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RETRENCHMENT, TEMPORARY-EFFECT LEGISLATION, AND THE HOME MORTGAGE INTEREST DEDUCTION

VICTORIA J. HANEMAN[*]

There are several sacred cows in the Internal Revenue Code,[1] but perhaps none quite as sacrosanct as the home mortgage interest deduction.[2] U.S. Treasury Secretary Steve Mnuchin has characterized the mortgage interest deduction as so beloved by the American people that it is "kind of like apple

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1. *Sacred Cow*, POL. DICTIONARY, https://politicaldictionary.com/words/sacred-cow/ (last visited May 9, 2018) ("A program, policy, or person that is regarded as being beyond attack or untouchable. The term references the status held by cows in Hindu culture, where the cow is regarded as a sacred animal. In American politics, Social Security has been considered a sacred cow because it is so politically popular that most politicians would never support ending the program."); *see also* Richard Rubin, *Talking Taxes: The Sacred Cows of the Tax Code*, WALL ST. J. (Oct. 4, 2017, 5:30 A.M. ET), https://www.wsj.com/articles/talking-taxes-the-sacred-cows-of-the-tax-code-1507109402 (referencing other sacred cow tax provisions, including "employer-sponsored health insurance, state and local taxes, . . . and charitable donations").

2. James A. Fellows, *Tax Issues*, 41 REAL EST. L.J. 338, 338 (2012) ("There is probably no tax deduction more sacred to individual taxpayers than the deduction for interest paid on their home mortgages. Advocating the elimination of this deduction is tantamount to political suicide, much like advocating the reform of Medicare and Social Security payments. Oddly, the U.S. remains the only developed country that allows the deduction unconditionally. Nearly all the others have abolished the deduction. Only the Netherlands and Switzerland allow the deduction, but both countries first require taxpayers to increase taxable income by a percentage of the value of the property, a so-called 'notional rental value,' thereby negating much of the deduction's value.").

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pie."[3] It is not an overstatement to suggest that a threat to this deduction has been perceived as a direct assault upon the middle-class dream of homeownership:[4] in a 2011 Gallup survey, 61% of Americans were opposed to the elimination of the deduction, even when it was framed in the context of a tax rate or deficit reduction.[5] Reform of the home mortgage interest deduction has been described as the third rail of tax reform, in that "touching the [mortgage interest deduction] is not just treasonous but ruinous."[6] That is, until December 22, 2017 when the Tax Cuts and Jobs Act of 2017 (TCJA) was enacted.

A deduction for interest paid on personal indebtedness, including mortgage interest, has a long history that dates back to the inception of modern U.S. tax law—one of the original itemized deductions allowed under the 1913 Revenue Act.[7] When all other forms of personal interest were rendered nondeductible, the deduction of home mortgage interest was explicitly blessed by the Revenue Act of 1986, with the overlay of the Revenue Act of 1987. The legislation rendered personal interest nondeductible while carving out an exception for the deduction of qualified residence interest—specifically, interest associated with up to "$1 million of

3. Prashant Gopal & Joe Light, *25 Million Americans Could Find Mortgage Tax Break Useless Under Trump's Plan*, BLOOMBERG (May 16, 2017, 4:00 AM CDT), https://www.bloomberg.com/news/articles/2017-05-16/trump-tax-plan-would-make-mortgage-break-worthless-for-millions.

4. *See* G.I., *Don't Defend This Deduction*, ECONOMIST (Sept. 13, 2010), https://www.economist.com/blogs/freeexchange/2010/09/mortgage_interest_deduction [hereinafter *Don't Defend This Deduction*] ("I JUST got an email from Nancy Pelosi's press office lambasting John Boehner for wanting to eliminate 'tax relief benefiting millions of middle-class families' by scrapping the mortgage interest deduction."); David Streitfeld & Megan Thee-Brenan, *Despite Fears, Owning Home Retains Allure, Poll Shows*, N.Y. TIMES (June 29, 2011), http://www.nytimes.com/2011/06/30/business/30poll.html?scp=1&sq=homeownership&st=cse ("Nearly nine in 10 Americans say homeownership is an important part of the American dream, according to the latest New York Times/CBS News poll. . . . [A]nd almost no one favors discontinuing the mortgage tax deduction, a prized middle-class benefit that has been featured on some budget-cutting proposals.").

5. Jeffrey M. Jones, *Americans Oppose Eliminating Income Tax Deductions*, GALLUP (Apr. 15, 2011), http://www.gallup.com/poll/147125/americans-oppose-eliminating-income-tax-deductions.aspx. In a poll conducted by the New York Times and CBS News, more than 90% of Americans were opposed to the elimination of the deduction. Streitfeld & Thee-Brenan, *supra* note 4.

6. Dennis J. Ventry Jr., *The Fake Third Rail of Tax Reform* 181 (UC Davis Legal Studies Research Paper Series, Research Paper No. 289, 2012).

7. Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 114, 167.

acquisition indebtedness" and $100,000 of home equity indebtedness[8] on the taxpayer's primary and secondary residence.[9] Any interest paid in excess of these upward limits became nondeductible personal interest.[10] These rules changed when the TCJA was passed by the U.S. House of Representatives and Senate on December 20, 2017, and signed into law by President Trump on December 22, 2017.[11] Taxpayers with existing mortgages (incurred before December 15, 2017) remain grandfathered under old law, and may deduct interest on a total of $1 million debt for a first and second home. For new homeowners, however, the $1 million limit drops to $750,000. Interest attributable to home equity indebtedness is nondeductible for all homeowners as of January 1, 2018.[12] These rules expire on December 31, 2025, at which time limits will revert to pre-TCJA levels.

Economists generally agree that the home mortgage interest deduction is a terrible idea, and so the notion of elimination or substantial revision of the home mortgage interest deduction is not without substantial support from a tax policy perspective.[13] The home mortgage interest deduction is vulnerable

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8. William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43, 47–48 (1996). A home equity loan must be secured by the residence and is generally incurred after the taxpayer acquires a home (thereby excluding debt used to purchase or construct the home). *Id.* at 47. Prior to January 1, 2018, §§ 163(h)(3)(A)(ii) & (C) provided a deduction for interest paid on home equity indebtedness up to $100,000. *See* Tax Cuts and Jobs Act of 2017, sec. 11043, § 163(h)(3), Pub. L. No. 115-97, 131 Stat. 2054, 2086.

9. Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 511, § 163 (h)(5)(A)(i)(II), 100 Stat. 2085, 2248; *see also* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, Sec. 10102, § 163(h)(3), 101 Stat. 1330, 1330-384 to -386 (amending I.R.C. § 163(h)(3)). This law modified the Tax Reform Act of 1986 with regard to qualified residence interest.

10. H.R. REP. NO. 100-391, pt. 2, at 1031-32 (1987).

11. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

12. I.R.S. News Release IR-2018-32 (Feb. 21, 2018), https://www.irs.gov/newsroom/interest-on-home-equity-loans-often-still-deductible-under-new-law (clarifying that under new law, a taxpayer "can often still deduct interest on a home equity loan, home equity line of credit (HELOC) or second mortgage, regardless of how the loan is labelled . . . [as long as the loan proceeds] are used to buy, build or substantially improve the taxpayer's home that secures the loan").

13. *See, e.g.*, *Don't Defend This Deduction*, *supra* note 4 ("If you must defend a tax break, find a different one. The mortgage interest deduction (MID) is truly one of the worst, most pernicious features of our income tax code. Not only does it encourage excessive investment in homes, it encourages doing it with debt. The MID didn't cause our crisis—after all, it's been around since 1986 when the deductibility of almost all other types of interest was eliminated. But it is symptomatic of our fondness for endless subsidies and distortions to promote home ownership, which did ultimately produce our crisis."); *All*

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to criticism because it is an example of an upside-down housing subsidy[14]—overwhelmingly benefitting wealthy taxpayers, with little benefit to most middle-income taxpayers,[15] and no benefit to low-income taxpayers.[16] This is a problematic allocation of resources given that the home mortgage interest deduction is the largest subsidy offered by the federal government to homeowners, and also one of the largest tax expenditures in the Internal Revenue Code.[17] Further, indirectly subsidizing homeownership through the

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Things Considered: Is Tax Deduction for Home Mortgages a Bad Idea?, NAT'L PUB. RADIO (Nov. 22, 2009 5:10 PM ET), http://www.npr.org/templates/story/story.php?storyId =120668836 (suggesting that there are no economists who would claim the mortgage interest deduction is good for the economy, other than those who are employed by the National Association of Realtors); Andrew Chamberlain, *The Case Against the Home Mortgage Interest Deduction*, TAX FOUND. (Sept. 24, 2005), https://taxfoundation.org/case-against-home-mortgage-interest-deduction/ (stating that despite the popularity of the home mortgage interest deduction, "economists are basically united in their opposition to it"); Max Ehrenfreund, *There's Good News for Well-off Homeowners in the GOP Presidential Campaign*, WASH. POST: WONKBLOG (July 6, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/07/06/theres-good-news-for-well-off-homeowners-in-the-gop-presidential-campaign/?utm_term=.c7291edefcc8 (asserting that "many economists say [the mortgage interest deduction] is among the biggest and most problematic in the tax code").

14. David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 977 (2004) ("Upside-down subsidies are created because the value of tax deductions increases with the marginal tax rate, so that wealthy individuals with high marginal tax rates will receive more for a given deduction than individuals with lower incomes and lower marginal tax rates. If one views tax expenditures as equivalent to the government handing out money, wealthy individuals get bigger handouts than the poor.").

15. Anthony Randazzo & Dean Stansel, *Mortgage Interest Deduction Saves Middle Class Taxpayers All Of $51/Month*, FORBES (Dec. 18, 2013, 8:00 AM), https://www.forbes.com/sites/realspin/2013/12/18/mortgage-interest-deduction-saves-middle-class-taxpayers-all-of-51month/#326ae7e1105c (finding that on average, middle-class homeowners saved only $51.25 in taxes per month in 2012 thanks to the mortgage interest deduction).

16. *See id.* A married couple would need a home-loan balance of at least $560,000, *see infra* Part III, tbl. 2, which is more than double the median-priced U.S. home in the United States (of $216,000), Gopal & Light, *supra* note 3 ("U.S. Treasury Secretary Steven Mnuchin has taken pains to stress that the Trump administration isn't out to kill Americans' beloved mortgage-interest tax deduction–but a side effect of the plan could turn it into a perk for only the wealthy. President Donald Trump has proposed rewriting the tax code to raise the standard federal deduction to a level where about 25 million homeowners would no longer take advantage of the century-old break."). A lower-income taxpayer would be unable to benefit from this, for they would be unable to afford the $560,000 mortgage-balance threshold.

17. Brian J. McCabe, *Despite Benefit Disparities, Middle Class Supports Mortgage Deduction*, FIVETHIRTYEIGHT (July 13, 2011, 4:04 PM), https://fivethirtyeight.com/features/despite-benefit-disparities-middle-class-supports-mortgage-deduction/.

https://digitalcommons.law.ou.edu/olr/vol71/iss2/2

direct subsidization of debt[18] normatively deemphasizes the importance of equity, stymying economic growth, worsening inequality, and creating systemic fragility.[19]

And though the change to § 163 may not seem significant by its own terms, its interaction with other amendments of the Internal Revenue Code will result in profound change: the reduction of the home mortgage interest cap to $750,000 from $1 million will interact with the provision capping state and local property, sales, and income tax at $10,000, and the almost-doubled standard deduction. The direct effect will be fewer homeowners itemizing their home mortgage interest deduction: an estimated 44% of taxpayers received the benefit of the home mortgage interest deduction under prior law,[20] and it is anticipated that this number will drop to less than 15%.[21] The cost of the home mortgage interest deduction (in terms of foregone revenue) before the TCJA was estimated by the Joint Committee on Taxation to be $83.4 billion (in 2017 for fiscal year 2020),[22] with a revised estimate post-TCJA reducing this number to $36.9 billion (in 2018 for fiscal year 2020).[23]

Notably, the Tax Cuts and Jobs Act of 2017 continues a trend of temporary lawmaking—the changes to the home mortgage interest deduction expire in eight years unless extended by Congress.[24] Though the

18. *The Great Distortion*, ECONOMIST (May 16, 2015), https://www.economist.com/news/leaders/21651213-subsidies-make-borrowing-irresistible-need-be-phased-out-great-distortion ("[A] vast distortion in the world economy is wholly man-made. It is the subsidy that governments give to debt.").

19. *Id.* ("Economies biased towards debt are more prone to crises, because debt imposes a rigid obligation to repay on vulnerable borrowers, whereas equity is expressly designed to spread losses onto investors.").

20. Svenja Gudell, *Tax Reform with $750k Cap on Mortgage Interest Deduction Would Leave 1 in 7 U.S. Homes Ineligible*, FORBES (Dec. 18, 2017), https://www.forbes.com/sites/zillow/2017/12/18/tax-reform-with-750k-cap-on-mortgage-interest-deduction-would-leave-1-in-7-u-s-homes-eligible/#332269365983.

21. *Id.* (stating that the number of homes valuable enough to justify itemizing mortgage interest deduction varies dramatically from county to county, and state to state: in Washington, D.C. the number drops from 98% to 64%; in Los Angeles, the number drops from 94% down to 48%; in the city of Cleveland and some surrounding suburbs, the number drops from 21% to 3%).

22. STAFF OF JOINT COMM. ON TAXATION, 154TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016-2020, at 32 (Comm. Print 2017) [hereinafter ESTIMATES OF FEDERAL TAX EXPENDITURES: 2016-2020].

23. STAFF OF JOINT COMM. ON TAXATION, 155TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2017-2021, at 37 (Comm. Print 2018) [hereinafter ESTIMATES OF FEDERAL TAX EXPENDITURES: 2017-2021].

24. Temporary legislation refers simply to legislation that has a beginning date and a terminating date. I toyed with more visual or creative alternatives, such as ephemeral

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implementation of temporary fiscal policy is certainly not new, the use of sweeping temporary-effect tax provisions[25] truly came into vogue with the Economic Growth and Tax Relief Reconciliation Act of 2001 (TRA 2001).[26] The Republicans used the budget reconciliation process to avoid filibuster and pass TRA 2001—enacting major tax reform that was stacked with phase-ins and sunsets to circumvent budget rules.[27] Additional sunsets were included in the Jobs and Growth Tax Relief Reconciliation Act of 2003, which was set to expire on December 31, 2008.[28] This increased use of temporary-effect tax legislation during the administration of George W. Bush has been the object of scathing critique,[29] with a prevailing view that such legislation is generally little more than a manipulation that allows the cost of legislation to be distorted.[30]

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legislation or deciduous legislation, but decided that the mundane was both concise and complete.

