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Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration

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LATINOS AND THE INTERNAL REVENUE
CODE: A TAX POLICY PRIMER FOR
THE NEW ADMINISTRATION

Leo P. Martinez*

ABSTRACT

With the expectation that the new administration and the new Congress will undertake significant tax reform, this article seeks to provide a comprehensive view of how seemingly neutral legislation in the form of the Internal Revenue Code (the “Code”) disadvantages Latinos. If tax reform is ever to correct the many inequities outlined in this paper, education of legislators and other policymakers is of paramount importance. To this end, I recognize that the complexity of the Code is such that the big picture is often lost in details. Accordingly, this article is not a technical one. Instead, I paint with a broad brush seeking to acquaint the non-tax expert as to how the Code impinges on a particular population in a way that surely must be unintended. It is with this breadth and accessibility that perhaps some meaningful tax reform is possible.

With these preliminary observations, Part I begins with a brief overview of Latinos and taxation. Part II of this Article will address Tax Policy and Latinos. Part II discusses in turn: the tax effects of Latino culture; the effects of Latino low-income status; taxation and Latino educational attainment; and undocumented residents. Part III deals with particular problem areas which include relative tax burdens and Latinos, Social Security and pension plans, the earned income tax credit, and state tax issues. My conclusion is that the seemingly neutral provisions of the Code affect Latinos in specific and non-equitable ways. In order for legislators and policymakers to undertake informed tax reform that is fundamentally fair to all requires a broad appreciation that the Code can affect different populations of taxpayers in different ways.

TABLE OF CONTENTS

INTRODUCTION	102
I. AN OVERVIEW OF THE LATINO POPULATION AND TAXATION ..	103
II. TAX POLICY AND LATINOS	106
A. <i>Tax Effects of Latino Culture</i>	106
B. <i>Effects of Latino Low-Income Status</i>	107
C. <i>Taxation and Latino Educational Achievement</i>	109
D. <i>Undocumented Residents</i>	111
III. PARTICULAR PROBLEM AREAS	112
A. <i>Relative Tax Burdens and Latinos</i>	112

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B. Social Security, Pension Plans, and Wealth Creation . . .	114
C. The Earned Income Tax Credit	116
D. State Tax Issues	117
CONCLUSION	119

What if Latinos mattered in the public policy debate?

—Professor Rachel Moran

INTRODUCTION

In 1997 Professor Rachel Moran posed an important question, “What if Latinos mattered in the public policy debate?” Twenty years later it is not at all clear whether we have an answer to her question. In the tax policy arena, however, the relative lack of discussion regarding Latinos suggests that the answer to Professor Moran’s question is a weak and meek, “Latinos do not matter much in the debate.”

It is no exaggeration to say that taxes lie at the core of our democracy and our society. Indeed, what separates us from cave dwellers is our ability to collectively agree to pay for the benefits we receive from government. That being said, it is no easy task to decide how much we should charge ourselves or how we should spend the revenue. The debate regarding taxation in the next few years will likely be as intense as it has ever been in our lifetimes. In this context, Latinos’ relationship to our system of taxation must matter.

It bears emphasis that there is a dearth of scholarly work exploring the intersection of Latinos and taxation.¹ This is at once surprising and not surprising.² It is surprising in light of the fact that Latinos will likely constitute the largest plurality in the United States within the next 50 years. As of 2014, the Latino population in the United States was estimated to be on the order of 55 million.³ One would expect volumes of material on the subject.

¹ See Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. OF HIGHER EDUC. 407, 407 (2009), archived at <https://perma.cc/394Q-XNT8> (citing the not well-known body of literature on these overlapping issues). Professor Olivas also addresses the interplay between tax treatment of scholarship receipt and immigration status. *Id.* at 412–13.

² See generally Gerald P. Lopez, *Learning About Latinos*, 19 CHICANO-LATINO L. REV. 363 (1998). This comprehensive discussion explores the origin and meaning of the term “Latino.” *Id.* Further, it decries the dearth of scholarship regarding Latinos. *Id.* at 367. Professor Lopez advocates for tax-payer supported bilingual education and public services in Spanish. *Id.* at 408.

³ See Jens M. Krogstad & Mark H. Lopez, *Hispanic Population Reaches Record 55 Million, but Growth has Cooled*, PEW RES. CTR.: FACT TANK (June 25, 2015), <http://www.pewresearch.org/fact-tank/2015/06/25/u-s-hispanic-population-growth-surge-cools>, archived at <https://perma.cc/JT4R-FKC7>. The Latino population reached a new high of 55.4 million in 2014 (or 17.4% of the total U.S. population). *Id.* This number reflects a growth rate of 2.1%, which continues a trend of slower growth that began in 2010. *Id.* Part of this growth rate reduction is due to the slowdown in immigration from Latin America and Mexico. *Id.*; see also

On the other hand, it is not surprising given the distinct shortage of scholars who can focus attention on both Latinos and their relationship to various systems of taxation.

With the expectation that the new administration (and assuming a willing Congress) will undertake significant tax reform, the hope is that such tax reform will be cognizant and deal with the disparate effects of the Code. Thus, this article seeks to inform the debate in several and significantly different respects. First, this article is broad and touches on a large number of concerns. Second, I have come to the realization that in my other work, focus on the education solely of Latinos was much too narrow. If tax reform is ever to correct the inequities outlined in this article, education of legislators and other policymakers is key. Finally, the complexity of the Code is such that the big picture is often lost in details. Accordingly, this article is not a technical one. Instead, I paint with a broad brush seeking to acquaint the non-tax expert as to how the Code impinges on a particular population in a way that surely must be unintended. In this effort, I draw on the work of a number of scholars who have probed different aspects of the Code's application to Latinos. It is with this breadth and accessibility that perhaps some meaningful tax reform is possible.

With these preliminary observations, Part I begins with a brief overview of the Latino population and taxation. Part II of this Article will address Tax Policy and Latinos. Part II discusses in turn; the tax effects of Latino culture; the effects of Latino low-income status; and taxation and Latino educational attainment; and undocumented residents. Part III deals with particular problem areas which include Latinos' relative tax burdens, Social Security and pension plans, the earned income tax credit, and state tax issues. My conclusion is that the seemingly neutral provisions of the Code affect Latinos in specific and inequitable ways. It is with this knowledge that legislators and policymakers can undertake tax reform that is fundamentally fair to all taxpayers.

I. AN OVERVIEW OF THE LATINO POPULATION AND TAXATION

I use the term "Latino" in this article. Like others this is my attempt to avoid the homogenization implicit in the term "Hispanic"⁴ and my own

JEFFREY S. PASSEL, PEW HISP. CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (2005), available at <http://pewhispanic.org/files/reports/44.pdf>, archived at <https://perma.cc/DCF2-GUJY> (noting that the overwhelming majority (about 81%) of the almost 14 million undocumented United States residents are Latino and of these, most are from Mexico (57%) with others representing the various Latin American countries (24%)).

⁴ See Gloria Sandrino-Glasser, *Los Confundidos: De-conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 73, 155-6 (1998) (arguing in favor of making "Latino" the preferred descriptive term to dispel the homogenization implicit in the term "Hispanic"); Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER J. 93, 100 (1995) (condemning racial subcategories that prevent Latinos from identifying as their own race, independent of Black, White, or another color and arguing the term "Latino" is more inclusive and appropriate to use than the term "Hispanic").

forays into the formulation of a working definition have followed suit.⁵ Thus I use Latino instead of Hispanic to refer to those who trace their ancestry principally to Spanish-speaking Latin American countries.⁶

Tax systems, primarily state tax systems, have not always been kind to Latinos. Too often, they have been tools used in the disenfranchisement of and discrimination against Latinos. Included in this category are Texas poll taxes of the 19th and 20th Centuries,⁷ as well as the 1850 California Foreign

⁵ See generally Miguel A. Mendez & Leo P. Martinez, *Toward a Statistical Profile of Latinos in the Legal Profession*, 13 BERKELEY LA RAZA L.J. 59 (2002); Leo P. Martinez & Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 22 U. FLA. J. L. & PUB. POL'Y 377 (2011).

