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FOREWORD

ILLUSION OF NEUTRALITY: THERE'S MORE THAN MATH AND
MONEY IN TAX

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FOREWORD

ILLUSION OF NEUTRALITY: THERE'S MORE THAN MATH AND MONEY IN TAX

*Alice G. Abreu**

On February 24, 2023, nearly 100 people gathered at Skadden's conference room in Washington, D.C. for a symposium on "The Federal Income Tax: Racially Blind but Not Racially Neutral," (the Symposium) with about 250 others participating online. The in-person attendees included tax practitioners from a variety of venues, ranging from private practice to public service (IRS's Office of Chief Counsel) and public interest (low

* The Honorable Nelson A. Diaz Professor of Law, Temple University Beasley School of Law. Heartfelt thanks to Bridget Crawford for her unstinting support from the inception of this project as well as for her prodigious organizational skills; this Symposium would not have happened without her. Thanks as well to Tony Infanti, Phil Hackney, and the University of Pittsburgh School of Law for publishing the essays contained in this issue and thus providing a platform for the dissemination of the ideas discussed at the Symposium. The American Tax Policy Institute (ATPI), under the leadership of Eric Solomon, past President, and Julie Divola, current President, made the Symposium possible by being its principal sponsor. ATPI provided significant financial support as well as all of the administrative support, including housing all of the Symposium materials on its website, where they still reside: <https://www.americantaxpolicyinstitute.org/race-and-tax-symposium/>. In addition to ATPI, the American College of Tax Counsel, the Tax Section of the American Bar Association, the National Tax Association, Skadden, Arps, Slate, Meagher & Flom, and Temple University's Beasley School of Law as well as the Elisabeth Haub School of Law at Pace University also provided vital financial and other vital support, for which I am very grateful.

This project would not exist without the pioneering work of scholars like Professors Beverly Moran, William Whitford, Karen Brown, and Mary Louise Fellows, among many others, or without the tenacity of Professor Dorothy Brown, whose work demonstrating the racially disparate effects of the federal income tax system began decades ago but exploded onto the national conscience in March 2021, with the publication of *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021). Professor Brown's book was the inspiration and catalyst for the Symposium, and we, and the tax system, are in her debt. Thanks also to Michael Graetz for inspiring the title to this foreword: Michael J. Graetz, *Distributional Tables, Tax Legislation, and the Illusion of Precision*, in *DISTRIBUTIONAL ANALYSIS OF TAX POLICY* (David F. Bradford ed., 1995), expanded in Michael J. Graetz, *Paint by Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609 (1995).

income taxpayer clinics), as well as the judiciary (several Tax Court judges and other Tax Court personnel), and law schools, including students from Howard University and Temple University, as well as their faculty, many of whom were presenters. The energy and anticipation in the room were palpable.

The impetus for the Symposium was the publication of Professor Dorothy Brown’s pathbreaking book *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans—And How We Can Fix It*, which was embraced not only by tax scholars but also by the public. *The Whiteness of Wealth* (TWOW) brought into popular discourse an analysis that had previously been the province of a relatively small group of legal academics, and it brought Professor Brown into the homes of thousands of Americans. It made its subject—the ways in which the tax system privileges white taxpayers and disadvantages Black taxpayers—a topic of dinnertime conversation and social media discussion. Two months after its publication, it even penetrated daytime television with Professor Brown’s appearance on the popular program *The View*.¹

Given that the analysis of systemic racism in the tax law was pioneered by legal academics,² and that the subject was catapulted into mainstream discourse by a legal academic,³ it seemed fitting that academics actively

¹ *The View: Dorothy A. Brown on “The Whiteness of Wealth” and Financial Tips for Black Community* (ABC television broadcast May 19, 2021), <https://abcnews.go.com/theview/video/dorothy-brown-whiteness-wealth-financial-tips-black-community-77784029>.

