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ABSTRACT

This Article describes the connection between wealth inequality and the increasing structural racism in the U.S. tax system since the 1980s. A long-term sociological view (the why) reveals the historical racialization of wealth and a shift in the tax system overall beginning around 1980 to protect and exacerbate wealth inequality, which has been fueled by racial animus and anxiety. A critical tax view (the how) highlights a shift over the same time period at both federal and state levels from taxes on wealth, to taxes on income, and then to taxes on consumption—from greater to less progressivity. Both of these shifts disproportionately benefit Whites while disproportionately burdening Blacks and other people of color.

INTRODUCTION

This Article emerges from a series of conversations between the authors, both professors of law. One of us, Palma, has written extensively on racism in the United States and its evolving manifestations over time. The other, Nick, is a tax specialist with a tax lawyer's grasp of the intricacies not only of federal tax law but of state and local tax law as well.

The specific genesis of this Article was a simple—though not straightforward—question from Palma to Nick: Could the tax system overall be the current mutation of racism in the United States—acting to incrementally, but decisively, benefit White taxpayers and burden Black[1] taxpayers and other taxpayers of color—apart from any explicit racial intent to discriminate? The authors seek to answer this question in light of

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[1] In this Article, the racial terminology we use, except when quoting others, is Black and White. *See* BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE 94–95 (rev. ed. 2017).

increased awareness of how racism, a system of advantage and disadvantage, acts to perpetuate racial disparities and wealth inequality.

In Part I, Palma sets forth the case for posing the question. She links taxes and inequality to race and inequality. She traces the evolutionary history of racism in the United States and highlights relevant features of wealth in the twenty-first century. She concludes that the tax system is a form of structural racism that is just now being named and explored.

In Part II, Nick examines federal and state tax systems holistically, searching for evidence to support or challenge Palma's assertion. He finds ample support in the federal Internal Revenue Code (IRC) and even more evidence in a survey of state tax systems. The IRC and many state tax codes operate directly to increase wealth inequality, deepening pre-existing historically-based racial wealth disparities. The recent Tax Cuts and Jobs Act of 2017 (TCJA) intensifies these effects.

Finally, in Part III, we assess the political, legal, and social landscape that has led the nation to the current status quo of racialized tax inequity and racialized wealth inequality. In this Part, we also highlight the connection between tax inequity and investment in public infrastructure, and we offer some initial insights regarding strategies for moving toward equity.

I. TAXES, INEQUALITY, AND RACISM AS A SYSTEM OF ADVANTAGE AND DISADVANTAGE

A. Inequality and Taxes are Connected: A Systems View

When most of us file our individual federal tax returns on April 15, we focus on our own personal bottom line: "Do I have a balance due or do I get a refund?" The calculations for arriving at the answer to this question—as well as the "how much"—are often simply a matter of arithmetic gymnastics applied to receipts and recordkeeping.

As individuals, we rarely pause to consider our overall tax contribution: federal and state income taxes on revenues we receive; local property taxes on real estate or personal property we own or that are incorporated into rent we pay; sales taxes on what we buy; Social Security and Medicare payroll taxes on what we earn; and taxes on meals and lodging when we travel or go out to eat. And those are just the starting point. Those of us who are especially wealthy might encounter estate or inheritance taxes; those of us at the opposite end of the wealth spectrum might benefit from an Earned Income Tax Credit. We help corporations both make money and pay their taxes when we purchase the goods and services they offer. We support roads through gasoline taxes and public transit through transportation taxes.

While our taxes support the government, the government is supporting us through our taxes. When we deduct the interest paid on our home mortgage, the government forgoes revenue in order to boost our ability to purchase a home. Similarly, our dollars go further when income committed to health or retirement is untaxed. Untaxed investment earnings, when saved for college, help families pay tuition.

These "tax expenditures"—taxes diminished or forgiven—create a net benefit or offset against taxes otherwise owed. Tax expenditures, which reduce government income from taxes and thus appear on the "income" side of the government's budget, have a similar effect to direct expenditures, which appear on the "expense" side of the government's budget. Both tax and direct expenditures affect the government's fiscal bottom line, and both operate to subsidize and support private endeavors favored by public policy. Both are net negatives to the public balance sheet and net positives to the individuals they benefit.

In this Article, we take a step back from an individual perspective to view taxes holistically as a system comprised of the taxes and tax expenditures listed above, and more. Taxes comprise the primary financial mechanism through which our community (writ large) raises revenues to support expenditures that benefit the collective. As the tax system has become more complicated, the tax expenditures described above have gained importance as benefits to private individuals for asserted public purposes.

While it is easy to get drawn into the tax weeds with an analysis of the effectiveness of this tax deduction or the equity of that marginal rate, our project in this Article is to sketch the ecosystem within which those weeds flourish as well as to explore the question of what goals this system is currently operating to accomplish—and why.

We started down this path with a few simple observations. As a starting point, inequality, especially wealth inequality, has been rising in the United States since the 1970s and is now higher than it has been at any time since the late 1920s, before the stock market crash of 1929 and the subsequent Great Depression.[2] Robert Reich, U.S. Secretary of Labor under President Clinton, popularized both the fact and the dangers of inequality with the 2013 film documentary *Inequality for All*,[3] based on his 2010 book *Aftershock*,[4] which tied the housing and financial crisis of 2008 and 2009 to the enrichment of the wealthy and the languishing economic capacity of the middle class. Shortly thereafter, Joseph Stiglitz, winner of the Nobel Prize in Economics, warned in his 2012 book *The Price of Inequality* of the detrimental effects of growing inequality in terms of lackluster investment in people and in both social and physical infrastructure. He tied that inequality explicitly to the increasing political influence of the financially well-off.[5] Just recently, a billionaire founder of the world's largest hedge fund cautioned that current income and wealth inequality is a "national emergency" that along with a conflicted government can yield a dangerous populism that threatens our democracy.[6]

Around the same time, the Occupy movement brought the issue of inequality to the national public consciousness with demonstrations and protests.[7] Naming the "1%"—the people in the top one percent of the wealth and income distribution—provided a vivid shorthand description of the problem of economic inequality.[8] Four leading economists

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[2] Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, Q. J. OF ECON. 519, 531 (May 2016) (most of this wealth inequality is due to the concentration of wealth in the top 0.1%); Gabriel Zucman, *Global Wealth Inequality* 14–17 (Nat'l Bureau of Econ. Research, Working Paper No. 25462, 2019), https://www.nber.org/papers/w25462.pdf.

[3] INEQUALITY FOR ALL (72 Productions 2013).

[4] ROBERT REICH, AFTERSHOCK: THE NEXT ECONOMY AND AMERICA'S FUTURE (2010).

[5] JOSEPH STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012).

[6] Mark Niquette, *Dalio Says Capitalism's Income Inequality Is National Emergency*, BLOOMBERG (Apr. 7, 2019), https://www.bloomberg.com/news/articles/2019-04-07/dalio-says-capitalism-s-income-inequality-is-national-emergency.html.

[7] The Occupy movement, though it spotlighted economic inequality, attracted criticism as insufficiently attuned to issues of racial justice. *See, e.g.*, Kenyon Farrow, *Occupy Wall Street's Race Problem*, THE AMERICAN PROSPECT (Oct. 24, 2011), https://prospect.org/civil-rights/occupy-wall-street-s-race-problem/; Rinku Sen, *Race and Occupy Wall Street*, THE NATION (Oct. 26, 2011), https://www.thenation.com/article/archive/race-and-occupy-wall-street/.

[8] Emily Stewart, *We are (Still) the 99 Percent*, VOX (Apr. 30, 2019), https://www.vox.com/the-

affirmed this focus on accretion of wealth by those at the very top in a high-profile research paper that documented the doubling of the share of total income received by the top 1% in the United States over the prior thirty years.[9] The first of four contributing factors identified by these economists—Facundo Alvaredo, Anthony Atkinson, Thomas Piketty, and Emmanuel Saez—was tax policy. In 2010, Alavaredo et al. observed, "the top tax rate in the [United States] was less than half its 1950 value,"[10] and "there is a strong correlation between the reductions in top tax rates and the increases in top one percent pre-tax income shares."[11]

More recently, the inequality spotlight has widened to encompass a larger swath of upper income earners. In 2017, Richard Reeves called out the top 20% in his book *Dream Hoarders: How the American Upper Middle Class is Leaving Everyone Else in the Dust, Why That is a Problem, and What to Do About It*.[12] Reeves made the case that members of the top quintile benefit disproportionately from a bundle of federal government policies geared to helping them build wealth and pass that wealth on to their offspring. In this view, tax-preferred 401(k) pensions relieve children of costs associated with caring for aging parents, and 529 college tax-deferred accounts subsidize investment of the human capital of those same children. Meanwhile, the home interest mortgage deduction supports those able to buy expensive upscale homes in neighborhoods with good schools, paid for with tax-subsidized local property taxes.[13]

In a similar vein, Matthew Stewart announced the "Birth of a New Aristocracy" in *The Atlantic* in 2018.[14] For this group, income and wealth inequality go hand in hand with social and class immobility. Those who are in the top 9.9%—the top 10% minus the much-bruited super-rich—are riding the inequality wave while denying that they are anything other than middle class. Stewart asserts, "In between the top 0.1 percent and the bottom 90 percent is a group that has been doing just fine…[A]s a group, it owns substantially more wealth than do the other two combined."[15] This wealth is supported, according to Stewart, by substantial government largesse in the form of tax expenditures such as those described in the previous paragraph—"reverse taxation…[as to which] the bottom 90 percent haven't got a clue."[16] And, despite this level of advantage, writes Stewart, "we've convinced ourselves that we don't have any privilege at all."[17]

Three themes emerge from this chorus. First, economic inequality has been rising and has reached a level at which it has the potential to destabilize our social compact. A functioning democracy depends on all groups in society having—or perceiving that they

highlight/2019/4/23/18284303/occupy-wall-street-bernie-sanders-dsa-socialism.

[9] Facundo Alvaredo, Anthony Atkinson, Thomas Piketty, & Emmanuel Saez, *The Top 1 Percent in International and Historical Perspective*, 27 J. ECON. PERSP. 3 (2013).

[10] *Id*. at 7.

[11] *Id*. at 7–8.

[12] RICHARD REEVES, DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT (2017).

[13] *See, e.g.*, Palma Joy Strand, *Education-as-Inheritance Crowds Out Education-as-Opportunity*, 59 ST. L. UNIV. L. J. 283, 294 (2015) [hereinafter Strand, *Education-as-Inheritance*]; John Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 733–34 (1988).

[14] Matthew Stewart, *The Birth of a New American Aristocracy*, THE ATLANTIC (June 6, 2018), https://www.theatlantic.com/magazine/archive/2018/06/the-birth-of-a-new-american-aristocracy/559130/.

[15] *Id*.

[16] *Id*. at 58.

[17] *Id*. at 59.

have—representation and a voice in government decision-making. If the wealthy can buy influence and others are shut out, the government ceases to be "for the people." Similarly, a functioning economy depends on all groups in society having, or perceiving that they have, the opportunity to succeed. If the well-off can consolidate and perpetuate the economic status of their children, and in doing so consign the children of others to the lower rungs of the economic ladder, the economy ceases to enjoy the support of all. The problem of inequality is related to the problem of poverty, but it is distinct. Poverty describes the condition of particular individuals. Inequality describes a system characteristic: it is a relationship among individuals and groups within the larger polity and economy.[18]

Second, inequality is manifested through wealth as well as through income. Wealth and income are related—wealth generates income and income can generate wealth. In our system of private property, however, wealth can be directly protected, preserved, and transferred over time. The Takings and Just Compensation Clauses of the Constitution protect wealth in the form of private property.[19] Property and trust law protect and preserve wealth. Inheritance law provides for the transfer of wealth. In contrast, income, at least earned income, is contingent on the continued health and economic relevance of the skills of the earner. There are no guaranteed legal rights to income or even, in the United States, a human right to be gainfully employed.[20] In systems terms, income is the water that flows into or out of the bathtub, while wealth is the reservoir of water in the tub.[21] The behavior of the system depends on both the flow and the reserve, income and wealth.

Third, taxes affect inequality. Specifically, the current tax regime has contributed to, and is presently contributing to, the high levels of inequality that exist today. Alvaredo et al. point to the inequality effects of income tax rates, especially the marginal rates on top incomes.[22] Stiglitz advocates full-rate taxation of income from capital.[23] Reich proposes taxing wealth by bringing back a robust estate tax.[24] For example, only an estimated 0.07%, or 1 in 1,400 people who died in 2018, would pay any federal estate tax.[25] Reeves and Stewart focus on the cumulative effect of a series of federal tax expenditures that are universally available, but that in fact accrue heavily to a cohort of 10-20% at the top of the income and wealth distribution.[26] Consensus on the importance of taxes to inequality is combined with divergence over which specific tax provisions are the key levers for keeping inequality in check.

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[18] *See generally* RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY MORE EQUAL SOCIETIES ALMOST ALWAYS DO BETTER (2009).
[19] U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").
[20] *Cf.* International Covenant on Economic, Social, and Cultural Rights, art. 6, Dec. 16, 1966, 993 U.N.T.S. 3 (human right to work) (not ratified by the United States).
[21] DONELLA MEADOWS, THINKING IN SYSTEMS: A PRIMER 19–25 (Diana Wright, ed., (2008)).
[22] *See supra* notes 9–11 and accompanying text.
[23] Joseph Stiglitz, *Joseph Stiglitz Says Standard Economics Is Wrong. Inequality and Unearned Income Kills the Economy*, EVONOMICS (Sept. 9, 2016), http://evonomics.com/joseph-stiglitz-inequality-unearned-income/.
[24] Robert Reich, *To Restore Our Democracy We Must Tax Wealth*, NEWSWEEK (Sep. 18, 2017), https://www.newsweek.com/robert-reich-restore-our-democracy-we-must-tax-wealth-666856.
[25] Alexandra Thornton & Galen Hendricks, *Ending Special Tax Treatment for the Very Wealthy* 11 CTR. FOR AMER. PROGRESS (June 2019), https://cdn.americanprogress.org/content/uploads/2019/06/03112929/Ending-Special-Tax-Treatment.pdf.
[26] *See supra* notes 12–17 and accompanying text.

Although much tax analysis focuses on encouraging or discouraging a particular behavior with a specific tax expenditure or imposed tax, the contribution of tax policy and practice to inequality is multi-faceted. If inequality is a characteristic of our society as a whole, viewing taxes holistically illuminates system dynamics not apparent from more segmented investigations. In systems theory, taxes are an essential strategy for breaking a "loop of the rich getting richer and the poor getting poorer."[27] Taxes accomplish this moderating of potential extreme accumulations of wealth by shifting wealth away from the rich through a financial contribution to the public or community good, which entails redistributing wealth toward the poor. This redistribution generally occurs in the form of social welfare expenditures, including especially robust health care and public education.[28] Taxes keep a "success to the successful" system loop from spinning out of control. They bring stability to the social and economic system as a whole.

