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TAX CODE BIAS AND ITS STARRING ROLE IN PERPETUATING INEQUALITIES

Phyllis C. Taite*

I. INTRODUCTION

I have published numerous articles demonstrating how tax laws distribute benefits and burdens through a social justice lens.[1] This Article takes the next step in my scholarly agenda by directly exploring the levels to which tax code

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1. *See generally* Phyllis C. Taite, *Saving the Farm or Giving Away the Farm: A Critical Analysis of the Capital Gains Tax Preferences*, 53 SAN DIEGO L. REV. 1017, 1017 (2016) (discussing how capital gains tax preferences have contributed to wealth inequalities) [hereinafter *Saving the Farm*]; Phyllis C. Taite, *Taxes, the Problem and Solution: A Model for Vanishing Deductions and Exclusions for Residence-Based Tax Preferences*, 59 N.Y. L. SCH. L. REV. 361, 361–62 (2015) (discussing and proposing limitations to tax benefits for homeownership) [hereinafter *Taxes, the Problem and Solution*]; Phyllis C. Smith, *Change We Can't Believe In . . . or Afford: Why the Timing Is Wrong to Reduce the Estate Tax for the Wealthiest Americans*, 42 U. MEM. L. REV. 493, 495 (2012) (discussing the estate tax and its effect on wealthy and unwealthy Americans) [hereinafter *Change We Can't Believe In*].

bias perpetuates the racial wealth gap. There are obstacles to finding evidence because the Internal Revenue Service (IRS) does not define tax benefits based on race and does not directly collect data regarding race on tax forms.[2] Consequently, this Article concentrates on exploring tax bias indirectly by focusing on how tax laws and policies disparately impact Black households.

Almost twenty-five years ago, Professors Beverly Moran and William Whitford published an article that identified several tax benefits and opportunities to determine how those benefits were distributed based on race.[3] They limited the scope of their critique to wealth transfers, homeownership-based preferences, employee benefits, and marital-based preferences. They demonstrated how tax provisions favored white households over Black households and systematically contributed to the "Great Wealth Divide" in America.[4]

Professor Dorothy Brown has also published extensively on race and tax matters.[5] Just over twenty years ago, Professor Brown published an article identifying racial inequalities in the tax code.[6] She demonstrated that Black households pay a marriage tax penalty because they are disproportionately dual-income households in which taxpayers earn similar amounts of income.[7]

Several tax acts have been implemented since these and other articles were published, giving Congress an opportunity to address these inequalities and reverse some of the effects of racial bias in tax policy.[8] This Article explores whether Congress has responded to the call to address economic justice issues identified in tax policies.

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2. Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 2 (2019).

3. Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 753.

4. *Id.* at 799.

5. *See generally* Dorothy A. Brown, *Race, Class, and the Obama Tax Plan*, 86 DENV. U. L. REV. 575, 576 (2009) (predicting the impact of President Obama's tax plan on taxpayers of color); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y. L. SCH. J. HUM. RTS. 287, 295 (1999) (discussing proposed legislative solutions to the marriage penalty/bonus based on the differences in African-American and white households); Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 CORNELL J.L. & PUB. POL'Y 633, 634 (2000) (discussing the effects of social security reform on blacks and other minorities); Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 90 (1997) (discussing the racial impacts of the marriage penalty and bonus).

6. Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do with It?*, 21 UNIV. ARK. LITTLE ROCK L. REV. 759, 763 (1999).

7. *Id.*

8. *See Major Enacted Tax Legislation, 2010–2019*, TAX POL'Y CTR., https://www.taxpolicycenter.org/laws-and-proposals/major-enacted-tax-legislation-2010-2019 [https://perma.cc/PQM4-66TL].

Part II of this Article defines the scope of social and economic justice by outlining specific historical events that compound economic inequalities. Part III explores how tax policy and social justice expose tax code bias through the tax treatment of capital gains as compared to labor income and the tax treatment of wealth transfers. Part IV discusses the federal government's investment in homeownership and its disproportionate benefits to white households. This Part further identifies how the federal government has responded to tax code bias by evaluating tax legislation specific to the bias identified in Parts II and III. Part V concludes by summarizing the Article's proposals and challenging government leaders to directly address tax code bias.

II. JUSTICE MATTERS

A. *The Social Justice Agenda*

The social justice movement is finally a priority in America. While we are nowhere near attaining racial equality, the importance of protecting voting rights and engaging in the political process has gained traction as evidenced by local and national elections. We have also witnessed a higher level of police scrutiny as acts of violence against the Black population precipitated by the public display of Derek Chauvin ending George Floyd's life by kneeling on his neck for nine minutes and twenty-nine seconds.[9] Even in health care, we are attentive to the Black population's treatment in medical facilities as Black individuals are disproportionately dying from COVID-19 yet still being dismissed from these facilities.[10]

While the social justice movement has taken center stage, it is important to address the economic aspect of social justice: economic justice. Attaining economic justice is crucial in that it binds many other components of social justice. The wealthiest households have access to political power; therefore, they are rarely seen on the opposite end of police violence. Wealthy families have disposable income to invest in political campaigns at the highest levels, thus giving politicians an incentive to prioritize their agendas.

9. Shawn Hubler & Julie Bosman, *A Crisis That Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html [https://perma.cc/5PKH-ASH3]; Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds – Not the Infamous 8:46*, CNN (Mar. 30, 2021, 6:27 AM), https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html [https://perma.cc/TRD8-KNVV].

10. Tiffany N. Ford et al., *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS: UP FRONT (June 16, 2020), https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/ [https://perma.cc/FBW5-SBXE].

Wealth also generates wealth. For example, the wealthiest households can afford to send their offspring to the best schools to obtain an excellent education at the secondary and postsecondary levels. That education is a form of human capital that paves the way to cultural capital and leads to higher income careers without the burden of substantial debt.

Politicians—through legislation and policies—have demonstrated they have little interest in combating wealth concentration, which has led to vast wealth inequalities by class and race.[11] Until the Black population has political power beyond individual votes, legislation to address past injustices will continue to have little or no priority. The gateway to political power is economic power, and the pathway to economic power is wealth.

Black households comprise less than 2% of the wealthiest households while white households comprise over 96%.[12] This disparity is commonly referred to as the racial wealth divide.[13] To seriously reduce the racial wealth divide, law and policy must fundamentally change in multiple areas, including labor, economics, education, and taxation, to begin the process of building generational wealth. To build generational wealth, various actions—such as salaried careers, debt reduction, and asset accumulation—must work in concert. This Article demonstrates how the federal government has facilitated the racial wealth divide and why it has the responsibility to redress that divide.

