Perspectives on Minority Business Development

Tuesday, April 20, 4:00-8:45 p.m. EDT

Session 7: Perspectives of the Tax Policy Experts
7:35 - 8:05 p.m. EDT

Discussion Leader: Sabrina Conyers, Partner at Nelson Mullins Riley & Scarborough, Charlotte, North Carolina

Presenters: Beverly Moran, Professor Emerita of Law, Vanderbilt Law School; and Loren Ponds, Partner at Miller & Chevalier Chartered

Event Co-Chairs:

Samuel C. Thompson Jr.
Professor and Arthur Weiss Distinguished Faculty Scholar at Penn State Law

Sabrina Conyers
Partner at Nelson Mullins Riley & Scarborough
MATERIALS FOR: SESSION 7: PERSPECTIVES OF THE TAX POLICY EXPERTS

DISCUSSION LEADER: SABRINA CONYERS, PARTNER AT NELSON MULLINS, CHARLOTTE, NORTH CAROLINA
PRESENTERS: BEVERLY MORAN, PROFESSOR EMERITA OF LAW, VANDERBILT LAW SCHOOL; AND LOREN PONDS, PARTNER AT MILLER & CHEVALIER CHARTERED

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1996

A Black Critique of the Internal Revenue Code

Beverly I. Moran

William Whitford

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A BLACK CRITIQUE OF THE INTERNAL REVENUE CODE

BEVERLY I. MORAN & WILLIAM WHITFORD*

I. INTRODUCTION

This article raises the question of whether the Internal Revenue Code systematically favors whites over blacks. In recent years a small number of scholars in the legal academy have become known as critical race theorists.1 One main thrust of critical race theory is a belief that racial subordination is everywhere, a structural aspect of all parts of American
society. If this part of critical race theory has merit, then every important American institution should reflect racial subordination, even such a seemingly neutral institution as the American tax system.

A tax professor’s question whetted our interest in the racial neutrality of the Internal Revenue Code. Responding to Professor Jerome Culp’s article Toward a Black Legal Scholarship, which argues that the white academy has ignored generations of distinct black legal thought, the professor asked: “Is there a black view on income averaging?” In context, the professor was obviously attempting to assert the racial neutrality of tax law.

Our response to this question is that, yes, there is a black view on income averaging—that it is not very important. Income averaging is an attempt to right the perceived wrong that due to our system of annual accounting periods, people with fluctuating incomes are forced to pay high tax rates when their average income is in fact quite low. When it existed, income averaging allowed taxpayers with fluctuating incomes to average their incomes over several accounting periods, thereby placing themselves in lower tax brackets. When Congress compressed the difference between rates in 1986, the perceived wrong of high rates disappeared and Congress repealed income averaging. While the income of blacks can certainly vacillate—blacks are disproportionately among the first to be laid off in periods of economic retrenchment, for example—most blacks rarely make enough to worry about high tax rates. Consequently, it is likely that blacks rarely used income averaging. Thus, a Congress oriented solely to the interests of blacks

5. Under former I.R.C. §§ 1301-1305 (1994), if a taxpayer’s income in a taxable year exceeded 140% of his average income for the preceding three years, the excess was taxed as if it had been earned in equal installments over the four-year span.
9. Thirty-nine percent of black households survive on incomes of $11,612 or less, while only six percent of black households bring in “high incomes” of $50,000 or more. Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 100-01 (1995).
would never have perceived the original wrong that income averaging was intended to cure.

Our thinking about income averaging led us to ask how one might determine whether the tax code is racially discriminatory. Discrimination connotes that persons who are similarly situated except for race are not treated similarly.10 This definition presupposes, however, some standard for determining when people are similarly situated. In the context of the Internal Revenue Code, everyday tax policy analysis provides us a ready tool for this analysis. In \textit{Commissioner v. Glenshaw Glass},11 the Supreme Court defined income as "all accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Since then generations of tax scholars have used this definition to craft a conception of a comprehensive income tax base. Our standard for when persons are similarly situated, therefore, is when they have the same income, and we too use the \textit{Glenshaw Glass} definition of income.

Of course, many provisions of the Internal Revenue Code deviate from the ideal of taxing all income in the comprehensive income tax base. Sometimes the Code compromises the ideal in order to achieve a more administratively practical rule. More often, Congress has decided to encourage particular lifestyles or behaviors by holding out tax benefits as an incentive. For example, the exclusion of interest on tax free bonds explicitly removes from the tax base "accessions to income, clearly realized, and over which taxpayers have complete dominion." Congress has adopted the exclusion to make the purchase of state and local bonds more attractive to rich taxpayers, and thereby reduce the cost of borrowing for states and municipalities.14

Our hypothesis is that deviations from the ideal of a comprehensive income tax systematically favor whites over blacks. While many studies about the impact of tax law rely on data from returns, we were unable to do so because tax returns are not coded by race. In the absence of tax return data, we have turned to social science studies of the lifestyles and behaviors of whites and blacks. This evidence will enable us to estimate what proportion of each group is seemingly eligible for various tax benefits. We define as a tax benefit any opportunity for deductions or exclusions from income that deviate from the ideal of a comprehensive income tax base, or opportunities to postpone reporting income to a time

\begin{enumerate}
\item In tax law this concept is called horizontal equity and is often used in tax policy analysis. For a discussion of horizontal equity see Boris I. Bittker, \textit{Federal Taxation of Income, Estates and Gifts} § 3.1.4 (1981).
\item 348 U.S. 426 (1955).
\item \textit{Id.} at 431.
\item I.R.C. § 103(a) (1994).
\item 1 Bittker, \textit{supra} note 10, § 15.2.1.
\end{enumerate}
later than when it should be reported according to the ideal of the comprehensive tax base. Our evidence about the availability of these tax benefits to whites and blacks comes both from existing social science studies conducted for other purposes and from our own analysis of some important demographic databases. We describe these databases in the Appendix.

We have limited our study to black/white differences in the enjoyment of tax benefits, though we recognize that other racial and ethnic groups in America claim to be systematically subordinated. The social science data on which we rely is scarce enough for blacks, and even less available for other groups. We hope future research can extend our study to other racial and ethnic groups.

In studying the differential enjoyment of various tax benefits, we look just at the immediate effect of these provisions. We recognize that the ultimate impact of a tax benefit is uncertain. Tax benefits create incentives for particular lifestyles and behaviors. As taxpayers respond to these incentives, the demand, and therefore the market price, for various things and services rises or falls. For example, if taxpayers have responded to the various incentives for homeownership by increasing the demand for homes, the price of homes may have increased. If the price increase is large enough, taxpayers buying such homes may be no better off, even with the tax benefits of homeownership, than if the tax benefit was never enacted. However, the marketplace effects of tax benefits are virtually impossible to measure. We accordingly limit our study to estimating the differences in the degree to which blacks and whites utilize tax benefits.

We would like to study the impact of all major tax benefits in the Code. However, reviewing existing social science data and conducting our own statistical studies on black/white lifestyle differences is time consuming and expensive. Limited resources have prevented us from studying all major tax benefits. In this article we report on the results of our study of tax benefits in four categories. We cannot reach a conclusion about whether the Internal Revenue Code as a whole is systematically biased in favor of whites. Even though we will find evidence that whites gain more from various tax benefits than blacks, other tax benefits that we have not studied (such as the earned income credit) may offer greater benefits to blacks. Nonetheless, our study will test our method—the use of demographic social science studies and

15. For a discussion of the true value of a tax preference see CHIRELSTEIN, supra note 4, at 361-67.
databases to draw conclusions about the racial impact of various tax benefits. Furthermore, because we study very important tax benefits, and find them systematically biased in favor of whites, we add credibility to our hypothesis with respect to the Code as a whole. We hope to later extend our study to other tax benefits.

The tax benefits that we have studied fall into four broad categories:

(1) Some benefits granted to wealth and wealth transfers, specifically the exclusion of gifts,\(^{17}\) basis adjustment rules at the time of gift and at death,\(^ {18}\) reduced rates for capital gains,\(^ {19}\) and various aspects of the realization requirement for determining the timing of income.

(2) Four benefits of homeownership, specifically the home mortgage interest deduction,\(^ {20}\) the real property tax deduction,\(^ {21}\) the rollover of gains on the sale of a principal residence,\(^ {22}\) and the one time exclusion of $125,000 of gain on the sale of a principal residence by a person over fifty-five years of age.\(^ {23}\)

(3) Several employee benefits, specifically Keogh plans,\(^ {24}\) IRAs,\(^ {25}\) employer provided pensions,\(^ {26}\) and employer provided health insurance.\(^ {27}\)

(4) The different tax rate treatment of single and married persons, which is sometimes called the "marriage penalty."

\(^{17}\) I.R.C. § 102(a).
\(^{18}\) I.R.C. §§ 1014(a), 1015(a).
\(^{19}\) I.R.C. § 1(h).
\(^{20}\) I.R.C. § 163(h)(1), (h)(2)(D).
\(^{21}\) I.R.C. § 164(a)(1).
\(^{22}\) I.R.C. § 1034(a).
\(^{23}\) I.R.C. § 121(a)-(b).
\(^{24}\) I.R.C. § 401(c).
\(^{25}\) I.R.C. §§ 219, 408.
\(^{26}\) I.R.C. §§ 401(a)(1), 501(a).
\(^{27}\) I.R.C. § 106.
A. Critical Race Theory and Method

Critical race theory has generated heated debates about method. In particular, critical race theorists' use of narrative has sparked controversy.\(^2\) For us, narrative is a powerful and worthwhile method. Narrative allows one person to experience another person's life in an intimate and meaningful way. For example, Patricia Williams is well known for her ability to reach whites with her stories of everyday black life. When Professor Williams writes about being denied entrance to a store because of her race,\(^2\) she opens this experience to whites in an intimate way that statistics cannot replicate.

Narrative also allows the use of ridicule and exaggeration to expose situations that are otherwise ignored. For instance, Professor Derrick Bell often uses such devices as a means of exposing society's faults. When Professor Bell writes about licensing white people to discriminate,\(^3\) or when he writes about whites selling blacks to aliens from outer space,\(^4\) he exposes a black American truth—the tenuous status of blacks on these shores.

Thus narrative has its place within critical race theory. But our primary interest in critical race theory is its substantive theory of racial subordination, not its methods. In our view, hostile critics of critical race theory have placed too much emphasis on the use of narrative, and not enough emphasis on the theory of systematic racial subordination in American society. Our use of social science methodology will prevent individuals from avoiding our conclusions by attacking narrative as a method.

B. Use of Controls

In studying racial subordination, we had to decide whether we were interested solely in the differential impact of tax benefits by race, or whether we were interested in the differential impact by race after

\(^4\) Derrick L. Bell, Faces at the Bottom of the Well: The Permanence of Racism 47-64 (1992).
\(^2\) Id. at 158-94.
controlling for income and other indicants of socio-economic status (SES). We decided that we were interested in both. It is commonly assumed that blacks cluster in the lower economic classes, and that most tax benefits favor the wealthy more than the poor. If these assumptions are correct, it follows that tax benefits in the Internal Revenue Code directly benefit whites as a group more than blacks. But our version of the racial subordination theory is stronger than this.

We believe that even if income is held constant, the Internal Revenue Code systematically disfavors the financial interests of blacks. We believe that, even at the same incomes, the typical black and the typical white lead different lives, largely as a result of the American history of racial subordination. These different lives, we hypothesize, trigger different tax results.

Because we want to test the stronger version of our hypothesis, we have always controlled for income in our analysis of the social science data. A more difficult decision has been whether to control for other indicants of socio-economic status as well. Many social scientists engaged in race relations research believe that by controlling for as many SES characteristics as possible, the effect of race in human relationships is minimized or eliminated entirely. Minimizing the effect of race is appropriate when a study is interested in the influence of skin color alone. We do not hypothesize, however, that blacks pay more taxes because tax administrators respond to skin color (though that may happen), but rather because blacks are more likely to have lifestyles that are less advantaged by tax benefits. As a result, for our purposes controlling for all possible SES characteristics would constitute nothing more than defining in nonracial terms the very lifestyles that cause blacks to be disadvantaged by the tax code.32

At the same time we are concerned that if we only control for income, some readers will dismiss our findings as not truly driven by racial differences. Furthermore, much of the quantitative social science literature concerning black/white lifestyle differences uses controls in addition to income in order to isolate the effects of race. We rely extensively on this literature in our analysis and will report on its use of controls.

In doing our own data analysis, we have adopted a compromise position. We have analyzed data about lifestyle differences using race and income alone as relevant categories, but we have also analyzed and will report about black/white lifestyle differences after controlling for a limited

32. As the Yiddish saying goes: “If your grandmother had balls, she would be your grandfather.”
number of additional characteristics of SES. In the Appendix, we report in detail on the controls used in our data analyses.

C. The Significance of Our Work

For the most part we reserve our conclusions until we have presented the data. But we must address preliminarily the potential significance of a finding of systematic racial subordination in the Internal Revenue Code. If these findings have no significance, then there is no point to conducting our study.

First, we want to make clear that we are not asking a question about discriminatory intent. We do not hypothesize that members of Congress set out to harm blacks through the Internal Revenue Code. Nonetheless, in America a gap exists between blacks and most lawmakers because many whites and blacks do not interact in any meaningful way. Legislators are affected by this social segregation. Black life remains largely unknown to most of the white world, and to most white legislators. Hence legislators are largely unaware of the Internal Revenue Code's impact on blacks. We believe that this ignorance is one of the reasons for structural racial subordination in America.

Second, although we cannot possibly come to a definitive conclusion about the entire Internal Revenue Code, we will present evidence suggesting that certain provisions benefit whites more than blacks. If the Code as a whole reflects racial subordination, we believe such a finding has value as social science. It would offer support for the basic substantive theory of critical race theory—that racial subordination is everywhere.

However, as lawyers concerned with racial justice in America, we also believe that if the Internal Revenue Code systematically subordinates black interests, then Congress should change it. To develop possible changes, we have invented a metaphor of a Black Congress that is exclusively oriented to the interests of blacks as a group. We will suggest changes in the Internal Revenue Code that such a Congress might consider. Because no change should be enacted without consideration of the Code as a whole, and because we studied a limited number of provisions, we make no final recommendations. Our suggestions should not only stimulate interest in possible reforms, but also illustrate how the actual Congress, largely unaware of black lifestyles, might have created a Code that systematically subordinates black interests.

We next present our evidence about how the provisions that we studied have different impacts on blacks and whites. Afterwards we will elaborate on our conclusions.
II. WEALTH

A. Tax Benefits

We looked at four code sections that protect wealth, both while the original owner holds it and when the original owner passes it on to other people, usually younger family members. These four provisions are the Section 1014 basis adjustment, the Section 1 reduced rate for capital gains income, the Section 102 exclusion for gifts and the Section 1015 gift basis. In addition, we considered two unwritten rules that work to benefit wealth—the realization requirement and tax-free financing.

Each of these sections and rules allow taxpayers with wealth to avoid income taxes that would be due under the Glenshaw Glass goal of taxing all “accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” These provisions are relevant to our topic of black/white differences in tax benefits for two reasons. First, on average blacks own less assets than whites. Second, to maximize the tax benefits of many of these provisions an individual needs not only to own property, but to own the right types of property. As we will show, the small percentage of blacks who do own assets are likely to own the wrong type of assets to maximize tax benefits.

We discuss each of the provisions before turning to analysis of their racial impact. Investments in home equity are an important category of wealth, but because special tax provisions pertain to them, we reserve our discussion of this form of wealth until the next section.

1. REALIZATION AND REFINANCING

When a taxpayer earns a salary, his increase in wealth is immediately subject to tax. In contrast, when many assets appreciate in value in their owners’ hands, the increased value is not immediately taxed. A nonstatutory rule called “realization” determines the time of taxation.

34. See discussion of the social science literature and our results infra pp. 766, 769-70, 771-72.
35. See discussion of the social science literature and our results infra pp. 767-68, 770-72.
36. See infra p. 775.
A multitude of rules determine when realization occurs with respect to different assets. For example, interest on bank accounts (both checking and savings, including certificates of deposit requiring a penalty for early withdrawal) is realized when it accrues and is immediately taxed. But appreciation in the value of stock, real estate, and many other assets is not deemed to be realized until there is a “sale or exchange.”

The realization requirement often permits taxpayers to delay paying the tax on an accession to wealth. Delayed taxation is usually advantageous to a taxpayer because he can then invest the resources that would otherwise have gone to taxes. Further, if realization occurs only after a sale or exchange, the taxpayer has considerable control over the timing of taxation, and can plan to realize the accession to wealth in a year in which he has little other income, or even an excess of realized losses, thereby avoiding taxation at higher rates or altogether.

From the taxpayer’s perspective, one problem with the realization requirement is that, in order to obtain its benefits, the taxpayer must often hold onto his property. Fortunately for those with assets to spare, the Code provides several ways around this limitation. Most importantly, the taxpayer can exploit the principle that borrowed monies are not income because the corresponding obligation to repay means there is no accession to wealth.

Taxpayers with appreciated property can borrow against that appreciation without having a realization event. By using the borrowed funds, wealthy taxpayers can enjoy property appreciation without a corresponding tax cost. There are other ways to accomplish this objective as well. For example, some swaps of property are considered “like kind” exchanges, which the statute exempts from immediate recognition of untaxed appreciation.

2. SECTION 1014 BASIS ADJUSTMENT

When a taxpayer owns the type of property for which appreciation in value is not recognized in the year in which it occurs, the taxpayer can avoid liability for the appreciation altogether by owning the property until death. Section 1014 provides that the heir of property acquires a basis in the inherited property equal to its fair market value at the time of the decedent’s death. Any previously untaxed (because “unrealized”) appreciation in the value of the property escapes tax altogether. This is

40. I.R.C. § 1222.
41. CHIRELSTEIN, supra note 4, § 3.01.
42. See, e.g., I.R.C. §§ 1031(a), 1034(a). For a discussion of like kind exchanges see CHIRELSTEIN, supra note 4, § 15.01-02.
true even if the decedent enjoyed the benefit of that appreciation by, for example, using the property as collateral for a loan.

In order for a taxpayer to obtain Section 1014's benefits, the type of property involved is crucial. First, Section 1014 only benefits property that has appreciated in value. Property that has declined in value receives a stepped down basis on the owner's death, and thus nobody takes a deduction for the lost value. Second, even if the property appreciates, Section 1014 only benefits those who inherit property with unrealized gains. Bank accounts can appreciate as they accumulate interest but that interest is realized and taxed each year. When the heirs receive the contents of those already-taxed accounts, there is no built in—yet untaxed—gain for Section 1014 to protect.

3. CAPITAL GAINS

If a taxpayer sells appreciated property prior to death, he must pay tax on the appreciation. However, if the property is a "capital asset," that accession to wealth may be taxed at favorable capital gains rates.\(^\text{43}\) Essentially, the capital gains rate is a special (lower) rate of tax on the sale of investment property as opposed to the common (higher) rate on "ordinary" income. Avoiding technical detail, ordinary income consists of such items as salary, dividends and interest, while capital gains come from the sale or exchange of capital assets such as stocks and real estate.\(^\text{44}\) The practical result of the difference between "ordinary income" and "capital gains" is that the highest rate of federal tax on ordinary income is 39.6% while the highest capital gains rate is 28%.\(^\text{45}\) Although some argue that Congress should lower or repeal the capital gains tax,\(^\text{46}\) the more than forty percent increase in tax from 28% to 39.6% is enough to keep wealthy taxpayers focused on the capital gains rate.

\(^{43}\) See I.R.C. §§ 1(h), 1221, 1222. Section 1222 divides capital gains and losses into two classes: 1) long-term arising from the sale or exchange of capital assets held for more than one year; 2) short-term arising from the sale or exchange of capital assets held for one year or less. Net long-term gains are treated preferentially, while net short-term gains are taxed at ordinary rates. Section 1245 limits the ability of taxpayers to receive capital treatment on the sale of business assets whose cost has been recovered through depreciation deductions from ordinary income. A taxpayer's gain on the sale of his property is taxed as ordinary income to the full extent of his prior depreciation deductions.

\(^{44}\) For a discussion of the definition of capital asset see CHIRELSTEIN, supra note 4, § 17.01-05.

\(^{45}\) I.R.C. § 1(a)-(d), (h).

Owning the right kind of property is crucial to capital gains treatment. First, preferential treatment goes only to property that produces a gain on sale. Depreciated properties, such as cars and real estate in inner city slum neighborhoods, are disfavored if they are capital assets because a taxpayer is often unable to deduct losses resulting from these properties. Further, the capital gains rate only applies when the property is of a type where its appreciation is not immediately realized. Finally, the taxpayer must hold the property for investment rather than for sale to customers. Thus investors are favored over small businessmen. As we will see, all these requirements have adverse effects on blacks because they disfavor the very assets that blacks tend to own.

4. GIFTS

Surely an extra $5000 received without an obligation to repay is an "accession to wealth." Yet, under Section 102 this $5000 (or $50,000 or $500,000) escapes income taxation if it meets the Code's "gift" definition. Under Commissioner v. Duberstein, a transfer with no obligation to repay constitutes a "gift" for tax purposes only if it results from the donor's "detached and disinterested generosity." In combination with other rules, the net result of the "detached and disinterested generosity" requirement is that gifts from strangers (such as prizes and awards) are usually taxed. In contrast, gifts from family members and friends commonly receive the Section 102 exclusion. Moreover, wealthy people generally count other wealthy people as their family and friends, while low-asset individuals can only hope to get wealth transfers from strangers and lotteries. The gift exclusion under Section 102 thus favors the more fortunate both because wealthy individuals have access to more gifts and because they have access to the "right" gifts.

47. Capital losses are generally deductible only to the extent that they offset capital gains. In the case of a noncorporate taxpayer, up to $3000 of capital losses in excess of capital gains can be deducted from ordinary income. Any capital loss balance is carried forward into succeeding taxable years where it can be applied against capital gains (and to a lesser extent against ordinary income) in each succeeding year until fully utilized. I.R.C. §§ 1211(b), 1212(b) (1994).

48. For example, the capital gains rate does not apply to appreciating bank accounts.

49. I.R.C. § 1221(1).


51. See I.R.C. § 74 (including in gross income amounts received as prizes and awards). But see I.R.C. § 117 (excluding from gross income amounts received as a qualified scholarship).
This emphasis on the right gifts only increases when we consider the rules in Section 1015 that govern the donee's basis in gifts. Under Section 1015 the donee takes the donor's basis so long as the gift has appreciated in value. This provision allows a high bracket donor to arrange for gains to be taxed at the rates applied to a donee, who may be selected for the gift because of his low bracket. But the donee's basis in property that has depreciated in the donor's hands is the fair market value of the property at the time of gift. 52 Thus no one gets the tax benefit of deducting the loss that resulted from the depreciation in value. Therefore, the basis rules mean that only taxpayers who have property with unrealized appreciation can reduce taxes by giving that property to family members.

B. Wealth and the Social Science Literature

Until the 1970s, studies of race and economics focused on income rather than wealth. Studies of wealth differences by race were few and far between. Once the importance of wealth and race was acknowledged, the reason for the dearth of studies changed from lack of interest to problems with data collection. 53 Income surveys are relatively easy because researchers can obtain income information from pay stubs, tax returns and bank records. 54 Because value is constantly affected by ever-changing market conditions, information on home and car equity or the value of household goods is harder to obtain. Even today, social scientists point out that wealth data is suspect if for no other reason than that the wealthy are uncooperative subjects with a tendency to substantially underestimate their holdings. 55

1. EARLY WEALTH RESEARCH

Despite data collection problems, social scientists conducted several race and wealth studies from the 1960s through the 1980s. For these

52. I.R.C. § 1015(a).
55. Oliver & Shapiro, supra note 9, at 57 (stating that "[s]urveys of assets and wealth invariably underrepresent the upper levels, primarily because of the difficulty in obtaining the cooperation of enough very wealthy subjects."); O'Hare, supra note 54, at 8 (finding that "income from investments tends to be underreported more than income from other sources").
purposes, probably the most important databases created during this period were the United States Bureau of the Census' 1979 Income Survey Development Program (IDSDP) and the Survey of Income and Program Participation (SIPP), which the Bureau has conducted annually since 1984. The early studies were often limited to gross comparisons, lacking controls. For example, as late as 1983, William O'Hare complained that he could not use IDSDP data to look at "the wealth of blacks and whites with similar socioeconomic characteristics." Instead, applying gross averages to IDSDP, O'Hare showed that, in 1979, the average black household had one-third of the wealth of its average white counterpart. He further showed that although blacks made up twelve percent of the nation's households, they held only four percent of all personal wealth. Contrasting this information with black mean income figures from the U.S. Bureau of the Census, O'Hare pointed out that while average white income was 1.6 times greater than black income, white wealth was three times larger than black wealth.

Despite limitations on the data, some authors did try to make more precise comparisons between more similarly situated blacks and whites. As early as 1971, Henry Terrell took a step beyond comparing averages when he looked at the relative size of wealth accumulation by comparing blacks and whites in similar income ranges. Using mean income within seven groups, Terrell showed that black wealth ranged from a low of 16.1% of white wealth in the $2500 to $4999 category, to a high of 47.3% of white wealth in the $15,000 to $19,999 income group.