B. Race and Wealth Inequality are Connected: A Brief History

The inequality Cassandras described above focuses on straightforward economic inequality, in which the rich are simply the rich and the poor are simply the poor. Other investigators of inequality, however, have documented that the rich tend to be White and the poor tend to be people of color. In terms of income, Black men's hourly earnings in 2016 averaged 70% of White men's hourly earnings. Black women's hourly earnings averaged 82% of White women's hourly earnings.[29] These wage disparities have actually widened since 1979, when these percentages were 80% and 95% respectively.[30] Further, Black men and Black women experience higher unemployment than White men and White women.[31] In terms of wealth, White household wealth currently averages about ten times that of Black household wealth[32] and about eight times that of Latinx household wealth.[33] For Black people in particular, racial wealth disparities are long standing and are grounded in history.[34]

Historical waves of nation-scale wealth-building initiatives accrued primarily to the benefit of Whites, both native and foreign-born, excluding Black citizens and other people of color.[35] The institution of slavery, serving as the foundation for much of the nation's wealth,[36] funneled the economic benefits of the labor of Black people almost exclusively to White people who were slave owners or who engaged in commercial enterprises built

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[27] MEADOWS, *supra* note 21, at 130.
[28] *Id*.
[29] Mary Daly et al., *Disappointing Facts about the Black-White Wage Gap*, FED. RESERVE BANK OF S.F. 1, 2 (2017), https://www.frbsf.org/economic-research/publications/economic-letter/2017/september/disappointing-facts-about-black-white-wage-gap/.
[30] *Id*.
[31] *Id*.
[32] Angela Hanks, Danyelle Solomon, & Christian Weller, *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/.
[33] *Id*.
[34] Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 474–77 (2010) [hereinafter Strand, *Inheriting Inequality*].
[35] *See* Kimberly Amadeo, *Home Equity and the Racial Wealth Gap*, THE BALANCE (Jan. 15, 2019), https://www.thebalance.com/how-home-equity-drives-the-racial-wealth-gap-4178236.
[36] *See generally* SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2017).

on or tied to the labor of Black enslaved people.

Following the Civil War and the abolition of slavery, Reconstruction failed to deliver on the promised "forty acres and a mule" for those who had been enslaved and were now free.[37] Beginning in 1862, the Homestead Acts opened up vast acreages in the Midwest and West for acquisition by ordinary people.[38] Though the resulting farms and ranches provided a secure toehold on the American ladder of success for many Whites—immigrants from places such as Germany and the Scandinavian countries, as well as overland migrants from the Eastern seaboard—newly freed Black citizens were generally excluded.[39]

When pervasive violence in the South and the pull of labor shortages in the North led to the Great Migration over the first half of the twentieth century, locally segregated neighborhoods and discrimination in access to housing were brought to national scale by redlining and federal mortgage policies beginning in the 1930s. Federally supported investment in White neighborhoods and disinvestment in Black or racially-mixed neighborhoods provided public subsidies that gave White citizens the opportunity to build private wealth in the form of home equity.[40] Again, Black citizens were generally excluded. While less tangible during the mid-twentieth century, labor and organizing protections, Social Security, and the GI Bill's door to education redounded primarily to the advantage of White citizens with resulting disadvantage to Black citizens.[41]

Overall, massive federal wealth-building programs over centuries successfully created a large body of citizens—often described as the "middle class"—with sufficient family wealth to serve as both an economic springboard and an economic buffer. The cumulative result of the racial skew of these programs over time is starkly evident today. White families hold more wealth than Black families, and the racial wealth inequities that exist today resulted from systematic and repeated actions by government that intentionally afforded White citizens access to private wealth while excluding Black citizens and other people of color.[42] Today, these racial disparities perpetuate themselves through White inheritance[43] and other intergenerational wealth transfers such as investments in education.[44]

In describing discrimination, we often focus on the way differential treatment disadvantages a specific group. This focus on disadvantage has the effect of "norming" the treatment of the advantaged group. For example, suburban homeownership with home equity is characterized as a benefit that "most people" enjoy, and discrimination becomes the exclusion of some from suburbia. Yet discrimination just as effectively takes the form of preferential treatment of one group, resulting in advantage for that group. Discrimination

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[37] W.T. Sherman, Special Field Order No. 15: "Forty Acres and a Mule" (Jan. 16, 1865).

[38] Keri Leigh Merritt, *Land and the Roots of African-American Poverty*, AEON (Mar. 11, 2016), https://aeon.co/ideas/land-and-the-roots-of-african-american-poverty.

[39] *Id*.

[40] *See generally* IRA KATZELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005).

[41] *Id.*

[42] *See generally* Christopher Petrella & Ameer Hasan Loggins, *"Middle Class" is a White Racial Construct*, BLACK PERSPECTIVES (Apr. 16, 2018), https://www.aaihs.org/middle-class-is-a-white-racial-construct/.

[43] *See generally* Strand, *supra* note 34.

[44] *See generally* Strand, *Education-as-Inheritance*, *supra* note 13.

thus also takes the form of huge and longstanding federal subsidies for White suburbs, wealth-building in the form of home equity in "desirable" (predominantly-White) neighborhoods, and high-performing suburban schools with populations that include low percentages of children in poverty, populations that happen to be predominantly White.

For most "middle class" families, the bulk of the wealth that federal wealth-building programs facilitated during the 1900s is today held in home equity. Homeownership and home equity give those families a disproportionate "stake" in their local communities and in the nation as a whole. Black citizens, as compared to White citizens, are less likely to own their own home. In the fourth quarter of 2018, for example, the national non-Hispanic White homeownership rate was 73.6%; the Black homeownership rate was 42.9%.[45] When Black citizens do own homes, those homes on average provide lower levels of home equity wealth than do those owned by White citizens.[46] In 2016, "Black homeowners also had less than half the home equity of white homeowners—$45,000 compared with $92,000, respectively."[47] Though the 1968 federal Fair Housing Act outlawed racial discrimination in housing,[48] many institutional practices on the part of both government and private entities continue to advantage White citizens in the enterprise of building wealth through homeownership.

C. Evolution of Racism: Legal and Institutional Forms Change, but Effects Remain the Same

The history of racism in the United States is one of evolution.[49] Slavery was the foundational economic institution on which American capitalism was built.[50] Following the abolition of slavery, convict labor systems evolved to control and exploit Black men.[51] Lynchings and White Supremacy in the form of the separate-but-equal system of Jim Crow evolved in the South to suppress Black economic success and social resistance.[52] In

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[45] Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2018 tbl. 7, Release No. CB19-10 (Feb. 28, 2019), https://www.census.gov/housing/hvs/files/qtr418/Q418press.pdf.

[46] William Darity Jr. et al, *What We Get Wrong About Closing the Racial Wealth Gap*, DUKE INSIGHT CTR. FOR CMTY. ECON. DEV. (Apr. 2018), https://insightcced.org/wp-content/uploads/2018/07/Where-We-Went-Wrong-COMPLETE-REPORT-July-2018.pdf; J. Brian Charles, *Federal Housing Discrimination Still Hurts Home Values in Black Neighborhoods*, GOVERNING (Apr. 30, 2018, 1:00 PM), https://www.governing.com/topics/transportation-infrastructure/gov-redlining-race-real-estate-values-lc.html.

[47] Hanks, Solomon, & Weller et al., *supra* note 32; Dorothy A. Brown, *Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Inequity,* 49 U. OF MEM. L. REV. 205, 222 (2018) (a study of the first decade of this millennium revealed that between 2003 and 2005, as well as between 2005 to 2007, White housing net worth increased by approximately 50% while Black housing net worth decreased by 23% and 47%, respectively).

[48] 42 U.S.C. §§ 3601–3619 (2012).

[49] Palma Joy Strand, *Racism 4.0, Civity, and Re-Constitution*, 42 HASTINGS CONST. L. Q. 763, 765–71 (2015) (citing and expanding on Bryan Stevenson speech) [hereinafter Strand, *Racism 4.0*].

[50] EDWARD BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2016).

[51] DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2009).

[52] Calvin Schermerhorn, Why the Racial Wealth Gap Persists, More than 150 Years After Emancipation, WASH. POST (June 19, 2019), https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation/.

response to the Great Migration, housing segregation and racialized investment in homeownership led to racial disparities in wealth and disproportionate exposure of Black citizens to poverty and poor neighborhoods in the North as well. Mass incarceration of Black men[53] and an epidemic of housing insecurity for Black women and children[54] perpetuate exclusion and marginalization of Black citizens in the United States today.

In particular, the legacy of decades of redlining and other differential neighborhood investment is coming to light.[55] Maps of many metropolitan areas tell a powerful story. Redlined areas to which Black people and other people of color were historically restricted are often today areas of concentrated racial or ethnic poverty.[56] These neighborhoods have poorer schools, sometimes in separate school districts.[57] Health outcomes, employment, exposure to crime—all of these racial disparities are, in the words of legal scholar john a. powell, "inscribed in geography."[58]

The institutional arrangements that perpetuate these racial disparities are often hidden, though sometimes hidden in plain sight. Exclusionary zoning effectively occurs when there is an absence of inclusionary zoning.[59] School district lines and funding structures concentrate funding for public schools in up-scale, predominantly White neighborhoods and provide Black neighborhoods with fewer financial resources, the result of disinvestment over years.[60] Neighborhoods of people of color are torn up to build interstate freeways.[61] Food deserts are allowed to exist while local incentives subsidize stadiums rather than grocery stores.[62] Parsing causation of deep-seated and historically normed practices entails sophisticated critical institutional forensics.[63]

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[53] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[54] *See generally* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

[55] *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2018) (national history); Palma Joy Strand, *"Mirror, Mirror, on the Wall…": Reflections on Fairness and Housing in the Omaha-Council Bluffs Region*, 50 CREIGHTON L. REV. 183 (2017) (metropolitan Omaha history) [hereinafter Strand, *"Mirror Mirror"*].

[56] Tracy Jan, *Redlining was Banned 50 Years Ago. It's Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/.

[57] Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, 6 RACE SOC. PROBS. 4 (2015); Kimberly Quick & Richard Kahlenberg, *Attacking the Black-White Opportunity Gap That Comes from Residential Segregation*, THE CENTURY FOUND. REPORT (June 25, 2019), https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/.

[58] *Interview with john a. powell*, Race: The Power of an Illusion, Episode 3: "The House We Live In" (2003), https://www.pbs.org/race/000_About/002_04-background-03-06.html (national pattern); *See, e.g.*, Palma Joy Strand, *The Invisible Hands of Structural Racism in Housing: Our Hands, Our Responsibility*, 96 U. OF DETROIT MERCY L. REV. 155, 169–71 (2019) (metropolitan Omaha pattern) [hereinafter Strand, *Invisible Hands*]

[59] *See, e.g.*, Strand, *"Mirror, Mirror," supra* note 55, at 210.

[60] *See generally* DAVID DANTE TROUTT, THE PRICE OF PARADISE: THE COSTS OF INEQUALITY AND A VISION FOR A MORE EQUITABLE AMERICA (2013).

[61] Alana Semuels, *The Role of Highways in American Poverty*, THE ATLANTIC (Mar. 18, 2016), https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282/.

[62] Kelly Brooks, Research Shows Food Deserts More Abundant in Minority Neighborhoods, JOHNS HOPKINS MAG. (2014); Scott Wolla, *The Economics of Subsidizing Sports Stadiums*, FED. RES. BANK OF ST. LOUIS (May 2017).

[63] *See, e.g.*, Strand, *"Mirror, Mirror," supra* note 55; Strand, *Invisible Hands*, *supra* note 58.

The long view of the history of race, racism, and wealth in the United States highlights two important themes. First, the broad brush is that over the course of centuries, a transfer of wealth of almost unimaginable scope from Black people to White people took place in this country. Black labor literally built much of the nation, and the lion's share of that labor was unpaid or underpaid. Using that labor, White owners and investors created and consolidated capital enterprises that shape the nation's economy today. As the nation democratized[64] and the federal government began to view broad-based wealth-building opportunities in the national interest, White citizens were given access to those opportunities while Black citizens and other people of color were generally excluded. Through private, individual ownership, the Homestead Acts consolidated the United States' hold on land in the middle and western parts of the continent.[65] Home mortgages and the G.I. Bill built a solid base of middle-class human capital that enabled the post-WWII economic boom.[66]

Second, racism and racial practices that advantage White citizens and disadvantage Black citizens are deep-seated and difficult to eradicate. With each historical social movement for equality and equity—abolition, Reconstruction, the anti-lynching movement, the Civil Rights Movement—the dominant form of racism shifted from one that takes a more overt institutionalized and legalized form to one that is less overt in form but nonetheless potent.[67] Lawmakers constructed current anti-discrimination law to counter Jim Crow *de jure* racism, focusing on overt and intentional acts of discrimination.[68] Current law, which assumed its present form in the 1970s, has shown itself incapable of taking on racial discrimination that is embedded in institutional arrangements that are racially neutral on their face.[69] Yet this form of systemic racism is pervasive today.

In addition, even where anti-discrimination statutes explicitly go beyond racial neutrality to address the continuing effects of past discrimination that was overt and explicit, enforcement of legal requirements has been less than robust and continues to weaken. For example, the Affirmatively Furthering Fair Housing (AFFH) provision of the Fair Housing Act of 1968 was adopted to redress the federal government's own role in housing discrimination over decades.[70] HUD regulations promulgated in 2015 gave teeth to the statutory AFFH requirement,[71] but HUD suspended those regulations in 2018.[72] As

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[64] *See, e.g.*, Daniel Feller, *Andrew Jackson: The American Franchise*, MILLER CENTER, https://millercenter.org/president/jackson/the-american-franchise ("By the time Jackson was elected [in 1828], nearly all white men could vote and the vote had gained in power.").

[65] Merritt, *supra* note 38.

[66] *See supra* notes 13 & 40 and accompanying text.

[67] Strand, *Racism 4.0*, *supra* note 49, at 766–69.

[68] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Strand, *Racism 4.0*, *supra* note 49, at 766–67**.**

[69] Strand, *Racism 4.0*, supra note 49, at 767–68.

[70] Strand, *"Mirror, Mirror," supra* note 55; Strand, *Invisible Hands*, *supra* note 58.

[71] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015), amending 24 C.F.R. Part 5).

