxing provision at all.<sup>36</sup> It takes nothing from any individual and can result in a pay-

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starting point for proposing and debating more integrated approaches to legislation and administration. See, e.g., Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 535–36 (1995); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1237–39 (2006); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957 (2004); Zelinksy, *James Madison*, *supra* note 9, at 1166–67.

31. Congress established the Joint Committee on Taxation in 1926. Revenue Act of 1926, ch. 27, § 1203, 44 Stat. 9, 127–28 (codified as amended at I.R.C. §§ 8001–8005, 8021–8023 (2018)); see Karla W. Simon, *Constitutional Implications of the Tax Legislative Process*, 10 AM. J. TAX POL’Y 235, 237 (1992); George K. Yin, *James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 788–89 (2013). There are three other joint committees—Printing, Libraries, and Economics—but none has jurisdiction over any substantive field of law. For a captivating account of the role the Joint Committee played in the codification of the tax law, see George K. Yin, *Codification of the Tax Law and the Emergence of the Staff of the Joint Committee on Taxation* (Univ. of Va. Law and Econ. Research Paper No. 2017-20, 2017).

32. I.R.C. § 1(a)–(e).

33. *Id.* § 11. Subtitle A, the income tax, comprises sections 1–1563.

34. *Id.* §§ 2001–2801. Subtitle B, the transfer taxes, comprises sections 2001–2801. Subtitle C, the employment taxes, comprises sections 3101–3512. Subtitles D and E comprise sections 4001–5000C and 5001–5891, respectively, and contain miscellaneous excise taxes as well as the excise taxes on alcohol and tobacco. Subtitle F, the provisions governing procedure and administration, comprises sections 6001–7874.

35. *Id.* § 32(a)(1).

36. We recognize that our use of the term “taxing” equates it with “revenue raising” and that it can seem logically inconsistent to do that while also acknowledging that the provision does not in

ment from the government of as much as \$6,431 to one individual.<sup>37</sup> This can occur even if the individual faces no positive tax liability; in such a case the amount received from the government can in no sense be considered a refund or a return of the individual's own funds.<sup>38</sup> Therefore, the EITC can function as a negative tax, doing the polar opposite of raising revenue. Although the EITC is likely the most extreme example of a Code provision that does not raise revenue at all but instead distributes it, it is far from the only one. The Code is teeming with provisions that reduce taxes otherwise due if taxpayers engage in transactions that Congress wants to favor, such as buying a house, a fuel-efficient vehicle, or health insurance.<sup>39</sup> These are provisions which use the tax system to promote social policy goals other than raising revenue. They have come to be known as tax expenditures.

### B. The Birth of Tax Expenditures

As noted in the Introduction, tax expenditures are “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.”<sup>40</sup> The term Surrey coined—tax expenditures—is adroit, combining the seemingly antithetical concepts of taxing and spending. Not surprisingly, it has endured the test of time. It is now foundational to the study of the tax system and is discussed prominently at the very beginning of nearly every major tax casebook, including the successor to Surrey's own.<sup>41</sup>

Much good has come of the widespread acceptance of the concept of tax expenditures. Analysis has been sharpened by the deeper under-

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fact raise any revenue at all. We explain this apparent contradiction, and how tax scholars address it, in Section I.B, *infra*, where we detail the development and use of the concept of tax expenditures.

37. This is the maximum EITC available for an individual with three qualifying children in 2018. *2018 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates: Earned Income and AGI Limits*, IRS, <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/eitc-income-limits-maximum-credit-amounts-next-year> (last updated Apr. 23, 2018).

38. This is strictly true only if one takes a very narrow view of taxation, considering only the income tax. An individual who is paying social security, self-employment, or payroll taxes, as well as other excise taxes can more generally be considered to be receiving a refund of those taxes paid (indeed, ameliorating the effect of the lack of a zero bracket in the social security tax was an important part of the origin story of the EITC, *see* Alstott, *supra* note 30, at 540–41), but no specific accounting between non-income taxes paid and the amount of EITC received is either required or possible.

39. *See, e.g.*, I.R.C. § 30B (the alternative motor vehicle credit); § 30C (the alternative fuel vehicle refueling property credit); § 30D (the new qualified plug-in electric drive motor vehicle credit); § 35 (credit for health insurance costs); § 36B (the refundable premium assistance credit); § 105 (exempting health insurance payments from income); § 106 (exempting the cost of employer-provided health insurance premiums from the employee's income); § 163(h)(3) (allowing a deduction for home mortgage interest); § 4064 (the gas guzzler tax); *see also* Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 75–77 (2013) [hereinafter Tahk, *Everything Is Tax*]; Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875, 876–77, 891–95 (2018).

40. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(a)(3), 88 Stat. 297, 299 (1974).

41. *See* Griswold, *supra* note 5, at 331; *see also supra* note 7 and accompanying text.

standing of the nonrevenue-raising objectives behind numerous Code provisions, and Congress has been encouraged to confront the cost of accomplishing those nonrevenue-raising objectives.<sup>42</sup> That deeper understanding of the dual functions of the tax system captured by the concept of tax expenditures has led to serious calls for the reorganization of the IRS along functional lines that distinguish between the revenue raising and the social benefit administration objectives of the tax system.<sup>43</sup>

But despite its analytical usefulness, the concept of tax expenditures has a dark side, which has not been explored to date. In developing, coining, and ultimately enshrining the concept of tax expenditures in the legislative process during his tenure as Assistant Treasury Secretary for Tax Policy, Surrey did more than just succeed in showing that the tax system had blurred the pristine lines seemingly drawn by the congressional architecture—lines that separate taxing from spending. The dark side is that the concept of tax expenditures by implication divorces revenue-raising objectives from everything else (e.g., the promotion of home ownership, the prevention of poverty, or the generation of renewable energy), as a proper subject for tax policy analysis.<sup>44</sup> Former IRS Commissioner Larry Gibbs' observation—that “[t]he use of our tax system to encourage and administer . . . government spending programs has become so extensive that the focus of our tax laws and tax system appears to no longer be primarily on revenue raising”<sup>45</sup>—reflects the view held by many tax scholars and professionals that the tax system should be “primarily [about] revenue raising.”<sup>46</sup> Tax expenditures do not belong. Their growth is to be lamented.

Divorcing revenue raising from other social policy goals not only bifurcates tax provisions into those deemed to promote what Surrey and many others considered the proper objective of a tax system—raising revenue—and those that promote other objectives—social policy objectives. Like many actual divorces, it also invites a judgment about who is right and who is wrong. The concept of tax expenditures implicitly divides tax provisions into the good and the bad. Good provisions raise

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42. Surrey began to have the Treasury compile a tax expenditure budget in 1968, during his tenure as Assistant Treasury Secretary for Tax Policy, and the practice became legally mandated by the Congressional Budget and Impoundment Control Act of 1974. Surrey & McDaniel, *supra* note 3, at 681–82; *see supra* note 3. The Tax Expenditure Budget estimates costs in ways that mirror those employed to evaluate spending programs. Surrey & McDaniel, *supra* note 3, at 714 n.126.

43. NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2010 ANNUAL REPORT TO CONGRESS 15–27 (2010) (Most Serious Problem #2), [https://www.irs.gov/pub/tas/2010arcmsp2\\_irsmission.pdf](https://www.irs.gov/pub/tas/2010arcmsp2_irsmission.pdf); Kristin E. Hickman, *Pursuing a Single Mission (or Something Closer to It) for the IRS*, 7 COLUM. J. TAX L. 169, 185 (2016).

44. The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, required the promulgation of an annual Tax Expenditure Budget. *See* Surrey & McDaniel, *supra* note 3, at 682–85, 709.

45. Gibbs, *supra* note 25, at 146; *see also* Weisbach & Nussim, *supra* note 30, at 958, 961–65, 979–80 (remarking on the administrative advantages of using the Code to regulate corporate governance and similar behavior, and minimize deadweight loss).

46. *See infra* notes 72–76.

revenue; that is what tax provisions are supposed to do. Bad provisions spend revenue, which is incompatible with the essential fiscal goal of taxation. Those bad provisions are the ones that promote social policy objectives—tax expenditures. This generally embraced bifurcation, including the attendant judgments about what is good and what is bad, contributes to a view of tax as fundamentally different from other fields of law. For unlike other fields of law, which are uncontroversially acknowledged to promote diverse and often conflicting values,<sup>47</sup> tax law is assumed to properly promote only one value: raising revenue.<sup>48</sup> All of the other values the tax law actually promotes are seen as pollutants from outside of tax. The concept of tax expenditures operationalizes that view.

To understand more deeply how tax expenditures contribute to the view that the role of the tax system is principally to raise revenue, how

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47. For example, the criminal law is widely thought to promote the values of deterrence, retribution, and rehabilitation; the tort law is known to be concerned with fault and compensation, among others.

48. That the primary goal of the income tax system should be to raise revenue has been stated so often that it has assumed the status of truism, rarely challenged or analyzed. The authorities range from the Supreme Court, to government agencies, to countless scholars, including, of course, Surrey. See, e.g., *Thor Power Tool Co. v. Comm'r*, 439 U.S. 522, 542 (1979) (“The primary goal of the income tax system, in contrast, is the equitable collection of revenue; the major responsibility of the Internal Revenue Service is to protect the public fisc.”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-1009SP, UNDERSTANDING THE TAX REFORM DEBATE: BACKGROUND, CRITERIA, & QUESTIONS 5 (2005), <http://www.gao.gov/assets/210/202725.pdf> (“The primary purpose of the tax system is to collect the revenue needed to fund the operations of the federal government, including its promises and commitments.”); SURREY, PATHWAYS, *supra* note 8, at 6. (“A tax system that is so vulnerable to this injection of extraneous, costly, and ill-considered expenditure programs is in a precarious state from the standpoint of the basic tax goals of providing adequate revenues and maintaining tax equity.”); Rosanne Altshuler, *The Case for Fundamental Tax Reform*, 21 KAN. J.L. & PUB. POL’Y 399, 400 (2012) (“The state of our current system reflects a collective disregard that the fundamental purpose of the tax system is to raise revenues to fund government.”); William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 325–326 (1972) (“The primary intended effect of a direct, personal tax must be to divert economic resources away from personal consumption and accumulation. Some part of the national output which would otherwise be consumed or accumulated by private individuals is to be devoted to public purposes.”); Matthew Dimick, *Should the Law Do Anything About Economic Inequality?*, 26 CORNELL J.L. & PUB. POL’Y 1, 4 n.7 (2016) (“While certainly the tax system is a species of the legal system, a more substantive distinction might be that legal rules are explicitly intended to regulate behavior, while the purpose of the tax system is to raise revenue for public goods or redistribution. Indeed, when public goods provision or redistribution is the objective, the ideal forms of taxation are those whose effects on behavior are *as small as possible*. Note that this distinction does not challenge the notion that the tax system could also be used for ‘non-tax’ purposes, for example, to regulate behavior, as with corrective (also called Pigovian) taxation.”); Yoseph Edrey, *Constitutional Review and Tax Law: An Analytical Framework*, 56 AM. U. L. REV. 1187, 1209 (2007) (“The purpose of a tax system in a democratic society is to finance the policies of the elected government.”); Robert B. Eichholz, *Should the Federal Income Tax Be Simplified?*, 48 YALE L.J. 1200, 1202 (1939) (“By definition, the primary requisite of a good tax law is that it raise revenue.”); James Edward Maule, *Tax and Marriage: Unhitching the Horse and the Carriage*, 67 TAX NOTES 539, 549–50 (1995) (“Not only is the tax law, which should be the simplest device possible for raising revenue, an inappropriate social regulation device, it also has evolved into a complex jumble of words because of the inconsistent goals, and alternating legislative successes, of diametrically opposed social regulators.”); Jeffrey Partlow, *The Necessity of Complexity in the Tax System*, 13 WYO. L. REV. 303, 316 (2013) (“Although the primary purpose of the tax system is to collect revenue, Congress also uses the system to promote and discourage certain behaviors, attain social and economic goals, and occasionally help individual taxpayers.” (footnotes omitted)).

that view can contribute to the relative lack of diversity in the tax bar, and how the concept of tax expenditures can be reconciled with an understanding of the tax system as the proper locus for both raising and spending revenue, it is helpful to examine the development of the concept.

Surrey did not just wake up one morning and alight on the concept of tax expenditures. Instead, his writing reveals an evolutionary process that spanned a decade.<sup>49</sup> Surrey began by observing that some tax provisions were “special” because they departed from “the criterion of equity or fairness . . . [which] demands that the income-tax burden should as far as possible apply equally to persons with the same dollar income.”<sup>50</sup> He tried to examine why Congress would enact such “special” provisions, which were “not properly justified by the requirements of other criteria,”<sup>51</sup> and which threatened the integrity of the income tax and its continued viability.<sup>52</sup> Writing in the *Harvard Law Review*, Surrey deliberately avoided using terms like “loophole,” choosing instead the more neutral “special tax provisions.”<sup>53</sup>

The “special tax provisions” Surrey invoked included the “exceedingly preferential treatment of capital gains; percentage depletion; the exemption of interest on state and local obligations; the continual expansion of deductions for personal expenses unrelated to profit-seeking activities; the provisions for the blind and the aged; and the exemption of certain fringe benefits,”<sup>54</sup> as well as provisions that served to benefit only one, or very few, taxpayers “such as the so-called ‘Louis B. Mayer amendment.’”<sup>55</sup>

Surrey’s indictment was that “these provisions run counter to our notions of tax fairness.”<sup>56</sup> They were enacted because special interest groups proposed them, and often there was no one but an inattentive and

49. Compare Stanley S. Surrey, *The Congress and the Tax Lobbyist: How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1146, 1149 (1957) [hereinafter Surrey, *Congress and the Tax Lobbyist*] (discussing oft-criticized “special tax provisions”), with Surrey & Hellmuth, *supra* note 11, at 528 (introducing the concept of “tax expenditures”).

50. Surrey, *Congress and the Tax Lobbyist*, *supra* note 49, at 1146–47.

51. *Id.* at 1147.

52. *Id.* at 1146, 1181 (asserting a “growing concern with the integrity of the tax system” and observing that continued “success with our federal-tax structure demands . . . constant alertness to the correction of faults as they appear”).

53. *Id.* at 1148–49.

54. *Id.* at 1147.

