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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

* Professors of Law, University of Wisconsin Law School. Copyright © 1996 by Beverly I. Moran.

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The project would not have been possible without all of this assistance, but only we remain responsible for any errors.

1. For an overview of critical race theory and theorists, see *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberle Crenshaw et al. eds., 1995); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

society.² 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*,³ 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.⁴ 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.⁵ When Congress compressed the difference between rates in 1986,⁶ the perceived wrong of high rates disappeared and Congress repealed income averaging.⁷ While the income of blacks can certainly vacillate—blacks are disproportionately among the first to be laid off in periods of economic retrenchment,⁸ for example—most blacks rarely make enough to worry about high tax rates.⁹ Consequently, it is likely that blacks rarely used income averaging. Thus, a Congress oriented solely to the interests of blacks

2. See Richard Delgado, *Critical Race Theory*, SAGE RACE RELATIONS ABSTRACTS, May 1994, at 4-5.

3. Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39.

4. See MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS § 10.01 (7th ed. 1994).

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.

6. Tax Reform Act of 1986, Pub. L. No. 99-514, § 101, 100 Stat. 2085, 2096-99 (codified as amended at I.R.C. § 1 (1994)).

7. Tax Reform Act of 1986, Pub. L. No. 99-514, § 141, 100 Stat. 2117 (codified as amended at I.R.C. §§ 3(b), 5(b), 6511(d)(2)(B) (1994)).

8. See ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 108 (1995).

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 *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.”¹² 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 *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 bonds¹³ 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

10. In tax law this concept is called horizontal equity and is often used in tax policy analysis. For a discussion of horizontal equity see 1 BORIS I. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* § 3.1.4 (1981).

11. 348 U.S. 426 (1955).

12. *Id.* at 431.

13. I.R.C. § 103(a) (1994).

14. 1 BITTKER, *supra* note 10, § 15.2.1.

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.¹⁵ 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)¹⁶ 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.

16. I.R.C. § 32 (1994) provides a credit to low wage workers against income taxes otherwise due.

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.²⁸ 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,²⁹ 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,³⁰ or when he writes about whites selling blacks to aliens from outer space,³¹ 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

28. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (arguing that although stories "can play a useful role in legal scholarship," they should be evaluated by the same standards as traditional scholarship).

29. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991).

30. DERRICK L. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 47-64 (1992).

31. *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.”³³ 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.³⁴ 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.³⁵

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.³⁶

1. REALIZATION AND REFINANCING

When a taxpayer earns a salary, his increase in wealth is immediately subject to tax.³⁷ 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.³⁸

33. 348 U.S. 426, 431 (1955).

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.

37. I.R.C. § 61(a)(1) (1994).

38. For a discussion of the realization requirement see CHIRELSTEIN, *supra* note 4, § 5.01-.05; Beverly I. Moran, *One Tax Piece of the Savings and Loan Crisis: Can the Federal Home Loan Bank Board Use the Internal Revenue Code to Bail Out the Ailing Savings and Loan Industry?*, 22 U. TOL. L. REV. 351, 359-63 (1991).

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.³⁹ 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."⁴⁰

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.⁴¹ 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.⁴²

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

39. I.R.C. § 61(a)(4).

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.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.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%.⁴⁵ Although some argue that Congress should lower or repeal the capital gains tax,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).

46. See, e.g., Jack Kemp, *Lower Taxes, Higher Revenues*, N.Y. TIMES, Feb. 11, 1996, at D15; Floyd Norris, *Ring in an Answer to a Tax Question*, N.Y. TIMES, Dec. 17, 1995, at C1.

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.⁴⁷ Further, the capital gains rate only applies when the property is of a type where its appreciation is not immediately realized.⁴⁸ Finally, the taxpayer must hold the property for investment rather than for sale to customers.⁴⁹ 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."⁵⁰ 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.⁵¹ 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).

50. 363 U.S. 278, 285 (1960) (quoting *Commissioner v. LoBue*, 351 U.S. 243, 246 (1956)).

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).

53. Henry S. Terrell, *Wealth Accumulation of Black and White Families: The Empirical Evidence*, 26 J. FIN. 363, 363 (1971) (finding that race studies focus on income and earnings rather than wealth because of the greater availability of income data).