[72] *HUD Indefinitely Suspends AFFH Rule, Withdraws Assessment Tool*, NAT'L LOW INCOME HOUS. COALITION (May 21, 2018), https://nlihc.org/resource/hud-indefinitely-suspends-affh-rule-withdraws-assessment-tool. HUD proposed replacement AFFH regulations in January 2020. Proposed Rule on Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020). Jim Dalrymple II, *HUD unveils fair housing proposal, draws condemnation from housing advocates*, INMAN (Jan. 7, 2020) https://www.inman.com/2020/01/07/hud-unveils-fair-housing-proposal-draws-condemnation-from-housing-advocates/.

another example, the U.S. Supreme Court in 2013 eviscerated the preclearance provisions of the Voting Rights Act of 1965, which Congress had re-endorsed at several points.[73]

Current legal doctrine holds disparities between racial groups, even the best-proven and most-acute, to be beyond the purview of the Constitution's guarantee of equal protection of the law.[74] Chief Justice John Roberts, for example, embraces the racially naïve "colorblind" view that "the way to get past racial discrimination is to stop discrimination based on race."[75] Justice Sotomayor, in contrast, has strongly rebutted this view:

> 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.[76]

Challenging each renewed manifestation of racism requires first naming and describing it and then organizing for resistance and change. The current rising documentation of and willingness of more people to pay attention to systemic and institutionalized racism that results in racial disparities inextricably intertwined with economics and wealth is hopefully laying the groundwork for social, political, and legal anti-racist mobilization to challenge and dismantle racism that extends beyond explicit and invidious discriminatory actions.

D. Wealth in the Twenty-First Century: Different Assets, Same Racial Disparities

In the twenty-first century, financial assets and human capital are of increasing importance in the calculus of wealth. The center of gravity of wealth has shifted over the past two hundred years from land in an agricultural economy to tangible assets in an industrial economy to financial instruments and human capital in a post-industrial knowledge economy. Law professor John Langbein noted this shift in the context of inheritance in the 1980s, observing that intergenerational wealth transfers were shifting away from businesses and other tangible assets.[77] Rather, wealth was, and is, passing intergenerationally in families by older generations relieving successive generations of the burdens of care through increasing provision of pensions to cover expenses associated with aging, as well as investment in the human capital of younger generations through education.[78]

The defined-benefit pensions that predominated at the time Langbein was writing, provided primarily by corporate employers, have given way to defined-contribution retirement savings plans, which operate through tax incentives extended to individuals.[79]

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[73] Shelby Cty. v. Holder, 570 U.S. 529 (2013); ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA 182–86 (2020).
[74] *See, e.g.*, McKleskey v. Kemp, 481 U.S. 279 (1987).
[75] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 786 (2007).
[76] Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 380 (2014) (Sotomayor, J., dissenting).
[77] Langbein, *supra* note 13, at 727–36, 739–46.
[78] Langbein, *supra* note 13, at 743, 730.
[79] Hunter Kuffel, *Pension vs. 401(k): Comparing Retirement Plans*, SMART ASSET (Feb. 25, 2019),

"Education-as-inheritance"[80] also enjoys substantial financial government support via the tax system, through college savings plans[81] as well as deductions for local property taxes that fund public schools and home interest mortgages to purchase homes in "desirable" (low-poverty, high-tax-base, often predominantly-White) school districts.[82] Both of the latter deductions provide greater benefit to taxpayers buying premium homes in premium districts.[83]

These knowledge-economy forms of wealth—financial assets such as pensions; access to top-quality education—manifest significant racial disparities. As noted above, the average White household holds ten to fourteen times the wealth of the average Black household.[84] The racial disparities for *financial* wealth—intangible assets such as pensions, mutual funds, stocks and bonds—are even more acute. Before the housing crisis of the late 2000s, while median Black wealth hovered around 10% of median White wealth, median Black financial wealth came in at 0% of median White financial wealth.[85] The current picture with respect to retirement savings specifically reveals significantly less of a pension wealth "cushion" for Black families than for White families. In 2016, "[o]nly 37.5 percent of non-retired blacks had retirement savings plans—401(k)s and IRAs—compared with 65.9 percent of whites. Blacks had a median balance in retirement savings that was approximately one-third that of whites—$23,000 compared with $67,000, respectively."[86] The latter comparison includes only those who actually have retirement savings.

With respect to education, the picture is less clear because so many factors contribute to a family's ability to invest in the next generation. Families with greater wealth can afford child enrichment, residency within school districts with high-performing public schools,[87] college preparation support, and college itself.[88] With lower net worth, Black parents have fewer resources to apply to educating their children. Home equity, as White anti-racism activist Tim Wise points out in *White Like Me*, provides a significant family asset that can serve as collateral for a loan for college tuition.[89] White families are simply more likely to have such a nest egg—and to have it be plumper when they do. Similarly, of families that

https://smartasset.com/retirement/pension-vs-401k.html.

[80] *See* Strand, *Education-as-Inheritance*, *supra* note 13.

[81] *See, e.g.*, *Name the Top 7 Benefits of 529 Plans*, SAVING FOR COLLEGE (Aug. 29, 2018), https://www.savingforcollege.com/intro-to-529s/name-the-top-7-benefits-of-529-plans.html.

[82] *See supra* note 13 and accompanying text. The cap on these deductions was lowered by the Tax Cuts and Jobs Act of 2017 from $1 million to $750,000 for married taxpayers filing jointly.

[83] Dorothy Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 331, 332 (2009) ("For the majority of blacks, homeownership is a poor financial investment . . . But the vast majority of whites receive better neighborhoods, better schools, less crime and a good financial investment when they become homeowners.").

[84] WILLIAM DARITY ET AL., WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP 2 (2018) ("Recent data from the Survey of Income and Program Participation (2014) shows that black households hold less than seven cents on the dollar compared to white households.").

[85] Strand, *Inheriting Inequality*, *supra* note 34, at 461–62 (Black median financial wealth was $0 compared to White median financial wealth of $6,999 in 1995, based on 1980s data).

[86] Hanks et al., *supra* note 32, at ¶ 30.

[87] *See* Motoko Rich, Amanda Cox & Matthew Bloch, *Money, Race and Success: How Your School District Compares*, N.Y. TIMES (Apr. 29, 2016), https://www.nytimes.com/interactive/2016/04/29/upshot/money-race-and-success-how-your-school-district-compares.html. The national graph shows a direct correlation between parent socioeconomic status and student education attainment by public school district.

[88] Strand, *Education-as-Inheritance, supra* note 13.

[89] TIM WISE, WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON 11–13 (2004).

use 529 savings accounts to cover their children's higher education, the total average contribution to a child's college costs from such funds by a White family is $1863 compared to $669 by a Black family and $432 by a Hispanic family.[90] The need for Black and Latinx students to assume more debt to pay for college leads to a lower return on investment for higher education generaly. While the median wealth return to college graduation for White students is $60,000, it is only $4,846 for Black students and $4,191 for Latinx students.[91]

More indirect factors related to housing and wealth also have a racial skew. Recent work by economist Raj Chetty's "Moving to Opportunity" team, for example, shows that growing up in a neighborhood with greater resources increases a child's chance of going to college.[92] Education professors Sean Reardon et al., however, have shown that access to "neighborhoods of opportunity" is racially distributed:

> [L]ow-income black and Hispanic children face a triple disadvantage relative to middle-class white children: not only do their families have fewer private resources and live in poorer neighborhoods, but they also live in much poorer neighborhoods than equally poor white children. Given that neighborhood conditions matter for children's development, the joint patterns of racial and economic segregation described here suggest that children of different races and incomes face dramatically different life opportunities.[93]

The increasing importance of financial forms of wealth such as pensions and 529s compound the effects of more tangible forms of wealth such as home equity.

More deeply, the growth of new forms of wealth—financial and human capital—reveals how the acquisition of new forms of wealth is supported by the possession of older wealth. Home ownership and home equity, for historical reasons held disproportionately by White households, create access to education and human capital through enrollment in predominantly White suburban schools.[94] Homeownership and home equity also support this growth in human capital by providing wealth that can be applied to college tuition, which provides a level of education critical in the knowledge economy. Human capital in upcoming generations enables high-paying employment,[95] the kind of employment that provides benefits such as private pension plans and that allows surplus income that

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[90] SALLIE MAE & IPSOS PUBLIC AFFAIRS, HOW AMERICA PAYS FOR COLLEGE: SALLIE MAE'S NATIONAL STUDY OF COLLEGE STUDENTS AND PARENTS 33 (2019).

[91] Laura Shin, *The Racial Wealth Gap: Why A Typical White Household Has 16 Times The Wealth Of A Black One*, FORBES (Mar. 26, 2016), https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#ad178d01f45e.html.

[92] Raj Chetty, Nathaniel Hendren, & Lawrence Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Project*, 106 AM. ECON. REV. 4, 21–24 (2016), https://scholar.harvard.edu/hendren/publications/effects-exposure-better-neighborhoods-children-new-evidence-moving-opportunity.

[93] Sean Reardon, Joseph Townsend, & Lindsay Fox, *A Continuous Measure of the Joint Distribution of Race and Income Among Neighborhoods*, 3 RUSSELL SAGE J. SOC. SERV. 34, 53 (2017).

[94] *See supra* notes 13, 40–41, 55, & 58 and accompanying text.

[95] Palma Joy Strand, *Is* Brown *Holding Us Back? Moving Forward, Six Decades Later: Visionary States, Civic Locals, and Trusted Schools and Teachers*, 23 KAN. J. L. & PUB. POL'Y 283 (2014) [hereinafter Strand, *Brown*].

facilitates investment in the financial wealth that supplements home equity, as well as high-quality education for the next generation.

E. The Tax System is the New Racism

Two constants and two variables emerge from the discussion to this point. The first constant is the inverse relationship between progressive taxation and inequality: higher levels of redistribution lead to lower inequality.[96] As described above, the counters to an inherent tendency in the wealth system for the rich to get richer and the poor to get poorer are public in nature.[97] Public tax revenues can pay for robust and effective public education, which, when universally available, can "crowd out" well-off individuals investing privately in their children's education.[98] Similarly, public tax revenues can fund public pensions, roughly represented by Social Security, to soften the need for private pensions. But public goods only counter the escalating tendency toward concentration of wealth in the system if they are redistributive—if the revenues paying for them come from taxation that is progressive, referring to a system in which the net benefits flow from the rich to the poor, and if the expenditures substantially accrue to the poor.

The second constant is the direct relationship in the United States between race and wealth in the form of White advantage and Black disadvantage. As discussed previously, racial disparities not only in wealth but in other areas of well-being to which wealth makes a direct contribution—education, health, liberty, income, and more—are not asymptotically approaching zero. Far from it.

The first variable is the form taken by racism. The exploitation of slavery was replaced by the exploitation of convict labor. Lynching and Jim Crow gave way to redlining and racially determined patterns of neighborhood investment and disinvestment that persist today. Overt institutions of racial discrimination are now superseded by social and legal structures that reproduce racial disparities in a facially race-neutral manner following the civil rights reforms of the 1960s. Mass incarceration and continuing racial disparities in health, education, safety, and more are the products of today's racism. Though the system of racial advantage has not changed, the form that system takes has mutated.

The second variable is the form of wealth. Home equity is still important, as is the location of the home in which that equity lies. Financial assets such as pensions and college funds, however, now augment the middle-class wealth cushion for many White households—far more than for Black households.[99] And human capital, developed through education, is increasingly valuable in the knowledge economy.

If racism is continuing to evolve and if a core imperative of racism relates to differential wealth creation, the question arises: What is the current mutation, the new institutions, laws, and practices that are perpetuating racial inequity without as yet having been recognized and named? How is racism continuing to operate to the advantage of White citizens while disadvantaging Black citizens and other people of color? The Civil Rights reforms of the 1960s sent racism underground, yet we continue to see today the tangible effects of the overtly racist policies of the past, including those of the twentieth century.

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[96] *See supra* notes 10-11, 21-28 and accompanying text.
[97] *See supra* notes 27-28 and accompanying text.
[98] Strand, *Education-as-Inheritance, supra* note 13, at 297–301.
[99] *See supra* notes 86 and 90 and accompanying text.

Going more deeply, what institutional structures and systems have evolved over the past half-century that are operating "under the radar" of law while at the same time having large-scale and pervasive racist effect? We use the word "racist" here in the sense offered by psychologist Beverly Daniel Tatum; building on her definition of "racism" as "a system of advantage based on race,"[100] "racist" becomes a descriptor of a system that results in advantage and disadvantage based on race. Racist systems need not appear in the garb of the Ku Klux Klan or be framed in terms of overt White Supremacy.

Our thesis here is that the tax system as a whole—federal, state, and local; income, payroll, sales, property, individual, corporate—has gradually but distinctly shifted in ways that serve to protect and consolidate existing White wealth and wealth perpetuation since the 1970s.[101] The tax system accomplishes this in two distinct ways. First, the system as a whole has shifted away from taxes on wealth to taxes on consumption. Taxes on wealth are progressive; they fall more heavily on those with greater assets and higher incomes, often unearned incomes. Taxes on consumption, in contrast, are regressive; they fall more heavily on those with fewer assets and lower incomes, often earned incomes. Second, tax expenditures for individuals have skewed to largely benefiting wealthier, higher-income taxpayers, disguising government benefits for these citizens and leaving poorer, lower-income taxpayers to scramble for other, non-tax-supported resources. Concurrently, support for direct expenditures for public infrastructure that supports everyone has declined.

II. Federal, State, and Local Tax Systems as Drivers of Inequality

A. A Roadmap

Most critical tax writing focuses on one or more specific provisions of the tax code, usually the federal tax code. Our focus here is the tax system writ large and the overall functional effect of that system as it currently exists, the product of decades of anti-tax initiatives and legislation. We include as important features of the Federal tax system the following: (i) income versus payroll; (ii) estate tax roll-back; (iii) capital gains preference; (iv) roll-back of top marginal income tax rates; (v) reduction of corporate tax rates and other business-focused tax benefits; (vi) shift of CEO compensation from salary to entity ownership incentives; and (vii) "mandarin/ aristocratic" tax expenditures, which include the home mortgage interest deduction, pre-tax contributions to retirement plans, and tax benefits for education (section 529 qualified tuition programs). In our review of state and local tax systems, the overall regressive quality of those tax systems is rampant, with definite commonalities among states with the most regressive taxes and similarities among those with the least regressive taxes.

[100] Tatum, *supra* note 1, at 87–89.

[101] The tax system is also gendered, but that is not our focus here. For example, pension benefits accrue disproportionately to men because pensions derive from income and men's work leans toward paid over unpaid work, while women as a group work more unpaid hours than paid hours. Men also work at better-paying jobs with better benefits due to workplaces being structured in ways that do not accommodate non-work care responsibilities most often shouldered by women. *See, e.g.*, Stephanie Lane, *The Scary Facts Behind the Gender Pension Gap*, World Econ. Forum (Mar. 7, 2018), https://www.weforum.org/agenda/2018/03/retired-women-less-money-pensions-than-men/; Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It (2001).

Our inequality framework centers on three essential insights. First, it is important to focus on wealth because focusing on income alone distracts from long-term systemic dynamics. Second, tax 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. Third, the federal tax code is not the only contributor to inequality. While federal tax receipts were sixty-five percent of total tax revenues in 2016, states accounted for 20% of the total tax revenues and local governmental units accounted for the remaining 15%.[102] Furthermore, state and local governments pay for the lion's share of education—a key factor in the inequality equation. As with the federal tax system, state and local tax systems have exhibited a distinct and systemic shift away from income tax progressivity and towards consumption-based taxes.

