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The Internal Revenue Code and Latino Realities: A Critical Perspective

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THE INTERNAL REVENUE CODE AND LATINO REALITIES: A CRITICAL PERSPECTIVE

*Leo P. Martinez & Jennifer M. Martinez**

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INTRODUCTION

An air of discomfort has always permeated discussions about race. Because egalitarian ideals are very much in the eye of the beholder, reasoned discourse is further complicated.¹ Tax and tax policy are not free of these strictures. Accordingly, we have taken a decidedly utilitarian view of Latinos and taxation in order to remove these strictures and reduce the discomfort associated with the race issue.

In addition to an intrinsic moral component, fairness also has a utilitarian purpose with respect to taxation—a fair system facilitates tax collection. A tax system must be at least perceived as fair by the taxpaying public in order to withstand the public's scrutiny and, by extension, to encourage the public's willing compliance.² While the concept of fairness in taxation is an elusive one, the basic proposition that fairness matters seems unassailable. If this is the case, an equally unassailable proposition is that the system of taxation should be racially and ethnically neutral. The corollary is that collection is impaired to the extent a system is perceived as unfair.

Arriving at the answer to the question as to what is fair or what is racially and ethnically neutral is not an easy task. For example, John Stuart Mill's exposition of the relationship between justice and utility used taxation as an example for demonstrating how one method of justice can vary widely from another. He observed that while one could argue that everybody should be taxed the same amount, another could assert that justice required "graduated taxation" on a theory that those with greater wherewithal are better able to part with greater amounts of wealth without suffering detriment.³

More than ten years ago, in their influential piece, *A Black Critique of the Internal Revenue Code*,⁴ Professors Beverly Moran and William Whitford questioned whether the Internal Revenue Code (Code) was, in fact, racially neutral with respect to African Americans. Their surmise was that a number of key provisions in the Code treated African-American taxpayers differently than their White counterparts. In particular, the Moran-Whitford study concluded that certain key Code provisions created benefits that were outside the reach of many African

1. Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 365 (2009) (an incisive and biting commentary about those whose otherwise sound judgment appears clouded when issues of race arise).

2. Leo P. Martinez, *The Problem with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 414 (2004); Joseph Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 567-69 (1965).

3. Martinez, *supra* note 2, at 415-16 (citing JOHN S. MILL, UTILITARIANISM 102 (Roger Crisp ed., Oxford Univ. Press 1998) (1863)).

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

Americans because of socioeconomic, educational, and cultural differences.

Since Professors Moran and Whitford published their work, a number of scholars have undertaken critical examinations of the Code that deal with some underrepresented groups.⁵ Curiously, no such examination has comprehensively addressed Latinos and the Code.⁶ Our hope is to address at least part of that deficiency.⁷

We take pains to emphasize that it is not our intent to merely replace the word “Latino” for “African American” in *A Black Critique of the Internal Revenue Code*. Accordingly, this piece will proceed along several lines. In Part I we begin with an introduction to the federal income tax system and basic tax policy. In Part II we describe how relative economic circumstances can affect how individual taxpayers are treated under the Code. In Part III we observe that even in cases of equal economic circumstances, behavioral and cultural differences among Latinos result in different treatment under the Code. In this Part, we examine the application of the Code in the context of several areas in which Latinos are treated substantially different than other racial or ethnic groups. We bring into focus the shortcomings of public policy as implemented by the Code. In Part IV, we explain that education has a substantial effect on a taxpayers’ likelihood of taking advantage of the Code, and suggest that it can play an important role in mobilizing the Latino community. Our goal is to encourage further examination of the

5. See, e.g., Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 466 (2000) (noting various ways in which the Internal Revenue Code disadvantages homosexuals); Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN AM. L.J. 117, 124 (2004). Professor David Brennen has neatly surveyed related literature. See David Brennen, *Race and Equality Across the Law School Curriculum*, 54 J. LEGAL EDUC. 336, 337 n.5 (2004).

6. One reason Professors Moran and Whitford began their examination with African-Americans was because they perceived data was more widely available for this group. Moran & Whitford, *supra* note 4, at 754. They expressed the desire to extend their study to other racial and ethnic groups. *Id.* Professor Alice Abreu, among others, has urged such an inquiry and has highlighted the tax system’s role in achieving distributional equity and wealth distribution. Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575, 577 (2001). Our use of the term Latino refers to American citizens and undocumented residents who trace their ancestry principally to Spanish-speaking Latin American countries. This repeats the practice by one of the authors in a prior work. See Miguel Mendez and Leo Martinez, *Toward A Statistical Profile of Latinos in the Legal Profession*, 13 BERKELEY LA RAZA L.J. 59, 60 n.6 (2002). We also note that the term Latino describes a widely diverse group that may well defy categorization in cultural terms save for the most obvious trait of sharing the common language of Spanish. We acknowledge that the term Latino may be at once overinclusive and underinclusive. We also note the data cited in this article at times appeared in the original under the heading “Hispanic.”

7. As is plain from the text below, we are aided in our quest by a number of scholars who have done comprehensive studies of particular aspects of the Code. See *supra* text accompanying note 5 & *infra* text accompanying note 8.

problems that we raise, with the ultimate hope that policy-makers will realize that the Code is less than perfect, and that Latinos, with their increasing political clout, will be aware of the powerful economic consequences of seemingly neutral legislation.⁸

I. A TAX AND TAX POLICY PRIMER

We begin by outlining the federal income tax system and we follow with a discussion of tax policy principles. Understanding the basics of the federal tax system provides a needed background to understanding its role in connection with Latino realities in America.

A. *The Federal Income Tax System*

The American federal tax system can be seen as stultifyingly complex—Albert Einstein is credited with observing that, “the hardest thing to understand in the world is the income tax.”⁹ At the same time, the rough contours of the tax system are relatively simple.

To begin, the federal tax system, as embodied in the Code, applies to all persons who are citizens or residents of the United States or to anyone who has U.S.-sourced income.¹⁰ This includes all citizens of the United States, certain persons who are physically present in the United States, whether documented or undocumented, and persons who are not physically present in the United States but who invest in U.S.-sourced activities.¹¹

The federal system of income taxation is based on the concept of “gross income.” The Code very broadly defines gross income as “all income from whatever source derived.”¹² This broad definition is further expanded by a sweeping construction of the term under existing U.S. Supreme Court decisions as “accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”¹³ Gross income

8. A number of tax scholars have striven for greater awareness of the effects of the Code and any tax system on the citizenry. Marjorie Kornhauser, *Educating Ourselves Towards a Progressive (and Happier) Tax*, 45 B.C. L. REV. 1399, 1407 (2004); see generally Edward J. McCaffrey, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861 (1994). Professor McCaffrey observes that framing—how an issue is presented—can have dramatic effects. *Id.* at 1915.

9. *Tax Quotes*, Internal Revenue Service, <http://www.irs.gov/newsroom/article/0,,id=110483,00.html> (May 20, 2011).

10. I.R.C. § 1 (2011) (imposing the federal income tax on all “individuals”).

11. Treas. Reg. § 1.1-1(b) (2011) (describing individuals subject to tax including resident aliens); see Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 7 n.26 (2006).

12. I.R.C. § 61 (2011).

13. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), *reh'g denied*, 349 U.S. 925 (1955).

is then used to calculate taxable income, the base on which a taxpayer's tax liability is computed. The tax liability, or tax burden, is the final amount of tax that must be paid.

A taxpayer's tax burden can be reduced by: (1) exclusions from gross income, (2) deductions from gross income, and (3) the system of tax credits.¹⁴ Each of these requires explanation.¹⁵

Exclusions. The federal tax system contemplates a number of exclusions from gross income. Certain kinds of gross income, although constituting accessions to wealth, are simply not counted as gross income by the Code.¹⁶ One of the most common exclusions is that for the receipt of gifts or inheritances.¹⁷

Deductions. The federal tax system also contemplates a number of deductions that reduce taxable income. Most deductions are essentially expenditures that the U.S. Congress has enacted as part of the Code to reduce taxable income. Deductions act to lower the tax burden by reducing the amount of taxable income (the tax base) that is subject to taxation. Several deductions are highlighted in the discussion that follows.

Credits. The Code also contains a system of tax credits. These credits are applied to a taxpayer's tax liability so as to reduce the tax itself. Key credits, like the Earned Income Tax Credit and education credits, are discussed below.

How this system of exclusions, deductions, and credits applies, directly affects the amount of revenue collected by the federal government and the amount of capital that individuals and entities are permitted to retain. The system of exclusions, deductions, and credits operates, in effect, as a kind of subsidy for each area affected by the system.¹⁸ A few examples illustrate the principles and show how policy goals are advanced.

