RACE, CLASS, AND THE OBAMA TAX PLAN

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ABSTRACT

This Essay examines three areas of federal tax policy: (i) the exclusion for employer provided pensions; (ii) the mortgage interest deduction; and (iii) the earned income tax credit for the working poor. Each of the three areas is addressed in The Obama Tax Plan. My previous research showed that in those three areas, low-income taxpayers were disadvantaged when compared with higher income taxpayers, and taxpayers of color were disadvantaged when compared with white taxpayers. This Essay shows that The Obama Tax Plan's provisions would be good for low-income taxpayers and taxpayers of color. This Essay also briefly discusses political pitfalls inherent in enacting each of the Obama Tax Plan provisions discussed.

I. INTRODUCTION

This has been an historic political season. Senator Obama was the first African-American of a major party to run for President.[1] Even more importantly, Senator Obama has become the first African-American President of the United States[2] after running a brilliant campaign.[3] At a symposium addressing the Obama Phenomenon, it may be reasonable to ask the question: what does tax have to do with all this?

I have spent over a decade studying the race and class implications of federal tax policy.[4] I thought it would be interesting to see if the tax

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1. *See e.g.*, John Harwood, *History Suggests McCain Faces an Uphill Battle*, N.Y. TIMES, Oct. 13, 2008, at A16 ("Mr. Obama has already made history as the first African-American to become a major-party nominee for president.").

2. *See e.g.*, Peter Baker, *Whose President Is He Anyway?*, N.Y. TIMES, Nov. 16, 2008, at WK1 ("As the first African-American president in a nation long divided over race, Mr. Obama will face crosscurrents that none of his predecessors ever did . . . .").

3. *See* Holman W. Jenkins, Jr., *Obama's Car Puzzle*, WALL ST. J., Nov. 12, 2008, at A17 ("[Obama] ran a brilliant campaign. . . ."); Editorial, *Election Brings Change to America*, CINCINNATI ENQUIRER, Nov. 5, 2008, at 8B ("The brilliant, nearly flawless campaign of Barack Obama was more than just the compelling oratory of a gifted politician.").

4. *See*, Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 790 (2007) (discussing the earned income tax credit) [hereinafter *Race and Class Matters*]; Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 756 (2005) (comparing the earned income tax credit and the child tax credit) [hereinafter *Tax Treatment*]; Doro-

policies of the first African-American President would benefit taxpayers of color as well as low-income white taxpayers. My preliminary conclusion is that the specific provisions of the Obama Tax Plan discussed in this Essay, if enacted, will significantly benefit taxpayers of color as well as low-income white taxpayers.

Part II will describe my current and previous research in three discrete areas of federal tax law: employer provided pensions;[5] mortgage interest deduction;[6] and the earned income tax credit.[7] It will show that current tax policies significantly disadvantage low-income taxpayers regardless of race as well as middle-income black and Latino taxpayers.[8]

Part III will describe the Obama Tax Plan in those three areas. It describes the proposal to require employer provided pension plans to have as their default rule that employees opt in. Employees would have to affirmatively opt out of the plan if they did not want to participate. It then describes the proposed tax credit for homeownership which would benefit homeowners who currently do not receive any tax benefits. Finally, it describes the proposals to expand tax credits for the working poor by expanding the earned income tax credit as well as creating a new refundable tax credit.

Part IV then shows how the Obama Tax Plan would greatly benefit taxpayers of color as well as low-income white taxpayers. Part V describes the political vulnerabilities of the Obama Tax Plan.[9] This Essay concludes by noting that the Bush tax cuts are set to expire in 2010,

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thy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1479 (1997) (discussing the marriage penalty and marriage bonus); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV 1501, 1514 (2004) (discussing employer provided pensions) [hereinafter *Pensions*]; Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385, 386 (2007) (discussing employer provided pensions) [hereinafter *Risk Aversion*]; *see generally,* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, *in* TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows, eds., 1996); Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do With It?*, 21 U. ARK. LITTLE ROCK L. REV. 759 (1999); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004); Dorothy A. Brown, Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Risks, Returns, and Race,* 9 CORNELL J.L. & PUB. POL'Y 633 (2000); Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory,* 19 W. NEW ENG. L. REV. 89 (1997); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287 (1999).

