

**RACE, CLASS, AND THE INTERNAL REVENUE CODE: A
CLASS BASED ANALYSIS OF *A BLACK CRITIQUE OF THE
INTERNAL REVENUE CODE***

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INTRODUCTION

Economic class differences within the black community should be considered, in conjunction with the history of black racial oppression, in developing proposals to reduce economic disparities between whites and blacks. Analysis of *A Black Critique of the Internal Revenue Code (A Black Critique)*,¹ as well as the writings of commentators on that article,² will serve as evidence for this view. In *A Black Critique*, Professors Beverly Moran and William Whitford documented the white and black tax gap by analyzing the extent to which blacks and whites benefit from certain provisions of the Internal Revenue Code (Code).³ They focused primarily on code sections related to wealth while controlling for factors

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¹ Beverly Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751.

² The commentators to Moran & Whitford, *supra* note 1, were part of a 1998 symposium published by the North Carolina Law Review. *See infra* note 251 and accompanying text. Some of the articles included in the symposium were: Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998); Nancy C. Staudt, *Tax Theory and "Mere Critique": A Reply to Professor Zelenak*, 76 N.C. L. REV. 1581 (1998); James D. Bryce, *A Critical Evaluation of the Tax Crits*, 76 N.C. L. REV. 1687 (1998); Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753 (1998); Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771 (1998); Michael A. Livingston, *Radical Scholars, Conservative Field: Putting "Critical Tax Scholarship" in Perspective*, 76 N.C. L. REV. 1791 (1998); Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817 (1998); and Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837 (1998).

³ Moran & Whitford, *supra* note 1, at 751.

such as race, “income, education, region and marital status.”⁴ They concluded that race was a statistically significant predictor of the benefit that whites and blacks receive from the Code, with whites benefiting disproportionately.⁵

Professors Moran and Whitford did not analyze class differences within the black community; they focused on the tax provisions’ impact upon blacks in the aggregate in developing strategies to remedy the tax gap.⁶ Their proposals, however, reflect a bias toward lower-income⁷ blacks and against the economic interests of middle-income⁸ blacks due to their focus on race as the primary determinant of the tax disparities.⁹ That analysis leads to overly broad prescriptions. The racial tax disparity is a consequence of the historical effects of racial subordination, reflected in wealth disparities between whites and blacks.¹⁰ As a result, a race-based approach will not adequately address the problem because it may eliminate tax provisions that benefit middle-income blacks in an effort to assist lower-income blacks who are unable, due to their economic condition, to utilize those provisions. This Article supports the incorporation of class-based considerations in creating tax legislation to resolve black-white economic disparities because class allows for a more particularized

⁴ *Id.* at 769.

⁵ *Id.* at 770–71.

⁶ *See id.* at 802–03.

⁷ This Article uses the terms “lower-income” and “lower-class” interchangeably by adopting Bart Landry’s definition of this group, which Landry describes as the “unskilled working class”:

[L]aborers such as construction workers, garbage collectors, and longshoremen as well as domestic workers and many in the hotel and restaurant industries. These jobs require such low-level skills that they can be learned in a few weeks. They are the most disposable of all workers, many earning minimum wage except in cases where they are unionized.

BART LANDRY, *THE NEW BLACK MIDDLE CLASS* 12 (1987).

⁸ This Article uses the terms “middle-income” and “middle-class” interchangeably, which are defined as “all white-collar workers and small businessmen plus a number of service occupations . . . on a par with sales and clerical work, such as firemen, policemen, and dental assistants. These service occupations require a period of training before admission and may even attempt to maintain professional standards.” *Id.* at 10–11.

⁹ “Race is the crucial variable in all of our regression equations.” Moran & Whitford, *supra* note 1, at 769.

¹⁰ *See* discussion *infra* Part II.

approach, and for specific segments of the black community to be identified and targeted for assistance.

In support of this approach, this Article reviews Professors Moran and Whitford's research and their recommendations. In addition, this Article looks at the historical development of social class within the black community, beginning with the antebellum period and through the modern Civil Rights Movement. The history of social class development within the black community illustrates the impact of relevant events and their effect upon black class mobility. Next, Professors Moran and Whitford's proposals to remedy the black-white tax gap, taking into account their likely effect on middle-class blacks as compared to lower-class blacks, are discussed. In connection with that discussion, the views of other law professors who have written about Moran and Whitford's article are analyzed. Ultimately, this Article finds that Professors Moran and Whitford's research and analysis is beneficial and important in illustrating the degree of economic disadvantage between blacks and whites. However, because they focus on aggregate tax outcomes on the basis of race, without considering class differences within the black community, their recommendations would harm the economic interests of middle-income blacks. This proposal does not supplant the racial critique that Professors Moran and Whitford utilized. It merely supplements the critique in order to target black taxpayers who would benefit most from assistance, without harming the interests of those who benefit under the current system.

I. *A BLACK CRITIQUE OF THE INTERNAL REVENUE CODE*, BY BEVERLY MORAN & WILLIAM WHITFORD

In their article, Professors Moran and Whitford analyzed whether the Code benefited whites more than blacks.¹¹ They defined tax benefits as provisions allowing deductions, exclusions, or deferrals of income that were inconsistent with the *Glenshaw Glass*¹² definition of income.¹³

¹¹ Moran & Whitford, *supra* note 1, at 751.

¹² *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

¹³ Moran & Whitford, *supra* note 1, at 753–54. *Glenshaw Glass* defined gross income as “undeniable accessions to wealth, clearly realized, over which the taxpayers have complete dominion.” 348 U.S. at 431. Commentators argued that their use of *Glenshaw Glass* to define comprehensive income was inaccurate. Zelenak, *supra* note 2, at 1563–64; Bryce, *supra* note 2, at 1692.

Taxpayers with similar incomes were considered to be similarly situated for purposes of identifying tax code discrimination.¹⁴

They looked at four areas of the Code: (1) the exclusion for gifts and inherited property, the capital gains preference, and realization; (2) mortgage interest and other housing-related provisions; (3) the pension and health benefit exclusion; and (4) the marriage penalty.¹⁵

Tax preferences generally benefit white taxpayers more because blacks have lower levels of material wealth and lower incomes.¹⁶ However, blacks whose incomes are equal to that of white taxpayers benefit less from the tax code.¹⁷ This reflects a tax disparity, even for blacks who are similarly situated, income-wise, with their white peers.¹⁸ In devising remedies for these disparities, Professors Moran and Whitford used the “Black Congress”—a fictional body that would create legislation furthering the interests of black taxpayers.¹⁹

The next section briefly details the tax provisions analyzed by Professors Moran and Whitford and the response the Black Congress would take in addressing the interests of black taxpayers.

A. *Gift Tax, Basis, Capital Gains Tax Rate, and Realization*

1. *Section 102(a) Gift and Inheritance Exclusion*

Section 102(a) allows taxpayers to exclude gifts and inherited property from gross income.²⁰ This benefits wealthy taxpayers disproportionately because they own more assets and are more likely to make gifts or transfers at death.²¹ Whites possess more assets than blacks²² and therefore are more likely to benefit from this provision.²³ The Black Congress

¹⁴ Moran & Whitford, *supra* note 1, at 753.

¹⁵ *Id.* at 755 (citing various provisions of the Internal Revenue Code).

¹⁶ *Id.* at 757; see LANDRY, *supra* note 7, at 127 (“To earn an increase in income similar to that of whites, black males must have more education than whites, on the average, and be in higher occupations. These findings prove that the income gap between black males and white males is *primarily* a result of discrimination . . .”); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 100–01, 197 *tbl.A5.1* (1995) (showing the relationship between income disparities and wealth inequality between whites and blacks).

¹⁷ Moran & Whitford, *supra* note 1, at 757.

¹⁸ *Id.*

¹⁹ *Id.* at 758.

²⁰ I.R.C. § 102 (2000).

²¹ Moran & Whitford, *supra* note 1, at 762.

²² *Id.* at 759.

²³ *Id.* at 772.

would not change this provision because adjustments to the estate and gift tax regime would be necessary and because it provides incentives for blacks to save and transfer wealth to future generations.²⁴

2. Section 1(h) Capital Gains Tax Preference

Gain from the sale or exchange of capital assets is taxed at a maximum rate of 15% under section 1(h).²⁵ The capital gains rate allows significant tax savings compared to the top marginal rate of 35% which otherwise applies to taxable income,²⁶ which includes wages,²⁷ interest,²⁸ and rental income.²⁹ When Professors Moran and Whitford's article was published, the maximum rate was 28% for capital gains and 39.6% for taxable income.³⁰

Because blacks own fewer capital assets than whites³¹ and have a lower percentage of their wealth invested in stocks, mutual funds, and investment real estate,³² they benefit less from the capital gains preference.³³ The Black Congress would repeal this provision because most blacks do not benefit from it.³⁴

²⁴ *Id.* at 783.

²⁵ I.R.C. § 1(h) (2000 & Supp. III 2003).

²⁶ *Id.* § 1(a)-(d), (h).

²⁷ Taxable income "means gross income minus the deductions allowed by this chapter (other than the standard deduction)." I.R.C. § 63(a) (2000). Thus, the items included for taxable income can be found under the definition of gross income, codified in I.R.C. section 61(a). Wages are found in subsection (1) of that definition. *Id.* § 61(a)(1) ("Compensation for services, including fees, commissions, fringe benefits, and similar items.").

²⁸ *Id.* §§ 61(a)(4); 63(a).

²⁹ *Id.* §§ 61(a)(5); 63(a).

³⁰ Moran & Whitford, *supra* note 1, at 761.

³¹ *Id.* at 759.

³² *Id.* at 770-71. Oliver and Shapiro stated that blacks have 13% of their wealth invested in financial assets like "stocks, mutual funds, bank deposits, IRAs, bonds and income-mortgages," whereas whites have almost one-third of their wealth invested in such assets. OLIVER & SHAPIRO, *supra* note 16, at 105-06.

³³ OLIVER & SHAPIRO, *supra* note 16, at 43-44.

³⁴ See Moran & Whitford, *supra* note 1, at 782. Oliver and Shapiro also support the elimination of the preferential capital gains tax rate. OLIVER & SHAPIRO, *supra* note 16, at 184.

3. *The Realization Requirement*

Realization is an administrative rule that requires a sale or exchange of an asset to take place before gain or loss is recognized for tax purposes.³⁵ Whites derive a greater benefit from the deferral of tax on unrealized appreciation³⁶ because they own more assets than blacks.³⁷ Therefore, the Black Congress would tax appreciation on publicly traded securities and nonresidential real estate as it accrues.³⁸

B. Home Mortgage Interest Deductions and Other Property Provisions

The tax benefits of home ownership increase as a taxpayer's marginal tax rate increases.³⁹ As a result, high-bracket taxpayers derive greater tax savings from home-related deductions than lower-bracket taxpayers.⁴⁰ In addition, the lower market value of homes owned by blacks and their lower rate of ownership results in their having a "lower share of aggregate housing wealth."⁴¹ Whites, therefore, benefit more from home ownership related tax provisions.⁴²

1. Section 163(h) Home Mortgage Interest Deduction and Section 164 Property Tax Deductions

Section 163(h) provides interest deductions on loans used in acquiring, constructing, or improving a personal residence and section 164(a)(1)

³⁵ *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 559 (1991); Moran & Whitford, *supra* note 1, at 759–60. The realization requirement can be justified on practical grounds, including the difficulty in determining the amount of appreciation that has accrued annually and the hardship that paying a tax on unrealized appreciation may have on cash-poor taxpayers. See *Cottage Sav. Ass'n*, 499 U.S. at 559; Deborah H. Schenk, *A Positive Account of the Realization Rule*, 57 TAX L. REV. 335, 359 (2004).

³⁶ See Moran & Whitford, *supra* note 1, at 759–60.

³⁷ *Id.* at 759.

³⁸ See *id.* at 782. Moran and Whitford pointed out the availability of information concerning stock prices and property values. See *id.*

³⁹ See *id.* at 774.

