

“Tax and Race: The Impact on Asian Americans”

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INTRODUCTION

Articles about tax law often begin by invoking Benjamin Franklin’s famous phrase: “In this world nothing is certain but death and taxes.”¹ As the Internal Revenue Code (hereinafter “Code”) increases in complexity,² the certainty of taxes seems more and more illusory. For many taxpayers, taxes are more unpredictable than certain.³ Continued changes add to the Code’s complexity and to taxpayers’ confusion.⁴ For many taxpayers who are low-income or limited in English proficiency, these factors contributing to their lack of understanding of the law and its requirements are exacerbated. For example, in response to the California Franchise Tax Board’s request for documentation of his disability, one taxpayer merely scribbled on a piece of paper, “I am disabled,” along with his social security number.⁵ Apparently, he believed such “documentation” was

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1. See, e.g., Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1115 (2003). A search on Westlaw for law review articles with the phrase “death and taxes” comes up with 400 results, the maximum number the system can generate.

2. See Jonathan Barry Forman, *Simplification for Low-Income Taxpayers: Some Options*, 57 OHIO ST. L.J. 145, 163 (1996).

3. “Complexity is a major problem for the federal tax system. Complexity erodes voluntary compliance with the tax laws, creates a perception of unfairness for the system, impedes the effective administration of the tax laws, results in high compliance costs, and interferes with economic transactions.” *Id.* at 173. See also Sharon C. Nantell, *A Cultural Perspective on American Tax Policy*, 2 CHAP. L. REV. 33, 36 (1999) (“So, if the experts cannot master the entire Code, what chance do average taxpayers have? The complexity of the Internal Revenue Code has been the topic of discussion of tax reform for many years.”).

4. Forman, *supra* note 2, at 167 (reporting that millions of people need help preparing their income tax returns each year and that Americans may spend as much as \$30 billion a year to prepare their income tax returns). In fact, during Franklin’s time, the country did not have the system of taxes we have today; rather, the federal system was an excise tax. Nantell, *supra* note 3, at 39. Consequently, our conception of taxes today is completely different from Franklin’s.

5. I interned at the California Franchise Tax Board (hereinafter, “FTB”) during the spring of 2003, and this was one of the cases I handled. At the FTB, I wrote opening briefs in taxpayer protests,

sufficient.

Why is the law so often disconnected from the understanding and expectations of the taxpayers? Is it related to the fact that the people making these laws do not reflect the demographic makeup of the public who ultimately pays the taxes? Does one's cultural understanding of the tax laws make any difference? How does one's race affect how one is taxed? This Comment seeks to explain by way of critical tax theory the Code's disparate impact on Asian Americans, and why this disparate impact is not recognized or addressed by traditional critical tax law theorists.

As background, Part I discusses why tax is relevant in the context of race and civil rights. Next, Part II examines recent scholarship in critical tax theory, most of which focuses on the Code's effects on blacks. Part III brings Asian Americans into the picture and examines the Code's disparate impact on Asian Americans. This section will highlight how empirical data may be deceptive in masking the Code's disparate impact. Finally, Part IV looks to possible solutions for the situation at hand, recognizing that some solutions will reach beyond the Internal Revenue Code.

I. WHY TAX MATTERS

Examining the implications of money seems crass within conversations about social justice, especially since concerns about money appear at odds with traditional conceptions of social justice.⁶ Yet, money talk should be at the heart of the civil rights discussion, for economic well-being is one measure of existing inequities.⁷ When we examine why so many Southeast Asian Americans live below the poverty line, we are talking about money. When we discuss why home values in black neighborhoods do not appreciate as much as those in white neighborhoods, we are talking about money. "Tax systems are the primary means by which democratic governments redistribute wealth. . . . That tax is at the heart of the inquiries about the meaning of justice is not surprising."⁸ When a group is taxed disproportionately, that group suffers an injury akin to any other civil rights injury.⁹

The tax system has become a way for our society to articulate its values.¹⁰ Reality is less simple however, since the people articulating these

which were submitted to the State Board of Equalization, the government body that decides tax appeals. The taxpayers in my cases were often low-income or limited English proficient.

6. See Alice G. Abreu, *Tax Counts: Bringing Money Law to LatCrit*, 78 DENV. U. L. REV. 575 (2001).

7. See Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1754 (noting that debates about tax policy touches upon many important public policy issues); see also Abreu, *supra* note 6, at 591. Professor Abreu defines "money-law" as the "process of integrating the money areas of the law into the LatCrit enterprise." *Id.* at 575.

8. Abreu, *supra* note 6, at 577-78.

9. *Id.* at 577.

10. Marjorie E. Kornhauser, *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1627 (1998) (noting that tax policy is a reflection of social and

values are not fully representative of the society upon which these policies are imposed.¹¹ These social values can be a source of empowerment for those who have the choice of using the tax system to burden others or benefit themselves.¹² First, individuals can alter their behavior to lessen their tax burden. For example, home ownership is a value that the legislature has built into the Internal Revenue Code, as is evidenced by the number of tax benefits that homeowners receive.¹³ Second, the system is set up so that individuals can shift the economic burdens of a particular tax. For example, a business owner can offset his burden of the sales tax onto the consumer by charging higher prices.¹⁴

Tax systems, however, empower only those who can take advantage of the tax benefits. For instance, those who cannot afford to buy a home never get to take advantage of the provisions that encourage home ownership. While the theoretical notion of choice seems to be a good thing, in reality, only some people have the luxury of this choice. Under our income tax system, wealthier individuals have more choices.¹⁵ "The rich can buy houses, invest in tax-advantaged financial instruments, and get paid in stock options that generate no current income or employment tax liability, but the working poor have none of those choices. By distributing the power to choose in proportion to wealth, the federal tax system contributes to the subordination of the poor people, particularly poor working people."¹⁶ Tax policy encourages certain behaviors that are valued by those who created the tax policy. It is not surprising that given the dominance of wealthy, white males in our legislature, our tax policies reflect biases in their favor.¹⁷ Historically, the original federal income tax scheme was implemented as a measure of taxing the "excessively wealthy"—namely, no more than 1% of the population.¹⁸ It has instead turned into a system that perpetuates and exacerbates the gap between the rich and the poor.¹⁹ In 1990, families in the top 1% in income received

political values, not just economic ones); see also Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 753-54 (1996) (defining a "tax benefit" as any opportunity to deduct, exclude, or postpone reporting income that "deviate from the ideal of a comprehensive income tax base" and stating that "[m]ore often, Congress has decided to encourage particular lifestyles or behaviors by holding out tax benefits as an incentive").

11. Nantell, *supra* note 3, at 64 ("Our tax system, much like the rest of our law, was created by mostly wealthy, mostly male, mostly white individuals.")

12. See, e.g., Abreu, *supra* note 6, at 582; see also Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do with It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 766-67 (1999) [hereinafter Brown, *Racial Equality*] ("We must remember that federal tax laws are widely believed to encourage behavior through allowing deductions and credits and discourage behavior by denying deductions, or imposing penalties.")

13. See discussion *infra* Part II.C.

14. Abreu, *supra* note 6, at 582.

15. *Id.* at 584.

16. *Id.* at 585 (footnote omitted).

17. Nantell, *supra* note 3, at 65 (noting that wealthy white males still dominate the legislature today). See *infra* note 98 and accompanying text.

18. See Forman, *supra* note 2, at 173; Nantell, *supra* note 3, at 49.

19. Abreu, *supra* note 6, at 585. A number of scholars use the word "exacerbate" to describe the

13% of all income, but families in the bottom 40% also earned 13% of all generated income, creating a situation where the top 1% earned as much as the bottom 40%.²⁰ A decade later, this gap only increased.²¹ In 2001, the Census Bureau reported that families in the top 5% in income received 22.4% of the share of aggregate income, while the bottom 60% received 26.8% of the income, only a little more than what the top 5% received.²² Because the poor are disproportionately women, children and people of color,²³ socio-economics and the fight for racial and gender equality are interconnected. Only by examining these issues and their intersections can we start to break down the inequities.²⁴

II. A CASE OF DISPARATE IMPACT: WORK, HOME AND MARRIAGE

A. Critical Tax Theory, Wealth Distribution and Color

If tax policy favors the rich,²⁵ and the richest people in the country are overwhelmingly white, then issues of race may be implicated in tax policy.²⁶ In the mid-1990s, whites had a median net worth of \$43,800, significantly higher than blacks' median net worth of \$3,700.²⁷ These

tax system's role in problems of social and racial justice. See, e.g., Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1501 (1997) [hereinafter Brown, *The Joint Return*] (discussing how federal tax laws "exacerbate the penalty that African-American families suffer in the labor force."); Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837, 1841 (1998) (describing the tax system as one which reinforces the existing economic hierarchy and "exacerbate[s] the subordinate status and relative impoverishment of [certain] sectors of society.").

