RACIALIZED TAX INEQUITY: WEALTH, RACISM, AND THE U.S. SYSTEM OF TAXATION

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This article presents two perspectives on big-picture trends in federal and state taxation over the past 40 years. A long-term sociological view (the why) reveals the historical racialization of wealth and a shift starting around 1980 in the tax system collectively to protect and exacerbate wealth inequality, which is fueled by racial animus and anxiety and perpetuates racial wealth disparities. A critical tax view (the how) highlights a shift, over the same time period and manifested at both federal and state levels, from taxes on wealth to taxes on income to taxes on consumption—from greater to less progressivity, which disproportionately benefits Whites while disproportionately burdening Blacks and other People of Color. Together, these perspectives reveal the connection between race and wealth inequality and the increasing structural racism of the U.S. tax system overall.

INTRODUCTION

This article emerges from a series of conversations between the authors. Though both of us are professors of law, one of us (Palma) has written extensively on racism in the U.S. and its evolving manifestations over time. The other (Nick) is a tax specialist with a tax lawyer’s grasp of the intricacies not only of federal tax law but of state and local tax law as well.

Awareness of the ways racism as a system of advantage and disadvantage acts to perpetuate racial disparities and concern about increasing wealth inequality have both been rising in recent years. The specific genesis of this article was a simple—though not straightforward—
question from Palma to Nick: “Could the tax system overall be the current mutation of U.S. racism—acting to incrementally but decisively benefit White taxpayers and burden Black taxpayers and other taxpayers of color—apart from any explicit racial intent to discriminate?”

In Part I, Palma sets forth the case for posing the question. She links taxes and inequality as well as race and inequality. She traces the evolutionary history of racism in the United States and highlights relevant features of wealth in the 21st Century. Her conclusion is that the tax system is the new racism.

In Part II, Nick examines federal and state tax systems holistically, searching for evidence to support or challenge Palma’s assertion. He finds ample support in the federal Internal Revenue Code (“IRC”) and even more evidence in a survey of state tax systems. The IRC and many state tax codes operate directly to increase wealth inequality which, because of pre-existing historically-based racial wealth disparities, deepens those disparities. The recent Tax Cuts and Jobs Act of 2017 (“TCJA”) intensifies these effects.

Finally, in Part III, we together assess the political, legal, and social landscape that has led us to the current status quo of racialized tax inequity, which perpetuates racialized wealth inequality. In this Part, we also highlight the connection between tax inequity and investment in public infrastructure, and we offer some initial insights regarding strategies for moving toward equity.

I. TAXES, INEQUALITY, AND RACISM AS A SYSTEM OF ADVANTAGE AND DISADVANTAGE

A. Inequality and Taxes are Connected: A Systems View

When most of us file our individual Federal tax returns on April 15, we focus on our own personal bottom line: Do I have a balance due or do I get a refund? The calculations for arriving at the answer to this question—as well as the “how much”—are often simply a matter of arithmetic gymnastics applied to receipts and recordkeeping.

As individuals, we rarely pause to consider our overall tax contribution: Federal and state income taxes on revenues we receive, local property taxes on real estate or personal property we own or incorporated into rent we pay,
sales taxes on what we buy, Social Security and Medicare payroll taxes on what we earn, meals and lodging taxes when we travel or go out to eat. And those are just the starting point. Those of us who are very wealthy might encounter estate or inheritance taxes; those of us at the opposite end of the wealth spectrum might benefit from an Earned Income Tax Credit. We help corporations both make money and pay their taxes when we purchase the goods and services they offer. We support roads through gasoline taxes and public transit through transportation taxes.

While our taxes support the government, the government is supporting us through our taxes. When we deduct the interest paid on our home mortgage, the government forgoes revenue in order to boost our ability to purchase a home. Similarly, income that isn’t taxed when we earn it because we are committing it to health or retirement helps our dollars go further. Investment earnings on savings for our kids that aren’t taxed when they are used to pay for college – that tax forgiveness helps pay tuition. These tax expenditures—taxes diminished or forgiven, which create a net benefit or offset against taxes otherwise owed—these are also part of the overall tax system.

In this article, we take a giant step back from an individual perspective to view taxes holistically as a system comprised of all of the taxes listed above—and more. Taxes comprise the primary financial mechanism through which our community (writ large) raises revenues to support expenditures that benefit the collective. These expenditures, which originate primarily with government, are generally referred to as “public” though they are disbursed to or directly benefit private individuals. As the tax system has become more complicated, moreover, the “tax expenditures” described above are of increasing importance. Along with direct expenditures paid for by tax-raised revenue, they are net negatives to the public balance sheet and net positives to the individuals they benefit.

While it is easy to get drawn into the tax weeds with an analysis of the effectiveness of this tax deduction or the equity of that marginal rate, our project in this article is to sketch the ecosystem within which those weeds flourish and to explore in particular the question of what goal or goals this system overall is currently operating to accomplish – and why.

We started down this path with a few simple observations. As a starting point, inequality, especially wealth inequality, has been rising in the U.S. since the 1970’s and is now higher than it has been at any time since the late 1920’s before the stock market crash of 1929 and the subsequent Great
Depression. Robert Reich, U.S. Secretary of Labor under President Clinton, popularized both the fact and the dangers of inequality with the 2013 film documentary *Inequality for All*, based on his 2010 book *Aftershock*, which tied the housing and financial crisis of 2008 and 2009 to the enrichment of the wealthy and the languishing economic capacity of the middle class. Shortly thereafter, Joseph Stiglitz, winner of the Nobel Prize in Economics, warned in his 2012 book *The Price of Inequality* of the detrimental effects of growing inequality in terms of lackluster investment in people and in both social and physical infrastructure, and he tied that inequality explicitly to the increasing political influence of the financially well-off. Just recently, a billionaire founder of the world’s largest hedge fund cautioned that current income and wealth inequality is a “national emergency” that along with a conflicted government can yield a dangerous populism that threatens our democracy.

Around the same time, The Occupy movement brought the issue of inequality to the national public consciousness with demonstrations and protests. Naming the “1%”—the people in the top one percent of the wealth and income distribution—provided a vivid shorthand description of the problem. The publication of a high-profile research paper by four economists documenting the doubling in the U.S. over the prior 30 years of the share of total income received by the top 1% affirmed this focus on the most acute manifestation of wealth inequality. And the first of four contributing factors identified by Alvaredo, Atkinson, Piketty, and Saez was tax policy. In 2010, “the top tax rate in the U.S. was less than half its 1950 value,” and “there is a strong correlation between the reductions in top tax rates and the increases in top 1 percent pre-tax income shares.”

1 Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, NBER WORKING PAPER 20625 (October 2014) (most of this wealth inequality is due to the concentration of wealth in the top 0.1%); Gabriel Zucman, *Global Wealth Inequality*, NBER WORKING PAPER 25462 (January 2019).
2 *Inequality for All* (2013).
7 Id. at 7.
8 Id. at 7-8.
More recently, the inequality spotlight has widened to focus on the larger swath of upper income earners. In 2017, Richard Reeves called out the top 20% in his book *Dream Hoarders: How the American Upper Middle Class is Leaving Everyone Else in the Dust, Why That is a Problem, and What to Do About It.* Reeves made the case that the top quintile benefits disproportionately from a bundle of federal government policies that help that cohort build wealth and pass that wealth on to the next generation. 401(k) pensions relieve children of costs associated with caring for aging parents, and 529 college tax-deferred accounts subsidize investment of the human capital of those same children. Meanwhile, the home interest mortgage deduction supports those able to buy expensive upscale homes in neighborhoods with good schools, paid for with tax-subsidized local property taxes that have also been deductible and thus tax-subsidized.  

In a similar vein, Matthew Stewart announced *The Birth of a New Aristocracy* in *The Atlantic* in 2018. For this group, income and wealth inequality go hand in hand with social and class immobility. Those who are in the top 9.9%—the top 10% minus the much-bruited super-rich—are riding the inequality wave while denying that they are anything other than middle class. Stewart asserts, “In between the top 0.1 percent and the bottom 90 percent is a group that has been doing just fine…[A]s a group, it owns substantially more wealth than do the other two combined.” And, despite substantial government largesse in the form of tax expenditures—“reverse taxation…[as to which] the bottom 90 percent haven’t got a clue,”—“we’ve convinced ourselves that we don’t have any privilege at all.”

Three themes emerge from this chorus. First, economic inequality has been rising and has reached a level at which it has the potential to destabilize our social compact. A functioning democracy depends on all groups in society having—or perceiving that they have—representation and a voice in government decision-making. If the wealthy can buy influence...
and others are shut out, the government ceases to become “theirs.” Similarly, a functioning economy depends on all groups in society having—or perceiving that they have—the opportunity to succeed. If the well-off can consolidate and perpetuate the economic status of their children, and in doing so consign the children of others to the lower rungs of the economic ladder, the economy ceases to enjoy the support of all. The problem of inequality is related to the problem of poverty, but it is distinct. Poverty describes the condition of particular individuals. Inequality describes a relationship among individuals and groups within the larger polity and/or economy.\textsuperscript{14} It is a system characteristic.

Second, inequality is manifested through wealth as well as income. Wealth and income are related—wealth generates income and income can generate wealth. In our system of private property, however, wealth can be directly protected, preserved, and transferred over time. The Takings and Just Compensation Clauses of the Constitution protect wealth. Property and trust law protect and preserve wealth. Inheritance law provides for the transfer of wealth. In contrast, income, at least earned income, is contingent on the continued health and economic relevance of the skills of the earner. There are no guaranteed legal rights to income or even, in the U.S., a human right to be gainfully employed and free from unemployment.\textsuperscript{15} In systems terms, income is a flow; wealth is a stock: Income is the water that flows into or out of the bathtub, while wealth is the reservoir of water in the tub.\textsuperscript{16} The behavior of the system depends on both flow and stock, income and wealth.

Third, taxes affect inequality. Specifically, the current tax regime has contributed/is contributing to the high levels of inequality that exist today. Alvaredo et al. point to the effects of tax rates for the income tax, especially the marginal rates on top incomes. Stiglitz advocates full-rate taxation of income from capital.\textsuperscript{17} Reich proposes taxing wealth by bringing back a robust estate tax.\textsuperscript{18} For example, estimates are that only 0.07 percent or 1 in

\textsuperscript{14} \textit{See also} \textsc{Richard Wilkinson} \& \textsc{Kate Pickett}, \textit{The Spirit Level: Why More Equal Societies Almost Always Do Better} (2009).
\textsuperscript{15} Compare \textsc{International Covenant on Economic, Social, and Cultural Rights}, Article 6 (right to work), not ratified by the United States.
\textsuperscript{16} \textsc{Donella Meadows}, \textit{Thinking in Systems: A Primer} (2008).
\textsuperscript{17} \textsc{Joseph Stiglitz}, \textsc{Joseph Stiglitz Says Standard Economics Is Wrong, Inequality and Unearned Income Kills the Economy}, \textsc{Evonomics}, \url{http://evonomics.com/joseph-stiglitz-inequality-unearned-income/}.
\textsuperscript{18} \textsc{Robert Reich}, \textit{To Restore Our Democracy We Must Tax Wealth}, \textsc{Newsweek} (Sep. 18, 2017), \url{https://www.newsweek.com/robert-reich-restore-our-democracy-we-must-tax-wealth-666856}. 
1,400 of all the people who died in 2018 would pay any federal estate tax.\footnote{19} Reeves and Stewart focus on the cumulative effect of a series of federal tax expenditures that are universally available but that in fact accrue heavily to a cohort of 10-20\% who fall at the top of the income and wealth distribution. Consensus on the importance of taxes to inequality is combined with divergence in terms of which specific tax provisions are the key levers.