54. WILLIAM P. O'HARE, *WEALTH AND ECONOMIC STATUS: A PERSPECTIVE ON RACIAL INEQUALITY* 2 (1983).

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."⁵⁶ 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.⁵⁷ He further showed that although blacks made up twelve percent of the nation's households, they held only four percent of all personal wealth.⁵⁸ 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.⁵⁹

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.⁶⁰

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,⁶¹ 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.

61. Lorman L. Lundsten & Harold Black, *The Impact of Race and Other Variables on the Composition and Value of Individual Portfolios*, 8 REV. BLACK POL. ECON. 360 (1978).

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

Type of Financial Asset	Percent of households with this type of asset		Average holdings for households with this type of asset	
	Black	White	Black	White
Total	78.0%	95.3%	\$2180	\$20,413
Cash, checking accounts	70.7%	91.1%	\$545	\$1117
Savings accounts	48.2%	77.0%	\$1670	\$5107
Savings bonds	10.8%	22.9%	\$396	\$1808
CDs, bonds, loans	1.6%	17.5%	\$15,823	\$38,786
Stocks, mutual funds	3.4%	21.8%	\$6544	\$33,838

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.⁷⁵ 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

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

n = 32,162

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

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.⁷⁷ But little data analysis actually addresses this question. Because of the important tax benefits associated with gifts and inheritance,⁷⁸ 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.⁷⁹

77. See, e.g., OLIVER & SHAPIRO, *supra* note 9, at 155-56; Francine D. Blau & John W. Graham, *Black-White Differences in Wealth and Asset Composition*, 105 Q.J. ECON. 321, 334 (1990).

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

	Black (mean per person)	White (mean per person)
Gifts Given	\$236	\$1054
Gifts Received	\$172	\$1033
Inheritances Received	\$1485	\$5348
Value of Property at Age 65	\$15,346	\$81,936

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.⁸⁰ 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.⁸¹ 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.⁸² 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,⁸³ 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

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 1986,⁸⁴ Congress eliminated the deduction for most personal interest expenditures.⁸⁵ However, homeowners may deduct interest on mortgages running as high as \$1,000,000.⁸⁶ 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.⁸⁷

Congress also eliminated the deduction for state and local sales taxes that are paid for personal, as opposed to business, items.⁸⁸ However, the deduction for state and local property taxes survived.⁸⁹

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.⁹⁰

We can be certain, however, that the tax benefits of homeownership 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.⁹¹

84. Tax Reform Act of 1986, Pub. L. No. 99-514, § 511(b), 100 Stat. 2085, 2246-49 (codified as amended at I.R.C. § 163(h) (1994)).

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.

86. I.R.C. § 163(h)(1), (h)(2)(D), (h)(3)(A)-(B).

87. I.R.C. § 163(h)(1), (h)(2)(D), (h)(3)(C).

88. Tax Reform Act of 1986, Pub. L. No. 99-514, § 134, 100 Stat. 2085, 2116 (codified as amended at I.R.C. § 164 (1994)).

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

If homeowning blacks, on average, have a lower income than homeowning whites,⁹² 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."⁹³ Other studies show ownership disparity rates of a similar range.⁹⁴ 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

bracket.

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.

93. Mary R. Jackman & Robert W. Jackman, *Racial Inequalities in Home Ownership*, 58 SOC. FORCES 1221, 1222-23 (1980).

94. See, e.g., Hayward D. Horton, *Race and Wealth: A Demographic Analysis of Black Homeownership*, 62 SOC. INQUIRY 480, 483 (1992); Paul M. Ong & J. Eugene Grigsby III, *Race and Life-Cycle Effects on Home Ownership in Los Angeles 1970 to 1980*, 23 URB. AFF. Q. 601, 608-10 (1988).

