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Taxpayer Choices, Itemized Deductions, and the Relationship Between the Federal & State Tax Systems

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TAXPAYER CHOICES, ITEMIZED DEDUCTIONS, AND THE RELATIONSHIP BETWEEN THE FEDERAL & STATE TAX SYSTEMS

Heather M. Field*

Abstract

Almost 30 million taxpayers who itemized their federal deductions for the 2017 tax year switched to the standard deduction for 2018. The provisions of the Tax Cuts & Jobs Act (“TCJA”) that led to this shift were intended to simplify the individual income tax system. This Article’s empirical study of federal and state tax filing data, however, demonstrates that the TCJA’s simplifying effect varied state-to-state depending on whether a state obligated its taxpayers to make the same choice for state tax purposes (i.e., to itemize deductions or take the standard deduction) as the taxpayer made for federal purposes. In states that obligated taxpayers to make the same choice, taxpayers experienced at least some simplification, and tax administration by the IRS and state tax authorities became materially easier, although the IRS’s simplification benefit was dampened to some degree. In states that allowed taxpayers to make state tax choices that differed from their federal choices, the TCJA’s simplifying effect for many taxpayers was largely illusory, state income tax administration actually became more complex, and some tax enforcement costs were, in effect, shifted from the IRS to state tax authorities. Thus, this Article’s study reveals that state-level rules about tax choices undermined the federal policy goal motivating the TCJA’s itemization-related changes.

A taxpayer’s choice whether to itemize is just one of many tax elections explicitly provided to taxpayers. Accordingly, this Article’s study of taxpayers’ itemization choices also serves as an example that illustrates a broader point—state-level rules about whether taxpayers must make uniform federal and state tax elections create important, but previously underappreciated, interactions between the federal and state tax systems. Policymakers cannot fully understand the policy implications of many federal tax law changes unless they appreciate these federal/state interactions. This Article helps policymakers do so.

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INTRODUCTION

The Tax Cuts & Jobs Act (“TCJA”),¹ enacted in December 2017, was intended to reduce dramatically the number of taxpayers that itemize their deductions, thereby simplifying the individual income tax system.² As anticipated, the rate of itemization on federal income tax returns decreased from 30.6% for the 2017 tax year (pre-TCJA) to 11.4% for the 2018 tax year (post-TCJA).³ Almost 30 million fewer federal income tax returns had itemized deductions. That meant almost 30 million fewer Schedule A forms filed with the IRS and almost 30 million fewer taxpayers whose itemized deductions the IRS might audit. Thus, at a high level, the TCJA’s itemization-related changes—specifically, the increase to the standard deduction and limits on itemized deductions—seem to have simplified the income tax system for individual taxpayers and the IRS.

This Article’s analysis of federal and state individual income tax filing data for 2017 and 2018, however, tells a more complex story both for taxpayers and tax administrators. Specifically, the data show that a significant number of individual taxpayers in some states (including, for example, more than 22% of individual filers in Oregon⁴) switched from itemizing to taking the standard deduction for federal purposes but continued to itemize for state purposes. Thus, these taxpayers did not experience nearly as much simplification as the federal itemization data, alone, suggest. In addition, the simplification benefits experienced by the IRS as a result of the TCJA’s itemization-related changes were dampened because some taxpayers continued to itemize for federal purposes post-TCJA even though their federal itemized deductions were less than the federal standard deduction. Further, and perhaps most notably, the decline in federal itemization rates, which simplified tax administration for the IRS, increased the complexity of tax administration for tax authorities in several states. The net effect was to shift some enforcement costs from the IRS to state tax administrators.

As this Article will explain, whether one or more of the foregoing consequences arose for a particular state or its taxpayers depended largely on whether the state (a) obligated taxpayers to make the same election—to itemize or take the standard deduction—for state purposes as the taxpayer made for federal purposes, or (b) allowed taxpayers to make an independent choice about whether to itemize deductions or take the standard deduction for state purposes (i.e., regardless of the itemization choice that the taxpayer made for federal purposes). That is, a state’s

¹ The official name of this legislation is “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.” Pub. L. No. 115-97, 131 Stat. 2054 (2017). Although the bill’s original title, the “Tax Cuts and Jobs Act,” was stricken from the final legislation, many commentators continue to use that name. *See, e.g.,* Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439 (2019). This Article does the same.

² *See infra* Part I.B.

³ *SOI Tax Stats – Individual Income Tax Returns Complete Report* (Publication 1304), IRS, <https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns-publication-1304-complete-report> [<https://perma.cc/R76L-355V>] (last visited Nov. 21, 2021) (Table 1.4. All Returns: Sources of Income, Adjustments, and Tax Items, by Size of Adjusted Gross Income, Tax Year 2017 & Tax Year 2018) and author calculations.

⁴ *See infra* note 94 and accompanying text.

“tax election uniformity rule” affected the success of the federal policy goal motivating the TCJA’s itemization-related changes.

These consequences have been overlooked by existing scholarship. On the one hand, this omission is surprising because the TCJA’s itemization-related changes were touted by proponents as simplifying.⁵ On the other hand, the omission may not be surprising because scholars have paid relatively little attention, either in general or in the context of the TCJA, to tax election uniformity rules or the indirect interactions between federal and state tax regimes that these rules create.⁶ Commentators analyzing the interactions between federal and state tax laws, whether in general or in the context of the TCJA specifically, typically focus on conformity (i.e., whether a state’s income tax laws change to follow federal income tax law changes,⁷ including changes made by the TCJA),⁸ tax preferences such as the deductibility (now capped⁹) of state and local taxes for purposes of the federal income tax,¹⁰ or administrative cooperation between the federal and state tax authorities.¹¹ Even when election uniformity has been mentioned in the context of the TCJA, commentators and policymakers generally focused on the impact on

⁵ See *infra* Part I.B.

⁶ See Heather M. Field, *Binding Choices: Tax Elections & Federal/State Conformity*, 32 VA. TAX REV. 527 (2013) (the one law review article discussing policy considerations relevant to states’ election uniformity rules); see also *infra* note 12 (citing sources that discuss the state revenue effects of the TCJA in light of states’ election uniformity rules).

⁷ See, e.g., Jane G. Gravelle & Jennifer Gravelle, *How Federal Policymakers Account for the Concerns of State and Local Governments in the Formulation of Federal Tax Policy*, 60 NAT’L TAX J. 631 (2007); LeAnn Luna & Ann Boyd Watts, *Federal Tax Legislative Changes and State Conformity*, 100 PROC. ANN. CONF. ON TAX’N NAT’L TAXPAYER ASSOC. 260 (2007); Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267 (2013); Ralph B. Tower & Caroline M. Boyd, *Tax Base Modifications: The Hidden Barrier to Simplification*, 41 ST. TAX NOTES 165 (2006). Commentators also discuss the relationship between federal and state tax laws as part of broader discussions about fiscal federalism. See, e.g., Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895 (1992); Kirk J. Stark, *The Federal Role in State Tax Reform*, 30 VA. TAX REV. 407, 423 (2010); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).

⁸ See, e.g., Dylan Grundman, *What the Tax Cuts and Jobs Act Means for States—A Guide to Impacts and Options*, INST. TAX’N & ECON. POL’Y (Jan. 26, 2018), <https://itep.org/what-the-tax-cuts-and-jobs-act-means-for-states-a-guide-to-impacts-and-options/> [<https://perma.cc/7ZWX-N49K>]; Amy Monahan, *State Individual Income Tax Conformity in Practice: Evidence from the Tax Cuts & Jobs Act*, 11 COLUM. J. TAX L. 57 (2019); Darien Shanske & David Gamage, *Why States Should Tax the GILTI*, 91 ST. TAX NOTES 751 (2019); Adam Thimmesch et al., *Strategic Nonconformity to the TCJA, Part 1: Personal Income Taxes*, 97 TAX NOTES ST. 17 (2020); Jared Walczak, *Toward a State of Conformity: State Tax Codes a Year After Federal Tax Reform*, TAX FOUND. (Jan. 28, 2019) <https://taxfoundation.org/state-conformity-one-year-after-tcja/> [<https://perma.cc/8YWN-3M3R>].

⁹ I.R.C. § 164(b)(6)(B), codifying Pub. L. No. 115-97, § 11042(a), 131 Stat. 2054, 2085-86 (2017) (capping the deductibility of state and local taxes at \$10,000).

¹⁰ See, e.g., Daniel Hemel, *The Death and Life of the State and Local Tax Deduction*, 72 TAX L. REV. 151 (2019); Manoj Viswanathan, *Hyperlocal Responses to the SALT Deduction Limitation*, 71 STAN. L. REV. ONLINE 294 (2019).

¹¹ See, e.g., Harley Duncan & LeAnn Luna, *Lending a Helping Hand: Two Governments Can Work Together*, 60 NAT’L TAX J. 663 (2007); Erin Adele Scharff, *Laboratories of Bureaucracy: Administrative Cooperation Between State and Federal Tax Authorities*, 68 TAX L. REV. 699 (2015).

state tax revenue and the size of individual taxpayers' state income tax bills,¹² rather than on simplicity.

Admittedly, the impact of states' election uniformity rules on the degree of simplification created by the TCJA may have been difficult to identify or appreciate without a careful study of federal and state individual income tax filing data from before and after the TCJA's enactment (i.e., from 2017 and 2018). Thus, I gathered and analyzed that data, and this Article discusses the results and their implications. My study shows that the simplifying effects of the TCJA's itemization-related changes varied state-to-state depending on states' itemization election uniformity rules.¹³ In states that allowed different federal and state itemization choices, the TCJA's simplifying effect was largely illusory for many taxpayers, and state tax administration became more complex. In contrast, in states that required uniform federal and state itemization elections, the TCJA's changes were generally much more simplifying for taxpayers and tax authorities, although the IRS's benefit was dampened, at least slightly, because states bound taxpayers to their federal itemization elections.

This Article's analysis also illustrates a broader point—that states' tax election uniformity rules are critical to understanding the relationship between the federal and state tax regimes and should be considered in the policy analysis of any tax change that relates to a tax election. There are hundreds of tax elections,¹⁴ and the itemization election, discussed here, is merely one example of where the policy implications of a federal tax law change cannot be fully understood without understanding states' tax election uniformity rules. The same is true for many other tax elections, including a married couple's election whether to file jointly or separately,¹⁵ an eligible corporation's election to be taxed as an "S corporation"

¹² See, e.g., Grundman, *supra* note 8; Erin Huffer et al., *Effects of the Tax Cuts and Jobs Act on State Individual Income Taxes*, 58 WASH. U. J.L. & POL'Y 205 (2019); Walczak, *supra* note 8; see also, e.g., RICHARD AUXIER & KIM RUEBEN, TAX POLICY CTR., CONFORMITY, COVID-19, AND STATE BUDGETS 15-18 (Jan. 2021) https://governor.kansas.gov/wp-content/uploads/2021/01/tpc_kansas_january_2021.pdf [<https://perma.cc/2SHV-MUHL>] (in a presentation to Kansas Governor's Council on Tax Reform, discussing Kansas taxpayers who pay higher state taxes but lower overall taxes because of TCJA's increased standard deduction and Kansas's itemization uniformity rule, and briefly mentioning the possibility of administration issues if Kansas changed its itemization uniformity rule); N.Y. STATE DEP'T OF TAXATION & FIN., PRELIMINARY REPORT ON THE FEDERAL TAX CUTS AND JOBS ACT (Jan. 2018) https://www.tax.ny.gov/pdf/stats/stat_pit/pit/preliminary-report-tcja-2017.pdf [<https://perma.cc/FT5Y-8BWP>] (estimating \$44 million revenue increase absent change to New York's 2017 itemization uniformity requirement); VA. DEP'T OF TAXATION, ESTIMATED IMPACT OF THE TCJA, 14-15, 17, 21 (Nov. 19, 2018) http://leg5.state.va.us/User_db/firmView.aspx?ViewId=5343&s=23 [<https://perma.cc/5YSS-W3BZ>] (estimating that the increase in federal standard deduction coupled with Virginia's itemization uniformity law would generate over \$121 million in state revenue in the 2019 fiscal year, and that allowing taxpayers to itemize for state purposes regardless of federal election would cost Virginia more than \$350 million in revenue in the 2020 fiscal year and more than \$250 million in revenue in the 2021 fiscal year).

¹³ See *infra* Part III.

¹⁴ ANTHONY J. DECHELLIS & KAREN L. HORNE, PPC'S TAX ELECTION DESKBOOK (26th ed. 2020) (discussing over 300 tax elections).

¹⁵ I.R.C. § 6031.

rather than as a “C corporation,”¹⁶ and the election to have certain corporate acquisitions taxed as asset purchases rather than stock purchases.¹⁷ These federal tax elections and others are also available at the state level in many states, and like in the case of a taxpayer’s itemization election, states differ as to whether they bind taxpayers to their federal choices or allow independent state-level choices.¹⁸ Thus, states’ tax election uniformity rules for each of these and other elections are likely to affect the policy consequences of tax law changes that are relevant to taxpayers’ decisions about these elections.

The itemization election provided a good opportunity for an empirical study of the effects of states’ tax election uniformity rules because the TCJA’s changes were intended to alter taxpayers’ choices and because federal and state filing data from before and after the TCJA were available. As a result, this example concretely illustrates the previously underappreciated interactions between the federal and state tax systems created by election uniformity rules. Insights from this Article’s analysis of the itemization election can be leveraged in other situations, including to help states determine which tax election uniformity rules to use for which elections and to guide policymakers as they evaluate the policy implications of many other tax law changes. For example, applying this Article’s insights reveals that two recent federal tax law provisions enacted to help people weather the pandemic likely provided different degrees of assistance to married couples in different states depending on whether the states obligated couples to make the same filing status choice (married filing jointly or separately) for state purposes as they made for federal purposes.¹⁹ These types of issues will continue to arise over time, including possibly in connection with future tax changes that may be forthcoming under the Biden administration.

This Article proceeds as follows. Part I provides background about the TCJA’s changes that affect taxpayers’ decisions about whether to itemize or take the standard deduction. Part II discusses 2017 and 2018 income tax return data from taxpayers in states that take different approaches to tax election uniformity. This Part explains what the data reveal about how the TCJA’s itemization-related changes affected taxpayers’ itemization choices. Part III uses the data discussed in Part II to analyze how states’ election uniformity rules affected the simplification achieved by the TCJA’s itemization-related changes. Part IV explains how this Article’s insights about states’ tax election uniformity rules advance our understanding of the relationship between the federal and state tax regimes more broadly.

¹⁶ I.R.C. § 1362.

¹⁷ I.R.C. § 338(h)(10).

¹⁸ See *infra* Part IV.A.

¹⁹ *Id.*

I. THE TCJA'S ITEMIZATION-RELATED CHANGES

The TCJA was the most sweeping tax reform legislation since 1986, and it included major changes to the taxation of businesses,²⁰ cross-border activities,²¹ and individuals. For individuals, the TCJA reduced income tax rates, increased the standard deduction, limited many itemized deductions, suspended personal and dependency exemptions, increased the child tax credit, and reformed the individual alternative minimum tax so that it applied to fewer taxpayers, among other changes.²² According to the IRS, the TCJA's increase to the standard deduction and limits on itemized deductions (the "TCJA's itemization-related changes") are the "most substantial changes [for individual taxpayers] introduced in the TCJA."²³ This Part provides more detail about these changes, explains the stated policy goal behind them, and discusses their expected impact of the changes on itemization rates and simplicity.

