U.S. Tax Policy in Light of Globalization and Growing Inequality

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ABSTRACT

The Tax Cuts and Jobs Act[1] *significantly reformed the system of taxation in the United States by enacting permanent and temporary provisions to the Internal Revenue Code. These provisions encompass changes affecting U.S. individuals and entities, both domestically and internationally. Claiming that the change would "pay for itself," the Tax Cuts and Jobs Act intends to stimulate the economy.*[2] *The large tax cuts may have created short-term economic growth; however predictions suggest that in the long-run, the increased spending and the decline in tax revenue will significantly raise the U.S. budget deficit.*[3]

Regardless of Congressional intent, the Tax Cuts and Jobs Act impacts both individuals and businesses; yet, the burdens and benefits have not been distributed equally. This Comment will argue that the tax reform enacted in 2017 is not the tax reform required to address the issue of growing inequality both in the United States and on a global scale. Furthermore, this Comment will explain how tax policy should be used as a weapon to combat human suffering, a weapon policy makers should use to create a progressive system of taxation.

First, it examines several major social and economic issues faced by citizens and businesses in countries around the world, focusing on the issue of income inequality. It will specifically examine the causes and effects of these major issues. It will then parallel the issues identified on a global scale to those encountered in the United States, surveying the underlying causes and effects. Next, it will evaluate the impact of globalization on these major global issues and analyze the role that tax policy could play in mitigating some of the most commonly faced issues. This Comment will then

1. *See generally* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).
2. Seth Hanlon, Alan Cohen & Sara Estep, *Rising Deficits, Falling Revenues*, CTR. FOR AM. PROGRESS (Nov. 29, 2018), https://www.americanprogress.org/issues/economy/reports/2018/11/29/461579/rising-deficits-falling-revenues [https://perma.cc/A2PY-B694].
3. Mark Mazur, *Does the Tax Cuts and Jobs Act Pass the Tests of Good Tax Policy?*, TAX POLICY CTR. (Apr. 12, 2018), https://www.taxpolicycenter.org/taxvox/does-tax-cuts-and-jobs-act-pass-tests-good-tax-policy [https://perma.cc/URL8-WJJN].

review countries that have recently effectuated tax reforms, contrasting successful tools used by certain governments with ineffective strategies used by others.

The argument will mainly be based on analysis of several specific provisions included in the Tax Cuts and Jobs Act. These provisions will be explained and evaluated based on their purpose and ability to effectuate change for certain groups of taxpayers and for the economy as a whole. This Comment will conclude that the legislation does not meet the standards of a successful tax regime (defined as one that reduces inequality) because it fails to eliminate many of the major socioeconomic issues in the U.S. and abroad.

Finally, this Comment will suggest what a successful tax legislation should have aimed for, and how modifications to the TCJA are necessary to address the issues in the domestic and global economy. It will ultimately conclude that tax reform must aim toward the goal of multilateralism and equality among taxpayers in a given regime.

INTRODUCTION

"[G]lobalization has helped many people rise out of poverty, but it has also damned many others to starve to death. It is true that global wealth is growing in absolute terms, but inequalities have also grown, and new poverty arisen."[4] Throughout the centuries, the world community has increasingly embraced the concept of globalization, documented by hosts of treaties and international bodies, designed to regulate international relations and trade among countries, governments, individual citizens, and international businesses.[5] Over the last decade, the development of profound economic connections between countries and multinational businesses is exemplified by the 30% increase in globally traded goods and services.[6]

4. Andrea Gagliarducci, *For Pope Francis, loving concern for the poor is not communism*, CATHOLIC NEWS AGENCY (Jan. 12, 2015, 11:00 AM), https://www.catholicnewsagency.com/news/for-pope-francis-loving-concern-for-the-poor-is-not-communism-54341 [https://perma.cc/BT5W-ESBU].

5. *See generally* David Bederman & Chimene Kietner, *Int'l Law Frameworks*, in INT'L ECON. LAW 215, 215–27 (4th ed. 2016).

6. Angel Gurría, OECD Sec'y-Gen., Address at the Montreal Council of Foreign Relations: Challenges for the Global Economy and Possible Responses: Multilateralism that Delivers (May 14, 2018).

Citizens and leaders have come to realize that a country's internal affairs affect global markets and influence interactions between nations.[7] Before any country enacts significant social or economic policy changes, those policy makers must assess not only internal implications, but also the global impact of these intended changes.[8] The possibility of negative spillover effects is frequently brushed aside; however, when spillover effects exist, they often disrupt international cooperation and creates tensions between countries.[9]

With the enactment of the Tax Cuts and Jobs Act (TCJA) in late 2017, the Trump administration failed to consider the dynamic effects of the legislation on each social class within the country.[10] On a global scale, the legislation minimized considerations regarding spillover affecting a multitude of countries engaging in economic and political relations with the United States (U.S.). Policy makers failed to grasp how the abrupt and pointed changes enacted under the TCJA can provoke harsher approaches to international tax competition among the global economic community.[11]

This Comment proceeds in four sections. Section I will begin by addressing several major socioeconomic issues faced in countries around the world,[12] providing context for the main analysis by offering a comparison of member countries of the Organization for Economic Cooperation and Development (OECD) and the United States.[13] By discussing the impact of globalization,

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7. The Center for Global Development (CGD) is a non-governmental organization representing this statement. The CGD mission is to produce "innovative economic research that drives better policy and practice by the world's top decision makers." *See* CTR. FOR GLOB. DEV., https://www.cgdev.org/page/mission [https://perma.cc/843K-XGKB].

8. *See* Johnathan B. Wiener, *Better Reg. in Eur.*, 59 CURRENT LEGAL PROBLEMS 447, 476 (2006) (explaining that "an assessment can play an important role in informing, in a very explicit manner, those taking the decisions on the details about the trade-offs that they are making.").

9. Tao Zhang, Deputy Managing Dir., Int'l Monetary Fund, Speech to the 59th Annual Meeting of the National Association for Business Economics, Global Economic Challenges and Opportunities (Sept. 25, 2017).

10. Vanessa Williamson, *The 'Tax Cuts and Jobs Act' and the 2016 Midterms: Examining the Potential Electoral Impact*, BROOKINGS INST. (Aug. 27, 2018), https://www.brookings.edu/research/the-tax-cuts-and-jobs-act-and-the-2018-midterms-examining-the-potential-electoral-impact/ [https://perma.cc/JPT8-A4RX].

11. Countries might engage in tax competition by lowering their tax rate in order to become a more favorable location for investment. *See* Michael J. Graetz, *The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy*, 128 YALE L.J.F. 315, 328 (2018) (discussing the lack of Democratic votes supporting the Tax Cuts and Jobs Act).

12. *See infra* Section I (addressing major socioeconomic issues focusing on income inequality and the drivers of this global phenomenon including technological advances, productivity growth, and underemployment).

13. The OECD is a forum where the governments of member states with market economies and non-member states work with each other to promote economic growth, prosperity, and sustainable development. *What is the OECD?*, U.S. MISSION TO THE

it will show how social and economic development has been beneficial and yet has also intensified these issues over time. Section II will then identify the most prominent issues currently faced by individuals in the U.S. To that end, it will review general tax policy requirements and recent tax reforms enacted by comparable developed nations in order to address similar issues.

Next, Section III narrows the focus of the analysis. It will explain specific provisions included in the TCJA and it will state the intended effect of these provisions. By relating the significant changes enacted under the TCJA to the major issues demanding government intervention, it will explain that despite stated congressional hopes,[14] the TCJA does not provide policy measures that result in any significant benefit to individual taxpayers.[15] Using U.S. tax policy considerations, that section will identify specific observations regarding the TCJA's failure to encourage progressivity.[16] Section IV will propose short-term modifications to the current legislation and a long-term plan for reform of U.S. tax policy, with objectives aimed at promoting standard tax policy objectives as well as multilateralism.[17]

ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT, https://usoecd.usmission.gov/our-relationship/about-the-oecd/what-is-the-oecd/ [https://perma.cc/3BWJ-KTNC]. "OECD provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies." *Id.*

14. Robert J. Barro & Jason Furman, *The Macroeconomic Effects of the 2017 Tax Reform*, BROOKINGS INST. PAPERS ON ECON. ACTIVITY 57 (Conference Draft, Mar. 4, 2018).

15. Kimberly Amadeo, *Trump's Tax Plan and How it Affects You*, THE BALANCE, https://www.thebalance.com/trump-s-tax-plan-how-it-affects-you-4113968 [https://perma.cc/VRF3-FSCW] (last updated June 25, 2019).

16. Tax policy considerations include the principles of equity, efficiency, and simplicity and these principles will be mentioned throughout this Comment. *See infra* Section IV for further explanation and analysis.

17. ATSUSHI TAGO*, Multilateralism, Bilateralism, and Unilateralism in Foreign Policy*, OXFORD RES. ENCYCLOPEDIAS (2017) (defining multilateralism with three main features: (1) indivisibility; (2) general organized principles; and (3) diffuse reciprocity, generally meaning that multilateralism requires cooperation on public goods and opposition to discrimination and preferential bilateralism).

I. SOCIOECONOMIC ISSUES PERSIST IN COUNTRIES AROUND THE WORLD

A. OECD Countries

The Organization for Economic Cooperation and Development (OECD) publishes an annual "Employment Outlook" assessing key findings from the data collection in each OECD member country.[18] This report provides an influential overview and comparison of issues plaguing labor markets around the world.[19] Unemployment rates in a significant number of developed OECD countries have decreased; however increased employment has generally been accompanied by slow wage growth, productivity slowdowns, low inflation expectations, and underemployment of workers.[20] These factors indicate a problematic trend in developed countries: although individuals are employed, workers are often overqualified for the job, and are receiving wages that are increasingly insufficient to maintain the average standards of living in a given nation.[21]

Wage stagnation and decreasing ability to afford necessities contribute to the pressing issues of income polarization and overall inequality among citizens.[22] Growing inequality among individual citizens has been identified in many countries around the world,[23] although the effects of this trend are most visible in Europe and the U.S.[24] The OECD notes that in the past twenty-five years, the average income of the richest 10% of individuals has grown seven-fold, and is now ten times greater than that of the poorest 10% of individuals.[25] Thus, wealth is concentrated in a small percentage of individuals and the majority suffers, as evidenced by the shrinking middle class—with most individuals falling lower on the distribution—and by the declining purchasing power of wages leaving wage-earners unable to meet the basic standards of living.[26]

Significant factors contributing to rising income inequality in countries around the world include technology, globalization, education, and political

18. *See* ORG. FOR ECON. COOPERATION AND DEV., OECD EMPLOYMENT OUTLOOK (2018) [hereinafter OECD Outlook].
19. *Id.* at 23–28.
20. *Id.* at 28–29.
21. *See id.* at 33–34.
22. Zhang, *supra* note 9.
23. *Id.*
24. Peter Hooper et al., *U.S. Income and Wealth Inequality*, DEUTSCHE BANK (Mar. 1, 2018), https://www.db.com/newsroom_news/Inequality_Jan2018.pdf [https://perma.cc/Y38L-K9ZH].
25. OECD Outlook, *supra* note 18.
26. *Id.*

agendas.[27] While technological advancements have contributed to modernization and have increased the ability to trade and to invest, they have also displaced low-skilled labor, eliminating these jobs with automation or increasing the skill level required for jobs.[28] Furthermore, globalization has opened labor markets and the utilization economies of scale: countries have realized efficiency in international trade, consequently displacing workers in industries that have become outsourced.[29] Although inequality among individuals continues to rise, this issue has been discounted when investing in capital rather than individuals has led to increasing GDP and higher average wages in many countries.[30]

While international factors play a significant role in the growing income inequality around the world, internal and external policies enacted by countries may be the leading causes of inequality.[31] Significantly, tax policies have contributed to inequality, even where they promote growth.[32] The OECD has identified personal and corporate income taxes as having an adverse effect on economic activity and growth by distorting labor use, productivity, and capital accumulation.[33] However, tax policies attempting to mitigate this distortion by taxing consumption and property rather than income tend to increase inequality.[34] For example, many countries have enacted a Value Added Tax[35] (VAT) that encourages economic growth by reducing costs

27. *Inequality*, OECD, http://www.oecd.org/social/inequality.htm#tax (last visited July 15, 2019) [https://perma.cc/WHE8-8ZYG] [hereinafter OCED, *Inequality*].

28. *See id.*

29. Nahuel Berger & Eric Maskin, *Globalization is Increasing Inequality*, WORLD BANK (June 23, 2014), http://www.worldbank.org/en/news/feature/2014/06/23/theorist-eric-maskin-globalization-is-increasing-inequality [https://perma.cc/2SJJ-ESXN].

30. *Id.*

31. *Piketty Explains why Wealth Inequality is Challenging, but far from Apocalyptic*, HARV. KENNEDY SCH. POL'Y CAST (Apr. 4, 2018), https://hkspolicycast.org/piketty-explains-why-capitals-analysis-of-wealth-inequality-is-far-from-apocalyptic-eeaec28ac40f [https://perma.cc/Z5TQ-4FYC] (describing research on world inequality and the contributing factors, including policies that favor increasing capital rather than policies that support equality).

32. OECD Econ. Dep't. Pol'y Notes, *Income Inequality and Growth: The Role of Taxes and Transfers*, No. 9, at 3 (Jan. 2012), https://www.oecd.org/eco/public-finance/49417295.pdf [https://perma.cc/YSC3-33QX] [hereinafter OECD Policy Notes].

33. *Id.* at 10.

34. *Id.*

35. The United States is one of few countries that does not impose a VAT. Thus, trading partners unilaterally impose subsidies on U.S. imports, and penalties are unilaterally imposed on U.S. Exports. *See e.g.*, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA,

on exported products, while increasing costs on imported products in a country.[36] While the VAT has a positive effect on international trade, its deficiencies include distorting business and investment decisions[37] and imposing a higher relative burden on low income people by taxing consumption rather than income.[38]

Rising inequality in OECD countries leads to a cycle of poverty, where the totality of the circumstances limits an individual's ability to achieve higher earnings throughout their lifetime.[39] Generally, poorer students are unable to compete with wealthier students in the education system, leading those poorer students to take lower-skilled jobs, with lower-paying salaries.[40] Lower-paid jobs typically require harder labor, under more strenuous working conditions, inducing more stress and health issues.[41] While the poor grow poorer, the wealthy have the ability to invest capital and increase earning capacity, thus raising inequality and widening the income gap.

B. The United States

Similarly to many OECD countries, the U.S. is currently experiencing low unemployment levels combined with a high Gross Domestic Products (GDP).[42] While statistics show an improvement in economic health, they fail to accurately reflect the current state of the country, and the struggles faced by millions of U.S. workers.[43] Although unemployment rates are low, wages have not increased and many employed Americans cannot afford basic necessities with their after-tax wages.[44] Wage stagnation has led to a raise in income inequality, a decline in the middle class, and it has had an overall negative impact on the economy.[45] The U.S. has the highest level

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A Pro-Growth Tax Code for All Americans, TAX 28 (June 24, 2016), http://templatelab.com/a-better-way-tax-policy-paper/ [https://perma.cc/7BGS-9B93] [hereinafter A BETTER WAY].

36. A BETTER WAY, *supra* note 35.

37. *Id.*

38. Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT'L L.J. 139, 171 (2003).

39. *See* OECD *Inequality*, *supra* note 27.

40. *Id.*

41. *See id.*

42. Heather Long, *The Alarming Statistics that Show the Economy Isn't as Good as it Seems*, WASH. POST (May 25, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/05/25/the-alarming-statistics-that-show-the-u-s-economy-isnt-as-good-as-it-seems/?noredirect=on&utm_term=.3fd3cf1b02d4 [https://perma.cc/4URX-PLBA].

