

# THE TAX WAR ON POVERTY

Susannah Camic Tahk\*

*In recent years, the war on poverty has moved in large part into the tax code. Scholarship has started to note that the tax laws, which once exacerbated the problem of poverty, have become increasingly powerful tools that the federal government uses to fight against it. Yet questions remain about how this new tax war on poverty works, how it is different from the decades of nontax anti-poverty policy, and how it could improve. To answer these questions, this Article looks comprehensively at the provisions that make up the new tax war on poverty. First, this Article examines each major piece of the tax war on poverty—looking at its mechanics of each, its political history, and its effectiveness at addressing poverty. Second, this Article analyzes the tax war on poverty as a whole, identifying commonalities across its different provisions and highlighting its distinctive features. Third, this Article proposes ways that the tax war on poverty could be more effective. In particular, this Article examines how tax lawmakers and tax lawyers could approach this task. In so doing, this Article conceptualizes tax law as the new poverty law and proposes a growing role for public-interest tax lawyers.*

---

\* Assistant Professor of Law, University of Wisconsin Law School. For extremely helpful comments, suggestions, and discussions, thanks to Lisa Alexander, Anne Alstott, Alan Auerbach, Jordan Bergmann, Jennifer Bird-Pollan, Andrew Blair-Stanek, Tonya Brito, Dorothy Brown, Chas Camic, Gregory Crespi, Tessa Davis, Howard Erlanger, Miranda Perry Fleischer, Nicholas Herdrich, Leandra Lederman, Lily Kahng, David Kamin, Caitlin Madden, Ajay Mehrotra, Adam Mand, Beverly Moran, Victoria Nourse, Florence Wagman Roisman, Erin Scharff, Mitra Sharafi, Daniel Shaviro, Timothy Smeeding, Alex Tahk, Bill Whitford, and Anna Zielinski. Thanks also to my co-panelists on “The Role of the IRS in Administering Social Welfare Policy” at the American Bar Association Section of Taxation 2014 Midyear Meeting, to the audience members at the March 5, 2014 University of Wisconsin Institute for Legal Studies Faculty Workshop series and to the participants in the 2014 Tax Roundtable at Tulane Law School, the Indiana-Maurer School of Law faculty workshop, and the NYU Tax Policy Colloquium for comments. My gratitude also goes to everyone at Harmony Place and Mothers for Justice (New Haven, CT), A Simple House (Washington, DC), Southside Together Organizing for Power (Chicago, IL) and Street Pulse, the Tenant Resource Center and Shine608 (Madison, WI) for showing me both how grave the problem of poverty is in the United States and what committed people can do to solve it. For extraordinary research assistance, thanks to Lauren Fangmann. All errors are my own.

## TABLE OF CONTENTS

INTRODUCTION .....	793
I. PROVISIONS OF THE TAX WAR ON POVERTY .....	796
A. Earned Income Tax Credit .....	797
B. Child Tax Credit.....	804
C. Child Care Credit and Dependent Care Assistance Exclusion .....	805
D. Education Credits .....	807
E. Premium Assistance Credit .....	810
F. Low-Income Housing Tax Credit .....	810
G. New Markets Tax Credit.....	813
H. Work Opportunity and Empowerment Zone Employment Credits.....	815
I. Tax Subsidies for Anti-Poverty Organizations .....	817
II. COMMONALITIES ACROSS PROVISIONS IN TAX WAR ON POVERTY .....	820
A. Political Feasibility .....	820
1. Legislative Procedures .....	821
2. Public Opinion.....	822
B. Problems of Distributive Equity .....	826
C. Less Stigmatizing of Recipients .....	828
D. Administrative Ease .....	829
E. Flexibility: Market Responsiveness & Cash Subsidies .....	832
F. Neglect of the Extremely Poor.....	834
G. Weak Legal Infrastructures .....	835
III. MECHANISMS TO MAKE THE TAX WAR ON POVERTY MORE EFFECTIVE .....	837
A. Tax Lawmakers.....	837
1. Increasing Use of Refundable Credits .....	837
2. Shifting the Focus to Those in Deep Poverty .....	839
3. Developing Evaluation Procedures for Anti-Poverty Tax Programs.....	840
4. Reorienting the IRS .....	841
B. Tax Lawyers.....	842
1. “[T]raditional legal assistance in establishing or asserting clearly defined rights” .....	844
2. “[L]egal analysis and representation directed toward reform where the law is vague or destructively complex” .....	848
3. “[L]egal representation where the law appears contrary to the interests of the slum community” .....	849
4. “[L]egal representation in contexts which appear to be nonlegal and where no judicially cognizable right can be asserted” .....	850
CONCLUSION .....	851

## INTRODUCTION

In 1964, President Lyndon Johnson famously declared a “war on poverty.”<sup>1</sup> In recent decades, the war on poverty has moved into the tax code.<sup>2</sup> Johnson’s war on poverty consisted of an array of direct spending programs.<sup>3</sup> Today, in contrast, the federal government anchors many of its anti-poverty initiatives in the nation’s tax code.<sup>4</sup>

It has been 50 years since after Johnson first declared his war on poverty, yet the problem of poverty remains pervasive in American society. Commemorating the 50th anniversary of Johnson’s speech, *The New York Times* recently reported: “The poverty rate has fallen only to 15 percent from 19 percent in two generations, and 46 million Americans live in households where the government considers their income scarcely adequate.”<sup>5</sup> In fact, 21.8% of American children experienced poverty in 2012, placing the United States second from the bottom in the United Nations’s comparative study of child poverty in 35 developed countries.<sup>6</sup> To realize Johnson’s original promise that “every American citizen [can] fulfill his basic hopes,”<sup>7</sup> the nation still has great work to do.

The United States does continue to pursue Johnson’s goal. Increasingly, however, the federal government relies on the tax code to do so. While the federal government still uses many nontax programs to fight poverty, the list of anti-poverty programs based in the tax code is long and varied. It includes what I call “direct” programs that directly subsidize low-income individuals as well as “indirect” policies that create incentives for third parties to fulfill certain needs of the poor.

---

1. President Lyndon Baines Johnson, First State of the Union Address (Jan. 8, 1964), available at <http://www.c-span.org/video/?153275-1/state-union-address>.

2. For the phrase “move[d] to the tax code” to describe the war on poverty, see Len Burman & Elaine Maag, *The War on Poverty Moves to the Tax Code*, TAX NOTES TODAY (Jan. 6, 2014), <http://www.taxpolicycenter.org/UploadedPDF/1001711-war-on-poverty-moves-to-tax-code.pdf>.

3. These included, among others, the Office of Economic Opportunity, the Job Corps, Volunteers in Service to America, Upward Bound, Head Start, Legal Services, the Neighborhood Youth Corps, the Community Action Program, small business loan programs, rural programs, migrant worker programs, remedial education projects, local healthcare centers, food stamps, and Medicare and Medicaid. See Kent Germany, *War on Poverty*, in POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, AND POLICY 774–82 (Alice O’Connor & Gwendolyn Mink eds., 2004).

4. This trend has occurred in other areas of the law as well. For a discussion of that phenomenon, see my earlier article about it. Susannah Camic Tahk, *Everything is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67 (2013).

5. Annie Lowrey, *50 Years Later, War on Poverty is a Mixed Bag*, N.Y. TIMES, Jan. 5, 2014, at A1.

6. UNICEF OFFICE FOR RESEARCH, CHILD WELL-BEING IN RICH COUNTRIES: A COMPARATIVE OVERVIEW 7 (2013), available at [http://www.unicef-irc.org/publications/pdf/rc11\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/rc11_eng.pdf); see also Carmen DeNavas-Walt et al., INCOME, POVERTY & HEALTH INSURANCE COVERAGE IN THE U.S. 2012, U.S. CENSUS BUREAU 13 (2013), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf> [hereinafter INCOME, POVERTY & HEALTH].

7. Johnson, *supra* note 1.

Some of the anti-poverty tax programs tackle poverty head on by giving the poor more money; others treat poverty's causes and effects.

In particular, on the demand side, the Earned Income Tax Credit ("EITC") is the federal government's largest anti-poverty program.<sup>8</sup> The Child Tax Credit fulfills a similar purpose.<sup>9</sup> Accompanying it are the Child Care Tax Credit<sup>10</sup> and Dependent Care Assistance Exclusion,<sup>11</sup> which jointly subsidize the childcare expenses of middle- and low-income families. The American Opportunity<sup>12</sup> and Lifetime Learning<sup>13</sup> credits assist middle- and low-income individuals in paying educational expenses. The Premium Assistance Credit partially covers health insurance costs for middle- and low-income taxpayers.<sup>14</sup>

On the supply side, the Low-Income Housing Credit aims to help with the housing shortage that poor Americans face.<sup>15</sup> Furthermore, the New Markets Tax Credit stimulates investment in high-poverty communities.<sup>16</sup> The Work Opportunity<sup>17</sup> and Empowerment Zone Employment Credits<sup>18</sup> provide incentives to create jobs for members of hard-to-employ social groups. Likewise, organizations concerned with poverty relief receive tax subsidies in the form of tax exemptions and the ability to receive tax-deductible contributions.<sup>19</sup>

These direct and indirect programs, all of which this Article will discuss, are not the only major anti-poverty provisions contained in the federal tax code. Many other tax provisions also target lower-income groups or have some anti-poverty effect.<sup>20</sup> In addition, many of the programs that make up the tax war on poverty are, as this Article will discuss, not targeted exclusively at the poor. Yet they all provide at least some assistance to the poor through either alleviating their

---

8. I.R.C. § 32 (2012); John Karl Scholz et al., *Trends in Income Support, in* CHANGING POVERTY, CHANGING POLICIES, 203–212 (2009); see also Jennifer Bird-Pollan, *Who's Afraid of Redistribution? An Analysis of the Earned Income Tax Credit* 74 MO. L. REV. 251, 254 (2009); Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719, 725 (2012); Hilary Hoynes, *The Earned Income Tax Credit, Welfare Reform, and the Employment of Low-Skilled Single Mothers* (Aug. 22, 2008) (unpublished manuscript), available at [https://www.chicagofed.org/digital\\_assets/others/events/2007%20improving\\_economic\\_mobility/paper\\_earned\\_income\\_tax\\_credit.pdf](https://www.chicagofed.org/digital_assets/others/events/2007%20improving_economic_mobility/paper_earned_income_tax_credit.pdf).

9. I.R.C. § 24 (2012).

10. *Id.* § 21.

11. *Id.* § 129.

12. *Id.* § 25A.

13. *Id.*

14. *Id.* § 36B.

15. *Id.* § 42.

16. *Id.* § 45D.

17. *Id.* § 51.

18. *Id.* § 1391.

19. *Id.* §§ 170(a), 501(a), 501(c)(3).

20. See, e.g., *id.* § 221 (allowing a taxpayer to deduct interest on a qualified student loan as long as the taxpayer's income is below a certain level); *id.* § 35 (subsidizing healthcare purchases by workers, some of whom are presumably low income, who have lost jobs because of a federal trade agreement).

poverty directly, or addressing a cause or effect of poverty such as lack of housing or education.

The federal government's heavy use of the tax code to fight poverty is a relatively recent development. The federal government relies more heavily on the tax code to fight poverty now than it has in any earlier era. For the first time, the government's major anti-poverty programs include tax provisions, one of which has become the government's largest anti-poverty program.<sup>21</sup> Congress has enacted, or substantially expanded, most of the provisions listed above in the past 15 years.<sup>22</sup> This is because, as this Article will show, Congress and presidential administrations have found it increasingly politically feasible to pursue anti-poverty policy through the tax code. Tax law has become one way of overcoming some of the political obstacles that the nontax war on poverty has faced.

Recent scholarship, moreover, finds that the federal tax code in this era is better at reducing poverty than it is at its more traditional goal of mitigating inequality.<sup>23</sup> Indeed, in earlier decades, the tax code generally made poverty worse. To quote a recent post on *Washington Post's* Wonkblog: "You'd expect [the inequality] – taxes take your money, and not having enough money is a leading cause of poverty. But then that changed."<sup>24</sup> But exactly what changed? How does what I will christen the "tax war on poverty" operate, and how good is it at reducing poverty? What are its distinctive features? How can the lessons learned from the

---

21. See generally Hoynes, *supra* note 8.

22. The first major expansions of anti-poverty tax programs happened in 1993 with the doubling of the Earned Income Tax Credit and the permanence of the low-income housing credit. Congress and various presidential administrations have expanded that credit several times since, most notably as part of the American Recovery and Reinvestment Act of 2009. Pub. L. No. 111-5, § 1002, 123 Stat. 115, 312 (2009) [hereinafter Recovery Act of 2009]. Congress enacted the Child Tax Credit in 1997 and substantially expanded it in 2010. See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296, 3298 (2010) [hereinafter Tax Relief Act of 2010]; Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 105, 118 Stat. 1166 (2004); H.R. REP. NO. 108-696, at 33–34 (2004) (Conf. Rep.). Congress enacted the New Markets Tax Credit in 2000 and the Work Opportunity Credit in 1996. See Pub. L. No. 106-554, § 121, 114 Stat. 2763 (2000); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1201, 110 Stat. 1755 (1996). The Lifetime Learning Credit and the Hope Credit, the predecessor to the American Opportunity Credit, joined the tax code in 1997. ARRA expanded the Hope Credit into the American Opportunity Credit. Recovery Act of 2009 § 1004. Subsequent legislation extended those expansions. See Tax Relief Act of 2010 § 103; Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-240, § 103, 126 Stat. 2313 (2012) [hereinafter Tax Payer Relief Act of 2012]. The Premium Assistance Credit was part of 2010's health care reform bill, the Patient Protection and Affordable Care Act. See Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter Affordable Care Act of 2010].

23. David Kamin, *Reducing Poverty, Not Inequality: What Changes in the Tax System Can Achieve*, 66 TAX L. REV. 593, 594 (2013).

24. Dylan Matthews, *The Tax System is Keeping 2.2 Million People Out of Poverty*, WASH. POST WONKBLOG (Aug. 6, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/06/the-tax-system-is-keeping-2-2-million-people-out-of-poverty/>.

past 50 years of nontax anti-poverty policy enable tax lawmakers and lawyers to make the tax war on poverty more effective?

By introducing and developing the concept of the tax war on poverty, this Article seeks to confront these questions. This Article's thesis is that a substantial amount of anti-poverty policy has moved into the tax code, a move that offers significant advantages, disadvantages, and opportunities to improve the federal government's effectiveness at fighting poverty. To support this thesis, I will build on the work of poverty researchers who, along with tax scholars, have begun to examine certain individual provisions that the tax code now uses to fight poverty. Drawing on this research, this Article offers a comprehensive analysis of the tax war on poverty, considering the relevant provisions of the tax code as a totality. In doing this, this Article seeks to delineate the features that distinguish the tax war from the pretax war on poverty and to spur a more successful war on poverty going forward.

The Article proceeds in three steps. First, it examines the major provisions of the tax war on poverty, describing how each provision historically developed, and how successful it has been at combatting poverty. Second, considering these provisions in their entirety, this Article identifies their underlying commonalities and examines their positive and negative effects on poverty. These commonalities include political feasibility, problems of distributive equity, less stigmatizing of program recipients, administrative ease, program flexibility, neglect of the extremely poor, and weak legal infrastructures. Third, this Article proposes two mechanisms to make the tax war on poverty more effective. These mechanisms involve tax lawmakers (both legislative and administrative) and, even more importantly, tax lawyers. Regarding the latter, I argue that, in the contemporary phase of the war of poverty, tax lawyers can and should fill the roles that poverty lawyers played when Johnson's war on poverty first launched. Contrary to what conventional stereotypes may suggest, tax law *is* the new poverty law. Lawyers aiming to fight poverty have no better place to begin than with the tax code.

In addition, by examining the tax war on poverty, this Article turns a wide lens on changes that the last decades have brought to the federal government's anti-poverty policy more generally. In these years, the federal government has changed its approach to fighting poverty in a number of other ways beyond the move to the tax code. In particular, following 1996's welfare reform, many more anti-poverty programs are tied to work.<sup>25</sup> Additionally, in the past several decades, the federal government has emphasized not just alleviating poverty but addressing its causes and effects, such as lack of education and affordable housing. While these trends are beyond the scope of this Article, examining the tax war on poverty as a whole will also point to some of these issues and open up possibilities for future research evaluating these trends in tandem with the tax war on poverty.

## I. PROVISIONS OF THE TAX WAR ON POVERTY

Federal tax law currently has at its disposal an arsenal of weapons aimed at reducing poverty, its causes, and its effects. In this Article, I will focus on federal

---

25. VEE BURKE, CONG. RESEARCH SERV., 7-5700, THE 1996 WELFARE REFORM LAW 1-2 (2003), available at <http://royce.house.gov/uploadedfiles/the%201996%20welfare%20reform%20law.pdf>.

programs. State tax laws also play a key role in contributing to and combatting poverty. Some scholarship has begun to explore the extent to which that is the case, however, this important line of research is outside the scope of this Article.<sup>26</sup> Among the federal-level weapons, nine have been especially important. I will discuss each one in turn. For each, I will describe the provision, examine its political history, and consider the evidence on how effective it has been at fighting poverty. I will begin with the direct programs, and then turn to the indirect ones.

These provisions are major anti-poverty programs that Congress has embedded in the tax code. However, other tax provisions may have substantial influence on poverty. Individuals who fall within one of the government's various definitions of poverty may feel the effects of some of these others as well.<sup>27</sup> These include, among others: personal exemptions and, in some years, phasing out certain income levels;<sup>28</sup> the dependency exemptions;<sup>29</sup> the standard deduction;<sup>30</sup> the progressive rate structure;<sup>31</sup> the nonrefundable retirement savings credit;<sup>32</sup> the limits on itemized deductions;<sup>33</sup> and subsidies for bonds issued to develop distressed areas.<sup>34</sup>

#### A. *Earned Income Tax Credit*

Currently, the EITC is the federal government's largest anti-poverty program and probably the best known of its tax-based anti-poverty tools. According to economists John Karl Scholz, Robert Moffitt, and Benjamin Cowan: "No other federal antipoverty program has grown so rapidly since the mid-1980s."<sup>35</sup> Probably for this reason, the EITC has also been the focus of intense scholarly attention and periodic controversy.<sup>36</sup>

---

26. See, e.g., KATHERINE NEWMAN & ROURKE O'BRIEN, *TAXING THE POOR: DOING DAMAGE TO THE TRULY DISADVANTAGED* (Lee Friedman ed., 2011).

27. How to define "poverty" is a topic of academic interest that is beyond the scope of this Article. The Census Bureau currently uses an official poverty measure and a supplemental one, and this paper uses "poverty" to refer to the condition of living in either one. See Press Release, U.S. Dep't of Commerce, Census Bureau to Develop Supplemental Poverty Measure (Mar. 2, 2010), available at <http://www.commerce.gov/news/press-releases/2010/03/02/census-bureau-develop-supplemental-poverty-measure>. In the Article, I use the terms "poor" and "low income" interchangeably to refer to individuals who fall within either definition.

28. I.R.C. §§ 151(b), 151(d)(3)(A) (2012).

29. *Id.* § 151(c).

30. *Id.* § 63(c)(1).

31. *Id.* § 1(a)-(d).

32. *Id.* § 25B.

33. *Id.* § 68.

34. *Id.* §§ 143(j), 144(c).

35. Scholz et al., *supra* note 8, at 212.

36. See, e.g., Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Reagan Baughman, *The EITC and Low-Income Workers' Demand for Private Health Insurance*, in NAT'L TAX ASS'N, PROCEEDINGS OF 93D ANNUAL CONF. ON TAX'N 116 (2000); Bird-Pollan, *supra* note 8; Marsha Blumenthal et al., *Participation and Compliance With the Earned Income Tax Credit*, 58 NAT'L TAX J. 189 (2005); Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of*

The EITC provides a cash subsidy to low-income families in proportion to their earned income up to a certain limit, above which the credit phases out.<sup>37</sup> The

---

*Benefits to the Working Poor Through the Tax System*, 2006 WIS. L. REV. 1103 (2006); Dorothy A. Brown, *Race & Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Nada Eissa & Hilary Hoynes, *The Earned Income Tax Credit and the Labor Supply of Married Couples*, NAT'L BUREAU OF ECON. RES. (1998); Katie Fitzpatrick & Jeffrey P. Thompson, *The Interaction of Metropolitan Cost-of-Living and the Federal Earned Income Tax Credit: One Size Fits All*, 63 NAT'L TAX J. 419 (2010); Daniel P. Glitterman et al., *Expanding the EITC for Single Workers and Couples Without Children: Tax Relief for All Low-Wage Workers*, 15 GEO. J. ON POVERTY L. & POL'Y 245 (2008); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013); V. Joseph Hotz & John Karl Scholz, *The Earned Income Tax Credit*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 141 (Robert A. Moffitt ed., 2001); Hoynes, *supra* note 8; John F. Infranca, *The Earned Income Tax Credit as an Incentive to Report: Engaging the Informal Economy Through Tax Policy*, 83 N.Y.U. L. REV. 203 (2008); Vada Waters Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J. L. REFORM 83 (2010); Bruce D. Meyer, *The Effects of the Earned Income Tax Credit and Recent Reforms*, in TAX POLICY & THE ECONOMY, NAT'L BUREAU OF ECON. RES. 153 (2010); Robert A. Moffitt & John Karl Scholz, *Trends in the Level & Distribution of Income Support*, in 24 TAX POLICY & THE ECONOMY, NAT'L BUREAU OF ECON. RES. 111–52 (Jeffrey R. Brown ed., 2010); Robert A. Moffitt, *The Negative Income Tax and the Evolution of U.S. Welfare Policy*, 17 J. ECON. PERSP. 119 (2003); Kerry Ryan, *EITC As Income (In)Stability?*, 15 FLA TAX REV. 583 (2014); David Neumark & William Wascher, *Using the EITC to Help Poor Families: New Evidence and a Comparison With the Minimum Wage*, 54 NAT'L TAX J. 281 (2001); Cherie O'Neil & Linda Nelsestuen, *The Earned Income Credit: The Need for a Wealth Restriction for Eligibility Determination*, 63 TAX NOTES 1189 (1994); Jonathan P. Schneller et al., *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 177 (2012); Schneller, *supra* note 8; John Karl Scholz, *Taxation & Poverty 1960–2006*, 25 FOCUS 52 (2007); Scholz et al., *supra* note 8; Laurence Seidman & Saul Hoffman, *Getting Back to the Earned Income Tax Credit: The Next EITC Reform*, 100 TAX NOTES 1429 (2003); H. Luke Shaefer & Kathryn Edin, *Rising Extreme Poverty in the United States and the Response of Federal Means-Tested Transfer Program*, 87 SOC. SERV. REV. 250 (2011); Janet Spragens, *Welfare Reform and Tax Counseling: Overlooked Part of the Welfare Debate?*, 73 TAX NOTES 353 (1996); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 438–41 (2008); Laura Tach & Sarah Halpern-Meekin, *Tax Code Knowledge and Behavioral Responses Among EITC Recipients: Policy Insights from Qualitative Data*, 33 J. POL'Y ANALYSIS AND MGMT 413 (2014); Dennis J. Ventry, Jr., *Welfare By Any Other Name: Tax Transfers and the EITC*, 56 AM. U. L. REV. 1261 (2007); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004); Laura Wheaton & Elaine Sorensen, *Tax Relief for Low-Income Fathers Who Pay Child Support*, in NAT'L TAX ASS'N, PROCEEDINGS OF 90TH ANNUAL CONF. ON TAX'N 260 (1997); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1869 (2005); James J. Heckman et al., *Learning-by-Doing vs. On-the-Job-Training: Using Variation Induced by the EITC to Distinguish Between Models of Skill Formation* (Nat'l Bureau of Econ. Research, Working Paper No. 9083, 2002); David Neumark & William Wascher, *Using the EITC to Help Poor Families: New Evidence and a Comparison With the Minimum Wage* (Nat'l Bureau of Econ. Research, Working Paper No. 7599, 2000).

