CONTEMPLATING HOMEOWNERSHIP TAX SUBSIDIES AND STRUCTURAL RACISM

Victoria J. Haneman[*]

An insidious form of racism is facilitated by those who are heedless of structural inequities—or in this instance, the fact that legal structures have been developed to protect the experiences of those who are white, with an underlying obliviousness to the fact that persons of color may have a different experience. Almost 80% of the United States' four centuries of existence have involved racialized slavery and extreme racial segregation. The subject of structural discrimination should be almost noncontroversial by now: established social and political structures have been built upon a foundation of racial inequality, inherently conferring power and privilege to some, while perpetuating the marginalization of others. A system that treats equally those who are positioned unequally will only serve to exacerbate the preexisting inequalities.

Sweeping changes were made to two important homeownership tax subsidies when the Tax Cuts and Jobs Act of 2017 ("TCJA") was passed by the U.S. House of Representatives and Senate on December 20, 2017, and signed into law by President Trump on December 22, 2017. Within the framework of these tax expenditures, this Article explores the notion that TCJA amendments have structurally racist implications both because of the persistently harmful way in which homeownership continues to be subsidized and also because of the supply-side allocation of revenue generated by the amendments. This is less a polemic and more a thought piece—and perhaps more accurately, an economic meditation—contemplating the way in which structural racism exists organically in institutions or

* Assistant Professor of Law, Creighton University School of Law. The author wishes to thank Associate Dean Tiffany C. Graham and Professor Diane J. Klein, both of whom are always willing to take the time to review drafts and provide insightful feedback. Special thanks to friend and mentor Dean Emeritus Edward A. Dauer, University of Denver College of Law, for sharing his thoughts. Also, my heartfelt gratitude to research assistant Ali J. Tornow for her tireless efforts with taming unruly footnotes over holiday break. The usual disclaimers apply.

structures that have historically incorporated racialized norms such that facially "neutral" changes to those structures are not in fact neutral. This idea is particularly relevant to housing law and policy—an area in which equal opportunity has either been blocked or simply neglected.

TABLE OF CONTENTS

I. INTRODUCTION

"Now you're in the Sunken Place."[1] In the horror movie *Get Out*, protagonist Chris Washington's panicked search for car keys is met with a calmly oblique monologue by a middle-aged white man with (quite literally) a god complex.[2] The tapping of a silver spoon against a china teacup forces Chris into a fugue—into an inescapable form of incarceration in which his physical form becomes a puppet for a white man.[3] The Sunken Place has swiftly become an iconic cultural reference, alluding not only to the oppression and paralysis of marginalized groups by systemic or structural racism but also to the encompassing silence and invisibility forced upon those who are

1. GET OUT (Universal Pictures 2017). Jordan Peele, who wrote and directed *Get Out*, explained, "'The Sunken Place means we're marginalized. No matter how hard we scream, the system silences us.' It's an analogy for the systemic racism black people continue to experience in the US, from the microaggressions in *Get Out* to more overt acts of discrimination." Shannon Liao, *Get Out Now Has Its Own Online Class About Black Horror: Based on a UCLA College Course*, VERGE (Jan. 27, 2018, 4:00 PM), https://www.theverge.com/2018/1/27/16938664/get-out-jordan-peele-ucla-seminar-online-course.

2. GET OUT, *supra* note 1 ("What is your purpose, Chris? . . . In life? What is your purpose? . . . The fire is a reflection of our own mortality. It's born, it breathes, and then it dies. . . . Even the sun will die someday, Chris. It is us who are the divine ones. We are the Gods who are trapped in cocoons.").

3. *Id.*

marginalized.[4] This movie highlights the subconscious that lurks beneath white, liberal, "I wish I could have voted for Obama a third time" *wokeness*.[5] An insidious (albeit often unintentional) form of racism is facilitated by those who are heedless of structural inequalities—or in this instance, the fact that legal structures have been developed to protect the experiences of those who are white, with an underlying obliviousness to the fact that persons of color may have a different experience.[6]

There is no question that government policy generally, but upside-down tax subsidies specifically, should be audited to ensure that all households, including households of color, have the same opportunity to build wealth.[7] Almost 80% of the United States' four centuries of existence have involved racialized slavery and extreme

4. Alex Rayner, *Trapped in the Sunken Place: How* Get Out*'s Purgatory Engulfed Pop Culture*, GUARDIAN (Mar. 17, 2018, 3:00 PM), https://www.theguardian.com/film/2018/mar/17/trapped-in-the-sunken-place-how-get-outs-purgatory-engulfed-pop-culture ("[*Get Out*] speaks allegorically to so many issues blacks in the United States in particular have grappled with: assimilation, incarceration, slavery and silencing. This visualisation of black pain and struggle has a profound impact on viewers and my students, who readily recognise how Peele's film unpacks so many aspects of their experiences.") (quoting Tananarive Due).

5. Luke Darby, *Daniel Kaluuya of* Get Out *Breaks Down the New Things White People Say to Show They're Cool*, GQ (Jan. 17, 2018), https://www.gq.com/story/kaluuya-things-white-people-say; *see also* Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 36 (2001) ("My white skin enables me to continue my intellectualization without having to *feel* the racism in our society on a day-to-day basis. As racism becomes more and more institutionalized in our society, white people become more able to be indifferent to the problem at best, and, at worst, more able to express their racism openly and act upon it without consequence.").

6. *See* Reni Eddo-Lodge, *Why I'm No Longer Talking to White People About Race*, GUARDIAN (May 30, 2017, 12:30 AM), https://www.theguardian.com/world/2017/may/30/why-im-no-longer-talking-to-white-people-about-race ("[W]hite people have been taught not to mention that people of colour are 'different' in case it offends us. They truly believe that the experiences of their life as a result of their skin colour can and should be universal. I just can't engage with the bewilderment and the defensiveness as they try to grapple with the fact that not everyone experiences the world in the way that they do. They've never had to think about what it means, in power terms, to be white, so any time they're vaguely reminded of this fact, they interpret it as an affront. Their eyes glaze over in boredom or widen in indignation. Their mouths start twitching as they get defensive. Their throats open up as they try to interrupt, itching to talk over you but not to really listen, because they need to let you know that you've got it wrong. The journey towards understanding structural racism still requires people of colour to prioritise white feelings.").

7. *See* DEDRICK ASANTE-MUHAMMED ET AL., THE EVER-GROWING GAP: WITHOUT CHANGE, AFRICAN-AMERICAN AND LATINO FAMILIES WON'T MATCH WHITE WEALTH FOR CENTURIES 18–22 (2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf.

racial segregation.[8] The subject of structural discrimination should be almost noncontroversial by now: established social and political structures have been built upon a foundation of racial inequality, inherently conferring power and privilege to some, while perpetuating the marginalization of others. A system that treats equally those who are positioned unequally will only serve to exacerbate the preexisting inequalities.[9] Recent changes by the Tax Cuts and Jobs Act of 2017 ("TCJA") focus attention on a need for evaluation.

The TCJA made two important changes to the tax treatment of homeownership when it was signed into law by President Trump on December 22, 2017.[10] First, the itemized deduction for state and local taxes ("SALT"), which includes the deduction of property taxes, is now capped at $10,000.[11] Second, the TCJA placed new limits on the deduction of home mortgage interest. Taxpayers with existing mortgages (incurred before December 15, 2017), remain grandfathered under the old tax law and may deduct interest on a total of $1 million for debt related to a first and second home—for new homeowners, however, this $1 million limit drops to $750,000.[12] Both the SALT and home mortgage interest deductions are available only to those income taxpayers who continue to itemize deductions.[13] Given that the standard deduction has almost doubled (in 2017, $6,350 for singles and $12,700 for married filing jointly ("MFJ"); in 2018, $12,000 for singles and $24,000 for MFJ),[14] only an estimated 10% of higher-income filers will continue to itemize their deductions (down from roughly 30%).[15]

8. George Yancy & Joe Feagin, Opinion, *American Racism in the 'White Frame'*, N.Y. TIMES (July 27, 2015, 7:15 AM), https://opinionator.blogs.nytimes.com/2015/07/27/american-racism-in-the-white-frame/.

9. The poor "must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep upon the bridges, to beg in the streets, and to steal their bread." ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman, ed., Winifred Stephens, trans., John Lane Co. 1908) (1894). France is making the point that the same law applies to rich and poor alike but presents a different burden on each. Andrew Sepielli, *The Law's 'Majestic Equality'*, 32 L. & PHIL. 673, 673–74 (2013).

10. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified in scattered sections of 26 U.S.C.).

11. *Id.* at 2085–86 (codified as amended at 26 U.S.C.A. § 164(b)(6)(B) (West 2019)).

12. *Id.* at 2086 (codified as amended at 26 U.S.C.A. § 163(h)(3)(F)(i)(I)–(III) (West 2019)).

13. I.R.S. Pub. 530 (Jan. 15, 2019).

14. *See infra* Tables 1, 2.

15. *See* JOINT COMM. ON TAXATION, 115TH CONGRESS, JCX-32R-18, TABLES RELATED TO THE FEDERAL TAX SYSTEM AS IN EFFECT 2017 THROUGH 2026, at 6 (2018) [hereinafter TABLES RELATED TO THE FEDERAL TAX SYSTEM: 2017-2026], https://www.jct.gov/publications.html?func=startdown&id=5091; *see also* I.R.S. News Release IR-2018-230 (Nov. 21, 2018).

Homeownership in the United States is highly stratified along race and class lines,[16] and homeownership subsidies in the Internal Revenue Code ("Code") therefore quietly cement these disparities. Before the TCJA, the home mortgage interest deduction was regressive: white households accounted for 67% of all households but received 78% of the benefit from the home mortgage interest deduction; African Americans and Hispanics each accounted for roughly 13% of all households but received 6% and 7% of the benefit, respectively.[17] After the TCJA, the home mortgage interest deduction will only benefit those higher-income homeowners with larger mortgages (a group largely dominated by white homeowners) who continue to itemize deductions, and the subsidy from the deduction will widen the wealth gap between the white community and communities of color.

