

# The Utopian Technician

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No one should be surprised that our leading student of the tax system sometimes has turned his attention to the interface of tax and civil rights. Boris Bittker's articles on the constitutionality of tax exemptions for churches<sup>1</sup> and private groups that discriminate on the basis of race<sup>2</sup> deploy his mastery of technicality in areas where those who specialize in constitutional law often lose their footing. Nor should anyone be surprised that a person as humane as Professor Bittker would turn his attention to one of the central threats to our country's claim to being a land of justice. Yet Bittker's work on the law of racial discrimination does seem curious.

*The Case of the Checkerboard Ordinance*<sup>3</sup> has all the earmarks of a seminal article. There Bittker examined the constitutionality of an ordinance designed to promote stable residential integration by limiting the number of blacks who could reside in any particular neighborhood. This problem goes to the heart of theoretical positions regarding the "color-blindness" of the Constitution, and the dialogue Bittker created among hypothetical judges lays out with his usual subtlety all the dimensions of the problem. But the article did not provoke responses of the sort that seminal works do. When the article was written, some may have thought—though I doubt that Bittker did—that white America had reached the point where the next problem it would confront would be reconciling extensive remedial and compensatory actions with the fundamentals of constitutional theory. Instead, however, the next stage was the grudging acceptance of limited remedies. The Supreme Court has not yet faced a "checkerboard ordinance" problem, because it will arise only when whites come to understand what racial justice demands.<sup>4</sup>

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1. Bittker, *Churches, Taxes and the Constitution*, 78 *YALE L.J.* 1285 (1969).

2. Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 *YALE L.J.* 51 (1972).

3. Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations*, 71 *YALE L.J.* 1387 (1962).

4. See *Johnson v. Board of Educ.*, 604 F.2d 504 (7th Cir. 1979), *vacated*, 449 U.S. 915 (1980), *reaff'd on remand*, 664 F.2d 1069 (7th Cir. 1981), *vacated and remanded*, 457 U.S. 52 (1982), *consolidated with United States v. Board of Educ.*, 554 F. Supp. 912 (N.D. Ill. 1983). *Johnson* involves a challenge by the parents of black junior high school students to the settlement decree entered in the Chicago school desegregation litigation. As part of that agreement, their neighborhood school was designated a "magnet" school and a ceiling was placed on the school's minority enrollment. Thus, some black students were excluded from the school because of their race. This situation differs in important ways from the problem presented in Bittker's article, *supra* note 3. *Johnson* involves trade-

The tone of *The Case of the Checkerboard Ordinance* deserves note, too, because it reveals much about Professor Bittker's intellectual stance. The reader can count the votes and find out how the majority on Bittker's fictitious court came out. But the contending positions are presented so forcefully that one is wary about attributing the fictitious majority's position to Bittker. It would also be premature to conclude that Bittker himself was ambivalent. Rather, the article's tone reflects the technician at work. Its message is entirely conditional. It contains the kind of advice a good tax lawyer would give to a client contemplating a complex transaction: "If you want to do *that*, here's what you have to do first." Where the "*that*" is extensive compensatory and remedial action in the field of race, *The Case of the Checkerboard Ordinance* tells us that we have to rethink constitutional fundamentals. In contrast, the limited remedies we have now are constitutionally anomalous precisely because we have been unwilling to incur the costs of racial justice and the constitutional reconstruction it would require. Seen in that way, the article's failure to provoke extensive response stems not from its somehow being out-of-date when it was written but rather from its being so far ahead of its time as to be fairly called utopian.

The perspective on Bittker's work that I have suggested gives insight as well into Professor Bittker's *The Case for Black Reparations*,<sup>5</sup> a book that the reviewers uniformly both admired and puzzled over. The reviewers seemed repeatedly to shake their heads in wonder as they asked themselves, "How could a serious scholar worry in such detail about the intricacies of a policy that has no chance of being adopted in his lifetime?" After all, the book was published in 1973, when "white backlash" was a potent political force and when the Burger Court was in place. Yet a large part of the book discusses the details of possible section 1983 suits seeking reparations. Surely, the reviewers told themselves, Bittker must have known that it was sheer fantasy to imagine that such suits would succeed in the near future. As with *The Case of the Checkerboard Ordinance*, *The Case for Black Reparations* was, on the surface, curious.

But details and intricacies are the technician's strong point. One difficulty in schemes for reparations is posed by the need to identify the groups and individuals entitled to the payments. Indeed, in one of the most insensitive passages in recent Supreme Court opinions, Justice Powell facetiously converted that difficulty into an apparent constitutional barrier

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offs between blacks who desire to attend their neighborhood schools and a racially diverse group which wishes to create integrated schools; the "checkerboard ordinance" problem concerns tradeoffs *within* the group of blacks interested in stable residential integration. Obviously, this is a crude characterization, but it captures the core of the distinction.

5. B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

to some kinds of reparations schemes.<sup>6</sup> This must be contrasted with the painstaking attention that *The Case for Black Reparations* gave to possible analogies and alternative methods of identifying beneficiary groups and individuals, and to possible methods of distributing the benefits to qualifying individuals or their representatives. Bittker shows that creative thought can devise a structure for reparations payments that takes into account the kinds of practical difficulties often described as unavoidable flaws inevitably fatal to such schemes.

Bittker's writing on civil rights, then, is a response to self-styled pragmatists on issues of race. They say, "Those ideas are nice in theory, but we cannot implement them in practice." Bittker, the utopian technician, replies, "Here's how you could indeed implement them. When you say that you can't, you must mean that you don't want to." Reformists and radicals often disparage utopians as unrealistic in spinning out speculative visions of reorganized societies that could work only if people were dramatically transformed. Bittker's is a different, and surely honorable, utopianism. It takes people as they are—or at least as they say they want to be—and shows them how exactly to be that way. It appears that, like truth, Utopia resides in the details.

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6. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295-97 (1978) (opinion of Powell, J.).

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