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## Tax Allyship

Blaine G. Saito

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# Tax Allyship

*Blaine G. Saito*\*

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## ABSTRACT

Tax has a race problem. The tax system’s traditional color-blind approach only ossifies our existing structures of racial hierarchy. The solution, then, is to abandon the color-blind approach and introduce reform to explicitly help combat the inequities in wealth and income that fall along racial lines.

This essay calls on young lawyers and racial-justice activists to pressure the tax field—scholars, legislators, practitioners, and judges—to do better. I hope, especially, to inspire law students to consider taking tax courses and becoming tax lawyers with an eye toward promoting racial justice both within and outside the field.

## INTRODUCTION

Tax law is pervasive. It is everywhere; the Code<sup>1</sup> contains the whole world. Every American has contact with the tax system. Most adults pay payroll taxes for Social Security and Medicare; file a federal income tax return;<sup>2</sup> and pay local and state income, sales, and property taxes.

Historically, tax's enormous influence has been largely negative. By framing itself as color-blind, it has solidified and amplified the existing structures of racial injustice and oppression. Because this solidification and amplification are generally invisible, most civil rights and racial justice advocates have not thought to focus their efforts here. They have generally considered tax law and racial justice to be two entirely separate and unrelated realms.

In this essay, I will argue that this assumption is mistaken. Thanks largely to the work of several tax scholars—including Dorothy Brown,<sup>3</sup> Jeremy Bearer-Friend,<sup>4</sup> Francine J. Lipman, Nicholas A. Mirkay, Pamela Joy Strand,<sup>5</sup> and Alice G. Abreu<sup>6</sup>—it is now very clear that tax law and racial justice are intimately connected.

My goal is to inspire law students, young attorneys, and legislators to start thinking about tax law as a vital part of the fight for racial justice. I hope that law students will consider taking tax courses, young attorneys

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1. All references to the Code refer to Title 26 of the United States Code, as amended.

2. I.R.C. §§ 3101, 3111.

3. Professor Brown is perhaps the leading voice in issues of critical race theory and taxation. She has numerous scholarly articles and has recently written an excellent book that draws together many of her pieces and translates them for a popular audience. DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT*. (2021).

4. Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019).

5. Francine J Lipman et al., *U.S. Tax Systems Need Anti-Racist Restructuring*, 168 TAX NOTES 855 (2020).

<sup>6</sup> See generally Alice G. Abreu and Richard K. Greenstein, *Rebranding Tax/Increasing Diversity*, 96 DENVER L. REV. 1 (2018) (linking the racialized aspects of tax expenditures to a lack of diversity in the tax bar).

will think about specializing in tax law, and legislators will think about making race-conscious reforms to the tax system.

My argument falls into three main parts. Part I explicates the three main connections between tax law and racial justice: the distributional effects of tax laws, social policies enacted through tax laws, and the administration of tax laws. Part II explains why the individuals who have traditionally taught, practiced, and created tax law have typically remained ignorant of the connections explicated in Part I. Part III calls on everybody who is concerned with racial justice to engage with tax law.

### I. WHY TAX IS SO IMPORTANT FOR RACIAL JUSTICE

In this section, I will explain first how implementation and enforcement of tax law disfavor racial minorities and, second, how tax law can be used to achieve economic equity.

#### A. *Tax for Government and Redistribution*

In order to work toward greater racial justice, including reduction of the yawning wealth gap between whites and blacks, we must work with and through the tax system.<sup>7</sup> Trying to address racial wealth and income disparities without the powerful tool of tax law is like going into a fistfight with a hand tied behind one's back.

Tax law is a critical part of our system of government. Because taxes provide a significant portion of the government's revenue, tax law exerts significant influence on government spending, economic policies, and distribution of wealth and benefits. From income support for the working poor through the Earned Income Tax Credit (EITC)<sup>8</sup> to various subsidies for health insurance like the exemption of employer-sponsored insurance,<sup>9</sup> taxation drives our social policy and welfare.

Taxes pay for both direct re-distribution, such as income support for those who are poor, and more indirect re-distribution, such as the provision of healthcare financing and educational opportunities. The structure of the tax laws can also help with re-distribution. For example, income tax rates are generally progressive, meaning people who have greater income pay

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7. See BROWN, *supra* note 4, at 18. (noting that according to a 2016 Pew Research Center the median white household has \$171,000 in wealth while the median wealth of a Black households was \$17,000 and \$20,600 for Latin households).