“black analysis” of Section 121’s exclusion of gains on the sale of a home by people aged fifty-five or over.⁹⁵ 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.⁹⁶

TABLE 4: Home Ownership by Race and Income

Household Income	Whites	Blacks
<i>Total</i>	0.638	0.416
<\$11,611	0.473	0.274
\$11,611-24,999	0.549	0.408
\$25,000-34,999	0.615	0.454
\$35,000-49,999	0.765	0.668
>\$50,000	0.854	0.75

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.⁹⁷ James Long and Steven Caudill found that permanent income and central city location, rather than race, explain

95. See the Black Congress section *infra* pp. 790-91.

96. OLIVER & SHAPIRO, *supra* note 9, at 109.

97. Howard Birnbaum & Rafael Weston, *Home Ownership and the Wealth Position of Black and White Americans*, 20 REV. INCOME & WEALTH 103, 110, 113 (1974).

the differences in black/white homeownership rates.⁹⁸ 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.⁹⁹ When they used controls, Long and Caudill found that race explained differences in the *value* of homes, as opposed to the *rate* of homeownership.¹⁰⁰

Toby Parcel focused his study on equity in owner occupied housing.¹⁰¹ Parcel limited his study to male homeowners in the labor force and imposed controls for earnings, age, marital status, and area of current residence.¹⁰² 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.¹⁰³

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.

James E. Long & Steven B. Caudill, *Racial Differences in Home Ownership and Housing Wealth, 1970-1986*, 30 *ECON. INQUIRY* 83, 88 (1992).

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.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%).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.

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 *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

104. OLIVER & SHAPIRO, *supra* note 9, at 148, 150.

105. *Id.* at 106.

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 homeowning, 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.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. *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 homeownership 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 \$114,700.¹⁰⁹ 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 \$50,000,¹¹⁰ they will not be adversely affected by this limitation.

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

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

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.

4. *Repeal special tax rates for capital gains.*

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,¹¹¹ we have little faith in trickle down economics.

5. *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

A. Tax Benefits

Under the ideal comprehensive income tax system based on the *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;¹¹² health insurance;¹¹³ life insurance;¹¹⁴ educational assistance;¹¹⁵ discounts on clothing,

111. For a discussion of this issue, see Robert Dodge, *Economists Have Questions About Dole Tax Cut*, DALLAS MORNING NEWS, Aug. 11, 1996, at 1H.

112. I.R.C. § 132(f)(2)(B) (1994). This benefit is capped at \$155 per month.

113. I.R.C. § 106.

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).

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;¹¹⁶ and airline tickets for airline employees.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;¹¹⁸ employee contributions to pensions;¹¹⁹ employee contributions to tax deferred annuities (sometimes called 401(k) plans or 403(b) plans);¹²⁰ and Keogh plans, which are self-directed pension plans for the self-employed.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.¹²² We are interested, of course, in whether blacks receive proportionately fewer benefits than whites.

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 1988 *Current Population Survey* on employee benefits.¹²³

Joni Hersch and Shelley White-Means have published the most significant analysis of this data for our purposes.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.

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(e)(1)(A).

117. I.R.C. § 132(a)(1), (b).

118. I.R.C. §§ 401(a)(1), 501(a).

119. I.R.C. §§ 401(a)(1), 501(a).

120. I.R.C. §§ 401(k), 403(b).

121. I.R.C. § 401(c).

122. See WILLIAM A. KLEIN & JOSEPH BANKMAN, *FEDERAL INCOME TAXATION* 27 (10th ed. 1994).

123. For a discussion of the database see *infra* Appendix, Part II.

124. Joni Hersch & Shelley White-Means, *Employer-Sponsored Health and Pension Benefits and the Gender/Race Wage Gap*, 74 *SOC. SCI. Q.* 851 (1993).

in that industry.¹²⁵ They limited their analysis to wage and salary workers employed privately in nonagricultural employment and between the ages of eighteen and sixty-five.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.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.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 percent 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 percent of the log earnings gap between white women and white men and about 80 percent of the log earnings gap between black women and

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. *Id.* at 853.

126. *Id.*

127. *Id.* at 851.

128. *Id.* at 855.