55. *Id.* The Mayer Amendment allowed capital gain treatment for certain distributions of employers’ profits; according to Surrey, it was

generally assumed that the amendment at the time covered only two persons, Louis B. Mayer, retired vice-president of Loew’s, Inc., and one other executive in the company, and that the amendment saved Mayer about \$2,000,000 in taxes . . . The 1954 Code, while continuing the provision, which had been adopted in 1951, underscored its special character by restricting its application to contracts entered into prior to the 1954 Code.

*Id.* at 1147 n.4.

56. *Id.* at 1148.



overwhelmed Treasury to come to the defense of the tax system and the taxpaying public at large.<sup>57</sup> Thus, even as they were being conceived, what came to be known as tax expenditures were seen as being not only outside the ambit of a sound system of taxation but as antagonistic to it. Even though a full decade elapsed before the “special tax provisions” that Surrey referred to in 1957 became the “tax expenditures” that he publicly identified in 1967,<sup>58</sup> his view of their essential nature as provisions that did not belong in the income tax system remained intact. These provisions were not a regular part of the tax law—they were special, and they were unfair.

Surrey’s views evolved—not with respect to the special nature of tax expenditures, but with respect to their outsider status.<sup>59</sup> By the time he introduced the term tax expenditures, Surrey was no longer objecting to the relative advantages enjoyed by the lobbyists who proposed them or to the assault on horizontal equity they represented.<sup>60</sup> The heart of the case Surrey made when he introduced the concept of tax expenditures in 1967 was that these were actually spending provisions and should be identified and treated as such.<sup>61</sup> He therefore called for a “full accounting” of such provisions.<sup>62</sup> Although he was keenly aware of the definitional issues posed by the need to determine “which tax rules are special provisions and therefore tax expenditures, and which tax rules are just tax rules; simply part of the warp and woof of a tax structure,”<sup>63</sup> he did not regard that difficulty as an insurmountable obstacle.<sup>64</sup> Instead, he adopted the pragmatic, relatively modest view espoused by the Treasury

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57. *Id.* at 1158–71. Surrey enumerated a number of aspects of the tax legislative process that made it vulnerable to the pleas of special interest groups seeking favors. *Id.* at 1153–82. Perhaps chief among those he noted:

[T]here are no private pressure groups actively defending the integrity of the tax structure.

As a consequence, the congressman does not see a dispute over a special provision as one between a particular group in the community and the rest of the taxpaying public. He sees it only as a contest between a private group and a government department. He begins to think of the government department as representing only itself and as having no identification with the public and with taxpayers in general. Far too often this picture passes swiftly into that of a hard-pressed, struggling group of citizens engaged in worthy endeavors only to be opposed by an unsympathetic bureaucracy. When this image appears, victory for the special tax provision is inevitable.

*Id.* at 1166. Interestingly, Erwin Griswold later reported that what Surrey wrote in this article posed some difficulty for him as he went through the confirmation process preliminary to his becoming Assistant Treasury Secretary for Tax Policy in 1961. Griswold, *supra* note 5, at 330.

58. *See supra* note 11.

59. *See* Surrey & Hellmuth, *supra* note 11, at 530 (describing the “many provisions” in tax law that function as “alternatives to direct expenditures, loan programmes and loan guarantees to influence the direction of economic activity or to provide assistance to special groups”).

60. *See id.*

61. *Id.* at 528–29.

62. *Id.*

63. Surrey, *Tax Incentives*, *supra* note 8, at 706.

64. *See id.* at 706–07.

Department which he led.<sup>65</sup> As a Treasury Report issued under his guidance had explained:

The immediate objective . . . of this study is to provide a list of items that would be generally recognized as more or less intended use of the tax system to achieve results commonly obtained by government expenditures. The design of the list seems best served by constructing what seemed a minimum list rather than including highly complicated or controversial items that would becloud the utility of this special analysis.<sup>66</sup>

Although Surrey spent much of his career championing, defending, and refining the concept of tax expenditures, when he returned to academia in 1969, his steadfast adherence to the full accounting objective allowed him to remain above the fray of the debates that raged alongside the controversy over tax expenditures.<sup>67</sup> Most notable among these was the debate over whether the tax system should endeavor to adopt a comprehensive tax base (CTB), whose proponents urged the removal of all provisions inconsistent with a CTB, including tax expenditures.<sup>68</sup> In addition, Surrey's pragmatic approach to the definitional issues allowed him to largely dismiss the concerns raised by scholars like Professor Boris Bittker, who was not an advocate of the CTB but who nevertheless challenged the utility of tax expenditure analysis.<sup>69</sup>

Surrey came to see the removal of tax expenditures from the tax system as providing a "pathway to tax reform."<sup>70</sup> That objective persists in many quarters to this day, and scholars have generated an impressive

65. *Id.*

66. *Id.* at 707 (quoting U.S. DEP'T OF THE TREASURY, ANNUAL REPORT ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1968, at 330 (1969)).

67. See Surrey & Hellmuth, *supra* note 11, at 528, 530 (explaining "[t]he purpose of the tax expenditure budget" as "allow[ing] decisions which make the most effective use of all budgetary resources").

68. See Charles O. Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR*, 81 HARV. L. REV. 1016, 1018-19 (1968). The debate over the CBT may have contributed to the outsider status of tax expenditures by reinforcing their characterization as an improper part of the tax system.

69. Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 260 (1969). In their response to Bittker's 1969 critique, Surrey and Hellmuth charged that "Bittker puts up a straw man which he proceeds to beat without mercy—and a Bittker beating is indeed an awesome sight." Surrey & Hellmuth, *supra* note 11, at 531. After beginning by noting that it was "not easy to be clear as to just what one is responding to," *id.* at 528, they characterized Bittker's critique as little more than a quibble with Surrey's placement of the adjective "full" before "accounting." *Id.* at 530. They contended that if Surrey had only sought "'an accounting,' it is hard to see how [Bittker's] article would have been written." *Id.* They believed that Bittker was in essential agreement with their characterization of tax expenditures as spending provisions, which was what they regarded as important, so they were dismissive of his critique. *Id.*

70. SURREY, *PATHWAYS*, *supra* note 8, at vii. For a contemporary version, see Leonard E. Burman, *Pathways to Tax Reform Revisited*, 41 PUB. FIN. REV. 755, 756 (2013). See also Sugin, *supra* note 12, at 7.

body of work examining the analytical path that ought to be followed in orchestrating the eradication or reduction of tax expenditures.<sup>71</sup>

Indeed, for the great majority of tax lawyers and policy makers, it is nearly an article of faith that tax expenditures are bad.<sup>72</sup> The conventional thinking is that if only Congress would cease being so craven as to use the tax system for political expediency,<sup>73</sup> the tax system could be stripped of tax expenditures and become the pristine revenue-raising machine it ought to be.<sup>74</sup> This view of tax expenditures as bad persists from the heights of tax scholarship—with a scholar as respected and prolific as Professor Daniel Shaviro proclaiming that it is imperative to “[k]eep the tax laws clean of tax preference provisions, henceforth and forever”<sup>75</sup>—to novice law students who express the view that Congress

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71. See, e.g., C. David Anderson, *Conventional Tax Theory and “Tax Expenditures”: A Critical Analysis of the Life Insurance Example*, 57 TAX NOTES 1417, 1418 (1992); Leonard E. Burman, *Is the Tax Expenditure Concept Still Relevant?*, 56 NAT’L TAX J. 613, 614 (2003); Fleming & Peroni, *supra* note 9, at 444–45; Marianne T. Hill & Edward L. Ranck, *Tax Expenditures or Tax Loopholes?*, J. ST. TAX’N, Summer 1992, at 15, 15–16; Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 TAX NOTES 1661, 1662–63 (1992); Edward D. Kleinbard, Lecture, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1, 1–3 (2010); Eric T. Laity, *The Corporation as Administrative Agency: Tax Expenditures and Institutional Design*, 28 VA. TAX REV. 411, 413 (2008); Gregg D. Polsky, *Rationally Cutting Tax Expenditures*, 50 U. LOUISVILLE L. REV. 643, 643–44 (2012); David M. Schizer, *Limiting Tax Expenditures*, 68 TAX L. REV. 275, 275–76 (2015); Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 188–89 (2004); Thuronyi, *supra* note 9; Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, LAW & CONTEMP. PROBS., Winter 2010, at 233, 262–64.

72. Hill & Ranck, *supra* note 71, at 21; Laity, *supra* note 71; see also, e.g., Logue, *supra* note 9, at 1524–25; Schizer, *supra* note 71, at 275.

73. One party favors reducing taxes and the other favors spending on social programs, so tax expenditures are a marriage made in heaven (at least in times of bipartisan tax lawmaking), because they do both. As former IRS Commissioner Larry Gibbs has observed:

The use of our tax system to accomplish social, economic, and fiscal objectives of our politicians and to replace direct spending programs has grown so large that today our tax law and tax system are at the center of the contentious fiscal disagreement between our two political parties. One party wishes to raise taxes and the other wishes to reduce spending, but both parties only prolong a year-by-year extension of a significant portion of our present tax law.

Gibbs, *supra* note 25, at 146.

74. Identification of this dynamic predates Surrey’s coining of the term tax expenditures. Bittker, *supra* note 69, at 244–45. In 1959 Walter Heller observed that

The back door to government subsidies marked “tax relief” is easier to push open than the front door marked “expenditures” or the side door marked “loans, guarantees, and insurance.” Rather than run the gauntlet of the Budget Bureau and the congressional Appropriations Committees, groups seeking subsidies turn to the tax committees of Congress for Government support without Government interference.

*Id.* at 244 (quoting Walter Heller, *Some Observations on the Role and Reform of the Federal Income Tax*, in 1 HOUSE COMM. ON WAYS & MEANS, TAX REVISION COMPENDIUM, 181, 190 (1959)). For a more contemporary analysis, to the same effect, see Christopher Faricy, *The Politics of Social Policy in America: The Causes and Effects of Indirect Versus Direct Social Spending*, 73 J. POL. 74, 75–76 (2011); see also Charles Fried, *Whose Money Is It? One Side’s Tax Cut Is the Other Side’s Grant*, WASH. POST, Jan. 1, 1995., at C7.

75. Logue, *supra* note 9, at 1525. According to Professor Logue, Professor Shaviro “does not contend that Congress should never intervene in the economy to encourage one type of investment over another. Indeed, he expressly rejects that conclusion. But he is clearly arguing that Congress should not, for the reasons just stated, intervene *through the tax system* to encourage one type of investment over another.” *Id.* (emphasis added).

should eliminate tax expenditures so that it “can concentrate more on the intended purpose of the tax law: to raise revenue and to redistribute income.”<sup>76</sup>

This party-crasher view of tax expenditures, which regards them as different from *real* tax provisions, (and different in a negative way, which justifies their eradication) has an important but unexamined consequence. It supports the view that the promotion of social values, which unabashedly accounts for the classification of a provision as a tax expenditure, is itself a party crasher.

As we will show more fully in Section I.C, that view is wrong and should be abandoned. It should be replaced with a view that acknowledges that social values are necessarily intrinsic to the tax system. The reason is not that tax expenditures *qua* tax expenditures are a proper part of the tax system and may offer the best or most efficient delivery of the intended benefit, as Dr. Joseph Pechman<sup>77</sup> and some noted scholars have argued.<sup>78</sup> We take no position on the ongoing debate between scholars who embrace the concept of tax expenditures and those who urge its abandonment on pragmatic or efficiency grounds. We argue instead that the bifurcated view of the tax system should be replaced with a unified view that acknowledges the influence of social values and the promotion of social policies throughout the tax system, and not only through tax expenditures.

There are several reasons to adopt this more holistic view of the role of social values. But for anyone who values diversity, the most important reason is that doing so may be crucial to attracting a more diverse group of individuals to the study and practice of tax.<sup>79</sup> Bluntly put, a field which is acknowledged to be concerned with multiple values is likely to attract a more diverse contingent of students and practitioners than a field which claims only one value. If tax is seen as a field concerned only with the value of raising revenue, it is likely to attract a more uniform group of individuals than if it is seen as a field concerned with multiple values, including social justice values. And as the data we discuss in Part II suggest, that more diverse contingent may well include lawyers who see entry into the legal profession as affording “the opportunity to change or

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76. Uy, *supra* note 1, at 142.

77. Joseph A. Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63, 66 (1967).

78. See, e.g., EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY 251–52 (2015); Sugin, *supra* note 12, at 10; Tahk, *Everything Is Tax*, *supra* note 39, at 68–69; see also Kornhauser, *supra* note 9, at 254 n.6 (providing a compendium of the scholarship favoring the use of tax expenditures on efficiency grounds).

79. If it were not the case that all of the tax law reflects social values we could rightly be accused of attempting to mislead socially conscious students or lawyers into becoming tax lawyers. But because the tax law really does reflect social values in all of its provisions, beginning with the rate structure in IRC § 1, such an accusation is unwarranted on its face.

improve society” to “help individuals,” and to engage in “socially responsible work.”

### *C. Beyond Tax Expenditures: Social Values in Tax*

It is simply incorrect to maintain that the tax system would be purged of social values even if Professor Shaviro’s dream came true and all tax expenditures were excised from the Code “henceforth and forever.”<sup>80</sup> To understand why this is so, assume that the premise underlying the concept of tax expenditures is true: namely, that an ideal tax system is concerned exclusively with raising revenue. Operationalizing such a system requires answering at least four specific questions.

The first question involves what the system would tax. Focusing on the goal of raising revenue will not answer that question because the government can raise revenue by taxing different things. To answer the question, policy makers must choose among competing social policies. For example, if the desire is to design the system around taxpayers’ ability to pay, income might serve as the base. On the other hand, if the desire is to promote the availability of resources for public use, consumption might serve as the base. And if the desire is to do both, a hybrid system would result, which is precisely what the current system is. Our point is not to pass judgment on the merits of hybridity versus purity or on the taxation of income versus consumption, but rather to point out that focusing on the goal of raising revenue does not determine whether we choose to tax income, consumption, or a mixture of the two. Decisions about social policy determine that. Moreover, once that decision is made—say, in favor of taxing income—there would still be a need to decide how to define income. Reflecting on the objective of raising revenue alone cannot do that.<sup>81</sup>

The second question involves determining who should be taxed. Decades ago, Professor Bittker demonstrated that it is impossible to tax all individuals and all married couples alike and still have a progressive tax system.<sup>82</sup> Because all three objectives cannot coexist simultaneously, choices must be made among them in designing the tax system.<sup>83</sup> But focusing on the goal of raising revenue does not determine those choices. Instead, decisions must be made about which social policy goal or goals to sacrifice. The current system favors progressivity and equal taxation of married couples over the equal taxation of individuals, creating the

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80. See *supra* note 75 and accompanying text.