43. *Id.*

44. *Id.*

45. Lawrence Mishel & Ross Eisenbrey, *How to Raise Wages: Policies that Work and Policies that Don't*, ECON. POL'Y INST. (Mar. 19,2015), https://www.epi.org/publication/how-to-raise-wages-policies-that-work-and-policies-that-dont/ [https://perma.cc/JQG3-L8AD].

of income inequality in the Western world,[46] with the top 10% of households owning 75% of wealth, and the top 0.1% holding as many assets as the bottom 90%.[47] This gap has been widening since the 1980s.[48]

The driving factors of inequality in the U.S. are analogous to those in other OECD countries and include technological change, globalization, education, and policy objectives.[49] Technology has generated wealth for some groups of individuals in the U.S., however the advance of technology has generally increased competition in the job market, with a growing demand for highly-skilled workers.[50] Globalization has increased the impact of technology on the job market; corporations now use automation, or outsource low-skill jobs to countries with lower production costs and wages than those in the U.S.[51]

Furthermore, studies have shown that in the U.S., families with greater wealth typically invest more money into their children's education, while children from poorer families are often not afforded the same opportunities.[52] Unequal investment in children's education leads to unequal opportunities in the job market and disparity in students' achievement level based on social class.[53] Science performance, as an indicator of proficiency in enquiry and development of technology, is specifically noted and compared among OECD countries.[54] Disadvantaged students in the U.S. are less likely than

46. *See Income Inequality: USA 1913-2014*, WORLD INEQ. DATABASE, https://wid.world/country/usa/ [https://perma.cc/8DJL-WLYM] (last visited Mar. 12, 2019) (showing the trends in income distribution throughout several decades); *see also generally* WORLD INEQ. DATABASE, https://wid.world [https://perma.cc/SF3L-A3XC] (providing similar data tables and charts for countries around the world as a point of comparison).

47. Sophie Hardach, *The State of the US Economy in 11 Charts*, WORLD ECON. FORUM (July 2, 2018), https://www.weforum.org/agenda/2018/07/heres-the-state-of-the-us-economy-in-11-charts/ [https://perma.cc/SN3F-4VYE].

48. *Id.*

49. *E.g., id.*

50. *See id.*

51. Brad Moon, *10 Companies that Are Bringing Jobs Back to America*, INV'R PLACE (Jan 23, 2017, 3:06 PM), https://investorplace.com/2017/01/10-companies-bringing-jobs-back-to-america/ [https://perma.cc/LX3H-HJ3V].

52. The Hechinger Report, *The Growing Achievement Gap*, U.S. NEWS & WORLD REPORT (May 28, 2018, 6:00 AM), https://www.usnews.com/news/education-news/articles/2018-05-28/income-inequality-exacerbates-the-achievement-gap [https://perma.cc/4LTZ-NGRU].

53. *Id*.

54. *See* OECD, *Country Note: Key Findings from PISA 2015 for the U.S.*, OECD 42 (2016), https://www.oecd.org/pisa/PISA-2015-United-States.pdf [https://perma.cc/7PF3-3HDQ] (noting that the OECD suggests policies to promote equity in education).

similarly situated students in other OECD countries to have access to a career in science or technology.[55] Interestingly, the OECD reports a ninety-one-point gap in science performance between those students attending "advantaged" schools and those attending "disadvantaged" schools.[56] The increasing relevance of science and technology related careers highlights the importance of equity in educational opportunities for students, equity that the U.S. has not uniformly achieved.[57]

Along with the variety of factors contributing to income inequality in the U.S., several policies tend to exacerbate the effects of inequality on poorer American citizens.[58] For example, policies that artificially parade themselves as protecting the poor, while actually benefitting large producers and government-supported industries.[59] Tax policy supposedly provides a variety of tools for incentivizing, supporting and utilizing economic resources.[60] However, when U.S. lawmakers enact tax reforms based on political factors rather than to promote economic and social wellbeing, taxes become another contributing factor to the growing income inequality in the country.[61]

The impact of income inequality within the U.S. has become widespread, generally inducing social tensions and limited opportunities for individual citizens.[62] Socially, inequality negatively impacts mental health and increases rates of drug use, criminal activity, and suicide.[63] Furthermore, the U.S. becomes limited from an economic perspective because unequal education and job opportunities limit the number of skilled workers and consequently limit the country's ability to compete in the global market.[64]

Demand for policy change is not unprecedented:[65] as a consequence of the aforementioned negative implications, popular opinion of both citizens

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55. *Id.* at 33.
56. *Id.* at 8 (identifying "advantaged" and "disadvantaged" based on school system ranking, socio-economic status, and other indicative factors).
57. *Id.*
58. *See generally* Daren Bakst & Patrick Tyrrell, *Big Gov't Policies That Hurt the Poor and How to Address Them*, THE HERITAGE FOUND. (Apr. 5, 2017), https://www.heritage.org/poverty-and-inequality/report/big-government-policies-hurt-the-poor-and-how-address-them [https://perma.cc/C6TB-ZWT6].
59. *Id.* at 1.
60. *See* Brian Roach, *Taxes in the U.S.: History, Fairness, and Current Political Issues*, TUFTS UNIV. (2010), http://www.ase.tufts.edu/gdae/education_materials/modules/Taxes_in_the_United_States.pdf [https://perma.cc/D7CS-5HLH].
61. *See id.*
62. Hardach, *supra* note 47.
63. *Id.*
64. *See id.*
65. *See e.g.*, Marcus Hobley, *Public Opinion Can Play a Positive Role in Policy Making*, THE GUARDIAN (Sept. 3, 2012, 8:00 AM), https://www.theguardian.com/public-leaders-network/2012/sep/03/public-opinion-influence-policy [https://perma.cc/FKE4-QRA4 .

and lawmakers began recommending an update to the U.S. tax policy long before the most recent legislation imposed on the Internal Revenue Code (IRC).[66] Arguments centered around evidence that the code had become outdated, regressive, and was increasingly causing lost opportunities for disadvantaged groups with limited ability to participate in the market.[67] Congress stated its intentions to stimulate the economy by addressing significant social and economic issues faced by U.S. citizens and businesses.[68] Thus, as a result of growing discontent, Congress pushed the TCJA through quickly.[69] It was adopted without bipartisan approval and without substantive assurance to citizens that the changes would address the growing issue of inequality.[70]

II. TAX POLICY ON A GLOBAL SCALE

A. Significance

Countries around the world depend on tax revenue to develop and support the economic and social welfare of their nation.[71] How a government decides to allocate its citizens' tax dollars determines the welfare of those citizens; it dictates the ability of the country to develop its natural resources, to support local production and businesses, to interact on a global scale in trade deals, and to attract investment from foreign governments and businesses.[72] Tax policy is generally one of the most important tools used

66. The 1986 Code governed the United States tax system, and while taxpayers, scholars, and even the Internal Revenue Service have, for many years, urged for an update and simplification of the code, this is not what Congress did with the TCJA. *See generally The Complexity of the Tax Code*, 1 TAXPAYER ADVOC. SERV. – ANN. REP. TO CONG. 12–13 (2012) (describing the most serious problems with the Internal Revenue Code and the consequences this poses for taxpayers).

67. A BETTER WAY, *supra* note 35, at 13.

68. *See generally* H.R. REP. NO. 115-466, at 191–540 (2017) (Conf. Rep.) (providing information regarding lawmakers' intended policy objective).

69. *See* TJCA (regarding the speed of adoption: the bill was introduced in the House on Nov. 2, 2017 and signed by the President on Dec. 22, 2017).

70. *See* Graetz, *The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy*, *supra* note 11, at 319 (discussing the lack of Democratic votes supporting the Tax Cuts and Jobs Act).

71. Esteban Ortiz-Ospina & Max Roser, *Taxation*, OUR WORLD IN DATA (2019), https://ourworldindata.org/taxation [https://perma.cc/V393-6NRR].

72. Press Release, Soc. Dev. Comm'n, Governments' Primary Responsibility for Essential Public Services Stressed by Speakers in Social Development Commission Debate,

by a country's government to improve societal, social and economic well-being; however, politicians sometimes (mis)use this tool as a political tool to gain popularity among certain groups of citizens.[73]

B. Politics in Policy

As noted in the preceding section, a country's tax policy not only affects the country internally, but also impacts its relations with other countries and its ability to interact in the global marketplace.[74] In many instances, politicians are faced with significant choices such as the duty to weigh both internal and external considerations[75] in order to make a policy trade-off.[76] While a variety of factors determine the goal of a particular policy decision, politicians generally favor decisions that serve their own political interests, such as gaining support for reelection.[77] Politicians, earning relatively high wages, also engage in self-interested decision-making, for instance, when a tax policy provides inequitable benefits to citizens falling higher on the income distribution scale.[78] Assumingly, politicians favor the votes of wealthier citizens, who have more influence on society and more money to invest in support of the politicians.[79] Inevitably, globalization encourages the creation of tax incentives in order to boost foreign direct investment, producing an additional opportunity for policy makers to skew their objectives.[80] A country's wealth and the politician's popularity may increase as a result of additional foreign investment; however the net effect

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U.N. Press Release SOC/4638 (Feb. 5, 2004) (discussing the importance of government allocation of resources, particularly in the context of developing nations).

73. *See* Graetz, *The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy*, *supra* note 11, at 327–28.

74. OECD, *Policy Framework for Investment User's Toolkit*, OECD 4, 5 (2013), http://www.oecd.org/investment/toolkit/policyareas/41890309.pdf [https://perma.cc/8FHQ-TMU9] (setting forth a Policy Framework for Investment, analyzing international tax policies and providing guidance for countries seeking to establish policy).

75. *See id.* at 13, 15.

76. *See id.* at 4.

77. *Id.* at 14.

78. *See* Jon Schwarz, "*Yes, We're Corrupt": A List of Politicians Admitting That Money Controls Politics*, THE INTERCEPT (July 30, 2015, 9:23 AM), https://theintercept.com/2015/07/30/politicians-admitting-obvious-fact-money-affects-vote/ [https://perma.cc/4ZDV-D2Y7].

79. *See, e.g.*, *id.*

80. Foreign direct investment drives the growth of multinational companies, and economies of scale drive movement of jobs and manufacturing with the objective of increasing cost efficiency, skewing the equity distribution. The overall impact increases the income inequality on a global scale. *See* Justin Kuepper, *The Impact of Globalization on Economic Growth*, THE BALANCE, https://www.thebalance.com/globalization-and-its-impact-on-economic-growth-1978843 [https://perma.cc/5JM6-95LF] (last updated Nov. 19, 2018).

likely increases competition within the country and puts individuals and corporations at an economic disadvantage.[81]

C. Globalization's Growing Impact on Tax Policy

Advances in technology, communication, and efficiency of international relations have created global connections that enable businesses and governments to effectively allocate resources and achieve economies of scale.[82] Businesses and individuals around the world realize benefits from international financing, trade, and multinational production.[83] Yet, despite globalization's positive effects, the accompanying issues of trade tensions, international taxation, transfer pricing, and overall financial risk present persistent challenges to the global economy.[84] Governments must maintain international relations while constantly working to improve policies that benefit their citizens.[85]

As a result of globalization, multinational businesses have gained the ability to utilize foreign countries, thus expanding their market and achieving

81. Inequitable policy may arise when foreign companies receive favorable tax treatment in a country and they are given an advantage over domestic companies, which may not be able to achieve the same efficiency in a particular market. *See* UNDP, Humanity Divided: Confronting Inequality in Developing Countries, UNDP 28, 83–84 (Nov. 2013), https://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Humanity%20Divided/HumanityDivided_Full-Report.pdf [https://perma.cc/GL93-HHGS] (discussing the equity approach, which aims to "eliminat[e] disadvantage[s] from circumstances that lie beyond the control of the individual but that powerfully shape both the outcomes and actions in pursuit of those outcomes").

82. "Economies of scale" refers to the concept of utilizing the lowest-cost producer, resulting from specialization and division of labor in trade or industry. Globalization increases the effect of economies of scale by opening the market to more places, resources, and workers. On a global scale, this produces lower costs to consumers, better access to capital and jobs, higher productivity, and increased competition. *See* Sean Ross, *How do Economies of Scale Work with Globalization?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/013015/how-do-economies-scale-work-globalization.asp [https://perma.cc/98TZ-RZN7] (last updated June 25, 2019).

83. Hitesh Bhasin, *What is Globalization? What are the Positives and Negatives of Globalization?*, MARKETING 91 (Dec. 18, 2017), https://www.marketing91.com/what-is-globalization/ [https://perma.cc/3TMN-CF5C].

84. Eustance Huang, *Trade Tensions are Just One of the Three Biggest Challenges for the Global Economy*, *IMF Says*, CNBC, https://www.cnbc.com/2018/04/20/the-three-biggest-challenges-facing-the-global-economy-imf.html [https://perma.cc/898G-27AX] (last updated Apr. 20, 2018, 5:48 AM).

85. *See* Gurría, *supra* note 6 (stating that even though countries do not agree on everything, continued efforts must be made to reach the ultimate goal of multilateralism: supporting a process of inclusive and sustainable growth).

significant growth.[86] OECD findings demonstrate that foreign direct investment increases in a particular country when that country decreases the stringency of its barriers to entry and its cost-increasing regulations.[87] However, controlling the growth of international businesses and ensuring the welfare of a country's citizens requires that domestic and international policies be highly responsive to internal and external conditions; regulatory measures must be consistently reviewed and modified to accommodate any issues that may arise.[88]

Taxation of international business remains one of the most important policy measures used by a country's lawmakers to attract investment and regulate market factors within the country.[89] Consequently a country's corporate tax rate has the ability to attract investment, drive local businesses to relocate abroad, or encourage excessive tax planning and tax sheltering by domestic and international businesses.[90]

For example, before the TCJA, the U.S. used a 35% federal corporate income tax rate on a worldwide basis,[91] incentivizing large multinational companies to use tax shelters to avoid significant compliance costs.[92] As a result of this high tax, most U.S. multinational corporations utilized tax planning, achieving tax rates even lower than the current 21% effective

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86. Trade and financial globalization have led to market expansion but have also contributed to the issue of income inequality. *See* Hooper, *supra* note 24.

87. Regulations play a crucial role in attracting multinational businesses by controlling costs, including tax costs. *See* Giuseppe Nicoletti, *The Influence of Policies on Foreign Direct Investmen*t, ASIAN DEV. BANK AND OECD 11–12 (Nov. 27, 2013), http://www.oecd.org/dev/pgd/20354689.pdf [https://perma.cc/U6EL-FT4X].

88. David Weisbach, *The Use of Neutralities in International Tax Policy* 2–3, 17 (Univ. Chi. L. Sch. Working Paper No. 697, 2014).

89. Kimberly A. Clausing, *Who Pays the Corporate Tax in a Global Economy?*, 66 NAT'L TAX J. 153, 154 (2013) (noting that uncertainties in "key economic parameters . . . including degree of capital mobility, international product substitution elasticities, the relative capital intensity of the corporate sector, the size of the country, and the degree of factor substitution" play a role in the effects of international corporate tax policy).

90. A BETTER WAY, *supra* note 35; *see also* Barro & Furman, *supra* note 14, at 50, 56 (discussing the importance of relativity in evaluating marginal tax rates across international jurisdictions).

91. *See* Erica York, *The Benefits of Cutting the Corporate Income Tax Rate*, TAX FOUND. (Aug. 14, 2018), https://taxfoundation.org/benefits-of-a-corporate-tax-cut/ [https://perma.cc/RQG8-DU96] (explaining how the United States employed the highest statutory corporate income tax among the OECD countries, at 38.9%. In comparison, at the time the TCJA was enacted, OECD average statutory corporate income tax rate was 23.8%, a significantly lower rate).

92. *See* David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1445–46 (2019).

corporate tax rate.[93] Although other non-tax factors[94] influence a multinational corporation's decision of where to invest, tax rates and profitability have influenced many large corporations to move production to, promote sales in, and outsourcing to tax-favorable jurisdictions.[95]

A nation's approach to international taxation generally falls under either a territorial system or a worldwide system—although each country's system will vary in the details of their rates, scopes, and specific methods of implementation.[96] Most countries have adopted a territorial system of international taxation, choosing to only tax business profits within the country's borders while exempting profits from a domestic company's foreign business activity.[97] In contrast, the less-popular worldwide system of taxation taxes a country's citizens and multinational businesses earning income abroad in their home country, regardless of income tax paid in the

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93. *See* James McBride, *How will the Tax Overhaul Affect U.S. Competitiveness?*, COUNCIL ON FOREIGN RELATIONS (Jan. 5, 2018), https://www.cfr.org/backgrounder/how-will-tax-overhaul-affect-us-competitiveness [https://perma.cc/9R2W-RBNR].

94. Non-tax factors help identify the economic reality of a country before investing. For example, the availability of relevant natural resources in the country, the demand for specific products and services, the consumer preferences in the country, and the infrastructure supporting a company's industry all influence investing. *See International Expansion*, ERNST & YOUNG, AUSTRALIA (Oct. 2017) (describing other examples of non-tax factors influencing decision-making to invest in a country), https://www.ey.com/Publication/vwLUAssets/EY-international-expansion-october-2017/$File/ey-international-expansion-october-2017.pdf [https://perma.cc/WZU8- Q5H3]; *see also* OFFICE OF TAX POL'Y, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS: A POLICY STUDY 56 (Dec. 2000) (finding that among 290 non-tax factors, multinational competitiveness is unlikely to be significantly affected by any single factor of a country's tax system).