While much tax analysis focuses on the particular behavior sought to be encouraged or discouraged by a specific tax expenditure or imposed tax, the contribution of tax policy and practice to inequality is multi-faceted. If inequality is a characteristic of our society as a whole, viewing taxes holistically illuminates system dynamics not apparent from more segmented investigations. In systems theory, taxes are an essential strategy for breaking a “loop of the rich getting richer and the poor getting poorer.”\footnote{20} They do this by shifting wealth away from the rich through a financial contribution to the public or community good, which entails redistributing wealth toward the poor in the form of social welfare expenditures, including especially robust health care and public education.\footnote{21} Taxes keep a “success to the successful” system loop from spinning out of control. Taxes bring stability to a social/economic system.

\section*{B. Race and Inequality are Connected: A Brief History}

The inequality Cassandras described above focus on straightforward economic inequality in which the rich are simply the rich and the poor are simply the poor. Other investigators of inequality, however, have documented that the rich tend to be White and the poor tend to be people of color. In terms of income, Black men’s hourly earnings in 2016 averaged 70\% of White men’s hourly earnings; Black women’s hourly earnings averaged 82\% of White women’s hourly earnings.\footnote{22} These wage disparities have actually increased since 1979, when the percentages were 80\% and

\footnote{20} Meadows, \textit{supra} note 16, at 130.
\footnote{21} \textit{Id.}

Electronic copy available at: https://ssrn.com/abstract=3442674
95% respectively. Further, both Black men and Black women experienced higher unemployment than Whites. And in terms of wealth, White household wealth currently averages about 10 times that of Black household wealth and about 8 times that of Latinx household wealth. For African-Americans in particular, racial wealth disparities are of long standing and are historically grounded.

Historical waves of nation-scale wealth-building initiatives accrued primarily to the benefit of Whites, both native and foreign-born, and excluded Black citizens and other people of color. The institution of slavery, serving as the foundation for much of the nation’s wealth, funneled the economic benefits of the labor of Black people almost exclusively to White people who were slaveowners or who engaged in commercial enterprises built on or tied to the labor of Black enslaved people: Textile mills and insurance, both based predominantly in the North, are examples.

Following the Civil War and the abolition of slavery, Reconstruction failed to deliver on the promised “forty acres and a mule” for those who had been enslaved and were now free. Beginning in 1862, the Homestead Acts opened up vast acreages in the Midwest and West for acquisition by ordinary people. Though the resulting farms and ranches provided a secure toehold on the American ladder of success for many Whites—immigrants from places such as Germany and the Scandinavian countries as well as overland migrants from the Eastern seaboard—newly-freed Black citizens were generally excluded.

When the push of lynchings and pervasive violence in the South and the pull of labor shortages in the North led to the Great Migration over the first half of the 20th century, locally segregated neighborhoods and discrimination in access to housing were brought to national scale by redlining and Federal mortgage policies beginning in the 1930’s. Federally-

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23 Id.
24 Id.
26 Id.
supported investment in White neighborhoods and disinvestment in Black or racially-mixed neighborhoods provided public subsidies that gave White citizens the opportunity to build private wealth in the form of home equity. Again, Black citizens were generally excluded. Less tangibly during the mid-20th century, labor and organizing protections, social security, and the GI Bill’s door to education—all Federal investments in a wide swath of citizens—redounded primarily to the advantage of White citizens, with resulting relative disadvantage of Black citizens.29

Overall, massive Federal wealth-building programs over centuries have successfully created a large body of citizens—often described as the “middle class”—with sufficient family wealth to serve as both an economic springboard and an economic buffer. The cumulative result of the racial skew of these programs over time is starkly evident today. White families hold more wealth than Black families, and the racial wealth inequities that exist today resulted from systematic and repeated actions by government over centuries that intentionally afforded White citizens access to private wealth while excluding Black citizens and other people of color. Today these racial disparities perpetuate themselves through inheritances passed from older White generations to younger White generations30 and other intergenerational wealth transfers.31

In describing discrimination, we often focus on the way differential treatment disadvantages an identified group. This focus on disadvantage has the effect of “norming” the treatment of the advantaged group. For example, suburban homeownership with home equity is characterized as a benefit that “most people” enjoy, and discrimination becomes the exclusion of some from suburbia. Yet discrimination just as effectively takes the form of preferential treatment of one group, resulting in advantage for that group. Discrimination also takes the form of huge and longstanding federal subsidies for White suburbs, wealth-building in the form of home equity in “desirable” (predominantly-White) neighborhoods, and high-performing suburban schools with populations that include low percentages of children in poverty, populations that happen to be predominantly White.

For most “middle class” families, the bulk of the wealth that Federal wealth-building programs facilitated during the 1900’s is today held in home equity. Homeownership and home equity give those families a

30 Strand, Inheriting Inequality, supra note 27

Electronic copy available at: https://ssrn.com/abstract=3442674
“stake” in their local communities and in the nation as a whole. Black citizens, as compared to White citizens, are less likely to own their own home. In the fourth quarter of 2018, for example, the national non-Hispanic White homeownership rate was 73.6%; the Black homeownership rate was 42.9%. When Black citizens do own homes, those homes on average provide lower levels of home equity wealth than White citizens. In 2016, “Black homeowners also had less than half the home equity of white homeowners—$45,000 compared with $92,000, respectively.” Though racial discrimination in housing was outlawed 50 years ago in 1968 by the Fair Housing Act, many institutional practices on the part of both government and private entities continue to advantage White citizens in the enterprise of building wealth through homeownership.

C. Evolution of Racism: Legal and Institutional Forms Change, but Remain the Same

The history of racism in the U.S. is one of evolution. Slavery was the foundational economic institution on which U.S. capitalism was built. Following the abolition of slavery, convict labor systems evolved to control and exploit Black men. Lynchings and White Supremacy in the form of the separate-but-equal system of Jim Crow evolved in the South to suppress Black economic success and social resistance. In response to the Great Migration, housing segregation and redlining led to racial disparities in wealth and disproportionate exposure to poverty and poor neighborhoods in the North as well. Mass incarceration of Black men and an epidemic of

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32 U.S. Census, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2018 (Feb. 28, 2019) Table 7.
34 Hanks et al, supra note 24; Dorothy Brown, Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Inequity, 49 U. OF MEM. L. REV. 205, 222 (2018) (a study of the first decade of this millennium revealed that between 2003 and 2005, as well as between 2005 to 2007, white housing net worth increased by approximately 50% while black housing net worth decreased by 23% and 47%, respectively).
37 DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2009).
housing insecurity for Black women and children today perpetuate exclusion and marginalization of African-Americans in the U.S. And the continuing effects of housing segregation and differential neighborhood investment are manifest.

In particular, the legacy today of decades of redlining and other differential neighborhood investment is coming to light. Maps of many metropolitan areas tell a powerful story. Redlined areas to which African-Americans and other people of color were historically restricted are often today areas of concentrated racial or ethnic poverty. These neighborhoods have poorer schools, often in separate school districts. Health outcomes, employment, exposure to crime – all of these racial disparities are, in the words of legal scholar John a. powell, “inscribed in geography.”

The institutional arrangements that perpetuate these racial disparities are often hidden, though sometimes hidden in plain sight. Exclusionary zoning effectively occurs when there is an absence of inclusionary zoning. School district lines and funding structures concentrate funding for public schools in up-scale, predominantly White neighborhoods and allow Black neighborhoods with fewer financial resources, the result of disinvestment over years, to fend for themselves. Neighborhoods of people of color are torn up to build interstate freeways. Food deserts are created when local incentives go to stadiums rather than grocery stores. Parsing causation of deep-seated and historically normed practices entails sophisticated critical institutional forensics.

The long view of the history of race, racism, and wealth in the U.S. in

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39 Matthew Desmond, Evicted: Poverty and Profit in the American City (2016).
42 See, e.g., Strand, “Mirror, Mirror,” supra note 40.
44 See, e.g., Strand, “Mirror, Mirror,” supra note 40; Strand, Invisible Hands, supra note 41.
the centuries before the nation’s formal creation highlights two important themes. First, the broad brush is that over the course of centuries there has been a transfer of wealth in this country from African Americans to Whites of almost unimaginable scope. Black labor literally built much of the nation, and the lion’s share of that labor was unpaid or underpaid. Using that labor, White owners and investors created and consolidated capital enterprises that shape the nation’s economy today. As the nation democratized and the Federal government began to view broad-based wealth-building opportunities as in the national interest, White citizens were given access to those opportunities while Black citizens and other people of color were most often excluded. Through private, individual ownership, the Homestead Acts consolidated the U.S. hold on land in the middle and western parts of the continent. Home mortgages and the GI Bill built a solid base of middle class of human capital that enabled the post-WWII economic boom.

Second, racism and racial practices that advantage White citizens and disadvantage Black citizens are deep-seated and difficult to eradicate. With each historical social movement for equality and equity—Abolition, Reconstruction, the anti-lynching movement, the Civil Rights Movement—more overt form of institutionalized and legalized racism is replaced by a less overt form that is nonetheless potent. Current anti-discrimination law was constructed to counter Jim Crow de jure racism and is geared to overt and intentional acts of discrimination. Current law has shown itself incapable of taking on racial discrimination that is embedded in institutional arrangements that are racially neutral on their face. Yet this form of systemic racism is pervasive today.

The present legal course was charted in the 1970’s and has been followed ever since. In addition, even where anti-discrimination statutes explicitly go beyond racial neutrality to address the continuing effects of past discrimination that was overt and explicit, enforcement of legal requirements has been less than robust and continues to weaken. The Affirmatively Furthering Fair Housing (AFFH) provision of the Fair Housing Act of 1968, adopted to redress the federal government’s own role in housing discrimination over decades, was briefly given teeth through

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45 See, e.g., Daniel Feller, Andrew Jackson: The American Franchise (“By the time Jackson was elected [in 1828], nearly all white men could vote and the vote had gained in power.”), https://millercenter.org/president/jackson/the-american-franchise.