81. See Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 299–300 (2011).

82. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1442–43 (1975).

83. See Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1725 (2014) (“Congress seems doomed to choose between disfavoring single individuals or married couples in determining the income tax rate brackets and the standard deduction.”).

marriage penalties and marriage bonuses so familiar to tax scholars, as well as to many taxpayers.<sup>84</sup> But the penalties and bonuses result from decisions about the unit of taxation—decisions that are made with reference to factors which may include, but must transcend, raising revenue.

The third question involves determining what the rate structure should look like. Vertical equity means taxing based on the ability to pay, but that does not necessarily mean that the tax rate should increase as ability to pay increases. For example, taxes could be levied proportionately—at the same rate regardless of ability to pay—or even regressively, so that tax burdens increase as ability to pay decreases. Focusing on the goal of raising revenue does not determine this choice. Policy considerations not directly related to raising revenue come into play, (e.g., promoting investment or ensuring a minimum level of subsistence). More generally, the choice of rate structure is a choice among different competing visions of what a just society looks like.

The fourth question involves determining whether the ideal tax system should reflect horizontal equity. Answering that question again requires consideration of what a just society looks like. If a just society requires that the tax system reflect horizontal equity, the tax system will tax similarly situated taxpayers similarly. But that requires a determination of what it means for two taxpayers to be similar. If the tax base is income, is a working taxpayer who receives \$100 of wages like an impoverished taxpayer who receives \$100 of welfare benefits? If the base is consumption, is a taxpayer who consumes \$100 of food like one who consumes \$100 of manicures? Furthermore, is a taxpayer who consumes \$100 of vegetables like one who consumes \$100 of sugary drinks? Focusing on the goal of raising revenue does not answer questions like these. Rather, the answers depend on choices among different social policies.<sup>85</sup> Moreover, once those decisions are made, the job is not finished. Deciding to treat wages like welfare benefits (or not), or the consumption of food like the consumption of manicures (or not), still requires deciding

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84. The literature on the marriage penalty is voluminous. For a recent example, see Margaret Ryznar, *A Practical Solution to the Marriage Penalty*, 44 PEPP. L. REV. 647, 656 (2017). See also Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 798 (1997); Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 330 (2016); Robert S. McIntyre & Michael J. McIntyre, *Fixing the "Marriage Penalty" Problem*, 33 VAL. U. L. REV. 907, 919 (1999); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 5–6 (2000); Lawrence Zelenak, *For Better and Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C. L. REV. 783, 784–85 (2015). The 2017 tax legislation, originally titled the "Tax Cuts and Jobs Act," eliminated rate-based marriage penalties at all but the 35% bracket, subject to a sunset, as with many of the individual provisions of that legislation; nevertheless, it left other marriage penalties, and bonuses, intact. See I.R.C. § 1 (2018); Allyson Versprille, *Final Tax Bill Keeps Marriage Penalty, But Only for Top Earners*, BNA: DAILY TAX REP. (Dec. 18, 2017), <https://www.bna.com/final-tax-bill-n73014473351>.

85. The need to make choices does not disappear even if a just society is thought not to require that the tax system reflect horizontal equity; it will need to decide who is like whom and who will be better or worse off. Only resorting to social values can help to make those determinations.

what counts as wages, welfare, food, and manicures. Focusing on the goal of raising revenue will not answer any of these questions.

Our point should be apparent: Because there are multiple ways of raising revenue through taxation, fundamental social values are integral to the specific design of any tax system. Therefore, even if the tax system were thought to be concerned solely with raising revenue—which is the underlying premise of Surrey’s concept of tax expenditures—choices among social values are essential.<sup>86</sup>

If focusing on raising revenue does not eliminate the need to choose among competing social policies, among competing social values, or among competing visions of a just society, then it means that raising revenue cannot be disengaged from the kind of policies, values, and visions that are reflected in tax expenditures. In other words, provisions classified as tax expenditures are not the only ones that implicate social values. The concept of tax expenditures may be useful because it can make patent that a particular policy objective can be achieved by a variety of means—the tax system or some system of direct expenditures or subsidies. But that does not mean that tax expenditures have a monopoly on the promotion of social values in the tax law.

The identification of the concept of tax expenditures captured the imagination of scholars and policy makers because, like the scholarship that preceded it, it pointed out the existence of multiple means to realizing a policy objective and allowed for the weighing of the costs and benefits associated with the selection of one means over another. It delivered on the promise of transparency. The concept was useful in that way, and for purposes of this Article we are agnostic on the desirability of its abandonment. But our claim is that its very utility has allowed the bifurcation of the Code into tax expenditures and proper tax provisions, and that bifurcated view has defined taxation on the macro level.

The bifurcated view maps perfectly onto the constitutional and congressional architecture that divides fiscal policy into taxing and spending. It is therefore not surprising that this bifurcation has led to the assumption that tax expenditures are extraneous to tax: the tax committees cannot engage in direct spending. It also implies that the promotion of the policies typically fostered by spending programs is extraneous to tax: the spending committees cannot levy a tax. Despite the tenacity of this bifurcated view, apparently encouraged by the constitutional and congress-

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86. Cf. Allison Christians, Introduction to Tax Policy Theory 1, 6–7, 21 (May 29, 2018) (unpublished paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3186791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186791) (arguing that the fundamental tax value of efficiency justifies Pigouvian taxes (taxes designed to create disincentives to engage in certain activities) by forcing the taxpayer to internalize externalities); see also Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3, 23–24 (2006) (arguing that the basic goals of taxation include “steer[ing] private sector activity in the directions desired by the government” and that tax expenditures are an effective tool for accomplishing this).

sional architecture, we challenge the assumption that the promotion of social policies is extraneous to tax.

We are not the first scholars to mount such a challenge. Indeed, the core of Professor Bittker's critique of the concept of tax expenditures back in 1969 was that it did not really distinguish between structural provisions that were not classified as tax expenditures and those that were so classified.<sup>87</sup> In a *tour-de-force* dissection of the tax system, Professor Bittker demonstrated that even the rate structure,<sup>88</sup> the determination of the unit of taxation,<sup>89</sup> the separate taxation of the income of corporations,<sup>90</sup> and the provisions that determine the timing of income and deductions could be recast as tax expenditures.<sup>91</sup> All of those provisions, he pointed out, involved precisely the same type of value choices attributed to tax expenditures, and the objectives they promoted might also be recast as government expenses or subsidies, as the case may be.<sup>92</sup> In other words, Professor Bittker pointed out that there was no fundamental difference between structural provisions designed for the principal purpose of raising revenue and tax expenditures. Although he did not conclude that the concept of tax expenditures was devoid of insight, Professor Bittker maintained that the insight fell far short of the "full accounting" that Surrey advocated.<sup>93</sup> We agree with Professor Bittker and think that the reason the concept of tax expenditures cannot offer the full accounting Surrey sought is precisely the reason tax expenditures should not be regarded as the only purveyors of social values: all tax provisions implicate social values and require choices among competing values.

In sum, we believe that embrace of the concept of tax expenditures led to the unexamined assumption that the tax system should be purged of provisions that promote social values unrelated to taxation. That, in turn, generated a widespread perception of the tax system as one properly concerned only with raising revenue. That perception might, in further turn, be dissuading individuals whose career objectives prioritize the promotion of social values from becoming schooled in the tax law.

If, for example, individuals who are members of racial or ethnic minorities are more likely than others to prioritize the professional pursuit of a particular subset of social values—one that we will refer to as "social justice values"—then the view of the tax system as the bastion of a monolithic set of values unconnected to the pursuit of values like justice could be contributing to the relative lack of diversity in the tax bar. We now turn to an exploration of that relative lack of diversity and its possi-

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87. Bittker, *supra* note 69, at 245.

88. *Id.* at 251.

89. *Id.* at 253.

90. *Id.* at 254.

91. *Id.* at 257.

92. *Id.* at 253.

93. *Id.* at 261.



ble connection to the lack of appreciation for the role of social values in the tax law.

## II. THE TAX BAR IS VERY WHITE

### A. Revelations from the Available Data

The bar is much less diverse than the population as a whole—a fact that is both well-known and troubling.<sup>94</sup> As recently as 2014, nearly 38% of the population was composed of members of racial or ethnic minority groups, but only 14.5% of employed lawyers were members of such groups in 2015.<sup>95</sup> Moreover, although nearly 27% of law graduates in 2014 were members of minority groups, the following year only 13.97%

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94. Popular press accounts of the lack of diversity in the legal profession are legion, as a quick Google search for “diversity in lawyers,” which turned up 73,900,000 results on November 1, 2016, shows. The first four search results alone are telling: Debra Cassens Weiss, *Only 3 Percent of Lawyers in BigLaw are Black, and Numbers Are Falling*, ABA JOURNAL (May 30, 2014, 12:18 PM), [http://www.abajournal.com/news/article/only\\_3\\_percent\\_of\\_lawyers\\_in\\_biglaw\\_are\\_black\\_which\\_firms\\_were\\_most\\_diverse](http://www.abajournal.com/news/article/only_3_percent_of_lawyers_in_biglaw_are_black_which_firms_were_most_diverse); Aviva Cuyler, *Diversity in the Practice of Law: How Far Have We Come?*, GP SOLO (September/October 2012), [https://web.archive.org/web/20170109033204/https://www.americanbar.org/publications/gp\\_solo/2012/september\\_october/diversity\\_practice\\_law\\_how\\_far\\_have\\_we\\_come.html](https://web.archive.org/web/20170109033204/https://www.americanbar.org/publications/gp_solo/2012/september_october/diversity_practice_law_how_far_have_we_come.html); *Minorities & Women*, NALP, <http://www.nalp.org/minoritieswomen> (last visited Aug. 31, 2018); Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that>. A recent report produced in California in connection with that state’s decision on whether to reduce the “cut score” for passing the bar exam considered the racial and ethnic composition of the California bar and concluded that “California’s attorney population remains disproportionately white and male.” STAFF, COMM. OF BAR EXAM’RS, THE STATE BAR OF CAL., REPORT TO THE ADMISSIONS AND EDUCATION COMMITTEE AND THE COMMITTEE OF BAR EXAMINERS REGARDING PUBLIC COMMENTS ON THE STANDARD SETTING STUDY 23 (2017), <http://apps.calbar.ca.gov/cbe/docs/agendaitem/Public/agendaitem1000001998.pdf> [hereinafter CALIFORNIA BAR REPORT]. The California Bar Report compared “the demographic make-up of California with the findings of a recent survey of licensed attorneys in California,” using only the population of people over eighteen, and the results were stark. *Id.* In tabular form, they are as follows:

	<u>% Population</u>	<u>% Licensed Attorneys</u>
Latinos	35.4%	<5%
African Americans	5.9%	<2%
Asians	13.8%	<6%

The report noted that “[a]t the current pass line . . . the pass rate of whites is 97.1 percent higher than that of African Americans, a gap of 33.5 percentage points,” *id.* at 20, and then went on to calculate the relative pass rates if the pass line were lowered in varying degrees. *Id.* Proposals to change the bar passage rate a school must demonstrate to obtain or retain accreditation or to change the format of the exam are also attacked on the ground that they will result in a less diverse bar. See Dennis P. Saccuzzo & Nancy E. Johnson, *California’s New Bar Exam Format in Conjunction with ABA’s Proposed Bar Pass Standard Will Adversely Impact Diversity, Women and Access to the Profession*, TAXPROF BLOG 1–2, 8, (Jan. 30, 2017), <http://taxprof.typepad.com/files/taxprof-blog-op-ed-adverse-impact-on-diversity.pdf>.

95. MP McQueen, *A Slow Rise: The Diversity Scorecard Survey Shows a Modest Rise in Minority Lawyer Numbers at Large Law Firms*, AM. LAW., June 2016, at 42, 43. The data on employed lawyers came from the Department of Labor and is broken down by race and ethnicity: 4.6% black, 4.8% Asian, 5.1% Latino/Hispanic. *Id.* The 38% figure came from census data. See *New Census Bureau Report Analyzes U.S. Population Projections*, U.S. CENSUS BUREAU (March 3, 2015), <http://www.census.gov/newsroom/press-releases/2015/cb15-tps16.html>. This data is consistent with that reflected in *Race and Ethnicity in the Legal Profession* (the *Race and Ethnicity Monograph*). WILDER, *supra* note 18, at 8.

of lawyers at large law firms were members of such groups<sup>96</sup>—notwithstanding that members of minority groups who take “jobs in private practice are more likely to join firms of more than 100 attorneys compared with non-minority graduates.”<sup>97</sup> Efforts to increase the diversity of the bar through affirmative action and similar programs abound,<sup>98</sup> and seem to have increased the number of minority students admitted to law school and hence the number of such students that pass the bar,<sup>99</sup> but the disparity remains.<sup>100</sup> Bar passage rates generally are lower for members of ethnic and racial minority groups,<sup>101</sup> although there are significant differences among minority groups.<sup>102</sup>

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96. See NAT'L ASS'N FOR LAW PLACEMENT, NALP DIVERSITY THROUGH INFOGRAPHICS: FROM LAW SCHOOL TO PARTNERSHIP 11 (2016), <http://www.nalp.org/uploads/Membership/2016NALPDiversitythroughInfographics-FromLawSchooltoPartnership.pdf>.

97. *Id.*

98. A number of organizations, including the ABA, have “pipeline” and other programs designed to attract young members of minority groups to the law. For example, the ABA’s council for Racial and Ethnic Diversity in the Educational Pipeline works to “increase diversity and inclusion in the educational pipeline to the legal profession.” *Council for Diversity in the Educational Pipeline*, ABA, [http://www.americanbar.org/groups/diversity/diversity\\_pipeline.html](http://www.americanbar.org/groups/diversity/diversity_pipeline.html) (last visited Oct. 11, 2018). Its Commission on Racial and Ethnic Diversity in the Profession has established numerous groups whose mission is to develop programs and initiatives that will increase diversity in the profession. *Commission on Racial and Ethnic Diversity in the Profession*, ABA, <http://www.americanbar.org/groups/diversity/DiversityCommission.html> (last visited Oct. 11, 2018). Other organizations devote time and resources to the goal of increasing the diversity of the legal profession. See *About LCLD*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY, <https://www.lclcdnet.org/about> (last visited Oct. 11, 2018); *About Us*, ALFDP, <http://alfdp.com/about> (last visited Aug. 18, 2018); *Advancing Diversity, Inclusion and Equity*, MCCA, <https://www.mcca.com> (last visited Oct. 11, 2018); CTR. FOR LEGAL INCLUSIVENESS, <http://centerforlegalinclusiveness.org> (last visited Oct. 11, 2018).