⁴⁰ *Id.*

⁴¹ *Id.* at 777. Oliver and Shapiro stated that the baby boom generation will inherit close to \$7 trillion over the next twenty-five years, but blacks will not benefit significantly from that transfer of wealth. OLIVER & SHAPIRO, *supra* note 16, at 152. They also pointed out that home equity represents sixty-three percent of overall black wealth and only forty-three percent of white wealth. *Id.* at 108–09.

⁴² Moran & Whitford, *supra* note 1, at 780.

allows deductions for state and local real estate taxes.⁴³ Based on the disproportionate tax benefits that whites receive, the Black Congress would recommend replacing the mortgage interest and property tax deductions with a tax credit that phases out when adjusted gross income exceeds \$50,000.⁴⁴ Tax credits allow a dollar for dollar reduction in the taxpayer's tax liability, rather than the proportionate benefit received from a deduction.⁴⁵ Professors Moran and Whitford stated that the phase-out would not adversely affect blacks because most do not have incomes over \$50,000.⁴⁶

2. *Section 1034 Rollover of Gain on Sale of Principal Residence and Section 121 One-Time Exclusion of Gain*

Prior to 1997, section 1034 allowed taxpayers to exclude gain from the sale of a principal residence if a new residence was purchased within a specified period of time.⁴⁷ Section 121 allowed taxpayers who were at least fifty-five years of age to elect to exclude from gross income up to \$125,000 of gain from the sale of a principal residence.⁴⁸

Professors Moran and Whitford recommended retaining section 121 to encourage the accumulation of wealth among blacks because home ownership is the primary investment for most blacks.⁴⁹ In 1997, section 1034 was repealed and section 121 was amended.⁵⁰

⁴³ I.R.C. §§ 163(h), 164(a) (2000).

⁴⁴ Moran & Whitford, *supra* note 1, at 781.

⁴⁵ *See id.* The dollar for dollar reduction, in the form of tax credits, "which a taxpayer subtracts directly from the taxes he owes, save a taxpayer the amount of the credit, regardless of his bracket." *Id.*

⁴⁶ *Id.*

⁴⁷ I.R.C. § 1034(a) (1994).

⁴⁸ *Id.* § 121(a)-(b).

⁴⁹ Moran & Whitford, *supra* note 1, at 782.

⁵⁰ Pub. L. 105-34 repealed section 1034 and amended section 121 on August 5, 1997. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, 836, 839. Section 121 now allows taxpayers to exclude from gross income up to \$250,000 of gain (\$500,000 of gain for joint filers) from the sale or exchange of a principal residence. I.R.C. § 121(a), (b)(1)-(2) (2000). Section 121 currently requires taxpayers to have owned and used the sold residence as their principal residence for a period aggregating at least two years out of the five-year period, ending on the date of the sale or exchange. *Id.* § 121(a). The section 121 exclusion can be utilized once every two years. *Id.* § 121(b)(3)(A).

C. *Employee Pension Benefits*

Privately employed white men receive employer-subsidized pension and health care benefits at a higher rate than white women and blacks,⁵¹ and employees participating in qualified retirement plans benefit from tax deferral, avoiding taxation on their employer's or their own plan contributions until benefits are distributed.⁵² The Black Congress would suggest the possible repeal of 401(k) retirement plans because blacks do not utilize them on the same scale as whites⁵³ and retain the health benefits exclusion due to uncertainty as to whether "blacks are benefited or harmed" by that provision.⁵⁴

D. *The Marriage Penalty*

For married couples where each partner earns equivalent amounts of income, their joint tax liability as a married couple may be greater than their combined separate tax liabilities, assuming they had remained single and filed separate tax returns.⁵⁵ This is called the "marriage penalty."⁵⁶ Because two-income households are more prevalent among married blacks, the likelihood is greater for their being subject to the marriage penalty.⁵⁷ In addition, for two-income white households, the gap between each spouse's income is usually larger than that for two-income black couples.⁵⁸ As a result, a higher percentage of black couples are subject to the marriage penalty.⁵⁹

⁵¹ Moran & Whitford, *supra* note 1, at 785.

⁵² *Id.* at 784.

⁵³ *Id.* at 790–91. The lower participation rate by blacks may be a result of employers not offering it as an option, or due to the burden that income deferral would have upon blacks, who earn lower salaries than whites on average. *Id.*

⁵⁴ *Id.* at 790.

⁵⁵ *Id.* at 792.

⁵⁶ *Id.* at 791–92.

⁵⁷ *Id.* at 793. "In a group such as blacks in which females have had greater access historically to white-collar occupations and have been employed full-time at higher rates than in other groups, women contribute relatively more to the economic well-being of the family. When translated into a class dimension . . . it becomes apparent that the class position of black families is more frequently determined by wives than is the case in white families . . ." LANDRY, *supra* note 7, at 14.

⁵⁸ Moran & Whitford, *supra* note 1, at 793.

⁵⁹ *Id.* The arguments made in relation to the marriage penalty are based on two facts concerning income levels among black couples: (1) "[b]lack wives participate in the labor force at a greater rate than white wives," and (2) black wives earn salaries more comparable

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To remedy the marriage penalty, the Black Congress would: (1) adopt a single tax rate for all individuals; (2) allow married couples to elect annually whether to file separate returns or file a joint return; or (3) allow married and unmarried couples to file individual tax returns or joint returns.⁶⁰

II. THE CLASS-BASED IMPLICATIONS OF *A BLACK CRITIQUE OF THE INTERNAL REVENUE CODE*

One of the most significant findings by Professors Moran and Whitford was that blacks who have incomes equal to that of whites benefit less from the tax code.⁶¹ As they acknowledged, blacks generally earn less than whites, so most would assume that whites benefit more from tax deductions and other preferences.⁶² The fact that blacks of the same or similar income level benefit less than comparable whites is not only unexpected, but provides support for the Critical Race critique since the tax code is race-neutral in terms of its application.⁶³

The foundation of their argument is horizontal equity,⁶⁴ which means that taxpayers earning similar incomes should be subject to similar tax liabilities.⁶⁵ However, the wealth disparity between whites and blacks is what accounts for the differential tax treatment documented in *A Black Critique*.⁶⁶ As observed by Professors Moran and Whitford, the types of

to those earned by their husbands than white wives earn when compared to their husbands. *Id.* at 794. This is borne out as income levels increase. *See id.* at 793.

⁶⁰ *Id.* at 798–99. The Working Families Tax Relief Act of 2004 allows some marriage penalty relief for low income taxpayers by providing that the basic standard deduction for joint filers is 200% of the basic standard deduction allowed to single filers. Pub. L. No. 108-311, 118 Stat. 1166, 1167 (to be codified in I.R.C. § 63(c)(2)(A)(i)). The maximum taxable income for joint filers in the 15% tax bracket is 200% of the maximum taxable income for single filers in the 15% bracket. Pub. L. No. 108-311, 118 Stat. 1166, 1168 (to be codified in I.R.C. § 1(f)(8)(A)).

⁶¹ Moran & Whitford, *supra* note 1, at 757.

⁶² *See supra* notes 39–60 and accompanying text.

⁶³ Moran & Whitford, *supra* note 1, at 751–52.

⁶⁴ *Id.* at 753 & n.10.

⁶⁵ 1 BORIS I. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 3.1.4 (1981) (“Persons who are similarly situated should be treated equally (‘horizontal equity’) . . .”). Professors Moran and Whitford used the *Glenshaw Glass* definition of income to determine if persons are similarly situated. Moran & Whitford, *supra* note 1, at 753; *see supra* notes 12–14 and accompanying text.

⁶⁶ The conclusion made by Professors Moran and Whitford demonstrated the differing tax treatment of whites and blacks. *See* Moran & Whitford, *supra* note 1, at 757 (“We
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assets owned by whites benefit from tax deferrals, exclusions, and deductions.⁶⁷ These benefits are unavailable to blacks of the same income level who do not own tax-favored assets or possess comparable wealth.⁶⁸ Two different approaches could be taken to address this issue. One is that whites are underreporting income relative to similarly situated blacks, accounting for the tax disparity. Professors Moran and Whitford showed support for this view through their proposal to eliminate the capital gains preference and to tax unrealized capital gains from publicly traded stocks and commercial real estate.⁶⁹ The other approach looks to class differences between white and blacks and within the black community itself. Class encompasses not only income, but also wealth,⁷⁰ allowing for a more complete analysis of a group or person's financial condition. The use of horizontal equity as a means of categorizing "similarly situated" parties,⁷¹ coupled with an analysis of wealth disparities to highlight tax disparities between the races,⁷² leads to a disjointed analysis because wealth incorporates income, but income is not a measurement of wealth.⁷³

believe that even if income is held constant, the Internal Revenue Code systematically disfavors the financial interests of blacks." This conclusion concentrated on income but failed to account for wealth disparities. See OLIVER & SHAPIRO, *supra* note 16, at 100–01, 197 tbl.A5.1 (discussing the wealth disparities).

⁶⁷ See *supra* notes 20–60 and accompanying text.

⁶⁸ See *supra* notes 20–60 and accompanying text.

⁶⁹ Moran & Whitford, *supra* note 1, at 782–83; see *supra* notes 31–38 and accompanying text.

⁷⁰ See Max Weber, *The Distribution of Power Within the Political Community: Class, Status, Party*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 180 (H. H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946), reprinted in CLASSICAL SOCIOLOGICAL THEORY 206, 207 (Craig Calhoun et al. eds., 2002) ("In our terminology, 'classes' are not communities; they merely represent possible, and frequent, bases for social action. We may speak of a 'class' when (1) a number of people have in common a specific causal component of their life chances, insofar as (2) this component is represented exclusively by economic interests in the possession of goods and opportunities for income, and (3) is represented under the conditions of the commodity or labor markets. This is 'class situation.'"). For a definition of wealth, see *infra* note 73.

⁷¹ See Moran & Whitford, *supra* note 1, at 753 & n.10.

⁷² See OLIVER & SHAPIRO, *supra* note 16, at 100–01, 197 tbl.A5.1; *supra* notes 20–60 and accompanying text.

⁷³ Oliver and Shapiro described the distinction between wealth and income:

Wealth is a particularly important indicator of individual and family access to life chances. Income refers to a flow of money over time, like a rate per hour, week, or year; wealth is a stock of assets owned at a

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A class-based analysis does not allow for the numerical certainty of income, but the development of class differences, particularly among blacks,⁷⁴ does provide a basis for understanding the factors that have contributed to the present-day wealth disparities.⁷⁵ Without further elaboration or the consideration of other contributing factors, Professors Moran and Whitford's analysis may create the impression that the tax system alone contributes to the tax disparities suffered by blacks.

III. CLASS DEVELOPMENT AND DIFFERENTIATION WITHIN THE BLACK COMMUNITY

"Class" refers to persons having similar economic interests, as represented by the ownership of goods and the ability to earn income through participation in a market economy.⁷⁶ As a result, a class-based analysis of the black community requires segmentation based upon the economic positions of its members.⁷⁷

To appreciate how class differences affect wealth and asset accumulation within the black community, a look at the development of black class differentiation is necessary. The ability of blacks to progress economically and socially was and still is directly tied to the degree of hostility and oppression exhibited toward them by American society.⁷⁸

particular time. Wealth is what people own, while income is what people receive for work, retirement, or social welfare. Wealth signifies the command over financial resources that a family has accumulated over its lifetime along with those resources that have been inherited across generations. . . . [T]he command over resources that wealth entails is more encompassing than is income or education, and closer in meaning and theoretical significance to our traditional notions of economic well-being and access to life chances.

OLIVER & SHAPIRO, *supra* note 16, at 2.

⁷⁴ See discussion *infra* Part III.

⁷⁵ See OLIVER & SHAPIRO, *supra* note 16, at 100–01, 197 tbl.A5.1 (analyzing the present-day disparities in wealth between whites and blacks).

⁷⁶ WEBER, *supra* note 70, at 207.

⁷⁷ See *id.*

⁷⁸ See E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE* 234 (1997) ("The very existence of a separate Negro community with its own institutions within the heart of the American society is indicative of its quasi-pathological character, especially since the persistence of this separate community has been due to racial discrimination and oppression."); WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 1–2 (2d ed. 1980) (discussing the obstacles put in front of blacks and how they have fundamentally changed).

