

Spring 2021

Taxation and Racial Injustice in South Carolina

Jordan M. Wayburn

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Jordan M. Wayburn, Taxation and Racial Injustice in South Carolina, 72 S. C. L. REV. 847 (2021).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

TAXATION AND RACIAL INJUSTICE IN SOUTH CAROLINA

Jordan M. Wayburn*

I. INTRODUCTION.....	847
II. SOUTH CAROLINA’S STORY: THE PROBLEM	850
A. <i>Racial Animus: The South Carolina Constitution of 1895 and Disenfranchisement by Taxation</i>	851
1. <i>Literacy Tests and the Property Tax Exemption</i>	853
2. <i>The Poll Tax</i>	857
B. <i>Abuse of Demographic Differences: South Carolina Public School Desegregation and Funding</i>	858
C. <i>“Facially Neutral” Neglect: Contemporary Racial Disparities</i> ..	864
1. <i>An Example: The Sales Tax “Max Tax” Cap</i>	866
2. <i>Homeownership: A General Area of Disparity</i>	868
3. <i>The Elderly Tax Advantage</i>	876
D. <i>South Carolina’s Racial Tax Inequality in Summary</i>	878
III. THE RACISM ANALYSIS ACT: A PROPOSAL	879
A. <i>The National Environmental Policy Act, Compared</i>	880
B. <i>Racial Tax Justice Is Well-Suited for a NEPA-esque Policy</i>	883
1. <i>Similarities to the Environmental Neglect That Justified NEPA</i>	884
2. <i>Taxes and Racial Justice Simplify and Improve NEPA</i>	885
C. <i>Test Examples for Applying the RAA</i>	889
IV. CONCLUSION	891

I. INTRODUCTION

Critical tax theory is a small body of scholarship animated by the idea that even the tax code is not immune from bias and structural discrimination.¹ A segment of this scholarship has analyzed the ways in which the Internal

* J.D. Candidate, May 2022, University of South Carolina School of Law. I must thank Professor Tessa Davis for her excellent advice and feedback as I was writing and for the encouragement to aim high. Many thanks as well to everyone at the *South Carolina Law Review* for their thorough and very helpful assistance editing.

1. See Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 751–52.

Revenue Code has perpetuated or worsened racial equity² through a “myth of neutrality” that views tax policy as an economic matter without regard to any underlying social inequality.³ Critical tax theory is, in essence, a combination of two ideas: the idea that more than just financial conditions matter in taxation because tax policies reflect society’s values⁴ and the idea that those reflections imbue “explicit and implicit bias in the tax code.”⁵ This work, together with detailed literature documenting the numerous inequalities on

2. *Id.* at 751; see 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, 269 (2020); Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What’s Tax Policy Got to Do With It?*, 21 UALR L. REV. 759, 765–66 (1999).

3. Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 90–91 (1997) (“[T]ax law has a myth about it that suggests that it is different than other areas of the law One such consequence is perpetuating the myth that tax law is neutral and objective. . . . To the extent that tax law is assumed to be different, any disparate impact based upon race or ethnicity will continue unabated.” (citations omitted)); Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J.L. & SOC. POL’Y 206, 224 (2014) (“[C]ritical tax theory has challenged the presumed objectivity and neutrality of a tax theory based primarily on economic modeling.” (citation omitted)); LEACHMAN ET AL., CTR. ON BUDGET & POL’Y PRIORITIES, *ADVANCING RACIAL EQUITY WITH STATE TAX POLICY* 5 (2018), <https://www.cbpp.org/sites/default/files/atoms/files/11-15-18sfp.pdf> [<https://perma.cc/NL2B-SMND>] (“[P]olicy makers may be tempted to think of state and local tax policy as neutral with respect to race. Statutes do not mention race or ethnicity. And tax liabilities are determined using mathematical calculations”). See generally Knauer, *supra*, at 214–30 (discussing the “neutrality” failure in detail).

4. See, e.g., MEG WIEHI ET AL., INST. ON TAX’N & ECON. POL’Y, RACE, WEALTH AND TAXES 1 (2018), https://prosperitynow.org/sites/default/files/resources/ITEP-Prosperity_Now-Race_Wealth_and_Taxes-FULL%20REPORT-FINAL_5.pdf [<https://perma.cc/YZ7T-YPHG>] (“At its core, the U.S. tax code is more than a tool the government uses to collect revenue . . . it is a statement of our collective priorities as a society”); Kasey Henricks & Louise Seamster, *Mechanisms of the Racial Tax State*, 43 CRITICAL SOCIO. 169, 169 (2017) (“At their most basic level, taxes say something about the ever-changing structures of social, economic, and political life.” (citations omitted)); Moran & Whitford, *supra* note 1, at 753 (“Congress has decided to encourage particular lifestyles or behaviors by holding out tax benefits as an incentive.”).

5. See Knauer, *supra* note 3, at 225.

account of race—across class,⁶ income,⁷ wealth,⁸ homeownership,⁹ and on¹⁰—as well as the national history of discriminating through tax,¹¹ accounts well for these inequities, mostly at the national and federal level.¹²

This Note looks at South Carolina. In Section II.A, it analyzes inequality throughout the state's history, beginning with the constitution of 1895 where delegates to the state convention deliberately and knowingly used taxes and tax-based policies to discriminately disenfranchise Black voters. Section II.B examines the taxation and funding questions that arose just prior to public school desegregation as the state purposefully adopted policies placing larger

6. See Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 797 (2007); Dorothy A. Brown, *Race, Class, and the Obama Tax Plan*, 86 DENV. U. L. REV. 575, 576 (2009).

7. E.g., SEMEGA ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018, at 4 (2018), <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf> [<https://perma.cc/QQ2H-7HLY>] (reporting a \$30,000 income gap between median White and Black income); Strand & Mirkay, *supra* note 2, at 268.

8. See, e.g., LEACHMAN ET AL., *supra* note 3, at 4 (noting ten times the wealth gap). This inequality has been growing for decades. Strand & Mirkay, *supra* note 2, at 281 (“Since the early 1980s, median wealth among Black and Latinx families remained stagnant at less than \$10,000, while White household median wealth grew from \$105,300 to \$140,500 (adjusted for inflation).”). This wealth disparity is inextricably tied to White-wealth building policies from the past. See *id.* at 270–72.

9. See Dorothy A. Brown, *Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Inequality*, 49 U. MEM. L. REV. 205, 207 (2018) [hereinafter *Homeownership in Black and White*]; Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 332 (2010) [hereinafter *Shades of the American Dream*]. Nationally, 73% of White families are homeowners while only 41% of Black families are. Aravind Boddupalli & Kim S. Rueben, *How Income Taxes Interact with Racial Disparities*, TAX POL’Y CTR. (Jan. 30, 2020), <https://www.taxpolicycenter.org/taxvox/how-income-taxes-interact-racial-disparities> [<https://perma.cc/9EGR-9HR6>]. This gap is remarkably unchanging over the last several decades. See Moran & Whitford, *supra* note 2, at 775 (quoting a 71.3%, compared to 41.2%, gap). Then, even among homeowners, White families on average hold over twice as much wealth in their homes than Black families. See Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (2017), <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm> [<https://perma.cc/ADR3-JCMT>]; Strand & Mirkay, *supra* note 2, at 272; Moran & Whitford, *supra* note 1, at 802.

10. For example, racial disparities persist in education. See generally AM. PSYCH. ASS’N, PRESIDENTIAL TASK FORCE ON EDUC. DISPARITIES, ETHNIC AND RACIAL DISPARITIES IN EDUCATION (2012), <https://www.apa.org/ed/resources/racial-disparities.pdf> [<https://perma.cc/FL43-EVQ8>] (noting how minority groups in the United States underperform comparatively). Even average life expectancy varies by race. See ELIZABETH ARIAS & JIAQUAN XU, NAT’L CTR. HEALTH STAT., UNITED STATES LIFE TABLES, 2017, at 3 tbl.A (2017).

11. See generally CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP 1869–1973 (2018) (discussing the connection between tax policy and whiteness).

12. Strand & Mirkay, *supra* note 2, at 279 (“Most critical tax writing focuses on one or more specific provisions of the tax code, usually the federal tax code.”).

burdens on Black citizens. At both of these times, state leaders abused demographic differences between racial groups and adopted racist policies to disproportionately disadvantage Black South Carolinians. Instead of inspecting the rationale behind a given policy, Section II.C evaluates several of the state's current policies to explain why they generate benefits that disproportionately accrue to White people and burdens that disproportionately fall on Black people.

Part III is a proposal: The Racism Analysis Act. Modeled after a federal environmental law, the Act would mandate policy makers be informed about the possible racially disparate impacts of proposed tax policies, as well as potential alternatives and methods to mitigate those inequities. Part III also explains why tax policy is particularly well-suited to this type of review and then uses three provisions currently in South Carolina's tax code to imagine how the proposal might be used.

II. SOUTH CAROLINA'S STORY: THE PROBLEM

*"Perfect equality before the law in taxation or anything else is an impossibility."*¹³

—Senator Benjamin "Pitchfork Ben" Tillman

It is important to "confront openly the historical roots of today's racial disparities"¹⁴—even more so in South Carolina. The historical lens allows us to look back on a time when racial discrimination was express and intentional rather than unacknowledged and incidental. By understanding the methods used to foster a racial hierarchy, we can more easily identify the ways in which it is perpetuated today.

13. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 470 (1895) [hereinafter 1895 CONSTITUTIONAL JOURNAL]. "Tillman was one of the South's most virulent racists." "Pitchfork" Ben Tillman: *The Most Lionized Figure in South Carolina History*, 58 J. BLACKS IN HIGHER EDUC., Winter 2007–2008, at 38, 38. "Pitchfork Ben" was the largest player in South Carolina's politics. Just prior to his election to the U.S. Senate, he was elected South Carolina's governor in 1890 "on a wave of agrarian discontent and Negro phobia." Laughlin McDonald, *An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina*, 37 S.C. L. REV. 557, 569 (1986). At his inauguration, Pitchfork Ben "pledged to maintain white dominance: 'The whites have absolute control of the government and we intend at any hazard to retain it.'" *Id.* One of Pitchfork Ben's "most urgent objectives" was "the complete elimination of the Negro from participation in South Carolina politics. The Constitutional Convention of 1895 marked the achievement of that objective." George B. Tindall, *The Question of Race in the South Carolina Constitutional Convention of 1895*, 15 J. NEGRO HIST. 59, 59–60 (1952). At the Constitutional Convention of 1895, Pitchfork Ben led the "Committee on the Franchise," the most important committee. See McDonald, *supra*, at 570; Tindall, *supra*, at 65.

14. LEACHMAN ET AL., *supra* note 3, at 6.

Sections A and B of this Part review two points in South Carolina's history to show how, at both times, policy makers deliberately designed and adopted public policies that disfavored Black taxpayers without mentioning race. Section C examines modern policies within the state that are doing the same thing, even if now unintentionally.

A. Racial Animus: The South Carolina Constitution of 1895 and Disenfranchisement by Taxation

*"[W]e can all hope a great deal from the Constitution we have adopted. It is not such an instrument as we would have made if we had been a free people. We are not a free people. We have not been since the war. . . . If we were free, instead of having negro suffrage, we would have negro slavery."*¹⁵

—Senator Tillman

The fact that taxes affect different populations in various ways is not a novel proposition.¹⁶ Taxation's ability to affect people according to race has been well understood in South Carolina for a long time—not as a flaw but as a tool.¹⁷

Between 1890 and 1905,¹⁸ following Reconstruction, White southerners campaigned to disenfranchise Black voters and so adopted constitutions "planned to evade the 15th Amendment."¹⁹ In 1895, "the people"²⁰ of South

15. 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 731.

16. See Moran & Whitford, *supra* note 1, at 751–52; Strand and Mirkay, *supra* note 2, at 265–66; Brown, *supra* note 3, at 760; Knauer, *supra* note 3, at 211; LEACHMAN ET AL., *supra* note 3, at 1; WIEHI ET AL., *supra* note 4, at 1; Henricks & Seamster, *supra* note 4, at 169.

17. See, e.g., Guild Comms., *The Geyer Poll Tax Bill*, 3 NAT'L L. GUILD Q. 102, 103 (1940). See generally George Ruble Woolfolk, *Taxes and Slavery in the Ante Bellum South*, 26 J.S. HIST. 180 (1960) (analyzing South Carolina's revenues from the institution of slavery).

18. For the sake of boundaries, this Note begins its discussion with the 1895 constitution and convention. Of course, this is not the beginning of the story. For one tax-specific example, in 1844, over 60% of the state's revenue was generated from a property tax on the enslaved people. Woolfolk, *supra* note 17, at 184.

19. Guild Comms., *supra* note 17, at 102. Across the south, conventions like South Carolina's have been referred to as "disenfranchising conventions." See Daniel S. Goldman, *The Modern-Day Literacy Test*, 57 STAN. L. REV. 611, 616 (2004).

20. "The people" did not include all of South Carolina's citizens but essentially meant the White people and only by force and intimidation. See Guild Comms., *supra* note 17, at 102 ("Following the shock of Reconstruction, white men won control through the Southern states and proceeded, by terrorism, to exclude, the Negroes from the polls."); Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 370 (2014) ("[W]ith the withdrawal of federal support for Reconstruction in 1877, unreformed white Democrats . . . returned to power through the widespread use of intimidation, violence, and brazen electoral fraud aimed primarily at black people.").

Carolina created a new constitution and summoned 160 delegates to Columbia.²¹ Despite nearly 60% of South Carolina being Black at the time,²² there were only six Black delegates.²³ Those present made clear the convention's purpose was "the retention of the supremacy of political power by the whites, by retaining the suffrage in their hands, so far as is possible."²⁴ Upon being named president of the convention, Governor John Evans addressed the delegates.²⁵ He opened with instructions for the delegates: "[I]t is your duty to so fix your election laws that your wives, your children and your homes will be protected and Anglo-Saxon supremacy preserved."²⁶

Understanding that the entire goal of the convention was to disenfranchise Black voters, the delegates primarily used taxes in two ways: (1) to impose the education requirement (literacy test) and property tax exemption and (2) to enact a poll tax due six months before an election.²⁷ The extreme effectiveness²⁸ of these policies centered on two principles: discretionary application and disparate demographics.

21. Amasa M. Eaton, *The Late Constitutional Convention and Constitution of South Carolina*, 31 AM. L. REV. 198, 198 (1897). The convention resulted from an 1894 election that was "engineered" by Senator Ben Tillman after the same referendum failed in 1892. Charles W. McKinney Jr., *Democratic Intent? The Perils and Promise of Constitutional Reform in the New South*, 3 CHARLESTON L. REV. 555, 557 (2009); see also McDonald, *supra* note 13, at 570 ("Tillman . . . took the lead in calling for a constitutional convention to devise a more effective way to exclude the state's blacks from the voter registration lists.").

