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TEACHING CIVIL RIGHTS THROUGH THE BASIC TAX COURSE

DOROTHY A. BROWN*

INTRODUCTION

My teaching package includes the following courses: Corporate Tax, Critical Race Theory, Federal Income Tax, and Tax Policy. Whenever anyone finds out what I teach, they usually comment about what an odd combination that is, and I usually respond that it really isn't so odd because my scholarship (at least since 1996) examines the racial implications of federal tax policy.¹ The conversation then takes one of two turns: the other participant either changes the subject, or he or she asks me to tell them more. I am going to assume for the rest of this Essay that if you're still reading, then you fall in the latter category.

When I was five years old, according to my mother, I said that I wanted to be a lawyer. My first memory of wanting to be a lawyer relates to the late Justice Thurgood Marshall. He helped secure civil rights for many people,

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1. My previous scholarship has looked at the race and class impact of several Internal Revenue Code provisions. See, e.g., Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. L. REV. 329, 332 (2010) [hereinafter Brown, *Shades*] (discussing tax subsidies for homeownership); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007) (discussing earned income tax credit); Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007) [hereinafter Brown, *Risk Aversion*] (discussing strategies for providing for retirement through investments and employer-provided pensions); Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755 (2005) [hereinafter Brown, *Separate But Unequal*] (comparing the earned income tax credit and the child tax credit); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004) (discussing employer provided pensions); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004) (discussing marriage penalty/bonus in the social security system); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997) [hereinafter Brown, *Joint Return*] (discussing discriminatory effect of joint return); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45 (Karen B. Brown & Mary L. Fellows eds., 1996) [hereinafter Brown, *Marriage Bonus/Penalty*] (discussing inequity inherent in marriage penalty).

especially black people. He was my hero, and I wanted to grow up and become just like him. I wanted to become a civil rights lawyer. I needed to look no further than my own neighborhood for likely clients. You see, I was born and raised in the South Bronx, New York City, not too far from Yankee Stadium.²

One day, as my mother and I were running an errand, we were waiting at the corner for the light to change in order to cross the street. I was holding my mother's hand because I was not yet old enough to cross the street safely. As we were waiting, a police car was turning right. I recall seeing a black man in the back seat with his hands cuffed behind him and he was being beaten by a police officer. My eyes widened and my mouth fell open as I turned to my mother and asked, "Did you see that?" She said, "Yes," and explained to me that it happens sometimes. I couldn't believe my eyes or my ears. I followed the car with my eyes as it made its turn; for a brief moment, the handcuffed man and I made eye contact. It seemed as if everything was going in slow motion. The light turned green, and we started walking. But no one spoke a word. I couldn't stop thinking about that man. I wanted to help him, but I didn't know how. That feeling of powerlessness would eventually cause me to run, not walk, away from my dream of becoming a civil rights attorney.

I went into tax law because I thought it had nothing to do with race. It was only about money, right? No one could be sentenced to death; nobody was likely to go to jail. What's a little tax evasion among friends? I practiced tax and securities law. Then I was hired by a client and became an investment banker on Wall Street, and eventually I found myself in the legal academy. My first tax class was Partnership Tax, a course that I am still convinced is the hardest class to teach in the entire J.D. curriculum. One particular afternoon I was looking for a break, so I picked up an article by the late Professor Jerome Culp and read the words that would change me forever and take me back to my childhood dream of becoming like Justice Marshall: "*There may be a [sic] income tax problem that would benefit from being viewed in a black perspective, but until you look, how will anyone know?*"³

I called Jerome and promised him that I would look. Little did I know how hard it would be to keep that promise. First, the only tax course that I was teaching was Partnership Tax, and to this day I still haven't written anything about race and partnership tax. It wasn't until I changed schools and was able to teach the basic federal income tax course that the racial implications started becoming clearer. Second, the Internal Revenue Service does not keep

2. For those of you unfamiliar with the South Bronx, it has quite a reputation. See, e.g., FORT APACHE, THE BRONX (Twentieth Century-Fox Film Corporation 1981) (memorializing the South Bronx and starring Paul Newman).

3. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 101 (1991).

statistics by race, so I had to find alternative data to examine. I made that promise to Jerome in the early 1990s and finally made good on it in 1996 when I published a book chapter that looked at the marriage penalty/bonus question from a race perspective.⁴

Writing about race and tax also has been difficult for one additional reason: most tax academics, inevitably white men (because so many tax academics are white men),⁵ have either ignored scholarship in the race and tax area or been downright hostile to the work.⁶ Someone concerned with not offending her tax peers would have quit long ago. But the difference between me now and the little girl standing on the street corner helplessly watching a handcuffed man getting beaten by the cops is that, although I may be intimidated by police officers with guns, I am not intimidated by academics. Therefore, I encourage you to explore race (and class) in whatever subject matter you teach. After all, if I can do it in tax, you can do it anywhere. In fact, others have already started down the road in areas such as Corporate Law;⁷ Bankruptcy Law;⁸ and Nonprofit Law.⁹ For first-year subjects, I would

4. Brown, *Marriage Bonus/Penalty*, *supra* note 1.

5. Brown, *Separate But Unequal*, *supra* note 1, at 813 (describing how 65.9% of tax professors in 2004 were white men).

6. *Id.* at 808–09 (discussing hostile comments from scholars who question “the merits of the critical race tax project” and describe the project as “not a helpful development” or as not “taking us in a desirable direction”).

7. See, e.g., Larry Cata Backer, *Director Independence and the Duty of Loyalty: Race, Gender, Class, and the Disney-Ovitz Litigation*, 79 ST. JOHN’S L. REV. 1011 (2005); Thomas W. Joo, *Corporate Hierarchy and Racial Justice*, 79 ST. JOHN’S L. REV. 955 (2005); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351 (2004); Alfred Dennis Mathewson, *Race in Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses*, 23 ST. JOHN’S J. LEGAL COMMENT. 667 (2008); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN’S L. REV. 837 (2003); Kellye Y. Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA. L. REV. 1025 (2000); Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002); Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN’S L. REV. 901 (2003).

8. See, e.g., A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004); Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777 (2004); Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231 (2009); Dariely Rodriguez, *Left Behind: The Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Economic, Social, and Racial Justice*, 18 BERKELEY LA RAZA L.J. 65 (2007); David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH & LEE L. REV. 1695 (2004).

9. See, e.g., David A. Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336 (2004); David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1 (2006); David A. Brennen, *Race-Conscious Affirmative Action by Tax-Exempt 501(c)(3) Corporations after Grutter and Gratz*, 77 ST. JOHN’S L. REV. 711 (2003).

recommend my Critical Race Theory Casebook, which has a chapter for each first-year course.¹⁰

The balance of this Essay will discuss how to incorporate race and class into the basic tax course. It is by no means a comprehensive analysis, but a first step.¹¹ The Essay will not debate the merits of one tax rule over another, but will merely describe the existing state of the world.¹²

I. CIVIL RIGHTS AND THE BASIC TAX COURSE

The basic tax course is a survey course which enables the professor to select which items to emphasize and which items to skim or even not cover, because regardless of whether the course is three or four credits, there will inevitably be topics that time will not permit the instructor to cover. The entire course is about choices the professor will make. I choose to discuss race and class implications.

When examining specific tax laws through a race and class lens, the first thing you have to do is ask: Who is winning and who is losing? Which activity is being encouraged and which activity is being discouraged? For example, when I first wrote about the joint return, I focused on the marriage penalty and discovered that married black taxpayers were more likely to pay the marriage penalty than white taxpayers.¹³ My friend, Professor Mary Lou Fellows,¹⁴ told me that I was only looking at half of the problem. She nudged me to look at the ways in which the joint return provides a marriage bonus to certain married couples. I needed to ask the question: If certain married couples are being penalized, then are other married couples being advantaged? As it turns out, married couples with stay-at-home spouses were the couples gaining an advantage, and were more likely to be white.¹⁵ When I expanded the book chapter into an article, I discovered how *race and class* came into play.¹⁶ Regardless of income, black married couples were most likely to pay a

10. DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS (2d ed. 2007). I might add that the book comes with a pretty thorough teacher's manual.

11. Although I do not discuss it in this Article, section 104 also has race and class implications. See Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN'S STUD. 223 (1998).

12. I am currently writing a book that explores how our tax policies are causing middle-class America to fall further behind those with significantly higher income.

13. See Brown, *Marriage Bonus/Penalty*, *supra* note 1.

14. Professor Fellows is Everett Fraser Professor of Law Emerita, University of Minnesota Law School and currently a Visiting Professor of Law at Seattle University School of Law.

