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# Implicit Legislative Bias: The Case of the Mortgage Interest Deduction

Leigh Osofsky<sup>†\*</sup> & Kathleen DeLaney Thomas<sup>\*\*</sup>

*The home mortgage interest deduction is over 100 years old. The deduction has been subject to increasing and, at times, withering criticism from commentators. Scholars have argued that the mortgage interest deduction may be a particularly ineffective and regressive way to subsidize homeownership. Other scholars have made the important point that the mortgage interest deduction has a disparate racial impact: homeowners are disproportionately white, so the deduction disproportionately benefits white people at the expense of people of color. Yet, the mortgage interest deduction has retained remarkable and costly staying power despite all the critiques.*

*How has the mortgage interest deduction persisted over a century, despite extensive critique? We argue that an underappreciated part of the story of the mortgage interest deduction is how its very creation arose out of implicit racial bias and other cognitive biases. First, scholars and policymakers ignored the racialized history of homeownership in the United States and relied on racist tropes in studying the potential economic benefits of the deduction. After such associations occurred, policymakers misattributed to homeownership benefits that were really, at least in part, benefits that flowed from whiteness. Perceiving positive benefits from homeownership, legislators viewed it as a good worth subsidizing through the tax system. Cognitive biases such as confirmation bias then made it unlikely that, once in place, the mortgage interest deduction would be substantially changed.*

*This understanding of the mortgage interest deduction should upset any future attempts to characterize the deduction as a neutral, albeit flawed, way to subsidize desirable values. More generally, this case study illustrates*

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<sup>\*</sup> William D. Spry III Family Distinguished Professor of Law, University of North Carolina School of Law.

<sup>\*\*</sup> George R. Ward Term Professor of Law, University of North Carolina School of Law. For helpful comments, we thank Jeremy Bearer-Friend, Dorothy Brown, John Coyle, David Gamage, Andrew Hayashi, Osamudia James, and participants at the Association of Midcareer Tax Professionals Conference hosted at UNC in 2022.

*a phenomenon that merits more attention in the legal literature: how implicit racial bias and other cognitive biases in the legislative process make flawed legislation, like the mortgage interest deduction, more likely to be made and more difficult to upend. We conclude by offering suggestions for minimizing bias in future legislation and for reforming existing legal policy that already reflects such bias.*

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INTRODUCTION

The mortgage interest deduction (“MID”) is over 100 years old. As long as the modern income tax has existed in the United States, so has the MID.<sup>1</sup> The deduction has long been subject to criticism along a number of grounds, including that it benefits high-income taxpayers more than low-income taxpayers, and that it is a costly and ineffective way to promote homeownership.<sup>2</sup> Several scholars have also made the important observation that the MID has a disparate racial impact: homeowners are disproportionately white, so the deduction disproportionately benefits white people at the expense of people of color.<sup>3</sup>

Yet, the MID persists. Among other things, taxpayers can deduct home mortgage interest on the first \$750,000 of indebtedness used to acquire, construct, or improve a qualified residence.<sup>4</sup> This produces significant revenue costs for the government. Indeed, the Joint Committee on Taxation estimates the deduction will cost the United States approximately \$125 billion in foregone tax revenue from 2020 to 2024 (approximately \$25 billion per year).<sup>5</sup>

So why has this much criticized and costly deduction persisted over time? To be sure, tax policy often reflects suboptimal choices, for

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<sup>1</sup> See MARK P. KEIGHTLEY, CONG. RSCH. SERV., AN ECONOMIC ANALYSIS OF THE MORTGAGE INTEREST DEDUCTION 4 (2020), [https://www.everycrsreport.com/files/2020-06-25\\_R46429\\_edb7f30fafef9ffd056893901b124ca9775c0000.pdf](https://www.everycrsreport.com/files/2020-06-25_R46429_edb7f30fafef9ffd056893901b124ca9775c0000.pdf) [https://perma.cc/4EG4-VXP7] [hereinafter MORTGAGE INTEREST DEDUCTION].

<sup>2</sup> See *infra* Part I.C.

<sup>3</sup> See, e.g., Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 348 (2009) (exploring disparities in the context of the homeownership tax subsidies); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 780 (exploring relationship between MID and race).

<sup>4</sup> I.R.C. § 163(h)(3)(B), (F)(i)(II) (2018).

<sup>5</sup> JOINT COMM. ON TAX’N, JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020-2024, at 28 (2020), <https://www.jct.gov/publications/2020/jcx-23-20/> [https://perma.cc/JNK4-6BUV].

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example, due to lobbying and capture.<sup>6</sup> However, we believe that being satisfied with this answer alone inappropriately absolves policymakers of responsibility for an even more problematic part of the story: that the very creation of the MID and its perpetuation over a century arises out of implicit racial and other cognitive biases. These powerful phenomena have allowed MID supporters to imagine they are supporting positive societal values, without having to confront the much more problematic, racist elements at the core of the MID.

Over the many years that the MID has existed, support for the deduction has been fueled, in large part, by a number of empirical studies purportedly demonstrating that homeownership creates positive spillover effects for society and, thus, is worth subsidizing.<sup>7</sup> These economic studies examine whether homeowners better maintain their homes and are more likely to vote, less likely to commit crimes, and more likely to raise children with better academic and social outcomes.<sup>8</sup> In other words, the research suggests that homeowners may be good for society, so the government should enact policies that subsidize homeownership. Politicians and interest groups who support the MID have repeatedly cited these outcomes in favor of retaining it.<sup>9</sup> While the results of many of these studies have been called into question in recent years, the conclusion that homeownership creates positive societal benefits has remained deeply engrained in the American psyche.

In this Article, we fundamentally challenge this perception of the mortgage interest deduction. We show that the mortgage interest deduction, and the homeownership it sought to promote, were rooted in fundamentally racist worldviews. First, the economic study of the MID ignored the extremely racialized history of homeownership in the United States.<sup>10</sup> What's more, this history of racist housing policy is not just omitted from the economic studies examining the MID. A close examination of this economic literature reveals that it relies extensively, though perhaps unwittingly, on some of the same tropes that were used to justify the country's discriminatory housing practices.<sup>11</sup> For example, the economic literature's study of whether homeowners keep the exterior of their homes well maintained or engage in good childrearing

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<sup>6</sup> See *infra* text accompanying notes 226–28.

<sup>7</sup> See *infra* Part I.B.

<sup>8</sup> See *infra* Part I.B.

<sup>9</sup> See, e.g., *infra* text accompanying notes 60–65 (discussing public and governmental support for the MID).

<sup>10</sup> See *infra* Part III.B.

<sup>11</sup> See *infra* Part II.B.

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practices bears striking resemblance to racialized language used by proponents of housing segregation.<sup>12</sup>

For decades, economists and policymakers have pointed to a number of purportedly “good” outcomes to support the notion that homeownership should be subsidized through the tax system.<sup>13</sup> We argue, however, that the positive outcomes observed in the homeownership literature are best explained by wealth and white privilege, and are not due to some inherently beneficial aspect of owning a home.<sup>14</sup> In making this connection, we show that the economic case for homeownership subsidies — a disproportionate amount of which go to white individuals — relies on the pre-existing benefits already disproportionately enjoyed by white people. Yet, implicit racial bias likely caused policymakers and scholars to miss the ways that benefits from homeownership really flowed from whiteness. Missing this connection allowed legislators and the public to imagine that subsidizing homeownership meant subsidizing positive public goods, like stability, good citizenship, and successful childrearing practice, without recognizing how they were doubling down on discriminatory practices and motivations.

Given the durability of the MID for more than a century, as well as extensive study of this provision over time, how could this implicit bias in the construction of the MID escape notice for so long? We describe how implicit racial bias is not the only bias that contributed to the creation and longevity of the MID. Other cognitive biases, such as confirmation bias and loss aversion, likely perpetuated the deduction and its economic justifications. Once the economic studies on the benefits of homeownership became part of the political discourse, an unshakable narrative took hold: homeownership is good for society. Unfortunately, this narrative papered over a much less sanguine reality: much of the economic study of homeownership, and the tax policy that resulted from such study, was reflecting and perpetuating existing racist hierarchies and inequities.

Indeed, a critical — but untold — story of the MID goes something like this. Congress inadvertently enacted the MID in the early twentieth century as part of a broader rule for deducting interest.<sup>15</sup> Decades later, experts set out to determine whether the rule, which was already part of the tax law, had an economic justification.<sup>16</sup> Unsurprisingly, once

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<sup>12</sup> See *infra* Part II.B.

<sup>13</sup> See *infra* Part I.B.

<sup>14</sup> See *infra* Part II.C.

<sup>15</sup> See *infra* text accompanying notes 40–45.

<sup>16</sup> See *infra* p. 61–62.

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they set out to find a justification for a tax rule that benefits entrenched and powerful groups, they found one.<sup>17</sup> What's more, experts found this justification in the positive economic and social outcomes they observed among homeowners, the very people who had already been singled out by the government for preferential treatment in decades of racist housing policies.<sup>18</sup> Understanding this story of the MID should upset future attempts to characterize the deduction as a neutral, albeit flawed, way to subsidize desirable values.

This Article makes several contributions to the literature. As we have described, this Article illuminates the pervasive bias underlying the empirical and legislative process that produced the MID. More broadly, the case study of the MID illustrates a phenomenon that merits more attention in the literature. Exploration of the role of racial bias in the legislative process remains limited, with most inquiry focused on the criminal justice context.<sup>19</sup> This focus misses the ways that implicit racial bias has likely yielded racialized preferences in many areas of law. A further contribution is the Article's focus not just on implicit racial bias, but on cognitive bias more generally. While other scholars have written at the intersection of cognitive bias and the law, most literature considers either cognitive biases (such as framing effects or confirmation bias), *or* implicit racial bias, but not both.<sup>20</sup> We contend that a comprehensive picture of the MID requires examining both the implicit racial bias underlying its justification and other cognitive biases that have fueled its longevity. We hope this more comprehensive approach will serve as a guide for future research on bias in the legislative process.

This Article proceeds as follows. Part I provides background on the MID and surveys the arguments in support of and against the deduction. This Part includes descriptions of the empirical research describing positive spillover effects from homeownership, as well as the critiques that have been lodged against the MID. Part II explores how the economic study of the MID failed to take account of the racialized history of homeownership in the United States, but did rely on tropes of whiteness and segregation in studying the MID, thereby misattributing benefits from whiteness to homeownership and the MID. Part III offers the theoretical underpinnings of how implicit racial bias and other cognitive biases have affected the study and perpetuation of

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<sup>17</sup> See *infra* p. 61-62.

<sup>18</sup> See *infra* Parts II.A, II.C, for discussions of history and effects of housing discrimination.

<sup>19</sup> See *infra* text accompanying notes 255-57.

<sup>20</sup> See *infra* text accompanying notes 221-22.

the MID. Part IV then offers suggestions for minimizing bias in future legislation and for reforming legal policy that already reflects such bias. Part V concludes.

## I. THE STORY OF THE MID

### A. *Facts and Figures for the MID*

#### 1. Overview of the Deduction

Generally, interest on loans connected to business or investment is deductible,<sup>21</sup> but the tax law does not allow a deduction for interest paid on loans used to fund personal consumption.<sup>22</sup> However, an important exception to the non-deductibility of personal interest is the deduction for home mortgage interest.<sup>23</sup> Specifically, Section 163(h) of the Internal Revenue Code (the “Code”) provides a deduction for “qualified residence interest.”<sup>24</sup> A taxpayer’s qualified residence includes their primary residence and one additional residence (for example, a vacation home).<sup>25</sup> Currently, such interest is deductible on mortgage principal of up to \$750,000.<sup>26</sup> To be eligible for an interest deduction, the loan must have been used to acquire or substantially improve the taxpayer’s residence.<sup>27</sup>

As an itemized deduction, the MID can only be claimed by those taxpayers who elect to itemize, and therefore forego the standard

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<sup>21</sup> See I.R.C. § 163(h)(2)(A)-(B) (2018) (excluding trade or business and investment interest from the definition of nondeductible personal interest).

<sup>22</sup> See *id.* § 163(h)(1).

<sup>23</sup> See *id.* § 163(h)(2)(D) (excluding “qualified residence interest” from the definition of nondeductible personal interest).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § 163(h)(4)(A).

<sup>26</sup> *Id.* § 163(h)(3)(F). The \$750,000 ceiling was enacted in as part of the Tax Cuts & Jobs Act (“TCJA”) in 2017 and is set to expire at the end of 2025. See *id.* Prior law provided a maximum of \$1,000,000 of qualified residence indebtedness, plus an additional \$100,000 of home equity indebtedness (\$1,100,000 total). See *id.* § 163(h)(3)(B)-(C). For mortgage loans exceeding \$750,000, interest is partially deductible, with taxpayers allocating their interest paid between the qualifying balance of the mortgage and the amount that exceeds the \$750,000. See SCOTT EASTMAN & ANNA TYGER, THE HOME MORTGAGE INTEREST DEDUCTION 3 (2019), <https://files.taxfoundation.org/20191011104310/The-Home-Mortgage-Interest-Deduction.pdf> [<https://perma.cc/JX7R-4D7R>].

<sup>27</sup> I.R.C. § 163(h)(3)(B) (2018). Although interest on home equity indebtedness of up to \$100,000 was previously deductible, the TCJA has made such interest nondeductible until 2026. See *supra* note 26 and accompanying text.

deduction.<sup>28</sup> The standard deduction is about \$12,500 for a single taxpayer and \$25,000 for married couples filing jointly.<sup>29</sup> Practically speaking, this means taxpayers only claim itemized deductions when the sum of those deductions — including mortgage interest and other itemized deductions like charitable contributions and property taxes — exceeds the standard deduction.<sup>30</sup> This turns out to be a narrow pool of taxpayers — roughly 10 percent — which is concentrated among higher earners.<sup>31</sup>

The preceding description reflects some curtailment of the MID by recent legislative changes. In particular, a major overhaul of the tax code in 2017, the legislation often referred to as the Tax Cuts and Jobs Act (“TCJA”), lowered the amount of debt on which mortgage interest is deductible to \$750,000, from a prior amount of \$1,000,000.<sup>32</sup> Moreover, as a separate matter, the TCJA raised the standard deduction,<sup>33</sup> making it significantly less likely that taxpayers would itemize their deductions, and thus be eligible to take the MID.<sup>34</sup> Indeed, for these reasons, the Joint Committee on Taxation estimated that the projected revenue cost of the MID in 2019 was \$26.85 billion,

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<sup>28</sup> I.R.C. § 63(a)-(b) (2018).

<sup>29</sup> These amounts are adjusted annually for inflation. *Id.* § 63(c)(7). In 2021, the standard deduction for a single taxpayer is \$12,550 and the standard deduction for joint filers is \$25,100. *See* REV. PROC. 2020-45, at 13, <https://www.irs.gov/pub/irs-drop/rp-20-45.pdf> [<https://perma.cc/U2PF-Q8CP>].

<sup>30</sup> The largest itemized deductions are home mortgage interest and charitable contributions. TAX POL’Y CTR., TAX POLICY CENTER BRIEFING BOOK 109-10 (2021), [https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc\\_briefing\\_book\\_2021.pdf](https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book_2021.pdf) [<https://perma.cc/HU67-SFGJ>].

<sup>31</sup> *See id.* at 110. The Tax Policy Center estimates that 11 percent of returns will itemize deductions in 2020. *Id.*

<sup>32</sup> *See* sources cited *supra* note 26. *See also supra* note 27 and accompanying text for a discussion of changes to home equity indebtedness. The formal name of the Tax Cuts and Jobs Act is An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018. H.R. 1, 115th Cong. (2017-2018). For an explanation of why the short, colloquial name was struck from the legislation, see, for example, Eli Watkins, *Senate Rules Force Republicans to Go with Lengthy Name for Tax Plan*, CNN POL. (Dec. 19, 2017, 10:14 PM), <https://www.cnn.com/2017/12/19/politics/tax-bill-name-delay/index.html> [<https://perma.cc/K2FD-6SVE>] (providing explanation).

<sup>33</sup> I.R.C. § 63c(7) (2018).

<sup>34</sup> *See, e.g.,* Robert McClelland & Livia Mucciolo, *How the TCJA Affected the Housing Market*, TAX POL’Y CTR.: TAXVOX (Mar. 30, 2022), <https://www.taxpolicycenter.org/taxvox/how-tcja-affected-housing-market> [<https://perma.cc/97J3-B8CE>] (analyzing impact of various TCJA changes, including the increase in the standard deduction, on the MID).



significantly less than the \$68.1 billion from 2018.<sup>35</sup> To some, this greater than 60 percent drop in the projected cost of the MID from 2018 to 2019 may undercut its perceived durability.<sup>36</sup>

However, these changes, while significant, should not be overblown. As an initial matter, they are temporary, set to expire after 2025.<sup>37</sup> Moreover, a large portion of the reduced cost of the MID is a result of the increase in the standard deduction, a system-wide change with many consequences, which was not targeted at the MID in particular.<sup>38</sup> The fact remains that interest is still deductible on significant amounts of home mortgage debt, which produces large (though smaller than before), projected revenue costs.<sup>39</sup> In some ways, then, the fact that the MID survived the TCJA largely intact, despite calls for more drastic change,<sup>40</sup> might only underscore its durability.

## 2. History of the Deduction

Interestingly, Congress did not specifically enact a mortgage interest deduction at any point in the nation's history. Rather, the deduction naturally followed from the Code's original interest rules from 1913, which allowed all interest to be deducted.<sup>41</sup> Professor Dennis Ventry aptly described this as the "Accidental Deduction," as it appears Congress did not intend to offer a subsidy to homeownership when interest was first made deductible.<sup>42</sup> Rather, allowing a deduction for expenses incurred in the production of income (such as interest on

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<sup>35</sup> U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES 33 (2018), <https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf> [<https://perma.cc/FU2J-JGRB>]; U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES 34 (2016), [https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2018\\_0.pdf](https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2018_0.pdf) [<https://perma.cc/5VK9-755B>].

<sup>36</sup> See *supra* note 35 and accompanying text (\$68.1 billion x .60 = 40.86. \$68.1 billion – 40.86 = 27.24).

<sup>37</sup> I.R.C § 163(h)(3)(F) (2018).

<sup>38</sup> See KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 13 ("The itemization rate among all households is currently much lower than in the past (10.9% in 2018 compared to 30.6% in 2017) due to the TCJA (P.L. 115-97), which nearly doubled the standard deduction.").

<sup>39</sup> See *supra* text accompanying note 35.

<sup>40</sup> See, e.g., William G. Gale, *Chipping away at the Mortgage Deduction*, BROOKINGS (May 13, 2019), <https://www.brookings.edu/opinions/chipping-away-at-the-mortgage-deduction/> [<https://perma.cc/CF3B-UH5J>] (arguing that the MID "has never been easy to justify" and calling for its elimination altogether in the wake of TCJA).

<sup>41</sup> See KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 4.