By allowing a deduction for amounts paid to charity, for example, the Code encourages and subsidizes private philanthropy. Similarly, by allowing an exclusion from gross income for amounts paid into qualified pension plans, the Code encourages individual retirement

14. This formulation is greatly simplified for illustrative purposes. The Code contains myriad other tax preferences including, for example, preferential treatment of certain capital gains.

15. To be sure this is a crude formulation. The Code also contains provisions which result in preferential rates of taxation on certain kinds of income including capital gains and dividends. I.R.C. § 1(h) (2011).

16. For example, gross income does not include compensation for injuries or sickness. I.R.C. § 104 (2011).

17. I.R.C. § 102 (2011).

18. Carolyn V. Juarez, *Liberty, Justice, and Insurance for All: Re-Imagining the Employment-Based Health Insurance System*, 37 U. MICH. J.L. REFORM 881, 885-86 (2004) (in the health insurance area the subsidy amounts to over \$100 billion in foregone revenue).

savings. On the surface, this is simply the implementation of sound social policy. Digging deeper, however, it could be seen that the approach is flawed from a number of perspectives.¹⁹

Even without addressing the realities facing the Latino community (which we refer to as “Latino realities”), the approach systematically disadvantages low-income working people. Instead, it favors those who are investors or employed by large businesses, resulting in an uneven distribution of burdens and benefits. Because the various incentives embodied in the Code (for example, philanthropy and pension savings as discussed above) are implemented and encouraged by tax savings, low-income individuals and the unemployed are ill-placed to take advantage of deductions.²⁰ With low income levels to tax, deductions, exclusions, and credits do little good for the poor. Similarly, the working poor lack the wherewithal to save in qualified pension plans.²¹ Especially with respect to pension plans, these provisions are poorly targeted, that is *away* from those who already save the least for retirement. Thus, however sound the public policy that underlies any particular Code provision, actual implementation of such policy is often of little use to the poor and the policy justification is obscured.

B. A Tax Policy Primer

Tax policy is an amorphous concept. While the Code’s primary purpose is to enable the collection of revenue and to implement fiscal policy, it also functions to implement certain social goals as well.²² For example, the deduction for the payment of qualified residence interest is a way of encouraging home ownership. Home ownership, in turn, promotes social responsibility and the creation of a citizenry more attuned to the preservation of responsible government.²³ Without quarreling with this policy itself, it can be seen as creating a tension

19. *See id.* at 902-03 (outlining limitations of tax incentives in connection to health insurance).

20. We concede that philanthropy and charitable donations often benefit the poor and that it can be argued that by encouraging benevolence, the Code is benefiting the poor indirectly.

21. It is possible, of course, for employers to contribute to pension plans. The sad reality, however, is that this has become an infrequent phenomenon. *See* Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 948 (2007) (58% of pension plan participants are covered only by a defined contribution plan, *i.e.*, plans which are funded primarily by employees themselves).

22. Martinez, *supra* note 2, at 415-16.

23. Uy, *supra* note 5, at 124 (“Congress’ choice of favoring homeowners possibly reflects the belief that people who own houses are more stable people.”). Professor Alice Abreu has also noted that the deduction for qualified residence interest can also foster the feeling of empowerment. Abreu, *supra* note 6, at 582.

between the implementation of a worthy social goal and the even-handed treatment of citizens. We focus on two aspects of tax policy that address this issue of “fairness” in the Code—first, horizontal, and vertical equity, and second, benefit theory.

1. Horizontal and Vertical Equity

Most tax policy theorists at least pay lip service to the idea of horizontal equity. The principle of horizontal equity posits that those who are similarly situated should be treated equally by any system of taxation.²⁴ This is seemingly not a hard case to make. If I make \$100 in one year and my neighbor also makes \$100 in the same year, it only seems “natural” or “fair” that if we are taxed by the same system we should pay the same in taxes. It should come as no surprise that the principle of horizontal equity is advanced as a foundation stone of any rational and fair system of taxation.²⁵

The only difficulty is that when applied, the principle of horizontal equity can lead to results that seem to be unfair. This unfairness can stem from several different kinds of causes, each of which can be seen as a variant of the unfortunate truth of the Anatole France description of law as having that “majestic quality . . . which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread.”²⁶ France recognized that any kind of law which purported to be neutral in its application to a population might affect certain citizens in different ways.²⁷ To be sure, laws that are, for instance, seemingly race-neutral can be applied differentially in a decidedly race-based manner.²⁸ To make the obvious point, the rich

24. See Martinez, *supra* note 2, at 422.

25. See, e.g., General Explanation of the Tax Reform Act of 1986, H.R. CONF. REP. NO. 99-841, pt. 2, at 7 (1986) (Conf. Rep.) (primary objective is to ensure that individuals with similar income pay similar amounts of tax); Senate Finance Committee Report on the Tax Equity and Fiscal Responsibility Act of 1982, S. Rep. No. 97-494, 97th Cong., 2d Sess. at 97 (1982) (Act is designed to improve tax equity); RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 5-6 (2d ed. 1973) (“[T]ransfer policies [distributions between wealthy and poor] remain of major importance”); JOSEPH A. PECHMAN, FEDERAL TAX POLICY 5 (5th ed. 1987) (“A distinct policy objective of the federal taxation schemes is the distribution function”); JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE GREAT DEBATE OVER TAX REFORM 51 (2d ed. 2000) (“Fairness . . . deserves close scrutiny because much of the bewildering complexity of the tax law is justified in its name.”).

26. ANATOLE FRANCE, LE LYS ROUGE (The Red Lily) ch. VII, p. 49 (1894). Anatole France won the 1921 Nobel Prize in Literature. For an excellent explication of historical relief mechanisms for the poor, see Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871, 953-65 (1995).

27. FRANCE, *supra* note 26.

28. For a good example, see Professor Michael Olivas’s citation of Professor Pat Chew

and the poor were, in France's world, subject to the same limitation on their behavior—neither could steal a crust of bread. The law could be seen as fair in this regard. France's genius was to recognize that this "equal" treatment bore upon the poor with more harshness than the rich.

The principle of vertical equity would seem to account for France's objection. Vertical equity refers to the equitable treatment of taxpayers with unequal incomes.²⁹ The poor, not being similarly situated with the rich, can justifiably be treated differently—presumably with a lesser rate of taxation. So it is with the Code, which generally taxes the high amounts of taxable income at higher rates than lower amounts of taxable income.³⁰

The principles of horizontal and vertical equity have limitations. Horizontal and vertical equity seem to be defined solely in economic terms. However, as one prominent scholar has observed, the focus on economic circumstances in analyzing the fairness of the Code should not cause us to overlook non-economic considerations in such analysis.³¹ Much like Anatole France, Professors Moran and Whitford contributed to the debate by observing that African Americans are systematically short-changed by the Code despite the absence of overt discrimination and despite the principles of horizontal and vertical equity.³² In that spirit we proceed.

2. Benefit Theory

Another aspect of tax policy deserves attention as it relates to "fairness"—the benefit theory of taxation. Benefit theory posits that there is, or at least there should be, some relationship between taxes paid and benefits received.³³ For example, many property tax regimes fund schools. Thus, resistance to property taxes is often found in neighborhoods where an aging population resides and where there are relatively few school-aged children.

and Robert Kelly's study demonstrating systematic racial bias in the outcomes of discrimination claims. Michael A. Olivas, *The Tenth Annual Frankel Lecture: Commentary: Reflection on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81, 86 (2006) (citing Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. (2006)).

29. Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1193 (2008).

30. I.R.C. § 1 (rates of taxation on high incomes are higher than for low incomes).

31. Infanti, *supra* note 29, at 1196.

32. Moran & Whitford, *supra* note 4.

33. Donna M. Byrne, *Locke, Property, and Progressive Taxes*, 78 NEB. L. REV. 700, 728-30 (1999). Professor Joe Dodge's work is mandatory reading on the subject. See generally Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399 (2005) (discussing, in considerable depth, the author's criticisms of benefit theory).

The benefit theory of taxation has its limitations. A significant problem is that the amount of benefits received relative to the taxes paid can be difficult to measure.³⁴ The value of benefits, such as clean air and safe streets, are at best difficult to quantify.³⁵ Moreover, the poor likely derive greater benefit from publicly funded programs that simply are not needed by the rich. These can include public transportation, food assistance programs, and schools.³⁶ Taxpayers also might receive benefits that they simply do not need or want.³⁷ Finally, it can be argued that the rich derive greater benefit from programs, such as national defense, that entrench the wealthy and powerful elite, though the valuation of such benefits would be at best speculative.³⁸

All of this is not to say that benefit theory is not useful at some level. The utility of benefit theory is demonstrated in the context of Latinos' relationship with the Code. A large proportion of the Latino population in the United States is represented by the undocumented.³⁹ It was reported for tax year 2006 that undocumented taxpayers seemed to be filing federal tax returns in record numbers.⁴⁰ However, many undocumented residents, despite the payment of taxes, do not seek or are barred from receiving many government benefits. Professor Francine Lipman includes among her list of benefits unavailable to the undocumented: "food stamps, Temporary Assistance for Needy Families, Medicaid, federal housing programs, Supplemental Security Income, Unemployment Insurance, Social Security, Medicare, and the Earned Income Tax Credit (EITC)."⁴¹ Indeed, as of 1996, federal law has explicitly disqualified undocumented immigrants from receiving most federal public benefits.⁴² A simple application of benefit theory,

34. See Byrne, *supra* note 33, at 731-33.

35. *Id.*

36. *Id.* at 728-30.

