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## REMARKABLE

WILLIAM C. WHITFORD\*

No one would disagree with Professor Zelenak's general proposition that scholarship should be done carefully.<sup>1</sup> And I acknowledge shortcomings in *A Black Critique of the Internal Revenue Code*,<sup>2</sup> some of which Professor Zelenak has identified. However, his major criticisms are based on analytical mistakes, failure to disclose commonly known information, and/or serious misinterpretations or misrepresentations of our article. Most importantly, I continue to defend our major conclusions: (1) it is possible and appropriate to study racial discrimination in the Internal Revenue Code, and we successfully demonstrated a methodology for doing so; and (2) our study provided a sufficient basis for the conclusion that the Internal Revenue Code "is likely skewed in the favor of whites."<sup>3</sup>

This response is divided into four sections. The first describes important parts of our research and article that mostly escape

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\* Emeritus Professor of Law, University of Wisconsin Law School. I am grateful for helpful comments on an earlier draft from Professors Beverly Moran, Mary Louise Fellows, Howard Erlanger, Gwen Handelman, and Ms. Sarah Waldeck.

A word is necessary about why Professor Moran and I write separately for this Symposium, though we co-authored the article that is the subject of Professor Zelenak's criticism. Professor Moran was teaching in Eritrea when we first received Professor Zelenak's article and were provided an opportunity to respond. The ground rules originally set for the Symposium by the editorial board would have allowed Professor Zelenak to alter his draft after he had read our responses. We were then to be allowed to change our responses in turn. Professor Moran made a special effort in the summer of 1997 to return to the United States to prepare her response to this Symposium, but she was scheduled to return to Eritrea before we submitted our initial responses. Because it is difficult for Professor Moran to work extensively on these matters from Eritrea, we decided it was wisest for Professor Moran to write about matters that would not need to be changed substantially if Professor Zelenak changed his draft and for me to assume the task of responding to Professor Zelenak's specific criticisms. Shortly after our original deadline for submission, the editorial board altered the ground rules to limit Professor Zelenak's freedom to change his draft, but by this time Professor Moran had already returned to Eritrea, and it was too late for us to change our approach to this Symposium.

1. See Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1580 (1998).

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

3. *Id.* at 801.

mention in Professor Zelenak's critique. The next section responds to Professor Zelenak's three major areas of criticism of our article. The third section comments on Professor Zelenak's objectives in his critique of critical tax theory. The last section reflects on my experience in writing about race for the first time in my professional career.

### I. A FULLER DESCRIPTION OF OUR ARTICLE

The most important part of our article received only the briefest mention in Professor Zelenak's critique. Until our work, very little had been done on racial disparities in the incidence of the income tax. At least one reason for this lack of inquiry had been difficulties in getting information. Tax returns are not coded by race, and most tax incidence scholarship is based on analysis of tax returns. To overcome this difficulty, we constructed a methodology for estimating the differential tax incidence on groups of similarly situated whites and blacks. Because race is not an explicit criterion for determining tax liability, any differential impact exists because various tax principles favor or disfavor particular living patterns and because blacks and whites with similar income tend to live different lifestyles. To test this hypothesis, we first searched the existing social science literature for evidence of different lifestyles relevant to tax. Often we were unable to find precisely the data we wanted because existing studies failed to use the categories that are most relevant to tax. For example, the existing social science literature provides little information about differential receipt of gifts and inheritances (both excluded from income by the Internal Revenue Code) by blacks and whites.<sup>4</sup> In these circumstances we found appropriate databases, mostly compiled by the United States Bureau of the Census, and constructed our own regression equations to determine whether race or other characteristics, such as age or marital status, could explain differences between blacks and whites with similar incomes in the receipt of such distributions.

By far the greatest effort in preparing our article was devoted to examining the social science literature, discovering appropriate databases, and constructing our own regression equations. Twenty-two pages of a fifty-three page article, and all of a sixteen-page technical appendix, are devoted to the many methodological issues we faced and to the reporting of our results.<sup>5</sup> We clearly indicated in

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4. *See id.* at 771.

