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Book Reviews

In each issue, *JATA* publishes reviews of textbooks and other books of interest to tax scholars. All book reviews are solicited by the Associate Editor. However, if you know of a book that you would like reviewed or if you are interested in reviewing a book, please contact the Associate Editor.

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DOROTHY BROWN, *The Whiteness of Wealth* (New York, NY: Penguin Random House, 2021, 1–279, $16.99).

Anyone who has even a passing interest in tax policy has surely heard by now about Dorothy A. Brown's superlative book, *The Whiteness of Wealth*. Brown, who is a nationally recognized expert both in tax law and in race and the law, is currently the Martin D. Ginsburg Chair in Taxation at Georgetown University Law Center. Originally published in March 2021, Brown's book has sparked a valuable conversation about how our tax system contributes to economic racial disparities from which Black Americans suffer.

The central thesis of *The Whiteness of Wealth* is that a myriad of provisions of the Internal Revenue Code help white taxpayers to make, save, and grow their money. At the same time, according to this thesis, those same provisions make it far more difficult for Black taxpayers to generate income, set aside savings, or otherwise amass property. Brown argues that the disparate racial impacts of these federal tax rules are a substantial cause of the extraordinary racial wealth gap in the United States.

Initially, some readers may be skeptical of these claims. After all, the same tax rates apply to all taxpayers, regardless of whether they are white or Black (or any other race). So, too, the rules for calculating a taxpayer's taxable income—for example, the various deductions or exclusions from income—apply uniformly, irrespective of the taxpayer's race. Given that our tax laws are racially neutral on their face, how could they produce anti-Black outcomes?

The answer, as Brown advises, is that, while our tax laws may be racially impartial on paper, they are racially discriminatory in practice. She describes how multiple facets of our income tax system help white taxpayers to achieve financial success while simultaneously buttressing systemically racist obstacles to Black taxpayers' ability to attain even basic financial stability. In Brown's words, various tax policy decisions that we have made "every year take money out of Black taxpayers' hands and put it into white taxpayers' pockets."

The reason for this, according to Brown, is that "our most foundational tax laws were created at a time when racial bias wasn't just common—it was the norm and quite legal." Brown traces the histories and then describes the present-day effects, of these laws—from the rules for taxing married couples to the preferential treatment of long-term capital gains. In so doing, she demonstrates how our current tax system has evolved in consistent recognition and promotion of white preferences and white economic circumstances and in near-total disregard of the cultural norms and unique financial challenges of Black Americans. In short, as Brown puts it, "our tax policies ignore the day-to-day reality of most [B]lack Americans, who are still playing catch-up in a system that deliberately excluded them for many years."

Tax Rules with Disparate Impacts—The Treatment-of-Home-Sales Example

Brown provides numerous analyses of tax rules that may appear to be racially neutral on the surface but which have insidious anti-Black effects in practice. For a sample of her analytical approach, let us review one of her most compelling examples:

In Chapter 2, Brown discusses how the tax treatment of home sales helps to make white homeowners richer but often makes Black homeowners poorer. Home ownership comes with a potential tax benefit that can help to greatly increase the owner's wealth. If a taxpayer who has owned and used her home as her primary residence for at least 2 years sells the home at a profit, she can exclude the first $250,000 of her gain from her taxable income. A married couple filing jointly can exclude the first $500,000 of their gain. However, if a taxpayer sells her personal residence at a loss, she cannot claim the loss for tax purposes. Unlike losses on sales of business-use assets or assets held for investment (such as stocks or bonds), losses on sales of personal-use assets cannot be used to offset a taxpayer's taxable income from other sources. Because one's home is deemed to be a personal-use asset rather than an investment asset, losses on a home sale are not tax deductible.

Brown acknowledges that, on its face, this "doesn't seem like a policy that would have a profoundly disparate racial impact." But, as Brown informs us, the policy does in fact have disparate impacts that ultimately stem from anti-Black discrimination in the housing market—which once was overtly supported by federal law and which continues today.