A. Increasing the Standard Deduction & Limiting Itemized Deductions

The TCJA roughly doubled the standard deduction, from \$6,350 to \$12,000 for single taxpayers and from \$12,700 to \$24,000 for married taxpayers filing jointly.²⁴ In addition, the TCJA limited itemized deductions by imposing a \$10,000 cap on the deduction for state and local taxes,²⁵ reducing the home mortgage interest deduction,²⁶ limiting the deductibility of personal casualty and theft losses,²⁷ and suspending the deductibility of miscellaneous itemized deductions.²⁸ By raising the standard deduction and reducing the availability of certain itemized deductions,²⁹ the TCJA generally increased the financial incentive for taxpayers to take the standard deduction rather than itemizing their deductions. As a result, the TCJA was expected to increase the percentage of taxpayers who take the standard deduction.³⁰

²⁰ Business tax changes included reducing tax rates on corporations and on the income of pass-through businesses, allowing 100% bonus depreciation, and repealing the corporate alternative minimum tax. MOLLY F. SHERLOCK & DONALD J. MARPLES, CONG. RSCH. SERV., THE 2017 TAX REVISION (P.L. 115-97): COMPARISON TO 2017 TAX LAW 9, 18-40 (2018).

²¹ The TCJA moved the U.S. international tax system toward a territorial regime. *Id.* at 41-49.

²² *Id.* at 8-19 (summarizing the individual tax provisions of the TCJA).

²³ 83 Fed. Reg. 34,698, 34,700 (July 20, 2018) (in the IRS's request for comments on revisions to the individual income tax forms for 2018).

²⁴ Rev. Proc. 2016-55, 2016-45 I.R.B. 432 (stating the inflation-adjusted standard deduction for 2017); I.R.C. § 63(c)(7); Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072-73 (stating the standard deductions for 2018).

²⁵ Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11042, 131 Stat. at 2085-86.

²⁶ *Id.* § 11043, 131 Stat. at 2086-87.

²⁷ *Id.* § 11044, 131 Stat. at 2087-88.

²⁸ *Id.* § 11045, 131 Stat. at 2088.

²⁹ The TCJA also suspended section 68's overall limitation on itemized deductions, which actually increases, rather than reduces, the availability of itemized deductions. § 11046, 131 Stat. at 2088.

³⁰ See *infra* Part I.C.

B. The Stated Policy Goal: Simplification

Simplifying the income tax system for individuals and families was a key goal motivating the TCJA's individual income tax changes.³¹ Proponents of these changes touted that the TCJA would bring "unprecedented simplicity" for families.³² They said that "[d]oubling the standard deduction . . . helps make the tax code so straightforward that 9 out of 10 Americans will be able to file on a form as simple as a postcard,"³³ and they promised that the TCJA would make the form-completing tasks easier for American families.³⁴ Advocates explained that "fewer taxpayers [will] need to go through the trouble of determining whether they should itemize,"³⁵ indicating a desire to reduce individual taxpayers' record-keeping obligations and the number of decisions taxpayers must make when preparing their returns. In addition, proponents explained that the benefits of this simplification included reducing taxpayers' out-of-pocket costs of filing (for example, because taxpayers would no longer need to hire "an army of lawyers and accountants")³⁶ and reducing taxpayers' other costs of the filing process, including the "hassle"³⁷ and "aggravation of itemizing."³⁸

This commentary suggests that, when increasing the standard deduction and limiting itemized deductions, lawmakers were primarily concerned about compliance complexity,³⁹ which involves "the problems faced by the taxpayer in

³¹ TREASURY DEP'T, UNIFIED FRAMEWORK FOR FIXING OUR BROKEN TAX CODE 2-6 (2017) (emphasizing the goal of simplifying the tax system for families and individuals). Indeed, the Conference Report accompanying the final bill lists the increase to the standard deduction and the limits on itemized deductions, among other changes, as provisions that provide "simplification" for individual taxpayers. H.R. REP. NO. 115-466, at 191, 256 (2017) (Conf. Rep.). Additional TCJA changes that the Conference Report listed as simplifying included reduction of individual income tax rates and the reform to the individual alternative minimum tax, among others. *Id.* at 191, 225.

³² H. COMM. ON WAYS & MEANS, THE TAX CUTS & JOBS ACT: COMMUNICATIONS AND POLICY DETAILS, at ii (quoting Chairman Kevin Brady).

³³ *Id.* at 8.

³⁴ See, e.g., *Out with the Old, in with the New: Tax Cuts and Reforms That Look Out for Hardworking Taxpayers*, TRUMP WHITE HOUSE ARCHIVES (Apr. 17, 2018) [hereinafter *Out with the Old*], <https://trumpwhitehouse.archives.gov/briefings-statements/old-new-tax-cuts-reforms-look-hardworking-taxpayers/> [<https://perma.cc/C5C9-8LH5>].

³⁵ H. COMM. ON WAYS & MEANS, *supra* note 32, at 15.

³⁶ *Out with the Old*, *supra* note 34; see also Donald J. Trump, Remarks at Loren Cook Company in Springfield, Missouri (Aug. 30, 2017).

³⁷ *Saying Goodbye to an Outdated Tax Code*, TRUMP WHITE HOUSE ARCHIVES (Apr. 17, 2018) (quoting Speaker Paul Ryan), <https://trumpwhitehouse.archives.gov/briefings-statements/saying-goodbye-outdated-tax-code/> [<https://perma.cc/7R3C-SVRA>].

³⁸ H. COMM. ON WAYS & MEANS, *supra* note 32, at 8.

³⁹ Simplicity is not a particularly simple concept. There is voluminous scholarship about the meaning and importance of simplicity, and its opposite, complexity. See, e.g., DAVID F. BRADFORD, UNTANGLING THE INCOME TAX (1986); Rosemary Marcuss et al., *Income Taxes and Compliance Costs: How Are They Related?*, 66 NAT'L TAX J. 833 (2013); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1270-71; N.Y. STATE BAR ASS'N, REPORT ON SIMPLIFICATION OF THE INTERNAL REVENUE CODE 2-6 (2002) (quoting OMB as saying "tax simplification is not simple" and providing an overview of complexity); Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 123 (1989);

keeping records, choosing forms, making necessary calculations and so on.”⁴⁰ Legislators appeared less concerned with rule complexity (“the problems of interpreting the written and unwritten rules”)⁴¹ and transactional complexity (“the problems faced by taxpayers in organizing their affairs so as to minimize their taxes within the framework of the rules”).⁴²

C. Expectations About Itemization Rates and Simplification

When evaluating the probable simplifying effect of the TCJA’s itemization-related changes, much of the focus was on the expected decline in federal itemization rates. For example, the Joint Committee on Taxation’s analysis of expected tax complexity associated with the TCJA’s itemization-related changes estimated that “approximately 94-percent of taxpayers will claim the standard deduction under the bill, up from approximately 70-percent under [2017] law.”⁴³

Kathleen DeLaney Thomas, *User-Friendly Taxpaying*, 92 IND. L.J. 1509 (2017); *see also* STAFF OF J. COMM. ON TAXATION, 107TH CONG., JCS-3-01, STUDY OF THE OVERALL STATE OF THE FEDERAL INCOME TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986 (Comm. Print. 2001) (providing a comprehensive analysis of tax complexity).

⁴⁰ BRADFORD, *supra* note 39, at 266-67; *see also* McCaffery, *supra* note 39, at 1270-72 (defining compliance complexity as the complexity “relat[ing] to the variety of record-keeping and form-completing tasks a taxpayer must perform in order to comply with the tax laws”); N.Y. STATE BAR ASS’N, *supra* note 39, at 3-4. Lawrence Zelenak separates out computational complexity, which is often lumped together with compliance complexity. LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 113 (2013).

⁴¹ BRADFORD, *supra* note 39, at 266-67; *see also* McCaffery, *supra* note 39, at 1270-72 (discussing the similar concept of “technical complexity”); N.Y. STATE BAR ASS’N, *supra* note 39, at 4-6 (parsing rule complexity further into technical complexity and interpretational complexity).

⁴² BRADFORD, *supra* note 39, at 266-67; *see also* N.Y. STATE BAR ASS’N, *supra* note 39, at 6. Kathleen DeLaney Thomas parses complexity differently, into substantive complexity (“complexity in the tax rules makes it difficult for taxpayers to comprehend those rules”) and procedural complexity (“any type of complexity that involves burdensome or numerous processes or steps”). Thomas, *supra* note 39, at 1516-17. Under Thomas’s parsing, lawmakers, when discussing the TCJA’s itemization-related changes, appeared more concerned about procedural complexity than substantive complexity.

⁴³ H.R. REP. NO. 115-446, at 67 (2017) (Conf. Rep.) (part of the JCT’s Tax Complexity Analysis). The JCT published a more refined analysis in April 2018 with slightly different numbers, estimating that the number of returns with itemized deductions would fall from approximately 46.5 million for the 2017 tax year to approximately 18 million for the 2018 tax year. STAFF OF J. COMM. ON TAXATION, TABLES RELATED TO THE FEDERAL TAX SYSTEM AS IN EFFECT 2017 THROUGH 2026, JCX-32-18, at 6 (2018). This means that the JCT expected 88-90% of taxpayers to claim the standard deduction in 2018, up from approximately 70% under pre-TCJA law.

The IRS and the CBO made similar predictions about the expected decline in the number of itemizers,⁴⁴ as did tax policy commentators.⁴⁵

The Joint Committee on Taxation also qualitatively explained why a decline in itemization rates was expected to reduce complexity:

Some taxpayers who currently itemize deductions may respond to the provision by claiming the increased standard deduction in lieu of itemizing. . . . These taxpayers will no longer have to file schedule A to Form 1040, a significant number of which will no longer need to engage in the record keeping inherent in itemizing below-the-line deductions. . . . This reduction in complexity and record keeping also may result in a decline in the number of individuals using a tax preparation service, or tax preparation software, or a decline in the cost of such service or software. The provision [increasing the standard deduction] should also reduce the number of disputes between taxpayers and the IRS regarding the substantiation of itemized deductions.⁴⁶

D. The Decline in Itemization Rates as a Proxy for Simplification

The JCT's analysis, discussed above, used the decline in itemization rates as a proxy for simplification, and many others did the same. The rest of this Article also uses data about changes in itemization rates to analyze the simplifying effect of the TCJA's itemization-related changes. Thus, before proceeding to the data and analysis, it is important to examine the extent to which a decline in itemization rates is a good proxy for simplification.

When doing so, this Part considers simplification for both taxpayers and tax authorities. Although commentators discussing the TCJA focused on simplification for taxpayers,⁴⁷ it is well-accepted that simplicity for the government when

⁴⁴ CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028, at 24, 112 (2018) ("a higher standard deduction for personal income taxes will reduce by more than 50 percent the number of households who find it advantageous to itemize their deductions. . . . the combination of the higher standard deduction and the restrictions on [itemized deductions will reduce] the number of taxpayers itemizing deductions . . . from 49 million in 2017 to 18 million in 2018."); 83 Fed. Reg. 34,698, 34,700 (July 20, 2018) ("the increase in the standard deduction and the limitation on the Schedule A tax deductions, taken together, . . . are expected to decrease the number of Schedule A filed from 46 million to 20 million").

⁴⁵ See, e.g., *Impact on the Number of Itemizers of H.R.1, The Tax Cuts & Jobs Act (TCJA), by Expanded Cash Income Level, 2018*, TAX POL'Y CTR. (Jan. 11, 2018), <https://www.taxpolicycenter.org/model-estimates/impact-itemized-deductions-tax-cuts-and-jobs-act-jan-2018/t18-0001-impact-number> [<https://perma.cc/JJ5R-F34A>] (using a simulation model to predict that the number of itemizers would drop from approximately 46.5 million in 2017 to approximately 19.3 million in 2018).

⁴⁶ H.R. REP. NO. 115-466, at 676-77 (2017) (Conf. Rep.). JCT also briefly addressed the likely impact on the government, explaining that the government would face short-term complications because the IRS would need to publish new forms, publications, and withholding tables to reflect the new individual income tax provisions.

⁴⁷ The rhetoric surrounding the TCJA's individual income tax changes generally omits discussions about the complexity faced by the IRS (e.g., when processing returns, enforcing the tax laws, and assisting taxpayers). See *supra* Part I.B.

administering and enforcing tax laws (often referred to as “administrability”) is an important part of understanding simplification.⁴⁸ Thus, this Article considers simplification for both taxpayers and tax authorities. Ultimately, this Part explains that the decline in itemization rates is a better proxy for simplification experienced by tax authorities than for simplification experienced by taxpayers.

1. For Taxpayers

The decline in itemization rates may not be a particularly good proxy for the simplification experienced by taxpayers. Itemizing entails several steps for taxpayers, including keeping records of potential itemized deductions, analyzing whether those deductions are allowed, computing the amount of allowed itemized deductions, deciding whether to itemize, completing and submitting the relevant form if they decide to itemize, dealing with a possible audit of their itemized deductions, and planning ahead about itemizing to minimize their tax liability over multiple years. Switching from itemizing to taking the standard deduction simplifies some of these steps but not others. Indeed, many commentators discussing the TCJA’s itemization-related changes expressed doubts about whether reduced itemization would confer material simplification benefits.⁴⁹ This was because, among other reasons, taxpayers still “have to do the math to determine if they should itemize,” meaning that much of the simplification benefit of switching to the standard deduction would be “illusory.”⁵⁰

If a taxpayer does not itemize, they⁵¹ clearly do not need to complete or submit a Schedule A with their federal income tax returns. In addition, if a taxpayer

⁴⁸ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, UNDERSTANDING THE TAX REFORM DEBATE 49-52 (2005) (discussing administrability); JOHN GUYTON ET AL., TAX COMPLIANCE BURDEN 1 (2018) (explaining two sides to tax compliance burden: “the burden experienced by taxpayers and the administrative costs incurred by the IRS to administer the tax code”); McCaffery, *supra* note 39, at 1272 (explaining that simplicity and complexity can also be evaluated from different perspectives, including the perspective of “the taxpayer, the tax preparer, the tax planner or advisor, the Internal Revenue Service (IRS), the courts, the tax legislative system, academics or economists”); Joel Slemrod, *Optimal Tax Simplification: Toward a Framework for Analysis*, 76 PROC. ANN. CONF. ON TAX’N NAT’L TAX ASS’N 158 (1983) (“characterize[ing] a tax system’s simplicity by the value of the resources that are expended in complying with the law and enforcing the law.”).

⁴⁹ See, e.g., Omri Marian, *We Have Been Promised a Postcard. We Didn’t Get a Postcard.*, AM. ENTERPRISE INST. (Nov. 4, 2019) <https://www.aei.org/economics/we-have-been-promised-a-post-card-we-didnt-get-a-post-card/> [<https://perma.cc/L49B-5VT2>]. Commentators also discussed the simplifying or complexifying impact that other TCJA provisions would have on individual taxpayers. This Article, however, focuses on evaluating the simplification impact of only provisions that were *intended* to simplify.

⁵⁰ Daniel Shefter, *Tax Reform: We Could Have Done So Much Better!*, 158 TAX NOTES 389, 390 (Jan. 15, 2018).

⁵¹ This Article uses the epicene singular “they” to refer to individual (singular) taxpayers in a gender-neutral way. See MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/they> [<https://perma.cc/36FR-VMPY>] (providing that one definition of “they” is as a pronoun that is “used with a singular antecedent to refer to an unknown or unspecified person”); ABA STYLE, *Singular “They”* <https://apastyle.apa.org/style-grammar-guidelines/grammar/singular-they> [<https://perma.cc/YE54-R5A9>] (endorsing the use of the singular “they” as part of APA Style and explaining the singular “they” is used “as a generic third-person

takes the standard deduction, there is no risk of a dispute with the IRS about their itemized deductions. Thus, these sources of complexity are eliminated for any taxpayer who switches from itemizing to taking the standard deduction.