99. See Henry Ramsey, Jr., *Historical Introduction* to LINDA F. WIGHTMAN, *LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY* iv, viii (1998), [https://ia800208.us.archive.org/29/items/ERIC\\_ED469370/ERIC\\_ED469370.pdf](https://ia800208.us.archive.org/29/items/ERIC_ED469370/ERIC_ED469370.pdf). The *LSAC National Longitudinal Bar Passage Study (LSAC Study)* sought “to find accurate and scientifically valid answers to the questions of how minority students performed in law school and on the bar examination.” *Id.* at vi. The LSAC used “[d]ata provided by students, their law schools, and state boards of bar examiners over a five-year period . . . to report for the first time national bar examination outcome data by ethnicity and gender and to explore factors that could explain differences in outcomes.” *Id.* at viii. The *LSAC Study* showed that “[s]pecially admitted minority law graduates are now serving our communities as responsible lawyers, professors, judges, law librarians, corporate executives, government officials, and university presidents, as well as in other positions of community leadership and service. Therefore, the debate should be put to rest about whether law school affirmative action admission programs materially increase the number of minority lawyers.” *Id.* at vii.

100. See WIGHTMAN, *supra* note 99, at 48 (1998).

101. The *LSAC Study* showed that the eventual bar passage rate was 94.8% for all participants and 84.7% for participants of color. Ramsey, *supra* note 99, at viii. Nevertheless, there were differences among categories of participants. *Id.*

102. While 96.7% of white participants and 91.5% of other participants eventually passed the bar, the rate for black participants was 77.6%; for Hispanic participants, 89%; Mexican American, 88.4%; Puerto Rican, 79.7%; American Indian, 82.2%; and Asian American, 91.9%. *Id.* Data from California, which publishes bar passage rates by members of racial and ethnic minorities, is consistent with this general pattern. In 2015, 65.4% of whites passed the bar the first time, but only 38.6% of blacks, 51.7% of Hispanics, 56.3% of Asians, and 50.5% of members of other minority groups did. STATE BAR OF CAL., *GENERAL STATISTICS REPORT: JULY 2015 CALIFORNIA BAR EXAMINATION* 2 (2015), <http://www.calbar.ca.gov/Portals/0/documents/admissions/Statistics/JULY2015STATS.121715.pdf>.

That the bar is less than half as diverse as the population would be reason enough to care about the diversity of the tax bar in particular—even if the tax bar were as diverse as the bar as a whole, the absence of proportional diversity would itself be a problem. But the absence of proportional diversity might be even more pronounced in tax. Data compiled by the American Bar Association (ABA), by the National Association for Law Placement Foundation (NALP Foundation), and by Professors David Wilkins and Mitu Gulati, seem to confirm what those of us who are members of the tax bar suspect based on our experience: the tax bar is very white,<sup>103</sup> and very possibly whiter than the bar in other fields of law.<sup>104</sup>

ABA data regarding its membership, collected during fiscal year 2014–2015, are consistent with the well-known whiteness of the bar generally. The graph below shows, by ABA section, what percentage of those members willing to disclose their racial or ethnic identity are members of racial or ethnic minority groups. Specifically, it shows that only a very small percentage—between 3% and 6% of ABA members—identified as minority.<sup>105</sup> And although the ABA data captures only lawyers who are ABA members (less than a third of all lawyers)<sup>106</sup> and is

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For all groups except Asians, the difference was greatest among applicants who graduated from unaccredited law schools. *Id.* The comparable figures there are 27.7% for whites; 0% for blacks, Hispanics, and members of other minority groups; and 37.5% for Asians. *Id.* The data for repeat test takers differs in that the differences are not nearly as great, but they exhibit the same pattern of lower bar passage rates for members of racial and ethnic minority groups than for whites. *Id.* The California bar passage statistics have generated considerable controversy, including much debate about whether the minimum score required for passing should be changed, but the controversy does not involve any breakdowns by practice area and is beyond the scope of this Article. See Paul Caron, *Judge Denies Richard Sander Access to California Bar Admissions Data to Study Racial Implications of Bar Passage Rates*, TAXPROF BLOG (Nov. 9, 2016), [http://taxprof.typepad.com/taxprof\\_blog/2016/11/judge-denies-richard-sander-access-to-california-bar-admissions-data.html](http://taxprof.typepad.com/taxprof_blog/2016/11/judge-denies-richard-sander-access-to-california-bar-admissions-data.html); Sara Randazzo, *California Judge Denies Release of Lawyer-Race Data*, WALL ST. J.: L. BLOG (Nov. 7, 2016, 7:16 PM), <https://blogs.wsj.com/law/2016/11/07/california-judge-denies-release-of-lawyer-race-data>.

103. The definition of “white,” like that of other racial and ethnic designations, is contested. For purposes of our discussion, unless we are discussing a specific data set, we will use the approach of the U.S. Census Bureau, which is to contrast white with black, American Indian/Alaska Native, Asian, 2+ Races, and Hispanic. See William H. Frey, *Census Projects New “Majority Minority” Tipping Points*, BROOKINGS (Dec. 13, 2012), <https://www.brookings.edu/opinions/census-projects-new-majority-minority-tipping-points>.

104. Because accountants do significant work in tax we considered examining the diversity of the accounting profession to see if we found the same relative lack of racial and ethnic diversity there as we did in the tax bar. The data we found reflected the ethnic and racial composition of the profession as a whole but was not broken down by areas of specialization. Because accounting encompasses much more than tax, we ultimately decided that we could not draw meaningful inferences from data on accountants and CPAs.

105. 2016 COMM’N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, ABA, GOAL III REPORT: THE STATE OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION 45 (2016), [http://www.americanbar.org/content/dam/aba/administrative/racial\\_ethnic\\_diversity/redgoalthreeereport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/redgoalthreeereport.authcheckdam.pdf) [hereinafter 2016 ABA GOAL III REPORT].

106. This is a difficult statistic to derive because the ABA does not list its total membership on its website. Nevertheless, comparing the total number of lawyers in 2015, 1,300,705, to the total number of ABA members, 416,982, as reported by the ABA in its Timeline, yields the conclusion

otherwise not robust,<sup>107</sup> it nevertheless suggests that minority representation in tax is smaller than in a number of other fields.

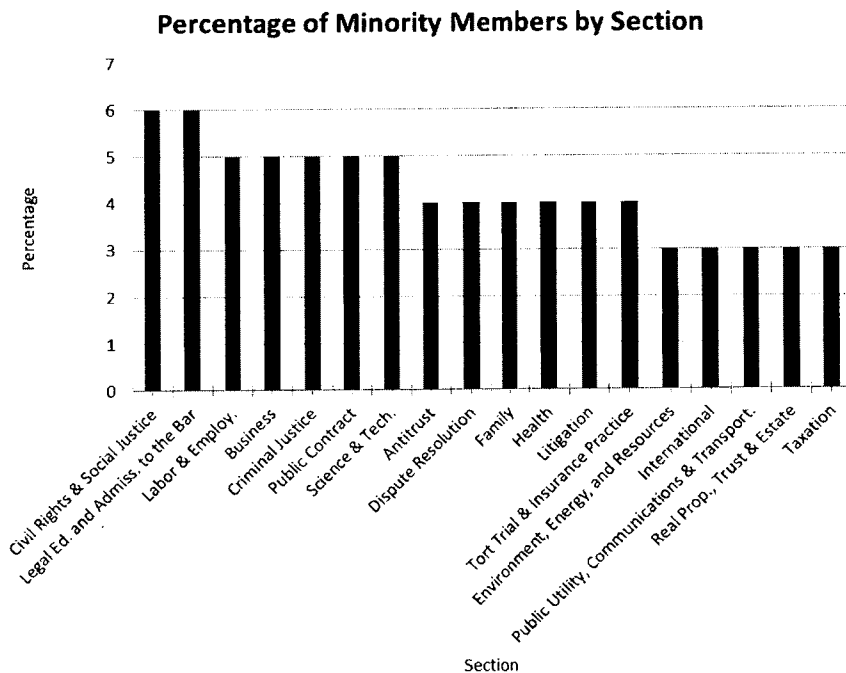
As the graph below shows, the sections on Civil Rights and Social Justice, and Legal Education and Admission to the Bar, have almost twice the proportion of minority members (6%) as the Tax section, and the sections on the Environment, Energy, and Resources, International Law, Public Utility, Communication and Transportation Law, and Real Property, Probate Trust and Estate Law (3%).<sup>108</sup> And is it mere coincidence that those 6% sections involve the areas that overtly address social values: Civil Rights and Social Justice, and Legal Education and Admission to the Bar?

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that 32.1% of lawyers are ABA members. *ABA National Lawyer Population Survey: Historical Trend in Total National Lawyer Population 1878–2018*, ABA (2018), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/Total\\_National\\_Lawyer\\_Population\\_1878-2018.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.pdf); *ABA Timeline*, ABA, [https://www.americanbar.org/about\\_the\\_aba/timeline](https://www.americanbar.org/about_the_aba/timeline) (last visited Oct. 14, 2018). Nevertheless, this conclusion likely overstates the percentage of lawyers who are ABA members because the total number of members reported by the ABA includes student members. We did not use the individual section numbers reflected in the ABA Goal III Report because some individuals belong to more than one section, so that would overstate the percentage of ABA members as well. 2016 ABA GOAL III REPORT, *supra* note 105. On the other hand, the ABA data may overstate the percentage of black lawyers who do tax work, because the NALP Foundation reported that “Black lawyers reported higher levels of participation than members of other racial-ethnic groups in bar associations and civic organizations.” WILDER, *supra* note 18, at 6.

107. The data is sometimes inconsistent. For example, data on minority membership in the section on State and Local Government was apparently not available (so it is not included in this graph), but that section, with minority membership data, is listed in the comprehensive graph on page 45. See 2016 GOAL III REPORT, *supra* note 105, at 23, 45. Deeper analysis revealed that the comprehensive graph on page 45 in the 2016 Goal III Report is the same comprehensive graph that appeared as part of the 2015 Goal III Report. 2015 COMM’N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, ABA, GOAL III REPORT: THE STATE OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION 40 (2015), [http://www.americanbar.org/content/dam/aba/administrative/racial\\_ethnic\\_diversity/2015GoalIII.aut\\_hcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/2015GoalIII.aut_hcheckdam.pdf) [hereinafter 2015 ABA GOAL III REPORT]; 2016 GOAL III REPORT, *supra* note 105, at 23, 45. Because the data in the 2016 comprehensive graph appears not to have been updated, we fear it is likely inaccurate and hence we have not relied on or reproduced any data from it here. Instead, we have relied only on the data presented in the compilations of the individual sections. Goal III Reports for years before 2015 do not contain graphs of comprehensive data. Even that data is not necessarily robust because it is reported by each section and is derived from data that is not identified and that may differ depending on the section; indeed, we believe the reported data is the result of the best efforts of whatever staff member is assigned the task of completing the form the ABA sends out annually. This is not to say that the data is without value, particularly since there is so little data that shows the distribution of racial and ethnic minorities along practice areas, but only to point out its limitations.

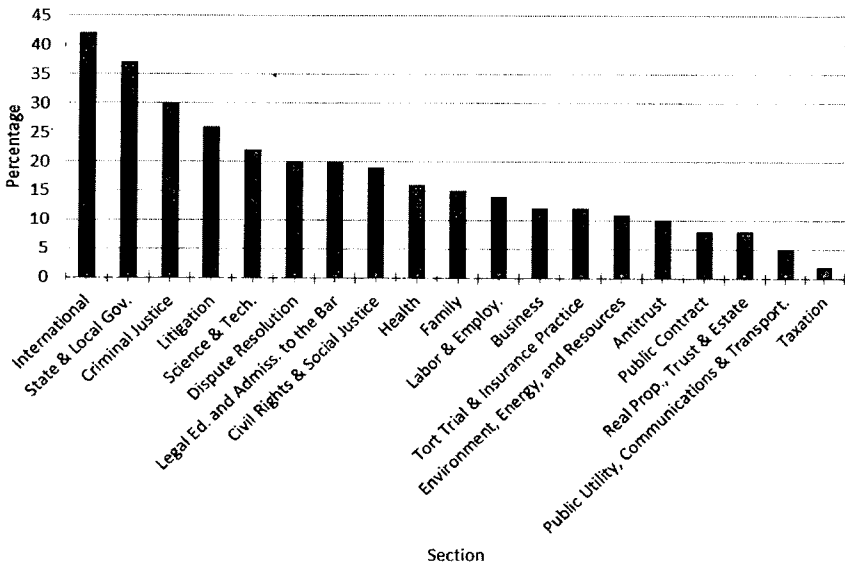
108. See 2016 ABA GOAL III REPORT, *supra* note 105, at 7–26.



It is in the percentage of minority representation in section leadership, however, that the largest differences in minority representation by practice area exist. Hence, although 3% of Tax section members were members of minority groups, only 2% of the leadership of the Tax section consisted of minority members. By contrast, other sections had disproportionately larger minority representation in leadership. For example, as the graph below demonstrates, the section on International Law had 42% minority representation in leadership, although (precisely like the Tax section) only 3% of its membership consisted of members of minority groups; the section on Criminal Justice had 30% minority representation in leadership, even though only 5% of its membership consisted of members of minority groups; and the section on Litigation had 26% minority participation in leadership, even though only 4% of its members were members of minority groups.<sup>109</sup> The graph below underscores the differences.<sup>110</sup>

109. We recognize that the data on leadership can fluctuate from year to year because of the relatively small number of leadership positions and because what positions are taken into account in determining what constitutes a leadership position seems to differ from one year to another. For example, the Tax section reportedly had 10% minority participation in leadership for the 2013–2014 year, *see* 2015 ABA GOAL III REPORT, *supra* note 107, at 24, but only 2% in 2016, *see* 2016 ABA GOAL III REPORT, *supra* note 105, at 24. The seemingly precipitous percentage drop was likely due to the much broader definition of leadership position used in the 2015 Report, which included publication authors, programming faculty and other positions not reflected in the 2016 Report, as well as fluctuations in the composition of the leadership team due to the conclusion of terms of service. For

### Percentage of Minorities in Leadership by Section



Data compiled by the NALP Foundation is perhaps even more revealing. The NALP Foundation surveyed lawyers a few years after graduation, obtaining data on a variety of aspects of their professional lives.<sup>111</sup> Among other things, young lawyers were asked to estimate the

example, one of us, who had been a Hispanic Council member in various capacities, completed her term as Vice-Chair, Publications in 2014.

