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Intent, Inequality, and the Berlin Walls of the Mind

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Abstract

Although acknowledging that various provisions in the Tax Cuts and Jobs Act of 2017 appear responsive to normative arguments presented in tax literature, this article posits that, true to its core intent, the law aggressively advanced the persistent effort to shift the tax burden away from the nation's wealthiest citizens to the great bulk of taxpayers of more modest financial means. Thus, those with political power successfully employed the tax law to protect, preserve, and enhance prevailing wealth and income inequality. With the election of President Joe Biden and the assumption of Democratic control in both chambers of Congress, however, we now have the opportunity to repeal or modify a number of the TCJA's provisions. Beyond suggesting specific short-term measures regarding tax rates, this article proposes a multi-faceted, long-term investment in education. Those completing higher education generally enjoy greater financial stability (and the enhanced ability to build and transfer wealth across generations). Moreover, and perhaps more importantly, the higher education experience facilitates exposure to those who are different, enables the conscious dismantling of prejudices, frustrates the confirmation of long-held biases, and thereby weakens those intangible, ignorance-rooted elements that have also played key roles in creating and perpetuating economic and a host of other inequalities. Given the burgeoning and burdensome cost of higher education, the article highlights the need to augment targeted tax

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expenditures to support student debtors, especially those who are unable to reap the tax benefits of homeownership or maximize retirement savings in the near term.

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I. INTRODUCTION

> While we typically think of the rule of law as being designed to protect the weak against the strong, and ordinary citizens against the privileged, those with wealth will use their political power to shape the rule of law to provide a framework within which they can exploit others. They will use their political power, too, to ensure the preservation of inequalities rather than the attainment of a more egalitarian and more just economy and society.
>
> —Joseph E. Stiglitz[1]

With the convergence of a Republican President and Republican majorities in both chambers of Congress, the Tax Cuts and Jobs Act (TCJA) became law in December of 2017.[2] To its credit, the legislation appears, at least in many of its provisions, responsive to a host of normative arguments presented by tax scholars and economists over time. Among other topics, commentary concerning progressive tax rates, the mortgage interest deduction, corporate taxes, the alternative minimum tax, and the deduction for payment of state and local taxes has been quite robust. Indeed, many policy advocates cheer the law's enactment and likely remain inclined to sanction more of the same. They may be in for a decidedly uncomfortable wait. In the wake of a host of Democratic victories in recent national elections, resulting in both a Democratic President and Democratic control of both chambers of Congress, much accomplished in the TCJA may face prompt dismantling (and with good reason). Notwithstanding the law's apparent and occasional merits, it remains critically necessary to consider both the intent behind and the ramifications flowing from the law's enactment. Moreover, viewing the legislation as a powerful vehicle capable of implementing much-needed changes in the tax law, it is equally necessary to consider both what the legislation introduced or changed as well as what it, rather stubbornly, managed to leave in place.[3] With clear and specific intent, the new law

1. JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY 190–91 (W.W. Norton & Co. 2012) (citation omitted); *see also* K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2476–77 (2018) (pointing out that legal regimes were central in constructing prevailing systemic inequality).

2. Tax Cuts and Jobs Act (TCJA) of 2017, Pub. L. No. 115-97, 131 Stat. 2051.

3. *See* STIGLITZ, *supra* note 1, at 28 ("Much of the inequality that exists today is a result of government policy, both what the government does and what it does not do. Government has the

aggressively exacerbates existing income and wealth inequality by shifting even more of the tax burden away from the well-tailored back pockets of the rich and onto the yokes of salaried white-collar professionals and the heavy-laden backs of blue-collar working men and women. Far more than a mere partisan achievement, the legislation works hand in glove with the unchecked market forces that almost invariably give rise to inequality and reflects the work of a Congress largely captured[4] by politically-influential monied interests[5] and thus dominated by those willing to take bold steps to preserve systemic inequality.[6] It is a national victory for the so-called 1% at the top of the income and wealth distribution in their ongoing and generally fruitful quest to reap all the benefits of American capitalism largely at the expense of the 99%.[7] And this most recent triumph of burden-shifting is merely one in a series. With the enactment of the Tax Reform Act of 1986 (Tax Reform Act),[8] Congress lowered individual tax rates, largely benefitting those at the top of the progressive rate structure. Others were forced to finance these rate cuts by various means such as suffering, for example, the elimination of the

power to move money from the top to the bottom and the middle, or vice versa.").

4. *Cf. id.* at 47–48 (discussing regulatory capture and cognitive capture). *See id.* at 161 ("Persuading politicians to adopt one's perspectives and perceptions has a double advantage: not only do they sell the ideas to the public; they translate the ideas into legislation and regulation.").

5. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 661 (Arthur Goldhammer trans., Belknap Press of Harvard Univ. Press 2017) ("Has the US political process been captured by the 1 percent? This idea has become increasingly popular among observers of the Washington political scene.") (citation omitted). There may well be no need for "capture." Self-interest may be at play. *See id.* at 662 (noting that U.S. politicians appear to be much wealthier than their European counterparts and in a category notably different relative to the average American citizen). The 27th Amendment to the Constitution restricts Congress's ability to alter congressional salaries, but can it not accomplish the same thing, in effect, by lowering its own taxes? U.S. CONST. amend. XXVII.

6. *See* PIKETTY, *supra* note 5, at 662 ("The experience of France in the Belle Époque proves . . . that no hypocrisy is too great when economic and financial elites are obliged to defend their interests—and that includes economists, who currently occupy an enviable place in the US income hierarchy.") (citation omitted).

7. *See* STIGLITZ, *supra* note 1, at xxi (emphasizing that often, those at the top enjoying financial rewards do not necessarily create jobs and may use their financial wherewithal to distort the political process to their benefit). Stiglitz also goes on to emphasize that political systems dominated by the wealthy facilitate the design of legal, regulatory, and administrative regimes that "not only fail to protect the ordinary citizens against the wealthy but also further enrich the wealthy at the expense of the rest of society." *Id.* at xix. He later re-emphasizes the point, noting that "[e]very law, every regulation, every institutional arrangement has distributive consequences—and the way we have been shaping America's market economy works to the advantage of those at the top and to the disadvantage of the rest." *Id.* at 52–53.

8. I.R.C. §§ 1–1400.

deduction for personal interest,[9] although Congress did opt to spare some long-treasured allowances (e.g., the deduction with respect to qualified residence interest).[10] In the years after the enactment of the Tax Reform Act, individual and other tax rates were pushed down further or temporarily increased, depending on prevailing political sentiment, but tax provisions favoring the wealthy managed to persist.[11] The TCJA did not alter the favorable treatment of long-term capital gains[12] or qualified dividend income,[13] and it left in place the favorable treatment of investment interest,[14] the dismal treatment of student loan interest,[15] and the longstanding favor of

9. *See* I.R.C. § 163(h)(1) (2012).

10. *See* I.R.C. § 163(h)(2)(D) (2012).

11. TAX POLICY CTR., *Historical Individual Income Tax Parameters*, (Aug. 2, 2019), taxpolicycenter.org/statistics/historical-individual-income-tax-parameters (documenting the fluctuation of tax rates for low- and high-income brackets over time).

12. *See* STIGLITZ, *supra* note 1, at 71 (noting that "[t]he most egregious aspect of recent tax policy was the lowering of tax rates on capital gains . . . . In this way we have given the very rich, who receive a large fraction of their income in capital gains, close to a free ride."). Other commentators have lamented the favorable tax treatment accorded long-term capital gains. *See* ANDREA FLYNN ET AL., THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY 73–74 (Cambridge Univ. Press 2017) (arguing that racial wealth inequality is heavily affected by tax law favoring asset holding over income earned).

13. *See* STIGLITZ, *supra* note 1, at 71 (noting that the tax cuts ushered in during the presidency of George W. Bush benefitted the very rich by lowering rates on qualified dividends and capital gains and gradually eliminating the estate tax). Stiglitz goes on to note that such tax cuts did not yield expected benefits. *See id.* at 71, 211 (emphasizing that tax cuts for the wealthy and rich (capital gains and dividends) did not lead to increases in investment and sustainable growth); *see also id.* at 221 (noting that cutting taxes on the wealthy via embracing supply-side economics has not resulted in increased economic activity).

14. *See* I.R.C. § 163(h)(2)(B) (2012).

15. *See* I.R.C. § 163(h)(2)(F) (2012); *see also* I.R.C. § 221(b) (2012) (promptly phasing out the deduction with respect to student loan interest). Like other forms of interest, student loan interest was deductible prior to the Tax Reform Act of 1986. *See* Jacqueline T. Albus, Comment, *The Deduction for Interest on Student Loans: Relief is on the Way*, 42 ST. LOUIS U. L.J. 591, 591 (1998). Although student loan interest was rendered non-deductible as "personal interest" by the Tax Reform Act, the Taxpayer Relief Act of 1997 restored the deductibility of student loan interest to some extent. *See id.* Notwithstanding Congress's acknowledgment that many students incur substantial debt in obtaining college and graduate education, the rapid phase-out of the student loan interest deduction effectively undermines the policy objectives supporting enactment. *See id.* The rapid phase-out results in the student loan interest deduction primarily benefitting lower-income taxpayers. *See* JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2018–2022 at 38 (2018) [hereinafter JOINT COMMITTEE ESTIMATES] (estimating that the student loan interest deduction will benefit those in the $40,000–$50,000 income class more than it will benefit those in the $200,000 and Over income class).

real estate industry interests.[16] In addition to lowering progressive tax rates applicable to individuals,[17] the new law also lowered the tax rates on corporations as well as specific non-corporate businesses (via the deduction for qualified business income).[18] And notwithstanding the fact that the deduction for personal exemptions has been especially valuable to large and growing families for decades, Congress chose to reduce the exemption amount to $0.[19] There's more. Those with deductions sufficient to justify itemizing (1) must contend with a new and hard ceiling with respect to deductions for the payment of state and local income and property taxes, and (2) may be forced to contend with the impact of reduced debt ceilings with respect to the deduction of qualified residence interest.[20]

Faithful to its originating intent, the TCJA aggressively advances the ongoing burden-shifting offensive. The legislation has many beneficiaries of Congress's legislative grace, and yet we have no guarantee that the fortunate individuals and businesses will go on to generate positive societal externalities.[21] Without question, unfortunately, those outside the favored class must shoulder more and more of the burden of Congress's largesse,[22]

16. *See* I.R.C. § 62(a)(4) (2012). Although all miscellaneous itemized deductions have been suspended, the deductions taken in arriving at adjusted gross income do not constitute "itemized deductions." *See* I.R.C. §§ 63(d)(1), 67(g) (2012). Specific deductions "attributable to property held for the production of rents" are taken into account in arriving at adjusted gross income. I.R.C. § 62(a)(4); *see also* STIGLITZ, *supra* note 1, at 239–40 (noting that those controlling the political process will use their power to influence the creation of economic systems that favor them and pointing out that industry-specific measures are one means).

17. *See* PIKETTY, *supra* note 5, at 662. The persistent attempt to push progressive tax rates lower and lower is troubling. *Id.* Piketty notes that "the history of the progressive tax over the course of the twentieth century suggests that the risk of a drift towards oligarchy is real and gives little reason for optimism about where the United States is headed." *Id.*

18. Tax Cuts and Job Act of 2017, Pub. L. No. 115-97, § 199A, 131 Stat. 2054, 2063 (2017) (allowing a 20% deduction for qualified business income).

19. *See* I.R.C. § 151(d)(5)(A) (2012).

20. *See* I.R.C. §§ 163(h)(3)(F)(i)(II), 164(b)(6) (2012).

21. *See* Lily L. Batchelder, et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006) (noting that most tax incentives take the form of deductions or exclusions (resulting in those with higher marginal tax rates enjoying a larger tax preference) and arguing that providing a larger tax incentive to those with higher marginal tax rates is economically inefficient unless such beneficiaries generate more positive societal externalities or are more responsive to the incentive); *see also* PIKETTY, *supra* note 5, at 656 (concluding that substantial reduction in the top marginal tax rates in the early 1980s did not stimulate productivity, at least not to any statistically measurable extent).

22. The same balancing was seen with respect to the Tax Reform Act. *See* Kenneth Allen Jewell, Note, *The Home Equity Loan Consumer Protection Act of 1988: Beyond the Informed Use of Credit*,

enhancing the likelihood that economic inequality will not only persist in the near term but also worsen in the future.

In Part II of this Article, I discuss several of the root causes of economic inequality as well as the mechanisms employed to ensure its perpetuation. Addressing the critical role played by tax laws and policies, I provide a brief survey of many of the changes introduced by the TCJA. Given the significance of homeownership in terms of wealth-building and intergenerational wealth transfer, I devote focused attention to the historical and current treatment of mortgage interest.[23] Parts III and IV present short-term and long-term measures directed at alleviating economic inequality, with the latter highlighting the importance of higher education, and Part V proceeds to discuss the urgent need to intervene at various stages of the educational process to ensure access to educational opportunity and to stymie the economic and non-economic inequalities that have given rise to burgeoning social unrest. In Part VI, I comment briefly on President Biden's near-term tax policy goals while setting forth my concluding thoughts.

2 DEPAUL BUS. L.J. 351, 353 (1990) (noting how the anticipated revenue loss resulting from the lowering of marginal tax rates by the Tax Reform Act of 1986 prompted the contemporaneous elimination or phaseout of several deductions and items of tax preference).

23. *See infra* Sections II.B.4.b, II.B.4.c.

II. THE EXISTENCE AND PERPETUATION OF INCOME AND WEALTH INEQUALITY

A. *The Causes of Economic and Other Inequalities*

The level of wealth inequality in the United States has grown steadily over the years, and according to at least one recent commentator, the economic disparity has reached a level not seen in almost a century.[24] Although no one factor dominates as the root cause of inequality,[25] it merits emphasizing, whether one focuses on income[26] inequality or the wealth[27] inequality that it often begets, that neither chronic nor burgeoning inequality is natural but is a product of government policies.[28] Although one can justifiably point to deregulation of the financial sector and progressive tax policy changes as significant historical contributors,[29] commentators have noted the impact of factors as divergent as adverse U.S. Supreme Court decisions,[30] globalization

24. *See* A. Mechele Dickerson, *Millennials, Affordable Housing, and the Future of Homeownership*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 435, 450 (2016) (noting that wealth inequality has grown to levels not seen since the Gilded Age of the 1920s).