8. I.R.C. § 32.

9. I.R.C. § 106.

tax at a higher rate.<sup>10</sup> And taxes on large wealth transfers via gifts or estates are designed to prevent generational wealth, though recent changes have blunted their efficacy.<sup>11</sup>

In theory, re-distribution could be salutary for American minorities, who tend to have lower incomes and less accumulated wealth than white Americans. Black Americans have less accumulated wealth than white Americans they were systematically excluded, through slavery and Jim Crow, from full participation in the economy for hundreds of years. In practice, however, the way the tax laws have been structured, implemented, and enforced tend to work against equitable re-distribution.

First, many states, even some that are relatively stingy in social benefits, prioritize consumption taxes over progressive income tax.<sup>12</sup> While consumption taxes can be useful in raising revenue for social programs, they take a larger share of poor people's income than does income tax.<sup>13</sup>

Second, and perhaps more importantly, our supposedly progressive tax laws are not really all that progressive. In particular, income earned via capital holdings, which tends to flow to wealthier and higher-income people, is taxed at much lower rates than earned income.<sup>14</sup> Likewise, the United States has also eviscerated the estate and gift taxes.<sup>15</sup>

All of these policies make it harder for minorities, who (again) tend to have accumulated less wealth and earn lower incomes, to catch up. In this way, tax law is currently helping to obstruct rather than facilitate our goal of full racial equity.

### *B. Social Programs through Taxation*

Other source of racial inequity are tax credits, deductions, and exclusions, which are deviations from full taxation. The deviations help to

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10. I.R.C. § 1.

11. See I.R.C. §§ 2001–2801.

12. For example, the State of Texas has no state income tax and relies solely on sales and property taxes. In addition, Texas is one of the many states that has refused to expand Medicaid under the ACA.

13. See Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PA. L. REV. \_\_\_, 49–51 (2021). (noting caution in moving forward on regressive tax because it can lead toward further impoverishment of vulnerable populations).

14. Compare I.R.C. § 1(a)–(d) with I.R.C. § 1(h).

15. See Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. 115-97 §11061, 131 Stat. 2054, 2091 (2017) (raising the gross estate exemption from \$5 million to \$10 million). See also, generally MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005).

subsidize certain activities in lieu of direct government spending and can subsidize many types of social goods, such as housing, healthcare and retirement savings. The idea is that it is better to reduce taxes than to increase the size of government outlays.<sup>16</sup> But as I will explain later in this subsection, this theory is flawed. Our system of tax credits, deductions, and exclusions tends to help white people and hurt people of color.

Before explaining how tax credits and deductions have disparate racial impacts, I will offer a summary of how tax credits, deductions, and exclusions work and the differences between them.

A tax credit is a dollar-for-dollar reduction in the claimant's tax liability. Suppose that Aaron's tax liability, after calculating his income is \$10. Aaron also undertook an activity that qualifies him for a \$3 tax credit. His actual tax bill then is only \$7 ( $\$10 - \$3 = \$7$ ).

Some tax credits are refundable credits. That means if the amount of the credits exceeds the amount of a taxpayer's tax due, the remainder gets sent to them as cash. Suppose Brittney has a \$5 tax bill. She qualifies, though, and claims an \$8 refundable tax credit. She would owe no tax, and instead the IRS would pay her \$3 ( $\$5 - \$8 = -\$3$  in tax owed).

Unlike a credit, a deduction or exclusion does not directly affect the tax bill. Rather, a deduction or exclusion affects the amount of income that is used to calculate the amount of tax. A deduction reduces taxable income while an exclusion excludes certain income received from taxation. Because of the progressive nature of our income tax, whereby the rate of tax increases as income increases, deductions and exclusions create an upside-down subsidy; they are worth more to people who have higher tax rates and greater incomes.

For example, take Aaron and Brittney again. This time, suppose Aaron has an income of \$200 and Brittney has an income of \$100. Suppose further that there is a progressive income tax system, whereby the first \$100 of income is taxed at 5% and the second \$100 of income is taxed at 10%. Without any deductions and exclusions Aaron would owe \$15 of tax (5% of \$100 + 10% of \$100) while Brittney would owe \$5 of tax (5% of \$100). Suppose both Aaron and Brittney qualify for a deduction against their taxable income of \$20. Aaron would then have income of \$180, and he would pay tax of \$13 (5% of \$100 and 10% of \$80). This result is a savings of \$7. Brittney, on the other hand, would have taxable income of \$80, which would result in \$4 (5% of \$80). That is a reduction of tax of

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16. See Blaine G. Saito, *Tax Coordination*, 38 GA. ST. L. REV. \_\_\_\_, 9 (2022) (discussing the political benefits of using tax policy to deliver social goods).

