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Making Tax Policy Great Again: America, You've Been Trumped

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Making Tax Policy Great Again: America, You've Been Trumped

by

*Phyllis C. Taite**

Abstract

Tax policy plays a role in shaping the economy. Scholars have long asserted that tax policy should be used to make positive impacts on economic activity by adjusting and creating policies that benefit most of the population rather than the elite few. Scholars advocate for implementing policies to address wealth and income inequality while effectively facilitating other goals such as revenue raising and combating wealth concentration.

Scholars and economists found that a key factor in wealth inequality is the increasing capital income concentration of the top income earners. Economists have further found that income and wealth

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inequality undermined democracy and the economy. Scholars assert tax policy has been historically used to further the financial goals of the very wealthy and contributes to income and wealth inequality. Proponents of lower tax responsibility contend tax reform is necessary to simplify the tax code, stimulate the economy, and provide economic efficiency.

Politicizing tax policy contributes to the polarizing effects as politicians use their platforms to incite or satisfy their constituents. Political affiliations influence beliefs and myths about tax policy, with taxpayers often supporting proposed policies consistent with their political ideologies. In his first presidential campaign, one of Donald Trump's platforms was "Tax Reform that Will Make America Great Again." He indicated his tax reform would provide tax cuts for everyone, particularly the middle class. On December 22, 2017, President Trump signed legislation, commonly referred to as the Tax Cuts and Jobs Act (TCJA), claiming it as "the largest tax cuts in history." While proponents of the TCJA claimed this legislation provided tax breaks for everyone, the prediction by most tax policy experts was that the provisions would predominantly benefit the wealthy.

This Article asserts tax policy should reflect the values of society and benefit taxpayers who need assistance. The tax base should be modeled on historical justifications for determining tax responsibility, meaning, primarily imposed on the wealthiest taxpayers. In short, tax policy should revert to its roots when tax rates structures were both marginally and effectively progressive. By shifting tax responsibility to the wealthiest taxpayers, we can provide tax relief to middle- and low-income taxpayers.

This Article will examine how tax law, particularly the TCJA, continues historical trends to bait taxpayers with proposed tax reform described as benefiting middle- and low-income households but that instead disproportionably benefits the wealthy. Additionally, this Article will address tax policies in the TCJA that exacerbate wealth and income inequality by focusing on two aspects of the TCJA: the transfer tax laws and the mortgage interest deduction (MID).

Introduction 242
I. Evolution of Tax Policy 246
A. Brief Historical Review 246
B. Intentional and Structural Regressiveness 248
C. Regressivity in Tax Policy and the TCJA 252
D. Proposals 254

II. The Mortgage Interest Deduction 259
A. Homeownership and Tax Policy 259
B. TCJA and the Mortgage Interest Deduction 263
III. The Overall Impact of TCJA on Income and Wealth Inequalities 267
A. Income Inequality 267
B. Wealth Inequality 271
C. The TCJA and Income and Wealth Inequality 274
Conclusion 276

Introduction

Tax policy plays a role in shaping the economy.[1] Scholars have long asserted that tax policy should be used to make positive impacts on economic activity by adjusting and creating policies that benefit the majority of the population rather than the elite few.[2] Scholars advocate for implementing policies to address wealth and income inequality while effectively facilitating other goals such as revenue raising and combating wealth concentration.[3]

Scholars and economists found that a key factor in wealth inequality is the increasing capital income concentration of the top income earners.[4] Economists have further found that income and wealth

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1. *See generally* William G. Gale & Andrew A. Samwick, *Effects of Income Tax Changes on Economic Growth*, Tax Pol'y Ctr. (Feb. 2016), https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/413223-Effects-of-Income-Tax-Changes-on-Economic-Growth.pdf [https://perma.cc/4X3F-272B] (detailed analysis of the impact of taxation on the economy).

2. *See generally* John W. Lee, III, *The Capital Gains "Sieve" and the "Farce" of Progressivity 1921–1986*, 1 Hastings Bus. L.J. 1, 8 (2005); Beverly Moran, *Wealth Redistribution and the Income Tax*, 53 How. L.J. 319 (2010); Phyllis C. Taite, *Saving the Farm or Giving Away the Farm: A Critical Analysis of the Capital Gains Tax Preferences*, 53 San Diego L. Rev. 1017 (2016).

3. *See infra* notes 143–160.

4. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* (Nat'l Bureau Econ. Rsch., Working Paper No. 20625, 2014), https://www.nber.org/papers/w20625.pdf [https://perma.cc/S6HU-RRYR].

inequality undermines democracy and the economy.[5] Scholars assert tax policy has been historically used to further the financial goals of the very wealthy and contributes to income and wealth inequality.[6] Proponents of lower tax responsibility contend tax reform is necessary to simplify the tax code, stimulate the economy, and provide economic efficiency.[7]

Politicizing tax policy contributes to the polarizing effects as politicians use their platforms to incite or satisfy their constituents.[8] Political affiliations influence beliefs and myths about tax policy, with taxpayers often supporting proposed policies consistent with their

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5. Joseph E. Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future 1, 13 (2012); *see* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. Econ. 519, 520–21 (2016).

6. Taite, *supra* note 2; *see also* Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 Buff. L. Rev. 685 (1988–89).

7. Jane G. Gravelle, Cong. Rsch. Serv. R44823, The "Better Way" House Tax Plan: An Economic Analysis (2017); *see* Robert W. McGee, *Principles of Taxation for Emerging Economies: Lessons from the U.S. Experience*, 12 Dick. J. Int'l L. 29, 39–41 (1993) (discussing the pros and cons of high and low tax rates and the impact on the economy).

8. *See, e.g.*, Patricia Cohen, *Republican Presidential Candidates Rally Around Flat Tax*, N.Y. Times (May 15, 2015), https://www.nytimes.com/2015/05/16/business/economy/republican-presidential-candidates-rally-around-flat-tax.html [https://perma.cc/CK4P-9LZQ] ("Senator Rand Paul of Kentucky and Ben Carson, a retired neurosurgeon who joined the race early this month, have also suggested a one-size-fits-all tax, while the former Texas governor Rick Perry pushed a flat-tax proposal during the 2012 presidential campaign."); Howard Gleckman, *How Should We Tax the Rich?*, Forbes (Sept. 11, 2019), https://www.forbes.com/sites/howardgleckman/2019/09/11/how-should-we-tax-the-rich/#1abb0c5638bd [https://perma.cc/TEJ9-FPU6] ("Senator Bernie Sanders would raise the top federal income tax rate from today's 37 percent to 52 percent for households making $10 million a year or more. Representative Alexandria Ocasio-Cortez (D-NY) would raise the income tax rate on those same households to 70 percent."); Naomi Jagoda, *Key Senate Democrat Unveils Proposal to Tax the Rich*, The Hill (Sept. 12, 2019), https://thehill.com/policy/finance/461043-key-senate-dem-unveils-proposal-to-tax-the-rich [https://perma.cc/U27H-VQ7Y] ("Sen. Ron Wyden (Ore.), the top Democrat on the tax-writing Senate Finance Committee, released a paper that calls for taxing ordinary income and capital gains at the same rates, and taxing certain investment gains of the wealthiest people annually.").

political ideologies. In his first presidential campaign, one of Donald Trump's platforms was "Tax Reform that Will Make America Great Again."[9] He indicated his tax reform would provide tax cuts for everyone, particularly the middle class.[10] On December 22, 2017, President Trump signed legislation, commonly referred to as the Tax Cuts and Jobs Act (TCJA),[11] claiming it as "the largest tax cuts in history."[12] While proponents of the TCJA claimed this legislation provided tax breaks for everyone, the prediction by most tax policy experts was that the provisions would predominantly benefit the wealthy.[13]

This Article asserts tax policy should reflect the values of society and benefit taxpayers who need assistance. The tax base should be modeled on historical justifications for determining tax responsibility,

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9. *Trump Tax Reform That Will Make America Great Again*, DONALDJTRUMP.COM, https://assets.donaldjtrump.com/trump-tax-reform.pdf [https://perma.cc/HH2U-76QK] (last visited Jan. 25, 2021) [hereinafter *Trump Tax Reform*].

10. Louis Jacobson, *All Income Groups Get Cuts Early On, But Not 'Everyone*,' POLITIFACT (Dec. 21, 2017), https://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1424/cut-taxes-everyone/ [https://perma.cc/8QKG-LRUA].

11. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

12. *Trump Hails 'Largest Tax Cut' in US History*, BBC NEWS (Dec. 20, 2017), http://www.bbc.com/news/world-us-canada-42429424 [https://perma.cc/3SAV-Q5M3] ("'We are making America great again,' a jubilant Mr. Trump said. . . . He thanked congressional leaders for pushing through what he called 'the largest tax cut in the history of our country.'").

13. *Analysis of the Tax Cut and Jobs Act*, TAX POL'Y CTR., https://www.taxpolicycenter.org/feature/analysis-tax-cuts-and-jobs-act [https://perma.cc/D228-WDPX] (last updated May 8, 2020) (noting the largest average tax cuts would be received by taxpayers in the 95–99th percentile of income distribution); s*ee also Distributional Analysis of the Tax Cuts and Jobs Act as Passed by the Senate*, TAX POL'Y CTR. (Dec. 4, 2017), https://www.taxpolicycenter.org/sites/default/files/publication/149851/2001628-distributional_analysis_of_the_tax_cuts_and_jobs_act_as_passed_by_the_senate_1.pdf [https://perma.cc/JPA4-C7PX] [hereinafter TCJA ANALYSIS TAX POL'Y CTR.] ("Compared to current law, taxes would fall for all income groups on average in 2019, increasing overall average after-tax income by 1.6%. In general, tax cuts as a percentage of after-tax income would be larger for higher-income groups, with the largest cuts as a share of income going to taxpayers in the 95th to 99th percentiles of the income distribution.").

meaning, primarily imposed on the wealthiest taxpayers.[14] In short, tax policy should revert to its roots when tax rates were marginally and effectively progressive. By shifting tax responsibility to the wealthiest taxpayers, we can provide tax relief to middle- and low-income taxpayers.[15]

This Article will examine how tax law, particularly the TCJA, continues historical trends to bait taxpayers with proposed tax reform described as benefiting middle- and low-income households but that instead disproportionably benefits the wealthy. Additionally, this Article will address tax policies in the TCJA that exacerbate wealth and income inequality by focusing on two aspects of the TCJA: the transfer tax laws and the mortgage interest deduction (MID).