<sup>42</sup> Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 L. & CONTEMP. PROBS. 233, 241-43 (2010) [hereinafter *The Accidental Deduction*].

business loans) was viewed as the proper economic treatment of interest expense.<sup>43</sup> Commentators have suggested that originally, no distinction was made between the deductibility of business interest and personal interest.<sup>44</sup> Doing so would have been administratively difficult, and at the time, very little outstanding debt related to personal assets.<sup>45</sup> Indeed, the early rules on interest deductibility pre-dated both the rise of home mortgages (discussed further in Part II) and the existence of the credit card.<sup>46</sup>

As noted by Professor Ventry, the tax treatment of homeownership does not appear to have entered into tax policy discussions until the 1950s, when critiques of the deduction of home mortgage interest began to surface.<sup>47</sup> Notwithstanding criticism by tax policy experts of the regressive nature of housing subsidies, the deduction remained unaltered until the 1980s.<sup>48</sup> Congress finally revisited the deductibility of interest in connection with the Tax Reform Act of 1986, which made personal interest non-deductible in an effort to broaden the tax base and scale back deductions.<sup>49</sup> However, the deduction for home mortgage interest was exempted from this new rule.<sup>50</sup> Other than imposing ceilings on the amount of mortgage principal eligible for the deduction, Congress essentially left the deduction for home mortgage interest untouched.<sup>51</sup> Since 1986, only modest tweaks have been made to the MID, even in the face of heavy criticism from tax policy experts.<sup>52</sup>

In sum, the MID, which began as a natural consequence of a rule that allowed all interest to be deducted, has demonstrated remarkable

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<sup>43</sup> See KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 4.

<sup>44</sup> See *id.*; Ventry, *The Accidental Deduction*, *supra* note 42, at 241-42.

<sup>45</sup> Ventry, *The Accidental Deduction*, *supra* note 42, at 236.

<sup>46</sup> KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 4.

<sup>47</sup> Ventry, *The Accidental Deduction*, *supra* note 42, at 256-57.

<sup>48</sup> See *id.* at 269-70. For a fascinating and in-depth discussion of the history of these critiques and the legislative response (or lack thereof), see *id.* at 260-74.

<sup>49</sup> See Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 511, § 163(h), 100 Stat. 2085, 2246 (1986); Ventry, *The Accidental Deduction*, *supra* note 42, at 274.

<sup>50</sup> See Ventry, *The Accidental Deduction*, *supra* note 42, at 274-75.

<sup>51</sup> See KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 4 (“The Tax Reform Act of 1986 . . . eventually restricted the deduction to interest on loans not exceeding a home’s purchase price, plus any improvements . . .”); see also Ventry, *The Accidental Deduction*, *supra* note 42, at 274-75.

<sup>52</sup> Congress enacted a \$1,000,000 ceiling on acquisition indebtedness in 1987, see KEIGHTLY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 4, and subsequently lowered the ceiling to \$750,000 in 2017. See sources cited *supra* note 26. For a discussion of criticism of the MID by experts, see, for example, Brown, *supra* note 3 at 336-37; Ventry, *The Accidental Deduction*, *supra* note 42, at 281 (arguing that there is no evidence that MID encourages homeownership).

staying power over the past century. While virtually all other personal interest deductions have been repealed,<sup>53</sup> the deduction for home mortgage interest remains.

### 3. The MID Is Part of a Larger Statutory Scheme Favoring Homeownership

As a final point of background, it should be noted that the MID is part of a broader tax preference for homeownership imbued in the tax law. Two rules in particular provide further subsidies to homeowners.<sup>54</sup> First, if taxpayers sell their personal residence at a gain, section 121 exempts up to \$250,000 of that gain from tax (\$500,000 for joint filers).<sup>55</sup> Second, the Code does not tax imputed rent — that is, the economic benefit from living in one's own home.<sup>56</sup> Like the MID, these rules favor wealthier taxpayers with more expensive homes. The more valuable one's home, the larger the economic benefit from excluding imputed rent from income.<sup>57</sup> Similarly, the section 121 exclusion is worth more for homes sold for large gains (up to the exclusion amount) compared to homes sold for smaller gains, and the exclusion is worth more to taxpayers with higher marginal tax rates. On the other hand, homes sold at a loss receive no tax benefit at all.<sup>58</sup> While this Article

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<sup>53</sup> Student loan interest is also deductible under section 163(h) if certain requirements are met. *See* I.R.C. § 163(h)(2)(F) (2018).

<sup>54</sup> Numerous other provisions also subsidize real estate ownership in other contexts, such as credits for low-income housing or subsidies for real estate investors (such as accelerated depreciation). For a summary of the many tax subsidies for real estate, see JOINT COMM. ON TAX'N, JCX-10-13, PRESENT LAW, DATA, AND ANALYSIS RELATING TO TAX INCENTIVES FOR RESIDENTIAL REAL ESTATE (2013), <https://www.jct.gov/publications/2013/jcx-10-13/> [<https://perma.cc/MJ43-SH2T>].

<sup>55</sup> I.R.C. § 121 (2018).

<sup>56</sup> Imputed income from homeownership can be thought of as the rental income one could earn from renting out one's home, or as the rent one avoids paying by virtue of owning a home instead of renting. *See, e.g.*, Brown, *supra* note 3, at 338 (discussing values of imputed income). Homeowners further benefit by being able to deduct property taxes. *See id.* However, this benefit has been scaled back by the TCJA, which capped the deduction for all state and local taxes (including property taxes) at \$10,000. *See* sources cited *supra* note 26.

<sup>57</sup> Brown, *supra* note 3, at 338.

<sup>58</sup> *See* I.R.C. § 165(c) (2017) (limiting the deduction for losses on the disposition of personal property). Professor Brown notes that this rule exacerbates the inequity in the homeownership tax rules because low-income homeowners are more likely to sell their home at a loss. Brown, *supra* note 3, at 345.

focuses solely on the MID, these other preferences for homeownership contribute further to the inequities discussed herein.<sup>59</sup>

### B. Support for the MID

As one of the most deeply embedded tax expenditures in the Code,<sup>60</sup> the MID has been hailed over decades as providing numerous benefits. Indeed, one set of economists observed that “[p]oliticians, political activists, and philosophers have long attributed almost magical qualities” to the homeownership that purportedly flows from the MID.<sup>61</sup> As recently as 2017, the U.S. government expressed that the MID is critical to “strengthen[ing] civil society, as opposed to dependence on the government . . . .”<sup>62</sup>

This support for subsidizing homeownership has come from both Republican and Democratic administrations. President Reagan made preserving the MID an explicit priority during the aforementioned tax reform of the 1980s.<sup>63</sup> Presidents Clinton and George W. Bush continued to make homeownership incentives an explicit policy priority through their respective administrations.<sup>64</sup> Consider remarks made in 1995 by then-President Clinton:

You want to reinforce family values in America, encourage two-parent households, get people to stay home? Make it easy for people to own their own homes and enjoy the rewards of family life and see their work rewarded. This is a big deal. This is about more than money and sticks and boards and windows. This is

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<sup>59</sup> For further discussion of these preferences for homeownership and their racially disparate impact, see DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS — AND HOW WE CAN FIX IT* 64-95 (2021).

<sup>60</sup> William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, 115 *TAX NOTES* 1171, 1171 (2007) (“The income tax deduction for mortgage interest payments is possibly the best-known federal housing policy and is deeply ingrained in the economic and social fabric of the country.”).

<sup>61</sup> Dean H. Gatzlaff, Richard K. Green & David C. Ling, *Cross-Tenure Differences in Home Maintenance and Appreciation*, 74 *LAND ECON.* 328, 328 (1998).

<sup>62</sup> TRUMP ADMIN., HOUSE COMM. ON WAYS & MEANS & S. COMM. ON FIN., *UNIFIED FRAMEWORK FOR FIXING OUR BROKEN TAX CODE 5* (2017), <https://www.finance.senate.gov/imo/media/doc/9.27.17%20Unified%20Tax%20Framework.pdf> [https://perma.cc/M7CS-TXPR].

<sup>63</sup> See Ventry, *The Accidental Deduction*, *supra* note 42, at 271-72.

<sup>64</sup> See *id.* at 276.

about the way we live as a people and what kind of society we're going to have.<sup>65</sup>

The MID also enjoys very widespread public support.<sup>66</sup> For these and other reasons, it has sometimes been referred to as “sacrosanct,” or a “sacred cow.”<sup>67</sup>

Although support for the MID is sometimes just framed as essential for the “American Dream,”<sup>68</sup> economists have sketched out more concrete arguments as well. As described below, the more concrete arguments for the MID fall in three main categories. Proponents argue that the MID encourages greater homeownership, which (1) generates positive externalities such as better home maintenance, better childrearing, and better citizenship, (2) provides more equitable access to important savings and borrowing features, thereby allowing more widespread and stable wealth accumulation, and (3) provides other intangible benefits to the homeowners in the form of a greater sense of well-being.<sup>69</sup>

### 1. Positive Externalities

The positive externalities argument has received the most attention in the literature justifying the MID and is most often reflected in

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<sup>65</sup> President William J. Clinton, Remarks on the National Homeownership Strategy (June 5, 1995), <https://www.presidency.ucsb.edu/documents/remarks-the-national-homeownership-strategy> [<https://perma.cc/QUB4-TV55>].

More recently, President Biden's 2020 campaign included a proposal for a first-time homebuyer credit of up to \$15,000, which has since been proposed in draft form in the House of Representatives. The Down Payment Towards Equity Act of 2021, H.R. 4495, 117th Cong. (2021), [https://financialservices.house.gov/uploadedfiles/3.10\\_downpayment.pdf](https://financialservices.house.gov/uploadedfiles/3.10_downpayment.pdf) [<https://perma.cc/5JMY-CMVZ>]; *The Biden Plan for Investing in Our Communities Through Housing*, JOE BIDEN, <https://joebiden.com/housing/> (last visited June 28, 2021) [<https://perma.cc/6WSJ-RXL6>].

<sup>66</sup> See, e.g., Dennis J. Ventry, Jr., *The Fake Third Rail of Tax Reform*, 135 TAX NOTES 181, 181 (2012) [hereinafter *The Fake Third Rail of Tax Reform*] (quoting pseudonyms and praises for the MID).

<sup>67</sup> Bruce Bartlett, *The Sacrosanct Home Mortgage Interest Deduction*, N.Y. TIMES: ECONOMIX (Aug. 6, 2013, 12:01 AM), <https://economix.blogs.nytimes.com/2013/08/06/the-sacrosanct-mortgage-interest-deduction/> [<https://perma.cc/VXK3-D28V>].

<sup>68</sup> See, e.g., KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 1 (noting that policymakers historically held the MID as an important part of the American Dream); Gale et al., *supra* note 60, at 1171 (starting with the American Dream rationale and then delving into deeper critique).

<sup>69</sup> MARK P. KEIGHTLEY, CONG. RSCH. SERV., WHY SUBSIDIZE HOMEOWNERSHIP? A REVIEW OF THE RATIONALES 1-2 (2019), [https://www.everycrsreport.com/files/2019-09-06\\_IF11305\\_756ed5f23f5de1b2353b25a17a30e0618c94f3f6.pdf](https://www.everycrsreport.com/files/2019-09-06_IF11305_756ed5f23f5de1b2353b25a17a30e0618c94f3f6.pdf) [<https://perma.cc/H5CT-RKBV>] [hereinafter WHY SUBSIDIZE HOMEOWNERSHIP].

political discourse.<sup>70</sup> The basic argument is that home ownership not only benefits the homeowner, but also has positive, spillover effects on the community, which justify the government providing monetary incentives to encourage greater homeownership.<sup>71</sup> Economists have examined such spillover behaviors, including taking better care of one's home, practicing better childrearing, and being more engaged in local community governments and organizations.<sup>72</sup>

For instance, many policymakers, commentators, and economists have argued that homeowners may keep their homes in better condition than renters, which contributes to the overall neighborhood upkeep.<sup>73</sup> Economists have undertaken extensive empirical examination of this possibility, and have theorized why this distinction may exist: returns from maintenance accrue to homeowners rather than to a landlord, providing homeowners with greater maintenance incentives.<sup>74</sup> In studying the home maintenance hypothesis, economists have paid particular attention to whether homeowners tend to garden more, thus increasing the aesthetic value of their community.<sup>75</sup> Some studies have suggested that, perhaps as a result of the greater likelihood of homeowner maintenance, homeownership tends to increase the value of surrounding homes and even neighborhoods.<sup>76</sup>

Another line of positive-externality studies has examined whether homeowners produce more successful children. If successful children create a public good, then any relationship between homeowning and more successful children might merit government subsidization of homeowning. Various studies have examined this possibility, including

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<sup>70</sup> See *id.* at 1-2.

<sup>71</sup> JOINT COMM. ON TAX'N, *supra* note 54, at 29.

<sup>72</sup> E.g., Richard K. Green & Michelle J. White, *Measuring the Benefits of Homeowning: Effects on Children*, 41 J. URB. ECON. 441, 442 (1997).

<sup>73</sup> See, e.g., George C. Galster, *Empirical Evidence on Cross-Tenure Differences in Home Maintenance and Conditions*, 59 LAND ECON. 107, 107 (1983) (finding superior maintenance in owner occupied housing).

<sup>74</sup> See J.V. Henderson & Y.M. Ioannides, *A Model of Housing Tenure Choice*, 73 AM. ECON. REV. 98, 99-100 (1983).

<sup>75</sup> See, e.g., Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction*, 17 TAX POL'Y & ECON. 37, 38 (2003) (discussing relationship between home ownership and maintenance and gardening).

<sup>76</sup> See, e.g., N. Edward Coulson & Herman Li, *Measuring the External Benefits of Homeownership*, 77 J. URB. ECON. 57, 66 (2013) (using American Housing Survey Data to find that "transiting a home from rental to ownership in a typical neighborhood would create about \$1327 per year in externality value"); Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Raymond Owens III, *Housing Externalities*, 118 J. POL. ECON. 485, 528 (2010) (studying revitalization efforts from Neighborhoods-in-Bloom program in Richmond, Virginia).

one study that found a significant positive correlation between homeownership and academic success of children, as well as lower likelihood of teenage daughters getting pregnant.<sup>77</sup> The authors of this study hypothesized that “homeowners have a stronger incentive than renters to monitor their own children and their neighbors’ children and prevent them from engaging in behavior which would threaten housing values.”<sup>78</sup>

Finally, many have posited that homeownership might make better, more engaged citizens. In a particularly comprehensive study using the U.S. General Social Survey, Denise DiPasquale and Professor Edward Glaeser explore the relationship between homeownership, citizens, and community.<sup>79</sup> They find that, compared to renters, homeowners are more likely to know the name of their U.S. representative and their school board head, vote in local elections, and “work to solve local problems.”<sup>80</sup> They also find that homeowners are more likely to garden, more likely to frequent church, and are members of more community organizations.<sup>81</sup> Other studies have also looked at associations between homeownership and local engagement.<sup>82</sup> The theory here is that as more permanent, invested members of the community, homeowners may be more likely to engage in local civic and democratic engagement.

## 2. Saving and Borrowing

Aside from the positive externalities argument, the saving and borrowing argument is the second main support for the MID, although the economic literature on this point is less extensive than the literature on positive externalities.<sup>83</sup> The argument for saving and borrowing is

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<sup>77</sup> E.g., Green & White, *supra* note 72, at 450-52. Other studies have explored potential ties between homeownership and successful childrearing and found significant positive correlations. See, e.g., Donald R. Haurin, Toby L. Parcel & R. Jean Haurin, *Does Homeownership Affect Child Outcomes?*, 30 REAL EST. ECON. 635, 635 (2002) (examining cognitive and behavioral outcomes on children of homeowners).

<sup>78</sup> Green & White, *supra* note 72, at 443.

<sup>79</sup> Denise DiPasquale & Edward Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON. 354, 361-77 (1999).

<sup>80</sup> *Id.* at 356.

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., Peter H. Rossi & Eleanor Weber, *The Social Benefits of Homeownership: Empirical Evidence from National Surveys*, 7 HOUS. POL’Y DEBATE 1, 1 (1996) (using American National Election Studies to examine many of the purported benefits of homeownership including, among others, social ties to neighbors and greater engagement in local community organizations).

<sup>83</sup> George McCarthy, *The Economic Costs and Benefits of Homeownership: A Critical Assessment of the Research* 4 (Res. Inst. for Hous. Am. 2001, Working Paper 01-02,

that homeownership allows homeowners to build equity in a relatively illiquid savings vehicle, their home.<sup>84</sup> Homes are typically the biggest source of wealth in an individual's portfolio, and the fact that homeowners can use debt to finance their home purchase allows amplification of any wealth accumulation developed through homeownership.<sup>85</sup> The equity that homeowners can create in their home can then serve as a means of financing discretionary and emergency spending, including by providing a source of wealth that generates access to borrowing.<sup>86</sup> To the extent that homeownership is enjoyed by wide swaths of people of different income and wealth levels, homeownership may spread these forced savings and borrowing advantages in a way that increases equity and that reduces burdens on the government.<sup>87</sup> Studies show that homeowners do tend to have higher income and net worth than renters,<sup>88</sup> though there are serious questions about causality, which will be discussed in more detail below.

### 3. General Well-Being

Finally, for its part, the more amorphous well-being-of-homeowners argument has received relatively little attention, likely due to some of the difficulty developing clear empirical evidence. Those who have studied the link between homeownership and general sense of well-being have found some weak evidence of individual benefits of homeownership, — for example, one study found owners “rate themselves as slightly happier and in better physical condition.”<sup>89</sup> However, these benefits are offset by other findings, such as that owners seem to find running a

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2001), <https://web.archive.org/web/20220119122238/https://www.mba.org/news-research-and-resources/research-and-economics/research-institute-for-housing-america/published-reports/2002-2000/the-economic-benefits-and-costs-of-homeownership-a-critical-assessment-of-the-research> [<https://perma.cc/BT2T-92F5>].

<sup>84</sup> KEIGHTLEY, WHY SUBSIDIZE HOMEOWNERSHIP, *supra* note 69, at 2.

<sup>85</sup> McCarthy, *supra* note 83, at 5-6.

<sup>86</sup> KEIGHTLEY, WHY SUBSIDIZE HOMEOWNERSHIP, *supra* note 69, at 2.

<sup>87</sup> KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 9. A related argument is that the MID may allow cash-poor taxpayers to mimic some of the tax advantages that wealthier taxpayers can get from the nontaxation of imputed income from housing. See, e.g., Gregg D. Polsky, *Rationally Cutting Tax Expenditures*, 50 U. LOUISVILLE L. REV. 643, 656-57 (2012) (explaining this phenomenon). This may suggest there are some progressive reasons to favor the MID, although the progressiveness would likely only benefit cash-poor, moderate income taxpayers, rather than truly low-income taxpayers.

<sup>88</sup> KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 9.