25. In Professor Yin's footnotes, the phrase "temporary-effect legislation" is used instead of "temporary legislation." *See* George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174 (2009). Temporary tax legislation, though temporary in nature, may have cost estimates that exceed the ten-year budget window. This Article focuses specifically on tax legislation with budget effects that do not extend beyond the ten-year budget window.

26. Economic Growth and Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38; Frank Fagan, *The Fiscal Cliff as Reelection Strategy: Rethinking the Temporary Taxation Debate*, 116 W. VA. L. REV. 783, 784 (2014) ("At the beginning of 2000, more than 100 American tax provisions were scheduled to expire, including some of the largest tax cuts in history. Only a decade prior, less than two dozen relatively inconsequential provisions were scheduled to expire. The increase from 1990 to 2000 continued into the following decade: during fiscal year 2011, 251 tax provisions were scheduled to expire.").

27. JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY 59-64 (2005).

28. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

29. *See, e.g.*, Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1051-65 (2011) [hereinafter Kysar, *Lasting Legislation*]; Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 338 (2006) [hereinafter Kysar, *The Sun Also Rises*].

30. Kysar, *Lasting Legislation*, *supra* note 29, at 1054. There are scholars who believe, however, to varying degree and with varying applications, that temporary-effect legislation may be useful. *See, e.g.*, Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007); Jason S. Oh, *The Pivotal Politics of Temporary Legislation*, 100 IOWA L. REV. 1055 (2015) Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656 (2007); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 232-34 (2009).

The purpose of this Article is to parse this issue further, using the recent changes to the home mortgage interest deduction as a framework. In his work on renewal certainty of temporary-effect legislation, Professor Jason Oh identifies four underlying reasons why legislation is enacted on a temporary basis: (1) as a responsive policy tool; (2) to circumvent budgetary and procedural restrictions; (3) in response to transitory circumstances, such as a legislative response to a natural disaster or the housing crisis; (4) in response to strategic concerns.[31] The focus of this Article is the use of temporary-effect legislation for the fourth underlying reason—as a strategic approach to retrench a sacred cow tax provision.[32]

Thus, the thesis is equal parts positive, normative, and prescriptive. The advantages of temporary-effect legislation are examined through the lens of an entrenched tax expenditure, namely the home mortgage interest deduction. This Article models the impact of the home mortgage interest deduction for taxpayers at varying income levels, under both prior and current law. The models untangle some of the excruciating complexity with which almost any tax expenditure operates and provides a powerful opportunity to see the deeper problems with this tax expenditure. A problem is illuminated in that both the previous and present approaches are broken: a pernicious regressive subsidy has been exacerbated, and a drip-feed of upper- and upper-middle-class welfare benefits continues to be delivered through the Internal Revenue Code.[33] Consequently, this Article explores the anathema of temporariness as a retrenchment device to fix this tax expenditure, and balances the negative externalities that flow from renewal uncertainty against long-term policy implications.

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31. Oh, *supra* note 30, at 1075.

32. Entrenchment, as a concept, may be either hard or soft. Hard (or formal) legislative entrenchment is when legislation explicitly impedes or binds a subsequent legislature, and there is considerable scholarly discussion as to whether or not such action is constitutional. Soft (or functional) entrenchment, by way of contrast, usually refers to rules or mechanisms inherent in the process that are designed to impede (but not technically bind) a subsequent legislature (e.g. the filibuster). Michael Doran, *Legislative Entrenchment and Federal Fiscal Policy*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 27, 28 (focusing also on another type of soft legislative entrenchment: specifically, when policy status quo has developed because of popular public opinion and expectations).

33. Sixty percent of those who claim the home mortgage interest deduction believe that they have never used a government program. Derek Thompson, *The Shame of the Mortgage-Interest Deduction*, ATLANTIC (May 14, 2017), https://www.theatlantic.com/business/archive/2017/05/shame-mortgage-interest-deduction/526635/ (concluding that "rich households can be skeptical of public-housing policies while benefiting from a $71 billion annual tax benefit which is, functionally, a public-housing policy for the rich").

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A brief overview of housing finance generally is provided in Part I of this Article. Part II tracks pre-2018 tax law applicable to home mortgage interest, as well as the changes effective on January 1, 2018, and explores the upside-down way in which homeownership through debt is subsidized under the Internal Revenue Code: a tax deduction that misallocates benefits to higher-earning taxpayers at the expense of lower- and middle-income taxpayers. Examples illustrating the way in which the January 1, 2018 changes have increased the regressive nature of this deduction are introduced in Part III, and the idea of the home mortgage interest deduction as a failure in tax policy is unpacked. Part IV discusses the opaque legislative process of introducing long-term tax reform through temporary-effect provisions as well as the options that face the legislature in 2025 when this legislation expires. The ambition of this Article is to evaluate the recent changes to the home mortgage interest deduction from a tax policy perspective and to also consider the politics and processes that are drivers—and so Part V suggests that it is time to pivot. Temporary-effect legislation has created a window during which it is feasible to retrench the entrenched home mortgage interest deduction from the Internal Revenue Code, with little political cost, and replace the deduction with a targeted tax credit to subsidize homeownership.[34]

I. The Landscape of Housing Finance and Homeownership in the United States

The rate of homeownership in the United States reached its peak of 69.2% in June 2004.[35] In 2016, this number decreased to a fifty-year low of 62.9%—likely the consequence of unaffordability as prices in the housing market continue to climb.[36] Despite the disastrous consequences of the

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34. It is important to make clear that the references to entrenchment in this Article are to functional (or soft) and not formal entrenchment. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 403 (2015) ("[C]onsider Social Security, a program that is notorious for its resistance to reform or retrenchment. The program is not protected by any legal barrier to repeal or special election rules favoring its supporters . . . . Rather, the program mobilized and empowered its defenders to stave off subsequent political attacks. Put differently, Social Security is entrenched not *formally*, but *functionally*. This was no accident.").

35. Prashant Gopal, *Homeownership Rate in the U.S. Drops to Lowest Since 1965*, BLOOMBERG (July 28, 2016, 12:04 PM CDT), https://www.bloomberg.com/news/articles/2016-07-28/homeownership-rate-in-the-u-s-tumbles-to-the-lowest-since-1965.

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

rupture of the housing bubble in 2007-2008,[37] homeownership is alive and well in the United States. Support of the American dream of homeownership is bipartisan, and Part I of this Article traces the way in which mortgage financing and tax treatment has developed to facilitate and incentivize ownership.

The features of the American mortgage have evolved dramatically over the past century.[38] In pre-Depression America,[39] mortgages were typically offered by local institutions to homebuyers who made a large down payment (in excess of 30%).[40] These mortgages were subject to short five- or ten-year terms, and most had variable interest rates.[41] Only interest was paid, and at the end of the mortgage term, a lump sum payment (known as a "bullet" payment) of the principal came due.[42] If homeowners did not have the funds to make the lump sum payment, as was frequently the case, the homeowner refinanced the debt.[43] The homeowner faced dire consequences if refinancing

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f6c947fd0cb8_story.html?utm_term=.f3226270fa2e (stating that the "U.S. homeownership rate has just fallen to its lowest level since the Census Bureau began tracking it in 1965").

37. Jeff Holt, *A Summary of the Primary Causes of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper*, 8 J. BUS. INQUIRY, no. 1, 2009, at 120, 120, http://journals.uvu.edu/index.php/jbi/article/view/211/183 ("On December 1, 2008, the National Bureau of Economic Research announced that the economy had entered into a recession in December of 2007.").

38. *See generally* Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, J. ECON. PERSP. Fall 2005, at 93, http://repository.upenn.edu/cgi/viewcontent.cgi?article=1000&context=penniur_papers.

39. Roger Lowenstein, *Who Needs the Mortgage-Interest Deduction?*, N.Y. TIMES MAG. (Mar. 5, 2006), http://www.nytimes.com/2006/03/05/magazine/who-needs-the-mortgageinterest-deduction.html ("It was not until the 1920's and the spread of the automobile that home mortgages outnumbered farm mortgages. In the 1930's, the mortgage industry got a huge assist from the feds – not from the tax deduction, but from agencies like the Federal Housing Administration, which insured 30-year loans, and, over time, the newly created Federal National Mortgage Association, or Fannie Mae. . . . It wasn't until after 1950 that the majority of homeowners had mortgages.").

40. Peter M. Carrozzo, *A New Deal for the American Mortgage: The Home Owners' Loan Corporation, the National Housing Act and the Birth of the National Mortgage Market*, 17 U. MIAMI BUS. L. REV. 1, 5-6 (2008).

41. U.S. DEP'T OF HOUS. & URBAN DEV., EVOLUTION OF THE U.S. HOUSING FINANCE SYSTEM: A HISTORICAL SURVEY AND LESSONS FOR EMERGING MARKETS 3 (2006) ("In this era, the maturity terms for most loans were 6 to 10 years, payments were semiannual with no or partial amortization of principal, interest rates were variable, and the maximum loan-to-value ratio was about 50 percent."); *see also* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196 (1985).

42. JACKSON, supra note 41, at 196.

43. Carrozzo, *supra* note 40, at 6.

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was not an option.[44] The invention of the fixed-rate, self-amortizing, long-term mortgage came in response to financial turmoil,[45] as federal legislation enacted during the New Deal in the 1930s provided the stability needed in the banking industry to offer long-term loans.[46] This legislation, together with the strong expansion of the U.S. economy following World War II, turned America from a nation of renters into one of homeowners: homeownership levels below 50% prior to 1930 surged in excess of 60% by 1980.[47]

In the two decades following World War II, mortgage origination in the United States was predictable: savings and loan depository institutions made the majority of prime mortgage loans.[48] These depositories directly funded the mortgages that they made. In the early 1980s, the landscape of mortgage

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44. *Id.* at 7-8 ("Beyond the expense of a new mortgage every five years, the need for frequent refinancing was a particular problem in times of tight money when the supply of funds was limited. The cost of mortgage money increased as a result. At the outset of the Great Depression, the need for mortgage money created by this inefficient system went from problematic to catastrophic. . . . [T]he lack of mortgage money for people in desperate need to refinance mirrored the cash-flow problem caused by the margin purchasing of stock—a fad of the 1920s—and the collapse caused by the call to meet the margin (pay back borrowed money used to purchase stock devalued by the crash), when people were least able to afford it. With thousands of unemployed homeowners facing foreclosure, hundreds of banks failing and a scarcity of available mortgage money, the structurally unsound Depression-era mortgage market was crumbling.").

45. *See* Green & Wachter, *supra* note 38, at 98-99.

46. Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV. 1111, 1115-16, 1130 (2013) ("The New Deal response to the market failures in the housing finance market was for the federal government to create new institutions that were active as market participants, offering liquidity and insurance to financial institutions. This was done through several new institutions that completely remade the housing finance market: the Federal Home Loan Banks ("FHLBs"), the Federal Deposit Insurance Corporation ("FDIC"), the Federal Savings and Loan Insurance Corporation ("FSLIC"), the Home Owners' Loan Corporation ("HOLC"), the Federal Housing Authority ("FHA"), the Reconstruction Finance Corporation ("RFC"), the Federal National Mortgage Association (or Fannie Mae), and later the Veterans Administration ("VA").").

47. Carrozzo, *supra* note 40, at 2 ("The New Deal's business-friendly, unobtrusive regulation of the American housing market fostered a financial triumph. Indeed, the nation of homeowners, unrivaled in the world, and the trillion dollar industry that has grown around the American mortgage, can look to a five-year period in the 1930s when a few bright New Dealers ushered in a revolution in mortgage lending.").

48. Cathy Lesser Mansfield, *The Road to the Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 498 n.155 (2000) (observing that savings and loans made about 60% of all home mortgage loans up to 1979) (citing 125 CONG. REC. 29,930 (1979) (statement of Sen. Morgan)).

origination dramatically shifted and securitization became the primary source of mortgage funding.[49] This remains the norm today.[50] The majority of mortgages are originated by mortgage and finance companies or mortgage brokers.[51] Unlike savings and loans that use deposits to fund mortgage loans, mortgage companies typically draw upon a line of credit to extend mortgages loans, which the mortgage company will hold for only a short period of time—until they can be pooled and sold to investors or securitized.[52] Securitization enables mortgage products to be offered with a broad array of choices that appeal to a wide variety of borrowers: higher-risk borrowers can participate in the same mortgage pool as lower-risk borrowers.[53]

The United States government is involved with housing finance both directly and indirectly—the former, through the Federal Housing Administration and Department of Veterans' Affairs, and the latter through government-sponsored enterprises (e.g. Fannie Mae and Freddie Mac).[54] Homeownership may not be facilitated without a robust housing finance system because few potential homebuyers have the savings to buy a home outright. Roughly three-quarters of home purchasers in the United States utilize financing,[55] and two-thirds of owner-occupied housing is encumbered by secured debt.[56]

Rates of homeownership in the United States are highly stratified along race and class lines. Considering the demographics by race in 2014, 34.4% of whites were renters instead of homeowners—in stark contrast to the 66.1% of

49. *See* Green & Wachter, *supra* note 38, at 99.

50. *Id.* ("The shift to mortgages being funded by capital markets rather than by depositories has continued. By the end of 2003, Fannie and Freddie either guaranteed or held more than $3.6 trillion of mortgages, or about 60 percent of the market in which they are allowed to participate and 43 percent of the overall market.").

51. Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1324 (2006) ("Often the initial contact with a borrower is not even made by the loan originator but by a mortgage broker. According to the National Association of Mortgage Brokers, mortgage brokers may be involved in more than half of all home mortgage loan originations.").

52. *Id.*; *see also* Green & Wachter, *supra* note 38, at 99.

53. *See* Green & Wachter, *supra* note 38, at 99.

54. N. ERIC WEISS & KATIE JONES, CONG. RES. SERV., R42995, AN OVERVIEW OF THE HOUSING FINANCE SYSTEM IN THE UNITED STATES 9 (2017).

55. RACHEL BOGARDUS DREW, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., BUYING FOR THEMSELVES: AN ANALYSIS OF UNMARRIED FEMALE HOME BUYERS tbl.1 (2006), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/n06-3_drew.pdf.

56. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2005. at 156 tbl.3-15 (2006).