A taxpayer who switched to the standard deduction after the TCJA, however, might still have kept records of their possible itemized deductions, analyzed whether each potential itemized deduction was allowed, computed their total amount of itemized deductions allowed, and compared that total to the standard deduction, before determining that the standard deduction was larger than their itemized deductions and opting to take the standard deduction. Thus, even if a taxpayer did not itemize, those preliminary steps, if taken, may have required significant time and effort for the taxpayer, especially if they prepared their returns themselves. The time spent on these steps was almost certainly lower for the ~95% of taxpayers who use a tax preparer or tax return software⁵² because the preparer or the software generally does most of the analysis. However, even taxpayers who use software or a tax preparer might have spent time and effort collecting records of their possible itemized deductions. Admittedly, some taxpayers might have skipped the preliminary steps and taken the standard deduction without analyzing their possible itemized deductions. For these taxpayers, taking the standard deduction was likely quite simple. The number of taxpayers who take this simpler approach should grow over time if, as taxpayers adjust to post-TCJA law, they grow increasingly confident that they will continue to take the standard deduction. Nevertheless, it is likely that some taxpayers who itemized deductions for 2017 and took the standard deduction for 2018 continued to do the record-keeping and analysis for 2018 to determine whether they should take the standard deduction. It is, however, difficult to know which taxpayers who switched to the standard deduction took which approach to recordkeeping and analysis of their possible itemized deductions. Thus, although the decline in the federal itemization rate suggests at least some reduction in compliance complexity for some taxpayers, it is difficult to rely on itemization rates to draw conclusions about the degree of simplification experienced by taxpayers who switched to the standard deduction.

In addition, the TCJA's itemization-related changes may increase transactional complexity for taxpayers.⁵³ This is because taxpayers might, for example, plan to bunch itemized deductions (particularly charitable contributions) into a single year to maximize their total deductions over a two-year period.⁵⁴ This could be a useful strategy particularly for taxpayers whose annual itemized deductions (without bunching) would otherwise be close to, but somewhat below, the federal standard deduction. Given the TCJA's increase to the standard

singular pronoun to refer to a person whose gender is unknown or irrelevant to the context of the usage").

⁵² 83 Fed. Reg. 34,698, 34,700 (July 20, 2018).

⁵³ See *supra* notes 37, 38, 40 and accompanying text.

⁵⁴ See, e.g., *Will Tax Reform Affect Your Charitable Deduction? What You Need to Know*, FIDELITY CHARITABLE (July 15, 2020), <https://www.fidelitycharitable.org/articles/will-tax-reform-affect-your-charitable-deduction.html> [<https://perma.cc/L4YE-FPP3>] (recommending bunching charitable contributions post-TCJA to minimize overall tax liability).

deduction, more taxpayers likely can minimize their overall tax liability through this type of planning.⁵⁵

Thus, although itemization rates may provide some insight into tax complexity experienced by taxpayers, the decline in federal itemization rates between 2017 and 2018 is only a weak proxy for the simplifying effect of the TCJA's itemization-related changes.⁵⁶

There are other ways to try to measure simplification.⁵⁷ For example, the IRS also tried to quantify the expected simplifying effects of the TCJA's itemization-related changes using the "Income Taxpayer Burden Model" (ITBM). The ITBM is "a microsimulation model developed jointly by IBM and the IRS to estimate the amount of time and money that individuals spend on federal tax compliance."⁵⁸ The model relies on both IRS data and data gathered from surveys of taxpayers and paid tax professionals, about taxpayers' tax-related activities, compliance methods, and time and money spent on tax compliance.⁵⁹ The survey seeks to capture the time and money spent by taxpayers on activities that are part of the return preparation process, even if those activities do not result in actual filings (e.g., of a Schedule A).⁶⁰ Using the ITBM, the IRS estimated that the "drop in Schedule A filings and the elimination of certain Schedule A line items [was] expected to lead to a decrease of 241,000,000 hours and a decrease of \$2,948,000,000 in out-of-pocket costs" for taxpayers.⁶¹ The ITBM, however,

⁵⁵ A taxpayer pursuing this strategy would likely vacillate between itemizing and taking the standard deduction for federal purposes, so this effect may be difficult to pick up in aggregate itemization data from the IRS.

⁵⁶ Nevertheless, many commentators implicitly use the decline in federal itemization rates as a proxy for simplification, particularly in the context of broader discussions about the TCJA. *See, e.g.,* William G. Gale et al., *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis*, TAX POLICY CTR. 17 (June 13, 2018) ("TCJA will simplify taxes in . . . [that] the number of people who itemize their deductions will decline significantly because of the increases in the standard deduction and the reduction or elimination of certain itemized deductions" but also highlighting how the TCJA increase complexity); Stephen J. Pieklik et al., *Deducting Success: Congressional Policy Goals and the Tax Cuts and Jobs Act of 2017*, 16 PITT. TAX REV. 1, 27-29 (2018) ("Congress was both successful and unsuccessful in meeting its goal of simplifying the tax system" – successful in that the TCJA "makes paying taxes simpler for the vast majority of taxpayers because these taxpayers are likely to utilize the standard deduction" but unsuccessful because of changes unrelated to itemization).

⁵⁷ Commentators have used various other approaches to try to estimate the impact of tax changes on simplification. *See, e.g.,* JASON J. FICHTNER, BIPARTISAN POLICY CTR., TAX ADMINISTRATION: COMPLIANCE, COMPLEXITY, AND CAPACITY 6-8 (2019), <https://bipartisanpolicy.org/wp-content/uploads/2019/04/Tax-Administration-Compliance-Complexity-Capacity.pdf> [<https://perma.cc/7MDB-3DLS>] (citing studies using different approaches); JASON J. FICHTNER & JACOB M. FELDMAN, MERCATUS CTR., THE HIDDEN COSTS OF TAX COMPLIANCE (2013).

⁵⁸ Guyton et al., *Estimating the Compliance Cost of the U.S. Individual Income Tax*, 56 NAT'L TAX J. 673 (2003) (explaining how the ITBM works).

⁵⁹ *Id.*

⁶⁰ *See, e.g.,* IRS, SAMPLE INDIVIDUAL TAXPAYER BURDEN SURVEY FOR 2018 (2019) (question 3, for example, which asks about recordkeeping regardless of whether taxpayer used the records).

⁶¹ IRS, OMB CONTROL NO. 1545-0074, SUPPORTING STATEMENT A, U.S. INDIVIDUAL INCOME TAX RETURN 33 (2018), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201808-1545-031

remains subject to many limitations,⁶² but it is one way to study an aspect of simplification that a mere decline in the number of itemizers cannot capture—time and effort invested in the process of determining whether to itemize or take the standard deduction. Moreover, the IRS’s use of the ITBM as an alternative method of measuring simplification supports the conclusion that the decline in itemization rates may not be the best proxy for the simplification experienced by taxpayers as a result of the TCJA’s itemization-related changes.

2. For Tax Authorities

In contrast, the decline in itemization rates is likely a reasonably good proxy for the long-term simplification experienced by tax authorities. The TCJA’s itemization-related changes did add some short-term complications for the IRS because the IRS needed to revise forms, instructions, publications, and other materials to reflect the changes in the law before taxpayers filed their returns. After taxpayers filed their returns, however, the decline in itemization rates simplified the IRS’s post-filing responsibilities for at least two reasons. First, there were almost 30 million fewer Schedule A forms that needed to be processed in 2018 as compared to 2017. Processing fewer forms is easier and presumably saved the IRS time and money. Second, with almost 30 million fewer Schedule A forms filed in 2018, there were fewer taxpayers whose itemized deductions might need auditing and thus fewer opportunities for disputes about itemized deductions. Given that “itemized deductions reported on Schedule A of IRS Form 1040 have been among the [National Taxpayer Advocate’s list of] ten Most Litigated Issues” in recent years,⁶³ changes that dramatically reduce the number of taxpayers who itemize deductions should also reduce audits and disputes related to itemized deductions, thereby simplifying the IRS’s work. The enforcement resources otherwise spent on these tasks can be saved and reallocated for other tax administration uses. These simplification benefits for the IRS are likely to continue for years, as long as the TCJA’s itemization-related changes persist enough to keep itemization rates down. Thus, a decline in itemization rates represents a real decline in the IRS resources spent administering one part of the individual income tax.

[<https://perma.cc/FC83-W324>] (included in the Information Collection Review (ICR) submitted to Office of Information and Regulatory Affairs (OIRA) in connection with OIRA’s review of the revised U.S. Individual Tax Return).

⁶² See GUYTON, *supra* note 48; Guyton, *supra* note 58; Janet Holtzblatt, *Measuring Compliance Burdens: Issues Raised by the Individual Taxpayer Burden Model*, 97 PROC. ANN. CONF. ON TAX’N NAT’L TAXPAYER ASS’N 366 (2004). This scholarship identifies many concerns including, for example, that data are based on a survey of taxpayers, and although the survey is completed relatively close in time to when taxpayers file, the taxpayers may still be subject to recall bias.

⁶³ NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 2018 (2019); NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 2019 (2020).

II. USING TAX FILING DATA TO UNDERSTAND CHANGES IN TAXPAYERS' ITEMIZATION CHOICES

With an understanding of what a decline in itemization rates does (and does not) mean about simplification, this Part delves into the data about itemization before and after the TCJA. This Part first examines how federal itemization rates changed after the TCJA. Then, this Part adds state itemization data to the analysis to understand how (and why) federal and state itemization rates vary by state.

A. Federal Itemization Data

Filing data from the 2017 and 2018 tax years are consistent with the predictions that federal itemization rates would decline after the TCJA. For the 2017 tax year, 30.6% of tax returns itemized deductions, whereas for the 2018 tax year, only 11.4% itemized deductions.⁶⁴ Almost 30 million fewer tax returns itemized deductions in 2018 than in 2017.

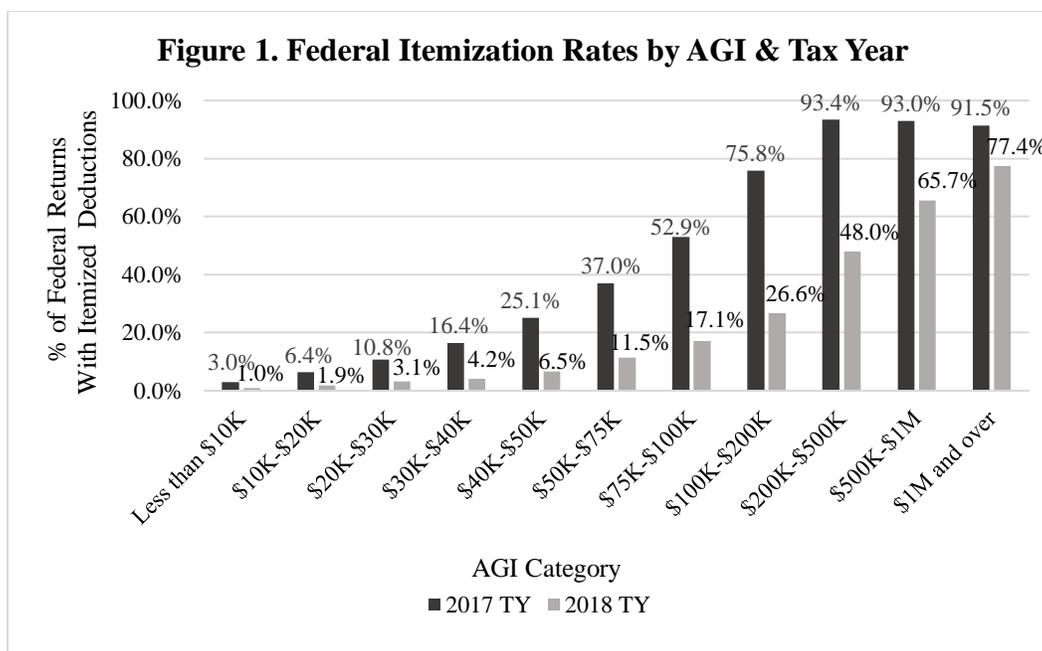
As illustrated in Figure 1, federal itemization rates declined in all income categories, although the magnitude of the impact varied by income category.⁶⁵

⁶⁴ *SOI Tax Stats - Individual Income Tax Returns Complete Report* (Publication 1304), IRS, <https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns-publication-1304-complete-report> [<https://perma.cc/R76L-355V>] (last visited Nov. 21, 2021) (Table 1.4. All Returns: Sources of Income, Adjustments, and Tax Items, by Size of Adjusted Gross Income, Tax Year 2017 & Tax Year 2018). The SOI also published data broken down by state. IRS Statistics on Income, Individual Income and Tax Data, by State and Size of AGI (Tax Year 2017 & Tax Year 2018). The aggregated nationwide numbers of returns and returns with itemized deductions are slightly different in the different sources, as follows:

	Total # of Returns	# of Returns with Itemized Deductions	% of Returns with Itemized Deductions	Decline in # of Itemizers	Decline in Itemization Rate (as a % of 2017 Rate)
Publication 1304 (Table 1.4) (SOI Complete Report)				29,320,083	62.8%
TY2017	152,903,231	46,852,675	30.6%		
TY2018	153,774,296	17,532,592	11.4%		
SOI State-by-State Data				29,504,500	62.9%
TY2017	152,455,900	47,103,650	30.9%		
TY2018	153,455,990	17,599,150	11.5%		

The numbers are quite close, but this Article, when reporting aggregate nationwide data, will rely on the data from Publication 1304 because the state-by-state data are rounded.

⁶⁵ *SOI Tax Stats - Individual Income Tax Returns Complete Report* (Publication 1304), IRS, <https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns-publication-1304-complete-report> [<https://perma.cc/R76L-355V>] (last visited Nov. 21, 2021) (Table 1.4. All Returns: Sources of Income, Adjustments, and Tax Items, by Size of Adjusted Gross Income, Tax Year 2017 & Tax Year 2018) and author calculations.



Very few lower-income taxpayers itemized before or after the TCJA, but of those who did itemize in 2017, a large percentage switched to the standard deduction for 2018.⁶⁶ A substantial percentage of middle- and upper-middle-income taxpayers also switched from itemizing in 2017 to taking the standard deduction in 2018. In contrast, although some of the highest-income taxpayers switched to the standard deduction, their post-TCJA itemization rates remained quite high.⁶⁷

B. A Closer Look at the Data: Variation in Itemization Rates by State

Federal itemization rates vary not only by income, but also by state. In 2017, federal itemization rates for taxpayers in different states ranged from a low of 17.4% (in West Virginia) to a high of 46.7% (in Maryland), with a median of 29.2%.⁶⁸ There are many reasons for this state-to-state variation in federal itemization behavior, including differences in income and wealth across states, state and local tax levels, home ownership rates, and home prices.⁶⁹

In addition, state itemization rates vary by state among those states with an income tax. There are many possible explanations for this variation as well,

⁶⁶ This is not surprising because the higher post-TCJA standard deduction is larger relative to the income of a lower-income taxpayer.

⁶⁷ This is also not surprising because high-income taxpayers are most likely to have itemized deductions (especially mortgage interest deductions and deductions for charitable donations) in excess of the standard deduction.

⁶⁸ See Appendix A showing the 2017 and 2018 federal itemization rates for every state.

⁶⁹ The deductions for state and local taxes and home mortgage interest were two of the top three most commonly taken itemized deductions before the TCJA (taken by >97% and >70% of 2017 itemizers respectively), and all continued to be taken at high rates in 2018. IRS, INDIVIDUAL INCOME TAX RETURN LINE-ITEM ESTIMATES 2017, PUB. 4801, at 32 (2019), and author calculations.

including the factors listed above, differences in state laws regarding which expenditures are deductible (i.e., whether state tax law conforms to federal tax law), and differences in the size of states' standard deductions. Several states made changes to their tax laws in response to the TCJA, particularly with respect to conformity and the size of the state's standard deduction.⁷⁰ For example, some states (e.g., Missouri) increased their standard deductions to match the large post-TCJA federal standard deduction.⁷¹ The standard deduction in most other states (e.g., Oregon, Maryland, and Nebraska) increased but remained significantly lower than the post-TCJA federal standard deduction, although the magnitude of the gap between federal and state standard deduction varied. Table 1 provides pre- and post-TCJA standard deductions for these states as examples, along with the federal standard deduction amounts for comparison.

