

Fear of a Black Planet and the Wealth of Nations¹

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For the last century, international tax policy has been defined not by consistency but by disparate treatment. A selective cosmopolitanism has denied some the resources it has offered freely to others. This chapter casts an unflattering light on institutions and technologies at the heart of global tax policy. And it pairs that critique with a call for robust efforts to ensure that the next 100 years delivers the tax sovereignty that fear has long denied to more than a billion Black people.

The United States has long helped guide the evolution of international tax policy. An outsized influence has translated into a disproportionate impact on its trajectory, no different than the story that has played out in countless other contexts. With the “proliferation of institutions designed to manage, or ‘govern’ global capitalism.... the United States in particular benefited from these institutions since, as the preeminent power involved in setting up such capitalist infrastructure after 1945, it was able to shape their design, influence staffing, and otherwise exert power.”³ That US influence has not always been acknowledged.⁴ Nor has it been consistently benign, inevitably reflecting America’s flaws as well as its strengths.

In a world in which racial bias continues to shape policies and to fuel politics, a failure of US leadership helped to create a global tax system defined by separate and unequal treatment, reinscribing a shameful history of disenfranchisement on a far larger scale. The central role of tax revenues in supporting economic development and the elevation of human rights from aspiration into reality makes that failure profoundly impactful. For more than half a century international tax rules have been crafted by an organization that robbed a continent of its tax sovereignty at a crucial moment.

Fear of a Black planet helped give rise to an institution that over decades has boasted dozens of members, not a single one of which has ever been majority Black. Created as an alternative to increasingly diverse international organizations like the United Nations as the decolonization of Africa gained momentum, the Organization for Economic Cooperation and Development has built a troubling legacy. In time, it would oversee a global tax regime that left the developing world bound by chains of debt while securing freedom for the wealthy world’s multinationals. Its birth, as this chapter explains, stripped Africans of their voice at their independence.

This would not, of course, be the first time that fear had helped disenfranchise Blacks. The same prejudices long prevented the United States from realizing the promise of emancipation in the wake

¹ Forthcoming in *TAXING PEOPLE: THE NEXT 100 YEARS* (Cambridge University Press, Tsilly Dagan & Ruth Mason, eds.).

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³ VANESSA OGLE, *Global Capitalist Infrastructure and US Power*, in *THE CAMBRIDGE HISTORY OF AMERICA AND THE WORLD* (David C. Engerman et al. eds., 2022).

⁴ The implausible conventional narrative of global inattention and US passivity in a context as impactful as taxation has been upended by new research demonstrating that the rise of the OECD disrupted a vibrant debate within the United Nations about the future of international tax. Compare Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 *BROOK. J. INT’L L.* 1357, 1358 (2001) (“Nothing comparable to the thoroughgoing multilateral restructurings of international monetary and trade relationships that followed the Second World War (which themselves have been substantially revised and refined since) has affected the system of international income taxation.”) and NIKKI TEO, *THE UNITED NATIONS IN GLOBAL TAX COORDINATION*, 2 (2023) (describing a long-overlooked post-World War II era featuring “promising developments of the UN as a forum for double taxation matters and the interested participation of non-European, post-colonial developing countries in the subject”).

of its Civil War. The painful history of Reconstruction—with racial bias legitimizing the disenfranchisement of formerly enslaved people—serves as a cautionary tale for efforts to make global tax policymaking more inclusive. Only military intervention by the North provided Blacks in the South with a meaningful opportunity to influence the policymaking process during Reconstruction. And once the soldiers left, the freedom Blacks briefly enjoyed came to an end.

A successful remaking of the global tax policymaking process—sufficient to overcome entrenched structural obstacles to the participation of states not members of the OECD—would require remedies far more potent than those offered to date. This chapter draws on the lessons of US post-Civil War Reconstruction to suggest what might begin to undo the damage of more than a half-century of exclusion. That history reveals why merely extending an invitation for disenfranchised states to participate in global tax policy discussions will not be enough.

Tax and Decolonization

In the 1950s, the world faced the prospect of Black governance of a continent. At that time, Reconstruction remained deeply misunderstood. Scholars—labeled the Dunning School after the Columbia University professor most closely associated with its ideas—described Reconstruction “as a time of corruption and misgovernment caused by the enfranchisement of the former slaves.”⁵ That misreading of history—which would not be definitively put to rest until the 1980s—would have made Africa’s dawning independence the source of grave concern.

Those fears would not have been confined to the United States. Thanks to influential scholars and mainstream books like the “sensationalist bestseller of the 1920s, *The Tragic Era*, that described Louisiana’s Reconstruction legislature as a ‘zoo’”⁶ such views had an opportunity to spread far and wide. As a result, “the alleged failure of Reconstruction became part of the ideology of the white man’s burden, cited all over the world to demonstrate the incapacity of nonwhite peoples for self-government.”⁷

In the 1950s those fears would have grown acute. Put bluntly, as African independence loomed “[m]any Europeans... held deep-seated racist convictions about the absence of business acumen among native populations and simply could not imagine economic life continuing in regular form after independence.”⁸ With the Dunning School offering Reconstruction to the world as the epitome of nonwhite mismanagement, Black sovereignty on such a scale could hardly have sat easily with the public.

That feared misgovernance would have included the possibility of outright nationalization of foreign-owned ventures.⁹ But other changes would have been certain. Given the demands of statehood “increased taxation”¹⁰ would have been a foregone conclusion. Before independence, rates remained

⁵ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, xxxix (2014).