25. *See* STIGLITZ, *supra* note 1, at xxiv (noting that various intertwined factors contribute to existing inequality).

26. *See* Palma J. Strand, *Education-as-Inheritance Crowds Out Education-as-Opportunity*, 59 ST. LOUIS U. L.J. 283, 286 (2015) ("Income represents resources that arrive over time, frequently in the form of earnings.").

27. *Id.* Delineating income and wealth, one commentator noted the following:

> Unspent and saved income . . . gives rise to wealth. Wealth represents amassed resources that may generate income and that, importantly, provide an economic cushion to meet unexpected contingencies such as sickness or lost employment or a reserve to cover anticipated major expenditures such as college education or the purchase of a home.

Id. (citation omitted). It has been argued that wealth disparities merit primary and preliminary focus in addressing economic inequality. *See* FLYNN ET AL., *supra* note 12, at 64 (noting policy discussion focused on closing education and income gaps as a means of addressing economic and racial inequality and emphasizing the preliminary need to address wealth disparities (in which other forms of inequality are rooted)).

28. *See* Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 397 (2014).

29. *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY xxxi (preface) (paperback ed. 2013) (reasoning that deregulation of the financial sector and reduction in progressive tax rates during the presidency of Ronald Reagan was a pivotal moment in terms of widening inequality in the United States).

30. *See* Gilman, *supra* note 28, at 393 (arguing that the U.S. Supreme Court sometimes renders decisions harmful to the economic interests of the 99% and impedes legislative efforts to remedy the situation). Gilman notes that "[w]hile a popular conception of the Court is that it is designed to protect vulnerable minorities at the hands of majoritarian impulse, the Court, instead, is helping to protect a

and the mobility of capital,[31] deficits in the educational system,[32] and intergenerational transfers of accumulated wealth at death (with minimal or no tax consequence in most instances).[33] In fact, various intergenerational *inter vivos* transfers of wealth (including down payments on homes and fully-funded college educations)[34] have been identified as contributing factors.[35] Interestingly enough, the transfer may go well beyond mere college funding.

The recent Varsity Blues scandal (in which several famous and wealthy individuals were arrested and criminally charged[36] for using bribes to fraudulently secure the admission of their children to colleges and universities) highlights the extent to which the wealthy will go; they manage to transfer wealth by fully funding a college education, and they are willing to break the law to ensure that they have the ability to effect the transfer at the *right* college. The scandal itself causes one to ponder not only how long such transgressions have being operating behind the scenes but also how many took advantage of the scheme and escaped without exposure or punishment. And, by the way, although there may be those who face real and meaningful punishment for their role in the Varsity Blues fraud scheme, sentences for those apparently complying with prosecutors (to some extent at least) have thus far been remarkably light.[37] This end result should come as no surprise.

very powerful minority at the expense of the majority." *Id.*

31. *See* STIGLITZ, *supra* note 1, at 62 (pointing out that the high mobility of capital ultimately forces workers to accept lower wages and less desirable working conditions).

32. *See* Gilman, *supra* note 28, at 392 (identifying deficits in the educational system as one of several factors identified by economists as contributing to rising inequality).

33. *See* FLYNN ET AL., *supra* note 12, at 74 (identifying the receipt of appreciated property via inheritance (and taking it with a stepped-up basis) as a driver of racial wealth inequality).

34. *See* Strand, *supra* note 26, at 287–88 (noting that education is not always identified or quantified as a wealth transfer and emphasizing the importance of taking a more holistic view of wealth transfer).

35. *See* FLYNN ET AL., *supra* note 12, at 67 (discussing research that concluded racial wealth disparities—rather than being rooted in education, income, and employment disparities—flow largely from intergenerational transfers such as down payments on homes, fully-funded college education, and parental bequests); *see also* Strand, *supra* note 26, at 286 (discussing Langbein's argument regarding the intergenerational transfer of wealth *inter vivos* via human capital investment (primarily through the financing of education)).

36. *See generally* U.S. Att'y Office, Dist. of Mass., *Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme*, U.S. DEP'T OF JUST. (Mar. 12, 2019), https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic (discussing relevant arrests).

37. *See* Steve Helling, *Lori Loughlin Reports to Prison: 'She Hopes to be Home by Christmas*,*'* PEOPLE (Oct. 30, 2020), https://people.com/crime/lori-loughlin-reports-to-prison-she-hopes-to-be-out-by-christmas/ (indicating that for her role in the crimes, Lori Loughlin has been sentenced to two

The palpably inconvenient reality is that different rules and standards have long been applied to different groups of people. Inevitably, social forces like discrimination[38] (both overt and tacit[39]) not only give rise to distinct forms of inequality but they have also played an immense role in creating and perpetuating economic inequality.[40] The case for optimism is not impossible to make, but there are numerous hurdles to clear.[41]

B. The Critical Role of Tax Laws

1. In General

Of the many intertwined and root causes of economic inequality, tax laws and policies play a critically important role. As one commentator noted, "Those at the top have managed to design a tax system in which they pay less than their fair share—they pay a lower fraction of their income than do those who are much poorer."[42] Worse yet, the relief afforded those at the top, as was noted previously, is financed by gradually shifting the tax burden to those lower down on the income scale. The TCJA represents the most recent phase of this evolutionary degeneration in vertical taxpayer equity. Although an exhaustive treatment of each change introduced in the TCJA is beyond the scope of this article, a brief commentary tour facilitates a holistic view of the legislation and thereby reveals its core intent. Given that many individuals have most of their wealth concentrated in their principal residence(s) (which accounts for some degree of wealth inequality), the changes influencing homeownership merit closer examination. We will see that the changes with respect to the treatment of qualified residence interest reflect Congress's broad-based approach to burden-shifting, ensuring that even the upper middle

months in jail, must pay a fine of $150,000, and must perform 150 hours of community service).

38. *See* STIGLITZ, *supra* note 1, at 68–71 (noting that inequality arises not only from the operation of government but also from social forces like discrimination).

39. *See id.* at 69 (noting the impact of implicit discrimination on perpetuating inequities and pointing out that tacit collusive behavior can play a role in the economic suppression of another group).

40. *See id.* at 68–71.

41. *See id.* at 282 (noting that discrimination is one of the most invidious and hardest sources of inequality to eradicate); Michele E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1, 2, 6 (2016) (emphasizing that inequality falls more harshly on women and minorities and pointing out that "[t]he Court's benign view of the market and its biased view of women create a potent combination that results in further entrenchment of economic inequality for women").

42. STIGLITZ, *supra* note 1, at 38.

class (rich in tax revenue potential) shares its portion of the pain.

2. Provisions Helpful to Wealthy Individuals

By far, the TCJA provision most helpful to wealthy individuals is the lowering of progressive tax rates, continuing a concerted and persistent effort started during the Reagan administration. At the same time, Congress altered the alternative minimum tax rules (AMT), thereby ensuring that progressive rate relief on the one hand would not be countered by AMT confiscation on the other. Likewise, the *increase* in the allowance for charitable contributions (in the form of cash) was balanced by a suspension in the phaseout or overall limitation on itemized deductions. Your Average Joe does not itemize deductions, and to be sure, he does not donate 60% of his adjusted gross income to charity, in cash or otherwise.[43] Although some believe that such tax relief for the wealthy stimulates the economy and ultimately trickles down to the benefit of middle- and low-income taxpayers, history confirms that such supply-side measures ultimately fail to pan out.[44]

In fact, in the wake of progressive rate reductions in the 1980s, taxpayers no longer facing extraordinary marginal rates took the opportunity to pursue even higher salaries,[45] retaining or appropriating for themselves funds that could have been used to expand businesses, hire more workers, or (in some instances), distribute earnings to shareholders. Dissuasive taxation (i.e., the imposition of very high marginal rates) has been proposed as one means of curbing such behavior.[46]

The TCJA also changed the rules regarding alimony.[47] Under prior law,

43. *See* JOINT COMMITTEE ESTIMATES, *supra* note 15, at 36. Although the charitable contribution deduction was estimated (in 2018) to be a $78 million tax expenditure for those in the $40,000–$50,000 income class, the same deduction was estimated to be a tax expenditure of over $33.5 billion for those in the $200,000 and Over income class. *Id.*

44. *See* PIKETTY, *supra* note 5, at 656 (concluding that substantial reduction in the top marginal tax rates in the early 1980s did not stimulate productivity, at least not to any statistically measurable extent).

45. *See id.* at 655 (noting that after 1980, executives sought substantial increases in compensation as a result of markedly lower marginal tax rates).

46. *See* PIKETTY, *supra* note 5, at 659–61 (arguing that dissuasive taxation can curb skyrocketing executive compensation demands without reducing productivity).

47. *See* Stephan Fishman, *New Rule for Alimony Under the Tax Cuts and Jobs Act*, NOLO (last visited Mar. 17, 2021), https://www.nolo.com/legal-encyclopedia/you-must-report-alimony-received-income-but-many-dont.html (detailing the impacts of the TCJA on alimony taxation); Martin M. Shenkman, *Divorce Post-TCJA: Unexpected Consequences*, TAX ADVISER (Jan. 17, 2019),

the individual paying alimony was entitled to a deduction with respect to alimony paid, and the recipient was required to include such alimony in gross income.[48] For divorce and separation instruments executed after December 31, 2018, however, those paying alimony are no longer allowed to deduct such alimony, and recipients are no longer required to include such alimony in gross income.[49] On its face, the new law draws a clear line of demarcation and would, in general, appear to be balanced and fair. But the new law also allows those whose divorce and separation instruments were executed on or *before* December 31, 2018 to amend them such that the new law applies; this provision, as law, has full force and effect but is *not* set forth in the Code.[50] Many believe that the new provision will harm "new" alimony payers,[51] and it may do just that. But to the extent an alimony payer's divorce or separation instrument was executed on or before December 31, 2018, he or she may have absolutely no reason to amend the agreement to apply new law and forego a deduction. The law does, unfortunately, create a disturbing possibility.[52] If an alimony payer operating under the old rules has managed to reduce or effectively eliminate his or her tax liabilities otherwise by employing professional tax strategists, an alimony deduction is useless, but the recipient (who may receive hundreds, thousands, or even millions[53] of dollars in alimony) can be relieved of 100% of any alimony-related taxes by mere

https://www.thetaxadviser.com/newsletters/2019/jan/divorce-post-tcja-consequences.html (highlighting the elimination of deductible alimony payments).

48. *See* Fishman, *supra* note 47 (explaining how the prior system worked because those paying alimony were typically in a higher tax bracket than those receiving, so each party was taxed accordingly).

49. *See* Fishman, *supra* note 47 (highlighting the changes in alimony taxation per the TCJA); Shenkman, *supra* note 47 (explaining that the TCJA amendment is permanent and applies to any divorce or separation instrument executed after December 31, 2018 or one that was executed before December 31, 2018 but is modified after that date).

50. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051(c), 131 Stat. 2054 (2017).

51. *See* CHH TAX LAW EDITORS, TAX CUTS AND JOBS ACT: LAW, EXPLANATION & ANALYSIS 103 (Wolters Kluwer 2018).

52. *See, e.g.*, Jim Tankersley, *'Hurry Up and Get a Divorce'? For the Rich, There's an Incentive*, N.Y. TIMES (July 2, 2018), https://www.nytimes.com/2018/07/02/us/politics/new-tax-law-rich-divorce.html (discussing both the various ways to apply the new law and the option of getting a divorce before the law takes effect).

53. *Dr. Dre Estranged Wife Justifies $2 Mil Monthly Support*, TMZ (Sept. 5, 2020), https://www.tmz.com/2020/09/05/dr-dre-wife-nicole-young-justifies-two-million-dollar-monthly-support-with-expenses/ (explaining that Nicole Young, the estranged wife of infamous rapper "Dr. Dre" (Andre Romelle Young), hopes to receive $2 million per month as spousal support in connection with the couple's divorce).

amendment of the divorce or separation instrument.[54] For those amicably divorced from billionaires (and obligated to include alimony in gross income under the old rules), the ability to escape taxes legally is huge.[55] Assuming pre-nuptial contracts are not dispositive, single billionaires hoping to get married can promise tax-free alimony, married billionaires facing divorce can use tax ramifications as a bargaining chip in divorce proceedings, and billionaires divorced (pre-TCJA with no need of a deduction) have a new carrot to wave in front of whomever they pay includible alimony to. It's a billionaire's paradise.

3. Provisions Beneficial to Businesses and Business Owners

In an apparent effort to make it easier and more profitable to do business in the United States, the TCJA lowered the corporate tax rate from 35% to 21%.[56] The immediate effect, however, was not prompt investment in domestic enterprises to save American jobs.[57] Rather, corporations often used the additional funds to buy back stock and thereby pump up short-term earnings per share.[58] With an objective increase in that metric, corporate executives across the board could then petition for performance-related bonuses and thereby reap personal financial benefits. Ensuring that no

54. *See* Tankersley, *supra* note 52 (noting several options spouses may choose instead of alimony payments, such as real estate and retirement accounts); *Should You Modify Your Decree? Impact of Tax Law Changes on Alimony*, YHB (Jan. 11, 2018), https://yhbcpa.com/tax-consulting/modify-decree-impact-tax-law-changes-alimony/ (noting that modifying a divorce agreement could be beneficial to the taxpayer if the income levels of the alimony payer or recipient change).

55. *See* Heather L. Locus, *Minimizing Taxes in Divorce Without the Alimony Deduction*, FORBES (July 12, 2019, 8:05 PM), https://www.forbes.com/sites/heatherlocus/2019/07/12/minimizing-taxes-in-divorce-without-the-alimony-deduction/?sh=40101788344b (arguing the change in alimony tax treatment may not always be beneficial to the recipient); Tankersley, *supra* note 52 ("Because they have more, the folks in the higher brackets have more of the ability, not to circumvent the law, but use the law accordingly.").

56. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13001(a), 131 Stat. 2054 (2017).

57. *See* Richard Phillips, *The Immediate Economic Impact of the Tax Cuts and Jobs Act Could Be Even Less Than Expected*, INST. OF TAX'N & ECON. POL'Y (July 11, 2018), https://itep.org/the-immediate-economic-impact-of-the-tax-cuts-and-jobs-act-could-be-even-less-than-expected/ (estimating that 43% of the increase in real GDP will go to foreign investors instead of Americans).

