

TAX AS URBAN LEGEND

Anthony C. Infanti¹

AMERICAN TAXATION, AMERICAN SLAVERY. By *Robin L. Einhorn*. Chicago and London: University of Chicago Press. 2006. Pp. xii, 337. Cloth, \$35.00.

What do race, gender, sexual orientation, and other non-economic characteristics of individuals have to do with tax policy? Shouldn't tax policy debates focus on neutral, objective, and quantifiable economic factors rather than on group status? What utility can there really be in bringing the perspective of subordinated groups to tax policy debates? As someone with an interest in critical tax theory, I am often asked these or similar questions by "mainstream" tax scholars² who look askance at—or simply ignore—attempts to inject a critical perspective into tax policy debates. I will readily confess that my level of frustration rises each time I am asked such questions. I am frustrated because, even after more than a decade into the critical tax movement,³ "mainstream" apathy towards critical tax theory seems to be on as firm a footing as ever.

At this point, I am sure that you are wondering what this frustration has to do with a review of Robin Einhorn's book, *American Taxation, American Slavery*. As it turns out, this book may have finally provided critical tax scholars with an effective tool for undermining the foundation upon which this "mainstream" apathy—that sometimes crosses over into antipathy—has been built. At first glance, though, with a title like *American Taxation, American Slavery*, you might think that Einhorn's book belongs on a shelf somewhere between the promotional materials published by tax protesters⁴ and a book of tax quips and quotes from Grover Norquist.⁵

¹ Associate Professor of Law, University of Pittsburgh School of Law. Thanks to Bridget Crawford for very helpful comments on an earlier draft of this book review.

² For a discussion of the artificiality of the mainstream/marginal distinction in the tax policy literature, see Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005).

³ Symposium, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1519 (1998). On the question whether critical tax theory qualifies as a "movement," see Infanti, *supra* note 2, at 711 n.11.

⁴ Tax protesters have actually marketed materials claiming that taxation is a form of slavery that is prohibited by the Thirteenth Amendment to the U.S. Constitution. For the Internal Revenue Service's discussion and debunking of this argument, see Rev. Rul. 2005-19, 2005-1 C.B. 819.

⁵ Grover Norquist is the president of Americans for Tax Reform. Ams. for Tax Reform, *ATR Staff*, <http://www.atr.org/home/about/staff.html> (last visited Nov. 23, 2007). Norquist is one of the most vocal proponents of a "starving the beast" approach to reducing the size of government (i.e., he wishes to force the government to reduce its size by starving it of revenue). Norquist has commented that he does not "want to abolish government. [He] simply want[s] to reduce it to the size where [he] can drag it into the bathroom and drown it in the bathtub." Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES, Sept. 14, 2003, § 6, at 54. More controversially, Norquist has actually compared the estate tax to the Holocaust, referring "to the supposedly specious argument that the estate tax was worth keeping because it really affected only '2 percent of Americans.'" He went on: "I mean, that's the morality

But far from being a diatribe against taxation, Einhorn's book exposes the unsavory roots of such diatribes. Delivering on her provocative title, Einhorn, a UC-Berkeley history professor, asserts that "the antigovernment rhetoric that continues to saturate our political life is rooted in slavery rather than liberty." (p. 7)

In an area that seems to have more than its share of myths,⁶ Einhorn reveals that the stories we tell ourselves over and over again about taxation and politics in America are little more than the stuff of urban legend:

The American mistrust of government is not part of our democratic heritage. It comes from slaveholding elites who had no experience with democratic governments where they lived and knew only one thing about democracy: that it threatened slavery. The idea that government is the primary danger to liberty has many sources, but one of its main sources in the United States involved the "liberty" of some people to hold others as chattel property. The allied idea that government is the primary danger to property rights also has many sources. In the early United States, however, it made the most sense where large amounts of the "property" consisted of human beings. (pp. 7–8)

Einhorn supports these assertions with a thorough retelling of "some of the most familiar set piece stories of American political history"—re-told, that is, through the lens of slavery. (p. 2) She traces the relationship among democracy, taxation, and slavery from colonial times through the antebellum period. (p. 1)