5. *See Pensions*, *supra* note 4, at 1501; *Risk Aversion*, *supra* note 4, at 385.

6. *See, e.g.*, Dorothy A. Brown, *Shades of the American Dream* (unpublished manuscript, on file with author).

7. *See Race and Class Matters*, *supra* note 4, at 790; *Tax Treatment*, *supra* note 4, at 756.

8. My research which is largely based on empirical data is limited to African-Americans and Latinas/os, primarily because of the difficulty of obtaining data on Asian-Americans and American Indians due to their limited sample size in the studies that I have seen.

9. *See, e.g.*, Newt Gingrich & Peter Ferrara, *Let's Have a Real Middle-Class Tax Cut*, WALL ST. J., Nov. 20, 2008, at A19 ("For the bottom 40% of income earners, who pay no federal income taxes on net today, these refundable income tax credits will not reduce tax liability but instead result in new checks from the federal government for the targeted social purposes. That's not a tax cut. It's welfare.")

which makes it extremely likely that tax reform will occur. What the final Obama Tax Plan will consist of is anybody's guess. If, however, the Obama Tax Plan includes the provisions discussed herein, economic justice issues, which have largely been excluded from tax policy discourse, will be front and center this time around—and that's a good thing.[10]

II. RACE, CLASS, AND THE TAX CODE

This Part describes my current and previous research in three areas of federal tax policy: (i) employer provided pension plans; (ii) the mortgage interest deduction; and (iii) the earned income tax credit. To provide some context, for fiscal year 2009, the projected revenue loss from employer provided pension plans is $124.8 billion,[11] and the projected revenue loss from the mortgage interest deduction is $99.4 billion.[12]

A. Employer Provided Pension Plans[13]

There are significant tax benefits associated with employer provided pensions. First, amounts set aside by employers are tax deductible.[14] Second, employees get to exclude such amounts from their current income.[15] Third, the income that accumulates on such amounts will accumulate tax free.[16] Fourth, the employee is only taxed when she withdraws such amounts.[17]

Not every employee has access to an employer provided pension plan. In 2005, almost sixty percent of employees worked for employers with pension plans, yet only slightly more than half participated in those plans.[18] In addition, there are race and class effects of such participation.

White workers were more likely to participate than workers of color, and higher income employees were more likely to participate than lower income workers.[19] Only white workers had a majority participating in employer provided pension plans, followed by slightly less than half for Asian, Native American, and black workers with Latino workers

10. *Cf*. Richard A. Booth, *Five Decades of Corporation Law: From Conglomeration to Equity Compensation*, 53 VILL. L. REV. 459, 471 (2008) ("As Martha Stewart would say, that is a good thing.").

11. STAFF OF THE JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005-2009, JCS-1-05 38 (2005).

12. *Id*. at 33.

13. This section draws significantly from my prior work in this area. *See Pensions*, *supra* note 4; *Risk Aversion*, *supra* note 4.

14. *Risk Aversion*, *supra* note 4, at 388.

15. *Id*.

16. *Id*.

17. *Id*.

18. *Id*. at 390.

19. *Id*. ("In 2005, 57.3% of white employees participated in the plan, followed by 48.8% of Asian and Native American workers, 46.5% of black workers, and 29% of Hispanic workers.").

significantly behind with only twenty-five percent participation rates.[20] No racial or ethnic minority group has a majority of its members participating in employer provided pensions.

Seventy percent of workers earning more than $60,000 participated in their employers' pension plans, while only twenty-seven percent of workers earning less than $25,000 participated.[21] Therefore, the tax benefits go disproportionately to higher income employees and to white employees.

