NEW YORK UNIVERSITY SCHOOL OF LAW

SPRING 2014

COLLOQUIUM ON TAX POLICY
AND PUBLIC FINANCE

"The Tax War on Poverty"

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April 8, 2014
NYU Law School
Vanderbilt Hall-208
Time: 4:00-6:00pm
Number 10

SCHEDULE FOR 2014 NYU TAX POLICY COLLOQUIUM

(All sessions meet Thursday 4:00-5:50 p.m., Vanderbilt-208, NYU Law School)

1. January 21 – Saul Levmore, University of Chicago Law School, "From Helmets to Savings and Inheritance Taxes: Regulatory Intensity, Information Revelation, and Internalities." (Main discussion paper); and "Internality Regulation Through Public Choice." (Background paper).

2. January 28 – Fadi Shaheen, Rutgers-School of Law, Newark, "The GAAP Lock-Out Effect and the Investment Behavior of Multinational Firms."; "Evaluating Investments of Locked-Out Earnings (an Outline).

3. February 4 – Nancy Staudt, University of Southern California, Gould School of Law "The Supercharged IPO."

4. February 11 – Thomas J. Brennan, Northwestern University School of Law, "Smooth Retirement Accounts."

5. February 25 – Chris Sanchirico, University of Pennsylvania Law School. "As American as Apple Inc., International Tax and Ownership Nationality."

6. March 4 – James R. Hines, Jr. and Kyle D. Logue, University of Michigan Law School, "Delegating Tax."

7. March 11 – Stephanie Sikes, Wharton School, Accounting Department, University of Pennsylvania. "Cross-Country Evidence on the Relation between Capital Gains Taxes, Risk, and Expected Return."

8. March 25 – Matthew C. Weinzierl, Harvard Business School, "Revisiting the Classical View of Benefit-based Taxation."

9. April 1 – Andrew Biggs, American Enterprise Institute, "The Risk to State and Local Budgets Posed by Public Employee Pensions."

10. **April 8 – Susannah Camic Tahk, University of Wisconsin Law School, "The Tax War on Poverty."**

11. April 15 – Nirupama Rao, NYU Wagner School, "The Price of Liquor is Too Damn High: State Facilitated Collusion and the Implications for Taxes."

12. April 22 – Kimberly Clausing, Reed College, Economics Department, "Lessons for International Tax Reform from the U.S. State Experience under Formulary Apportionment."

13. April 29 – David Gamage, Berkeley Law School, "On Double-Distortion Arguments, Distribution Policy, and the Optimal Choice of Tax Instruments."

14. May 6 – Mitchell Kane, NYU School of Law, "Reflections on the Coherence of Source Rules in International Taxation."

THE TAX WAR ON POVERTY

Susannah Camic Tahk[1]

ABSTRACT

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 non-tax 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. The Article looks 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.

INTRODUCTION

In 1964, President Lyndon Johnson famously declared a "war on poverty."[2] In recent decades, the war on poverty has moved into the tax code.[3]

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[2] President Lyndon Baines Johnson, First State of the Union Address, January 8, 1964.

[3] 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, January 6, 2014.

Johnson's war on poverty consisted of an array of direct spending programs.[4] Today, in contrast, the federal government anchors many of its anti-poverty initiatives in the nation's tax code.

Fifty years after Johnson first declared his war on poverty, the problem of poverty remains pervasive in U.S. society. Commemorating the fiftieth 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."[5] In fact, 21.8% of American children experienced poverty in 2012, placing the U.S. second from the bottom in the United Nations' comparative study of child poverty in 35 developed countries.[6] To realize Johnson's original promise that "every American citizen [can] fulfill his basic hopes,"[7] the nation still has great work to do.

The U.S 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 non-tax 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. 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 (the "EITC") is the federal government's largest anti-poverty program.[8] The Child Tax Credit fulfills a similar purpose.[9] Accompanying it are the Child Care Tax

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[4] 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 and local health care centers, food stamps, Medicare and Medicaid. *See* Kent Germany, *War on Poverty, in* POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, AND POLICY (ALICE O'CONNOR AND GWENDOLYN MINK, EDS.) 774-782 (2004).

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

[6] UNICEF OFFICE FOR RESEARCH, CHILD WELL-BEING IN RICH COUNTRIES: A COMPARATIVE OVERVIEW, April 2013 at 7. *See also* Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, INCOME, POVERTY & HEALTH INSURANCE COVERAGE IN THE U.S. 2012, U.S. CENSUS BUREAU, September 2013 at 13 (hereinafter, "INCOME, POVERTY & HEALTH").

[7] Johnson, *supra* note 2.

[8] I.R.C. § 32 (2011); John Karl Scholz , Robert Moffittt & Benjamin Cowan, *Trends in Income Support, in* CHANGING POVERTY, CHANGING POLICIES, 203-241, at 212 (2009). *See also* Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719, 725 (2012); Jennifer Bird-Pollan, *Who's Afraid of Redistribution? An Analysis of the Earned Income Tax Credit* 74 MO. L. REV. 251, 254 (2009); Hilary Hoynes, *The Earned Income Tax Credit, Welfare Reform, and the Employment of Low-Skilled Single Mothers*, Chicago Fed. Reserve Bank (Aug. 22, 2008).

[9] I.R.C. § 24.

Credit[10] and Dependent Care Assistance Exclusion,[11] which jointly subsidize the child care expenses of middle- and low-income families. The American Opportunity[12] and Lifetime Learning[13] 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.[14]

On the supply side, the Low-Income Housing Credit, aims to help with the housing shortage that poor Americans face.[15] Furthermore, the New Markets Tax Credit stimulates investment in high-poverty communities.[16] The Work Opportunity[17] and Empowerment Zone Employment Credits[18] 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 both of tax exemptions and the ability to receive tax-deductible contributions.[19]

These direct and indirect programs, all of which this Article will discuss, are not only the 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.[20]

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 than it has in any earlier era. For the first time, the government's major anti-poverty programs include tax provisions, including one that has become the government's largest. Congress enacted, or substantially expanded, most of the provisions listed above in the past 15 years.[21] This is

[10] I.R.C. § 21.
[11] I.R.C. § 129.
[12] I.R.C. § 25A.
[13] *Id.*
[14] I.R.C. § 36B.
[15] I.R.C. § 42.
[16] I.R.C.§ 45D.
[17] I.R.C. § 51.
[18] I.R.C. § 1391.
[19] I.R.C. § 501(a); 501(c)(3).
[20] *See, e.g.*, I.R.C. § 221, which allows taxpayers to deduct interest on a qualified student loan as long as the taxpayer's income is below a certain level; I.R.C. § 35, which subsidizes health care purchases by workers, some of whom are presumably low-income, who have lost jobs because of a federal trade agreement.
[21] 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 (hereinafter "Recovery Act of 2009"). Pub.L. 115-5, 123 Stat. 115 (2009). Congress enacted the Child Tax Credit in 1997 and substantially expanded it in 2010. *See* Pub. L. No. 111-312, § 101, 124 Stat. 3296 (2010); Pub. L. No. 108-311, § 105, 118 Stat. 1166 (2004); H.R. Rep. No. 696, 108th Cong., 2d Sess. 33–34 (Conf. Rep. 2004). 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); Pub. L. No. 104-188, § 1201, 110 Stat. 1755 (1996). The Lifetime Learning Credit and the Hope Credit, the predecessor to

because, as this paper 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 non-tax-war on poverty has faced.

Recent scholarship, moreover, finds that the federal tax code is in this era better at reducing poverty than it is at its more traditional goal of mitigating inequality.[22] Indeed, in earlier decades, the tax code generally made poverty worse. To quote a recent post on the *Washington Post*'s Wonkblog: "You'd expect that – taxes take your money, and not having enough money is a leading cause of poverty. But then that changed."[23]

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 past fifty years of non-tax 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 pre-tax 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

the American Opportunity Credit, joined the tax code in 1997. ARRA expanded the Hope Credit into the American Opportunity Credit. Pub. L. 115-5, 123 Stat. 115 (2009), and subsequent legislation extended those expansions. *See* Pub.L. 111–312, H.R. 4853, 124 Stat. 3296; Pub.L. 112–240, H.R. 8, 126 Stat. 2313. The premium assistance credit was part of 2010's health care reform bill, the Patient Protection and Affordable Care Act. *See* Pub.L. 112–240, H.R. 8, 126 Stat. 2313.

[22] David Kamin, *Poverty Not Inequality: Federal Taxes and Redistribution*, TAX L. REV. (forthcoming).

[23] 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/.

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 also 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. In addition, in the past several decades, the federal government has emphasized not just alleviating poverty but on 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 accomplishing anti-poverty objectives. In this Article, I will focus on federal programs. State tax laws also play an key role in contributing to and combatting poverty. Some scholarship has begun to explore the extent to which that is the case, although this important line of research is outside the scope of this Article.[24] Among these 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, then turn to the indirect ones.

a. Earned Income Tax Credit

Currently, the Earned Income Tax Credit – the EITC – is the federal government's largest anti-poverty program and probably the best known of its

[24] *See, e.g.*, KATHERINE NEWMAN & ROURKE O'BRIEN, TAXING THE POOR: DOING DAMAGE TO THE TRULY DISADVANTAGED (2011).

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."[25] Probably for this reason, the EITC has also been the focus of intense scholarly attention and periodic controversy.[26]

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[25] Scholz et al., *supra* note 8, at 212.

[26] *See, e.g.*, Laura Tach & Sarah Halpern-Meekin, *Tax Code Knowledge and Behavioral Responses Among EITC Recipients: Policy Insights from Qualitative Data*, __ J. OF POL'Y ANALYIS AND MGMT __ (forthcoming, 2014); Kerry Ryan, *EITC As Income (In)Stability?*, FLA TAX REV. __ (forthcoming, 2014); Sara 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); H. Luke Schaefer & Kathryn Edin, *Rising Extreme Poverty in the United States and the Response of Federal Means-Tested Transfer Program*, 250 SOC. SERV. REV. 102 (2103); Jonathan P. Schneller, Adam S. Chilton & Joshua P. Boehm, *The Earned Income Tax Credit, Low-Wage Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176 (2012); Schneller, *supra* note 8; 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. 153-180 (2010); Robert A. Moffitt & John Karl Scholz, *Trends in the Level & Distribution of Income Support*, *in* TAX POLICY & THE ECONOMY, NAT'L BUREAU OF ECON. RES. 111-152 (2010); Bird-Pollan, *supra* note 8; Scholz et al., *supra* note 8; Jeffrey Fitzpatrick & Katie 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, Lucy S. Gorham & Jessica L. Dorrance, Expanding the EITC for Single Workers and Couples Without Children: Tax Relief for All Low-Wage Workers, 15 GEORGETOWN J. ON POV. LAW & POL'Y 245 (2008); John 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); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 438 (2008) Hoynes, *supra* note 8; Dorothy A. Brown, Race & Class Matters in Tax Policy, 107 COLUM. L. REV. 2007 (2007); John Karl Scholz, Taxation & Poverty 1960-2006, 25 FOCUS 52 (2007); Dennis J. Ventry, Jr., *Welfare By Any Other Name: Tax Transfers and the EITC*, 56 AM. U. L. REV. 1261 (2007); Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, 2006 WIS. L. REV. 1103 (2006); Marsha Blumenthal, Brian Erard & Chih-Chin Ho, *Participation and Compliance With the Earned Income Tax Credit*, 57 NAT'L TAX J. 189 (2005); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income* Tax *Credit*, 52 UCLA L. REV. 1867, 1869 (2005); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004); Robert A. Moffitt, *The Negative Income Tax and the Evolution of U.S. Welfare Policy*, 17 J. ECON. PERSP. 119 (2003); Laurence Seidman & Saul Hoffman, *Getting Back to the Earned Income Tax Credit: The Next EITC Reform*, 100 TAX NOTES 1429 (Sept. 15, 2003); James Heckman, Lance Lochner & Ricardo Cossa, *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. RES. (2002); V. Joseph Hotz & John Karl Scholz, *The Earned Income Tax Credit, Nat'l Bureau of Econ. Res.* (2001); 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); 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); 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. RES. (2000); Nada Eissa & Hilary Hoynes, *The Earned Income Tax Credit and the Labor Supply of Married Couples*, NAT'L BUREAU OF ECON. RES. (1998); 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 (1998); Janet

