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The Racial Wealth Gap and the Tax Benefits of Homeownership

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ABOUT THE AUTHOR: Otto L. Walter Distinguished Professor of Tax Law and Director, Graduate Tax Program, New York Law School. J.D. Yale Law School, 1976; A.B. *magna cum laude* Harvard-Radcliffe, 1973. This article is dedicated to Professor Kimberlé Williams Crenshaw who has given the lens of Critical Race Theory and Intersectionality to us, and to Dorothy A. Brown, who opened the author's eyes by applying them to tax law. Professor Brown's new book, *The Whiteness of Wealth*, provides a compelling analysis of the critical junctures at which tax law fuels the racial wealth gap. The author thanks Corey Gibbs for his excellent research assistance and number crunching. For their comments, corrections, and questions, the author thanks her NYLS colleagues from the Race, Bias, and Advocacy (RBA) course and writing project, Edward A. Purcell, Jr., Penelope Andrews, Lenni Benson, Kirk Burkhalter, Richard Chused, Kris Franklin, Richard Marsico, Frank Munger, Rebecca Roiphe, and Lynn Su; the NYLS Tuesday Faculty Workshop; her tax colleague Alan Appel; and especially William P. LaPiana, her RBA co-teacher and patient reader. All errors and omissions are hers alone.

I. INTRODUCTION

The Black/white racial wealth gap in the United States is huge.[1] It is persistent. And it has changed very little since the 1960s. In 2019, before the onset of the COVID-19 pandemic and some fifty-five years after landmark civil rights legislation intended to equalize access to housing, education, and employment,[2] the net assets of the median Black family in America were less than 15 percent of the net assets of the median white family. The typical white family had median net assets of $188,200; for the typical Black family the median was $24,100.[3] In other words, white families had almost eight times more net assets than Black families.[4] The numbers are shocking.

That an enormous racial wealth gap exists at this time in our history flies in the face of the progress-toward-racial-equality narrative that holds our national psyche so firmly in its grip.[5] Although now more widely discussed in the popular press, academic scholarship, and across the internet, misconceptions about the dimensions and the causation of racial economic inequality abound.[6] As an entry point for discussion of this urgent problem, this article presents an explication of one of the societal structures, colorblind on its face, that has contributed to America's racial wealth gap—the slate of income tax benefits conferred on homeownership.

Over the past 109 years of the modern federal income tax, wealth-building tax benefits for homeowners, especially the exclusion of imputed rental income from

1. A note on terminology and racial classifications. Racial identification in statistical sources has evolved over time. In this article, the term "Black" refers to non-Hispanic Blacks and the term "white" refers to non-Hispanic whites. "Hispanics" refers to Hispanics of all races. These are the broad racial classifications used in the statistics compiled in federal government surveys such as the U.S. Census Current Population Survey, the U.S. Census American Community Survey, and the Federal Reserve Board's Survey of Consumer Finances. More recent sources sometimes provide statistics regarding persons of Asian, Native Alaskan, Native American, and Pacific Islander descent as a group; older sources report "Other" as a classification.

2. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 and 52 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 28 U.S.C. §§ 2341–2342 and scattered sections of 42 U.S.C.).

3. Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, Bd. Governors Fed. Rsrv. Sys. [hereinafter *Disparities in 2019 Survey of Consumer Finances*], https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm (Sept. 28, 2020). "Medians" better represent the typical family and are used in this article rather than "means" to avoid the distortions that result from averaging in outliers such as billionaires and families with negative assets.

4. The Hispanic/white wealth gap is of similar proportions, but at 78.3 percent in 2019, it is narrower than the Black/white gap. *See* Signe-Mary McKernan et al., *Nine Charts About Wealth Inequality in America*, Urb. Inst. [hereinafter *Nine Charts*], https://apps.urban.org/features/wealth-inequality-charts/ (Oct. 24, 2017). Discussion of this vital problem and the growing body of research documenting and analyzing it is beyond the scope of this article.

5. *See* Jennifer A. Richeson, *The Mythology of Racial Progress*, Atlantic, Sept. 2020, at 9, 10–12; Michael W. Kraus et al., *The Misperception of Racial Economic Inequality*, 14 Pers. on Psych. Sci. 899, 899–921 (2019) (indicating that white Americans underestimate the racial wealth gap by 900 percent).

6. Kraus et al., *supra* note 5, at 917; *see also* Dion Rabouin, *10 Myths About the Racial Wealth Gap*, Axios (July 23, 2020), https://www.axios.com/racial-wealth-gap-ten-myths-d14fe524-fec6-41fc-9976-0be71bc23aec.html.

owner-occupied housing, have been enormous. Since the 1970s, the homeownership rate for white American families has been at about 72 percent.[7] For Black American families the homeownership rate has been barely above 40 percent.[8] In other words, more than 70 percent of white families can benefit from these wealth-building tax breaks while almost 60 percent of Black families cannot.[9] Faced with these facts, it is difficult not to conclude that the tax benefits of homeownership have become racialized.

Part II of this article examines the racial wealth gap and the intertwined racial homeownership gap. Part III provides an introduction to the long tradition of federal income tax benefits relating to homeownership and the tax expenditure budget quantification of this investment of national resources. It then examines eight tax benefits of homeownership that collectively compound the racial wealth gap. Part IV reviews the three prerequisites for purchasing a home and the structural inequities that both historically and currently make them barriers to Black American homeownership and, consequently, limit the opportunities for Black families to amass generational wealth. Part V concludes this article with a proposed method for reducing the inequalities fostered by the tax subsidies currently reserved for homeowners.

The racial wealth gap stands in the way of the racial equality and the multiracial democracy to which we as a nation claim to aspire. It is also a drag on the national economy.[10] If we are to solve this problem, we need to name it and understand it.

II. THE RACIAL WEALTH GAP AND THE RACIAL HOMEOWNERSHIP GAP

A. The Racial Wealth Gap

In recent years, economists have focused on household wealth rather than household income as the better measure of financial well-being. Although household income is also a significant marker and indeed is the key driver of household wealth, it does not take into account resources that wealth represents, such as savings, home equity, or investments that a family can tap to cushion a job loss, pay for an emergency repair, educate children, retire, or get through a pandemic. For this reason, household or family wealth is now the typical focus in assessments of social inequality.[11]

Wealth in this context does not mean affluence or riches. It merely denotes the existence of some amount of net worth, some amount by which a family's assets exceed its debt and other liabilities. Functionally, wealth is a measure of the resources

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7. *See Disparities in 2019 Survey of Consumer Finances*, *supra* note 3.

8. *See id.*; Jung Hyun Choi, *Racial Homeownership Rates Vary Across the Most Commonly Cited Datasets. When and Why Should You Use Different Ones?*, Urb. Inst. (Dec. 8, 2021), https://www.urban.org/urban-wire/racial-homeownership-rates-vary-across-most-commonly-cited-datasets-when-and-why-should-you-use-different-ones.

9. *See infra* Figure 4 (showing a stark disparity in white, Black, and Hispanic family homeownership).

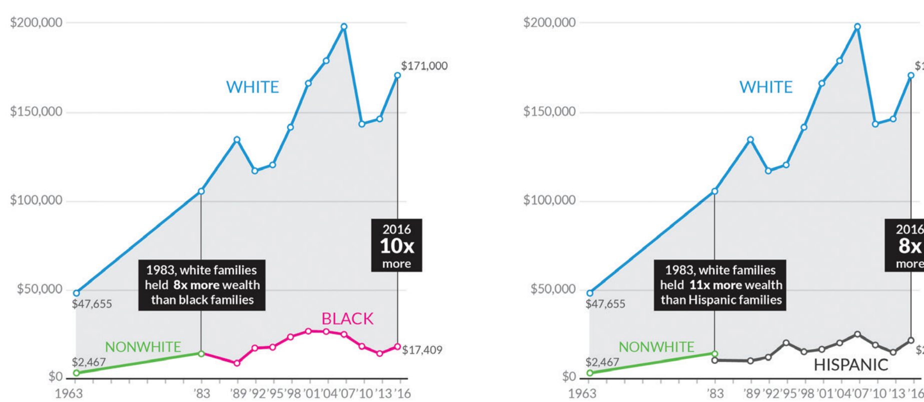
10. *See* Elana Duré, *Here's How the Racial Wealth Gap Affects the Entire Nation*, J.P. Morgan Wealth Mgmt. (July 15, 2021), https://www.chase.com/personal/investments/learning-and-insights/article/heres-how-the-racial-wealth-gap-affects-the-entire-nation.

11. Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth 2 (2d ed. 2006).

available to improve a person's quality of life and provide stability and access to opportunities for well-being.[12]

Looking at family financial well-being over time, the dimensions of the racial wealth gap—both its size and its persistence—become clear.[13] The timeline starts with 1963, the year before the enactment of the Civil Rights Act of 1964, a law that prohibited discrimination on the basis of race, color, religion, sex or national origin in hiring, promotion, and firing; in public accommodations; and in federally funded programs.[14] It also banned segregation in public schools and discrimination in public facilities and service, and it created the Equal Employment Opportunity Commission.[15] In 1963, the median wealth of non-white families was $2,467, while that of a typical white family was $47,655.[16] Thus, the net worth of the typical non-white family immediately before the Civil Rights Act of 1964 was 5 percent of the typical white family's net worth.[17] The racial wealth gap was 95 percent.[18]

Figure 1 Median Family Wealth by Race and Ethnicity, 1963–2016[19]



12. *Id.* at 30.

13. *See infra* Figure 1 (illustrating the history of the racial wealth gap based on household net worth and income by race and ethnicity).

14. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 and 52 U.S.C.).

15. *Id.* The mission of the Equal Employment Opportunity Commission is to remedy and ultimately end unlawful employment discrimination in the workplace. *Id.*

16. *See Nine Charts*, *supra* note 4 (tracking median family wealth on the basis of race and ethnicity between 1963 and 2016).

