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Margaret Ryznar
Indiana University McKinney School of Law

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Tax Reform on Homeownership

MARGARET RYZNAR*

The 2017 tax reform, by curtailing the deductions for mortgage interest and state and local taxes, frustrates the American public policy of encouraging homeownership. Yet, there are many reasons that public policy has encouraged homeownership for decades. Most importantly, homeownership is an important savings tool for Americans—and tax reform should be mindful of it.

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INTRODUCTION

The United States is a country of homeownership.[1] Yet, the 2017 tax legislation reduced the support for homeownership, imposing

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* Professor of Law, Indiana University McKinney School of Law.

[1] "America has long been a land of homeowners, from the 19th century homesteaders moving west to the 21st century families moving to the exurbs, all striving to stake claim to the American dream and own their own home." Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 116 (2009). For a history of homeownership in the United States, see generally William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503 (2010).

> This love affair with single-family housing has shaped the American landscape. During the post-World War II building

new limitations on the deduction of home mortgage interest and real property taxes.[2] There are important reasons to continue supporting homeownership benefits,[3] but often overlooked is the role of hous-

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> boom, European countries generally built apartments, while the U.S. was transformed from a nation of renters to a nation of homeowners by massive tax subsidies to homeowners as well as the restructuring of home financing by FHA and VA mortgages. The result is geography dominated by suburbs and a housing market dominated by owners.

Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 328 (1998) [hereinafter Williams, *Rhetoric*].

[2] *See generally* Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (to be codified in scattered sections of 26 U.S.C.). A goal of the reform was to simplify the tax code and grow the economy. "By modifying or eliminating certain tax preferences, the government can address some of the revenue shortfalls without raising taxes." 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, 362 (2015). In recent years, "[t]ax subsidies to homeowners (wherein homeowners write mortgage interest off of their taxable income) amounted to a $119.3 billion subsidy nationwide." john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 623 (2008).

> Tax incentives for homeownership are some of the most expensive subsidies in the Internal Revenue Code. The mortgage interest deduction, the exclusion of gain from the sale of a primary residence and the deduction for real property taxes together cost $183.83 billion annually in lost revenue, and that number is growing rapidly. The mortgage interest deduction alone is a $119.75 billion annual tax expenditure.

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, 753 (2012).

[3] *See, e.g.*, Douglas G. Baird, *Technology, Information, and Bankruptcy*, 2007 U. ILL. L. REV. 305, 307 ("Living in one's own home is often touted as an integral part of the American Dream, and promoting homeownership is often an explicit government policy."); Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131, 145 (1999) ("Homeownership has long been identified with the 'American dream.' It is considered to be 'a basic value in American society' and a 'national good.'"); Michael S. Knoll, *Taxation, Negative Amortization and Affordable Mortgages*, 53 OHIO ST. L.J. 1341, 1378 (1992) ("Homeownership is a cherished part of the American dream.").

ing as a savings mechanism. The tax law on retirement favors saving,[4] but most Americans do not save enough. Instead, they put much of their money toward homeownership.[5] Many of the advantages of saving and homeownership are the same—except savings are parked in homes instead of 401(k)s.

The United States is thus a country of homeownership instead of retirement saving.[6] This reality should give lawmakers pause when changing the tax-favorability of homeownership, by arguing in favor of expanding instead of restricting the tax benefits of homeownership. At the very least, to maintain consistency, it makes sense to subsidize homeownership as much as retirement because many Americans cannot afford both, and they serve similar purposes.[7]

Accordingly, this Article argues that homeownership is an important savings vehicle justifying tax breaks. Part I begins by considering the tax incentives for retirement saving. Part II does so for homeownership. Part III examines the relationship between homeownership and saving, while Part IV considers its implications for tax reform. This Article then concludes that just as the tax law incentivizes retirement saving, it should also provide incentives for homeownership.

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[4] *See* Kiran Iyer, *Nudging Virtue*, 26 S. CAL. INTERDISC. L.J. 469, 477 (2017) ("Governments have an interest in ensuring that people have retirement savings, given that their capacity to live well in the future depends in part on their material well-being. Therefore, lawmakers must seriously consider the effectiveness of any policy aimed at increasing savings rates. However, the analysis of consequences would not exhaust the inquiry.").

[5] *See, e.g.*, Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 21 (2009) ("The effect of homeownership on household wealth has been greatest among young, low-income, and minority households, which often have very few non-home assets.").

[6] *See supra* note 1; *see also* Tara Twomey & Todd F. Maynes, *Protecting Nest Eggs and Other Retirement Benefits in Bankruptcy*, 90 AM. BANKR. L.J. 235, 236–41 (2016).

[7] *See also infra* Section III.B. *See generally* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2017, at 5 (2017), http://www.jchs.harvard.edu/sites/default/files/harvard_jchs_state_of_the_nations_housing_2017_0.pdf (discussing that the unaffordability of housing and homeownership has left 38.9 million households cost-burdened).

I. TAX INCENTIVES FOR RETIREMENT SAVING

Governments can either incentivize saving or require it among their citizens.[8] Like many countries, the United States has chosen to incentivize it, including through the tax law. Whether through financial incentives or penalties, tax drives people's behavior.[9] There are several ways to incentivize behavior through tax, including by

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[8] This is different from "nudging" people into saving. *See* Iyer, *supra* note 4, at 469. Without either, it is unlikely that people will save as much for retirement. *See, e.g.*, Ryan Bubb, Patrick Corrigan & Patrick L. Warren, *A Behavioral Contract Theory Perspective on Retirement Savings*, 47 CONN. L. REV. 1317, 1317 (2015) ("The primary motivation for retirement savings policy is the view that many of us, if left to our own devices, will not save enough for retirement.").

[9] A classic example is the charitable deduction. *See, e.g.*, Patrick E. Tolan, Jr., *Compromising the Safety Net: How Limiting Tax Deductions for High-Income Donors Could Undermine Charitable Organizations*, 46 SUFFOLK U. L. REV. 329, 329 (2013) (noting the importance of the charitable deduction to giving). For a background on tax incentives for corporations, see Margaret Ryznar & Karen Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1680–81 (2015). "Policymakers also understand the motivation of corporate managers to minimize taxes and rely on corporate managers to respond to incentives to engage in certain activities—such as investing in new equipment or research and development—put in the tax law." Mark J. Cowan, *A GAAP Critic's Guide to Corporate Income Taxes*, 66 TAX LAW. 209, 232 (2012).

Another example is the marriage penalty in the tax code. For the argument that economic incentives drive women's behavior, see EDWARD J. MCCAFFERY, TAXING WOMEN 19–23 (1997) (noting that because married couples often view the wife's income as supplemental, which is taxed at higher marginal rates, the tax code provides a disincentive for married women to work); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1033, 1040–41 (1993) (arguing that Congress should lower married women's tax rates to encourage both marriage and married women's participation in the labor force); Jennifer L. Venghaus, Comment, *Tax Incentives: A Means of Encouraging Research and Development for Homeland Security?*, 37 U. RICH. L. REV. 1213, 1220 (2003) (suggesting that the tax code can change society's behavior). However, other scholars have suggested that the tax code does not influence people's behavior, but that people's behavior influences the tax code. *See, e.g.*, Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392 (1975) (arguing that the tax code codifies social mores); Erik M. Jensen, Book Review, 5 PITT. TAX REV. 165, 170 n.16 (2008) (reviewing JONATHAN BARRY FORMAN, MAKING AMERICA WORK (2006)) ("Sexism might be involved in creating misguided societal expectations, but, on its face, the Code is indifferent to whether husband or wife is the primary wage-earner.").

providing a tax deduction that reduces taxable income[10] or a tax credit that reduces tax liability dollar for dollar.[11]

"[F]or more than forty years . . . , nearly every presidential administration has tried to act creatively to incentivize private retirement savings. Unsurprisingly, somewhat unconventional vehicles, such as the Roth IRA, have come about because the government has not been fully successful in its efforts."[12] These tax incentives are often seen as helping the middle class.[13] Saving for retirement on any scale today can help people in the future, particularly younger people who benefit from compound interest.[14]

The IRA was an early-tax favored savings tool. "The IRA is a type of tax-favored personal savings plan originating in 1974 under ERISA as a tax-favored retirement savings opportunity to those individuals not participating in an employer-sponsored plan."[15] The

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[10] Mildred Wigfall Robinson, *It Takes a Federalist Village: A Revitalized Property Tax as the Linchpin for Stable, Effective K-12 Public Education Funding*, 17 RICH. J.L. & PUB. INT. 549, 582 (2014) ("An example [on tax deductions] may be helpful here. Assume . . . A . . . [has] paid $1000 under [a] local property tax. Taxpayer A is an itemizer whose income places him in a 15% marginal rate bracket. . . . Because A is able to take the [$1000] deduction, A will not have to pay $150 in income tax. A's property tax expense has been subsidized by the federal treasury . . . .").