To effectively facilitate a burden shift, more tax responsibility must be borne by the wealthiest taxpayers in order to reduce rates and provide credits to middle- and low-income taxpayers. This Article proposes several reforms to facilitate this shift and make tax policy great again. First, the estate tax exemption should be reduced to three million dollars and the gift tax exemption should be reduced to four million dollars. Next, the Code section 1014 stepped-up basis provision and the MID must be eliminated. By implementing these measures, more tax responsibility will be shifted to taxpayers who can most afford it, thereby re-directing tax policy in the right direction, towards a more effective progressive tax system.

Part I of this Article will provide a brief historical review of the evolution of taxation and more explicitly of transfer taxes. Further, this Part will discuss relevant provisions of selected tax acts that negate progressivity and will recommend proposals for reform focused on relevant provisions of the TCJA. Part II will discuss the historical use of the mortgage interest deduction, the regressive nature of this deduction, and proposals for reform focused on relevant provisions of the TCJA. Part III will engage in a big-picture analysis of income and wealth inequality and discuss the relevant tax provisions of the TCJA. A brief conclusion will follow.

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14. Jones, *supra* note 6, at 685; *see also* David Frederick, *Reconciling Intentions with Outcomes: A Critical Examination of the Mortgage Interest Deduction*, 28 Akron Tax J. 41, 46–49 (2013) (discussing the Revenue Act of 1913, Pub. L. No. 63-16, § II (B), 38 Stat. 114).

15. Jones, *supra* note 6, at 685.

I. Evolution of Tax Policy

A. Brief Historical Review

Reviewing the origins of tax policy, it is evident the tax burdens were not originally intended for low-income taxpayers; instead; they were imposed on the wealthiest taxpayers.[16] As implemented, the U.S. tax system was based on a progressive schedule.[17] True progressive schedules are widely believed to be based on ability to pay and thus, generally perceived as a fair and aspirational tax system.

The progressive structure is apparent in income and transfer taxes. From the inception, the estate and gift taxes were imposed on the wealthiest taxpayers.[18] The estate tax imposed a transfer tax on property that passed from a decedent to the beneficiaries of the estate.[19] The estate tax base was comprised of a decedent's estate and included some lifetime (gift) and death time (estate) transfers.[20]

While estate and gift taxes were related, they had slightly different functions.[21] The estate tax was initially imposed as a source of

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16. Jerome Kurtz & Stanley S. Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal,* 70 Colum. L. Rev. 1365, 1367 (1970) ("Roughly, the progressivity element of the individual income tax can be defined as the revenue raised by that portion of the rate schedules in excess of 20 percent. In 1965 this element was $5 billion, while total estate and gift tax liability was $2.7 billion. Studies of the association of wealth and income indicate that estate and gift taxes are involved almost exclusively with families with annual incomes of over $20,000. Thus the estate and gift taxes are probably responsible for about one-third of the net progressivity in the U.S. tax system." (quoting U.S. Treas. Dep't, Tax Reform Studies and Proposals, pt. 1, at 106 (1969)).

17. Donald R. Nichols & William F. Wempe, *Regressive Tax Rates and the Unethical Taxation of Salaried Income,* 91 J. Bus. Ethics 553, 554 (2010).

18. *See* Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 Fla. Tax Rev. 875, 881 (2010) (describing the early history of federal estate and gift taxation from 1797 to 1932).

19. *See* I.R.C. § 2031.

20. *See generally* I.R.C. §§ 2031, 2511.

21. Mitchell M. Gans & Jay A. Soled, *Reforming the Gift Tax and Making It Enforceable*, 87 B.U. L. Rev. 759, 761 (2007) ("Unlike other taxes, the gift tax does not serve an independent function. Rather, Congress designed

revenue to finance wars and military conflicts.[22] After the estate tax became permanent, the gift tax was introduced, in part, as a mechanism to prevent lifetime transfers as a viable way to avoid the estate tax.[23] The estate and gift taxes have predominantly operated with separate structures and functions with common goals to raise revenue and combat wealth concentration.[24] Appropriately, transfer taxes were imposed on the wealthiest taxpayers.

The income tax had a similar history. Initially, less than five percent of the population, referred to as "economic royalists" were subject to the income tax.[25] In the 1930s, proposals to expand the tax base beyond the wealthiest taxpayers were not well received by the general public.[26]

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it to protect the integrity of the estate tax and income tax. Strong historical support for this proposition is found in the congressional record.").

22. *See* Cooper, *supra* note 18, at 882–84.

23. *Id.* at 911.

24. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2005, 90 Stat. 1520, 1872 (carryover basis for property acquired from decedent), *repealed by* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401(a), 94 Stat. 229, 299–300. From 1976 until 2001, the estate and gift transfer taxes operated under a unified structure. The estate and gift transfer taxes were again decoupled from 2001–2010 pursuant to the Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L. No. 107-16, § 501 *et seq.*, 115 Stat. 38, 69 *et seq.* The transfer taxes were re-unified in 2010 as a result of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§ 301–304, 124 Stat. 3296, 3300–04.

25. Jones, *supra* note 6, at 685 ("During the 1930s, no more than five percent of Americans were income taxpayers. The tax was viewed as a 'class tax' directed toward the rich—those President Roosevelt referred to as 'economic royalists.'" (citations omitted)).

26. *Id.* at 685–86 ("The individual income tax accounted for only between ten and twenty percent of federal revenues during the 1930s. World War II dramatically altered this very limited conception of the income tax. Federal budget expenditures increased more than twelve times from 1940 to 1945. Shortages of goods and increased consumer purchasing power produced a worrisome inflationary situation. For government officials, the income tax came to be seen as both a war financing device and as a means of decreasing excess purchasing power. The result was that the income tax rolls increased from about 7 million taxpayers in 1940 to more than 42 million in 1945. The income tax became in Treasury Secretary Henry Morgenthau, Jr.'s words, 'a people's tax.'" (citations omitted)); *see also Federal Individual Income Tax Rates History*, Tax Found., https://files.taxfoundation.org/legacy/docs

The wars, particularly World War II, created budget shortfalls and economic disparity, and Congress was forced to increase the tax base to raise revenue.[27] By the 1960s, the income tax had clearly transformed from a tax on the elite to a tax on virtually all income levels.[28] The expanded tax base was necessary to raise additional revenue, not to relieve the burden on the highest income taxpayers.[29]

Also, during the 1960s, in addition to expanding the tax base, tax laws decreased the top marginal rate for income taxes and imposed higher average tax rates on low-income taxpayers.[30] During the early 1960s, the top marginal income tax rate was over 90% and substantially decreased over time.[31] Since the 1960s, data also revealed that income share for the top taxpayers increased substantially with income heavily concentrated in the top one percent.[32] The United States has led the world with the "highest level of income inequality among the advanced countries."[33] Without intervention, the wealthiest taxpayers will continue to reap the benefits of tax policies, and the rest of the population may remain stagnant or regress to a lower income group.

B. Intentional and Structural Regressiveness

While both income and transfer taxes are progressive in structure, they have elements and provisions that make them regressive in application. The two types of regressivity relevant to this discussion are situational and structural, as described by Professors Nichols and Wempe.[34] They describe situational regressiveness as not a deliberate feature of a tax system but instead arising because of differences in taxpayers' circumstances, activities, or behaviors.[35] For example, the total sales tax

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/fed_individual_rate_history_nominal.pdf [https://perma.cc/SG3V-3JWN] (last visited Jan. 27, 2021) [hereinafter *Tax Rates History*].

27. *See* Jones, *supra* note 6; *see also* Cooper, *supra* note 18, at 887.

28. Thomas Piketty & Emmanuel Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. Econ. Persps., Winter 2007, at 3, 12.

29. *See* Jones, *supra* note 6.

30. Piketty & Saez, *supra* note 28.

31. *Tax Rates History*, *supra* note 26.

32. Piketty & Saez, *supra* note 28, at 14.

33. Stiglitz, *supra* note 5, at 27.

34. Nichols & Wempe, *supra* note 17.

35. *Id*.

liability of any taxpayer is determined by the taxpayer's spending habits, not by expressed provisions in the tax code. Consequently, the tax paid is determined without regard to ability to pay.

Professors Nichols and Wempe describe structural regressiveness as intentional regressive provisions imposed by the tax system.[36] For example, deductions are designed to reduce tax liability and, therefore, to impact the overall effective tax rate a taxpayer pays. The U.S. federal tax system exhibits both situational and structural regressiveness. Structural regressiveness is demonstrated through various tax acts that provide tax relief for high income taxpayers. For instance, major tax changes occurred under the Reagan presidency with the Economic Recovery Tax Act of 1981 (ERTA) that made the tax system less progressive.[37]

When ERTA was implemented, it represented one of the greatest tax reductions in history, where the top marginal rate was reduced from 70% to 50%.[38] On the other hand, taxpayers in the lowest income brackets experienced trivial tax relief.[39] While the marginal tax rates were still classified as progressive, the substantially reduced rates provided significant tax relief for high-income taxpayers, leaving them with more disposable income.