5. One of the most difficult questions, explored more fully in Professor Moran's

our article, and I still believe, that the development of this methodology, as well as the results we reported, are the most important scholarly contributions of our article.<sup>6</sup>

One other important point follows from this account of our methodology. Not only did the development of our own methodology occupy a great deal of our time, but it was expensive. We needed to hire demographers to help us identify appropriate databases, construct control variables from information contained in those databases, and run regression equations. We clearly stated in our article that limited resources prevented us from studying the impact of more than a few Internal Revenue Code sections.<sup>7</sup> I will return to this point when I discuss Professor Zelenak's allegations of one-sidedness.

## II. PROFESSOR ZELENAK'S REMARKABLE CRITICISMS

### A. *Choice of Baseline*

Professor Zelenak's first major criticism of our article concerns our choice of the comprehensive income tax ideal as a baseline for determining what is a "tax benefit."<sup>8</sup> We regarded the Code as skewed in favor of whites because of the evidence that the tax benefits we studied are enjoyed more by whites than blacks, after controlling for income to ensure that we compared only whites and blacks who should be taxed similarly according to the comprehensive income tax ideal.<sup>9</sup>

Professor Zelenak correctly points out that there is debate about whether the consumption tax or the comprehensive income tax is the more appropriate ideal for the personal income tax,<sup>10</sup> and he even makes a respectable argument that a hybrid consumption-income tax, probably the most accurate description of the Code we have, is normatively preferable.<sup>11</sup> The question of what baseline to use to identify "tax benefits" is one that deserved more discussion than we

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contribution to this Symposium, is the question of what controls, other than income, to use in our regression analyses. See Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629 (1998).

6. See Moran & Whitford, *supra* note 2, at 800-01. Professor Zelenak's only comment on this part of our article is that it "is consistently interesting and well-presented." Zelenak, *supra* note 1, at 1562.

7. See Moran & Whitford, *supra* note 2, at 754.

8. See Zelenak, *supra* note 1, at 1563-66.

9. See Moran & Whitford, *supra* note 2, at 756-58.

10. See Zelenak, *supra* note 1, at 1563-65.

11. See *id.* at 1566.

offered.

I cannot agree with Professor Zelenak that we should have done our study differently with respect to selection of a baseline, however. As mentioned above, we had limited resources with which to conduct difficult sociological inquiries. We could not study thoroughly very many deviations from ideals. Given that limitation, we were surely correct in choosing the comprehensive income tax ideal as a baseline. As we stated in our article, it is the basis for "everyday tax policy analysis."<sup>12</sup> It is the basis for deciding what is a "tax expenditure" in constructing the tax expenditure budget, published annually by the United States Treasury and which both we<sup>13</sup> and Professor Zelenak<sup>14</sup> cite as authoritative. Professor Chirelstein's excellent and popular hornbook for students studying tax is oriented principally to explaining how the Code is and is not consistent with the comprehensive income tax ideal.<sup>15</sup> Professor Zelenak is aware of the conventionality of tax policy analysis based on the comprehensive income tax ideal.<sup>16</sup> In an article in which he professes so much aversion to "one-sided" presentation of arguments,<sup>17</sup> it is remarkable that he did not point out this justification for our choice.<sup>18</sup>

Professor Zelenak argues that from the perspective of a consumption tax ideal, the current Code can be considered anti-white because it taxes some investment income and whites disproportionately receive investment income.<sup>19</sup> In this comment,

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12. Moran & Whitford, *supra* note 2, at 753.

13. *See id.* at 801 n.170.

14. *See Zelenak, supra* note 1, at 1568 n.236.

15. *See* MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* (8th ed. 1997). The preface to the most recent edition contains some discussion of the debate between proponents of a comprehensive income tax and of a consumption tax, confirming our view that tax analysis premised on the comprehensive income tax ideal has been the dominant approach, but indicating that both normative and positive analysis premised on a consumption tax ideal is gaining adherents. *See id.* at vi-viii.

16. *See* Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 354 (1994) ("It is, after all, basically an *income* tax, rather than a *consumption* tax.").