[11] "Unlike an income tax deduction, a credit is taken after tentative federal income tax liability has been determined. It is a dollar-for-dollar reduction of federal tax liability that would otherwise be borne." *Id.* at 583.

[12] Ausher M. B. Kofsky, *Rehabilitating Frankenstein's Monster: Repairing the Public Policy of the Roth IRA*, 80 ALB. L. REV. 161, 182 (2017).

[13] For a discussion on the relationship between tax policy and middle-class identity in Canada, see Lisa Philipps, *Registered Savings Plans and the Making of Middle-Class Canada: Toward a Performative Theory of Tax Policy*, 84 FORDHAM L. REV. 2677, 2677, 2685, 2687 (2016) (suggesting that tax-incentivized saving in Canada resulted from consumption tax theory, fiscal federalism, and neoliberalism).

[14] "According to legend, Albert Einstein once said that compound interest is the most powerful force in the universe." Robert M. Lloyd, *Discounting Lost Profits in Business Litigation: What Every Lawyer and Judge Needs to Know*, 9 TRANSACTIONS: TENN. J. BUS. L. 9, 9, 12 (2007) ("[Discounting to present value] is the converse of compound interest, and, like compound interest, discounting to present value is based on the time value of money.").

[15] John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 190 n.114 (2004) (citing Employee Retirement Income Security Act of 1974 (ERISA), Pub.

Employee Retirement Income Security Act of 1974 ("ERISA") set an annual maximum deductible contribution limit of $1,500 per year,[16] but the Economic Recovery Tax Act of 1981 ("ERTA") increased the annual IRA deduction limit to $2,000 and expanded eligibility for the IRA deduction to all taxpayers.[17]

In 1978, President Carter signed the Revenue Act of 1978, which allowed employers to provide 401(k) defined contribution retirement plans at work.[18] Employees could then redirect a portion of their paycheck to the account, which would be deferred to later withdrawals, without paying federal income tax.[19] The Roth IRA did not become available until the Taxpayer Relief Act of 1997.[20] The Roth IRA is similar to the IRA, except the owner prepays the tax and later withdraws money tax-free.[21]Also, in the mid-twentieth century, § 403(b) came into the tax code for the benefit of employees of certain tax-exempt organizations. [22] Functionally, 403(b) is similar to 401(k)s.[23]

The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") raised the various contribution limits on these accounts.[24] For example, the annual allowable contribution amounts

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L. No. 93-406, § 2002, 88 Stat. 829, 958–71 (codified as amended in scattered sections of 26 U.S.C.)) ("amending the Internal Revenue Code to include IRAs").

[16] *See* 26 U.S.C. § 219(b)(1) (1974) (amended 1981) (setting the maximum deduction amount allowable to not exceed fifteen percent of annual gross income or $1,500, whichever is less).

[17] *See* Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.); STAFF OF THE JOINT COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 199 (Comm. Print 1981).

[18] *See* Revenue Act of 1978, Pub. L. No. 95-600, § 135(a), 92 Stat. 2763, 2785–87 (codified as amended at 26 U.S.C. § 401 (2012)).

[19] *Id.*

[20] *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 302, 111 Stat. 788, 825–28 (codified at 26 U.S.C. § 408A (2012)).

[21] For an excellent discussion of the differences between IRAs and Roth IRAs, see Kofsky, *supra* note 12, at 162–63.

[22] *See* David A. Pratt, *Very Serious Business: Sense and Nonsense Under Section 403(b) of the Internal Revenue Code of 1986*, 59 ALB. L. REV. 1197, 1200, 1204 (1996).

[23] *Id.* at 1227.

[24] *See generally* Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.).

for traditional IRAs and Roth IRAs increased to $5,000 per person, then indexed to inflation.[25] EGTRRA also allowed additional "catch-up contributions" of $1,000 per year for taxpayers aged fifty or older.[26] Finally, EGTRRA raised the maximum amount that employees could contribute to their employer 401(k) and 403(b) retirement plans to $15,000, indexing it to inflation.[27] For these plans, EGTRRA included a catch-up annual amount of $5,000 for employees aged at least fifty.[28]

IRAs, Roth IRAs, 401(k)s, and 403(b)s provide several retirement savings options.[29] Other developments have included the starter Roth IRA called "My Retirement Account" or "MyRA."[30] MyRA is a government-administered Roth IRA for moderate- and low-income employees who do not have access to an employer retirement plan.[31] Once the balance in this starter account either reaches $15,000 or the starter account has been open for thirty years, the balance is transferred to a private Roth IRA.[32]

While in the most recent tax reform discussions there were proposals to lower the cap on pretax 401(k) contributions, no significant or structural changes were ultimately made to the tax-preferred retirement savings plans.[33] Thus, as suggested by the tax reform, lawmakers have decided that making changes to the 401(k) and other retirement options is too politically risky.[34]

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[25] 26 U.S.C. § 219(b)(5) (2012).

[26] *Id.* at § 219(b)(5)(B).

[27] *Id.* at § 402(g).

[28] *Id.*

[29] *See* Richard L. Kaplan & Kate S. Poorbaugh, *What's the Matter with Retirement Savers?*, 47 CONN. L. REV. 1281, 1296 (2015).

[30] *Id.* at 1289.

[31] *Id.* at 1292–94.

[32] *Id.* at 1290.

[33] *See* Naomi Jagoda, *Trump Promises: 'NO Change to Your 401(k),'* HILL (Oct. 23, 2017, 7:57 AM), http://thehill.com/policy/finance/356658-trump-promises-no-change-to-your-401k ("President Trump on Monday tweeted that changes won't be made to 401(k) plans after reports that congressional Republicans were considering a major alteration to the retirement accounts in forthcoming tax-reform legislation.").

[34] *See* Joseph Lawler, *Trump Jumps Ahead GOP Tax Reform Effort with 401(k) Tweet*, WASH. EXAMINER (Oct. 23, 2017, 8:58 PM), https://www.washingtonexaminer.com/trump-jumps-ahead-gop-tax-reform-effort-with-401-k-tweet.

At the end of 2015, Americans owned $24 trillion in retirement assets.[35] The composition of that 2015 year-end total was as follows: IRAs, $7.5 trillion; defined contribution plans, $6.5 trillion; private defined benefit plans, $2.9 trillion; state and local government pension plans, $3.7 trillion; federal pension plans, $1.5 trillion; and annuities, $2 trillion.[36]

Yet, most Americans are not saving enough for retirement.[37] Almost half of all working-age families have no retirement account savings.[38] For those families with retirement account savings, the median amount was recently around $60,000.[39] However, people need to save several times their income by retirement.[40] People are also not saving enough in general—most combined checking and savings accounts have under $1,000.[41]

Nevertheless, saving for retirement is more important than ever. Social Security funds will run out by 2034,[42] yet they were never intended to be the sole source of retirement income.[43] Happily, life expectancy is increasing; however, it prolongs the retirement years.[44] Finally, "the shift to employee-directed retirement savings has resulted in 'the greatest retirement crisis in history,' in which

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[35] *See Report: The US Retirement Market, Second Quarter 2018*, INV. COMPANY INST.: RES. & STAT., https://www.ici.org/research/stats/retirement (follow "Report: The US Retirement Market, First Quarter 2018" hyperlink under "Quarterly Retirement Market Data") (last updated Sept. 27, 2018).

[36] *See id.*

[37] Twomey & Maynes, *supra* note 6, at 240–41.

[38] *Id.* at 236–37.

[39] MONIQUE MORRISSEY, ECON. POL'Y INST., THE STATE OF AMERICAN RETIREMENT: HOW 401(K)S HAVE FAILED MOST AMERICAN WORKERS 15 (2016), https://www.epi.org/files/2016/state-of-american-retirement-final.pdf.