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Hispanics and 61% of African Americans.[57] Broken down by income in the same year, 64.8% of low-income households (those with incomes of $31,000 or less) were renters, 33.5% of upper-middle income households (with incomes of $126,000 to $188,000) were renters, and a mere 17.3% of upper-income households (with incomes of $188,000 or more) were renters.[58]

II. Past and Present: An Overview of the Home Mortgage Interest Deduction

To the voting public, homeownership is essential to upward mobility and integral to the American Dream.[59] It is has been internalized as a norm, and largely perceived as fair, that those who journey through life as renters do not receive the same tax benefits as those who choose to borrow and purchase a home.[60] For some, recent changes to the home mortgage interest deduction made through the TCJA may upend homeownership as a de facto preference. While homeownership carries with it the promise of upside in the form of gain on the property, there are also attendant expenses in the form of insurance, closing costs, maintenance, remodeling, and property taxes—with the new expense of wholly or partially non-deductible mortgage interest added to that list for some taxpayers.[61] Part II provides an overview of the home mortgage interest deduction prior to the TCJA, and also explains the changes that have been made through this legislation.

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57. Richard Florida, *The New American Dream: A Rental of One's Own*, ATLANTIC (Feb. 17, 2016), https://www.theatlantic.com/business/archive/2016/02/suburban-homeowners-to-urban-tenants/463113; *see also* Richard Fry & Anna Brown, *In a Recovering Market, Homeownership Rates Are Down Sharply for Blacks, Young Adults*, PEW RES. CTR. (Dec. 15, 2016), http://www.pewsocialtrends.org/2016/12/15/in-a-recovering-market-homeownership-rates-are-down-sharply-for-blacks-young-adults (noting that, in 2004, homeownership reached a pinnacle of 76% for whites and 49.1% for black households; in 2007, it reached 49.7% for Hispanic/Latino households; and in 2016, these percentages by household were 71.9% white, 41.3% black, and 47% Hispanic/Latino).

58. Florida, *supra* note 57.

59. *Public Opinion on Opportunity and the American Dream, Homeownership, and Housing*, OPPORTUNITY AGENDA (2011), https://opportunityagenda.org/explore/resources-publications/public-opinion-opportunity-and-american-dream-homeownership-and.

60. *See* Lowenstein, *supra* note 39 ("According to studies, people who own their homes take better care of them; they fix the roof more often and plant more lilacs. They join more clubs and community groups; they vote more often; they move around less often; and their kids do better in school. The government is subsidizing my house so I will do more gardening. Or something like that.").

61. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, sec. 11042, § 164(b), 131 Stat. 2054, 2085-86 (amending I.R.C. § 164(b) to place a cap of $10,000 on the deduction for state and local taxes, including property taxes).

A. The Home Mortgage Interest Deduction Prior to January 1, 2018

The norm of homeownership has arguably been woven into the very fabric of this country's culture—dating back to Colonial America when the right to vote was often restricted to those who were propertied, with tenants inherently having a lesser stake.[62] However, it is unlikely that a subsidy for home mortgage interest was intentionally capitalized into the Internal Revenue Code in 1913; [63] instead, it is far more likely that one of the country's most expensive tax expenditures arose by accident.[64] It was one of the many types of personal interest that were deductible until the Tax Reform Act of 1986 (TRA 1986) amendment denied any deduction for interest on personal indebtedness.[65] Moreover, there is no clear justification for or agreed upon explanation for the deduction of personal interest.[66]

The Tax Reform Act of 1986, together with the Revenue Act of 1987, resulted in an overhaul of the Code that dramatically reshaped the deductibility of personal interest. Section 163(a) of the Internal Revenue Code provided that all interest paid or accrued on indebtedness shall be allowed as a deduction.[67] The home mortgage interest deduction survived as a miscellaneous itemized deduction, though one was forced to take a rather circuitous route to find it.[68] An exception to the general rule of I.R.C. § 163(a) is set forth in § 163(h)(1), which states that in the case of an individual taxpayer, no deduction shall be allowed for personal interest.[69] Exceptions to this exception are set forth in I.R.C. §§ 163(h)(2)(D) and (h)(3)—taken

62. *See generally* Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787-1828*, 33 J. EARLY REPUBLIC 219 (2013).

63. Derek Thompson, *America in 1915: Long Hours, Crowded Houses, Death by Trolley*, ATLANTIC (Feb. 11, 2016), https://www.theatlantic.com/business/archive/2016/02/america-in-1915/462360/ ("In 1920, there were about four times as many renters as homeowners . . . . Houses were cheaper, but buying was a relative hassle: Although the average value of a home was no more than $75,000 in today's dollars, mortgages typically required a downpayment of about 50 percent.").

64. See Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 241-43 (2010).

65. Julee Brooke Little, Note, *Section 163: Interest Paid on Educational Indebtedness—Past, Present and Future*, 43 TAX LAW. 1007, 1007–08 (1990).

66. Ventry, *supra* note 64, at 236 ("Indeed, the historical record fails to indicate why Congress allowed a deduction for personal interest in 1913."). Scholars have developed many theories as to why personal interest was deductible. *Id.* There is, however, no clear right answer.

67. I.R.C. § 163(a) (2012).

68. *See* Ventry, *supra* note 64, at 274.

69. I.R.C. § 163(h)(1).

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together, these provisions allow for the deduction of "qualified residence interest,"[70] which includes mortgages and home equity loans subject to certain limitations.

The overhaul of the Internal Revenue Code in the late 1980s produced two important limitations on home mortgage interest—interest attributable to up to $100,000 borrowed against home equity, to be used for any purpose whatsoever, remained deductible ("home equity indebtedness");[71] and the interest attributable to up to $1 million borrowed to acquire, construct, or improve a first or second home[72] also remained deductible ("acquisition indebtedness").[73]

B. The Home Mortgage Interest Deduction Effective January 1, 2018

President Donald Trump signed the TCJA into law in December 2017 with an effective date of January 1, 2018. The home mortgage interest deduction is amended in this legislation, though the important impact is collateral—the scope of the deduction dramatically changed due to amendment of other provisions.

The direct changes made to the home mortgage interest deduction are fairly straightforward. The acquisition indebtedness cap was lowered from $1 million ($500,000 for married filing separately) to $750,000 ($375,000 for married filing separately).[74] The lowering of the acquisition indebtedness cap expires effective January 1, 2026, at which time it reverts to the pre-2018 level of $1 million. A deduction for interest paid on home equity loans and lines of credit is disallowed (through 2026) unless the indebtedness is used to "buy, build or substantially improve the taxpayer's home."[75] While there is no longer a $100,000 limit upon home equity indebtedness, importantly, the

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70. *See id.*

71. In addition to a cap of $100,000 found in I.R.C. § 163(h)(3)(C)(ii), home equity indebtedness also may not exceed the fair market value of the residence, reduced by the amount of the acquisition indebtedness with respect to such residence. *Id.* § 163(h)(3)(C)(i).

72. *Id.* § 163(h)(4)(A)(i) (defining "qualified residence" to include an additional home used by the taxpayer as a residence).

73. *Id.* § 163(h)(3)(B).

74. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, sec. 11042, §164(b), 131 Stat. 2054, 2086. For acquisition indebtedness incurred before December 15, 2017, there is a grandfathering provision and the cap remains at $1 million.

75. I.R.S. News Release IR-2018-32 (Feb. 21, 2018), https://www.irs.gov/newsroom/interest-on-home-equity-loans-often-still-deductible-under-new-law.

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combined amount of acquisition indebtedness and home equity indebtedness is capped at $750,000.[76]

The collateral impact is less obvious: none of these mortgage interest rules matter to a taxpayer unless she itemizes. Home mortgage interest is only deductible if a taxpayer itemizes his or her deductions on a Schedule A.[77] A taxpayer usually opts to itemize his deductions to the extent that the deductions exceed the amount of the standard deduction. For 2018, the standard deduction has been raised to $12,000 for a single taxpayer (or $24,000 for married filing jointly taxpayers), from 2017 amounts of $6,350 (single) and $12,700 (married filing jointly). The number of taxpayers claiming the home mortgage interest deduction will dramatically drop according to estimates from the Joint Committee on Taxation (JCT), from 32.3 million in 2017 down to 13.8 million in 2018.[78] Taxpayers deducted $304.5 billion in home mortgage interest in 2015,[79] and the JCT projects that this amount will drop to $25 billion in 2018.[80]

At the end of 2025, the individual income tax cuts will expire. As a result the standard deduction and limitations on the home mortgage interest deduction will both revert to pre-TCJA levels.

III. Cuiusvis hominis est errare, nullius nisi insipientis in errore perseverare[81]

Economists characterize tax preferences—generally in the form of a deduction, credit, or exclusion—as an indirect form of government spending referred to as a "tax expenditure."[82] The government collected $1.885 trillion

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76. There is no grandfathering provision for home equity loans or lines of credit, as there is with acquisition indebtedness.

77. Dep't of the Treasury, I.R.S. No. 936-10426G 2 (2018).

78. STAFF OF JOINT COMM. ON TAXATION, 155TH CONG., TABLES RELATED TO THE FEDERAL TAX SYSTEM AS IN EFFECT 2017 THROUGH 2026 7 (Comm. Print 2018) [hereinafter TABLES RELATED TO THE FEDERAL TAX SYSTEM: 2017-2026].

79. This is the most current data available from the Internal Revenue Service. See Individual Income Tax Returns 2015, I.R.S. Pub. No. 1304, 22 (Rev. 09-2017).

80. TABLES RELATED TO THE FEDERAL TAX SYSTEM: 2017-2026, *supra* note 80, at 7.

81. Translated from the Latin as "Any man is liable to a mistake; but no one but a downright fool will persist in error." Marcus Tullius Cicero, Philippics, Book XII, ii, 5, *in* SELECT ORATIONS OF M.T. CICERO 462 (C.D. Yonge trans., Harper & Bros. 1856).

82. This idea was first popularized by Stanley Surrey, Assistant Secretary of the Treasury for Tax Policy from 1961 to1969. Surrey oversaw the calculation of the first tax expenditure budget for fiscal year 1968. Upon departing from the Treasury, he joined the faculty of Harvard Law School. *See generally* STANLEY S. SURREY, PATHWAYS TO TAX REFORM vii (1973). *See generally* Stanley S. Surrey, *Federal Income Tax Reform: The*

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in 2015 from individual income taxes and corporate income taxes,[83] which would be a substantially higher number but for the $1.339 trillion indirectly spent through tax expenditures in a "shadow budget."[84] This form of indirect spending is insidious[85]—more permanent than budgeted spending because it does not come up for annual review, and less obvious because most voters do not consider this to be "spending."[86] Part III explores the ways in which the home mortgage interest deduction is broken from a tax policy perspective prior to the TCJA—in that it has always been an upside-down subsidy that misallocates benefits to higher-earning taxpayers at the expense of lower and middle income taxpayers. Using this as a departure point, Part III then explores the fact that the TCJA has caused the mortgage interest deduction to become even more regressive. Illustrations demonstrate the old versus new impact, in a way that highlights the troubling fairness issues.

Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance, 84 HARV. L. REV. 352 (1970); Stanley S. Surrey, *Reflections on the Tax Reform Act of 1976*, 25 CLEV. ST. L. REV. 303 (1976); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

83. BUREAU OF THE FISCAL SERV., DEP'T OF THE TREASURY, FINAL MONTHLY TREASURY STATEMENT 1 (2015). Individual income tax revenue in fiscal year 2015 was $1.541 trillion, and corporate income tax was $344 billion, totaling $1.885 trillion. *Id.*

84. Steven Dean, *The Tax Expenditure Budget Is a Zombie Accountant*, 46 U.C. DAVIS L. REV. 265, 267 (2012) ("Enacted into law decades ago, the tax expenditure budget computes the dollar cost of a wide range of tax breaks. It serves as a shadow budget for tax benefits that would otherwise fall through cracks in the budget process."); OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2015, 205-14 tbls.14-1 to -4 (2014).

85. In 2015, Medicare spending was $647.9 billion and Medicaid spending was $543.4 billion, totaling $1.191 trillion. See *NHE Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID SERV., https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html (last visited Sept. 29, 2018). Indirect government spending through a "shadow budget" in 2015 thus amounted to more than the combined direct spending on Medicare and Medicaid.

86. Katy O'Donnell, *The Shadow Budget*, POLITICO (Oct. 21, 2015, 4:55 AM EDT), http://www.politico.com/agenda/story/2015/10/government-tax-code-expenditures-loopholes-000290.

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A. Tax Policy and Homeownership Bias

Congress uses tax subsidies—such as the deduction for property taxes and home mortgage interest—to encourage home ownership.[87] While some believe that tax expenditures should not be used with the purpose of social engineering, it is obvious that the government does indeed use the tax code to influence and shape social and economic behavior. In such instances, the tax expenditure is arguably justified only when the social purpose (here, the promotion of home ownership) is both meritorious and efficiently served.

Several commentators generally agree that homeownership is beneficial for the community:[88] homeowners are more likely to vote in local elections; there is wealth accumulation that benefits homeowners;[89] those who own homes tend to purchase multiple homes over a lifetime, fueling the economy;[90] that, all things being equal, the children of homeowners are more likely to succeed (e.g. higher test scores, lower rates of drug usage and anti-social behaviors);[91] and, homeowners are more active in their communities.[92]

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87. J. COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 263-64 (Comm. Print 1987), http://www.jct.gov/jcs-10-87.pdf ("[E]ncouraging home ownership is an important policy goal, achieved in part by providing a deduction for residential mortgage interest."); John Iselin & Philip Stallworth, *Who Benefits from Tax Subsidies for Home Ownership?*, URBAN INST. & BROOKINGS INST.: TAX POL'Y CTR. (Sept. 14, 2016), http://www.taxpolicycenter.org/taxvox/who-benefits-tax-subsidies-home-ownership.

88. Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1354 (2000).

89. It is a proven path to building savings and wealth. *See* Lawrence Yun, *Why Homeownership Matters*, FORBES (Aug. 12, 2016, 1:09 PM), https://www.forbes.com/sites/lawrenceyun/2016/08/12/why-homeownership-matters/#39b422af480f ("According to the Federal Reserve's Survey of Consumer Finances, a typical homeowner's net worth was $195,400, while that of a renter was $5,400 as of 2013. Given that home prices have risen by 17% since then, according to Federal Housing Finance Agency[,] the wealth of home owning Americans would have grown even more. That is, a typical homeowner will be ahead of a typical renter by a multiple of 45 on a lifetime financial achievement scale."); *see also* Matthew Desmond, *How Home Ownership Became the Engine of American Inequality*, N.Y. TIMES MAG. (May 9, 2017), https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html.

90. *See* Yun, *supra* note 88 ("With each home sale, there are expenditures related to lawn care, home remodeling, new furniture, mortgage origination, moving, and an inducement to build new homes.").