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

129. Hersch & White Means, *supra* note 124, at 861-63.

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

TABLE 3
Earnings Ratios (%)

Earnings Measure	WF/WM	BM/WM	BF/WM
<i>All Workers</i>			
Hourly wage	71.3	82.8	64.8
Hourly wage + benefits	70.3	82.6	64.8
<i>Benefit-Sector workers</i>			
Hourly wage	72.4	81.5	67.0
Hourly wage + benefits	71.9	82.1	67.6

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
Participation in Employer-Provided Benefits by Race

Benefits	Blacks	Whites
Health Insurance	0.83	0.82
401(k)*	0.12	0.17
Pension	0.77	0.79

Data Source: *May 1988 Current Population Survey—Employee Benefits*

* 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.¹³³ To be non-discriminatory, "benefits provided for participants who are highly compensated individuals [must be] provided for all other participants,"¹³⁴ and a health plan must benefit at least seventy percent of all employees.¹³⁵

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.¹³⁶ 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.

133. I.R.C. § 105(h) (1994).

134. I.R.C. § 105(h)(4).

135. I.R.C. § 105(h)(3)(A)(i).

136. I.R.C. § 401(a)(5)(B); *see also* I.R.C. §401(l) (permitting modest deviations in favor of highly compensated employees from even a proportionate standard).

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.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;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."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%

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.

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).

142. Edward J. McCaffery, *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%).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.¹⁴⁴

For joint returns in 1995, the rate shifted from 15% to 28% for taxable income over \$36,900.¹⁴⁵ 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%.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

143. I.R.C. § 1(f).

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.

145. See I.R.C. § 1(a)(2), (f)(1).

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 unmarried 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.

B. Marriage Penalty and the Social Science Literature

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 1976.¹⁴⁹ 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.¹⁵⁰ The more educated the black husband, the more likely he was to have a working black wife.¹⁵¹ Even children did not negatively affect black wives' participation in the labor force.¹⁵² In contrast, working white wives tended to have husbands with lower socio-economic 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.¹⁵³

149. Joyce O. Beckett, *Working Wives: A Racial Comparison*, 21 SOC. WORK 463 (1976).

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.¹⁵⁴ 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."¹⁵⁵ James Smith looked at how female labor force participation affected individual families' economic well being as well as income distributions across families.¹⁵⁶ 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.¹⁵⁷ 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."¹⁵⁸ According to Geschwender and Carroll-Seguin, there are proportionably 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.¹⁵⁹ 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

154. Duran Bell, *Why Participation Rates of Black and White Wives Differ*, 9 J. HUM. RESOURCES 465, 466 (1974).

155. *Id.* at 472.

156. James P. Smith, *The Distribution of Family Earnings*, 87 J. POL. ECON. S163 (1979).

157. *Id.* at S172.

158. James A. Geschwender & Rita Carroll-Seguin, *Exploding the Myth of African-American Progress*, 15 SIGNS: J. WOMEN CULTURE & SOC'Y 285, 298 (1990).

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.¹⁶²

The design of our variable left us with a sample of 17,578 married women of which 5884 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.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.¹⁶⁴

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

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.

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.

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.¹⁶⁵ 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.¹⁶⁶ 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).

return.¹⁶⁷ 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.¹⁶⁸ 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.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

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.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.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.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.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.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

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

171. See *supra* p. 786-87.

172. See *supra* p. 782.

173. See *supra* p. 789-91.

174. 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 argument¹⁷⁶ 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.

APPENDIX

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

VARIABLE	b	t
Age	<i>1388.35</i>	<i>41.86</i>
Region (1 = South)	1144.38	0.79
Family Income (Monthly/100)	<i>2583.58</i>	<i>81.47</i>
Education (Highest grade attended)	<i>1716.65</i>	<i>20.83</i>
Marital Status (1 = Married)	<i>-6570.63</i>	<i>-4.48</i>
Race (1 = White)	<i>13761.21</i>	<i>7.17</i>