37. See generally I.R.C. § 32 (2012).



credit is fully refundable.<sup>38</sup> A refundable credit is one where the taxpayer gets a refund from the Internal Revenue Service (“IRS”) to the extent that the credit amount exceeds tax liability. For example, if a taxpayer has \$1,000 in tax liability and is entitled to a \$5,000 refundable credit, the credit will reduce the taxpayer’s tax bill to zero, and the taxpayer will get \$4,000 from the IRS. To calculate her annual EITC, each taxpayer begins with “earned income” for the year below a ceiling amount, indexed annually for inflation.<sup>39</sup> Then, the taxpayer multiplies the earned income figure by a “credit percentage.”<sup>40</sup> An individual’s “earned income” consists of wages, salaries, tips, and other employee compensation, including net self-employment income.<sup>41</sup>

The EITC statute restricts its benefits to low-income families by phasing out the credit for taxpayers whose adjusted gross income exceeds a phase-out amount.<sup>42</sup> Above the phase-out amount, a taxpayer must reduce her otherwise available credit.<sup>43</sup> She reduces it by the “phase-out percentage” of the amount by which her adjusted gross income exceeds a statutorily set “phase-out amount.”<sup>44</sup> Married couples may not file separately to avoid the phase-out amount and instead must file jointly.<sup>45</sup> For tax year 2013, the maximum credit—for incomes below the phase-out amounts—was \$6,044 for families with three or more qualifying children, \$5,372 with two qualifying children, \$3,250 with one qualifying child, and \$487 with no qualifying children.<sup>46</sup> Additionally, taxpayers must have less than \$3,300 in investment income for the year.<sup>47</sup> To take an example, for 2013, a single taxpayer with one child and \$20,000 in earned income (for example, wages) could have claimed a credit of \$2,850. If he had wages of \$17,000 in earned income, he could claim the maximum credit amount of \$3,250. If his earned income rose to \$30,000, he would only be able to obtain a \$1,250 EITC, and if his earned income exceeded \$37,870, he could no longer take the EITC.

Significantly, while traditional welfare support has contracted substantially over the past 20 years, the EITC’s own history is one of persistent and sustained growth. While politicians have sometimes proposed significant cuts to the EITC,

---

38. I.R.C. § 32 is part of subpart C of part iv of subchapter A of Chapter 1 of the Code, entitled “Refundable Credits.” Refundability arises from the lack of statutory limitation of the credit to tax liability. *See also* BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 37.1 (3d ed. Supp. 2012).

39. I.R.C. § 32(a)(1)-(2); 32(j) (2012).

40. *Id.* § 32(e).

41. *Id.* § 32(c)(2).

42. *Id.* § 32(a)(2)(B).

43. *Id.* § 32(a)(2).

44. *Id.*

45. *Id.* § 32(d).

46. *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, INTERNAL REVENUE SERV. (Mar. 27, 2014), <http://www.irs.gov/Individuals/EITC-Income-Limits,-Maximum-Credit--Amounts-and-Tax-Law-Updates> [hereinafter *EITC Income Limits*].

47. *Id.*

they have not passed.<sup>48</sup> EITC growth has occurred in all kinds of political climates. As the following material will demonstrate, the EITC has expanded under Republican and Democratic presidential administrations and houses of Congress controlled by both parties, even during periods of partisan gridlock. The EITC has also expanded across different economic conditions and shifting attitudes about welfare policy.

The EITC got its start in President Richard Nixon's administration.<sup>49</sup> Nixon was influenced by academic economists, such as Milton Friedman, who advocated for a "negative income tax" which would provide low-wage individuals with additional work incentives.<sup>50</sup> Therefore, in 1969 Nixon proposed a "family assistance plan" ("FAP").<sup>51</sup> The purpose of the FAP was to replace existing federal anti-poverty programs with a guaranteed minimum income for every U.S. family.<sup>52</sup> Eventually, the Tax Reduction Act of 1975 enacted a version of Nixon's proposal; a refundable credit labeled the EITC.<sup>53</sup> At the time, it was a credit equal to 10% of each taxpayer's first \$4,000 in income, with a phase out between \$4,000 and \$8,000.<sup>54</sup>

The EITC proceeded to grow during the next four decades. Under President Jimmy Carter, and as part of the Revenue Act of 1978,<sup>55</sup> the maximum EITC increased from \$400 to \$500, the phase-out range increased to an income of \$10,000, and the credit became permanent.<sup>56</sup> This trend toward expansion continued during the 1980s during Ronald Reagan's presidency.<sup>57</sup> Eager to appeal to the working poor—a swing constituency<sup>58</sup>—both political parties in this period<sup>59</sup> supported increases to the EITC,<sup>60</sup> passing the Tax Reform Act of 1986. The Act expanded the credit by indexing the maximum earned income and phase-out income levels to inflation.<sup>61</sup> In 1990, Congress and President George Bush expanded the EITC

---

48. See, e.g., Tax Reform Bill, H.R. \_\_\_, 113th Cong. § 1103 (Discussion Draft, Feb. 21, 2014), available at [http://waysandmeans.house.gov/uploadedfiles/statutory\\_text\\_tax\\_reform\\_act\\_of\\_2014\\_discussion\\_draft\\_\\_022614.pdf](http://waysandmeans.house.gov/uploadedfiles/statutory_text_tax_reform_act_of_2014_discussion_draft__022614.pdf).

49. The history of the EITC has been well documented in a number of places. See, e.g., Bird-Pollan, *supra* note 8, at 252–53, Greene, *supra* note 36, at 531–32; Moffitt, *supra* note 36, at 120, 122, 134. I found the most detailed account in CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE (1997), from which the following discussion will draw.

50. Moffitt, *supra* note 36, at 120.

51. HOWARD, *supra* note 49, at 65.

52. *Id.* at 65–66.

53. *Id.* at 69.

54. *Id.*

55. *Id.* at 143–44.

56. *Id.* at 144.

57. *Id.* at 145–50.

58. *Id.* at 142.

59. *Id.* at 142–43.

60. *Id.* at 142–49.

61. THOMAS L. HUNGERFORD & REBECCA THEISS, ECON. POLICY INST., THE EARNED INCOME TAX CREDIT AND THE CHILD TAX CREDIT: HISTORY, PURPOSE, GOALS & EFFECTIVENESS 3 (2013), available at <http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/>.

through extending eligibility, increasing the maximum credit from \$953 to \$1,702, and adjusting credit amounts for family size.<sup>62</sup>

All of this was prior to the major expansion of the EITC in 1993. Believing that President Bill Clinton's frequent campaign promise "to make work pay" contributed to his electoral victory,<sup>63</sup> his advisers included an EITC increase in the president's first budget. As a result, although that first budget consisted mostly of budget cuts aimed at deficit reduction, it added \$20.8 billion to the EITC, nearly doubling the program.<sup>64</sup> More recently, President Barack Obama's administration has ushered in further substantial EITC growth. As part of the President's 2009 stimulus bill—the American Recovery and Reinvestment Act ("ARRA")—the EITC temporarily added an increased benefit category for families with three children and raised the phase-out range.<sup>65</sup> Together, the Tax Relief and Job Creation Act of 2010 and the American Taxpayer Relief Act of 2012 made these changes law through 2017.<sup>66</sup> Then, in his 2014 State of the Union Address, the President's single legislative proposal concerned the EITC:<sup>67</sup>

There are other steps we can take to help families make ends meet, and few are more effective at reducing inequality and helping families pull themselves up through hard work than the Earned Income Tax Credit. Right now, it helps about half of all parents at some point. Think about that. It helps about half of all parents in America at some point in their lives.<sup>68</sup>

Emphasizing the bipartisan support that the credit has always attracted, the President continued: "I agree with Republicans like Senator Rubio that it doesn't do enough for single workers who don't have kids. So let's work together to strengthen the credit, reward work, help more Americans get ahead."<sup>69</sup>

The credit has come to play a major role in reducing the nation's poverty rate. According to NYU legal scholar David Kamin, the federal tax system is now responsible for lessening the poverty rate substantially, particularly the child poverty rate,<sup>70</sup> and "[t]he expansion of the EITC is responsible for about 60 percent of the shift from the mid-1980s to 2011."<sup>71</sup> Along similar lines, economist Bruce Meyer

---

62. HOWARD, *supra* note 49.

63. *Id.* at 157.

64. *Id.* at 158.

65. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1002, 123 Stat. 115, 312 (2009) (amending 26 U.S.C. § 32).

66. Tax Relief Act of 2010, Pub. L. No. 111-312, § 103, 124 Stat. 3296, 3299 (2010); Tax Payer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313 (2012) (codified at 26 U.S.C. § 32(b)(3)(A)).

67. *This is the Only New Legislative Proposal from Obama's State of the Union Address*, TIME (JAN, 28, 2014), <http://swampland.time.com/2014/01/28/state-of-the-union-obama-earned-income-tax-credit/>.

68. President Barack Obama, *State of the Union Address*, WHITE HOUSE (Jan. 28, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

69. *Id.*

70. *See generally* Kamin, *supra* note 23.

71. Kamin, *supra* note 23, at 634.

finds that, already by 2007, the credit “lifted just under 4.0 million people above the poverty line, reducing the overall poverty rate by 10% and the poverty rate among children by 16%.”<sup>72</sup> The Center for Budget and Policy Priorities recently found that in 2012, “the EITC lifted about 6.5 million people out of poverty, including about 3.3 million children. The number of poor children would have been one-quarter higher without the EITC.”<sup>73</sup>

Even so, some poverty researchers have observed that the EITC is less effective at reducing poverty than the cash welfare program that preceded it as the country’s largest anti-poverty program. These scholars measure poverty with a metric known as the “poverty gap”; a gap they define as the sum of the differences for all poor families between the income that poor families actually have and the poverty line.<sup>74</sup> Using this metric, economists Scholz, Moffitt, and Cowan have found that federal “transfers now do less to close the poverty gap than they did” in the 1980s and 1990s.<sup>75</sup> This is so because, while nontax cash transfer programs succeeded in closing 72.7% of the poverty gap in 1993, these nontax measures closed only 66.2% of the gap by 2004.<sup>76</sup> The major change in anti-poverty policy during that period was replacing cash-based welfare with the EITC as the nation’s primary anti-poverty program. The federal government spends more on the EITC than it used to spend on cash-based welfare, laying out \$59 billion on the EITC in 2012,<sup>77</sup> as compared to \$44.7 billion in inflation-adjusted dollars on cash-based welfare, or Aid to Families with Dependent Children (“AFDC”), in 1995, the program’s peak spending year.<sup>78</sup>

Scholz et al. go on to isolate the current effect of the EITC on poverty, finding that the program filled 4.5% of the poverty gap in 2004, the most recent year for which economists have performed the analysis.<sup>79</sup> Meanwhile, food stamps, on which the government currently spends less than it does on the EITC, filled 6.3% of the poverty gap. However, in 1989, when AFDC was still the government’s primary anti-poverty device, it filled an average of 21.7% of the poverty gap.<sup>80</sup> In 1991, it filled an average of 21.19%.<sup>81</sup> Even in 2001, after 1996’s landmark welfare reform legislation and the subsequent nationwide fall in welfare caseloads, the successor to AFDC, Temporary Assistance to Needy Families (“TANF”), filled 8.1% of the poverty gap.<sup>82</sup>

---

72. Meyer, *supra* note 36, at 159.

73. CT. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT (2014), available at <http://www.cbpp.org/files/policybasics-eitc.pdf>.

74. Scholz et al., *supra* note 8, at 216.

75. *Id.* at 229.

76. *Id.*

77. STAFF OF JOINT COMM. ON TAXATION, 113TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017, JCS-1-13 45 (Comm. Print 2013) [hereinafter, JCT 2012 Report].

78. Scholz et al., *supra* note 8, at 232.

79. *Id.* at 224.

80. Author’s own calculations, using data from James P. Ziliak, *Filling the Poverty Gap Then and Now*, in 1 FRONTIERS OF FAMILY ECON. 39 (Peter Rupert ed., 2008).

81. *Id.*

82. *Id.*

The EITC has likely improved its performance somewhat during the last decade. From 2004 to 2012, spending on the EITC increased by 20.4%.<sup>83</sup> If the effect on the poverty gap has been proportional to this increase, the EITC would now be filling roughly 5.4% of the poverty gap.<sup>84</sup> But even this generous 5.4% estimate falls well below the 21.7% of the poverty gap that AFDC once filled. However, in the present era the EITC fulfills more of the poverty gap than TANF does. In 2004, TANF filled 2.5% of the poverty gap compared to the EITC's 4.5%.<sup>85</sup> This shows that, while the EITC is not as effective as welfare once was, it is currently a more effective way of reducing poverty than welfare is today.

However, research has also shown that the EITC is not particularly effective at reducing poverty among the poorest citizens. This is because the EITC also distributes substantial benefits to families *above* the poverty line, and it requires recipients to have earned income *aside from* government benefits—a requirement that families in (what scholars call) “extreme poverty” may not meet.<sup>86</sup> Taking account of these stipulations, economist Moffitt found in 2013 that the EITC is now “regressive within low income ranges and provides greater benefits to those with higher family earnings.”<sup>87</sup>

Conventional wisdom has sometimes observed that perhaps the EITC is ineffective because recipients only access it once a year and cannot use it throughout the year to cover expenses. The IRS attempted an advance EITC program, but it faced low take-up rates and accuracy issues, and it is no longer in place.<sup>88</sup> However, some scholarship has found that recipients welcome the fact that the EITC serves as a forced-savings mechanism.<sup>89</sup> Interviews with EITC beneficiaries reveal that they are particularly likely to use their tax refunds to make large investment purchases, such as cars, or to pay down debt.<sup>90</sup> In fact, low-income taxpayers often increase employer withholdings throughout the year, which reduces their monthly paychecks but maximizes tax refunds.<sup>91</sup> Whether this, or other factors, contributes to the EITC's relative effectiveness or ineffectiveness remains a topic for future study.

---

83. JCT REPORT 2012, *supra* note 77, at 45; Scholz et al., *supra* note 8, at 233.

84. Author's own calculation based on JCT REPORT 2012, *supra* note 77, at 42; Scholz et al., *supra* note 8, at 221, 233.

85. Scholz et al., *supra* note 8, at 221. These are not dynamic estimates, so the figures might be different taking into account various incentive effects.

86. Shaefer & Edin, *supra* note 36, at 253.

87. Robert A. Moffitt, *The Great Recession and the Social Safety Net*, ANNALS AM. ACAD. POL. & SOC. SCI (forthcoming 2014) (manuscript at 25).

88. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1110, ADVANCE EARNED INCOME TAX CREDIT: LOW USE AND SMALL DOLLARS PAID IMPEDE IRS'S EFFORTS TO REDUCE HIGH NONCOMPLIANCE 3-5 (2007); Education, Jobs and Medicaid Assistance Act, Pub. L. No. 111-226, 124 Stat. 2403 (2010).

89. Greene, *supra* note 36, at 561-62; Tach & Halpern-Meekin, *supra* note 36.

90. Stephanie Wagner, *Building Assets, Building Futures: Does Receiving The Earned Income Tax Credit (EITC) Help Poor Single Mothers Build Assets For The Future?* 16 (Apr. 18, 2007) (unpublished manuscript) (on file with author).

91. Greene, *supra* note 36 at 561-62; Tach & Halpern-Meekin, *supra* note 36.

### B. Child Tax Credit

The federal tax code also currently provides direct subsidies to poor families through the Child Tax Credit. Applicable for years after 1997, the Child Tax Credit provides a tax credit for each “qualifying child” of a taxpayer.<sup>92</sup> The maximum credit currently equals \$1,000 per child through 2017.<sup>93</sup> Like the EITC, this credit phases out above certain threshold incomes.<sup>94</sup> Also like the EITC, the credit is not available at all above a series of higher thresholds.<sup>95</sup> At present, the Child Tax Credit is partially refundable for incomes over \$3,000.<sup>96</sup> This means that, if the otherwise allowable Child Tax Credit exceeds what the taxpayer owes in tax for the year, the taxpayer receives a check from the government equal to a part of that excess amount. The refundability rules surrounding the Child Tax Credit require that only workers with income may receive the credit.<sup>97</sup> Individuals and families with no income are not able to receive any credit.<sup>98</sup>

Again, like the EITC, the Child Tax Credit also has a history of steady expansion. The Taxpayer Relief Act of 1997 enacted the credit at \$400 per child for 1998 and \$500 per child for 1999.<sup>99</sup> The Economic Growth and Tax Relief Reconciliation Act of 2001 increased the credit from \$500 to \$1,000 per child, made it refundable for a larger number of families, and allowed families who pay the Alternative Minimum Tax to take the credit.<sup>100</sup> ARRA allowed the refundability threshold.<sup>101</sup> The Job Creation Act of 2010 and the American Taxpayer Relief Act of 2012 together extended the expansions of both 2001 and 2009 through 2017.<sup>102</sup> Obama has proposed to make them permanent.<sup>103</sup>

The Child Tax Credit costs the federal government roughly the same amount as the EITC but has been less successful at fighting poverty. In 2012, the Child Tax Credit was worth a total of \$56.8 billion, compared to the EITC’s \$59 billion.<sup>104</sup> But these figures are not comparable because many Child Tax Credit recipients are not low income. This is because the EITC’s income cutoffs are

92. I.R.C. § 24(a) (2012).

93. *Id.*

94. *Id.* § 24(b)(1).

95. *Id.* § 24(b)(2)(A)-(C).

96. *Id.* § 24(d)(3).

97. *Id.* § 24(d)(1), (3)-(4). The credit is refundable above \$3,000 of income. Below \$3,000 of income, a taxpayer would not have any tax to pay, so would not be able to take advantage of a nonrefundable credit. *Id.*

98. *Id.* § 24(c).

99. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 796 (1997).

100. ELAINE MAAG & ADAM CARASSO, TAX POLICY CTR., TAXATION AND THE FAMILY: WHAT IS THE CHILD TAX CREDIT? (2013), available at <http://www.taxpolicycenter.org/briefing-book/key-elements/family/ctc.cfm>.

101. Recovery Act of 2009, Pub. L. No. 115-5, § 1003, 123 Stat. 115 (2009).

102. Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3299 (2009); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2319 (2012).

103. EXECUTIVE OFFICE OF THE PRESIDENT, U.S. TREASURY DEP’T, THE PRESIDENT’S PROPOSAL TO EXPAND THE EARNED INCOME TAX CREDIT 4 (2014), available at [http://www.whitehouse.gov/sites/default/files/docs/eitc\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/eitc_report.pdf)

104. JCT 2012 REPORT, *supra* note 77, at 45-46.

substantially lower than those for the Child Tax Credit.<sup>105</sup> For example, for a family with two children, the EITC is not available if the family makes more than \$48,378.<sup>106</sup> For 2014, the EITC will begin to phase out for two-child families above \$17,530.<sup>107</sup> In contrast, families with up to \$149,001 in annual income may still take the Child Tax Credit.<sup>108</sup> The Child Tax Credit does not start to phase out for a two-child family until the family has \$110,000 in annual income.<sup>109</sup>

Additionally, in the lowest income ranges, the EITC's subsidy is larger than the one the Child Tax Credit provides. For instance, for a two-child family with an income below the phase-out threshold, the EITC will be \$5,372; however, that family will be able to take only a \$2,000 Child Tax Credit. In addition, some families have incomes that are simply too low to qualify for the Child Tax Credit. The Tax Policy Center found that in 2011, 28% of children "whose parents work lived in families that received less than the full credit because the parents earned too little."<sup>110</sup> Further, "[f]ive percent of these children were in families which received no credit at all because their earnings fell below the refundability threshold."<sup>111</sup>

This limitation reflects the deliberate congressional choice to target the Child Tax Credit toward the poor and the middle-class, rather than to focus more narrowly on lower-income families—those that are the very poorest. As a result of this choice, the Child Tax Credit does not and cannot have as large an impact on poverty as the EITC. Indeed, Scholz et al. found that, in 2004, the Child Tax Credit was responsible for closing only 0.5% of the poverty gap compared to the EITC's 4.5%.<sup>112</sup> Together, the two programs closed only 5% of the poverty gap, again compared to the average of 21.7% that AFDC closed back in 1991.<sup>113</sup>

### *C. Child Care Credit and Dependent Care Assistance Exclusion*

One of the most important needs facing poor working families in the United States is childcare.<sup>114</sup> Presently, one of the federal government's primary means of subsidizing childcare is through provisions in the tax code, namely, the Child Care Credit and the exclusion for employer-provided dependent-care assistance.<sup>115</sup>

---

105. *Compare Ten Facts about the Child Tax Credit*, INTERNAL REVENUE SERV. (Feb. 10, 2011), <http://www.irs.gov/uac/Ten-Facts-about-the-Child-Tax-Credit> (Beginning phase out at \$75,000 for single taxpayers and \$110,000 for married taxpayers filing jointly regardless of number of children), with *EITC Income Limits*, *supra* note 46 (allowing a maximum of \$46,227 for those filing solo and \$51,567 for married filing jointly).