Social scientists also became interested in the different types of assets owned by individuals of different races. For social scientists, asset composition is important because some assets are investments that tend to increase wealth while others are largely for consumption (e.g., homes and cars) and do not enhance future income or wealth. Using different databases and slightly different controls, Lorman Lundsten and Harold Black, O'Hare, and Terrell all looked at asset composition and came to much the same conclusions. To quote Terrell: "Black families have a definite tendency toward accumulation in assets yielding consumption services (cars, trucks, and housing) while white families hold a greater

56. O'HARE, supra note 54, at 27.
57. Id. at 3.
58. Id.
59. Id. at 7.
60. Terrell, supra note 53, at 364.
share of their nonfinancial wealth in income providing assets (farms, other real estate, and business equity)." 62 O'Hare concluded:

Three types of assets are likely to bring income in return: financial assets, rental property, and ownership of businesses or farms. Black households have a much smaller proportion of their wealth invested in such assets than do white households. . . . Thus, the wealth of white families actually expands their income, to a much greater extent than for black families. Wealth that is tied up in a home, a car, or household goods . . . represents consumption rather than investment, because these assets do not regularly generate income; over two-thirds of black wealth is tied up in these durable goods. Thus, this difference in the distribution of wealth is also likely to perpetuate itself. 63

These social scientists found significant differences in the types of assets that blacks and whites owned.

The early commentators on race and asset composition did not classify assets according to which ones yielded tax benefits. One table published by O'Hare is suggestive, however. The following table concerns what O'Hare called "financial assets." It shows holdings in various asset categories by race. Significantly, the greatest differences in holdings between blacks and whites are for stocks and mutual funds. These are assets which allow the owner to reap the benefit of the realization requirement, and therefore also allow the possibility of escaping tax on gain altogether by holding the asset until death. For the most part, the other categories shown in the table consist of assets for which the tax system recognizes appreciation in the year it accrues (e.g., savings accounts). 64

62. Terrell, supra note 53, at 366.
63. O'HARE, supra note 54, at 14.
64. Table 1 is reproduced from O'HARE, supra note 54, at 12.
TABLE 1
Distribution of Financial Assets, 1979

<table>
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<th>Type of Financial Asset</th>
<th>Percent of households with this type of asset</th>
<th>Average holdings for households with this type of asset</th>
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<td>Black</td>
<td>White</td>
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<td>Total</td>
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<td>95.3%</td>
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<td>Cash, checking accounts</td>
<td>70.7%</td>
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<tr>
<td>Savings accounts</td>
<td>48.2%</td>
<td>77.0%</td>
</tr>
<tr>
<td>Savings bonds</td>
<td>10.8%</td>
<td>22.9%</td>
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<tr>
<td>CDs, bonds, loans</td>
<td>1.6%</td>
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<tr>
<td>Stocks, mutual funds</td>
<td>3.4%</td>
<td>21.8%</td>
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</table>

2. OLIVER AND SHAPIRO

The early studies of race and wealth came to remarkably similar conclusions of dramatic differences in asset values and asset composition. However, these early studies did not control for such supposedly race neutral factors as region, age, income and education. Although the idea of using controls was attractive, the data on wealth and race took some time to catch up to the ideal. To a large extent, more recent SIPP databases have solved this problem. Using these databases, in 1995 Melvin Oliver and Thomas Shapiro produced their important book entitled *Black Wealth/White Wealth*.65 Their study uses both gross comparisons and multiple regression analyses to study the differences in black and white wealth and asset composition.

Oliver and Shapiro confirmed the general conclusions reached in the 1970s and 1980s, except they found that the wealth gap between blacks and whites is even larger than previously estimated:

African Americans have not shared equally in the nation's prosperity. They earn less than whites, and they possess far less wealth, whatever measure one may use. . . . The black-to-

65. OLIVER & SHAPIRO, supra note 9.
white median income ratio has hovered in the mid-50 to mid-60 percentage range for the past twenty years or so. . . . The median wealth data expose even deeper inequalities. Whites possess nearly twelve times as much median net worth as blacks, or $43,800 versus $3,700.66

The earlier studies had estimated a black/white wealth gap of smaller magnitude.

Oliver and Shapiro also used a large number of controls in their work, including income, age, sex, marriage, children, number of people who work within the household, education, occupation, work history, and region.67 Terrell used some of these controls in the 1970s, but not nearly as many nor on so large a database.68 With these controls Oliver and Shapiro confirmed that nonracial factors standing alone cannot explain the black/white wealth gap. Blacks whom Oliver and Shapiro viewed as “middle class” because of income, occupation and education had significantly fewer assets than similarly-situated whites:

Most significant, we believe, is that blacks’ claim to middle-class status is based on income and not assets. . . . Recalling the overall black-to-white income ratio of 0.62, . . . the gap for white-collar workers narrows to 0.7, and further tapers to 0.76 for college graduates. Turning to net worth . . . the least amount of inequality occurs among middle-income earners, where the ratio registers 0.35; but even among households with similar income flows the difference amounts to over $28,000. White-collar occupations disclose the most inequality: the black middle class owns fifteen cents for every dollar owned by the white middle class.69

Thus Oliver and Shapiro, by looking at similarly-situated blacks and whites, showed that race neutral factors did not fully account for differences in wealth.

Oliver and Shapiro also studied asset composition. They differentiated between “net worth” and “net financial assets.” They defined “net worth” as all assets less debt and “net financial assets” as net worth less equity in homes or cars.70 Net financial assets are most likely

66. OLIVER & SHAPIRO, supra note 9, at 85-86.
67. Id. at 73-85.
68. Terrell’s regression contained controls for income, age, education, employment status and residential location. Terrell, supra note 53, at 372-73.
69. OLIVER & SHAPIRO, supra note 9, at 95.
70. Id. at 58.
to produce additional income and wealth. Net worth, with its inclusion of assets that are permanently dedicated to consumption (i.e., houses and cars), is more likely to produce no change in wealth or even a net decline. Oliver and Shapiro found that "the average white household controls $6,999 in net financial assets while the average black household retains no [net financial asset] nest egg whatsoever,"71 and that "The net worth middle class blacks command . . . largely represents housing equity, because neither the middle-income earners nor the well educated nor white-collar workers [who are black] control anything other than petty net financial assets."72 A regression equation that controlled for region of residence, educational background, age, income, occupational prestige, as well as a number of other race neutral factors, found race was a highly significant predictor of the amount of net financial assets.73

C. Results of Our Study

Our review of the social science literature confirms a wide gap in black and white wealth, both in gross averages and after controlling for such factors as income, education, region, marriage, and children. The studies also confirm that blacks hold a higher percentage of their wealth in consumption items than whites do, and a lesser percentage in financial and investment assets.

We have conducted our own analysis of available databases for two reasons. First, because we are concerned about tax consequences, we are interested in different categorizations of assets than the social scientists are. Social scientists group houses and cars together as consumption items.74 Yet we know that the Internal Revenue Code strongly favors investment in housing, so much so that we will discuss it separately in our next section. Similarly, the social scientists' concept of investment or financial assets fails to distinguish between assets which can benefit from the realization requirement and capital gains rates, such as stocks and bonds, and assets which do not so benefit, such as bank deposits. Our own data analysis takes account of these tax concerns in estimating differences by race in the composition of asset holdings.

Our other addition to the social science literature is to estimate the difference by race in the amounts received by inheritance or gift. Amounts received by gift and inheritance are tax free to the recipient. Equally important, amounts received by inheritance that have previously

71. Id. at 86.
72. Id. at 95.
73. Id. at 130.
74. OLIVER & SHAPIRO, supra note 9, at 106.
appreciated in value are eligible for the stepped up basis at death which enables the total avoidance of tax on a gain. Hence a study of gifts and inheritance is important to a full understanding of the different wealth-related tax benefits that blacks and whites enjoy.

1. ANALYSIS OF RACE AND ASSET COMPOSITION

Our analysis of asset composition, which segregates assets into “tax favored” and “tax disfavored” groupings, relies on data that the SIPP surveys gathered. We more fully describe these databases in the Appendix. Race is the crucial variable in all of our regression equations. We controlled for various other independent variables to see if race remains a statistically significant predictor of asset holdings in various tax favored categories. We explain our selection of the variables we used as controls in the Appendix as well.

We first constructed a dependent variable of total net worth. Using controls for income, education, age, region and marital status, we ran a regression to determine whether race was a statistically significant predictor of total net worth, as measured in this data set. We found that it was, just as other researchers had previously found using the same and different databases. Table A in the Appendix contains the detailed results of our regression.

In order to separate tax favored assets from disfavored assets we used the SIPP databases to get measures of wealth in equity in one’s home, equity in real estate aside from one’s own home, stocks and mutual fund shares, and equity in vehicles. The first three of these categories are tax favored investments. But because vehicles generally decline in value, and the loss is not deductible if the vehicle is held for personal use, vehicles are tax disfavored. Because we have run regressions on each of these new dependent variables, for logistical reasons (division by zero) we had to perform the analysis using only respondents whose wealth was greater than zero. However, that subset of respondents causes us to overlook the fact that more blacks than whites have no wealth at all. As a result, the wealth differences between the two racial groups that we report are most likely smaller than they are in the general population.

Table 2 shows the mean amounts owned in each asset category, by black and white respondents separately. The last two columns report the percentage of total holdings in these four asset categories that consist of assets in each individual category, again for black and white respondents separately.

75. I.R.C. § 262(a) (1994).
TABLE 2
Race and Wealth Composition

<table>
<thead>
<tr>
<th>Component of Wealth</th>
<th>Black Mean $</th>
<th>White Mean $</th>
<th>Black % of total</th>
<th>White % of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stock/Mutual Funds</td>
<td>207</td>
<td>6746</td>
<td>0.01</td>
<td>0.04</td>
</tr>
<tr>
<td>Real Estate Equity</td>
<td>4587</td>
<td>11943</td>
<td>0.05</td>
<td>0.08</td>
</tr>
<tr>
<td>Home Equity</td>
<td>21384</td>
<td>39711</td>
<td>0.53</td>
<td>0.56</td>
</tr>
<tr>
<td>Equity in Vehicles</td>
<td>3328</td>
<td>5906</td>
<td>0.41</td>
<td>0.32</td>
</tr>
<tr>
<td>Total</td>
<td>29507</td>
<td>64306</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

n = 32,162

This table indicates that blacks who own assets are less likely to hold assets that are tax favored. Investments in home equity need special consideration because of the many tax incentives for homeownership, so we discuss that data in more depth in the next section. Table 2 shows that blacks hold a much smaller percentage of their wealth in stock and mutual funds and real estate equity. These are both asset categories where tax favored appreciation in value is common. In contrast, blacks hold a greater percentage than whites of their wealth in equity in vehicles. Assuming that almost all these vehicles are held for personal use, this is a tax disfavored investment.

We used regression analysis to ensure that the differences displayed in Table 2 are not byproducts of socio-economic and demographic differences between blacks and whites.\(^76\) Tables B, C, and D in the Appendix report the results of the regressions for each of the asset categories except home equity, which is discussed in the next section. The tables show that the differences by race in percentage of assets held in the different categories in Table 2 are statistically significant after controlling for various measures of socio-economic status, as well as age and region of residence. Whites thus hold more tax-favored assets than

\(^76\) The controls used in the regression equations are explained in the section of the Appendix discussing controls infra pp. 818-20.
blacks, even after controlling for relevant socio-economic and demographic factors.

2. GIFTS AND INHERITANCE

Analysts have sometimes speculated that blacks receive less in gifts and by inheritance than whites, and that this disparity accounts for at least part of the well-documented race and wealth disparity. But little data analysis actually addresses this question. Because of the important tax benefits associated with gifts and inheritance, we decided to look at this issue in depth. The SIPP database did not have enough information on what people receive and what people give, but we were able to get relevant data from the National Survey of Families and Households (NSFH), a database compiled in 1988-89 and more fully described in the Appendix.

Unfortunately, although the NSFH supplies data by race on the values of gifts and inheritances, it does not break down the values according to the type of asset that was received or inherited. This information is important because some of the tax benefits associated with gifts and inheritances depend on the donor or decedent transferring property with untaxed appreciation that has resulted from the realization requirement. For example, cash gifts and bequests get none of the benefits of avoiding tax on previously unrealized appreciation, whereas gifts and bequests of appreciated stock commonly capture this tax benefit.

To partially rectify this data deficiency, we constructed a variable from the NSFH database that measured the value of assets held by blacks and whites at age sixty-five in four asset categories: home, other real estate, business or farm property, and motor vehicles. Our intent was to get some measure of the value of assets that blacks and whites owned at a time near death, as a way of estimating the differential potential by race of taking advantage of the stepped up basis for property transferred by bequest. However, our constructed variable is far from perfect because it does not include the value of stocks and bonds, which are most likely to benefit from basis adjustments at the time of gift or death. Furthermore, our variable includes motor vehicles, which rarely benefit from such adjustments.

78. See supra pp. 759-63.
79. The recipient's basis in depreciated property under I.R.C. § 1014 and § 1015 is the fair market value of the property at the time of the gift or at the time of the decedent's death.
Table 3 reports the differences by race for the value of gifts given and received, inheritances received, and value of assets held at age sixty-five. The data comes from NSFH.

**TABLE 3**

Gifts and Inheritance by Race

<table>
<thead>
<tr>
<th></th>
<th>Black (mean per person)</th>
<th>White (mean per person)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gifts Given</td>
<td>$236</td>
<td>$1054</td>
</tr>
<tr>
<td>Gifts Received</td>
<td>$172</td>
<td>$1033</td>
</tr>
<tr>
<td>Inheritances Received</td>
<td>$1485</td>
<td>$5348</td>
</tr>
<tr>
<td>Value of Property at Age 65</td>
<td>$15,346</td>
<td>$81,936</td>
</tr>
</tbody>
</table>

The differences by race reported in Table 3 are very dramatic and indicate a wide variance in the degree to which blacks and whites enjoy the tax benefits associated with gifts and inheritance. In order to determine whether these differences were simply a product of status differences between blacks and whites, we ran regression equations with respect to the value of gifts received, inheritances received, and property held at age sixty-five. We controlled in each instance for income, education, age, region and marital status. Race remained a statistically significant predictor with respect to these dependent variables. We reproduce the relevant data in Tables E, F, and G of the Appendix.

**D. Conclusion**

It must be emphasized that we have not measured directly the differential impact on blacks and whites of the tax rules we have discussed, because we have been unable to directly examine returns. The evidence that we have gathered cannot account for the fact that not all taxpayers who are eligible for a tax benefit claim it. Nonetheless, we have gathered very strong inferential evidence to support the hypothesis that whites benefit more than blacks from the tax provisions we have studied, each of which deviates from an ideal income tax as set forth in *Glenshaw Glass*. After we consider the available evidence bearing on a similar hypothesis with respect to the tax incentives for homeownership, we will offer some suggestions about tax policy.
III. HOMES

A. Tax Benefits

As we saw in Part II, property that appreciates in value brings with it many tax benefits. If an owner-occupied home has appreciated in value, it can reap wealth-related tax benefits just like any other wealth. In addition to the general benefits that flow to appreciated property, owner-occupied homes come with four tax benefits of their own. Here we discuss Section 1034, which pushes realization past the date of sale; Section 121, which results in $125,000 of gain escaping tax completely; and two provisions that allow yearly deductions for the costs of owning a home—the Section 163 deduction for mortgage interest and the Section 164 deduction for real property taxes. We begin by briefly reviewing these provisions.

1. GAIN ON THE SALE OF A PRINCIPAL RESIDENCE

Under Section 1034 a taxpayer can sell his principal residence at a profit and avoid any tax on the sale if he purchases a more expensive principal residence within two years. Under Section 121 a person aged fifty-five or over can also sell his principal residence and keep up to $125,000 of gain tax free, regardless of whether he purchases a new residence. Sections 1034 and 121 work in conjunction so that a person aged fifty-five or over can sell his home, purchase a new (more expensive) home, keep $125,000 of gain tax free and defer tax on any additional gain as well.

Both sections are a great help to homeowners of all ages and are particularly useful for those who intend to use their homes as a tax-free retirement account. Unlike Individual Retirement Accounts or pensions, for which earnings are taxed on distribution, Section 121 ensures that $125,000 of a home’s appreciation is never taxed, even when that gain is not used for housing.

However, for the purposes of our study, there is a catch to the benefits conferred by Sections 1034 and 121. First, in order to get any benefits from these sections, the taxpayer must own a home, something we will see that blacks do much less often than whites. Second, the extent of the benefits increase as the amount of appreciation in home

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80. The tax advantages of appreciated property are discussed supra pp. 759-63.
81. I.R.C. § 1034(a).
82. I.R.C. § 121(a)-(b).
83. See the discussion of pensions in the Employee Benefits section infra pp. 784-86.
value increases. As we will see, when blacks do own homes, their dwellings are likely to appreciate in value less than white homes do.

2. HOME MORTGAGE INTEREST AND PROPERTY TAX DEDUCTIONS

In 1986, Congress eliminated the deduction for most personal interest expenditures. However, homeowners may deduct interest on mortgages running as high as $1,000,000. In addition, homeowners may still deduct an additional $100,000 of interest on loans secured by homes even if the principal loan amount is not used for a home purchase.

Congress also eliminated the deduction for state and local sales taxes that are paid for personal, as opposed to business, items. However, the deduction for state and local property taxes survived.

It is commonly assumed that the mortgage interest and property tax deductions benefit homeowners as compared with taxpayers who decide to defer home purchases in order to spend their resources on other types of consumption. But we cannot know for sure whether such discrimination occurs, because it is impossible to know whether the tax benefits of homeownership have caused the market price of owner-occupied homes to have increased relative to the price of other forms of consumption. If so, in effect the taxpayer fully pays for the tax benefits of homeownership "up front." Relative to prices in a world that did not include these tax benefits, renters may pay less for their accommodation and homeowners may pay more for their homes.

We can be certain, however, that the tax benefits of homeowning are greater for homeowners with high incomes than for homeowners with lower incomes, because the tax benefits of deductions are always a function of income bracket. A taxpayer in the 39.6% bracket benefits more from a deduction of $100 than a taxpayer in the 15% bracket.

85. I.R.C. § 163(h)(1) (1994). An interest expenditure is personal rather than business when the loan proceeds are used for personal consumption, such as acquisition of a personal car.
89. I.R.C. § 164(a)(1).
90. See discussion supra p. 754.
91. The value in tax savings of a deduction is equal to the amount of the deduction multiplied by the tax rate. Hence, a $100 deduction is worth $39.60 to an individual in the 39.6% tax bracket, but only worth $15 to an individual in the 15% tax bracket.
If homeowning blacks, on average, have a lower income than homeowning whites, this principle alone assures that the tax benefits of deducting mortgage interest and property taxes are racially skewed. Of particular interest to our study is the likelihood that the tax benefits of these deductions are also a function of home value. If we assume that on average higher value homes carry larger mortgages which require larger interest payments, then owners of high value homes get bigger interest deductions and save more taxes. Similarly, although property tax rates vary by community, owners of higher value homes likely pay more in property taxes and thus benefit more from the property tax deduction. In our subsequent analysis, by seeking evidence of whether blacks are likely to own lower-valued homes, we focus particularly on this aspect of the interest and property tax deductions.

B. Homes and the Social Science Literature

In our study we place wealth ahead of homeownership. We do this even though housing is a form of wealth, often a family’s primary form of wealth. Nevertheless, we believe that the Internal Revenue Code’s many structural and statutory benefits for wealth cast a greater shadow on the entire Code than benefits for homeownership alone. There are relatively few social science studies of black/white differences in wealth, however. In contrast, there are many social science studies of black/white differences in homeownership. We divide our discussion of these studies into two categories, those bearing on differences in ownership rates, and those bearing on differences in the value of homes.

There is a uniform consensus that blacks are less likely than whites to own a home. Writing in 1980, Mary Jackman and Robert Jackman reported that “Whites are considerably more likely to be owners than blacks; 71.3 percent of the whites and 41.2 percent of the blacks indicated that they own their home.” Other studies show ownership disparity rates of a similar range. As one would expect, and as illustrated in Table 3 below, all studies show that elderly blacks are more likely to own homes than young and middle-aged blacks, a fact that will affect our

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92. This seems very likely. O’HARE, supra note 54, at 3, reports that the annual income of black families is about sixty percent that of white families.


“black analysis” of Section 121’s exclusion of gains on the sale of a home by people aged fifty-five or over. For the most part, published studies also find a black/white differential ownership of homes after controlling for appropriate indicants of socio-economic status. The following table, reproduced from Oliver & Shapiro, is exemplary of the findings of several different researchers.

**TABLE 4: Home Ownership by Race and Income**

<table>
<thead>
<tr>
<th>Household Income</th>
<th>Whites</th>
<th>Blacks</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td>0.638</td>
<td>0.416</td>
</tr>
<tr>
<td>&lt;$11,611</td>
<td>0.473</td>
<td>0.274</td>
</tr>
<tr>
<td>$11,611-24,999</td>
<td>0.549</td>
<td>0.408</td>
</tr>
<tr>
<td>$25,000-34,999</td>
<td>0.615</td>
<td>0.454</td>
</tr>
<tr>
<td>$35,000-49,999</td>
<td>0.765</td>
<td>0.668</td>
</tr>
<tr>
<td>&gt;$50,000</td>
<td>0.854</td>
<td>0.75</td>
</tr>
</tbody>
</table>

Data Source: 1987 Survey of Income and Program Participation Survey—Wave 4

This table, then, illustrates that whites are more likely than blacks to own homes.

Some commentators have disagreed with the implications of this table, arguing that if different controls are used, it can be shown that blacks are more likely than similarly-situated whites to own homes. Howard Birnbaum and Rafael Weston have argued that if an appropriate measure of wealth is used as a control, blacks are even more likely to own their homes than whites. James Long and Steven Caudill found that permanent income and central city location, rather than race, explain

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95. See the Black Congress section infra pp. 790-91.
96. OLIVER & SHAPIRO, supra note 9, at 109.
the differences in black/white homeownership rates. However, a minority of analysts reach such conclusions.

In regard to studies of home values, Long and Caudill's 1992 study shows that black couples own a disproportionately lower share of aggregate housing wealth, both because they are less likely to be homeowners and because they are more likely to own homes with low market values. When they used controls, Long and Caudill found that race explained differences in the value of homes, as opposed to the rate of homeownership.

Toby Parcel focused his study on equity in owner occupied housing. Parcel limited his study to male homeowners in the labor force and imposed controls for earnings, age, marital status, and area of current residence. Using these limitations on the data and additional controls to ferret out other factors that increase or decrease homeowner equity, Parcel found that for every $1000 increase in earnings, whites increase their home equity by $514 on average while black home equity does not increase at all.

There are fewer studies that have looked at appreciation in housing value, a critical question for tax analysis. Oliver and Shapiro have done the most extensive study, and the following quotation summarizes their findings:

Among blacks and whites who bought less expensive homes [between 1978 and 1988], the typical white homeowner's equity increased by $40,700 with an average black increase of $27,500. Among those buying less expensive homes, white home values grew 122 percent in comparison to 79 percent for blacks. Among those buying

98. Long and Caudill state that:
Of all the potential differences between black and white households controlled for in the model, permanent-income and central-city-residence differentials are most important by far, each responsible for over 30 percent of the observed black-white homeownership gap. The remaining racial disparities are statistically significant but relatively unimportant as far as contributing to the homeownership gap between black and white couples.


99. Id. at 99.

100. Id. at 95-97.

101. Equity is defined as fair market value less mortgage. Toby L. Parcel, Wealth Accumulation of Black and White Men: The Case of Housing Equity, 30 SOC. PROBS. 199, 202 (1982).

102. Id. at 202-03.

103. Id. at 205.
more expensive homes, the typical white home appreciated $47,800, or 56 percent, while the value of an average black one went up $34,900 or 44 percent. . . . [T]hose who bought homes between 1967 and 1977 . . . have enjoyed a longer period of equity accumulation, one including the recent era of high inflation. Whites who bought less expensive homes . . . benefited from a $60,000 gain in home equity versus $28,700 for blacks in the same purchase bracket. . . . Among those buying more expensive homes, the characteristic white home went up almost $78,000 in value and the typical black home value increased by $38,700; blacks experienced an impressive 88 percent growth in equity, but whites’ home equity rose 148 percent.

A regression analysis confirms the importance of race in housing appreciation, even when non-race-related factors affecting home values are taken into account.\textsuperscript{104}

Although Oliver and Shapiro find that the value of black housing and housing appreciation is lower, they make one additional finding of potentially great importance. They find that housing constitutes a significantly greater percentage of black wealth (62.5\%) than of white wealth (43.3\%).\textsuperscript{105} Even though blacks own less housing value than similarly-situated whites, they own even less of other kinds of assets, except, as noted in our wealth discussion, equity in vehicles. This finding is consistent with the findings of other commentators, as discussed in Part II.

\textbf{C. Results of Our Study}

Because there have been so many studies of race and home ownership, less need exists for us to do our own data analysis. The studies have conflicted, however, on whether blacks own fewer homes than whites when controls for socio-economic status and other appropriate factors are considered. For this reason, we did a limited study using data from the 1988 \textit{National Survey of Families and Households}, which contains a randomly-drawn sample of over 9000 families and households.

In this database, 38.8\% of the blacks owned their homes, while 61.6\% of the non-hispanic whites did so. A regression analysis controlling for family income, age, urban residence, education, and marital status showed that race was a statistically significant predictor of

\begin{footnotes}
\footnote{104. \textbf{OLIVER \\& SHAPIRO}, \textit{supra} note 9, at 148, 150.}
\footnote{105. \textit{Id.} at 106.}
\end{footnotes}
homeownership in this sample. Table H of the Appendix reports this data.

