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## A TAX NATIONAL ANTHEM

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## A TAX NATIONAL ANTHEM

*Bridget J. Crawford\**

### I. INTRODUCTION

In 2016, Ada Limón, now the twenty-fourth United States Poet Laureate, wrote a poem that she thought might thwart her career ambitions.<sup>1</sup> “A New National Anthem” begins with the speaker’s confession, “[t]he truth is, I’ve never cared for the National / Anthem. If you think about it, it’s not a good song.”<sup>2</sup> The speaker recalls the time she sang the song at a high school football game, throwing “even the tenacious high school band off key / But the song didn’t mean anything, just a call / to the field, something to get through before the pummeling of youth.”<sup>3</sup> The speaker then moves to critique the performance of the National Anthem as a ritual unrooted from its meaning and then pivots again to reference the lyrics (mentioning slavery) in a typically unsung stanza.<sup>4</sup> The speaker interjects a clarification, though: “Don’t get me wrong, I do / like the flag” and lists the many ways that she

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<sup>1</sup> See Krista Tippett, *On Being With Krista Tippett*, ON BEING (Feb. 16, 2023), <https://onbeing.org/programs/ada-limon-to-be-made-whole/> (quoting Ada Limón saying that after she wrote the poem, “I wrote it and then I immediately sent it to an editor who’s a friend of mine and said, ‘I don’t know if you want this.’ And it was up the next day on the website. I was like, ‘Oh.’ Then I came downstairs and I was like, ‘Lucas, I’m never going to get to be Poet Laureate.’”).

<sup>2</sup> Ada Limón, *A New National Anthem*, in *THE CARRYING* (2018), reprinted in POETRY FOUNDATION, <https://www.poetryfoundation.org/poems/147506/a-new-national-anthem>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

finds the National Anthem inspirational and unifying.<sup>5</sup> Limón likely had feared that readers would misinterpret this poem as unpatriotic, but it is—to my eye—a beautiful reminder of the highest and best values embodied by the flag of the United States of America.

In many ways, the contributors to the February 24, 2023 Symposium on “The Federal Income Tax: Racially Blind But Not Racially Neutral” are engaged in a project similar to Limón’s: critiquing the familiar, pointing out what is hidden (sometimes in plain sight), and formulating a vision for a just and inclusive future. While they write separately, the authors of the essays in this issue of the *Pittsburgh Tax Review* are collectively writing what I think of as a “Tax National Anthem.” This concluding commentary on the essays, interspersed with lines of Limón’s “A New National Anthem,” identifies the emerging contours of that Tax National Anthem—one that embraces a role for the tax system in achieving a more racially just society.<sup>6</sup>

II. “AND WHAT OF THE STANZAS / WE NEVER SING, THE THIRD THAT MENTIONS ‘NO REFUGE / COULD SAVE THE HIRELING AND THE SLAVE’?”<sup>7</sup>

When the speaker of “A New National Anthem” asks, “what of the stanzas / we never sing, the third that mentions ‘no refuge / could save the hireling and the slave’?” she is inviting the reader to consider the lyrics that are *not* sung, whether for reasons of economy or discomfort with the past.<sup>8</sup> So, too, many of the contributions to this symposium bring to light the racial bias in tax law. Consider Professor Samuel Brunson’s essay, *Black Charity: Rethinking the Subsidy of Black Charitable Donations*.<sup>9</sup> He points out that the structure of the income tax charitable deduction, as a “below the line”

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<sup>5</sup> *Id.*

<sup>6</sup> On the importance of racial justice to the critical tax project, see, e.g., Anthony C. Infanti & Bridget J. Crawford, *Introduction*, in *CRITICAL TAX THEORY: AN INTRODUCTION*, at xxi (2016) (identifying “to uncover bias in the tax laws” as a goal of critical tax scholarship) and Anthony C. Infanti & Bridget J. Crawford, *Critical Tax Theory: Insights from the US and Opportunities for All*, 51 *AUSTL. TAX REV.* 81, 83–84 (2022) (reviewing foundational critical tax scholarship on race).

<sup>7</sup> Limón, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> See Samuel D. Brunson, *Black Charity: Rethinking the Subsidy of Black Charitable Donations*, 21 *PITT. TAX REV.* 61 (2023).

deduction, disproportionately benefits white households.<sup>10</sup> Practically speaking, this means Black taxpayers have less ability “to direct their tax dollars,” which may mean less support for Black charities.<sup>11</sup> Thus, Professor Brunson exposes the disparate racial impacts of a familiar rule—the income tax charitable deduction—that is largely seen as pro-taxpayer.