only \$1. So, Aaron, because of his higher rate, gets a higher benefit from a deduction.<sup>17</sup>

Given this structure, how we design the use of tax law to distribute subsidies for social goods like housing and healthcare is important for equity and racial justice. Because of the upside-down subsidies of deductions and exclusions, the most equitable means for distributing social goods through tax law is via refundable tax credits. And indeed, there are a few programs that meet this criterion. For example, two key programs designed to support low-income working families, the earned income tax credit (EITC)<sup>18</sup> and the child tax credit (CTC),<sup>19</sup> are refundable tax credits. Refundable credits are also the mechanism used in the Affordable Care Act (ACA) to subsidize the purchase of health insurance.<sup>20</sup> Structuring the use of tax law to distribute social goods in this manner best helps those who are of lower-income and given the distribution of wealth and income in this country, disproportionately helps racial minorities.

But a large amount of social goods subsidized through the tax laws happen via deductions and exclusions. Because of the upside-down subsidy and the fact that white Americans have higher income levels and wealth, the use of these tools help ossify racial inequities.

People of color often cannot access many of these tax expenditures or are actively harmed by them. Take, for instance, the deductions and exclusions for home ownership. There is an exemption from income, up to \$250,000, for any gain on a sale of a principal residence.<sup>21</sup> The idea is that we want to encourage home ownership to build wealth. Thus, when people move or upgrade homes, we should limit the tax they need to pay so they can continue building that wealth. On the flip side, if the home depreciates, which lawmakers assume is a rare event, a deduction for the amount of the loss is disallowed.<sup>22</sup>

Unfortunately, structural racism undermines this policy of encouraging wealth building through home ownership. For many white Americans, this tax program works well. Throughout most of the 20<sup>th</sup> Century, their homes have appreciated in wealth.<sup>23</sup> But, as Professor Brown points out, the situation is different for Black Americans. Many Black Americans buy homes in majority Black neighborhoods. Those

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17. Exclusions mathematically work similarly.

18. I.R.C. § 32.

19. I.R.C. § 24.

20. I.R.C. § 36B.

21. I.R.C. § 121.

22. See I.R.C. § 165(c) (disallowing loss deductions for personal losses except under certain circumstances).

23. BROWN, *supra* note 4, at 74–76.

neighborhoods are disfavored by the market because white Americans, who often have more wealth to purchase homes and make up the majority of home buyers, prefer not to live in majority minority neighborhoods.<sup>24</sup> As a result, homes in majority Black neighborhoods do not appreciate as well, or even lose their value when compared to similar homes in majority white neighborhoods. Furthermore, home values drop as a greater concentration of Black homeowners move into a given neighborhood. Hence, if they own homes in majority Black neighborhoods, Black Americans will either see little tax benefit for the exemption of gain. They may even see a tax harm should their home decrease in value because the loss from a sale of the home is denied.<sup>25</sup>

Of course, Black Americans could move to a majority white neighborhood. But structural racism here exacts a different toll. Blacks living in majority white neighborhoods must often deal with neighbors who make certain slights against them, thinking that they do not belong. Sometimes there are actions by white neighbors that are more than slights and highly dangerous, like calling the police on a Black homeowner in their own neighborhood trying to enter their own home.<sup>26</sup>

Another example of racially disparate social programs comes with health-related tax expenditures, the employer sponsored insurance (ESI) exemption. Because it constitutes as an exemption, higher-income taxpayers have greater subsidies from this program, which in turn leads to a racially disparate outcome.

Structural racism impedes Black taxpayers from accessing these programs. Even if there is no overt and intentional discrimination in the labor market against Black Americans and people of color, structural racism still produces discriminatory results. Blacks and people of color are less likely to get hired for high paying jobs and they are more often passed over for promotions. These discriminatory effects interact with the ESI exemption in two ways. First, Blacks and other people of color are less likely to get the kind of jobs that offer generous ESI and are excluded from

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24. *See id.* at 81, 86–87 (noting the historical factors of fearmongering among white homeowners regarding living near Black homeowners and how many of these white homeowners continue to prefer to live in majority white neighborhoods).

25. *See id.* at 77–79 (discussing the situation of John, who bought a home in a majority Black neighborhood, which lost value and who then was denied the deduction for the loss per I.R.C. § 121).

26. *Id.* at 80, 82–83. Brown also notes that there could even be financial harms to Blacks living in majority-white neighborhoods. *See id.* at 82–84 (discussing the problems when home values rise and the issues of increased property taxes on Black homeowners).

accessing the subsidy.<sup>27</sup> Second, because of these biases, their wages are held down, reducing the tax subsidy they receive over their careers even if they have a job with ESI.