106. *EITC Income Limits*, *supra* note 46.

107. *Earned Income Tax Parameters, 1975–2014*, TAX POLICY CTR. (Jan. 23, 2014), [http://www.taxpolicycenter.org/taxfacts/Content/PDF/historical\\_eitc\\_parameters.pdf](http://www.taxpolicycenter.org/taxfacts/Content/PDF/historical_eitc_parameters.pdf).

108. I.R.C. § 24(b)(2)(C) (2012).

109. *Id.* § 24(b)(2).

110. MAAG & CARASSO, *supra* note 100.

111. *Id.*

112. Scholz et al., *supra* note 8, at 221.

113. *See supra* note 84 and accompanying text.

114. *See, e.g.*, R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* 335 (2000).

115. Mary L. Heen, *Welfare Reform, Child Costs and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 *YALE L. & POL'Y REV.* 173, 173 (1993).

Combined, these two provisions cost the federal government \$2.5 billion in 2010,<sup>116</sup> compared to the \$5 billion the federal government spent on direct grants to states to operate childcare facilities.<sup>117</sup>

Both the Child Care Credit and the exclusion for dependent-care assistance tie support for childcare to work. With the Child Care Credit, taxpayers may take a nonrefundable credit of between 20% and 35% of their “employment-related expenses” for the care of “qualifying individuals.”<sup>118</sup> For a taxpayer’s household that include one qualifying individual, the statute caps “employment-related expenses” at \$3,000 and, if the household includes two or more qualifying individuals, the cap is \$6,000.<sup>119</sup> Crucially, the expenses for which the taxpayer claims the childcare credit must be what the statute terms “employment-related expenses.”<sup>120</sup> “Employment-related expenses” are those that enable the taxpayer to be “gainfully employed.”<sup>121</sup> Thus, to receive the credit, a taxpayer has to be either actually employed or actively looking for work, and the taxpayer’s spouse must work, enroll in school, or be disabled.<sup>122</sup>

The other tax benefit for childcare contained in the tax code is the exclusion for dependent-care assistance.<sup>123</sup> This provision allows a taxpayer to exclude from gross income any amounts received from his employer pursuant to a “dependent care assistance” program.<sup>124</sup> The excluded payments may pertain to childcare provided both on and off of the employer’s premises, including any reimbursements an employer might offer for employee childcare.<sup>125</sup> The rules for employers who intend to offer dependent-care assistance programs are fairly complex, but the idea behind them is to prevent employers from using their childcare system to discriminate against lower-paid employees. For instance, the program must not favor highly compensated employees and the average benefit for rank-and-file employees must be at least 55% of the average benefit for highly compensated employees.<sup>126</sup> The maximum excludible amount is \$5,000.<sup>127</sup>

Congress enacted the Child Care Credit in 1976, after several decades of offering less generous deductions for employment-related childcare expenses, and it tinkered with the credit in 1981.<sup>128</sup> Since then, Congress has not revised the Child

116. STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2010–2014, 47 (Comm. Print 2010).

117. Hannah Matthews, *Child Care Assistance in 2009: Spending Update*, CTR. FOR LAW & SOC. POLICY 1 (March 2011), available at <http://www.clasp.org/resources-and-publications/publication-1/childcareassistance2009.pdf>.

118. I.R.C. § 21(a)(1)-(2) (2012).

119. *Id.* § 21(c)(1)-(2).

120. *Id.* § 21(b)(2)(A).

121. *Id.*

122. Treas. Reg. § 1.21-1(c)(1) (2007).

123. I.R.C § 129 (2012).

124. *Id.* § 129(d)(1).

125. *Id.* §§ 21(b)(2), 129(a)(1), 129(e)(1).

126. *Id.* §§ 129(d)(2), (8)(A).

127. *Id.* § 129(d)(6).

128. BITTKER & LOKKEN, *supra* note 38, ¶ 37.2. See also Heen, *supra* note 115, at 173; Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349 (1994).



Care Credit.<sup>129</sup> The Dependent Care Assistance Exclusion entered the tax code in 1981.<sup>130</sup> Congress altered it somewhat in 1986, but not since.<sup>131</sup>

Both the Child Care Credit and the dependent-care assistance program help low-income families. Congress, however, did not market either one especially at the poor because one is a nonrefundable credit<sup>132</sup> and the other is an exclusion.<sup>133</sup> As a result, neither is available to taxpayers who have no income tax liability. The standard deduction and the personal and dependency exemptions, along with the other poverty-related tax benefits, mean that many low-income taxpayers in fact do not have any positive tax liability.<sup>134</sup> In the Child Care Credit, Congress did include a 35% rate specifically for taxpayers who have annual incomes below \$15,000, many of whom are presumably low-income.<sup>135</sup> This suggests that Congress intended for some low-income families to take this credit. Poverty scholars have observed that many families may be genuinely low-income without falling beneath the federal poverty line. Therefore, some of these families may be the congressionally intended recipients of the childcare tax benefits.

Even so, many poor families remain ineligible for these benefits since neither is a refundable credit. This is the reason the many commentators have proposed making the Child Care Credit refundable.<sup>136</sup> Scholars have also pointed out that the two childcare tax benefits have failed to address the needs of poor families because taxpayers may only receive them once a year at tax-refund time.<sup>137</sup> Neither provides an ongoing source of cash support on which taxpayers may draw to meet regular childcare demands.<sup>138</sup>

#### *D. Education Credits*

The tax code provides a number of incentives for post-secondary education, including preferential tax treatment of Coverdell educational savings accounts,<sup>139</sup> a

129. *Id.*

130. BITTKER & LOKKEN, *supra* note 38, ¶ 63.9.

131. *Id.*

132. I.R.C. § 21 (2012).

133. *Id.* § 129.

134. *See infra*, Part I.C.

135. I.R.C. § 21(c) (2012).

136. Jonathan B. Forman, *Beyond President Bush's Child Tax Credit Proposal: Towards a Comprehensive System of Tax Credits to Help Low-Income Families With Children*, 38 EMORY L.J. 661, 678–79 (1989); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1059 (1993); Brian Wolfman, *Child Care, Work, and the Federal Income Tax*, 3 AM. J. TAX POL'Y 153, 191 (1984); June H. Zeitlin & Nancy D. Campbell, *Strategies to Address the Impact of the Economic Recovery Tax Act of 1981 and the Omnibus Budget Reconciliation Act of 1981 on the Availability of Child Care for Low-Income Families*, 28 WAYNE L. REV. 1601, 1624–27 (1982); Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319, 1333–37 (1992).

137. Heen, *supra* note 115, at 202.

138. *Id.*

139. I.R.C. § 530 (2012).

deduction for student loan interest,<sup>140</sup> and the education credits.<sup>141</sup> The last of these, the education credits, represent the most concerted Congressional effort to encourage low-income individuals to assume educational costs, so I will focus on those here. However, all of the education provisions likely have some effect on poverty.

Since the 1990s, the tax code has had two major tax credits for education, the Hope Credit and the Lifetime Learning Credit.<sup>142</sup> More recently, at the urging of Obama Administration, Congress has replaced the Hope Credit with the more generous American Opportunity Credit for tax years 2009 through 2017 (and perhaps thereafter).<sup>143</sup>

The nonrefundable Lifetime Learning Credit equals 20% of the first \$5,000 of a taxpayer's "qualified tuition and related expenses," including tuition at a part-time or graduate program.<sup>144</sup> The \$5,000 cap applies on a per family basis to the aggregate expenses of the taxpayer and the taxpayer's dependents.<sup>145</sup> The Lifetime Learning Credit phases out above certain incomes, adjusted for inflation.<sup>146</sup> In contrast, the American Opportunity Credit equals 100% of the first \$2,000 of a taxpayer's qualified tuition and related expenses for a tax year, plus 25% of the next \$2,000 of expenses.<sup>147</sup> To take the American Opportunity Credit, a student must be enrolled at least half time in a qualified higher education program.<sup>148</sup> Forty percent of the American Opportunity Credit is refundable.<sup>149</sup>

Congress enacted the Lifetime Learning Credit and the Hope Credit in 1997.<sup>150</sup> As with the other anti-poverty tax statutes, the history of these credits has been one of consistent growth and expansion. Since temporarily replacing the Hope Credit with the more generous American Opportunity Credit,<sup>151</sup> Congress has already extended the credit twice.<sup>152</sup> The federal government spends a substantial amount of money through these credits each year. In 2012, the American Opportunity Credit cost \$21.8 billion and the Lifetime Learning Credit cost \$2

140. *Id.* § 222.

141. *Id.* § 25A.

142. See *infra* text accompanying note 150.

143. Recovery Act of 2009, Pub. L. No. 115-5, § 1003, 123 Stat. 115 (2009).

144. IRC § 25A(c) (2012).

145. I.R.S. Notice 97-60, 1997-2 C.B. 310, at § 2.

146. I.R.C. § 25A(d) (2012).

147. *Id.* § 25A(i)(1).

148. *Id.* § 25A(b)(3).

149. H.R. REP. NO. 111-16, at 12 (Conf. Rep.).

150. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 796 (1997).

151. Recovery Act of 2009, Pub. L. No. 111-5, § 1002, 123 Stat. 115, 312 (2009).

The changes increased the maximum credit amount from \$2,000 to \$2,500 per eligible student per year, expanded the definition of qualified tuition and expenses to include course materials, permitted the credit for four years of education instead of two, increased the phase-out range, allowed taxpayers to claim the credit against alternative minimum tax liability, and made the credit partially refundable.

152. Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296, 3298 (2010); Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313 (2012).

billion<sup>153</sup>—an amount that in total is roughly equal to that of the well-known Pell Grant program.<sup>154</sup>

Despite the substantial costs of these education credits, however, many critics have argued that the education credits are more helpful to middle- and upper-income taxpayers than to the poor. For instance, tax scholar Phyllis Smith points out that, because the credits are not entirely refundable, the many low-income taxpayers without tax liability may not take full advantage of them.<sup>155</sup> In addition, Smith finds the amounts of the credits too small to be of genuine assistance to poor students.<sup>156</sup> Deborah Schenk and Andrew Grossman echo this view, demonstrating quantitatively that the credit amounts are too small to change low-income taxpayer behavior.<sup>157</sup> Kerry Ryan adds that many low-income taxpayers may not even know about the credits when deciding whether to enroll in higher education.<sup>158</sup>

Further, Ryan, Smith, and Natasha Mullineaux argue that the educational credits are only available after a student has paid the relevant expenses up front, something that many low-income taxpayers may be unable to do.<sup>159</sup> These and other

---

153. JCT 2012 REPORT, *supra* note 77, at 42.

154. REIMAGINING AID DESIGN & DELIVERY CONSORTIUM FOR HIGHER EDUC. TAX REFORM, HIGHER EDUCATION TAX REFORM: A SHARED AGENDA FOR INCREASING COLLEGE AFFORDABILITY, ACCESS AND SUCCESS (2013), available at [http://www.clasp.org/resources-and-publications/publication-1/Nov2013RADD\\_TaxAid.pdf](http://www.clasp.org/resources-and-publications/publication-1/Nov2013RADD_TaxAid.pdf) [hereinafter RADD REPORT].

155. Phyllis A. Smith, *The Elusive Cap And Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 181, 211 (2008); see also Bridget Terry Long, *The Impact of Federal Tax Credits for Higher Education Expenses*, in COLLEGE CHOICES: THE ECONOMICS OF WHERE TO GO, WHEN TO GO, AND HOW TO PAY FOR IT 101, 115 (Caroline M. Hoxby ed., 2004) (“[H]alf of the higher education tax credit beneficiaries were not able to take the full credit for which they were otherwise eligible” because of insufficient positive income tax liability); Andrew Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U. L. REV. 1229, 1250–51 (2009) (showing that wealthier taxpayers receive greater benefit from education deductions than those who earn less).

156. Smith, *supra* note 155, at 210.

157. Deborah A. Schenck & Andrew L. Grossman, *The Failure of Tax Incentives for Education*, 61 TAX L. REV. 295, 309–10 (2008) (finding a similar lack of effect for the student loan interest deduction and incentives for educational savings accounts). See generally Stuart Lazar, *Schooling Congress: The Current Landscape of the Tax Treatment of Expenses for Higher Education Expenses and a Framework for Reform*, 2010 MICH. ST. L. REV. 1047, 1127 (2010); Amy J. Oliver, *Improving the Tax Code to Provide Meaningful and Effective Tax Incentives for Higher Education*, 12 U. FLA. J.L. & PUB. POL'Y 91 (2000); Bradley R. Palmer, *Uncle Sam, Tuition Costs, and the Changing Economy: Tax Incentives for Education Expenses and How to Improve Them*, 38 J.L. & EDUC. 345 (2009). But see George Salimbis, *Educational Incentives for Taxpayers*, 18 AKRON TAX J. 1 (2003) (arguing that the education credits provide effective incentives for lower-income students but do not do enough to assist middle- and upper-income taxpayers).

158. Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1, 35 (2008); see also RADD REPORT, *supra* note 154, at 12.

159. Ryan, *supra* note 158, at 54; Smith, *supra* note 155, at 210–12; Natasha Mullineaux, *The Failure to Provide Adequate Higher Education Tax Incentives for Lower-Income Individuals*, 14 AKRON TAX J. 27, 36–39 (2000). See also MARGOT L. CRANDALL-

scholars propose a number of reforms, including making the credits fully refundable and perhaps giving them an otherwise more progressive structure.<sup>160</sup>

#### *E. Premium Assistance Credit*

Enacted as part of 2010's health care reform bill, the refundable Premium Assistance Credit is the first major tax-based social policy to deal with healthcare for the poor.<sup>161</sup> This provision subsidizes the purchase of certain health insurance plans for low- and middle-income families.<sup>162</sup> Individuals receive the Premium Assistance Credit based on income; a premium that the IRS pays directly to the insurance plan in which the individual is enrolled.<sup>163</sup> The individual then pays to the plan the difference between the premium tax credit amount and the total plan premium.<sup>164</sup> Individuals and families with household incomes between 100% and 400% of the federal poverty level receive premium assistance credits on a sliding scale.<sup>165</sup> The scale provides that those at 100% of the federal poverty level spend no more than 2% of income on health insurance premiums.<sup>166</sup> That percentage rises with income.<sup>167</sup>

The Premium Assistance Credit is the newest anti-poverty provision in the tax code and it has yet to apply to any tax year. As a result, no data exist as to how much the credit costs the federal government or how effectively it addresses poverty. The Joint Committee on Taxation estimates a cost of \$27 billion.<sup>168</sup> However, even that estimate remains uncertain until the full healthcare reform program goes into effect.

#### *F. Low-Income Housing Tax Credit*

The next anti-poverty program that I will discuss is what I call an indirect program. As such, in contrast to the provisions discussed so far, the Low-Income Housing Tax Credit ("LIHTC") is not a direct subsidy to low-income families. Congress enacted the credit to serve as an "efficient mechanism for encouraging the

---

HOLLICK, CONG. RESEARCH SERV., R42561, THE AMERICAN OPPORTUNITY TAX CREDIT: OVERVIEW, ANALYSIS, AND POLICY OPTIONS 13 (2012); RADD REPORT, *supra* note 154, at 11.

160. Ryan, *supra* note 158, at 53–54; Smith, *supra* note 155, at 212; Mullineaux, *supra* note 159, at 41–42. *See also* RADD REPORT, *supra* note 154, at 15; Pike, *supra* note 155, at 1257; Sean M. Stegmaier, *Tax Incentives for Higher Education in the Internal Revenue Code: Education Tax Expenditure Reform and the Inclusion of Refundable Tax Credits*, 37 SW. U. L. REV. 135 (2000) (arguing for replacing both credits with a single refundable credit).

161. Affordable Care Act of 2010, Pub. L. No. 11-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of I.R.C. and 42 U.S.C.). The discussion in this section is taken from my earlier paper, Susannah Camic Tahk, *Everything is Tax*, 50 HARV. J. ON LEGIS. 67 (2013).

162. I.R.C. § 36B (2012).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. JCT 2012 Report, *supra* note 77.

production of low-income rental housing.”<sup>169</sup> As such, it replaced several previous nontax low-income housing programs that, in Congress’s view, “failed to guarantee that affordable housing would be provided to the most needy low-income individuals.”<sup>170</sup> The federal government spent \$5.8 billion on the LIHTC in 2012,<sup>171</sup> roughly the same amount expended on all federal public housing in the United States in that year.<sup>172</sup> The credit is currently “the largest federal program to finance the development and rehabilitation of affordable rental housing for low-income households.”<sup>173</sup>

The LIHTC gives private investors and developers tax incentives to build low-income housing. The credit equals a percentage, up to 70%, of the amount that an investor in a “qualified low-income housing project” spends on that project.<sup>174</sup> To receive the credit, the developer must make a long-term commitment to use the building for low-income housing.<sup>175</sup> A qualifying low-income housing project must have certain percentages of low-income renters.<sup>176</sup> Developers may charge rent for units in the project based on percentages of resident income.<sup>177</sup> The statute also creates additional incentives for building and rehabilitating low-income housing in what it calls “qualified census tracts” and “difficult development areas.”<sup>178</sup> In these areas, developers can use higher base amounts for calculating their credit.<sup>179</sup> The low-income housing credit framework envisions an active role for state housing credit agencies in selecting credit-eligible projects. Among many other requirements, each agency must have a credit-use plan that gives preference to projects serving the lowest-income tenants and projects committed to serving low-income tenants for the longest periods.<sup>180</sup>

Congress enacted the LIHTC in 1986 to provide, as stated above, an “efficient mechanism for encouraging the production of low-income rental housing” and to replace previous programs which “operated in an uncoordinated manner, resulted in subsidies unrelated to the number of low-income individuals served, and failed to guarantee that affordable housing would be provided to the most needy

---

169. STAFF OF JOINT COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, 152 (Comm. Print 1987) [hereinafter JCT 1987 REPORT].

170. *Id.*

171. JCT 2012 REPORT, *supra* note 77, at 35. This figure is the official JCT estimate and may not reflect long-term costs and benefits not captured by the JCT figure.

172. Will Fischer & Barbara Sand, *Chart Book: Federal Housing Spending Is Poorly Matched to Need: Tilt Toward Well-Off Homeowners Leaves Struggling Low-Income Renters Without Help*, CTR. ON BUDGET & POLICY PRIORITIES (2013).

173. J. William Callison, *Achieving the Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. CAL. REV. L. & SOCIAL JUSTICE 213, 226 (2010).

174. I.R.C. §§ 42(g)(3)(A), 42(b)(1)(B) (2012).

175. *Id.* § 42(g)(3)(A).

176. *Id.* § 42(g)(1).

177. *Id.* § 42(i)(3).

178. *Id.* § 42(d)(5)(B)(i).

179. *Id.* In these areas, the base amount, called the “eligible basis” of a new building is 130% of what it would otherwise be and any relevant “rehabilitation expenditures” for an existing building are 130% of what they would otherwise be.

180. *Id.* § 42(m)(1)(B)(ii).

low-income individuals.<sup>181</sup> At first, the credit was temporary, but Congress made it permanent in 1993.<sup>182</sup> Since then, Congress and the IRS have made a variety of smaller changes to the credit rules, but have not carried out any major overhauls.

In assessing the effectiveness of this tax credit, one scholar has placed the number of low-income housing units it creates at anywhere between 69,000 and 100,000 annually.<sup>183</sup> Even so, whether the credit is necessary to generate these units remains an open question. Some studies suggest that the “rate of substitution” is relatively high, meaning that investors would have built many of those units without the credit, although the relevant data is mixed.<sup>184</sup>

Notwithstanding this issue, commentators have criticized the effectiveness of the LIHTC for addressing poverty on several grounds.<sup>185</sup> Most notably, Florence Wagman Roisman has argued that, “the LIHTC program operates without effective regard to civil rights laws, due primarily to the fact that the Treasury and state and local agencies have failed to impose meaningful bars to discrimination.”<sup>186</sup> According to her analysis, there is a substantial body of civil rights law that applies to direct housing subsidies, but does not clearly encompass housing built with low-income housing credits.<sup>187</sup> A 2000 Memorandum of Understanding between the Treasury Department, the Department of Justice, and the Department of Housing and Urban Development purported to address this issue, but did so incompletely and has not provided effective grounds on which to assert civil rights violations with regard to the LIHTC.<sup>188</sup> Roisman also finds that a disproportionate number of the tenants who occupy units that receive low-income housing credits are not the poorest of the poor.<sup>189</sup> David Philip Cohen similarly observed that “owners of qualified projects can generate larger cash flows by renting to tenants with the highest income

---

181. See JCT 1987 REPORT, *supra* note 169, at 152.

182. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13142(a), 107 Stat. 312, 437-38 (1993).

183. Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 234 (2003).

184. See *id.* at 234; David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Credit*, 6 J.L. & POL'Y 537 (1998); Stephen Malpezzi & Kerry Vandell, *Does the Low-Income Housing Tax Credit Increase the Supply of Housing?*, 11 J. HOUSING ECON 360, 370 (2002). For a competing view, see Jian Chen & Xin Janet Ge, *Will Tax Credit Increase Housing Supply? Experience from U.S. and Prospect for Australia* (March 25, 2013) (unpublished manuscript), available at <http://dx.doi.org/10.2139/ssrn.2294715>.

185. For a rosier view, see Michael Rubinger, Op-Ed, *Two Tax Credits That Work*, N.Y. TIMES, July 13, 2014, at A19.

186. Florence Wagman Roisman, *Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 (1998).

187. See generally *id.*

188. Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. and Cmty. Affairs, 749 F. Supp. 2d 486 (N.D. Tex. 2010) *aff'd*, 747 F.3d 275 (5th Cir. 2014); Memorandum Of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department Of Justice, DEP'T OF HOUS. & URBAN DEV. (Aug. 2000), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/lihtcmou](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/lihtcmou).