Behavioral research has shown however that default rules can play a key role in whether employees who are eligible to participate in employer provided pensions actually participate.[22] For example, default rules that require employees to opt out of, instead of opting into pension plans, make it far more likely that employees will participate in their employer provided plans.[23]

B. The Mortgage Interest Deduction[24]

There are significant tax benefits for homeownership. Homeowners, who itemize their deductions, can deduct their mortgage interest payments on up to two personal residences from income in calculating their tax liability.[25] In addition, the rental value of the personal residence is excluded from income.[26] The receipt of those tax benefits also has a race and class effect.

Whites are more likely to be homeowners and eligible for homeownership tax benefits than blacks, Latinos, or Asians.[27] Seventy-six percent of whites are homeowners, while sixty-one percent of Asians, forty-nine percent of Latinos, and forty-eight percent of blacks are homeowners.[28] While the majority of whites and Asians are eligible for housing tax breaks, the majority of Latinos and blacks are not. Whites, because they are the most likely to be homeowners, are more likely to be eligible for the tax benefits associated with homeownership, followed by a majority of Asians as well. The majority of Latinos and blacks are ineligible for tax breaks, because the majority of Latinos and blacks are renters, not homeowners.

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20. *Id*.
21. *Id*. at 391 ("In 2005, the percentage of workers who actually participated in their pension plan was 70.3% (>$60,000), 61.5% ($38,000–60,000), 49.8% ($25,000–38,000), and 27.5% (<$25,000).").
22. *See id.* at 404.
23. *Id*.
24. This section draws significantly from an article that I'm working on. *See* Brown, *supra* note 5.
25. *See* I.R.C. § 163(h) (2007). The interest deduction is only allowed on mortgages up to $1 million and an additional $100,000 on home equity loans.
26. *See* Brown, *supra* note 6, at 6.
27. *Id*.
28. *Id*.

Only fifty-four percent of homeowners receive a tax benefit from the mortgage interest deduction.[29] Only two percent of taxpayers who are homeowners with income up to $15,000 receive a tax benefit, while ninety percent of taxpayers who are homeowners with income at least $75,000 receive a tax benefit. Ninety-seven percent of taxpayers who are homeowners with income over $1 million receive a tax benefit. Tax benefits associated with homeownership disproportionately go to higher income taxpayers.

C. The Earned Income Tax Credit[30]

There are significant benefits available under the earned income tax credit ("EITC") for the working poor. The EITC is a refundable credit which means the credit can be for an amount greater than the taxpayer's tax liability.[31] For 2009, a family with at least two children can receive up to $5,028, and the EITC is completely phased out for those households earning just under $44,000.[32] In many instances, without the EITC, families would live below the poverty line.[33] The complexity of the EITC, is however, well documented.[34]

The EITC benefits for families with children are significantly greater than for childless households, and the EITC benefit for households with two or more children are greater than the EITC benefit for households with one child.[35] Yet when compared with the Child Tax Credit ("CTC"), which was enacted as a middle class tax cut[36] and increases with every child in the household,[37] the EITC is found lacking.

The CTC was enacted to respond to the reduced ability to pay taxes as family size increases with additional children.[38] The EITC on the other hand was originally enacted to not increase as family size increased with additional children so as to ensure that such families were not being financially rewarded for having additional children.[39]

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29. *Id*.
30. This section draws significantly from two articles that I've written on the earned income tax credit: *Race and Class Matters*, *supra* note 4; *Tax Treatment*, *supra* note 4.
31. *Tax Treatment*, *supra* note 4, at 766.
32. James C. Young, *A Summary of 2009 Inflation Adjustments Affecting Individuals*, 121 TAX NOTES 439 (2008).
33. *Tax Treatment*, *supra* note 4, at 766.
34. *Id.* at 767.
35. *Id.* at 770-71.
36. *Id.* at 782-83.
37. *Id.* at 788-89.
38. *Id.* at 783.
39. *Id.* at 767. The Senate Finance Committee did not want to increase the EITC for each additional child out of concern of providing an "economic incentive for having additional children[.]" *Id.*at 767 n.41.