B. Income vs. Wealth Inequality

Economist Daniel Altman has written extensively on wealth and income inequality, stating that "the debate about inequality inflames many passions because of its moral and philosophical trappings."[103] Framing inequality as an economic problem and not just a social one,[104] he concludes that the real menace for long-term prosperity is not income inequality but wealth inequality because wealth inequality distorts access to economic opportunities.[105] Altman provides a staggering comparison: "In 1992, the top tenth of the population controlled twenty times the wealth controlled by the bottom half. By 2010, it was 65 times."[106] Between 1983 and 2016, the number of households with $10 million or more in wealth increased at an exponential rate of 856%![107] These comparisons buttress the warnings being declared more frequently these days—wealth inequality, both nationally and globally, puts democracies in jeopardy.[108] Rising inequality yields public skepticism of governmental purpose, leading to conclusions that the government operates more in favor of the rich and therefore provides fewer options for those of lesser wealth.[109]

When economists measure inequality, they focus typically on income because the data are more readily accessible. However, income data do not reveal the true economic power of people who are retired, receive securities or other ownership interests as compensation, or utilize complex strategies and planning to avoid taxes.[110] Trends in

[102] THE TAX POLICY CENTER, BRIEFING BOOK (2020), https://www.taxpolicycenter.org/briefing-book/what-breakdown-tax-revenues-among-federal-state-and-local-governments.
[103] Daniel Altman, *The Inefficiency of Inequality*, FOREIGNPOLICY.COM (Jan. 22, 2014), https://foreignpolicy.com/2014/01/22/the-inefficiency-of-inequality/.
[104] *Id*.
[105] Daniel Altman, *To Reduce Inequality, Tax Wealth, Not Income*, N.Y. TIMES (Nov. 18, 2012), https://www.nytimes.com/2012/11/19/opinion/to-reduce-inequality-tax-wealth-not-income.html.
[106] *Id*.
[107] *See infra* note 119, at 281–82.
[108] Niquette, *supra* note 6 and accompanying text; STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); *see also* Martin Wolf, *Inequality is a Threat to Our Democracies*, FINAN. TIMES (Dec. 19, 2017), https://www.ft.com/content/47e3e014-e3ea-11e7-97e2-916d4fbac0da.html; Laurie Goering, *Growing Wealth Inequality 'Dangerous' Threat to Democracy: Experts*, REUTERS.COM (Apr. 15, 2016), https://www.reuters.com/article/us-democracy-wealth-inequality/growing-wealth-inequality-dangerous-threat-to-democracy-experts-idUSKCN0XC1Q2.html.
[109] *Id*.
[110] Altman, *supra* note 103.

distribution of wealth can vary greatly from trends in income because wealth is a measure of accumulated assets, not a flow over time. High earners add much more to their wealth every year compared to low earners.[111] Over time, wealth inequality rises even as income inequality is stagnant, with wealth inequality becoming more severe.

Tax policy undoubtedly has a role to play in overall wealth inequality by affecting how much high-income earners can accumulate annually and add to their wealth. To illustrate, with a focus on "private income" such as earnings and dividends among other income streams, income of families in the top 10% of households increased approximately 90% from 1963 to 2016; income of families in the bottom 10% increased less than 10% in that same time period.[112] The concentration of income among wealthy taxpayers is conspicuous across all fifty states. The average income of the top 5% of households is at least ten times that of the bottom 20%; further, in approximately nineteen states, the top 20% of households receives more than 45% of all income.[113] These disparities in earning potential, which clearly benefit high-income taxpayers, add up over a lifetime, positively affecting their wealth accumulation.[114]

Most Americans, particularly higher-income Whites, "vastly overestimate progress toward economic equality between blacks and whites."[115] Notwithstanding perception, the actual differences in earning potential based on race and ethnicity are stark, widening the racial and ethnic wealth gap as well. Based on Census Bureau data, Blacks are the only racial group experiencing a drop in median income since 2000; White, Asian and Hispanic households have all seen at least modest income gains.[116] In 2016, median household income for Blacks was just over $39,000, compared to over $47,000 for Hispanics, over $65,000 for Whites, and over $81,000 for Asian American households.[117]

With respect to wealth, a significant racial divide between White households and households of color has occurred over the past three decades. 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).[118] Between 1983 and 2016, the median wealth of a Black household decreased by more than one-half, while median White household wealth increased by 33%.[119]

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[111] Signe-Mary McKernan et al., *Nine Charts About Wealth Inequality in America*, URBAN INST. (2017), http://apps.urban.org/features/wealth-inequality-charts/.
[112] *Id*.
[113] Elizabeth McNichol, *How State Policies Can Stop Increasing Inequality and Start Reducing It*, CTR. ON BUDGET & POL. PRIORITIES (Dec. 15, 2016), https://www.cbpp.org/research/state-budget-and-tax/how-state-tax-policies-can-stop-increasing-inequality-and-start [hereinafter McNichol, *State Policies*].
[114] McKernan et al., *supra* note 111.
[115] Emily Badger, *Whites Have Huge Wealth Edge Over Blacks (but Don't Know It)*, N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/interactive/2017/09/18/upshot/black-white-wealth-gap-perceptions.html; *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RESEARCH CTR. (June 27, 2016), https://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/ ("About four-in-ten blacks are doubtful that the U.S. will ever achieve racial equality.").
[116] Heather Long, *African Americans are the Only Racial Group in U.S. Still Making Less than they Did in 2000*, WASH. POST (Sept. 15, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/15/african-americans-are-the-only-racial-group-in-u-s-still-making-less-than-they-did-in-2000/?noredirect=on&utm_term=.7b15dbc00621.
[117] *Id*.
[118] INST. FOR POL'Y STUDIES, *Dreams Deferred: How Enriching the 1% Percent Widens the Racial Wealth Divide* (Jan. 15, 2019), https://ips-dc.org/racial-wealth-divide-2019/.
[119] *Id*. More specifically, wealth inequality has widened along racial and ethnic lines since end of the "Great

Additionally, the 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).[120] To make up that gap in wealth is daunting; one study illuminates it: "By 2024, median Black and Latino households are projected to own 60-80% less wealth than they did in 1983. By then, the continued rise in racial wealth inequality between median Black, Latinx and White households is projected to lead White households to own ninety-nine and seventy-five times more wealth than their Black and Latino counterparts, respectively."[121] Reflecting on that study, one commentator noted: "While the income gap provides a huge hurdle to equality, the wealth gap presents a mountain."[122]

C. The Internal Revenue Code Drives Wealth Inequality

The current Internal Revenue Code (IRC) is frequently referred to as a major social policy tool, with critics bemoaning both its use—"to be everything to everyone"[123]—and the vast number of preferences or "tax expenditures" it provides. The modern concept of tax expenditures originated in the 1960s from then-Assistant Secretary of the Treasury Stanley Surrey observing that many tax preferences in the IRC resembled spending. Surrey regarded "tax expenditures" as comprising two elements—structural provisions and special preferences.[124] The first element encompasses structural provisions necessary to a functioning income tax, namely, the concepts of net income, exemptions, accounting periods, entities subject to tax, and rate schedules.[125] The second element consists of the special preferences—"tax incentives or tax subsidies"—that depart from the tax structure and "favor a particular industry, activity, or class of persons."[126] Government support of private business through tax subsidies often equates to "corporate welfare."[127]

Tax subsidies assume many forms including exclusions, deductions, deferrals, tax credits, or special tax rates, and "essentially represent government spending for the favored activities or groups made through the tax system rather than through direct grants, loans,

Recession" (generally defined as beginning in December 2007 and ending in June 2009). *See* Katherine Peralta, *Wealth Inequality Has Widened Along Racial Lines*, U.S. NEWS (Dec. 12, 2014), https://www.usnews.com/news/blogs/data-mine/2014/12/12/wealth-inequality-has-widened-along-racial-lines.html (based on Rakesh Kochhar & Richard Fry, *Wealth inequality has widened along racial, ethnic lines since end of Great Recession,* PEW RESEARCH CTR. (2014), https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/.

[120] McKernan et al., *supra* note 111.

[121] Chuck Collins et al., *The Road to Zero Wealth: How the Racial Divide is Hollowing Out American's Middle Class*, PROSPERITYNOW.ORG & INST. FOR POL'Y STUDIES (2017), https://prosperitynow.org/resources/road-zero-wealth.

[122] Brian Thompson, *The Racial Wealth Gap: Addressing America's Most Pressing Epidemic*, FORBES (Feb. 18, 2018), https://www.forbes.com/sites/brianthompson1/2018/02/18/the-racial-wealth-gap-addressing-americas-most-pressing-epidemic/#3bcae7027a48.

[123] Adriene Hill, *Why So Much of the U.S. Tax Code is Social Policy*, MARKETPLACE.COM (Oct. 2, 2017), https://www.marketplace.org/2017/10/02/economy/why-so-much-us-tax-code-social-policy-0.html.

[124] Stanley S. Surrey, *Federal Income Tax Reform*, 84 HARV. L. REV. 352, 353–54 (1970) [hereinafter Surrey & Daniel, *Tax Expenditure Concept*]; Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974,* 17 B.C. L. REV. 679, 680 (1976).

[125] Surrey & McDaniel, *Tax Expenditure Concept*, *supra* note 124, at 680.

[126] *Id*.

[127] John White, *How Corporate Welfare Is Killing Small Businesses*, INC. (Aug. 21, 2017), https://www.inc.com/john-white/how-corporate-welfare-is-killing-small-businesses.html. Between 2000 and 2015, two-thirds of corporate welfare subsidies went to fewer than 600 large companies.

or other forms of government assistance."[128] As a result, these tax subsidies or expenditures reduce the amount of tax that families or corporate taxpayers pay. Accordingly, the IRC essentially represents a series of choices that benefit—or fail to benefit—discrete groups of taxpayers. And because these tax benefits are not immediately obvious, recipients of these benefits often believe or characterize themselves as not receiving a government benefit—a political sleight of hand. Over time, the role of government can appear disconnected from the benefits it provides.[129]

The value of these individual tax expenditures or tax breaks rises as household income increases.[130] Accordingly, these tax expenditures are significantly more available to and usable by higher-income taxpayers, although these higher-income taxpayers are least likely to need the tax incentives to afford the very activities that the respective tax expenditures were created to promote: home ownership, college education, or retirement saving. In the interim, "moderate- and low-income families receive considerably smaller tax-expenditure benefits" for engaging in those same activities.[131]

The realization-based system utilized by the IRC creates even more income and wealth disparities. Higher-income taxpayers are more financially able to invest in assets such as additional homes and artwork, the increased value of which is not taxed until a "realization event" or transfer occurs.[132] These "unrealized capital gains" make up a large portion of the wealth gap.[133] In 2018, 69% (or more than $584 billion) of such unrealized capital gains—gains from real estate, businesses, stocks and investment funds (and not gains in the value of primary residences and retirement accounts)—were held by the top 1% of income earners.[134] The wealthy can hold on to these assets indefinitely and protect them from taxation on increased value, thereby creating the impression that the IRC is more progressive than it is in reality. As some commentators have noted: "America's tax code no longer adheres to the core principle of ability to pay—the idea that taxes should be based

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[128] Surrey & McDaniel, *Tax Expenditure Concept*, *supra* note 124, at 680. The Congressional Budget and Impoundment Control Act of 1974 (the "Budget Act") mandated that these tax expenditures be computed annually as part of the federal budget process and defined "tax expenditures" 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 liability." Pub. L. No. 93-344, sec. 3(3).

[129] Derek Thompson, *The Shame of the Mortgage-Interest Deduction*, THE ATLANTIC (May 14, 2017), https://www.theatlantic.com/business/archive/2017/05/shame-mortgage-interest-deduction/526635/ ("Since tax benefits are most useful for people with taxable income, U.S. wealth-creation policy is predominantly for people who already have wealth. These high-income households don't consider their taxable benefits to be a form of governmental policy at all."); *see also* Kirk J. Stark & Eric. M. Zolt, *We Don't Need Tax Cuts for the Middle Class*, WASH. POST (Oct. 18, 2017), https://www.washingtonpost.com/opinions/we-dont-need-tax-cuts-for-the-middle-class/2017/10/18/4ce2f378-b37c-11e7-a908a3470754bbb9_story.html?utm_term=.ce8f0c443ad3.

[130] *Policy Basics: Federal Tax Expenditures*, CTR ON BUDGET & POL. PRIORITIES, https://www.cbpp.org/research/federal-tax/policy-basics-federal-tax-expenditures.html (last updated Apr. 9, 2018).

[131] *Id*.

[132] I.R.C. §1001 (2019).

[133] Thornton & Hendricks, *Ending Special Tax Treatment*, *supra* note 25; Lynnley Browning, *Capital Gains Increases at Heart of Democrats' Tax-the-Rich Plans*, BLOOMBERG TAX (Mar. 12, 2019), https://news.bloombergtax.com/daily-tax-report/capital-gains-increase-at-heart-of-democrats-tax-the-rich-plans.html.

