

# RACE AND CLASS MATTERS IN TAX POLICY

Dorothy A. Brown\*

*The Earned Income Tax Credit (EITC), which is available only to low-income workers, is headed for extinction or at least the “end of the EITC as we know it.” Recently we were informed that 1.6 million low-income taxpayers had their tax refunds frozen over the last five years, although the vast majority did nothing wrong. Low-income taxpayers are far more likely to be audited than their high-income counterparts. In fact, since 1998 over \$1 billion has been spent auditing low-income taxpayers. This Essay shows that the EITC is headed for extinction because the EITC has a “welfare” taint. The EITC first received a welfare taint during the Clinton Administration, and it has continued during the Bush Administration. In order to reverse the trend, EITC taxpayers will have to be painted in a more sympathetic or “deserving” light. This Essay suggests that the truth actually will help here, given that the racial analysis of the EITC shows that the vast majority of EITC taxpayers are white. Because scholars have ignored the race and class effects of the EITC, they offer no solution to improve the plight of low-income taxpayers. Building upon Professor Derrick Bell’s interest-convergence thesis, I predict that if the race and class information can be properly “packaged,” the EITC’s elimination can be prevented.*

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\* Professor of Law and Director, Frances Lewis Law Center, Washington and Lee University School of Law, Lexington, Virginia; B.S., Fordham University; J.D., Georgetown University Law Center; L.L.M. (Taxation), New York University. Email: Brownda@wlu.edu. I would first like to thank Professors Leslie Book, Darryl Brown, Montré Carodine, Michele Landis Dauber, Mechele Dickerson, Ron Krotoszynski, Molly Micheltore, David Millon, Joel Newman, Robert Peroni, Dorothy Roberts, James Ryan, Scott Sundby, David Super, and the faculty workshop participants at Seattle University Law School for their helpful comments. I thank Mr. Adam West Lee, Ms. Kristina Longo, and Mr. Robert Spake for excellent research assistance. I would like to especially thank Ms. Joy Milligan for her outstanding editorial assistance and for going above and beyond the call of duty. I also thank Ms. Linda Newell and Ms. Judy Stinson for their flawless library research assistance. The financial support of the Frances Lewis Law Center, Washington and Lee University School of Law is gratefully acknowledged.

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"As all of us saw on television, there is also some deep, persistent poverty in this region as well. And that poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America. We have a duty to confront this poverty with bold action."

— President George W. Bush, September 2005<sup>1</sup>

"Tax policy matters."

— President George W. Bush, February 2006<sup>2</sup>

#### INTRODUCTION

As President Bush recently acknowledged, Hurricane Katrina made visible the race and class divide in America. Many questions have been raised in the wake of this tragedy, and hopefully those questions will spark vigorous debates regarding racism and poverty in our country. One question that should be asked, but has rarely been, is what role does tax policy play in creating or exacerbating America's racial and class divide?<sup>3</sup> As President Bush stated earlier this month, albeit in a very different context, "tax policy matters."

Low-income taxpayers are under attack. We recently learned that for the past five years, hundreds of thousands of low-income taxpayers have had their refunds frozen and labeled fraudulent, although almost two-thirds appear to have done nothing wrong.<sup>4</sup> Beginning in 2004, the IRS now requires additional records be submitted in addition to tax returns

1. Elisabeth Bumiller, *Bush Pledges Federal Role in Rebuilding Gulf Coast*, N.Y. Times, Sept. 16, 2005, at A1 (quoting speech by President Bush on Hurricane Katrina).

2. Richard Keil, *Bush Says Renewing Investment Tax Cuts Is Essential* (Update2), Bloomberg.com, Feb. 8, 2006, at <http://www.bloomberg.com/apps/news?pid=10000103&sid=aC0ja9G3aqYY&refer=us> (on file with the *Columbia Law Review*) (quoting comments made by President Bush on reduced tax rate applicable to capital gains and dividends).

3. Cf. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 Duke L.J. 39, 101 ("There may be a [sic] income tax problem that would benefit from being viewed in a black perspective, but until you look, how will anyone know?").

4. See Sandra Block, *IRS Quietly Freezes Many Refunds; Tax Fraud Sweep Snares Innocent Low-Income Filers*, USA Today, Jan. 11, 2006, at 1A; Albert B. Crenshaw, *IRS Froze Refunds, Study Says; Taxpayers Had No Chance to Respond to Fraud Suspicions*, Wash. Post, Jan. 11, 2006, at D1; Joel Havemann & Peter Wallsten, *IRS Improperly Freezes Refunds, Report Says*, L.A. Times, Jan. 11, 2006, at A9; David Cay Johnston, *I.R.S. Move Said to Hurt the Poor*, N.Y. Times, Jan. 11, 2006, at C1; Jerry Kronenberg, *IRS Called Not Fair in Refund Holds*, Boston Herald, Jan. 11, 2006, at 34.

before 25,000 low-income taxpayers receive their refund.<sup>5</sup> Low-income taxpayers are more likely to be audited than any other taxpayer group.<sup>6</sup> Since 1998, the Internal Revenue Service (IRS) has spent over \$1 billion on audits of low-income taxpayer returns.<sup>7</sup> No other taxpayers are subject to such scrutiny.

Each year five million families are lifted out of poverty because they receive the low-income taxpayer credit.<sup>8</sup> More children are lifted out of poverty as a result of the credit than any other governmental program.<sup>9</sup>

Tax scholars who have recently written about low-income taxpayers often either ignore these facts,<sup>10</sup> or assume they are the price to be paid for tax benefits for low-income taxpayers.<sup>11</sup> Politicians routinely demonize low-income taxpayers by decrying all the “fraud” associated with the low-income tax credit.<sup>12</sup>

Politicians are correct to a certain extent. There are errors associated with tax returns of low-income taxpayers.<sup>13</sup> This is true regardless of whether the returns are completed by taxpayers or their paid tax return preparers.<sup>14</sup> In addition, once the tax return is received by the IRS, the

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5. Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 *Emory L.J.* 755, 781–82 (2005) [hereinafter Brown, *Children*].

6. See *infra* Part I.C.

7. See *infra* Part I.C.

8. See David Cay Johnston, *Perfectly Legal* 129 (2003) [hereinafter Johnston, *Perfectly Legal*] (“About five million of these families are lifted above the official poverty line because of the credit . . .”).

9. See *infra* note 56 and accompanying text.

10. See, e.g., David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 *Yale L.J.* 955, 997–1028 (2004) (providing analysis for deciding whether governmental programs should be administered through tax system or as direct spending program by comparing EITC and food stamp program). For articles describing the disadvantages faced by low-income taxpayers, see, e.g., Leslie Book, *The IRS’s EITC Compliance Regime: Taxpayers Caught in the Net*, 81 *Or. L. Rev.* 351, 369–74 (2002) [hereinafter Book, *The IRS’s EITC Compliance Regime*] (describing how low-income taxpayers are more likely to get audited than high-income taxpayers); Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 *U. Kan. L. Rev.* 1145, 1156–65 (2003) [hereinafter Book, *The Poor and Tax Compliance*] (describing vigorous IRS compliance efforts directed at low-income taxpayers in generally lax compliance environment); Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 *Wis. L. Rev.* 461, 472–74 (describing refund anticipation loans that are targeted to low-income taxpayers filing for their EITC refunds).

11. See, e.g., Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 *UCLA L. Rev.* 1867, 1915–16 (2005) (fearing either repeal of EITC or transfer of EITC to welfare-type bureaucracy unless increased scrutiny continues).

12. See *infra* Part I.B.

13. Brown, *Children*, *supra* note 5, at 775 (listing error rates from 1994–1999 as ranging from twenty-five to thirty-six percent of EITC claimed, although noting rates are “not without controversy”); Weisbach & Nussim, *supra* note 10, at 1010 (“The EITC has a high participation rate but also a high overpayment rate.”).

14. U.S. Gen. Accounting Office, *Tax Administration: Continuing Problems Affect Otherwise Successful 1994 Filing Season 2* (1994), available at <http://www.gao.gov/archive/gg95005.pdf> (on file with the *Columbia Law Review*) [hereinafter Gen. Accounting

staff makes mistakes in processing the claims for a refund.<sup>15</sup> Politicians argue that the error rate is due to fraud, and I argue it is due to complexity.<sup>16</sup>

To begin with, the IRS publication associated with the low-income taxpayer credit, Publication 596, is over *fifty* pages long with six separate worksheets.<sup>17</sup> The credit's complexity also results in tax professionals preparing the majority of low-income taxpayer returns at an estimated cost of \$1.75 billion annually.<sup>18</sup>

Yet whenever there is an error found in a low-income taxpayer's return, politicians only suspect fraud and not complexity. Why is fraud so much easier for elected officials to believe? The answer lies in the political rhetoric surrounding the low-income tax credit.

In January 1994, during President Clinton's State of the Union address, he stated that the 1993 expansion of the low-income tax credit "will lift 15 million working families out of poverty, rewarding work over welfare, making it possible for people to be successful workers and successful parents. *Now that's real welfare reform.*"<sup>19</sup> A tax credit for low-income taxpayers was equated with welfare reform—by a Democratic President.

In 1997, when Congress was debating the child tax credit which would provide a \$500 tax credit for every child—except for the children of low-income taxpayers—then-Speaker Newt Gingrich (R-Ga.) stated that giving "an additional \$500-per-child tax credit to [low-income taxpay-

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Office, Continuing Problems] ("The Earned Income Credit (EIC) was the source of many errors by taxpayers and tax practitioners in preparing returns. Those errors, *along with errors by IRS staff* in following IRS procedures for handling EIC claims, increased IRS' error resolution workload and delayed taxpayers' receipt of benefits." (emphasis added)).

15. *Id.*

16. Cf. U.S. Gen. Accounting Office, *Earned Income Credit: Opportunities to Make Recertification Program Less Confusing and More Consistent* 5 n.6 (2002), available at <http://www.gao.gov/new.items/d02449.pdf> (on file with the *Columbia Law Review*) ("It is not known how much of the overclaims was due to simple error versus negligence or fraud."). In addition, there are serious questions raised about the accuracy of the error rates as reported by the IRS. See, e.g., Robert Greenstein, Ctr. on Budget & Policy Priorities, *What Is the Magnitude of EITC Overpayments?* 1 (rev. 2003), available at <http://www.cbpp.org/5-20-03eitc3.pdf> (on file with the *Columbia Law Review*) ("The last study of EITC overpayments, an IRS study of overpayments in tax year 1999, has significant methodological shortcomings that likely result in an overstatement of the overpayment rate. In addition, substantial changes have been made in the EITC since tax year 1999 to reduce overpayments . . .").

17. Brown, *Children*, supra note 5, at 767 ("Calculating the EITC is quite complicated. The IRS publication which explains the EITC is over fifty pages long.").

18. Johnston, *Perfectly Legal*, supra note 8, at 141 ("Tax preparers and lenders take in about \$1.75 billion in fees each year from the roughly \$30 billion in earned income tax credits."); Lipman, supra note 10, at 465 ("Sixty-eight percent of tax filers who received the EITC hired paid tax practitioners to prepare their income tax returns.").

19. Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 126, 129 (Jan. 25, 1994) (emphasis added).

ers] who pay no taxes is welfare, plain and simple.”<sup>20</sup> Republican members of Congress, when denying tax benefits to low-income taxpayers in 2003, referred to the tax benefit as “welfare.”<sup>21</sup> Politicians understand that by describing a governmental program as welfare, they are creating opposition to that program.<sup>22</sup>

Welfare is a racially and politically charged word. It has become a code word for race.<sup>23</sup> In America, “welfare recipients” equal lazy blacks, who would rather receive money from the government than work.<sup>24</sup>

It is also well known that race plays a significant role in determining public support for welfare spending. Racial attitudes of whites are a key determinant of public support for welfare programs.<sup>25</sup> What receives less scholarly attention however are the forms of governmental aid other than

20. 143 Cong. Rec. E1365, E1365 (daily ed. July 8, 1997) (statement of Rep. Gingrich).