110. Although we cannot offer an explanation for the relative dearth of minority leadership in tax, we believe it contributes to a perception of the tax bar as more white than others. Moreover, we are confident that it does not reflect any exclusionary animus on the part of section leadership. Indeed, the experience of one of us, who served in section leadership for eight years, confirms that section leadership was eager to promote diversity in numerous ways.

111. See WILDER, *supra* note 18, at 6. The *Race and Ethnicity Monograph* analyzed and reported on the first phase of a study that followed nearly 4,000 lawyers who graduated in 2000 over a ten-year period to develop longitudinal data on practice settings, specialization, compensation and other practice patterns, surveying them in 2002–2003, 2007, and, finally in 2012. *Id.*; *After the JD Monographs*, NALP FOUND., <http://www.nalpfoundation.org/afterthejd>. The NALP Foundation produced three reports on the results of each survey, all of which are available online. ABA & THE NALP FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 61–68 (2004), <http://www.nalpfoundation.org/uploads/50-AJD1.pdf> [hereinafter AFTER THE JD I]; ABA & THE NALP FOUND., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 71–83 (2009), <https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf> [hereinafter AFTER THE JD II]; ABA & NALP FOUND., AFTER THE JD III: THIRD RESULTS FROM NATIONAL STUDY OF LEGAL CAREERS 71–78 (2014), [http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report\\_final\\_for\\_distribution.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf). The reports contain interesting data on the practice settings, specialization, hours worked, income, satisfaction, mobility, and gender, but these data not broken down by specific areas of practice, so it does not permit us to draw conclusions about the composition of the tax bar in particular. Nevertheless, the *Race and Ethnicity Monograph*, published after the publication of the *After the JD: First Results* in 2004 but based on the same data discussed there, examined specifically the “experiences of members of racial-ethnic groups—whites as well as minorities—as they pursue the goal of building satisfying careers in law,” and does reveal much about the specific areas of practice, including tax. WILDER, *supra* note 18, at 3. More recently a group of scholars interviewed some of the partici-

amounts of time they spent practicing in various areas of law—including tax—and to identify the factors that led them to take their first job out of law school.<sup>112</sup> The resulting data provide valuable information not only about minority lawyers generally but about specific groups of minority lawyers.<sup>113</sup>

The NALP Foundation data show not only which practice areas consumed the greatest portions of lawyers' time, but also how the participation by members of minority groups varied among practice areas.<sup>114</sup> Not surprisingly, the practice areas that consumed the greatest proportion of young lawyers' time were Civil Litigation (21%), Criminal Law (16%), and "Other" (18%),<sup>115</sup> and Tax was near the bottom of the distribution (3%).<sup>116</sup> The graph below shows the percentage of time the surveyed lawyers spent working on matters in various areas of the law, broken down by race/ethnicity, to the extent that the specificity of the NALP Foundation data allows.<sup>117</sup>

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pants in the Study "to examine the evolving role of race, gender and ethnicity in lawyer careers." Bryant G. Garth & Joyce Sterling, *Diversity, Hierarchy, and Fit in Legal Careers: Insights from Fifteen Years of Qualitative Interviews*, 31 GEO. J. LEGAL ETHICS 123, 126 (2018). Their findings reveal the many hurdles that women and members of minority groups face within the legal profession, but they do not address issues of specific practice areas, which is the subject of this Article, except to note the apparently special role of diversity in labor employment litigation: labor and employment firms may have structural reasons to show greater diversity. *Id.* at 143. "They can have a leg up if they have a diverse team. If that team is representing a company accused of gender bias, often it makes a better impression to have a diverse team." *Id.* (quoting Miriam Rozen, *As Clients Get Tougher on Diversity, Some Firms See a Selling Point*, AM. LAW. (Aug. 1, 2017, 2:33 PM), <https://www.law.com/americanlawyer/almID/1202794457489>).

112. WILDER, *supra* note 18, at 26–27, 47–48.

113. The group-specific data is available because the designers of the study believed:

[I]t is inaccurate and perhaps misleading to think of and treat even the larger racial-ethnic minority groups—blacks, Hispanics, and Asians—as a single "minority group" . . . [because] regarding racial-ethnic minorities as a single group tends to obscure the reality that the circumstances of each of the three largest groups, and of the even smaller number of Native Americans, are not the same. The groups differ sufficiently that each represents a unique set of circumstances that distinguishes it from the national population of lawyers as well as from other minority groups.

*Id.* at 8–9.

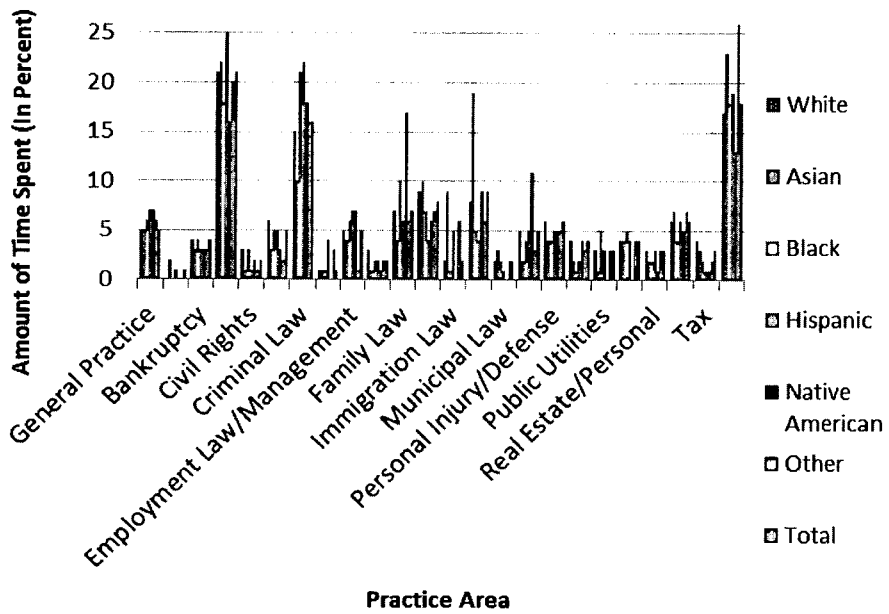
114. *Id.* at 27 tbl.12.

115. *Id.*

116. *Id.* Time spent on Tax was on a par with time spent working on matters involving Real Estate/Personal and Public Utilities, one percentage point higher than time spent on Municipal Law, Immigration Law, Environmental Law, and Civil Rights matters, and two percentage points higher than time spent on Employment Law/Union and Antitrust matters. *Id.*

117. *Id.*

## Percentage of Time Spent in a Practice Area per Race



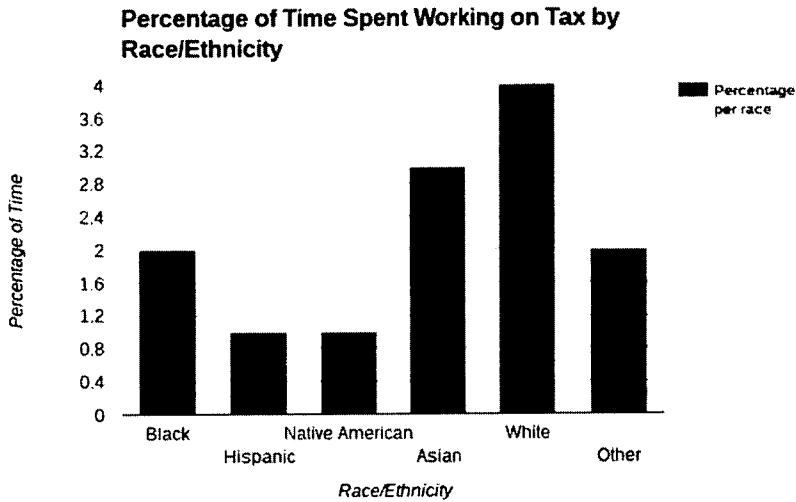
The NALP Foundation data show “that, beyond the shared focus of many new lawyers on criminal law and civil litigation regardless of race-ethnicity, there are specialties in which members of some racial-ethnic groups are more likely than others to be working.”<sup>118</sup> The examination of the group of lawyers who spent time practicing tax is both revealing and troubling: white lawyers reported spending twice as much time as black lawyers on tax matters, and black lawyers spent twice as much time on tax matters as Hispanic and Native American lawyers.<sup>119</sup> Asian lawyers fell precisely in the middle, spending less time on tax than white lawyers but more than members of any other minority group. These results appear in graphic form below.<sup>120</sup>

118. *Id.* at 26.

119. *Id.* at 27 tbl.12. Because we are referring to data in the *Race and Ethnicity Monograph* we decided to follow the classification and capitalization conventions adopted in that Monograph.

120. *Id.*





### B. The Legacy of Tax Expenditures

Despite obvious weaknesses, including the problems of age, sample size,<sup>121</sup> definition, and self-reporting, these data suggest that there is reason to be concerned that minority participation in tax is low, and that it is especially low among members of certain specific minority groups.<sup>122</sup> The tax numbers are further troubling when compared to other fields, in which members of minority groups spend as much time as whites (e.g., Bankruptcy, in which black and white lawyers spend the same amount of time (4%) with Hispanic, Native American and Asian lawyers not far behind at 3% each),<sup>123</sup> and even more so when compared to still other areas, in which members of some minority groups spend *more* time than white lawyers (e.g., Family Law, in which white lawyers spend only 7% of their time but Native American lawyers spend 17% and black lawyers, 10%, with Hispanic and Asian lawyers spending 6% and 4%, respectively).<sup>124</sup>

The NALP Foundation data are therefore consistent with the ABA data and confirm our intuitions regarding the relative lack of diversity in the tax bar, but the data alone do not answer what is to us the most important question: Why? Although we are certain that the answer is multifaceted, other information obtained by the NALP Foundation suggests

121. The problems raised by the relatively small size of the sample of minority lawyers generally (about 15% of the total) caused the Study designers to oversample minorities to compensate. AFTER THE JD I, *supra* note 111, at 14–15; AFTER THE JD II, *supra* note 111, at 90.

122. See *supra* Section II.A.

123. *Id.*

124. *Id.* One of the more popular fields, Criminal Law, shows a similar pattern, with Hispanic, black, and Native American lawyers spending a greater percentage of their time (22%, 21%, and 18%, respectively) in that field than white lawyers (15%) and only Asian lawyers spending less time than all others. *Id.* Nevertheless, we limited our comparisons in the text to fields which, like Tax, have relatively small participation overall for ease of comparability.

something that may be a contributing factor. Two of the questions posed by the NALP Foundation's researchers asked the respondents to rate the importance of several considerations in their decision to go to law school and in choosing their first job.<sup>125</sup> It is telling that in deciding to go to law school,

Black and Hispanic respondents considered the opportunity to change or improve society somewhat more important (ratings of 3.6 and 3.7) than Asians and whites did (ratings of 3.5 and 3.3) and all of the minority groups considered helping individuals more important (all with ratings of 3.7) than whites did (3.5).<sup>126</sup>

In addition, black, Hispanic, and Asian respondents rated "to help individuals" as slightly more important (3.7) than Native American (3.6) or white (3.5) respondents.<sup>127</sup>

The NALP Foundation also asked respondents what led them to select their first job after law school.<sup>128</sup> Specifically, respondents were asked to rate ten factors, including among others "Substantive interest," "Develop specific skills," "Work/life balance," and doing "Socially responsible work."<sup>129</sup> Minority participants were more likely than white participants to report that "doing socially responsible work" was important.<sup>130</sup> Indeed, black respondents gave this factor a score of 4.6, whereas for Hispanic respondents the equivalent score was 4.4, for Native American and Asian respondents, 4.1 and for white respondents, 4.2.<sup>131</sup>

The foregoing is consistent with data gathered by the Harvard Law School's Center for the Legal Profession under the direction of Professor David Wilkins. Professor Wilkins and his collaborators surveyed black Harvard Law School (HLS) graduates in 2000 and 2016.<sup>132</sup> These sur-

125. WILDER, *supra* note 18, at 48 tbl.26, 51 tbl.29.

126. *Id.* at 51. The *Race and Ethnicity Monograph* does not reveal whether the researchers engaged in any analysis of the statistical significance, if any, of their findings, and we believe it is reasonable to infer that they did not. Therefore, we cannot and do not claim that the differences revealed in these results are statistically significant. Nevertheless, we do believe that they are telling because they are consistent with the intuition which our own experience suggests.

127. *Id.* at 51 tbl.29. While we recognize that the differences here are small, we nevertheless regard it as important that the data reveals them, and that they are skewed in the direction our intuition would have suggested.

128. *Id.* at 47.

129. *Id.* at 48 tbl.26.

130. *See id.* Once again, the *Race and Ethnicity Monograph* does not reveal whether the researchers engaged in any analysis of the statistical significance, if any, of their findings, and we believe it is reasonable to infer that they did not. Therefore, we cannot and do not claim that the differences revealed in these results are statistically significant. Nevertheless, we do believe that they are telling because they are consistent with the intuition which our own experience suggests.

131. *Id.*

132. DAVID B. WILKINS & BRYON FONG, HARVARD LAW SCH. CTR. ON THE LEGAL PROFESSION, HARVARD LAW SCHOOL REPORT ON THE STATE OF BLACK ALUMNI II: 2000-2016, at 31 (2017), <http://clp.law.harvard.edu/assets/HLS-Report-on-the-State-of-Black-Alumni-II-2000-2016-High-Res.pdf> [hereinafter WILKINS & FONG, REPORT II]; DAVID B. WILKINS ET AL., HARVARD

veys not only chronicle the development of the black bar, from the graduation of the first black student in 1869, but they also consider the life and career decisions made by the graduates as well as the impact of race on those decisions and outcomes.<sup>133</sup> Because the questions the graduates were asked were not designed to elicit information on particular practice areas beyond broad categories such as “private practice” or “government” and the like, the data they produced do not allow us to draw inferences about the possible connection between race and tax practice,<sup>134</sup> with one significant exception. That exception involves two survey questions.