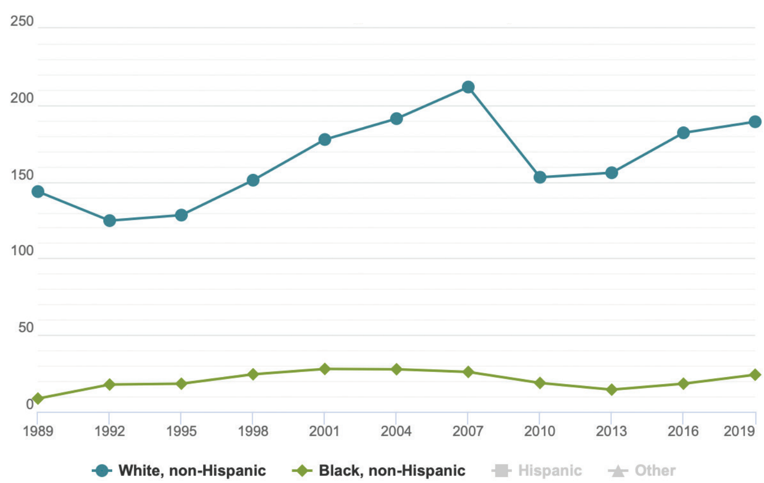
17. *Id.*

18. *Id.* Until 1983, the Federal Reserve Board's Survey of Consumer Finances, on which the chart reproduced in Figure 1 is based, reported only two racial classifications: white and non-white. *Id.* This is why the measures of Black and Hispanic family wealth appear identical through 1983.

19. *Id.* (click "SAVE CHART" then click "JPG" under "Median") (depicting Chart 3 created by the Urban Institute). To view the data on which this chart is based in a user-friendly format, see Dorothy S. Projector, *Survey of Financial Characteristics of Consumers*, FED. RSRV. BULL., Mar. 1964, at 285, 285–93;

Nearly fifty years later, the median Black/white racial wealth gap in 2016 was roughly 90 percent.[20] Indeed, between 1983 and 2016, the gap grew: In 1983, the typical white family had eight times the wealth of the typical Black family; in 2016, white families had almost ten times the wealth.[21] The gap narrowed slightly in 2019 to 87.2 percent.[22] And preliminary analyses suggest that the Black/white wealth gap grew in the pandemic years from 2020 through the present, as Black workers and Black communities have been more heavily impacted.[23] Overall, the Federal Reserve Board's research shows that in more than half a century, the racial wealth gap has only narrowed from 95 percent to 87.6 percent, an improvement of less than 8 percent.[24]

Figure 2 White and Black Median Family Wealth, 1989–2019[25]



Dorothy S. Projector, Survey of Changes in Family Finances (1968); and *Disparities in 2019 Survey of Consumer Finances*, *supra* note 3, fig.1.

20. *Nine Charts*, *supra* note 4.

21. *Id.*

22. *Disparities in 2019 Survey of Consumer Finances*, *supra* note 3, fig.1.

23. *Id.* This increase seems to be attributable to the delayed recovery of Black families from the Great Recession. *Id.*; *see also* Christian E. Weller & Lily Roberts, Ctr. for Am. Progress, Eliminating the Black-White Wealth Gap Is a Generational Challenge (2021).

24. *See Disparities in 2019 Survey of Consumer Finances*, *supra* note 3; *see also, e.g.*, Jeffrey P. Thompson & Alice Henriques Volz, Fed. Rsrv. Bank of Bos., A New Look at Racial Disparities Using a More Comprehensive Wealth Measure (2021).

25. *Survey of Consumer Finances, 1989–2019*, Bd. Governors Fed. Rsrv. Sys. (Nov. 4, 2021), https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/index.html (choose "Net worth" from "Select household financial component" dropdown; then choose "Race or ethnicity" from "Distribute by" dropdown; then click "White, non-Hispanic" and "Black, non-Hispanic" under "Display"). This chart shows white and Black median family wealth and the share of Black families below the white family median. *Id.* (showing roughly $181,000 as median net worth for White families and roughly $24,000 as median net worth for Black families). Dollar values are inflation-adjusted to 2019 dollar amounts using the consumer price index for all urban consumers (CPI-U) and rounded to the nearest one-thousandth dollar. *Disparities in 2019 Survey of Consumer Finances*, *supra* note 3, n.3; *see also* Ana Hernandez Kent & Lowell Ricketts, *Has Wealth*

The Civil Rights Act of 1964 together with the Voting Rights Act of 1965 and the Fair Housing Act of 1968 that quickly followed clearly improved the conditions under which Black Americans live.[26] Those statutes banned many of the racial barriers to employment, education, housing, and voting in the laws of the states and customs of businesses. The Civil Rights Act was particularly transformational. But although the new laws made possible new opportunities, the laws' impact was entirely prospective. They did nothing to redress the financial harms that racial discrimination had inflicted on Black Americans before their enactment. No federal law has compensated Black families for the century-plus of restrictions on employment and property ownership, theft of their services, destruction of their property, or the truncated educations that Jim Crow laws violently imposed upon them.[27]

Nor did the new laws reverse the economic impact on Black adults in 1964 who had been denied education or training; union membership, jobs, or credit; or the opportunity to buy a home in Levittown or rent an apartment in a safe neighborhood because of their race. Nor did they erase the impact on their baby boomer children of facing "Whites Only" signs over public drinking fountains in the South or attending segregated schools in the North at which there were not enough books or desks to go around.[28] The Black baby boomers of 1964 are the parents of today's Gen Y, or Millennials, and Gen Z; the Black adults of 1964 are the grandparents and great-grandparents.

Even if all racial discrimination had actually ended in 1964, Black baby boomers started out with a huge deficit in human capital and family wealth.[29] They did not commence their adult lives on a level playing field. The outcome for Black baby boomers can be seen in Figure 3: In their sixties and seventies, their median net worth was $46,890, or 14.8 percent of the wealth of their white contemporaries.[30]

Inequality in America Changed Over Time? Here Are Key Statistics, Fed. Rsrv. Bank St. Louis (Dec. 2, 2020), https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics?print=true.

26. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 and 52 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 28 U.S.C. §§ 2341–2342 and in scattered sections of 42 U.S.C.).

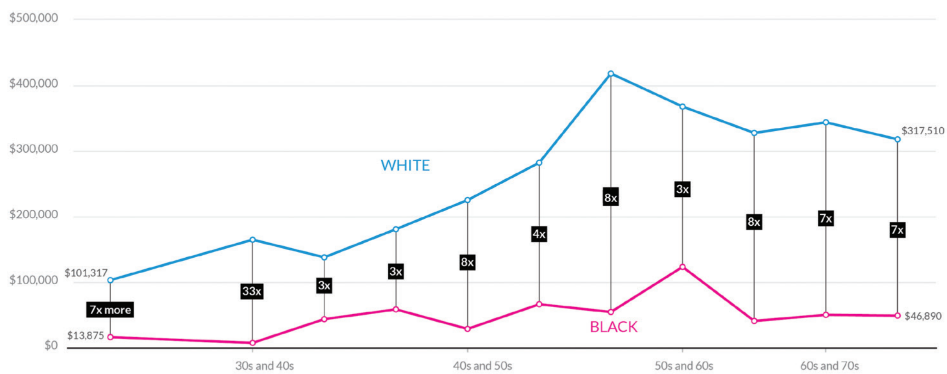
27. *Cf.* H.R. 40, 117th Cong. (2021) (ordered for amendment Apr. 14, 2021) (introducing legislation to provide reparations).

28. *See, e.g.*, Richard Rothstein, The Color of Law 59–75, 77–91 (2017) (reviewing racially discriminatory housing practices through the Levittown restrictive covenants). I encountered similar circumstances while tutoring students at public schools in Camden, New Jersey, from 1966 to 1968.

29. *See* Nick Fortuna, *'Stark Inequality' Points to Retirement Struggles for Many Americans*, Barron's, https://www.barrons.com/articles/generational-racial-wealth-gap-retirement-struggles-51632154247?tesla=y (Sept. 21, 2021); Valerie Wilson & William M. Rodgers III, Econ. Pol'y Inst., Black-White Wage Gaps Expand with Rising Wage Inequality (2016).

30. *See infra* Figure 3 (illustrating median family wealth for those born between 1943 and 1951); *Nine Charts*, *supra* note 4, (illustrating median family wealth for those born between 1943 and 1951); *Disparities in 2019 Survey of Consumer Finances*, *supra* note 3 (illustrating median wealth of white and Black families in 2019); *see also* Duke Univ., Bootstraps Are for Black Kids (2015).

Figure 3 Median Family Wealth for Those Born 1943–1951 by Race[31]



But as we well know, the Civil Rights Act of 1964 did not end racial discrimination any more than *Brown v. Board of Education*, decided ten years prior, ended public school segregation.[32] Prohibiting discrimination by law or Supreme Court opinion is one thing. Ending racial discrimination in practice is quite another. Both academic research and the lived experience of Black Americans make it clear that racial discrimination continues to this day.[33] For example, recent research has confirmed that over the last twenty-five years there has been little reduction in racially discriminatory hiring practices.[34] Schools are arguably more segregated in 2022 than they were in 1954 when *Brown* made de jure segregation illegal.[35] Racialized low-ball appraisals of homes take money from the pockets of Black homeowners.[36] The

31. *Nine Charts*, *supra* note 4.

32. 347 U.S. 483 (1954). For a related historical discussion, see Edward A. Purcell, Jr., *Race and the Law: The Visible and the Invisible*, 66 N.Y.L. Sch. L. Rev. 141 (2021–2022).

33. *See, e.g.*, Shukri Olow, A Qualitative Study of Lived Experiences of Black Women in Leadership Positions in K–12 Educational Settings 67 (2021) (EdD dissertation, Seattle University) (on file with the *New York Law School Law Review*) (reporting that Black women in K–12 leadership positions face "race, stereotype, and gender challenges" not faced by their white counterparts in hiring and employment).

34. *See generally* Lincoln Quillan et al., *Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 Proc. Nat'l Acad. Scis. U.S., 10,870 (2017).

35. *See* Erica Frankenberg et al., Harming Our Common Future: America's Segregated Schools 65 Years After *Brown* 5, 21 (2019); Richard D. Marsico, *The Intersection of Race, Wealth, and Special Education: The Role of Structural Inequities in the IDEA*, 66 N.Y.L. Sch. L. Rev. 207 (2021–2022).

36. *See, e.g.*, Lauren Helper, *A Black Couple 'Erased Themselves' from Their Home to See If the Appraised Value Would Go Up. It Did—by Nearly $500,000*, S.F. Chron., https://www.sfchronicle.com/bayarea/article/Black-Marin-City-couple-sues-appraiser-for-16672840.php (Dec. 5, 2021); *What's Your Home Worth? A Review of the Appraisal Industry: Hearing Before the Subcomm. on Hous., Cmty. Dev. & Ins. of the H. Comm. on Fin. Servs.*, 116th Cong. (2019) (statement of Andre M. Perry, David M. Rubenstein Fellow, Metropolitan Policy Program, the Brookings Institution); *see also* Richard Chused, *Strategic Thinking About Racism in American Zoning*, 66 N.Y.L. Sch. L. Rev. 307 (2021–2022) (examining racialized zoning and lending practices).

continuation of insurance and mortgage redlining[37] reinforces residential segregation and depresses the value of homes in majority minority neighborhoods.[38] In light of these realities, it may be shocking but it should not be surprising that today more than 80 percent of Black families have less wealth than the median white family.[39]

The racial wealth gap amplifies across generations when we consider the forward-looking uses to which family wealth can be put—for a down payment on a home, to cushion a job loss, car breakdown, or an unexpected bill, to start a business, pursue higher education, or pass down rainy day money to children or grandchildren. In some important ways, the process is circular. Wealth begets wealth by boosting the next generation. And the inability of families to improve life chances in these ways or provide such opportunities for their members limits the likelihood that the next generation will be able to accumulate greater assets. These are some of the dynamics that sustain the racial wealth gap.