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

VARIABLE	\$ Amounts		Proportion	
	b	<i>t</i>	b	<i>t</i>
Children in HH (1 = yea)	-9714.11	-0.55	-0.039	-0.85
Respondents Age	<i>214.74</i>	<i>13.19</i>	<i>0.001</i>	<i>22.24</i>
High School Grad (1 = yea)	<i>2063.8</i>	<i>2.98</i>	<i>0.021</i>	<i>11.15</i>
College Grad (1 = yea)	<i>2403.28</i>	<i>3.18</i>	<i>0.03</i>	<i>15.4</i>
Southern Residence (1 = yea)	615.09	0.94	-0.003	-1.69
Marital Status (1 = married)	-3078.96	-5.22	-0.02	-12.92
Monthly Family Income/100	<i>492.28</i>	<i>34.08</i>	<i>0.001</i>	<i>22.67</i>
Race (1 = white)	1096.02	1.21	<i>0.019</i>	<i>7.33</i>

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

VARIABLE	\$ Amounts		Proportion	
	<i>b</i>	<i>t</i>	<i>b</i>	<i>t</i>
Children in HH (1=yes)	-12165	-0.99	-.075.	-1.09
Respondents Age	<i>246.33</i>	<i>21.55</i>	<i>0.001</i>	<i>16.66</i>
High School Grad (1=yes)	<i>3110.38</i>	<i>6.39</i>	<i>0.019</i>	<i>6.48</i>
College Grad (1=yes)	<i>4210.69</i>	<i>7.93</i>	<i>0.025</i>	<i>8.49</i>
Southern Residence (1=yes)	450.28	0.98	0.004	1.41
Marital Status (1=married)	-697.21	-1.68	0.002	0.96
Monthly Family Income/100	<i>464.28</i>	<i>45.78</i>	<i>0.001</i>	<i>20.55</i>
Race (1=white)	<i>1947.99</i>	<i>3.05</i>	<i>0.014</i>	<i>3.42</i>

Data Source: *1984 Survey of Income and Program Participation—Wave 4*
Italics indicate statistical significance with 95% confidence.

TABLE D
Race and Equity in Vehicles

VARIABLE	\$ Amounts		Proportion	
	<i>b</i>	<i>t</i>	<i>b</i>	<i>t</i>
Children in HH (1=yes)	<i>-3832.06</i>	<i>-2.44</i>	<i>-0.328</i>	<i>-2.65</i>
Respondents Age	<i>12.21</i>	<i>8.39</i>	<i>-0.007</i>	<i>-61.87</i>
High School Grad (1=yes)	<i>1173.08</i>	<i>62.01</i>	<i>-0.036</i>	<i>-6.78</i>
College Grad (1=yes)	<i>99.73</i>	<i>1.48</i>	<i>-0.004</i>	<i>-0.83</i>
<i>Southern Residence</i> (1=yes)	<i>226.24</i>	<i>3.88</i>	<i>-0.014</i>	<i>-2.89</i>
Marital Status (1=married)	<i>774.19</i>	<i>14.68</i>	<i>-0.008</i>	<i>-1.74</i>
Monthly Family Income/100	<i>106.3</i>	<i>82.34</i>	<i>-0.004</i>	<i>-42.07</i>
Race (1=white)	<i>1560.92</i>	<i>19.2</i>	<i>-0.04</i>	<i>-5.61</i>

Data Source: 1984 Survey of Income and Program Participation—Wave 4
Italics indicate statistical significance with 95 % confidence.

TABLE E
Value of Gifts Received

VARIABLE	b	t
Age	-12.16	-1.75
Family Income	-0.01	-1.87
Southern Residence (1 = South)	303.47	1.28
Marital Status (1 = Married)	-9.33	-0.04
Education	968.96	-1.89
Race (1 = White)	761.03	2.43

Data Source: 1988 National Survey of Families and Households
n = 9,660; *Italics indicate statistical significance with 95% confidence.*

TABLE F
Inheritance Received

VARIABLE	b	t
Age	<i>172.01</i>	<i>8.51</i>
Family Income	<i>-0.03</i>	<i>-4.12</i>
Southern Residence (1 = South)	-787.38	-1.14
Marital Status (1 = Married)	-379.08	-0.53
Education	-16.5	-1.83
Race (1 = White)	<i>3915.82</i>	<i>4.29</i>

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

VARIABLE	b	t
Family Income	-0.28	-1.68
Marital Status (1=Married)	<i>54023.97</i>	<i>3.49</i>
Southern Residence (1=South)	-18437.79	-1.14
Education	-320.45	-1.86
Race (1=White)	<i>45688.43</i>	<i>2.1</i>

