

AB 3121 TASK FORCE TO STUDY AND DEVELOP REPARATIONS PROPOSALS FOR AFRICAN AMERICANS

Witness Panel: Tax Law Considerations

Friday, January 27, 2023

1:45pm – 2:45pm PT

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Biographies and Background

Sarah Moore Johnson is a Founding Partner at Birchstone Moore LLC, a boutique estate planning law firm in Washington, D.C., where her practice focuses on transfer tax planning and family wealth stewardship for ultra-high net worth clients whose net worth is \$50M or greater, as well as the administration of estates and trusts. Sarah graduated *magna cum laude* from Wake Forest University (B.S. in Business) and the University of Georgia School of Law (J.D.). She is licensed to practice law in the District of Columbia, Maryland, Virginia, and Georgia. Sarah is a past President of the Washington D.C. Estate Planning Council where she started a Diversity, Equity and Inclusion initiative, a Fellow of the American College of Trust and Estate Counsel (ACTEC), and she serves on the Board of Trustees of the Greater Washington Community Foundation, which has made closing the racial wealth gap its strategic mission.

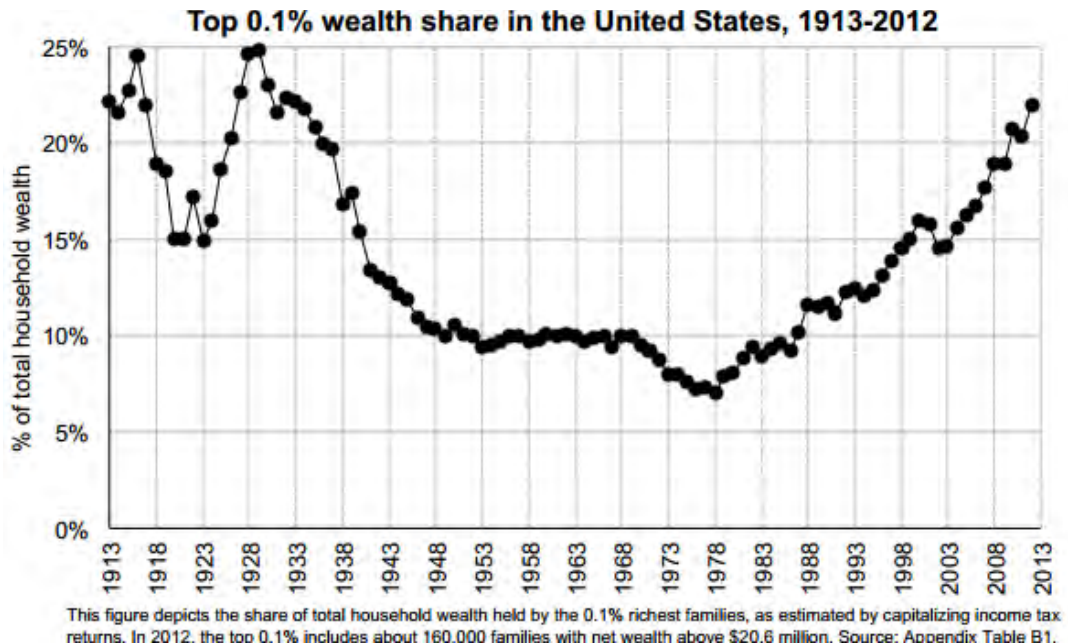
Raymond C. Odom is a Senior Vice President at Northern Trust in Chicago, Illinois. He serves as a Managing Wealth Partner - Director of Wealth Transfer Services providing wealth transfer and estate tax consultation to Northern Trust partners and their clients. Ray has a B.A. from Valparaiso University and a J.D. from The Ohio State - Moritz College of Law. He is licensed to practice law in Illinois and before the U.S. Tax Court and is a Certified Financial Planner (CFP). Ray is one of 6 Black Fellows in the 2400 member American College of Trust and Estate Counsel (ACTEC). Ray's father Nathaniel M. Odom founded the DuPage County Illinois chapter of the NAACP that secured one of the first municipal "open housing" ordinances in the country, shortly after Dr. King's attempt to establish such legislation in Chicago was stymied. A nationally acclaimed speaker on estate tax and wealth transfer topics, Ray was a co-panelist for Congresswoman Joyce Beatty (Dem 3 Dist. Ohio –Past Head of The Congressional Black Caucus) at the Annual Legislative Conference of The Congressional Black Caucus in Washington DC from 2013-2018 on the topic of racial wealth disparity.

Ms. Johnson and Mr. Odom published *The Forgotten 40 Acres: How Real Property, Probate and Tax Laws Contributed to the Racial Wealth Gap and How Tax Policy Could Repair It*, in REAL PROPERTY, TRUST & ESTATE LAW JOURNAL, Spring 2022, Vol. 57, No. 1 and their similarly-titled presentation was selected as one of seven CLE Showcase Programs delivered at the annual meeting of the American Bar Association on August 5, 2022. Their testimony draws from their law review article and presentation.

Executive Summary

1. America was founded on Thomas Jefferson's vision of equality of opportunity, a meritocracy where wealth was relatively evenly distributed among the citizens.
2. The purpose of the initial income tax and estate tax (enacted in 1913 and 1916, respectively) was not only to raise revenue, but also to break up and redistribute large concentrations of wealth held by robber barons and industrialists, which was leading to social unrest and economic volatility.
3. When income and estate tax rates were at their peak levels from 1936 through 1980, home ownership exploded (albeit disparately benefitting White families) and the American middle class was born. By 1971, 61% of American households were middle class.
4. Beginning with California's Proposition 13 in 1978, which protected property owners from any increase in property taxes greater than 2% per year, an era of tax revolt ushered in regressive, or anti-tax policy. As tax rates were lowered and the estate tax exemption increased from \$675,000 in 2000 to almost \$13 million in 2023, wealth disparity in America has risen to levels not seen since the Estate Tax was implemented in 1916.

The charts below show how much of the country's wealth was concentrated in the hands of the wealthiest 0.1% of households in the United States over time. The greatest concentrations occurred (i) before the enactment of the estate tax (and again in the late 1920s before the gift tax was enacted) and (ii) in the 2010s to present day, as estate tax rates declined to their lowest levels and the exemption from the tax increased to \$5 million or greater. The period of lowest concentrations of wealth directly correlate to the period of highest estate tax rates and lowest exemptions from the tax.





5. Theodore Roosevelt, in arguing for the estate tax, coined the term “swollen fortunes”. Andrew Carnegie believed the estate tax was a necessary condemnation of “selfish millionaires” who did not use their wealth for public ends and the good of the community. The charitable contribution deduction from estate tax is the embodiment of Andrew Carnegie’s philosophy.
6. The estate tax has been stripped of its usefulness by the increasing exemptions and declining rates, first enacted by The Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) during George W. Bush’s tenure as President. The exemption was doubled in 2018 by the Trump-era Tax Cuts and Jobs Act.

Today, a married couple can leave \$25,840,000 to their heirs without paying estate tax.

Most choose to leave this amount to “dynasty”-type trusts for their children, grandchildren, and more remote descendants, and estate and generation-skipping transfer taxes will never be assessed on that amount, no matter how much the trust corpus grows with each passing generation. It marks a return to the very aristocracy America sought to avoid.

7. **By bolstering and earmarking the Estate Tax for reparations, swollen fortunes will be returned to those with stolen fortunes. The Estate Tax is the fairest of all the taxes, as it taxes wealth that has no owner** – the estate belongs not to the wealth creator, who is deceased, nor does the wealth creator’s family have any legal claim to the estate – at least not without the affirmative action of the law, the courts, and the government. The Estate Tax solves the problem of imposing societal blame for the racial wealth gap on a particular

set of taxpayers. By taxing an estate, the government is in effect taxing no one, and therefore no one can claim, “I should not have to pay for the sins of my fathers”.

8. Even if the Estate Tax is not used as the source of funds for reparations, it is important that the revenue source be tied to the wrong. California should find a current revenue source that has a clear tie to a current problem created by historic and government-sponsored, encouraged, or ignored racism.

Evanston, Illinois is a good example of tying the funding source to the harm being repaired. In addition, voters in the City of Los Angeles recently approved an additional real property transfer tax of 4% on all real property sales priced or valued from \$5 million up to \$10 million and a 5.5% tax on real property sales priced or valued at \$10 million or greater. The stated purpose of this new tax revenue is to fund an increase affordable housing supply and reduce housing costs for homeless and low-income individuals. Taxing high value home sales to reduce homelessness is an excellent example of creating a source of revenue directly tied to the societal harm being corrected.