21. See, e.g., Bruce Alpert, *Demos See Tax Debate as Fodder in Campaign; GOP Calls Complaints a Class-Warfare Tactic*, Times-Picayune (New Orleans), June 15, 2003, at 16 [hereinafter Alpert, Demos] (quoting Congressman Spencer Bachus (R-Ala.) as saying that “increasing the child tax credit to [EITC recipients] who don’t pay income taxes amounts to turning the tax code ‘into a welfare system’”); Stephen Dinan, *Bush’s Tax Cuts Add Up to Zero*, Wash. Times, June 19, 2003, at A1 (quoting Congressman Ernest Istook (R-Okla.), Chairman of Appropriations Subcommittee, which has authority over IRS budget, as saying that “[t]he problem is that welfare payments are being mislabeled as tax rebates. . . . To end the confusion, we should stop putting the ‘tax refund’ label on government checks that are actually public assistance.”); David Firestone, *Fight or Flight? G.O.P. Split over Tax Credits*, N.Y. Times, June 8, 2003, at A30 [hereinafter Firestone, Fight or Flight] (quoting Congressman Robert Portman (R-Ohio) as saying that EITC “is not a tax issue—it’s a government transfer payment to people who do not pay income taxes”).

22. See Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy 1* (1999) (“Of course, politicians vilify welfare because welfare bashing strikes a chord with the American public.”).

23. Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 Yale L.J. 1563, 1563 (1996) (book review) (“Racial politics has so dominated welfare reform efforts that it is commonplace to observe that ‘welfare’ has become a code word for race.”).

24. See, e.g., Joel F. Handler, *The Poverty of Welfare Reform 3–4* (1995) (“The stereotypical welfare recipient is a young, inner-city black mother who has several children in order to get more welfare, thus breeding another generation of future welfare mothers, unemployed males, and criminals.”); Dorothy K. Newman et al., *Protest, Politics, and Prosperity: Black Americans and White Institutions, 1940–75*, at 255 (1978) (“And when, in addition, the public thought AFDC [Aid to Families with Dependent Children] benefits were going largely to black families, whose numbers on welfare appeared to them to be increasing daily, a host of prejudices combined in vociferous opposition to the program.”); Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 Mich. L. Rev. 965, 966 (1997) (“Indeed, welfare reform can be seen as an attempt to control poor black women. Thus, although welfare is not explicitly raced, it is implicitly a raced issue.”); see also *infra* Part II.B (describing racial stereotyping of welfare recipients).

25. Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 Colum. L. Rev. 552, 593 (1999) (“[W]hile policy debates concerning welfare appear to be race neutral, racial attitudes, specifically those of the white majority, are a strong determinant of the public’s level of support . . . for welfare spending.”); see also Cybelle Fox, *The Changing Color of Welfare? How Whites’ Attitudes Toward Latinos Influence Support for Welfare*, 110 Am. J. Soc. 580, 615–17 (2004).

welfare that are not viewed as welfare because whites are those programs' primary beneficiaries.

Governmental assistance is not treated as welfare when the recipients are considered to be blameless for their problems.<sup>26</sup> Race and gender influence potential claimants' ability to be considered "deserving" because they are victims of events beyond their control.<sup>27</sup> That is true primarily because of the racial stereotypes assigned to blacks, namely being "lazy, criminal, [and] irresponsible," which make it harder for blacks than for whites to be viewed as blameless.<sup>28</sup>

Welfare stereotypes however do apply to low-income taxpayers because even though the low-income taxpayer credit was created as an *alternative* to welfare, low-income taxpayers are viewed as lazy former welfare recipients who work because they have to and will lie and cheat in order to line their pockets with government money. While the public generally supports programs for low-income wage earners who are believed to value work over welfare,<sup>29</sup> low-income taxpayers are not viewed as favorably.

Professor David Super eloquently shows how the Food Stamp Program (FSP) has been transformed from a hated welfare program into a politically popular program largely because a greater percentage of its benefits flow to low-income wage earners.<sup>30</sup> The transformation of the

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26. See, e.g., Michele Landis Dauber, *The Sympathetic State*, 23 *Law & Hist. Rev.* 387, 415–16 (2005) [hereinafter Dauber, *The Sympathetic State*] (discussing congressional consideration of Freedmen's Bureau); Michele L. Landis, *Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State*, 33 *Law & Soc'y Rev.* 257, 257–60 (1999) [hereinafter Landis, *Fate, Responsibility, and Natural Disaster Relief*] (noting Senator Robert La Follette Jr.'s (R-Wis.) description of flood victims as blameless in justifying federal assistance); Michele L. Landis, "Let Me Next Time Be 'Tried by Fire': Disaster Relief and the Origins of the American Welfare State, 1789–1874," 92 *Nw. U. L. Rev.* 967, 971 (1998) [hereinafter Landis, *Next Time*] ("[I]t is the very ability of claimants to narrate themselves as the morally blameless victims . . . that has largely determined the success or failure of a given claim.").

27. Landis, *Fate, Responsibility, and Natural Disaster Relief*, supra note 26, at 285 ("[F]actors such as race and gender crucially shape relief claimants' ability to successfully portray themselves as deserving victims of forces beyond their own control."); Landis, *Next Time*, supra note 26, at 1024–29 ("[T]he ability of claimants to successfully portray themselves as deserving victims of unpredictable forces beyond their control was, and continues to be, infused with a politics of race, gender, and class.").

28. See Michele Landis Dauber, *Assoc. Professor, Stanford Law Sch., Lessons from Katrina 6–7* (Nov. 28, 2005), at <http://ccsre.stanford.edu/pdfs/DauberComments.pdf> (on file with the *Columbia Law Review*) [hereinafter Dauber, *Speech*].

29. See David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 *N.Y.U. L. Rev.* 1271, 1390–91 (2004) [hereinafter Super, *Quiet "Welfare" Revolution*] ("By reorienting the [Food Stamp] program's philosophies and rules toward meeting the needs of low-income working families, they helped distance it from the stigma of 'welfare.' . . . Latitude that policymakers never would have granted to 'welfare recipients' seemed altogether reasonable when sought on behalf of low-wage workers.").

30. *Id.* at 1286 ("Working within the themes of reform by reaching out to the *working* poor strengthened the program's image politically."). The political support of the Food Stamp Program has continued. See Carl Hulse, *Congress Rushes to Tie Up Loose Ends*

FSP because of its tie to paid labor should provide a blueprint for political supporters of low-income taxpayers because in order to qualify, you must work. While Professor Super does not address the extent to which race played any role in the widespread political support for the Food Stamp Program, this Essay will address the salience of race in welfare politics.<sup>31</sup>

It is my hope that this Essay will be an important first step toward transforming the political discourse surrounding tax benefits and low-income taxpayers.<sup>32</sup> The view that blacks disproportionately benefit from the low-income taxpayer credit, which is seen by the use of the word “welfare” as a descriptive term, is inaccurate. The majority of low-income taxpayers eligible for the credit are white, and the majority of blacks can’t receive the credit because they’re ineligible. In other words, almost three-fourths of blacks are ineligible either because they have no wage income or because they have too much wage income.<sup>33</sup>

Studies reveal that where the public believes that most welfare beneficiaries are white, they are much less likely to oppose welfare.<sup>34</sup> Thus, we could expect to see onerous policies targeting low-income taxpayers diminish or be eliminated. The dissemination of the data will rely on politicians, community activists, academics, and the media. It will be necessary to “sell” the value of the low-income tax credit as the New Deal was sold to the American public.<sup>35</sup>

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Before Break, *N.Y. Times*, Nov. 19, 2005, at A11 (“In their push for greater budget cuts . . . to mollify conservatives, the House leadership had to soften the impact of the measure on food stamp recipients and poor Americans who rely on Medicaid in order to win votes from Northeastern Republicans and other centrists who were balking.”).

31. Because Professor Super does not address how or whether race played a role in the transformation of the FSP into a politically acceptable program, its use as a blueprint for this Essay must be carefully analyzed. As a result, this Essay uses other examples as blueprints for reform, including natural disaster relief and school funding reform.

32. I take up Professor George Yin’s recent challenge to academics to become more active in tax policy debates. Joseph J. Thorndike & Heidi Glenn, *Conversations: George K. Yin*, 110 *Tax Notes* 322, 325 (2006) (“I would encourage the academic community to become more active in the [tax policy] debate.”). Professor Yin was most recently the Chief of Staff of the Joint Committee on Taxation. *Id.*

33. Brown, *Children*, *supra* note 5, at 818–26; see also *infra* Part III.B.

34. See Gilens, *supra* note 22, at 173 (“[W]e do know that Americans with more accurate perceptions of the racial composition of the welfare population are substantially less cynical about the needs and motives of welfare recipients, and that such perceptions are strongly related to opposition toward welfare.” (citations omitted)); Kenneth J. Neubeck & Noel A. Cazenave, *Welfare Racism: Playing the Race Card Against America’s Poor* 64 (2001) (“Researchers found that states whose populations contained greater proportions of African Americans had more restrictive welfare eligibility requirements than did other states. Studies also found that, in general, the higher the proportion of African Americans in a state’s population, the less aid welfare recipients received.” (footnotes omitted)).

35. Landis, *Fate, Responsibility, and Natural Disaster Relief*, *supra* note 26, at 284–314 (describing use of photographs of “sympathetic” whites such as women and children, very few men, and virtually no blacks); cf. Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 *Buff. L. Rev.* 685

Once the public understands that policies that hurt low-income taxpayers will hurt more whites than blacks, one would expect that the tide will turn in favor of low-income taxpayers. As in most areas of the law, race and class matter in tax policy analysis.<sup>36</sup>

Part I describes *how* low-income taxpayers have been targeted when compared with other taxpayers. The targeting of low-income taxpayers began ironically because of the expansion of their benefits in 1993. President Clinton's fears that the Republican-controlled Congress might seriously curtail the low-income taxpayer credit caused him to propose increasing the IRS budget for low-income taxpayer audits.<sup>37</sup>

Part I begins by discussing how low-income taxpayers, in the mid-1990s, became welfare recipients. It describes how, beginning in the mid-1990s, the low-income taxpayer credit began being compared to welfare by politicians. When President Clinton promised to "end welfare as we know it" in 1996,<sup>38</sup> he set political wheels in motion which have negatively impacted public perception of low-income taxpayers. In fact, the scapegoating of low-income taxpayers closely parallels the negative treatment of welfare recipients during the mid-1990s. Low-income taxpayers were the subject of more governmental scrutiny than other taxpayers,

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(1989) (describing government's efforts to "sell" expansion of income tax). I am not however advocating using paid spokesmen pretending to be objective journalists.

36. Cf. Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 *Tex. L. Rev.* 121, 151 (2003) (book review) ("Critical race theorists should also examine the relationship between class and race more carefully than they have done. Is the significance of race really declining, and, if so, are poverty and the income gap the new civil rights issues of the millennium?" (footnotes omitted)).

37. Johnston, *Perfectly Legal*, *supra* note 8, at 132 ("How would Congress feel, Clinton asked, about giving the IRS more than \$100 million a year just to audit applicants for the credit to make sure that only the *deserving* working poor benefited? Congress went for the deal." (emphasis added)); see also John W. Lee, *Transaction Costs Relating to Acquisition or Enhancement of Intangible Property: A Populist, Political, but Practical Perspective*, 22 *Va. Tax Rev.* 273, 293 (2002) ("Declines in audit rates . . . 'accelerated in 1995, after Congress, by then controlled by Republicans, cut [the Service's] spending sharply and required the agency to devote more resources to customer service.' Congress also directed the Service to devote more audit resources to EITC issues largely for political reasons." (quoting David Cay Johnston, *I.R.S. Figures Show Drop in Tax Audits for Big Companies*, *N.Y. Times*, Apr. 12, 1999, at A1)).