189. Roisman, *supra* note 186, at 1015–16.

levels within the LIHTC guidelines, [because] there is no incentive for these owners to restrict rents to levels that are affordable for families with very low- or extremely low-income.”<sup>190</sup> On the other hand, as discussed above, the statute does explicitly create incentives to build housing for the lowest-income taxpayers, and some research has pointed out that more than 40% of LIHTC tenants have extremely low incomes.<sup>191</sup>

Additionally, Megan Ballard argues that, in the context of the LIHTC, for-profit developers have used their political advantage to attempt to improve their situation relative to that of nonprofit developers.<sup>192</sup> Some scholarship has also reported that the low-income housing credit has not increased the supply of certain key types of low-income housing such as units for large families.<sup>193</sup> On the other hand, urban planning scholar Kirk McClure has found that the LIHTC has proved particularly effective at moving low-income individuals out of low-income communities.<sup>194</sup>

### *G. New Markets Tax Credit*

The New Markets Tax Credit gives incentives to invest in low-income communities. This provision provides benefits to “qualified community development entities” or “CDEs.”<sup>195</sup> A CDE is an organization or other entity whose primary mission is “serving, or providing investment capital for, low-income communities or low-income persons.”<sup>196</sup> The New Markets Tax Credit equals a certain percentage of a “qualified equity investment” in the CDE.<sup>197</sup> The investment must generally be in a “qualified active low-income community business”<sup>198</sup> which carries out a certain level of its activities in a “low-income community,” as defined by reference to income levels or poverty levels in census tracts.<sup>199</sup>

Congress enacted the New Markets Tax Credit on a temporary basis in 2000.<sup>200</sup> The new program reflected President Clinton’s concern about the “‘pockets of poverty’ that existed in the country even in the midst of a booming economy which was otherwise bringing low unemployment and strong growth.”<sup>201</sup> Clinton’s

---

190. Cohen, *supra* note 184, at 553.

191. MOELIS INST. FOR AFFORDABLE HOUS. POLICY, WHAT CAN WE LEARN ABOUT THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BY LOOKING AT THE TENANTS? (2012), available at [http://furmancenter.org/files/publications/LIHTC\\_Final\\_Policy\\_Brief\\_v2.pdf](http://furmancenter.org/files/publications/LIHTC_Final_Policy_Brief_v2.pdf).

192. See generally Ballard, *supra* note 183.

193. Cohen, *supra* note 184, at 551–52.

194. Kirk McClure, *The Low-Income Housing Tax Credit Program Goes Mainstream and Moves to the Suburbs*, 17 HOUS. POL’Y DEBATE 419 (2006).

195. I.R.C. § 45D(a) (2012).

196. *Id.* § 45D(c)(1)(A).

197. *Id.* § 45D(a).

198. *Id.* § 45D(d)(2)(A).

199. *Id.* § 45D(e)(1).

200. Community Renewal Tax Relief Act 2000, tit. 1, subtitle C, sec. 121(a), as enacted by the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 1(a)(7), 114 Stat. 2763 (2000) [hereinafter Renewal Act of 2000].

201. Julia Sass Rubin & Gregory M. Stankewicz, *Evaluating the Impact of Federal Community Economic Development Policies on Targeted Populations: The Case of the New Markets Initiatives of 2000*, 29 (July 2003) (unpublished manuscript), available

interest in using tax credits to address this situation stemmed from “urban development scholars who endorsed private-sector, market-based approaches for low-income community economic development.”<sup>202</sup> As in the case of the EITC, Clinton was able to assemble a bipartisan coalition to support his plan.<sup>203</sup> As a result, on the final day of its last session of 2000, Congress enacted the bipartisan Community Renewal Tax Relief Act, which included over \$25 billion in tax incentives for community economic development in “low- and moderate-income communities across the country.”<sup>204</sup>

Since that date, the tendency in Congress has been to expand and extend the credit. Legislation in 2004 redefined and loosened the criteria for qualifying low-income communities.<sup>205</sup> In 2006, Congress extended the credit for an additional two years and revised the statute to eliminate bias against rural communities.<sup>206</sup> Legislators have also extended the credit several times.<sup>207</sup> While the credit is now slated to expire after the 2013 tax year, if previous years are indicative, Congress may well continue to extend the credit every two years as part of its annual package of “tax extenders.”

The New Markets Tax Credit is expected to cost the federal government approximately \$5 billion in 2012.<sup>208</sup> As with the LIHTC, this program explicitly targets low-income communities. As a result, insofar as CDEs are using the credits, developers are investing in low-income communities and presumably creating some benefits there. However, as with the LIHTC, a question remains as to how many of these low-income community investments would occur without the new markets credit. Anecdotal evidence suggests that at least some of these projects have been effective.<sup>209</sup>

Nevertheless, as with the LIHTC, commentators have raised concerns about how well the New Markets Tax Credit actually benefits the poor. For instance, tax scholar Roger Groves has examined a sample of projects funded with the New

---

at [http://www.chicagofed.org/cedric/files/2003\\_conf\\_paper\\_session4\\_rubin.pdf](http://www.chicagofed.org/cedric/files/2003_conf_paper_session4_rubin.pdf) (cited in Janet Thompson Jackson, *Can Free Enterprise Cure Urban Ills? Lost Opportunities for Business Development in Urban, Low-Income Communities Through The New Markets Tax Credit Program*, 37 U. MEM. L. REV. 659, 687 (2007)).

202. Jackson, *supra* note 201, at 688.

203. *Id.* at 691.

204. Michael S. Barr, *Access to Financial Services in the 21st Century: Five Opportunities for the Bush Administration and the 107th Congress*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 447, 453 (2002).

205. American Jobs Creation Act of 2004, Pub. L. 108-357, §§ 221-223, 118 Stat. 1418, 1431-32 (2004).

206. Tax Relief and Health Care Act of 2006, Pub. L. 109-432, § 102, 120 Stat. 292 2, 2934 (2006) [hereinafter Tax Relief Act of 2006].

207. Tax Extenders and AMT Relief Act of 2008, Pub. L. 110-343, § 302, 122 Stat. 3765, 3866 (2008); Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (2010); Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313 (2012).

208. U.S. DEP'T OF TREASURY, *CDFI Fund Opens CY 2014 Round of New Markets Tax Credit Program* (Aug. 5, 2013), [http://www.cdfifund.gov/news\\_events/CDFI-2014-27-CDFI\\_Fund\\_Opens\\_CY\\_2014\\_Round\\_of\\_New\\_Markets\\_Tax\\_Credit\\_Program.asp](http://www.cdfifund.gov/news_events/CDFI-2014-27-CDFI_Fund_Opens_CY_2014_Round_of_New_Markets_Tax_Credit_Program.asp).

209. Jackson, *supra* note 201, at 700. *See also* Rubinger, *supra* note 185.



Markets Tax Credit and found that some of them amounted to “gentrification.”<sup>210</sup> Groves contends that these projects do not assist the poor, but instead help higher-income residents enjoy services in what rapidly become gentrified neighborhoods.<sup>211</sup> Susan R. Jones similarly laments that the credit seems overly “commercial real estate development driven,”<sup>212</sup> while Jennifer Forbes argues that the credit “primarily benefits private investors.”<sup>213</sup> Janet Thompson Jackson focuses on the racial aspects of the program, maintaining that New Markets Tax Credits flow largely to white investors, thereby disrupting the tradition of African Americans investing in their own communities.<sup>214</sup> In addition, like some of the credits described below, this credit is not permanent, which may limit its effectiveness.<sup>215</sup> Data on all of these questions are sparse, however.<sup>216</sup>

#### ***H. Work Opportunity and Empowerment Zone Employment Credits***

As discussed above, the idea that low-income individuals should work is currently central to federal anti-poverty policy. Two tax credits that highlight this idea are the Work Opportunity Credit and the Empowerment Zone Employment Credit. These two provisions provide incentives for employers to hire certain disadvantaged individuals.

The Work Opportunity Credit allows an employer to take a nonrefundable credit of 25% or 40% of a set amount (usually \$6,000) of the first-year wages paid to certain employees.<sup>217</sup> To make her employer eligible for the Work Opportunity Credit, an employee must fall within one of several categories, such as that of a long-term recipient of various federal assistance programs like the Supplemental Nutrition Assistance Program (“SNAP”) (the program formerly known as the food stamp program) or TANF.<sup>218</sup> Shorter-term recipients of SNAP benefits may also

---

210. See Roger Groves, *The De-Gentrification of the New Markets Tax Credit*, 8 FLA. TAX. REV. 213 (2007).

211. See generally *id.*

212. Susan R. Jones, *Will New Markets Enhance Community Economic Development?*, 8 J. SMALL & EMERGING BUS. L. 229, 237 (2004).

213. Jennifer Forbes, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177, 177 (2006). See also Megan Bakath, *Comment: Take The Money and Run: A Case for Benchmarking in the New Markets Tax Credit Program*, 47 CAL. W. L. REV. 411 (2011) (arguing that the program just needs benchmarks that prescribe a certain required amount of assistance to low-income individuals).

214. Jackson, *supra* note 201, at 701–04.

215. I.R.C. § 45D(f)(1)(G) (2012).

216. For a particularly detailed summary of existing data, see MARTIN D. ABRVAENEL ET. AL., URBAN INST., NEW MARKETS TAX CREDIT (NMTC) PROGRAM EVALUATION (2013), <http://www.urban.org/UploadedPDF/412958-new-markets-tax-final.pdf>.

217. I.R.C. §§ 51(a), 51(c), 51(i)(3).

218. *Id.* § 51(d)(1)–(2). For the inclusion of TANF, see H.R. REP. NO. 106-1033, at 1027 (2000) (Conf. Rep.). A “qualified IV-A recipient” can be a member of a family that, for at least nine months during the 18-month period ending on the hiring date, received assistance under one of the specified federal programs. An employer can also take the credit for a “long-term family assistance recipient.” A “long-term family assistance recipient” is an individual

make employers eligible for the credit,<sup>219</sup> as can individuals who are recent recipients of federal disability benefits,<sup>220</sup> veterans of certain types,<sup>221</sup> “qualified ex-felons,”<sup>222</sup> or residents, ages 18–39, of federally designated distressed communities.<sup>223</sup> The credit is also available for “qualified summer youth employees” who live in the same kinds of communities.<sup>224</sup>

Congress enacted the Work Opportunity Credit on a temporary basis in 1996, replacing a similar prior credit called the Targeted Jobs Credit.<sup>225</sup> Since then, Congress has expanded and extended the Work Opportunity Credit almost every year.<sup>226</sup> The credit is currently set to expire with regard to workers hired after the end of 2013; however, based on the credit’s periodic regular renewal, Congress may extend it again as part of 2014’s extenders bill.

The Empowerment Zone Employment Credit is a similar tax incentive. Taxpayers may take this credit for a percentage of wages paid to employees who work and live in federally designated “empowerment zones,”<sup>227</sup> which are low-income communities around the country that the Department of Housing and Urban Development has targeted for federal assistance.<sup>228</sup> The credit generally equals 15%

that a designated local agency has certified as being a member of a family that received assistance under a specified program throughout the 18-month period ending on the hiring date, or a member of a family that ceased to be eligible for such assistance because of a federal or state limitation. *Id.* § 51(d).

219. *Id.* §§ 51(d)(1)(G), (d)(8). A SNAP recipient, termed for the purposes of this statute a “qualified food stamp recipient,” is someone between the ages of 18 and 40 who belongs a family that received SNAP during the past six months.

220. *Id.* §§ 51(d)(1)(H), (d)(9).

221. *Id.* §§ 51(d)(1)(B), (3)(B), (d)(3)(A).

222. *Id.* §§ 51(d)(1)(C), (d)(4).

223. *Id.* §§ 51(d)(1)(D), (d)(5). The relevant federally designated communities are known as “empowerment zones,” “enterprise communities,” “renewal communities,” and “rural renewal counties.”

224. *Id.* §§ 51(d)(1)(F), (d)(7)(A). Youth who give rise to the credit under this provision must live in federally designated “empowerment zones or “enterprise communities.”

225. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1201, 110 Stat. 1755, 1768–72 (1996).

226. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 796 (1997); Tax and Trade Relief Extension Act of 1998, 1999, Pub. L. No. 105-277, § 1002, 112 Stat. 2681, 2681–888 (1998); Renewal Act of 2000, Pub. L. No. 106-554, § 1(a)(7), 114 Stat. 2763 (2000); Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 303, 118 Stat. 1166 (2004); Taxpayer Relief Act of 2006, Pub. L. 109-432, § 102, 120 Stat. 292 2, 2934 (2006); Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, 121 Stat. (2007) [hereinafter Small Business Act of 2007]; Recovery Act of 2009, Pub. L. No. 111-5, § 1002, 123 Stat. 115, 312 (2009); Hiring Incentives to Restore Employment Act, Pub. L. 111-147, 124 Stat. 71 (2009); Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296, 3298 (2010); Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2012).

227. I.R.C. § 1396(b).

228. *Welcome to the Community Renewal Initiative*, DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/economicdevelopment/programs/rc](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/rc) (last visited Aug. 4, 2014).

of the first \$15,000 in employee salary.<sup>229</sup> Congress enacted the credit in 1993 on a temporary basis, and Congress has subsequently renewed it, most recently in 2012, as part of the broader empowerment-zone program.

In 2012, the federal government spent \$1 billion on the Work Opportunity Credit. The Joint Committee on Taxation does not prepare a separate annual estimate for the Empowerment Zone Employment Credit, but researchers believe that it costs the federal government around \$50 million each year.<sup>230</sup> As with the low-income real estate credits, the question remains open as to how many targeted workers employers would employ without the credit.

Few scholars have examined these credits. The best-known tax treatise is skeptical of their effectiveness in light of the government's experience with the earlier targeted jobs credit.<sup>231</sup> The primary problem that research has identified with these credits, as anti-poverty tools, is that employers "underutilize" them.<sup>232</sup> Tax scholar Francine Lipman observes that, in a Government Accountability Office ("GAO") Report, 57% of participating employers said that the credits play no role in their hiring decisions.<sup>233</sup> Interviewees in that report also reported that "lack of familiarity with the [Work Opportunity Credit], its low dollar value, and administrative requirements limited its usage."<sup>234</sup> In addition, again, the credits' impermanence may impede their success. However, even that report admitted that "existing data limitations and limitations in the studies' research methods do not allow for directly measuring the effectiveness of the incentives."<sup>235</sup>

### *I. Tax Subsidies for Anti-Poverty Organizations*

The tax code allows organizations "organized and operated" for certain defined purposes to be exempt from federal income tax and receive tax-deductible contributions.<sup>236</sup> To qualify for exemption and contribution deductibility under I.R.C. § 501(c)(3), an organization must be "organized and operated" exclusively for one of the statutorily enumerated charitable purposes. These include "religious, charitable, scientific, . . . or educational purposes,"<sup>237</sup> as well as "relief of the poor

229. *Empowerment Zone Tax Incentives Summary Chart – 2013*, DEP'T OF HOUS. & URBAN DEV. (AUG. 2013), [http://portal.hud.gov/huddoc/ez\\_tis\\_chart.pdf](http://portal.hud.gov/huddoc/ez_tis_chart.pdf). As this chart demonstrated, the tax code also provides several other small programs for empowerment zones, mostly including tax-exempt bonds.

230. Matias Busso et al., *Results of the Federal Urban Empowerment Zone Program*, INST. FOR RESEARCH ON POVERTY 18 (2013), available at [http://www.ssc.wisc.edu/~jmgregory/FOCUS\\_EZ\\_summary.pdf](http://www.ssc.wisc.edu/~jmgregory/FOCUS_EZ_summary.pdf) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-306, COMMUNITY DEVELOPMENT: FEDERAL REVITALIZATION PROGRAMS ARE BEING IMPLEMENTED, BUT DATA ON THE USE OF TAX PROGRAMS ARE LIMITED (2004)).

231. See BITTKER & LOKKEN, *supra* note 38, ¶ 27.3.

232. See generally Francine J. Lipman, *Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives*, 53 AM. U.L. REV. 393 (2003).

233. *Id.* at 433.

234. *Id.* at 434.

235. *Id.* at 435.

236. I.R.C. §§ 501(c), 527–28 (2012).

237. *Id.* § 501(c)(3).

and distressed or of the underprivileged, . . . and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.”<sup>238</sup>

Significantly, what this statutory and regulatory framework means is that tax law governs all charitable organizations that provide services to the poor that do not come from the government. Further, poverty relief organizations became eligible for tax exemption under § 501(c)(3) as a result of an administrative IRS regulation that determines whether and to what extent tax-exempt organizations qualify as serving the poor.<sup>239</sup>

When the IRS first started regulating charities, it held that relieving poverty was the only permissible exempt purpose for organizations that did not clearly fall into one of the noncharity statutory categories e.g., religious or educational groups.<sup>240</sup> For instance, in 1923 the IRS ruled that a civic organization could not qualify under § 501(c)(3) because “the word ‘charitable’ as used in the existing exemption provision was limited to ‘relief of the poor’ and not [any] broader . . . definition.”<sup>241</sup> However, in 1959, the IRS revised its definition of “charitable” to include the broader set of permissible activities listed above.<sup>242</sup> In contrast, subsequent IRS actions<sup>243</sup> and court decisions<sup>244</sup> took a more restrictive view. Even so, the broad list of exempt purposes enumerated in the statute and in the relevant regulations continues to provide substantial room for tax-exempt organizations to be organized and operated for activities that have nothing to do with poverty.<sup>245</sup>

---

238. Treas. Reg. § 1.501(c)(3)–1(d)(2).

239. *Id.* § 1.501(c)(3).

240. JOHN D. COLOMBO, NAT’L CTR. ON PHILANTHROPY & LAW, THE ROLE OF REDISTRIBUTION TO THE POOR IN FEDERAL TAX EXEMPTION FOR CHARITIES 3 (2009) available at <http://www1.law.nyu.edu/ncpl/resources/documents/Conf2009JColomboPaper.pdf>.

241. *Id.* at 3–4 (citing I.T. 1800, 11-2 Cum. Bull. 152 (1923)).

242. Treas. Reg. § 1.501(c)(3)–1(d)(2).

243. *See, e.g.*, Rev. Rul. 69-161, 1978-2 C.B. 149 (clarifying that providing legal services only to the poor counts as an exempt purpose); Rev. Rul. 70-585, 1970-2 C.B. 115 (explaining that an organization providing housing to the middle-class would not qualify for exemption).

244. *See, e.g.*, *Federated Pharmacy Servs. v. Comm’r*, 72 T.C. 687 (1979), *aff’d* 625 F.2d 804 (8th Cir. 1980) (indicating that an organization selling medications to the nonpoor elderly does not constitute an exempt purpose); *Dumain Farms v. Comm’r*, 73 T.C. 650 (1980) (denying exemption to a working farm that provided no particular services to the poor).

245. For views on how well this practice comports with various visions of distributive justice, see generally Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601 (2011); Miranda Perry Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165 (2008); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010). For a defense of the phenomenon on distributive-justice grounds, *see* Colombo, *supra* note 217, at 18–33.

Although available data reveals a great deal about the tax-exempt sector in general, it is difficult to determine the precise impact that this sector has on poverty. The tax-exempt sector is certainly growing. Indeed, the IRS recorded approximately \$1.58 million nonprofits in 2011, an increase of 21.5% from 2001.<sup>246</sup> In 2011, those nonprofits contributed an estimated \$836.9 billion to the U.S. economy.<sup>247</sup> Nonprivate foundations, or “public charities” qualifying under § 501(c)(3), generated 75% of the nonprofit sector’s revenue in 2011.<sup>248</sup> Of that, human-services organizations, the broader category of organizations that might have poverty relief as an exempt purpose, made up 34.8% of that figure, with \$202.4 billion in revenues, \$195.8 in expenses, and \$303.7 in assets.<sup>249</sup> However, not all of those organizations provide direct support to the poor.<sup>250</sup>

A few scholars have attempted to determine how many human-services tax-exempt organizations genuinely address poverty. For example, drawing on a sample of human-services organizations in Chicago,<sup>251</sup> sociologist Kirsten Gronbjerg reported that “[a]lmost half (48%) saw no particular relationship between the major problems of their target group and poverty; only 18 percent said there was a strong and direct link.”<sup>252</sup> She also found that “a relatively small proportion of agencies report[ed] extensive contacts with low-income clients.”<sup>253</sup> Echoing Gronbjerg’s concerns, political scientist Robert Reich has observed that IRS data shows that only about 10% of deductible contributions each year go to human-services organizations.<sup>254</sup> Similarly, policy scientist Lester Salamon has found, using a nationwide sample of human-services organizations, that only 21% of the total population that human-services organizations help fell in the lowest-income quartile, while 30% was in the next income quartile.<sup>255</sup> He also found that “only about 40 percent of the expenditures of the agencies . . . surveyed went to support services targeted to the poor and that 60 percent went for services to other income groups.” Salamon added, however, that determining the impact of human-service organizations on the poor was difficult given that “[i]n addition to the direct benefits that accrue to the immediate recipients of services, there are a variety of indirect or community benefits that accrue to a wide assortment of other people—family

---

246. SARAH L. PETTIJOHN, URBAN INST., *THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING & VOLUNTEERING*, 2013, at 1 (2013), available at <http://www.urban.org/UploadedPDF/412923-The-Nonprofit-Sector-in-Brief.pdf>.

247. *Id.*

248. *Id.*

249. *Id.* at 4.

250. *Directory of Charities and Nonprofit Organizations*, GUIDESTAR, <https://www.guidestar.org/nonprofit-directory/human-services.aspx> (last visited Aug. 4, 2014).

251. See generally Kirsten Gronbjerg, *Poverty and Nonprofit Organizational Behavior*, 64 SOC. SERV. REV. 208 (1990).

252. *Id.* at 216.

253. *Id.*

254. Robert Reich, *A Failure of Philanthropy: American Charity Shortchanges the Poor, and Public Policy is Partly to Blame*, STAN. SOC. INNOVATION REV. 25, 30 (Winter 2005).

255. Lester M. Salamon, *Social Services, in WHO BENEFITS FROM THE NONPROFIT SECTOR?* 134–73 (Charles Clotfelder ed., 1992).

members, acquaintances, neighbors, the general public.”<sup>256</sup> In addition, a recent study of high-net-worth donors to tax-exempt organizations found that poverty ranked as their third-most important concern, which suggests that they might be particularly likely to give to groups that deal with poverty.<sup>257</sup>

## II. COMMONALITIES ACROSS PROVISIONS IN TAX WAR ON POVERTY

What accounts for the federal government’s increasing use of the tax code to conduct the nation’s war on poverty? What particular strengths and limitations do the programs described in Part I share? What guidance do the past history and the current workings of these policies offer with regard to future tax anti-poverty programs? The aim of this Part is to address these questions by integrating the separate lines of legal scholarship and poverty research discussed in the previous section into a composite analysis of the tax war on poverty as a whole.