Recipients of the EITC have been referred to as receiving "welfare."[40] The argument is that EITC payments can be in excess of the taxpayer's income tax liability and such amounts are "welfare." What that argument ignores is the primary function of the EITC is to offset federal taxes associated with working, which includes income taxes and social security or payroll taxes.[41] The EITC was designed to encourage work and offset the costs associated with work that are not associated with welfare, where the benefits are received tax-free.

In addition, the EITC has been assumed by academics—with no empirical basis—to disproportionately benefit blacks.[42] Perhaps they assumed that since blacks represent a higher percentage of the population in poverty than their overall numbers in the population, that would mandate that the black working poor would represent a higher percentage of the overall EITC-eligible population than their numbers in the overall population. Yet none of the academics who stated blacks disproportionately benefit from the EITC had any data on the racial composition of the EITC-eligible population.[43]

Over half of all EITC eligible taxpayers are white, slightly less than twenty-five percent of all EITC eligible taxpayers are black, and slightly less than eighteen percent of all EITC eligible taxpayers are Latino.[44] One comparison could be the EITC-eligible population and the population in poverty. In 2007, 8.2 percent of non-Hispanic whites, 10.2 percent of Asians, 21.5 percent of Hispanics, and 24.5 percent of blacks, were living in poverty.[45] Under that comparison we would see that whites disproportionately benefit from the EITC and blacks are eligible for the EITC in a percentage similar to their overall poverty rate. As I've written elsewhere, poverty is a weak proxy for the EITC.[46] What is significant to remember, however, is that academics writing about the EITC perceive it to disproportionately benefit blacks.

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40. *Race and Class Matters*, *supra* note 4, at 802, 805; *Tax Treatment*, *supra* note 4, at 796-801.

41. *Race and Class Matters*, *supra* note 4, at 817.

42. *Tax Treatment*, *supra* note 4, at 801-05.

43. *Id.* at 802-04.

44. *Race and Class Matters*, *supra* note 4, at 821.

45. United States Census Bureau, Housing and Household Economic Statistics Division, http://www.census.gov/hhes/www/poverty/poverty07/pov07hi.html (last visited Jan. 20, 2009); *cf.*, Symposium, *Panel Two: Who's Minding the Baby*, 49 AM. U. L. REV. 901, 918 (2000) ("[T]he rate of poverty remains at twenty-five percent in the black community while it is under ten percent for whites . . . ."); Hermon George, Jr., *Community Development and the Politics of Deracialization: The Case of Denver, Colorado, 1991-2003*, 594 ANNALS AM. ACAD. POL. & SOC. SCI. 143, 146 (2004) ("In 2000, the national black poverty rate (all persons) was 22.1 percent, 2.35 times the white rate.").

46. *Tax Treatment*, *supra* note 4, at 826 ("Poverty, therefore, is a weak proxy for EITC-eligibility.").

III. THE OBAMA TAX PLAN

During the recent presidential election, Senator Obama (now President Obama) ran with numerous tax policy proposals. I have referred to them as the Obama Tax Plan. This section will examine three different individual tax proposals put forth by the Obama campaign, and for ease of analysis, I rely on the description provided by the Tax Policy Center.[47] Those proposals are: (i) mandatory default rules for employer-provided pensions; (ii) refundable credit for mortgage interest; and (iii) refundable credits for low-income workers.

A. Employer-Provided Pensions—Default Rules

The Obama Tax Plan includes automatic enrollment in employer-provided pension plans.[48] This would require employees to affirmatively opt out of the pension plan rather than to affirmatively opt in.[49] Currently, employees have to affirmatively opt in to an employer's pension plan. The Obama Tax Plan doesn't address the detail of how the employee's money will be invested, but if there is a default rule that opts in employees, there can also be a default rule for investing based upon the age and years left to retirement.

B. Refundable Credit for Mortgage Interest

The Obama Tax Plan includes a proposed refundable credit equal to ten percent of a taxpayer's mortgage interest for a maximum credit of $800 which will be indexed for inflation in later years.[50] Current law only allows a tax benefit for mortgage interest if the taxpayer itemizes her deductions.[51] A significant percentage of low-income homeowners cannot currently take advantage of the mortgage interest deduction because they don't itemize their deductions.