[40] *See, e.g.*, *How Much Do I Need to Save for Retirement?*, FIDELITY (Aug. 21, 2018), https://www.fidelity.com/viewpoints/retirement/how-much-money-do-i-need-to-retire.

[41] Terrence Cain, *The Bankruptcy of Refusing to Hire Persons Who Have Filed Bankruptcy*, 91 AM. BANKR. L.J. 657, 692 (2017).

[42] Soc. Sec. & Medicare Bds. of Trs., *A Summary of the 2018 Annual Reports*, SOC. SECURITY ADMIN., https://www.ssa.gov/oact/trsum/ (last visited Sept. 7, 2018).

[43] *See* Ilan Moscovitz, *5 Huge Myths About Social Security*, MOTLEY FOOL (Oct. 15, 2012, 12:00 AM), https://www.fool.com/retirement/general/2012/10/15/5-huge-myths-about-social-security.aspx.

[44] *See* Scott D. Makar, *A Modest Proposal: Raise the Mandatory Judicial Retirement Age*, 18 FLA. COASTAL L. REV. 51, 55 (2016).

many elderly Americans will have insufficient retirement savings."[45]

Sub-optimal retirement savings may be a result of either misplaced optimism about the future or an inability to save because of economic factors such as low-wage growth.[46] Additionally, people may prefer instant rather than delayed gratification.[47] One commentator has blamed sub-optimal retirement savings on bad worker defaults, bad employer incentives, and low income.[48] Better advertising may help encourage saving,[49] or perhaps people must change their way of thinking in order to save enough.[50]

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[45] Jill E. Fisch et al., *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66 DUKE L.J. 633, 634 (2016).

[46] This may be true of tax-incentivized savings in other countries too, such as Canada. There is "mounting evidence that [savings tax incentives] are ineffective or inadequate solutions" to the problems of "economic insecurity and precarity." Philipps, *supra* note 13, at 2678. To help address the difficulty of saving for low-income families, the saver's credit in the United States tax code "offers a 50 percent nonrefundable credit on funds up to $2,000 for individuals ($4,000 for married couples filing jointly) deposited into a retirement savings account—such as a 401(k), IRA account, or Roth IRA account—for households with low incomes." Adi Libson, *Confronting the Retirement Savings Problem: Redesigning the Saver's Credit*, 54 HARV. J. ON LEGIS. 207, 228 (2017).

[47] Morrow, *supra* note 2, at 787–88 ("Humans strongly prefer immediate payoffs relative to delayed payoffs."). For a discussion of other reasons for the lack of retirement saving in the United States, see generally Daniel Shaviro, *Multiple Myopias, Multiple Selves, and the Under-Saving Problem*, 47 CONN. L. REV. 1215 (2015).

[48] *See* Deepa Das Acevedo, *Addressing the Retirement Crisis with Shadow 401(k)s*, 92 NOTRE DAME L. REV. 38, 39–46 (2016).

[49] "We'd like to see as many advertisements for lifetime savings accounts as we do for lipstick and light beer." Michael Kranish, *Life Insurers Fight Major Bush Initiative*, BOS. GLOBE (Jan. 20, 2005), http://bi.galegroup.com/essentials/article/GALE%7CA127359395/a84e58e8c0cf0ecd526f18c0bb333e31?u=miami_richter (quoting Pamela Olson, former Treasury Assistant Secretary for Tax Policy).

[50] *See* Derek Thompson, *Why Don't Americans Save More Money?*, ATLANTIC (Apr. 19, 2016), https://www.theatlantic.com/business/archive/2016/04/why-dont-americans-save-money/478929/. For an analysis on why the law should take into account people's cognition in designing retirement policy, see Peter H. Huang, *Achieving American Retirement Prosperity by Changing Americans' Thinking About Retirement*, 22 STAN. J.L. BUS. & FIN. 189 (2017).

Americans' financial illiteracy is also problematic.[51] After people put aside money for retirement, they must select their investments.[52] Nearly half of Americans saving for retirement in self-directed accounts say they feel "not confident" or only "slightly confident" that they will make good investment decisions.[53]

Many foreign countries similarly encourage saving by offering relevant tax advantages. For example, in 2009, Canada began its Tax-Free Savings Account ("TFSA") program.[54] Any Canadian resident age 18 or older with a Social Insurance Number can open a Tax-Free Savings Account, even without an earned income.[55] The annual contribution limit is $5,500, which increases with inflation over time.[56] However, people can indefinitely carry forward their unused contribution amounts until they hit the cumulative maximum, which was $57,500 in 2018.[57] They can also re-contribute the amounts they withdrew the previous year, up to the cumulative maximum.[58] There is no tax deduction for contributing to a TFSA.[59]

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[51] *See* Jeffrey T. Dinwoodie, *Ignorance Is Not Bliss: Financial Illiteracy, the Mortgage Market Collapse, and the Global Economic Crisis*, 18 U. MIAMI BUS. L. REV. 181, 182 (2010) ("Countless surveys and studies portray an unfortunate reality: millions of Americans—both young and old—are financially illiterate.").

[52] *See Ultimate Guide to Retirement: Where Should I Put My Retirement Money?*, CNN MONEY, https://money.cnn.com/retirement/guide/investing_basics.moneymag/index3.htm (last visited Aug. 26, 2018).

[53] JEFF LARRIMORE ET AL., DIV. OF CONSUMER & CMTY. AFFAIRS, BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015, at 63 (2016), https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf.

[54] For more detailed information on the TFSA, see *The Tax-Free Savings Account*, GOV'T OF CAN., https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/tax-free-savings-account.html (last modified Nov. 24, 2016) [hereinafter *TFSA*].

[55] *Id.*; *The Tax-Free Savings Account (TFSA), Guide for Individuals*, GOV'T OF CAN., https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4466/tax-free-savings-account-tfsa-guide-individuals.html#contributions (last modified Apr. 17, 2018) [hereinafter *TFSA, Guide for Individuals*].

[56] *See TFSA, Guide for Individuals*, *supra* note 55.

[57] *Id.*; *The Max You Can Contribute to Your TFSA for 2018*, MONEYSENSE (Jan. 2, 2018), https://www.moneysense.ca/save/investing/tfsa/tfsa-limit-max-contr ibute/.

[58] *TFSA, Guide for Individuals*, *supra* note 55.

[59] *TFSA*, *supra* note 54.

However, the tax benefit is that people can make tax-free withdrawals, including earned interest, dividends, and capital gains.[60] "This tax-free compound growth means that . . . money grows more quickly in a TFSA than in a taxable account."[61] Furthermore, people can withdraw money tax-free from their TFSA at any time,[62] making it a flexible investment account that helps people meet both their short- and long-term goals.[63]

The United Kingdom offers similar incentives for saving in the form of an Individual Savings Account ("ISA").[64] ISAs come in four types: cash ISAs, stocks and shares ISAs, innovative finance ISAs, and Lifetime ISAs.[65] People can save up to £20,000 in one type of ISA or split across other types of ISAs.[66] However, people "can only pay £4,000 into [their] Lifetime ISA in a tax year."[67] Payments into the account are made from after-tax income.[68] The account is exempt from income tax and capital gains tax on the investment returns and no tax is payable on money withdrawn.[69] "[People] can take [their] money out of an [ISA] at any time, without losing

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[60] *Id.*; *TFSA, Guide for Individuals*, *supra* note 55.

[61] *Tax-Free Savings (TFSA)*, VANGUARD CREDIT UNION, https://vanguardcu.mb.ca/agriculture/agricultural-savings/savings/ (last visited Aug. 30, 2018); *accord* Melissa Leong, *Here Are the 10 Most Misunderstood Things About TFSAs*, FIN. POST (Aug. 12, 2014, 5:10 PM), https://business.financialpost.com/personal-finance/tfsa-misunderstood.

[62] *TFSA, Guide for Individuals*, *supra* note 55.

[63] *See* Dan Bortolotti, *TFSAs for Young Savers*, MONEYSENSE (Sept. 25, 2015), https://www.moneysense.ca/save/investing/tfsa/tfsas-for-young-savers/.

[64] *See* David Rotfleisch, *Canadian Tax Treatment of Individual Saving Accounts in the United Kingdom – A Toronto Tax Lawyer Analysis*, CANADIAN TAX AMNESTY (Apr. 26, 2017), https://www.canadiantaxamnesty.ca/article/individual-savings-account/?utm_source=Mondaq&utm_medium=syndicaion&utm_campaign=View-Original ("Essentially, ISAs are the UK-equivalent of Canadian Tax-Free Savings Accounts.").