Using the SIPP data that we reported in Part II, we analyzed the value of home equity for blacks and whites. As reported in Table I of the Appendix, we find that blacks have less home equity than whites after controlling for socio-economic and demographic factors. This confirms prior research. In contrast to some other studies, however, we find that blacks and whites tend to devote approximately the same proportion of their total wealth to home equity, once we control for socio-economic status and demographics. Other studies have shown blacks with a higher proportion of their total wealth in housing than whites even after using similar controls. 106

D. A Black Congress on Wealth and Homeownership

In our introduction, we asked how a Black Congress would write tax rules on income averaging. Now we ask that question about wealth and homeownership.

The data on blacks and wealth tells us that blacks own very little wealth and that this lack of wealth is at least partially responsible for the continuing black/white wealth gap. Blacks inherit very little wealth and they do not acquire very much more during their lifetimes. As a consequence, blacks receive very little benefit from the Code sections discussed in Part II. In particular, blacks are much less likely than whites to own assets, such as stocks and bonds, that benefit from the realization requirement, a necessary prerequisite to benefiting from the stepped up basis at death and a usual prerequisite to benefiting from the favorable capital gains tax rates.

A partial exception to this generalization concerns homes. The tax benefits that apply to stocks and bonds also apply to homes. Appreciation in home value is not taxed until realized, and can avoid tax altogether if the owner transfers it at death. Homeowners benefit additionally from some special tax provisions, such as forgiveness of tax on $125,000 in gain for realizations during the owner’s lifetime. Although whites own more homes and more valuable homes than blacks, even after controlling for appropriate nonrace variables, many blacks do own homes that appreciate in value. The social science studies indicate that blacks have at least as high a percentage of their wealth invested in homes as whites

106. O’HARE, supra note 54, at 9 (finding that “equity in a home accounted for almost half of the wealth of blacks (46 percent) but less than a third of the wealth of whites (32 percent”), OLIVER & SHAPIRO, supra note 9, at 106 (finding that home equity accounted for 62.5% of the wealth of blacks and 43.3% of the wealth of whites); Birnbaum & Weston, supra note 97, at 107.
do, and perhaps a greater percentage. Unlike the tax benefits that apply primarily to other forms of wealth, from which few blacks gain, many blacks benefit from the tax benefits of homeownership.

But while blacks benefit, whites benefit even more. White homes appreciate more, and hence receive more favorable treatment of gains from investments in homes. Moreover, because white homes are more valuable, on average whites benefit more than blacks from the deductions for home mortgage interest and property taxes.

Vehicle equity is one form of investment for which no tax benefits exist. In fact, the Code disfavors investment in vehicle equity, because unlike losses in investments in most other kinds of assets except homes, owners cannot deduct declines in vehicle value. Since the Code views such declines in value as consumption expenses, this tax result is commonly considered consistent with the *Glenshaw Glass* vision of income. It is still worth noting, however, that although whites on average own more total vehicle equity, even after controlling for income and other measures of status, blacks indisputably invest a higher percentage of their wealth in vehicles than whites do. 107 Hence the one category of assets which blacks favor in their investment behavior, in comparison with white investment behavior, receives no tax benefits.

As we turn to suggestions about how a Black Congress might amend the Code in light of our findings, two preliminary comments are appropriate. First, if a Black Congress truly existed, we would not expect it to act solely in the interest of blacks, any more than we expect the current Congress, which is mostly white, to act solely in the interest of whites. Our Black Congress, oriented solely to the interest of blacks, is purely a metaphor, useful for analytic purposes.

Second, our Black Congress is not solely motivated by the goal of minimizing black taxes. Blacks are interested in government spending; consequently, some of our recommendations will reflect concerns about the level of government revenues. Moreover, the tax provisions we are considering all have ostensible purposes which may benefit blacks. For example, the realization requirement and the stepped up basis at death are commonly justified as making the tax system more administrable. The realization requirement permits a sale or exchange to measure the amount of asset appreciation, rather than relying on some alternative valuation method. The stepped up basis at death avoids the necessity for determining a decedent's basis in property, which can be very difficult when the person has kept inadequate records. Not all of the supposed benefits are administrative. The special tax benefits for homeownering, for

107. See Table 2 and discussion *supra* p. 770, and Table D in the Appendix *infra* p. 808.
instance, are justified as explicit incentives for taxpayers to own rather than rent their residences, apparently on the theory that homeowners on average are more stable and responsible citizens.\textsuperscript{108} We do not agree with all of these justifications, but it is not the point of this article to debate about them. However, a Black Congress would consider these usual justifications for tax benefits.

We next offer some suggested tax reforms that a Black Congress might consider in light of our findings.

1. \textit{Replace the current home mortgage interest deduction and the deduction for real property taxes with a credit (of an undetermined percentage) that begins to decline to zero once adjusted gross income on a joint return exceeds $50,000.}

Currently, taxpayers are allowed a deduction for home mortgage interest and real property taxes. The benefit of deductions is a function of bracket, benefiting wealthier taxpayers more than less wealthy ones. Credits, which a taxpayer subtracts directly from the taxes he owes, save a taxpayer the amount of the credit, regardless of his bracket. Because whites have higher-valued homes on average and hence probably pay more interest and taxes, they would receive a greater proportion of total tax benefits from credits than their proportion in the population or even in the homeowning population. But at least a switch from deductions to credits would distribute more of the tax benefits of homeownership to blacks than is currently the case, while still preserving tax incentives for homeownership.

Currently, a taxpayer cannot deduct the home mortgage interest that is generated by mortgage principal in excess of $1,000,000. Furthermore, both the interest deduction and the real property tax deduction are reduced when adjusted gross income on a joint return exceeds $114,700.\textsuperscript{109} In order to maintain this principle of phasing out the tax benefit for the most wealthy, our proposed credit begins to decline to zero once taxpayers reach an adjusted gross income of $50,000 a year. Because most black families earn less than $50,000,\textsuperscript{110} they will not be adversely affected by this limitation.

\textsuperscript{108} S. REP. NO. 313, 99th Cong., 2d Sess. 804 (1986) (stating that "encouraging home ownership is an important policy goal").

\textsuperscript{109} I.R.C. § 68(a), (b)(1) (1994) (adjusting the $100,000 applicable amount for inflation).

\textsuperscript{110} Only six percent of black families have incomes greater than $50,000. OLIVER & SHAPIRO, supra note 9, at 102.
2. *Maintain the Section 121 exclusion for $125,000 of gain on the sale of a personal residence, and maintain the Section 1034 rollover of gain on the sale of a principal residence.*

Because homeownership is one of the most common forms of black investment, we suggest maintaining the $125,000 exclusion for gain on the sale of a personal residence for homeowners aged fifty-five and over, and the postponement of realization permitted by the rollover of gain. Because black homes are generally lower-valued, there is no need to increase the $125,000 limit. Tax benefits for this type of gain may help blacks accumulate wealth that they can bequeath, so that blacks can begin inheriting wealth.

3. *Tax property appreciation as it accrues on investments in publicly traded securities and nonresidential real estate.*

Except for homes and vehicles, blacks generally do not own property. Instead, blacks earn income in the form of wages that are immediately subject to tax. Depository accounts are probably the most common form of black wealth other than homes and vehicles. Hence repeal of the realization requirement would raise considerable revenue without adversely affecting blacks. We believe that limiting repeal of the realization requirement to publicly traded securities and nonresidential real estate is an eminently practical reform, because it is possible to measure the extent of appreciation on these assets without a sale or exchange. Public listings report the trading value of securities, and property tax assessments provide a usually reliable estimate of the market value of real estate.


It is very unlikely that many blacks benefit directly from special rates for capital gains. Homes are eligible for these favorable rates, but with the stepped up basis at death, the exclusion of $125,000 of gain for homes sold by an owner aged fifty-five or over, and the Section 1034 rollover of gain, most gain on homes is probably not ever subject to tax. While some argue that favorable rates for capital gains stimulate economic
activity which trickles down to taxpayers who never enjoy a capital
gain,\textsuperscript{111} we have little faith in trickle down economics.

5. \textit{Maintain the Section 102 exclusion for income from
   gifts and inheritances.}

Although blacks receive few gifts or bequests that benefit from this
exclusion, we decline to recommend changing it for two reasons. First,
any change in this provision must be coordinated with gift and estate taxes
because it may not be appropriate to tax both the grantor and the
recipient. But consideration of gift and estate taxes is beyond the scope
of this article.

Second, a Black Congress might want to preserve some incentives
for savings and intergenerational transfers of wealth. The story of black
American life has been one of inability to pass wealth from generation to
generation, whether because of slavery, racism, or poverty. The inability
to transfer wealth has adversely affected black wealth. We believe that
a Black Congress would prefer to encourage, rather than discourage, such
transfers.

IV. EMPLOYEE BENEFITS

\textit{A. Tax Benefits}

Under the ideal comprehensive income tax system based on the
\textit{Glenshaw Glass} definition of income as "accessions to wealth," whether
a taxpayer received a payment for wages in cash or in kind would not
matter. A person who received $10,000 in cash would be taxed the same
amount as someone who received an employer purchased life insurance
policy worth $10,000. Nonetheless many employee benefits are never
taxed to the employee even though they have value and the employer
treats the benefit as a deductible expense. Examples include parking
valued at under $155 a month;\textsuperscript{112} health insurance;\textsuperscript{113} life
insurance;\textsuperscript{114} educational assistance;\textsuperscript{115} discounts on clothing,

\textsuperscript{111} For a discussion of this issue, see Robert Dodge, \textit{Economists Have Questions
   About Dole Tax Cut}, DALLAS MORNING NEWS, Aug. 11, 1996, at 1H.
\textsuperscript{112} I.R.C. § 132(f)(2)(B) (1994). This benefit is capped at $155 per month.
\textsuperscript{113} I.R.C. § 106.
\textsuperscript{114} I.R.C. § 79(a). To the extent that the cost of the life insurance exceeds
   $50,000, it is included in the gross income of the employee. I.R.C. § 79(a)(1).
\textsuperscript{115} The amount of any reduction in tuition provided to an employee of an
   educational organization for education (below the graduate level) at such organization
   is not included in the gross income of the employee. I.R.C. § 117(d). Employees of other
appliances and other retail goods when the employee works for the retail store;\textsuperscript{116} and airline tickets for airline employees.\textsuperscript{117} Another group of employee benefits are taxed, but the imposition of the tax is delayed. Employee benefits that defer taxes include employer paid pensions;\textsuperscript{118} employee contributions to pensions;\textsuperscript{119} employee contributions to tax deferred annuities (sometimes called 401(k) plans or 403(b) plans);\textsuperscript{120} and Keogh plans, which are self-directed pension plans for the self-employed.\textsuperscript{121}

The employee benefits that escape tax entirely or that are taxed later than they would be under a Glenshaw Glass definition of income provide significant tax savings. We focus our study on the two benefits that produce the largest tax savings: pensions (including tax deferred annuities), and employer-paid health insurance.\textsuperscript{122} We are interested, of course, in whether blacks receive proportionately fewer benefits than whites.

\textbf{B. Employee Benefits and the Social Science Literature}

Social scientists have long been interested in studying income differences by race, and their work has naturally involved employee benefits, since they are an important component of income. For our purposes, the most appropriate database is the U.S. Census Bureau's \textit{1988 Current Population Survey} on employee benefits.\textsuperscript{123}

Joni Hersch and Shelley White-Means have published the most significant analysis of this data for our purposes.\textsuperscript{124} A limit of this study, however, is that respondents were asked only whether they received a particular type of benefit, without ascertaining its value. Hersch and White-Means compensated for this deficiency by assuming that each benefit a respondent received had an average value for benefits institutions can receive up to $5250 of educational assistance from their employers tax free. I.R.C. § 127.

\begin{itemize}
\item \textsuperscript{116} I.R.C. § 132(a)(2), (c). To the extent that the employee discount exceeds the gross profit percentage of the price at which the property is being offered by the employer to customers, it is included in gross income. I.R.C. § 132(c)(1)(A).
\item \textsuperscript{117} I.R.C. § 132(a)(1), (b).
\item \textsuperscript{118} I.R.C. §§ 401(a)(1), 501(a).
\item \textsuperscript{119} I.R.C. §§ 401(a)(1), 501(a).
\item \textsuperscript{120} I.R.C. §§ 401(k), 403(b).
\item \textsuperscript{121} I.R.C. § 401(c).
\item \textsuperscript{123} For a discussion of the database see infra Appendix, Part II.
\end{itemize}
in that industry.\textsuperscript{125} They limited their analysis to wage and salary workers employed privately in nonagricultural employment and between the ages of eighteen and sixty-five.\textsuperscript{126} For this sample, they studied only health and pension benefits and not contributions to 401(k) plans. Hersch and White-Means found that 52\% of white men in private employment in 1988 were covered by employer provided pension plans and that 75\% received employer provided health care. In contrast, only 39\% of all other workers in private employment (white women, black men, black women, etc.) were covered by employer provided pension plans and only 58\% received employer paid health insurance.\textsuperscript{127} However, the authors acknowledge that part of these differences is accounted for by the fact that white men are more likely than other groups to accept benefits for which they are eligible.\textsuperscript{128} Moreover, Hersch and White-Means' statistics combine race and gender. Data from our research, which we will report below, suggests that the "benefits gap" reported by Hersch and White-Means is more accounted for by gender differences than race differences.

In addition, Hersch and White-Means did not directly measure the extent to which the above percentages were related to age, education, and other non-race and non-gender worker characteristics. However, they did construct a total compensation variable consisting of both wages and benefits. Hersch and White-Means used a regression equation to determine whether race and gender differences in total compensation could be explained by other worker characteristics. Their conclusions were as follows:

The wage and total compensation equations indicate that almost half of the log earnings gap between white and black men is explained by differences in qualifications. The remaining 54\% may be interpreted as attributable to discrimination. However, for women, particularly black women, the log wage and log compensation gaps are largely unexplained by differences in qualifications, suggesting that discrimination may be an important component of the gender-race wage gap. Over 65\% of the log earnings gap between white women and white men and about 80\% of the log earnings gap between black women and

\begin{footnotesize}
\begin{myfootnotes}

\item[125.] Hersch & White-Means relied on the U.S. Chamber of Commerce 1988 survey of employee benefits for the average value of benefits in a particular industry. \textit{Id.} at 853.

\item[126.] \textit{Id.}

\item[127.] \textit{Id.} at 851.

\item[128.] \textit{Id.} at 855.

\end{myfootnotes}
\end{footnotesize}
white men is unexplained by observable characteristics and may be attributable, at least in part, to discrimination. 129

Finally, Hersch and White-Means measured how adding benefits to wages increased or reduced the wage gap between white men and the other groups. Their conclusions were mixed. Counting benefits decreased the earnings gap when black men or women were compared with white men, but it increased the gap when white women were compared with white men. In no case, however, did adding benefits to wages make a great difference in the "gaps" between the groups they studied. 130 Because fringe benefits contribute so little to the narrowing of any wage gap, Hersch and White-Means concluded that:

While fringe benefits in the form of health care are heralded as equalizers in the employment setting, they have only a small impact on gender and race differences in earnings gaps and/or the returns to qualifications. Women, particularly black women, still face a large compensation disadvantage relative to white men. 131

C. Results of Our Study

For several reasons, we did our own analysis of the same data used by Hersch and White-Means. We were interested in results for the entire labor force, not just the private sector, nonagricultural employees Hersch and White-Means studied. Since public sector employees are generally assumed to receive extensive benefits, and public sector employment is generally assumed to be less subject to racial discrimination than private

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130. The following table is reproduced from id. at 856:

<table>
<thead>
<tr>
<th>Earnings Measure</th>
<th>WP/WM</th>
<th>BM/WM</th>
<th>BF/WM</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All Workers</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hourly wage</td>
<td>71.3</td>
<td>82.8</td>
<td>64.8</td>
</tr>
<tr>
<td>Hourly wage + benefits</td>
<td>70.3</td>
<td>82.6</td>
<td>64.8</td>
</tr>
<tr>
<td><strong>Benefit-Sector workers</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hourly wage</td>
<td>72.4</td>
<td>81.5</td>
<td>67.0</td>
</tr>
<tr>
<td>Hourly wage + benefits</td>
<td>71.9</td>
<td>82.1</td>
<td>67.6</td>
</tr>
</tbody>
</table>

Earnings ratios are based on geometric means.

131. Id. at 864-65.
employment, public sector employees were an ideal group to test our hypotheses. We also wanted to look at the data on participation in 401(k) and Keogh plans, in addition to receipt of health and pension benefits included in Hersch and White-Means' study. Finally, since the census data measured only receipt of employee benefits, not their value, we did not want to try to estimate their value as Hersch and White-Means did. Instead, we simply studied whether there are racially-explained differences in the receipt of any of the four types of employee benefits that we analyzed.

Unfortunately, the census data did not include enough respondents participating in Keogh plans to permit us to draw any statistically significant results. Table 5 reports the extent of participation in other benefits for blacks and whites respectively.

**TABLE 5**

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Blacks</th>
<th>Whites</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health Insurance</td>
<td>0.83</td>
<td>0.82</td>
</tr>
<tr>
<td>401(k)*</td>
<td>0.12</td>
<td>0.17</td>
</tr>
<tr>
<td>Pension</td>
<td>0.77</td>
<td>0.79</td>
</tr>
</tbody>
</table>


* Difference is significant with 99% confidence

We used regression equations to determine whether there were racially significant differences in the receipt of these benefits after controlling for essentially the same worker characteristics that Hersch and White-Means did.\(^{132}\) We found that at the 95% confidence level race was a significant predictor of receipt of pension benefits and that at the 99% confidence level race was a predictor of participation in a 401(k) plan. However, race was not a statistically significant predictor of receipt of health benefits. The relevant tables showing the results of these regressions are reproduced in the Appendix as Tables J, K, and L.

\(^{132}\) Hersch and White-Means look at employment in the "benefit sector" as a function of age, marital status, number of children, education, hours worked, union status, metropolitan location, location in the South, family income, industry, occupation, and firm size. *Id.* at 858.
D. Conclusion

Because blacks are less likely to be employed and, when employed, to enjoy benefits, blacks are less likely to receive tax favored employee benefits of all kinds. We found evidence that, when controlling for relevant socio-economic and demographic factors, blacks are less likely than whites to participate in employer-provided pension and 401(k) plans. However, when controlling for relevant socio-economic and demographic factors, there is no evidence that blacks are less likely to receive employer provided health insurance.

Our findings pertain just to participation in benefit programs. The value of benefits received, which Hersch and White-Means crudely estimated, is more relevant to tax concerns, since as the value of excluded or deferred benefits increase, the tax benefits grow as well. Although we have no direct evidence on point, it seems likely that the value of employer-provided health benefits is more or less the same for all workers, since the Code requires that employer provided health benefits be "non-discriminatory" if they are to be excluded from the employee's income.\footnote{I.R.C. \S 105(h) (1994).} To be non-discriminatory, "benefits provided for participants who are highly compensated individuals [must be] provided for all other participants,"\footnote{I.R.C. \S 105(h)(4).} and a health plan must benefit at least seventy percent of all employees.\footnote{I.R.C. \S 105(h)(3)(A)(i).}

On the other hand, the analogous non-discrimination rules for employer-provided pension plans permit employers to contribute amounts to pensions proportionate to wages. Thus highly compensated employees receive more tax deferred contributions than others.\footnote{I.R.C. \S 401(a)(5)(B); see also I.R.C. \S 401(l) (permitting modest deviations in favor of highly compensated employees from even a proportionate standard).} Because blacks are less likely to be highly compensated, when they do participate in employer provided pension and 401(k) plans, they are likely to receive less pension benefits than whites.

Finally, we emphasize that the benefit of all exclusions or deferrals of income are a function of the relevant tax bracket. Because blacks on average are in lower marginal brackets than whites, even if they receive employee benefits of equivalent dollar value to whites—as they may with respect to health benefits—the tax savings to the average black is less than the tax savings to the average white.
E. A Black Congress on Employee Benefits

The first observation a Black Congress might make about tax excluded and deferred employee benefits is that the degree of racial skewing is not nearly as great as it is for the tax benefits discussed in Part II. Accordingly, employee benefits are not likely to be at the top of a Black Congress’ tax reform agenda.

However, because there is evidence that the tax benefits of pension and 401(k) plans are skewed racially, a Black Congress might nonetheless consider employee benefit reform. Before we discuss what reforms it might consider, however, we will discuss the very interesting situation regarding health benefits.

We have not found evidence that, when appropriate controls are used, blacks receive health benefits less often than whites. Of course, because whites on average are in higher brackets, they benefit more from the tax exclusion. Still, Hersch and White-Means found that the wages of black men are a higher percentage of white men’s earnings when benefits are added to wages. 137 We suspect this finding results from the non-discrimination rules respecting health benefits. If one adds a constant to two numbers, one of which is larger than the other, the absolute difference between the two numbers remains the same but the lower number nonetheless becomes a higher percentage of the other. 138

Some commentators contend, however, that the non-discrimination rules that tie tax benefits to a wide distribution of employee benefits actually work against blacks and other low income workers. They claim that these rules force employers to provide benefits that low income workers do not want and which make low income workers too expensive to employ. To attract high income employees, who value tax free benefits more than low income employees because of their marginal bracket, the employer is forced to give expensive employee benefits to the high rate group. However, because of the Internal Revenue Code’s non-discrimination rules, the employer must include low rate employees in its employee benefits package as well. But, the argument proceeds, to pay for these increased benefits to low wage employees, the employer pays lower wages to his low income employees. Increased employee benefits in return for decreased cash wages is a bad trade for low tax rate employees because the value ratio of employee benefits to tax benefits is smaller for low tax rate employees. Thus the argument concludes that the Internal Revenue Code’s forced inclusion of high tax rate and low tax rate

137. See supra note 124 and accompanying text.
138. For example, the absolute difference between 3 and 5 is 2, and 3 is 60% of 5. The absolute difference between 4 and 6 is also 2, but 4 is approximately 67% of 6.
workers in the same employee benefits package distorts income between the groups by giving high rate employees too few benefits and low rate employees too many. 139

Evaluation of this nonempirical, a priori argument is beyond the scope of this article, except for one observation. The non-discrimination rules do not necessarily result in low tax rate employees receiving cash wage reductions exceeding the value of the benefits they receive. High tax rate employees may receive wage reductions exceeding the cost of providing the health benefits to them, so that the employer is able to fund the benefits for low rate employees required by the non-discrimination rules. In other words, the non-discrimination rules may require high tax rate employees to share some of their tax benefits with low tax rate employees.

Given the ambiguity respecting whether blacks are benefited or harmed by the exclusion of health benefits from income, we doubt that a Black Congress would want to change this tax benefit. But this discussion about the possible impact of the non-discrimination rules suggests an interesting approach to reform of the tax treatment of employer provided pension benefits. The non-discrimination rules currently applicable to pension benefits cannot leverage high rate employees to share their benefits with low rate employees, because they do not require a parity in the absolute value of the pension benefits provided to high and low rate employees. Instead, the non-discrimination rules require only that employer contributions to pension funds be approximately proportionate to taxable wages for high and low wage employees. To limit the racial skewing of the tax benefits from the tax deferral of employer pension contributions, however, the non-discrimination rules might be amended to require that the contributions have the same absolute value. As a less radical alternative, the amount of annual employer pension contributions that receive tax deferred treatment might be capped. Here the goal is to allow the tax benefits of deferral for employer contributions sufficient to provide a middle, or even an upper middle, income lifestyle, without providing the same tax benefit for contributions to pensions that are principally a vehicle for investing accumulated wealth.

A Black Congress' approach to 401(k) plans might be to repeal them. The evidence of racial skewing of the tax benefits of 401(k) plans is strong, even after controlling for relevant worker characteristics. Blacks may work less frequently for employers who offer 401(k) plans. Further, since participation in 401(k) plans is voluntary for employees, blacks may

139. For an article that makes this argument, see Frank A. Scott et al., Effects on the Tax Treatment of Fringe Benefits on Labor Market Segmentation, 42 INDUS. & LAB. REL. REV. 216, 220 (1989).
not choose to participate in the same proportions as whites with similar salaries and opportunities. Because of the differential wealth of blacks and whites with similar incomes, it may be more burdensome for blacks to voluntarily defer receipt of income. Thus blacks benefit relatively little from the availability of 401(k) plans, just as they benefit relatively little from preferential rates for capital gains or the stepped up basis at death.\textsuperscript{140}

V. MARRIAGE PENALTY

A. Tax Benefits

Section 1 of the Internal Revenue Code establishes different tax schedules depending on whether the taxpayer(s): (1) are married and file a joint return; (2) file as a head of household;\textsuperscript{141} (3) are not married and file a single return; or (4) are married but file separate returns. In this section we will focus on the first and third rate schedules, which are the ones most frequently used. The joint return enables many married couples to pay a lower total tax on their combined income than they would if they were each single and paid taxes on the income each earned or received. We will call this a “marriage bonus.” However, the joint return benefits a married couple only when there is a gap between each partner’s income. At all levels of income, if each partner’s income is the same, the couple will pay at least as much combined tax as they would if each remained single. Moreover, at higher income levels, the joint return status makes husbands and wives who earn close to the same amount of income pay more tax than they would if they remained single. When this latter situation occurs, it is called a “marriage penalty.”\textsuperscript{142}

Section 1 rate schedules are adjusted annually with respect to the amounts of taxable income at which higher tax rates apply (e.g., 28%}

\textsuperscript{140} Although we have not studied IRAs, and could not get meaningful data about Keogh plans, it is likely we would reach the same conclusion (i.e., repeal) about all tax deferral schemes that are voluntary with the taxpayer.