C. Making Work Pay

The Obama Tax Plan would create a new "Making Work Pay" credit to offset social security withholding on up to $8,100 of earnings.[52] In addition, Senator Obama proposed increasing the EITC in a variety of ways, but for our purposes, I want to concentrate on just one, namely increasing the credit for taxpayers with three or more children. Current law does not increase the EITC for families with more than two children, yet the middle class CTC increases for every child the taxpayer has. The

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47. *See* LEN BURMAN, SURACHAI KHITATRAKUN, GREG LEISERSON, JEFF ROHALY, ERIC TODER, & BOB WILLIAMS, TAX POLICY CENTER, AN UPDATED ANALYSIS OF THE 2008 PRESIDENTIAL CANDIDATES' TAX PLANS: REVISED AUGUST 15, 2008 14-15, *available at* http://www.taxpolicycenter.org/UploadedPDF/411749_updated_candidates.pdf.

48. *Id.* at 14.

49. *Id.*

50. *Id.*

51. Brown, *supra* note 6.

52. *See* BURMAN ET AL., *supra* note 47, at 14.

Obama Tax Plan would attempt to ameliorate the different treatment by providing a larger credit amount for families with three or more children.

IV. RACE, CLASS, AND THE OBAMA TAX PLAN

The Obama Tax Plan in the areas discussed will change for the better the tax circumstances of low-income taxpayers regardless of race as well as workers and homeowners of color. First, the mandatory opt in rules for employer provided pensions should increase the number of low-income workers and workers of color who currently do not participate in pension plans. (Recall a majority of low-income workers and workers of color do not participate in their employer provided pension plans.) Currently the Obama Tax plan is silent concerning what those amounts will be invested in. Perhaps this proposal should be coupled with a default investment strategy that is more aggressive for younger employees who are a long way from retirement and less aggressive for older employees who are nearing retirement.

Second, the refundable mortgage credit will provide assistance to low-income homeowners who currently do not itemize. It will allow low-income homeowners to receive tax benefits that they currently do not receive that their middle- and upper-income counterparts currently do receive. I haven't seen an analysis of the mortgage interest deduction by race, so it is unclear whether middle- and upper-income homeowners of color are more or less likely than their white counterparts to itemize deductions.

Third, the expansion of the EITC for more than two children gets the EITC closer to the CTC, but by no means on parity with the CTC. Low-income families' ability to pay taxes is reduced for each additional child the same way middle-income families' ability to pay taxes is reduced for each additional child. The legislative history of the CTC clearly recognized this for middle-income families, and the legislative history of the EITC clearly denied this benefit to low-income families. The Obama Tax Plan is a good first step.

V. CAUTIONARY TALE

I see two areas of potential political problems in the three proposals discussed herein, leaving aside the dire economic circumstances we find ourselves in, which have the potential to override everything discussed in this Essay. The first is the impact which the default opt in rule will have on employer decision making. The second is how the Republicans will portray the numerous refundable credit proposals in the Obama Tax Plan.

Recently, General Motors announced that it was temporarily suspending its employer match for its pension plans.[53] Generally as an incentive to participate in an employer's pension plan, employers will match employee contributions to a certain extent. It of course costs employers' money, but it is a way to recruit highly skilled labor, and since many employees don't opt in, the "benefit" can be largely illusory. Behavioral economics literature suggests that more employees will participate as a result of an opt in default rule which means employer matches will cost more—an amount many employers may be unwilling to provide. It is possible therefore that many more employers than General Motors will suspend or eliminate their employer match which will hurt all employees.[54] It will hurt the low-income employees more, because they won't have the financial wherewithal to invest more of their money to compensate for the lack of an employer match, or invest their money outside of the workplace. Default opt in rules will have to be carefully calibrated given these tough economic times. That said, it is the right proposal if you are concerned about increasing retirement security for all Americans. Given the serious strains upcoming on social security as a baby boomer generation prepares to retire, employer provided pensions will play a key role in the financial security of millions of Americans.