37. *Id.* at 731-33.

38. In the same way state and local taxes fund fire and police protection which arguably also entrench the wealthy.

39. The overwhelming majority of the almost 14 million undocumented U.S. residents are Latino. JEFFREY S. PASSEL, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1-2 (2005), <http://pewhispanic.org/files/reports/44.pdf> (a Pew study says about 81%: Mexico (57%) and other Latin American countries (24%)); see also Lipman, *supra* note 11, at 9-10. By comparison, there were nearly 42 million Latinos in the United States in 2005. *Hispanics at Mid-Decade-Table 1. Population by Race and Ethnicity: 2000 and 2005*, PEW HISPANIC CENTER (Sept. 2006), <http://pewhispanic.org/files/2006/08/complete.pdf> [hereinafter *Hispanics*].

40. Nina Bernstein, *Tax Returns Rise for Immigrants in U.S. Illegally*, N.Y. TIMES (Apr. 16, 2007), available at <http://www.nytimes.com/2007/04/16/nyregion/16immig.html>.

41. Lipman, *supra* note 11, at 5-6.

42. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996. This act also authorized states to adopt similarly restrictive eligibility requirements for programs of general cash public assistance furnished under state law. See also 8 U.S.C. § 1624(a)-(b) (2006).

whatever its limitations, leads to the conclusion that despite the payment of what some estimate to be billions in sales, excise, property, income, and payroll taxes,⁴³ the undocumented receive little in return. We explore this further below.

As noted, benefit theory has significant shortcomings. We use it only in the way described by Professor Joseph Dodge, as an intuitive tool motivated by our desire for social equity.⁴⁴ In any society in which there are disparities in wealth and income, it seems self-evident that the poor will, or at least should, generally contribute less in taxes than they receive in basic social services. Thus, the assessment of taxes on the undocumented coupled with the denial of social services seems to turn this concept on its head.⁴⁵ Benefit theory, in this instance, is a crude tool that nonetheless highlights a basic inequity.

3. A Critique of Tax Policy Critiques

A nuanced critique of tax policy critiques is offered by Professor Lawrence Zelenak, who questions whether critiques of the fairness of the Internal Revenue Code essentially take a too narrow and a too purposely selective view by choosing only those Code provisions that

Even so the Code also treats U.S. taxpaying residents with families who reside outside of the United States in a different way. I.R.C. § 152(b)(3)(A) (2011) (denying the deduction for dependents if the dependent is not a citizen and not a U.S. resident).

43. See Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Working Poor*, 7 NEV. L.J. 736, 750-51 (2007) (discussing that unauthorized workers pay billions of dollars annually for Social Security taxes, even though these workers do not qualify for Social Security Benefits). Professor Lipman noted "In 2003, the government collected an estimated seven billion dollars in Social Security and Medicare taxes, or approximately one percent of overall revenue, from 7.5 million workers and their employers with mismatched SSNs." *Id.* The payment of taxes by the undocumented is attributable to several reasons. See Bernstein, *supra* note 40, at A1. These include the simple fact of withholding, they believe that it is right, they want to establish a paper trail in case of immigration reform, or they want the refund because they are able to claim dependents outside the United States. *Id.*

44. Dodge, *supra* note 33, at 418. As Professor Dodge eloquently stated:

There is another level of public discourse, which consists of direct appeals to intuition or values. On this level, the new benefit principle easily might be embraced by those who have some sympathy for a meaningfully redistributive function of government, but who cannot really articulate it beyond a general charitable impulse or sense of social "fairness."

Id.

45. See Lipman, *supra* note 11, at 8. Professor Francine Lipman's take is that "the high effective tax rate imposed on the poorest undocumented working families relative to their less unfortunate friends and neighbors is inconsistent with fundamental tax policy." *Id.*

advance a particular point of view.⁴⁶ He baldly states: “Within the critical tax movement, there is a reward for examining a tax provision and finding it guilty of hidden discrimination; there is no reward for discovering a provision is innocent.”⁴⁷

Professor Zelenak makes a defensible point to the effect that (1) some critiques of the Code uncritically assume that the income tax is a neutral baseline and (2) that the Code provisions that disadvantage one racial group might be offset by Code provisions that advantage that same group.⁴⁸ Nonetheless, we persist in believing that highlighting racial inequities in the Code is a useful task because exposing racial inequalities is the best avenue for promoting discourse with respect to whether such inequalities can in fact be justified.

We persist in our task for two further reasons. First, a neutral baseline does not necessarily result in a fair tax structure. For example, we hope no one would disagree with the notion that it would be unfair to tax women based on a rate schedule that was ten percent higher than the rate schedule for men, regardless of whether the income tax base is neutral. In the same way, a similar reaction might follow a more nuanced examination of certain Code provisions that are overall neutral but benefit or burden certain groups over others.

Second, we acknowledge the possibility that Code provisions that disfavor one ethnic group over another may mask a grand design so that

46. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1522-23 (1998).

47. *Id.* at 1578.

48. *Id.* at 1562. In commenting on our work, Professor Leandra Lederman raises the question of why it isn't the overall result that matters. She writes:

For example, if Code sec. X provides that women have \$500 of extra gross income, but Code sec. Y allows only women a \$500 above-the-line deduction, presumably Code sec. X is not unfair, because its result is undone by sec. Y. It would be misleading to look just at sec. X in the abstract. My example is of course artificial. I think a good rebuttal is that absent a situation where one Code section neatly undoes the effect of another, looking at the effects of the Code overall still might a disproportionate impact. For example, if some Code sections favor married couples and others favor unmarried couples, is the Code neutral as to marriage? Not necessarily. It depends on the amounts of benefits and burdens, as well as whether subsets of each group disproportionately benefit or are burdened. For example, it could be that all the marriage penalty provisions apply to elderly couples, so the Code encourages marriage only late in life. That would not be neutral as to marriage for any couple, even if, overall, the Code penalized some couples by the same amount it benefited other couples.

E-mail from Leandra Lederman, William W. Oliver Professor of Tax Law, Indiana Univ. Sch. of Law (Bloomington), to Leo P. Martinez, Professor of Law, Hastings Coll. of Law (Feb. 19, 2008) (on file with authors).

these Code provisions are balanced out by other Code provisions that favor the same ethnic group—the idea being that the different treatments even out in the wash as a sort of rough justice. Professor Zelanak suggests that the Earned Income Tax Credit—the EITC—may be one such Code provision that serves to balance the possible inequities created by other Code inequities.⁴⁹ We concede that, assuming a random distribution of favorable and unfavorable Code provisions, this idea may even be demonstrable. Our intuition, however, is that the distribution of favorable and unfavorable Code provisions is far from random and that there is no meaningful counterbalancing of Code inequities. However attractive the idea that there is a counterbalancing of Code equities might seem, certainly, no articulation of this idea has found a voice in the enactment of any Code provision. We leave to others the task of showing our intuition is not well-founded.

II. THE CODE AND THE POOR

The structure of the Code disadvantages the poor in a number of systematic respects. Because some of the disadvantages are not readily apparent, we discuss several examples that illustrate the problem.

First, studies have shown that the poor make charitable contributions at rates equal to or exceeding those with substantially higher incomes.⁵⁰ Under the Code, taxpayers whose aggregate deductions do not exceed a threshold amount—the standard deduction—are effectively denied the benefit of the charitable deduction.⁵¹ The wealthy, even though they may give at a rate lower than the poor, are able to use the charitable deduction because their aggregate deductions will exceed the standard deduction. In effect, the Code rewards the wealthy for their philanthropic impulses while effectively denying the benefits of the Code to the poor for their philanthropy.⁵²

49. Zelanak, *supra* note 46, at 1568.

50. See *Alms From the Working Class*, PORTFOLIO.COM, <http://www.portfolio.com/graphics/2008/02/Alms-From-the-Working-Class> (last visited July 31, 2011). See also Russel N. James III & Deanna L. Sharpe, *The Nature and Causes of the U-Shaped Charitable Giving Profile*, NONPROFIT & VOLUNTARY SECTOR Q. (June 2007), <http://nvs.sagepub.com/cgi/content/abstract/36/2/218>. See generally *Patterns of Household Charitable Giving by Income Group*, CENTER ON PHILANTHROPY IND. UNIV. 1, 15 (2007).