\textsuperscript{141} An individual is considered a head of a household if such individual is not married and maintains as his home a household which constitutes the principal place of abode of a dependent of the individual. I.R.C. § 2(b) (1994).

\textsuperscript{142} Edward J. McCaffrey, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. REV. 983, 991-94 (1993). For a chart giving the amount of the marriage penalty in 1993 for a wide range of combined incomes and distributions between spouses, see John Brozovsky & A.J. Cataldo II, The Marriage Tax Penalty: Inequities and Tax Planning Opportunities, 52 OHIO CPA J., Dec. 1993, at 21-22. The authors indicate that at a combined income of $100,000, the marriage penalty exceeds $1200 if the lower earning spouse earns 40% or more of the combined income.
rather than 15%).\textsuperscript{143} So long as the combined taxable income of a
couple is less than the amount at which the single taxpayer's rate shifts
from 15\% to 28\%—$22,100 in 1995—there can be no marriage bonus or
penalty. All the taxable income will be taxed at 15\%, whether it is
earned by one person or jointly and whether the taxpayers are married or
single.\textsuperscript{144}

For joint returns in 1995, the rate shifted from 15\% to 28\% for
taxable income over $36,900.\textsuperscript{145} If a couple has a taxable income
between the rate shift levels for single and joint returns, there is a
possibility of a marriage bonus. If the income is earned by only one
partner, some of it which would be taxed at a higher rate on a single
return (28\%), is taxed at a lower rate on a joint return (all income at
15\%). Although a marriage bonus is possible even when both partners
have some taxable income, the marriage bonus is always greatest for a
given combined taxable income when all that income is attributed to one
partner. The population of one wage earner married couples are therefore
the greatest beneficiaries of the marriage bonus.

Once a couple's taxable income rises above the rate shift level for
joint returns, however, the couple faces the possibility of a marriage
penalty. If each partner earns a taxable income of $20,000 for example,
it will all be taxed at 15\% if they file two single returns. But if this same
couple is married and files jointly, some of their combined income will
be taxed at 28\%.\textsuperscript{146} The marriage penalty will be greatest for any given
combined taxable income when each partner has the same taxable income.
That is the situation in which the greatest proportion of the combined
income taxed at a higher joint rate (e.g. 28\%) would have been taxed at
a lower single rate (e.g. 15\%) if the parties had remained single. The

\footnotesize{143. I.R.C. § 1(f).}

\footnotesize{144. However, there can be a marriage penalty at lower income levels due to the
standard deduction under I.R.C. § 63(c)(2) ($5000 for joint returns, $3000 for single
returns). Moreover, because the earned income credit is phased-out as income rises, and
combined income is used for a married couple filing jointly, in some circumstances one
would receive a higher earned income credit if single than if married. See Daniel R.
Feenberg & Harvey S. Rosen, Recent Developments in the Marriage Tax, 48 Nat'l Tax
J. 91, 92-93 (1995). However, in this article we explore only marriage bonuses and
penalties resulting from the Section 1 rate schedules, because our social science data is
most relevant to this issue.

\footnotesize{145. See I.R.C. § 1(a)(2), (f)(1).}

\footnotesize{146. Married partners derive no rate advantage from filing separate returns. The
taxable incomes at which rates shift for married filing separately returns is exactly 50\%
of the income at which the rates shift for married filing jointly returns (e.g., in 1993, the
rate shifted from 15\% to 28\% at a taxable income of $18,450 for married filing separately
returns). I.R.C. § 1(a), (d). In the example in the text, therefore, if the couple were
married they could not avoid a 28\% rate on some of the taxable income by electing to file
separate returns.}
possibility for a marriage penalty or bonus continues to exist at all higher incomes until the lower income partner has an individual taxable income of $250,000. Taxable incomes above that amount were taxed, in 1995, at 39.6%, the highest possible rate, whether reported on a single or a joint return.¹⁴⁷

Our first hypothesis is that married blacks are more likely than married whites to live in two wage earner couples. Since there is never a marriage penalty without two wage earners, and one wage earner couples gain the greatest marriage bonuses, if the hypothesis is true then white couples enjoy more and larger marriage bonuses than black couples. Our second hypothesis is that when both spouses work, and have combined incomes high enough to risk substantial marriage penalties, the gap between the husband's and wife's wages in white families is on average higher than the average gap in wages between black spouses. If this is true, then black couples are more likely to suffer substantial marriage penalties than white couples.¹⁴⁸

¹⁴⁷. See I.R.C. § 1(a), (c), (f)(1). The combined effects of the marriage bonus and penalty can be illustrated by comparing the following three couples (A, B, and C). Couple A is married and files a joint return. Couples B and C are unmarried and file four separate returns. Each couple has a combined taxable income of $40,000 in 1995.

Couple A pays a 15% rate on $36,900 (= $5535) and a 28% rate on $3100 (= $868), for a tax of $6403. Couple B consists of two individuals filing single returns, each with a taxable income of $20,000. All their income is taxed at a 15% rate, for a tax of $6000. Comparing Couple B with Couple A indicates that the latter pays a "marriage penalty" of $403.

Couple C consists of two individuals filing single returns, but one partner has no taxable income. The other partner has a taxable income of $40,000. $22,100 is taxed at a 15% rate (= $3315) and $17,900 is taxed at a 28% rate (= $5012), for a tax of $8327. Comparing Couple C with Couple A indicates that at this combined income, there is a marriage bonus for single income couples (which could also be called a "single penalty") of $1924.

¹⁴⁸. As in all parts of this paper, we are looking here only at the relation between race and a small part of the tax code. In particular, we are not looking here at the special head of household rate schedule, which sometimes taxes income of a qualifying single person at lower rates than other single people. It is possible the head of household rate schedule benefits blacks more than whites. However, we do not explore that question here.

We also do not discuss the married filing separately rate schedule. That schedule is rarely selected, as it rarely is to the tax advantage of a married couple to file separately. See supra note 146. Hence, this rate schedule is usually ignored in discussions of the marriage penalty.
Very little social science literature examines the precise topic of income differences between married partners by race. However, several articles address general patterns of racial differences in labor force participation among married women. That literature contains two critical findings.

1. Black wives participate in the labor force at a greater rate than white wives. Accordingly, there are more dual wage earner families among blacks than whites. It follows that black families are less likely to receive the biggest marriage bonuses, which go to single wage earner families.

2. Black wives earn incomes much closer to their black husbands' incomes than white wives make in comparison to their white husbands, especially at higher income levels. This means that black couples are more likely to suffer the most substantial marriage penalties.

Joyce Beckett reviewed nine studies of social science databases comparing black and white wives during various periods from 1960 to 1976. She found that black wives were more eager to work than white wives and black husbands were more eager than white husbands to have their wives work. The more educated the black husband, the more likely he was to have a working black wife. Even children did not negatively affect black wives' participation in the labor force. In contrast, working white wives tended to have husbands with lower socioeconomic status and with greater than average periods of unemployment. Beckett concluded that these black/white differences in wives' participation in the labor force could not be fully attributed to any other demographic characteristics other than race.

150. Id. at 465.
151. Id. at 464-65.
152. Id. at 466.
153. Id. at 464.
Writing in the same period, Duran Bell used a regression analysis to explain differences in black/white wife labor force participation. Bell's work confirmed that black families with working black wives were the most "stable and better educated black families, whereas the white working wife emerged from the lesser educated, poorer, and more unstable white families." James Smith looked at how female labor force participation affected individual families' economic well being as well as income distributions across families. Comparing black and white wives, Smith found that black wives' incomes moved their families above the black average income while white wives' wages tended to move their families up to the white average income. The tendency of black wives to push black family income into higher tax brackets is just the type of behavior that triggers bigger marriage penalties.

More recently, in 1990, James Geschwender and Rita Carroll-Seguin came to similar conclusions: "African-American families have been able to achieve a standard of living comparable to that of the middle-class European-Americans because African-American wives have been far more likely than European-American wives to work, and to work full-time." According to Geschwender and Carroll-Seguin, there are proportionately more dual earner families among blacks than whites. Their main concern was recent social science studies claiming that blacks have "closed the economic gap" with whites. They objected to this assertion by countering that black economic improvement reflects black wives' labor force participation.

Even though the racial discrepancy in the number of working wives is decreasing, Geschwender and Carroll-Seguin conclude that working black wives contribute a higher portion of family income than do working white wives. For example, in 1987 the average dual income white family made $41,023. With the husband alone in the work force, the average white family income was $27,394 or only $13,629 (49%) less. On the other hand, the average dual income for a black family was $33,333, and black family income was $16,822 when only the husband worked. This

155. Id. at 472.
157. Id. at S172.
159. Id. at 285.
contrast suggests that black wives make on average $16,511 a year, or 98.2% of black husbands' income.160

Thus, the social science literature indicates that black working wives are more likely to widen the disparity between the middle and lower classes in the black community, while working white wives often lessen income dispersion in their communities. Rather than pulling their families from the lower classes to the middle class, black wives pull their families from the lower rungs of the middle class to its higher rungs, where the families suffer the marriage penalties that result from two spouses earning similar incomes.161

C. Results of Our Study

Previous studies have not had tax consequences primarily in mind and hence have not conducted a couple by couple analysis of income difference. Using a sample called the PUMS Couples File drawn from the 1980 United States Census data, we constructed a variable that measured the proportion of family income earned by the wife for married couples with incomes that triggered the marriage penalty. We were uncertain, however, about what combined income triggered the penalty because in 1980 Section 1 rate schedules were radically different from those in place today. Furthermore, the census data reports total income, not taxable income, and we could not know what deductions, personal exemptions, etc., particular taxpayers used to calculate taxable income. In the end we constructed our variable only for couples with a combined

160. Id. at 294.

161. Quester and Green set about showing that there are no significant differences in labor force participation rates among black married women and white married women. Aline O. Quester & William H. Green, The Labor Market Experience of Black and White Wives in the Sixties and Seventies, 66 Soc. Sci. Q. 854 (1985). They posit that previous studies that showed black/white differences were flawed because husband's income was presumed to have a linear relationship to wife's labor force participation. Instead, Quester and Green find that there are threshold levels of family income at which the slope of the line increases or decreases. Id. at 865. Controlling for the wife's education, health, residence, age, presence of preschool-age children and the previously mentioned non-linearity, Quester and Green find few racial differences in wife's labor force participation. Id. Nonetheless, the authors do make one observation which is relevant to our study, and, in our view, discredits their own conclusions. Quester and Green find that the threshold levels of family income have differing effects for blacks and whites:

The negative effect of income on market participation for black wives appears only after [family] income has reached a fairly high level. The pattern for white wives is one of participation probabilities slowly increasing until income reaches the first threshold, fairly sharply decreasing until the second threshold, and thereafter more slowly decreasing.

Id. at 862.
income exceeding $30,350 in 1980 dollars. We are confident that we have identified a population that would be subject to the marriage penalty if their incomes were adjusted for inflation and if 1995 rate schedules were applied to them.\textsuperscript{162}

The design of our variable left us with a sample of 17,578 married women of which 5,884 were black. In this sample the average black wife earned 29.5% of her family's income, while the average white wife earned only 18% of her family's income. This percentage difference indicates that within this sub-sample, black couples were more likely to be subject to marriage penalties, and at any given combined income, to higher marriage penalties.\textsuperscript{163}

We used a regression analysis to assure ourselves that the racial differences in this data are not solely byproducts of socio-economic and demographic differences between blacks and whites. As shown in Table M in the Appendix, we found that race was a highly significant predictor of a wife's proportion of family income even when we accounted for such other variables as the husband's income and the education of the wife.\textsuperscript{164}

\textbf{D. The Black Congress and the Marriage Penalty}

Section 1 rate schedules create both marriage bonuses and marriage penalties, depending on the combined taxable income of a couple and its distribution between them. The social science evidence demonstrates quite convincingly that black couples are less likely than white couples to enjoy a marriage bonus, because married black women are more likely to be in the labor force. And because black wives generally contribute a

\textsuperscript{162} That is, if income kept up with inflation, the population in this sample would have combined incomes in excess of $60,000, yielding taxable incomes well within the income ranges yielding marriage penalties when the income is split between each spouse.

\textsuperscript{163} We could not determine from census data what unmarried persons were living together in a single household. Thus, we could not determine which couples were avoiding the marriage penalty by avoiding marriage while in all other respects living together as a couple. It is possible, of course, that blacks are more likely than whites to so behave. We do know that blacks are more likely to be single. In 1991, 43.1% of black men and 38.4% of black women were married, while 62.4% of white men and 59.0% of white women were married. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, THE BLACK POPULATION IN THE UNITED STATES 5 (1991). But we do not know what proportion of single whites and blacks live with another person as a couple.

All we can conclude from our data, therefore, is that within the population of married couples, blacks are more likely to suffer from the marriage penalty than whites. We do not know whether the apparent racial skewing of the marriage penalty would disappear if we were able to examine all couples, married and unmarried.

\textsuperscript{164} The wife's education is a proxy for her potential earning capacity.
higher percentage to the total family income, black couples are more likely to suffer a marriage penalty, and a higher marriage penalty, than white couples. Regression equations confirm that these correlations do not disappear when controls are introduced for education, husbands’ incomes, and other possible race neutral factors which might account for black wives’ high participation in the labor force and high contribution to total family income.

What would a Black Congress do with this information? We will discuss three possible actions. The simplest solution would be to adopt a one rate schedule for all individuals. Married couples would each file separate returns and each partner’s taxable income would be taxed at the same rate at which it would have been taxed if they were single. There would be no separate schedule for heads of households, nor would there be a marriage bonus for couples with only one wage earner, regardless of income. Moreover, there would be no marriage penalty for couples with two wage earners, regardless of the percentage of combined income that the lower income spouse contributed.

This reform has been previously advocated for reasons of gender equity. We believe that we are the first to suggest it for reasons of racial equity. Though simple, this solution might be unacceptable because it would eliminate the marriage bonus. Longstanding congressional policy favors use of the tax code to encourage marriage and to encourage women to be primarily homemakers. Though we disagree with this policy, a Black Congress might want to keep these incentives in place. Some blacks receive a marriage bonus, of course, even if a disproportionate amount of the benefits go to whites. A Black Congress may decide that there are social gains from women working mostly in the home, such as better quality childcare.

A Black Congress would still want to eliminate the marriage penalty while preserving the marriage bonus. A simple approach would be to provide for elective filing status by married taxpayers on each year’s

165. Pamela B. Gann, Abandoning Marital Status As a Factor in Allocating Income Tax Burdens, 59 TEX. L. REV. 1, 67 (1980); Marjorie E. Kornhauser, Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return, 45 HASTINGS L.J. 63, 108 (1993) (arguing that “[a] system that treats each person as a separate taxable unit is more equitable, more consistent with basic tax principles, more efficient, and ultimately better able to accomplish social family goals”).

166. See Nancy Staudt, Taxing Housework, 84 GEO. L.J. (forthcoming 1996).
Married taxpayers would have the choice to file as single people or as a married couple with a joint return.

A more radical alternative would be to allow both married and single couples to get the best tax result depending on their changing income combinations, by filing as two single persons or as married couple filing jointly, regardless of actual marital status. We know that blacks are more likely to be single than whites. We do not know whether there are more black than white couples who are living together but unmarried and who would enjoy a marriage bonus if they did marry. But enough black couples may be in this situation that a Black Congress would want to ensure that single working couples never pay more taxes than married working couples.

This more radical solution to the marriage bonus/penalty problem might also find favor in a gay Congress because gay people often live together as couples but are not yet provided the option of legal marriage. Under such a system, some method would be necessary for verifying relationships between unmarried persons as satisfying the criteria for the filing status election. The current controversy over providing benefits to the partners of gay employees may be of help in this regard. As states and cities begin to develop definitions and registration procedures for gay and other single couples, the federal government can follow suit and piggy back on the expanded state definitions in allowing elective tax filing status.

VI. CONCLUSION

Our article explores the critical race theory tradition that racial subordination infects virtually all American institutions. We have tested this hypothesis against the Internal Revenue Code. We have presented evidence that members of the black community receive, on average, fewer of the tax benefits we have studied than the average member of the white community. Our evidence is strongest with respect to the tax provisions we discussed in our wealth section. Blacks have less of the type of investment wealth which benefits from the realization requirement and special rates for capital gains. Blacks also receive fewer gifts and inheritances, a form of tax free accessions to wealth. When blacks do have wealth, they are more likely to invest in assets that are not tax favored, such as vehicles. Blacks do invest in homes, the primary asset

167. In a different context, the Internal Revenue Service has issued proposed regulations that would allow business entities, other than those automatically classified as corporations for federal tax purposes, to choose their classification. IRS Regulations, 71 Tax Notes 881 (1996).

168. See supra note 163.
for most American families, but black homes are on average less valuable and generally appreciate at a slower rate than white homes. As a result, the homeownership tax benefits, particularly the deductibility of home mortgage interest and property taxes, are more beneficial to whites than blacks.

The results of our study of black/white differences in the tax benefits associated with employee benefits is more mixed. We found that, once the data is controlled with appropriate socio-economic and demographic factors, blacks and whites participate equally in employer provided health plans.\textsuperscript{169} However, fewer blacks than whites participate in employer provided pension plans and 401(k) plans, which enjoy very substantial tax deferral advantages.

Section 1 rate schedules provide bonuses to some couples and penalties to other couples for being married. Because of extensive participation in the work force by black women, blacks are less likely to enjoy marriage bonuses and more likely to incur marriage penalties. This relationship between race and marriage bonuses and penalties remains after controlling for family income and other relevant economic variables.

Much of our analysis used regression equations to control for relevant demographic and socio-economic status (the independent variables) in an attempt to support the "null hypothesis"—that race does not matter—by trying to explain variance in the enjoyment of tax benefits (the dependent variable) as reflecting the influence of causes other than race. In nearly every instance we failed to find support for the null hypothesis because race remained a statistically significant predictor of enjoyment of tax benefits in our regression equations. However, regression equations are only as good as the selection of the independent variable candidates. Another researcher might select different independent variables and succeed in constructing an equation in which race is not a statistically significant predictor of enjoyment of these tax benefits. Until and if such a regression is created, however, we think our regressions are the best evidence available.

Before we go further, we must repeat two caveats we made in our introduction. First, because we have studied only some provisions of the Internal Revenue Code, we make no claim that the Internal Revenue Code as a whole subordinates black economic interests. Further study of other provisions may discover some which favor blacks over whites. However, we do believe that this study demonstrates the utility of our methodology. Further, we have studied some of the most significant tax benefits

\textsuperscript{169.} And because of the non-discrimination provisions in the Internal Revenue Code, we presume that medical plans have approximately equal value for all employees, regardless of class, gender or race. See supra notes 133-35 and accompanying text.
applicable to the individual income tax. If the tax benefits studied in our wealth section and the benefits associated with employer provided pension plans are skewed as substantially to whites as our analysis suggests, the entire Code is likely skewed in the favor of whites.\textsuperscript{170}

Second, we make no accusations of discriminatory intent. We suggest that the Code reflects systematic black political underrepresentation in the halls of power. As a result, black people are not in the consciousness of Congress as it enacts the Internal Revenue Code. Indeed, we suspect many legislators will be taken aback by our evidence of racial skewing in the distribution of tax benefits. We have used our metaphor of a Black Congress to emphasize how a tax code focused on the economic interests of blacks might look.

We suggest that a Black Congress would look favorably on a number of radical changes in the Internal Revenue Code. We repeat only the most prominent here. We have advocated changing the current deductions for home mortgage interest and real property taxes into credits that diminish as income rises.\textsuperscript{171} We suggested the elimination of both the capital gains rate and the realization requirement for the taxation of gain on many kinds of appreciated property.\textsuperscript{172} We proposed changes in the non-discrimination requirement for employer provided pension plans to require parity in dollar contributions for all employees, rather than parity in percentage of earnings.\textsuperscript{173} Finally, we recommended that a single rate schedule apply to all taxpayers, married or single, to eliminate both the marriage bonus and the marriage penalty.\textsuperscript{174}

Anyone who wished to shift more of the tax burden away from lower income persons and towards the more wealthy would tend to favor these proposals. Given the general economic situation of blacks in America, that such persons would make political alliance with those taking a black-oriented view of the Internal Revenue Code should not be surprising. However, we want to stress once again that we have provided evidence that the Code provisions we have studied disfavor blacks as a group, even holding income and other measures of socio-economic status constant. Thus, even high income blacks are less likely to benefit from employer

\textsuperscript{170} Estimates of the "tax expenditure" budget consistently indicate that the two largest "tax expenditures"—that is, lost revenue because of deviations from the \textit{Glenshaw Glass} definition of income—are the deductibility of interest on home mortgages and the exclusion of employer contributions to pension plans. \textit{See} KLEIN \& BANKMAN, \textit{supra} note 122, at 26-27.

\textsuperscript{171} \textit{See supra} p. 786-87.

\textsuperscript{172} \textit{See supra} p. 782.

\textsuperscript{173} \textit{See supra} p. 789-91.

\textsuperscript{174} \textit{See supra} pp. 798-99.
provided pensions and more likely to suffer marriage penalties than are whites with equivalent incomes. 175

All tax benefits as we have defined them—deviations from a comprehensive income tax base as defined in Glenshaw Glass—have some underlying public policy goal. Sometimes that goal is to achieve a more easily administered income tax, as reflected in the realization principle. Sometime that goal is to provide an incentive for particular lifestyles, such as getting married, investing in 401(k) plans or capital assets, owning homes, etc. If blacks are not responding in sufficient numbers to these incentives, one possible response is that the tax benefits should be made stronger to provide even greater incentives for the desired behaviors.

Our response to this argument 176 is that the social science literature we introduced in this article clearly confirms that in many cases blacks have no access to tax favored choices. Black homes appreciate less, partly because of widespread discrimination in housing markets. Blacks do not enjoy marriage bonuses and suffer marriage penalties, in part because employment discrimination prevents black husbands from earning as much as white husbands. Most outstandingly, the glaring discrepancies in black and white wealth and inheritances make it almost impossible for most blacks to invest in capital assets and in other tax favored ways. The country could and should adopt programs that would improve the ability of blacks to make lifestyle decisions that are now tax favored. No-one can doubt that black poverty is a product of our country’s unfortunate racial history—centuries of slavery followed by de jure and de facto racial segregation. It is a history that needs to be corrected, but it will not be corrected overnight.

In the meantime, the Internal Revenue Code should not perpetuate and aggravate the inequities between blacks and whites. The importance of achieving public policy goals must be balanced against any racially skewing effects of these provisions. If other types of tax provisions can achieve public policy goals without skewing the Code against blacks,

175. See supra p. 786-87, 796-97.
176. An alternative response is that lifestyle choices are constantly in flux and no more so than in the past three decades. Blacks have often said that we are the canaries in the mine of American society. This was true for drug use which was originally confined to the black community and which has spread throughout our society. It was also true for illegitimate births which are now so prevalent in all races. It is true in terms of married women working outside the home, which was virtually unheard of among whites years ago although it was quite common among blacks. The lifestyles that blacks lead today may be the lifestyles that whites lead tomorrow. If whites want to keep the Internal Revenue Code best serving their interests, they must pay attention to how the Code ill serves blacks.
those other provisions certainly are preferable. If legislators cannot accommodate both public policy goals and black/white equity, then they will have to make hard choices. But even analysts who cannot support our rather radical proposals for the Internal Revenue Code need to address the question of the racially skewed impact of the tax benefits we have studied. Ignoring the impact that the Internal Revenue Code has on black welfare is a tradition that must stop.
This Appendix has three sections. Part I contains the tables referred to in the text. Part II contains a description of the databases used to construct the tables. Part III contains a discussion of the controls we used in doing the regressions reported in the tables.

PART I: Tables

In each table we report a regression coefficient \( b \) and a measure of statistical significance \( t \). Regression coefficients are estimates of the change in the dependent variable for a unit change in a given independent variable (e.g., age or income). For example, in Table A, the coefficient for Education is 1,716.55. This means that for each additional grade completed by the respondent, the amount of gifts received over a given period increased by an average of $1,716.65. The preceding example is based on an ordinary least squares regression. However, when dependent variables are binary or zero-sum variables, for technical reasons we have used logistic regressions. The interpretation of the regression coefficient \( b \) is not as straightforward in those circumstances.