Economists have identified several data points that together explain the present-day racial wealth gap. For example, in 2012 the lifetime earnings for Black male baby boomers was 67 percent of that of white male boomers.[40] A greater proportion of Black families are burdened by greater amounts of student debt.[41] White families hold more wealth-producing financial assets than Black families, including more than six times the liquid retirement savings of Black families.[42] White families receive gifts and inheritances at three times the rate of Black families, which alone account for 12 percent of the racial wealth gap.[43] The rate of homeownership for white families outpaces that of Black families by about 167 percent.[44] The role of

37. "Mortgage redlining" is the name given to discriminatory lending practices dating back to the 1930s, when lenders would draw red lines on maps around predominantly Black neighborhoods to claim the area as "high risk" and deny a mortgage accordingly. Brai Odion-Esene & Rachel Witkowski, *What Is Redlining in Real Estate?*, Forbes Advisor (Dec. 7, 2021), https://www.forbes.com/advisor/mortgages/what-is-redlining/.

38. Caley Horan, Insurance Era 139–66 (2021).

39. *See* Weller & Roberts, *supra* note 23.

40. *Nine Charts*, *supra* note 4 (reporting that the lifetime earnings of white male baby boomers to Black male baby boomers was $2.7 million to $1.8 million in 2012, and for women, it was $1.5 million to $1.3 million). For more recent data on overall wealth and earnings by race and gender, see Dedrick Asante-Muhammad et al., Nat'l Cmty. Reinvestment Coal., Racial Wealth Snapshot: Women, Men and the Racial Wealth Divide (2022), which estimates $78,200 median wealth for single white men compared to $10,100 for single Black men, and $81,200 for single white women compared to $1,700 for single Black women.

41. *Nine Charts*, *supra* note 4 (presenting the average family student loan debt for those between the ages of 25–55 by year from 1989 to 2016).

42. *Id.* (presenting the average family liquid retirement savings by year from 1989 to 2016).

43. *See* Signe-Mary McKernan et al., *Do Racial Disparities in Private Transfers Help Explain the Racial Wealth Gap? New Evidence from Longitudinal Data*, 51 Demography 949 (2014); Maury Gittleman & Edward N. Wolff, *Racial Differences in Patterns of Wealth Accumulation*, 39 J. Hum. Res. 193 (2004); Signe-Mary McKernan et al., Urb. Inst., Do Financial Support and Inheritance Contribute to the Racial Wealth Gap? (2012).

44. *See infra* Figure 4; *Nine Charts*, *supra* note 4.

each of these factors in building wealth is obvious: Higher measures at each data point mean that there will be more wealth; lower measures mean there will be less.

Factors such as lower student loan rates and more gifts and inheritances are associated with tax benefits that enhance wealth. For example, parents and grandparents who can afford to put money aside in 529 Plans[45] will see college savings for their families grow tax free.[46] Those who make use of these tax advantages will likely incur less student debt in educating their families. Further, for the lucky recipient of a gift or inheritance, this addition to personal wealth comes tax free.[47] These tax benefits are significant contributors to building wealth for those who can use them but are in effect paid for by those for whom they are inaccessible.[48]

B. The Racial Homeownership Gap

Owning one's own home in the neighborhood of one's choice has long been described as the American Dream.[49] It is a dream that encompasses many goals. In addition to providing status, shelter, and stability, it has been a strategy that has enabled households to build wealth. More accurately, homeownership has disproportionately enabled more than 70 percent of white households to build wealth with the assistance of rising housing markets and trillions of dollars in tax benefits while almost 60 percent of Black families have been left behind.[50] These homeownership rates have been relatively stable since the 1970s.[51] However, the gap is growing. In 2020 it was 28.7

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45. I.R.C. § 529. All references are to the Internal Revenue Code of 1986 as amended unless otherwise noted. So-called "529 plans" or "qualified tuition plans" are "designed to enourage saving for future education costs." *An Introduction to 529 Plans*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/reportspubs/investor-publications/investorpubsintro529htm.html (May 29, 2018).

46. I.R.C. § 529. New York State adds a further wealth enhancing element—an income tax deduction for donations of up to $10,000 a year for married couples and $5,000 for unmarrieds. *Direct Plan Tax Benefits*, *Why Choose NY 529 Direct Plan?*, NY's 529 Coll. Sav. Program, https://www.nysaves.org/home/why-ny-529-direct-plan/highlights.html (last visited Apr. 24, 2022).

47. I.R.C. § 102.

48. *See How Tax Laws Disadvantage Black Americans but Subsidize White Americans*, PBS NewsHour (May 16, 2021), https://www.pbs.org/newshour/show/how-tax-laws-disadvantage-black-americans-but-subsidize-white-americans.

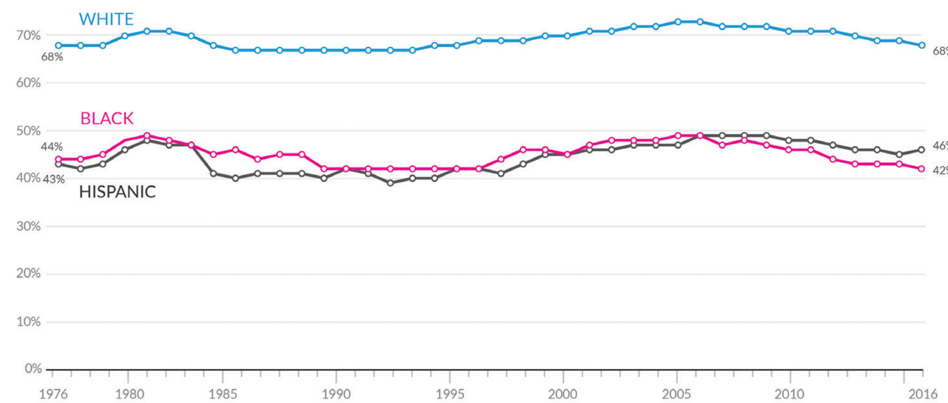
49. Margery Austin Turner & Felicity Skidmore, Mortgage Lending Discrimination 1 (1999) (refining the definition of "American Dream" insightfully by adding to its component of homeownership "in the neighborhood of one's choice").

50. *Compare* Shawn Harrison, *How Inequities in U.S. Taxation Can Perpetuate Systemic Racism* (Apr. 20, 2021), https://equitablegrowth.org/how-inequities-in-u-s-taxation-can-perpetuate-systemic-racism/ (attributing major tax benefits for whites to their respective incomes), *with* Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, Brookings (Dec. 9, 2020), https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/ (finding that certain tax policies perpetuate discrimination and exploitation of Blacks).

51. *See* U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Second Quarter (2021); *Nine Charts, supra* note 4 (reporting that roughly 42 percent of Black families owned homes versus 68 percent of white families in 2016). The story for Hispanic families has very much paralleled that of Black families. *Nine Charts*, *supra* note 4.

percent, an increase over the previous two-plus decades.[52] The white homeownership rate grew by 3.3 percent between 1994 and 2019, while the Black homeownership rate declined by 0.2 percent.[53] And it is likely that the COVID-19 pandemic caused a disproportionate decline in Black homeownership.[54] That is what happened in the Great Recession of 2008 when white homeownership declined by 2.43 percent but Black homeownership fell by 9.07 percent.[55]

Figure 4 Homeownership Rate by Race and Ethnicity, 1976–2016[56]



It took about one hundred years for Black families to reach peak levels of homeownership.[57] In 1870, five years after the Thirteenth Amendment outlawed slavery throughout the United States,[58] about 8 percent of households headed by Black men of prime working age owned their own homes.[59] At that time, some 57 percent of households headed by white men were homeowners.[60] The racial homeownership gap was 49 percent. By 1900, the homeownership rate for Black households had more than doubled, while

52. Lawrence Yun et al., Nat'l Ass'n of Realtors, Snapshot of Race and Home Buying in America 7 (2022).

53. Jung Hyun Choi, *Breaking Down the Black-White Homeownership Gap*, Urb. Inst. (Feb. 21, 2020), https://www.urban.org/urban-wire/breaking-down-black-white-homeownership-gap.

54. Sharon Cornelissen & Alexander Hermann, *A Triple Pandemic? The Economic Impacts of COVID-19 Disproportionately Affect Black and Hispanic Households*, Joint Ctr. for Hous. Stud. Harv. Univ. (July 7, 2020), https://www.jchs.harvard.edu/blog/a-triple-pandemic-the-economic-impacts-of-covid-19-disproportionately-affect-black-and-hispanic-households.

55. White homeownership fell from 75 percent to 73.1 percent. *See* Choi, *supra* note 53. Black homeownership declined from 47.4 percent to 42.1 percent. *Id.*

56. *See Nine Charts*, *supra* note 4.

57. *See infra* Figure 5.

58. U.S. Const. amend. XII, § 1.

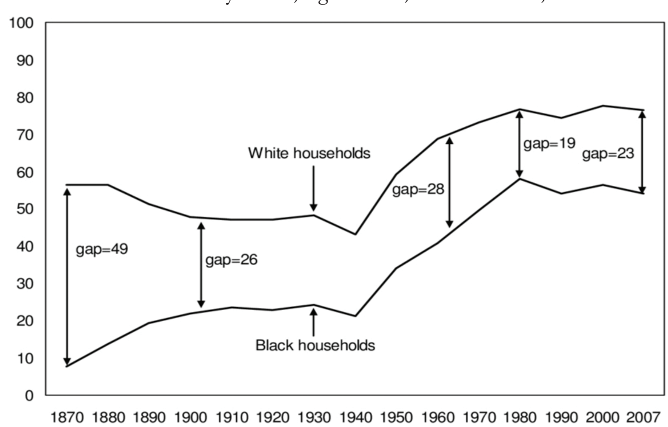
59. William J. Collins & Robert A. Margo, *Race and Home Ownership from the End of the Civil War to the Present*, 101 Am. Econ. Rev. 355, 357 (2011) [hereinafter *Civil War to Present*].

