

Cambridge University Press  
978-1-316-51020-9 — Feminist Judgments  
Edited by Bridget J. Crawford , Anthony C. Infanti  
Excerpt  
[More Information](#)

---

PART I

Introduction and Overview

## 1

## Introduction to the *Feminist Judgments:* *Rewritten Tax Opinions* Project

BRIDGET J. CRAWFORD AND ANTHONY C. INFANTI

How would judicial opinions change if the judges used feminist methods and perspectives when deciding cases? That is a question that various groups of scholars, working around the globe and mostly independently of each other, have taken up in a series of books of “shadow opinions” – literally rewritten judicial decisions – using precedents, authorities, theories, and approaches that were in existence at the time of the original decision to reach radically different outcomes and often using saliently different reasoning. This global sociolegal movement toward critical opinion writing originated when a group of lawyers and law professors who called themselves the Women’s Court of Canada published a series of six decisions in 2008 in the *Canadian Journal of Women and the Law*. Inspired by that project, scholars have produced similar projects in the United Kingdom,<sup>1</sup> Australia,<sup>2</sup> the United States,<sup>3</sup> and Ireland.<sup>4</sup> Other projects well under way involve New Zealand law<sup>5</sup> and international law.<sup>6</sup> Nascent projects are under consideration in India and Scotland as well.

<sup>1</sup> See *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE* (Rosemary Hunter et al. eds., 2010).

<sup>2</sup> See *AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW* (Heather Douglas et al. eds., 2015).

<sup>3</sup> See *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford eds., 2016).

<sup>4</sup> See *NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY* (Máiréad Enright et al. eds., 2017).

<sup>5</sup> See *New Research Project to Look at New Zealand Judgments from a New Angle*, ADLS (Oct. 16, 2015), <http://www.adls.org.nz/for-the-profession/news-and-opinion/2015/10/16/new-research-project-to-look-at-new-zealand-judgments-from-a-new-angle/> (describing FEMINIST JUDGMENTS PROJECT AOTEAROA).

<sup>6</sup> See *Feminist International Judgments Project: Women’s Voices in International Law*, U. LEICESTER, <http://www2.le.ac.uk/institution/researchimages/feminist-international-judgments-project-women2019s-voices-in-international-law> (last visited Mar. 31, 2017) (describing FEMINIST INTERNATIONAL JUDGMENTS (Troy Lavers & Loveday Hodson eds., forthcoming)).

What all of these projects have in common is that they involve rewriting judicial opinions that, up until this point, have mostly, if not entirely, been grounded in questions of constitutional interpretation. The Women's Court of Canada, for example, focused attention on Section 15 (the equality clause) of the Canadian Charter of Rights and Freedoms (for a discussion of Section 15 in this volume, see Kathleen Lahey's contribution in Chapter 2). The U.S. project, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, examined twenty-five key cases on gender ranging from 1873 to 2015, most of which involved the interpretation of constitutional rights.

This book approaches the question posed at the start of this chapter from a different perspective – that is, it concerns the rewriting of judicial opinions in an area of law that is largely governed by statute and in which constitutional arguments play a relatively small role. This book thus takes the sociolegal movement of critical opinion writing in a new, hitherto uncharted direction. The book is also – and quite appropriately in view of the tax system's key and keystone role in society – the first in a series of U.S.-based *Feminist Judgments* books to be published by Cambridge University Press. Future volumes in the series are expected to take up other areas of law and a variety of state and federal court decisions organized around different subject matters.

#### THE APPEAL OF CRITICAL OPINION WRITING

Critical opinion writing, as a form of scholarship, has tremendous appeal to us – and given the number of completed, ongoing, and nascent projects around the world, it obviously appeals to others in different countries and across a variety of areas of law, too. But why? For us, critical opinion writing is appealing because it represents a multidimensional and iterative challenge to preconceived notions about law's subjects and objects as well as about how law is created and interpreted and how it develops. Critical opinion writing challenges not only the law and the legal system to open its vistas but also represents particular challenges to those who write and rewrite judicial opinions and to those who read and consume those opinions.