[134] Browning, *Capital Gains*, *supra* note 133.

on a person's capacity to pay taxes. Instead, today's tax code turns that principle on its head by letting the wealthiest of the wealthy pay virtually nothing on their gains."[135]

The projected cost of tax expenditures in 2018 was $1.5 trillion, with $1.3 trillion in individual expenditures and $0.2 trillion ($200 billion) in corporate expenditures.[136] The largest individual tax expenditures subsidize health care, capital gains and dividends, and savings plans. The Treasury Department's Office of Tax Analysis published the estimated cost of the following tax expenditures that have varying effects on American households for fiscal year 2019:[137]

- Exclusion of employer contributions for medical insurance premiums: $203.29 billion
- Preferential rates on individual capital gains: $102.91 billion
- Defined contribution employer plans: $75.72 billion
- Defined benefit employer plans: $71.43 billion
- Child Tax Credit: $76 billion
- Step-up basis of capital gains at death: $49.92 billion
- Capital gains exclusion on home sales: $44.38 billion
- Mortgage interest deduction on owner-occupied homes: $26.85 billion[138]
- State and local property tax deduction on owner-occupied homes: $6.25 billion[139]
- State and local nonbusiness taxes deduction (other than homes): $4.61 billion[140]
- Qualified tuition programs (sec. 529 plans): $2.20 billion

Contrary to popular belief, the TCJA did not reduce the number of tax expenditures; rather, between 2017 and 2018, the number of individual tax expenditures increased from 172 to 173.[141] And despite the promises of economic stimulus and decreased tax bills for middle-income taxpayers, the TCJA has provided little benefit to the economy and yielded

[135] Thornton & Hendricks, *Ending Special Tax Treatment*, *supra* note 25.
[136] Robert Bellafiore, *Tax Expenditures Before and After the Tax Cuts and Jobs Act*, TAX FOUND. (Dec. 2018), https://taxfoundation.org/tax-expenditures-pre-post-tcja/ [hereinafter Bellafiore, *Tax Expenditures*].
[137] U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES (Oct. 19, 2018), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf.
[138] *Id*. One of the major effects of TCJA—a lower cost of the mortgage interest deduction from $68.1 billion in FY 2018 to $26.85 billion in FY 2019 (due to limits imposed on the deduction and a corresponding increase in the standard deduction that resulted in a decreased number of taxpayers itemizing their deductions).
[139] *Id*. ("Because of interactions with the $10,000 cap on state and local tax deductions for the years 2018 through 2025, these estimates understate the combined effects of repealing deductions for both owner-occupied housing and other taxes. The estimate of repealing both is (in millions of dollars): 2018 $41,090; 2019 $17,360; 2020 $21,470; 2021 $23,310; 2022 $25,200; 2023 $27,060; 2024 $28,880; 2025 $30,540; 2026 $131,460; 2027 $187,990; and 2028 $199,290.").
[140] *Id*. The cost of this deduction for state and local, nonbusiness taxes (other than taxes on owner-occupied homes) decreased from $63.34 billion in FY 2018 to $4.61 billion in FY 2019 due to the $10,000 aggregate cap.
[141] Bellafiore, *Tax Expenditures*, *supra* note 136.

larger tax benefits to the wealthy.[142] High-income taxpayers who earn more than $1 million annually are estimated to enjoy tax cuts amounting to $37 billion in 2019 alone and experience a higher percentage change in after-tax income over the seven years that the Act's temporary provisions will be in place; lower- and middle- income taxpayers will see the Act's benefits fade progressively over those years.[143] Corporations, which saw their income tax rates decreased by 14%, from 35% to 21%, engaged in a record-breaking amount of stock buybacks (estimated at $1 trillion in 2018) that, along with increased dividends, wildly benefitted shareholders.[144] Therefore, the promise that the corporate tax rate cut will yield increased domestic capital investments remains unfilled because corporations are primarily using the tax savings to sustain their bottom lines. By imposing an annual $10,000 limit on the deduction for state and local taxes, the Act likely incentivizes a shift from progressive income taxes to the imposition of more regressive fees and fines.[145] Accordingly, it is no surprise that recent studies consistently conclude that the TCJA contributes to continued economic inequality and increases the racial wealth divide.[146]

D. State and Local Tax Systems Drive Inequality

The bottom line with respect to current state and local taxation systems is inherent inequality among income-earning tiers and an overall unfairness.[147] This inequality is due, in part, to a historical shift from taxes on wealth (most progressive) first to a tax on income (less progressive) and more recently to taxes on consumption (least progressive; most regressive). As discussed in this part, these shifts contribute to increased wealth inequality.

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[142] *See* Howard Gleckman, *A New Congressional Study Finds Little Economic Benefit From The 2017 Tax Cuts*, FORBES (May 29, 2019), https://www.forbes.com/sites/howardgleckman/2019/05/29/a-new-congressional-study-finds-little-economic-benefit-from-the-2017-tax-cuts/#1731c428549e; Ben Steverman et al., *A Year After the Middle Class Tax Cut, the Rich Are Winning*, BLOOMBERG (Dec. 18, 2018), https://www.bloomberg.com/graphics/2018-tax-plan-consequences/; Steve Wamhoff & Matthew Gardner, *Federal Tax Cuts in the Bush, Obama, and Trump Years*, INST. ON TAX'N & ECON. POL'Y (July 11, 2018), https://itep.org/federal-tax-cuts-in-the-bush-obama-and-trump-years/.

[143] Steverman et al., *Rich Are Winning*, *supra* note 142; *see also* TAX POLICY CENTER, T17-0313 – CONFERENCE AGREEMENT: THE TAX CUTS AND JOBS ACT, https://www.taxpolicycenter.org/model-estimates/conference-agreement-tax-cuts-and-jobs-act-dec-2017/t17-0313-conference-agreement.

[144] Michael Hiltzik, *A Devastating Analysis of the Tax Cut Shows it's Done Virtually No Economic Good*, L.A. TIMES (May 29, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-tax-cut-effects-20190529-story.html; Matt Townsend & Brandon Kochkodin, *Trump's Cuts Have Boosted Bottom Lines, But Not Much Else*, BLOOMBERG (Dec. 21, 2018), https://www.bloomberg.com/news/articles/2018-12-21/trump-s-tax-cuts-have-boosted-bottom-lines-but-not-much-else.html.

[145] Darrick Hamilton & Michael Linden, *Hidden Rules of Race are Embedded in the New Tax Law*, ROOSEVELT INST. (May 2018), https://rooseveltinstitute.org/hidden-rules-new-tax-law/.

[146] *Id*.; *see also* Meg Wiehe et al., *Race, Wealth and Taxes: How the Tax Cuts and Jobs Act Supercharges the Racial Wealth Divide*, INST. ON TAX'N & ECON. POL'Y (Oct. 11, 2018), https://itep.org/race-wealth-and-taxes-how-the-tax-cuts-and-jobs-act-supercharges-the-racial-wealth-divide/; Steph Sterling & Marshall Steinbaum, *Beyond the Budget: How the Tax Cut and Jobs Act Increases Inequality and Exacerbates Our High-Profit, Low-Wage Economy*, ROOSEVELT INST. (June 20, 2018), https://rooseveltinstitute.org/beyond-budget/.

[147] *Who Pays? A Distributional Analysis of the Tax Systems in All 50 States, Fifth Edition*, INST. ON TAX'N & ECON. POL'Y (Jan. 2015), https://itep.org/who-pays-5th-edition/.

1. Poor and Middle-Income Families Are Taxed More Heavily than High-Income Families

Nearly every state government, including local governments, collects more taxes from poor families than from high-income families relative to their incomes, and more taxes are generally collected from middle-income families than high-income families.[148] These disparities increase income inequality and overall wealth inequality by reducing after-tax incomes of low- and middle-income families more deeply than those of high-income families.[149] Many major state taxes were implemented in the first half of the twentieth century, a period when many Americans, particularly Blacks in the South, were barred from voting and when urban areas were underrepresented in many states' legislatures.

As a result of that history, most state tax codes are regressive today, resulting in low- and middle-income families paying a larger share of their income in taxes than wealthy families.[150] One of the primary reasons for such inequality is states' heavy reliance on sales and other consumption taxes, which often disproportionately affects low-income families because they spend a larger percentage of their income on consumables rather than on saving or investments. This inequality is exacerbated by the doubling of most states' sales tax rates since 1970, with little if any change on the top income tax rate.[151] Further, as states and localities increasingly cut or avoid raising taxes (particularly, income taxes) but nonetheless search for additional revenue, many have increased their reliance on fees (e.g., admission to government-funded museums and state parks, costs for drivers' licenses and identification cards, and toll fees for roads and bridges), resulting in even greater regressivity than reported in recent studies.[152] In addition, property taxes disproportionately affect low- and middle-income families compared to high-income families.[153]

2. Regressivity Illuminated

Because of the absence of a graduated personal income tax and an overreliance on consumption taxes in many states, low- and middle-income families typically experience higher overall effective state and local tax rates. Combining all state and local income, property, sales and excise taxes that Americans pay, the average effective state and local tax rate nationally is: 11.4% for the poorest 20% of non-elderly residents; 9.9% for the middle 20%; and 7.4% for the top 1%.[154] While there are some common systemic characteristics between states with the most regressive tax structures and those with the

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[148] McNichol, *State Policies*, *supra* note 113, at 7; *see also Who Pays? A Distributional Analysis of the Tax Systems in All 50 States, Sixth Edition*, INST. ON TAX'N & ECON. POL'Y (Oct. 2018), https://itep.org/whopays/ [hereinafter *Who Pays? Sixth Edition*].
[149] McNichol, *State Policies*, *supra* note 113, at 7.
[150] *Id*.
[151] *Id*.
[152] *Who Pays? Sixth Edition*, *supra* note 148 (author contends that two features of ITEP's analysis "create uncertainty"—sample of taxpayers excludes all "senior" households (65 or older), and "exported and imported tax burdens" ("incidence of state and local taxes levied in one state but whose burden is borne in another state")); *cf.* Robert Tannenwald, *How Regressive Are State and Local Taxes? ITEP's Analyses*, TAX NOTES (Aug. 12, 2019).
[153] McNichol, *State Policies*, *supra* note 113, at 7.
[154] *Who Pays?, Sixth Edition*, *supra* note 148, at 4.

least regressive tax systems, the kinds of taxes a state utilizes matter greatly in addressing inequality.

In the ten states with the most regressive tax structures, referred to in a recent study as the "Terrible Ten," the poorest 20% of families proportionately pay up to six times more of their income in taxes as their wealthy counterparts.[155] Washington State is the most regressive, followed by Texas, Florida, South Dakota, Nevada, Tennessee, Pennsylvania, Illinois, Oklahoma, and Wyoming.[156] Seven of the Terrible Ten do not levy a broad-based personal income tax, while the remaining three states have a flat or practically flat income tax rate.[157] Two of the most regressive state income tax benefits are (1) preferential rates for capital gains and (2) deductions for federal income tax paid, both of which disproportionately benefit higher-income taxpayers.[158] The Terrible Ten rely heavily on sales and excise taxes, and six of them derive roughly half to two-thirds of their tax revenue from sales and excise taxes compared to a national average of approximately one-third.[159] As the most regressive of the state and local taxes, sales and excise taxes have higher effective rates on the underprivileged—on average: the poorest 20% pays a 7.1% effective rate; the middle pays 4.8%; and the top one percent pays a .9% effective tax rate.[160] Because food is one of the largest expenses for low-income families, taxing food is particularly regressive; six of the twelve states with higher effective consumption tax rates include food purchases in their tax bases.[161]

States applauded as "low tax" states because they do not impose income taxes are often high tax states for low- and middle-income families. The ten states with the highest taxes on the poorest taxpayers are Washington, Hawaii, Illinois, Pennsylvania, Oklahoma, Arizona, Texas, Indiana, Florida, and Iowa.[162] Six of these "low-tax" states are also among the Terrible Ten because they are high effective tax for the poorest while concurrently low effective tax for the wealthiest. Washington is the leader in this category in that its poorest families pay an average 17.8% of their income in state and local taxes compared to the poor in neighboring states—10.1% in Oregon and 9.2% in Idaho.[163]

Taxes on personal and business property, both real and personal, are a significant revenue source for both states and localities. Property taxes are also generally regressive in their overall effect, particularly for middle-income households, though less regressive than sales and excise taxes. Businesses paying approximately 40% of a typical state's property taxes lessens this regressivity somewhat.[164] In addition, because the taxes are

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[155] *Id*. at 7.
[156] *Id*. at 7.
[157] *Id*. at 8. Florida, Nevada, South Dakota, Tennessee, Texas, Washington and Wyoming do not levy a broad-based personal income tax (Tennessee currently levies a limited personal income tax that only applies to interest and dividend income but set to be eliminated by 2021). Both Pennsylvania and Illinois utilize a flat rate thereby taxing wealthy families' income at the same marginal rate as the poorest families. Oklahoma utilizes a graduated rate structure, but its top rate starts at taxable income of $12,200 for married couples that results in essentially a flat tax.
[158] *Id*. at 8.
[159] An excise tax is legislated tax on the purchase of specific goods or services such as fuel, tobacco, and alcohol.
[160] *Who Pays?, Sixth Edition*, *supra* note 148, at 2.
[161] *Id*. at 19.
[162] *Id*. at 2.
[163] *Id*. at 24.
[164] *Id*. at 21.

based on the value of the property, they are not entirely regressive; lower-income earners tend to inhabit less expensive homes, thus partially indexing property taxes to income. Nevertheless, for average low- and middle-income families, home ownership represents their primary accumulation of wealth, so most of that wealth is subject to property taxation.[165]

In comparison, home ownership represents a lesser share of high-income taxpayers' wealth, with such wealth being balanced out with stock investments, business interests, and other intangible assets that are typically exempt from property taxation. For example, a typical middle-income family's home is worth three times as much as the family's income, while a high-income taxpayer's home may be valued at one-and-a-half times the annual income.[166] Besides the regressive effects of property tax on low- and middle-income families, the shift in wealth from home ownership to more financial investments and assets is racialized as well. Although not an equalizing provision, a homestead exemption (exempting a flat dollar or percentage amount of property value from a property tax) can lessen the regressivity of property taxation. In addition, the use of targeted tax credits for low-income taxpayers is another tool used by a majority of states to combat the overall disproportionate effect of the tax.[167]

3. States' Tax Policies Can Reduce Inequality

The increase in inequality can be attributed to many factors including the unequal growth in wages (substantially more for the top income earners and much less for low- and middle-income earners), the growth of investment income to high-income households, and an array of government actions and inaction (federal minimum wage, reduction in government assistance, and tax policy among others).[168] As discussed previously, a history of unequal opportunities and access to education, housing, employment and other economic resources based on race has led to racialized wealth inequality.[169] The role of federal and state tax systems in increasing inequality, with implications for wealth inequality among racial groups, has increased over the last several decades due to the persistent shift to highly regressive, consumption-based taxes.

States with the least regressive state and local tax systems share commonalities. They share one common characteristic: an income tax that is highly progressive in terms of both brackets and rates. In addition, these states rely less on regressive consumption taxes. California is the least regressive state, followed by the District of Columbia, Vermont, Delaware, Minnesota, New Jersey, Maine, New York, Montana, and Maryland.[170] All ten of these states provide a refundable earned income tax credit (EITC), with the EITC exceeding 25% of the federal credit in seven of the ten states. Four states—California, Connecticut, New Jersey, and New York—plus the District of Columbia, have enacted laws that increase income taxes for high-income households with tax brackets for income

[165] Eric Kades, *Giving Credit Where Credit is Due: Reducing Inequality with a Progressive State Tax Credit*, 77 LA. L. REV. 360, 383 (2016).
[166] *Who Pays?, Sixth Edition*, *supra* note 148, at 21.
[167] *Id*. at 22.
[168] McNichol, *State Policies*, *supra* note 113, at 4.
[169] Chuck Collins et al., *supra* note 121, at 6–7.
[170] *Who Pays?, Sixth Edition*, *supra* note 148, at 5.

over $500,000.[171] Other states, including Hawaii, Maryland, Minnesota, Oregon, and Vermont, have top brackets for income over $250,000 for joint filers.[172] Similarly, all of the least regressive states utilize targeted, refundable credits for low-income taxpayers. For example, Maine provides a sales tax credit, a dependent care tax credit, and an expanded property tax "circuit breaker," which imposes a cap on amount of property taxes based on taxpayer's personal income.[173] A total of twenty-nine states, plus the District of Columbia, provide property tax relief to struggling taxpayers via a circuit breaker credit or income-based credit.[174] California is among the least regressive because of graduated marginal income tax rates that are more progressive than most states, an additional tax on income exceeding $1 million, and limited tax benefits (deductions and exemptions) for upper-income taxpayers.[175] The state's reliance on consumption taxes is within the national average, with less reliance on property taxes.[176] Again, in combatting inequality, the kind of taxes utilized matters.

