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**THE SOUTH BRONX HAS SOMETHING TO SAY:
SYMPOSIUM KEYNOTE***

Dorothy A. Brown**

My book, *The Whiteness of Wealth*, was recently published by Crown. It looks at how systemic racism and federal tax policies compound our racial wealth gap. My book is based on my research that began with an invitation in the mid-1990s from Karen Brown and Mary Louise Fellows, who were editing a book called *Taxing America*.¹ My chapter, entitled “The Marriage Bonus/Penalty in Black and White,” looked at how husbands and wives contributed their income to the household and the impact that the joint return provisions, or the operation of a joint return, had on their tax bill. The chapter talked about how white married couples were more likely to have one wage earner in the paid labor market and one stay-at-home spouse. Those households received a tax cut when they got married—we call that the marriage bonus. On the other hand, couples where husbands and wives earn equal amounts of income do not get a tax cut; rather, their taxes increase—we call that the marriage penalty. I further explored the marriage penalty in a subsequent article entitled *Race, Class, and Gender Essentialism in Tax Literature*.² While at the University of Cincinnati College of Law, I looked at original data from the U.S. Census Bureau, which showed that, regardless of income, Black married couples pay higher taxes than white married couples because Black married couples are more likely to live in equal wage-earning households.

Taxing America comes out and then the backlash. Within a year, Lawrence Zelenak, who was then at the University of North Carolina School of Law and is now at Duke University School of Law, created a symposium called *Taking Critical Tax Theory Seriously*, where he did everything but. He wrote the following line: “[the Earned Income Tax Credit (EITC)] is a massive

* This Article is an edited, annotated transcript of Professor Brown’s Keynote Address during the *South Carolina Law Review*’s Symposium on Taxation, Finance, and Racial (in)Justice, which was held virtually on February 19, 2021. Of course, the title refers to the quote by André 3000 at the 1995 Source Awards. See *The South Got Something to Say: A Celebration of Southern Rap (2010-2014)*, NPR (Aug. 3, 2020, 12:00 PM), <https://www.npr.org/2020/08/03/897247369/the-south-got-something-to-say-a-celebration-of-southern-rap-2010-2014> [https://perma.cc/GR92-JGNY].

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1. KAREN B. BROWN & MARY LOUISE FELLOWS, *TAXING AMERICA* (1997).

2. Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997).

subsidy . . . for the working poor. It seems likely the benefits go disproportionately to [B]lacks.”³

Now, when you start on an intellectual endeavor looking at race and tax when people are not generally doing that and a symposium is organized basically attacking the entire project, one might be deterred. But the South Bronx has something to say. So, I turned Zelenak’s attack on race and tax scholarship into my next mission. I decided to write about the EITC and show how anti-intellectual Zelenak’s scholarly contribution in the area really was. Thinking Black Americans disproportionately benefit from a tax credit tied to work quite obviously ignores anti-Black racism in the labor market. I partnered with two economists and found the following: 54% of EITC-eligible taxpayers are white and 24.5% are Black. That is not disproportionate. But even worse is that Zelenak also failed to recognize how children are treated when a tax credit, like the EITC, is viewed as being disproportionately received by Black Americans versus when a tax credit is perceived as being disproportionately received by white Americans. By targeting the EITC, or racing it as Black, we see that white supremacy hurts white people as well.

My research, *The Tax Treatment of Children: Separate But Unequal*, was published in the *Emory Law Journal*,⁴ and *Race and Class Matters in Tax Policy* was published in the *Columbia Law Review*.⁵ I discovered the EITC did not disproportionately benefit Black Americans, but more importantly, children in the EITC were disadvantaged when we compared their tax treatment with children under the Child Tax Credit (CTC). For example, the CTC increases per child. That is not the case for the EITC once there are a certain number of children in the household. If you look at the legislative history behind the CTC, it was designed to make it easier for large families to get by with a tax break. If you look at the legislative history behind the EITC, the opposite is true. What we see is legislative history that says “we do not want to encourage lots of children.” I found that the EITC was raced Black by academics, and it was raced Black by legislators on Capitol Hill as well.

Then, I wrote about employer-provided retirement accounts in *Pensions, Risk, and Race*, which was published in the *Washington and Lee Law Review*,⁶ then *Pensions and Risk Aversion* was published in the *Lewis and Clark Law Review*.⁷ What did they show? They showed, first of all, that occupational

3. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1568 (1998).

4. Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755 (2005).

5. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).

6. Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004).

7. Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007).

segregation matters in terms of eligibility for a job equipped with employer-provided retirement accounts. Occupational segregation tended to cause most African-Americans to work jobs that did not come with those benefits. On the other hand, the jobs that came with those benefits tended to be held disproportionately by white Americans. Even eligibility for a job that provides those tax-free benefits is raced.