Less widely understood as a homeownership subsidy, the SALT deduction of property tax also modifies local housing markets to varying degrees based upon the structures of the state and local tax systems. New limits on the deductibility of SALT are facially progressive. Before the TCJA, roughly 90% of the SALT benefit flowed to itemizing taxpayers with incomes exceeding $100,000.[18] However, the new TCJA limits will potentially have far-reaching, regressive consequences for persons of color (only briefly summarized in this Article). Most notable is the concern that states that feel pressured to lower taxes must raise income from other sources or, alternatively, make budget cuts. Both paths are potentially disastrous for communities of color. To boost revenue, many states and localities have historically turned to fees and fines—meaning court fees may increase, and in turn, law enforcement would transform into a collection agency of sorts, ticketing vulnerable populations such as racial minorities.[19] Conversely or concurrently,

---

16. *See infra* Part III.

17. INST. ON ASSETS & SOC. POLICY & NAT'L LOW INCOME HOUS. COAL., MISDIRECTED INVESTMENTS: HOW THE MORTGAGE INTEREST DEDUCTION DRIVES INEQUALITY AND THE RACIAL WEALTH GAP 7 (2017), https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/misdirected-investments.pdf.

18. *See* JARED WALCZAK, TAX FOUND., THE STATE AND LOCAL TAX DEDUCTION: A PRIMER 5 (2017), https://files.taxfoundation.org/20170315142330/Tax-Foundation-FF545.pdf.

19. *See* Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, URB. AFF. REV. 2, 5 (Aug. 11, 2018), https://journals.sagepub.com/doi/10.1177/1078087418791775 ("Census of Governments data from 2012 show that about 80% of American cities with law enforcement institutions derive at least some revenue from fees, fines, and asset forfeitures, with about 6% of cities collecting more than 10% of their revenues this way in 2012. . . . Although property taxes are the main component of own-source revenue for local governments, real estate prices rarely change significantly or quickly enough for property tax revenue levels to change quickly. Therefore, local governments tend to rely on traffic tickets and other fines when other revenue sources are limited.") (citations and references omitted). *See generally* U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST

budget cuts will necessarily reduce support for state education funding and state safety-net programs benefitting lower- and lower-middle-income individuals.[20]

Structures are developed and laws are passed that discriminate subtly or indirectly in a way that is sometimes referred to as second-order discrimination[21]—perhaps without an intent to harm or exclude a specific group but instead because of a lack of sensitivity to their interests relative to others or themselves.[22] Within the framework of the two homeownership tax subsidies mentioned above, this Article explores the notion that the TCJA amendments have structurally racist implications because of both the persistently harmful way in which homeownership continues to be subsidized and the supply-side allocation of revenue generated by the amendments. This is less a polemic and more a thought piece—and perhaps more accurately, an economic meditation—contemplating the way in which structural racism exists organically in institutions and structures that have historically incorporated racialized norms such that facially "neutral" changes to those structures are not in fact neutral.[23] This idea is particularly relevant to housing law and policy—an area in which equal opportunity has either been blocked or simply

COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS (2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf (listing findings that "unchecked discretion or stringent requirements to impose fines or fees can lead and have led to discrimination").

20. This inclination to cut spending on safety net programs can be demonstrated as recently as October 2018 when Senator Mitch McConnell suggested that changes needed to be made to Medicare, Medicaid, and Social Security to reduce the deficit. Jennifer Steinhauer, *Republicans Look to Safety Net Programs as Deficit Balloons*, N.Y. TIMES (Oct. 26, 2018), https://www.nytimes.com/2018/10/26/us/politics/medicare-medicaid-social-security-republicans-elections.html.

21. *See* Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 948 (2008) ("I hoped that by pointing out that we were all infected with racism I would at least remove the very stigma that caused my friends to deny their racism, and at the same time help them recognize that the injury of racism was found in symptomatic material conditions, including inequalities of wealth, employment, schooling, health, incarceration, etc., and in the ideology that produced and justified those symptomatic material conditions.").

22. *See generally* BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT (2015) (discussing second-order discrimination).

23. john a. powell, *Understanding Structural Racialization*, 47 CLEARINGHOUSE REV. 146, 146 (2013) ("Many of us come at a systemic understanding of racial harm through the idea of disparate impact, or through the outcomes of policies rather than their intentions. And that's important. And in this essay I will talk about persistent racial disparities and the structures that recreate them. But, at its core, I assert that a structural racialization analysis is not only about how racialized disparities are produced, as important as this is. It is about how racialized sensibilities and concerns, both conscious and unconscious, have continued to create our sociopolitical structures, and also affect our understanding of ourselves and our communities. These sensibilities affect us all.").

neglected.[24] And while there is no question that the almost doubling of the standard deduction and the reduction of tax rates through the TCJA operate as a tax cut for most individual taxpayers, this temporary tax reduction for all taxpayers reinforces status quo inequality[25] while simultaneously obscuring the underlying issues.[26]

II. AN OVERVIEW OF THE TCJA AMENDMENTS

Although homeownership rates cycle through highs (69.2% in the fourth quarter of 2004) and lows (62.9% in the second quarter of 2016),[27] the voting public has accepted homeownership as an integral part of the American Dream. Homeownership is subsidized through the home mortgage interest deduction and, to a lesser extent, the SALT deduction, because homeownership is a political issue that has historically received overwhelming and bipartisan support.[28] This is problematic in that these itemized deductions are, as a general matter, tax expenditures—an indirect form of government spending

24. *See generally* Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329 (2009) (arguing that federal tax policies do not encourage homeownership and are less beneficial to black homeowners than to white homeowners). *See also* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998) ("In spite of these aspirations for fair housing, for twenty years there was little enforcement strength in the Act. Federal housing programs for the poor were decimated. The segregation of blacks from whites not only persists, but has now become 'hypersegregation' for a significant segment of the population. Discrimination in the real estate and lending markets persists as well. In many ways, racism has simply overwhelmed fair housing.") (citations omitted).

25. *See* R. Richard Banks, *"Nondiscriminatory" Perpetuation of Racial Subordination*, 76 B.U. L. REV. 669, 672 (1996) (reviewing MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995)) ("[B]ecause gross degrees of racial inequality can persist even in the complete absence of contemporary racial discrimination, a colorblind state will, ironically, reinforce the social conditions that impede the attainment of a colorblind society. Persistent and substantial racial inequality vests race with social and practical meaning and thereby promotes the societal race consciousness that the colorblind state is intended to counteract and eventually overcome.") (citations omitted).

26. *See* Victoria J. Haneman, *Retrenchment, Temporary-Effect Legislation, and the Home Mortgage Interest Deduction*, 71 OKLA. L. REV. 347, 382 (2018) ("This type of 'baited' tax reform is a shell game of sorts, in which the attention of the taxpayer is focused upon the impact of a lost or reduced deduction because the impact is not felt.").

27. Charles Lane, Opinion, *Why the Decline of the Homeownership Rate Is Good News*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/opinions/why-the-decline-of-the-homeownership-rate-is-good-news/2016/08/03/c6b8bf7c-58d1-11e6-9767-f6c947fd0cb8_story.html.

28. OPPORTUNITY AGENDA, PUBLIC OPINION ON OPPORTUNITY AND THE AMERICAN DREAM, HOMEOWNERSHIP, AND HOUSING 21 (2011), https://opportunityagenda.org/sites/default/files/2017-03/memo_public_opinion_0.pdf.

that is insidious[29] both because it is a form of spending that is not obvious and because it is more permanent than annually budgeted spending that does not undergo annual review.[30] This Part briefly explains how the TCJA changes two itemized deductions that subsidize homeownership.

First, until January 1, 2018, home mortgage interest associated with, as previously mentioned, up to $1 million of acquisition indebtedness and $100,000 of home equity indebtedness on a taxpayer's primary and secondary residences remained deductible as a miscellaneous itemized deduction, and any interest exceeding those upper limits was treated as nondeductible personal interest.[31] As a result of the TCJA, taxpayers with acquisition indebtedness incurred on or prior to December 15, 2017, may continue to deduct interest associated with $1 million of debt on either a first or second home.[32] For all other taxpayers, the maximum limit on the deduction of interest associated with acquisition indebtedness is now only $750,000.[33] Further, under the TCJA, there is no grandfathering provision for home equity indebtedness—interest associated with home equity indebtedness is nondeductible for all homeowners as of

29. For example, in 2015, indirect government spending through a "shadow budget" resulting from "the huge web of deductions, loopholes and credits written into" the Code amounted to more than "$1.3 trillion in tax-related benefits." Katy O'Donnell, *The Shadow Budget*, POLITICO (Oct. 21, 2015, 4:55 AM), http://www.politico.com/agenda/story/2015/10/government-tax-code-expenditures-loopholes-000290. This shadow budget totaled more than the combined direct spending on Medicare and Medicaid, $649 billion and $542.6 billion, respectively, that year. *See NHE Fact Sheet*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/research-statistics-data-and-systems /statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html (last modified Feb. 20, 2019, 3:32 PM) (follow "NHE Tables" hyperlink; then download "Table 04 National Health Expenditures by Source of Funds and Type of Expenditures").

30. O'Donnell, *supra* note 29.

31. William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43, 47–48 (1996). One must travel a winding path through the Code to understand the home mortgage interest deduction and its associated limitations: I.R.C. § 163(h)(1) provides that no deduction is permitted for personal interest. I.R.C. § 163(h)(1) (2018). Exceptions are set forth in § 163(h)(2)(D) and § 163(h)(3), which allow for the deduction of "qualified residence interest." *Id.* § 163(h)(2)(D), (3)(A). Qualified residence interest is interest associated with either acquisition indebtedness or home equity indebtedness, both of which are subject to limitations. *Id.* § 163(h)(3)(A)(i)–(ii). Acquisition indebtedness is debt borrowed to acquire, construct or substantially improve a first or second home, and it remains deductible up to $1 million under § 163(h)(3)(B). *Id.* § 163(h)(3)(B). Home equity indebtedness is debt borrowed against home equity (and used for any purpose whatsoever), subject to two limitations set forth in § 163(h)(3)(C)(i) and (ii): in addition to a cap of $100,000, home equity indebtedness may not exceed the fair market value of the residence reduced by the amount of the acquisition indebtedness with respect to such residence. *Id.* § 163(h)(3)(C).

32. I.R.C. § 163(h)(3)(F)(i)(III).

33. *Id.* § 163(h)(3)(F)(i)(II).