[65] For more detailed information on ISAs, see *Individual Savings Accounts (ISAs)*, GOV.UK, https://www.gov.uk/individual-savings-accounts/print (last visited Aug. 25, 2018).

[66] *Id.*

[67] *Id.*

[68] *ISA Guide*, GIBRALTAR ASSET MGMT., http://www.gam.gi/uploads/files/Trading%20Notes/Other/2012/isa%20guide.pdf (last visited Aug. 25, 2018).

[69] *Id.*; *Individual Savings Account (ISAs)*, *supra* note 65.

any tax benefits."[70] Similar to the TFSA, the ISA helps people plan for both short- and long-term goals.[71]

Both TFSAs and ISAs address the criticism of the American retirement patchwork of the 401(k), 403(b), IRA, and Roth IRA[72] (dubbed "alphabet soup").[73] These foreign models also cure people's fear of locking up their money for decades,[74] especially for lower income families that may have emergency expenses arise.[75] Currently in the United States, it is generally difficult to access retirement savings without paying an early withdrawal penalty.[76]

These foreign savings models thus have advantages that may spur saving,[77] which is the goal of American policy as well.[78] The models can be implemented in the United States by either adapting the Roth IRA or adding another kind of savings account to the current options; in fact, several legislative efforts have already attempted to introduce them to the American tax landscape.[79]

In sum, there are several tax breaks to help retirement saving, but many Americans do not use them to the maximum extent. Instead, people put much of their extra income into another savings vehicle: homeownership.

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[70] *Individual Savings Accounts (ISAs)*, *supra* note 65.

[71] *See id.*; Bortolotti, *supra* note 63.

[72] Kofsky, *supra* note 12, at 182.

[73] Hubert Bromma, *Sipping the Alphabet Soup of Retirement Savings*, FORBES (Mar. 27, 2007, 6:00 PM), https://www.forbes.com/2007/03/27/401k-ira-sep-pf-ie-in_hb_0327soapbox_inl.html#7ec579a83289.

[74] *See* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1626 (2014).

[75] *See* LARRIMORE ET AL., *supra* note 53, at 21–26.

[76] *See* Michael Flynn & Craig C. Minko, *Personal Foul . . . Roughing the Taxpayer: The IRS' Triple Penalty on Hardship Distributions*, 17 FORDHAM J. CORP. & FIN. L. 15, 43–44 (2012) ("Generally, hardship withdrawals are subject to a 10% early distribution penalty if they are made before the participant reaches the age of 59 ½.").

[77] *See supra* text accompanying notes 54–71.

[78] *See* Kofsky, *supra* note 12, at 168–69.

[79] A bill has already been introduced by Republican Senator Jeff Flake from Arizona and Republican Representative Dave Brat from Virginia to set up universal savings accounts, which would be similar to Roth IRAs except that account holders could withdraw money at any time. *See, e.g.*, Universal Savings Account Act, S. 323, 115th Cong. (2017).

II. TAX INCENTIVES FOR HOMEOWNERSHIP

The United States is a country of homeownership.[80] The tax laws have supported and subsidized it for almost a century,[81] and much of American saving has been directed toward it.[82] Although the fundamental point of tax is to raise revenue for the government, public policy exceptions long existed for homeownership, which the 2017 tax legislation curtailed.[83]

A. *Pre-Reform Tax Law on Homeownership*

For the last century, the tax laws have encouraged homeownership.[84] In addition, states have offered tax provisions favorable to

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[80] *See supra* note 1.

[81] "The United States has supported and subsidized homeownership for well over a century." A. Mechele Dickerson, *Public Interest, Public Choice, and the Cult of Homeownership*, 2 U.C. IRVINE L. REV. 843, 845 (2012) [hereinafter Dickerson, *Public Interest*].

[82] Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1495 (2004) [hereinafter Warren, *The Over-Consumption Myth*].

[83] *See infra* Sections II.A, II.B.

[84] *See* Dickerson, *Pubic Interest*, *supra* note 81, at 845–46 ("Abraham Lincoln signed the Homestead Act to encourage people to move west and establish households. After the Great Depression, the federal government's participation in housing markets increased dramatically and President Franklin D. Roosevelt's New Deal interventions completely transformed the mortgage finance market. Recent White House policies and programs also promote homeownership. These initiatives include President Clinton's National Homeownership Strategy, President George W. Bush's initiative to expand homeownership for all Americans, and President Barack Obama's Home Affordable Modification Program. These programs had one goal: increase and maintain the number of homeowners."); *see also* Michael Lind, *The Smallholder Society*, 1 HARV. L. & POL'Y REV. 143, 143 (2007) ("In recent years, the idea of promoting widespread property ownership in the United States by means of public policy has enjoyed a renaissance across the political spectrum.").

homeownership.[85] For example, many states have property tax homeownership exemptions and senior discount rates.[86]

On the federal level, tax reform in 1986 created the Housing Credit to provide an incentive to the private sector to create and preserve affordable housing.[87] The Housing and Economic Recovery Act of 2008 established a tax credit for first-time homebuyers that was worth up to $7,500.[88] There has also been an exclusion of up to $250,000 per person on the gain from the sale of a home, with the remaining gain taxed at the capital gains rates.[89] Additional tax deductions include expenses related to home offices and moving.[90]

However, a major tax benefit to homeowners has been the mortgage interest deduction, even though personal interest is not ordinarily deductible.[91] For tax years prior to 2018, the mortgage interest deduction was allowed on a primary and/or secondary home as

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[85] Lind, *supra* note 84, at 156–57. Also, "in some states, such as Florida, a homeowner values the home as asset protection and wealth building for the next generation." Taite, *supra* note 2, at 374. "Florida has very generous homestead protections for homeowners. Homes are not subject to most creditor claims, and these protections can be transferred to the heirs of the homeowner." *Id.* at 374 n.90.

[86] *See* Lind, *supra* note 84, at 156–57.

[87] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–2208 (codified at 26 U.S.C. § 42 (2012)).

[88] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3011, 122 Stat. 2654, 2888 (codified as amended at 26 U.S.C. § 36 (2012)).

[89] *See* 26 U.S.C. § 1(h) (2012) (provides reduced rates for capital gains); § 121(b)(1); § 1221(a) (classifies a personal residence as a capital asset); § 1222 (clarifies that the gain on the sale or exchange of a capital asset is capital gain).

[90] *See* Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 VA. TAX REV. 587, 624 (2005).

[91] § 163(h). "American homeowners may deduct from their taxable income an amount equal to the interest they paid during the tax year on any loan which is secured by their first or second residence, up to a ceiling amount on the loan." David Frederick, *Reconciling Intentions with Outcomes: A Critical Examination of the Mortgage Interest Deduction*, 28 AKRON TAX J. 41, 43 (2013). However, "[i]t is more of an exception to an exception to a rule, and its complexity prohibits a direct recitation." *Id.* at 42. "Indeed, the historical record fails to indicate why Congress allowed a deduction for personal interest in 1913. Commentators have surmised that the deductibility of consumer interest 'may have been less a matter of principle than a reflection of the practical difficulty of distinguishing personal from profit-seeking interest.'" Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 L. & CONTEMP.

long as the mortgage did not exceed $1 million.[92] Also deductible was interest paid on up to $100,000 of home equity debt loans, the proceeds of which could be used for any purpose.[93]

The vast majority of Americans have supported the home interest deduction[94]—more than those who actually take the deduction.[95] As a result, "the [mortgage interest deduction] was deemed 'untouchable' because it was considered an important part of promoting homeownership."[96] Before the 2017 tax reform, homeowners were also allowed an unlimited deduction of their state and local taxes ("SALT").[97] This deduction included both state income taxes and real property taxes.[98]

Yet, the tax law did not support homeownership to the maximum extent. For example, these homeowner-friendly deductions were below-the-line, competing with the standard deduction.[99] Therefore, in order to benefit from them, taxpayers would have to itemize.[100] Furthermore, the tax law treated commuting costs as non-deductible

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PROBS. 233, 236 (2010) (quoting Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 713 (1988)).

[92] § 163(h).

[93] *See* Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 70 TAX L. REV. 667, 671 (2017); Frederick, *supra* note 91, at 43.