51. See I.R.C. § 63(b) (2011) (providing for the standard deduction if a taxpayer does not “itemize” deductions); *id.* (c) (describing the standard deduction). See also I.R.C. § 170 (describing the charitable deduction).

52. See generally Lynnley Browning, *Senate's Tax Bill Includes Incentives for Charity Gifts*, N.Y. TIMES, Nov. 22, 2005, at A21; C. Eugene Steuerle, *President Bush's Proposal to Encourage Charitable Giving: Statement Before the United States Senate Committee on Finance*, URBAN INST. (Jan. 1, 2001), <http://www.urban.org/url.cfm?ID=900325>.

Second, the Code is structured generally for wage earners as a pay-as-you-go system through employers withholding taxes based on earnings.⁵³ By contrast, those who derive their income from investment are not subject to withholding of taxes on investment income (*e.g.*, interest, dividends, capital gains, rental income).⁵⁴ Furthermore, those who derive their income from investment are much more likely to be wealthy.⁵⁵ Therefore, one can reasonably conclude that the Code is structured in a manner that disproportionately favors the rich.

Not only do the wealthy who do pay their taxes receive more benefits than the poor, the wealthy who do not pay their taxes often fare better than the poor who do not. This argument is especially important for undocumented workers who do not file their taxes for fear of immigration authorities. Therefore, a low-income person may well overpay her taxes if she does not jump through all the challenging and potentially expensive hoops of preparing a tax return and filing it. These challenges are more significant for those who suffer language and cultural barriers, lack of professional contacts, and often a paralyzing fear of government. Thus, the suspicion is that the many millions (maybe even billions) of dollars from unpaid refunds every year likely should go to low-income individuals. By contrast, a higher-income person with investment income that is not offset by deductions will underpay if they do not file because they have not been paying on income as they go. It is possible that such underpayments might not be detected as they are not the subject of withholding by employers or information reporting.

A final example of the treatment of the poor is the deduction for qualified home mortgage interest paid. If a taxpayer owns a personal residence, the interest paid on the mortgage used to acquire the residence results in a tax deduction which reduces the amount of tax that must be paid.⁵⁶ If a taxpayer, whether by personal choice or by economic circumstance, rents a personal residence, that payment, even if it approximates the interest that might be paid on a mortgage, does not provide for a deduction. As Professors Moran and Whitford observed, this has the effect of favoring those who can qualify for credit

53. I.R.C. § 31 (2011) (allowing a credit for tax withheld on wages); I.R.C. § 3401 (2011) (defining wages); I.R.C. § 3402 (2011) (requiring employers to withhold taxes on wages).

54. To be fair, such individuals are required to make estimated payments of income tax. I.R.C. § 6654 (2011) (requiring individuals to pay estimated tax). The amount of estimated tax required to be paid is the lesser of 90% of the tax liability shown on the return for the current year, or 100% of the tax liability shown on the return for the preceding year. I.R.C. § 6654(d) (2011).

55. Jonathan Barry Forman, *Making America Work*, 60 OKLA. L. REV. 53, 60 (2007) (“Relatively few well-off households receive the lion’s share of this nation’s investment income.”).

56. I.R.C. § 163(h)(3) (2011) (describing qualified residence interest).

and who can afford, using borrowed funds, to purchase a personal residence. To the extent a taxpayer cannot so qualify for credit, the tax benefit, in the form of the deduction for qualified personal residence interest, is simply not available. We develop this idea in greater detail below.

The preceding examples serve to underscore how the poor fare under the Code. To be sure, this results in unequal treatment of African Americans and Latinos, who are overrepresented at the low end of the income scale.⁵⁷ The relationship of Latinos in the Code is more subtle yet. Again, we rely on Professors Moran and Whitford.

Professors Moran and Whitford did not make a comprehensive examination of the entire Code. This observation is not intended as a criticism. Rather, we mention this limitation because we also follow their approach. Because Professors Moran and Whitford aimed to expose specific disparities, and recognized a dearth of reliable data, they focused on four concrete areas of the Code. These areas included: (1) benefits granted to wealth and wealth transfers, (2) the benefits of home ownership, (3) employees benefits associated with pension plans, and (4) the different tax rate treatment of single and married persons.⁵⁸

Professors Moran and Whitford first relied primarily on economic data that places African Americans, as a group, in the lower rungs of wealth accumulation and income levels. Thus, they found that African Americans are less apt to be the recipients of tax-favored gifts or inheritances,⁵⁹ that African Americans were less likely to own their own homes,⁶⁰ that African Americans had less ability to take advantage of voluntary contribution pension plans,⁶¹ and that married African Americans were more likely to consist of two wage-earners, they were more subject to the so-called marriage penalty.⁶² This approach harmonizes with the examples we have set forth above.

Professors Moran and Whitford were careful in their conclusions. Their examination of the four areas outlined above suggested that African Americans' economic circumstances led to different treatment under the Code in these four areas. As any careful researcher would do, they did not attempt to extrapolate beyond the data they had. Indeed, they made the pointed comment, "We cannot reach a conclusion about

57. See Barbara J. Robles, *Tax Refunds and Microbusinesses: Expanding Family and Community Wealth Building in the Borderlands*, 613 ANNALS AM. ACAD. POL. & SOC. SCI. 178 (Sept. 2007) (discussing low incomes among Latinos). See also Uy, *supra* note 5, at 121 (noting that Latinos earn much less than Whites).

58. Moran & Whitford, *supra* note 4, at 755.

59. *Id.* at 772.

60. *Id.* at 776.

61. *Id.* at 787.

62. The Congress has since addressed the marriage penalty problem for low income individuals. I.R.C. § 32(b)(3)(B).

whether the Internal Revenue Code as a whole is systematically biased in favor of whites.”⁶³ Nonetheless, their examination would lead the casual reader to the inescapable conclusion that the Code systematically discriminates against African Americans.⁶⁴ Our own reading of their work must necessarily agree with the notion that substantial disparate treatment of African Americans under the Code exists despite the facially neutral text of the Code. We believe that the Code also treats Latinos in a disparate way.

III. LATINO REALITIES

Notwithstanding a reliance on economic circumstances, it is evident that Professors Moran and Whitford were sensitive to the nuance that economic circumstances do not necessarily explain everything. Here, their contribution is more important. If their thesis had been that the Code discriminates solely on the basis of differing economic circumstances, it would be easy to dismiss based on the aspiration of the American dream. That is, if we all work hard and apply ourselves diligently, we can all take advantage of the Code—we can make tax-favored gifts, we can own our own homes, we can contribute to 401(k) plans, and we can afford to have our spouses tend to the household. Our aspirations can be limitless, transcending the achievement of middle-class status to an attainment of wealth equal to that of Bill Gates.⁶⁵ Professors Moran and Whitford recognized that even if their examination of the Code controlled for income levels, there nonetheless remained disparities in the treatment of African Americans under the Code. As they stated, “[E]ven at the same incomes, the typical black and the typical white lead different lives, largely as a result of the American history of racial subordination. These different lives, we hypothesize, trigger different tax results.”⁶⁶

Based on this view, it is hardly surprising that the preceding themes are influenced by Latino realities. In this part, we look at the more subtle effects of the Code on Latinos. Our examination necessarily defines the Latino experience in the United States as different from the African American experience.⁶⁷ As it develops, our examination reveals

63. Moran & Whitford, *supra* note 4, at 754.

64. Professors Moran and Whitford were willing to say that their limited examination made the hypothesis of systematic bias credible. *Id.* at 755.

65. As Professor Elizabeth Warren states: “The assumption that participation in the middle class will solve other economic and social problems facing racial minorities is strong.” Elizabeth Warren, *The Economics of Race: When Making It to the Middle is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1778 (2004).

66. Moran & Whitford, *supra* note 4, at 757.

67. Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85

that the differences are not always intuitive.