January 1, 2018, unless the debt was used to "buy, build or substantially improve the taxpayer's home."[34] The TCJA eliminated the $100,000 cap on home equity indebtedness.[35] The new $750,000 cap applies cumulatively to acquisition indebtedness and home equity indebtedness.[36] These rules expire on December 31, 2025, at which time these limits will revert to pre-TCJA levels.[37]

Although the changes to the home mortgage interest deduction through the TCJA are fairly straightforward, their collateral interaction with other amended provisions of the Code promises to be far more impactful. A taxpayer makes a choice when filing her tax return to either itemize her deductions on a Schedule A or forego taking itemized deductions and instead use the standard deduction.[38] This choice usually depends on whether the taxpayer's itemized deductions exceed the amount of the standard deduction—the latter deduction amount is set forth in I.R.C. § 63(c) and indexed for inflation annually.[39] As mentioned previously, the TCJA has almost doubled the standard deduction amount for 2018 to $12,000 for a single taxpayer ($24,000 for MFJ taxpayers).[40] The nonpartisan Joint Committee on Taxation ("JCT")[41] estimates that the number of taxpayers claiming the home mortgage interest deduction will drop precipitously from 32.3 million in 2017 to 13.8 million in 2018.[42] Taxpayers deducted an estimated $283 billion in home mortgage interest in 2016,[43] and this number is estimated to drop to $25 billion in 2018.[44]

The second notable TCJA change for purposes of this discussion is the § 164(b)(6) cap of $10,000 placed upon the itemized deduction for SALT that is personal in nature.[45] Although the Code generally

34. I.R.S. News Release IR-2018-32 (Feb. 21, 2018).
35. I.R.C. § 163(h)(3)(F)(i)(I).
36. *See* I.R.S. News Release, *supra* note 34.
37. I.R.C. § 163(h)(3)(F)(i).
38. *See* I.R.S. Pub. 936 (Jan. 24, 2019).
39. *See* I.R.C. § 63(c)(4); *Topic Number 501 – Should I Itemize?*, INTERNAL REVENUE SERV., https://www.irs.gov/taxtopics/tc501 (last updated Mar. 7, 2019).
40. *See* Kelly Phillips Erb, *New: IRS Announces 2018 Tax Rates, Standard Deductions, Exemption Amounts and More*, FORBES (Mar. 7, 2018, 8:23 AM), https://www.forbes.com/sites/kellyphillipserb/2018/03/07/new-irs-announces-2018-tax-rates-standard-deductions-exemption-amounts-and-more/#57041c983133.
41. DANIEL J. BERMAN & VICTORIA J. HANEMAN, MAKING TAX LAW 39–40 (2014) (describing the JCT's role in the tax legislative process).
42. TABLES RELATED TO THE FEDERAL TAX SYSTEM: 2017-2026, *supra* note 15, at 7.
43. This is the most current data available from the Internal Revenue Service. *See* INTERNAL REVENUE SERV., INDIVIDUAL INCOME TAX RETURNS COMPLETE REPORT, Pub. 1304 (2016).
44. TABLES RELATED TO THE FEDERAL TAX SYSTEM: 2017-2026, *supra* note 15, at 7.
45. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 § 11,042, 131 Stat. 2054 (codified in scattered sections of 26 U.S.C.).

denies deductions for personal expenses,[46] § 164(a) allows an itemized deduction for SALT—meaning that these taxes are deductible but only for a taxpayer who itemizes her deductions.[47] State and local governments raise revenue through the collection of state and local taxes—revenue that is spent on education, public welfare, healthcare systems, police, corrections, and roadways.[48] These state and local taxes come in a number of different forms, including individual income taxes, property taxes, sales and gross receipts taxes, motor vehicle license taxes, and corporate taxes.[49] Although revenue varies from state to state, the largest portion of tax revenue is derived from property, individual income, and sales taxes.[50] Property taxes are the highest source of revenue for state and local governments (31.1%) and represented 72% of tax collections for local governments in 2015.[51]

Although the SALT deduction is claimed by the individual taxpayer, it passes through a subsidy or benefit to the state—the cost of the state tax is reduced by the amount of benefit that the taxpayer receives through the deduction on her federal tax return, and consequently, the state may raise its tax to absorb some of that benefit.[52] This change ranks among the most controversial changes wrought by this revenue bill because of the claim that it unfairly targets specific states—notably, the states with the least voter support for President Donald Trump—and arose from "improper political animus."[53] On this basis, four states (New York, Connecticut, Maryland, and New Jersey) have filed a constitutional challenge to the TCJA and enacted workarounds to circumvent the $10,000 SALT-deduction cap.[54]

III. THOUGHTS ON STRUCTURAL RACISM AND HOMEOWNERSHIP

The racial wealth gap is sobering in the United States—the median black household has only $7,113 in wealth holdings as

46. *See, e.g.*, I.R.C. § 62(a)(2)(A) (2018).

47. *See, e.g.*, *id.* § 63(d).

48. *See State and Local Taxes*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/faqs/taxes/pages/state-local.aspx (last updated Dec. 5, 2010); Katherine Loughead, *Average Per Capita Property Taxes: How Does Your State Compare?*, TAX FOUND. (May 11, 2018), https://taxfoundation.org/state-property-taxes-per-capita-2018/.

49. *See* Liz Malm & Ellen Kant, *The Sources of State and Local Tax Revenues*, TAX FOUND. (Jan. 28, 2013), https://taxfoundation.org/sources-state-and-local-tax-revenues/.

50. *Id.*

51. Loughead, *supra* note 48.

52. Brian Galle, *A Republic of the Mind: Cognitive Biases, Fiscal Federalism, and Section 164 of the Tax Code*, 82 IND. L.J. 673, 677 (2007).

53. Amandeep S. Grewal, *The Charitable Contribution Strategy: An Ineffective SALT Substitute*, 38 VA. TAX REV. 203, 204–05 (2018).

54. *Id.* at 205; Katie Lobosco, *New York and Three Other States Claim Trump Tax Law Is Unconstitutional*, CNN (July 18, 2018, 9:29 AM), https://www.cnn.com/2018/07/17/politics/new-york-tax-lawsuit/index.html.

compared to $8,348 for the median Latinx household and $111,145 for the median white household.[55] When the Emancipation Proclamation was signed in 1863, the total wealth of the black community was roughly 0.5% of the nation's total wealth, which is a number that has only minimally improved to 1% today.[56] When the average white household has *sixteen times* the wealth of the average black household, it is unsurprising that homeownership numbers are impacted—wealth holdings determine whether one has the funds to make a down payment on a home purchase.[57] And in fact, persons of color have lower rates of homeownership and often reside (as homeowners or renters) in neighborhoods that are almost as segregated as in 1968[58] when President Lyndon Johnson signed the first Federal Fair Housing Act into law.[59]

Twenty years later, scholars concluded that little meaningful progress had been made.[60] Although the Fair Housing Act has facially prohibited racial discrimination for half a century,[61] covert discrimination nonetheless persists in ways that are difficult to police.[62] A "well-documented history" of racial discrimination in

55. Laura Shin, *10 Proposals for Eliminating the Racial Wealth Gap*, FORBES (Mar. 27, 2015, 8:00 AM), https://www.forbes.com/sites/laurashin/2015/03/27/10-proposals-for-eliminating-the-racial-wealth-gap.

56. MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 9 (2017).

57. *See* Shin, *supra* note 55.

58. Joseph P. Williams, *Segregation's Legacy*, U.S. NEWS (Apr. 20, 2018, 6:00 AM), https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act.

59. *See* Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

60. *See, e.g.*, Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 745–50 (1993). And to that end, the 1988 Fair Housing Amendments Act ("FHAA") significantly amended the Fair Housing Act that preceded it two decades prior. *Id.* at 745.

61. *See* Fair Housing Act of 1968, Pub. L. 90-284, 82 Stat. 73; NAT'L FAIR HOUSING ALLIANCE, THE CASE FOR FAIR HOUSING: 2017 FAIR HOUSING TRENDS REPORT 79 (2017)"", http://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf ("The word racism is not written on any page, but it can be read between the lines. It's a story of racially-restrictive real estate covenants, toxic red lines on mortgage lending maps, blockbusting and racial steering by real estate agents, redlining by homeowners insurance companies, exclusionary zoning by local communities, and community opposition to affordable housing.").

62. *See* john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 605–06 (2008) (observing that the provisions of the Fair Housing Act had not produced integrated neighborhoods, nor had it meaningfully addressed "segregated living patterns"); Swati Prakash, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CAL. L. REV. 1437, 1445 (2013) ("While there is enormous potential inherent in the Fair Housing Act for achieving 'win-win' solutions that share housing opportunity expansively across property owners, this potential has not yet been realized."); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 800, 807 (2008) (concluding that the Fair Housing Act had not remedied racial

mortgage lending has resulted in lower rates of homeownership among people of color.[63] And though redlining[64] has been illegal for almost fifty years,[65] the impact of redlining maps continues[66]—the white middle class has had a decades-long head start with regard to wealth creation through homeownership, and residential segregation for people of color has a significant economic impact.[67] Indeed, the National Fair Housing Alliance has found that persons of color continue to be "steered" towards housing options based on race: according to their study, geographic "'steering' occurred 87 percent of the time," with African American prospective homebuyers shown housing in African American neighborhoods.[68] Racial segregation in housing is patent,[69] and more than 50% of black or white residents in

---

discrimination in housing and continued segregation in urban areas); *see also* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1050–51 (1989) ("[C]ultural apartheid, the legacy of legal apartheid, remains the reality in America, housing remains the most segregated aspect of American life and the greatest failure of the civil rights revolution.").

63. ANGELA HANKS ET AL., CTR. FOR AM. PROGRESS, SYSTEMIC INEQUALITY: HOW AMERICA'S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP 1 (2018), https://cdn.americanprogress.org/content/uploads/2018/02/20131806/RacialWealthGap-report.pdf.

64. Jamelle Bouie describes redlining as follows:

> [T]he [Home Owners' Loan Corporation] would map cities and divide neighborhoods into various risk categories that were based on his ethnic hierarchy and coded accordingly. A "green" neighborhood was white, affluent, Anglo-Saxon, and appropriately Protestant. A "blue" one had less desirable whites—Jews, Irish, and Italians—but was stable and upwardly mobile. A "yellow" one had undesirable, often working-class whites, and a "red" one was predominantly black or Mexican, regardless of wealth or class. And in these "redlined" areas, loans were either expensive or nonexistent, forcing families to rely on speculators and private sales by unscrupulous homeowners.

