Homeownership in Black and White: The Role of Tax Policy in Increasing Housing Inequity

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I. INTRODUCTION

> *Poor people are forced to pay more for less. Living in conditions day in and day out where the whole area is constantly drained without being replenished. . . . And the tragedy is, so often these forty million people are invisible because America is so affluent, so rich.*[1]
>
> *Reverend Martin Luther King, Jr.*

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1. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, (Mar. 31, 1968), http://kingencyclopedia.stanford.edu/kingpapers/documents/remaining-awake-through-great-revolution.

In approaching the topic of persistent poverty in America, it may seem an unusual choice to talk about tax subsidies for homeownership. I place the focus on tax subsidies because they are often ignored, forgotten, and as a result, are all too invisible. Discussions surrounding alleviating persistent poverty invariably stumble when the topic moves to how to pay for the suggested reforms. Tax subsidies for two tax breaks associated with homeownership, which are projected to be $70 billion in lost revenue in 2019 for the United States Treasury,[2] describe an America that lacks not the financial resources to solve our persistent poverty but the political will.

Tax subsidies for homeownership have been a part of our progressive income tax system since the Revenue Act of 1913.[3] This Essay focuses on two of the most common tax provisions: the deduction for mortgage interest[4] and the tax-free receipt of gain upon sale.[5] This Essay will then discuss one lesser-known provision: the inability to deduct a loss upon sale.[6] Homeownership remains a tax-favored activity, but, as this Essay will show, tax subsidies for homeownership are not evenly distributed across racial lines. Part II briefly outlines the homeownership tax subsidies, Part III examines homeownership and race, Part IV focuses on the way tax subsidies affect race, Part V provides suggestions to reform the racial inequities in homeownership, and Part VI briefly concludes.

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2. The tax breaks are exclusion from income for gain upon sale of a principal residence ($36.3 billion) and the deduction for mortgage interest on homes ($33.9 billion). U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES (2017), https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2019.pdf [hereinafter TAX EXPENDITURES].

3. *See* Revenue Act of 1913, ch. 16, 38 Stat. 114, 166–81.

4. I.R.C. § 163(h) (2012).

5. *Id.* § 121. The recent tax bill decreased the limits on mortgages eligible for the mortgage interest deduction, but for our purposes the changes were relatively minor. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11043, 131 Stat. 2054, 2086. The 2017 Tax Act lowered the maximum mortgage outstanding from $1 million to $750,000; eliminated the interest deduction for home equity loans unless the proceeds are used to improve the residence; and, in a significant shift, limited the deduction for state and local income taxes and real property taxes to a maximum of $10,000. *Id.* §§ 11043, 13204, 11042.

6. I.R.C. § 165(c)(3) (2012) (denying deduction on sale of personal residence).

The homeownership experiences of blacks and whites in America are different and not simply because most whites are homeowners and most blacks are renters.[7] That is true because even when blacks and whites engage in the same activity—buying a home—our tax laws treat those homeowners differently, reflecting how the real estate market treats homeowners differently based upon race.[8] Tax laws interact with the marketplace discrimination experienced by black homeowners and taxes them more while simultaneously taxing whites less. If tax subsidies for homeownership were reformed, there would be sufficient revenue to begin to address persistent poverty while also putting money into the pockets of black homeowners.

II. TAX SUBSIDIES FOR HOMEOWNERSHIP

This section will briefly examine two well-known tax rules: (i) the deduction for mortgage interest;[9] and (ii) tax-free receipt of gain on sale.[10] It also examines a lesser-known tax rule, that if you sell your home at a loss, the loss is not allowed to decrease your taxes.[11] On the other hand, if you sell stock at a loss, some (if not all) of that loss can decrease your taxes.[12] As a result of the three tax rules interacting with the different homeownership experiences of blacks and whites in America, this Essay argues that our laws tax white homeowners less while at the same time taxing black homeowners more. Whites and blacks engage in the same activity, buying a home, yet our tax laws apply to their experiences as homeowners with vastly different outcomes.

The most commonly known tax subsidy is that interest on your mortgage is deductible. The amount of mortgage interest paid on mortgages not in excess of $750,000 is deductible.[13] The projected

7. Eleanor Marie Lawrence Brown, *On Black South Africans, Black Americans, and Black West Indians: Some Thoughts on* We Want What's Ours, 114 MICH. L. REV. 1037, 1048 (2016) (book review).

8. *See infra* notes 61–63.

9. I.R.C. § 163(h) (2012).

10. *Id.* § 121.

11. *Id.* § 165.

12. *Id.* § 165(c)(2); *see id.* §§ 1211, 1212.

13. I.R.C. § 163(h) (2012).

revenue loss from the mortgage interest deduction (with the $1 million limits) is projected to be $92 billion in 2018.[14] What most do not know, however, is how tax law norms are violated by allowing deductions for homeownership.

The general rule is that personal, family, or living expenses are not tax deductible because they are the result of individual choices, and we should not be required to subsidize each other's personal likes and dislikes.[15] Food and clothing are not deductible for that reason. Similarly, rent is not deductible, even though roughly one-third of all Americans (including a majority of blacks) are renters.[16] When it comes to rent, where you live is considered to be the result of a personal choice. The deduction for mortgage interest, therefore, is a huge exception to the general rule, because what could be more personal than the decision to buy a home?