⁶ *Id.* at xxxii.

⁷ *Id.* at xxxix.

⁸ See Vanessa Ogle, *Funk Money: The End of Empires, The Expansion of Tax Havens, and Decolonization as an Economic and Financial Event*, 249 PAST & PRESENT 213, 214 (2020).

⁹ *Id.*

¹⁰ *Id.* (“Distrustful of newly independent governments and non-white rule, fearing resentment, increased taxation or possibly even nationalization, Euro-American businesses active in the colonial world divested from empire.”).

well below those of the metropolises. Those differences hid even more substantial disparities in actual tax burdens as “evasion of income taxes in colonies was widespread.”¹¹

Public demand for long-neglected public services like education and healthcare promised a swift end to an era of modest colonial taxation. Under direct imperial control, financial pressures ruled out such spending. “Colonies that struggled to make their budgets balance were particularly wary of public investments that would commit them to future spending. This included building schools and hospitals, which would need to be maintained and staffed in future years.”¹²

After independence, new nations promised to remedy those failures. “With the transfer of power came widespread optimism that independence would allow for the provision of services, particularly education, at a more generous level than colonial authorities had allowed.”¹³ But without tax sovereignty, new governments could not keep those promises. Although newly independent states “dramatically increased their spending on services like education and healthcare, neglected during the colonial period.... these increases were ultimately unsustainable.”¹⁴

The impact of that failure—like the unraveling of Reconstruction almost a century before—would be broad and deep. Without tax revenues, new governments proved unable to deliver schools and hospitals. In time, “the tax systems established by colonial governments were unable to cope with the demands of democracy, and the political systems of many independent African countries descended into single-party autocracy and military rule.”¹⁵ In both the post-Civil War American South and in a newly independent Africa, fear fueled by anti-Black racism helped young democracies die on the vine.

The Failure of Africa’s Reconstruction

In Africa’s Reconstruction, America and Europe perceived a familiar threat. They responded by embracing tools and structures designed to limit Africa’s sovereignty. That pattern can be seen clearly in taxation. Until the early 1950s, the United Nations retained jurisdiction over global tax policy.¹⁶ With Africa’s decolonization imminent, that would change.

Formed by adding Canada and the United States to the Organization for European Economic Cooperation, the OECD offered a reassuring, all-white¹⁷ alternative. This substitute for multiracial democracy took shape at the same time the United Nations prepared to welcome a host of new Black members. Little effort was made to disguise the impetus for such changes. The OECD charter, for

¹¹ *Id.* at 236.

¹² LEIGH A. GARDNER, TAXING COLONIAL AFRICA: THE POLITICAL ECONOMY OF BRITISH IMPERIALISM 10 (2012).

¹³ *Id.* at 245.

¹⁴ Gardner suggests that the failure of African tax systems not only prevented them from providing the hoped-for social services, but contributed to the rise of dictatorships. *Id.*

¹⁵ *Id.*

¹⁶ Teo details the involvement of the United Nations in global tax policy in the years following World War II noting that it “formulated principles on two difficult issues that were indirectly related to revising the model conventions, namely the general allocation principles to apply in relations between developed and undeveloped countries, and the taxation of international air transport.” Teo, *supra* note 2, at 10.

¹⁷ Many might be surprised to find that the US Census includes Turkey in its definition of white. *About the Topic of Race*, US CENSUS BUREAU, (date & time of access) <https://www.census.gov/topics/population/race/about.html> (“White. A person having origins in any of the original peoples of Europe, the Middle East, or North Africa. It includes people who indicate their race as ‘White’ or report responses such as German, Irish, English, Italian, Lebanese, and Egyptian.”).

example, would be signed on the same day in 1960 the UN General Assembly adopted its Declaration on Decolonization.¹⁸

Vibrant debates over international tax policy flourished in the United Nations through the early 1950s. During World War II, the United States had found it useful to make a show of embracing inclusive global tax governance.¹⁹ Yet with Africa’s decolonization, US support allowed the OECD to effortlessly take control of global tax policy.

By the 1960s, thanks to that US change of heart a “thoroughgoing multilateral restructuring[] of... the system of international income taxation”²⁰ occurred. But neither that restructuring nor its devastating impact has ever been acknowledged. Thanks to the rise of the OECD, global tax policy would no longer be part of what economist John Maynard Keynes described in a cable to the British Treasury—paraphrasing, perhaps unintentionally, *The Tragic Era*—not as a zoo but as “the most monstrous monkey-house assembled for years.”²¹

The League of Nations

In the years to come, the OECD would dominate global tax policymaking. But at its inception it possessed neither tax expertise or experience.²² Despite—or perhaps because of—a need to add heft to its international tax policy efforts, the OECD ignored the work of the United Nations. Instead, it reached back to the work of the League of Nations from the 1920s.

The failure of the League of Nations—and more pointedly its failure to prevent renewed conflict in the wake of World War I—tends to be overshadowed in tax circles by what would prove to be a notable posthumous success. Specifically, the League published a series of model tax treaties in the 1920s. Fittingly described as a “flawed miracle”²³ the League’s treaties came to play a central role in global tax governance well after the League itself had collapsed. Designed in such a way that those treaties subtly constrain the tax sovereignty of poor countries, they reflect a darker aspect of the League’s work.