22. CENSUS OFF., DEP'T OF THE INTERIOR, REPORT ON POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, PART I, at 396 tbl.9 (1897).

23. Eaton, *supra* note 21, at 198.

24. *Id.* at 199–200; see also Guild Comms., *supra* note 17, at 102 ("The object of the suffrage clauses in these state constitutions is not a matter of conjecture—it is plainly stated in the journals of the various constitutional conventions.").

25. 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 9.

26. *Id.* at 12; see also *id.* at 468 (statement of Senator Tillman to the convention) ("[A]s white men, we will present a united front to the remnant of the black cohorts whom we have come here to reduce and paralyze.").

27. Of course, Black disenfranchisement was accomplished through more than just tax policy. For example, the 1895 constitution also denied the right to vote based on a "crazy quilt" of certain crimes that Black men were thought more likely to commit than White men, and it excluded those thought equally likely to be committed by any man, such as murder. McDonald, *supra* note 13, at 571. South Carolina also used statewide White-only primaries, and because the "primary was tantamount to election to office in South Carolina, even those few blacks actually registered were barred from participating in the only state elections that mattered." *Id.* at 572. This is not to mention the violence and intimidation placed upon Black people. See *id.* (describing 1890 South Carolina as "a perverse golden age of lynching").

28. One description of the adoption of the 1895 constitution concluded: "Thus was ushered in the era of complete white political domination. No Negro has since been elected to Congress from South Carolina." Tindall, *supra* note 13, at 68–69.

1. *Literacy Tests and the Property Tax Exemption*

*"We did not disfranchise the negroes until 1895. Then we had a constitutional convention convened which took the matter up calmly, deliberately, and avowedly with the purpose of disfranchising as many of them as we could under the fourteenth and fifteenth amendments. We adopted the educational qualification as the only means left to us."*²⁹

—Senator Tillman

*"By means of the \$300 clause you simply reach out and take in some more white men and a few more colored men."*³⁰

—Senator Tillman

The first part of the convention's solution to the Black suffrage "problem"³¹ was implementing a literacy test and limiting the vote to only those who could read.³² The literacy test was,³³ of course,³⁴ deliberately adopted with racist intent.³⁵ The convention adopted the test solely to

29. Benjamin Tillman, S.C. Senator, Speech to the Senate Floor (March 23, 1900), in CONGRESSIONAL RECORD—SENATE 3204, 3223–24.

30. 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 471.

31. "Problem" is the word of a deeply racist account of southern Black disenfranchisement. See KIRK HAROLD PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 154 (1918); "Pitchfork" Ben Tillman: The Most Lionized Figure in South Carolina History, *supra* note 13, at 38 (noting that Tillman used the word "problem" as well).

32. S.C. CONST. OF 1895, art. II, § 4(c)–(d). For simplicity, I use the South Carolina Constitution of 1895 to refer to provisions in the constitution as they were adopted in 1895, although technically, the 1895 constitution was never replaced but only extensively amended. See generally Cole Blease Graham Jr., *The Evolving South Carolina Constitution*, 24 J. POL. SCI. 11 (1996) (noting the history of the constitution and its creation).

33. See, e.g., *supra* text accompanying note 28; 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 12 (statement of Governor Evans to the convention) ("There should be an educational qualification for the right of suffrage if the supremacy of intelligence is to be preserved. It is no injustice to any man, black or white, to have such a qualification, for only the intelligent are capable of governing. . . . We have experienced the cost and hardship of the rule of the ignorant, and know what it means."). The "rule of the ignorant" he refers to is the period during Reconstruction when Black men were actually able to vote.

34. See Ross, *supra* note 20, at 370 ("In the South, literacy tests were an integral part of the region's exceptionally brutal system of black disenfranchisement."); see also *id.* (describing Mississippi's literacy test, which was implemented for the same reasons in 1890, as an "intentionally discriminatory, but facially race-neutral means of disenfranchising black voters en masse").

35. See PORTER, *supra* note 31, at 195 ("Southerners were determined to redeem their states from black control This necessarily involved a more or less forcible exclusion of the blacks").

disproportionately burden Black voters.³⁶ Every delegate present knew that a reading requirement would discriminate against Blacks because, prior to the Civil War one generation earlier, it was illegal to teach enslaved people to read.³⁷ Empirically, in 1890, 72.6% of nonwhite South Carolinians over the age of twenty were illiterate, but only 18.1% of the “native white” population, and even fewer of the “foreign white” population, were illiterate.³⁸ The convention knew exactly what it was doing.

Nonetheless, insisting on the “perfect equality of white men,”³⁹ the convention faced a problem: as one commentator at the time put it, “how to exempt some special favorites from a perfectly impartial literacy test.”⁴⁰ The convention’s solution, as was common in the south,⁴¹ was to exempt from the test any individual who had paid property taxes on \$300 worth of land in the state.⁴² The convention understood it was some thirty years removed from the Civil War, so of course there were few Black landowners.⁴³ Because one must own property in order to pay property taxes, the exemption inherently

36. Ross, *supra* note 20, at 370 (“Literacy tests had an obvious racially disparate impact: less than twenty percent of whites, but seventy-five percent of Blacks . . . were illiterate at that time.”); Eaton, *supra* note 21, at 558–59; *see also* Goldman, *supra* note 19, at 623 (“[C]ourts and . . . legislators soon recognized that literacy tests served no legitimate purpose; rather they solely perpetuated the exclusion of blacks from the political process.”); *id.* at 623 n.62 (“The Court was fully aware of the racial discrimination connected to literacy tests.”). Later statistical analysis unsurprisingly shows that, at least through to the 1960s, literacy tests had larger impacts on counties with larger nonwhite populations. John E. Filer et al., *Voting Laws, Educational Policies, and Minority Turnout*, 34 J.L. & ECON. 371, 374 (1991).

37. *See* Gary B. v. Whitmer, 957 F.3d 616, 650 (6th Cir. 2020), *reh’g en banc granted*, vacated, 956 F.3d 1216 (mem.) (6th Cir. 2020) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–88 (1978) (Marshall, J., concurring in part and dissenting in part)); *South Carolina v. Katzenbach*, 383 U.S. 301, 311 n.10 (1966).

38. CENSUS OFF., DEP’T OF THE INTERIOR, REPORT ON POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, PART II, at liii, liv, lv (1987).

39. 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 464; *see also* PORTER, *supra* note 31, at 211 (“It will be remembered that some means of protecting the illiterate white man was being sought.”); Tindall, *supra* note 13, at 63–65.

40. PORTER, *supra* note 31, at 116. The preceding phrase reads: “The entire history of the literacy test down to the present day has been characterized by this difficulty.” *Id.*

41. *See* Ross, *supra* note 20, at 365 (“[L]iteracy tests . . . were facially race-neutral”).

42. McDonald, *supra* note 13, at 570–71; 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 297. A similar loophole allowed for “an ‘understanding test’ in which a registration officer would read the Constitution to the prospective voter” and then assess the voter’s understanding. McDonald, *supra* note 13, at 570–71.

43. Even where former slaves had been promised “forty acres and a mule” when they were freed, the federal government failed to deliver. Mark A. Bunbury Jr., *Forty Acres and a Mule . . . Not Quite Yet: Section 14012 of the Food, Conservation, and Energy Act of 2008 Fails Black Farmers*, 87 N.C. L. REV. 1230, 1233 (2009) (describing General Sherman’s order directing all freed people be given forty acres and a mule from land taken by the Union in South Carolina’s low country, only for President Andrew Johnson to veto Congress’s move to legitimate the direction); Strand & Mirkay, *supra* note 2, at 271.

benefited Whites, and as Senator Tillman explained, the convention understood this disparity would admit only “a few” Black men.⁴⁴

Without mentioning race at all, the convention designed the constitution to disenfranchise Black voters through the use of taxes. This was no secret either.⁴⁵ In the face of opposition, Senator Tillman rhetorically asked the convention, “How do you propose to get around the Chinese wall, the impassable bulwark which the Fifteenth Amendment throws around the negroes, except by an educational or property qualification?”⁴⁶ One opposing delegate later explained he voted no because he thought that the understanding clause would be rejected by federal courts, could allow fraud, and was “unnecessary, inasmuch as other provisions in the Note, which are beyond suspicion of unfairness, will accomplish the desired end, *i.e.*, securing white supremacy.”⁴⁷ The convention not only protected white supremacy by law, but it also was deeply conscious of the options available to do so.⁴⁸ And where there was disagreement among the delegates, it was over the means of “accomplishing the desired end,” not over the end itself.⁴⁹ Delegates were cautious and deliberative in adopting a policy that achieved their goals as best as possible by giving White people a “loophole”⁵⁰ while simultaneously

44. See *supra* text accompanying note 30.

45. H.C. Patton and others in the 1895 convention laughed aloud when Senator Tillman suggested the understanding requirement, as well as the property tax receipt requirement, “simply show[ed] partiality.” See 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 469.

46. *Id.* at 468; see also Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 91 n.156 (2008) (“As one scholar reported, ‘subconsciously, if not consciously, the great majority of all the white people of the old slave States have felt and feel that the Fifteenth Amendment had no moral sanction and is not binding on their consciences.’”). Senator Tillman was particularly despondent over this “problem”:

With existing conditions there is nothing left, no man’s ingenuity can contrive or conceive of anything to do except to put an educational or property qualification, or both. The property qualification straight would disfranchise thirty thousand people, white men, who own nothing in their own names, and it is contrary to all my ideas of principle, fairness and right

1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 469.

47. 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 727.

48. Tindall, *supra* note 13, at 61 (describing the suffrage proposals as made with a “strained effort to evade stating in so many words the intent to evade the Fifteenth Amendment”); Eaton, *supra* note 21, at 200 (“It was freely stated in the debates that took place in this convention that an educational or other qualification was desirable, with the loophole attachment, as it was called, by which the illiterate whites might get through, while the negroes, even if qualified, might be kept out. *Doubts however were expressed as the constitutionality of such a system.*” (emphasis added)).

49. John Gary Evans, S.C. Governor, Speech to the House Floor (Mar. 23, 1900), in CONGRESSIONAL RECORD—SENATE at 3204, 3237.

50. Eaton, *supra* note 21, at 200.

appearing “beyond suspicion of unfairness.”⁵¹ The convention accomplished these ambitions by abusing demographics and discretion.

First, while the opposing delegate recoiled at “opening the door for fraud,” Senator Tillman made his purpose abundantly clear—fraud was a feature, not a bug:

If you put it in here that a man must understand, and you vest the right to judge whether he understands in an officer, it is a constitutional act. That officer is responsible to his conscience and his God, he is responsible to nobody else. There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps, [laughter,] or discriminating.⁵²

Although Senator Tillman was referencing the understanding clause, discretion identically applied to property tax receipts—a requirement of the literacy exception.⁵³ Writing about South Carolina’s literacy test and the property tax exemption, one white supremacist asserted “[p]roper discrimination in applying this test was supposed to keep out” Black men and “admit the remaining ignorant whites.”⁵⁴ The convention’s intention and desire to promote deliberately discriminatory disenfranchisement depended on the discretion of local elections officers. That discretion—or, as Senator Tillman put it, *discrimination*—put the fate of Black landowners who tried to vote in the hands of local elections managers.⁵⁵ Of course, those managers “happily abused their power.”⁵⁶ Much later, their discretion would be relevant to the Supreme Court when it upheld the Voting Rights Act ban on literacy tests in, aptly named, *South Carolina v. Katzenbach*.⁵⁷

51. 1895 CONSTITUTIONAL JOURNAL, *supra* note 13, at 727.

52. *Id.* at 469 (alteration in original).

53. *See id.*

54. PORTER, *supra* note 31, at 211.

55. Tindall, *supra* note 13, at 62; S.C. CONST. OF 1895, art. II, § 4(e); *see also* Tindall *supra* note 13, at 62 (writing that the election manager essentially had “the legal power to pick and choose among the prospective voters”); Ross, *supra* note 20, at 374 (“[E]ven properly registered black voters would usually have their credentials arbitrarily challenged by poll workers and private partisans.”).

56. Ross, *supra* note 20, at 373. This discretion was an important aspect of the injustice and effectiveness of the practice. *See generally id.* at 374 (arguing that the discretion in modern voter identification laws has comparable effects and methods as literacy tests).

57. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (“Underlying the [Act] was the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about ‘dilution’ of their electorates through the registration of Negro illiterates.”).

2. *The Poll Tax*

*"The effectiveness of the [poll] tax can be summarized by a statement by a woman in the Georgia backcountry when asked about the tax: 'A dollar ain't much if you've got it.'"*⁵⁸

After Reconstruction, Whites in southern states commonly implemented poll taxes.⁵⁹ The South Carolina Constitution of 1895 adopted a particularly aggressive version of the tax, which required payment at least six months prior to the actual election.⁶⁰ South Carolina's poll tax was one dollar, but its disenfranchising effects were substantial.⁶¹ Later, a congressman wrote in 1944 that poll taxes disenfranchised some 10 million voters across the country.⁶² One study from the time found that, on average, states with poll taxes had voter participation rates 45% lower than states without.⁶³

From its inception, the tax was written to discriminate against potential Black voters. It was deliberately "calculated to eliminate many Negroes . . . in November for not paying their poll taxes in May, a time when ready cash was least available to farmers."⁶⁴ It was tailored to abuse the disparate economic circumstances of Blacks and Whites.⁶⁵ At the time, most Black individuals lived in extreme poverty. Over one-third of Black families made under \$200 per year, not accounting for inflation.⁶⁶ When individuals earned less than four

58. Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 431 (2020).

59. See Chin & Wagner, *supra* note 46, at 84–85. The convention absolutely knew what it was doing; the poll tax had been used to disenfranchise Black South Carolinians since before South Carolina was even a state. Brian Sawers, *The Poll Tax Before Jim Crow*, 57 AM. J. LEGAL HIST. 166, 173 (2017) ("South Carolina's tax regime marks the starkest divide between the races. In only two years did South Carolina impose a poll tax on whites. In 1737 and again in 1786. . . . Starting in 1760, South Carolina imposed an annual poll tax on free blacks.").

60. S.C. CONST. of 1895, art. II, § 4(a).

61. *Id.* art. XI, § 6.