We have examined five different areas. They are the deduction for personal residence interest, the Code benefits associated with pension plans, the treatment of the undocumented, the tax benefits provided under the Code for the pursuit of higher education, and the Earned Income Tax Credit. We examine the first two in order to compare and contrast with two of the areas touched on by Moran and Whitford. We examine the last to test whether Professor Zelenak's suggestion that the EITC serves to even out inequities in the Code is supported. In each area, we show that Latino realities result in significant differences in the way the Code deals with equally wealthy (or equally poor) but different racial groups.⁶⁸

A. *The Deduction for Personal Residence Interest*

We start with the deduction for personal residence interest to provide both a point of comparison and a point of departure from Professors Moran and Whitford. The Code provides a deduction for the payment of qualified home mortgage interest.⁶⁹ This deduction has the effect of reducing the amount of a taxpayer's taxable income and, hence, income tax liability.⁷⁰ To the extent a taxpayer is wealthy enough, has sufficient income, and has a sufficient credit rating to borrow funds, the taxpayer can borrow money, at some rate of interest, to purchase a personal residence. The payment of such interest could result in a tax deduction that will reduce that taxpayer's tax liability—a considerable benefit. If a taxpayer lacks the wealth, lacks sufficient income, or does not have a credit rating high enough to justify borrowing an amount sufficient to buy a home, that taxpayer might be forced to rent a residence. The payment of rent, unfortunately, does not generate a tax deduction and hence this residence-based benefit of the Code is denied to renters. Professors Moran and Whitford suggested that because African Americans were more likely to fall in the lower strata of income levels, they were disproportionately denied a benefit available, in theory, to all.⁷¹ Thus far, Latinos would be treated no worse (or, alternatively, just as harshly) as African Americans.

Professor Elizabeth Warren has also studied closely the phenomenon

CALIF. L. REV. 1315, 1331-44 (1997) (observing that it is a mistake to equate the Latino experience with the African-American experience).

68. We might have added a sixth area of inquiry—the ability to take advantage of the Code's incentives for capital investment.

69. I.R.C. § 163(h)(3) (describing qualified residence interest).

70. I.R.C. § 63(a) (deductions reduce taxable income).

71. Moran & Whitford, *supra* note 4, at 774-75.

of homeownership by racial and ethnic groups.⁷² Her study is partly based on the idea that homeownership is a rough proxy for wealth. She finds that the net worth of homeowners (median \$171,700) far exceeds the net worth of renters (median \$4,800).⁷³ Here, her finding is consistent with Professors Moran and Whitford's view that the poor do not share in the tax benefits associated with home ownership.⁷⁴ If African Americans and Latinos are more likely to be among the poor, it follows that the qualified residence interest deduction will, as a practical matter, be largely unavailable to either group. Thus far, the effect of this Code provision is an economically oriented one. This does not lessen the discriminatory effect of such a provision on the poor, but as noted above, this effect might be offset with the salutary effects of encouraging home ownership and the aspiration of the American dream.

Professor Warren's findings, however, go further. First, she notes, again perhaps unsurprisingly, that Latino homeownership rates are on the order of 57% the rate of White homeownership rates.⁷⁵ Professor Warren's most surprising finding was that, for Whites, homeownership equated with financial stability while for Latinos this was not the case. She used the rates of bankruptcy filing to measure financial stability.⁷⁶ According to her, "White renters are about three times more likely to file for bankruptcy than white homeowners."⁷⁷ For Latinos, by contrast, the rates of bankruptcy filings between homeowners and renters were about equal.⁷⁸ Her conclusion is that Latino homeowners are much more economically unstable than are their White counterparts.⁷⁹ She also found that the bankruptcy filings of similarly situated African Americans were slightly higher than were Latino bankruptcy filings.⁸⁰

Professor Warren also discovered that the value of Latino homes (median \$92,000) was significantly less than the value of homes owned by Whites (median \$130,000).⁸¹ These data harmonize with Professor Dorothy Brown's findings that while nearly 84% of Whites have wealth attributed to the equity in their residence, only 61% of Blacks and 58% of Latinos have such equity.⁸² The value of this housing equity is

72. Warren, *supra* note 65, at 1778.

73. *Id.* at 1790.

74. Moran & Whitford, *supra* note 4, at 773-79.

75. Warren, *supra* note 65, at 1788. This rate approximated the African-American rate of homeownership. *Id.*

76. *Id.* at 1789.

77. *Id.* at 1790.

78. *Id.* at 1791.

79. *Id.*

80. *Id.*

81. Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385, 390 (2007).

82. *Id.* at 393-94.

similarly disparate—the median value of White housing equity is more than two and a half times Latino housing equity.⁸³ The Pew Hispanic Center observes that in 2004, Latino “homeowners, in fact, [had] a net worth that is half again as high as the wealth of non-Hispanic homeowners.”⁸⁴ The conclusion is inescapable. To the extent that homeownership is a measure of wealth and to the extent that the Code encourages homeownership, the data suggests that Latinos are not keeping pace. While we do not suggest wealth is the ultimate goal of any group, sufficient wealth to see to the needs of one’s family and to see to the education of one’s children is an important factor in social mobility and in social stability.

While the findings above may not suggest a surprising result, the point for our purposes is that, while African Americans and Latinos may occupy the same rough income strata, each population must be examined separately in order to pinpoint exactly how the Code affects each. We aim for this demarcation in the material that follows.

B. *Latinos and Pension Benefits*

The relationship between Latinos and the Code is especially curious in the context of pension plans. Here, the Code mechanism is more intricate and requires some background. The Employee Retirement Income Security Act (ERISA) was enacted in 1974 to protect the rights of employees and their beneficiaries in employee benefit plans.⁸⁵ ERISA provides a source of substantive law that broadly governs employer-provided benefits, including pensions and healthcare. ERISA does not require employers to provide their employees with pension plans. Rather, ERISA creates a series of tax incentives under the income tax system that encourages employers to provide pension plans and encourages employees to participate in them.⁸⁶

Almost all pensions are provided by employers.⁸⁷ Private pension

83. *Id.* at 394 (explaining the relatively higher rate of economic instability among Latino homeowners. Their lower equity stake is a smaller cushion against income interruptions).

84. Press Release, Pew Hispanic Center, Wealth Gap Widens Between Whites and Hispanics (Oct. 18, 2004), <http://pewhispanic.org/newsroom/releases/release.php?ReleaseID=15>.

85. Employee Retirement Income Security Act of 1974, 93 P.L. 406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2011)).

86. Befort, *supra* note 21, at 946. Although ERISA is a tax-oriented program, it is overseen by both the Treasury Department and by the Department of Labor. This Department of Labor responsibility is attributable to the labor roots of the employer-employee relationship. Colleen E. Medill, *Transforming the Role of the Social Security Administration*, 92 CORNELL L. REV. 323, 327 (2007).

87. Befort, *supra* note 21, at 945.

plans came into being substantially after World War II.⁸⁸ The growth in pension plans and the desire of employers to provide them to their employees, though voluntary, was fueled by tax incentives and the hope of attracting and retaining employees.⁸⁹ Over the years, however, the incentives have changed and, with them, so has the range of pension plans that are offered to employees.

When ERISA was enacted in the mid 1970s, “defined benefit” pension plans dominated the landscape.⁹⁰ As the term suggests, defined benefit pension plans provide for the payment of an annuity upon an employee’s retirement, the amount of which is based on years of service and relative pay level.⁹¹ In the 1980s, Congress decreased tax rates, which in turn decreased the economic value of deductions. Congress also effectively decreased the tax benefits associated with pension benefits for highly compensated employees out of concern that ERISA should benefit those at the lower rungs of the economic ladder.⁹² This discouraged defined benefit pension plans.⁹³ To fill the vacuum, “defined contribution” pension plans became more prevalent.

Defined contribution plans are funded largely by an employee’s tax-deductible contributions; although in some cases, employers voluntarily match at least part of the employee’s contributions.⁹⁴ With defined contribution plans, an employer is freed of the risk of funding the benefits of her employee’s retirement. An employee is able to manage his own finances and, importantly, the retirement fund that accrues is “portable,” allowing an employee to change employment without losing the benefits of retirement.⁹⁵ Of course, an employee’s decision to contribute to her own retirement under a defined contribution plan, while encouraged by the income tax system through the use of deductions, is voluntary.⁹⁶

Pension plans are almost always provided as an employee benefit. However, not all employers provide pension plans. It is in this arena that Latino reality is substantially different than that of Whites or African Americans. Latino workers are the least likely of all racial and ethnic groups to work for employers that provide pension plans.⁹⁷ In 2005, only some 37% of Latinos were covered by pension plans

88. *Id.* at 947.

89. *Id.*; Karen C. Burke & Grayson M.P. McCouch, *Social Security Reforms: Lessons from Private Pensions*, 92 CORNELL L. REV. 297, 298 (2007).

90. Burke & McCouch, *supra* note 89, at 299; Medill, *supra* note 86, at 327.

91. Befort, *supra* note 21, at 946; Burke & McCouch, *supra* note 89, at 299-300.

92. Burke & McCouch, *supra* note 89, at 300.

93. *Id.*

94. *Id.* at 305-06; Befort, *supra* note 21, at 946.

95. Burke & McCouch, *supra* note 89, at 305-06.

96. *Id.* at 306.