You can get a tax deduction for interest on your mortgage for up to two different homes[17]—violating tax norms even further. A recent report said roughly 4% of homes in America are second homes.[18] But the "two home limit" comes with a catch. Your deduction is only good if the combined mortgages are $750,000 or less.[19] If your mortgages are greater than $750,000, then you are only allowed a deduction for interest on the part of the mortgages that do not exceed that amount.[20] The alternative minimum tax, which in the past has limited the tax benefit of the mortgage interest deduction, has recently been

14. TAX EXPENDITURES, *supra* note 2. An estimate of the mortgage interest deductions with the recent tax changes included is almost $60 billion. *Id.*

15. I.R.C. § 262 (2012).

16. Anthony Cilluffo, Abigail Geiger & Richard Fry, *More U.S. Households Are Renting than at Any Point in 50 Years*, PEW RES. CTR. (July 19, 2017), http://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/.

17. I.R.C. § 163(h)(4)(A)(i) (2012).

18. *Second Homes Stay Away*, THE ECONOMIST (May 12, 2016), http://www.economist.com/news/leaders/21698651-theres-new-villain-townat-weekends-and-during-summer-stay-away.

19. I.R.C. § 163(h)(3)(F) (2012 & Supp. 2018).

20. *Id.*

amended, making it less likely that the alternative minimum tax will apply.[21]

Taxpayers only get the benefit of the mortgage interest deduction if their "itemized deductions" are greater than the pre-determined standard deduction amount.[22] So when taxpayers add up all of their tax deductions, if that amount is greater than the amount of their standard deduction determined by their filing status (single, married, etc.), then the taxpayers will itemize deductions. If the amount of their tax deductions is less than the standard deduction, then the taxpayers will take the standard deduction. The majority of taxpayers (two-thirds) do not itemize deductions, and projections about the recent tax bill have suggested that the number will increase to 90%.[23] Most *homeowners*, however, itemize deductions. Eighty-two percent of the tax returns where taxpayers itemized their deductions claimed the mortgage interest deduction.[24] Historically, only a minority (approximately 18%) of homeowners select the standard deduction instead of itemizing because the standard deduction amount is greater than their itemized deductions.[25] Those taxpayers are more than likely to have lower incomes.[26] Who benefits from the mortgage interest deduction is partly a function of household income.

An analysis of IRS statistics for the tax year 2014 showed that only 22% of tax returns claimed home mortgage interest related de-

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21. Heather Long, *The Final GOP Tax Bill Is Complete. Here's What Is in It*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/15/the-final-gop-tax-bill-is-complete-heres-what-is-in-it/?utm_term=.dfd151d48efe.

22. I.R.C. § 63 (2012).

23. Chris Gates, *Nonprofits Are the Unintended Victims of the New Tax Bill*, THE HILL (Dec. 29, 2017, 11:00 AM), http://thehill.com/opinion/finance/366773-nonprofits-are-the-unintended-victims-of-new-tax-bill.

24. Chenxi Lu, *Itemized Deductions*, TAX POL'Y CTR. (Jan. 26, 2017), http://www.taxpolicycenter.org/sites/default/files/publication/138036/2001128-itemized-deductions_0.pdf. ("Before 2006, between 81 and 83 percent of itemizers deducted mortgage interest. But that share steadily dropped to a low of 74 percent in 2014, consistent with the decline in homeownership following the housing bubble collapse and falling mortgage interest rates.").

25. *Id.*

26. *Id.*

ductions.[27] The Center on Budget and Policy Priorities produced a report showing that in 2012, 77% of the benefits of the mortgage interest deduction went to homeowners with incomes higher than $100,000, while almost half of middle- and lower-income homeowners with mortgages did not receive any tax benefit.[28] That is likely because the standard deduction was higher than all of the middle- and lower-income homeowners' itemized deductions added together. Higher-income taxpayers are more likely to claim the mortgage interest deduction, to deduct larger amounts of mortgage interest, and to receive larger tax benefits from the mortgage interest deduction than lower-income taxpayers.

A second well-known tax subsidy from homeownership is that a gain from the sale of a home is generally tax-free.[29] The first $500,000 of gain is tax-free if you are married or the first $250,000 if you are single.[30] The revenue loss from this subsidy is projected to be $45 billion in 2018.[31] This statutory exception is again a transgression to the tax norm that income is broadly defined. But for Congressional action declaring this income tax-free, taxpayers would have additional taxable income when they sell their homes at a gain.

The third and lesser known tax impact of homeownership is if you sell your home at a loss, which generally occurs when you sell your home for less than you paid for it, that loss is not deductible and

27. Erik Sherman, *Well-Off Whites Get the Biggest Housing Subsidies There Are*, FORBES (Apr. 1, 2017, 1:44 AM), https://www.forbes.com/sites/eriksherman/2017/04/01/well-off-whites-get-the-biggest-housing-subsidies-there-are/#306a290d1f9d; *see also* Adam J. Cole, Geoffrey Gee & Nicholas Turner, *The Distributional and Revenue Consequences of Reforming the Mortgage Interest Deduction*, 64 NAT'L TAX J. 977, 977 (2011) ("Of the 143 million tax returns filed for tax year 2007, 29 percent claimed the [mortgage interest deduction], and among the 50.5 million returns on which taxpayers itemized their deductions, 82 percent claimed the [mortgage interest deduction].").