<sup>89</sup> Rossi & Weber, *supra* note 82, at 29.



household to be more difficult.<sup>90</sup> Moreover, to the extent any general well-being benefits accrue to homeowners themselves, it is not entirely clear why the federal government should be subsidizing their production.<sup>91</sup>

### C. Critiques of the MID

Notwithstanding widespread and durable support for the MID, especially in the political and popular realms, economists have also catalogued many problems with it. Together, these critiques suggest that, even if there are reasons to encourage homeownership, the MID is a particularly bad way to go about doing so.<sup>92</sup> Moreover, some have wondered whether it even makes sense to encourage homeownership.

#### 1. May Not Actually Encourage Homeownership

One of the most significant critiques of the MID is that it does not actually seem to encourage more homeownership than would otherwise exist.<sup>93</sup> Rather, to the extent that the deduction subsidizes homebuying, it may be most likely to encourage people who otherwise would have purchased homes to purchase larger homes.<sup>94</sup> Many have suggested that the monetary benefits conferred by the MID are actually capitalized into the price of homes, which perversely make it more expensive to purchase homes.<sup>95</sup>

#### 2. Inequitable

Whether or not the MID encourages homeownership, the subsidy it provides is hard to defend on equity grounds. The MID is a quintessential “upside down subsidy,” because it is more valuable the higher one’s income.<sup>96</sup> The Joint Committee on Taxation estimates that the MID will cost the United States approximately \$125 billion in foregone tax revenue from 2020 to 2024 (approximately \$25 billion per year).<sup>97</sup> The distribution of this expenditure skews heavily towards high

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<sup>90</sup> *See id.*

<sup>91</sup> *See* KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 11-12.

<sup>92</sup> *See* Glaeser & Shapiro, *supra* note 75, at 37.

<sup>93</sup> *See* Ventry, *The Accidental Deduction*, *supra* note 42, at 281-82.

<sup>94</sup> Gale et al., *supra* note 60, at 1171.

<sup>95</sup> E.g., Richard Voith, *Does the Federal Tax Treatment of Housing Affect the Pattern of Metropolitan Development?*, 1999 FED. RESV. BANK PHILA. BUS. REV. 3, 7.

<sup>96</sup> Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L. J. 1155, 1159.

<sup>97</sup> JOINT COMM. TAX’N, *supra* note 5, at 28.

earners. Less than one percent of revenue loss is attributable to taxpayers earning less than \$50,000; and over 60 percent is attributable to taxpayers earning over \$200,000.<sup>98</sup>

There are a number of reasons high income taxpayers take the lion's share of the benefit from the MID. The primary reason is that lower earners are far less likely to itemize their deductions and, therefore, generally do not benefit from the MID.<sup>99</sup> In 2020, the Joint Committee on Taxation estimated that 37 percent of total MID claims would be made by taxpayers earning over \$200,000, another 39 percent by taxpayers earning over \$100,000, and less than 4 percent by taxpayers earning less than \$50,000.<sup>100</sup> Another reason high earners disproportionately benefit from the MID is that they have higher marginal tax rates. For any deduction, the value of the benefit to the taxpayer, and corresponding revenue loss to the government, is tied to the taxpayer's marginal tax rate. The higher the marginal tax rate, the greater the benefit to the taxpayer (and greater the revenue loss to the government).<sup>101</sup> Finally, wealthier taxpayers are more likely to purchase more expensive homes with larger mortgages, which in turn generate larger interest payments and a bigger MID.<sup>102</sup>

While the income distribution features of the MID have long been recognized, far fewer scholars have focused on the distribution of the MID in terms of race.<sup>103</sup> In some ways, this is unsurprising. As Professor Jeremy Bearer-Friend has detailed in recent work, the IRS neither analyzes nor publishes statistics about taxpaying and race, a notable omission, given that this type of analysis is standard in other federal agencies.<sup>104</sup> This lack of data about taxpaying and race is mirrored in other parts of the federal tax statutory and administrative

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<sup>98</sup> EASTMAN & TYGER, *supra* note 26, at 4; *see also* JOINT COMM. TAX'N, *supra* note 5, at 42 tbl.3.

<sup>99</sup> *See* KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 2-3.

<sup>100</sup> Calculations based on JOINT COMM. ON TAX'N, *supra* note 5, at 42 tbl. 3.

<sup>101</sup> For example, a taxpayer with a 35 percent marginal tax rate would save \$3500 in tax if they claimed a \$10,000 deduction (35% x \$10,000); whereas a taxpayer with a 20 percent marginal tax rate would save only \$2000 in tax for the same deduction (20% x \$10,000). *See* KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 3.

<sup>102</sup> *Id.*

<sup>103</sup> *See* Brown, *supra* note 3, at 366-67 (discussing the limited scholarship addressing race and the mortgage interest deduction).

<sup>104</sup> Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 34-37 (2019) (discussing colorblind nature of tax data and resulting policy analysis); *see also* Clinton G. Wallace, *Tax Policy and Our Democracy*, 118 MICH. L. REV. 1233, 1235-38 (2020) (exploring, through provocative examples, traditional tax policy discourse's inability to account for tax policies that are racist, gender-biased, or heteronormative, among other concerns).

process, including in institutions such as the Treasury and the Joint Committee on Taxation.<sup>105</sup> As Bearer-Friend details, the lack of attention to race in tax data obscures “the disparate racial outcomes of tax policy” and stalls “efforts to remedy that disparate impact.”<sup>106</sup>

Despite the obstacles identified by Bearer-Friend, some legal scholars have pressed the analysis of how the MID has a disparate impact on different races.<sup>107</sup> Most notably, Professor Dorothy Brown has explored how, relative to white taxpayers, tax laws disadvantage Black taxpayers, as well as other taxpayers of color.<sup>108</sup> Brown notes that tax advantages like the MID only benefit homeowners, and white taxpayers are far more likely to be homeowners than Black taxpayers or any other racial group.<sup>109</sup> This is true even holding income levels constant; in other words, even within a given income range, significant differences in homeownership exist based on race.<sup>110</sup> Moreover, because homes in white neighborhoods tend to appreciate at a significantly higher rate than homes in Black neighborhoods, white homeowners disproportionately benefit from other tax benefits — such as the exclusion of gain on the sale of one’s home — whereas Black taxpayers disproportionately lose out from the inability to deduct home sale losses.<sup>111</sup>

Several other tax law scholars have also examined these disproportionate impacts of the MID and other housing tax incentives,<sup>112</sup> and Professor Brown has recently amplified these efforts

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<sup>105</sup> Bearer-Friend, *supra* note 104, at 19-32. *But see* Laura Davison & Ben Steverman, *Treasury Plans First Analysis of U.S. Tax Benefits by Race*, BLOOMBERG (Dec. 14, 2021, 11:00 AM PST), <https://www.bloomberg.com/news/articles/2021-12-14/treasury-plans-first-analysis-of-u-s-tax-benefits-by-race?sref=y8VYjYe4> [<https://perma.cc/G5VD-JY3P>] (announcing beginning of Treasury efforts to examine benefits distributions and tax collections by race).

<sup>106</sup> Bearer-Friend, *supra* note 104, at 5-6 (discussing colorblind nature of tax data and resulting policy analysis).

<sup>107</sup> *E.g.*, Brown, *supra* note 3, at 348-62 (explaining how MID has had a disparate impact on different races); Moran & Whitford, *supra* note 3, at 779-82 (explaining the same).

<sup>108</sup> Brown, *supra* note 3, at 366-73 (exploring disparities in the context of the homeownership tax subsidies); *see also* Moran & Whitford, *supra* note 3, at 780 (exploring relationship between MID and race).

<sup>109</sup> Brown, *supra* note 3, at 348-54.

<sup>110</sup> *Id.* at 354.

<sup>111</sup> *Id.* at 354-62.

<sup>112</sup> *See, e.g.*, Victoria J. Haneman, *Contemplating Homeownership Tax Subsidies and Structural Racism*, 54 WAKE FOREST L. REV. 363, 388 (2019) (more recently exploring how, “[a]lthough the Code may appear to be color-blind or neutral, those code sections that assist taxpayers based upon income, wealth, or asset ownership disproportionately

in an influential book examining how the tax system generally impoverishes Black Americans.<sup>113</sup>

### 3. Not Clear that MID Yields Purported Benefits

Even if the MID does encourage homeownership in an equitable way, it is not clear that this yields the benefits many have suggested it might. Some studies have questioned whether there is even a clear correlation between homeownership and some of its most often cited positive externalities. For instance, after critiquing the evidence of better home maintenance by owners as sparse, one study attempted to develop stronger empirical evidence about the connection by exploring the short- and long-run appreciation rates of owner-occupied versus renter-occupied homes.<sup>114</sup> The study found very small differences in appreciation, which did not hold after taking into account differences in location between owner-occupied and renter-occupied homes.<sup>115</sup> Other studies have found similar lack of evidence of the purported benefits of homeownership. For instance, a relatively recent study found that, after controlling for numerous factors such as residential mobility and wealth, there is no evidence of an effect of homeownership on high school dropout rates, improved reading or math scores for children, or success of children more generally.<sup>116</sup>

Likewise, some economists have questioned whether some of the other purported benefits of homeownership — such as the forced wealth building and available borrowing features — are actually attributable to homeownership, and if they are, whether they lead to desirable outcomes.<sup>117</sup> Homeownership may not actually increase access to wealth and borrowing — rather, people with more wealth and greater access to borrowing might more often be homeowners. It also is not clear that we should be trying to increase the amount of wealth invested in homes. Homeownership is an undiversified way to hold

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impact communities of color” and using the MID as evidence of disproportionate impact); 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, 1365 (2000) (following the analysis of Moran and Whitford); Moran & Whitford, *supra* note 3, at 779-82 (exploring disparate effects of the MID and exclusion of gain on sale of home).

<sup>113</sup> BROWN, *supra* note 59, at 69-77.

<sup>114</sup> Gatzlaff et al., *supra* note 61, at 328.

<sup>115</sup> *Id.* at 341.

<sup>116</sup> David Barker & Eric Miller, *Homeownership and Child Welfare*, 37 REAL EST. ECON. 279, 300 (2009).

<sup>117</sup> KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 7-8.

one's wealth.<sup>118</sup> And especially after taking into account costs of maintaining a home, it is not clear that it is necessarily a superior form of investment than others.<sup>119</sup> Some scholars have even linked the MID (and other policies that over-incentivize home purchases) to housing market bubbles, subprime lending, and resulting crises.<sup>120</sup> The risks and costs of subprime lending and potential home price depreciation are borne in particular by lower-income households, undermining further the argument of homeownership as a way to equitably spread wealth accumulation and access to credit.<sup>121</sup>

Even to the extent that there is a correlation between homeownership and the positive benefits economists have studied, many have acknowledged that it is extremely difficult to prove homeownership actually *causes* these positive benefits.<sup>122</sup> One possibility is that there are observable differences between homeowners and renters (such as household wealth, to use just one example), which might explain why homeownership tends to be associated with certain outcomes (such as higher home maintenance).<sup>123</sup> Another possibility is that there are unobservable differences between homeowners and renters that might explain any correlations economists have found.<sup>124</sup> For instance, people with certain attributes (such as a predilection for gardening) might be more likely to become homeowners (perhaps because one's investment in establishing a garden is more likely to be secure with a home that one owns).

A recent study that used instrumental variables to try to determine the true impacts of homeownership found that positive effects of

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<sup>118</sup> *Id.* at 9.

<sup>119</sup> *See id.* at 10 (pointing out that after factoring “in the costs of maintaining a property . . . renting can be a wise financial decision under the right circumstances”).

<sup>120</sup> *See* Ventry, *The Fake Third Rail of Tax Reform*, *supra* note 66, at 181, 190 (discussing the “overaggressive government intervention in housing and mortgage markets . . . created the housing bubble” by relaxing lending standards, encouraging risky mortgages, subprime lending, and authorizing low down payments).

<sup>121</sup> McCarthy, *supra* note 83, at 19-20.

<sup>122</sup> *E.g.*, KEIGHTLEY, WHY SUBSIDIZE HOMEOWNERSHIP, *supra* note 69, at 1; David R. Barker, *The Evidence Does Not Show that Homeownership Benefits Children*, 15 CITYSCAPE: J. POL'Y DEV. & RSCH. 231, 231-33 (2013) (discussing correlation/causation issue in the context of impact of homeownership on children); Gale et al., *supra* note 60, at 1177 (explaining why positive outcomes associated with homeownership “do not prove that homeownership causes that behavior”); Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 959 (2018) (discussing mixed evidence of homeownership externalities and, in particular, difficulty in economics literature in distinguishing between correlation and causation in the study of homeownership).

<sup>123</sup> KEIGHTLEY, WHY SUBSIDIZE HOMEOWNERSHIP, *supra* note 69, at 1.

<sup>124</sup> *Id.*

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homeownership, if any, are likely attributable to unobserved characteristics.<sup>125</sup> If these unobservable differences explain the correlations, then the MID may be a needless subsidy, paying people for outcomes (like maintaining a garden) they would have produced anyway. For these and other reasons, economists studying the field have determined “research on the effects of homeownership is more than ordinarily cursed with severe problems in establishing the direction of causality.”<sup>126</sup>

Indeed, some economists have pointed to a particular characteristic of homeowners that is likely associated with many of the perceived benefits of homeownership: length of tenure in a home. Homeowners tend to live in homes for longer, and many of the perceived positive externalities generated by homeownership — such as being better, more engaged citizens, or taking better care of one’s property — likely derive from this greater length of tenure in a community, not necessarily homeownership per se.<sup>127</sup> Likewise, some economists have argued any greater homeowner successes in childrearing may simply be a reflection of greater residential stability by homeowners.<sup>128</sup>

#### 4. Hidden Costs

Aside from questions about some of the purported benefits of homeownership, there are some (limited) suggestions in the literature that homeownership may also produce negative externalities that need to be weighed against any positive externalities. For instance, length of tenure itself has significant costs. Lower mobility associated with homeownership may prevent families from seizing better job opportunities.<sup>129</sup> And greater investment of time and money in a home may reduce investments that may better be allocated elsewhere, such as

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<sup>125</sup> See Gary V. Engelhardt, Michael D. Eriksen, William G. Gale & Gregory B. Mills, *What Are the Social Benefits of Homeownership? Experimental Evidence for Low-Income Households*, 67 J. URB. ECON. 249, 249-258 (2010) (posturing that one’s willingness to accept an offer on a house, inferably an unobserved trait, can influence homeownership outcomes).

<sup>126</sup> Rossi & Weber, *supra* note 82, at 2.

<sup>127</sup> DiPasquale & Glaeser, *supra* note 79, at 356.

<sup>128</sup> See Daniel Aaronson, *A Note on the Benefits of Homeownership*, 47 J. URB. ECON. 356, 369 (2000) (posturing that higher school attainment, arguably an indicator of childrearing success, correlates positively with residential stability).

<sup>129</sup> See KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 15-16 (observing the “more quickly workers can transition from the weaker sectors of the economy to the stronger sectors, the more quickly the economy can recover. Homeownership can slow this transition because it reduces the ability of workers to move” from one sector to another).

in other enrichment opportunities that may produce even greater welfare gains.<sup>130</sup> Some economists have also wondered whether homeownership may be associated with greater support for exclusionary zoning, which seeks to exclude certain groups of people from living near one's homeownership community.<sup>131</sup> However, as the Congressional Research Service has remarked, these concerns about negative externalities are generally absent from the discussion about homeownership.<sup>132</sup>

##### 5. Better Ways to Achieve Benefits

Especially in light of some of the problems outlined above, many have argued that there are better ways to achieve any value that is currently being produced through the MID.<sup>133</sup> In particular, if we think there are positive externalities from things like home maintenance or greater participation in the local community, the tax system could subsidize such maintenance or participation, whether for renters or owners. Likewise, if we are concerned about children's educational outcomes, rather than subsidizing home purchases to improve such outcomes, a more appropriate policy choice might be to engage in greater, direct educational expenditures.<sup>134</sup>

Even if homeownership is worth subsidizing due to a bundle of values that it produces, there are more equitable and effective ways to go about doing so. And even the strongest proponents of the positive externalities of homeownership have suggested alternative policies.<sup>135</sup> For example, targeted first-time homebuyer credits for low-income households are more likely to achieve this objective by conferring the benefits to those

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<sup>130</sup> Aaronson, *supra* note 128, at 369.

<sup>131</sup> KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 9; see Gale et al., *supra* note 60, at 1177 (observing "the effect of homeownership rates could be due in part to the fact that homeowners are more likely to support restrictive zoning measures that inflate prices").

<sup>132</sup> KEIGHTLEY, WHY SUBSIDIZE HOMEOWNERSHIP, *supra* note 69, at 1.

<sup>133</sup> See, e.g., Ventry, *The Fake Third Rail of Tax Reform*, *supra* note 66, at 193-99 (discussing possible better alternatives, for instance, a tax credit for mortgage interest paid).

<sup>134</sup> KEIGHTLEY, MORTGAGE INTEREST DEDUCTION, *supra* note 1, at 8.

<sup>135</sup> Green & White, *supra* note 72, at 459-60.

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who actually need it to buy homes.<sup>136</sup> Many others have supported these and similar options for reforming the deduction.<sup>137</sup>

Together, these critiques of the MID have been withering. While homeownership and the MID retain strong support in political and popular spheres, sustained study has not borne out this support. There is a striking disconnect between sustained beliefs that the MID is a key driver of positive societal values and little evidence that clearly supports these beliefs (as well as significant evidence to the contrary).

## II. HOMEOWNERSHIP, THE MID, AND WHITENESS

As illustrated in the prior Part, the MID has persisted over 100 years despite significant and sustained critique along many grounds, leading some to conclude there is an “untouchable sanctity of the [MID].”<sup>138</sup> What explains the almost magical support for the MID? This Part will begin this examination by exploring the ways that the history of homeownership in the United States has associated it with whiteness, thus leading even economists studying the MID to misattribute benefits accruing to whiteness to the MID.

### A. Race and Homeownership in the United States

As an initial matter, homeownership itself has historically been associated with whiteness in the United States, both as a result of explicit government policy and discriminatory private action. This history is long and ugly. This Part will begin with a brief synopsis of this problematic history, which will refer to examinations that cover the topic in greater length.

The legacy of slavery, official segregation, and numerous other formal and informal harms visited on Black people in America created extraordinarily uneven starting points for Black individuals and families in the quest for homeownership.<sup>139</sup> Federal housing policy exacerbated

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<sup>136</sup> *Id.*

<sup>137</sup> E.g., Ventry, *The Fake Third Rail of Tax Reform*, *supra* note 66, at 193-99 (summarizing various options that have been considered for reforming and replacing the MID).

<sup>138</sup> Derek Thompson, *The Shame of the Mortgage-Interest Deduction*, *ATLANTIC* (May 14, 2017), <https://www.theatlantic.com/business/archive/2017/05/shame-mortgage-interest-deduction/526635/> [<https://perma.cc/CHW3-9C39>].