Even this briefest of descriptions is probably enough to pique most tax law scholars' interest in Einhorn's book. From a critical perspective, however, Einhorn's book is fascinating for another reason; that is, because it helps to dispel a different myth—the myth that both underlies the questions with which this review began and underpins "mainstream" apathy to critical perspectives—the myth that tax policy debates should focus on nothing more than neutral, objective, and quantifiable economic factors. This myth of quantification has proved a highly effective means of cleansing tax policy debates of uncomfortable discussions about invidious discrimination on the basis of race, gender, sexual orientation, and other non-economic characteristics. In fact, this myth has proven so effective that, in tax policy circles, any mention of these subjects is immediately viewed with suspicion, at best, or derision, at worst. As we will explore more fully below, Einhorn's detailed explication of the historical connection between

of the Holocaust. "Well, it's only a small percentage," you know. I mean, it's not you. It's somebody else.' " Richard Cohen, *Out of Their Anti-Tax Minds*, WASH. POST, Jan. 6, 2004, at A17.

⁶ E.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002); Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000); Joseph M. Dodge & Jay A. Soled, *Debunking the Basis Myth Under the Income Tax*, 81 IND. L.J. 539 (2006); Deborah A. Geier, *The Myth of the Matching Principle as a Tax Value*, 15 AM. J. TAX POL'Y 17 (1998); David H. Safavian, *Indexing Tax Attributes for Inflation: Dispelling the Myths and Advocating Change*, 1995 DET. C.L. REV. 109; Lawrence Zelenak, *The Myth of Pretax Income*, 101 MICH. L. REV. 2261 (2003) (reviewing MURPHY & NAGEL, *supra*).

taxation and slavery goes far in turning the tables on this myth of quantification, helping to render the myth itself suspect.⁷

The remainder of this review is divided into four parts. Parts I–III briefly summarize Einhorn’s discussion of the relationship between slavery and (1) colonial taxation, (2) the creation of a national tax structure, and (3) the adoption of uniformity clauses in state constitutions in the antebellum period. Part IV then turns to a discussion of how Einhorn’s book helps to debunk the urban legend of modern tax policy debates; namely, that critical perspectives and tax simply don’t mix.

I. COLONIAL TAXATION

In the first part of her book, Einhorn compares Virginia’s unsophisticated tax system (pp. 29–52) with Massachusetts’s more sophisticated tax system (pp. 53–78). Einhorn appears to have chosen these two colonial tax systems for detailed treatment both because several other colonies borrowed their early tax laws from them (p. 79) and because their differing tax experiences are emblematic of those of the North and South more generally during this period. (pp. 27, 81) The general theme throughout this part is that of a strict divide between North and South in terms of the relationship among democracy, taxation, and slavery: “Tax structures were more sophisticated in the colonies (and states) where local governments were more democratic *and* where slavery was rare. Either way, they were more sophisticated in the North.” (p. 83)

Einhorn describes Virginia’s tax system as “extraordinarily primitive”:

It levied several different taxes, giving the system as a whole an air of complexity, but each tax in this system was primitive in design and simple to implement. Nothing in Virginia’s tax system required local officials to perform complex administrative tasks and nothing imposed serious administrative burdens on taxpayers. Nothing in this system involved even a hint of the sacrifice of simplicity to equity that is the hallmark of modern taxation. (p. 29)

Virginia thus eschewed imposing any difficult administrative tasks upon its tax officials, who were notoriously corrupt. (pp. 35–36) For example, during colonial times, Virginia’s tax officials were never asked to actually value any of the property that was subject to tax. (pp. 29, 39, 50–51) Not coincidentally, by avoiding questions of valuation, Virginia also protected slaveholding elites from the prying eyes of their tax-collecting social inferiors—as well as from any hint that their authority over their “families” was being undermined, especially when some members of

⁷ Not being a historian, I cannot comment on the strength of Einhorn’s work from that perspective; however, it is worth noting that reviews of her book by historians generally appear to be positive, though they are naturally peppered with some critiques. *E.g.*, Max M. Edling, *Reviews of Books: American Taxation, American Slavery*, 63 WM. & MARY Q. 843 (2006); Stanley L. Engerman, *Book Review: American Taxation, American Slavery*, 93 J. AM. HIST. 1209 (2007); Stephen Mihm, *The Peculiar Origins of American Taxation*, 34 REVS. IN AMER. HIST. 455 (2006) (reviewing ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006)).