17. *See Zelenak, supra* note 1, at 1575-76 (discussing Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971), which he praises for its "careful analytical approach," rather than "the one-sided analyses . . . typical of the subsequent critical tax literature").

18. Instead, Professor Zelenak offers this suggestion for our choice: "I suspect Moran and Whitford chose the income tax starting point because the existing income-consumption tax hybrid is called an income tax." Zelenak, *supra* note 1, at 1565. This is a very condescending remark. The much more evident explanation for our choice is that we were adopting the standard adopted by the vast majority of conventional tax policy analysts, and indeed that is what we stated in our article. *See* Moran & Whitford, *supra* note 2, at 753.

19. *See Zelenak, supra* note 1, at 1565.

Professor Zelenak reveals a profound misunderstanding of our project. Our goal was not to compare the tax liabilities of blacks and whites in gross, but of *similarly situated* blacks and whites. As Professor Moran explains in her contribution to this Symposium, it is far from obvious, *a priori*, that the Code's deviations from a consumption tax ideal disadvantage similarly situated blacks less than whites.<sup>20</sup>

Professor Zelenak concludes the first section of his criticism with the remarkable proposition that there is no legitimate basis for studying the differential racial impact of the individual income tax.<sup>21</sup> His reason for taking this position, not as clearly stated as I would like, apparently is based on his conclusion that "the [intellectual] arguments between income tax and consumption tax proponents are close to a standoff."<sup>22</sup> He seems to assume that any analysis of tax bias in the Code must start from what he calls an "extreme" position<sup>23</sup>—that is, either a pure income tax or a pure consumption tax. He concludes: "Without a good reason to start from either extreme, there is no reason to accuse the actual hybrid tax of discrimination against any race."<sup>24</sup>

This conclusion must stem from Professor Zelenak's assumption that the Code is anti-white when measured against a consumption tax ideal, whereas from the perspective of a comprehensive income tax ideal it may be anti-black. This reasoning falls apart, of course, if one drops the assumption that the Code is anti-white from the perspective of a consumption tax ideal.

More fundamentally, if a hybrid tax code is normatively ideal, as Professor Zelenak suggests,<sup>25</sup> there is no reason why tax benefits could not be defined as deviations from this hybrid ideal and tested, using the same methodology we have used, to determine their differential racial impact. Several provisions of the current Code are inconsistent with both income and consumption tax ideals, and presumably with almost any normative hybrid tax as well. The exclusion of gifts from the tax base and the full deductibility of home mortgage interest and property taxes are two examples.<sup>26</sup> The

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20. See Moran, *supra* note 5, at 1636-37.

21. See Zelenak, *supra* note 1, at 1566-67.

22. *Id.* at 1565.

23. *Id.*

24. *Id.*

25. See *id.* at 1566.

26. For a discussion of home mortgage interest and property tax deductions under one version of a consumption tax, see CHIRELSTEIN, *supra* note 15, at 391-92.

evidence in our article that these provisions are anti-black from the perspective of the comprehensive income tax ideal<sup>27</sup> suggests that they are anti-black from the perspective of any other ideal as well.

Professor Zelenak's second reason for questioning the validity of any study of the differential racial impact of the Code presumes that one can debate and decide about the normatively preferable hybrid tax without considering racial effects. As he states it: "If the provision is right, it makes no sense to examine it for racial bias . . . . If the provision is wrong, it should be repealed regardless of its racial effects."<sup>28</sup>

For my taste, this statement sounds too much like an argument for making public policy without considering racial effects.<sup>29</sup> It is akin to the arguments being advanced for abolishing affirmative action in university admissions and a host of other activities. Race matters in America. It always has, and it still does. I hope the day will come when it matters much less, but I do not believe that benign neglect, or color blindness, is the most efficacious route to that goal. Tax policy, like other public policy (for example, public policy pertaining to university admissions), should take racial effects into account in deciding on normative ideals. Tax law should not unnecessarily and inadvertently make an already bad situation worse. Professor Moran and I were careful to state that we did not believe that race concerns should always trump other policy concerns in deciding on an ideal tax provision, but we do believe race concerns should always be considered in the policy mix.<sup>30</sup>

### B. *Alleged Sampling Bias*

Professor Zelenak titles his second major criticism "Sampling Bias."<sup>31</sup> He is particularly critical of our tentative conclusion that "the entire Code is likely skewed in favor of whites."<sup>32</sup> He suggests that we should have used some random method for selecting the

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27. See Moran & Whitford, *supra* note 2, at 771-72, 774-79.