Anticipating precisely the future the world confronted in the 1950s, the League’s efforts would be informed both by empire’s evident decline and fears of nonwhite governance. It worked to craft a legal framework capable of preserving the substance of empire in a post-imperial age. What could no longer be accomplished through direct control, the imperial powers hoped to accomplish with treaties and other international legal instruments.

¹⁸ Both the OECD Charter and the General Assembly’s Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)) were adopted on December 14, 1960.

¹⁹ Teo corrects the story of the fabled Mexico draft of the model tax treaty by showing that it was the product of US efforts to curry favor with Latin America during the war, unnecessary after the war ended. See Teo *supra* note 4 at 82 (expressing skepticism about the “League’s wartime engagement of developing countries into its double taxation work”).

²⁰ Compare Graetz, *supra* note 2, at 1358 with Teo, *supra* note 4, at 2.

²¹ Letter from John Maynard Keynes to Sir David Walley (30 May 1944), in THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES, 42 (Elizabeth Johnson & Donald Moggridge, eds.) (describing a UN conference that included African and Latin American representatives).

²² See Teo *supra* note 4 at 353 (noting that because “the OEEC had no experts in the field” and with “the UN staff suitably skilled” the UN “flagged the possibility of seconding an International Tax Section official for a few months to furnish the OEEC Secretariat with technical support”).

²³ Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1303 (1996).

That dynamic can be observed in the fate of Germany's colonies. Most of the war's victors had hoped to annex the imperial possessions of the losing side. But US objections and a growing distaste for imperial control made that impossible. "Only reluctantly did they bend to American pressure and the wave of internationalist and anti-imperialist sentiment sweeping the globe" by agreeing that Germany's former possessions would instead be nominally sovereign and "governed under League oversight."²⁴

The League's architects hoped to formally embrace the "right to self-determination" while "repurpos[ing] the principle to preserve racial hierarchy in the new international organization."²⁵ The League's "'colonial' branch, the Mandate System"²⁶ reveals how lofty ideals coexisted with racist beliefs. By the time the Permanent Mandates Commission met for the first time in 1921 "whatever purposes the mandates system had been devised to serve, extending the right of national self-determination was not one of them."²⁷

The League's Mandate System alarmed some observers and dashed the hopes of those that would be governed by it. Armed with the lessons of Reconstruction, W.E.B. Du Bois fruitlessly "urge[d] that a 'man of African descent' be added to the Commission."²⁸ Bitterly disappointed that they would not be fully independent, the subjects of the Mandate System "responded by resisting its imposition almost as strenuously as had the imperial powers."²⁹

There might be no future for empire, but racism and hierarchy tainted the League's vision. Despite their growing distaste for empire its "architects and officials had intended.... to uphold imperial authority and strengthen the prestige and legitimacy of alien, non-consensual rule."³⁰ While insisting that they supported the principle of self-determination, US President Woodrow Wilson and others "argued that racially backward people were not suited for democracy but could partake in minimal forms of consent and were owed some modicum of respect."³¹ The League crafted legal technologies that delivered control with a veneer of legitimacy.

The territory Germany once held in Africa now became Mandates, independent, but subject to the "tutelage" of European powers. The Mandate System would in theory help "peoples not yet able to stand by themselves under the strenuous conditions of the modern world"³² learn the skills necessary to one day graduate to true sovereignty. That notion would be reflected in the Mandate System's racially stratified classification system.

The whitest Mandates—including portions of what had been the Ottoman Empire—would possess A status, providing them with a significant degree of autonomy. Next in the hierarchy came "B Mandates, which included former German colonies in Central Africa" over which "Mandatory powers were granted much broader powers."³³ Finally "C Mandates included South West Africa, New Guinea

²⁴ SUSAN PEDERSEN, *THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE* 1 (2015).

²⁵ ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* 10 (2019) (arguing that "Woodrow Wilson and Jan Smuts excised the revolutionary implications of the Bolshevik right to self-determination and repurposed the principle to preserve racial hierarchy in the new international organization")

²⁶ NTINA TZOUVALA, *CAPITALISM AS CIVILIZATION*, 89 (2020).

²⁷ See PEDERSEN, *supra* note 24 at 3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 13.

³¹ See GETACHEW *supra* note 25 at 42 (2019)

³² League of Nations covenant article 22

³³ TZOUVALA *supra* note 26 at 101

and small Pacific islands like Nauru, Samoa and those under Japan's South Pacific Mandate" which "were in the peculiar legal position of being 'administered under the laws of the Mandatory as integral portions of its territory.'"³⁴ The League's Mandate System promised former imperial powers the capacity to contain the risks posed by nonwhite misgovernance.

Double Tax Treaties

For tax experts only familiar with its double tax treaties, the League's Mandate System may seem incongruous. But the two share a common purpose. Understanding the origins and operation of its Mandate System offers critical context for the League's tax work. It suggests why the OECD pointedly ignored the United Nations in favor of the League. Those treaties, like the Mandate System, paired formal equality with hierarchy.