B. Economic Justice

Economic justice is a component of social justice. For purposes of this Article, economic justice means facilitating income and wealth equality for communities that are historically and economically oppressed by systemic government action or inaction. Wealth inequalities cannot be adequately described without addressing the impact of historical actions that negatively affect the ability of Black families to accumulate wealth.

Professor Alice Thomas addressed the severity of wealth inequalities among races and the factors that contributed to those inequalities.[14] She detailed how slavery, the "Great Migration," and Jim Crow laws legally

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11. Brian Chappatta, Opinion, *The Fed Is Powerful, Except in Fighting Wealth Inequality*, BLOOMBERG (Dec. 31, 2020, 6:00 AM), https://www.bloomberg.com/opinion/articles/2020-12-31/the-fed-is-powerful-except-in-fighting-wealth-inequality [https://perma.cc/2TVH-9HW2].

12. WILLIAM DARITY JR. ET AL., SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY, WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP 2 (2018).

13. Alice M. Thomas, *The Racial Wealth Divide Through the Eyes of the Younger Family: Undoing America's Legacy of Wealth Inequality in Search of the Elusive American Dream Utilizing a Sankofa Model of Transitional Justice*, 5 FLA. A & M U. L. REV. 1, 5 (2009).

14. *Id.*

inhibited and denied Blacks the ability to build wealth.[15] She further described the government's impact in promoting wealth for white families while impeding wealth for Black families, which she called the "invisible hand."[16] She explained how the invisible hand influenced housing policies through segregation and discriminatory lending practices, which negatively impacted Black families' ability to purchase homes.[17]

Professors Palma Strand and Nicholas Mirkay also identified the government's role in promoting wealth generation and concentration in white households through intergenerational wealth transference.[18] They argued the government facilitated these transfers by incentivizing retirement and college savings plans.[19] Critically, access to higher education impacts the ability to build wealth, and education paves the way to higher paying jobs. Higher paying jobs provide the opportunity to generate disposable income and the power to make money though income-producing assets.

Black households have historically encountered roadblocks when attempting to engage in education at secondary and postsecondary levels.[20] Cost is a major roadblock to gaining access to education. Financial assets, such as home equity, have eased the burden for white households because funds from home equity may finance their children's education.[21] Tax legislation has only further eased their financial burdens.[22]

The Taxpayer Relief Act of 1997 (TRA 1997) is one of many tax acts that facilitated a reduction in the costs of higher education for the wealthy.[23] Using *A Black Critique of the Internal Revenue Code* as my starting point, the TRA 1997 was the first major tax act passed after the article was published.[24] The TRA 1997 implemented its education incentive provisions under the pretext of making higher education accessible and affordable for low- and

15. *Id.* at 17, 24, 34.
16. *Id.* at 30.
17. *Id.*
18. Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J.L. & SOC. POL'Y 265, 271 (2020).
19. *Id.* at 275–76 (explaining Professor John Langbein's theory that older generations self-financing retirement and investing in human capital by educating their children are the new forms of wealth transference).
20. *Id.* at 276.
21. *Id.*
22. *Id.* at 279.
23. David Cay Johnston, *'97 Middle-Class Tax Relief Benefits Wealthy First*, N.Y. TIMES (Apr. 5, 1998), https://www.nytimes.com/1998/04/05/us/97-middle-class-tax-relief-benefits-wealthy-first.html [https://perma.cc/W2EQ-XC3V].
24. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788; Moran & Whitford, *supra* note 3.

middle-income families.[25] Instead, these provisions provided subsidies for wealthier households, which are predominantly white.[26] The education incentive provisions were codified under programs known as Hope Scholarship Credit, Lifetime Learning Credit, education individual retirement account (IRA), and qualified tuition programs.[27]

While Congress subsidized the expenses of higher education for the wealthy, it did not make a comparable investment in Pell Grants for low-income students.[28] Even though Pell Grants were authorized, grant amounts did not maintain pace with college tuition, and consequently, low-income students were forced to find other ways of financing their education at four-year institutions.[29] Some potential students could not afford the additional payment and did not attend (or dropped out) while others turned to student loans and the financial consequences of significant debt.[30]

The Economic Growth and Tax Reconciliation Relief Act of 2001 (EGTRRA) made significant changes only to the education IRA.[31] EGTRRA increased the maximum contribution from $500 to $2,000 and changed the education IRA's name to Coverdell education savings account (ESA).[32] Time has confirmed that education incentive programs predominantly benefit wealthier, white households who can afford to save for the tax benefit up front or initially spend for a later tax benefit.[33] The tax code bias is clearly exhibited by these provisions.[34] Congress has not comparably invested in education's

25. Phyllis C. Smith, *The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR. AM. L. & POL'Y 181, 182 (2008).

26. *Id.* at 210.

27. For a detailed analysis of these programs, see *id.* at 205–17.

28. Higher Education Act of 1965, Pub. L. No. 89-329, §§ 401–409, 79 Stat. 1219, 1232–36 (establishing the Pell Grant).

29. *See* Smith, *supra* note 25, at 197 (describing the impact of the changes to student federal aid for low-income students and families); *see also* Camilla E. Watson, *The Future of Lower-Income Students in Higher Education: Rethinking the Pell Program and Federal Tax Incentives*, 45 FLA. ST. U. L. REV. 1107, 1123 (2018) (describing the history of Pell Grants and the decline in college enrollment after 1998, when the maximum grant amount was insufficient to cover in-state tuition and fees at four-year public institutions).

30. *See* Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEGIS. 99, 106 (2016) (discussing student education debt and the impact of the borrowers' financial future).

31. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 501(a), 115 Stat. 38, 69.

32. *Id.* § 401(a), 115 Stat. at 57 (striking "$500" and inserting "$2,000"); Pub. L. No. 107-22, § 1(a)(1), 115 Stat. 196, 196 (striking "an education individual retirement account" and inserting "a Coverdell education savings account").

33. *See* Andrew D. Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U. L. REV. 1229, 1255–56 (2007).

34. *Id.* at 1255–56.

accessibility and affordability for low- and middle-income families—where Black households predominately reside.