HUD regulations in 2015; those regulations were suspended in early 2018.47 The preclearance provisions of the Voting Rights Act of 1965, re-endorsed by Congress at several points, were eviscerated by a Supreme Court in 2013 that saw history as entirely in the past.48

Current legal doctrine holds racial disparities, even the best-proven and most-acute, to be beyond the purview of the Constitution’s guarantee of the Equal Protection of the Laws.49 Current Chief Justice John Roberts, for example, embraces the racially naïve “colorblind” view that “the way to get past racial discrimination is to stop discrimination based on race.”50 Justice Sotomayor, in contrast, has strongly rebutted this view:

In my colleagues’ view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.51

Though the current Supreme Court majority is steadfast in its denial of legal consequences arising from the profound racial disparities caused by entrenched racial practices rooted in the past and continuing to the present, more and more books, articles, websites, and videos are rendering visible the previously invisible geographical structure of racial advantage and disadvantage.

Challenging each iteration requires first naming and describing it and then organizing for resistance and change. The current rising documentation of and awareness about systemic and institutionalized racism that results in racial disparities that are inextricably intertwined with economics and wealth is hopefully laying the groundwork for the next big step toward racial equality. At the same time, resistance to dismantling the current iteration of racism arises from those who benefit from the status quo.

47 Strand, “Mirror, Mirror,” supra note 40; Strand, Invisible Hands, supra note 41.
D. Wealth in the 21st Century: Different Assets, Same Racial Disparities

In the 21st century, financial assets and human capital are of increasing importance in the calculus of wealth. The center of gravity of wealth has shifted over the past two hundred years from land in an agricultural economy to tangible assets in an industrial economy to financial instruments and human capital in a post-industrial knowledge economy. Law professor John Langbein noted this shift in the context of inheritance in the 1980’s, observing that intergenerational wealth transfers were shifting away from businesses and other concrete assets. Rather, wealth increasingly was, and is being transferred in families by older generations relieving successive generations of the burdens of care through increasing provision of pensions to cover expenses associated with aging as well as investment in the human capital of younger generations through education.52

The defined-benefit pensions that predominated at the time Langbein was writing, which were provided primarily by corporate employers, have been overtaken by defined-contribution retirement savings plans, which operate through tax incentives extended to individuals.53 “Education-as-inheritance”54 also enjoys substantial financial government support via the tax system—through college savings plans55 as well as deductions for local property taxes that fund public schools and home interest mortgage to purchase homes in “desirable” (low-poverty, high-tax-base, often predominantly-White) school districts.56 Both of the latter deductions provide greater benefit to taxpayers buying premium homes in premium districts.57

These knowledge-economy forms of wealth—financial assets such as pensions, and access to top-quality education—manifest significant racial

52 Langbein, supra note 10.
55 See, e.g., Name the top 7 benefits of 529 plans (August 29, 2018), https://www.savingforcollege.com/intro-to-529s/name-the-top-7-benefits-of-529-plans.
56 See supra note 10 and accompanying text. The cap on these deductions was lowered by the Tax Cuts and Jobs Act of 2017 from $1 million to $750,000 for married taxpayers filing jointly.
57 Dorothy Brown, Shades of the American Dream, 87 WASH. U. L. REV. 331, 332 (2009) (“For the majority of blacks, homeownership is a poor financial investment. . . . But the vast majority of whites receive better neighborhoods, better schools, less crime and a good financial investment when they become homeowners.”)
disparities. As noted above, average White household wealth is 10 to 14 times \(^{58}\) that of average Black household wealth. The racial disparities for financial wealth are even more acute. Before the housing crisis of the late 2000’s, while the median Black wealth hovered around 10% of median White wealth, median Black financial wealth came in at 0% of median White financial wealth: ($0 to $6,999 in 1995 based on 1980’s data). \(^{59}\) The current picture with respect to retirement savings specifically reveals significantly less of a pension wealth “cushion” for Black families than for White families. In 2016, “[o]nly 37.5 percent of nonretired blacks had retirement savings plans—401(k)s and IRAs—compared with 65.9 percent of whites. Blacks had a median balance in retirement savings that was approximately one-third that of whites—$23,000 compared with $67,000, respectively.” \(^{60}\) The latter comparison, it is important to note, includes only those who have any retirement savings.

With respect to education, the picture is less clear because so many factors contribute to families’ ability to invest in the next generation. Most directly, families with greater wealth can use that wealth to pay for child enrichment, to buy into school districts with high-performing public schools, \(^{61}\) to pay for college preparation support, as well as to actually pay for college. \(^{62}\) With lower net worth, Black parents have fewer resources to apply to educating their children. Home equity, as Tim Wise points out in *White Like Me*, the author’s reflection on his own White privilege, provides a nice nest egg for college tuition. \(^{63}\) White families are simply more likely to have such a nest egg—and to have it be plumper when they do. Similarly, of families that use 529 accounts to save for their children’s college, White families save $3,081 on average while Black families save $987. \(^{64}\) The need for Black students to assume more debt to pay for college leads to a lower return on investment for higher education generally: While the median wealth return to college graduation for White students is

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\(^{58}\) William Darity et al, “What We Get Wrong About Closing the Racial Wealth Gap” (April 2018) p. 2 (“Recent data from the Survey of Income and Program Participation (2014) shows that black households hold less than seven cents on the dollar compared to white households.”).

\(^{59}\) Strand, *Inheriting Inequality*, supra note 27, at 461-462.

\(^{60}\) Hanks et al, *supra* note 25.


\(^{63}\) TIM WISE, WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON (2004).

\(^{64}\) SALLIE MAE, HOW AMERICA PAYS FOR COLLEGE 2014, p. 20.
$60,000, it is only $4,846 for Black students and $4,191 for Latinx students.65

More indirect factors related to housing and wealth also have a racial skew. Recent work by the Raj Chetty Moving to Opportunity team, for example, shows that growing up in a neighborhood with greater resources increases a child’s chance of going to college.66 Sean Reardon et al, however, have shown that access to “neighborhoods of opportunity” is racially distributed:

In general, children growing up in poor families face a double disadvantage. Their families have fewer private resources than richer families, and they tend to live in poorer neighborhoods, meaning they have access to fewer contextual resources as well. Even more troubling...low-income black and Hispanic children face a triple disadvantage relative to middle-class white children: not only do their families have fewer private resources and live in poorer neighborhoods, but they also live in much poorer neighborhoods than equally poor white children. Given that neighborhood conditions matter for children’s development, the joint patterns of racial and economic segregation described here suggest that children of different races and incomes face dramatically different life opportunities.67

The increasing importance of financial forms of wealth such as pensions and 529s compound the effects of more tangible forms of wealth such as home equity.

More deeply, the growth of new forms of wealth—financial and human capital—reveals how the acquisition of new forms of wealth is supported by

67 Sean Reardon, Joseph Townsend, & Lindsay Fox, A Continuous Measure of the Joint Distribution of Race and Income Among Neighborhoods, RUSSELL SAGE J. SOC. SERV. (Feb. 2017) p. 53.
the possession of older wealth. Home ownership and home equity, for historical reasons held disproportionately by White households, create access to education and human capital through enrollment in predominantly White suburban schools. Homeownership and home equity also support this growth in human capital by providing wealth that can be applied to college tuition, which provides access to a level of education that is critical in the knowledge economy. Human capital in upcoming generations provides access to high-paying employment, the kind of employment that provides access to private pension plans and that allows surplus income that facilitates investment in the financial wealth that supplements home equity, as well as high-quality education for the next generation.

E. The Tax System is the New Racism

Two constants and two variables emerge from the discussion to this point. The first constant is the inverse relationship between progressive taxation and inequality: Higher levels of redistribution lead to lower inequality. As described above, the counters to an inherent tendency in the wealth system for the rich to get richer and the poor to get poorer are public in nature. Public tax revenues can pay for robust and effective public education, which when universally available can “crowd out” well-off individuals investing privately in their children’s education. Public tax revenues can fund public pensions, roughly represented by Social Security, which can minimize the need for private pensions. But public goods only counter the escalating tendency in the system if they are redistributive—if the revenues paying for them come from taxation that is progressive, if net benefits flow from the rich to the poor.

The second constant is the direct relationship in the U.S. historically between race and wealth in the form of White advantage invariably accompanied by Black disadvantage. Racial disparities not only in wealth but in other areas of well-being to which wealth makes a direct contribution—education, health, liberty, income, and more—are not asymptotically approaching zero. Far from it.

The first variable is the form taken by racism, defined as a system of advantage based on race. Slavery gave way to convict labor gave way to lynching and Jim Crow gave way to redlining and racially determined patterns of neighborhood investment and disinvestment. And, following the civil rights strictures of the 1960’s, these overt institutions of racial

68 See supra note 16 and accompanying text.
69 Strand, Education-as-Inheritance, supra note 10, at 297-301.
discrimination gave way to social and legal structures that reproduce racial disparities in a facially race-neutral manner. Mass incarceration and continuing racial disparities in health, education, safety, and more are the products of today’s racism. Though the system of racial advantage has not changed, the form that system takes has mutated.

The second variable is the form of wealth. Home equity is still important, as is the location of the home in which that equity lies. Financial assets such as pensions and college funds now augment the middle-class wealth cushion for many White households—far more than for Black households. And human capital, developed through education, is increasingly valuable in the knowledge economy.

If racism is continuing to evolve and if a core imperative of racism relates to differential wealth creation, the question arises: What is the current mutation, the new institutions, laws, and practices that are perpetuating racial inequity without as yet having been recognized and named? How is racism continuing to operate to the advantage of White citizens while disadvantaging Black citizens and other people of color? The Civil Rights reforms of the 1960’s sent racism underground, yet we continue to see today the tangible effects of the overtly racist policies of the past, including those of the 20th century.

Going more deeply, what institutional structures and systems have evolved over the past half-century that are operating “under the radar” while at the same time having large-scale and pervasive racist effect? We use the word “racist” here in psychologist Beverly Daniel Tatum’s sense: Building on her definition of “racism” as “a system of advantage based on race,” “racist” becomes a descriptor of a system that results in advantage and disadvantage based on race. Racist systems need not appear in the garb of the Ku Klux Klan or be framed in terms of over White Supremacy.

Our thesis here is that the tax system as a whole—federal, state, local; income, payroll, sales, property, individual, corporate—has since the 1970’s gradually but distinctly shifted in ways that serve to protect and consolidate existing White wealth and wealth perpetuation. The tax system as a whole

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70 See supra notes 60 and 64 and accompanying text.
71 The tax system is also gendered but is not our focus here. For example, pension benefits accrue disproportionately to men because pensions derive from income and men’s work leans toward paid over unpaid work, while women as a group work more unpaid hours than paid hours. Men also work at better-paying jobs with better benefits due to workplaces being structured in ways that do not accommodate non-work care
accomplishes this in two distinct ways. First, the tax system as a whole has shifted away from taxes on wealth to taxes on consumption. Taxes on wealth are progressive; they fall more heavily on those with greater assets and higher incomes, often unearned incomes. Taxes on consumption, in contrast, are regressive; they fall more heavily on those with fewer assets and lower incomes, often earned incomes. Second, tax expenditures for individuals have skewed to largely benefiting wealthier, higher-income taxpayers, disguising government benefits for these citizens and leaving poorer, lower-income taxpayers to scramble for other, non-tax-supported resources. Concurrently, support for direct expenditures for public infrastructure that supports everyone has declined.