15. Brown, *Marriage Bonus/Penalty*, *supra* note 1, at 49 ("Conversely, married white couples are more likely to receive a marriage bonus.").

16. Brown, *Joint Return*, *supra* note 1 (discussing the interplay between race, class, and taxes).

marriage penalty,¹⁷ and white married couples were most likely to receive a marriage bonus.¹⁸ I also found out that white married couples earning between \$60,000 and \$90,000 were the most likely among white couples to pay a marriage penalty.¹⁹ Professor Fellows was right—looking at the marriage penalty only told the penalty part of the story. A complete picture would involve looking at how the joint return was privileging certain families by providing them with a tax break. As it turned out, the black married couples were being penalized and the white married couples were getting a tax advantage.

The balance of this section will be organized around the race and class implications which flow from asking the following questions that are asked in any basic income tax course: (1) what is taxable income; (2) what is a permissible deduction; and (3) which tax rate applies.

A. *What is Taxable Income?*

The question of whether amounts received are taxable or not taxable raises race and class issues. Our tax laws say wages are taxable income.²⁰ The question that I must ask: what is not defined as wages but still looks like wages? The response is that the payments received by hedge fund managers in exchange for the services they provide. This looks a lot like wages, but are not taxed that way. Due to a loophole, those amounts are not taxed like wage income at the progressive rate, but at the lower, flat, capital gains rate.²¹ There are certainly class implications when dealing with hedge funds, and I would speculate there are race implications, as well. Another example of amounts that are not viewed as wages is imputed income, which is the value of personal

17. *Id.* at 1502 tbl.3.4 (describing a table that shows that a greater percentage of African-American couples pay a marriage penalty than white couples at all income levels).

18. *Id.* at 1500 tbl.3.3 (showing that a greater percentage of married white couples receives the marriage bonus than African-Americans at all income levels).

19. *Id.* at 1502 tbl.3.4 (demonstrating that white households earning between \$60,000 and \$90,000 have a greater percentage of families in the marriage penalty category than white households at other income levels).

20. I.R.C. § 61 (2009).

21. *See, e.g.,* Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 3–4 (2008).

The tax rules treat partnership profits interests more favorably than other forms of compensation. By getting paid in part with carry instead of cash, [hedge] fund managers defer the tax on income derived from their human capital. Often, they are also able to convert the character of that income from ordinary income into long-term capital gain, which is taxed at a lower rate. This conversion of labor income into capital gain is contrary to the general approach of the Internal Revenue Code and diverges from the treatment of other compensatory instruments.

Id. (citations omitted).

services performed for your family.²² Those amounts are not taxable.²³ Yet imputed income in certain circumstances can have racial implications. For example, families that can afford to have stay-at-home spouses are more likely to be white than black.²⁴

The rental income not charged from living in your own home is another example of imputed income,²⁵ and homeownership is largely a function of race and class.²⁶ Most whites and Asians are homeowners, while most blacks and latinos are renters.²⁷ Most high income taxpayers are homeowners.²⁸ The rule, which fails to tax imputed income from homeownership, benefits many white and Asian taxpayers, who are most likely to own homes, and disadvantages the majority of black and Latino taxpayers, who are renters, not homeowners.

A different type of nontaxable income includes amounts received as gifts and inheritances.²⁹ (Perhaps you could even argue that gifts and inheritances are the opposite of wage income, kind of like anti-wage income.) Of the ten richest Americans in 2002, half received their wealth from tax-free inheritances.³⁰

TABLE 1: THE 10 RICHEST PEOPLE IN THE UNITED STATES, 2002³¹

<i>Name</i>	<i>Source of Wealth</i>	<i>Net Worth (in billions)</i>
William H. Gates, III	Microsoft Corp.	\$43.0
Warren Edward Buffett	Stock market	36.0
Paul Gardner Allen	Microsoft Corp.	21.0
Alice L. Walton	Inheritance	18.8
Helen R. Walton	Inheritance	18.8
Jim C. Walton	Inheritance	18.8
John T. Walton	Inheritance	18.8

22. Brown, *Joint Return*, *supra* note 1, at 1481.

23. *Id.*

24. *Id.* at 1489.