60. *Id.*

that of households headed by white men dropped to roughly 48 percent.[61] The racial homeownership gap was reduced to 26 percent.[62] This leap in Black homeownership likely reflects the new opportunities to own property and the fruits of one's own labor that Reconstruction brought to the formerly enslaved.[63] But the sharp ascent stopped there, coincidental with the violent end of Reconstruction[64] and enactment of Jim Crow laws.[65] Further progress was not made until the 1940s, with Black homeownership rates peaking in the 1980s before declining again to today's levels.[66]

What is not visible from this homeownership data, however, is the role that exceedingly generous tax benefits have played since the enactment of the first modern income tax law in 1913 in creating wealth and intergenerational advantage for the families of homeowners.[67]

Figure 5 Rates of Owner-Occupancy, 1870–2007:
Households Headed by Males, Ages 25–64, in Labor Force, Not in School[68]



61. *Id.* By then, the Black homeownership rate increased to 22 percent, allowing the racial gap in homeownership to drop by about 23 percent. *Id.*

62. *Id.*

63. *Id.* at 355 (noting that the majority of Blacks in the postbellum South could only rely on becoming a farm owner through moving up the agricultural ladder due to their own or their parents' previous status as slaves).

64. Gregory P. Downs & Kate Masur, Nat'l Park Serv., The Era of Reconstruction, 1861–1900: A National Historic Landmarks Theme Study 1–8 (2017).

65. Dedrick Asante-Muhammad et al., Nat'l Cmty. Reinvestment Coal., 60% Black Homeownership: A Radical Goal for Black Wealth Development 5, 13 (2021).

66. *See infra* Figure 5.

67. *See* U.S. Const. amend. XVI; Revenue Act of 1913, ch. 16, § 2, 38 Stat. 114, 166 (codified at 26 U.S.C. §§ 163(h), 164(a)); *see also* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 11 (1916) (holding that the Sixteenth Amendment provides a power to levy an income tax not subject to the regulation of apportionment applicable to all other direct taxes); William J. Collins & Robert A. Margo, *Race and Home Ownership, 1900 to 1990*, at 23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7277, 1999) (adding that whites benefitted disproportionately from the tax code because Black Americans had lower taxable income, were less likely to be homeowners, and had lower housing value than whites).

68. *Civil War to Present*, *supra* note 59.

III. TAX BENEFITS CONFERRED ON HOMEOWNERSHIP PERPETUATE THE RACIAL WEALTH GAP

Racial disparities in homeownership have been one of the most significant factors contributing to the racial wealth gap. And the trillions of dollars in tax benefits that are bestowed upon homeowners have themselves been an important factor in the creation and distribution of wealth. It is important to understand both the scale of these tax subsidies and the mechanisms of tax law that create them.

Taxation is ultimately a zero-sum game. Tax rates are set to produce the required amount of revenue assuming a given base of taxable income. If the taxable income base is reduced by giving one taxpayer a deduction or tax credit or exempting them from taxation altogether, then the tax burden on everyone else will have to be increased to make up the difference.

For example, if the required amount of tax revenue is $100 and taxpayers A and B each have $500 of taxable income, a tax rate of 10 percent will produce the necessary $100 in revenue from the combined A-plus-B tax base of $1,000. A and B will each pay $50 in tax. But if A is allowed a deduction of $200 and B is not, then A's taxable income will be reduced to $300, and the taxable income base will fall to $800. At the 10 percent tax rate, only $80 in tax revenue will be produced in the aggregate. To produce the needed $100 in tax revenue, the tax rate must be raised to 12.5 percent. A will then pay $37.50 in tax ($300 x 12.5 percent), saving $12.50 when compared to A's prior tax bill of $50. But B will have to pay $62.50 ($500 x 12.5 percent), which is $12.50 more than what B owed before A was allowed a $200 deduction. It is a heads-I-win, tails-you-lose result for A. For B it is simply a lose-lose.

The examination of tax expenditures below illustrates the scale of wealth building that tax benefits have provided to homeowners over the past decades at the expense of taxpayers who do not own their own homes. An explication of the tax structures that have created present conditions follows.

A. Tax Expenditure Budget

Tax subsidies for owner-occupied housing in 2022 alone are expected to exceed $213.7 billion in lost revenue.[69] This information is readily available because since 1974, the U.S. Treasury has been required to publish a list of the revenue losses attributable to tax benefits that are unrelated to basic principles of taxation such as ability to pay.[70] Called the tax expenditure "budget," it was the idea of tax professor

69. Calculations by author and adjusted for 2022 dollar amounts based on projected 2022 tax expenditures. *See* Off. Tax Analysis, U.S. Dep't Treasury Tax Expenditures (2022) [hereinafter 2022 Tax Expenditures]; Ann F. Thomas, Table of Tax Expenditures for Owner-Occupied Housing with Constant Dollars 1974–2017, at 8 (Apr. 22, 2022) [hereinafter Owner-Occupied Housing Table] (unpublished manuscript) (on file with author).

70. The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 203, 88 Stat. 297, 512 (1974); *see also* 2022 Tax Expenditures, *supra* note 69, at 1. Tax expenditure reports and tables are accessible online. *See, e.g.*, Budget of the United States Government, Special Analyses, FRASER, https://fraser.stlouisfed.org/title/budget-united-states-government-special-analyses-126?browse=1960s [hereinafter Expenditure Tables 1976–1990] (last visited May 5, 2022)

Stanley S. Surrey when he served as assistant secretary of the Treasury in the 1960s.[71] Its purpose is to create greater transparency in policymaking and the use of federal government resources.[72] The concept is that a decision by Congress to give a tax credit for, say, the purchase of an electric car, has the same fiscal impact as a decision to authorize the Deparment of Transportation to send the electric car–buyer a check. That is, it reduces the resources available for other parts of the federal budget.

While tax expenditures are equivalent to the direct programmatic outlays by the federal government included in the federal budget each year, they do not have a line in the federal budget because they are delivered through the Internal Revenue Code (IRC) as a reduction in individual or business tax liability. Less visible politically,[73] there may be less public scrutiny and hence less accountability for the policy decisions they effectuate. Indeed, once embedded in the tax law, these expenditures can become separated from wider political discourse about the policies they serve. This has been the situation with respect to the tax benefits of homeownership until very recently. The trillions of dollars of benefits conferred on homeowners are submerged in the intricacies of the IRC and rarely added up for public discussion.[74] To put the $213.7 billion in tax expenditures for homeowners in perspective, the fiscal year 2022 budget request for the entire U.S. Navy was only slightly smaller, at $211.7 billion.[75]

Historically, total tax expenditures for owner-occupied housing have been the most expensive category in the list of tax subsidies.[76] The high to date was in 2017, the year before the Tax Cuts and Jobs Act (TCJA) took effect to cut back some of

(go to "Statistical Data" and then click "Tax Expenditures"); Budget of the United States Government, FRASER, https://fraser.stlouisfed.org/title/54 [hereinafter Expenditure Tables 1991–1994] (last visited May 5, 2022) (click "ALL ISSUES" and then go to left margin and click desired decade (e.g., "1990s") and then click desired fiscal year (e.g., "Fiscal Year 1992")); Budget of the United States Government: Analytical Perspectives, FRASER, https://fraser.stlouisfed.org/title/budget-united-states-government-analytical-perspectives-425?browse=1990s [hereinafter Expenditure Tables 1995–2023] (last visited May 5, 2022) (click "ALL ISSUES" and then go to left margin and click desired decade (e.g., "2010s") and then click desired fiscal year (e.g., "Fiscal Year 2018")).

71. *Stanley S. Surrey, 74; Taxation Law Expert*, N.Y. Times, Aug. 28, 1984, B7.

72. Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 Harv. L. Rev. 491–98 (1985) (reviewing Stanley S. Surrey & Paul R. McDaniel, Tax Expenditures (1985)).

73. *See* Tax Pol'y Ctr., Briefing Book 112–16 (2020) [hereinafter Briefing Book] (explaining the political appeal of tax expenditures and the controversies surrounding it).

74. *See infra* pp. 259–69. Even prominent tax law commentators do not usually present the issues from the total tax expenditure perspective. *See, e.g.*, Dorothy Brown, The Whiteness of Wealth 206–210 (2022); Dennis J. Ventry, Jr., *The Fake Third Rail of Tax Reform*, 135 Tax Notes 181, 182–86 (2012).

75. Off. of the Under Sec'y of Def. (Comptroller)/Chief Fin. Off., U.S. Dep't of Def., Defense Budget Overview: United States Department of Defense Fiscal Year 2022 Budget Request app. A tbl.A-2 (2021); *see* sources cited *supra* note 69 and accompanying text (estimating $213.7 billion in tax expenditures for homeowners).

76. 2022 Tax Expenditures, *supra* note 69. Four tax expenditures for homeowners are now reported by Treasury: the home mortgage interest deduction (HMID), real property tax deduction, exclusion of gain on sale of principal residence, and exclusion of imputed rental icome.

those tax benefits.[77] At that point, federal tax expenditures for homeowners totaled approximately $300.9 billion.[78] From 2007 through 2016, the tax expenditure budget for owner-occupied housing averaged $227.8 billion per year.[79] At that rate, one year of homeowner tax expenditures could fund the federal judiciary's budget for twenty.[80]

In the zero-sum game that is tax policy, this means that non-homeowners are paying more tax so that homeowners can pay less.[81] Renters, including close to 60 percent of Black American households and nearly 52 percent of "Hispanic- or Latino-led households," are subsidizing the American Dream for others at the expense of building their own assets and financial well-being.[82]

B. Eight Tax Breaks for Homeowners

Eight different federal tax benefits are associated with homeownership. Among the most familiar are the home mortgage interest deduction (HMID), the deduction for real property tax, the exclusion of up to $250,000 ($500,000 for married couples) in gains on the sale of a principal residence, and the taxation of any remaining profit at long-term capital gains rates.[83] Relatedly but perhaps less familiar is the use of the home as collateral for tax free borrowing.[84] Another tax benefit is the step up in basis upon the death of the homeowner which entirely eliminates capital gains for the heirs.[85] Moreover, with unified estate and gift credit at $12.06 million for individuals ($24.12 million for married couples),[86] the family home is virtually exempt from the

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

78. Calculation by author based on 2018 tax expenditures and adjusted to constant dollars (income after adjustment for inflation) for January 1, 2022, using an inflation calculator. Owner-Occupied Housing Table, *supra* note 69; *see* Off. of Mgmt. & Budget, Exec. Off. of the President, Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2018, at 130–31 tbl.13-1 (2017) [hereinafter FY2018 Budget]; *CPI Inflation Calculator*, U.S. Bureau Lab. Stats., https://data.bls.gov/cgi-bin/cpicalc.pl (last visited May 1, 2022).