⁶ See Mendez & Martinez, *supra* note 5 (using the term Latino instead of Hispanic to refer to those who trace their ancestry principally to Spanish-speaking Latin American Countries). See also Martinez & Martinez, *supra* note 5 (noting without specifying a particular geographical region that the Latino population is "heavily represented" by immigrants, whether or not undocumented).

Others, too many to mention here, have undertaken this inquiry. Nevertheless, a brief survey of the literature follows. Broadly, Latinos in the United States encompass people who are immigrants or who are the children of immigrants from the countries within Central and South America, as well as Mexico, Puerto Rico, and Cuba. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 883–84 (1995). People from Haiti are included in this definition, but those who hail from countries previously under Dutch or British colonial rule are excluded. Professor Oquendo's argument in favor of the Latino descriptive highlights the term's inclusiveness. See Oquendo, *supra* note 4. Latinos can also accurately be described as those who lived in areas that once were Mexico but now are the states of Arizona, California, New Mexico, and Texas. See Brest & Oshige, *supra* note 6, at 884. The term Latino is shorthand for "latinoamericano" in Spanish and defines people from the Americas previously colonized primarily by Spain. See Oquendo, *supra* note 4 at 97.

Others have taken slightly different approaches in embracing the Latino descriptive. These are worth reviewing. It is also worth noting that this scholarship includes a former justice of the California Supreme Court, the former dean of Stanford University Law School, the dean of the University of California Davis School of Law, and several other prominent scholars. Former California Supreme Court Justice Cruz Reynoso has observed Latinos are a diverse group and identify themselves by various ethnic backgrounds, usually based on their own regional roots or those of their ancestors. Cruz Reynoso, *A Survey of Latino Lawyers in Los Angeles County - Their Professional Lives and Opinions*, 38 U.C. DAVIS L. REV. 1563, 1577–80 (2005). While highlighting that Latinos are a diverse group in the aggregate, they are nevertheless "seriously disadvantaged" compared to whites. Former Dean Paul Brest has noted Latinos are far more likely than Whites to live in poverty because a large proportion of them are recent immigrants. See Brest & Oshige, *supra* note 6, at 886–87. Dean Kevin R. Johnson has discussed the problem of Latino assimilation in the United States and the diversity of the Latino population in regards to qualification for affirmative action and related programs. Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1298–1300 (1997).

One well-known scholar, Professor Gerald Lopez suggests the population included within the term Latino is comprised of political community, citizenship, self-identification, race, assimilation, history, and language. See Lopez, *supra* note 2, at 385–408 (1998). This perspective seems to be the decided trend and may very well be the best formulation extant. This is further complicated by the tendency of Latinos to self-identify as per country of origin rather than with the descriptive, "Latino," "Hispanic," or what the author and others call a "Pan-Latin" identity. PAUL TAYLOR ET AL., PEW RES. CTR., WHEN LABELS DON'T FIT: HISPANICS AND THEIR VIEWS OF IDENTITY (2012), available at <http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity>, archived at <https://perma.cc/4HR9-YPFK>.

⁷ See Nina Perales et al., *Voting Rights in Texas: 1982-2006*, 17 S. CAL. REV. LAW & SOC. JUST. 713, 720–22 (2008) (describing the use of poll taxes in Texas to disenfranchise Latino

Miners Tax enacted in the midst of the Gold Rush to drive Latino miners out of the gold fields.⁸

Today, such overt discrimination is rare. This is not to say that discrimination is gone; rather it is more nuanced and subtle. Professors Beverly Moran and William Whitford's classic work of tax policy, *A Black Critique of the Internal Revenue Code*, questioned whether the Internal Revenue Code (the "Code") was, in fact, racially neutral with respect to African Americans.⁹ At Professor Moran's urging, several years ago, my daughter and I authored a technical work explaining how the Code operates to the systematic disadvantage of Latinos in several distinct areas.¹⁰ It was, as we described, a paradigmatic example of Anatole France's description of law as having that "majestic quality . . . which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread."¹¹ We concluded that it was incumbent upon Latinos to educate themselves about the asymmetric allocation of tax burdens and tax benefits. Again, this piece seeks to emphasize our previous view that limiting tax education to Latinos was much too narrow. In sum, I seek to cast a wider net.

In that vein, the importance of understanding all of this is not to be underestimated. In the words of Martin Luther King, Jr., "[w]e are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history, there 'is' such a thing as being too late. This is no time for apathy or complacency. This is a time for vigorous and positive action."¹² In short, Latinos must matter and must seek to matter in the tax policy debate.

and African-American voters); see generally Patrick G. Williams, *Suffrage Restriction in Post-Reconstruction Texas: Urban Politics and the Specter of the Commune*, 68 J. S. HIST. 31 (2002) (discussing a late 19th Century Texas poll tax aimed at decreased voter participation among the lower classes).

⁸ See David E. Hayes-Bautista et al., *Empowerment, Expansion, and Engagement: Las Juntas Patrióticas in California, 1848-1869*, 85 CAL. HIST. 4, 7 (2007). This practice is not too far removed from actions by unscrupulous employers who threaten Latino workers with notification to the immigration authorities in order to avoid paying earned wages. See Sachin S. Pandya, *Tax Liability for Wage Theft*, 3 COLUM. J. TAX L. 113, 134, 136 (2012). While these examples place tax systems in a bad light, there are those who advocate using tax systems in a positive way to curb the practice of wage theft by some employers. *Id.* at 136.

⁹ See Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996). As the numerous citations in this piece to her work show, Professor Dorothy A. Brown has carried on this fight. See, e.g., Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).

¹⁰ See Martinez & Martinez, *supra* note 5.

¹¹ ANATOLE FRANCE, *LE LYS ROUGE* 49 (1894). Anatole France won the 1921 Nobel Prize for literature. For an excellent explication of historical relief mechanisms for the poor, see Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871, 953-65 (1995).

¹² Martin Luther King Jr., *Beyond Vietnam: A Time to Break Silence*, Speech at Riverside Church, New York, N.Y., (Apr. 4, 1967), available at http://www.crmvet.org/info/mlk_viet.pdf, archived at <https://perma.cc/E3ES-2VD2>.

II. TAX POLICY AND LATINOS

As a general proposition, the Code affects different populations in different ways.¹³ This is not so much to say the Code is unfair but rather to recognize the disparate effect of seemingly neutral tax legislation. The broad observation is that without knowledge and awareness of this aspect of the application of the Code, meaningful change will never occur.

These disparate effects are seen in several different areas. In each of these areas the Code fails to account for Latino culture, low-income status, and educational attainment. These are discussed below.

