

Tax and Race

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Dorothy Brown, [The Whiteness of Wealth](#) (2021).

Almost twenty-five years ago, [Professor Dorothy Brown](#) started writing law review articles (such as [here](#), [here](#) and [here](#)) in which she applies critical race theory to tax law. This year, she published [The Whiteness of Wealth](#), a book that not only claimed waves of popular and media attention but also provides a definitive statement of her longstanding scholarly project. The book offers a detailed case study of structural racism in law. It merits sustained attention from teachers and researchers, tax and otherwise.

Brown's project has a descriptive component and a normative component. The descriptive component is based in cold logic, though made more accessible with stories from original interviews and from Brown's family history. The logical equation is this: facially neutral tax law doctrine plus empirically different experiences based on race equals disparate impact that systematically favors white taxpayers and white wealth. In 2016, the median wealth of Black households was \$17,100; of Latinx households, \$20,600; of white households, \$171,000. (P. 18.) Brown explains that tax law—not personal choice—explains a large part of this wide and persistent divide. She further argues that as a normative matter, equity and fairness require tax policy to reject rules that disadvantage “black families’ financial and social structures.” (P. 41.)

Here are three illustrative examples from Brown's book: First, marriage. Brown presents data that shows that Black married couples are systematically less likely to be single-earner couples and more likely to be dual-earner couples, each as compared to white couples. The gap is eight percentage points at household income of \$50,000 and grows with income. (P. 51.) This means that, holding income constant, white married couples disproportionately and systematically benefit from the exclusion of imputed income from household services and from the marriage bonus that produces lower tax bills for a single earner when he marries. Black adults who are single (a larger proportion compared to white adults) do not benefit from the marriage bonus either. (P. 57.)

Next comes homeownership. The tax law does not tax imputed rental income from owner-occupied real estate, and it allows deductions (subject to some limits) for mortgage interest and property taxes. These tax breaks increase the value of existing residential real estate. But only 44 percent of Black households are homeowners as compared to 73 percent of white households. (P. 85.) And among Black homeowners, Brown explains that “the average black homeowner lives in a neighborhood that is 51 percent black [and] property values start falling when black presence in the neighborhood exceeds 10 percent.” (P. 81.) Based on these data, homeownership is not a safe investment for a Black household, but rather a risky bet that could well produce a loss. On the other hand, most white homeowners will see their homes' value increase over time. Yet the tax law disallows losses and exempts most gains on sale of owner-occupied real estate.

The third example is retirement savings. Brown explains that Black Americans “consistently [say] they prefer to invest in housing and life insurance,” not in the stock market (P. 179) and that “[w]hite middle-class families are more than twice as likely as black middle-class families to own stock.” (P. 175.) Thus, the retirement and other savings preferences in the tax law that begin at the starting point of an investment account help white taxpayers more than Black taxpayers.

Brown explains that race discrimination supports the results in each of these examples. Black couples are more likely to be dual earners in order to mitigate the job insecurity and lower wages that result from labor market discrimination.

(P. 41.) White homeowners' current preferences for avoiding neighborhoods with any significant proportion of Black families—in addition to the legalized segregation and redlining of the past—drives disparate housing market results. (P. 87.) Risk aversion in investing is a predictable outcome of systemic racism, which produces more risk, and thus more risk aversion, for Black families in nearly every aspect of life. (P. 181.)

The normative portion of Brown's argument rests on a broad foundation. She argues that equity and fairness require the tax law to reject rules that disadvantage "black families' financial and social structures." (P. 41.) Brown's argument finds a parallel in recent work in law and political economy (for instance [here](#), [here](#) and [here](#)) that argues that part of law's task is to address structural inequities, including those that appear because of the interaction between the market and the law.

Brown follows the logic of her normative claims to their full conclusions and recommends sweeping changes to core individual income tax provisions of the Code. As to marriage, Brown would adopt single filing. (P. 61.) As to homeownership, she would allow loss on sale, tax gain on sale and disallow deductions for property taxes and mortgage interest. (Pp. 89, 93.) (Brown does not propose the taxation of imputed income from household services and homeownership.) As to retirement savings, she would repeal all incentives—although in a later section she also points out that so long as these and other incentives exist, Black Americans should consider taking advantage of them, for instance by investing in the stock market. (P. 212.)

Indeed, Brown would repeal all exclusion and deductions and special rates, including the deduction for state and local taxes and lower rates for capital gain. The reason is simple: these disproportionately benefit wealthy Americans, and thus white Americans. (Pp. 206-07.) Instead she would enact a living allowance deduction and a refundable tax credit paid to those with less wealth. (P. 209.)

Brown writes that the idea of a refundable wealth-based credit is second-best compared to the first-best idea of paying reparations. (P. 216.) Brown's support for reparations aligns with the view expressed in [Boris Bittker's seminal 1973 book](#). Her analysis not only explains the tax law's role in producing racially disparate wealth (which Bittker does not mention) but also provides a modern tax expenditure design twist. How might her first-best choice of reparations payments be delivered? Through a refundable tax credit available to all Black Americans. (P. 216.)

Brown is well aware of counterarguments to her proposals. Take transition costs, such as the reduction in home values that would result from the repeal of residential real estate tax advantages. As she writes, this would reduce home values for a large majority of American households, including for the 44% of Black households who own homes, and including for Brown herself. (Pp. 90-91.) But Brown's goal is simply bigger and more important than avoiding pricing disruptions in the housing market.

The proposals Brown makes for broad-based income tax reform generally draw support for other reasons, including economic efficiency and administrability. Eliminating special deductions and exclusions and tax rates tends to reduce excess burden distortions, and also tends to reduce tax law complexity. But to the extent there is any tension between Brown's fairness claims, on one hand; and efficiency or administrability concerns, on the other hand, Brown does not accept any caveats. She has a clear and different goal, and that goal is grounded in vertical and horizontal equity and based on race. Her point is that the tax law should reverse its history of quietly and inexorably increasing the racial wealth gap because that is the fair and right thing to do.

Brown's book is an instant classic. This is so both because of what it reveals about tax law and because of Brown's method of marshaling statistics to reveal disparate impact in a technical area of law. Read it!

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