² Professors Beverly Moran and William Whitford wrote what is widely regarded as the first article to undertake a systematic analysis of racism in the tax law, Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996), and Professors Karen Brown and Mary Louise Fellows were the first to devote an entire book to its examination. KAREN B. BROWN & MARY LOUISE FELLOWS, *TAXING AMERICA* (1997). Underscoring how long legal tax academics have been engaged in what now seems to some a newly-discovered pursuit, in the authors’ footnote to *A Black Critique*, Professors Moran and Whitford note that their “work was first presented in 1991 at a Minority Teacher’s Workshop organized by the Association of American Law Schools.” *Id.* at 751. In his 2020 Presidential address, Dr. William Gale, then President of the National Tax Association, the principal professional organization of public finance economists, observed that “Mainstream public finance analysis has proceeded for decades with virtually no attention to race issues. *The legal literature has focused more directly on race and taxes; as just two notable examples out of many, see Moran and Whitford (1996) and Brown (2021).*” William G. Gale, *Public Finance and Racism*, 74 NAT’L TAX J. 953, 954 (2021) (emphasis added).

³ DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021).

engaged in the production of scholarship amplifying that analysis should gather to discuss it before an audience that reached beyond the halls of academia. The Symposium was that gathering. For what I believe to be the first time, the subject of systemic racism in the tax law was discussed for an entire day before an audience in which academics were almost certainly a minority.

The Symposium also confirmed that the analysis of systemic racism in the tax law has entered the mainstream of tax discourse. Not only did the Symposium receive public financial support from the largest organization of tax lawyers in the country—the Tax Section of the American Bar Association—it had as its principal sponsor the American Tax Policy Institute (ATPI), an “organization whose Trustees and members are some of the leading experts on taxation from the fields of law, accounting and economics.”⁴ The tax system and tax scholarship owe a debt of gratitude to the two individuals whose leadership at ATPI made the Symposium possible: Eric Solomon,⁵ President of ATPI when I first approached it for support, and Julie Divola,⁶ President of ATPI when the Symposium was held. The Symposium would not have happened without them, and it was my distinct pleasure to work with two such brilliant tax lawyers and leaders.

Moreover, the Symposium was robustly supported by the American College of Tax Counsel,⁷ under the leadership of Armando Gomez, its

⁴ AM. TAX POL’Y INST., <https://www.americantaxpolicyinstitute.org/> (last visited Oct. 19, 2023).

⁵ Eric Solomon, now a partner at Ivins, Phillip & Barker, was then a partner at Steptoe & Johnson and has held numerous high-level positions both at the IRS Office of Chief Counsel and the Treasury Department’s Office of Tax Policy, including the highest such position in tax, Assistant Treasury Secretary for Tax Policy. *See Eric Solomon*, IVINS PHILLIPS BARKER, https://www.ipbtax.com/attorneys-Eric_Solomon (last visited Nov. 10, 2023).

⁶ Julie Divola is a partner at Pillsbury Winthrop Shaw Pittman and the leader of its San Francisco tax practice. She has been the Chair of the Tax Section of the American Bar Association and is the current President of ATPI. *See Julie A. Divola*, PILLSBURY WINTHROP SHAW PITTMAN LLP, <https://www.pillsburylaw.com/en/lawyers/julie-divola.html> (last visited Oct. 19, 2023).

⁷ The College is composed of

an extraordinary group of America’s very best tax attorneys. Membership is reserved for those leaders who have made an exceptional contribution to their chosen profession. Fellows must be nominated for the honor of membership and must then undergo a rigorous screening process prior to being elected as Fellows of the College. . . . As part of its mission to improve the tax system,

President,⁸ who was also instrumental in obtaining the support of his firm, Skadden, Arps, Meagher & Flom.⁹ Skadden generously provided the use of its conference room, which has a maximum occupancy of 150 as well as state-of-the-art technology, making it possible for the Symposium to be the kind of interactive, thought-provoking, and community-building event that seemed like a distant memory during the pandemic years. The support of the National Tax Association meant that Symposium attendees included public finance economists, who had recently begun to examine racism in tax through the lens of their own profession,¹⁰ thus expanding the scope of the analysis.

In coming together to advance the project of exposing the ways in which the tax system provides only the illusion of neutrality, the scholars who participated in the Symposium¹¹ amplified the pivotal insight with which Professor Brown opened her book: the ubiquity of math and money in tax, which hides the ways in which the tax law reflects other values. As Professor Brown explains, before she became a lawyer, tax had seemed to be a field of law that “was about math” and in which “the only color that matter[s] is green.”¹² But, eventually, she discovered that she had “never been more

the College provides recommendations to Congress and the Internal Revenue Service for improving the nation’s tax laws and the way that they are interpreted and administered, and it provides input into the judicial system by filing “friend of the court” briefs in selected tax cases.