20. Abreu, *supra* note 6, at 586.

21. David Cay Johnston, *USA: Very Richest's Share of Income Grew Even Bigger in 2000*, *Data Show*, N.Y. TIMES, June 26, 2003, at A1, available at <http://www.corpwatch.org/news/PND.jsp?articleid=7368> (last visited June 2, 2004) ("The 400 wealthiest taxpayers accounted for more than one percent of all the income in the United States in the year 2000, more than double their share just eight years earlier, according to new data from the Internal Revenue Service. But their tax burden plummeted over the period.").

22. U.S. CENSUS BUREAU, *MONEY INCOME IN THE UNITED STATES: 2001*, at 19 (Sept. 2002) [hereinafter MONEY INCOME], available at www.census.gov/prod/2002pubs/p60-218.pdf.

23. See Beverly Moran, *Setting an Agenda for the Study of Tax and Black Culture*, 21 U. ARK. LITTLE ROCK L. REV. 779, 787 (1999) (discussing the intersection of caste and class).

24. Brown, *Racial Equality*, *supra* note 12, at 768 ("The federal tax laws' role in reinforcing societal racism must be explored, written about, challenged and ultimately eliminated.").

25. This is because they can take advantage of the choices built into the tax system. See Abreu, *supra* note 6, at 585; see also Nantell, *supra* note 3, at 67 ("Tax provisions such as the home mortgage deduction and the preferential tax treatment for capital gains primarily benefit taxpayers in the upper-income brackets.").

26. See generally Charlie James, *Millennium Report Shows It's Time to Close Black-White Economic Gap*, SEATTLE POST-INTELLIGENCER (Mar. 6, 1998), at <http://www.eisenhowerfoundation.org/aboutus/media/SeattlePostIntell.MillenniumMar81998.html> ("[T]he economic and racial divide in America not only has materialized, it's also getting wider."); see also Moran & Whitford, *supra* note 10, at 757 (arguing that although most assume that "blacks cluster in the lower economic classes, and that most tax benefits favor the wealthy more than the poor," the authors propose that even if income was held constant, the Code systematically disfavors blacks).

27. Moran & Whitford, *supra* note 10, at 766-67 (citing MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 85-86

numbers did not change in 2001, when the Census Bureau reported that black and Latino households earned much less than white households.²⁸ Therefore, when tax policies favor the rich, it can be said that they really favor whites.²⁹ From this notion emerged “critical tax theory,” a novel area of inquiry under critical race theory. Critical race theorists posit that implications of race permeate every aspect of American society.³⁰ It follows that race matters in tax policy as well.³¹ In essence, critical tax theory questions the assumption that tax law is neutral and objective.³²

Critical tax theorists focus not on discriminatory intent, but disparate impact.³³ They argue that the Code systematically favors the financial interests of whites and disfavors those of blacks.³⁴ When Congress decides to encourage particular lifestyle choices or behaviors by offering specific tax benefits, blacks are typically less able to utilize these benefits. Blacks are less advantaged by the tax benefits fashioned by a mostly white Congress.³⁵ Like other laws, tax law is made by mostly wealthy white males,³⁶ and “not all of their assumptions about American values and behavior are necessarily reflective of a primarily middle- and lower-class, two-gender, multi-ethnic society.”³⁷

(1995)).

28. In 2001, the average median income of non-Hispanic white households was \$46,305. See MONEY INCOME, *supra* note 22, at 4. It was \$29,470 for black households (more than one-third less than white households) and \$33,565 for Hispanic households (more than one-fourth less than white households). See *id.* Asian American household income will be discussed later in this paper. See *infra* Part III.

29. Moran and Whitford argue that even after adjusting for income disparities, the Internal Revenue Code disfavors blacks. Moran & Whitford, *supra* note 10, at 757.

30. *Id.* at 751-52.

31. *Id.* at 752 (“If this part of critical race theory has merit, then every important American institution should reflect racial subordination, even such a seemingly neutral institution as the American tax system.”).

32. See Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 89-90 (1997) [hereinafter Brown, *Split Personalities*]; see, e.g., Stacey Y. Abrams, *Income, Deductions and Wealth: A Survey of Policy Remedies to the Intersection of Color, Gender and Taxation*, 28 S.U. L. REV. 255, 256 (“Invariably, critical theory addressing tax policy is concerned either with the gender-bias that belies ‘tax neutrality’ and the implications of wife labor or theorists who rightly decry the employment discrimination and deduction and exemption policies that disproportionately impact singles and couples of color.”).

33. See Moran & Whitford, *supra* note 10, at 758 (“[W]e want to make clear that we are not asking a question about discriminatory intent.”). A disparate impact analysis looks at how a system adversely affects a disproportionate number of people in one group over those in another group. See Ronald Turner, *Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 444 (1995) (discussing disparate impact in the context of employment discrimination policies); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”).

34. See Moran & Whitford, *supra* note 10, at 757.

35. *Id.* Moran and Whitford argue this is the case due to a number of economic inequities that blacks experience. See discussion *infra*.

36. Nantell, *supra* note 3, at 64.

37. *Id.* at 65; see Brown, *Split Personalities*, *supra* note 32, at 91 (“My scholarship is dedicated to

Critical tax scholars have identified numerous Code provisions that potentially disfavor blacks. Although the Code deals with more than just the personal income tax, this Comment examines three specific areas in the personal income tax provisions that affect the general population: work, home and marriage.³⁸ After looking at how blacks are disparately affected in these three areas, this Comment examines how these same areas under the Code affect Asian Americans.³⁹

B. Work: Income and Employment Discrimination.

Minorities suffer two substantial obstacles in achieving financial equality with whites: lower wages and higher rates of unemployment. As scholars have noted, "there is no greater culprit that prevents the achievement of racial equality in this country than the systemic racism found throughout the labor market."⁴⁰ In 1995, although median weekly earnings for white males were \$566, median weekly earnings were \$411 for black males, \$355 for black females, \$350 for Hispanic males, and \$305 for Hispanic females.⁴¹ Such disparity persisted in 2000, when white males earned \$669 per week compared with \$500 for white females, \$503 for black males, \$429 for black females, \$414 for Hispanic males, and \$364 for Hispanic females.⁴² In addition to the wage disparities, minorities suffered a higher rate of unemployment. In 2000, the unemployment rate for whites was 3.5%, compared with 7.6% for blacks and 5.7% for Hispanics.⁴³

These numbers set the scene for a discussion of tax laws and their disparate effects. First, tax treatment of employer's payments in employment discrimination cases does not help reduce discrimination in the workplace. Second, because blacks earn less than whites, they are less

forever eradicating the belief that tax law is somehow different, that it has no differing impact based upon race, ethnicity, or any other characteristic.").

38. Moran and Whitford also talk about other Code provisions, such as the gift and estate tax and various benefits employers offer to their employees. See generally Moran & Whitford, *supra* note 10, at 755, 762, 783.

39. Asian Americans are discussed *infra*, Part III.

40. Brown, *Racial Equality*, *supra* note 12, at 763.

41. *Id.*

42. U.S. CENSUS BUREAU, 2001 STATISTICAL ABSTRACT OF THE UNITED STATES 403 (2001) [hereinafter STATISTICAL ABSTRACT]. Missing from these statistics are the numbers for Asian men and women workers. According to Brown, the Bureau of Labor Statistics does not collect information on median weekly earnings for Asian Americans. Brown, *Racial Equality*, *supra* note 12, at 763 n.19.

43. STATISTICAL ABSTRACT, *supra* note 42, at 368.

<Median Weekly Earnings>

	1995		2000	
	Male	Female	Male	Female
White	\$566		\$669	\$500
Black	\$411	\$355	\$503	\$429
Hispanic	\$350	\$305	\$414	\$364

likely to be able to buy a home and take advantage of the tax benefits available for homeowners. Third, wage disparities mean that black married couples suffer the marriage penalty more often.⁴⁴

1. Tax treatment of employment discrimination

Besides being an inherent evil, employment discrimination is concretely significant in this critical tax law inquiry. For instance, the Code enables the deduction of discrimination payments employers make in workplace discrimination suits. Such payments have been found to fall under Section 162's deductible "ordinary and necessary" business expenses.⁴⁵ This payment is deductible regardless of whether it is part of a settlement or a court judgment, and regardless of whether that judgment is compensatory or punitive. The employee must report the payment as income, and the full amount is subject to income tax.⁴⁶ Under such a system, the employer has less incentive to reduce discrimination in the workplace since the employer receives some tax benefit from making any payments that may result from an employment discrimination lawsuit.

Empirical evidence shows an increase in the number of job discrimination suits during the 1990s, supporting the above assertion. Class action lawsuits for job discrimination more than doubled between 1993 and 1997,⁴⁷ and the Justice Department reported that private lawsuits involving alleged workplace discrimination more than tripled in the 1990s.⁴⁸ Workplace discrimination suits usually allege discrimination in hiring, firing, promotion or pay, and "[f]or as long as we have had federal tax laws they have subsidized race discriminators by allowing them complete deductions."⁴⁹ By allowing deductions for discrimination payments, the tax system helps perpetuate the institutionalized system of racism in the workplace.