II. FEDERAL, STATE, AND LOCAL TAX SYSTEMS AS DRIVERS OF INEQUALITY

A. A Roadmap

Most Critical tax writing focuses on one or more specific provisions of the tax code, usually the Federal tax code. Our focus here is the tax system writ large and the overall functional effect of that system as it currently exists, the product of decades of anti-tax initiatives and legislation. We include as important features of the Federal tax system the following: (i) income versus payroll; (ii) estate tax roll-back; (iii) capital gains preference; (iv) roll-back of top marginal income tax rates; (v) reduction of corporate tax rates and other business-focused tax benefits; (vi) shift of CEO compensation from salary to entity ownership incentives; and (vii) “mandarin/ aristocratic” tax expenditures—home mortgage interest deduction, pre-tax contributions to retirement plans, tax benefits for education (section 529 qualified tuition programs). In our review of state and local tax systems, the overall regressivity of those tax systems is rampant, with definite commonalities in states that are most regressive and similarities of tax policy in the least regressive states.

Our framework centers on three essential insights. First, it is important to focus on wealth because focusing on income alone distracts from long-term systemic dynamics. Second, tax expenditures are accounting sleights-of-hand for government benefits. So often in examining race we are responsibilities most often shouldered by women. See, e.g., Stephanie Lane, *The scary facts behind the gender pension gap*, WORLD ECON. FORUM (Mar. 7, 2018), https://www.weforum.org/agenda/2018/03/retired-women-less-money-pensions-than-men/; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2001).
socialized to focus on disadvantage rather than advantage, yet it is equally important to name advantage where it exists. Third, the Federal tax code isn’t the only game in town when it comes to inequality. While Federal tax receipts were 65 percent of total tax revenues in 2016, states accounted for 20%, local governmental units for 15%. Furthermore, state and local governments pay for the lion’s share of education—a key factor in the inequality equation. As with the Federal tax system, state and local tax systems have exhibited a distinct shift away from income tax progressivity and increased use of, and revenues from, consumption-based taxes. This is systemic!!!

B. Income vs. Wealth Inequality

Economist Daniel Altman has written extensively on wealth and income inequality, stating that “the debate about inequality inflames many passions because of its moral and philosophical trappings.” Framing inequality as an economic problem not just a social one, he concludes that the real menace for long-term prosperity is not income inequality but wealth inequality because wealth inequality distorts access to economic opportunities. Altman provided a staggering comparison: “In 1992, the top tenth of the population controlled 20 times the wealth controlled by the bottom half. By 2010, it was 65 times.” Between 1983 and 2016, the number of households with $10 million or more in wealth increased at an exponential rate of 856%! These comparisons buttress the warnings being declared more frequently these days—wealth inequality, both nationally and globally, puts democracies in jeopardy. Rising inequality yields public skepticism of governmental purpose, leading to conclusions that the

74 Id.
76 Id.
77 See infra note 87.
78 Niquette, supra note 5 and accompanying text; Steven Levitsky and Daniel Ziblatt, How Democracies Die (Crown, 2018); see also Martin Wolf, Inequality is a threat to our democracies, FINAN. TIMES (Dec. 19, 2017), https://www.ft.com/content/47e3e014-e3ea-11e7-97e2-916d4fbc0da; Laurie Goering, Growing wealth inequality ‘dangerous’ threat to democracy: experts, REUTERS.COM (Apr. 15, 2016), https://www.reuters.com/article/us-democracy-wealth-inequality/growing-wealth-inequality-dangerous-threat-to-democracy-experts-idUSKCN0XC1Q2.
government operates more in favor of the rich and thereby provides fewer options for those of lesser wealth.79

When economists measure inequality, they focus typically on income, because the data are more readily accessible, but income data do not reveal the true economic power of people who are retired, receive securities or other ownership interests as compensation, or utilize complex strategies and planning to avoid taxes.80 Trends in distribution of wealth can vary greatly from trends in income, because wealth is a measure of accumulated assets, not a flow over time. High earners add much more to their wealth every year than low earners.81 Over time, wealth inequality rises even as income inequality is stagnant, with wealth inequality becoming more severe.

Tax policy undoubtedly has a role to play in overall wealth inequality, affecting how much income can be accumulated annually by high-income earners and thus added to their wealth. To illustrate, with a focus on “private income” such as earnings and dividends among other income streams, income of families in the top 10% of households increased approximately 90% from 1963 to 2016; income of families in the bottom 10% increased less than 10% in that same time period.82 The concentration of income among wealthy taxpayers is conspicuous in every state. The average income of the top 5% of households is at least 10 times that of the bottom 20%; further, in approximately nineteen states, the top 20% of households receives more than 45% of all income in the state.83 These differences in earning potential clearly add up over a lifetime, affecting wealth accumulation.84

However, most Americans, particularly higher-income Whites, “vastly overestimate progress toward economic equality between blacks and whites.”85 Notwithstanding perception, the actual differences in earning

79 Id.
80 Altman, supra note 75.
82 Id.
84 Nine Charts about Wealth Inequality, supra note 81.
85 Emily Badger, Whites Have Huge Wealth Edge Over Blacks (but Don’t Know It), N.Y. TIMES (Sep. 18, 2017), https://www.nytimes.com/interactive/2017/09/18/upshot/black-white-wealth-gap-perceptions.html; On Views of Race and Inequality, Blacks and Whites Are Worlds Apart,
potential based on race and ethnicity are stark, thereby widening the racial and ethnic wealth gap as well. Based on Census Bureau data, African Americans are the only racial group experiencing a drop in median income since 2000; White, Asian and Hispanic households have all seen at least modest income gains. In 2016, median household income for African Americans was just over $39,000, compared to over $47,000 for Hispanics, over $65,000 for Whites, and over $81,000 for Asian American households.86

With respect to wealth, a significant racial divide between White households and households of color has occurred over the past three decades. Since the early 1980s, median wealth among Black and Latino families remained stagnant at less than $10,000, while White household median wealth grew from $105,300 to $140,500 (adjusted for inflation).87 Between 1983 and 2016, the median wealth of a black household decreased by more than one-half, while median White household wealth increased by 33%.88

Additionally, there is evidence that racial wealth gap increases precipitously with age.89 To make up that gap in wealth is daunting; one study illuminates it: “By 2024, median Black and Latino households are projected to own 60-80% less wealth than they did in 1983. By then, the continued rise in racial wealth inequality between median Black, Latino and White households is projected to lead White households to own 99 and 75 times more wealth than their Black and Latino counterparts, respectively.”90


89 Nine Charts about Wealth Inequality, supra note 81.

90 The Road to Zero Wealth, How The Racial Divide Is Hollowing Out American’s Middle Class, PROSPERITYNOW.ORG & INSTITUTE FOR POLICY STUDIES (Sep. 2017),
Reflecting on that study, one commentator noted: “While the income gap provides as huge hurdle to equality, the wealth gap presents a mountain.”

C. The Internal Revenue Code Drives Wealth Inequality

The current Internal Revenue Code (“IRC”) is frequently referred to as a major social policy tool, with critics bemoaning both its use—“to be everything to everyone”—and the vast number of preferences or “tax expenditures” it provides. The modern concept of tax expenditures originated in the 1960s from then Assistant Secretary of the Treasury Stanley Surrey observing that many tax preferences in the IRC resembled spending. Surrey regarded “tax expenditures” as comprising two elements—structural provisions and special preferences. The first element encompasses structural provisions necessary to a functioning income tax; namely, the concepts of net income, exemptions, accounting periods, entities subject to tax, and rate schedules. The second element consists of the special preferences—“tax incentives or tax subsidies”—that depart from the tax structure and “favor a particular industry, activity, or class of persons.” The government support of private business through tax subsidies is often referred to as “corporate welfare.”

Tax subsidies assume many forms including exclusions, deductions, deferrals, tax credits, or special tax rates, and “essentially represent government spending for the favored activities or groups made through the tax system rather than through direct grants, loans, or other forms of government assistance.”

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94 Surrey & McDaniel, Tax Expenditure Concept, supra note 93 at 680.

95 Id.


97 Surrey & McDaniel, Tax Expenditure Concept, supra note 93 at 680. The
reduce the amount of tax that families or corporate taxpayers pay. Accordingly, the IRC essentially represents a series of choices that benefit—or fail to benefit—discrete groups of taxpayers. And because these tax benefits are not immediately obvious, recipients of these benefits may believe or characterize themselves as not receiving a government benefit—a political sleight of hand. Over time, the role of government can get disconnected from the benefits it provides.98

The value of these individual tax expenditures or tax breaks rises as household income increases—"the higher a taxpayer’s tax bracket, the greater the tax benefit for each dollar that is deducted, exempted, or excluded."99 Accordingly, these tax expenditures are significantly more available and usable to higher-income taxpayers, despite such taxpayers being least likely to need the tax incentives to afford the very activities that the respective tax expenditures were created to promote: home ownership, college education, or retirement saving. In the interim, “moderate- and low-income families receive considerably smaller tax-expenditure benefits” for engaging in those same activities.100

The realization-based system utilized by the IRC creates even more income and wealth disparity. Higher-income taxpayers have considerably more financial ability to invest in assets such as additional homes and artwork, the increased value of which is not taxed until a “realization event” or transfer occurs.101 These “unrealized capital gains” make up a large
portion of the wealth gap. In 2018, 69% (or more than $584 billion) of such unrealized capital gains—gains from real estate, businesses, stocks and investment funds (and not gains in the value of primary residences and retirement accounts)—are held by the top 1% of income earners. The wealthy can hold on to these assets indefinitely and protect them from taxation on increased value, thereby creating the impression that the IRC is more progressive than it is in reality. As some commentators have noted: “America’s tax code no longer adheres to the core principle of ability to pay—the idea that taxes should be based on a person’s capacity to pay taxes. Instead, today’s tax code turns that principle on its head by letting the wealthiest of the wealthy pay virtually nothing on their gains.”