[94] *See* Morrow, *supra* note 2, at 760–61 ("In a recent poll conducted by The New York Times, more than 90 percent of respondents supported the mortgage interest deduction.").

[95] "Largely, the support stems from one of the following: people mistakenly believing that the MID promotes homeownership; or people wanting to preserve the deduction for the day when they will buy their first home, or if they are already homeowners, a more expensive home." Taite, *supra* note 2, at 365.

[96] *Id.* at 364. *But see* Frederick, *supra* note 91, at 62 ("Moreover, since the interest deduction preceded the rise of the widespread American mortgage market, scholars have never been able to compare a market without the deduction to one with it, or observe the effects of introducing the deduction as a new variable to the market.").

[97] § 164(a).

[98] *Id.* For a history of the federal deduction for state and local taxes, see Gladriel Shobe, *Disaggregating the State and Local Tax Deduction*, 35 VA. TAX REV. 327, 337–40 (2016).

[99] *See, e.g.*, Shobe, *supra* note 98, at 375; Kirk J. Stark, *The Federal Role in State Tax Reform*, 30 VA. TAX REV. 407, 426 (2010).

[100] *See* Shobe, *supra* note 98, at 375.

personal expenses, without consideration of the effects this might have on homeownership incentives.[101]

The federal government also encourages homeownership through several other efforts.[102] For example, Fannie Mae and Freddie Mac provide secondary mortgage markets that increase the supply of lenders and mortgages.[103] The United States Department of Housing and Urban Development ("HUD") works to create quality affordable homes.[104] For decades, the federal government has promoted new financing strategies and the expansion of the mortgage market with the explicit goal of increasing homeownership rates.[105]

Thus, the federal government has long offered homeownership-friendly provisions, including in the tax code. The 2017 tax reform reversed this approach by targeting the mortgage interest and SALT deductions.

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[101] *See* Tsilly Dagan, *Commuting*, 26 VA. TAX REV. 185, 190–91, 202–03 (2006) (noting that the tax law treats the decision to live far away from where one works as a personal preference, even when taxpayers must live far away from work because their work location is necessarily isolated).

[102] "For decades, the federal government has sought to increase the rate of homeownership for Americans. This support for homeownership can be seen in three major areas: (1) regulation and participation in the financial markets, (2) direct financial subsidies, and (3) tax policy." Julie D. Lawton, *Limited Equity Cooperatives: The Non-Economic Value of Homeownership*, 43 WASH U. J.L. & POL'Y 187, 189 (2013).

[103] For further background, see David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019, 1027–42, 1053–54 (2008); Winston Sale, *Effect of the Conservatorship of Fannie Mae and Freddie Mac on Affordable Housing*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 287, 289–95 (2009).

[104] *See* Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 587 (2009) ("The program's goal was to achieve record high homeownership in six years.").

[105] *See id.*; Daniel Immergluck, *Private Risk, Public Risk: Public Policy, Market Development, and the Mortgage Crisis*, 36 FORDHAM URB. L.J. 447, 453–54 (2009) ("By the early 1920s, the federal government had become a supporting—and sometimes catalyzing or initiating—actor in the promotion of homeownership in the United States."); Todd Zywicki, *The Behavioral Law and Economics of Fixed-Rate Mortgages (and Other Just-So Stories)*, 21 SUP. CT. ECON. REV. 157, 164–65 (2013) (describing the uniqueness of the traditional 30-year mortgage financing mechanism in the United States, the stability it gives consumers, and its costs to homeowners and the economy).

B. *Tax Reform on Homeownership*

In late 2017, Congress enacted the Tax Cuts and Jobs Act,[106] the most comprehensive tax reform since 1986.[107] It made numerous changes to the taxation of corporations, individual income, and estates.[108] For individuals, tax brackets were lowered and the standard deduction was doubled, meaning that fewer taxpayers will take the below-the-line deductions, which include homeownership tax breaks.[109]

Those who still itemize can deduct the interest on the first $1 million of mortgage debt incurred before December 15, 2017.[110] Homes purchased after December 15, 2017 are limited to a mortgage interest deduction on only the first $750,000 of mortgage debt,[111] while mortgage debt on a second home qualifies for an interest deduction to the extent that the first mortgage does not exceed $750,000.[112] The new law eliminates the deduction for home equity debt.[113]

In regard to the SALT deduction, taxpayers are now limited to a $10,000 deduction.[114] This limitation was a compromise after lawmakers discussed eliminating this deduction entirely.[115] In sum, the 2017 tax legislation curtailed the tax advantages of homeownership through major cuts to both the mortgage interest and SALT deductions.

III. HOMEOWNERSHIP AS SAVINGS

While homeownership has several benefits, there is one benefit in particular that should make lawmakers pause: homeownership as

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106 *See generally* Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (to be codified in scattered sections of 26 U.S.C.).

107 Christopher H. Hanna, *Some Observations on Corporate or Business Tax Reform*, 68 SMU L. REV. 595, 595 (2015).

108 *See* TCJA §§ 11001(a), 13001(a).

109 *See* §§ 11001(a), 11021(a).

110 *See* § 11043(a).

111 *See id.*

112 *See id.*

113 *See id.*

114 *See* § 11042(a).

115 *See* Maya Rhodan, *Congress Wants to Eliminate the State and Local Tax Deduction. What's That?*, TIME (Oct. 6, 2017), http://time.com/4972976/tax-reform-state-local-tax-deduction-explainer/.

a tool for wealth creation. Simply put, homeownership is a form of forced savings.[116] Homeowners benefit from "wealth generation and inter-generational wealth transfer, protection from inflation, [and] increased borrowing power."[117]

A. *The Benefits and Drawbacks of Supporting Homeownership*

There are numerous benefits and drawbacks to supporting homeownership. These must all be considered in determining tax policy.

The often-cited reasons for the federal government support of homeownership are varied and important. Homeownership has been described as "an important component of 'social, economic,[] psychic,' and financial well-being."[118] Often, homeownership is seen as a milestone.[119]

Homeownership also has notable advantages for families with children, including permanency, stability, and security.[120] Families do not move as much when they own as compared to when they rent, thus avoiding school transfers for children and enhancing educational outcomes.[121] Studies show that compared to the children of renters, the children of homeowners are more emotionally stable, have fewer behavioral problems at school, and are less likely to be arrested or become teenage parents.[122]

Many people prefer to remain homeowners even after raising their families, including members of the older generations who want

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[116] "Economists have argued there are two main purposes of homeownership. The first is housing as a utility for consumption, and the second is housing as an investment vehicle." Lawton, *supra* note 102, at 216.

[117] powell, *supra* note 2, at 623.

[118] *Id.* (citing Matt A. Barreto et al., *Homeownership: Southern California's New Political Fault Line?*, 42 URB. AFF. REV. 315, 315–16 (2007)).

[119] *See* Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 899 (2011).

[120] *See* Taite, *supra* note 2, at 373–74 ("While some research supported the premise that neighborhoods are important, Ellen and Turner found that other factors, such as family dynamics and parents' education and income levels, significantly impact a child's educational attainment.") (citing Ingrid Gould Ellen & Margery Austin Turner, *Does Neighborhood Matter? Assessing Recent Evidence*, 8 HOUSING POL'Y DEBATE 833, 846 (1997)).

[121] Dickerson, *Public Interest*, *supra* note 81, at 848.

[122] *Id.*

to age in their homes.[123] Single people also seek homeownership.[124] "[O]wners report that they are in better shape physically and have less psychological distress than renters."[125] Homeowners take pride in ownership and invest in improving neighborhoods for all residents.[126] Much scholarship addresses the civic virtues resulting from residents' stake in their community.[127]

However, there are also drawbacks to supporting homeownership.[128] Many commentators have underscored the disadvantages of homeownership and the tax policies that favor it.[129]

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[123] Andrea J. Boyack, *Equitably Housing (Almost) Half A Nation of Renters*, 65 BUFF. L. REV. 109, 114 (2017).

[124] *See* powell, *supra* note 2, at 623.

[125] Dickerson, *Public Interest*, *supra* note 81, at 847.

[126] *Id.* at 848–50; Janet Reno, Essay, *The Criminal Justice System: Towards the 21st Century*, 1 DUKE J. GENDER L. & POL'Y 39, 49 (1994) ("We can do so much in terms of developing programs that provide affordable housing and reaching out to give people throughout America the understanding that there is potential for home ownership and for home pride.").