62. George H. Bender, *The Poll Tax: A Democratic Deformity*, 7 FREE WORLD 415, 415 (1944). He continued: "More votes were cast for the two Congressman from Rhode Island (the smallest state in the country) than for the thirty-seven Congressmen in the entire poll-tax area from the Atlantic Ocean to the Mississippi River and the Gulf of Mexico." *Id.* Finally, he criticized that it gave "[N]azi and Japanese propaganda machines" ammunition with which to ridicule American democracy. *Id.*

63. Guild Comms., *supra* note 17, at 104.

64. Tindall, *supra* note 39, at 62; see also Guild Comms., *supra* note 17, at 103.

65. "In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread." ANATOLE FRANCE, *LE LYS ROUGE* 117–18 (Calmann-Levy ed., 362d ed. 1922).

66. This is a rough estimation. Statistics tracking income by race start in 1949. At that time, over one-third of Black families had an annual income of less than \$500. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., 2 CENSUS OF POPULATION: 1950 CHARACTERISTICS OF THE POPULATION pt. 40, at 43 tbl.32a [hereinafter 1950 CENSUS]. The Bureau of Labor Statistics

dollars per week, the “one-dollar” poll tax was, for all practical purposes, a total prohibition. At the time, even median Black income was only approximately \$320.⁶⁷ Meanwhile, adjusted median White income was nearly \$1,000.⁶⁸ The delegates at the convention would have known the one-dollar tax disproportionately burdened Black voters.⁶⁹ Finally, the convention further tailored the tax in favor of White people by exempting confederate veterans over the age of fifty,⁷⁰ of which the vast majority were White.⁷¹

Then, just like literacy tests and the property tax exception, the poll tax was discriminatorily applied.⁷² At the polls, local election officials “would easily be satisfied” that White voters paid their tax, but Black voters “would have to produce unimpeachable tax receipts.”⁷³

B. Abuse of Demographic Differences: South Carolina Public School Desegregation and Funding

*“Our colored population will receive great benefits from the expenditures and they should be willing to bear their just share of the burden.”*⁷⁴

—Governor James F. Byrnes

only has inflation data as early as 1913. Stephen B. Reed, *One Hundred Years of Price Change: The Consumer Price Index and the American Inflation Experience*, U.S. BUREAU LAB. STAT. (Apr. 2014), <https://www.bls.gov/opub/mlr/2014/article/one-hundred-years-of-price-change-the-consumer-price-index-and-the-american-inflation-experience.htm> [https://perma.cc/6YPG-ALCD]. After adjusting for inflation between 1913 and 1950, the number was just over \$200. Presumably, inflation between 1895 and 1913 further exaggerated the value of a dollar. See Bryan Taylor, *The Century of Inflation*, GLOB. FIN. DATA (Oct. 27, 2020), <https://globalfinancialdata.com/the-century-of-inflation> [https://perma.cc/26RP-A86H].

67. See 1950 CENSUS, *supra* note 66, at 43 tbl.32a (applying the same method of adjustment for inflation).

68. See *id.* (same).

69. After South Carolina repealed its poll tax, the Supreme Court would go on to hold state poll taxes unconstitutional. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). The appellants in *Harper* offered census data showing a drastically higher poverty rate in nonwhite families as evidence of the “commonly known fact that there is a higher proportionate incidence of poverty among Negroes than among white persons.” WALSH, *supra* note 11, at 113.

70. S.C. CONST. of 1895, art. XI, § 6.

71. See *The Civil War by Numbers*, AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/death-numbers/> [https://perma.cc/263G-UN4C].

72. See PORTER, *supra* note 31, at 204.

73. *Id.* (describing Tennessee’s post-Reconstruction poll tax); see also *id.* at 209 (blaming the disenfranchisement of Black voters on their “carelessness” “because they do not save the receipts,” although the “white man is seldom asked to exhibit his receipt”).

74. James F. Byrnes, Governor of S.C., Address to the Joint Assembly (Jan. 8, 1952), in H. 89-1660, 2d Reg. Sess., at 22 (S.C. 1952).

Adopted at the 1895 convention, the South Carolina constitution mandated the state legislature create a segregated public school system.⁷⁵ At the time, schools were funded in part by the poll tax.⁷⁶ By the 1950s, however, South Carolina recognized the national trend toward desegregated schools.⁷⁷ In an attempt to retain segregation, the state spent large sums of money to fulfill the “promise” of *Plessy v. Ferguson*.⁷⁸

James F. Byrnes, governor from 1951 to 1955, spearheaded the campaign. The state went from spending \$36 million a year on education in 1951 to spending \$65 million by 1954, largely on new construction projects. Property taxes were not adequate, the governor soon realized, to actually provide any semblance of substantive equality in school conditions in short order, so the state chose to levy a sales tax to raise most of the funds. But the *Briggs*[v. *Elliott*]⁷⁹ case from South Carolina, which would eventually be consolidated into *Brown v. Board of Education*, was an example of enormous funding and resource inequalities that could not be remedied with a few years of higher taxes.⁸⁰

In 1953, Governor Byrnes, speaking of this campaign “to equalize facilities for the races,” made its purpose clear: “We have done it because it was right. It was also wise because it has helped us in our efforts to uphold the provision of our State Constitution that the races shall be kept separate in our public school system.”⁸¹

The state knew exactly how unjust its education system was and what it would take to correct that injustice. In 1948, the Education Survey Committee

75. S.C. CONST. OF 1895, art. XI, § 7 (“Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race.”).

76. *Id.* art. XI, § 6 (“There shall be assessed . . . an annual tax of one dollar on each poll, the proceeds of which tax shall be expended for school purposes in the several school districts in which it is collected.”). In 1880, the poll tax made up 6.1% of the state’s entire revenue. Sawers, *supra* note 59, at 196.

77. See WALSH, *supra* note 11, at 78 (“Under the imminent threat of desegregation litigation, however, tax funds abruptly materialized to build new schools for African American children and improve transportation facilities.”).

78. *Id.*; see 47 STATUTES AT LARGE pt. 1, art. II, at 546 (1951) (“The General Assembly recognizes that in order to discharge the Constitutional mandate, set forth in Section 5 of Article XI, . . . and to insure [sic] equality of educational opportunity for all such children in respect to said schools and school system . . .”).

79. 103 F. Supp. 920 (D.S.C. 1952), *rev’d sub nom.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

80. WALSH, *supra* note 11, at 78–79.

81. James F. Byrnes, Governor of S.C., Address to the Joint Assembly (Jan. 14, 1953), in H. 89-1660, 2d Reg. Sess., at 43 (S.C. 1952).

released a report with extensive factual evidence displaying the extent of the racial and wealth disparities in the state.⁸² Due to these disparities, achieving even a semblance of equality would require large sums of money.⁸³ In his 1951 State of the State address, Governor Byrnes argued that “a retail sales tax is the only source from which we can hope to secure the revenue necessary.”⁸⁴

But that was not the only reason Governor Byrnes supported the tax; rather, a sales tax was also a judgment about who should pay for new schools. As he explained the next year:

In this State, the loudest complaint against the sales tax comes from colored citizens, misled by professional agitators. Few of them pay income taxes to the State. One of the reasons for the levying of the sales tax was to get revenue to equalize school facilities between the races. Our colored population will receive great benefits from the expenditures and they should be willing to bear their just share of the burden.⁸⁵

Governor Byrnes was not alone; the Clarendon County superintendent of schools—a named defendant in *Briggs v. Elliott*—“claimed that black students were not entitled to school transportation because blacks did not ‘pay

82. THE EDUC. SURV. COMM., PUBLIC SCHOOLS OF SOUTH CAROLINA 309 (1948) (“[E]ducational opportunities available to Negro children are much more unsatisfactory than those available for white children. The desperate plight of the schools for Negro children in South Carolina is emphasized further when it is realized that the educational facilities available for white children in South Carolina are poorer than in most states.”). To highlight some of the racial disparities:

1. Just under half of school districts had even a single elementary school for Black students; however, 90% of school districts had an elementary school for White students. *Id.* at 165 tbl.20.
2. The average teacher in a White school was paid nearly 50% more than a teacher in a Black school. *Id.* at 309 tbl.56.
3. Over one-third of White students had busses to school while only 1.8% of Black students did. *Id.*
4. Per pupil, the school buildings for White children were over five times as valuable as those for Black students, on average. *Id.*

83. See Byrnes, *supra* note 81, at 43 (“The program has been a serious financial burden because we have now been called upon to do in a few years what should have been done through the last fifty years.”).

84. James F. Byrnes, Governor of S.C., Address to the General Assembly of South Carolina 3 (Jan. 24, 1951) (transcript available in the South Carolina State Library).

85. Byrnes, *supra* note 74, at 22. Governor Byrnes’s claim is a quintessential example of the virtually fictitious “outside agitator” trope that is still used today. See Jacey Fortin, *The Long History of the ‘Outside Agitator’*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/08/us/outside-agitators-history-civil-rights.html> [<https://perma.cc/4XNE-RXQG>].

enough in taxes' to warrant a school bus."⁸⁶ With his speech, Governor Byrnes sought to assuage fears that segregation would be deemed unconstitutional by urging listeners to "have no fear" because "[w]e will find a lawful way of educating all of South Carolina's children and at the same time providing separate schools for the races."⁸⁷ That July, South Carolina implemented the state's first general sales tax at a 3% rate.⁸⁸

Governor Byrnes's statements are representative of white segregationists at the time who believed that "taxpayer status was a symbol of whiteness, and that taxpayers were engaged in a market relationship of purchasing public services from the state."⁸⁹ Commonly, this led to excluding Black families from public services on the assumption they "did not 'pay taxes'" and thus "should be excluded from full citizenship rights."⁹⁰ Here, Governor Byrnes inserted a step into the process as if to say: "If Black families want access to schools, we will make them pay for it." This rationale ignored the fact that, in the south, Blacks were frequently taxed to support White schools.⁹¹ But further, the financial condition of Black South Carolinians had not meaningfully improved since the 1895 convention.⁹² Governor Byrnes's argument betrayed a belief about distributing the tax burden on society. In so many words, "they should be willing to bear their just share of the burden" speaks volumes. Governor Byrnes believed the existing tax policy, even where not explicitly race conscious, distributed the tax burden differently

86. WALSH, *supra* note 11, at 78.

87. Many schemes were discussed and considered for keeping segregation should federal courts outlaw it. Prominently among them was a proposal to amend the state constitution and remove the command on the legislature to provide for a system of public education at all. Byrnes, *supra* note 74, at 18. Around the same time, many southern school districts were attempting various schemes of their own. *See, e.g.*, WALSH, *supra* note 11, at 135 (describing a plan in a Georgia city and county to "get around" desegregation by effectively dividing the White students into the city district and the Black students into the county district).

88. S.C. TAX'N REALIGNMENT COMM'N, FINAL REPORT OF THE SOUTH CAROLINA TAXATION REALIGNMENT COMMISSION 38 (2010); *see* John N. Popham, *Pupil Segregation Held Drag on U.S.*, N.Y. TIMES (May 29, 1951), <https://www.nytimes.com/1951/05/29/archives/pupil-segregation-held-drag-on-us-witnesses-in-federal-court-test.html> [<https://perma.cc/D7GQ-FU4R>]. Of course, at the same time, the state also lowered income taxes to the benefit of all taxpayers, including those with higher income. *See* Byrnes, *supra* note 74, at 21. The funding to build new schools actually came from the sale of bonds, but the bonds were effectively financed by the sales tax. *See* Byrnes, *supra* note 84, at 5–6. South Carolina was not the only state to shift the tax burden in this way. *See* LEACHMAN ET AL., *supra* note 3, at 2 (describing Mississippi's adoption of the sales tax premised on reducing property tax as, "in practice [] a reduction in taxes owed by mostly white property owners and an increase in those owed by Black households that owned little or no property and had little else to tax").

89. WALSH, *supra* note 11, at 107.

90. *Id.* ("The concept that black schooling was 'a result of white tax dollars' was a common refrain among those upset by desegregation decisions.").

91. *See id.* at 58–60.

92. *See infra* notes 93–99 and accompanying text.

along racial lines. He believed income and property taxes placed a larger burden on White individuals than on Black individuals and that a sales tax did the opposite—how else would a sales tax make Black people bear a more “just share” of the tax burden?

The first major problem is that, where Governor Byrnes inferred a flaw in tax policy, he ignored the failure in social equity. Poverty data was not collected in an organized manner until slightly later in 1959, but at that time, the national poverty rate among Black Americans was 55.1%.⁹³ The national poverty rate among White Americans was only 18.1%.⁹⁴ In 1949, over one-third of Black South Carolinians—almost double the rate of Whites—earned less than \$500 annually.⁹⁵ Nearly one-third of Black individuals fell into the next group, earning less than \$1,000 annually.⁹⁶ After adjusting for inflation, \$500 is only \$5,525 in 2021.⁹⁷ Looking at today’s federal poverty line of \$26,500 for a family of four,⁹⁸ approximately 90% of Black South Carolinians lived in poverty.⁹⁹ This is unsurprising considering the nearly complete lack of generational wealth, the total bar to education, and the prevalence of social and economic racism.

These same issues show why Black South Carolinians were expected to pay more in sales tax.¹⁰⁰ Governor Byrnes understood that, by its nature, the tax would place a larger burden on lower income Black families because the lower a family’s income, the more must be spent on food, supplies, and other goods by proportion. And the larger a portion of one’s income is spent on goods, the more that income is subject to a sales tax.¹⁰¹ For this reason, sales

93. SEMEGA ET AL., *supra* note 7, at 58 tbl.B-5. There is no reason to suppose that South Carolina would have been fairing considerably better seven years earlier, especially in light of the modern intractability of Black poverty rates. See Ajay Chaudry et al., *Poverty in the United States: 50-Year Trends and Safety Net Impacts*, U.S. DEP’T HEALTH & HUM. SERVS., Mar. 2016, at 27 fig.20.

94. *Id.* at 55.

95. 1950 CENSUS, *supra* note 66, at 40–43, 43 tbl.32a.

96. *Id.*

97. *CPI Inflation Calculator*, U.S. BUREAU LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/8FWP-7E8Z>]. This calculation was performed by comparing the value of \$500 in February of 1949 to the value of the same in February of 2021.

98. *2021 Poverty Guidelines*, ASPE (Jan. 21, 2021), <https://aspe.hhs.gov/2021-poverty-guidelines#guidelines> [<https://perma.cc/9DZW-RLGP>].

99. One of the income brackets reported on the 1950 census ends at \$2,499, which is approximately \$27,616 adjusted for inflation. Then, 92.7% is the sum of the nonwhite families and individuals with income below \$2,499 divided by the total number of nonwhite families and individuals with a reported income. Approximately two-thirds of that 90% were people in the \$500 or \$1,000 brackets, representing an income of less than *half* the current federal poverty line. See 1950 CENSUS, *supra* note 66, at 43 tbl.32a.