Because of the use of tools like deductions and exemptions to deliver social goods and the broad reaching effects of structural racism, facially racially neutral tax programs can help reinforce racial structures. But the problem is even worse because racial disparities also appear in tax administration and enforcement.

The reason for implementing social policies such as housing and healthcare through tax laws is mostly political. Americans generally want two things that are in tension with each other: a strong social safety net and low taxes. By weaving expenditures for social programs into tax law, politicians from both parties can satisfy both goals.

### C. *Disparate Administration*

The racial disparities in tax administration and enforcement often amplify many of the problems discussed above.

Recent reports have shown that the rate of audits in low-income, high racial minority areas are much higher than the rate of audits in wealthier areas. This stems from the fact that Congress has slashed the IRS's budget. As a result, the IRS has turned to auditing low-income taxpayers as easy targets.<sup>28</sup>

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27. BROWN, *supra* note 5, at 135. See also Blaine G. Saito, *The Value of Health and Wealth: Economic Theory, Administration, and Valuation Methods for Capping the Employer Sponsored Insurance Tax Exemption Note*, 48 HARV. J. ON LEGIS. 235, 245 (2011) (noting that frequently lower-income individuals do not have access to ESI, or often work multiple part-time jobs where they do not receive such coverage).

28. Paul Kiel & Hannah Fresques, *Where in the U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA, <https://projects.propublica.org/graphics/eitc-audit> [<https://perma.cc/7VS4-J855>] (last visited Apr. 26, 2021); Paul Kiel Eisinger Jesse, *Who's More Likely to Be Audited: A Person Making \$20,000 — or \$400,000?*, PROPUBLICA, <https://www.propublica.org/article/earned-income-tax-credit-irs-audit-working-poor?token=MXXIImPWCCwUNwUmGqOoUsYmxDqE3A> [<https://perma.cc/BXE5-99CG>] (last visited Apr. 26, 2021); Paul Kiel, *It's Getting Worse: The IRS Now Audits Poor Americans at About the Same Rate as the Top 1%*, PROPUBLICA, <https://www.propublica.org/article/irs-now-audits-poor-americans-at-about-the-same-rate-as-the-top-1-percent?token=uoYT3QQC93fqm0Bw2XM2uFPVTHBJBAML> [<https://perma.cc/8J9S-5GAR>] (last visited Apr. 26, 2021); Paul Kiel, *IRS: Sorry, but It's Just Easier and Cheaper to Audit the Poor*, PROPUBLICA, <https://www.propublica.org/article/irs-sorry-but-its-just-easier-and-cheaper-to-audit-the-poor?token=--sanitized-->

Many of these low-income taxpayer audits are so-called automated paper audits, whereby there is almost no in-person or phone contact between the taxpayer and an IRS revenue agent. Instead, the IRS uses automated tools to determine audit targets, and most of the communication is done via letters, many of which are often form letters. If the low-income taxpayer actually responds, most of what is sent are documents to substantiate their various claims on the tax returns. Low-income taxpayers often fail to contest any part of the audit process or the determinations, leading to a result against the taxpayer. This situation then allows these audits to be cheap and numerous. The result is that many low-income taxpayers who are racial minorities get caught in this mess, and often have a negative outcome of their audit.

The same resource constraints have reduced audits of high-income, high-wealth, often white taxpayers. The audit of a high net-worth taxpayer is almost the opposite of a low-income one. There are often complex structures that the wealthy have created that a revenue agent must examine thoroughly. Numerous meetings with the taxpayer are required. Taxpayers will also often contest the process of the audit, like the collection of documents by the IRS, as well as the audit determination itself. And often these people have well-paid advisors to protect their interests. Doing even one of these audits can cost a great deal. Furthermore, Congress has dismantled the Global High Wealth Group, a group designed to focus on auditing high wealth people, compounding the disparities then in race, given the large income and wealth disparities between races.<sup>29</sup>

These effects go far beyond audits. One of the most important tax expenditures for social policy is the Earned Income Tax Credit (EITC), which provides some wage support for lower income workers with children. Many of these people, who are often people of color, depend on this credit for making ends meet when employed in low-wage jobs. An audit can be devastating to an already dire situation. If the automated system detects what is a suspicious claim of the EITC, then the IRS delays the issuance of their refund with their EITC payment. That means that

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[<https://perma.cc/F2ZB-AVJQ>] (last visited Apr. 26, 2021); Paul Kiel, *Lawmakers Just Confronted the IRS Over Tax Audits That Target the Poor*, PROPUBLICA, [https://www.propublica.org/article/lawmakers-to-irs-commissioner-charles-rettig-system-stacked-for-the-rich?token=VSEdY3J3\\_IUtPCCPDevwWPNmP-AuNa7O](https://www.propublica.org/article/lawmakers-to-irs-commissioner-charles-rettig-system-stacked-for-the-rich?token=VSEdY3J3_IUtPCCPDevwWPNmP-AuNa7O) [<https://perma.cc/FW7C-P6ZF>] (last visited Apr. 26, 2021).