[127] *See, e.g.*, A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership is Not Always a Good Thing*, 84 IND. L.J. 189, 191–92 (2009) ("Home ownership is also thought to benefit the individual homeowner's community since homeowners tend to be concerned, involved citizens who are more likely to participate in local civic organizations, who will lobby for long-term or high quality community services."); Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 440–41 (2008) (noting that despite homeownership's financial risks, investment limitations, and mobility constraints, there are sociological and psychological benefits that include greater political involvement and participation in local voluntary organizations, as well as greater personal satisfaction); 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) ("This 'homeowner activism' creates a better community for all residents. Arguably, homeowners are better citizens than renters, and thus wider home ownership creates economic and political stability.").

[128] *See* Lawton, *supra* note 102, at 192.

[129] *See* Mark Andrew Snider, *The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?*, 32 N. KY. L. REV. 157, 167–73 (2005) (summarizing many of the arguments made by others against tax subsidies for housing, including its costs to the federal treasury). "After so many years of the federal government's promotion and support of homeownership, commentators and advocates have raised the question of whether homeownership remains a defensible strategy, particularly for low- and moderate-income residents." Lawton, *supra* note 102, at 192.

Commentators note that homeownership is not necessarily good public policy.[130] They point to the risks, to both individual homeowners and the economy, of investing in homeownership to the exclusion of everything else. For instance, many people use significant credit in their home purchases,[131] but consumer debt is not healthy

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130 *See* Snider, *supra* note 129, at 167–73.

131 *See* Adams, *supra* note 104, at 599. "[T]he irresponsible extension of credit is not limited to subprime borrowers. Instead, and especially as job losses continue to mount, delinquencies and foreclosures among prime borrowers are increasing as well." *Id.* at 587–88.

for the economy.[132] Credit is particularly risky in economic downturns,[133] where the loss of a home's value may result in foreclosure[134] and cumulative effects on the economy.[135] The risks are especially pronounced for lower income and minority groups who are more likely to be targeted as victims in mortgage schemes.[136]

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[132] "High debt consumption rates negatively impacted homeowners and the economy." Taite, *supra* note 2, at 369. "Between 1981 and 1991, home equity debt increased from $60 billion to $357 billion." *Id.*

[133] *See, e.g.*, Laurie S. Goodman & Sherrill Shaffer, Commentary and Debate, *The Economics of Deposit Insurance: A Critical Evaluation of Proposed Reforms*, 2 YALE J. ON REG. 145, 153–55 (1984). For a discussion on housing characteristics from 2000 to 2010, see CHRISTOPHER MAZUR & ELLEN WILSON, U.S. CENSUS BUREAU, HOUSING CHARACTERISTICS: 2010 (2011), https://www.census.gov/prod/cen2010/briefs/c2010br-07.pdf. For example, "[h]omeowners were a majority in nearly all counties, however many of these counties saw homeownership rates decrease during the decade." *Id.* at 9.

[134] "The risk of losing one's home through forced sale at the hands of a creditor, in a foreclosure or in the context of bankruptcy, raises important issues concerning the acclamation of homeownership as a universal value for women and men . . . ." Lorna Fox, *Re-Possessing "Home": A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 431 (2008).

[135] *See* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 973–74 (2010) ("The collapse of the U.S. housing market has left millions of homeowners owing more on their mortgages than their homes are worth. As a historical snapshot, more than 34% of all mortgaged properties in the United States were 'underwater' as of the third quarter of 2009. The national numbers hide the full extent of the problem, however, as the percentage of underwater mortgages has been much higher in the regions suffering the worst price declines. Again, as a snapshot, by the end of 2009, 65% of mortgage borrowers in Nevada were already underwater, 48% of homeowners were underwater in Arizona, 45% were underwater in Florida, 37% were underwater in Michigan, and 35% were underwater in California."). "This housing crisis contributed to what has become known as the Great Recession." Taite, *supra* note 2, at 376 (explaining that the tax deduction for home equity incentivized homeowners to take out home equity loans, raising the loan-to-value ratio of their property, while high loan-to-value ratios were linked to the housing crisis of the early 2000s).

[136] Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 378 (1994); *see also* Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 192–93 (2007).

Furthermore, people's optimism often means that they are surprised by financial troubles that may arise during homeownership,[137] as seen in the recent housing bubble.[138] Even when they are financially overwhelmed, however, people do not necessarily want to sacrifice homeownership despite its costs.[139]

Regardless of affordability issues, the economics of homeownership may not make sense for all people, such as the transaction costs associated with a short period of homeownership.[140] There are

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[137] Forrester, *supra* note 136, at 385; *see also* Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757–61 (2009) (discussing how optimism biases risk-assessment in related contexts).

[138] "Historically homeownership in the United States has been about 60%. At the height of the bubble, homeownership was 69%. That actually has a lot to do with why we got into all this trouble. An awful lot of people who couldn't afford homes bought them." Joe Nocera, *Lessons from the Financial Crisis*, 52 ARIZ. L. REV. 1, 6 (2010). "And yet, the 2008 economic collapse was sparked by overinvestment in real property. Homeowners were not establishing economic security by building equity in their homes, but were borrowing against the perceived increased values of their homes through home equity lines of credit, the interest on which was deductible." Morrow, *supra* note 2, at 754. *See also* Peter W. Salsich, Jr., *Homeownership—Dream or Disaster?*, 21 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 17, 27 (2012) (noting the increasing sizes and costs of houses available for purchase).

[139] Taite, *supra* note 2, at 374–75 ("Generally, the presumption is that if homeowners have negative equity, they will simply choose to abandon their homes, but research shows that the majority of homeowners remain in their homes against their economic interests. Some of these homeowners can take advantage of additional government financial assistance available through the Troubled Asset Relief Program (TARP). However, by providing direct financial assistance to troubled homeowners, TARP also contributes to the federal deficit."). This is also to the detriment of the government:

> The financial setbacks associated with a foreclosure eliminate most, if not all, of the wealth built by the household. In addition, the tax benefits received by the homeowner—such as the MID, real estate tax deduction, and TARP relief—are eliminated through the foreclosure process. In these situations, not only does the taxpayer lose his home, but the government forfeits revenue.

Id. at 375.

[140] Robert C. Ellickson, *Legal Sources of Residential Lock-Ins: Why French Households Move Half as Often as U.S. Households*, 2012 U. ILL. L. REV. 373, 382–83 (2012).

also maintenance and property taxes.[141] Often, the beneficiaries of high homeownership rates are realtors, homebuilders, and financial institutions.[142]

Tax subsidies for homeownership might also be economically inefficient.[143] For example, the mortgage interest deduction does not emphasize the purchase decision, but the quantity decision.[144] This contributes to urban sprawl.[145]

Meanwhile, the reasons for supporting homeownership are similar to those for supporting renting—everyone can benefit from having pride in their home and neighborhoods, not just homeowners.[146] A mobile labor market that is not tied down by homeownership is also beneficial to the economy.[147]

Additionally, reducing homeownership deductions may make certain housing cheaper because house prices may fall to offset the loss of tax incentives.[148] Indeed, housing affordability has become a

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[141] *See* Jonathan Spader & Christopher Herbert, *Waiting for Homeownership: Assessing the Future of Homeownership, 2015–2035*, 37 B.C. J.L. & SOC. JUST. 267, 269 (2017).

> My conclusion at the end of this exercise is that a family earning the median American household income and making the median monthly mortgage payment would pay $177 to $468 each month above what it can afford; notably, the median monthly mortgage payment is $260 above the 28% maximum mortgage debt load for a family earning the median household income.

Adams, *supra* note 104, at 579–80.

[142] *See* Lily Kahng, *Path Dependence in Tax Subsidies for Home Sales*, 65 ALA. L. REV. 187, 210 (2013).

[143] *See* William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43, 44, 53–65 (1996).

[144] *See* Alan L. Feld, *Redeployment of Tax Expenditures for Housing*, 23 TAX NOTES 1441, 1448 (1984).

[145] Williams, *Rhetoric*, *supra* note 1, at 328.

[146] *See* Arlo Chase, *Rethinking the Homeownership Society: Rental Stability Alternative*, 18 J.L. & POL'Y 61, 74–75 (2009).