97. Brown, *supra* note 81, at 390.

compared to 65% of Whites, 57% of African-Americans, and 56% of Asians and Native Americans.⁹⁸

The relatively small number of Latinos who are covered by pension plans masks another reality. The trend from defined benefit plans to defined contribution plans has created opportunity for funding retirement but has shifted risk.⁹⁹ In the case of defined benefit plans, an employer has assumed the obligation, and risk, of funding retirement benefits; in the case of a defined contribution pension plan, that risk is shifted to the employee who must fund his own pension plan and accept the consequences of unwise investment or a downturn in the economy. The voluntariness of pension plan participation explains why less than half of employees that are covered by employer-provided pension plans actually participate in those pension plans.¹⁰⁰ Unfortunately, most Americans are not paying heed to any of this. A recent detailed study suggests that Americans are not preparing well for their retirement years.¹⁰¹ The study's unsurprising conclusion is that wealthier households are better prepared for retirement than poor households.¹⁰²

Preparation for retirement is yet another measure of racial disparity that traces its roots, in part, to the Code. Nearly half of Whites have pensions from previous employers and well over half have income from assets, but only about a fourth of Latinos have a private pension or income from assets.¹⁰³ One of the major contributing factors in this racial disparity of asset and savings possession is the "overrepresentation [of Latinos] in low-wage service industry jobs and labor-intensive occupations, which do not [generally] offer pensions or other retiree benefits such as supplemental retiree insurance."¹⁰⁴

Even among employees working for employers who sponsor pension plans, Latinos are the least likely to actually participate in such plans.¹⁰⁵ The rates of Latino participation in pension plans are dismal. In 2005, 57% of White employees participated in their employer's plan, while the percentages were 48% for Asians, 46% for Blacks, and only 29% for Latinos.¹⁰⁶ The difference is "most dramatic" when examining

98. *Id.*

99. Eric M. Engen et al., *Lifetime Earning, Social Security Benefits, and the Adequacy of Retirement Wealth Accumulation*, 66 SOC. SEC. BULL. 38, 38 (2005), available at <http://ssa.gov/policy/docs/ssb/v66n1/v66n1p38.html>.

100. Berfort, *supra* note 21, at 948.

101. See Engen et al., *supra* note 99, at 38.

102. *Id.* at 46.

103. Steven P. Wallace & Valentine M. Villa, *Equitable Health Systems: Cultural and Structural Issues for Latino Elders*, 29 AM. J.L. & MED. 247, 261-62 (2003).

104. *Id.* at 262.

105. Brown, *supra* note 81, at 390.

106. *Id.*

pension wealth disparities by race.¹⁰⁷ Using defined benefit and defined contribution wealth measures from 1992, the median value of pension wealth is \$37,721 for Whites and \$24,076 for Blacks, and \$0 for Latinos.¹⁰⁸ In 1998, the median Latino family wealth, excluding home equity, was still zero.¹⁰⁹ As the material that follows demonstrates, this kind of disparity is pervasive.

This racial disparity is evident in related pension and non-housing equity areas as well. Fifty percent of Whites own tax-favored Individual Retirement Accounts or Keogh accounts, while just 15% of Blacks, and 12% of Latinos own such accounts.¹¹⁰ Similarly, over 90% of Whites own liquid assets, while 60% of Blacks, and 53% of Latinos own these types of assets.¹¹¹ The racial gap in non-housing equity is even more striking in light of the value of such equity: the median value of White non-housing equity is almost eleven times the median value of Latino non-housing equity.¹¹² These disparities persist even when controlling for income level and educational attainment.¹¹³

Although the relatively low level of Latino participation in pension plans disproportionately excludes them from the associated tax benefits, Latinos are also excluded from the tax benefits associated with housing equity and other asset acquisition. Again, while we do not suggest wealth is the ultimate goal of any group, we again want to emphasize our point that sufficient wealth to see to the needs of one's own family and to see to the education of one's children is an important factor in

107. *Id.* at 391.

108. *Id.* A median describes not an average (the mean) but rather the most common data point. Thus the reason why there is zero median pension wealth for Latinos is because within the data sample, only 47% of Latinos own any pension wealth. In other words, more Latinos have a \$0 value than not, so the median must be \$0. In contrast, 79% and 66% of Whites and Blacks respectively own pension wealth in this sample, which is why their median pension wealth is above zero.

109. From 1992 to 2010 employee participation in defined benefit plans declined from 93% to 87% and employee participation in defined contribution plans increased from 9% to 19%. Employee Benefit Research Institute, *Chapter 4: Participation in Employee Benefit Programs*, EBRI DATABOOK ON EMPLOYEE BENEFITS (July 2008), <http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2004.pdf>. In the same period, the personal savings rate as a percentage of disposable income declined from a relative high of 7.3% in 1992 to a relative low of 1.4% in 2005 before rebounding somewhat to 5.8% in 2010. Employee Benefit Research Institute, *Chapter 9: Personal Savings*, EBRI DATABOOK ON EMPLOYEE BENEFITS (May 2011), <http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2009.pdf>. Not surprisingly, Latinos have not seen much in wealth accumulation in this same period. Eric Rodriguez & Deirdre Martinez, *Pension Coverage: A Mission Step in the Wealth-Building Ladder for Latinos*, 11 NCLR ISSUE BRIEF 16 (2004), http://issuu.com/nclr/docs/1388_file_ib11_pensioncoverage?mode=window&pageNumber=16.

110. *Id.* at 396.

111. *Id.* at 395.

112. *Id.* at 394.

113. *See id.* at 398-401.

social mobility and social stability.

C. *The Undocumented*

The Latino population in the United States is heavily represented by immigrants, including undocumented immigrants.¹¹⁴ Professor Francine J. Lipman has undertaken a comprehensive look at the taxation of undocumented immigrants.¹¹⁵ She has observed that undocumented immigrants contribute more to the economy than they consume.¹¹⁶ She also reminds us that the U.S. Supreme Court has echoed this view.¹¹⁷ The Court, she notes, stated in *Plyler v. Doe*:

[T]here is no evidence . . . suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.¹¹⁸

However, even without federal or state legislation barring undocumented immigrants from receiving public benefits, the undocumented use or apply for public services at relatively low rates. For example, undocumented immigrants are overwhelmingly uninsured and tend not to seek out regular or preventive healthcare—let alone Medicare or Medicaid funding for healthcare—due to language barriers, lack of knowledge about the U.S. healthcare system, and fear of detection by immigration authorities.¹¹⁹

114. Lipman, *supra* note 11, at 10. The overwhelming majority of the almost 14 million undocumented U.S. residents are Latino. By comparison, there were nearly 42 million Latinos in the United States in 2005. *Hispanics*, *supra* note 39.

115. Lipman, *supra* note 11 *passim*; see Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, U. CHI. LEGAL F., 27, 33-34 (2007) (state, county and local ordinances regulating immigration functions can also implicate tax issues).

116. Lipman, *supra* note 11, at 2. The amount collected is substantial. See A. Michael Froomkin, *Creating a Viral Federal Privacy Standard*, 48 B.C. L. REV. 55, 85 (2007) (“The SSA collects \$ 17 billion per year in payroll tax payments for which valid SSNs cannot be found . . .”). To support her premise, Professor Lipman cites a large number of scholars, among them Professor Michael A. Olivas who has long spoken against the demonization of the undocumented so prevalent in today’s political discourse. Lipman, *supra* note 11, at 1 (citing Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT’L L. 217, 220, 227-34 (1994-1995) (describing the twisted analysis of data to support the false conclusion that undocumented immigrants “drain-the-fisc”).

117. Lipman, *supra* note 11, at 2 (citing *Plyler v. Doe*, 457 U.S. 202, 228 (1982)).

118. *Id.*

119. Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants’ Access to Health Services: The Public Health Implications of Welfare Reform*, 93 AM. J. PUB. HEALTH 1630, 1630 (2003).

The disproportionate impact of the Code on low-income individuals and families is particularly severe for undocumented families who are often inhibited from sending their children to college, and are consequently limited in their generational social mobility. To understate the problem, undocumented families, headed by parents who usually work low-paying jobs, are often too poor to afford a college education. Because of their immigration status, undocumented students are also ineligible for financial aid in the form of state or federal grants and loans for college.¹²⁰ Despite the increasing rate at which undocumented immigrants are filing tax returns,¹²¹ it is likely that many do not claim or are ineligible for the tax benefits associated with higher education. The fear of being detected by immigration authorities may be deterrent enough from claiming and pursuing tax credits and deductions, but many undocumented families and students may not even know that higher education tax benefits exist. The statutory requirements for claiming the credit are extremely complex and this fact may discourage claims by families in which no one has ever attended college—a likely circumstance in the case of undocumented Latinos.¹²²

If the undocumented receive less in federal tax funded benefits than they contribute in taxes paid, tax policy underlying benefit theory is turned on its head. The argument would be easy to make that by following such a policy, the United States is exploiting the benefit theory shortfall at the expense of the undocumented. Professor Lipman's view is that "Congress could not have intended that the poorest working families pay more than their more fortunate working colleagues."¹²³ Whether Congress has the will to remedy the problem is difficult to predict. It may very well be that this is a Latino reality that will be among the last to fade from the landscape.