After the 1968 enactment of the Fair Housing Act, it is no longer legal to include racially restrictive covenants in home sale contracts or to "redline" Black neighborhoods for mortgage denials. Nevertheless, real estate agents apparently continue to find ways to "steer" white homebuyers away from neighborhoods with significant Black populations. For example, Brown references a 2019 *Newsday* article on the practices of Long Island real estate agents, who warned "white homebuyers…of crime in racially diverse neighborhoods, while [B]lack homebuyers were encouraged to buy in the same neighborhoods." These practices persist because, as Brown observes, "present-day, twenty-first-century white Americans"—who constitute the majority of homebuyers—"simply do not want to live next to too many [B]lacks."

According to research that Brown cites, home values in a given neighborhood begin to decline "when [B]lack presence in the neighborhood exceeds 10 percent[,]" and "[t]he values fall even further as [B]lack presence increases." Similarly, for neighborhoods with higher percentages of Black residents, the rate of appreciation (if any) in home values is substantially lower than in white neighborhoods. This creates an ugly dichotomy. White Americans' homes tend to appreciate in value "because the neighborhoods they live in are attractive to other white American homebuyers." At the same time, Black Americans who buy homes in neighborhoods with significant Black populations get very different results. If they are able to sell their homes for any gain at all, "their gain is significantly less[,] and they are more likely to sell their homes at a nondeductible loss."

For white Americans, investing in a home is a reliable method for building wealth. But, because of white homebuyers' anti-Black racism, investing in a home often makes Black Americans poorer. Brown recounts a study, for example, which shows that, during the period from 2000 to 2010, low-to-moderate-income Black families "consistently lost money" on home sales "regardless of timing."

Federal tax policy exacerbates the effects of this racism, as Brown points out. White homeowners disproportionately reap the additional wealth-building benefits of the gain-on-sale exclusion. Black homeowners, by contrast, suffer even more wealth depletion when they sell their homes at a loss, because they cannot apply the loss to reduce their tax burden. The rules for taxing home sales, in Brown's words, "ignore the very real economic and social differences between [B]lack and white experiences." Those rules "reward" white taxpayers who choose to buy homes in predominantly white neighborhoods, and they "punish" Black taxpayers who choose to buy homes in neighborhoods with other Blacks.

Because of these inequities, Brown advocates for eliminating all tax subsidies for homeownership—including both the exclusion of gain on sale and the mortgage interest deduction. She notes that such reforms might be politically difficult to effect, however, given the powerful interests that would fight to protect those subsidies. Additionally, she recommends making a loss on the sale of a home tax deductible—in the same way that losses on sales of securities currently are.

Other Disparate-Impact Tax Rules and Systemic Racism More Broadly

Brown finds similarly disparate racial impacts in such provisions as the joint filing status for married couples, the home mortgage interest deduction, the student loan interest deduction, the exclusion from employee income of employer-provided health insurance, the preferential treatment of section 401(k) accounts and other employer-provided retirement benefits, preferential capital gains rates, the exclusion from the recipient's income of gifts or inheritances, and the unified transfer tax credit.

At the same time, she implores us to recognize how systemic anti-Black racism continues to infect the vast majority of American public institutions—including the labor market, the housing market, and our system of higher education to name but a few examples. As she potently demonstrates in example after example, the racism that pervades nearly all aspects of economic life prevents Black Americans from competing on an equal playing field with their white peers. Brown's mantra is that we have to admit that this racism still exists so that we can finally eradicate it.

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A Conception of Horizontal Equity that Accounts for Societal Racism

In the tax policy realm, Brown challenges us to reconsider the actual meaning of "horizontal equity." The doctrine of horizontal equity, which is foundational to any fair income tax regime, technically requires that taxpayers who stand in equal relation to the income tax base—that is, who have equal taxable incomes—should be taxed equally. The underlying principle is that taxpayers who have the same ability to pay should pay the same amount of tax. But what exactly should we look at to determine whether any particular taxpayers really have the same ability to pay a tax?