those “families” were considered property and would, therefore, themselves subject to valuation and taxation. (pp. 30–31, 50–51)

In contrast, Massachusetts’s tax system, though probably as regressive as Virginia’s in its incidence (pp. 64–65), was far more sophisticated (that is, vaguely modern) in its operation. (p. 78) Before the Revolutionary War, Massachusetts had a long history of, and experience with, the valuation of property and the apportionment of taxes among its towns. (p. 54) A more egalitarian society than Virginia (i.e., slavery was legal but rare during the colonial era), Massachusetts also “had the luxury of a more democratic political system, because the system did not exist for the very purpose of perpetuating drastically exploitative social relations.”⁸ (p. 60) With annual elections for many positions and “broad participation in local officeholding,” Massachusetts avoided both Virginia’s rampant corruption of public officials and a political situation in which “clever members of a privileged gentry class periodically tried to junk one set of institutions for another.” (pp. 55, 60–63) Instead, Massachusetts’s tax system changed and evolved over time in response to political pressures familiar to our modern tax system: “The history of taxation in Massachusetts is a story about prosaic political struggles and incremental changes. It is a recognizably modern story in which various groups competed over the distribution of tax burdens.” (p. 78)

Einhorn concludes the first part of her book with descriptions of the Pennsylvania and South Carolina tax systems (pp. 83–92 and 92–104, respectively), because these two colonies did not borrow their tax systems from other colonies and, consequently, represent a variation on the general theme of this part of the book. (p. 83) Pennsylvania had “low taxes but a comprehensive and sophisticated tax structure.” (p. 83) The Pennsylvania tax system also embodied some modern features, including “tax breaks for debt, child rearing, and poor families, plus a tax penalty to promote marriage” (p. 88), all of which probably reflected both Pennsylvania’s uniquely Quaker heritage and its different system for allocating land (i.e., it sold land to settlers rather than making land grants as Massachusetts did). (pp. 88–90) South Carolina had a more sophisticated tax system than its neighbors; nonetheless, the contours of its tax system were just as influenced by slavery as were those of its neighbors. For example, despite having demonstrated the ability to value property, South Carolina refused to “value the wealth of its plantation economy. It levied flat taxes on each slave and each hundred acres of land and ignored improvements to plantation real estate (e.g., buildings, irrigation works).” (p. 93) And, in the mid-eighteenth century, South Carolina enacted a poll tax targeted at free African Americans that was imposed at the same rates as its slave taxes: “It was a way to harass free blacks by charging them their taxable ‘value’ as slaves. It may also have been a way to enslave them: their freedom was a valuable asset to seize and sell for nonpayment.” (p. 99)

⁸ It is worth noting that Einhorn is careful in her use of the word “more” here; in other words, Massachusetts may have been “more” democratic and “more” egalitarian than Virginia, but that does not mean that it was either a fully democratic or fully egalitarian society. (p. 55) In fact, Einhorn specifically recognizes the plight of women in Massachusetts during this period in history: “Women [in Massachusetts] were disfranchised and, if married, prohibited from owning property.” (pp. 55; *see also* pp. 61, 211)

II. CREATING A NATIONAL TAX STRUCTURE

In the second part of her book, Einhorn describes how a national tax structure emerged out of the period surrounding the Revolutionary War and how that structure continued relatively unchanged until the beginning of the twentieth century. During this period, the federal government principally raised revenue through the imposition of tariffs while state and local governments principally raised revenue through the imposition of property taxes. (p. 111) This division of taxing instruments resulted from the divergent political considerations that influenced the shape of the taxing structure at the different levels of government. At the state and local level, the primary considerations in making tax decisions included (1) how to distribute the tax burden and (2) the relative (in)ability of the relevant government to administer a tax system. (pp. 111–12) Naturally, these same concerns were present at the federal level; indeed, the federal government’s reliance on the tariff was due, in part, to the fact that “it was easier to collect than other taxes and it subsidized the domestic producers of the goods that it taxed.” (p. 117). Nevertheless, it was impossible to address these practical considerations at the federal level without also “includ[ing] an accommodation to the sectional geography of slavery.” (p. 112)