<sup>139</sup> See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, *ATLANTIC* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/47KN-FLXA>] (linking the destruction that slavery visited on Black Americans with the discriminatory laws that followed and the wealth gap that the federal government engineered through housing policy in the twentieth century).



these inequalities by making it exceedingly more difficult for Black people to purchase quality homes than white people. Most notoriously, in the New Deal Era, the Roosevelt administration sought to rescue homeownership from the brink of financial disaster.<sup>140</sup> It did so by creating the Home Owners' Loan Corporation ("HOLC"), which sought to prop up existing and new mortgages by issuing low interest rate, periodic payment mortgages.<sup>141</sup> As part of its evaluation of what mortgages should receive federal backing, the HOLC created color-coded maps of every metropolitan area, which "graded" neighborhoods into four categories: A (best), B (still desirable), C (definitely declining), and D (hazardous).<sup>142</sup> Having minority occupants, or even minority individuals who might pass through or near a neighborhood, resulted in the neighborhood being downgraded.<sup>143</sup>

Comments in the HOLC map left no room for guessing about what role race played in the grading decision. For instance, a comment on one B- minus area near Richmond, Virginia explained that there are "[r]espectable people but homes are too near negro area."<sup>144</sup> Another comment explained the grade of a neighborhood in Camden, New Jersey, by noting, "Negro district on edge of section, but splendid cooperation of all residents in this section will always prevent spread."<sup>145</sup> Based on these maps, people in the redlined area were denied federally backed mortgages and other forms of credit, thereby making it exponentially more difficult and expensive for people of color to purchase housing.<sup>146</sup> Notwithstanding the fact that redlining practices were made formally illegal by the Fair Housing Act of 1968,<sup>147</sup> private, state, and local behavior picked up where the federal government left

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<sup>140</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW* 63-64 (2017).

<sup>141</sup> *Id.*

<sup>142</sup> Camila Domonoske, *Interactive Redlining Map Zooms in on America's History of Discrimination*, NPR (Oct. 19, 2016, 3:22 PM EST), <https://www.npr.org/sections/thetwo-way/2016/10/19/498536077/interactive-redlining-map-zooms-in-on-americas-history-of-discrimination> [<https://perma.cc/GXN7-5FCQ>].

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html> [<https://perma.cc/37VR-T2F2>].

<sup>147</sup> 42 U.S.C. § 3601 (2018).

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off — engaging in organized, discriminatory practices to keep people of color out of white areas, and less able to purchase quality housing.<sup>148</sup>

While probably most well-known, redlining is only a part of the story of America's discriminatory housing policy. The United States also created racially segregated public housing projects, with higher quality public housing being reserved for white people, and lower quality housing available for Black people and other people of color.<sup>149</sup> Localities used zoning power to place communities of color in highly undesirable locations — such as near power plants, sewage treatment, industrial development, highways, and other hazardous locations — undermining the quality and safety of the housing.<sup>150</sup> For a time, localities relied on explicit racial zoning practices, zoning undesirable areas for communities of color, and more highly desirable areas for white communities.<sup>151</sup> The Supreme Court struck down this explicit racial zoning practice in *Buchanan v. Warley*.<sup>152</sup> However, localities quickly learned how to engage in work-arounds, getting many of the same results without the explicit use of race.<sup>153</sup>

Several years later, in *Euclid v. Ambler Realty*, which stressed the importance of deferring to localities' zoning practices, the Supreme Court's language reflected the segregationist worldview it would empower when it expressed that denser, multi-family housing “depriv[ed] children of the privilege and quiet and open spaces for play, enjoyed by those in more favored localities.”<sup>154</sup> This opinion, and the views behind it, became the foundation for decades of exclusionary zoning, whereby municipalities used purportedly race neutral practices like single-family zoning and minimum square feet requirements to try to keep out communities of color.<sup>155</sup>

In supporting exclusionary zoning, local residents often used language that harkened back to the Supreme Court's own language from *Euclid*. For instance, in *MHANY Management*, an important Second Circuit case that examined whether a zoning decision to preclude multi-

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<sup>148</sup> See, e.g., ROTHSTEIN, *supra* note 140, at 115-38 (describing government enforcement of private agreements and local tactics).

<sup>149</sup> *Id.* at 19-26.

<sup>150</sup> *Id.* at 54-57.

<sup>151</sup> *Id.* at 39-48.

<sup>152</sup> 245 U.S. 60 (1917).

<sup>153</sup> ROTHSTEIN, *supra* note 140, at 39-48.

<sup>154</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

<sup>155</sup> Richard D. Kahlenberg, *The Walls We Won't Tear Down*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/opinion/sunday/zoning-laws-segregation-income.html> [https://perma.cc/W3CL-LQLK].

family housing violated the Fair Housing Act, residents expressed concern that the multi-family housing would have changed the “character” and “flavor” of the municipality, yielding problems such as sanitation services being overrun, and the introduction of “undesirable elements” into the community.<sup>156</sup>

Flyers protesting the proposed multi-family zoning also circulated in the community, which said things like:

WILL GARDEN CITY PROPERTY VALUES DECREASE IF  
OVER 300 APARTMENTS ARE BUILT AT THE SITE OF  
SOCIAL SERVICES?

and

ISN'T IT TRUE THAT MANY FAMILIES MOVE TO GARDEN  
CITY TO ASSURE THEIR CHILDREN OF A QUALITY  
EDUCATION?<sup>157</sup>

In striking down the municipality’s zoning decision as being racially discriminatory, the Second Circuit upheld the District Court’s finding that the comments made by the municipality’s residents were “code words for racial animus.”<sup>158</sup>

Much more can, and has, been said about the racialized history of housing in the United States. For instance, to address just one more facet of it, racially discriminatory covenants were another common practice that homeowners and neighborhoods used to maintain segregated housing.<sup>159</sup> While the Supreme Court eventually held that state enforcement of racially discriminatory covenants was unconstitutional state action,<sup>160</sup> the federal government continued to insure properties subject to racially restrictive covenants until 1962.<sup>161</sup> It is beyond the scope of this Article to set forth a comprehensive history of housing discrimination in the United States. However, as this Section makes clear, it is also impossible to understand the nature of housing in the United States without at least some recognition of how the system

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<sup>156</sup> *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 608 (2d Cir. 2016).

<sup>157</sup> *Id.* at 595.

<sup>158</sup> *Id.* at 609.

<sup>159</sup> Carol M. Rose, *Racially Restrictive Covenants — Were They Dignity Takings?*, 41 *LAW & SOC. INQUIRY* 939, 939 (2016).

<sup>160</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948).

<sup>161</sup> Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and out of Reach for Blacks*, 115 *YALE L.J.* 186, 216 (2005).

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was built on racial subordination, which resulted in many of the benefits of homeownership being allocated to white people.

B. *Racialized Tropes in Studying the MID*

As explored above, the very history of housing in the United States created a strong association between the benefits of homeownership and whiteness. A close examination of the economics literature that studied the MID reveals that it relies on some of the same tropes that were used to justify the country's discriminatory housing practices. As a result, the economic study of the benefits of homeownership and the MID not only ignores the history of race in housing in the United States; in many ways, the economic study seems to trade in some of the same racialized values and biases. The result is that not only homeownership, but also the study of the MID, are inextricably associated with benefits accruing to whiteness.

Indeed, as mentioned previously, one of the major criteria that the literature uses to explore whether there are positive externalities of homeownership is whether homeowners maintain their homes in better condition.<sup>162</sup> One frequent inquiry is whether homeowners garden more.<sup>163</sup> An important hypothesis of this literature is that these positive behaviors, including, in particular, better home maintenance and more gardening, will be valuable to neighboring homes, thereby increasing local property values.<sup>164</sup>

Studies from the residential segregation and affordable housing context have shown that white people often use these exact criteria to explain why they would not want to live in a neighborhood with Black people, a fact noted by the Second Circuit in *MHANY Management*.<sup>165</sup> For instance, when white people are asked why they don't want to live in neighborhoods with more than *de minimis* concentrations of Black people, they often express concerns such as "fear of property value decline, increasing crime, decreasing community quality (e.g., physical decay of housing, trash in neighborhood, and unkempt lawns) and increasing violence."<sup>166</sup>

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<sup>162</sup> *Supra* text accompanying notes 73–74.

<sup>163</sup> *Supra* text accompanying note 75.

<sup>164</sup> Glaeser & Shapiro, *supra* note 75, at 38, 61.

<sup>165</sup> *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 610 (2d Cir. 2016).

<sup>166</sup> Mai Thi Nguyen, Victoria Basolo & Abhishek Tiwari, *Opposition to Affordable Housing in the USA: Debate Framing and the Responses of Local Actors*, 30 HOUS., THEORY & SOC'Y 107, 111 (2013).

When presented with the possibility of living in integrated neighborhoods, these concerns are also often translated into a broader, catch-all concern regarding property values. In one study, in which more than 400 white people said they would move away from racially mixed communities, “the modal explanation focused on property values,”<sup>167</sup> a finding that has remained durable over decades.<sup>168</sup> The concern about maintaining and increasing property values for neighbors, a centerpiece of the MID literature, is consistent with the racially discriminatory justifications for engaging in redlining, racial zoning and exclusionary zoning, racially discriminatory covenants, and other segregationist housing practices. Indeed, redlining was originally justified as an effort to protect the property values of houses that were going to receive federally subsidized mortgages,<sup>169</sup> a concern echoed in the Supreme Court’s deference to zoning decisions,<sup>170</sup> and citizens’ own desire to keep outsiders out to maintain property values.<sup>171</sup>

Likewise, as previously discussed, the economics literature focuses on childrearing and whether homeowners tend to have superior childrearing practices. The literature examines this possibility in a number of ways, including whether homeowners are less likely to have daughters who become pregnant as teenagers and whether homeowners are more likely to monitor their own children and their neighbors’ children.<sup>172</sup> Here, too, the economic inquiry about the potential benefits of homeownership echoes problematic history. Concern about children is a common trope in racially charged statements that seek to defeat the introduction of affordable housing into communities. For instance, the spokesman for an effort to defeat the introduction of an apartment complex in Rancho Cucamonga expressed that, “What we don’t want is all of the undesirables moving from L.A. into our area . . . Not mom and

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<sup>167</sup> Reynolds Farley, Howard Schuman, Suzanne Bianchi, Diane Colasanto & Shirley Hatchett, “*Chocolate City, Vanilla Suburbs: Will the Trend Toward Racially Separate Communities Continue?*,” 7 SOC. SCI. RSCH. 319, 336 (1978).

<sup>168</sup> Reynolds Farley, Charlotte Steeh, Maria Krysan, Tara Jackson & Keith Reeves, *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOC. 750, 760 (1994).

<sup>169</sup> ROTHSTEIN, *supra* note 140, at 64.

<sup>170</sup> See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

<sup>171</sup> See, e.g., *supra* text accompanying note 157 (describing concerns regarding property values in flyer in *MHANY Management*).

<sup>172</sup> See, e.g., *supra* text accompanying notes 77–78 (“Other studies have explored potential ties between homeownership and successful childrearing and found significant positive correlations.”).

dad both working with latchkey kids, not criminals, not people of a transient nature that don't have a stake in the community."<sup>173</sup>

Similarly, when expressing the problems with affordable housing in a nearby locality, a Modesto councilman explained, "They have high Hispanic folks there. They ended up in these units with lots of kids downtown. I'm just saying this could easily happen here."<sup>174</sup> A City Council Member in Desert Hot Springs similarly expressed that they were not interested in having "a bunch of minority kids running around" in affordable housing.<sup>175</sup>

Indeed, this coded language can even be seen from the Supreme Court's own problematic statements in *Euclid*, when the Court expressed that zoning that keeps out apartments and other undesirables "will increase the safety and security of home life, greatly tend to prevent accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc."<sup>176</sup> It can also be seen in the citizens' racially coded objections to zoning policy in *MHANY Management*, which emphasized concerns such as the possibility that affordable housing would undermine schools.<sup>177</sup>

To be sure, economic studies examining academic performance of children in homeownership communities<sup>178</sup> appear significantly less objectionable than expressed concerns about "a bunch of minority kids running around."<sup>179</sup> However, as the affordable housing resistance literature has demonstrated, subtle expressions of bias are often far from obvious. For instance, at the initial stages of conflict regarding a proposed use of particular land (such as the siting of affordable housing), there is typically a small, vocal group that voices opposition in raw, blunt terms.<sup>180</sup> Over time, the rhetoric becomes more rational and objective-sounding, relying on arguments about property value

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<sup>173</sup> Nguyen et al., *supra* note 166, at 119.

<sup>174</sup> *Id.* at 121.

<sup>175</sup> *Id.*

<sup>176</sup> *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

<sup>177</sup> See, e.g., *supra* text accompanying note 157 (describing concerns regarding schools in flyer in *MHANY Management*).

<sup>178</sup> Glaeser & Shapiro, *supra* note 75.

<sup>179</sup> However, the economic literature's examination of the relationship between homeownership and pregnant teenage daughters is problematic. Even to the extent that one is concerned about teenagers not being able to support their children, it is unclear why teenage sons who produce offspring would not also be a concern.

<sup>180</sup> Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288, 290 (1992).

decline, increased traffic volumes, and the like.<sup>181</sup> Likewise, in the anti-discrimination context, courts have recognized that while it is rare to find blatant expressions of discrimination as the motivation for particular action, discrimination nonetheless underlies many decisions that are presented as seemingly neutral.<sup>182</sup>

At the least, many values of homeownership examined by economists appear to be local or even hyper-local in effect. As explored previously, studies of homeownership are often concerned with whether homeowners do things like take better care of their homes, practice better childrearing, or engage more in local community governments and organizations.<sup>183</sup> All these qualities are associated with maintaining the perceived quality and value of homes in the immediate area. For instance, whether one's neighbor paints her house more frequently is a decidedly local question — to the extent it improves the quality and value of homes, it will improve those in the immediate vicinity. Even examination of homeowners' participation in governance have had a local focus — with questions like whether homeowners are more likely to know the names of local officials like their school board head, vote in local elections, and “work to solve local problems.”<sup>184</sup> Indeed, some of the most significant literature examining the purported positive externalities of homeownership has referred to how homeownership can create “local amenities” and social capital,<sup>185</sup> both decidedly local.

In light of the racialized history of homeownership in the United States, and the ways that homeownership has been used to promote segregation, this concern for local and hyper-local benefits of homeownership becomes more problematic. It again centers the study of the MID in segregated housing and the benefits of segregated housing that have largely accrued to white people.

Another way to view this point is by engaging in a thought experiment: how *could* the economics literature have studied the potential benefits of homeownership if considered from an equity lens, dedicated to reducing segregation and spreading out resources, rather than keeping the benefits of homeownership concentrated in largely white communities? Just to name a few possibilities, positive externalities one might examine from this equity lens might include:

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<sup>181</sup> *Id.*

<sup>182</sup> *See, e.g., Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996) (“Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms.”).

<sup>183</sup> *Supra* Part I.B.1.

<sup>184</sup> DiPasquale & Glaeser, *supra* note 79, at 356.

<sup>185</sup> *Id.* at 356-57.

whether homeowners are more likely to live in neighborhoods that are more diverse, or that reduce the world's environmental footprint, or that pay workers an equitable wage, or that reduce differences in educational outcomes between different groups of students, or any number of other outcomes with broad-based impact or tendencies to increase equity. The actual, insular concerns evinced by the economics literature instead are consistent with a long and steady history of segregation and efforts to keep rich and white communities white and well-off.<sup>186</sup> The economics literature thus inextricably — though perhaps unwittingly — associates not just homeownership, but also the MID, with a history of racialized preferences in which the bulk of the benefits of homeownership accrue to white people.

### C. Misattribution of Benefits of Whiteness to MID

Even to the extent that we accept the values examined by the economics literature as unobjectionable positive goods, there is still a risk that the literature is missing factors, including racial bias, that are actually causing the correlations between homeownership and these positive goods. Indeed, as mentioned previously, the economics literature is self-aware about the possibility that factors other than homeownership may cause certain outcomes that appear to be associated with homeownership.<sup>187</sup> However, the literature has been less explicit about how race and privilege may be playing a role in affecting some of the findings about homeownership.

Generally, the economics studies indicate that they attempt to control for race. For instance, a major study about whether homeowners are better citizens (which finds significant, positive correlations between homeownership and citizenship) indicates that it controls for “race, gender, marital status, children, income, education, residential structure type (e.g., detached home), and city size.”<sup>188</sup> With respect to race in particular, the study indicates that it uses “the average homeownership rate of the individual's income quartile for each race in each individual's state.”<sup>189</sup>

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<sup>186</sup> Some studies have mentioned that homeowners may be more inclined to engage in discriminatory zoning practices. See, e.g., Glaeser & Shapiro, *supra* note 75, at 42 (noting that homeowners are more likely than renters to fight racial integration of neighborhoods).

<sup>187</sup> E.g., *supra* text accompanying notes 122–24.

<sup>188</sup> DiPasquale & Glaeser, *supra* note 79, at 356.

<sup>189</sup> *Id.* Other studies take race into account, but do not explicitly claim to control for race. See, e.g., Coulson & Li, *supra* note 76, at 65–66 (modeling certain variable as a function of a number of demographic characteristics, including race).



However, even to the extent that the studies attempt to control for race, there are other critical attributes that most of the economic studies do not even attempt to control for. In particular, many of the studies control for income, but not wealth.<sup>190</sup> Controlling for income is important because if higher income people tend to be homeowners, then it could be higher income, not homeownership, driving positive attributes associated with homeownership. Wealth could clearly have a similar effect. However, wealth is more difficult for researchers to identify than income,<sup>191</sup> which probably explains why many of the studies control for income, but not wealth. Indeed, one of the studies regarding the relationship between homeownership and childrearing explains that “[b]ecause the [data source we rely upon] only occasionally collects wealth data, we cannot test this possibility directly. However, if we suppose that income and wealth are correlated, then we can test for selection bias for low wealth households by estimating the model separately for households having low income.”<sup>192</sup>

Unfortunately, it is not clear that tracking income predictably tracks wealth.<sup>193</sup> And in any event, tracking income will likely fail to capture differences between groups, as some groups have much higher (or lower) amounts of wealth relative to their income.<sup>194</sup> As an example of how the failure to control for wealth may be driving spurious conclusions, a more recent study regarding the relationships between homeownership and childhood outcomes, which did control for wealth, found that “evidence of a relationship between homeownership and several indicators of the well-being of children is weaker than previous researchers have found.”<sup>195</sup> The researchers warned that the social science findings that housing policy rhetoric relies on may need to be more carefully reviewed and reevaluated.<sup>196</sup>

Indeed, there are reasons wealth may correlate strongly with some of the positive attributes that have been associated with homeownership. As one wealth scholar has explained, “[w]ealth not only allows the

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<sup>190</sup> See, e.g., *supra* text accompanying note 188 (noting that study controls for many attributes, including income, but not wealth).