Table 1. Standard Deductions Pre- and Post-TCJA: Federal and Select States

	Standard Deduction for Single Taxpayers		Standard Deduction for Married Taxpayers Filing Jointly	
	2017	2018	2017	2018
Federal	\$6,350	\$12,000	\$12,700	\$24,000
State				
Missouri ⁷²	\$6,350	\$12,000	\$12,700	\$24,000
Nebraska ⁷³	\$6,350	\$6,750	\$12,700	\$13,500
Oregon ⁷⁴	\$2,175	\$2,215	\$4,350	\$4,435
Maryland ⁷⁵	Max of \$2,000	Max of \$2,250	Max of \$4,000	Max of \$4,500

One additional factor that can affect both the federal itemization rate and the state itemization rate for a state's taxpayers is whether the state requires election uniformity. That is, does the state obligate its taxpayers to make the same itemization decision for state purposes as the taxpayer made for federal purposes? Very generally, states take three different approaches to election uniformity. Some states, including Georgia and Virginia, require taxpayers to make completely

⁷⁰ See Walczak, *supra* note 8 (summarizing states' conformity changes in response to the TCJA).

⁷¹ Compare 2018 Missouri Income Tax Reference Guide 7 (2018) with 2017 Missouri Income Tax Reference Guide 8 (2017). The state standard deduction increases beyond the federal amount for taxpayers over age 65.

⁷² *Id.*

⁷³ *Chronological History of Nebraska Tax Rates*, NEB. DEP'T OF REVENUE, <https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/research/chronology/4-607table1.pdf> [<https://perma.cc/NJX9-VNUY>] (last visited Nov. 21, 2021) (listing income tax rate data, income tax bracket data, and standard deduction amounts by year).

⁷⁴ Compare OR. DEP'T OF REVENUE, 2017 OREGON INCOME TAX FULL-YEAR RESIDENT, PUB. OR-40-FY at 15 (2018) with OR. DEP'T OF REVENUE, 2018 OREGON INCOME TAX FULL-YEAR RESIDENT, PUB. OR-40-FY at 15 (2019).

⁷⁵ COMPTROLLER OF MD., MARYLAND 2017 STATE & LOCAL TAX FORMS & INSTRUCTIONS 12 (2018), https://www.marylandtaxes.gov/forms/17_forms/Resident_Booklet.pdf [<https://perma.cc/C59F-KEM8>]; COMPTROLLER OF MD., MARYLAND 2018 STATE & LOCAL TAX FORMS & INSTRUCTIONS 12 (2019), https://www.marylandtaxes.gov/forms/18_forms/Resident_Booklet.pdf [<https://perma.cc/Q8F4-ZH59>].

The remainder of this Part analyzes the pre- and post-TCJA itemization rates of taxpayers in states with different approaches to itemization election uniformity. Oregon is used as the example of a state that allows independent itemization choices (i.e., states with dots), and Nebraska and Maryland are used as examples of states that require some degree of election uniformity (i.e., states with stripes).⁷⁸ These three states are used as case studies for three reasons. First, their state income tax laws largely conform to federal individual income tax laws, which allows the analysis to focus primarily on the impact of the election uniformity choice (rather than on differences between federal and state income tax laws regarding, for example, what deductions are allowed).⁷⁹ Second, these states did not change their approach to itemization election uniformity between 2017 and 2018.⁸⁰ Third, state-level itemization data for both 2017 and 2018 were available

⁷⁸ These states take the same approach—requiring taxpayers who take the standard deduction for federal purposes to take the standard deduction for state purposes. However, both are included because their state standard deductions and state itemization data are quite different. Readers may notice that this discussion does not include an example of a state that fully binds a taxpayer to their federal itemization deductions (i.e., states with vertical stripes). This is primarily because of the unavailability of state-level itemization data from these states. However, analyzing Nebraska’s and Maryland’s data provides insight into the consequences for all taxpayers who, post-TCJA, prefer to take the standard deduction for federal purposes but prefer to itemize for state purposes. For taxpayers with these preferences, the analysis is the same regardless of whether they are in a state that fully binds taxpayers or a state that binds taxpayers only to the federal standard deduction. The taxpayers omitted by this analysis are those who, post-TCJA, prefer to itemize for federal purposes but take the standard deduction for state purposes. Taxpayers in states like Nebraska and Maryland are allowed to act on these preferences, but in states that fully bind taxpayers to their federal itemization choices, the taxpayer may not itemize for federal purposes and take the standard deduction for state purposes. However, the taxpayers who would want to do that are practically a null set, so little is lost by omitting an example of a state that requires complete uniformity. Thus, this Article, when referring to states that bind taxpayers to their federal elections, will also include states that bind taxpayers only to federal standard deduction, because it is binding to the *federal standard deduction* that is the part of the election uniformity rule with the most potentially significant impact post-TCJA.

⁷⁹ For 2018, all three states generally conformed to the individual income tax changes made by the TCJA. In Oregon and Maryland, the primary disconformity with the IRC for individual income taxes was that they do not allow a state deduction for state income tax (or, in Maryland income tax paid to a locality). OR. REV. STAT. § 316.695(1)(d) (2019); MD. CODE ANN. TAX-GEN. § 10-218 (2017). In Nebraska, no state or local taxes at all (including non-income taxes) are deductible for state income tax purposes. NEB. REV. STAT. § 77-2716.01(3) (2018). In contrast, California is not discussed because it generally conforms to the IRC as of Jan. 1, 2015 (i.e., to very dated law). CAL. REVENUE & TAXATION CODE § 17024.5 (2019). In 2019, California adopted some (but far from all) changes to conform with the TCJA but did not conform to the TCJA at all in 2018. See Kathleen K. Wright, *California Conformity to the TCJA (The “Light” Version of Conformity)*, 93 TAX NOTES ST. 405 (2019).

⁸⁰ This is why New York is not discussed. New York taxpayers were bound to their federal standard deductions for 2017 but allowed independent elections for 2018. See N.Y. STATE DEP’T OF TAXATION & FIN., PRELIMINARY REPORT ON THE FEDERAL TAX CUTS AND JOBS ACT (Jan. 2018), https://www.tax.ny.gov/pdf/stats/stat_pit/pit/preliminary-report-tcja-2017.pdf [https://perma.cc/BMB9-F4B7] (explaining that absent change in New York’s 2017 itemization uniformity requirement, the TCJA’s changes “would generate approximately \$44 million in additional revenue” for 2018 because more NY taxpayers would opt for the federal standard deduction, thus obligating them to take the standard deduction for NY purposes too); N.Y. STATE, DEP’T OF TAXATION & FIN., ITEMIZED DEDUCTIONS (2019), <https://www.tax.ny.gov/pit/file/itemized-deductions-2018.htm>

for analysis.⁸¹ For each example, the following discussion analyzes how the TCJA's itemization-related changes would, in theory, be expected to change taxpayers' itemization behavior⁸² and compares those theoretical expectations to data about actual changes in itemization behavior. Together, this analysis illustrates that the TCJA's itemization-related changes led to different results (not only for state purposes, but also for federal purposes) for taxpayers in states depending on each state's itemization election uniformity rules.

1. *Independent Itemization Elections Allowed: Oregon*

Oregon is an example of a state that allows independent itemization elections.⁸³ Taxpayers are free to itemize for Oregon state income tax purposes even if they take the standard deduction for federal income tax purposes.

a. Change in Itemization Behavior of Oregon Taxpayers – Theory

Because Oregon does not require taxpayers to make uniform federal and state itemization elections, Oregon taxpayers would be expected to analyze their federal and state itemization elections separately. Then, they would make the federal election that best reduces federal income tax liability and make the state election that best reduces state income tax liability, even if the former and latter differ. Neither election would obligate the taxpayer to make any particular choice for the other election.⁸⁴

Accordingly, Oregon taxpayers should be expected to make whatever federal itemization choice best reduces their federal income taxes. Thus, the federal itemization rate for Oregon taxpayers would be expected to drop significantly

[<https://perma.cc/ZK3B-N4ZC>] (“Beginning with tax year 2018, the Tax Law allows you to itemize your deductions for New York State income tax purposes whether or not you itemized your deductions on your federal income tax return.”); N.Y. STATE DEP’T OF TAXATION & FIN., TECHNICAL MEMORANDUM TSB-M-18(6)I – NEW YORK STATE DECOUPLES FROM CERTAIN PERSONAL INCOME TAX INTERNAL REVENUE CODE (IRC) CHANGES FOR 2018 AND AFTER (2018). Minnesota made a similar change between 2017 and 2018. MINN. DEP’T OF REVENUE, REVENUE NOTICE #18-01: INDIVIDUAL INCOME TAX – STANDARD DEDUCTION OR ELECTION TO ITEMIZE – TAX YEAR 2018 (2018), <https://www.revenue.state.mn.us/sites/default/files/2018-09/RN-18-01.pdf> [<https://perma.cc/CF3S-4YHD>] (explaining that prior to 2018, “[t]he computation of Minnesota individual income tax . . . requires taxpayers to have a consistent election [with respect to itemizing or taking the standard deduction] between their federal and state income tax returns” but that, “[f]or taxable year 2018, taxpayers may either claim the standard deduction or elect to itemize deductions on their 2018 Minnesota income tax return, regardless of the election made on their 2018 federal income tax return”).

⁸¹ Federal itemization data for 2018 is available from the IRS SOI for taxpayers from all states. However, state-level data is much harder to obtain because some states generally do not provide such data or only do so on a very delayed basis.

⁸² This analysis uses a rational actor model, assuming that taxpayers make utility-maximizing decisions, measuring utility in money.

⁸³ Independent itemization elections are allowed for Oregon state purposes even though Oregon's starting point for conformity is federal taxable income. OR. REV. STAT. §§ 316.048, 316.695(1)(c)(A) (2019).

⁸⁴ A taxpayer's state itemization choice could, however, affect the taxpayer's SALT deduction for federal purposes, and thus affect the desirability of itemizing for federal purposes.

between 2017 and 2018. This is because the TCJA's dramatic increase in the federal standard deduction likely led many more Oregon taxpayers to choose the standard deduction for federal purposes in 2018 than in 2017. This decline in federal itemization by Oregon taxpayers would likely be similar to the decline in federal itemization by taxpayers nationwide.

The decline in federal itemization by Oregon taxpayers, however, would be expected to have no effect on Oregon taxpayers' itemization decisions for *state* income tax purposes. Because Oregon allows independent state itemization decisions, the expected change in taxpayers' state itemization behavior should depend primarily on which itemized deductions Oregon allows and on the size of Oregon's standard deduction. Oregon's state income tax laws about itemized deductions mirror the federal income tax laws with minimal exceptions.⁸⁵ As a result, the TCJA's limits on itemized deductions for federal purposes also limited taxpayers' itemized deductions for Oregon state purposes beginning in 2018. However, Oregon's standard deduction increased by less than 2% between 2017 and 2018.⁸⁶ Thus, the financial incentive to itemize for Oregon state tax purposes was largely unchanged between 2017 and 2018, except for the relatively small number of taxpayers whose itemized deductions were significantly limited by Oregon's conformity to the TCJA's limitations. Therefore, in contrast to the large expected decline in the *federal* itemization rate by Oregon taxpayers, relatively little change in the Oregon *state* itemization rate would be expected between 2017 and 2018.⁸⁷

b. Change in Itemization Behavior of Oregon Taxpayers – Data

Federal and state individual income tax filing data from 2017 and 2018 provide insight into how actual taxpayer itemization behavior changed after the TCJA, and the data reveal that the actual results match the theoretical expectations. As Figure 3 shows, the percentage of Oregon taxpayers who itemized for *federal* purposes declined dramatically between 2017 and 2018 (from 37.5% to 14.6%).⁸⁸ This decline was similar in magnitude to the overall decline in federal itemization.⁸⁹

⁸⁵ Oregon is a static conformity state that regularly updates its conformity date. S.B. 1529, 79th Leg. Assemb., Reg. Sess. (Or. 2018) updated Oregon's conformity date to December 31, 2017, effective for the 2018 tax year. Itemized deductions for Oregon purposes are the same as a taxpayer's federal itemized deductions except that Oregon income taxes are not deductible for Oregon state purposes. OR. REV. STAT. § 316.695(1)(d) (2019).

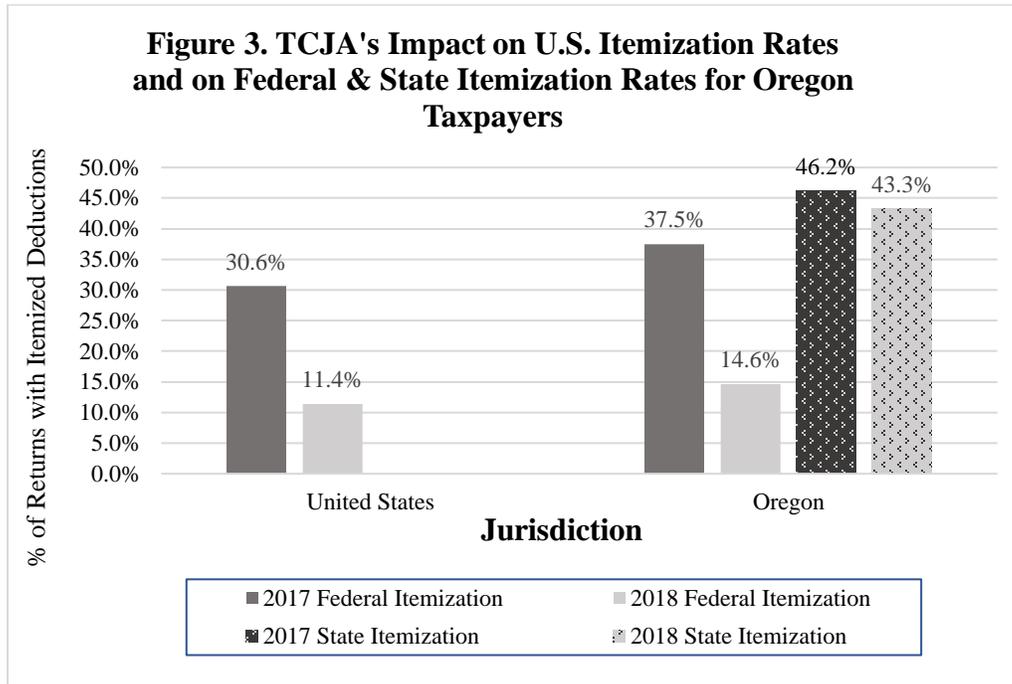
⁸⁶ See *supra* Table 1.

⁸⁷ See OR. LEGISLATIVE REVENUE OFFICE, TAX CUTS AND JOBS ACT OF 2017 – AN UPDATE 18 (2018) (anticipating that Oregon state itemization rates would remain at approximately 47% and anticipating that the share of Oregon taxpayers who itemize for federal purposes would decline from approximately 40% in 2017 to 15% in 2018).

⁸⁸ *SOI Tax Stats – Historic Table, Individual Income and Tax Data, by State and Size of Adjusted Gross Income*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2> [<https://perma.cc/YPZ4-NGJU>] (last visited Nov. 21, 2021), and author calculations.

⁸⁹ See *supra* Part II.A.

In contrast, the percentage of Oregon taxpayers who itemized for Oregon *state* purposes declined only slightly (from 46.2% to 43.3%).⁹⁰



In absolute numbers, ~441,000 fewer income tax returns from Oregon taxpayers itemized deductions for federal purposes for 2018 than for 2017.⁹¹ However, the number of Oregon income tax returns that itemized deductions for state purposes declined, between 2017 and 2018, by only ~37,000.⁹² Thus, ~404,000 Oregon taxpayers continued, post-TCJA, to itemize for state income tax purposes despite switching to the standard deduction for federal income tax purposes. This represents more than 90% of Oregon taxpayers who switched to the standard deduction for federal purposes⁹³ and more than 22% of all Oregon state individual income tax returns.⁹⁴ Appendix B provides additional details about the data.

In sum, the decline, between 2017 and 2018, in the percentage of Oregon taxpayers who itemized for state tax purposes was much smaller than the decline in the percentage of Oregon taxpayers who itemized for federal tax purposes. Thus, the TCJA's changes had a significant impact on the percentage of taxpayers who itemized for federal purposes, but a very small impact on itemization rates for

⁹⁰ *Oregon Personal Income Tax Statistics*, OREGON.GOV, <https://www.oregon.gov/dor/programs/gov-research/Pages/research-personal.aspx> [https://perma.cc/28CK-AZ62] (last visited Nov. 21, 2021), and author calculations.