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

29. I.R.C. § 121 (2012).

30. *Id.* If you are fortunate enough to have gain in excess of those amounts, then the tax rate will be a flat rate of 20% or 23.8% if the taxpayer has something called "net investment income."

31. TAX EXPENDITURES, *supra* note 2, at 22.

cannot be used to reduce your taxable income.[32] The argument behind the denial of the deduction is that taxpayers purchased their home not as an investment but primarily to live in. The loss therefore is personal, and personal losses are not allowed to impact your tax bill in the way that losses on the sale of investment property, like stock, are allowed to impact your tax bill.[33] These investment property losses impact your tax bill because such losses are deductible in calculating your taxable income.[34] There are limits to the amount of loss allowed on the sale of stock, but losses are allowed.[35] In contrast, if personal property, like a home, is sold at a loss, there is not a deduction.[36] This makes the treatment of gains and losses asymmetrical without a good explanation.

The generally proffered explanation for the numerous tax subsidies for homeownership is that Congress wants to encourage homeownership.[37] Research indicates that homeowners take better care of their homes than renters and are more likely to be actively involved in their communities.[38] However, research cannot tell us whether homeownership causes these results or whether the people who buy homes are the same people who would take care of their property and be actively involved in their communities even if they remained renters.

The billions in lost revenue to the Treasury from these tax subsidies is a high price to pay to "encourage homeownership." But the cost is even higher because economists generally agree that the mortgage interest deduction does virtually nothing to encourage people to buy homes.[39] Over the last forty years, while tax rates have changed dramatically—making the value of the tax benefits fluctuate—the

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32. I.R.C. § 165(c) (2012). The only loss allowed for personal assets like a home is if there is a casualty as defined in §165(c)(3). *Id.*

33. *Id.*

34. *Id.*

35. *Id.* § 1211.

36. If I sell stock and have losses in excess of gains, then I am limited in my ability to take a loss and can only deduct $3,000 against my other income. *Id.*

37. Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 336 (2009).

38. William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, 115 TAX NOTES 1171, 1177 (2007).

39. Brown, *supra* note 37, at 336–37.

homeownership rate remained quite stable.[40] The biggest increase in homeownership rates came after World War II.[41] This stable homeownership rate does not mean that homeowners are unaware that they get a tax break when they buy a home. It means that they do not *decide* to buy a home because of the tax break. The research generally shows that the tax deduction simply rewards behavior—buying a home—that was going to occur anyway.[42] The American public is not getting anything in return for the billion-dollar subsidies for homeownership.

The American homeownership rate of 64.2%[43] is comparable to other countries that do not offer tax subsidies for housing through their tax laws. Australia does not permit a mortgage interest deduction, yet has a 70% homeownership rate.[44] Canada also does not permit a mortgage deduction, yet has a 63% homeownership rate.[45] Britain has a very limited mortgage interest deduction and also has a 68% homeownership rate.[46]

To make matters worse, research shows that the tax deduction for mortgage interest increases the price of homes making it more difficult for first time homeowners to be able to afford to purchase.[47] Research also shows that the deduction encourages taxpayers to buy McMansions—bigger and therefore more expensive homes.[48] Next we turn to the market-based racial discrimination in the real estate market.

40. *Id.* at 337.

41. *Id.* at 349–50.

42. *Id.* at 337.

43. *Quarterly Residential Vacancies and Homeownership, Second Quarter 2018*, U.S. CENSUS BUREAU (July 26, 2018, 10:00 AM), https://www.census.gov/housing/hvs/files/currenthvspress.pdf [hereinafter U.S. CENSUS BUREAU] (comparing the first quarter 2018 national homeownership rate with the second quarter 2018 rate).

44. Gale et al., *supra* note 38, at 1182.

45. *Id.*

46. *Id.*

47. Brown, *supra* note 37, at 337.

48. *Id.*

III. HOMEOWNERSHIP AND RACE

There has never been a point in American history where black homeownership rates have approached those of whites.[49] Current homeownership rates show almost 73% of whites and 42% of blacks are homeowners.[50] The black-white disparity cannot be explained by simply a class-based analysis. "Even after controlling for income, however, differences between whites and blacks in homeownership are substantial, between 16 and 34 percentage points for groups with incomes below $50,000 and between 12 and 22 percentage points for groups with incomes between $50,000 and $100,000."[51] The black-white disparity may, however, be explained by examining historical trends, the race-based appreciation gap in neighborhoods, and economic trends building wealth.

A. Historical Racial Inequality in Homeownership

There is a historical component to the racial disparity found in homeownership. Post-World War II, loans insured by the Federal Housing Administration ("FHA") were not available to blacks who wanted to buy in all-black neighborhoods or to blacks or whites who wanted to buy in racially diverse neighborhoods.[52] The FHA underwriting manual encouraged developers to include racially restrictive covenants in their subdivisions, even providing a sample.[53] In effect, only home buyers in all-white neighborhoods were eligible for FHA

49. Tracy Jan, *Report: No Progress for African Americans on Homeownership, Unemployment and Incarceration in 50 Years*, WASH. POST (Feb. 26, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/02/26/report-no-progress-for-african-americans-on-homeownership-unemployment-and-incarceration-in-50-years/?utm_term=.357d99068f25.