[147] *See* William P. Kratzke, *The (Im)Balance of Externalities in Employment-Based Exclusions from Gross Income*, 60 TAX LAW. 1, 17 (2006).

[148] Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1501 n.20 (1999) ("[T]he mortgage interest deduction has made homes more valuable and has undoubtedly been capitalized into home prices."); Martin J. McMahon, Jr., *Individual Tax Reform for Fairness and Simplicity: Let Economic Growth Fend for Itself*, 50 WASH. & LEE L. REV. 459, 486 (1993) (suggesting that the mortgage interest deduction is mostly capitalized into the price of a home); *see also* William G. Gale et al.,

major problem in many parts of the United States.[149] This is particularly true in states that most benefit from the SALT and mortgage interest deductions—big cities in high-tax jurisdictions.[150] However, to the extent that home values will decrease with the reduction of homeownership deductions, wealth creation would be eliminated for those who bought their houses under the previous tax laws.[151]

Encouraging Homeownership Through the Tax Code, 115 TAX NOTES 1171, 1171 (2007) (arguing that the mortgage interest deduction "serves mainly to raise the price of housing and land").

[149] "From 1990-2000, affordability problems increased by 52%, two-and-a-half times the rate of homeownership increases. Low-income families and minorities are hardest hit by decreasing affordability." powell, *supra* note 2, at 622–23. For further background on affordability in the housing context, see Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 418–25 (2004).

[150] "Home prices have traditionally been highest in the West, followed in order by the Northeast, the South, and the Midwest." Adams, *supra* note 104, at 581. *See also* MAZUR & WILSON, *supra* note 133, at 8 ("As in 2000, New York ranked at the bottom with respect to homeownership (53.3 percent) in 2010.").

[151] *See generally* Holden Lewis, *5 Homeownership Changes Coming Under New Tax Law*, NERD WALLET (Dec. 20, 2017), https://www.nerdwallet.com/blog/mortgages/6-ways-tax-plan-could-change-homeownership (discussing how some people believe that tax reform will cause a plunge in home values). *But see* Tobie Stanger, *Home Values Are Rising, So Grab the Benefits and Avoid the Risks*, CONSUMER REP. (July 14, 2018), https://www.consumerreports.org/home-equity-products/home-values-rising-grab-benefits-and-avoid-risks/.

Finally, there are some federalism concerns surrounding homeownership federal tax breaks, particularly in regard to the SALT deduction.[152] The SALT deduction has been described as "in effect . . . a federal matching grant for eligible state levies."[153] The underlying idea is that some taxpayers are subsidizing others who take large SALT deductions in high-tax states.[154]

In sum, there are some drawbacks to a public policy that supports homeownership. Yet, there are benefits as well, including the often overlooked benefit of homeownership as a forced savings tool.

B. *Homeownership as Savings*

Homeownership is a form of forced savings, starting with the down payment and then continuing with monthly payments for often decades.[155] The mortgage payments force people to contribute regular amounts of money that usually produce a return when it comes

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[152] *See, e.g.*, Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389, 1394 (2004) ("Together, these features of the deduction for state and local taxes give state and local governments an incentive to raise revenues through property and income taxes on high-income taxpayers—an outcome that is exactly contrary to the central normative prescription of fiscal federalism regarding the assignment of redistributive policies to the national government."). *See also* Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 1021–25 (2011); Darien Shanske, *How Less Can Be More: Using the Federal Income Tax to Stabilize State and Local Finance*, 31 VA. TAX REV. 413, 423–24 (2012).

[153] Brian Galle & Jonathan Klick, *Recessions and the Social Safety Net: The Alternative Minimum Tax As A Countercyclical Fiscal Stabilizer*, 63 STAN. L. REV. 187, 191 (2010).

[154] *Cf. id.* at 214 ("[T]he SALT deduction functions as a subsidy for state and local governments. First, it induces a substitution effect in favor of state and local taxation. A local taxpayer facing the choice between savings, private consumption, and consumption of government services (i.e., higher taxes) should prefer government service because a dollar's worth of government services costs her only $0.65, while a dollar's worth of savings or private consumption costs $1. The deduction also likely increases demand for local government through an income effect. Assuming local government services are a so-called 'normal' good, in which demand rises as income rises, the taxpayer's higher after-federal-tax wealth should produce a greater demand for local government services.").

[155] Dickerson, *Public Interest*, *supra* note 81, at 846. ("Potential homebuyers had to save money to make a 20% down payment or they would not qualify for the low-cost fifteen- to thirty-year self-amortizing mortgages that were guaranteed by the U.S. government. The new homeowner then had to continue to save enough

time to sell.[156] Not only do people then retrieve the money they invested in the house, but they also often benefit from appreciation—tax-free up to $500,000 per married couple due to the exclusion of gain from the sale of a principal residence.[157]

Homeownership has historically been seen as an investment for Americans. For an American family, home equity is the typical and most important financial asset, as well as an important vehicle for transmitting wealth from generation to generation.[158] It is the most significant marital asset for many couples in a divorce, serving as a major source of funds for support obligations.[159] Those who rent have less worth than homeowners.[160] As a result, a "move away from real property residential ownership leaves a void regarding available pathways to advance economically within society."[161]

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money to make equal monthly loan payments of principal and interest for fifteen to thirty years.").

[156] *Id.*

[157] 26 U.S.C. § 121 (2012).

[158] powell, *supra* note 2, at 623; Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 65 (2006) ("Homeownership is the largest component of the wealth portfolios of both white and black families. In 2002, housing wealth accounted for 63% of all wealth in African-American families.").

[159] D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 614 (6th ed. 2016).

[160] *See* Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 627 (2002) (reviewing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001)) ("In 1998, the median family income of renters was less than half that of homeowners, and the median family net worth of renters was less than one-thirtieth that of homeowners."); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 627 n.167 (1998) ("[T]he median net worth of owner-occupiers is $77,183 compared to $2203 median net worth for renters."); Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1790 (2004) [hereinafter Warren, *The Economics of Race*] ("[M]ost renters have far lower total net worth than their home-owning counterparts. The differences are not confined only to homes. Renters have fewer assets of every kind—stocks, bonds, retirement accounts, cars, personal property, small businesses, and so on.").

[161] Kristen Barnes, *"Pennies on the Dollar": Reallocating Risk and Deficiency Judgment Liability*, 66 S.C. L. REV. 243, 254–55 n.58 (2014).

In her academic research, Senator Warren has contended that homeownership is widely considered a hallmark of middle class financial stability.[162] Analyzing data from 2001, she found that "more than two-thirds of all households—67.7%—were homeowners, and the average value of the house they owned was $122,000," but there were racial disparities in homeownership rates and home values—"[a]mong non-Hispanic white families, homeownership rates in 2001 were at 74.3%, while Hispanic and black families' homeownership rates trailed at 47.3% and 47.7% respectively."[163]

Homeownership costs may lead to the lack of retirement savings because people are investing so much of their income in their houses.[164] When examining how people spent their money, Senator Warren found housing to be a major item.[165] Thus, in contrast to lackluster retirement saving, Americans strive to own a home, making the mortgage interest and SALT deductions among the largest tax subsidies in the previous federal income tax code.[166] Homeownership might as well be a 401(k), except that, unlike 401(k)s, people do not ignore homeownership—its best feature and the very reason that tax policy undercutting it poses a problem.

IV. IMPLICATIONS FOR TAX REFORM

All of this is not to say that homeownership should be the primary vehicle for saving, but rather an acknowledgement that it is. This suggests that people should receive more tax relief for homeownership, not less. Reducing tax breaks for homeownership is inconsistent with the policy of supporting saving. Given that homeownership is a way of saving, many people have argued to expand,

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[162] Warren, *The Economics of Race*, *supra* note 160, at 1789.

[163] *Id.* at 1788. Unfortunately, retirement savings mimic this. Eric W. Orts, *Corporate Law and Business Theory*, 74 WASH. & LEE L. REV. 1089, 1102 (2017) ("From 1989 to 2013, average retirement savings for white families grew from about $31,500 to almost $130,500. This compares to average savings for African-American families over the same period increasing from around $5,500 to only about $19,000. Average savings for Hispanic families similarly increased from around $7,000 to only $12,500.").

[164] *See* Warren, *The Over-Consumption Myth*, *supra* note 82, at 1495–98.

[165] *Id.* at 1495.

