TAX LAW AND RACIAL ECONOMIC JUSTICE

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Tax Law and Racial Economic Justice

To Lauren, Jasmyne, and Marley

Preface

Before we discuss how taxation and tax law contributes to the study of race and racism, before we reveal that the first instances of affirmative action, or intentional governmental assistance to assist one race, were tax laws in South Carolina designed to encourage the presence and increase the economic fortunes of white men, and before we discuss black people and taxation from Ancient Egypt to twenty-first-century America, let's first deal head-on with the concept of race.

Since race is not real, it should be disavowed entirely, say the post-racialists. Race cannot be boiled down to a phenotypical, biological, or cultural essence. Race is constricting and stands in the way of one's personal autonomy. It is divisive. It is merely an ideological construct. Naomi Zack asks, if race has no consistent basis in biology, genetics, phenology, why acknowledge it at all?[1]

While race is a "mere" ideological construct, so is the line between the United States and Mexico, and pretending that it does not exist invites certain consequences. There are privileges in society assigned to those perceived as white and demerits for those perceived as black. Even though whiteness does not have the value it once had, it would be foolhardy for black people to disavow racial solidarity when others have not. According to philosopher Charles Mills, "That race should be irrelevant is certainly an attractive ideal, but when it has not been irrelevant, it is absurd to proceed as if it had been."[2] Embracing "blackness" is then an act of self-defense, for the political and economic fates of blacks have improved in times before only to be retarded by those who would enjoy the benefits of greater white cohesion.

Post-racialism in the hands of equity obstructionists represents an intentionally false claim of victory over racism designed to dampen society's enthusiasm for addressing white socio-economic-political supremacy.[3] It fails to recognize or address the historical redistribution of wealth from blacks to whites, along with the foreclosure of many lucrative markets to blacks. It ignores the fact that racial discrimination can be imposed without expressing the goal of racial subordination, that racial inequality can and has been maintained through subterfuge, that overt discrimination is but one way to maintain racial hierarchy.

Post-racialism also refuses to recognize that race relations and civil rights for blacks improved in the past only to be viciously and violently taken away. Consider how the gains of Reconstruction were taken away

and slavery reinstituted under the Jim Crow convict leasing-sharecropping system. It refuses to recognize that the absence of black solidarity contributed to the African slave trade in the first place. At its worsts, it is designed to ignore imperfections in the market relating to race, including and especially those least susceptible to public, legal interference. For these reasons, pretending not to "see" race maintains, rather than eliminates, a racial caste socio-political-economic system in the United States.

One of the principal techniques of the post-racialist is to reduce the concept of racism to mere discrimination; that way, any attempts to address the material subordination of black people somehow becomes discrimination.[4] Under this perverse conception, post-racialism makes racists out of those of us who seek justice for black people, and celebrities of those who encourage society to ignore racial subordination and thereby help maintain the status quo of inequality. In the Rules of Racial Standing, Derrick Bell predicted that black people who publicly assist the post-racial movement would be given superior racial standing.[5]

Another problem with post-racialism is that it pretends that our racist history has little to no relationship to the degraded economic position of black people in the United States today. It places all of the blame for rampant black poverty on black people for supposedly adopting a prurient, violent, slothful social culture. Now, to the extent there are segments of black people who attach themselves more than those in other racial groups to violence, prurience and slothfulness, it is clearly the responsibility of black people to address and counter such trends whenever and wherever and however they originate and flourish. It is unreasonable to expect others to address vestiges of the "slave" mentality. But post-racialism ignores the fact that counter-productive elements of black culture, like, say, gangster hiphop, are fully aware of their counter culture status and defend themselves, not unreasonably, by pointing to the millions of blacks who play by the rules, who have pretty much assimilated into "American" culture, who go to work, school, and church regularly, and who are still left at the end of the day with nothing more than they started with, and sometimes less.

To the extent post-racialism is based on the idea that racism and racial inequality ended with de jure discrimination, it is simply wrong: consider a game of Monopoly where one of the players is not allowed to go around the board for a significant number of dice rolls, meanwhile all of the other players are not so restricted and are able to earn money and invest in property. The game is not fair once the restricted player is allowed to participate on equal terms, because the other players have accumulated more wealth and property to use to their advantage. Not only will the disadvantaged player find it hard to stay afloat, he or she will likely be put out of the game.