Einhorn details the history behind the serendipitous choice of the tariff over other taxing instruments. She demonstrates that the choice was not taken because “a political economy treatise show[ed] that it was the best way to finance American governments”; instead, the choice was inextricably linked with slavery—and, more particularly, with the desire “to avoid talking about slavery.” (p. 111) Beginning shortly after the adoption of the Declaration of Independence, southern representatives at the Continental Congress began to warn that the confederation would quickly come to an end if the institution of slavery were threatened. (p. 120) The specific context for these warnings “was the debate about a tax clause for the Articles [of Confederation] and a draft proposing that Congress apportion national tax burdens to the states according ‘to the Number of Inhabitants of every Age, Sex and Quality, except Indians not paying Taxes.’”⁹ (p. 120) Making the first move to protect southern interests, Samuel Chase of Maryland made a motion to insert the word “white” before “Inhabitants” in this clause, a change that would surely have reduced the tax burden on the southern states. (pp. 120–21) Yet, in making this motion, Chase initiated what Einhorn describes as “a dangerous debate”—one “with stakes higher than Chase seems to have intended”—about how to take slavery into account in apportioning the national tax burden. (p. 121) Following contentious debate, Congress ultimately decided to eschew an apportionment based on population, choosing instead to apportion the tax burden based on relative land values. Congress settled on this “wildly unworkable scheme” (p. 124) because “[i]t was a way to get the Articles [of Confederation] framed without talking about slavery.” (p. 128). In other words, apportionment based on land values

⁹ Einhorn explains in a footnote that “Indians not paying Taxes” refers “to two groups: Indians living under sovereign tribal governments (i.e., those not conquered by English settlers) and Indians living under English jurisdiction in colonies (such as Massachusetts) whose tax laws exempted Indians.” (p. 293 n.6) It is worth noting here that, at various points in the text, Einhorn discusses the (unequal) relationship between Indian tribes and the colonists. (*see, e.g.*, pp. 31–34, 56–57, 58, 65, 86, 96–98)

had nothing to do with state sovereignty or fears of central authority. Nor did it reflect an ideological framework that defined politics as a perpetual struggle between “power” and “liberty.” The real estate apportionments solved only one problem: the fact that apportionments by population forced northerners and southerners to talk about slavery. (p. 128)

Shortly before the last state ratified the Articles of Confederation in 1781, Congress asked the states to amend the Articles to allow it to lay an impost on imported goods and war prizes. (p. 132) By that time, Congress had come to realize that the Articles’ requisition system was failing, and the impost had become a practical alternative because the French had weakened “the British blockade of American ports, enabling several to reopen for business.” (p. 132) However, because the Articles required every state legislature to approve amendments, Rhode Island was able to stymie the attempt to grant Congress the power to lay an impost when it refused to approve the amendment in the fall of 1782. (p. 134)

The impost’s defeat, coupled with a confluence of other events, led “Congress to initiate a wide-ranging debate about the nation’s financial alternatives” in 1783. (p. 138) Although this debate did not succeed in altering the tax scheme under the Articles of Confederation, it did produce “the infamous ‘three-fifths ratio’ for counting the population of enslaved African Americans” and did leave “its participants with a deeper appreciation for the political advantages of the impost.” (p. 138) The three-fifths ratio was a compromise designed to save the requisition system under the Articles by replacing the unworkable apportionment based on land values with an apportionment based on population. (pp. 138–45) Further recognizing that the states might not be able to meet their requisitions even under a more workable population-based apportionment scheme, the impost was seen as an attractive supplemental source of revenue because it required little administrative capacity, was advanced by merchants who had ready access to currency, and was of uncertain economic incidence (because it was expected that merchants would pass the impost on to consumers). (pp. 133, 145) This last attribute—opaque economic incidence—made the impost attractive because it obviated any need for apportionment and undercut any arguments that a state was being “overrated” as compared to other states under the requisition system. (p. 148)

A few years later, the framers included both the three-fifths ratio and the impost in the U.S. Constitution. The Constitution permits Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises,” provided that they are “uniform throughout the United States.”¹⁰ The impost could, however, be levied only on imports because of the prohibition on export taxes, and a cap of \$10 was placed on any tax on the importation of slaves.¹¹ This source of revenue was protected from encroachment by the states by a clause in the Constitution that prohibited the states from levying imposts or duties on imports or exports, except as absolutely necessary to

¹⁰ U.S. CONST. art. I, § 8, cl. 1.