29. Jesse Eisinger Kiel Paul, *The Top 0.5% Underpay \$50 Billion a Year In Taxes and Crushed the IRS Plan to Stop Them*, PROPUBLICA, <https://www.propublica.org/article/ultra-wealthy-taxes-irs-internal-revenue-service-global-high-wealth-audits?token=mtRqVqWf3m79M17eu5HGekP4E21lceqH> [<https://perma.cc/EY2V-NZKQ>] (last visited Apr. 26, 2021).

these taxpayers are unable to pay their bills or large expenses. If, after a final audit determination, they are found to have recklessly taken the credit improperly, they are barred from receiving the credit for up to two years.<sup>30</sup> That result can lead people further into poverty. Given that people of color face higher rates of audits and are more likely to claim and depend upon the EITC, these practices are working together to reinforce racial income and wealth disparities.

Thus, when one examines the role of tax, they will find that it can either help advance the goals of racial justice or further perpetuate existing systems of injustice. The question as to why it does not do more of the former stems from the way that tax has traditionally viewed itself as colorblind. The next section examines tax's colorblindness.

## II. TAX'S RACE BLINDNESS

Tax has historically not considered race. There are times when there were matters of intentional racial discrimination in the domain of tax. More often than not, neglect and ignorance of the racial undergirding of the entire system of American law and society was the motivating matter. Unfortunately, when people within the tax field raised these concerns, the response was less than ideal.

This section first examines the problems with the traditional view of tax as a race neutral matter. It then talks about tax's awakening to a new moment.

### A. *Traditional Race Neutral Tax*

Most of tax law and policy appears racially neutral. But it has traditionally lacked language in the statutes, regulations, legislative, or regulatory history that include the matters of race.

Part of the problem, as pointed out by Professor Brown, is that the insidious nature of race in America means that colorblindness does not allow us to escape race. It instead causes us to do things that unwittingly replicate and reinforce the racial hierarchy. She points to the exemption of gain from the sale of a principal home discussed above. It is unlikely that Congress was intentionally and actively trying to hurt Black Americans. Rather, it is the idea that the default of a "taxpayer" is an upper-middle

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30. I.R.C. § 32(k). If, after a deficiency procedure, a taxpayer wishes to restore their ability to claim the EITC, they must fill out Form 8862. Treas. Reg. § 1.32-3.

class white American.<sup>31</sup> Because of structural racism that pervades American society, not being conscious of this default assumption leads to a situation whereby not thinking about race makes issues of race worse.

Consequently, colorblindness in the making of tax policy then led to tax policy reinforcing the problems of race in America. The way to overcome this problem is to start thinking and talking about race. And to do that well, data on how tax policy affects people of different races and ethnicities is necessary.

Even in data, the tax system is failing with respect to race. The IRS does not collect or disaggregate data by race. As Professor Bearer-Friend notes, the IRS, like all other federal agencies, is required to collect information based on race.<sup>32</sup> But the IRS and other tax related agencies in government have, nonetheless, continually failed to do that. The reasons why are somewhat unclear.<sup>33</sup>

As Professor Bearer-Friend notes, the lack of this data harms the goals of racial equity. To some extent, without easy access to tax data that includes race, determining the racially disparate effects of tax policy is either speculative or requires significant work interpolating data from other sources with IRS data. Without knowing this information, it is impossible to try to become more racially aware.<sup>34</sup> As a result, colorblindness is hampering those who want to end its pernicious effects, because we do not have the data to pinpoint its problematic effects.

Colorblindness in tax, much like in other areas of law and policy, is willful blindness. In order to combat racial disparities, tax must actually confront race.

Traditionally, when people attempted to raise questions of race in tax, they were often met with pushback or inaction.<sup>35</sup> For example, Professor Bearer-Friend notes that even though the IRS and Treasury are compelled

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31. See BROWN, *supra* note 4, at 62–63, 77 (noting the default assumption of white as the base case). This taxpayer is also likely a cis-male and married to a woman who does not work and they have one or two children.

32. Bearer-Friend, *supra* note 5, at 2–5.

33. *Id.* at 6–7.