95. *See* Kimberly A. Clausing, *The Real and Imagined Problems with the U.S. Corporate Tax Code*, HARV. BUS. REV. 172 (2018) (stating "U.S. companies are not being held back by the corporate tax code" where after-tax profits of U.S. multinational corporations were more than 50% higher as a share of GDP between 2010-2015 than recent decades); Eric Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 54 (1996) (discussing the equity and efficiency issues that arise from offering favorable tax treatment on an unequal basis).

96. *See* Gary Clyde Hufbauer, *Tax Policy in a Global Economy*, PETERSON INST. FOR INT'L ECON. (Jan. 1, 2000), https://piie.com/commentary/speeches-papers/tax-policy-global-economy [https://perma.cc/K89X-5UXK] (stating that "every national system reflects the continually evolving mix of forces in a democratic society.").

97. Kyle Pomerleau & Kari Jahnsen, *Designing a Territorial Tax System: A Review of OECD Systems*, TAX FOUND. (Aug. 1, 2017), https://taxfoundation.org/territorial-tax-system-oecd-review/ [https://perma.cc/MT2U-YBKD] (explaining the policy rationale behind a territorial system).

country where profits are earned.[98] The differences between countries' tax systems allow multinational businesses, who compare tax rates, to make fiscally-educated choices regarding moving or expanding their markets.[99]

D. International Tax Competition

A nation creates tax competition by encouraging foreign direct investment through its international tax policy.[100] Countries can use their tax systems to support research and development, job creation, and economic prosperity by offering tax incentives to multinational corporations.[101] However, policies favoring foreign investment tend to also favor profit shifting by multinational corporations seeking to move their business into countries offering lower tax rates.[102] Tax planning tools allow foreign investors to shift profits to jurisdictions offering lower tax rates.[103] Companies and individuals can choose where and how to structure a business, and that choice can lead to increased divergence between where actual economic activity occurs and where that activity is located for tax purposes.[104] Multinational corporations may establish holding companies, rather than moving an aspect of production into a low-tax country, to enable global profits to pass through and be taxed at a lower rate.[105]

Tax competition among nations may be policy driven, for instance when a government is lowering tax rates in order to achieve maximization of social

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98. This system had been used by the U.S. before the reform under the TCJA. The U.S. allowed a credit for foreign income taxes paid abroad, however this system usually resulted in the double taxation of income. *See* Jacqueline Laínez Flanagan, *Holding U.S. Corporations Accountable: Toward a Convergence of U.S. International Tax Pol'y and Int'l Human Rights*, 45 PEPP. L. REV. 685, 710–11 (2018).

99. OECD, *Policy Framework for Investment User's Toolkit*, *supra* note 74 (setting forth different factors used to determine taxable income under a specific country's tax regime, which should be evaluated by international business in the context of FDI).

100. Daniel Shaviro, *The New Non-Territorial U.S. International Tax System, Part I* (N.Y.U. Law Sch. Law & Econ. Research Paper Series, Working Paper No. 18–23, 2018).

101. *See generally* Michael Graetz & Rachael Doud, *Tech. Innovation, Int'l Comp., and The Challenges of Int'l Income Tax'n*, 113 COLUM. L. REV. 347 (2013).

102. *See* Lilian Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 TAX L. REV. 311, 316 (2018) (analogizing tax competition to market competition, with governments competing for tax revenue and investment rather than producers competing for prices and consumers, although noting that the definition is not comprehensive of the true purpose and effects of tax competition).

103. Simon Naitran, *Corporate Tax Competition and Profit Shifting to Tax Havens*, ADAM SMITH BUSINESS SCHOOL, UNIVERSITY OF GLASGOW 4–5 (Oct. 2016) (noting that a multinational corporation's decision of where to invest and produce is distinct from its decision of where to raise the financing for that investment and production).

104. Clausing, *The Real and Imagined Problems with the U.S. Corporate Tax Code*, *supra* note 95, at 172.

105. Naitran, *supra* note 103, at 5 (stating that by lowering their corporate income tax rates some countries compete for "paper profits" and others compete for actual investment).

welfare for its citizens or to place a downward pressure on government spending.[106] Harmful tax competition, on the other hand, occurs when, in order to lower the country's tax rate, the government offers rates below the overall average rate in the region, or applies the low tax rate only to income from sources abroad (and thus only foreign taxpayers benefit from these rates), or when changes to the tax rates are implemented without notifying other countries in the region.[107]

Regardless of whether specific policy goals or harmful intentions lay behind lowering corporate income tax rates, tax competition typically creates conflict rather than cooperation and the search for solutions between countries.[108] International tax competition creates tax incentives based on political appeal instead of sound economic policy.[109] The implementation of a competitive tax rate produces chain effects: it encourages other countries to respond to the new rate by changing their nations' tax policies, by engaging in tax competition and by skewing market forces in the global economy.[110] Furthermore, tax competition encourages a country to maximize its resources[111] and it influences actual market participants' willingness to change tax base in response to an enacted competitive tax policy.[112] Inefficiencies also result where competitive tax policies encourage the movement of capital between jurisdictions, while failing to create the same incentives to support labor mobility.[113] When companies move investment to a low-tax country,

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106. *See* Faulhaber, *supra* note 102, at 328; *see also Towards Tax Co-ordination in the European Union: A Package to Tackle Harmful Tax Competition*, COM (1997) 567 final 2 (May 11, 1997).

107. Faulhaber, *supra* note 102, at 329.

108. Conflict arises as a result of one country enacting tax policy to achieve financial growth at the expense of another country competing for a similar stimulus from investment. *See* Gurría, *supra* note 6 (discussing the impact of cross-border digital transformation on international competition and the ability of countries to regulate).

109. Graetz & Doud, *Tech. Innovation, Int'l Comp., and The Challenges of Int'l Income Tax'n*, *supra* note 101, at 351.

110. *Id.*

111. A country's ability to lower tax rates is contingent on the sufficiency of the tax revenue it currently receives. If tax rates are cut without a simultaneous increase in the tax base, the country's fiscal deficit will increase.

112. If not accompanied by an increase in foreign investment, a lower tax rate will not benefit a country's economy. *See* Hansjörg Bïochliger & José Pinero-Campos, *Tax Competition Between Sub-Central Governments*, 13 OECD WORKING PAPERS ON FISCAL FEDERALISM 4–5 (2011).

113. The "Ramsey Rule" of inverse elasticity "suggests that marginal tax rates should be inversely related to the elasticity of factor supply." Thus, tax policy is most efficient when providing preferential treatment for mobile factors, such as investment, rather than immobile

employment moves as well—shifting from importing countries to export producing countries.[114] As result of globalization, tax base mobility has significantly increased,[115] intensifying the potential negative effects of international tax competition.[116]

E. Evaluating Tax Reforms in Countries Around the World

A country's tax reform may be triggered by a variety of factors, including economic pressure, change in political power, social initiatives, and globalization.[117] The country's social, economic and political history directly impact tax reform, including the method of implementation adopted.[118] Consequently, no single framework for tax reform is universally applicable.[119] Developing an effective tax reform requires to balance the country's internal objectives with other externalities, such as the ability to remain internationally competitive.[120] The following paragraphs provide comparisons of tax reform in Japan and the United Kingdom (U.K.), illustrating various considerations and responses that policy makers have incorporated in developing policy goals.

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ones, such as labor. Mukul Asher & Remkishen Rajan, *Globalization and Tax Systems: Implications for Developing Countries with Particular reference to Southeast Asia*, 18 ASEAN 119, 120–21 (Yusof Ishak Institute Apr. 2001); Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1542 (2009) (analyzing the efficiency issues created by policies that affect global labor mobility).

114. Asher & Rajan, *supra* note 113, at 120.

115. Note that mobility of tax bases and choice of location for tax purposes may reduce tax liability in a territorial system of taxation. However, where a business' home country utilizes a worldwide system of taxation, the business must still pay income taxes to its home country, unless it engages in tax sheltering.

116. *See* Omri Y. Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in The United States*, 32 VA. TAX REV. 133, 172 (2012) (stating that "most jurisdictions face the same global competitiveness concerns and reducing tax rates is a natural response to capital flight"); *see also* Asher & Rajan, *supra* note 113, at 120–21 (noting that capital mobility has intensified tax competition among developing countries with the objective of influencing location decisions).

117. Roel Dom & Mark Miller, *Reforming Tax System in the World*, OVERSEAS DEVELOPMENT INSTITUTE 8 (June 2018), https://www.odi.org/sites/odi.org.uk/files/resource-documents/12280.pdf [https://perma.cc/9RT8-9YEM].

118. *Id.*

119. For example, U.S. principles of effective tax policy rely on the goals of equity, efficiency, and simplicity; however, other countries, depending on their current economic position and history of successful tax legislation, may rely more heavily on principles such as adequacy, exportability, or neutrality. For definitions of tax policy principles, see *Tax Principles: Building Blocks of a Sound Tax System*, INST. ON TAX'N AND ECON. POL'Y (Dec. 2012), https://itep.org/wp-content/uploads/pb9princ.pdf [https://perma.cc/CAB2-JZWE].

120. Antonis Adam & Pantelis Kammas, *Tax Policies in a Globalized World: Is It Politics After All?*, SPRINGER 321, 322 (June 23, 2007) (stating that regardless of highly integrated international markets, "national governments are still able to overcome the constraints set by international forces in order to achieve their own political agenda.").

Japan's government initiated a major tax reform in 2007 when its Tax Commission publicized its focus on pillars of "fairness, neutrality, and simplicity."[121] Japan considered national objectives, such as invigorating the economy in light of an aging population, and international concerns, such as remaining competitive in light of globalization.[122] In 2009, Japan began moving from a worldwide system to a territorial system of taxation, in an attempt to recapture retained overseas earnings being held in Japanese multinational corporations and controlled foreign corporations.[123] Japan identified tax avoidance as a contributing factor to stagnated employment, research and development, finding that companies were avoiding tax consequences of repatriating their earnings from international sources.[124]

Japan's decision to eliminate its repatriation tax has had long-lasting effects[125] and has impacted subsequent reforms. Japan's long-lasting effects of eliminating its repatriation tax has had different consequences when compared with the U.S.'s 2004 temporary repatriation holiday.[126] In 2009, the Japanese government declined to lower the corporate tax rate,[127] despite that high tax rate constituting a competitive disadvantage for attracting investment.[128] Japan considered the impact caused by shifting to a territorial system and determined that its economy could not sustain revenue loss from

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121. TAX COMM'N, MINISTRY OF FINANCE JAPAN, BASIC IDEA FOR FUNDAMENTAL REPORT OF TAX SYSTEM (2007), http://www.mof.go.jp/english/tax_policy/tax_commission/e0711a.pdf [https://perma.cc/88E7-RXTW].

122. Marian, *supra* note 116, at 74–75.

123. Controlled foreign corporations in Japan are defined as corporations with at least 25% Japanese ownership for a minimum of six months. *See* Toru Morotomi, *Japan's Shift to Territoriality in 2009 and the Recent Corporate Tax Reform: A Japan-United States Comparison of Taxing Income from Multinationals*, 14 PITT. TAX. REV. 173, 200–01 (2017).

124. *Id.*

125. The Joint Committee on Taxation considers this a failed tax incentive, causing the U.S. a total estimated revenue loss of $3.3 billion. *See* William Gale & Peter Orszag, Tax Analysts, BUSH ADMINISTRATION TAX POLICY: REVENUE AND BUDGET EFFECTS, (Oct. 4, 2004), https://www.brookings.edu/wp-content/uploads/2016/06/20041004orszaggale.pdf [https://perma.cc/RV4A-D6HJ].

126. Morotomi, *supra* note 123, at 201–06 (comparing U.S. and Japanese reforms in their effects over several years, noting that Japan sustained repatriation rates for more years following reform than the U.S.).

127. Marian, *supra* note 116, at 176.

128. *See How Other Countries Have Used Tax Reform to Help Their Companies Compete in the Global Market: Hearing Before the H. Comm. on Ways and Means*, 112th Cong. (2011) (statement of Gary M. Thomas, Partner, White & Case LLP).

lower corporate tax rates at that time.[129] OECD reports show the success of Japan's reform: it has led to increased employment, increased wages, and stable corporate tax revenues.[130]

Similarly, the U.K., also a large industrialized nation, initiated a corporate tax reform in 2007 to improve the competitiveness and attractiveness of the U.K. as a location for multinational business.[131] Since 1984, the U.K. had been reducing corporate tax rates.[132] However, by 2007, the accompanying base broadeners were increasingly complicating the country's tax system. Policy constraints in developing corporate tax reform include economic, political, international and administrative complications.[133] Unlike Japan, the U.K.'s shift to a territorial tax system was heavily influenced by a European Union ruling.[134] Change in U.K.'s corporate tax policy attempted to deter companies from moving their business to Ireland, where lower tax rates attracted investment at the U.K.'s expense.[135]

The U.K. has decreased its corporate income tax rate from 30 percent in 2007 to 19 percent in 2017 while shifting to a territorial tax system.[136] The

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129. Japan has since reevaluated and lowered its corporate tax rate in order to remain competitive. *See id.* (explaining that "the government concluded that the adoption of a foreign dividend exemption system itself would not unduly influence corporate decisions as to whether to establish or move operations overseas.").

130. While Japanese companies have increased their relevance in the world market during this time, the country has also persevered despite the financial struggles caused by the 2008 Global Recession. *Japan Disproves Fears of Territorial Taxation*, TAX FOUND. (Nov. 13, 2012), https://taxfoundation.org/japan-disproves-fears-territorial-taxation-0/ [https://perma.cc/R352-PZXQ].

131. *See generally* HM TREASURY, TAX'N OF THE FOREIGN PROFITS OF COMPANIES: DISCUSSION DOC, 2007 (U.K.).

132. Accompanying base broadeners allowed the U.K. to tax more revenue, albeit at lower rates. Consequently, the country's high negative effective marginal tax rates tended to discourage investment. *See* Alan Carter, *Corporate Tax Reform and Investment: Experience in U.K. & OECD Countries*, HM REVENUES AND CUSTOMS, http://www.oecd.org/mena/competitiveness/38880900.pdf [https://perma.cc/9N39-ZLCA].

133. Several considerations include the trend of lowered corporate tax rated among OECD countries, particularly in the EU, such as the effect on revenue stability, tax shifting, unfair tax competition among nations, and the effect of investment on economic growth. For a more comprehensive list, *see id.*

134. *See* Cadbury Schweppes, 2006 E.C.R. I-7995 (citing Case C-212/97, Centros Ltd. v. Selskabbstyrelsen, 1999 E.C.R. I-1459, para. 27; Case C-167/01, Inspire Art, 2003 E.C.R. I-10155, para. 96). For a thoughtful review of the ruling and analysis on the possible result of tax avoidance, see also Phuong Tran, *Cadbury Schweppes plc. v. Commissioners of inland Revenue: Eliminating a Harmful Tax Practice or Encouraging Multinationals to Shop Around the Bloc?*, 30 LOY. L.A. INT'L & COMP. L. REV. 77 (2008).

135. Tran, *supra* note 134. The Court ruled that the U.K. could not collect tax revenue from foreign sources, except in the case of a controlled foreign corporation (CFC) created as a holding company, meaning no actual business was being conducted by the CFC. This ruling effectively caused several U.K. businesses to move to Ireland in the following year.

136. Amir El-Sibaie, *There is More Than Meets the Eye When Analyzing the U.K.'s Corporate Tax Cut*, TAX FOUND. (Oct. 25, 2017).

U.K. successfully implemented these changes without losing significant tax revenue by including anti-base erosion rules and changes to provisions regarding capital investments.[137]

While each country develops its own framework to modify its tax system, policymakers often look to learn from other countries' efforts.[138] Comparing tax reform in Japan and in the U.K. illustrates two important aspects of global income inequality. First, governments tend to compete and attract investors, revenues or other resources by lowering their tax rates.[139] Second, governments focus on corporate income taxes to avoid losing revenue and to promote efficiency.[140] Policy goals are generally drafted after identifying economic and social needs within the country.[141] Implementing a policy reform should require identifying the most efficient way to drive change; oftentimes change rests upon the use of resources and capital held by corporations rather than those held by individuals.[142]

Policies focused on obtaining foreign direct investment and corporate wealth intensify income inequality, particularly where the country's lower corporate tax rates shift the tax burden to individuals.[143] Furthermore, where multinationals do relocate to low-tax jurisdictions, other economic considerations

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137. *See id.* Anti-base erosion measures, including changes in valuation of assets and expensing provisions, increased the effective marginal tax rates of corporations, indicating that changes to the corporate tax rate did little to incentivize multinational businesses to invest in the U.K. Effective tax planning would discover this inconsistency before a large multinational were to invest in the country.