50. U.S. CENSUS BUREAU, *supra* note 43.

51. Gale et al., *supra* note 38, at 1172.

52. *See* Brown, *supra* note 37, at 372. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW (2017) (describing how federal, state, and local government "segregated America").

53. Brown, *supra* note 37, at 372–73.

loans.[54] FHA loans came with low down payment requirements, low and fixed interest rates, and lower costs. Blacks were generally shut out of that market.[55]

While in 1948 the Supreme Court held that the courts would not enforce racially restrictive covenants,[56] it wasn't until 1968 that the Supreme Court in *Jones v. Alfred H. Mayer Co.* held that the Fair Housing Act of 1968 made it illegal to discriminate in housing based upon race.[57] Between 1948 and 1968, however, private parties were legally free to enforce racially restrictive covenants.

Because fair housing laws were not enacted until 1968, black home buyers had to successfully navigate a more costly, non-FHA insured system in all-white neighborhoods, where they were often faced with violence.[58] Black home buyers were not able to buy insurance because of concerns about violence, and they often had to abandon their homes. Generations of wealth were lost.[59]

B. The Race-Based Appreciation Gap

Research demonstrates that the real estate market is not color blind.[60] Homes in homogeneous white neighborhoods are valued more highly than homes in racially diverse neighborhoods.[61] The majority of blacks live in predominately minority neighborhoods while most whites live in overwhelmingly white neighborhoods.[62] The real

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54. MECHELE DICKERSON, HOMEOWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 146–50 (2014).

55. *Id.*

56. Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948).

57. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

58. Ronald H. Silverman, *Homeownership for the Poor: Subsidies and Racial Segregation*, 48 N.Y.U. L. REV. 72, 82–83 (1973).

59. *Id.*

60. Brown, *supra* note 37, at Section IV.D.

61. *Id.*

62. *See* Gregory D. Squires, *Demobilization of the Individualistic Bias: Housing Market Discrimination as a Contributor to Labor Market and Economic Inequality*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 204 (2007), https://www.jstor.org/stable/25097881 ("A range of institutionalized private practices and public policies have directly led to a national housing pattern in which the

estate market operates differently for blacks and whites because of where the majority of white home buyers choose to live.

The race conscious real estate market results in homes in racially diverse or all-black neighborhoods not appreciating as much as homes in homogeneous white neighborhoods,[63] proving the old adage that the real estate market is about three things: location, location, location. The real estate market has an "appreciation gap" when it comes to valuing white and black homes. The appreciation gap begins whenever a neighborhood is more than 10% black and increases as the percentage of blacks in the neighborhood increases.[64]

When whites, who are the majority of all home buyers, are not interested in buying homes in racially diverse or all-black neighborhoods, this "creates a smaller pool of potential purchasers for homes in mixed-race neighborhoods. This decreased demand depresses the market value for these homes and simultaneously increases the demand for homes in all-white neighborhoods."[65]

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typical black resident lives in a neighborhood that is 51 percent black while the typical white resident lives in a neighborhood that is 80 percent white and just 7 percent black.").

63. Brown, *supra* note 37, at Section IV.D.

64. "[H]ousing units lose about 16 percent of their value when neighborhood racial composition increases from less than 10 percent black to between 10 percent and 60 percent black. . . . An even larger reduction in housing value is associated with moving from a neighborhood in which less than 10 percent of residents are black to one where at least 60 percent of the neighborhood is black." David R. Harris, *"Property Values Drop When Blacks Move In, Because . . .": Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AM. SOC. REV. 461, 471 (1999). "Western housing loses no more than 33 percent of its value when located in neighborhoods that are more than 10 percent black. By contrast, reductions in annual costs are as much as 40 percent in the South, 52 percent in the Midwest, and 70 percent in the Northeast for dwellings located in neighborhoods that are more than 10 percent black." *Id.* at 472. The data Harris used are from the Panel Study of Income Dynamics, a longitudinal survey conducted annually and initiated in 1968. *Id.* at 467. At the time of the study, it included data on 37,500 individuals who resided in one of 4,800 initial sample households (including co-residents or offspring) across the country. *Id.* He looked at the pricing data paid for homes bought and sold. Harris concludes that "[t]hese race effects are highly significant, both statistically and substantively, and are consistent with the observation that 'property values drop when black families move in.'" *Id.* at 471.

65. DICKERSON, *supra* note 54, at 151.

The race-based appreciation gap is well documented. One study was based on a comparison of home values in the nation's 100 largest metropolitan areas that were home to 58% of all whites and 63% of all blacks.[66] The study showed: (i) "[w]ealthy minority neighborhoods had less home value per dollar of income than wealthy white neighborhoods[;]"[67] (ii) "[p]oor white neighborhoods had more home value per income than poor minority neighborhoods[;]"[68] and (iii) "[e]qualizing for income, black homeowners received 18 percent less value for their homes than white homeowners."[69]

Another study concluded that "at no point do blacks attain residential parity with whites—that is, the communities in which they reside have less affluence and other less desirable characteristics (e.g., more crime) than the communities where whites with similar personal and household characteristics are found."[70] That same study also showed that "[middle-class blacks'] white neighbors tend to have lower incomes than they do; consequently, middle-class blacks live in less affluent communities than do whites with the same socioeconomic characteristics."[71] Yet another study showed that "[n]ot only are blacks less likely to own homes than are whites, but, when they do own, the value of their homes is smaller at the means, at the medians, and with and without controls."[72]

Whites do not want to live in neighborhoods with blacks, unless there are very few blacks.[73] There are primarily two explana-

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66. DAVID RUSK, BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, THE "SEGREGATION TAX": THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS 2 (2001), https://www.brookings.edu/wp-content/uploads/2016/06/rusk.pdf.