Every student of international tax law learns that the League's experts designed its treaties for "the sole purpose of mitigat[ing] international double taxation so that governments could benefit from international economic liberalization."³⁵ That myth,³⁶ as tenacious as the fiction of Reconstruction's failure because of Black misgovernance, survives despite ample evidence to the contrary. Logically, unilateral measures could just as easily—and more justly—eliminate the threat of two countries taxing the same cross-border activities or investment.³⁷

The League's treaties operate according to the same hierarchical principles as its Mandate System. In contrast to alternatives that might nurture the fiscal autonomy of poor countries, those treaties make such countries poorer. In the waning days of World War I, the United States took a very different approach. It embraced an extraordinarily generous unilateral remedy for double taxation.³⁸ Unlike that intervention—embraced before the League developed its treaties—double tax treaties resolve tax conflicts in favor of wealthy states.³⁹

In contrast to the unilateral measures that preceded them, but like its Mandate System, the League's treaties recreated the substance of empire while maintaining the illusion of self-determination. The permanent establishment concept illustrates that dynamic.⁴⁰ A hallmark of the League's treaties, still operative today, permanent establishment applies universally but limits the tax sovereignty of states in lockstep with their dependence on foreign capital. States with a surplus of capital accrue tax sovereignty while those dependent on capital imports sacrifice it under the League's permanent establishment framework.

The League's vision of a world that replicates the logic of imperialism without its formal trappings produced its Mandate System. It also shaped its double tax treaties. As mechanisms for reproducing the constraints of an imperial relationship without empire, both the League's Mandate System and its

³⁴ *Id.*

³⁵ Thomas Rixen, *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance*, REV. INT'L POL. ECONOMY 197 (2011).

³⁶ Tsilly Dagan *The Myth of Tax Treaties*, 32 N.Y.U. J. INT'L L. P. 939

³⁷ *Id.*

³⁸ EDWIN SELIGMAN, DOUBLE TAXATION AND INTERNATIONAL FISCAL COOPERATION, 135 (1928)

³⁹ Dagan, *supra* note 36.

⁴⁰ Graetz observes that, by lobbying for the inclusion of the permanent establishment concept in the League's treaties, the "United States, a major net exporter of goods in the 1920s, thus relieved its businesses of much foreign taxation with the permanent establishment rule, while preserving the spirit of source-based taxation." Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L. J. 1021, 1089 (1997).

double tax treaties delivered. In formal terms, those reciprocal double tax treaties appear the inverse of imperial control. They afford the same rights to—and impose the same obligations on—each signatory. But they entrench economic power by shifting tax sovereignty towards wealthier states. Thanks to the League’s ingenious design, embraced decades later by the OECD, the richer the state, the more tax sovereignty it enjoys.

Fear of a Black Planet

The League was no more when the OECD confronted the reality of decolonization by reviving its double tax treaties. An extraordinary bounty of post-war growth belies any notion that economic necessity breathed new life into treaties. The impending threat of Africa’s decolonization, by contrast, offers a coherent, if less savory, explanation for their long-delayed deployment.

Precisely as the League’s creators might have hoped, those treaties allowed the OECD to rise to power as an informal World Tax Organization, displacing Keynes’ “monkey house.” The UN had demonstrated a commitment to international tax policy, embodying precisely the sort of multiracial democracy Reconstruction had taught the world to fear. The United States helped orchestrate a quiet takeover by the OECD. In turn, the OECD acquired much-needed legitimacy by embracing the handiwork of the long-dead League.

The end of formal empire in Africa transformed a dynamic that had oscillated between selflessness and selfishness. Before the League was formed, the United States unilaterally made “a present of revenues” to a Europe desperate for capital after World War I.⁴¹ Later, in a tentative effort to claw back some of that generosity, the United States and the League would work closely together, with the League “urging treaty negotiations between governments” while “sidestepping procedural formalities and collaborating with the US government as well as with US business interests.”⁴²

As African colonies neared independence, that ambivalence dissipated. Both the generosity the US had once shown Europe and any skepticism of the League’s vision of alien, non-consensual rule yielded to fear. To constrain the tax sovereignty of new African states desperate to fund the schools and hospitals denied them under colonial rule, the United States, Canada, and Europe embraced the League’s treaties. In 1963, just three years after the OECD’s creation, it issued its first model treaty. All but moribund in the intervening three decades since the League created them, those treaties quickly proliferated, becoming the backbone of an international tax system that persists today.

Separate but Equal

From a US perspective, Africa’s decolonization posed a familiar threat. Today, it may be true that today global tax policymaking follows a predictable path: “the United States takes the lead, the OECD and its members reach a compromise, and the rest of the world follows the OECD.”⁴³ But before that could be true, the OECD would itself blossom thanks to a widely shared anxiety over Black governance fueled by lies about Reconstruction.

⁴¹ SELIGMAN, *supra* note 38, at 135.

⁴² Teo, *supra* note 4, at 82.

⁴³ Jinyan Li, *Global Profit Split: An Evolutionary Approach to International Income Allocation*, 50 CAN. TAX J. 823, 867 (2002) (discussing transfer pricing).

Over the past decade, concern over disenfranchisement of states has prompted a push to shift global tax policymaking back to the United Nations.⁴⁴ To many, such a dramatic transformation may seem excessive. The history of Reconstruction suggests that it may not be nearly enough.

The same fears that stripped the UN of its central role in global tax policy once doomed Reconstruction. Reconstruction represented a concerted effort to remake the legal architecture of the Southern states that once comprised the Confederacy. Having seceded from the United States in order to preserve the right to enslave Blacks, the Confederacy suffered a devastating military loss at the hands of the Northern army. Even in defeat, those Confederate states fiercely resisted granting equal status to millions of formerly enslaved Blacks.