One of these survey questions asked whether the graduates had “intended to work in a substantive area serving black clients or interests (e.g. community development)” when they entered law school.<sup>135</sup> Over 36% of the respondents responded affirmatively in 2016, a finding which was consistent with that in the first survey.<sup>136</sup> These graduates described having wanted to “us[e] their legal skills to improve the plight of black Americans generally,” and to become “social engineer[s] for justice.”<sup>137</sup>

The other question asked whether the graduates thought that “black lawyers have an obligation to use their legal skills to improve the black community.”<sup>138</sup> On a scale of 7, which indicated that the respondent “strongly agreed” with the statement, the average was 5.3 and changed little over time.<sup>139</sup> The authors of the second survey characterize this result as “signaling broad support for . . . the ‘obligation thesis’” suggested by Professor Wilkins.<sup>140</sup> Although we take no position on the obligation thesis as a normative matter, we nevertheless feel that data that supports it also suggests that fields of law that are not seen as important vehicles

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LAW SCHOOL REPORT ON THE STATE OF BLACK ALUMNI 1869–2000, at 27 (2002), <https://clp.law.harvard.edu/assets/Report-on-the-State-of-Black-Alumni-I-1869-2000.pdf> [hereinafter WILKINS ET AL., REPORT I].

133. WILKINS & FONG, REPORT II, *supra* note 132, at 1; WILKINS ET AL., REPORT I, *supra* note 132, at 36.

134. WILKINS & FONG, REPORT II, *supra* note 132, at 49 fig.5; WILKINS ET AL., REPORT I, *supra* note 132, at 32 fig.2. The reason for this is that tax practice can occur in a variety of venues, including the government, the private sector, firms of all sizes, and even firms that do not involve the practice of law at all, such as accounting firms.

135. WILKINS & FONG, REPORT II, *supra* note 132, at 41.

136. Compare *id.* with WILKINS ET AL., REPORT I, *supra* note 132, at 30 fig.1. The 36% figure is an aggregate number; more granular data reveals substantial gender differences. Thus, while 40% of women voice this sentiment, only 30% of men do so, and the gender difference is more pronounced in the 2016 cohort, where 53.7% of women voiced that sentiment. WILKINS & FONG, REPORT II, *supra* note 132, at 41.

137. WILKINS & FONG, REPORT II, *supra* note 132, at 41.

138. *Id.* at 69.

139. *Id.* at 67, 68 tbl.33 & fig.13.

140. *Id.* at 69. Professor Wilkins has argued that black lawyers “have moral obligations running to the black community that must be balanced against other legitimate professional duties and personal commitments when deciding on particular actions and, more generally, when constructing a morally acceptable life plan. I call this strategy the obligation thesis.” David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1984 (1993) (footnote omitted); see also Wilkins, *supra* note 1, at 138.

for "improving the black community" are less likely to draw students motivated by that career objective. Hence, insofar as black students actually experience the tug of an "obligation" to serve black communities, they are not likely to be drawn to fields that they do not perceive as serving social justice values. Accordingly, they will not be drawn to tax unless the perception of the tax law changes. Even though the surveys do not compare the preferences of black students to those of members of other minority groups, the surveys nevertheless support the broad conclusion we derived from the NALP Foundation data: students who are members of racial or ethnic minority groups are more likely to be drawn to fields of law that promise an opportunity to advance social justice than are other students.

Scholars who have looked at comparative placement data for white and minority law school graduates have made observations consistent with a greater preference for public interest careers among minority students. For example, Professor Gary Munneke studied the NALP Employment Survey of the law school graduating class of 1978.<sup>141</sup> The statistics he offered showed that while 5.9% of all respondents were employed in jobs falling in the category of "Public Service—Public Interest," 17.2% of minority respondents were employed in such jobs.<sup>142</sup> Commenting on the obverse phenomenon—the relatively higher percentage of white graduates entering private practice—Professor Munneke suggested:

[M]any minority students enter law school with motivations and goals different from their white classmates. There seems to be a larger number of minorities whose interests are humanitarian or public service oriented than whites. As the number of minorities in law school increases, and the backgrounds of the students becomes more diverse, this seems to be changing.<sup>143</sup>

Similarly, Professor Michael D. Rappaport studied the 1976–1978 UCLA School of Law graduating classes and found that "[f]ully thirty-seven percent or thirty out of eighty-two minority graduates were working in [poverty law positions] as compared to only three percent or fifteen out of 542 white graduates."<sup>144</sup> As with the data Professor Munneke studied, this higher placement rate for minority graduates in poverty law practice correlated with a relatively lower placement in private practice

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141. Gary A. Munneke, *An Analysis of the Employment Patterns of Minority Law Graduates*, 7 BLACK L.J. 153, 153, 155 (1981).

142. *Id.*

143. *Id.* at 156.

144. Michael D. Rappaport, *Placement Patterns of University of California—Los Angeles Law School Minority Graduates*, 7 BLACK L.J. 137, 141 (1981).

positions.<sup>145</sup> Attempting to explain these trends, Professor Rappaport observed:

Overall, however, it is quite clear that minority students simply do not do as well obtaining jobs with private law firms as their white counterparts. It should be noted that as part of the explanation for this might well lie with the attitude and actions of the minority graduates themselves. At least until quite recently, it was common to hear rhetoric by minority students indicating they did not want or had no interest in working for private firms. There was in fact a great deal of peer pressure at UCLA not to participate in the interview process because that would be regarded as selling out to the wrong social interest in this country . . . .

As noted earlier, minority students have done quite well in the public interest sector of law placement. Thirty-seven percent of the eighty-two minority graduates surveyed were working in this area. This compared to three percent of the white graduates. The obvious question is why this gross disparity occurs. On the positive side, many minority students when entering law school, indicated a strong desire to work in public defender and legal services areas based on the long standing social commitments which they felt motivated them to go to law school in the first place. Therefore, it should not be surprising that such a high percentage of graduates had gone on to work in that area.<sup>146</sup>

The more recent data compiled by the NALP Foundation are consistent with this pattern:

Members of minority groups are less likely than white lawyers to be private practitioners. Compared with about two-thirds of new white lawyers, only 48% of black lawyers, 51% of Native American lawyers, 54% of Hispanic lawyers, and 58% of Asian lawyers were working in private firms in 2002-03 . . .

. . . .

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145. *Id.*

146. *Id.* at 143. For additional studies showing disparities between white and minority placement in public interest or other nonprofit practice jobs, see David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 423 (2000) (reporting that a study of Michigan Law graduates showed that minority graduates are more likely to begin their careers in government or public service than their white counterparts); Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 892, 895 tbl.20 (1995) (stating that among 1601 students receiving J.D. degrees from NYU 1987-1990, not-for-profit jobs were chosen by 8.4% of white and Asian American men, 10.6% of white and Asian American women, 15.8% of African American and Latino men, and 31.3% of African American and Latino women); James A. Thomas, *Career Patterns of Black Yale Law School Graduates: From Young Blacks to Old Blues*, 7 BLACK L.J. 131, 134 (1981) ("Legal services and nonprofit organizations take a higher portion of black students than they do of Yale Law School graduates in general."). See also Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 588 (2009) (discussing the value of diversity and its connection to rankings).

Beyond private practice, the next largest proportion of [After the JD] respondents held government positions at the time of the survey, although the proportion—16%—is small in absolute terms. Black, Hispanic, and Native American respondents were considerably more likely than white and Asian respondents to be employed by government: 27% of black, 21% of Hispanic, and 29% of Native American respondents were working in government settings, compared with 16% of white and 14% of Asian respondents. Note that Asian respondents were the least likely to be employed by government, particularly the federal government.<sup>147</sup>

Furthermore, the NALP Foundation data reveal that of the lawyers who work in the fields of “Legal services/public defender,” “Public interest organization,” and “Other nonprofit organization,” less than 5% are white.<sup>148</sup> In other words, the fields of legal services, public defender, and nonprofit organizations are disproportionately composed of minority lawyers. More recent data from California “suggests that attorneys of color and women tend to choose practice areas of public-interest and non-profit law more often than white men.”<sup>149</sup>

Finally, it is illuminating to examine differences in the ways that members of various minority groups and white lawyers responded to questions regarding other careers they considered. Of the ten categories of careers offered in addition to “other,” some seem to offer a greater opportunity than others to work in the public interest and thus operationalize the subset of social values that we identified as “social justice values” at the end of Part I. For example, careers in “Community Organizing,” “Public Policy,” and “Public/Social Service,” would seem to be more attractive to individuals who want to promote social justice values than careers in “Business,” “Consulting,” and “Investment banking.”<sup>150</sup>

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147. WILDER, *supra* note 18, at 4, 15.

148. *Id.* at 16 tbl.5.

149. CALIFORNIA BAR REPORT, *supra* note 94, at 22. The *California Bar Report* revealed that in a recent survey conducted by the State Bar of California, just under four percent of white respondents indicated that they worked in the non-profit sector. In contrast, over eight percent of Latino attorneys, six percent of African American attorneys, and 6.3 percent of Asian attorneys indicated that they worked in the non-profit sector.

*Id.* Although merely reporting working in the public interest or nonprofit sectors does not necessarily indicate a choice to do so in all cases, it is not unreasonable to assume that there is a strong element of choice in most cases.

150. Other categories were: “Journalism/writing,” “Politics,” “Starting own business,” and “Teaching/academia.” WILDER, *supra* note 18, at 52 tbl.30. The NALP Foundation researchers highlighted the relative preferences of the members of the various minority groups, noting that: “Teaching/academia” was the top choice of virtually all of the racial-ethnic groups, although the actual proportions varied widely. Black respondents, more than any others (61%), said they had considered teaching, as did 55% of Hispanics, 48% of whites, 45% of Asians, and 43% of Native Americans. After teaching, black respondents had been most interested in starting their own businesses (51%). Hispanic, Asian, and white respondents were next most likely to have been interested in entering business (47% of Hispanics, 45% of whites, 42% of Asians, and 49% of blacks as well), not necessarily their own. Investment banking was the least popular of the alternatives provided, ranging

Given the other data reported in this study about the career objectives of some of the minority respondents, it is not surprising that a much greater percentage of black respondents identified each of those three career alternatives as ones they had considered than did white respondents. The data are shown in tabular form below.<sup>151</sup>

<u>Alternative Considered</u>	<u>Black %</u>	<u>White %</u>
Community Organizing	21	11
Public Policy	42	32
Public/Social Service	38	32

Although these are not the only career alternatives that black respondents preferred in greater percentages than white respondents,<sup>152</sup> we feel that the magnitude of the difference corroborates the other findings in this data and is relevant to our inquiry. Taken together, these data suggest that members of minority groups, in general, and members of some categories of minority groups, in particular, are drawn to professional endeavors that promote or reflect social justice values to a greater extent than members of the majority group.<sup>153</sup>

Nevertheless, we do not claim that the social justice preferences of minority law graduates account entirely for the differences between their practice choices and those of white graduates. Racial discrimination,<sup>154</sup>

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from none of the Native Americans to 13% of Hispanics who reported having considered it.

*Id.* at 52. Because our focus is on the difference in interests expressed by members of minority groups and white members of the NALP sample with respect to social values, we have focused on those aspects of the data. We emphasize that careers in “Business,” “Consulting,” “Investment banking,” and so forth also promote social values. Consistent with our argument in Part I that all tax expenditures—indeed, all Code provisions—reflect and promote social values, those that promote, say “Investment banking” promote social values. Again, our discussion in the text focuses on a particular subset of social values, viz., social justice values.

151. *Id.* at 52 tbl.30.

152. The career alternative showing the largest discrepancy in consideration between black and white respondents was “Starting own business,” which 51% of black respondents considered, versus only 32% of white respondents. *Id.*

153. Consistently with the NALP Foundation researchers’ earlier observation that each group showed distinct preferences and that “minorities” should not be considered a monolithic group, fewer members of some minority groups considered some of these alternatives than whites. *Id.* For example, only 10% of Hispanic respondents considered Community Organizing (vs. 11% of whites, 14% of Native Americans and 15 % of Asians), only 17% of Native American respondents considered Public Policy (vs. 32% of whites, 28% of Hispanics and 32% of Asians), and only 30% of Hispanic respondents considered Public/Social Service (vs. 32% of white, 31% of Native American and 36% of Asian respondents). *Id.*

154. See, e.g., Munneke, *supra* note 141, at 156 (“It is difficult to explain these differences and hard not to attribute the low percentage entering private practice to racial discrimination.”); Rapaport, *supra* note 144, at 142 (“Another explanation might be simple racism or perhaps a better term might be social differences.”).

wage considerations,<sup>155</sup> academic performance,<sup>156</sup> and other factors likely play important roles. As Professor Rappaport noted:

[T]here may well be reasons other than simple idealism that have motivated minorities. The fact that white graduates, who because of better law school performances, have more latitude in the choice of jobs available to them, have chosen to go into public service at such a disturbingly small rate, suggest that there is more than altruism at work. Minorities in some cases might have been channeled into public service work because the more prestigious and high paying jobs in the private sector were far less available to minority graduates. Another reason might be that many of the agencies which hire students in this area are public agencies serving minority clients. They are, therefore, more committed to aggressively recruiting and hiring minorities and maintain affirmative action programs to do so.<sup>157</sup>

Similarly, Professor Wilkins cites evidence that “[p]artners sometimes assume that minorities are ‘uninterested’ in corporate practice and prefer to work in government or public service, where their efforts would be ‘more in sync with their personal politics.’”<sup>158</sup> He has also described anecdotal evidence suggesting that black lawyers are directed by employers to particular practice areas, such as labor and employment law, where their race is seen as an asset in defending discrimination cases.<sup>159</sup> Nonetheless, it is telling that studies repeatedly identify interest among minority students in careers promoting social justice values as a significant reason for the differences in practice choices.

In sum, the available data suggest that (1) members of racial and ethnic minorities tend to be more interested in working in fields that offer the opportunity to “help individuals” and “do socially responsible work”

155. See, e.g., Kornhauser & Revesz, *supra* note 146, at 915 (“[T]he difference in the wages offered by the three sectors (the Wage variable) had a statistically significant effect on both the choice between non-elite for-profit and not-for-profit jobs, and the choice between elite for-profit and not-for-profit jobs.”).