9. Charitable organizations such as higher educational institutions and churches are already raising and deploying funds for reparative justice. Charities have the existing infrastructure to know who is most negatively impacted by the racial wealth gap and how those individuals’ greatest economic challenges could be alleviated. Creating charitable incentives for private payment of reparations would allow the government to capitalize on that existing infrastructure and speed its ability to make reparations payments.
10. Creating a new type of charity, a “501(c)(40) Reparations Organization”, pays homage to the broken promise of 40 acres and the new promise of H.R. 40, and would allow unlimited charitable income tax deductions and an estate tax credit for private contributions to organizations that would carry out the recommendations of the Reparations Task Force or the H.R. 40 commission.
11. Creating a new type of savings account, a “501(c)(40) Account” modeled after 529 plans could further accelerate Black wealth creation by allowing income-tax free growth of reparations payments deposited in the account, and tax-free distributions for qualifying expenses that meet the directives of the HR 40 commission, such as debt repayment, home purchases, education, and health care. Further, a 501(c)(40) account could be transferrable at death to other eligible recipients of reparations, thus allowing more Black Americans to enjoy the financial security that an inheritance brings.

1. The American Paradoxes: Freedom and Slavery; Egalitarianism and Inherited Wealth

The underlying promise of America is almost universally understood to be *equality* of opportunity. Yet this ideal clashed in two major ways with the individual self-interest of the men in power at the inception of the country.

First, there was the problem of slavery and equality of personhood. How exactly did the colonists declare freedom from servitude to Britain by asserting American equality while at the same time importing and then legalizing chattel slavery, the worst form of servitude? The answer was plain and simple—it was in the colonists’ political and economic self-interest.¹ America’s early leaders desperately needed the assistance of European trading partners, especially France, and the French were the third-largest slave traders, behind Portugal and Britain.² Before cotton, the colonists’ single most valuable product was tobacco, which required an ever-growing pool of cheap labor.³ It was this economic imperative of cheap labor and trade that drove the statutory creation of involuntary servitude in Virginia and other colonies.⁴

The second paradox to be overcome by the founding fathers was the problem of inherited wealth and its inherent inequality of opportunity. Thomas Jefferson’s view of society was formed “by the ideal of an agrarian society in which the economic functions were performed chiefly by independent small farmers.”⁵ Moreover, a central tenant of republicanism required “securing and then maintaining a nearly equal distribution of wealth among the voting citizenry.”⁶

Thomas Jefferson was an ideal ambassador of this paradox. He combined a forceful argument for freedom from autocratic rulers with his own inherited wealth in both land and slaves.⁷ The man best articulating America’s resentment of British aristocracy was America’s most powerful aristocrat.⁸

¹ See IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEA IN AMERICA* 107 (2017).

² See Joshua J. Mark, *Tobacco & Colonial American Economy*, *WORLD HIST. ENCYC.* (Feb. 12, 2021), <https://www.ancient.eu/article/1681/tobacco--colonial-american-economy/> [<https://perma.cc/B5HC-MM2R>].

³ See *id.*

⁴ See *id.*

⁵ JENS BECKERT, *INHERITED WEALTH* 73 (English ed., Thomas Dunlap trans., Princeton Univ. Press 2008) (2004); see also BOYD AND CATANZARITI EDS., *PAPERS OF JEFFERSON, Jefferson to Madison, October 28, 1785*.

⁶ JAMES L. HUSTON, *SECURING THE FRUITS OF LABOR* xii, 22 (2015) (“Of course, virtually all individuals who commented on the distribution of wealth qualified their claims of egalitarianism by insisting that some inequalities would always and rightfully exist. In most of the leaders’ discourses, equal really meant equitability, and the revolutionaries hoped to achieve an equitable distribution of wealth rather than an equal one.”).

⁷ See WILLIAM A. DARITY, JR. & A. KRISTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 314 n.89 (2020) at 76–77 (“In 1757, at the young age of fourteen, . . . Thomas Jefferson inherited [from his father] fifty slaves, 1,900 acres that comprised the Monticello estate, and his father’s vast library. From his mother, . . . he inherited a position of respect and noblesse oblige within the Virginia aristocracy In 1773, less than a year after Jefferson married the young widow Martha Wayles Skelton, her father died, bequeathing an estate to the couple that consisted of 135 slaves and 11,000 acres of land.”).

⁸ *Id.* at 76 (“The Declaration of Independence could have been a document affirming universal rights. To the extent that black people are construed as fully human, championing liberty and freedom for some—‘We hold these truths to be self-evident, that all men are created equal’—while condemning blacks to eternal servitude is highly problematic. Republicanism affirmed the ascendancy of the colonial aristocracy while maintaining a fine line of control over the masses of poor whites, providing opportunities for some of them to obtain land and own slaves while assuring even the most impoverished whites that they could exercise dominance over blacks.”).

Inherited wealth runs directly counter to the idea of a meritocracy, where one can achieve success and power by skill and merit alone.⁹ America’s initial revulsion to the wealth concentration of primogeniture and fee entails made it easy for populist politicians to promote “breaking up” concentrated wealth through taxation during periods of economic volatility, labor unrest, social inequality, and/or progressive activism. In the 30 years leading up to the enactment of the estate tax in 1916, America experienced all of these.¹⁰

Today, we exist in an environment where the estate tax has been nearly eradicated at the state level and bankrupted at the federal level by exorbitantly high exemptions. We also find ourselves in an economic and political environment reminiscent of the early 1900s, when public sentiment against the robber barons made enactment of the estate tax possible. Our wealth and political power has become concentrated in the hands of the few, the middle class is shrinking, frustrated laborers have renewed interest in unionizing, and social inequality has destabilized democracy. It is notable that progressive tax policies from 1916 through 1977 strongly correlated with the rise of the American middle class, and the regressive, or “anti-tax” movement of the 1980s through today has eroded it.

2. Brief History of Tax Policy

Progressive Tax Policy (1916 through 1977)

Our modern system of taxation has its roots in the 16th Amendment to the Constitution, ratified in 1913, which provided Congress the “power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States”. That same year, the first federal income tax was enacted, but it only applied to the highest-earning taxpayers.¹¹ It was not until President Franklin D. Roosevelt passed the Revenue Act of 1942 that the vast majority of Americans began to pay income taxes, and paycheck withholding began in 1943.¹² Even so, the income tax was meant to redistribute wealth, as the top tax rates were 70% or higher from 1936 through 1980.

The estate tax shares a similar story. It was enacted in 1916¹³ with a purpose not only of funding World War I, but also to implement President Theodore Roosevelt’s progressive tax policy ideals and mitigate the negative effects of unearned inheritances. As with the income tax, many Americans became subject to the estate tax -- from 1941 to 1976 the highest estate tax rate was 77% with exemptions of only \$40,000 to \$60,000.¹⁴

⁹ See BECKERT, *supra* note 5, at 13.

¹⁰ See *id.* at 178 n.2. However, beginning in the 1890s, there was increasingly a climate of public opinion in which the demand for the (progressive) taxation of inheritance was no longer perceived solely as socialist radicalism, but as a necessary measure of reform to enhance equality of opportunity, as a counterweight to the existing concentration of wealth, and as a contribution to tax equity—and thus as an expression of the realization of American values. See *id.* (citing RANDOLPH E. PAUL, *TAXATION IN THE UNITED STATES* 108 (1954)). Paul also believed that the passage of the estate tax in 1916 was made possible largely by the public political discourse. See *id.* at 325-26 n.31 (“The estate tax enacted by the 1916 act was a manifestation of a grass roots movement which had been visible for discerning eyes for a good many years.”).

¹¹ IRS.gov, *Historical Highlights of the IRS*, <https://www.irs.gov/newsroom/historical-highlights-of-the-irs> (last visited Jan. 16, 2023) (Congress adopted a 1% tax on net personal income of more than \$3,000 with a surtax of 6% on incomes of more than \$500,000).

¹² *Id.*

¹³ See *id.* at 120.

¹⁴ See, e.g., Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, IRS, <https://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [<https://perma.cc/8V6T-TLS4>].

As Professor Boris Bittker explained, the original proponents of both the income tax and the estate tax were clear about their legislative intention to use federal taxes to combat wealth concentration.¹⁵ Specifically, “[p]rogressives, including President Theodore Roosevelt, advocated both an inheritance tax and a graduated income tax as tools to address inequalities in wealth.”¹⁶

In a speech in 1906, Roosevelt declared:

It is important to this people to grapple with the problems connected with the amassing of enormous fortunes As a matter of personal conviction, ... I feel that we shall ultimately have to consider the adoption of some such scheme as that of a progressive tax on all fortunes ... —a tax so framed as to put it out of the power of the owner of one of these enormous fortunes to hand on more than a certain amount to any one individual; the tax, of course, to be imposed by the National and not the State government. Such taxation should, of course, be aimed merely at the inheritance or transmission in their entirety of *those fortunes swollen beyond all healthy limits*.¹⁷

At the time of Roosevelt’s words in 1906, those swollen fortunes could have been easily and clearly traced back to the profits stolen through slave labor – stolen human beings, stolen wages, and the stolen promise of land to the freed slaves.