79. Owner-Occupied Housing Table, *supra* note 69; FY2018 Budget, *supra* note 78. Calculation by author and adjusted for 2022 dollar amounts.

80. Calculation by author based on a ten-year projection of the judicial branch budget at approximately $101.9 billion. Off. of Mgmt. & Budget, Exec. Off. of the President, Table 21-1. Federal Budget by Agency and Account, FY 2022 President's Budget Policy 23 (2021).

81. *See* Jenny Schuetz, *Under US Housing Policies, Homeowners Mostly Win, While Renters Mostly Lose*, Brookings (July 10, 2018), https://www.brookings.edu/research/under-us-housing-policies-homeowners-mostly-win-while-renters-mostly-lose/.

82. Drew DeSilver, *As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S.*, Pew Rsch. Ctr. (Aug. 2, 2021), https://www.pewresearch.org/fact-tank/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/; *see* Schuetz, *supra* note 81.

83. I.R.C. §§ 163(h), 164(a)(1), 121(b); *see* § 1(h).

84. *See* discussion *infra* pp. 263–64.

85. I.R.C. § 1014; *see* discussion *infra* pp. 265–66.

86. Rev. Proc. 2021-45, 2021-48 I.R.B. 764.

federal wealth transfer taxes. But the most valuable and least understood tax benefit for homeowners is the exclusion from tax of their imputed rental income.[87]

1. Thes HMID and the Real Property Tax Deduction

Both the home mortgage interest deduction and the deduction for real property tax have been features of the federal tax system since 1913.[88] The HMID allows homeowners to reduce their taxable income by deducting mortgage interest incurred on up to two homes.[89] Comparatively, the real property tax deduction falls under the state and local tax deduction umbrella, which allows homeowners to reduce their taxable income up to a certain aggregate amount.[90] Corresponding both deductions is a drain on the tax revenue that the government must offset through some other means.

Prior to 1987, interest on home mortgages of any amount and incurred at any time and for any purpose (other than for the purpose of purchasing tax-free municipal bonds) was fully deductible.[91] Since then, the deduction has generally been limited to interest on the first $1 million ($750,000 for 2018–2025)[92] of mortgage debt on up to two homes.[93] In less than fifty years, going back only to 1974, before which the tax expenditure numbers were not publicly available, the total revenue loss from the HMID alone has been approximately $3.594 trillion, or an average of about $73.35 billion per year.[94]

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87. *See* discussion *infra* pp. 266–69.

88. Revenue Act of 1913, ch. 16, § 2(B), 38 Stat. 114, 167 (now codified at I.R.C. §§ 163(h), 164(a)).

89. Mark P. Keightley, Cong. Rsch. Serv., IF11063, 2019 Tax Filing Season (2018 Tax Year): The Mortgage Interest Deduction (2019); *see also* Scott Eastman & Anna Tyger, Tax Found., No. 671, The Home Mortgage Interest Deduction 2 (2019).

90. I.R.C. §§ 163(h), 164; Sean Lowry, Cong. Rsch. Serv., IF11091, 2019 Tax Filing Season (2018 Tax Year): Itemized Deductions (2019); *see also State and Local Tax (SALT) Deduction*, Tax Found. [hereinafter *SALT Deduction*], https://taxfoundation.org/tax-basics/salt-deduction/ (last visited May 1, 2022).

91. Staff of the J. Comm. on Tax'n, 99th Cong., General Explanation of the Tax Reform Act of 1986, at 262–70 (J. Comm. Print 1987).

92. For a general understanding of the HMID, see Julia Kagan, *Mortgage Interest Deduction*, Investopedia, https://www.investopedia.com/terms/home-mortgage-interest.asp (Sept. 28, 2021). The TCJA reduced this limit to $750,000, effective 2018–2025. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11043, 131 Stat. 2054, 2086 (codified at I.R.C. § 163(h)(3)(F)).

93. In 1986, HMID was limited to the interest on the amount of the loan that did not exceed the basis of the principal residence and one other home. Tax Reform Act of 1986, Pub. L. No. 99-514, § 511, 100 Stat. 2085, 2244, 2247 (codified at I.R.C. § 163(d) and (h)). In 1988, the HMID was limited to the interest on the first $1 million of mortgage loans used for the acquisition or renovation of homes and home equity loans of up to $100,000. Omnibus Budget Reconciliation Act of 1987 § 10102. The TCJA set a $750,000 limit for mortgages created in the years 2018 through 2025. Tax Cuts and Jobs Act of 2017 § 11043.

94. Calculations by author and adjusted for 2022 dollar amounts. *See* 2022 Tax Expenditures, *supra* note 69. From time to time there have been general limitations on itemized deductions overall. *See, e.g.*, I.R.C. § 68.

Likewise, for more than one hundred years the deduction for real property tax was unlimited.[95] Between 1974 and 2017, the real property tax deduction for owner-occupied homes resulted in a revenue loss of approximately $1.257 trillion, or an average of about $28.57 billion a year. [96] After the 2017 TCJA limited federal income tax deductions for all state and local taxes paid to $10,000 per federal tax return and nearly doubled the standard deduction, the number of tax returns claiming a deduction for real property tax fell dramatically. Yet in 2020, the revenue loss from this deduction still hit $6.450 billion.[97]

Although all homeowners are permitted to claim both the HMID and the real property tax deduction as itemized deductions, most do not. Since 1944, taxpayers have had the opportunity to choose the standard deduction if it is larger than the sum of all of their itemized deductions—that is, larger than the sum of their HMID plus their real property tax deduction—in any given year.[98] Thus in 2017 when the standard deduction for a married couple was $12,700, about 31 percent of individual tax returns were itemized.[99] Approximately 22 percent of returns filed claimed the HMID, and 13 percent claimed the deduction for real property tax.[100] With the near doubling of the standard deduction in the 2017 TCJA,[101] the number of filers who claimed HMID and real property tax deductions as itemizers has fallen off by about 60 percent.[102] Tax expenditures for the HMID fell to $25.13 billion in 2019, less

95. Tax Cuts and Jobs Act of 2017 § 11042.

96. Calculations by author and adjusted for 2022 dollar amounts. *See* Owner-Occupied Housing Table, *supra* note 69.

97. Calculations by author based on 2020 tax expenditures and adjusted to constant dollars for January 1, 2022, using an inflation calculator. Off. of Mgmt. & Budget, Exec. Off. of the President, Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2020, at 174–76 tbl.16-1 (2019); *CPI Inflation Calculator*, *supra* note 78.

98. I.R.C. § 63(b); Joseph J. Thorndike, *Tax History: The Love-Hate Relationship with the Standard Deduction*, Tax Hist. Project (Mar. 27, 2014), http://www.taxhistory.org/thp/readings.nsf/ArtWeb/FD4865793851996185257D1B0041C875?OpenDocument.

99. Adrian Dungan et al., IRS, Dep't of the Treasury, Pub. No. 4801, Individual Income Tax Returns Line Item Estimates 2017, at 7–8 (2019) [hereinafter 2017 IRS Pub. No. 4801]; Rev. Proc. 2016-55, 2016-45 I.R.B. 707.

100. 2017 IRS Pub. No. 4801, *supra* note 99 (providing Schedule A itemized deduction filings for 2017).

101. Staff of J. Comm. on Tax'n, 115th Cong., General Explanation of Public Law 115-97, at 67 (J. Comm. Print 2018). For 2018, the standard deduction increased to $24,000 for joint filers, up from $12,700 for 2017. *Id.* For single filers and married filers filing separately, the deduction amount increased to $12,000, up from $6,350. *Id.* For heads of households, the deduction was $18,000, up from $9,350. *Id.*

102. *Id.* at 23; Adrian Dungan & Michael Parisi, IRS, Dep't of the Treasury, Pub. No. 4801, Individual Income Tax Returns Line Item Estimates 2018, at 7–8 (2020) (providing line item estimates and Schedule A itemized deductions). *Compare id.* at 34 (showing that 13.7 billion HMID and 15.4 billion real property tax deductions were claimed in 2018), *with* 2017 IRS Pub. No. 4801, *supra* note 99, at 32 (showing that 33.4 billion HMID and 39.1 billion real property tax deductions were claimed in 2017).

than half of the $68.61 billion in 2017; the revenue loss for the real property tax deduction declined from $33.71 billion to $6.01 billion.[103]

The wealth-generating mechanism of the HMID and real property tax deduction is simply that they allow the homeowner to pay each of these expenses with pre-tax income while the tenant must pay her rent from after-tax income. For example, if a residential tenant pays $1,000 a month in rent, it will take $13,333 of pre-tax income to cover her $12,000 annual rent bill if she is in the lowest bracket (10 percent) and $19,048 if she is in the top bracket (37 percent).[104] On the other hand, a homeowner paying $1,000 monthly for mortgage interest and real property tax only needs $12,000 of pre-tax income to cover those expenses because the HMID and real property tax deduction remove that $12,000 from her taxable income. If she is in the 10 percent bracket, these deductions save her $1,333; if in the 37 percent bracket, she saves $7,048.[105]

The $1,333 or $7,048 tax savings for the homeowner constitutes lost tax revenue. Aggregated from all taxpayers who enjoy them, these subsidies comprise the tax expenditures reported by the Treasury. In the 109 years since 1913, these tax expenditures have added trillions to the family wealth of homeowners.

2. *Tax Free Borrowing*

Another tax benefit that contributes to building the wealth of homeowners is the opportunity to raise cash from their homes on a tax-free basis without selling. This can be accomplished by using the home as collateral for a new loan. When the homeowner has sufficient equity in the home, lenders may be willing to take a second mortgage and provide financing for a purpose unrelated to the home, such as starting a new business, paying for a child's education, or investing in the stock market. The interest on such a financing may or may not be deductible depending on the use of the funds.[106] But the real tax benefit is that although the borrowing itself puts money into the hands of the homeowner, the amount borrowed is not taxed if it is a bona fide loan.[107] In this manner, the equity in the family home can be monetized tax free

103. Calculation by author based on 2017 and 2019 tax expenditures and adjusted to constant dollars for January 1, 2022, using an inflation calculator. Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 21–22 tbl.1 (2015) (providing 2017 estimate); Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 22–23 tbl.1 (2017) (providing 2019 estimate).