Over time, former Confederate states embraced an approach that provided Blacks with hollow rights promising equal—but delivering discriminatory—treatment. Forty years after the end of the Civil War, the US Supreme Court delivered one of its most infamous rulings, rejecting a direct challenge to such arrangements. In *Plessy v. Ferguson*, the Court blessed the notion of “separate but equal” embedding discrimination into the law of the entire United States.⁴⁵ The Louisiana law at issue required Blacks and whites to travel in separate train cars. With the Supreme Court’s blessing, segregation kept the nation’s Blacks and whites apart in nearly every aspect of their lives, basking on separate beaches and mourning in separate graveyards.

Reconstruction

The US path to *Plessy* serves as a stark warning for the current unsettled state of global tax policymaking. With the end of the Civil War, the matter of slavery had been resolved but little else seemed certain. A humiliated Confederacy found its enslaved Blacks free. It would be an understatement to say that Southern whites displayed ambivalence about treating them as equals. In practice, the North’s success and the Emancipation it delivered did little to dispel the anti-Black racism that fostered—and was fueled by—centuries of dehumanizing trafficking.

The process of remaking American society to ensure that Black freedom would be more than an empty promise demanded profound changes in US law. The US Constitution itself would be repeatedly altered to deliver fundamental rights to the millions of men, women, and children the legal system had once treated as property.⁴⁶ The Fourteenth Amendment prohibited disparate treatment because of a person’s race. The Fifteenth “prohibit[ed] the federal and state governments from depriving any citizen of the vote on racial grounds.”⁴⁷

The most important lesson of Reconstruction may be that none of those changes proved to be enough. In part, that was because of the laws of the former Confederate states themselves. Those laws

⁴⁴ Phillip Inman, *Rich countries accused of foiling effort to give poorer nations a voice on tax*, THE GUARDIAN, <https://www.theguardian.com/global-development/2015/jul/14/financing-for-development-conference-addis-ababa-rich-countries-accused-poorer-nations-voice-tax> (quoting advocates urging that “the UN should create an international body to oversee global tax matters”).

⁴⁵ 163 U.S. 537, 552 (1896) (a dissent by Justice Harlan uses the phrase “separate but equal”).

⁴⁶ The Supreme Court ruled that Blacks were property and could not be citizens. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁴⁷ Foner, *supra* note 5, at 446 (critics noted that “the Amendment did not forbid literacy, property, and educational tests that, while nonracial, might effectively exclude the majority of blacks from the polls”).

would define the contours of the relationship between former slaveholders and formerly enslaved persons.

In a series of state constitutional conventions from 1867-1869, the South deliberated over Black civil and political rights.⁴⁸ They weighed the reality of integration in education.⁴⁹ They even grappled with the challenges of tax reform.⁵⁰ Southern states considered “the need to provide freedman with land and encourage the breakup of the plantation system.”⁵¹

These efforts faced fierce opposition. But a surprising coalition assembled in support of change. Alongside Black Freedmen, white Republicans—a combination of Southern-born “scalawags” and Northern transplants known as “carpetbaggers”—helped ensure that those revisionist state constitutions succeeded throughout the south, with the exception of Alabama and Mississippi.⁵²

Those federal and state reforms aimed to ensure that the end of slavery meant real freedom for Blacks. But they would not be enough. A swift backlash to Reconstruction came in a variety of forms. The most searing response would be unchecked violence designed to intimidate Blacks and their white allies. An extraordinary “wave of counterrevolutionary terror... swept over large parts of the South between 1868 and 1871.”⁵³ That violence had no “counterpart either in the American experience or in that of the other Western Hemisphere societies that abolished slavery in the 19th century.”⁵⁴

Such violence severely compromised Blacks’ capacity to exercise their newfound rights. The Fifteenth Amendment was ratified in 1870, but countless murders of officials and ordinary citizens made exercising the rights it guaranteed exceedingly dangerous. The eventual response to that wave of terror would be dramatic and—all too briefly—effective.

The North interceded, relying on a combination of law enforcement and military intervention to ensure that Blacks could vote. The “federal legal offensive of 1871”⁵⁵ targeted terror organizations like the Ku Klux Klan. It produced “nearly 700 indictments”⁵⁶ against Klansmen in Mississippi alone.

But even that would not be enough to protect the rights of Freedmen. Federal and state reforms paired with vigorous law enforcement efforts still left them and their white supporters vulnerable to violence. Keeping the peace and ensuring the integrity of the voting process would ultimately require far more.

The federal effort to counter white terror in the former Confederacy ultimately required military intervention. The Northern military incursion into the South “culminat[ed] in the use of troops to root out the South Carolina Klan.”⁵⁷ Those interventions by the federal government demonstrated a

⁴⁸ *Id.* at 320.

⁴⁹ *Id.* at 321

⁵⁰ *Id.* at 327

⁵¹ *Id.* at 329.

⁵² *Id.* at 332.

⁵³ *Id.* (“the Klan was a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy.... it sought to affect power relations, both public and private.... and restore racial subordination in every aspect of Southern life”).

⁵⁴ *Id.*

⁵⁵ *Id.* at 458.

⁵⁶ *Id.* at 457.

⁵⁷ *Id.* at 458.

“willingness to bring its legal and coercive authority to bear.”⁵⁸ By 1872 the combination of criminal prosecutions and troops “had broken the Klan’s back and produced a dramatic decline in violence throughout the South.”⁵⁹

But by 1876 the nation’s appetite for such extraordinary measures waned. Without them, the elaborate protections offered to Blacks by federal and state law would prove meaningless. Northern indifference would eviscerate the Fourteenth and Fifteenth Amendments and ultimately breathe life into *Plessy*.