<sup>191</sup> Tax data, for instance, provides ample information about income, but not wealth.

<sup>192</sup> Green & White, *supra* note 72, at 457.

<sup>193</sup> LISA A. KEISTER, WEALTH IN AMERICA: TRENDS IN WEALTH INEQUALITY 10 (2000); Alexandra Killewald, Fabian T. Pfeffer & Jared N. Schachner, *Wealth Inequality and Accumulation*, 43 ANN. REV. SOCIO. 379, 389-90 (2017).

<sup>194</sup> See, e.g., *infra* text accompanying notes 200–01 (exploring dynamic in terms of black and white wealth gap).

<sup>195</sup> Barker & Miller, *supra* note 116, at 301.

<sup>196</sup> *Id.*

direct purchase of a home, but it also allows its owner to purchase advantages such as physical protection and a safe and pleasant living environment.”<sup>197</sup> Wealth can also “buy leisure, that is, it can allow its owner to decide whether to work or not,” and “it certainly removes the stresses associated with meeting very basic needs.”<sup>198</sup>

These attributes of wealth would seem to be strong explanatory variables for many of the positive attributes associated with homeownership. The ability of a wealthier person at a given income level to make more purchases to produce a more pleasant living environment would seem to indicate that wealthier people are more likely to engage in better home maintenance. A greater amount of leisure time and freedom from worries about meeting basic needs would also seem to provide a stronger foundation to provide children with support, engage in local organizations, and undertake civic responsibilities. Indeed, a series of studies finds that greater wealth is associated with greater educational and cognitive achievement in one’s children, and that, in this regard, wealth has properties distinct from income.<sup>199</sup> All of these associations underscore the nagging concern that the economic homeownership studies’ general omission of controls for wealth leaves an important gap in our understanding of homeownership.

This omission becomes even more problematic because of the clear racial wealth gap. Professor Thomas Shapiro, a leading scholar in the racial wealth gap, has explained that, “Wealth, as distinguished from income, offers the key to understanding racial stratification in the United States, especially the persistence of racial inequality in a post-civil rights era in which minorities have made remarkable advances.”<sup>200</sup> Shapiro explains further that “whites and blacks are most persistently unequal along the wealth dimension,” and that wealth is particularly important and distinct from income, because families use wealth very differently from income.<sup>201</sup>

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<sup>197</sup> KEISTER, *supra* note 193, at 7.

<sup>198</sup> *Id.*

<sup>199</sup> See, e.g., Dalton Conley, *Capital for College: Parental Assets and Postsecondary Schooling*, 74 SOCIO. EDUC. 59, 59 (2001) (finding that “parental wealth . . . has a strong, nonlinear effect on the postsecondary schooling of offspring”); Terri Friedline, Rainer D. Masa & Gina A.N. Chowa, *Transforming Wealth: Using the Inverse Hyperbolic Sine (IHS) and Splines to Predict Youth’s Math Achievement*, 49 SOC. SCI. RSCH. 264, 264 (2015) (finding correlation between debt accumulation and math achievement).

<sup>200</sup> Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL’Y 53, 53 (2006).

<sup>201</sup> *Id.* at 56.

The wealth gap between racial groups has been holding relatively steady over time, with recent research showing that typical white families have approximately eight times the wealth as typical Black families.<sup>202</sup> This gap is incredibly important in measuring overall well-being. As many scholars have detailed in extensive work, wealth is critical to understanding numerous privileges that income does not convey.<sup>203</sup> For instance, among other things, wealth conveys an ability to provide (or receive) inheritances and other intergenerational transfers such as educational support, provision of housing down payments, and the like.<sup>204</sup> It provides the ability to earn income on one's savings, creating a multiplicative wealth effect.<sup>205</sup> And it provides emergency savings and security so that income shocks will not lead to dire outcomes.<sup>206</sup> For these and other reasons, wealth can reflect and perpetuate a legacy of advantages along numerous dimensions.<sup>207</sup>

As applied to the study of homeownership, the failure to control or account for wealth differences means that, even when researchers purport to control for race and income, they may very well be comparing apples to oranges. Imagine a Black family that lives in a wealthy, largely white neighborhood. This Black family, like many of the Black family's white neighbors, may have more positive outcomes on a number of dimensions, including children's academic success, home maintenance, and the like. As compared to a family of Black renters, who have equivalent income, the more positive outcomes of the Black homeowner family along these dimensions would support research that emphasizes the relationship between homeownership and these positive outcomes. However, if the Black homeowner family has significantly higher wealth than the Black renter family, it may very well be the wealth that explains some of these differences. Greater wealth may allow the Black homeowner family to provide better educational opportunities and support for their children, may allow for greater upkeep on the home, and other similar attributes.

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<sup>202</sup> Neil Bhutta, Andrew C. Chang, Lisa J. Dettling, Joanne W. Hsu & Julia Hewitt, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. GOVERNORS FED. RSRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/RYR4-TYAF>].

<sup>203</sup> See, e.g., KEISTER, *supra* note 193, at 7 (noting that “[w]ealth can be used to indirectly gain advantages such as political influence, social prestige, flexibility, leisure, and improved educational and occupational advantages”).

<sup>204</sup> Bhutta et al., *supra* note 202.

<sup>205</sup> KEISTER, *supra* note 193, at 6-7.

<sup>206</sup> Killewald et al., *supra* note 193, at 392.

<sup>207</sup> Bhutta et al., *supra* note 202.

This, of course, may be true for wealthier families in general, not just the wealthy Black family. However, the reason the potential role of wealth nonetheless matters so much from a racial perspective is because, in light of the racial wealth gap explained above and detailed extensively by scholars, it is so much rarer for Black families to be wealthy than white families.<sup>208</sup> Finding purported positive outcomes from homeownership, which may actually be attributable to positive outcomes from wealth, thus fails to take account of the fact that Black families are much more likely to be systematically excluded from these outcomes because they are much less likely to have wealth than other races.

Using positive outcomes from wealth as evidence that homeownership should be subsidized thus results in a subsidy of the very advantages that homeowners, and white people, already have to a greater extent. It is a classic case of the rich getting richer, albeit here in a racialized fashion to boot.

Likewise, the economic studies of homeownership fail to account for the role of privilege more generally in the claimed, positive outcomes of homeownership. White privilege includes wealth but is broader than wealth alone. White privilege includes all the advantages that are conferred on white people because of their skin color — including, for instance, higher likelihood of receiving job opportunities, lower likelihood of being subject to school discipline, and so much more.<sup>209</sup> When the economic studies find that people are willing to pay more to live in, or near, homeownership communities, the studies again tend to attribute this to the positive value of homeownership, though they are typically careful to say they cannot be sure about causation.<sup>210</sup>

But the studies are missing that, since homeownership communities are more often white, the willingness to pay more to live in or near such communities may be yet another privilege afforded to whiteness. And attempting to control for race does not necessarily solve this problem. As with the discussion above, it may be the case that a Black family that lives in a largely white homeownership community also benefits from

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<sup>208</sup> See *supra* text accompanying note 202.

<sup>209</sup> See, e.g., Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 475 (2014) (explaining that “white racial identity is consciously and unconsciously rooted in privilege and subordination”); Russell J. Skiba, Robert H. Horner, Choong-Geun Chung, M. Karega Rausch, Seth L. May & Tary Tobin, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85, 85 (2011) (finding significant racial disparities in school discipline outcomes).

<sup>210</sup> See, e.g., Coulson & Li, *supra* note 76, at 66 (acknowledging that estimating impact of homeownership is “fraught with difficulty”).

higher prices that will be associated with living in that community.<sup>211</sup> But this is a privilege afforded to whiteness, which the Black family happens to benefit from, not a privilege equally shared by white and Black people.<sup>212</sup> One study suggests how this mechanism might be playing out. In the study, researchers observed that renters are both more likely to have Black neighbors and to think their neighborhoods would become all Black in the future.<sup>213</sup> To the extent that renter neighborhoods in general are more likely to be racialized as non-white, and homeownership communities in general are more likely to be racialized as white, lower appreciation in renter neighborhoods and higher appreciation in homeownership neighborhoods may very well reflect discriminatory biases, and not some inherent, greater value of homeownership.

Tying all of the above together, the lesson is that homeownership in the United States, as well as the study of the MID by economists, has been inextricably tied to whiteness. Explicit government policy as well as private actions have long associated the benefits of homeownership with whiteness. The study of the benefits of homeownership and the MID are deeply (although perhaps unwittingly) associated with the same tropes of whiteness, in ways that end up attributing the benefits of the MID to what may really be benefits that likely flow, in part, from whiteness itself.

### III. SUBSIDIZING THE MID: UNCONSCIOUS BIAS IN LAWMAKING

Part II explored how, historically, homeownership and the study of the MID have been associated with whiteness and benefits of whiteness. But the MID is not a mere theoretical possibility, which has been subject to biased study by economists. As laid out in Part I, the MID is a very costly tax benefit which disproportionately benefits wealthy taxpayers and white people at the expense of low-income taxpayers and people of color.<sup>214</sup> The fact that our tax system actually subsidizes this arguably inequitable tax provision, despite sustained critique that threatens to undermine any serious, rational case for it, deepens the puzzle: How has a preference that benefits so few taxpayers, and that is so problematic,

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<sup>211</sup> *See id.*

<sup>212</sup> *See id.*

<sup>213</sup> Rossi & Weber, *supra* note 82, at 22.

<sup>214</sup> *See supra* Part I.A.3, Part I.D.

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garnered so much political support for decades, by both lawmakers and the public?<sup>215</sup>

In this Part, we move beyond the historical associations between housing and the MID and tropes of whiteness to show how the psychological phenomenon of bias — by academics, lawmakers, and the public — is a quiet but driving force behind the making of the modern-day MID. Technology scholars have recognized that biased data (such as the use of predominantly white, male faces) can inadvertently create racially discriminatory technology.<sup>216</sup> Analogously, our claim is that bias in the empirical and legislative process can similarly result in discriminatory legislation.

Two aspects of the MID make it a particularly interesting case study in bias in the lawmaking process. One is the racialized history of homeownership in the United States, as discussed in Part II. The other is its “accidental” nature,<sup>217</sup> that is, its status as an unintended rule that simply never got repealed. These factors created a perfect storm of sorts that allowed spurious justifications for the MID to perpetuate for decades and have made the rule so hard to repeal. And this is not merely a story of society perpetuating structural racism long after the laws have been changed, as might be the case when neighborhoods continued to stay segregated after restrictive housing covenants were technically made illegal. This is a story of a law that has never been repealed at all.

How has this happened? In the Sections below, we describe how cognitive biases — including but not limited to implicit racial bias — have contributed to the acceptance and longevity of the MID. The history of the deduction provides a compelling illustration of confirmation bias, susceptibility to framing effects, and other cognitive biases, which are explored further below.

It is worth pausing here to consider the connection between implicit racial bias<sup>218</sup> and cognitive bias more generally. For several decades,

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<sup>215</sup> See, e.g., Ventry, *The Fake Third Rail of Tax Reform*, *supra* note 66, at 182 (noting that polls show three-quarters of Americans support the deduction, but also pointing out that many polls are sponsored by the real estate lobby).

<sup>216</sup> See, e.g., Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 *PROC. MACH. LEARNING RSCH.* 1, 1 (2018) (exploring biases in facial recognition).

<sup>217</sup> See Ventry, *The Accidental Deduction*, *supra* note 42, at 236.

<sup>218</sup> As distinguished from explicit bias, implicit bias refers to *unconscious* associations people make between certain groups and attributes. See, e.g., Jack Glaser, Katherine Spencer & Amanda Charbonneau, *Racial Bias and Public Policy*, 1 *POL’Y INSIGHTS FROM BEHAV. & BRAIN SCIS.* 88, 89 (2014) (“[A]s substantial research shows, *implicit* bias is ever-present. People associate racial groups with specific attributes (e.g., crime,

scholars in the growing field of behavioral law and economics have recognized that research from psychology provides important insights into how people behave and make decisions, and that those insights have implications for legal systems.<sup>219</sup> A general theme that emerges from that literature is that humans are irrational actors who demonstrate predictable biases.<sup>220</sup> However, in incorporating social science research on bias into legal theory, two parallel tracks have emerged. As observed by Professors Christine Jolls and Cass Sunstein, implicit racial bias generally has not been grouped with other so-called “heuristics” and cognitive biases identified by the behavioral economics literature.<sup>221</sup> As Jolls and Sunstein note, “Thus far, the reception within law of the two areas of research has been largely independent.”<sup>222</sup> In other words, legal scholars tend to focus on implicit bias and the law, or cognitive bias and the law, but not both. But Jolls and Sunstein rightly point out that implicit bias can and should be understood as one of many cognitive biases we demonstrate, and one that is attributable to the same underlying psychological mechanisms as other forms of bias.<sup>223</sup> Indeed, the same parts of our brain that cause us to jump to

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weapons, simply ‘goodness’ or ‘badness’) outside of conscious awareness and control. Such associations are separate from explicit attitudes . . .”).

We use “implicit racial bias” here because we believe race plays an important role in understanding the MID. However, much of the literature refers more broadly to “implicit bias,” which would include implicit bias based on race as well as other characteristics, such as gender, disability, or weight. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 64-75 (2013) (describing developing implicit association tests that address these traits and more).

<sup>219</sup> See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1473-74 (1998) (“The unifying idea in our analysis is that behavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior, and more accurate predictions and prescriptions about law.”); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U. CHI. L. REV.* 1159, 1168-70 (2003) [hereinafter *Libertarian Paternalism is Not an Oxymoron*] (noting that “some of the time, people do not choose optimally even when the stakes are high”).

<sup>220</sup> See, e.g., Sunstein & Thaler, *Libertarian Paternalism is Not an Oxymoron*, *supra* note 219, at 1167-69 (noting that there is “little empirical support” for the claim that people are excellent decision-makers).

<sup>221</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 *CALIF. L. REV.* 969, 973 (2006); cf. Glaser et al., *supra* note 218, at 88-89 (focusing on implicit racial bias but discussing the link between implicit bias and general cognitive bias).

<sup>222</sup> Jolls & Sunstein, *supra* note 221, at 973.

<sup>223</sup> *Id.* (“Most important, implicit bias — like many of the heuristics and biases emphasized elsewhere — tends to have an automatic character, in a way that bears importantly on its relationship to legal prohibitions.”).

conclusions when solving problems or evaluating risk also lead us to categorize and stereotype people according to race, gender, or other characteristics.<sup>224</sup> Accordingly, we argue a comprehensive approach to understanding bias in the lawmaking process should consider both implicit racial bias and other forms of cognitive bias. As a result, we describe below how both implicit, racial bias and other cognitive biases (the latter of which we refer to simply as “cognitive biases”) have contributed to the construction and the longevity of the MID.

#### A. *The Null Hypothesis*

Before exploring the association between the MID and bias, it is worth examining an alternative hypothesis for why the MID has had such staying power. One could argue that there actually is no puzzle that needs solving. Many bad ideas from a theoretical tax policy perspective nonetheless exist in practice because of the political economy of taxation and the role of rent seeking.<sup>225</sup> And, indeed, there are many tax provisions that are not popular amongst tax policy scholars, which nonetheless have had historical staying power. For instance, as just one other example, non-economic accelerated depreciation is widely believed to contribute significantly to aggressive tax planning and sheltering.<sup>226</sup> And, like in other areas, the durability of the MID can be explained, in part, by a powerful lobbying group that protects it.<sup>227</sup> The real estate lobby has surely played an important role in convincing Congress to retain housing preferences.<sup>228</sup>

However, this acknowledgement that tax provisions do not always reflect perfect tax theory cannot absolve all problematic tax provisions from serious consideration as to why they last. Even if lobbying is part of the reason, the lobbying is typically built on some sort of principled foundation. For instance, while problematic, the accelerated

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<sup>224</sup> See *id.* at 975 (“We believe that the problem of implicit bias is best understood in light of existing analyses of System I processes.”).

<sup>225</sup> See, e.g., Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 914 (1987) (presenting taxation as a contract, which legislators use to benefit themselves).

<sup>226</sup> See, e.g., Theodore S. Sims, *Debt, Accelerated Depreciation, and the Tale of a Teakettle: Tax Shelter Abuse Reconsidered*, 42 UCLA L. REV. 263 (1994) (exploring generally the role of depreciation in tax shelters).

<sup>227</sup> See, e.g., Lorraine Woellert, *Powerful Lobbyists Swoop in to Save Sacred Tax Break*, POLITICO (Dec. 31, 2016, 7:51 AM EST), <https://www.politico.com/story/2016/12/lobbyists-mortgage-interest-deduction-tax-233081> [<https://perma.cc/6GD8-E55Y>].

<sup>228</sup> See, e.g., Ventry, *The Accidental Deduction*, 42*supra* note 42, at 233 (“In late 1988, the National Association of Realtors (NAR) . . . launched a campaign to bolster support for the mortgage interest deduction (MID).”).



depreciation rules are based on the need to take into account economic depreciation in some way, because depreciation reflects the cost of the production of taxable income.<sup>229</sup> Likewise, the misguided theory that homeownership benefits society has long served as a principled justification for the deduction, which has fueled lobbying efforts.

Moreover, the admitted existence of a strong real estate lobby for the MID does not entirely explain the existence of the MID or the arguments made on its behalf. The arguments for subsidizing homeownership predate the 1980s, when the real estate lobby stepped up its campaign to preserve real estate tax subsidies in the wake of tax reform.<sup>230</sup> The deduction itself, of course, began decades before this time.<sup>231</sup> The real estate lobby has simply capitalized on economic arguments offered in support of real estate subsidies from earlier decades.<sup>232</sup> And these arguments have been repeated many times over, not just by lobbyists, but by influential politicians from *both* political parties.<sup>233</sup>

So, although successful lobbying efforts have certainly added to the staying power of the MID, we believe that the lobbying success is a byproduct of a deeper story.<sup>234</sup> Indeed, we believe that being satisfied with lobbying and rent seeking alone as explanations for the durability of the MID inappropriately absolves policymakers and legislators of responsibility for a more problematic part of the story: that the very creation of the MID and its duration over a century arises out of implicit racial and other cognitive biases.<sup>235</sup>

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<sup>229</sup> Sims, *supra* note 226, at 276-79 (describing “economic depreciation”).

<sup>230</sup> Ventry, *The Accidental Deduction*, *supra* note 42, at 233 (“In late 1988, the National Association of Realtors (NAR), still stinging from the Tax Reform Act of 1986, which cut into the value of housing tax subsidies, launched a campaign to bolster support for the mortgage interest deduction . . .”). Ventry also describes lobbying from the housing industry as early as the 1960s, arguing that a Treasury proposal to limit itemized deductions would slow the purchase and construction of homes. *Id.* at 260-61.

<sup>231</sup> *See supra* Part I.B.

<sup>232</sup> Ventry, *The Accidental Deduction*, *supra* note 42, at 280 (critiquing claims by the housing industry that the MID “is an important factor promoting broad-based homeownership”).