67. *Id.* at 7.

68. *Id.* at 8.

69. *Id.* at 1.

70. Richard D. Alba, John R. Logan & Brian J. Stults, *How Segregated Are Middle-Class African Americans?*, 47 SOC. PROBS. 543, 556 (2000). See Sean F. Reardon, Lindsay Fox & Joseph Townsend, *Neighborhood Income Composition by Household Race and Income 1990-2009*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 78 (2015), for a more recent study describing how middle-class blacks live in poorer neighborhoods than their white counterparts.

71. Alba et al., *supra* note 70, at 544.

72. Kerwin Kofi Charles & Erik Hurst, *The Transition to Home Ownership and the Black-White Wealth Gap*, 84 REV. ECON. STAT. 281, 288 (2002).

73. Brown, *supra* note 37, at Section IV.D.

tions: white aversion or white fear. Whites either do not want to live near blacks because they are racist or because they are fearful that when blacks move into their neighborhood, their property values will decline. A third possibility could be that whites simply want better schools and want to live in areas with lower crime rates, and those neighborhoods are largely white. However, research does not support that argument.[74]

Professor Gregory Squires describes the situation that whites do not want to live in neighborhoods with high black populations as follows:

> African Americans have been particularly affected as several studies have found them to be the most disfavored minority group by whites as well as other racial and ethnic groups. Evidence indicates that it is the presence of blacks, and not just neighborhood conditions often associated with black neighborhoods (e.g., bad schools, high crime) that accounts for white aversion to such areas. In one survey, whites reported that they would be unlikely to purchase a home that met their requirements in terms of price, number of rooms, and other housing characteristics in a neighborhood with good schools and low crime rates if there was a substantial representation of African Americans. The presence of Hispanics or Asians had no such effect.[75]

Other researchers have similarly found that "whites report less satisfaction in neighborhoods with higher proportions of minority residents" regardless of socioeconomic conditions.[76] Yet another study concluded that "race, per se, shapes how whites and, to a lesser extent, blacks view residential space."[77] That study showed videos of different neighborhoods, some all-white, some all-black, and some racially diverse and revealed that the racially diverse neighborhoods

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74. *See* Alba et al., *supra* note 70.

75. Squires, *supra* note 62, at 206 (internal citations omitted).

76. Sapna Swaroop & Maria Krysan, *The Determinants of Neighborhood Satisfaction: Racial Proxy Revisited*, 48 DEMOGRAPHY 1203, 1224 (2011).

77. Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527, 548 (2009).

were still majority white.[78] While the technique did not permit finer gradations of how much racial diversity was too much or not enough, the study did find several statistically significant conclusions.

First, once you controlled for social class, whites preferred the all-white neighborhood as significantly more desirable than either the racially diverse or all-black neighborhoods.[79] The mere presence of blacks in a neighborhood made it less appealing to whites. It wasn't, therefore, amenities, crime, or schools—but black people. Whether this was attributable to fear of lower property values due to having black neighbors or because whites held racist beliefs about blacks that prevented them from wanting to have black neighbors is beside the point. The effect is the same: whites prefer all-white neighborhoods to homes in racially diverse or all-black neighborhoods.[80]

Second, while blacks were also responsive to the racial composition of the neighborhoods, they were significantly less responsive than whites.[81] Controlling for social class, blacks least preferred the all-white neighborhood.[82] Blacks viewed the racially diverse and all-black neighborhoods similarly and ranked them well above the all-white neighborhood.[83] Black preferences were away from being the only black or one of a very few blacks in the neighborhood.

Third, the study differed from prior research that suggested blacks' experiences with prior discrimination influenced their preferences.[84] This study showed no impact on preferences related to blacks' prior experiences with discrimination.[85] In other words, the results did not change whether blacks expressed significant experience with racial discrimination or not.

Research consistently shows both that whites do not want to live near blacks even when the neighborhood has all the amenities

78. *Id.*

79. *Id.* at 542.

80. *Id.* at 545.

81. *Id.* at 550 ("Turning to the results for African-Americans, we find that race matters for them as well. But it matters less strongly—and differently—than it does for whites.").

82. *Id.*

83. *Id.*

84. *Id.* at 547–50.

85. *Id.*

they seek and that blacks prefer to not live in all-white neighborhoods.[86] Whites, who are the majority of home buyers, make the real estate market race conscious and will lower the price and potential for appreciation of homes in racially diverse and all-black neighborhoods.[87] This will not only hurt black homeowners in those neighborhoods but *all* homeowners in those neighborhoods.