This Part will highlight some of the relative advantages, along with many of the disadvantages, of the tax war on poverty. However, this list is in no way meant to be exhaustive. Instead, I mean it to start what I hope will be a broader literature on the features of the tax war on poverty. I encourage others to take this discussion as a starting point and to identify further commonalities among the different pieces of the tax war on poverty. While, in a fundamental sense, tax and spending anti-poverty programs are equivalent, this Part demonstrates that anti-poverty programs that run through the tax system differ functionally in a number of ways from their nontax counterparts.

Additionally, this Part does not purport to offer either a broad defense or critique of the tax war on poverty. Instead, this Part endeavors to demonstrate that the tax war on poverty gives rise to both key opportunities and profound concerns. The tax war on poverty is certainly not a panacea, nor is it a crisis. Instead, it is a crucial step that the nation has taken toward fighting poverty, one that, like its predecessors, holds real promises and serious dangers.

### A. *Political Feasibility*

The tax war on poverty gives rise to different politics than its nontax counterparts. This is the result of two key aspects of tax-based anti-poverty programs. First, the legislative procedures that apply to tax proposals are easier to successfully navigate than the procedures relevant to direct spending programs. Second, American public opinion advantages the tax war on poverty over nontax poverty policy.

---

256. *Id.* at 142.

257. BANK OF AMERICA, THE 2012 BANK OF AMERICA STUDY OF HIGH NET WORTH PHILANTHROPY (2012). For more on the distributional issues related to charitable giving, see CONGRESSIONAL BUDGET OFFICE, OPTIONS FOR CHANGING THE TAX TREATMENT OF CHARITABLE GIVING 3–6 (2011).

*1. Legislative Procedures*

In comparison with their nontax counterparts, proposals to attack poverty through the tax code generally have smooth routes in Congress toward both passage and later growth.<sup>258</sup> This smoothness results for three reasons. First, the particular congressional committees that are designated to handle tax-embedded programs ease their course to enactment. Congress's two tax-writing committees—the House Ways & Means Committee and the Senate Finance Committee—are legendarily effective. The House Ways & Means Committee (“Ways & Means”), where all tax bills must originate, is especially skilled at getting legislation through Congress, in part because it has historically cultivated credibility with the parent chamber.<sup>259</sup> Research on congressional committees has argued that the central aims of Ways & Means have always been to generate bills that will pass the House<sup>260</sup> and remain “influential.”<sup>261</sup> Certainly not all bills that go through Ways & Means pass, but this research demonstrates that relative to other committees, Ways & Means has a good passage record. In addition, Ways & Means usually has notably strong leadership.<sup>262</sup> Further, because Ways & Means is one of the most sought after committee assignments, its members are usually well-established congressional leaders of the House.<sup>263</sup> Political science research has found that Ways & Means goals, bill passage rates, and leadership strengths similarly apply to the Senate Finance Committee.<sup>264</sup>

Second, tax bills ordinarily enjoy certain formal procedural protections. For example, the 1974 Budget Act gives bills from Ways & Means priority on the House floor over proposed direct-spending programs.<sup>265</sup> Then, legislation from Ways & Means appears on the floor of the House under a closed rule, which means that other members of Congress cannot hold a bill up by amending it on the floor. More important still, tax bills only require the approval of a single committee to come to the House floor, whereas nontax, nonentitlement spending programs must go through more than one committee.<sup>266</sup>

---

258. Much of this discussion is taken from Tahk, *supra* note 161, at 82–93. See generally Robert Lepore, *Note: Bringing Balance to the Budget Debate: Challenging the Privileged Procedural Status of Regressive Tax Expenditures over Progressive Discretionary Spending Programs*, 17 *GEO. J. ON POVERTY L. & POL'Y* 103 (2010).

259. RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 114–18 (1973). See also RICHARD F. FENNO, JR. *LEARNING TO GOVERN: AN INSTITUTIONAL VIEW OF THE 104TH U.S. CONGRESS* (1997).

260. FENNO, *CONGRESSMEN IN COMMITTEES*, *supra* note 259. See also FENNO, *LEARNING TO GOVERN: AN INSTITUTIONAL VIEW OF THE U.S. CONGRESS*, *supra* note 259.

261. FENNO, *CONGRESSMEN IN COMMITTEES*, *supra* note 259, at 202.

262. *Id.* at 114–19.

263. CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* 60–73 (1997).

264. *Id.* at 82–83. For more detail about the advantages of lawmaking before these committees, see generally Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 *YALE L.J.* 1165 (1993).

265. See generally FENNO, *CONGRESSMEN IN COMMITTEES*, *supra* note 260.

266. *Id.*

Third, embedding an anti-poverty program into the tax code means that the federal government can pass programs and then very easily allocate additional funds to the programs. Most nontax subsidies require annual congressional funding under their enacting legislation.<sup>267</sup> In contrast, a tax-embedded program can pass without an appropriation and then grow automatically without having to receive a bigger appropriation. For example, if more taxpayers suddenly qualify for the Child Tax Credit, more taxpayers simply file for and receive the credit without Congress having to authorize additional funding. This growth can happen smoothly and responsively, allowing tax-embedded anti-poverty programs to incorporate substantial numbers of new participants without political battles. This advantage also accrues to direct spending programs that fall into the category of mandatory-spending programs, as some but not all direct-spending anti-poverty programs do.<sup>268</sup>

One particular threat to the political viability of tax-embedded programs comes from periodic tax-reform efforts that promise to wipe the tax code clean of deductions, exclusions, and credits. Sometimes, tax-reform plans include proposed cuts to anti-poverty programs.<sup>269</sup> However, as I have discussed at length in prior work, lawmakers discuss broad-based tax reform often, but have only accomplished it once.<sup>270</sup> That bill, the Tax Reform Act of 1986, actually increased the EITC.<sup>271</sup> The reason that happened suggests that tax war on poverty programs are less likely than other tax-embedded programs to disappear during any potential tax reform period. The Tax Reform Act of 1986, for political reasons, had to be distributionally neutral, which meant that it could not increase the tax burden of lower-income groups relative to higher-income groups.<sup>272</sup> Many members of Congress wanted to include in the tax reform package particular elements that would benefit their higher-income constituencies.<sup>273</sup> However, to do that, these members had to balance benefits for higher-income taxpayers with benefits for lower-income taxpayers.<sup>274</sup> As a result, many members of Congress proposed, and then enacted, the EITC expansion as part of the 1986 package.<sup>275</sup>

## 2. Public Opinion

The second key factor that advantages the tax war on poverty over the nontax war on poverty is that public opinion views tax-embedded programs more

---

267. *Id.*

268. For a description of mandatory spending programs, see Sheila Dacey, *Options for Reducing the Deficit: Mandatory Spending*, CONGRESSIONAL BUDGET OFFICE, (Dec. 6, 2013), <http://www.cbo.gov/publication/44939>.

269. See, e.g., NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, *THE MOMENT OF TRUTH: REPORT OF THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM* (2010), available at [http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12\\_1\\_2010.pdf](http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf) (commonly known as the Simpson–Bowles Report).

270. See generally Susannah Camic Tahk, *Making Impossible Tax Reform Possible* 81 *FORDHAM L. REV.* 2683 (2013).

271. HOWARD, *supra* note 49, at 148.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*



favorably than their nontax counterparts. Several recent studies have documented that voters are more likely to favor a social policy enacted through the tax code than a social policy that is not.<sup>276</sup> Popularity of the tax anti-poverty programs likely results, in part, from the fact that many of them are also available to nonpoor taxpayers, who then lend their support to programs they also receive benefits from. However, these studies demonstrate that individuals are more likely to favor the exact *same* hypothetical program designed as a tax provision than designed as a nontax spending program.<sup>277</sup>

For example, using experimental survey data, political scientists Christopher Faricy and Christopher Ellis<sup>278</sup> found that respondents were more likely to support programs enacted as tax breaks than as direct expenditures.<sup>279</sup> Similarly, political scientists Jake Haselswerdt and Brandon Bartels, also using a survey experiment, reported that “respondents were significantly more likely to support policies to increase homeownership, provide job training for the unemployed, and allow paid parental leave when the policies were described as tax breaks rather than direct payments.”<sup>280</sup> Alex Tahk and I have reported similar results with regard to hypothetical programs to subsidize adoption.<sup>281</sup> Legal scholar Edward Zelinsky’s experiments about tax subsidies and direct payments to volunteer firefighters yielded results along the same lines.<sup>282</sup> He found that, “for a critical segment of the public, public subsidy framed as tax relief is different from, and less objectionable than, equivalent cash payments.”<sup>283</sup>

The literature still must explore *why* this preference is so strong. To speculate briefly, perhaps individuals prefer tax-embedded social programs because they amount to tax cuts, which tend to be politically popular. In addition, middle- and high-income taxpayers themselves receive credits, deductions, and exclusions. A high-income recipient of the home mortgage interest deduction, for example, might be more willing to support social programs that take the form of tax deductions for others. In contrast, that same individual would not receive welfare or

---

276. Christopher Faricy & Christopher Ellis, *Public Attitudes Toward Social Spending in the United States: The Differences Between Direct Spending and Tax Expenditures*, 36 POL BEHAV. 53 (2013); Jake Haselswerdt & Brandon Bartels, Public Opinion, Policy Tools, and Policy Feedbacks: Evidence from a Survey Experiment (July 11, 2011) (unpublished manuscript), available at [http://home.gwu.edu/~jakehas/JH&BB\\_Experiment\\_7-11-13.pdf](http://home.gwu.edu/~jakehas/JH&BB_Experiment_7-11-13.pdf); Alexander Tahk & Susannah Camic Tahk, *Tax-Embedded Programs and the Politics of Public Policy* (2013) (unpublished manuscript) (on file with author).

277. Faricy & Ellis, *supra* note 272, at 13; Haselswerdt & Bartels, *supra* note 272; Tahk & Tahk, *supra* note 272.

278. Faricy & Ellis, *supra* note 272.

279. *Id.* at 13.

280. Haselswerdt & Bartels, *supra* note 272, at 12.

281. Tahk & Tahk, *supra* note 272. So far, no study has reported a conflicting finding.

282. Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797, 799–823 (2005).

283. *Id.* at 823. See also David S. Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience & Political Salience*, 65 TAX L. REV. 19–38 (2012).

food stamps and might be less likely to support similar programs. Another reason might pertain to what behavioral economists have termed the “endowment effect.” This effect means that, “people often demand much more to give up an object than they would be willing to pay to acquire it.”<sup>284</sup> As a result, individuals may prefer programs that just cut taxes, rather than first collecting tax revenues from some and then giving those funds to others via direct spending programs. Tax lawmakers may have an additional opportunity to take advantage of this effect by styling payments via tax anti-poverty programs as refunds of past or future years’ tax liability.<sup>285</sup>

Given their relative popularity, tax-embedded programs are particularly likely to attract bipartisan support. In the 112th Congress, for example, 238 representatives and 41 senators signed conservative activist Grover Norquist’s “Taxpayer Protection Pledge.”<sup>286</sup> All but three were Republicans,<sup>287</sup> and all of these signatories promised to “oppose and vote against any effort to raise the federal income tax on individuals or corporations.”<sup>288</sup> As part of this promise, signers pledged “to oppose changes in tax deductions or credits that increase the net tax burden on Americans”<sup>289</sup>—a pledge that effectively preserved existing tax deductions and credits across the board, including those applying to the tax provisions of the tax war on poverty. This meant, for instance, that almost 300 Republican members agreed not to cut the EITC.<sup>290</sup> To take another example, in his recent report criticizing many features of the nontax war on poverty, current House

---

284. Daniel Kahneman et al, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991).

285. Thanks to Dan Shaviro for this point.

286. *The Taxpayer Protection Pledge Signers 112th Congressional List*, AMERICANS FOR TAX REFORM, <http://s3.amazonaws.com/atrfiles/files/files/081012-federalpledgesigners.pdf> (last visited Aug. 4, 2014).

287. *Federal Taxpayer Protection Pledge Questions and Answers*, AMERICANS FOR TAX REFORM, <http://www.atr.org/federal-taxpayer-protection-questions-answers-a6204> (last visited Nov. 5, 2012) [hereinafter *Questions and Answers*].

288. *Id.*

289. *Id.*

290. Some might argue that the bipartisan preference for the EITC and the Child Tax Credit emerges because these programs have work requirements, whereas cash welfare has traditionally not had them. See COMM. ON WAYS & MEANS, 104TH CONG., SUMMARY OF WELFARE REFORMS MADE BY PUBLIC LAW 104-193 THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT AND ASSOCIATED LEGISLATION 5 (Comm. Print 1996), available at <http://www.gpo.gov/fdsys/pkg/CPRT-104WPRT27305/pdf/CPRT-104WPRT27305.pdf>. However, of course, post-1996, cash welfare does have work requirements. In addition, the Taxpayer Protection Pledge applies to any tax-embedded program that Congress might pass, requiring all signatories never to cut or trim away at any of them, whether or not they include work requirements. See *Questions and Answers*, supra note 287. Further, the survey data cited above suggests that individuals just prefer tax programs to their nontax counterparts, even when the content of the programs is exactly the same.

Budget Committee chair, Republican Paul Ryan, praised the EITC's effectiveness<sup>291</sup> the day before President Obama proposed expanding it as part of his budget.<sup>292</sup>

The tax war on poverty is also politically viable because, as discussed in this Article, tax programs are likely to take the form of market-stimulating mechanisms that give rise to interest groups that then work to protect and grow the provisions from which they benefit. Describing tax provisions versus their direct-spending counterparts, political scientist Jacob Hacker has written that:

Because privatized social welfare approaches tend to rely to a substantial degree on third parties, they typically have a base of support not just among beneficiaries but also among private intermediaries who sponsor or deliver benefits. These are political actors who are likely to be already mobilized and organized, to have relatively long time horizons and to take a continuing interest in policy development.<sup>293</sup>

An example of such an interest group is the real estate developers who make use of the LIHTC.

These legislative and public opinion features of the tax war on poverty render the goal of sustaining it more politically feasible than the challenge of sustaining the nontax war. The increased political feasibility of the tax war on poverty is particularly important given the repeated political setbacks that the nontax war on poverty has experienced. No sooner had President Johnson passed his anti-poverty agenda than Congress, following the 1966 elections, started to place obstacles in its way.<sup>294</sup> This path of roadblocks and cuts has continued up to the food stamp cuts that Congress passed in February of 2014.<sup>295</sup>

Yet, the tax war on poverty has only gained strength in recent decades. Indeed, as the evidence in Part I makes clear: no presidential administration or session of Congress has ever substantially cut back on even one of the existing anti-poverty tax provisions.<sup>296</sup> To the contrary, many of these tax-embedded programs have grown substantially. This has been true, for instance, of the EITC, which grew from a \$5 billion program in 1975 to an approximately \$50 billion program in the current era<sup>297</sup>—making it a much costlier program than the ever-under-attack

291. MAJ. STAFF OF H. BUDGET COMM., 113TH CONG., *THE WAR ON POVERTY: 50 YEARS LATER* 17 (Comm. Print 2014).

292. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015*, at 143 (2014).

293. JACOB S. HACKER, *THE DIVIDED WELFARE STATE* 57 (2002).

294. Germany, *supra* note 3, at 774–75, 780–82.

295. See, e.g., *id.* at 780–82; *Farm Bill Signed, USDA on the Clock*, POLITICO (Feb. 7, 2014, 3:29 PM), <http://www.politico.com/story/2014/02/farm-bill-usda-103270.html>.

296. Occasionally, Congress may temporarily enact a tax program with anti-poverty effects and let it expire. The primary recent example was 2009's Making Work Pay Credit, which was an across-the-board tax credit of up to \$400 for working individuals and up to \$800 for married taxpayers filing joint returns. This was not an anti-poverty program, as it applied more or less universally to all workers, but poor people did presumably take advantage of it, and then it expired. See *The Making Work Pay Credit*, INTERNAL REVENUE SERVICE (Apr. 23, 2014), <http://www.irs.gov/uac/The-Making-Work-Pay-Tax-Credit>.

297. Scholz et al., *supra* note 8, at 232.

AFDC.<sup>298</sup> Yet, Congress and presidential administrations alike continue to expand the EITC, citing its political popularity as a reason for doing so.<sup>299</sup> Not only this, but all of the components of the tax war on poverty described above have expanded during the past 25 years.<sup>300</sup>

Commentators, as cited in Part I, who criticize the tax war on poverty for its shortcomings overlook the relative political feasibility of tax-based war on poverty. Insofar as the nontax war of poverty lacks political viability, the real choice for policymakers and advocates may not be between the tax and the nontax war, but between the flawed tax war on poverty and *no* war on poverty at all.

### ***B. Problems of Distributive Equity***

Common to programs in the tax war on poverty is that many of their provisions are more valuable to taxpayers in higher tax brackets or with higher tax bills than their intended recipients. This inequality arises because many of the anti-poverty tax programs take the form of exclusions, deductions, or nonrefundable credits—provisions that raise two major concerns about distributional equity. First, the value of these provisions often turns on one's income tax bracket, meaning that they are worth more in dollars to taxpayers in higher brackets. Second, exclusions, deductions, and nonrefundable credits depend on the taxpayer's overall income or tax liability, also making them more valuable to taxpayers with more income and more tax liability.

The first problem, often called the “upside-down subsidy” concern, was stated most famously in prominent tax scholar Stanley Surrey's 1970s critique of social policies embedded in the tax code.<sup>301</sup> Surrey highlighted the fact that the value to a taxpayer of a deduction or exclusion equals the dollar amount of the deduction or exclusion multiplied by the taxpayer's marginal rate.<sup>302</sup> To see this, imagine Taxpayer A making \$20,000 in gross annual income and falling in the 15% bracket, and Taxpayer B making \$60,000 and falling in the 25% bracket. Each then receives a \$5,000 deduction. Taxpayer A's taxable income falls by \$5,000, causing her tax liability to fall by \$5,000 multiplied by her 15% marginal rate, or by \$750. In contrast, when wealthier Taxpayer B's taxable income falls by \$5,000, her tax liability falls by \$5,000 multiplied by her 25% marginal rate, or by \$1,250. In other words, due to her lower bracket, Taxpayer A's deduction was worth \$500 less to her than to Taxpayer B. This disparity arises in connection with several of the provisions of the tax war on poverty.

Second, most of the tax code's anti-poverty programs depend on the taxpayer's income and/or tax liability. Except for refundable credits, all tax credits require a taxpayer to have positive tax liability. To take advantage of exclusions, deductions, and nonrefundable credits, a taxpayer needs, in the first two cases, a gross income, and in the third case, a positive tax liability. Yet, low-income

---

298. *Id.*

299. *See supra* Part I.A.

300. *See supra* Part I.

301. STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 35–39 (1973).

302. *Id.* at 37.

taxpayers often do not have either of these.<sup>303</sup> To the contrary, due to the personal and dependency exemptions, the standard deduction, and the plethora of other anti-poverty benefits now available to them through the tax code, many low-income taxpayers now have no positive tax liability.<sup>304</sup> A single taxpayer with gross income of \$10,000 for 2013, for example, will have no income tax liability merely as a result of the personal exemption and the standard deduction. She will subtract from her gross income of \$10,000 her personal exemption of \$3,900 and her standard deduction of \$6,100, leaving her with taxable income of \$0. As a result of situations such as this one, poor taxpayers often have nothing against which to offset their various tax credits. This is the reason why, for example, statistics show that many low-income students simply cannot take advantage of the Lifetime Learning Credit.<sup>305</sup>

Tax scholars have noted these two issues for decades.<sup>306</sup> The problems become especially acute, however, when looking at the tax code as a tool to fight poverty. The same two distributional concerns are less troublesome in regard to provisions that do not target poor people directly, but seek to induce nonpoor taxpayers to address poverty-related issues. The low-income housing credit applies, for example, to investors in real estate projects, many who presumably have positive tax liability. Further, those credits are transferrable, so even if an investor cannot take advantage of a low-income housing credit herself, she can—and, data show, likely will—sell it to a taxpayer who can use it.<sup>307</sup> Or, to take another example, eligibility to receive deductible contributions is likely valuable to any organization that wants financial support, whether the organization has tax liability or not. For this reason, exemption from federal income tax under § 501(c)(3) status may be a powerful incentive even for an exempt organization that never expects to have any taxable profits.

Related to the problems of distributive justice is that these programs, taken together, may result in particularly high marginal tax rates for certain low-income taxpayers.<sup>308</sup> Being in the phase-out range for the EITC, for instance, may give rise to a higher marginal tax rate than the one that a taxpayer would face once she is out of that range.<sup>309</sup> The less narrowly targeted that programs are toward the poor, the less of an issue this is. However, functional high marginal tax rates are inherent to

---

303. Bruce Bartlett, *Who Doesn't Pay Federal Income Taxes (Legally)*, N.Y. TIMES ECONOMIX BLOG (June 28, 2011, 6:00 AM), [http://economix.blogs.nytimes.com/2011/06/28/who-doesnt-pay-federal-income-taxes-legally/?\\_php=true&\\_type=blogs&r=0](http://economix.blogs.nytimes.com/2011/06/28/who-doesnt-pay-federal-income-taxes-legally/?_php=true&_type=blogs&r=0).

304. This is the fact to which Mitt Romney was referring, with his infamous comment about the 47% of Americans who pay no income tax. For an explanation of this phenomenon, see *Who Doesn't Pay Federal Taxes?*, TAX POLICY CENTER, <http://www.taxpolicycenter.org/taxtopics/federal-taxes-households.cfm> (last visited Aug. 4, 2014).

305. See, e.g., Smith, *supra* note 155, at 208.

306. See generally SURREY, *supra* note 301. See also Brian Jenn, *The Case for Tax Credits*, 61 TAX. LAW. 549 (2008).

307. For a description of trades in low-income housing credits, see generally Callison, *supra* note 173.

308. For a description of this problem, see Daniel N. Shaviro, *Effective Marginal Tax Rates on Low-Income Households*, 1999 TAX NOTES TODAY 162, 162–82.