Professor Victoria Haneman’s examination of 529 plans is in a similar vein.<sup>12</sup> On the surface, it is hard to argue against tax subsidies for higher education. Yet Professor Haneman exposes 529 plans as “a school voucher scheme for the wealthy,”<sup>13</sup> explaining how school choice programs are a continuation of a “strategy developed in the mid-50s to dismantle the public school system and circumvent law that required desegregation.”<sup>14</sup> In this light, 529 plans are revealed as far more complex than is discernible on the surface, not unlike the full lyrics to the National Anthem.

III. “PERHAPS, / THE TRUTH IS, EVERY SONG OF THIS COUNTRY / HAS AN  
UN Sung THIRD STANZA, SOMETHING BRUTAL / SNAKING UNDERNEATH US  
AS WE BLINDLY SING / THE HIGH NOTES WITH A BEER SLOSHING IN THE  
STANDS / HOPING OUR TEAM WINS.”<sup>15</sup>

The notion that “every song of this country / has an unsung third stanza” suggests the pervasiveness of racism, a theme echoed in the essays written by Professor Richard Winchester,<sup>16</sup> Professor Francine Lipman,<sup>17</sup> and Professor Leo Martinez.<sup>18</sup> Professor Winchester highlights how, in a Tax

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<sup>10</sup> *Id.* at 64–65.

<sup>11</sup> *Id.* at 65.

<sup>12</sup> See Victoria Haneman, *529 Plans and School Choice*, 21 PITT. TAX REV. 81 (2023).

<sup>13</sup> *Id.* at 82.

<sup>14</sup> *Id.* at 87.

<sup>15</sup> Limón, *supra* note 2.

<sup>16</sup> See Richard Winchester, *A Simple Tax Case Complicated by Race*, 21 PITT. TAX REV. 37 (2023).

<sup>17</sup> See Francine J. Lipman, *Is Now A(nother) Teachable Moment? Honoring the Memory of Dr. William E. Spriggs*, 21 PITT. TAX REV. 129 (2023).

<sup>18</sup> See Leo P. Martinez, *You’ve Got to Speak Out Against the Madness: The Myth of Tax Neutrality*, 21 PITT. TAX REV. 11 (2023).

Court case from 1963, the judge embraced racial segregation and accepted the status quo of restricting Black homebuyers to purchasing only within a limited geographic area.<sup>19</sup> Under these conditions, the judge surprisingly treated the real estate developer, who most certainly held property for sale to Black homeowners, as nevertheless eligible for preferential capital gains treatment.<sup>20</sup> The “unsung third stanza” of racist practices drove the tax result.

Professor Lipman critiques the supposed colorblindness in economics and tax policy, which in the vein of Limón’s poem might be thought of as one of the “stanzas” that is frequently “sung” in discussions of tax law and policy. Defenders of the status quo insist that “there is no reason to accuse the actual hybrid tax of discrimination against any race.”<sup>21</sup> Professor Lipman, though, reads another metaphoric “unsung third stanza” of tax law by pointing to the “hundreds of years of racism” as the bedrock on which the current tax laws rest.<sup>22</sup> Only by “demanding transparency, accountability, and data in tax administration, impact, costs, and benefits from federal, state, and local tax authorities and in proposed legislation” will it be possible to achieve a politics “that produce or sustain racial equity,” she explains.<sup>23</sup>

Like Professor Lipman, Professor Leo Martinez favors better gathering and distribution of taxpayer data on the basis of race and ethnicity, reasoning that “[o]nly by knowing that problems exist can they be addressed.”<sup>24</sup> Professor Martinez encourages all who are interested in tax fairness to “speak out against the madness,” namely, the notion that “laws (especially tax laws) are neutral,” which is that unsung third stanza of the tax law again. Instead of continuing to labor under that myth of neutrality, almost blindly “sing[ing] / the high notes with a beer sloshing in the stands,” as Limón’s speaker does, Professor Martinez calls for identification and evaluation of tax

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<sup>19</sup> See Winchester, *supra* note 16, at 41–42.

<sup>20</sup> *Id.*

<sup>21</sup> Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1565 (1998). For a robust critique of this view, see, e.g., Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1194–95 (2008) and Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You’ve Got to Speak Out Against the Madness)*, 28 BERKELEY LA RAZA L.J. 49 (2017).

<sup>22</sup> Lipman, *supra* note 17, at 139.

