

Testimony of
Dorothy A. Brown
Martin D. Ginsburg Chair in Taxation, Georgetown University Law Center
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Chairman Himes, Ranking Member Steil, and members of the Committee: Thank you for inviting me to share these views on the role of tax policy in exacerbating economic disparities.

In my testimony today, I will make the case for how race plays an important role in tax policy even though the Internal Revenue Code does not explicitly mention race. I will use the tax subsidies for marriage, retirement accounts, housing, and children as examples. The one thing that I hope you remember from what I will be sharing today is that by ignoring race in tax policy discussions, you ignore the higher taxes that many *white* Americans are also paying.

I Became A Race and Tax Scholar by Accident

I went into tax law to get away from race. Growing up in the South Bronx and experiencing racism regularly made me want to practice a type of law that had nothing to do with race. And I thought that I would find it in tax law. I majored in accounting in college, took tax classes in law school and after graduating law school, received a Master's degree in Tax Law. Never once was race ever mentioned in any of my classes. That seemed about right to me given that the Internal Revenue Code says nothing about race.¹ In my view, the only color that mattered was green. As I write in my book *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans – And How We Can Fix It*,² I have never been more wrong about anything in my life.

How I came to the realization that race and tax law were inextricably linked was a journey that began at my parents' kitchen table where every Spring I would prepare their tax returns. My mother was a nurse and my father was a plumber. Their tax returns were straightforward, yet I was always struck by two things: (i) my mother and father earned almost identical amounts; and (ii) I always thought they paid too much in taxes. I knew that I had not missed anything, but my gut told me something was wrong. I would never have figured it out had I not become a law professor.

One day in the early 1990s, while on the faculty at George Mason Law School (now Antonin Scalia Law School) I had time to read an article by a respected mentor that asked the

¹ See Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 Tax Law Review 1, 9- 11 (2019) (author describes instances where the Internal Revenue Code is not colorblind, yet no data is collected or published).

² Dorothy A. Brown, *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans-And How We Can Fix It* 5 (Crown Publishing Co. 2021).

following question: To what extent have our tax laws been distorted ... by... racism?³ In that moment, I started to question everything I thought I knew about tax law. I decided that I would try to answer the question, and the first roadblock that I hit was a lack of race and tax data. Neither the Internal Revenue Service (IRS) nor the Treasury Department (Treasury) publishes tax statistics by race. That makes them outliers when compared with other government agencies.⁴ (And although President Biden signed a racial equity order last January that requires federal agencies to disaggregate data by race, almost eighteen months later we still have no data.⁵)

As a result of the choices made by Treasury and IRS, I began looking at economic disparity statistics by race and applying my tax knowledge because I was determined to answer the question raised by my mentor. One day I came across the following sentence in a publication by the U.S. Commission on Civil Rights: “On average married black women contribute 40 percent to household income compared with only 29 percent for white women.”⁶ To anyone else, that may not have been all that remarkable a statistic, after all, black women have historically worked outside the home more than white women,⁷ but to me that sentence was tax gold. And, as it turned out, that sentence would lead me to uncover why my parents paid so much in taxes.

Marriage Creates Tax Winners and Losers Based Upon Race And Class

The joint return operates so that when households have a spouse who is the sole wage earner (contributing at least 90 percent), that couple gets a tax cut when they marry referred to as “a marriage bonus.” On the other hand, married couples where spouses contribute roughly equal amounts to household income like my parents (contributing at least 40 percent), pay higher taxes once married referred to as “a marriage penalty.”⁸ I would have never solved the puzzle of my parents’ tax returns by looking for an answer in the Internal Revenue Code, because my parents were paying what the law required them to pay. Instead, I had to look outside of the Code – to the way my parents’ labor contributed to the household- to solve the mystery. My parents paid too much in taxes because they both worked full-time. My father, like many black men, did not earn enough money to be the sole breadwinner in our household. And my mother would not have been happy if she was unable to work in her chosen profession. Research shows that no matter how high the husband’s income, black wives are more likely to contribute significant amounts to household income than white wives.⁹ Black wives make different choices from white wives.

³ Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 Duke Law Journal, 39, 101 (“To what extent have our tax laws been distorted now and historically by the question of slavery and continuing racism?”).

⁴ Bearer-Friend, *supra* note 1, at 65.

⁵ Department of Treasury, *Equity Action Plan: One Year Progress Report*, April 2022 (“Treasury has made progress in developing sound methods to impute demographic data.”).

⁶ U.S. Commission on Civil Rights, *The Economic Status of Black Women: An Exploratory Investigation*, 100 (1990). The marriage penalty starts when the lower earning spouse contributes more than 20% to household income and is the greatest at the 50/50 contribution level. That statistic told me that certain white married couples would pay a penalty, but it would be relatively small.