34. *Id.* at 38–46 (noting that the failure to include this data leads toward an obscuring of racially disparate outcomes in tax and reinforces these structures).

35. Perhaps one of the most vivid accounts appears in a paper by Professor Brown that formed the basis of her book *THE WHITENESS OF WEALTH*. There, she notes that many prominent academics in taxation tried to waive away these issues of race. Dorothy A Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 362–65 (2009).

to do so under the Civil Rights Act of 1964, they did not even have regulations to implement this mandate for data collection related to race.<sup>36</sup>

There is no direct evidence to show why there is resistance and inaction, but two likely sources are part of it. The first is something unique to tax, and it is a sense of exceptionalism that tax has.<sup>37</sup> Tax has often had an air apart from other fields of law. It seems impenetrable to those outside of it. It is not hard to see the line between that type of exceptionalist thinking to the forms of colorblindness discussed above. Tax is outside that system and seemingly unaffected by many of these racial structures.

The second unprovable belief here is that many people who work in the field of tax, including this very author, do not think of themselves as intentionally racist. As Professor Brown notes, and many others who work in the sphere of race and the law, racial hierarchies, or castes are baked into the system. We unwittingly think that just because we do not intend to do harm that we are doing no harm. When confronted with the truth that we are unwittingly creating harms for people of color, we, including this author, sometimes become defensive and shut down.<sup>38</sup>

Tied together, these two potential sources of resistance have allowed tax to stand apart from a lot of discussions surrounding racial equity. As a result, it continued to serve the system of racial injustice inadvertently, but that changed with a new realization and a new awareness of race.

### B. *A Great Racial Tax Awakening*

No recent event has focused many Americans' minds on the issue of race as did the murder of George Floyd in Minneapolis. The protests spawned by the event and the invigoration of the Black Lives Matter

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36. Bearer-Friend, *supra* note 5, at 25–26.

37. See Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518–19 (1994) (noting the general view of tax as weird and exceptional by both the tax field and other legal fields); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1538–41 (2006) (noting the odd situation of how tax laws and regulatory processes stood outside of the standard Administrative Procedure Act review and the purview of *Chevron U.S.A. v. Natural Res. Def. Counsel*, 467 U.S. 837 (1984), prior to the decision in *Mayo Fdn. For Med. Educ. Res. v. United States*, 562 U.S. 44 (2011)). Generally, as these examples show, tax exceptionalism often refers to tax law's interaction with administrative law. The idea is that tax is different from other regulatory actions, and thus there should be exceptional and different procedures from the standard procedures in administrative law.

38. Brown, *supra* note 35, at 362–65.

Movement forced many of us who were not Black, including many white Americans on the left side of the political spectrum, to reexamine race.

While tax is often exceptional, it is not entirely immune from such a powerful cultural force. As many called for, not just racial neutrality, but a greater notion of anti-racism—where one tries to work actively against the hidden structures that are the most pernicious and powerful parts of the racial hierarchies, —tax started to follow suit.

One significant event happened at the meeting of the National Tax Association (NTA), one of the largest meetings of tax policymakers and academics from various fields including law, accounting, and economics. The NTA President at the time, William Gale of the Brookings Institution, gave a keynote address that specifically called on his colleagues to start to grapple with racial justice in tax.<sup>39</sup>

Many of the scholars and activists who spoke about race and tax issues finally had a receptive audience, both inside and outside of tax. For example, Professor Brown has garnered great praise and done an excellent job of explaining some of these racial issues in her newly published book, *The Whiteness of Wealth*. Tax Notes, a major publication in the tax world, published an important piece by Francine Lipman, Nicholas Mirkay, and Pamela Joy Strand calling for an anti-racist restructuring of our tax systems.<sup>40</sup> Others have started to echo Professor Bearer-Friend's call for better data on how the tax system works with race. Tax matters may also fall under the Biden Administration's call for looking at racial disparities in the enforcement of law.<sup>41</sup>

Thus, right now, there is a moment in tax, where the area is receptive to thinking about and hearing concerns of racial justice. This is where allyship and thinking about the future come into play.

### III. STRIKING WHILE HOT AND BUILDING A DURABLE MOVEMENT

Given these changes, the current moment is rich with opportunities. The goal for those of us interested in racial justice, then, is to rally together to keep the focus on this work and to force the system into an adaptative change. Indeed, mere technical solutions likely will not help here.

To that end, this Part—the heart of the piece—makes a few pushes. First, it outlines to those not in the world of tax why they should care and why now. Second, it raises to those inside of the field of tax the need to

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39. See generally William G. Gale, *Public Finance and Racism* (noting that race issues are generally ignored by public finance economists).