What has occurred, especially since the Civil Rights Movement, is that race, as well as class, are the significant determinants of an individual's economic prospects.⁷⁹ But neither alone is sufficient to comprehend fully the current circumstances of blacks.⁸⁰ As a result, the lesson derived from history is that race and class are intertwined, and analysis of both allows a more complete appreciation of the economic condition of blacks as a group.⁸¹

A. Social Class Development Within the Black Community

Two works examining the historical aspects of class development within the black community are E. Franklin Frazier's *Black Bourgeoisie*⁸² and William Julius Wilson's *The Declining Significance of Race*.⁸³ Frazier's book was a criticism of the black middle class of the 1940s and 1950s, based on their tendency to engage in "conspicuous consumption,"⁸⁴ their detachment from the folk traditions of the traditional black community,⁸⁵ and their imitation of white middle-class behaviors and values.⁸⁶ Wilson's work supports his argument that class status among blacks is a more significant factor than race in determining their economic prospects due to the prohibition of job-related racial discrimination and improved access to educational opportunities.⁸⁷ Despite their controversial positions, both works are valuable resources in understanding how social class differentiation began and altered the black community. This history provides a sobering view of the progress blacks have made socially and economically, as well as how the challenges of the past continue to frame present-day issues. In the preface to his book, and as a response to criticism from whites and blacks for his findings, Frazier wrote:

⁷⁹ See WILSON, *supra* note 78, at ix ("When black and white relations are viewed from a broad historical perspective, a uniform reliance on class to explain all forms and degrees of racial conflict can be as misleading as a uniform reliance on race."); Moran & Whitford, *supra* note 1, at 757.

⁸⁰ See WILSON, *supra* note 78, at ix.

⁸¹ Cf. Johnson, *supra* note 2, at 1781 ("To the extent differential enjoyment of tax benefits is income-dependent, the Code sections in question may be the result of social-class preference, not race preference.").

⁸² FRAZIER, *supra* note 78.

⁸³ WILSON, *supra* note 78.

⁸⁴ See FRAZIER, *supra* note 78, at 5.

⁸⁵ See *id.* at 234–38.

⁸⁶ See *id.*

⁸⁷ See WILSON, *supra* note 78, at 144–54.

[*Black Bourgeoisie*] demonstrated on the basis of factual knowledge that Negroes were not only at the bottom of the economic ladder but that all the pretended economic gains which Negroes were supposed to have made had not changed fundamentally their relative economic position in American life. It revealed also that the new Negro middle class was comprised almost entirely of wage earners and salaried professionals and that so-called Negro business enterprises amounted to practically nothing in the American economy.⁸⁸

That sentiment, expressed by Frazier in 1962,⁸⁹ prior to the civil rights advances of the mid-1960s,⁹⁰ is still relevant today. The difference is that race alone is not enough to understand or explain the issues affecting the economic prospects of the black community.⁹¹ The answer is a complicated mixture of class and race, making the analysis and discussion more complicated and the search for solutions more difficult due to the need to balance and address both race and class issues simultaneously.

B. The Antebellum Period

Slavery imposed upon all blacks a racial caste order that held them to the lowest status within American society.⁹² There were no meaningful distinctions between slaves; house servants participated more in the daily lives of their white owners but were still subject to discipline and complete subordination.⁹³ Emancipated blacks had some opportunity for social and economic advancement, but “the majority of the free Negroes in the South did not live much above a subsistence level . . .”⁹⁴ Slavery also marginalized poor and lower-class whites economically as a result of the slaveholders’ reliance upon slave labor.⁹⁵ As a result, white laborers sought laws to restrict employment for slaves outside of the plantation

⁸⁸ FRAZIER, *supra* note 78, at 5.

⁸⁹ *Id.* at iv (showing that the preface was written in 1962).

⁹⁰ See *infra* notes 139–52 and accompanying text.

⁹¹ See WILSON, *supra* note 78, at ix.

⁹² *Id.* at 20.

⁹³ FRAZIER, *supra*, note 78, at 12.

⁹⁴ *Id.* at 14. There were 500,000 free blacks at the outbreak of the Civil War with half residing in the South. *Id.* at 15.

⁹⁵ See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 150–51 (8th ed. 2000).

system, but they settled for laws restricting the employment of free blacks.⁹⁶

When allowed, free blacks worked in many different occupations and served as important sources of skilled labor.⁹⁷ Some freemen owned businesses and acquired wealth during that time.⁹⁸ Northern free blacks, however, were more dependent upon domestic and laborer work.⁹⁹ Further inhibiting the progress of northern freemen was opposition to black employment, attributable to competition with European immigrants¹⁰⁰ and other northern whites¹⁰¹ for jobs.

C. The Postbellum Period and the Emergence of Jim Crow

After the Civil War, slaveholders' control over the economic and political structure of the South was maintained through the "Black Codes," which restricted movement, voting, and other freedoms of recently emancipated blacks.¹⁰² The eventual decline of agriculture as the South's primary economic activity led to the erosion of the slaveholders' influence, paving the way for poor whites to restrict black competition for jobs.¹⁰³ Poor whites were in competition with blacks for industrial employment, which grew due to capital investment in the South.¹⁰⁴ Jim Crow eventually replaced the Black Codes, which were abolished in 1886, continuing to restrict blacks from meaningful participation in southern society.¹⁰⁵

D. Black Migration to the North

In 1900, ninety percent of all blacks lived in the South, with the majority residing in rural areas, making them dependent upon agricultural

⁹⁶ WILSON, *supra* note 78, at 44; FRANKLIN & MOSS, *supra* note 95, at 172.

⁹⁷ FRAZIER, *supra* note 78, at 32; FRANKLIN & MOSS, *supra* note 95, at 173–74.

⁹⁸ FRAZIER, *supra* note 78, at 32–33. Estimates indicate that free blacks had accumulated \$50 million in assets prior to the Civil War. *Id.* at 34.

⁹⁹ *Id.* at 33.

¹⁰⁰ *Id.*

¹⁰¹ See FRANKLIN & MOSS, *supra* note 95, at 172 ("Whites sought legislation barring free blacks from certain trades; failing in this, they frequently resorted to intimidation and violence in order to eliminate competition with free blacks.").

¹⁰² FRAZIER, *supra* note 78, at 140.

¹⁰³ WILSON, *supra* note 78, at 55–56.

¹⁰⁴ *Id.* at 56; FRANKLIN & MOSS, *supra* note 95, at 309.

¹⁰⁵ See WILSON, *supra* note 78, at 53–60; FRAZIER, *supra* note 78, at 142–43; FRANKLIN & MOSS, *supra* note 95, at 286–91 (outlining the triumph of white supremacy in the South).

employment.¹⁰⁶ Non-agricultural employment was limited to laborer and domestic work.¹⁰⁷ Those constraints, coupled with oppressive social conditions under Jim Crow,¹⁰⁸ forced many blacks to leave the South.¹⁰⁹

Black migration, which began prior to World War I, greatly increased black populations in northern areas.¹¹⁰ Some blacks found better job prospects and living conditions due to the absence of Jim Crow.¹¹¹ They also experienced improved educational options and growing black political

¹⁰⁶ FRAZIER, *supra* note 78, at 44.

¹⁰⁷ *Id.*

¹⁰⁸ Prior to the civil rights advances of the 1960s, “blacks were formally subordinated by the state.” Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 103, 114 (Kimberle Crenshaw et al. eds., 1995). This subordination took two different forms:

Symbolic subordination refers to the formal denial of social and political equality to all blacks, regardless of their accomplishments. Segregation and other forms of social exclusion—separate restrooms, drinking fountains, entrances, parks, cemeteries, and dining facilities—reinforced a racist ideology that blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals.

Material subordination, on the other hand, refers to the ways that discrimination and exclusion economically subordinated blacks to whites and subordinated the life chances of blacks to those of whites on almost every level.

Id.

¹⁰⁹ WILSON, *supra* note 78, at 65.

¹¹⁰ FRAZIER, *supra* note 78, at 44, 78; *see* LANDRY, *supra* note 7, at 20 (“The 1924 National Origins Quota Act . . . restrict[ed] Eastern and Southern European immigrants Only then did white northern industrialists, who previously had demonstrated a preference for white immigrant labor over the abundant supply of southern black workers, turn in desperation to recruiting blacks for their factories, stockyards, and steel mills. Blacks responded eagerly to this opportunity—4.6 million between 1910 and 1960—in their desire to escape the oppression of the South and their subordinate status.”); *see also* FRANKLIN & MOSS, *supra* note 95, at 308 (stating that the black migration out of the South “began as early as 1879”).

¹¹¹ FRAZIER, *supra* note 78, at 45.

influence.¹¹² Despite those benefits, most blacks migrating north were still limited to low-skilled employment.¹¹³

A small black professional class began to develop during the first quarter of the twentieth century, though it comprised a very small percentage of all workers.¹¹⁴ This group included doctors, lawyers, teachers, and other professionals who relied upon the segregated black population for their livelihood.¹¹⁵ Members of this black elite were descendants of blacks who were emancipated prior to the Civil War and maintained “close economic and social ties with the white community.”¹¹⁶

¹¹² *Id.*

¹¹³ WILSON, *supra* note 78, at 124; *see* LANDRY, *supra* note 7, at 31 (“Skilled craftsmen were especially important in southern cities, where they often monopolized the trades until forced out by white competition and craft unions during the last decades of the nineteenth century. Because of early competition by white immigrant workers in the North, blacks never gained the same foothold in the crafts that was characteristic in the South . . .”); *see also* FRANKLIN & MOSS, *supra* note 95, at 310–11 (on union hostility to black workers in the North).

¹¹⁴ FRAZIER, *supra* note 78, at 44 (“A small professional group comprising between two and three per cent of all workers, and an even smaller group of clerical workers, had gradually become differentiated from the Negro masses.”); LANDRY, *supra* note 7, at 19–20 (“As recently as 1910, 50 percent of all blacks were part of a rural proletariat of sharecroppers and subsistence farmers, while another 39 percent were concentrated among unskilled laborers and service workers. . . . Only 3 percent of all black workers in 1910 held white-collar positions, compared to 24 percent of whites, and only 2.5 percent were in skilled blue-collar jobs.”).

¹¹⁵ WILSON, *supra* note 78, at 124; *see* LANDRY, *supra* note 7, at 8 (“[T]he entrance of blacks into professional occupations during the first half of the twentieth century was entirely a factor of the black community’s need for certain basic services such as health care, religion, education, and, to a more limited extent, legal aid. When direct service to the black community was not involved, blacks were usually barred from entering a professional field, thus distorting their role in the class structure.”).

¹¹⁶ WILSON, *supra* note 78, at 125; *see* LANDRY, *supra* note 7, at 30 (“The old mulatto elite, with its roots in white society, evolved in part through a paternalistic relationship with upper-class whites that developed in the decades following emancipation. In the South, especially in small towns, white ancestry, a history of freedom before the Civil War, leadership roles in the black church and the local black school, property ownership, and conventional moral behavior were important characteristics affording access to the small circle of the local [black] elite.”).

They also supported integration as the most effective approach to resolving racial divisions within American society.¹¹⁷

Another group of black businessmen, intent on developing a self-sustaining, independent black community, supplanted the earlier black middle class.¹¹⁸ This new black leadership depended upon the segregated black community also, but did not interact with the white community.¹¹⁹ Their ideology was in reaction to Jim Crow in the South and the racial animosity encountered by blacks in the North.¹²⁰ They identified with Booker T. Washington and his message of black self-help and uplift.¹²¹ Their tenure, however, was short-lived, because the Great Depression and financial difficulties led to the collapse of many of their businesses.¹²²

In spite of the Great Depression and its impact upon black businesses,¹²³ black gains in occupational differentiation continued, but at a slower rate.¹²⁴ Less than half of all southern blacks were employed in agriculture at that time and many northern blacks retained employment

¹¹⁷ WILSON, *supra* note 78, at 125; W.E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 135–39 (Buccaneer Books, Inc. 1976) (1903) (arguing for immediate integration); *see also* FRANKLIN & MOSS, *supra* note 95, at 299–303 (showing Booker T. Washington’s commitment to integration).