<sup>23</sup> *Id.*

<sup>24</sup> Martinez, *supra* note 18, at 15.

laws that are racially discriminatory, and sees “targeted education of voters, legislators, and budding lawyers” as a key step in expanding awareness and creating a will for reform.<sup>25</sup>

IV. “DON’T GET ME WRONG, I DO / LIKE THE FLAG, HOW IT UNDULATES  
IN THE WIND / LIKE WATER, ELEMENTAL, AND BEST WHEN IT’S  
HUMBLED, / BROUGHT TO ITS KNEES, CLUNG TO BY SOMEONE WHO / HAS  
LOST EVERYTHING, WHEN IT’S NOT A WEAPON, WHEN IT  
FLICKERS / WHEN IT FOLDS UP SO PERFECTLY / YOU CAN KEEP IT UNTIL  
IT’S NEEDED, UNTIL YOU CAN LOVE IT AGAIN . . . .”<sup>26</sup>

Just as the speaker of Limón’s poem ultimately embraces the flag as a something one can “love . . . again,” Professors Nicholas Mirkay and Palma Strand imagine a society in which tax policy and rhetoric can be a progressive tool.<sup>27</sup> In *Economic Dignity Creates a Pro-Tax Story for Racial Equity*,<sup>28</sup> Professors Mirkay and Strand emphasize “the substantial role of tax policy in perpetuating enduring racial wealth disparities”<sup>29</sup> and suggest that an emphasis on the human right to economic dignity is an effective organizing principle for a newly designed tax system that supports “people of all races and ethnicities.”<sup>30</sup>

If the flag is “best when it’s humbled, / brought to its knees, clung to by someone who has lost everything,” then so, too, does tax law have the potential to enhance communities lacking in resources. Professors Tracy Kaye and Andrew Greenlee envision redesigned Opportunity Zone rules as a potent tool for “redlined neighborhood revitalization.”<sup>31</sup> These authors do important work in mapping census tracts and showing how Opportunity

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<sup>25</sup> *Id.* at 18.

<sup>26</sup> Limón, *supra* note 2.

<sup>27</sup> *Id.*

<sup>28</sup> Nicholas A. Mirkay & Palma Joy Strand, *Economic Dignity Creates a Pro-Tax Story for Racial Equity*, 21 PITT. TAX REV. 109 (2023).

<sup>29</sup> *Id.* at 115.

<sup>30</sup> *Id.* at 117.

<sup>31</sup> See Tracy A. Kaye & Andrew J. Greenlee, *Opportunity Zones and Race*, 21 PITT. TAX REV. 95, 107 (2023).

Zones do not currently bring economic development where it is most needed. Professors Kaye and Greenlee propose revamping the Opportunity Zone rules to assist areas most severely hampered in growth by past federally endorsed racial segregation.<sup>32</sup>

Attempts to remedy the legacy of past discrimination are not invariably permitted by the courts, however. In *Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Schools and Colleges After Students for Fair Admissions v. Harvard and UNC*, Professor David Brennen considers the future of the public policy doctrine in light of the U.S. Supreme Court's decision to limit the use of race in higher education admissions.<sup>33</sup> In the past, the public policy doctrine was the grounds on which the Court denied tax exempt status to higher education institutions that prevented African Americans from enrolling.<sup>34</sup> But in light of the recent Supreme Court decision prohibiting race-conscious affirmative action in college admissions,<sup>35</sup> Professor Brennen asks whether the public policy doctrine might prevent race-conscious affirmative action through private exempt organizations that receive no federal financial assistance.<sup>36</sup> Although Professor Brennen concludes that the public policy doctrine does not operate as such a prohibition, the outcome is far from certain. The public policy doctrine could potentially become the “weapon” of Limón’s poem.

Similar to the admiration the poem’s speaker has for a flag that attractively “undulates” and “flickers,” Professor Phyllis Taite sketches a tax system that she and many others would admire: one anchored by a functioning wealth tax (which she suggests would be better named a “surcharge”).<sup>37</sup> In *Taxing Wealth: Strategic Methods to Address Growing Inequalities*, Professor Taite names “the right balance of tax base, methodology, rate structure, exemption amount, and purpose” as the key

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<sup>32</sup> *Id.*

<sup>33</sup> David A. Brennen, *Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Schools and Colleges After Students for Fair Admissions v. Harvard and UNC*, 21 PITT. TAX REV. 49 (2023).

<sup>34</sup> *See id.* at 56–57 (discussing prior case law).

<sup>35</sup> *Students for Fair Admissions v. President of Harvard College*, 143 S. Ct. 2141 (2023).

<sup>36</sup> Brennen, *supra* note 33, at 58.