¹¹ *Id.* § 9, cls. 1, 5. It is worth noting that Congress never imposed a tax on the importation of slaves. (pp. 169–70)

administer their inspection laws (and, in any event, these imposts or duties could not be imposed without the consent of Congress and any amounts collected had to be turned over to the federal government).¹² The framers intended the impost to solve the fiscal problems of the new nation:

They placed their trust in the impost not only because they thought it would be lucrative and easy to collect (from a few merchants at the ports rather than individual taxpayers scattered across the country), but also because they thought they learned a political lesson in earlier tax debates: that imposts, with their uncertain ultimate incidence, could minimize the dangers of distributing tax burdens across a nation that was half slave and half free. (p. 157)

Thus, “[j]ust as the framers had intended, the [impost] confined the threat of a tax to ‘compel the Southern States to liberate their negroes’ to the doomsday fantasies of slaveholders ‘who substitute unsupported suspicions to reason.’ ” (p. 199)

In connection with their “debate about how to count slaves in the apportionment of representation” under the Constitution, the framers decided to require the apportionment of both representation *and* direct taxes by population. (p. 172) As originally written, the relevant constitutional provision incorporated the three-fifths ratio: It required both representation and direct taxes to be “apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”¹³ The framers did not anticipate that direct taxes would be imposed regularly, but expected them to be available in case an emergency arose in which the impost could not provide sufficient revenue. (pp. 158, 165–66) In fact, Congress temporarily availed itself of direct taxes four times before the end of the Civil War—in 1798, 1813, 1815, and 1861. (p. 158)

The apportionment rule for direct taxes “was intended to preempt future debates about how to apportion these taxes. Like the real estate apportionment of the Articles—and like the impost itself—it was intended to prevent the tax debates that would politicize slavery.” (p. 158) Nonetheless, it turned out that both the impost and direct taxes did implicate slavery. Under the Constitution, the legislative deals that congressmen were able to strike quickly turned the impost into a protectionist tariff. (p. 150) Once discussions began in the first session of the first House of Representatives about levying an impost and representatives began to argue “about the economic impact of the provisions of their evolving bill, someone was bound to point to the role of slavery in any realistic analysis of the American economy.” (p. 151) Direct taxes also implicated slavery, albeit less directly. Because the apportionment of taxes between states was fixed in the Constitution, the apportionment of direct taxes “did not affect the distribution of burdens *between* states”; rather, it affected “the distribution of burdens *within* states.” (pp. 184–

¹² U.S. CONST. art. I, § 10, cl. 2.

¹³ *Id.* § 2, cl. 3 (prior to amendment).

85) With the rise of political parties, the impact of taxes on “party constituencies within particular states” became important:

The stakes in decisions about what to tax and how to tax it involved class interests rather than sectional interests. But, because of the sectional geography of American slavery, they involved two separate arrays of class interests. To Republican and Federalist politicians, these sectional arrays of class interests were the crucial political facts. In a way that the “founding fathers” had not begun to anticipate, the politics of an apportioned direct tax turned out to hinge on slavery indirectly—as partisans appealed to class interests in a nation that was half slave and half free. (p. 185)

III. “UNIFORMITY” CLAUSES AND STATE PROPERTY TAXATION

Because of the federal government’s heavy reliance on tariffs prior to the Civil War, “the history of antebellum taxation is primarily the history of state and local taxation.” (p. 201) In the final section of her book, Einhorn thus focuses her attention on state and local taxation, and more particularly, on the spread of “uniformity” clauses in state constitutions. As the name suggests, such clauses “required that different forms of property be treated ‘uniformly’: that they be assessed in the same way and taxed at the same rate.” (p. 202) Einhorn uncovers how these clauses—which, on their face, appear to be unobjectionable codifications of American notions of equality—were actually anti-democratic measures designed “to preempt the decision-making power of legislatures. They were intended to lock the design of tax structures against the potentially dangerous preferences of majorities.” (p. 202) And, as we will see, they too had their roots in the protection of slaveholders.