Likewise, tax deductions and exemptions contribute to situational and structural regressivity of the U.S. tax system by reducing the amount of taxable income and ultimate tax liability for high-income taxpayers. For instance, taxpayers who earn the same income may have

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36. *Id*. at 554 ("In contrast, *structural* regressiveness in income taxation results form a decision by policymakers to deliberately apply a rate of tax on lower incomes that exceeds the rate imposed on higher incomes.").

37. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 101, 95 Stat. 172, 176–85.

38. *Tax Rates History*, *supra* note 26. Before ERTA, the top marginal rate for married filing jointly taxpayers was 70% at incomes at or above $215,400. *See id.* The top marginal rate for the same taxpayers with incomes at $85,600 was 59% before ERTA. After ERTA, the top marginal rate was reduced to 50% for incomes at or above $85,600. For single taxpayers, the highest marginal rate, before ERTA, was 70% for incomes at or above $108,300. After ERTA, the top marginal rate was 50% for incomes at or above $41,000. *See id.*

39. *Id*. The average tax reduction for married filing jointly taxpayers was 1 or 2% rate reduction for income levels between $3,400 and $16,000. *See id.*

the same marginal tax rates before deductions are applied. Deductions are built into the system, and any taxpayer may exercise the option to engage in behavior that would allow the same opportunity to reduce tax liability but not necessarily the same benefit.[40]

If two taxpayers purchase a home at their respective affordable amounts, only the taxpayer with interest payments high enough to itemize deductions will receive the benefit of the MID. As such, only the homeowner taxpayer who could afford to buy a more expensive home will receive a tax benefit, and this exhibits a regressive effect. A tax deduction designed to benefit wealthier taxpayers and reduce their tax liability is an example of structural regressiveness.[41] Indeed, a more expensive house with high interest payments will increase the deduction.[42] There are numerous tax deductions and exemptions that negate the progressivity of the tax system, but this Article will primarily focus on the MID, capital gains, and transfer taxes.[43]

Transfer tax laws and policies were designed to tax the wealthiest taxpayers. Over time, the line for determining tax responsibility has moved in the wrong direction. For example, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) implemented scheduled increases in the exemption amount and decreased tax rates for the estate tax between the years 2001 and 2009.[44] Consequently, there was

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40. Heather M. Field, *Choosing Tax: Explicit Elections as an Element of Design in the Federal Income Tax System*, 47 Harv. J. on Legis. 21, 22 (2010).

41. Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9284, 2002), https://www.nber.org/papers/w9284 [https://perma.cc/4TYT-NTP8].

42. Joint Comm. on Tax'n, 113th Cong., JCX-10-13, Present Law, Data, and Analysis Relating to Tax Incentives for Residential Real Estate 36–37 (2013).

43. *See infra* Part II for analysis of housing-based tax preferences.

44. Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L. No. 107-16, 115 Stat. 38. EGTRRA phased out the estate tax and ultimately eliminated it in 2010 through annual reductions, but the tax was automatically reinstated in 2011. *Id.* § 901(a)(2), 115 Stat. 38, 150; s*ee also* H.R. Rep. No. 4154 (2009). President Obama proposed that the 2009 rules be permanently extended (i.e., $3.5 million exemption and 45% tax rate), which the House approved on December 3, 2009. Cong. Res. Serv. R41203, Estate Tax

a significant reduction in the number of estates required to pay the estate tax and a resultant decrease in revenue generated.[45] Between 2001 and 2009, the number of taxable returns was reduced from approximately 50,500 to 5,700 returns.[46] In the same time period, the estate liability was reduced from approximately $24 billion to approximately $14 billion.[47]

Later, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRUIRJCA)[48] retroactively reinstated the tax changes implemented under EGTRRA and extended them through 2012 which, in turn, made temporary increases permanent.[49] Next, TRUIRJCA increased the exemption amount to five million dollars and reunified the estate and gift taxes.[50] At that time, TRUIRJCA was the largest tax cut since the estate tax became permanent, excluding the 2010 temporary repeal.[51] In 2011, the number of taxable estates were further reduced to 4,400, and estate tax liability was further reduced to approximately $11 billion.[52]

Consequently, tax burdens were not so subtly shifted from the highest wealth and income taxpayers to middle- and low-income taxpayers, while proponent lawmakers were still promoting the U.S. tax system as a progressive system. As tax policy continues to evolve, the burden shift from a tax on the elite to a tax on the populace has become clearer to tax scholars while remaining nebulous to the average taxpayer. Reduced transfer tax base and rates have contributed to income and wealth inequalities and the overall regressive nature of tax policy. Just

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Options 1 (2010). The Senate Democrats suggested retroactively reinstating the 2009 rules for 2010 and subsequent years. *Id.* Senate Minority Leader McConnell instead proposed a 35% tax rate and a $5 million exemption. *Id.*

45. Tax Pol'y Ctr., Briefing Book 406 (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book_2020.pdf [https://perma.cc/67Y2-R9YB].

46. *Id*. at 407.

47. *Id*.

48. Pub. L. No. 111-312, 124 Stat. 3296.

49. Tax Pol'y Ctr., *supra* note 45, at 406 ("For those who died in 2010, executors could elect to have the EGTRRA rules apply, which meant that no estate tax was imposed.").

50. *Id*. at 401. The TRUIRJCA set the top rate at 35%, and the exemption was set at $5.12 million. *Id.*

51. *See id.*

52. *Id*. at 407.

as tax policy has been used to contribute to income inequality, it should also be used to help eradicate it.

C. Regressivity in Tax Policy and the TCJA

Presidential candidate Donald Trump claimed his tax reform proposal would make tax reform great by reducing taxes on Americans and reverting to a time when just one percent of Americans were subject to the income tax.[53] However, he did not acknowledge the one percent were only comprised of high wealth taxpayers. As taxes are a major source of revenue, it is not a question of whether taxes are paid but, rather, who pays the taxes.[54]

Initial claims for the TCJA predicted the legislation would boost the gross domestic product (GDP), reduce revenue loss, and decrease the deficit.[55] Further, estimates indicated an overall tax reduction of $1.455 trillion over a ten-year period.[56] The Tax Policy Center later released data indicating middle- and low-income families would see

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53. *Trump Tax Reform*, *supra* note 9.

54. Tax Pol'y Ctr., *supra* note 45, at 2. ("About 50 percent of federal revenue comes from individual income taxes, 7 percent from corporate income taxes, and another 36 percent from payroll taxes that fund social insurance programs.").

55. Benjamin R. Page et al., *Macroeconomic Analysis of the Tax Cuts and Jobs Act*, Tax Pol'y Ctr. (Dec. 20, 2017), https://www.taxpolicycenter.org/sites/default/files/publication/151176/macroeconomic_analysis_of_the_tax_cuts_and_jobs_act_conference_12-20.pdf [https://perma.cc/8EBH-2B3Q] ("We find the legislation would boost US gross domestic product (GDP) 0.8 percent in 2018 and would have little effect on GDP in 2027 or 2037. The resulting increase in taxable incomes would reduce the revenue loss arising from the legislation by $186 billion from 2018 to 2027 (around 13 percent). Because most of the individual provisions expire after 2025, we expect deficits (not including interest costs) would decline by $415 billion from 2028 to 2037, and macroeconomic feedback would boost the deficit savings by $3 billion over that interval. Including macroeconomic effects and interest costs, the legislation is projected to increase debt as a share of GDP over 5 percentage points in 2027 to 97 percent of GDP, and almost 4 percentage points in 2037 to 117 percent of GDP.").

56. *See* Joint Comm. on Tax'n, 115th Cong., JCS-1-18, General Explanation of Public Law 115-97, at 441 (2018).

little change in their tax liability.[57] They reported the largest average tax cuts would be received by taxpayers in the 95–99th percentile of the income distribution.[58] The TCJA ultimately provided the greatest tax relief for the wealthiest taxpayers, frustrating the progressive structure of tax policy.

The TCJA added further regressiveness to tax policy with changes to transfer taxes. The historically regressive nature of changes to the estate tax has been evidenced by various tax acts that significantly reduced tax liability of the wealthy through increased exemptions and reduced rates.[59] The most significant exemption increase, in the history of transfer taxes, occurred when the TCJA was signed.[60] The exemption, beginning in 2018, increased to $10 million, indexed for inflation, per taxpayer until the end of 2026.[61] The taxable estate is subject to a 40% top rate,[62] a decrease from the 45% top rate in 2009[63] and an increase from the 35% rate in 2013.[64] By doubling the exemption

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57. TCJA Analysis Tax Pol'y Ctr., *supra* note 13, at 2.

58. *Id.* at 1; s*ee also* Joint Comm. on Tax'n, 116th Cong., JCX-10-19, Distributional Effects of Public Law 115-97 (2019).

59. *See supra* notes 44–52 and accompanying text; s*ee also* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 501, 111 Stat. 788, 845 (enacting gradual increase in the estate exemption from $600,000 in 1997 to $1 million by 2006); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2315–18 (2013) (signed into law by President Obama on Jan. 2, 2013, and making "permanent" previously "temporary" changes to estate, gift, and generation-skipping taxes).

60. David Joulfaian, The Federal Estate Tax: History, Law, and Economics, at ch. 2 (2019). The last time a tax act doubled the exemption amount was the 1976 Tax Reform Act (TRA 1976). *Id.* tbl.2.1. The TRA 1976 lowered the maximum estate tax reform rate from 77% to 70%, raised the exemption amount from $60,000 to $120,666, and integrated the estate and gift tax under the Unified Transfer Tax. *Id.* ch. 2.

61. I.RC. § 2010(c)(3)(C). The inflation-adjusted exemption amount for 2021 is $11.7 million. Rev. Proc. 2020–45, 2020–46 I.R.C. 1016.

62. I.R.C. § 2001(c).

63. Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L. No. 107-16, § 511(c), 115 Stat. 38, 70 (lowest top rate after gradual phasedown over the years 2003–2009).