A. Tax Effects of Latino Culture

Particular aspects of Latino culture prevent Latinos from fully enjoying the tax benefits available under the Code. First, the United States subsidizes family care through the dependent care tax credit.¹⁴ Yet, there is a strong Latino tradition to rely on extended family for dependent care.¹⁵ The emphasis on traditional gender roles and the interdependence of the extended family within Latino culture lead many Latinas to stay at home with their children or to rely on care provided by the extended family, rather than to use the services provided by day care centers.¹⁶ As a direct result, Latinos are less likely to take advantage of the dependent care tax credit.¹⁷

Exploring further, tax policy variables dealing with marriage are not equal across race and ethnicity.¹⁸ The differences in the marriage penalty as applied to Latinos illustrate this problem.¹⁹ The Code imposes a slightly *higher* rate of taxation on a married couple in which both work, as opposed to unmarried couples who both work—the “marriage penalty.”²⁰ Con-

¹³ See Martinez & Martinez, *supra* note 5, at 391–401 (2011) (observing the Code disfavors Latinos through the personal residence interest deduction, pension plans, higher education tax deductions, and the earned income tax credit). My colleague, Professor Reuel Schiller has sounded the same theme that racial egalitarianism assumes that the goals of African Americans are the same as those of Latinos and other racial and ethnic groups. See generally REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* (2015). His explorations have included employment discrimination, housing discrimination, and bilingual education. *Id.*

¹⁴ See 26 U.S.C. § 21 (2012).

¹⁵ See Note, *Into the Mouths of Babes: La Familia Latina and Federal Funded Child Welfare*, 105 HARV. L. REV. 1319, 1329–30 (1992). Although this article is not intended to delve into arcane aspects of tax policy, I am aware that the untaxed imputed income associated with family-provided child care would reduce the disparate treatment of Latinos in this context.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 ECONOMICA 297, 302 (Aug. 1999).

¹⁹ See *id.* at 302, 307.

²⁰ *Id.* at 307–08; Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1478 (1997) (explaining that the joint tax return treats married couples as a single taxable unit and that a couple consisting of two earner spouses is taxed the same where there is one wage earner—placing the working married

versely, the Code imposes a slightly *lower* rate of taxation on married couples in which only one spouse works than similarly situated unmarried couples—the “marriage bonus.”²¹ Because Latino families are more likely to consist of two earner spouses, Latinos as a class are more likely than whites to be disadvantaged by the marriage penalty.²²

Culture also acts to the disadvantage of Latinos when considering charitable deductions under the Code. For instance, Latino, in addition to African American and Asian American households, have a cultural tradition of family-based self-help.²³ Latino philanthropy is heavily oriented toward family and focuses on family support structures.²⁴ The focus of this philanthropy is seen in data showing a significant amount of money that so-called Hometown Associations and migrant organizations obtain from their members and transfer abroad to benefit specific communities.²⁵ In so doing, Latinos bypass the Code mechanisms that reward such charitable behavior.

A final observation is that the Code systematically disadvantages single mothers from all racial groups.²⁶ As discussed below, the ability of low income taxpayers to use deductions are “wasted.” Second, childcare credits provide little benefit because many single mothers have little or no tax liability to use the credit.²⁷ Because divorced single mothers tend to be older, more educated, and economically better off than never-married mothers, the latter group is additionally disadvantaged.²⁸ Moreover, recognizing that divorced Latinas form a larger proportion of single mothers (52%) than divorced white women (34%); the disparity in the allocation of the tax benefit then emerges.²⁹

B. Effects of Latino Low-Income Status

Although I began by promising that this article would not be a technical one, a small tax lesson is needed for the following discussion. First, the Code

couple in a higher tax bracket than if they simply filed separately). While the details of the affected groups have changed in the 20 years since Professor Brown’s fine work, the sense of her observations remains salient.

²¹ *Id.* at 1479.

²² See *id.* at 1473. While Professor Brown applies her thesis to African-Americans, the thesis could similarly be applied to Latinos. *Id.*

²³ See Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-income Generosity*, 6 CORNELL J. L. & PUB. POL’Y 325, 352–53 (1997) (noting that in Latino culture, charity is perceived as sharing rather than giving).

²⁴ See *id.* at 353; Martin Chavez, *Remittances and the Charitable Deduction: A New Approach to Encouraging Development in Mexico*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 565, 570 (2011) (noting that in 2008, \$25 billion, or 2.47% of Mexico’s GDP, was sent to the country in the form of personal remittances from those living in the United States).

²⁵ See Chavez, *supra* note 24, at 603 (providing data by country of the amount of such remittances over an eight-year span).

²⁶ See Akari Atoyama-Little, *Taxing Single Mothers: A Critical Look at the Tax Code*, 88 N.Y.U. L. REV. 2146, 2169 (2013).

²⁷ See *id.* at 2151 (“Taxpayers earning less than \$3000 do not receive any [childcare tax credit] benefit”).

²⁸ See *id.* at 2151.

²⁹ See *id.*

encourages and subsidizes private philanthropy by allowing deductions for amounts paid to charity. Second, by allowing an exclusion from gross income for amounts paid into qualified pension plans, the Code encourages individual retirement savings. On the surface, this is simply the implementation of sound social policy. Digging deeper, however, the approach is flawed from several perspectives. Because the various incentives embodied in the Code (philanthropy and pension savings) are implemented and encouraged by tax savings, low-income individuals and the unemployed are ill-placed to take advantage of these deductions.³⁰ At low-income levels, deductions, exclusions, and credits do little good for the poor. Going one step further, because our progressive system of taxation taxes those with higher incomes at higher rates, a deduction is “worth” more to a taxpayer who pays at the higher rate.

A disproportionate number of low-income taxpayers are racial and ethnic minorities who are disfavored by the Code.³¹ For example, suppose taxpayers A and B each contribute \$100 to charity. Taxpayer A saves \$30 in taxes if she is taxed at the 30% rate. Taxpayer B saves only \$10 if he is taxed at the 10% rate. Thus, this structural approach to encourage certain behaviors systematically disadvantages low-income taxpayers. This basic observation should color how legislators and policymakers approach the largess that is visited on taxpayers through the system of tax deductions. It is not unexpected then, that deductions have skewed distributions.³² It bears repeating that deductions favor high-income taxpayers because a deduction is “worth” more to a taxpayer who pays taxes at a high rate.³³ Moreover, because low-income taxpayers resort to the standard deduction in lieu of itemizing deductions like the charitable tax deduction, the deduction is wasted on low-in-

³⁰ The poor are sometimes the beneficiaries of philanthropy and charitable donations and the Code at least indirectly benefits the poor by encouraging benevolence. Still, there is a suggestion that the proportion of charitable contributions that benefit the poor is on the order of 33%. See Dylan Matthews, *Only a Third of Charitable Contributions Go to the Poor*, WASH. POST (May 30, 2013), available at https://www.washingtonpost.com/news/wonk/wp/2013/05/30/only-a-third-of-charitable-contributions-go-the-poor/?utm_term=.8c33f9544d50, archived at <https://perma.cc/7M3H-J547>. This 33% estimate may well be too high. See Charles Kenny, *Why Private Donations Aren't Helping America's Poor*, Bloomberg (Oct. 13, 2014), <https://www.bloomberg.com/news/articles/2014-10-13/why-private-donations-arent-helping-americas-poor>, archived at <https://perma.cc/XPR2-Q7HS> (estimating the proportion at 12%).

³¹ See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 5 (2006) (noting that undocumented immigrants pay billions each year in excise, property, and payroll taxes, and that hundreds of thousands more file state and federal tax returns); John Edwards, *A Tax System that Embraces Fairness and Equality*, 73 SOC. RES. 431, 439 (Summer 2006) (discussing the income gap).

³² See Bullock, *supra* note 23, at 339; Chavez, *supra* note 25, at 593–94 (arguing for use of the charitable tax deduction to encourage increased spending of collective remittances by Latino immigrants in order to further benefit specific communities within and without the United States).

³³ Bullock, *supra* note 23, at 339 (“Because the per-dollar tax savings for charitable contributions rise as one’s marginal rate rises, high income taxpayers enjoy a proportionally larger tax deduction than lower income taxpayers. In other words, the price of giving becomes cheaper and cheaper as income increases.”).

come taxpayers.³⁴ To the extent Latino taxpayers are overrepresented in the lower income levels, the Code has the effect of working toward their disadvantage.