309. *Id.*

any narrowly targeted anti-poverty programs, whether or not they are tax programs. One minor advantage of running anti-poverty programs through the tax code is that it may be easier to see particularly high marginal tax rates that emerge when they result entirely from tax programs, rather than in part from tax programs and in part from nontax programs.

### *C. Less Stigmatizing of Recipients*

Another commonality of anti-poverty tax programs is that they carry less social stigma than nontax programs. To procure a benefit that derives from any of the provisions of the tax code, a benefit-seeker merely files his annual tax return and then receives a refund (insofar as he is eligible). In contrast, most direct-spending programs require participants to fill out a separate application with a distinct agency and (in many cases) to undergo an interview or some other prescreening process.

The relative absence of stigma with tax-based anti-poverty measures is due to the fact that almost every citizen at some point in his or her life has to pay taxes or file returns. A low-income taxpayer who primarily uses the tax system to get benefits has the same experience of a higher-income taxpayer. Both fill out the same form, often with help from a return preparer, both hope to get a large refund, and both likely get at least some refund.<sup>310</sup> Tax scholar Jonathan Barry Forman contrasts this experience with that of being a welfare recipient:

[W]elfare is demeaning: food stamp beneficiaries are stigmatized every time they go to the grocery store, and Aid to Families with Dependent Children (AFDC) beneficiaries end up with social workers controlling their lives. If [opponents of tax-based programs] think that any individual could find the ‘costs of filing a tax return’ more repugnant, I urge them to go talk with some welfare beneficiaries at their county . . . welfare department.<sup>311</sup>

In addition, while some commentators have noted that the IRS’s attempts to identify family status infringe upon taxpayer privacy, filing a tax return is less invasive than an in-depth interview with a caseworker at a traditional welfare agency.

To take an example of one tax benefit, interviews with EITC recipients suggest that they in fact do not view the credit as a stigmatizing welfare program but instead as a “bonus,” like “winning the lottery,” or similar to a “reward” for working.<sup>312</sup> Based on her study of Boston-area EITC recipients, legal scholar Sara Greene has reported: “Respondents reported favorable feelings toward the EITC . . . because it allowed them to feel, as one respondent said, like ‘a real American.’ Terms such as ‘taxpayer,’ ‘earner,’ and ‘hard worker’ were common in

---

310. In 2009, for instance, 83.4% of individual income tax returns resulted in refunds. See *SOI Tax Stats – IRS Data Book*, INTERNAL REVENUE SERVICE, TBLs. 2 & 12, <http://www.irs.gov/uac/SOI-Tax-Stats-IRS-Data-Book> (last visited Feb. 17, 2014).

311. Jonathan B. Forman, *Let’s Keep (and Expand Upon) the Earned Income Credit*, 56 TAX NOTES 233, 233 (1992).

312. Tach & Halpern-Meekin, *supra* note 36.

the narratives that respondents invoked when describing themselves as wage-earning EITC recipients.<sup>313</sup>

Perhaps because filing for tax benefits is less stigmatizing, poor individuals are more likely to file tax returns to get benefits than to apply for benefits through other agencies. While conventional wisdom might suggest that the poor do not know to file tax returns and for that reason miss out on available benefits, data reveal that the take-up rates, at least for the EITC, are substantially higher than for nontax welfare programs.<sup>314</sup>

The flip side of the lower stigma associated with return filing is the onerous process that arises when the IRS challenges a taxpayer's claim for a tax benefit. In the majority of correspondence audits, the IRS "freezes" the refund and sends a letter to the taxpayer requiring the taxpayer to substantiate his claim.<sup>315</sup> Tax professor Michelle Lyon Drumbl, who runs a low-income taxpayer clinic, notes that most low-income taxpayers are not able to comply with the demands of an audit.<sup>316</sup> Echoing this concern in regard to the EITC, Schneller et al. find that "the most important drawback of the EITC's tax administration derives from the fact that when EITC claimants – who are responsible for certifying their own eligibility – erroneously claim to be eligible, they are required to engage the IRS's complex 'deficiency process' encompassing correspondence audits, the IRS Office of Appeals, and United States Tax Courts."<sup>317</sup> Further, Drumbl observes that many low-income taxpayers' tax-benefit overclaims are inadvertent, and the IRS makes insufficient effort to distinguish between taxpayers who deliberately filed for benefits inappropriately and taxpayers who simply did not understand the complex rules surrounding tax-embedded benefits.<sup>318</sup> She finds that, in contrast to anti-poverty programs based in the tax code, direct-benefit "programs such as the SNAP and Supplemental Security Income (SSI) are *not* punitive in their treatment of inadvertent error."<sup>319</sup>

#### *D. Administrative Ease*

Policymakers and scholars often give administrative justifications for the various provisions of the tax war on poverty (as well as for other tax-embedded social policies). Including a program in the tax code generally means that the IRS will run it. In contrast, a variety of other agencies, all with their own substantive emphases, administer direct-spending programs. The IRS brings a particular set of advantages and disadvantages to the programs that Congress has assigned it.

---

313. Greene, *supra* note 36, at 126.

314. Weisbach & Nussim, *supra* note 36, at 1010–12.

315. TAXPAYER ADVOCATE SERV., 2011 ANNUAL REPORT TO CONGRESS 2011 287, fn. 17 (2012), available at <http://www.taxpayeradvocate.irs.gov/Annual-Reports-To-Congress/FY-2011-Annual-Report-To-Congress>.

316. See generally Michelle Lyon Drumbl, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113 (2013)

317. Schneller et al., *supra* note 36, at 186.

318. Drumbl, *supra* note 316, at 3.

319. *Id.* at 4.

Perhaps the most distinctive feature of the IRS's capabilities is their relatively low cost. As Jonathan Barry Forman puts it, "[t]he IRS is far and away one of the most efficient agencies in the federal government. The IRS has a highly trained staff and a solid resource base."<sup>320</sup> Leslie Book concurs, highlighting the IRS's singular prowess at reaching low-income individuals and getting them to claim the benefits for which they are eligible.<sup>321</sup> In their *Yale Law Journal* comparative study of the EITC and SNAP, David Weisbach and Jacob Nussim found that, even though the EITC is substantially larger than SNAP, the EITC costs the federal government roughly one-tenth the amount to administer as SNAP does.<sup>322</sup> On the other hand, taxpayers themselves bear some of the administrative costs associated with tax anti-poverty programs.<sup>323</sup>

In addition, the IRS may bring special facilities to policies within its purview. The IRS has historically cultivated its ability to measure income and quickly deliver benefits to intended recipients. David Weisbach has observed that the IRS's "mission and expertise are so different than a typical line agency. . . . The tax agency is unlikely to have strong views about other programs, such as environmental, energy, housing or education programs."<sup>324</sup> Instead, the IRS's "expertise in processing paper and measuring income may be significantly different than that of other agencies."<sup>325</sup> Similarly, the National Taxpayer Advocate—the IRS ombudsman figure—has noted that the IRS is especially good at verifying income-based eligibility criteria and sending out refunds quickly.<sup>326</sup>

However, the National Taxpayer Advocate has also highlighted some of the particular challenges that the IRS has faced, as a revenue collection agency, in administering anti-poverty programs. In the 2009 report to Congress, National Taxpayer Advocate Nina Olson emphasized several such problems, including "fact-based eligibility requirements," a "lack of pre-certification procedures," "characteristics of the target population," the "large size of the benefit amounts," and "the role of return preparers in claiming the benefit."<sup>327</sup> Specifically, she argues that the IRS has difficulty verifying some of the nonincome information necessary to allot social welfare benefits, such as the number of qualifying children that give rise to the Child Tax Credit.<sup>328</sup> Regarding "pre-certification," the IRS has few procedures available to determine whether a benefit is appropriate before depositing a refund with a taxpayer.<sup>329</sup> The IRS's brief experiment with precertification in the

---

320. Forman, *supra* note 311, at 233.

321. Book, *supra* note 36, at 1105.

322. Weisbach & Nussim, *supra* note 36, at 1004.

323. These might take the form of individual expenses to hire paid tax preparers as well as the broader cost to the taxpaying public of having a complex tax code that includes so many social programs. Thanks to George Yin for this point.

324. David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1841 (2006).

325. *Id.*

326. TAXPAYER ADVOCATE SERV., INTERNAL REVENUE SERV. 2009 ANNUAL REPORT TO CONGRESS vol. II, at 83 (2009), available at [http://www.irs.gov/pub/irs-utl/1\\_09\\_tas\\_arc\\_vol\\_1\\_preface\\_toc\\_msp.pdf](http://www.irs.gov/pub/irs-utl/1_09_tas_arc_vol_1_preface_toc_msp.pdf).

327. *Id.* vol. I, at 43.

328. *Id.* vol. I, at 484.

329. *Id.* vol. II, 84.



mid-2000s, she notes, did not work very well.<sup>330</sup> Concerning the target population, she points out that many low-income taxpayers are unfamiliar with the tax system, and that the IRS is not good at educating them.<sup>331</sup> In addition, she observes the mission creep that has occurred as the IRS has had to take on so many social programs.<sup>332</sup>

In addition, Olson observes that benefits as large as the EITC, often claimed with the help of low-skill private tax preparers, are “ripe for fraud.”<sup>333</sup> Issues with paid preparers may be of particular concern, especially given the accuracy problems that may arise when preparers for low-income populations also offer high-interest refund-anticipation products.<sup>334</sup> Low-income taxpayers may have trouble with complex forms, and while the IRS is investing in Volunteer Income Tax Assistance (“VITA”) sites across the country, those sites currently only serve a fraction of the need that exists in helping low-income taxpayers navigate complicated tax provisions.<sup>335</sup> This issue is less of a problem when dealing with the indirect anti-poverty programs, most of which target relatively sophisticated businesses.

Yet, even noting these important concerns, some of the worries about error rates in the tax war on poverty lack a comparative reference point. Weisbach and Nussim find that, while the IRS tends to overpay claimants of tax benefits, other agencies tend to err in the reverse direction, failing to reach large segments of eligible populations.<sup>336</sup> Weisbach and Nussim’s data suggest that delivering large-scale benefits to substantial recipient groups, especially low-income individuals, involves an inherent error rate that no agency has yet been able to escape. Given this, Weisbach and Nussim observe that, “when accuracy is measured based on under-and over-provision, [SNAP], while generating a different type of error than the EITC, cannot be said to be more accurate than the EITC, even though it costs

---

330. *Id.*

331. *Id.* vol. II, 84–85.

332. *Id.* vol. II, 87.

333. *Id.* vol. II, 85–86.

334. For a general look at the problems that refund anticipation products cause, see generally *id.* at 84–85; Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2006); Leslie Book, *Closing the Tax Gap: Refund Anticipation Loans and the Tax Gap*, 20 STAN. L. & POL’Y REV 85 (2009); Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2006).

335. In 2009, VITA sites, which are available to taxpayers with annual incomes below approximately \$50,000, served about 3.2 million taxpayers. INTERNAL REVENUE SERV., SOI TAX STATS - SELECTED TAXPAYER ASSISTANCE AND EDUCATION PROGRAMS, BY TYPE OF ASSISTANCE OR PROGRAM - IRS DATA BOOK TABLE 19 (2009), available at <http://www.irs.gov/uac/SOI-Tax-Stats-Selected-Taxpayer-Assistance-and-Education-Programs-by-Type-of-Assistance-or-Program-IRS-Data-Book-Table-19>. However, in 2011, taxpayers filed about 95 million returns in that income category. INTERNAL REVENUE SERV., SOI TAX STATS - INDIVIDUAL STATISTICAL TABLES BY SIZE OF ADJUSTED GROSS INCOME (2011), available at <http://www.irs.gov/uac/SOI-Tax-Stats—Individual-Statistical-Tables-by-Size-of-Adjusted-Gross-Income>. For more information on VITA sites, including the income cutoffs, see *Free Tax Return Preparation for Qualifying Taxpayer*, INTERNAL REVENUE SERV., <http://www.irs.gov/Individuals/Free-Tax-Return-Preparation-for-You-by-Volunteers> (last visited Aug. 4, 2014).

336. Weisbach & Nussim, *supra* note 36, at 1003–06.

ten times as much to administer and is only one-half the size.”<sup>337</sup> Similarly, while conventional wisdom often views the IRS as opaque, it is not clear that the other large federal agencies that administer anti-poverty programs are any more transparent.

Overall, the IRS actually may be a *relatively* good administrator for the tax war on poverty. In particular, when dealing with the human suffering of poverty, there may be good a reason to prefer an agency that errs by paying out too much, rather than by failing to deliver benefits to those who urgently need them.

#### ***E. Flexibility: Market Responsiveness & Cash Subsidies***

Many of the provisions of the tax war on poverty deliberately involve more flexibility than nontax programs. This flexibility takes two particular forms. First, rather than regulating the behavior of program beneficiaries directly, many of the tax-based programs create incentives for their market participation. Second, because the benefits delivered take the form of cash subsidies, they allow recipients the freedom to decide what to do with their subsidies. Both types of flexibility proceed from the tax system’s particular aptitude for transmitting monetary amounts, and both have costs and benefits.

Consider market responsiveness. All of the anti-poverty tax programs described here attempt to shape recipients’ conduct by giving them financial incentives to behave in certain ways: obtain employment, build low-income housing, hire the indigent, and so forth. These programs do not directly *require* the targeted populations to engage in any particular activities. Nor do they empower the federal government to itself participate in the relevant market. Instead, they merely offer rewards to taxpayers who choose the desired behavior.

As the Supreme Court decision in the Affordable Care Act case pointed out, the line between mandating a behavior and merely providing a positive or negative financial incentive for it can be blurry.<sup>338</sup> Nonetheless, the Court’s ruling distinguished between the two, holding that tax subsidies or penalties do not constitute mandates for the purposes of constitutional law.<sup>339</sup> Further, tenets of prospect theory and behavioral economics, particularly about loss aversion, suggests that individuals respond less strongly to positive financial incentives than to negative rules or penalties.<sup>340</sup> All of the provisions of the tax war on poverty provide positive incentives, showing policymakers’ willingness to allow these programs to give taxpayers freer choice and flexibility about whether to engage in the desired behavior, providing a less powerful effect than they otherwise could. The flip side of the positive-incentive approach means that, in some cases, program recipients produce less than the desired amount of the activity or product in question. The extent of this concern depends on the size and design of incentive, on the various markets it affects, and on the nature of the target population.

---

337. *Id.* at 1006.

338. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2597–611 (2012).

339. *Id.*

340. See Nicholas C. Barberis, *Thirty Years of Prospect Theory in Economics: A Review and Assessment*, 27 J. OF ECON. PERSP. 173, 175 (2013).

The tax war on poverty is also notably flexible because it delivers its benefits in cash subsidies rather than in kind. Milton Friedman favored this approach because he believed it gave poor families more freedom to decide how they wanted to spend their money.<sup>341</sup> Additionally, recent scholarship has pointed out that flexible cash subsidies may be particularly effective at combatting poverty. A series of studies on the effects of cash transfers on poor families has recently found that periodic payments, similar in size to the maximum EITC payouts, had dramatic positive effects over the long term on the health, educational attainments, and propensity toward crime of children in the families that received the payments.<sup>342</sup> Another study, examining this question historically, discovered improved child outcomes in families that had received cash mothers' pensions.<sup>343</sup> In the context of developing countries, experiments have revealed that cash transfers increase work hours among recipients, a change that in turn improves quality of life.<sup>344</sup>

The one way in which the tax war on poverty does *not* promote flexible spending among the poor is by distributing its benefits, including those to low-income taxpayers, only once a year. Normally, taxpayers receive their tax-embedded benefits as part of their tax refund. As a result, some low-income individuals may not have the cash on hand to pay for various needs as they arise throughout the year. The literature has shown this arrangement to be a particular problem with the education credits.<sup>345</sup> Conversely, however, some research has shown that receiving

---

341. MILTON FRIEDMAN, *CAPITALISM & FREEDOM* 191–92 (1982). *See also* Moffitt & Scholz, *supra* note 36, at 121–22.

342. *See* William Copeland & Elizabeth J. Costello, *AM ECON J APPL. ECON.* 86 (2010); E. Jane Costello et al., *Relationships Between Poverty and Psychopathology: A Natural Experiment*, 290 *J. OF THE AM. MED. ASSOC.* 2023 (2003); Elizabeth J. Costello et al., *Association of Family Income Supplements in Adolescence With Development of Psychiatric And Substance Use Disorders in Adulthood Among an American Indian Population*, 303 *J. OF THE AM. MED. ASSOC.* 1954 (2010). For summaries of this research in the popular press, see Matt Yglesias, *Fight Poverty By Giving Poor People Money*, *SLATE* (Jan. 19, 2014, 11:42 AM), [http://www.slate.com/blogs/moneybox/2014/01/19/fight\\_poverty\\_by\\_giving\\_money\\_to\\_the\\_poor\\_more\\_evidence\\_that\\_it\\_works.html](http://www.slate.com/blogs/moneybox/2014/01/19/fight_poverty_by_giving_money_to_the_poor_more_evidence_that_it_works.html); Moises Velasquez-Manoff, *What Happens When the Poor Receive A Stipend?*, *N.Y. TIMES OPINIONATOR* (Jan. 18, 2014, 3:47 PM), [http://opinionator.blogs.nytimes.com/2014/01/18/what-happens-when-the-poor-receive-a-stipend/?\\_php=true&\\_type=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2014/01/18/what-happens-when-the-poor-receive-a-stipend/?_php=true&_type=blogs&_r=0).

343. *See* Anna Aizer et al., *The Long Term Impact of Welfare: Evidence from the Mother's Pension Program* (Sept. 2013) (unpublished manuscript), *available at* <http://www.econ.ucla.edu/alleras/research/papers/childhood%20transfers%20v10-september%202013.pdf>. For a summary of this research in the popular press, see Matt Yglesias, *Welfare Works*, *SLATE* (Jan. 13, 2014, 9:15 AM), [http://www.slate.com/articles/business/moneybox/2014/01/welfare\\_works\\_for\\_kids\\_children\\_whose\\_parents\\_get\\_money\\_grow\\_up\\_healthier.html](http://www.slate.com/articles/business/moneybox/2014/01/welfare_works_for_kids_children_whose_parents_get_money_grow_up_healthier.html).

344. Christopher Blattman et al., *Generating Skilled Self-Employment in Developing Countries: Experimental Evidence from Uganda*, *Q. J. OF ECON.* (forthcoming 2014), *available at* [http://cega.berkeley.edu/assets/cega\\_events/53/WGAPE\\_Sp2013\\_Blattman.pdf](http://cega.berkeley.edu/assets/cega_events/53/WGAPE_Sp2013_Blattman.pdf).

345. *See, e.g.,* Ryan, *supra* note 141, at 54; Smith, *supra* note 138, at 210–12; Mullineaux, *supra* note 142, at 36–39.

benefits only once a year helps poor families save and purchase investment assets.<sup>346</sup> Further, with the Premium Assistance Credit, the IRS is experimenting on a large scale for the first time with distributing credit benefits throughout the year.<sup>347</sup> Should this administrative experiment succeed, perhaps the IRS could do the same with other tax anti-poverty programs. This would further increase the cash-based flexibility of the tax war on poverty.

#### *F. Neglect of the Extremely Poor*

The tax war on poverty is particularly effective at addressing moderate poverty. Work incentives and market interventions target poor individuals who participate in the workforce, and take advantage of various market-based goods and services. However, the tax war on poverty does very little to reach those in American society who are most in need of government help: those in deep poverty.

Poverty-law scholar Peter Edelman has recently documented an intermittently growing trend in the United States: namely, a rise in the number of individuals and families with very little, if any, income.<sup>348</sup> Defining “deep poverty” or, in other words, “extreme poverty” using “a World Bank metric of global poverty [of] \$2 or less, per person, per day,”<sup>349</sup> Edelman observes that deep poverty among children rose by 75% between 1995 and 2005.<sup>350</sup> Further, approximately 15 million people in the United States remain in deep poverty.<sup>351</sup> Poverty scholars are still attempting to ascertain the precise level of deprivation that these families face.<sup>352</sup> However, Edelman cites data showing that “[e]ven six months of the kind of trauma that deep poverty entails can derail a child emotionally, psychologically, physically, and educationally for a much longer period. Even a short spell among the deeply poor can have lingering effects that harm a person or family for much longer than the basic statistics would indicate.”<sup>353</sup>

The tax war on poverty does have some impact on deep poverty. Shaefer and Edin find, for example, that refundable credits, mostly the EITC, have been responsible for lifting 1.17 million children out of extreme poverty in between 1996 and 2011.<sup>354</sup> In addition, some of the tax-exempt organizations that address poverty presumably provide benefits to those in deep poverty. Food banks and homeless

---

346. Jennifer L. Romich & Thomas Weisner, *How Families View and Use the EITC: Advance Payment Versus Lump Sum Delivery*, 53 NAT'L TAX J. 1245, 1260 (2000); Weisbach & Nussim, *supra* note 36, at 1025.

347. Julia James, *Health Policy Brief: Premium Tax Credits*, HEALTH AFFAIRS (Aug. 1, 2013), [http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief\\_id=97](http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=97).

348. PETER EDELMAN, *SO RICH SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA*, 81–100 (2012). Some scholars argue that a consumption-based measure would be more appropriate for assessing deep poverty, but most of the studies of the phenomenon appear to use the income measure. Sorting between the two is outside of the scope of this paper.

349. Shaefer & Edin, *supra* note 36, at 251.

350. EDELMAN, *supra* note 348, at 82.

351. *Id.*

352. EDELMAN, *supra* note 348, ch. 5.

353. *Id.* at 83.

354. Shaefer & Edin, *supra* note 36, at 259.

shelters are all human-services tax-exempt organizations that likely assist the extremely poor.