The projected cost of tax expenditures in 2018 was $1.5 trillion, with $1.3 trillion in individual expenditures and $0.2 trillion ($200 billion) in corporate expenditures. The largest individual tax expenditures subsidize health care, capital gains and dividends, and savings plans. For fiscal year 2019, the Treasury Department Office of Tax Analysis provided the estimated cost of the following tax expenditures that have varying effects on U.S. households:

- Exclusion of employer contributions for medical insurance premiums—$203.29 billion
- Preferential rates on individual capital gains—$102.91 billion
- Defined contribution employer plans—$75.72 billion
- Defined benefit employer plans—$71.43 billion
- Child Tax Credit—$76 billion
- Step-up basis of capital gains at death—$49.92 billion
- Capital gains exclusion on home sales—$44.38 billion
- Mortgage interest deduction on owner-occupied homes—$26.85 billion

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103 Browning, Capital Gains, supra note 102.
104 Thornton & Hendricks, Ending Special Tax Treatment, supra note 19.
107 Id. One of the major effects of TCJA—a lower cost of the mortgage interest deduction from $68.1 billion in FY 2018 to $26.85 billion in FY 2019 (due to limits imposed on the deduction and a corresponding increase in the standard deduction that resulted in a decreased number of
• State and local property tax deduction on owner-occupied homes—$6.25 billion

• State and local nonbusiness taxes deduction (other than homes)—$4.61 billion

• Qualified tuition programs (sec. 529 plans)—$2.20 billion

Contrary to popular belief, the TCJA did not reduce the number of tax expenditures; rather, between 2017 and 2018, the number of individual tax expenditures increased from 172 to 173.110 And despite the promises of economic stimulus and decreased tax bills for middle-income taxpayers, the TCJA has provided little benefit to the economy and yielded larger tax benefits to the wealthy.111 High-income taxpayers who earn more than $1 million annually are estimated to enjoy tax cuts amounting to $37 billion in 2019 alone and experience a higher percentage change in after-tax income over the 7 years that the Act’s temporary provisions are in place, whereas lower- and middle-income taxpayers will see the Act’s benefits increasingly fade over those years.112 Corporations, which saw their income tax rates decreased by 14% from 35% to 21%, engaged in a record-breaking amount of stock buybacks (estimated at $1 trillion in 2018) that,
along with increased dividends, wildly benefitted shareholders.\textsuperscript{113} Therefore, the promise that the corporate tax rate cut will yield increased domestic capital investments has not yet been fulfilled; corporations have mostly used the tax savings to sustain their bottom lines. By imposing an annual $10,000 limit on the deduction for state and local taxes, the Act likely incentivizes a shift from progressive income taxes to the imposition of more regressive fees and fines.\textsuperscript{114} Accordingly, it is no surprise that recent studies consistently conclude that the TCJA contributes to continued economic inequality and increases the racial wealth divide.\textsuperscript{115}

\textbf{D. State and Local Tax Systems Drive Inequality}

The bottom line with respect to current state and local taxation systems is inherent inequality among income-earning tiers and an overall unfairness.\textsuperscript{116} This is due, in part, to a historical shift from taxes on wealth (most progressive), to a tax on income (less progressive), to more recently taxes on consumption (least progressive; most regressive). As discussed herein, these shifts contribute to increased wealth inequality.

1. Poor and Middle-Income Families Are Taxed More Heavily Than High-Income Families

Nearly every state government (including local governments) collects more taxes from poor families than high-income families, relative to their incomes, and more taxes are generally collected from middle-income


families than high-income families. These disparities increase income inequality and overall wealth inequality by reducing after-tax incomes of low- and middle-income families more deeply than those of high-income families. Many major state taxes were implemented in the first half of the Twentieth Century, a period in which many Americans, including African-Americans in the South, were barred from voting, and when urban areas were underrepresented in many states’ legislatures. As a result of that history, regressivity is present in most state tax codes—low- and middle-income families pay a larger share of their income in taxes than wealthy families. One of the primary reasons for such inequality is states’ heavy reliance on sales and other consumption taxes, which often affects low-income families disproportionately because they spend a large percentage of their income on consumables rather than saving or investing those dollars. This inequality is exacerbated by the doubling of most states’ sales tax rates since 1970, with little if any change on the top income tax rate. As states and localities increasingly cut or avoid raising taxes—especially the more progressive income taxes—but nonetheless search for additional revenue, many have increased their reliance on fees (e.g., admission to government-funded museums and state parks, costs for drivers’ licenses and identification cards, and toll fees for roads and bridges), resulting in even greater regressivity than reported in recent studies. Property taxes disproportionately affect low- and middle-income families compared to high-income families.

2. Regressivity Illuminated

Because of the absence of a graduated personal income tax and an overreliance on consumption taxes in many states, low- and middle-income families typically experience higher overall effective state and local tax rates. Combining all state and local income, property, sales and excise

117 McNichol, State Policies, supra note 83; see also Who Pays?, Sixth Edition, infra note 121.
118 McNichol, State Policies, supra note 83.
119 Id.
120 Id.
122 McNichol, State Policies, supra note 83.
taxes that Americans pay, the nationwide average effective state and local tax rate is 11.4% for the poorest 20% of individuals and families, 9.9% for the middle 20%, and 7.4% for the top 1%.\footnote{Who Pays?, Sixth Edition, supra note 121.} For states with the most regressive tax structures versus states with the least regressive tax systems, common systemic characteristics exist; essentially, the kind of taxes a state utilizes matters greatly.

In the 10 states with the most regressive tax structures (referred to in a recent study as the “Terrible 10”) the lowest-income 20% pay up to six times as much of their income in taxes as their wealthy counterparts. Washington State is the most regressive, followed by Texas, Florida, South Dakota, Nevada, Tennessee, Pennsylvania, Illinois, Oklahoma, and Wyoming.\footnote{Id.} Seven of the Terrible 10 states do not levy a broad-based personal income tax, while the remaining three states have a flat or practically flat income tax rate. Two of the most regressive state income tax benefits are preferential rates for capital gains and deductions for federal income tax paid, both of which disproportionately benefit higher-income taxpayers.\footnote{Id.} The Terrible 10 states heavily rely on sales and excise taxes, and six of them derive roughly half to two-thirds of their tax revenue from sales and excise taxes compared to a national average of approximately one-third. As the most regressive of the state and local taxes, sales and excise taxes have higher effective rates of the underprivileged—on average, the poorest 20% pays a 7.1% effective rate, the middle pays 4.8%, and the top one percent pays a .9% effective tax rate. Because food is one of the largest expenses for low-income families, taxing food is particularly regressive; six of the twelve states with higher effective consumption tax rates include food purchases in their tax bases.\footnote{Id.}

States applauded as “low tax”, frequently because they don’t impose an income tax, are often high tax states for low- and middle-income families. The 10 states with the highest taxes on the poorest taxpayers are Washington, Hawaii, Illinois, Pennsylvania, Oklahoma, Arizona, Texas, Indiana, Florida, and Iowa.\footnote{Id.} Six of these “low-tax” states are also among the Terrible 10 because they are high tax for the poorest while concurrently low tax for the wealthiest. As the leader in this category, Washington’s poorest families pay an average 17.8% of their income in state and local taxes, compared to the poor in neighboring states—10.1% in Oregon and

\begin{footnotes}
\item[124] Id.
\item[125] Id.
\item[126] Id.
\item[127] Id.
\end{footnotes}
For the states with the least regressive state and local tax systems, one common characteristic is shared—an income tax that is highly progressive in terms of both brackets and rates. In addition, these states rely less on regressive consumption taxes. California is the least regressive state, followed by the District of Columbia, Vermont, Delaware, Minnesota, New Jersey, Maine, New York, Montana, and Maryland. All of these ten states provide a refundable earned income tax credit (“EITC”), with the EITC exceeding 25% of the federal credit in seven of the ten states. Four states—California, Connecticut, New Jersey, and New York—plus the District of Columbia have enacted laws that increase income taxes for high-income households with tax brackets for income over at least $500,000. Other states, including Hawaii, Maryland, Minnesota, Oregon, and Vermont, have top brackets for income over at least $250,000 for joint filers. Similarly, all of the least regressive states utilize targeted, refundable credits for low-income taxpayers. For example, Maine provides a sales tax credit, dependent care tax credit, and an expanded property tax “circuit breaker” (imposes a cap on amount of property taxes based on taxpayer’s personal income). A total of 29 states plus the District of Columbia provide property tax relief to struggling taxpayers via a circuit breaker credit or income-based credit. California is among the least regressive because of graduated marginal income tax rates that are more progressive than most states, an additional tax on income exceeding $1 million, and limited tax benefits (deductions and exemptions) for upper-income taxpayers. The state’s reliance on consumption taxes is within the national average, with less reliance on property taxes. Again, in combatting inequality, the kind of taxes utilized matters.

Taxes on personal and business property, both real and personal, are a significant revenue source for both states and localities and are generally regressive in their overall effect, particularly for middle-income households, though less regressive than sales and excise taxes. This regressivity is lessened somewhat by businesses paying approximately 40% of a typical

9.2% in Idaho.

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128 Id.
129 Id.
131 Id.
133 Michael Leachman et al., Advancing Racial Equity, supra note 130.
state’s property taxes. In addition, because the taxes are based on the value of the property, they are not entirely regressive; lower-income earners tend to inhabit less expensive homes, thus partially indexing property taxes to income. Nevertheless, for average low- and middle-income families, home ownership represents their primary accumulation of wealth, so most of that wealth is subject to property taxation.

In comparison, home ownership represents a lesser share of high-income taxpayers’ wealth, with such wealth being balanced out with stock investments, business interests, and other intangible assets that are typically exempt from property taxation. For example, a typical middle-income family’s home is typically worth three times as much as the family’s income, while a high-income taxpayer’s home may be valued at one-and-a-half times his or her annual income. Besides the regressive effects of property tax on low- and middle-income families, the shift in wealth from home ownership to more financial investments and assets is racialized as well. Although not an equalizing provision, a homestead exemption (exempting a flat dollar or percentage amount of property value from a property tax) can lessen the regressivity of property taxation. In addition, the use of targeted tax credits for low-income taxpayers is another tool used by a majority of states to combat the overall disproportionate effect of the tax.

3. States’ Tax Policies Can Reduce Inequality

The increase in inequality can be attributed to many factors including the unequal growth in wages (substantially more for the top income earners and much less for low- and middle-income earners), the growth of investment income to high-income households, and an array of government actions and inaction (federal minimum wage, reduction in government assistance, and tax policy among others). As discussed previously, a history of unequal opportunities and access to education, housing, employment and other economic resources based on race has led to racialized wealth inequality. The role of federal and state tax systems in

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135 Id.
136 Eric Kades, Giving Credit Where Credit is Due: Reducing Inequality with a Progressive State Tax Credit, 77 La. L. Rev. 360, 383 (2016).
138 Id.
139 McNichol, State Policies, supra note 83.
increasing inequality, with implications for wealth inequality among racial
groups, has enlarged over the last several decades due to the persistent shift
to highly regressive, consumption-based taxes.

Based on our discussion of the causes of state tax systems’ regressive
impact on low-income taxpayers, state tax changes can obviously lessen
income inequality, thereby contributing to the reduction of wealth
inequality and the disparate effects based on race. Some of the policy
changes that states can make have been discussed in the context of what
makes a state tax system more or less regressive and thus a driver of
inequality. Here are some commonly offered tax policy changes to upend
inequality:141

a. Higher income tax rates on higher earners; place cap on
itemized deductions based on income levels.142
b. Expand state payroll taxes past the federally-imposed Social
Security annual cap.
c. Target financial asset wealth to higher capital gains taxes
and/or financial transaction tax.
d. Enact or increase state earned income tax credits.
e. Expand estate or inheritance taxes that increase taxes on
wealth.143
f. Strengthen corporate taxes to eliminate loopholes and ensure
strong minimum taxes by corporate entities (and/or adopt
combined reporting).
g. Broaden sales tax to include services purchased by wealthy
individuals.
h. Impose a luxury tax on luxury goods (high-end automobiles

141 McNichol, State Policies, supra note 83; see also Sarah Anderson & Chuck Collins,
What States Can Do to Reduce Poverty and Inequality Through Tax Policy,
INEQUALITY.ORG (Feb. 22, 2019), https://inequality.org/great-divide/what-states-can-do-to-
reduce-poverty-and-inequality-through-tax-policy; Sarah Anderson & Chuck Collins, How
to Reduce Poverty and Inequality Through State Government Taxes, INEQUALITY.ORG
142 Shira Schoenberg, Massachusetts lawmakers revive ‘millionaires tax” proposal,
lawmakers-revive-millionaires-tax-proposal.html; cf. Jeffrey Dorman, Higher Taxes On
Rich Are Not Enough to Stop Inequality, FORBES (Sep. 19, 2017),
https://www.forbes.com/sites/jeffreydorffman/2017/09/19/higher-taxes-on-the-rich-are-not-
enough-to-stop-inequality/#454ec6af5b96 (postulates that the problem is poverty, not
inequality; remedy is to not target the rich with higher taxes but rather to find effective
policies to combat poverty).
143 Road to Zero Wealth, supra note 140.
and expensive yachts).

i. Ensure overall tax system raises sufficient revenue to fund foundations of shared prosperity such as education and health care access.