The progressive tax system worked. At the same time as top income tax and estate tax rates were being implemented and the reach of the taxes were broadened to affect more taxpayers in the 1940s through 1960s, home ownership exploded from 44% to 64% from 1940 to 1980 (and has remained relatively stagnant since then)¹⁸ and the middle class became the largest income tier in the U.S., at 61% of households in 1971,¹⁹ up from an almost non-existent number when the estate and income taxes were implemented. Of course, the taxes were paid by Americans of all races, but as has been documented by this Task Force, the primary beneficiaries of the government programs funded by such revenue were White.

Regressive Tax Policy (1978 to Present)

On the heels of civil rights victories in the 1960s, America’s tax policies began to shift from progressive to regressive, or “anti-tax”²⁰ Anti-tax systems create and enforce economic segregation, solidifying and

¹⁵ See BORIS BITTKER & LAWRENCE STONE, FEDERAL INCOME, ESTATE AND GIFT TAXATION 983 (4th ed. 1972).

¹⁶ BORIS I BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 4 (9th ed. 2005).

¹⁷ Theodore Roosevelt, President of the U.S., The Man with the Muck Rake (Apr. 14, 1906) (transcript available at <https://voicesofdemocracy.umd.edu/theodore-roosevelt-the-man-with-the-muck-rake-speech-text/> [https://perma.cc/CCE7-P2PC]) (emphasis added).

¹⁸ United States Census Bureau Housing Data Table (2000), available at <https://www.census.gov/data/tables/time-series/dec/coh-owner.html> (last visited Jan. 16, 2023).

¹⁹ Pew Research Center, “The American Middle Class Is Losing Ground: No longer the majority and falling behind financially.” Washington, D.C.: December 2015, p.7.

²⁰ Many people use the terms prejudice and racism interchangeably. In his book, *Portraits of White Racism*, David Wellman argues that limiting our understanding of racism to prejudice does not offer a sufficient explanation for the persistence of racism. He defines racism as a “system from which advantage is derived on the basis of race,” which is what the federal and state tax systems have promoted. David Wellman, PORTRAITS OF WHITE RACISM 210 (Cambridge Univ. Press 2d ed. 1993). Another related definition of racism, commonly used by antiracist educators and consultants, is “prejudice plus power.” Beverly Daniel Tatum, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? 87–88 (Twentieth Anniversary ed. 2017) (“While I think

boosting White advantage, while further inhibiting the creation of Black wealth. As will be explained, this economic segregation occurs at every level of government and with most types of tax systems.

Property Tax. In the 1970s, the country was swept by a wave of tax protests, often called the Tax Revolt.²¹ States were pressured into placing limits on property taxes, the most widely publicized being California's Proposition 13,²² a constitutional amendment approved by California voters in 1978 that protected landowners from any increase in property taxes that were greater than 2% year over year.²³ Almost every state enacted a form of a homestead exemption to shield primary residences from aggressive property taxes.

Limits on property taxes for primary residences protect those who have the fortune to own a home. U.S. Census Bureau data for 2019 shows that 73.3% of White Americans own their own home, as compared with only 42.1% of Black Americans.²⁴ This gap—31.2% points—is the largest gap since the Census began collecting the data in 1994.²⁵

Income Tax. The Reagan-era tax cuts of the 1980s shifted the tax burden away from wealthy taxpayers. The highest top income tax rate in our country's history was in 1944, when the top rate of 94% was imposed on taxable income over \$200,000 (which is the equivalent of about \$2.5 million in today's dollars).²⁶ From the 1950s through the 1970s, the top income tax rate never dipped below 70%.²⁷ The Tax Reform Act of 1986 ended progressive taxation, implementing a top rate of 28%. Since then, the top rate has fluctuated in a narrow range of 28% to 39.6% (or 43.4% if the Obama administration's net investment income tax is included).²⁸

Since the Reagan-era tax cuts were implemented, the racial wealth gap has increased. Statistics maintained by the Federal Reserve show that “the racial wealth gap between Black and White families grew from about \$100,000 in 1992 to \$154,000 in 2016, in part because White families gained significantly more wealth (with the median increasing by \$54,000), while median wealth for Black families did not grow at all [in real terms] over that period.”²⁹

this definition also captures the idea that racism is more than individual beliefs and attitudes, I prefer Wellman's definition because the idea of systematic advantage and disadvantage is critical to an understanding of how racism operates in American society.”)

²¹ See, e.g., Lee Sigelman et al., *The Tax Revolt: A Comparative State Analysis*, THE WESTERN POLITICAL QUARTERLY 36, no. 1 (1983): 30–51, <https://doi.org/10.2307/447843> [<https://perma.cc/74JU-JUQ3>].

²² See CAL. CONST. art. XIII A §§ 1–7.

²³ See, e.g., Glenn W. Fisher, *History of Property Taxes in the United States*, ECON. HIST. ASS'N, <https://eh.net/encyclopedia/history-of-property-taxes-in-the-united-states/> [<https://perma.cc/DX6R-FF66>].

²⁴ See *Homeownership Rates Show That Black Americans Are Currently the Least Likely Group to Own Homes*, USA FACTS (July 20, 2020), <https://usafacts.org/articles/homeownership-rates-by-race/> [<https://perma.cc/4ZGP-ZQR6>].

²⁵ See *id.*

²⁶ See I.R.S., U.S. INDIVIDUAL INCOME TAX: PERSONAL EXEMPTIONS AND LOWEST AND HIGHEST BRACKET TAX RATES, AND TAX BASE FOR REGULAR TAX: 1913 TO 2018, tbl.23, <https://www.irs.gov/statistics/soi-tax-stats-historical-table-23>; [<https://perma.cc/Q77M-97XZ>]; see also *History of Federal Income Tax Rates*, BRADFORD TAX INST., <https://bradfordtaxinstitute.com/FreeResources/Federal-Income-Tax-Rates.aspx> [<https://perma.cc/HN5S-ZSXA>].

²⁷ See I.R.S., *id.*

²⁸ See *id.*

²⁹ Nick Noel et al., *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY & COMPANY (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap> [<https://perma.cc/4VTF-9FAK>]; see Brandon Fuller, *Understanding the Racial Wealth Gap*, FED. RSRV. BANK OF RICHMOND (2020), https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/econ_focus/2020/q4/at_the_richmond_fed.pdf [<https://perma.cc/EF6H-V4NW>]; see also *Survey of Consumer Finances 1989-2019*, BD. OF GOVERNORS OF THE FED. RSRV. SYS (Sept. 28, 2020),

The Reagan-era promise of trickle-down economics did not come to fruition. A study by David Hope of the London School of Economics and Julian Limberg of King’s College London “examines 18 developed countries—from Australia to the United States—over a 50-year period from 1965 to 2015. The study compared countries that passed tax cuts in a specific year, such as the U.S. in 1982 when President Ronald Reagan slashed taxes on the wealthy, with those that [did not], and then examined their economic outcomes.”³⁰ The study found that while macroeconomic data such as per capita gross domestic product and unemployment rates were nearly identical after five years in countries that cut taxes on the rich and in those that did not, “the incomes of the rich grew much faster in countries where tax rates were lowered.”³¹

The researchers argue that the economic rationale for lowering the tax rates of the rich is weak. The period through history with highest economic growth and lowest unemployment was also the period with the highest taxes on the rich—the postwar period.³²

Tax Expenditures. Substantial federal tax expenditures subsidize this wealth-building. Tax expenditures are carve-outs to taxes that would otherwise be owed, such as the itemized deductions or credits on an individual income tax return.³³ Tax-expenditures reflect governmental policy supporting home equity, pensions, medical insurance, K–12 education, and college.³⁴ Because these are largely itemized deductions, they offer the greatest advantage to high income earners who own their own home and who can elect to take itemized deductions instead of the standard deduction. This, in turn, benefits White taxpayers more than Black taxpayers.

A look at home ownership and income can help explain this phenomenon. As mentioned previously, U.S. Census Bureau data for 2019 shows that 73.3% of White Americans own their own home, as compared with only 42.1% of Black Americans.³⁵ According to the U.S. Census data, 76 percent of White households have income over \$150,000, as compared to only 6% of Black households.³⁶ Finally, we know that 76 percent of taxpayers earning at least \$150,000 claim itemized deductions on their income tax returns.³⁷ Therefore, even though the IRS does not keep statistics based on race, we can glean that the overwhelming majority of taxpayers that take advantage of the expenditures such as the mortgage interest deduction and the exclusion of gain on the sale of a principal residence are White.