Accordingly, state tax policy changes can clearly lessen income inequality, thereby contributing to the reduction of wealth inequality and the disparate effects based on race. State tax policy changes commonly offered to upend inequality include the following:[177]

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[171] Michael Leachman et al., *Advancing Racial Equity with State Tax Policy*, CTR ON BUDGET & POL'Y PRIORITIES 13 (Nov. 15, 2018), https://www.cbpp.org/sites/default/files/atoms/files/11-15-18sfp.pdf [hereinafter Leachmen et al., *Advancing Racial Equity*].
[172] *Id.*
[173] *Who Pays?, Sixth Edition*, *supra* note 148, at 10.
[174] Leachman et al., *Advancing Racial Equity*, *supra* note 171, at 16.
[175] *Who Pays?, Sixth Edition*, *supra* note 148, at 9.
[176] *Id*.
[177] McNichol, *State Policies, supra* note 113; *see also* Sarah Anderson & Chuck Collins, *What States Can Do to Reduce Poverty and Inequality Through Tax Policy*, INEQUALITY.ORG (Feb. 22, 2019), https://inequality.org/great-divide/what-states-can-do-to-reduce-poverty-and-inequality-through-tax-policy; Sarah Anderson & Chuck Collins, *How to Reduce Poverty and Inequality Through State Government Taxes*, INEQUALITY.ORG (Mar. 2, 2018), https://inequality.org/great-divide/how-to-reduce-poverty-and-inequality-through-state-government-taxes/.

- Impose higher income tax rates on higher earners; place cap on itemized deductions based on income levels.[178]
- Expand state payroll taxes past the federally-imposed Social Security annual cap.
- Target financial asset wealth to higher capital gains taxes and/or financial transaction tax.
- Enact or increase state earned income tax credits.
- Expand estate or inheritance taxes that increase taxes on wealth.[179]
- Strengthen corporate taxes to eliminate loopholes and ensure strong minimum taxes by corporate entities (and/or adopt combined reporting).
- Broaden sales tax to include services purchased by wealthy individuals.
- Impose a luxury tax on luxury goods (high-end automobiles and expensive yachts).
- Ensure overall tax system raises sufficient revenue to fund foundations of shared prosperity such as education and health care access.

As discussed in greater detail in Part III,[180] states' tax systems have a substantial contribution to make towards eliminating regressivity and race-based disparities. In most states, the aggregate tax burden falls more heavily on lower-income taxpayers.[181] Only a small number of states—California, Delaware, Minnesota, New Jersey, and Vermont—and the District of Columbia have reformed their tax laws to ensure that those with higher incomes pay a larger share of their incomes in tax.[182] Accordingly, acknowledgement by states of their role in contributing to increased inequality, as well as race-based disparities, is a first fundamental step towards correcting the problem.

E. Federal and State Tax Systems and Rising Wealth Inequality

As documented above, wealth inequality is a real and ever-increasing reality in our country; the wealthiest 1% hold approximately 40% of the net wealth, which is nearly twice the amount of net wealth held by the bottom 90%.[183] This extraordinary concentration of wealth, combined with "historical and contemporary racial discrimination" produces "patterns of wealth holding that are highly unequal along lines of race and ethnicity."[184] To illustrate, White households, which encompass 65% of all households, own 87% of the

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[178] Shira Schoenberg, *Massachusetts Lawmakers Revive 'Millionaires Tax" Proposal,* MASSLIVE.COM (Jan. 21, 2019), https://www.masslive.com/news/2019/01/massachusetts-lawmakers-revive-millionaires-tax-proposal.html; *cf.* Jeffrey Dorman, *Higher Taxes On Rich Are Not Enough to Stop Inequality*, FORBES (Sept. 19, 2017), https://www.forbes.com/sites/jeffreydorfman/2017/09/19/higher-taxes-on-the-rich-are-not-enough-to-stop-inequality/#454ec6af5b96.html (postulates that the problem is poverty, not inequality; remedy is to not target the rich with higher taxes but rather to find effective policies to combat poverty).
[179] Collins et al., *supra* note 121, at 21.
[180] *See infra* Part III, at 291.
[181] *See supra* note 148 and accompanying text.
[182] Editorial Board, *State and Local Taxes Are Worsening Inequality*, N.Y. TIMES (July 20, 2019), https://www.nytimes.com/2019/07/20/opinion/sunday/inequality-taxes.html.
[183] Leachman et al., *Advancing Racial Equity*, *supra* note 171, at 13 (citing Edward N. Wolff, *Household Wealth Trends in the United States, 1962-2016: Has Middle Class Wealth Recovered?*, NAT'L BUREAU ECON. RES., Working Paper No. 24085, tbl. 2 (Nov. 2017), http://www.nber.org/papers/w24085.
[184] Leachman et al., *Advancing Racial Equity*, *supra* note 171.

nation's wealth; people of color comprise 35% of all households but hold only 13% of the nation's wealth.[185] This racialized wealth inequality is only exacerbated by the vast disparities in household income based on race and ethnicity, affecting how much income can be accumulated and added to earners' wealth,[186] and by inheritance patterns of White wealth being passed to the next generation in White families.[187]

The shifts in federal and state tax policy over the last decades are an essential component to solidifying this racialized wealth inequality. As commentators have recently discerned, tax codes are "both a symptom of and instrument of systemic racism."[188] Yet the IRC's contribution to systemic racism is not even on the IRS's radar. In contrast to other federal agencies implementing equity-grounded social policy, the IRS neither compiles nor evaluates the effects of tax laws on various racial and ethnic groups.[189] Rather, such race-based analysis has been "relegated outside of the 'mainstream' of tax policy analysis."[190] As we have acknowledged, the racialized consequences of tax policy are grounded in racialized wealth advantage and disadvantage that are supported by historical and systemic racism.[191] Accordingly, as discussed in Part III, national racism and its contribution to wealth inequality must first be addressed before tackling the racial inequities in the federal and state tax codes. The effective transformation of tax policy both to equalize racialized wealth inequality and to invest in future generations depends on the acknowledgement of racism.

III. The Racialized Effects of the Current Tax Systems and Strategies for Transformation

Overall, today's tax system continues a history in the United States of government support for the creation and protection of wealth for Whites in conjunction with a lack of government support for Black wealth. In this Part, we first situate the racialized tax system of the United States within the context of the "anti-tax" movement that has dominated politics since the late 1970s. Then, we explore strategies for moving toward racial equity.

A. The Shifting Social Contract and the Anti-Tax Movement—Round One

The clarion call for the anti-tax movement that has had profound effects in the United States over the past generation sounded in California in 1978. Proposition 13 (Prop. 13), a populist reaction against increased property taxes caused by rising property values, limited the real property tax assessment on existing homeowners to the price they had paid for their home. At the same time, Prop. 13 declared open season on newcomers because it demanded that new homeowners pay taxes assessed on the full fair market value paid for their

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185 *Id*.
186 *See supra* notes 111-114.
187 *See* Strand, *Inheriting Inequality*, *supra* note 34.
188 Misha Hill et al., *The Illusion of Race-Neutral Tax Policy*, INSTIT. ON TAX. & ECON. POL'Y 4 (Feb. 2019), https://itep.org/the-illusion-of-race-neutral-tax-policy/.
189 Clinton G. Wallace, *Tax Policy and Our Democracy*, 118 MICH. L. REV. __ (forthcoming 2020) (citing Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. __ (forthcoming 2020)).
190 Wallace, *Tax Policy and Our Democracy*, *supra* note 189 (citing ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 14, 39 (2018)).
191 *See supra* notes 101, 149-150 and accompanying text.

home.[192] In addition to shifting the tax burden from "those who already owned" to "those who seek to own," Prop. 13 severely curtailed the funds available for investment in California's public schools, for which local property taxes were the primary source of funding. The most direct result of Prop. 13 was that California's public education, which had been of top quality in the 1950s and 1960s, plummeted from "First to Worst."[193]

The de-funding of California's public schools following Prop. 13 contrasted with California's response to an influx of immigrants a generation before. In the 1930s, California had experienced a substantial influx of poor White migrants from the South, many of them pushed west by the Dust Bowl and the Depression. California's response had been to invest heavily in public education to create from the human potential arriving in the state a vital and vibrant economy.[194] California had again experienced in the 1960s an influx of poor immigrants during which the state's Latinx population rose from 8% in 1950, to 10% in 1960, and to 13% in 1970.[195] This population was heavily concentrated in Southern California, the birthplace of Prop. 13. In 1970, nearly 20% of all Mexican-origin Latinx individuals in the United States lived in Los Angeles County.[196]

During the 1960s, moreover, both Black and Latinx populations became more politically vocal in the state. The Black Panthers and the Watts riots of 1965, combined with Chicano activism and student protests against the Vietnam War, gave "a slightly older and much whiter California population a fear that the ways of society so dear to them were falling apart."[197] Prop. 13's anti-tax stance was partially informed by an economy that was faltering,[198] but it was also a White reaction against demographic and political changes that were unfamiliar and unsettling.[199] Prop. 13 was racialized in the political impetus that birthed it, and it perpetuated the system of advantage in California based on race: It imposed a greater tax burden on new-to-California residents of color while enabling more established White residents to enjoy increased equity in their homes without corresponding tax responsibilities. The world-class public schools that had provided a springboard to previous generations of White migrants were decimated for the new, less-White cohort of immigrants.[200]

When Ronald Reagan, Governor of California from 1967 to 1975, became President in 1981, he brought to the national scene the anti-tax fervor of Prop. 13 as well as its coded-yet-clear racialized rhetoric.[201] Continuing in the tradition of dog-whistle politics—using "racially coded language that conveyed racialized messages without being blatantly racist"—Reagan telegraphed racial anxiety and insecurity and blamed the United States

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[192] *See* JEFFREY CHAPMAN, PROPOSITION 13: SOME UNINTENDED CONSEQUENCES 11–15 (1998). Unintended consequences of Prop. 13's rollback of property taxes (more progressive) included a shift to sales taxes (more regressive).
[193] Learning Matters, First to Worst (2004), https://www.youtube.com/watch?v=r5NhiM9ApCw.
[194] MANUEL PASTOR, STATE OF RESISTANCE: WHAT CALIFORNIA'S DIZZYING DESCENT AND REMARKABLE RESURGENCE MEAN FOR AMERICA'S FUTURE 27–34 (2018).
[195] *Id*. at 37.
[196] *Id*. at 43.
[197] *Id*. at 44.
[198] *Id*. at 46.
[199] *Id*. at 49–52.
[200] *Id*. at 53–54.
[201] PETER TEMIN, THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY 22, 38 (2017).

government by using the anti-tax rallying cry that had proved effective in California.[202] Reagan's reference to "welfare queens" sent a clear warning about "Our" taxes (taxes paid by White voters) being used to support "Their" needs (needs of people of color).[203]

Starting in the 1980s, the progressivity of taxation in the United States at the federal, state, and local levels has been systematically eroded. Taxes have shifted overall away from (more progressive) taxes on wealth and income to (more regressive) taxes on payroll and consumption. According to tax policy expert Leonard Burman, at the federal level "[a]fter World War II, progressive income and estate taxes comprised more than 70% of federal receipts, while regressive payroll and excise taxes accounted for only about 26% of receipts . . . By 2011, the regressive taxes made up over 40% of receipts while progressive taxes accounted for less than 58%."[204] Today, the majority of people pay more (regressive) payroll tax[205] than (progressive) income tax,[206] and the estate tax is levied only on the ultra-rich.[207] At the state and local level, many states have increased reliance on user fees in conjunction with lowering taxes, with the net effect of increasing the regressivity of revenue-raising overall.[208] And with increasing inequality, tax expenditures designed to support the well-being of the nation's taxpayers through education, retirement, housing, and health have accrued increasingly to the well-off.

As taxes on wealth have declined and the benefits of tax expenditures for the well-off increased, public services to those in the lower-income and wealth brackets have been cut back. Net redistribution has decreased. The wealthy who benefit are disproportionately White, while the poorer cohorts of the population who have lost support are disproportionately people of color. The tax system as a whole has contributed to the rise of inequality, and this inequality is racialized.[209]

The Census Bureau predicts that non-Hispanic Whites will become a minority of the nation's population overall in the 2040s. Children of color became a new majority in the nation's public schools in 2014.[210] As this shift is occurring, however, an older White cohort of the population has declined to invest through taxes and public services in a younger segment of the population that is majority people of color.[211] Just as Black citizens

[202] Laura Ellyn Smith, *How Donald Trump put an end to the GOP's Southern Strategy: Trading the Dog-whistle for the Bullhorn*, WASH. POST (Jan. 10, 2018).
[203] *See* Ayana Byrd, *LISTEN: Code Switch Dives Into Story Behind the "Welfare Queen*,*"* COLORLINES (June 10, 2019), https://www.colorlines.com/articles/listen-code-switch-dives-story-behind-welfare-queen.
[204] Leonard Burman, *Taxes and Inequality*, 66 TAX L. REV. 563, 574 (2013).
[205] Payroll taxes are regressive because the income to which they apply is capped so that for lower-income earners the tax is levied on their entire income while for higher-income earners the tax is levied on only a part of their income. In addition, income that is not earned is not subject to payroll taxes. *Id*., at 573–74.
[206] Robert Bellafiore, *New Report Shows the Burdens of Payroll and Income Taxes*, TAX FOUND. (Mar. 26, 2019), https://taxfoundation.org/payroll-income-tax-burden/.
[207] Ashlea Ebeling, *IRS Announces Higher 2019 Estate and Gift Tax Limits*, FORBES (Nov. 15, 2018), https://www.forbes.com/sites/ashleaebeling/2018/11/15/irs-announces-higher-2019-estate-and-gift-tax-limits/#5aad9bb74295 (estate and gift tax exemption for 2019 is $11.4 million per individual, up from $11.18 million in 2018).
[208] *Who Pays?, Sixth Edition*, *supra* note 148, at 24.
[209] *See supra* notes 183-187 and accompanying text.
[210] Sarah Carr, *Tomorrow's Test*, SLATE (June 5, 2016), http://www.slate.com/articles/life/tomorrows_test/2016/06/american_is_becoming_a_majority_minority_nation_it_s_already_happened_in.html.
[211] *See* PASTOR, *supra* note 194, at 55–56. *Cf.* Vladimir Kogan et al., *The Democratic Deficit in U.S. Education Governance*, Working Paper No. 20-196, ANNENBERG INST. AT BROWN U. (Jan. 2020) ("most

moved into position to join White citizens in benefiting from the post-WWII social contract through the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act, that social contract was torn up. And just as Latinx immigrants and citizens brought their energy and numbers to the table as a result of population shifts arising from the 1965 Immigration and Nationality Act, [212] the game changed.

Since 1980, the tax system as a whole has operated to increase racialized wealth inequality. Today's tax system entrenches the system of advantage based on race that centuries of racial exploitation and unequal access to wealth created. As the nation becomes less White, the United States' tax system, anti-tax rhetoric, and the shift from progressivity to regressivity continue to exacerbate economic inequality and racial inequity. More deeply, the tax system is inhibiting broad-scale public investment in the primary resource of the future: human capital.