III. WEALTH MATTERS

I, along with other scholars, have written articles about who has versus who should have the burden of paying taxes in America.[35] Tax policy has played an integral role in creating income and wealth disparities and should also play an integral role in carrying out economic justice.[36] It will take hundreds of years to reverse the dense history of systemic economic oppression; therefore, we must take an aggressive approach.[37]

This Part highlights legislators' missed opportunities to reform capital gains, transfer taxes, and state and local taxes. Reform for these taxes can immediately impact economic justice for low-income and Black households. If economic justice is a priority, tax policy will reflect that. Tax reform must be one of the first steps to effectuate meaningful change in this area.

A. Capital Gains

Capital gains property receives multiple tax preferences.[38] First, the taxpayer has power to determine the timing of a capital gains tax because of the requirement of a realization event.[39] If the taxpayer sells the appreciated property, there is a realization event, but the taxpayer has control over the timing of that event.[40] The taxpayer may decide to sell the property after owning it for thirty days or thirty years.[41] This is a beneficial preference because it allows the taxpayer to manipulate the timing of income or losses based on other taxable income.

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35. *See generally Change We Can't Believe In*, *supra* note 1, at 557 (discussing how to shift the burden of tax revenue to the wealthiest); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1512 (1997); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1504–05 (2004) (discussing the tax-favored treatment of employer-provided pensions).

36. MEG WIEHE ET AL., INST. ON TAX'N & ECON. POL'Y, RACE, WEALTH AND TAXES: HOW THE TAX CUTS AND JOBS ACT SUPERCHARGES THE RACIAL WEALTH DIVIDE 9 (2018).

37. *Id.* at 3.

38. Ed Dolan, *It Is Time to Rethink the Capital Gains Tax Preference*, NISKANEN CTR. (June 10, 2020), https://www.niskanencenter.org/it-is-time-to-rethink-the-capital-gains-tax-preference/ [https://perma.cc/3WRF-XHXX].

39. *Id.*

40. *Id.*

41. *See id.*

In most cases, labor income is taxed when earned.[42] Deferred compensation is one exception that allows taxpayers to delay taxable events from earned income.[43] Generally, this benefit is available to, and used by, highly compensated individuals through employer programs that, in turn, reduce current tax liability and build future wealth.[44] Still, taxpayers have less control on the timing of income and may be subject to penalties if they withdraw the funds early.[45]

Although there may be opportunities to engage in employer pension plans, only households with disposable income have the means to do so.[46] By household race, Black taxpayers are less likely to participate in employer retirement plans than white taxpayers.[47] It is worth noting that, even with other retirement instruments, such as defined contribution plans and individual retirement accounts, Black taxpayers still linger behind white taxpayers.[48]

Second, while earned income is subject to federal payroll taxes, capital gains are not subject to this burden.[49] Payroll taxes significantly impact income inequality and the opportunity to build wealth because they are burdened with funding income security programs.[50] Because they simply shift

42. INTERNAL REVENUE SERV., PUB. 538, ACCOUNTING PERIODS AND METHODS 8 (2019).

43. Barbara Weltman, *Taxation on Non-Qualified Deferred Compensation Plans*, INVESTOPEDIA (June 3, 2015), https://www.investopedia.com/articles/personal-finance/060315/taxation-nonqualified-deferred-compensation-plans.asp [https://perma.cc/W6NE-YZGU].

44. *Id.*

45. *Id.*

46. Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RES. SYS. (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/4VKM-D6R3] ("These differences in participation may be caused by a variety of factors, including whether or not a family has sufficient income to enable saving in this manner, the types of funds offered by employer-sponsored plans, whether participation is by default or not, and financial literacy.").

47. *Id.* ("About 60 percent of White and 54 percent of other families participate in a retirement plan, compared to 45 percent of Black families and 34 percent of Hispanic families.").

48. *Id.* ("In all age groups, Black and Hispanic families are far less likely to have such retirement accounts. For example, among middle-aged families—who have the highest rates of account ownership—65 percent of White families have at least one retirement account, compared to 44 percent of Black families, and just 28 percent of Hispanic families.").

49. John Olson, *What Are Payroll Taxes and Who Pays Them?*, TAX FOUND. (July 25, 2016), https://taxfoundation.org/what-are-payroll-taxes-and-who-pays-them/ [https://perma.cc/8942-7DP4] ("Put simply, payroll taxes are taxes paid on the wages and salaries of employees. These taxes are used to finance social insurance programs, such as Social Security and Medicare. According to recent Tax Foundation research, these social insurance taxes make up 23.05 percent of combined federal, state, and local government revenue—the second largest source of government revenue in the United States.").

50. *See* Stephen Miller, *2021 Wage Cap Rise Modestly for Social Security Payroll Taxes*, SHRM (Oct. 13, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages

the costs to employees, employers do not share this burden as implied by "employer-side" expenses on pay and earning statements.[51]

Social Security was enacted to provide income security to the elderly and low-income earners.[52] Scholars and economists have identified the regressive nature of the Social Security tax and proposed methods and justifications to increase the contribution base by eliminating the income cap.[53] I wholeheartedly agree with eliminating the income cap, and I also propose imposing the responsibility of funding income security on dividend and capital gains when distributed. Excluding these other tax-favored forms of income from societal responsibility further illustrates tax bias in favor of passive—over labor—income.

Third, a taxpayer may avoid the capital gains tax altogether.[54] For example, the taxpayer could avoid a realization by transferring the property as a gift. In the case of a gift transfer, there is no realization event and, therefore, no taxable event.[55] Only taxpayers who can afford to transfer property by gift can take advantage of this tax-free opportunity to transfer wealth. While the transaction is tax free, it delays the tax because the gift recipient receives transferred basis, and the inherent gain is taxed when the recipient engages in a taxable event.[56]

If, however, the taxpayer can afford to retain ownership of the property until death, this transfer will completely avoid the income tax because of the stepped-up provision rules.[57] Transfers by death are not realization events; consequently, there is no income tax liability.[58] In this case, the taxpayer is

/2021-wage-cap-rises-modestly-for-social-security-payroll-taxes.aspx [https://perma.cc/P8C5-W7ZW].

51. Olson, *supra* note 49 ("This means that, rather than workers and employers each paying 7.65 percent in payroll taxes, employers send their portion of the tax to the government and then decrease workers' wages by almost 7.65 percent. Next, workers pay their 7.65 percent share on those wages. In effect, there is hardly such a thing as the "employer-side" payroll tax, because almost the entire burden of the payroll tax is passed on to employees in the form of lower wages.").

52. Patricia E. Dilley, *Through the Doughnut Hole: Reimagining the Social Security Contribution and Benefit Base Limit*, 62 ADMIN. L. REV. 367, 381, 384 (2010).