A truly absurd consequence, known to all who have played Monopoly, is that when a player is unlikely to earn enough money to pay the

expenses they are likely to incur going around the game board, they roll the dice often hoping to land in jail! Moreover, the game cannot be considered fair by pointing to the fact that once every so often a once-disadvantaged player who, with cunning, with skill, and a few lucky rolls of the dice will overcome the initial circumstance and win the game. It is to that person's credit that she succeeded against enormous obstacles. It does not discredit others who were unable to fight through the disadvantage. In shorter words, neutral rules and principles alone do not necessarily produce equal opportunity.[6]

In some respects, individual blacks have more opportunity to advance economically than ever before. I would even concede (enthusiastically!) that racism as a global system of white economic and political supremacy has been in slow decline for about one hundred years. But I disagree that its complete disintegration is inevitable. Its decline has been due to the strident efforts and sacrifice of justice-minded people, and no less is required to finish the job. In the context of legal architecture, critical race legal theorists (and critical race tax theorists!) embrace this responsibility.

Daria Roithmayr, for one example, has written extensively on how private market exclusions in the past, like the National Realtors Association's restrictions on black home purchases, have led to today's racial economic inequality.[7] She calls it "locked-in" inequality. Juan Perea similarly demonstrated how twentieth-century economic assistance programs, like the G.I. bill, were designed and implemented in ways that disproportionately benefited whites. In a broader context, Douglas Blackmon's *Slavery By Another Name* won the Pulitzer prize by demonstrating how blacks were almost entirely excluded from taking advantage of the most lucrative markets in America during both slavery and twentieth-century Jim Crow.[8] I hope that by identifying tax laws designed to exclude blacks from lucrative markets and redistribute wealth from blacks to whites, this work comes close to shedding as much light on the topic these and other authors have done.

This work is dedicated to the many who have helped me think over these issues over the years, including, but certainly not limited to, Derrick Bell, the Howard University School of Law, Beverly Moran, Dorothy Brown, Alice Gresham Bullock, Luther Clark, Mildred Robinson, J. Clay Smith, Lisa Crooms-Robinson, Spencer Boyer, Carlton Waterhouse, Deborah Post, Calvin Johnson, Daria Roithmayr, Anthony Infanti, David Brennan, Darryl Jones, Karen Brown, Kimberle Crenshaw, James Hackney, Anthony Farley, Emma Coleman Jordan, Angela Harris, Cheryl Harris, Todd Clark, Taunya Banks, Reginald Mombrun, Kenneth Nunn, Lenese Herbert, Okianer Christian Dark, Francine Lipman, Keeva Terry, Darryll K. Jones, Stacey Holmes-Hawkins, Carla Pratt, Ediberto Roman, Linda Ammons, Stanley Fish, Leonard Strickman, Rhonda Williams, Samuel Myers, Keisha Stokes-Edwards, Tima McGuthry-Banks, Erica Chaplin, Derrick White, and countless others.

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NOTES

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3. Eduardo Bonilla-Silva, Racism Without Racists (2008).
4. Stanley Fish, *Reverse Racism, Or How the Pot Got to Call the Kettle Black*, The Atlantic Monthly (November 1993) ("Reverse Racism is a cogent description of affirmative action only if one considers the cancer of racism to be morally and medically indistinguishable from the therapy we apply to it. A cancer is an invasion of the body's equilibrium, and so is chemotherapy; but we do not decline to fight the disease because the medicine we employ is also disruptive of normal functioning. Strong illness, strong remedy: the formula is as appropriate to the health of the body politic as it is to that of the body proper.")
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Contents

Introduction

This project presents six chapters on tax and race: 1) Does it Matter What Slaves Thought "Direct Tax" Meant?, 2) PreColonial African Tax Experiences, 3) Taxes and the Rise of White Supremacy (1600–1900), 4) Interlude: "No Reparation Without Taxation," 5) Taxes and the Demise of White Supremacy (1900–2015) 6) and Critical Race Tax Theory in Twenty-first-Century American Legal Architecture.