⁹¹ See *supra* note 88.

⁹² See *supra* note 90.

⁹³ $404,000/441,000 = 91.6\%$

⁹⁴ The exact percentage depends on which number is used for the denominator (i.e., federal returns or state returns; 2017 returns or 2018 returns), but any denominator yields a percentage greater than 22%. See Appendix B for more detailed numbers.

Oregon state tax purposes. This disparity arose because some Oregon taxpayers made different federal and state itemization choices, and that can only happen because Oregon allows taxpayers to make independent state itemization choices.

2. Election Uniformity Required: Maryland & Nebraska

The results are quite different in states, such as Maryland and Nebraska, that require taxpayers who take the standard deduction for federal purposes to take the standard deduction for state purposes. In these states, a taxpayer can itemize for state income tax purposes only if they itemize for federal income tax purposes.

a. Change in Itemization Behavior of Maryland and Nebraska Taxpayers – Theory

To decide whether to itemize, a taxpayer in a state requiring itemization election uniformity should determine which itemization choice minimizes their *net* income tax liability.

For some of these taxpayers, one itemization choice may be tax-minimizing for both federal and state purposes, in which case the choice is easy. If the federal standard deduction exceeds the taxpayer's federal itemized deductions and the state standard deduction exceeds the taxpayer's state itemized deductions, the taxpayer should take the standard deduction for both federal and state purposes. Similarly, if a taxpayer's itemized deductions exceed both the state and federal standard deductions, the taxpayer should itemize for both purposes.

Other taxpayers have conflicting itemization preferences—typically preferring to take the standard deduction for federal purposes and to itemize for state purposes.⁹⁵ In states that require election uniformity, the taxpayers with this set of conflicting federal/state itemization preferences must determine whether it is tax minimizing, on net, to (1) itemize for federal purposes (even though their federal standard deduction is larger) so they can also itemize for state purposes⁹⁶ or (2) take the standard deduction for federal purposes even though doing so requires them to take the standard deduction for state purposes too (instead of taking their larger

⁹⁵ See Walczak, *supra* note 8, at 18 (highlighting this possibility). Conflicting preferences could be reversed, where a taxpayer prefers to itemize for federal purposes but take the standard deduction for state purposes. However, that would be extremely unlikely, at least in states that largely conform to federal tax law, because no state's basic standard deduction exceeds the federal standard deduction. See Morgan Scarborough, *State Individual Income Tax Rates and Brackets for 2018*, TAX FOUND. FISCAL FACT NO. 576 (2018); Katherine Loughhead & Emma Wei, *State Individual Income Tax Rates and Brackets for 2019*, TAX FOUND. FISCAL FACT NO. 643 (2019); see also *supra* note 79.

⁹⁶ H&R Block, for example, explicitly flags this possibility. See *What is the Standard Deduction vs. Itemized Deduction?*, H&R Block, <https://www.hrblock.com/tax-center/filing/adjustments-and-deductions/standard-vs-itemized-deductions/> [https://perma.cc/ZW8Z-HPFT] (last visited Nov. 21, 2021) (“There’s one situation where you may want to itemize deductions even if your total itemized deductions are less than your standard deduction. You might want to do this if you’d pay less tax overall between your federal and state taxes. This can happen if you itemize on your federal and state returns and get a larger tax benefit than you would if you claimed the standard deduction on your federal and state returns.”).

amount of state itemized deductions).⁹⁷ These taxpayers cannot make their preferred itemization choice for both federal and state purposes. They must make a single choice and either pay extra in state income tax to save even more in federal income taxes, or vice versa. Ultimately, where a state requires itemization uniformity, the tax minimizing choice, on net, is a function of (a) the taxpayer's federal marginal tax rate, (b) the amount of the taxpayer's federal itemized deductions, (c) the size of the federal standard deduction, (d) the taxpayer's state marginal tax rate, (e) the amount of the taxpayer's state itemized deductions, and (f) the size of the state standard deduction.⁹⁸

The TCJA's dramatic increase in the size of the federal standard deduction increased the net benefit to taxpayers of taking the standard deduction, thereby increasing the economic incentive to take the standard deduction. Thus, the federal itemization rates for taxpayers in Nebraska and Maryland should be much lower in 2018 than they were for those same taxpayers in 2017.⁹⁹ Because these states require taxpayers to take the standard deduction for state purposes if they take the standard deduction for federal purposes, an increase in the percentage of taxpayers taking the standard deduction for federal purposes post-TCJA should also result in a corresponding increase in the percentage of taxpayers taking the standard deduction for state purposes. Thus, for taxpayers in Nebraska, Maryland and other states that require election uniformity, both federal and state itemization rates would be expected to decline after the TCJA, and the federal itemization rate of each state's taxpayers should be approximately equal to the state itemization rate.

Notwithstanding the foregoing, there is likely to be some variation in itemization rates even among states with the same itemization election uniformity rules. For example, Nebraska's itemization rate in 2017 (~28%) was significantly lower than Maryland's (~46%).¹⁰⁰ Although both would be expected to decline

⁹⁷ In states that bind taxpayers only to their federal standard deduction (rather than fully binding them to their federal itemization choices), a taxpayer who prefers to itemize for federal purposes and take the standard deduction for state purposes may do so.

⁹⁸ Very generally, the following formula can be used to determine whether the taxpayer is better off, on net, itemizing or taking the standard deduction, assuming that the federal choice is binding for state purposes.

$$\begin{aligned} &\text{Benefit of itemizing for both Federal and State purposes} = \\ &\text{State marginal tax rate} * (\text{State itemized deductions} - \text{State standard deduction}) \\ &+ \text{Federal marginal tax rate} * (\text{Federal itemized deductions} - \text{Federal standard deduction}) \end{aligned}$$

If the benefit of itemizing is positive, itemization makes the taxpayer better off. If the benefit of itemizing is negative, taking the standard deduction makes the taxpayer better off. This formula does not consider how the itemization choice's impact on state tax liability affects the taxpayer's SALT deduction and thus the taxpayer's desire to itemize for federal purposes. That said, this consideration may have a limited or even no effect if the taxpayer's total state and local taxes paid exceed the \$10,000 cap. In addition, the formula could take account of the impact of the SALT deduction with slightly more complex math.

⁹⁹ Even pre-TCJA, taxpayers with conflicting federal/state itemization preferences in states that required election uniformity may have opted to take the standard deduction for both federal and state purposes. By increasing the standard deduction, limiting itemized deductions and lowering tax rates, the TCJA likely just increased the incentive to take the standard deduction for both federal and state purposes.

¹⁰⁰ COMPTROLLER OF MD., INCOME TAX SUMMARY REPORT: TAX YEAR 2017, at 3 (2018), <https://www.marylandtaxes.gov/reports/static-files/revenue/incometaxsummary/summary17.pdf>

substantially in 2018, Nebraska's itemization rate would likely remain lower than Maryland's. In addition, the decline in Nebraska's itemization rate would probably be more precipitous than Maryland's. These results are likely to be driven by factors similar to those that caused the itemization rate disparity pre-TCJA including (a) Maryland's much lower state standard deduction, (b) Maryland's higher total state and local tax rate; (c) higher household income in Maryland and higher percentages of Maryland taxpayers in the highest income categories (noting that high income taxpayers typically itemize at higher rates than do lower income taxpayers),¹⁰¹ and (d) higher average home prices and mortgage payments in Maryland¹⁰² (which would be expected to lead to higher home mortgage interest deductions and total itemized deductions) in Maryland. Table 2 provides a comparison for some of these numbers.

Table 2. Basic Tax & Income Data: Nebraska and Maryland

Nebraska ¹⁰³			Maryland ¹⁰⁴		
	2017	2018		2017	2018
Standard deduction (single)	\$6,350	\$6,750	Standard deduction (single)	Max of \$2,000	Max of \$2,250
Standard deduction (MFJ)	\$12,700	\$13,500	Standard deduction (MFJ)	Max of \$4,000	Max of \$4,500

[<https://perma.cc/VEA4-KM3P>]; *Individual Income Tax Data by Size of AGI, Tax Year 2017 Table B4*, NEB. DEP'T OF REVENUE, <https://revenue.nebraska.gov/research/statistics/nebraska-statistics-income> [<https://perma.cc/T39L-3F4A>] (last visited Nov. 21, 2021); and author calculations.

¹⁰¹ See Table 2.

¹⁰² In 2018, the median home mortgage payment was \$1,352 in Nebraska and \$1,987 in Maryland. Liz Knueven, *The Average Monthly Mortgage Payment by State, City, and Year*, BUS. INSIDER (Aug. 6, 2020), <https://www.businessinsider.com/personal-finance/average-mortgage-payment#mortgage-payments-by-state> [<https://perma.cc/87U7-42SA>] (using data from the Census Bureau's 2018 American Community Survey). Median home value, as of an article published in early 2020, was \$175,884 in Nebraska and \$308,041 in Maryland. Marissa Perino & Dominic-Madori Davis, *Here's the Typical Home Price in Every State—and What You Can Actually Get for That Money*, BUS. INSIDER (Apr. 2020), <https://www.businessinsider.com/average-home-prices-in-every-state-washington-dc-2019-6> [<https://perma.cc/JR7T-L2VL>] (using Zillow data). Hillary Hoffower & Libertina Brandt, *The Most Expensive and Affordable States to Buy a House, Ranked*, BUS. INSIDER (Apr. 2019), <https://www.businessinsider.com/cost-to-buy-a-house-in-every-state-ranked-2018-8> [<https://perma.cc/RA7D-GGN6>] (using Zillow data to report that the median listing price was \$215,000 in Nebraska and \$329,989 in Maryland).

¹⁰³ *Chronology of Nebraska Tax Rates – 1993 to Present: Table 1, Income and Sales Tax*, NEB. DEP'T OF REVENUE, <https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/research/chronology/4-607table1.pdf> [<https://perma.cc/89CB-VJ4Z>] (last visited Nov. 21, 2021) (listing income tax rate data, income tax bracket data, and standard deduction amounts by year).

¹⁰⁴ COMPTROLLER OF MD., MARYLAND: 2017 STATE & LOCAL TAX FORMS & INSTRUCTIONS 12 (2018), https://www.marylandtaxes.gov/forms/17_forms/Resident_Booklet.pdf [<https://perma.cc/YT55-B92D>] (last visited Nov. 21, 2021); COMPTROLLER OF MD., MARYLAND: 2018 STATE & LOCAL TAX FORMS & INSTRUCTIONS 12, https://www.marylandtaxes.gov/forms/18_forms/Resident_Booklet.pdf [<https://perma.cc/UK8Z-J3VB>] (last visited Nov. 21, 2021).

Top income tax rate	6.84%		Top income tax rate	8.95% (including county level tax) ¹⁰⁵	
Median household income ¹⁰⁶	\$60,847	\$59,566	Median household income	\$82,747	\$83,242
% of taxpayers with AGI>\$200K ¹⁰⁷	3.6%	4.0%	% of taxpayers with AGI>\$200K	6.6%	7.1%
% of taxpayers with AGI>\$100K ¹⁰⁸	16.7%	18.1%	% of taxpayers with AGI>\$100K	23.4%	24.5%

In addition, Nebraska's and Maryland's itemization uniformity requirements are expected to impact not just state itemization rates, but also *federal* itemization rates. This is because, where a state allows a taxpayer to itemize for state purposes only if they also itemize for federal purposes, some taxpayers likely conclude that the benefit of itemizing for state purposes (i.e., state income taxes saved) exceeds the cost of itemizing for federal purposes (i.e., extra federal income taxes paid). As a result, such a taxpayer should itemize for federal purposes so they can itemize for state purposes. The number and percentage of such taxpayers would be expected to increase after the TCJA in states like Nebraska and Maryland, where the TCJA's increase in the federal standard deduction was not accompanied by a commensurate increase in the state's standard deduction.¹⁰⁹ This is particularly likely given the TCJA's reduction in individual income tax rates, which means that the value of federal deductions was smaller in 2018 than it was in 2017.

¹⁰⁵ Maryland imposes state income tax at a top rate of 5.75%, and Maryland counties also impose an additional county (or city) level tax on a taxpayer's state taxable income. The Maryland state tax authority collects this county-level income tax for the counties to assist local governments. The additional county level income tax ranges from 2.25% to 3.2%, for a combined top rate of between 8% and 8.95% of state/local income tax. *Tax Rates Maryland Income Tax Rates and Brackets*, COMPTROLLER OF MD., <https://www.marylandtaxes.gov/individual/income/tax-info/tax-rates.php> [<https://perma.cc/G2KJ-TAAC>] (last visited Oct. 8, 2021). Thanks to Neil Buchanan for his insights about county-level income taxes in Maryland.

¹⁰⁶ Gloria G. Guzman, *American Community Survey Briefs: Household Income: 2018* at 3 (Sept. 2019), <https://census.gov/content/dam/Census/library/publications/2019/acs/acsbr18-01.pdf> [<https://perma.cc/9RFU-7CJT>] (report from the U.S. Census Bureau reporting data in 2018 inflation-adjusted dollars).

¹⁰⁷ *SOI Tax Stats – State Data FY 2017*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-state-data-fy-2017> [<https://perma.cc/9MJW-PKH6>] (last visited Nov. 21, 2021), and author calculations; *SOI Tax Stats – State Data FY 2018*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-state-data-fy-2018> [<https://perma.cc/Y45R-QNXF>] (last visited Nov. 21, 2021), and author calculations.

¹⁰⁸ *Id.*

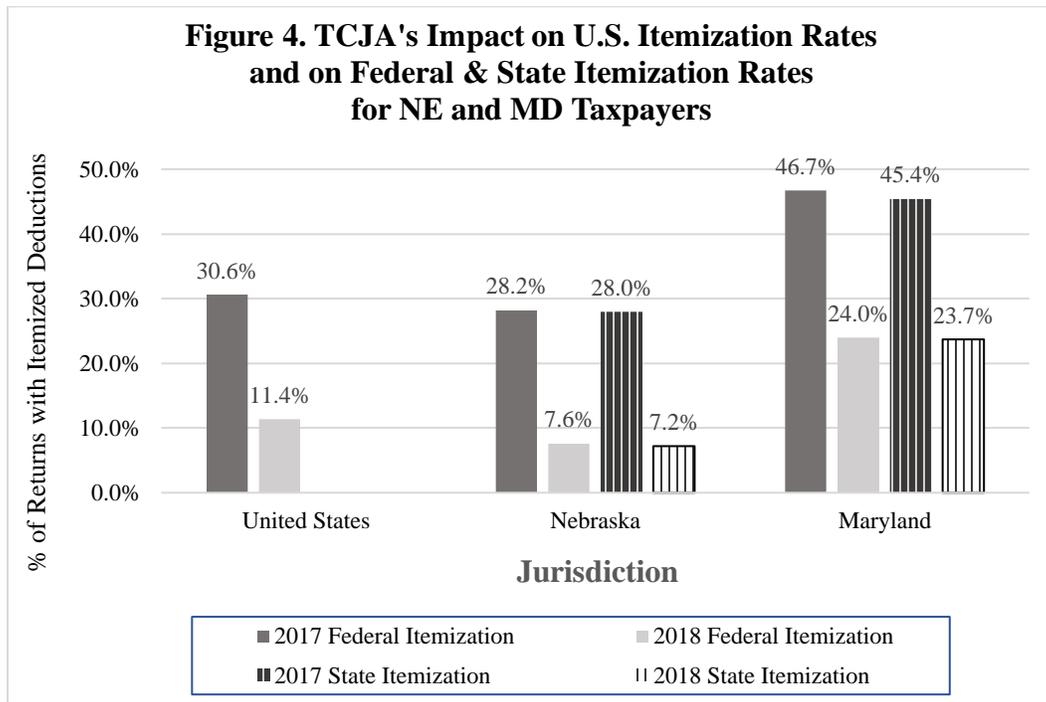
¹⁰⁹ In contrast, in a state like Maine, where the state standard deduction equals the federal standard deduction, it is highly unlikely for any taxpayer to prefer to take the standard deduction for federal purposes and itemized deductions for state purposes (absent material state disconformity). Even if such a taxpayer existed, the difference between federal and state income tax rates is highly likely to mean that taking the standard deduction (the preferred option for federal purposes) minimizes net tax liability.

b. Change in Itemization Behavior of Maryland and Nebraska Taxpayers – Data & Modeling

Federal and state individual income tax filing data from 2017 and 2018 provide insight into how actual itemization behavior of Nebraska and Maryland taxpayers changed after the TCJA. Again, the data reveal that the actual results match the theoretical expectations.