Critical opinion writing challenges the rewriter – professors and practitioners who are mostly accustomed to analyzing, applying, and critiquing judicial opinions rather than writing them from the ground up – by forcing the critic/consumer to place herself in the shoes of the judge/opinion writer. With views colored by the path that history has taken since the original opinion was written but confined to sources available at the time the original opinion was drafted, the rewriter finds that she must wrestle with and resolve the issues and conundrums that judges routinely face. Thought must be given

to achieving a just result in the case at hand while taking a broader view of how the case fits into the general framework and structures of the law so as not to prematurely stymie future legal development or foreclose it altogether. This move of placing the critic/consumer of judicial opinions into the role of the judge provides the opinion rewriter with a new lens for viewing and interpreting judicial opinions when she returns to her life as a critic/consumer of judicial opinions. This experience should provide the rewriter with a new appreciation for the difficulty of crafting good judicial opinions and increase her empathy for the role played by judges.

At the same time, critical opinion writing challenges judges themselves by highlighting the contingent nature of the opinions that they write and their role in the process of making law. Imagining an alternative path for the law – whether by directly displacing the majority opinion in a case or by laying the groundwork for taking a different path in the future through an imagined concurring or dissenting opinion – challenges the aura of neutrality and objectivity conveyed by the tone that judges generally use when writing their opinions, as well as the notion that it is not so much the person as the judicial office pronouncing judgment. The rewritten opinions thus pointedly show that, however nostalgic the analogy, deciding cases is about much more than being a baseball umpire who simply calls balls and strikes, as some have contended.<sup>7</sup> Through the act of producing work in the form of a judicial opinion (rather than the more typical law review article or essay critiquing an opinion), the opinion rewriter demonstrates that judges possess no monopoly on articulating what the law ought to be, much less on purporting to correctly interpret the law or to set the law on a path toward furthering the cause of justice and the flourishing of society. The commentaries provided alongside the rewritten opinions underscore this challenge by explaining just how the rewritten opinions differ from the originals and by imagining what a different path for sociolegal history might have looked like. Taken together, the opinions and commentaries in this volume also help make the case for ensuring that there is a diversity of backgrounds on the bench so that judges do not approach their work with a uniform worldview influenced by the same set of preconceptions and privilegings and can thus helpfully challenge and question each other's perspectives.

For those who read these rewritten opinions (and we hope that some sitting judges will be among the readers of this volume), critical opinion writing may help expose the ways in which judges – and, in turn, the development of the

<sup>7</sup> Bob Egelko, *Roberts Deftly Evades Attempts to Pin Him Down*, S.F. CHRON., Sept. 15, 2006, at A4.

law – are subtly influenced by preconceptions, endemic privilegings and power hierarchies, and prevailing social norms and “conventional” wisdom. Especially when compared with the original opinions, the rewritten opinions concretely demonstrate how opening oneself to different and differing viewpoints that bring to the surface and call into question how underlying subjective experiences and perspectives can influence the current interpretation and application of the law – as well as its future development – in ways that benefit society as a whole. Naturally, the commentaries included with each rewritten opinion in this volume facilitate this process, but, in the end, there is no substitute for comparing the original and rewritten opinions side by side and examining them for yourself. Whether you are a student of tax law, a practitioner, a judge, or merely an interested taxpayer, actively engaging in this process of questioning judicial decision-making can help sensitize readers of judicial decisions to the multiple (and sometimes insidious) influences on any decision-maker. For those judges among our readers, this process can go far toward ensuring that these influences do not inappropriately creep into their own opinion writing.