¹¹⁸ WILSON, *supra* note 78, at 125; LANDRY, *supra* note 7, at 29–30 (“By the 1920s, most members of the elite—at least in large cities such as Detroit, Chicago, and Cleveland—were professionals or successful (in the eyes of blacks) businessmen. . . . By this time, however, the old elite had been supplanted in most cities by a new elite dependent on black community patronage rather than on whites for their success.”).

¹¹⁹ WILSON, *supra* note 78, at 125; *see* LANDRY, *supra* note 7, at 29–30.

¹²⁰ WILSON, *supra* note 78, at 125; *see* LANDRY, *supra* note 7, at 38 (“As migrants from the South gradually increased the size of black urban communities, blacks experienced increased difficulty in finding white realtors who would sell or rent property to them. White insurance agents began refusing to sell policies to blacks, and banks frequently turned down their loan applications. Even white funeral parlors showed reluctance to bury their dead. Since these were some of the most basic needs of a growing black community, ambitious black entrepreneurs, seeing an opportunity to fill a void, began entering these fields.”).

¹²¹ WILSON, *supra* note 78, at 125; *see also* FRANKLIN & MOSS, *supra* note 95, at 299–303 (showing Washington’s commitment to black education), 305–06 (discussing the shortcomings of Washington’s program), 312 (noting Washington’s founding of the National Negro Business League).

¹²² WILSON, *supra* note 78, at 125–26.

¹²³ *Id.* at 126.

¹²⁴ FRAZIER, *supra* note 78, at 45–46.

advantages secured prior to the Depression.¹²⁵ Occupational differentiation among blacks continued up to and during the 1940s.¹²⁶ In addition, a study of cities with black populations of 100,000 or more¹²⁷ found that the black middle class represented over twenty percent of the black population in northern cities and about seventeen percent in southern cities.¹²⁸ In spite of the advantages blacks gained in northern cities, residential segregation, coupled with housing shortages and high housing costs, led to the creation and growth of urban ghettos.¹²⁹

E. The World War II Era

World War II industrial expansion allowed blacks to obtain semi-skilled jobs in the industrial sector and some white-collar employment with government agencies.¹³⁰ These opportunities led to a large migration of blacks to urban areas, which continued through the 1960s.¹³¹

From the 1950s to the 1970s, the percentage of black males employed in middle-class jobs more than doubled.¹³² This growth in black economic mobility was due to: (1) the post-World War II economy; (2) access to white collar jobs for educated blacks; (3) greater black membership in labor unions; (4) equal employment legislation, at the local, state, and then federal level; and (5) the migration of blacks from the South to other regions that offered better opportunities.¹³³

¹²⁵ *Id.* at 45.

¹²⁶ *Id.* at 46.

¹²⁷ The cities included Atlanta, Birmingham, Memphis, New Orleans, Baltimore, St. Louis, Washington D.C., Chicago, Detroit, New York, and Philadelphia. *Id.* at 242 n.6.

¹²⁸ *Id.* at 47.

¹²⁹ WILSON, *supra* note 78, at 85, 124.

¹³⁰ *Id.* at 88–89; FRAZIER, *supra* note 78, at 168–69.

¹³¹ WILSON, *supra* note 78, at 79.

¹³² *Id.* at 129 (describing the period with “[t]he most dramatic changes in black mobility”); LANDRY, *supra* note 7, at 2 (“[A]t midcentury only 10 percent of all black workers held middle-class jobs compared to 40 percent of white workers.”), 70 (“Between 1960 and 1970 the percentage of middle-class blacks suddenly doubled, growing from about 1 in 8 [12.5%] to 1 out of every 4 [25%] black workers. While this was far below the 1 out of 2 level of whites in 1970, the gain experienced by the black middle class during the 1960s exceeded their total increase during the previous fifty years.”).

¹³³ WILSON, *supra* note 78, at 129; *see also*, LANDRY, *supra* note 7, at 2–3 (“As a result of [the Civil Rights Movement and a booming economy], the black middle class doubled in size during the 1960s, encompassing 27 percent of all black workers by 1970.”).

The postwar period saw industry begin to leave the cities (where the majority of blacks resided) and relocate into outlying areas.¹³⁴ Slowdowns in central city manufacturing and industrial job growth¹³⁵ led to decreases in blue-collar jobs, while white-collar and entry-level service employment increased.¹³⁶ These changes benefited educated white-collar workers and provided job opportunities for low-skilled workers in support-type jobs, which were low paying and did not offer many opportunities for advancement.¹³⁷ These changes contributed to the high rates of unemployment that plagued residents of urban areas.¹³⁸

F. The Civil Rights Movement and Affirmative Action Policies

During the 1940s, black leaders returned to the integrationist goals of the black middle class that existed around the turn of the century.¹³⁹ The National Association for the Advancement of Colored People and the Urban League provided leadership in the drive for racial equality.¹⁴⁰ These organizations adopted goals reflecting the aims of middle-class blacks, at least in their initial stages.¹⁴¹

Legislation outlawing discrimination in public accommodations and the housing market reflected the concerns of the black middle class,¹⁴² but were of limited benefit to poor blacks.¹⁴³ The Civil Rights Movement's incorporation of voting rights and employment discrimination made its aims more relevant to the concerns of the poor.¹⁴⁴

¹³⁴ WILSON, *supra* note 78, at 92–93.

¹³⁵ *Id.* at 93.

¹³⁶ *Id.* at 94–95.

¹³⁷ *Id.* at 95.

¹³⁸ *Id.* at 95–96.

¹³⁹ *Id.* at 134–35; *see supra* notes 116–17 and accompanying text.

¹⁴⁰ WILSON, *supra* note 78, at 135.

¹⁴¹ *Id.*; LANDRY, *supra* note 7, at 71–72 (“The new wave of protest in the early 1960s was now being led by the sons and daughters of the old middle class and by many who were moving up the class ladder, by students of the traditionally black colleges of the South, by ministers and other middle-class organizers. It was a middle-class movement, and as some have criticized, it was at first a movement with middle-class goals—desegregation of public accommodations, many of which the masses of black poor could not hope to enjoy In time, its goals were broadened to include equal access to jobs and the ballot box.”).

¹⁴² WILSON, *supra* note 78, at 136.

¹⁴³ *Id.*

¹⁴⁴ LANDRY, *supra* note 7, at 72.

However, the major contributor to black middle class expansion during the 1960s was the passage of Title VII of the Civil Rights Act of 1964, prohibiting employment discrimination on the basis of race.¹⁴⁵ That legislation, coupled with the growing economy of the 1960s, led to tremendous gains in the black middle class.¹⁴⁶ In addition to legislation and increased enforcement of antidiscrimination laws, affirmative action policies benefited educated blacks.¹⁴⁷ Generally applying to jobs requiring some level of education and training,¹⁴⁸ affirmative action helped blacks seeking government and private sector employment.¹⁴⁹

Black class development illustrates that class differentiation did not begin in earnest until around the WWII era, and growth in the black middle class did not take root until the 1960s.¹⁵⁰ As a result, we can look to the 1960s as the period of time to begin tracing the black middle class as we know it today.¹⁵¹ The black middle class is, however, vulnerable to economic declines and resistance to minority advancement, both of which occurred during the 1970s, leading to declines in black middle-class growth.¹⁵²

G. The Modern Black Social Class Condition

The power and influence of urban areas has diminished due to middle-class families leaving the cities for the suburbs, the relocation of manufacturing and other industry outside of urban areas, increases in poor and working class populations, and a decline in tax revenues.¹⁵³ This consequence is significant to poor and working-class blacks who lack the resources to reside elsewhere and whose educational background may not qualify them for jobs other than low-skilled service employment.¹⁵⁴

¹⁴⁵ *Id.* at 85.

¹⁴⁶ *Id.* at 85–86.

¹⁴⁷ WILSON, *supra* note 78, at 100. Affirmative action's focus on blacks did not last long; the focus shifted in the 1970s. LANDRY, *supra* note 7, at 204–05 (“[I]n the 1970s, the emphasis of affirmative action shifted to women, away from blacks, and in a tighter economy profited white women more than blacks.”).

¹⁴⁸ WILSON, *supra* note 78, at 100.

¹⁴⁹ *See id.* at 100–03.

¹⁵⁰ *See supra* notes 130–33, 145–49 and accompanying text.

¹⁵¹ *See supra* notes 145–49 and accompanying text.

¹⁵² LANDRY, *supra* note 7, at 74–76.

¹⁵³ WILSON, *supra* note 78, at 139.

¹⁵⁴ *See id.* at 95, 139.

Middle-class blacks, due to their economic resources, have more housing, educational, and employment opportunities.¹⁵⁵

H. The Significance of Wealth

Oliver and Shapiro point out that wealth represents assets that have accumulated over time and that are passed down through successive generations within a family.¹⁵⁶ Wealth creates opportunities that sustain class status and support upward mobility within families and through generations.¹⁵⁷ Without the transmission of wealth to aid future generations, each one starts from scratch in the climb up the economic ladder, relying on income without the benefits of accumulated wealth to assist them.¹⁵⁸

Viewing the black economic condition in terms of wealth, as opposed to employment or income, the historical effects of racism and discrimination are much more conspicuous and oppressive.¹⁵⁹ An example of these effects is that middle-class blacks earn approximately seventy percent of the income of middle-class whites, but blacks only possess fifteen percent of the wealth of similarly situated whites.¹⁶⁰

A partial explanation for the wealth disparity is that the black middle class has existed for only a short length of time, with most of its growth occurring during the 1960s.¹⁶¹ This compromises its ability to develop traditions, to pass along class status to future generations, and to accumulate wealth.¹⁶²

The next section describes the comprehensive income tax and the consumption, or cash flow, tax. Professors Moran and Whitford analyzed deviations from the comprehensive income tax to determine the racial

¹⁵⁵ See LANDRY, *supra* note 7, at 5–11, 143–44 (showing the increased educational and employment opportunities of the black middle class and the propensity of the group to obtain housing).

¹⁵⁶ OLIVER & SHAPIRO, *supra* note 16, at 2.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.*

¹⁵⁹ *Id.* at 3–5, 12–13. “Income discrimination is . . . very much a fact of life among middle-class black males and one of the principal sources of economic inequality between the black and the white middle classes.” LANDRY, *supra* note 7, at 128–29.

¹⁶⁰ OLIVER & SHAPIRO, *supra* note 16, at 7.

¹⁶¹ See *supra* text accompanying notes 145–49.

¹⁶² LANDRY, *supra* note 7, at 86–87. Eighty percent of the black middle class during the 1980s were the first members of their families to reach that class level. *Id.* at 86.

disparities between blacks and whites.¹⁶³ The consumption or cash flow tax is usually mentioned in tax reform proposals as an alternative to the comprehensive income tax.¹⁶⁴

I. Comprehensive Income Tax Versus Consumption (Cash Flow) Taxation

Due to “exclusions, deductions, and shortcomings in income measurement rules, the tax base under current law departs from this comprehensive concept of income.”¹⁶⁵ Professors Moran and Whitford hypothesize that “deviations from the ideal of a comprehensive income tax systematically favor whites over blacks.”¹⁶⁶

Professor Zelenak, however, criticized their failure to justify use of comprehensive income as the standard for determining racial tax disparities,¹⁶⁷ and he argued from a consumption tax standpoint¹⁶⁸ that the current income tax is unfair to whites because savings and investment would be excluded from taxation under a consumption tax system.¹⁶⁹

¹⁶³ Moran & Whitford, *supra* note 1, at 753.