156. See, e.g., *id.* at 914 (“[L]aw school performance had a statistically significant effect only on the choice between elite for-profit and not-for-profit jobs.”); Rappaport, *supra* note 144, at 142 (“The reason most minority graduates would have difficulty being hired by the medium to larger law firms is that a very high premium is placed on hiring graduates with outstanding academic records.”).

157. Rappaport, *supra* note 144, at 143.

158. David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1589 (2004) (citing COMM. ON MINORITY EMP’T, BAR ASS’N OF S.F., 1993 INTERIM REPORT: GOALS & TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT 17 (1993); and then citing 1 REPORT OF THE NEW YORK STATE JUDICIAL COMM’N ON MINORITIES 74–113 (1991)).

159. *Id.* at 1595. Professor Wilkins explained that “[t]he plurality of the black corporate lawyers I interviewed specialized in ‘labor and employment law,’ which in large-law-firm speak is a euphemism for defending discrimination cases.” *Id.* He went on to note that this resulted in black lawyers finding themselves “trapped inside a ‘black box’ that severely limits their ability to broaden their horizons,” or “being ‘matched’ in areas in which they have no interest and with which they have no business being involved.” *Id.*



than their white counterparts, and (2) they operationalize that preference by choosing to work in fields that seem to provide significant opportunities for doing so. These conclusions offer a window into why minority participation in tax lags behind that in other areas.

As we argued in Part I, the concept of tax expenditures, developed by Stanley Surrey, has fostered the view that the proper concern of tax law is raising revenue and that issues of substantive social policy, including issues of social justice, lie outside of tax law's legitimate concerns. But if tax is perceived as a field properly concerned only with raising revenue, that might render the field uninviting to students who enter law school to change or improve society and to help individuals, who rank doing socially responsible work as important in choosing their first jobs after graduation, and who might have chosen other careers that would allow them to promote social justice values. In other words, the perception of tax as a field whose principal objective is raising revenue, not advancing social policy objectives, could contribute in subtle and under analyzed ways to its relative lack of diversity. The results of the NALP Foundation study and the Harvard Reports are consistent with this hypothesis.<sup>160</sup>

The trailblazing work undertaken by Professors David Wilkins and Mitu Gulati suggests an alternative hypothesis. Professors Wilkins and Gulati engaged in an empirical analysis of black Harvard Law School graduates during the 1980s in an attempt to answer the question raised in the title of their article, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*.<sup>161</sup> Their work is relevant to our project because corporate law firms typically engage in a significant amount of tax work.

An answer Professors Wilkins and Gulati give to the title's question focuses on what they term "risk averse strategies."<sup>162</sup> They note that in law school:

[I]t is widely believed that certain advanced corporate courses, such as corporate tax, commercial transactions, and securities regulation, are among the most difficult in the law school curriculum, particularly for students who have little or no prior background (academic or otherwise) in these areas. If this is true, and if black students are less likely to have the kind of background knowledge that increases their chance of doing well in these subjects, then they will have an incen-

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160. See *supra* notes 111–40 and accompanying text.

161. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 508–09 (1996). We note that the data in WILKINS ET AL., REPORT I, *supra* note 132, and WILKINS & FONG, REPORT II, *supra* note 132, is consistent with the patterns described by Professors Wilkins and Gulati on matters such as the relative paucity of black lawyers and partners in big firms; that increases our confidence in the conclusions we draw from the findings Professors Wilkins and Gulati report.

162. *Id.* at 576.

tive to avoid these difficult, but potentially useful, courses in favor of classes where they stand a better chance of getting a good grade.<sup>163</sup>

Furthermore, Professors Wilkins and Gulati suggest that as lawyers, risk-averse associates would likely steer clear of corporate work because

many observers believe that corporate practice in general (as opposed to litigation), and related specialties such as tax, securities, and banking in particular, require higher levels of substantive legal knowledge and technical skill than other fields of practice. Moreover, these areas (particularly specialties such as tax) tend to have lower associate-to-partner ratios. Consequently, associates in these areas are more closely supervised, thereby increasing the odds that mistakes will be detected.<sup>164</sup>

Professors Wilkins and Gulati connect this to

[a]necdotal evidence [suggesting] that black associates may, on average, be overly cautious when performing their work. Thus, those who study law firm interactions report that many black associates tend to speak less in meetings (particularly with clients), ask more clarifying questions when receiving work, are more likely to check (and re-check) assignments before handing them in, are more reluctant to disagree with partners or express criticism of their peers, and construe their assignments more narrowly than their white peers.<sup>165</sup>

In light of these risk-averse strategies attributed to both black law students and black law firm associates, Professors Wilkins and Gulati were not surprised to find that the data on black lawyers in big law firms showed that “blacks appear to be underrepresented in these high-level corporate areas.”<sup>166</sup> In addition, when they surveyed black Harvard law graduates from two classes in the 1980s, they found that only about a quarter of the total number of graduates who worked in elite firms were in corporate practice.<sup>167</sup> Most importantly for our purposes, only one of the graduates in the sample specialized in tax,<sup>168</sup> and the percentage of black partners in the firms was lowest for partners who worked in tax:

Of those who were in corporate practice, few worked in specialty departments such as tax. The distribution of black partners confirms this trend. Only 14% of black partners work in general corporate

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163. *Id.* at 556 (footnote omitted). Professor Wilkins also points to anecdotal evidence from Harvard colleagues who “report that relatively few black students” take upper-level courses in corporations, securities and tax, and that “several black students reported that the reputed difficulty of these courses and concerns that a low grade would diminish their overall employment prospects has discouraged them or their African American classmates from enrolling in these courses.” *Id.* at 556 n.210.

164. *Id.* at 574 (footnotes omitted).

165. *Id.* at 576.

166. *Id.* at 575.

167. *Id.*

168. *Id.* at 575 n.298.

practice, and less than 11% specialize in technical fields such as banking (6%), bankruptcy (2%), and tax (1%).<sup>169</sup>

Despite the obvious problem of drawing conclusions from limited samples, which Professors Wilkins and Gulati acknowledge,<sup>170</sup> their findings are consistent with claims of the general lack of diversity in the tax bar.<sup>171</sup> They also offer some support for our claim of the more extreme lack of diversity in the tax bar.<sup>172</sup>

In their embrace of the “risk averse” hypothesis, Professors Wilkins and Gulati reject the thesis that “many black students are uninterested in the work done by corporate law firms . . . [because] given the historical connection between the black bar and the struggle for racial justice, many blacks come to law school intending to use their new skills to advance the interests of the African American community.”<sup>173</sup> Their rejection of this “racial justice” hypothesis focuses on a study suggesting that “after adjusting for grades, loans, law school activities, and even stated preferences, blacks were more likely to take jobs at corporate law firms than their white counterparts. If anything, blacks appear to be *more* interested in starting work at a corporate firm than whites.”<sup>174</sup>

We believe that this dismissal of the racial justice hypothesis might be too hasty. There may be factors that explain the apparent greater attractiveness of corporate firm jobs for black students that are not inconsistent with their having a special interest in racial justice. For example, it may be that pervasive feelings of vulnerability and insecurity experienced by members of racial and ethnic minority groups make jobs that hold out the possibility of prestige, power, and wealth more attractive to them than to white students and may override preferences for work in the service of racial justice. It could also be that because there are so few black lawyers in corporate firms, such jobs mean more to black law students than to whites. Moreover, many corporate firms are well known for championing pro bono and public interest work, so that working there is not necessarily inconsistent with an interest in the pursuit of racial justice.

Finally, it may well be that what Professors Wilkins and Gulati see as risk aversion is, at least in part, lack of complete knowledge. Thus, Professors Wilkins and Gulati attribute black students’ avoidance of “certain advanced corporate courses, such as corporate tax, commercial transactions, and securities regulation,” to risk aversion due, in turn, to a

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169. *Id.* at 575 (footnote omitted).

170. *Id.* at 500. At this point in time, of course, an additional qualification is the age of the data sample.

171. *Id.* at 505.

172. *Id.* at 575 n.298.

173. *Id.* at 508.

174. *Id.*

lack of “prior background (academic or otherwise) in these areas.”<sup>175</sup> But at least in the case of tax, students may perceive that they lack the relevant background because they incorrectly believe that the subject requires a background in accounting, mathematics, or business. That incorrect belief, when added to the widely held but also incorrect belief that taxation is unrelated to social values and, therefore, to the pursuit of racial justice, would reinforce the lack of appeal of that area of law.<sup>176</sup> In other words, if both the lack-of-interest hypothesis and the risk-aversion hypothesis are correct, the dramatic results reported by Professors Wilkins and Gulati are even easier to understand.

All of this, of course, is speculative. But that is exactly our point. The quest for a *single* reason that explains the alarming lack of diversity in the tax bar is almost certainly misguided and doomed to failure. Humans are complex and there are almost certainly multiple reasons for the relative lack of diversity of the tax bar. Accordingly, we believe there is merit in attempting to identify an array of possible explanations, and we are offering one explanation that we have not seen discussed thus far: the widely held view of tax law and policy as properly focused only on raising revenue. Such a vision would make tax attractive to students with technical backgrounds in business or economics, to students who want to help clients maximize the return on their labor or investments, or to students who want to help the government counter those same efforts. But it excludes social policy concerns and would likely make tax law relatively unattractive to law students who sought legal careers for the opportunity “[t]o change [or] improve society,”<sup>177</sup> in a direct way—particularly if they feel they lack the requisite background.<sup>178</sup>

As we showed above in Section II.B., the NALP Foundation data suggest that members of racial and ethnic minority groups are more likely than whites to be motivated to enter law school in pursuit of social justice and to choose practice areas that allow an opportunity to “help individuals”<sup>179</sup> and to do “socially responsible work.”<sup>180</sup> Consequently, the narrow view of the tax law as simply concerned with raising revenue

175. *Id.* at 556.

176. The incorrect belief that the tax law is unrelated to social values likely extends to other areas of corporate and commercial law which may be perceived as being concerned only with the creation and retention of wealth. See Abreu, *supra* note 1, at 109. The extent to which that is so is beyond the scope of this Article.

177. See WILDER, *supra* note 18, at 51 tbl.29.

178. Although we recognize that some individuals might regard any work with the tax system as work that can “change or improve society” because of the importance of the tax system in providing for a functioning government that can enforce the rule of law, fund defense and infrastructure, and provide other crucial social goods, we believe that such a connection between the tax system and the general social good is too attenuated to serve as the driving force in many career decisions. We therefore interpret the quest to “do socially responsible work” that can “help individuals” and “change or improve society” as requiring a more proximate connection between the work and the social good than even a sincere belief in the social value of a tax system can provide.

179. See *supra* text accompanying note 127.

180. See *supra* text accompanying note 130.

might contribute to the lack of racial and ethnic diversity in the tax bar because it obscures the extent to which the tax law reflects and implements social policies. In addition, the narrow view supports the perception of tax practice as being principally about helping business enterprises and wealthy individuals keep more of their money.

In Part III, we develop our thesis that embracing tax expenditures as a part of the tax system might alter the perception of that system and its role in promoting social justice in ways that might attract a more diverse population to the study and practice of tax.

### III. IMPLICATIONS FOR TAX PRACTICE

Explicitly recognizing that all tax provisions reflect social policy decisions regardless of whether they purport to take (tax) or give (spend) could also alter the view of the nature of tax practice. Our most utopian vision would have tax lawyers regarded as the implementers of social values. Although that vision is unlikely to be widely realized, a more nuanced understanding of the role of tax expenditures could help to provide a more comprehensive frame for tax practice. That could, in turn, help to expose the role of social values in the tax law.

The contemporary understanding of tax practice reflects the popular view of the tax system as a monolithic instrument for transferring wealth from the private to the public sector. Tax matters are seen as being about money, and taxpayers seek tax advice to determine how much tax is due or how to structure a transaction so that a minimum of tax is due. For most government tax lawyers, tax is also about money. Although tax lawyers in some parts of the government focus primarily on tax policy,<sup>181</sup> the work of most government lawyers is driven by a bottom line which is nearly always about how much money the taxpayer owes the government, or how the taxpayer is going to pay what is owed. That is true even when a matter involves a tax expenditure.

For example, even when the legal question is a taxpayer's entitlement to a deduction for home mortgage interest, the bottom line is the amount of tax due. While the policy that animates the statutory provision may be important in interpreting the provision, the policy fades before the salience of the need to determine the amount of money that is due. Our intuition is that a government lawyer working on a matter involving the home mortgage interest deduction does not see herself as an implementer of housing policy (the reason the home mortgage interest deduction is classified as a tax expenditure); she likely sees herself as the enforcer of the tax laws—laws that require the payment of money. And we

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181. This would include lawyers who work at the Treasury's Office of Tax Policy, on the staff of some legislators and tax-writing committees, the legislation and regulations functions of the IRS, as well as some of those who are on the staff of the Joint Committee on Taxation or the Taxpayer Advocate Service.

think that is likely true regardless of whether the work involves litigation, the issuance or private letter rulings or other determinations, or the drafting regulations and other guidance. The bottom line is always how much tax is due.

In the private sector, most tax lawyers see themselves as business or transactional lawyers or as controversy lawyers who represent clients in disputes with the IRS, including litigation before the Tax Court and other federal courts.<sup>182</sup> In law or accounting firms, tax lawyers generally work with business lawyers as part of a team that structures and implements transactions, and many also represent their clients in administrative disputes with the IRS and in litigation.<sup>183</sup> In all of those private practice settings, the relationship between lawyer and client is a traditional one in which the client's interest is the lawyer's first priority. And typically the client's interest is stark: to pay as little tax as possible. The focus of the representation is to ensure that the client achieves that objective. The practice model therefore reinforces the view of the tax system as the engine of revenue taking, which taxpayers and their counsel are dedicated to thwarting at every turn.

The situation is different for lawyers who work in Low Income Taxpayer Clinics (LITCs) or who engage in pro bono work on behalf of low income taxpayers. (We will refer to both of these types of lawyers as "LITC lawyers.") LITC lawyers address the tax issues of a taxpayer population that depends on the tax system for most of the benefits that currently comprise the social safety net: the EITC,<sup>184</sup> the Child Tax Credit,<sup>185</sup> and American Opportunity Tax Credit.<sup>186</sup> Unlike government lawyers and lawyers in private practice, LITC lawyers can easily see themselves as poverty lawyers. The connection between their work and the alleviation of poverty is patent because the tax expenditure operates by delivering a social benefit directly to its intended beneficiary. In addition, the refundability feature of these tax expenditures means that the client does not just pay less tax but often receives funds in excess of any amount otherwise owed or paid.