Low income generally correlates to low wealth levels.³⁵ Latinos suffer in this area as well.³⁶ For example the comparatively low rate of home ownership by Latinos means that the very real tax benefits associated with home ownership are not well distributed.³⁷ As Professor Dorothy Brown observes, a majority of whites (76%) are homeowners, while the majority Latinos (51%) are not.³⁸ Because there are scant tax benefits associated with renting, Latinos are disproportionately disfavored by the tax subsidies provided for homeownership under the Code.³⁹ Even at high-income levels, a smaller percentage of Latinos are homeowners than whites.⁴⁰ The result is that the Code's subsidies for homeownership create winners and losers along racial and class lines.⁴¹

C. Taxation and Latino Educational Attainment

Latinos are more likely to live in poverty than non-Latinos and more likely to be employed in low-wage jobs.⁴² While this is a disadvantage in and of itself, the situation is substantially worse. Perhaps as a direct result, Latinos lag behind whites and African Americans in educational achievement by a wide margin—the high school dropout rate among Latinos is approximately double that of African-Americans and Whites.⁴³

³⁴ See Lipman, *supra* note 31, at 28–29. (suggesting deductions are wasted by undocumented low-income taxpayers who opt for the standard deduction because their aggregate deductions are small).

³⁵ See Edwards, *supra* note 31, at 439–40.

³⁶ Data indicates the median net worth of non-Latino homeowners in 2002 was \$129,778 and the median net worth of non-Latino renters and others was \$1,526. See RAKESH KOCHHAR, PEW HISP. CTR., *THE WEALTH OF HISPANIC HOUSEHOLDS: 1996 TO 2002 (2004)*, available at <http://pewhispanic.org/files/reports/34.pdf>, archived at <https://perma.cc/8V84-86FS>. By contrast the median net worth of Latino homeowners was \$62,839 in 2002 and the median net worth of Latino renters and others in 2002 was \$762. *Id.*

³⁷ See Lipman, *supra* note 31; Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 343–44 (2009). In addition to disfavoring Latinos through the personal residence interest deduction, the Code also disfavors Latinos with respect to deductions and exclusions related to pension plans, higher education tax deductions, and the earned income tax credit. See Martinez & Martinez, *supra* note 5, at 391–401.

³⁸ See Brown, *supra* note 37, at 348 (also observing a rate of African Americans home ownership of 52%).

³⁹ See Brown, *supra* note 37, at 349.

⁴⁰ See Brown, *supra* note 37, at 352.

⁴¹ See Brown, *supra* note 37.

⁴² See Ana M. Martinez-Aleman, *Latino Demographics, Democratic Individuality, and Educational Accountability: A Pragmatist's View*, 35 EDUC. RESEARCHER 25, 26 (Oct. 2006).

⁴³ See ANTONIA DARDER ET AL., *LATINOS AND EDUCATION: A CRITICAL READER* 53 (1992). See also Barbara J. Robles, *Tax Refunds and Microbusinesses: Expanding Family and Community Wealth Building in the Borderlands*, 613 ANNALS AM. ACAD. POL. & SOC. SCI. 178, 178 (Sept. 2007) (describing low educational attainment by Latinos). Furthermore, Latinos also have the highest high school dropout and illiteracy rates. NAT. CTR. FOR EDUC. STAT., U.S. DEP'T EDUC., *THE CONDITION OF EDUCATION 2008* 38 (2008), available at <https://>

Current education tax policy does little to promote bridging the Latino education gap. In fact, it probably makes things worse. There exist myriad Code provisions designed to provide exclusions from income, tax credits, and other tax benefits related to expenses incurred in connection with the pursuit of higher education that are effectively denied to the Latino populace.⁴⁴ These benefits are provided to students whose parents are U.S. citizens but are effectively denied to Latinos by reason of low income levels because, to repeat, a deduction is worth more to a taxpayer who pays taxes at a higher rate under our system of progressive taxation. Latinos are also denied these benefits because of the relatively small number of Latinos who pursue higher education. This kind of disparity is especially insidious. Lack of opportunity to participate in tax programs incentivizing higher education offers little in the way of ending the cycle in which those at the low end of the socioeconomic scale are not provided the means by which to escape the drag caused by low educational attainment.

It almost goes without saying that the multitude of undocumented Latino immigrants fare even worse. In addition to low income and low educational achievement, the undocumented are denied access to loans or resident tuition rates that would, if available, enable them to attend institutions of higher education.⁴⁵

There are macro costs in addition to the very real cost of existing educational tax policy to Latinos. Increasing the number of Latinos completing high school and attending college would significantly increase federal tax revenues.⁴⁶ This phenomenon is demonstrable. In Compton, California, an

nces.ed.gov/pubs2008/2008031.pdf, archived at <https://perma.cc/VHY7-EWD4>. One study found that in 1990, the Latino dropout rate was an astounding 32.4% while the corresponding rate among African Americans was 13.25% and among Whites was 9%. *Id.* at 38, 138. More recent data are not as dramatic but are nonetheless compelling. *Id.* In 2006, the Latino dropout rate was 22.1% while the corresponding rate among African-Americans was 10.7% and among whites was 5.8%. *Id.* These dismal statistics are made yet worse because Latinos are also less likely to pursue higher education. See Martinez-Aleman, *supra* note 42, at 27. It does not make it any easier to deal with this problem when we discover that this disparity may very well be the result of systematic discrimination in the provision of basic educational opportunity. Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391, 408–09 (2005) (describing the effects of *de jure* discrimination).

⁴⁴ See, e.g., 26 U.S.C. §§ 25A (hope and lifetime learning credits), 117 (qualified scholarships), 135 (treatment of bonds used to pay higher education expenses), 221 (qualified education loans).

⁴⁵ See SPIROS PROTOPSALTIS, UNDOCUMENTED IMMIGRANT STUDENTS AND ACCESS TO HIGHER EDUCATION: AN OVERVIEW OF FEDERAL AND STATE POLICY (2005), available at <http://www.williamperezphd.com/articles/protopsaltis-2005.pdf>, archived at <https://perma.cc/6B93-J3PR> (observing that thousands of undocumented students graduate from high school but are unable to go to college because of lack of access to public loans or in-state tuition). Colorado legislatures have recommended that undocumented students be allowed to pay in-state college tuition rates. See *id.* at 8.

⁴⁶ See Barbara J. Robles, *Exploring the Wealth Returns to Latino Higher Educational Attainment: Estimates of Work-Life Earnings Profile*, 8 J. HISP. HIGHER EDUC. 5 (2009) (finding that public investment in Latino higher education increases public tax revenues and contributes to national economic strength). See also Lupe S. Salinas, *Latino Educational Neglect: The Result Bespeaks Discrimination*, 5 U. MD. L.J. RACE RELIG. GENDER & CLASS 269,

increase in the Latino population with decreased employment prospects led to a decrease in the tax base.⁴⁷ This decrease had predictable negative effects on the local economy and system of public education in that community.⁴⁸ The decrease in property tax revenues brought about by the passage of Proposition 13 further exacerbated the situation.⁴⁹ This spiral downward cannot bode well for either Compton, California, or the United States. We would all be better served with a better-educated Latino populace. The sociological implications of a significant Latino education gap cannot be ignored.⁵⁰ That the Code is complicit in sustaining this gap should be intolerable to all.

D. Undocumented residents

The makeup of the Latino population in the United State remains elusive because it includes an indeterminate, yet significant number of undocumented residents.⁵¹ Still, some rough estimates exist. In the early 2000s some 80% of undocumented residents were believed to be Latino.⁵² Of these, most were from Mexico (57%) with others representing various Latin American countries (24%).⁵³ Some data suggests the growth rate of Latinos in the United States has entered a trend of diminished growth, partly due to the slowdown in immigration from Latin America and Mexico.⁵⁴ While the absolute number may be elusive, it is clear that this part of the population, undocumented or otherwise, is significant.