¹⁶⁴ U.S. DEPT. OF THE TREASURY, BLUEPRINTS FOR BASIC TAX REFORM 9 (Jan. 1977) [hereinafter BLUEPRINTS]. In January 2005, President George W. Bush formed a panel to identify problems with the tax code and to develop recommendations to make the code simpler, fairer, and more efficient. THE PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA’S TAX SYSTEM xi (Nov. 2005). The panel recommended two tax plans. The first was a “Simplified Income Tax Plan,” which would reduce complexity, eliminate some tax provisions, and lower tax rates. *Id.* at 107–08. The other was a “Growth and Investment Tax Plan,” which would lower tax rates, allow businesses to expense their capital investment, and reduce the tax burden on savings and investments. *Id.* at 151–52.

¹⁶⁵ BLUEPRINTS, *supra* note 164, at 3.

¹⁶⁶ Moran & Whitford, *supra* note 1, at 753.

¹⁶⁷ Zelenak, *supra* note 2, at 1565.

¹⁶⁸ The Congressional Budget Office explained the consumption tax:

All consumption-based taxes have one feature in common—they do not tax the normal return from saving and investment. As a result, the expected after-tax rate of return to the saver generally equals the expected before-tax rate of return from investment. That fundamental feature distinguishes taxes on consumption from taxes on income.

CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC EFFECTS OF COMPREHENSIVE TAX REFORM 2 (July 1997).

¹⁶⁹ Zelenak, *supra* note 2, at 1565. The following is contrary to Professor Zelenak’s claim of pro-white bias in a consumption tax:

(continued)

Interestingly, a consumption tax would address some of the disparities that Moran and Whitford found in the current tax code.¹⁷⁰ The model cash flow consumption tax, as discussed in *Blueprints for Basic Tax Reform*, would tax capital gains at the same rate as ordinary income and would tax donees for inter vivos gifts.¹⁷¹ The elimination of the capital gains tax preference would remove a significant disparity between investors, as compared to taxpayers who derive all or most of their earnings from salaries.¹⁷² The taxation of gifts would ensure that they did not escape the income tax.

In the short term, a comprehensive consumption-based tax would tax consumption that was paid for out of current wages and out of existing savings. That outcome would have the effect of taxing existing savings more heavily than they would be taxed under the current income tax. Take, for example, a couple who had saved for their retirement by holding shares in a mutual fund that was not part of a 401(k) plan or some other type of retirement account. Under current law, when the couple sold their shares in the fund to pay for their consumption needs, they would be taxed only on the appreciation of those shares—the excess of the selling price over the original purchase price. If a consumption tax with no transition relief was put in place before they had sold their shares, they would in effect have to pay tax on the entire sales price of the shares.

CONGRESSIONAL BUDGET OFFICE, *supra* note 168, at 5.

¹⁷⁰ See *supra* Part I for a discussion of the tax disparities. However, a consumption tax could impose heavier tax burdens on wage earners. According to the Congressional Budget Office:

If there were no other changes to the tax system and if tax revenues were held constant, a switch from the current income tax to a consumption-based tax would in fact raise the tax [rate] on earnings. By way of example, consider that a simple definition of consumption is income less saving. A consumption-based tax removes saving from the tax base. To maintain the same amount of revenue, the remaining piece of income, which is primarily earnings, must be taxed at a higher rate than before.

CONGRESSIONAL BUDGET OFFICE, *supra* note 168, at 4.

¹⁷¹ BLUEPRINTS, *supra* note 164, at 14–15.

¹⁷² See *supra* notes 31–34 and accompanying text.

J. Blueprints for Basic Tax Reform

In *Blueprints for Basic Tax Reform*, a comprehensive income and a consumption base tax, also called a cash flow tax, were analyzed as part of a tax reform proposal.¹⁷³ Both plans would broaden the tax base by including items currently excluded from tax, simplifying the Code and lowering tax rates.¹⁷⁴

K. The Comprehensive Income Tax

Under the comprehensive income tax, income is defined as consumption plus increases in net worth.¹⁷⁵ The calculation of taxable income is determined by subtracting from all receipts expenditures that are not consumption or increases in net worth.¹⁷⁶ Deductible expenditures would include business expenses, expenses incurred in earning a salary, and possibly “interest, charitable contributions, State and local income and sales taxes, and large nondiscretionary medical expenditures.”¹⁷⁷

A comprehensive income tax would eliminate the corporate income tax and allow corporate integration.¹⁷⁸ Shareholders would report their share of corporate income whether or not distributed.¹⁷⁹ Corporate income would be taxed at the rate applicable to the shareholder.¹⁸⁰

Under a comprehensive income tax, capital gains that reflect an increase in net worth would be subject to tax, whether or not realized, while capital losses would be deducted in full.¹⁸¹ This is consistent with Professors Moran and Whitford’s proposal to tax unrealized appreciation from publicly traded securities and commercial real estate.¹⁸² However,

¹⁷³ BLUEPRINTS, *supra* note 164, at 2.

¹⁷⁴ *Id.* at 2–3.

¹⁷⁵ *Id.* at 3.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 4–5.

¹⁷⁹ *Id.* “Corporations would supply to all stockholders a statement of the amount of profit attributed to that stockholder in the previous year, and an adjustment to basis that would rise with earnings and fall with distributions.” *Id.* at 14.

¹⁸⁰ *Id.* at 4–5.

¹⁸¹ *Id.* at 5. “Deferral of a portion of tax liability is a form of reduction in tax burden in an income tax framework because interest can be earned on the deferred tax payments.” *Id.* at 25.

¹⁸² See Moran & Whitford, *supra* note 1, at 782.

(continued)

due to the burden of annual asset valuations, tax reporting, and difficulties taxpayers may have in paying taxes on unrealized gains, the model plan outlined in *Blueprints for Basic Tax Reform* did not adopt that approach.¹⁸³ Instead, the model plan would tax capital gains only upon realization, at ordinary tax rates, with adjustments to the stock basis for retained earnings and inflation.¹⁸⁴ Capital losses would be deductible in full from all sources of income.¹⁸⁵

The model comprehensive income tax would allow the deduction of mortgage interest.¹⁸⁶ The justifications for this benefit are the desire to provide equal treatment to taxpayers (whether they purchase a home with accumulated funds or borrow to finance the purchase), and the difficulty of tracing borrowed funds secured by collateral other than the residence.¹⁸⁷

As a remedy to the marriage penalty, income splitting could be allowed so that the combined income of a married couple would be divided equally between spouses and taxed at the same rates as that applicable to single taxpayers.¹⁸⁸ The possibility for a marriage bonus would exist, assuming the spouses have differing incomes.¹⁸⁹

Contributions to retirement plans and earnings on those contributions should be included in the comprehensive income tax base because they are increases in net worth.¹⁹⁰ Current income tax law taxes earnings on pension and retirement plans as they are distributed and allows deductions to employers and employees for plan contributions.¹⁹¹ That would continue under the model comprehensive income tax, but pension plan

The Internal Revenue Code prescribes an “income” tax, with “income” defined by the elaborate body of statutory and administrative tax law that has evolved. But this definition is criticized by many observers, who believe that tax burdens should be related to a broader tax base, i.e., to a wider set of transactions.

BLUEPRINTS, *supra* note 164, at 26.

¹⁸³ See BLUEPRINTS, *supra* note 164, at 81.

¹⁸⁴ *Id.* at 77.

¹⁸⁵ *Id.* at 77, 79.

¹⁸⁶ *Id.* at 88.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 103.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 7–8, 56.

¹⁹¹ *Id.* at 8.

earnings would be taxed upon accrual.¹⁹² Deferral of income tax on pension contributions and earnings under the current income tax, along with the deferral of tax on unrealized capital gains, illustrates that the current income tax incorporates consumption tax features by deferring taxation of increases in net worth until distribution, or realization, occurs.¹⁹³

Gifts made by taxpayers would be excluded from the model comprehensive income tax base and included in the gross income of the recipient.¹⁹⁴ This is illustrative of the “standard of living” concept because the donor reduces their net worth by the amount of the gift.¹⁹⁵ In addition, employer-paid health insurance premiums would be included in the tax base, as well as the Medicare component of the Social Security tax.¹⁹⁶ The value of any medical benefits received would be excluded.¹⁹⁷

Government cash transfer payments, such as “veterans’ disability and survivor benefits, veterans’ pensions, aid to families with dependent children, supplemental security income, general assistance, workmens’ compensation, black lung benefits, and the subsidy element of food stamps,” would be included in the tax base.¹⁹⁸ In-kind benefits, such as housing and medical care, would be excluded from taxation.¹⁹⁹

¹⁹² *Id.* at 56.

¹⁹³ *Id.* at 23. The Congressional Budget Office weighed in on the proposals:

[C]haracterizing recent proposals as a fundamental switch from taxing income to taxing consumption is an overstatement. The current U.S. income tax system is really a hybrid of an income tax and a consumption tax: it already taxes many forms of saving as they would be taxed under a consumption-based tax. For example, taxpayers can deduct saving for retirement from taxable income—either through employment-related pension plans, individual retirement accounts (IRAs), or 401(k) plans—and pay tax on the principal and interest from those accounts only on withdrawal. The result is that normal returns from pension saving are not taxed—the same treatment as under a consumption-based tax.

CONGRESSIONAL BUDGET OFFICE, *supra* note 168, at 2; *see also* Zelenak, *supra* note 2, at 1563–65.

¹⁹⁴ BLUEPRINTS, *supra* note 164, at 31–32, 36–38.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 59.

¹⁹⁷ *See id.*

¹⁹⁸ *Id.* at 61–62.

¹⁹⁹ *Id.* at 62.

L. The Consumption Base or Cash Flow Tax

The cash flow or consumption base tax²⁰⁰ would exclude savings and investment, or net worth, from taxation until consumed by the taxpayer.²⁰¹ The cash flow tax takes into account that taxpayers use their earnings for either personal consumption, savings, or gifts.²⁰² All monetary receipts would be included in the tax base, reduced by savings and gifts, and the difference would represent their consumption.²⁰³ The cash flow tax would also utilize corporate integration; however, no tax would be incurred by any shareholder until corporate earnings were consumed.²⁰⁴ The receipt of gifts and inheritances would also be a taxable event, but the donor would receive a tax deduction.²⁰⁵ Furthermore, property tax deductions would not be allowed under the cash flow tax.²⁰⁶

Another factor to take into account is the effect of each tax system on the lifetime tax treatment of taxpayers. A consumption tax is superior to an income tax in maintaining progressivity among taxpayers over their lifetimes, using lifetime wealth as a measure of ability to pay,²⁰⁷ however, increases in net worth would escape taxation until consumed.²⁰⁸ The effect of an income tax on similarly situated taxpayers varies depending on their patterns of consumption and saving.²⁰⁹ Under an income tax, taxpayers who save early in life have more lifetime income, but higher tax burdens, due to double taxation of their earnings and investment returns.²¹⁰

IV. DISCUSSION

Professors Moran and Whitford did not find intentional discrimination on the part of Congress, but they found a lack of awareness on Congress's

²⁰⁰ *Id.* at 113.

²⁰¹ See CONGRESSIONAL BUDGET OFFICE, *supra* note 168, at 16; BLUEPRINTS, *supra* note 164, at 11. "In some respects, a broad-based consumption tax is more equitable than a broad-based income tax. It is also easier to design and implement and has fewer harmful disincentive effects on private economic activity." BLUEPRINTS, *supra* note 164, at 23.

²⁰² BLUEPRINTS, *supra* note 164, at 113.

²⁰³ *Id.*

²⁰⁴ *Id.* at 133.

²⁰⁵ *Id.* at 12, 15.

²⁰⁶ *Id.* at 117–18.

²⁰⁷ See *id.* at 39.

²⁰⁸ See CONGRESSIONAL BUDGET OFFICE, *supra* note 168, at 16; *supra* note 201 and accompanying text.

²⁰⁹ BLUEPRINTS, *supra* note 164, at 39.