The tax system should eliminate the deduction of discrimination payments that employers make in workplace discrimination suits. Section 162 of the Internal Revenue Code generally allows for the deduction of "ordinary and necessary" business expenses by employers. Because

44. Critics of critical tax theory are skeptical that disparate earnings underlie adverse treatment in the tax system. After all, if black males earn less than white males, then—so the argument goes—black males are paying less tax than the white males due to the progressive tax system. See Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1817-18 (1998). This argument is problematic for three reasons. First, while it acknowledges that "African-Americans are dramatically underrepresented in high- and middle-income groups and overrepresented in the lowest income group," it does not seem bothered by the fact. *Id.* at 1818. Second, it does not acknowledge that the lower income prevents many blacks from enjoying benefits that the income tax system offers. (These benefits are discussed further *infra*.) Third, paying less tax is unlikely to make up for the indignity of wage discrimination.

45. Brown, *Racial Equality*, *supra* note 12, at 756 n.36.

46. *Id.* at 765.

47. *Id.* at 764.

48. NATIONAL CENTER FOR POLICY ANALYSIS, *Idea House, Job Discrimination Lawsuits Soar*, at <http://www.ncpa.org/pd/law/pd011700b.html> (last visited Aug. 10, 2003).

49. Brown, *Racial Equality*, *supra* note 12, at 767.

workplace discrimination should not be considered something that happens in the “ordinary and necessary” course of business, employment discrimination awards should not be considered as such. In addition, the discrimination award should not be considered income to the employee. Scholars like Brown have gone further to propose that all of the discriminator’s employee wages should be non-deductible whenever the employer loses or settles a race-based discrimination suit.⁵⁰ This would be an added disincentive to employers and would provide appropriate punishment to those who discriminate.⁵¹ Those who do not discriminate would have a competitive edge against those who do.⁵²

C. Home: The Home Mortgage Interest Deduction

Another area in which the tax system disparately impacts racial minorities is in the Code’s incentives for home ownership. Section 163 disallows almost all personal interest deductions,⁵³ although one exception is the home mortgage interest deduction.⁵⁴ Homeowners are able to deduct from their taxable income any interest they paid on their home loan during the year. This subsidy is one that Congress chose to enact through the Code, but it has little to do with raising revenue. Rather, it is a tax expenditure⁵⁵ that costs our government \$60 billion a year. Congress’ choice of favoring homeowners possibly reflects the belief that people who own house are more stable people.⁵⁶

In addition to the mortgage interest deduction, as the value of the house appreciates, the homeowner can take out an equity line of credit to make improvements to the house or even to buy a new car or other personal expenses, and the interest payments on these loans are also deductible. This is the paradox of Section 163(h), which eliminates the deductibility of personal interest payments but still circuitously allows for it. Beyond the deductibility of the home mortgage interest, there are two additional incentives for homeownership. First, homeowners can deduct the property taxes they pay on the house.⁵⁷ Second, they can shelter \$250,000 of gain on the sale of a principal residence from income taxation.⁵⁸ For married

50. *Id.*

51. *Id.* at 767-68.

52. *Id.*

53. 26 U.S.C. § 163(h)(1) (2004) (stating that “no deduction shall be allowed under this chapter for personal interest paid or accrued during the taxable year”).

54. Any “qualified residence interest” is one of the few exceptions to § 163(h). See 26 U.S.C. § 163(h)(2)(D) (2004).

55. Tax expenditures are “reductions in individual or corporate income tax liabilities that result from special tax provisions or regulations that provide tax benefits to particular taxpayers.” Nantell, *supra* note 3, at 68.

56. Nantell, *supra* note 3, at 35 (“[A] society’s choice of a system of taxation speaks volumes about what that society values and believes. . . . How a particular society chooses to share its resources or revenues among villagers or throughout a nation is reflective of what that society holds dear in its culture.”).

57. 26 U.S.C. § 163(h) (2004).

58. *Id.*; § 121(b)(1) (2004).

couples, the amount allowed for exclusion from income tax is \$500,000. These provisions provide a substantial benefit to home ownership, and their effectiveness in changing behavior is evidenced in the increasing amount of people looking to buy houses⁵⁹ and the subsequent increase in real estate prices.⁶⁰ To benefit from these provisions, however, one must own a house,⁶¹ something that is becoming more difficult for low and middle income earners, as the cost of homes rises.

Due in part to the fact that minorities earn less and are more likely to be unemployed, trends in homeownership are divided along racial lines. Blacks are less likely to own a house than whites.⁶² A study from the 1980s revealed that 71.3% of whites owned their homes, in stark comparison to 41.2% of blacks.⁶³ Another study found that at every level of income, whites owned homes 10 to 20% more often than blacks.⁶⁴ Not much has changed since. In 1999, 46.1% of blacks owned their homes, as compared with 45.1% of Hispanics and 73.0% of whites.⁶⁵ The latest study indicates that 74.7% of whites own their homes, compared with 48.9% of blacks and 47.4% of Hispanics.⁶⁶

Blacks are less likely to be homeowners compared to whites due to three possible factors. First, since blacks earn less than whites, they may be less able to save enough for a down-payment and other up-front costs

59. If the rate of homeownership is any indication, this is an incredibly effective incentive. See JOINT CTR. FOR HOUSING STUDIES OF HARV. U., *THE STATE OF THE NATION'S HOUSING: 2003*, at 35 [hereinafter *NATION'S HOUSING*], at <http://www.jchs.harvard.edu/publications/markets/son2003> (showing that homeownership is continuing to increase, with an overall rate of homeownership at 67.9%); see also Nantell, *supra* note 3, at 78 ("Nowhere is the behavioral impact of the tax code more evident than in the purchase and sale of homes.").

60. See also Moran & Whitford, *supra* note 10, at 754-55 (noting that as the demand for housing increases, prices will increase and taxpayers buying such expensive homes might be no better off with the tax benefits than without).

61. Moran & Whitford, *supra* note 10, at 773.

62. *Id.*

63. *Id.* at 775.

64. *Id.*

65. *NATION'S HOUSING*, *supra* note 59, at 35.

<Home Ownership>

	1980s	1999	2003
White	71.3%	70.3	74.7
Black	41.2	45.2	48.9
Hispanics		42.8	47.4

66. *Id.* This Harvard University study found that demographics and income factors did not fully explain the homeownership gaps. *Id.* at 17. Critics of the Moran-Whitford study argue that the disparities are products of choice: blacks simply choose not to participate in tax-beneficial behavior. See Jensen, *supra* note 7, at 1761. Jensen's argument looks at the issue of choice too simplistically. *Id.* It neglects to examine the reasons and constraints behind the "choice," which may render the purported "choice" not really a choice at all. *Id.* Moran and Whitford also argue that blacks face different tax consequences under the current system than whites because the former's experiences are colored by America's history of racial subordination. See Moran & Whitford, *supra* note 10, at 757.

associated with buying a house. Also, ability to afford the monthly mortgage payments may be a contributing factor. Second, blacks are more likely to be rejected for mortgage applications than whites.⁶⁷ This is in addition to the fact that blacks are already less likely to apply for a loan in the first place.⁶⁸ Third, the two groups manifest significant differences in family wealth.⁶⁹ Because whites are more likely to own a home, they are more likely to have savings and assets, which can be used to help the next generation make a down payment and purchase a home.

Even when blacks own homes, they benefit less from the tax benefits available for homeowners. For instance, because up to \$500,000 of gain on the sale of a house is tax-free, the more one's house appreciates, the more benefit one derives from the sale of the home. This results in a disparate impact for blacks because while they are homeowners, their homes tend to appreciate less than white homes.⁷⁰ Therefore, along with a lower rate of appreciation, blacks are unable to fully take advantage of the gains borne from selling their home.⁷¹

Currently, a number of programs are in place to increase minority homeownership by providing information about obtaining a home mortgage and even financial assistance to get a home loan.⁷² Moran and Whitford also suggest replacing the home mortgage interest and property taxes deduction with a credit which will phase out once income reaches \$50,000.⁷³ Deductions reduce a taxpayer's taxable income so wealthier taxpayers, who are at a higher tax bracket benefit more from deductions than less wealthy taxpayers. A credit, on the other hand, directly reduces the amount of taxes one owes which means taxpayers save the same amount regardless of their income tax bracket. Because blacks earn less on average than whites, such a system of credits could allow blacks to benefit

67. Indeed, blacks are 87% more likely than whites to be rejected for a mortgage. Kerwin Kofi Charles & Erik Hurst, *The Transition to Home Ownership and the Black-White Wealth Gap 3* (June 2000), at www.ksg.harvard.edu/inequality/Seminar/Papers/Charlespaper.pdf. Between 1991 and 1995, Charles and Hurst followed blacks and whites who were transitioning from renting to homeownership to determine why there was a gap between black and white homeownership. *Id.*

68. *Id.* at 3 (finding that blacks are twenty percent less likely to apply for home loans).

69. *See supra* note 27 and accompanying text.