Jamelle Bouie, *A Tax on Blackness*, SLATE (May 13, 2015, 6:59 PM), https://slate.com/news-and-politics/2015/05/racism-in-real-estate-landlords-redlining-housing-values-and-discrimination.html.

65. *See* Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasted-for-decades.html.

66. *See* Natasha M. Trifun, *Residential Segregation after the Fair Housing Act*, 36 HUM. RTS. 14, 16 (2009) ("The practice of redlining—lenders declaring some neighborhoods off-limits for mortgage loans—once went hand-in-hand with geographic steering. However, the FHA made it illegal for lenders to designate communities as unsuitable for mortgage backing or to establish lending criteria that were discriminatory. But the practice of redlining continues in some places because enforcement efforts, especially against large institutional lenders, are costly, complex, and extremely time-consuming.").

67. Palma Joy Strand, *The Invisible Hands of Structural Racism in Housing: Our Hands, Our Responsibility*, 96 U. DET. MERCY L. REV. 155, 166–67.

68. Trifun, *supra* note 66, at 14.

69. *See* NAT'L FAIR HOUS. ALL., THE CASE FOR FAIR HOUSING: 2017 FAIR HOUSING TRENDS REPORT 6 (2018), http://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf ("As a result, in today's

70 of the top 100 metro areas in the United States would have to "move to a different census tract" to integrate their respective metro area.[70] To the extent that racial bias impacts homeowners (and it most certainly does), this continued housing segregation imposes staggering cumulative costs.[71] For example, one study found that owner-occupied housing in black neighborhoods is undervalued by an average of $48,000 per home or $156 billion cumulatively.[72] Realtors steer homebuyers to specific neighborhoods based upon their skin color.[73] Landlords are concerned about the impact upon rental values if persons of color move into their buildings.[74] Blacks, Hispanics, and Asians are asked more questions about their finances than whites when they are looking for housing.[75] Whether prospective renters or homebuyers, they are shown fewer options.[76] A generation of affluent baby boomers has blocked subsidized housing and multifamily housing that may make housing values more affordable to lower-income homebuyers and persons of color, because of a fear that such "undesirables" will adversely impact property values.[77] Lurking

America, approximately half of all Black persons and 40 percent of all Latinos live in neighborhoods without a White presence. The average White person lives in a neighborhood that is nearly 80 percent White.").

70. Dayna Bowen Matthew et al., *Time for Justice: Tackling Race Inequalities in Health and Housing*, BROOKINGS INST. (Oct. 19, 2016), https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing/.

71. ANDRE M. PERRY ET AL., BROOKINGS INST., THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS: THE CASE OF RESIDENTIAL PROPERTY 15 (2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf.

72. *Id.*; *see also* Bouie, *supra* note 64 ("Put differently, they suffered a kind of tax that reflects the stigma associated with blackness, independent of wealth or status. It doesn't matter how rich the inhabitants are. If a neighborhood is black, other groups don't want to live there, hurting the value. And on the other end, while we tend to associate gentrification with poor minority neighborhoods, the reality is a little different. According to a Harvard study on Chicago neighborhoods, full gentrification only happened in low-income neighborhoods with substantial white populations, 35 percent. If there's an equally substantial black population, around 40 percent, the process either slowed, or stopped altogether.").

73. *See* Bouie, *supra* note 64.

74. *See id.*

75. Shaila Dewan, *Discrimination in Housing Against Nonwhites Persists Quietly, U.S. Study Finds*, N.Y. TIMES (June 11, 2013), https://www.nytimes.com/2013/06/12/business/economy/discrimination-in-housing-against-nonwhites-persists-quietly-us-study-finds.html.

76. *See id.* ("Over all, black prospective renters were presented 11 percent fewer rentals than whites, Hispanics about 12 percent fewer rentals and Asians about 10 percent fewer rentals. As prospective buyers, blacks were presented 17 percent fewer homes and Asians 15 percent fewer homes, but Hispanics were given the opportunity to see roughly the same number of homes as whites.").

77. *See* Mimi Kirk, *When Millennials Battle Boomers Over Housing*, CITYLAB (Nov. 5, 2018), https://www.citylab.com/equity/2018/11/millennials-home-buying-generation-priced-out/574840/ (describing how baby boomers have restricted

within a discussion of these few ways in which discrimination continues to effect homeownership in the United States, there is no question that racial bias is diffuse, amorphous, and embedded—and all the more difficult to discuss with the naysayer.

IV. CONTEMPLATING STRUCTURAL DISCRIMINATION AND THE HOMEOWNERSHIP TAX SUBSIDIES

Homeownership has fairly been referred to as the "engine of inequality" in the United States—an "enormous entitlement" that is propped up by the Code.[78] As previously mentioned, sweeping changes were made to homeownership tax subsidies when the TCJA was signed into law,[79] but those changes are indifferent to the obscene wealth inequality in the United States. The median net wealth of black and Latinx families is $17,600 and $20,700, respectively, compared to $171,000 for white families.[80] A black family in the ninety-ninth percentile of wealth[81] is worth $1,574,000, as compared to more than $12 million in wealth for a similarly situated white family.[82] At the other end of the spectrum, white families "living near the poverty line" have around "$18,000 in wealth," while black families "have a median wealth near *zero*."[83] Data suggests that the median black family has 3–10% for every dollar of wealth held by the median white family.[84] The racial wealth gap in the United States is staggering and undoubtedly the consequence of slavery followed by segregation—exacerbated by ongoing racism and discrimination. Meaningfully addressing the wealth gap requires public policy interventions, including a conscious effort to shape tax policy that unpacks and recognizes these issues. To this end, this Part explores

affordable housing in cities); *see also* BRUCE CANNON GIBNEY, A GENERATION OF SOCIOPATHS: HOW THE BABY BOOMERS BETRAYED AMERICA 146–47 (2017) (arguing that to protect property tax caps on their homes, baby boomers forced "budget shortfalls disproportionately onto the shoulders of nonhomeowners—i.e., the young and the poor—in the form of regressive higher sales taxes and the like").

78. Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES MAG. (May 9, 2017), https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html.

79. WILLIAM G. GALE ET AL., BROOKINGS INST., EFFECTS OF THE TAX CUTS AND JOBS ACT: A PRELIMINARY ANALYSIS 1 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf.

80. JESSE BRICKER ET AL., FED. RESERVE BULLETIN, CHANGES IN U.S. FAMILY FINANCES FROM 2013 TO 2016: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES 13 (2017), https://www.federalreserve.gov/publications/files/scf17.pdf.

81. Wealth is a separate and distinct concept from income. *See* Signe-Mary McKernan, *Wealth Is Not Just for the Wealthy*, URB. INST. (May 25, 2018), https://www.urban.org/urban-wire/wealth-not-just-wealthy.

82. WILLIAM DARITY JR. ET AL., WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP 2 (2018).

83. *Id.*

84. *Id.* at 2 n.1.

the ways in which the relevant TCJA amendments may impact the most economically vulnerable in our society.

A. Spending Found Money: An Overarching Criticism of the TCJA Changes

The TCJA calls attention to the modern tax reform trend of focusing upon wealth (unearned income, such as qualified dividends and long-term capital gains) over work (wages, salaries)—or, put simply, tax reform that results in the employee taxpayer paying twice the taxes of the investor taxpayer with the same amount of income.[85] The impetus to focus on incentivizing wealth over wages is bolstered by the conservative tax ideology that favoring "job creators" (usually the wealthy) will spur economic growth that will benefit everyone through business expansion, job creation, and higher wages.[86]

Two important principles at the foundation of the TCJA's reform highlight implicit rules that shape wealth in the United States: (1) families at every level can expect an individual tax cut; and (2) those individual tax cuts disappear at the end of 2025, at which point the permanent corporate tax cut remains.[87] As to the first principle, tax cuts disproportionately benefit the wealthy, both in terms of absolute dollars and proportional benefit.[88] As to the second principle, in 2007, the top 1% of households generated 43% of business income (as opposed to 17% in 1979) and accounted for 75% of capital gains.[89] The richest 10% of Americans own 80% of corporate stock.[90] Consequently, there is no question that the reduction in corporate taxes will disproportionately benefit those who are most heavily

85. *See* Ben Steverman, *Why American Workers Pay Twice as Much in Taxes as Wealthy Investors*, BLOOMBERG (Sept. 12, 2017, 3:00 AM), https://www.bloomberg.com/news/features/2017-09-12/why-american-workers-pay-twice-as-much-in-taxes-as-wealthy-investors ("The last time Congress passed comprehensive tax reform, in 1986, it eliminated the gap between workers' and investors' taxes. Their rates didn't start diverging again until the early '90s, when Congresses controlled by Democrats boosted taxes on wealthy Americans' wages more than on their investments. Republican-controlled Congresses widened the gap further by slashing rates on rich investors in the late 1990s and early 2000s.").

86. *See* Bruce Bartlett, *I Helped Create the GOP Tax Myth. Trump Is Wrong: Tax Cuts Don't Equal Growth*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/09/28/i-helped-create-the-gop-tax-myth-trump-is-wrong-tax-cuts-dont-equal-growth/?utm_term=.0d4c4f78183b.

87. Derek Thompson, *Why the GOP Tax Cut Will Make Wealth Inequality So Much Worse*, ATLANTIC (Dec. 19, 2017), https://www.theatlantic.com/business/archive/2017/12/gop-tax-bill-inequalilty/548726/.

88. *Id.* The temporary reduction of individual tax rates extended to the wealthiest families is obsequious and heavy-handed pandering, designed to secure political supporters at the expense of the community. *See id.*

89. Paul Krugman, Opinion, *Wealth Over Work*, N.Y. TIMES (Mar. 23, 2014), https://www.nytimes.com/2014/03/24/opinion/krugman-wealth-over-work.html.