28. Zelenak, *supra* note 1, at 1567.

29. I cannot be sure that this is Professor Zelenak's position because his discussion suggests that his position is linked to his belief that racial disparities in a tax system can be measured only from the extreme positions of a pure comprehensive income tax or a pure consumption tax. See *supra* notes 23-24 and accompanying text. If Professor Zelenak were to become convinced of our position—that it is possible to measure disparities from the perspective of a normative hybrid tax ideal—perhaps his position on considering racial effects in formulating tax policy would change.

30. See Moran & Whitford, *supra* note 2, at 802-03.

31. Zelenak, *supra* note 1, at 1567.

32. Moran & Whitford, *supra* note 2, at 801.

Code provisions that we chose to study.<sup>33</sup> And he suggests that we deliberately chose to study provisions that would tend to confirm our hypothesis, while avoiding other provisions.<sup>34</sup>

Professor Zelenak's suggestion that we should have used random methods in selecting Code provisions for study shows remarkable naiveté about empirical research. In expensive research based on empirical data, in an exploratory study, one would never randomly select the Code provisions to be studied. There is too great a risk that a random method would select an inconsequential section, or one about which it is impossible to obtain relevant data, and the goal of testing our method would not be achieved. Any experienced social science researcher knows that in an exploratory study, a sounder approach is to select important Code provisions about which there is reason to believe data is available.<sup>35</sup>

That is exactly what we did in our study. As we stated in the article, we had limited resources. We began with the study of the marriage penalty because it enabled us to look at a limited category of data and because it was a good topic on which to test our method.<sup>36</sup> Encouraged by our results, we began to study the home mortgage interest and property tax deductions, where we had some reason to believe relevant data would be available.<sup>37</sup> Simultaneously, we applied for additional grant support to expand our study. However, we were unsuccessful in our grant applications. At that point, we decided to take our study as far as we could with the resources available to us and then publish our results, partly to relate our methodological successes and difficulties to others who might be interested in studying race and tax, and partly to increase the chances that subsequent grant applications to continue the work would be successful. We selected employee benefits and a set of tax benefits for investors as our final areas of study because the tax expenditures involved are so large.<sup>38</sup>

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33. See Zelenak, *supra* note 1, at 1567 ("That inference [to wit, our conclusion] is not justified if the provisions studied were not randomly selected.").

34. See *id.* at 1568.

35. Of course, in selecting data about black and white lifestyles relevant to the tax provisions we studied, randomness was essential, and we followed principles of random selection in that respect.

36. Professor Moran first presented our preliminary findings on the marriage penalty in 1991 as part of the Minority Section program at the annual meetings of the American Association of Law Schools.

37. Because so many studies of race and home ownership exist, in this part of our study we were able to rely mostly on the social science literature for our data. See Moran & Whitford, *supra* note 2, at 778.

38. See *infra* text accompanying notes 43-44.



Professor Zelenak believes we were deliberately biased in our choice of Code provisions to study. He cites several provisions that he believes we should have studied, with particular emphasis given to the progressive rate structure—which he describes as a “massive anti-white aspect of the Code”<sup>39</sup>—and the earned income tax credit—which he describes as a “massive subsidy . . . for the working poor,”<sup>40</sup> presumably disproportionately black.