100. See *supra* note 88 and accompanying text.

101. See *General Sales Tax*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/sales-taxes> [<https://perma.cc/TK2P-2AGW>].

taxes are generally regressive.¹⁰² Governor Byrnes's argument shows he appreciated the regressive, racially biased nature of the sales tax, and for him, that weighed in *favor* of justice.

The second fundamental flaw in Governor Byrnes's assertion was his complete disregard for the facts: schools were largely funded by property taxes,¹⁰³ and those taxes disproportionately burdened Black residents.¹⁰⁴ Around 1950, Black South Carolinians paid the highest property tax rates while simultaneously owning the least amount of wealth.¹⁰⁵ The Education Survey Committee studied the average property tax rates and "taxpaying ability" of the counties in South Carolina at the time.¹⁰⁶ It found that counties with the "lowest assessed valuation per pupil" levied property taxes for school purposes at an average of 28.94 mills, but those with the highest per-pupil valuation "lev[ied] an average of only 21.04 mills."¹⁰⁷ In other terms, poorer counties had a tax rate 27.3% higher than wealthier counties.

Black families were disproportionately likely to live in counties with the lowest per-pupil valuations and the highest taxes. Using census data from the time,¹⁰⁸ Figure 1 maps the relative populations of the counties named by the Education Survey Committee and shows that Black individuals tended to live in poorer counties with higher tax rates.¹⁰⁹

102. See Strand & Mirkay, *supra* note 2, at 279 ("Taxes on consumption . . . are regressive; they fall more heavily on those with fewer assets and lower incomes, often earned incomes."); Carl Shoup & Louis Haimoff, *The Sales Tax*, 34 COLUM. L. REV. 809, 813 (1934) ("[S]ales tax . . . is much more of a burden on the poorer classes than almost any other tax in this country . . . The well-to-do spend a smaller percentage of their income on taxable transactions than do the poor, and the sales tax burden, expressed as a percentage of income, is thus greater on the latter than on the former."); SAMUEL A. DONALDSON & DONALD B. TOBIN, FEDERAL INCOME TAX 5 (3d ed. 2018); see also *Douglas v. California*, 372 U.S. 353, 361–62 (1963) (Harlan, J., dissenting) ("Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. [Such as] a uniform sales tax . . .").

103. See THE EDUC. SURV. COMM., *supra* note 82, at 304–06.

104. It should also not be overlooked that even renters would have borne the burden of higher property taxes in the form of higher rents, despite explicitly racist Federal Housing Authority policies that meant Black individuals were less likely to own a home. See Jane Kim, *Black Reparations for Twentieth Century Federal Housing Discrimination*, 29 B.U. PUB. INT. L.J. 135, 154 (2019).

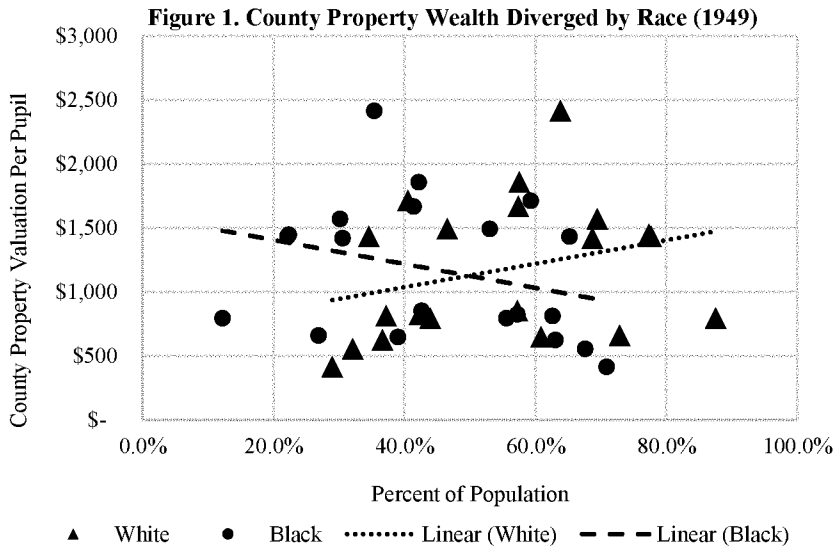
105. See *infra* text accompanying notes 106–107.

106. THE EDUC. SURV. COMM., *supra* note 82, at 307.

107. *Id.* at 308.

108. See 1950 CENSUS, *supra* note 66, at 25 tbl.12.

109. This disparity continues to be the case today because "homeowners are sorted by race and wealth into different taxing jurisdictions with different effective tax rates." IRIS J. LAV & MICHAEL LEACHMAN, STATE LIMITS ON PROPERTY TAXES HAMSTRING LOCAL SERVICES AND SHOULD BE RELAXED OR REPEALED 17 (2018).



As an example, Clarendon County—the subject of *Briggs v. Elliott*—had the lowest per-pupil property valuation in the state.¹¹⁰ Its population was 70.9% nonwhite.¹¹¹ In contrast, Richland County, the wealthiest county per pupil, was 64.6% White.¹¹² In general, the whiter a school district was, the more wealth it had and the lower tax rate it imposed. These are the disparate racial impacts of tax policy because, even without explicitly naming separate tax rates for Black and White populations, Black individuals still paid higher taxes. Despite being over three times as likely to live in poverty, having less wealth and lower income, and receiving less and worse schooling—in many cases receiving no schooling at all—Black South Carolinians paid higher taxes.

C. “Facially Neutral” Neglect: Contemporary Racial Disparities

Undeniably, racial equality in the United States and South Carolina has improved since the 1950s, but in too many ways, there has been little improvement in reforming policies that “reinforce racial inequities.”¹¹³ Our progress has not made race immaterial, but instead, it has “mutated” the form

110. THE EDUC. SURV. COMM., *supra* note 82, at 308.

111. 1950 CENSUS, *supra* note 66, at 25 tbl.12.

112. *Id.*

113. LEACHMAN ET AL., *supra* note 3, at 6.

that racial discrimination takes.¹¹⁴ This Section outlines the tendency of South Carolina's tax policies to prefer activities more common among White individuals and to disadvantage activities more common, or more significant, among Black individuals.¹¹⁵ This tendency is a mere continuation of the disparate impact South Carolina knowingly abused in its past.

For example, an income tax deduction for the elderly sounds generous and kind; helping individuals on a fixed income who are often unable to work is an indisputably reasonable policy goal.¹¹⁶ But we often forget (or ignore) that, in our society, race still matters. The fact is, on average, White individuals have longer life expectancies than Black individuals. Because White individuals are more likely to be over the age of sixty-five, they benefit more from an elderly tax deduction.¹¹⁷ That deduction also ignores the inherently "upside-down" effect of income tax deductions because, by reducing marginal taxable income, "higher-income[] and disproportionately White" households receive larger benefits than lower income households, which are more likely to consist of people of color.¹¹⁸

When policies focus on traits that are disparately common or uncommon among racial groups, such as income or homeownership, tax burdens and benefits are also disproportionately dispensed along racial lines. In South Carolina, the myth of neutrality pervades in facially neutral laws—like an elderly income tax deduction—that, at best, inadvertently benefit White individuals over Black individuals.¹¹⁹ The term "facially neutral" itself "indicates the awareness that there can still sometimes be a disparate impact on particular racial groups."¹²⁰ When tax policy depends on characteristics that vary by race, it effectively takes race into account, even if unintentionally. By evaluating tax policy in a race-blind way, policy makers inherently ignore reality much like an ostrich sticking its head in the sand.

Often, this preferential treatment is in the form of "tax expenditures"—deviations from a baseline that advantage and give special treatment to a certain group or activity.¹²¹ That preferential treatment is just as important and

114. See Strand & Mirkay, *supra* note 2, at 278.

115. Moran & Whitford, *supra* note 1, at 757 (arguing that "blacks are more likely to have lifestyles that are less advantaged by tax benefits").

116. See S.C. CODE ANN. § 12-6-1170(B) (2014) (authorizing a \$15,000 income tax deduction for each taxpayer sixty-five and older).

117. See ARIAS & XU, *supra* note 10, at 3 tbl.A, 46 tbl.19.

118. Strand & Mirkay, *supra* note 2, at 301.

119. As Professor Dorothy Brown put it, "There is nothing in the Code that explicitly says blacks pay more, whites pay less. This is still America—isn't it?" Brown, *supra* note 2, at 760.

120. Walsh, *supra* note 11, at 164.

121. "Tax expenditures are defined in the law as 'revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax

impactful as its disadvantaging effects.¹²² This Section outlines many of the facially neutral tax expenditures in South Carolina law and explains their likelihood of contributing to racially disparate advantages and disadvantages.

1. *An Example: The Sales Tax “Max Tax” Cap*

In South Carolina, the sales tax paid on personal vehicles is capped at \$500.¹²³ The South Carolina Taxation Realignment Commission (TRAC) described the cap as “one of the most regressive aspects” of the tax code, adding that it “is truly unique among the 50 states.”¹²⁴ The Revenue and Fiscal Affairs Office estimated the cap for all vehicles in 2020 would cost the state \$284 million in foregone revenue.¹²⁵ That much money could more than fund a \$3,000 pay raise for each of the state’s underpaid teachers.¹²⁶

Assuming that, on average, higher income correlates with higher car value, this regressivity is critically important as Black individuals are disproportionately poorer than White individuals.¹²⁷ Virtually every

liability.” U.S. DEPT. OF TREASURY, TAX EXPENDITURES FY 2021 (2020). In research and policy discussions—and in addressing American poverty—tax expenditures “are often ignored, forgotten and, as a result, are all too invisible.” *Homeownership in Black and White*, *supra* note 9, at 206; *see also* LEACHMAN ET AL., *supra* note 3, at 19 (describing how state tax expenditures often continue “from year to year without much or any scrutiny or debate”).

122. Strand & Mirkay, *supra* note 2, at 280 (“[T]ax expenditures are accounting sleights-of-hand for government benefits. The recipients often do not view themselves as receiving a benefit. So often in examining race, we are socialized to focus on disadvantage rather than advantage, but it is equally important to name advantage where it exists.”).

123. S.C. CODE ANN. §12-36-2110 (2014 & Supp. 2020).

124. S.C. TAX’N REALIGNMENT COMM’N, FINAL REPORT 11, 73 (2010). In Act 81 of 2009, the South Carolina General Assembly charged the Taxation Realignment Commission (TRAC) to undertake a thorough assessment of the state’s current tax structure to determine its “adequacy, fairness, and efficiency” (or lack thereof) to ensure the state remains an “optimum competitor in its efforts to attract business and individuals to locate, live, work, and invest” in South Carolina. *Id.* at 11. At the time, the sales tax cap was \$300 and implemented over twenty-five years prior. *Id.* at 73. TRAC illustrated the regressivity of the cap:

[A] resident purchasing a \$6,000 car pays an effective sales tax rate of 5 percent - a rate that is 10 times HIGHER than a resident buying a car that costs \$56,000, whose effective tax rate in South Carolina is just 0.54 percent - a tax rate 10 times less on a car that costs 10 times more. That is the definition of a regressive tax.

Id.

125. S.C. BD. OF ECON. ADVISORS, SALES AND USE TAX EXEMPTIONS, EXCLUSIONS, CAPS, AND LIMITATIONS IN FY2019-20, at 1 (2019).

126. *See* S.C. OFF. OF THE GOVERNOR, EXECUTIVE BUDGET 8 (2020).

127. In South Carolina, Blacks are over twice as likely to live in poverty than Whites. *See* U.S. CENSUS BUREAU, POVERTY STATUS IN THE PAST 12 MONTHS tbl.S1701 (2019) (showing that 23.1% of Blacks live in poverty as compared to 9.8% of Whites). Likewise, in South Carolina, median Black household income is nearly \$30,000 lower than median White

regressive aspect of a tax code places a larger burden on Blacks than on Whites. However, it is not enough to identify policies by regressivity alone because more than just financial factors cause racially discriminatory tax policies.¹²⁸ That path does little to disabuse people of the fiction that taxes are simply mathematic equations. To avoid disparate impacts and because taxes inherently represent community values, we must look further and expressly consider social and lifestyle differences. Economic factors are not the only reason some policies tend to burden Black individuals more, or benefit them less, than White individuals.¹²⁹

To that end, the “max cap” is not limited to personal vehicles; it extends to all trailers, motorcycles, boats, and even planes.¹³⁰ Further still, these purchases are exempt from the additional 1% sales tax imposed on most other purchases¹³¹ and any additional sales tax adopted by a county.¹³² Yet Whites are three times more likely to own a boat.¹³³ Certainly, taxes on boat sales are not very important—the exemption cost the state only \$2.5 million in 2019.¹³⁴ But this preferential tax treatment represents that even seemingly irrelevant, unimportant matters of personal taste and judgment are another way tax policy tends to favor Whites at the literal expense of Blacks.¹³⁵

household income. See U.S. CENSUS BUREAU, MEDIAN INCOME IN THE PAST 12 MONTHS tbl.S1903 (2019) (showing that median income is \$37,327 for Black households as compared to \$65,506 for White households).

128. See Moran & Whitford, *supra* note 1, at 757 (describing a weaker theory of racial discrimination in tax policy due to simple economic differences and instead deciding to “test the stronger version” by controlling for income in their analysis).

129. See *id.* at 801.

130. S.C. CODE ANN. § 12-36-2110(A)(1) (Supp. 2019).

131. § 12-36-1110.

132. § 4-10-20.

133. BRIAN BOHNSACK ET AL., DEMOGRAPHIC INFLUENCES ON CHANGES IN BOAT OWNERSHIP AND BOATING RELATED RECREATION (2013).

134. S.C. BD. OF ECON. ADVISORS, *supra* note 125, at 1.

135. In exactly the same way, White individuals are more likely to have solar panels on their roofs, even after correcting for the racial disparity in income and homeownership. Deborah A. Sunter et al., *Disparities in Rooftop Photovoltaics Deployment in the United States by Race and Ethnicity*, 2 NATURE SUSTAINABILITY 1, 1 (2019). South Carolina offers a tax credit for residential renewable energy sources. See § 12-6-3587(A). The credit could cost the state \$25 million in uncollected revenue. See S.C. REVENUE & FISCAL AFFS. OFF., TAX EXPENDITURE REPORT FY 2018-19 TO FY 2020-21, at 6 (2020). That money is more likely to flow to White homes than it is to Black homes.