A recent American Bar Association article calling for an anti-racist restructuring of the U.S. tax systems notes, “The indirect nature of these tax expenditures obscures what is effectively government welfare for

https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Retirement_Accounts;demographic:racecl4;population:1,2,3,4;units:median;range:1989,2019 [https://perma.cc/DF2T-Y57N].

³⁰ Aimee Picchi, *50 Years of Tax Cuts for the Rich Failed to Trickle Down, Economics Study Says*, CBS NEWS (Dec. 17, 2020), <https://www.cbsnews.com/news/tax-cuts-rich-50-years-no-trickle-down/> [https://perma.cc/CX95-XBN9].

³¹ *Id.*

³² *See id.*

³³ *See, e.g.,* William McBride, *A Brief History of Tax Expenditures*, TAX FOUNDATION (Aug. 22, 2013), <https://taxfoundation.org/brief-history-tax-expenditures/> [https://perma.cc/9JFW-J2KB].

³⁴ *See id.*

³⁵ *See supra* note 24; *see also*, Jung Hyun Choi, Hyojung Lee, *Racial Homeownership Rates Vary Across the Most Commonly Cited Datasets*, Urban Institute (Dec. 8, 2021), available at <https://www.urban.org/urban-wire/racial-homeownership-rates-vary-across-most-commonly-cited-datasets-when-and-why-should-you-use-different-ones> (last visited Jan. 19, 2023)

³⁶ U.S. Census Bureau, Current Population Survey, 2019 Annual Social and Economic Supplement, Table HINC-01: Selected Characteristics of Households, by Total Money Income in 2018 (Sept. 2019).

³⁷ Erica York, *Who Benefits from Itemized Deductions*, Tax Foundation (Mar. 7, 2019).

wealthy white taxpayers. The tax system today is the stealth equivalent of historical whites-only wealth-building.”³⁸

Capital Gains. Our system of taxing wealth only at realization events, combined with the charitable income tax deduction and basis adjustment at death,³⁹ further promotes, preserves, and protects White wealth advantage. Higher-income earners are more able to invest in appreciating assets such as stocks, bonds, and real estate.⁴⁰ As these assets increase in value over time, there is no corresponding increase in the tax burden of their owners. In 2018, 69 percent of unrealized capital gains were held by the top 1 percent of income earners.⁴¹

Thus, the top 1% can control when and whether to pay capital gains tax by timing sales to occur in lower income years, or by giving the asset to charity to both further decrease the tax bill and avoid a realization event altogether. Asset owners can also choose to avoid a realization event by retaining the assets until death, when IRC Section 1014 permits an adjustment of basis to equal the date of death value.⁴² Thus, at death, assets can be liquidated and passed on to heirs with a “stepped up” basis. Some argue that the basis adjustment at death prevents a double-taxation caused by the estate tax,⁴³ but very few taxpayers today pay the estate tax.

State and Local Tax. State and local tax systems have also led to increased wealth disparity due to their heavy reliance on sales and other consumption taxes, which often disproportionately affect low-income families because they spend a larger percentage of their income on consumables rather than on saving or investments. To avoid the political fallout of increasing income taxes, states have instead increased sales tax rates and 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), all of which have a greater impact on the lower income population.⁴⁴

Estate Tax. There is perhaps no greater promoter of the racial wealth gap than the untaxed gifts and inheritances received by White families.⁴⁵ Members of White families are three times more likely to receive an inheritance than members of Black families.⁴⁶ And, increasingly, that inheritance is not subject to estate tax.

As mentioned previously, the estate tax was implemented in 1916, and from 1941 to 1976 the highest estate tax rate was 77% with exemptions of only \$40,000 to \$60,000.⁴⁷ Since 1976, the exemptions have

³⁸ Francine J. Lipman, Nicholas A. Mirkay & Palma Joy Strand, *#BlackTaxpayers-Matter: Anti-Racist Restructuring of U.S. Tax Systems*, AM. BAR ASS’N (Dec. 14, 2020), [https://perma.cc/QPT2-2MY4].

³⁹ See I.R.C. §§ 1001, 170(a), 1014.

⁴⁰ See Lipman, *supra* note 38.

⁴¹ *Id.*

⁴² See I.R.C. § 1014.

⁴³ See, e.g., Lawrence Zelenak, *Taxing Gains at Death*, 46 VANDERBILT L. REV. 361 (1993) (discussion at footnotes 7 through 14 and accompanying text for various theories regarding the purpose of the basis adjustment at death).

⁴⁴ Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 Nw. J. L. & Soc. POL’Y 265, 286 (2020); Robin Kaiser-Schatzlein, *Alabama Takes from the Poor and Gives to the Rich*, N.Y. TIMES (Jul. 27, 2022).

⁴⁵ See Jermaine Toney & Darrick Hamilton, *Economic Insecurity in the Family Tree and the Racial Wealth Gap* (May 27, 2021), <http://dx.doi.org/10.2139/ssrn.3397222> [https://perma.cc/D9FN-S7DG].

⁴⁶ See Bhutta, *supra* note 59.

⁴⁷ See, e.g., Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, IRS, <https://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [https://perma.cc/8V6T-TLS4].

increased and the top tax rates have come down, dramatically so beginning with the George W. Bush administration's Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001.⁴⁸ Prior to EGTRRA, the estate tax exemption was \$675,000 in 2000 and the top estate tax rate was 55%.⁴⁹ EGTRRA increased the exemption and lowered the estate tax rate over a 10-year period.⁵⁰ However, EGTRRA included a 10-year sunset provision, and so in December 2011, Congress forestalled the estate tax rate reset for 2011 and 2012 with a tax-cut compromise that raised the exemption to \$5 million for individuals (\$10 million for married couples) and lowered the marginal estate tax rate to 35%.⁵¹

To avoid another sunset to pre-2001 levels in 2013, Congress again enacted last minute legislation to make the \$5 million exemption (adjusted for inflation) and a 40% estate tax rate permanent.⁵²

The Trump-era Tax Cuts and Jobs Act doubled the exemption beginning in 2018 and adjusted it for inflation so that the exemption is now \$12.92 million in 2023 and the estate tax rate remains 40%.⁵³ This "bonus" exemption will expire after 2025, and the exemption amount will revert to its pre-2018 level (adjusted for inflation) in 2026 unless Congress acts to renew the legislation.⁵⁴

Today, a married couple can leave \$25,840,000 to their heirs without paying estate tax. Most choose to leave this amount to "dynasty"-type trusts for their children, grandchildren, and more remote descendants, which means estate and generation-skipping transfer taxes will never be assessed on the exempt amount, no matter how much the nearly \$26 million trust corpus grows through each generation. It marks a return to the very aristocracy we sought to avoid at America's inception.

The increases in the estate tax exemptions have left the tax only a shell of its former self. Only about 1,900 decedents' estates were subject to estate tax in each of 2018 through 2020,⁵⁵ and the estate tax is the smallest source of revenue at the federal level, accounting for only 0.5% of the nation's tax revenue in 2019.⁵⁶

⁴⁸ See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

⁴⁹ See Brian G. Raub, *Recent Changes in the Estate Tax Exemption Level and Filing Population*, I.R.S., <https://www.irs.gov/pub/irs-soi/05estate.pdf> [<https://perma.cc/D292-RWAU>].

⁵⁰ See *id.*

⁵¹ See Gillian Brunet, *New Estate Tax Rules Should Expire After 2012*, CTR. ON BUDGET AND POL'Y PRIORITIES (May 26, 2011), <https://www.cbpp.org/research/new-estate-tax-rules-should-expire-after-2012> [<https://perma.cc/Z6N7-FGQ7>]; Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§ 302, 303(a)(2), 124 Stat. 3296, 3301 (2010) (also known as the 2010 Tax Relief Act).

⁵² See American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101(c), 126 Stat. 2313, 2318 (2013).

⁵³ See Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11061(a), 131 Stat. 2054, 2091 (2017) (an Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018).

⁵⁴ See Julie Garber, *How the Federal Estate Tax Exemption Changed from 1997 to Today*, THE BALANCE, <https://www.thebalance.com/exemption-from-federal-estate-taxes-3505630> [<https://perma.cc/6EV6-V7FF>].

⁵⁵ See *How Many People Pay the Estate Tax?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax> [<https://perma.cc/GL2R-5XAP>]. In 2019, there were 2,854,838 American deaths. With only about 1,900 of these paying estate tax, the Estate Tax affects 0.06655% of the population. See *Preliminary US Death Statistics Show Over 3.4 Million Total Deaths in 2020 — 20% More Deaths Than in 2019*, USA FACTS (Dec. 15, 2020), <https://usafacts.org/articles/preliminary-us-death-statistics-more-deaths-in-2020-than-2019-coronavirus-age-flu/> (last updated May 5, 2021) [<https://perma.cc/8MHG-TWCD>].