In his suggestion that we should have studied the progressive rate structure, Professor Zelenak, for the second time, reveals a profound misunderstanding of our study. Our goal was not to compare blacks and whites in gross. Rather we sought to compare *similarly situated* blacks and whites, and we *always* controlled for income. Controlling for income, it simply makes no sense to study the progressive rate structure.<sup>41</sup>

Professor Zelenak’s criticism of our failure to study the earned income tax credit is particularly pointed. He states: “Moran and Whitford claim they ‘have studied some of the most significant tax benefits applicable to the individual income tax,’ yet they do not study a \$27 billion tax benefit [the earned income tax credit], which they are aware may be pro-black by their standards.”<sup>42</sup>

Professor Zelenak’s authority for the \$27 billion figure is the Tax Expenditure Budget. What he doesn’t say is that, in the next sentence after the one from our article that Zelenak quotes, we also cite the Tax Expenditure Budget as our authority for our claim that the tax benefits that we studied are some of the “most significant tax benefits applicable to the individual income tax.”<sup>43</sup> The same Tax

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39. Zelenak, *supra* note 1, at 1568.

40. *Id.*

41. Professor Zelenak makes an argument that we implicitly adopt a flat tax as a neutral baseline because we suggest that the home mortgage interest and property tax deductions be converted to credits rather than deductions. *See id.* at 1569. Our suggestion was made in the context of suggesting proposals that a “Black Congress” might adopt. *See* Moran & Whitford, *supra* note 2, at 781. I discuss our use of the “Black Congress” metaphor in the next section of this Article. *See infra* notes 48-53 and accompanying text. Where we suggest credits rather than deductions, we explicitly make the point that this change would not completely eliminate the disparities between similarly situated blacks and whites introduced by these tax benefits, but it would reduce the disparity. *See* Moran & Whitford, *supra* note 2, at 781. Our comments cannot fairly be read as implicitly advocating a flat tax as a neutral baseline or normative ideal, and we never intended to do so.

42. Zelenak, *supra* note 1, at 1568 (footnote omitted) (quoting Moran & Whitford, *supra* note 2, at 800).

43. Moran & Whitford, *supra* note 2, at 801. The next sentence reads: “If the tax benefits studied in our wealth section and the benefits associated with employer provided pension plans are skewed as substantially to whites as our analysis suggests, the entire

Expenditure Budget that Professor Zelenak cites for this \$27 billion figure gives the following estimates of the cost of the four largest tax expenditures listed in Table 1 (all of which were included in our study):<sup>44</sup>

TABLE 1: TAX EXPENDITURE COSTS

Employer contributions to medical insurance and care	\$75.7 billion
Employer contributions to pension plans	\$56.2 billion
Deductibility of home mortgage interest	\$52.1 billion
Step up in basis of capital gains at death	\$31.9 billion

For Professor Zelenak not to have revealed the information just provided as our stated defense for the proposition he ridicules is once again best described as remarkable.<sup>45</sup>

### C. *The Problem with Our Solutions*

Professor Zelenak's final section of criticisms concerns our proposed changes in the Code. Early in the article he describes our

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Code is likely skewed in the favor of whites." *Id.* A footnote cites the Tax Expenditure Budget as indicating we had studied the two largest expenditures. *See id.*

44. *See Expenditures Chapter from the President's Fiscal 1998 Budget*, 74 TAX NOTES 915, 927-29 (1997). Estimates are of the 1998 Tax Expenditure Budget.

45. In deference to the limited pages we are allowed for this response and to the reader's patience, I make no effort to respond to all the criticisms that Professor Zelenak makes. The section of his article entitled "Sampling Bias" contains many charges, most of which can be refuted. I do believe that Professor Zelenak makes a constructive point in directing attention to what Professor McCaffery calls the stacking effect of joint returns. *See Zelenak, supra* note 1, at 1570-71. This aspect of joint returns plausibly could be considered anti-white, and we could have considered it without the commitment of a great deal of extra resources. I wish we had done so.