There is much to suggest that undocumented residents are both over-taxed and are under-allocated tax benefits.⁵⁵ Migrant workers, who are

297–98 (2009) (focusing on “public school systems and the needs of a large and growing Latino population that pays taxes and expects a fair, equitable, and effective public education”); STEPHEN SORENSON ET AL., INCREASING HISPANIC PARTICIPATION IN HIGHER EDUCATION: A DESIRABLE PUBLIC INVESTMENT 2–3 (Sept. 1995), available at http://maxweber.hunter.cuny.edu/pub/eres/BLPR102_PIMENTEL/latinos3.pdf, archived at <https://perma.cc/BG2E-5W73> (estimating that increasing the number of Latinos completing high school with at least some attending college could increase federal tax revenues on the order of \$25 billion each year).

⁴⁷ See Emily E. Straus, *Unequal Pieces of a Shrinking Pie: The Struggle between African Americans and Latinos over Education, Employment, and Empowerment in Compton, California*, 49 HIST. EDUC. Q. 507, 515 (2009).

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See Martinez-Aleman, *supra* note 42, at 27. See also MICHAEL A. OLIVAS & R.G. SCHNEIDER, EDUCATION LAW STORIES (2007); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of a “Systematic Analysis of Affirmative Action in American Law Schools”*, 7 AFR.-AM. L. & POL’Y REP. 1 (2005) (discussing the charged academic atmosphere surrounding affirmative action and law school admissions); DARDER ET AL., *supra* note 43.

⁵¹ See Olivas, *supra* note 1 (citing literature on the overlapping issues of taxation, the undocumented, and higher education while observing scant scholarship on the operationalization of these issues).

⁵² The overwhelming majority (about 81%) of the almost 14 million undocumented United States residents are Latino. See PASSEL, *supra* note 3.

⁵³ See *id.*

⁵⁴ See Krogstad & Lopez, *supra* note 3 (describing Latino population trends).

⁵⁵ See Luis Larrea, *Taxation Inequality and Undocumented Immigrants*, 5 WM. MITCHELL L. RAZA J. 1, 37 (2013) (undocumented immigrants pay a disproportionate amount of taxes to

predominantly Latino and undocumented, are likely to be taxed while simultaneously denied social welfare benefits funded by tax revenues.⁵⁶ The undocumented are also significantly less likely to be the beneficiaries of public outlays for education.⁵⁷ Similarly, there is much evidence to suggest that the benefits provided expressly in the Code are lost to the undocumented. For example, the benefit of the home mortgage interest tax deduction is “wasted” by undocumented workers who are, at best, unlikely to claim an interest deduction.⁵⁸ Undocumented immigrants are likewise denied Medicaid access due to their immigration status.⁵⁹ This denial of federal welfare benefits has severely restricted undocumented immigrants’ access to health care and has never fully been addressed judicially.⁶⁰ Finally, undocumented workers pay billions of dollars annually for Social Security taxes, even though these workers do not qualify for Social Security Benefits.⁶¹

I do not mean to suggest that tax policy affecting Latinos should be driven by the ill treatment of undocumented taxpayers. At the same time, Latinos should not be disadvantaged by a myopic tax policy that depends on inflammatory populist rhetoric regarding undocumented taxpayers and not on sound data.

III. PARTICULAR PROBLEM AREAS

In this Part I focus on relative tax burdens and Latinos; Social Security, pension plans, and wealth creation; the earned income tax credit; and state tax issues. Each area provides examples of how Latinos are disfavored by the Code.

A. *Relative Tax Burdens and Latinos*

Myth seems to obscure reality when it comes to perceptions of the relative tax burdens borne by Latinos.⁶² Nowhere is this better illustrated than in

the benefits received); Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219, 248 (1991) (concluding that undocumented immigrants pay more in taxes than they cost in social services); Ariel Stevenson, *Improving the U.S. Guest Worker System Through Tax and Social Welfare Reform*, 17 HARV. LATINO L. REV. 147, 156–65 (2014) (describing the relative over taxation of, predominantly Latino, migrant workers coupled with U.S. policymakers’ consistent practice of excluding migrant workers from tax and social welfare benefits).

⁵⁶ See Stevenson, *supra* note 55. Stevenson also suggests a better immigration policy would enable temporary workers to return home sooner by helping them achieve financial security. See *id.* at 168.

⁵⁷ See Olivas, *supra* note 1, at 408–09.

⁵⁸ Lipman, *supra* note 31, at 28–29.

⁵⁹ See Elizabeth R. Chesler, *Denying Undocumented Immigrants Access to Medicaid: A Denial of Their Equal Protection Rights?*, 17 B.U. PUB. INT. L.J. 255, 256 (2008).

⁶⁰ See *id.* at 261.

⁶¹ See Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of “Undeserving” Working Poor*, 7 NEV. L.J. 736, 747 (2007).

⁶² Indeed, this idea seems to coexist with the equally incorrect concerns that immigrants are displacing native-born workers as to most skilled positions in the United States. See David

the popular, pervasive, yet incorrect, notions regarding the largely Latino immigrant population. There is a real disconnect between the tangible economic benefits that result from less restrictive immigration policies and possibly irrational fears of adverse effects on natural-born citizens' wages and tax burdens.⁶³ To be sure, while it appears that the burden primarily falls on local and state governments because of the cost of undocumented immigration, the fiscal impacts at the federal level are uniformly positive.⁶⁴

There is a wide gap between the actual tax burden on immigrant Latinos (both documented and undocumented) and their perceived tax burden.⁶⁵ Several scholars have demonstrated the positive effect of undocumented immigrants on the economy.⁶⁶ At the federal level, the argument that immigration will increase the fiscal burden of lawfully present individuals is simply wrong. As a general proposition, immigrants receive few federal benefits while paying taxes and helping fund Social Security.⁶⁷

The gap between reality and mainstream perceptions regarding undocumented residents is even more pronounced. Contrary to popular belief, undocumented workers do in fact pay taxes.⁶⁸ Moreover, undocumented workers pay a wide variety of taxes at the federal, state, and local levels⁶⁹ and unquestionably pay more in taxes than they receive in public benefits.⁷⁰ More specifically, undocumented workers pay billions of dollars annually in Social Security taxes, even though these workers do not qualify for Social Security benefits.⁷¹ "In 2003, the government collected an estimated \$7 billion in Social Security and Medicare taxes, or approximately one percent of

P. Weber, *Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 774 (2009) (noting that on average for every skilled immigrant worker requested, technology companies increased their number of employees by five the following year).

⁶³ See Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 AM. L. & ECON. REV. 271, 311 (2003) (advocating for a more liberal and selective immigration policy because with increased personal mobility, the application of immigration quotas can have an adverse economic effect).

⁶⁴ See Eric S. Rothman & Thomas J. Espenshade, *Fiscal Impacts of Immigration to the United States*, 58 POPULATION INDEX 381 (1992) (surveying studies that address the fiscal impact of undocumented immigrants on local, state, and national government tax budgets).

⁶⁵ See Trebilcock, *supra* note 63, at 289–90, 299. "The monetary cost of the social services that illegal immigrants do use, such as emergency medical care or public education, almost certainly does not offset the tax contribution illegal immigrants make." *Id.* at 290.