53. *See, e.g.*, *id.* at 410; THOMAS L. HUNGERFORD, CONG. RSCH. SERV., RL33943, INCREASING THE SOCIAL SECURITY PAYROLL TAX BASE: OPTIONS & EFFECTS ON TAX BURDENS 3–4 (2013); *see also* Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 804 (2007) (discussing the regressive nature of Social Security taxes).

54. *See* I.R.C. § 1015(a).

55. *See id.*

56. *See id.*

57. *See* I.R.C. § 1014(a). For further details about the benefits of stepped-up basis, see *infra* text accompanying notes 81–83.

58. *See id.*

incentivized to retain the property because of a potential windfall.[59] Again, the taxpayer has the control, and tax code bias is obvious.

The fourth and final tax preference is the capital gains tax rate. Capital gains are taxed at preferential rates, which provide tax relief for the owners.[60] In a prior article, I discussed the historical justifications for preferential rates and why continued preferential rates are unwarranted.[61] Economists and scholars have long provided data and research demonstrating that capital gains preferences primarily benefit the wealthiest of households.[62]

Economists Thomas Piketty and Emmanuel Saez reported that, in 2007, the top 1% of households received more than 21% of all income.[63] Capital assets are more concentrated; households with income of at least $200,000 owned 63% of nonresidential capital assets.[64] The ownership disparity is even more significant by race—even within the same income quartile.[65] According to her study, Sharmila Choudhury indicated stock ownership in the lowest quintile was almost 15% for white individuals and less than 2% for Black individuals.[66] Significant disparities existed even at the highest income quartile, where 56% of white individuals owned stock compared to 26% of Black individuals.[67]

Even though preferences were already bestowed on property subject to capital gains taxes, congressional leaders gave even more preferences in the TRA 1997. Pursuant to the TRA 1997, long-term capital gains rates were reduced from 28% to 20% for taxpayers in the 28% bracket and higher.[68] Later, in 2003, pursuant to the Jobs and Growth Tax Relief Reconciliation

59. For further details about the benefits of stepped-up basis, see *infra* text accompanying notes 81–83.

60. *See Saving the Farm*, *supra* note 1, at 1025.

61. For a more detailed discussion on capital gains taxes, see generally *id.*

62. JOEL FRIEDMAN & KATHARINE RICHARDS, CTR. ON BUDGET & POL'Y PRIORITIES, CAPITAL GAINS AND DIVIDEND TAX CUTS: DATA MAKE CLEAR THAT HIGH-INCOME HOUSEHOLDS BENEFIT THE MOST 3 (2006), http://www.cbpp.org/files/1-30-06tax2.pdf [https://perma.cc/KZZ5-P7GE] (explaining that more than 75% of capital gains and divided income were attributed to the top 3% of households); *see also* THOMAS L. HUNGERFORD, CONG. RSCH. SERV., R40411, THE ECONOMIC EFFECTS OF CAPITAL GAINS TAXATION 7 (2010) (explaining that private stock ownership is almost completely owned by top income levels).

63. Facundo Alvaredo et al., *The Top 1 Percent in International and Historical Perspective*, 27 J. ECON. PERSPS. 3, 4 (2013).

64. CONG. BUDGET OFF. & JOINT COMM. ON TAX'N, THE DISTRIBUTION OF ASSET HOLDINGS AND CAPITAL GAINS 17 (2016).

65. Sharmila Choudhury, *Racial and Ethnic Differences in Wealth and Asset Choices*, 64 SOC. SEC. BULL., no. 4, 2001–2002, at 1, 8 ("The cutoff points for the income quartiles (in 1992 dollars) are $23,460, $41,900, and $66,900.").

66. *Id.* at 8. ("Probably because the respondents in this study are near retirement age, even households in the lowest quartile own some stock.").

67. *Id.* at 9 tbl.4.

68. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 311, 111 Stat. 787 (codified as amended in scattered sections of the Internal Revenue Code).

Act, capital gains rates were further reduced to 15% for taxpayers in the 20% bracket and higher.[69] The American Taxpayer Relief Act of 2012 (ATRA) made the maximum 20% rate permanent.[70] The Tax Cuts and Jobs Act (TCJA) expanded the 15% rate such that both taxpayers earning $40,000 and taxpayers earning over $400,000 pay the same 15% rate.[71] With each new piece of tax legislation, the capital gains tax receives more favorable treatment, thereby continuing to exacerbate income and wealth inequality between classes and races.

B. *Transfer Taxes*

Generating wealth is an important aspect of gaining economic power. So far, I have explained several of the contributors to the racial wealth gap. Because there are multiple contributors to this gap, we must combat it with multiple instruments. Typical justifications for the racial wealth gap place blame on the Black community, commanding Black individuals to work harder, get an education, and make better financial choices.[72] These justifications ignore income inequality, barriers to education and higher paying jobs, and financial obligations that impede the ability to save and invest.[73] They also ignore specific policies that facilitate tax-free wealth transfers and subsidize wealthier, white households.[74] This Section discusses how the federal government used estate tax exemptions to effectively subsidize tax-free wealth transference.

The TRA 1997 was significant because it began a series of tax acts in which Congress overtly passed legislation that contributed to wealth concentration.[75] Under the TRA 1997, the estate tax exemption amount was changed for the first time since 1987.[76] The TRA 1997 scheduled increases of

69. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 301(a)(2), 117 Stat. 753, 758 (codified as amended in scattered sections of the Internal Revenue Code).

70. American Taxpayer Relief Act of 2012, Pub L. No. 112-240, § 102(b), 126 Stat. 2313, 2318 (2013) (codified as amended in scattered sections of the Internal Revenue Code).

71. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a)(5)(B)(ii), 131 Stat. 2054, 2058 (2017) (codified as I.R.C. § 1(j)(5)(B)(ii)).

72. *See* DARITY ET AL., *supra* note 12, at 3 ("These myths support a point of view that identifies dysfunctional black behaviors as the basic cause of persistent racial inequality, including the black-white wealth disparity, in the United States. We systematically demonstrate here that a narrative that places the onus of the racial wealth gap on black defectiveness is false in all of its permutations.").

73. *See id.*

74. *See id.* at 30.

75. *See* JOINT COMM. ON TAX'N, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 10–11 (2015).