91. *Id.*

92. *See Why Home Ownership Is Good for Everyone*, DISCOVER BANK (Jan. 16, 2015), https://www.discover.com/home-loans/blog/why-home-ownership-is-good-for-everyone ("Homeowners in a city or town are often very invested in the area. They get involved in

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Homeowners reportedly enjoy better quality housing (e.g. single-family units and backyards), and neighborhoods with a higher percentage of single-family homes tend to be better maintained and have lower crime rates.[93]

Given that homeownership generates positive externalities that benefit the community,[94] the relevant question is whether the home mortgage interest deduction is effective at promoting that goal. The answer is unequivocally no. As one of the largest tax expenditures,[95] the home mortgage interest deduction costs the government around $70 billion annually.[96] While not all tax expenditures disproportionately benefit the wealthy, it is no secret that the home mortgage interest deduction is regressive.[97] Though it is often regarded as a middle-class tax benefit, nothing could be further from the truth:[98] More than 77% of the benefits of this deduction flow to households making more

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activities, volunteer for charity organizations and help out with special events. They feel a sense of belonging that is often greater than someone who is renting for the short term.").

93. *See* WILLIAM M. ROHE & MARK LINDBLAD, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV. REEXAMINING THE SOCIAL BENEFITS OF HOMEOWNERSHIP AFTER THE HOUSING CRISIS 8 (2013), http://www.jchs.harvard.edu/sites/default/files/hbtl-04.pdf.

94. There are, of course, negative externalities to encouraging homeownership that are rarely discussed. *See* Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction*, 17 TAX POL'Y & ECON. 37, 42 (2003) ("The homeowners' desire to keep property values up has a dark side, however. Homeowners, not renters, have been more aggressive in fighting racial integration, especially in the 1960s and 1970s. More recently, homeowners have spearheaded the movement to limit new housing supply, which has artificially inflated housing throughout the United States. Essentially, as owners have organized, they have started to act like local cartels, restricting new entry into the market: the downside to having individuals who have incentives to keep price up.").

95. The home mortgage interest deduction ranks fifth in terms of largest tax expenditures for fiscal 2016, behind employer-paid health care, long-term capital gains, deferral of active income of controlled foreign corporations, and contributions to defined-contribution retirement plans. Drew DeSilver, *The Biggest U.S. Tax Breaks*, PEW RES. CTR. (Apr. 6, 2016), http://www.pewresearch.org/fact-tank/2016/04/06/the-biggest-u-s-tax-breaks.

96. Will Fischer & Chye-Ching Huang, *Mortgage Interest Deduction Is Ripe for Reform*, CTR. ON BUDGET & POL'Y PRIORITIES (June 25, 2013), http://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform.

97. Frank Pompa & Janet Loehrke, *Mortgage Deduction Is Popular, but Few Claim It*, USA TODAY (Dec. 5, 2012, 4:58 AM ET), https://www.usatoday.com/story/news/politics/2012/12/04/fiscal-cliff-mortgage-deduction/1737611 ("The use of the deduction varies widely from region to region, ranging from a high of 37% of taxpayers in Maryland to a low of 15% in North Dakota and West Virginia . . . .").

98. Louis Jacobson, *Do 73 Percent of Benefits from Mortgage Deduction Go to Those Earning $250,000 a Year?*, POLITIFACT (Dec. 17, 2014, 10:52 AM), http://www.politifact.com/truth-o-meter/statements/2014/dec/17/tom-coburn/coburn-says-73-percent-benefits-mortgage-deduction.

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than $100,000.[99] The national rate of homeownership is presently hovering around 62%.[100] Roughly one-third of these homeowners own their homes outright and do not have a mortgage.[101] Of the 173 million homeowners,[102] only 40 million (or 22.5%) received any benefit from the home mortgage interest deduction prior to the enactment of the TCJA.[103] It is estimated that this number will drop to 13.8 million taxpayers post-TCJA.[104]

The tables set forth below illustrate the amount of mortgage debt a taxpayer would need before the deductible interest in the first year outweighs the standard deduction.[105] These calculations[106] are based on the first-year interest cost for a thirty-year fixed-rate mortgage at the average rate of 4.32%.[107]

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99. *See* Rebecca Lake, *How Much Income Puts You in the Top 1%, 5%, 10%?*, INVESTOPEDIA (Sept. 15, 2016, 3:58 PM EDT), http://www.investopedia.com/news/how-much-income-puts-you-top-1-5-10 ("According to statistical data from the Internal Revenue Service (IRS), the top 1% had an adjusted gross income of $465,626 or higher for the 2014 tax year. The Washington Center for Equitable Growth put the average household income for this group at $1,260,508 for 2014.").

100. Diana Olick, *Heads Up Homeowners: Mortgage Interest Deduction on Trump's Chopping Block*, CNBC (Dec. 1, 2016, 11:59 AM ET), http://www.cnbc.com/2016/12/01/heads-up-homeowners-mortgage-interest-deduction-on-trumps-chopping-block.html.

101. *Id.*

102. *Id.* Of the two-thirds of homeowners with mortgages, close to half (primarily lower- and middle-income taxpayers) "receive [absolutely] no benefit from the deduction," some of whom because they do not owe federal income taxes at all. Will Fischer & Chye-Ching Huang, *Mortgage Interest Deduction Is Ripe for Reform*, CTR. ON BUDGET & POL'Y PRIORITIES (June 25, 2013), http://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform.

103. Olick, *supra* note 100.

104. Richard Rubin, *Tax Changes Mean Mortgage-Interest Deduction Finds Fewer Takers*, WALL ST. J. (Apr. 23, 2018, 1:30 PM ET), https://blogs.wsj.com/economics/2018/04/23/tax-changes-mean-mortgage-interest-deduction-finds-fewer-takers/. The number of taxpayers who itemize is predicted to drop from 46.5 million in 2017 to 18 million in 2018. And, only those taxpayers who itemize are eligible to claim the deduction. *Id.*

105. Many taxpayers will itemize even if their deductible interest is less than the standard deduction because they are able to add deductions from other sources. For ease of illustration, however, these other possible deductions are excluded.

106. The author used Bankrate's Amortization Schedule Calculator. *Amortization Schedule Calculator*, BANKRATE, https://www.bankrate.com/calculators/mortgages/amortization-calculator.aspx (last visited Sept. 26, 2018).

107. According to Freddie Mac's report, the thirty-year fixed-rate mortgage averaged 4.32% for the week ending February 8, 2018. *Primary Mortgage Market Survey*, FREDDIE MAC, http://www.freddiemac.com/pmms/docs/historicalweeklydata.xls (last visited May 8, 2018).

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Table 1. Itemized Mortgage Interest v. Standard Deduction for 2017

FILING STATUS	STANDARD DEDUCTION	MORTGAGE BALANCE TO ITEMIZE	AMOUNT OF INTEREST PAYMENT
SINGLE	$6,350	$147,000	$6,302.31
MARRIED FILING JOINTLY	$12,700	$296,500	$12,711.80
HEAD OF HOUSEHOLD	$9,350	$218,500	$9,367.72

Table 2. Itemized Mortgage Interest v. Standard Deduction for 2018

FILING STATUS	STANDARD DEDUCTION	MORTGAGE BALANCE TO ITEMIZE	AMOUNT OF INTEREST PAYMENT
SINGLE	$12,000	$280,000	$12,004.40
MARRIED FILING JOINTLY	$24,000	$560,000	$24,008.79
HEAD OF HOUSEHOLD	$18,000	$420,000	$18,006.59

Whether to itemize or take the standard deduction is a binary decision—meaning, taxpayers must choose one path or the other. Only those taxpayers who itemize their deductions receive any benefit from the home mortgage interest deduction, and as illustrated by Tables 1 and 2 (above), these taxpayers are carrying a higher debt load, which generally correlates with the higher income needed to service the debt.

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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.[108] After TJCA, it is projected that the benefit from the deduction will flow as follows: 88% (or $28.07 billion) to households with more than $100,000 in income; and 57.73% to households with over $200,000.[109] An already regressive deduction has been made more regressive by the TCJA. Ironically, the benefit of a subsidy intended to facilitate homeownership is flowing to those taxpayers less in need of a subsidy—a group already statistically more likely to own versus rent. Broken down by income, 33.5% of upper-middle income households (with incomes of $126,000 to $188,000) are homeowners, and 17.3% of upper-income households (with incomes of $188,000 or more) are homeowners.[110]

The home mortgage interest deduction was, and continues to be, a tax expenditure that exploits the ignorance and self-interest of the average taxpayer to exacerbate systematic problems—a misallocation of benefits to upper and upper-middle income taxpayers at the expense of lower and middle income taxpayers. In this sense, the dubious moral nature of the home interest mortgage deduction is the worst form of exploitation:[111] taxpayers are widely supportive of this deduction[112] either because they are misinformed (i.e. they believe that it effectively promotes homeownership), self-interested (i.e. they currently receive a subsidy from the deduction), or a combination of self-interested and optimistic (i.e. they believe that they will one day be homeowners who will be eligible to take the deduction).[113]

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108. ESTIMATES OF FEDERAL TAX EXPENDITURES: 2016-2020, *supra* note 22, at 44.

109. ESTIMATES OF FEDERAL TAX EXPENDITURES: 2017-2021, *supra* note 23, at 52 tbl.3.

110. Florida, *supra* note 57.

111. *See generally* John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631 (1994).

112. Jay Heflin, *Mortgage Interest Deduction Has Broad Support Among All Voters*, HILL (Sept. 23, 2010, 9:35 PM EDT), http://thehill.com/policy/finance/120661-mortgage-interest-deduction-has-broad-support-among-all-voters?source=patrick.net ("Seventy-nine percent of respondents, comprised of homeowners and renters, believe the federal government should provide tax incentives to promote homeownership. The consensus cuts across party lines with 76 percent of Republicans, 75 percent of Independents and 68 percent of Democrats opposing the elimination of the deduction.").

113. 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 (2015).

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This is, however, a tax subsidy that influences the behavior of taxpayers with deleterious, interesting, but certainly unintended, consequences: taxpayers may buy larger homes,[114] borrow more money, borrow interest-only loans (whenever possible), [115] and purchase second homes.[116] Leveraging is incentivized—and consequently, the housing market is flooded with borrowed money, arguably driving up the cost of housing for everyone (homeowners and renters both). The revision of the Internal Revenue Code through TRA 1986 caused an increase in mortgage consumption without a commensurate increase in homeownership rates.[117] Mortgage debt became more concentrated among the group of individuals who were already participating in the mortgage market, as opposed to being spread among more participants.[118] Some experts contend that a surge in credit demand and accessibility contributed to the home mortgage debt bubble, and there has consequently been a move to revising policies that lower the cost of mortgage debt, such as the home mortgage interest deduction.[119] There is legitimate concern that this tax expenditure artificially drives housing prices upward even in times of unsustainable appreciation.[120] But this is ironic—the biggest obstacle to homeownership

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114. Nick Timiraos, *Mortgage Tax Breaks Trickle Up, New Study Shows*, WALL ST. J. (Mar. 24, 2014, 1:00 PM ET), https://www.wsj.com/articles/mortgage-tax-breaks-trickle-up-new-study-shows-1395612649 (discovering that the average house size in the Washington, D.C., area is about *1,400 square feet larger* than it would have been if the U.S. government didn't promote home ownership by providing tax benefits such as the mortgage-interest deduction).

115. ALYSSA KATZ, OUR LOT: HOW REAL ESTATE CAME TO OWN US 216 (2010).

116. Iselin & Stallworth, *supra* note 87.

117. David Frederick, *Reconciling Intentions with Outcomes: A Critical Examination of the Mortgage Interest Deduction*, 28 AKRON TAX J. 41, 80 (2013) ("Why would the changes to the mortgage interest deduction in the Tax Reform Act of 1986 correspond with an increase in mortgage consumption but not an increase in homeownership rates? The simple answer is that the refinement of the interest deduction into the mortgage interest deduction was enough to cause consumers to switch their mode of personal finance, but even the entrenchment of an already existing deduction was insufficient to alter Americans' personal home buying calculations enough to push them into homeownership. A more elegant answer would be that though the mortgage market and the housing market are closely related and have tremendous overlap, they are not identical.").

118. *Id.* at 69-70.

119. David J. Munroe, Response of Home Equity Debt to Mortgage Policy: Evidence from a Kink and a Notch 3 (May 6, 2014) (unpublished manuscript) (on file with Columbia University), http://www.columbia.edu/~djm2166/munroe_hel_052014.pdf.

120. 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, 754-55 (2012).

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is saving for a down payment,[121] and capitalization of the home mortgage interest deduction into housing prices harms already down-payment-constrained taxpayers.[122] Further, evidence suggests that the deduction increases the amount borrowed by homeowners while doing nothing to increase rates of homeownership.[123] Certainly, homeownership rates are no higher in the United States than in other countries that do not provide equivalent tax subsidies.[124]

The reality of this deduction is lost in propaganda,[125] and one cannot help but cynically pause to consider the political forces that may have had an interest in turning the home mortgage interest deduction into a sacred cow provision. The answer is likely attributable to some combination of voter appeasement, lobbying,[126] and campaign donations.[127] For certain private

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121. *See* Lane, *supra* note 36 ("If the Great Recession taught anything, it was that, despite decades of rhetoric about the "American Dream" from real estate lobbyists, politicians and well-meaning low-income-housing advocates, homeownership is not a surefire ticket into the middle class. It can be downright risky. Our national return to Square One, homeownership-rate-wise, is thus an opportunity to rethink wealth-building strategies for people of modest means. We should de-emphasize house buying and explore alternatives that do not require people to bet on a single illiquid asset class — or make it harder to relocate in pursuit of opportunities, which is another drawback of home buying."); *see also* Neal Gabler, *The Secret Shame of Middle-Class Americans*, ATLANTIC (May 2016), https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415 (explaining that research in 2016 suggests 47% of Americans would have to borrow or sell something to cover a $400 emergency, or alternatively, fail to come up with the money entirely).

122. Adam J. Cole et al., *The Distributional and Revenue Consequences of Reforming the Mortgage Interest Deduction*, 64 NAT'L TAX J. 977, 987 (2011); *see also* Desmond, *supra* note 89 ("[T]he benefit helps to prop up home values. It's impossible to say how much, but a widely cited 1996 study estimated that eliminating the MID and property-tax deductions would result in a 13 to 17 percent reduction in housing prices nationwide, though that estimate varies widely by region and more recent analyses have found smaller effects.").

123. *See* Glaeser & Shapiro, *supra* note 94, at 39; *see also* Bruce Bartlett, *The Sacrosanct Mortgage Interest Deduction*, N.Y. TIMES: ECONOMIX (Aug. 6, 2013, 12:09 AM), https://economix.blogs.nytimes.com/2013/08/06/the-sacrosanct-mortgage-interest-deduction/.

124. *See e.g.*, Mann, *supra* note 88 (comparing homeownership rates in ten developed countries against the level of tax subsidy conferred upon taxpayers in each country).