2. *Homeownership: A General Area of Disparity*

South Carolina's property tax policy is incredibly generous to homeowners.¹³⁶ In 2006, the state significantly reformed its property tax system, and the result, as TRAC described it, is "unique compared to . . . many other states and is, in many cases, a product of extremes."¹³⁷ There are three primary reasons for this. First, owner-occupants bear no responsibility for their local school operating expenses.¹³⁸ Second, their properties are taxed at an assessed value of only 4%, while most other properties are assessed at a 6% rate.¹³⁹ Third, the recognized appreciation of owner-occupied homes is capped at a 15% increase per five years, regardless of actual appreciation.¹⁴⁰

The critical issue is that, although these policies "are a great help to homeowners, . . . there is a catch."¹⁴¹ To qualify for any of the tax benefits offered to homeowners, a taxpayer must own a home, which—for reasons of

136. South Carolina is not generous in favor of homeownership but rather in favor of those who own homes, which, at most, has an indirect and modest effect of promoting homeownership, especially for those with low income. See, e.g., Christian A.L. Hilber & Tracy M. Turner, *The Mortgage Interest Deduction and Its Impact on Homeownership Decisions*, 96 REV. ECON. & STATS. 618, 635 (2014) (estimating that the federal Mortgage Interest Deduction (MID) has both positive and negative impacts on homeownership rates depending on local land-use regulations, but regardless of the area, "[t]he MID has no impact on the homeownership attainment of low-income households"). *Id.*

The distinction is important because pretending that the MID promotes homeownership perverts reality by suggesting individuals who are not homeowners somehow benefit from this policy by an increased likelihood or ability to purchase a home. In actuality, the more direct and much more meaningful impact is that individuals who are already homeowners or likely to become homeowners—both disproportionately White—are granted a tax subsidy just the same as if they received a check in the mail. This Section focuses on specific tax provisions that provide some preference for the taxpayer, specifically in the taxpayer's relationship with the state through taxes. It does not discuss the benefits that accrue to homeowners in the form of imputed rent. See *id.* at 619 ("[E]xclusion of imputed rental income of owner-occupied housing from taxable compensation is the key tax benefit to homeowners."); Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. ECON. PERSPS., Winter 2018, at 31, 47 ("While most political debate about tax benefits of homeownership focuses on the tax deductions for mortgage interest and property taxes, even more important for many homeowners is the 'hidden' benefit from not having to pay taxes on the imputed rent and capital gains on the home.").

137. S.C. TAX'N REALIGNMENT COMM'N, *supra* note 124, at 14; see 1 LINCOLN INST. OF LAND POL'Y, A DEEP DIVE ON SOUTH CAROLINA'S PROPERTY TAX SYSTEM 4 (2020) (describing South Carolina's property tax system as "an outlier compared to the rest of the United States"); S.C. DEP'T OF REVENUE, SOUTH CAROLINA PROPERTY TAX 80 (2015).

138. S.C. CODE ANN. § 12-37-220(B)(47) (2014).

139. § 12-43-220(c)(1) (stating the owner-occupant ratio); § 12-43-220(e) (stating the general property ratio).

140. § 12-37-3140(B).

141. Moran & Whitford, *supra* note 1, at 773.

historic oppression—is something Black individuals do less often than White individuals.¹⁴² That catch is critical in the obvious financial way, but it is also the same underlying reality that Senator Tillman abused when he advocated for the property tax exception under the belief that it would enfranchise “some more” White men but only “a few” Black men. Now, just as then, Black individuals own less property, and thus, policies that favor property owners mostly benefit White people and “a few” Black people.

The first disparate policy is the school expenses exemption, but arguably more important than the exemption itself is that it was funded by a “tax swap.”¹⁴³ The exemption was adopted “[i]n exchange for” an added 1% sales tax on most purchases; tax-capped vehicles were notably excepted.¹⁴⁴ Because sales taxes place a larger burden on the poor,¹⁴⁵ the racial impacts of this swap should not be understated. The change was not adopted to raise revenue for funding a project or improving the state. Instead, it was explicitly adopted to redistribute the tax burden, and it did so in a racially biased manner. In exactly the same way Governor Byrnes advocated for a sales tax *because* it would place a larger burden on Black individuals, South Carolina again placed a larger burden on that population, even if this time unintentionally. And the state increased the burden on Black South Carolinians only to ease that of homeowners, who were disproportionately White individuals with more wealth.¹⁴⁶

In 2006, South Carolina did the exact same thing that Mississippi did in 1930:

[Mississippi]’s governor urged adopting the new [sales] tax in part by emphasizing that the revenue would be used to reduce property taxes, and that as a result, the tax would shift the state tax base away from (mostly white) property owners and more heavily onto consumers with little or no property and little else to tax (many of whom were Black)

This is not to say that Mississippi adopted its sales tax solely to shift tax burdens more heavily to Black residents

Still, it’s not possible to separate Mississippi’s adoption of the first modern sales tax from the context of racial discrimination in

142. *Id.*

143. S.C. DEP’T OF REVENUE, *supra* note 137.

144. *Id.*; § 12-36-2110(A)(1).

145. LEACHMAN ET AL., *supra* note 3, at 2 (describing the sales tax as “a tax that generally falls hardest on those with the least income”).

146. *See* Boddupalli & Rueben, *supra* note 9, at 2; *supra* note 127 and accompanying text.

which it occurred. The tax required African American residents to pay more as a share of their income than white residents, and it helped hold down property taxes that were paid primarily by white people. The tax thus reinforced racial inequities in a state where Jim Crow laws and various forms of violence and intimidation were pervasive.¹⁴⁷

While this Note does not suggest South Carolina's 2006 reforms were deliberately adopted to shift the burden from White homeowners to poor, Black individuals, the \$750 million program undoubtedly had that effect.¹⁴⁸

School operating expenses comprise over one-third of property taxes and, in some places, nearly one-half.¹⁴⁹ This policy is unique to the United States, and demographics quickly expose its disparate impact.¹⁵⁰ Whites are more likely to be homeowners than Blacks;¹⁵¹ therefore, they tend to benefit more from the policy. No less impactful, however, is the counterpart to the homeownership gap: the rental gap. Blacks are more likely to rent than Whites.¹⁵² Because rental properties are subject to school operating expenses and assuming landlords pass this cost on, Black renters are subjected to their burden. This is no supposition: one study found that, after South Carolina changed this policy, the share of funding from commercial and rental property increased almost ten percentage points over a five-year period.¹⁵³ This inequity is also regressive as renters tend to have lower incomes and less wealth than homeowners.¹⁵⁴ Additionally, because Black homes tend to be less valuable than White homes,¹⁵⁵ it is likely that, even among homeowners, Whites tend to receive larger benefits than Blacks.¹⁵⁶

147. LEACHMAN ET AL., *supra* note 3, at 9–10.

148. See S.C. REVENUE & FISCAL AFFS. OFF., HOMESTEAD EXEMPTION FUND: FINAL TIER III REIMBURSEMENTS FOR FY 2018-19, at 1 (2019).

149. ELLEN W. SALTZMAN, STATE PROPERTY TAX COMPARISONS: RESIDENTIAL PROPERTY 7 tbl.5 (2009).

150. LINCOLN INST. OF LAND POL'Y, *supra* note 137, at 4.

151. See Boddupalli & Rueben, *supra* note 9, at 2–3.

152. Anthony Cilluffo et al., *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RSCH. CTR. (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/> [<https://perma.cc/R6UG-EG2A>].

153. JOHN SALAZAR & ELLEN W. SALTZMAN, ACT 388 AND SCHOOL FUNDING IN BEAUFORT COUNTY, SOUTH CAROLINA, at ii (2013) ("In the average South Carolina school district, the estimated share of total school property tax funding (operating and debt service millage combined) coming from commercial and rental property increased from 38 percent in 2006-07 to 47 percent in fiscal year 2010-11.").

154. See LINCOLN INST. OF LAND POL'Y, *supra* note 137, at 5.

155. See Dettling et al., *supra* note 9.

156. In comparison to actual market value, Black homes tend to have property values assessed over 10% higher than White homes, which results in 10% higher taxes. See Carlos

Because the ratio of owner-occupants to renters varies around the state, some areas also receive a larger “reimbursement” from the tax swap than they necessarily raised in sales tax revenue.¹⁵⁷ This particularly favors richer areas because as income increases, homeownership increases and higher property values generate higher absolute property tax bills. For example, despite visitors accounting for over half of Beaufort County’s sales tax revenue, the county, which has a higher White population than the state as a whole,¹⁵⁸ received twice as much in property tax reimbursements.¹⁵⁹ Further, even *excluding* owner-occupied property wealth, Beaufort County is the richest per-pupil school district in the state.¹⁶⁰ Because the county itself does not raise equal sales tax revenue, that money must come from elsewhere in the state, most likely from poorer and more Black areas that are then deprived of fiscal ability to fund schools.¹⁶¹ Their sales tax revenue is essentially paying for Beaufort County’s property taxes.

The legislation that enacted the school expense exemption was particularly pernicious because it provided for repeal or reduction of the exemption only by a two-thirds majority vote in both houses of the South Carolina General Assembly.¹⁶² This practice of limiting provisions is called “legislative entrenchment[,] and it is widely regarded as inconsistent with basic principles of democracy.”¹⁶³ Legislative entrenchment was a common

Avenancio-León & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation* 20 (June 2020) (unpublished manuscript) (on file with the Washington Center for Equitable Growth).

157. See SALAZAR & SALTZMAN, *supra* note 153, at iii; U.S. CENSUS BUREAU, *DEMOGRAPHIC CHARACTERISTICS FOR OCCUPIED HOUSING UNITS* tbl.S2502 (2019).

158. U.S. CENSUS BUREAU, *AMERICAN COMMUNITY SURVEY DEMOGRAPHIC AND HOUSING ESTIMATES* tbl.DP05 (2019).

159. See SALAZAR & SALTZMAN, *supra* note 153, at iii (“Act 388’s sixth penny on the state sales tax generated about \$20.7 million in Beaufort County in 2011. Visitors contributed 55 percent, or about \$11.4 million.”); see also *id.* at 33, 35 tbl.17.

160. See S.C. REVENUE & FISCAL AFFAIRS OFF., *OVERVIEW OF PUBLIC FUNDING FOR EDUCATION* 23 (2019).

161. See Jamie Self, *SC Lawmakers May Rethink Controversial Property Tax Law*, *THE STATE* (Sept. 28, 2016), <https://www.thestate.com/news/politics-government/article104501406.html> [<https://perma.cc/62LW-SRCU>].

Some lawmakers expressed concern the state’s tax laws force rural governments to raise their tax rates much higher than wealthier areas to raise enough money to operate. The end result is fewer taxpayers shouldering a greater share of the burden, said state Rep. Bill Bowers, D-Hampton. The question for lawmakers, Bowers said, is: “Does the state want to have the policy that punishes poor, rural counties? We have that now.”

Id.

162. S.C. CODE ANN. § 12-37-220(B)(47)(c) (2014).

163. John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation*, 91 CALIF. L. REV. 1773, 1775 (2003). But see Eric A. Posner & Adrian Vermeule, *Legislative*

practice in the post-Reconstruction south to limit future legislatures' ability to raise taxes and thereby further entrench racial inequality and curtail progress.¹⁶⁴ In modern times, it is particularly egregious for South Carolina to adopt these racially biased policies and bind future generations to contemporary failures, just as the state and much of the south did in the past.¹⁶⁵

Second is the assessment rate: real property in South Carolina is generally subject to a 6% assessment rate¹⁶⁶ unless it is an owner-occupied home, in which case the property is subject to only a 4% rate.¹⁶⁷ This is an abnormal arrangement that disproportionately burdens renters.¹⁶⁸ Assuming landlords pass this cost to renters, renters pay 50% higher property taxes even *before* considering the school expense exemption.¹⁶⁹ Estimating that school expenses are roughly one-third of property taxes,¹⁷⁰ renters are responsible for over *twice as much* in property taxes compared to homeowners. Because Black individuals are disproportionately likely to rent,¹⁷¹ Black renters are subsidizing White homeownership.

Entrenchment: A Reappraisal, 111 YALE L.J. 1665, 1666 (2002) (supporting legislative entrenchment).

164. LEACHMAN ET AL., *supra* note 3, at 8 (describing Mississippi's super-majority requirements).

165. The South Carolina Attorney General's Office has opined that statutory super-majority entrenchment is per se unconstitutional: "[A]ny statute which imposes a two-thirds requirement of each House upon a future General Assembly in order to amend or repeal a provision . . . would probably not pass constitutional muster." Letter from Robert D. Cook, Solic. Gen., Off. of the S.C. Att'y Gen., to Mike Burns, Member, S.C. House of Representatives (June 25, 2020) (on file with the *South Carolina Law Review*). However, this has not yet been directly tested in court.

166. § 12-43-220(e).

167. § 12-43-220(c)(1).

168. S.C. TAX'N REALIGNMENT COMM'N, *supra* note 124, at 182 ("South Carolina is one of the only states in the Southeast that applies a different assessment rate to primary residential real property (4 percent) and other real property types (e.g. 6 percent for rental and/or second home properties."); see also SALTZMAN, *supra* note 149, at 6 (comparing property tax exemptions in several southern states, noting that no nearby state offers a similar exemption without restriction).

169. SALTZMAN, *supra* note 149, at 7.

170. See *supra* text accompanying note 149.

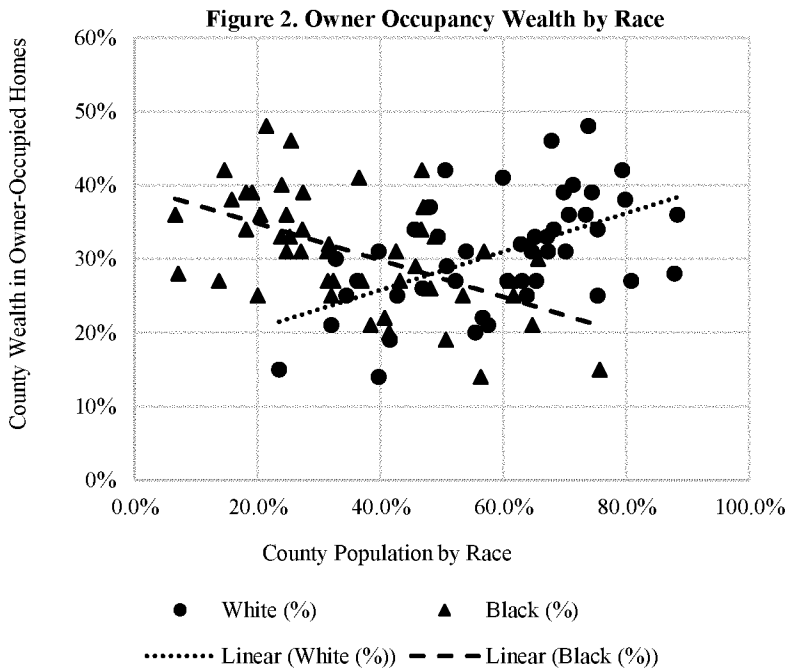
171. Cilluffo et al., *supra* note 152 ("Black and Hispanic households continue to be about twice as likely as white households to rent their homes."); see Richard Fry & Anna Brown, *In a Recovering Market, Homeownership Rates Are Down Sharply for Blacks, Young Adults*, PEW RSCH. CTR. (Dec. 15, 2016), <https://www.pewresearch.org/social-trends/2016/12/15/in-a-recovering-market-homeownership-rates-are-down-sharply-for-blacks-young-adults/> [<https://perma.cc/M2GH-MPAW>] ("Nonwhite renters are far more likely than white renters to cite financial reasons for not owning their home.").