<sup>233</sup> *See supra* notes 63–65 and accompanying text.

<sup>234</sup> Indeed, Professors Jeffrey Rachlinski and Cynthia Farina argue that, in some contexts, cognitive psychology better explains government policy failures than public choice theory. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 604 (2002).

<sup>235</sup> Relatedly, political science literature observes that some policies respond not just to powerful lobbying interests, but to positive “social constructions” of those targeted by the policy. For example, scholars have argued that legislators tend to support policies that help groups that benefit from positive stereotypes, such as being hardworking,

B. *The Role of Implicit Bias in the MID*

1. Implicit Bias: Background

Research on implicit bias seeks to uncover unconscious attitudes and stereotypes about groups based on traits such as race, gender, age, or disability.<sup>236</sup> Foundational work by researchers in the 1990s led to the development of the Implicit Association Test (“IAT”), which seeks to measure unconscious associations we make between certain categories (for example, Black v. white, male v. female) and certain traits or stereotypes (e.g., good v. bad, athletic v. clumsy).<sup>237</sup> The IAT gauges implicit bias by measuring speed on a computerized sorting test: the theory is that a person can sort items more quickly if words or photos that they associate as belonging together share the same response key on the computer.<sup>238</sup> For example, a person with an implicit bias against Black people might sort a photo of a white person more quickly if the photo shares a response key with words that are labelled “good,” and that person might sort photos of a Black person more quickly if the photo shares a response key with words labelled “bad.”<sup>239</sup>

Years of empirical research by psychologists have offered several key insights relating to implicit bias.<sup>240</sup> First, unconscious preferences, attitudes, and stereotypes are pervasive: most people display them.<sup>241</sup> Second, these attitudes often deviate from people’s *expressed*

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deserving, or honest. Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 334-35 (1993). Schneider and Ingram argue that “[t]here are strong pressures for public officials to provide beneficial policy to powerful, positively constructed target populations and to devise punitive, punishment-oriented policy for negatively constructed groups. Social constructions become embedded in policy as messages that are absorbed by citizens and affect their orientations and participation patterns.” *Id.* at 334.

<sup>236</sup> For early work developing an implicit association test for racial bias, see Russell H. Fazio, Joni R. Jackson, Bridget C. Dunton & Carol J. Williams, *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCH. 1013, 1013 (1995).

<sup>237</sup> See *id.* For the ongoing IAT project, see *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited June 16, 2021) [<https://perma.cc/HPD7-RARM>].

<sup>238</sup> *About the IAT*, *supra* note 237.

<sup>239</sup> See *id.*

<sup>240</sup> For a comprehensive summary, see generally BANAJI & GREENWALD, *supra* note 218 (finding that IAT scores correlated moderately with discriminatory judgments and behavior).

<sup>241</sup> See Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 429 (2007).

attitudes.<sup>242</sup> Third, and importantly for this purpose, the outcomes of IATs have been shown to predict behavior in some contexts.<sup>243</sup> For example, one study first measured implicit bias among emergency room physicians, and then asked them to recommend treatment to hypothetical patients of different races.<sup>244</sup> The study revealed that doctors' implicit biases were predictive of the treatment they prescribed: doctors who showed implicit bias against Black people were less likely to prescribe a blood-thinning procedure (thrombolysis) to Black patients than they were to white patients who had an identical medical condition.<sup>245</sup> Notably, the doctors' expressed racial attitudes were *not* predictive of the treatment.<sup>246</sup>

Research on implicit bias reveals that people generally have positive implicit attitudes towards members of "socially privileged groups;" they prefer young over old, light skin over dark skin, thin over obese, and straight over gay, for example.<sup>247</sup> Another important phenomenon related to implicit bias is ingroup favoritism — the idea that people prefer members of their own group to outsiders.<sup>248</sup> Researchers have documented that ingroup favoritism is so strong that subjects prefer their own groups even when they are randomly assigned in an experiment.<sup>249</sup> However, people who belong to socially-privileged groups (e.g., people who are white, young, and/or straight) tend to show stronger ingroup preferences than those who do not belong to those groups.<sup>250</sup>

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<sup>242</sup> *See id.*

<sup>243</sup> *See id.* For a review of studies examining the link between the IAT and behavior, see Anthony G. Greenwald, Eric Luis Uhlmann, T. Andrew Poehlman & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCH. 17, 28 (2009).

<sup>244</sup> Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1232-33 (2007). The study administered an online IAT to the doctors to measure implicit bias. *Id.* at 1231.

<sup>245</sup> *Id.* at 1235.

<sup>246</sup> The physicians expressed equal preferences for blacks and whites, but the IAT measured implicit bias against blacks in favor of whites. *See id.* at 1233-35.

<sup>247</sup> Lane et al., *supra* note 241, at 433.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010).

## 2. Implicit Bias and the Law

Both psychologists and legal experts have recognized that implicit bias, particularly implicit racial bias, impacts the decisions of important legal actors such as judges, juries and law enforcement.<sup>251</sup> Research has shown that Black and Latino men are more likely to be stopped, searched, and arrested by police officers, and experience greater use of force.<sup>252</sup> Evidence of implicit bias has also been found in jury selection and in jury decision making.<sup>253</sup> For example, jurors are more likely to find a defendant guilty and impose a harsher sentence if the defendant belongs to a different racial group.<sup>254</sup> Most of the legal literature on implicit bias focuses on the treatment of *individuals* — e.g., a criminal suspect or a defendant.<sup>255</sup> In the legislative context, examinations of implicit bias have been almost entirely limited to the criminal justice context. For instance, scholars have argued that massively disparate sentencing rules for powder versus crack cocaine are likely explained by lawmakers' implicit bias against Black people and in favor of white people.<sup>256</sup> Likewise, notable work by Professor Brown (which crosses over between tax and criminal justice) suggests that implicit racial bias likely underlies Congress's decision to pursue aggressive fraud enforcement of the Earned Income Tax Credit.<sup>257</sup>

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<sup>251</sup> See, e.g., Isabel Bilotta, Abby Corrington, Saaid A. Mendoza, Ivy Watson & Eden King, *How Subtle Bias Infects the Law*, 15 ANN. REV. L. & SOC. SCI. 227, 228 (2019) ("It follows that the creation and enforcement of laws, and the prosecution and adjudication of offenders, are necessarily imbued with the biases endemic to the human condition.").

<sup>252</sup> *Id.* at 229.

<sup>253</sup> *Id.* at 234-35; see also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007) (showing implicit bias predicts how mock jurors remember certain facts).

<sup>254</sup> Bilotta et al., *supra* note 251, at 235.

<sup>255</sup> For a study documenting implicit bias in judges, see Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009).

<sup>256</sup> See Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 886 (2015) ("Americans saw crack as a 'black' problem. The link between crack cocaine and blackness triggered automatic associations between black Americans and violence, dangerousness, and criminality."). Smith, Levinson, and Robinson also argue that white favoritism led state legislatures to adopt a much more lenient and treatment-based approach to the methamphetamine epidemic. *Id.* at 917-18. For further discussion of the crack-powder sentencing disparity, see Charles Ogletree, Robert J. Smith & Johanna Wald, *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 45, 51-52 (Justin D. Levinson & Robert J. Smith eds., 2012).

<sup>257</sup> Dorothy A. Brown, *Tax Law: Implicit Bias and the Earned Income Tax Credit*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 256, at 164-70.

Finally, some legal scholars have argued that implicit bias by private actors should be addressed through the law. For example, seminal work by Professor Linda Krieger argues that employment discrimination laws, which generally require a showing of the defendant's intent, should be reformed to account for the fact that employment discrimination is often motivated by unconscious, rather than conscious, bias.<sup>258</sup> Others have suggested reforms to criminal law, civil rights law, equal protection claims, and remedies to account for the role of unconscious bias.<sup>259</sup>

### 3. Implicit Bias and the MID

Consider again the historic justifications for the MID. As detailed in Part I above, numerous economic studies offer purported justifications for subsidizing homeownership based on positive externalities like better home maintenance, more community involvement, and higher academic achievement for children. This notion that homeownership produces important societal benefits worth subsidizing has permeated political discourse, even today.<sup>260</sup> Part II then described how those studies, and most other analyses of the MID,<sup>261</sup> completely — and alarmingly — omit any discussion of the deeply racialized nature of homeownership in the United States. This failure to observe that the many purported positive aspects of homeownership are simply incidents, and even perpetrators, of white privilege is a classic “blind spot” indicative of implicit bias.<sup>262</sup>

To be sure, explicit racial bias undoubtedly plays an important role in shaping homeownership in this country. As discussed above, redlining, restrictive covenants, and other racist policies clearly and explicitly sought to exclude Black people from white neighborhoods and, in many cases, from homeownership altogether. But studies of the MID are several steps removed from this history. Economists and other

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<sup>258</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

<sup>259</sup> See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1536 (2005); Lane et al., *supra* note 241, at 439-40; see also Reshma M. Saujani, “*The Implicit Association Test*: A Measure of Unconscious Racism in Legislative Decision-Making”, 8 MICH. J. RACE & L. 395, 413 (2003) (suggesting reform to equal protection doctrine to take implicit bias into account).

<sup>260</sup> See *supra* note 62 and accompanying text.

<sup>261</sup> However, discussions of the MID's disparate impact are a notable exception. See *supra* Part II.D.

<sup>262</sup> See BANAJI & GREENWALD, *supra* note 218, at xiii.

experts studying the MID were not explicitly seeking to change policy or even influence laws governing property ownership, but rather were analyzing whether homeownership itself justifies an economic subsidy from the government. But, in hindsight, the rhetoric of those analyses, the failure to acknowledge the socio-historic context, and their tendency toward self-fulfilling conclusions are consistent with pervasive implicit racial bias.

We obviously cannot go back and administer an IAT to each economist, tax expert, and legislator who has supported the MID over the years. But we can see evidence of implicit associations throughout the literature and the political discourse. For example, recall President Clinton's remarks that we should encourage homeownership "to reinforce family values in America [and] encourage two-parent households."<sup>263</sup> According to this discourse: the model homeowner stays out of trouble, takes care of their home, raises good kids, and contributes to their society. In many minds, though without conscious realization, this person is undoubtedly white.

Indeed, Professor Jennifer Eberhardt, a leading expert on implicit bias, has documented how many people make unconscious associations between the desirability of a home or neighborhood and the race of its occupants.<sup>264</sup> For example, one study asked two groups of participants to evaluate a fictional suburban middle-class home; the home was identical in the two scenarios other than that in one scenario it was occupied by a fictional white family and in the other, it was occupied by a fictional Black family.<sup>265</sup> Participants who evaluated the home occupied by the white family saw it as more valuable and in a more desirable neighborhood as compared to participants who rated the identical home occupied by the Black family.<sup>266</sup> Other studies indicate that people think neighborhoods with Black residents are more likely to be unkempt, degraded, and lacking resources.<sup>267</sup> Studies also show that people assume neighborhoods with Black residents (particularly Black male residents) have higher rates of crime; this holds true even when

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<sup>263</sup> Clinton, *supra* note 65.

<sup>264</sup> See JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 160-61 (2019).

<sup>265</sup> See Courtney M. Bonam, Hilary B. Bergsieker & Jennifer L. Eberhardt, *Polluting Black Space*, 145 J. EXPERIMENTAL PSYCH.: GEN 1561, 1567-68 (2016).

<sup>266</sup> *Id.* at 1568. The participants were given the same description of the home. The descriptions were accompanied by a photo of a four-person white family or a photo of a four-person Black family; both families were dressed similarly and had two similarly aged children. *Id.*

<sup>267</sup> *Id.* at 1566.

controlling for actual crime rates.<sup>268</sup> In other words, people make this association between crime and Black residents regardless of whether the actual crime rate in a particular area is high.<sup>269</sup>

The positive associations many have with a white homeowner have likely helped support the belief that homeownership, which, as outlined in Part II has long been associated with whiteness, is good and merits subsidization. And as the implicit bias literature has shown, the unconscious associations we make not only impact our attitudes, but also our decisions.<sup>270</sup> There is no reason to think policymakers considering whether to subsidize homeownership are immune from such bias.<sup>271</sup>

Stepping back, the race issue seems hard to miss. The government systematically excluded Black people from homeownership and many other economic and social privileges, while actively supporting and subsidizing those things for white people. The people who were allowed to buy homes in desirable neighborhoods — with government subsidized loans and enough accumulated wealth for a down payment — did so. Then, those very same people used their economic resources and social networks to maintain their homes, garden, vote, get involved in their local community, and send their kids to highly resourced schools. Policymakers looked at this outcome and said to themselves: homeowners seem to do good things, so we should *subsidize* homeownership. But this borders on the absurd: economic and social (white) *privilege* is the best explanation for the positive outcomes associated with homeownership, the very opposite of what governments should subsidize. It is essentially akin to saying, rich people have good jobs and make a lot of money, so we should give them a tax credit for being rich! This admittedly oversimplified account of the MID is meant

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<sup>268</sup> Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOCIO. 717, 747 (2001).

<sup>269</sup> *Id.* at 747-49 (observing that the mental association between race and crime goes beyond any “actual association” between race and crime).

<sup>270</sup> See *supra* notes 243–45 and accompanying text.

<sup>271</sup> Cf. Schneider & Ingram, *supra* note 235, at 336 (“Public officials find it to their advantage to provide beneficial policy to the advantaged groups who are both powerful and positively constructed as ‘deserving’ because not only will the group itself respond favorably but others will approve of the beneficial policy’s being conferred on deserving people.”).

to illustrate the most pernicious aspect of implicit bias: it blinds us to what is sometimes right in front of us.<sup>272</sup>

### C. *The Role of Cognitive Bias in the MID*

While implicit racial bias played a major role in the construction of the MID, we argue that other cognitive biases have contributed significantly to its continued entrenchment in the law. And whereas understanding implicit racial bias can help us appreciate how the MID was justified on positive externality grounds, these other cognitive biases, such as confirmation bias and representativeness, illustrate how widely accepted claims about homeownership can become so firmly embedded in the American psyche.

#### 1. Cognitive Bias: Background

The starting premise of the cognitive bias literature is that humans do not behave like rational actors much of the time, but are instead prone to making predictable errors in judgment.<sup>273</sup> These errors, or biases, can be traced back to the evolution of the human brain and often involve conserving precious time and mental resources.<sup>274</sup> In seminal work on cognitive bias, Nobel Prize-winning psychologist Daniel Kahneman describes two “systems” of thinking that have evolved in the human brain: System 1, which “operates automatically and quickly,” without effort or control; and System 2, which is the deliberate, reasoned part of our minds.<sup>275</sup> System 1, essentially our subconscious, does most of our thinking, works fast, and often relies on mental shortcuts (or “heuristics”).<sup>276</sup> This quick, impression-based thinking likely helped our ancestors act fast to avoid danger.<sup>277</sup> System 2, our conscious mind, works slowly and deliberately, and is only activated when necessary to solve problems that cannot be solved by System 1.<sup>278</sup> However, the two

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<sup>272</sup> See BANAJI & GREENWALD, *supra* note 218, at xiii (“Once lodged in our minds, hidden biases can influence our behavior toward members of particular social groups, but we remain oblivious to their influence.”).

<sup>273</sup> See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* xviii-xx (2008) (“[A]s you will see in this book, we are really far less rational than standard economic theory assumes . . . these irrational behaviors of ours are neither random nor senseless. They are systematic, and . . . predictable.”).

<sup>274</sup> See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20-21 (2011).

<sup>275</sup> *Id.*

<sup>276</sup> See *id.* at 21.

<sup>277</sup> See *id.* at 21-22.

<sup>278</sup> *Id.* at 21, 24.



systems communicate — System 1 passes on its quickly developed impressions and intuitions to System 2, which, in most cases, adopts them into beliefs without question.<sup>279</sup> While this is generally an efficient way for our brains to function, it can lead to errors when the heuristics adopted by System 1 convert into faulty beliefs.<sup>280</sup> Researchers have conducted a wealth of experiments that observe and categorize cognitive biases that predictably result from these heuristics.<sup>281</sup>

## 2. Cognitive Bias and the Law

Several examples of cognitive bias in legislation emerge from the legal literature. On a general level, Professors Jeffrey Rachlinski and Cynthia Farina observe that members of Congress are vulnerable to cognitive biases like availability, framing, and representativeness (discussed further below), which they argue may lead to poor policy decisions.<sup>282</sup> Other scholars have noted that cognitive bias isn't limited to individual decision-making, but operates in group or institutional decision-making processes (such as Congressional committees), as well.<sup>283</sup> For example, Professors Eskridge and Ferejohn colorfully describe the committee report for the Defense of Marriage Act ("DOMA") as "a virtual cornucopia of decision-making biases."<sup>284</sup> Scholars have also highlighted the Endangered Species Act and food and drug legislation as examples of Congress displaying irrational bias, in both instances by essentially overreacting to salient events.<sup>285</sup> In a similar vein, Professors

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 24-25.

<sup>281</sup> For a comprehensive overview of these studies, see generally *id.* (categorizing and analyzing mental processes like quick judgments and slower, critical thinking as System 1 and System 2).

<sup>282</sup> Rachlinski & Farina, *supra* note 234, at 572; see also William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 621-22 (2002) (discussing that Congressional committees may be prone to availability and representativeness, as well as anchoring or cognitive dissonance). Framing and representativeness are described in more detail below.

<sup>283</sup> See Eskridge & Ferejohn, *supra* note 282, at 620-21; Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 541 (2002).

<sup>284</sup> Eskridge & Ferejohn, *supra* note 282, at 627-28 ("The House Judiciary Committee anchored its report on the threat to marriage posed by 'homosexual marriage,' but never explained how excluding committed couples contributed to strengthening an institution already weakened by high rates of divorce and spousal abuse.").

<sup>285</sup> See *id.* at 628 (describing critiques of the Endangered Species Act being inspired by "horror stories," which implicate availability and representativeness, rather than by a careful cost-benefit analysis); Sharon B. Jacobs, *Crises, Congress, and Cognitive Biases:*

Kuran and Sunstein document “availability cascades,” through which repeated public discourse about an issue eventually leads to “widespread mistaken beliefs,” which in turn leads to faulty risk regulation by policymakers.<sup>286</sup> Kuran and Sunstein focus on availability cascades relating to the regulation of risk, citing the regulation of certain highly-publicized but arguably low-risk environmental hazards as an example.<sup>287</sup>

### 3. Cognitive Biases and the MID

While implicit racial bias played a major role in the construction of the MID, we argue that other cognitive biases have contributed significantly to its continued entrenchment in the law.