Imagine, for example, two married couples who each file a joint return and who each have a combined taxable income of \$80,000. Do those two couples have the same ability to pay? Should they be taxed in the same amount? Under the conventional conception of horizontal equity—in which one simply compares the amounts of the taxpayers' incomes comprising the tax base—the answer to both questions is "yes." Each couple purportedly has \$80,000 available from which to pay an income tax; therefore, the couples should be taxed equally.

Brown, however, argues that true horizonal equity—that is, accurately measuring whether different taxpayers have the same ability to pay a tax—requires taking account of more than the taxpayers' respective nominal incomes. Assume, for instance, that in the example above, one of the two married couples is white and the other is Black. Do they have equal ability to pay an income tax simply because they each have \$80,000 of taxable income? Brown would say "no." For a variety of reasons—each ultimately traceable to continuing systemic racism—the Black couple likely has substantially less means to pay.

For one thing, as Brown would note, it is statistically far more probable for the white couple (than for the Black couple) to have one spouse earning the entire \$80,000 in the workplace and the other spouse being a homemaker. The Black couple, in other words, is more likely comprised of two spouses who both work outside the home, perhaps earning \$40,000 apiece. Brown says this is largely because, due to ongoing racism in the labor market, "it often takes two [B]lack workers to match the salary of one white worker." Moreover, she would argue that the white couple with one \$80,000 wage earner and one stay-at-home spouse has greater actual income than the Black couple with two \$40,000 wage earners. The white couple has imputed income from the stay-at-home spouse's work within the home. By contrast, the Black couple is likely to have additional expenses for things like child daycare because both spouses have to work outside the home.

In addition, as Brown discusses, a white employee is statistically considerably more likely than a Black employee to receive employer-provided health insurance and retirement benefits. Even if they are equally qualified (in terms of education or training), Black workers often have to accept lower-paying jobs than their white peers, and such jobs are less likely to have health or retirement benefits attached. Even in the case of more senior white-collar workers within an organization, a Black worker is statistically more likely than her white counterpart to fill the position as a so-called "contract" employee rather than as a regular full-time permanent employee. These contract positions are also less likely to come with health insurance and retirement benefits. To Brown, these discrepancies again exemplify anti-Black discriminatory employment practices. Assuming that our hypothetical white couple receives health insurance and/or retirement benefits from the working spouse's employer and assuming that our hypothetical Black spouses receive no such benefits, the white couple has yet another source of actual income that the Black couple lacks.

Perhaps most significantly, Brown repeatedly reminds us that income and wealth are two different things. On her view, a truly equitable measure of a taxpayer's ability to pay a tax would consider not only the taxpayer's income but also her wealth. As Brown delineates, because of past and present systemic racism, Blacks at all income and education levels are statistically likely to have far less wealth than their white peers. For instance, because of the above-described anti-Black discrimination in the housing market, Black homeowners are likely to have far less home equity than white homeowners. Indeed, according to research that Brown cites, "the single largest contributor to the racial wealth gap" during the period from 1984 to 2009 "was homeownership."

Brown contends that systemic racism significantly reduces wealth-building opportunities even for higher-income Black Americans. She points out that many Black Americans have "family member[s] who [have been] denied access to wealth-building perks because of their race[.]" Therefore, as she puts it, Black Americans who have corporate jobs with good salaries tend to "stretch their salaries to support extended family members who haven't had the same wealth-building opportunities." This prevents these higher-salary Black workers from accumulating savings for themselves or their children.

For example, as Brown notes, "[B]lack college graduates are more likely to provide financial support to their parents, while white college graduates are more likely to receive financial support *from* their parents." Based on one study that Brown cites, such financial transfers from child to parent—which are "much more common among Black college-educated households"—apparently "decrease household net wealth by more than 25 percent." As a result, a Black person "who gets a high-paying job, with the same salary and benefits enjoyed by [her] white peers…won't be able to build wealth as easily as [her] white peers."

In sum, based on Brown's analysis, our hypothetical Black couple is statistically likely to have substantially less wealth than our hypothetical white couple.