<sup>37</sup> Phyllis C. Taite, *Taxing Wealth, Strategic Methods to Address Growing Inequalities*, 21 PITT. TAX REV. 119, 124 (2023).

elements of a progressive tax system that would provide “wealth mobility middle- and lower-income households.”<sup>38</sup> Of the flag, the speaker of Limón’s poem knows she can “love it again.” So, too, does Taite contemplate that the tax system can return to its progressive roots.<sup>39</sup>

V. “. . . THE SONG THAT’S OUR BIRTHRIGHT, / THAT’S SUNG IN SILENCES  
WHEN IT’S TOO HARD TO GO ON, / . . . THAT SOUNDS LIKE A MATCH  
BEING LIT / IN AN ENDLESS CAVE, THE SONG THAT SAYS MY BONES / ARE  
YOUR BONES, AND YOUR BONES ARE MY BONES, / AND ISN’T  
THAT ENOUGH”<sup>40</sup>

If the National Anthem is something “sung in / silences when it’s too hard to go on,” then so, too, might the law be a tool for addressing what seem like intractable problems of racial discrimination. In *Who Has Standing to Challenge Tax Exemption for Stochastic Terrorists?*, Professor Darryl Jones argues that the free speech doctrine is no obstacle to denying tax exemption to groups that foster racial hatred and violence.<sup>41</sup> Granting these groups tax exemption, he says, “necessarily conscripts all taxpayers into unequal protection.”<sup>42</sup>

In *The HBCU Tax Pipeline Creating Charles Hamilton Houston Social Justice Tax Warriors: How to Build, Populate, Maintain, and Sustain the HBCU Tax Pipeline*, Professor Alice Thomas details her exhaustive efforts to encourage students at Howard University School of Law to pursue careers in tax.<sup>43</sup> Professor Thomas views tax law as “an element of civil rights[,] and human rights as economic parity is the true leveler of 400 years of economic

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<sup>38</sup> *Id.* at 120.

<sup>39</sup> *See id.*

<sup>40</sup> Limón, *supra* note 2.

<sup>41</sup> Darryl K. Jones, *Who Has Standing to Challenge Tax Exemption for Stochastic Terrorists?*, 21 PITT. TAX REV. 71 (2023).

<sup>42</sup> *Id.* at 73.

<sup>43</sup> Alice Martin Thomas, *The HBCU Tax Pipeline Creating Charles Hamilton Houston Social Justice Tax Warriors: How to Build, Populate, Maintain, and Sustain the HBCU Tax Pipeline*, 21 PITT. TAX REV. 21 (2023).



exploitation.”<sup>44</sup> By exposing her students to the multiple facets of the tax profession and successful tax professionals, Professor Thomas seeks to make clear that tax is a field that should be available to all.<sup>45</sup> In so many ways, Professor Thomas’s work is the “match being lit” of Limón’s poem; she illuminates the way for others, as Professor Thomas acknowledges that others had done for her.<sup>46</sup>

## VI. CONCLUSION

Definitionally, a national anthem is “a unique musical work . . . that functions primarily as a malleable symbol of a bounded geographical region.”<sup>47</sup> It is a “dynamic symbol . . . brought to life through performance, where it is then filled with meaning that extends beyond the notes, silence, and words.”<sup>48</sup> In other words, a particular performer’s or listener’s understanding of the anthem may be informed by the socio-cultural context. For example, Jimi Hendrix’s playing the “Star Spangled Banner” on the electric guitar at Woodstock in 1969<sup>49</sup> is not the same as the Boston Pops’ performance of the same song as part of its advertised “patriotic sing-along” performance on July 4, 2023.<sup>50</sup> But what the two performances have in common is their ability to spark feelings or conversations—or both—about the nation and its values.

In “A New National Anthem,” Ada Limón’s speaker reflects deeply on the meaning of the song and its symbolism. In the same vein, contributions to this Symposium engage at the intersection of taxation and racial justice.

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<sup>44</sup> *Id.* at 32.

<sup>45</sup> *Id.* at 35.

<sup>46</sup> *Id.* at 29–30.

<sup>47</sup> Carlos R. Abril, *Functions of a National Anthem in Society and Education: A Sociocultural Perspective*, 172 BULL. OF THE COUNCIL FOR RSCH. IN MUSIC EDUC. 69, 73 (2007).

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., Paul Grimstad, *Rewinding Jimi Hendrix’s National Anthem*, NEW YORKER (Jan. 26, 2021), <https://www.newyorker.com/culture/cultural-comment/rewinding-jimi-hendrixs-national-anthem> (“What Hendrix did with ‘The Star-Spangled Banner’ at Woodstock, in August of 1969, was something else altogether. It was, among other things, an act of protest whose power and convincingness were inseparable from its identity as a fiercely nonconformist act of individual expression.”).

<sup>50</sup> See *Boston Pops Fireworks Spectacular 2023*, BSO, <https://www.bso.org/pops/digital-program-boston-pops-fireworks-spectacular-2023>.

As the speaker of Limón’s poem embraces the flag as a symbol of hope, the authors of these essays have hope in tax law, too. The Tax National Anthem they have written is a statement of values and aspirations, and a call to understand taxation as a cornerstone of racial justice.