Reducing Itemization Rates, In General

As illustrated in Figure 4, the federal and state itemization rates both for Nebraska and Maryland taxpayers declined significantly between 2017 and 2018.¹¹⁰ In each year, each state’s federal and state itemization rates are approximately equal. Thus, in each state, the decline in federal itemization was accompanied by an almost identical decline in state itemization.



¹¹⁰ *SOI Tax Stats – State Data FY 2017*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-state-data-fy-2017> [https://perma.cc/9MJW-PKH6] (last visited Nov. 21, 2021); *SOI Tax Stats – State Data FY 2018*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-state-data-fy-2018> [https://perma.cc/Y45R-QNXF] (last visited Nov. 21, 2021); COMPTROLLER OF MD., *supra* note 100, at 3; COMPTROLLER OF MD., *INCOME TAX SUMMARY REPORT: TAX YEAR 2018*, at 3 (2019), <https://www.marylandtaxes.gov/reports/static-files/revenue/incometaxsummary/summary18.pdf> [https://perma.cc/9HPV-26DA] (last visited Nov. 21, 2021); *Individual Income Tax Data by Size of AGI, Tax Years 2017 & 2018 Table B4*, NEB. DEP’T OF REVENUE, <https://revenue.nebraska.gov/research/statistics/nebraska-statistics-income> [https://perma.cc/T39L-3F4A] (last visited Nov. 21, 2021); and author calculations.

Although itemization rates in both states declined, the extent of the declines and the overall post-TCJA itemization rates varied by state. In Nebraska, the itemization rate declined by just under 75%, and between 7% and 8% of taxpayers continued to itemize after the TCJA. In contrast, in Maryland, the itemization rate declined by just under 50%, and approximately 24% of taxpayers continued to itemize after the TCJA.

The results in both Nebraska and Maryland were different than the nationwide results. Federal itemization rates of Nebraskan taxpayers declined slightly more than the nationwide decline (~63% decline), and post-TCJA Nebraskans itemized somewhat less frequently than taxpayers nationwide. In contrast, federal itemization rates of Maryland taxpayers declined less than the nationwide decline, and post-TCJA Maryland taxpayers itemized more frequently than taxpayers nationwide.

Causing Taxpayers to Itemize for Federal Purposes (Despite a Larger Federal Standard Deduction)

The IRS declined to gather and provide the data needed to determine the frequency with which taxpayers in states that require election uniformity opted to itemize for federal purposes even though the federal standard deduction exceeded their federal itemized deductions (i.e., paying extra federal taxes) to enable them to itemize for state purposes (i.e., so they could save even more in state taxes).¹¹¹ However, basic modeling, using information that is available, allows inferences to be drawn about the existence of this effect.

Nebraska provides an example. In 2017, Nebraska's standard deduction matched the federal standard deduction, and it would be quite surprising if a Nebraska taxpayer's state itemized deductions exceeded their federal itemized deductions.¹¹² So Nebraska taxpayers generally would not have benefited from itemizing for state tax purposes while taking the standard deduction for federal purposes. As a result, it is highly unlikely that any Nebraskan would have opted to make a less favorable federal itemization choice in 2017 to enable them to make their preferred state itemization choice.

However, more Nebraska taxpayers would have an economic incentive to do so in 2018, after the TCJA. For example, consider a married couple filing jointly in Nebraska with \$100K AGI in 2018. If that couple had between ~\$21.5K and

¹¹¹ I asked the IRS Statistics of Income for data, parsed by state, of the number of taxpayers who checked the box on line 30 of the 2017 Schedule A (indicating that a taxpayer chooses to take federal itemized deductions even though the federal standard deduction is larger) and the number of taxpayers who checked the box on line 18 of the 2018 Schedule A (same question, just with a different line number). After an extensive back and forth, the IRS SOI explained that they do not track this data as part of their regular statistical analyses, and they declined my request that they perform a data run to pull this data for me. Email exchanges between E. Gross (among others) and Heather M. Field (last email on Mar. 3, 2021) (on file with author).

¹¹² Nebraska largely conforms to federal income tax laws applicable to individuals but does not allow state or local taxes to be deducted for state purposes. Thus, a Nebraska taxpayer's federal itemized deductions would generally be larger than their state itemized deductions.

\$24K of itemized deductions for both state and federal purposes in 2018 and holding everything else constant,¹¹³ the couple likely would have been better off itemizing for both federal and state tax purposes rather than taking the standard deduction for both, even though the couple would be foregoing the benefit of the higher federal standard deduction.¹¹⁴ The analysis is similar with taxpayers of different filing statuses and income levels, but the exact thresholds at which it becomes economical to itemize vary. Thus, it is likely that some Nebraskans opted for the less favorable federal itemization choice in 2018, which is more than the number (basically zero) who likely did so in 2017.

The example of Maryland is similar, although slightly more complex. The Maryland and federal standard deductions differed even in 2017. Thus, even pre-TCJA, some Maryland taxpayers likely would have opted to itemize and pay extra in federal taxes so they could itemize for state purposes and save even more in state taxes. However, the disparity between the Maryland and federal standard deduction increased in 2018. That, together with the reduction in federal individual income tax rates and the cap on the federal SALT deduction, means that it even more Maryland taxpayers likely had a net economic incentive to opt for the less favorable federal itemization choice in 2018 than in 2017.

Consider again the example of the married couple filing jointly (now in Maryland) with \$100K AGI. In 2017, they would likely have been better off itemizing for both federal and state tax purposes than taking the standard deduction for both (even though the couple would be foregoing the higher federal standard deduction) if they had state and federal itemized deductions between approximately \$10.5K and \$12.7K, holding everything else constant.¹¹⁵ The same couple in 2018 would likely have been better off itemizing for both (even though they would be foregoing the larger federal standard deduction) if they had state and federal itemized deductions between approximately \$19K¹¹⁶ and \$24K. In this example,

¹¹³ Author calculations using the formula in note 98 *supra*. Of course, everything else is not constant. In particular, itemizing for state purposes increases the taxpayer's SALT deduction for federal purposes. This effect is ignored for ease in the basic numerical examples discussed. However, taking the effect into account would either (a) push the taxpayer's federal itemized deductions above the federal standard deduction, meaning that the taxpayer would no longer have conflicting itemization preferences; or (b) increase the cost of itemizing for federal purposes on the margin, thereby slightly reducing the frequency with which the state-level benefit of itemizing would exceed the federal-level cost of itemizing. Nevertheless, after the TCJA's imposition of the \$10K cap on SALT deductions, any variation in the amount of state taxes would not have this effect as long as the taxpayer's total state taxes remained at least \$10K.

¹¹⁴ Assume, for example, the couple had \$23K of itemized deductions for both state and federal purposes. By itemizing for state purposes rather than taking the standard deduction, the taxpayer would save \$649.80 ($(\$23K - \$13,500) * 6.84\%$), but itemizing for federal purposes too would only cost the taxpayer an extra \$220 ($(\$24K - \$23K) * 22\%$), meaning that the taxpayer reduces their net tax liability by itemizing for both. There are, of course, other costs that could outweigh the tax savings of itemizing, including additional tax preparation costs and the costs to the taxpayer of compiling the information. However, both of those may already be sunk once the taxpayer gets to the point of doing this analysis, in which case they should be ignored.

¹¹⁵ Author calculations using the formula in note 98 *supra*.

¹¹⁶ This number depends on the Maryland county in which the taxpayer lives. See *supra* note 105 (explaining the imposition of county level income taxes in addition to the state income

the range of itemized deductions in which taxpayers would benefit from making the less favorable federal itemization deduction is more than twice as large in 2018 as in 2017. In addition, with the \$10K cap on the SALT deduction for federal purposes, it becomes more probable, in 2018, that a Maryland taxpayer's state itemized deductions and federal itemized deductions would be equal (or at least close) in amount,¹¹⁷ which increases the chance that the taxpayer would have both state and federal itemized deductions in the range where the benefit itemizing for state tax purposes exceeds the cost of doing so for federal purposes. Nevertheless, it is hard to know how the number of taxpayers with itemized deductions in this larger range in 2018 compares to the number of taxpayers with itemized deductions in the smaller range in 2017, at least without data that is unavailable. However, the foregoing discussion suggests that it is likely that some Maryland taxpayers who might have preferred to take the federal standard deduction in 2018 (if they could make unconstrained choices) opted to itemize instead because of the value to them of itemizing for state purposes.

Ultimately, basic modeling illustrates that it is reasonable to conclude that, in some states that prohibit state itemization unless the taxpayer itemizes for federal purposes,¹¹⁸ more taxpayers whose federal standard deduction exceeded their federal itemized deductions likely opted to itemize for federal purposes in 2018 than in 2017. Thus, although the TCJA's itemization-related changes caused a large reduction in federal itemization rates, that reduction was likely not as large as it would have been had all states allowed independent itemization choices. Said differently, absent the election uniformity requirement, Maryland's federal and state itemization rates, for example, would be expected to look more like Oregon's—more itemizers for state purposes and fewer itemizers for federal.

3. Key Takeaways from the Data

Federal itemization rates declined in all states after the enactment of the TCJA, but a close look at the data reveals that the TCJA's impact on itemization

tax). If the taxpayer is in a county with the maximum 3.2% tax rate, this number is closer to \$18.8K. If the taxpayer is in a county with the minimum 2.25% tax rate, this number is closer to \$19.3K.

¹¹⁷ Pre-TCJA, there was always likely to be a disparity between a taxpayer's SALT deduction for federal and state purposes because the taxpayer generally could deduct Maryland state income taxes for federal purpose but not for Maryland state income tax purposes. However, the \$10K cap on SALT increases the chances that the federal and state deductions are the same amount. For example, if in 2018, a Maryland taxpayer has at least \$10K in local property taxes, their SALT deduction for federal purposes would be capped at \$10K and their local tax deduction for state purposes would also be \$10K; the amount of their state income taxes would not change either. Specifically, if only non-income taxes in Maryland are used as a deduction for federal purposes, there are no Maryland or local *income taxes* used as a deduction for federal purposes that would need to be added back to the itemized deductions allowed for Maryland purposes. See COMPTROLLER OF MD., MARYLAND 2018 STATE & LOCAL TAX FORMS & INSTRUCTIONS 11 (2019), https://www.marylandtaxes.gov/forms/18_forms/Resident_Booklet.pdf [<https://perma.cc/M92M-2KYV>].

¹¹⁸ This effect is quite unlikely to occur in states where the state standard deduction matched the federal standard deduction because, as explained earlier, it would be rare for taxpayers in these states to have conflicting itemization preferences at all.

rates varied state-to-state depending on whether the state bound its taxpayers to their federal itemization choices.

Within that core observation, there are several insights. First, in states that allowed taxpayers to make independent itemization elections (e.g., Oregon), state itemization rates may have remained quite high post-TCJA as they did in Oregon. Thus, post-TCJA, many taxpayers in these states (including, for example, more than 22% of Oregon individual taxpayers)¹¹⁹ continued to itemize for state purposes despite switching to the standard deduction for federal purposes. Second, in states (e.g., Nebraska or Maryland) that required election uniformity, the decline in state itemization rates after the TCJA was almost identical to the decline in the federal itemization rates for the state's taxpayers. Third, even among states with the same itemization uniformity rules and that largely conformed to the federal individual income tax (again like Nebraska and Maryland), absolute itemization rates varied significantly. Fourth, in states where standard deductions did not increase commensurately with the increase to the federal standard deduction, more taxpayers had conflicting itemization preferences post-TCJA (generally preferring to itemize for state purposes but preferring the standard deduction for federal purposes). Fifth, in states where standard deductions did not increase commensurately with the increase to the federal standard deduction and that required itemization election uniformity, more taxpayers in 2018 chose to take the standard deduction for both federal and state purposes in 2018 even though their state itemized deductions exceeded the state standard deduction. In these same states, some other taxpayers, and likely more after the TCJA than before, did the opposite—taking itemized deductions for both federal and state purposes even though the federal standard deduction exceeded their federal itemized deductions.

III. THE TCJA'S SIMPLIFYING EFFECT, CONSIDERING TAXPAYERS' ITEMIZATION BEHAVIOR

The insights provided by the data demonstrate that it matters—to taxpayers, to the IRS, and to state tax authorities—whether states bind taxpayers to the tax elections they make for federal purposes. Yet little attention has been paid to the simplicity and administrability implications of the interaction between state and federal itemization elections. This is surprising because simplification was the primary policy objective motivating the TCJA's itemization-related changes. However, the impact of states' election uniformity rules on the degree of simplification created by the TCJA may have been difficult to identify or appreciate without a careful study of the federal and state individual income tax filing data pre- and post-TCJA. Part II of this Article discussed the results of my study of that data. In Part III, I use the insights from the data to analyze how states' election uniformity laws affected the simplification achieved by the TCJA's itemization-related changes.

¹¹⁹ See *supra* Part II.B.1.b.

A. For Taxpayers

Recall that the decline in itemization rates is only a relatively weak proxy for the simplification experienced by taxpayers because, among other reasons, taxpayers may continue with record-keeping, analysis, and related compliance tasks even if they do not ultimately itemize.¹²⁰ With the federal itemization data alone, however, it was difficult to estimate how frequently taxpayers who switched from federal itemized deductions in 2017 to the federal standard deduction in 2018 continued to perform those tasks.¹²¹ However, the addition of state-level itemization data, as discussed in Part II allows for more insights into simplification experienced by taxpayers as a result of the TCJA's itemization-related changes, but the insights differ depending on the state's election uniformity rules.

1. *Where Independent Itemization Elections Are Allowed*

In Oregon, where taxpayers can make independent itemization elections, ~414,00 Oregon taxpayers switched to the standard deduction for federal purposes after the TCJA, but ~404,000 of those taxpayers (i.e., >90%) continued to itemize for state purposes.¹²² These returns represent more than 22% of all annual individual income tax returns filed in Oregon.¹²³ The taxpayers who filed these returns clearly continued to keep records of the possible itemized deductions, analyzed the allowability of itemized deductions, and took related compliance tasks—even though they did not itemize for federal purposes. Thus, these data establish the minimum number¹²⁴ of Oregon taxpayers for whom the purported simplifying effect of the TCJA's itemization-related changes was largely eliminated.¹²⁵ Because more than 90% of the Oregon taxpayers who switched to the federal standard deduction post-TCJA continued to itemize for Oregon state purposes, the simplification for taxpayers implied by the decline in federal itemization rates for Oregon taxpayers was largely illusory. The analysis would be similar for taxpayers in other states that, like Oregon, allow independent state

¹²⁰ See *supra* Part I.D.1.

¹²¹ *Id.*

¹²² See *supra* Part II.B.1.b.

¹²³ See *supra* note 94.

¹²⁴ The actual number of taxpayers for whom the purported simplifying effect of the TCJA's itemization-related changes was largely eliminated may be higher if some taxpayers that ultimately switched to the standard deduction for both federal and state purposes continued to keep records and undertake analysis of possible itemized deductions to determine whether to itemize at all.