38. Larry Cata Backer, *Welfare Reform at the Limit: The Futility of "Ending Welfare as We Know It"*, 30 *Harv. C.R.-C.L. L. Rev.* 339, 339 (1995) ("With grand ceremonial splendor, President Clinton . . . on June 14, 1994, announced his intention to deliver to Congress a 'plan to change the welfare system.' The President assured his audience that this plan would . . . change it so that the focus is clearly on work." (footnote omitted)); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 *Fordham Urb. L.J.* 1051, 1058 (1995) ("Indeed, as a presidential candidate, Clinton called for 'end[ing] welfare as we know it.' As President, he proposed a welfare reform package that makes significant changes in the present system, but that maintains its status as a federal entitlement." (footnote omitted)); David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 *Cal. L. Rev.* 1051, 1079 (2005) ("President Clinton had campaigned heavily on a platform of 'end[ing] welfare as we know it' . . .").



were audited more, and subjected to more requirements than any other taxpayer group in America.

Part II seeks to explain *why* low-income taxpayers have been targeted. I build upon the work of other scholars who have shown that government assistance is generally “raced”<sup>39</sup> and extend the argument to low-income taxpayers. Low-income taxpayers have been targeted because during the 1990s, *welfare stereotypes applied to low-income taxpayers*.

Part II begins by describing how governmental assistance is “raced.” It contrasts the treatment of natural disaster relief and aid to farmers with the treatment of Temporary Assistance to Needy Families. It then shows how low-income taxpayers have become “raced” merely by being referred to as welfare recipients.

Part III seeks to provide a solution. It provides empirical data that refute the stereotype that the low-income taxpayer credit primarily benefits blacks. The data show that over half of all low-income taxpayers eligible for the credit are white and that over three-fourths of all black families are ineligible for the credit.

This section builds upon Professor Derrick Bell’s interest-convergence thesis.<sup>40</sup> The interest-convergence thesis states that because of the permanence of racism in American society, “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>41</sup> Professor Bell’s interest-convergence thesis has been used by scholars to explain such disparate historical events as desegregation, the Cold War,<sup>42</sup> racial diversity in higher education,<sup>43</sup> and workplace discrimination.<sup>44</sup> While virtually all interest-convergence analysis is historical in nature, this Essay seeks to use the theory as a blueprint for future reform efforts.

Part III suggests (optimistically) that once the empirical data are properly “packaged” for the American public, it will become apparent

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39. See, e.g., Ira Katznelson, *When Affirmative Action Was White* (2005) (describing how government assistance in number of programs, including welfare and social security, excluded African Americans during early half of twentieth century).

40. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980).

41. *Id.* The permanence of racism is a central tenet of critical race theory (CRT). See, e.g., Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 Yale L.J. 1757, 1758 (2003) (reviewing *Crossroads, Directions, and a New Critical Race Theory* (Francisco Valdes et al. eds., 2002)) (“Central to CRT is the notion that racism is endemic to American society.”); Cheryl I. Harris, *Mining in Hard Ground*, 116 Harv. L. Rev. 2487, 2493 (2003) (reviewing Lani Guinier & Gerald Torres, *The Miner’s Canary* (2002)) (“[A] central thesis of Critical Race Theory (CRT)—[is] that racism is endemic to and productive of what we understand to be ‘society.’ Under this view, racism is always already present.”).

42. See, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988).

43. See, e.g., Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113 (2003).

44. See, e.g., Carbado & Gulati, *supra* note 41, at 1764.

that tax policies penalizing low-income taxpayers will hurt more white taxpayers than black taxpayers. This section builds upon the literature in both the welfare context and the school funding reform context that shows how white support for welfare or education funding reform is tied to whether or not the public thinks that blacks are predominantly benefiting.<sup>45</sup> Once the low-income taxpayer credit is “properly” raced, and viewed as primarily benefiting whites, it will no longer be perceived as welfare but as a tax credit available to the hardworking poor. Low-income taxpayers then will not be lazy, looking for a handout, or trying to defraud the government. They will become taxpayers trying to work their way through the maze of the Internal Revenue Code. The error rate will become the “complexity index,” precertification should become a failed experiment, and audit rates should decrease as the necessary statutory changes to simplify the credit will be enacted. This Essay concludes by showing how taking account of race can help us move past it and help low-income taxpayers regardless of race.

### I. THE TARGETING OF LOW-INCOME TAXPAYERS

Low-income taxpayers are eligible for the earned income tax credit (EITC).<sup>46</sup> The EITC is only available for “earned income” such as wages.<sup>47</sup> The EITC rewards work.<sup>48</sup> The expansion of the EITC in the 1980s and 1990s increased employment among single low-income parents, especially single mothers.<sup>49</sup> Numerous studies show that the growth

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45. See, e.g., William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 *Hastings L.J.* 1077, 1089–90 (2004) (stating that judges “may recognize that the political majority in the state, acting in its own self-interest, may oppose any school finance reform benefiting only minority school districts”); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 *Mich. L. Rev.* 432, 432 (1999) [hereinafter Ryan, *School Finance Reform*] (citing studies showing that white opposition to school funding reform legislation was function of whites’ beliefs that legislation would primarily benefit blacks); James E. Ryan, *Schools, Race, and Money*, 109 *Yale L.J.* 249, 259 (1999) (explaining that one purpose of desegregation is to “create physical ties by placing black students in white schools and vice versa, such that the minority students would necessarily benefit from the desire of white parents and legislators to provide for their ‘own’ children”); see also Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 *Wash. U. L.Q.* 179, 209 n.185 (1996) [hereinafter Brown, *Invisibility Factor*] (describing study that shows racial hostility plays major role in explaining level of support for school funding reform).

46. I.R.C. § 32 (2000).

47. *Id.* § 32(a). For 2006, a taxpayer can have a certain amount of unearned income from interest, dividends, tax-exempt interest, net rents and royalties, capital gain net income, and net income from passive activities. *Id.* § 32(i)(2). This figure is adjusted to take into account inflation on an annual basis. *Id.* § 32(j). For taxable year 2006, unearned income in excess of \$2,800 will cause a taxpayer to be disqualified for the earned income tax credit. Rev. Proc. 2005-70, 2005-47 I.R.B. 979.

48. See *infra* Part II.C (discussing legislative history of EITC).

49. See Robert Greenstein, *Ctr. on Budget & Policy Priorities, The Earned Income Tax Credit: Boosting Employment, Aiding the Working Poor* 1, 3 (2005) [hereinafter

in the EITC increased the labor-force participation of single parents.<sup>50</sup> Expansions of the EITC have also led to large declines in the receipt of cash welfare assistance.<sup>51</sup>

The EITC supplements the minimum wage. It takes a combination of the EITC, minimum wage, and food stamps to allow a family of four with a full-time minimum-wage worker to raise their standard of living to something approaching the poverty level.<sup>52</sup> In order for the minimum wage to support a family of four with a standard of living above the poverty level, the minimum wage would have to be significantly increased from its current level.<sup>53</sup> Given the anticipated outcry by employers at the doubling of the minimum wage, it's easy to understand perhaps why it is in their enlightened self-interest to support the FSP and the EITC, which they do not directly pay for, as a means of subsidizing their workforce.

In tax year 2002, about seventy-five percent of EITC benefits went to families earning between \$5,000 and \$20,000 a year.<sup>54</sup> In 2003, 4.4 million people were lifted out of poverty by the EITC, with 2.4 million of them being children.<sup>55</sup> As Robert Greenstein has written, "the EITC lifts more children out of poverty than any other single program or category of programs."<sup>56</sup> It is against this backdrop, ironically, that we turn to a discussion of the numerous ways that low-income taxpayers who are eligible for the EITC have been targeted.

EITC taxpayers have been targeted because they are viewed as being the equivalent of welfare recipients. That perception in turn leads to a higher level of scrutiny than that faced by *any* other taxpayer group. First, numerous congressional hearings have been held,<sup>57</sup> and General

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Greenstein, Boosting Employment] (describing increases in employment and decreases in welfare received by single parents because of their receipt of EITC).

50. See, e.g., Rebecca M. Blank, Evaluating Welfare Reform in the United States, 40 J. Econ. Literature 1105, 1140 (2002) ("There is unanimous agreement that the growing EITC increased labor-force participation among single parents. A number of studies . . . all find that a sizable component of the growth in labor force participation among single women can be linked to the EITC expansions.").

51. See Greenstein, Boosting Employment, *supra* note 49, at 3 ("Economists Stacy Dickert, Scott Houser, and John Scholz estimated that expansions of the EITC between 1993 and 1996 induced more than a half a million families to move from welfare (AFDC cash assistance) to work." (citing Stacy Dickert et al., The Earned Income Tax Credit and Transfer Programs: A Study of Labor Market and Program Participation, 9 Tax Pol'y & Econ. 1 (1995))).

52. *Id.* at 4 ("For several years after the EITC expansions of 1990 and 1993, the combination of the EITC, the minimum wage, and food stamps met the goal of ensuring that a family of four with a full-time minimum-wage worker would not have to raise its children in poverty.").

53. *Id.*

54. *Id.* at 2.

55. *Id.* at 3 ("Census data show that in 2003, the EITC lifted 4.4 million people out of poverty, including 2.4 million children.").

56. *Id.*

57. See, e.g., Fraud in Income Tax Return Preparation: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 109th Cong. 49-52 (2005)

Accounting Office reports published,<sup>58</sup> studying the high “error rates” associated with the EITC. Those “error rates” are presumed to be the result of fraud and not the credit’s complexity. The Treasury releases all sorts of data on the EITC’s rate of noncompliance that it does not for most other aspects of the tax system. If taxpayers understood the true rate of noncompliance, it could seriously undermine the voluntary nature of tax assessment.<sup>59</sup>

Second, EITC taxpayers are audited more than *any* other taxpayer group.<sup>60</sup>

Third, a certain portion of EITC taxpayers are required to be precertified.<sup>61</sup> In other words, filing their tax return is insufficient. They must file additional paperwork and affidavits to “certify” that their child qualifies them for the EITC months in advance of filing their returns or face delays in getting their refund far exceeding those most taxpayers experience.

While politicians and the media are largely responsible for this targeting, academics contribute not to the solution but to the problem. Two recent articles by tax scholars about the EITC prove the point.<sup>62</sup> Scholars either ignore the attack that low-income taxpayers face,<sup>63</sup> or suggest that such targeting is the price to be paid by low-income taxpayers.<sup>64</sup> Either way, tax scholars offer no hope for low-income taxpayers. This

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(statement of Tom Purcell, Chair, Tax Executive Committee, American Institute of Certified Public Accountants).

58. See Brown, Children, *supra* note 5, at 773–74 n.74 (listing seventeen GAO reports).

59. Cf. Marco R. Steenberg et al., Taxpayer Adaptation to the 1986 Tax Reform Act: Do New Tax Laws Affect the Way Taxpayers Think About TAXES?, *in* Why People Pay Taxes: Tax Compliance and Enforcement 9, 13 (Joel Slemrod ed., 1992) (“Social influence (specifically, perceived attitudes toward noncompliance of the individuals with whom the taxpayer discussed taxes) had by far the strongest impact on the taxpayer’s commitment and compliance.”). There is another argument, however, that focusing attention on the EITC makes non-EITC taxpayers believe they can get away with tax evasion. See Steven M. Sheffrin & Robert K. Triest, Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance, *in* Why People Pay Taxes, *supra*, at 193, 214 (“Increased enforcement efforts [in the area of tax compliance] might result in a perverse indirect increase in future noncompliance if the enforcement mechanism reveals to the affected taxpayer (and associates) that it is relatively easy to get away with evasion.”).

60. See *infra* note 104; see also Zelenak, *supra* note 11, at 1884–85 (“For fiscal years 2000–2003, EITC issues accounted for about half of all individual income tax examinations. Since EITC returns make up less than 20 percent of all individual income tax returns, this means that EITC returns are several times more likely to be selected for audit than non-EITC returns.” (footnotes omitted)).

61. See *infra* Part I.D.

62. See Weisbach & Nussim, *supra* note 10, at 1023–27; Zelenak, *supra* note 11, at 1915–16.

63. See Weisbach & Nussim, *supra* note 10, at 1023–27 (evaluating EITC as part of analysis on integrating tax and spending programs).