70. *Id.* *See also* Mark Howard, *Florida Trend, Not Fair, Not Yet* (2001), at <http://www.bizpubs.org/content/events/summer2001/awards/award1a.asp> (reporting that Mark Howard's house costs fifteen to twenty-five percent less than houses located ten miles northward). Howard sees it as a race issue. *Id.*

71. In addition, homeowners can take out an equity line of credit on the value of appreciation of their home, and the interest payments on this equity loan can also be tax deductible. When black homes appreciate less than white homes, blacks are able to borrow less if they wished to take out an equity loan on the appreciation of their home.

72. *See* Erin Johansen, *Minority Home Ownership Rising, But Rates Are Still Low*, DENVER BUS. J., July 28, 2003, at <http://www.bizjournals.com/denver/stories/2003/07/28/focus3.html?page=1>; Press Release, San Francisco Public Library, *Seminars on Home Ownership Offered at San Francisco Libraries* (Oct. 16, 2002) ("[W]e will provide easy access to information about home buying, which will help homebuyers overcome the information barriers to home ownership. In particular, we will focus on helping low- to moderate-income and minority homebuyers because rates of homeownership are lower among these groups.")

73. Moran & Whitford, *supra* note 10, at 782.

more from owning a home.

D. Marriage: The Marriage Penalty and the Marriage Bonus

Another way that income disparities manifest themselves in the tax system is in the marriage penalty and marriage bonus. When two people marry, depending on various factors, they can either receive a marriage penalty or a marriage bonus.⁷⁴ The “marriage penalty” is an increase in taxes for a married couple filing jointly compared to what they would pay if they were single.⁷⁵ The “marriage bonus” is the opposite. It is a decrease in taxes for a married couple filing jointly compared to what they would pay if they were single.⁷⁶ The marriage bonus is highest when only one person earns the entire household income.⁷⁷ The marriage penalty is highest when both spouses earn the household income equally (50/50).⁷⁸ As an illustration, take two families, Family 1 and Family 2. In Family 1, one spouse works outside of the home and the other is a homemaker. The family has an adjusted gross income of \$100,000. The working spouse’s taxes if he or she were single would be \$23,013. But as a couple filing jointly, their taxes are \$17,063.⁷⁹ The family has received a bonus of \$5,950. In Family 2, the couple’s combined income is \$100,000 a year, \$50,000 earned by the husband and \$50,000 earned by the wife. If they were not married, they each would pay \$7,774 in taxes,⁸⁰ for a total tax liability of \$15,548 between the two of them. As a married couple filing jointly, their taxes are \$17,063. They have suffered a \$1,151 penalty.

White upper-class households receive the greatest marriage bonus, and black households pay the greatest marriage penalty,⁸¹ since blacks are more likely than whites to live in two-worker households where both workers earn at similar income levels.⁸² In addition, if the white family does have two wage earners, the gap between the incomes of the white husband and wife will be greater than the gap between the incomes of the black husband and wife. This is due to the fact that a black man on average makes considerably less than a white man, so the black man’s income will more closely resemble that of his black wife’s. As a result, the working black

74. For a more detailed explanation of the marriage penalty, marriage bonus and the joint return, see Brown, *The Joint Return*, *supra* note 19, at 1477-81 and Moran & Whitford, *supra* note 10, at 791-93.

75. Moran & Whitford, *supra* note 10, at 791.

76. *Id.*

77. Brown, *The Joint Return*, *supra* note 19, at 1479.

78. *Id.*

79. Internal Revenue Service, 2002 1040 Instructions, at 73. The taxable income in this example is computed by subtracting out the standard deduction and personal exemptions from the adjusted gross income.

80. *Id.* at 68.

81. Brown, *The Joint Return*, *supra* note 19, at 1501; Moran & Whitford, *supra* note 10, at 791-98.

82. See Brown, *The Joint Return*, *supra* note 19, at 1489; Moran & Whitford, *supra* note 10, at 798.

couple will pay a higher marriage penalty.⁸³

Married black men make significantly less than married white men. In 1990, married white men earned an average annual salary of \$39,389. Married black men had an average annual salary of \$27,026. Married white women had an average annual salary of \$23,493. Married black women had an average annual salary of \$20,693.⁸⁴ Because a black husband makes 68.61% of what a married white man does, and because a married black woman makes 52.53% of what a married white man does, the husband and wife in a black family may not enjoy the option of staying home. Working together, they earn only a little more than what a white man earns working alone. All things being equal, between a black family and a white family, the black family will work more, but suffer the marriage penalty on their tax return. The married white man's higher income permits more white wives to work at home, allowing for them to benefit from the marriage bonus.⁸⁵ The federal tax laws, then, exacerbate the discrimination that black men and women already suffer in the work force.⁸⁶

The Moran-Whitford study suggests several solutions for the problem of the marriage penalty. First, the joint return could be eliminated and a one rate schedule for all individuals could be adopted.⁸⁷ This solution however would also eliminate the marriage bonus. Thus, Moran and Whitford's second proposal is to allow for elective filing status for married taxpayers.⁸⁸ A third approach is to "allow both married and single couples to get the best tax result . . . by filing as two single persons or as a married couple filing jointly, regardless of actual marital status."⁸⁹ Keep in mind, however, that solutions for eliminating the marriage penalty, "would have no impact on the race, class, and gender bias found in the waged labor market,"⁹⁰ the main reason why black couples suffer the marriage penalty more.

83. See Brown, *The Joint Return*, *supra* note 19, at 1498-99; Moran & Whitford, *supra* note 10, at 793. Cf. Schmalbeck, *supra* note 44, at 1831 (arguing that the marriage bonus and marriage penalty are just a reflection of changed economic realities and not a result of Congress bias). According to Schmalbeck, when the high-income taxpayer marries someone with no income, they pay a lower income tax than the taxpayer would have if she were single. This is because of the taxpayer's reduced ability to pay. "Two cannot live as cheaply as one . . ." *Id.* at 1832. On the other hand, the marriage penalty is just a reflection of the fact that when two working people combine their households, it will cost them less to maintain the household. Therefore, they as a unit can afford to pay more taxes. *Id.* This explanation of the changed economic realities, however, ignores the heart of the problem. Black families are still earning less than white families.

84. Brown, *The Joint Return*, *supra* note 19, at 1489.

85. *Id.* at 1499.

86. *Id.* at 1501.

87. Moran & Whitford, *supra* note 10, at 798.

88. The current system does allow for a married person to file Married Filing Separately, but it is usually a disadvantage to do so, because the filing status disallows a number of deductions and credits.

89. Moran & Whitford, *supra* note 10, at 798.

90. Brown, *The Joint Return*, *supra* note 19, at 1508.

III. BEYOND THE BLACK-WHITE PARADIGM: HOW DOES TAX LAW AFFECT ASIAN AMERICANS?

The literature on the effect of tax laws on minorities overwhelmingly looks at one minority group: blacks.⁹¹ In this context, “‘race’ means, quintessentially, African American,”⁹² a manifestation of what has been called the “black-white paradigm” or the “black-white binary.”⁹³ Because race is such a complex issue, it is easier to identify the black experience as *the* minority experience.⁹⁴ “The risk [of this narrow identification] is that non-black minority groups, not fitting into the dominant society’s idea of race in America, become marginalized, invisible, foreign, un-American.”⁹⁵ In the context of tax law, blacks appear the most negatively affected, especially within the context of their economic reality.⁹⁶ In addition, given the *de facto* segregation of black and white lives,⁹⁷ it is understandable that a system developed almost a hundred years ago by wealthy white men would benefit whites more than blacks.⁹⁸ When tax and economics are so intermingled, Asian Americans appear too well off to be negatively impacted by the tax laws. Asian American households earn an average annual salary of \$53,635 in 2001, compared to a white household’s \$46,305. But the empirical data may not always provide a complete picture into the economic situation of Asian Americans. When the data is examined a little closer, the factors that support a disparate impact on blacks could also support a disparate impact on Asian Americans. For example, Asian Americans have a very small presence in Congress.⁹⁹ Critical tax scholars cite lack of representation in the legislature as one factor leading to the disparate impact of the tax laws on blacks. In addition, Asian American men and women also suffer discrimination similar to that suffered by blacks. Therefore, the lack of Asian American

91. Abreu does talk about tax and its affects on Latino Americans and the need for a Latino perspective. But her discussion is limiting because it merely differentiates between those who are wealthy and those who are not. See Abreu, *supra* note 6, at 591.

92. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 67 (2001).

93. *Id.* at 67-68 (“The paradigm holds that one group, blacks, constitutes the prototypical minority group. . . . Other groups, such as Asians, Indians, and Latinos/as, are minorities only in so far as their experience and treatment can be analogized to that of blacks.”).

94. *Id.* at 70.

95. *Id.*

96. In 1999, 21.9% of black families lived below the poverty line. STATISTICAL ABSTRACT, *supra* note 42, at 445; see also discussion *supra* Part II.A.

97. DELGADO & STEFANCIC, *supra* note 92, at 79-80 (“Many critical race theorists and social scientists alike hold that racism is pervasive, systemic, and deeply ingrained.”).