58. *See* Anne Marie Knott, *Why the Tax Cuts and Jobs Act (TCJA) Led to Buybacks Rather Than Investment*, FORBES (Feb. 21, 2019, 4:47 PM), https://www.forbes.com/sites/annemarieknott/2019/02/21/why-the-tax-cuts-and-jobs-act-tcja-led-to-buybacks-rather-than-investment/?sh=17b39e1137fb ("The underlying logic for the TCJA was that allowing companies to keep a greater share of profits[] would stimulate investments in long term growth. Instead, the dominant company response to the TCJA was stock buybacks.").

business was left behind, Congress also created the deduction for qualified business income, such that non-corporate taxpayers could deduct 20% of the income passed through to them from their business.[59] Greasing the wheels of commerce further, Congress allowed the immediate expensing of up to $1 million of otherwise capitalizable business expenditures,[60] removed the twenty-year cap on the use of net operating losses,[61] and preserved the ability to deduct business meals (while generally eliminating the allowance for business-related entertainment expenses).[62]

4. Shifting the Burden to Other Taxpayers

a. In General

Congress's embarrassingly favorable treatment of wealthy individuals and businesses in the TCJA is more than well-matched in its treatment of other taxpayers. At first glance, the suspension of all miscellaneous itemized deductions might appear to be fairly harmless. After all, to the extent taxpayers itemize at all, most have little if anything in the way of unreimbursed employee expenses or similar items, so losing the ability to deduct even a scaled-down amount is no loss at all. Likewise, if hobbyists are no longer able to offset hobby income with hobby losses, they can forego the activity or simply enjoy the psychic, non-tax benefits of their activity.[63] No

59. *See generally* I.R.C. § 199A(a)(2) (2018) (explaining the requirements for the potential 20% reduction).

60. *New Rules and Limitations for Depreciation and Expensing Under the Tax Cuts and Jobs Act*, IRS (Apr. 2018), https://www.irs.gov/newsroom/new-rules-and-limitations-for-depreciation-and-expensing-under-the-tax-cuts-and-jobs-act (describing the new maximum deduction of $1 million, up from $500,000).

61. *CARES Act Impact on Net Operating Losses: Frequently Asked Questions*, BDO (Apr. 2020), https://www.bdo.com/insights/tax/federal-tax/cares-act-impacts-on-net-operating-losses-frequent ("The 2017 tax reform legislation known as the Tax Cuts and Jobs Act of 2017 . . . lifted the previous 20-year limit on [net operating loss] carryforwards . . . .").

62. See I.R.C. § 274(a) (2017) (prohibiting deductions for business-related entertainment expenses). But see Diana Fitzpatrick, IRS Clarifies 50% Business Meal Deduction Under TCJA, Nolo, https://www.nolo.com/legal-updates/irs-clarifies-50-business-meal-deduction-under-tcja.html (last visited Mar. 17, 2021) (explaining that the TCJA did not alter the ability to deduct business-related meals).

63. See I.R.C. § 183(a) (2018) ("In the case of an activity engaged in by an individual or an S corporation, if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section."); Steven Wright, Hobby Loss Law Changes: Loss of Miscellaneous Deduction, Intuit Accts. (Feb. 7, 2019),

harm, no foul. What's key is that in stripping taxpayers of deductions, Congress was, indeed, aggressive.

For example, in addition to clarifying that non-military taxpayers are not currently entitled to deduct moving expenses,[64] Congress was sure to provide that even if the employer covered moving expenses, the amount paid would be includible in gross income as compensation,[65] and would *not* constitute a qualified moving expense reimbursement.[66] In reducing the personal exemption amount to zero, Congress took the historically significant step of assaulting a family-friendly provision that has been a part of the tax law for decades.[67] Although ostensibly offset by increases in standard deduction amounts and the child tax credit, decreasing the personal exemption amount to zero ultimately lowers, at some point, what Congress would otherwise allow as a tax benefit to large and growing families. Middle- and lower-income families are, in effect, forced to finance tax cuts for the wealthy.[68] Moreover, in light of differential birth rates, such an approach falls more harshly on families of color[69] and threatens to weaken the economy.[70] Those who used to enjoy handsome tax refunds may find that they are no longer arriving.

Turning its attention to itemized deductions of real import and fiscal impact, Congress capped the deduction for the payment of state and local income *and* property taxes (SALT) at $10,000, thereby depriving many upper-middle class taxpayers of a substantial portion of what they would otherwise have been able to claim.[71] One could certainly argue that lowering the SALT

https://proconnect.intuit.com/taxprocenter/tax-law-and-news/hobby-loss-law-changes-loss-of-miscellaneous-deduction/ (discussing the changes and impact of the TCJA on hobbyists).

64. *See* I.R.C. § 217(a), (g), (k) (2018).

65. *See* I.R.C. § 82 (2018).

66. *See* I.R.C. § 132(a)(6), (g)(2) (2018).

67. I.R.C. § 151(d)(5) (2017).

68. *See* STIGLITZ, *supra* note 1, at 239 ("[O]ur economic system has benefited those at the top, at the expense of the rest, and [] this system is far removed from what has been called 'the achievement model of income determination,' in which incomes reflect contributions to society.").

69. *Cf.* BEVERLY D. TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? 2 (Basic Books 2017) (pointing out that the vast majority of the population growth in the United States takes the form of growth in the non-White population as a result of differential birth rates and immigration patterns).

70. *See* STIGLITZ, *supra* note 1, at 243–44 (arguing that investment stimulus is a function of getting money into the hands of those in the middle class and noting that measures effectively raising taxes on the middle class will dampen demand).

71. I.R.C. § 164(b)(6)(B) (2017) ("[T]he aggregate amount of [state and local] taxes taken into

deduction made sense from a vertical taxpayer equity perspective. After all, the SALT deduction was estimated to be a $10.57 billion tax expenditure in 2018 for those in the $200,000 and Over income class and only a $123 million tax expenditure for those in the $40,000–$50,000 income class.[72] But at the same time that Congress was capping the SALT deduction, it was increasing the deduction cap for charitable cash contributions (which made up some portion of the estimated $33.56 billion tax expenditure in 2018).[73] Congress *decreased* the deduction for taxes largely paid by working individuals while *increasing* the deduction for money given away freely.[74] The burden-shifting could not be more explicit, and the SALT deduction was not the only victim.

b. Qualified Residence Interest—Acquisition Indebtedness

For many, achieving the American Dream includes owning a home, and commentators have noted that the inability to achieve homeownership (and rely on it to effect intergenerational wealth transfers) has contributed significantly to existing levels of wealth inequality. The TCJA altered the rules governing the deduction of qualified residence interest, and by doing so, it altered the homeownership calculus. Many would argue that the change was warranted and long overdue.[75] But what exactly did the TCJA accomplish? Let's take a closer look.

Before enactment of the TCJA, taxpayers were generally able to deduct the qualified residence interest paid on up to $1 million of acquisition indebtedness (with respect to a principal residence and a second residence). Many have noted that the deduction with respect to mortgage interest was not made part of the tax law to encourage homeownership.[76] Rather, the deduction for mortgage interest simply existed alongside the deduction for all forms of personal interest.[77] When Congress eliminated the deduction for

account . . . for any taxable year shall not exceed $10,000 . . . .").

72. *See* JOINT COMMITTEE ESTIMATES, *supra* note 15, at 36.

73. *See id.*

74. *See id.* (demonstrating this disparity in a side-by-side chart).

75. *See e.g.*, ERIC TODER ET AL., REFORMING THE MORTGAGE INTEREST DEDUCTION, URBAN INSTITUTE 1–2 (2010) (arguing that the pre-TCJA state of mortgage interest deduction was in need of reform).

76. *See, e.g.*, *id.* at 1 ("The [mortgage interest deduction] was not originally placed in income tax law to subsidize home ownership.").

77. *See id.* (noting that the mortgage interest deduction was not put in the Code to encourage homeownership and that at the time, all personal interest was deductible); U.S. GOV'T

personal interest in the Tax Reform Act, the mortgage interest deduction managed to survive[78] as a carveout; by definitional fiat, "qualified residence interest" is not "personal interest." As a tax expenditure, the allowance is costly,[79] and commentators have criticized the deduction for some time on various grounds. In addition to arguing that the allowance fails to encourage

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ACCOUNTABILITY OFF., HOME MORTGAGE INTEREST DEDUCTION: DESPITE CHALLENGES PRESENTED BY COMPLEX TAX RULES, IRS COULD ENHANCE ENFORCEMENT AND GUIDANCE 3 (July 2009) [hereinafter USGAO] (noting that the mortgage interest deduction goes back to 1913 because it was simply one of many forms of deductible interest).

78. *See* TODER ET AL., *supra* note 75, at 1 (noting that the Tax Reform Act eliminated the deductibility of personal interest, but the mortgage interest deduction was left in place); *see also* Albus, *supra* note 15, at 593 (noting that with the 1986 Act, qualified residence interest was still deductible, but that if it was not acquisition indebtedness, interest deductibility would follow only if the money was used for qualified medical or qualified educational expenses). Thus, before the Tax Reform Act, all personal interest was deductible. *See* Christine Manolakas, *Qualified Residence Interest Deduction: A Win for Unmarried Co-Owners*, 17 NEV. L.J. 199, 204 (2016) (explaining the two major changes the Tax Reform Act of 1986 included). The Tax Reform Act rendered all personal interest non-deductible, but carved out (by definition) qualified residence interest which was deductible within limits. *Id.* ("A major exception to the general disallowance of a deduction for personal interest was qualified home mortgage interest."). In general, the interest on the debt was deductible to the extent the debt did not exceed the lesser of (1) the fair market value of the residence(s) or (2) the sum of the cost basis of the residence, qualified medical expenses, and qualified educational expenses. *Id.* (discussing when a taxpayer could deduct personal interest). The interest on any debt in excess of the relevant ceiling was not considered "qualified residence interest" and was presumably non-deductible. *See generally* STAFF OF THE JOINT COMM. ON TAX'N, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 52–53 n.120 (Jan. 27, 2005) [hereinafter STAFF OF THE JOINT COMMITTEE OPTIONS]. The limits existing prior to the TCJA were put in place in 1987, and although interest on home equity indebtedness was capped at $100,000, the funds could be used for any purpose. *See id.* at 53.

79. *See* JOINT COMMITTEE ESTIMATES, *supra* note 15, at 39 (noting that the mortgage interest deduction was estimated to be a $25 billion tax expenditure in 2018). Commentators have lamented the cost of the mortgage interest deduction over time and encouraged reform. *See* Dickerson, *supra* note 24, at 460 (noting that the mortgage interest deduction is one of the most significant federal tax expenditures, and that it is largely useless to ordinary Americans who do not itemize their deductions); Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1396 (2000) (concluding that the mortgage interest deduction is "expensive, distributionally inequitable, and encourages [urban] sprawl"); Martin A. Sullivan, *The Rich Get 100 Times More Mortgage Subsidy Than the Poor*, TAX ANALYSTS 1110–12 (Mar. 7, 2011) (indicating that those in Congress who oppose budget-conscious modification of mortgage interest subsidies have little sincere interest in tax reform).

homeownership[80] and provides bad incentives,[81] commentators have opined that it provides an upside-down subsidy for the wealthy,[82] is discriminatory,[83]

80. *See* TODER ET AL., *supra* note 75, at 3 (citing various studies comparing homeownership rates in different countries (some with and some without a mortgage interest deduction) indicating that there is no clear link between availability of the mortgage interest deduction and homeownership rates). According to reported data (circa 1998), the United States had a homeownership rate of 65%. U.S. CENSUS BUREAU, TABLE 5: HOMEOWNERSHIP RATES FOR THE UNITED STATES (1998) (reporting the homeownership rates from 1965 to 1998). At the same time, several countries had similar rates of homeownership without a mortgage interest deduction (e.g., Australia had 70%, and Canada had 63%). *See* Mann, *supra* note 79, at 1385–86 n.235. Mann also points out that some economists believe that elimination of the mortgage interest deduction would result in lower home prices. *See id.* at 1387. She goes on to argue that a shelter tax credit would encourage all Americans to own homes. *See id.* at 1393.

81. *See* Mann, *supra* note 79, at 1351 (arguing that although the mortgage interest deduction tends to encourage the purchase of expensive homes, the mortgage interest deduction not only fails to incentivize all Americans to own homes but also encourages urban sprawl); *see also* TODER ET AL., *supra* note 7518, at 2–3 (noting that allowing the deduction of interest on up to $1 million of acquisition debt incentivizes the purchase of more expensive homes and encourages one to own the most expensive home one can afford (or, as the case may be, cannot afford)).

82. *See* Mann, *supra* note 79, at 1360–62 (noting that those who benefit most from the mortgage interest deduction do not need a subsidy, and pointing out that the mortgage interest deduction is an upside-down subsidy because those who need a subsidy least enjoy its benefits most); *see also* TODER ET AL., *supra* note 75, at 2–3 (emphasizing that those at the very top of the income distribution benefit the most from the mortgage interest deduction); *id.* at 8, 10 (noting that eliminating the mortgage interest deduction would have the most significant impact on those at the top of the income distribution and, with respect to family type, married taxpayers with children); *id.* at 17 ("The distributional effects largely reflect the fact that the mortgage interest deduction provides the largest benefit . . . for taxpayers who itemize, face high marginal tax rates, and live in expensive homes."); John J. Ammann & Jennifer Hagner, *The Double Standard in Housing Subsidies: Why Should Criminals Be Allowed to Take the Mortgage Interest Deduction?*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. 229, 231 (2007) (noting that the richest taxpayers with more mortgage debt get bigger mortgage interest deductions); 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, 408 (1994) ("The allowance of a deduction for home mortgage interest has been criticized as being a subsidy directed at middle-class and wealthy taxpayers and as being of little benefit to moderate- and low-income homeowners. Despite this criticism, the home mortgage interest deduction is unlikely to be eliminated due to its popularity and the perceived political risk of opposing it."); William T. Mathias, Note, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 MICH. J. L. REFORM 43, 61–62 (1996) (noting that at the time, those in the ninety-first percentile of the income distribution enjoyed more than 50% of the tax savings from the mortgage interest deduction).