Another criticism by Professor Zelenak may be technically correct but is best described as nit-picking. He criticizes our statement that there are no tax benefits to ownership of motor vehicles because we ignore the non-taxation of the imputed rental income produced by motor vehicle ownership. *See id.* at 1572. To be true to the comprehensive income tax ideal, if the imputed rent from motor vehicle ownership were taxed, then the costs of ownership, including interest on loans and depreciation, would have to be deductible. After these deductions, it is doubtful that there would be much *net* imputed rent; prohibiting the deduction of the costs of motor vehicle ownership is probably a reasonably good surrogate for taxing the imputed rental income. In any event, the basic point in our article, that motor vehicle ownership (where blacks have a higher percentage of their wealth invested) is less tax-favored than other forms of investment that we studied, is certainly true. With respect to homes, for example, we do not tax imputed rents *and* in most instances we permit the most important costs of owning a home (home mortgage interest and property taxes) to be deducted.

“failure to think through proposed solutions with sufficient care” as “the most serious problem.”<sup>46</sup> He also states: “It is unfair to criticize current law for its effects on women or blacks without showing a way to do better; more important, mere critique without a workable solution does nothing to better anyone’s situation.”<sup>47</sup>

I believe these criticisms of our article are inappropriate. Professor Zelenak does not acknowledge sufficiently the context in which we put forward our proposed changes. Most remarkably, he implies that we failed to weigh considerations that we discussed several times. Furthermore, I disagree in the strongest way possible with the sentiment stated in the quoted sentence.

Our suggestions for reform are advanced as proposals that a “Black Congress . . . exclusively oriented to the interests of blacks as a group”<sup>48</sup> might consider. Professor Moran’s contribution to this Symposium discusses more fully our purpose in inventing the Black Congress metaphor.<sup>49</sup> Our fully disclosed intent was to illustrate how the current Congress, largely ignorant of the differences in average black and white lifestyles that yield differential enjoyment of the tax benefits we studied, could have enacted a Code that has a discriminatory impact while having no discriminatory intent.<sup>50</sup> Our Black Congress metaphor illustrated that a Congress sensitive only to black lifestyles would enact a very different tax code.<sup>51</sup> We were even careful to state that we do not really believe that a Black Congress should act solely in the interests of blacks.<sup>52</sup> And it would have been irresponsible to come to any final recommendations without a study of the Code as a whole.<sup>53</sup>

I vehemently disagree with Professor Zelenak’s suggestion that “mere critique without a solution”<sup>54</sup> is of no value. Critique can raise issues that others may solve. “Mere” critique tells us more about the

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46. *Id.* at 1524.

47. *Id.*

48. Moran & Whitford, *supra* note 2, at 758.

49. *See* Moran, *supra* note 5, at 1629-30.

50. *See* Moran & Whitford, *supra* note 2, at 758.

51. *See id.* (“Our suggestions should not only stimulate interest in possible reforms, but also illustrate how the actual Congress, largely unaware of black lifestyles, might have created a Code that systematically subordinates black interests.”)

52. *See id.* at 780 (“[I]f a Black Congress truly existed, we would not expect it to act solely in the interest of blacks . . . . Our Black Congress, oriented solely to the interest of blacks, is purely a metaphor, useful for analytic purposes.”)

53. *See id.* at 758 (“Because no change should be enacted without consideration of the Code as a whole, and because we studied a limited number of provisions, we make no final recommendations.”)

54. Zelenak, *supra* note 1, at 1524.

world in which we live. Academics normally advance the sentiment that all knowledge is good. Professor Zelenak suggests that new knowledge about the society in which we live is not useful unless accompanied by practical solutions for changing any problems revealed. I am confident that he is in a very small minority in this essentially anti-intellectual position.

Professor Zelenak criticizes us for proposing change or elimination of tax benefits when we should have weighed more seriously the possibility of changing black lifestyles to take better advantage of tax benefits offered by the Code. In fact, we mentioned this latter possibility three different times in the article, including in the conclusion.<sup>55</sup> Professor Zelenak is free to disagree with our conclusion that the tax benefits should be repealed. But because his purpose is to illustrate our incomplete analysis, his discussion implies we did not consider the alternative he favors.<sup>56</sup> Because of this implication, Professor Zelenak's failure to inform his readers of our discussion and rejection of the adequacy of encouraging blacks to take better advantage of existing tax benefits<sup>57</sup> is, once again, simply remarkable.