Even as “electoral fraud became the order of the day in counties with black majorities”⁶⁰ it became clear “that the northern public would no longer support federal intervention in southern affairs.”⁶¹ Renewed violence and “the President’s refusal to send federal troops... thoroughly demoralized”⁶² those fighting for Reconstruction. The results would be felt slowly in parts of the south, with Blacks continuing to vote freely in some states. By contrast “in the Deep South, where electoral fraud was widespread and the threat of violence hung most heavily over the black community.... long before their outright disenfranchisement around the turn of the century, blacks saw their political rights progressively eroded.”⁶³

The Lessons of Reconstruction

When history repeats itself, as it has with the rise of the OECD in response to fears of Black misgovernance, the hard-won lessons of the past can offer critical guidance. This chapter draws four insights from Reconstruction for those struggling to secure meaningful participation for non-OECD member states in global tax governance.

1. Truth matters
2. Rights alone are not enough
3. Not all rights are created equal
4. Vigilance is essential

Truth matters

By 1877, violence and fraud had brought Reconstruction to an end. Today, historians agree that the collapse of Reconstruction never served as an indictment of Black governance. Despite the efforts of historians like W.E.B. Du Bois, it came to be seen as precisely that.

Formerly enslaved Blacks, offered the opportunity to take control of their futures, it would long be thought, demonstrated that they could not be trusted to rule. Well into the mid-twentieth century, scholars openly embraced racist notions of Black incompetence to explain the failure of Reconstruction.⁶⁴ They lamented that “childlike blacks... unprepared for freedom and incapable of

⁵⁸ *Id.* at 458-59.

⁵⁹ *Id.* at 458-59.

⁶⁰ *Id.* at 490.

⁶¹ *Id.* at 567.

⁶² *Id.* at 569.

⁶³ *Id.* at 590.

⁶⁴ Foner describes a Dunning School book published in 1947. *Id.* at xviii (“The fact that blacks took part in government wrote E. Merton Coulter in the last full-scale history of Reconstruction written entirely within the Dunning tradition, was a ‘diabolical’ development, ‘to be remembered, shuddered at, and execrated.’”).

properly exercising the political rights” Reconstruction “thrust upon them”⁶⁵ governed with predictably disastrous consequences. Not until the civil rights movement of the 1960s would that dominant narrative—falsely ascribing the failure of Reconstruction to the greed of carpetbaggers, the naïveté of scalawags and incompetence of freed Blacks—be successfully challenged.

Du Bois published *Black Reconstruction* in 1935, offering an accurate telling of its rise and fall. But the conventional account—articulated by the Dunning school—steadfastly ignored Du Bois. Copious evidence historians would later rely on to show that Southern resistance and Northern indifference, not Black incapacity, doomed Reconstruction went unexamined. Only with the 1988 publication of the definitive history of Reconstruction would the last embers of the Dunning School be snuffed out.⁶⁶

The myth of Reconstruction’s failure becomes even more troubling when considered against its initial successes in the years following the North’s use of military force to protect Black rights. Blacks acquired political power in a variety of arenas. States that had made Blacks the legal equivalent of livestock not long before sent Black Senators and Representatives to Washington. In 1870 the South sent Mississippi’s Hiram Revels to the Senate. In 1872 Louisiana elected its first Black governor.

The conventional account of global tax policymaking’s path pointedly omits any mention of the initial successes of inclusive tax policymaking.⁶⁷ The substantive discussions that took place in the United Nations in the years before the OECD took control dispel the widespread belief that it merely stepped into the League’s empty shoes.⁶⁸ Developing states demonstrated both an interest in and a capacity for high-level international tax work.

Ignoring that inconvenient fact continues to legitimize the disenfranchisement that followed. The myth that the OECD and the League’s treaties filled a gap rather than displacing a far more democratic form of global tax governance made the lack of representation within the OECD more palatable. Knowing that the OECD silenced an important conversation about global tax justice that had hardly begun amplifies concerns about its capacity to empathize with the needs and concerns of nonmembers.

Rights alone are not enough

More than six decades after its creation, the OECD has still never had a Black member. In the tax context, it now insists that membership has become irrelevant. The OECD asserts that—thanks to its Inclusive Framework—all states participate in global tax policymaking “on an equal footing.”⁶⁹

⁶⁵ *Id.* at xviii.

⁶⁶ *Id.*

⁶⁷ *Teo, supra* note 4 at 6 (“Many prominent works that outline international tax history overlook the [UN Fiscal] Commission altogether, citing the OECD’s Fiscal Committee as the effective successor to the League’s Fiscal Committee.”).

⁶⁸ *Id.* at 2 (noting that the fact that “the reports and resolutions of the period would never be broached again in successive international taxation efforts” does not erase the promise of its initial efforts).

⁶⁹ The OECD uses the phrase to describe participation in its anti-tax avoidance initiative launched in 2013. See *Closing tax gaps—OECD launches Action Plan on Base Erosion and Profit Shifting*, OECD (Jul. 19, 2013, <time of access>) <https://www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm> (applying the phrase to “all OECD members and G20 countries on an equal footing”). Under pressure from states excluded from that group, the OECD expanded the promise of equal footing to members of what it termed the

Research indicates that—despite the OECD’s assurances—poor, nonmember states have no meaningful opportunity to participate in that policymaking process.⁷⁰ To students of Reconstruction, the distance between the OECD’s statements and the experience of nonmember states comes as no surprise. First the Fourteenth and then the Fifteenth Amendments promised to protect the rights of Blacks. State reforms attempted to deliver equality in an array of areas.

