

Race and Tax: Colorblind No More

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Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data* (Nov. 18, 2020), available on [SSRN](#).

The summer of 2020 opened the eyes of many to the concept of systemic racism, and some even started looking in unlikely places – like tax law. Senator Sherrod Brown (D-Ohio) acknowledged in a June 2020 [hearing](#) that “Congress writes the tax laws. If there are ways that our current tax code exacerbates racial inequity, then it’s our job to fix it.”

Senator Brown’s articulated vision will be difficult to achieve because the Internal Revenue Service (“IRS”) does not collect or publish statistics by race. I confirmed this fact in a [telephone interview](#) with an IRS employee when I was writing one of my first pieces about systemic racism and tax policy over two decades ago. I was most interested in the distribution question – whether or not taxpayers were treated differently by race. (The answer is yes — they are treated differently. I write about this in a forthcoming book, [The Whiteness of Wealth: How the Tax System Impoverishes Black Americans—And How We Can Fix It](#).) But equally important questions were asked and answered by George Washington University Associate Professor of Law Jeremy Bearer-Friend, in his article: *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*.

Those questions included: (i) how the IRS came to ignore statistics on race; (ii) why is tax colorblind?; and (iii) how did tax become colorblind? In other words, how is it that our federal government that collects and publishes an enormous amount of information by race has never published tax statistics by race, whether we are talking about the IRS Statistics of Income Division (“SOI”), the Treasury Office of Tax Analysis (“OTA”), or the Joint Committee on Taxation (“JCT”) ? I had glided over these.

It is a brilliant work of legal scholarship documenting the long history of the federal government’s fairly consistent failure to provide tax statistics by race. His painstaking research included not only combing through a myriad of forms and reports looking for race and ethnic data, but also using freedom of information act requests. (P. 16.) But the article’s most important contribution lies in the even-handed approach he takes as he provides potential explanations for the colorblind policy and that policy’s equally “troublesome consequences.” (P. 66.)

Professor Bearer-Friend’s research documents the history of the federal government’s colorblind approach in its publication of tax data. Here he becomes a world-class detective, scouring through a hundred years of tax reports, forms, etc. to document the exceptional nature of how tax data is treated when compared with non-tax data where publishing race and ethnicity have been the long-established norm. He highlights the serious problem that the lack of data brings – namely that it renders invisible any racially disparate impact of our tax laws, which means the likely continuance of such disparities. For example, he compares the tax treatment of race by the SOI, OTA, and JCT with other government agencies like the United States Census Bureau that has included questions on race since 1790, or the Social Security Administration which began collecting such data in 1936. In short, other agencies collect data on race, but the IRS does not. In 1977, the Office of Management and Budget issued a directive to “standardize federal statistics and administrative reporting on race collected and ethnicity.” (Pp. 3-4.) But this did not trickle down to our tax administrators.

Professor Bearer-Friend points out how the lack of racial and ethnic data collection and/or publication is all the more exceptional given how the SOI, OTA, and/or JCT have included published analyses based on *gender* and *age*. He observes how their tax staff have ironically “described their own awareness of the importance of racial and ethnic

inequality in the same tax analysis publications in which they omit race and ethnicity.” (Pp. 8-9.) The one consistent exception on race and the IRS is when it comes to reporting statistics of its own workforce. The IRS began this practice in 1962. Professor Bearer-Friend points out the leadership of the IRS in the 1960s was actively trying to integrate its southern offices. The IRS collected data on race of its personnel to comply with Title VII of the Civil Rights Act of 1964. Yet it wasn’t until 2015 that the IRS proposed regulations implementing Title VI of the same Civil Rights Act and those regulations were finalized in 2016.

Two contrasting examples demonstrate Professor Bearer-Friend’s thesis that colorblindness was a choice. One JCT project that studied future taxable estates drew on census data which included population estimates by race and ethnicity but then did not include race or ethnicity in its published projections. *The JCT had the race data but didn’t do anything with it.* The second example comes from an OTA working paper in 1977 on income averaging that did include race data.

The harm done by not unpacking effects of tax policy on different racial and ethnic groups is staggering given the ubiquitous nature of tax policy and the “breadth of the taxing power” (P. 38.) And as Professor Bearer-Friend correctly observes, the government’s failure to deal with race has not stopped racially discriminatory harms. Many of these harms have been documented by scholars.

Professor Bearer-Friend concludes that there are three reasons why the colorblind approach continued for over 100 years: (i) privacy requirements afforded individual tax return data; (ii) path dependence, meaning that once colorblindness got a good head of steam, a course correction was difficult; and (iii) the belief long held by tax administrators in the “racial neutrality of tax laws.” (P. 66.)

Professor Bearer-Friend discusses the pros and cons of the different ways of collecting race and ethnicity tax data. Should a box be added to the 1040? Should existing collectors of race data add 1040 questions to their surveys? Should the IRS add race and ethnicity questions to their existing surveys?

Making race and tax data publicly available is a choice whose time has come. In January President Biden signed an [executive order](#) requiring that racial equity become a focus of all government agencies. Professor Bearer-Friend’s path-breaking article can serve as a guide in the area of tax administration.

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