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.[27] The credit is fully refundable.[28] A refundable credit is one where the taxpayer gets a refund from the IRS to the extent that the credit amount exceeds tax liability. For example, if a taxpayer has $1000 in tax liability and is entitled to a $5000 refundable credit, the credit will reduce the taxpayer's tax bill to 0, and the taxpayer will get $4000 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.[29] Then, the taxpayer multiplies the earned income figure by a "credit percentage."[30] An individual's "earned income" consists of wages, salaries, tips and other employee compensation, including net self-employment income.[31]

The EITC statute restricts its benefits to low-income families by phasing out the credit for taxpayers whose adjusted gross income exceeds a phaseout amount.[32] Above the phaseout amount, a taxpayer must reduce her otherwise available credit.[33] She reduces it by the "phaseout percentage" of the amount by which her adjusted gross income exceeds a statutorily set "phaseout amount."[34] Married couples may not file separately to avoid the phaseout amount and instead must file jointly.[35] For tax year 2013, the maximum credit – for incomes below the phaseout amounts – is $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.[36] Additionally, taxpayers must have less than $3,300 in investment income for the year.[37]

Significantly, while traditional welfare support has contracted substantially over the past twenty years, the EITC's own history is one of persistent and

Spragens, *Welfare Reform and Tax Counseling: Overlooked Part of the Welfare Debate?* 73 TAX NOTES 353 (Oct. 21, 1996); Anne Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Cherie O'Neil & Linda Nelsestuen, *The Earned Income Credit: The Need for a Wealth Restriction for Eligibility Determination*, 63 TAX NOTES 1189 (1994).

[27] *See, generally,* I.R.C.§ 32.

[28] 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 & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, ¶ 37.1 (3d ed. Supp. 2012).

[29] I.R.C. § 32(a)(1).

[30] I.R.C. § 32(e).

[31] I.R.C. § 32(c)(2).

[32] I.R.C. § 32(a)(2)(B).

[33] I.R.C. § 32(a)(2).

[34] *Id.*

[35] I.R.C. § 32(d).

[36] EITC Income Limits, Maximum Credit Amounts and Tax Law Updates, INTERNAL REVENUE SERVICE, http://www.irs.gov/Individuals/EITC-Income-Limits,-Maximum-Credit--Amounts-and-Tax-Law-Updates.

[37] *Id.*

sustained growth. While politicians have sometimes proposed significant cuts to the EITC, they have not passed.[38] 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, including 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.[39] 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.[40] Therefore, in 1969 Nixon proposed a "family assistance plan" ("FAP").[41] The purpose of the FAP was to replace existing federal anti-poverty programs with a guaranteed minimum income for every U.S. family.[42] Eventually, the Tax Reduction Act of 1975 enacted a version of Nixon's proposal, a refundable credit labeled the EITC,[43] a credit equal to 10 percent of each taxpayer's first $4000 in income, with a phaseout between $4000 and $8000.[44]

The EITC proceeded to grow during the next four decades. Under President Jimmy Carter, and as part of the Revenue Act of 1978,[45] the maximum EITC increased from $400 to $500, the phaseout range increased to an income of $10,000, and the credit became permanent.[46] This trend toward expansion continued during the 1980s during the presidency of Ronald Reagan.[47] Eager to appeal to the working poor – a swing constituency[48] – both political parties in this period[49] supported increases to the EITC,[50] passing the Tax Reform Act of 1986, which expanded the credit by indexing the maximum earned income and phaseout income levels to inflation.[51] In 1990, Congress and President George

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[38] *See, e.g.*, Discussion Draft, Tax Reform Bill, § 1103 (Feb. 21, 2014) http://waysandmeans.house.gov/uploadedfiles/statutory_text_tax_reform_act_of_2014_discussion_draft__022614.pdf.
[39] The history of the Earned Income Tax Credit has been well-documented in a number of places. *See, e.g.*, Greene, *supra* note 26; Bird-Pollan, *supra* note 8; Moffitt, *supra* note 26. I found the most detailed account in CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE (1997), from which the following discussion will draw.
[40] Moffitt, *supra* note 26, at 120.
[41] HOWARD, *supra* note 39, at 65.
[42] *Id.* at 65-66.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 143.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 142.
[49] *Id.* at 142-3.
[50] *Id.* at 142-49.
[51] THOMAS L. HUNGERFORD & REBECCA THEISS, THE EARNED INCOME TAX CREDIT AND THE CHILD TAX CREDIT: HISTORY, PURPOSE, GOALS & EFFECTIVENESS, ECONOMIC POLICY INSTITUTE (Sept. 23,

Bush further enlarged the EITC, extending eligibility, increasing the maximum credit from $953 to $1702 and adjusting credit amounts for family size.[52]

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,[53] 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.[54] 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 phaseout range.[55] Subsequently, the Tax Relief and Job Creation Act of 2010 and the American Taxpayer Relief Act of 2012 together made these changes law through 2017.[56] Then, in his 2014 State of the Union Address, the President's single legislative proposal concerned the EITC,[57] as he told Congress:

> 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.[58]

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."[59]

2013), *available at* http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/.

[52] *Id.* at 156.

[53] *Id.* at 157.

[54] HOWARD, *supra* note 39, at 158.

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

[56] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 103, 124 Stat. 3296, 3299 (hereinafter "Tax Relief Act of 2010"); Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–240, H.R. 8, 126 Stat. 2313 (hereinafter "Taxpayer Relief Act of 2012") (codified at 26 U.S.C. § 32(b)(3)(A)).

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

[58] President Barack Obama, State of the Union Address, January 28, 2014.

[59] *Id.*

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,[60] and "[t]he expansion of the EITC is responsible for about 60 percent of the shift from the mid-1980s to 2011."[61] Along similar lines, economist Bruce Meyer 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%."[62] 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."[63]

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.[64] 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.[65] This is so because, while non-tax cash transfer programs succeeded in closing 72.7% of the poverty gap in 1993, these non-tax measures closed only 66.2% of the gap by 2004.[66] The major change in anti-poverty policy during that period has been replacing cash-based welfare with the EITC as the nation's primary anti-poverty program. The federal government in fact spends more on the EITC than it used to spend on cash-based welfare, laying out $59 billion on the EITC in 2012,[67] 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.[68]

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.[69] 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

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[60] *See generally* Kamin, *supra* note 22.
[61] Kamin, *supra* note 22, at 35.
[62] Meyer, *supra* note 26, at 159.
[63] CENTER ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT (January 31, 2014), http://www.cbpp.org/cms/?fa=view&id=2505.
[64] Scholz et al., *supra* note 8, at 216.
[65] *Id.* at 229.
[66] *Id.*
[67] JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012-2017, JCS-1-13 (Feb. 1, 2013) at 42 (hereinafter, "JCT 2012 Report").
[68] Scholz et al., *supra* note 8, at 232.
[69] *Id.* at 221.

government's primary anti-poverty device, it filled an average of 21.7% of the poverty gap.[70] In 1991, it filled an average of 21.19%.[71] 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.[72]

The EITC has likely improved its performance somewhat during the last decade. From 2004 to 2012, spending on the EITC increased by 20.4%.[73] 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.[74] Even this generous 5.4% estimate, however, 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%.[75] 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.[76] 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."[77]

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.[78] However, some scholarship has found that recipients welcome the fact

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[70] Author's own calculations, using data from James P. Ziliak, *Filling the Poverty Gap Then and Now*, 1 FRONTIERS OF FAMILY ECON. 39 (2008).
[71] *Id.*
[72] *Id.*
[73] Scholz et al., *supra* note 8, at 233; JCT Report 2012, *supra* note 67, at 42.
[74] Author's own calculation based on Scholz et al., *supra* note 8, at 221, 233; JCT Report 2012, *supra* note 67, at 42.
[75] Scholz et al., *supra* note 8, at 233. These are not dynamic estimates, so the figures might be different taking into account various incentive effects.
[76] H. Luke Shaefer & Kathryn Edin, *Rising Extreme Poverty in the United States and the Response of Federal Means-Tested Transfer Programs*, 82 SOC. SERV. REV. 250 (2013).
[77] Robert A. Moffitt, *The Great Recession and the Social Safety Net*, ANNALS OF AM. ACAD. OF POL. AND SOC. SCI (forthcoming, 2014) at 25.
[78] General Accounting Office, Advance Earned Income Tax Credit: Low Use and Small Dollars Paid Impede IRS's Efforts to Reduce High Noncompliance (August 2007); Education, Jobs and Medicaid Assistance Act, P.L. 111-226 (August 2010).

that the EITC serves as a forced-savings mechanism.[79] 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.[80] In fact, low-income taxpayers often increase employer withholding throughout the year, which reduces their monthly paychecks but maximizes tax refunds.[81] Whether this, or other factors, contributes to the EITC's relative effectiveness or ineffectiveness, remains a topic for future study.

