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The 535 Report: A Pathway to Fundamental Tax Reform

Dorothy A. Brown*

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I. INTRODUCTION

In February we celebrated 100 years of our income tax.[1] I don't know if celebrated is the right word. Our leaders in Washington just voted to continue the Bush tax cuts for all but the highest income wage earners.[2] But if you think the fiscal cliff deal was a good thing for the middle class—as President Obama promised[3]—think again. The extension of the Bush tax cuts does nothing to change the fact that most middle- and low-income wage earners do not benefit from the tax breaks, loopholes, and deductions that

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1. The Sixteenth Amendment was ratified on February 3, 1913. *Charters of Freedom: Constitution of the United States, Amendments 11–27*, NAT. ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html (last visited Mar. 25, 2013).

2. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013), *available at* http://www.govtrack.us/congress/bills/112/hr8/text.

3. *See* Stephanie Condon, *"Fiscal Cliff" Averted After Deal Clears House*, CBS NEWS, Jan. 1, 2013, http://www.cbsnews.com/8301-250_162-57561534/fiscal-cliff-averted-after-deal-clears-house/.

Congress preserved for the richest Americans.[4] Warren Buffett will still pay a lower effective tax rate than his secretary.[5]

The recent elections showed that race matters,[6] but guess which taxpayers stand to lose most from the fiscal cliff deal?: taxpayers of color.[7] Ignored in the discussion was whether a continuation of current law would be good for taxpayers based upon their race and/or ethnicity. Current law reflects congressional choices about whether income will be taxed and at what rate, and whether something just paid for is deductible. This Essay[8] shows that most taxpayers of color and most whites do not get the benefit of those congressional choices.

The price that most of us pay for the deductions, loopholes, and special deals received by a small, high-income slice of mainly white Americans is higher tax rates.[9] Plus, two-thirds of Americans do not itemize their

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4. *See generally* Alice Gresham Bullock, *The Tax Code, the Tax Gap, and Income Inequality: The Middle Class Squeeze*, 53 HOW. L.J. 249 (2010) (discussing the ways in which the Bush tax cuts impact the rich as well as the middle and lower classes).

5. *See, e.g.*, Seniboye Tienabeso, *Warren Buffett and His Secretary Talk Taxes*, ABCNEWS, Jan. 25, 2012, http://abcnews.go.com/blogs/business/2012/01/warren-buffett-and-his-secretary-talk-taxes/.

6. *See, e.g.*, Allison Kopicki & Will Irving, *Assessing How Pivotal the Hispanic Vote Was to Obama's Victory*, N.Y. TIMES BLOG (Nov. 20, 2012, 4:16 PM), http://thecaucus.blogs.nytimes.com/2012/11/20/assessing-how-pivotal-the-hispanic-vote-was-to-obamas-victory/; *Latino Voters Showing Strong Turnout in Election 2012*, WASH. POST, Nov. 6, 2012, http://articles.washingtonpost.com/2012-11-06/politics/35505575_1_latino-voters-hispanic-voter-turnout-mi-familia-vota; Adam C. Smith, *Hispanic Voters Hold Key to 2012 Electoral College Map*, POLITICO, May 6, 2012, http://www.politico.com/news/stories/0512/75949.html.

7. *See infra* Parts II, III, and IV.

8. This Essay follows up on my previous scholarship that has looked at the race and class impact of several Internal Revenue Code provisions. *See, e.g.*, Dorothy A. Brown, *Implicit Bias and the Earned Income Tax Credit*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 164 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter Brown, *Implicit Bias*]; Dorothy A. Brown, *Teaching Civil Rights Through the Basic Tax Course*, 54 ST. LOUIS U. L.J. 809 (2010) [hereinafter Brown, *Teaching Civil Rights*]; Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329 (2009) [hereinafter Brown, *Shades*] (tax subsidies for housing); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007) [hereinafter Brown, *Race and Class*] (earned income tax credit); Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007) [hereinafter Brown, *Risk Aversion*] (employer-provided pensions); Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755 (2005) [hereinafter Brown, *Separate but Unequal*] (comparing the earned income tax credit and the child tax credit); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004) [hereinafter Brown, *Risk and Race*] (employer-provided pensions); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004) (marriage penalty/bonus in the social security system); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997) [hereinafter Brown, *Joint Return*]; Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, *in* TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996) [hereinafter Brown, *Marriage Bonus/Penalty*] (joint return).

9. *Cf.* Shartia Brantley, *Who Are the Black "1 Percent"?*, GRIO (Nov. 21, 2011, 9:38 AM), http://thegrio.com/2011/11/21/who-are-the-black-1-percent/.

deductions and therefore get no tax advantage from most of the choices Congress makes when it comes to deductions.[10] If deductions and special deals were eliminated, tax rates could be cut by as much as ten percentage points for all but the lowest income wage earners.[11] That would mean a simpler and fairer tax code for all. It would also mean that the highest income households would pay a great deal more in taxes. Ours would then be a true progressive tax system.

Most Americans lose under the current system, yet the system continues. What would it take for change to occur? Have the highest income Americans so "influenced" Congress with their campaign contributions that Congress mindlessly does their bidding? I believe the explanation is more complicated than that. I argue that the people who benefit most from our current tax policies are members of Congress.

I suspect that members of Congress are disproportionate beneficiaries of the choices they enact into law.[12] I don't know this for a fact, because members of Congress are not required by law to release their tax returns and very few do.[13] Therefore, the first step toward meaningful tax reform will be for the Internal Revenue Service (IRS) to issue a report on the 535 tax returns of every member of Congress.