With the exception of Illinois,¹⁴ all of the earliest adopters of uniformity clauses were southern states: Maryland, Missouri, Kentucky, Arkansas, Louisiana, and Texas. (Map 1, p. 203) As Einhorn explains, the adoption of uniformity clauses in these states resulted from compromises between, on the one hand, nonslaveholders who demanded democratizing reforms and, on the other, slaveholders who “responded by demanding ‘security’ against the danger that nonslaveholding majorities would impose heavy or prohibitive slave taxes.” (p. 203) The slaveholders obtained the desired security through the uniformity clauses because, under those clauses, slaves would have to be assessed in the same way—and taxed at the same rates—as all other property. (pp. 203–04)

The later adopters of uniformity clauses were all northwestern states that had borrowed the general property tax systems of the Northeast. (p. 209) These states included Wisconsin, California, Michigan, Indiana, Ohio, Minnesota, and Oregon. (Map 1, p. 203) Given that the uniformity clause was the product of bargains between southern slaveholders and

¹⁴ Einhorn describes the murkiness surrounding Illinois’s adoption of a uniformity clause and the possibility that the clause may have been adopted to protect slaveholders on p. 242.

nonslaveholders, Einhorn pointedly raises the question why uniformity clauses would be attractive to constitutional drafters in the Northwest. (p. 204) She answers that “while the southern political deal was irrelevant in the Northwest, the constitutional formula was highly attractive. The constitution writers of the Northwest looked at the southern language of ‘uniformity’ and interpreted it as an American language of ‘equality.’ ” (p. 204) Preoccupied with the regressivity of a property tax that covered land owned by farmers but not the intangible assets held by elites (p. 242), the northwestern constitutional conventions “thought that they were prohibiting *lower* taxes on financial and corporate assets” when they adopted uniformity clauses.” (p. 231) In reality, however, the uniformity clauses operated to prohibit “*higher* taxes on these assets.” (p. 231; *see also* p. 244) Thus, the northwestern constitutional conventions borrowed a provision that was designed to protect southern slaveholding elites because they saw it as a means of protecting the northern “common man”; instead, ironically, the uniformity clause ended up protecting northern elites—those who owned the financial and corporate assets that now could *not* be subjected to progressive taxation—when those elites had never actually asked for such protection. (p. 231)

None of the states in the Northeast adopted uniformity clauses during this time period. Einhorn states that none of the legislatures in the Northeast “needed a constitutional mandate to tax property uniformly” because their “[g]eneral property taxes *were* uniform taxes.” (p. 231) The movement to adopt uniformity clauses also generally bypassed the Deep South, but for different reasons. For example, Einhorn explains that the 1829–1830 Virginia constitutional convention debated, but did not adopt, a uniformity clause. (pp. 236–39) At that time, the Virginia slaveholders were able to obtain an advantageous apportionment of representation that rendered the inclusion of a uniformity clause in the state’s constitution unnecessary. (p. 239) Decades later, in 1851, Virginia did adopt what Einhorn describes as a “qualified” uniformity clause in the context of a less advantageous reapportionment. (p. 247)

IV. DEBUNKING THE URBAN LEGEND OF MODERN TAX POLICY DEBATES

In each of the three parts of her book, Einhorn clearly describes how the institution of slavery shaped federal, state, and local tax systems from colonial times through the antebellum period. Throughout, Einhorn paints a compelling picture of a tax system that has its roots firmly planted in the accommodation of slavery. Some might dismiss this connection as a vestige of the distant past—we certainly don’t countenance invidious discrimination in our modern tax system, now do we? Well, the answer to this question is that our modern tax system is far from free of invidious discrimination. It is at this point that Einhorn’s work dovetails nicely with the work that critical tax scholars have been doing for more than a decade. Coincidentally, by highlighting the old and continuous connection between taxation and invidious discrimination in the United States, Einhorn undermines the old chestnut that critical tax scholars are simply a group of

postmodern academic “whiners”¹⁵ who are out to do no more than find support for their foreordained conclusions about the pervasiveness of discrimination in the legal (and, by extension, tax) system.¹⁶