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.[82] The maximum credit currently equals $1000 per child through 2017.[83] Like the EITC, this credit phases out above certain threshold incomes.[84] Also like the EITC, above a series of higher thresholds, the credit is not available at all.[85] At present, the Child Tax Credit is partially refundable for incomes over $3000.[86] 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. Individuals and families with no income are not able to receive any credit.[87]

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.[88] 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.[89] ARRA allowed for a lower refundability threshold. The Job Creation Act of 2010 and the American

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[79] Tach & Halpern-Meekin, *supra* note 26, Greene, *supra* note 26 at 149-50.
[80] Stephanie Wagner, *Building Assets, Building Futures: Does receiving the Earned Income Tax Credit (EITC) help poor single mothers build assets for the future?* (2007) (unpublished manuscript, on file with author).
[81] Tach & Halpern-Meekin, *supra* note 26, Greene, *supra* note 26 at 149-50.
[82] I.R.C. § 24(a).
[83] *Id.*
[84] I.R.C. § 24(b)(2).
[85] I.R.C. § 24(b)(2)(C).
[86] I.R.C. § 24(d)(3).
[87] I.R.C. § 24(c).
[88] Taxpayer Relief Act of 1997, Pub.L. 105–34, 111 Stat. 787 (hereinafter "Taxpayer Relief Act of 1997").
[89] TAXATION AND THE FAMILY: WHAT IS THE CHILD TAX CREDIT?, TAX POLICY CENTER, http://www.taxpolicycenter.org/briefing-book/key-elements/family/ctc.cfm

Taxpayer Relief Act of 2012 together extended the expansions of both 2001 and 2009 through 2017.[90] Obama has proposed to make them permanent.[91]

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.[92] 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 substantially lower than those for the Child Tax Credit. For example, for a family with two children, the EITC is not available if the family makes more than $48,378.[93] For 2014, the EITC will begin to phase out for two-child families above $17,530.[94] In contrast, families with up to $149,001 in annual income may still take the Child Tax Credit.[95] The Child Tax Credit does not start to phase out for a two-child family until the family has $110,000 in annual income.[96]

In addition, 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 phaseout threshold, the EITC will be $5,372. That family will be able to take only a $2000 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."[97] Further, "[f]ive percent of these children were in families which received no credit at all because their earnings fell below the refundability threshold."[98]

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%.[99] 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.[100]

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[90] *Id.*
[91] *Id.*
[92] JCT Report 2012, *supra* note 67, at 42.
[93] INTERNAL REVENUE SERVICE, *supra* note 36.
[94] EARNED INCOME TAX PARAMETERS, 1975-2014, TAX POLICY CENTER (Jan. 23, 2014), http://www.taxpolicycenter.org/taxfacts/Content/PDF/historical_eitc_parameters.pdf.
[95] I.R.C. § 24(b)(2)(C).
[96] I.R.C. § 24(b)(2).
[97] TAX POLICY CENTER, *supra* note 89
[98] *Id.*
[99] Scholz et al., *supra* note 8, at 221.
[100] Author's calculations, *supra* note 74.

c. *Child Care Credit and Dependent Care Assistance Exclusion*

One of the most important needs facing working poor families in the U.S. is child care.[101] At the present time, one of the federal government's primary means of subsidizing child care is through provisions in the tax code, namely, the Child Care Credit and the exclusion for employer-provided dependent care assistance. Combined, these two provisions combined cost the federal government $2.5 billion in 2010,[102] compared to the $5 billion the federal government spent on direct grants to the states to operate child-care facilities.[103]

Both the Child Care Credit and the exclusion for dependent care assistance tie support for child care to work. With the Child Care Credit, taxpayers may take a nonrefundable credit of between 20 and 35 percent of their "employment-related expenses" for the care of "qualifying individuals."[104] The statute caps "employment-related expenses" at $3,000 if the taxpayer's household includes only one qualifying individual or $6,000 if it includes two or more.[105] Crucially, the expenses for which the taxpayer claims the child care credit must be what the statute terms "employment-related expenses."[106] "Employment-related expenses" are those that enable the taxpayer to be "gainfully employed."[107] For this reason, 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, be disabled.[108]

The other tax benefit for child care contained in the tax code is the exclusion for dependent care assistance.[109] This provision allows a taxpayer to exclude from gross income any amounts received from his employer pursuant to a "dependent care assistance" program.[110] The excluded payments may pertain to child care provided both on or off of the employer's premises, including any reimbursements an employer might offer for employee child care.[111] 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 child care system to discriminate against lower-paid employees. For instance, the program must not favor highly compensated employees and the average benefit

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[101] *See, e.g.*, R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 335 (2000).
[102] JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2009-2014, JCS-3-10 50 (Dec. 10, 2010).
[103] Hanah Mathews, *Child Care Assistance in 2009*, CENTER FOR LAW AND SOCIAL POL'Y 1 (March 2011).
[104] I.R.C. § 21(a)(1).
[105] I.R.C. § 21(a)(2).
[106] I.R.C § 21(b)(2)(A).
[107] *Id.*
[108] Treas. Reg. § 1.21-1(c)(1).
[109] I.R.C § 129.
[110] I.R.C. § 129(d)(1)
[111] I.R.C. §§ 21(b)(2);129(a)(1), 129(e)(1).

for rank-and-file employees must be at least 55% of the average benefit for highly compensated employees.[112] The maximum excludible amount is $5000.[113]

Congress enacted the Child Care Credit in 1976, after several decades of offering less generous deductions for employment-related child care expenses, and it tinkered with the credit in 1981.[114] Since then, Congress has not revised the Child Care Credit.[115] The Dependent Care Assistance Exclusion entered the tax code in 1981.[116] Congress altered it somewhat in 1986, but not since.[117]

Both the Child Care Credit and the dependent care assistance program help low-income families. However, as this next material will show, Congress targeted neither one especially at the poor. One is a nonrefundable credit and the other is an exclusion. 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.[118] 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.[119] 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. Some of these families may be, therefore, the Congressionally-intended recipients of the two child care 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.[120]) Scholars have also pointed out that the two child care tax benefits have failed to address the needs of poor

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[112] I.R.C. §§ 129(d)(2); 129(d)(8)(A).
[113] I.R.C. § 129(d)(6).
[114] BITTKER & LOKKEN, *supra* note 28, ¶ 37.2. *See also* Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349 (1994); 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 (1993).
[115] *Id.*
[116] BITTKER & LOKKEN, *supra* note 28, ¶ 63.9.
[117] *Id.*
[118] *See infra*, part I.c.
[119] I.R.C. § 21(c).
[120] 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); 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).

families because taxpayers may only receive them once a year at tax-refund time.[121] Neither provides an ongoing source of cash support on which taxpayers may draw to meet regular child-care demands.[122]

d. *Education Credits*

The tax code provides a number of incentives for post-secondary education, including preferential tax treatment of Coverdell educational savings accounts,[123] a deduction for student loan interest,[124] and the education credits.[125] 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. More recently, at the urging of the purportedly pro-hope Obama Administration, Congress has replaced the Hope Credit with the more generous American Opportunity Credit for tax years 2009-2017 (and perhaps thereafter).[126]

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.[127] The $5000 cap applies on a by-family basis to the aggregate expenses of the taxpayer and the taxpayer's dependents.[128] The Lifetime Learning Credit phases out above certain incomes, adjusted for inflation.[129] In contrast, the American Opportunity Credit equals 100% of the first $2000 of a taxpayer's qualified tuition and related expenses for a tax year, plus 25% of the next $2000 of expenses.[130] To take the American Opportunity Credit, a student must be enrolled at least half-time in a qualified higher-education program.[131] Forty percent of the American Opportunity Credit is refundable.[132]

Congress enacted the Lifetime Learning Credit and the Hope Credit in 1997.[133] 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

[121] Heen, *supra* note 114, at 202.
[122] *Id.*
[123] I.R.C. § 530.
[124] I.R.C. § 222.
[125] I.R.C. § 25A.
[126] Recovery Act of 2009, *supra* note 56
[127] IRC § 25A(c).
[128] Notice 97-60, 1997-2 C.B. 310, § 2 Q&A 6.
[129] I.R.C. § 25A(d).
[130] I.R.C. § 25A(i)(1).
[131] I.R.C. § 25A(b)(3).
[132] Pub.L. 111-5, Conf. Rept No. 111-16, 12 (2009).
[133] Taxpayer Relief Act of 1997, *supra* note 88.

Hope Credit with the more generous American Opportunity Credit,[134] Congress has already extended the credit twice.[135] Through these credits, the federal government spends a substantial amount of money each year. In 2012, the American Opportunity Credit cost $21.8 billion and the Lifetime Learning Credit cost $2 billion[136] – an amount that in total is roughly equal to that of the well-known Pell Grant program.[137]

Despite the substantial cost 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. [138] In addition, Smith finds the amounts of the credits too small to be of genuine assistance to poor students.[139] Deborah Schenk and Andrew Grossman echo this view, demonstrating quantitatively that the credit amounts are too small to change low-income taxpayer behavior.[140] Kerry Ryan adds that many low-

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[134] Recovery Act of 2009, *supra* note 55. The changes increased the maximum credit amount from $2000 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 phaseout range, allowed tapayers to claim the credit against alternative minimum tax liability and made the credit partially refundable.

[135] Tax Relief Act of 2010, *supra* note 56; Taxpayer Relief Act of 2012, *supra* note 56.

[136] JCT 2012 Report, *supra* note 67, at 42.

[137] HIGHER EDUCATION TAX REFORM, A SHARED AGENDA FOR INCREASING COLLEGE AFFORDABILITY, ACCESS AND SUCCESS, THE REIMAGINING AID DELIVERY AND DESIGN CONSORTIUM FOR HIGHER EDUCATION TAX REFORM (November 2013), *available at* http://www.clasp.org/resources-and-publications/publication-1/Nov2013RADD_TaxAid.pdf (last visited February 16, 2014) (hereinafter "RADD AGENDA").

[138] 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 (2008). *See also* Andrew Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U.L. REV. 1229, 1250-51 (2009); *See* 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) ("half 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).

[139] Smith, *supra* note 138, at 210.

[140] *See generally* Deborah A. Schenck & Andrew L. Grossman, *The Failure of Tax Incentives for Education*, 61 TAX L. REV. 295 (2008). They also find a similar lack of effect for the student loan interest deduction and incentives for educational savings accounts. For similar general arguments, *see also* 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 (2010); 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); 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). *But see* George Salimbas, *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).

income taxpayers may not even know about the credits when deciding whether to enroll in higher education.[141]

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.[142] These scholars and others propose a number of reforms, including making the credits fully refundable and perhaps otherwise giving them a more progressive structure.[143]

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 health care for the poor.[144] This provision subsidizes the purchase of certain health insurance plans for low-and-middle income families.[145] 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.[146] The individual then pays to the plan the difference between the premium tax credit amount and the total plan premium.[147] Individuals and families with household incomes between 100% and 400% of the federal poverty level receive premium assistance credits on a sliding scale.[148] The scale ensures that those at 100% of the federal poverty level spend no more than 2% of income on health insurance premiums.[149] That percentage rises with income.[150] The credit is refundable, so if

[141] 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 137, at 12

[142] Ryan, *supra* note 141, at 54; Smith, *supra* note 138, at 210-212; 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* RADD REPORT, *supra* note 137, at 11; Margot L. Crandall-Hollick
The American Opportunity Tax Credit: Overview, Analysis, and Policy Options, CONGRESSIONAL RESEARCH SERVICE 13 (June 11, 2012).

[143] Ryan, *supra* note 141, at 53-54; Smith, *supra* note 138 at 212; Mullineaux, *supra* note 142, at 41-42. *See also* RADD REPORT, *supra* note 137, at 15; Pike, *supra* note 143, 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).

[144] Patient Protection and Affordable Care Act ("Affordable Care Act"), 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).

[145] I.R.C. § 36B.

[146] *Id.* § 36B(b).