40. Lipman et al., *supra* note 6.

41. William Hoffman, *Biden Focus on Agency Biases Could Implicate Tax Administration*, 171 TAX NOTES 143 (April 2021).

work and listen to activists and scholars on racial justice inside our field and without. It calls on us to be allies to them and to engage them rather than be defensive. Third, and most importantly, it speaks to the next generation, particular young lawyers and law students. It calls on those who care about undoing our systems of white supremacy to take tax. It also calls on many of them to consider dedicating their lives to the field of tax law.

*A. Engagement from the Outside*

Given the importance of taxation to the goals of racial justice and given the new receptivity, now is the time for those outside the tax sphere to engage and agitate in the area of taxation in a more concerted way.

Those involved with racial justice in many other spheres should start to take aim at the writing and application of our tax laws. They should question when policies get made and pressure those in charge whether these changes will advance the goals of racial equity or detract from it. Agitation from the outside and causing good trouble, even when pestering and annoying to those inside, is often a necessarily important part of making change. While many insiders may rebuff on such matters, it is important to keep persistent. As the previous parts have shown, tax is too important for the key goals of racial justice.

Second, those from the outside may have developed interesting techniques and tools to address racial disparities that could be applied to tax law. For example, in criminal justice, there appears to be a growing effort through racial impact assessments in making and implementing policy. Such a tool could help in taxation too. Many people involved in the world of racial justice have also figured out useful communication techniques to highlight the underlying racial problems in many of our systems without making a listener, who may not be the most receptive, shut down. There may also be other areas of expertise and tools that those outside can introduce to the tax world, destroying its insularity to racial justice matters.

Third, those outside the sphere of tax can serve as allies to those in tax who are interested in racial justice. Connecting and engaging in a dialogue with each other can help develop a sustained vision for racial justice in tax. These discussions can also help prevent those who care about racial justice inside and outside of tax from working at cross-purposes, which are when advocates do things that unintentionally undermine each other. Having these connections can also build a system of emotional care and support for undertaking this hard work of changing hearts and minds.

Fourth, those outside the tax field can also serve as monitors to help us in tax see blind spots. For example, they may be better able to track some of the disparate effects of IRS audits and enforcement on Black and Brown communities. Since many of those involved in racial justice are also closely tied or members of these communities, they can also help those in tax understand some of the on the ground effects of tax policies and administration.

### *B. How Tax Can Be Better*

The tax field must also make racial justice a significant priority. It must be receptive to the bridge building that was described above.

One thing that tax people need to become more aware of is just how deep seeded a lot of these racial systems are. Professor Brown's recent book, as noted, talks quite a bit about this matter. So pervasive is the issue of race and racially problematic ways of thinking that we often do not see some of the connections. For example, in international tax, which seems quite far from the issues of racial justice, Professor Steve Dean has noted that much of our discussions and conceptions of tax havens often have a problematic racial and imperialist undertone to them. He and Attiya Waris have noted that frequently majority Black and Brown countries in the developing world, like Liberia, are often singled-out as tax havens, while bad actors that are white, like Switzerland, get a pass.<sup>42</sup> This example shows the reach of race to shape our thinking even in matters that appear far afield.

Tax also needs to understand the complexity of race issues. While it is important to understand the anti-Blackness that undergirds so many aspects of this country, race issues are often more complicated than that. There are more matters of race besides Black and white issues. For example, there is often a problematic view that Asian American and Pacific Islanders (AAPIs), a group from which this author hails, are model minorities. There is a sense that there is no discrimination against AAPIs and that there is no negative result of systemic oppression.

That misses the mark. Significantly, the experience of many longer-term early arriving Chinese-Americans and Japanese-Americans are very different from the obstacles and racial prejudice faced by Hmong refugees or Micronesian Compact Migrants. The wealth and income disparities within the AAPI community also tend to be bimodal, with those long-time Chinese and Japanese Americans at a higher end with newer groups at the

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42. Steven A. Dean & Attiya Waris, *Ten Truths About Tax Havens: Inclusion and the 'Liberia' Problem*, 70 EMORY L.J. \_\_\_, 2–5 (2021).

bottom and for the most part remaining stuck.<sup>43</sup> A failure to recognize this and other similar issues relating to non-Black people of color could hamper racial justice issues in tax.

Tax professionals must also do more to listen to scholars and activists within the tax field when they mention issues of race and racial disparities. We need to take what they say seriously and use it to inform how policies are made.

Finally, it is incumbent on everyone in the tax system to at least acknowledge that much of what we have done and will inevitably do is racially problematic. What is important is to take a growth stance when we are called out and resolve to do better rather than get defensive. It is important for us to listen to our colleagues and those who are outside on these matters with a sense of humility and growth. Sometimes it stings, but that is how development happens.