AM. COLL. OF TAX COUNS., <https://www.actonline.org/> (last visited Oct. 19, 2023).

⁸ Armando Gomez is a partner at Skadden, Arps, Slate, Meagher & Flom, former Chair of the Tax Section of the American Bar Association and currently its Senior Delegate to the House of Delegates, as well as co-chair of the tax system working group of the Law Firm Antiracism Alliance, among many other activities and honors. *See Armando Gomez*, SKADDEN, <https://www.skadden.com/professionals/g/gomez-armando> (last visited Oct. 20, 2023).

⁹ *See* SKADDEN, <https://www.skadden.com/> (last visited Oct. 19, 2023).

¹⁰ *See* Gale, *supra* note 2, at 953.

¹¹ This group consists of the scholars who attended the Symposium as well as those unable to participate in person but who nevertheless wanted to contribute their insights and whose work is included in this issue.

¹² BROWN, *supra* note 3, at 5.

wrong about anything in [her] life.”¹³ The Symposium participants provided further evidence of the importance of that insight.

There is no denying that tax seems to be about numbers. Despite my own resistance to the concept of tax exceptionalism, I acknowledge that tax is different from other fields of law—that is what makes it a field of law.¹⁴ And one of the most salient ways in which tax is different from other fields of law is the central role that numbers and math play in tax. The impact of the tax law—the amount of tax due or benefit to be received—always involves money, which is measured in numbers. So, numbers are integral parts of the tax law. In addition, it is impossible to determine the amount of tax due or refund to be received without engaging in some computation. Therefore, math, or at least arithmetic, is also fundamental to tax. That one-two punch—numbers and math—creates the illusion of neutrality. Adding two to two will always produce four, no matter who is doing the adding or is affected by the result. So, it might follow that a field with numbers and math at its core would be neutral. But it is not.

The tax law, like all law, reflects values. And one of the values most prominently reflected in the tax law is the value of capital. Tax law systematically privileges capital not only because it applies dramatically lower rates to gains from capital than to income from labor,¹⁵ but also because the realization requirement allows the value of capital to escape taxation for years, and even generations. Wealth is capital, and if, on average, “for every dollar the middle white household holds in wealth—measured by assets like homes, cash savings, and retirement funds—the middle black household possesses a mere ten cents,”¹⁶ it must follow that a system that preferences capital over labor preferences white taxpayers over Black taxpayers. And that

¹³ *Id.*

¹⁴ Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663 (2019).

¹⁵ Under current law, the maximum rate on capital gains is either 20% or 23.8%, depending on the application of § 1411, whereas the maximum rate of tax on income from labor is 37% or 40.3%. I.R.C. § 1(h)(1) & (j)(2).

¹⁶ WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 31 (1st ed. 2020). Darity and Mullen base this statement on data from the 2016 Survey of Consumer Finances. *See id.* at 299 n.9.

is what the presentations at the Symposium, and the essays in this issue, demonstrate.

Professor Leo Martinez’s essay, *You’ve Got to Speak Out Against the Madness: The Myth of Tax Neutrality*, is the first in this issue. The essay not only develops the theme of illusory neutrality but also “explores how unfairness is allowed to lurk in the neutral tax regime”¹⁷ and describes approaches for increasing its fairness. Professor Martinez discusses the vital role that education, and those of us who are educators, can play in exposing bias and concludes with a call for action. Although Professor Martinez was not able to join us in person at the Symposium, his essay frames the ones in this issue.

Next, Professor Thomas’s essay, *Creating Charles Hamilton Houston Social Justice Tax Warriors: How to Build, Maintain, and Sustain an HBCU Tax Pipeline*, provides a concrete example of how an educator can “connect tax, pedagogy, and Houstonian ideals to build, maintain, and sustain an HBCU tax pipeline.”¹⁸ Professor Thomas sees her work “as an opportunity to bridge the gap between social justice advocacy and tax, resulting in positive outcomes in the lived economic experiences of Black, Indigenous, and immigrant communities of color.”¹⁹ By describing her work at Howard University and her own journey in tax, she offers a model that students, members of the bar, and educators can learn from and emulate.