²¹⁰ *Id.* at 40.

part as the basis for the tax laws being harmful to black interests.²¹¹ They argued that if the Code as a whole is consistent in this manner, it provides support for the Critical Race critique that racial subordination is reflected in American institutions, even those that are seemingly race-neutral like the tax code.²¹²

The Critical Race component is evidenced by the disproportionate tax benefits shown by their study of black and white tax outcomes.²¹³ Based

²¹¹ Moran & Whitford, *supra* note 1, at 758. *But cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection Reckoning with Unconscious Racism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 235, 236 (Kimberle Crenshaw et al. eds., 1995) (arguing that, because finding “discriminatory motivation” is so difficult, “racially disproportionate harm should trigger heightened judicial scrutiny without consideration of motive”). Lawrence wrote:

Washington v. Davis . . . requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law’s enactment or administration.

[C]ritics [of *Davis*] advance two principal arguments. The first is that a motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to hide. And because behavior results from a multitude of motives, governmental officials will always be able to argue that racially neutral considerations prompted their actions. Moreover, where several decisionmakers are involved, proof of racially discriminatory motivation is even more difficult.

The second objection to the *Davis* doctrine is more fundamental. It argues that the injury of racial inequality exists irrespective of the decisionmakers’ motives. Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her? Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind? Those who make this second objection reason that the “facts of racial inequality are the real problem.” They urge that racially disproportionate harm should trigger heightened judicial scrutiny without consideration of motive.

Id. (citations omitted).

²¹² See Moran & Whitford, *supra* note 1, at 751–52, 758.

²¹³ See *id.* at 799 (stating that “members of the black community receive, on average, fewer of the tax benefits . . . than the average member of the white community”).

on that standard, Professors Moran and Whitford succeeded in showing that the tax provisions they studied reflected racial subordination.²¹⁴ Acknowledgement of historical racial subordination as a contributor to or cause of tax disparities supports remedying the historical racial disparities as a more direct means of addressing the problem.²¹⁵ This argument has validity in that the disparities are not due to the tax code applying different rules to blacks as opposed to whites; the disparities result from blacks not qualifying for similar tax treatment due to their economic position.²¹⁶

Yet, Professors Moran and Whitford's recommendations did not address the historical economic disparities that were the foundation for the tax disparities they documented.²¹⁷ Their approach focused instead on adjusting tax outcomes as the remedy.²¹⁸ Based on their Critical Race analysis, their approach appears reasonable. Because the racial disparity is reflected through the Code, fixing the Code would remedy the problem.

²¹⁴ See *id.* at 801 (stating that their study provided evidence that some code provisions disfavor blacks as a group).

²¹⁵ See *supra* Part III for a discussion of historical racial disparities.

²¹⁶ See Jensen, *supra* note 2, at 1759–60 (“Moran and Whitford are not always clear in distinguishing between cases in which the Code has different effects because blacks and whites, on the average, are in different economic circumstances before imposition of any tax, and cases in which the Code has different effects on blacks and whites in approximately the same pre-tax economic positions. Those two flaws, assuming that both can be attributed to the Code in the first place, are hardly of the same moral order.”).

²¹⁷ Instead, their proposals can be analogized to the “perpetrator perspective.” Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 29 (Kimberle Crenshaw et al. eds., 1995). Freeman stated, “The perpetrator perspective sees racial discrimination not as conditions but as actions, or series of actions, inflicted on the victim by the perpetrator.” *Id.* The perpetrator perspective lent itself to remedial schemes which prohibited actions or behaviors of the perpetrator without resolving the objective conditions which would continue to harm the victims, such as joblessness, poverty and lack of housing. *Id.* “The victim . . . conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated. To remedy the condition of racial discrimination would demand affirmative efforts to change the condition.” *Id.*

²¹⁸ See Zelenak, *supra* note 2, at 1571–72 (discussing Moran and Whitford's solution to the issue of black employees participating at a lower rate than white employees in 401(k) plans—repeal section 401(k)—and stating that “Moran and Whitford favor accommodating current behavior”).

Professors Moran and Whitford concluded that the Black Congress would: (1) retain the gift and inheritance exclusion;²¹⁹ (2) repeal the capital gains preference;²²⁰ (3) tax unrealized appreciation on publicly traded securities and nonresidential real estate;²²¹ (4) replace the mortgage interest and property tax deductions with a tax credit;²²² (5) retain section 121;²²³ (6) possibly repeal section 401(k) while retaining the health benefits exclusion;²²⁴ and (7) adopt a single tax rate or allow optional tax filing statuses to eliminate the marriage penalty.²²⁵ The remainder of this section analyzes Professor Moran and Whitford's proposed changes to the Code and their likely impact on middle and lower-income blacks.

The retention of section 102 and the exclusion of health benefits would not be particularly harmful to the interests of either poor or middle-class blacks. In fact, it would probably be more beneficial to middle-income blacks because they are more likely to take advantage of those provisions. Professors Moran and Whitford's recommendations regarding the marriage penalty are probably more beneficial to lower-income black couples because their income levels may make them more susceptible to the penalty; however, this recommendation would not harm the interests of middle-income blacks, either.²²⁶

The recommendation to repeal the capital gains tax preference would harm middle-income blacks who are more likely to take advantage of and benefit from this provision. Looking at the capital gains tax preference and its relevance to blacks as a group, Professors Moran and Whitford had a justifiable argument for repeal: most blacks do not use it; therefore, its elimination will not be significant to their interests.²²⁷ That analysis is particularly persuasive if the focus is on lower-income blacks, who are least likely to own capital assets. Even though census data shows that

²¹⁹ Moran & Whitford, *supra* note 1, at 783.

²²⁰ *Id.* at 782–83.

²²¹ *Id.* at 782.

²²² *Id.* at 781.

²²³ *Id.* at 782.

²²⁴ *Id.* at 790.

²²⁵ *Id.* at 798–99.

²²⁶ See Zelenak, *supra* note 2, at 1570–71, for a discussion of the disproportionate burden on whites due to the joint return and the “stacking” effect. See *id.* at 1573–74, for a discussion of “black singles” bearing a disproportionate tax burden based on some of Moran and Whitford's marriage penalty proposals.

²²⁷ Moran & Whitford, *supra* note 1, at 782 (“It is very unlikely that many blacks benefit directly from special rates for capital gains.”).

whites have a higher percentage of their net worth in stocks and mutual funds,²²⁸ black ownership percentages, based on their net worth, are increasing.²²⁹ In 1988, stocks and mutual funds represented 1.1% of the net worth of blacks, as compared to 6.7% for whites.²³⁰ In 1998, the percentage of net worth represented by stocks and mutual funds for blacks and whites was 6.3% and 19.6%, respectively.²³¹ In 2000, the percentages for blacks and whites were 4% and 16.2%, respectively.²³² Despite the reduction from 1998 to 2000, black net worth reflects a greater reliance on capital assets and serves as an important step in the diversification of black investments.²³³

Furthermore, blacks with investment assets tend to invest in real estate.²³⁴ Census data shows that rental property represented 7.9% of the net worth of whites and 7.8% of the net worth for blacks in 1988, while commercial real estate represented 4.3% and 3% of the net worth of whites and blacks, respectively.²³⁵ In 2000, rental property represented 5.6% of the net worth of blacks and 3.6% of the net worth for whites, while commercial real estate was 2.9% for blacks and 3.7% of the net worth of whites, respectively.²³⁶

Assuming those real estate holdings qualify for capital gains treatment,²³⁷ the owners would benefit from the lower capital gains tax rate. In addition, more so than with stocks and mutual funds, rental and commercial real estate holdings reflect greater parity in terms of black and white ownership rates.²³⁸ Despite the minimal rate of capital asset

²²⁸ U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P70-88, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000, at 12 (May 2003) [hereinafter 2000 CENSUS] ("Black . . . households had a significantly lower proportion [of their net worth] in financial assets such as stocks and mutual fund shares . . . compared with non-Hispanic White households.").

²²⁹ *See id.* at 15 tbl.I.

²³⁰ U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-70, NO. 22, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1988, at 10 tbl.J (Dec. 1990) [hereinafter 1990 CENSUS].

²³¹ 2000 CENSUS, *supra* note 228, at 15 tbl.I.

²³² *Id.*

²³³ *See id.*

²³⁴ OLIVER & SHAPIRO, *supra* note 16, at 104.

²³⁵ 1990 CENSUS, *supra* note 230, at 10 tbl.J.

²³⁶ 2000 CENSUS, *supra* note 228, at 15 tbl.I.

²³⁷ *See Moran & Whitford, supra* note 1, at 761.

²³⁸ 2000 CENSUS, *supra* note 228, at 15 tbl.I.

ownership among blacks, the elimination of the tax preference would harm the interests of those blacks most likely to benefit from this provision.²³⁹

Likewise, Professors Moran and Whitford's recommendation to eliminate the home mortgage interest and property tax deductions and replace them with a tax credit²⁴⁰ would harm the interests of middle-income taxpayers. Equity acquired through home ownership is the most significant financial asset owned by blacks.²⁴¹ Home ownership also represents a greater percentage of net worth for blacks, as compared to whites.²⁴² In 2000, owner-occupied homes represented 61.8% of black net worth, while for whites it was 31%.²⁴³ These statistics illustrate the importance of home ownership, but also that home ownership is the principal investment possessed by blacks. In addition, for blacks and whites with household income greater than \$50,000, their home ownership rates were seventy-five percent and eighty-five percent, respectively, reflecting the relationship between rising incomes and home ownership rates.²⁴⁴ Eliminating the home ownership tax provisions would harm the interests of those blacks most able to utilize them and would impair the ability of many blacks to acquire their most significant asset.

The repeal of section 401(k) would harm middle-income blacks because they are more likely to have sufficient resources to put away for retirement and because their jobs are more likely to make these plans available.²⁴⁵ In 1988, IRAs and Keogh plans represented 3.8% of the net

²³⁹ See Zelenak, *supra* note 2, at 1562; see also Johnson, *supra* note 81, at 1784–85.

²⁴⁰ Moran & Whitford, *supra* note 1, at 781.

²⁴¹ OLIVER & SHAPIRO, *supra* note 16, at 108.

²⁴² *Id.*

²⁴³ 2000 CENSUS, *supra* note 228, at 15 tbl.I.

²⁴⁴ OLIVER & SHAPIRO, *supra* note 16, at 109.

²⁴⁵ See Moran & Whitford, *supra* note 1, at 788 (arguing that blacks are less likely to be employed and thus get fewer 401(k) benefits, and showing that higher compensated employees receive more benefits from 401(k) plans), 790 (“Blacks may work less frequently for employers who offer 401(k) plans.”). Injecting middle-class blacks into the discussion changes the analysis because these blacks would benefit from 401(k) with more lucrative jobs. See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 514 (2004). Some commentators have vehemently rejected the repeal of section 401(k). See Zelenak, *supra* note 2, at 1571–72 (describing plans to repeal 401(k) plans as “more a surrender than a solution”). *But see* Livingston, *supra* note 2, at 1810 (“Blacks would likely benefit less from employee benefit tax incentives, even at equivalent income levels, not because they are indifferent to retirement but because their lesser wealth means they are likely to need more of their income for immediate consumption.”).

worth of whites and 1.8% for blacks.²⁴⁶ In 2000, IRA and Keogh plans represented nine percent of the net worth of whites and only 2.3% for blacks; however, 401(k)s and other savings plans represented 6.7% and 9.6% of the net worth for blacks and whites, respectively.²⁴⁷ 401(k)s and other savings represent the third largest net worth category for blacks, only surpassed by housing and vehicle equity.²⁴⁸ With 401(k)s representing such a significant portion of the overall net worth of blacks, it provides a strong basis for the continuation of these tax benefits.²⁴⁹

In the end, the question is whether the elimination or alteration of these tax provisions will benefit blacks in the aggregate. Some of these recommendations will harm middle-class blacks; however, no clear demonstration has been made that lower-income blacks will benefit, with the possible exceptions of the marriage penalty and the mortgage tax credit provisions.²⁵⁰

A. *The North Carolina Law Review Symposium*

In 1998, the North Carolina Law Review published a symposium that analyzed the state of Critical Tax scholarship, focusing on feminist and race tax scholarship.²⁵¹ Professor Lawrence Zelenak, who wrote the lead article, listed the following complaints with Critical Tax scholarship: (1) an over-eagerness to blame tax law for harming black interests;²⁵² (2) a

²⁴⁶ OLIVER & SHAPIRO, *supra* note 16, at 106.