A modern connection with Einhorn’s work can most readily be seen in Beverly Moran and William Whitford’s *A Black Critique of the Internal Revenue Code*, in which they describe how our facially neutral income tax system “systematically disfavors the financial interests of blacks.”¹⁷ But the connections between taxation and invidious discrimination do not stop there. In his book *Taxing Women*, Edward McCaffery has done some important historical work of his own, exploring in detail both the development of our deeply gendered tax system and the current, practical impact of that system on women’s decisions to enter or exit the labor market.¹⁸ Moreover, Congress unabashedly engaged in invidious discrimination just a little more than a decade ago when it enacted the so-called Defense of Marriage Act (commonly referred to by its acronym, “DOMA”). DOMA, which prohibits same-sex marriages from being recognized for federal tax purposes,¹⁹ was nothing less than an act of intentional and purposeful discrimination by Congress against lesbians and gay men:

The exclusion of same-sex couples from the marital provisions is intentional. As a result, there is nothing hidden or covert about the heterosexist bias of the tax code. There is no neutral principle at work. The rationale for the exclusion is not that same-sex couples do not pool their resources like opposite-sex married couples. Instead, the rationale for the exclusion is based on the beliefs that a same-sex couple is not a family, that no civilized society has ever countenanced such unions, and that our Judeo-Christian heritage forbids them.²⁰

¹⁵ Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1729 (1998) (“The foregoing critiques tend to validate Professor Zelenak’s thesis that critical tax scholarship betrays a ‘whiner’ mentality: (1) critical tax scholarship obsesses over tax provisions it does not like while ignoring the larger context, and (2) it is weak on plausible solutions.”).

¹⁶ James D. Bryce, *A Critical Evaluation of the Tax Crits*, 76 N.C. L. REV. 1687, 1688 (1998) (“The second general observation is that most of this literature starts with the premise that either women or blacks are oppressed. Starting with the premise that something is wrong, it is not surprising that things are found about which to complain.”).

¹⁷ Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 751.

¹⁸ EDWARD J. MCCAFFERY, *TAXING WOMEN* 11–160 (1997).

¹⁹ 1 U.S.C. § 7 (2007).

²⁰ Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 233 (1998); *see also id.* at 190 (“Numerous members of Congress returned again and again to the cost of providing federal benefits to same-sex partners. The effect of DOMA on the marital provisions of the tax code was not an unintended consequence.”); H.R. REP. NO. 104-664, at 11 n.40 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2915 (referencing the prepared statement of Lynn D. Wardle); *Hearing Before the House Sub-comm. on the Constitution of the Comm. on the Judiciary on H.R. 3396 (Defense of Marriage Act)*, 104th Cong. 171 (1996) (prepared statement of Lynn D. Wardle, Professor of Law, Brigham Young University School of Law) (specifically enumerating tax benefits as being among the federal benefits that would have to be extended to same-sex couples if a state were to legalize same-sex marriage).

Once we acknowledge these historical and modern connections between invidious discrimination and taxation, we can almost watch the tables turn on “mainstream” tax scholars. Now, the time has finally come for them to answer a question; namely, why they so steadfastly refuse to take race, gender, sexual orientation, and other non-economic characteristics into account in tax policy debates, when there is compelling evidence that the tax system has been persistently used as a tool for invidious discrimination against, and oppression of, subordinated groups.

I suspect that the answer to this question—which I really would like to hear “mainstream” tax scholars answer—lies in their discomfort with issues relating to race, gender, sexual orientation, and other non-economic characteristics of individuals. At the most immediate level, I expect that “mainstream” tax scholars are uncomfortable with the idea of admitting that the tax system that they have labored in, with, and (sometimes) over is not what they thought it to be. I imagine that it would be difficult to admit that our tax system, which has been the focal point of their careers, is not merely a means for raising the revenue that our government needs to operate and for engaging in some incidental social engineering, but is also a tool for invidiously discriminating against subordinated groups. Who would want to admit that their work to improve, explain, and teach about the tax system might actually have abetted a long-standing pattern of discrimination? At a deeper level, I expect that “mainstream” tax scholars are uncomfortable with the prospect of having to engage in the conversations about how to redress invidious discrimination on the basis of race, gender, sexual orientation, and other non-economic characteristics that will naturally ensue from facing the truth about how our tax system operates. In this sense, “mainstream” tax scholars would be little different from most of the players in Einhorn’s book, as they similarly attempted to avoid uncomfortable, divisive, and dangerous debates about slavery.