Other studies have shown that whites are not comfortable living in neighborhoods where more than 20% of their neighbors are black. That explains why neighborhoods, such as Oak Park, Illinois, with 21.1% black residents and 67.0% white residents, are seen as integration success stories.[88]

A 2016 *New York Times* analysis of census data showed that black families making at least $100,000 were "more likely to live in poorer neighborhoods" than white families making less than $25,000.[89] Even blacks with higher income are surrounded by more poverty than poorer white homeowners. Blacks with higher incomes do not equate with a similar home-owning experience as that of their white peers.

Falling property values provide a non-racist explanation for why whites might not want to live around a lot of blacks. But why might blacks want to live in racially diverse or all-black neighborhoods when it hurts blacks financially?

Perhaps most blacks do not understand the appreciation gap and negative financial outcomes of buying a home in a racially diverse or all-black neighborhood. This could be particularly true given the rhetoric surrounding home ownership that is found in both Democratic and Republican Administrations. Part of it could be illegal steering by real estate agents who know their former white clients

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86. *See* Brown, *supra* note 37.

87. DICKERSON, *supra* note 54, at 150–51.

88. *Quick Facts: Oak Park Village, Illinois*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/1754885 (last visited Sept. 25, 2018).

89. John Eligon & Robert Gebeloff, *Affluent and Black, and Still Trapped by Segregation*, N.Y. TIMES (Aug. 20. 2016), https://www.nytimes.com/2016/08/21/us/milwaukee-segregation-wealthy-black-families.html.

don't want blacks moving into their all-white neighborhoods.[90] Blacks simply are not shown options in white neighborhoods. This explanation, however, is inconsistent with studies that show most blacks prefer not to live in all-white neighborhoods.[91] It could be that even if blacks were shown homes in white neighborhoods, blacks might make the same choices.

As the Squires excerpt makes clear, whites are not concerned about crimes committed against them by blacks when they admit they would not move into a racially diverse neighborhood with low crime rates.[92] On the other hand, blacks in virtually all-white neighborhoods are genuinely concerned about real anti-black violence either because their neighbors call the police on them for very normal behavior[93] or the police shoot them.[94]

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90. Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 901 (2006) ("Moreover, studies have shown that Black homeowners, more than any others, are steered toward real estate that actually loses equity value."); *see also* OFFICE OF POLICY DEV. & RES., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 (June 2013), http://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf (showing black home buyers were shown fewer options than white home buyers).

91. *See* Krysan et al., *supra* note 77, at 546.

92. *See* Squires, *supra* note 62, at 206.

93. For example, black actor Ving Rhames was entering his own home when a neighbor called the police and claimed that "a large black man was breaking into the house." Travis M. Andrews, *Police Held 'Mission: Impossible' Actor Ving Rhames at Gunpoint for Entering His Own Home*, WASH. POST (July 29, 2018), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/07/29/police-held-mission-impossible-actor-ving-rhames-at-gunpoint-for-entering-his-own-home/?utm_term=.5fc46da028cd. This occurred in Santa Monica, which has a 3.9% black population. *Santa Monica, California Population 2018*, WORLD POPULATION REVIEW, http://worldpopulationreview.com/us-cities/santa-monica-population/ (last visited Sept. 25, 2018). *See also Black Oregon Lawmaker Says Police Were Called as She Knocked on Doors*, NBC NEWS (July 5, 2018), https://www.nbcnews.com/news/nbcblk/black-oregon-lawmaker-says-police-were-called-she-knocked-doors-n888916 (black lawmaker in Clackamas, Oregon, had the police called on her when she was canvassing in her own district because the caller said "she appeared to be casing the neighborhood."). Clackamas, Oregon, has a 1.0% black population. *Clackamas, Oregon*, CITY-DATA.COM, http://www.city-data.com/city/Clackamas-Oregon.html (last visited Sept. 25, 2018).

Historically in the twentieth century, when racially restrictive covenants were declared unconstitutional and blacks moved into all-white neighborhoods, they would be "greeted" with bricks through their windows or a burning cross on their lawn.[95] In the twenty-first century, whites are more "enlightened." If you are a black woman in Santa Monica in "an almost entirely white apartment complex in a mostly white city" who left her keys at home and hired a locksmith to get back in to her own apartment, then you will have your white neighbor call the police and will report you as breaking into your own apartment.[96] You will then look out the window and see more than a dozen police officers and a gun pointed at you. Hours later you will be "cleared." If you are the parents of tall black boys and live in a suburb twelve miles outside of Ferguson, Missouri, with a 3.5% black population, then before you and your husband go on a cruise, you will e-mail the chief of police with pictures of your sons to alert the police that they will be walking to school and belong in the neighborhood.[97] There is a price blacks pay when they are the only family or one of very few blacks in an otherwise all-white neighborhood. Most blacks are not inclined to risk it.

C. Homeownership Wealth in Black and White

Whites and blacks have very different economic returns from owning homes. While it is true that black homeowners have more wealth than black renters, it is also true that approximately two-thirds of black net worth is found in black homes.[98] On the other hand, just

94. *See, e.g.*, Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014) (Robbie Tolan was shot by police in Bellaire, Texas—a neighborhood with less than 2% black population).

95. CAROL ANDERSON, WHITE RAGE 56–57 (2016).

96. Fay Wells, *My White Neighbor Thought I Was Breaking into My Own Apartment. Nineteen Cops Showed Up.*, WASH. POST (Nov. 18, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/18/my-white-neighbor-thought-i-was-breaking-into-my-own-apartment-nineteen-cops-showed-up/.