90. Thompson, *supra* note 87.

invested in business and corporate stock. To the extent that curtailing tax expenditures produces a tax savings used to reduce the top marginal tax rate and business taxes, the benefit inherently skews towards the wealthiest Americans who are predominantly white—in fact, white families are three times more likely than black or Latinx families to be among the top 1% of earners.[91] In this way, hidden rules of race shape this nation's economy and implicitly fuel wealth inequality for persons of color.[92]

It is not the purpose of this Article to explore the merits of supply-side economics in depth, as it is an expansive concept that deserves its own individual treatment. Suffice it to say, however, that there is little reliable data that the Reagan or George W. Bush tax cuts produced a demonstrable benefit for lower- and middle-income taxpayers.[93] The timing of investor decisions may be influenced in the short term by tax cuts, but there is little empirical evidence that savings and growth will be stimulated.[94] If such an approach to tax

91. MEG WIEHE ET AL., INST. ON TAXATION AND ECONOMIC POLICY & PROSPERITY NOW, RACE, WEALTH, AND TAXES: HOW THE TAX CUTS AND JOBS ACT SUPERCHARGES THE RACIAL WEALTH DIVIDE 1–2 (2018), https://prosperitynow.org/sites/default/files/resources/ITEP-Prosperity_Now-Race_Wealth_and_Taxes-FULL%20REPORT-FINAL_6.pdf (finding that 1.2% of white families are in the top 1%, as compared to 0.4% of Latinx and black families).

92. DARRICK HAMILTON & MICHAEL LINDEN, ROOSEVELT INST., HIDDEN RULES OF RACE ARE EMBEDDED IN THE NEW TAX LAW 1 (2018), http://rooseveltinstitute.org/wp-content/uploads/2018/05/Hidden-Rules-of-Race-and-Trump-Tax-Law.pdf.

93. *See* Bartlett, *supra* note 86 ("Strenuous efforts by economists to find any growth effect from the 1986 act have failed to find much. The most thorough analysis, by economists Alan Auerbach and Joel Slemrod, found only a shifting of income due to tax reform, no growth effects: 'The aggregate values of labor supply and saving apparently responded very little,' they concluded. . . . Despite huge tax cuts almost annually during the George W. Bush administration that cost the Treasury trillions in revenue, according to the Congressional Budget Office, growth collapsed in the first decade of the 2000s. Real GDP rose just 19.5 percent, well below its '90s rate.").

94. Steverman, *supra* note 85. In support of supply-side economics, see Louis Uchitelle, *A Political Comeback: Supply-Side Economics*, N.Y. TIMES (Mar. 26, 2008), https://www.nytimes.com/2008/03/26/business/26supply.html ("'The supply-side argument these days really applies to upper-income people,' said Robert M. Solow, a Nobel laureate in economics who served in the Kennedy administration. 'They are portrayed as the golden geese, and you don't want to discourage them from laying their eggs.' By contrast, Mr. Solow says, 'the Democrats are convinced they'll lay their eggs anyway, without tax cuts as an incentive.'"). In support of the Trump tax cuts, see Dion Rabouin, *Art Laffer Says Trump's Tax Cuts Don't Go Far Enough*, YAHOO FIN. (Sept. 3, 2018), https://finance.yahoo.com/news/art-laffer-says-trumps-tax-cuts-dont-go-far-enough-134629116.html. For arguments against the merits of supply-side economics, see ROBERT D. ATKINSON, SUPPLY-SIDE FOLLIES: WHY CONSERVATIVE ECONOMICS FAILS, LIBERAL ECONOMICS FALTERS, AND INNOVATION ECONOMICS IS THE ANSWER 49–72 (2006); Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1235, 1242–46 (1993). For an interesting critique of the Laffer Curve, see generally Eugenio J.

reform fails to deliver the promised benefit, there is cause for concern in any discussion about inequality—because a system that confers benefit in favor of wealth over work will inherently exacerbate the wealth gap, causing a drift towards the concentration of wealth in the hands of a few.[95] Further, tax cuts that hinge upon prognosticated economic growth are a dangerous gamble for the most vulnerable among us: if unsuccessful, deficit-producing tax cuts doubly penalize those lower-income households that rely upon social welfare programs when or if the pendulum swings the other way and deficit-reduction measures force deep spending cuts. Inevitably, important domestic programs intended to reduce barriers are then placed on the proverbial chopping block.[96]

Within the narrow context of the homeownership tax subsidies, the curtailment of two tax expenditures that have long been criticized for their regressive nature is laudable if considered in isolation. However, in this tax policy shell game, judgment cannot be based upon a component part of the deconstructed whole. The revenue generated by amending the home mortgage interest and SALT deductions is being reinvested in a normatively important way—rather than reinvesting the tax savings from these two homeownership tax subsidies into affordable housing solutions, such savings have been reinvested into businesses and higher-income households.[97] Further issues arise specific to each deduction, warranting separate consideration.

B. The Regressive Benefits Afforded by the "New" Home Mortgage Interest Deduction

There is no question that the home mortgage interest deduction is a regressive deduction: homeowners are generally wealthier than renters and subsidization that benefits homeowners trickles benefits

Miravete et al., *Market Power and the Laffer Curve*, 86 J. ECONOMETRIC SOC'Y 1651 (2018). The Laffer Curve has been named "in honor of Arthur Laffer, the economist who supposedly laid it out on a cocktail napkin for an aide to President Gerald Ford." Richard Schmalbeck, *The Death of the Efficiency-Equity Tradeoff?: A Commentary on McMahon's* The Matthew Effect and Federal Taxation, 45 B.C. L. REV. 1143, 1148 (2004). In essence, the Laffer Curve stands for the paradoxical proposition that government revenue may increase through tax cuts. *Id.* at 1149.

95. Krugman, *supra* note 89. In fact, the concentration of vast wealth in the hands of a small number of elites is at the foundation of *Capital in the Twenty-First Century* by French economist Thomas Piketty. *Id.* It is a circumstance that Piketty refers to as "patrimonial capitalism." *Id.* (quoting Piketty).

96. *See* MEG WIEHE ET AL., *supra* note 91, at 9.

97. *House Republican Tax Bill Includes Historic Direct Reforms to Mortgage Interest Deduction, But Harms Affordable Housing*, NAT'L LOW INCOME HOUSING COALITION (Nov. 6, 2017) [hereinafter *House Republican Tax Bill*], https://nlihc.org/article/house-republican-tax-bill-includes-historic-direct-reforms-mortgage-interest-deduction-harms.

uphill.[98] The TCJA appears to have substantially reduced the benefit of the home mortgage interest deduction—directly (through new deduction limits) and indirectly (through increased standard deduction amounts and lower individual income tax rates). In a legislative shell game, tax savings for all shift attention away from a lost entitlement.[99] Few are worse off from the new limits on deductibility because of the almost doubling of the standard deduction, which certainly adds to the complexity of the argument but in no way undermines it. Although retrenchment of entrenchment appears to be successful, with the direct and collateral changes that have substantially limited a sacred cow tax expenditure, the changes made to the home mortgage interest deduction are problematic. While the size of the subsidy has been almost halved, what remains is (1) a continued subsidy to those who most certainly do not need it and (2) billions of dollars saved from the amendment that are being diverted away from affordable homeownership initiatives.[100]

While the overall cost of the home mortgage interest deduction has been reduced, the regressivity of the TCJA version of the deduction is largely due to the TCJA's increase of the standard deduction. The tables set forth below illustrate the amount of mortgage debt a taxpayer would need before the deductible home mortgage interest in the first year outweighs the standard deduction.[101] These calculations[102] are based on the 2019 forecasted first-year interest cost for a thirty-year, fixed-rate mortgage of 5.1%.[103]

98. Jenny Schuetz, *Who is the New Face of American Homeownership?*, BROOKINGS INST. (Oct. 9, 2017), https://www.brookings.edu/blog/the-avenue/2017/10/09/who-is-the-new-face-of-american-homeownership/.

99. Haneman, *supra* note 26, at 381–82.

100. *See House Republican Tax Bill*, *supra* note 97.

101. *See infra* Tables 1, 2. Many taxpayers will itemize even if their deductible interest is less than the standard deduction because they are able to add deductions from other sources. *See Topic Number 501 – Should I Itemize?*, *supra* note 39. For ease of illustration, however, these other possible deductions are excluded.

102. The author used Bankrate's Amortization Schedule Calculator. *Amortization Schedule Calculator*, BANKRATE, https://www.bankrate.com/calculators/mortgages/amortization-calculator.aspx (last visited Apr. 9, 2019).

103. Deborah Kearns, *Mortgage Rate and Housing Forecast for 2019*, BANKRATE (Dec. 18, 2018), https://www.bankrate.com/finance/mortgages/mortgage-rates-forecast.aspx (forecasting an average rate of 5.1% for 2019 by the Mortgage Bankers Association).

TABLE 1: ITEMIZING MORTGAGE INTEREST V. STANDARD DEDUCTION IN TY2017

Filing Status	Standard Deduction for TY2017	Mortgage Balance Needed to Itemize	Amount of Interest Payment
Single	$6,350	$125,370	$6,351.80
Married Filing Jointly	$12,700	$250,700	$12,701.57
Head of Household	$9,350	$184,550	$9,350.12

TABLE 2: ITEMIZING MORTGAGE INTEREST V. STANDARD DEDUCTION IN TY2018

Filing Status	Standard Deduction for TY2018	Mortgage Balance Needed to Itemize	Amount of Interest Payment
Single	$12,000	$237,000	$12,007.47
Married Filing Jointly	$24,000	$473,750	$24,002.27
Head of Household	$18,000	$355,300	$18,001.07

The decision to itemize or to instead take the standard deduction is a binary one—a taxpayer must choose one path or the other, with the decision usually resting upon whether one's itemized deductions exceed the amount of the standard deduction.[104] Choosing the latter path over the former renders any available itemized deductions irrelevant and unusable by the taxpayer.[105] As illustrated by Tables 1 and 2, the doubling of the standard deduction results in fewer taxpayers receiving any benefit from the mortgage interest deduction because fewer taxpayers will itemize.[106] The benefit of the TCJA

104. I.R.S. Pub. 17, at 154 (Jan. 30, 2019).
105. *Id.*
106. *See supra* Tables 1, 2.

version will inure only to the advantage of those taxpayers carrying a higher debt load, which correlates with the higher income needed to service the debt. Assuming a thirty-year, fixed-rate mortgage at the average rate of 5.1% and no other itemized deductions, a single taxpayer needed a mortgage balance of $125,370 in 2017, as compared to $237,000 in 2018, before the taxpayer would consider itemizing home mortgage interest.[107] MFJ taxpayers needed to carry $250,700 in mortgage debt in 2017, as compared to $473,750 in 2018, to generate sufficient mortgage interest to justify itemizing.[108] At the median home price of $315,300 in February 2019,[109] single taxpayers may justify itemizing mortgage interest if a 20% down payment was made on their home (assuming no other itemized deductions), but MFJ taxpayers would certainly not find themselves itemizing.