25. Brown, *Shades*, *supra* note 1, at 333 (“[Y]et imputed rental income (which is the income the homeowner would receive if she rented her house to a tenant at fair market value) is excluded from income.”).

26. *Id.* at 339–62 (describing the race and class implications of homeownership).

27. *Id.* at 348 (“[T]he majority of whites (76 percent) and Asians (61 percent) are homeowners, while the majority of blacks (52 percent) and latinos (51 percent) are not.”).

28. *Id.* at 340 tbl.3.1 (demonstrating that when income exceeds \$119,999, 92.1 percent of households are homeowner-households).

29. I.R.C. § 102 (2009). While there may be estate and gift-tax implications of such transfers, this essay is limited to the basic Income Tax course, which does not address those implications.

30. LISA A. KEISTER, GETTING RICH: AMERICA’S NEW RICH AND HOW THEY GOT THAT WAY 65 tbl.3.2b (2005).

31. *Id.*

S. Robson Walton	Inheritance	18.8
Lawrence Joseph Ellison	Oracle Corp.	15.2
Steven Anthony Ballmer	Microsoft Corp.	11.9

As far as I can tell, every single person on the list is white. While it is true that black inheritances are significantly less than white inheritances,³² it is equally true that not all whites benefit from the tax-free nature of gifts and inheritances to the same degree.³³ According to one study, the majority of inherited wealth will actually be received by only a few individuals.³⁴ The study divided the recipients into thirds: one third will receive an average of \$1.6 million each; one third will receive an average of \$336,000 each; and one third will receive about \$40,000 each.³⁵ The first third represents about 1% of the recipient population; the second third, about 9%; and the final third, about 90%.³⁶ Thus, ninety percent of those receiving inheritances will receive about \$40,000 each while one percent will receive \$1.6 million each.³⁷ All bequests are not created equal.

B. What is a Permissible Deduction?

Next we turn to deductions. The big dividing line for deductions in the basic tax course is what is a personal, nondeductible expense³⁸ and what is a

32. See, e.g., THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 60–84 (2004) (“A core part of my argument is that family inheritances, especially financial resources, are the primary means of passing class and race advantages and disadvantages from one generation to another.”) *Id.* at 61. See also Gregory Squires, *Overcoming Discrimination in Housing, Credit, and Urban Policy*, 25 BUFF. PUB. INT. L.J. 77, 86 (2006–07) (“Whites are more than twice as likely as blacks to receive an inheritance and when they do, they receive an inheritance that’s three or four times larger than what blacks get.”); David Dante Troutt, *A Portrait of the Trademark of a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS L. REV. 1196 n.178 (2005) (citing ROLAND DAEUMER & MARK HAYWARD, *SELF-EMPLOYMENT AND WEALTH DISPARITIES BETWEEN BLACK AND WHITE HOUSEHOLDS APPROACHING RETIREMENT* (1999)) (noting that 8.4% of black households receive inheritance as compared to 30.7% of white households (averages of \$7500 versus \$58,000)).

33. See, e.g., SHAPIRO, *supra* note 32, at 5. Professor Shapiro writes: Economists Robert Avery and Michael Rendall presented a benchmark statistical study in 1993 showing that most inherited wealth will be pocketed by only a few. According to the study, one-third of the money will go to 1 percent of the baby boomers, who will receive about \$1.6 million apiece. Another third, representing an average bequest of \$336,000, will go to the next 9 percent. The final slice, divided by the remaining 90 percent of the generation, will run about \$40,000 apiece.

Id.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. I.R.C. § 262 (2009).

permissible deductible expense.³⁹ One example of a nondeductible expense is commuting expenses.⁴⁰ Commuting expenses are not deductible because they are regarded as a personal preference reflecting where to live,⁴¹ but as my friend Professor Regina Jefferson pointed out to me years ago, the decision where we live may not be controlled in its entirety by personal preference. What if I want to live near work to minimize my commute but can't afford to? What if I want to live near work, but I either can't buy or can't rent because of my race?⁴²

The only costs associated with housing that are deductible are those associated with homeownership. Mortgage interest is deductible,⁴³ as are real property taxes,⁴⁴ but rent is not deductible.⁴⁵ If housing is a personal choice, then why are any expenses associated with it deductible? By providing deductions for only certain types of housing, tax law benefits only homeowners and not renters, which has race and class implications. This point also illustrates the inconsistency of federal tax policy. In certain instances the tax laws advantage personal preference, and in other instances, they disadvantage personal preference. Not all homeowners, however, benefit from the mortgage interest deduction. Certain low income homeowners do not benefit from their mortgage interest deductions because they don't itemize, but rather, use the standard deduction because it is higher in amount.⁴⁶ On the other hand, high income taxpayers almost always itemize their deductions.⁴⁷