B. *The Shifting Social Contract and the Anti-Tax Movement—Round Two*

Anti-tax rhetoric and the anti-tax movement are more about securing tax benefits for the wealthy than about minimizing taxes overall.[213] Lower investment in the public infrastructure that non-wealthy Americans rely on goes hand-in-hand with anti-tax reforms. Redistribution of wealth upward and hardening of wealth inequality result.

The recent experience of the State of Kansas, described by physician Jonathan Metzl in *Dying of Whiteness: How the Politics of Racial Resentment is Killing America's Heartland*,[214] parallels that of California in the 1960s. When Sam Brownback became Governor in 2011, he initiated a series of policy shifts that responded to a "resentment of government overreach" in the state.[215] His initiatives deregulated business, cut spending on welfare, "rolled back anti-discrimination laws," and declined expansion of Medicaid coverage under the Affordable Care Act.[216] Further, in "an "epic defunding of state government," Kansas cut income taxes, providing relief particularly for wealthy taxpayers.[217]

The state also made significant changes to school financing. Along with cutting property taxes, it "allowed public school districts to hire unlicensed teachers for science

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majority-nonwhite districts in our sample have a majority-white electorate and [ ] these electoral disparities are associated with racial achievement gaps").

[212] Muzaffar Chishti, Faye Hipsman, & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States,* MIGRATION POL'Y INST. (Oct. 15, 2015), https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states.

[213] With respect to the asserted purposes and actual effects of the Tax Cut and Jobs Act of 2017, for example, *see* Jonathan Chait, *Study Finds Trump Tax Cuts Failed To Do Anything But Give Rich People Money*, INTELLIGENCER (May 29, 2019), http://nymag.com/intelligencer/2019/05/study-trump-tax-cuts-failed-growth-investment.html; *see* Jane G. Gravelle & Donald J. Marples, *The Economic Effects of the 2017 Tax Revision: Preliminary Observations*, CONG. RES. SERV. 9 (updated June 7, 2019), https://www.everycrsreport.com/files/20190607_R45736_7633cfe1a9ceda0931cd8ccfeca6eb5455e2ee1d.pdf ("the tax revision favored higher-income taxpayers, in part because most of the tax cut benefited corporations and in part because the individual income tax cut largely went to higher-income individuals").

[214] *See* JONATHAN M. METZL, DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND (2019).

[215] *Id*. at 199, 200.

[216] *Id*. at 200.

[217] *Id*. at 201.

and math classes, cut support for at-risk students, and made it easier for schools to fire experienced teachers."[218] Kansas, which had historically supported strong public education,[219] hollowed out that support in short order. In particular, funding for less affluent, more urban school districts declined, and base aid per pupil fell from $4,400 to $3,800.[220] A state that had long benefited from quality public education took a nose dive: "By 2016, Kansas fell to forty-fourth in the nation in per-pupil spending in public elementary and high schools" and "into the lower 25 percent of all states on a number of key education benchmarks."[221]

In Kansas, White taxpayers benefitted disproportionately from the tax cuts; taxpayers of color were disproportionately burdened:

> The data showed that the 2012 tax cuts deceptively increased taxes on the bottom 40 percent of earners in Kansas…by hiking sales taxes and eliminating tax credits that benefited low-income families. Such trends disproportionately affected minority communities, including 75 percent of African American and 83 percent of Latino households in the state. By contrast . . . 'Kansans who saw the biggest tax cut are mostly white.'[222]

In response to the effects on the public schools, the Kansas Supreme Court found that the state's new public financing system violated the state constitution's requirement that students receive a public education of minimum adequacy and that the effects were particularly acute on Black and Latinx students.[223] Overall, minority and low-income parents paid more taxes while the education their children were receiving declined.[224]

Although Metzl notes that Kansas politics has a long history of "racial animus"—including racist and xenophobic statements by state politicians—he does not attribute discriminatory intent to state leaders across the board. [225] Nevertheless, "tax cuts and the school-funding overhaul allowed Kansas GOP politicians to enact an agenda with significant racial implications without expressly needing to talk about race."[226] In the long history of the United States' evolution of racism, the manipulation of fiscal policy involving taxes and broad-based public infrastructure to advantage Whites and disadvantage people of color is consistent with the shift from more to less overt forms of exploitation and discrimination. Though the specifics differ, the Kansas pattern is highly evocative of the California pattern three decades earlier.

And, just as the California anti-tax rhetoric and policies migrated to the national scene in the 1980s, the Kansas tax overhaul of the early 2010s is remarkably similar to the Tax Cuts and Jobs Act of 2017. Metzl points out:

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[218] *Id*.
[219] *Id*. at 223–24.
[220] *Id*. at 205.
[221] *Id*. at 226.
[222] *Id*. at 212 (quoting Kansas Center for Economic Growth, "Kansas' Tax Plan Makes Racial Economic Disparities Worse" (Oct. 14, 2016)).
[223] *Id*. at 214 ("The ruling explicitly highlighted how the state system failed to prepare over 25 percent of students in basic reading and math skills and shortchanged half of the state's African American students and one-third of its Hispanic students.").
[224] *Id*.
[225] *Id*. at 215.
[226] *Id*. at 216.

> Among other actions, the 2017 GOP bill slashed tax rates for many types of businesses, limited deductions, eliminated alternative minimum taxes paid by corporations, cut estate taxes—and also repealed the individual mandate of the ACA. The bill gifted permanent tax cuts to the wealthiest Americans and provided temporary relief for everyone else.[227]

Kansas, Metzl concludes, was "the godfather of governance via tax cutting, pro-corporate, austerity economics" as well as "the object lesson in the broad effects of massive-tax-cut governance[.]"[228]

In both California and Kansas, waves of anti-tax sentiment led to tax overhauls that increased regressivity along with racialized inequality. The anti-tax sentiment rested, at least in part, on a sense among White voters that "others" were gaining benefits unfairly. The primary benefits of the resulting tax reductions accrued to wealthier taxpayers, who were disproportionately White.[229] Lower-income and poorer taxpayers either benefited less or were burdened as more regressive taxes came to substitute for more progressive taxes. As the Institute for Taxation and Economic Policy observed, "[s]tates commended as 'low-tax' are often high-tax for low- and middle-income families."[230] Further, diminished public revenues led to diminished public expenditures, which had negative effects on public infrastructure, in particular public infrastructure in the form of public schools serving Black and Latinx students.[231] Compromised public infrastructure had more significant and detrimental effects on low-income households and especially people of color.[232]

Anti-tax movements, then, are prone to racialized effects that enhance pre-existing White advantage and add weight to pre-existing disadvantage experienced by Black citizens and other people of color. To some degree, the rhetoric of these movements invokes racism and xenophobia overtly, though more often the racial resonance is cloaked in vague assertions such as "the government is wasting money on 'people who do not deserve it.'"[233] Over time, the voters of both California and Kansas came to realize that eviscerating public infrastructure doesn't only affect "others." In both states, shifts toward raising revenues to re-invest in public infrastructure, particularly public schools, eventually followed the radical disinvestment. [234]

[227] *Id*. at 199.
[228] *Id*.
[229] Michael Leachman et al., *Advancing Racial Equity*, *supra* note 171. As a result of the 2013 tax cuts that reduced income tax rates in North Carolina, Black and Latinx residents now pay a larger share of state taxes than before, while White residents pay a smaller share.
[230] *Who Pays?, Sixth Edition*, *supra* note 148, at 2.
[231] Michael Leachman, Kathleen Masterson, & Eric Figueroa, *A Punishing Decade for School Funding*, CTR ON BUDGET & POL'Y PRIORITIES (Nov. 29, 2017), https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding.
[232] Jeff Raikes & Linda Darling-Hammond, *Why Our Education Funding Systems Are Derailing the American Dream*, LEARNING POL'Y INST. (Feb. 18, 2019), https://learningpolicyinstitute.org/blog/why-our-education-funding-systems-are-derailing-american-dream.
[233] METZL, *supra* note 214, at 211.
[234] *See* PASTOR, *supra* note 194, at 133–36; METZL, *supra* note 214, at 223–35.

C. Investing in Future Generations and Equalizing Racialized Wealth and Inequality

In the twentieth century, the United States became a leader among nations as a result of its investment in its most valuable resource: its people.[235] The United States mustered itself to provide a high school education almost universally and higher education to many at a time when most countries viewed education as unnecessary for the masses and a privilege of the elite. Investing in young people tells them that they are valued and valuable, opens the door to opportunity, and brings them into the realm of citizenship. In today's knowledge economy, education has become an even more important investment in human capital, which is investment in future prosperity.

Education is essential, but education alone is not sufficient. Children and youth need a place to live, food to eat, health care, and adults to support and nurture them. Yet children living in low-income households are more likely than their more affluent peers to encounter housing insecurity,[236] lack adequate health and medical care,[237] and attend underfunded schools.[238] In the United States today, about 19% of children under the age of eighteen live in households with earnings that put them below the poverty line, a measure that vastly underestimates necessary income for meeting basic needs.[239] About 41% of all children in the United States live in low-income households, defined as households with inadequate income to meet basic needs.[240] A substantial cohort of our children, then, lack the security and the assurance that they are supported and valued by the community at large.

Investing in the future of the United States today calls for investing in public infrastructure in the form of education, housing, health care, and other necessary forms of support for families. While we often think of infrastructure as roads and bridges, infrastructure is also the institutional supports necessary to prepare and support individuals so that they can contribute to society as a whole. Further, the provision of essential infrastructure, whether physical or institutional, can have significant equity effects depending on whether it is made available to all, to what degree, and in what form. K-12 education, for example, is available to all children in the United States, although the quality

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[235] Strand, *Brown*, *supra* note 95, at 323–24.

[236] Heather Koball & Yang Jiang, *Basic Facts about Low-Income Children: Children under 18 Years, 2016*, NAT'L CTR. FOR CHILD. IN POVERTY 7 (Jan. 2018), http://www.nccp.org/publications/pdf/text_1194.pdf ("[C]hildren living in low-income families are 50 percent more likely than as other children in other families to have moved in the past year.").

[237] *Id*. at 8. In 2016, 6% of low-income children were uninsured, compared to 4% of all children. Overall, the percentage of low-income children with health insurance has risen over the past two decades, though the coverage by private insurance has decreased. *Id.*; *Key facts about health care coverage for children*, CHILD TRENDS, https://www.childtrends.org/indicators/health-care-coverage. In 2017, over half of Black and Hispanic children were covered by public health insurance; over three-quarters of White and Asian children were covered by private health insurance. *Id.*

[238] Ivy Morgan & Ary Amerikaner, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. And Within Each State*, EDUC. TRUST 6 (2018), https://edtrust.org/resource/funding-gaps-2018/ ("Across the country, the highest poverty districts receive about U.S. spends approximately 7 percent — or $1,000 —less per pupil on students educated in our nation's highest poverty districts than those educated in the wealthiest.").

[239] Koball & Jiang, *supra* note 236, at 2.

[240] *Id*. A significantly higher proportion of children are poor and low-income compared to adults aged 18-64 as well as seniors age 65 and older.

provided varies widely.[241] Pre-K education and post-secondary education, in contrast, are much more accessible to those with wealth, which allows them to augment public K-12 education.[242]

In the United States today, children of color represent the future of the nation to an unprecedented degree. In 1980, 74% of the nation's children were non-Hispanic White.[243] In 2000, that percentage had fallen to 61%.[244] In 2017, it was 51%, and by 2020, it is projected to be 49.8%.[245]

To a disproportionate degree, however, these children of color live in low-income households. While only 28% of White children in 2017 lived in low-income households, approximately 60% of Black, Hispanic, and Native American children live in such households.[246] This means that children of color are especially in need of the support provided by public institutional infrastructure in the form of housing, education, and health care.

As noted previously, the overall demographic trend in the United States is a shift away from a population that is majority non-Hispanic White, with that group becoming a minority around the year 2045. This tipping point for the nation as a whole will be preceded by tipping points for younger cohorts because people of color in the United States are overall younger than Whites. By 2020, for example, youth under eighteen are predicted to be majority people of color;[247] and by 2027, the 18–29-year-old cohort will be majority people of color.[248] For the over-60 age cohort, however, the tipping point will not occur until after 2060.[249] For decades to come, older Whites—a powerful voting cohort[250]—will continue to exercise disproportionate control over policy decisions that affect younger people of color.

Old habits die hard. In the former states of the Confederacy, political habit is to refrain from investing in public benefits and public infrastructure. There was resistance, after the Civil War, to taxing White people and spending public funds to benefit Black

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[241] Strand, *Brown*, *supra* note 95, at 313–14; Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/.

[242] Strand, *Brown*, *supra* note 95, at 311–13, 314–16; Strand, *Education as Inheritance*, *supra* note 13, at 292–97.

[243] *Health Care Coverage for Children*, CHILD TRENDS, Appendix 1. Percentage of Children Under Age 18, by Race and Hispanic Origin: Selected Years, 1980-2016, and Projections, 2020-2050, https://www.childtrends.org/indicators/racial-and-ethnic-composition-of-the-child-population.

[244] *Id*.

[245] *Id*.

[246] *Id*. 61% of Black children, 59% of Hispanic children, and 60% of Native American children live in low-income households compared to 28% of White children. *Id*.

[247] William Frey, *The US will become 'minority white' in 2045, Census projects*, BROOKINGS (Mar. 14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/; Rogelio Saenz & Dudley L. Poston, Jr., *Children of Color Projected to be Majority of U.S. Youth this Year*, PBS NEWS HOUR (Jan. 9, 2020), https://www.pbs.org/newshour/nation/children-of-color-projected-to-be-majority-of-u-s-youth-this-year.html.

[248] Frey, *supra* note 247.

[249] *Id*. The mostly-White baby boomer generation continues to have a significant effect on the population overall. *Id*.

[250] Frederick R. Lynch, *Opinion: Don't Discount Older Voters. They Could Decide the White House*, N. Y. TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/opinion/democrats-republicans-senior-voters-aarp-.html.

people. Over time, this disinclination to public investment became a habit. The result has been and is a dearth of community benefits for everyone. Everyone is affected; poor people, who happen to be disproportionately Black, suffer the most.[251]

The anti-tax waves that have surged in California and Kansas and that have swelled at the national level have racialized origins and racialized effects. Policies consistent with the anti-tax wave redistribute tax burden disproportionately to people who are less wealthy and especially to people of color. The scarcity mentality the wave encourages leads to disinvestment in essential public institutional infrastructure for investing in the future.

We have come to a point where taxing and investing for racial and ethnic equity merge with taxing and investing for the nation's future. For equity and for our future, we need to tax ourselves in a truly progressive way. Progressive tax systems will slow the continued accretion of further wealth to those who are already wealthy—and who are disproportionately older and White. Progressive tax systems will also provide funds necessary to invest in public institutional infrastructure in the form of education, housing, health care, and more for our younger population—who are disproportionately poorer and people of color.