It has been generally accepted that the home mortgage interest deduction is a failure in tax policy that incentivizes leveraging versus homeownership,[110] disproportionately benefits higher-income taxpayers,[111] and likely increases the price of residential property.[112]

107. *See id.*

108. *See id.*

109. U.S. CENSUS BUREAU, MEDIAN AND AVERAGE SALES PRICES OF NEW HOMES SOLD IN THE UNITED STATES 11, https://www.census.gov/construction/nrs/pdf/uspricemon.pdf (this undated resource continues to be updated, and this February 2019 statistic was retrieved on March 29, 2019).

110. *See* Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction*, 17 TAX POL'Y & ECON. 37, 38–39 (2003); *see also* Bruce Bartlett, *The Sacrosanct Mortgage Interest Deduction*, N.Y. TIMES: ECONOMIX (Aug. 6, 2013, 12:01 AM), https://economix.blogs.nytimes.com/2013/08/06/the-sacrosanct-mortgage-interest-deduction/.

111. Victoria J. Haneman, *A Timely Proposal to Eliminate the Student Loan Interest Deduction*, 14 NEV. L.J. 156, 177–78 (2013) ("The deduction is indefensible from a distributional perspective, as only those taxpayers with enough income to itemize their deductions receive any benefit. Ironically, these same taxpayers are likely to buy a home without the assistance of a deduction, and thus the deduction merely rationalizes carrying more debt to buy larger homes.") (citations omitted).

112. Dennis J. Ventry, Jr., *The Fake Third Rail of Tax Reform*, 135 TAX NOTES 181, 186 (2012) (stating that "[t]he macroeconomic effects of the MID are so destructive that every economist (excluding only those employed by the housing industry) believes" that it needs to be repealed); *see also* Andrew Hanson et al., *Rethinking Tax Benefits for Home Owners*, NAT'L AFF. 40, 41 (2014) (criticizing the mortgage interest deduction as "regressive"); Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1396 (2000); Rebecca N. Morrow, *Billions of Tax Dollars Spent Inflating the Housing Bubble: How and Why the Mortgage Interest Deduction Failed*, 17 FORDHAM J. CORP. & FIN. L. 751, 822 (2012); Stephen G. Cecchetti & Kermit L. Schoenholtz, *Why the Mortgage Interest Tax Deduction Should Disappear, but Won't*, MONEY & BANKING (June 8, 2015), http://www.moneyandbanking.com/commentary/2015/6/3/why-the-mortgage-interest-tax-deduction-should-disappear-but-wont (criticizing the home mortgage interest deduction for "rais[ing] inequality and reduc[ing] economic efficiency"). *See generally* William T. Mathias, *Curtailing the Economic*

Despite consensus among experts who are not employed by the real-estate industry or influenced by their lobbyists, politicians have always deftly avoided amendment of a tax expenditure described as the third rail of tax reform.[113] Although the TCJA's amendment of the home mortgage interest deduction seems bold, it is not an example of noteworthy tax reform. Tables 1 and 2 cast into sharp relief the inherent problem with the TCJA's amendment of the home mortgage interest deduction: the expenditure was unquestionably narrowed in scope, but the preexisting wrong of subsidizing homeownership for those who have no need for assistance remains. With that said, the 2025 expiration date of the changes provides an interesting opportunity. It is arguably unconscionable to renew the almost hyperbolically regressive TCJA version of the home mortgage interest deduction, which means that the law will either return to its pre-TCJA form or it will prove timely for a new solution to be implemented.[114]

As mentioned above, the change to the home mortgage interest deduction is also problematic because the found revenue is being spent in the wrong way. The amendment of the home mortgage interest deduction must be considered together with the way in which revenue generated from the amendment is spent. Thoughtful reform of this expensive tax expenditure would have created an opportunity for budget-neutral investment in affordable housing and homelessness initiatives for low- and middle-income taxpayers.[115] While there has been a significant reduction in the benefit that will flow from the TCJA version of the deduction to upper- and upper-middle income taxpayers,[116] a compelling argument can be made that these Americans are stably housed without the need for *any* deduction. In every state, there is a severe shortage of affordable rental homes for low-income households, forcing 71% of these households to spend more than half of their income on rent and utilities at the expense of other basic needs, such as food and savings for retirement.[117] Notably, food insecurity and housing instability are

Distortions of the Mortgage Interest Deduction, 30 U. MICH. J.L. REFORM 43 (1996) (criticizing the mortgage interest deduction on economic grounds).

113. *See* Ventry, *supra* note 112, at 182.

114. Haneman, *supra* note 26, at 395.

115. *NLIHC CEO Calls for MID Reforms to Help Lower Income Homeowners and Renters*, NAT'L LOW INCOME HOUSING COALITION (Oct. 16, 2017), https://nlihc.org/article/nlihc-ceo-calls-mid-reforms-help-lower-income-homeowners-and-renters (citing Diane Yentel, president and chief executive officer of the National Low Income Housing Coalition).

116. Howard Gleckman, *The TCJA Shifted the Benefits of Itemized Deductions to Higher-Income Households*, FORBES (Oct. 16, 2018, 4:36 PM), https://www.forbes.com/sites/howardgleckman/2018/10/16/the-tcja-shifted-the-benefits-of-itemized-deductions-to-higher-income-households/#18cf88746e71.

117. Diane Yentel, Opinion, *A Budget Neutral Way to Help Low-Income Americans Pay for Their Rent or Mortgage*, HILL (Oct. 9, 2017, 10:15 AM),

both issues that disproportionately impact low-income households and particularly persons of color.[118] Both are important issues that have economic impacts potentially reaching across generations and damaging behavioral development, educational outcomes, and emotional wellbeing.

C. In/Direct Harm and the State and Local (Property) Tax Deduction

Limitation of the SALT deduction carries with it potentially staggering unintended consequences for communities of color. State and local taxes fund shared services for the community, with some municipalities already contending with strained budgets.[119] The limitation upon the SALT deduction may fall hard upon the shoulders of states and municipalities due to a confluence of factors: (1) states will feel pressure to reduce taxes, or at a minimum, to avoid implementing tax increases; (2) pending budget plans by the President and the Republican-controlled Senate might offload some federally funded items onto local governments;[120] and (3) changes by

https://thehill.com/blogs/congress-blog/economy-budget/354493-a-budget-neutral-way-to-help-low-income-americans-pay-for.

118. ELSADIG ELSHEIKH & NADIA BARHOUM, HAAS INST. FOR A FAIR & INCLUSIVE SOC'Y, STRUCTURAL RACIALIZATION AND FOOD INSECURITY IN THE UNITED STATES 1–3 (2013), https://haasinstitute.berkeley.edu/sites/default/files/Structural%20Racialization%20%20%26%20Food%20Insecurity%20in%20the%20US-%28Final%29.pdf.

119. MICHAEL LEACHMAN & IRIS J. LAV, CTR. ON BUDGET & POLICY PRIORITIES, ELIMINATING STATE AND LOCAL TAX DEDUCTION TO PAY FOR TAX CUTS FOR WEALTHY A BAD DEAL FOR MOST AMERICANS 1 (2017), https://www.cbpp.org/sites/default/files/atoms/files/10-19-17sfp.pdf.

120. *Id.* at 6 ("Repealing the SALT deduction would be one part of a painful one-two punch that the budgets of President Trump and congressional Republicans would deliver to state budgets, many of which are already weak. The President's 2018 budget and the pending House and Senate budget plans would shift substantial costs to states and localities over the next decade. In particular, these plans would cut Medicaid and Affordable Care Act funding by $1.3 trillion to $1.9 trillion over the next ten years. That would effectively require states to: reduce health services for their residents; cut funding for other services to free up funding to offset some of the lost federal health care funding; raise state taxes; or some combination of all three."). For a discussion of some of the deleterious impacts of proposed cuts on communities of color, see generally THE IMPACTS OF PROPOSED FISCAL YEAR 2018 BUDGET CUTS ON THE AFRICAN-AMERICAN COMMUNITY, BREAD FOR THE WORLD (2017), https://summittoendhunger.com/wp-content/uploads/2017/11/understanding-racial-equity-workshop-handout-impact-of-budget-cuts-on-african-americans-august-2017.pdf.

the TCJA will cause the cost of financing infrastructure projects[121] through the borrowing of municipal debt to increase substantially.[122]

These three factors may converge to create a number of consequences when the need for revenue nonetheless persists, budget cuts become necessary, and state and local governments are forced to turn to more creative and less transparent ways of raising revenue. There is valid cause for concern: the 2008 recession had a devastating impact upon state finances, causing states to raise revenue through new taxes and fines and fees.[123] Limiting the SALT deduction increases the sting of a tax rate increase, and concern for this sting will likely cause (or perhaps force) state legislators to impose or increase fines and fees simply because fines and fees are less controversial and transparent than tax increases. However, they are not factored into a taxpayer's computation of her total local, state, and federal tax liability. Taxpayers do not account for increasing fees on a sightseeing tour, to dispose of a mattress at a landfill, to register a daycare center, to renew a livestock license, to order a birth certificate, or to reserve a vanity license plate as increasing their overall tax liability.[124]

Indeed, the U.S. Department of Justice's investigation of the death of an unarmed African American teenager who was shot in Ferguson, Missouri, has drawn national attention to systematic, racially discriminatory police tactics used to disproportionately impose fines and fees (i.e., parking violations, traffic infractions, housing code fines, etc.) against low-income persons of color as a

121. Most significant infrastructure projects are financed by municipal debt, and "the muni-debt market is huge—about $3.8 trillion." Aaron Klein, *How the New Tax Bill Will Cut Infrastructure Investment*, BROOKINGS INST. (Dec. 26, 2017), https://www.brookings.edu/blog/up-front/2017/12/26/how-the-new-tax-bill-will-cut-infrastructure-investment/.