76. *Id.* at 9–10.

the exemption amount by $25,000 annually until 2006, when the exemption was set to increase to $1 million.[77] What the TRA 1997 did to the estate tax, the EGTRRA supercharged.[78]

Under EGTRRA, the estate tax accelerated the $1 million exemption to 2002 instead of 2006 and scheduled additional increases from 2004 to 2010.[79] Significant wealth transfers for the wealthy resulted during these years, and those transfers certainly contributed to increased wealth concentration and revenue loss to the government.[80]

During the 2010 temporary repeal, I.R.C. § 1014, commonly referred to as the "stepped-up basis rule,"[81] was substituted by the modified carryover basis rules for 2010.[82] With the modified carryover basis included under EGTRRA, it became clear that the stepped-up provision rules were not an oversight and had been intentionally disregarded in prior years.

Section 1014 allows a decedent to transfer property with inherent gain to the recipient income tax free.[83] This is another way to subsidize the wealthiest taxpayers. With estates that fall under the exemption amount, there is no justification for wiping out the income tax due on the property. The Congressional Budget Office (CBO) has advised that the stepped-up provision rules should be eliminated, and the Joint Committee on Taxation estimated this change could increase revenues by $105 billion from 2019 to 2028.[84] The

77. *See id.* at 10.

78. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 501(a), 115 Stat. 37, 69 (codified as amended in scattered sections of the Internal Revenue Code).

79. § 521(a), 115 Stat. at 71 (providing that, pursuant to the terms of EGTRRA, the exemption amount for the estate tax was increased to the following amounts: $1 million for 2002–2003, $1.5 million for 2004–2005, $2 million for 2006–2008, $3.5 million for 2009, and a repeal in 2010; the gift tax remained at $1 million from 2002–2010).

80. *See* Alvaredo et al., *supra* note 63, at 4 (noting an increase in wealth concentration for the top 1%, particularly from 2002–2007); CONG. BUDGET OFF., CHANGE THE TAX TREATMENT OF CAPITAL GAINS FROM SALES OF INHERITED ASSETS (2018), https://www.cbo.gov/budget-options/54792 [https://perma.cc/WY4D-2M77].

81. Jay A. Soled et al., *Re-Assessing the Costs of the Stepped-Up Tax Basis Rule* 1 (Tulane Univ., Working Paper No. 1904, 2019).

82. I.R.C. § 1022(a) (repealed 2010) (indicating that, for estates of decedents who died in 2010, the modified carryover basis rules required the basis of property transferred through the decedent to equal the lessor of the fair market value on the date of death or the decedent's basis).

83. *See* I.R.C. § 1014(a).

84. CONG. BUDGET OFF., *supra* note 80 ("The estimate for this option is uncertain for two primary reasons. First, the estimate relies on CBO's economic projections, including those of the value of assets at their owners' death and of capital gains realizations, and such projections are inherently uncertain. Second, the estimate reflects taxpayers' anticipated responses to the change in the tax treatment of inherited assets, including delays in the sales of those assets, which are also uncertain.").

federal government has decidedly placed the burden of raising revenue on labor income by foregoing these other opportunities to collect taxes.[85]

The ATRA followed in 2012 by further increasing the exemption amount to \$5.2 million and permanently unifying the estate and gift tax.[86] As previously mentioned, the TCJA is one of the most recent tax acts, and I was not surprised when it doubled down on perpetuating inequality.[87] Under the TCJA, the transfer tax exemption was increased to \$11.2 million and adjusted for inflation. Tax policy makes the alignment of American values and priorities clear.

C. *The Effect of Tax Reform*

In prior articles, I discussed how tax policies worked in a concerted effort to subsidize the wealthy and offered proposed reforms to address inequalities.[88] The proposed reforms identified methods to reverse wealth concentration by mitigating tax policies that inhibited low-income households' ability to build wealth.[89] I focused on class and secondarily on race because, while I understand that a disproportionate number of Black families live in the lowest income and wealth class, I did not want to give the impression that only Black families were affected.

In this Article, I address the matter more directly because it is frustrating to watch tax policies develop and government leaders decline to address growing wealth inequalities. Because policies historically benefit white, wealthy Americans, social justice should require Congress use the same level of effort to increase wealth for Black and low-income families.

The TCJA, as the most recent tax legislation, was another opportunity for Congress to right some of its historical wrongs.[90] Instead of passing laws to provide tax relief for low-income and Black households, it doubled down on

85. *See id.*

86. *See* American Taxpayer Relief Act of 2012, Pub L. No. 112-240, § 101(c)(3)(A), 126 Stat. 2313, 2318 (2013) (codified as amended in scattered sections of the Internal Revenue Code) (unifying the estate and gift tax); *see also* Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 302(a), 124 Stat. 3296, 3301 (codified as amended in scattered sections of the Internal Revenue Code) (reinstating the estate tax at \$5 million for the 2010 repeal authorized under EGTRRA). Personal representatives still had the option to elect the repeal with the modified carryover basis. *See id.*

87. Tax Cuts and Jobs Act, Pub. L. No. 115-97, §11061(a), 131 Stat. 2054, 2091 (2017) (codified as I.R.C. § 2010(c)(3)(C)) (increasing the exemption to \$10 million).

88. *See, e.g.*, Phyllis C. Taite, *Exploding Wealth Inequalities: Does Tax Policy Promote Social Justice or Social Injustice?*, 36 W. NEW ENG. L. REV. 201, 202, 209–11, 216–18 (2014).

89. *Id.* at 209–11, 216–18; *see also Saving the Farm*, *supra* note 1, at 1050–53; *Taxes, the Problem and Solution*, *supra* note 1, at 384–90; *Change We Can't Believe In*, *supra* note 1, at 547.

90. WIEHE ET AL., *supra* note 36, at 4.

subsidizing the wealthy.[91] The Institute on Taxation and Economic Policy (ITEP) created a microsimulation model that demonstrates the TCJA's distribution benefit.[92]

According to the ITEP, the top 1% of households earning more than $590,000 receive an average tax benefit of $47,650 while low-income households earning less than $23,000 receive an average tax benefit of $90.[93] The distributional benefit of the TCJA by race is even more egregious: white households receive an average tax benefit of $2,020, and Black households receive an average tax benefit of $840.[94]

Even within the same income quintiles, most Black households do not receive the same level of tax benefit as white households. In the lowest income group—earning less than $23,000—the tax benefit is the same among white and Black households ($90).[95] In the middle-income group—earning between $40,000 and $110,000—white households receive an average benefit of $1,020 while Black households receive an average benefit of $920.[96] The highest income group—earning more than $590,000—represents the greatest disparity as white households receive an average benefit of $52,400 and Black households receive an average benefit of $19,290.[97]

Overall, the Forbes 400 list owns more wealth than the bottom 64% of the American population.[98] In terms of Black wealth, Black families have a median net worth of $17,000 while white families enjoy a median net worth of $171,000.[99] In the end, each tax act represents a missed opportunity to facilitate change and progress toward economic justice.