#### GOALS OF THE PROJECT

This volume, *Feminist Judgments: Rewritten Tax Opinions*, is unique primarily for two reasons. First, its focus is on an area of law that most people do not associate with feminism or gender equality. Second, as mentioned earlier, this volume focuses on an area of law that is largely controlled by statutes and in which constitutional arguments typically play a relatively small role. But just as the volume that gave rise to this series, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, showed how feminist analysis can transform decisions of the nation’s highest court, so too does this volume show how feminist analysis can transform tax law (as well as other statutory or code-based areas of the law) by highlighting the importance of perspective, background, and preconceptions on the reading and interpretation of statutes. As William Eskridge argues in *Dynamic Statutory Interpretation*, with the passage of time, the perspective of anyone interpreting a law “diverges from that of the statute as a result of changed circumstances which give rise to unanticipated problems, developments in law and the statute’s evolution, and different political and ideological frameworks.”<sup>8</sup> In Eskridge’s view, statutes are just as much subject to interpretation as the common law and the

<sup>8</sup> WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 11 (1994).

Constitution are – and understanding this fact is crucial to understanding how the modern regulatory state operates.<sup>9</sup> This book of rewritten tax opinions similarly stands on the foundational belief that statutes are susceptible to multiple interpretations, and who is doing the interpreting matters greatly.

Within the scholarly tax community, there historically has been great resistance to bringing noneconomic “perspectives” to bear in the analysis or interpretation of tax law (whether those perspectives are based on critical race theory, feminism, queer theory, or other “outsider” approaches to the law). Instead, “mainstream” scholars have traditionally viewed tax law as closely aligned with the “science” of economics. From this perspective, the core questions addressed by tax law cut across all lines of difference in society – save those of income or, for those working in the transfer tax area, wealth – and are thus unaffected by concerns relating to race, ethnicity, gender and gender identity/expression, sexual orientation, socioeconomic class, immigration status, and disability. For this reason, “mainstream” tax scholars resist the notion that these “social” concerns play any part in our “neutral” tax laws and greet the critical tax scholars who raise these concerns through work that draws attention to the differential or discriminatory impact of tax laws on traditionally subordinated groups either with hostility or, more commonly, a cold shoulder.

For scholars and laypeople alike, tax is considered to be an arcane and technical subject, but all can agree that taxes have a direct impact on the pocketbook. Taxes impact each of us in terms of how much of our salary we take home from work each pay period; how much we pay for items at the grocery store; how much it costs us to purchase and own a home (due to the deductibility of home mortgage interest and property taxes and transfer taxes levied at the time of purchase or sale); and how much it costs us to transfer to family and friends, either by gift or inheritance, the property that we accumulate during our lives – just to name a few examples. It is thus unsurprising that tax is often seen as linked more closely with economics than law. In keeping with this view, the dominant mode of analyzing tax law focuses on people as little more than the sum of their financial transactions. That is, “mainstream” tax analysis homogenizes taxpayers so that all lines of difference (save those of income or wealth) are fully erased or ignored. Obviously, this thinking leaves no room to conceive of the possibility of a feminist tax judgment. But what the dominant mode of analysis ignores – and what this volume highlights – is the fact that tax statutes are rarely determinative on their own. Approaching

<sup>9</sup> *Id.* at 1–2.

the critical tax project from a different vantage point, this volume shows that the context in which parties and courts operate influences the understanding, interpretation, and application of statutes.

#### METHODOLOGY

When *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* was still in its editing phase, we recognized the potential for extending that book's methodology to our area of shared expertise – taxation. Our plans for this book began when we assembled a list of eight tax cases culled from our own knowledge and scholarship. We were interested in cases that implicated gender on their face (such as those involving medical expense deductions for certain fertility-related expenditures or gender confirmation surgery) as well as cases that require an understanding of the way that tax issues function in different historical, political, and economic settings (such as the state taxation of land set aside for American Indians). In composing our initial list of cases that might be ripe for feminist rewriting, we did not limit the cases to any particular court or jurisdiction, mostly because very few tax cases make it all the way to the Supreme Court and also because decisions issued by the U.S. Tax Court and other lower courts play a large role in the development and practice of tax law.