### *C. Growing Allies with and in Tax*

Perhaps most importantly, making changes and agitating for greater racial justice in tax is also going to require a look toward the future in the legal profession. It is in law students and new lawyers where I have hope for bringing about a more racially just tax system and profession. But that requires some actions.

First, anyone involved who cares about racial justice should consider taking at least the basic federal income tax class. As noted above, income tax is intimately connected with many aspects of American's lives.

One reason to take tax and have a basic understanding of tax principles is that it dispels some of the fears and magic that tax often holds on people. The way to fight tax exceptionalism is to make it seem less mysterious.

Another reason that future racial justice advocates should take tax is that having some background makes communication with those in the tax field easier. Building bridges requires some understanding on both sides of technical terms. Understanding tax ideas as a racial justice advocate can supercharge this effort, and it can help build trust with those in the, sometimes insular, tax community.

Knowledge of tax also allows racial justice advocates to understand both the importance of tax to their broader goals and to note where they may lack specific knowledge of detailed workings of the tax laws. Like any area of the law, taxation has many nooks and crannies with people

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43. See Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117, 129–39 (2004) (discussing some of the unique problems faced by AAPIs in the tax system).

who are deeply specialized in certain areas. One of the most important parts of having some knowledge is that it allows one to understand when you need to ask for more specialized help.

Finally, those who are students and interested in racial justice should take at least the basic tax class so they can foreground these issues in class. As a teacher, I note that it can sometimes be difficult to have to address issues of race in class, especially given the need to cover material. But we teachers must have reminders about these important matters in class so that we can take the time to discuss them. These discussions in class are helpful, because they often spur us, the professors and scholars, to reflect a bit more and perhaps do a better job in our scholarship of considering the issue of racial disparities and how tax contributes to them. It also has the advantage of helping center matters of racial justice as a key issue in tax policy.

Second, and perhaps more importantly, law students and young attorneys who care about racial justice should also consider becoming a tax attorney and getting involved in this vital field. The field needs you.

One reason to do this is, as noted above, tax has traditionally had a blind spot for these issues. Nothing helps crystalize the issue more effectively than having people who care about racial justice at the table. While advocates outside the tax field are important, those inside can help influence those discussions and work on implementing the solutions.

Another important reason for law students and young attorneys to learn tax is to help diversify the field of taxation.<sup>44</sup> Many of us who are interested in racial justice are people of color. If one were to imagine a tax lawyer, the image is of a white person, often male. The field needs diversity, first as a reminder that perhaps the default should not always be a white man's perspective. Second, having people from diverse racial backgrounds can help us foreground narratives and experiences, which are also diverse in making changes to turn taxation into an anti-racist tool. The power of linking that personal narrative is shown in some of the vulnerable passages of Professor Brown's book, where she talks about her family's background. Sharing these perspectives helps to raise awareness of the issues of race and also helps to show the commonalities and differences across and within racial minority groups.

More people in the field interested in racial justice can also serve as a network of support. Regardless of the increased awareness, the changes required to transform taxation are not merely technical, they are adaptive. Having more people in the field who care about this adaptive change helps

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44. See Abreu and Greenstein, *supra* note 6, at 23–31 (noting how tax is even whiter than most other areas of legal practice).

to keep a focus on this work. These people can band together and often support each other during the tough, and sometimes bruising work of forcing the field to change. Having more people reduces the loneliness that some of the early forebearers who have raised racial justice in taxation felt.

Finally, having experts in taxation who care about racial justice can help bring the issues of race in taxation to those outside the field and work with those outside to push for change inside the field. These are the people who are best positioned to serve as a bridge. They are best suited to translate between the different worlds. Having more people in the field attuned to these issues will make coordination to fulfill the adaptive work of dismantling systemic racial injustice better.

Thus, for those younger lawyers or law students who care about racial justice consider taking a tax class. Better yet, consider becoming a tax lawyer. In order to maintain the momentum of the present moment, the field needs more people to carry on this work.

#### CONCLUSION

Taxation is vital to solving many of the key racial injustice patterns. Too often those outside the field of tax have ignored it as a vital source for perpetuating the system of white supremacy. The field of taxation has also blithely ignored the issues of race, but there is now a moment where there is growing interest in these issues.

This short essay should inspire those both in tax and outside of tax to work together to turn taxation into a tool of racial justice rather than a replication of systems of oppressions. It should also inspire more people who care about racial justice to join the field and the profession. The world needs these voices, and it cannot wait.