104. Calculations by author based on the tax gross-up formula: n = x/(1-tax rate), thus 12,000/(1-10%) = $13,333 or $12,000/(1-37%) = $19,048. Adam Hayes, *Gross-Up*, Investopedia, https://www.investopedia.com/terms/g/gross-up.asp (Mar. 4, 2021).

105. Calculations by author based on the tax gross-up formula.

106. *See* I.R.C. § 163(h) (listing categories of personal interest expense that individual taxpayers will be allowed to deduct).

107. Michael J. Graetz et al., Federal Income Taxation 177 (8th ed. 2018). A "bona fide loan" or "bona fide debt" is defined as "a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money." Treas. Reg. § 1.166-1(c) (2022); *see also* Memorandum from the Branch 1 Chief, Off. of the Assoc. Chief Couns. to the Assoc.

without selling the property. This tax benefit is not included in the tax expenditure budget at the present time.[108]

3. *Tax Benefits on the Sale of the Principal Residence*

In contrast, two other tax benefits for homeowners are only applicable when the home is sold. Most visible are the various mechanisms that Congress created over the past seventy or so years to enable homeowners to sell their principal residences without paying tax on the gain.

Beginning in 1951, when the post–World War II baby boom was in full swing and white flight to the suburbs was beginning,[109] Congress made the sale of a principal residence tax free to the extent that the proceeds of sale were rolled over into the purchase of a new principal residence.[110] In 1964, it added section 121 which provided an exclusion of gain for taxpayers age sixty-five and older who did not want to rollover their entire proceeds of sale into a new home.[111] Congress later enlarged and extended the exclusion to those fifty-five and over.[112] And in 1997, Congress scrapped the rollover approach altogether and enacted the current section 121 system, which allows qualifying homeowners of all ages to exclude up to $250,000 ($500,000 for married couples) of the gain on the sale of their principal residence.[113]

Under the current section 121 scheme, married homeowners who exclude the maximum of a gain of $500,000 on the sale of their principal residence will save $119,000.[114] There is no requirement to reinvest in another principal residence as

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Area Couns. 7 (Sept. 30, 2004) (on file with author) ("Generally, whether a transaction for federal income tax purposes constitutes a *bona fide* loan is a factual question . . . .").

108. Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures (2021) (providing 2022 estimate).

109. For more on zoning law and "white flight," see Chused, *supra* note 33, at 307.

110. I.R.C. of 1954, ch. 736, § 1016(a)(7), 68A Stat. 3, 300 (codified as amended in scattered sections of the I.R.C.). What became section 1034 in the 1954 I.R.C. was first added to the 1939 I.R.C. as section 112(n) by Public Law 83-591 in 1951.

The rollover in theory was a deferral because it required the basis of the new home to be reduced by the amount of gain deferred. I.R.C. § 1061(a)(7). But if the taxpayer held the home until death, the deferred gain was eliminated by the section 1014 basis step up to fair market value. *Id.* § 1014.

111. I.R.C. § 121.

112. Revenue Act of 1978, Pub. L. No. 95-600, § 404(c)(6), 92 Stat. 2763, 2869–70 (amending I.R.C. § 121); *see also* Staff of J. Comm. on Tax'n, 95th Cong., General Explanation of the Revenue Act of 1978, at 255–57 (J. Comm. Print 1979) [hereinafter General Explanation of the Revenue Act of 1978].

113. I.R.C. § 121; *see also* Staff of J. Comm. on Tax'n, 105th Cong., General Explanation of Tax Legislation Enacted in 1997, at 45 (J. Comm. Print 1997) [hereinafter General Explanation of Tax Legislation Enacted in 1997].

114. Calculation by author based on the $500,000 exclusion which would have otherwise been taxed at the top long-term capital gains rate of 20 percent as of 2022, in addition to the 3.8 percent tax added on by section 1411. I.R.C. § 1411.

there had been under prior law.[115] The homeowner is free to put the $500,000 or $250,000 to whatever welfare-enhancing use they choose. For 2022, it is estimated that the tax expenditure for the section 121 exclusion will be $41.8 billion.[116] Since 1974, the section 1034 rollover benefit and exclusions together have cost some $1.42 trillion in lost revenue.[117]

The second benefit on the sale of a principal residence is that any gain not excluded by one provision or another is taxed at the preferential, lower, long-term capital gains rates. With the top rate on ordinary income now at 37 percent,[118] the 23.8 percent maximum offered by the long-term rate represents a substantial tax savings.[119] The preferentially lower long-term capital gains tax rate is considered a tax expenditure but the U.S. Treasury's annual report does not break out the revenue losses attributable to the sale of homes.[120]

4. *Two Tax Benefits on the Death of the Homeowner*

Although it may seem macabre to frame it this way, the death of the homeowner gives rise to two other tax benefits related to the home. The first is the elimination of unrealized taxable gains for the heirs and estate. Upon the death of the homeowner the basis for measuring taxable gain on sale of the home is marked to market,[121] or, in other words, is adjusted to fair market value.[122] This is a substantial tax benefit if

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115. *Compare* James C. Smith & Walter Hellerstein, *State Taxation of Federally Deferred Income: The Interstate Dimension*, 44 Tax L. Rev. 349, 352 (1989) ("Under [former section] 1034, recognition of gain on a sale of a principal residence is deferred if another residence of equal or greater value is purchased within two years from the date of the sale."), *with* I.R.C. § 121(a) ("Gross income shall not include gain from the sale or exchange of property if . . . such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating [two] years or more."); *see also* General Explanation of Tax Legislation Enacted in 1997, *supra* note 113, at 54–56.

116. Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures tbl.1 (2021).

117. Expenditure Tables 1976–1990, *supra* note 70; Expenditure Tables 1991–1994, *supra* note 70; Expenditure Tables 1995–2023, *supra* note 70. Calculations by author and adjusted for 2022 dollar amounts.

118. I.R.C. § 1(j).

119. *See* I.R.C. §§ 1(h), 1(j), 1411. Long-term capital gains rates apply only if the home was owned for more than a year. I.R.C. § 1222(3). The Tax Reform Act of 1986 set 28 percent as the top tax rate on all income and eliminated the preferential long-term capital gains rates. *See* Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of the I.R.C.). It was revived in 1993 when the top rate on ordinary income rose to 39.6 percent. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (codified as amended in scattered sections of 7 U.S.C., 20 U.S.C., 21 U.S.C., and 26 U.S.C.).

120. *See, e.g.*, 2022 Tax Expenditures.

121. *See* Alicia Tuovila, *Mark to Market (MTM)*, Investopedia, https://www.investopedia.com/terms/m/marktomarket.asp (Dec. 31, 2021) ("Mark to market is an accounting practice that involves adjusting the value of an asset to reflect its value as determined by current market conditions.").

122. I.R.C. § 1014. For comparison, if the testator sells the home while they are alive, they will be taxed on any gain recognized, measured by the difference between the adjusted basis and the amount realized. *See* § 1001. The adjustment to fair market value on death eliminates the unrealized gain.

the home has appreciated in value since its purchase—it eliminates any taxable gain for the heirs.

The second tax benefit on the death of the homeowner is that, although the full value of the home is included in the decedent's estate and in theory is subject to the estate tax, with the current $12.06 million gift, estate, and generation-skipping tax exemption ($24.12 million for married couples),[123] very few estates and family homes are actually subject to the federal estate tax.[124] For context, only about 1,900 of the estates of some 2.8 million people who died in 2020 were expected to be taxable.[125] The portions of the tax expenditures involved here that are attributable to homes are not separately reported in the U.S. Treasury's annual tax expenditure budget.[126]

5. *Imputed Rental Income*

The exclusion from taxation of the net imputed rental income[127] from owner-occupied housing is the largest of all tax subsidies for homeowners but the least understood and the least discussed. This exclusion alone is expected to result in $130.88 billion in lost tax revenue in 2022.[128] The U.S. Treasury projects it will result in $1.6 trillion in foregone tax revenue from 2022 through 2031,[129] almost enough to fund the Food and Nutrition Service for ten years.[130]

All homeowners receive this tax benefit whether they claim the standard deduction or itemize and whether or not they are aware of it. Indeed, the exclusion of imputed rental income is so deeply embedded in the concept of homeownership in the United States that very few homeowners today are aware of it. Yet it has been a feature of the federal income tax since the Revenue Act of 1913.[131]

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123. Rev. Proc. 2021-45, 2021-48 I.R.B. 764.

124. *See* Briefing Book, *supra* note 73, at 406.

125. *Id.*

126. *See* Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 3–20 (2015) [hereinafter 2017 Tax Expenditures] (tax expenditure budget for FY2017); Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 3–21 (2016) [hereinafter 2018 Tax Expenditures] (tax expenditure budget for FY2018); Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 3–20 (2017) [hereinafter 2019 Tax Expenditures] (tax expenditure budget for FY2019).

127. In this article "net imputed rental income" is used interchangeably with "imputed rental income." "Net" in this case means imputed rental income after the subtraction of expenses that would be deductible if rented to a third party.

128. *See* U.S. Dep't of the Treasury, Off. of Tax Analysis, Tax Expenditures 32 tbl.3 (2021) (ranking estimated income tax expenditures for fiscal years 2021 to 2023 by total).

129. *See id.* at 22 tbl.1 (listing estimates of total income tax expenditures for fiscal years 2021 to 2031).

130. *See Federal Spending by Category and Agency*, Data Lab, https://datalab.usaspending.gov/americas-finance-guide/spending/categories/ (last visited Apr. 16, 2022) (choose "Income Security" from chart) (reporting $168.1 billion spent on food and nutrition assistance in 2021).

131. Revenue Act of 1913, ch. 16, § II(G) 38 Stat. 114, 172–74 (codified as amended in scattered sections of the I.R.C.) (silent on rent deduction and imputed rental income).

The Treasury Department only started reporting the revenue loss from the exclusion of net imputed rental income in 2004, although this tax benefit goes back to the beginning of the modern income tax.[132] For each of the past six years, this exclusion has been the second largest tax expenditure, one spot behind the exclusion from employee income of employer contributions to health insurance premiums.[133] The exclusion of imputed rental income has cost approximately $1.57 trillion in lost tax revenue since 2004.[134]

But what is "imputed rental income"? The analysis is as follows. The homeowner's home is a capital asset that can command income for its "use," that is, its rental value. Economists describe it as "owner-occupied housing."[135] If the owner rents it out to a third party, the owner will receive actual rental income which will be taxable to her. If the owner chooses to live in it herself, she is still enjoying the financial benefit of its rental value, consuming it herself rather than using it to generate market income. The value of the free rent is the imputed rental income. Among economists and policymakers, the rental value of owner-occupied housing is so widely recognized as a financial asset that it is included in determining eligibility for welfare benefits.[136]

For example, if X owns a house and rents it to Y for $10,000 a year and Y rents the house that she owns to Z for $10,000, both X and Y will have $10,000 of rental income subject to tax. If instead Y decides to live in the house that she owns, she is in effect renting it to herself for free. Economic theory would say that Y has "imputed rental income"—that the decision to rent it to herself instead of to Z does not alter the value that she receives from her investment in the house. The homeowner is simply collecting the $10,000 return on her investment in the form of free rent. And yet, under current income tax law, that $10,000 investment return is excluded from taxation.[137]

Despite the force of this analysis, modern tax systems rarely attempt to tax the imputed rental value of owner-occupied housing with the result being that homeowners

132. Off. of Mgmt. & Budget, Exec. Off. of the President, Analytical Perspectives: Budget of the United States Government Fiscal Year 2004, at 140 tbl.3 (2003).

133. Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 33 tbl.3 (2015) (tax expenditure budget for FY2016); 2017 Tax Expenditures, *supra* note 126, at 34 tbl.3; 2018 Tax Expenditures, *supra* note 126, at 34 tbl.3; 2019 Tax Expenditures, *supra* note 126, at 33 tbl.3; Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 40 tbl.3 (2020) (providing 2021 estimate); Off. of Tax Analysis, U.S. Dep't of the Treasury, Tax Expenditures 33 tbl.3 (2021) (providing 2022 estimate).

134. Calculation by author and adjusted for 2022 dollar amounts. Expenditure Tables 1995–2023, *supra* note 70.

135. *Cf.* U.S. Census, Quarterly Residential Vacancies and Homeownership, First Quarter 2022 (2022).

136. U.S. Dep't of Com., Bureau of Econ. Analysis, Chapter 12: Rental Income of Persons 9 (2022).

137. *See* Steve R. Johnson, *Don't Tax Imputed Income from Owner-Occupied Houses*, A.B.A. New Quarterly Section on Tax'n, Winter 2013, 17, 17 (emphasizing that U.S. income tax excludes imputed rental income).

enjoy a large and almost invisible tax subsidy.[138] In recent years, however, as concerns about income inequality have grown,[139] there is renewed interest in understanding the scope and impact of this sizable tax subsidy for homeowners.[140] It is notably regressive; the wealthiest benefit the most. Families with the most expensive homes typically have higher incomes and are in higher tax brackets. The exclusion of $100,000 of imputed rental income for someone in the top 37 percent bracket will save them $37,000 in tax. For someone in the 20 percent bracket, it will save only $20,000.[141] And once again, it is a subsidy for homeowners paid for by renters.

Perhaps surprisingly, the inequity of allowing net imputed rental income from owner-occupied housing to escape taxation was recognized and addressed in U.S. tax law in the nineteenth century, in the Civil War income tax laws.[142] In the Act of March 3, 1863, Congress created a deduction for the amount of residential rent "actually paid" by tenants as an alternative to attempting to tax the imputed rental income from owner-occupied homes.[143] Commissioner of Internal Revenue Joseph J. Lewis vehemently argued for repealing the rent deduction and taxing imputed rental income itself, but to no avail.[144] Indeed, in the Revenue Act of June 30, 1864,

138. *See, e.g.*, Serena Fatica & Doris Prammer, *Housing and the Tax System* 12 n.6 (Eur. Cent. Bank, Working Paper No. 2087, 2017) ("In the Netherlands and Luxembourg the imputed rental income is taxed, but at a very low level."); *see also id.* at 22 tbl.4.

139. *See* James R. Hines, Jr., *Income Inequality, Progressive Taxation, and Tax Expenditures*, *in* The Political Economy of Inequality 145–66 (Sisay Asefa & Wei-Chiao Huang eds., 2020) (discussing growing concerns about income inequality in the United States).

140. *See* Eur. Comm'n, Tax Reforms in EU Member States: Tax Policy Challenges for Economic Growth and Fiscal Responsibility 81–86 (2012); Bruce Bartlett, *Taxing Homeowners as if They Were Landlords*, N.Y. Times: Economix (Sept. 3, 2013), https://economix.blogs.nytimes.com/2013/09/03/taxing-homeowners-as-if-they-were-landlords/.

141. *See generally* Nina Chien & Suzanne Macartney, What Happens When People Increase Their Earnings? Effective Marginal Tax Rates for Low-Income Households (2019) (comparing marginal tax rates among various households).

142. *See* Richard Goode, *Imputed Rent of Owner-Occupied Dwellings Under the Income Tax*, 15 J. Fin. 504, 504 (1960) (stating that imputed rental income has never been included in the base federal income tax); Joan Ruhtenberg, *Federal Income Tax Discrimination Between Homeowners and Renters: A Proposed Solution*, 12 Ind. L. Rev. 583, 584 (1979) (footnotes omitted) ("Under the Civil War income tax laws, tenants were allowed to deduct rent, and homeowners were allowed to deduct mortgage interest and property taxes.").

143. Act of Mar. 3, 1863, ch. 74, § 11, 12 Stat. 713, 723; Joseph A. Hill, *The Civil War Income Tax*, 8 Q.J. Econ. 416, 432 (1894); Internal Revenue Act of 1864, ch. 173, § 117, 13 Stat. 223, 281–82. The tenant's rent deduction also appears as one of the permitted deductions on Civil War–era income tax forms. *See 1862 Federal Income Tax Return*, TaxAnalysts (Jan. 1, 2004), http://www.taxhistory.org/thp/readings.nsf/ArtWeb/9134D0498E7C820085256E4400040844?OpenDocument.

144. Off. of Internal Revenue, U.S. Dep't of the Treasury, Report of the Commissioner of Internal Revenue on the Operations of the Internal Revenue System for the Year Ending June 30, 1863, at 11 (1864).

> I am unable to see why a man who consumes his income should not be taxed for it as well as one who saves it, nor why one who lives in his own house should not be taxed on its rental value, as much as if he let it to another and put the rent in his purse.

Off. of Internal Revenue, U.S. Dep't of the Treasury, Report of the Commissioner of Internal Revenue on the Operations of the Internal Revenue System for the Year Ending

Congress continued the rent deduction and explicitly provided that "the rental value of any homestead used or occupied by any person or by his family, in his own right or in the right of his wife, shall not be included and assessed as part of his income."[145] Homeowners were not taxed on their imputed rental income and renters were given rough justice through the rent deduction.

Since the Act of June 30, 1864, federal income tax law has been silent on the subjects of taxing imputed rental income from owner-occupied housing and allowing deductions for residential renters, leaving homeowners untaxed and renters without a compensating adjustment.[146] Edwin R. A. Seligman, the leading American tax theorist and proponent of the income tax, described this policy posture as "manifestly an injustice."[147]

6. *In Summary*

Perhaps surprisingly, at this point it is not possible to be precise about how many white families and how many Black American families have claimed the HMID or the real property tax deduction, or whether one demographic over another has taken advantage of the exclusions of gains on the sale of their homes. This is because the Internal Revenue Service does not collect information about the race of taxpayers.[148] But it is clear that all homeowners benefit from the exclusion of imputed rental income and that some 70 percent of white families are enriched by this policy, while almost 60 percent of Black families are paying higher taxes to make up for the lost revenue.[149] Clearly a lose-lose situation indeed when it comes to narrowing the racial wealth gap.

June 30, 1864, at 13 (1865); *see also* Hill, *supra* note 143, at 433 ("[T]he deduction . . . for rent actually paid ought to be fixed, so that owners and renters should enjoy equal privileges under the law.").

145. Internal Revenue Act of 1864, ch. 173, 13 Stat. 223 § 117.

146. Revenue Act of 1870, ch. 255, 16 Stat. 256. Congress allowed the last of the Civil War income tax acts to expire in 1872 and it was not until 1894 that another income tax was enacted, though without the return of the rent deduction or mention of imputed rental income. Act of Aug. 27, 1894, ch. 349, 28 Stat. 509. It was declared unconstitutional in *Pollock v. Farmers' Loan & Trust Co.* within a year of its enactment. 157 U.S. 429 (1895). The Revenue Act of 1913 was then enacted after ratification of the Sixteenth Amendment cleared away the constitutional impediment at issue in *Pollock*. *See* Revenue Act of 1913, ch. 16, 38 Stat. 114 (codified as amended in scattered sections of the I.R.C.); Edwin R. A. Seligman, *The Income Tax*, 9 Pol. Sci. Q. 625 (1894) [hereinafter Seligman 1894]; Edwin R. A. Seligman, The Income Tax 512 (A.M. Kelly 2d ed. 1970) (1914).

147. Seligman 1894, *supra* note 146, at 625. For a summary of Seligman's achievements, see *E.R.A. Seligman, Economist, 78, Dies*, N.Y. Times, July 19, 1939, at O26.

148. *See generally* Jeremy Bearer-Friendly, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 Tax L. Rev. 1 (2019) (discussing the impact of government access to information about the race and ethnicity of taxpayers); Benjamin H. Harris & Lucie Parker, The Mortgage Interest Deduction Across Zip Codes 2–7 (2014) (analyzing mortgage interest characteristics using zip code data). President Biden has ordered the creation of an Equitable Data Working Group to address the problem that many "federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables." Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

149. *See* discussion *supra* Section III.B(5).

Figure 6 Tax Expenditures for Homeownership (2022 dollars in billions): Summary, 1974–2022[150]

	2022	**1974–2022**	**2020–2030**
HMID	26.17	3,593.98	595.98
Real property tax deduction	6.45	1,301.54	294.60
Capital gains exclusions I.R.C. §§ 121, 1034	41.80	1,420.08	500.66
Imputed rental income exclusion (2004–2022)	139.29	1,355.66	1,645.98
Total	213.71	7,671.26	3,037.22

C. Beyond the Tax Expenditure Budget—the Taxpayer's Perspective

What is the impact of these billions and trillions of tax expenditures on actual families? The answer depends on a myriad of particular circumstances such as the size of the mortgage, real property tax rates, local patterns in appreciation, and duration of ownership. An exploration of a range of typical circumstances would go far to illuminate this important question. In the meantime, one commentator has made a noteworthy effort to quantify the contribution to wealth from the federal and state tax benefits of homeownership: Based on the purchase of a modest home in California by a married couple for $20,000 in 1965 with a thirty-year fixed-rate mortgage plus a 10 percent interest rate, the use of part of the home for a daycare business, and a later $30,000 expansion, he estimated that the federal income tax savings alone over forty-nine years exceeded $182,000 with the result that this family enjoyed the equivalent of an additional $912,300 in income.[151] Valued at $1 million at the death of the parents, their child inherited the home free of tax and with a fair market value basis that would allow her to sell for $1 million in cash without paying any tax.[152] Or live in it and reap the homeowners' tax benefits for another generation.[153]

IV. STRUCTURAL BARRIERS TO BLACK HOMEOWNERSHIP

With billions of dollars in tax benefits going to homeowners every year, why have generations of Black Americans disproportionately chosen to be renters rather than homeowners? The short answer is that historically, Black families have had little choice. Overt racial discrimination and the structural racism that such past discrimination created prevented Black American families from achieving the

150. Calculations by author and adjusted for 2022 dollar amounts in billions. Table 1 US Treasury Analytic Perspectives, Tax Expenditures, 1975–2021.