97. Kimberly Norwood, *Why I Fear for My Sons*, CNN (Aug. 25, 2014), http://www.cnn.com/2014/08/25/opinion/norwood-ferguson-sons-brown-police/.

98. Brown, *supra* note 37, at 350.

under 40% of white net worth is found in their homes.[99] That lack of diversification in blacks' net worth is the reason why the recent housing recession hit blacks especially hard.[100] Home equity was then, and remains now, the most important asset to black net worth.

Homeownership in America is a successful vehicle for building wealth for whites, but less so for blacks, as evidenced in the results of a recent study of first-time low- and moderate-income home buyers between 2000 and 2010.[101]

The study showed that when blacks purchased homes they lost money, regardless of the year of purchase, but for whites, timing determined whether they made or lost money.[102] Between 2003 and 2005, as well as between 2005 and 2007, white housing net worth increased by approximately 50%.[103] For those same time periods, black housing net worth decreased by 23% and 47%, respectively.[104] Not all whites made money. For new home buyers between 2007 and 2009, whites lost 33% of their net worth, but blacks lost more.[105] Blacks lost 43% of their net worth.[106]

The authors of the study focused on first-time home buyers because about 40% of all buyers are first-time homeowners and more than 60% have low or moderate incomes.[107] Less is known about lower-income first-time home buyers, especially black first-time home buyers. It is important to understand how homeownership operates in the lives of that group given how, since the 1990s, government policies to expand access to homeownership have targeted that group.

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99. *Id.*

100. RAKESH KOCHHAR ET AL., TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, AND HISPANICS, PEW RES. CTR. 25 (2011), http://www.pewresearch.org/wp-content/uploads/sites/3/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

101. Sandra J. Newman & C. Scott Holupka, *Is Timing Everything? Race, Homeownership and Net Worth in the Tumultuous 2000s*, 44 REAL EST. ECON. 307, 308 (2015).

102. *Id.* at 309.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 308.

What is especially ironic is that blacks were the target of government policies expanding homeownership in the 1990s and 2000s by both Democrats and Republicans.[108] The government was saying buy a home, it will help you build wealth.[109] While true for many whites as explained above, it was only true for the small segment of black homeowners living in all-white neighborhoods. However, during the 2000s, black first-time home buyers did not benefit from the boom years and were especially hit by the bust years.[110] For white first-time home buyers, net worth gains were short-lived. What began as short-term increases quickly became decreases four to six years later.[111]

Nevertheless, the study results showed whites made money and blacks never did.[112] For whites, timing was the key determinant. For blacks, what mattered the most, I would argue, is where they purchased homes. Most blacks purchased homes in mostly black neighborhoods. For blacks, the old adage about the only thing that matters in real estate is location, location, location has never been more true.

IV. TAX SUBSIDIES AND RACE

White home buyers set the terms of engagement in the homeownership market. If they do not wish to live in racially diverse neighborhoods, those homes will have less demand. All-white neighborhoods, where most whites live, increase the demand for homes in all-white neighborhoods.[113] That creates the appreciation gap, which makes it more likely that whites will have more gain from the sale of their homes that escapes taxation than blacks.

The real estate market that highly values white homeowner preferences results in white homeowners being the ones most likely to make money when selling their homes, and tax policies declare that

108. *See* Gale et al., *supra* note 38.

109. *See* Orfield, *supra* note 90, at 901 ("Moreover, studies have shown that Black homeowners, more than any others, are steered toward real estate that actually loses equity value.").

110. Newman & Holupka, *supra* note 101, at 309.

111. *Id.*

112. *Id.*

113. *See* DICKERSON, *supra* note 54, at 151.

money invisible and tax-free.[114] Tax law allows whites who receive up to half a million dollars when they sell their home to keep all of it tax-free, thus making it easier for them to save, invest, and build more wealth.[115] Blacks who live in homogeneous white neighborhoods also receive their income tax-free when they sell their homes. However, the problem is that most blacks do not live in those neighborhoods while most whites do. Tax policies reward most white taxpayers' *personal choices* but not those made by most black taxpayers. Recall the general idea behind tax policy analysis is that tax liability will not turn on a taxpayer's personal choices.[116]

Black homeowners, who are most likely to sell their homes at a loss, get no tax benefit from the loss because tax laws do not allow homeowners to lower their taxable income by recognizing a loss.[117]

A recent Tax Policy Center study looked at Internal Revenue Service statistics and matched them with zip code level and demographic data.[118] The study found the percentage of tax returns claiming a mortgage interest deduction increases with income.[119] In addition to income, the study found that there is a racial component as well.

Those in the top income level claimed the mortgage interest deduction at more than three times the rate of those in the lowest income level.[120] "Among the high-claiming zip codes, 5.6 percent of the population is African American, and 82.5 percent of the population is white . . . Among the lower-claiming zip codes, 13.4 percent of the population is African American, and 73.3 percent of the population is white."[121] The mortgage interest deduction flows disproportionately to white homeowners as black homeowners are dispropor-

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114. *See* I.R.C. § 121(b)(1)–(2) (2012).

115. *See* Gale et al., *supra* note 38, at 1174.

116. *Id.* at 1173 n.4.