⁶⁶ See Tyler Grimm, Note, *Using Employer Sanctions to Open the Border and End Undocumented Immigration*, 12 J. GENDER, RACE & JUST. 415, 418–19, 432–33 (2009); Francine J. Lipman, *The "Illegal" Tax*, 11 CONN. PUB. INT. L.J. 93, 105–06 (2011); Luis Larrea, *Taxation Inequality and Undocumented Immigrants*, 5 WM. MITCHELL L. RAZA J. 1, 37 (2013) (concluding that undocumented immigrants pay a disproportionate amount of taxes to the benefits received).

⁶⁷ See Weber, *supra* note 62, at 779 (noting that in 2005, undocumented immigrants contributed around \$7 billion annually into Social Security).

⁶⁸ See generally Lipman, *supra* note 66 (explaining how undocumented immigrants contribute to the tax system).

⁶⁹ *Id.* at 98. It should go without saying that undocumented immigrants are not immune from paying consumption taxes on the goods and services they use. *Id.*

⁷⁰ In face of and despite these contributions, undocumented immigrants are burdened with a higher tax rate because of their ineligibility for tax credits like EITC. See *id.* at 100.

⁷¹ See Lipman, *supra* note 61, at 750–51.

the overall revenue, from 7.5 million workers and their employers with mismatched [Social Security Numbers],” a prime indicia of undocumented status.⁷² The bottom line is that undocumented immigrants are not the parasites on the economy that they are perceived to be.⁷³ They pay into the system but take little out.

B. Social Security, Pension Plans, and Wealth Creation

The tax-supported Social Security System and the tax advantages related to pension plans provide concrete examples of ostensibly neutral legislation that disproportionately disadvantages Latinos. In the case of Social Security, the relatively small contribution by lower earning Latinos translates directly into lower payouts. As noted above, the Social Security pay-in of many undocumented Latino workers is not correctly attributed in government records because they do not have valid Social Security numbers.⁷⁴ In this case, there is a pay-in but no pay-out.

In this dire landscape, there are anomalies. For example, the United States Government Accountability Office and several scholars, have found that Latinos receive greater benefits than their white counterparts.⁷⁵ Thus, it appears that Latinos are significant beneficiaries of the Social Security system. This phenomenon, however, warrants a closer look.

While Latinos receive more in Social Security benefits for each dollar they contribute compared to non-Latino whites or African Americans, they also rely on Social Security funds for a larger share of their income than the rest of the population.⁷⁶ Latinos also have higher disability rates, although not as high as their African American counterparts, in addition to lower lifetime earnings.⁷⁷ Thus, for these reasons alone, they receive greater benefits in a greater *proportion* of their income relative to social welfare taxation than whites. Finally, because of greater life expectancy relative to other ethnic groups, including whites, Latinos further benefit by receiving more years of retirement benefits.⁷⁸ In this sense, Latinos can be said to benefit from the Social Security system, and it is this more nuanced view that is often missed by others. An uncritical appraisal of the Social Security system can easily

⁷² *Id.*

⁷³ See Grimm, *supra* note 66, at 418.

⁷⁴ See Lipman, *supra* note 61, at 753 (“Because unauthorized workers do not have a [Social Security Number], the [Social Security Administration] will not have an accurate record of their earnings history.”).

⁷⁵ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-387, SOCIAL SECURITY & MINORITIES 8–15 (2003), available at <https://www.gao.gov/assets/240/237964.pdf>, archived at <https://perma.cc/8SQR-DGMH>; Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1514 (2004).

⁷⁶ See FERNANDO TORRES-GIL ET AL., CTR. ON BUDGET & POL’Y PRIORITIES, HISPANICS’ LARGE STAKE IN THE SOCIAL SECURITY DEBATE 2–3 (2005), available at <http://www.cbpp.org/sites/default/files/atoms/files/6-28-05socsec.pdf>, archived at <https://perma.cc/U5YX-25EU>.

⁷⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 75, at 12.

⁷⁸ *Id.* at 15.

overlook this nuance and we should be aware of the potential for rhetorical abuse

Ultimately, Latinos would be disproportionately disadvantaged if large cuts were made to the Social Security system. Because Latinos are typically younger than the general population and have lower wages, they would be disproportionately affected by a “back-loaded” change to Social Security.⁷⁹

In the case of pension benefits, Latinos also face a disadvantage. Many Latinos work in low-wage occupations that do not offer pension plans.⁸⁰ Less than one-third of Latino workers have jobs that come with this benefit.⁸¹ Even when Latinos have jobs that do provide pension benefits, only a relatively small proportion of those eligible actually participate; this is likely because pension plan contributions would be cutting more from their already meager paychecks.⁸² According to the Employee Benefits Research Institute, just over two in ten Latino workers participate in their tax-favored pension plans or are even eligible for the benefit.⁸³

These two factors mean that Latinos are simply not well-positioned to take advantage of the tax benefits associated with pension plan contributions. To circle back a bit, a direct consequence of this disadvantage is that 75% of Latino (and African American) retirement income is from Social Security, compared with 60% of white retirement income.⁸⁴

The lack of participation in pension plans suggests that Latinos are slow to build wealth—a predicate to having sufficient capital to afford a home and enjoy the tax benefits of ownership.⁸⁵ For example, even Latinos and African Americans who participate in their tax-advantaged, defined contribution pension plans are significantly less likely to invest in the stock market than whites.⁸⁶ A large segment of Latino workers are effectively financially illiterate and remain disenfranchised from ordinary financial services.⁸⁷

⁷⁹ See RICHARD FRY ET AL., PEW HISP. CTR., *HISPANICS AND THE SOCIAL SECURITY DEBATE*, i–ii (2005), available at <http://www.pewhispanic.org/files/reports/43.pdf>, archived at <https://perma.cc/F7PN-ECQJ>.

⁸⁰ See Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385, 390–91 (2007); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1526–27 (2004).

⁸¹ Dorothy A. Brown, *The 535 Report: A Pathway to Fundamental Tax Reform*, 40 PEPP. L. REV. 1155, 1161 (2013).

⁸² See *id.* at 1161.

⁸³ *Id.* at 1158.

⁸⁴ Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1514 (2004).

⁸⁵ See Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385, 392–93 (2007).

⁸⁶ See *id.* at 399.

⁸⁷ Amy L. Cavanaugh, *Cultural Relevance: An Essential Component of Participant Education*, 25 BENEFITS L.J. 42, 46 (2012). Concepts such as deferred taxation and compound interest are unfamiliar to many Latinos working in the United States, partially explaining the lack of participation. *Id.*

C. The Earned Income Tax Credit

The Internal Revenue Code attempts to rectify some of the effects of poverty and income inequality by giving taxpayers the option of the Earned Income Tax Credit (EITC). At its best, the EITC can be an effective anti-poverty device.⁸⁸ At its worst, the EITC is a crude tool.⁸⁹ As applied to Latinos, the problems with the EITC are numerous. Chief among these problems is an uneven distribution of the credit, likely attributable to a profound ignorance about the credit's availability among the Latino population.

Notwithstanding popular conceptions to the contrary, white taxpayers are the primary beneficiaries of the credit. Professor Dorothy Brown observed that more than half of EITC eligible taxpayers are white, while less than 20% of EITC eligible taxpayers are Latino.⁹⁰ There is an unmistakable racial "welfare taint" on the EITC, despite its predominant use by white taxpayers.⁹¹

The relatively low use of the EITC by Latinos undoubtedly relates to the group's woeful ignorance of the credit's existence.⁹² While the EITC can help to lift people out of poverty, low-income Latino households are less likely to know about the credit than low-income households of any other race.⁹³ Professor Brown noted that Latinos are "less likely than whites or blacks to know about the EITC."⁹⁴ Other research supports this hypothesis.⁹⁵ Only 27.1% of low-income Latino parents know about the EITC, a signifi-

⁸⁸ See Bekah Mandell, *Race and State-Level Earned Income Tax Credits: Another Case of Welfare Racism?*, 10 RUTGERS RACE & L. REV. 1, 16 (2008).