⁷ Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family, From Slavery to the Present* (Basic Books 2010).

⁸ Married filing separately does not help here as the penalty/bonus is a feature of the rate structure and also included in the married filing separately rate tables.

⁹ Elizabeth Potamites, *Why Do Black Women Work More? A Comparison of White and Black Married Women’s Labor Supply*, Working Paper, 2007.

By now I was on the faculty at the University of Cincinnati College of Law which had an Institute for Policy Research which worked with me to analyze the 1990 Census Bureau data for white married couples and black married couples based on each spouse's contribution level to their household. The research showed that most married black couples experience marriage like my parents and most married white couples lived in single wage earner households.¹⁰ That meant most black couples would be paying higher taxes when they got married, while most white couples would be paying less. Yet nowhere in the joint return provision of the Code is there any mention of race.

Internal Revenue Code section 6013(a) provides in part: "A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions,..." Nowhere does the provision say that black married couples pay more or white married couples pay less. Yet that is exactly what was happening. My research which has spanned over twenty-five years has shown that tax provisions can have a racially disparate impact, even though the provision never mentions race or ethnicity. That is possible because taxpayers bring their racial identities onto their tax returns. But that is only part of the explanation. The other part requires an understanding of the history behind our tax provisions. Once we understand how the joint return became law and which couples it was *designed* to benefit, we will understand why black married couples have been left behind and why over time an increasing number of white married couples have been left behind as well.

At the beginning of our progressive income tax system in 1913, only the richest Americans paid taxes. That was because our progressive rate structure is based on the concept of "ability to pay": those with more should pay more. And even though there was nothing in our tax laws that said only rich, white Americans pay taxes, that is how the law operated. The overwhelming majority of Americans of all races and ethnicities did not pay taxes. And there was no such thing as a joint return.

By 1927 roughly five percent of the richest Americans paid taxes, and one of those taxpayers was a white man named Henry Seaborn from the state of Washington. He did not like the fact that he was one of the "five percenters," so he and his tax advisors came up with a scheme to change that. Henry who was the sole breadwinner, treated half of his income as belonging to his stay-at-home wife Charlotte and she put those amounts on her tax return. Henry then only included half of his income on his own tax return.¹¹ The IRS audited their tax returns and determined all of the income should have been included on Henry's tax return and as a result Henry owed an additional \$703.01 (in today's dollars just shy of \$12,000.) The Seaborns sued and took their case all the way to the Supreme Court and won.¹² The Supreme Court ruled it was legal for Henry to put half of his income on Charlotte's tax return because Washington was a community property State, and she was legally entitled to her half. The Supreme Court also ruled in a different case, that this scheme would not work in a separate property State.¹³ That meant rich, white Americans got a tax break depending upon their state of residency. And those "five

¹⁰ Dorothy A. Brown, *Race, Class and Gender Essentialism in Tax Literature: The Joint Return*, 54 Washington & Lee L. Rev. 1469 (1997).

¹¹ According to court records, in 1927 Henry had taxable income of just under \$38,448.17. The taxpayers paid a total in taxes of the following amounts: Henry: \$152.38 and Charlotte \$168.32. Curious that even though it was his income, she wound up paying more.

¹² *Poe v. Seaborn*, 282 U.S. 101 (1930).

¹³ *Lucas v. Earl*, 281 U.S. 111 (1930).

percenters” who could not receive a marriage bonus did not like it and lobbied Congress for a solution.¹⁴ Congress obliged in 1948 when they enacted the joint return. The joint return was designed for the Henry Seaborns of the country – married white couples with the financial security and desire to choose to live off of the income of a single wage earner.

But the story got worse for married black couples, because while the married Henry Seaborns were happy with the joint return provision, the single Henry’s were not. A single Henry with the same household income as a married Henry, paid higher taxes because single Henry was unable to file a joint return and shift half of his income to a spouse. Single Henry paid what is referred to as the “single’s penalty” and now they were angry and lobbied Congress. One more historical factor to mention is that by the end of World War II, we now had most Americans – not just rich, white Americans - paying federal income taxes and any change in tax law would be felt by more taxpayers.

Congress obliged the single Henry’s with the Tax Reform Act of 1969, which lessened the single’s penalty, but introduced the marriage penalty. This is when my parents - the Browns - started paying too much in taxes. Census Bureau data showed married black couples look more like the Browns while married white couples look more like the Seaborns. Tax law treats the Seaborns favorably but not the Browns – and that is how the joint return was designed to operate. However what was bad for the Browns, eventually became bad for an increasing minority of white married couples who had more in common with the Browns than the Seaborns and paid higher taxes like the Browns.