#### a. “What You See Is All There Is” and Confirmation Bias

As discussed above in Part I, the MID was never enacted as a standalone provision. Thus, there is no historical record of policy debate surrounding its enactment.<sup>288</sup> Rather, proponents of the rule sought to justify it on an ex-post basis, decades later.<sup>289</sup> This disposition — rationalizing a pre-existing rule — probably influenced even the best-intentioned policy experts who sought to analyze the MID. As numerous studies of cognitive bias over many decades reveal, it is human nature to rationalize our beliefs, seek to confirm our pre-existing theories, and ignore contrary evidence.<sup>290</sup>

In describing our tendency to ignore alternative theories and see only the evidence in front of us, Kahneman coined the acronym WYSIATI (“What You See Is All There Is”).<sup>291</sup> According to Kahneman, WYSIATI stems from the interaction of Systems 1 and 2.<sup>292</sup> By design, System 1 tends to jump to conclusions from very little evidence, that is, whatever

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*A Critical Examination of Food and Drug Legislation in the United States*, 64 *FOOD & DRUG L.J.* 599, 621-22 (2009) (examining cognitive bias in the legislative response to crises in the context of Food and Drug legislation).

<sup>286</sup> Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683, 685 (1999).

<sup>287</sup> *Id.* at 691-703.

<sup>288</sup> See *supra* text accompanying notes 41-46.

<sup>289</sup> See *supra* text accompanying notes 47-51.

<sup>290</sup> See KAHNEMAN, *supra* note 274, at 80-88 (summarizing results of prior studies).

<sup>291</sup> *Id.* at 86 (“Jumping to conclusions on the basis of limited evidence is so important to an understanding of intuitive thinking, and comes up so often . . . that I will use a cumbersome abbreviation for it: WYSIATI, which stands for what you see is all there is.”).

<sup>292</sup> *Id.* at 209.

evidence is in front of it.<sup>293</sup> Again, this is likely an efficient way to operate in many cases. Because it is designed to think fast, System 1 takes only the evidence at hand and creates a narrative, which we then tend to accept as true and fail to question.<sup>294</sup>

This tendency to formulate confident beliefs based on only limited evidence was demonstrated in a seminal set of experiments in the 1990s.<sup>295</sup> The study involved having subjects predict juror votes in a hypothetical legal case.<sup>296</sup> Some study subjects received background on the plaintiff's case only; others received information on the defendant's case only.<sup>297</sup> The subjects were then asked to predict the number of jurors who voted for a given side and to estimate their confidence in their predictions.<sup>298</sup> Although the subjects themselves received one-sided information, they were told repeatedly and explicitly that the jury would receive information for both sides.<sup>299</sup> Despite this warning, the subjects demonstrated a tendency to favor the side they were presented with. (In other words, the subjects "did not adjust sufficiently for one-sided evidence.")<sup>300</sup> More strikingly, the subjects who received one-sided evidence had *more* confidence, not less, in their predictions about how the jury would vote.<sup>301</sup> In explaining this surprising result — that people who received one-sided evidence would be more confident in their predictions than people who received both sides of the story — Kahneman notes that it is the consistency and coherence of a story that underlies System 1's confidence in it, not its completeness.<sup>302</sup>

Another related and well-documented phenomenon is confirmation bias, which describes our tendency to deliberately seek out evidence that confirms our currently held beliefs.<sup>303</sup> This raises the question of how we first adopt these beliefs, which we later seek to confirm. Psychologist Daniel Gilbert explains that we are inclined to naturally accept what we see and hear as true, rather than going through the

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<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 87.

<sup>295</sup> Lyle A. Brenner, Derek J. Koehler & Amos Tversky, *On the Evaluation of One-Sided Evidence*, 9 J. BEHAV. DECISION MAKING 59, 59-60 (1996).

<sup>296</sup> *Id.* at 60.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 68.

<sup>301</sup> *Id.* Subjects in another group received evidence for both sides; these subjects displayed less confidence in their predictions. *Id.*

<sup>302</sup> KAHNEMAN, *supra* note 274, at 87.

<sup>303</sup> See, e.g., *id.* at 81 (illustrating how confirmation bias produces different results depending on the question asked and the person's existing beliefs).

mental effort of disproving information that comes to us.<sup>304</sup> Gilbert notes this tendency is efficient, given that most things we hear and see are true, and that “the savings of time and energy [arguably] outweighs the intellectual deficits of inaccurate beliefs.”<sup>305</sup>

Once we hold a belief, confirmation bias leads us to seek out evidence to support it, by either selectively gathering evidence or giving undue weight to supporting evidence.<sup>306</sup> Psychologists note that this tendency is generally unconscious, and is even observed in people who have no vested interest in a particular belief or outcome.<sup>307</sup> Scholars have noted that confirmation bias has been used to rationalize government policies, for example, the United States’ lengthy involvement in Vietnam.<sup>308</sup> Experiments have also shown confirmation bias among doctors making diagnoses, as well as jurors.<sup>309</sup>

Consider again the history of the MID. It came into the Code as part of a general rule allowing all interest to be deducted, and for decades, it was largely unquestioned. Eventually, policy experts began to criticize its regressive nature, and politicians considered whether it should be eliminated as a revenue-raising measure. But by that time, politicians — no doubt spurred by entrenched real estate interests — had already been making public statements on the value of homeownership for decades, such as:

- “A family that owns its own home takes pride in it and has a more wholesome, healthful, and happy atmosphere in which to bring up children.”<sup>310</sup>
- “Owning a home can increase responsibility and stake out a man’s place in his community.”<sup>311</sup>

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<sup>304</sup> Daniel T. Gilbert, *How Mental Systems Believe*, 46 AM. PSYCH. 107, 116 (1991).

<sup>305</sup> *Id.*

<sup>306</sup> Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

<sup>307</sup> See *id.* at 178; see also P.C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 52 Q.J. EXPERIMENTAL PSYCH. 133, 133 (1960) (finding in a psychological experiment where participants completed a simple conceptual task that a significant number were unwilling to test their hypotheses and drawn to confirming evidence).

<sup>308</sup> Nickerson, *supra* note 306, at 191 (“Once a policy has been adopted and implemented by a government, all subsequent activity of that government becomes focused on justification of that policy[.]”) (citing BARBARA W. TUCHMAN, *THE MARCH OF FOLLY: FROM TROY TO VIETNAM* 245 (1985)).

<sup>309</sup> *Id.* at 192-94 (summarizing studies).

<sup>310</sup> Green & White, *supra* note 72, at 441 (quoting Herbert Hoover).

<sup>311</sup> *Id.* (quoting Lyndon B. Johnson).

- “Homeownership . . . [is] an essential part of the American Dream.”<sup>312</sup>

What happened next? Economists got to work studying whether there was an economic justification for the MID. Unsurprisingly, they found there was such a justification, a finding that has remained strikingly unshakable in popular opinion, despite significant erosion of empirical support and many other critiques over the years. This is a stunning example of WYSIATI and confirmation bias. People — policymakers, academic experts, and voters — hear a statement (or in this case, a series of statements): homeownership is good for society and should be subsidized. These statements are rooted in a one-sided view of the world, which assumes that homeownership produces positive outcomes, rather than the reverse. Even experts who seek to study homeownership mimic this same worldview by valorizing insular tendencies of homeownership while ignoring its racialized history, as well as the fact that positive outcomes from homeownership may in fact result from privilege and wealth, not homeownership itself.<sup>313</sup> The public and political discourse then take the studies as further proof of the value of subsidizing homeownership, notwithstanding significant, contradictory evidence even within the studies themselves.

*b. The Conjunction Fallacy and Representativeness*

In addition to confirmation bias and WYSIATI, other cognitive biases probably further contributed to the strength of the narrative of the homeowner as “good” citizen. Two of these additional biases are what psychologists call “representativeness” and the “conjunction fallacy.” These are best illustrated by an example from the seminal experiment by Amos Tversky and Daniel Kahneman.<sup>314</sup> In the experiment, subjects were presented with a brief description of a hypothetical person named Linda.<sup>315</sup> The description informed the subjects that Linda “is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and

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<sup>312</sup> *Id.* at 442 (quoting the Clinton/Gore campaign). Note, some of these statements, such as the first quote from Herbert Hoover, date back to the 1920s, well before the first empirical studies of the positive externalities of homeownership were published. *Id.* at 441.

<sup>313</sup> See *supra* Parts II.B and II.C.

<sup>314</sup> Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 *PSYCH. REV.* 293, 296-300 (1983) [hereinafter *Extensional Versus Intuitive Reasoning*].

<sup>315</sup> *Id.* at 297.

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social justice, and also participated in anti-nuclear demonstrations.”<sup>316</sup> Subjects were then asked to rate which of the following statements is more probable:

- Linda is a bank teller; or
- Linda is a bank teller and is active in the feminist movement.<sup>317</sup>

An astounding 85 percent of subjects chose the second option, that Linda was more likely to be a bank teller who is active in the feminist movement.<sup>318</sup> Note that an elementary rule of probability holds that the broader outcome (just a bank teller) *must* be more probable than the more specific outcome that is a subset of the broader outcome (bank teller who is also a feminist).<sup>319</sup> The explanation for this outcome, the authors posit, is representativeness.<sup>320</sup>

Representativeness, according to Tversky and Kahneman, describes our tendency to store and process information “in relation to mental models, such as prototypes and schemata.”<sup>321</sup> When it comes to evaluating people, we think a person is representative of a group if they conform to our mental model (i.e., our stereotype) of that group.<sup>322</sup> In the Linda problem, the description of Linda evokes a stereotype of a liberal, feminist woman.

Tversky and Kahneman argue that this tendency to compare people and situations to prototypes impacts how we judge probabilities.<sup>323</sup> If X is deemed to be highly representative of Y (i.e., we think X matches up with our prototype of Y), we think it’s more probable that X is related to Y, or that X originates from Y.<sup>324</sup> This explains the outcome of the Linda study. According to the authors, the subjects view Linda as a *feminist* bank teller as more representative of Linda than just a plain old

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<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 299.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 294 (explaining the “simple[]” and “fundamental” probability law, the conjunction rule as “ $P(A\&B) \leq P(B)$ : A conjunction cannot be more probable than one of its constituents” because “the set of possibilities associated with a conjunction A&B is included in the set of possibilities associated with B”).

<sup>320</sup> *Id.* at 297.

<sup>321</sup> *Id.* at 295.

<sup>322</sup> *Id.* at 296.

<sup>323</sup> *Id.*

<sup>324</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974).

bank teller.<sup>325</sup> Since the feminist bank teller is the more representative description of the Linda prototype, subjects rated it more probable.<sup>326</sup>

The conjunction fallacy describes this tendency to link traits or events together based on representativeness, without actual evidence for making the link.<sup>327</sup> It explains why subjects think Linda is more likely to be a bank teller *and* someone who is active in the feminist movement (the conjunction), in defiance of a relatively simple rule of probability.<sup>328</sup> Again, the explanation is that the conjunction better conforms to our mental prototype of Linda.<sup>329</sup> As Tversky and Kahneman note, “[t]he representativeness heuristic generally favors outcomes that make good stories or good hypotheses. The conjunction feminist bank teller is a better hypothesis about Linda than bank teller....”<sup>330</sup>

Representativeness has much broader implications for understanding how we rely on stereotypes, in both pernicious ways and harmless ways.<sup>331</sup> But in the current context, consider the connection between homeownership and being a good citizen. It is possible (or, perhaps, likely) that years of political statements and propaganda by the lobbying industry have contributed to a prototype of a homeowner as a “good” citizen: one who gardens his yard, does not commit crimes, sends his kids to well-resourced schools and enrichment activities, and keeps his unwed teenage daughter from getting pregnant. Now consider asking legislators or voters to evaluate the probability of two statements. One statement simply says that “Steve is a homeowner.” The other statement says, “Steve is a homeowner who votes, maintains his yard, and participates in community events.” The second statement must be less likely than the first according to the rules of probability. But the second statement conforms to the narrative of the homeowner as good citizen; in other words, it is more representative of our stereotypical homeowner. Importantly, what Tversky and Kahneman’s research tells us is that if we have a strong mental prototype of the homeowner as

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<sup>325</sup> Tversky & Kahneman, *Extensional Versus Intuitive Reasoning*, *supra* note 314, at 300.

<sup>326</sup> Note, these results have been replicated in numerous other contexts. For a discussion of multiple studies of the Linda study (and similar studies), see KAHNEMAN, *supra* note 274, at 156-65.

<sup>327</sup> Tversky & Kahneman, *Extensional Versus Intuitive Reasoning*, *supra* note 314, at 311.

<sup>328</sup> *Id.*

<sup>329</sup> See KAHNEMAN, *supra* note 274, at 157 (“Everyone agrees that Linda fits the idea of a ‘feminist bank teller’ better than she fits the stereotype of bank tellers.”).

<sup>330</sup> Tversky & Kahneman, *Extensional Versus Intuitive Reasoning*, *supra* note 314, at 311.

<sup>331</sup> For a discussion of stereotypes and representativeness, see, for example, Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCH. SCI. 319 (1990).

good citizen, we are more likely to mistakenly assume these things always go hand in hand or believe that one causes the other.<sup>332</sup> This conjunction fallacy might lead to honest beliefs that homeownership *causes* good citizenship, without good empirical support. As Kahneman notes, we find coherent narratives to be the most plausible, and then tend to confuse what's plausible with what's probable.<sup>333</sup>

c. *The More You Hear It, The More You Believe It*

The “illusory truth effect” is yet another cognitive bias that likely plays a role in the staying power of the MID.<sup>334</sup> Simply put, studies have shown that we are more likely to believe a statement is true the more we hear it repeated over time.<sup>335</sup> Researchers note that even false information, whether verbal or written, becomes credible to the listener when repeated enough times.<sup>336</sup> For example, one study found that repeating certain key evidence to mock jurors caused them to give greater weight to such evidence.<sup>337</sup> Jurors who heard certain factual statements supporting conviction repeated seven times were more confident in a suspect's guilt than jurors who heard the same statements only one time.<sup>338</sup>

The public and legislators alike have heard the homeownership narrative repeated over and over again, for at least a hundred years.<sup>339</sup> The illusory truth effect tells us that, the more we hear it repeated that homeownership is good for society, the more likely we are to believe it is true.

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<sup>332</sup> See *supra* notes 328–30 and accompanying text.

<sup>333</sup> KAHNEMAN, *supra* note 274, at 159.

<sup>334</sup> See generally Alexandra Johnston, Daniel Ambrosini & Bruno Losier, *The Impact of the Illusory Truth Effect and Location of Testimony in Juror Deliberations*, 4 INT'L J. RISK & RECOVERY 18 (2021) (describing what the illusory truth effect is).

<sup>335</sup> See, e.g., Lynn Hasher, David Goldstein & Thomas Toppino, *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107, 111 (1977) (“The present research has demonstrated that the repetition of a plausible statement increases a person's belief in the . . . validity or truth of that statement.”); Johnston et al., *supra* note 334, at 18 (“The illusory truth effect (ITE) is the tendency to believe false information as being accurate after it has been presented repeatedly over time.”).

<sup>336</sup> Hasher et al., *supra* note 335, at 107.

<sup>337</sup> Johnston et al., *supra* note 334, at 18.

<sup>338</sup> *Id.* at 23 (“[R]epeating key phrases increased participants' confidence that [the suspect] is guilty by a factor of two to three.”).

<sup>339</sup> See *supra* note 312 and accompanying text.



d. *Framing, Loss Aversion, and the Endowment Effect*

Finally, the MID's formal entrenchment in the law before its merits were ever questioned implicates another set of interrelated biases: framing, loss aversion, and the endowment effect. In their groundbreaking work developing prospect theory, Kahneman and Tversky observed that individuals tend not to evaluate outcomes in isolation but, rather, they frame outcomes as gains or losses relative to a neutral reference point.<sup>340</sup> For example, consider a pair of outcomes where each of two people have \$5 million in the bank. At first glance, these outcomes may appear neutral: each person has the same amount of money. However, assume that on the previous day, one person had \$9 million in the bank and the other person had \$1 million. Even though they have the same amount of money, prospect theory holds that the first person is very unhappy, because she experienced a \$4 million loss, while the second person is very happy, because she experienced a \$4 million gain.<sup>341</sup> In other words, both individuals will frame the outcome (the \$5 million in the bank) relative to their reference point (the money in the bank the day before).<sup>342</sup>

How choices are framed, in terms of a positive or a negative outcome, can have a powerful impact on our decisions. For example, in a seminal study on framing effects, doctors were more likely to recommend a procedure when they were told, "the one-month survival rate is 90%"; as compared to when they were told "[t]here is 10% mortality in the first month."<sup>343</sup> The survival rates are clearly equivalent in the two scenarios, but the framing as "survival" (positive) versus "mortality" (negative) impacted the doctors' decisions.<sup>344</sup>

In their work developing prospect theory, Kahneman and Tversky also observed that people exhibit loss aversion, that is, their losses cause more displeasure than the pleasure from an equivalent gain.<sup>345</sup> In the above example, the person who lost \$4 million would experience roughly twice as much displeasure (according to Kahneman and

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<sup>340</sup> Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 274 (1979); see also KAHNEMAN, *supra* note 274, at 282.

<sup>341</sup> This example comes from KAHNEMAN, *supra* note 274, at 274-75.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 367.

<sup>344</sup> *Id.*; see also Annette M. O'Connor, *Effects of Framing and Level of Probability on Patients' Preferences for Cancer Chemotherapy*, 42 *J. CLINICAL EPIDEMIOLOGY* 119, 119 (1989) (presenting medical information in terms of survival rates instead of death rates increased participants' willingness to take on more effective, but toxic, treatment, even though the actual rate of survival/death was the exact same).

<sup>345</sup> KAHNEMAN, *supra* note 274, at 283-84.

Tversky's experiments) than the pleasure experienced by the person who gained \$4 million.<sup>346</sup> In simpler terms, we hate losing more than we like winning.

Relatedly, the "endowment effect" describes the tendency of individuals to value items they own more than items they don't own.<sup>347</sup> The endowment effect can be explained by loss aversion; once an item is viewed as part of our "endowment," we view it as painful to lose it, and this pain outweighs the pleasure experienced by acquiring something we don't yet own.<sup>348</sup> This is also described as a "status quo bias," whereby individuals prefer to remain at the status quo because "the disadvantages of leaving it loom larger than the advantages."<sup>349</sup>

Scholars have argued that voters demonstrate loss aversion and status quo bias when they become accustomed to the benefits of legislation.<sup>350</sup> One notable example is the Affordable Care Act, which was unpopular when first enacted, but turned out to be very difficult to repeal once voters grew accustomed to having affordable health insurance.<sup>351</sup> Similar preference reversals in favor of retaining the status quo have been observed with respect to New York City's Smoke Free Air Act and a carbon tax in British Columbia.<sup>352</sup> In each case, voters eventually become attached to a status quo and don't want to give it up, a phenomenon described as the "political endowment effect."<sup>353</sup>

Turning back to the MID, by the time it was subject to serious political scrutiny, homeownership taxpayers had been reaping its benefits for decades, as had entrenched interests such as the real estate lobby. Because it was part of the general interest deduction that originated in

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<sup>346</sup> *Id.* at 284.