None of those protections would prevent the emergence of the separate but equal doctrine under *Plessy v. Ferguson*. Thanks to extraordinary legal and military interventions Blacks enjoyed a brief period during which they possessed real freedom to engage in civic life. Intimidation and electoral fraud brought that to an end, forcing Blacks to accept a second-class status masked by a pretense of equality.

Whatever the reality of the OECD’s Inclusive Framework, the history of Reconstruction leaves no doubt that rights alone—without robust enforcement—produce unsatisfying results. *Brown v. Board of Education*⁷¹ would ultimately find that separate schools violated the Fourteenth Amendment. Before that landmark decision, Black families and businesses paid taxes that funded schools for whites.⁷² Without a meaningful Black voice in structuring tax rules, separate Black schools remained systematically underfunded. Often, they simply closed.⁷³ When able to operate at all, they lacked the resources white schools enjoyed. Before *Brown*, Blacks challenging underfunded schools received favorable verdicts from courts again and again, to no effect.⁷⁴

Under decades of OECD leadership, African states have consistently lacked the resources necessary to provide their people with the education and healthcare available to their counterparts within the OECD.⁷⁵ Against that backdrop, the Inclusive Framework’s absence of any mechanism to ensure that the rights it grants to nonmembers lend them a voice in global tax policymaking sounds alarm bells. For such reasons, the Inclusive Framework—created in response to criticism of the OECD’s exclusive membership—has done little to mollify skeptics.

inclusive framework. See Developing Countries and the OECD/G20 Inclusive Framework on BEPS: OECD Report for the G20 Finance Ministers and Central Bank Governors, OECD (Oct. 2021 <time of access>), <https://www.oecd.org/tax/beps/developingcountries-and-the-oecd-g20-inclusive-framework-on-beps.htm>. (“[t]he Inclusive Framework now includes 140 members, who, on an equal footing, monitor the implementation and contribute to the development of measures to combat Base Erosion and Profit Shifting (BEPS)”).

⁷⁰ Rasmus Christensen et. al., *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations*, (ICTD Working Paper No. 115, 2020), <https://www.ictd.ac/publication/at-table-off-menu-assessing-participation-lower-income-countries-global-tax-negotiations> (concluding that the inclusive framework had only a limited impact).

⁷¹ 347 U.S. 483 (1954).

⁷² CAMILLE WALSH, *RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869-1973* 52 (2018) (describing the challenge of “a Kentucky state statute that designated all corporate property taxes for the benefit of white schools only”).

⁷³ Walsh cites a number cases in which Black schools were closed due to a lack of funding while white schools remained open. See, e.g., *id.* at 37 (describing a challenge arguing that “a tax benefiting the high school for white girls while the black high school had been closed was an unconstitutional deprivation of their property rights, forcing them to pay in support of a white school they were excluded from utilizing”).

⁷⁴ *Id.* at 51 (“lawsuits that succeeded... challenged the constitutionality of separate taxation or other methods of funding and resource inequality.... [h]owever, many of these seeming victories did very little”).

⁷⁵ ATIYA WARIS, *FINANCING AFRICA* 27 (2019).

Because of structural obstacles, participation by non-member states in the Inclusive Framework remains limited.⁷⁶ Merely inviting states to participate, without ensuring the conditions exist to allow them to do so freely and fully falls far short of true inclusion. It certainly seems no more likely than the Fourteenth or Fifteenth Amendments to deliver justice to those long denied a voice.

Not all rights are created equal

Black Codes “favored by the Southern legislatures”⁷⁷ in the years immediately following the Civil War offer an even sterner warning over the perils of false inclusivity. They represented an “indisputable attempt on the part of the Southern States to make Negroes slaves in everything but name.”⁷⁸ Much like the League’s C Mandates did for newly liberated colonies, they offered only the appearance of equality.

Black Codes gave Blacks both “the right to hold property” and “to sue and be sued.”⁷⁹ They ensured that their “family relations for the first time were legally recognized.”⁸⁰ But, in the words of Du Bois, the “the Black Codes were deliberately designed to take advantage of every misfortune of the Negro.”⁸¹

Du Bois details the extraordinary lengths some states went to in order to recreate the conditions of slavery, Emancipation notwithstanding. “Mississippi simply reenacted her slave code” so that the all the laws that once governed slaves applied to Freedman.⁸² A local law in Louisiana provided that any Freedman on the streets after 10pm without written permission from his employer could be compelled to work for five days.⁸³ North Carolina permitted Blacks to testify in court only where the “rights of persons or property of persons of color shall be put in issue” but made their testimony inadmissible in all other cases.⁸⁴

Those Black Codes may be a more apt comparison for the Inclusive Framework than the Fourteenth and Fifteenth Amendments. The former represented an effort to retain power while the latter constituted a sincere but ineffectual attempt to lend a voice to Blacks. History will ultimately reveal what the Inclusive Framework was meant to accomplish.

Vigilance is essential

For the first half-century of the OECD’s dominance of global tax policy, it did not even dignify nonmembers with the pretense of rights offered by the Black Codes. The results of that complete lack

⁷⁶ Rasmus Christensen et. al., *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations* 3, ICTD Working Paper 115, Dec. 2020, <https://www.ictd.ac/publication/at-table-off-menu-assessing-participation-lower-income-countries-global-tax-negotiations> (“We find that the explosion in formal membership has not in itself led to the step-change in developing country influence that the raw numbers imply. This is because of a combination of structural obstacles that are not unique to the IF, and some challenging aspects of the OECD’s way of working.”).