83. *See* Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 347–48 (2009) (arguing that low-income and Black taxpayers benefit less from the deduction for qualified residence interest and that the latter likely enjoy less of the tax benefit derived from excluding gain on the sale of a principal residence); Mann, *supra* note 79, at 1365 (noting that the mortgage interest deduction discriminates against minorities who are more likely to have lower incomes and are less likely to be homeowners); *see also* Sullivan, *supra* note 79, at 1011–12 (pointing out that those living in "rich" cities or areas benefit far more from the mortgage interest deduction than those living in

distorts the housing market,[84] and is plagued with compliance issues.[85] It should also be noted, for the sake of adding wealth inequity insult to wealth inequity injury, that a taxpayer's "second residence" can be a "boat" (which apparently includes a yacht), so long as it has toileting, sleeping, and cooking facilities.[86]

Despite the mortgage interest deduction's apparent shortcomings and repeated calls for its replacement or reduction,[87] the allowance has considerable staying power. The TCJA left the mortgage interest deduction in place, and even in its reduced state, it was still estimated to be a $25 billion tax expenditure in 2018 (largely benefitting—by approximately $15 billion—

"poor" areas); TODER ET AL., *supra* note 75, at 13 ("Black and Hispanic taxpayers are much less likely than [W]hites or Asians to benefit from the home mortgage deduction. On average, [B]lacks and Hispanics have lower incomes, lower rates of homeownership, and lower house values than [W]hites. Consequently, they are less likely to qualify for the home mortgage deduction, less likely to itemize, and less likely to realize substantial tax savings. Asians are only slightly less likely than [W]hites to benefit from the home mortgage deduction."); Ammann & Hagner, *supra* note 82, at 229–30 (pointing out that upper-class individuals committing crimes are not at risk of losing a housing subsidy (in the form of a mortgage interest deduction), whereas those in public housing may lose their home and housing subsidy in the wake of certain forms of criminal conduct).

84. *See* Mathias, *supra* note 82, at 56 (noting that the economic effects associated with the mortgage interest deduction distort the housing market). Mathias later points out that a government subsidy for homeownership disturbs optimally efficient market allocation of resources by having investors over-invest in owner-occupied housing. *See id.* at 58.

85. *See* USGAO, *supra* note 77, at 13 ("Because the Form 1098 information report shows the dollar amount of interest a taxpayer paid in a year without regard to the limits on the amount of debt imposed by law, IRS's computer matching program comparing Form 1098 and tax return amounts will not detect certain noncompliance."). Suggested revisions to enhance compliance have included addition of the following: property address, balance information, refinancing indicators, and designations identifying acquisition and home equity indebtedness. *See id.* at 14–15. Those in the mortgage industry complain that those filing the forms may not be able to provide the relevant information or would encounter substantial and costly difficulties in achieving compliance, especially if loans have been resold or refinanced. *See id.* at 19. At least one IRS examiner has noted that it is common to find taxpayers with three homes deducting the interest on all three while waiting to sell one of the residences. *See id.* at 22.

86. *See* Treas. Reg. § 1.163-10T(p)(3)(ii) (2014).

87. *See, e.g.*, Kristin McGovern Painter, Note, *There's No Place Like Home: Projections on the Fate of the Home Mortgage Interest Deduction and the Alternative Minimum Tax in Light of Consumer Behavior*, 22 ST. JOHN'S J. LEGAL COMMENT. 295, 306–07 (2007) (discussing President George W. Bush's Advisory Panel on Federal Tax Reform, which proposed eliminating the home mortgage interest deduction, replacing it with a "Home Credit," and eliminating the interest deduction with respect to mortgages on second homes and home equity indebtedness); *see also* Dickerson, *supra* note 24, at 460 (arguing that, however unlikely, the best way to generate revenue to address the problem of housing affordability is to reduce or eliminate the deduction for mortgage interest); Mathias, *supra* note 82, at 45 (arguing that the mortgage interest deduction should be eliminated or substantially reduced).

those in the $200,000 and Over income class).[88] The TCJA accomplished, more or less, what the Tax Reform Act accomplished.[89] It grandfathered existing acquisition indebtedness while chipping away at the basic allowance going forward, reducing the acquisition indebtedness cap to $750,000 from $1 million.[90] Notwithstanding the fact that any tampering with the mortgage interest deduction can prove disruptive and despite the fact that there is approximately $9.78 trillion of mortgage debt outstanding (as of June 2020),[91] Congress still felt obliged to reduce (on a going forward basis) the interest deduction allowance for upper middle-class home buyers; even *those* taxpayers were not spared the aggression of the revenue collector in financing rate cuts and preserving favorable tax rates for the rich. To be sure, it may appear that Congress was wholly justified in reducing this beleaguered, upside-down subsidy, but bear in mind that the mortgage interest deduction matters only to those who choose to (or must) borrow to finance a home purchase. The rich need not borrow. But those taxpayers who do (even if economically privileged) must shoulder more and more of the burden of allowing, among other things, tax rates to remain low on long-term capital gains and qualified dividend income, forms of income the rich care about a great deal.

c. Interest on Home Equity Indebtedness

Rather than trimming back the deduction with respect to interest on home equity indebtedness, the TCJA eliminated it altogether, regardless of whether the home equity debt is new or was previously outstanding.[92] Under the law as it existed immediately prior to the enactment of the TCJA, taxpayers could deduct (to some extent at least) the interest on home equity indebtedness. The principal amount limit was the lower of (1) $100,000 or (2) the fair market value of the home reduced by the amount of acquisition indebtedness

88. *See* JOINT COMMITTEE ESTIMATES, *supra* note 13, at 36 tbl.3 (estimating 2018 expenditures).

89. USGAO, *supra* note 77, at 3 (noting that the $1 million limit only applies with respect to post-October 13, 1987 debt and that interest on acquisition indebtedness incurred on or prior to that date is deductible in full because of its "grandfathered" status).

90. *See* I.R.C. § 163(h)(3)(F) (2018).

91. *See* CENTER FOR MICROECONOMIC DATA, QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2020: Q2, at i (2020) [hereinafter CENTER FOR MICROECONOMIC DATA].

92. I.R.C. § 163(3)(f)(i)(I) (2018) (excluding home equity indebtedness interest from the list of allowable personal interest deductions).

outstanding at the time the home equity indebtedness was incurred.[93] Taxpayers were free to use the money obtained for any purpose.[94] Not surprisingly, commentators and analysts regularly called for the deduction's repeal,[95] arguing that its availability allowed homeowner exploitation,[96]

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93. I.R.C. § 163(h)(3)(C)(i) (providing the deductible calculation).

94. TODER ET AL., *supra* note 75, at 2 n.3 ("In practice, individuals often use the proceeds of home equity loans to purchase cars and other durables, thereby making the costs of financing these items effectively deductible to homeowners."); *see also* STAFF OF THE JOINT COMMITTEE OPTIONS, *supra* note 78, at 53 (noting that the interest on valid home equity indebtedness is deductible and that funds acquired can be used for any purpose). The Committee further noted the following:

> The present-law deduction for interest on home equity indebtedness is inconsistent with the goal of encouraging home ownership while limiting significant disincentives to saving. A taxpayer may deduct interest on a loan of up to $100,000 secured by his residence that has no relation to the acquisition or substantial improvement of the residence. This acts as a disincentive to savings and is unrelated to the purpose of encouraging home ownership. Further, the present-law home equity indebtedness rules provide inconsistent treatment by allowing deductible interest for homeowners' consumption spending that is not allowed to similarly situated non-homeowners.

Id.

95. STAFF OF THE JOINT COMMITTEE OPTIONS, *supra* note 78, at 53 (proposing repeal of the deduction for interest on home equity indebtedness); *see also* Forrester, *supra* note 82, at 378 (arguing that although home equity indebtedness should be allowed, federal laws encouraging the incurring of home equity indebtedness should be eliminated); *id.* at 379 (arguing for the elimination of the deduction for interest on home equity indebtedness). Forrester also noted that the availability of the interest deduction with respect to home equity indebtedness contributed to the dramatic increase in total home equity indebtedness; from 1981 to 1991, total home equity indebtedness increased from $60 billion to $357 billion. *See id.* at 378–79. Regarding then-salient equity considerations, Forrester argued for the elimination of the interest deduction for home equity indebtedness because allowing such a deduction offended horizontal equity norms, rewarded those who had equity in their homes, and failed to make homeownership more accessible. *See id.* at 440–42.

96. *See* Forrester, *supra* note 82, at 375 (arguing that Congress has enacted measures which encourage home equity indebtedness and thereby provide inappropriate incentives to various segments of the mortgage industry); *id.* at 378 (pointing out that predatory lenders enjoy special privileges under federal bankruptcy law and that they are able to victimize home equity debtors); *id.* at 388–89 (emphasizing that minorities and the elderly are frequently targeted by predatory home equity lenders); *id.* at 378, 383 (noting that borrowers do not appreciate the risks, including foreclosure, associated with home equity financing); Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1, 1 (2000) (discussing predatory home lending practices, particularly as they negatively impact the elderly); Jewell, *supra* note 22, at 355 (discussing abusive practices in the home equity lending market); Gary Klein, *Preventing Home Equity Lending Fraud—Special Truth in Lending Protections Enacted*, 7 LOY. CONSUMER L. REP. 126, 126 (1995) (noting Congress's passage (in 1994) of laws protecting consumers from abusive home equity lending practices); *id.* (pointing out that predatory home equity lenders tended to target the elderly, racial minorities, and the poor because such borrowers often could not obtain credit through mainstream channels); *id.* at 127 (indicating that lenders often hoped to foreclose on homes with substantial equity, purchase the home at foreclosure for less than its fair market value, and later re-sell the home at fair market value (thereby capturing the prior homeowner's

operated as a loophole through personal interest deduction prohibitions,[97] made underserved credit available,[98] presented numerous compliance issues,[99] and would not prove difficult to eliminate.[100] Without question, the commentators make a number of highly legitimate points. The deduction for interest on home equity indebtedness did present a loophole allowing those fortunate enough to incur such indebtedness to deduct amounts that would likely constitute personal interest in the hands of others. But in its zeal to bar such a deduction outright (and regardless of taxpayer reliance interests), Congress may have cut far too close to the bone in some instances.

Taxpayers who need to borrow to finance various purchases often have considerable wealth tied up in their homes, and some have relied on home equity indebtedness to cover medical and educational expenses.[101] The TCJA could have carved out exceptions (subject to substantiation requirements) making it possible to deduct interest on home equity indebtedness used for specific purposes. And while leaving in place its cap on debt used to acquire a personal residence, it could have preserved some allowance with respect to

equity as profit on the sale)).

97. *See* Klein, *supra* note 96, at 127 (noting that the changes introduced by the Tax Reform Act of 1986 made home equity lending attractive because the interest on such loans was deductible and interest on most other forms of consumer debt had become non-deductible for federal income taxation purposes); Forrester, *supra* note 82, at 411 ("Early versions of the [Tax Reform Act] in Congress phased out deductibility of consumer interest but provided for deduction of interest on any loan secured by a first or second residence. Lenders recognized this as a 'loophole' and, even before the tax reform package was passed, began advertising home equity loans as a means for homeowners to continue deducting interest paid on consumer loans despite the general non-deductibility of consumer interest under the proposed measure.").

98. *See* Forrester, *supra* note 82, at 383 (pointing out that the home equity option may allow a debtor to obtain otherwise unavailable credit).

99. *See* USGAO, *supra* note 77, at 10 (noting that although home equity interest was not deductible by taxpayers subject to the alternative minimum tax, some taxpayers would deduct it and tax practitioners failed to detect the oversight); *id.* at 19 ("By comparing homeowners' current mortgage debt for a particular property with earlier debt, SMR Research estimated that up to several million homeowners had loans that might have exceeded the home equity debt limitation. In the aggregate, these homeowners' debts over the debt limitation were several hundred billion dollars."); *see id.* at 14 (highlighting the difficulty of identifying returns with a home equity interest compliance issue).

100. *See* Forrester, *supra* note 82, at 443 (pointing out that eliminating the deduction for home equity interest would not present unduly onerous administrability burdens); *see also* STAFF OF THE JOINT COMMITTEE OPTIONS, *supra* note 78, at 54 (noting that repeal of the deductibility of interest on home equity indebtedness would not alter homeownership incentives, because potential homeowners are not likely to hinge the decision on the availability of this deduction).

101. *See* LINDA CAVANAUGH, U.S. CENSUS BUREAU, HOME EQUITY LINES OF CREDIT—WHO USES THIS SOURCE OF CREDIT? 1 tbl.1 (2007) (reporting 4% of homeowners used home equity loans to cover medical or education expenses).

home equity indebtedness used specifically to fix up or improve a recently acquired home.[102] As it currently stands, a loan denominated as a "home equity loan" can qualify as acquisition indebtedness if it is used to substantially improve a qualified residence of the taxpayer (i.e., qualifying definitionally as "acquisition indebtedness"), but only if the total amount of acquisition indebtedness is at or below $750,000.[103] Again, the rich need not concern themselves with the irritant of borrowing, but those who turn to home equity to cover various expenses—and there is approximately $375 billion in home equity lines of credit out there[104]—must bear some portion of the burden of favorable tax rates for favored businesses and well-protected forms of income.

III. ADDRESSING THE INEQUALITIES: SHORT-TERM MEASURES

Inasmuch as there is no single root cause for economic inequality, there is no single solution. Even so, the most effective strategy for addressing the problem should involve some combination of short-term and long-term measures. In addition to enhancing vertical taxpayer equity by increasing progressive tax rates on individuals,[105] Congress should increase tax rates on corporations,[106] or at least ensure a tighter link between lower tax rates and the generation of objectively-measurable positive societal externalities (e.g., domestic job growth and investments in job-generating capital projects). And rather than give a blanket 20% deduction with respect to qualified business income, Congress should eliminate the deduction altogether or tailor and condition the extent of its availability on various factors (e.g., gross revenues,

102. *See* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION 9–10 (2020) (noting the home acquisition debt limit and distinguishing substantial improvements, which qualify for deduction, from repairs, which do not qualify).