125. Desmond, *supra* note 89 ("America's national housing policy gives affluent homeowners large benefits; middle-class homeowners, smaller benefits; and most renters, who are disproportionately poor, nothing. It is difficult to think of another social policy that more successfully multiplies America's inequality in such a sweeping fashion.").

126. Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822 ("Something is out of balance in Washington. Corporations now spend about $2.6 billion a year on reported lobbying expenditures–more than the $2 billion we spend to fund the House ($1.18 billion) and Senate

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interests in the United States, the mortgage interest deduction has always been non-negotiable: "the National Association of Realtors spent $64.8 million on lobbying efforts in 2016," which places it "second only to the U.S. Chamber of Commerce in terms of dollars spent."[128] The National Association of Realtors also made $7.3 million in campaign donations in the 2012 election cycle, and have made clear that they want current mortgage interest deduction policies to remain changed.[129] The National Association of Home Builders has a website that sets forth quotable propaganda explaining all of the reasons why "some economists" are flawed in their criticisms of the home mortgage interest deduction.[130] By creating a favored type of debt in the Internal Revenue Code, Americans have been implicitly encouraged to funnel investment dollars into the industry that

($860 million). It's a gap that has been widening since corporate lobbying began to regularly exceed the combined House-Senate budget in the early 2000s.").

127. Paul C. Barton, *Mortgage Deduction Backers Spend Heavily on Politics*, TAX ANALYSTS (Mar. 7, 2016), http://www.taxhistory.org/www/features.nsf/Articles/7125C98AD87398A785257F6F0055BAA4?OpenDocument ("According to figures compiled for Tax Analysts by the Center for Responsive Politics, real estate interests had donated more than $36 million to 2016 presidential candidates as of February 5. The total reflects money given to their official campaign committees and to outside groups, mainly super PACs, that support their candidacies. The leading recipient has been Sen. Ted Cruz, R-Texas, with $16.04 million. Of that total, $15.34 million reflects money that wealthy Texas real estate investors gave to super PACs, which can receive donations of unlimited size. . . . To all federal candidates, including those running for congressional seats, the real estate sector has so far given $80.42 million in the 2016 elections, according to the Center for Responsive Politics.").

128. Desmond, *supra* note 89 ("We often discuss the influence of the gun and pharmaceutical lobbies, but the real estate lobby has spent much more than either group . . . [a]nd to 1.2 million Realtors, the mortgage-interest deduction is nonnegotiable. The association calls it a 'remarkably effective tool that facilitates homeownership.' Jerry Howard, the chief executive of the National Association of Home Builders, refers to the MID as "one of the cornerstones of American housing policy.").

129. Barton, *supra* note 127.

130. Robert Dietz & Natalia Siniavskaia, *Who Benefits from the Housing Tax Deductions*, NAT'L ASS'N OF HOME BUILDERS (Jan. 4, 2011), http://nationalhousingendowment.org/fileUpload_details.aspx?contentTypeID=3&contentID=150471&subContentID=314585 ("[These] estimates and [this] data . . . prove the mortgage interest and real estate tax deductions are progressive tax rules that provide the majority of their benefits to middle class taxpayers. . . . [T]he larger tax benefits for these deductions are realized by families and households with larger numbers of members, which is consistent with such groups having higher housing demand and costs. Curtailing or eliminating these deductions would thus constitute a tax increase on homeowning families, particularly those with children, as well as younger households who rely more on mortgage debt as a share of household income to achieve homeownership.") .

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these lobbyists are hired to support.[131] Special interests have an incentive to retain this powerful deduction without regard to the consequences to minorities and lower-income households.

B. Illustrative Examples

To support the conclusions presented in this Article, it is useful to illustrate the options of four taxpayers with varying income. The model taxpayer for the following examples is a young unmarried male borrower with no dependents.[132] He resides in the imaginary state of Amorcensorum in the United States,[133] and the taxpayer spends no more than a recommended 35% of pre-tax income on his housing payment.[134] Where the deductions set forth in these examples did not exceed the standard deduction for the taxable year, the standard deduction was taken in lieu of itemizing deductions. These calculations are based on the first-year interest cost for a thirty-year fixed-rate mortgage at the average rate of 4.32%.[135]

131. Bartlett, *supra* note 123.

132. *See* Pay Equity & Discrimination, INST. FOR WOMEN'S POL'Y RES., https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/ (last visited Sept. 8, 2017) ("Women are almost half of the workforce. They are the sole or co-breadwinner in half of American families with children. They receive more college and graduate degrees than men. Yet, on average, women continue to earn considerably less than men. In 2016, female full-time, year-round workers made only 80.5 cents for every dollar earned by men, a gender wage gap of 20 percent.").

133. Latin for "love of taxes." *See Amor*, LATIN DICTIONARY, https://www.online-latin-dictionary.com/latin-english-dictionary.php?parola=amor (last visited Sept. 28, 2018) (translating "amor" as "to love"); *Censeorum*, LATIN DICTIONARY, https://www.online-latin-dictionary.com/latin-english-dictionary.php?lemma=CENSEOR200 (last visited Sept. 28, 2018) (describing "censeor" as the unconjugated form of "censeorum," which is translated to the ability to "define assets").

134. Affordability of a home is a complicated question that hinges upon the income of the taxpayer, as well as the location of the home. Interest rates and property taxes vary from state to state, sometimes dramatically. A taxpayer's housing budget would normally include mortgage payment, applicable state/local taxes, and applicable insurance (e.g., homeowner's insurance, PMI insurance). *See* David Weliver, *What Percentage of Your Income Can You Afford for Mortgage Payments?*, MONEY UNDER 30 (Oct. 4, 2016), https://www.moneyunder30.com/percentage-income-mortgage-payments (stating that if one is truly conservative, no more than 35% of pretax income should be spent on one's housing budget).

135. *Mortgage Market Survey*, FREDDIE MAC, http://www.freddiemac.com/pmms/docs/historicalweeklydata.xls (last visited May 8, 2018) (reporting that the thirty-year fixed-rate mortgage averaged 4.32% for the week ending February 8, 2018).

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Case 1: The High-Income Earner

This taxpayer earns $214,463 per year.[136] He purchases a $1,200,000 house in the imaginary state of Amorcensorum, contributing a 20% down payment ($240,000) towards the purchase of the house. The remaining balance ($960,000) is borrowed subject to a thirty-year (or 360 month) term.[137] The total interest paid over the life of the loan will be $754,336. At the end of Year 1, interest paid on the indebtedness will total $41,158.

For purposes of computing tax liability, the taxpayer is single. His home purchase closes on the first day of the tax year. He is twenty-five years old, not a widower, has no dependents, and carries health insurance. All of the taxpayer's income is from W-2 employment (with no investment income). No state income tax or real estate taxes have been included in these computations. The taxpayer is a homeowner who is eligible to take the home mortgage interest deduction but no other deductions and no applicable tax credits.[138] Because of this taxpayer's annual income, the Medicare Tax of $130 was included in computations for both 2017 and 2018.[139]

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136. BERNADETTE D. PROCTOR, JESSICA L. SEMEGA & MELISSA A. KOLLAR, U.S. CENSUS BUREAU, P60-256(RV), INCOME AND POVERTY IN THE UNITED STATES: 2015 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf (figure from September 2016 report by US Census Bureau reflects data from 2015).

137. The author used Bankrate's Amortization Schedule Calculator. *Amortization Schedule Calculator*, *supra* note 106.

138. Only homes purchased after December 14, 2017 and until 2026 are impacted by the changes under the Tax Cuts and Jobs Act of 2017. Any homes purchased prior to December 14, 2017 are grandfathered under old law. Erica York & Alex Muresianu, *The Tax Cuts and Jobs Act Simplified the Tax Filing Process for Millions of Households*, TAX FOUND. (Aug. 17, 2018), https://taxfoundation.org/the-tax-cuts-and-jobs-act-simplified-the-tax-filing-process-for-millions-of-households/#_ftnref1. For purposes of calculating the taxpayer's 2017 tax liability, 2017 rules are applied. For purposes of calculating the taxpayer's 2018 tax liability, the new rules under the Tax Cuts and Jobs Act of 2017 are applied—which means, in effect, that the taxpayer must have purchased his house after December 14, 2017.

139. *See Questions and Answers for the Additional Medicare Tax*, I.R.S., https://www.irs.gov/businesses/small-businesses-self-employed/questions-and-answers-for-the-additional-medicare-tax (last updated July 3, 2018).

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	TAX LIABILITY	GREATER OF ITEMIZED OR STANDARD DEDUCTION
ESTIMATED TAX LIABILITY IN 2017	$40,503	$41,158
ESTIMATED TAX LIABILITY IN 2018	$40,158	$32,154[140]

Case 2: The Middle-Income Earner

This taxpayer earns $66,739.20 per year.[141] He purchases a $300,000 house in Amorcensorum and contributes a 20% down payment ($60,000). The remaining balance ($240,000) is borrowed subject to a thirty-year (or 360 month) term.[142] The total interest paid over the life of the loan will be $188,584. At the end of Year 1, interest paid on the indebtedness will total $10,289.

For purposes of computing tax liability, the taxpayer is single. He is twenty-five years old, not a widower, has no dependents, and carries health insurance. All of the taxpayer's income is from W-2 employment (with no investment income). No state income tax or real estate taxes have been included in these computations. The taxpayer is a homeowner who is eligible to take the home mortgage interest deduction, but no other deductions and no applicable tax credits.[143]

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140. This illustration presupposes that the taxpayer purchases his home on January 1, 2018, in which case he will not be grandfathered under the former $1,000,000 limit. Only interest attributable to $750,000 of mortgage debt ($32,154.63) will be deductible.

141. Median earnings of $1290 per week in 2017 for individuals holding at least a bachelor's degree, at 52.14 weeks per year, equals $67,260.60. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS SECOND QUARTER 2017, at 2 (2017), https://www.bls.gov/news.release/pdf/wkyeng.pdf.

142. The author used Bankrate's Amortization Schedule Calculator. *Amortization Schedule Calculator*, *supra* note 106.

143. *See supra* note 137.

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	TAX LIABILITY	GREATER OF ITEMIZED OR STANDARD DEDUCTION
ESTIMATED TAX LIABILITY IN 2017	$8,839	$10,289
ESTIMATED TAX LIABILITY IN 2018	$7,982	$12,000 (SD)

Case 3: The Middle-Income Earner: African American Male

College-educated black men earn roughly 80% the hourly wages of white college educated men. Given that the taxpayer in the preceding example earns $66,739.20, the assumption for this example will be that the African American taxpayer earns $53,391.36.[144] Because these illustrations require that a taxpayer have a monthly housing payment that is equal to or less than 35% of his monthly gross income, the taxpayer in Case 3 purchases a less expensive home than the taxpayer in Case 2—$250,000 with 20% down ($200,000 mortgage and $50,000 down payment). The total interest paid over the life of the loan will be $157,153. At the end of Year 1, interest paid on the indebtedness will total $8,574.[145]

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144. *See* Eileen Patten, *Racial Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RES. CTR. (July 1, 2016), http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/.

145. The interest attributable to $750,000 of mortgage debt is $32,154.63, which is relevant to computing taxes in 2018 when the deduction is limited to interest attributable to no more than $750,000 of debt.

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	TAX LIABILITY	GREATER OF ITEMIZED OR STANDARD DEDUCTION
ESTIMATED TAX LIABILITY IN 2017	$5,931	$8,574
ESTIMATED TAX LIABILITY IN 2018	$5,046	$12,000 (SD)

Case 4: The Low-Income Earner

This taxpayer earns $33,369.60 per year.[146] He purchases a $150,000 house in Amorcensorum[147] and contributes a 20% down payment ($30,000). The remaining balance ($120,000) is borrowed subject to a thirty-year (or 360 month) term.[148] The total interest paid over the life of the loan will be $94,292. At the end of Year 1, interest paid on the indebtedness will total $5,144.[149]

146. Median earnings of $1290 per week in 2017 for those holding at least a bachelor's degree, at 52.14 weeks per year, equals $67,260.60. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Usual Weekly Earnings of Wage and Salary Workers Second Quarter 2017 (July 19, 2017), https://www.bls.gov/news.release/pdf/wkyeng.pdf. For purposes of this example, we are assuming that the taxpayer earns a wage that is one-half of the median wage.

147. Just as we used one-half of the salary stipulated in example one, in this example, we will use one-half of the home value. As of September 2017, the median home value in San Bernardino, California is $256,400 according to Zillow. *San Bernadino Home Prices & Values*, ZILLOW, https://www.zillow.com/san-bernardino-ca/home-values/ (last visited Sept. 8, 2017).

148. *See Mortgage Calculator*, NERDWALLET, https://www.nerdwallet.com/mortgages/mortgage-calculator/calculate-mortgage-payment (last visited Sept. 8, 2017).

149. The interest attributable to $750,000 of mortgage debt is $32,154.63, which is relevant to computing taxes in 2018 when the deduction is limited to interest attributable to no more than $750,000 of debt.

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	TAX LIABILITY	GREATER OF ITEMIZED OR STANDARD DEDUCTION
ESTIMATED TAX LIABILITY IN 2017	$2,979	$6,350 (SD)
ESTIMATED TAX LIABILITY IN 2018	$2,374	$12,000 (SD)

In each of the above illustrations, the taxpayer is receiving a tax cut without regard to the partial or complete loss of the home mortgage interest deduction.[150] Because the home mortgage interest deduction is only available to those taxpayers who itemize their deductions, the home mortgage interest deduction inures only to the benefit of the Case 1, High-Income Earner after passage of the TCJA.

IV. Temporary-Effect Tax Legislation and Retrenchment of Entrenchment

The fundamental difference between temporary-effect and permanent legislation is that the former must be extended to continue, whereas the latter must be repealed to cease. Temporary-effect legislation is an all-encompassing term referring to legislation that contains an expiration date or "sunset" provision,[151] and includes legislation that is temporary in duration and/or temporary in effect.[152] Though temporary-effect legislation has more recently come into vogue in the context of sweeping tax legislation,[153] use of such legislation has been used before, during, and after

150. The tax cuts are as follows: Case 1, 0.85%; Case 2, 9.7%; Case 3, 14.93%; and Case 4, 20.31%.

151. *See* Kysar, *The Sun Also Rises supra* note 29, at 337-38 n.7 (quoting AM. ENTERPRISE INST. FOR PUB. POLICY RES., ZERO-BASED BUDGETING AND SUNSET LEGISLATION 5 (1967) ("Typically, sunset legislation sets a date on which either budget authority or a program expires automatically unless reauthorized.")).