\( t \) is a standard measure of statistical significance used in regression equations. It is dependent on a number of factors, particularly the size of the sample and the amount of variability within it. In the tables we identify the independent variables that are significantly correlated with the dependent variable with 95% or 99% confidence by printing the results in italics.
### TABLE A
**Race and Total Net Worth**

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<tr>
<th>VARIABLE</th>
<th>b</th>
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<tbody>
<tr>
<td>Age</td>
<td>1388.35</td>
<td>41.86</td>
</tr>
<tr>
<td>Region (1 = South)</td>
<td>1144.38</td>
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<tr>
<td>Family Income (Monthly/100)</td>
<td>2583.58</td>
<td>81.47</td>
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<tr>
<td>Education (Highest grade attended)</td>
<td>1716.65</td>
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<tr>
<td>Marital Status (1 = Married)</td>
<td>-6570.63</td>
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</tr>
<tr>
<td>Race (1 = White)</td>
<td>13761.21</td>
<td>7.17</td>
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</table>

Data Source: *1984 Survey of Income and Program Participation—Wave 4*  
*n = 52,223*: Italics indicate statistical significance with 99% confidence.
### TABLE B
**Race and Holdings of Stocks and Mutual Funds**

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<thead>
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<th>VARIABLE</th>
<th>$ Amounts</th>
<th>Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>b</td>
<td>t</td>
</tr>
<tr>
<td>Children in HH (1=yes)</td>
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<tr>
<td>Respondents Age</td>
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<tr>
<td>High School Grad (1=yes)</td>
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<tr>
<td>College Grad (1=yes)</td>
<td>2403.28</td>
<td>3.18</td>
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<tr>
<td>Southern Residence (1=yes)</td>
<td>615.09</td>
<td>0.94</td>
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<tr>
<td>Marital Status (1=married)</td>
<td>-3078.96</td>
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<tr>
<td>Monthly Family Income/100</td>
<td>492.28</td>
<td>34.08</td>
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<tr>
<td>Race (1=white)</td>
<td>1096.02</td>
<td>1.21</td>
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</table>

Data Source: 1984 Survey of Income and Program Participation—Wave 4
Italics indicate statistical significance with 95% confidence.
### TABLE C
Race and Non Owner Occupied Real Estate

<table>
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<tr>
<th>VARIABLE</th>
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<th>Amounts $t$</th>
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<th>Proportion $t$</th>
</tr>
</thead>
<tbody>
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<td>-12165</td>
<td>-0.99</td>
<td>-.075</td>
<td>-1.09</td>
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<tr>
<td>Respondents Age</td>
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<td>21.55</td>
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<tr>
<td>High School Grad (1=yea)</td>
<td>3110.38</td>
<td>6.39</td>
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<td>College Grad (1=yea)</td>
<td>4210.69</td>
<td>7.93</td>
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<td>0.98</td>
<td>0.004</td>
<td>1.41</td>
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<tr>
<td>Marital Status (1=married)</td>
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<td>-1.68</td>
<td>0.002</td>
<td>0.96</td>
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<td>Monthly Family Income/100</td>
<td>464.28</td>
<td>45.78</td>
<td>0.001</td>
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<td>Race (1=white)</td>
<td>1947.99</td>
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<td>0.014</td>
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Data Source: 1984 Survey of Income and Program Participation—Wave 4
*Italicics indicate statistical significance with 95% confidence.*
### TABLE D
Race and Equity in Vehicles

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<th>VARIABLE</th>
<th>$ Amounts</th>
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<td>b</td>
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<td>Respondents Age</td>
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<td>Marital Status (1=married)</td>
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<td>Monthly Family Income/100</td>
<td>106.3</td>
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<td>Race (1=white)</td>
<td>1560.92</td>
<td>19.2</td>
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Data Source: 1984 Survey of Income and Program Participation—Wave 4
Italics indicate statistical significance with 95% confidence.
### TABLE E
Value of Gifts Received

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<td>Southern Residence (1=South)</td>
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<tr>
<td>Marital Status (1=Married)</td>
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<tr>
<td>Education</td>
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<tr>
<td>Race (1=White)</td>
<td>761.03</td>
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Data Source: 1988 National Survey of Families and Households
n = 9,660: Italics indicate statistical significance with 95% confidence.

### TABLE F
Inheritance Received

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<td>Marital Status (1=Married)</td>
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<td>Education</td>
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<tr>
<td>Race (1=White)</td>
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<td>4.29</td>
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Data Source: 1988 National Survey of Families and Households
n = 9,660: Italics indicate statistical significance with 95% confidence.
### TABLE G
Generational Transfer of Wealth

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<thead>
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<td>Marital Status (1 = Married)</td>
<td>54023.97</td>
<td>3.49</td>
</tr>
<tr>
<td>Southern Residence (1 = South)</td>
<td>-18437.79</td>
<td>-1.14</td>
</tr>
<tr>
<td>Education</td>
<td>-320.45</td>
<td>-1.86</td>
</tr>
<tr>
<td>Race (1 = White)</td>
<td>45688.43</td>
<td>2.1</td>
</tr>
</tbody>
</table>

Data Source: 1988 National Survey of Families and Households  
n = 1,686: Italics indicate statistical significance with 95% confidence.

### TABLE H
Race and Home Ownership

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>b</th>
<th>t</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Family Income</td>
<td>0.04</td>
<td>19</td>
</tr>
<tr>
<td>Age in Years</td>
<td>0.04</td>
<td>13</td>
</tr>
<tr>
<td>Age (categorical)</td>
<td>0.26</td>
<td>2</td>
</tr>
<tr>
<td>Urban/Non-Urban Residence</td>
<td>-0.2</td>
<td>-3</td>
</tr>
<tr>
<td>Highest Grade Completed</td>
<td>-0</td>
<td>-1</td>
</tr>
<tr>
<td>Marital Status</td>
<td>1.01</td>
<td>15</td>
</tr>
<tr>
<td>Race (B/W)</td>
<td>0.36</td>
<td>4</td>
</tr>
<tr>
<td>Constant</td>
<td>-3.1</td>
<td>-17</td>
</tr>
</tbody>
</table>

Data Source: 1988 National Survey of Households and Families  
Italics indicate statistical significant at the .01 level.
### TABLE I

Race and Home Equity

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>$ Amounts</th>
<th></th>
<th>Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>b</td>
<td>t</td>
<td>b</td>
</tr>
<tr>
<td>Children in HHI (1 = yes)</td>
<td>21950.3</td>
<td>1.91</td>
<td>0.441</td>
</tr>
<tr>
<td>Respondents Age</td>
<td>576.93</td>
<td>53.95</td>
<td>0.005</td>
</tr>
<tr>
<td>High School Grad (1 = yes)</td>
<td>8395.34</td>
<td>18.42</td>
<td>-0.005</td>
</tr>
<tr>
<td>College Grad (1 = yes)</td>
<td>2288.3</td>
<td>4.51</td>
<td>-0.051</td>
</tr>
<tr>
<td>Southern Residence (1 = yes)</td>
<td>-1562.5</td>
<td>-5.64</td>
<td>0.013</td>
</tr>
<tr>
<td>Marital Status (1 = married)</td>
<td>591.58</td>
<td>1.53</td>
<td>0.026</td>
</tr>
<tr>
<td>Monthly Family Income/100</td>
<td>815.08</td>
<td>9.49</td>
<td>0.002</td>
</tr>
<tr>
<td>Race (1 = white)</td>
<td>9641.68</td>
<td>16.13</td>
<td>0.007</td>
</tr>
</tbody>
</table>

Data Source: 1984 Survey of Income and Program Participation—Wave 4

*Italics indicate statistical significance with 95% confidence.*
TABLE J
Race and Employer Provided Health Insurance

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>b</th>
<th>t</th>
</tr>
</thead>
<tbody>
<tr>
<td>RACE</td>
<td>0.1097</td>
<td>0.92</td>
</tr>
<tr>
<td>TENURE2</td>
<td>0.0969</td>
<td>16.17</td>
</tr>
<tr>
<td>EDUC</td>
<td>0.0801</td>
<td>5.33</td>
</tr>
<tr>
<td>FT</td>
<td>2.5184</td>
<td>31.38</td>
</tr>
<tr>
<td>PROFMAN</td>
<td>0.0576</td>
<td>0.71</td>
</tr>
<tr>
<td>METRO</td>
<td>0.0811</td>
<td>1.08</td>
</tr>
<tr>
<td>SOUTH</td>
<td>0.1433</td>
<td>2.07</td>
</tr>
<tr>
<td>UNIONMEM</td>
<td>1.0765</td>
<td>10.02</td>
</tr>
<tr>
<td>FIRM SIZE</td>
<td>0.2337</td>
<td>3.48</td>
</tr>
<tr>
<td>Bracket2</td>
<td>0.845</td>
<td>6.38</td>
</tr>
<tr>
<td>CONSTANT</td>
<td>-2.7432</td>
<td></td>
</tr>
</tbody>
</table>

n = 10,721: Italics indicate statistical significance with 95% confidence.
### TABLE K

Race and 401(k) Plans

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>b</th>
<th>t</th>
</tr>
</thead>
<tbody>
<tr>
<td>RACE</td>
<td>0.3913</td>
<td>4.03</td>
</tr>
<tr>
<td>TENURE1</td>
<td>0.042</td>
<td>14.48</td>
</tr>
<tr>
<td>EDUC</td>
<td>0.1439</td>
<td>11.89</td>
</tr>
<tr>
<td>FT</td>
<td>1.3522</td>
<td>9.78</td>
</tr>
<tr>
<td>PROFMAN</td>
<td>0.2294</td>
<td>3.82</td>
</tr>
<tr>
<td>METRO</td>
<td>0.0976</td>
<td>1.65</td>
</tr>
<tr>
<td>SOUTH</td>
<td>-0.1853</td>
<td>-3.56</td>
</tr>
<tr>
<td>UNIONMEM</td>
<td>-0.3415</td>
<td>-5.53</td>
</tr>
<tr>
<td>FIRM SIZE</td>
<td>0.6217</td>
<td>11.14</td>
</tr>
<tr>
<td>BRACKET2</td>
<td>0.3982</td>
<td>6.67</td>
</tr>
<tr>
<td>PUBLIC</td>
<td>-0.3854</td>
<td>-6.24</td>
</tr>
<tr>
<td>CONSTANT</td>
<td>-5.7229</td>
<td></td>
</tr>
</tbody>
</table>

n = 10,836: Italics indicate statistical significance with 95% confidence.
### TABLE L
Race and Employer-Provided Pension Plans

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>b</th>
<th>t</th>
</tr>
</thead>
<tbody>
<tr>
<td>RACE</td>
<td>0.2664</td>
<td>2.35</td>
</tr>
<tr>
<td>TENURE2</td>
<td>0.2152</td>
<td>25.93</td>
</tr>
<tr>
<td>EDUC</td>
<td>0.055</td>
<td>3.43</td>
</tr>
<tr>
<td>FT</td>
<td>1.903</td>
<td>17.99</td>
</tr>
<tr>
<td>PROFMAN</td>
<td>0.13</td>
<td>1.57</td>
</tr>
<tr>
<td>METRO</td>
<td>-0.139</td>
<td>1.78</td>
</tr>
<tr>
<td>SOUTH</td>
<td>-0.0505</td>
<td>-0.74</td>
</tr>
<tr>
<td>UNIONMEM</td>
<td>0.78</td>
<td>7.91</td>
</tr>
<tr>
<td>FIRM SIZE</td>
<td>0.0372</td>
<td>0.52</td>
</tr>
<tr>
<td>BRACKET2</td>
<td>0.6555</td>
<td>5.76</td>
</tr>
<tr>
<td>PUBLIC</td>
<td>0.7589</td>
<td>8.93</td>
</tr>
<tr>
<td>CONSTANT</td>
<td>-2.8518</td>
<td></td>
</tr>
</tbody>
</table>


n = 8,952: Italic indicates statistical significance with 95% confidence.
### TABLE M
Race and Proportion of Family Income Earned by Wife

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>b</th>
<th>t</th>
</tr>
</thead>
<tbody>
<tr>
<td>WIFRACE</td>
<td>0.051</td>
<td>22.928</td>
</tr>
<tr>
<td>PREVMAR</td>
<td>0.018</td>
<td>6.659</td>
</tr>
<tr>
<td>HUSNOWRK</td>
<td>-1.241</td>
<td>-0.134</td>
</tr>
<tr>
<td>EDUCW</td>
<td>0.015</td>
<td>39.458</td>
</tr>
<tr>
<td>SOUTH</td>
<td>0.004</td>
<td>1.659</td>
</tr>
<tr>
<td>CHILDREN</td>
<td>-0.009</td>
<td>-9.988</td>
</tr>
<tr>
<td>URBAN</td>
<td>0.013</td>
<td>3.973</td>
</tr>
<tr>
<td>OTHERINC</td>
<td>-0.009</td>
<td>-128.295</td>
</tr>
<tr>
<td>PREKKID</td>
<td>-0.014</td>
<td>-4.765</td>
</tr>
<tr>
<td>(Constant)</td>
<td>0.286</td>
<td>40.931</td>
</tr>
</tbody>
</table>


n = 17,578; *italics indicate statistical significance with 99% confidence.*
Part II: Databases

We used four databases in our data analyses: the Survey of Income and Program Participation (SIPP), the National Survey of Families and Households (NSFH), the U.S. Census May 1988 Current Population Survey (CPS), and the 1980 Census, PUMS Couples File. In this part of the Appendix, we provide some information about each database.

The Survey of Income and Program Participation (SIPP) was begun in 1984 by the Bureau of Census. It is a large, random field survey of the U.S. population designed to track entry into and exit from participation in various government funded social programs. The large number of households in the sample and the range and depth of questions concerning demographic detail and work experience allows an expanded analysis of black-white differences.

A SIPP panel consists of households which are interviewed every four months during a two-and-a-half-year period. A new panel is introduced every year. The SIPP database is premised on basic demographic questions that are repeated at each interview and topical “waves” that are only asked once. The repeated questions concern basic demographic and social characteristics for each member of the household including labor force activity and types and amounts of income. The more in-depth “waves” cover such topics as “assets” and “government program participation.” We used Wave 4 of the 1987 Panel to examine wealth, race and taxation.

The National Survey of Families and Households (NSFH) consists of interviews with a national sample of 13,017 respondents. The field work began in March 1987 and was concluded in May 1988. The survey includes a main sample of 9643 respondents who represent the noninstitutional United States population aged nineteen and older. The remaining 3374 respondents are the spouses or cohabiting partners of the main respondents. In addition, to obtain a sample of minority groups that was large enough to support inferences made from the data, several population groups were double sampled.

One adult per household was randomly selected to be the primary respondent. A shorter self-administered questionnaire was given to the spouse or cohabiting partner of the primary respondent. Several portions

177. For a more complete description of the SIPP database and its use in studying wealth, see OLIVER & SHAPIRO, supra note 9, at 55-65.

178. Wave 4 of the 1987 Panel includes information on assets and liabilities. The assets covered include: savings accounts, stocks, business equity, mutual funds, bonds, Keogh and IRA accounts, and equity in homes and vehicles. Wave 4 does not cover pension funds; a problem for our study of employee benefits.
of the main interview were self-administered to facilitate the collection of sensitive information and to ease the flow of the interview.

The end result is a data set that is large enough and broad enough draw inferences from. Of particular interest for us is the 3026 blacks in the NSFH sample. In our study we have drawn on data from the NSFH sample about work patterns and income sources, home ownership, inheritance and gifts.

In order to study race differences in employee benefit plan participation, we used the *U.S. Census May 1988 Current Population Survey of Employee Benefits*. This data set includes information on wages, industry, occupation, union status, region, education, marital status, and age, found in the May *Current Population Survey* conducted by the Census every year, but in addition includes information on employee benefits, firm size, and tenure with employer. The *CPS Survey of Employee Benefits* does not include information on the dollar value of benefits available.

We used the *1980 Census, PUMS Couples File* to study the income of couples and to ascertain the likelihood of receiving a marriage bonus or penalty. The *File* consists of data taken from a random sample of decennial census respondents who are asked to complete a very detailed questionnaire. The *PUMS Couples File* is compiled by the Census from this data.
Part III: Controls

Table N shows the controls other than race that we have employed in our regressions.

**TABLE N**

Controls Used in Logistic Regressions

<table>
<thead>
<tr>
<th>MARRIAGE PENALTY</th>
<th>EMPLOYEE BENEFITS</th>
<th>HOME-OWNERSHIP</th>
<th>WEALTH</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race</td>
<td>Race</td>
<td>Race</td>
<td>Race</td>
</tr>
<tr>
<td>Income</td>
<td>Income</td>
<td>Income</td>
<td>Income</td>
</tr>
<tr>
<td>Education</td>
<td>Education</td>
<td>Education</td>
<td>Education</td>
</tr>
<tr>
<td>Region</td>
<td>Region</td>
<td>Region</td>
<td>Region</td>
</tr>
<tr>
<td>Area type</td>
<td>Area type</td>
<td>Area type</td>
<td></td>
</tr>
<tr>
<td>Previous Marriage</td>
<td></td>
<td>Marital Status</td>
<td>Marital Status</td>
</tr>
<tr>
<td>Children/Young children</td>
<td></td>
<td>Tenure in Job</td>
<td>Age</td>
</tr>
<tr>
<td>Husband's labor force participation</td>
<td>Various aspects of employment</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

We discuss each of these controls, beginning with those we used most frequently in our analyses.

**EDUCATION.** Because socio-economic status is largely dependent on education,\(^{179}\) we included some measure of education in all equations. In trying to tease out the effects of education on the marriage penalty tax rates, we were most interested in wives' education because the labor force participation of married women is largely a function of their educational attainment, and the married women's labor force participation is the factor that qualifies couples for the marriage penalty. In other situations we measured the educational attainment of the person responding to the interview.

**INCOME.** Another variable that reflects socio-economic status is income.\(^{180}\) In all our equations we employed some measure of income to

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179. OLIVER & SHAPIRO, supra note 9, at 70.
180. O'HARE, supra note 54, at 1.
to control for the possibility that race differences in tax benefits are a function of income rather than race.

In the case of the marriage penalty, we used a measure which represents all family income not earned by the wife—OTHERINC—because some married women might work more than others because the other income source for their families is inadequate. In the analysis of homeownership and wealth, all family income is measured. In our analysis of employee benefits, we classified respondents as high income (over $35,000) or low income (BRACKET2 in Tables J, K & L).

REGION. We controlled in each instance for region because blacks are most heavily concentrated in the South, a significantly poorer part of the country. As a result, observed racial disparities might actually reflect regional differences.

AGE. We included a measure of age in wealth and homeownership because increased age is directly related to increased wealth and homeownership. Because the black population is significantly younger and has shorter life expectancies than the white population, observed racial differences in wealth and homeownership may be merely a function of age rather than race. In our employee benefits analysis, we controlled for tenure in the job, which is also related to age. In our marriage penalty analysis, however, we did not control for age.

MARITAL STATUS. Marriage joins together individuals and their incomes and wealth. Accordingly, married people may be more likely to own homes and other assets than unmarried people. Because whites marry at a much higher rate than blacks, we controlled for marital status when looking at homes and wealth.

While we did not have to control for current marital status when studying the marriage penalty, we did control for whether a respondent had been previously married. We believe that it is possible that previously married wives are more impressed with the fragility of marriage and more concerned about developing a career as a source of economic security.

We did not control for marital status in our analysis of employee benefits.

AREATYPE. Here we consider whether the respondent lives in an urban or non-urban area. Area type is important for the marriage penalty rate because married women in urban areas are more likely to work than
married women in non-urban areas. For homes, area type is important because housing in urban areas is more scarce than in non-urban areas. Because blacks are overwhelmingly urban dwellers, area type may be more important to home ownership than race.

Area type does not appear in our wealth or employee benefit analysis. Although rural people tend to have lower incomes, we have already controlled for income.

EMPLOYMENT. The decisions of wives to enter the paid labor force may be dependent on the stability of their husbands’ work. In our analysis of marriage bonuses and penalties, we included HUSNOWRK, a measure of the number of weeks in the past year that a wife’s husband did not work.

In our analysis of employee benefits, we included a number of variables related to the respondent’s employment, including full or part time, public or private employer, firm size for private employers, white or blue collar occupation, and union status.

CHILDREN. The number and age of children in a family influences married women’s labor force participation. In our study of the marriage penalty, we use PREKKID and CHILDREN to measure the effect that the presence of preschool age children, and the effect that the presence of each additional child (regardless of age), respectively has on a wife’s labor force participation. We did not control for children in our other analyses.

185. See id. at 239 (showing that a higher percentage of the black and white metropolitan populations work than the non-metropolitan populations).

186. See Heather Timmons, Big Lenders Aiding Push in Bronx Homeownership, AM. BANKER, Aug. 20, 1996, at 15 (citing a study finding that the “shortage of affordable urban housing is dangerous”).

187. FARLEY & ALLEN, supra note 183, at 135-36.

188. PHYLLIS A. WALLACE, BLACK WOMEN IN THE LABOR FORCE 34-36 (1980).
2007

Race And Wealth Disparity: The Role Of Law And The Legal System

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Vanderbilt University

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Santa Clara University

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Cover Page Footnote
The authors thank Ivy A. Flores, John B. Lough, Jr., Professor Daniel M. Schneider, and Professor Leon Trakman for their helpful comments and support. Special thanks to Jennifer Alesio, for superlative research assistance and incisive commentary.

This article is available in Fordham Urban Law Journal: https://ir.lawnet.fordham.edu/ulj/vol34/iss4/2
RACE AND WEALTH DISPARITY: THE ROLE OF LAW AND THE LEGAL SYSTEM

Beverly Moran* and Stephanie M. Wildman**

Many authors in the forthcoming book Race and Wealth Disparities: A Multidisciplinary Discourse assume that law plays some role in the creation and maintenance of wealth disparities based upon race.¹ Yet some lawyers, judges, legislators, professors, and law students would strongly dispute that view. Many legal workers, like other Americans, believe in a legal system that aspires to, and often achieves, neutrality in matters of class and equality in matters of race.² They do not view law and the legal system as one way that American society polices race and wealth disparities. Because American law seems removed from race and wealth concerns, legal workers see no place for such considerations in their education or practice.

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** Copyright © 2007 by Stephanie M. Wildman, Professor of Law and Director, Center for Social Justice and Public Service, Santa Clara University. The authors thank Ivy A. Flores, John B. Lough, Jr., Professor Daniel M. Schneider, and Professor Leon Trakman for their helpful comments and support. Special thanks to Jennifer Alesio, for superlative research assistance and incisive commentary.

¹. RACE AND WEALTH DISPARITIES: A MULTIDISCIPLINARY DISCOURSE (Beverly Moran ed., forthcoming 2007). Most of the chapters in this text, by authors from disciplines ranging from sociology and psychology to history, economics, and literary criticism, consider the relevance of law to their discipline. See, e.g., Tony N. Brown & Daniel B. Cornfield, A Selective Review of Sociological Perspectives on the Relationship Between Race and Wealth, in RACE AND WEALTH DISPARITIES, supra (laws affecting unionization); William J. Collins & Robert A. Margo, Racial Differences in Wealth: A Brief Historical Overview, in RACE AND WEALTH DISPARITIES, supra (laws that prohibited blacks from owning property); M. Elizabeth Kirkland & Sheila R. Peters, “Location, Location, Location” Residential Segregation and Wealth Disparity, in RACE AND WEALTH DISPARITIES, supra (laws that enforced segregation); Dr. Roland Mitchell & Dr. Reavis L. Mitchell, History and Education: Mining the Gap, in RACE AND WEALTH DISPARITIES, supra (public education laws and segregation); Cecelia Tichi, Wealth Whiteout: Creative Writers Confront Whites’ Downward Mobility in America’s Newest Gilded Age, in RACE AND WEALTH DISPARITIES, supra (bankruptcy and property taxation); Kenneth K. Wong, Federalism and Equity: Evolution of Federal Educational Policy, in RACE AND WEALTH DISPARITIES, supra (“No Child Left Behind” federal legislation).

². See, e.g., Terry Carter, Divided Justice, NAT’L B. ASS’N MAG., Jan./Feb. 1999, at 16-17 (reporting that 80.7 percent of white attorneys and 59.1 percent of black attorneys polled were “hopeful” that the justice system would eliminate racial bias).
In response to the prevalent view that American law and legal institutions are class and color blind, this Article provides examples of how legal institutions sometimes do create and maintain racialized wealth disparities. The Article offers examples of this phenomenon by examining a sequence of federal judicial decisions, the federal taxing statutes, the role of legal education, and access to legal services. These examples are instructive because they cut across a broad spectrum of components of the American legal system. By revisiting issues of race and wealth in different legal settings from the Constitution to federal cases, the tax system, and legal education and practice, this Article confirms that race and wealth are both involved in legal outcomes and ignored by legal actors and institutions in a systematic way. Legal actors and citizens of all vocations need to look more critically at the American legal landscape and critique the influence of race and wealth.

America’s foundational aspirations toward equality and neutrality allow legal actors to ignore the effect that race and wealth disparities have upon law and the legal system, even when those actors acknowledge how often law fails to achieve these ideals. Legal realists, critical legal theorists, critical race theorists, feminist theorists, and others have noted the contradiction between legal doctrines and legal realities. Yet, despite its contradictions and failures, the urge towards equality and neutrality creates opportunities for change. As E.P. Thompson observed, “people are not as stupid as some . . . suppose them to be. They will not be mystified by the first man who puts on a wig.” For Thompson, neutrality and equality provide opportunities to redress an unequal class system even while these concepts also protect ruling class interests.

3. See, e.g., Karl N. Llewellyn, Jurisprudence: Realism in Theory and in Practice (1962); Max Radin, Law as Logic and Experience (1940).