Finally, refundable credits, like the EITC, have been referred to by Republican members of Congress as "welfare."[55] Consider the following excerpt which describes why Republican members of Congress decided not to make the CTC fully refundable to EITC taxpayers:

> Congressman Robert Ehrlich (R-Md.) observed that "[a]ll working Americans with kids deserve a tax break. Middle-income workers should not be responsible for subsidizing the payroll taxes paid by low-income workers." Congressman Jack Kingston (R-Ga.) stated that making the CTC refundable to low-income taxpayers would be giving "another welfare benefit to people who are not paying taxes." He continued by observing that there are "11 million middle-class children whose parents desperately need tax relief for education needs, for medical needs, for shelter, for food . . . ." Then Speaker Newt Gingrich (R-Ga.) stated that giving "an additional $500-per-child tax credit to those who pay no taxes is welfare, plain and simple." Congressman Bill Archer (R-Tex.) stated that the Democratic proposal which would make the CTC refundable "takes money away from middle-income parents who pay income taxes and gives it to people who do not pay income taxes or who already receive a large

53. *See, e.g.*, Emily Brandon, *Will Your Employer Eliminate Its 401(k) Match?*, U.S. NEWS & WORLD REP., Nov. 3, 2008 ("General Motors employees saving for retirement will no longer receive a match for retirement dollars tucked into their 401(k)'s.").

54. *Id.* ("Charles Schwab, CMS Energy, El Paso Corp., Ford Motor Co., Great Northern Paper, Lear, Prudential Securities, Tech Data Corp., and Textron Inc. are just a few of the companies that suspended their 401(k) matches during the 2001 to 2003 bear market, but many of the companies restored the benefits later.").

55. *Tax Treatment*, *supra* note 4, at 791-92.

> check from the Government." Congressman Archer also was reported to have said that extending the CTC to low-income working families would amount to "a welfare payment."[56]

We have seen similar talk during the recent presidential campaign.[57]

The Obama Tax Plan will have to be sold to the public in a way to humanize the working poor. I have argued that given the misconception about who receives the EITC, racial stereotypes will have to be addressed. The working poor work every day, pay federal income taxes, social security taxes, and other taxes and do not receive welfare payments. They are receiving income to offset the taxes that they're already paying. Republicans will once again try to sell to the public the notion that these are lazy welfare cheats, waiting at home for their government checks. The Obama Administration will have to be vigilant in "selling" its proposals for low-income taxpayers to the American public. A series of commercials that displayed predominantly white, EITC claimants—such as single mothers, single fathers, married couples, and the struggles they face and how the EITC refunds have helped in the past—would be a good place to start.[58]

The mortgage interest credit, which is also refundable, will similarly be fodder for the "welfare" label. However, the question that remains to be seen is whether it will be as easy for Republicans to paint homeowners as "welfare" recipients the way it has been with low-income taxpayers. Homeownership is so closely tied to the American Dream, and an asset owned overwhelmingly by whites, that it is more likely than not, that a refundable credit for homeowners, may escape the "welfare" name calling. This may be especially true now, where homeowners generally are currently viewed through a sympathetic lens.

CONCLUSION

The Bush tax cuts are set to expire in 2010. As a result, tax reform within the next year or more is very likely. If the portions of the Obama Tax Plan discussed herein actually become law, the tax situations of low-income taxpayers as well as taxpayers of color will improve and the tax situations of middle- and upper-income white taxpayers will not be harmed. This is an exciting time to be a tax law professor!

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56. *Id.* at 784-85 (citations omitted).

57. Gingrich and Ferrara, *supra* note 9 and accompanying text.

58. *Cf.* DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION 234 (2007) ("If we activate most Americans' networks about fairness, equality, and playing by the rules—and lead them to evaluate racially charged issues *consciously* in the context of *those* values—they will support measures that level the playing field, even if it costs them a little.").