138. Dan Kopf, *Eight Lessons from Eight Countries as America Attempts an Ambitious Tax Reform*, QUARTZ (Apr. 20, 2017), https://qz.com/956475/eight-lessons-from-eight-countries-as-america-attempts-an-ambitious-tax-reform/ [https://perma.cc/5KXV-28ZH] (noting the successes and problems posed by tax policies proposed or enacted in eight different countries around the globe).

139. This may be referred to as the "race to the bottom" approach: countries rationalize that lower tax rates will equal higher revenue. This concept causes inequity in the country's tax system by offering preferential treatment to taxpayers (typically corporate taxpayers) having more capital mobility. *See* Faulhaber, *supra note* 102, at 312.

140. *See generally* Michael Keen & Kai A. Konrad, *The Theory of International Tax Competition and Coordination*, HANDBOOK OF PUB. ECON. 257, 262 (2013).

141. *See e.g., id.*

142. OECD, *supra* note 74, at 14–15 (explaining that governments aim to attract foreign direct investment for several reasons, including greater ability to provide tax incentives as opposed to providing infrastructure, skilled labor, or public funds; "tax incentives do not require an actual expenditure of funds or cash subsidies to investors").

143. Kimberly A. Clausing, *Analysis: Would Cutting Corporate Taxes Raise Incomes for Workers?*, PBS.ORG (Oct. 30, 2017), https://www.pbs.org/newshour/economy/analysis-would-cutting-corporate-taxes-raise-incomes-for-workers [https://perma.cc/E7R9-BUB3].

may limit the effect of the intended stimulation in the country.[144] This is true particularly in light of technology, where job opportunities are increasingly being replaced by automation,[145] indicating that the trickle-down effects promised by policy makers are often limited by other factors.[146]

III. THE TAX CUTS AND JOBS ACT (TJCA)

This section proceeds in four parts. First, it will briefly identify the characteristics of the U.S. tax system, its accompanying tax policy goals, and how market factors and costs of implementing government programs have increased income inequality. Second, it will broadly explain the TCJA and it will discuss issues relevant to the scope of this Comment. Third, it will elucidate the effects of the legislation thus far, such as the TCJA's impact on the economy and on taxpayers' minds in its first year. It will analyze specific provisions of the TCJA, and in particular the modifications of the U.S. corporate tax system since these modifications are the ones having the strongest impact both in the U.S. and internationally. Last, this section will use U.S. tax policy standards to analyze the legislation as a universally effective tax reform and it will identify the significant equity, efficiency, and simplicity implications of the TCJA with respect to the issue of income inequality.

A. The U.S. Tax System

The U.S. employs a progressive tax system,[147] purporting to allow greater equality in society and to ensure the welfare of all citizens.[148] The tax policy objectives of the U.S. center around the principles of equity, efficiency,

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144. *See generally* Council of Econ. Advisers, *The Growth Effects of Corporate Tax Reform and Implications for Wages*, CEA (Oct. 2017), https://www.un.org/development/desa/dpad/publication/cdp-background-paper-no-01/ [https://perma.cc/GJF3-6T5W] (stating that "even when statutory corporate tax rates decrease, other components of the user cost can limit the dynamic effects on an economy.").

145. Clausing, *Analysis: Would Cutting Corporate Taxes Raise Incomes for Workers?*, *supra* note 143.

146. This refers to situations where politicians promise job creation as a result of tax reform, but in fact, even in domestic companies, jobs are often replaced by technology as a cost efficiency measure taken by corporate management.

147. A progressive tax system involves allocation of tax burden based on one's ability to pay, with the goal of making after-tax income more equally distributed. As an individual's income rises, so does their tax burden. *See* Julia Kagan, *Progressive Tax*, INVESTOPEDIA (May 18, 2017), https://www.investopedia.com/terms/p/progressivetax.asp [https://perma.cc/BYW9-5EVA]; *see also* I.R.C. § 1 (2017) (providing the tax rate structure for each earning level and taxpayer filing status; rates were most recently changed in 2017 as a result of the TCJA, discussed herein).

148. Roach, *supra* note 60.

and simplicity.[149] A tax policy meets efficiency standards when it does not coerce behavioral responses by taxpayers, relative to a tax-free world.[150] Equity means that similarly situated taxpayers should be treated similarly, both in terms of incomes and resources taxed ("ability to pay") and in term of tax benefits available.[151] Vertical equity encourages distributing tax burden equally based on the ability to pay principle.[152] Horizontal equity suggests that all taxpayers earning the same amount of income should bear the same tax burden.[153] Simplicity refers to the enforcement of taxes and to compliance; tax regulations do not meet the simplicity standard when they can easily be misconstrued or when they create administrative burden for law makers and enforcement agencies.[154]

Domestically, equity, efficiency, and simplicity are achieved when taxpayers have the same opportunities to maximize their well-being regardless of tax incentives, and when taxpayers earning similar amounts of income have similar effective tax rates and are imposed similar levels of burden.[155]

Internationally, the equity, efficiency and simplicity criteria imply that tax considerations should not affect an individual or an entity's decision to participate in domestic over foreign investment, or vice versa, and that

149. Ass'n of Int'l Certified Prof. Acct. (AICPA), *Guiding Principles of Good Tax Policy: Framework for Evaluating Tax Proposals* 4 (2017), https://www.aicpa.org/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf [https://perma.cc/F9JK-LDSM].

150. *See id.* at 9.

151. *Id.* at 3–4.

152. The ability to pay is an economic principle stating that the amount of imposed on an individual should be dependent on the level of burden the tax will create relative to the wealth of the individual. Thus, this progressive concept advocates wealthier taxpayers have a higher relative tax burden than poorer taxpayers. *Id.* at 4; *see also* Will Kenton, *Ability to Pay*, INVESTOPEDIA (May 30, 2018), https://www.investopedia.com/terms/a/abilitytopay.asp [https://perma.cc/KGU2-HYVN].

153. AICPA, *supra* note 149, at 4; *see also* Joseph J. Cordes, *Horizontal Equity*, in THE ENCYCLOPEDIA OF TAX'N AND POL'Y 164, 195 (1999), http://webarchive.urban.org/publications/1000533.html [https://perma.cc/7TYZ-A3RA].

154. AICPA, *supra* note 149, at 4, 8.

155. Employing a progressive tax system encourages this goal by making after-tax income more equal among taxpayers, thus allowing more equal access to resources opportunities. Growing income inequality is fueled by regressive policies that do not align with U.S. tax policy objectives. *See generally How Do Taxes Affect Income Inequality?*, TAX POLICY CENTER: BRIEFING BOOK, https://www.taxpolicycenter.org/briefing-book/how-do-taxes-affect-income-inequality [https://perma.cc/3QYE-97VF].

taxpayers will receive similar treatment to other individuals investing in that economy.[156]

The U.S. federal government develops spending programs purporting to achieve equity, efficiency, and simplicity objectives and to support societal welfare.[157] However, the objectives of these programs are often distorted due to political interests and associated costs,[158] which tend to fall on individuals and which counteract most benefits that may have been expected.[159] Growth of income inequality in the U.S. can be attributed to the imposition of vertically inequitable burdens on individuals,[160] resulting in an increased percentage of taxpayers struggling to meet living standards with their after-tax income, despite the country's advanced economy.[161]

Between 1979 and 2013 the top 1% of taxpayers experienced a 137.7% wage growth, while the bottom 90% of taxpayers realized only a 15.2% growth in wages, widening the wage gap and limiting the ability to pay for a growing number of citizens.[162] Due to ever-rising inflation, average wages now have the same purchasing power as they did in 1978, over forty years ago.[163] Thus, more and more households earning average wages are falling lower on the income distribution, evidencing the shrinking the middle class.[164] The country's ability to function as a democracy is limited by the

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156. *See generally The Complexity of the Tax Code*, 1 TAXPAYER ADVOC. SERV.– ANN. REP. TO CONG. (2012), https://www.irs.gov/pub/tas/08_tas_arc_msp_1.pdf [https://perma.cc/4CH9-FJ5Z] (describing the most serious problems with the Internal Revenue Code and the consequences this poses for taxpayers).

157. H. Beales, et al., *Government Regulation: The Good, The Bad, & The Ugly*, REGULATORY TRANSPARENCY PROJECT OF THE FEDERALIST SOCIETY (June 12, 2017), https://regproject.org/wp-content/uploads/RTP-Regulatory-Process-Working-Group-Paper.pdf [https://regproject.org/wp-content/uploads/RTP-Regulatory-Process-Working-Group-Paper.pdf [https://perma.cc/3FSK-CGAK].

158. Hidden costs of government regulation include distortion of supply and demand, higher prices imposed on consumers, and shifts in the market that tend to favor or disfavor specific industries. *See generally* Tom Lehman, *Six Arguments Against Gov't Reg.*, CAPITALISM (May 19, 2017), https://www.capitalism.com/six-arguments-government-regulations/ [https://perma.cc/7HU7-SYQG].

159. The Hechinger Report, *supra* note 52.

160. The principle of vertical equity implies that tax burden is distributed appropriately among those in unequal positions, i.e. imposing a higher burden on wealthier individuals and a lighter burden on low-income individuals. *See* Zolt, *supra* note 95, at 87.

161. Zhang, *supra* note 9.

162. Mishel & Eisenbrey, *How to Raise Wages: Policies that Work and Policies that Don't*, *supra* note 45, at 6.

163. Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RESEARCH CENTER (Aug. 7, 2018), http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/ [https://perma.cc/Y8E5-JWXW].

164. Zhang, *supra* note 9.

rising social and economic inequality among citizens.[165] Predictions regarding enactment of the TCJA suggest that the legislation will increase the rate at which this gap grows, creating a tight concentration of high-income taxpayers at the top of the distribution, and a much stronger concentration of low-income taxpayers at the bottom of the distribution.[166]

B. TCJA: Explanation and Issues

The Tax Cuts and Jobs Act created many changes to the Internal Revenue Code,[167] some changes being permanent, some changes being intended to phase out, and others that will be modified over the next eight years using changing rate structures to alter their application.[168] For example, the TCJA permanently reduces the corporate tax rate, cutting income tax liability for corporations from 35% to 21%.[169] While the TCJA also decreases individual income tax liability,[170] the reduction to these tax rates is less significant, and will be adjusted each year for inflation based on the Chained Consumer Price Index for All Urban Consumers (C-CPI-U).[171] As an example of a provision that will be phased out, Congress suspended the itemized deduction for individual taxpayers in tax years 2018 through 2026,[172] only

165. While purchasing power disparity is created by inequality, the ability to participate in a democratic society is also impacted where voters do not have the same ability to contribute to campaigns and take hours off from work to participate in the election of local officials. Furthermore, campaign financing is openly supported by high-earning individuals with strong political ideals, typically those ideals are not in alignment with low-wage earning citizens. *See, e.g.*, James Puckett, *Improving Tax Rules by Means-Testing: Bridging Wealth Inequality and "Ability to Pay"*, 70 OKLA. L REV. 405, 413 (2018).

166. Hardach, *supra* note 47; *see also* Amadeo, *supra* note 15.

167. The TCJA is considered the most significant reform of the Internal Revenue Code since 1986, when President Reagan initiated an overhaul of the code, intending to rectify unemployment, lack of economic stimulus, and lack of corporate regulation. While effective in addressing social and economic issues at the time, many of these same issues are present nowadays as the result of market forces and globalization. *See supra* Section I; *see* A BETTER WAY, *supra* note 35 (identifying a slew of social issues created by the tax code before the enactment of the TCJA).

168. For a more detailed overview of the TCJA, see *2018 Tax Cuts & Jobs Act Overview*, SMITH & HOWARD (MAR. 2018), https://www.smith-howard.com/2018-tax-cuts-jobs-act-overview/ [https://perma.cc/8BDF-58CU].

169. Internal Revenue Code § 11 (2017); *see also* TJCA, Pub. L. No. 115-97, section 13001, 131 Stat. 2054 (2017).

170. § 1(f)(3)(C) (2017).

171. § 1(f)(6)(A).

172. § 68(f).

giving taxpayers the option to take an increased standard deduction during those years.[173]

The provisions noted above exemplify seemingly simple changes to the tax code, however policy rationale dictates these changes are intended to work in tandem with all original and modified provisions of the code in order to create an economic stimulus.[174] Noting decline in the country's ability to compete with other world powers, the Trump administration determined that business friendly tax policies and regulations would induce a stimulus and accelerate growth, allowing the U.S. to regain its declining market power.[175] The TCJA took a macroeconomic approach in using tax policy to improve the properly identified issue of stagnated growth.[176] Rationale for reform focused on incentivizing corporate investment, increasing economic gain, and creating productivity in the U.S., intending ultimately to benefit wage earners through a trickle-down effect.[177] However, by focusing efforts towards making the U.S. a more competitive player in the world market, the effect on individual taxpayers and the issue of growing income inequality were not properly taken into account.[178]

173. § 63. The standard deduction is increased based on filing status, for individual taxpayers the standard deduction is increased from $6,000 to $12,000 in tax year 2018. *See generally* Publication 501, Dependents, Standard Deduction, and Filing Information, I.R.S. (2018), https://www.irs.gov/publications/p501 [https://perma.cc/H2Y6-T79S].

174. Changes to the tax code have been made for purposes of individual and corporate taxpayers, intending to shift allocation of government expenditures and tax burdens assumed by individual and corporate taxpayers. While certain provisions induce spending by taxpayers, the shifting tax base makes compliance more difficult for unsavvy taxpayers and uncertainty higher regarding the purpose of specific provisions.

175. *See* H.R. REP. NO. 115-596, at 3–15 (2018).

176. William Gale & Aaron Krupkin, *Did the Tax Cuts and Jobs Act Pay for Itself in 2018?*, TAX POL'Y CTR (Mar. 13, 2019), https://www.taxpolicycenter.org/taxvox/did-tax-cuts-and-jobs-act-pay-itself-2018 [https://perma.cc/SJZ8-6TF4] (analyzing the Trump Administration's early statements that the tax cut could "pay for itself" in light of data showing a decrease in total revenues and a decrease in the size of the economy in fiscal year 2018).

177. Mihir A. Desai, *Tax Reform, Round One: Understanding the Real Consequences of the New Tax Law*, HARV. MAG. (May-June 2018), https://harvardmagazine.com/2018/05/mihir-desai-tax-reform [https://perma.cc/ZX9F-AH95].

178. Equity and efficiency issues are raised as a result of provision changes intended to soften the more extreme changes affecting individuals. Using an example, suspending itemized deductions under I.R.C. § 68 was counteracted by increasing the standard deduction for individual taxpayers from $6,000 to $12,000 under I.R.C. § 63. Taxpayers are consequently at a disadvantage, in particular for those professionals such as doctors, lawyers, or independent contractors, who typically file individual returns itemizing business expenses including professional license fees, employment related expenses, or any other expenses typically incurred in the course of business. Many taxpayers fall under this category and will end up paying taxes on more pre-tax income as a result of this suspension. While some individuals filing as independent contractors will be eligible for the qualified business income deduction under I.R.C. § 199A, this category is defined narrowly, excluding many professionals and individuals earning beyond the set income floor. In summary, while some individuals will benefit by

Another issue with the approach taken by the TCJA results from the focus on incentivizing bringing foreign investment capital into the U.S., a rational policy goal from a purely economic standpoint.[179] However analyzing social, business, and political factors, Congress failed to consider the impact of globalization on investment decisions and allocation of resources.[180] Corporate tax reform must be examined in light of the possible effects and responses from other countries and multinational businesses.[181] Analysis shows that, contrary to intentions, the changes effectuated under the TCJA in its first year have not met the expectations projected by Congress (these expectations encompassed raising efficiency, equity, and administrative concerns not only within the U.S., but also in the international forum).[182]

C. Reviewing the First Year

Upon adopting the Tax Cuts and Jobs Act in late 2017, an initial analysis by the Tax Foundation predicted long-term and short-term effects of the

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obtaining a higher standard deduction, many more individuals will be negatively impacted by certain provision changes that will reduce their after-tax income.