D. *The Tax Benefits Associated With Higher Education*

We have noted that despite Latino contribution to the fisc, "Latinos are more likely to live in poverty than non-Latinos and they are

120. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623 (2006). Some states have filled the gap, enacting legislation that allows undocumented students to be eligible for receiving "in-state" tuition aid. *See, e.g.*, CAL. EDUC. CODE § 68130.5 (West 2011).

121. *See* Bernstein, *supra* note 40, at A1.

122. *See generally* Andrew D. Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U. L. REV. 1229 (2007). Sadly, aware of their limited opportunities for higher education, many undocumented students drop out before finishing high school. *See generally* Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 395 (2002).

123. Lipman, *supra* note 11, at 57.

employed in low-wage jobs.”¹²⁴ This is a disadvantage in and of itself; however, available data also show an alarming situation with respect to education. Latinos lag behind Whites and African Americans in educational achievement by a significant margin.¹²⁵ Latinos also have the highest dropout and illiteracy rates.¹²⁶ One study found that in 1990, the Latino dropout rate was an astounding 32.4% while the corresponding rate among African Americans was 13.25% and among Whites was 9%.¹²⁷ More recent data is not as dramatic but is nonetheless compelling. In 2006, the Latino dropout rate was 22.1% while the corresponding rate among African-Americans was 10.7% and among Whites was 5.8%.¹²⁸ These dismal statistics are made yet worse because Latinos are also less likely to pursue higher education.¹²⁹

What does all of this mean in the context of the Code? Two points might be made. First, we add our voices to the many that have argued that the sociological implications of a significant Latino education gap cannot be ignored.¹³⁰ Second, the Code is complicit in exacerbating the Latino education gap. There exist myriad Code provisions designed to provide exclusions from income, tax credits, and other tax benefits related to expenses incurred in connection with the pursuit of higher education that are effectively denied to the Latino populace.¹³¹ These benefits provided to students of the parents of U.S. citizens are denied to Latinos by reason of low income levels and undocumented status that, as a practical matter, do not allow for the exploitation of these benefits. They are also denied by reason of the relatively small number of Latinos who pursue higher education. This kind of disparity is

124. Ana M. Martinez-Aleman, *Latino Demographics, Democratic Individuality, and Educational Accountability: A Pragmatist's View*, 35 EDUC. RESEARCHER 25, 26.

125. ANTONIA DARDER ET AL., *LATINOS AND EDUCATION: A CRITICAL READER* 53 (Routledge 1992); see generally Robles, *supra* note 57, at 178-79 (describing low educational attainment by Latinos).

126. DARDER ET AL., *supra* note 125.

127. NAT'L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2011*, at 218, available at <http://nces.ed.gov/pubs2011/2011033.pdf>.

128. *Id.*

129. Martinez-Aleman, *supra* note 124, at 27. It does not make it any easier to deal with this problem when we discover that this disparity may very well be the result of systematic discrimination in the provision of basic educational opportunity. See Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391, 408-09 (2005) (describing the effects of *de jure* discrimination).

130. Martinez-Aleman, *supra* note 124, at 27. See also EDUCATION LAW STORIES (Michael A. Olivas & R.G. Schneider eds., 2007); Martinez-Aleman, *supra* note 124, at 25; Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of a "Systematic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. L. & POL'Y REP. 1 (2005); DARDER ET AL., *supra* note 125, at 58.

131. See Martinez-Aleman, *supra* note 124, at 27 ("Latinos . . . are less likely to pursue higher education").

especially insidious as it offers little in the way of ending the cycle in which those at the low end of the socioeconomic scale are not provided the means by which to escape the drag caused by low educational attainment. Higher education tax policy, it seems, ill-serves Latinos.

E. *The Earned Income Tax Credit*

The disparities among Latinos, African Americans, and Whites under the Code are also shown in connection with the Earned Income Tax Credit (EITC), by which those with earned income below a certain threshold are provided a refundable tax credit.¹³² Like the deduction for the payment of qualified residence interest, the EITC has a non-revenue generating purpose—it was envisioned as a work-incentive program that was a preferable alternative to welfare.¹³³ The EITC provides a means for the working poor to lift themselves out of poverty.¹³⁴

The expectation here is that all of the poor eligible for the EITC would be homogenous—the poor could be expected to use, or not use, the EITC at the same rates without regard to race or ethnicity. Here, the data are surprising. Professor Dorothy Brown has discovered that more than half of EITC eligible taxpayers are White and that Latinos are “less likely than whites *or* blacks to know about the EITC.”¹³⁵ Indeed poor undocumented immigrants are ineligible for most public assistance

132. I.R.C. § 32 (2011) (describing the earned income credit).

133. Dennis J. Ventry, Jr., *Welfare By Any Other Name; Tax Transfers and the EITC*, 56 AM. U. L. REV. 1261, 1266 (2007). The EITC is not without its critics. For example, one of its difficulties is that while it is aimed at the working poor, the benefits accrue to the poor who are paid as opposed to the unpaid working poor. *Id.* at 1270-71.

134. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 792 (2007).

135. *Id.* at 821 n.197 (emphasis added) (citing Katherine Ross Phillips, Who Knows About the Earned Income Tax Credit? 1 URBAN INST. (Jan. 1, 2001), http://www.urban.org/UploadedPDF/anf_b27.pdf). Professor Dorothy Brown further observes in a table of EITC eligible taxpayers that less than 20% of those are Latino. *Id.* at 821. See Elaine Maag, *Disparities in Knowledge of the EITC*, 106 TAX NOTES 1323, 1323 (Mar. 14, 2005), <http://www.taxpolicycenter.org/publications/urlprint.cfm?ID=1000752> (“Only a small portion (27.1 percent) of low-income Hispanic parents know about the EITC—significantly less than their peers of other races and ethnicities.”); Robles, *supra* note 57, at 181-82 (“Although the EITC has been successful in providing substantial economic relief to a growing segment of the U.S. population and although Latinos are eligible for the EITC, Hispanics are least likely to be aware of this refunded tax credit and less likely to claim it compared to whites and blacks.”). The Urban Institute mentions that 18.4% of low income Hispanic parents have ever received the EITC, which is well below the average of all low income parents. Phillips, *supra*, at 4. Moreover, 47.2% of non-Hispanic non-U.S. citizens have heard of the EITC, while only 16.5% of Hispanic non-U.S. citizens have heard of it. *Id.* at 5. The undocumented do not qualify for the EITC and one undocumented family member taints the entire household. I.R.C. § 32(c)(1)(E) (requiring a taxpayer identification number in order to be eligible); see Lipman, *supra* note 43, at 745-46 (the EITC is denied to workers who are not authorized to work in the United States).

programs, including tax relief. As such, they pay federal, state and local income, property, excise, and sales taxes at exceptionally high effective marginal tax rates.¹³⁶

The irony of the EITC is twofold. First, Professor Dorothy Brown notes that the EITC lifts more children out of poverty than any other government program.¹³⁷ If the EITC is intended to have such salutary effects, it would seem that these salutary effects should be distributed in an equitable manner. Unfortunately, the percentage of Latinos who have actually received the EITC is also less than half of the percentage of African Americans and Whites who have received the EITC.¹³⁸ These results should be as appalling to policymakers as it is to those who are shortchanged. Second, the EITC is extraordinarily complex¹³⁹ but is aimed at a segment of the population that, on balance, is likely to be less educated than the general populace.

All of this makes for an interesting dilemma. We recognize that the EITC has accomplished a lot. Indeed, the cost of administering the EITC is significantly less than the cost of administering the Food Stamp Program or other traditional welfare programs.¹⁴⁰ Moreover, participation rates are higher with the EITC than they are with other programs.¹⁴¹ However, Professor Joseph Dodge makes the point that: “[T]he burden of attaining distributive justice through government action would fall primarily (if not exclusively) on the spending side, not

136. Lipman, *supra* note 43, at 743 (discussing that undocumented immigrants are ineligible for tax relief programs and as such they pay exceptionally high effective marginal tax rates for federal, state and local income, property, excise and sales taxes).