Second, we saw that, even though there were disparate rates of participation when Black Americans participated, Black Americans were more likely to withdraw amounts early to take care of financial struggles that I would argue are the result of systemic racism in America. Black Americans were less likely to participate and more likely to make early withdrawals—meaning they would have less money at retirement and were less likely to invest in the stock market despite it yielding the best return on investment. Because of this, we see Black Americans falling behind while white Americans are receiving full benefits of the tax break.

So, I covered the joint return. I covered rate structure issues. I covered tax credits. And I covered the exclusion of the employer-provided retirement accounts. What was left? Deductions. When I started this project, I wanted to understand how systemic racism worked throughout the Code and how one might fix it. You cannot do that with just one article. You have to look at, for example, how the rate structure works. I may think I have a solution, but how does that interchange or interconnect with exclusions? I then turned to deductions and the mortgage interest deduction. That research, *Shades of the American Dream*, was published in the *Washington University Law Review*.⁸ It was followed by a symposium issue at the *Memphis Law Review*, entitled *Homeownership in Black and White*.⁹

What did I uncover there? First, white Americans are more likely to be homeowners. That has been true since the beginning of time. Because the majority of white Americans are likely to be homeowners, they are more likely to be eligible for the mortgage interest deduction. Black Americans are more likely to be renters, and we do not allow deductions for rent. The deduction is predicted to be and is disproportionately received by white Americans. That makes sense. One might say the solution is increasing the rate of Black homeownership in America such that there will be an equal take-up rate. Well, hold your horses.

I also looked at the tax-free gains available when you sell your home. In fact, if you are married and you sell your home, you can receive tax-free gains of up to \$500,000. If you sell your home with a loss, no tax break for you. Well, what does the research show? The research shows that white Americans

8. Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329 (2009).

9. Dorothy A. Brown, *Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Equity*, 49 U. MEM. L. REV. 205 (2018).

are more likely to sell their home at a gain and Black Americans are more likely to sell their home at a loss. Once again, tax policy reinforces the way white Americans engage in a behavior—how they marry, how they qualify for tax credit based on children, and whether they own a home.

Now why is that? Why is it that white Americans are more likely to sell their home at a gain and Black Americans at a loss? It has to do with the real estate market. The real estate market is not colorblind. It is driven by the majority of homeowners. What you see is that white homeowners like living in homogeneous white neighborhoods, and Black homeowners like living in racially diverse or all Black neighborhoods. Because white homeowners want to live in homogeneous white neighborhoods and not in racially diverse neighborhoods, those white homogeneous neighborhoods value their homes higher. That is why white Americans wind up with tax-free gains when they sell their home.

Once I went through rate structures, tax credits, retirement accounts, exclusions, and mortgage interest deductions as well as the exclusion for gain, I was ready to tackle the book. But this book would not have happened if this girl from the South Bronx had not moved south. What do I mean?

First, one of the best things that ever happened to my scholarly project was when then-Dean David Partlett invited me to visit Washington and Lee University and teach a course in critical race theory. I had never taught critical race theory before. And I am a tax lawyer, so I am kind of a data person—not kind of, I am a data person all in. The thought of a touchy-feely “let’s talk about racism in America” was not anything I was particularly interested in. So, I put together my original set of materials and said to myself, “How am I going to go about doing this? Oh, I know! I’m going to write a book that has a separate chapter for every first-year course.” There is Torts, Contracts, Criminal Law, Criminal Procedure, Civil Procedure, and Property. That sounds like a great idea. Why did I do that? Because I knew I was teaching second- and third-year students. And those students all had first-year courses, right? Whatever I was going to do, they would at least be familiar with the material. Okay, great idea! Except for one design flaw: I don’t teach first-year courses. Between the time I received the offer to visit and when I actually taught the course, I bugged every friend I had who taught first-year courses. They gave me cases, and I was able to put together excerpts from law review articles. In doing the research for the book, reading the articles, and getting immersed, it really opened my thinking about how to tackle the race and tax project that I had embarked on in the mid-1990s. You will never think the same way about law once you read Cheryl Harris’s *Whiteness as Property*—period.

The second reason it is important that I moved south was that when I arrived at Emory Law, I learned the value of other disciplines. I went outside

the building. Actually, Emory's campus makes it really easy. My work became interdisciplinary and better. I learned how to ask different questions. Historians made me ask, "How did we get here?" Sociologists made me think more deeply about the impact that a society built around anti-Black racism had on tax policy. Political scientists made me ask more questions about why laws benefiting white Americans were enacted and not laws benefiting others. Stratification economists taught me to think about economic inequality as a function of societal racism. Each of those disciplines taught me to ask more insightful questions that led to different revelations. And along the way, I learned three principles of researching systemic racism in tax work that I would like to share.