Together, they demonstrate that there is practically no area of human activity where race is irrelevant. They are intended to promote a greater understanding of how the history of race relations in the United States produced the economic inequality and injustice black people experience today. The findings and conclusions herein support scholars who advocate for reparations,[1] Equal Protection Clause and thirteenth amendment scholars who advocate for affirmative action,[2] as well as tax scholars whose critique of the standard conceptions of tax fairness relies on the concept of an unjust "baseline."[3] In fact, the first examples of "affirmative action," American legal institutions acting affirmatively to advance the economic interests of one race, were tax laws designed to encourage the presence of whites and discourage the presence of blacks in antebellum South Carolina.

While later chapters will deal more specifically with how American taxation redistributed wealth from blacks to whites and excluded blacks from lucrative markets, chapter 1 is both an exercise in legal theory and an example of how race is relevant in even the most esoteric and abstract circumstances. *Does it Matter What Slaves Thought Direct Tax Meant*, uses race and taxation as tools to criticize neo-textualism in legal interpretation, specifically the plain meaning rule to be exact.[4]

Chapter 1 makes the point that a thorough consideration of plain meaning must include the meanings attributed to a word by different "interpretive communities," to the extent such meanings differ from the dominant one.[5] Judges trying to gather the plain meaning of "Direct Tax" in the U.S. Constitution must research and incorporate the views of women, blacks, native americans, or any group whose interpretation differs from the dominant construct, especially since it is widely accepted that white males at the time of the Constitution had no idea what direct tax was supposed to mean.[6] Two years after publishing this as an article in the *Widener Journal of Race, Economics and Law*, Supreme Court Justice Antonin Scalia and Judge Richard Posner of the 7th Circuit Court of

Appeals engaged in a spirited public debate precisely over the issue whether legal, deliberative processes should require judges to become historians.[7]

Chapter 2 answers skeptics who read chapter 1 and doubt whether slaves could have had *any* thoughts about what "direct tax" meant in the U.S. Constitution. The myth of black inferiority begins with the false notion that European conquest, slavery, and colonization brought civilization to Africa specifically, and dark-skinned people generally. Many Americans, both black and white, are still unaware that centralized government in Africa predates the trans-atlantic slave trade by centuries if not millenia. Recognition for the pre-colonial African states of Nubia, Ethiopia, Ghana, Mali, Songhay, Kanem, Hausa, Kongo, Kuba, etc., is long overdue. Thus, in this chapter, we present examples of African taxation (tribute, excise taxes, poll taxes, income taxes) going back over five thousand years.[8]

Considering the high rate of illiteracy amongst whites in eighteenth-century America, a slave captured from an aristocratic African family, like Equianoh the African, or Prince Abdur Rahman, would have as good and valuable an understanding of what "direct tax" meant as anyone else.

Chapters 3 and 5 represent a tax history of race and racism in the United States. Chapter 3 demonstrates how the tax laws of the United States have historically been conscripted toward the installation and maintenance of socio-political-economic white supremacy. This chapter focuses on tax laws that redistributed wealth from blacks to whites, those that excluded blacks from lucrative markets and the voting franchise, as well as those that helped establish a racial hierarchy. Slavery itself was nearly a 100 percent tax on Black labor, and so was Jim Crow era convict-leasing/sharecropping system. Excise taxes on the slave trade redistributed wealth which should have vested in Black laborers from the slave-owners to poor white southerners, and perhaps to the North in even greater amounts due to the Federal Tariff. In addition, discriminatory occupational taxes excluded inchos from lucrative markets, and poll taxes disenfranchised blacks so that whites could conscript state governments toward social and economic supremacy. On the expenditure side, millions of dollars which should have vested in black laborers were redistributed in the form of government services and anti-poverty programs designed exclusively for whites.

Chapter 4 is something of an interlude. Chapter 3's discussion of how tax law redistributed black wealth to whites as well as excluded blacks from lucrative markets supports scholars who believe that black people are owed reparations for slavery, as well as Jim Crow apartheid. It is indeed curious that tax laws have been ignored in the context of reparations—especially since one of the early substantial works on reparations

was written by one of the more famous tax professors in American legal history, Boris Bittker.[9]

In chapter 4, I engage with reparations scholar Carlton P. Waterhouse about whether and how a reparations program would be taxed by the federal government.[10] Professor Waterhouse and I agree that the optimal reparations program would eschew payments to individuals in favor of funding organizations designed to "repair" the black community. Such organizations, however, may face challenges to their non-profit tax status to the extent employment and other internal operations are limited to blacks, or to the extent the benefits of the organization are distributed strictly to black people.[11]