### III. THE NATURE OF PROFESSOR ZELENAK'S PROJECT

Professor Zelenak justifies his article as stimulating needed dialogue about the ideas raised in the critical tax literature.<sup>58</sup> At the same time, however, he explicitly attempts to justify a "broader point

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55. See Moran & Whitford, *supra* note 2, at 781 (incentives for home ownership); *id.* at 798 (encouraging women to be homemakers); *id.* at 802 (a number of tax benefits, including 401(k)—the very example Professor Zelenak uses to illustrate his point).

56. Early in his article, Professor Zelenak accuses us of "tax myopia" because we give only "minimal consideration of whether [our] goal is best achieved through the tax system rather than through non-tax legal reform." Zelenak, *supra* note 1, at 1524.

57. Our discussion consumes two paragraphs in our conclusion. We basically conclude that blacks do not have sufficient access to the resources needed to take advantage of the tax benefits discussed. See Moran & Whitford, *supra* note 2, at 802.

Professor Zelenak's final criticism in this part of his article criticizes some of our suggested solutions to the marriage penalty for failing to consider the impact of those solutions on singles, who may be disproportionately black. See Zelenak, *supra* note 1, at 1573-74. As he makes clear, his criticism is based on the assumptions that any change would have to be revenue-neutral and that all the revenue losses from our suggested reforms (for example, allowing married couples to file as singles) would be passed on to singles. In fact, even in a revenue-neutral reform, much or all of the revenue loss from eliminating the marriage penalty could be passed on to other married couples through a general increase in rates for joint returns. If rates were increased for those presently enjoying a marriage bonus, the impact would probably fall disproportionately on whites.

58. See Zelenak, *supra* note 1, at 1579-80.

about critical approaches to tax policy.”<sup>59</sup> After carefully separating out, and not extensively discussing, articles that he considers to be in the critical tax tradition, yet well done, he reserves his attack for six articles (including ours) that he considers weak. He concludes: “I believe that there is something special—that problems of one-sidedness and incomplete analysis are more common in the critical tax literature than in the general academic tax policy literature.”<sup>60</sup>

There is nothing inherently objectionable with critiquing a body of literature and finding it wanting. *The Emperor's New Clothes*<sup>61</sup> is an important fable in Western culture, one that teaches an important lesson, as do all fables. But when the attack is based not on additional evidence of how the world works, but on an internal critique of the professional competence with which the ideas are advanced—and that clearly is the gravamen of Professor Zelenak's attack on our article, because he offers no new evidence about the impact of tax on blacks and whites—it is not just the wisdom of ideas, but the professional reputations of authors that are being called into question. An attack like Professor Zelenak's must be made carefully to avoid unnecessary and unjustified reputational injury.

It is obvious that I believe that Professor Zelenak's attack on our article was not made with requisite care.<sup>62</sup> Ironically, his critique illustrates the very vices of which he accuses others—incomplete analysis and bias.

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59. *Id.* at 1578.

60. *Id.*

61. HANS CHRISTIAN ANDERSON, *The Emperor's New Clothes*, in FAIRY TALES 29 (Anthea Bell trans., 1991). Normally, it is an emperor who is the subject of attack, not an unimportant commentator. I am aware of the implicit flattery in being selected for attack by Professor Zelenak.

62. Lawyers care about procedures as well as substance. Professor Zelenak had a responsibility not only to be accurate in his attacks, but also to adopt procedures reasonably designed to avoid inadvertent error. I now know that Professor Zelenak publicly presented a draft of his article at the annual Harvard Seminar on Current Research in Taxation in August 1996. However, I did not learn about or see a draft of his article until May 2, 1997, when I received, all at the same time, a draft of the article, notice that it had been accepted for publication, and an invitation to respond. All of this was sent by the Editor in Chief of the *North Carolina Law Review*, not by Professor Zelenak, who has yet to communicate directly with me. I believe the experiences of the other targets of Professor Zelenak's attack have been similar. A procedure reasonably designed to avoid public dissemination of inadvertent error and inappropriate reputational injury would have provided the targets of Professor Zelenak's attack an opportunity to review Professor Zelenak's attack even before his presentation to the Harvard seminar.