152. *See supra* notes 24, 25 (explaining the terms temporary legislation and/or temporary-effect legislation).

153. This Article excludes "tax extenders" from its discussion of temporary-effect tax legislation. It is worth mentioning, however, that tax extenders embody every negative criticism of temporary-effect tax legislation, with little upside. They are a subset of temporary-effect legislation that are far narrower in scope, usually addressing one specific issue. Dozens of tax provisions—some codified decades ago, while others have been enacted

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the founding of the United States.[154] Though there are four underlying reasons why legislation may be enacted as temporary (as a responsive policy tool, to circumvent budgetary and procedural restrictions, in response to transitory circumstances, and in response to strategic concerns), it is not reductionist to state simply that most temporary-effect legislation is the product of some amalgam of politics and policy.[155] Part IV considers the advantages and disadvantages of temporary-effect legislation, while also exploring the way in which such legislation may have been used to facilitate reform of entrenched, deleterious tax policy.

A. The Advantages and Disadvantages of Temporary-Effect Legislation

Historically, a sunset provision in temporary-effect legislation was tailored to a discrete provision that would then expire by its own terms unless reauthorized.[156] While the use of these provisions in tax legislation is

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more recently—are scheduled to expire each year. When the process operates smoothly, Congress rushes to renew extenders in December, generally without much scrutiny. Business as usual with tax extenders is the decades-long practice of tacking the extenders onto a different piece of legislation and passing them without much consideration. Consequently, extenders are technically temporary but effectively permanent because budgeting rules do not require that Congress estimate a cost beyond the one or two-year term of the extender. For more information about extenders, see DANIEL BERMAN & VICTORIA HANEMAN, MAKING TAX LAW 126 (2014) ("Expiring provisions mask the long-term cost of tax proposals that reduce revenue, and may therefore . . . lack political support to be enacted permanently. It is, for example, far easier to pass a provision that costs $10 million for one year rather than $100 million for ten years.").

154. *See* Gersen, *supra* note 30, at 250-54 ("Indeed, going far beyond acceptance of temporary statutes, at one point Thomas Jefferson crafted a normative argument in favor of a temporary or intragenerational constitution. In an exchange of letters between Jefferson and James Madison, the two confronted the desirability of an entire constitution that would sunset at the turn of each generation. Jefferson argued that no generation had the normative authority to bind another generation to its constitution or laws: On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation Every constitution, then, and every law, naturally expires at the end of 19 years.").

155. *See* Oh, *supra* note 30.

156. *See* Kysar, *The Sun Also Rises*, *supra* note 29, at 338 ("Over the past three decades, Congress has employed sunset provisions to discrete sections of tax legislation. Rather significantly, however, Congress recently attached far-reaching sunset provisions to nearly the entirety of major tax acts."); Chris Mooney, *A Short History of Sunsets*, LEGAL AFF. (Jan./Feb. 2004), http://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp ("Sunsetting was once heralded as a cure-all to the ills of inefficient government, a legislative device capable of eliminating obsolete and antiquated statutes and of keeping stodgy regulatory bureaucracies efficient and effective. But what was once a weapon for good-government reformers has been transformed in recent years. Under the

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neither novel nor new,[157] the modern age of temporary-effect legislation was marked by the prolific use of these provisions in the Economic Growth and Tax Reconciliation Act of 2001(EGTRA)—with every tax provision in the Act expiring on December 31, 2010.[158] Two years later, nearly every provision in the Jobs and Growth Tax Relief Reconciliation Act (JGTRRA) sunsets before 2008.[159] Though temporary-effect legislation was once a tool to address new needs or problems in a restrained way, expansive sunset provisions are now being incorporated in response to budget rules intended to constrain government spending.[160] In fact, the budget math mandated by the now-infamous Byrd rule may be credited for the sunset provisions in the 2001 and 2003 tax cuts (EGTRA and JGTRRA), as well as the Tax Cuts and Jobs Act of 2017.[161]

In a polarized political climate, the most likely route for legislating tax reform will be through the budget reconciliation process.[162] This is largely owing to changes implemented in the Congressional Budget Act of 1974, which allows the Senate to pass deficit reduction legislation—referred to as budget reconciliation—by a simple-majority "vote of fifty-one rather than

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Bush Administration, sunsetting has been reduced to a spoonful of sugar that helps controversial legislation go down.").

157. *See* Mooney, *supra* note 156 ("[The history of sunsetting] stretches back to the writings of Thomas Jefferson. Though he didn't use the word, Jefferson believed that a version of sunsetting sprang directly from natural law. 'Every constitution . . . and every law,' he wrote, 'naturally expires at the end of 19 years,' which was considered the length of a generation in his era.").

158. *See* Economic Growth and Tax Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.); Viswanathan, *supra* note 30, at 657 ("The majority of the tax cuts enacted in 2001, 2002, and 2003 will expire before 2011.").

159. *See* Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (codified as amended in scattered sections of 26 U.S.C.).

160. *See* Kysar, *The Sun Also Rises*, *supra* note 29, at 338.

161. *See* Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 L. & CONTEMP. PROBS., no. 2, 2018, at 99.

162. The 1986 Tax Reform Bill passed in the Republican-controlled Senate by a vote of 74-23 because majority-party members courted the minority-party members needed for cloture. *See* Brad Dillon, *Budget Reconciliation: Procedure and Possibilities for Permanent Tax Reform*, 126 J. TAX'N 170, 171 (2017). This courtship approach is unlikely to be effective in a highly polarized political setting. Another possible path involves the majority-party members of the Senate eliminating the super-majority requirement for cloture. Dubbed "the nuclear approach," it always remains a possibility, but no serious attempt to implement it has been undertaken. For an overview on these three obvious paths for legislating tax reform, see *id.*

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the super-majority (filibuster-avoiding) vote of sixty."[163] The Byrd Rule, a procedural centerpiece of the reconciliation process, allows a provision to be removed from reconciliation legislation if is extraneous.[164] Though there are several ways in which legislation may run afoul of requirements and be deemed extraneous, perhaps the most relevant for purposes of temporary-effect tax legislation is that the provision may not increase the deficit in any year beyond the ten-year budget window.[165] The TCJA demonstrates the way in which this seemingly minor, once-obscure procedural rule has become extremely impactful in shaping tax legislation over the past two decades:[166] almost all of the individual tax provisions in the bill expire December 31, 2025.[167]

This "new normal" of temporary-effect tax legislation raises four criticisms regarding temporariness as a legislative strategy: it evokes change that will lead to deficit increases; the uncertainty of temporary changes undermines long-term investment strategies; legislative transaction costs increase; and, it is a legislative entrenchment strategy that allows the legislature of today to impose its agenda on the legislature of tomorrow.[168] Critics assert that the practice of sunsetting tax legislation, or terminating its effect prior to the end of the ten-year budget window, hides or disguises true budgetary cost. [169] Further, temporary legislation may create uncertainty when taxpayers will not internalize the tax change into long-

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163. BERMAN & HANEMAN, *supra* note 153, at 119.

164. A provision is extraneous if it: (A) "does not produce a change in outlays or revenues;" (B) "produc[es] an increase in outlays or decrease in revenues" that does not follow the reconciliation instructions in the budget resolution; (C) "is not in the jurisdiction of the committee" that reported the provision; (D) "produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision[s];" (E) increases the deficit in any fiscal year after the period specified in the budget resolution (i.e., the "budget window"); or, (F) recommends changes to Social Security. 2 U.S.C. § 644(b)(1) (2012).

165. *See* BERMAN & HANEMAN, *supra* note 153, at 120.

166. *See* Aprill & Hemel, *supra* note 161, at 99-102. Temporary-effect legislation has since become a popular strategy employed by politicians to entrench a political agenda. *See, e.g.*, Alan J. Auerbach, *US Experience with Federal Budget Rules*, CESIFO DICE REP., Jan. 2009, at 41 (concluding that budget rules did have some effects); James M. Poterba, *Do Budget Rules Work?*, *in* FISCAL POLICY: LESSONS FROM ECONOMIC RESEARCH 53 (Alan J. Auerbach ed., 1997) (surveying empirical literature on budget institutions and fiscal policy).

167. *See* Aprill & Hemel, *supra* note 161, at 100.

168. *See* Yin, *supra* note 30, at 232-33; *see also, e.g.*, Kysar, *The Sun Also Rises*, *supra* note 29, at 338-41 (concluding that sunset provisions are "mere devices that assist congressional misbehavior").

169. *See* Yin, *supra* note 168, at 189-94.

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term planning because of the possibility of change,[170] which will ultimately undermine the effectiveness of the provision.[171] Although uncertainty surrounds all lawmaking, both permanent and temporary, the latter is inherently more unreliable in that it requires an affirmative response to continue—especially when the renewal of a provision requires political momentum to be successful. The third common criticism argues that legislative transaction costs increase, with an eye towards private-sector lobbying costs required to influence expiring or uncertain outcomes.[172] Finally, critics are concerned with the strategy of stringing along and forcing reconsideration of tax provisions. The nature of temporary-effect tax legislation is that, rather than definitively resolving an issue, the matter is kicked down the road eight to ten years to be reconsidered later—monopolizing the agenda of tomorrow with issues that need to be revisited. And as was seen recently in the estate planning community, the failure to revisit and address these expiring provisions may cause a train wreck.[173]

Supporters of temporary-effect tax legislation argue that the provisions increase accountability and allow for more accurate budget forecasting than permanent legislation.[174] It has been heralded by some as potentially transformative[175] and a solution to stagnancy.[176] Others point to the need for temporary-effect legislation as symbolic of a deeper problem: the only way

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170. *See* Zachary J. Gubler, *Making Experimental Rules Work*, 67 ADMIN. L. REV. 551, 577 (2015) ("Depending on the type of tax cut, taxpayers might accelerate the sale of capital assets to benefit from temporary capital gains taxes, or they might accelerate *inter vivos* gifts to take advantage of a temporary increase in the estate tax exemption. Regardless, the resulting data in that case would be skewed as a result of the over-responsiveness of the rule's beneficiaries.").

171. *See Tax Code Complexity: New Hope for Fresh Solutions: Hearing Before the S. Comm. On Finance*, 107th Cong. 21-23 (2001) (statement of Betty Wilson, President, Tax Executives Institute) (arguing that the temporary nature of certain tax provisions creates a fruitless complexity which undermines public faith in the tax system).

172. *See* Yin, *supra* note 30, at 239.

173. *See* Beth Shapiro Kaufman, *2010: The Anatomy of a Train Wreck*, EST. PLAN., May 2010, at 42, 43 ("[T]he uncertainty of 2010 is paralyzing.").

174. *See* William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004*, 45 B.C. L. REV. 1157, 1178 (2004) (illustrating how permanent tax cuts, unlike the expiring tax provisions imposed by the Bush administration, threaten fiscal stability); *see also* Yin, *supra* note 30, at 237-39.

175. *See, e.g.*, Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 30 THE PAPERS OF THOMAS JEFFERSON, 1 JANUARY 1798-31 JANUARY 1799, at 250-51 (Barbara B. Oberg ed., 2003) (discussing the merits of a constantly temporary Constitution).

176. *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 42 (Norton 2d ed., 1979) (1969).

https://digitalcommons.law.ou.edu/olr/vol71/iss2/2

in which to navigate around the counter-majoritarian Senate requirement of sixty votes to invoke cloture and avoid filibuster. Thus, in a polarized political environment, temporary-effect tax legislation passed during the reconciliation process by a simple majority may be the only way in which to change entrenched tax provisions.[177] Temporary tax legislation may be used to demonstrate the effectiveness of a tax provision, to temporarily advantage a new or socially desirable industry, or to provide temporary assistance in times of crisis.[178]

B. The Tax Cuts and Jobs Acts of 2017: Temporary-Effect Legislation in Action

The enactment of the TCJA makes for an interesting study of temporary-effect tax legislation because of its approach to revision of the home mortgage interest deduction. As discussed above in Part III, promotion of home ownership is an idea that receives broad support from both political parties. Although "America's favorite tax break"[179] has critics across the political spectrum, it remains a fixture in the Internal Revenue Code[180]—perhaps because politicians are loath to touch the proverbial "third rail" with attempted reform or repeal of a "sacred cow" provision.[181]

The TCJA has revised interlocking tax provisions—specifically, the reduced individual income tax rates, increased standard deduction, and new limitations upon the home mortgage interest deduction—thereby moving pieces on a chess board to eliminate a valued entitlement and shift

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177. *See* Yin, *supra* note 30, at 248-49.

178. *See* Kysar, *The Sun Also Rises*, *supra* note 29, at 358-59.

179. Nicholaus W. Norvell, *Transition Relief for Tax Reform's Third Rail: Reforming the Home Mortgage Interest Deduction After the Housing Market Crash*, 49 SAN DIEGO L. REV. 1333, 1334-35 (2012) (quoting Jeanne Sahadi, *Mortgage Deduction America's Costliest Tax Break*, CNN MONEY (Apr. 15, 2010), http://money.cnn.com/2010/04/14/pf/taxes/mortgage_interest_deduction/index.htm) ("Tax policy experts on both the left and right agree that the mortgage interest deduction fails to meaningfully increase the homeownership rate despite the substantial subsidy for many homeowners.").

180. *See* Lowenstein, *supra* note 39 ("Over the years, [the mortgage interest deduction] has become an American folk legend: the government invented the mortgage-interest deduction to help people buy their own homes, and the level of homeownership has risen ever since. What part of the legend is true? Basically, none of it.").

181. This Author believes that discussion of the home mortgage interest deduction warrants the bold move of mixing metaphors in the same sentence. *See Sacred Cow*, *supra* note 1; *Third Rail of Politics*, WIKIPEDIA, https://en.wikipedia.org/wiki/Third_rail_of_politics (last visited May 9, 2018) ("The third rail of a nation's politics is a metaphor for any issue so controversial that it is 'charged' and 'untouchable' to the extent that any politician or public official who dares to broach the subject will invariably suffer politically.").