Bold reform that eliminates loopholes, deductions, and special deals as a means of lowering tax rates in general would help the majority of taxpayers—white and nonwhite alike. A blueprint for such reform already exists. Due to space constraints, this Essay considers only three of the

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> Blacks comprise 13.6% of the U.S. population according to the 2010 Census, but account for only 1.4% of the top 1% of households by income. Whites are the overwhelming majority of the top 1% of households by income, comprising 96.2%. (Results were calculated from 2007 data from the Federal Reserve's Survey of Consumer Finances and the Tax Policy Center's tax table[.] The income cutoff to be a part of the top 1% was $646,195.

Id.

10. Dorothy Brown, *Let's Kill the Progressive Tax Rate System*, CNN OPINION (Apr. 17, 2012, 7:43 AM), http://www.cnn.com/2012/04/17/opinion/brown-progressive-tax-rates.

11. *Cf.* ALAN SIMPSON & ERSKINE BOWLES, THE MOMENT OF TRUTH: REPORT OF THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM 29 (2010), *available at* http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf.

12. *See Dorothy A. Brown, Harry Reid Has a Glass House Quandry on Taxes, Bloomberg View*, Sept. 16, 2012, *available at* http://www.bloomberg.com/news/2012-09-16/harry-reid-has-a-glass-house-quandary-on-taxes.html.

13. Stephanie Condon, *Few in Congress Have Released Tax Returns, Report Shows*, CBS NEWS, July 19, 2012, http://www.cbsnews.com/8301-503544_162-57475567-503544/few-in-congress-have-released-tax-returns-report-shows/.

largest tax expenditures.[14] In December 2010, the bi-partisan National Commission on Fiscal Responsibility and Reform (Simpson–Bowles) issued a report showing how tax rates could be cut by roughly ten percentage points for all but the lowest income bracket if (1) taxable income were viewed more broadly, (2) there was no preferential rate for capital gains, and (3) deductions were significantly modified or eliminated.[15] However, one tax break I would retain is the earned income tax credit (EITC), which lifts millions of Americans and children out of poverty.[16] Meaningful reform would require Congress to stop making choices that favor their wallets over the wallets of most Americans.

Part II of this Essay considers the tax exclusion from gross income for employer or union-provided pensions.[17] The estimated revenue loss in 2013 from those wages and earnings not currently being taxed is projected to be $147 billion.[18] The data for private sector workers show that most Asian-Americans, blacks, Latinos, and whites do not receive this benefit.[19] According to the Employee Benefits Research Institute, less than four in ten black workers, less than four in ten Asian-American workers, and just over two in ten Latino workers participate in their private sector pension plans and are eligible for this benefit.[20] Just over four in ten white workers were eligible for this benefit.[21] Thus, most workers do not benefit from this tax break.[22] Part II goes further than Simpson–Bowles by arguing for the repeal of this exclusion.[23] Wages placed in employer-provided pensions should be included in the employee's gross income when earned and should be currently taxed.[24]

Part III considers the congressional decision to tax income from stock at a preferential rate compared to that applied to wages.[25] Less than one in ten

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14. While this Essay considers three examples, I am currently writing a book on this topic that will include additional examples and a more in-depth analysis.

15. *See* SIMPSON & BOWLES, *supra* note 11.

16. I have written previously on the EITC. *See, e.g.*, Brown, *Separate but Unequal*, *supra* note 8; Brown, *Race and Class*, *supra* note 8. See also Francine Lipman's contribution to this symposium detailing the importance of the EITC to reducing childhood poverty.

17. *See infra* Part II.

18. J. COMM. ON TAX'N, JCS-1-12, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2011–2015 42 (2012), *available at* https://www.jct.gov/publications.html?func=startdown&id=4386.

19. *See infra* Part II.

20. Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2010*, EBRI ISSUE BRIEF, Oct. 2011, at 1, 9, 11, 30, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_10-2011_No363_Ret_Part.pdf.

21. *Id.*

22. *See id*.

23. *See infra* Part II.

24. *See infra* Part II.

25. *See infra* Part III.

Americans of color own stock in a way that makes them eligible for the low preferential rate.[26] Less than two in ten white Americans own stock in a way that makes them eligible for the preferential rate.[27] This tax break is projected to cost $110 billion in lost revenue this year.[28] In 2012, 71% of capital gains and corporate dividends went to the top *one* percent of American households.[29] The majority of Americans never pay the low preferential rate associated with stock ownership.[30] Simpson–Bowles shows that marginal tax rates can be lowest if income from stock is taxed at the same rate as income from wages.[31] Part III concludes by arguing that all income should be subject to the same tax rates.[32]

Part IV considers the congressional decision to allow a tax deduction for mortgage interest.[33] For 2013, the estimated revenue loss caused by this deduction is expected to be almost $90 billion.[34] By comparison, the entire budget for the U.S. Department of Housing and Urban Development is less than $50 billion.[35] The majority of blacks and Latinos are not homeowners and are therefore not eligible for the mortgage interest deduction.[36] Though the majority of whites and Asian-Americans are homeowners, the majority of all Americans, regardless of race, never receive the benefit of this

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26. Jesse Bricker et al., *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, 98 FED. RES. BULL. 1, 29 (2012), *available at* http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf.

27. *Id.*

28. J. COMM. ON TAX'N, *supra* note 18, at 37.

29. Chye-Ching Huang & Chuck Marr, *Raising Today's Low Capital Gains Tax Rates Could Promote Economic Efficiency and Fairness, While Helping Reduce Deficits*, CENTER ON BUDGET & POL'Y PRIORITIES, Sept. 19, 2012, at 2, *available at* http://www.cbpp.org/files/9-19-12tax.pdf ("Capital gains are heavily concentrated at the top; the top 1 percent of taxpayers will receive *71 percent* of all capital gains in 2012 . . . ."). Beginning in 2013, the low preferential rate for the highest income households is 20% plus 3.8% on net investment income under the health reform law. *Id.* at 22–23. Note that high-income households are defined differently under the Internal Revenue Code with the extension of the Bush tax cuts ($400,000/$450,000) and under the Patient and Affordable Care Act ($200,000/$250,000/$225,000). *See, e.g.*, Thomas A. Humphreys et al., *Fiscal Cliff Diving a.k.a. American Taxpayer Relief Act*, TAX TALK, Jan. 2013, at 2 & n.1, *available at* http://www.mofo.com/files/Uploads/Images/130125-MoFo-Tax-Talk.pdf.