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Brown maintains that, due to the foregoing factors, "Black and white households with the same income simply do not have the same ability to pay." In her words, the "two households are in completely different financial situations, and federal policy created that discrepancy." Therefore, "[t]rue equity demands that they *not* pay the same amount in taxes." On this theory, the only fair result would be for our hypothetical Black couple to pay less in tax than our hypothetical white couple, despite the couples' nominally equal $80,000 taxable incomes. Any contrary conception of horizontal equity, Brown argues, "assume[s] away the impact of societal race-based discrimination."

Of course, under our present system, the two couples would pay the same income tax because they have the same filing status and taxable income, but, as Brown explains, the Code provides numerous benefits that redound disproportionately to white households and place a number of burdens that fall disproportionately upon Black households.

Applying Brown's analysis, the imputed income of our hypothetical white couple's stay-at-home spouse is excluded from taxable income, as are the white couple's employer-provided health insurance benefits. Similarly, inclusion of the white couple's employer-provided retirement benefits is deferred. The white couple can also exclude the first $500,000 of any gain that they realize on a sale of their primary residence, while our hypothetical Black couple will be unable to deduct any loss that they realize on a sale of theirs. If the white couple receives a financial gift from a parent or other relative, the gift is not included in their taxable income. At the same time, the Black couple will not receive any deduction or other allowance for financial support that they provide to extended family members who do not qualify as dependents.

On top of all this, our hypothetical white couple gets a tax break for being married, which our hypothetical Black couple does not. Brown observes that, unless they are in the highest marginal bracket (or, bizarrely, unless they qualify for the earned income tax credit), a married couple filing jointly in which salary income comes from only one spouse will pay somewhat less in tax than the two spouses would pay collectively if they were unmarried. Married couples in which both spouses earn equal salaries, however, do not receive nearly as much of a marriage-based benefit.

Brown proclaims that results such as these reflect how "[o]ur tax policies were built in total ignorance of—if not willful disregard for—black families' financial and social structures." She makes a strong case that, because of this indifference or malice, "[b]arriers to [B]lack wealth building are deeply embedded in our tax code and result in an ever-increasing racial wealth gap."

Brown's Antiracist Tax Reform Proposals

If the gross inequities that Brown describes indeed exist in our tax system, how can we remedy them? Brown declares that we need a "new tax system [that] will benefit [B]lack Americans with intention, by recognizing the racism they endure in every walk of life." This means, among other things, instituting tax reforms expressly to "address the racism that has shaped the housing, college, and labor markets in the decades since" the Revenue Act of 1913 created the modern income tax. To that end, she "propose[s] three key tax measures that would both reduce the existing [racial wealth] gap and prevent it from perpetuating across generations."

First, Brown would eliminate all exclusions or deferrals from taxable income. For instance, the value of gifted or inherited property would be included in the recipient's income, and a homeowner would have to include all gain on a sale of her house. All wage or salary income would also be taxable, "including whatever portion goes into a retirement account." She would make these changes on the ground that "[c]urrent exclusions…privilege white taxpayers with existing wealth at the expense of [B]lack taxpayers without it." She believes that "[b]y eliminating all exclusions, we can halt the cycle in which established white wealth continues to grow, and [B]lack wealth continues to diminish."

Likewise, Brown thinks that "[r]epealing all deductions [would have] a similar effect, and [would be] likely to have the greatest impact on only the wealthiest taxpayers." Although she is not entirely clear on this detail, she presumably is referring here to an individual taxpayer's *personal* deductions, such as the mortgage interest deduction and the charitable contribution deduction. Repealing a noncorporate taxpayer's trade-or-business-expense deductions, by contrast, would hardly seem to further Brown's policy goals. Accordingly, the only personal expense deduction that Brown would permit would be a new "living allowance deduction[,]" which "would reduce or eliminate income taxes for those taxpayers who earn less than the living wage in their geographic region."

In conjunction with eliminating exclusions and deductions, Brown would subject all taxable income to a uniform progressive tax rate schedule. She would do away with preferential rates on long-term capital gains. Furthermore, she would require all taxpayers, including each spouse in a married couple, to file an individual return. Brown would eliminate the joint filing status for married couples, which she sees as more beneficial to white couples than to Black couples. She argues that these reforms of the income tax base and tax rates "would not only intentionally create a more level playing field for [B]lack American taxpayers but [would] also benefit the majority of taxpayers of all races[.]"