The racial disparity caused by this policy is stark because White wealth is much more tied to homes,¹⁷² and this is true in South Carolina as well.¹⁷³ On average, as a county's White population increases, the percentage of that county's owner-occupied wealth increases; as a county's Black population increases, owner-occupied houses begin to comprise a smaller percentage of the county's wealth.¹⁷⁴

172. See Dettling et al., *supra* note 9.

173. See *infra* text accompanying note 175 and Figure 2; *supra* text accompanying notes 157–158. I am not a statistician. My math is hardly rigorous; it is a very rough approximation at best. Proper analysis of this particular problem would look to actual values correlated with race rather than this county-wide analysis. However, while the estimations are rough, I hope the point will stand that, generally, there are certain categories of activities that South Carolina policy favors and disfavors. On average, the first kind of policies are likely more common for White individuals, while the second are likely more common for Black individuals. The degree or extent to which those benefits and burdens accrue is better left to someone with more expertise. I can only estimate the broad impact.

174. For property values used to comprise Figure 2, see S.C. REVENUE & FISCAL AFFS. OFF., ASSESSED VALUE BY CLASS TAX YEAR 2018 (2020), <https://rfa.sc.gov/sites/default/files/TY%202018%20Assessed%20Value%20by%20County%20FY%2020.pdf> [<https://perma.cc/D8U9-SREJ>]. For population data used to comprise Figure 2, see U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES (2018), <https://data.census.gov/cedsci/table?q=ACSDP1Y2019.DP05&tid=ACSDP1Y2018.DP05> [<https://perma.cc/E7JH-CRZQ>].



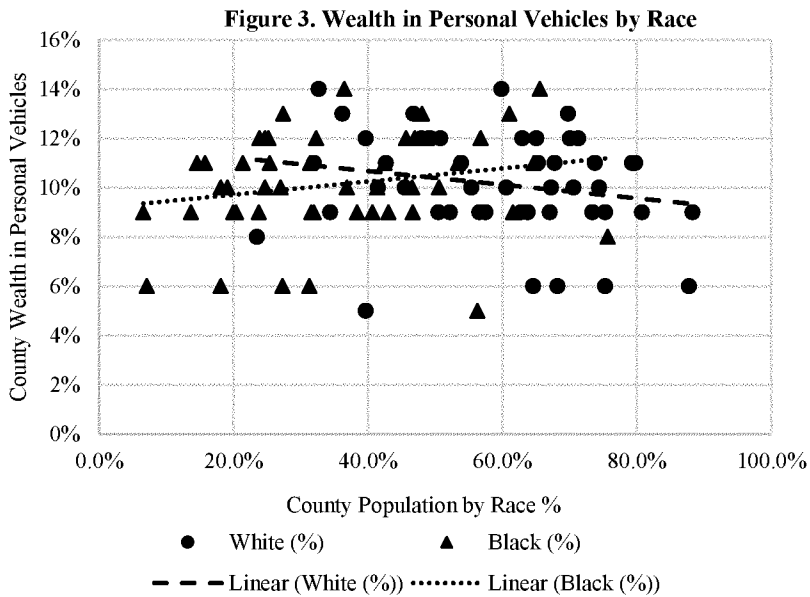
Because the policy favors homeowners and is more beneficial as property value increases, White individuals presumably benefit most from it. The same issue arises with personal vehicles because they, too, are taxed at the 6% general assessment ratio.¹⁷⁵ Conversely, in majority Black counties, more of the county's wealth is in its citizen's cars.¹⁷⁶ This has been known: in their research on racial taxation over twenty years ago, Professors Moran and Whitford found Black individuals "indisputably invest a higher percentage of their wealth in vehicles than whites do."¹⁷⁷ Again, Blacks bear a larger tax burden because the "one category of assets" where Black wealth is proportionally held more than White wealth is the least favored form.¹⁷⁸

175. See S.C. CODE ANN. § 12-36-910(a) (2014); § 12-36-1110 (adding the two tax rates together).

176. Data for Figure 3 was compiled in the same way as for Figure 2. See *supra* note 174.

177. Moran & Whitford, *supra* note 1, at 780.

178. *Id.*



These are exactly the kind of “facially neutral” policies that affect racial equity, yet their impact goes unnoticed. In every likelihood, the legislators who designed these policies did not consider that Black wealth is more commonly held in personal vehicles. Nevertheless, “blacks are more likely to have lifestyles that are less advantaged by tax benefits.”¹⁷⁹

Third, South Carolina pretends—for property tax purposes—that a home can appreciate no more than 15% within a five-year period.¹⁸⁰ But most property tax limits “exacerbate racial inequality,” giving the largest benefits to White homeowners.¹⁸¹ Over time, the appreciation cap will artificially restrict local governments and shift tax burdens “toward more slowly appreciating property.”¹⁸² In general, “more slowly appreciating property” tends to be Black-owned property.¹⁸³ Among homeowners, Whites are more likely to benefit from the cap while Blacks pay their full share in property taxes. This means that, even beyond the homeownership gap, Black homeowners are still less likely to benefit from the appreciation cap. “[E]ven

179. *Id.* at 757.

180. § 12-37-3140(B).

181. LAV & LEACHMAN, *supra* note 109, at 17.

182. SALAZAR & SALTZMAN, *supra* note 153, at ii.

183. *Id.*; Moran & Whitford, *supra* note 1, at 802; *Shades of the American Dream*, *supra* note 9, at 355, 358.

when blacks and whites engage in the same activity—[owning] a home—our tax laws treat those homeowners differently.”¹⁸⁴

Combined, Black renters and Black homeowners will be the ones most burdened and least advantaged by these policies.

3. *The Elderly Tax Advantage*

As a matter of policy, the legislature has offered those sixty-five and older substantial preference in virtually every area of tax.¹⁸⁵ One study found “South Carolina’s substantial tax preference for senior tax payers [sic] to be among the highest nationwide.”¹⁸⁶ The racial implications of these policies result from several—mostly economic—inequities, but they are all compounded by the fact that, on average, White individuals live 3.5 years longer than Black individuals.¹⁸⁷ Black Americans are also less likely than White Americans to be sixty-five and older.¹⁸⁸ In 2016, although 61.1% of the total U.S. population was White, 77.3% of Americans sixty-five and older were White.¹⁸⁹ Conversely, 12.3% of Americans were Black and only 8.9% were sixty-five and older.¹⁹⁰ White individuals not only comprise a larger share of the elderly population such that they inherently benefit more from age-based preferences, but they are also more likely to be the ones least in need of preferential treatment because they tend to be wealthier.¹⁹¹

For homeowners sixty-five and older, South Carolina’s credits and exemptions contribute to one of the lowest property tax rates in the country.¹⁹² Elder homeowners are further subsidized beyond the substantial exemptions and limitations that benefit owner-occupants because \$50,000 of their home’s value is excluded from any remaining property taxes.¹⁹³ In general, older people are more likely to own their home than younger people.¹⁹⁴ Of those

184. *Homeownership in Black and White*, *supra* note 9, at 207.

185. See S.C. TAX’N REALIGNMENT COMM’N, *supra* note 124, at 120 (“[A]mong ten Southeastern states, South Carolina had the highest elderly tax advantage for senior vs. non-senior taxpayers, especially when comparing high income households.” (footnote omitted)).

186. *Id.*

187. See ARIAS & XU, *supra* note 10, at 3 tbl.A.

188. See *id.* at 4 tbl.B.

189. ANDREW W. ROBERTS ET AL., U.S. CENSUS BUREAU, THE POPULATION 65 YEARS AND OLDER IN THE UNITED STATES: 2016, at 4 tbl.2 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf> [<https://perma.cc/73RL-C5GT>].

190. *Id.*

191. See Strand & Mirkay, *supra* note 2, at 282 (“[T]he racial wealth gap increases precipitously with age. Whites have seven times more wealth than Blacks at sixty years of age than they did at thirty years of age (only three times).”).

192. See S.C. TAX’N REALIGNMENT COMM’N, *supra* note 124, at 15.

193. S.C. CODE ANN. § 12-37-250 (2014).

194. ROBERTS ET AL., *supra* note 189, at 14.

sixty-five and older, 77.9% owned their home.¹⁹⁵ Within this group, however, 81% of White Americans owned their homes while only 62% of Black Americans owned theirs.¹⁹⁶

As discussed above, the state offers a \$15,000 income tax deduction for any person age sixty-five and older.¹⁹⁷ Because Black South Carolinians are less likely to be that age, they are also less likely to benefit from this “substantial exclusion[.]” which “appears unique compared to other states,” where such deductions are limited to certain types of income.¹⁹⁸ In 2020, this White-weighted policy was estimated to have cost the state over \$200 million.¹⁹⁹ That benefit disproportionately accrued to White people, and because deductions are inherently “upside-down” tax benefits,²⁰⁰ it disproportionately advantaged the well-off, who tended to be White.

As an adjacent policy, although South Carolina applies a blanket 44% deduction for all capital gains,²⁰¹ Black individuals are half as likely as White individuals to own any equities.²⁰² White individuals are almost twice as likely to have a retirement account²⁰³ and to have triple the value held in it.²⁰⁴ In 2020, the 44% capital gains deduction was estimated to have cost the state \$135 million.²⁰⁵ This is on top of the \$153.43 million cost of excluding up to \$3,000 in income from retirement accounts.²⁰⁶ All of these effects are overwhelmingly felt by older, wealthier citizens who are much more likely to be White.

195. *Id.* at 14 fig.10.

196. *Id.* at 14.

197. § 12-6-1170(B).

198. S.C. TAX’N REALIGNMENT COMM’N, *supra* note 124, at 121.

199. S.C. REVENUE & FISCAL AFFS. OFF., *supra* note 135, at 8.

200. *See supra* note 118 and accompanying text.

201. §§ 12-6-1140(1), -1150.

202. *See Dettling et al.*, *supra* note 9.

203. *See id.*

204. Angela Hanks et al., *Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/> [<https://perma.cc/49PL-NVX8>].

205. S.C. REVENUE & FISCAL AFFS. OFF., *supra* note 135, at 8.

206. *Id.*; § 12-6-1170(A).

Finally,²⁰⁷ social security income is entirely exempt from South Carolina's income tax.²⁰⁸ Age demographics again mark a significant disproportionality that is further exacerbated because, on average, Black individuals receive smaller social security benefits.²⁰⁹ In 2020, the social security exemption was estimated to have cost the state over \$300 million.²¹⁰

D. South Carolina's Racial Tax Inequality in Summary

Historically, South Carolina has been keenly aware that the lived experience of its Black and White citizens was different. At its worst, the state deliberately and maliciously abused those differences to the disadvantage of Black South Carolinians. In the same way, current tax policy either disregards or accepts persistent differences between White and Black lives, and it continues to operate to the disadvantage of Black individuals. This systematic failure allows the myth of neutrality to hide these disparate impacts.

In 1895, South Carolina's constitutional delegates convened with the express intention of disenfranchising Black voters and reinstalling white supremacy. It accomplished this, in part, by relying on the racial divide of extreme poverty. In the 1950s, this story changed to one of "justice" and "fairness" rather than blatant racial animus. With the same effect, however, tax policy relied on the ways in which White and Black South Carolinians were different in some respects—like in the percentage of income that could be accessed by a sales tax—while ignoring the ways they were different in others—like the vast difference in average income.

207. One final policy decision worth addressing but beyond the scope of this Note is that South Carolina's income tax base starts with post-federal-deduction income:

South Carolina...adopts "federal taxable income" as its starting point for determining state taxable income. In contrast, most states use federal "adjusted gross income" as their starting point for determining what income will be taxable at the state level...Using federal taxable income instead of AGI when computing personal income taxes substantially narrows the tax base, and creates inefficiencies caused by federal exemptions that are not available to everyone.

S.C. TAX'N REALIGNMENT COMM'N, *supra* note 124, at 108 (footnotes omitted); see §§ 12-6-40(A)(2)(b), -560. This decision means all the inequities and inadequacies that apply to the federal tax system automatically carry over to South Carolina's tax system *as a starting point*. Obvious policies, like the MID, that are more advantageous to White individuals are then amplified by the state through simple repetition. See *Homeownership in Black and White*, *supra* note 9, at 207.

208. § 12-6-1120(4).

209. See PATRICIA P. MARTIN & JOHN L. MURPHY, SOC. SEC. ADMIN., AFRICAN AMERICANS: DESCRIPTION OF SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME PARTICIPATION AND BENEFIT LEVELS USING THE AMERICAN COMMUNITY SURVEY 9 & tbl.5, 12 & tbl.6 (2014).

210. S.C. REVENUE & FISCAL AFFS. OFF., *supra* note 135, at 8.

Today, the authors of South Carolina's tax policy appear to be either indifferent or ignorant to the ways in which race still matters. Even with no deliberate mention or intention of favoring or disfavoring certain individuals because of their skin color, there is no other reasonable explanation for such a large-scale White preference. South Carolina has a system-wide characteristic of consistently favoring things that White individuals tend to have and do, while disfavoring the things that Black individuals tend to have and do. Portions of state policy are designed to benefit or encourage a certain type of person or activity with little regard for racial disparities.²¹¹ While granting tax preferences to homeowners or the elderly might be reasonable in some circumstances and to some extent, there is an overwhelming tendency for South Carolina tax policy to rely on characteristics that disproportionately benefit White individuals. Combined, these policies result in systematic advantages and disadvantages based on race that fly "under the radar."²¹²

By designing policies with no apparent regard for race, South Carolina has neglected its responsibility to pursue equity and help historically disadvantaged citizens. Instead, the state has actively erected and accepted barriers to equality in the form of preferential tax treatment for White behavior.

III. THE RACISM ANALYSIS ACT: A PROPOSAL

South Carolina's contemporary tendency to prefer and incentivize White activities seems different from its past. Rather than being the result of a knowing, concerted effort to disadvantage Black South Carolinians, modern inequitable policies appear to stem from a combination of the myth of neutrality and ignorance as to the ways in which Black and White individuals tend to live different lives.²¹³ Tax policy has not been considered with complete information. Lacking information, the state has inherently considered proposed policies more naively, inaccurately, and incompletely than if it had taken tax policy seriously as a source of, and potential solution

211. See Moran & Whitford *supra* note 1, at 802 (describing the federal tax code as a system of incentives that Black individuals forfeit because they lack access to tax-favored lifestyle choices).