However, the tax war on poverty is not very effective at targeting the extremely poor. Some of the deeply poor do not work, which means they cannot claim the EITC, nor the Child Tax Credit, nor the education credits; and they are also ineligible for the childcare tax benefits, which mandate that the recipient work or be actively looking for work. By definition, moreover, the employment credits also do not help those who do not work. As discussed above, the LIHTC creates incentives to rent to poor people with the highest incomes allowable, a group that very likely excludes deeply-poor people. Perhaps some of the unemployed and deeply poor occasionally patronize businesses developed with the New Markets Tax Credit, although, if they are living on less than \$2 a day, they probably do not engage in much commercial activity. Most of the nonworking deeply poor likely qualify for Medicaid,<sup>355</sup> so the Premium Assistance Credit will not help them pay for healthcare. To be sure, many tax-exempt organizations that serve the extremely poor do not condition assistance on work. However, as discussed, there is little evidence the organizations in tax-exempt sectors deal substantially with the nonworking deeply poor. Taking account of all of its provisions, the tax war on poverty appears to be barely fighting poverty at all for the nonworking extremely poor and their children.

The Shaefer and Edin data make clear, however, that some of the deeply poor do work, enough to claim at least some of the EITC.<sup>356</sup> Nevertheless, even the working extremely poor likely miss out on many of the provisions of the tax war on poverty. For one thing, most of those in the category probably do not have enough income or tax liability to qualify for anything besides the refundable credits. As a result, these taxpayers cannot take the full Child Tax Credit, the Dependent Care Assistance Exclusion, the Child Care Credit, the Lifetime Learning credit, or the full amount of the American Opportunity Credit.

In addition, the deeply poor will have difficulty paying out-of-pocket for education or childcare—a circumstance that prevents them from taking the education or childcare credits, even with tax liability. Again, because the LIHTC creates an incentive to build housing for individuals at the upper end of the income levels, the deeply poor are probably less likely to live in housing built with that credit. Similarly, even the working extremely poor probably cannot afford to shop much at any businesses receiving the New Markets Tax Credit, although some of those businesses may provide jobs to those in deep poverty who are working. Insofar as the working deeply poor do have jobs, some of those jobs may have resulted from the employment credits, although, given how few employers appear to claim those credits, the chance of even that result is not large.

### ***G. Weak Legal Infrastructures***

The final common feature of the provisions of the tax war on poverty is their lack of an effective legal infrastructure. This deficiency exhibits itself on both

---

355. *Eligibility*, MEDICAID, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html> (last visited Aug. 25, 2014).

356. Shaefer & Edin, *supra* note 36, at 252.

the front end and the back end of the use of these provisions. On the front-end, because lawyers concerned with the anti-poverty tax provisions are (as of yet) few and far between, these provisions have no accumulated bodies of relevant poverty law that might help ensure that poor individuals can take full advantage of the programs. On the back end, neither the IRS nor any other governmental agency has the mandate or the resources to evaluate the effectiveness of the tax-embedded anti-poverty programs on a regular basis.

To begin at the front end: there are very few lawyers or other legal advocates currently working to ensure that the IRS administers the tax war on poverty in a way that accords with the interests of the poor. Writing in the *Duke Law Journal*, J. Skelly Wright, legendary judge and civil rights advocate, formulated this problem in general terms when he stated as early as 1970: “[F]or many government programs, the interstitial legislation involved in rulemaking and regulation by the various agencies and departments may often be far more important to the people concerned than the original congressional action.”<sup>357</sup> Further, Wright pointed out, litigation over legislation can productively bend the law in the interests of the poor individuals it serves.<sup>358</sup>

However, tax law currently lacks a cadre of lawyers or other advocates fighting for the interests of the poor in front of Congress and the IRS, or representing poor clients in court on tax issues. Legal aid offices rarely, if ever, have tax divisions to do this type of work, focusing instead on more traditional poverty-law areas like housing or welfare law. A few law schools have clinics that represent low-income taxpayers, but they are rare and do not practice substantial policy advocacy. Not only this, but the anti-poverty tax programs have not generally incorporated bodies of relevant nontax law. As mentioned earlier, Roisman vividly makes this case in regard to the low-income housing credit. In prior decades, substantial civil rights law protecting the interests of various marginalized groups in federal housing policy developed.<sup>359</sup> However, it is still unclear whether any of that law extends to low-income housing credit, although Roisman convincingly argues that it should.<sup>360</sup>

In addition, on the back end, most of the anti-poverty tax programs have not undergone substantial formal evaluation. The primary way that the federal government assesses tax expenditures is by providing an annual revenue estimate. It is helpful to know how much each tax provision costs but, in itself, that figure tells us very little about how well each expenditure is serving its stated goals. The data cited above about the effect of the EITC and the Child Tax Credit on the poverty rate tells us little about, for instance, administrative problems or incentive effects that the programs may generate. Additionally, sometimes, the General Accounting Office or the Congressional Budget Office (“CBO”) issues reports on some particular tax provisions, but those are largely ad hoc, and decades can go by without the GAO or the CBO turning attention to certain other tax programs. In addition,

---

357. J. Skelly Wright, *Poverty, Minorities and Respect for Law*, 1970 DUKE L.J. 425, 443.

358. *Id.* at 442.

359. *See generally* Roisman, *supra* note 186.

360. *Id.* at 1012–13.

their reports do not generally delve into questions as to how well the different programs are doing at addressing poverty.

### III. MECHANISMS TO MAKE THE TAX WAR ON POVERTY MORE EFFECTIVE

In light of the analysis presented in Parts I and II, the final Part of this Article proposes ways in which two groups, tax lawmakers and tax lawyers, can make the tax war on poverty more effective.

#### A. Tax Lawmakers

This Subpart identifies four of the many ways in which tax lawmakers, both at the legislative and administrative levels, could make the tax war on poverty more effective: namely, (1) by increasing use of refundable credits; (2) by shifting the focus of the tax war on poverty to those in deep poverty; (3) by developing evaluation procedures for anti-poverty tax programs; and, (4) by reorienting the IRS.

These four changes are steps that tax lawmakers could take to improve the tax war on poverty broadly across all of its different provisions. At the same time, lawmakers could tackle the issue of how well each of the individual provisions itself fights poverty. Part I of this Article described these provisions and analyzed their individual shortcomings. In view of this analysis, tax lawmakers should address ways to overcome the individual shortcomings.

In addition to provision-specific reforms, tax lawmakers should initiate several larger changes that would affect the tax war on poverty's entire package of provisions. Some of these changes are relatively low cost, but others may represent additional budget demands. For this reason, lawmakers may want to consider these changes along with offsetting cuts. For example, with regard to any tax provision, Congress can cut back on high-income taxpayer eligibility to pay for expanding eligibility among lower-income taxpayers. Considered in light of budget issues, these larger changes would go a long way toward enhancing the effectiveness of the tax war on poverty as a whole, even in the absence of more provision-specific reforms. It is these more overarching changes that are the focus of the following divisions of this Subpart.

##### 1. Increasing Use of Refundable Credits

As observed throughout this Article, many poor people are unable to take advantage of the anti-poverty tax provisions directed at them because they do not have enough income or tax liability to do so. This creates serious distributional equity problems, as well as reduces the number of people actually affected by the relevant tax incentives. Given this situation, tax lawmakers should, at a minimum, convert tax provisions for which many low-income individuals would otherwise qualify into refundable credits. That would allow low-income taxpayers to qualify for these programs, regardless of income or income tax liability.

Employing refundable credits is not a new idea. As discussed above, several scholars have proposed turning various provisions of the tax war on poverty

into refundable credits.<sup>361</sup> Other scholars have called on Congress to stop using exclusions and deductions altogether due to their upside-down subsidy effects.<sup>362</sup> Members of Congress even seem to agree. In the past decade, Congress has started making more of its credits refundable or partially refundable, including the Child Tax Credit, the American Opportunity Credit, and the Premium Assistance Credit.<sup>363</sup>

However, in the context of the tax war on poverty, the need for Congress to make more credits refundable becomes even more pressing. If the tax code has now evolved into one of the primary tools—if not *the* primary tool—that the federal government uses to attack poverty, its provisions need to be available to all poor individuals. Making credits refundable does make them more expensive, but Congress can also save money by phasing tax benefits out for higher-income taxpayers.

Making credits refundable may also make them less politically viable. Refundable credits resemble direct-spending programs more than other tax provisions do, and for this reason, might be less popular. However, refundable credits still have political feasibility advantages that direct subsidies do not. All of the political advantages described above still apply to refundable credits. Refundable credits may use the easier legislative pathways available to tax programs and do not require annual appropriations. The public opinion surveys discussed reveal significantly more support for refundable credits than for otherwise identical direct-spending programs.<sup>364</sup> The most prominent anti-poverty refundable credit, the EITC, has long attracted bipartisan support.<sup>365</sup> Refundable credits are at least as likely to attract interest-group support as their nonrefundable counterparts, presumably more so, because they tend to be more valuable to recipients.

Certainly, anti-poverty policy, because it benefits a disadvantaged minority in the United States, is inherently politically vulnerable. For this reason, anti-poverty refundable credits may someday face political challenges. Yet, this is the precise reason the various political advantages that accrue to refundable credits are so important.

---

361. ABA Section of Taxation, *Report of the Child Care Task Force*, 46 TAX NOTES 331 (1990); Jonathan B. Forman, *Beyond President Bush's Child Tax Credit Proposal: Towards a Comprehensive System of Tax Credits to Help Low-Income Families With Children*, 38 EMORY L.J. 661, 678–79 (1989); Smith, *supra* note 155, at 32–33.

362. SURREY, *supra* note 301.

363. Some scholars have proposed collapsing some of these refundable credits into a single credit. See, e.g., PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR & PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 107–09 (2005), available at <http://www.taxpolicycenter.org/taxtopics/upload/tax-panel-2.pdf>; Jonathan Barry Forman, *Designing a Work-Friendly Tax System*, 2 PIERCE L. REV. 131, 131–55 (2004); Jonathan Barry Forman et. al., *Designing a Work-Friendly Tax System: Options and Trade-Offs 5* (Urban Inst., Discussion Paper Nov. 20, 2005), available at [http://www.taxpolicycenter.org/UploadedPDF/411181\\_TPC\\_DiscussionPaper\\_20.pdf](http://www.taxpolicycenter.org/UploadedPDF/411181_TPC_DiscussionPaper_20.pdf)).

364. Faricy & Ellis, *supra* note 276; Haselswerdt & Bartels, *supra* note 276; Tahk & Tahk, *supra* note 276.

365. See *supra* Part I.A.



## 2. *Shifting the Focus to Those in Deep Poverty*

The growing problem of “extreme poverty” is one that tax lawmakers should recognize and then attack in a variety of ways. The tax system may have inherent limits in its ability to address deep poverty. However, the precise nature and extent of those limits will not be clear until Congress and the IRS attempt to work on deep poverty using the tax code and run up against whatever hurdles may exist. However, to this day, the tax war on poverty has not seriously attempted to tackle deep poverty, and lawmakers should start to step into this gap.

One way in which Congress might address deep poverty is to remove some of the work requirements that accompany certain tax anti-poverty provisions, legislating tax benefits that do not have work requirements. In one study, poverty researchers Sheila Zedlewski and Sandi Nelson followed 95 families in deep poverty.<sup>366</sup> They found that none of them had substantial work.<sup>367</sup> This was the case for three main reasons: some parents in this category had health barriers to work; other parents could not afford reliable childcare; and still others could not find jobs.<sup>368</sup>

To address deep poverty, Congress should consider allowing families such as those in the Zedlewski and Nelson study to access at least part of the Child Tax Credit, even if the parents do not work. To this end, Congress could require recipients to have at least one of a list of specified reasons for not working. For instance, Congress could lift the work rules for taxpayers with health barriers to work. In an alternative approach, Congress could just waive the work requirement for part or all of the credit, or for taxpayers below a certain income level. It is true that anti-poverty programs decoupled from work, notably AFDC, have struggled in the past. However, due to their political-feasibility advantages, tax provisions that help the extremely poor should be at least easier to enact than their nontax counterparts. Then in some circumstances, for example in the case of the poor and disabled or the poor and mentally ill, the public may be willing to accept an anti-poverty program not tied to work, especially when designed as an otherwise widely available tax program. The tax war on poverty provides a context in which legislators could assess the extent to which this is the case.

Currently, taxpayers who do not work often do not file tax returns. However, given how well some direct-spending programs—SNAP, for instance—reach this population, many of the indigent clients clearly know how to apply for government benefits. Filing a tax return is easier than going through the more complex SNAP precertification process. As a result, there is no evident reason why nonworking taxpayers could not file tax returns to get tax benefits.

Another set of approaches Congress should try would involve loosening the requirements for the childcare tax benefits, increasing them in amount, and/or making them available on an advance basis throughout the year. Lack of adequate childcare appears to be a genuine obstacle for poor parents hoping to work, and the

---

366. Sheila R. Zedlewski & Sandi Nelson, *Families Coping Without Earnings or Government Cash Assistance*, URBAN INSTITUTE, OCCASIONAL PAPER NO. 64, vii (2003).

367. *Id.*

368. *Id.* at 3–7.

current nonrefundable child credit capped at a few thousand dollars, and payable only after parents purchase childcare might not meet needs of families who either do not have thousands of dollars to pay up front or who have childcare needs in excess of a few thousand dollars. However, a credit designed like the Premium Assistance Credit, substantial in amount, refundable, and perhaps payable directly to third party providers on a periodic basis has the potential to substantially assist deeply-poor parents in being able to work.

Another way that Congress could target the deeply poor would be to increase incentives for third parties to provide assistance to this group. For example, Congress could expand the low-income housing credit for developers who invest in housing for the very low-income. As discussed above, the research on that credit suggests that the main reason builders are not creating housing for the deeply poor is that, by tying the rent that investors can collect to a percentage of renters' income and allowing the same-size credit for housing to all low-income tenants, the statute induces recipients to develop housing for the highest-earning low-income renters possible.<sup>369</sup> Congress could address this problem by raising the value of the credit for projects that house the deeply poor. Alternatively, Congress could rewrite the statute to eliminate the percent-of-income-required rent calculation. Congress might consider similar reforms to provisions like the New Markets Tax Credit and the employment credits, as well as to the tax-exempt organization rules. With reforms in place, given the ease of filing a tax return relative to filing to participate in other programs, the tax code could become an effective means for targeting not only the moderately poor, but the extremely poor as well.

### 3. *Developing Evaluation Procedures for Anti-Poverty Tax Programs*

As discussed above, the federal government is currently spending over \$100 billion annually on the tax war on poverty every year, but with no accurate way of knowing how effective the various tax provisions are, let alone how good they are at combatting poverty. No institution currently has the mandate or the resources to evaluate these various programs seriously.<sup>370</sup>

For these reasons, Congress should charge some agency, perhaps the IRS, with this task and then provide the agency with sufficient funding to do its job well. This is a simple policy prescription. Congress could have significant leeway about how it designed the evaluation process, because almost any review of these programs would be better than the current lack thereof. The National Taxpayer Advocate made a similar recommendation in her 2010 report,<sup>371</sup> urging that Congress specifically fund and authorize the IRS to collect all the data it needs, yet currently lacks, to evaluate tax-based anti-poverty programs.<sup>372</sup> Her report continues: “[i]t is possible that data also could help to determine if a tax-expenditure

---

369. Cohen, *supra* note 184, at 553.

370. This is an issue with tax-embedded programs generally, not just with anti-poverty tax provisions.

371. TAXPAYER ADVOCATE SERV., 2010 REPORT TO CONGRESS, vol. II, at 115, available at [http://www.irs.gov/pub/irs-utl/vol\\_2\\_tasresearchandrelatedstudies2010arc.pdf](http://www.irs.gov/pub/irs-utl/vol_2_tasresearchandrelatedstudies2010arc.pdf).

372. *Id.* at 117.

is effectuating intended policy. . . . Research like this can interest policymakers.”<sup>373</sup> The Taxpayer Advocate seems to believe the IRS could evaluate the programs it runs relatively well. However, if another branch of the Treasury Department or federal agency had superior evaluative capacity, Congress could certainly charge it with regular formal evaluation of the tax programs.

#### 4. Reorienting the IRS

The IRS’s recognized competencies of income measurement and benefit delivery already serve it well in doing anti-poverty work. Tax-based anti-poverty programs do, however, thrust the IRS into the lives of low-income taxpayers with many different characteristics than the business taxpayers the IRS has dealt with traditionally, thus requiring some reorientation on its part. Reorienting the IRS might seem to move it away from its traditional revenue-collecting function. However, by assigning the IRS the responsibility for so many anti-poverty programs, Congress has already done that. Now, the IRS must consider ways to serve this role into which the legislature has thrust it more effectively.

In this regard, certain small initiatives by the IRS might enable its officers to work more easily with the agency’s new clientele. For example, other federal agencies with different substantive jurisdictions, such as the Department of Health and Human Services, have spent decades assisting individuals and families facing the hardships of poverty.<sup>374</sup> The IRS could enter into partnerships or consulting arrangements with agencies of this kind, which could share their expertise in administering anti-poverty programs. In the alternative, the IRS might review its own hiring priorities to bring into the agency personnel with the accumulated wisdom to address the challenges of working with low-income taxpayers.

The IRS might also modify its organizational structure to accommodate its heightening level of responsibility for tackling poverty. In her 2010 report, the National Taxpayer Advocate recommended precisely this.<sup>375</sup> One of the top recommendations of the report was for the IRS to “consider creating a permanent office to establish policy and coordinate issues associated with social program administration.”<sup>376</sup> The report pointed out that, “the office would gain experience in implementing social programs, and as a centralized source of stored institutional knowledge, it would be invaluable in developing future programs.”<sup>377</sup> Describing how the new office would fit within the agency’s current structure, the report envisioned that “the deputy commissioner would have a budget for the office’s staff and have resource allocation authority for all social program initiatives.”<sup>378</sup> The report also imagined that, within this office, the IRS could establish suboffices to

---

373. *Id.* at 118.

374. *Historical Highlights*, U.S. DEP’T OF HEALTH & HUMAN SERV., <http://www.hhs.gov/about/hhshist.html> (last visited Aug. 4, 2014).

375. TAXPAYER ADVOCATE SERV., 2010 REPORT TO CONGRESS, THE IRS MISSION STATEMENT DOES NOT REFLECT THE AGENCY’S INCREASING RESPONSIBILITIES FOR ADMINISTERING SOCIAL BENEFITS PROGRAMS vol. I, 23 (2010), available at <http://www.taxpolicycenter.org/events/upload/2010-MSP2-IRS-Mission-Statement.pdf>

376. *Id.*

377. *Id.*

378. *Id.*

deal with particular programs and the challenges they present, as it has done with regard to the healthcare reform programs.<sup>379</sup>

In the same report, the Taxpayer Advocate also recommended revising the IRS's mission statement "to reflect its dual mission of collecting federal revenues *and* delivering federal social benefits."<sup>380</sup> As a positive model, the report looked to the mission statement of the Social Security Administration, which places its benefit-delivery role front and center, trumpeting its mission to "deliver Social Security services that meet the changing needs of the public."<sup>381</sup> Revamping the IRS's mission statement to incorporate its new role in anti-poverty work could underwrite this goal of reorientation. One downside of such a change might be to make anti-poverty policy even less popular than it is already through association with an often-disliked agency. However, even absent such a drastic change to its mission statement, however, the IRS should seriously reconsider its ever-growing anti-poverty responsibilities and find ways of pursuing them more effectively than it does at the present time.

### **B. Tax Lawyers**

Tax lawyering provides an important additional mechanism for improving the effectiveness of the tax war on poverty. The nontax war on poverty famously involved a very active role for lawyers, as legal-services organizations sprung up nationwide to enable lawyers to shape how the federal government fought that war on poverty.

Going back to that earlier war is instructive in the present context. In their seminal *Yale Law Journal* article on the original nontax war on poverty—an article that Sargent Shriver would call the "genesis of legal services"—Edgar and Jean Cahn argued forcefully that a condition of "responsiveness [on the part of the] law-making bodies [of the war on poverty would be] possible only if the citizens themselves are enfranchised and given effective representation in the processes which determine modes of official behavior."<sup>382</sup> Making this condition into reality was, according to the Cahns, the role and responsibility of the "professional advocate"<sup>383</sup>—the poverty lawyer. Fleshing out this idea, the Cahns mapped out four ways in which lawyers could participate in the war on poverty by providing: (1) "traditional legal assistance in establishing or asserting clearly defined rights";<sup>384</sup> (2) "legal analysis and representation directed toward reform where the law is vague or destructively complex";<sup>385</sup> (3) "legal representation where the law appears contrary to the interests of the slum community";<sup>386</sup> and, (4) "legal representation in contexts

---

379. *Id.* at 24.

380. *Id.* at 21

381. *Id.* at 22.

382. Edgar S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317, 1333 (1964) [hereinafter Cahn & Cahn].

383. *Id.* at 1334.

384. *Id.* at 1336.

385. *Id.*

386. *Id.*

which appear to be nonlegal and where no judicially cognizable right can be asserted.”<sup>387</sup>

The decades since the Cahns’ article have been difficult ones for poverty lawyers. Legal aid organizations face additional substantial restrictions on their ability to carry out class action lawsuits and other types of advocacy work.<sup>388</sup> Notably, after 1996’s welfare-reform law, legal-services organizations cannot “participate in litigation, lobbying or rulemaking involving an effort to reform a Federal or State welfare system.”<sup>389</sup> This rule drastically reduced the amount of welfare rights litigation in the United States, causing legal-aid caseloads to fall by millions of cases and putting hundreds of legal-aid lawyers out of work.<sup>390</sup> Additionally, federal funding for legal services has always been tight, although it has slightly increased under the Obama administration.<sup>391</sup>

Yet, even in this environment, tax lawyers, by whom I mean lawyers who have or gain some expertise in tax matters, can carry forth the legacy of the poverty lawyer in the war on poverty. This proposal may run counter to the conventional wisdom that views tax law as an area for business and the wealthy. With regard to tax lawyers and pro bono work, for instance, one prominent tax lawyer recently wrote of tax lawyers: “[W]e are as a group among the underperformers of our profession.”<sup>392</sup>

Today, however, tax lawyers can and should play an active role in advocating around all of the provisions of the tax war on poverty. In fact, the tax war on poverty offers opportunities for lawyers that may no longer be available in nontax contexts. As such, it now opens up ample room for members of the legal profession to advocate on behalf of the poor, no less than lawyers did during the original war on poverty. For this reason, lawyers and law students who are interested in ending poverty need to consider tax law as a career. In addition, practicing tax lawyers should undertake active pro bono and public-service oriented activities in the tax war on poverty. In so doing, tax lawyers can, in the Cahns’ words, “amplify . . . the voices of silence . . . try to fashion sounds and words out of gestures of despair and postures of surrender. At stake is the practicability of democracy.”<sup>393</sup>

The Cahns’ four-point blueprint suggests several fundamental ways in which tax lawyers can now join the nation’s anti-poverty forces. Here I will take each of their four points in turn. Before I do, however, I want to stress that some of

---

387. *Id.*

388. 49 C.F.R. pt. 1639 (1996). For a description of these regulations, see Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 LAW AND SOC. INQUIRY 919, 925 (2011); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Law Practice: 1975 – 2004*, 84 N.C. L. REV. 1591, 1616–17 (2006).