## IV. WRITING ABOUT RACE IN THE 1990S

Professor Zelenak describes our article as looking for “hidden” discrimination where few would expect to find it.<sup>63</sup> His statement that few expect to find discrimination in the Internal Revenue Code reminds me of a repeated experience that Professor Moran and I had while working on this project. Other people have been surprised by our hypothesis as well. It has not occurred to them that the Internal Revenue Code might be part of the system that perpetuates the subordination of black people. It is precisely because we received many comments to that effect that we went to great lengths in *A Black Critique of the Internal Revenue Code* to make clear that we are not charging that Congress intended to use the Internal Revenue Code as a vehicle for the continued suppression of black people.

I believe, however, that it should not be surprising that the Code inadvertently discriminates against black people.<sup>64</sup> It is well known that the Internal Revenue Code favors certain life behaviors over others. And in the history of this country, black people have never wielded political influence in accordance with their numbers. Until the Voting Rights Act of 1965,<sup>65</sup> before the time most of the tax benefits we studied were formulated, most blacks could not vote. Today, blacks cannot contribute financially to political campaigns at anywhere near the per capita rate of whites.<sup>66</sup> Lifestyles of blacks and whites with similar incomes will, on average, differ in some respects—sometimes because black lifestyles result from continuing or past discrimination,<sup>67</sup> sometimes because blacks choose different lifestyles. Because of the nature of the political process in this country, it is unremarkable that, where black and white lifestyles differ, tax benefits will be more likely to reward the white ones.

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63. See Zelenak, *supra* note 1, at 1578-79.

64. Professor Moran makes a similar point. See Moran, *supra* note 5, at 1630-31. In particular, she emphasizes her belief, which I share, that whites in general are unaware of differences between black and white lifestyles, in part because there is so little cross-racial communication in this country. This perspective emphasizes how inadvertent the resulting discrimination is.

65. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994).

66. This is true even for blacks and whites with similar incomes because of the vast disparity in average wealth between blacks and whites of similar incomes. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 100-01 (1997).

67. On continuing racial discrimination in America, see ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1995), JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991), and DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 83-114 (1993).

I have completed thirty-two years in the law-teaching business and published more than thirty articles in law reviews. I have never before had my professional competence so sharply challenged. Professor Zelenak believes I deserve it this time. I disagree, of course. Assuming I am right, it could still be just coincidence, a kind of bad luck, that our article was targeted for such strongly stated charges of incompetence and bias. I hope that is true, but I fear that it is not. I fear that it is the subject matter of the article—race in America—that accounts for this experience. It is the first time I have written professionally about race.

People who write about race, whether from what we conventionally call the Right or the Left, are subject to having their views, their competence, and their integrity attacked. When the attacks come from the Right, the targets of the attack are often described as succumbing to “political correctness.”<sup>68</sup> When the attacks come from the Left, the targets of the attack are described as participating in “backlash.”<sup>69</sup>

Critiques of articles about race, and critiques of attacks on articles about race, are appropriate. We need constructive dialogue about this most important of all topics. Attacks on competence and motives are also proper if well-founded.

But all such attacks and critiques should be made responsibly and carefully. In today’s world, scholars know that the charged nature of race as a topic provokes response, and that the response is often an attack on competence or motive. All this has a chilling effect. The safer course for a scholar concerned about professional reputation is not to write about race. Given the pervasiveness and persistence of America’s race problem, the incentives should be just the opposite. Ensuring that critiques are careful and responsible will help limit the perverse incentives that I fear are all too extant today.

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68. See, e.g., DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 239 (1991) (“‘It is common . . . today to hear talk of politically correct opinions . . . . These are [opinions] . . . that are not really open to argument.’” (quoting Donald Kagan, Dean of Arts and Sciences, Yale University)).

69. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* at xviii (1991) (“The truth is that the last decade has seen a powerful counterassault on women’s rights, a backlash . . . . This counterassault is largely insidious . . .”).