103. *See id.*

104. CENTER FOR MICROECONOMIC DATA, *supra* note 91, at i (indicating a balance of $375 billion in home equity lines of credit as of June 30, 2020).

105. *See* STIGLITZ, *supra* note 1, at 31 (pointing out that progressive tax policies can limit the extent of inequality). Stiglitz further notes that increasing tax rates will not prove harmful to small businesses. *See id.* at 224 (characterizing as myth the argument that raising taxes on millionaires and corporations will hurt small businesses and lead to job losses).

106. *See id*. at 278 (pointing out that an across-the-board tax cut for corporations is inferior as an investment incentive relative to cutting taxes for firms that create jobs and invest in America). Stiglitz also notes that at least one form of rent-seeking takes the form of corporations seeking the enactment of laws that allow them to take advantage of others and pass costs along to others in society. *See id*. at 39–40.

individuals employed, measurable domestic investment, etc.). Congress should also modify the mechanism by which it taxes long-term capital gains and qualified dividend income. Even if Congress does not wholly abandon the favorable treatment of these forms of income (or fully embrace the other changes suggested), even small modifications will move us closer to economic equity and slow the growth of the nation's budget deficits.[107] Congressional Budget Office estimates (2019–2028) indicate that raising the ordinary income tax rate on the two highest brackets by 1% would generate $123.4 billion in revenue,[108] increasing the corporate income tax rate by 1% would generate $96.3 billion,[109] and raising the rate on long-term capital gains and qualified dividends by 2% would generate $69.6 billion.[110]

IV. ADDRESSING THE INEQUALITIES: INVESTMENT IN EDUCATION

With the concerted effort of President Joe Biden and Democratic leadership controlling both the Senate and the House of Representatives, we may soon see the prompt repeal (or, perhaps, substantial modification) of a number of the provisions in the TCJA. But Rome was not built in a day, and one cannot cure economic inequality with short-term measures alone, no matter how quickly implemented. Fortunately, inequalities in income and wealth are not problems too big to solve. Wealth-building takes time, and barring the inheritance of assets or the receipt of various *inter vivos* intergenerational transfers, an individual usually builds wealth by saving or possibly investing income received above and beyond that needed to cover daily living essentials. The well-hewn path to financial prosperity starts with higher education. In addition to putting the individual on firm financial footing and thereby laying the foundation for wealth-building, the broader higher education experience provides valuable social harmonization benefits.

107. *See* STIGLITZ, *supra* note 1, at 214–15 (reasoning that reductions in the deficit could be achieved by, inter alia, raising taxes on the wealthiest taxpayers, eliminating the favored treatment of income earned primarily by the wealthy, and eliminating corporate subsidies).
108. CONGRESSIONAL BUDGET OFFICE, OPTIONS FOR REDUCING THE DEFICIT: 2019–2028 at 207 (2018).
109. *See id.* at 266.
110. *See id.* at 207.

A. The Tangible Value of Higher Education

According to Ben Bernanke, "the best way to improve economic opportunity and reduce inequality is to increase the educational attainment and skills of American workers."[111] Commentators have long emphasized the importance of higher education not only as a means of attaining lifetime financial security,[112] but also as an important contributor to general health, life expectancy,[113] civic engagement,[114] and other benefits.[115] Equally significant

111. *See* Cody Branham, Note, *Stuck in the Middle: Curbing Income Inequality with the Better Bargain Plan*, 25 KAN. J.L. & PUB. POL'Y 187, 188 (2016) (quoting Ben Bernanke); *see also* STIGLITZ, *supra* note 1, at 275 (pointing out that increasing inequality of opportunity is rooted, to some extent, in changes with respect to educational opportunity); *id.* at 19 ("[E]ducation is one of the keys to success; at the top, the country gives its elite an education that is comparable to the best in the world. But the average American gets just an average education . . . .").

112. *See* STIGLITZ, *supra* note 1, at 31 (noting the importance of education to enhanced productivity and high wages); *id.* at 75 (emphasizing how poorly those with only a high school education or less have fared in the marketplace); Barack H. Obama, President of the United States, Address Before a Joint Session of Congress on the State of the Union (Jan. 25, 2011) ("Many people watching tonight can probably remember a time when finding a good job meant showing up at a nearby factory or a business downtown. You didn't always need a degree, and your competition was pretty much limited to your neighbors. If you worked hard, chances are you'd have a job for life, with a decent paycheck and good benefits and the occasional promotion. Maybe you'd even have the pride of seeing your kids work at the same company. That world has changed. And for many, the change has been painful."); Dickerson, *supra* note 24, at 452 ("In the 1960s, it was possible for a family to maintain a middle-class life-style even if neither parent had a college degree. . . . A bachelor's degree from a four-year college has now become almost essential for people who aspire to be in the middle class and it is virtually impossible for a worker to have reasonably predictable and stable lifetime earnings without at least a bachelor's degree."); *id.* (pointing out that some lower-skilled jobs (for which a high school diploma would previously have been sufficient) now require a college degree); Gilman, *supra* note 28, at 420 (discussing the importance of "education as a springboard to financial security" and a class equalizer); Amy J. Oliver, *Improving the Tax Code to Provide Meaningful and Effective Tax Incentives for Higher Education*, 12 U. FLA. J.L. & PUB. POL'Y 91, 93 (2000) (noting that a college degree has "replaced the high school diploma" as the preferred job credential); Andrew D. Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U. L. REV. 1229, 1230 (2007) ("Commentators assert that higher education provides low-income children with the greatest opportunity for economic advancement."); Branham, *supra* note 111, at 194 ("Graduating from a four-year institution enables a student to earn about $1 million more over a lifetime.") (citation omitted).

113. *See* STIGLITZ, *supra* note 29, at xiii (preface) ("Educational attainment, which is often tied in with income and race, is a large and growing predictor of life span.").

114. *See* Gilman, *supra* note 28, at 432.

115. *See* Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 532–33 (2013) (pointing out the various economic benefits typically flowing from obtaining higher education, including increased wages and reduced risk of unemployment); *see also* Vincent G. Kalafat, Note, *Rethinking Treasury Regulations § 1.162-5 and Slaying the Monster in the Education Tax Maze*, 80 NOTRE DAME L. REV. 1985, 1988 (2005) ("With the potential to break down socioeconomic and racial

is the fact that higher education provides numerous macro-economic benefits,[116] including enhanced economic efficiency (supporting overall growth),[117] reduction in labor force polarization[118] (between the "elites" and the "non-elites" we hear so much about),[119] and a general reduction in inequality.[120] Ben Bernanke's statement seems to champion higher education largely as a means of facilitating the attainment of economic benefits (thereby

barriers, to fulfill individual dreams, and to unleash waves of innovation even greater than those of the last century, higher education clearly provides lasting benefits both to individuals and society.").

116. Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1, 3 (2008) ("By expanding college enrollment across the income spectrum, the government facilitates realization of the positive externalities associated with an educated citizenry by society as a whole."); *see also* Oliver, *supra* note 112, at 97–98 (pointing out that both the individual and society benefit from the investment in human capital made by those seeking out and securing higher education and emphasizing that as a result, tax law should incorporate incentives associated with higher education); Pike, *supra* note 112, at 1230 (noting the belief of economists that "higher education produces positive externalities"); Kimberly J. Robinson, *Restructuring the Elementary and Secondary Education Act's Approach to Equity*, 103 MINN. L. REV. 915, 922–23 (2018) (discussing racial and socioeconomic gaps in the educational context and emphasizing that "[l]ongstanding opportunity and achievement gaps along lines of race, national origin, and class harm our national interests in an educated democracy, a robust economy, and a just society.") (citation omitted); Simkovic, *supra* note 115, at 532 (noting that rationales for public support of education generally point to the positive societal externalities flowing from education (both economic and value-based)); Ruth Lynch Buchwalter, Note, *Should 1 + 1 = 2? Does the Structure of Federal Income Tax Expenditures for Higher Education Disadvantage Women and Low-Income Individuals?*, 22 WOMEN'S RTS. L. REP. 77, 92–93 (2000) (noting that both the individual and society benefit from education).

117. *See* STIGLITZ, *supra* note 29, at xxii (preface) ("But if a country doesn't give a large proportion of the population the education that they need to earn a decent living, if employers don't pay workers a decent wage, if a society provides so little opportunity that many people become alienated and demotivated, then that society and its economy won't work well.").

118. *See* STIGLITZ, *supra* note 1, at 9 ("The polarization of the labor force has meant that while more of the money is going to the top, more of the people are going toward the bottom." (citation omitted)); *see also* Dickerson, *supra* note 24, at 443 (pointing out how various technological developments have reduced the need and availability for low-skill but high-wage jobs that previously existed); *id.* (noting the recent sluggishness of wage increases in middle-income jobs, except jobs in science, technology, engineering, and mathematics).

119. *See* STIGLITZ, *supra* note 1, at 9 (noting the polarization of the labor force between the highly skilled (very well-paid) and the low-skilled (not well paid)); *id.* at 53 (positively correlating the availability of education and the supply of skilled labor).

120. *See id.* at 5 (highlighting the marked decrease in inequality between the 1950s and the 1970s and crediting government policies related to education access via the G.I. Bill and the enactment of highly progressive tax rates during World War II); Ryan, *supra* note 116, at 10 ("[A]dvanced educational attainment may be one means to reduce income inequality and poverty."); Simkovic, *supra* note 115, at 532 (noting that "[v]alues-based rationales in the United States often cite the role of public investment in education in reducing inequality or providing socioeconomic mobility." (citation omitted)).

addressing financial inequality), but much in the way of inequality is rooted in societal factors (like discrimination)[121] that have contributed heavily to the existence of income and wealth inequality. Unless these societal factors are checked, or at least made part of the dialogue concerning inequality, such factors promise to silently nourish its perpetuation. The good news is that the higher education experience can play a critical role here as well.

B. Tearing Down the Berlin Walls of the Mind

Many students arriving at college have never had the opportunity to spend an extended amount of time around those who are different in terms of class,[122] race, religion, sexual orientation, national origin, or gender identity. Without the benefit of exposure to those who are different, prejudices and fears will persist;[123] thus, the enduring benefit of affirmative action programs, especially those that are race-based.[124] Indeed, writing for the majority in *Grutter v. Bollinger*,[125] Justice O'Connor emphasized the role of diversity in breaking

121. *See* STIGLITZ, *supra* note 1, at 282.

122. *See* Robinson, *supra* note 116, at 938 (noting that "[c]hildren from different socioeconomic statuses and races too often live in separate and unequal worlds") (citation omitted); *see also* TATUM, *supra* note 69, at 4 (noting that segregation in housing along race and class lines portends segregation in secondary education); *id.* at 3 (noting that in most regions of the country, public schools are more racially segregated than they were in the 1980s); *id.* at 8 (noting that Whites are least likely to live in a racially diverse neighborhood and thus least likely to encounter non-Whites).

123. *See* Ashlee Richman, *The End of Affirmative Action in Higher Education: Twenty-Five Years in the Making?*, 4 DEPAUL J. SOC. JUST. 61, 75 (2010) (referring to a study conducted at New York University and Harvard which indicated that racial prejudices are rooted in fear and that exposure to people of other races can break down the predisposition to fear); *id.* at 63 (highlighting the merits of a diverse student population, including the exposure to "people who think and feel differently" on various issues, the enrichment of class discussion, and the preparation for a diverse working environment); Chris C. Goodman et al., *A Teacher Who Looks Like Me*, 27 J. C.R. & ECON. DEV. 105, 106 (2013) (highlighting the engagement benefits of diversity, as distinct from mere student characteristics or numbers); *id.* at 123 ("Meaningful contact must include opportunities to experience diversity both inside and outside of the classroom, but availability of opportunity for contact is a necessary first step."); Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 420 (2012) (citing Justice Powell's opinion in *Bakke* in which he emphasized the need for diversity as a means of exposing students to the ideas and mores of others).

124. *See* Gilman, *supra* note 28, at 433 (pointing out that a class-based approach to affirmative action might challenge racial diversity efforts at the college level because poor Whites outnumber poor Blacks and tend to have higher test scores while also noting that well-crafted plans may increase racial and socioeconomic diversity); *see also* Richman, *supra* note 123, at 85 (expressing pessimism as to the effectiveness of admissions programs that are not race-conscious but still are directed at achieving diversity).

125. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

down racial and ethnic stereotypes and in developing a diverse and racially integrated leadership class.[126] Over time, the U.S. Supreme Court has generally proven supportive of affirmative action programs, but in recent years, there have been numerous challenges and defeats.[127] Such setbacks have prompted one commentator to conclude that the Court's distaste for race-based affirmative action effectively preserves existing inequalities (by disregarding the long history of discrimination that produced such stark inequity) and embraces the current resource allocation as a baseline from which to address equal protection issues.[128] He proceeds to argue that the Court's stance constitutionalizes racial inequality and does so, ostensibly, to promote equality.[129]

Although college diversification initiatives continue to bear fruit, challenges have managed to persist. Some students in that environment, for example, will self-segregate,[130] whatever their identifying characteristic, and there is the persistent risk that diversity initiatives will have an excessively narrow and limited focus.[131] Aside from these concerns, one commentator casts doubt on the value of diversity exposure after the earliest formative years. He reasons that attempting to break down stereotypes and advance social harmonization is best achieved much earlier in life[132] and that

126. *See id.* at 330.

127. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003) (striking down, as not sufficiently narrowly-tailored, the affirmative action program in use at the college level at the University of Michigan).

128. *See* Girardeau A. Spann, *Affirmative Inaction*, 50 HOWARD L.J. 611, 635–36 (2007).

129. *See id.* at 636.

130. *See* TATUM, *supra* note 69, at 1 (noting that in many high schools and colleges, some degree of racial segregation is present in cafeterias); Richman, *supra* note 123, at 63–64 (noting the existence of self-segregation on campus and the negative influence it has on the proliferation of diverse ideas); *id.* at 78 (lamenting the existence of self-segregation the author experienced and noting that such activity impeded the opportunity to enjoy a diversely enriched educational experience).

131. *See* Goodman, *supra* note 123, at 108 ("In order to reap the greater rewards of diversity in higher education, that diversity must not be concentrated in one group, such as students or faculty. Instead, diversity must permeate the institution from the students to the staff to the faculty."); *id.* at 118 (noting the likelihood that implicit biases may develop further (and diversification efforts may be handicapped) without a critical mass of diversity in various educational environments).