7. English judges wear wigs, so Thompson’s reference is to the role of law (represented by the man in the wig) in perpetuating or combating injustice. See E.P. Thompson, Whigs and Hunters: The Origin of the Black Act 262–63 (1975).
RACE AND WEALTH DISPARITY

ular support and so is not useful in maintaining class hierarchy.\textsuperscript{8} Thus, the aspiration for universality and equity can sometimes force law to follow its "own logic and criteria of equity."\textsuperscript{9}

THE AMERICAN CONFLICT BETWEEN EQUALITY, NEUTRALITY, AND ASSIGNED RACE ROLES

From its beginnings, the American legal system has articulated two distinct, yet contradictory, views of human relations. The Declaration of Independence aspired to equality among people and neutral application of law.\textsuperscript{10} Yet at the same time, Article I, section 2 of the United States Constitution provided that the census shall count "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."\textsuperscript{11} This constitutional provision allocated roles by race for the construction of political rights: Indians outside American society; black slaves; and white male full citizens, whether free or bound for a term of years.

Ironically, neutrality and equality can support subordination and hierarchy. Anatole France illustrated this point when he sarcastically applauded the majestic equalitarianism of the law, which "forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."\textsuperscript{12}

In 1943, Robert Hale echoed France’s sentiment, as he wrote about the law’s role in creating unequal bargaining relationships and unequal wealth effects. Hale explained that wealth gives its owner control over his or her own life and leisure and over other people’s lives as well.\textsuperscript{13} Hale illustrated this control of the wealthy

\textsuperscript{8} Id.
\textsuperscript{9} Id. Thompson allows that a legal system may not achieve neutrality and fairness:
It is true that certain categories of person may be excluded from this logic (as children or slaves), that other categories may be debarred from access to parts of the logic (as women or, for many forms of eighteenth-century law, those without certain kinds of property), and that the poor may often be excluded, through penury, from the law’s costly procedures.

\textsuperscript{10} "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator, with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness." The Declaration of Independence para. 2 (U.S. 1776).

\textsuperscript{11} U.S. Const. art. I, § 2, cl. 3.

\textsuperscript{12} Anatole France, Le Lys Rouge [The Red Lily], reprinted in John Bartlett, Familiar Quotations 655 (1980).

\textsuperscript{13} Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 626-28 (1943).
over the working classes through the greater bargaining power that capital has over labor, especially low-skilled workers. This unequal bargaining power leads to the inequitable distribution of wealth as those with control over capital can extract work from others without just compensation. As seen in Hale’s work, legal neutrality claims that law has no effect on this wealth distribution. Instead, law simply protects property rights and freedom of contract. Under this concept of legal neutrality, other institutions, for example the market, fuel the wealth distribution occasioned by unequal bargaining power.

Hale rejected the claim that legal neutrality has no wealth effects. Rather, Hale pointed out that legal rules lead to particular wealth distribution patterns and that different legal rules create different wealth distribution patterns while still protecting property rights and freedom of contract. For Hale, the allegedly neutral system of American property and inheritance laws does more than merely protect private property and freedom of contract; these laws also give property owners power over workers to the detriment of most Americans.

Sixty years after Hale, Stephen J. Rose, in a book and poster depicting the interrelationships of income, wealth, occupation, race, gender, and household type, showed that five percent of the United States population owns sixty percent of the nation’s wealth. Using an icon representing 160,000 people as its primary unit, the left side of the poster portrayed the American population by income up to $125,000. Ninety-three percent of the American population earned at or below this $125,000 mark. Ninety-three percent of the American population is able to fit within the physical frame of the approximately two by three foot poster.

14. *Id.* at 626-27.
15. *Id.* at 627-28.
16. *Id.* at 626.
17. *Id.*
18. *Id.* at 628. “Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others.” *Id.* at 627-28.
19. *Id.* at 627-28.
20. STEPHEN J. ROSE, SOCIAL STRATIFICATION IN THE UNITED STATES: THE NEW AMERICAN PROFILE POSTER 25 (2000); see also generally Collins & Margo, supra note 1.
21. ROSE, supra note 20, at 25.
22. *Id.*
23. *Id.*
In order to expand the chart at the same 160,000 people per icon scale and include those who earn combined incomes of up to $300,000, the poster must add eight feet in height. Few icons populate this extended chart representing people who earn more than $125,000 annually. In order to reflect the 150,000 households with more than $1 million in yearly income, the poster must grow three stories high.

Although Rose’s poster tells a different story, the American myth perpetuates the idea that anyone can climb those three stories in one lifetime. This belief coexists with public rules and private practices that have tied wealth to race for generations. As a result, non-whites are even less likely to move out of poverty than whites.

The disparate, distributional result that ties race and wealth has been supported throughout American history by government programs. The United States began as a slave nation, and the end of slavery did not break the tie between race and wealth. Most people are aware of the failures of the post-Civil War Reconstruction and the emergence of the Jim Crow system of segregation. Few are as aware of how the liberal New Deal tied race and wealth. The New Deal introduced the notion of an economic safety net into American politics. As such it pulled many Americans from poverty. But the New Deal also excluded agricultural and domestic workers from that economic safety net because those occupations served as a “neutral” proxy for race. After World War II, the government continued to enrich its citizens based on race through the Federal Housing Administration, which made home

24. Id.
25. The Y axis (the vertical line running along the left hand side of the poster) shows income up to $125,000. The X axis shows the U.S. population in increments of 160,000 up to ninety-three percent of the population. Id.
26. Id.
ownership available to working class whites, while excluding black buyers through redlining and other exclusionary practices.\footnote{29}

These government programs increased white family well-being significantly while systematically excluding blacks, Indians, and others. Yet, because each program based exclusions on seemingly neutral factors, many whites have never understood the role their race played in their rise from poverty to middle class status.

Hale argues that contract law is driven by bargaining power and made up of seemingly class neutral rules that actually shift bargaining power to owners of capital and away from labor. Favoring the wealthy over workers is not the stated justification for these rules. Instead, proponents justify these rules as the most efficient means of supporting an important social goal called freedom of contract. The rules ignore the fact that, without true bargaining power, there can be no freedom of contract. Thus the rich and the poor share in the same freedoms which somehow mysteriously tend to favor the wealthy. The New Deal developed seemingly race-neutral rules that actually shifted wealth away from blacks and towards whites. These rules were not presented as part of an effort to bring the white working class into the middle class while leaving black America in Depression conditions for another forty years. Yet, by restricting benefits to whites either explicitly—as in the federal home mortgage arena—or implicitly—as in Social Security—these government programs helped ensure that government benefits would enforce an income and wealth gap between white Americans and their non-white counterparts. These gaps, first between the wealthy and everyone else (which is enforced by contract law among other legal rules) and between black wealth and white wealth (perpetuated by historical gaps in government benefits), occur in a wide range of assets, including access to education.

Two judicial decisions announced twenty-five years apart illustrate how equality and neutrality can veil the reinforcement of existing wealth inequities. *Rodriguez v. San Antonio School District* and *Hopwood v. Texas* both concerned the Texas public education system. *Rodriguez* dealt with elementary and secondary education; *Hopwood* grappled with higher education in the state’s premier law school.

*Rodriguez* challenged the practice of funding local school districts through property taxes. In a property tax system, rich school districts are able to raise more funds through taxation than poor districts. Because rich districts include land and buildings with higher property values, these districts are able to raise greater funding while putting less tax burden on each taxpayer within the district. As Douglas Reed explained, “property-rich districts could generate significant revenues for education (at relatively low tax rates), while property-poor districts could produce only very small amounts of revenue (while taxing themselves at comparatively high rates).” This uneven and unequal funding scheme led three law professors to argue that state wealth, rather than school district wealth, was a better measure of funding per student. The professors urged that “children are classless ... no child of tender years is capable of meriting more or less than another.” The Edgewood School District’s budget, where Mr. Rodriguez’s children attended school, spent only two-thirds as much money per student as compared to the Alamo Heights School District’s per-student expenditures. The residents of the Edgewood District were

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32. See generally Wong, *supra* note 1, for further discussion of elementary and secondary education.
34. *Rodriguez*, 411 U.S. at 4-5.
37. COONS, CLUNE & SUGARMAN, *supra* note 36, at 419.
predominantly Mexican-American; in contrast, the residents of Alamo Heights were predominantly “Anglo.”\textsuperscript{39}

Although the factual record fully apprised the Supreme Court concerning the wealth and ethnic differences between the Edgewood and Alamo Districts, the majority explicitly rejected a link between the “property-poor districts” and race. Instead the majority declared: “Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts.”\textsuperscript{40} Citing a Connecticut-based study, the majority also rejected associating economic disadvantage and “property-poor” districts.\textsuperscript{41} In ruling against the funding challenge, the majority wrote:

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. . . . The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefited by abrogation of traditional modes of financing education.\textsuperscript{42}

Thus, in 1973 the Supreme Court let Texas continue to fund its school districts through local property taxes, thereby ensuring that rich school districts would spend more on their elementary and secondary school systems than poor school districts. The Court refused to find any connection between wealth and race or ethnicity, nor did it find a connection between wealth and educational resources.

In 1996, the Fifth Circuit decided \textit{Hopwood v. Texas},\textsuperscript{43} a challenge to the admissions policy at the University of Texas School of Law. Children who attended kindergarten in Texas at the time \textit{Rodriguez} was decided were twenty-five years old when the \textit{Hopwood} litigation began. Thus, Texans who were in the applicant pool to attend the University of Texas Law School grew up in an educational system that had allowed vast differentials in their publicly funded education because of \textit{Rodriguez}. In addition, these

\textsuperscript{39} Id. at 12.
\textsuperscript{40} Id. at 57.
\textsuperscript{41} Id. at 23.
\textsuperscript{42} Id. at 54-55, 56.
\textsuperscript{43} 78 F.3d 932 (5th Cir. 1996).
Texan applicants grew up shortly after the University of Texas de-segregated, although for the vast majority of its history the University of Texas was a segregated institution.\footnote{The famous Supreme Court decision in \textit{Sweatt v. Painter}, 339 U.S. 629 (1950), challenged that segregation and served as one of the building blocks in the litigation strategy that led to \textit{Brown v. Board of Education}, 347 U.S. 483 (1954). \textit{See also} A'Lelia R. Henry, \textit{Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education}, 27 J.L. & EDUC. 47, 66-71 (1998) (discussing the cumulative negative effect of \textit{Rodriguez}, \textit{Hopwood}, and other “color-blind” holdings on higher education for black students).}

Even though the University of Texas and its law school had ended de jure segregation, enrollment at the University remained predominantly white.\footnote{Hopwood v. Texas, 861 F. Supp. 551, 556 (W.D. Tex. 1994), \textit{rev'd in part and dismissed in part}, 78 F.3d 932 (5th Cir. 1996).} During the \textit{Hopwood} era, the law school embarked on an affirmative action plan meant to address this de facto segregation.\footnote{\textit{Hopwood}, 78 F.3d at 935-38.}

In \textit{Hopwood}, the Fifth Circuit characterized the question before it as whether “in order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law discriminates in favor of those applicants by giving substantial racial preferences in its admissions program.”\footnote{\textit{Id.} at 934.} The court rejected the University of Texas Law School’s admission policy as unconstitutional because it produced an entering class containing students who did not meet a supposedly neutral and objective standard of merit.\footnote{In 1993 resident (Texan) white applicants had a mean grade point average of 3.53 and a law school admissions test score of 164. Mexican Americans averaged 3.27 and 158, respectively; blacks averaged 3.25 and 157. \textit{Id.} at 937 n.7.} The court’s reliance on supposedly neutral tests did not reflect the race and class issues inherent in the Texas public school system.

Both \textit{Rodriguez} and \textit{Hopwood} reflect a kind of neutrality. As Anatole France might have said, in \textit{Rodriguez} the law is equalitarian and neutral when it allows all parents to spend whatever funds they want on their children’s education, so long as they have the money to do so. Further, the law remains neutral when the graduates of under-funded schools are subject to the same tests as graduates of well-funded schools in order to gain admission to the state university’s law school. Each decision reflects a theoretical neutrality that together create a real world differential in access to public education at the primary, secondary, and graduate levels.
The law acknowledges that a rule allowing only whites to enter the University of Texas is not neutral. But the Fifth Circuit employed the shield of neutrality by demanding that the University of Texas employ an admission policy for local Texas residents that heavily relied on test scores. Many view the use of test scores as neutral, even though the judges received evidence of these tests’ race and class bias. Further, the differences in educational opportunity on the primary and secondary levels meant that there would be different test scores by race even if the tests themselves had no race bias.

From a doctrinal perspective, Rodriguez and Hopwood illustrate Hale’s two observations that (1) neutrality can mask redistributive effects, and (2) different rules could create different wealth effects without harming fairness, freedom of contract, or property ownership. Read together, Rodriguez and Hopwood offer a microcosmic view of children denied educational opportunities under the guise of neutral law.

49. See Sweatt v. Painter, 339 U.S. 629, 634 (1950) (“It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities.”).

50. Hopwood, 78 F.3d at 962.


52. For further discussion of the race and class implications of Rodriguez, see generally Goodwin Liu, The Parted Paths of School Desegregation and School Finance Litigation, 24 Law & Ineq. 81 (2006), arguing that Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) and Rodriguez together presented the opportunity to fuse school finance litigation and desegregation, though the Court rejected that opportunity. See also Susan H. Bitensky, We “Had a Dream” in Brown v. Board of Education . . . , 1996 Det. C. L. Rev. 1, 16 (arguing that Rodriguez must be overturned in order for the United States to realize the full promise of Brown); Michael Heise, Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and an Alternative Explanation, 32 Ga. L. Rev. 543, 575 (1998) (discussing how Rodriguez forced proponents of school finance equity at the federal level into state court battles for adequacy); Paula J. Lundberg, State Courts and School Funding: A Fifty-State Analysis, 3 Alb. L. Rev. 1101, 1145 (2000) (arguing that the states which are less urban, have a higher per-capita income, and have greater state constitutional protection have been and will be more likely to reject the Rodriguez holding and invalidate their own funding schemes); Denise C. Morgan, The Less Polite Questions: Race, Place, Poverty and Public Education, 1998 Ann. Surv. Am. L. 267 (arguing that to improve public education contrary to the traditional litigation preceding and including Rodriguez, litigation that is capable of fusing race, poverty, and space must be encouraged).
STATUTORY LAW: RACE, WEALTH, AND TAXES

As the discussion of Rodriguez and Hopwood above illuminates, American legal institutions sometimes create seemingly neutral rules that actually enforce race and wealth roles. For example, access to education is a type of wealth. The Rodriguez and Hopwood decisions each articulate neutral rules that, when combined, distribute public education in skewed ways. Yet, as Hale pointed out, the unequal distribution of wealth is hard to detect. Neutral rules serve to mask unequal wealth distribution and to make the skewed distribution possible.

Until now this Article has looked at a series of rules and government policies that purported to be race and class neutral, such as freedom of contract and law school admissions. This Article now turns to a law that does not purport to represent class neutrality: the federal tax code. There are a number of reasons to consider tax laws as statutes with both race and wealth effects. The first and most obvious reason that the United States tax system might have both race and wealth effects is that the system clearly implicates both income and wealth distribution. At its most basic level, the gift and estate tax laws explicitly tax large estates as they pass from generation to generation, and the income tax uses progressive rates as income rises. A second reason for expecting to see differences based on race and wealth in the United States taxing statutes is that both the income gap between blacks and whites and the wealth gap are dramatic in this country. Because both the income and wealth gaps are so extreme by race, effects of the intersection of race and wealth might appear more readily in a statute that deals directly with income and wealth.

The observations contained in the paragraphs above argue that the American tax system is both race-neutral as written and race-and wealth-sensitive as structured. In fact, as one would expect, it turns out that the United States tax system has a series of rules that result in blacks and whites at the same income level, education level, marital status, number of children, and region of residence paying very different amounts of federal income tax, with blacks

53. For more on education as a form of wealth, see generally Wong, supra note 1, and Mitchell & Mitchell, supra note 1.

54. Hale, supra note 13, at 628.

55. Rose, supra note 20; see also Beverly Moran & William Whitford, A Black Critique of the Internal Revenue Code, 1996 Wis. L. Rev. 751, 770.

56. See generally Moran & Whitford, supra note 55.
paying more. This differential by race is achieved through a number of mechanisms. One way that the distribution is achieved is through the technical rules and how those rules interact with how people live. Another way the distribution is achieved is through the silence that allows the rules to play out differently by race without any movement toward reform. A third factor that helps maintain wealth distribution by race is the shaping of public opinion so that Americans accept rules that favor the wealthy as neutral rules that favor us all.

Technically, the distribution of tax benefits to whites and away from blacks is achieved through a series of credits, exclusions, and deductions that all work so that the greatest benefits go to people who fit a white profile and the lowest benefits go to people who fit other profiles. A quick example of this phenomenon is apparent in the bundle of benefits that apply to home ownership.

A vast gap in home ownership exists between whites and blacks. The gap in home ownership is a direct result of a wide range of government policies from the creation of the Republic to date. Thus, it can hardly be argued that home ownership is a voluntary act or that black people have purposefully eschewed home ownership. Instead, black people are now, and have been, consistently shut out of the home ownership market by a series of laws, rules, and private policies.

The Internal Revenue Code gives tremendous benefits to home ownership. The cost of financing a home is completely deductible for most Americans. Property taxes that support local schools are also deductible. If the house goes up in value, the owners can draw money out of the house through borrowing, not pay any tax on the receipt of the borrowed funds, and deduct the payment of mortgage interest. When the owner sells the home, the gain realized from any increased value or equity is usually received completely tax-free.

57. Id. at 754-55.
58. Id. at 754.
59. Id. at 753-54.
60. Id. at 752.
61. The home mortgage interest deduction presents one example of this phenomenon. See id. at 754; see also Beverly Moran, Setting an Agenda for the Study of Tax and Black Culture, 21 U. ARK. LITTLE ROCK L. REV. 779, 783 (1999); William C. Whitford, Remarkable, 76 N.C. L. REV. 1639, 1645 (1998).
63. See generally Collins & Margo, supra note 1; Kirkland & Peters, supra note 1.
64. See generally Collins & Margo, supra note 1.
The combination of the tremendous tax benefits for home ownership and the private practices and policies that kept blacks from that home ownership shows how the intersection of a neutral law with a race-charged situation compounds race effects. The intersection of the law and the reality of how people live allows the race-neutral law to change wealth outcomes by race.

As E.P. Thompson might tell us, the intersection of race and wealth in the United States tax laws is best achieved if the law is supported by public opinion. For example, support for such concepts as freedom of property and freedom of contract helps mask how the law serves to create wealth based on bargaining power. In the case of tax legislation, manipulation of public opinion and societal ignorance of racial hierarchy both contribute to attitudes that veil recognition of the tax law’s role in maintaining wealth disparities.

One illustration of how public relations can manipulate public opinion for political ends in federal tax legislation is provided by Marjorie Kornhauser. Her article presents an early example of the still-current political phenomenon of small, well-financed groups influencing tax legislation through lobbying, the media, and rhetorical appeals to the “common man.” Kornhauser shows Americans reacting completely outside their class interests when dealing with tax policy.

Kornhauser’s work concerns the repeal of certain public reporting requirements that made information on wealthy taxpayers’ income accessible to the general public. Kornhauser opines that the average American had nothing to lose from the public reporting requirement. In contrast, wealthy Americans felt vulnerable in the face of public revelations of their holdings. Even though they represented a numeric minority, the campaign the wealthy mounted against the disclosure rules gained wide popular support. The wealthy were able to construct a story that resonated

65. Cashin, supra note 29, at 3-38.
68. Id. at 58.
69. Id.
70. Id.
71. Id.
72. Id. at 58-59.
with average Americans who came to identify with those wealthy taxpayers but were actually harmed by the provision.  

Contemporary debates over the estate tax present a more current example of the same crossover identification phenomenon. The estate tax is nothing if not a tax that directly targets upper class families seeking to make intergenerational wealth transfers. Yet, even when commentators assured the public that only one percent of the population would ever confront the gift and estate tax, a mass abolition movement arose against the so-called “death” tax.  

What Professor Kornhauser’s work illustrates and what the public outcry against the “death tax” reflects is how the great American cultural urge toward neutrality and equality masks, as Hale and France both suggested, a tremendous class-based privilege. The cultural concern for equality and neutrality serves as both a strength and weakness. In its best light, the culture fosters empathy with those less fortunate and a willingness to sacrifice for the greater good. At its worst, it supports a type of silence that prevents Americans from seeing, and therefore discussing, ways to actually achieve that neutrality and equality. This silencing dynamic is evident in legal education.

**LEGAL EDUCATION: TRAINING GROUND FOR CONTINUED SILENCE**

Wealth disparities and race both play marginal roles in the law school curriculum. Although all first year law students study sub-

73. *Id.*  
74. The estate tax currently affects less than 1 percent of families, and it is the most progressive tax in the country because its impact is almost entirely on the nation’s richest families. . . . At the moment, the government imposes a tax of about 46 percent on estates worth more than $2 million, or more than $4 million in the case of couples. Edmund L. Andrews, *G.O.P. Fails in Attempt to Repeal Estate Tax*, N.Y. TIMES, June 9, 2005, at C1.  
75. bell hooks describes class in America as the subject the culture does not address. “Nowadays it is fashionable to talk about race or gender; the uncool subject is class.” bell hooks, *WHERE WE STAND: CLASS MATTERS* vii (2000) (grieving that greed sets “the standard for how we live and interact in everyday life”). Her comment is reminiscent of Patricia J. Williams’s description of race as the elephant in the room that gets tiptoed around, also not discussed. Patricia J. Williams, *The Alchemy of Race and Rights* 49 (1991). Although both wealth and race tend to be ignored in law school classrooms, several good casebooks are available on these subjects, including Derrick Bell, *Race, Racism and American Law* (5th ed. 2004); Emma C. Jordan & Angela P. Harris, *Economic Justice: Race, Gender, Identity and Economics* (2005); and Juan Perea, Richard Delgado, Angela P. Harris & Stephanie M. Wildman, *Race and Races: Cases and Resources for a Diverse America* (2d ed. 2007).
jects that raise wealth and race issues, legal educators rarely teach those subjects in ways that raise those concerns. Instead, legal pedagogy adopts a mode of “perspectivelessness,” reinforcing the ideal that legal discourse is objective and analytical. Perspectivelessness supports the myth of legal neutrality. Although legal scholars like Hale have been very explicit about the role of wealth in American law, and critical race theory has been equally explicit about the role race plays in American legal institutions, both topics remain relegated to boutique seminar courses. Students can, and often do, study law for three years without ever considering either wealth or race as legitimate topics of study.

The omission of race and wealth disparities from the core law school curriculum reinforces its invisibility in other parts of the profession, thereby supporting the kinds of judicial decisions and statutes discussed in the preceding sections. As E.P. Thompson observed, “class is something which in fact happens.” When class just “happens” in the law school classroom without any study or comment, legal educators train the next generation of lawyers to ignore these fundamental issues of fairness and their implications for democracy.

A student writing exercise provides one example of the absence of basic knowledge about wealth disparity within the context of legal education. Upon finishing a unit on work and care giving, which included readings on the United States’ economy and how it is managed to ensure unemployment, law students taking a Social Justice Law class spent three minutes on a free write exercise, answering the question: “What is class?” Several essays discussed physical classroom space. Other students wrote about “class” as


77. See, e.g., Cass R. Sunstein, Why Does the Constitution Lack Social and Economic Guarantees?, 56 SYRACUSE L. REV. 1, 20 (2005) (supporting the idea that the Nixon appointments to the Supreme Court removed the potential for a progressive understanding of wealth distribution); see also Hale, supra note 13, at 626.


79. E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 9 (1964); see also Martha R. Mahoney, Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases, 76 S. CAL. L. REV. 799, 805 (2003) (arguing that “when law ignores class while claiming to protect white workers, it gives authority to the claim that whites are harmed by the advent of people of color”).

conduct, in the sense of classy, or snobby, or being embarrassed by a lack of “classiness.” Thus, even in the context of readings and discussions of wealth disparities, these students’ initial reaction to the term “class” was to envision meanings disconnected from wealth. When asked whether they spoke much about class and wealth disparities in law school, the students answered “No.”

The silence on wealth and class in the law school classroom is not limited to one school or one classroom. Indeed, that silence is so pervasive that it impacts student career choices, and reduces the number of law students who aspire to work for social justice. Several studies of legal education note that students enter law school with a desire to work in the public interest. Yet by the time these same students graduate, they have changed their vision of success toward a corporate practice devoid of social justice issues.

Class implicates relationships and power so that, while social stratification statistics give a snapshot of one aspect of class or wealth, these statistics fail to convey the ways people experience class, how they identify themselves and others, or how power structures become replicated. Wealth’s invisibility in legal education is part of how class “happens.” When class just “happens,” the failure to pay attention replicates and reinforces existing structures. The replication and reinforcement of these existing structures influences the development of law, legal theory, and the next generation of legal professionals.

81. Margaret Montoya illustrates another example of missed learning opportunities for the whole class, because prevailing assumptions in the classroom prevented the recognition of wealth disparities. See Margaret E. Montoya, Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 17 Harv. Women’s L.J. 185, 192 (1994).

82. See Robert Granfield, Making Elite Lawyers: Visions of Law at Harvard and Beyond 3 (1992) (describing students’ changing view of career goals); Robert Stover, Making It and Breaking It: The Fate of Public Interest Commitment During Law School 13 (1989) (reporting that one-third of beginning first-year law students said they hoped to work in public interest jobs and one-sixth of graduating third years expressed the same hopes; the number of students who expressed commitment to public interest jobs dropped by half during law school).