As discussed in greater detail in Section III, states’ tax systems have a substantial contribution to make towards eliminating regressivity and race-based disparities. In most states, the aggregate tax burden falls more heavily on lower-income taxpayers. Only a small number of states—California, Delaware, Minnesota, New Jersey, and Vermont—and the District of Columbia have reformed their tax laws to ensure those with higher incomes pay a larger share of their incomes in tax. Accordingly, acknowledgement by states of their role in contributing to increased inequality, as well as race-based disparities, is a first fundamental step towards correcting the problem.

E. Federal and State Tax Systems and Rising Wealth Inequality

As documented above, wealth inequality is a real and ever-increasing reality in our country—the wealthiest 1 percent hold approximately 40 percent of the net wealth, which is nearly twice the amount of net wealth held by the bottom 90 percent. This extraordinary concentration of wealth, combined with “historical and contemporary racial discrimination” produces “patterns of wealth holding that are highly unequal along lines of race and ethnicity.” To illustrate, White households, which encompass 65 percent of all households, own 87 percent of the nation’s wealth; People of Color comprise 35 percent of all households but hold only 13 percent of the nation’s wealth. This racialized wealth inequality is only exacerbated by the vast disparities in household income based on race and ethnicity, affecting how much income can be accumulated and added to high-income earners’ wealth, and by inheritance patterns of White wealth being passed to the next generation in White families.

144 See supra note 117 and accompanying text.
147 Michael Leachman et al., Advancing Racial Equity, supra note 130.
148 Id.
149 See supra notes 81 to 84 and accompanying text.
150 See Strand, Inheriting Inequality, supra note 27.
The shifts in federal and state tax policy over the last decades are an essential component to solidifying this racialized wealth inequality. As commentators have recently discerned, tax codes are “both a symptom of and instrument of systemic racism.” Yet the IRC’s contribution to systemic racism is not even on the IRS’s radar. In contrast to other federal agencies implementing equity-grounded social policies, the IRS neither compiles nor evaluates the effects of tax laws on various racial and ethnic groups. Rather, such race-based analysis has been “relegated outside of the ‘mainstream’ of tax policy analysis.” As we have acknowledged, the racialized consequences of tax policy are grounded in racialized wealth advantage and disadvantage that are grounded in historical and systemic racism. Accordingly, as discussed in Section IV, to tackle the racialized inequities in the federal and state tax code, national racism and the wealth inequality that emanates from it must be first addressed head on. Only then can these countermeasures be effective—the transformation of tax policy to equalize racialized wealth inequality and to invest in future generations.

III. THE RACIALIZED EFFECTS OF THE CURRENT TAX SYSTEMS AND STRATEGIES FOR TRANSFORMATION

A. The Shifting Social Contract and the Anti-Tax Movement—Round One

The clarion call for the anti-tax movement that has had profound effects in the U.S. over the past generation sounded in California in 1978. Proposition 13, a populist reaction against property taxes that were soaring as a result of rising property values, limited the real property tax assessment on existing homeowners to the price they had paid for their home. At the same time, Prop. 13 declared open season on newcomers, who would pay taxes assessed on full fair market value represented in more recent purchases. In addition to shifting the tax burden from “those who already

153 Wallace, Tax Policy and Our Democracy, supra note 152 (citing ANTHONY C. INFANTI, OUR SELFFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 14, 39 (2018)).
154 See supra notes 71 and 118 to 119 and accompanying text.
owned” to “those who seek to own,” Prop. 13 severely curtailed the funds available for investment in California’s public schools, for which local property taxes were the primary source of funding. The most direct result in California was that public education, which had been top-quality in the 1950’s and 1960’s, plummeted from “First to Worst.”  

California had, the generation prior, experienced a substantial influx of poor White migrants from the South, many of them pushed west by the Dust Bowl and the Depression. California’s response had been to invest heavily in public education to create from the human potential arriving in the state a vital and vibrant economy. California had again experienced, in the 1960’s, an influx of poor immigrants during which the state’s Latinx population rose from 8% in 1950 to 10% in 1960 to 13% in 1970. This population was heavily concentrated in Southern California (the birthplace of Prop. 13): In 1970, nearly 20% of all Mexican-origin Latinos in the U.S. lived in Los Angeles County.

During the 1960’s, moreover, both the Black population and the Latinx population became more politically vocal in the state. The Black Panthers and the Watts riots of 1965 combined with Chicano activism and student protests against the Vietnam War to give “a slightly older and much whiter California population a fear that the ways of society so dear to them were falling apart.” Prop. 13’s anti-tax stance was partially informed by an economy that was faltering, but it was also a White reaction against demographic and political changes that were unfamiliar and unsettling. Prop. 13 was racialized in the political impetus that birthed it and racist in that it perpetuated the system of advantage in California based on race: The world-class public schools that had provided a springboard to previous generations of White migrants were decimated for the new, less-White cohort of immigrants.

When Ronald Reagan, Governor of California from 1967 to 1975, became President of the United States in 1981, he brought with him the anti-tax fervor of Prop.13 as well as its coded-yet-clear racialized rhetoric. Continuing in the tradition of dog-whistle politics—using “racially coded

progressive) included a shift to sales taxes (more regressive).  

158 Id. at 43.  
159 Id. at 44.  
160 Id. at 46.
language that conveyed racialized messages without being blatantly racist”—Reagan telegraphed racial anxiety and insecurity and blamed the U.S. Government using the anti-tax rallying cry that had proved effective in California.  

Reagan’s coded reference to “welfare queens” sent a clear warning about “Our” taxes (taxes paid by White voters) being used to support “Their” needs (needs of people of color).

Starting in the 1980’s, the progressivity of taxation in the U.S.—at the federal, state, and local levels—has been systematically eroded. Taxes have shifted overall away from (more progressive) taxes on wealth and income to (more regressive) taxes on payroll and consumption. At the federal level, “[a]fter World War II, progressive income and estate taxes comprised more than 70% of federal receipts, while regressive payroll and excise taxes accounted for only about 26% of receipts...By 2011, the regressive taxes made up over 40% of receipts while progressive taxes accounted for less than 58%.”

Today, most people pay more (regressive) payroll tax than (progressive) income tax, and the estate tax has been eliminated for all but the ultra-rich. At the state and local level, taxes have shifted to user fees. And with increasing inequality, tax expenditures, designed to support the well-being of the nation’s taxpayers through education, retirement, housing, and health have accrued increasingly to the well-off.

As taxes on wealth have declined and the benefits of tax expenditures for the well-off increased, public services to those in the lower income and wealth brackets have been cut back. Net redistribution has decreased. Moreover, the wealthy who benefit are disproportionately White, while the poorer cohorts of the population who have lost support are disproportionately people of color. The tax system as a whole has

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161 Laura Ellyn Smith, How Donald Trump put an end to the GOP’s Southern strategy: Trading the dog-whistle for the bullhorn, WASH. POST (Jan. 10, 2018).


164 Payroll taxes regressive because the income to which they apply is capped so that for lower-income earners the tax is levied on their entire income while for higher-income earners the tax is levied on only a part of their income. In addition, income that is not earned is not subject to payroll taxes. Burman, supra note 163, at 573-574.


166 Ashlea Ebeling, IRS Announces Higher 2019 Estate and Gift Tax Limits, FORBES (Nov. 15, 2018) (estate and gift tax exemption for 2019 is $11.4 million per individual, up from $11.18 million in 2018).

contributed to the rise of inequality, and this inequality is racialized.

An older White cohort of the population has declined to invest through taxes and public services in a younger segment of the population that is majority people of color. The Census Bureau predicts that non-Hispanic Whites will fall into the minority of the nation’s population overall in the 2040s. Children of color became a majority in the nation’s public schools in 2014. Just as African-American citizens moved into position to join White citizens in benefiting from the post-WWII social contract through the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act, that social contract was torn up. And just as Latinx immigrants and citizens brought their energy and numbers to the table as a result of population shifts arising from the 1965 Immigration and Nationality Act, the game changed.

As a whole, the tax system since 1980 has served more and more to increase racialized wealth inequality. The tax system is today operating to entrench the system of advantage based on race that centuries of racial exploitation and unequal access to wealth created. As the future face of the nation becomes less White, the U.S. tax system as a whole and the anti-tax rhetoric that has fueled its shift from progressive to regressive are driving economic inequality and racial inequity. More deeply, the tax system is inhibiting broad-scale public investment in the primary resource of the future: human capital.

B. The Shifting Social Contract and the Anti-Tax Movement—Round Two

As it turns out, anti-tax rhetoric and the anti-tax movement are more about securing tax benefits for the wealthy than about minimizing taxes overall. And lower investment in the public infrastructure that non-
wealthy Americans rely on goes hand-in-hand with anti-tax reforms. Redistribution of wealth upward and hardening of wealth inequality result.

The recent experience of the State of Kansas parallels that of California, as physician Jonathan Metzl describes in Dying of Whiteness: How the Politics of Resentment is Killing America’s Heartland.\textsuperscript{171} When Sam Brownback became Governor in 2011, he initiated a series of policy shifts that responded to a “resentment of government overreach”\textsuperscript{172} in the state. His initiatives deregulated business, cut spending on welfare, “rolled back anti-discrimination laws,”\textsuperscript{173} and declined expansion of Medicaid coverage under the Affordable Care Act. Further, in an “epic defunding of state government,”\textsuperscript{174} Kansas cut income taxes, with particular relief for wealthy taxpayers.