64. Jane G. Gravelle, Cong. Rsch. Serv. R42959, Recent Changes in the Estate and Gift Tax Provisions 4 (2018) ("Compared with pre-existing law (a $1 million exemption and a 55% rate), the ATRA revision was projected to lose $369 billion in revenue from FY2013 to FY2022, rising from

amount through the TCJA, the Joint Committee on Taxation estimates a revenue loss of $83 billion for transfer taxes alone between 2018 and the sunset.[65]

Because of the regressive effects of each tax act, both the number of taxpayers required to pay an estate tax and revenue generated from the estate tax have decreased over time. The exemption for 2017, before TCJA, was $5.49 million and, already indexed for inflation, included provisions for spousal portability and stepped-up basis provisions for capital gains property.[66] As such, the estate tax already excluded a substantial number of taxpayers from estate tax liability and simultaneously facilitated substantial wealth transfers.

D. Proposals

The TCJA has taken transfer taxes in the wrong direction. Doubling the exemption amount exacerbated wealth concentration, provided a conduit for wealth and income inequality for the foreseeable future, and resulted in significant revenue loss to the government.[67] The estates subject to an estate tax were already significantly reduced under EGTRRA and even fewer under ATRA 2012; as such, there was little justification to provide further tax relief for the wealthiest taxpayers.[68] The Congressional Research Service (CRS) reports only a small portion of estates

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$27 billion in FY2015 to $54 billion FY2022. This change reduced total projected revenue from the estate tax by about two-thirds.").

65. Joint Comm. on Tax'n, 115th Cong., JCX-67-17, Estimated Budget Effects of the Conference Agreement for H.R. 1, the "Tax Cuts and Jobs Act" 2 (2017); *see also* Steve Wamhoff & Matthew Gardner, *Progressive Revenue-Raising Options*, Inst. on Tax'n & Econ. Pol'y (Feb. 5, 2019), https://itep.org/progressive-revenue-raising-options/ [https://perma.cc/ABS3-8EW7] (estimating entire TCJA will reduce revenue by $1.9 trillion over a decade).

66. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

67. Gravelle, *supra* note 64, at 4 ("The 2017 revision was projected to reduce revenues by $83 billion over eight years, for a further reduction in projected revenue of about 40%.").

68. *Id*. at 5 ("Only a small portion of high-income decedents are affected by the tax under a $5 million exemption. The estate tax would have affected less than 0.2% of decedents over the next decade under the permanent rules. The doubling of the exemption would reduce that share to 0.05%.").

were affected by the five million dollars exemption and reports even fewer would be subject to an estate tax under the TCJA.[69]

Moreover, when the TCJA passed, it failed to enact other provisions to counteract other substantial tax relief that contributed to the regressiveness of tax policy. When Congress voted to double the exemption, they should have abolished stepped-up basis by abolishing the stepped-up basis provision in Code section 1014. The stepped-up basis provision is not necessary because most estates are no longer taxable, and there is virtually no threat of the double taxation the stepped-up basis provision was intended to avoid. Instead, deemed realization should be implemented for capital property transferred at death to trigger the taxable gain. For loss property, transferred basis, instead of fair market value, should be used for determining tax liability to preserve the loss.

For example, if a taxpayer had sold his/her capital property during his/her lifetime, any gain on that property would have been subject to income taxation.[70] If the same taxpayer transferred property by gift during his/her lifetime, the recipient would receive a transferred basis and the loss would be preserved or the property would be subject to taxation on any built-in appreciation upon a subsequent sale.[71]

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69. *Id.* ("The estate tax is concentrated among high-income taxpayers: 91% is paid by the top quintile, 60.4% by the top 1%, and 26% by the top 0.1%. The concentration in upper income categories would be increased with the higher temporary exemption levels.").

70. Treas. Reg. § 1.1001–1(a) ("[T]he general method of computing such gain or loss is prescribed by section 1001(a) through (d) which contemplates that from the amount realized upon the sale or exchange there shall be withdrawn a sum sufficient to restore the adjusted basis prescribed by section 1011 and the regulations thereunder (i.e., the cost or other basis adjusted for receipts, expenditures losses, allowances, and other items chargeable against and applicable to such cost or other basis). The amount which remains after the adjusted basis has been restored to the taxpayer constitutes the realized gain. If the amount realized upon the sale or exchange is insufficient to restore to the taxpayer the adjusted basis of the property, a loss is sustained to the extent of the difference between such adjusted basis and the amount realized.").

71. I.R.C. § 1015(a) ("If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis (adjusted for the period before the date of the gift as provided in section 1016) is greater than the fair market value of the property

If instead the taxpayer transferred property through an estate, the pre-death appreciation would be forever eliminated when the basis amount increased to the fair market value. Further, the property would also avoid an estate tax if the estate value were below the exemption amount.[72] This illustrates the double revenue loss from the income tax and estate tax. With the proposed reforms, the recipient would be in the same tax position as the original transferor no matter when the property transferred.

Instead of an increase, the estate tax exemption amount should be reduced to three million dollars with a 45% tax rate and a full exemption for the primary homestead.[73] This proposal excludes the value of the primary homestead from the estate tax base to account for high cost of living areas such as Hawaii, New York, and California.[74] Homeownership in high cost of living areas may trigger an estate tax for taxpayers whose other assets would not be enough to cause estate tax inclusion thereby frustrating the intent of this proposal.

The TCJA provided the wealthiest taxpayers the greatest tax benefits during times when the country was subject to significant debt.[75]

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at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value.").

72. I.R.C. § 1014(a)(1) ("Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death. . . .").

73. Tax Pol'y Ctr., *supra* note 45, at 412 ("If 2009 law were made permanent starting in 2019, the number of estate tax returns filed for decedents who died between 2019 and 2028 would increase by 246,000, and estate tax liabilities of these decedents would increase by $234 billion.").

74. *See* Hillary Hoffower & Libertina Brandt, *The Most Expensive and Affordable States to Buy a House, Ranked*, Bus. Insider (July 5, 2019), https://www.businessinsider.com/cost-to-buy-a-house-in-every-state-ranked-2018-8 [https://perma.cc/2E7Y-PGJ7].

75. *See* Off. of Mgmt. & Budget, Historical Tables tbl.7.1 (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/hist_fy21.pdf [https://perma.cc/26ED-WDV6] (showing that, at the end of 2017, the gross federal debt was over $20 trillion); *see also* Cong. Budget Off., The Budget and Economic Outlook: 2019 to 2029 (2019), https://www.cbo.gov/system/files?file=2019-01/54918-Outlook.pdf [https://perma.cc/KAK9-EM28] ("Because

One of the primary functions of taxes is to raise revenue, and transfer tax reforms have consistently hindered this important function.[76] As previously discussed, expanding the tax base has been a consistent tool to raise revenue. Reducing the transfer tax exemption amount to three million dollars will provide additional revenue from the resulting expansion of the base, but not beyond the wealthiest households, and facilitate shifting the tax burden back to the wealthy.[77]

As an additional measure, deemed realization provisions should be imposed on capital gains property upon certain lifetime transfers.[78] A realization event is necessary to trigger an income tax on capital gains property.[79] Therefore, deemed realizations may be an effective tool to trigger a tax upon certain gifts. Deemed realizations may be especially useful in providing a disincentive for taxpayers to retain capital property until death.[80]

In most cases, the income tax on capital property was deferred, another form of tax preference, because of the realization requirement.[81]

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of persistently large deficits, federal debt held by the public is projected to grow steadily, reaching 93 percent of GDP in 2029 (its highest level since just after World War II) and about 150 percent of GDP in 2049—far higher than it has ever been. . . . Moreover, if lawmakers amended current laws to maintain certain policies now in place, even larger increases in debt would ensue.").

76. *See supra* notes 44–52, 59, and accompanying text.

77. Tax Pol'y Ctr., *supra* note 45, at 413 ("Returning to an estate tax exemption of $5 million (indexed for inflation from 2011) in 2019 through 2025 would increase the number of estate tax returns filed by 55,000 between 2019 and 2028 and would increase estate tax liabilities by about $60 billion.").

78. *See* Joseph M. Dodge, *A Deemed Realization Approach Is Superior to Carryover Basis (and Avoids Most of the Problems of the Estate and Gift Tax)*, 54 Tax L. Rev. 421, 448–49 (2001). Deemed realization is a concept in taxation whereby a certain event or act that would not ordinarily trigger a realization event is deemed to have triggered one.

79. *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554 (1991); Eisner v. Macomber, 252 U.S. 189 (1920).

80. Jeffrey L. Kwall, *When Should Asset Appreciation Be Taxed?: The Case for a Disposition Standard of Realization*, 86 Ind. L.J. 77, 95 (2011) ("Under a disposition standard, death would constitute a realization event. Treating death as a realization event would eliminate the tax incentive to hold property until death by ensuring an eventual tax on all gains. This change from current law should reduce the lock-in effect.").

81. Cong. Budget Off., How Capital Gains Tax Rates Affect Revenues: The Historical Evidence 21–22 (1988), https://www.cbo.gov/sites

By forcing a taxable transaction, the government will gain revenue and the transferor would be responsible for the tax liability. To prevent perpetual lifetime transfers, limitations must be imposed on the number of times a property may be transferred tax-free.[82] As such, property should be limited to one tax-free transfer. On the second transfer, deemed realization should be imposed whether the transfer was made during life or after death. This final measure provides a level of assurance that any income tax liability on appreciable property will be imposed.