30. *See id*.

31. *See* SIMPSON & BOWLES, *supra* note 11, at 28.

32. *See infra* Part III.

33. *See infra* Part IV.

34. J. COMM. ON TAX'N, *supra* note 18, at 36.

35. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, FISCAL YEAR 2013 BUDGET: HOUSING AND COMMUNITIES BUILT TO LAST, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=CombBudget2013.pdf.

36. *See infra* notes 128–52 and accompanying text.

deduction: a recent study showed that only 29% of returns claimed a mortgage interest deduction.[37] While Simpson–Bowles argues for converting the mortgage interest deduction into a credit,[38] I argue for its repeal.

Part V points out a possible political path toward achieving my vision of tax reform, which would broaden the base of taxable income while lowering tax rates in order to benefit the majority of Americans.[39] Simpson–Bowles is the least we should be able to accomplish. The recent fiscal cliff deal did little to change the status quo.[40] If Congress passes tax laws that benefit the rich because the rich are the primary source of their campaign contributions,[41] then we should never expect change. We have a classic collective action problem.[42]

The rich are a relatively small yet highly motivated group when compared with the general public—who are diffuse and not engaged. What will change the dynamic will be something that political scientists call a "focusing event."[43] That focusing event will be the issuance of and the media coverage surrounding "The 535 Report."[44]

The 535 Report will be a study of congressional tax returns undertaken by the IRS in order to identify the tax laws utilized by each member of Congress.[45] Because the IRS already publishes its Statistics of Income on all tax returns, with this study we will be able to compare the percent of congressional beneficiaries with the percent of ordinary Americans who benefit from various loopholes, special tax rates, and deductions. I predict that after The 535 Report is released, the public will get angry and Congress—ever more concerned about retention issues and primary

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37. *Id.* Only a *third* of all returns itemized deductions, and of those returns that itemized deductions, over 80% claimed the mortgage interest deduction. Adam J. Cole, Geoffrey Gee & Nicholas Turner, *The Distributional and Revenue Consequences of Reforming the Mortgage Interest Deduction*, 64 NAT'L TAX J. 977, 977 (2011), *available at* http://ntj.tax.org/wwtax/ntjrec.nsf/009a9a91c225e83d852567ed006212d8/5e1815e49ceb7d318525796800526cf8/$FILE/A04_Cole.pdf ("Of the 143 million tax returns filed for tax year 2007, 29 percent claimed the [mortgage interest deduction] . . . and among the 50.5 million returns on which taxpayers itemized their deductions, 82 percent claimed the [mortgage interest deduction]."). This study does not analyze the 29% by race because I.R.S. statistics do not collect taxpayer information by race.

38. *See* SIMPSON & BOWLES, *supra* note 11, at 31.

39. *See infra* Part V.

40. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013), *available at* http://www.govtrack.us/congress/bills/112/hr8/text.

41. *See generally* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 152 U. PA. L. REV. 73 (2004) (discussing the intricacies of campaign finance and recommending campaign finance reform).

42. *See* Brown, *Marriage Bonus/Penalty*, *supra* note 8, at 45.

43. JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 94–100 (2d ed. 1995).

44. *See infra* Part V.

45. *See infra* Part V.

challengers—will embrace tax reform that is good for most Americans, even if it is bad for them.[46]

II. INCOME CHOICES

This Part discusses the exclusion for employer- or union-provided pension plans in the private sector.[47] Current law allows wages that employees place in pension plans (as well as amounts contributed by employers) to be exempt from an employee's current wages and not taxed. As the pension plans accumulate earnings, those amounts are also not taxed at the time they accrue. Only when the employee makes withdrawals, perhaps forty years later at their retirement, will those amounts be taxed.[48]

According to the Employee Benefits Research Institute, less than four in ten black workers, less than four in ten Asian-American workers, and just over two in ten Latino workers participate in their pension plans and are eligible for this benefit.[49] The majority of workers of color do not benefit from this tax break.[50] The reasons are varied.[51] First, less than half of black and Asian-American workers and less than one-third of Latino workers have jobs that come with this benefit.[52] Second, of the workers of color that have jobs that come with this perk, an even smaller group participates.[53]

Just over four in ten white workers participated in their employer- or union-provided pension plan.[54] Thus, the majority of white workers also do not benefit from this tax break.[55] Just over half of white workers have jobs that come with pensions, but just over 40% actually participate.[56]

Given that most taxpayers, regardless of race, do not benefit from this tax break,[57] the exclusion should be repealed and wages should be taxed currently. Investment income could be taxed at retirement in a way similar to the tax treatment of annuities—where every payment would include a

46. *See infra* Part V.
47. I have previously written on this subject. *See* Brown, *Risk Aversion*, *supra* note 8.
48. *See* I.R.S., PUB. 575, PENSION AND ANNUITY INCOME 4–5 (2012), *available at* http://www.irs.gov/pub/irs-pdf/p575.pdf.
49. Copeland, *supra* note 20, at 11.
50. *Id*. at 8–11.
51. *See* Brown, *Risk Aversion*, *supra* note 8, at 404–05.
52. Copeland, *supra* note 20, at 11.
53. *Id.*
54. *Id*.
55. *Id*.
56. *Id.*
57. *Id*. at 8–9.

return of capital representing wages that were previously taxed (and not taxed again) and the investment income portion which would be taxed at retirement for the first time.[58] Simpson–Bowles, which only suggests minimal changes to non-employer-provided pensions,[59] does not go far enough. Current taxation of employer-provided pensions would be a first step toward a major tax rate reduction for middle- and low-income taxpayers.