⁸⁹ See KATHERIN ROSS PHILLIPS, THE URBAN INST., WHO KNOWS ABOUT THE EARNED INCOME TAX CREDIT? 1 (2001), available at <http://www.urban.org/sites/default/files/publication/61066/310035-Who-Knows-about-the-Earned-Income-Tax-Credit-.PDF>, archived at <https://perma.cc/4S9D-C5PP>.

⁹⁰ Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 821 (2007); Dorothy A. Brown, *Tax Treatment of Children: Separate But Unequal*, 54 EMORY L. J. 755, 823 (2005). See also Phillips, *supra* note 89 (analyzing the availability of the Earned Income Tax Credit).

⁹¹ See Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 821 (2007).

⁹² Perhaps this tendency to overlook the EITC will lessen over time with e-filing of tax returns. As of 2014 about 91% of taxpayers e-filed their returns. *As e-file Grows, IRS Receives Fewer Tax Returns on Paper*, IRS.GOV (Apr. 3, 2014), <https://www.irs.gov/uac/newsroom/as-e-file-grows-irs-receives-fewer-tax-returns-on-paper>, archived at <https://perma.cc/ABQ6-EDY6>. Of course, those who qualify for the EITC are probably less likely to have the home computers that allow for e-filing.

The undocumented also contribute to this phenomenon. As a class, the undocumented do not qualify for the Earned Income Tax Credit and one undocumented family member taints the entire household. 26 U.S.C. § 32(c)(1)(E) (2012) (requiring a taxpayer identification number in order to be eligible). See also Lipman, *supra* note 61, at 743–46 (explaining that the EITC is denied to workers who are not authorized to work in the United States).

⁹³ See generally ALAN BERUBE & BENJAMIN FORMAN, THE BROOKINGS INST., A LOCAL LADDER FOR THE WORKING POOR: THE IMPACT OF THE EARNED INCOME TAX CREDIT IN U.S. METROPOLITAN AREAS (2001) (study dealing with the spatial distribution of the federal Earned Income Tax Credit in the 100 largest metropolitan areas in the United States).

⁹⁴ Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 821 n.197 (2007) (emphasis added) (citing KATHERIN ROSS PHILLIPS, URBAN INST., WHO KNOWS ABOUT THE EARNED INCOME TAX CREDIT? 1 (2001)).

cantly smaller amount than those of other races and ethnicities.⁹⁶ Going back nearly 20 years, the 1999 National Survey of America's Families indicated that low-income Latino parents are significantly less aware of the credit than are non-Latino parents, at a rate of fewer than one in three.⁹⁷

All of this is not to say that the EITC is a bad policy. To the contrary, the credit has provided needed economic relief to a significant number of people in the United States.⁹⁸ In this respect, there is good news—there is evidence that Latinos resort to the EITC to improve social mobility.⁹⁹ This should encourage those who support the credit to see to a more evenhanded distribution and to publicize its availability to Latinos in a more effective way.¹⁰⁰

D. State Tax Issues

While Latino interaction with state tax mechanisms is not widely researched, the few works that do exist suggest many of the same federal taxation issues affecting Latinos can also be found at the state level. Sparse as this research is, it can nonetheless inform federal tax policy.

At the state level, there is recognition that tax revenues attributable to Latinos are significant and expected to grow as the Latino population increases.¹⁰¹ State tax credits play a role in alleviating the effects of poverty

⁹⁵ See Barbara J. Robles, *Advancing Research on Minority Entrepreneurship; Tax Refunds and Microbusinesses: Expanding Family and Community Wealth Building in the Borderlands*, 613 ANNALS AM. ACAD. POL. & SOC. SCI. 178 (2007); Karen P. Varcoe et al., *Rural Latino Families in California Are Missing Earned Income Tax Benefits*, 58 CAL. AGRIC. 24 (2004); Phillips, *supra* note 89.

⁹⁶ Elaine Maag, *Disparities in Knowledge of the EITC*, 106 TAX NOTES 1323, 1323 (2005) (“Only a small portion (27.1 percent) of low-income Hispanic parents know about the EITC - significantly less than their peers of other races and ethnicities.”); Robles, *supra* note 95, at 182 (explaining that although the EITC has been successful in providing substantial economic relief to a growing segment of the U.S. population and although Latinos are eligible for the EITC, “Hispanics [sic] are least likely to be aware of this refunded tax credit and less likely to claim it compared to whites and blacks.”). The Urban Institute mentions that 18.4% of low-income Hispanic [sic] parents have ever received the EITC, which is well below the average of all low-income parents. Phillips, *supra* note 89, at 4. Moreover, 47.2% of non-Hispanic [sic] non-US citizens have heard of the EITC, while only 16.5% of Hispanic [sic] non-U.S. citizens have heard of it. *Id.* at 5.

⁹⁷ Phillips, *supra* note 89, at 4.

⁹⁸ Robles, *supra* note 95, at 181.

⁹⁹ See TIMOTHY M. SMEEDING ET AL., CTR. FOR POL. RES., THE EITC: EXPECTATION, KNOWLEDGE, USE, AND ECONOMIC AND SOCIAL MOBILITY 5 (2000). A sample of tax returns of Chicago area households in 1998 found the Earned Income Tax Credit funds improvements in social mobility (e.g., buying a car, paying tuition, relocation) or assists in making ends meet (e.g., paying bills, purchasing food). *Id.* at 9–14. While more than one half of beneficiaries use the credit to improve social mobility, Latinos are 2.4 times more likely than whites to do so. *Id.* at 21. Thus, increased incentives for savings, greater access to credit markets, and federal programs to match specific low-income savings could lead to greater self-sufficiency for low-income people. *Id.* at 27.

¹⁰⁰ Increased e-filing of taxes may eventually deal with this problem, assuming the easy availability of computer access and literacy to e-file.

¹⁰¹ See Bruce P. Corrie, *A New Paradigm for Immigrant Policy: Immigrant Capital*, 35 WM. MITCHELL L. REV. 283, 300 (2008) (providing data as to taxes paid by Latinos in Minne-

but, as is the case at the federal level, there appears to be systematic bias against undocumented residents.¹⁰²

Interestingly, there appears to be a distinct geographic distribution of tax benefits that is asymmetric among the states for which data is available. State earned income tax credits are geographically concentrated in the Northeast and Midwest.¹⁰³ Ironically enough, it is the South and Southwest, both areas with significant Latino populations, that are the most lacking in tax programs that benefit Latinos.¹⁰⁴ These geographic distributions are consistent with evidence from a variety of state welfare policies suggesting that race is a “significant determinant of support for redistributive programs.”¹⁰⁵ “Given the role race plays in other welfare contexts, it is likely that the race of potential recipients . . . play[s] a role in limiting support for such programs.”¹⁰⁶

As is the case with the federal EITC, Latinos in the state of Washington remain largely unaware of the state earned income tax credit and are, in fact, the least likely to be aware of this credit.¹⁰⁷ Furthermore, the earned income tax credit in Washington state contains some restrictions that disproportionately disqualify Latinos, such as the individual taxpayer identification number rule, citizenship requirement, age requirement, rules for qualifying children, and a marriage penalty, as well as an advantage for English speakers, and an inherent cultural bias.¹⁰⁸ The Washington regressive tax structure also hurts Latinos more than non-Latinos, because Latinos are more likely to be poor.¹⁰⁹

In California, data from the Rural Families Speak Project survey found that the majority of qualified low-income Latino families living in rural communities may not be receiving the EITC.¹¹⁰ This non-participation seems to be due to lack of accurate information and limited access to tax-preparation assistance.¹¹¹

sota). In Minnesota, Mexican-American citizens paid an estimated \$284 million in personal taxes and non-citizens paid an estimated \$24 to \$55 million in taxes. *Id.* Dr. Corrie predicts that the Latino population will be a significant part of the prime tax base in Minnesota in 2030 and will grow over 300 percent during that time. *Id.*

¹⁰² See Heather Nichols-Haining, *The Relationship between the Earned Income Tax Credit and Wealth Inequalities Among Washington Latinos*, in *THE STATE OF THE STATE FOR WASHINGTON LATINOS* (Paul Apostolidis ed., 2008), available at <http://www.walatinos.org/2008/12/the-relationship-between-the-earned-income-tax-credit-and-economic-inequalities-among-washington-latinos/>, archived at <https://perma.cc/Z4GQ-QFZC> (analyzing Latinos in Washington state and their relationship to the Code).