64. See *infra* Part II.C.

Essay challenges politicians, journalists, and academics to acknowledge that we owe more to low-income taxpayers.

A. *Low-Income Taxpayers Become Welfare Recipients*

President Clinton in his State of the Union address in 1994 described the expansion of the earned income tax credit as “real welfare reform.”<sup>65</sup> So began open season on low-income taxpayers.

In 1996, included in the Personal Responsibility and Work Opportunity Reconciliation Act were provisions amending the EITC,<sup>66</sup> which also made an estimated \$1.4 billion of cuts in the EITC.<sup>67</sup> In 1997, the Child Tax Credit (CTC) was enacted by Congress and signed into law by President Clinton.<sup>68</sup> The CTC is often referred to as tax relief for middle-class families.<sup>69</sup> The legislative history tells us that the CTC was enacted for three reasons: (1) “[to] reduce the individual income tax burden of families with dependent children[;]” (2) “[to] better recognize the financial responsibilities of raising dependent children[;] and” (3) “[to] promote family values.”<sup>70</sup> There is no requirement that the taxpayer have earned

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65. Address Before a Joint Session of the Congress on the State of the Union, *supra* note 19, at 129. President Clinton tied the EITC to welfare:

Then this Congress took a dramatic step: Instead of taxing people with modest incomes into poverty, we helped them to work their way out of poverty by dramatically increasing the earned-income tax credit. It will lift 15 million working families out of poverty, rewarding work over welfare, making it possible for people to be successful workers and successful parents. Now that's real welfare reform.

*Id.*

66. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, sec. 451, § 32(c)(1), 110 Stat. 2105, 2276–77 (codified as amended in scattered sections of 8 and 42 U.S.C.); see also Jennifer E. Spreng, When “Welfare” Becomes “Work Support”: Exempting Earned Income Tax Credit Payments in Consumer Bankruptcy, 78 Am. Bankr. L.J. 279, 283 (2004).

67. Cong. Budget Office, CBO Memorandum: Federal Budgetary Implications of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, at 50 tbl.9 (1996), available at <http://www.cbo.gov/ftpdocs/46xx/doc4664/1996Doc32.pdf> (on file with the *Columbia Law Review*) (describing fiscal year impacts of PRWORA from 1996 to 2002).

68. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101(a), 111 Stat. 788, 796–98 (codified at I.R.C. § 24 (2000)).

69. See 143 Cong. Rec. 11341, 11341 (1997) (statement of Rep. Kingston) (“We seem to be in a gridlock right now on the \$500-per-child tax credit, and the way the Republican bill is, is that *middle-class families* with children under 17 years of age and with household incomes of under \$110,000 will get a \$500-per-child tax credit.” (emphasis added)). Representative Robert Ehrlich (R-Md.) stated, “Democrats claim the Ways and Means bill is unfair because it offers a nonrefundable credit to *middle-income families*.” 143 Cong. Rec. H4611, H4611 (daily ed. June 25, 1997) (emphasis added). Representative Jack Kingston (R-Ga.) also stated that what “we have at stake [is] 11 million *middle-class* children whose parents desperately need tax relief for education needs, for medical needs, for shelter, for food, and so forth like that.” 143 Cong. Rec. 11341 (emphasis added).

70. Staff of Joint Comm. on Taxation, 105th Cong., General Explanation of Tax Legislation Enacted in 1997, at 7 (Comm. Print 1997).

income—as is the requirement in the EITC.<sup>71</sup> The partially refundable nature of the CTC when combined with eligibility for the EITC complicates the CTC calculations greatly.<sup>72</sup>

Certain low-income families do not benefit from the CTC.<sup>73</sup> For example, in 1999, two-parent families with two children and incomes below \$18,000 (\$15,000 for one-parent families) were not eligible for the CTC because they owed no federal income taxes.<sup>74</sup> On the other hand, two-parent, two-child families earning \$25,000 (one-parent families earning \$22,000) would qualify for the full CTC.<sup>75</sup> Since the poverty line in 1999 for a family of four was \$17,029, the CTC was not designed to help the poorest low-income taxpayers.<sup>76</sup>

The decision to exclude certain low-income taxpayers from receiving the benefits of the CTC was a conscious one. Consider the following congressional statements where low-income taxpayers who earned too little income to pay federal income taxes but paid Social Security taxes on every dollar of that income, were described. Congressman Jack Kingston (R-Ga.) claimed that extending the CTC to low-income taxpayers would give “another welfare benefit to people who are not paying taxes.”<sup>77</sup>

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71. A trust fund beneficiary with a child who does not work is eligible for the CTC, but not the EITC. Cf. Donald B. Tobin, *Investing in Our Children: A Not So Radical Proposal*, 73 U. Cin. L. Rev. 457, 487 (2004) (“A person who receives \$30,000 from a trust fund would receive the full [child tax] credit . . .”). The legislative history provides that because of the reduced ability to pay taxes as family size grows, the CTC must increase for each child. See Staff of Joint Comm. on Taxation, 105th Cong., *supra* note 70, at 7 (“Congress believed that a tax credit for families with dependent children will reduce the individual income tax burden of those families, will better recognize the financial responsibilities of raising dependent children and will promote family values.”). There is no similar increase for family size in the EITC once the household has two children. See 2 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates & Gifts* § 37.1.1 (3d ed. 2000).

72. See Martin J. McMahon, Jr., *The New Child Credits: Explainable Mechanics and Unfathomable Policy*, 76 Tax Notes 1625, 1625 (1997) (“Regardless of how many children the taxpayer has, for lower-income taxpayers, a set of *extraordinarily complicated* rules provide additional refundability and coordination with the earned income credit.” (emphasis added)).

73. It is unclear why Congress thought middle-class families need help paying for their children, but not lowest-income families. I have recently explored this point in great detail. See Brown, *Children*, *supra* note 5.

74. Rebecca M. Blank & David T. Ellwood, *The Clinton Legacy for America’s Poor 6–7* (Nat’l Bureau of Econ. Research, Working Paper No. 8437, 2001) (“In 1999, two parent families with two children and incomes below \$18,000 (\$15,000 for a one-parent two-child family) owed no federal income taxes and could not receive the credit.”). Recall, however, that low-income taxpayers also pay social security taxes which the CTC could be used to offset. See *infra* Part II.C (describing one purpose behind creation of EITC as offsetting social security taxes).

75. Blank & Ellwood, *supra* note 74, at 6–7.

76. *Id.* at 7.

77. Brown, *Children*, *supra* note 5, at 784–85 (internal quotation marks and footnote omitted). The CTC is only refundable to the extent to which the taxpayer’s social security taxes and income tax liability are greater than the taxpayer’s EITC. See 2 Bittker & Lokken, *supra* note 71, § 37.1.4; see also Allan J. Samansky, *New Developments in*

Then-Speaker Newt Gingrich (R-Ga.) stated that extending the CTC benefit “to those who pay no taxes is welfare, plain and simple.”<sup>78</sup> Congressman Bill Archer (R-Tex.) declared that to make the CTC available to low-income taxpayers “takes money away from middle-income parents who pay income taxes and gives it to people who do not pay income taxes or who already receive a large check from the Government.”<sup>79</sup>

In 2003, Congress passed legislation accelerating previously enacted CTC expansions for other taxpayers, but consciously declined to provide comparable treatment to low-income taxpayers that would qualify for the CTC. Again Republican members of Congress referred to low-income taxpayers as welfare recipients. Congressman Spencer Bachus (R-Ala.) claimed that increasing the CTC to EITC taxpayers amounted to turning the Tax Code “into a welfare system.”<sup>80</sup> Congressman Robert Portman (R-Ohio) concluded that the EITC “is not a tax issue—it’s a government transfer payment to people who do not pay income taxes.”<sup>81</sup> Congressman Ernest Istook (R-Okla.), who had authority over the IRS budget as Chairman of the Appropriations Subcommittee, stated that “[t]he problem is that welfare payments are being mislabeled as tax rebates. To end the confusion, we should stop putting the ‘tax refund’ label on government checks that are actually public assistance.”<sup>82</sup> Finally, then-House Majority Leader Tom DeLay (R-Tex.) expressed the view that, “it’s a little difficult to give tax relief to people that don’t pay income tax.”<sup>83</sup> What each elected official ignored was the fact that all wage earners pay Social Security and Medicare taxes.<sup>84</sup> In addition, over eighty percent of EITC dollars are used to meet EITC taxpayers’ federal tax liabilities.<sup>85</sup>

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Marriage Penalties and Bonuses, 96 Tax Notes 1745, 1751–54 (2002) (discussing interaction of EITC and CTC with calculations at various income levels). At lower income levels, for families with income not greater than \$10,000, the standard deduction and personal exemptions will eliminate their income tax liability. Leonard E. Burman & Laura Wheaton, *Who Gets the Child Tax Credit?*, 109 Tax Notes 387, 390 (2005). As a result, many low-income parents will not receive the full amount of the CTC.

78. Brown, *Children*, supra note 5, at 785 (internal quotation marks omitted).

79. *Id.* (internal quotation marks omitted).

80. Alpert, *Demos*, supra note 21 (internal quotation marks omitted).

81. Firestone, *Fight or Flight*, supra note 21 (internal quotation marks omitted).

82. Dinan, supra note 21 (internal quotation marks omitted). Congressman Istook has been in the news recently on a non-EITC matter. He was responsible for inserting a provision into a recent spending bill which would have given legislators and their staff assistants the ability to examine income tax returns. David E. Rosenbaum, G.O.P. Says Motive for Tax Clause in Budget Bill Was Misread, *N.Y. Times*, Nov. 22, 2004, at A22.

83. David Firestone, *DeLay Rebuffs Move to Restore Lost Tax Credit*, *N.Y. Times*, June 4, 2003, at A1 (internal quotation marks omitted).

84. Brown, *Children*, supra note 5, at 797.

85. Zelenak, supra note 11, at 1910 n.180 (“For tax year 2000, a Treasury study found that about 81 percent of EITC dollars offset federal tax liabilities (income, payroll, and excise), with only 19 percent constituting net transfers.” (citation omitted)).

Discussions surrounding the EITC began to sound similar to the discussions surrounding welfare reform during the 1990s.<sup>86</sup> For example, low-income taxpayers were routinely referred to as receiving welfare. Democrats and Republicans alike applied this characterization. That rhetoric had a significant impact on the political fortunes of low-income taxpayers and the EITC.<sup>87</sup>

### B. *Low-Income Taxpayers Regularly Commit Fraud*

Much has been made of the error rate associated with the EITC. In 1994, at a congressional hearing, then-Commissioner of Internal Revenue Margaret M. Richardson testified “that based upon an IRS study conducted in January of 1994, about 50% of the EITC errors appeared to result from ‘intentional misrepresentations.’”<sup>88</sup>

Dozens of General Accounting Office (GAO) reports were “commissioned” investigating fraud in the EITC.<sup>89</sup> The EITC has a high participation rate as well as a high error rate.<sup>90</sup> EITC overpayment estimates range anywhere from twenty-seven percent to thirty-one percent.<sup>91</sup> Congress, believing that fraud is the reason for the high error rate, has conducted numerous hearings and requested GAO reports.<sup>92</sup> As Professor Leslie Book has stated, “[a]t the center of the debate on the [EITC] Initiative is the belief that the EITC is riddled with taxpayer cheating.”<sup>93</sup>

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86. See Book, *The Poor and Tax Compliance*, supra note 10, at 1193–94 (“As the EITC becomes an increasingly important part of welfare reform, it is not surprising that the perceptions and vocabulary of welfare abuse became part of the tax system. Concerns with cheating and undeserving beneficiaries—long dominant themes in the welfare arena—now dominate discussions of the EITC.”).