III. RATE CHOICES

One of the biggest loopholes in current law is the result of a congressional choice to tax income from wages at a much higher rate than income from stock ownership.[60] That choice is also responsible for much of the complexity in our tax system.[61] Income from stock includes not only gains from sale, but also dividends that are currently taxed at the preferential rate.[62] It is that rate differential (at least fifteen percentage points) that is responsible for Warren Buffett (who gets most of his income from stock) paying taxes at a lower rate than his secretary (who gets most of her income from wages.)[63]

In 2010, fewer than one in ten non-white or Hispanic families held stock in a way that made them eligible for the low preferential rate.[64] Fewer than two in ten white families owned stock in a way that made them eligible for the preferential rate.[65] Most families do not take advantage of this loophole.[66]

In 2012, just over 70% of all capital gains went to the top 1% of taxpayers.[67] But not all one percenters are beneficiaries of this tax break.[68]

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58. *Cf.* 26 U.S.C.A. § 72 (West 2012).

59. *See* SIMPSON & BOWLES, *supra* note 11, at 31 n.6. No changes were made to the tax treatment of employer-provided pensions. *Id*.

60. The lower preferential rate is applicable to gains from the sale or exchange of any capital asset as defined in § 1221. 26 U.S.C.A. § 1221 (West 2012). Stock is a common example of the type of capital gains that individual taxpayers have. *See, e.g.,* Kelly Phillips Erb, *Income Taxes on Capital Gain,* DAILY FINANCE (Jan. 21, 2010, 2:00 PM), http://www.dailyfinance.com/2010/01/21/income-taxes-on-capital-gains/.

61. *Tax Reform and the Tax Treatment of Capital Gains: Hearing Before the H. Comm. on Ways & Means and the S. Comm. on Fin.,* 112th Cong. 6 (2012) (statement of Leonard E. Burman, Professor of Public Affairs, Syracuse University).

62. Qualified dividends are subject to tax at the preferential rate. 26 U.S.C.A. § 1(h)(11)(B)(ii) (West 2012).

63. Tienabeso, *supra* note 5. Warren's secretary, Debbie Bosanek, reportedly pays 35.8% of income as taxes; Warren pays only 17.4% of income as taxes. *Id*.

64. Bricker et al., *supra* note 26, at 29.

65. *Id.*

66. *Id*.

67. Huang & Marr, *supra* note 29, at 2 ("Capital gains are heavily concentrated at the top; the

Every high-income taxpayer will not benefit simply because they have high income. They will only benefit if they receive a significant amount of their income from stock and not wages. Not every high-income family receives significant income from stock.[69] One famous high-income couple that does not receive significant income from stock is President and Mrs. Obama.[70]

An examination of the last five years worth of tax returns shows how little income from stock the Obamas receive.[71] They are very different from other one percenters.[72] Focusing on three of those years, 2007-2009, the First Couple's effective tax rate was almost 10% higher than comparable income households.[73] That difference is attributable to the fact that the Obamas, like most blacks, do not own much stock, while stock ownership is more prevalent amongst whites with comparable income.[74] While wage income and book royalties (how the Obamas have earned their millions[75]) are taxed at progressive rates up to 39.6% of income, income from stock is taxed at a maximum 23.8% rate.[76]

According to IRS statistics, most one percenters with at least $1.5 million of household income receive 30% of that income from stock.[77] In

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top 1 percent of taxpayers will receive *71 percent* of all capital gains in 2012 . . . .").

68. *See* G. William Domhoff, *Wealth, Income, and Power*, U.C. SANTA CRUZ, at tbl. 6b, http://www2.ucsc.edu/whorulesamerica/power/wealth.html (last visited Mar. 28, 2013).

69. *See id*.

70. *See President Obama and Vice President Biden: 12 Years of Tax Returns*, ORGANIZING FOR ACTION, http://www.barackobama.com/tax-returns/ (last visited Apr. 1, 2013) (showing President Obama's tax returns from years 2000 to 2011).

71. *Id*.

72. *See* Domhoff, *supra* note 68.

73. The Obamas' 2007 tax return: (Total Tax/AGI) *$1,396,772/$4,139,965 = 33.7%*; 2008 tax return: *$855,323/$2,656,902 = 32.19%*; 2009 tax return: *$1,792,414/$5,505,409 = 32.56%*. *See supra* note 70. Compare with the analysis provided by Martin Sullivan, *infra* note 77: 23.9% for households with AGI between two and five million dollars and 22.8% for households with AGI between five and ten million dollars.

74. *See supra* notes 70–73 and accompanying text.

75. *See Obama Worth Millions, Mainly Due to Book Royalties*, REUTERS (May 16, 2011, 4:34 PM), http://www.reuters.com/article/2011/05/16/us-obama-wealth-idUSTRE74F6UR20110516.

76. Tony Nitti, *Capital Gains and the Fiscal Cliff Deal: How Does It Work?*, FORBES, Jan. 4, 2013, http://www.forbes.com/sites/anthonynitti/2013/01/04/capital-gains-and-the-fiscal-cliff-deal-how-does-it-work/. This is calculated by the 20% rate on high-income taxpayers plus the 3.8% tax on net investment income. Ashlea Ebeling, *Tax Hikes Hit Trusts Hard, Beneficiaries Pull Money Out*, FORBES, Jan. 9, 2013, http://www.forbes.com/sites/ashleaebeling/2013/01/09/tax-hikes-hit-trusts-hard-beneficiaries-pull-money-out/. During the tax years at issue for the Obama tax returns, the differential was between 35% as the highest marginal tax rate on royalty income and wages compared with a 15% tax rate on income from stocks.