<sup>347</sup> See, e.g., KAHNEMAN, *supra* note 274, at 292-93 (explaining what the endowment effect means). For example, in a famous "coffee mug experiment," subjects demanded more money to sell a mug or a pen that they owned than other subjects were willing to pay to acquire the same mug or pen. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342-46 (1990).

<sup>348</sup> KAHNEMAN, *supra* note 274, at 293.

<sup>349</sup> Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPS. 193, 197-98 (1991).

<sup>350</sup> See, e.g., Alberto Alesina & Francesco Passarelli, *Loss Aversion in Politics*, 63 AM. J. POL. SCI. 936, 936 (2019) (studying loss aversion in elections).

<sup>351</sup> *Id.* at 936.

<sup>352</sup> *Id.* (citing GALEN A. TREUER, ELKE U. WEBER, KRISTIN C. APPELT, APOLLONIA E. GOLL & RAY D. CROOKES, CTR. FOR DECISION SCIS., WEATHERING THE STORM: STATUS QUO ADJUSTMENTS EXPLAIN SUCCESSFUL POLICY IMPLEMENTATION (2012)).

<sup>353</sup> *Id.* at 937 ("Once a new policy becomes the status quo, a preference reversal occurs: A larger majority of voters wants to maintain it. We call it the *political endowment effect*.").

1913, reforming the MID has always been framed as removing a benefit. This history behind the deduction thus implicates loss aversion and the endowment effect: it is no surprise that the public would react negatively to having a tax benefit taken away from them. Our tendency to frame outcomes as gains and losses suggests that this disposition of the MID as a pre-existing benefit subject to removal likely shapes our attitudes about its merits. The MID was never truly evaluated in a vacuum. Because it has (virtually) always existed, deductibility of home mortgage interest is the reference point. Anything short of such deductibility is a painful loss compared to this reference point. This framing and loss aversion, especially by powerful groups, likely contribute to the resistance to repealing or significantly reforming the MID.

#### IV. WHERE DO WE GO FROM HERE? DEBIASING LAWMAKING

As examined above, the MID, one of the most deeply embedded tax expenditures in the Code, reflects and perpetuates biased decision making. Moreover, the MID exemplifies this phenomenon, but is likely far from isolated. This raises the question: how do we minimize bias in future legislation and how can we reform existing legal policy that reflects such bias?

##### A. *Minimizing Bias in Future Legislation*

Beyond the MID itself, we believe that the research in this Article suggests broader lessons regarding bias in future legislation. If, legislators, like the rest of us, are prone to rely on numerous cognitive biases in decision making, including implicit racial bias, how can we try to minimize the effects of such biases on the legislative process? In the criminal justice context, some state governments have begun using racial impact statements in order to assess the potential disparate impacts of proposed legislation.<sup>354</sup> Modeled after environmental and fiscal impact statements that are required for other types of legislation, the goal of racial impact statements is to identify disparate impacts, as well as alternative options, for legislators, prior to the adoption of the legislation.<sup>355</sup> Federal legislation has also been proposed (though not adopted) that would enable federal prosecutors to assess and make

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<sup>354</sup> For a general description, see, for example, Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 19 (2009).

<sup>355</sup> *Id.*

recommendations about federal prosecution disparities.<sup>356</sup> Notably, Professor Brown has also recommended that racial impact statements accompany all future proposed tax legislation.<sup>357</sup>

We agree that racial impact statements may be an important addition to the legislative process, and that they should be used across the legislative process, not just for criminal justice legislation. However, racial impact statements are unlikely to be a panacea. First, as currently contemplated, the scope of racial impact statements, even in assessing disparate impact, would be limited. While one American Bar Association panel has suggested using racial impact statements to assess proposed and current law in the criminal justice context,<sup>358</sup> even strong proponents of racial impact statements have worried about resource constraints that would prevent such a wholesale reexamination.<sup>359</sup>

Even as to future legislation, it is important to recognize that racial impact statements may not capture all disparate impact. The fiscal impact statements after which racial impact statements are modeled are often subject to a variety of methodological controversies and limitations,<sup>360</sup> and we imagine that racial impact statements will face similar obstacles. For instance, it is not clear what time period a racial impact analysis of the MID would cover. As explained previously, the MID was never affirmatively enacted as such, but rather existed as a result of the general deductibility of interest in 1913.<sup>361</sup> In 1986, the deduction for personal interest was disallowed, but the deduction for

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<sup>356</sup> Justice Integrity Act of 2008, S. 3245, 110th Cong. (2008).

<sup>357</sup> Dorothy A. Brown, Asa Griggs Candler Professor of L. at Emory Univ., Testimony Before the Senate Comm. on Fin. 5 (Apr. 20, 2021), <https://www.finance.senate.gov/imo/media/doc/Professor%20Dorothy%20Brown%20Testimony.pdf> [<https://perma.cc/EM3R-DWMF>].

<sup>358</sup> AM. BAR ASS'N JUST. KENNEDY COMM'N, REPORT TO THE ABA HOUSE OF DELEGATES 47 (2004), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/justice-kennedy-commission-reports.pdf> [<https://perma.cc/2T4J-MSG3>].

<sup>359</sup> See, e.g., Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 MINN. J.L. & INEQ. 211, 243-44 (2011) (expressing concern about resource limitations with respect to the ABA proposal).

<sup>360</sup> Critics across the political aisle have suggested that the scoring rules can be gamed. See, e.g., Robert Saldin, *Gaming the Congressional Budget Office*, 21 NAT'L AFFS. 81 (2014), <https://www.nationalaffairs.com/publications/detail/gaming-the-congressional-budget-office> [<https://perma.cc/KC2R-H52T>] (decrying gaming of budget scoring process); Arindrajit Dube, *No, A \$15 Minimum Wage Won't Cost 1.4 Million Jobs*, WASH. POST (Feb. 24, 2021, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2021/02/24/minimum-wage-economic-research-job-loss/> [<https://perma.cc/2JLA-M9R3>] (critiquing CBO conclusions regarding the cost of a \$15 million minimum wage).

<sup>361</sup> See *supra* text accompanying note 40.

home mortgage interest was made an exception to this general disallowance.<sup>362</sup> Perhaps, at the time of the 1986 legislation, the home interest deduction would have been subject to its own scoring had racial equity statements been in place at the time. However, it is not clear that this exception to a disallowance necessarily would have been viewed as its own legislative policy, meriting racial impact scoring, especially in complex legislation with many moving pieces. The broader lesson is that there will likely be significant controversies about what should be scored from a racial equity perspective, and how such scoring will happen, leaving holes in the analysis.

Most critically from the perspective of this Article, racial impact statements, like the literature focusing on disparate impact of legislation generally, do not focus on the bias underlying the *construction* of legislation. To identify and respond to such bias, we recommend that Congress engage in additional de-biasing efforts. Indeed, we emphasize that identifying bias in the legislative *process* is a critical way to head off legislation that will likely have disparate impact on the backend, especially given the many cognitive biases we identified that often make it difficult to upend legislation that has already been passed.

The literature on law and bias suggests a potentially fruitful approach. A frequent prescription among bias researchers is the use of expert testimony; this suggestion typically arises in the context of helping judges and/or juries overcome bias in litigation.<sup>363</sup> One compelling example is the testimony of psychologist Susan Fiske at a trial in which a female plaintiff was suing Price Waterhouse for gender discrimination.<sup>364</sup> The plaintiff, Ann Hopkins, was highly successful by all objective measures but was not promoted to partner.<sup>365</sup> Price Waterhouse alleged that her lack of interpersonal skills was the problem.<sup>366</sup> Among other critiques, Hopkins' evaluations noted that she was "macho," "overcompensated for being a woman" and needed a "course in charm school."<sup>367</sup> At trial, Dr. Fiske compellingly testified about the role that unconscious gender stereotyping likely played in the

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<sup>362</sup> See *supra* text accompanying notes 49–50.

<sup>363</sup> See, e.g., Glaser et al., *supra* note 218, at 92 (advocating for scientists to provide expert testimony in policy-relevant cases); Kang & Lane, *supra* note 250, at 493-94 (discussing use of expert testimony from social scientists to inform the jury).

<sup>364</sup> Kang & Lane, *supra* note 250, at 494. See generally Susan T. Fiske, Donald N. Bersoff, Eugene Borgida, Kay Deaux & Madeline E. Heilman, *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCH. 1049 (1991) (providing background on Dr. Fiske's role in the trial).

<sup>365</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233-34 (1989).

<sup>366</sup> *Id.* at 234-35.

<sup>367</sup> *Id.* at 235.

defendant's decision not to promote Hopkins, relying on social science research on stereotypes.<sup>368</sup> Fiske also highlighted the fact that some of the more gender-neutral critiques of Hopkins (such as the fact that she was "annoying") were also indicative of stereotyping.<sup>369</sup> In ruling for the plaintiff, the court explicitly acknowledged Fiske's testimony and the role of gender stereotyping in Price Waterhouse's failure to promote Hopkins.<sup>370</sup>

Turning to the legislative process, Congress could similarly employ the use of social science experts in its consideration of legislation. In the same way that House and Senate committees call experts to testify about various implications of proposed bills, those hearings could also include testimony from social science experts about potential bias in the rationales for legislation, or about racially disparate impacts of new or existing legislation. Consider, for example, relatively recent Congressional hearings on the MID. A 2011 Senate Finance Committee Hearing on "Tax Reform Options: Incentives for Homeownership" heard from five experts in tax, real estate, and economics, none of whom mentioned race or bias.<sup>371</sup> Similarly a 2017 hearing on the tax reform, which included discussions of reforming the MID, heard from tax and real estate experts who did not mention race or bias.<sup>372</sup> Testimony about implicit bias in the economic rationales for housing subsidies, or about the racially disparate impact of housing subsidies, could illuminate the issue for legislators and help them account for bias in their decisions.

Congress has made some recent progress in this regard. In April of 2021, a hearing on racial, gender, and ethnic disparities in tax law was held before the Senate Finance Committee and included testimony from Professor Brown and other experts on bias in the law.<sup>373</sup> This recognition by Congress of the long-ignored role of bias in the tax

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<sup>368</sup> See *id.*

<sup>369</sup> *Id.* at 235-36.

<sup>370</sup> *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117-20 (D.C. Cir. 1985). The finding of gender stereotyping was affirmed by both the D.C. Circuit and the Supreme Court, although the Supreme Court reversed part of the D.C. Circuit's decision on other grounds. *Price Waterhouse*, 490 U.S. at 256-58.

<sup>371</sup> *Tax Reform Options: Incentives for Homeownership: Hearing Before the S. Comm. on Fin.*, 112th Cong. (2011), <https://www.finance.senate.gov/imo/media/doc/77019.pdf> [<https://perma.cc/WSL4-9YQG>].

<sup>372</sup> *Individual Tax Reform: Hearing Before the S. Comm. on Fin.*, 115th Cong. (2017), <https://www.finance.senate.gov/imo/media/doc/31548.pdf> [<https://perma.cc/F8T5-R7PF>].

<sup>373</sup> *Combatting Inequality: The Tax Code and Racial, Gender, and Ethnic Disparities: Hearing Before the S. Comm. on Fin.*, 117th Cong. (2021), <https://www.finance.senate.gov/hearings/combating-inequality-the-tax-code-and-racial-ethnic-and-gender-disparities> [<https://perma.cc/6P6L-3EC2>].

system is undoubtedly a crucial first step in creating awareness. However, it is unclear how hearing such testimony in a vacuum will impact future legislative decisions. We suggest it would be more impactful to continue to incorporate expert testimony on bias or disparate impact during the hearings on substantive legislation, where it will be most salient and likely to inform lawmakers' views on particular bills. For example, the experts called in the April 2021 hearing on bias in the tax system could be called again to testify the next time Congress considers reforming a particular provision of the Code or enacting a new bill.

Finally, we would be remiss not to mention that education and training programs to combat bias are frequently recommended in the literature.<sup>374</sup> Targeted anti-bias training has proven successful in some contexts, such as reducing shooter bias among law enforcement officers.<sup>375</sup> Commentators have also recommended training for judges, juries, and lawyers to reduce bias in the legal system.<sup>376</sup>

Whether providing anti-bias training to members of Congress would have a meaningful impact on legislation remains to be seen. We hasten to acknowledge that Congress operates far from optimally, and that the notion of de-biasing efforts, including along racial lines, may seem naive to some. As a cautionary tale, one might point to recent congressional hearings that have displayed Congress's ability to turn academic topics, like critical race theory, into political theater. Some may suggest that de-biasing training is likely to have a similar fate.

However, we believe our case study illustrates the importance of continuing to pursue de-biasing measures, regardless of the political theater that will no doubt occur to some extent. As we have displayed, the MID, one of the most embedded tax expenditures, reflects deep-seated racism at its core, despite decades of study, analysis, and critique. Congress, for too long, has been able to escape responsibility for perpetuating this provision, in part because of our collective failure to hold Congress accountable.<sup>377</sup> We do not believe that Congress's

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<sup>374</sup> See, e.g., Bilotta et al., *supra* note 251, at 233, 236 (recommending training to reduce shooter bias); Kang & Lane, *supra* note 250, at 500 (suggesting juror education to debias the courtroom).

<sup>375</sup> See, e.g., Kang & Lane, *supra* note 250, at 498 (finding that some training regimens can decrease shooter bias).

<sup>376</sup> See, e.g., Bilotta et al., *supra* note 251, at 233, 236 (recommending judges, jurors, and legal professionals be trained on subtle bias); Kang & Lane, *supra* note 250, at 500 (suggesting juror education to debias the courtroom).

<sup>377</sup> As mentioned throughout, an important exception is Dorothy Brown, who has led the way in pointing out how the MID has disproportionately benefitted white people at the expense of taxpayers of color. See *supra* text accompanying notes 108–13.

tendency (or likelihood) of responding in suboptimal ways to debiasing training should foreclose scholars from recommending it, to the extent such programs prove helpful in debiasing other legal actors. At the least, they may force Congress to have to openly choose to ignore bias embedded in legislation, thus ultimately forcing Congress to take responsibility, even if as a result of its clear inaction.

### *B. Examining Existing Legal Policy for Bias*

A final question is when and how we should examine existing legislative policy for bias. This is a difficult and fraught question about the extent to which we should unsettle existing legislative order. As explored in Part III, cognitive bias, including implicit racial bias, is pervasive and likely has a significant hand in shaping our existing legislative policy. But does this mean that we have to throw out the U.S. Code? Start from scratch? What would the basis of our legislative policy be in the meantime? There are obviously significant practical and philosophical obstacles to tossing out all of our existing legislation in our search for bias. Short of that approach, there are also real resource constraints on our ability to delve into the potential bias that may have motivated the design of each legislative provision, as well as resource constraints on our ability to ameliorate all of them. And yet, it remains deeply problematic to continue to apply law that was motivated by implicit racial and other biases. The question, then, is how we resolve this tension between the biases of the past and the aspirations and constraints of our present.

In some ways, resolving this question is far beyond the scope of this Article, in that it is at the heart of the racial reckoning facing the country today, and is not easily resolvable in concluding paragraphs. Our central contribution, then, is not to neatly resolve this question, but rather to underscore the extent to which our system of legislation raises it. This Article reveals that implicit biases likely pervade our legislation much more extensively than previously realized, hidden behind seemingly objective studies, economic facts and figures, and cognitive biases that make the implicit bias harder to detect. While we do not suggest starting from scratch, we also think we should be much more attuned to the possibility, and even probability, of bias in the legislative process.

We also think that when such biases are identified, as with the MID, legislators will be much more hard-pressed to defend policy animated by them. Our analysis underscores that the MID not only disparately affects different racial groups, but that such disparate impacts likely flow from racially biased visions of the world, which sought to further privilege whiteness in the first instance. This critical step in our



understanding of the MID makes it very difficult to continue to view it as an almost “magical” promotion of the values that are central to our society. Or, looked at another way, we believe that our examination of the MID lays bare how it *does* promote certain visions of what good society is, but these visions are deeply racialized, exclusionary, and problematic. Laying bare this racism at the heart of the MID should preclude policymakers and legislators from defending their support of the MID as a flawed, but well-intentioned, attempt to promote positive social values.

The more we identify implicit racial and other cognitive biases in the actual construction of the law, the stronger the argument is to rethink the particular policy. And the more we recognize such biases in the construction of existing legislation, the more prepared we hopefully are to avoid the same mistakes in the future. Indeed, there is evidence that mere awareness of bias, including implicit racial bias, can be a powerful tool to reduce such bias.

Consider, for example, studies showing racial bias among referee decisions in the National Basketball Association (“NBA”).<sup>378</sup> One of such studies showed that personal fouls were called more often against players when there was an “opposite-race refereeing crew” as compared to “when officiated by an own-race refereeing crew.”<sup>379</sup> The results of the study were highly publicized, appearing on major television networks (e.g., ESPN), in major newspapers, and in comments from star basketball players.<sup>380</sup> After the publicity surrounding the referee bias, researchers conducted another study of NBA referees, and found *no* own-race bias among referees.<sup>381</sup>

In a similar vein, even the exercise of calling attention to bias in the legislative process may be impactful. We hope that recognizing the extent of bias in the construction of the MID, a highly entrenched tax benefit, and similar examinations in other areas of legislative policy, may make the public as well as policymakers more open to the idea that racialized bias likely plays a significant role in lawmaking.

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<sup>378</sup> Devin G. Pope, Joseph Price & Justin Wolfers, *Awareness Reduces Racial Bias* 1 (Econ. Stud. at Brookings, Working Paper, Feb. 2014), [https://www.brookings.edu/wp-content/uploads/2016/06/awareness\\_reduces\\_racial\\_bias\\_wolfers.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/awareness_reduces_racial_bias_wolfers.pdf) [https://perma.cc/A23P-66GN].

<sup>379</sup> *Id.* at 1.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 2 (“We argue that this dramatic decrease in bias is a causal result of the awareness associated with the treatment — the *release* and subsequent publicity surrounding the original academic study in 2007.”).

## CONCLUSION

In this Article, we examined how the construction of the MID an integral and longstanding tax benefit is the result of implicit racial bias as well as other cognitive biases. Homeownership as well as the MID became tied with whiteness over time, in part because the economic study of the MID relied on some of the same tropes of whiteness that had long been used to support housing segregation. This powerful association influenced legislators and the public, who came to believe in the almost “magical” qualities of homeownership, without adequate recognition of their highly racialized origins. In laying out this account, we offer a critical explanation of how the MID has lasted for so many years notwithstanding its many problems.

Beyond the MID, we have offered what we believe to be a powerful case study of legislative bias. Scholars have yet to fully recognize the role that implicit biases play in the construction of legislation, and how such implicit biases interact with, and dovetail with, other cognitive biases. In this Article, we show how these mechanisms interact and shape our laws. This study sets forth a model for future research, as well as future legislative progress. We hope that the more scholars recognize bias in the construction of legislation, the better prepared policymakers will be to engage in debiasing efforts and reform of existing legislation.