D. Strategies for Transformation

The increasingly high level of wealth inequality is a national crisis that threatens the existence and stability of our democracy. It also represents a major self-inflicted wound in terms of national capacity considering the serious underinvestment in the nation's potential human capital. Compounded with the basic injustice of the continuing adverse effects of a racist system, the crisis becomes even more grave.

This Article views taxes holistically as a system comprised of all the taxes discussed herein and others not discussed that contribute to the ongoing racialized wealth inequality. In searching for solutions to the systemic problems of increasing wealth inequality and continuing race-based disparities, it is difficult to not get stuck in the weeds of analyzing the effectiveness of one or more taxes or tax expenditures. Yet it is imperative to understand the myriad choices made over decades that are reflected in the federal *and* state *and* local tax systems and how these choices and systems act together to drive the intertwined effects of wealth inequality and racial wealth disparities.[252] To move toward equity, we must first, as a country, consciously acknowledge and deal with the issue of race. Only then can we acknowledge the tax system's contribution to wealth inequality and generate the actions necessary to combat these systemic inequities.

1. The First Step: Acknowledgement of Racial Wealth Inequality

The 2016 election put race on the national agenda with renewed urgency. While racist rhetoric and hate crimes have increased, more and more people, including Whites, are also becoming aware of racism as a system of advantage based on race and of White privilege. There is rising awareness that racial advantage and disadvantage have not disappeared of their own accord and that current racism is a continuation of past racism. There is also increased recognition that racism manifests in groups, rather than in

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[251] Jamelle Bouie, *How the South Blocked Health Care for Those Who Need It Most*, DAILY BEAST (July 11, 2017), https://www.thedailybeast.com/how-the-south-blocked-health-care-for-those-who-need-it-most.
[252] *See* Hill et al., *Illusion of Race-Neutral Tax Policy*, *supra* note 188 and accompanying text.

individual injuries that fit a traditional cause-and-effect paradigm. Conversations about race have increased; calls for reparations have swelled.[253]

A national truth and reconciliation process offers the possibility of a bridge to policy and legal action to address continuing racial disparities.[254] There have been numerous calls for a "national conversation about race,"[255] but there is a mismatch between the scale at which people can actually engage in meaningful conversations about race in the particulars of personal and local community histories around race and the scale at which effective policy agendas must be set and action taken to actually address and eradicate entrenched systemic state and national racism. There is a need, moreover, for these conversations to be relational and to connect with people's hearts as well as their minds. This is where the possibility for change arises.

Inspiration and potential models for this multitude of conversations, this emergent national conversation, include various truth and reconciliation processes such as that conducted with First Nations in Canada beginning in 2009[256] and the Maine-Wabanaki State Child Welfare TRC (Truth and Reconciliation Commission) initiated in 2012.[257] Informed by restorative practice strategies, the initial phase of a truth and reconciliation process involves creating space for previously marginalized truths to emerge. In the case of race in the United States, many of these truths are historical and involve racial and ethnic groups as groups rather than solely as individuals. In addition, while the foundational racial dynamic in the United States is Black-White, other racial and ethnic groups have also experienced significant discrimination and disadvantage; the question of whether to define the process broadly or narrowly arises. As previously unheard stories reshape history and generate new shared truths, reconciliation can begin.

Much of the history that underlies racial wealth disparities is not widely disseminated or discussed. Bringing this history, these stories, from the margins to the center reveals the continuing presence of racism as a system of advantage and disadvantage—a system for which we are collectively responsible.[258] The naming of racism and the tangible effects such as racial wealth disparities and tax policies that perpetuate those disparities lays a necessary foundation for addressing long-standing inequities.

2. The Second Step: Addressing Wealth & Racial Inequality in Our Tax Systems

Building on a foundation of truth, policy and legal action can begin to move us toward reconciliation. Our discussion in this Article documents the need for policy and legal action to revamp our federal and state tax systems to eradicate racial disparities. To

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[253] *See, e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631.html.

[254] *See* Bonny Ibhawoh, *What Canada and South Africa Can Teach the U.S. About Slavery Reparations*, CHI. REP. (July 18, 2019), https://www.chicagoreporter.com/what-canada-and-south-africa-can-teach-the-u-s-about-slavery-reparations.

[255] *See, e.g.*, Exec. Order No. 13,050, 3 C.F.R. 207 (1998) (revoked by Exec. Order No. 13,128, 3 C.F.R. 218 (2000) (establishing the President's Advisory Board on Race). Advisory Board's Report to the President, One America in the 21st Century: The President's Initiative on Race (June 14, 1997).

[256] *Truth and Reconciliation Commission of Canada*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525 (last modified Feb. 2, 2019).

[257] *The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, UPSTANDER PROJECT, https://upstanderproject.org/firstlight/trc (last visited Feb. 16, 2020).

[258] Strand, *Invisible Hands*, *supra* note 58.

suggest federal and state coordination in altering their tax systems to address racial and wealth inequalities is pure folly in today's political environment. States leading the charge on combatting these inequalities may be more realistic, as in fact some states already are.[259] Nevertheless, the existing interrelationships between federal and state systems necessitates looking at integrated approaches.

There is no single magical cure for the equity problems inherent in the tax systems because so many provisions constitute contributing factors. It is also not rocket science, however. History informs us well: Look back to the 1970s when wealth and income inequality were not so drastically high,[260] and you will discover more significantly progressive income taxes and more effective wealth transfer taxes. The main purpose of a tax system is to raise revenue to finance governmental functions and priorities. The TCJA has lowered that revenue considerably, thereby negatively affecting investment in infrastructure such as public transit, education, and neighborhood revitalization that could help address historical neglect of communities of color.[261] Because many of the TCJA changes regarding individuals are comprised of temporary provisions that expire at the end of 2025, the TCJA presents an opportunity to determine how best to move forward and make conscious systemic changes to address this rising inequality and racialized wealth.

One such systemic change is to focus on certain tax expenditures and their actual, not just intended, outcomes. For example, certain "upside-down tax breaks" that target activities intended to build economic resources—home ownership, college education, retirement savings—benefit higher-income and wealthy households significantly.[262] These higher-income, and disproportionately White, households benefit more than lower-income households, disproportionately comprised of people of color, because these tax breaks are typically offered in the form of deductions, exemptions or exclusions, the values of which rise with household income. These tax breaks often are available to those who have less need for financial incentives to engage in the targeted economic activity.[263]

Professor Dorothy Brown has written extensively on racial bias in the federal tax system, opining that the most efficient solution is to focus tax relief or tax incentives on those who were targeted with discrimination.[264] But, as she has acknowledged, targeting incentives based entirely on race would engender constitutional barriers, especially in light of recent Supreme Court precedent.[265]

Navigating these legal shoals, Senator Elizabeth Warren has proposed offering down-payment assistance to home buyers in formerly "redlined" neighborhoods where the federal government once denied access to mortgages.[266] Senator Cory Booker has proposed

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[259] *See supra* notes 170–176 and accompanying text.

[260] Drew Desilver, *U.S. Income Equality, on Rise for Decades, Is Now Highest Since 1928*, PEW RESEARCH CTR. (Dec. 5, 2013), https://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/.

[261] Chye-Ching Haung & Roderick Taylor, *How the Federal Tax Code Can Better Advance Racial Inequity*, CTR. ON BUDGET & POL'Y PRIORITIES (June 25, 2019), https://www.cbpp.org/sites/default/files/atoms/files/7-2519tax.pdf.

[262] *Id*.

[263] *Id*.

[264] *See* Brown, *supra* note 47 and Brown, *supra* note 83 and accompanying text; *see also* Emily Badger, *Can the Racial Wealth Gap Be Closed Without Speaking of Race?*, N.Y. TIMES (May 10, 2019), https://www.nytimes.com/2019/05/10/upshot/racial-wealth-gap-2020-candidates.html.

[265] Brown, *supra* note 83, at 372.

[266] Badger, *supra* note 264.

"baby bonds" that would offer all newborns $1,000 savings accounts, and then add up to $2,000 annually for children in low-income households.[267] According to a new study, such a program would significantly decrease racial wealth inequality.[268] Both of these proposals are not focused specifically on race, but have the effect of decreasing racial gaps in wealth because, due to historical causes, poorer households and children are disproportionately Black and other people of color.

The wealthy significantly and unabashedly benefit from current lower and preferential rates. Highly paid chief executive officers (CEOs) are a prime example. In 1978, CEOs made thirty times higher pay than the average worker; that increased to 271 times more in 2016.[269] This gargantuan pay differential, accompanied by significant decreases in the top marginal rate over the last several decades, seals inequality. The pay differential and decreased tax rates also allow greater wealth accumulation, which is exacerbated by significantly less tax on wealth transfers under the current law.[270] Similarly, lower capital gains rates continue to support a racial power differential between Whites and Blacks. Currently, the top 20% of income earners—who are "overwhelmingly and disproportionately" White—own approximately 92% percent of all shareholder wealth.[271] Shifts in tax rates that benefit executives and shareholders contribute to the wealth inequalities that negatively affect Blacks and other people of color.[272] These shifts also support the proposition that the IRC should particularly focus on wealth inequality, not just income inequality, through re-established higher capital gains and estate tax rates.[273]

Another proposal with respect to the federal tax system is the adoption of a wealth tax. With support from other former Democratic presidential candidates, Senator Warren has proposed such a tax, which would target the 75,000 wealthiest families in the country.[274] A 2% tax on a family's wealth exceeding $50 million would be imposed, with an additional surcharge of one percent on wealth above $1 billion.[275] The barriers to the effectiveness of a wealth tax can be significant; these include: calculation of family wealth and loopholes therein, lack of compliance and enforcement resources within the IRS, potential constitutionality challenges,[276] and an incentive for wealth to be moved from the

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[267] Dylan Matthews, *Study: Cory Booker's Baby Bonds Nearly Close the Racial Wealth Gap for Young Adults*, VOX (Feb. 1, 2019, 11:57 AM), https://www.vox.com/future-perfect/2019/1/21/18185536/cory-booker-news-today-2020-presidential-election-baby-bonds.
[268] *Id*.
[269] Sterling & Steinbaum, *supra* note 146, at 3.
[270] *Id*. at 5.
[271] *Id.* at 4.
[272] *Id*.
[273] Hamilton & Linden, *supra* note 145, at 10.
[274] Matt Stevens, *Elizabeth Warren on a Wealth Tax*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/us/politics/elizabeth-warren-wealth-tax.html.
[275] Laura Davison, *Democrats Love a Wealth Tax, But Europeans are Ditching the Idea*, BLOOMBERG (Mar. 28, 2019), https://www.bloomberg.com/news/articles/2019-03-28/democrats-love-a-wealth-tax-but-europeans-are-ditching-the-idea.
[276] Michael Hiltzik, *Elizabeth Warren's Wealth Tax Proposal is Constitutional, Experts Say—and Necessary*, L.A. TIMES (Jan. 25, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-warren-wealth-tax-20190125-story.html; *see* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020); Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L. J. 111 (2018).

United States to countries abroad.[277] Many European countries that previously imposed a wealth tax have abandoned it; some scholars suggest that these barriers to an effective wealth tax are potentially unsurpassable. These scholars propose alternatives such as strengthening the wealth-equalizing potential of existing tax laws by raising capital gains rates, taxing capital gains at death by eliminating the stepped-up basis rules, and imposing a transferee-oriented accessions tax.[278] There are, however, resilient and viable responses that address such barriers and concerns.[279]

Due to the political paralysis in Congress, states may have the most opportunity and best ability to address wealth inequality through reformation of their tax systems. Because state and local governments collect approximately one-third of the country's taxes and comprise almost one-half of all domestic public-sector spending, including over 90% of elementary and secondary education funding, and nearly all public college and university funding, these governments are powerfully positioned to expand opportunity and increase equality based on race.[280] As discussed herein, states must acknowledge their historical shifts from progressive taxes on wealth transfers and income, to regressive taxes on consumption, which have undoubtedly contributed to the steady increase in wealth inequality over the last decades. A return to progressive income taxes and consequential estate or inheritance taxes is a first step.[281] "Circuit breakers" on property taxes and credits on other taxes based on household income are a positive step towards combatting wealth inequality, thereby addressing racial inequalities as well. States should likewise explore taxes that address accumulated wealth like increased taxes on capital gains and consequential inheritance taxes that address intergenerational wealth transfer.[282] Some states like California have adopted a number of tax measures to address wealth inequality, and thereby disparate racial effects, with some success to date.[283]

CONCLUSION

Racism in the United States has shifted over time from the direct to the indirect, from the overt to the implicit, from the intentional to the reflexive, from the personal to the institutional. Tax policy and law—which are often so complicated as to be opaque to non-experts—operate in the aggregate and often masquerade as apolitical. Tax thus provides "cover" for racism as it has gone increasingly to an offstage rather than onstage role.[284]

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[277] Davison, *supra* note 183.

[278] Miranda Perry Fleischer, *Not So Fast: The Hidden Difficulties of Taxing Wealth*, NOMOS WEALTH VOL. (2016); *see also* Samuel D. Brunson, *Afterlife of the Death Tax*, 94 IND. L. J. 355, 358 (2019).

[279] Michael Hiltzik, *How Much Would Elizabeth Warren's Wealth Tax Raise? Economists Battle Over the Number*, L.A. TIMES (June 26, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-wealth-tax-20190626-story.html; *see also* Thornton & Hendricks, *Ending Special Tax Treatment*, *supra* note 24.

[280] Leachman et al., *Advancing Racial Equity*, *supra* note 171.

[281] Dylan Grundman, *Moving Toward More Equitable State Tax Systems*, INST. ON TAX. & ECON. POL'Y (Jan. 2019), https://itep.org/moving-toward-more-equitable-state-tax-systems/.

[282] Elizabeth McNichol, *State Taxes on Inherited Wealth*, CTR ON BUDGET & POL'Y PRIORITIES (Dec. 12, 2018), https://www.cbpp.org/research/state-budget-and-tax/state-taxes-on-inherited-wealth; Sean Farrell, *Use Inheritance Tax to Tackle Inequality of Wealth, Says OECD*, GUARDIAN (Apr. 12, 2018), https://www.theguardian.com/ inequality/2018/apr/12/use-inheritance-tax-to-tackle-inequality-of-wealth-says-oecd.

[283] *See supra* notes 170-176 and accompanying text.

[284] CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869-

Our goal in this Article has been to illuminate the racialized inequities perpetuated by the tax system as a whole and to document the continuing discriminatory effects of government action—here the federal, state, and local tax law and policy. We must name and describe inequity in order to move toward equity.

Thomas Jefferson wrote to James Madison in 1786, "whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right."[285] In our view, the tax laws of the nation—a component of the laws of property—have been inequitably extended for far too long.

1973, at 174 (2018) ("[t]he quiet power of tax systems is their ability to hide in plain sight, even as they enact great injustices.").

[285] Letter from Thomas Jefferson to James Madison (June 19, 1786), https://www.loc.gov/resource/mjm.02_0677_0679/?st=text.