⁵⁶ See *Updated Budget Projections: 2019-2029*, CONG. BUDGET OFF. (May 2, 2019), <https://www.cbo.gov/publication/55151> [<https://perma.cc/2TYM-7PZ7>].

Over the past four decades, a polarizing racial wealth divide has grown between White households and households of color.⁵⁷ Since the Reagan-era tax cuts were implemented in the 1980s, median net worth among Black families has been stuck in a range from \$8,000 to \$24,000.⁵⁸ Meanwhile, White household median net worth grew from \$124,600 in 1992 to \$189,100 in 2019, adjusting for inflation.⁵⁹

3. Earmarking the Estate Tax to Fund Reparations

The 400 years of intentional deprivation of Blacks their due wages, property, life, liberty, and happiness, when transformed into money, or money's worth, creates a stolen inheritance. The logical remedy of a government-sponsored theft of Black wealth and inheritance is to use government taxation of inheritances to redistribute the wealth of those most benefiting from America's ongoing systemic racism to those most hurt by the intrinsic unfairness and injustice of racism.

This concept of stolen inheritances is currently illustrated by the staggering realities of the racial wealth gap—the glaring disparities in the net worth of White and Black families.⁶⁰ An interesting and alarming statistic is the fact that if the current rate of economic growth is maintained, it would take 200 years to eradicate the racial wealth gap.⁶¹ This is almost as long as the nearly 250 years of government-supported slavery. Discussions of American wealth disparity are now ubiquitous. Yet we already have a system in place in the U.S. that is designed to redistribute wealth, enacted to create a re-set to the Jeffersonian ideals of a meritocracy. That system is the much-maligned federal estate, gift, and generation skipping taxes⁶² (hereafter, collectively, the “Estate Tax”). The Estate Tax is perfectly designed (and originally intended) to correct the twenty-first century wealth disparity whereby 0.1% of the population owns more than 20% of the nation's wealth, and the Estate Tax should be earmarked to repair the damage done to the most disparate group on the racial wealth continuum – Black Americans.

President Theodore Roosevelt colorfully referred to the wealth owned by the robber barons in the early 1900s as “swollen fortunes”.⁶³ An Estate Tax imposed on swollen fortunes should be used to refund stolen fortunes. Suggesting that the Estate Tax is ideally designed to provide for Black reparations is no small matter. Eminent commentator and jurist Professor Eric Posner and his co-author wrote that the *design*

⁵⁷ See *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDERAL RESERVE (Sept. 28, 2020), <http://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/6BEN-VL5V>].

⁵⁸ See *id.*

⁵⁹ See Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS NOTES, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sept. 28, 2020), <https://doi.org/10.17016/2380-7172.2797> [<https://perma.cc/XE2F-3MUS>].

⁶⁰ See William Darity, Jr. et al., *What We Get Wrong About Closing the Racial Wealth Gap*, THE SAMUEL DUBOIS CTR. ON SOC. EQUITY (Apr. 2018), at 2, 8–9, <https://socialequity.duke.edu/portfolio-item/what-we-get-wrong-about-closing-the-racial-wealth-gap/> [<https://perma.cc/BR8N-F9CC>] (“The racial wealth gap is large and shows no signs of closing. 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. The white household living near the poverty line typically has about \$18,000 in wealth, while black households in similar economic straits typically have a median wealth near zero. . . . At the other end of America's economic spectrum, black households constitute less than 2 percent of those in the top one percent of the nation's wealth distribution; white households constitute more than 96 percent of the wealthiest Americans.”).

⁶¹ See Angela Hanks et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS 10 (2018), <https://community-wealth.org/content/systematic-inequality-how-americas-structural-racism-helped-create-black-white-wealth-gap> [<https://perma.cc/C8YM-GCAG>].

⁶² See Pub. L. No. 99–514, 100 Stat. 2095 (1986).

⁶³ President Theodore Roosevelt coined the term “swollen fortunes.” See *supra* note 17.

for payment of reparations may be the most important component of any reparations discussion.⁶⁴ In discussing the Estate Tax as a source of funds for reparative justice, addressing the criticism of the Estate Tax is a useful starting point to explain the benefits of bolstering the tax to support such a proposal.

Criticism of Estate Tax

Modern commentators starting from the 1950s all the way to 2019 have lamented that the current Federal Estate Tax has lost mooring to any rational legislative purpose, and they argue that it should be abandoned as completely ineffective.⁶⁵ They note that it does not raise meaningful revenue or redistribute concentrated wealth.⁶⁶ One commentator described the tax as a “zombie tax”—a sort of dead concept that stalks around creating unjustified fear and not much else.⁶⁷

Wealth owners and their representatives argue that the Estate Tax is a failed revenue raiser and inhibits capital formation and economic growth.⁶⁸ These legacy wealth-owners focus on the early history of the estate, inheritance, and stamp taxes as revenue raisers for wars that have already been fought and funded.⁶⁹ Another of their arguments focuses on the “step-up in basis” rules that serve to completely eliminate income tax on decedents’ appreciated capital assets like stocks and bonds. They suggest that when you add in the lost income tax from decedent capital gains, the Estate Tax may lose more than it collects.⁷⁰ The political path of Estate Tax opponents is clear—disable, deny, or disassociate the Estate Tax from the goal of ameliorating wealth disparity and then urge repeal of the tax because it has no purpose and is detrimental those seeking to swell-up their wealth.

Obviously, a tax designed to prevent large accumulations of capital by individuals within a capitalist economy will have some effect on U.S. capitalism. However, a tax on wealth after death, by definition, is not a tax that inhibits economic activity because the deceased no longer own their wealth. **The Estate Tax is the fairest of all the taxes, as it taxes wealth that has no owner** – the estate belongs not to the wealth creator, who is deceased, nor does the wealth creator’s family have any legal claim to the estate – at least not without the affirmative action of the law, the courts, and the government. For a wealthy decedent subject to estate tax, it is not the family that has the first right to the decedent’s wealth -- it is the federal government that stands first in line via a lien that attaches at the moment of death.⁷¹

⁶⁴ See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 690 (2003) (“Within the normative debates, proponents of reparations often focus monomaniacally on the historical injustices inflicted upon victim groups, while minimizing the serious problems of policy design that reparations pose. Opponents of reparations, on the other hand, minimize the relevant injustices and portray reparations proposals as outlandish or even unprecedented, overlooking that federal and state governments have often paid reparations in one form or another. Most generally, commentators on all sides of the issue focus excessively on abstract questions about the justice of reparations while ignoring institutional and prudential questions about how reparations schemes should be designed. *As we shall see, answers to the design questions will themselves help to determine whether and when reparations should be paid in the first place.*”).

⁶⁵ See, e.g., DANIEL MILLER, *THE ECONOMICS OF THE ESTATE TAX* 1, 35–38 (1998), <https://ssrn.com/abstract=644343> [<https://perma.cc/8KA9-6HXW>].

⁶⁶ See, e.g., *id.* at 5.

⁶⁷ See Samuel D. Brunson, *Afterlife of the Death Tax*, 94 INDIANA L. J. 355, 356 (2019) (“In many ways, the current estate tax is a zombie, neither fully alive nor fully dead.”).

⁶⁸ See *id.* at 359.

⁶⁹ See *id.* at 357.

⁷⁰ See *id.* at 371.

⁷¹ See I.R.C. § 6324 (“Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death . . .”).

Estate Tax Embodies Egalitarianism

There is a historical connection between Jefferson’s founding-fear of concentrated wealth and wealth disparity, and the recent social unrest caused, in part, by widening racial wealth disparity.