87. Politicians, however, were not the only group to refer to the EITC as welfare. Professors Weisbach and Nussim refer to the EITC as “welfare.” Weisbach & Nussim, supra note 10, at 963 (“Similarly, suppose the government wants to provide welfare to a subset of the poor. For example, the government may want to provide welfare to those poor who work a certain amount. Such a welfare program can be implemented through the tax system. The EITC does exactly this . . . .”); id. at 964 (“The EITC is one of the largest welfare programs, having grown faster than any other program over most of the last decade.”); id. at 995 (“Suppose we are considering whether parts of the welfare system should be integrated into the tax system, as the EITC is.”); id. at 997 (“This Part applies the framework developed above to two major welfare programs—the Earned Income Tax Credit and the Food Stamp Program (FSP).”); id. at 998 (“Finally, these two programs [food stamps and EITC] are among the largest welfare programs in the United States.”).

88. George K. Yin, *Accommodating the “Low-Income” in a Cash-Flow or Consumed Income Tax World*, 2 Fla. Tax Rev. 445, 476 (1995) (citing *High Risks and Emerging Fraud: IRS, Student Loans, and HUD: Hearing Before the S. Comm. on Governmental Affairs*, 103d Cong. 17 (1994) (statement of Margaret M. Richardson, Internal Revenue Service Comm’r)).

89. Brown, *Children*, supra note 5, at 773 n.74 (citing seventeen GAO reports).

90. Weisbach & Nussim, supra note 10, at 1010.

91. Id. at 1004 & n.154.

92. See *infra* Part I.C.

93. Leslie Book, *EITC Noncompliance: What We Don’t Know Can Hurt Them*, 99 Tax Notes 1821, 1823 (2003).



Congress, in 1997, enacted § 6695(g), which imposes a \$100 penalty on a tax return preparer's failure to comply with due diligence requirements in determining his or her client's eligibility for the EITC.<sup>94</sup> At the same time, Congress enacted § 32(k), which disallows the EITC for taxpayers for two years who claim the EITC but are ineligible because of a reckless disregard of the rules and regulations, and disallows the EITC for ten years for EITC claimants who fraudulently claim the EITC.<sup>95</sup>

In 1998, the IRS, with direction and special funding from Congress, began the "EIC compliance initiative."<sup>96</sup> Congress has made direct appropriations of over \$1 billion since 1998 on EITC compliance initiatives.<sup>97</sup> That these numbers can be calculated with such accuracy is also a function of the governmental resources spent targeting EITC taxpayers.

The IRS Data Book has a table entitled "Costs Incurred by the Internal Revenue Service, by Budget Activity," which has a separate line for the EITC.<sup>98</sup> The remarkable feature of the table is that *no other tax provision* is singled out in the table. If we wanted to find out how much, if anything, the IRS spends on denying unlawful tax shelters to high income taxpayers, we can't because those data are not separately stated.

The Improper Payments Information Act of 2002 requires each federal agency to identify those programs that "may be susceptible to significant improper payments" and the steps it has taken to reduce such payments.<sup>99</sup> The Office of Management and Budget (OMB) has interpreted the Improper Payments Information Act to require that the IRS notify it of improper payments associated with only one tax provision—the EITC.<sup>100</sup> *The EITC is the only tax provision about which the OMB has requested improper payment information.*

Recently we learned that since 2001, hundreds of thousands of low-income taxpayers have had their refund claims labeled as fraudulent and unnecessarily delayed even though it appears that two-thirds were due either all or part of the claimed amount.<sup>101</sup> The belief that EITC errors

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94. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1085(a)(2), 111 Stat. 788, 956 (codified at I.R.C. § 6695(g) (2000)).

95. *Id.* § 1085(a)(1), 111 Stat. at 955-56 (codified at I.R.C. § 32(k)).

96. U.S. Gen. Accounting Office, *Earned Income Credit: IRS' Tax Year 1994 Compliance Study and Recent Efforts to Reduce Noncompliance 2-3* (1998) ("With new enforcement tools provided by Congress and an increase in funding specifically designated for [EITC]-related activities, IRS began implementing in fiscal year 1998 a plan that, over . . . 5 years, calls for attacking [EITC] noncompliance through expanded customer service and public outreach, strengthened enforcement, and enhanced research.").

97. Author's calculations based upon Internal Revenue Service Data Books in years 1998-2004.

98. See, e.g., Internal Revenue Service 1999 Data Book 39 tbl.33 (1999).

99. Pub. L. No. 107-300, § 2(a), (c), 116 Stat. 2350, 2350 (codified at 31 U.S.C. § 3321 note (Supp. III 2003)).

100. Zelenak, *supra* note 11, at 1897 (citing Office of Mgmt. & Budget, Executive Office of the President, Memorandum No. 03-13, Improper Payments Information Act of 2000, Exhibit 57B (2003)).

101. See *supra* note 4.

are the result of fraud and not complexity is a function of the mental connection between EITC recipients and welfare recipients.<sup>102</sup>

C. *Low-Income Taxpayers Must Be Heavily Audited*

“If you look at why we’re doing a relatively heavy audit of low-income [taxpayers], it is because we’ve been directed by the Congress to examine the devil out of the so-called earned income tax credit filers. We’re doing what we’ve been directed to do by the Congress.”

— Paul O’Neill, Secretary of the Treasury, April 17, 2002<sup>103</sup>

General audits of taxpayers under the Taxpayer Compliance Measurement Program (TCMP) were ended by the IRS in 1995, under pressure from Congress and taxpayer groups among others.<sup>104</sup> General taxpayer audits were viewed as too intrusive for *most* taxpayers. At the same time that general taxpayer audits were decreasing for most individual taxpayers, they were significantly increasing for one group of taxpayers—low-income taxpayers.<sup>105</sup> Since the TCMP program ended, the only compliance studies performed have been of the EITC.<sup>106</sup>

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102. See *infra* Part II.B.

103. Hearing on the Treasury Before the Subcomm. on Treasury, Postal Serv., and General Government Appropriations of the H. Comm. on Appropriations, 107th Cong. 672 (2002) (statement of Paul O’Neill, Secretary of the Treasury) [hereinafter O’Neill Testimony].

104. U.S. Gen. Accounting Office, Tax Administration: Alternative Strategies to Obtain Compliance Data 1 (1996) (“On October 23, 1995, the Internal Revenue Service (IRS) decided to postpone the 1994 Taxpayer Compliance Measurement program (TCMP) indefinitely because of budget concerns. Also, there was considerable pressure from Congress, taxpayer groups, paid preparers, and others to cancel TCMP because of its cost and burden on taxpayers.”). Recently, however, the successor to the TCMP was announced as the “IRS National Research Program’s (NRP) current individual reporting compliance study.” Herman P. Ayayo, ABA Tax Section Meeting: Depth of IRS National Compliance Study Questioned, 102 Tax Notes 716, 716 (2004). “Of the approximately 46,000 Forms 1040 it expects to examine, the NRP expects to contact about 8,000 study participants, with 2,000 returns handled by correspondence only and another 6,000 returns subject to face-to-face audits . . . .” *Id.*

105. Johnston, *Perfectly Legal*, *supra* note 8, at 130 (“The IRS audited 397,000 of the working poor who applied for the credit in 2001, eight times as many audits as it conducted of people making \$100,000 or more.”); Book, *The IRS’s EITC Compliance Regime*, *supra* note 10, at 374 (“In 2000, . . . the odds of audit for low-income taxpayers [was] approximately one in ninety while for everyone else the risk of an audit was approximately one in 370.” (footnote omitted)); John Connor, *IRS Audit Rates Drop for the Rich*, GAO Study Finds, *Wall St. J.*, May 24, 1996, at B13 (“[IRS] audit rates have generally decreased since fiscal year 1988 for the highest-income individuals, while increasing in the past two years for the lowest-income individuals . . . . IRS officials attributed the increase in audit rates for lowest-income individuals [partially] to . . . reviews of the [EITC] . . . .”).

106. Robert Greenstein, *The New Procedures for the Earned Income Tax Credit*, 99 Tax Notes 1525, 1528 (2003) [hereinafter Greenstein, *New Procedures*] (“As a recent paper by analysts in the Treasury’s Office of Tax Policy reports: ‘The IRS has not conducted a comprehensive study of taxpayer compliance since the 1988 Taxpayer

As a result, about half of all individual income tax examinations are EITC returns.<sup>107</sup> In fact, *filing for the EITC increases the risk of an audit*.<sup>108</sup> As I have previously stated, the increased audits of low-income taxpayers were set in motion by President Clinton as a political compromise with the Republican Congress in exchange for the continuation of the EITC.<sup>109</sup> As Treasury Secretary Paul O'Neill observed, these IRS auditing efforts resulted in "very little money."<sup>110</sup>

Audits of high-income taxpayers generally result in at least four times the recommended additional tax than audits of low-income taxpayers.<sup>111</sup> A recent GAO report provided data that showed audits of high-income taxpayers were more productive than audits of their low-income counterparts.<sup>112</sup> Yet the IRS has conducted annually approximately 400,000 EITC audits.<sup>113</sup> Virtually all EITC audits are "correspondence audits" conducted entirely by mail and as a result use less administrative resources and are significantly less expensive than office or field audits. Although correspondence audits can be used for high-income taxpayers, a majority of audits of taxpayers reporting more than \$100,000 of income are "face-to-face" audits.<sup>114</sup> Why does the IRS use correspondence audits for low-income taxpayers, which only require paper to travel back and forth, and use face-to-face audits for high-income taxpayers?

The standard procedure is that an EITC refund will not be issued until the completion of the audit and the taxpayer proves to the IRS's satisfaction that he or she is eligible for their EITC.<sup>115</sup> Virtually every other taxpayer receives a refund based solely on their self-declared eligibility.<sup>116</sup>

On the other hand, typical welfare programs are not funded based upon self-declared eligibility. The review process is much more rigorous. Generally applicants can't declare themselves eligible for transfer pro-

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Compliance Measure Program study. However, the IRS undertook four studies on noncompliance among EITC claimants between 1993 and 1999."').

107. Zelenak, *supra* note 11, at 1884 ("For fiscal years 2000–2003, EITC issues accounted for about half of all individual income tax examinations.").

108. See *supra* notes 104–106 and accompanying text.

109. See *supra* note 37.

110. Lee, *supra* note 37, at 293 n.106 (citing Editorial, O'Neill's Refreshing Candor, *Rocky Mountain News* (Denver), Apr. 19, 2002, at 49A).

111. Brown, Children, *supra* note 5, at 777.

112. Zelenak, *supra* note 11, at 1886.

113. *Id.* at 1877.

114. *Id.* at 1886.

115. *Id.* at 1877.

116. *Id.* at 1879. Zelenak does note at least four other instances in the IRC where additional paperwork is required: (i) work opportunity credit; (ii) dependency exemption for noncustodial parents; (iii) low income housing credit; and (iv) historic structure credit. *Id.* But even in those instances, the IRS does not independently verify the information submitted, or review the documentation submitted prior to issuing a refund, which means it is not a true precertification process. *Id.* at 1879–80.

grams such as Temporary Assistance to Needy Families (TANF).<sup>117</sup> A beneficiary must establish to the satisfaction of the government agency that he or she is eligible *before* receiving any benefits.<sup>118</sup> In effect, there is a one hundred percent audit rate for traditional welfare programs.<sup>119</sup>

D. *Low-Income Taxpayers Must Be Precertified*

In August 2003, the IRS announced that it was subjecting 25,000 EITC claimants to precertification.<sup>120</sup> Initially, the IRS had said that it wanted to begin by subjecting 45,000 EITC claimants to precertification, to be followed in the subsequent year by subjecting two million EITC claimants to precertification, and four million EITC claimants the year after.<sup>121</sup> Precertification requires that EITC claimants provide additional documentation to the IRS showing that they are eligible for the credit.<sup>122</sup>

EITC claimants must show that their child qualifies them for the larger credit amount.<sup>123</sup> The IRS issued preliminary results from the first set of precertification claimants in May 2004, including information that almost twenty percent of the taxpayers did not claim the EITC on their 2003 return.<sup>124</sup> The IRS couldn't say whether failure to claim the credit was the result of ineligible taxpayers choosing not to file, or eligible taxpayers being deterred from filing.<sup>125</sup>

The IRS also precertified EITC claimants in 2004. However, in 2005, although the IRS again planned to precertify 25,000 taxpayers, one-third were scheduled to come from Hartford, Connecticut, and Hartford, Connecticut promptly filed suit to enjoin the IRS from "singling out" Hartford on several grounds, including race-based discrimination.<sup>126</sup>

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117. *Id.* at 1878; see also Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means Tested Welfare Programs*, 36 *Colum. Hum. Rts. L. Rev.* 663, 664-65 (2005) ("To test the truthfulness of claimants' assertions, local welfare agencies rely on documentation submitted by claimants, visits to claimants' homes, conversations with third parties (such as landlords or employers), and 'computer-matching,' in which information provided by claimants is compared with that reported in public and private databases.").