Credit card interest is not deductible;⁴⁸ only interest on debt incurred to purchase homes is deductible.⁴⁹ Yet credit card debt is not distributed evenly

39. Treas. Reg. § 1.161-1 (2008) (stating that deductions are allowed and referring to sections of Internal Revenue Code defining such deductions).

40. Treas. Reg. § 1.162-2(e) (2008). Perhaps the "anti-commuting expense deduction" would be a deduction which is allowed for a home office. See I.R.C. § 280A. What could be a more personal decision than to have an office in your home as opposed to somewhere else?

41. See, e.g., Tsilly Dagan, *Commuting*, 26 VA. TAX REV. 185, 202 (2006) ("Case law and commentators often explain that commuting expenses are disallowed because they are personal rather than ordinary and necessary business expenses.").

42. See Olivia Winslow, *Report: Housing Bias on LI 'Routine Practice'*, NEWSDAY, Mar. 1, 2009, at A20 (describing African-American couple being steered toward "neighborhoods that were low-income, rundown").

43. I.R.C. § 163(h) (2009).

44. *Id.* § 164.

45. Treas. Reg. § 1.262-1(3) (as amended in 1972) ("Expenses of maintaining a household, including amounts paid for rent . . . are not deductible.").

46. Brown, *Shades*, *supra* note 1, at 13 tbl.2.2. n.56 (showing that while only 23% of taxpayers with an adjusted gross income below \$40,000 itemize, over 85% of taxpayers with an adjusted gross income over \$150,000 itemize their deductions).

47. *Id.* at 344 tbl.3.2 (demonstrating that at least ninety percent of taxpayers with an adjusted gross income greater than \$75,000 itemize their deductions).

48. I.R.C. § 163 (2009).

49. I.R.C. §§ 163(h)(1), (h)(2)(D) (2009).

among income groups. Lower income taxpayers are more likely to have credit card debt than higher income taxpayers.⁵⁰ In addition, taxpayers of color tend to have higher credit card debt than white taxpayers.⁵¹ Disallowing a deduction for credit card interest, therefore, disadvantages low income taxpayers and taxpayers of color. Taxpayers who take out home equity lines of credit to pay off their credit card debt are able to deduct that interest up to certain limits.⁵² Yet again, this is a benefit bestowed upon homeownership, which as previously noted, has inherent race and class implications.

C. Which Tax Rate Applies?

Tax policy in America does not treat all income the same. Wage income is taxed at up to 35% under a progressive tax rate structure.⁵³ A progressive tax rate exists where rates increase as income rises.⁵⁴ Income from capital gains and dividends, on the other hand, are generally taxed at a flat rate of 15%.⁵⁵ A flat rate exists when, regardless of the amount taxed, the rate stays the same.⁵⁶ Interest income received from tax-exempt debt is excluded completely⁵⁷ (subject only to the alternative minimum tax in certain instances),⁵⁸ as are gifts

50. See, e.g., Richard A. Brown & Susan E. Burhouse, *Implications of the Supply-Side Revolution in Consumer Lending*, 24 ST. LOUIS U. PUB. L. REV. 363, 385 (2005) (“David Moss and Gibbs Johnson argue, for example, that bankruptcy filings have risen during the past two decades due to a redistribution of types of credit, with lower-income households taking on more credit card debt and high-income households increasingly holding concentrations of secured (mainly mortgage) debt.”); Wayne Jekot, Note, *Over the Limit: The Case for Increased Regulation of Credit Cards for College Students*, 5 CONN. PUB. INT. L.J. 109, 128 (2005) (“[D]ata indicat[ed] that low- and middle-income households hold higher credit card debt-to-income ratios than others’ and that credit card issuers had a ‘major incentive . . . to target low and middle-income households, due to the fact that the issuers make the majority of their profits from these populations.’”) (omissions in original).