[147] *Id.*

[148] *Id.*

[149] *Id.*

individuals are entitled to credit amounts in excess of tax liability, the IRS will issue a refund equal to the difference.[151]

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 estimates a cost of $27 billion in its first year, making the credit a relatively large element pricewise in the tax code's anti-poverty arsenal.[152] However, even that estimate remains uncertain until the full health care reform program goes into effect.

f. Low-Income Housing Tax Credit

The next anti-poverty program in the tax code is what I call a indirect program. As such, in contrast to the provisions discussed so far, the Low-Income Housing Tax Credit (the "LIHTC") is not a direct subsidy to low-income families. Congress enacted the credit to serve as an "efficient mechanism for encouraging the production of low-income rental housing."[153] As such, it replaced several previous non-tax 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."[154] Congress hoped to use the LIHTC to harness private capital in the service of creating low-income housing. The federal government spent $5.8 billion on the LIHTC in 2012,[155] roughly the same about expended on all federal public housing in the U.S. in that year.[156] The credit is currently "the largest federal program to finance the development and rehabilitation of affordable rental housing for low-income households."[157]

The LIHTC gives private investors and developers tax incentives to build low-income housing. The credit equals a percent, up to 70%, of the amount that an investor in a "qualified low-income housing project" spends on that project.[158] To receive the credit, the developer must make a long-term commitment (generally 15 years in length) to use the building for low-income housing.[159] A

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150 *Id.*
151 *Id.*
152 2012 JCT Report, *supra* note 67.
153 JOINT COMM. ON TAX'N, 99TH CONG., 2D SESS., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 152 (Comm. Print 1987).
154 *Id.*
155 JCT REPORT 2012, *supra* note 67, at 35.
156 Will Fischer & Barbara Sand, *Federal Housing Spending Is Poorly Matched to Need: Tilt Toward Well-Off Homeowners Leaves Struggling Low-Income Renters Without Help*, CENTER ON BUDGET AND POL'Y PRIORITIES (Dec. 18, 2013).
157 J. William Callison, *Achieving the Country: Geographic Desegregation and the Low-Income Housing Credit,* 19 S. CAL. REV. L. & SOCIAL JUSTICE 213, 226 (2010).
158 I.R.C. § 42(g)(3)(A); I.R.C. § 42(b)(1)(B).
159 I.R.C. § 42(g)(3)(A).

qualifying low-income housing project must have certain percentages of low-income renters."[160] Developers may charge rent for units in the project based on percentages of resident income. The statute also creates additional incentives for building and rehabilitating low-income housing in what it calls "qualified census tracts" and "difficult development areas."[161] In these areas, developers can use higher base amounts for calculating their credit.[162] 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.[163]

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 low-income individuals."[164] At first, the credit was temporary, but Congress made it permanent in 1993.[165] 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.

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.[166] Even so, it is an open question whether the credit is necessary is to generate these units. Some studies have suggested 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 at best.[167]

This issue notwithstanding, commentators have, on several grounds, criticized the effectiveness of the LIHTC for addressing poverty.[168] Most notably,

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[160] I.R.C. § 42(g)(1).

[161] I.R.C. § 42(d)(5)(B)(i)

[162] *Id.* In these areas, the base amount, called the "eligible basis" of a new building is 130 percent of what it would otherwise be and any relevant "rehabilitation expenditures" for an existing building are 130 percent of what they would otherwise be.

[163] *Id.*

[164] See JOINT COMM. ON TAX'N, *supra* note 153 at 152.

[165] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13142(a), 107 Stat. 312 (1993).

[166] 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).

[167] *See* Ballard, *supra* note 166 at 234; Stephen Malpezzi & Kerry Vandell, *Does the Low-Income Housing Tax Credit Increase the Supply of Housing?*, 11 J. HOUSING ECON 360, 370 (2002); David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Credit*, 6 J.L. & POL'Y 537 (1998).

[168] For a rosier view, *see* Michael Rubinger, *Two Tax Credits That Work*, N.Y. TIMES at A19, July 13, 2014.

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."[169] 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.[170] Not only this, but Roisman finds that a disproportionate number of the tenants who occupy units that receive low-income housing credits are not the poorest of the poor.[171] David Philip Cohen similarly observed that "owners of qualified projects can generate larger cash flows by renting to tenants with the highest income 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."[172] Megan Ballard echoes this concern, pointing out that the statute often advantages for-profit builders of low-income housing over their nonprofit counterparts.[173] Scholars have 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.[174]

g. New Markets Tax Credit

The New Markets Tax Credit provides incentives to invest in low-income communities. This provision allocates its benefits to investors who belong to what the tax code refers to as "qualified community development entities" or "CDEs."[175] 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."[176] The New Markets Tax Credit equals a certain percentage (generally between three and six percent per year over a number of years) of a "qualified equity investment" in the CDE.[177] The investment generally must be in a "qualified active low-income community business"[178] which carries out a certain level of its activities in a "low-income community," as defined by reference to income levels in census tracts.[179]

[169] 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).
[170] *See generally* Roisman, *supra* note 169.
[171] *Id.* at 1015-16.
[172] Cohen, *supra* note 167, at 553.
[173] *See generally* Ballard, *supra* note 166.
[174] Cohen, *supra* note 167, at 551-2.
[175] I.R.C. § 45D(a).
[176] I.R.C. § 45D(c)(1).
[177] I.R.C. § 45D(a).
[178] I.R.C. § 45D(d)(2)(A).
[179] I.R.C. § 45D(e)(1).

Congress enacted the New Markets Tax Credit on a temporary basis in 2000.[180] 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."[181] Clinton's 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." [182] As in the case of the EITC, Clinton was able to assemble a bipartisan coalition to support his plan.[183] 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."[184]

Since that date, the tendency in Congress has been to expand and extend the credit. Legislation in 2004 re-defined and loosened the criteria for qualifying low-income communities. [185] In 2006, Congress extended the credit for an additional two years and revised the statute to eliminate bias against rural communities.[186] Legislators have also extended the credit several times.[187] 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 federal government allocated $3.5 billion to the new markets tax credit in 2013.[188] As with the LIHTC, this program explicitly targets low-income

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[180] 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) (2000) (hereinafter "Renewal Act of 2000").

[181] 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), *available at* 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).

[182] Jackson, *supra* note 181, at 688, citing Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV. May--June 1995.

[183] *Id.* at 691.

[184] 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), *cited in* Jackson, *supra* note 181, at 692.

[185] American Jobs Creation Act of 2004, Pub. L. 108-357, 118 Stat. 1418-1660 (2004).

[186] Tax Relief and Health Care Act of 2006, Pub.L. 109–432, 120 Stat. 292 (2006) (hereinafter "Tax Relief Act of 2006").

[187] Tax Extenders and AMT Relief Act of 2008, Pub.L. 110–343, 122 Stat. 3765 (2008); Tax Relief Act of 2010, *supra* note 67; Taxpayer Relief Act of 2012, *supra* note 67.

[188] UNITED STATES DEPARTMENT OF THE TREASURY, TREASURY ANNOUNCES $3.5 BILLION IN NEW MARKETS TAX CREDIT AMOUNTS (April 24, 2013), http://www.cdfifund.gov/news_events/CDFI-2013-21-Treasury_Announces_Billions_in_New_Markets_Tax_Credit_Awards.asp.

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.[189]

Nevertheless, as with the LIHTC, commentators have raised concerns about how well the New Markets Tax Credit, or indeed any credit directly allocated to investors rather than to low-income individuals, actually benefits the poor. Tax scholar Roger Groves has, for instance, examined a sample of projects funded with the new markets tax credit and found that some of them amounted to "gentrification."[190] Groves contends that these projects do not assist the poor, but instead help higher-income residents enjoy services in what rapidly become gentrified neighborhoods.[191] Susan R. Jones similarly laments that the credit seems overly "commercial real estate development driven,"[192] while Jennifer Forbes argues that the credit "primarily benefits private investors."[193] 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.[194] In addition, like some of the credits described below, this credit is not permanent, which may limit its effectiveness. Data on all of these questions are sparse, however.

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.

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189 Jackson, *supra* note 181, at 700. *See also* Rubinger, *supra* note 168.
190 *See* Roger Groves, *The De-Gentrification of the New Markets Tax Credit*, 8 FLA. TAX. REV. 213 (2007).
191 *See, generally, id.*
192 Susan R. Jones, *Will New Markets Enhance Community Economic Development?* 8 J. SMALL & EMERGING BUS. L. 229, 237 (2004).
193 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. *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).
194 Jackson, *supra* note 181, at 701-704.

The Work Opportunity Credit allows an employer to take a nonrefundable credit of 25 or 40% of a set amount (usually $6000) of the first-year wages paid to certain employees.[195] To make her employer eligible for the Work Opportunity Credit, an employee must fall within one of several categories, such as that of long-term recipient of various federal assistance programs like SNAP (the program formerly known as the food stamp program) or TANF.[196] Shorter-term recipients of SNAP benefits may also make employers eligible for the credit,[197] as can individuals who are recent recipients of federal disability benefits,[198] veterans of certain types,[199] "qualified ex-felons,"[200] or residents, ages of 18 to 39, of federally designated distressed communities.[201] The credit is also available for "qualified summer youth employees," who live in the same kinds of communities.[202]

Congress enacted the Work Opportunity Credit on a temporary basis in 1996, replacing a similar prior credit called the "Targeted Jobs Credit."[203] Since then, Congress has expanded and extended the Work Opportunity Credit almost every year.[204] The credit is currently set to expire with regard to workers hired after the end of 2013, but again, based on the credit's periodic regular renewal, Congress may extend it again as part of 2014's extenders bill.

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[195] I.R.C. §§ 51(a), 51(c), 51(i)(3).
[196] I.R.C. §§ 51(d)(1)-(2). For the inclusion of TANF, see Conf. Rept. No. 106-1033 (PL 106-554) p. 1027 (1996). 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 that a designated local agency has certified as being (1) a member of a family that received assistance under a specified program throughout the 18-month period ending on the hiring date or (2) a member of a family that ceased to be eligible for such assistance because of a federal or state limitation.
[197] IRC §§ 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.
[198] I.R.C. §§ 51(d)(1)(H), (d)(9).
[199] I.R.C. §§ 51(d)(1)(B), (3)(B), (d)(3)(A).
[200] I.R.C. §§ 51(d)(1)(C), (d)(4).
[201] I.R.C. §§ 51(d)(1)(D), (d)(5). The relevant federally designated communities are known as "empowerment zones," "enterprise communities," "renewal communities," and "rural renewal counties."
[202] I.R.C. §§ 51(d)(1)(F), (d)(7)(A). Youth who give rise to the credit under this provison must live in federally designated "empowerment zones or "enterprise communities."
[203] Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1201, 110 Stat. 1755 (1996).
[204] Taxpayer Relief Act of 1997, *supra* note 88; Tax and Trade Relief Extension Act of 1998, 1999, P.L. 105-277, 112 Stat. 2681 (1998); Renewal Act of 2000, *supra* note 180; Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, 118 Stat. 1166 (2004); Taxpayer Relief Act of 2006, *supra* note 186; 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, supra note 55; Hiring Incentives to Restore Employment Act, Pub.L. 111–147, 124 Stat. 71 (2009); Tax Relief Act of 2010, *supra* note 56; Taxpayer Relief Act of 2012, *supra* note 56.