Jens Beckert, a German economic-sociologist makes a strong historical link from Jefferson’s promises to the purpose of the Estate Tax:

This criticism of the dynastic concentration of wealth was not based on the idea of class warfare aimed at a socialist model of equality, but was a direct expression of the liberal meritocratic tradition from the founding period of the United States. . . . One of the principles which controlled the action of Jefferson . . . [was] to give all [citizens] as nearly as practicable an equal start in the race of life. . . . [B]eginning in the 1890s, there was increasingly a climate of public opinion in which the demand for the (progressive) taxation of inheritance was no longer perceived solely as socialist radicalism, but as a necessary measure of reform to enhance equality of opportunity, as a counterweight to the existing concentration of wealth, and as a contribution to tax equity—and thus as an expression of the realization of American values.⁷²

Louis Eisenstein is regarded as having “produced some of the most erudite tax law scholarship from the mid-1940s to the mid-1960s.”⁷³ His article, *The Rise and Decline of The Federal Estate Tax*, is frequently cited for its definitive research and knowledge-based conclusions.⁷⁴ Eisenstein carefully describes the well-worn path of Estate Tax opponents who claim the Estate Tax was designed to raise revenue.⁷⁵ Contrary to the conclusion of at least two Estate Tax experts quoting him,⁷⁶ Eisenstein does not use the revenue-raising legislative history of the Estate Tax to encourage abolishment of the tax.⁷⁷ Quite the contrary,⁷⁸ Eisenstein’s final conclusion lines up perfectly with Beckert’s conclusion:

Many years ago John Stuart Mill made a proposal which we would do well to borrow and revise. The estate tax should fix a limit on ‘what anyone may acquire by the mere favour (sic) of others without any exercise of his faculties.’ If ‘he desires any further accession of fortune, he shall work for it.’ Or in Theodore Roosevelt’s exuberant language, he should “show the stuff that is in him when compared with his fellows.’ When inheritance does much more, it gravely and inexcusably augments inequality of opportunity. It then becomes hereditary economic power, which is no more tenable than hereditary political power.⁷⁹

⁷² BECKERT, *supra* note 5, at 177–78.

⁷³ Terrance O’Reilly, *Tax Legal Scholarship to 1970*, 34 VA. TAX REV. 269, 306 (2014).

⁷⁴ See, e.g., Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 N.Y.U. TAX L. REV. 223 (1956) (417 citations to this Article on LexisNexis).

⁷⁵ See *id.* at 225.

⁷⁶ See Carlyn McCaffrey & John C. McCaffrey, *Our Wealth Transfer Tax System - a View from the 100th Year*, 41 ACTEC L. J. 1, 39 (2015–2016).

⁷⁷ See Eisenstein, *supra* note 74.

⁷⁸ See *id.*

⁷⁹ *Id.* at 258–59.

If we genuinely believe in a substantial equality of opportunity, **then we should cheerfully desire an Estate tax [that] truly levels [the playing field]**. We cannot have one unless we also have the other.

Professor Berle has recently reminded us of Jefferson's 'picture of the ideal United States.' It was 'a country in which none was very rich; none very poor; all were producers, all owners and consumers.' Within its limitations the estate tax has much to contribute toward the consummation of Jefferson's vision.⁸⁰

Thomas Jefferson originally articulated America's promise of equal opportunity against the tyranny of England's landed aristocracy. However, it was Andrew Carnegie and the sweeping conclusions of his "Gospel of Wealth" that may have been the most influential articulation of the redistribution imperative. The harshness of Carnegie's commentary on "swollen fortunes" must be quoted to be believed:

Men who continue hoarding great sums all their lives, the proper use of which for public ends would work good to the community, should be made to feel that the community, in the form of the state, cannot thus be deprived of its proper share. *By taxing estates heavily at death, the state marks its condemnation of the selfish millionaire's unworthy life.*⁸¹

Following the history of Carnegie and Theodore Roosevelt, William Gates, Sr. (an attorney and father of Microsoft Corporation's co-founder, Bill Gates, Jr.) and Chuck Collins powerfully supported the redistribution of swollen fortunes using estate tax in their book, *Wealth and Our Commonwealth: Why America Should Tax Accumulated Fortunes*, by highlighting the importance of "earmarking" estate tax revenues for a positive public purpose:

For many ordinary Americans, the estate tax is a remote issue in their lives. The vast majority will never pay it, nor do they perceive any particular benefit from it. Its revenue flows into the treasury, paying for general government services, the benefits of which are often difficult to see during the course of daily life. . . . It is our view that public support for the estate tax would greatly increase if people saw a direct connection between the tax and their quality of life. **There is something poetic about allocating estate tax revenues to particular initiatives that strengthen equality of opportunity in America.**⁸²

Resistance to Black reparations often boils down to two primary objections. First, who should pay for it, given that the greatest sins committed against Black Americans were committed generations ago. Second, how much should be paid, given funding limits and the fact that there is no sum great enough to fully repair the country's past wrongs against Black people. Various estimates of the reparation cost range from \$500 billion to over \$17 trillion.⁸³ We believe these objections are easier to overcome by first identifying the Estate Tax as the source of funding for the study, administration, and ongoing distribution of reparations that address all the elements mentioned in H.R. 40 and the report of California's Task Force.

⁸⁰ *Id.* at 259.

⁸¹ ANDREW CARNEGIE, *THE GOSPEL OF WEALTH* 8–9 (2017) (1889), <https://www.carnegie.org/publications/the-gospel-of-wealth> [<https://perma.cc/6XYF-5ZYM>] (emphasis added).

⁸² BILL GATES, SR. & CHUCK COLLINS, *WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES*, epilogue (2002).

⁸³ See Patricia Cohen, *What Reparations for Slavery Might Look Like in 2019*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/economy/reparations-slavery.html> [<https://perma.cc/84DZ-AQPD>].

4. Possibility of a California State Estate Tax or Inheritance Tax

At the state level, an estate tax could also be earmarked to provide a source for reparations. Prior to 2001, all states imposed an estate tax at death. At that time, the Internal Revenue Code provided a credit for state estate and inheritance taxes paid by an estate, which offset the federal estate taxes paid, dollar-for-dollar, up to 16 percent of an estate's value. This gave states a strong incentive to impose estate or inheritance taxes because states could raise revenue without increasing the net tax burden on their citizens.⁸⁴ The state estate tax was called a "sponge tax" or "pickup tax" – the states simply took their share of the money owed to the federal government, up to a cap of 16% of the taxable estate.⁸⁵

The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") repealed the state death tax credit, and now there are only twelve states, plus the District of Columbia, that have an estate tax, and six states that have an inheritance tax.⁸⁶ Maryland is the only state that has both.⁸⁷ State death taxes (including both estate taxes and inheritance taxes) generated a combined \$5.3 billion in revenue in 2018.⁸⁸ Similar to the estate tax at the federal level, redirecting the revenue raised from state estate taxes would not have a significant budgetary impact. Prior to the enactment of EGTRRA, the state estate taxes levied in 2000 "still provided less than 1 percent of combined state and local own-source general revenue."⁸⁹

5. Clear Connection Between Harm Being Corrected and Funding Source

At the local level, the City of Evanston, Illinois adopted an approach to determining reparations that combined the H.R. 40 process with a predetermined funding source. On March 22, 2021, the City Council of Evanston enacted Resolution 37-R-27, "Authorizing the Implementation of the Evanston Local Reparations Restorative Housing Program and Program Budget."⁹⁰

Lawmakers carefully identified and then confessed to the city's historic governmental policy of Black exclusion, redlining and Jim Crow segregation.⁹¹ The Council obtained statistical and testimonial evidence of over-policing of Black people in Evanston that was often justified under cover of enforcing laws against the possession of illegal drugs like cannabis.⁹² Certainly, a tax on legalized cannabis use is a logical funding source to repay the victims of the city's prior racial injustices. Given that Evanston's history of residential

⁸⁴ Norton Francis, *Back from the Dead: State Estate Taxes After the Fiscal Cliff*, Urban Brookings Tax Policy Center (Nov. 14, 2012).

⁸⁵ See Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, I.R.S., <https://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [<https://perma.cc/8V6T-TLS4>].

⁸⁶ States with an estate tax include Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia. States with an inheritance tax include Iowa, Kentucky, Maryland, Nebraska (at the county level), New Jersey, and Pennsylvania.

⁸⁷ See *Estate and Inheritance Taxes*, URB. INST. <https://www.urban.org/policy-center/s/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/estate-and-inheritance-taxes>, [<https://perma.cc/A8BK-6G7E>].

⁸⁸ See *id.*

⁸⁹ *The State of State (and Local) Tax Policy*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-do-state-estate-and-inheritance-taxes-work> [<https://perma.cc/N64A-QWXW>] (updated May 2020).

⁹⁰ Memorandum from Kimberly Richardson, Interim Assistant City Manager, City of Evanston, to Honorable Mayor and Members of the City Council, at 1 (Mar. 22, 2021), <https://cityofevanston.civicweb.net/document/50624/Adoption%20of%20Resolution%2037-R-27,%20Authorizing%20the.pdf?handle=E11C7B73E1B6470DA42362AB80A50C46> [<https://perma.cc/96A5-6CA8>].

⁹¹ See *id.* at 2, 5.