122. Although there are numerous ways in which the cost of borrowing is likely to increase, two are notable. First, buyers of municipal bonds are primarily higher-income taxpayers. *See id.* When the top marginal rate of taxation is reduced, there is a corresponding reduction in the value of the municipal bond. *Id.* A new bond issuance must pay a higher rate of return to attract the same higher-income taxpayer. *Id.* Second, the TCJA's reduction of the corporate tax rate from 35% to 21% will have a similar impact because an estimated 30% of municipal debt is owned by banks and insurance companies. *Id.*

123. *See* NICHOLAS JOHNSON ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATE TAX CHANGES IN RESPONSE TO THE RECESSION 1–2 (2010), https://www.cbpp.org/sites/default/files/atoms/files/3-8-10sfp.pdf.

124. David Segal, *Cities Turn to Fees to Fill Budget Gaps*, N.Y. TIMES (Apr. 10, 2009), https://www.nytimes.com/2009/04/11/business/11fees.html ("Ohio's governor has proposed a budget with more than 150 new or increased fees, including a fivefold increase in the cost to renew a livestock license, as well as larger sums to register a car, order a birth certificate or dump trash in a landfill. Other fees take aim at landlords, cigarette sellers and hospitals, to name a few.").

source of revenue.[125] The Department of Justice discovered that these practices were incentivized by a system that generated revenue to support the city and court system.[126] Relying heavily upon fines and fees to fund a budget is effectively transforming fine/fee-dependent state criminal justice systems into a tax collection arm of the government that subordinates along racial lines. While the data within this area is primarily local in its focus, the data is still didactic.[127] In 2015, Chief Justice Hardesty of the Nevada Supreme Court warned that the highest court was almost out of money in 2015—attributable to a decline in tickets for traffic infractions over a two-year period.[128] Similarly, a study of ninety-six North Carolina counties found a decrease in revenue correlated with an increase in the issuance of tickets in the following year.[129] This is problematic to the extent that law enforcement may be motivated to focus attention on money-making infractions rather than on preventing or solving serious crimes[130] but also because reliance upon these fines and fees is not colorblind in its administration.[131] To the extent that the TCJA's amendment may motivate states and localities to turn

125. ALEXANDRA BASTIEN, POLICYLINK, ENDING THE DEBT TRAP: STRATEGIES TO STOP THE ABUSE OF COURT-IMPOSED FINES AND FEES 1 (2017), https://www.policylink.org/sites/default/files/ending-the-debt-trap-03-28-17.pdf.

126. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015) [hereinafter DOJ Ferguson Investigation Report], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

127. *See, e.g.*, *id.* at 2. The Department of Justice's report following the Ferguson incident is an important example of how local data can illustrate a national problem. Elizabeth Jones, *Racism, Fines and Fees and the US Carceral State*, 59 RACE & CLASS 38, 39 (2017).

128. Matt Ford, *The Problem with Funding Government Through Fines*, ATLANTIC (Apr. 2, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387/. This may have been attributable to state highway patrol focusing more upon dangerous crimes instead of mundane traffic violations. *Id.*

129. Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 71 (2009).

130. *See* Ford, *supra* note 128.

131. The Department of Justice found that African Americans accounted for 67% of the population in Ferguson and yet were subjected to 85% of the vehicle stops, 90% of the citations, and 93% of the arrests. DOJ Ferguson Investigation Report, *supra* note 126, at 4. It is also problematic when law enforcement is incentivized to pursue the politically powerless and economically vulnerable. *See* German Lopez, *Study: Cities Rely More on Fines for Revenue if They Have More Black Residents*, VOX (July 7, 2017, 8:01 AM), https://www.vox.com/identities/2017/7/7/15929196/police-fines-study-racism ("When you put any type of numbers on a police officer to perform, we are going to go to the most vulnerable, . . . to [the] LGBT community, we're going to the black community, we're going to go to those people that have no boat, that have no power.") (quoting New York City police officer Adhyl Polanco); *see also* German Lopez, *The Tyranny of a Traffic Ticket*, VOX (Aug. 10, 2016, 11:20 AM), https://www.vox.com/2016/8/5/12364580/police-overcriminalization-net-widening.

towards the imposition of fees that are not wealth adjusted, it will make a preexisting problem worse—serving as another example of the larger argument that blindness to differences makes equality look equal when in fact the underlying differences make the reality even more unequal.

It is worthwhile to briefly touch upon other inequities, in addition to fines and fees, that may result from constrained state budgets. For example, important safety net programs necessary to help people meet basic needs or to assist those who face obstacles make an investment in their future may be eliminated or underfunded. Likewise, budget cuts that result in pay freezes and reductions in workforces in the public sector disproportionately harm women and African Americans, because both groups have been historically overrepresented in state and local government jobs.[132] Specifically, when more than 600,000 workers were laid off in the public sector during the postrecession time of 2009 to 2012, data shows that African Americans were "more likely" to be the workers who were laid off.[133]

A final consideration is the freedom of upper- and upper-middle income taxpayers to relocate to jurisdictions with more affordable tax rates (though this claim is difficult to substantiate because many nontax factors play a role in relocation).[134] Although it is suggested that taxpayers in high-tax-high-service cities such as San Francisco and New York City have the freedom to move to lower-tax cities to mitigate the impact of the TCJA's limitations upon the SALT deduction, economists have projected that the U.S. economy would shrink roughly 9% per year if fewer taxpayers moved to cities that support agglomerative economies.[135]

132. *See* DAVID COOPER ET AL., ECON. POLICY INST., THE PUBLIC-SECTOR JOBS CRISIS 1 (2012), https://www.epi.org/files/2012/bp339-public-sector-jobs-crisis.pdf. In 2011, women constituted 48.3% of the workforce but filled 59.5% of state and local government positions. *Id.* at 3. African Americans accounted for 10.9% of the workforce but filled 12.8% of public-sector state and local positions. *Id.*

133. HAMILTON & LINDEN, *supra* note 92, at 9 (citing Jennifer Laird, sociologist).

134. Brian Galle, *Federal Fairness to State Taxpayers: Irrationality, Unfunded Mandates, and the "SALT" Deduction*, 106 MICH. L. REV. 805, 824–26 (2008). Ta-Nehisi Coates makes a case for reparations because of the "compounding moral debts" of structural racism, particularly in housing. *See* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

135. Tracy Gordon, *The Price We Pay for Capping the SALT Deduction*, TAX POL'Y CTR. (Feb. 15, 2018), https://www.taxpolicycenter.org/taxvox/price-we-pay-capping-salt-deduction ("[I]f fewer Americans moved to places like New York City and the San Francisco Bay Area[,] the US economy would shrink by about 9 percent a year, or roughly $7,000 per American worker. The reason is agglomeration economies: when people and firms cluster together in a city, ideas

V. A PATH TO DURABLE CHANGE

Structural racism does not require intentionally racist actors to exist in an institution or structure but exists subtly or implicitly through institutions or structures that have incorporated racialized norms.[136] Meaningfully addressing structural racism requires those who wield political power to accept that the system discriminates against the most vulnerable in a way that is less overt and not always readily identifiable but nonetheless insidious.[137] Although the Code may appear to be color-blind or neutral, those code sections that assist taxpayers based upon income, wealth, or asset ownership disproportionately impact communities of color. Evidenced by data collected on the wage gap, unemployment, and rates of homeownership, economic outcomes support the assertion that a form of racial subordination is occurring.[138] In contrast to the TCJA's changes as discussed in this Article, this Part briefly discusses a more thoughtful approach to tax reform. To the extent that homeownership is a notable characteristic of those who build wealth, reform that is conscious of racial subordination would (1) embrace a "first, do no harm" approach[139] toward implementing change, and (2) resist funneling revenue generated from change to subsidize supply-side principles, because the underlying argument that that which is good for all will also benefit the vulnerable is problematic.[140]

Tax reform must endeavor to, first, do no harm. Innovation requires risk-taking, and that risk-taking should be preceded by impact assessments. To this end, the voting public must be suspicious of comprehensive tax reform that is pushed through with urgency (absent a compelling reason for haste, such as a national emergency).[141] Durable, cohesive policy is unlikely to be the result of

spread, new businesses are born, and the cities grow faster and are more resilient.").

136. powell, *supra* note 23 ("[A] structural racialization analysis is not only about how racialized disparities are produced, as important as this is. It is about how racialized sensibilities and concerns, both conscious and unconscious, have continued to create our sociopolitical structures, and also affect our understanding of ourselves and our communities.").

137. *See generally* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOCIOLOGY 181 (2008), https://www.annualreviews.org/doi/pdf/10.1146/annurev.soc.33.040406.131740.

138. *See supra* text accompanying notes 7–26.

139. *See* Robert H. Shmerling, *First, Do No Harm*, HARV. HEALTH PUB.: HARV. HEALTH BLOG (Oct. 14, 2015, 11:27 AM), https://www.health.harvard.edu/blog/first-do-no-harm-201510138421 (explaining the "first, do no harm" approach within the medical context).

140. *See supra* text accompanying notes 93–96; *infra* text accompanying notes 151–53.

141. *See* Emily Stewart, *Historians on the Tax Fight: "This Was Manufactured Urgency,"* VOX (Dec. 18, 2017, 9:30 AM), https://www.vox.com/policy-and-politics/2017/12/18/16773376/republican-tax-bill-history (noting that it is not just the speed with which the recent tax reform was passed that is troubling but also

politically invented haste.[142] Though the law of unintended consequences has long been respected by economists, it is anathema to the politicians who ignore it.[143] However, policy designed to address structural racism explicitly or implicitly strains against the status quo and must be designed with intentionality—which is usually the enemy of haste.

Second, our budget acts create a "pay-go" structure that requires that all "tax spending" be revenue neutral.[144] As a result, spending will occur only when there is a commensurate increase in tax revenue resulting from either a tax increase or a reduction in tax benefits.[145] These rules arguably restrain congressional inclination to spend through the tax system but also limit Congress' ability to engage in significant structural reform of the Code.[146] Congress is loath to raise taxes but determined to legislate tax changes, and there is no question that the budget rules have been the driving force behind some unfortunate tax policy choices.[147] It is consequently a rare and important lawmaking moment when retrenchment (or reform) of an entrenched tax expenditure occurs—and it falls upon legislators to "spend" recaptured revenue prudently.