118. Zelenak, *supra* note 11, at 1878.

119. *Id.* at 1884.

120. *Id.* at 1871-72.

121. Letter from Rosa L. DeLauro, Member of Cong., to John Snow, Sec'y, U.S. Dep't of the Treasury (May 21, 2003), available at [http://www.house.gov/delauro/press/2003/eitc\\_letter\\_5-23-03.htm](http://www.house.gov/delauro/press/2003/eitc_letter_5-23-03.htm) (on file with the *Columbia Law Review*) ("While we understand the [EITC precertification] program will apply to 45,000 people this year, we also understand it will be expanded to two million the next year and at least four million subsequently . . .").

122. See I.R.S. Announcement 2003-40, 2003-1 C.B. 1132.

123. Greenstein, *New Procedures*, *supra* note 106, at 1525.

124. Zelenak, *supra* note 11, at 1872.

125. *Id.*

126. See Complaint, *Ramos v. U.S. Dep't of Treasury*, No. 3:04CV20195 (D. Conn. Nov. 29, 2004), reprinted in 2004 *Tax Notes Today* 231-13 (alleging, in counts four, five, and six, discrimination under § 1981, § 1985, and Title VI); see also Allen Kenney, *Hartford to IRS: See You in Court*, 105 *Tax Notes* 1305, 1305 (2004) ("In an interview with

Hartford was chosen by the IRS in part because of the racial composition of its residents and their similarities to the racial composition of EITC taxpayers generally.<sup>127</sup> Currently the IRS is proceeding with the 2005 precertification program.

No other tax provision requires precertification, while all welfare-type programs require it.<sup>128</sup> I believe that—to the extent the public perception of low-income taxpayers does not change, and their error rates which are highly publicized (unlike other IRC provisions) are assumed to be the result of fraud and not complexity—eventually all EITC claimants will have to be precertified—assuming of course that the EITC is not repealed outright. That leads us toward the next section which seeks to explain why low-income taxpayers are targeted unlike any other taxpayer group.

## II. WELFARE POLITICS: WHEN RACE AND CLASS COLLIDE

I'm one of the undeserving poor: that's what I am. Think of what that means to a man. It means that he's up agen middle class morality all the time. If theres anything going, and I put in for a bit of it, it's always the same story: "Youre undeserving; so you cant have it." But my needs is as great as the most deserving widow's that ever got money out of six different charities in one week for the death of the same husband. . . . What is middle class morality? Just an excuse for never giving me anything.<sup>129</sup>

George Bernard Shaw's character Alfred Doolittle appropriately understood the dilemma currently faced by low-income taxpayers. They are the "undeserving poor." They are not middle-class, and they are politically unpopular.<sup>130</sup> Their tax benefits *should* be limited. This section shows how political discourse surrounding tax benefits for low-income taxpayers reflects class—and race—warfare.

This section makes three points. First, government aid should be viewed through a race and class lens. Second, "welfare" is a racially and politically charged word. When welfare is provided to predominantly white beneficiaries, it is not considered welfare. Third, when the EITC is

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Tax Analysts, Hartford Mayor Eddie A. Perez said the city filed the complaint last Monday in Connecticut federal district court because the program would violate Hartford taxpayers' civil rights, 'disproportionately' denying or delaying EITC payments to low-income 'families of color,' as well as non-English speakers."). The lawsuit has since been dismissed. E-mail from David R. Williams, Internal Revenue Serv., to author (Feb. 19, 2007) (on file with the *Columbia Law Review*).

127. Janet Spragens & Nancy Abramowitz, *Low-Income Taxpayers and the Modernized IRS: A View from the Trenches*, 107 *Tax Notes* 1407, 1414 (2005) ("Hartford was chosen, according to the IRS, because it shares demographic characteristics (race, gender, patterns of EITC claims, geographic distribution of EITC taxpayers, and infrastructure supporting low-income taxpayers) with many other areas of the country having high concentrations of EITC claimants.").

128. Zelenak, *supra* note 11, at 1884.

129. George Bernard Shaw, *Pygmalion* 39–40 (Dodd, Mead & Co. 1942) (1916).

130. See *infra* Part II.B (describing political fortunes of low-income taxpayers).

referred to as “welfare,” “EITC” becomes a racially and politically charged word. By referring to low-income taxpayers as welfare recipients, politicians have jeopardized their tax benefits.

A. *Government Aid Should Be Viewed Through a Race and Class Lens*

American support for relief efforts has focused on judgments about moral worth.<sup>131</sup> The “deserving” poor receive governmental assistance, while the “undeserving” poor do not.<sup>132</sup> While much of the scholarly literature describes the dismantling of programs for the poor, such as Aid to Families with Dependent Children, it ignores the fact that, at the same time, federal subsidies for certain poor beneficiaries have increased.<sup>133</sup> Disaster relief aid has not decreased, and disaster victims, by and large, have escaped any serious scrutiny.<sup>134</sup>

Successful appeals for disaster relief must show the claimants as “blameless victims” of fate.<sup>135</sup> Race, however, “crucially shapes a claimant’s ability to cross the threshold of virtuous need.”<sup>136</sup> Because the relative status of minorities is rooted in racial and political events, the ability of members of disfavored racial groups to be viewed as “blameless victims” varies over time.<sup>137</sup> What doesn’t change, however, is that “racial minorities in the American state always have a less certain possibility of success than do whites, even when facing otherwise identical exigencies.”<sup>138</sup> Following the 1927 Mississippi River flood, whites were “blameless victims” who were “entitled to relief, while [b]lacks were crowded into slave labor camps on dangerous levee tops where even children were lucky” to be fed or housed.<sup>139</sup> In other words, “the ability of claimants to successfully portray themselves as deserving victims of unpredictable

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131. See Landis, *Fate, Responsibility, and Natural Disaster Relief*, supra note 26, at 261 (“American relief efforts have historically sorted the poor by their relative moral worth.” (citations omitted)).

132. *Id.*; see also Joel F. Handler, “Ending Welfare as We Know It”: The Win/Win Spin or the Stench of Victory, 5 *J. Gender Race & Just.* 131, 134 (2001) (“The cornerstone of U.S. welfare policy has always been to separate the ‘deserving’ poor from the ‘undeserving.’”).

133. See Landis, *Fate, Responsibility, and Natural Disaster Relief*, supra note 26, at 261.

134. *Id.* We may, however, be seeing a change in this trend due to the racial composition of the victims impacted by Hurricane Katrina. There has been a recent focus on fraud in Hurricane Katrina disaster relief programs. See, e.g., Bruce Alpert, *Waste Plagues Hurricane Response; FEMA Spent Millions on Unusable Housing*, *Times-Picayune* (New Orleans), Feb. 14, 2006, at A-1; Kevin McCoy, *Fraud Mounts in Katrina Aid Program*, *USA Today*, Feb. 13, 2006, at 1A; Peter Whoriskey, *FEMA Aid Effort Fraught with Fraud: Thousands Received Money Improperly*, *Wash. Post*, Feb. 14, 2006, at A9.

135. Landis, *Next Time*, supra note 26, at 1023.

136. *Id.*

137. *Id.*

138. *Id.* at 1023–24.

139. *Id.* at 1024. See generally John M. Barry, *Rising Tide* (1997) (describing conditions of Great Mississippi Flood, including poor treatment of blacks).

forces beyond their control was, and continues to be, infused with a politics of *race*, gender, and *class*.”<sup>140</sup>

The most sympathetic natural disaster victims are generally viewed as “blameless” and can receive the following: (i) free public housing for eighteen months regardless of need; (ii) \$26,200 in cash; (iii) no means test; and (iv) unemployment benefits and food stamps regardless of eligibility.<sup>141</sup> Sympathetic natural disaster victims are treated with trust and are subjected to very little scrutiny, with no means tests and benefits including \$2,000 debit cards.<sup>142</sup>

Welfare recipients on the other hand are not viewed as “blameless,” but “viewed with suspicion and subjected to an array of bureaucratic practices designed to ferret out fraud, malingering, and so forth.”<sup>143</sup>

### B. *Welfare Is Viewed Through a Race and Class Lens*

The American public strongly supports higher government spending levels for “almost every aspect of the welfare state”—except payments to the “undeserving poor.”<sup>144</sup> The public generally supports aid to the poor, yet the overwhelming majority opposes welfare.<sup>145</sup>

Welfare, however, is hard to define. It has been defined by identifying those characteristics of welfare that most antagonized its opponents leading to its repeal in 1996.<sup>146</sup> It has also been defined as “cash benefits

140. Landis, *Next Time*, supra note 26, at 1027 (emphasis added).

141. Dauber, *Speech*, supra note 28, at 2.

142. *Id.* But see Motoko Rich, *Some Middle-Class Residents Who Evacuated Say They Lack Faith in Federal Aid*, N.Y. Times, Sept. 17, 2005, at A13 (describing how FEMA discontinued debit card program for Hurricane Katrina victims within three days of announcing it). Hurricane Katrina victims were recently told that they had to once again evacuate—this time from the hotels they were living in, well shy of the maximum eighteen months. See, e.g., Matt Friedman & John Riley, *Struggle to Keep Shelter; Thousands Living in Hotels Since Katrina Battered Gulf Coast Must Find Housing as FEMA Ends Subsidies*, Newsday (N.Y.), Feb. 14, 2006, at A20; Jason B. Johnson, *No Room Left at the Inn for Katrina Victims; Forced out of Hotels, Some Evacuees Are Left Homeless Again*, S.F. Chron., Feb. 14, 2006, at A11.

143. Dauber, *Speech*, supra note 28, at 2; see also *infra* Part II.B (describing lengths to which members of Congress will go to characterize aid to farmers as anything other than welfare).

144. Gilens, supra note 22, at 2 (“Year after year, surveys show that most Americans think the government is not doing enough (or not spending enough) for education, health care, child care, the elderly, the homeless, and the poor.”). The key, however, is to provide benefits to the “deserving poor.”

145. See *id.* at 2–3 (“While no one factor can fully account for the public’s opposition to welfare, the most important single component is this widespread belief that most welfare recipients would rather sit home and collect benefits than work hard to support themselves.”); Super, *Quiet “Welfare” Revolution*, supra note 29, at 1289–90 (“Though the public supports ‘aid to the poor,’ . . . the overwhelming majority . . . disapproves of ‘welfare.’”).

146. See Super, *Quiet “Welfare” Revolution*, supra note 29, at 1290–94 (describing characteristics of AFDC that “attracted the most hostility,” leading to its elimination).

paid to the working-age, able-bodied poor.”<sup>147</sup> Welfare is perceived to be filled with fraud,<sup>148</sup> and any program that wants political support cannot be perceived as welfare. And any program that wants political support *must* emphasize work.

While policy debates about welfare appear to be race neutral, they are anything but. Welfare policy debates strongly cater to and reflect the racial views of the white majority.<sup>149</sup> American opposition to welfare is due to the public perception that the typical welfare recipient is undeserving.<sup>150</sup> They are undeserving because Americans believe that most welfare recipients are black and because Americans believe that blacks are not committed to working.<sup>151</sup> “[R]acial stereotypes play a central role in generating opposition to welfare in America. In particular, the centuries-old stereotype of blacks as lazy remains credible for large numbers of white Americans.”<sup>152</sup>

The distinction between the deserving and undeserving poor began long before the New Deal. Black beneficiaries of the Freedmen’s Bureau programs were described by reference to “racial imagery.” For example, during the debate over the 1866 effort to extend the Freedmen’s Bureau two additional years, Senator Saulsbury was concerned that white taxpayers were being asked “‘to support in idleness a class who are too lazy or too worthless to support themselves.’”<sup>153</sup> Senator Davis believed that the Freedmen’s Bureau would “‘establish[ ] a great system of lazzaroni . . . of poor-houses for the support of lazy Negroes all over the Southern states.’”<sup>154</sup> Fears that “lazy and worthless men” would wait upon the Freedmen’s Bureau to be fed and clothed so concerned Congress that a condition of extending the Freedmen’s Bureau for two years was that a

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147. Gilens, *supra* note 22, at 1. The fact that FSP payments are received in the form of coupons, not cash, may account for the program’s popularity.