137. Brown, *supra* note 134, at 792.

138. STEVE HOLT, THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW 12 (Feb. 2006), available at http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_holt/20060209_Holt.pdf (Spanish speakers claim EITC at lower rates than others and only 15% of Latino low-income parents reported receiving the Federal EITC in 2002); Phillips, *supra* note 135, at 4 (outlining ethnic differences in knowledge about the EITC and receipt of the EITC). The following table, which tracks low income taxpayers who are among those eligible for the EITC, is abridged from the original:

	Latino	African Amer.	White
Percentage who have heard about the EITC	32	72.7	75.9
Percentage who have received the EITC	18	48	53.1

Id. at 5.

139. Brown, *supra* note 134, at 793. Professor Dorothy Brown observes that the IRS publication that is intended to assist taxpayer understanding of the EITC “is over *fifty* pages long with six separate worksheets.” *Id.* (emphasis added). We address the problem of access to knowledge and information in Part IV.

140. Ventry, *supra* note 133, at 1265 (cost of EITC is less than 2% of benefits compared to 20-25% for Food Stamps and 10% for welfare programs).

141. *Id.* (EITC participation rates are as high as 85% while Food Stamp participation is on the order of 70%).

on the taxing side.”¹⁴² Thus, a mechanism by which the poor, including Latinos, were lifted out of poverty by means of spending might well be more effective. “It would be generally sufficient that tax rules did not thwart or undermine spending programs.”¹⁴³

Moreover, the relative cost of administering the EITC is largely shifted to the taxpayer.¹⁴⁴ At best, this is not a happy result.

Professor Brown suggests that only when popular perception of the EITC is such that it benefits primarily Whites will its complexity be addressed and will audit rates decrease.¹⁴⁵ The not-so-subtle subtext of her suggestion is that the EITC’s complexity and the associated high audit rates have a decidedly racial aspect.¹⁴⁶

IV. EDUCATION OF THE POPULACE AND THE POLICYMAKERS

We are mindful of the power of information. One commentator has noted that “[t]ax systems . . . empower only those who can take advantage of the tax benefits.”¹⁴⁷ In order to take advantage of tax benefits, a taxpayer must not only reach a certain income level,¹⁴⁸ a taxpayer must also *know* about the tax benefits. We believe information about rights and government processes in general should be available to everyone, including Spanish speakers, in the United States. Our view is underscored by the Voting Rights Act, which requires that voting materials in minority languages be made available to applicable language minority groups.¹⁴⁹ Implicit in the Voting Rights Act is the notion that effective and responsible participation in democracy requires a basic understanding of the mechanisms of the electoral process.¹⁵⁰ It strikes us that the extraordinary complexity of the Code alone would justify the availability of materials in minority languages.¹⁵¹ In this

142. *Id.*; Dodge, *supra* note 33, at 452.

143. *Id.*

144. Francine J. Lipman, *The Working Poor are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461, 466-67 (2003).

145. Brown, *supra* note 134, at 798-99 (building on Derrick Bell’s interest convergence theory).

146. *See id.*

147. Uy, *supra* note 5, at 119.

148. *Id.*

149. Section 4(f)(4) of the Voting Rights Act codified as amended at U.S.C.A. § 1973aa-1a (West 2011), require that when a covered state of political subdivision: “[P]rovides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language.”

150. As more eloquently phrased in the context of illiteracy, “[a]n illiterate population can neither work effectively nor participate in democracy.” DARDER ET AL., *supra* note 125, at 58.

151. We invite the reader to search “tax loopholes” on google.com (last visited Oct. 11,

respect, the Internal Revenue Service has commendably made tax information, forms, and publications in Spanish.¹⁵² Still, there remains concern that more must be done to educate Latinos as to the availability of the EITC so those who are eligible actually receive the intended benefit.

We also are mindful of the insidious effect of subtle forms of discrimination. In this regard, we take our cue from Professor Zelenak who suggests a multi-step approach that begins with the inquiry as to whether a particular Code provision was intended to have a disparate impact, and whether there exists a legitimate purpose for the provision.¹⁵³ While we think that in the majority of cases, the answer would be no to the former question and yes to the latter question, we are open to persuasion. We leave the final step of Professor Zelenak's approach—finding “the best balance between eliminating or ameliorating the adverse impact, and serving the provision's legitimate purpose”¹⁵⁴—to the new Congress.

To be sure, it may be that any tax system will always have its winners and losers. Perhaps, for that reason, distributive justice may very well be best accomplished by focusing not on the system itself but rather on programs that can, in some positive way, accomplish the social goals not well-suited for the tax system.¹⁵⁵ One candidate for this program would be concerted education regarding the tax system aimed at Latino and other minority populations. As we mentioned above, only a small percentage of low-income Latino parents even *know* about the EITC, let alone receive it.¹⁵⁶

The knowledge necessary to become tax literate depends on the mastery of basic financial principles and exposure to their application.¹⁵⁷ In the case of Latinos, this familiarity may be difficult to acquire.¹⁵⁸ This knowledge is certainly not widely available and, as one scholar observes, financial skills, including knowledge of tax benefits, “are often overlooked as a component in financial education curricula and outreach.”¹⁵⁹ Those who have the opportunity to improve this aspect of their education will gain the means to break the cycle of

2011). Our attempt returned 1,009,000 hits. This is not a frivolous exercise. It invites the question as to who has access to such information. We think it is those rich enough to have computers, those who speak English, and those who can read.

152. Internal Revenue Service, *EI IRS en Español*, IRS.GOV, <http://www.irs.gov/espanol/> (last visited Sept. 24, 2011).

153. Zelenak, *supra* note 46, at 1575.

154. *Id.*

155. See Dodge, *supra* note 33, at 451-52.

156. Brown, *supra* note 134, at 821 n.197.

157. See Robles, *supra* note 57, at 181.

158. *Id.*

159. *Id.*

dependency on the EITC, and can ultimately take advantage of the largess provided in the Code.¹⁶⁰

In the case of the Code, obligations and benefits should be made well-known to Spanish speakers. This is neither a trivial concern nor is it an unambitious goal. The effects could be tremendous. According to the 2000 census, there are 28.1 million native Spanish speakers living in the United States: this number includes 14.3 million who reported that they spoke English “very well” and 13.8 million who reported that they spoke English “less than very well.”¹⁶¹ Despite this language barrier, Latinos have growing political clout and contribute a significant portion of the tax revenue, even if some are undocumented.¹⁶²

We are driven by Professor Marjorie Kornhauser’s eloquence in describing the challenges that we as Latinos face:

[W]e must constantly be aware that the tax laws reflect social and political choices, not just economic ones, and that all these choices have different impacts on different groups. Our awareness of these facts can help us deal with any resultant inequities . . . through the tax code¹⁶³

CONCLUSION

At bottom, “it remains important not to lose sight” of the effect of public policy choices.¹⁶⁴ In the case of the Code, we take pains to emphasize that public policy choices, in the guise of tax statutes appear neutral in their application, can have profound effects on the future of Latinos. Ultimately, randomized justice is a poor proxy for more precise fairness. Conscious and transparent decision-making must permeate the inevitable policy choices and tradeoffs inherent in the Code. It is with this spirit that we proceeded with our critique, mindful that minimization of racial and ethnic inequities in the Code can only lead to greater tax compliance.

While it is tempting to develop the theme that a tax structure that caters to the majority is inherently discriminatory, it would then have to follow that no tax structure could pass muster as being truly equitable. The principle of horizontal equity is inherently suspect, not because it

160. *Id.* at 187.

161. *Id.* at 178.

162. Hyon B. Shin & Rosalind Bruno, *Language Use and English Speaking Ability: 2000*, U.S. CENSUS 2000, at 2 (Oct. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

163. Marjorie E. Kornhauser, *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1627 (1998).

164. See Olivas, *supra* note 129, at 415.

fails as an ideal, but rather because the idea of treating similarly situated persons similarly may be an impossible task.¹⁶⁵ A second problem is that in attempting a truly horizontally equitable tax system, there might be a tendency to subordinate that cultural identity, which makes us unique.¹⁶⁶ As Dr. Ana Martinez Aleman observes, by disregarding individuality, “we invoke one of the paradoxes of American democracy: the belief and confidence in the individual and the coincident disregard for an individual’s reality.”¹⁶⁷

Accordingly, the analysis of whether Latinos are ill-treated under the Code must necessarily depend on notions of distributive justice. While tax policy theorists may balk at such an approach, distributive principles have always permeated the Internal Revenue Code. Latino demographic realities make this reality too hard to ignore. This is demonstrated by the increasing economic clout of Latinos in this country coupled with the persistent asymmetric distribution of tax benefits among all ethnic and racial groups. Finally, reducing this inherent unfairness will also serve the utilitarian purpose mentioned at the start of our analysis—making the Code fair facilitates tax collection.

165. See Martinez, *supra* note 2, at 424 n.60.

166. See Martinez-Aleman, *supra* note 124, at 25 (discussing educational programs that constrain individuality).

167. *Id.*