1. *For Every Negative, There Is a Positive*

Tax winners always come with tax losers. The marriage bonus comes with the marriage penalty. The EITC, which disadvantages the working poor, comes with the CTC, which advantages the middle class. Homeownership tax-free gains come with non-deductible losses. And my twenty-five years of research showed me the bottom line: white Americans are more likely to receive tax breaks and Black Americans are not.

2. *Haters Gonna Hate*

When you publish in the race and tax area, do not expect universal acclaim. Now, a story.¹⁰ In January of 2002, while at Cincinnati, I participated in a tax panel for the Association of American Law Schools. I had presented my marriage bonus/penalty work. It had gotten a good reception, and I was very excited. I was, as I described it, running with the big dogs. I was on a panel with George Yin from the University of Virginia, Reed Shuldiner from the University of Pennsylvania, Michael Graetz from Yale University. And there was little old me from Cincinnati and Leandra Letterman from George Mason University. I was running with the big dogs.

The first question was directed at me: "Dorothy, everybody knows your work is irrelevant because Blacks are poor and don't pay a lot of taxes." A hush fell over the crowd. The first person to my defense was Michael Graetz who said it is really important to understand whether tax policy has a disparate impact based on race. He later told me he did not want me to be the first person to have to respond to that. Then I responded to the question. I said, "Well, if you're right, that means we want our children to grow up to be poor, so they don't pay a lot in taxes." At that point, the room devolved in laughter and I

10. For more about this story, see Dorothy A. Brown, *Tales from a Tax Crit*, 10 PITT. TAX REV. 47 (2012).

said, “No! We don’t want our kids to grow up poor. We want our kids to grow up to be Warren Buffet, with lots of income that’s either subject to the preferential rate or not taxed at all.” Haters gonna hate. So why did I continue? Because I knew I was right, and the South Bronx has something to say.

3. *You Do You*

The single best decision I made after finishing *Shades of the American Dream* was limiting my presentations at law faculty workshops. The typical law faculty does not understand race; they want to talk about class. When I talk about race, they want to talk about class because, after all, it is really a poverty issue. If more Blacks were not poor, everything would be fine as the Black middle class and upper-middle class are just fine. Well, that is not true. And those questions caused me to always write about race *and* class. In my marriage bonus/penalty work, I saw that Black Americans, *regardless of income*, were more likely to pay the marriage penalty than their white peers. So, I decided I was tired of talking to law faculty who really did not understand the project. One of my favorites was when I presented *Shades of the American Dream* and someone said, “It’s not race! It’s wealth!” I did not even know how to respond because wealth is raced. How can I have a conversation with you at that point? That was the first decision.

I also noticed that, when I would get invitations to speak to the general public or to other disciplines, the reception was amazing. I realized my ideas were not necessarily going to resonate in the legal academy, so I stopped fighting and decided to do a trade book. Let me tell you, it was not easy. Getting an agent was not easy, but it happened. I landed a book deal with a phenomenal editor and could not be happier with how *The Whiteness of Wealth* turned out. But the book was a result of my decision to not fight with law professors anymore. And I understand that academics will say that *The Whiteness of Wealth* is not scholarly. #SorryNotSorry.

Saidiya Hartman, Columbia University professor and MacArthur Fellowship grant awardee, talked about “[finding] freedom in her colleagues’ low expectations.”¹¹ She stated: “As a Black woman intellectual, I am at the bottom of the food chain But within that space of no one taking me seriously, there was all this space to work.”¹² Her comments resonate with me. I have been toiling in the race and tax field for twenty-five years—marginalized, ignored, and insulted. Nevertheless, the South Bronx has something to say.

11. Alexis Okeowo, *How Saidiya Hartman Retells the History of Black Life*, THE NEW YORKER (Oct. 19, 2020), <https://www.newyorker.com/magazine/2020/10/26/how-saidiya-hartman-retells-the-history-of-black-life> [https://perma.cc/ZXH8-LE63].

12. *Id.* (internal quotation marks omitted).

My work being ignored gave me the space to produce *The Whiteness of Wealth*. My book shows that you cannot tackle the racial wealth gap without transforming our tax policies. My aim has never been to impress scholars but to change the world. And I like my odds. For example, in the last few months, I have been contacted by congressional staff members asking how publishing statistics on race and tax would work. In June of last year, Senator Sherrod Brown talked about systemic racism in tax. I almost fell off my chair when I saw it. He commented that the summer of 2020 made us aware of systemic racism in all areas and that systemic racism in tax law had not previously been explored. Therefore, he wanted to make sure it was put on congressional radar screens. Then, at the end of January, President Biden signed an executive order calling for a racial equity focus by every federal agency. So, if I had to make one prediction, I predict we are going to see race and tax statistics in some form come out of this Administration. And as the expression goes, that would mean my living is not in vain.