⁹² See generally MORRIS ROBINSON, JR. & JENNY THOMPSON, *EVANSTON POLICIES AND PRACTICES DIRECTLY AFFECTING THE AFRICAN AMERICAN COMMUNITY, 1900-1960 (AND PRESENT)* (2020), <https://www.cityofevanston.org/home/showpublisheddocument?id=59759> [<https://perma.cc/U3FM-DSD9>].

segregation was the harm that most clearly resulted in economic deprivation of the city’s Black people, the City Council decided to make Black residents of Evanston from 1916 to 1969 (or their descendants) the potential beneficiaries of the reparation funds and agreed that the funds would provide benefits in the areas of home ownership, home improvement, and mortgage assistance.⁹³

In like manner, the use of Estate Tax ties a current tax to a current problem created by historic and government-sponsored, encouraged, or ignored racism. There is a clear connection between slavery and discriminatory policies of the past and the White/Black wealth disparity of today. Further, **earmarking a funding source that is constant (as Benjamin Franklin noted, “in this world, nothing [is] certain, except death and taxes”)⁹⁴ will provide a lasting revenue stream to allow for continuing correction of a harm that was over 400 years in the making.**

If the Estate Tax is earmarked for the study and implementation of Black reparations, the answer to the question of “how much to pay” will be self-evident—the State, or the country, will pay what it can afford. In 2020, revenues from federal estate and gift taxes totaled \$17.6 billion.⁹⁵ One suggestion might be to use the Estate Tax revenue as the budget for a new Department of Black Reparations. Interestingly, \$16 billion is roughly the current budget for the Department of Commerce.⁹⁶ While Estate Tax is a compelling *source* for Black reparations, the Estate Tax revenues have no relationship to the *dollar-value* of the reparations that are owed.

6. Charitable Incentives for Public-Private Partnership

Like California, local governments and charitable organizations are not waiting for the federal government to act before addressing reparations on their own. The effort by Georgetown University is an example. In 1838, two of the nation’s top Jesuit priests sold 272 enslaved men, women, and children to pay the debts and ensure the survival of what would become Georgetown University.⁹⁷ A memory project was started by a wealthy alumnus and the school to trace the ancestry of the sold slaves, whose names were all clearly delineated in the school’s records.⁹⁸ Today, the identities of the victims’ living descendants have been genetically established, and a debt repayment of some sort is sought.⁹⁹ The problem is connecting the benefit that Georgetown gained by sale of the slaves (\$3.3 million in today’s dollars)¹⁰⁰ to a compensable detriment being suffered by the descendants.

⁹³ See Memorandum, *supra* note 90, at 2–3.

⁹⁴ Sparks, Jared (1856). "[The Writings of Benjamin Franklin, Vol. X \(1789-1790\)](#)"

⁹⁵ See *Understanding Federal Estate and Gift Taxes* CONG. BUDGET OFF. (JUNE 2021), <https://www.cbo.gov/system/files/2021-06/57129-Estate-and-Gift-Tax.pdf> [<https://perma.cc/G2Q6-N5PA>]; *The Budget and Economic Outlook: 2020 to 2030*, CONG. BUDGET OFF. (Jan. 2020), www.cbo.gov/publication/56020 [<https://perma.cc/YF6C-JZW5>]. “For 2019, the total net estate tax reported on all estate tax returns filed in the year was just over \$13.2 billion.” *Estate Tax Returns Filed for Wealthy Decedents, Filing Years 2010-2019*, I.R.S., <https://www.irs.gov/pub/irs-pdf/p5332.pdf> [<https://perma.cc/PFA9-CWZM>] (revised Feb. 2021).

⁹⁶ See *Department of Commerce*, USASPENDING.GOV, <https://www.usaspending.gov/agency/department-of-commerce?fy=2022> [<https://perma.cc/7M65-4NKW>].

⁹⁷ See Rachel L. Swarns, *272 Slaves Were Sold to Save Georgetown. What Does It Owe Their Descendants?*, N.Y. TIMES (Apr. 16, 2016), <https://www.nytimes.com/2016/04/17/us/georgetown-university-search-for-slave-descendants.html> [<https://perma.cc/VW8S-E4SN>].

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

Georgetown University's combined endowment is \$1.5 billion.¹⁰¹ A proximate causation argument for damages would say that since the school would not be in existence "but for" the immoral sale of the slaves, the entire endowment should be paid into a reparation fund. In fact, the slave descendants have asked for a billion-dollar fund, and the leaders of the newly created Descendants Trust & Reconciliation Foundation have stated that \$1 billion remains the long-term fundraising goal.¹⁰²

The Descendants Trust & Reconciliation Foundation, formed by the GU272 Descendants Association and the Jesuits, will "support the educational aspirations of descendants for future generations and play a prominent role in engaging, promoting and supporting programs and activities that highlight truth, accelerate racial healing and reconciliation, and advance racial justice and equality in America."¹⁰³

Other religious leaders are now atoning for their churches' role in the slave trade. The Episcopal church has been the most active thus far, with the Dioceses of Texas, New York and Maryland setting aside a combined \$15 million for long-term programs benefitting African Americans.

7. Creation of Section 501(c)(40) Reparations Organizations and 501(c)(40) Reparations Accounts

To allow the government to leverage the progress and existing infrastructure of charitable organizations, charitable incentives could be developed that would allow private citizens and charities to redistribute wealth. To be clear, racial repair is a matter of justice based on broken promises and human rights violations; therefore, reparations cannot proceed from a request for benevolence. Generosity is not justice. While it is incorrect to call racial repair "charitable" work, the tax-deduction framework for charitable contributions is easily understood by the public and useful. We believe that tax deductions should be allowed for private contributions to racial repair because the individual contributors would be paying a debt of the federal or state government *on the government's behalf*. If an individual directly assumes the debt or responsibilities of the government, the dollars spent on that purpose by that individual should not be subject to tax.

Background of Charitable Contribution Deduction

The charitable deduction from gift and estate taxes is definitive proof that our transfer tax system was designed for redistribution of wealth.¹⁰⁴ Unlike the federal income tax, the estate tax is completely avoidable by giving everything over and above the estate tax exemption to a qualifying charity at death.¹⁰⁵

¹⁰¹ See FAQs, GEORGETOWN UNIV. INV. OFF. <https://investments.georgetown.edu/faqs/#3> [<https://perma.cc/47HR-3WEY>].

¹⁰² See Rachel L. Swarns, *Catholic Order Pledges \$100 Million to Atone for Slave Labor and Sales*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/us/jesuits-georgetown-reparations-slavery.html> [<https://perma.cc/LYD6-HQ34>].

¹⁰³ *Descendants Truth & Reconciliation Foundation Launches Billion Dollar Vision of Racial Healing in America*, P.R. NEWSWIRE (Mar. 16, 2021), <https://www.prnewswire.com/news-releases/descendants-truth--reconciliation-foundation-launches-billion-dollar-vision-of-racial-healing-in-america-301247895.html#:~:text=WASHINGTON%20C%20March%2016%2C%202021%20%2F,move%20America%20toward%20deep%20racial> [<https://perma.cc/ZJ5Y-J9X5>]; *Jesuits Pledge \$100 Million in Reparations to Descendant of Enslaved People*, NAT'L CATH. REP. (Mar. 17, 2021), <https://www.ncronline.org/print/news/justice/jesuits-pledge-100-million-reparations-descendants-enslaved-people> [<https://perma.cc/WMD8-F3C8>].

¹⁰⁴ See generally Edward A. Zelinsky, *Why the Buffett-Gates Giving Pledge Requires Limitation of the Estate Tax Charitable Deduction*, 16 FLA. TAX REV. 393, 412–18 (2014).

¹⁰⁵ See I.R.C. § 2055 ("For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers—(1) to or for the use of the United States, any State, any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes").

Therefore, the estate tax is in essence a voluntary tax because you can choose not to pay it at all. In effect, it is a penalty tax for decedents who have swollen fortunes and no accompanying charitable intent.

Currently, limits are placed on the charitable income tax deduction, such that income taxes cannot be avoided completely in the same way as the estate tax. A taxpayer can deduct only 60 percent of their adjusted gross income for contributions of cash to a charitable organization, and only 30 percent of their adjusted gross income for non-cash contributions.¹⁰⁶

How Charitable Contributions Can Be Leveraged Under Current Law

Under existing federal tax law, California could create a state-sponsored **reparations trust fund** to which individuals should be able to make federal and state income tax-deductible charitable contributions. Charitable contribution tax incentives are currently permitted for contributions to the United States, or a state or local government,¹⁰⁷ but only if the contribution is made for exclusively public purposes (traditionally thought of along the lines of funding a park or library). It follows that even with no changes to the current Internal Revenue Code, individuals should be able to make tax-deductible contributions to a state or local government-sponsored reparations trust fund if repairing the racial wealth gap is recognized as a public purpose.

In *Bob Jones University v. United States*,¹⁰⁸ the United States Supreme Court implied that preventing racial discrimination is a fundamental public *policy*, stating:

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not “charitable” should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.