It may not be practical to insist that revenue generated through the revision of homeownership tax subsidies be allocated to homeownership initiatives, but thoughtful and durable change would contemplate whether structural discrimination would be exacerbated by permanent tax cuts for a select group (inveigled into legislation by temporary tax cuts for most).[148] Although the incidence of these tax

---

the partisanship that drove the reform—both of which place the durability of the tax act in question).

142. *See* Jonathan Lewallen, *Legislative Error and the "Politics of Haste,"* 49 PS: POL. SCI. & POLS. 239, 239, 243 (Apr. 20, 2016).

143. Rob Norton, *Unintended Consequences*, LIBRARY ECON. & LIBERTY, http://www.econlib.org/library/Enc1/UnintendedConsequences.html (last visited Apr. 9, 2019).

144. Harry L. Gutman, *Reflections on the Process of Enacting Tax Law*, 26 OHIO N.U. L. REV. 183, 185–86 (2000).

145. *See id.*

146. *Id.* at 186; *see* Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2123 (2013) ("Although Congress increasingly enacts a high volume of temporary, patchwork tax provisions, it fails to accomplish fundamental tax reform, which is a necessary part of any solution to the looming budgetary crisis. . . . [As a result,] [r]ecent proposals to enact tax reform through an existing fast-track framework, the reconciliation process, or through an entirely new process aimed specifically at tax reform, have gained popularity.") (citations omitted).

147. Gutman, *supra* note 144.

148. *See id.* at 199 ("If we recognize that the existence of budget surpluses present opportunities for tax rationalization in the areas I have mentioned, as well as others I have not, how does the system capture, rather than squander, those opportunities? Put differently, what is necessary to get the attention of the legislators, whose interest will naturally be diverted to other, easier to understand, issues with more visible political payoffs? Put simply, the answer is education and persistence.").

cuts has been sold as a change that will spur economic growth (and consequently benefit the masses),[149] tax revenue is being directly invested in such a way that predominantly facilitates wealth building for those who—based on available data on the racial wealth gap—are disproportionately white.[150] To the extent that subsidies are delivered to higher-income taxpayers, those subsidies should be purposefully designed to assist those most in need—for example, by incentivizing the development of multitenant residential rental units in urban areas. Because economic experts differ on the legitimacy of supply-side economic policy,[151] it is problematic to hinge the economic well-being of communities of color and lower-income taxpayers upon the economy as a whole.[152] Deficit-producing tax cuts that are not offset by promised growth will ultimately doubly penalize lower-income households who do not receive the benefit of the invested tax revenue today and will potentially suffer the burden of deep spending cuts tomorrow.[153]

VI. CONCLUSION

Critics of structural discrimination would like to theoretically erase the concept as divisive rhetoric.[154] Some critics abuse the historic analogue: "Women and minorities have it better now than at any time in history."[155] When one's identity affords resources, power, and opportunity, there is a strong incentive to preserve status quo hierarchies.[156] Other critics seek to preserve white equilibrium: "If

149. Thomas Kaplan & Alan Rappeport, *Republican Tax Bill Passes Senate in 51-48 Vote*, N.Y. TIMES, (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html.

150. *See supra* Part IV.

151. *See* Uchitelle, *supra* note 94.

152. This is a topic that the author plans to take up, in depth, on another day. For today, see generally G. Marc Worthy, *An Examination of Tax Law and Supply-Side Economics: Creed of Greed or Opportunity for All?*, 72 N.D. L. REV. 691 (1996) for a discussion of supply-side economics.

153. WIEHE ET AL., *supra* note 91, at 8.

154. A notable resistance to the idea of structural racism exists, as demonstrated when then-candidate for vice president Mike Pence failed to check his privilege and criticized the subject matter as divisive. Discussing the shooting of Keith Lamont Scott, Pence said, "[W]e ought to set aside this talk about institutional racism and institutional bias . . . when tragedies happen. . . . [T]o move away from the rhetoric of division and embrace the rhetoric of unity, I think, is the order of the day." Igor Bobic, *Mike Pence Says We Shouldn't Talk About Racial Bias in the Wake of Police Shootings*, HUFFPOST (Sept. 23, 2016), https://www.huffingtonpost.com/entry/mike-pence-racial-bias-police_us_57e434bbe4b0e28b2b52f012 (quoting then-candidate for vice president Pence).

155. This comment was made to the author by a white, heterosexual, cisgender male colleague in the legal academy.

156. Emma Fernandez et al., *Mortgage Interest Deduction and the Racial Wealth Gap*, BERKELEY PUB. POL'Y J. ONLINE (Aug. 23, 2018), https://bppj.berkeley.edu/2018/08/23/mortgage-interest-deduction-and-the-racial-wealth-gap/.

everyone pays their fair share of taxes, we can support public spending and job growth, and we'll all do better."[157] If the structure itself is built upon a historical foundation of racism and the economic benefits of whiteness, persons of color will continue to be systematically disadvantaged in ways that are not visible.[158] And then there are those critics who find their white fragility triggered through any discussion of structural racial inequities: "The suggestion that certain governmental actions disproportionately impact communities of color, such as social assistance programs being cut or criminal fines increasing, is condescending and racist."[159] The lived experience of race and its far-reaching consequences are statistically supported and should not be ignored.

This Article examines some of these same considerations that undergird structural racism but in a particular setting that has not been previously discussed—the recent TCJA's amendment of two important tax expenditures. The significance of this setting is severalfold. This purported overhaul[160] of the Code was enacted in great haste.[161] While the Tax Reform Act of 1986 passed the Senate with 97 votes and substantial bipartisan support, the TCJA passed the Senate over the strenuous objection of Democrats by a narrow vote of 51–48.[162] Unless growth rates offset spending, which seems

157. This statement paraphrases a line of progressive argumentation. *See* Joelle Gamble, *Tax Policy Is More About Race Than You Think*, SALON (Sept. 7, 2014, 8:00 PM), https://www.salon.com/2014/09/07/tax_policy_is_more_about_race_than_you_think_partner/.

158. *See id.* ("A rising tide can't lift all boats, if some boats are bolted to the sea floor.").

159. This statement is derived from a comment made by the anonymous "Woody" in response to a *Washington Post* op-ed about the TCJA and racism that was posted on the TaxProf Blog on June 26, 2018. *See* Woody, Comment to *Report: The Tax Cuts and Jobs Act Will Deepen Racism and Inequality in America*, TAXPROF BLOG (June 26, 2018, 11:34 AM), https://taxprof.typepad.com/taxprof_blog/2018/06/report-the-tax-cuts-and-jobs-act-will-deepen-racism-and-inequality-in-america-.html ("[T]he statements that blacks are destined to remain dependent upon government and will be unfairly hit by increases in state criminal fines are blatantly racist and condescending.").

160. *See* William G. Gale, *(Not So) Happy Birthday to the Tax Cuts and Jobs Act*, BROOKINGS INST. (Dec. 18, 2018), https://www.brookings.edu/blog/up-front/2018/12/18/not-so-happy-birthday-to-the-tax-cuts-and-jobs-act/.

161. Will Wilkinson, Opinion, *The Tax Bill Shows the G.O.P.'s Contempt for Democracy*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/opinion/tax-bill-gop-democracy.html ("[T]he open contempt for democracy displayed in the Senate's slapdash rush to pass the tax bill ought to trouble us as much as, if not more than, what's in it. In its great haste, the 'world's greatest deliberative body' held no hearings or debate on tax reform. The Senate's Republicans made sloppy math mistakes, crossed out and rewrote whole sections of the bill by hand at the 11th hour and forced a vote on it before anyone could conceivably read it.").

162. Kaplan & Rappeport, *supra* note 149; *see* Kimberly Clausing, Opinion, *Trump's Tax Cut Is Turning 1, And It's Not a Happy Birthday*, HILL (Oct. 22,

unlikely, the TCJA will substantially increase the deficit.[163] More to the point, in times of budget crisis and partisanship, it is necessary to question the way in which and to whom resources are being allocated.

When deliberating over the proposed reallocation of revenue saved from the amendment of homeownership tax subsidies, it is appropriate and necessary to consider opportunities for the homeless, the housing insecure, and those who are not homeowners but would like to be.[164] The racial wealth gap in the United States remains at unprecedented levels[165] and represents the cumulative impact (over many generations) of structural discrimination and racism. White households control the majority of wealth in the United States—steeped in obliviousness as to the way in which the structure itself delivers unfair subsidies.[166] The bottom line is plain: meaningfully addressing structural racism requires a commitment to challenge implicit racial and economic subordination that is perpetuating hierarchies—namely, acknowledging a problem that is diffuse, amorphous, and embedded. Passing laws that are facially neutral is insufficient because a fiscal policy need not be race-based to contribute to long-standing inequity.

2018, 1:00 PM), https://thehill.com/opinion/finance/412516-trumps-tax-cut-is-turning-1-and-its-not-a-happy-birthday.

163. *See* Jeff Stein, *Deficit to Top $1 Trillion Per Year by 2020, CBO Says*, WASH. POST (Apr. 9, 2018), https://www.washingtonpost.com/business/economy/deficit-to-top-1-trillion-per-year-by-2020-cbo-says/2018/04/09/93c331d4-3c0e-11e8-a7d1-e4efec6389f0_story.html. The Congressional Budget Office ("CBO") reported in April 2018 that the deficit is rising and will exceed $1 trillion per year by 2020. *Id.* Further, the CBO has attributed this increase to increased spending and tax cuts codified in the TCJA. *Id.*

164. Structural racism considered against the backdrop of two changes to homeownership tax subsidies is the focus of this Article. I would, however, be remiss if I did not acknowledge that while notions of class and race are unquestionably related, sometimes converging, they are also distinct. Mitigating economic injustices may be a meaningful first step in addressing structural racism in the United States but is by no means a cure-all.

165. *See supra* Part III.

166. Josh Hoxie, *The Racial Wealth Divide Is Worse Than People Think—And It's Growing*, QUARTZ (Sept. 26, 2017), https://qz.com/1087711/the-racial-wealth-divide-is-worse-than-people-think-and-its-growing/.