The "Empowerment Zone Employment Credit" is a similar tax incentive. Taxpayers may take this credit for a percent of wages paid to employees who work and live in federally designated "empowerment zones,"[205] which are low-income communities around the country that the Department of Housing and Urban Development has targeted for federal assistance.[206] The credit generally equals 15% of the first $15,000 in employee salary.[207] 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.[208] 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.[209] The primary problem that research has identified with these credits as anti-poverty tools is that employers "underutilize" them.[210] Tax scholar Francine Lipman observes that, in a General Accounting Office ("GAO") Report, 57% of participating employers said that the credits play no role in their hiring decisions.[211] 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."[212] 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."[213]

[205] I.R.C. § 1396(b).

[206] WELCOME TO THE COMMUNITY RENEWAL INITIATIVE, HUD. GOV, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/rc.

[207] EMPOWERMENT ZONE TAX INCENTIVES SUMMARY CHART – 2013, HUD.GOV, 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.

[208] Matias Busso, Jesse Gregory & Patrick Kline, *Results of the Federal Empowerment Zone Program*, INSTITUTE FOR RESEARCH ON POVERTY FOCUS, 18 (2013), citing U.S. GENERAL ACCOUNTING OFFICE, *Community Development: Federal Revitalization Programs are Being Implemented, but Data on the Use of Tax Programs are Limited*, 04-306, (2004).

[209] *See* BITTKER & LOKKEN, *supra* note 28, ¶ 27.3.

[210] *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).

[211] *Id.* at 433.

[212] *Id.* at 434.

[213] *Id.* at 435.

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.[214] To qualify for exemption and contribution deductibility under IRS Sec. 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"[215]; and they also include "relief of the poor 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.[216]

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

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 non-charity statutory categories (e.g., religious or educational groups).[217] For instance, in 1923, the IRS ruled that a civic organization could not qualify under Section 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."[218] However, in 1959, the IRS revised its definition of "charitable" to include the broader set of permissible activities listed above.[219] Subsequent IRS actions[220] and court decisions,[221] in

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[214] I.R.C. §§ 501(c), 527–28.
[215] I.R.C. § 501(c)(3).
[216] Treas. Reg. § 1.501(c)(3)-1(d)(2).
[217] John D. Colombo, *The Role of Redistribution to the Poor in Federal Tax Exemption for Charities*, NATIONAL CENTER ON PHILANTHROPY AND THE LAW 3 (2009) *available at* http://www1.law.nyu.edu/ncpl/resources/documents/Conf2009JColomboPaper.pdf.
[218] *Id.*, citing I.T. 1800, 11-2 Cum. Bull. 152 (1923).
[219] Treas. Reg. § 1.501(c)(3)-1(d)(2).
[220] *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).
[221] *See, e.g.*, Federated Pharmacy Services v. Com'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. Com'r, 73 T.C. 650 (1980) (denying exemption to a working farm that provided no particular services to the poor).

contrast, 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.[222]

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.[223] In 2011, those nonprofits contributed an estimated $836.9 billion, or 5.6% of the country's GDP, to the U.S. economy.[224] Non-private foundations, or "public charities" qualifying under Section 501(c)(3), generated 75% of the nonprofit sector's revenue in 2011.[225] 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.[226] However, not all of those organizations provide direct support to the poor.[227]

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,[228] sociologist Kirsten Gronbjerg reported that "Almost 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."[229] She also found that "a relatively small proportion of agencies report[ed] extensive contacts with low-income clients."[230] Echoing Gronbjerg's concerns, political scientist Robert Reich has observed that IRS data show that only about 10% of deductible contributions each year go to human-services organizations.[231] Similarly, policy scientist Lester Salamon has

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[222] For views on how well this practice comports with various visions of distributive justice, *see generally* Miranda Perry Flesicher, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B. U. LAW REV. 601 (2011); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. LAW REV. 505 (2010); Miranda Perry Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165-230 (2008). For a defense of the phenomenon on distributive-justice grounds, *see* Colombo, *supra* note 217, at 18-33.
[223] Sarah L. Pettijohn, *The Nonprofit Sector in Brief: Public Charities, Giving & Volunteering, 2013*, URBAN INSTITUTE 1 (2013).
[224] *Id.* at 1.
[225] *Id.*
[226] *Id.* at 4.
[227] DIRECTORY OF CHARITIES AND NONPROFIT ORGANIZATIONS, GUIDESTAR.ORG, https://www.guidestar.org/nonprofit-directory/human-services.aspx.
[228] *See generally* Kirsten Gronbjerg, *Poverty and Nonprofit Organizational Behavior*, 64 SOC. SERV. REV. 208 (1990).
[229] *Id.* at 216.
[230] *Id.*
[231] 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).

found, using a nationwide sample of human-services organizations, that only 21% of the total population served by these organizations fell in the lowest income quartile, while 30% was in the next income quartile.[232] 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 members, acquaintances, neighbors, the general public."[233]

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. These include, among others, personal exemptions and the the fact that, in some years, they have phased out above certain income levels;[234] the dependency exemptions;[235] the standard deduction;[236] the progressive rate structure;[237] the nonrefundable retirement savings credit;[238] the limits on itemized deductions;[239] and subsidies for bonds issued to develop distressed areas.[240]

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 Section I share? What guidance does the past history and the current workings of these policies offer with regard to future tax anti-poverty programs? The aim of this Section 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 section 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 other to take this discussion as a starting point and to identify further commonalities among the different pieces of the tax war on poverty.

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232 Lester Salamon, *Social Services*, in WHO BENEFITS FROM THE NONPROFIT SECTOR? 134-173 (Charles Clotfelder, ed., 1992)
233 *Id.* at 142.
234 I.R.C. §§ 151(b); 151(d)(3)(A).
235 I.R.C. § 151(c).
236 I.R.C. § 63(c)(1).
237 I.R.C. § 1(d).
238 I.R.C. § 25B.
239 I.R.C. § 68.
240 I.R.C. §§ 143(j); 144(c).

Additionally, this section does not purport to offer either a broad defense or critique of the tax war on poverty. Instead, this section 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 promise and serious danger.

a. Political Feasibility

The tax war on poverty gives rise to different politics than its non-tax counterparts. This is true as 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 non-tax poverty policy.

i. Legislative Procedures

In comparison with their non-tax counterparts, proposals to attack poverty through the tax code generally have relatively smooth routes in Congress, both toward passage and toward later growth.[241] 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.[242] The House Ways & Means Committee, 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. Research on Congressional committees has shown that the central aims of Ways & Means have always been to generate bills that will pass the House [243] – and to remain "influential."[244] In addition, Ways & Means usually has notably strong leadership.[245] Further, because Ways & Means is one of the most sought-after committee assignments, its members are usually

[241] Much of this discussion is taken from Tahk, *supra* note 144, at 82-93. *See also, 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).
[242] *See* STANDING RULES OF THE SENATE, Rule XXV, Cl. 1(i), 111th Cong. (2000); RULES OF THE HOUSE OF REPRESENTATIVES, Rule X, Cl. 1(t), 111th Cong. (2009).
[243] RICHARD. F. FENNO, CONGRESSMEN IN COMMITTEES, 68 (1973). *See also* RICHARD F. FENNO, LEARNING TO GOVERN: AN INSTITUTIONAL VIEW OF THE U.S. CONGRESS (1997).
[244] FENNO, CONGRESSMEN IN COMMITTEES, *supra* note 243, at 202.
[245] *Id* at 114-19.

well-established members of the House.[246] All of these features of Ways & Means similarly apply to the Senate Finance Committee.[247]

Second, tax bills ordinarily enjoy certain formal procedural protections. For example, the 1974 Budget Act gives tax bills from Ways & Means priority on the House floor over proposed direct-spending programs.[248] Then, (tax) legislation from Ways & Means appears on 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 non-tax, non-entitlement spending programs must go through more than one committee.[249]

Third, embedding an anti-poverty program in the tax code means that the federal government can very easily allocate additional funds to the program as demand for it increases. Most non-tax subsidies require annual Congressional funding under their enacting legislation. In contrast, a tax-embedded program can 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.

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 tax war on poverty programs.[250] However, as I have discussed at length in prior work, lawmakers discuss broad-based tax reform often, but have only accomplished it once.[251] That bill, the Tax Reform Act of 1986, actually increased the EITC.[252] The reason that happened actually 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

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[246] CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 60–73 (1997).

[247] *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).

[248] *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 512-13 (1998) at 507–08.

[249] *Id.* at 510.

[250] *See, e.g.*, NATIONAL COMMISSION ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH: REPORT OF THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM (Dec. 1, 2010), commonly known as the Simpson-Bowles Report.

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

[252] HOWARD, *supra* note 39 at 148.

the tax burden of lower-income groups relative to higher-income groups.[253] Many member of Congress wanted to include in the tax reform package particular elements that would benefit their higher-income constituencies.[254] However, to do that, these members had to balance those benefits with benefits for low-income taxpayers.[255] As a result, many members of Congress proposed, and then enacted, EITC expansion as part of the 1986 package.[256]

ii. Public Opinion

The second key factor that advantages the tax war on poverty over the non-tax war on poverty is that public opinion views tax-embedded programs more favorably than their non-tax counterparts. Several recent studies, in fact, have clearly documented that voters are more likely to favor a social policy enacted through the tax code than a social policy that is not. For example, using experimental survey data, political scientists Christopher Faricy and Christopher Ellis[257] found that respondents were more likely to support programs enacted as tax breaks than as direct expenditures.[258] 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.[259] Alex Tahk and I have reported similar results with regard to hypothetical programs to subsidize adoption.[260] Legal scholar Edward Zelinsky's experiments about tax subsidies and direct payments to volunteer firefighters yielded results along the same lines. 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.[261]

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[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] 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 (March 2014).
[258] *Id.* at 13.
[259] Jake Haselswerdt & Brandon Bartels, *Public Opinion, Policy Tools, and Policy Feedbacks: Evidence from a Survey Experiment* (2011), unpublished manuscript, *available at* http://home.gwu.edu/~jakehas/JH&BB_Experiment_7-11-13.pdf.
[260] Alexander Tahk & Susannah Camic Tahk, *Tax-Embedded Programs and the Politics of Public Policy* (2013), unpublished manuscript, on file with author.
[261] 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). *See also* David S. Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience & Political Salience*, 65 TAX L. REV. 19–38 (2012).

The literature is still exploring *why* this preference is so strong and has not yet reached conclusions. 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 food stamps, so might be less likely to support similar programs.