132. *See* Paradise, *supra* note 123, at 418–19 (arguing that correcting the "deficit in cross-racial mutual understanding and empathy" is best achieved via exposing citizens to racial and other differences in their formative (i.e., K-12) years); *id.* at 471 (arguing that early and sustained exposure to difference is key in cultivating cross-racial and cross-religio-racial cooperation and identifying the integration of primary and secondary schools as the most obvious opportunity for implementing the needed exposure).

attempting to achieve those goals at the college stage may be too late.[133] Such a reality will certainly be the case for some, especially given confirmation biases, but it would be unwise to generalize. Both longstanding and recent affirmative action cases, such as *Grutter*, clearly challenge the notion that post-secondary exposure to diversity is ineffective.[134] Objective realities have a way of nailing the eyes wide open. One could also argue that with extensive racial segregation in housing and constitutional barriers to integration at the K-12 level, the lived, residential college experience[135] is perhaps the last best hope for achieving and sustaining racially transcendent diversity[136] in society at large or at least in a segment of the population. Higher education produces leaders, and it is critical that our leaders in business, industry, and education have broad exposure to difference. It is critical that they be given the opportunity to challenge their implicit biases and, brick by brick, tear down the Berlin Walls of their minds before assuming positions of power and influence. Such is especially the case in a country as diverse as the United States.

V. THE URGENT NEED TO FIX EDUCATION

Although attaining higher education confers a host of economic and non-economic benefits, it is impossible to ignore the fact that education in the United States is broken. Attending that fact is the reality that educational deficits at all levels have contributed to the existence of inequality and, until

133. *See id.* at 473 (expressing doubt that exposure to diversity at the stage of life in which one undertakes higher education can significantly alter an individual's character); *id.* (arguing that exposure to diversity in a higher education setting, while beneficial, "will, in many cases, perhaps most, prove insufficient to uproot outlooks and mindsets that have taken hold over the course of a young adult's childhood and adolescence").

134. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (deferring to the Law School's educational judgment that "diversity is essential to its educational mission" and that diversity will produce educational benefits). The college and graduate school experiences also offer the opportunity to study and explore diversity in greater depth in an academic setting. *See* Richman, *supra* note 123, at 82 (noting the benefits of courses addressing diversity-related topics in fostering understanding and interaction).

135. *See* Richman, *supra* note 123, at 81–82 (discussing research finding that diversity is likely to be most impactful when students live with those from other racial groups).

136. *See* Paradise, *supra* note 123, at 417 (emphasizing that racially transcendent diversity focuses on the achievement of unity while candidly acknowledging racial differences); *id.* at 418 ("Thus, racially transcendent diversity, unlike post-racialism, does not claim that we are beyond race but challenges us all to cooperate in the interest of our shared future and to avoid being bogged down in the racial division of the past.").

effectively addressed, will play a key role in its perpetuation. Systemic problems manifest at every stage of the educational experience.

A. The Need to Adequately Support Schools

As a preliminary matter, one problem with higher education is that some students never make it to the university front gate. The resources dedicated to individual educational systems at the pre-college level can vary significantly.[137] Rather than accepting the notion that financing disparities are an unfortunate development, some argue that such inequities are a matter of systemic design[138] and political power.[139] One commentator noted the following: "[P]ublic education is brutally efficient at denying meaningful educational opportunities to children who are growing up in poverty. With relentless effectiveness, it shortchanges such children in everything from the amount of funding their schools receive, to the qualifications of their teachers, to the rigor of their daily assignments."[140]

Disparities appear between states,[141] within states,[142] and within various

137. *See* Susan L. DeJarnatt, *The Myth of School Choice: Reflections on the Two-Income Trap*, 4 RUTGERS J. L. & PUB. POL'Y 94, 115 (2006) (stating that "[d]iscrepancies in tax bases among districts lead to enormous disparities in resources available for schools").

138. *See* Ross Wiener, *Opportunity Gaps: The Injustice Underneath Achievement Gaps in Our Public Schools*, 85 N.C. L. REV. 1315, 1316 (2007) (arguing that despite knowledge that poverty-stricken students need more educational assistance, such students receive far less than what they need, apparently as a function of public education systemic design); *see also* Gilman, *supra* note 28, at 432 (drawing attention to the problem of unequal school financing); Robinson, *supra* note 116, at 916 (emphasizing that the Every Student Succeeds Act "greatly reduced federal involvement in education," leaving considerable control to state and local governments); *id.* at 916–17 (lamenting that state and local government control of public education portends grave consequences for poor and minority students because such governments have consistently neglected the educational needs of those student populations).

139. *See* John Dayton, *Rural Children, Rural Schools, and Public School Funding Litigation: A Real Problem in Search of a Real Solution*, 82 NEB. L. REV. 99, 101 (2003) ("The interests of those with political power are advanced through legislation, often at the expense of those without political power. Because the advocates for rural children and schools generally lack both the financial and political power to rival the influence of the more affluent suburban regions, rural schools are often put at a disadvantage by school funding legislation.").

140. Wiener, *supra* note 138, at 1317 (citation omitted).

141. *See id.* at 1319 (noting that the funding formulas in Title I of the Elementary and Secondary Education Act operate, in effect, to provide more funding to wealthier states, notwithstanding its stated goal of providing more resources to disadvantaged students).

142. *See id.* at 1319–21 (emphasizing unequal funding between states, between districts within states, and within districts, resulting in states, districts, and schools with more poor students receiving less funding).

districts in a given state,[143] resulting in a school system that regularly reinforces the wide range of inequities existing outside school.[144] And those disparities invariably find glaring reflection in learning resources,[145] basic facilities,[146] and (perhaps most tragically) in teacher quality. Even if (as has been argued) funding disparities have narrowed in recent years, there remains the need to devote considerable attention to teacher quality,[147] and in doing so, we should employ an holistic approach.[148] As an initial matter, we need to make secondary school teaching more attractive as a profession by augmenting teacher pay[149] and ensuring that teachers have a suitable working environment.[150] Moreover, given the extraordinarily important roles teachers play in achieving learning outcomes,[151] students across the board should enjoy access to teachers of high quality,[152] and ongoing attention should be devoted

143. *See id.* at 1321–22 (focusing on intra-district disparities with respect to teacher talent and teacher salaries).

144. *See id.* at 1336 (noting that the allocation of resources in public education context "reflect and reinforce inequality outside of school").

145. *See id.* at 1324 (reasoning that high-poverty schools with lower teacher salary budgets should receive additional funding for student support resources such as tutoring and professional development rather than having such funds subsidize teacher salaries at schools in more affluent areas).

146. *See* TATUM, *supra* note 69, at 4 (pointing out that in schools with high concentrations of poverty and racial segregation, lower teacher quality and higher turnover are likely (as are poorer facilities)).

147. *See* Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1602 (2016) (arguing that although school finance litigation has closed or alleviated funding disparities, enhancing the education that students receive requires considerable focus on teacher quality).

148. *See id.* at 1604 (pointing out the need for an holistic approach to improving teacher quality).

149. *See* STIGLITZ, *supra* note 1, at 57 (arguing that better pay might have attracted and retained better teachers (thereby improving long-term economic prosperity for the nation as a whole)).

150. *See* Black, *supra* note 147, at 1615–17 (emphasizing the importance of competitive teacher salaries while noting that working conditions play a significant, and often predominant, role in terms of retaining teachers); *id.* at 1605 ("Evidence shows that, at the very least, attracting more talented teachers requires that teacher salaries be competitive with job opportunities outside of teaching and that the environment within which teachers work improve." (citations omitted)).

151. *See* Black, *supra* note 147, at 1604 (noting the importance of teacher quality to learning outcomes and concluding that states have failed to address the teacher quality problem adequately); Wiener, *supra* note 138, at 1327 (correlating teacher quality with college readiness in high-poverty, high-minority schools); Lisa Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California's Public Schools*, 43 SANTA CLARA L. REV. 1045, 1051 (2003) ("National studies have also found that differences in teachers' qualifications—including teachers' general ability, knowledge of subject matter, preparation for teaching, and certification status, which reflects aspects of all of these other indicators—show significant effects on student achievement measured at the state, district, school, and individual student levels." (citation omitted)).

152. *See* Wiener, *supra* note 138, at 1328 (pointing out that students in high-poverty schools are

to providing teachers with sufficient resources and to monitoring instructor readiness[153] and performance.[154] Students of modest financial means remain capable of high academic achievement, and effective, experienced teachers can usually elicit that level of performance.[155]

B. Accessing and Affording Higher Education

Under ideal circumstances, everyone with sufficient scholastic aptitude would have access to an enriching college experience, but that is not the world we live in.[156] The sobering truth is that "[t]he fact that tax cuts for the rich have increased the deficit and the national debt substantially has another effect: it has created pressure to reduce government support for investments in education, technology, and infrastructure."[157] One commentator reasons that "[a] lot of the growing inequality relates to America's inability to educate so many of its young people."[158] The past is disheartening and the forecast for the future is not encouraging. Education needs fixing, and it's not going to be outpatient surgery.

At a time when more education is needed,[159] dropout rates are soaring,

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likely to have less experienced teachers who are covering subjects outside their expertise and reasoning that such teaching quality proxies "reveal extreme inequality in access to quality teachers").

153. *See* Darling-Hammond, *supra* note 151, at 1046 (noting the importance of teaching skill and knowledge and lamenting the fact that tens of thousands of teachers in California lacked full preparation and credentialing, many working on waivers).

154. *See* Black, *supra* note 147, at 1606 (reasoning that the removal of ineffective teachers needs to be a realistic possibility).

155. *See* Wiener, *supra* note 138, at 1325 ("Research unequivocally documents that the classroom teacher is the single biggest determinant of how much students learn and that poor students can achieve at high levels when taught by high-quality teachers." (citation omitted)); *id.* at 1332 ("There is evidence in schools all over the country of students who are growing up poor . . . and yet are learning at the highest levels because their schools are working for them . . . . [W]hat we do in public education absolutely can change the life chances of students from low-income families.").

156. *See* Alanna Bjorklund-Young, *Family Income and the College Completion Gap*, JOHN HOPKINS INST. FOR EDUC. POL'Y (2016), https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/63021/familyincomeandcollegegapmastheadfinal.pdf?sequence=1&isAllowed=y (stating that in a recent study, 58% of high school sophomores from low socioeconomic status backgrounds expected to graduate from college and only 25% actually did so, while 87% of students from high socioeconomic backgrounds expected to graduate from college and 66% did so).

157. STIGLITZ, *supra* note 1, at 115. Stiglitz notes the possibility of borrowing to invest in the nation's future by "ensuring quality education for poor and middle-class Americans," among other things. *See id.* at 217.

158. Wiener, *supra* note 138, at 1318.

159. *See* Obama, *supra* note 112 (discussing the fact that new jobs will require post-secondary

and that reality portends more polarizing income and wealth inequality.[160] Education, ordinarily, could be relied on as an instrument of social mobility,[161] but the status quo in the United States appears to be one in which the education level of one's parents well predicts the education likely to be received by a given individual.[162] Thus, the current educational system works not to alter but to reproduce the current societal order[163] in a perpetual cycle. Most college students at highly selective colleges come from the top income quartiles,[164] and that reality enhances the gravity of the following observation:

> At selective institutions of higher education, admissions decisions have a special political impact: rationing access to societal influence and power, and training leaders for public office and public life. Those admitted as students then graduate to become citizens who shape business, education, the arts, and the law for the next generation.[165]

Thus, differential access to education not only constitutes another form of inequality,[166] but it also can serve as a mechanism by which those who control

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education and that such education must be within the grasp of every individual).

160. *See* Cheryl George, *Non-Education in America: Gateway to Subsistence Living*, 14 TEX. WESLEYAN L. REV. 243, 243 (2008) ("Dropout rates are the proverbial canary-in-the-coal-mine. If ever there was a predictor of poverty, discrimination, abuse, neglect, inability to parent—in short the suffering of an entire generation—it is the lack of experience and education we are affording our minority students.").

161. *See* Strand, *supra* note 26, at 285 (pointing out that education, which enhances opportunity, generally acts to break down the rigidity of extant societal hierarchies).

162. *See* STIGLITZ, *supra* note 1, at 18 (noting that relative to other comparable countries, a child's education in the United States is more heavily influenced by parental educational attainment); *id.* at 94 (linking the ability to access good education to the income, wealth, and education of one's parents); Gilman, *supra* note 28, at 421–22 (highlighting the fact that wealthy families have the ability to invest in educational resources such as tutors, enrichment programs, private schools, and college).

163. *See* Gilman, *supra* note 28, at 420 (noting that the current educational system perpetuates an achievement gap between wealthy and poor students (who are disproportionately racial minorities)); Strand, *supra* note 26, at 291; *id.* at 288–289 (discussing the relative lack of social mobility in the United States in terms of intergenerational elasticities, which generally measure the likelihood that a child's socioeconomic status will track that of his parents); Wiener, *supra* note 138, at 1318 (noting that there is less social mobility in America, even relative to other industrialized countries).

164. *See* STIGLITZ, *supra* note 1, at 19 (pointing out that most of the students in highly selective colleges (74%) come from the top quarter of the population).

165. Lani Guinier, *Admission Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 115 (2003) (citations omitted).

166. *See* Rahman, *supra* note 1, at 2450 (arguing that differential access to public goods such as "healthcare, *education*, water, and housing" is a "troubling and pernicious form of inequality"

access to education can perpetuate inequality.[167] To its credit, Congress has historically taken steps to support the efforts of a wide range of students to access higher education. The Talent Search and Upward Bound programs, for example, aim to facilitate entry to college and post-baccalaureate programs by various students, including those who are from low-income families,[168] those who will be first-generation college students, and those who are disabled.[169] Those programs can legitimately claim some degree of success,[170] and yet, these programs have endured attempts to defund or eliminate them,[171] often by tactics that can accurately be described as silly.[172] Aside from programs requiring direct funding, Congress has made an effort to enhance access to higher education via tax-favored incentives, but such measures generally benefit those with some degree of discretionary income.[173] Programs like

(emphasis added)).