179. Inducing foreign direct investment is typical of a tax reform, particularly where the U.S. intends to create a more competitive corporate tax policy. The significance of rate change, repatriation incentives and shift in the corporate tax base creates extremely strong incentives while it also increases international tax competition. *Executive Summary: Tax Effects on Foreign Direct Investment*, 17 OECD RECENT EVIDENCE & POL'Y ANALYSIS (2007), http://www.oecd.org/ctp/tax-policy/39866155.pdf [https://perma.cc/VZQ9-KWTW].

180. While capital is a mobile resource, it is also limited, restraining multinational companies seeking to maximize global profits. Furthermore, the significant decrease in the U.S. corporate tax rate does not necessarily reduce the incidence of profit shifting and tax sheltering by U.S. corporations, who still obtain more favorable rates by sheltering profits, especially where there is no incentive to invest in research and development. Japan was successful in changing its corporate tax regime by using tax incentives as a tool to encourage repatriation of corporate funds and by stimulating investment directed at research and development in the country. *See supra* Section II; *see* Simon Naitram, *Corporate Tax Competition and Profit Shifting to Tax Havens*, U. GLASGOW 1, 7 (Oct. 2016); *see also* OECD, R&D TAX INCENTIVE SUPPORT: JAPAN (2015), https://www.oecd.org/sti/OECD-STI-RDTaxIncentives-CountryProfile_JPN.pdf [https://perma.cc/SBH7-MV7Z] (describing the use of preferential tax treatment as a policy instrument for incentivizing investment and growth through research and development).

181. Furthermore, enacting a competitive corporate tax policy acts against multilateralism and discourages inclusive labor markets by inducing investment away from growing economies and into developed economies with the objective of competing for power rather than achieving sustainability as a nation. *See generally* Angel Gurría, *supra* note 6.

182. *See e.g.*, Gale & Krupkin, *supra* note 176 (observing that several prominent conservatives, including members of the Trump Administration, would be disappointed if they looked at the data).

TCJA on the overall economy, including a 1.7% increase in GDP each year, 1.5% higher wages for workers, and an additional 339,000 jobs for Americans.[183] However, the Tax Foundation also estimated that the TCJA would add $448 billion to the U.S. budget deficit over the next ten years, although an analysis by the Joint Committee on Taxation estimated a $1 trillion increase in the U.S. budget deficit over the same time frame.[184]

Reports from the first fiscal year (October 2017 to September 2018) accurately reflect the decline in revenue predicted by the Tax Foundation[185] and the Joint Committee on Taxation,[186] among many other sources asserting similar predictions.[187] Additionally, the Congressional Budget Office predicts that the budget deficit would be higher if the numbers did not include fourth quarter 2017 data.[188] Despite intentions to attract investment by cutting the corporate tax rate, results did not show increased rates of investment capital in the corporate sector.[189] However corporate income tax revenue for this period declined by $135 billion from the previous fiscal year, indicating that this policy measure did not create a beneficial impact on the economy during the first year.[190]

Furthermore, there has been no significant impact on worker's wages in the U.S. since the TCJA came into effect at the beginning of 2018.[191] Americans for Tax Fairness[192] found that although government's revenue

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183. *Details and Analysis of the 2017 Tax Cuts and Jobs Act*, TAX FOUND., SPECIAL REP. NO. 239 (Nov. 2017), https://files.taxfoundation.org/20171115134148/Tax-Foundation-SR2391.pdf. [https://perma.cc/VF7W-JQX9] [hereinafter SPECIAL REP. NO. 239].

184. Amadeo, *supra* note 15.

185. The Tax Foundation is a nonprofit organization that engages in tax policy research in order to reflect expert opinions on tax polies and outcomes. TAX FOUNDATION, https://taxfoundation.org/about-us/ [https://perma.cc/7YXF-5P4T].

186. The Joint Committee on Taxation is a nonpartisan committee of Congress; it is involved in the tax legislative process and provides analysis of legislative proposals. The Joint Committee on Taxation is legitimized as a U.S. government organization and given explicit powers under I.R.C. § 8021.

187. *See e.g.*, Alexander Arnon & Xiayue Sun, *Cost of Tax Reform Meets PWBM's Expectations*, U. PA. (July 30, 2018), http://budgetmodel.wharton.upenn.edu/issues/2018/7/30/cost-of-tax-reform-meets-pwbms-expectations [https://perma.cc/H6VM-6MZ8]; SPECIAL REP. NO. 239, *supra* note 183; BUS. MONITOR ONLINE, *Fiscal Stimulus in the US Set to Support Growth, but Pose Longer-Term Risks* (Sept. 10, 2018).

188. *See* Gale & Krupkin, *supra* note 176.

189. *See* Josh Bivens & Hunter Blair, *The Likely Economic Effects of the Tax Cuts and Jobs Act*, ECON. POL'Y INST. (June 1, 2018), https://www.epi.org/publication/the-likely-economic-effects-of-the-tax-cuts-and-jobs-act-tcja-higher-incomes-for-the-top-no-discernible-effect-on-wage-growth-for-typical-american-workers/ [https://perma.cc/47JB-ADVY].

190. *See* Gale & Krupkin, *supra* note 176.

191. *See infra* note 193.

192. Americans For Tax Fairness, a campaign on behalf of the American people, is endorsed by over 420 national, state, and local organizations encouraging a fair tax system for the majority of American citizens. This group researches and reflects the interests of

on corporate taxes will decrease by approximately 44% in 2018, only about 3% of American workers have been promised wage increases or bonuses as a result of the increase after-tax corporate income.[193]

Similarly, incentivizing repatriation of foreign profits by using a decreased tax rate, policy makers and analysts predicted $338.8 billion in tax revenue over ten years, creating economic stimulus through reinvestment of the repatriated corporate funds.[194] Out of an estimated $1 trillion in liquid corporate assets held abroad, companies repatriated $294.9 billion[195] during the first quarter, decreasing to $169.5 billion in repatriated funds in the second quarter.[196] Notably, corporate decision making may result in delayed response to repatriation incentives, and the short-term data trends may not be reflective of the long-term estimates provided by policy makers.

However, short-term responses by corporations have already depressed wishful taxpayers, where during the first two quarters of the TCJA, only 116 out of about 5.9 million employers announced intentions to invest in the U.S. as a result of the tax cuts.[197] Historical trends, economists' predictions, and current indicators show that rather than increasing wages or investments, companies utilize the additional funds from the tax cuts to initiate stock buybacks and award dividends to shareholders.[198] Considering the interaction

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the American public in engaging in conversation about tax policy. Americans for Tax Fairness, https://americansfortaxfairness.org/about/ [https://perma.cc/86SJ-DLPF].

193. *See* AM. FOR TAX FAIRNESS, *No Evidence Trump-GOP Tax Cuts Are Improving the Economy* (Sept. 14, 2018), https://americansfortaxfairness.org/trump-gop-tax-cuts-not-improving-economy/ [https://perma.cc/L858-YZ4A].

194. Although barriers to repatriation have been weakened, companies face liquidity issues to repatriation and lack incentives to reinvest repatriated earnings. Erica York, *Evaluating the Changed Incentives for Repatriating Foreign Earnings*, TAX FOUND. (Sept. 27, 2018), https://taxfoundation.org/tax-cuts-and-jobs-act-repatriation/ [https://perma.cc/9JMA-N37P].

195. Note that the repatriation holiday provided by the TCJA taxes liquid repatriated assets at 15.5% and illiquid repatriated assets at 8%. I.R.C. § 965 (2017).

196. U.S. BUREAU OF ECON. ANALYSIS, "Table 4.2. U.S. International Transactions in Primary Income on Direct Investment" (June 20, 2017), http://apps.bea.gov/iTable/iTable.cfm?ReqID=62&step=1 [https://perma.cc/SU97-SKG6]; *see* York, *supra* note 194.

197. *See* AM. FOR TAX FAIRNESS, *supra* note 193.

198. Several large companies have manifested their intentions to increase investment or wages, however the first quarter data shows that $305 billion was spent on cash mergers and share repurchases, while only $131 billion was spent on increasing wages, proving to be just a slight increase from prior years. *See* Michael Corkery, *Good News (And Bad) at Walmart*, N.Y. TIMES, Jan. 11, 2018, at B1; Jeff Cox, *Tax Cut Riches Have Gone to Execs and Investors Over Workers by Nearly 3-to-1 Margin*, CNBC (Apr. 17, 2018), https://www.cnbc.com/2018/04/17/tax-cut-windfall-has-gone-more-to-executives-than-to-workers-trimtabs.html?wpisrc=nl_finance202&wpmm=1 [https://perma.cc/HKE7-BV95].

of the dynamic global market and the requirement for compliance with corporate regulations in each country, the 2017 tax cuts may reasonably take years before the lower taxes create a chain of events that allow taxpayers to benefit from some effects such as an increase in wages.[199] However, where corporations are already realizing and using the benefits for purposes other than those intended by Congress, the tax cuts have been deemed by many as a giveaway to corporations.[200]

Despite what the first two quarters have revealed about the impacts of the TCJA, weariness and unintended responses by individual and corporate taxpayers result from factors including the impact of the rising fiscal deficit, the uncertain timing of the imminent economic effects, and planning considerations made in anticipation of impending provision phase-outs.[201] With incentives aimed at corporations both domestically and abroad, the effect on individual taxpayers depends on the responses assumed by corporations.[202] The TCJA proves ineffective in enhancing individual welfare by focusing policy goals on increasing investment by corporations, ignoring the inequity that is created on a global scale by placing too much power in the hands of corporations.[203]

D. Analysis and Evaluation

The proceeding section will focus on several provisions of the TCJA effecting taxation of corporations,[204] most significantly: (1) the repatriation

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199. Paul Krugman, *Bonuses and Bogosity*, N.Y. TIMES (Feb. 27, 2018), https://www.nytimes.com/2018/02/27/opinion/bonuses-and-bogosity.html?register=email&auth=register-email [https://perma.cc/3PEN-LCAB].

200. *Id.*

201. SPECIAL REP. NO. 239, *supra* note 183.

202. While certain provisions of the legislation have been enacted in order to support individuals, most measures are aimed at a specific group of taxpayers who do not typically change spending patterns in response to tax expenditures offering support for basic necessities. Economic rationale claims that tax incentives have the most impact on the middle class, who is more likely to spend additional income, whereas low-wage earning individuals and families will use that extra income to offset reduced government support while wealthy individuals and families will save additional income, but not reinvest it in the market. *See generally What are tax expenditures and how are they structured?*, THE TAX POL'Y CTR.: BRIEFING BOOK, https://www.taxpolicycenter.org/briefing-book/what-are-tax-expenditures-and-how-are-they-structured [https://perma.cc/KVG5-SJG9].

203. Aiming policy goals at corporations requires a trickle-down effect of the additional funds. Although economists contend that this is likely to occur in the long run, without effective incentives the impact of trickle-down effects will be subdued, not achieving the growth required. James Freeman, *Trump's Tax Wisdom*, WALL ST. J. (Aug. 9, 2018), https://www.wsj.com/articles/trumps-tax-wisdom-1533850010?mod=searchresults&page=1&pos=10 [https://perma.cc/RCC7-CMLZ].

204. By focusing on changes to taxation of corporations, this Comment does not intend to discount the significance of TCJA provisions that apply only on a domestic level, or

holiday for overseas corporate earnings; (2) the reduction in the corporate tax rate from 35% to 21%; (3) the shift of the U.S. corporate tax base from a worldwide system to a territorial system; and (4) the addition of BEAT, GILTI, and FDII as base broadening provisions included under the TCJA. These provisions work in conjunction with each other and applicable domestic changes created by the TCJA in order to effectuate one of the most significant tax reforms in U.S. history.[205] The tax policy standards of efficiency, equity, and simplicity to analyze these provisions will display the concerns faced by individual and corporate taxpayers, and the ability of the U.S. to regain its power in the international market.[206]

1. Repatriation Holiday

The tax repatriation holiday initiated by the TCJA intends to repatriate trillions of U.S. dollars in corporate assets held oversees.[207] Business assets brought into the U.S. under the repatriation holiday receive preferential tax treatment, applying a 15.5 percent tax rate on income held as cash or cash equivalents, and an 8 percent tax rate on illiquid assets, including equipment.[208] Comparing effective repatriation rates to the 35 percent corporate tax rate employed before the TCJA, the significantly lower rates create incentives

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only to individual taxpayers. Instead it aims to show that these provisions intended to have the most impact overall tend to ignore the import aspect of supporting individual welfare.

205. *See also* Barro & Furman, *supra* note 14, at 51.

206. Concepts of equity, efficiency and simplicity will be elaborated throughout this section. For further consideration of these concepts as they apply to tax reform, see Zolt, *supra* note 95, at 39.

207. H.R. REP. NO. 115-409, at 369 (2017), *reprinted in* 2017 Leg. Bill Hist. U.S. H.B. 1, 115th Cong., at § 3801-5001.

208. Similar to the 20% tax rate applied to capital gain under the policy rationale of encouraging long term investments, preferential tax rates are used as an incentive for repatriation, intended to stimulate economic growth using repatriated funds for investment. Application of these tax rates are simply stated, however applicable corporate tax provisions require adjustment to basis, earnings and profits upon transfer of CFC assets into the U.S., particularly when repatriated assets are then distributed to U.S. shareholders who are able to recognize the distributions at a significantly lower tax rate because of the repatriation holiday. *See* I.R.C. § 965 (2017).

for many controlled foreign corporations (CFCs)[209] to repatriate foreign earnings while these preferential tax rates apply.[210]

This provision aims to reconcile the inefficiencies induced by the former U.S. policy that required corporate tax payments on worldwide income of any U.S. individual or entity taxpayer.[211] U.S. shareholder owned CFCs have accumulated liquid asset worth an estimated one trillion U.S. dollars in foreign countries around the world.[212] The use of tax shelters exemplifies the inefficiencies created as a result of motives adopted by taxpayers in their attempts to avoid imposition of the former 35% corporate tax rate on foreign income.[213] By allowing repatriation of foreign-sourced income at a significantly lower rate, the TCJA seemingly counteracts the inefficiencies promoted by prior law, although it does not create neutral result.[214]

The high corporate tax rate not only effectively discouraged repatriation of foreign earnings, but it also caused entity reincorporation in lower-tax jurisdictions where they realized higher after-tax income.[215] Policy makers have now enabled the TCJA to compete with low-tax jurisdictions, however lack of accompanying incentives suggest that the U.S. economy will not see an investment boom as a result of repatriated funds.[216] Thus, this provision meets efficiency standards by allowing market forces to determine the result of shifting capital across borders.[217] However, because the repatriation holiday lacks incentives to reinvest foreign-sourced income in the U.S., inequity is created by allowing corporate shareholders to realize increased

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209. A controlled foreign corporation is defined as any non-U.S. corporation where U.S. shareholders own more than 50% of the corporation's stock. *See* § 957.

210. Amadeo, *supra* note 15; *see also* Bloomberg, *IRS Issues Tax Rate Guidance for Stockpiled Foreign Income*, FORTUNE (Dec. 30, 2017), http://fortune.com/2017/12/29/irs-tax-rate-guidance-foreign-income/ [https://perma.cc/Z5QJ-SMDE].

211. Under the new "quasi-territorial" tax base permanently employed by the TCJA, foreign earnings will not be taxed at the new ordinary corporate tax rate of 21%. Instead, foreign earnings will be subject to base broadening provisions, which this Comment will address within a proceeding subsection. *Infra* section III.D.4.

212. *See* York, *supra* note 194.

213. Naitran, *supra* note 103, at 7.

214. Because repatriation is promoted in order to pursue other policy goals, characterizing the one-time repatriation rate as neutral would be inaccurate.

215. *See* OECD, *Inequality*, *supra* note 27 (noting that profit shifting to avoid tax implications, resulting in rising inequality).

216. As noted in Section III.C., funds have been repatriated during the first year of the TCJA, however the economy has not experienced growth in investment, and overall tax revenue has declined significantly. ECON. ANALYSIS, *supra* note 196; York, *supra* note 194.

217. This means that the country with the most advanced economic market appeals strongly to investors, who see no need to participate in other markets through investment. *See* Gao Shangquan, *Economic Globalization: Trends, Risks, and Risk Prevention*, CDP Background Paper No. 1 (2000) ST/ESA/2000/CDP/1. ECON. & SOC. SFF. (stating that "international competition in the era of economic globalization is competition on economic systems and enterprise mechanisms.").

after-tax income from tax-sheltered foreign investments.[218] Yet taxpayers without the ability to invest domestically or abroad are not able to receive the same benefit, nor do they see any economic stimulus from the minimally-taxed repatriated funds.[219] This inequity has the effect of increasing inequality amongst taxpayers; those with the option to repatriate foreign earnings see a significant benefit from the provision, yet the benefits will not be available to the majority of taxpayers.[220] Alternatively, because corporate tax revenue has decreased under the TCJA,[221] most U.S. taxpayers will experience negative benefits from reduced government spending.[222] Administrative burdens are not significantly impacted as a result of repatriation; additional forms required for compliance do not create an excessive burden on the IRS. Furthermore, tax policy indicates that taxpayers choosing to make investments abroad must assume the duty to certify compliance with U.S. international tax policies.