Given their relative popularity, tax-embedded programs are particularly likely to attract bipartisan support. In the 112th Congress, for example, 238 members of the House and 41 senators signed conservative activist Grover Norquist's "Taxpayer Protection Pledge."[262] All but three were Republicans,[263] and all of these signatories promised to "oppose and vote against any effort to raise the federal income tax on individuals or corporations."[264] As part of this promise, signers pledged "to oppose changes in tax deductions or credits that increase the net tax burden on Americans"[265] – 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 three hundred Republican members agreed not to cut the EITC.[266] To take another example, in his recent report criticizing many features of the non-tax war on poverty, current House Budget Committee chair, Republican Paul Ryan, praised the EITC's effectiveness,[267] the day before the Democratic president proposed expanding it as part of his budget.[268]

The tax war on poverty is also particularly politically viable because it has interest-group support that the non-tax version may not have. This is because the indirect programs in particular give rise to interest groups that then work to

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262 *The Taxpayer Protection Pledge Signers 112th Congressional List*, AMERICANS FOR TAX REFORM, http://s3.amazonaws.com/atrfiles/files/files/081012-federalpledgesigners.pdf.

263 *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).

264 *Id.*

265 *Id.*

266 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. 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. Further, the survey data cited above suggests that individuals just prefer tax programs to their non-tax counterparts, even when the content of the programs is exactly the same.

267 House Budget Committee Majority Staff, The War on Poverty: 50 Years Later, House Budget Committee, 17 (March 3, 2014).

268 Office of Management and Budget, Analytical Perspectives, Budget of the United States Government, Fiscal Year 2015 143 (March 4, 2014).

protect and grow the tax anti-poverty provisions from which they benefit. Describing tax provisions versus their direct-spending counterparts, political scientist Jacob Hacker has written, that, because they

> 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.[269]

An example of such an interest group might be 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 challenging of sustaining the non-tax one. The increased political feasibility of the tax war on poverty is particularly important given the repeated political setbacks that the non-tax war on poverty has experienced. No sooner had Johnson passed his anti-poverty agenda than Congress, following the 1966 elections, started to place obstacles in its way. This path of roadblocks and cuts has continued up to the food stamp cuts that Congress has passed in Feburary of 2014.[270]

Yet, the tax war on poverty has only gained strength in recent decades. Indeed, as the evidence in Section 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.[271] Again, while Congress has sometimes entertained these proposals, none has passed. 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[272] – making it a program much costlier than the ever-under-attack AFDC.[273] Yet, Congress and presidential administrations alike continue to expand the EITC, citing its political popularity as a reason for doing

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[269] JACOB S. HACKER, THE DIVIDED WELFARE STATE 57 (2002).

[270] *See, e.g.*, Germany, *supra* note 4 at 774; *Farm Bill Signed, USDA on the Clock*, POLITICO.COM (Feb. 7, 2014), http://www.politico.com/story/2014/02/farm-bill-usda-103270.html.

[271] 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* INTERNAL REVENUE SERVICE, THE MAKING WORK PAY CREDIT, http://www.irs.gov/uac/The-Making-Work-Pay-Tax-Credit.

[272] Scholz et al., *supra* note 8, at 232.

[273] *Id.*

so.[274] Not only this, but all of the components of the tax war on poverty described above have expanded in this period.[275]

Commentators, as cited in Section 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 non-tax war of poverty lacks political viability, the real choice for policymakers and advocates may not be between the tax and the non-tax 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 higher-income, rather than lower-income, taxpayers. 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.[276] Surrey demonstrated 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. 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 $5000 deduction. So Taxpayer A's taxable income falls by $5000, causing her tax liability to fall by $5000 multiplied by her 15% marginal rate, or by $750. In contrast, when wealthier Taxpayer B's taxable income falls by $5000, her tax liability falls by $5000 multiplied by her 25% marginal rate, or by $1250. In other words, due to her lower bracket, Taxpayer A's deduction was worth $500 less to her than to Taxpayer B. Disparities of this type arise 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-

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[274] *See infra* Part I.a.
[275] *See infra* Part I.
[276] STANLEY S. SURREY, PATHWAYS TO TAX REFORM 37 (1973).

income taxpayers oftentimes do not have either of these. To the contrary, due to the 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.[277] As a result, they 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 – they have no tax liability against which to take it.[278]

Tax scholars have been complaining about issues similar to these two problems for decades.[279] The two problems, become especially acute, however, looking at the tax code as a tool to fight poverty. Tax provisions aimed at helping poor people cannot be very effective anti-poverty devices if most poor people cannot use them.

The same two distributional concerns are somewhat less disconcerting in regard to provisions that do not target poor people directly, but seek to induce developers and other non-poor taxpayers to address poverty-related issues. The low-income housing credit applies, for example, to investors in real estate projects, many of whom 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.[280] 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, 501(c)(3) status may be a powerful incentive even for an organization than never plans to have any taxable profits. As a result, the two distributional equity problems described here are more pressing in regard to some anti-poverty tax provisions than to others.

c. *Less Stigmatizing of Recipients*

Poor citizens generally obtain tax-embedded subsidies in a way that carries less social stigma than non-tax-embedded programs carry. 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

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[277] 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* TAX POLICY CENTER, WHO DOESN'T PAY FEDERAL TAXES? http://www.taxpolicycenter.org/taxtopics/federal-taxes-households.cfm.

[278] *See, e.g.*, Smith, *supra* note 138, at 208.

[279] *See generally* SURREY, *supra* note 276. *See also* Brian Jenn, *The Case for Tax Credits*, 61 TAX. LAW. 549 (2008).

[280] For a description of trades in low-income housing credits, *see generally* Callison, *supra* note 157.

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 recipient of benefits through the tax code assumes the identity of a taxpayer the minute she walks into a tax preparer's office to file the year's return. In this way, 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.[281] 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.[282]

In addition, while some scholarship has 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.[283] 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 the narratives that respondents invoked when describing themselves as wage-earning EITC recipients.[284]

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

[282] Jonathan Barry Forman, *Let's Keep and Expand Upon the Earned Income Credit*, 56 TAX NOTES 233 (1992).

[283] Tach & Halpern-Meekin, *supra* note 26.

[284] Greene, *supra* note 26 at 126.

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 for anti-poverty tax provisions are substantially higher than for non-tax programs.[285]

The flip side of the lower stigma associated with return filing is the onerous process that arises when the IRS attempts to deny a taxpayer a benefit that he claimed. 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.[286] 17.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.[287] 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"[288] 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. She finds that, in contrast to anti-poverty programs based in the tax code, direct-benefit "programs such as the Supplemental Nutrition Assistance Program (SNAP) and Supplemental Security Income (SSI) are *not* punitive in their treatment of inadvertent error."[289]

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

[285] Weisbach & Nussim, *supra* note 26 at 1010-1012.
[286] NATIONAL TAXPAYER ADVOCATE, REPORT TO CONGRESS 2011, http://www.taxpayeradvocate.irs.gov/Annual-Reports-To-Congress/FY-2011-Annual-Report-To-Congress 287, fn. 17.
[287] *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. __ (forthcoming, 2014).
[288] Schneller, *supra* note 8, at 186.
[289] Drumbl, *supra* note 287 at 4.

emphases, administer direct-spending programs. The IRS brings particular set of advantages and disadvantages to the programs that Congress has assigned it.

Perhaps the most distinctive feature of the IRS's capabilities is their relatively low cost. As Jonathan Barry Forman puts it, "The 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."[290] Writing in the *Wisconsin Law Review*, 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.[291] In their *Yale Law Journal* comparative study of the EITC and the program then known as food stamps, David Weisbach and Jacob Nussim found that, even though the EITC is substantially larger than the food stamp program, the EITC costs the federal government roughly one-tenth the amount to administer as the food stamp program does.[292] On the other hand, taxpayers themselves bear some of the administrative costs associated with tax anti-poverty programs.[293]

In addition, the IRS may bring special know-how 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."[294] Instead, the IRS's "expertise in processing paper and measuring income may be significantly different than that of other agencies,"[295] 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.[296]

The 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, 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

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[290] Forman, *supra* note 282.
[291] Book, *supra* note 26, at 1105.
[292] Weisbach & Nussim, *supra* note 26, at 1004.
[293] 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.
[294] David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1841 (2006).
[295] *Id.*
[296] NATIONAL TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS 90-91 (2009), http://www.irs.gov/Advocate/National-Taxpayer-Advocate's-2009-Annual-Report-to-Congress!.

preparers in claiming the benefit."[297] Specifically, she argues that the IRS has difficulty verifying some of the non-income-related information necessary to allot social welfare benefits, such as the number of qualifying children that give rise to the child tax credit.[298] Regarding "pre-certification," the IRS has few procedures available to determine whether a benefit is appropriate before depositing a refund with a taxpayer.[299] The IRS's brief experiment with pre-certification in the mid-2000s, she notes, did not work very well.[300] 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.[301] In addition, she observes the mission creep that has occurred as the IRS has had to take on so many social programs.[302]

Finally, she observes that benefits as large as the EITC, often claimed with the help of low-skill private tax preparers, are "ripe for fraud."[303] 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.[304] 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.[305] This issue is less of a problem when dealing with the indirect anti-poverty programs, most of which target relatively sophisticated taxpayers.

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

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[297] *Id.* at 83.
[298] *Id.*
[299] *Id.* at 84.
[300] *Id.*
[301] *Id.* at 84-85.
[302] *Id.* at 87.
[303] *Id.* at 85-86.
[304] For a general look at the problems that refund anticipation products cause, *see, generally, id.* at 84-85; 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);
[305] In 2009, VITA sites, which are available to taxpayers with annual incomes below approximately $50,000, served about 3.2 million taxpayers. INTERNAL REVENUE SERVICE, SOI TAX STATS - SELECTED TAXPAYER ASSISTANCE AND EDUCATION PROGRAMS, BY TYPE OF ASSISTANCE OR PROGRAM - IRS DATA BOOK TABLE 19, 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 SERVICE, SOI TAX STATS - INDIVIDUAL STATISTICAL TABLES BY SIZE OF ADJUSTED GROSS INCOME, 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* Internal Revenue Service, Free Tax Return Preparation for Qualifying Taxpayers, http://www.irs.gov/Individuals/Free-Tax-Return-Preparation-for-You-by-Volunteers.

agencies tend to err in the reverse direction, failing to reach large segments of eligible populations.[306] Weisbach and Nussim's data suggest that delivering large-scale benefits to substantial recipient groups, especially low-income individuals, involve 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 overprovision, the [food stamp program], while generating a different type of error than the EITC, cannot be said to be more accurate than the EITC, even though it costs ten times as much to administer and is only one-half the size."[307] 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.

Weighing its advantages and disadvantages, 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 may need them to survive.

e. Flexibility: Market Responsiveness & Cash Subsidies

Many of the provisions of the tax war on poverty deliberately involve a degree of flexibility. 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, first, 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: go to work, 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 well-known 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.[308] 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.[309]

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[306] Weisbach & Nussim, *supra* note 26, at 1003-1006.
[307] *Id.* at 1006.
[308] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2597-2611 (2012).
[309] *Id.*

Further, the findings 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.[310] Since all of the provisions of the tax war on poverty provide positive incentives, they show policymakers' willingness to allow these programs to provide a less powerful effect than they could in order to give taxpayers freer choice and flexibility about whether to comply.

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. For example, several studies have found that the EITC is actually a notably strong work incentive, particularly among single mothers.[311] Nowhere do low-income EITC beneficiaries receive an explicit instruction that they *must* go to work, nor are they fined if they do not work. Yet, the potential EITC reward has apparently been sufficient to induce a substantial number of them to enter the workforce.