In order to benefit from the input of colleagues with different areas of tax expertise, we assembled a diverse and distinguished group of a dozen leading tax scholars as our Advisory Panel to help evaluate the cases on our list as especially deserving (or not) of feminist rewriting and to suggest other cases. This Advisory Panel consists of Alice G. Abreu, Patricia A. Cain, Joseph M. Dodge, Mary Louise Fellows, Wendy C. Gerzog, Steve R. Johnson, Marjorie E. Kornhauser, Ajay K. Mehrotra, Beverly I. Moran, Richard L. Schmalbeck, Nancy Staudt, and Lawrence A. Zelenak. We received much valuable feedback from the Advisory Panel and expanded the list of potential cases to twenty-four. We then issued a public call for authors, allowing prospective authors to indicate their preferences for rewriting an opinion or writing a commentary on any of the cases on the list of twenty-four. Prospective authors were further invited to suggest cases that were not on our list, too.

With the goal of choosing the most qualified and diverse authors, and taking into account the input of our Advisory Panel, we narrowed our selection to eleven cases. Eight of the cases came from the list of twenty-four; three were suggested by the intended authors. Most of the contributors to this volume are tax specialists (whether academics or practitioners), but some have nationally recognized expertise in a substantive specialty that underlies the tax

law focus of the chosen case. We are proud that our contributors represent a range of expertise and experience. The authors include nationally recognized senior tax experts, well-known feminist scholars, specialists in other substantive areas of the law, junior scholars, a law dean, a practicing attorney, and colleagues whose primary teaching work occurs in the clinical setting. We sought diversity of gender, sexual orientation, race, perspective, expertise, and status in the academy, consistent with an active commitment to a volume that would represent many viewpoints and voices. In addition, we have included a chapter written by Canadian feminist tax scholar Kathleen Lahey immediately following this Introduction in order to provide an important comparative/international context for the rewritten opinions in this volume.

#### WHAT IS A FEMINIST JUDGMENT ANYWAY?

In our call for participation, we explicitly stated that we, as volume editors, conceive of feminism as a broad movement concerned with justice and equality, and that we welcomed proposals to rewrite cases in a way that brings into focus issues such as gender, race, ethnicity, socioeconomic class, disability, sexual orientation, national origin, and immigration status. In keeping with the stance taken in the compilation and editing of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*,<sup>10</sup> we did not instruct authors on what we believed to be a “feminist” interpretation of the cases or confine them to any certain method or process for completing their work. From our perspective, this book is squarely within the tradition of critical tax theory, scholarship that we have described as sharing one or more of the following goals: “(1) to uncover bias in the tax laws; (2) to explore and expose how the tax laws both reflect and construct social meaning; and (3) to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements.”<sup>11</sup> To be sure, feminism has been historically motivated by concern for equality for women, but the most effective and inclusive feminism takes into account the way that many intersecting identities can make the quest for justice more complex and elusive, given the structure of both the law itself as well as the meaning of equal protection as interpreted by twenty-first-century courts. We did and do welcome a diversity

<sup>10</sup> Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford, *Introduction* to FEMINIST JUDGMENTS, *supra* note 3, at 3.

<sup>11</sup> Anthony C. Infanti & Bridget J. Crawford, *Introduction* to CRITICAL TAX THEORY: AN INTRODUCTION, at xxi (Anthony C. Infanti & Bridget J. Crawford eds., 2009).



of viewpoints about feminism's goals and practices and how they manifest themselves in judicial opinions.