[166] *See* Stark, *supra* note 152, at 1394.

not curtail, homeownership tax benefits to more people,[167] including veterans[168] and racial minorities.[169] Instead, there has been a decrease in homeownership,[170] especially among young people who are saddled with more debt than previous generations.[171]

Two broad groups of people who do not benefit from the tax laws favoring homeownership are those who do not own a home and those who do not itemize.[172] The latter group consists of well over

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[167] *See* Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 366–74 (2009) (suggesting solutions to increase equitable distribution of homeownership tax benefits); Kenya Covington & Rodney Harrell, *From Renting to Homeownership: Using Tax Incentives to Encourage Homeownership Among Renters*, 44 HARV. J. ON LEGIS. 97, 113–16 (2007) (proposing "the basic outline of a federal renter-to-homeowner program. The program has three basic features: (1) it is structured as a one-time, non-refundable tax credit; (2) it is universal–that is, it is not restricted by income level, age, or disability status; (3) it is designed to promote homeownership.").

[168] *See* Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 IND. L. REV. 103, 162–75 (2005).

[169] "Wealth, as distinguished from income, offers the key to understanding racial stratification in the United States, especially the persistence of racial inequality in a post-civil rights era in which minorities have made remarkable advances." Shapiro, *supra* note 158, at 53.

[170] Spader & Herbert, *supra* note 141, at 267–68 ("A historic decline in the homeownership rate has generated substantial discussion over the future of homeownership in the United States. After peaking at 69.2% in 2004, the national homeownership rate declined steadily to 63.7% in 2015 according to the Housing Vacancy Survey. Although this decline returned the overall homeownership rate to approximately the level it held between 1985 and 1995, the homeownership rates for multiple age cohorts have fallen well below their 1995 levels. For example, the homeownership rate for households between ages 35 and 44 increased from 65.2% in 1995 to 69.3% in 2005 before falling to 58.5% in 2015. The overall homeownership rate has not fallen as far as these age-specific rates only because the aging of the population during this period has increased the number of households in older age cohorts where homeownership rates are highest.").

[171] *Id.* at 290 (noting "young households' slowed rates of homeownership").

[172] Taite, *supra* note 2, at 365. As a result, "the MID provides no benefits to low-income households and only minimal benefits to middle-income households. It does not help renters. And it gives little assistance to the elderly who either are no longer servicing mortgages or who have too little income to receive any benefit." Ventry, *supra* note 91, at 280. *See also* Feld, *supra* note 144, at 1443 (noting that tax benefits for homeownership "flow disproportionately" to high-income taxpayers due to their tie to marginal tax rates, rise with increased housing consumption, and are unavailable to nonitemizers).

half of Americans who take the standard deduction.[173] This number only increases with the near doubling of the standard deduction in the 2017 tax legislation.[174] Those who do not pay federal income taxes also do not benefit from any of these tax laws.[175] Thus, some commentators have suggested an above-the-line deduction for homeownership tax benefits.[176] They have also proposed turning the mortgage interest deduction into a credit instead of a deduction.[177]

Other commentators have suggested a one-time grant or loan assistance to help with upfront costs, which do not have some of the distortions of other approaches.[178] These commentators would trade certain tax expenditures for direct financial assistance grants to Americans seeking homeownership.[179]

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[173] Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 732 (2015).

[174] Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. No. 115-97, § 11021(a), 131 Stat. 2054, 2072–73 (to be codified in scattered sections of 26 U.S.C. § 163(c)(7)).

[175] Yair Listokin & David M. Schizer, *I Like to Pay Taxes: Taxpayer Support for Government Spending and the Efficiency of the Tax System*, 66 TAX L. REV. 179, 208 (2013) (noting the proportion of population that does not owe federal income taxes is forty-seven percent (47%)).

[176] *See, e.g.*, *Senate Committee on Finance Releases Economic and Community Development Option Paper*, NAT'L LOW INCOME HOUSING COALITION (May 17, 2013), https://nlihc.org/article/senate-committee-finance-releases-economic-and-community-development-option-paper.

[177] *See, e.g.*, Brown, *supra* note 167, at 368–70; Ventry, *supra* note 91, at 282.

[178] *See, e.g.*, Taite, *supra* note 2, at 387 ("My proposal adopts Surrey's proposal for a one-time grant, but limits the grant assistance to households earning $50,000 or less. This grant amount would be limited to 10% of the purchase price (up to $8,000), and the taxpayer would have the option to apply and receive approval for the grant prior to purchasing the home. The grant would be verified and signed by both the purchaser and the seller. Basing the grant amount on a percentage of the home price necessarily limits the grant amount."). Taite further explains that "[b]y providing specific one-time assistance, the government provides a more direct way to promote homeownership without encouraging homeowners to overspend," which "removes tax policy from the equation." *Id.* ("By placing the homeownership responsibility in the hands of the taxpayer, he will most likely purchase a home within his price range. Finally, providing assistance with upfront costs removes one of the first barriers to homeownership for low-and middle-income taxpayers."). *See also* Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 360–61 (1970).

[179] *See* Surrey, *supra* note 178, at 360–61.

State governors are attempting to get around the curtailment of these tax benefits, attacking their constitutionality or setting up tax payments as charitable contributions.[180] Perhaps future politicians will re-introduce homeownership benefits to the federal tax code,[181] or perhaps their curtailment is necessary to help balance the budget when making other tax cuts. In the end, however, the role of homeownership in savings should make lawmakers consider augmenting homeownership tax rules, not weakening them.

CONCLUSION

In sum, homeownership is more than just an American dream and tax reform should be mindful of it. In reality, homeownership is a savings vehicle. While traditional retirement savings are incentivized by the tax law, Americans do not save much outside of homeownership.

Yet, the 2017 tax legislation reduced support for homeownership. The tax reform targeting homeownership, such as curtailing or eliminating the deductions for mortgage interest and SALT, frustrates the American public policy of encouraging homeownership. There are many reasons that, for decades, the public policy position in the United States has been to encourage homeownership, including the fact that homeownership is an important savings tool for Americans.

No doubt, the tax code and any related reform are complicated,[182] invariably picking winners and losers. Often, the meaning

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[180] *See, e.g.*, Annie Nova & Darla Mercado, *High-Tax States Plan Workarounds to the Federal SALT Deduction*, CNBC (Jan. 20, 2018, 11:01 AM), https://www.cnbc.com/2018/01/19/high-tax-states-plan-workarounds-to-the-federal-salt-deduction.html ("In early January [2018], California Senate leader [Kevin] de León introduced a bill that would allow residents to pay some of their state taxes to the California Excellence Fund, a state charity. In turn, taxpayers would be able to deduct the amount of their charitable contribution on their federal returns.").

[181] *See, e.g.*, Cristina Marcos, *NY, NJ Republicans Show Early Opposition to Tax Bill*, HILL (Nov. 2, 2017, 1:49 PM), http://thehill.com/homenews/house/358458-ny-nj-republicans-oppose-tax-bill (discussing some House members' opposition to the proposed tax bill, specifically because it initially aimed to to eliminate state and local tax deduction).

[182] Robin Cooper Feldman, *Consumption Taxes and the Theory of General and Individual Taxation*, 21 VA. TAX REV. 293, 330 (2002) ("Everyone agrees

of fairness is grey or dependent on ideology, but there are several guideposts.[183] The federal income taxation system aims for "neutrality, efficiency, and simplicity."[184] Further tax reform should mind these goals in the context of the importance of homeownership as a fundamental savings tool.

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that the current income tax system is horribly complicated."); Stephanie Hunter McMahon, *What Innocent Spouse Relief Says About Wives and the Rest of Us*, 37 HARV. J.L. & GENDER 141, 162 (2014) ("[T]he tax system is complicated, and many people rely on accountants or software to prepare their returns.").

[183] There are at least two aspects of fairness in the context of tax. First, there is the notion of "horizontal equity," or that similarly situated individuals should be treated the same. Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323, 1324–25 (2008). Second, there is the concept of "vertical equity," or that the tax treatment of differently-situated persons should be fair—a form of distributive justice. *Id.* at 1324.

[184] Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N. U. L. REV. 61, 83–84 (2007); *see also* Hayes Holderness, *Taxing Privacy*, 21 GEO. J. ON POVERTY L. & POL'Y 1, 7 (2013) ("The principle of neutrality holds that a tax should not change the economic decision making of individuals by not discriminating between different types of income, expenditures or other economic activities.").