On the other hand, research on the LIHTC suggests that this credit is not particularly effective at prompting developers to build more low-income housing than they would without the credit.[312] If the federal government itself used the money that goes into the LIHTC to build more public housing, perhaps additional housing per dollar would become available. Similarly, the research on the education credits finds that those programs are not very good at promoting higher education among low-income populations.[313] Perhaps direct subsidies like Pell grants or even federally subsidized student loans would be more successful at getting poor students into college classrooms. Even so, the more flexible, market-based approach of the low-income housing credit and the education credits may offer advantages in terms of efficiency or fairness that go beyond their power as behavior-driving incentives.

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

[310] *See* Nicholas C. Barberis, *Thirty Years of Prospect Theory in Economics: A Review and Assessment*, 27 J. OF ECON. PERSP. 173, 175 (2013).
[311] *See, generally* Meyer, *supra* note 26; Harry J. Holzer, *Workforce Development as an Antipoverty Strategy: What Do We Know? What Should We Do? in* CHANGING POVERTY, CHANGING POLICIES (MARIA CANCIAN AND SHELDON DANZIGER, EDS.) (2009); Adam Carasso, Harry J. Holzer, Elaine Maag & C. Eugene Steuerle, *The Next Stage for Social Policy: Encouraging Work and Family Formation Among Low-Income Men*, TAX POLICY CENTER Discussion Paper No. 28 (2008).
[312] *See infra* Part 1.e.
[313] *See infra* Part 1.h.

they wanted to spend their money.[314] 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.[315] Another study, examining this question historically, discovered improved child outcomes in families that had received cash mothers' pensions.[316] In the context of developing countries, experiments have revealed that cash transfers actually increase work hours among recipients, a change that in turn improves quality of life.[317]

The one way in which the tax war on poverty does *not* promote flexible spending among the poor is by ordinarily 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.[318] Conversely, however, some research has shown that receiving benefits only once a year helps poor families save and purchase investment assets.[319] Further, with the premium assistance credit, the IRS is for the first time experimenting on a large scale with distributing credit benefits throughout the year. Should this administrative experiment succeed,

[314] MILTON FRIEDMAN, CAPITALISM & FREEDOM 191-2 (1962). *See also* Moffittt, *supra* note 26, at 121-22.
[315] *See* Elizabeth J. Costello, Alaattin Erkanli, William Copeland & Adrian Angold, *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); William Copeland & Elizabeth J. Costello, AM ECON J APPL. ECON. 86 (2010); E. Jane Costello, Scott N. Compton, Gordon Keeler, & Adrian Angold, *Relationships Between Poverty and Psychopathology: A Natural Experiment*, 290 J. OF THE AM. MED. ASSOC. 2023 (2003). For summaries of this research in the popular press, see Matt Yglesias, *Fight Poverty By Giving Poor People Money*, SLATE.COM (January 19, 2014); Moises Velasquez-Manoff, *What Happens When the Poor Receive A Stipend?* OPINIONATOR, NYTIMES.COM (Jan. 18, 2014).
[316] Anna Aizer, Shari Eli, Joe Joe Ferrie and Adriana Lleras-Muney, *The Long Term Impact of Welfare: Evidence from the Mother's Pension Program* (working paper) (2013). For a summary of this research in the popular press, *see* Matt Yglesias, *Welfare Works*, SLATE.COM (Jan. 13, 2014).
[317] Christopher Blattman, Christopher, Nathan Fiala and Sebastian Martinez, *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
[318] *See, e.g.*, Ryan, *supra* note 141, at 54; Smith, *supra* note 138, at 210-212; Mullineaux, *supra* note 142, at 36-39.
[319] Weisbach & Nussim, *supra* note 26 at 1025; 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).

perhaps the IRS could do the same with some of its other 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. Use of work incentives and market interventions targets poor individuals who participate in the workforce and who take advantage of various market-based goods and services. However, the tax war on poverty does very little to reach those in U.S. society who are most in need of government help: those in deep poverty.

Georgetown poverty-law scholar Peter Edelman has recently documented an intermittently growing trend in the U.S.: namely, a rise in the number of individuals and families with very little, if any, income.[320] 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,"[321] Edelman observes that deep poverty among children rose by 75% between 1995 and 2005.[322] Further, approximately 15 million people in the U.S. remain in deep poverty.[323] Poverty scholars are still attempting to ascertain the precise level of deprivation that these families face.[324] 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."[325]

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.[326] In addition, some of the tax-exempt organizations that address poverty presumably provide benefits to those in deep poverty. Food banks and homeless 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. It is not a coincidence that deep poverty among children rose dramatically in the years when the tax war on poverty was expanding and the non-tax one was simultaneously contracting. Anti-poverty tax programs

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[320] PETER EDELMAN, SO RICH SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA, ch. 5. (2010).
[321] Shaefer & Edin, *supra* note 26, at 250.
[322] *Id.* at 82.
[323] *Id.*
[324] EDELMAN, *supra* note 320, ch. 5.
[325] *Id.* at 83.
[326] Shaefer & Edin, *supra* note 26, at 259.

generally link their benefits to employment; but some of the deeply poor do not work regularly for a variety of reasons.[327] If they do not work, neither they nor their children can benefit much from anti-poverty tax programs. They cannot claim the EITC, nor the child tax credit, nor the education credits; and they are ineligible for the child care tax benefits, which mandate that the recipient work or (in the case of the child care tax benefits) be actively looking for work. By definition, moreover, the employment credits 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 poor people without jobs. 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, so the premium assistance credit will not help them pay for health care. 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 sector regularly deal with the poor in any way, let alone 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, at least at times, to claim at least some EITC. 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. Then, the deeply poor will have difficulty paying out-of-pocket for education or child care – a circumstance that prevents them for taking the education or child care 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 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.

[327] EDELMAN, *supra* note 320, at 96.

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 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. Nor have the tax programs yet incorporated pertinent bodies of law which have developed in the context of related direct-spending 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. This hinders the ability of these agencies to assess how well those programs are doing at actually fighting poverty.

To begin at the front-end: there are currently 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."[328] Further, Wright pointed out, litigation over legislation can productively bend the law in the interests of the poor individuals it serves.[329]

For its part, 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 those clinics 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 non-tax law. As mentioned earlier, Roisman makes this case vividly in regard to the low-income housing credit. In prior decades, advocates had created substantial civil-rights law protecting the interests of various marginalized groups in federal housing policy. However, it is still unclear whether any of that law extends to low-income housing credit, although Roisman convincingly argues that it should. No one has litigated most of these issues, so poor residents and potential residents of low-

[328] J. Skelly Wright, *Poverty, Minorities & Respect for Law*, 1970 DUKE L.J. 425, 443 (1970).
[329] *Id.* at 442.

income housing credit dwellings have not had a court rule on whether various antidiscrimination principles apply to them.

On the back-end of the poverty-related tax provisions – i.e., after these provisions have been put into practice – most of the anti-poverty tax programs have not undergone substantial formal evaluation. The primary way that the federal government assesses tax expenditures of all kinds each year is to measure their 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, let alone how effective it is in measuring poverty. No formal procedures exist to ensure that such evaluative research gets done. There is just no standard practice for evaluating a tax-embedded program.

Occasionally, the General Accounting Office or the Congressional Budget Office issues reports on some particular tax provision, 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, 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 Sections I and II, the final section of this paper proposes two important mechanisms by which the tax war on poverty could become significantly more effective in fighting poverty: tax lawmakers and tax lawyers.

a. Tax Lawmakers

This subsection 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, (i) by increasing use of refundable credits; (ii) by shifting the focus of the tax war on poverty to those in deep poverty; (iii) by developing evaluation procedures for anti-poverty tax programs; and (iv) 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. Section I of this paper described these provisions one by one, and it analyzed their individual shortcomings. In view of this analysis, tax lawmakers can and should re-examine each of these provisions to consider and address ways to overcome the individual shortcomings.

In addition to such provision-specific reforms, however, tax lawmakers should initiate several larger changes to the tax war of poverty, changes that would affect its entire package of provisions. Some of these changes are relatively low-cost, but others may represent additional budget demands on the federal government. 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 subsection.

i. Increasing Use of Refundable Credits

As observed throughout this paper, 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, plus reduces the number of people actually affected by the relevant tax incentives. Given this situation, tax lawmakers should, at a minimum, convert every tax provision that might have some anti-poverty effect into a refundable credit. That would allow every low-income taxpayer 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. Other scholars have called on Congress to stop using exclusions and deductions altogether due to their upside-down subsidy effects. Members of Congress even seem to agree. In the past decade, Congress has certainly started making more of its credits refundable or partially refundable, including the Child Tax Credit, the American Opportunity Credit and the Premium Assistance Credit.[330]

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 on tax benefits by phasing them 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

[330] Some scholars have proposed collapsing some of these refundable credits into a single credit. *See, e.g.*, Jonathan Barry Forman et. al., *Designing a Work-Friendly Tax System: Options and Trade-Offs*, Urban Institute Discussion Paper No. 20 (June 2005); PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR & PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 107 (2005); *Designing a Work-Friendly Tax System*, 2 PIERCE L. REV. 131-55 (June 2004).

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. The most prominent antipoverty refundable credit, the EITC, has long attracted bipartisan support. 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 U.S., 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.

ii. Shifting the Focus to Those in Deep Poverty

The growing problem of "extreme poverty" is one that tax lawmakers should squarely recognize and then attack in a variety of ways. For one, Congress might consider legislating tax benefits that do not have work requirements. In one study, poverty researchers Sheila Zedlewski and Sandi Nelson followed ninety-five families in deep poverty.[331] They found that none of them had substantial work. This was the case for three main reasons: some parents in this category had health barriers to work; other parents could not afford reliable child care; and still others could not find jobs.[332]

To address deep poverty, Congress should consider allowing families such as those in the Zedlewski-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 one of a list of specified reasons for not working, or it could just waive the work requirement for part or all of the credit, or for taxpayers below a certain income level. After all, by its title, the child tax credit is supposed to help children; it is unclear why their parents should have to work to satisfy that purpose. Some policymakers may object, believing that individuals should have to work to receive benefits whether they have children or not. As a result, this recommendation may run into political feasibility issues. However, given the feasibility advantages of tax-embedded programs, tax provisions that help the extremely poor should be easier to enact than their non-tax counterparts.

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[331] Sheila Zedlowski & Sandi Nelson, *Families Coping Without Earnings or Government Cash Assistance*, URBAN INSTITUTE, OCCASIONAL PAPER NO. 64 (2003).
[332] *Id.* at 3-8.

Taxpayers who do not work often do not currently 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 child care tax benefits, increasing them in amount, and (or) making them available on an advance basis throughout the year. Lack of adequate child care appears to be a genuine obstacle for poor parents hoping to work, and the current non-refundable child credit capped at a few thousand dollars, and payable only after parents purchase the child care, is unlikely to be significantly helping this group. 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 assist deeply poor parents substantially in being able to work.