2. Cutting the Corporate Tax Rate

Congress enacted many provisions under the TCJA intending to modify the income tax liability of corporations. However, corporations realize the most significant benefit through the permanent decrease of the corporate tax rate from 35% to a flat rate of 21%.[223] Before the TCJA, U.S. corporate tax policy had been deemed outdated, requiring reform in order for the country to experience social and economic growth.[224] The immediate effect of the rate reduction allows corporations to retain an increased percentage

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218. Vertical inequity is described in this generalization, allowing certain groups of taxpayers to realize benefits of this policy change, while others do not have the ability to similarly benefit.

219. This rationale suggests that the repatriation holiday under the TCJA serves the sole purpose of driving wealth out of foreign jurisdictions, propelling international tax competition, and raising equity concerns regarding income inequality among U.S. taxpayers.

220. Based on the concentration of taxpayers falling at the bottom of the wage distribution, "majority of taxpayers" refers to the group who generally does not have resources or financial literacy to engage in investment either domestically or in foreign jurisdictions.

221. This is mentioned above and will be further analyzed in the proceeding subsection. I.R.C. § 11 (2017).

222. Government resources are limited as a result of decreased tax revenue, contributing to the country's increased fiscal deficit and limitations on further government expenditures for the benefit of social welfare programs. *See generally Confronting Budget Deficits*, INT'L MONETARY FUND (Sept. 1996), https://www.imf.org/external/pubs/ft/issues3/ [https://perma.cc/DZ9K-FC3W].

223. § 11.

224. Council of Econ. Advisers, *supra* note 144.

of after-tax income.[225] Policy makers intended this increase in corporate wealth to influence corporate decision making, reasoning that more capital equals more investment.[226] While this logic is arguably true, as noted in Section II of this Comment, tax reform requires much more than strictly economic rationale.[227]

First, in cutting drastically the corporate tax rate, policy makers explicitly intended to engage in international tax competition, incentivizing investment into the U.S. and away from other countries.[228] With one of the highest corporate tax rates among OECD nations[229] and fearing the loss of corporate revenue due to competitive rates offered in other countries, U.S. policy makers determined that without cutting the corporate tax rate, the U.S. would not be able to achieve growth.[230] By implementing a 21% corporate tax rate, the U.S. now falls below the worldwide average statutory corporate income tax rate of 23.03%.[231]

With the previous 35% tax rate on corporate income, the U.S. began seeing corporations relocating to lower-tax jurisdictions, locating corporate income from foreign subsidiaries in tax havens, and using tax planning methods in order to minimize the effective rate below 35%.[232] Cutting the corporate income tax intends to be an economically efficient tax policy for multinational and U.S. businesses, disincentivizing tax gaming by directly reducing the burden of compliance.[233]

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225. This basic concept of rate reduction has been employed as a reform measure by many countries to achieve tax policy goals.

226. *See* H.R. REP. NO. 115-596, at 13–15 (2018).

227. *See, e.g.*, Lawrence Mishel, *We Need More Than Tried and Failed Trickle-Down Economics*, ECON. POL'Y INST. (Aug. 11, 2016), https://www.epi.org/multimedia/we-need-more-than-tried-and-failed-trickle-down-economics/ [https://perma.cc/WA7E-95VD] (pointing out that "if cutting tax rates were going to give us an economic nirvana of high growth, we would have seen it by now, wouldn't we? And why is it that economic growth is expected to raise the wages of most people? We haven't seen that in four decades.").

228. Corporate income is more mobile and more significant than individual income and is subject to global tax competition. *See* Shaviro, *supra* note 100.

229. Danielle Kurtzleben, *Fact Check: Does the U.S. Have the Highest Corporate Tax Rate In the World?*, NPR (Aug. 17, 2017), https://www.npr.org/2017/08/07/541797699/fact-check-does-the-u-s-have-the-highest-corporate-tax-rate-in-the-world [https://perma.cc/AT3E-LBRS] (speculating on the impending change of the corporate tax rate before enactment of the TCJA).

230. *See* H.R. REP. NO. 115-596, at 27.

231. GDP weighted average statutory corporate tax rate is 26.47%. Daniel Bunn, *Corporate Tax Rates Around the World*, TAX FOUND. (Nov. 27, 2018), https://files.taxfoundation.org/20190603100114/Tax-Foundation-FF623.pdf [https://perma.cc/RXU7-M73H].

232. Effectively, the U.S. had not been collecting 35% of corporate income, and decreasing the rate reflects that reality. *See* McBride, *supra* note 93.

233. *But see* Kamin, *supra* note 92, at 1446 (indicating that the new lower corporate tax rate provides more, not less, gaming opportunities, effectively allowing a tax savvy

In fact, this rate decrease produces efficient gains for corporations by allowing the entities to benefit from conducting business in the U.S., which is typically considered a favorable market. However, as discussed in the preceding overview of TCJA impact reports, corporate tax remittance as a percentage of government tax revenue has declined; yet, the majority of U.S. taxpayers have not experienced significant upsurges in job creation, wages have not increased, and the majority of U.S. citizens have not otherwise experienced any tax benefit as a result of this reduced rate.[234] Arguably, the steep rate cut is too efficient as a policy objective for enacting reform.[235] Lack of incentives for reinvestment of increased after-tax income implies that corporations are benefiting from increased savings, while U.S. citizens have not seen economic growth, and the government is obtaining significantly less tax revenue in order to fund expenditures that may provide more direct taxpayer benefits.[236]

Using corporate income tax to effectuate growth is an effective policy rationale, however equity concerns are raised by lack of similar incentives for individual taxpayers. The issue of growing income inequality is largely affected by unequal access to opportunities such as education, high-skilled jobs, and the ability to save.[237] Taxpayers having greater ability to save are able to invest in corporations; thus, in addition to receiving a favorable tax rate on capital gains from stock investments, wealthier taxpayers will now stand to benefit from higher after-tax income of certain corporations, earning more in dividends in the short run, or as a result of increased corporate investment in the long-run.[238]

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individual to earn income through a corporate entity while also avoiding the double layer of tax applied to corporate income).

234. Eric Levitz, *Most Americans' Wages Have Actually Declined Over the Past Year*, N.Y. INTELLIGENCER (June 13, 2018), http://nymag.com/intelligencer/2018/06/most-americans-wages-have-declined-over-the-past-year.html [https://perma.cc/WUV5-R7BF].

235. The TCJA should have created some incentive not only for corporate gains, but also for reinvestment of corporate funds in the form of increased wages or expansion requiring labor capital. Note that the U.S. has a high concentration of labor capital compared to many countries, however, poverty rates are currently high due to lack of demand for the abundance of labor capital. *See* Hooper, *supra* note 24.

236. Effectuating change of international tax incentives for corporations has led to the exclusion of beneficial personal tax expenditures. *See* Mason, *supra* note 113.

237. Effectively, the rich have more opportunities to make money and get richer. The poor do not have the same opportunities under the corporate tax rate cuts, particularly if no reinvestment of profits occur.

238. Zolt, *supra* note 95, at 87–88.

Corporations have incentives to reward investors who contribute to the business' growth, achieved by distributing dividends appropriately and acting in the best interest of shareholders, those investing in the corporation.[239] A corporation is not inclined to engage in goodwill for the benefit of non-employee taxpayers who are unable to provide investment capital, particularly where the corporation engages in high-skill labor, generally not engaging low-skill (and thus low-earning) employees.[240]

Despite limited application to many taxpayers, the corporate tax rate cut achieved greater administrative efficiency by adopting a flat 21 percent rate applying to all corporate income.[241] Additionally, suspending the alternative minimum tax for corporations in tax years 2018 through 2025 contributes to administrative simplicity, particularly where the lower tax rate and shift in corporate tax basis benefits all corporations at the onset.[242] An evaluation provided in the proceeding sections regarding implementation of a territorial system taxation and the inclusion of base-broadening provisions will raise simplicity issues regarding 21 percent corporate tax rate.

3. Eliminating the Worldwide Approach of International Taxation

Policy considerations driving the TCJA called for implementation of a regime change in the U.S. approach to international taxation.[243] The resulting modifications drove the adoption of a territorial approach to international taxation, an essential requirement for increasing the nation's ability to compete in the global market.[244] Prior to the reform, the U.S. was one of very few countries employing a worldwide system of taxation.[245] Under

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239. Corporations, as fiduciaries of shareholders, are required to act in the best interest of shareholders because shareholders have interest in the continued success of the corporation. DEL. CODE ANN. 8, § 144 (2017).

240. From a jurisdictional perspective, the OECD notes that capacity and access to innovation may fuel disparities in wage-earners by favoring particular skills or attributes (such as capital). *See* OECD, *Inequality*, *supra* note 27.

241. I.R.C. § 11 (2017).

242. § 55 (2017). The Alternative Minimum Tax (AMT) computes tax liability under §§ 56, 57, and 58 benefiting certain taxpayers by allowing payment of the minimum tax for the taxable year. The AMT may apply to both individual taxpayers and corporate taxpayers. However, during tax years 2018 through 2025, the TCJA has increased the threshold for individuals who may be eligible for AMT, whereas the corporate AMT has been suspended and will not apply to any corporate taxpayer during the seven-year suspension period.

243. H.R. REP. NO. 111-409, at 375 (2017) (noting the policy goals used to implement provision modifications under the TCJA).

244. *Id.*

245. Michael Goode & David Mittlestadt, *New Tax Act Brings Major Changes to U.S. International Taxation System*, TENN. BAR ASS'N (Aug. 1, 2018), https://www.tba.org/journal/new-tax-act-brings-major-changes-to-us-international-taxation-system [https://perma.cc/6A2X-Q4S4] (discussing the unique features of the participation exemption system employed by the U.S. under the TCJA and the changes effecting how foreign sourced income is taxed).

the worldwide tax regime, an increasing number of corporations began outsourcing productions, indicating that the U.S. approach to international taxation had become inefficient.[246] When all other world economic powers effectuated less-burdensome territorial taxes on corporate income, the U.S. became comparatively less desirable as a location for multinational businesses seeking to reduce tax liability.[247]

Under the TCJA, the U.S. now employs a participation exemption system, also referred to as the "quasi-territorial" approach to taxation of income earned by U.S. citizen in foreign jurisdictions.[248] Using the term "territorial" to describe the U.S.'s updated approach to international taxation does not accurately describe the specific mechanics implemented under the revised tax code provisions.[249] Furthermore, foreign profits are still subject to anti-profit shifting measures, created in light of the now-limited tax base,[250] including the Base Erosion and Anti-abuse Tax (BEAT), and Global Intangible Low-Taxed Income (GILTI), which will be further discussed in the analysis.[251]

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246. By taxing U.S. corporations on all income earned worldwide, the U.S. international tax system proved inefficient by disincentivizing companies from engaging in multinational business transactions and causing more corporations to engage in profit shifting to hide total earnings domestically and abroad in order to reduce tax liability. *See generally* Kimberly Clausing, *Does Taxing U.S. Corporations Make Sense in a Global Economy?*, ECONOFACT (July 19, 2017), https://econofact.org/does-taxing-u-s-corporations-make-sense-in-a-global-economy [https://perma.cc/LZ92-E4N8].

247. *Id.*

248. *Id.*; I.R.C. § 245A (2017) (encouraging U.S. multinational corporations to transfer funds back to the U.S. to reduce the tax liability of repatriated income).

249. A territorial approach implies that only income earned domestically will be subject to income tax. The U.S. intends to repatriate foreign-sourced income by providing taxpayers with the choice to repatriate at lower tax rates so that capital can be employed in the U.S. rather than abroad. *See What is a territorial tax and does the United States have one now?*, TAX POL'Y CTR.: BRIEFING BOOK, https://www.taxpolicycenter.org/briefing-book/what-territorial-tax-and-does-united-states-have-one-now [https://perma.cc/VP29-7778].

250. By taxing only corporate income in the U.S., rather than income earned by U.S. corporations on a worldwide basis, the TCJA limited the applicable tax base, i.e. the scope of entities and earnings that may be subject to U.S. tax liability. Base erosion is present in both worldwide and territorial approaches, however the effects on a territorial system are more pronounced where the smaller tax base relies more heavily on the tax revenues from the specific base. The U.S. has implemented provisions to prevent base erosion, however the OECD also provides studies and guidelines as a result of the significant impact that base erosion has caused in many OECD countries. *See OECD, Base Erosion and Profit Shifting*, OECD, https://www.oecd.org/tax/beps/about/ [https://perma.cc/Y2ZY-4VVZ] (last visited July 18, 2019).

251. Shaviro, *supra* note 100, at 60.

Efficiency considerations are addressed by the modified U.S. international tax basis, which shifted its focus from the total worldwide earnings of U.S. corporations, to only those profits resulting from U.S. operations under a territorial system. Reducing the tax burden on corporate taxpayers creates efficiency gains by limiting the tax base to domestically derived profits, diminishing corporate incentives to shift activity to a lower-tax jurisdiction.[252]

This quasi-territorial regime does nothing to limit corporations' ability to engage in tax sheltering to avoid the application of the U.S. income tax, typically easier to achieve under a territorial system. Similarly to the equity concerns raised by the reduction in the corporate tax rate, revenue reductions (by reducing the corporate tax basis) and lack of incentives for corporations to invest have a negative impact on individuals who are impacted by revenue decline as a result of corporate decision making.[253]

Assuming proper compliance with the base broadening provisions enacted under the TCJA, corporations will pay some income tax, whether to the U.S., or to the foreign jurisdiction in which the corporation engages in business.[254] Although the decreased regulation of CFCs[255] and the limited ability of the U.S. to collect corporate taxes from certain U.S. companies seems to achieve simplified corporate compliance,[256] administrative

252. Generally, applicability creates efficient tax policy by allowing corporations to make business decisions in light of market factors other than the applicability of tax rates. By reducing the corporate tax base to domestic profits, exempting offshore earnings, corporate profits in foreign jurisdictions will only be subject to one corporate tax, and will not be required to obtain foreign tax credit in compliance with U.S. tax law. Thus, corporations will retain a greater percentage of after-tax earnings. *See* Kyle Pomerleau, *A Hybrid Approach: The Treatment of Foreign Profits under the Tax Cuts and Jobs Act*, TAX FOUNDATION (May 3, 2018), https://taxfoundation.org/treatment-foreign-profits-tax-cuts-jobs-act/ [https://perma.cc/HL6A-A3Y8].

253. While the effect on corporations does not prove inequitable, the negative impact falls on U.S. individual taxpayers, who realize the negative side effects of reduced investment and reduced tax revenue in the U.S. economy. The result of corporate decision-making likely leads low-income taxpayers to realize the societal impacts that result from higher retained earnings by corporate entities and reduced government expenditures, exacerbating inequality by decreasing the ability of low-income taxpayers to engage in decision making regarding investment flows.

254. Base broadening provisions, explained in the following subsection, will further analyze considerations raised by the shifting tax base.

255. Reporting shares held in foreign corporations is still necessary for taxpayers who file U.S. income tax returns. *See Do I need to file Form 8938, "Statement of Specified Foreign Financial Assets"?*, I.R.S., https://www.irs.gov/businesses/corporations/do-i-need-to-file-form-8938-statement-of-specified-foreign-financial-assets [https://perma.cc/DZ2Q-AXL6] (last visited Nov. 16, 2019).

256. While compliance in the early years of tax reform may be complicated by the need for clarification by revenue rulings and IRS manuals, many corporations, especially those engaging in the international market, seek assistance from tax professionals in an effort to achieve compliance in operating business abroad.

considerations are raised as a result of the complications added through the base broadening provisions, as explained below.