As a final measure to reform transfer taxes, the gift tax exemption should also be reduced to four million dollars with a 30% tax rate. The additional million dollars exemption would be structured as "use or lose" and not transferrable to the estate. Providing the additional million dollars exemption and reduced tax rates may induce donors to make more lifetime transfers, rather than holding property until death. This approach harkens back to one of the other justifications for implementing the gift tax as described by Professor Cooper.[83] He explained that Congress enacted The Revenue Act of 1932, which included implementation of the gift tax, to serve as a backstop for the estate tax and to raise immediate revenue.[84]

/default/files/cbofiles/ftpdocs/84xx/doc8449/88-cbo-007.pdf [https://perma.cc/HBS8-93RQ].

82. Kwall, *supra* note 80, at 110 ("Although a gift has not historically been treated as a realization event, there is nothing inherently unique about a gratuitous transfer that would preclude Congress from treating a gift as a realization event. No constitutional impediment exists to taxing the accrued appreciation existing in property transferred as a gift." (footnotes omitted)).

83. Cooper, *supra* note 18, at 910–11 ("Congressional leaders of 1932 portrayed the gift tax as a mere companion to the estate and income taxes, designed solely to prevent taxpayers from avoiding these taxes by making lifetime gifts. Modern scholarship so routinely reiterates this accepted legislative history that it has become accepted as truth. However, the structure of the gift tax reflects a very different intent—a stealth legislative agenda which has been effectively lost to history. Notwithstanding assertions to the contrary, the architects of the 1932 gift tax did not intend to deter lifetime gifts by imposing a gift tax. To the contrary, they sought to incentivize such gifts." (footnotes omitted)).

84. *Id*. at 912 ("The gift tax provided a far more timely solution. Rather than being due 18 months after a taxpayer's death, gift taxes were payable no later than March 15 of the year following a gift. As a result, if wealthy

Deemed realization imposed at death or second transfers are both better alternatives to the current stepped-up basis provisions. Combined, these proposals negate some of the regressive effects of transfer taxes, provide additional revenue to the government, and shift more of the tax burden back to the wealthy.

II. The Mortgage Interest Deduction

A. Homeownership and Tax Policy

Homeownership-based tax preferences and expenditures have a perverse relationship with tax policy. First, the relationship is one sided. For example, a taxpayer may exclude up to $250,000 ($500,000 for qualified married couple) on the sale of a home, if residency and ownership requirements are satisfied, no matter how the funds are used.[85] Under prior tax acts, the taxpayer was permitted to defer gain of the sale of a personal residence under a "rollover" provision if they purchased a new home.[86]

Under the rollover provision, any amount in excess of the purchase price of a new personal residence was taxable.[87] Without debating the merits of the rollover provision, the relationship had some

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taxpayers could be induced to make large gifts in 1932, the Treasury would receive the resulting tax revenue before the spring of 1933. This more rapid collection cycle made gift taxes a far better source of emergency revenue than estate taxes could ever be." (footnotes omitted)).

85. I.R.C. § 121(a) ("Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more.").

86. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 312(b), 111 Stat. 788, 839, repealed the rollover provision, I.R.C.§ 1034 (1996).

87. I.R.C. § 1034(a) (1996) ("If property (in this section called 'old residence') used by the taxpayer as his principal residence is sold by him and, within a period beginning 2 years before the date of such sale and ending 2 years after such date, property (in this section called 'new residence') is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price . . . of the old residence exceeds the taxpayer's cost of purchasing the new residence.").

mutuality. Congress encouraged taxpayer investment in homeownership and balanced the taxpayer's interest with the revenue-raising function by deferring the tax only if the funds were tied to the purchase of a replacement primary personal residence.[88]

Second, the relationship lacks economic substance.[89] While this is not the type of transaction subject to challenge under an economic substance analysis, tax laws should also be subjected to an economic substance analysis. Typically, a deductible item is associated with an item included in income; that is, deductions are typically non-personal based expenses.[90] The decision to purchase a home is a personal decision; as such, any interest paid on a personal residence should not be deductible because other personal expenses are not deductible. Other than providing significant tax relief, there is no other purpose for the MID. Taxpayers are subject to an economic substance analysis; tax laws should be held to the same or similar standard.

Before 2018, homeowner taxpayers were permitted to use the MID for acquisition indebtedness up to one million dollars and for home equity indebtedness up to one hundred thousand dollars.[91] If a deduction of this magnitude is permitted, then imputed income should be

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88. John Calhoun Morrow, *Blowing Hot and Cold at the Same Time: Section 1034 Rollover and Rental Deductions on Rental and Sale of Principal Residence*, 41 Wash. & Lee L. Rev. 1509, 1509–10 (1984) ("Congress enacted section 1034 . . . to protect a taxpayer's investment in his home. Section 1034 provides for the nonrecognition of any gain realized from the sale of a taxpayer's principal residence that the taxpayer applies to the purchase of a new principal residence within two years of the date of sale of the old residence. The I.R.C. terms section 1034's nonrecognition of the gain realized from the sale of a taxpayer's principal residence as a 'rollover' because section 1034 enables a taxpayer to continue his investment by applying the gain to the purchase of a new principal residence." (footnotes omitted)).

89. *See* I.R.C. § 7701(o)(1) ("In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if—(A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.").

90. I.R.C. § 163(h)(1) ("In the case of a taxpayer other than a corporation, no deduction shall be allowed under this chapter for personal interest paid or accrued during the taxable year.").

91. I.R.C. § 163(h)(3)(B)–(C), (F).

included on the opposite side of the transaction to create economic substance. Landlords are permitted a deduction for mortgage interest as a business expense but must report the income received from tenants.[92] Taxpayers who own their homes are not required to pay taxes on imputed income even though they receive a deduction.

Economists have generally criticized the substantial subsidizing of homeownership even when based on the reasoning that homeownership stabilizes communities and provides an important asset for the middle class.[93] The research supports the premise that wealthy taxpayers primarily receive the benefits of homeownership-based tax breaks and would likely purchase a home without incentives.[94] Whether policies that promote and facilitate homeownership for middle- and low-income taxpayers are effective is debatable. Data suggests that the MID is ineffective at facilitating homeownership for middle- and low-income taxpayers.[95]

The MID is one of the most expensive tax expenditures,[96] and yet Congress continues to justify its relevance, despite its ineffectiveness

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92. *See* I.R.C. §§ 61(a)(5), 163(a).

93. *See* Gravelle, *supra* note 7, at 8–9.

94. Dorothy A. Brown, *Shades of the American Dream*, 87 Wash. U. L. Rev. 329, 333 (2009) ("Adding insult to injury, economists agree that virtually no one buys a house because of those tax subsidies, but the subsidies do increase the cost of housing. Federal tax subsidies for homeownership are expensive and inefficient, with race and class key determinants of their receipt. Finally, homeownership increases wealth disparities by race in America. Therefore, the current subsidies for homeownership are too costly to retain in their present form." (footnotes omitted)).

95. *See* Gravelle, *supra* note 7, at 8–9; Jane G. Gravelle & Thomas L. Hungerford, Cong. Rsch. Serv. R42435, The Challenge of Individual Income Tax Reform: An Economic Analysis of Tax Base Broadening 12–15, 23–24 (2012); Mark P. Keightley, Cong. Rsch. Serv. R41596, The Mortgage Interest and Property Tax Deductions: Analysis and Options 14–17 (2014).

96. *See* Joint Comm. on Tax'n, 115th Cong., JCX-3-17, Estimates of Federal Tax Expenditures for Fiscal Years 2016–2020, at 2 (2017) ("Special income tax provisions are referred to as tax expenditures because they may be analogous to direct outlay programs and may be considered alternative means of accomplishing similar budget policy objectives. Tax expenditures are similar to direct spending programs that function as entitlements to those who meet the established statutory criteria.").

at increasing homeownership and providing tax relief to middle- and low-income homeowners.[97] The TCJA, by increasing the standard deduction, made the MID even more inefficient to provide tax relief to middle- and low-income homeowners.[98] The CRS reports that increasing the standard deduction will reduce the number of taxpayers who itemize, which, in turn, will reduce the number of taxpayers eligible to claim the deduction.[99]

Finally, the homeownership-based tax preferences and expenditures contribute to regressiveness in tax policy. Professor Brown's research demonstrates that class and race play a role in who becomes a homeowner and receives the benefit of the MID.[100] Professor Morrow also found evidence in her research that indicated the MID has historically benefitted a small population.[101] Both professors found that recipients of the MID overwhelmingly favor wealthy taxpayers with large mortgages.[102] When the MID reduced tax liability of these

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97. S*ee* Phyllis C. Taite, *Taxes, the Problem and Solution: A Model for Vanishing Deductions and Exclusions for Residence-Based Tax Preferences*, 59 N.Y. L. Sch. L. Rev. 361, 365–66 (2014/15); *cf.* Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 70 Tax L. Rev. 667 (2017).

98. Daniel Berger & Eric Toder, *Distributional Effects of Individual Income Tax Expenditures After the 2017 Tax Cuts and Jobs Act*, Tax Pol'y Ctr. 10 (June 4, 2019), https://www.taxpolicycenter.org/sites/default/files/publication/157267/distributional_effects_of_individual_income_tax_expenditures_after_the_2017_tax_cuts_and_jobs_act_1.pdf [https://perma.cc/86CB-96TQ] ("TPC estimates that overall, the TCJA reduced the number of itemizers in 2018 from about 26 percent of tax units to about 11 percent."); *see also* John R. Brooks II, *Doing Too Much: The Standard Deduction and the Conflict Between Progressivity and Simplification*, 2 Colum. J. Tax L. 203 (2011).

99. *See* Gravelle, *supra* note 7, at 8–9.

100. Brown, *supra* note 94, at 341 ("However, not everyone who owns a home benefits from the tax deductions for homeownership. Only taxpayers who itemize their deductions are eligible to receive the mortgage interest and real property deductions. . . . Moreover, the mortgage interest deduction disadvantages low-income homeowners.").

101. 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, 760–61 (2012).