Chapter five, *Taxes and the Demise of White Supremacy in the United States*, identifies the role taxation had in the civil rights movement. At first, the Civil Rights Movement succeeded in attacking neutrally written tax laws that were designed to maintain racial subordination. For example, the twenty-fourth Amendment's prohibition against poll taxes in 1964 reflects a direct assault on American apartheid. Since then, a national taboo against express advocacy for white supremacy emerged. But, two tax cases in the early 1980s, *Bob Jones v. US* (1983), and *Allen v. Wright* (1984), presage the Supreme Court's twenty-first century, "post-racial" attitude, where the government pays lip service to racial equality while ignoring inequality in actual practice. Bob Jones stands for the proposition that federal statutes should not be interpreted in ways that exacerbate racial inequality. But Allen v. Wright holds that black people generally don't have standing to force the government to eradicate racism even when it is illegal.

The Bob Jones court's intrusion on white privilege in the private sphere was perhaps the last straw before a long, sustained conservative assault on so-called "judicial activism." The very next year after Bob Jones, the court chastised itself in *Chevron v. NRDC* (1984), holding that the judiciary was no longer the branch of government entitled to interpret federal statutes. Neo-forpsm, neo-textualism, and neo-positivism has been on the rise ever since. Nevertheless, chapter 6 demonstrates how none of these jurisprudential "stopping rules" actually prevent legal decision makers from considering racial phenomena.

Chapter 6 identifies critical race theory and critical race tax theory as counter-movements to post-racialism and neo-formalism. Despite the current absence of facially discriminatory tax laws in the United States, critical race tax theorists remain vigilant in exposing when and where neutrally worded tax laws create, maintain or exacerbate disparate economic impacts relating to race.[12] But the challenge faced by critical tax theorists is exemplified by *Banks v. US* (2006), where the Court literally marginalized the issue of race by reducing it to a footnote.

Therefore, toward a wider acceptance of critical race tax theory as a creditable part of the legal academy, I offer in this chapter the concept of

"asymmetrical market imperfections relating to race" as a rhetorical construct by which critical tax scholars can describe racially disparate impacts.[13] The benefit of adopting "asymmetrical market imperfections" is its consistency with several of the most current theories, aesthetics, and attitudes about law. Considering racism as AMI is consistent with neoclassical economic conceptions of efficiency, with the modern conception of tax fairness, the Rawlsian concept of justice as a fairness, and with each major technique of statutory interpretation or construction.

NOTES

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ONE

Does it Matter What Slaves Thought "Direct Tax" Meant?

When I was first on the market to become a law professor, I had a dinner interview during which one of the tenured folks looked at me quizzically and asked, "Why tax?" The question was clearly relevant, since I was applying to become a tax law professor. But it was also tinged with an accusation. I paused, and she clarified her question, making the charge explicit, "I mean people are dying on death row, and you're worried about taxes?"

Obviously, she had read my resume, which included short stints with Al Gore's (failed) presidential campaign, the Democratic National Committee, and the NAACP National Voter Fund, and concluded that I would make a good liberal soldier on the faculty. Except that, here I am at dinner speaking reverently about the Internal Revenue Code (IRC, or the Code) and enthusiastically about the myriad ways it can be interpreted. "I mean, liberty is more important than property, right?" she added.

I was certainly prepared to answer the generic "why teach tax" question. It's a job interview, after all. But I was a bit put off by the tone of her question, feeling as if I had just been accused of being a sellout. The table of five diners became slightly tense in the nanoseconds I took to respond. One of the others, hearing her question the same way I heard it, looked away from the table, as if to say "aw shit, this is not going to go well." On the other hand, an older gentleman, a retired judge who later tried to recruit me to the Republican Party as he drove me back to my hotel, looked up from his plate of food, giddily anticipating a confrontation between two people he had assumed up to that point would be aligned against him.

"Without property, I don't know how much you are at liberty to do," I replied. This would be far from the only time in my career that I failed to meet progressive expectations in the legal academy.