⁷⁷ W.E.B. Du Bois, *Black Reconstruction in America* 167 (1935).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 177.

⁸³ *Id.*

⁸⁴ *Id.* at 176-77.

of representation could at times prove awkward for the OECD.⁸⁵ The last decade has—in the form of the Inclusive Framework—delivered either a 21st century Black Code or an ineffectual attempt at inclusion.

An invitation to engage in the global tax policymaking process made under circumstances certain to prevent meaningful participation, the Inclusive Framework may represent a good faith effort. If so, it remains woefully inadequate. That should come as no great surprise. Even the best of intentions means little without adequate oversight.

Early in Reconstruction, former Confederate states introduced “modest poll taxes, with the revenue earmarked for the new school systems.”⁸⁶ Gradually, those poll taxes would become tools to disenfranchise Blacks and poor whites. But when they were introduced “Blacks generally supported these imposts, convinced that public education financed entirely by property taxes would quickly lose white support.”⁸⁷

Thanks to a lack of vigilance, poll taxes evolved from a tool of inclusiveness into a potent mechanism of disenfranchisement. Undermining the protections offered by the Fifteenth Amendment, for decades poll taxes prevented Blacks from voting. Ironically, once embraced by Blacks as a symbol of citizenship, those taxes—alongside “literacy tests, and property qualifications”—would “severely restrict black voting.”⁸⁸

During the civil rights era, the federal military would again be deployed to protect Blacks as they accepted the invitation offered by *Brown*. Along with measures like the 1965 Voting Rights Act that intervention constituted a Second Reconstruction. Described as “an act to enforce the Fifteenth Amendment” the Voting Rights Act finally did away “the discriminatory voting practices adopted in many southern states after the Civil War.”⁸⁹ A full century after the end of the war that ended slavery, Blacks finally had a meaningful opportunity to participate in shaping their country.

The Voting Rights Act gave substance to the Fifteenth Amendment by eliminating structural barriers to participation. Even if the Inclusive Framework deserves to be compared to the Fifteenth Amendment rather than the Black Codes, it will not be enough on its own to guarantee a meaningful voice for nonmembers. If the OECD were to take inclusion seriously, far more than a right with no mechanism to ensure beneficiaries have a meaningful opportunity to exercise it would be required. Of course, ensuring that non-OECD members no longer face structural obstacles to participating in the Inclusive Framework would not be enough if it represents a modern-day Black Code, offering a thinly disguised form of bondage.

Conclusion

⁸⁵ In 2000, the OECD once produced a blacklist of supposed tax havens that included Liberia but excluded Switzerland. The resulting backlash proved quite damaging to the OECD. [cite Dean/Waris 10 truths]

⁸⁶ Foner, *supra* note 5 at 328.

⁸⁷ *Id.* Foner notes that “black delegates had been misled into believing that a poll tax to support education could not be employed to limit black voting.” *Id.* at 319.

⁸⁸ *Id.* at 590.

⁸⁹ *Voting Rights Act (1965)*, NATIONAL ARCHIVES (<date & time>), <https://www.archives.gov/milestone-documents/voting-rights-act#> (“African Americans in the South faced tremendous obstacles to voting, including poll taxes, literacy tests, and other bureaucratic restrictions to deny them the right to vote. They also risked harassment, intimidation, economic reprisals, and physical violence when they tried to register or vote.”)

Even if the OECD were to be stripped of its governance role, replaced by a more inclusive alternative, vigilance would be essential. Federal and state constitutional reforms failed to provide a meaningful voice to disenfranchised Blacks. Poll taxes began as tools of inclusion but became something quite different. That history poses urgent questions for global tax governance.

What does the OECD's announcement that "[o]n 11 July 2023, 138 members of the OECD/G20 Inclusive Framework on BEPS—representing over 90% of global GDP—agreed on an Outcome Statement recognising the significant progress made and allowing countries and jurisdictions to move forward with historic, major reform of the international tax system"⁹⁰ mean? It might say little about what those states would say in a truly free and fair decision-making process overseen by a disinterested third party. In a world as sharply divided as today's, that striking uniformity of opinion on such a contentious issue should itself be viewed as a warning.

In recent years, a new kind of tax has emerged. Known as a digital services tax, jurisdictions ranging from France to Kenya have imposed it on global digital giants like Meta. The United States perceived these new taxes as anti-American and sought to prevent them from taking root. The OECD consensus described above purports to represent the near-universal rejection of such taxes.⁹¹ It seems that, once again, thanks to the intervention of the OECD, the US position has become the world's, "thus reliev[ing] its businesses of much foreign taxation... while preserving the spirit of source-based taxation."⁹²

The apparent summary rejection of digital services taxes suggests that the Inclusive Framework lies uncomfortably close to the Black Code end of the legitimacy spectrum. What alternative might adequately guard against the risks suggested by the history of Reconstruction remains to be seen. From the impotence of constitutional reforms designed to promote inclusion to the hidden threat posed by poll taxes, the evidence of those risks must not be ignored.

⁹⁰ *Tax Challenges Arising from Digitalization*, OCED, (<date & time>) <https://www.oecd.org/tax/beps/beps-actions/action1/>

⁹¹ The reform it describes includes a ban on digital services taxes.

⁹² See *supra* note 40.