My original Census Bureau research (based on the 1990 Census) showed that white married couples with household income between \$60,000 and \$90,000, had a higher percentage of married couples in co-equal earner households than in single wage earner households. That household income range however expanded when I analyzed the 2010 Census Bureau data. Now more white married couples in households with income between \$50,000 and \$200,000 looked like the Browns than the Seaborns and were subject to the marriage penalty. And while the 2017 Tax Cuts temporarily eliminated the marriage penalty for many married couples, it did so by significantly increasing the marriage bonus and by leaving intact existing marriage penalties found in the earned income tax credit. So even if couples like the Browns no longer pay the marriage penalty, couples like the Seaborns get even larger tax cuts.¹⁵ White taxpayers who experience marriage the way that black Americans do, get penalized as well – not because they are white, but because they are experiencing marriage the way most black Americans do.

The 2017 Tax Cuts did not eliminate the single’s penalty which remains and almost half (47%) of black Americans are single, compared with just over a quarter of white (28%) and Hispanic (27%) Americans.¹⁶ As a result, black Americans are disproportionately paying the single’s penalty along with over a quarter of other taxpayers. Even though the joint return provision says nothing about race, we see that it impacts taxpayers differently based upon race.

¹⁴ Some lobbied their state legislatures to convert from a separate property regime to a community property regime. See Carolyn Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 *Law and History Review* 259 (1988).

¹⁵ (In addition, the 2017 Tax Cuts and Jobs Act did not eliminate the marriage penalty for high income married couples and there is a higher percentage of high income black married couples paying the marriage penalty when compared with their high income white peers.) Brown, *supra* note 2, at 56.

¹⁶ Anna Brown, *Nearly Half of U.S. Adults Say Dating Has Gotten Harder for Most People in the Last 10 Years*, Pew Research Center, August 20, 2020.

Tax provisions that begin by disadvantaging black Americans eventually disadvantage white Americans.

Tax subsidies for retirement accounts, housing, and children that disadvantage black Americans also disadvantage white Americans.

In *The Whiteness of Wealth*, I discuss many other areas where our federal tax policies disadvantage taxpayers based upon race, but I want to briefly highlight a few more areas in my testimony today. My second example will be employer provided retirement accounts. Private sector employer provided retirement accounts are more likely to benefit white workers than black or Hispanic workers – but a significant percentage of white workers are left behind as well.¹⁷

The preferential tax treatment of employer provided retirement accounts is as follows: amounts set aside in retirement accounts by employees (and if there's a match by the employer, those amounts as well) are not included in the employee's gross income until retirement. If any amounts, however, are withdrawn prior to retirement (and age 59 ½) those amounts are subject to an additional tax penalty. Again we have no tax data from Treasury or IRS, but the Employee Benefit Research Institute provides relevant data.

In the private sector, for workers aged between 21 and 64, 56 percent of white workers work for an employer that offers a retirement plan compared with 50 percent of black workers, and almost 35 percent of Hispanic workers. When looking at who actually has or *participates* in their retirement accounts, the numbers paint a bleak picture. Almost 46 percent of white workers, almost 37 percent of black workers, and 25 percent of Hispanic workers actually have a private sector employer provided retirement account.¹⁸ That means less than half of white workers, a little over a third of black workers, and a quarter of Hispanic workers are not eligible for this tax break. That tax subsidy leaves behind the *majority* of black, Hispanic, and over *half* of white workers in the private sector.

My third example will be housing. There is no tax deduction for rent, as it is considered a personal, family, or living expense.¹⁹ Nevertheless, there is a tax deduction for mortgage interest for homeowners.²⁰ We know that who can own a home in America, has a sordid and racist past.²¹ But it has a racialized present as well.²² Roughly 74 percent of white Americans own homes compared with 44.7 percent of black and 49.1 percent of Hispanic, 59.4 percent of Asian, Native Hawaiian, and Pacific Islander Americans.²³ That means the majority of black and Hispanic

¹⁷ Public sector retirement plans tend to have better participation rates and fewer racial disparities: “In the public sector, 77 percent of white workers and 67 percent of black workers participate in a retirement plan.” Brown, *supra* note 2, at 149.

¹⁸ Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2013*, Employee Benefit Research Institute, No. 405 October 2014.

¹⁹ IRC §262.

²⁰ IRC §163(h).

²¹ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing Co.) 2017.

²² Brown, *supra* note 2, at 86-88.

²³ St. Louis Federal Reserve, *Housing and Homeownership: Homeownership Rate*, <https://fred.stlouisfed.org/release/tables?rid=296&eid=784188>.