²⁴⁷ 2000 CENSUS, *supra* note 228, at 15 tbl.I.

²⁴⁸ *Id.*

²⁴⁹ Zelenak, *supra* note 13, at 1571–72 & n.258 (stating that middle-class blacks save at similar rates as other middle-class persons but choose less risky and poorer performing investments).

²⁵⁰ See *supra* notes 20–50 and accompanying text.

²⁵¹ Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C. L. Rev. 1519 (1998).

²⁵² Zelenak, *supra* note 2, at 1523. This criticism is reflective of Alan David Freeman's discussion of the notions of fault and causation in connection with the perpetrator perspective:

Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm. The fault idea is reflected in the assertion that only "intentional" discrimination violates the antidiscrimination principle. In its pure form, intentional discrimination is conduct accompanied by a purposeful desire to produce discriminatory results. One can thus evade responsibility for ostensibly

(continued)

selection bias in the tax provisions analyzed because provisions that harm black interests were studied and beneficial provisions were left out;²⁵³ and (3) the proposed solutions are not sufficiently considered either in their ability to resolve the problem or as to whether the tax system is the best approach for doing so.²⁵⁴

discriminatory conduct by showing that the action was taken for a good reason, or for no reason at all.

The fault concept gives rise to a complacency about one's own moral status; it creates a class of "innocents," who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations.

... The causation principle makes it clear that some objective instances of discrimination are to be regarded as mere accidents, or "caused," if at all, by the behavior of ancestral demons whose responsibility cannot follow their successors in interest over time. The causation principle also operates to place beyond the law discriminatory conduct (action taken with a purpose to discriminate under the fault principle) that is not linked to any discernible "discriminatory effect."

Freeman, *supra* note 217, at 1054–56 (citations omitted).

²⁵³ Zelenak, *supra* note 2, at 1523–24. A thorough examination of the provisions in question leads to a startling revelation:

According to estimates of the federal government's Office of Management and Budget for 1996, the value to taxpayers of major portions of the tax expenditure budget studied by Moran and Whitford is staggering. Arguably the most "pro-black" provision, the EITC, was worth \$24.3 billion in 1996. However, the home mortgage interest deduction was valued at \$43 billion; favorable capital gains treatment on homes garnered taxpayers another \$20.1 billion; employer-paid health insurance was worth \$56.7 billion; and net itemized deductions landed a whopping \$72 billion in taxpayers' pockets, all of which are relatively more advantageous to white people than black people. In light of the huge government expenditures in the areas in question, Moran and Whitford are *more than justified* in their selections.

Shurtz, *supra* note 2, at 1877 (citations omitted).

²⁵⁴ Zelenak, *supra* note 13, at 1524. In connection with the last criticism, Professor Zelenak wrote, "It is unfair to criticize current law for its effects on women or blacks without showing a way to do better; more important, mere critique without a workable solution does nothing to better anyone's solution." *Id.*; see also Bryce, *supra* note 2, at (continued)

In response to his first criticism, the goal of Professors Moran and Whitford was to determine whether a racial bias existed within the tax code, testing the Critical Race viewpoint that racial subordination is reflected in major American institutions.²⁵⁵ The racial disparities they uncovered were not surprising because they acknowledged that taxpayers with higher incomes receive more benefits from the Code.²⁵⁶ That is a class distinction, which intersects with race because blacks, as a group, have lower incomes and lower wealth holdings than whites.²⁵⁷ That aspect of Professors Moran and Whitford's analysis was a result of the historical, social, and economic conditions of blacks and whites.²⁵⁸

Professor Zelenak wrote:

[Professors Moran and Whitford] define a tax benefit as “any opportunity for deductions or exclusions from income that deviate from the ideal of a comprehensive income tax base.” If a deviation from that ideal disproportionately favors whites, that is evidence in favor of the critical race theory hypothesis. The entire analysis depends on the validity of their assumption that a comprehensive income tax base is the appropriate race-neutral standard. For the Code to be skewed in favor of whites, it must be skewed relative to some standard. That standard, according to Moran and Whitford, is a comprehensive income tax.²⁵⁹

1688 (“The second general observation is that most of this literature starts with the premise that either women or blacks are oppressed.”); Shurtz, *supra* note 2, at 1878 (“When one examines the apparent relative weakness of some of the proposals, one must keep in mind that Moran and Whitford intended the concepts of these proposals to reflect the different perspective that could be expected to emerge in their metaphor of a Black Congress. This is a powerful image, for it is juxtaposed against its counterpart in the real world, an overwhelmingly White Congress. The overall impact of this work is forceful at the very least and invites more exhaustive study that is sure to follow—study that is sorely needed.” (citation omitted)).

²⁵⁵ Moran & Whitford, *supra* note 1, at 751–52.

²⁵⁶ *Id.* at 757.

²⁵⁷ See *id.* at 759; OLIVER & SHAPIRO, *supra* note 16, at 100–01, 197 tbl.A5.1.

²⁵⁸ See Moran & Whitford, *supra* note 1, at 756–58 (discussing the use of controls in their study); see also discussion *supra* Part III (analyzing the historical subordination of blacks in American society).

²⁵⁹ Zelenak, *supra* note 2, at 1563 (citations omitted).

In *A Black Critique*, deviations from the comprehensive income tax that benefits whites disproportionately served as evidence of racial bias.²⁶⁰ Comprehensive income taxation is not synonymous with race-neutrality.²⁶¹ It does, however, utilize a broad definition of income, with limited exclusions and deductions and minimal constraints on the measurement of income,²⁶² reaching the full extent of the government's taxing power. The current system, due to administrative and policy considerations, is not consistent with a comprehensive income tax, benefiting the economically well off disproportionately.²⁶³ Whites are more likely to fit into that category than blacks, and this is the basis for Professor Moran and Whitford's hypothesis.²⁶⁴

Related to this argument, Professor Zelenak pointed out that many of the provisions criticized by Professors Moran and Whitford are consistent with a consumption tax model.²⁶⁵ He then contrasted their income tax analysis with a consumption tax and argued that, from a consumption tax point of view, the current tax code is anti-white.²⁶⁶ Due to their failure to provide justification for why the comprehensive income tax is the appropriate standard for determining tax discrimination, Professor Zelenak argued that the consumption tax is equally valid as a standard for comparison, from a white taxpayer's point of view.²⁶⁷

In the event that tax reform does occur, the likelihood of a consumption tax being enacted is not very strong.²⁶⁸ Therefore, modification to the current income tax system is a more realistic option.²⁶⁹ A revenue-neutral consumption tax would require a significant broadening

²⁶⁰ Moran & Whitford, *supra* note 1, at 753.

²⁶¹ See BLUEPRINTS, *supra* note 164, at 2–3 (defining the comprehensive income tax without mentioning race-neutrality).

²⁶² *Id.* at 2.

²⁶³ See, e.g., Moran & Whitford, *supra* note 1, at 757.

²⁶⁴ See *id.* at 757, 759.

²⁶⁵ Zelenak, *supra* note 2, at 1564.

²⁶⁶ *Id.* at 1565.

²⁶⁷ *Id.*

²⁶⁸ “[C]omparing the current income tax system to an idealized—very comprehensive and uniform—version of a consumption-based tax is not particularly realistic simply because such a version is unlikely to be enacted.” CONGRESSIONAL BUDGET OFFICE, *supra* note 168, at 6.

²⁶⁹ See *id.*

of the tax base or an increase in tax rates, making it less politically viable.²⁷⁰

Realistic tax reform should broaden the tax base, lower tax rates and, to the extent possible, eliminate distinctions among different types of income.²⁷¹ Past efforts at tax reform, which should serve as a predictor for future attempts, “generally have retained an income-based system while attempting to broaden the tax base and lower tax rates. A good example is the Tax Reform Act of 1986”²⁷² The most expedient way to eliminate tax disparities among similarly situated taxpayers is to reduce deductions and exclusions from income.²⁷³ The result would be an expanded tax base, lower tax rates, and a reduction in tax-motivated activities.²⁷⁴

Professor Zelenak did acknowledge support for the examination of the tax code for racial effects as a fallback position to some other “normative” justification.²⁷⁵ However, when racial discrimination has obstructed blacks from taking advantage of opportunities available to other groups, preventing a significant segment of the black population from utilizing tax benefits, then the basis for a race-based analysis and critique is justified. In circumstances where there is no evidence of racial discrimination preventing or inhibiting black utilization of a tax benefit, then a race-based critique serves no legitimate purpose.

Professor Zelenak’s second criticism was more problematic because it appeared that the deck was stacked by only addressing tax provisions that benefit whites more than blacks.²⁷⁶ His criticism, however, failed to acknowledge that most of the provisions reviewed by Professors Moran and Whitford related to wealth holdings.²⁷⁷ Black wealth accumulation was prevented or impaired due to a history of racism and discrimination.²⁷⁸ These wealth disparities are illustrated through the Code,²⁷⁹ strengthening Professors Moran and Whitford’s argument that the tax code reflects racial

²⁷⁰ See *id.* at x, 4–6.

²⁷¹ See *id.* at ix.

²⁷² *Id.* at 18.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Zelenak, *supra* note 2, at 1567.

²⁷⁶ See *supra* note 253 and accompanying text.

²⁷⁷ See *supra* notes 61–75 and accompanying text.

²⁷⁸ See discussion *supra* Part III.

²⁷⁹ See discussion *supra* Part I.

disparities.²⁸⁰ In addition, the study of the racial tax gap illustrates the entrenched nature of racial inequality in our society.

Oliver and Shapiro noted that the wealth gap, which is the foundation for the racial tax gap, is more significant in terms of its effects on the “life chances” of blacks than any other economic factor.²⁸¹ The wealth gap affects blacks generationally because the opportunity to improve the educational and financial futures of their descendants is impaired.²⁸² The provisions analyzed by Professors Moran and Whitford, illustrating how the wealth gap translates into a tax gap, enrich the Critical Race critique and provide further evidence of the pervasiveness of generational wealth differences between the races.

Regarding the claim of selection bias on the part of Professors Moran and Whitford,²⁸³ I do not consider it problematic. The paucity or lack of data allowing analysis of various tax provisions is one obvious roadblock to an expanded study of this type. The provisions studied are, to a large extent, hallmarks of middle-class status and reflect the deficit that blacks have in reaching economic parity with whites, providing further evidence of wage income being the primary basis for black middle-class ascension.²⁸⁴

In addition, the tax provisions Professor Zelenak mentioned as those that disproportionately benefit blacks, such as the earned income tax credit and the exclusion of welfare benefits from taxable income, confirm the class dynamic that is at work.²⁸⁵ The tax provisions that disproportionately burden whites, the progressive rate structure, wealth transfer taxes, and the phasing out of itemized deductions and personal exemptions reflect the economic condition of the white populace.²⁸⁶ Some commentators have responded to this argument by looking to the tax expenditure budget, finding that the tax benefits received by whites exceed those received by

²⁸⁰ See discussion *supra* Part III.

²⁸¹ See OLIVER & SHAPIRO, *supra* note 16, at 2–3; see also WILSON, *supra* note 78, at ix (“One’s economic class position determines in major measure one’s life chances, including the chances for external living conditions and personal life experiences.”).

²⁸² See OLIVER & SHAPIRO, *supra* note 16, at 2–3 (showing that lack of wealth to pass down to future generations increases racial inequality). “Private wealth thus captures inequality that is the product of the past, often passed down from generation to generation.” *Id.* at 2.

²⁸³ See *supra* note 253 and accompanying text.

²⁸⁴ OLIVER & SHAPIRO, *supra* note 16, at 7.

²⁸⁵ Zelenak, *supra* note 2, at 1568.

²⁸⁶ See *id.* at 1568–69.

blacks.²⁸⁷ However, the focus is not on which group receives tax benefits alone, but whether racial discrimination impacted a group's ability to take advantage of that benefit.