83. See Stover, supra note 82, at 13. Note, however, that corporate law practice need not be disconnected from social justice work. Bob Egelko, 14 S.F. Law Firms Pledge Free Work for Poor Clients: Judicial Nudge Prompts Commitment, S.F. Chron., Dec. 15, 2000, at A26 (describing the successful effort of Chief Judge Marilyn Hall Patel, U.S. District Court in San Francisco, and Chief Justice Ronald George, California Supreme Court, with the Bar Association of San Francisco to encourage law firms to commit a percentage of attorney time to pro bono work).

84. See Mahoney, supra note 79, at 805.

85. Id.
Income and wealth inequalities exist for many reasons; law is only one of those reasons. Yet, as this Article shows, law is not a trivial reason. In many ways legal rules, especially those rules that claim to support equality and neutrality, can mask the means for supporting wealth and power differentials of all sorts. Legal education disserves the very people who need to understand both how law supports and undercuts equality and neutrality. Legal education ignores the issues of race, class, and inequality through the silence on these issues that permeates many classrooms. As a result, future leaders lack the training that they need to even imagine how law supports or undercuts true equality, much less how to address those issues in any serious way.

**Access to Lawyers and the Legal System: A Form of Wealth**

This Article offers different definitions of wealth. Some view income as a proxy for wealth. The discussion of the racial roles assigned by the Constitution makes race a type of political wealth, defining who has a say in forming the elected government. The discussion of *Rodriguez* and *Hopwood* addressed education as a form of wealth. The racial allocation of government benefits in the discussion of the federal tax laws illustrates how tax laws are structured. These tax laws create wealth transfers from blacks with less wealth to whites with more wealth, and the public financing of housing does the same by reducing blacks’ access to the funds needed to purchase housing and other types of wealth.

Access to lawyers and the legal system is another form of wealth. A typical view of the provision of legal services would see legal services as a value-free commodity that is governed by the market. But as Hale pointed out, legal rules have tremendous impact on the protection of property rights, the creation of bargaining power, and the determination of wealth distribution. Just as legal rules act to concentrate other types of wealth, such as education, housing, and tax benefits, legal resources are yet another type of wealth that remains unevenly distributed by class and race. Reginald Heber Smith decried the notion of “one law for the rich and another for the poor.” Indeed, Smith viewed freedom and equal access to justice as inextricably intertwined.

86. See Hale, *supra* note 13, at 628.
88. *Id.*
Like Smith, President Jimmy Carter charged that legal resources are inappropriately apportioned. President Carter complained that “ninety percent of lawyers serve only ten percent of the population.”

In a recent study by the National Legal Aid and Defenders Association, researchers found that in California alone there was roughly one legal aid attorney for every 10,000 economically disadvantaged Californians. Equal justice under law is a disregarded ideal when access to lawyers is so skewed.

The availability of lawyers to bring social justice cases on behalf of individuals and communities affects both the nature of cases that are brought into court and the legal rules that prevail. Cruz Reynoso provides an example of the importance of lawyers for the protection and creation of wealth with his description of a New Mexico program established to increase the number of Native American lawyers. “Soon we started seeing cases coming out of Arizona... in which Native American tribes sued to receive water that they were entitled to under treaties. Rights mean nothing if nobody enforces them.” Access to lawyers empowered the Indian community and allowed it to achieve rights that were previously not enforced because of a lack of legal resources. But Indians are not the only poor people who are in need of legal services. In New Jersey, it is estimated that less than one percent of all tenants have lawyers to help them in landlord tenant court.

91. A study released by Legal Services of New Jersey on October 13, 2006 finds that over the past year nearly 120,000 low-income New Jersey residents attempted to receive free legal assistance, but were turned away due to a lack of resources. Legal services providers are worried that the data underrepresent the problem because many low-income people do not attempt to receive legal services when they need them. The report, “People Without Lawyers: New Jersey’s Civil Legal Justice Gap Continues,” also found that ninety-nine percent of defendants in landlord-tenant eviction cases at state courts were not represented by a lawyer. Kate Conscarelli, Poor Jerseyans Have Limited Access to Legal Aid, Study Finds, The Star Ledger, Oct. 13, 2006.
93. Id. Lawyers are not, however, a panacea for the ailments of disempowered communities. Marc Galanter, in a classic article, explains how the legal system is stacked against the “have-nots” in society. See generally Marc Galanter, Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc’y Rev. 95 (1974).
94. See Ralph W. Johnson, Indian Tribes and the Legal System, 72 Wash. L. Rev. 1021, 1031 (1997) (noting that as “tribes have gained greater access to legal counsel, courts have increased their focus on Indian issues”).
95. See Conscarelli, supra note 91.
How different would landlord-tenant relationships in New Jersey, or in any other state, look if the parties approached the court with equal access to legal resources?

The United States spends only $300 million on legal services to serve over forty million poor citizens.96 By contrast, “[a] single law firm, which represents maybe a hundred or so corporate clients, earned . . . [one billion dollars].”97 The total profits of a half dozen law firms exceed the total federal, state, and local expenditures for legal representation for the poor.98

CONCLUSION

Louis Brandeis once warned that: “We can have democracy; in this country; or we can have great wealth concentrated in the hands of a few, but we can’t have both.”99 In the United States, race and wealth are so intertwined that the wealthy few are also almost invariably white. If Brandeis is correct, and democracy cannot exist alongside concentrated wealth, then perhaps wealth concentrated by race presents an even greater threat than wealth that is concentrated through more random means.

Most disciplines seem to believe that law plays a role in creating and maintaining wealth and race disparities. This Article shows that from the origins of the nation when the United States Constitution explicitly established racial roles to the present, government policy often directed wealth from Indians and blacks towards whites. This Article discussed one ironic aspect of legal method that helps legal institutions and doctrines play their role in maintaining race and wealth hierarchy—the aspiration to equality and neutrality. The examples of seemingly neutral rules having race and wealth effects included Texas public education as sustained by Rodriguez and Hopwood; the color-blind federal tax laws; the law school classroom and its replication of silence on matters of class; and access to justice as measured by the availability of lawyers’ services.

97. Id.
98. Id.
This Article also reflects different definitions of wealth. Human beings held as slaves provided a form of wealth to their owners.\footnote{See Anthony Paul Farley, \textit{Accumulation}, 11 \textit{Mich. J. Race} \& \textit{L.} 51, 54 (2005) (urging that the rule of law supports the primal scene of accumulation).} Access to education develops human capital and is another form of unevenly distributed wealth in this nation.\footnote{See generally Mitchell \& Mitchell, \textit{supra} note 1; Wong, \textit{supra} note 1.} Similarly, access to legal services is denied to the poorest Americans. Home ownership, the bedrock of wealth for the American middle class, is very skewed by race as a result of long-term public and private policies. Thus, while other disciplines have a more focused definition of wealth, the legal landscape invites a more encompassing view.

Richard Delgado has urged those in the legal academy to learn from other disciplines in their effort to promote social change.\footnote{R \footnote{Id. at 19.}} He noted, for example, that post-colonial literature, searching for ways to oppose imperial forces in Africa, Asia, and Latin America, developed chronologically parallel to the civil rights tradition in the United States, but “without much interchange between the two.”\footnote{Id. at 19.} Law and legal institutions need assistance from other disciplines to reveal the inconsistencies contained in the legal system and ultimately to hold that system accountable.

\textendnote{100}{See Anthony Paul Farley, \textit{Accumulation}, 11 \textit{Mich. J. Race} \& \textit{L.} 51, 54 (2005) (urging that the rule of law supports the primal scene of accumulation).}
\textendnote{101}{See generally Mitchell \& Mitchell, \textit{supra} note 1; Wong, \textit{supra} note 1.}
\textendnote{103}{\textit{Id.} at 19.}
Wealth Redistribution and the Income Tax

BEVERLY MORAN*

INTRODUCTION

This section of the Howard Law Journal is devoted to the question of wealth redistribution. The section on wealth redistribution contains five views of the United States tax system. This article asks how the tax system can stand against increasing income and wealth inequality.

Part I of this article presents evidence of the increasing trend towards inequality in both income and wealth that has occurred since the Reagan administration (1981-1989). Part II discusses whether social welfare payments lighten this otherwise growing income and wealth inequality. Part II also discusses the view, expressed by Adam Smith (the father of capitalism), that social welfare programs are created and maintained in order to protect social inequality rather than to redistribute wealth.

In Parts III and IV, the article discusses two ways the present federal tax system is meant to redistribute wealth: progressive rates and the Earned Income Tax Credit. These two Parts conclude that progressive rates essentially deliver greater public relations than true wealth redistribution and that the Earned Income Tax Credit is an inappropriate way of providing cash assistance to the working poor.

In Parts V and VI, the article discusses a wealth tax as an alternative wealth redistribution device. Part V discusses the general redistribution influences of a wealth tax given the large gaps in wealth within the United States and the constitutional issues with a federal wealth tax. Part VI looks at a wealth tax through the lens of black reparations.

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The article then concludes with the observation that the present federal income tax has lost whatever redistributive properties it once had and that a wealth tax would deliver more wealth redistribution than the present progressive income tax.

I. THE TREND TOWARD INEQUALITY

The phrase "wealth redistribution" tends to evoke images that contradict reality. Rather than unwashed hordes tearing at Marie Antoinette's silk gown, the expression "wealth redistribution" more accurately describes a flow of assets up from the poor to the rich.

Evidence abounds for viewing wealth redistribution as welfare for the rich. The Troubled Asset Relief Program is only the most recent confirmation of the phenomenon.\(^1\) As taxes from truck drivers and teachers went to bail out American International Group (A.I.G.) and Goldman Sachs, twenty-five hedge fund managers received more in combined annual salary than the gross domestic product of Costa Rica, Iceland, Jordan, or Uruguay.\(^2\)

Upward wealth distribution is ubiquitous. The great transfer of wealth through colonialism and slavery from Africa and Asia to Europe shapes today's world,\(^3\) as do the massive land transfers from Native Americans to various European powers and then to the United States from the fifteenth century onward.\(^4\)

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Wealth Redistribution and the Income Tax

Since the Reagan administration, upward wealth distribution has accelerated in the United States resulting in increasing inequality of both income and wealth. The growth of inequality since the 1980s is particularly shocking because, from the turn of the century and until the Reagan administration, the United States and Western Europe experienced small but stable declines in wealth and income inequality. Now, three decades after the Reagan Revolution, the United States enjoys both growing poverty and a shrinking middle class.

The concept of upward wealth distribution does not come from Karl Marx. Rather, the observation that “the rich get richer” comes from Adam Smith, also known as “the father of capitalism”: “Whenever there is great property, there is great inequality. For one very rich man, there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many.” Yet, despite forces that trend toward income and wealth concentration, Part II discusses government counter-forces to upward distribution.

II. AGAINST INCREASING INEQUALITY: COUNTER-FORCES TO DISTRIBUTION UP

Smith observed that great wealth creates great inequality. Smith also asserted that government actively protects the rich from the poor, thereby supporting income and wealth inequities:


7. See Jacob S. Hacker, The Risky Outlook for Middle-Class America, in Ending Poverty in America: How to Restore the American Dream 66-76 (John Edwards, Marion Carn, & Anne L. Kalleberg eds., 2007); Elizabeth Warren, The Vanishing Middle Class, in Ending Poverty in America: How to Restore the American Dream, supra, at 38-52. For a discussion on Reaganomics, see The American Economic History Reader, supra note 3, at 476-500.

The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions. It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provoked, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it.  

A counter to the idea of government as an instrument of upward distribution is the idea of government as a downward redistributor through benefits like public schools and welfare. Again, Smith suggests a different intent behind these programs. While some see public benefits as downward redistributions, Smith understands these same public benefits as ensuring an upward concentration of wealth. Along with the civil magistrate, Smith identifies welfare and public education as ways that government protects the wealthy against the poor:

The state . . . derives no inconsiderable advantage from . . . instruction [of the working classes]. The more they are instructed the less liable they are to the delusions of enthusiasm and superstition, which, among ignorant nations, frequently occasion the most dreadful disorders. An instructed and intelligent people, besides, are always more decent and orderly than an ignorant and stupid one. They feel themselves, each individually, more respectable and more likely to obtain the respect of their lawful superiors, and they are therefore more disposed to respect those superiors.

In this quote, Smith demonstrates his understanding of how public benefits enforce wealth and income inequities upward. Yet even if we accept Smith’s proposition that public benefits do not redistribute wealth downward, there are other aspects of government that seem directly dedicated to downward redistribution—in particular, the federal income tax system and its progressive rates.

III. DOWNWARD WEALTH REDISTRIBUTION: THE FEDERAL INCOME TAX SYSTEM AND ITS PROGRESSIVE RATES

From its inception to date, the federal income tax has contained

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9. Id.
10. Id. at WN V.i.f.61.
progressive rates; yet there is no common agreement on their purpose. One widely criticized justification for progressive rates is their

11. Progressive rates occur when those who earn more pay a higher marginal rate of tax. For example: a rate of 10% on the first $100 and 25% on the next $100 produces a total tax of $35 on $200 for a marginal rate of 17.5%. With respect to the federal income tax on individuals, the 1954 Code delineated a progressive tax with twenty-four income brackets applying to tax rates ranging from 20% to 91%. I.R.C. § 1(a) (1954).

Rates of tax on individuals (1954) indicates:

<table>
<thead>
<tr>
<th>If the taxable income is:</th>
<th>The tax is:</th>
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<tbody>
<tr>
<td>Not over $20000</td>
<td>20% of the taxable income</td>
</tr>
<tr>
<td>Over $2,000 but not over $4000</td>
<td>$400, plus 22% of excess over $2,000</td>
</tr>
<tr>
<td>Over $4,000 but not over $6,000</td>
<td>$840, plus 26% of excess over $4,000</td>
</tr>
<tr>
<td>Over $6,000 but not over $8,000</td>
<td>$1,360, plus 30% of excess over $6,000</td>
</tr>
<tr>
<td>Over $8,000 but not over $10,000</td>
<td>$1,960, plus 34% of excess over $8,000</td>
</tr>
<tr>
<td>Over $10,000 but not over $12,000</td>
<td>$2,640, plus 38% of excess over $10,000</td>
</tr>
<tr>
<td>Over $12,000 but not over $14,000</td>
<td>$3,400, plus 43% of excess over $12,000</td>
</tr>
<tr>
<td>Over $14,000 but not over $16,000</td>
<td>$4,260, plus 47% of excess over $14,000</td>
</tr>
<tr>
<td>Over $16,000 but not over $18,000</td>
<td>$5,200, plus 30% of excess over $16,000</td>
</tr>
<tr>
<td>Over $18,000 but not over $20,000</td>
<td>$6,200, plus 53% of excess over $18,000</td>
</tr>
<tr>
<td>Over $20,000 but not over $22,000</td>
<td>$7,260, plus 36% of excess over $20,000</td>
</tr>
<tr>
<td>Over $22,000 but not over $26,000</td>
<td>$8,380, plus 30% of excess over $22,000</td>
</tr>
<tr>
<td>Over $26,000 but not over $32,000</td>
<td>$14,460, plus 65% of excess over $32,000</td>
</tr>
<tr>
<td>Over $32,000 but not over $44,000</td>
<td>$18,360, plus 69% of excess over $38,000</td>
</tr>
<tr>
<td>Over $44,000 but not over $50,000</td>
<td>$22,500, plus 72% of excess over $44,000</td>
</tr>
<tr>
<td>Over $50,000 but not over $60,000</td>
<td>$26,820, plus 75% of excess over $50,000</td>
</tr>
<tr>
<td>Over $60,000 but not over $70,000</td>
<td>$34,320, plus 78% of excess over $60,000</td>
</tr>
<tr>
<td>Over $70,000 but not over $80,000</td>
<td>$42,120, plus 81% of excess over $70,000</td>
</tr>
<tr>
<td>Over $80,000 but not over $90,000</td>
<td>$50,220, plus 84% of excess over $80,000</td>
</tr>
<tr>
<td>Over $90,000 but not over $100,000</td>
<td>$58,620, plus 87% of excess over $90,000</td>
</tr>
<tr>
<td>Over $100,000 but not over $150,000</td>
<td>$67,330, plus 89% of excess over $100,000</td>
</tr>
<tr>
<td>Over $150,000 but not over $200,000</td>
<td>$111,820, plus 90% of excess over $150,000</td>
</tr>
<tr>
<td>Over $200,000</td>
<td>$156,820, plus 91% of excess over $200,000</td>
</tr>
</tbody>
</table>

After adjusting the 1954 income bracket thresholds for inflation, 2006 income tax rates are shown to be generally much lower than they were in 1954, with the general exception of those earning between $39,650 and $45,513 in constant 2006 U.S. dollars, whose statutory tax rates are only slightly lower than in 1954. In the graph below, the top line represents marginal income tax rates during the year 1954, and the bottom line represents such rates during 2006.

1954 vs 2006 Marginal Income Tax Rates (Single)

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>$50,000</td>
<td>25%</td>
<td>28%</td>
</tr>
<tr>
<td>$100,000</td>
<td>30%</td>
<td>28%</td>
</tr>
<tr>
<td>$200,000</td>
<td>35%</td>
<td>35%</td>
</tr>
<tr>
<td>$500,000</td>
<td>40%</td>
<td>35%</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>40%</td>
<td>35%</td>
</tr>
<tr>
<td>$2,000,000</td>
<td>40%</td>
<td>35%</td>
</tr>
</tbody>
</table>


12. See Walter Blum & Harry Kalven, The Uneasy Case for Progressive Taxation (1955); see also Marjorie E. Kornhauser, The Morality of Money: American Attitudes To-

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contribution to downward wealth redistribution.\textsuperscript{13} For its critics, progressive rates provide unnecessary downward redistribution in an already economically open society where individual work, rather than government intervention, is meant to reduce inequalities.\textsuperscript{14} But are progressive rates effective wealth redistributors; i.e. do the federal income tax's progressive rates redistribute wealth downward? 

On paper, progressive rates can appear dramatic. At times, the highest marginal rate has risen to 90% of taxable income.\textsuperscript{15} Working solely from the statute as written, progressive rates seem ideal for downward wealth redistribution; but the dramatic appearance of rates on paper are just part of the story.\textsuperscript{16}

Progressive rates are applied to ordinary income, including income from wages, but a lower rate applies to income from the sale of capital assets, such as stocks, bonds, and real estate. Progressive rates are more public than real because as income and wealth rises, sources of taxable income shift from wages to capital gains.\textsuperscript{17} This shift in the source of income moves most wealthy people out of the high progressive rates on ordinary income and into the lower tax rates on capital gains.\textsuperscript{18} The result is that, as income rises, tax rates actually fall.

Ironically, the only time that rates on capital gains equaled the rates for other types of income was during the Reagan administration.\textsuperscript{19} In all other eras, the federal income tax system reduced rates

\textsuperscript{13} See sources cited supra note 12.

\textsuperscript{14} See Blum & Kalven, supra note 12.


\textsuperscript{16} See I.R.C. § 1 (1986) as well as the version of the section contained in the 1954 I.R.C., supra note 11.

\textsuperscript{17} INTERNATIONAL COMPARISONS, supra note 6.


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for capital gains. 20 Even the extreme rates of the Eisenhower Administration (1953-1961) did not necessarily redistribute income because of the countervailing influence of the significantly reduced capital gains rates. 21

Further, even if federal income tax rates are progressive, progressivity in the federal income tax is counterbalanced by regressive state and federal taxes. 22 Thus, although the federal income tax's progressive rates might appear to redistribute wealth downward, the capital gains rate and other tax benefits reserved to capital such as the deferral of tax on appreciation until realization, combined throughout the twentieth century to make progressive marginal rates more imagined than real. In the twenty-first century, the still extant Bush administration (2001-2009) tax cuts have even more dramatically changed the incidence of progressivity.

In the present economy, increased inequality combined with the Bush administration's tax cuts for the wealthy have turned progressive rates on their head. The shift is so significant that Warren Buffet publicly challenged a crowd of 400 billionaires to reveal if any one paid a higher marginal tax rate than his own cleaning lady. 23 Buffet reported

<table>
<thead>
<tr>
<th>If taxable income is:</th>
<th>The tax is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not over $2,300</td>
<td>No tax</td>
</tr>
<tr>
<td>Over $2,300 but not over $3,400</td>
<td>11% of the excess over $2,300</td>
</tr>
<tr>
<td>Over $3,400 but not over $4,400</td>
<td>$121, plus 12% of the excess over $3,400</td>
</tr>
<tr>
<td>Over $6,500 but not over $10,500</td>
<td>$535, plus 15% of the excess over $6,500</td>
</tr>
<tr>
<td>Over $8,500 but not over $10,800</td>
<td>$835, plus 16% of the excess over $8,500</td>
</tr>
<tr>
<td>Over $10,800 but not over $12,900</td>
<td>$1,205, plus 18% of the excess over $10,800</td>
</tr>
<tr>
<td>Over $12,900 but not over $15,000</td>
<td>$1,581, plus 20% of the excess over $12,900</td>
</tr>
<tr>
<td>Over $15,000 but not over $18,200</td>
<td>$2,001, plus 23% of the excess over $15,000</td>
</tr>
<tr>
<td>Over $18,200 but not over $23,500</td>
<td>$2,731, plus 26% of the excess over $18,200</td>
</tr>
<tr>
<td>Over $23,500 but not over $28,800</td>
<td>$4,115, plus 30% of the excess over $23,500</td>
</tr>
<tr>
<td>Over $28,800 but not over $34,100</td>
<td>$5,705, plus 34% of the excess over $28,800</td>
</tr>
<tr>
<td>Over $34,100 but not over $41,500</td>
<td>$7,507, plus 38% of the excess over $34,100</td>
</tr>
<tr>
<td>Over $41,500 but not over $53,300</td>
<td>$10,319, plus 42% of the excess over $41,500</td>
</tr>
<tr>
<td>Over $53,300 but not over $81,800</td>
<td>$16,115, plus 42% of the excess over $53,300</td>
</tr>
<tr>
<td>Over $81,800</td>
<td>$28,835, plus 50% of the excess over $81,800</td>
</tr>
</tbody>
</table>


his own marginal rate as a little over 17% while his receptionist and cleaning lady each topped out at a 30% marginal rate.24

At least for the time being, the statutory progressive tax rates in the federal income tax are not achieving wealth redistribution down; but does redistribution lie somewhere else in the Internal Revenue Code? Perhaps the answer lies with the Earned Income Tax Credit.

IV. WEALTH REDISTRIBUTION DOWN? THE FEDERAL INCOME TAX SYSTEM AND THE EARNED INCOME TAX CREDIT

When George McGovern ran for president, he was widely mocked for the “negative income tax” he proposed in order to distribute cash to the working poor.25 Yet, twenty years later, McGovern’s acolyte, President Bill Clinton, reintroduced the negative income tax through the renamed Earned Income Tax Credit.26

When President Clinton (1993-2001) entered office he was faced with tremendous pressure to adopt “workfare,”27 a program first introduced in Wisconsin that tied welfare payments to work.28 Presi-

24. See Matthew Miller, Me and My Secretary, FORBES, Nov. 6, 2007, at 42-44, available at http://members.forbes.com/2007/1126042b; see also Warren Buffett’s Tax Rate Is Lower than His Secretary’s (Tom Brokaw interviews Warren Buffett), http://www.youtube.com/watch?v=CuSB2LoC4s or http://www.youtube.com/watch?v=3zLrOkJHk.


26. I.R.C. § 32 provides that a taxpayer’s Earned Income Tax Credit will equal a specified percentage of the taxpayer’s earned income up to a maximum dollar amount. The earned income tax credit (EITC) was introduced under President Gerald Ford, and increased under Presidents Carter, Reagan, and Bush. Under President Clinton through the Omnibus Reconciliation Act of 1993, the maximum EITC payment increased over $1000 to $2,528. In 1995, this went up to $3,110, and in 1996 the maximum EITC one could receive increased to $3,556. Also introduced in 1994 was an EITC payment for a single person with no dependents. See Jennifer Bird-Pollan, Who’s Afraid of Redistribution? An Analysis of the Earned Income Tax Credit, 74 MO. L. REV. 251 (2009), available at http://law.missouri.edu/lawreview/docs/74-2/Bird-Pollan.pdf (providing a brief history of the EITC and working through the mechanics of the credit); Jonathan Barry Forman, Earned Income Credit, in ENCYCLOPEDIA OF TAXATION AND TAX POLICY 99 (1999), available at http://www.taxpolicycenter.org/UploadedPDF/1000524.pdf. For a discussion of the earned income tax credit as a part of welfare reform, see JOEL F. HANDLER & YEHEZKEL HAUSENFELD, BLAME WELFARE: IGNORE POVERTY AND INEQUALITY (2007).