Interestingly, echoes of such denial can be seen in the stories that the “founding fathers” told themselves about taxation and slavery: “The ‘founding fathers’ told a different story [than the one described in Einhorn’s book] about national struggles over taxation and other policies in the early republic. They located the essence of these struggles in conflicts over class interests: rich versus poor, creditors versus debtors, merchants versus farmers and artisans.” (p. 113) This class conflict occurred between an elite (a small group of northerners) and the downtrodden “people,” who just happened to include the “southerners who owned dozens (if not hundreds) of human beings.” (p. 113) This is precisely the same tactic of transmuted difficult issues of race (and gender, and sexual orientation, etc.) into more comfortable (and more tractable) ones of economic class that we witness in modern tax policy debates. For example, as I have explained at length elsewhere,²¹ the bedrock tax policy concept of “equity” is framed in such a way that economic differences—and *only* economic differences—are taken into account when determining the fairness of a tax.²² Such an unbending focus on economics distorts tax policy

²¹ Anthony C. Infanti, *Tax Equity*, ___ BUFF. L. REV. ___ (forthcoming 2008).

²² *Id.* at ___.

debates by: (1) artificially creating a population that is homogeneous along all lines except economic class; (2) screening from the tax policy debate many issues relating to race, gender, sexual orientation, and other non-economic characteristics of individuals; and (3) transmuted any remaining issues relating to race, gender, sexual orientation, and other non-economic characteristics of individuals into ones of economic class.²³ This rhetorical sleight of hand has proved to be an effective means for those with wealth and power to manipulate tax policy debates to their own advantage.²⁴ Indeed, the idea that we should aspire to create a “fair” tax system has been twisted to the point where those with wealth and power have, at times, even succeeded in painting themselves as a subordinated group.²⁵

Although the unwillingness of “mainstream” tax scholars to face the truth about the relationship between our tax system and invidious discrimination may be understandable, it certainly is not excusable. Einhorn makes a similar point in a wonderful passage that likens Americans to J. R. R. Tolkien’s hobbits:

Writing about hobbits, J. R. R. Tolkien could have been describing our situation. Hobbits, it seems, were voracious consumers of their own history, though only when it was packaged in familiar form. They were especially partial to genealogy. “Hobbits delighted in all such things, if they were accurate: they liked to have books filled with things that they already knew, set out fair and square with no contradictions.” Tolkien’s joke here, of course, is that the “accuracy” of stories we already know depends on their familiarity rather than on a more meaningful measure of truth. For hobbits, the result of reading the same stories over and over again is that they know almost nothing about who they are or who they were in the past. They are profoundly surprised to learn that they actually have the capacity to be heroes. For Americans, whose familiar stories of slaveholding “founding fathers” are no longer quite as delightful as they used to be, the result is an unnecessary fatalism about our capacities to act on our ideals. (p. 2, *quoting* J. R. R. TOLKIEN, *THE LORD OF THE RINGS: PART ONE, THE FELLOWSHIP OF THE RING* 27 (1955) (footnote omitted))

“Mainstream” tax scholars are similarly “voracious consumers” of debates over tax policy, “though only when . . . packaged in familiar form.” For some “mainstream” tax scholars, tax policy discussions are “accurate” only when they are framed in the familiar terminology of economic efficiency and studiously avoid the “contradictions” that critical perspectives attempt to introduce. Moreover, in much the same way that hobbits comforted themselves with “‘books filled with things that they already knew,’ ” some “mainstream” tax scholars comfort themselves with the constant repetition of the line that tax policy is concerned with nothing more than neutral, objective, and quantifiable economic factors. It may even be that, merely by dint of that

²³ *Id.* at ____.

²⁴ *Id.* at ____.

²⁵ *Id.* at ____.

constant repetition, this line has come to be cloaked with a certain verisimilitude in their eyes. But a statement's appearance of truth is *not* the same thing as a statement's actually being true.

For those interested in shaking off their own tax policy fatalism and exploring "a more meaningful measure of truth" about the relationship between our tax system and invidious discrimination, Einhorn's *American Taxation, American Slavery* would be a good place to start.