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

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

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

TABLE I
Race and Home Equity

VARIABLE	\$ Amounts		Proportion	
	b	t	b	t
Children in HH (1=yes)	21950.3	1.91	0.441	3.36
Respondents Age	576.93	53.95	0.005	41.97
High School Grad (1=yes)	8395.24	18.42	-0.005	-0.86
College Grad (1=yes)	2238.3	4.51	-0.051	-3.96
Southern Residence (1=yes)	-1562.5	-3.64	0.013	2.56
Marital Status (1=married)	591.58	1.53	0.026	5.58
Monthly Family Income/100	815.08	9.49	0.002	20.99
Race (1=white)	9641.68	16.13	0.007	0.96

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

VARIABLE	b	t
RACE	0.1097	0.92
TENURE2	<i>0.0969</i>	<i>16.17</i>
EDUC	<i>0.0801</i>	<i>5.33</i>
FT	<i>2.5184</i>	<i>31.38</i>
PROFMAN	0.0576	0.71
METRO	0.0811	1.08
SOUTH	<i>0.1433</i>	<i>2.07</i>
UNIONMEM	<i>1.0765</i>	<i>10.02</i>
FIRM SIZE	<i>0.2337</i>	<i>3.48</i>
BRACKET2	<i>0.845</i>	<i>6.38</i>
CONSTANT	-2.7432	

Data Source: 1988 Current Population Survey — Employee Benefits
n = 10,721: *Italics indicate statistical significance with 95% confidence.*

TABLE K
Race and 401(k) Plans

VARIABLE	b	t
<i>RACE</i>	<i>0.3913</i>	<i>4.03</i>
<i>TENURE2</i>	<i>0.042</i>	<i>14.48</i>
<i>EDUC</i>	<i>0.1439</i>	<i>11.89</i>
<i>FT</i>	<i>1.3522</i>	<i>9.78</i>
<i>PROFMAN</i>	<i>0.2294</i>	<i>3.82</i>
<i>METRO</i>	<i>0.0976</i>	<i>1.65</i>
<i>SOUTH</i>	<i>-0.1853</i>	<i>-3.56</i>
<i>UNIONMEM</i>	<i>-0.3415</i>	<i>-5.53</i>
<i>FIRM SIZE</i>	<i>0.6217</i>	<i>11.14</i>
<i>BRACKET2</i>	<i>0.3982</i>	<i>6.67</i>
<i>PUBLIC</i>	<i>-0.3854</i>	<i>-6.24</i>
CONSTANT	-5.7229	

Data Source: 1988 Current Population Survey — Employee Benefits
n = 10,836: *Italics indicate statistical significance with 95% confidence.*

TABLE L
Race and Employer-Provided Pension Plans

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

Data Source: 1988 Current Population Survey — Employee Benefits
n = 8,952; *Italics indicate statistical significance with 95 % confidence.*

TABLE M
Race and Proportion of Family Income Earned by Wife

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

Data source: U.S. Bureau of Census, PUMS Couples File (1980)
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.¹⁷⁷ 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.¹⁷⁸

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

MARRIAGE PENALTY	EMPLOYEE BENEFITS	HOME-OWNERSHIP	WEALTH
Race	Race	Race	Race
Income	Income	Income	Income
Education	Education	Education	Education
Region	Region	Region	Region
Areatype	Areatype	Areatype	
Previous Marriage		Marital Status	Marital Status
Children/Young children			
	Tenure in Job	Age	Age
Husband's labor force participation	Various aspects of employment		

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

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.¹⁸¹ 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.¹⁸² Because the black population is significantly younger and has shorter life expectancies than the white population,¹⁸³ 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,¹⁸⁴ 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

181. *Id.* at 16.

182. *Id.* at 14.

183. REYNOLDS FARLEY & WALTER R. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 46 (1987).

184. *Id.* at 170.

married women in non-urban areas.¹⁸⁵ For homes, area type is important because housing in urban areas is more scarce than in non-urban areas.¹⁸⁶ Because blacks are overwhelmingly urban dwellers,¹⁸⁷ 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.¹⁸⁸ 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).