151. David Hasen, How I Learned to Stop Worrying and Love Our Homeowner Tax Rules 2–3, 9 tbl.1 (2015).

152. *Id.* at 2; *see* discussion *supra* pp. 265–66.

153. *Id.* at 9 tbl.1.

American Dream for most of the twentieth century,[154] and in this century there has been little improvement. Those structures fueled the racial wealth gap back then and continue to do so today.

There are three essentials for purchasing a home in the United States: a willing seller of desirable housing, a lender, and some cash for the down payment. For most Black Americans, racialized social and legal structures have put all three of these essentials out of reach.[155]

A. Willing Sellers and Residential Segregation

A new body of scholarship has documented laws and government policies that barred Black American families from property ownership well into the twentieth century, created racialized ghettos, turned integrated communities into segregated neighborhoods, supported private discrimination in housing,[156] and denied Black veterans their due under the G.I. Bill.[157] These legal barriers and active discrimination excluded Black families from buying homes in desirable neighborhoods and participating in the waves of real estate appreciation that built wealth for white, middle-class families in the years after World War II.[158]

B. Mortgage Lenders

For many Black Americans, finding a mortgage lender was and is a hurdle. The problem is two-fold: Lenders either refuse to lend when the home is in a predominantly Black community, like the ones created by the federal government itself, or lenders require larger down payments, more collateral, and higher interest rates of Black borrowers.[159] Many of these hurdles were erected by federal government policy such as mortgage and insurance redlining that made many Black neighborhoods into no-loan, no-investment zones.[160] Similarly, the Federal Housing Administration—the federal mortgage insurer—kept Black families out of integrated and white-majority neighborhoods by promoting racialized zoning restrictions that prohibited the occupancy of houses "except by the races for which they were intended."[161]

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154. *See* Chused, *supra* note 36, at 321–25.

155. *Barriers to Minority Homeownership*, U.S. Dep't Hous. & Urb. Dev., https://archives.hud.gov/reports/barriers.cfm (Apr. 9, 2010).

156. For example, the notorious restrictive racial covenants for Levittown. Rothstein, *supra* note 28, at 156.

157. *See generally id.*; Sarah E. Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans* 2–10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9044, 2002) (comparing the effects of the G.I. Bill on Black and white veterans).

158. *See* Rothstein, *supra* note 28, at 139, 156.

159. *See id.*; Oliver & Shapiro, *supra* note 11, at 139–49.

160. Rothstein, *supra* note 28, at 67. The maps were drawn in 1935 at the behest of the Home Owners' Loan Corporation. *See* Chused, *supra* note 36, at 319–20.

161. Rothstein, *supra* note 28, at 67; Oliver & Shapiro, *supra* note 11, at 41.

Racial discrimination in housing markets continues to this day. In 2020, Black mortgage applicants were turned down at more than twice the rate of white applicants: 27.1 percent of Black families as compared to 13.6 percent of whites.[162] A recent lawsuit filed against State Farm Insurance revealed a practice of routinely alleging fraud in primarily Black communities and refusing to honor claims of Black property owners.[163] And redlining continues in various forms.[164]

C. Down Payments

The final home-buying essential is some form of personal or family wealth that can supply the down payment. Here, the racial wealth gap is at issue and the vicious cycle that it sets up. Black families with less wealth in the parent generation have less ability to help the child generation get a foothold in homeownership that could create more wealth for the next generations. Even Black families who are homeowners may not be able to use their homes as collateral for a loan to help their children to the same extent that white families can. Black-owned real property is routinely undervalued and overtaxed.[165] Appraisers repeatedly undervalue Black-owned homes, diminishing the owner's opportunity to sell for a fair price or obtain adequate insurance, a conventional mortgage, or a home equity loan.[166]

V. CONCLUSION: CAN TAX REFORM MAKE A DIFFERENCE?

Racial discrimination was not introduced into American life by the federal income tax. Nor did it create the institutional racism that one can see at work in the racial homeownership gap. But it is essential to recognize that through tax benefits for homeowners, for generations the federal income tax has contributed to the racial wealth gap. If this is so, what is to be done?

Some of the tax subsidies for homeownership are much criticized, and rightly so, for favoring the wealthy, driving up residential real estate prices, encouraging overinvestment in owner-occupied housing, and contributing to overall economic and racial inequality.[167] Proposals for reform range from turning the HMID and real

162. Jung Hyun Choi et al., *What Different Denial Rates Can Tell Us About Racial Disparities in the Mortgage Market*, Urb. Inst. (Jan. 13, 2022), https://www.urban.org/urban-wire/what-different-denial-rates-can-tell-us-about-racial-disparities-mortgage-market; *see also* Home Mortgage Disclosure Act of 1975 § 302, 12 U.S.C. § 2801 (addressing incidents of redlining).

163. *See, e.g.*, Complaint, Williams v. State Farm Mut. Auto. Ins. Co., No.1 20-CV-01121 (N.D. Ill. Feb. 14, 2020); Emily Flitter, *State Farm Sees Fraud. Clients See Discrimination.*, N.Y. Times, Mar. 19, 2022, at B1.

164. *See, e.g.*, Aaron Glantz & Emmanuel Martinez, *Modern-Day Redlining: How Banks Block People of Color from Homeownership*, Chi. Trib. (Feb. 17, 2018), https://www.chicagotribune.com/business/ct-biz-modern-day-redlining-20180215-story.html.

165. Oliver & Shapiro, *supra* note 11, at 52–54.

166. *See, e.g.*, Debra Kamin, *An Appraisal That 'Kind of Broke' One Homeowner*, N.Y. Times, Aug. 29, 2020, at B1.

167. *See* Dorothy A. Brown, *Shades of the American Dream*, 87 Wash. U. L. Rev. 329, 360–62 (2009) (discussing the racial inequality associated with tax benefits and homeownership); Brown, *supra* note 74, at 206–10

property tax deduction into a tax credit, or even a refundable tax credit, to allowing deductions when homes sell at a loss, to outright repeal of all the tax preferences for homeownership.[168] Although still political hot buttons, proposals to repeal the HMID and real property tax deduction are not as improbable as they once were, now that taxpayers are being weaned away from claiming itemized deductions by the 2017 TCJA's near doubling of the standard deduction.

But even repealing the HMID, real property tax deduction, exclusion of gains on sale of the principal residence, and step up in basis on the homeowner's death would still leave the largest tax expenditure for homeowners in place: the exclusion of imputed rental income. Taxing imputed rental income is probably not feasible in the United States today for practical and political reasons any more than it was in 1864. If the HMID is aptly called the political third rail in tax policy, trying to tax imputed rental income must be a nuclear weapon. Yet there is another way to level the playing field: a residential renter's tax credit.

A residential renter's tax credit would put renting and owning on a more equitable footing. It would end the shifting of the tax burden from owners to renters that the exclusion of imputed rental income now produces. In a "rough justice" way, it would contribute to wealth formation for renters as the exclusion of imputed rental income now does for owner-occupied housing. What impact a renter's tax credit would have on the racial homeownership gap is not clear; it could change preferences for homeownership all around. But it could contribute meaningfully to at least narrowing the racial wealth gap. Likewise, how such a tax credit should be designed—as a refundable credit, with or without a cap, whether phased in or immediate—requires further work. It would also be important to understand the impact it would have on the residential housing market overall.[169] The Civil War income tax system does provide a precedent for this solution and there may be useful lessons to learn from that experience.[170]

A residential renter's tax credit would go a long way to mitigating what Seligman described as the manifest injustice of leaving imputed rental income untaxed, namely, its contributions to the racial wealth gap across generations. Reform of this kind will not undo the harm that the racial wealth gap has caused Black families, and indeed, our entire nation. But it could stop the damage going forward. A residential renter's tax credit is worth exploring.

(pointing out racism in the U.S. tax system); Ventry, *supra* note 74, at 181, 182–86 (reporting on inequities associated with mortgage interest deductions); *see also* ELAINE SORENSEN ET AL., REDIRECTING WELFARE POLICY TOWARD BUILDING STRONG FAMILIES 1–3 (Elaine Sorensen ed., 2000) (discussing the relationship between redistricting and family composition).

168. A tax deduction is applied before calculating tax owed to reduce the amount of your taxable income. *Credits and Deductions for Individuals*, IRS, https://www.irs.gov/credits-deductions-for-individuals (Apr. 8, 2022). In contrast, a tax credit reduces the tax owed dollar for dollar. *Id*.

169. *See* Brown, *supra* note 167 (suggesting that a deduction for renters would only enrich landlords).

170. Seligman 1894, *supra* note 146 (discussing fraud associated with Civil War-era income taxes). But in our digital age, these issues should be more manageable.

The impediments to racial equality hide in plain sight in our society, embedded in some surprising places. The federal income tax is one such place. Although concepts such as "taxation" and "structural racism" may not generally spring to mind in the same thought, examined in the context of social and economic reality such as barriers to homeownership for Black Americans, the IRC emerges as a sturdy source of inequality, generation after generation reliably contributing to racial disparities in wealth and poverty, well-being and economic fragility. Colorblind on its face but not in its impact, the IRC has fueled the racial wealth gap for many decades.[171] It is time to change the story.

171. On its face, the IRC is race-blind with one exception. There are several provisions that concern Native Americans, such as the Indian Employment Credit, I.R.C. §§ 38(b)(10), 45; the Indian Health Care and General Welfare Benefits, I.R.C. §§ 139D, 139E; the Alaskan Native Claims Act and Settlement Trusts, I.R.C. §§ 139G, 247, 6039H; and the Native American Sovereignty, I.R.C. §§ 168(h)(2)(A), 170(q)(7), 401, 414, 415, 646, 1033, 1391, 1402, 2055, 2106, 2522, 3121, 3306, 3309, 3402, 3511, 4225, 4377, 4484, 4965, 5000A, 6421, 6427, 7526A, 7701, 7871, 7873, 9801.