389. 49 C.F.R. § 1639.1.

390. Zaloznaya & Nielsen, *supra* note 388, at 925.

391. *LSC Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/lsc-funding> (last visited July 21, 2014).

392. Bruce Kayle, *Pro Bono Tax Matters (Not A Contradiction in Terms): A Primer*, TAX NOTES TODAY 777, 778 (August 15, 2005).

393. Cahn & Cahn, *supra* note 382, at 1333.

these proposals may require resources. Writing recently in the *Columbia Journal of Tax Law*, Schneller et al. have compellingly argued for federal funding for legal-assistance programs to develop tax expertise.<sup>394</sup> Given its ever-growing reliance on the tax code to fight poverty, the federal government certainly should provide the funding necessary to give taxpayers representation in this area. Resources for poverty tax law could also come from a number of other sources, including universities and law schools, state and local governments, and organizations in the tax-exempt sector. In particular, private foundations, which have played an important role in developing poverty law in the past, may have an active role to play in supporting some of these proposals.<sup>395</sup> For instance, the National Consumer Law Center, which does consumer-law anti-poverty work, has significant support from private foundations and might serve as a model for the tax world.<sup>396</sup> The tax code already provides for matching grant funds to support low-income taxpayer clinics, which I will support below, and some organizations have been successful in leveraging these funds to stimulate private fundraising.<sup>397</sup>

In addition, tax lawyers can make substantial inroads into poverty law without needing major resource outlays. Some of the ways tax lawyers can help to implement the tax war on poverty may require little in terms of resources, but could have large impacts. As I go through the proposals below, I will highlight some concrete steps tax lawyers could take that need not involve deep new resource pools. Law schools may also have an important low-resource role to play merely by disseminating the message that students interested in anti-poverty work might find tax law a fruitful area of study.

1. “[T]raditional legal assistance in establishing or asserting clearly defined rights”

The tax provisions described in Part I have given rise to substantial legal rights. The Cahns observed that the most important legal right that a poverty lawyer can defend is “the equitable and humane application of administrative rules and regulations under such programs as aid for dependent children, welfare and unemployment compensation.”<sup>398</sup> Elaborating, they observed that, within poverty law, “[t]he assertion of a right in even a single case can have community-wide ramifications.”<sup>399</sup>

The tax war on poverty offers many analogous opportunities for lawyers to help low-income taxpayers assert existing legal rights. For example, the audit rate

---

394. Schneller et al., *supra* note 36, at 203–04.

395. See Zaloznaya & Nielsen, *supra* note 388, at 922.

396. *Funders*, NATIONAL CONSUMER LAW CENTER, <https://www.nclc.org/about-us/funders.html> (last visited July 21, 2014).

397. I.R.C. § 7526(a) (2012). This section provides that “[t]he Secretary may, subject to the availability of appropriated funds, make grants to provide matching funds for the development, expansion, or continuation of qualified low-income taxpayer clinics.” The Community Tax Law Project in Richmond, VA is an example of an organization that has qualified for these funds without any connection to a university or legal aid program.

398. Cahn & Cahn *supra* note 382, at 1338.

399. *Id.*

for taxpayers who claim the EITC is very high.<sup>400</sup> Tax professor Michelle Lyon Drumbl, citing National Taxpayer Advocate data, has noted that claiming the EITC doubles a taxpayer's chances of an audit.<sup>401</sup> Low-income taxpayers often have difficulty navigating audits. Most audits take the form of correspondence audits, in which taxpayers merely get a letter telling them to pay some amount of tax.<sup>402</sup> Data show that 70% of EITC recipients who get a prerefund audit letter never challenge it.<sup>403</sup> Drumbl looks at survey data explaining why that is the case. She observes that "letters used in correspondence audits were not clear to the recipients: more than 25% of the EITC taxpayers it surveyed 'did not understand the IRS was auditing their return'; 39% 'did not understand what the IRS was questioning about their EITC claim'; and only 50% 'felt they knew what they needed to do in response to the audit letter.'"<sup>404</sup> If an EITC recipient does not challenge the letter, he loses the tax benefit, whether the error was his or the IRS's.

EITC audits are precisely the kind of areas in which the Cahns (as well as J. Skelly Wright) envisioned poverty lawyers taking an active role in defending an existing right. Some of the audited taxpayers presumably have potential factual defenses. However, if 70% of these individuals are not even responding to the audit letters, the IRS is never hearing any of these defenses and taxpayers are losing benefits to which they are entitled. A recent National Taxpayer Advocate study highlighted that even taxpayers who claimed the EITC correctly have difficulties in substantiating their claim.<sup>405</sup> A tax-oriented poverty lawyer could, without much difficulty, explain to them how to follow the audit procedures and how to assert their defenses.

Further, the EITC audit presents exactly the type of circumstance in which, according to the Cahns, outcomes of individual cases can have community-wide ramifications. The reason EITC audit rates are so high is that the IRS believes that the EITC gives rise to particularly high fraud rates. Yet, in measuring instances of fraud, the IRS includes the 70% of correspondence-audit letters that low-income taxpayers just do not answer. If those taxpayers had had legal representation, had answered those letters, and had successfully asserted defenses, those audits would not count toward the perceived fraud rate. If the IRS realized that the true fraud rate might be lower than the agency assumes, it might audit fewer EITC taxpayers, reducing the number of taxpayers facing EITC audits unrepresented and confused.

EITC audits furnish just one opportunity for lawyers to help poor taxpayers assert clearly defined rights. Low-income taxpayers claiming any of the provisions described above might face audits and need legal representation. Further, when tax disputes go beyond the administrative stage and reach litigation, representation can

---

400. Drumbl, *supra* note 316, at 14.

401. *See id.* at 133.

402. *See id.* at 135–38.

403. *Id.* at 137.

404. *Id.* at 136.

405. TAXPAYER ADVOCATE SERV., STUDY OF TAX COURT CASES IN WHICH THE IRS CONCEDED THE TAXPAYER WAS ENTITLED TO EARNED INCOME TAX CREDIT (EITC) 81–84, 86–91 (2012), available at [http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Research-Studies-Study-of-Tax-Court-Cases-in-Which-the-IRS-Conceded-the-Taxpayer-was-Entitled-to-Earned-Income-Tax-Credit-\(EITC\).pdf](http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Research-Studies-Study-of-Tax-Court-Cases-in-Which-the-IRS-Conceded-the-Taxpayer-was-Entitled-to-Earned-Income-Tax-Credit-(EITC).pdf).

further assist low-income taxpayers in asserting their rights. Tax professor Keith Fogg has found that approximately 70% of Tax Court petitioners represent themselves.<sup>406</sup> While the American Bar Association and the Tax Court itself have worked to reduce that number, it has remained relatively substantial.<sup>407</sup> Tax scholar Leandra Lederman has demonstrated that representation in Tax Court significantly increases the chances of a successful outcome for a taxpayer.<sup>408</sup> Practitioners have observed that the Tax Court very much wants to encourage taxpayers to seek representation, and has worked to create bar-sponsored pro bono programs and to send “stuffer notices” to taxpayers notifying them of potential sources of representation.<sup>409</sup>

To rise to the challenge of representing low-income taxpayers in audits and in litigation, institutional providers such as legal-aid clinics should build tax capacity.<sup>410</sup> These efforts have already started, particularly through the low-income taxpayer clinic program that I will discuss below, and should continue. Writing specifically about the EITC, Schneller et al. contend that “[t]he dual recognitions that (1) the EITC has largely displaced traditional welfare in American anti-poverty policy; and (2) the EITC imposes legal burdens arguably more daunting than those associated with traditional welfare, compel a renewed focus on the program by . . . the legal aid community.”<sup>411</sup> Going further, their research describes innovative efforts on the part of a handful of legal-aid clinics to serve low-income taxpayers, all of which fall within the category of helping taxpayers to assert their legal rights.<sup>412</sup>

Expanding legal aid capacity to handle audits and Tax Court cases need not require substantial resource outlays. Existing poverty lawyers would need only a simple introduction to these procedures to guide low-income taxpayers through them. For instance, law school low-income taxpayer assistance clinics already occasionally provide continuing legal education classes, training tax lawyers to handle pro bono matters.<sup>413</sup> Similar trainings at legal aid locations would allow existing poverty lawyers to work on tax matters. Literature has noted that the small-claims procedures at Tax Court are actually relatively simple to navigate,

---

406. Keith Fogg, *Tax Court Continues Efforts to Provide Greater Access to Justice to Pro Se Taxpayers*, PROCEDURALLY TAXING (Aug. 20, 2013), <http://www.procedurallytaxing.com/tax-court-continues-efforts-to-provide-greater-access-to-justice-to-pro-se-taxpayers/>.

407. *See id.*

408. Leandra Lederman & Warren B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1257 (2006).

409. Email from Michelle Lyon Drumbl, Assoc. Clinical Professor of Law, Washington & Lee Law School, to author (March 22, 2014, 11:20 EST) (on file with author).

410. Schneller, *supra* note 8, at 204.

411. *Id.*

412. *Id.* at 204–08.

413. *See, e.g., Tax Clinic for Low Income Taxpayers*, CTLAWHELP PRO BONO PORTAL, <http://probono.ctlawhelp.org/catalog/tax-clinic-low-income-taxpayers> (last visited Aug. 4, 2014).



particularly for lawyers trained in dealing with more complex judicial and legislative processes.<sup>414</sup>

Legal services organizations could also improve self-help materials for low-income taxpayers facing audits. While perhaps less useful than actual representation, a set of useful guides would be a cost-effective start. Schneller et al. envision such an effort:

First, the [IRS] EIC hotline should be expanded (or a new hotline created) so that EITC claimants subject to an audit can gain access to information on the audit process and the location of the nearest legal aid resource. Second, the website should provide clear information on the audit and Tax Court process. For example, the site could provide examples of the types of documents to submit during correspondence audits to satisfy common IRS requests. Similarly, [nonprofit organizations] could begin development of audit best practices to complement the filing best practices currently provided to partner organizations. Although not an exhaustive list, all of these steps would be relatively straightforward mechanisms to improve the coverage of taxpayer self-help and extend the limited assistance [already possible].<sup>415</sup>

Efforts such as these to assist pro se taxpayers could be particularly fruitful and relatively inexpensive.

Further, several federally funded low-income taxpayer clinics already exist at law schools and legal-aid offices around the country. These approximately 30 clinics include controversy clinics (those that represent clients before the IRS) as well as those that do educational outreach to taxpayers who speak English as a second language.<sup>416</sup> The clinics located at legal aid sites employ lawyers who have training in both tax and nontax government benefits.<sup>417</sup> However, Professor Drumbl also observes that these clinics are just “a drop in the bucket compared to the number of taxpayers who do [not] have representation.”<sup>418</sup> Yet, they might provide an important set of resources on which the federal government could build in helping legal-aid offices and other organizations build capacity.

In addition to assisting low-income taxpayers with asserting their rights in the EITC and related contexts, lawyers can help taxpayers assert their rights in transactional settings. Tax professor Susan Jones has found, for example, that New Markets Tax Credits can assist community coalitions in redeveloping their own

---

414. See generally William C. Whitford, *The Small-Case Procedure of the United States Tax Court: A Small Claims Court That Works*, 1984 AM. BAR FOUND. RES. J. 797, 801–02.

415. Schneller et. al., *supra* note 36, at 207.

416. Email from Michelle Lyon Drumbl, *supra* note 409.

417. *Id.*

418. *Id.* For more on these programs and their history, see generally TAXPAYER ADVOCATE SERV., *LOW INCOME TAXPAYER CLINICS: PROGRAM REPORT 4–5* (2014), <http://www.irs.gov/pub/irs-pdf/p5066.pdf>; Keith Fogg, *Taxation With Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3, 5–27 (2013).

neighborhoods.<sup>419</sup> However, community-based groups often do not know about the credits and need legal assistance both to apply for them and to comply with the relevant law.<sup>420</sup> Jones has observed that the demand for pro bono assistance among these groups is high.<sup>421</sup> Besides assistance of this type, tax lawyers aiming to reduce poverty can assert taxpayer rights in other transactional settings. For instance, tax lawyers can assist tax-exempt organizations that serve the poor in applying for exemptions and in following relevant legal regulations or help employers in low-income communities learn about and take advantage of the employment credits.

2. “[L]egal analysis and representation directed toward reform where the law is vague or destructively complex”

Examining the second feature of the Cahns’ legal blueprint points to further opportunities for tax lawyers in the new war on poverty. The Cahns contended that, “there is a greater need for clarification of legal status, policies, and rights in those areas of the law which affect the poor most frequently and adversely.”<sup>422</sup> Plainly, tax is such an area, now affecting the poor substantially, and featuring plenty of vagueness and complexity.

Tax lawyers can work to resolve that vagueness and complexity in several ways. For one, tax lawyers can litigate these issues. To return to just one aspect of this problem, currently it is unclear to what extent civil rights laws apply to the LIHTC because the relevant statutes are vague on this point.<sup>423</sup> In this situation, tax lawyers have room to argue in court that various civil rights holdings in the housing area do apply to the low-income housing credits. Certainly, favorable rulings in this area might substantially shape low-income housing projects going forward. Similarly, tax lawyers can advocate for the poor in front of the IRS and Congress in favor of simplifying statutory guidance and interpretation. As Wright’s earlier analysis anticipated, when a particular administrative or legislative tax rule is unduly burdensome or complicated, wealthy and business taxpayers regularly hire lawyers to bring the issue to the attention of IRS, Congress, and the Treasury.<sup>424</sup> Large law firms offer this type of advocacy as a service.<sup>425</sup> At the present time, poverty-oriented tax lawyers have an equivalent role to play in reducing tax complexity that bears on *their* clients.

The tax war on poverty offers a particular opportunity for public-interest law because some of the restrictions that prevent legal-services lawyers from

---

419. See generally Jones, *supra* note 212. Some law school clinics do provide assistance with the LIHTC. See, e.g., *Affordable Housing and Community Development Clinic*, SUNY BUFFALO LAW SCH., <http://www.law.buffalo.edu/academics/jd/concentrations/housinglaw.html> (last visited Aug. 4, 2014).

420. See generally Jones, *supra* note 212.

421. *Id.*

422. Cahn & Cahn, *supra* note 382, at 1341.

423. Roisman, *supra* note 186, at 1012.

424. See, e.g., *Tax Controversy and Litigation*, SKADDEN, ARPS, SLATE, MEAGHER, & FLOM LLP, <http://www.skadden.com/practice/regulatory-legislative/tax-controversy-and-litigation>, (last visited Aug. 4, 2014); *Tax Controversies*, CAPLIN & DRYSDALE, [http://www.capdale.com/tax\\_controversies](http://www.capdale.com/tax_controversies) (last visited July 20, 2014).

425. See, e.g., *id.*

advocacy-oriented litigation may not apply to the tax war on poverty. As described above, the most substantial ban on advocacy litigation by federally funded legal services came with the 1996 welfare reform bill.<sup>426</sup> Yet that regulation applies on its face only to traditional cash-based welfare.<sup>427</sup> As Zaloznaya and Nielsen report, after that rule, 300 legal-aid offices had to close and the available resource pool for welfare-rights law moved elsewhere.<sup>428</sup> Tax lawyers might be able re-deploy some of those public and private resources previously available for welfare advocacy in service of the tax war on poverty.

3. “[L]egal representation where the law appears contrary to the interests of the slum community”

While the term “slum community” is a relic of the 1960s context in which the Cahns wrote, when shorn of the antiquated term, the third aspect of their blueprint also applies to the tax lawyer working within the tax war on poverty. To illustrate what they meant, the Cahns observed that, “[i]n a society interlaced with governmental welfare and rehabilitative programs, much of the law encountered by slum dwellers is the rules of eligibility which entitle them to partake of the benefits of numerous governmental and quasi-governmental programs.”<sup>429</sup> However, “[w]here the rule, statute, or regulation works a hardship, legal representation may be able to suspend or postpone its operation, permit a period of transition, and otherwise mitigate its hardship.”<sup>430</sup>

Now, as demonstrated above, many of the anti-poverty tax programs contain provisions that run contrary to the interests of low-income communities. Some of these provisions even take the form of eligibility criteria just like those that the Cahns criticized (though others do not). For example, the American Opportunity Credit requires a student to be enrolled at least half-time.<sup>431</sup> This provision penalizes poor taxpayers who must pursue degree programs through night courses due to long or inflexible work hours. A legal advocate might confront this rule by lobbying the IRS to alleviate the burden of the rule within the confines of its administrative authority. The IRS may well have discretion about how to define “half-time,” and an advocate could encourage the IRS to do so in a way that encompasses night-school programs.

Further, a tax lawyer could pursue legislative remedies. Indeed, Wright’s 1970 manifesto for the poverty lawyer proposed this role when he argued that “[t]he poor need more vigorous representation in the legislature.”<sup>432</sup> Continuing, Wright presciently observed: “Well-heeled special interest groups send lawyers and representatives to hearings and to individual legislators with exhaustive analyses of proposed legislation, [whereas] the poor, unorganized, unable to pay for such help, and often unaware of proposed laws which will seriously affect their lives, have

---

426. Zaloznaya & Nielsen, *supra* note 388, at 925.

427. *See* 45 C.F.R. § 1639.2.

428. Zaloznaya & Nielsen, *supra* note 388, at 925.

429. Cahn & Cahn, *supra* note 382, at 1341.

430. *Id.* at 1342.

431. I.R.C. § 25A(b)(2)(B) (Supp. 2013).

432. Wright, *supra* note 357, at 444.

rarely in the past been able to speak out or lobby effectively on specific pieces of legislation,<sup>433</sup> so “[i]t is no wonder that [the poor] have not fared well.”<sup>434</sup> In the current tax war on poverty, however, this can change. Poverty-oriented tax lawyers can assist future members of Congress in crafting anti-poverty tax laws designed to target the poor more effectively. As discussed above, tax lawyers may have more legal room to carry out advocacy work than they do in other areas of law.<sup>435</sup>

4. “[L]egal representation in contexts which appear to be nonlegal and where no judicially cognizable right can be asserted”

Finally, in the tax war on poverty, lawyers can and should help the poor in situations that do not initially appear to involve legal proceedings. The Cahns pointed out that “[o]ften we are blinded to the efficacy of legal representation as a potential route to a desired result because other modes of communication, organization, pressure, and protest suffice—at least for the middle-class.”<sup>436</sup> They recognized that “in some situations the simple communication of legal authority for certain action may be sufficient to get officials to respond and to change a policy which inertia, timorousness, or lack of imagination appeared to have firmly ensconced.”<sup>437</sup>

The tax war on poverty presents a large number of comparable situations in which a poor taxpayer does not require a bulletproof legal theory, but instead just needs a vigorous advocate. Many low-income taxpayers have, for instance, reported trouble with supplying requested documentation as their reason for not replying to the IRS’s audit correspondence letters.<sup>438</sup> An impoverished individual who moves frequently does not keep electronic copies of documents, and functions in the informal economy may have no idea how to respond, say, to an IRS demand for proof that a child is living with him. But a tax lawyer can brainstorm about sources of documentation that the client may not have considered and then advocate to obtain them on behalf of the client. For example, a lawyer representing a client in an EITC audit might contact administrators at the school that the client’s child attends to see if they have copies of letters regarding the child that they may have sent to the client’s address. Or, perhaps there is a taxpayer who is trying to prove she was actively looking for work in a period for which she wants to claim the Child Care Credit. In a case like this, a tax lawyer might first suggest that the client contact the managers of the fast food restaurants to which she had applied for work to obtain copies of her applications and then might follow up by coaxing some of these (probably reluctant) managers to provide said copies.

In a more transactional context, a tax lawyer might provide similar kinds of nonlegal help. Owners of a convenience store in a low-income community might want, for example, to employ graduates of a rehabilitation program so that they (the owners) receive the Work Opportunity Credit but they may well have no idea where

---

433. *Id.* at 444–45.

434. *Id.* at 445.

435. *See supra* Part III.B.2.

436. Cahn & Cahn, *supra* note 382, at 1344.

437. *Id.*

438. *See* Drumbl, *supra* note 316, at 174–75.

to find these program graduates. A tax lawyer could reach out to colleagues in the social-service community and draw on social links to connect employers with potential credit-eligible employees. Networking and advice about potential business partners is a standard service that lawyers for high-income clients provide, and poverty-oriented tax lawyers could certainly do the same. These seemingly nonlegal ways in which lawyers can help in tax matters require little in terms of new resource outlays, but rather call for openness and creativity with regard to tax law on the part of legal services providers who may have previously found it an unfamiliar or off-putting area.

### CONCLUSION

This Article has introduced the concept of the “tax war on poverty” and analyzed the growing number of tax code provisions to which the concept refers. In recent years, substantial components of federal anti-poverty policy have moved, largely unobserved, into the tax code. Tax-based programs now provide income support, work incentives, childcare assistance, housing, community development jobs, education subsidies, healthcare benefits, and charitable gifts for individuals and families living in poverty. This Article has reviewed how each of these programs purports to address poverty, how each developed, and how effective each has been at combatting poverty.

The Article then analyzed these separate provisions as a whole, identifying their underlying commonalities and how these have led to the ever-expanding tax war on poverty. These commonalities included political feasibility, problems of distributive equity, less stigmatizing of program recipients, administrative ease, program flexibility, neglect of the extremely poor, and weak legal infrastructures. Taking these commonalities (and their pluses and minuses) into account, the Article then proposed ways in which tax lawmakers and tax lawyers can surmount the negative features of the tax war on poverty and significantly improve its effectiveness in attacking poverty. With some of these changes, and with the proper evaluation mechanisms in place, the federal government may soon be able to figure out whether the tax war on poverty could become even more effective than its nontax counterpart. To make this possible, however, tax lawyers must embrace the extent to which tax law has become the new poverty law and use tax tools to fight the nation’s continuing war on poverty.