212. Strand & Mirkay, *supra* note 2, at 279.

213. See Moran & Whitford, *supra* note 1, at 758 (arguing that "social segregation" means "Black life remains largely unknown . . . to most white legislators" and that, therefore, those legislators are "largely unaware of the Internal Revenue Code's impact on blacks"). "Hanlon's razor advises us to '[n]ever attribute to malice that which is adequately explained by stupidity.'" Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 150 (2018) (alteration in original).

for, racial inequity.²¹⁴ But the result is just the same: a tax code with racial preferences.

If South Carolina legislators were armed with information describing the racial disparities of a particular policy in detail, perhaps they would either refuse to adopt the policy or change it to reduce racial harm. While adopting a policy despite its racially disparate impact may be entirely justified in a given case, it would not be justified in every case because “[t]he importance of achieving public policy goals must be balanced against any racially skewing effects”²¹⁵ When legislators effectively fail to consider race, they adopt unjustifiable policies. This appears to be the current situation. Not only is there a point at which a particular policy’s disparate impact renders it unacceptable, but the collective impact of the tax code must also be considered in the aggregate. Although the cumulative effect of individually acceptable policies can cause inequities just as significant as those from a single unjustifiable policy, the *systematic* preferential treatment of White behavior is itself a major problem.

A systematic failure should be met with a systematic solution. If current legislators were reincarnations of historical racial antagonists, then replacing them would be the solution. But if instead the problem is that legislators are “largely unaware of black lifestyles,”²¹⁶ then the solution is not new legislators but informed ones.

A. *The National Environmental Policy Act, Compared*

In 1969, Congress enacted the National Environmental Policy Act (NEPA).²¹⁷ NEPA declared a “broad national commitment to protect[ing] and promoting environmental quality.”²¹⁸ With it, “Congress provided an environmental Magna Carta that has profoundly influenced decision making by federal agencies.”²¹⁹ Fundamentally, NEPA exists to “*educate*” decision makers by requiring federal agencies to evaluate and consider the environmental consequences of potential federal actions.²²⁰ It requires all

214. See generally LEACHMAN ET AL., *supra* note 3, at 1 (arguing state tax policy can be a real means of fostering racial equality).

215. Moran & Whitford *supra* note 1, at 802.

216. *Id.* at 758.

217. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

218. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); see also 42 U.S.C. § 4331(a) (“declar[ing] that it is the continuing policy of the Federal Government” to, among other goals, “create and maintain conditions under which man and nature can exist in productive harmony”).

219. DANIEL R. MANDELKER ET AL., *NEPA LAW AND LITIGATION* § 1:1 (2d ed. 2020).

220. JAMES SALZMAN & BARTON H. THOMPSON JR., *ENVIRONMENTAL LAW AND POLICY* 340 (5th ed. 2019).

federal agencies to consider the environmental impacts of any major federal action.²²¹ If an agency proposes a major action, it must prepare an Environmental Impact Statement (EIS) seriously considering the potential environmental impacts of the proposed action and describing alternatives or mitigation strategies to reduce any environmental burdens.²²²

This Note proposes South Carolina adopt a similar policy toward racially disparate impacts and racial justice: the Racism Analysis Act (RAA). NEPA was enacted in response to federal agencies regularly discounting and disregarding the environmental costs of their actions;²²³ just the same, the South Carolina legislature has regularly failed to adequately consider the racial impacts of its policy decisions. The RAA is an attempt to rebut the myth of neutrality and recognize that race still matters.²²⁴ As Justice Sotomayor explained:

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.²²⁵

Just the same, enacting tax policy requires that South Carolina legislators keep their eyes open to the ways in which wealth, income, homeownership, and other aspects of people's lives are affected by race.

The theory of NEPA is that policy makers will produce better substantive policies when procedures require them to consider environmental issues "at every important stage in the decision-making process"²²⁶ and "take a 'hard look' at environmental consequences."²²⁷ As NEPA's implementing body explained:

221. See 42 U.S.C. § 4332(C)–(D); see also SALZMAN & THOMPSON, *supra* note 220, at 342–45 (explaining broadly how the qualifiers "major" and "significantly" in the NEPA statute have been applied).

222. See § 4332(C).

223. See MANDELKER ET AL., *supra* note 219, § 1:2.

224. See Strand & Mirkay, *supra* note 2, at 299 ("To move toward equity, we must first, as a country, consciously acknowledge and deal with the issue of race.").

225. *Id.* at 275.

226. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). "*Calvert Cliffs* . . . was the first significant decision that interpreted NEPA . . ." SALZMAN & THOMPSON, *supra* note 220, at 340.

227. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.²²⁸

To make better decisions, South Carolina legislators must understand the racial consequences of their policy decisions and seriously consider those consequences at the design stage. If they were required to conceptualize how a proposed policy is affected by racial injustice before enacting it, perhaps some of those injustices would be mitigated or prevented altogether. Because taxes depend on more than just a person's financial or economic condition and because tax policy reflects societal values,²²⁹ purposefully declaring that racial justice is one of South Carolina's values and then designing the legal system to support that value should lead to better substantive results.

South Carolina should declare that it is the ongoing policy of this state to root out racism and the vestigial impacts of its prior governmentally sanctioned and imposed racial hierarchy. As a start, the legislature should require a Racial Impact Statement (RIS) for all proposed tax legislation that may disproportionately cause significant harm, or provide significant benefit, according to race. It should ensure that race is not "swept under the rug" when making these decisions²³⁰ or, more accurately, that race is pulled out of the attic of disregard and is instead considered with appropriate weight and significance.

State-level precedent for agencies analyzing proposed legislation exists. South Carolina's Revenue and Fiscal Affairs Office (RFAO) prepares a Statement of Estimated Fiscal Impact for certain types of proposed legislation that make it out of committee.²³¹ The RFAO was established to create "an organizational and procedural framework governing formulation, evaluation and continuing review of all state revenues and expenditures for all state programs[.]"²³² Just the same, an RAA Office could provide a framework for evaluating proposed policies for their potential racial disparities. Additionally,

228. 85 Fed. Reg. 43,358 (July 16, 2020) (repealing 40 C.F.R. § 1500.1(c)).

229. *See supra* note 4.

230. *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1029 (2d Cir. 1983) (quoting *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)) (describing NEPA's purpose).

231. *See* S.C. CODE ANN. §§ 2-7-71 to -78 (2005 & Supp. 2019).

232. § 11-9-810. A fiscal impact statement is reasonably required for all tax and expenditure bills, *see* §§ 2-7-71 to -72, but also for any bill "[that] would mandate a health coverage," § 2-7-73, or would "establish a new criminal offense or . . . amend the sentencing provisions of an existing criminal offense," § 2-7-74.

similar to how the RFAO predicts how much tax expenditures cost the state each year,²³³ the RAA Office could analyze those provisions and others in light of the racial bias already existent in the system.

B. Racial Tax Justice Is Well-Suited for a NEPA-esque Policy

Directly applying a NEPA-esque RIS requirement to racial justice is not a novel proposal. As early as 1979, it was suggested as a possible means to address residential segregation,²³⁴ and in 2020, it was suggested as a framework for highway development programs.²³⁵ In the interim, RIS-type policies have been advocated for both as generally applicable proposals²³⁶ and in specific contexts.²³⁷ Racial impact study requirements have been adopted in some form across several cities and states.²³⁸ Indirectly, federal agencies have also interpreted NEPA itself as requiring some consideration of race as a factor in the “social” environmental impacts, and advocates have used NEPA to pursue environmental justice in court.²³⁹

Any chosen policy concern could, in principle, benefit from a procedural requirement that legislators gather information and seriously consider a proposed action’s potential impacts on that policy concern.²⁴⁰ But such an expansive approach seems likely to result in unnecessary delay and obstruction. However, in the tax context, race deserves extra attention because the design of tax policy has systemic shortcomings and difficulties much like

233. § 11-9-830(7).

234. See James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 669 n.294 (1979) (“NEPA has succeeded in increasing decisionmakers’ awareness of the environmental aspects An identical sensitivity is needed in the area of race.”).

235. Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: Advancing Racial Equity Through Highway Reconstruction, 73 VAND. L. REV. 1259, 1321–30 (2020) (“[A]dopting an REIS requirement would allow jurisdictions to think creatively and broadly about the harms impacted communities confront . . .”).

236. See R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1552 & n.146 (2010); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359, 1364, 1387–91 (2012).

237. See, e.g., Archer, *supra* note 235, at 1323–24 (describing criminal justice reform suggestions); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 168–93 (2017) (proposing a NEPA-like policy for “predictive” policing algorithms).

238. Archer, *supra* note 235, at 1324–26 (“There is a growing body of statewide legislative mandates and local ordinances requiring policy makers to assess the impact of a project on racial and ethnic communities across government initiatives.”).

239. *Id.* at 1315–19 (describing a few cases that have brought environmental justice NEPA cases to the courts).

240. See William H. Rodgers Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENV’T L. 485, 488 (1990) (“Impact statements have proliferated on issues of energy, inflation, economics, employment, discrimination, and a variety of other topics.”).

those underlying NEPA. Also, compared to the environment, race and taxation have several qualities that can simplify and improve the impact review process.

1. *Similarities to the Environmental Neglect That Justified NEPA*

Because unintended consequences that align by race are likely and often unintuitive, racial tax justice faces obstacles similar to those that NEPA was intended to overcome. One of the failures NEPA sought to address was the single-mindedness in which federal agencies approached their legislative mandates.²⁴¹ Government action was frequently “mission-oriented.”²⁴² Congress directed federal agencies to carry out ‘mission’ programs to achieve legislative program objectives even though environmental resources were threatened.²⁴³ The Atomic Energy Commission granted permits for nuclear power plants; the Federal Highway Administration constructed highways. Because agencies were established with specific purposes, those purposes were often agencies’ only consideration when evaluating potential courses of action.²⁴⁴ These shortcomings were significant as agencies “tended to overstress the benefits of development and to explore insufficiently the less environmentally damaging alternatives”²⁴⁵ NEPA added an enumerated purpose to every agency’s statutory agenda: care about the environmental impacts of your actions.²⁴⁶ The Supreme Court has explained that NEPA operates “by focusing Government and public attention” on the environmental impacts of proposed actions.²⁴⁷

Just the same, South Carolina’s inequitable policies are partly the result of legislators’ single-minded orientation. Policies are adopted to address a given issue—be it assisting fixed-income elders or encouraging the adoption of renewable energy—and in that process, the problem and proposed solution are considered with seemingly paramount focus and apparently little to no thought about racial justice and disparities. Legislators have their problems,

241. See STAFFS OF S. COMM. ON INTERIOR & INSULAR AFFS. & H. COMM. ON SCI. & ASTRONAUTICS, 90TH CONG., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT 5 (Comm. Print 1968) (noting that “planners, developers, builders, and other practicing manipulators of the environment” have a “tendency to maximize a specific change or result” and “sacrifice[] other interrelated parts”).

242. MANDELKER ET AL., *supra* note 219, § 1:2.

243. *Id.*

244. See *supra* note 241.

245. See MANDELKER ET AL., *supra* note 219, § 1:2.

246. See *id.* § 1:1 (“NEPA’s importance lies in its role as an environmental statutory overlay on the statutory responsibilities of all federal agencies.”); Stephen Dycus, *NEPA Secrets*, 2 N.Y.U. ENV’T L.J. 300, 300 (1993) (noting one of NEPA’s goals is “to inject environmental considerations into the federal agency’s decision-making process”).

247. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

goals, and plans, and just as those rarely included the environment, they seem to rarely include race. But the “importance of achieving public policy goals must be balanced against any racially skewing effects”²⁴⁸ South Carolina needs a process and infrastructure that can illuminate the consequences that disproportionately accrue on account of race.

Lastly, accurately predicting environmental harm requires uncommon expertise that, at the time, was rare in general and, moreover, was absent in most “builder[.]” agencies constructing highways and approving nuclear power plants.²⁴⁹ It takes time and research to understand the impacts that a project may have on the environment, and because most agencies lacked expertise, they simply were unaware their actions had environmental consequences.²⁵⁰ In the same way, racial justice is inadequately considered because it is not always obvious how, why, or in what ways a policy will have racial impacts. Decision makers lacking adequate information are more likely to make inadequate decisions, particularly regarding race. The only way to correct their ignorance is to inform them.

2. *Taxes and Racial Justice Simplify and Improve NEPA*

A second function of NEPA is to promote information gathering.²⁵¹ In this way, NEPA has been a tool to combat environmental racism.²⁵² The RIS will depend on adequate data to inform decision makers about both the underlying reality in which a policy will operate and the likely and actual results of the policy. Currently, it is often difficult or impossible to know the

248. Moran & Whitford, *supra* note 1, at 802.

249. One proponent of NEPA expressed some hesitation:

[The field of ecology is] still in the formative stage: I think it may take a generation perhaps to achieve even the beginnings of the kind of training, the kind of production of original minds and talents that will be able to perform the sorts of—studies—which we stress the urgency of.

STAFFS OF S. COMM. ON INTERIOR & INSULAR AFFS. & H. COMM. ON SCI. & ASTRONAUTICS, 90TH CONG., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT 4–5 (Comm. Print 1968).

250. See COUNCIL ON ENV'T QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 27 (1997) (“Prior to NEPA . . . management decisions were made without the benefit of environmental information.”).

251. STAFFS OF S. COMM. ON INTERIOR & INSULAR AFFS. & H. COMM. ON SCI. & ASTRONAUTICS, *supra* note 241, at 12 (“[I]t is clear that two functions must be served: coordination and information gathering.”).

252. See Browne C. Lewis, *What You Don't Know Can Hurt You: The Importance of Information in the Battle Against Environmental Class and Racial Discrimination*, 29 WM. & MARY ENV'T L. & POL'Y REV. 327, 353 (2005); see also Heather E. Ross, Note, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY ENV'T L. & POL'Y REV. 353 (1994) (arguing for NEPA's utility more broadly, not simply as a means to gather information).

consequences of tax policy simply because that information is not collected.²⁵³ But insufficient data is not an unavoidable circumstance—it is a well-criticized failure that is unfortunately common and especially significant for race.²⁵⁴ To comply with NEPA, agencies must similarly deal with information that is “typically scarce, costly to assemble, highly uncertain, and variable in quality.”²⁵⁵ The RAA is not necessarily so limited and could improve upon the idea.