77. Martin A. Sullivan, *Economic Analysis: Is the Income Tax Really Progressive?*, 125 TAX NOTES 1135, 1135–36 (2009), *available at* http://www.taxanalysts.com/www/features.nsf/Article

households between $2 and $5 million of income, one percenters receive 36% of income from stock.[78] Taxpayers with between $5 and $10 million of income receive 45% from stock.[79] As Martin Sullivan has shown through his analysis of IRS statistics, once income exceeds roughly $1.5 million, effective tax rates decline because so much of household income comes from income from stock.[80] Thus, for the highest income taxpayers, ours is a regressive tax system. Not true for the Obamas, however. In each year that the Obamas had comparable income levels, they received *less than one percent* of their income from stock.[81]

The First Family's experience is consistent with numerous studies showing that whites have higher stock ownership than blacks, Latinos, and other people of color, even after controlling for income.[82] High income alone will not solve the black–white gap in stock ownership.

The reasons for the lack of stock ownership by blacks are complicated.[83] First, blacks are less likely to grow up in households where investing in the stock market is common practice.[84] Second, middle-income blacks are less likely to own stocks than middle-income whites.[85] Middle-income blacks are more likely than middle-income whites to assist family members financially.[86] Third, stocks are risky investments.[87]

Supporters of the preferential rate generally make several arguments in support of a lower tax rate on income from stock than income from wages. First, it has been this way for a very long time and to change the tax treatment would be disruptive to the stock market in this fragile economy.[88]

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s/C214B4EF383FC6C08525768C00615578?OpenDocument.

78. *Id.*

79. *Id.*

80. *Id.* at 1135.

81. *See supra* notes 70–73.

82. A 2007 study found that whites had higher stock ownership than blacks, Latinos, and other people of color, even after controlling for income, risk tolerance, and business ownership, among other things. Sherman D. Hanna, Cong Wang & Yoonkyung Yuh, *Racial/Ethnic Differences in High Return Investment Ownership: A Decomposition Analysis*, 21 J. FIN. COUNSELING & PLANNING 44, 44 (2010), *available at* http://6aa7f5c4a9901a3e1a1682793cd11f5a6b732d29.gripelements.com/pdf/vol_21_issue_2_hanna_wang_yuh.pdf.

83. Brown, *Risk Aversion*, *supra* note 8; Dorothy A. Brown, *How Home Ownership Keeps Blacks Poorer than Whites*, FORBES, Dec. 10, 2012, http://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/ [hereinafter Brown, *Home Ownership*].

84. Brown, *Home Ownership*, *supra* note 83.

85. N.S. Chiteji & Darrick Hamilton, *Family Connections and the Black–White Wealth Gap Among Middle-Class Families*, 30 REV. BLACK POL. ECON. 9, 16 (2002) ("Among middle-class families, the proportion of white families that own stock is more than twice as high as the proportion of similarly situated black families—about 35 percent compared to 13 percent.").

86. Brown, *Home Ownership*, *supra* note 83.

87. *Id*.

88. David John Marotta, *Capital Gains Tax is an Economic Monkey Wrench (2012)*, FORBES,

Second, if tax rates on income from stock were raised, people would hold onto their stocks and delay selling for fear of paying higher taxes.[89] This is referred to as the lock-in effect. Third, some even argue that the preferential rate is too high and should be cut even further. The rate cut would increase government revenues because people would be encouraged to sell their stock.[90]

Fourth, stocks held over a long period of time increase in value in part because of inflation, and some argue that it is not fair to tax that part of a capital gain that is attributable to inflation at a high rate. The lower rate takes into account the inflation aspect. A related point is that selling stocks during the year pushes a taxpayer into a higher marginal tax bracket in the year of sale, which is unfair because the income accrued over several years. A separate rate system is a better solution.[91]

Fifth, corporate dividends should be taxed at a reduced rate, because it represents the corporation distributing its earnings after paying tax on it. It is unfair, the argument goes, to tax a shareholder again on corporate earnings that have previously been taxed. None of these reasons, however, hold up under scrutiny.

First, it wasn't too long ago, 1986 to be precise, that wages and income from stock were taxed at the same rate.[92] It was part of a bipartisan tax reform effort led by President Ronald Reagan.[93] The tax rate that applied to capital gains was raised, and the tax rates that applied to wage income (and dividends) were lowered.[94] The bad news is that within the space of a few years, the preferential rate returned.[95] Still, the point not to lose sight of is that there was a time—relatively recently—when capital gains were taxed at

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Nov. 26, 2012, http://www.forbes.com/sites/davidmarotta/2012/11/26/capital-gains-tax-is-an-economic-monkey-wrench-2012/ ("[T]axation discourages financial activity. The harm will show up in lower gross domestic product growth. It will be reflected in a lack of hiring and expansion.").

89. *Id.* ("Your best bet might be simply to sit tight and forgo realizing any capital gains.").

90. *Id.*

91. *See id.*

92. *See* David Carris, *Capital Gains Taxation: A Full Circle?*, 14 T. MARSHALL L. REV. 43, 50 (1989) ("The Tax Reform Act of 1986 makes for the largest capital gains rate increase ever. Under the Act, the taxation of long-term capital gains is the same as ordinary income.").

93. For a description of President Reagan's role in the 1986 Tax Reform Act, see Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO L.J. 1737 (1992).

94. Carris, *supra* note 92, at 50.

95. Bruce Bartlett, *TRA 1986: Much Ado About Nothing?,* 133 TAX NOTES 359, 360 (2011) ("When the top income tax rate was increased to 31 percent in 1990, the rate on capital gains was kept at 28 percent, thus reintroducing a preference that was widened in 1993 when the top income tax rate rose to 39.6 percent while the capital gains rate stayed at 28 percent.").

the same rate as wage income, and the world as we know it did not come to an end.[96] Further, for our entire history before the Bush Tax Cuts of 2003, corporate dividends were taxed at the same rate as wages.[97] The outlier is taxing dividend income at the low preferential rate.