4. Effecting the New Quasi-Territorial System Through Base Broadeners

In migrating international tax policy from a worldwide system to a quasi-territorial system, congressional efforts to reduce tax avoidance require the addition of specific provisions intended to reduce base erosion.[257] A territorial system taxes only corporate income earned in the U.S., giving relevant tax authorities the sole power to collect taxes in the foreign jurisdiction where economic activity actually occurs.[258] The U.S. allows CFCs to pay income taxes just once, to the source country; thereafter the U.S. requires that proof of taxes paid be submitted to the IRS, showing corporate tax compliance in the country of operation.[259]

Using a territorial tax system incites profit-shifting and sheltering corporate income in tax havens, unless effective corporate compliance restrictions are placed upon CFCs.[260] Thus, implementing a territorial tax system required

257. In addition to significant reductions in the corporate income tax rate under the TCJA, changes to the code, specifically shift to a territorial system of international corporate taxation, provide increased opportunities and more profit incentives for companies to avoid U.S. corporate income taxes and exploit loopholes in the new international tax policy. *Base Erosion and Profit Shifting*, DELOITTE, https://www2.deloitte.com/in/en/pages/tax/articles/base-erosion-and-profit-shifting-beps.html [https://perma.cc/ MA4F-PUXV] (last visited July 18, 2019); Clausing, *Analysis: Would Cutting Corporate Taxes Raise Incomes for Workers?*, *supra* note 143.

258. For further description and application of territorial tax systems see *Territorial vs. Worldwide Tax'n*, RPC SENATE (Sept. 19. 2012), https://www.rpc.senate.gov/policy-papers/territorial-vs-worldwide-taxation [https://perma.cc/K7XU-WCMQ].

259. In contrast, the worldwide tax system employed by the U.S. before the TCJA required compliance with the tax rate where a corporation was incorporated (U.S.). So, CFCs were taxed on operations twice, once in the source country, and then again in the country of incorporation, the U.S. CFCs were able to pay foreign taxes in the country of operation and obtain relief from double taxation by claiming a foreign tax credit, along with proof of income taxes paid in a foreign country where the business operated. Notably, this did not completely eliminate income tax liability in the U.S. *See generally* Martin Simmler, *The Impact of Worldwide vs. Territorial Taxation on the Location of Assets and the Scale of Investment*, U. OXFORD CTR FOR BUS. TAX'N (JUNE 2017).

260. Corporations seek to minimize income tax liability, using tax planning to devise creative strategies and locating investments and holding companies in jurisdictions with the lowest-tax rate possible. *See* Kamin, *supra* note 92, at 1447.

Congress to adopt measures preventing complete tax avoidance.[261] Base broadening measures typically accompany corporate tax cuts in developed countries.[262] The TCJA implements three specific provisions intending to prevent corporate tax avoidance; the Base Erosion and Anti-Abuse Tax (BEAT), the Global Intangible Low-Income Tax (GILTI), and the Foreign Derived Intangible Income regime (FDII); these provisions create significant efficiency, equity, and administrative concerns domestically and internationally.[263] These additional provisions also contribute to the "participation exemption system," which, unlike the worldwide system, no longer places tax liability on the repatriated income of U.S. multinationals, but still implements taxes on certain transactions that occur in foreign jurisdictions.[264]

Examining international tax policy under efficiency standards provides that in a globalized market, tax considerations should not be a determining factor in deciding where to locate a business, nor should tax liability determine how a company structures its internal funding mechanisms.[265] However, by including provisions to broaden the tax base, the TCJA influences rational economic behavior of multinational companies and significantly hampers the efficiency of the tax policy.[266]

First, under § 59A, the Base Erosion and Anti-Abuse Tax (BEAT) places a minimum tax rate of 10% on multinationals operating in the U.S. when one multinational engages in transactions that may be considered profit-

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261. Jane Gravelle et al, *Issues in International Corporate Taxation*, CONG. RESEARCH SERV. (2018), https://fas.org/sgp/crs/misc/R45186.pdf [https://perma.cc/3HW3-VEZA].

262. Base erosion is a common issue arising in international taxation, resulting in OECD identifying sources of reoccurring issues and developing a coalition among countries trying to reduce and eliminate base erosion. *See* OECD, *Base Erosion and Profit Shifting*, http://www.oecd.org/tax/beps/ [https://perma.cc/R8XW-E6C3] (last visited July 18, 2019).

263. Phillip Wagman et al., *Tax Reform Implications for U.S. Businesses and Foreign Investments*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Jan. 5, 2018), https://corpgov.law.harvard.edu/2018/01/05/tax-reform-implications-for-u-s-businesses-and-foreign-investments/ [https://perma.cc/Y2L4-Q9XS].

264. Steven M. Saraisky & Philip Hirschfeld, *International Tax Reform: Adoption of Territorial System and GILTI Tax*, COLE SCHOTZ P.C. (Jan. 31, 2018), https://www.cstaxtrustestatesblog.com/2018/01/articles/corporate-tax/international-tax-reform-adoption-territorial-system-gilti-tax/ [https://perma.cc/Z2LX-TKAZ].

265. Mark J. Mazur, *Does the Tax Cuts and Jobs Act Pass the Test of Good Tax Policy?*, TAX POL'Y CTR. (Apr. 12, 2018), https://www.taxpolicycenter.org/taxvox/does-tax-cuts-and-jobs-act-pass-tests-good-tax-policy [https://perma.cc/X8FQ-QGF8] (suggesting that an efficient tax policy would not impede allocation of resources).

266. Adam Looney & Hilary Gelfond, *Senate Tax Bill: Lower Rates for Corporations? Check. Broadening the Tax Base? Not So Much.*, BROOKINGS (Dec. 5, 2017), https://www.brookings.edu/research/senate-tax-bill-lower-rates-for-corporations-check-broadening-the-tax-base-not-so-much/ [https://perma.cc/8EHM-6BK8].

shifting.[267] BEAT attempts to broaden the tax base of multinational companies and to reduce inbound base erosion.[268] The provision acts to capture and include a wide range of transactions in a company's profits, including royalties, interest, rent, and high-margin service payments.[269] Inefficient behavior is created where multinationals face limited ability to make lucrative business decisions in light of the possible tax consequences.[270] By placing a minimum tax on nearly every payment to a foreign party, BEAT goes beyond protecting against base erosion.[271] The provision oversteps its purpose by disadvantaging legitimate cross-border payments within companies.[272] While certain types of payment, such as costs of goods and raw materials paid to a company, will be non-taxable, BEAT still creates inefficiency by reducing the benefits from the lower corporate tax rate and discouraging foreign direct investment in the U.S. by placing heavier taxes on foreign multinationals.[273]

Similarly, the Global Intangible Low-Taxed Income (GILTI) ensures that a minimum tax payment on foreign income is imposed on U.S. corporations engaging in foreign operations.[274] GILTI implements a 10.5% rate on income received from controlled foreign corporations.[275] GILTI ensures that multinationals are not able engage in profit shifting, effectively preventing base erosion in the U.S. However the provision creates serious efficiency concerns, where the TCJA purports to employ a territorial system of international taxation.[276] Despite this claim, in the course of ensuring that CFCs are not being utilized as a tax shelter, GILTI creates

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267. Martin A. Sullivan, *Economic Analysis: Can Marked-Up Services Skip the BEAT?*, TAX NOTES (2018), https://www.taxnotes.com/tax-reform/economic-analysis-can-marked-services-skip-beat [https://perma.cc/9PYG-G2BG].

268. *Id.*

269. *Id.*

270. *Id.*

271. The provision significantly reduces the benefits provided by the elimination of the worldwide tax base. Considering the burdens imposed by the BEAT, multinationals might not benefit from the reduced tax burden supposedly created under the quasi-territorial system.

272. Sam Schechner & Nina Trentman, *BEAT Up? U.S. Tax Provision May Sting Foreign Firms*, WALL ST. J. (Feb. 13, 2018), https://www.wsj.com/articles/beat-up-u-s-tax-provision-may-sting-foreign-firms-1518526800 [https://perma.cc/TS5S-8Y23].

273. *Id.*

274. GILTI was added under the TCJA for the purpose of increasing the scope of foreign earnings subject to income tax, ensuring that most income earned as a result of foreign operations is subject to a minimum income tax requirement. *See* TJCA, Pub. L. No. 115-97, sec. 14201, § 965, 131 Stat. 2208 (codified as amended at 131 Stat. 2054).

275. Barro & Furman, *supra* note 14.

276. *Id.*

additional tax liability for companies holding intangible assets overseas.[277] A corporate taxpayer must show payment of income tax liability in a given foreign jurisdiction where business operations occur, it will then receive foreign tax credits to offset GILTI.[278] Despite the applicability of offsetting tax credits, any additional tax cost influences corporate decision-making.[279] Hidden costs influencing corporate operations in foreign jurisdictions may be caused by hidden tax liability, creating inefficiencies where other economic factors such as resource availability, risk allocation, marketing advantages, cost advantages, and transportation and distribution costs may allow more effective analysis of business factors to determine the most lucrative foreign market for a particular multinational company.[280] Furthermore, GILTI creates obvious tax incentives by discouraging U.S. corporations from engaging in overseas production.[281] On the other hand, GILTI may successfully encourage companies to hold tangible assets rather than intangible assets in foreign jurisdictions to minimize tax liability.[282] GILTI effectively encourages offshoring in low-tax jurisdictions to reduce tax liability, offering cross-credits to corporations for paying taxes in foreign countries, regardless of the tax rate imposed by that country.[283] In any case, the measures employed by GILTI deters corporations from operating subsidiaries or branches abroad, proving inefficient where companies have an incentive to shift assets in order to avoid additional tax liability.

Consequently, the BEAT provision creates equity concerns by placing a minimum tax on certain types of transactions, inhibiting only certain industries. For example, pharmaceutical and software companies pay

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277. While the TCJA intended to disincentive tax shelters, corporations still desire to pay a minimal income tax. As a pattern, when policy makers decrease income tax liability, corporate taxpayers seek to avoid a greater percentage of that liability.

278. Laura Davidson & Lynnley Browning, *IRS Moves to Ease Pain of New Tax That Targets Offshore Profits*, BLOOMBERG NEWS (Sept. 13, 2018, 6:12 PM), https://www.accountingtoday.com/articles/irs-moves-to-ease-pain-of-new-tax-that-targets-offshore-corporate-profits [https://perma.cc/AT82-QD2Q].

279. Corporations take significant measures to ensure profitability before initiating new ventures, particularly in a foreign jurisdiction. Hidden base broadeners influence corporations' decisions, especially when corporations become aware of risks of additional tax liabilities, even more if the liability's extent is unclear, and costs may prove to outweigh other considerations. Due diligence concerns implicate corporate analysis regarding market entry. *See generally* Chye-Ching Huang et. al., *The Fiscal and Economic Risks of Territorial Taxation*, CTR. ON BUDGET & POL'Y & PRIORITIES (Jan. 31, 2013), https://www.cbpp.org/research/the-fiscal-and-economic-risks-of-territorial-taxation [https://perma.cc/6REX-4REG].

280. *Business Organization and Environment*, TRIPLE A LEARNING, http://textbook.stpauls.br/business_organization/printview.htm.

281. Barro & Furman, *supra* note 14.

282. *Id.*

283. Kamin, *supra* note 92.

themselves for rights to sell in the U.S., reducing their taxable profit. BEAT places a tax on the transfer of intellectual property rights, causing reduced profits in industries.[284] Similarly, multinational corporations utilizing supply chains will encounter barriers in transactions, and may be limited in their ability to profit as a result of the new tax considerations introduced by the TCJA.[285] However, purely domestic corporations and industries do not face the same disadvantage posed by the BEAT provision.[286]

In addition, equity concerns arise with the GILTI provision because the tax creates liability for certain industries with international operations, while others are not affected by the provision, or is able to utilize gaming to avoid GILTI. Because the tax is applied on a global rather than on a per-country basis, corporations can locate investments in low-tax countries and high-tax countries, blending income earned in multiple jurisdictions in order to reduce GILTI liability.[287] Companies operating in multiple countries are provided more opportunities for gaming, whereas corporations only engaging in operations in high-tax countries will be subject to a higher GILTI tax.[288] For some multinational corporations, GILTI provides rational incentives to offshore to lower tax liability, however many other international companies find GILTI inequitable because it increases tax liability in a system that claims not to tax overseas profits.[289]

Administrative concerns become an important consideration in establishing a change in international tax policy, especially in facilitating a significant shift in the U.S. corporate income tax base. Taking administrative issues into consideration before shifting policies, the intent should focus on reducing complexity and on making corporate management able to determine tax liability without confusion or without shifting efforts to gaming the new

284. Schechner & Trentman, *supra* note 272.
285. *Id.*
286. A domestic corporation with no counterpart in a foreign jurisdiction does not pose the type of risk the BEAT intends to limit. *See generally* Gravelle, *supra* note 261.
287. Kamin, *supra* note 92.
288. Assuming operations in a high-tax jurisdiction indicates rational economic reasoning, in this situation the totality of the circumstances results in the taxpayer's decision to assume higher tax liability, where a lower-tax jurisdiction would impose higher costs for that taxpayer for transportation, production, and other necessary. Thus, weighing the taxes against these costs allows the corporate taxpayer to make a rational decision to assume the higher tax.
289. Factors such as natural resources, demand for the good or for the service provided by the business, and market concerns determine the applicability of GILTI regulations to a multinational corporation.

tax system.[290] More importantly, changes to the system of international taxation should allow the government and the IRS to determine tax liability and to detect obvious attempts to game, while also implementing compliance with foreign governments to determine the accuracy of reporting. Where international tax policy is overly complex, corporations are unable to comply, and where they fear sanctions for non-compliance, complicated policy limits their ability to maximize investments and profits. Furthermore, if new regulations by the Treasury department are released frequently in order to explain the meaning of new provisions, this means that certain provisions are obviously unclear, implying that neither governmental authorities nor corporate management can effectively determine the meaning of the tax code changes.

Administrative concerns arise within corporations, and within the U.S. government when attempting to measure the BEAT. Because the tax is applicable to a wide range of intracompany transactions, while specifically excluding others, complexity arises for a corporation attempting to manage and regulate tax liability for these transactions, or if the company makes an attempt to game the tax, inefficiently allocating resources to reduce costs in transacting. When such a high risk exists for companies to game the system, government regulations must allocate resources in order to prevent the gaming, adding another level of complexity to the BEAT and disincentivizing companies in and outside of the U.S. from engaging in international business transactions in the U.S.

The GILTI provision presents administrative issues by creating offshoring incentives that allow and encourage multinational corporations to engage in gaming. This not only adds complexity to government regulations regarding tax liability of multinational corporations, but it also creates complications in transfer pricing where corporations must determine their ability to offset GILTI liability based on their CFC's liability in foreign countries.[291] The complexity in determining possible tax implications created by GILTI impacts the corporation's ability to effectuate other economic concerns that may have more impact on ability to operate in foreign jurisdictions, but it also creates complexity for government in regulating and implementing the standard, especially where the provision may create offshoring incentives for many companies, thus producing the opposite outcome of what Congress intended.

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290. Gaming works to exploit loopholes in order to legally obtain the lowest costs possible. A corporation that engages in sufficient planning can circumventing regulation. Kamin, *supra* note 92.

291. Marina Gentile, *Transfer Pricing Implications from U.S. Tax Reform*, WITHIUM (Feb. 15, 2018), https://www.withum.com/resources/transfer-pricing-implications-tax-reform/ [https://perma.cc/Q4K7-SHH9].

Moving from the broad tax base covered under the worldwide system allows the U.S. to compete more effectively with other OECD nations, promoting fair opportunities for U.S. corporations to compete internationally. However in the globalized economy, implementing overly complex provisions may hinder the ability of the U.S. to engage in international tax competition as intended under the TCJA by creating incentives to offshoring rather than hindering it, as well as disincentivizing foreign direct investment.[292]

5. Summary of Findings Regarding the TCJA

Since the enactment of the TCJA, Congress's intent has been challenged. On one hand, many commentators fear that while the TCJA may stimulate growth in the short run by cutting corporate tax rates, the long-term effects of an increased federal budget deficit and of the increased global tax competition will have a detrimental long-term impact on the U.S. Conversely, others suggest that the TCJA's impact will be minimal, for better or worse.

Congress missed the mark with the TCJA. The intentions may have been on track, but by design the legislation failed to address significant issues facing the country, mainly wage stagnation and the steadily increasing income inequality. Not only are these issues inadequately focused, but certain changes and interactions between the provisions add complexity to the tax code and may turn the U.S. into a more regressive system.[293] Furthermore, by taking measures to repatriate capital into the U.S. and keep wealth in the country, the international provisions of the TCJA enact protectionist measures, effectively provoking tax competition with other countries. The legislation, as it pertains to individual and corporate taxpayers, should be reformed with proper incentives to deliver the stated benefits to both individuals and corporations. Furthermore, policies should support globalization and promote macroeconomic benefits to the global economy, rather than nationalistic ideals of the Republican administration.