The state also made significant changes to school financing: Along with cutting property taxes, it “allowed public school districts to hire unlicensed teachers for science and math classes, cut support for at-risk students, and made it easier for schools to fire experienced teachers.”\textsuperscript{175} The state “also changed the school financing formula at the expense of poorer, urban districts” and “base state aid per pupil (BSAPP) in Kansas dropped from $4,400 to $3,800, even as enrollment and the costs of health insurance increased for many districts.”\textsuperscript{176} A state that had long supported and benefited from quality public education took a nose dive: “By 2016, Kansas fell to forty-fourth in the nation in per-pupil spending in public elementary and high schools” and “into the lower 25 percent of all states on a number of key education benchmarks.”\textsuperscript{177}

In Kansas, White taxpayers benefitted disproportionately from the tax cuts; taxpayers of color were disproportionately burdened:

The data showed that the 2012 tax cuts deceptively increased taxes on the bottom 40 percent of earners in Kansas...by hiking sales taxes and eliminating tax credits that benefited low-income families. Such trends

\textsuperscript{171} JONATHAN METZL, DYING OF WHITENESS: HOW THE POLITICS OF RESENTMENT IS KILLING AMERICA’S HEARTLAND (2019).
\textsuperscript{172} Id. at 200.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 201.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 205.
\textsuperscript{177} Id. at 226.
disproportionately affected minority communities, including 75 percent of African American and 83 percent of Latino households in the state. By contrast, ‘Kansans who saw the biggest tax cut are mostly white.’\textsuperscript{178}

At the same time, the Kansas Supreme Court found that the state’s new public financing system violated the state constitution’s requirement that students receive a public education of minimum adequacy. “The ruling explicitly highlighted how the state system failed to prepare over 25 percent of students in basic reading and math skills and shortchanged half of the state’s African American students and one-third of its Hispanic students.”\textsuperscript{179} Overall, minority and low-income parents paid more taxes while the education their children were receiving declined.\textsuperscript{180}

While Metzl notes that Kansas politics has a long history of “racial animus” and there were clear statements by state politicians carrying racist and xenophobic messages,\textsuperscript{181} he does not attribute discriminatory intent to state leaders across the board. Nevertheless, “tax cuts and the school-funding overhaul allowed Kansas GOP politicians to enact an agenda with significant racial implications without expressly needing to talk about race.”\textsuperscript{182} In the long history of the evolution of racism in the U.S., the manipulation of fiscal policy measures involving taxes and broad-based public infrastructure to advantage Whites and disadvantage Blacks and other people of color is consistent with the shift over time from more to less overt forms of exploitation and discrimination. Though the specifics differ, the Kansas pattern is highly evocative of the California pattern three decades earlier.

And, just as the California anti-tax rhetoric and policies migrated to the national scene in the 1980’s, there is remarkable similarity between the Kansas tax overhaul of the early 2010’s and the Tax Cuts and Jobs Act of 2017. Metzl points out:

Among other actions, the 2017 GOP bill slashed tax rates for many types of businesses, limited deductions, eliminated alternative minimum taxes paid by corporations, cut estate taxes—and also

\textsuperscript{178} Id. at 212 (quoting Kansas Center for Economic Growth, “Kansas’ Tax Plan Makes Racial Economic Disparities Worse”).

\textsuperscript{179} Id. at 214.

\textsuperscript{180} Id.

\textsuperscript{181} Id. at 215.

\textsuperscript{182} Id. at 216.
repealed the individual mandate of the ACA. The bill gifted permanent tax cuts to the wealthiest Americans and provided temporary relief for everyone else.\(^{183}\)

Kansas, it turns out, was “the godfather of governance via tax cutting, pro-corporate, austerity economics” as well as “the object lesson in the broad effects of massive-tax-cut governance as a result.”\(^{184}\)

In both California and Kansas, waves of anti-tax sentiment led to tax overhauls that increased regressivity along with racialized inequality. The anti-tax sentiment rested, at least in part, on a sense among White voters that “others” were gaining benefits unfairly. The primary benefits of the resulting tax reductions accrued to wealthier taxpayers, who were disproportionately White.\(^{185}\) Lower-income and poorer taxpayers either benefited less or were burdened as more regressive taxes came to substitute for more progressive taxes. As the Institute for Taxation and Economic Policy observed, “States commended as ‘low-tax’ are often high-tax for low- and middle-income families.”\(^{186}\) Further, diminished public revenues led to diminished public expenditures, which had negative effects on public infrastructure. Compromised public infrastructure had more significant and more detrimental effects on less-well-off individuals and households, disproportionately people of color.

Anti-tax movements, then, are prone to racialized effects that enhance pre-existing White advantage and add weight to pre-existing disadvantage experienced by Black citizens and other people of color. To some degree, the rhetoric of these movements invokes racism and xenophobia overtly, though more often the racial resonance is cloaked in vague assertions such as “the government is wasting money on ‘people who do not deserve it.’”\(^{187}\) Over time, the voters of both California and Kansas came to realize that eviscerating public infrastructure doesn’t only affect “others.”\(^{188}\) In both states, shifts toward raising revenues to re-invest in public infrastructure – particularly public schools – eventually followed the radical disinvestment.

\(^{183}\) Id. at 199.

\(^{184}\) Id.

\(^{185}\) Michael Leachman et al., *Advancing Racial Equity*, supra note 130 (As a result of 2013 tax cuts that reduced income tax rates in North Carolina, Black and Latinx residents now pay a larger share of state taxes than before, while White residents pay a smaller share.).


\(^{187}\) Id. at 211.

\(^{188}\) Pastor, supra note 157, at 133-136; Metzl, *supra* note 171, at 223-235.
C. Investing in Future Generations and Equalizing
Racialized Wealth and Inequality

In the 20th century, the United States became a leader among nations as a result of its investment in its most valuable resource: its people. The U.S. mustered itself to provide a high school education almost universally and higher education to many; this at a time when most countries viewed education as unnecessary for the masses and a privilege of the elite. Investing in young people tells them that they are valued and valuable, opens the door to opportunity, and brings them into the realm of citizenship. In today’s knowledge economy, education has become an even more important investment in human capital, which is investment in future prosperity.

Education is essential, but education alone is not sufficient. Children and youth need a place to live, food to eat, health care, and adults to support and nurture them. Yet children living in low-income households are more likely than their more affluent peers to encounter housing insecurity, lack adequate health and medical care, and attend underfunded schools. In the U.S. today, about 21% of children under the age of 18 live in households with earnings that put them below the poverty line, a measure that vastly underestimates necessary income for meeting basic needs. About 41% of all U.S. children live in low-income households, defined as households with inadequate income to meet basic needs. A substantial

190 Heather Koball & Yang Jiang, Basic Facts about Low-Income Children: Children under 18 Years, 2016, NAT’L CTR. FOR CHILD. IN POVERTY (January 2018), http://www.nccp.org/publications/pdf/text_1194.pdf (“Children living in low-income families are 50 percent more likely than children in other families to have moved in the past year.”).
191 Id. at 8. In 2016, 6% of low-income children were uninsured, compared to 4% of all children. Overall, the percentage of low-income children with health insurance has risen over the past two decades, though the coverage by private insurance has decreased. CHILD TRENDS, Key facts about health care coverage for children, https://www.childtrends.org/indicators/health-care-coverage In 2017, over half of Black and Hispanic children were covered by public health insurance; over three-quarters of White and Asian children were covered by private health insurance. Id.
192 THE EDUCATION TRUST, Funding Gaps 2018, https://edtrust.org/resource/funding-gaps-2018/ (“Across the country, the U.S. spends approximately 7 percent — or $1,000 — less per pupil on students educated in our nation’s highest poverty districts than those educated in the wealthiest.”)
193 Koball & Jiang, supra note 190, at 2.
194 Id. A significantly higher proportion of children are poor and low-income
cohort of our children, then, lack security and the assurance that they are supported and valued by the community at large.

Investing in the future of the United States today calls for investing in public infrastructure in the form of education, housing, health care, and other necessary forms of support for families. While we often think of infrastructure as roads and bridges, infrastructure is also the institutional supports necessary to prepare and support individuals so that they can contribute to society as a whole. Further, the provision of essential infrastructure, whether physical or institutional, can have significant equity effects depending on whether it is made available to all, to what degree, and in what form. K-12 education, for example, is available to all children in the U.S., though the quality provided varies widely. Pre-K education and post-secondary education, in contrast, are much more accessible to those with private means.

In today’s United States, our future lies with children of color. In 1980, 74% of the nation’s children were non-Hispanic White. In 2000, that percentage had fallen to 61%. In 2017, it was 51%; by 2020, it is projected to be 49.8%.

And yet these children are disproportionately affected by living in low-income households. While only 28% of White children in 2017 lived in low-income households, approximately 60% of Black, Hispanic, and Native American children live in such households. This means that children of color, who are increasingly the contributors and citizens of the future of the U.S., are especially in need of the support provided by public institutional infrastructure in the form of housing, education, and health care.

The demographic shift of the population as a whole away from a

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196 Strand, Brown, supra note 189, at 311-313, 314-316; Strand, Education as Inheritance, supra note 10, at 292-297.
198 Id.
199 Id.
200 Id. 61% of Black children, 59% of Hispanic children, and 60% of Native American children live in low-income households compared to 28% of White children.
majority-White nation will follow the shift in demographics of our children: “Because minorities as a group are younger than whites, the minority white tipping point comes earlier for younger age groups…[f]or youth under 18—the post-millennial population—minorities will outnumber whites in 2020. For those age 18-29—members of the younger labor force and voting age populations—the tipping point will occur in 2027.” As today’s children continue to age, the tipping point for the population overall will occur in 2045. For the over-60 age cohort, however, the tipping point will not occur until after 2060, at least another 15 years. For decades to come, older Whites will continue to exercise a disproportionate effect over policy decisions made that affect younger people of color.

Old habits die hard. In the former states of the U.S. Confederacy, political habit is to refrain from investing in public benefits and public infrastructure. There was resistance, after the Civil War, to taxing White people and spending public funds to benefit Black people. Over time, this disinclination to public investment became a habit. The result has been and is a dearth of community benefits for everyone. Everyone is affected; poor people, who happen to be disproportionately Black, suffer the most.

The anti-tax waves that have surged in California and Kansas and that have swelled at the national level have racial undercurrents in terms of their origin, and they have racialized effects. Anti-tax turns out to redistribute tax burden to those who are less wealthy, who are disproportionately people of color. And the scarcity mentality it encourages leads to disinvestment in essential public institutional infrastructure for investing in the future.

We have come to a point where taxing and investing for racial and ethnic equity merge with taxing and investing for the nation’s future. For equity and for our future, we need to tax ourselves in a truly progressive way (wealthy, disproportionately White). Truly progressive tax systems will staunch the hemorrhaging of wealth to those who are already wealthy. Truly progressive tax systems will also provide essential funds so that we can invest in public institutional infrastructure in the form of education, housing, health care, and more for our younger population (poorer, disproportionately of color).

201 Frey, supra note 168.
202 Id.
203 Id. The mostly-white baby boomer generation continues to have a significant effect on the population overall.
204 Jamelle Bouie, How the South Blocked Health Care for Those Who Need It Most, DAILY BEAST (July 11, 2017).
D. Strategies for Transformation

The increasingly high level of wealth inequality is a national crisis that threatens the existence and stability of our democracy. It also represents a major self-inflicted wound in terms of national capacity considering the serious underinvestment in the nation’s potential human capital. Compound this with the basic injustice of the continuing adverse effects of a racist system and the crisis becomes even more grave.