98. Moran & Whitford, *supra* note 10, at 757.

99. Currently, two Asian Americans sit in the U.S. Senate, and four sit in the House of Representatives. Ethnicmajority.com, African, Hispanic (Latino), and Asian American Members of Congress, at <http://www.ethnicmajority.com/congress.htm> (last visited Aug. 11, 2003). The website also reports that thirty-seven blacks and nineteen Hispanic Americans are in the House of Representatives. *Id.* There are no African Americans or Latinos in the Senate. *Id.* This is out of a total of 435 representatives and 100 senators. GPO ACCESS, Congressional Directory (Mar. 29, 2003), at <http://www.gpoaccess.gov/cdirectory/browse-cd-02.html>.

representation and bias in the workplace could be factors leading to a disparate impact on Asian Americans.

In the mid-1800s, Asians began to immigrate in substantial numbers to the United States. Not long after that, taxes were used against them to subordinate and expel them.¹⁰⁰ A study of Asian American history reveals a long legacy of racism from the white mainstream society. The lynching of Chinese in California in the 1800s, the Japanese internment camps, and the murder of Vincent Chin comprise only a small part of the story.¹⁰¹ In 1988, the Civil Rights Commission reported that Asian Americans still suffer from "a variety of anti-Asian activities" and that the subject of anti-Asian discrimination still merited serious attention.¹⁰² The racism dealt with by Asian Americans, however, cannot be perfectly analogized to the black experience. Unfortunately, the model minority myth obscures the problems Asian Americans face in our society.¹⁰³ As a result, Asian Americans' needs and realities are often ignored.

This Section attempts to illuminate the Asian American experience by first debunking the model minority myth and its misleading characterization of Asian American economic reality. Second, the empirical data will be examined in conjunction with distinctive Asian American issues that are not readily apparent by simply looking at the numbers. These two factors will present a more realistic picture of Asian American's economic situation. Finally, this section will make clear that that Asian Americans may suffer from a disparate tax impact similar to and different from that experienced by blacks.

A. Debunking the Model Minority Myth (again)

The model minority myth paints a picture of Asian American economic success. The stereotype of the model minority emerged in the 1960s.¹⁰⁴ The New York Times Magazine published a story called *Success Story: Japanese American Style*. A few months later, U.S. News and World Report followed suit with an article called *Success Story of One Minority Group in the United States*.¹⁰⁵ According to the article, "Still being taught

100. The foreign miners' tax, enacted in 1852. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 21 (1993). Notably, another foreign miners' tax, enacted in 1850, was aimed at forcing Latinos out of the mines. *Id.*

101. See HELEN ZIA, ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE 55-81 (2000). Vincent Chin was a Chinese American man who lived in Detroit, Michigan and was killed in 1982 by Ronald Ebens and Michael Nitz. *Id.* According to Zia, his murder led to a pan-Asian American movement to bring awareness to anti-Asian hate crimes. *Id.* Some Asian American attorneys have cited the event as their inspiration for going into Asian American civil rights work. *Id.* at 81.

102. U.S. COMM'N ON CIVIL RIGHTS, THE ECONOMIC STATUS OF AMERICANS OF ASIAN DESCENT: AN EXPLORATORY INVESTIGATION 15 (1988) [hereinafter ECONOMIC STATUS OF ASIAN AMERICANS].

103. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1258 (1993) ("Asian Americans are portrayed as 'hardworking, intelligent, and successful.'").

104. See ZIA, *supra* note 101, at 46.

105. *Id.*

in Chinatown is the old idea that people should depend on their own efforts—not a welfare check—in order to reach America's 'Promised Land.'"¹⁰⁶

The model minority myth is dangerous in a number of ways. First, by assuming group success, the model minority myth masks the great disparity amongst Asian American ethnic groups.¹⁰⁷ The Civil Rights Commission reported in 1990 that Laotians, Hmong, Cambodians and Vietnamese have poverty rates of 67.2%, 65.5%, 46.9%, and 33.5%, respectively.¹⁰⁸ Only two groups of Asian Americans, Filipinos and Japanese, have poverty rates below the national average, 6.2% and 4.2%, respectively.¹⁰⁹ The needs of recent Southeast Asian refugees are ignored because they are viewed on the same footing as third- or fourth-generation Japanese or Chinese Americans.¹¹⁰ "Thinking Asian Americans have succeeded, government officials have sometimes denied funding for social service programs designed to help Asian Americans learn English and find employment."¹¹¹ Some scholars have even argued that accepting the model minority myth is a form of participation in the oppression of Asian Americans.¹¹²

The model minority myth also hurts other minorities.¹¹³ This myth's persistence is displayed in the Census's non-reporting of Asian American unemployment rates and median weekly income levels, making it difficult to assess their economic position in relation to other races. This misleadingly creates the belief that since Asian Americans have succeeded on their own, then other minority groups such as blacks and Latinos should be able to do it, too.¹¹⁴ Such rhetoric condones the subordination of other groups¹¹⁵ while simultaneously creating racial tensions between Asian Americans and other minorities.¹¹⁶ The masked success of Asian Americans supposedly serves as proof that the social and economic problems faced by other minority groups have nothing to do with race.¹¹⁷

106. *Id.*

107. See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 54 (2002); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 *ASIAN L.J.* 71, 90 (1997).

108. See U.S. COMM'N ON CIVIL RIGHTS, *CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S*, at 17 (1992) [hereinafter *CIVIL RIGHTS ISSUES*]. These numbers appear to include both native-born and foreign-born members of these groups. The analysis is further complicated if the groups are separated by native-born or foreign-born. For example, Filipinos and Indians who are native-born have poverty rates above those of whites, but Filipinos and Indians who are foreign-born have poverty rates below those of whites. This could be due to the fact that the United States imports a large amount of Filipinos and Indians into the medical profession, and these imports are better off financially and educationally.

109. *Id.*

110. Saito, *supra* note 107, at 90.

111. Chang, *supra* note 103, at 1261.

112. *Id.* at 1263-64.

113. *Id.* at 1264.

114. *Id.*

115. See Saito, *supra* note 107, at 92.

116. *Id.*

117. *Id.* at 93-94 ("Recent debates on affirmative action illustrate how the purported success of

But "the reality is that many Asian Americans, particularly recent immigrants, are neither economically well-off nor politically empowered."¹¹⁸

When other factors are examined, it is clear that the model minority myth is truly a myth. First, reliance on median family income as evidence that Asian Americans suffer no discrimination in the workforce is misleading. In actuality, because Asian American families have more workers per household than do white families, their median family income is on average higher.¹¹⁹ The Civil Rights Commission notes that when family income is adjusted for family size, the economic status of foreign-born Japanese and Indian families equals that of native-born whites, but that the economic status of foreign-born Chinese, Filipino, Korean and Vietnamese families fall behind.¹²⁰ Median family income, therefore, is not an accurate measure of how well Asian Americans are doing. Compounding the problem with the empirical data is the fact that Asian families are also more likely to have non-working relatives living with the nuclear family. "Thus, although the greater number of relatives living with foreign-born Asian families enhances their potential working pool, the contribution to Asian family income from this source is dominated by the increased burden their family income must support."¹²¹

In addition, average income levels of Asian Americans are skewed by the inclusion of the income of Asians who are not Americans.¹²² Japanese businessmen, for example, spend several years in the United States doing business, and their upper-management salaries are added to the average Asian American income.¹²³ This increases Asian Americans' average income and hides the economic reality of most Asian Americans.¹²⁴

The high academic achievement of Asian Americans is another component of the model minority myth. A number of factors, however, explain this "phenomenon" of Asian American academic achievement. A University of Hawaii sociology professor Herbert Barringer found that native-born Asian Americans make less than native-born whites, and possibly less than foreign-born whites.¹²⁵ The Barringer study concluded that "most Asian Americans are overeducated compared to whites for the income they earn."¹²⁶ Wu argues such a conclusion favors white Americans rather than Asian Americans: "Translated into practical terms, it

Asian Americans has been used to justify the elimination of remedial programs, and the concomitant effort to convince Asian Americans to actively oppose such measures.")

118. Chang, *supra* note 103, at 1308.

119. *Id.* at 1262; see also Saito, *supra* note 107, at 90.

120. ECONOMIC STATUS OF ASIAN AMERICANS, *supra* note 102, at 42.

121. *Id.* at 36.

122. Wu calls this group of Asians a "transnational overclass." WU, *supra* note 107, at 54-55.

123. *Id.* at 54.

124. See *infra*, Section III.B.1.

125. *Id.* at 50 (citing HERBERT R. BARRINGER, ASIAN AND PACIFIC ISLANDERS IN THE UNITED STATES 266-67 (1993)).