#### GUIDELINES FOR OPINIONS AND COMMENTARY

The purpose of *Feminist Judgments: Rewritten Tax Opinions* is to show (not describe) how certain tax cases could have been decided differently if the judges had brought to bear a more gender-sensitive viewpoint. Authors were free to draw on their own understandings and interpretations of feminist theories and methods, but they were limited to rewriting their opinions based on the law and facts in existence at the time of the original decision. This is a key feature of all of the books in the Feminist Judgments Series. One of the underlying claims of this particular volume is that statutory interpretation, like decisions on constitutional questions, is affected by judicial experiences, perspectives, and reasoning processes. Opinion authors were free to rewrite the majority opinion, or add a dissent or concurring opinion. Of the eleven feminist judgments in this book, seven are rewritten majority opinions, two are dissents, one is a dissent in part and concurrence in part, and one is a concurrence. Some authors enjoyed the exercise of re-envisioning the original opinion from the ground up, had they been on the deciding court. Other authors found it easier to react to a majority opinion with which they disagreed and therefore chose to write a dissent. Of the eleven rewritten cases in the book, six are Supreme Court decisions, one is a federal circuit court opinion, and four are Tax Court opinions.

What these feminist tax judgments collectively demonstrate is that incorporating feminist theories and methods into tax cases is consistent with judicial duties and accepted methods of interpretation. The cases combat the notion that tax law is a pseudoscientific subdiscipline of economics in which application of the law is foreordained by economic principles or precepts. Instead, the body of rewritten cases shows that tax law is a product of the larger political, social, and cultural context in which it operates. Rather than being dictated by the plain language of statutes or the abstract (and perhaps unknowable) “will” of Congress, tax law decisions are contingent on the interpretational context brought to bear by the judge and the parties. Seen in this light, it becomes clear that the history and development of tax law does not follow a linear path, but can take (and could have taken) a multiplicity of different paths.

From a practical perspective, opinion authors were limited to 10,000 words, regardless of whether they were writing reimagined majority opinions, dissents, or concurrences, as appropriate to the court. Commentators had the difficult task of explaining, in 4,000 words or less, what the original court

decided, how the feminist judgment differs from the original judgment, and what practical impact the feminist judgment might have had. Each opinion and commentary went through at least three rounds of editing with us, and opinion writers and commentators also shared their thoughts with each other throughout the process. In fact, many pairs of opinion writers and commentators worked quite closely and cooperatively through the rounds of editing, with the commentary writers incorporating points in their commentaries at the request of the opinion writers, and with opinion writers receiving comments on their opinions from the commentary writers. The members of our Advisory Panel also graciously read and gave comments on draft opinions, ensuring that the authors received feedback from multiple sources. The ultimate decision to accept or reject feedback, however, remained with the authors. If we had been the authors or commentators, we might have taken a different tack or reached a different conclusion in several cases in the book. And in some cases, opinion writers and commentators saw issues differently. In any event, we did not press authors to reach the conclusions we ourselves would have reached or force concordance between opinion writers and commentators. Instead, we celebrate these multiple viewpoints as consistent with the richness and complexity of feminist thought.

#### ORGANIZATION OF CASES AND WRITING CONVENTIONS

The eleven cases in the book span the date range of 1903 to 2013. They implicate a wide range of issues including gender difference, the basic meaning of equality, medical expense deductions, marriage, divorce, trusts, income tax filing status, Indian rights, business deductions, and eligibility for tax-exempt status. We considered a variety of different organizational frameworks for the cases, attempting to group them by common themes or subject matter. Ultimately, however, because many of the cases involve multiple issues, it was difficult to settle on any one coherent organizing framework. For that reason, we decided to present the cases in chronological order. By presenting cases from oldest to most recent, we (hopefully) have eliminated any of our personal bias in the way we may view the cases and allow readers to develop their own sense of how the opinions relate to each other and how various courts' style, language, and reasoning have evolved over more than a century.

A few words are also in order regarding some of the conventions used in writing the opinions and commentary included in this volume. In the opinions, for the sake of clarity, we asked authors to refer to the Internal Revenue Service as either the "IRS" or "Commissioner" (rather than "petitioner" or "respondent"). We also asked the opinion writers to refer in the text of their