167. *See id.* at 2450 (noting that those who control access to public goods can construct systematic forms of inequality and exclusion); *id.* at 2450–51 ("[E]quitable and inclusionary governance of these goods and services is critical to dismantling these structural inequalities and promoting a more inclusive and equitable social and economic order.").

168. *See* Placido G. Gomez, et al., *Don't Crimp the Pipe, or Dam the River, at the Law School Door*, 27 J. C.R. & ECON. DEV. 71, 90–91 (2013) (quoting B. Miller who noted that although the Upward Bound program she attended was 98% Black, the program she later worked with at the University of Iowa "had more White students than Black, Hispanic or Asian. . . . Many of these federal programs . . . had changed their focus from helping minorities to helping lower socio-economic students.").

169. *See id.* at 75.

170. *See id.* at 79 (referencing a study which indicated that Upward Bound participants were likely to enter and complete college).

171. *See* Kelly Field, *The Ups and Downs of Upward Bound*, CHRON. OF HIGHER EDUC. (May 18, 2017), https://www.chronicle.com/article/the-ups-and-downs-of-upward-bound/ (discussing repeated attempts to reduce funding for or eliminate the Upward Bound program, among others).

172. *See id.* (noting the Education Department's refusal to consider over seventy Upward Bound grant applications because they failed to follow, among other things, formatting guidelines such as line spacing and font size). One commentator noted the following:

> For the want of double spacing in a small section of a 65-page grant application, 109 low-income high-school students will be cut off from a program at Wittenberg University that has been providing them with tutoring and counseling to prepare them for college. And they're not alone. Over the past few weeks at least 40 colleges and organizations with similar Upward Bound programs have also had their grant applications summarily rejected by the U.S. Department of Education for running afoul of rules on mandatory double-spacing[], use of the wrong font, or other minor technical glitches.

Goldie Blumenstyk, *Dozens of Colleges' Upward Bound Applications Are Denied for Failing to Dot Every I*, CHRON. OF HIGHER EDUC. (Apr. 26, 2017), https://www.chronicle.com/article/dozens-of-colleges-upward-bound-applications-are-denied-for-failing-to-dot-every-i/.

173. *See* Phyllis C. Smith, *The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL'Y

Section 529 plans, for example, offer tax benefits to those with the ability to set aside funds for future educational use.[174] The more one is able to set aside, the greater the benefit. Accordingly, "[t]he greatest benefits accrue to those who can afford to front-load their contributions and to those in the highest tax brackets."[175] Those in the lowest income quartiles have difficulty saving for any purpose.[176] Even those who are able to take advantage of such educational incentives may find that they have failed to keep pace with the skyrocketing cost of college.[177] One commentator noted the following:

> Over the last three decades, the cost of attendance at colleges and universities increased at rates well in excess of the economy-wide rate of inflation. . . . Moreover, in recent years, colleges and universities have allocated more of their financial aid budgets towards "merit" scholarships with a smaller percentage of grants awarded on the basis of financial need. As a result, these costs make it difficult, if not impossible, for lower-income students to attend four-year institutions, even when they are academically qualified to

181, 210 (2008) ("The current design of the tax education incentives offers the greatest benefit to affluent individuals, while the working poor would likely receive no benefit.").

174. *Id.* at 216–17 (explaining that a wealthy individual could contribute a large sum of money, allow it to grow tax free, and then use it to pay for a private school education without being subject to income tax).

175. Pike, *supra* note 112, at 1254. Pike goes on to emphasize that "empirical data suggest that middle-income and upper-middle-income taxpayers enjoy most of the benefits from the education tax credits. Low-income families receive little, if any, benefit." *Id.* at 1255–56; *see also* DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 970, TAX BENEFITS FOR EDUC. 85–86 (2019) [hereinafter TREASURY—EDUCATION] (indicating that several education-related tax benefits allow exclusions or provide for tax credits which are generally non-refundable and subject to caps and phaseouts).

176. *See* Eric A. Lustig, *Taxation of Prepaid Tuition Plans and the 1997 Tax Provisions—Middle Class Panacea or Placebo? Continuing Problems and Variations on a Theme*, 31 AKRON L. REV. 229, 233, 236 (1997) (noting that the middle class, in particular, has a poor history with respect to savings generally). State prepaid tuition plans arose at least in part because families had difficulty saving for college and tuition costs were rising. *See id.* at 239–40.

177. *See* Branham, *supra* note 111, at 195 (noting extraordinary increases in college-level tuition over recent decades); *id.* at 188 (noting that the cost of college and the burden of student debt have contributed to current income inequality); *id.* at 213 (noting the low likelihood that enhancing the affordability of higher education can eliminate income inequality but pointing out that enhancing educational access may curb income inequality); Dickerson, *supra* note 24, at 453 (noting both the dramatic rise in the cost of college and, given the drain of financial aid resources and grants, the increase in student debt burdens).

do so.[178]

Although Pell Grants have traditionally helped to soften the financial burden of attending college,[179] such funding is under attack.[180] More and more, with rare and limited exception,[181] financial aid for students has taken the form of loans,[182] giving rise to the specter of default.[183] It also bears noting that most student loans are federal loans,[184] and such debt is a moneymaker for the government.[185]

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178. Pike, *supra* note 112, at 1230.

179. *See* Branham, *supra* note 111, at 197 (linking the increase in income equality with increased levels of students qualifying for federal Pell Grants); Cynthia E. Garabedian, Note, *Tax Breaks for Higher Education: Tax Policy or Tax Pandering?*, 18 VA. TAX REV. 217, 238 (1998) (arguing that increased Pell Grants would be more effective at encouraging low-income families to send their children to college).

180. A congressional report indicated the following:

> [The last Congress] recklessly expanded Pell [G]rants for higher education beyond government's means to pay, exacerbating an existing trend of spending-driven tuition inflation and endangering the viability of the program for the truly needy. The President's budget recognizes that Pell spending is on an unsustainable path and recommends a few reforms to start to get control of the program's costs.

HOUSE COMM. ON THE BUDGET, 112TH CONG., THE PATH TO PROSPERITY: RESTORING AMERICA'S PROMISE 42–43 (2011); *see also* Branham, *supra* note 111, at 197 (concluding that decreases in Pell Grant funding, combined with tuition increases and reduced state funding, will force individual families to incur increased higher education costs).

181. *See* Smith, *supra* note 173, at 219–20 (indicating that Harvard University and Yale University have programs which essentially make a college education available to low-income individuals free of charge).

182. *See id.* at 185 ("The primary sources [that] historically have been available to provide funding for low-income individuals going to college were grants, scholarships, and other sources of state and/or federal financial aid. By 1981, student loans became the primary source of financial aid for students across the income spectrum."); *see also* META BROWN ET AL., FED. RESERVE BANK OF N.Y., STAFF REPORT NO. 668, MEASURING STUDENT DEBT AND ITS PERFORMANCE 4 (2014) ("In 2010, student debt surpassed credit cards to become the second largest form of household debt after mortgages whereas prior to 2008, the student debt was the smallest of household debts."); Branham, *supra* note 111, at 199 (discussing the increase in the number of students receiving loans as well as the average loan balance); Garabedian, *supra* note 179, at 219 (pointing out Congress's acknowledgement (in connection with enacting § 221) that students incur substantial debt while obtaining graduate and undergraduate education).

183. *See* Smith, *supra* note 173, at 204 (pointing out that "as a result of the substantial amount of loans incurred by low-income borrowers, defaults have become a significant problem for the federal government and borrowers").

184. *See* Simkovic, *supra* note 115, at 560 (noting that the "overwhelming majority of the U.S. student loan market consists of federal government loans" (citation omitted)).

185. *See id.* at 561 (noting that "the federal direct loan program is still a moneymaker for the federal government").

C. Surviving College and Thriving Thereafter

Of those students who clear the various hurdles encountered in gaining entry to college, a substantial percentage manage to succeed while there.[186] Graduation from college often leads to a first job and from there to the building of both a healthy professional, financial, and personal future. Or at least it used to. Students employ a host of hard-earned skills to navigate college successfully,[187] but after the heady glee of commencement, many find they face a challenging job market. Some opt to attend graduate school (possibly incurring additional debt).[188] Others may become part of the so-called "gig" economy[189] which promises precious little, if anything, in terms of employment and economic stability. And yet another distinct subset of recent graduates becomes part of the so-called "boomerang generation," returning home after college to live with parents because they cannot afford to live independently.[190] Income and job insecurity[191] ultimately result in the delayed formation of independent households by millennials, resulting in historically low homeownership rates.[192] And the pressure to defer homeownership is not only exacerbated by the suffocating burden of student debt,[193] but the mere existence of substantial student debt may complicate or even doom an aspiring homeowner's mortgage underwriting process.

186. *See Undergraduate Retention and Graduation Rates*, NAT'L CTR. FOR EDUC. STAT. (last updated Apr. 2020), https://nces.ed.gov/programs/coe/indicator_ctr.asp (stating that about 62% of students who began working toward their bachelor's degree at a four-year institution in 2012 graduated from that same institution within six years).

187. *See* Strand, *supra* note 26, at 292 (highlighting the fact that graduating from college requires various forms of support (from an early age and continuing through high school) as well as the development and harnessing of specific personal skills and habits).

188. *See* STIGLITZ, *supra* note 29, at x (preface) (noting that for college graduates facing a tough job market, going to graduate school is the only viable option and pointing out that those not from an affluent background find that they may have to incur more debt in order to attend).

189. *See* Dickerson, *supra* note 24, at 437 (noting that workers in the "gig" economy have erratic employment and income patterns, making it difficult to save money towards a down payment on a home).

190. *See* STIGLITZ, *supra* note 1, at 15; *see also* Dickerson, *supra* note 24, at 436 (noting that rather than starting their own households, millennials are delaying marriage and reproduction and returning home to live with parents).

191. *See* Dickerson, *supra* note 24, at 436 (pointing out that millennial income and job insecurity (along with lifestyle choices) have contributed to delayed household formation by millennials).

192. *See id.* at 436 (noting that homeownership rates in 2015 were at their lowest in almost fifty years).

193. *See id.* at 441 ("[S]tagnant wages and student loan debt makes it much harder for young college graduates to buy homes or even find affordable rental housing.").

Several years ago, outstanding student debt totaled more than outstanding car loan and credit card debt combined.[194] As of the close of the second quarter of 2020, student debt had reached over $1.5 trillion.[195] Viewed on a more individualized basis, the numbers take on greater clarity. In commenting on the situation faced by recent law school graduates, one state bar association noted the following: "The average student graduates from law school today with over $100,000 of law school debt. After adding accrued interest, undergraduate debt, and bar study loans, the debt burden of new attorneys frequently increases to $150,000 to $200,000, levels of debt that impose a crushing burden on new lawyers."[196] Even if a student is fortunate enough to secure meaningful employment (after college or graduate school), he faces years of repayment[197] extending beyond his 20s, to his 30s and 40s and, quite possibly, into his 50s.[198] Should he encounter severe financial difficulty,[199] a bankruptcy filing may not result in relief.[200] But even if things proceed smoothly, the burden of the repayment of debt principal and the regular accrual of interest thereon ensures an extended term of indenture, likely from ten to thirty years or more.[201] If we are to win the war on income and wealth inequality (and Congress shows no inclination towards enhancing direct educational grants), then facilitating the servicing of student debt should be part of a long-term strategy.

Congress has already made manifest its intent to alleviate the burden of educational debt by allowing a deduction for student loan interest.[202] Indeed, during the period in which deductions with respect to student loan interest were disallowed altogether (while deductions for some forms of qualified residence interest were permitted), members of Congress expressed their

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194. *See* Branham, *supra* note 111, at 200 ("At the end of 2014, total student loan debt surpassed $1.3 trillion, more than both car loans and credit card debt in America." (citations omitted)).

195. *See* CENTER FOR MICROECONOMIC DATA, *supra* note 91 (indicating that outstanding student loan debt stood at $1.56 trillion as of the close of the second quarter in 2020).

196. ILL. STATE BAR ASS'N, FINAL REPORT, FINDINGS & RECOMMENDATIONS ON THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES 1 (2013).

197. *See* Branham, *supra* note 111, at 201 (noting that student loan debtors face years of repayment).

198. *See* CENTER FOR MICROECONOMIC DATA, *supra* note 91, at 21 (indicating that student loan debt still constitutes some percentage of total debt held by those over age fifty).

199. *See id.* at 28 (indicating that those with student debt tend to transition to serious delinquency (in arrears by more than ninety days) during their 30s and 40s).

200. *See* Branham, *supra* note 111, at 202 (pointing out the virtual impossibility of discharging delinquent student loan debt in bankruptcy).

201. *See* Oliver, *supra* note 112, at 113.

202. *See* I.R.C. § 221 (2018).

concern. One legislator commented as follows:

> As one advocate of the deduction for interest on student loans phrased it, "it seems to me that if we can allow the deductibility on a second home at the beach, at a minimum we can allow for that investment in a young person['s] . . . education." Similarly, Senator Price reiterated his opinion, one he set forth ten years ago, that "if you can deduct the interest on your home mortgage or even on a second home at the beach you surely ought to be able to deduct interest on something as basic as a student loan."[203]

Notwithstanding the existence of a basic allowance, commentators have argued that the $2,500 ceiling is too low[204] and that the deduction (which is phased out rapidly)[205] targets specific voter-rich segments of the population.[206] There have been various proposals concerning the deductibility of student loan interest.[207] One proposal coordinated "home equity indebtedness" and "qualified educational indebtedness."[208] Other proposals have even suggested an unlimited deduction with respect to student loan interest (i.e., without phaseout or dollar caps).[209] What's key and critical is that the TCJA, while appearing somewhat responsive to normative arguments regarding qualified residence interest, left the student loan interest deduction more or less unaltered.

Given the gradual shift away from direct grants and towards student loans, Congress could have taken the opportunity to provide some relief via the tax expenditure route. Rather than keeping the interest deduction low and retaining rapid phaseouts, Congress could have supported education by allowing the deduction of student loan interest in full.[210] Alternatively, given

203. Albus, *supra* note 15, at 603 n.102 (citations omitted).

204. *See* Oliver, *supra* note 112, at 142 (arguing that the interest deduction ceiling of $2,500 is too low).

205. *See* I.R.C. § 221(b) (2018).