Sometime later, a mentor of mine for whom I still have quite a bit of scholarly affection questioned why I often use neo-classical economics as an analytical construct in my writings on race. He was referring to Audre Lord when he asked, "aren't those the master's tools?"[1] My left eyebrow rose, betraying my attempts to remain honorific and expressing my disagreement without permission. I chose *not* to say, "ain't nothing master got, we didn't give him."

You see, I am not a Democrat or a Republican, I am neither liberal nor conservative. I consider myself a pragmatic, Black Nationalist—one who believes that black folks (however constructed) must realistically assess the costs and benefits of each and every invention, tool, construct, theory and strategy available toward redemption.[2] I also have a Pan-African or Afrocentric attitude toward blackness, which means I believe that black people (however constructed) have a special connection to Africa and that Africans wherever situated on the globe have participated in the forward march of "civilization" as much as any other group of people on the planet.[3] Therefore, I believe that there is hardly any invention, tool, construct, theory or strategy—including neo-classic economics—that belongs to white people.

For our present example, this chapter takes an esoteric legal question like "what is the precise meaning of Direct Tax in the U.S. Constitution" and shows how "textualism," the jurisprudential technique most favored by today's political conservatives, actually requires judges to consider race in many legal controversies, while purposivism and modern dynamics, the jurisprudential techniques most favored by today's political progressives, actually ignores what eighteenth-century black people had to say in respect of the U.S. Constitution.

TECHNIQUES FOR DELIBERATING OVER THE U.S. CONSTITUTION

The original purpose of this chapter was to show that textualism has little to no efficiency advantage over other statutory construction techniques, contrary to some scholarly suggestions.[4] Textualism, done right, can consume as much time and resources as dynamism, purposivism or intentionalism. This is because textualism requires, first, a two-step analysis of both plain meaning and statutory context and, second but more importantly, an investigation into various interpretive communities and a determination as to the meaning each would ascribe to a text. For example, the word "income" varies in breadth and scope depending on whether the interpretive community consists of lawyers, tax lawyers, accountants, laypersons, etc.

For another example, there is little agreement on what is meant by "Direct Tax" as used in the U.S. Constitution. Thus, textualism requires a judge to undertake the arduous activity of determining what each community thought Direct Tax meant in 1787, including women, slaves, free blacks, Native Americans, etc. This is of particular importance when, as with the debate over Direct Tax, the major or predominant interpretative group (white males) equivocates on the matter.[5] Consequently, it cannot be said that the plain meaning rule is a less costly endeavor than divining intent or considering foreseeable consequences.

Adrian Vermeule and Cass Sunstein presented the argument that textualism is a less costly activity than the consideration of legislative purposes.[6] Behind each statute might lay a multitude of purposes to consider, each perhaps requiring the exercise of some discrete expertise. Purposivism would thus require a judge and her clerks to acquaint themselves with different fields of study in order to decide each case. Dynamism, being a broader inquiry into foreseeable consequences than purposivism, would be even more costly. However, Vermeule and Sunstein's charge of relative inefficiency can stand only when purposivism and dynamism are compared against an overly simplistic and unrealistic conception of textualism.

Proponents of textualism typically offer little more to the would-be textualist other than "focus on the text," as if the correct answer will simply wash over you after mere concentration. Some refer the would-be textualist to the "canons of construction" for guidance. In fact, Justice Scalia has authored a how-to book on textualism.[7] But, as will be discussed, real textualism, particularly the part that relates to plain meaning, requires a number of calculations and admits more judicial discretion than is typically acknowledged. By asking whether the thoughts of slaves matter with respect to the legal question what is a "Direct Tax," I intend to prove simply that a text-based analysis is not necessarily more efficient than a purposive one.

In the end, no, I do not know what an individual slave would think Direct Tax meant—although in chapter 2, I intend to prove that some would have sophisticated thoughts on the matter if asked. Those not interested in the particulars of jurisprudence and legal theory may want to skip ahead to chapter 2's discussion of African taxation. Those who are interested exclusively by the issues of tax and race in the United states may be forgiven for jumping ahead to chapter 3.

Now what will represent a huge political irony to some is that Justice Scalia's brand of originalist textualism accords the most respect to the views of slaves on constitutional issues.[8] Similarly, it accords the most respect for women's views. His theory requires judges to consider what the text of the Constitution meant to the people of the United States. He considers the Federalist Papers not as evidence of the Framers' intent but as evidence of what the People thought specific words meant.[9] But, even