Tax policies have continued the predictable path of previous tax acts by substantially subsidizing wealthy, white households while providing less assistance for low-income and Black households. The racial wealth inequality has grown over time, and the government has failed to respond.[100] With disparities in wage income, retirement savings, homeownership, ownership of capital gains property, access to education, and wealth transfers by inheritance, it is no wonder the racial wealth divide is substantial.

91. *Id.*

92. *Id.*

93. *Id.* at 5.

94. *Id.* at 6.

95. *Id.* at 7. The definitions for low-, middle-, and high-income levels were defined by ITEP. *Id*

96. *Id.*

97. *Id.* at 8.

98. *Id.* at 2.

99. *Id.*

100. *See* Strand & Mirkay, *supra* note 18, at 285 ("[I]t is no surprise that recent studies consistently conclude that the TCJA contributes to continued economic inequality and increases the racial wealth divide.").

IV. HOMEOWNERSHIP MATTERS

A. Homeownership Rates and Their Impact on Wealth Building

Homeownership is a critical step in the process of generating wealth. Black households have faced significant obstacles to obtaining homeownership, ranging from overt to covert racial discrimination.[101] One of the most common methods of racial discrimination in housing is "redlining."[102] Redlining has been imposed on majority-minority neighborhoods by banks as well as government agencies.[103] Redlining has had a negative impact on Black homeownership rates and home values and has dealt a significant blow to Black wealth.

Subprime mortgages were another significant weapon against Black homeownership and wealth. The U.S. Department of Housing and Urban Development (HUD) conducted a study regarding subprime lending and found that a disproportionate concentration of subprime loans were in minority and low-income neighborhoods.[104] In fact, the study found that Black homeowners in high-income neighborhoods were twice as likely to have subprime loans than white homeowners in low-income neighborhoods.[105]

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101. *See* Gary A. Dymski, *Discrimination in the Credit and Housing Markets: Findings and Challenges* 4 (U. of Cal., Riverside Dep't of Econ., Working Paper No. 02-18, 2002) (describing different types of racial discrimination in the loan and housing market, including overt, disparate treatment, and disparate impact).

102. *Id.* ("In the early 1970's, home-mortgage markets were brought to the fore in policy debates about discrimination in these markets, as a broad-based movement of community-based groups exposed the 'redlining' of inner-city neighborhoods. Redlining involves a decision by either lenders or realty agents to avoid or make fewer transactions in a given area, due to its 'riskiness.'").

103. *Id.* ("The areas being redlined typically had higher minority populations than other areas—so this behavior could be linked to lenders' or brokers' spatial racial biases. Ironically, until the mid-1960s, the federal government's principal home-mortgage underwriting program (the FHA program), which accounted for nearly half of all homes sold in the 1950s and 1960s, itself used explicitly racial (and racist) criteria about neighborhoods in making decisions about whether to approve FHA loans. So redlining was not a phantasm of overzealous activists: it had been official government policy.").

104. U.S. DEP'T OF HOUS. & URB. DEV., UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000) ("The data clearly demonstrate the rapid growth of subprime lending during the 1990's and, further, the disproportionate concentration of such lending in the nation's minority and low-income neighborhoods. These findings are significant for the nation's policy-makers, in light of the growing evidence of widespread predatory practices in the subprime market.").

105. *Id.* ("Only 6 percent of homeowners in upper-income white neighborhoods have subprime loans while 39 percent of homeowners in upper-income black neighborhoods have subprime loans, more than twice the rate for homeowners in low-income white neighborhoods, 18 percent.").

The HUD study also found that banks were marketing subprime loans to Black homeowners for refinancing.[106] In other words, they were convincing Black homeowners with conventional loans to refinance for subprime loans by enticing them with lower payments. The Great Recession was, in part, the fallout from these predatory lending practices.[107] Following the Great Recession, Black homeownership rates dropped to near thirty-year lows while white homeownership rates never fell below 70%.[108]

I understand the government was not directly involved with subprime lending, but the deregulation of banks immediately preceded the rise in these loans. With widespread use of subprime loans, the government was aware and did not intervene in the attack on Black homeownership and wealth.[109] The government responded by bailing out banks—the very source of the problem.[110]

Subsidizing white wealth by facilitating homeownership is one part of a much larger discussion that demonstrates the government's support for wealthy, white homeowners. The next Sections of this Article discuss how tax policy has been integral to building wealth by providing substantial subsidies to predominantly white homeowners through the mortgage interest deduction[111] (MID) and principal residence exclusion[112] (PRE).

106. *Id.* ("In fact, as neighborhood income increases, the disparity between the African-American and white neighborhoods grows larger. Homeowners in low-income black communities are almost 3 times as likely as homeowners in low-income white communities to have subprime refinancing. For moderate income neighborhoods, black neighborhoods are 4 times as likely and in the upper income neighborhoods, black neighborhoods are six times as likely as white neighborhoods to have subprime financing.").

107. SARAH BURD-SHARPS & REBECCA RASCH, SOC. SCI. RSCH. COUNCIL, IMPACT OF THE US HOUSING CRISIS ON THE RACIAL WEALTH GAP ACROSS GENERATIONS 6 (2015), https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf [https://perma.cc/Z87B-CTYX].

108. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2018, at 3 fig.3 (2018), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf [https://perma.cc/4Q3F-9U4M] (indicating Black homeownership decreased from approximately 50% in 2005, to 45% in 2009, and to just over 40% in 2017).

109. *See* ALAN S. BLINDER, AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD 58 (2013).

110. *See generally* Kimberly Amadeo, *The Causes of the Subprime Mortgage Crisis*, THE BALANCE (Sept. 17, 2020), https://www.thebalance.com/what-caused-the-subprime-mortgage-crisis-3305696 [https://perma.cc/ZBH4-U5LZ]; Kimberly Amadeo, *What Was the Bank Bailout Bill?*, THE BALANCE (Oct. 26 2020), https://www.thebalance.com/what-was-the-bank-bailout-bill-3305675 [https://perma.cc/2AUQ-9Y8A].

109. I.R.C. § 163(h)(2)(D), (h)(3)(A).

110. § 121.