An additional way in which 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 percent of renters' income and allowing the same-size credit for housing all low-income tenants, the statute induces recipients to develop housing for the highest-income low-income renters possible. Congress could address this problem by raising the value of the credit for projects that house the deeply poor. In the alternative, Congress could re-write 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 relative ease of filing a tax return relative to filing to participate in other programs, the tax code could become an effective means of targeting not just the moderately poor but the extremely poor.

iii. Developing Evaluation Procedures for Anti-Poverty Tax Programs

As discussed above, the federal government is currently spending over a hundred billion dollars 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.[333]

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,[334] 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.[335] Her report continues: "[i]t is possible that data also could help to determine if a tax-expenditure is effectuating intended policy. . . Research like this can interest policymakers.[336] 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.

iv. Reorienting the IRS

The IRS's recognized competencies of income measurement and benefit delivery would seem already to 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 entailing some re-orientation on its part.

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. 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. One of the top

[333] This is an issue with tax-embedded programs generally, not just with anti-poverty tax provisions.
[334] NATIONAL TAXPAYER ADVOCATE, 2010 REPORT TO CONGRESS 115 http://www.irs.gov/pub/irs-utl/vol_2_tasresearchandrelatedstudies2010arc.pdf.
[335] *Id.* at 117.
[336] *Id.* at 118.

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."[337] 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."[338] 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."[339] The report also imagined that, within this office, the IRS could establish sub-offices to deal with particular programs and the challenges they present, as it has done with regard to the health care reform programs.[340]

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."[341] 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.'"[342] Revamping the IRS's mission statement to incorporate its new role in anti-poverty work could underwrite this goal reorientation. Even absent such a drastic change to its mission statement, however, the IRS should reckon seriously 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 improving the effectiveness of the tax war on poverty. The non-tax 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 non-tax war on poverty – an article that Sargent Shriver would call the "genesis of legal services" – Edgar Cahn 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

[337] *Id.* at 123.
[338] *Id.*
[339] *Id.*
[340] *Id.* at 24.
[341] *Id.* at 21
[342] *Id.* at 22.

processes which determine modes of official behavior."[343] Making this condition into reality was, according to the Cahns, the role and responsibility of the "professional advocate"[344] – 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 (i) "traditional legal assistance in establishing or asserting clearly defined rights";[345] (ii) "legal analysis and representation directed toward reform where the law is vague or destructively complex";[346] (iii) "legal representation where the law appears contrary to the interests of the slum community";[347] and (iv) "legal representation in contexts which appear to be non-legal and where no judicially cognizable right can be asserted."[348]

The decades since the Cahns wrote have been difficult ones for poverty lawyers. Legal aid organizations face substantial additional restrictions on their ability to carry out class action lawsuits and other types of advocacy work.[349] 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."[350] This rule drastically reduced the amount of welfare rights litigation in the U.S., causing legal-aid caseloads to fall by millions of cases and putting hundreds of legal-aid lawyers out of work.[351] Additionally, federal funding for legal services has always been tight, although it has slightly increased under the Obama administration.[352]

Yet, even in this environment, tax lawyers 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. However, with the onset of the tax war on poverty, that focus is emphatically no longer the case. Today, 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 non-tax 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

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[343] Edgar S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1333, 1963-1964.
[344] *Id.* at 1334.
[345] *Id.* at 1336.
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] 49 C.F.R. Part 1639 (1996). For a description of these regulations, *see* Marina Zaloznaya & Laura Beth Nielsen, *The Experience and Consequences of Professional Marginality: the Case of Public Interest Lawyers*, 35 LAW AND SOC. INQUIRY 4, 919 (2011); Laura Beth Nielsen & Catherine R. Albiston, *The Organizational Environment of Public Interest Law* 1975 – 2000, 84 U.N.C.L. REV. 1592 (2006).
[350] 49 C.F.R. § 1639.1.
[351] Zaloznaya & Nielsen, *supra* note 349 at 925.
[352] LEGAL SERVICES CORPORATION, LSC FUNDING, http://www.lsc.gov/congress/lsc-funding.

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."[353]

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 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.[354] 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.[355] For instance, the National Consumer Law Center, which does consumer-law anti-poverty work, might serve as a model for the tax world and has received significant support from private foundations.[356] 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.[357]

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.

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353 *Id.* at 1333.
354 Schneller et al., *supra* note 24, at 204.
355 Zaloznaya & Nielsen, *supra* note 349 at 922.
356 NATIONAL CONSUMER LAW CENTER, FUNDERS, https://www.nclc.org/about-us/funders.html.
357 I.R.C. §7526(a) 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 a Legal Aid program.

i. "[T]raditional legal assistance in establishing or asserting clearly defined rights"

The tax provisions described in Section I have given rise to substantial legal rights. The Cahns observed that the most important legal right that a poverty lawyer can defend is "to insure the equitable and humane application of administrative rules and regulations under such programs as aid for dependent children, welfare and unemployment compensation."[358] Elaborating, they observed that, within poverty law, "[t]he assertion of a right in even a single case can have community-wide ramifications."[359]

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 for taxpayers who claim the EITC is very high.[360] Tax professor Michelle Lyon Drumbl, citing National Taxpayer Advocate data, has noted that claiming the EITC doubles a taxpayer's chances of an audit.[361] 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.[362] Data show that 70 percent of EITC recipients who get a pre-refund audit letter never challenge it.[363] 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 EI[T]C claim"; and only 50% "felt they knew what they needed to do in response to the audit letter."[364]

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. A recent National Taxpayer Advocate study highlighted the difficulties that even taxpayers who in fact claimed the EITC correctly have in substantiating their claim.[365] A tax-oriented poverty lawyer could, without much difficulty, explain to them how to

[358] Cahn & Cahn *supra* note 343 at 1338.
[359] *Id.*
[360] Drumbl, *supra* note 287 at 14.
[361] *Id.*
[362] *Id.* at 15.
[363] *Id.* at 14.
[364] *Id.* at 15.
[365] NATIONAL TAXPAYER ADVOCATE, 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), 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.

follow the audit procedures and how to assert their defenses. Given that entire law-firm tax controversy practices exist to help high-income and business taxpayers do exactly this, the need for this type of legal assistance in the EITC area is pressing.

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 percent 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 is lower than the agency assumes, it would 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 further assist low-income taxpayers in asserting their rights. Tax professor Keith Fogg has found that approximately 70% of Tax Court petitioners represent themselves.[366] While the American Bar Association and the Tax Court itself have worked to reduce that number, it has remained relatively substantial.[367] Tax scholar Leandra Lederman has demonstrated that representation in Tax Court significantly increases the chances of a successful outcome for a taxpayer.[368] 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.[369]

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.[370] 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

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[366] Keith Fogg, TAX COURT CONTINUES EFFORTS TO PROVIDE GREATER ACCESS TO JUSTICE TO PRO SE TAXPAYERS, PROCEDURALLY TAXING, August 20, 2013, http://www.procedurallytaxing.com/tax-court-continues-efforts-to-provide-greater-access-to-justice-to-pro-se-taxpayers/.
[367] *Id.*
[368] Leandra Lederman & Warren Hrung, *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).
[369] E-mail from Michelle Lyon Drumbl, March 22, 2014, on file with author.
[370] Schneller, *supra* note 8, at 204.

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."[371] 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.[372]

Expanding Legal Aid capacity to handle audits and Tax Court cases need not require substantial resource outlays. Existing poverty lawyers would need only a simply 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.[373] 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, particularly for lawyers trained in dealing with more complex judicial and legislative processes.[374]

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].[375]

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[371] *Id.*
[372] *Id.* at 204-219.
[373] See, e.g., CTLawHelpProBonoPortal, Tax Clinic for Low-Income Taxpayers, http://probono.ctlawhelp.org/catalog/tax-clinic-low-income-taxpayers.
[374] *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. 4 (1984).
[375] Schneller et. al., *supra* note 8 at 207.

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

Further, several 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.[376] The clinics located at Legal Aid sites employ a lawyer who has training in both tax and non-tax government benefits.[377] However, Professor Drumbl also observes that these clinics are just a "a drop in the bucket compared to the number of taxpayers who do [not] have representation."[378]. However, 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 providing 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 neighborhoods.[379] 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.[380] Jones has observed that the demand for pro bono assistance among these groups is high.[381] 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 exemption and in following relevant legal regulations or help employers in low-income communities learn about and take advantage of the employment credits.

ii. "[L]egal analysis and representation directed toward reform where the law is vague or destructively complex"

Extending 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."[382]

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[376] E-mail from Michelle Lyon Drumbl, March 22, 2014, on file with author.
[377] *Id.*
[378] *Id.* For more on these programs and their history, *see, generally,* TAXPAYER ADVOCATE SERVICE, LOW INCOME TAXPAYER CLINICS: PROGRAM REPORT (2014), http://www.irs.gov/pub/irs-pdf/p5066.pdf; Keith Fogg, *History of Low-Income Taxpayer Clinics*, 67 TAX LAW. 1 (2013);
[379] *See generally* Jones, *supra* note 192. Some law school clinics do provide assistance with the LIHTC. *See, e.g.*, SUNY BUFFALO LAW SCHOOL, HOUSING FINANCE AND DEVELOPMENT LAW PROGRAMS, http://www.law.buffalo.edu/academics/jd/concentrations/housinglaw.html
[380] *Id.* at 453.
[381] *Id.*
[382] Cahn & Cahn, *supra* note 343, at 1341.

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. 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. Large law firms offer this type of advocacy as a service. 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 advocacy-oriented litigation may not apply to the tax way on poverty. As described above, the most substantial ban on advocacy litigation by federally funded legal services came with the 1996 welfare reform bill.[383] Yet that regulation applies on its face only to traditional cash-based welfare.[384] As Zaloznaya & Nielsen report, after that rule, three hundred legal aid offices had to close and the available resource pool for welfare-rights law moved elsewhere.[385] 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.

iii. "[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."[386] However, "[w]here the rule, statute, or regulation works a

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[383] Zaloznaya & Nielsen, *supra* note 349 at 925.
[384] 49 C.F.R. § 1639.2.
[385] Zaloznaya & Nielsen, *supra* note 349 at 925.
[386] *Id.*

hardship, legal representation may be able to suspend or postpone its operation, permit a period of transition, and otherwise mitigate its hardship."[387]

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. 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."[388] 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 rarely in the past been able to speak out or lobby effectively on specific pieces of legislation"[389] so "[i]t is no wonder that [the poor] have not fared well."[390] 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.[391]

iv. "[L]egal representation in contexts which appear to be non-legal 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."[392] They

[387] *Id.* at 1342.
[388] Wright, *supra* note 328, at 444.
[389] *Id.* at 444-445.
[390] *Id.*
[391] See III.b.ii., *infra*.
[392] Cahn & Cahn, *supra* note 343 at 1344.

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."[393]

The tax war on poverty presents a large number of comparable situations in which a poor taxpayer does not require a soundproof 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. 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 non-legal 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 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 non-legal 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.

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[393] *Id.*

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, child care assistance, housing, community development jobs, education subsidies, health care 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 non-tax counterpart. To make this possible, however, tax lawyers must embrace the extent to which tax law has become the new poverty law and to use tax tools to fight the nation's continuing war on poverty.