Concerning the third problem, Professor Zelenak was correct in noting the need to determine whether the tax system is the most appropriate way to respond to the problem and whether the proposals will have their intended results. He stated that some of the solutions proposed will harm the interests of blacks,²⁸⁸ however, the interests of middle-income blacks will be harmed more significantly, with minimal to neutral effects for lower-income blacks.

B. Use of Socioeconomic Factors to Address the Tax Gap

Middle and upper-income blacks are more likely to support the capital gains tax preference,²⁸⁹ the mortgage interest and property tax provisions,²⁹⁰ and the exclusion of gifts from income tax.²⁹¹ In an effort to ensure that the interests of those members of the black community are not negatively harmed, targeted tax incentives would be preferable to the policies supported by Professors Moran and Whitford. Their use of race as the primary basis for measuring tax disparities resulted in an overly broad approach, which, to some extent, explains the nature of their recommendations. Because the tax code does not identify taxpayers by race,²⁹² their approach eliminated provisions that are disproportionately favorable to white taxpayers.

Place-based incentives that provide tax benefits to residents of lower-income communities would target tax provisions to those most likely to benefit. Examples include Empowerment Zone and Enterprise Community legislation,²⁹³ which provide tax credits and investment incentives to

²⁸⁷ See, e.g., Moran & Whitford, *supra* note 1, at 781, 788, 801 n.170; Livingston, *supra* note 2, at 1809; Shurtz, *supra* note 2, at 1877.

²⁸⁸ Zelenak, *supra* note 2, at 1573–74.

²⁸⁹ See Moran & Whitford, *supra* note 1, at 761–62 (showing that wealthy taxpayers favor the capital gains tax preference).

²⁹⁰ See *id.* at 774 (“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.”).

²⁹¹ See *id.* at 762 (“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.”).

²⁹² *Id.* at 753.

²⁹³ I.R.C. §§ 1391–1397C (2000).

businesses located in areas with “pervasive poverty, unemployment and general distress.”²⁹⁴ Another example is the District of Columbia Enterprise Zone,²⁹⁵ which provides a \$5,000 one-time tax credit for first-time homebuyers in the District of Columbia.²⁹⁶ Those programs could be used as models for providing tax incentives to an intended population without eliminating or reducing provisions that benefit others. Rather than eliminate mortgage interest and other homeowner-related tax incentives, Professors Moran and Whitford’s tax credit proposal could apply to specific areas that meet criteria similar to those used in the Empowerment Zone program, with the intent of benefiting areas with significant black populations. Area residents could also receive reduced or no taxation on capital gains as a means of encouraging wealth accumulation.²⁹⁷ However, demand-side issues related to employment and income levels would need to be addressed. For this reason, the tax approach will not succeed on its own. It has to be combined with other programs to address issues that the tax code alone cannot remedy.

C. Framing the Issue

The most contentious issue in utilizing the tax code to address economic disparities between whites and blacks concerns differing opinions on the underlying causes of those disparities. Use of the Code to benefit specific groups or encourage certain activities is not new. What is unique about Professors Moran and Whitford’s work is their advocacy of the tax code to remedy inequities due to race and the history of racial discrimination in this country. They acknowledge past racial discrimination as the culprit, which includes Jim Crow, unequal funding of public education, employment discrimination, redlining, and mortgage discrimination.²⁹⁸ Professors Moran and Whitford did not certify the tax code as the sole means of resolving these issues. The tax code is one approach in an effort that requires input from and coordination with multiple areas, including employment policy, education, social services,

²⁹⁴ *Id.* § 1392(a)(2).

²⁹⁵ *Id.* §§ 1400–1400C.

²⁹⁶ *Id.* § 1400C(a).

²⁹⁷ The Tax Increase Prevention and Reconciliation Act of 2005 extended the current capital gains rates through December 31, 2010. Pub. L. No. 109-222, U.S.C.C.A.N. (120 Stat. 345) 234, 278.

²⁹⁸ See discussion *supra* Part III.

and re-invigorated efforts to address racial discrimination in all facets of American life.²⁹⁹

In his critique of the solutions proposed in *A Black Critique*, Professor Zelenak wrote: “The general question is whether the tax laws should be changed to accommodate black consumption patterns and low savings rates, when those patterns are of doubtful utility.”³⁰⁰ He also stated:

[Professors Moran and Whitford] point out that blacks hold a greater percentage of their wealth in personal-use cars and trucks than do whites. They find it ironic that this “one category of assets which blacks favor in their investment behavior, in comparison with white investment behavior, receives no tax benefits.” The characterization of buying cars as “investment behavior” is dubious³⁰¹

Those statements suggest that black consumption and saving behavior is a choice that is divorced from higher rates of unemployment, lower salaries, and compromised opportunities to pass wealth inter-generationally, and that black tax circumstances are solely a result of bad choices made by blacks as a group, unaffected by past disadvantage or racism. A logical conclusion, based on that view, is that the tax code is an equal opportunity system and a taxpayer’s own choices determine whether the Code helps or hurts their economic position, and most blacks make the wrong choice. There is no acknowledgement of racial circumstances affecting or constraining the economic choices available to blacks in terms of their consumption and saving behavior.

Ironically, the consumption behavior of blacks is actually quite rational under our current tax system, which discourages saving and investment to avoid taxation of interest income and capital gains. By consuming their

²⁹⁹ See Livingston, *supra* note 245, at 1793 (“Critical scholarship, in tax or other fields, cannot survive without a broader revival of interest in social justice and distributive concerns. In the tax field, this means rethinking the entire issue of progressivity and vertical equity to consider the effects of increasing income inequality, the rise of the global economy, and the concentration of poverty among women, minorities, and recent immigration groups. For this to occur, traditional scholars must pay greater attention to the issues raised by critical tax authors, and the ‘crits,’ for their part, must begin to integrate their work into a broader argument for distributive fairness. A compartmentalized discourse, in which various groups advance separate complaints about the tax code, is unlikely to produce needed changes.”).

³⁰⁰ Zelenak, *supra* note 2, at 1572.

³⁰¹ *Id.*

income instead of saving, blacks are able to reduce their overall level of taxation as compared to taxpayers who save and invest.³⁰² From a long-term perspective, black consumers reduce their overall economic power.³⁰³ On a short-term basis, however, they also reduce their tax exposure.³⁰⁴ This consumption bias is encouraged by the current income tax system's treatment of capital investment.³⁰⁵

Along similar lines, Professor Schmalbeck, in discussing vertical and horizontal equity in his analysis of *A Black Critique*, wrote:

[T]he prevailing sense of vertical equity appears to reflect the view that low-income taxpayers should hardly be subject to the income tax at all and that middle-income taxpayers should be subject only to relatively light taxation. This is a policy that is presumably not influenced to any significant degree by considerations of race. If African-Americans turn out to be the beneficiaries of such a view, it is because they are relatively poor, not because they are black.³⁰⁶

This is more objective in focusing on the relevant tax policy and its interaction with the economic conditions of blacks to support a particular outcome. However, it also provides support for the Critical Tax view that "tax objectivity allows the participants in tax discourse to claim a position of innocence and avoid accountability for the role the tax law may play in perpetuating social injustices."³⁰⁷

Regarding the marriage penalty, Professor Schmalbeck stated:

Any two married couples with the same taxable income face the same tax rates, regardless of their race, and regardless of the mix of their incomes. Since it does not

³⁰² See CONGRESSIONAL BUDGET OFFICE, *supra* note 168, at 50 ("[A]n income tax affects two major types of household decisions. First, by taxing income from labor, it reduces the price of current leisure relative to current consumption. . . . Second, by taxing capital income, it reduces the price of current consumption compared with future consumption, thus encouraging households to consume now and save less.").

³⁰³ *See id.*

³⁰⁴ *See id.*

³⁰⁵ See Moran & Whitford, *supra* note 1, at 761–62, for a brief discussion of the current income tax system's treatment of capital investment.

³⁰⁶ Schmalbeck, *supra* note 2, at 1820.

³⁰⁷ Karen B. Brown & Mary Louise Fellows, *Introduction to TAXING AMERICA* 6 (Karen B. Brown & Mary Louise Fellows eds., 1996).

seem that either of these factors should bear on tax liabilities, one is hardly disturbed to learn that they in fact do not. To make the case that blacks are disadvantaged by this arrangement, one must assert that a married couple whose partners have roughly similar incomes is entitled to a lower tax bill than an otherwise identical married couple with a wider income split between them.³⁰⁸

That statement does not acknowledge the fact that blacks, particularly black males, earn lower incomes than whites.³⁰⁹ It also fails to address the higher percentage of working black females contributing to the higher incidence of the marriage penalty among black couples.³¹⁰

Responses of this nature reflect a view that the tax system is separate and distinct from other aspects of society that contribute to the differing economic circumstances of blacks and whites. That view is in direct opposition to Professors Moran and Whitford's Critical Race analysis. The critics did not acknowledge the racial tax disparity as a consequence of either historical or present-day discrimination. Instead, they focused on the consumer choices and poverty in the black community as the explanation. Professors Moran and Whitford would attribute those economic differences to a history of discrimination, which is reflected in differing employment opportunities and income levels, diminishing the resources available to acquire tax-favored assets or to invest and save. The critics focused on choices, without any acknowledgement of racial inequities that may shape or limit those choices.

D. Why Use the Tax Code to Address These Issues?

This Article approaches the racial tax disparities documented by Professors Moran and Whitford with a class-based approach because it provides more insight into the historical aspects of class mobility and differentiation within the black community, and illustrates that race alone is not sufficient to explain the economic differences between whites and blacks. Race is still significant, but the analysis is much more complicated due to the social advances of the 1960s.³¹¹

³⁰⁸ Schmalbeck, *supra* note 2, at 1833.

³⁰⁹ See OLIVER & SHAPIRO, *supra* note 16, at 100–01, 197 tbl.A5.1, 200 tbl.A5.7.

³¹⁰ See Moran & Whitford, *supra* note 1, at 797–98.

³¹¹ Livingston, *supra* note 245, at 1814 (“[C]ritical scholars should consider whether at least some of their arguments might be made as effectively in class-based terms as in race- or gender-based terms.”); see *supra* text accompanying notes 145–49.

Using the tax code to reduce racial disparities in home ownership rates and wealth accumulation is an additional weapon against a continuing and persistent societal problem. It also affirms, however, that conventional methods are ineffective or incapable of resolving these problems. Either of those conclusions provides sufficient justification for *A Black Critique*. Despite its unconventionality in terms of its topic or approach, it should be acknowledged as a serious attempt to address an issue that will persist and continue to impair the black community.

CONCLUSION

A Black Critique was an important and necessary work in the debate on the economic condition of blacks in America. This Article recommends that the debate include a discussion of class differences within the black community, as well.

Professors Moran and Whitford provided arguments for a race-based approach that is interesting and thoughtful, but their proposals reflect the limitations of race in this context.³¹² That limitation does not, however, diminish the significance or the importance of their work. The complicating issue is what to do about the racial economic/tax disparity. Possible answers are grounded in economics, history, politics, social justice, and law.

This Article does not endorse the use of the tax code as an exclusive means of addressing the racial disparities acknowledged in *A Black Critique*. I assume Professors Moran and Whitford would not either. The tax code would be supplemental to other methods needed to address the educational,³¹³ wealth,³¹⁴ and employment³¹⁵ disparities that impair the economic condition of blacks. Analysis of black class distinctions is necessary in discussing and understanding the divides between the races and within the black community.³¹⁶

³¹² Cf. Johnson, *supra* note 2, at 1782 (“Moran and Whitford’s article does not purport to explain why, on an income-controlled basis, blacks own less housing and less valuable housing than whites.”).

³¹³ See Freeman, *supra* note 217, at 31–33 (discussing school desegregation).

³¹⁴ See OLIVER & SHAPIRO, *supra* note 16, at 100–01, 197 tbl.A5.1.

³¹⁵ See Freeman, *supra* note 217, at 43–45 (discussing a series of employment discrimination cases).

³¹⁶ “A critical analysis of the existing legal arrangements must take place prior to developing the social policies that remedy the perceived problems with the law. After all, without fully understanding the problem, analysts could not hope to remedy it.” Staudt, *supra* note 2, at 1582–83.