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dent Clinton built the idea of work driving welfare reform into a bipartisan consensus to provide cash assistance to working families through the Earned Income Tax Credit.29 The Earned Income Tax Credit is now the largest cash assistance program for the able-bodied in the United States.30

As a wealth redistribution device, the Earned Income Tax Credit’s main advantage over traditional welfare was its status as hidden cash assistance. So long as it remained buried in the tax code, the Earned Income Tax Credit avoided political controversy.31 Stanley Surrey described this phenomenon many years earlier in his pioneering work on the tax expenditure budget.32 Surrey understood that politicians use the federal income tax as a way of hiding programs that they believe cannot stand the light of public scrutiny.33

Tellingly, Surrey’s primary examples of tax-driven hidden government expenditures all achieved upward wealth distribution. For example, Surrey often employed the home mortgage interest deduction in his work; he explained that the deduction subsidizes home ownership for the wealthy at many times the rate that it subsidizes the poor.34 Surrey’s point was that Representatives and Senators could never publicly cast votes for direct government expenditures that subsidize millionaires while doing little for working people. But these same Congressmen could vote for complicated tax regimes that accomplished the same wealth concentrating purpose without challenge because the complicated tax code allows benefits to the wealthy to hide in plain sight.35

The Earned Income Tax Credit enjoyed the cover of tax complication until the heat of the last presidential election. In response to then-candidate Obama’s claim that he would reduce taxes for 95% of Americans, Republicans and conservatives caught hold of the Earned

29. See Handler & Hasenfeld, supra note 26, at 81-89.
30. See id. at 81.
31. See id.
33. See id.
34. See Stanley S. Surrey, Pathways to Tax Reform: The Concept of Tax Expenditure 134-36 (1973); see also Brian H. Jenn, The Case for Tax Credits, 61 Tax L. 549, 556-57 (2008) (using the example of the mortgage interest deduction to two taxpayers with equal mortgage interest expense but different tax rates to show the deductions are inequitable).
35. See Surrey, supra note 34.
Howard Law Journal

Income Tax Credit to retort that Obama’s promise was false on its face because a large portion of the population was already exempt from federal income taxation.\(^\text{36}\)

Perhaps purposefully misunderstanding that even those working people who pay no federal income tax still pay high rates on other state and federal taxes, the Republican party reviled the Earned Income Tax Credit as proof that the poor pay no taxes at all. As a result of the controversy, one great benefit of the Earned Income Tax Credit is lost: its ability to provide cash assistance to the working poor without being tagged as welfare. Instead of a politically neutral way of getting cash to the working poor, what is left of the Earned Income Tax Credit is an exposed and extremely complicated redistribution mechanism that costs too much for the government and the recipient.\(^\text{37}\)

Americans often share stories of their fear of the Internal Revenue Service, yet the United States places its most vulnerable citizens into the tax system in order to obtain their basic necessities. People working low paying jobs, with little time off, those who might have health issues, and who certainly have children, are asked to comply with complicated tax rules in order to obtain the benefits of the Earned Income Tax Credit.\(^\text{38}\) Furthermore, the burden of complying with the earned income tax credit falls most heavily on minorities and women because they make up the largest segment of the working poor.\(^\text{39}\) As a wealth redistribution device, the Earned Income Tax Credit is a failure.

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\(^{38}\) See BARBARA EHRENFREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

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But what other possibilities exist in the federal tax system? Can the federal tax system play a role in downward wealth distribution outside of the Earned Income Tax Credit?

V. DOWNWARD WEALTH REDISTRIBUTION: POSSIBILITIES FOR A WEALTH TAX

The federal tax system focuses on income rather than wealth.40 The federal government’s failure to tax wealth helps increase both income and wealth inequalities because, in the United States, wealth is more unevenly distributed than income.41 To the extent that wealth is protected from tax, the federal government helps support upward wealth concentration.

In the United States, wealth has race, ethnic, and gender effects. For example, in 2002, the median net worth of non-Hispanic white households was $87,056; for households with a black householder, the median net worth was $5,446; for households with an Asian or Pacific Islander householder, the median net worth was $59,292; and for households with an Hispanic householder, the median net worth was $7,950.42 Also in 2002, female householders had a median net worth of $20,217, which was 19.8 percent of the married-couple median. Male householders had a median net worth of $23,700 or 23.2 percent of the married couple median.43 The wealth gaps between groups in the United States are much greater than other gaps between blacks and whites, or males and females, including gaps in education and income.44 A tax on wealth, rather than income, might help decrease wealth and income inequality by addressing wealth as a foundational part of inequality.45

41. See WOLFF, supra note 5; OLIVER & SHAPIRO, supra note 5.
44. See, e.g., WOLFF, supra note 5; Moran, supra note 40.
45. See, e.g., WOLFF, supra note 5; Moran, supra note 40.
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The primary legal roadblock to a federal wealth tax is a constitutional restriction on direct taxes without apportionment that prohibits a wealth tax absent constitutional amendment. The constitutional prohibition on direct taxes is not, however, an insurmountable barrier to a wealth tax. The same constitutional provision was amended in 1913 in order to permit the modern American income tax.47 One hundred years later, Article 1 § 2 could be amended again in order to permit a federal wealth tax.

The restriction on wealth taxes is achieved by Article 1 § 2 of the Constitution, which requires that direct taxes be apportioned by population.48 The restriction on direct taxes reflects the eighteenth century American political need to accommodate southern slaveholders.49

In the eighteenth century United States, most wealth was held in land or slaves—both easy targets for tax. The wealthiest Americans—those with the largest acreage and slave holdings—resided in states with the lowest white male populations. Their low white male populations, especially in relation to acreage, put these wealthy southern planter states at a numerical disadvantage in the House of Representatives when compared to states with larger white male populations and smaller per capita white male land holdings.50

A tax on land and slaves—the most significant forms of eighteenth century American wealth—would have shifted the burden of government away from the highly populated small states of the northeast and toward the slaveholding south with its low white male population. At least two adjustments were placed in the United States Constitution in order to reaffirm southern power in the face of demographic reality:

(1) A modification that counted each slave as three-fifths of a person for purposes of allocating Representatives. This rule increased

46. See U.S. Const. art. I, § 2 ("Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, 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."); Moran, supra note 40.
47. See U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").
48. Id.
49. See Moran, supra note 40.
50. See id.; see also THE AMERICAN ECONOMIC HISTORY READER: DOCUMENTS AND READINGS, supra note 3.
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the number of Representatives from the southern states thereby
giving the South more political power for its white male minority.
(2) A second constitutional modification prohibiting direct taxes
without apportionment effectively made both a federal wealth
and a federal income tax unconstitutional.51 This second modifi-
cation ensured that the federal government could only tax land
and slaves on sale, when a transfer tax would avoid the constitu-
tional prohibition against direct taxes without apportionment.52

VI. CAN A WEALTH TAX CONTRIBUTE
TO REPARATIONS?

Given the racial history of Article 1 § 2 as a means of concentrat-
ing power in southern slaveholding elites and the continuing race ef-
effects of wealth distribution within the United States, a wealth tax as
one way to achieve wealth redistribution fits at least three tax policy
concerns:
(1) Because so much of the population has little or no wealth, a
wealth tax would exempt a large part of the population from fil-
ing, thereby saving the government and the taxpayers a great deal
of economic and social cost.53
(2) Because wealth and income are so closely associated, a wealth tax
would target those most able to pay and most likely to occupy the
smallest and most protected part of the population.
(3) Because if we are to believe Adam Smith and other tax benefit
theorists, a wealth tax most clearly ties government benefits to the
tax, which is a primary goal of taxation.54

In addition, a wealth tax could address some lingering race issues
in the United States, for example, the question of reparations for
slavery.

In the United States, even very mild attempts to make up for
slavery can provoke terrifying threats.55 Although the United States

52. See Moran, supra note 40.
53. See Graetz, supra note 37 (noting high cost of up to 100 million unnecessary tax re-
turns); Wolff, supra note 5 (discussing how many people would be exempt from a wealth tax).
54. See Smith, supra note 8, at WN V.i.b.2, WN V.i.f.61; Moran, supra note 40.
55. See, e.g., E. Gordon Gee, Carpetbagger and Conflagration: Vanderbilt University Makes
New Enemies of Old Friends, in University Presidents as Moral Leaders (David G. Brown
ed., 2006) (describing death threats received by the Chancellor and his cabinet as a result of an
attempt to change the name of a dormitory from "Confederate Memorial Hall" to "Memorial
Hall").
has sometimes acknowledged responsibility and provided redress,\(^{56}\) when the subject is American slavery, the topic of reparations raises serious disagreement.\(^{57}\)


58. For discussions of objections to the modern black reparations movement, see, for example, Robert K. Fullwilder, The Case for Reparations, and Stephen Krashner, The Case Against Reparations, both in Reparations for Slavery: A Reader, 141-50, 151-62 (Ronald P. Salzberger & Mary C. Turck eds., 2004); Juan Williams, Enough: The Phony Leaders, Dead-End Movements, and Culture of Failure that Are Undermining Black America—and What We Can Do About It 67-85 (2006) (listing several objections to the black reparations movement, including that the movement is not serious in either a political or a cultural sense); Alfred L. Brophy, Reconsidering Reparations, 81 Ind. L.J. 811, 814-18 (2006) (criticizing Eric A. Posner & Adrian Vermeule, Reparations for Slavery and Other Historical Injustices, 103 Colum. L. Rev. 689, 747 (2003) for using a too narrowly drawn definition of reparations). See generally Roy L. Brooks, supra note 56, at 180-206 (listing objections to black reparations, including African involvement with the slave trade, the universal acceptance of slavery in the nineteenth century, the universal acceptance of slavery in the nineteenth century, the unfairness of white Americans to their families immigrated after the Civil War, the absence of slaves to compensate because all the slaves are dead, that reparations is just an even more illegitimate form of affirmative action, that white soldiers paid reparations for the entire nation by their deaths in the Civil War, that slavery gave present day black Americans the opportunity to live in a prosperous country, that class based reparations are more universal and fair, that blacks need to contribute to racial reconciliation, that there is so much mixed blood in the United States that everyone would be entitled to reparations, and that the amount of reparations is impossible to calculate); Alfred L. Brophy, Reparations Pro & Con 76 (2006) (listing objections to reparations in addition to those listed by Brooks, including: only a small minority of whites ever owned slaves, black reparations are based on race and not injury, blacks owe a greater debt to the United States than the country owes to blacks, reparations are just disguised separatism); Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 967 (2001); Eric A. Posner & Adrian Vermeule, Reparations for Slavery and Other Historical Injustices, 103 Colum. L. Rev. 689, 747 (2003) (criticizing current writings on reparations as based on large-scale abstractions about justice and injustice).
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There is no doubt that slavery betrayed American political ideals by denying millions of people the ability to obtain wealth and confer that wealth to future generations. These restrictions on the ability to accumulate and pass on wealth did not end with slavery. Instead, a series of government programs reinforced the wealth disparities between those citizens that arrived by migration and those who arrived in chains. In addition to the other government programs that helped


58. For a discussion of the impact on modern law of the creation of people as property, see, for example, Patricia Williams, Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts, 42 FLA. L. REV. 81, 88 (1990). See generally Patricia J. Williams, On Being the Object of Property, 14 SIGNS J. WOMEN CULTURE & SOC'Y 5 (1988).

59. In the context of social security, see Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 TEX. L. REV. 1335, 1337-38 (1987) (noting that legislative history of the Social Security Act shows that blacks were deliberately excluded from benefits under the domestic and farm worker provisions, and that even blacks that were eligible for Social Security assistance received significantly lower benefits than whites). See also MEIZHU LUI ET AL., THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE 73-130 (2006) (discussing the historical events that have led to black wealth inequality, including slavery, blacks' inaccessibility to New Deal programs, and other state-sponsored discrimination in the areas of employment and housing); MARY POOLE, THE SEGREGATED ORIGINS OF SOCIAL SECURITY: AFRICAN AMERICANS AND THE WELFARE STATE 174-87 (2006).

For a discussion of the role of the federal government in denying black Americans access to wealth in housing, see, for example, MASSEY & DENTON, supra note 4. See generally William J. Collins & Robert A. Margo, Racial Differences in Wealth: A Brief Historical Overview, and Elizabeth Kirkland & Sheila R. Peters, Location, Location, Location: Residential Segregation and Wealth Disparity, both in RACE AND WEALTH DISPARITIES: A MULTIDISCIPLINARY DISCOURSE, 11-22; 23-40 (Beverly I. Moran ed., 2008).

For racist policies in education meant to perpetuate a black underclass, see, for example, Reavis Mitchell & Roland Mitchell, History and Education: Mining the Gap: Historically Black Colleges as Centers of Excellence for Engaging Disparities in Race and Wealth, in RACE AND WEALTH DISPARITIES IN THE UNITED STATES: A MULTIDISCIPLINARY DISCOURSE, 82-109 (Beverly I. Moran ed., 2008).

For general discussions of the wealth gap between blacks and whites in the United States, see, for example, DALTON CONLEY, BEING BLACK LIVING IN THE RED: RACE, WEALTH & SOCIAL POLICY IN AMERICA 55-81 (1999); Chuck Collins, BetsyLeonard-Wright, & Holly Sklar, SHIFTING FORTUNES: THE PERILS OF THE GROWING AMERICAN WEALTH GAP (1999); OLIVER & SHAPIRO, supra note 5, at 100-10; Francine D. Blau & John W. Graham, Black White Differences in Wealth and Asset Composition, 105 Q.J. ECON. 321, 337 (1990) (noting the large differences in wealth acquisition that cannot be explained by income, education, region, or marriage).

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maintain the wealth gap that began with slavery, we can add our decision to tax income instead of wealth.

Our federal tax laws continue to exacerbate the wrong started in slavery in a number of ways:

- First, by confiscating a portion of the earnings that could otherwise go towards accumulating wealth, the federal tax laws make it harder for each generation to make up for past lost opportunities.
- Second, government programs that created wealth for whites added to the black/white wealth gap.60
- Third, by treating income from wealth much more favorably than earned income, the current income tax system has skewed the progressive rates.61

Thus, the federal income tax both shelters wealth for the already rich and attacks the means of obtaining wealth for those without. At least some of the objections to reparations and the flaws in our federal tax system are answered with a wealth tax.

A wealth tax eliminates the special benefits that the Internal Revenue Code now confers on property and its owners.62 Thus, the great gap in wealth between blacks and whites (and males and females) no longer acts through the tax system as a way of protecting white wealth to the detriment of blacks or male wealth to the detriment of females. Instead, a wealth tax places the tax burden directly where Smith would recommend; that is, on the greatest beneficiary of government largesse: the property owner.

Next, any exemption for the lowest amounts of wealth within a wealth tax would excise a large portion of the black population from taxation. As a result, the exemption would provide a period for blacks to build up their wealth base after centuries of restrictions on black wealth accumulation.63

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60. See sources cited supra notes 57 and 59.
61. Such rules as deferring the unrealized gains in wealth, often allowing those unrealized gains to completely escape tax through the date of death basis rules of I.R.C. § 1014, and taxing the income flowing from wealth at less than half the maximum rates for earned income, I.R.C. § 1(h), have all led Warren Buffet (reportedly the third richest man on earth) to ask why he pays a lower tax rate than his secretary. See Martin J. McMahon, Jr., The Matthew Effect and Federal Taxation, 45 B.C. L. Rev. 993 (2004), 105 Tax Notes 1383 (2004); Beverly L. Moran & William Whitford, A Black Critique of the Internal Revenue Code, 1996 Wis. L. Rev. 751-820 (1996) (discussing ways that the benefits for wealth create greater tax liabilities for black taxpayers); Tom Bawden, Buffet Blasts System that Lets Him Pay Less than His Secretary, Times of London, June 28, 2007, at 1.
62. See, e.g., Moran & Whitford, supra note 61.
63. For general information about the growing gap between the rich and the poor in the United States based on income, see, for example, CONGRESSIONAL BUDGET OFFICE, HISTORI-
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Although government was a main force in stripping blacks of their wealth for the past four centuries, government was (and is) ironically also the cause of black wealth. For example, the Civil War Amendments and the Civil Rights Laws are real sources of black wealth. Without those government actions, blacks would have less wealth than they do today, no matter how disproportionate that wealth is in contrast to their white counterparts. With a wealth tax, blacks pay the tax that is most closely associated with the benefits that government conferred on them while also receiving the lower tax bills that come from the recognition that lower wealth rates are a result of government action against them.

CONCLUSION

The last thirty years have seen increasing wealth and income inequality. At the same time, the last eight years of tax reform have eroded the federal income tax system’s ability to stand against inequality through progressive rates. The one weapon left in the tax system’s arsenal for promoting wealth redistribution is the Earned Income Tax Credit. Although it is now the largest cash assistance pro-


For specific information on the larger wealth gap between blacks and whites in the United States, see generally CONLEY, supra note 59; OLIVER & SHAPIRO, supra note 5, at 100-10; COLLINS & MARGO, supra note 59.

gram for the working poor in the United States, the Earned Income Tax Credit is not well suited to assisting people in need. Middle and upper income people find the tax system difficult to deal with, despite access to professional help. Yet, the United States asks people most at risk and with the least access to professional advice to navigate the tax system in order to obtain basic subsistence.

A more efficient way to use the tax system as a wealth redistribution device is to tax wealth directly. The largest inequity in the United States is wealth, not income or education. Wealth is also one of the most salient predictors of future success. Tellingly, wealth is also highly predicted by race and gender. The association of wealth and race is not accidental. Rather, it is the result of a long string of government policies, many of which were explicitly based on race. Even the present constitutional restrictions on the federal government’s ability to tax wealth have their origin in the desire to protect slavery and the southern plantation class.

Given the increasing inequality of income and wealth within the United States; the present inability of the federal income tax system to effectively stand against increasing inequality; the importance of wealth to well being; and the past race history and present race effects of much of the United States increasing income and wealth inequality, a wealth tax is a more efficient means of wealth redistribution within the tax system. A wealth tax has several advantages over our present system including: (1) fewer tax returns, because such a large portion of the United States population has no wealth and would be exempt from filing; (2) a closer association of taxes paid with benefits received because such a large portion of the cost of government goes towards the protection of wealth; and (3) a wealth tax would target those with the greatest ability to pay, primarily because income is so tied to wealth.

Finally, because American history shows that wealth is so tied to race, a wealth tax would have an interesting reparations effect. Those who were once treated as property would receive the necessary breathing room to develop wealth and fulfill the American dream.
How the U.S. Tax Code Privileges White Families

Tax policies have preserved the racial inequality that has long defined America.

MARCH 23, 2021

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Soon after I got my master’s degree in tax law from NYU in 1984, I started preparing my parents’ tax returns. They filed jointly, and what always stuck out to me was how comparable their incomes were. My mother worked as a nurse at an assisted-living facility, and my father was a plumber with the New York City Housing Authority.
Some years, my father’s overtime would put him on top by a few hundred dollars; other years, my mother outearned him.

What I saw every year was what researchers call the “marriage penalty”: My parents, like many other married Black couples trying to pay for a mortgage, save for their children’s future, and afford health care, were paying higher taxes under the joint return than they would have had they remained single and filed separately. What I sensed then—and what 25 years of academic research have revealed to me in greater detail since—was that changes to the U.S. tax code typically benefit white taxpayers, while putting Black taxpayers at a further disadvantage, even when Black and white Americans have made the same life choices. Subsidies for homeownership benefit white homeowners more than Black homeowners. Tax breaks for workers benefit white workers more than Black workers. And tax reform has always been a fight over which white Americans get tax cuts, with Black Americans paying the price, as I document in my book *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans—And How We Can Fix It*.

The U.S. tax code can seem like a neutral, or at least equally punishing, system. But that misses how it has privileged white people—particularly white married couples—and preserved the racial inequality that has long defined America. Take the joint return, for instance, a policy that was designed to give a tax break to married (heterosexual) couples in which only the husband worked in the paid labor market. That setup favored white couples, whose familial structure was most likely to fit its mold. And it came at the expense of Black married couples, including my parents.

*Read: Why Black families struggle to build wealth*

That inequality flows from the joint tax return’s origins, a story that begins with an affluent couple named Henry and Charlotte Seaborn, members of the Seattle Yacht Club, who married in 1902. Henry was the vice president of a shipbuilding corporation, Skinner & Eddy, and Charlotte was a stay-at-home spouse. At the time, there was no such thing as “married filing jointly” in the way we understand it today. Each taxpayer filed his or her own return only if they had income greater than the exemption amount, which meant that Henry would file a return, but not Charlotte. By 1927, almost 98 percent of Americans paid no income tax, because their income did not exceed the exemption. The revenues needed to fund the government did not require any additional taxpayer dollars. Prior to World War II, our progressive tax system placed a target on Henry’s back.

But Henry had the wealth to do something about it, and in 1927, he and his lawyers figured out a workaround. Henry Seaborn’s taxable income for the year was $38,500 (well over $500,000 in today’s dollars), and his team came up with an idea: If he could treat half of his income as Charlotte’s, he could save $703.01 ($10,000 in
today’s dollars) in taxes. Why? Because the progressive tax system taxes income at higher rates as income increases. In other words, the rate that applies to my first dollar of taxable income is lower than the rate that applies to my last. If, however, each spouse were taxed on half of Henry’s income, the rate applicable to the half now characterized as Charlotte’s would be significantly less than if it were part of Henry’s total.

Washington was a community-property state, which meant that, legally, Charlotte had a right to half of Henry’s income. So they each filed individual tax returns, with Charlotte claiming her “half” of Henry’s income on hers. The IRS disapproved and said that Henry should have been taxed on all of the income, and therefore he owed the additional taxes.

Henry paid up, but then he went to court to fight. He won at the district-court level, but the IRS appealed. His case went all the way to the Supreme Court, where the Seaborns won. Their win, however, followed the loss by a different white taxpayer who tried to transfer half his income to his stay-at-home spouse by contract—not because of community-property law—and the Supreme Court ruled against him. That taxpayer loss, coupled with the Seaborns’ victory, meant that now the tax liability for married couples would turn on whether they lived in a community-property state.

That disparity ultimately led to Congress enacting the joint return in 1948, which allowed all married couples like the Seaborns—with a husband who works in the paid labor market and a wife who stays at home—to pay less in taxes, regardless of where they lived: a marriage bonus. The joint return gave tax breaks to single-wage-earner couples, but nothing to households where both spouses worked. So what? Weren’t we in a world where only the highest-earning Americans paid taxes? But WWII had changed everything.

Funding the war required tax revenue—lots of it—and from 1940 to 1945, income-tax rolls increased from 7 million to 42 million Americans because the exemption amount was lowered and more people now owed taxes. That number now included many Black Americans, and Black wives have always been likelier to work in the paid labor market than white wives. The reasons are varied, but one of the most significant is that Black men are subject to labor-market racial discrimination, which makes their income lower than that of white men and their labor-force participation less stable because of higher unemployment rates. Also, research suggests that Black married couples at all income levels are more egalitarian when it comes to sharing power than their white peers. While white married couples such as the Seaborns were getting a tax cut with the advent of the joint return, most Black married couples were not.

Everything comes down to who has a say. In 1948, only two Black Americans were voting members of Congress, and the law of the land was “separate but equal.”
Americans were paying taxes for government benefits that excluded them. Over time, those white people who did not benefit from the joint return figured out new ways to shape the system to their needs. Consider, for example, the situation of single white men. These men didn’t like how the joint return gave their married co-workers tax breaks that they didn’t have access to. They called it the “single’s penalty,” and they lobbied Congress. In 1969, they received a different rate structure that decreased the marriage bonus in order to decrease the single’s penalty. This meant that the taxes of married couples increased, but the hike was not the worst part. The worst came for the couples in which husbands and wives earned roughly equal amounts of income. Those couples’ tax bills would go up, and now—a long with marriage bonuses—they had marriage penalties. And marriage-penalty couples happened to be disproportionately Black. In order for single white men to pay less in taxes, married Black couples such as my parents would have to pay more. They would pay more for decades, until my father’s death in 1994.

Read: American wealth is broken

Over time, as more and more white wives entered the labor market, more married white couples also paid the marriage penalty. My research, based on 1990 Census Bureau data, shows that although most married white couples got a marriage bonus, the married white couples who were most likely to pay the marriage penalty were in households earning $60,000 to $90,000 a year. This marginally changed following the 2001 and 2003 Bush tax cuts, which provided some marriage-penalty relief. Based on 2010 Census Bureau data, I found that for households with income totaling $50,000 to $200,000, a greater percentage of married white couples are paying higher taxes than getting a tax break. A Treasury report predicted that for 2016, while 51 percent of married couples would get a marriage bonus, 40 percent would pay a penalty.

That set the stage for the 2017 Trump tax cuts. Suddenly, marriage-penalty relief was part of the agenda, without explanation in the legislative history other than rote statements such as “Married couples will no longer be penalized just for their choice to be married.” The Trump tax cuts temporarily eliminated the marriage penalty for nearly everyone. That was accomplished by a change to the rate structure that doubled the bracket for a single taxpayer, to account for the possibility of two equal earners. Those rate-structure changes ignored households at the low end that were eligible for the earned-income tax credit, and those at the high end. Households at the low end continue to face marriage penalties, but the same is not true for high-end married couples. Why? Because, as I found in my research, most of those high-income white married couples are in marriage bonus households, whereas their Black peers are more likely to be in marriage penalty households, even at high income levels. With the Trump tax cuts, the marriage penalty applicable to high-income white households has been largely theoretical—but it remains the reality for their Black peers.
For the unequal effects of marriage in the tax code, at least, the solution is easy: Return to our progressive beginnings and allow only individual tax returns. The decision on whether to get married should never have been allowed to affect anyone’s tax bill. Canada has had an individual-filing-based system for more than 100 years. Justice requires the married Henrys of the world to pay the same as the single Henrys. Racial justice requires that married couples like my parents don’t face a marriage penalty, and that they don’t get left behind when tax cuts come.

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