102. *Id.*; *see* Brown, *supra* note 94.

wealthy homeowners, there was less revenue for the government.[103] In the end, the public subsidized homeownership for the wealthy and missed the opportunity to provide tax relief for middle- and low-income taxpayers.[104]

B. TCJA and the Mortgage Interest Deduction

The TCJA reformed the rules in Code section 163 to disallow the interest deduction for home equity loans.[105] Further, section 163 was modified to reduce acquisition indebtedness from one million to seven hundred and fifty thousand dollars.[106] One of the reported dissenting views criticized the TCJA as having a negative impact on homeowners because it would negatively impact home values and homeownership rates.[107] One of the reasons indicated was that "[t]he bill cuts the amount people can claim as mortgage interest deduction so that only those people who can afford large down payments can afford to buy homes—especially in coastal cities where home prices are very high."[108]

In discussing the benefits of the mortgage interest deduction, Glaeser and Shapiro, indicated tax treatment of homes may affect the decisions of whether to purchase and how much to spend.[109] Their research concluded that the MID may induce individuals to purchase

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103. *See* Cong. Budget Off., The Distribution of Major Tax Expenditures in the Individual Income Tax System (2013), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/43768distributiontaxexpenditures.pdf [https://perma.cc/6CCV-EKRP].

104. *See id*. at 8 ("[T]ax expenditures reduce the amount of revenue that is collected for any given set of statutory tax rates—and thereby require higher rates to collect any chosen amount of revenue.").

105. § 163(h)(3)(F)(i)(I).

106. § 163(h)(3)(F)(i)(II).

107. H.R. Rep. No. 115-409, at 479 (2017) ("H.R. 1 depresses home ownership and home values.").

108. *Id.*

109. Glaeser & Shapiro, *supra* note 41, at 14 ("The tax code creates incentives both to consume more housing and for them to own their homes. These incentives are focused on wealthier people who are likely to itemize. Among non-itemizers, the incentive to own only gets large for those buyers who pay for a significant fraction of their own homes.").

more house than they need.[110] They also noted prior studies focused on either the purchase price of the house and social costs of overconsumption on the benefits of homeownership.[111] As such, the MID may have a negative impact on homeownership as taxpayers may purchase a more expensive home than they can afford.

Glaeser and Shapiro also researched the impact tax policy had on homeownership rates and found the impact was minimal.[112] In a different article, Frederick discussed a study conducted by Gale, Gruber, and Stephens-Davidowitz in which they concluded that theoretical and empirical evidence suggests the MID has a marginal impact, at best, on homeownership.[113] Yet the MID has general support based on the belief that homeownership is often the most valuable asset in a household, necessary for wealth building.[114] Providing mechanisms to build wealth in lower income households is an important aspirational goal, and providing subsidies to the wealthy is not the way to achieve it. On the other hand, eliminating this subsidy may finance the programs to provide tax credits and/or grants to assist low- and middle-income taxpayers with down payments, which would be a positive step towards wealth equality.

Another dissenting view on the House Bill indicated, "the House Republican tax reform plan abandons middle-class taxpayers in favor of high-income Americans and wealth corporations. The bill eviscerates

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110. *Id*. at 10 ("The tax treatment of homes potentially changes behavior along two margins: the decision to own or rent and the decision of how much housing to consume. The home mortgage interest deduction both induces individuals to consume more housing and to own the housing that they do consume.").

111. *Id*.

112. *Id*. at 41 ("[T]he home mortgage interest deduction is really not a pro-homeownership policy in any meaningful sense. It subsidizes housing consumption, but its impact on the homeownership rate appears to be minimal.").

113. Frederick, *supra* note 14, at 44 (noting that "Gale, Gruber, and Stephens-Davidowitz argue, '[b]oth theoretical considerations and empirical evidence suggest that the mortgage interest deduction] has little if any positive effect on homeownership.'" (quoting William G. Gale el al, *Encouraging Homeownership Through the Tax Code*, 115 Tax Notes 1171, 1179 (June 18, 2007)).

114. John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 Ind. L. Rev. 605 (2008).

existing housing tax benefits by drastically reducing the number of homeowners who can take advantage of mortgage interest and property tax incentives."[115] While the number of eligible homeowners would be reduced, this dissenting view is misleading. Middle class taxpayers are not the primary beneficiaries of this tax subsidy.[116] In fact, as noted above, the changes to the MID provisions may have very little, if any, impact on the homeownership rates for middle income taxpayers,[117] and, with the increased standard deduction under the TCJA, most taxpayers will not receive a tax benefit from the MID.[118]

When Congress enacts provisions to subsidize taxpayers for personal expenses, those tax expenditures should be linked to behavior and objectives that benefit the public or address inequalities.[119] Laws and policies that lead to tax expenditures are generally designed to further societal goals, but the MID subsidizes taxpayers who least need it.[120] In

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115. H.R. Rep. No. 115-409, at 479 (2017) (quoting National Association of Home Builders President Granger MacDonald).

116. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(3), 88 Stat. 297, 299 (defining tax expenditures as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability").

117. *Supra* notes 93–99 and accompanying text; *see also* Frederick, *supra* note 14, at 44 ("Numerous studies in government, academics, economics, and law have concluded that the mortgage interest deduction has little impact on homeownership.").

118. Victoria J. Haneman, *Retrenchment, Temporary-Effect Legislation, and the Home Mortgage Interest Deduction*, 71 Okla. L. Rev. 347, 366 (2019).

119. Cong. Budget Off., s*upra* note 103, at 7 ("The provisions of law that lead to tax expenditures are generally designed to further societal goals.").

120. Will Fischer & Chye-Ching Huang, *Mortgage Interest Deduction Is Ripe for Reform*, Ctr. on Budget & Pol'y Priorities 2–3 (June 25, 2013), https://www.cbpp.org/sites/default/files/atoms/files/4-4-13hous.pdf [https://perma.cc/4HAW-EHX6] ("Data from the Census Bureau's American Housing Survey show that in 2011, 10.5 million homeowners faced what HUD calls 'severe housing cost burdens,' meaning they paid more than half of their income for housing. Some 90 percent of those homeowners (and about 40 percent of all homeowners) had incomes below $50,000, yet JCT estimates for 2012 show that homeowners with incomes below that level received only 3 percent of the benefits from the mortgage interest deduction. At the same

addition to subsidizing the wealthier households, it is one of the largest federal tax expenditures costing billions of dollars annually.[121]

As the primary responsibility of the tax burden should be borne by wealthier taxpayers, the MID reforms in TCJA took a definite turn in the right direction, but they did not go far enough.[122] Even with the new limitations to mortgages of $750,000 or less, the MID will continue to cost billions in tax expenditures.[123] Policies to encourage and facilitate home ownership may be generally desirable, but methodologies used to incentivize homeowners should be designed to target only middle- and low-income taxpayers and the MID has been ineffective for this purpose. The reduction to the mortgage limit was a positive step, but not enough to negate the billions in government expenditures and the regressive effects of the deduction. For these reasons, and more, the MID should be abolished.

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time, 77 percent of the benefits from the mortgage interest deduction went to homeowners with incomes above $100,000, almost none of whom face severe housing cost burdens. Some 35 percent of the benefits went to homeowners with incomes above $200,000; taxpayers in this income group who claimed the deduction received an average subsidy of about $5,000.").

121. *Id*. at 1 ("Costing at least $70 billion a year, the mortgage interest deduction is one of the largest federal tax expenditures, but it appears to do little to achieve the goal of expanding homeownership.").

122. Tax Pol'y Ctr., *supra,* note 45, at 372 ("The OTA estimates that the mortgage interest deduction cost about $25.1 billion in fiscal year 2019. Prior to enactment of the TCJA, OTA estimated that the cost of the mortgage interest deduction would have been $74.5 billion in fiscal year 2018. The estimated cost fell largely because other provisions of TCJA resulted in many fewer taxpayers itemizing their deductions and in small part because of the lower cap on deductible mortgage interest. The Urban-Brookings Tax Policy Center estimates that only about 8 percent of tax units benefited from the deduction in 2018, compared to about 20 percent in 2017, prior to the TCJA.").

123. *See* Joint Comm. on Tax'n, 116th Cong., JCX-23-20, Estimates of Federal Tax Expenditures for Fiscal Years 2020–2024 (2020) (post-TCJA expenditure for the mortgage interest deduction is an estimated $25.5 billion for fiscal year 2020).

III. The Overall Impact of TCJA on Income and Wealth Inequalities

A. Income Inequality

Income inequality may be described and analyzed in different ways. The Congressional Budget Office (CBO) discussed income inequality in terms of household income growth and tax treatment of income.[124] The CBO analysis found that inequality has increased as wages and salaries have grown faster for the top tenth than for the rest of all other household distributions.[125] They also found that capital gains income was highly concentrated amongst the top income households.[126]

Professor James Puckett discussed income inequality as it relates to tax rates, specifically preferences attributed to long-term capital gain property.[127] In his article, he examined research conducted by the IRS that concluded the average income tax rate declined for taxpayers in the

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124. Cong. Budget Off., Projected Changes in the Distribution of Household Income, 2016 to 2021 (2019), https://www.cbo.gov/system/files/2019-12/55941-CBO-Household-Income.pdf [https://perma.cc/EGW7-NL5J].

125. *Id.* at 10 ("Over the past few decades, inequality in wages (including salaries) has grown as the wages of the top decile (or tenth) of wage earners have grown faster than those of the rest of the distribution. . . . Even within the top decile, inequality has increased because the growth of the average wages of earners in the top 1 percent, which has been correlated with the business cycle, has outpaced the growth of average wages of all other wage earners. That gap in growth has, however, narrowed in the past decade.").