Americans rent, because they do not own their own home and are left behind when it comes to homeownership subsidies. However, increasing percentages of Americans are renting.

In 2017, a Pew Research Center analysis of Census Bureau data showed “more U.S. households are headed by renters than at any point since at least 1965[.]”²⁴ The increase in renter populations cuts across all levels of educational attainment.²⁵ “White, non-Hispanic householders account for ... just over half of all renter-occupied units.”²⁶ While the majority of black and Hispanic Americans rent, a significant percentage of white Americans also rent. Denying a tax break to renters which has historically impacted a majority of black and Hispanic taxpayers, is now denying a tax break to an increasing percentage of white Americans.

My final example is the Child Tax Credit expansion that expired at the end of last year. Again, the Treasury and IRS do not publish statistics on who took advantage of the expired tax credit, but the Center for Budget and Policy Priorities analyzed Census Bureau data and came up with estimates of how many children benefitted from the expanded child tax credit. Those benefiting included 3.8 million Latino, 2.9 million white, 2.1 million Black, 426,000 Asian, and 280,000 American Indian or Alaska Native children.²⁷ More white children benefitted from the Child Tax Credit expansion than black, Asian, American Indian, or Alaska Native children combined. Refusing to extend the child tax credit expansion hurt almost 3 million white children. If the race and tax information had been included in the discussion, it most likely would have increased support and led to its continued expansion.

By ignoring race during tax policy discussions, we are working to maintain the status quo of economic inequality. The Treasury, IRS, and the Joint Committee on Taxation (regarding proposed legislation) should provide race-based analyses. Without it, taxpayers like the Seaborns will continue to win and those like the Browns will continue to lose. We also miss an opportunity to highlight the common ground that many taxpayers have across racial and ethnic lines. We can and should use race and tax data to create tax policy that is good for the many and not the few.

A Wealth Tax Credit Can Reduce Economic Disparities in our Tax System

One potential tax provision that could reduce economic inequality would be a wealth tax credit that I have proposed in *The Whiteness of Wealth*.²⁸ The wealth tax credit would apply to all taxpayers regardless of race and/or ethnicity living in U.S. households with below median wealth which is roughly \$100,000.²⁹ A wealth tax credit would help low-wealth taxpayers of all racial and ethnic backgrounds. It would help taxpayers who look like the Browns but not those who

²⁴ Anthony Cilluffo, A.W. Geiger and Richard Fry, *More U.S. households are renting than at any point in 50 years*, Pew Research Center (July 19, 2017).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Kris Cox, Chuck Marr, Arloc Sherman, and Stephanie Hingten, *If Congress Fails to Act, Monthly Child Tax Credit Payments Will Stop, Child Poverty Reductions Will Be Lost*, Center on Budget and Policy Priorities, December 3, 2021 <https://www.cbpp.org/sites/default/files/12-2-21tax.pdf> Children identified as Latino may be of any race, while children identified as Asian, Black, or white refer to that race and that race only.

²⁸ Brown, *supra* note 2, at 220-222.

²⁹ Juliana Menasce Horowitz, Ruth Igielnik and Rakesh Kochhar, *Trends in Income and Wealth Inequality*, Pew Research Center, January 9, 2020, <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/>.

look like the Seaborns. Because of our racial wealth gap, the wealth tax credit would disproportionately help black and Hispanic taxpayers *because* of the racial wealth gap.

The wealth tax credit would be refundable, which means if a taxpayer's liability was reduced below zero, the difference would be "refunded" to the taxpayer. A refundable wealth tax credit is different from the earned income tax credit in that it is measured by household wealth, whereas the earned income tax credit is a function of income. In addition, while the earned income tax credit is extremely complicated, a wealth tax credit could be quite straightforward to implement. It could be a fixed amount that each taxpayer is eligible to receive eliminating any possible confusion as to the amount of the credit claimed. If the taxpayer lives in a household with below median wealth, the taxpayer is eligible for the refundable wealth tax credit. It could be a tax credit that ends after a term of years, or after the wealth gap decreases. The *idea* of a refundable wealth tax credit is the important point, and the actual details should allow for flexibility in order to obtain political consensus.

Focusing on the role of race in tax policy means we would have a more robust picture of how our tax laws operate in American households. Tax policies that disadvantage black families also hurt many white families. Making our tax laws fairer for black Americans will make it fairer for white Americans, Hispanic Americans, Asian and Pacific Islander Americans, and Indigenous Americans. Every taxpayer – even rich, white taxpayers- should pay their fair share and connecting tax reform and race will help us get there.