¹²⁵ Although federal income tax laws and state income tax laws are enacted by different people at different times, individual taxpayers often encounter these laws together, as part of the single overall undertaking of preparing their annual income tax returns. Thus, a taxpayer's experience of income tax return preparation includes all activities undertaken as part of filing federal or state returns. Accordingly, this Article assesses simplification for taxpayers from the *taxpayer's* perspective, taking into account the totality of the taxpayer's itemization experience—regardless of whether it is undertaken as part of filing federal or state returns.

itemization deductions,¹²⁶ although the number and percentage of affected filers likely varies by state.¹²⁷

2. *Where Itemization Election Uniformity Is Required*

The insights are different for taxpayers in states like Maryland and Nebraska, where election uniformity is required. These taxpayers cannot make different state and federal itemization elections. Thus, while some Maryland and Nebraska taxpayers who ultimately switched to the standard deduction post-TCJA may have continued to keep records and analyze possible itemized deductions, the data do not establish for certain that they did. This is unlike the example of Oregon, where the data are clear that more than 90% of the taxpayers who switched to the federal standard deduction continued to keep records of itemized deductions etc. (so they could itemize for state purposes). As a result, the simplification experienced by taxpayers in states like Maryland and Nebraska that require itemization uniformity likely exceeded the simplification experienced by taxpayers in states like Oregon that allow independent itemization deductions.

The analysis of the itemization data for Maryland and Nebraska taxpayers provides additional insight into how simplification varied even among states that require election uniformity. Specifically, the Maryland and Nebraska case studies show that the lower the state's standard deduction and the higher the state's income tax rates, the larger the incentive for taxpayers in these states to continue to keep records and analyze itemized deductions because of the possibility of itemizing for state tax purposes, and the less simplification these taxpayers experience.¹²⁸

¹²⁶ This likely includes taxpayers in Alabama, Arizona, Arkansas, California, Delaware, Hawaii, Iowa, Kentucky, Minnesota, Mississippi, Montana, New York, North Carolina, and Wisconsin. *See supra* Figure 2; *see infra* Appendix A. This is less likely to occur in Idaho because, although Idaho allows independent itemization choices, the Idaho state standard deduction matches the federal standard deduction, meaning that it would be unusual for a taxpayer to itemize for state purposes but not federal.

¹²⁷ The number and percentage of filers affected in a state will depend, on state-specific information (e.g., the size of the state's itemized deduction and the state's tax rates) that affects how many taxpayers opt to switch to the federal standard deduction but continue to itemize for state purposes. Also, recall that Oregon largely conforms to the federal income tax laws regarding itemized deductions. The analysis is more complex in states where the income tax rules diverge significantly from the federal income tax rules. In these states, it becomes difficult to isolate the cause of the lack of simplification because the continued complexity experienced by taxpayers is attributable, at least in part, to the differences between federal and state law—rather than being primarily attributable to the state's itemization election uniformity rule.

¹²⁸ Taxpayers in a state like Maryland likely experienced less overall simplification than taxpayers in a state like Nebraska that has a higher standard deduction than Maryland (but still lower than the federal standard deduction). And taxpayers in Nebraska likely experienced less simplification than taxpayers in a state like Missouri, where the state requires itemization election uniformity but where the state standard deduction matched the high post-TCJA federal standard deduction.

In sum, the possibility of itemizing for state tax purposes reduces the TCJA's simplification effect, especially (but not exclusively) for taxpayers in states that allow independent itemization decisions.

B. For the IRS

Recall that a decline in itemization rates is a reasonably good proxy for simplification experienced by the IRS.¹²⁹ Thus, with the dramatic decline in federal itemization between 2017 and 2018, the TCJA's itemization-related changes simplified the IRS's task of administering the federal income tax.

That simplifying effect for the IRS, however, was likely dampened, at least slightly, by states that bound taxpayers to their federal itemization elections. To illustrate, consider Maryland. Absent the state requirement for itemization election uniformity, Maryland's federal and state itemization rates would be expected to look somewhat more like Oregon's—more itemizers for state purposes and fewer itemizers for federal purposes.¹³⁰ That is, absent Maryland's election uniformity requirement, *even more* Maryland taxpayers would have switched to the federal standard deduction than actually did. And this would have simplified the IRS's enforcement task even more than the TCJA's itemization-related changes actually did. However, because Maryland requires itemization election uniformity, the simplification benefit experienced by the IRS as a result of the TCJA's itemization-related changes was not quite as large as it could have been had taxpayers not been required to make uniform elections. The magnitude of this effect may be small given the infrequency with which the value of itemizing for state purposes will exceed the cost of itemizing (rather than taking the standard deduction) for federal purposes. However, there is likely to be at least some dampening of the IRS's simplification benefit with respect to taxpayers in states that require itemization election uniformity.

That dampening effect for the IRS, however, generally should not arise where states allow independent itemization choices. In these states, taxpayers' state itemization choices are not affected by their federal itemization choices, so taxpayers are free to opt for the federal standard deduction if that best reduces their federal income tax. Thus, the federal itemization rate in these states will likely decline as much as possible, likely yielding as much simplification for the IRS as possible, without a dampening effect.

C. For State Tax Authorities

The TCJA's itemization-related changes also affect state tax administration, and the impact on state tax authorities, once again, depends largely on the states' itemization uniformity rules and the taxpayers' itemization choices.

In states that require election uniformity, the TCJA's itemization-related changes likely simplified the administration of the state tax regimes in a manner very similar to the way they simplified the administration of the federal income tax

¹²⁹ See *supra* Part I.D.2.

¹³⁰ See *supra* Part II.B.2.

regime.¹³¹ In these states (e.g., Nebraska and Maryland), the dramatic decline in federal itemization rates was accompanied by an almost identical decline in state itemization rates.¹³² As a result, state tax authorities processed fewer forms reporting itemized deductions post-TCJA. And where fewer state taxpayers itemized deductions, there were fewer taxpayers whose itemized deductions might be audited by state tax authorities. These changes likely made enforcement easier and less costly for state tax authorities.

The TCJA's itemization-related changes had a very different impact on state tax authorities in states that allowed taxpayers to make independent itemization choices. The decline in federal itemization rates for taxpayers in these states was not necessarily accompanied by a similar decline in state itemization. Indeed, state itemization rates may not have declined much at all, even if federal itemization rates for the state's taxpayers declined significantly. Where federal itemization rates declined significantly more than state itemization rates, state tax administration became more complex, rather than simpler, post-TCJA.

The example of Oregon helps to illustrate. Recall that more than 90% of Oregon taxpayers who switched to the standard deduction for federal purposes continued to itemize for state purposes.¹³³ This complicated Oregon state tax administration for multiple reasons. Post-TCJA, state tax authorities could no longer benefit from data-sharing with the IRS about itemized deductions reported on these returns. The returns did not itemize for federal purposes, so there were no longer federal data about itemized deductions to share.¹³⁴ In addition, state tax authorities could no longer piggyback on federal audits of the itemized deductions on these returns. The returns did not itemize for federal purposes, meaning there were no itemized deductions on these returns for the IRS to audit, and thus no federal audits of the returns' itemized deductions on which to piggyback.¹³⁵ Further, where taxpayers itemized deductions for state but not federal purposes, state tax authorities were less able to rely on the deterrent effect of the threat of federal audits relating to the itemized deductions. This could have increased state-level noncompliance.¹³⁶ Thus, the TCJA's itemization-related changes made it

¹³¹ See *supra* Parts I.D.2, III.B.

¹³² See *supra* Part II.B.2.

¹³³ See *supra* Part II.B.1.b.

¹³⁴ See Scharff, *supra* note 11, at 714-15 (discussing federal to state data sharing).

¹³⁵ See Luna & Watts, *supra* note 7, at 260 (discussing the states' ability to "piggyback on federal tax audits and professional education programs, participate in data exchange programs, and cooperate in compliance initiative"). *But see* James Alm, Brian Erard & Jonathan S. Feinstein, *The Relationship Between State and Federal Tax Audits*, EMPIRICAL FOUNDATIONS OF HOUSEHOLD TAXATION 236 (Martin Feldstein & James M. Poterba eds., 1996) (suggesting that state piggyback audits were relatively rare). Even if states do not commonly initiate audits piggybacking on federal audits, many states require that taxpayers report to the state tax authority any change in tax liability paid to the IRS as a result of an audit, filing of an amended return, etc. See, e.g., OR. REV. STAT. § 314.380 (2019). This enables easy conforming action by the state, as appropriate, even without an independent state audit.

¹³⁶ See Scharff, *supra* note 11, at 735-37; Liucija Birskyte, *Effects of Tax Auditing: Does the Deterrent Deter?*, RESEARCH J. ECON., BUS. & ICT, Nov. 30, 2013 (concluding that deterrent effects of federal audits spill over to positively impact state tax compliance). The deterrent effect of the possibility of federal audits is particularly important if a state generally does not do many piggyback audits. See *supra* note 135.

harder for state tax authorities to enforce state income tax laws in states like Oregon that allowed taxpayers to make independent itemization choices.¹³⁷

D. Key Takeaways about Simplification

In sum, states' itemization election uniformity rules affected the extent to which the TCJA's itemization-related changes led to simplification for taxpayers, the IRS, and state tax authorities.

Where states obligated taxpayers to take the standard deduction for state purposes if they took the standard deduction for federal purposes, the TCJA's itemization-related changes generally simplified across the board. Taxpayers likely experienced at least some simplification. For the IRS and state tax authorities, tax administration became materially easier post-TCJA because of the decline in the number of itemizers for federal and state income tax purposes respectively. This simplification benefit for the IRS, however, was dampened to the extent that taxpayers opted to itemize for federal purpose (even though their standard deduction was larger) so they could itemize for state purposes.

Where states allowed taxpayers to itemize for state purposes regardless of whether they itemized for federal purposes, the TCJA's itemization-related changes had a very different effect on simplification. The IRS experienced more simplification because there was no dampening effect (i.e., taxpayers would not itemize for federal purposes if the federal standard deduction was larger). Taxpayers in these states, however, likely experienced less simplification. Many continued to itemize post-TCJA (albeit for state, rather than federal, purposes), which made the TCJA's simplification benefit for taxpayers largely illusory in some cases.

In addition, state tax administration in states that allowed independent itemization elections became materially more complex post-TCJA because many taxpayers continued to itemize for state purposes even though they switched to the standard deduction for federal purposes. That increase in complexity for state tax authorities reflected, at least in part, a reallocation of enforcement burden—from the IRS which, post-TCJA, no longer needed to worry about enforcement with respect to some taxpayers' itemized deductions (because those taxpayers no longer itemized for federal purposes) to the state tax authorities who needed to continue to enforce the laws about taxpayers' itemized deductions without help from the IRS. Thus, in states that allowed independent itemization elections, the TCJA's itemization-related changes likely resulted in a net shift of some enforcement

¹³⁷ In addition, tax authorities in states that allow independent itemization decisions may have incurred slightly increased administration costs if they state-specific forms and guidance. *See, e.g.,* OR. DEP'T OF REVENUE, 2018 SCHEDULE OR-A (2018). However, where a state, like Oregon, largely conformed to the federal itemized deductions, the costs of creating the new form may have been relatively low. Thus, in states that allow independent itemization choices, the increase in enforcement complexity, discussed in the text, is likely to be the most significant source of additional state tax administrative complexity that arose after the TCJA's itemization-related changes.

responsibilities from the IRS to state tax authorities.¹³⁸ This shift likely reduced efficiency of tax administration too because it is generally more costly (in relation to revenue collected) to administer the same law at the state level than at the federal level.¹³⁹

The foregoing discussion assumes that states largely conform to federal income tax laws, including the changes made by the TCJA.¹⁴⁰ But many states do not conform, which often exacerbates the complexity faced both by individual taxpayers and by the states.¹⁴¹ However, as this Article illustrates, it is critical to consider state election uniformity laws because, even where state tax laws largely conform to federal tax laws, states' election uniformity rules can thwart the achievement of federal tax policy goals.

IV. TAX ELECTIONS & THE RELATIONSHIP BETWEEN THE FEDERAL AND STATE INCOME TAX REGIMES

A. Broader Lessons from the Itemization Election Example

This Article's analysis of how states' election uniformity rules affected the simplification achieved by the TCJA's itemization-related changes to federal tax laws illustrates a broader point. Specifically, states' tax election uniformity rules are critical to understanding the relationship between the federal and state tax regimes, and these rules should be considered in any policy analysis of a tax change that relates to a tax election. There are hundreds of tax elections,¹⁴² and the itemization election, discussed here, is merely one example of where the policy implications of a federal tax law change cannot be fully understood without understanding states' tax election uniformity rules.

This is true for many other tax elections, including for example a married couple's election whether to file jointly or separately,¹⁴³ an eligible corporation's election to be taxed as an "S corporation" rather than as a "C corporation,"¹⁴⁴ and the election to have certain corporate acquisitions taxed as asset purchases rather

¹³⁸ The magnitude of that shift would vary by state depending on what percentage of state taxpayers switched to the standard deduction for federal purposes but continued to itemize for state purposes. A higher percentage results in a larger shift of enforcement costs from the IRS to the state tax authority.

¹³⁹ See Scharff, *supra* note 11, at 708.

¹⁴⁰ This discussion also assumes states are clear about their choices to conform (or not) and to bind taxpayers to their federal elections (or not). This is not always the case. For example, some states took a while to decide how to proceed on these issues after the TCJA, which created confusion, thereby further exacerbating the complexity faced by taxpayers and state tax authorities. See, e.g., Jared Walczak, *Arizona Delivers Rate Cuts and Tax Conformity*, TAX FOUND. (June 6, 2019), <https://taxfoundation.org/arizona-income-tax-cuts-tax-conformity/> [https://perma.cc/X3SJ-P72Z] (explaining that Arizona's tax forms for 2018 assumed Arizona's income tax would conform to the TCJA, but Arizona did not actually conform until the end of May 2019).

¹⁴¹ See *supra* note 11.

¹⁴² DECHELLIS & HORNE, *supra* note 14 (discussing over 300 tax elections).

¹⁴³ I.R.C. § 6031.

¹⁴⁴ I.R.C. § 1362.

than stock purchases.¹⁴⁵ These federal tax elections and others are also available at the state level in many states, and as with the itemization election, states take different approaches to election uniformity requirements.¹⁴⁶ Thus, states' tax election uniformity rules for each of these elections are likely to affect the policy consequences of changing these elections or changing laws that would affect taxpayers' election decisions.

The married filing status election provides an example of how this Article's insights apply. Married taxpayers in Minnesota must use the same filing status for state income tax purposes as they use for federal purposes.¹⁴⁷ In contrast, Iowa allows married taxpayers to make a fully independent filing status elections for state purposes regardless of their federal filing status election.¹⁴⁸ Michigan's approach falls in between: married taxpayers who file jointly for federal purposes must also file jointly for Michigan purposes, but married taxpayers who file separately for federal purposes may make an independent filing status election for Michigan purposes.¹⁴⁹

A change to federal tax law that affects a married couple's choice about their federal filing status likely has different consequences for couples in these different states. Consider, for example, two federal tax provisions enacted recently to help taxpayers weather the economic distress created by the pandemic: the recovery rebate credit enacted by the CARES Act in March 2020,¹⁵⁰ and the exclusion for unemployment benefits enacted by the American Rescue Plan Act enacted in March 2021.¹⁵¹ Both provisions increased the incentive for some married couples to file separately rather than jointly for 2020.¹⁵² If, because of these

¹⁴⁵ I.R.C. § 338(h)(10).

¹⁴⁶ With section 338(h)(10) elections, many states bind taxpayers to their federal choice, but several states do not provide guidance about whether independent state-level section 338(h)(10) elections are allowed or required. *See Corporate Income Tax* 10.5.3, Bloomberg Tax, https://www.bloomberglaw.com/product/tax/view_menu/corporate_income_tax [<https://perma.cc/TWX2-EZ4D>] (last visited Nov. 21, 2021) (identifying, for each state, whether separate state election can be made for purposes of section 338(h)(10)). With S corporation elections, states also take a variety of approaches, including providing that a corporation's federal S corporation election applies for state purposes too, providing that a federal S corporation must file an additional state S corporation election (otherwise, the corporation will not be treated as an S corporation for state purposes), and providing that a corporation's federal S corporation election generally applies for state purposes too but that a corporation can opt *out* of state S corporation treatment. *A Comprehensive Guide to State S Election Requirements*, EMINUTES (Dec. 6, 2017), <https://eminutes.com/a-comprehensive-guide-to-state-s-election-requirements> [<https://perma.cc/H6S3-ZQWR>].