148. See Super, *Quiet “Welfare” Revolution*, *supra* note 29, at 1293–94.

149. Cashin, *supra* note 25, at 593.

150. Gilens, *supra* note 22, at 2 (“But the source of their unhappiness, indeed the focus of considerable public anger and resentment, is not the *principle* of government support for the needy, but the perception that most people currently receiving welfare are undeserving.”).

151. *Id.* at 3. As a brief aside, what is odd about the racial stereotyping of welfare is that when welfare was originally created it was originally race-based—it was created for whites. *Id.* However, regardless of what the numbers tell us, “the public perception of welfare is raced black.” Cahn, *supra* note 24, at 966. The conservative Lawrence Mead argues that making welfare available to blacks generally contributed toward the negative views that the public has about welfare recipients. In other words, blacks were better off when they were ineligible to receive welfare and made up the working poor. See Lawrence M. Mead, *The New Politics of Poverty* 25–38 (1992).

152. Gilens, *supra* note 22, at 3.

153. Dauber, *The Sympathetic State*, *supra* note 26, at 415 (quoting Cong. Globe, 39th Cong., 1st Sess. 362 (1866)).

154. *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess. 396).



provision was included that no person could receive aid if they were "able to find employment."<sup>155</sup>

To bolster the claim that welfare is a code word for race, not all welfare is seen as welfare by members of Congress. Government subsidies that flow to predominantly white beneficiaries are not considered to constitute welfare.

Democratic Congress members tried to argue that payments to farmers under the Agricultural Market Transition Act (AMTA) constituted welfare.<sup>156</sup> AMTA was discussed in Congress in 1996, the same year that radical changes in welfare were being enacted, which is why Congress members were making the analogy. Members of Congress who stated that AMTA payments were welfare were roundly criticized.

Representative Harold Volkmer (D-Mo.) claimed that AMTA payments were "high-priced welfare. This is not cheap welfare. This is real high-priced welfare. This is not a little \$300 a month AFDC or an \$80 a month [FSP], these are thousands of dollars, and over a period of years, over \$1 million to some farmers . . . ."<sup>157</sup>

Representative Cal Dooley (D-Cal.) stated:

[W]e can be thankful that the same people that put together this agriculture reform were not the ones that devised our welfare reform, for if they were, we would be ensuring that anybody who received a welfare payment in 1 out of the last 5 years, that we would give them a welfare payment, guaranteed, for the next 7 years regardless of what happened to their income. They could win the lottery and the taxpayers of this country would still be obligated to write them a check for 7 years.<sup>158</sup>

Congressman Barney Frank (D-Mass.) compared the payments to AFDC and stated, "I would not necessarily mind welfare for farmers, but they get 7 years of welfare, the AFDC recipients get 5, and of course there is no work requirements [sic]."<sup>159</sup> Congressman Frank went on to compare the treatment of AFDC/TANF recipients to that of farmers and stated, "[t]he inconsistency between the toughness that is meted out to

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155. *Id.* at 415–16 (quoting Cong. Globe, 39th Cong., 1st Sess. 638, 655). For political purposes, however, there were instances where southern whites were referred to as "inferior, lazy, and unwilling to work for their own support, as contrasted with images of the hardworking slave robbed of his rightful wages." *Id.* at 417.

156. H.R. 2854, 104th Cong., 110 Stat. 888 (1996). It was originally called the Freedom to Farm Act. 142 Cong. Rec. H1415, H1415 (daily ed. Feb. 28, 1996); cf. Dinesh D'Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy?*, 60 *Alb. L. Rev.* 425, 455 (1996) (quoting question posed to debate participants: "Instead of government dependency, this trait might be defined as tax breaks and corporate welfare. What is the difference?").

157. 142 Cong. Rec. H1415, H1419 (daily ed. Feb. 28, 1996) (statement of Rep. Volkmer).

158. *Id.* at H1420 (statement of Rep. Dooley).

159. 142 Cong. Rec. H3147, H3150 (daily ed. Mar. 28, 1996) (statement of Rep. Frank).

the poor and the lavish and gentle treatment that goes to the favored political few is outrageous.”<sup>160</sup>

Several Congress members responded by stating that to call AMTA payments welfare was insulting to farmers. House Agriculture Committee Chairman Pat Roberts (R-Kan.) stated that “anybody that describes any farm program as a welfare payment does a disservice to agriculture and his constituency. These are not welfare payments. These are declining market transition payments.”<sup>161</sup> Representative Roberts further stated, “farm programs are not welfare and partisan statements equating farm programs with welfare do a disservice to farmers and ranchers.”<sup>162</sup>

Senator Conrad Burns (R-Mont.) stated: “I have listened to many of the Members of the Senate in the past day discuss that this will doom the future of agriculture, and that we are providing welfare for the American farmer. This is truly not the case.”<sup>163</sup>

Representative Jim Lightfoot (R-Iowa) asked the question, “Do you trust farmers, or do you trust bureaucrats and political appointees? I am going to go with the farmers.”<sup>164</sup> Farmers, we were told, would continue to farm even though they received money from the government.<sup>165</sup> In fact, some Democrats recoiled from associating their farmer constituents with welfare recipients: Senator Tom Harkin (D-Iowa) stated that:

Farmers do not want to be perceived as receiving something for nothing, regardless of whether they need it. I do not believe farmers receive welfare, or that farm programs are welfare . . . . There is real potential for this bill to contribute to an impression among the public that farm programs are welfare.<sup>166</sup>

Government subsidies to farm owners are “an almost perfectly race-matched system of affirmative action for whites.”<sup>167</sup> Farm owners are ninety-eight percent white, which is one of the highest percentages of white owners in any segment of American business.<sup>168</sup> “Legislative state-

160. *Id.* at H3156 (statement of Rep. Frank).

161. 142 Cong. Rec. H1509, H1531 (daily ed. Feb. 29, 1996) (statement of Rep. Roberts).

162. 142 Cong. Rec. H3147, H3163 (daily ed. Mar. 28, 1996) (statement of Rep. Roberts).

163. 142 Cong. Rec. S3039, S3089 (daily ed. Mar. 28, 1996) (statement of Sen. Burns).

164. 142 Cong. Rec. H1415, H1420 (daily ed. Feb. 28, 1996) (statement of Rep. Lightfoot).

165. See Brown, Children, *supra* note 5, at 799 n.208 (“No farmer, let me repeat this to all of the critics and you will hear it in this debate, no farmer is going to take his market transition payment and retire. Farmers will continue to farm.” (quoting 142 Cong. Rec. H1415, H1416 (daily ed. Feb. 28, 1996) (statement of Rep. Roberts))).

166. 142 Cong. Rec. S3039, S3082–83 (daily ed. Mar. 28, 1996) (statement of Sen. Harkin).

167. Jim Chen, *Of Agriculture’s First Disobedience and Its Fruit*, 48 *Vand. L. Rev.* 1261, 1306–07 (1995).

168. *Id.* (“Of American’s 2,088,000 farm operators in 1987, all but 45,000 were white. Out of 1,925,300 operators in 1992, 43,487 were nonwhite, including 18,816 blacks. American agriculture’s entrepreneurial class is roughly ninety-eight percent white—a

ments favoring 'family farms,' . . . create in their aggregate a *de facto* preference for white enterprise."<sup>169</sup> Therefore welfare is only associated with programs stereotyped as "black," while "welfare" received by farmers who are actually white is not really welfare.

Political support for farm programs also tracks public support for such programs. A recent Gallup poll shows that when asked whether they were satisfied with the work the government was doing on farming and agriculture, fifty-seven percent of whites said they were satisfied and only thirty-seven percent said they were dissatisfied.<sup>170</sup> The figures for non-whites are similar with fifty-four percent saying they were satisfied and thirty-nine percent saying they were dissatisfied.<sup>171</sup>

### C. *Low-Income Taxpayers Are Viewed Through a Race and Class Lens*

Professor Anne Alstott writes:

The case for the EITC, however, reflects the uneasy state of current welfare politics, in which the EITC's redistributive function is cloaked in anti-welfare rhetoric to attract maximum political support. This strategy could potentially turn anti-welfare sentiment to political advantage, but it is also risky. Promoting the EITC as the answer to the problems of welfare feeds inflated expectations about the capabilities of redistributive programs and reinforces negative attitudes about welfare that, in the long run, may jeopardize the cause of the EITC and of poverty relief more generally. Recent attacks on the EITC that condemn it as "welfare" and as a "handout" suggest that this danger is more than theoretical.<sup>172</sup>

This Essay reinforces Professor Alstott's analysis and adds a race-based analysis to her class-based one. Welfare is "raced."

Scholars recognize that welfare is "implicitly a raced issue."<sup>173</sup> Accordingly when politicians refer to anyone as a welfare recipient, they are playing the race card.<sup>174</sup> This is what happened when members of Congress referred to the EITC as welfare.

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higher concentration of whites than in almost any other economic endeavor in the United States."); see also Jess Gilbert et al., *Who Owns the Land? Agricultural Ownership by Race/Ethnicity*, *Rural Am.*, Winter 2002, at 55, 55 ("Of all private U.S. agricultural land, Whites account for 96 percent of the owners, 97 percent of the value, and 98 percent of the acres.").

169. Chen, *supra* note 167, at 1307. Professor Chen goes on to state his view that congressional support is "in spite of" rather than "because of" this racial disparity. *Id.*

170. Gallup Poll, September 12–15, 2005 (on file with the *Columbia Law Review*).

171. *Id.*

172. Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 *Harv. L. Rev.* 533, 537 (1995) [hereinafter Alstott, *Limitations of Tax-Based Welfare Reform*].

173. Cahn, *supra* note 24, at 966.

174. See *supra* notes 75–82 and accompanying text; Neubeck & Cazenave, *supra* note 34, at 90 ("The racialization of welfare has reached the point where politicians can now

Republican President Gerald Ford established the EITC in 1975.<sup>175</sup> The legislative history provides that the credit is to “correspond roughly to the added burdens placed on workers by both employee and employer social security contributions.”<sup>176</sup> The legislative history continues: “Because it will increase their after-tax earnings, the new credit, in effect, provides an added bonus or incentive for low-income people to work, and therefore, should be of importance in *inducing individuals with families receiving Federal assistance to support themselves.*”<sup>177</sup> In a later section, the legislative history provides: “The committee believes, however, that the *most significant objective* of the provision should be to assist in encouraging people to obtain employment, reducing the unemployment rate and *reducing the welfare rolls.*”<sup>178</sup> “More importantly, *Federal welfare* programs apply primarily to married couples with dependent children and it is in this area where this program can be most effective in *reducing any tax disincentive to work.*”<sup>179</sup> “Here, also, the larger credit will *largely remove the disincentive that the social security tax produces against seeking employment for low-income people.* It will thus encourage low income individuals to seek part-time or full-time work.”<sup>180</sup> “It is estimated that this provision will decrease 1975 income tax liabilities by \$1.5 billion. . . . Of this \$1.5 billion amount, *\$0.1 billion will be offset by reduced AFDC payments* resulting from the increase in income for those receiving the credit.”<sup>181</sup>

Consider further the legislative history from the next year:

The committee also decided to make the earned income credit a permanent feature of the personal income tax. This provides needed tax relief to a hard-pressed group in the population—the lower income worker. It also provides a strong work incentive, since the credit is based on the amount of earned income. In effect, it offsets the social security payroll taxes payable with respect to those who are working but whose incomes are slightly, if any, above the levels of those on welfare. This is designed to improve the financial position of those who work relative to those remaining on welfare.<sup>182</sup>

The EITC was made a permanent part of the Internal Revenue Code for two primary reasons. First, the EITC was designed to provide an in-

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exploit racial animus to promote their political ambitions and goals simply by speaking the word welfare.”).