B. Mortgage Interest Deduction

The MID is a provision in the Internal Revenue Code that allows a taxpayer to deduct the interest paid on a qualifying mortgage.[113] This is a beneficial deduction because a home is often the most expensive asset owned by a taxpayer, and the accompanying interest payment potentially provides enough expenses to itemize on tax returns.[114] Congressional leaders made an intentional choice to invest in homeownership by subsidizing taxpayers through the tax code.[115]

In previous articles, I discussed how the MID has benefitted wealthier taxpayers and how it remains a deductible expense despite homeownership being a personal expense.[116] I also discussed the historical justifications and how they have been largely debunked.[117] In this Article, I focus on the homeownership rates of Black households and the extent to which they benefit from the MID. There is no specific data because the IRS does not collect data on race, so I used income levels to identify which taxpayers itemized and benefitted from the MID and inferred Black household use based on representation in income classes.

Despite overwhelming research disproving beliefs about the effects of the MID and despite proof that most Americans do not qualify for the deduction, there is still uniform support from the public.[118] Even more puzzling, the evidence is undisputed that taxpayers in the highest income levels receive the greatest tax benefits, yet the MID is still marketed as a mechanism to facilitate homeownership for the middle class.[119]

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113. § 163(h)(2)(D), (h)(3)(A).

114. *See* Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1359–61 (2000) (explaining the itemization limitation to the MID through two hypothetical example households where the wealthier household with a more expensive home benefitted much more from the MID).

115. *Id.* at 1348–49 ("The Federal income tax system subsidizes the dream of home ownership through the home mortgage interest deduction, the property tax deduction, and the exclusion of imputed rental income from owner-occupied housing, as well as other forms of preferential treatment." (internal footnotes omitted)); *see also* Strand & Mirkay, *supra* note 18, at 282, 284 (describing "tax expenditures," or "tax subsidies" and reporting that, in 2019, the MID cost taxpayers $26.85 billion in uncollected revenue).

116. *See Saving the Farm*, *supra* note 1, at 207, 364.

117. *Id.* at 364.

118. Kathy Frankovic, *Tax Deductions Are Hard to Part With*, YOUGOV (Oct. 30, 2017, 1:00 PM), https://today.yougov.com/topics/politics/articles-reports/2017/10/30/tax-deductions-are-hard-part [https://perma.cc/AN5R-QHJP].

119. CONG. RSCH. SERV., R46429, AN ECONOMIC ANALYSIS OF THE MORTGAGE INTEREST DEDUCTION 2 (2020), https://fas.org/sgp/crs/misc/R46429.pdf [https://perma.cc/F35D-SBSQ] (showing that nearly 80% of households claiming the MID in 2018 had annual incomes over $100,000 and that over 90% of the value of the deduction went to those households).

Professors Moran and Whitford identified the MID as a subsidy primarily for wealthy, white households.[120] At the time of their publication, the MID authorized a mortgage interest deduction of up to $1 million for acquisition indebtedness on two homes and up to $100,000 for home equity indebtedness.[121]

Professor Brown also indicated that federal tax housing subsidies largely benefit white households because a greater percentage of white households are "middle- and upper-income" households.[122] In prior articles, I provided detailed analyses of the MID and proposed reducing the MID based on income levels.[123] Since then, the TCJA has eliminated personal exemptions and increased the standard deduction. By increasing the standard deduction, the TCJA further reduced the number of taxpayers eligible for the MID and increased its inefficiency.[124] On the other hand, the TCJA took small steps in the right direction by reducing the amount of acquisition indebtedness from $1 million to $750,000, eliminating interest deductions for home equity indebtedness and eliminating the MID for a second home.[125] Even so, the remaining provisions still subsidize the wealthiest households,[126] so there is more work to do.

C. Gains from the Sale of a Principal Residence

The PRE is another key component to homeownership's role in building wealth.[127] Ideally, investing in a home appreciates its value and contributes to

120. Moran & Whitford, *supra* note 3, at 781.

121. *Id.* at 774.

122. Dorothy Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 361 (2009).

123. *Saving the Farm*, *supra* note 1, at 209.

124. DANIEL BERGER & ERIC TODER, TAX POL'Y CTR., DISTRIBUTIONAL EFFECTS OF INDIVIDUAL INCOME TAX EXPENDITURES AFTER THE 2017 TAX CUTS AND JOBS ACT 10 (2019), https://www.taxpolicycenter.org/sites/default/files/publication/157267/distributional_effects_of_individual_income_tax_expenditures_after_the_2017_tax_cuts_and_jobs_act_1.pdf [https://perma.cc/N97M-WZKE] (explaining that the TCJA reduced the number of itemizers to roughly 11%).

125. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11043, 131 Stat. 2054, 2086 (2017) (codified as I.R.C § 163(h)(3)(F)).

126. JOINT COMM. ON TAX'N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016-2020, at 32 tbl.1, 44 tbl.3 (2017) (projecting the MID will increase in cost from $59 billion in 2016 to $83.4 billion in 2020, for a total expense of $357 billion over the five-year period).

127. The PRE excludes up to $500,000 in home appreciation from a person's taxable income, provided the conditions are met. I.R.C. § 121. This allows taxpayers to the reap financial benefits of their home's appreciation without having to pay taxes on that increased wealth.

overall wealth.[128] Selling a home is an experience uniquely personal to each taxpayer and has significance whether the taxpayer intends to upgrade to a larger home, downsize to a smaller home, or cash out.

When a home is sold, the gains from the sale qualify for multiple tax preferences. First, the gains are treated as capital gains that qualify for reduced tax rates.[129] Second, and more significantly, gains may be deferred or excluded under certain circumstances.[130] Professors Moran and Whitford discussed the tax benefits of selling a principal residence.[131] At the time of their research, the taxes due from sale were deferred if the gains were "rolled over" into the purchase of a new home within two years from the date of sale.[132] The TRA 1997 was implemented shortly thereafter and replaced the rollover provisions with a complete exclusion of the first $250,000 ($500,000 if married and filing jointly) so long as the taxpayer met the requirements.[133] This was a dramatic change from the previous provision, and it contributes to the regressions consistently evident in tax subsidies for wealthy homeownership.