¹⁴⁷ MINN. STAT. § 289A.08, Subdiv. 6 (2020).

¹⁴⁸ IOWA DEP'T OF REVENUE, IA 1040 INCOME TAX RETURN 2020 (2021).

¹⁴⁹ MICH. DEP'T OF TREASURY, MICHIGAN 2020 MI-1040 INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS (2021).

¹⁵⁰ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 6428 (2020).

¹⁵¹ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9042 (2021).

¹⁵² *See* Andrew Gross et al., *Recovery rebates: Tax planning pitfalls and opportunities*, THE TAX ADVISER, July 1, 2020; Amber Gray-Fenner, *What You Need to Know Now About Non-Taxable Unemployment*, FORBES (Mar. 14, 2021), <https://www.forbes.com/sites/ambergray-fenner/2021/03/14/what-you-need-to-know-now-about-non-taxable-unemployment> [<https://perma.cc/M2TZ-7NTK>].

changes, a couple opted to file separately for federal purposes for 2020, the couple also had to file separately for Minnesota purposes in 2020 but could still file jointly for Iowa and Michigan purposes. Thus, Minnesota couples with conflicting filing status preferences for federal and state purposes (e.g., wanting to file separately for federal purposes but jointly for state purposes) had to choose one filing status to use for both purposes. If a Minnesota couple with conflicting filing status preferences filed separately for federal purposes to benefit from the recovery rebate and unemployment benefits exclusion, the couple accepted less preferred state tax treatment. If a Minnesota couple filed jointly to minimize state income tax, the couple sacrificed some or all of the benefits of these recently enacted federal tax provisions. In contrast, married couples in Michigan or Iowa did not need to make this choice; regardless of how they preferred to file for state purposes, such couples could opt to file separately for federal purposes to benefit from the recovery rebate and unemployment benefits exclusion.

This is a brief example, but it illustrates that these two recent federal tax law changes that were enacted to help taxpayers through the pandemic likely have different tax consequences for taxpayers depending on their state's election uniformity rule regarding the married filing status election. A more comprehensive analysis, along the lines of this Article's analysis of the impact of states' itemization election uniformity rules, could identify the policy implications of those differences, including determining the specific situations in which the federal policy goal motivating these changes is most likely to be thwarted. Even without deeper analysis, however, this filing status example shows that this Article's insights about the impact of states' election uniformity rules are generalizable to other contexts.

Ultimately, this Article's analysis of the itemization election reveals that states' tax election uniformity rules create previously underappreciated interactions between the federal and state tax systems. These state-level rules can undermine the achievement of federal policy goals, and differences among these state-level rules can cause federal tax changes to apply differently to taxpayers in different states. Thus, tax election uniformity rules are an important part of analyzing the policy implications of a change to any of the hundreds of federal tax elections or a change that alters taxpayers' choices pursuant to any tax election (as the TCJA's itemization-related changes did). And when understanding the relationship between the federal and state tax regimes more broadly, scholars and policymakers should consider states' tax election uniformity rules in addition to the more commonly discussed issues of conformity, federal tax benefits for states, and cooperative tax administration.¹⁵³

B. Using These Lessons When Making Tax Policy Decisions

This Article's insights into the cross-jurisdictional impact of states' tax election uniformity rules might encourage action. Perhaps a greater appreciation of how each regime's laws affect the administrability of the other's reinforces the existing scholarship encouraging federal and state legislators and administrators to

¹⁵³ See *supra* notes 7-11 and accompanying text.

collaborate on enforcement initiatives and on tax law changes that advance shared policy objectives.¹⁵⁴

In particular, federal policymakers should consider how states' tax election uniformity rules might advance or hinder the federal policy objective (such as simplification) motivating any federal tax law change. To the extent that states' election uniformity laws are likely to undermine the achievement of federal policy objectives, federal legislators could also work with state legislators to try to mitigate that effect. Alternatively, proponents of the federal law change could be more circumspect about their rhetoric when touting the policy benefits of a change, as compared to how TCJA proponents touted the simplifying effect of the itemization-related changes. Adjustments to the rhetoric could increase the chances that the taxpayers' experiences match the promises. Further, to assist federal policymakers in better understanding the compliance burden associated with the interaction between federal and state tax laws, the IRS might consider adding questions to the Individual Taxpayer Burden survey to enable them to make better predictions about the compliance burdens created by the interactions between federal and state tax laws.¹⁵⁵ More data about the taxpayer burdens created by the such interactions could inform future decision-making, both by federal policymakers and state policymakers.

In addition, when state policymakers examine any of their election uniformity rules and evaluate possible changes, they should carefully consider the policy tradeoffs that their choice of uniformity rule makes.¹⁵⁶ For example, a state that prioritizes administrability in the context of a particular election might lean toward requiring election uniformity, but a state that prioritizes state fiscal sovereignty in that context might lean toward allowing independent elections.¹⁵⁷ Further, state policymakers could pay more attention to proposed federal tax changes (particularly those touted as simplifying) that, when coupled with the state's election uniformity rules, are likely to materially increase state-level administration costs. This could lead state policymakers to become more vocal about sharing any concerns regarding those proposed changes with federal legislators.¹⁵⁸ State legislators could also try to measure the complexity that arises

¹⁵⁴ See Duncan & Luna, note 11, at 663; Gravelle & Gravelle, *supra* note 7, at 643 (discussing a collaborative proposal intended to achieve “substantial savings in tax administration as well as compliance by taxpayers and resolution of issues in the courts”); Scharff, *supra* note 11, at (advocating for more fed/state tax cooperativity in general, not just in the context of federal changes).

¹⁵⁵ See *supra* notes 58-62 and accompanying text (discussing the IRS's income taxpayer burden model and the survey on which it relies). The ITB survey currently asks for record-keeping burden and out-of-pocket-cost information explicitly excluding any such burdens arising from state and local taxes. The survey could be modified, for example, to ask about those separately or to ask for taxpayer estimates about burdens and costs both with and without the state/local considerations.

¹⁵⁶ Some states already do this to some extent. See, e.g., AUXIER & RUEBEN, *supra* note 12 (Kansas considering administrability issues).

¹⁵⁷ See Mason, *supra* note 7 (discussing different policy considerations that motivate state-level choices).

¹⁵⁸ See Gravelle & Gravelle, *supra* note 7, at 646 (encouraging states to pursue “greater vigilance regarding issues under discussion at the federal level that do not appear to have a direct impact”—more revenue focused, but equally applicable for simplicity concerns).

for taxpayers and administrators from their existing election uniformity laws to give them more information about these state-level rules.

CONCLUSION

States' tax election uniformity rules should be considered in the policy analysis of any federal or state tax law change that relates to a tax election. Otherwise, the implications of that change cannot be fully understood. However, exactly what that consideration should entail, how much weight those considerations should be given, and what additional actions federal and state policymakers should take in light of those considerations are all normative questions that merit a separate article. Some possible ideas are mentioned above, but recommendations might be contentious.

Federal policymakers might argue, for example, that the additional complexity taxpayers and state tax authorities experience because of a state's itemization uniformity laws is the fault of state policymakers and should be addressed by them. On the other hand, state policymakers might argue that the additional complexity for taxpayers and state tax authorities is caused by, and should be addressed by, federal policymakers who know that state tax laws are generally based on federal tax laws and who nevertheless repeatedly change federal tax laws with little regard for the complexity that ripples through the state tax system. Yet, taxpayers might struggle to disaggregate which complexities are attributable to the federal income tax regime and which are attributable to the state income tax regime. And if taxpayers are promised a particular policy result (such as simplification) but do not experience it, that may harm tax morale and may undermine their faith in the tax system(s) or in political leaders more generally¹⁵⁹—regardless of whether federal or state policymakers are responsible for the result.

This Article, however, does not seek to determine whether federal or state policymakers bear more blame for the gap between the simplification promised by the proponents of the TCJA's itemization-related changes and the more limited simplification experienced by many taxpayers. Nor is this Article concerned about which set of lawmakers is more at fault for increases in administrative complexity for the other set of tax administrators. And the goal of this Article is not to push for specific changes with respect to itemized deductions, election uniformity rules, or otherwise. Rather, this Article's objective is to use data regarding the itemization election as an example to illuminate the underappreciated interactions between federal and state income tax laws that arise because of whether states obligate taxpayers to make the same choices for state tax purposes as they do for federal. This gives federal and state policymakers more visibility into ways in which their federal and state tax policy decisions are intertwined, thereby enabling policymakers to consider these interactions when making future tax policy choices.

¹⁵⁹ The magnitude of this impact, however, is unclear when trust in government officials is already quite low.

APPENDIX A. CHANGES IN FEDERAL ITEMIZATION RATES BY STATE¹⁶⁰

Jurisdiction	2017 TY Federal Itemization Rate	2018 TY Federal Itemization Rate	% Decline in Federal Itemization Rate (as a % of 2017 rate)	State's Itemization Election Uniformity Law 2017, 2018
Alabama	26.7%	8.5%	68.0%	Independent choice allowed
Alaska	23.0%	7.7%	66.7%	No state PIT
Arizona	29.8%	10.9%	63.2%	Independent choice allowed
Arkansas	22.8%	6.9%	69.6%	Independent choice allowed
California	35.7%	17.7%	50.5%	Independent choice allowed
Colorado	33.6%	13.5%	59.8%	Conformity starting point is FTI (so federal itemization choice is built in for state purposes)
Connecticut	41.8%	15.1%	63.7%	No state itemized deductions
Delaware	32.9%	11.7%	64.4%	Independent choice allowed
D.C.	40.9%	22.3%	45.5%	Fully bound to federal choice
Florida	26.2%	9.0%	65.5%	No state PIT
Georgia	33.9%	13.8%	59.2%	Fully bound to federal choice
Hawaii	30.6%	13.9%	54.4%	Independent choice allowed
Idaho	29.4%	8.9%	69.5%	Independent choice allowed
Illinois	32.5%	11.3%	65.4%	No state itemized deductions
Indiana	23.1%	6.1%	73.6%	No state itemized deductions
Iowa	30.8%	7.5%	75.6%	Independent choice allowed
Kansas	26.2%	8.1%	69.1%	Bound to federal standard deduction
Kentucky	26.7%	6.6%	75.3%	Independent choice allowed
Louisiana	24.4%	7.8%	68.2%	Deduction allowed for federal itemized deductions in excess of federal standard deduction
Maine	27.4%	7.4%	73.1%	Bound to federal standard deduction
Maryland	46.7%	24.0%	48.5%	Bound to federal standard deduction
Massachusetts	37.8%	14.7%	61.1%	No state itemized deductions
Michigan	27.4%	7.6%	72.1%	No state itemized deductions
Minnesota	35.5%	11.3%	68.3%	2018 and beyond: independent choice allowed 2017 and prior: conformity starting point was FTI, so federal itemization choice was built in for state purposes
Mississippi	24.4%	7.7%	68.6%	Independent choice allowed
Missouri	26.7%	7.7%	71.0%	Bound to federal standard deduction
Montana	29.7%	8.9%	70.0%	Independent choice allowed
Nebraska	28.2%	7.6%	72.9%	Bound to federal standard deduction
Nevada	26.6%	9.9%	62.8%	No state PIT
N.H.	31.8%	9.9%	68.9%	No state broad-based PIT

¹⁶⁰ *SOI Tax Stats – Historic Table, Individual Income and Tax Data, by State and Size of Adjusted Gross Income*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2> [<https://perma.cc/YPZ4-NGJU>] (last visited Nov. 22, 2021), and author calculations.

	2017 TY Federal Itemization Rate	2018 TY Federal Itemization Rate	% Decline in Federal Itemization Rate (as a % of 2017 rate)	State's Itemization Election Uniformity Law 2017, 2018
Jurisdiction				
New Jersey	42.2%	17.0%	59.8%	No state itemized deductions (except property taxes and medical expenses—not tied to federal itemization)
New Mexico	22.8%	7.3%	68.0%	Fully bound to federal choice
New York	35.4%	12.4%	64.8%	Bound to federal standard deduction in 2017; independent choice allowed in 2018
N.C.	29.2%	10.3%	64.8%	Independent choice allowed
North Dakota	19.8%	5.6%	72.0%	Conformity starting point is FTI (so federal itemization choice is built in for state purposes)
Ohio	26.3%	6.7%	74.6%	No state itemized deductions
Oklahoma	23.8%	8.1%	65.8%	Fully bound to federal choice
Oregon	37.5%	14.6%	61.2%	Independent choice allowed
Pennsylvania	29.2%	8.9%	69.6%	No state itemized deductions
Rhode Island	33.3%	10.6%	68.2%	No state itemized deductions
South Carolina	28.1%	9.5%	66.2%	Conformity starting point is FTI (so federal itemization choice is built in for state purposes)
South Dakota	18.2%	5.3%	71.1%	No state PIT
Tennessee	20.3%	6.7%	67.0%	No state broad-based PIT
Texas	26.1%	9.2%	64.8%	No state PIT
Utah	36.3%	14.8%	59.2%	State credit determined with reference to federal itemized deduction or standard deduction (fully bound)
Vermont	27.8%	7.1%	74.3%	No state itemized deductions (conformity starting point FTI 2017 and prior; FAGI for 2018 and after)
Virginia	38.1%	17.7%	53.5%	Fully bound to federal choice
Washington	31.4%	13.4%	57.3%	No state PIT
West Virginia	17.4%	4.3%	75.2%	No state itemized deductions
Wisconsin	31.8%	7.8%	75.6%	State credit for certain federal itemized deductions exceed the state standard deduction (but a taxpayer can claim credit even if they do not itemize on federal return—so independent choice).
Wyoming	22.2%	6.5%	70.9%	No state PIT

<i>Minimum</i>	17.4%	4.3%	45.5%
<i>Maximum</i>	46.7%	24.0%	75.6%
<i>Median</i>	29.2%	8.9%	68.0%

APPENDIX B. CHANGES IN FEDERAL & STATE ITEMIZATION (TY2017 TO TY2018) FOR OREGON, NEBRASKA, & MARYLAND – DETAILS

		TY2017			TY2018			Change	
		Total # of Returns	# of Returns with Itemized Deductions	% of Returns with Itemized Deductions	Total # of Returns	# of Returns with Itemized Deductions	% of Returns with Itemized Deductions	Decline (from 2017 to 2018) in # of Taxpayers Who Itemize	% Decline (2017 to 2018) in Itemization Rate (as a % of the 2017 rate)
OR	Federal Returns ¹⁶²	1,938,620	727,520	37.5%	1,965,610	286,450	14.6%	441,070	61.2%
	State Returns ¹⁶³	1,785,350	824,001	46.2%	1,819,167	787,032	43.3%	36,969	6.3%
NE	Federal Returns	905,980	255,410	28.2%	909,600	69,390	7.6%	186,020	72.9%
	State Returns ¹⁶⁴	866,360	243,000	28.0%	867,910	62,570	7.2%	180,430	74.3%
MD	Federal Returns	2,986,140	1,393,890	46.7%	3,004,390	722,050	24.0%	671,840	48.5%
	State Returns ¹⁶⁵	3,107,116	1,412,104	45.4%	3,123,790	741,204	23.7%	670,900	47.8%
US	Federal Returns	152,903,232	46,852,677	30.6%	153,774,296	17,532,594	11.4%	29,320,083	62.8%

¹⁶² *SOI Tax Stats – Historic Table, Individual Income and Tax Data, by State and Size of Adjusted Gross Income*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2> [<https://perma.cc/YPZ4-NGJU>] (last visited Nov. 22, 2021); and author calculations. Same source for Oregon federal returns, Nebraska federal returns, and Maryland federal returns.

¹⁶³ See *supra* note 90.

¹⁶⁴ See NEB. DEP'T OF REVENUE, *supra* note 100.

¹⁶⁵ COMPTROLLER OF MD., INCOME TAX SUMMARY REPORT: TAX YEAR 2017, at 3 (2018); COMPTROLLER OF MD., INCOME TAX SUMMARY REPORT: TAX YEAR 2018, at 3 (2019).