Professor Richard Winchester’s essay, *A Simple Tax Case Complicated by Race*,²⁰ discusses a case in which the Tax Court was neither racially blind nor racially neutral. Instead, it used the race of potential homeowners to provide a significant benefit for the white developer, while paying no attention to the years of government-sanctioned and -induced segregation that led to hardships inflicted on Black communities. Although race is not

¹⁷ Leo P. Martinez, *You’ve Got to Speak Out Against the Madness: The Myth of Tax Neutrality*, 21 PITT. TAX REV. 11 (2023).

¹⁸ Alice Martin Thomas, *The HBCU Tax Pipeline Creating Charles Hamilton Houston Social Justice Tax Warriors: How to Build, Maintain, and Sustain an HBCU Tax Pipeline*, 21 PITT. TAX REV. 21 (2023).

¹⁹ *Id.* at 21–22 (footnote omitted).

²⁰ Richard Winchester, *A Simple Tax Case Complicated by Race*, 21 PITT. TAX REV. 37 (2023).

mentioned in the Code, Professor Winchester shows that it can be determinative in the application of the tax law.

The next three essays take us to the world of charity and exempt organizations. In *Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Schools and Colleges After Students for Fair Admissions v. Harvard and UNC*,²¹ Professor David Brennen adds to his work on the importance of the public policy doctrine announced by the Supreme Court in *Bob Jones University v. United States*²² by considering the effect of the Court's recent decision in *Students for Fair Admissions v. Harvard and UNC*²³ on the future of affirmative action by organizations exempt under § 501(c)(3). As Professor Brennen explains, the *Bob Jones* “[c]ourt held that a private school that discriminates against African Americans in admissions is not entitled to § 501(c)(3) tax-exempt status” because such action violated public policy and therefore could not be considered “charitable” for purposes of qualifying the organization for tax exemption under § 501(c)(3).²⁴ Now that the Court has found race-conscious affirmative action unconstitutional, Professor Brennen cautions that such action could easily be found to violate public policy, thus limiting or preventing the use of race-conscious affirmative action by § 501(c)(3) tax-exempt entities. A new and troubling area of inquiry has been born.

Professor Sam Brunson's contribution, *Black Charity: Rethinking the Subsidy of Black Charitable Donations*, examines a different aspect of charity—the inability of many Black donors to itemize and thus receive a subsidy for their charitable contributions. This could produce a smaller base of Black donors that requires Black charities to appeal to white donors rather than to donors “of color [who] have unique insight and knowledge of what their communities need.”²⁵ The diminished donor base results in fewer

²¹ David A. Brennen, *Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Institutions After Students for Fair Admissions v. Harvard and UNC*, 21 PITT. TAX REV. 49 (2023).

²² *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

²³ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

²⁴ Brennen, *supra* note 21, at 49.

²⁵ Samuel D. Brunson, *Black Charity: Rethinking the Subsidy of Black Charitable Donations*, 21 PITT. TAX REV. 61, 66 (2023).

benefits for Black communities. Professor Brunson therefore proposes systemic changes to the charitable contribution deduction.

Professor Darryll Jones tackles the world of stochastic terrorists, which are “groups organized to teach people to hate other people based on immutable characteristics.”²⁶ In *Who Has Standing to Challenge Tax Exemption for Stochastic Terrorists?*, Professor Jones makes a provocative case for finding taxpayer standing to challenge the tax-exempt status of some stochastic terrorists. He sets out three separate bases on which taxpayer standing could be found and considers the possibility of congressional intervention. His essay is a call to action.

The next four essays each show how particular provisions of the Code have disparate racial impacts, despite facial racial neutrality. First, Professor Victoria Haneman explores § 529 plans and school choice, “shin[ing] a light upon the problematic use of the Internal Revenue Code to support state and local school choice policy.”²⁷ Professor Haneman explains that school choice shows “class power and racial inequity colliding in the worst possible way.”²⁸ She reminds us that the school choice movement has “a deeply troubling and racialized history”²⁹ and proposes a range of alternatives to allowing § 529 plan subsidy of individual school choice decisions.