51. Carlos J. Cuevas, *The Consumer Credit Industry, the Consumer Bankruptcy System, Bankruptcy Code Section 707(b), and Justice: A Critical Analysis of the Consumer Bankruptcy System*, 103 COM. L.J. 359, 376 (1998) (“Moreover, people of color carry more credit card debt than Caucasians, and during the last three years [the] [sic] amount of credit card debt held by Blacks and Hispanics has escalated rapidly.”) (citations omitted); see also A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 937 (2006) (“[B]lack, Hispanics and Asians have higher credit card debt than the national average.”).

52. I.R.C. § 163 (C(II)) (2009) (limiting interest deduction to home equity lines of credit not greater than \$100,000).

53. *Id.* §§ 1(a)–(e), (i).

54. JOSHUA D. ROSENBERG & DOMINIC L. DAHER, *THE LAW OF FEDERAL INCOME TAXATION* 26 (2008).

55. See I.R.C. § 1(h) (2009). I use the term “generally” because for lower income taxpayers, the capital gains rate is much lower than 15%.

56. ROSENBERG & DAHER, *supra* note 54, at 26.

57. For an overview of such tax-exempt debt and references to the respective provisions of the Internal Revenue Code, see *id.*, at 80–88.

58. I.R.C. §§ 55–59 (2009).

and inheritances,⁵⁹ while interest received from savings accounts and certificates of deposit is taxed at the progressive tax rate up to a maximum of 35%.⁶⁰ But the question of which taxpayers own assets subject to the flat tax, namely capital gains, has race and class implications.

One common form of capital gains is gains from the sale of stock. Those who are wealthy are more likely to own stocks: in fact, the top 10% of households own 70% of all taxable stock.⁶¹ The bottom 60% of households own 17% of all taxable stock.⁶² Only 30% of households own taxable stock (not in tax-deferred retirement accounts).⁶³ In 2001 dollars, the average value of stock holdings for the bottom 60% is \$52,000 and for the top 1% is \$2 million.⁶⁴

According to the Tax Policy Center, “in 2005, only 12.5 percent of the households earning less than \$100,000 received dividend income, and only 6.6% received any capital gains income.”⁶⁵ More than half of all capital gains and dividend income goes to households with annual incomes over \$1 million.⁶⁶ More than three-quarters of all capital gains and dividend income goes to households with income over \$200,000, which represents only three percent of all households.⁶⁷ Only 11% of capital gains and dividend income goes to households with incomes under \$100,000.⁶⁸ Only four percent goes to households with incomes under \$50,000.⁶⁹ Low income households do not receive anything close to what higher income households do when it comes to capital gains and dividend income. Thus, higher income households benefit to

59. *Id.* § 102(a).

60. *Id.* § 61(a)(4).

61. Joel Friedman & Katharine Richards, *Capital Gains and Dividend Tax Cuts: Data Make Clear That High-Income Households Benefit The Most*, CENTER ON BUDGET AND POLICY PRIORITIES 2, Jan. 30, 2006, <http://www.cbpp.org/files/1-30-06tax2.pdf>. (“The top 10 percent owns 70 percent of all taxable stock.”).

62. *Id.* (“Only 17 percent of households in the bottom 60 percent of the income spectrum own stock in taxable accounts.”).

63. *Id.* (“Survey of Consumer Finance data for 2001 show that 30 percent of households own some stock in taxable accounts . . .”).

64. *Id.* (“For households in the bottom 60 percent of the population that have any taxable stock, the average value of the holding is about \$52,000 (in 2001 dollars). The average value is nearly \$2 million for those in the top one percent of households.”).

65. *Id.* at 3.

66. Friedman & Richards, *supra* note 61, at 3 (“Over half—54 percent—of all capital gains and dividend income flows to the 0.2 percent of households with annual incomes over \$1 million.”).

67. *Id.* (“More than three-quarters—78 percent—of this income goes to those households with income over \$200,000, which account for about 3 percent of all households.”).

68. *Id.* (“[O]nly 11 percent of capital gains and dividend income goes to the 86 percent of households with incomes of less than \$100,000.”).

69. *Id.* (“Only 4 percent of this income flows to the 64 percent of households that have income of less than \$50,000.”).

a far greater extent from the lower, flat, capital gains rate than do low income households.