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prevailing norms, while also lowering tax rates across the board to focus attention away from the lost entitlement. As demonstrated in the illustrations included in Section III.B., all four taxpayers (ranging from the high-income earner at $214,463, down to the low-income earner at $33,369.60) see a tax cut, without regard to whether or not the taxpayer has lost the ability to deduct home mortgage interest. This type of "baited" tax reform is a shell game of sorts, in which the attention of the taxpayer is focused upon the impact of a lost or reduced deduction because the impact is not felt. The home mortgage interest has become increasingly regressive, with a predicted 24% of the subsidy from the revised deduction flowing "to households earning more than $500,000" per year.[182]

Use of temporary-effect tax legislation to change the home mortgage interest deduction is arguably a progressive step in an unintentionally regressive plan. A window of opportunity has been created, extending from January 1, 2018 through December 31, 2025, which will allow politicians the opportunity to wholly rid the Code of this tax expenditure.[183] The temporary character of the legislation affords time—between enactment and sunset—for preferences to shift and the acceptability of the policy underlying the legislation to change.[184] It is possible that simply by being enacted,[185] even in the form of temporary-effect legislation, reform of the home mortgage interest deduction starts to become more acceptable.[186] If we accept the notion that extreme policies are less stable and more likely to change, the degree to which the public currently embraces the home mortgage interest deduction would render a wholesale repeal unstable[187]—

182. This is up from 12.4% on 2017 returns. Jordan Weissmann, *Republicans Gutted the Mortgage Interest Deduction. Democrats Should Finish It Off*, SLATE (Apr. 27, 2018, 2:23 PM), https://slate.com/business/2018/04/its-time-for-the-mortgage-interest-deduction-to-go.html.

183. *See* Amir El-Sibaie, *A Look Ahead at Expiring Tax Provisions*, TAX FOUND. (Jan. 18, 2018), https://taxfoundation.org/look-ahead-expiring-tax-provisions/.

184. For interesting discussion of these issues, see Oh, *supra* note 30, at 1056-58 (discussing factors influencing renewal of temporary legislation).

185. *See* Mooney, *supra* note 156 ("No sooner had the laws been passed than their Republican backers launched a pre-emptive strike, criticizing the sunsets and attempting to undo them.").

186. *See* Jason S. Oh, *Will Tax Reform Be Stable?*, 165 U. PA. L. REV. 1159, 1176-77 (2017) (discussing how a rule that prevents new legislation from adding to the federal deficit may make tax deductions more stable).

187. *See id.* at 1202-03 ("However, there is evidence suggesting that *limiting* the home mortgage interest deduction would be much stickier than *repealing* it entirely. . . . [t]he majority of legislators from across the political spectrum have expressed support for limiting the mortgage interest deduction in various ways. Options include restricting the mortgage

whether temporary or permanent.[188] Instead, a partial and baited gutting of the provision allows a new status quo to take shape as taxpayers forego the deduction in lieu of the standard deduction—partial in that some homeowners retain the deduction; and baited in that everyone receives a tax cut to distract from the loss of a prized deduction. In the context of the home mortgage interest deduction, temporariness of change in the short-term may lead to durability of result in the long-term—provided that an effective and targeted change occurs before January 1, 2026. An irony inheres when a strategy of temporariness may cultivate permanence in policy.

The use of temporary-effect legislation to retrench an entrenched tax provision may be simultaneously protective and paternalistic. Moreover, it is notable—an approach that avoids many of the costs that may be otherwise born from advancing a politically unpopular goal. When the self-interested thinking of the voting majority drives entrenchment, temporary-effect legislation may be utilized to gradually shift the attitudes of the masses to facilitate retrenchment.

V. A Time to Pivot: Towards Solutions

Accepting that every tax expenditure is, on some level, an act of social engineering that capitalizes cultural expectations and identity, this Article contends that the regressive changes to this homeownership subsidy have paved the way for meaningful reform. Successfully advancing change through the political process is often wholly dependent upon timing. The regressive nature of the home mortgage interest deduction has been exacerbated through the TCJA, but the 2025 expiration date of the individual tax provisions opens a window of opportunity to eliminate the deduction from the Code, while only stripping a small minority of that entitlement. Part V first considers the politics and processes of tax policy at operation and the way in which temporary-effect legislation may be useful strategy to retrench entrenchment of bad tax policy. A substantive solution is thus advanced: the repeal of the home mortgage interest deduction in its

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interest deduction to a single house, reducing the mortgage cap from $1.1 million, or replacing the mortgage interest deduction with a tax credit. . . . In fact, our search yielded statements from over forty legislators from all over the ideological spectrum that wanted to limit the mortgage interest deduction in some way. This suggests that relative to repeal, limiting the mortgage interest deduction enjoys substantial legislative support and is likely a more stable policy.”).

188. *See id.* at 1178-80 (discussing how legislators’ preferences change over time).

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entirety on or before its expiration date, to be replaced with a fixed credit for homeownership that is tied to neither mortgages or debt.

A. The Impact of Politics and Processes in Shaping Tax Policy

Numerous and varied proposals for reform have been floated over the past three decades by congressional policymakers.[189] Limiting the home mortgage interest deduction for higher-income earners, or replacing the deduction altogether with a tax credit, is not a novel idea. Every year since 2010, the Obama Administration included a proposal in the Greenbooks sent to Congress that curtailed the home mortgage interest deduction for high-earners.[190] This proposal limited the mortgage interest deduction for 33%, 35%, and 39.6% taxpayers—specifically, single taxpayers earning more than $191,650 and married taxpayers earning more than $233,350.[191] Whereas a deduction for a taxpayer in the 39.6% bracket would normally be valued at the amount of the deduction multiplied by the tax rate (here, 39.6%), the value of the deduction would instead be limited to the dollar amount of eligible home mortgage interest multiplied by 28%.[192] In rough terms, the value of a $100 home mortgage interest deduction for a 39.6% taxpayer would be $28 ($100 multiplied by 28%) rather than $39.60 ($100

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189. *See generally* Norvell, *supra* note 179.

190. *See* U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2010 REVENUE PROPOSALS 87-88 (2009); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2011 REVENUE PROPOSALS 132 (2010); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2012 REVENUE PROPOSALS 132 (2011); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2013 REVENUE PROPOSALS 74 (2012); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2014 REVENUE PROPOSALS 135 (2013); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2015 REVENUE PROPOSALS 154-55 (2014); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 155 (2015); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 154 (2016). *See generally* BERMAN & HANEMAN, *supra* note 153.

191. I.R.C. § 1; 2017 Federal Tax Rates, Personal Exemptions, and Standard Deductions: IRS Tax Brackets & Deduction Amounts for Tax Year 2017, U.S. TAX CENTER, https://www.irs.com/articles/2017-federal-tax-rates-personal-exemptions-and-standard-deductions (last visited Oct. 29, 2018).

192. WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 23 (5th ed. 1999) ("[A] deduction only reduces taxes by the amount of the allowable deduction multiplied by the taxpayer's marginal tax rate.").

multiplied by $39.60).[193] The Simpson-Bowles commission, appointed by President Obama to suggest reforms to the tax code that would reduce the deficit,[194] proposed that the home mortgage interest cap be reduced from its current $1 million limit down to $500,000, and that the tax break for second homes be eliminated.[195] In the 2016 election, Republican Presidential candidates Camp and Cruz also supported this proposed reduction down to $500,000,[196] while Democratic candidates Clinton and Sanders supported a version of the Obama plan.[197]

For more than three decades, the National Commission on Fiscal Responsibility and Reform has proposed replacing the mortgage interest deduction with a 12% non-refundable tax credit for interest paid on the first $500,000 of mortgage debt.[198] The Bipartisan Policy Center's Debt Reduction Tax Force Plan presented a different version of the non-refundable credit proposal in 2010: a 15% refundable credit for the first $25,000 of home mortgage interest.[199] This credit would not apply to home mortgage interest attributable to a second home or a home equity loan.[200] The idea of a tax credit replacing the home mortgage interest deduction has been embraced, in some variously stated form, by those on the right such as the American Enterprise Institute economist Alan Viard, as well as those on the left, including the Center on Budget and Policy Priorities.[201]

Despite decades of discussion, and the proposal of more effective alternatives, congressional policymakers have avoided substantially

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193. The Obama Administration, in effect, was capping benefits that flow upwards as a result of the "upside-down" effect of deductions. *See* Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006).

194. Exec. Order No. 13,531, 75 Fed. Reg. 7927 (Feb. 18, 2010).

195. NAT'L COMM'N ON FISCAL RESP. & REFORM, THE MOMENT OF TRUTH 27 fig.7 (Comm. Print 2010).

196. Barton, *supra* note 127.

197. *See* Richard Auxier et al., *An Analysis of Hillary Clinton's Tax Proposals*, TAX POL'Y CTR. (Mar. 3, 2016), http://www.taxpolicycenter.org/publications/analysis-hillary-clintons-tax-proposals; *see also Making the Wealthy, Wall Street, and Large Corporations Pay Their Fair Share*, BERNIE 2016, https://berniesanders.com/issues/making-the-wealthy-pay-fair-share (last visited Oct. 19, 2017).

198. Adam J. Cole, Geoffrey Gee & Nicholas Turner, *The Distributional and Revenue Consequences of Reforming the Mortgage Interest Deduction*, 64 NAT'L TAX J. 977, 978 (2011).

199. *Id.*

200. BRUCE KATZ, BROOKINGS INST., REFORM THE MORTGAGE INTEREST DEDUCTION TO INVEST IN INNOVATION AND ADVANCED INDUSTRIES 3 (2012), https://www.brookings.edu/wp-content/uploads/2016/06/06-mortgage-interest-deduction.pdf.

201. Bartlett, *supra* note 123.

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changing America's favorite, entrenched tax break. Amended through the TCJA, all attention on the home mortgage interest deduction should now be upon the expiration date of the amendment so that an important opportunity is not lost.[202] Although a criticism of temporary-effect legislation is the agenda-control that a past legislature imposes on a future legislature, implicit in temporariness is an intertemporal choice that risks legislative drift.[203] Specifically, while a future committee chair will be forced to reconsider the temporary-effect legislation, he or she is also in a position to have significant substantive impact.[204] Legislators will be forced to reconsider the matter of the home mortgage interest deduction, but temporariness allows for information gathering with regard to the regressive distributional impact—supported not by estimates and projections, but actual hard data—and for the first time in decades, timing will be ideal for wholesale deconstruction and reconstruction of homeownership subsidies.

The January 1, 2018 change to the home mortgage interest deduction draws attention, once again, to the disagreement between scholars as to whether temporary-effect legislation is beneficial or harmful. When utilized as a functional entrenchment device, such legislation is problematic; conversely, when utilized as a reform or retrenchment device to dislodge an embedded entitlement, temporary-effect legislation may serve an invaluable purpose. The home mortgage interest deduction is the product of either functional or unintentional entrenchment.[205] The impediment to change with regard to this tax expenditure seems to be political not legal: the inevitable public outrage over the loss of a beloved tax expenditure.[206] Though a well-functioning democracy is responsive to majority will, the home mortgage interest deduction has been functionally entrenched for decades because a majority of Americans embrace the expenditure out of

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202. *See generally* Norvell, *supra* note 179.

203. Gersen, *supra* note 30, at 281–82.

204. *Id.*

205. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 475-76 (2015) ("As it happens, the phenomenon of entrenchment as it has been understood by social scientists and historians (and even the occasional legal scholar) is in no way limited to the self-consciously strategic efforts of political actors. . . . [C]onsider the home mortgage interest deduction, which created—apparently quite by accident—a constituency of homeowners and mortgage lenders that is deeply committed to, and formidably capable of, preserving their entitlement.").

206. *See id.* (explaining that criminal laws against homicide are not entrenched, because they would endure "because they remain consistent with the first-order political preferences of a (super) majority citizen").

ignorance (as to the real benefits and burdens of the tax expenditure), self-interest (because they themselves receive a benefit from the deduction), or optimism (in that they believe that they will one day receive a benefit, though they do not now)—but for no reason related to social good.

There are innumerable examples of temporary-effect tax legislation that facilitates Congressional misbehavior or circumvents budget constraints. Perhaps the most notable is the federal estate and gift tax—which has effectively been in a state of flux for almost twenty years, with Republicans pushing for permanent repeal but not having the requisite number of votes to accomplish it. Exemption amounts have increased, rates have fallen, the estate tax briefly died, and was later resurrected,[207] with Republicans refusing to accept that they should stop trying to make fetch happen.[208] In fact, changes to the estate and gift tax over the past two decades are an example of temporary-effect legislation being used as a tool of functional

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207. With Republican control of the House, Senate and Presidency in 2001, and a budget surplus, President Bush was unable to secure a permanent repeal of the estate and gift tax. The Byrd Rule overrode the reconciliation process because the legislation increased the federal deficit beyond the ten-year window. Consequently, repeal of the estate and gift tax would have required a 60-vote majority in the Senate. MAYLING BIRNEY & IAN SHAPIRO, DEATH AND TAXES: THE ESTATE TAX REPEAL AND AMERICAN DEMOCRACY 5 (2004), https://gradebuddy.com/doc/2623630/death-and-taxes-the-estate-tax-repeal-and-american-democracy?full=1. Unable to rally these 60 votes, Republicans had to settle for temporary-effect legislation. The Economic Growth and Reconciliation Act of 2001 increased the estate tax exemption from 2001 through 2009 and repealed the estate tax for 2010 (though the repeal never came to pass). Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 38. Estate taxes in 2010 through 2012 were based upon the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act, signed into law on December 17, 2010, which was supposed to sunset on December 31, 2012. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. 111-312, 124 Stat. 3296. The American Taxpayer Relief Act was signed into law on January 2, 2013, which was intended to make permanent the laws on the estate and gift tax. American Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313 (2013). This permanency did not last long given that the Tax Cuts and Jobs Act has doubled the base estate and gift tax exemption amount (from $5 million to $10 million) from December 31, 2017 through January 1, 2026. Act of Dec. 22, 2017, Pub. L. 115-97, 131 Stat. 2054.

208. Gretchen McCulloch, *Making "Fetch" Happen: What Makes New Words Catch On?*, SLATE (May 1, 2014, 12:44 PM), http://www.slate.com/blogs/lexicon_valley/2014/05/01/mean_girls_slang_fetch_10_years_later_why_it_didn_t_catch_on_according_to.html ("In the ten years since *Mean Girls* came out . . . the quote 'stop trying to make fetch happen' has achieved its own popularity as a means of mocking the out-of-touch."); *see also* Olivia B. Waxman, *The White House Made a Mean Girls Joke on Twitter and It Was Awesome*, TIME (Aug. 13, 2013), http://newsfeed.time.com/2013/08/13/the-white-house-made-a-mean-girls-joke-on-twitter-and-it-was-awesome/.

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entrenchment: although these provisions sunset and expire, the practical effect is that high-earning taxpayers benefitting from these provisions will be motivated to bankroll candidates who commit to extending these provisions.[209] There is immense pressure to extend temporary-effect legislation that reduces taxes, and this pressure creates political leverage in the future.[210] Of course the downside of this political strategy, in the context of the estate tax, is that the temporary-effect legislation has created instability through uncertainty over the past decade that was sometimes paralyzing for estate planners.[211]

There is no question that renewal uncertainty is a negative externality of temporariness and must be considered on balance. With regard to the home mortgage interest deduction, uncertainty is not a consideration upon which much time needs to be spent. The new caps upon the home mortgage interest deduction in the TCJA serve a signaling purpose: this deduction should no longer be counted upon when purchasing a home. And because the distribution of benefits from the deduction will prove to be shockingly regressive when data is released, it will be unconscionable to renew the home mortgage interest deduction in its present form—thus, renewal uncertainty ceases to become an issue. The law will either return to its pre-TCJA form—a wasted opportunity—or it will be repealed.