126. *Id.*

means that white Americans are paid more than Asian Americans who are equally qualified.¹²⁷ The fact that Asian Americans are better educated yet earn less than their white American counterparts undermines the model minority myth.¹²⁸ In fact, the studies demonstrate that Asian Americans are forced to overcompensate in their education, because they receive a lower return on their educational investment.¹²⁹

In addition, cultural capital is a big reason for Asian American academic achievement.¹³⁰ A study of high achieving Asian Americans found that 85% had fathers with graduate degrees, 71% with doctorate degrees, and 21% had mothers with doctorate degrees.¹³¹ The idea that overachieving is inherently an Asian trait is a fallacy, because the immigrants from Asia to the United States may not necessarily be representative of all Asians.¹³² Immigration by nature is self-selective.¹³³ Except for the recent refugees from Southeast Asia, the Asian immigrants had to be able to afford to come to the United States, or they came to fill an occupation that American workers could not fill.¹³⁴ More than 50% of the professional immigrants to the United States are Asian.¹³⁵ “[A]most none of the Chinese Americans who served on the boards of directors for Fortune 1000 companies were ‘authentic bootstrappers.’ Almost all of them [have] come from well-to-do families in China, Taiwan, and Hong Kong.”¹³⁶ Thus, when statistics lump together those who immigrate from a higher economic status with Southeast Asian refugees into a group called “Asian American,” the emerging numbers are not representative of either group.

Supposedly, high median household income and high education achievement of Asian Americans supports the idea of the model minority. However, the model minority myth overlooks the fact that more family

127. *Id.* at 51.

128. *Id.*

129. *Id.* In a 1990 survey of executives in Fortune 500 companies, only 0.3% of senior executives were of Asian descent. In addition, Asian Americans were underrepresented in management positions. In a 1988 study, U.S.-born Asian American men were seven to eleven percent less likely to be in managerial occupations than white men with the same characteristics. CIVIL RIGHTS ISSUES, *supra* note 108, at 132-33.

130. Wu, *supra* note 107, at 51-52 (“[O]ne of the most salient determinants of likely educational accomplishment of any individual is the highest degree held by [one’s] parents.”).

131. *Id.* at 52 (citing Julian C. Stanley, *Family Background of Young Asian Americans Who Reason Extremely Well Mathematically*, J. OF THE ILL. COUNCIL FOR THE GIFTED 11 (1988)).

132. *Id.* at 53 (“In Asia, there are millions of urban and rural poor who do not have the means to travel out of the city or the village, much less to the United States.”).

133. *Id.* at 52.

134. *Id.* (“[S]ome Asian immigrants are relatively fortunate compared to the many Asians who reside in Asia, and some of them are relatively fortunate compared to native-born Americans (including, incidentally, native-born Asian Americans), even though they have not had an easy time of it in coming to the United States and even though they experience prejudice.”).

135. *Id.* “Indian doctors are the single largest ethnic group in the medical profession in this country” *Id.* at 53. Indians make up four percent of the total number of physicians. Eleven percent of Indian men and 7% of Indian women in the United States hold medical degrees. *Id.*

136. *Id.* at 52.

members usually make up and work in the Asian American household and that Asian Americans make less than whites with the same education level. When these various factors are taken into account, they weaken the model minority myth and indicate that Asian Americans are not as successful as they are perceived. Ultimately, the model minority myth serves to “mask[] real issues of discrimination and uses Asian Americans against other minorities.”¹³⁷ As a result, the model minority perpetuates the social and economic subordination existing in the United States, which induces minorities to see differences rather than a similar tapestry of oppression.¹³⁸

B. Problems with Empirical Data: How the Tax System Really Affects Asian Americans

1. Asian American wages and employment

In 2001, the Census Bureau reported that Asian American families had a median annual income of \$53,635¹³⁹ but that Asian American income per household member was \$24,933. This falls below the average income for white household members, which is at \$25,751.¹⁴⁰ As mentioned above, these figures may not take into account that a number of Asian American women work for no pay in a family-owned business, or that Asian Americans often work below their level of educational achievement.¹⁴¹ In addition, the figure does not reflect the economic reality of many subgroups that fall under “Asian American.” A large percentage of Southeast Asian groups and recent immigrants live below the poverty line.¹⁴²

For both native and foreign born Asian Americans, the earnings of other relatives make up a larger fraction of Asian American family income

137. Saito, *supra* note 107, at 94.

138. *Id.*

139. MONEY INCOME, *supra* note 22, at 4. Interestingly, this figure has gone down from 2000’s figure of \$57,313. This is a 6.4% decrease. In comparison, the figures for “non-Hispanic” white households went from \$46,896 (in 2000) to \$46,305 (in 2001), a 1.2% decrease. For black households, the annual household income went from \$30,495 to \$29,470, a 3.4% decrease and for “Hispanic” households, income went from \$34,094 to \$33,565, a 1.6% decrease. It would seem that while all households were affected by the recent downturn in the economy, Asian American households were hardest hit.

< Median Annual Outcome >

	2000	2001	Comparison
Asian American	\$57,313	\$53,635	-6.4%
White	\$46,896	\$46,305	-1.2%
Black	\$30,495	\$29,470	-3.4%
Hispanic	\$34,094	\$33,565	-1.6%

140. *Id.* at 3.

141. *See supra* Part III.A.

142. *See id.*

than of white family income.¹⁴³ In native born Chinese, Filipino, Japanese, and Korean families, family members other than the husband generate more than 30% of the household income. Compare this to native born white families, where that number is 25%. In foreign born Filipino, Vietnamese and Chinese families, 43%, 37%, and 32% of family income, respectively, come from the combined labor income of wives, children, and other relatives. In foreign born white families, this number is only 23%.¹⁴⁴ This data indicates that more family members must work to make up Asian American household income. Without the supplemental income of other household members, the head of the household would not be able to make as much as the head of a white household.

In addition, Asian Americans tend to live in areas of the country that have higher wages and higher costs of living. The income in these areas would be higher, such that their average family income compared to the national average appears higher.¹⁴⁵ Many scholars argue that when one controls for geographic location, Asian American wages do not look that much better than black or Latino wages.¹⁴⁶ In California, for example, Korean men earn 82% of the income of white men, Chinese men 68%, and Filipino men 62%.¹⁴⁷ According to the Civil Rights Commission, if Asian Americans and whites shared the same regional distribution, the relative average family incomes for most Asian groups would be slightly lower.¹⁴⁸ According to another study, Asian American men make 10 to 17% less than white men and Asian American women make as much as 40% less than white women.¹⁴⁹ Therefore, a simple statistical comparison does not reflect the economic reality of Asian Americans.

Asian Americans are also more likely than whites to be self-employed.¹⁵⁰ "Self-employed individuals with the same income as corporate employees tend to put in longer hours, with fewer benefits and increased risks of bankruptcy and other setbacks."¹⁵¹ Self-employed individuals must pay for their own medical insurance while many employers offer this benefit to their employees. They also must cover the costs of doing business that individuals working for a company do not have to pay, such as other insurance and self-employment taxes.¹⁵² The

143. See ECONOMIC STATUS OF ASIAN AMERICANS, *supra* note 102, at 36. This is true except for foreign born Japanese.

144. *Id.* at 35-36.

145. Chang, *supra* note 103, at 1262.

146. *Id.* at 1262 n.92.

147. *Id.* at 1263 n.97.

148. ECONOMIC STATUS OF ASIAN AMERICANS, *supra* note 102, at 31.

149. WU, *supra* note 107, at 50. ("This lack of parity appears even between Asian Americans and white Americans who have the same qualifications. Controlling for other factors, the sole explanation for the inequities is race.")

150. *Id.* at 54.

151. *Id.*

152. Self-employment taxes are Medicare and Social Security taxes, of which employers pay half and employees pay half through withholdings in their paycheck. Self-employed individuals must pay

empirical data may not take into account these expenses that a self-employed individual must account for, since they simply report income.

In addition, the empirical data masks the fact that Asian Americans do face workplace discrimination. In 1992, the United States Civil Rights Commission released a report on the civil rights issues facing Asian Americans.¹⁵³ The report found that all Asian Americans suffered some level of employment discrimination such as accent or language discrimination, discrimination caused by immigration control laws, and "artificial barriers" preventing Asian Americans from rising to management positions.¹⁵⁴ Indeed, some believe that "Asian professionals face the worst promotional opportunities of all groups."¹⁵⁵

Therefore, when Asian American household income is broken down, each family member makes less than what an individual in a white household makes. In addition, the income of the Asian household members makes up a larger percentage of Asian American household income. Accepting the fact that Asian Americans often make less than whites and that they do face workplace discrimination, they face some of the same hurdles other minorities face in achieving racial equality.¹⁵⁶ These same hurdles may be reflected in the ways Asian Americans are taxed and in the tax benefits they receive.

2. Home ownership and family structure

Asian American home ownership is not at all near the level of white home ownership. According to a Harvard University study, approximately 53.9% Asian Americans and "others" owned their homes in 2002, compared to 74.7% of whites.¹⁵⁷ The homeownership rate for blacks was 48.9% and 47.4% for Latinos.¹⁵⁸ Despite the relatively large disparity between whites and the other minority groups, homeownership rates had increased for all groups, except for Asians in 2002.¹⁵⁹ In fact, the rate for Asians held constant for the last three years while the rate for all other races continued to steadily climb.¹⁶⁰

all of it themselves.