Second, the lock-in effect argument holds less weight given our history after the Tax Reform Act of 1986. Also, for most of the twentieth century, tax rates on capital gains were higher than the low of 15%, and the markets still functioned effectively.[98]

Third, tax rate increases can be accompanied by an increase in government revenues. According to the Center for Budget and Policy Priorities, in 1981, when tax rates on high-income taxpayers were cut, and in 1990 and 1993, when taxes on high-income taxpayers were increased, the economy grew at about the same rate (adjusted for inflation and population growth), but revenues grew about twice as fast in the 1990s, when tax rates were raised, as in the 1980s, when tax rates were lowered.[99]

Fourth, the inflation argument falls flat. In order to benefit from the preferential rate, you have to hold the stock for one year and one day.[100] That is not very long. (Historically, the period that you have to hold stock has been as low as six months.[101]) In this economy, there is very little inflation to worry about.[102] Further, why carve out an "inflation exception" for income from stock? Why not have an "inflation exception" for income from services? For an obvious example, let's return to President Obama.

He received income from book sales based on services that he performed many years ago when he actually wrote the books.[103] Those services were used to create a book. It is analogous to receiving income today from stock he bought years earlier but did not sell until now. Unfortunately, the President's book royalties cannot be considered a capital asset eligible for the lower preferential rate, because his services were used to create the book.[104] Those who argue for a low tax rate on income from

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96. *Id.* at 359–61.

97. *See* Floyd Norris, *Tax Reform Might Start with a Look Back to '86*, N.Y. TIMES, Nov. 22, 2012, http://www.nytimes.com/2012/11/23/business/a-starting-point-for-tax-reform-what-reagan-did.html?smid=pl-share.

98. *See supra* notes 92–98 and accompanying text.

99. Paul Krugman, *Reagan and Revenues,* N.Y. TIMES BLOG (June 22, 2011 3:12 AM), http://krugman.blogs.nytimes.com/2011/06/22/reagan-and-revenues/.

100. I.R.S., *Tax Topic 409: Capital Gains and Losses*, http://www.irs.gov/taxtopics/tc409.html (last visited Mar. 28, 2013).

101. Gerald E. Auten, *Capital Gains Taxation*, TAX POL'Y CENTER, http://www.taxpolicycenter.org/taxtopics/encyclopedia/Capital-Gains-Taxation.cfm (last visited Mar. 23, 2013).

102. *See Consumer Price Index*, BUREAU LAB. STAT., http://www.bls.gov/cpi/ (last visited Apr. 1, 2013).

103. *See supra* notes 70–73 and accompanying text.

104. 26 U.S.C.A. § 1221(a)(3)(A) (West 2012).

stock never argue that income like royalties should be subject to tax at a lower rate because of it. There should be no "inflation exception" for any type of income.

Fifth, the assumption that it would be unfair to tax corporate earnings at the higher progressive rate because they have already been taxed once at the corporate level ignores reality. According to a 2008 report by the GAO, two-thirds of corporations doing business in the U.S. paid no taxes between 1998 and 2005.[105] Corporations do the same thing individuals do—they look for deductions and any thing they can think of to lower their tax bill.[106] The "double tax" therefore only affects a minority of corporations and their shareholders.

Simpson–Bowles demonstrates that the key to getting the lowest marginal tax rates requires repealing the preferential rates that apply to income from stock.[107] For example, the highest marginal tax rate could be as low as 23%.[108] If the earned income tax credit was retained, something that I advocate, the tax rate could be as low as 24%.[109] Since my proposal is to broaden the taxable income base even more than Simpson–Bowles, one could expect the top rate to be reduced even further. Currently it is 39.6%, although Simpson–Bowles was operating at a top marginal tax rate of 35%.[110]

Finally, tax preferences for capital gains and dividends have been argued to be "the largest contributor to the increase in the overall income inequality."[111] Tax law should not be a factor in increasing income inequality. Since most Americans do not benefit from this special rate, it should be repealed.[112] All income should be taxed at the same rates. The Internal Revenue Code would be fairer and simpler even if this were the only change enacted.

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105. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-957, COMPARISON OF THE REPORTED TAX LIABILITIES OF FOREIGN- AND U.S.-CONTROLLED CORPORATIONS, 1998–2005 23 (2008), *available at* http://www.gao.gov/new.items/d08957.pdf.

106. *See, e.g.*, Michael Doran, *Managers, Shareholders, and the Corporate Double Tax*, 95 VA. L. REV. 517, 537–38 (2009) (summarizing some of the many corporate deductions available).

107. SIMPSON & BOWLES, *supra* note 11, at 31.

108. *Id.* at 29. This would include an elimination of the earned income tax credit, which I would not support.

109. *Id.*

110. *Id.*

111. Huang & Marr, supra note 29, at 2–3 (quoting THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., R42131, CHANGES IN THE DISTRIBUTION OF INCOME AMONG TAX FILERS BETWEEN 1996 AND 2006: THE ROLE OF LABOR INCOME, CAPITAL INCOME, AND TAX POLICY 1 (2011)).

112. *Id.* at 7.