Professors Tracy Kaye and Andrew Greenlee take us into the world of opportunity zones (OZs). *Opportunity Zones and Race*³⁰ presents a tour de force of data to show that by providing “favorable tax treatment of capital gains that are reinvested into Qualified Opportunity Funds (QOFs) as well as potential elimination of the capital gains taxes on the QOF investment within designated census tracts,” OZs fall far short of their objective to incentivize capital investment in low-income communities.³¹ Because “most OZ

²⁶ Darryll K. Jones, *Who Has Standing to Challenge Tax Exemption for Hate Groups?*, 21 PITT. TAX REV. 71 (2023) (footnote omitted).

²⁷ Victoria Haneman, *529 Plans and School Choice*, 21 PITT. TAX REV. 81 (2023).

²⁸ *Id.* at 92.

²⁹ *Id.* at 87.

³⁰ Tracy A. Kaye & Andrew J. Greenlee, *Opportunity Zones and Race*, 21 PITT. TAX REV. 93 (2023).

³¹ *Id.*

investment is concentrated in tracts where population, educational attainment, incomes, and home values are increasing while the proportion of elderly and non-white residents [are] declining,”³² Professors Kaye and Greenlee call for “limiting the zones to those specific census tracts that overlap with formerly redlined communities so that they primarily benefit the residents of the low-income communities.”³³ They pair the cure with the disease.

Next, in *Economic Dignity Creates a Pro-Tax Story for Racial Equity*, Professors Nicholas Mirkay and Palma Strand begin by observing that the “antitax narrative of neoliberalism has been a siren song for almost half a century now,”³⁴ but then explain that because “antitax really means shifting the tax burden from wealthy people to those with less ability to pay,”³⁵ what is needed is “a post-neoliberalism narrative, a *pro-tax* narrative, that calls Americans both to equity and to the value of contributing to the common good through paying taxes.”³⁶ Professors Mirkay and Strand find such a narrative in the concept of economic dignity, which “provides a foundation for a pro-tax story, calling us to reexamine and reconfigure our tax policies and systems to promote the economic dignity of all persons, not just those with substantial accumulated wealth.”³⁷ Their essay inspires change.

The last presenter at the Symposium, Professor Phyllis Taite, went outside of the income tax to combat inequality. Her essay, *Taxing Wealth: Strategic Methods to Address Growing Inequalities*,³⁸ provides succinct descriptions of proposals made by both politicians and academics and even offers granular advice on framing. Professor Taite also makes important suggestions on the determination of the tax base, considering the importance

³² *Id.* at 95.

³³ *Id.* at 107.

³⁴ Nicholas Mirkay & Palma Joy Strand, *Economic Dignity Creates a Pro-Tax Story for Racial Equity*, 21 PITT. TAX REV. 109, 109 (2023).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 117.

³⁸ Phyllis C. Taite, *Taxing Wealth: Strategic Methods to Address Growing Inequalities*, 21 PITT. TAX REV. 119 (2023).

of administrability. Her essay will help to provide a counterpoint to the income tax's preferential treatment of capital and its owners.

The final essay in this issue comes from a scholar long-known as an indefatigable champion of tax equity and social justice. Although Professor Francine Lipman could not attend the Symposium in person, we were delighted that she nevertheless wanted to contribute to this issue. *Is Now A(nother) Teachable Moment? Honoring the Memory of Dr. William E. Spriggs*, celebrates the work of Dr. Spriggs who, as Professor Lipman explains, was “an internationally renowned and prominent economist, professor and former department chair of economics at Howard University, chief economist for the AFL-CIO, and Assistant Secretary of Labor Policy in the Obama administration.”³⁹ Professor Lipman discusses Dr. Spriggs’ open letter, *Is Now A Teachable Moment for Economists?*,⁴⁰ to induce “tax scholars and policymakers to ‘ask the big questions about understanding the institutions that created our massive inequality,’ including tax systems.”⁴¹ Those big questions provide an apt frame for amplifying the insights offered by the scholars who participated in the Symposium.

Although making the Symposium a reality was not always easy, the event itself was exhilarating. I hope that this Foreword has provided some sense of the richness of the event and inspires further work at the intersection of race and tax.

³⁹ Francine J. Lipman, *Is Now A(nother) Teachable Moment? Honoring the Memory of Dr. William E. Spriggs*, 21 PITT. TAX REV. 129, 130–31 (2023).

⁴⁰ *Id.* at 131.

⁴¹ *Id.* (quoting Dr. Spriggs).