If the State of California or a California taxpayer could obtain a ruling from the IRS confirming that racial reparative justice is a public purpose, then contributions to a state-run trust fund that administers and distributes reparations should be tax-deductible under IRC Section 170(c) in the same manner as contributions to public charities.

How New Charitable Incentives Could Drive Change

In addition to a state-run reparations trust fund, there are existing public charities qualifying for tax-exempt status under IRC Section 501(c)(3) that engage in work to repair the racial wealth gap. One example of this taking place on a large scale began in 2021 when the Children’s Defense Fund, Harvard’s T.H. Chan School of Public Health, the Robin Hood Foundation and the Wharton School of The University of Pennsylvania joined forces with CEOs of major public companies to launch a “NinetyToZero” initiative with the goal of transforming “the economic landscape that has led to a 90 percent racial wealth gap

¹⁰⁶ See I.R.C. § 170(b)(1)(C) and (G).

¹⁰⁷ See I.R.C. § 170(a)(1) and 170(c)(1) (“there shall be allowed as a deduction any charitable contribution . . . to or for the use of a State . . . or any political subdivision [thereof], or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes”).

¹⁰⁸ 461 U.S. 574, 592 (1983).

between White and Black Americans”.¹⁰⁹ On a more localized level, the Greater Washington Community Foundation has made closing the racial wealth gap in the D.C. area its strategic mission.¹¹⁰ Existing charities are already doing the work that might be recommended by the Task Force – providing economic assistance, educational opportunities, health care initiatives and criminal justice reform.

Nevertheless, even with public charity status, there are still restrictions that would be counterproductive to the goal of reparations. For example, IRC Section 501(c)(3) requires that no part of a charity’s net earnings may “inure[] to the benefit of any private shareholder or individual.”¹¹¹ This limitation could be fatal to a public charity seeking to make cash payments to Black individuals as a form of reparations.

We suggest the creation of a new class of charity by adding an additional subsection to the end of 501(c). Given that IRC Section 501(c) currently ends at 501(c)(29), Congress could reserve subsections (30) through (39) of the Code and refer to the new class of charity as a “501(c)(40) Reparations Organization”, thus paying homage to the forgotten 40-acres promise and H.R. 40.

IRC Section 501(c)(40) would state the governmental purpose of repairing the injustice of slavery and anti-Black racism. Acknowledging the failed White paternalism of the past 400 years, we suggest that Reparations Organizations be run by Black Americans and have as their purpose carrying out the recommendations of the H.R. 40 commission (at the federal level), whether it be educating the American public on the institution of slavery and its lingering negative effects, developing programs to reverse the injuries of the past, or providing compensation and other forms of rehabilitation to the eligible recipients of reparative efforts.

A 501(c)(40) Reparations Organization could have a “most favored” tax status in the following ways:

1. The private inurement rules for individuals could be waived.
2. Lobbying activities related to an organization’s anti-racism exempt purpose could be permitted.
3. The application process could be modeled after that of a 501(c)(4) Social Welfare Organization, which is more of a notice to the IRS than a request for permission.¹¹² During an era of white supremacy resurgence, it is foreseeable that the IRS could refuse to grant exempt status to applicants seeking to become 501(c)(40) Reparations Organizations (particularly given claims that the IRS unfairly targeted “Tea Party”-type conservative groups in 2013).¹¹³ Using the 501(c)(4) application process for the creation of 501(c)(40) Reparations Organizations would allow existing charities and new organizations alike to quickly begin the work of racial repair.
4. Contributions could receive an “above the line” deduction for income tax purposes with no adjusted gross income percentage limitation, thereby allowing an individual to reduce their

¹⁰⁹ See, e.g., *Top Organizations Across US Launch NinetyToZero To Combat Racial Wealth Gap*, Children’s Defense Fund (April 6, 2021), available at <https://www.childrensdefense.org/2021/top-organizations-across-us-launch-ninetytozero-to-combat-racial-wealth-gap/> (last visited Jan. 18, 2023).

¹¹⁰ See <https://www.thecommunityfoundation.org/>.

¹¹¹ See *Exemption Requirements – 501(c)(3) Organizations*, I.R.S., **Error! Hyperlink reference not valid.** [<https://perma.cc/BPK3-VWX7>] (“[N]o part of a section 501(c)(3) organization’s net earnings may inure to the benefit of any private shareholder or individual.”).

¹¹² See *Instructions for Form 1024-A* I.R.S. 1 (2021), <https://www.irs.gov/pub/irs-pdf/i1024a.pdf> [<https://perma.cc/FBW3-YPJH>].

¹¹³ See, e.g., Emily Cochrane, *Justice Department Settles with Tea Party Groups After I.R.S. Scrutiny*, N.Y. TIMES (Oct. 26, 2017), available at <https://www.nytimes.com/2017/10/26/us/politics/irs-tea-party-lawsuit-settlement.html> (last visited Jan. 19, 2023).

taxable income to zero for the year. For example, if a person earned \$100,000 in a given year and gave \$100,000 to Reparations Organizations, then their adjusted gross income could be reduced to zero and no income taxes would be due.

5. Contributions at death could receive a credit from the gift and estate tax, rather than a deduction, which would mean that for every dollar given to the Reparations Organization, the taxpayer would have the ability to give an additional gift and estate-tax free dollar to family members or friends.

Giving 501(c)(40) Reparations Organizations the greatest possible advantages would allow the federal government to partially privatize its payment of the “forgotten 40 acres” debt and create a cottage industry of Reparations Organizations having as their mission a redress of White/Black wealth disparity. Creating a private wealth charitable industry around 501(c)(40) Reparations Organizations would perfectly allow for wealthy donors to be tax motivated to do Black reparations without social objection.

501(c)(40) Savings Accounts

If direct cash payments are to be made, we suggest that such payments could be placed in tax-favored “501(c)(40) accounts” for the eligible recipients, with a framework similar to that already in place for college savings plans under Section 529 of the Internal Revenue Code. Such accounts could be funded directly by the government, or by a Reparations Organization.

The benefits of a 501(c)(40) Account could be as follows:

1. Recipients could invest the funds as with a 529 plan, using the investment platforms that already exist in states for 529 plans.
2. The funds could be permitted to grow income tax free, as with 529 plans.
3. Tax-free distributions could be made for qualifying expenses that meet the directives of the HR 40 commission, such as debt repayment, home purchases, education, and health care.
4. Given that direct payments to individuals could be made from multiple sources (federal, state and local governments and Reparations Organizations), to promote equity and fairness we would recommend a maximum contribution limit per recipient, just like with 529 plans, but here, the limit should be tied to the target amount of direct payments recommended by the HR 40 commission. For example, if the government determined that its debt to eligible recipients was \$160,000 per person – the median disparity between white and black wealth, then that would be the funding cap for each eligible recipient’s 501(c)(40) account.
5. 501(c)(40) accounts should be transferrable at death by beneficiary designation to other eligible recipients, thus allowing more Black Americans to enjoy the financial security that an inheritance brings.
6. Reparations Organizations could be used to identify eligible recipients and receive tax-deductible contributions from private taxpayers to be deposited in the 501(c)(40) accounts of those eligible recipients.

There is perhaps no greater promoter of the racial wealth gap than the untaxed gifts and inheritances received by White families.¹¹⁴ Members of White families are three times more likely to receive an

¹¹⁴ See Jermaine Toney & Darrick Hamilton, *Economic Insecurity in the Family Tree and the Racial Wealth Gap* (May 27, 2021), <http://dx.doi.org/10.2139/ssrn.3397222> [<https://perma.cc/D9FN-S7DG>].

inheritance than members of Black families.¹¹⁵ Placing reparative payments in 501(c)(40) accounts could turn private donors and the government into *de facto* grandparents, creating the possibility of a grandparent-type gift for Black Americans lacking financial security so that they could take career, housing, and entrepreneurial risks.

8. Conclusion

It is not too late to repair the harm caused by slavery, Jim Crow, segregation and discrimination. By using the Estate Tax to fund reparations, we can pivot away from the continuing racial wealth divide and shift to the egalitarian promise of Thomas Jefferson, where every person begins life's journey from the same starting line. Charitable incentives can allow private citizens to speed the redistribution of wealth and provide a mechanism for repent at the individual level.

One advocate for Black Reparations, Nkechi Taifa, has said: "Our reparation settlement should be creative. The harm was multi-faceted, and the relief should be as well." We believe that earmarking the estate tax for reparations (or, at the very least, earmarking a source of funds that has a strong policy connection to the harm being corrected), creating new charitable 501(c)(40) Reparations Organizations and 501(c)(40) Reparations Accounts represent three creative solutions to the problem of how to fund Black reparations.

¹¹⁵ See Bhutta, *supra* note 59.