153. CIVIL RIGHTS ISSUES, *supra* note 108. When the report was released, an article from *Fortune* magazine claimed that it was the "strangest document" produced by the Civil Rights Commission. WU, *supra* note 107, at 69. The article concluded that "the predicament, if that is the word, which we doubt" of Asian Americans did not include civil rights issues. *Id.* at 70.

154. CIVIL RIGHTS ISSUES, *supra* note 108, at 130.

155. *Id.* at 133.

156. *See supra* Part II.

157. NATION'S HOUSING, *supra* note 59, at 35.

158. *Id.*

159. Asian American homeownership stayed at 53.9% during 2000, 2001 and 2002. During those years, black homeownership rates went from 47.5% to 48.4% to 48.9% and Latino homeownership went from 45.5% to 46.4% to 47.4%. *Id.*

160. *Id.* The empirical data becomes a problem, because "and others" includes Pacific Islanders, Aleuts and Native Americans. *Id.* at 16. This perplexing grouping most likely distorts the data. The Census report tells us that Native Hawaiians and other Pacific Islanders have the second highest average home value, and that American Indians and Alaska Natives have the lowest average home value. U.S.

That other minority groups increased in their rate of homeownership may be explained by the opportunities they receive in relation to Asian Americans. According to an article on homeownership in Colorado, except for Asian Americans, minority homeownership increased between 1990 and 2000.¹⁶¹ The article reports that the national mortgage lending company, Fannie Mae, encourages minority home ownership through programs such as continuing education for realtors on how to better serve minority home buyers.¹⁶² The article also reports that the Colorado Housing and Finance Authority, an agency offering down payment and loan assistance, is targeting blacks and Latinos to help increase rates of homeownership in these communities. Given the data on Asian American homeownership, it is surprising that the agency is not targeting Asian Americans as well.

In 2000, Asian Americans houses had the highest average value, \$199,300,¹⁶³ more than 50% above the national average. Homes owned by whites had an average value of \$123,400, blacks \$80,600, and Hispanics \$105,600.¹⁶⁴ As mentioned above, Asian Americans may own homes with a higher average value because these homes are located in areas of the country where cost of living is higher. For instance, 45% of the Asian households are located in Hawaii or California where average housing prices are the highest in the nation. Hawaii has the highest average house prices of \$272,700, and California has the second highest of \$211,500.¹⁶⁵

Additionally, the higher than average home values for Asian Americans may not be a reflection of their individual ability to buy larger homes but reflective of the fact that they have more family members contributing to the cost of home. At the same time, the inclusion of extended families in an Asian American household may necessitate larger homes. Therefore, factors such as geography and family structure may account for the high average cost of Asian American homes. In turn, these factors demonstrate how numerically, less Asian Americans benefit from the tax incentives available for homeowners.

Family structures informed by cultural differences may account for why Asian Americans are treated differently by the tax system. As noted earlier, the tax system benefits nuclear family households where one adult

CENSUS BUREAU, CENSUS 2000 BRIEF, HOME VALUES: 2000, at 3 (2003) [hereinafter HOME VALUES], available at www.census.gov/prod/2003pubs/c2kbr-20.pdf. But this does not necessarily tell us their rate of homeownership. Therefore, it is difficult to tell whether the grouping deflates or inflates the rate of homeownership for Asian Americans.

161. Johansen, *supra* note 77. Asian American homeownership in Colorado decreased from 55% in 1990 to 51% in 2000. The rate for whites increased from 64% to 71%; for blacks 39% to 46%; for Hispanics 51% to 53%.

162. *Id.*

163. HOME VALUES, *supra* note 160, at 3.

164. *Id.*

165. *Id.* For this reason, Native Hawaiians and other Pacific Islanders had the second highest average home price, \$160,500. *Id.*

works outside of the home and the other stays at home.¹⁶⁶ This poses problems when extended families live together in one household in Asian American families, for less Asian Americans are able to take advantage of the tax benefits allowed by the Code. For example, if two sibling families bought a house and lived in one household with their parents, only one of these siblings would take advantage of the home mortgage interest deduction, property tax deduction, or the favorable treatment of gains on that house if they were to sell it.

Another question in the inquiry is whether houses in Asian American neighborhoods appreciate as rapidly as those in white neighborhoods. Just because Asian American homes cost more does not mean they will appreciate more. It is possible that due to the positive image of Asian Americans as successful, the appreciation rate of Asian American homes reflect more those of white homes rather than the trend we see with black homes. This is highly unlikely, however, because Asian Americans are perpetually seen as the foreigner.¹⁶⁷

a. The marriage penalty and marriage bonus

Both spouses of the Asian American couple are more likely to work outside of the home, therefore making their economic reality more comparable to black couples. As noted earlier, more Asian American women than white women must work, because the males in their family earn such low wages.¹⁶⁸ Asian American wives are the largest contributor to family incomes next to their husbands, and their earnings make up a larger part of family income than in white families. This suggests that Asian Americans may be in the same position as African Americans in suffering the marriage penalty more often than whites.

In addition, the tax structure does not account for other family members that the working couple may be supporting. While the couple can claim children and some relatives as dependents, not all relatives can qualify as dependents even if the couple's income goes toward supporting the person. Often, Asian American households include extended family, some of whom may be dependent household members who cannot work; but tax benefits are still not extended for such families. Extended family may not always fall into the tax code's definition of who a "dependent" could be, further eliminating potential deductions available for Asian American families.

166. See *supra* Part II.D.

167. This is a question that needs to be explored further. A poll taken in 2001 indicates that 25% of Americans hold negative views toward Chinese Americans and 43% hold "somewhat negative attitudes" toward Chinese Americans. Thomas S. Edsall, *25% of U.S. View Chinese Americans Negatively, Poll Says*, WASH. POST, Apr. 26, 2001, at A4.

168. Chang, *supra* note 103, at 1262. "Only Indian and foreign-born Japanese women are less likely than white women to take a job outside the home." ECONOMIC STATUS OF ASIAN AMERICANS, *supra* note 102, at 36.

3. Immigration

An issue affecting a large number of Asian Americans and Latinos is immigration. Under the federal tax system, even if someone does not qualify to be a resident or citizen under immigration laws, they can be considered a resident for tax purposes. The federal tax law applies the "substantial presence" test, which basically asks whether the taxpayer has been present in the United States for 183 days in the tax year.¹⁶⁹ If the answer is yes, the taxpayer must file a 1040, just as a citizen or resident immigrant would. This "resident" for tax purposes does not enjoy any of the benefits that may come with full citizenship or resident immigrant status but must pay taxes just the same.¹⁷⁰ Even worse, the person cannot vote, and therefore has no voice in the democratic process.¹⁷¹

4. Conclusions

The current scholarship in critical tax theory argues that the tax system disparately affects blacks for several reasons. First, the tax laws were created by a legislature that is generally wealthy, white, and male. As a result, the created tax provisions tend to benefit those taxpayers with these characteristics over those who do not. Second, due to the wage disparities between blacks and whites, the former are less often able to take advantage of the tax incentives favoring those who make more money and have more savings.

This Comment delineated several reasons for the disparate tax effects on Asian Americans: 1) Very few Asian Americans make up the legislature. Therefore, for the same reason that tax laws benefit underrepresented blacks less than whites, these same tax laws also benefit Asian Americans less. 2) While the empirical data appears to indicate that Asian Americans are economically well off, in reality, there still exists a wage disparity between Asian Americans and whites. Related is the fact that Asian Americans suffer from workplace discrimination. Both factors translate into less favorable tax treatment for Asian Americans. 3) Asian American families form households that differ from their white counterparts, resulting in less available tax benefits for Asian Americans.

IV. WHAT DOES ALL THIS MEAN: WHERE DO WE GO FROM HERE?

A. Lessons Learned

In light of the many layers of complexity encountered when discussing the interplay of race, economics and tax, what can be taken from

169. See 26 U.S.C. § 7701(b)(3) (2003); see also Internal Revenue Service, International Taxpayer – Substantial Presence Test, at <http://www.irs.gov/businesses/small/international/article/0,,id=96352,00.html> (last visited Aug. 15, 2003).

170. Abreu, *supra* note 6, at 592.

171. The ironic counterpart is that people will renounce their U.S. citizenship in order to avoid this country's tax consequences. See *id.* at 591.

this? Is the discussion even worthwhile? The growing number of participants in the critical tax theory discussion suggests that it is.¹⁷² It is clear from this discussion that minorities still make less than their white counterparts. Ripple effects of this problem are felt in nearly every aspect of society, including tax. The literature indicates that tax laws disparately impact blacks in a number of ways. This discussion makes it apparent that tax laws also disparately affect Asian Americans, in both similar and different ways from their effect on blacks.