LITC lawyers likely understand that they are helping to implement social policy while also serving the interests of their client. Representing low income taxpayers makes the giving side of the Code salient because the intended beneficiary of the policy is the lawyer's client, and the connection between the receipt of the tax benefit and its effect on the client's life is salient. Indeed, one prominent scholar who has done substantial

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182. There are notable exceptions, such as lawyers who work in Low Income Taxpayer Clinics, or engage in pro bono representation, which will be discussed *infra*.

183. *Cf.* Wilkins & Gulati, *supra* note 161, at 575 (including tax lawyers in the pool of lawyers in large corporate firms).

184. I.R.C. § 32 (2018).

185. *Id.* § 24.

186. *Id.* § 25A.

work on matters affecting low income taxpayers has asserted that LITC lawyers are today's poverty lawyers.<sup>187</sup> Because the connection between the tax system and the well-being of their clients is so stark, LITC lawyers regularly see how they are "helping individuals," something that the NALP Foundation data found was especially important to members of minority groups.<sup>188</sup> Although we can cite no empirical evidence in support of the proposition that the cohort of LITC lawyers is more diverse than the tax bar as a whole, observation of the composition of attendees at many meetings of the Tax section of the ABA strongly suggests it. Attendance by one of us at meetings of the Pro Bono and Clinics Committee of the Tax section of the ABA as well as at meetings of other committees, including Corporate Tax, for more than fifteen years is consistent with that proposition.<sup>189</sup> It is also precisely what the data we discussed earlier in Section II.B would predict.<sup>190</sup>

If, as the data suggest, law students who are members of racial or ethnic minority groups are more likely to want to "help individuals" and "do socially responsible work" than their white counterparts, it is not far-fetched to think that they might gravitate to working in law school LITCs even if they otherwise have no interest in tax. In other words, LITCs might attract students to tax because they likely attract students who are interested in performing clinical work in law school, irrespective of subject matter.<sup>191</sup> In that way, LITCs might be serving as a gateway to tax for students who might otherwise never consider taking a tax course, much less pursuing a career in tax. And if the population of students attracted to tax through work in an LITC is likely to be more diverse than the general population of tax students, it would not be surprising to find that the community of LITC professionals is more diverse than that of other tax professionals.<sup>192</sup>

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187. Professor Francine Lipman, who teaches at the University of Nevada, Las Vegas and is also a Nevada Commissioner of Revenue, made such a reference during the meeting of the Diversity Committee of the ABA Tax section in Boston, Massachusetts in September 2016. See also John Young, *Tax Law 101 for the Legal Aid Practitioner*, CLEARINGHOUSE CMTY., Oct. 2017, at 1, 1, [http://povertylaw.org/files/docs/article/ClearinghouseCommunity\\_Young.pdf](http://povertylaw.org/files/docs/article/ClearinghouseCommunity_Young.pdf).

188. See *supra* text accompanying note 127.

189. One of us (Alice Abreu) was a member of the Tax section's council for eight years, 2009–2015 and attended each of the three meetings the section holds annually during that time. Since 2015, she has only missed one meeting, and often goes to parts of both the Pro Bono and Tax Clinics Committee and Corporate Tax Committee on the same day because they typically meet during the same time block. Although she has not attempted to record her visual impressions, and recognizes that they would not tell the complete story anyway, she is confident in reporting that the difference in the composition of the audience, and often of the presenters, is nearly always stark: the composition of the attendees at the meetings of the Pro Bono and Tax Clinics Committee appears significantly more diverse than that of the Corporate Tax Committee.

190. See *supra* Section II.B.

191. The text suggests a high degree of congruence between clinical opportunities and opportunities to engage in socially responsible work. While that is often the case, the relationship is complex. The nuances of that relationship are beyond the scope of this Article.

192. This would suggest that another way to increase the diversity of the tax bar would be to increase the number of law school LITCs, but further development of this point is beyond the scope

## CONCLUSION

In sum, the role of tax expenditures in casting tax practice as an activity that responds only to the tax system's objective of raising revenue will vary with the type of tax expenditure the practice involves. Lawyers who help clients determine qualification for the EITC can easily see themselves as poverty lawyers who help clients receive the government benefits for which they qualify; however, lawyers who help clients get the low income housing credit probably do not see themselves as poverty lawyers, and those who help create wind farms probably do not see themselves as environmental lawyers. The social benefit is likely regarded as a by-product of their work, even if a salutary and intended one.

And that is too bad. If our intuitions about how tax lawyers perceive the social utility of their work are correct, more widespread acceptance of our view of the tax system as embodying important social policies throughout would allow more lawyers to acknowledge the social utility of their work. Although some tax lawyers may not care about the social utility of their work, we believe that many do. Moreover, the data we cited in Part II suggest that lawyers who are members of racial and ethnic minority groups care even more than others. Hence, widespread acknowledgment of the social policy foundations of tax could help to bring members of such minority groups into the profession.

Our analysis has at least one additional implication: tax exceptionalism should be rejected, "henceforth and forever." Rejecting tax exceptionalism means accepting that tax is a field of law like any other, animated by a multiplicity of social values which sometimes conflict. Although tax is not like contracts, or torts, or criminal law, those fields are not like one another either. Indeed, it is the differences among them that make them different fields. Nevertheless, what they have in common is that they are law. Rejecting tax exceptionalism means accepting that the tax system is laden with social policy objectives, some of which it implements by taking wealth from the private sector and then distributing it to the public sector, and some of which it implements by taking less wealth from the private sector than principles of ability to pay might dictate. Our analysis does not require a rejection of the useful insights of tax expenditure analysis, but it does require confining that analysis to the purpose Surrey ascribed to it: providing a more complete accounting of government spending.

Fundamentally, we are simply calling for a more concerted acknowledgment of what many of us discovered when we began to study

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of this Article. For an excellent history of LITCs and illustrations of the significant role they play in tax administration and in operationalizing taxpayer rights, see generally T. Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3 (2013). See also NINA E. OLSON, TAXPAYER ADVOCATE SERV., LOW INCOME TAXPAYER CLINICS PROGRAM REPORT (2018), <https://www.irs.gov/pub/irs-pdf/p5066.pdf>.



the tax law: the tax law is endlessly fascinating because it affects all of life and business, and reflects our value choices throughout. Accounts of students who took tax at sufferance and were surprised to find the field so fascinating that they made tax law their life's work are commonplace.<sup>193</sup> They also suggest that if tax were more widely understood as being unexceptional in the promotion of social values, like other areas of law, more diverse individuals might be drawn to the study of tax. The pool of diverse tax lawyers would then grow because at least some of them would likely stay in tax.

That would be a win-win proposition. In a variety of different surveys inquiring into the relative professional happiness of lawyers working in different fields, tax lawyers come out on top.<sup>194</sup> That happy ending should not be reserved for those who brave the seemingly forbidding territory of the tax law as it is commonly portrayed. Transforming the perception of the tax system from a monolithic instrument of taking to a holistic tool of fiscal policy that both takes and gives, consistent with our social values, could attract a more diverse group of individuals to tax work. The ABA Tax section has undertaken a number of initiatives consistent with this objective, but it could do more.<sup>195</sup>

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193. One of us is such a person and many of her students report the same experience. See also Linda Galler, *Why Do Law Students Want to Become Tax Lawyers?*, 68 TAX LAW. 305, 308 (2015) (providing an anecdote of a professor's experience with students unexpectedly enjoying her tax course).

194. See *And Biglaw's Happiest Campers Are . . .*, ABOVE L. (Oct. 10, 2012, 1:29 PM), <http://abovethelaw.com/2012/10/and-biglaws-happiest-campers-are/>; *If You're Happy and You Know It*, ABA J., Apr. 2015, at 13, 13 (citing Vault's 2014 Law Firm Associate Survey); Kaitlin Edleman, *Switch to Your Law Firm's Tax Group ASAP!*, VAULT (Jan. 14, 2015), <http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/switch-to-your-law-firms-tax-group-asap>.

195. For example, the section adopted a Diversity Plan in 2015 that updates and enhances the Plan previously adopted in 2001. ABA SECTION OF TAXATION, DIVERSITY AND INCLUSION PLAN 1, 5, 9 (2015), <https://www.americanbar.org/content/dam/aba/administrative/taxation/2015-diversity-plan.authcheckdam.pdf>. In addition, the section promotes Careers in Tax events at law schools, which are intended to expose law students to diverse lawyers engaging in a variety of areas of tax practice. Paul Caron, *SoCal Law Students Invited to ABA Tax Section Careers in Tax Law Dinner on Jan. 28*, TAXPROF BLOG (Jan. 25, 2016), [http://taxprof.typepad.com/taxprof\\_blog/2016/01/socal-law-students-invited-to-aba-tax-section-careers-in-tax-law-dinner-on-jan-28.html](http://taxprof.typepad.com/taxprof_blog/2016/01/socal-law-students-invited-to-aba-tax-section-careers-in-tax-law-dinner-on-jan-28.html). It has also established a Public Interest Fellowship which makes patent the opportunity to do tax work in the public interest. See *Christine A. Brunswick Public Service Fellowship*, ABA (July 26, 2018), <http://www.americanbar.org/groups/taxation/awards/psfellowship.html>. These are praiseworthy efforts, but they are not enough. For the Tax section to be at least as diverse as the bar generally, it must help to grow the pool of tax lawyers from which it draws; as long as the tax bar is disproportionately white, the section will be as well. Hence, pipeline projects, like those established by the AICPA, are crucial. See SCOTT MOORE, 2013 TRENDS IN THE SUPPLY OF ACCOUNTING GRADUATES AND THE DEMAND FOR PUBLIC ACCOUNTING RECRUITS 4, 6 (2013); *Diversity and Inclusion*, AICPA, <https://www.aicpa.org/career/diversityinitiatives.html> (last visited Oct. 14, 2018); *Fueling the Accounting Profession Pipeline: What Will It Take?*, AICPA (July 14, 2015), <http://blog.aicpa.org/2015/07/fueling-the-accounting-profession-pipeline-what-will-it-take.html>; Frank K. Ross et al., *A Pipeline for Diversity*, J. ACCT. (July 31, 2014), <http://www.journalofaccountancy.com/issues/2014/aug/aicpa-diversity-20139181.html>. Projects such as Professor Marjorie Kornhauser's Tax Jazz program, in which law students go into high schools to teach students about the operation of the tax system and to train teachers to do likewise, should be embraced, funded, and expanded so that tax is taught in high schools. See Marjorie Korn-

The critical tax literature has long made the point that tax is not just about raising revenue but implicates the full panoply of social values.<sup>196</sup> Although in the end we may not be saying anything that critical scholars have not said before, our contribution is that we are deploying the argument in the service of an overtly different purpose: diversifying the tax bar. And that diversity could have far reaching implications for the shape of the tax system.

When we engage in the thought experiment that we suggested at the beginning of this Article, we are drawn to the conclusion that a more diverse tax bar would lead to a tax law that reflects the needs of a diverse population. Members of the tax bar not only provide scholarly commentary on tax policy but they serve in the professional organizations to which policy makers look to provide comments on legislative and regulatory proposals as well as on the staffs of the congressional committees that craft tax legislation. They also serve as lawyers for the IRS, the Tax Division of the Justice Department, and for the many state and local taxing authorities that interpret the tax law and determine enforcement and litigation priorities. Even if a more diverse tax bar would not have changed the recently enacted tax legislation because of the intensely partisan process that produced it, increased diversity in the tax bar could affect the interpretation and administration of the new law.<sup>197</sup>

In a larger sense, we are echoing Professor Kleinbard's call for integrated thinking about taxing and spending—fiscal policy—which inevitably requires engagement with values. We therefore close with his words:

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hauser, *TaxJazz: The Tax Literacy Program*, PROCEDURALLY TAXING (Feb. 20, 2017), <http://procedurallytaxing.com/taxjazz-the-tax-literacy-project>. According to Professor Kornhauser, "The mission of TaxJazz is to provide ordinary individuals, teachers and communities easily accessible, non-partisan, information about tax and tax policy, so they may participate in an informed way in a rational debate about the future of American tax policy." *Mission Statement*, TAXJAZZ, <http://taxjazz.com/about-2/mission-statement> (last visited Oct. 14, 2018).

196. For a representative but by no means comprehensive survey, see, e.g., Anthony C. Infanti & Bridget J. Crawford, *Introduction* to CRITICAL TAX THEORY: AN INTRODUCTION, at xxi, xxi (Anthony C. Infanti & Bridget J. Crawford eds., 2009); EDWARD J. MCCAFFERY, TAXING WOMEN 3 (1997); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y. L. SCH. J. HUM. RTS. 287, 287 (1999); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 790 (2007); Anthony C. Infanti, *The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation*, 89 WASH. L. REV. 1185, 1185 (2014); Anthony C. Infanti, *LGBT Taxpayers: A Collision of "Others,"* 13 GEO. J. GENDER & L. 1, 1 (2012); Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629, 1629 (1998); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 751 (1996).

197. For an example of how this can occur, consider the recently published book *Feminist Judgments: Rewritten Tax Opinions*, (Bridget J. Crawford & Anthony C. Infanti, eds. 2017), which provides an example of how a feminist perspective can reshape our understanding of tax law in the context of judicial opinions. The *Rewritten Tax Opinions* book is the first in a series of subject-matter-specific compilations that will follow the example set by *Feminist Judgments*, which showed how the inclusion of a feminist perspective can reshape our understanding of legal doctrine. See KATHRYN M. STANCHI ET AL., FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 22 (2016).

Fiscal policy recommendations in the end always are normative—they embody a point of view about our values, our relationships to each other, and what those values and relationships should be. Spending may be the sovereign, and tax policy the handmaiden, but *what* we choose to spend on is determined by our values and belief systems. And these in turn should be discussed more directly than they usually are, even by those of us whose inclinations tend more toward action than rumination . . .

. . . . [A]ll fiscal policy recommendations rest on a foundation of moral philosophy: the only question is whether we are conscious of that fact.<sup>198</sup>

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198. KLEINBARD, *supra* note 78, at xxii.