It is notable, however, that temporary-effect legislation has the potential to finally be utilized in the tax arena the way political theorists such as Thomas Jefferson envisioned: to dislodge an entrenched provision. We stand on the precipice of a "lawmaking moment," which emphasizes the fact that effective tax reform hinges as much, if not more, on political acceptability as it does upon sound tax policy. One absurd possibility is that the new, regressive home mortgage interest deduction (as illustrated above) will be extended before 2026, coming at a substantial cost and offering no benefit to the lower and middle classes. Clinging to optimism and perhaps naiveté, the alternative is that the 2017 changes to the home mortgage interest deduction will prove to be a fascinating example of temporary-

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209. Hacker & Pierson, *supra* note 27, at 59-62.

210. *Id.*

211. Brian J. O'Connor, *Heirs Inherit Uncertainty with New Estate Tax*, N.Y. TIMES (Feb. 23, 2018), https://www.nytimes.com/2018/02/23/business/estate-tax-uncertainty.html ("Despite repeated attempts by conservative lawmakers to kill it—and a 2016 campaign-trail vow by Donald J. Trump that 'no family will have to pay the death tax' because 'we will repeal it'—the estate tax remains a surprisingly resilient part of the United States tax code . . . [b]ut leaving the estate tax in place means America's richest families now face the prospect of scurrying to tax lawyers to revise older estate plans, and may need to do so again before the end of 2025.").

effect legislation as a retrenchment strategy to unwind deeply entrenched, bad tax policy.

Over the next few years, and certainly before 2026, the time will be ideal to repeal the home mortgage interest deduction and replace it with the tax credit suggested in Section V.2. As the old adage goes, timing is everything. A tax credit offers more transparency to the public, as it can be easily explained as a dollar-for-dollar reduction of one's tax liability. In many ways, it will make the Internal Revenue Code simpler—which seems to be a stated goal of almost every politician. The upside-down effect of deductions is avoided. A credit may also be easily tailored to provide targeted and meaningful tax relief to the income-level of taxpayer who is on the margin of owning versus renting.

B. The Replacement of the Home Mortgage Interest Deduction

It has been astutely observed that lawmaking moments are just that: fleeting moments that may swiftly pass.[212] Understanding that the chess board has been set, and the moment is now, what plan should be implemented prior to January 1, 2026 with regard to the home mortgage interest deduction? This Article proposes a two-prong approach: first, the deduction itself should be eliminated from the Internal Revenue Code; second, a tax credit should be implemented that will provide targeted relief for low- and middle-income taxpayers. This two-prong approach would be the first step in a larger plan of assistance intended to assist homeowners,[213] with further assistance focused upon the emphasis of equity (as opposed to debt).[214]

The repeal of the mortgage interest deduction would have little impact on low- and middle-income taxpayers who do not presently receive the benefit of the deduction anyways.[215] The tax credit may be designed to continue to offer assistance to those middle-income taxpayers who benefit from it, while phasing out higher-income taxpayers. Utilizing a tax credit that is tied to homeownership—rather than the size of a homeowner's mortgage

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212. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1156 (2009).

213. Gubler, *supra* note 171, at 129 ("When forming policy under conditions of extreme uncertainty, the optimal approach seems to be a process by which the policy decision is divided into multiple stages, or in other words, an experimental approach.").

214. To date, homeownership assistance programs have focused very little upon assisting the down payment-constraints.

215. Scott Greenberg, *Who Itemizes Deductions?*, TAX FOUND. (Feb. 22, 2016), https://taxfoundation.org/who-itemizes-deductions/.

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indebtedness—will shift focus to the desired social outcome of homeownership, and reduce the incentive to over-borrow. For illustrative purposes, this Article utilizes a 0.5% tax credit based upon the purchase price of the home up to $500,000 (or $2500).[216] It is possible to phase-out this credit for taxpayers with income above a threshold amount.

The benefits of this solution can be seen when applied to the illustrations of Part III of this Article.

Case 1: The High-Income Earner

The Case 1 taxpayer (income of $214,463, home purchase price of $1.2 million) was the only taxpayer who is in an income range where most taxpayers would itemize deductions and receive the benefit of the mortgage interest deduction, even in 2018, after the Tax Cuts and Jobs Acts of 2017 limited the deduction. It is also worth noting that if a phase-out were to be incorporated into the proposed tax credit, it is unlikely that the Case 1 high-income earner would receive the benefit of the credit.

For the sake of discussion, assuming that the proposed tax credit is applied, the credit for this taxpayer is capped at $2500. The results are illustrated below.

	Tax Liability	Notes	Effective Tax Rate
Estimated Tax Liability in 2018	$40,158	Includes Itemized MID of $32,154	18.72%
Application of Proposal Under 2018 Code	$44,182	Includes Credit of $2,500	20.60%
Application of Proposal Under 2017 Code	$48,370	Includes Credit of $2,500	22.55%

216. *See* Jason J. Fichtner & Jacob Feldman, *Reforming the Mortgage Interest Deduction* (Mercatus Ctr., Working Paper No. 14-17, 2014), https://www.mercatus.org/publication/reforming-mortgage-interest-deduction.

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Temporary-enactment of the individual tax cuts under the Tax Cuts and Jobs Act of 2017 have created uncertainty in the future. If the 2018 rates and standard deduction amounts are extended, the proposed credit will increase the high-income earner's liability from 18.72% to 20.60%. If the individual tax cuts are allowed to expire, and the tax rates and standard deduction return to 2017 levels on January 1, 2026, this taxpayer would pay an additional $6,914 ($41,456 with the home mortgage interest deduction; $48,370 with the proposed credit).

Case 2: The Middle-Income Earner

In Case 2, the middle-income earner (income of $66,739.20, home purchase price of $300,000) may apply a $1500 tax credit under this proposal.

	TAX LIABILITY	NOTES	EFFECTIVE TAX RATE
ESTIMATED TAX LIABILITY IN 2018	$7,982	INCLUDES $12,000 STANDARD DED.	11.96%
APPLICATION OF PROPOSAL UNDER 2018 CODE	$6,482	INCLUDES CREDIT OF $1,500	9.7%
APPLICATION OF PROPOSAL UNDER 2017 CODE	$8,324	INCLUDES $6,350 STANDARD DED. & $4,050 PE	12.47%

Temporary-enactment of the individual tax cuts under the TCJA have created uncertainty in the future. If the 2018 rates and standard deduction amounts are extended, the proposed credit will reduce the middle-income taxpayer's liability from 11.96% to 9.66%. This is attributable to the fact that any benefit from the home mortgage interest deduction has been eliminated for this taxpayer because of the increased 2018 standard deduction amount. If the individual tax cuts are allowed to expire, and the

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tax rates and standard deduction return to 2017 levels on January 1, 2026, this taxpayer would save $515 ($8,839 with the home mortgage interest deduction; $8,324 with the proposed credit).

Case 3: The Middle-Income Earner: African American Male

The African American middle-income earner of Case 3 (income of $53,391.36, home purchase price of $250,000) may apply a $1250 tax credit.

	TAX LIABILITY	NOTES	EFFECTIVE TAX RATE
ESTIMATED TAX LIABILITY IN 2018	$5,046	INCLUDES $12,000 STANDARD DED.	7.56%
APPLICATION OF PROPOSAL UNDER 2018 CODE	$3,796	INCLUDES CREDIT OF $1,250	5.68%
APPLICATION OF PROPOSAL UNDER 2017 CODE	$5,237	INCLUDES $6,350 STANDARD DED. & $4,050 PE	7.84%

Temporary-enactment of the individual tax cuts under the TCJA have created uncertainty in the future. If the 2018 rates and standard deduction amounts are extended, the proposed credit will reduce this taxpayer's liability from 7.56% to 5.68%. This is attributable to the fact that any benefit from the home mortgage interest deduction has been eliminated for this taxpayer because of the increased 2018 standard deduction amount. If the individual tax cuts are allowed to expire, and the tax rates and standard deduction return to 2017 levels on January 1, 2026, this taxpayer would save $639 ($5,931 with the home mortgage interest deduction; $5,237 with the proposed credit).

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Case 4: The Low-Income Earner

In Case 4, the low-income earner (income of $33,369.60, home purchase price of $150,000) may apply a $750 tax credit.

	TAX LIABILITY	NOTES	EFFECTIVE TAX RATE
ESTIMATED TAX LIABILITY IN 2018	$2,374	INCLUDES $12,000 STANDARD DED.	7.11%
APPLICATION OF PROPOSAL UNDER 2018 CODE	$1,624	INCLUDES CREDIT OF $750 AND $12,000 SD	4.86%
APPLICATION OF PROPOSAL UNDER 2017 CODE	$2,229	INCLUDES CREDIT OF $750, $6,350 SD & $4,050 PE	6.67%

Temporary-enactment of the individual tax cuts under the TCJA has created uncertainty. If the 2018 rates and standard deduction amounts are extended, the proposed credit will reduce the low-income taxpayer's liability from 7.11% to 4.86%. This is attributable to the fact that any benefit from the home mortgage interest deduction has been eliminated for this taxpayer because of the increased 2018 standard deduction amount. If the individual tax cuts are allowed to expire, and the tax rates and standard deduction return to 2017 levels on January 1, 2026, this taxpayer would save $750 ($2979 with the home mortgage interest deduction; $2229 with the proposed credit).

The low-income earner is the taxpayer who will find himself with the most dramatic subsidy if the home mortgage interest deduction is repealed and replaced: it is highly unlikely that he itemizes—thus, he has never received any benefit from the home mortgage interest deduction. The credit proposal routes the most significant homeownership subsidy to the taxpayers most in need—those for whom a subsidy may make all the

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difference in a decision to rent versus own—whether under the 2017 or the 2018 Code.

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Though Democrats would likely use the expression "dumpster fire"[217] to describe the TCJA, the legislation arguably sets the stage for repeal of a tax expenditure previously regarded as untouchable. As is illustrated above, only the high-income earner in Case 1 received a benefit from the home mortgage interest deduction prior to the enactment of the TCJA ("prior law"), and continues to receive a benefit when the new law is implemented in 2018 ("current law"). The Case 2 and Case 3 taxpayers will itemize their deductions to receive the benefit of the home mortgage interest deduction under prior law, but will not receive any benefit from the deduction under current law. The Case 4 taxpayer receives no benefit from the home mortgage interest deduction under prior or current law. Ironically, the Case 4 taxpayer is the individual for whom a government subsidy in favor of homeownership may be most impactful. Because the TCJA has rendered the home mortgage interest deduction worthless for all but the high-income taxpayer of Case 1, implementing targeted relief through the proposed two-prong plan will strip an entitlement from a taxpayer who is not in need of generous assistance.

VI. Conclusion

"Kicking the can down the road" is an adept and universally understood metaphor that may be used to describe the behavior of U.S. politicians on issues of great magnitude.[218] Politically difficult choices are, unsurprisingly, difficult—and when faced with a deadline, politicians often seem to choose inaction or half-measures. It is easy to understand why kicking the can down the road is a maligned strategy, perhaps signaling the placement of self above country by politicians unwilling to commit to a politically

217. Laurel Wamsley, *A Phrase for Our Time: Merriam Webster Adds 'Dumpster Fire' to Dictionary*, NAT'L PUB. RADIO (Mar. 5, 2018, 16:32 PM ET) https://www.npr.org/sections/thetwo-way/2018/03/05/590919849/a-phrase-for-our-time-merriam-webster-adds-dumpster-fire-to-dictionary (referencing the Merriam-Webster definition: "an utterly calamitous or mismanaged situation or occurrence: disaster").

218. James Hohmann & John F. Harris, *10 Quotes That Haunt Obama*, POLITICO (Oct. 2, 2012, 4:51 AM EDT), https://www.politico.com/story/2012/10/10-quotes-that-haunt-obama-081895 (noting that, five days before taking office, President Obama emphatically declared, "What we have done is kicked this can down the road. We are now at the end of the road and are not in a position to kick it any further. We have to signal seriousness in this by making sure some of the hard decisions are made . . . .").

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unpopular path. This Article considers the recent changes to the home mortgage interest deduction as a potentially noteworthy use of temporary-effect legislation in a politically polarized world, and identifies the value in using transition periods to shift norms and build consensus in an area of the law such as tax, which is dense and opaque, and sometimes best understood by the average voter in retrospect. Assuming that the preferences of the majority must be (or theoretically should be) reflected in legislative policy, temporary-effect tax legislation may be useful to retrench entrenched opinions of the majority.

For decades, tax policy experts have agreed that the home mortgage interest deduction is a failure in tax policy: it disproportionately benefits higher-income taxpayers,[219] has little impact on homeownership, and arguably raises home prices.[220] Changes in the TCJA have created a hyperbolically-regressive version of the home mortgage interest deduction that must be reconsidered before its December 31, 2018 expiration. While temporariness will force reconsideration, it also allows for legislative drift—enabling legislators to implement a wholesale reshaping of homeownership subsidies while deftly sidestepping many of the costs that would otherwise be born from an attack upon a sacred cow tax provision.

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

220. *See* Mann, *supra* note 88, at 1396 ("The present form of the home mortgage interest deduction no longer supports the American Dream"); Morrow, *supra* note 120, at 822 (alleging that the deduction "inflates housing prices, encourages excessive borrowing and contributes to instability in the real estate economy"); Jr., *supra* note 6, at 181 (stating that "[t]he macroeconomic effects of the MID are so destructive that every economist (excluding those employed by the housing industry) believes" that it needs to be repealed); *see also* Stephen C. Cecchetti & Kermit L. Schoenholtz, *Why the Mortgage Interest Tax Deduction Should Disappear, but Won't*, MONEY & BANKING (June 8, 2015), http://www.moneyandbanking.com/commentary/2015/6/3/why-the-mortgage-interest-tax-deduction-should-disappear-but-wont (criticizing the home mortgage interest deduction for "rais[ing] inequality and reduc[ing] economic efficiency"). *See generally* Andrew Hanson, Ike Brannon & Zackary Hawley, *Rethinking Tax Benefits for Homeowners*, NAT'L AFF., Spring 2014, at 40, 41 (criticizing the mortgage interest deduction as "regressive"); William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43 (1996) (arguing that the deduction must be eliminated or curtailed in size and scope).

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