Second, to rectify what she identifies as "decades of historical discrimination against [B]lack taxpayers[,]" Brown proposes a one-time refundable tax credit for all Black taxpayers. Under this proposal, if a Black taxpayer's tax liability

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were less than the credit, she would receive a refund each year until the credit had been fully applied. Conversely, if a Black taxpayer's tax liability were greater than the unused portion of her credit, she would pay the difference. In either case, the Black taxpayer would "pay less than white taxpayers with the same household income." Brown maintains that this "would satisfy a definition of horizontal equity that took societal racism into account." Based on a $10.7 trillion estimate of the Black-white racial wealth gap, Brown advocates a $267,000 tax "reparation credit" for each of "the forty million eligible [B]lack descendants of American slavery."

Third, Brown calls for the Internal Revenue Service to begin to collect and publish federal taxpayer statistics by race. She believes that this would help to expose "how the racially discriminatory tax policies revealed in [her] book play out on a national scale." Such exposure, in turn, could generate political support for the tax reforms that Brown proposes.

Just as importantly, drawing congressional attention to the racially disparate effects of current tax policies could provide crucial legal support for remedies targeted expressly to Black taxpayers, such as Brown's reparation credit. Brown expresses concern that the Supreme Court would likely invalidate any such targeted reforms because, under the Court's current constitutional interpretation, race-based remedies are permissible only to rectify governmental actions that have both discriminatory impact and discriminatory *intent*. At present, she concedes, it would be difficult to prove that today's tax policies are intended to be discriminatory. If the government begins to report race-based tax data, however, it will become increasingly difficult for Congress to ignore the evidence "of how [current] tax policies have different racial impact." Continuing those policies in the face of such evidence, Brown reasons, would be demonstrably tantamount to congressional discriminatory intent.

The Intellectual Force of *The Whiteness of Wealth*

Any reader who approaches Brown's arguments in good faith will come away, at the very least, with a deeper appreciation of the need for policymakers to be mindful of the ubiquitous role that race plays in American society. The real genius of *The Whiteness of Wealth* lies perhaps less in Brown's appraisal of any particular tax rule than in how she helps to focus our broader thinking about racial equity in American public policy.

Regardless of what one may think of Brown's specific proposal to abolish the joint filing status for married couples, for example, it is impossible to dismiss her underlying point: tax policy (or, indeed, any governmental policy) should not reflect a bias that favors white cultural norms over Black cultural norms—for example, in matters of family financial structure or divisions of labor within a marriage. This is especially true to the extent that the cultural differences in question developed out of Black Americans' necessary responses in the face of ongoing societal racism (such as their favoring two-earner households or prioritizing financial support for extended family members).

Engaging with Brown's arguments provides an illuminating intellectual exercise in empathy. To apprehend the full force of her policy assessments, a non-Black reader has to imagine him- or herself in the shoes of the Black taxpayers whom the policies affect.

For instance, Brown finds racial bias in preferential rates for long-term capital gains on sales of stocks or bonds. She notes that even affluent Black taxpayers hold far less of their wealth in securities than their white counterparts (and, thus, whites benefit disproportionately from the preferential rates). One reason why Blacks generally choose not to invest in securities, Brown tells us, is that securities brokerage personnel are overwhelmingly white. On first impression, this might seem to be an irrational choice and, by extension, a questionable ground for condemning as racist a policy that favors securities investments. But if we reflect on the matter honestly, we have to ask, would white taxpayers invest as heavily in securities as they do if securities brokers were overwhelmingly Black? It's an uncomfortable question, but it highlights the need for addressing issues of race that inform Brown's work.

Conclusion

The Whiteness of Wealth is an important and thought-provoking book. It promises to influence tax policy debates well into the future and for the better. For anyone whose work involves tax policy specifically and for anyone who wants to better understand the arguments for racial equity initiatives in public policy more generally, *The Whiteness of Wealth* is required reading.

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