IV. DEDUCTION CHOICES

Congress makes choices about whether the money taxpayers spend makes them eligible for a tax deduction.[113] Deductions in a progressive rate system do not benefit taxpayers equally.[114] The value of tax deductions becomes a function of how high a taxpayer's income is.[115] Higher income taxpayers receive more value from tax deductions than lower income taxpayers and have more of an incentive to "find" tax deductions.[116] This is not an unforeseen consequence.[117] This is how the progressive rate system is *designed* to work.[118] Middle and upper income taxpayers generally benefit from tax deductions much more than lower income taxpayers.[119]

This Part focuses on the deduction for mortgage interest on a home.[120] Current law allows a deduction for mortgage interest on up to two homes provided the mortgages do not exceed $1 million and a home equity loan does not exceed $100,000.[121]

When it comes to home ownership, higher income taxpayers are the ones most likely to own homes.[122] This makes sense, as higher income taxpayers can better afford to own. But it skews those eligible to receive this particular tax subsidy. Here Congress chose to tie a deduction to an asset that is more likely to be found in higher-income households. High-income taxpayers are the most likely to own homes and receive the benefit of tax subsidies.[123]

Economists generally believe that the mortgage interest deduction does virtually nothing to encourage people to buy homes.[124] Over the last forty years, while tax rates have changed dramatically (making the value of the tax benefits fluctuate), the home-ownership rate has been quite stable.[125]

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113. *See* Dorothy Brown, *Let's Kill the Progressive Tax Rate System*, *supra* note 10.

114. *Id*.

115. *Id*.

116. *Id*.

117. *Id*.

118. *See* Joseph J. Thorndike, *Americans Don't Mind Taxes—They Hate Tax Loopholes*, WASH. POST, Sept. 12, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/10/AR2010091002680.html.

119. *See* Dorothy Brown, *Let's Kill the Progressive Tax Rate System*, *supra* note 10.

120. This Part draws heavily on my prior work in this area. *See* Brown, *Shades*, *supra* note 8.

121. 26 U.S.C.A. § 163(h) (West 2012).

122. *A Profile of the High-Income Taxpayers in the Middle of the Tax Cut Debate*, TAX FOUND. (Sept. 22, 2010), http://taxfoundation.org/article/profile-high-income-taxpayers-middle-tax-cut-debate.

123. *Id*.

124. Brown, *Shades*, *supra* note 8, at 333.

125. William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, 115 TAX NOTES 1171, 1172 (2007), *available at* http://www.urban.org/UploadedPDF/1001084_Encouraging_Homeownership.pdf.

The biggest increase in home-ownership rates came after World War II and was the result of innovations in mortgage financing—not the tax subsidies which were there all along.[126] That does not mean that homeowners are not aware of the tax break when they buy a house. It means that they do not decide to buy a house *because* of the tax break. The research generally shows that the tax deduction simply rewards behavior (buying a home) that was going to occur anyway.[127]

The majority of blacks and Latinos are renters and do not pay any mortgage interest.[128] They are thus ineligible to receive this benefit. While the majority of whites and Asian-Americans own homes (and overall roughly two-thirds of Americans do), of the 143 million tax returns filed in 2007, only 29% of all taxpayers claimed the mortgage interest deduction as one of their itemized deductions.[129] Simpson–Bowles argues for changing the deduction into a credit, limiting the maximum mortgage outstanding to $500,000, and only making it available for one home.[130] This would certainly make the deduction more equitable; however, it does not go far enough. Because most taxpayers do not benefit from this deduction, repeal is the better option.

In the past, I have been reluctant to argue for the repeal of tax subsidies for housing because of the significant percentage of wealth that taxpayers of color have tied up in their homes.[131] Repeal would likely lead to some decrease in home values given that the mortgage interest deduction is priced into the value of our homes.[132] The amount of the decrease is subject to much speculation.[133] Nevertheless, repeal of the mortgage interest deduction would not hurt the majority of black and Latino families who do not own

126. *Id*. at 1171.

127. *Id*. at 1179–80.

128. *Id*. at 1172.

129. MARK P. KEIGHTLEY, CONG. RESEARCH SERV., R41596, THE MORTGAGE INTEREST AND PROPERTY TAX DEDUCTIONS: ANALYSIS AND OPTIONS 5 (2011), *available at* http://assets.opencrs.com/rpts/R41596_20110118.pdf.

130. SIMPSON & BOWLES, *supra* note 11, at 31.

131. Brown, *Shades*, *supra* note 8, at 341.

132. *Id.* at 374.

133. *Id.* at 377; *see also* Stan Humphries, *Mortgage Interest Tax Deduction Isn't the Best Way to Help Housing*, FORBES, Sept. 27, 2011, http://www.forbes.com/sites/zillow/2011/09/27/stimulating-homeownership-the-great-debate/ ("The debate over the [mortgage interest] deduction rears its head every few years, and again this year, we're getting ready to spend a lot of light and heat debating the issue."); Mark Koba, *End the Mortgage Interest Deduction? Expect a Fight*, CNBC, Feb. 28, 2013, http://www.cnbc.com/id/100506426.

homes. Finally, lower housing prices may encourage first-time home buyers to enter the market.

V. THE WAY FORWARD: THE 535 REPORT

As I have shown, the majority of taxpayers are penalized by the current tax system.[134] The bipartisan Simpson–Bowles plan provides a way out, yet it has languished since the report came out in December 2010. Simpson–Bowles has not been embraced by the public or by members of Congress.[135] One potential explanation for why the members of Congress have not embraced Simpson–Bowles is because they are beholden to the wealthiest Americans who fund their campaigns, and Simpson–Bowles-type reform is against their financial interests.[136] However, I propose a different explanation. Congress is not embracing Simpson–Bowles because, while it would be bad for the richest Americans, it would also be bad for Congress. Two-thirds of Senators are wealthy.[137] The median net worth of the members of Congress is just over $750,000.[138]

What is needed to enable the public to get engaged in the tax reform debate is what political scientists call a "focusing event." Professor Thomas A. Birkland defines a focusing event as "an event that is sudden; relatively uncommon; can be reasonably defined as harmful or revealing the possibility of potentially greater future harms; has harms that are concentrated in a particular geographical area or community of interest; and that is known to policy makers and the public simultaneously."[139]

The 535 Report could be that focusing event. The 535 Report would be "sudden" and "uncommon" because it has never been done before. My hunch is that the 535 Report would show that current tax laws are "harmful" to most Americans because they are not eligible for most of the tax breaks,

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134. *See supra* Part III.