126. *Id.* at 9–11 ("In 2016, capital gains accounted for less than 2 percent of the total income of households in the bottom 99 percent of the income distribution and for 22 percent of the total income of households in the top 1 percent of the distribution. On the basis of analysis of recent trends, CBO projects that capital gains will grow at an annual average rate of 6.3 percent per household. That growth disproportionately increases income for households toward the top of the distribution in the agency's projections.").

127. James M. Puckett, *Improving Tax Rules by Means-Testing: Bridging Wealth Inequality and "Ability to Pay,"* 70 Okla. L. Rev. 405 (2018).

top 1% and even more for the top .001%.[128] He further reports the top 400 taxpayers have experienced effective tax rates at less than 20%.[129]

Professor Stiglitz has discussed income inequality in terms of income concentration and mobility,[130] including describing how income mobility increased for the "ultra-high income earners" in the top one percent after the Great Recession.[131] On the other hand, he described how the time period following the Great Recession resulted in more people in poverty and the middle class income declined.[132] He also described how tax preferences for capital gains and dividend income distort the economy, contribute to the deficit through tax expenditures, and contribute to income inequality.[133]

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128. *Id.* at 409 ("Recent IRS analysis concluded that in 2013, much like prior years, the average income tax rate *declined* from approximately 27% within the top 1% of incomes overall to approximately 24% at the top .001% of incomes. The top 400 taxpayers have sometimes paid an effective rate of less than 20%. Differences between the top tiers are substantial: the top 1% had an average adjusted gross income (AGI) of $428,713, while the top .001% had an average AGI of over $45 million." (footnotes omitted)).

129. *Id.*

130. Stiglitz, *supra* note 5; Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers our Future*, *in* Sustainable Humanity: Sustainable Nature: Our Responsibility 379 (Partha S. Dasgupta et al. eds., 2015), http://www.academiadasciências.va/content/dam/accademia/pdf/es41/es41pas-acta19pass.pdf.

131. Stiglitz, *supra* note 130, at 380 ("Since the so-called recovery began after the Great Recession of 2008-2009—in other words, since the U.S. economy returned to growth—*95% of the gains in income* have gone to the top 1%. Even within the top 1%, there is inequality, with ultra-high income earners in the top 0.1% taking home some 11.3% of total income in 2012, which is some three to four times the number thirty years ago." (footnotes omitted)).

132. *Id.* at 381 ("Equally disturbing, there has been a hollowing out of the middle class—long the core strength of the societies of countries with advanced economies—which has seen its income stagnate. Median household income in the United States, adjusted for inflation, is lower today than it was in 1989, a quarter century ago. For large segments of the American population, matters are even worse. A full-time male worker today makes less than 40 years ago. This recession has made the plight of those in the bottom and middle far worse.").

133. *Id.* at 393 ("In the United States, the special provisions for capital gains and dividends not only distort the economy, but, with the vast

Under all scenarios, tax policy has played a role. Historically, tax reforms, tax preferences, and reduced tax rates have primarily benefitted high-income taxpayers and ultimately contributed to income and wealth inequalities. Earlier parts of this Article discussed several tax acts and their contributions to income and wealth inequalities thorough the use of tax preferences,[134] reduced rates,[135] and deductions.[136]

Other tax acts for discussion include the Revenue Act of 1921, which is the first tax act that reduced tax rates for capital gains property.[137] This is significant because it set the stage for providing preferential tax treatment for capital gains, and capital gains property is predominantly associated with high-income taxpayers.[138] Preferential tax treatment for capital gains reduces tax liability for the wealthy and distorts the progressive rate structure.[139]

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majority of the benefits going to the very top, increase inequality at the same time that they impose enormous budgetary costs: $2 trillion dollars over the next ten years, according to the Congressional Budget Office.").

134. *See supra* notes 126–142 and accompanying text.

135. *See supra* notes 37–52, 126–142, and accompanying text.

136. *See supra* notes 85–104 and accompanying text.

137. Revenue Act of 1921, Pub. L. No. 67-98, § 206(b), 42 Stat. 227, 233 (1921); *see also* Gregg A. Esenwein, Cong. Rsch. Serv. Report 98-473, Individual Capital Gains Income: Legislative History 3 (Apr. 11, 2007) ("The Revenue Act of 1921 marked a significant change in the tax treatment of capital gains income. For the first time, capital assets were specifically defined in the individual income tax code and were separated into long and short term assets. Assets held longer than two years were considered long-term while assets held two years or less were considered short-term. Gains on short-term assets were included in income and taxed at normal tax rates. Losses on short-term assets were deductible against ordinary income. Net gains on long-term assets were, at the taxpayer's election, subject to a flat tax of 12.5% instead of taxes assessed at the regular and surtax rates.").

138. Taite, *supra* note 2, at 1028 ("The record reflects that the wealthiest taxpayers have received the majority of the benefits from capital gains for over ninety years.").

139. *Id.* at 1032 ("As a consequence, preferential tax treatment of capital gain and other property frustrates the progressive tax structure. The effective rates that the wealthiest taxpayers enjoy are approximately the same or less than the marginal rate imposed on the middle and lower quintile taxpayers. Because of this distortion, the marginal rate schedule does not accurately reflect the actual tax responsibility for the wealthiest taxpayers.").

As previously mentioned, ERTA reduced the top marginal tax rate from 70% to 50% and also reduced the long-term capital gains rate to 20%.[140] These and other tax acts created a pattern of providing tax benefits to the wealthy, which positively impacted their income share. In terms of income mobility, the top income households experienced a rapid growth in their income share over time while the lowest income households saw a small increase, if any.[141] While the income growth attributed to capital gains were subject to market fluctuations, the top income households netted an increase in their income share and overall wealth.[142]

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140. *See Tax Rates History*, *supra* note 26.

141. Cong. Budget Off., Trends in the Distribution of Household Income Between 1979 and 2007, at 2 (2011), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/10-25-householdincome0.pdf [https://perma.cc/5C8U-TKMM] ("The distribution of after-tax income (including government transfer payments) became substantially more unequal from 1979 to 2007 as a result of a rapid rise in income for the highest-income households, sluggish income growth for the middle 60 percent of the population, and an even smaller increase in after-tax income for the 20 percent of the population with the lowest income." (footnotes omitted)); *see also* Robert Carroll, *Income Mobility and the Persistence of Millionaires, 1999 to 2007*, Tax Found. 2 (June 2010), https://files.taxfoundation.org/legacy/docs/sr180.pdf [https://perma.cc/9UUX-NHES] ("The share of income reported by the top 1 percent of taxpayers rose from 10.0 percent in 1980 to 23.5 percent in 2005.").

142. Cong. Budget Off., *supra* note 141, at 3 ("Average real after-tax household income for the 1 percent of the population with the highest income grew by 275 percent between 1979 and 2007. . . . Average real after-tax income for that group has been quite volatile: It spiked in 1986 and fell in 1987, reflecting an acceleration of capital gains realizations into 1986 in anticipation of the scheduled increase in tax rates the following year. Income growth for the top 1 percent of the population rebounded in 1988 but fell again with the onset of the 1990–1991 recession. By 1994, after-tax household income was 50 percent higher than it had been in 1979. Income growth surged in 1995, averaging more than 11 percent per year through 2000. After falling sharply in 2001 because of the recession and stock market drop, average real after-tax income for the top 1 percent of the population rose by more than 85 percent between 2002 and 2007.").

B. Wealth Inequality

While income inequality is a major factor in wealth inequality, these are separate and distinct concepts.[143] Wealth is measured by net worth, and wealth inequality is described as wealth accumulated by the wealthiest households compared to wealth accumulated by the lowest income households.[144] Similar to income, wealth is concentrated among a small percentage of households,[145] and wealth inequality has significantly increased over the years.[146] On the other hand, wealth inequality encompasses a broader scale of inheritance, laws, economics, and tax policy.[147]

Professors Paul Caron and James Repetti discussed how wealth inequality may pass generationally and lead to unfair advantages and disadvantages and how children's income will be comparable to their

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143. Saez & Zucman, *supra* note 4, at 3 ("Income inequality has a snowballing effect on the wealth distribution: top incomes are being saved at high rates, pushing wealth concentration up; in turn, rising wealth inequality leads to rising capital income concentration, which contributes to further increasing top income and wealth shares. Our core finding is that this snowballing effect has been sufficiently powerful to dramatically affect the shape of the US wealth distribution over the last 30 years.").

144. *See id.* at 6, 22.

145. Edward N. Wolff, *Household Wealth Trends in the United States in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?* 9 (Nat'l Bureau Econ. Rsch., Working Paper No. 24085, 2017), https://www.nber.org/papers/w24085.pdf [https://perma.cc/8AQW-E79A] ("Net worth is highly concentrated, with the richest 1 percent (as ranked by wealth) owning 39.6 percent of total household wealth in 2016 and the top 20 percent owning 89.9 percent. . . .").

146. Saez & Zucman, *supra* note 4, at 1 ("On the basis of new, annual, long-run series, we find that wealth inequality has considerably increased at the top over the last three decades. By our estimates, almost all of this increase is due to the rise of the share of wealth owned by the 0.1% richest families, from 7% in 1978 to 22% in 2012, a level comparable to that of the early twentieth century.").