Ultimately, the scholarship suggests that the playing field should be leveled in light of the inequities for people of color. Racism must be fought on many fronts,¹⁷³ which in this case, includes the tax system. Some solutions may be found outside the Internal Revenue Code.¹⁷⁴ Given the difficulties in compiling empirical data and interpreting it, the solutions may also be just as complex.¹⁷⁵

B. What Can Be Done?

First, law students of color should not shy away from studying and practicing business law even if they are interested in civil rights issues and may be more inclined to explore traditional areas that fall within the civil rights discourse.¹⁷⁶ Critical race theory is premised upon the belief that race is important in all aspects of society so achieving racial justice requires delving into all aspects of society. Critical tax law theorists such as Professor Alice Abreu argue that it is important for people of color to study “money-law.”¹⁷⁷ Abreu points to a myriad of ways a Latina’s perspective adds to the tax policy debate.¹⁷⁸ Latinos would be able to bring an enriched perspective on citizenship, immigration and culture. Not only is perspective important, so is presence: “By being at the table, I believe that I help to earn respect for Latinas and Latinos. By being a walking billboard for the intellectual diversity of Latinas and Latinos, I think I

172. Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1772 (1998) (criticizing critical tax theory but also noting that critical tax scholarship is beneficial). Johnson indicates that critical tax perspectives “can profitably inform tax reform initiatives, providing additional intellectual and political support for worthwhile change.” *Id.*

173. Brown, *Racial Equality*, *supra* note 12, at 768.

174. See Nantell, *supra* note 3, at 74 (“I remain unconvinced that the solution to all social and economic ills lies on the Internal Revenue Code.”).

175. See Brown, *Split Personalities*, *supra* note 32, at 93 (noting that the Internal Revenue Code “operates in the context of larger societal issues”). These issues are important to discuss not just because we want to find solutions to the problems we see. See Kornhauser, *supra* note 10, at 1622 (noting that scholarship has other purposes, such as describing the realities and identifying the problems that exist). “In a complicated, multi-cultural, multi-class, multi-raced, multi-everything world, there are bound to be conflicts no matter what the solution. One merit of critical tax scholarship is that it has encouraged scholars and legislators to consider all these subgroups instead of viewing taxpayers as a group undifferentiated except in economic terms.” *Id.* at 1622-23.

176. See discussion *supra* Part I.

177. See Jensen, *supra* note 7, at 1754; see also Abreu, *supra* note 6, at 575.

178. See Jensen, *supra* note 7, at 1754; see also Abreu, *supra* note 6, at 575.

advance the cause of inclusion and empowerment generally."¹⁷⁹

In addition to firm work or public interest work, more Asian American law students should pursue legislative policy or even run for office. More perspectives are needed in the legislature. Because "male legislators have little motivation to revise the laws against their interests,"¹⁸⁰ more women and minority legislators would question the previous assumptions of the Internal Revenue Code.¹⁸¹ They would bring more voices and perspectives to the discussion.¹⁸² Such discussion and debate could bring about change that is informed by personal experience, rather than a simple reliance on the incomplete picture painted by statistics.¹⁸³ When discussing tax policy, different cultural perspectives, different beliefs and values should be taken into account.¹⁸⁴

Most importantly, in order to achieve tax justice, we need to work towards economic and racial justice.¹⁸⁵ The poor are disproportionately represented by women, children and people of color.¹⁸⁶ Labor is undervalued in our society. That is, "employees are generally paid as little as the market will bear."¹⁸⁷ At the same time, the lower and middle classes are bearing a large portion of the tax burden.¹⁸⁸ This cuts against any notion of justice and fairness we might once have hoped the tax system could achieve. The systemic racism of the labor market is a huge barrier to racial equality.¹⁸⁹ The wealth, income, and job disparities that the empirical data reveals reflect the institutionalized racism still existing in our society today.¹⁹⁰

The disparate impact of the tax system on people of color can be lessened if tax expenditures which favor the white upper class are removed.¹⁹¹ This may also help to decrease the complexity in the Code.

179. See Abreu, *supra* note 6, at 592.

180. Nantell, *supra* note 3, at 67.

181. Moran suggests that Congress create a "Race Expenditure Budget," in which it will report each year about the effects of the Internal Revenue Code on people of color. Moran, *supra* note 23, at 792.

182. Shurtz, *supra* note 19, at 1887 (making the same argument in the area of tax scholarship).

183. Cf. Nantell, *supra* note 3, at 89 (stating that "fundamental reform is not likely to survive the harsh reality of the American political process").

184. *Id.* at 87.

185. According to Nantell, the disparate impact of the federal tax system stems not from the Internal Revenue Code itself, but from the issue of income. She argues that Americans need more income and more opportunity to get that income. *Id.* at 88. Inherent in this paper is the need for clear empirical data so that we can better understand the economic situation of all communities of color. In addition, narrative adds to a deeper understanding of how people of color live.

186. *Id.* at 67.

187. *Id.* at 66.

188. *Id.* at 68.

189. See Brown, *Racial Equality*, *supra* note 12, at 763; Moran, *supra* note 23, at 781 (arguing "that lack of economic and educational opportunities are barriers to full participation in American society").

190. See *Gratz v. Bollinger*, 123 S. Ct. 2411, 2443 (2003) (Ginsburg, J., dissenting) ("But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.").

191. Moran & Whitford, *supra* note 10, at 753 ("[D]eviations from the ideal of a comprehensive

What Congress characterizes as tax policy has transformed into “tax expenditure policy.”¹⁹² Congress should not use the tax system as a way to encourage certain behavior that hurts minority populations. Such a tax system only proves to reflect the values of a disproportionately white and privileged Congress and does not necessarily address the realities of people of color.

By eliminating the Internal Revenue Code’s many tax expenditures, Congress can concentrate more on the intended purpose of the tax law: to raise revenue and to redistribute income.¹⁹³ Tax policy should be premised upon the notion that those who can pay should, so that the revenue can be used to benefit those who cannot pay.¹⁹⁴ The early tax system reflected the notion that the rich should pay more than the poor.¹⁹⁵ It was not until the 1940s that the federal income tax implicated more than 5% of the population.¹⁹⁶ Since then, “Congress has modified tax rates, exemption levels, and deductions, and added or revised a plethora of tax preference provisions to address both good times and bad, to stimulate the economy or to slow it down, and to encourage business, investment, home ownership, and savings.”¹⁹⁷ These days, the rich cry out that they are paying too much in taxes. They claim that a flat tax should be implemented.¹⁹⁸ A flat tax, however, does not take into account the fact that 17% to someone who makes \$30,000 a year means much more than 17% to someone who makes \$300,000 a year.

In encouraging different perspectives in the tax debate, Nantell indicates that a feminist would argue that “a sense of connectedness with and obligation to others is an intrinsic part of the nature of the individual. Such a view of humanity naturally supports a redistributive progressive

income tax systemically favor whites over blacks.”).

192. Nantell, *supra* note 3, at 68 (“For the last 30 years, the primary tax policy focus has been upon ‘tax expenditures’ . . .”).

193. Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 665-66 (1996) (“Redistribution through the tax code has also been stymied as the federal income tax has become less progressive, and regressive federal taxes such as Social Security have grown. Since the 1980s, overall taxation in the United States appears to have ceased to redistribute income downward.”).

194. Maurice J. Holland, *Ill-Assorted Musings About Regulatory Takings and Constitutional Law*, 77 OR. L. REV. 949, 959 n.31 (1998) (“However, it was in the 1930s that the notion began to gain fairly wide currency that some degree of redistribution of income and wealth is a legitimate, even laudable aim, rather than a mere by-product, of public policy. Such New Deal initiatives as a sharply progressive federal income tax and recognition of collective bargaining rights on the part of industrial workers were in part justified on the basis of their supposedly redistributionist tendencies.”).

195. Nantell, *supra* note 3, at 41.

196. *Id.* at 54.

197. *Id.* at 74.

198. Public Broadcast System, Summary of Steve Forbes’s Flat Tax Plan, at http://www.pbs.org/newshour/bb/congress/forbes_flat_tax.html (last visited Aug. 14, 2003) (“Not one cent to the IRS on the first \$36,000. Anything over that would be taxed at a flat, fair 17%.”). Forbes proposes eliminating the tax on social security, pensions, personal savings, capital gains, and the estate tax. *Id.* These tax cuts, however, also favor the wealthy, because it is only the wealthy that has pensions, large amounts of personal savings, capital gains, and a large estate to consider for estate taxes purposes.

income tax.”¹⁹⁹

CONCLUSION

Oliver Wendell Holmes said, “Taxes are what we pay for civilized society.”²⁰⁰ However, a civilized society cannot be one in which the gap between the rich and the poor grows increasingly larger each year. A civilized society cannot be one in which more than 20% of black families and more than 30% of Vietnamese families live below the poverty line. What we consider a “civilized” society depends on our values and beliefs.²⁰¹ Those values and beliefs should involve a desire to combat the economic injustice that has resulted from a long history of racism. Those values and beliefs should also involve a desire to address the needs of those who “have not.” “[H]ow a society chooses to tax itself says something significant about that society.”²⁰² What is the message we will convey about our society?

199. Nantell, *supra* note 3, at 66 (quoting Marjorie K. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 506 (1987)). See Abrams, *supra* note 32, at 256 (noting that a civilized society is one where “social responsibility for each member is as fundamental as our means for paying for it”).

200. *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

201. *Id.*

202. Nantell, *supra* note 3, at 63.