135. *See, e.g.*, Donald Haider, *Simpson-Bowles: It's Back, and Better than Ever*, BLOOMBERG, June 14, 2012, http://www.bloomberg.com/news/2012-06-14/in-praise-still-and-again-of-simpson-bowles.html. On March 28, 2012, the House rejected a Simpson-Bowles type plan in a vote of 382-38. See Ezra Klein, House Reaches Bipartisan Deal to Reject Simpson-Bowles, WASH. POST (Mar. 29, 2012) at http://www.washingtonpost.com/blogs/wonkblog/post/wonkbook-house-reaches-bipartisan-deal-to-reject-simpson-bowles/2012/03/29/gIQAfucdiS_blog.html.

136. *See generally* Overton, *supra* note 41.

137. Catherine Rampell, *Your Senator Is (Probably) a Millionaire*, N.Y. TIMES BLOG (Nov. 25, 2009, 2:42 PM), http://economix.blogs.nytimes.com/2009/11/25/your-senator-is-probably-a-millionaire/.

138. *Net Worth, 2011*, OPENSECRETS.ORG, http://www.opensecrets.org/pfds/overview.php (last visited Feb. 25, 2013). There are more Democratic millionaires in the Senate (36) than Republican millionaires (30). *Id*.

139. Thomas A. Birkland, *Focusing Events, Mobilization, and Agenda Setting*, 18 J PUB. POL'Y, 53, 54 (1998); *see also* THOMAS A. BIRKLAND, AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY, AND FOCUSING EVENTS (1997); KINGDON, *supra* note 43.

but beneficial to members of Congress who are eligible. The 535 Report, once issued, would be known to policy makers and the public at the same time.

There is some precedent for this type of report. Currently, the IRS annually issues a report on the tax returns of the top 400 highest income individuals (the 400 Report).[140] Without disclosing names, the 400 Report analyzes the percent of household income from wages as well as capital gains and dividend income.[141] It looks at the extent to which those taxpayers benefit from deductions such as interest and charitable contributions.[142] As a result, we learn what type of income the highest income households receive and the frequency with which they take certain deductions.[143]

In June of 2003, David Cay Johnston reported in the *New York Times* that the 400 Report was issued at the urging of Professor Joel Slemrod, who then served on an IRS advisory panel.[144] The report itself provides: "The Statistics of Income (SOI) Division announces a new statistical report *in response to requests* to provide data on the 400 individual income tax returns reporting the highest adjusted gross income (AGI) in each tax year . . . ."[145] No law was required. Thus, there should be no legal impediment to the 535 Report being issued by the IRS.

Currently, members of Congress are not required to disclose their tax returns and very few do.[146] The 535 Report I propose would provide a study of the 100 senators and 435 members of the House of Representatives. Such a study would be less intrusive of privacy rights than a public release requirement for every member's tax returns, although a public release would be my preference.[147] The 535 Report should include, at a minimum, an analysis of the percent of members of Congress who take advantage of the largest tax expenditures and a comparison of the congressional percentages with those of all taxpayers.[148] The tax expenditures studied should include:

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140. I.R.S. Statistics of Income Bull. Pub. 1136, *The 400 Individual Income Tax Returns Reporting the Highest Adjusted Gross Incomes Each Year, 1992-2000* (Spring 2003), *available at* http://www.irs.gov/file_source/pub/irs-soi/00in400h.pdf [hereinafter 400 REPORT].

141. *Id*.

142. *Id*.

143. *Id*.

144. David Cay Johnston, *Very Richest's Share of Income Grew Even Bigger, Data Show*, N.Y. TIMES, June 26, 2003, http://www.nytimes.com/2003/06/26/business/very-richest-s-share-of-income-grew-even-bigger-data-show.html.

145. 400 REPORT, *supra* note 140.

146. *See* Condon, *supra* note 13.

147. *See generally* J. COMM. ON TAX'N, *supra* note 18.

148. Dorothy A. Brown, *Harry Reid Has a Glass-House Quandary on Taxes*, BLOOMBERG, Sept.

exclusion for employer-provided pensions exclusion for employer paid medical insurance premiums, preferential treatment for capital gains and dividends, deductions for mortgage interest, charitable contributions, state and local taxes, child tax credit, and the earned income tax credit. The percent of Congress that takes advantage of each expenditure should be compared with the experiences of all taxpayers in the areas studied.

My hunch is that the 535 Report would show the harm to the average American, in the form of higher tax rates, that was inflicted by Congress in exchange for tax breaks that most members of Congress receive but most Americans do not. I have one example to support this hunch. I recently performed a back-of-the-envelope analysis of Senate financial disclosure forms. I wanted to see the number of Senators who owned stock compared to the 20% of all families who own stock in a way that makes them eligible for the preferential tax rate.[149] I looked at every financial disclosure form for each Senator to check for stock ownership and tried not to count stock held in retirement accounts. When it wasn't clear, I counted it as being held by the retirement account. My very rough and conservative calculation showed that just under 90% of senators owned stock in a way that made them eligible for the low preferential rate. If the 535 Report were to show similar results for tax expenditures, I could imagine a very focused and angry electorate, which might persuade a reluctant Congress to enact reform.

VI. CONCLUSION

Most Americans do not benefit from the special breaks, loopholes, and deductions that Congress has passed. That is true of whites and especially true of taxpayers of color. Once the results of the 535 Report are released, the American public will be able to begin to understand the depths of the problem and the herculean effort it will take on their part to get Congress to change course. The 535 Report findings should provide that focusing event. The recent presidential election, which saw a successful private equity manager lose, demonstrated that money cannot buy everything. Twenty-first century tax reform is still possible.

16, 2012, http://www.bloomberg.com/news/2012-09-16/harry-reid-has-a-glass-house-quandary-on-taxes.html.

149. *See* Bricker et al., *supra* note 26, at 30.