147. *Id.* at 4 ("Despite our best effort, we stress that we still face limitations when measuring wealth inequality. The development of the offshore wealth management industry, changes in tax optimization behaviors, indirect wealth ownership (e.g., through trusts and foundations) all raise challenges."); *see also* Stiglitz, *supra* note 5.

parents' income.[148] Professor Stiglitz described how wealth inequality is more concentrated than income inequality with the top one percent owning more than 35% of the wealth.[149] He posits that inequalities are derived from economic, legal, and tax policies.[150] Professor Ray Madoff asserts that our current income tax system favors inherited wealth over earned income.[151] She argues that excluding inherited wealth as income, no matter the amount, shifts the tax burden to wage earners.[152] Further, Professor Madoff explains that inherited wealth has also benefitted from zero taxation upon the sale of capital property because of the basis increase through Code section 1014, which eliminated the income tax that would ordinarily have been due when the property sold.[153]

Additionally, wealth transfer tax policies contribute to wealth inequality. EGTRRA had one of the greatest impacts on wealth inequality by significantly reducing tax rates on estates and increasing the exemption amounts.[154] Under EGTRRA, the exemption amount increased from $1,500,000 to $3,500,000 between 2004 and 2009.[155] At that time, it represented the largest increase, in amount and percentage, of an exemption amount since the inception of the estate tax.[156] As noted earlier, TRUIRJCA followed EGTRRA and further increased the

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148. Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 Pepp. L. Rev. 1255, 1262 (2013).

149. Stiglitz, *supra* note 130, at 380.

150. *Id.* at 383 ("Every aspect of our economic, legal, and social frameworks helps shape inequality: from the education system and how it is financed, to the health system, to tax laws, to our governing of bankruptcy, corporate governance, the functioning of our financial system, to our antitrust laws. In virtually every domain, the United States, for instance, has made decisions that help enrich the top at the expense of the rest.").

151. Ray D. Madoff, *Considering Alternatives: Are There Methods Other Than the Estate and Gift Tax That Could Better Address Problems Associated with Wealth Concentration?*, 57 B.C. L. Rev. 883, 885 (2016).

152. *Id.*

153. *Id.* at 885–86.

154. Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L. No. 107-16, § 501(a), 115 Stat. 38, 69.

155. *Id.*

156. Patrick Fleenor, *A History and Overview of Estate Taxes in the United States*, Tax Found. (Jan. 1994), https://files.taxfoundation.org

exemption amount of both the estate and gift taxes to five million dollars, adjusted for inflation.[157] In 2009, America was in the middle of recession and instead of expanding the base and increasing tax liability on the wealthy, lawmakers allowed substantial tax breaks for the very wealthy.[158] These continuous patterns of regressive tax laws contributes to income and wealth inequality and continues to plague America.[159]

Research supports treating as fact that inequality has a negative effect on economic growth.[160] Continuing to ignore the impact wealth and income inequality has on the United States keeps us in the state of wealth concentration and economic inefficiency.

/legacy/docs/f7c34848582a114133f90711b50b9a3a.pdf [https://perma.cc/LKZ8-LMZ7].

157. *See supra* notes 48–51 and accompanying text.

158. Phyllis C. Smith, *Change We* Can't *Believe In . . . or Afford: Why the Timing Is Wrong to Reduce the Estate Tax for the Wealthiest Americans*, 42 U. Mem. L. Rev. 493, 513–14 (2012) ("By failing to act on the sunset provisions of EGTRRA, the lawmakers allowed the 2010 estate tax repeal to transpire, exacerbating the budget shortfall. This failure to take action is almost egregious considering that the country was in the heart of a great economic recession. Historically, this would have been the perfect time to not only ensure an estate tax was in place, but also to raise the top marginal rate and reduce the exemption, an amount which had just increased in 2009 from $2 million to $3.5 million. Instead, lawmakers did the opposite through their inaction and lost the opportunity to raise much needed revenue.").

159. Saez & Zucman, *supra* note 4, at 3 ("[W]ealth inequality is making a comeback, with the top 0.1% wealth share almost as high in 2012 as in the 1916 and 1929 peaks and three times higher than in the late 1970s"); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 Or. L. Rev. 453, 459 (2010) ("To start, wealth inequality in the United States is significantly greater than income inequality. In 2004–2005, for example, the top 20% of the income distribution received 47.7% of total income but held 84.4% of total wealth."); *see also* Puckett, *supra* note 127 (discussing the importance of achieving fairness in tax policy in support of economic equality).

160. Caron & Repetti, *supra* note 148, at 1266 ("There is substantial empirical evidence suggesting that inequality has a long-term negative impact on economic growth. A 1999 survey of the studies stated that 'several studies have examined the impact of inequality upon economic growth.'" (footnotes omitted) (quoting Philippe Aghion et al., *Inequality and Economic Growth: The Perspective of New Growth Theories*, 37 J. Econ. Lit. 1615, 1617 (1999)).

C. The TCJA and Income and Wealth Inequality

As previously discussed, reports and scholars have demonstrated that income inequality is measured by the earning power of a dollar and how income is distributed across the income spectrum, and wealth inequality is based on the ability to accumulate wealth. The commonality that binds the research is tax policy. Fair tax policy should be progressive and promote income and wealth equality, among other goals. The current tax system does not adequately exhibit these qualities, and policies under the TCJA exacerbated existing inequalities.[161]

The contribution of tax policies, and more specifically, the TCJA, were previously discussed in earlier parts of this Article.[162] To summarize, the progressive schedule is negated by regressive effects created by deductions, tax expenditures, preferential rates on capital gains property, reduction in exemption amounts, and the failure to capture capital gains taxes in property transferred at death.[163]

Admittedly, the MID reforms implemented in the TCJA took a step in the right direction but did not go far enough.[164] In a prior Article, I proposed reform similar to the MID provisions implemented in the TCJA.[165] That proposal was made before the standard deduction was increased, which significantly changed the profile of the taxpayer who would itemize. After the TCJA, a taxpayer filing as head of household would likely need a mortgage in excess of $400,000 to generate enough interest to guarantee deductibility.[166] As such, taxpayers in the highest income households will be the primary beneficiaries of this tax subsidy.[167]

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161. There are numerous provisions in the TCJA that should be reformed or abolished. This Article has intentionally focused on a select few.

162. *See supra* notes 37–52 and accompanying text.

163. *See supra* notes 53–66 and accompanying text.

164. *See supra* notes 105–123 and accompanying text.

165. Taite, *supra* note 97, at 378–89.

166. Haneman, *supra* note 118, at 366.

167. *Id.* at 367 ("It is therefore unsurprising that the home mortgage interest deduction has always been regressive in its delivery of the homeownership subsidy. Before the TCJA, the benefit from the deduction flowed as follows: 84% (or $54.63 billion) to households with more than $100,000 in income; and 45.86% to households with incomes over $200,000. After TJCA, it is projected that the benefit from the deduction will flow as follows: 88% (or

These regressive effects are directly related to both income and wealth inequalities as the tax burden has been shifted from high-income taxpayers to lower income taxpayers historically and, most recently, by the TCJA. Further, the tax cuts and extraordinary increases in the exemption amounts for transfer taxes from EGTRRA to TCJA have contributed to wealth concentration when transfer tax reform should instead hinder wealth concentration through aggressive progressive tax policies and expansion of the estate tax base.[168]

The estate tax is only a few steps away from an effective repeal, if not a complete repeal.[169] The TCJA estate tax provisions are scheduled to sunset in the year 2026.[170] Looking at the historical treatment of the estate tax, Congress is more likely to retain or increase the exemption amounts rather than allowing a sunset to prior rates. Continuing the trend of tax policies that encourage and enforce wealth concentration does not facilitate income or wealth equality.[171] In the TCJA, these tax laws continue to exacerbate wealth and income inequality and should be repealed.

$28.07 billion) to households with more than $100,000 in income; and 57.73% to households with over $200,000.").

168. Saez & Zucman, *supra* note 4, at 23 ("The losses experienced by the wealthiest families from the late 1920s to the late 1970s were so large that in 1980, the average real wealth of top 0.01% families ($44 million in constant 2010 prices) was half its 1929 value ($87 million). It took almost 60 years for the average real wealth of the top 0.01% to recover its 1929 value—which it did in 1988. These results confirm earlier findings of a dramatic reduction in wealth concentration and capital income concentration in the 1930s and 1940s. As these studies suggested, the most likely explanation is the drastic policy changes of the New Deal. The development of very progressive income and estate taxation made it much more difficult to accumulate and pass on large fortunes." (citations omitted)).

169. Jennifer Bird-Pollan, *Revising the Tax Law: The TCJA and Its Place in the History of Tax Reform*, 45 Ohio N.U. L. Rev. 501, 505, 507 (2019).

170. *See generally* H.R. Rep. No. 115-409.

171. Stiglitz, *supra* note 130, at 387 ("An economic system that only delivers for the very top is a failed economic system.").

Conclusion

Making tax policy great again does not equate to providing the "largest tax cut in the history of our country" to the wealthiest taxpayers.[172] Tax policy is a direct reflection of political priorities and should reflect societal goals. As our government leaders discuss and implement policy goals, they should consider how these laws will impact the people and, more specifically, how wealth and income equality will be impacted. While attention is often directed towards perceived progressive policies and tax cuts for the multitudes, the quiet threat is hidden in the confusion of deductions and preferential rates as provided in the TCJA. The TCJA requires massive reforms to reverse the regressiveness tax policies have enabled.

With tax legislation's established history of regressiveness, it is long overdue to reboot and overhaul our tax system with policies that benefit the majority of taxpayers. With each new tax act, a more progressive system should emerge as new laws should negate the current regressive laws. Implementing laws that contribute to the national debt and primarily benefit the wealthiest taxpayers has not promoted an economically healthy society.

While the early tax provisions may not have focused expressly on issues of wealth concentration nor income inequality, the tax burden was clearly levied on high-income taxpayers. Moving back to this model of tax responsibility would have the collateral benefit of addressing years of wealth and income inequality that has contributed to wealth concentration. Our tax policies must change to address the wealth concentration crisis because a democracy is not sustainable when the bulk of the wealth remain in the hands of a few. Tax burdens should shift to taxpayers who have historically benefitted the most from tax policy, the wealthiest Americans. Placing the tax burden on the wealthiest households would take us back to when tax policy was great—when there was recognition that taxpayers with the most wealth had a duty to bear the greatest tax burden.

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172. BBC News, *supra* note 12.