117. I.R.C § 165(c)(3) (2012).

118. BENJAMIN H. HARRIS & LUCIE PARKER, THE MORTGAGE INTEREST DEDUCTION ACROSS ZIP CODES, URBAN-BROOKINGS TAX POLICY CTR. (2014), https://www.brookings.edu/wp-content/uploads/2016/06/mortgage_interest_deductions_harris.pdf.

119. *Id.* at 2–3.

120. *Id.*

121. *Id.* at 5.

tionately found in lower claiming zip codes. The study's conclusion is worth highlighting: "zip codes with high claiming rates tend to be *disproportionately white, middle-aged, and married* . . . ."[122] Tax subsidies value the way whites experience homeownership. Tax subsidies that do not recognize losses from the sale of homes do not value the way blacks experience homeownership.

V. Suggestions for Reform

A tax system that valued the experiences of black homeowners would allow homeowners to include losses from the sale of a home in calculating their taxable income. It might also retain the provision that excluded gain from income when the home is sold; however, the amount excluded could be significantly reduced.

The more controversial idea is reform of the mortgage interest deduction, which I have written about elsewhere.[123] This idea limits the existing tax benefits to homes that are currently victims of an anti-black housing market by only allowing deductions for homes in neighborhoods with more than 10% black neighbors. As a race-based subsidy, this provision would receive strict scrutiny, making it unlikely to survive a constitutional challenge. However, an alternative likely to be upheld would be a provision based on the wealth of homeowners.[124] Then tax subsidies would disproportionately benefit black homeowners who have less wealth than their white peers. The homes in racially diverse neighborhoods might be valued higher because the mortgage interest deduction would be included as opposed to homes in all-white neighborhoods that would no longer be eligible for tax subsidies. One issue, which might need further reflection, is whether

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122. *Id.* at 7 (emphasis added).

123. Brown, *supra* note 37, at 370–71. For discussions on the proposal of limiting the existing tax benefits to neighborhoods with more than 10% black neighbors, see NATALIE Y. MOORE, THE SOUTH SIDE: A PORTRAIT OF CHICAGO AND AMERICAN SEGREGATION 32 (2017) and Emily Badger, *A Radical Idea to Compensate Black Homeowners Harmed by Racial Bias*, WASH. POST (June 21, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/21/homeownership-doesnt-pay-in-black-neighborhoods-heres-how-to-change-that.

124. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 26–29 (1973) (reaffirming the Supreme Court's prior holdings that "wealth discrimination alone [does not provide] an adequate basis for invoking strict scrutiny.").

those homes would suddenly be attractive to prospective white home buyers flipping the neighborhood to less than 10% black, thereby denying the deduction to black homeowners who managed to previously remain racially diverse. The upside would be that the market would reward that homeowner with a higher value for his home. Given white preferences away from those neighborhoods, that outcome may not be a significant risk.

The revised deduction proposal would work as follows. If you are a homeowner in a neighborhood with zero to 10% of black neighbors, there is no mortgage interest deduction. If you are a homeowner in a neighborhood with more than 10% black neighbors—even if all of your neighbors are black—then you get a deduction. That would mean any neighborhood where the market value of homes is penalized based upon the race of your neighbors would be eligible for the tax subsidies. Because the deduction would apply to any homeowner living in the neighborhood regardless of race, it should be a legally viable option.

Outright repeal of the mortgage interest deduction could have a deleterious impact on black homeowners. The price of the mortgage interest deduction is believed to be built into the price of homes, with estimates ranging from 2% to 13%.[125] The obvious drawback is that repeal could further depress home values in all-black and racially diverse neighborhoods where most black homeowners live.

Of course, tax subsidies could be extended to allow renters a deduction for their rent. My hesitation here is that if rent is deductible, the real winners will be landlords who will increase rents to com-

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125. Cole et al., *supra* note 27, at 987 ("Further, the MID [mortgage interest deduction] is unlikely to increase homeownership because the MID may lead to increases in house prices, and higher home prices are negatively associated with homeownership rates. The MID lowers the user cost of capital for housing, which will translate into higher home prices in areas where housing supply is relatively inelastic. Poterba and Sinai (2011) find that removing the MID would increase the user cost of housing by 3 to 5 percent, and Andersen, Clemens, and Hanson (2007) show that capping the MID would substantively increase the user cost of housing for homeowners above the cap. Hilber and Turner (2010) find that the MID has a negative effect on homeownership in larger coastal cities where the housing supply is relatively inelastic. Capozza, Green, and Henderschott (1996) estimate that eliminating the MID and the property tax deduction would reduce home prices between 2 to 13 percent.").

pensate for the tax break, the same way the mortgage interest deduction is built into the value of a home.[126] However, if paying rent allowed wealth building by tenants who could then invest their tax savings, this may be worth considering.

Currently our tax laws value the experiences of white homeowners, while keeping the experiences of black homeowners invisible. Honoring Dr. King's legacy requires us to include the forgotten black taxpayer in tax policy discourse.

VI. CONCLUSION

Persistent poverty in America is a big problem in search of big solutions and big funding ideas. At least $70 billion of revenue is lost each year due to tax subsidies supporting homeownership policies that disproportionately benefit higher-income, white Americans. A more racially just tax system could provide a way forward. Tax reform that better reflects the experiences of black homeowners is perhaps an idea whose time has come.

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126. Gale et al., *supra* note 38, at 1179–80.