Although environmental consequences are inherently specific to the project and site in question, there is no similar “bespoke” nature to tax policy. Tax legislation inherently deals with groups and demographic tendencies, not particularity. The specific result in a particular location is not the question. When the RAA Office evaluates a proposal’s effect on people in general, it only needs to know averages and statistics. Those general gaps are more easily filled with routine procedures, like asking for race when individuals fill out a form.²⁵⁶ Further, by necessity, more impactful proposals—like large-scale changes to income or property taxes—involve demographics and information that is easily collected. Thus, any significant change to the income or property tax could be evaluated with readily collectible information, such as income, homeownership, or home value.²⁵⁷

Just as tax returns at the federal level have been criticized,²⁵⁸ South Carolina does not ask taxpayers to identify their race on their tax returns.²⁵⁹ If it did, data for each of the hundreds of tax credits and deductions could be easily correlated with racial information. Currently, demographic estimates,

253. See Sawers, *supra* note 59, at 166–67 (“The materials available to the tax historian are relatively scarce, despite the importance of tax to American history. Reports by state fiscal authorities. . . often lumped all tax revenue into a single category. Thus, it is often impossible to determine the relative contribution of different taxes and thus relative burdens.” (footnote omitted)).

254. See generally Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019) (discussing the IRS’s historic practice of not asking taxpayers for their race, which leaves policymakers with less accurate means of understanding and evaluating policy); Brown, *supra* note 3, at 91–92 (noting the same).

255. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 926 (2002).

256. See EQUAL. & HUM. RTS. COMM’N, EQUALITY IMPACT ASSESSMENT QUICK-START GUIDE 2, 6 (2010) (describing compliance standards for “equality impact assessments” in the United Kingdom and instructing that “it is much more efficient to collect certain types of data such as statistics on employment or general research across the organization as part of mainstream data collection and analysis”).

257. Unfortunately, the sales tax—which, as explained, is a significant source of racial disparity—is not as well suited to simple, routine information collecting.

258. See Bearer-Friend, *supra* note 254, at 2 (“[C]olorblind tax data not only obscure the disparate racial impact of our tax policies, but may preserve such inequality.”). See generally *id.* at 6–13 (describing the history of the IRS not collecting information on race).

259. Historically, South Carolina has statically conformed to the federal tax code. See S.C. CODE ANN. § 12-6-40(A)(1) (Supp. 2020).

like county-wide approximations, might be able to accurately but imprecisely analyze the impact of a given policy proposal. But for at least some types of policies, such as income tax credits or deductions and those relating to homeownership, the actual information exists in the world—it just needs to be collected.

In particular, routine data collection could make retrospective analysis remarkably simple. Who kept the \$25 million in uncollected revenue from the renewable energy credits? If the Department of Revenue required taxpayers to identify their race, then it could know the precise demographics of the population that claimed the credits. If the Department of Motor Vehicles asked drivers to identify their race when registering a vehicle, the state could know exactly how much more the “max tax” cap benefits White individuals over Black individuals. The county tax assessor’s office and the register of deeds could also collect race data with property tax information on vehicles and houses, respectively. The RAA can fill the knowledge gap often obscuring contemporary policy analysis.

A historic component is critically important for racial justice as well.²⁶⁰ Wealth and economic security, by their very nature, compound. Having money in the past is an indicator that an individual, family, or group will have money in the future (and likely more of it).²⁶¹ Because the harms of racial injustice and taxation combine to create generational problems,²⁶² even if legislators seriously considered a current or proposed policy’s distribution of benefits and burdens based on race, they would still be missing the historical sources of today’s inequality that is rooted in the story described in Part II and across the literature on racial injustice. This compounding effect obscures the sources and reasons for modern racial inequity, making detailed analysis even more necessary than in environmental areas.

Separately, one of the most common criticisms of NEPA is the “costly and time-consuming” nature of the EIS.²⁶³ Both the Obama and Trump Administrations, along with most preceding administrations, tried to ease this burden.²⁶⁴ Race and tax are more suited for a simpler impact analysis because

260. See Archer, *supra* note 235, at 1323 (“[R]acial impact studies can unearth the source of ‘cumulative racial disadvantage across domains, time, and generations.’”).

261. See Strand & Mirkay, *supra* note 2, at 271.

262. *Id.* (“[T]hese racial disparities perpetuate themselves through White inheritance and other intergenerational wealth transfers such as investments in education.” (footnote omitted)).

263. E.g., Cronin v. U.S. Dep’t of Agric., 919 F.2d 439, 443 (7th Cir. 1990) (“[A] full-fledged environmental impact statement—which is very costly and time-consuming to prepare . . . has been the kiss of death to many a federal project . . .” (citing River Rd. All., Inc. v. Corps of Eng’rs of U.S. Army, 764 F.2d 445, 449 (7th Cir. 1985))).

264. See, e.g., Update to the Regulations Implementing the Procedural Provisions of National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pt. 1500–08, 1515–18) (outlining the Trump Administration’s revisions); OFF. OF THE

racial inequities involve questions of tendencies and probability across a population; “racism manifests in groups, rather than in individual injuries[.]”²⁶⁵ but environmental impacts are inherently questions of particular consequences in specific situations. That difference means that, while an EIS is designed to answer the question of precisely what is impacted and exactly how, the purpose of the RIS is distinct. The RIS should operate at a higher, societal level by asking not *which* person a policy impacts but *what kind* of person. This can be a question of tendencies as the RAA is designed to address problems that occur in trends. These statistical tendencies are more easily understood and analyzed than particular environmental consequences.

There are also numerous models for less onerous reports. For example, the RFAO’s Statements of Estimated Fiscal Impact offer an alternative in terms of scale. These statements are typically no more than five pages long,²⁶⁶ occasionally growing up to ten.²⁶⁷ The agency prepares hundreds of them each year.²⁶⁸ Bills are introduced by legislators and statements are promptly released that same year.²⁶⁹

Taxes also allow for a simple solution to one of NEPA’s problems: determining precisely when an EIS is necessary.²⁷⁰ While the definition of “major action” and “substantially affecting the environment” are inherently and purposefully vague, the RAA could prescribe a simple dollar-amount threshold by using the fiscal estimates already generated by the RFAO. An RIS might only be required given some specified monetary impact—for example, \$10 million. By drawing clear lines, administering the RAA can be simplified.

PRESS SEC’Y, THE WHITE HOUSE, PRESIDENTIAL MEMORANDUM—SPEEDING INFRASTRUCTURE DEVELOPMENT THROUGH MORE EFFICIENT AND EFFECTIVE PERMITTING AND ENVIRONMENTAL REVIEW (2011) (outlining the Obama Administration’s measures to expedite environmental reviews); Jonathan Wood, Opinion, *Speeding Up Environmental Reviews Is Good for the Economy and the Environment*, THE HILL (Feb. 6, 2020), <http://thehill.com/opinion/energy-environment/481513-speeding-up-environmental-reviews-is-good-for-the-economy-and-the> [<https://perma.cc/8NXX-LQUK>] (describing attempts by Presidents Reagan and Clinton to rein in delays caused by NEPA).

265. Strand & Mirkay, *supra* note 2, at 299–300.

266. See, e.g., S.C. REVENUE & FISCAL AFFS. OFF., STATEMENT OF ESTIMATED FISCAL IMPACT, S.1076 (2020); S.C. REVENUE & FISCAL AFFS. OFF., STATEMENT OF ESTIMATED FISCAL IMPACT, S.0753 (2020).

267. See, e.g., S.C. REVENUE & FISCAL AFFS. OFF., STATEMENT OF ESTIMATED FISCAL IMPACT, S.0545 (2020); S.C. REVENUE & FISCAL AFFS. OFF., STATEMENT OF ESTIMATED FISCAL IMPACT, S.1152 (2020) (evaluating proposed amendments to thirty-nine different tax provisions).

268. See *Fiscal Impact History*, S.C. LEGISLATURE (2021), <https://www.scstatehouse.gov/fiscalimpact.php> [<https://perma.cc/6MTA-TZ3B>] (providing both house and senate Fiscal Impact Statements).

269. See sources cited *supra* note 266–267.

270. See SALZMAN & THOMPSON, *supra* note 220, at 342–49.

C. *Test Examples for Applying the RAA*

When South Carolina overhauled its property tax system in 2006, it dramatically shifted the tax burden from White homeowners to Black renters.²⁷¹ Would legislators have made those same decisions if, in committee meetings, they had an RIS explaining the racial disparities of the policies they were considering? Would those legislators have survived public scrutiny if the world saw exactly how much White families, and almost only White families, had to gain?²⁷² The RIS could serve part of NEPA's design role,²⁷³ which is "to put officials on formal notice" not only that there are disproportionate impacts but also that the public and community are aware of them.²⁷⁴ The RIS could also serve as an "early warning" that informs interested groups of upcoming policy and actions.²⁷⁵

If used in 2006, the RIS would have demonstrated the overwhelming way in which White individuals benefit from proposed changes. It would have detailed the racial gap in homeownership and the significant discrepancy in home values for White and Black homeowners. When legislators were considering the proposed appreciation cap, the RIS would have informed them that White homes tend to appreciate faster than Black homes and would have estimated by race the proportion of homeowners that would benefit from the cap. It would have also explained, just as Governor Byrnes understood in 1952, that sales taxes tend to place a disproportionate burden on people of color. This is an easy example of a time where the RAA could have led to better outcomes.

Importantly, much like the EIS, the RIS could offer alternatives to mitigate disparate impacts, including the "no action alternative."²⁷⁶ For the property tax overhaul, that may have meant creating a program designed to increase homeownership in Black communities or extending the school tax exemption to all residential property, whether owner-occupied or not. The RIS could have suggested that the reassessment cap be set to 25%, rather than 15%, solely so fewer people hit it. Instead of increasing the sales tax, perhaps the RIS would have shown that it was less racially distorted to eliminate the

271. See *supra* Section II.C.2.

272. See Moran & Whitford, *supra* note 1, at 803 ("If legislators cannot accommodate both public policy goals and black/white equity, then they will have to make hard choices.").

273. See Karkkainen, *supra* note 255, at 912 ("The logic and legislative history of this scheme suggest that NEPA's authors expected the resulting public scrutiny to act as an independent constraint on agency discretion.").

274. See William Kennedy et al., *Putting Race Back on the Table: Racial Impact Statements*, 47 CLEARINGHOUSE REV. 154, 154 (2013).

275. See Rodgers, *supra* note 240, at 488–89.

276. 40 C.F.R. § 1502.14(c) (2020).

owner-occupied assessment ratio and bring it back to 6% while still furthering policy goals by retaining the school expense exemption.

Proposing alternatives is critical because there are options between adopting a racially biased policy and doing nothing at all. Suppose the legislature desires to adopt a given policy in substantive form but that policy has significant racially disparate impacts. The RIS may identify an alternative that can achieve 90% of the policy's benefits with drastically reduced racial disparity. The RIS can be a tool to optimize policy and accomplish public goals while reducing disparity.

To the contrary, some policies may have entirely justified racially disparate impacts. As a simple example, South Carolina offers teachers an income tax credit for classroom expenses at the modest cost of \$2.42 million.²⁷⁷ But, as compared to their representation among the general population, Black individuals are approximately half as represented among the state's teaching population.²⁷⁸ If the South Carolina Department of Revenue collected race data on tax returns, the RIS could detail exactly how large of a difference this policy makes depending on race. But regardless, the state would be entirely reasonable to keep the policy.

Finally, racial disparities do not always have clear implications. For example, South Carolina exempts all prescription medication from the sales tax.²⁷⁹ This is a substantial policy that, in 2020, cost the state nearly \$500 million in uncollected revenue.²⁸⁰ But the policy has racial consequences because, even beyond economic disparities, Black individuals are more likely to be underprescribed medication in comparison to White individuals.²⁸¹ Then, considering economic differences, individuals with lower incomes are less likely to fill their prescriptions.²⁸²

277. See S.C. REVENUE & FISCAL AFFAIRS OFF., *supra* note 135, at 7.

278. Compare S.C. DEP'T OF EDUC., 2016-17 SC TEACHERS BY RACE AND GENDER (2017) (reporting data that shows roughly 15% of South Carolina's teachers are Black), with U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY DEMOGRAPHIC AND HOUSING ESTIMATES tbl.DP05 (2018) (reporting that 27% of South Carolina citizens are Black).

279. S.C. CODE ANN. § 12-36-2120(28)(a) (2014).

280. S.C. BD. OF ECON. ADVISORS, *supra* note 125, at 4.

281. See Becky Briesacher et al., *Racial and Ethnic Disparities in Prescription Coverage and Medication Use*, 25 HEALTH CARE FIN. REV. 63, 73 (2003) ("These findings showed wide variation that persisted even among individuals with the same disease and same type of prescription coverage. As with studies of other medical services, we found that minority beneficiaries tend to get less of chronic medications compared with the majority of beneficiaries who are white.").

282. Ashley Kirzinger et al., *KFF Health Tracking Poll – February 2019: Prescription Drugs*, KFF (Mar. 1, 2019), <https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-february-2019-prescription-drugs> [<https://perma.cc/YW2F-DVJU>].

The RIS would reveal the extent of this disparity, which would be beneficial but not determinative. On the one hand, it could be reasonable for the legislature to decide that prescription medicine should not be subject to a sales tax because it is unlike other goods that are purchased for individual satisfaction. Even if an RIS found that the policy would be more beneficial for White than Black individuals, it may still be right to exclude medicine from the tax base. On the other hand, the disparity may be significant or extreme. In such a case, even if the theoretical distinction about consumption is meaningful, it still may be improper to create this categorical policy. Then, the RIS's alternative options are critical reforms that could reduce the inequity while retaining much of the benefit.²⁸³ Without proper information and analysis, this policy's implications are unclear, and it is difficult to determine whether the policy is worth its effects.

IV. CONCLUSION

Throughout South Carolina's history, the disparate impact of policies was *expressly* the point. State leaders understood that White and Black citizens tended to live in very different circumstances, and they abused this fact for racist ends by adopting policies that relied on those circumstances. They did this to disenfranchise Black voters and to shift the tax burden toward Black South Carolinians—the poorest population in the state.

More recently, South Carolina has constructed a systematic tax preference for White behavior because those differences are disregarded either out of simple ignorance or in deference to the myth of neutrality. One potential or partial solution is to require that legislators see the disparity in their proposals. The RAA would require the state to collect and generate the data necessary to understand these problems deeply and accurately. It would then equip legislators with the information and tools necessary to design more just policies.

283. For possible options to reform this policy, see S.C. TAX'N REALIGNMENT COMM'N, *supra* note 124, at 70–72.