Income from capital gains and corporate dividends increases steadily as a percentage of total income as household income rises. “For those making less than \$100,000, capital gains and dividend income makes up an average of 1.4 percent of total income.”⁷⁰ For those making more than \$1 million, capital gains and dividends make up an average of 31.4% of total income.⁷¹ In other words, almost a third of their household income will not be subject to the progressive tax rate structure. Clearly the ownership of stock has significant class implications. There are race implications as well.

More white taxpayers than black or latino taxpayers invest in the stock market.⁷² In 2002, 9.4% of latinos, 11.7% of blacks and 35% of whites owned stocks and mutual funds.⁷³ White middle class families are more than twice as likely to own stock than black middle class families.⁷⁴ Blacks are more likely to invest in the stock market when they earn at least \$100,000, while whites are most likely to invest in the stock market when they are in their thirties.⁷⁵

Higher income blacks are less likely to invest in the stock market than lower income whites.⁷⁶ Ariel Capital Management and Schwab annually survey white and black households earning over \$50,000 to determine where those households prefer to invest their money.⁷⁷ Over a ten-year period, every

70. *Id.*

71. Friedman & Richards, *supra* note 61.

72. Brown, *Risk Aversion*, *supra* note 1, at 395 (demonstrating in a chart that while 36% of whites own stocks, only 9% of blacks and 7% of latinos own stocks).

73. RAKESH KOCHHAR, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996 TO 2002, at 15 (2004), available at <http://pewhispanic.org/files/reports/34.pdf>.

74. N.S. Chiteji & Darrick Hamilton, *Family Connections and the Black-White Wealth Gap Among Middle-Class Families*, 30 REV. OF BLACK POL. ECON. 16 (2002) (“Among middle-class families, the proportion of white families that own stock is more than twice as high as the proportion of similarly situated black families—about 35 percent compared to 13 percent.”), available at <http://www.springerlink.com/content/0lamdk5cfjphfpxx/fulltext.pdf>.

75. ARIEL-SHWAB BLACK PAPER, A DECADE OF RESEARCH ON AFRICAN-AMERICAN WEALTH BUILDING AND RETIREMENT PLANNING 9 (2007), available at <http://www.arielinvestments.com/blackinvestor>.

76. See Sherman D. Hanna & Suzanne Lindamood, *Changes in Stock Ownership by Race/Hispanic Status, 1998–2004*, 53 CONSUMER INTS. ANNUAL 96, 96 (2007) (describing “lower risk tolerance of minority households and the lower likelihood for middle and upper income minority households to invest in stocks and other high return investments”); Brown, *Risk Aversion*, *supra* note 1, at 398–99 (demonstrating in a chart that lowest-quartile white households have a greater percentage of stock ownership than higher-income blacks in the lowest, second, and third quartiles and that at the second-lowest quartile, a greater percentage of whites own stock than blacks in the highest income quartile).

77. Press Release, Charles Schwab Corp., 9th Annual Ariel/Schwab Survey Shows Blacks & Whites Differ in Expectations and Strategies for Retirement (June 22, 2006) [hereinafter

year the results are the same—whites prefer to invest in the stock market, and blacks prefer to invest in housing and insurance.⁷⁸ The housing piece is surprising given that the majority of blacks are not homeowners,⁷⁹ although perhaps this could be explained by considering the audience that Ariel/Schwab is addressing, namely households earning more than \$50,000.⁸⁰ In that instance, the majority of blacks in households with income greater than \$50,000 are homeowners.⁸¹ One potential explanation is the race-based discrimination that blacks face in the housing market, as well as the credit markets.⁸² The question of who is eligible for the lower, flat rate has race and class implications, as do questions regarding who is eligible (or required) to pay the progressive tax rate.

CONCLUSION

Just as the late Professor Jerome Culp encouraged me to put my “race lenses” on when teaching basic Income Tax, I would like to encourage you to do the same in whatever area that you teach. The only thing that I ask: when you write about it, please include me on your reprint mailing list.

Ariel/Schwab], available at http://www.businesswire.com/portal/site/schwab/index.jsp?ndmViewId=news_view&ndmConfigId=1009912&newsId=20070919006028&newsLang=en.

78. Brown, *Risk Aversion*, *supra* note 1, at 399 n.65.

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

80. Ariel/Schwab, *supra* note 77.

81. Brown, *Shades*, *supra* note 1, at 353 tbl.4.2.

82. Devah Pager & Hana Sheperd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 188–91 (2008).