This is another situation where we cannot identify the extent to which Black households benefit from the provision because the IRS does not collect data on race and because the exclusion does not require formal reporting. Nonetheless, we can still make certain inferences based on the information that is readily available. First, the exclusion is another expensive expenditure losing billions of dollars in annual revenue.[134] Second, the exclusion primarily benefits white households because their home values are significant enough to trigger the exclusion.[135] Third and finally, research shows the regressive nature of the MID and the PRE. The federal government's consistent

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128. *E.g.*, Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 59 (2006) ("Homeownership and housing appreciation is the foundation of institutional accumulation [of families' wealth]."). *But see* Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1047 (2008) (arguing that homeownership—as an investment—should be reimagined so as to remove the need for homebuyers to "put large sums of money into risky, undiversified ventures that are utterly out of their personal control–local housing markets.").

129. Brown, *supra* note 122, at 339 n.40 ("I.R.C. § 1221(a) provides that a personal residence is a capital asset. I.R.C. § 1222 provides that gain on the sale or exchange of a capital asset is capital gain. I.R.C. § 1(h) (2007) provides reduced rates for capital gains.").

130. I.R.C. § 121; § 1034, *repealed by* Pub. L. No. 105-34, tit. III, § 312(b), 111 Stat. 839 (1997).

131. Moran & Whitford, *supra* note 3, at 773–74.

132. § 1034, *repealed by* Pub. L. No. 105-34, tit. III, § 312(b), 111 Stat. 839 (1997).

133. I.R.C. § 121.

134. JOINT COMM. ON TAX'N, *supra* note 126, at 32 tbl.1 (projecting the PRE will increase in cost from $29.2 billion in 2016 to $36.8 billion in 2020, for a total expense of $166.3 billion over the five-year period).

135. Junia Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980–2015*, SOC. PROBS., 2020, at 1, 13.

commitment to white homeownership and lack of response to threats on Black homeownership reveals its priorities.[136] At a time when Black homeownership is at a record low, tax policy continues to subsidize white homeownership while virtually ignoring its responsibility to Black homeownership and wealth.

V. CONCLUSION

Congressional leaders are not oblivious to the issues identified in this Article and other publications. As a country, we have not made these issues important enough to compel action. If their political careers were in jeopardy, leaders would surely create laws to address tax code bias. We have allowed the government and media to shape the ideology of what it means to be Black in America, thereby providing excuses for their treatment of the Black community.

Portraying Black individuals as lazy, dependent on welfare, and uneducated relieves the government's burden to address the problems largely caused by its own action or inaction. With so many obstacles to economic equality, the remedy is clearly more than one individual's choice to act in a specific way (unless you are lucky enough to win the lottery or exceptional enough to excel in a career—both longshots).

This Article demonstrates the difficulty of obtaining higher education and securing higher paying jobs because of racial discrimination and bias prevalent in the labor market.[137] Even when Black individuals secure jobs, income inequality results in lower pay for identical job performance.[138] Further, the government places most of the burden for generating revenue and financing income security on individual income and payroll taxes—the largest sources of income for Black households.[139]

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136. *See* Strand & Mirkay, *supra* note 18, at 279 ("[T]he tax system as a whole—federal, state, and local; income, payroll, sales, property, individual, corporate—has gradually but distinctly shifted in ways that serve to protect and consolidate existing White wealth and wealth perpetuation since the 1970s.").

137. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 3–4, 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9873, 2003), https://www.nber.org/system/files/working_papers/w9873/w9873.pdf [https://perma.cc/B6Z9-E2UD] (finding a 50% racial gap in job application callback rates when randomly assigning equivalent resumes "very White sounding names" and "very African American sounding names").

138. *The Racial Wage Gap Persists in 2020*, PAYSCALE, https://www.payscale.com/data/racial-wage-gap [https://perma.cc/JF5T-QKCZ].

139. I.R.C. §§ 3101, 3111 (addressing payroll taxes based on wages). *Compare* § 1(a)(1)-(2), (j)(1)–(2) (describing the ordinary tax rates and TCJA modifications), *with* § 1(h), (j)(5) (describing the capital gains tax rates and adjusting them to be lower than the ordinary rates).

At multiple levels, Black families have faced obstacles to gaining income and wealth equality. Because the racial wealth gap is so massive, we must pursue serious systematic reform to make sustainable changes.[140] The American people must unite and demand the change our society needs to address the vast and ever-growing inequalities in this country.

Economic justice and progressivity are not priorities, and we must admit this problem before expecting the level of change needed to reverse the historically and currently imposed injustices. By continuing to allow government leaders to subsidize the wealthy through the tax code, we are being complicit in the injustices. Tax policy is not race or class neutral—we know that. Researchers, economists, scholars, and politicians have all been very public about the economic injustices imposed by tax policy.[141]

If government leaders were interested in demonstrating tax policy's neutrality, congressional committees would be empaneled to propose strategic solutions and provide redress for historical harms. We are at a unique time in history where the platform is already set to advance the economic justice agenda, and we cannot silently let it pass.

It has been said that this country "has socialism for the rich and free enterprise for the poor."[142] Martin Luther King Jr. often quoted this in his speeches while arguing that everyone receives welfare benefits but "we call it subsidies" when white or rich people are the recipients.[143] Shifting the tax burden back to the wealthy by eliminating their tax subsidies is long overdue. The additional revenue can fund programs, create educational opportunities, and provide tax relief to low-income families. Because Black individuals disproportionately comprise low-income households, these reforms will reduce income and wealth inequalities and provide a proper foundation to build Black wealth.

Tax code bias is real, and it has been the center of exacerbating income and wealth inequalities. I am not suggesting tax policy can instantly erase injustices centuries in the making. Rather, I am suggesting it has the power to reverse some of the effects and be an instrumental tool in redressing historical

140. DARITY JR. ET AL., *supra* note 12, at 4 ("For the gap to be closed, America must undergo a vast social transformation produced by the adoption of bold national policies, policies that will forge a way forward by addressing, finally, the long-standing consequences of slavery, the Jim Crow years that followed, and ongoing racism and discrimination that exist in our society today.").

141. *See generally* Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN'S STUD. 223 (1998); David A. Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336 (2004); Bearer-Friend, *supra* note 2; Beverly I. Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. REV. 337 (2008).

142. THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE 332 (2007).

143. *Id.*

wrongs. The federal government has invested billions of dollars in facilitating asset accumulation through transfer tax relief, capital gains preferences, tax subsidies for homeownership, and retirement subsidies for wealthy, predominantly white households.

It is long overdue for the federal government to increase tax responsibility on wealthy households—who have benefitted from hundreds of years of favorable tax policies—and extend aggressive investment in low-income households. As tax policy played a starring role in creating the racial wealth disparity, it should also play a starring role in reversing its effects.