The goal of this article is to view taxes holistically as a system comprised of all the taxes discussed herein and others not discussed that contribute to the ongoing racialized wealth inequality. In searching for solutions to the systemic problems of increasing wealth inequality and continuing race-based disparities, it is difficult to not get stuck in the weeds of analyzing the effectiveness of one or more taxes or tax expenditures. Yet it is imperative to understand the myriad choices made over decades that are reflected in the federal and state and local tax systems and how these choices and these systems act together to drive the intertwined effects of wealth inequality and racial wealth disparities. To move toward equity, we must first, as a country, consciously acknowledge and deal with the issue of race. Only then can we acknowledge the tax system’s contribution to wealth inequality and generate the actions necessary to combat these systemic inequities.

1. First Step: Acknowledgement of Racial Wealth Inequality

The 2016 election put race on the national agenda with renewed urgency. While racist rhetoric and hate crimes have increased, more and more people, including Whites, are also becoming aware of racism as a system of advantage based on race and of White privilege. There is rising awareness that racial advantage and disadvantage have not disappeared of their own accord and that current racism is a continuation of past racism. There is also increased recognition that racism manifests in groups, rather than in individual injuries that fit a traditional cause-and-effect paradigm. Conversations about race have increased; calls for reparations have swelled.

A national truth and reconciliation process offers the possibility of a

205 See Misha Hill et al., Illusion of Race-Neutral Tax Policy, supra note 151 and accompanying text.
206 See, e.g., Ta-Nehisi Coates, The Case for Reparations, ATLANTIC (June 2014).
bridge to policy and legal action to address continuing racial disparities.\footnote{207} There have been numerous calls for a “national conversation about race,”\footnote{208} but there is a mismatch between the scale at which people can actually engage in meaningful conversations about race in the particulars of varying community histories around race (personal and local) and the scale at which effective policy agendas must be set and action taken to actually address and eradicate entrenched systemic racism (state and national). There is a need, moreover, for these conversations to be relational and to connect with people’s hearts as well as their heads. This is where the possibility for change arises.

Inspiration and potential models for this multitude of conversations, this emergent national conversation, include various truth and reconciliation processes such as that conducted with First Nations in Canada beginning in 2009\footnote{209} and the Maine-Wabanaki State Child Welfare TRC (Truth and Reconciliation Commission) initiated in 2012.\footnote{210} Informed by restorative practice strategies, the initial phase of a truth and reconciliation process involves creating space for previously marginalized truths to emerge. In the case of race in the U.S., many of these truths are historical and involve racial and ethnic groups as groups rather than solely as individuals. In addition, while the foundational racial dynamic in the U.S. is Black-White, other racial and ethnic groups have also experienced significant discrimination and disadvantage; the question of whether to define the process broadly or narrowly arises. As previously unheard stories reshape history, generating new shared truths, reconciliation can begin.

Much of the history that underlies racial wealth disparities is not widely disseminated or discussed. Bringing this history, these stories, from the margins to the center reveals the continuing presence of racism as a system of advantage and disadvantage – a system for which we are collectively responsible.\footnote{211} Naming racism and tangible effects such as racial wealth disparities and policies such as tax that perpetuate those disparities lays a necessary foundation for addressing long-standing inequities.

\footnote{207} See Bonny Ibhawoh, What Canada and South Africa can teach the U.S. about slavery reparations, CHI. REP. (July 18, 2019).
\footnote{208} See, e.g., Executive Order 13050, One America in the 21st Century: The President’s Initiative on Race (June 14, 1997).
\footnote{209} https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525.
\footnote{210} https://upstanderproject.org/firstlight/trc.
\footnote{211} Strand, Invisible Hands, supra note 41.
2. Second Step: Addressing Wealth & Racial Inequality in Our Tax Systems

Building on a foundation of truth, policy and legal action can begin to move us toward reconciliation. Our discussion in this article documents the need for policy and legal action to revamp our federal and state tax systems to eradicate racial disparities. To suggest federal and state coordination in altering their tax systems to address racial and wealth inequalities is pure folly in today’s political environment. States leading the charge on combatting these inequalities may be more realistic, as in fact some states already are. Nevertheless, the existing interrelationships between federal and state income systems necessitates looking at integrated approaches.

There is no single magical cure for the equity problems inherent in the tax systems because so many provisions constitute contributing factors. It is also not rocket science, however. History can inform us well: Look back to when wealth and income inequality were not so drastically high, and you will discover more significantly progressive income taxes and more effective wealth transfer taxes. The main purpose of a tax system is to raise revenue to finance governmental functions and priorities. The TCJA lowered that revenue considerably, thereby negatively affecting investment in infrastructure such as public transit, education, and neighborhood revitalization that could help address historical neglect of communities of color.⁴¹² Because many of the TCJA changes regarding individuals are comprised of temporary provisions that expire at the end of 2025, the TCJA actually presents an opportunity to determine how best to move forward and make conscious systemic changes to address this rising inequality and racialized wealth.

One such systemic change is to focus on certain tax expenditures and their actual, not just intended, outcomes. For example, certain “upside-down tax breaks” that target activities intended to build economic resources—home ownership, college education, retirement savings—benefit higher-income and wealthy households significantly.⁴¹³ These higher-income, and disproportionately White, households benefit more than lower-income households, disproportionately comprised of People of Color, because these tax breaks are typically offered in the form of deductions, exemptions or exclusions, the values of which rise with household income.

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²¹³ Id.
These tax breaks often are available to those who have less need for financial incentives to engage in the targeted economic activity.\textsuperscript{214}

Professor Dorothy Brown has written extensively on racial bias in the federal tax system, opining that the most efficient solution is to focus tax relief or tax incentives on those who were targeted with discrimination.\textsuperscript{215} But, as she has acknowledged, to target incentives based entirely on race would engender constitutional barriers, especially in light of recent Supreme Court precedent.\textsuperscript{216}

Navigating these legal shoals, Senator Elizabeth Warren has proposed offering down-payment assistance to home buyers in formerly “redlined” neighborhoods where the federal government once denied access to mortgages.\textsuperscript{217} Senator Cory Booker has proposed “baby bonds” that would offer all newborns $1,000 savings accounts, and then add up to $2,000 annually for children in low-income households. According to a new study, such a program would significantly decrease racial wealth inequality.\textsuperscript{218} Both of these proposals are not focused specifically on race, but have the effect of decreasing racial gaps in wealth because, due to historical causes, poorer households and children are disproportionately Black and other People of Color.

The current use of lower or preferential tax rates also contributes to both income and wealth inequality. Highly paid chief executive officers (CEOs) are a prime example. In 1978, CEOs made thirty times higher pay than the average worker; that increased to 271 times more in 2016. This gargantuan pay differential accompanied by significant decreases in the top marginal rate over the last several decades seals inequality, allowing for greater wealth accumulation and thus wealth transfer, which is potentially subject to significantly less tax under the current law.\textsuperscript{219} Similarly, lower capital gains rates continue to support a racial power differential between Whites and Blacks. Currently, the top 20% of income earners—who are

\textsuperscript{214} Id.
\textsuperscript{216} Brown, Shades of the American Dream, supra note 57 at 372.
\textsuperscript{217} Badger, Racial Wealth Gap, supra note 215.
\textsuperscript{219} Sterling & Steinbaum, TCJA Increases Inequality, supra note 115.
“overwhelmingly and disproportionately” White—own approximately 92% percent of all shareholder wealth. Shifts in tax rates that benefit executives and shareholders contribute to the wealth inequalities that negatively affect Blacks and other People of Color. These shifts also support the proposition that the IRC should particularly focus on wealth inequality, not just income inequality, through re-established higher capital gains and estate tax rates.

Another proposal with respect to the federal tax system is the adoption of a wealth tax. With support from other Democratic presidential candidates, Senator Warren has proposed such a tax, which would target the 75,000 wealthiest families in the country. A two-percent tax on a family’s wealth exceeding $50 million would be imposed, with an additional surcharge of one percent on wealth above $1 billion. The barriers to the effectiveness of a wealth tax could be significant—calculation of family wealth and loopholes therein, lack of compliance and enforcement resources within the IRS, potential constitutionality issues, and an incentive for wealth to be moved from the U.S. to countries abroad. Many European countries that previously imposed a wealth tax have abandoned it, a fact that some scholars contend suggests that the barriers to an effective wealth tax are potentially unsurpassable. Instead, these scholars propose alternatives such as strengthening the wealth-equalizing potential of existing tax laws by raising capital gains rates, taxing capital gains at death by eliminating the stepped-up basis rules, and imposing a transferee-oriented accessions tax. There are, however, resilient and viable responses that address such barriers and concerns.

220 Id.
221 Hamilton & Linden, Hidden Rules of Race, supra note 114.
225 Davison, Democrats Love a Wealth Tax, supra note 223.
227 Michael Hiltzik, How much would Elizabeth Warren’s wealth tax raise?
Due to the political paralysis in Congress, states may have the most opportunity and best ability to address wealth inequality through reformation of their tax systems. Because state and local governments collect approximately one-third of the country’s taxes and comprise almost one-half of all domestic public-sector spending, including over 90 percent of elementary and secondary education funding and nearly all public college and university funding, these governments are powerfully positioned to expand opportunity and increase equality based on race.\(^{228}\) As discussed herein, states must acknowledge their historical shifts from progressive taxes on wealth transfers and income, to regressive taxes on consumption, which has undoubtedly contributed to the steady increase in wealth inequality over the last decades. A return to progressive income taxes and consequential estate or inheritance taxes is a first step.\(^{229}\) “Circuit breakers” on property taxes and credits on other taxes based on household income are a positive step towards combatting wealth inequality, thereby addressing racial inequalities as well. States should likewise explore taxes that address accumulated wealth like increased taxes on capital gains and consequential inheritance taxes that address intergenerational wealth transfer.\(^{230}\) Some states like California have adopted a number of tax measures to address wealth inequality, and thereby disparate racial effects, with some success to date.\(^{231}\)

CONCLUSION

Racism in the United States has shifted over time from the direct to the indirect, from the overt to the implicit, from the intentional to the reflexive, from the personal to the institutional. Tax policy and law—which are often so complicated as to be opaque to non-experts—operate in the aggregate...

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\(^{228}\) Michael Leachman et al., *Advancing Racial Equity*, supra note 130.


\(^{231}\) See *supra* notes 129 to 134 and accompanying text.
and often masquerade as apolitical. Tax thus provides “cover” for racism as it has gone increasingly to an offstage rather than onstage role. 232 Our goal, in this article, has been to illuminate the racialized inequities perpetuated by the tax system as a whole and to document the continuing discriminatory effects of government action—here the federal, state, and local tax law and policy. We must name and describe inequity in order to move toward equity.

Thomas Jefferson wrote to James Madison in 1786, “whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right.” 233 In our view, the tax laws of the nation—a component of the laws of property—have been inequitably extended for far too long.

232 Camille Walsh, Racial Taxation: Schools, Segregation, and Taxpayer Citizenship, 1869-1973 at 174 (2018) (“[t]he quiet power of tax systems is their ability to hide in plain sight, even as they enact great injustices.”).