206. *See* Lustig, *supra* note 176, at 270 (pointing out that the phase-out of the student loan interest deduction at certain income levels allows the benefit of the deduction to be targeted to the voter-rich middle class).

207. *See* Albus, *supra* note 15, at 603–05.

208. *See id.* at 604 & n.107.

209. *See id.* at 604–05 nn.104–115.

210. *See id.* at 615 (arguing, ultimately, that the phase-out levels be increased because current phaseout levels will exclude those who borrow large sums to secure education at the graduate and professional school level).

that many students with considerable student debt will not take on or qualify for a mortgage, Congress could allow student loan debtors to deduct (within caps) either qualified residence interest, student loan interest, or any combination of the two with an aggregate limit (e.g., interest on $500,000 of acquisition indebtedness and $250,000 of student loan debt—or any combination up to $750,000 of total loan principal).

One could rationally counter that removing the low ceiling or the rapid phaseout with respect to the student loan interest deduction would, in some instances at least, simply constitute another tax expenditure largely enjoyed by the wealthy (i.e., those with high marginal tax rates).[211] But there's an important difference, for example, between a new surgeon who incurred no student debt (benefitting from a series of intergenerational wealth transfers) and a new surgeon who, in attempting to pull herself up by the bootstraps, incurred massive amounts of student debt along the way. Thus, such a tax expenditure would target its benefits not merely to those with high marginal tax rates but those who invested heavily in achieving professional success.[212]

Moreover, there is arguably a tighter link (relative to someone who may simply save money in the wake of a progressive tax rate cut) between the granting of tax relief in this context and the generation of positive societal externalities by the beneficiaries. Heavily indebted doctors respond to the health needs of the community. Indeed, many of those fighting on the front lines in response to the COVID-19 crisis had to borrow money to get there. And while, like some physicians, there are certainly attorneys who focus largely on advancing their own financial interests, there are heavily indebted attorneys who serve society as prosecutors, public defenders, and advocates for children, immigrants, and the elderly.

Failing to alleviate the student loan interest burden shouldered by students frustrates their ability to thrive and secures their place among those who must continue to shoulder the burden of financing rate cuts for rich individuals, corporations, and the like. Congressional miserliness in this regard not only stifles the nation's ability to achieve a competent and competitive work

211. *See id.* at 612–13 (concluding that the rules allowing the deduction of student loan interest achieve vertical equity by affording relief to taxpayers with lower incomes but fail to achieve horizontal equity because not everyone paying interest on student loans is able to take the deduction).

212. *See id.* at 613–14 (acknowledging that those who borrow to secure graduate and professional education may end up with higher incomes as a result but reasoning that such students are no less deserving of the interest deduction, especially given their debt load).

force[213] but also adds insult to the substantial opportunity costs endured by those borrowing to obtain college and graduate education. In addition to repaying loan principal and regularly accruing interest, students lose some degree of earning capacity while attending school (handicapping wealth-building). Heavily indebted students also may enter the work force but find themselves forced to delay or reduce contributions to retirement savings.[214] Perhaps the greatest opportunity cost takes the form of delayed homeownership and the collateral consequences flowing from that delay. While paying rent (or remaining in a parent's household), the heavily indebted student is unable to benefit from a mortgage interest deduction, has no real property tax deduction, and cannot borrow against any built-up equity in the home to finance investments or expenses. Even saving for a down payment on a home can prove difficult.[215] Accordingly, delayed homeownership ultimately translates to delayed wealth building, and delayed wealth building results in reduced wealth building. Those in a position to benefit from accumulated wealth can handily circumvent these opportunity costs.[216] That reality ensures the widening of the wealth gap.

Education in the United States needs considerable attention, and the effort must be both conscious and national.[217] In response to rising levels of inequality (in light of various social, political, and economic perils), Brazil implemented a massive increase in education expenditures and took steps to reduce hunger and poverty in the 1990s, whereas the United States allowed inequality and poverty to increase.[218] Prevailing levels of inequality indicate that little has changed in the intervening decades. The United States continues

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213. *See id.* at 601 (emphasizing that the legislation allowing the deduction of student loan interest was rooted in the desire to have a competent, educated, and competitive work force in the future).

214. *See* Branham, *supra* note 111, at 202 (reasoning that high levels of student debt result in decreased entrepreneurship, delayed homeownership, and reduced retirement savings).

215. *See* Dickerson, *supra* note 24, at 448 (reasoning that millennials often have considerable student loan debt burdens and, accordingly, have great difficulty saving money for a down payment on a home).

216. *See id.* at 448 ("There is a strong link among savings, inheritances, and homeownership, and young adults who inherit or can borrow money from friends or family to make a down payment on a home typically become homeowners earlier than other renters." (citation omitted)).

217. *See* STIGLITZ, *supra* note 1, at 275 ("Opportunity is shaped, more than anything else, by access to education, and the direction we have been going (income-segregated residential communities, sharply decreased support for higher education—and the resulting sharp increase in tuition in public colleges and restrictions on places available in engineering and other high-demand but high-cost fields) can be reversed as well, but it will take a concerted *national* effort.").

218. *See* STIGLITZ, *supra* note 1, at 5.

to stand in contrast with the rest of the developed world in that American students, rather than enjoying substantial financial support from the government and shouldering little financial cost, must finance higher education and, accordingly, often graduate with substantial debt burdens.[219] Those unfortunate enough to emerge with that debt face long repayment periods, minimal, if any, tax expenditure relief, and no real hope of escaping the debt in bankruptcy. The direct and opportunity costs associated with obtaining increasingly critical higher education in the United States remain exceedingly and unnecessarily high. Such costs nourish, and thereby perpetuate, a host of systemic inequalities.

VI. CONCLUSION

Just a few short years ago, the American Dream was within the reach of most Americans, but for many, that dream is now unattainable fantasy.[220] Although well-entrenched societal norms and institutions have contributed significantly to current levels of inequality,[221] government policies have also played a key role.[222] Rationally, one can expect considerable resistance to change by those intent on preserving their position of dominance and privilege,[223] but government policies and practices can evolve, and shifts in tax policy are a necessary first start. Current tax law overtly reserves preferential treatment for forms of income earned by the nation's wealthiest taxpayers and favored industries in which they operate. More covertly, it

219. *See* Simkovic, *supra* note 115, at 556–57.

220. *See* STIGLITZ, *supra* note 1, at 274 (concluding that for many at the bottom and in the middle, the American Dream has simply vanished). To the extent that the American Dream includes homeownership, statistics are not improving for certain segments of the population. *See* CENTER FOR MICROECONOMIC DATA, *supra* note 91 (reflecting notably fewer mortgage originations for those with lower credit scores in the first quarter of 2020 relative to the originations during the first quarter of prior years (e.g., 2003–2007)).

221. *See* STIGLITZ, *supra* note 1, at 53 (pointing out that the social norms and social institutions play a role in the level of inequality and emphasizing that the one percent shapes both the norms and the institutions).

222. *See id.* at 5 (arguing that government policies have been critical to the creation of inequality in the United States and reasoning that policy changes are needed to reverse the negative trend).

223. *See id.* at 77 (noting that "in the more unequal societies, government policies and other institutions tend to foster the persistence of inequality"); *id.* at 161 (emphasizing that in the political sphere, monied interest have ample incentives and resources to impede change because the current system works in their favor).

effects giveaways[224] and provides subsidies,[225] often while appearing responsive to normative concerns presented in scholarly tax literature. The TCJA brought about a number of undesirable changes in its quest to shift more of the nation's taxpaying burden from the rich to the upper, middle, and lower classes. Corrective legislation can set the nation on a different path, and it is my firm belief that a clear, concerted, and generous investment in the education of the nation's students will start the process of addressing a host of inequalities[226] and put the nation on the path towards greater societal harmony and economic vitality.[227] Viewed optimistically, the results of the recent national-level elections were a referendum on the status quo, a national moment of truth in which the electorate rejected the notion that prevailing inequalities are an acceptable norm.

Left unchecked for far too long, the now-bionic invisible hand has reproduced historic levels of income and wealth inequality and promises to do so going forward both very rapidly and on a global scale. Beneficiaries of inequity enjoy its fruits and can be counted on, with clear and specific intent, to attempt to preserve the inequitable state of affairs. Although governments have historically intervened to ensure an equitable distribution of goods and to facilitate social mobility, they sometimes fail. In the United States, unfortunately, Congress and the various federal courts[228] have often appeared to act as instruments to preserve inequity; the *Citizens United v. FEC*[229] decision paved the way for aggressive corporate influence in the political arena.[230] Moreover, a number of state-level legislatures have taken aggressive steps to handicap the ability of certain segments of the population to effect socioeconomic and other changes via the ballot box.[231] So our very political

224. *See* STIGLITZ, *supra* note 1, at 42 (noting the in America, giveaways tend to be relatively subtle).

225. *See id.* at 40 (identifying "subsidies hidden in the tax system" as rents from the public).

226. *See* STIGLITZ, *supra* note 1, at 275 ("Public money should be used to expand support for state and nonprofit higher educational systems and to provide scholarships to ensure that the poor have access.").

227. *See id.* at 281 (noting the need for heavy investment in education and technology to help workers move from jobs lost to new jobs being created).

228. *See* Gilman, *supra* note 28, at 446 (noting the possibility that Supreme Court justices subconsciously favor the wealthy).

229. 558 U.S. 310 (2010).

230. *See* Gilman, *supra* note 28, at 437 (arguing that the Supreme Court's decision in *Citizens United v. FEC* reinforced the primacy of corporate money in the political process, notwithstanding congressional efforts to reform campaign finance laws).

231. *Georgia Gov. Kemp Signs GOP Election Bill Amid an Outcry*, CNBC, (Mar. 26, 2021, 5:41

process is itself at risk.

Recent Republican administrations have played a key role in shifting the nation's taxpaying burden, and Republican incumbents have taken a number of steps to remain in office both over time and in preparing for recent and upcoming elections. The approach has many facets. In addition to appealing to single-issue voters (e.g., anti-abortionists), they have capitalized on existing inequalities by appealing to those who feel left behind (i.e., those lacking college degrees)[232] because they have lost earning power,[233] even as they live day-to-day with those who have considerable and growing economic power (i.e., the detested, well-educated "elites"). Many of the so-called left behind have been duped into thinking that Republican incumbents are advancing their economic interests[234] when, in fact, such policies exacerbate harm to those individuals.[235] Yet another tactic is to employ pejorative labeling and thereby exploit knowledge gaps; some who now vehemently criticize "socialism" still expect that Social Security and Medicare will be fully available to them as they enter the retirement years. And perhaps the most sinister tactic employed by some Republican incumbents has been to appeal to the nation's Achilles heel, ancient hatreds, prejudices, and stereotypes directed at people of color. Difficult as these realities may be to digest, there remains room for cautious optimism.

The base supporting Republican incumbents is weakening in the face of COVID-19 and a host of new economic issues. At a time when class-based unity at the ballot box is needed over the long term, it may come to fruition. The changes introduced by the TCJA resulted in some taxpayers not receiving the federal income tax refunds they had come to regularly expect. Worse yet,

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AM), https://www.cnbc.com/2021/03/26/georgia-gov-kemp-signs-gop-election-bill-amid-an-outcry.html (discussing a Republican-sponsored overhaul of Georgia elections in a move that some believe will disproportionately harm voters of color and pointing out that election-related bills have been introduced in many state legislatures since the November 2020 elections).

232. *See* TATUM, *supra* note 69, at 63 (discussing that fact that a Republican presidential nominee appealed "to a non-college-educated, working-class base that was feeling left behind by globalism and the loss of manufacturing jobs in the US"); *see id.* at 13 (discussing rising economic inequality and anger and linking them to support of a Republican presidential nominee).

233. *See* STIGLITZ, *supra* note 1, at 7 ("Young men (aged twenty-five to thirty-four) who are less educated have an even harder time; those who have only graduated from high school have seen their real incomes decline by more than a quarter in the last twenty-five years." (citation omitted)).

234. *See* STIGLITZ, *supra* note 1, at 137 (noting that those in the middle have been convinced that their interests align with those advanced by the individuals and entities at the top).

235. *See id.* at 167 (noting that political conservatives have been able to persuade some Americans to embrace policies that are not in their self-interest).

some of those same taxpayers found themselves cutting, for the first time ever, a check payable to the United States Treasury. If voters can manage to focus consistently and resolutely on these harsh, bottom line, economic realities, they can make rational, clear-headed decisions at the ballot box. The nation that elected President Obama to two terms in office also delivered a popular vote victory to Senator Hillary Clinton in 2016. Uniting once again, the nation delivered victory to both President Joe Biden and Vice President Kamala Harris in November of 2020, and shortly thereafter, Democrats assumed control of both chambers of Congress. As this article goes to press, President Biden is already moving forward with his tax policy agenda (i.e., proposing an increase in corporate tax rates, among other things, to facilitate funding of a multi-faceted infrastructure initiative).[236] And with Democrats controlling both houses of Congress, he is well-positioned to advance a number of tax-related measures which promise not only to generate considerable federal revenue[237] but also to enhance tax fairness. Alongside raising corporate tax rates generally, such measures include raising the top federal income tax rate, increasing the tax on long-term capital gains, taxing built-in capital gains upon the taxpayer's death, and augmenting the federal estate tax.[238]

At this historic juncture, we have the ability to address inequality and move the nation forward with dispatch, even as we acknowledge that we have hard work ahead in multiple arenas. Collective embrace of enduring American ideals empowers us to seize this opportunity to win our best and most promising future.

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236. *See FACT SHEET: The American Jobs Plan*, THE WHITE HOUSE (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

237. *See* Gordon B. Mermin et al., *An Updated Analysis of Former Vice President Biden's Tax Proposals*, TAX POL'Y CTR. (Nov. 6, 2020), https://www.taxpolicycenter.org/publications/updated-analysis-former-vice-president-bidens-tax-proposals/full (indicating that President Biden's tax proposals would increase federal tax revenue by approximately $2.1 trillion over the next decade).

238. *See* Tami Luhby & Katie Lobosco, *Here's How Biden Wants to Raise Taxes on the Wealthy and Corporations*, CNN (Mar. 18, 2021, 8:07 AM), https://www.cnn.com/2021/03/18/politics/biden-tax-plan-explainer/index.html.