¹⁰³ Mandell, *supra* note 88, at 38.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See* Nichols-Haining, *supra* note 102.

¹⁰⁸ *Id.* at 26–9.

¹⁰⁹ *Id.* at 30.

¹¹⁰ *See* Varcoe et al., *supra* note 95, at 25–6.

¹¹¹ *See id.* at 26.

In the District of Columbia, immigrant households pay taxes at nearly the same rate as native households, based on survey data.¹¹² However, immigrants without legal status, especially those headed by immigrants who speak little to no English, have lower incomes and hence pay a lower share of their incomes in taxes than those households of people legally residing in Washington, D.C.¹¹³

Digging deeper into state taxation patterns, some researchers have correlated racial segregation and per capita state property taxation. Here, per capita property taxation predicts higher segregation for Asians and African Americans but is not significant for Latinos.¹¹⁴ Relative property assessments in Latino neighborhoods tend to be on the high side.¹¹⁵ That is, residents of minority neighborhoods—namely, African American and Latino neighborhoods—face state property tax assessments that are, on average, significantly higher than the market value of their residences.¹¹⁶ Conversely, residents of majority white neighborhoods are, on average, assessed at significantly less than market value.¹¹⁷ Comparatively high assessments ultimately lead to high property tax bills for residents of minority neighborhoods.¹¹⁸

In some sense the experience of state taxation systems and Latinos parallels that of the Code and Latinos. In another sense, the experience is unique—bringing in the application of possibly overtly discriminatory legislation that is missing from the Code. This alerts us that our scrutiny of the Code should focus on its disparate impact effects.

CONCLUSION

The Latino population shows a preference for progressive taxation as well as the use of taxes to facilitate social programs.¹¹⁹ Latinos can be described as pragmatic progressives when it comes to taxation and spending. In addition to their preference for progressive taxation, core beliefs in a more

¹¹² RANDY CAPPS ET AL., THE CMTY FOUND., CIVIC CONTRIBUTIONS: TAXES PAID BY IMMIGRANTS IN THE WASHINGTON, D.C., METROPOLITAN AREA 24 (2006).

¹¹³ *Id.* at 27.

¹¹⁴ Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. ECON. REV. 290, 317 (2011).

¹¹⁵ See Lee Harris, *Assessing Discrimination: The Influence of Race in Residential Property Tax Assessments*, 20 J. LAND USE & ENVTL. L. 1, 29 (2004).

¹¹⁶ *Id.* at 29–30.

¹¹⁷ *Id.* at 29. One commentator suggested that this form of discrimination is effectively a discrimination “tax” paid by Latinos and African Americans. See John Yinger, *Sustaining the Fair Housing Act*, 4 CITYSCAPE: J. POL’Y DEV. & RES. 93, 97 (1999).

¹¹⁸ See Harris, *supra* note 115, at 28–9.

¹¹⁹ See Matt Barreto & Gary M. Segure, *Winning Over Latino America*, 329 CAMPAIGNS AND ELECTIONS 32, 34 (2015) (outlining Latino responses to questions regarding tax policy). See also Jonathan Nagler & R. Michael Alvarez, *Latinos, Anglos, Voters, Candidates, and Voting Rights*, 153 U. PENN. L. REV. 393, 406 (2004). Nagler and Alvarez poll data showing Latino response to questions regarding a large federal budget surplus: 9% favored a tax cut, 11% wanted to pay off the national debt, 46% wanted to increase spending on social programs, and 31% wanted to make Social Security financially sound. *Id.* at 407.

generous safety net and strong government intervention in the economy combine to drive Latinos toward the Democratic Party.¹²⁰ These preferences stand in stark contrast to the presumed reasons for Latinos' overwhelming Democratic allegiance: immigration policy and religion.¹²¹ On the other hand, it would be a mistake to assume that Latinos are all Democrats. Indeed, a significant percentage of eligible Latino voters cast their ballots for the current president.¹²²

My hope is that outlining the unique structural issues affecting Latinos in the application of the Internal Revenue Code will serve as an impetus to meaningful tax reform. In this respect, there is a real choice of which paths to take. One path might focus on poverty and concerns surrounding the safety net as is done by the EITC. Another path might focus on wealth building by encouraging homeownership and investment in retirement accounts in a way that is more inclusive of Latinos.

A recently-issued Nielson Company report, titled *From the Ballot Box to the Grocery Store: A 2016 Perspective on Growing Hispanic [sic] Influence on America*, noted that Latinos will comprise 29% of the total population of the United States by 2060.¹²³ The unsurprising surmise of the report is that the population increase alone will translate to significant political clout. If Latinos tend to lean toward the Democratic party, the lesson for the new administration should be to pay close attention to the issues that uniquely affect the Latino community, not least of which is tax policy.

As Professor Margaret Montoya has eloquently observed "budgets are moral documents; budgets, including tax expenditures, expose and reveal our lawmakers' values and commitments."¹²⁴ Latinos will inevitably emerge as a distinctive constituency in the coming years, one whose viewpoint both parties finally consider *seriously* when formulating a national campaign. It is only by making our voices heard that we can ensure that Latinos will matter in Professor Moran's sense. The fierce urgency of now is very much upon us.

¹²⁰ See Greg Grandin, *Taking Pleasure in the Republican Scramble*, 45 N. AM. CONG. ON LATIN AM. REP. ON AM. 4, 4 (2012).

¹²¹ See *id.* As Professor Rachel Moran observes, "[b]ecause of their complex make-up, Latinos remind us that the normative criteria underlying immigration and civil rights policy are contestable." Rachel Moran, *What If Latinos Really Mattered in the Public Policy Debate*, 85 CAL. L. REV. 1315, 1345 (1997).

¹²² See Harry Enten, *Trump Probably Did Better With Latino Voters Than Romney Did*, FIFTYTHREE (Nov. 18, 2016), <https://fivethirtyeight.com/features/trump-probably-did-better-with-latino-voters-than-romney-did/>, archived at <https://perma.cc/M7PF-ZCWV>.

Exit poll figures show Trump with 29% of the Latino vote. Roberto Suro, *Here's What Happened with the Latino Vote*, N.Y. TIMES, (Nov. 9, 2016), available at <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/heres-what-happened-with-the-latino-vote>, archived at <https://perma.cc/2K2Q-KAZN>.

¹²³ THE NEILSON CO., FROM THE BALLOT BOX TO THE GROCERY STORE: A 2016 PERSPECTIVE ON GROWING HISPANIC INFLUENCE IN AMERICA 3 (2016).

¹²⁴ Margaret Montoya, *Threats Demand Our Action*, THE ALBUQUERQUE J., (Mar. 24 2017), <https://www.abqjournal.com/975110/threats-demand-our-action.html>, archived at <https://perma.cc/FQX9-96E9>.