When Congress pushed the Tax Cuts and Job Act within two months at the end of 2017, it intended to stimulate the U.S. economy by decreasing

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292. *Territorial Tax is a Zero Rate on U.S. Multinationals' Foreign Profits, Threatens U.S. Revenues and Wages*, CTR. ON BUDGET AND POL'Y PRIORITIES (Oct. 6, 2017), https://www.cbpp.org/research/federal-tax/territorial-tax-is-a-zero-rate-on-us-multinationals-foreign-profits-threatens [https://perma.cc/223Y-BTG4].

293. Linda Sugin, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 YALE L.J. F. 403, 430 (Oct. 2018) (analyzing how provisions added to the Tax Code under the TCJA favor wealthy individuals, making the Tax Code more regressive in taxing income).

the tax liability of corporations and incentivizing the repatriation of billions of dollars of corporate income that had been stored overseas. Congress anticipated these acts would have a trickle-down effect on individuals and corporations, creating more money for investment in the U.S. and enabling subsequent wage increases. In theory, the objectives are promising. However, without proper incentives, the legislation creates opportunities for tax gaming, legal roadblocks, and complexities that will inevitably necessitate more guiding regulations.[294] Overall, the TCJA fails to meet the goals of a well-received tax reform: efficiency, equity, and administrative simplicity.[295]

Ultimately, Congress promulgated the TJCA as a bill that benefits taxpayers of the U.S., although the consequences radiate throughout the global economy. By aiming to impact multinational businesses, foreign taxpayers, foreign holders of U.S. securities, and countries engaging in the market with the U.S., the effects of the TCJA are more widespread than Congress anticipated. Many foreign countries are now scrambling to remain competitive in the global economy.[296] In analyzing changes to the corporate tax rate, the reform may be better understood in light of the reduced rate's impact in the global market, and how it ultimately not only impacts domestic corporations, but U.S. and foreign multinational corporations as well.[297] Concerns of efficiency, equity, and administration arise with the TCJA's effect overseas, particularly with the effect pertaining to the corporate tax rate cut, the end of a worldwide system of taxation, and the repatriation holiday.

a. *The Effect of the Corporate Tax Cut in the Global Economy*

Efficiency concerns are most prominently raised through Congress' clear intent to drive investment into the U.S. by allowing corporations to operate in the country with significantly less tax liability than before the TCJA.[298] U.S. multinational corporations have a clear incentive, in light of reduced tax liability, to return business operations to the U.S.; however, this entails moving investment out of foreign countries, and because a significant number of businesses are incentivized to do so under the TCJA, the resulting loss in productivity creates instability for host countries.[299]

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294. *See generally* Kamin, *supra* note 92.
295. AICPA, *supra* note 149.
296. Jim Blasingame, *The Good, The Bad, and the Ugly of the Tax Cuts and Jobs Act*, FORBES (Dec. 29, 2017), https://www.forbes.com/sites/jimblasingame/2017/12/29/the-good-the-bad-and-the-ugly-of-the-tax-cuts-and-jobs-act/#176f6066cf99 [https://perma.cc/CEQ3-63Y7].
297. *See* Desai, *supra* note 177.
298. Wagman, *supra* note 263.
299. As a basic economic consideration, business creates productivity and when productivity levels decrease, the country suffers. *See generally* Pomerleau, *supra* note 252.

Issues of horizontal equity also arise in the international context as the result of the reduction in the corporate tax rate. The TCJA reduces the U.S. corporate tax rate so that the U.S. may compete for business with other OECD nations. However, in light of the other changes made in the bill, the reduced rate increases the U.S. budget deficit.[300] Furthermore, no cross-country studies have shown that a clear correlation exists between lower corporate tax rates and investment and growth in the country.[301]

Congress failed to realize that by cutting the corporate tax rate in order to attract foreign investment, along with the other changes made, the provision creates a horizontal equity problem between domestic and foreign multinational corporations intending to invest in the U.S.[302] Foreign companies from high-tax countries having a territorial taxation system will benefit from the lower U.S. corporate rate, and have an incentive to invest in the U.S. in order to avoid having profits taxed at a higher rate in their home country.[303] Because foreign direct investment is sensitive to cross-border differences in tax rates, just as U.S. multinational corporations use foreign jurisdictions as tax shelters, foreign multinational entities now have an incentive to use the U.S. in order to avoid higher taxes.[304]

Administrative concerns are also raised in regulating multinational corporations where new provisions increase regulations and create complexities for Congress to oversee. Concerns also arise for state governments, in determining local tax liability for international corporations following the adoption of the new legislation.[305]

b. Room for Significant Improvement

Despite the first two quarters of 2018 having raised revenue from taxing several billion dollars of repatriated overseas earnings,[306] and despite an

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300. Hardach, *supra* note 47.
301. Kimberly A. Clausing & Edward Kleinbard, *Trump's Economists Say a Corporate Tax Cut Will Raise Wages by $4,000. It Doesn't Add Up*, VOX (Oct. 20, 2017, 9:30 AM), https://www.vox.com/the-big-idea/2017/10/20/16506256/cea-report-corporate-taxes-wages-boost-job-growth [https://perma.cc/2PL5-L3HU].
302. *Id.*
303. Council of Econ. Advisers, *supra* note 144.
304. *Id*.
305. *Minn. Bus. Anxiously Await New Budget*, LAW360 (Apr. 25, 2018), https://www.law360.com/articles/1036960/minn-businesses-anxiously-await-new-budget [https://perma.cc/ZU4P-LDQN].
306. York, *supra* note 194.

8.2% rise in corporate profits, short-term effects of the legislation do not indicate the long-term implications of a deeply flawed tax bill.[307] The TCJA provisions lead economists, politicians, and taxpayers to question what the short-term and long-term effects of the TCJA will actually be, especially where certain changes to the tax code are permanent while other provisions are set to expire in 2025. Concerns of the long-term effects, such as a predicted revenue loss of $1.9 trillion in the next ten years, tend to contradict the assumption that the changes to the tax code will improve the country's ability to sustain growth.[308] The initial effects of the TCJA have not panned out quite as Congress intended: instead the budget deficit has increased by significantly more than predicted and the Act has resulted in a lack of incentives encouraging investment. Speculation over the long-term effects has led some taxpayers to urge a repeal of the TCJA.

While economists contend that the cut of the corporate tax rate will have some trickle-down effect, it will require a chain of events that may only be achieved in the long run.[309] Furthermore, Congress did provide specific incentives through provisions such as the Federal Opportunity Zone Program, attempting to attract long-term investment to designated low-income communities across the country.[310] Through this program, Congress gives federal tax incentives to investors who invest in Qualified Opportunity Funds, intending to spur economic prosperity through development and job creation in low-income communities.[311] Despite the tax incentives of this program, the benefits are unlikely to be widespread where over 57% of all neighborhoods in the U.S. qualify under the federal selection criteria.[312] Only so many communities can achieve sustained growth through an infusion of capital. Thus, despite the possible benefits, this program is too limited to significantly

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307. AM. FOR TAX FAIRNESS, *supra* note 193.

308. Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROB. 61, 61–62 (2018).

309. Krugman, *supra* note 199.

310. *Colorado Springs, Pikes Peak Region Begin Work on Federal Opportunity Zones*, COLORADO SPRINGS ECON. DEV. (Sept. 5, 2018), https://coloradosprings.gov/economic-development/article/news/colorado-springs-pikes-peak-region; *see also* Conrad Swanson, *Opportunity Zones for Pikes Peak Region Met with Optimism, Disappointment, and Skepticism*, THE GAZETTE (Apr. 11, 2018), https://gazette.com/government/opportunity-zones-for-pikes-peak-region-met-with-optimism-disappointment/article_91c088cb-7017-55b0-a56e-e5b20f5881d7.html [https://perma.cc/Y25W-RNM2] (discussing the perspective of locals on opportunity zones in Colorado).

311. Ben Lane, *Trump Administration Unveils New Rules for Opportunity Zones*, HOUSINGWIRE (Oct. 22, 2018), https://www.housingwire.com/articles/47185-trump-administration-unveils-new-rules-for-opportunity-zones [https://perma.cc/Q8EU-R3BD].

312. Adam Looney, *The Early Results of States' Opportunity Zones are Promising, but There's Still Room for Improvement*, BROOKINGS (Apr. 18, 2018), https://www.brookings.edu/research/the-early-results-of-states-opportunity-zones-are-promising-but-theres-still-room-for-improvement/ [https://perma.cc/4RXF-6H2X].

address the wage and inequality issues that exist in communities across the country.

The problem with the repatriation incentive under the TCJA is that, where there is no demand to repatriate, or in the absence of incentives to invest the foreign earnings once they are repatriated, companies retain the funds or pay them out as dividends rather than reinvesting them as the TCJA intended.[313] As a result, employees of corporations do not benefit from the increase in retained earnings, and little of the capital is reinvested in the economy because it is paid out as dividends to shareholders, typically high-income taxpayers with propensity to save or reinvest the dividends income. In addition, dividend income is taxed at a 20% rate, even lower than the new corporate tax rate. While the incentives for repatriation may benefit multinational corporations, concerns about the negative effects of global tax competition include economic detriment in foreign countries and a lack of incentives to benefit the majority of taxpayers in the U.S.

Where Congress included provisions to effectuate internal growth through investment, in promulgating the significant shift to a territorial or "participation exemption system," Congress also included new and extremely complex provisions to prevent base erosion and profit shifting by adding GILTI, BEAT, and FDII, additional taxes applicable to foreign transactions.[314] The intention of these provisions is to ensure at least a minimum taxation on the profit of controlled foreign corporations, although the purpose of these regimes is clouded by technical problems and complexities that allow for tax gaming and interruption to the flow of overseas transactions.[315] Overall, the TCJA simply does not effectively create the change it intended nor the change that the United States as a global player has the ability to create.

313. Nat'l Taxpayer Advocate, *IRS Administration of the Section 965 Transition Tax Contravenes Congressional Intent and Imposes Unintended Burden on Taxpayers*, NTA BLOG (Aug. 16, 2018), https://taxpayeradvocate.irs.gov/news/nta-blog-irs-administration-of-the-section-965-transition-tax-contravenes-congressional-intent-and-imposes-unintended-burden-on-taxpayers [https://perma.cc/9TCK-FBGX].

314. Daniel Shaviro, *The New Non-Territorial U.S. International Tax System, Part II*, 160 TAX NOTES 171, 192 (2018).

315. Kamin, *supra* note 92.

IV. PROPOSED SOLUTIONS

Tax should be a tool of distributive justice.[316] Tax policy should be efficient, equitable, and simple; it should not favor taxpayers based on wealth, investment, gender, or class.[317] Most importantly, in carrying out policy goals, tax reform should provide effective incentives, rather than stated intentions that prove ineffective when there is no economic motivation for individual, corporate, or multinational corporate taxpayers to cede to Congressional intentions. Furthermore, incentives propelled through reforming tax policy should focus on the U.S. and "global markets" most significant issue: inequality within the nation.[318]

When tax policy creates economic inequality within a country and policy seems to spur inequality in foreign countries, taxpayers may become frustrated with the means used by governments in effectuating policy goals. Sustained dissatisfaction voiced by enough citizens may create instability in the global economy when policy makers disclaim the issues in the country.[319] Taxpayer fear and uncertainty about the long-term economic outlook leads to reduced demand and reduced output, which leads to unemployment, creating a cycle of economic depression in the long-run.[320]

A. Increasing Incentives

The most important action that Congress must take involves creating incentives that appeal to taxpayers, unlike the investment incentives promoted in the TCJA. The guiding policy principles highlights the inequality of the TCJA's application to different taxpayers and suggests that congressional motive in effectuating the TCJA focused more on improving the ability of corporations to compete in the global economy, and less on reducing income inequality and promoting welfare of citizens in the U.S. and around the world.

The Opportunity Zone program created under the TCJA represents one, and perhaps the only, direct incentive implemented in the legislation by rewarding investors for contributing to funds directed towards helping low-income communities through investment, job creation and opportunities through increased wages and ability to meet their needs. However, tax incentives highlighted through Qualified Opportunity Funds are specific

316. Sugin, *supra* note 293, at 405 (stating that the tax system must be created to reflect the core values of equality, community and dignity).

317. Roach, *supra* note 60, at 4–6.

318. Zhang, *supra* note 9.

319. *See* Puckett, *supra* note 165, at 415–16.

320. *Id.*

and preclude many taxpayers from benefitting from them; more can be done to reduce inequality.

B. Program Creation

While Opportunity Funds bring investment into low-income areas, this alone does not imply job creation or wage increases for taxpayers struggling to meet their needs-a fact illustrated by many studies. Where the economy is at nearly full employment, more reasonable policy should promote wage increases rather than job creation. A more effective way for Congress to create the ability for corporations to increase wages, to improve productivity and to incentivize foreign investment in the country, is to provide tax incentives. Alternatively, an incentive could be created for corporation subsidiaries willing to hire low-skilled workers and to provide them with job training that will increase the company's skilled workforce, thus justifying an increase in wages. Such an approach benefits low-skilled taxpayers as well as willing employers by allowing companies to build the skill level of their employees, while allowing those workers to earn higher wages and improve their ability to meet their needs.

C. International Considerations

While the TCJA intends to incentivize foreign direct investment through the low corporate tax rate, protectionist measures created by the anti-abuse provisions of the TCJA still create barriers to entry for foreign corporations otherwise inclined to do business with U.S. corporations, or in the U.S.[321] Reforming tax policy must reduce the barriers to entry, yet design and implement measures aligning with the OECD's goal to prevent base erosion and profit shifting.[322] Lowering the corporate tax rate to 21% creates incentives to allocate corporate investment in the U.S. However, foreign governments construe this policy as tax competition and are likely to take action in order to level the playing field in the global market. Alternatively, retaliation may be carried out through reducing trade with the U.S. and ensuring that the country's corporations do not invest in the

321. *Cf.* Justin Kuepper, *The Impact of Globalization on Economic Growth*, THE BALANCE, https://www.thebalance.com/globalization-and-its-impact-on-economic-growth-1978843 [https://perma.cc/8F9C-D9Q6] (last updated July 19, 2019).
322. *See generally Action Plan on Base Erosion and Profit Shifting*, OECD (2013), http://dx.doi.org/10.1787/9789264202718-en [https://perma.cc/PS8P-WVJ6].

U.S. Globalization is inevitable, it has the effect of creating reliance between countries and the U.S. must be careful not to destroy these relationships.

Rather than encouraging investors and U.S. multinational corporations operating abroad to shift money out of foreign countries and into the U.S., Congress must promote fair trade standards by offering foreign investors incentives to invest in the U.S. while not creating tensions in the U.S.'s relationship with foreign governments. For example, where foreign multinational corporations invest or expand business in the U.S., Congress should allow them to operate at the reduced corporate tax rate enjoyed by domestic corporations, but foreign investors should also be offered stepped-up incentives for hiring low-income workers, falling within a specific income tax bracket, at specified wage rates, thus promoting the global goal of lessening income inequality in the U.S. This may trigger equity concerns where foreign investors receive more benefits than domestic investors. However, equity concerns can be offset by allowing increased incentives for U.S. multinational corporations creating jobs abroad, thus promoting welfare of all global citizens.

V. CONCLUSION

Tax policy is and must continue to be an important economic and political tool that the government uses to foster growth, to obtain revenue, and to allow for the redistribution of economic resources.[323] Despite intentions to stimulate growth through corporate investment, policy makers have instead allowed corporations to profit through the realization of reduced tax liability both in and outside of the country, while limiting the ability of government spending due to the decrease in revenue.

This Comment seeks to address major societal issues and recognizes that policy makers, and many tax reformists, should include not only sound policy objectives, but also reasonable expectations. They should also show willingness to build upon feedback and to make improvements. Considerations should also focus on supporting social equality and equality in granting opportunities.

Despite the weak first year of the TCJA, the U.S. can attract investment in the long run. However, if and when this objective is finally achieved, the U.S. must consider addressing issues plaguing the U.S. market and identifying the source of the issues, mainly as it relates to income inequality. Congress, in its hurry to pass the TCJA, failed to realize that the U.S., despite being a great nation, is not the only nation in a global economy that relies on inputs and outputs from all countries. At the very core are each country's taxpayers, and the global economy does not run without workers in each income bracket.

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323. Roach, *supra* note 60.

Tax policy must consider not only the social and economic health of the U.S., but also other countries that act in response to changes in the U.S. tax system. Reform of the TCJA must take all relevant factors into account and consider the effects on the individuals and the whole of the global economy.