175. See Jonathan Barry Forman, *Improving the Earned Income Credit: Transition to a Wage Subsidy Credit for the Working Poor*, 16 Fla. St. U. L. Rev. 41, 50–51 (1988) (“In 1975, the economy was stagnating, and both the Ford Administration and Congress wanted to enact a tax cut to stimulate the economy.”).

176. S. Rep. No. 94-36, at 11 (1975), reprinted in 1975 U.S.C.C.A.N. 54, 64.

177. *Id.* (emphasis added).

178. *Id.* at 33 (emphasis added).

179. *Id.* (emphasis added).

180. *Id.* (emphasis added).

181. *Id.* at 35 (emphasis added).

182. S. Rep. No. 94-938, at 119 (1976), reprinted in 1976 U.S.C.C.A.N. 3438, 3554 (emphasis added).

centive to choose work over welfare and to offset social security taxes which were perceived to be a work disincentive. Second, the EITC was designed to financially reward work so that the financial position of those who worked would be better than the financial position of those who remained on welfare.

There is, however, some ambiguity in the legislative history which raises the question whether Congress thought that EITC claimants were somehow more trustworthy, honest, or hardworking than those receiving welfare, or whether they were just the former welfare recipients who could be tempted to work with the promise of an additional tax refund—or work bonus. This distinction is significant, because if the public thinks that EITC claimants are prior welfare recipients with the same negative characteristics associated with welfare recipients, then receiving the EITC changes nothing. If, on the other hand, the EITC is perceived by the public to be received by that subset of welfare recipients who value hard work and are not prone to engage in fraud to receive a greater check from the government, then receiving the EITC affords the taxpayer with a stamp of approval.

The EITC, when originally enacted, did not increase for family size.<sup>183</sup> Once it was shown that the family had one child, the EITC was available. There was no additional credit for additional children. Legislative history associated with a prior version of the EITC, however, provided the rationale for this decision. The Senate Finance Committee did not want to increase the EITC for each additional child out of concern of providing an “economic incentive for having additional children.”<sup>184</sup> So just as welfare recipients were lazy and had additional children to increase the government moneys they received, so too were EITC claimants. It wasn’t until 1990, however, that the EITC was amended to allow increases for family size.<sup>185</sup> The EITC currently increases for families with one child and for families with two or more children. Consider Table 1 below.

TABLE 1: 2007 MAXIMUM EITC BASED ON THE NUMBER OF CHILDREN<sup>186</sup>

Number of Children		
0	1	2 or more
\$428	\$2853	\$4716

As you can see, the maximum amount of \$2,853 is available for one child and the amount available for two or more children is only \$4,716.

183. See Brown, *Children*, *supra* note 5, at 767.

184. S. Rep. No. 92-1230, at 425-26 (1972).

185. See, e.g., Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-99*, 53 *Nat'l Tax J.* 983, 1004 (2000).

186. Rev. Proc. 2006-53, 2006-48 I.R.B. 996, 1000.

The EITC for families with two children is not twice the amount available for the first child, which would be \$5,706. Even today, there is imbedded in the EITC this notion that poor people will have children if it means they can get additional government dollars. Therefore, we can't "encourage" them by valuing each of their children the same. There is no such prohibition in the CTC, which benefits each middle class child the same regardless of how many children the family has.<sup>187</sup>

Because the EITC is only provided for working taxpayers, EITC recipients should be included in the term "deserving poor." Over two-thirds of EITC claimants do not receive a net transfer payment;<sup>188</sup> their EITC is used to offset their income, social security, and excise taxes. Accordingly, less than one-third receive their EITC as a transfer payment. Yet congressional statements turned EITC recipients into the "undeserving poor" by referring to them as "welfare recipients." Given the racial nature of welfare discourse, whenever EITC recipients are referred to as welfare recipients, the speaker is inviting opposition by the majority white population—and that is exactly what has occurred.

Thus, EITC recipients who receive payments only if they work receive "welfare," but farmers who receive payments even if they do not work do not receive "welfare." Farmers are insulted if they are referred to as welfare recipients, but hardworking low-income taxpayers are expected to accept the same insult. Farmers who do not have to work to receive government payments are hardworking, proud, and independent, while low-income taxpayers receive "public assistance." Farmers care about their children and their grandchildren, but EITC claimants do not.

### III. INTEREST CONVERGENCE AND THE "SELLING" OF THE EITC

"[C]ritical race theory is a grasp of emancipatory hope that law can serve liberation rather than domination."

— Cornel West<sup>189</sup>

This section seeks to use critical race theory as a framework for ending the attack on low-income taxpayers. The EITC lifts many low-income workers out of poverty.<sup>190</sup> As I have written elsewhere, economic rights should be the civil rights battleground of the twenty-first century.<sup>191</sup> Professor Richard Delgado has also encouraged critical race theorists to

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187. Brown, *Children*, *supra* note 5, at 789.

188. Zelenak, *supra* note 11, at 1910 n.180.

189. Cornel West, *Foreword to Critical Race Theory: The Key Writings That Formed the Movement*, at xi, xii (Kimberle Crenshaw et al. eds., 1995).

190. See Johnston, *Perfectly Legal*, *supra* note 8, at 129 ("About five million of these families are lifted above the official poverty line because of the credit . . .").

191. See Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 *Wash. & Lee L. Rev.* 1485, 1493 (2004) ("In my opinion, economic empowerment for people of color will be the battleground of the twenty-first century. CRT therefore needs to turn a critical eye toward economic issues." (footnote omitted)).

spend more time addressing issues of race and class.<sup>192</sup> To the extent that government policies are preventing low-income taxpayers from working their way out of poverty, those policies must be examined and changed.

Tax scholars who have written about the EITC have either ignored the impact the targeting of low-income taxpayers will have on the survival of the credit<sup>193</sup> or have suggested that targeting low-income taxpayers is the price to be paid for the credit's survival.<sup>194</sup> This section will show the harm that has been done to low-income taxpayers when scholars ignore race and class matters in tax policy.

Derrick Bell announced the interest-convergence principle over twenty-five years ago.<sup>195</sup> It states that gains for blacks occur primarily when they coincide with gains for whites. As a result, one would predict that if the primary beneficiaries of the EITC are black, white taxpayers and their elected representatives would not be inclined to fight to improve conditions affecting low-income taxpayers. In that instance, low-income taxpayers could only look forward to more targeting, perhaps one hundred percent precertification if they were lucky, and outright repeal if they were not so lucky.

There is reason for optimism, however, because this section shows that the majority of EITC-eligible taxpayers are white and most blacks are not eligible for the credit. Therefore, the targeting of the EITC has missed most blacks and harmed a lot of low-income white taxpayers.

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192. Delgado, *supra* note 36, at 151.

193. See Weisbach & Nussim, *supra* note 10, at 1010–11.

194. See Zelenak, *supra* note 11, at 1915 (providing cautionary note “[f]or those who value the tax-based administration of the EITC”). Zelenak suggests that it may not be wise to object to every aspect of EITC enforcement. Such objections may lead Congress to move the EITC from the IRS to the welfare bureaucracy or require universal precertification. In addition, Congress could repeal the EITC because the level of noncompliance was too high. *Id.* at 1916. Professor Zelenak’s concluding words are:

In a perfect world, the EITC might not be enforced any more strictly than the rest of the income tax—but in the real world, the surprise is that the EITC is enforced only slightly more strictly than the rest of the Internal Revenue Code. It would be a shame if that surprisingly good situation were lost in pursuit of perfection.

*Id.*

195. Bell, *supra* note 40, at 523.

## A. Targeting EITC Taxpayers Means Targeting White Taxpayers

TABLE 2: EITC-ELIGIBLE POPULATION BY RACE<sup>196</sup>

Race	Percent of EITC-Eligible Population
White, Non-Hispanic	54.0%
Black, Non-Hispanic	24.5%
Hispanic	17.9%
Other, Non-Hispanic	3.6%
Total	100.0%

Table 2 shows that more than half of EITC-eligible taxpayers are white, while less than one-quarter are black, and less than one-fifth are Latino.<sup>197</sup>

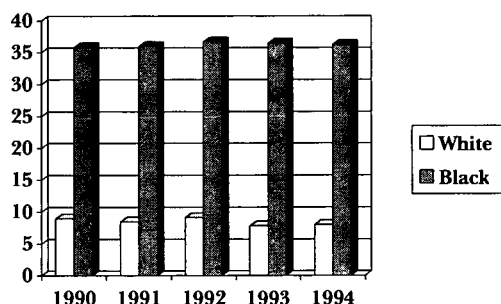
CHART 1: PERCENT INELIGIBLE BECAUSE NO EARNED INCOME<sup>198</sup>

Chart 1 shows that slightly more than thirty-five percent of blacks with children were ineligible for the EITC because they lacked earned income. Chart 1 also shows that a much smaller percentage (between seven and nine) of whites with children were ineligible because they too lacked earned income.

196. Brown, Children, *supra* note 5, at 823 (citing Jeffrey B. Liebman, Who Are the Ineligible Earned Income Tax Credit Recipients?, *in* Making Work Pay: The Earned Income Tax Credit and Its Impact on America's Families 274, 286–87 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001)) (reprinted with permission).

197. It has been reported that Latinos are far less likely than whites or blacks to know about the EITC. See Katherin Ross Phillips, Urban Inst., Who Knows About the Earned Income Tax Credit? 1 (2001) (“Low-income Hispanic parents are much less likely to know about the program than low-income non-Hispanic parents of any race. Among low-income parents who know about the EITC, Hispanics are also less likely to have ever received the tax credit.”); Brown, Children, *supra* note 5, at 819 n.317.

198. Brown, Children, *supra* note 5, at 825 (reprinted with permission).



CHART 2: PERCENT INELIGIBLE BECAUSE EARNED INCOME WAS TOO HIGH<sup>199</sup>

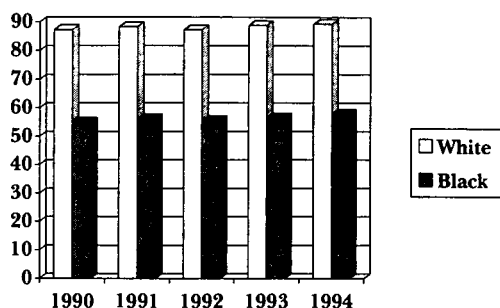


Chart 2 shows us that the majority of blacks and whites are ineligible for the EITC because they have too much income. Race is similarly a weak proxy for being eligible for the EITC. Charts 1 and 2 show us that the majority of blacks with children are ineligible for the EITC.

CHART 3: THE AVERAGE EITC FOR BLACKS AND WHITES<sup>200</sup>

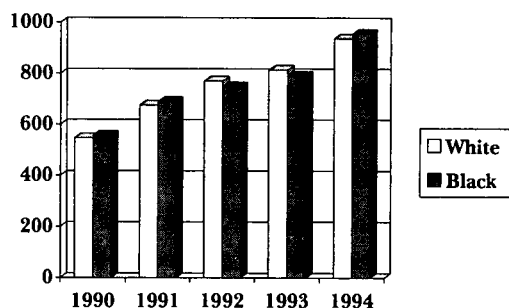


Chart 3 shows that the EITC for blacks and whites is very similar. This is in part a function of how the EITC is calculated<sup>201</sup> and perhaps a function of how class can dwarf race at low income levels.<sup>202</sup>

199. *Id.* at 826 (reprinted with permission).

200. *Id.* at 833 (reprinted with permission).

201. *Id.* at 770-73 (describing EITC calculations generally).

202. *Id.* at 833-36 (describing very similar demographics of black and white EITC-eligible taxpayers).

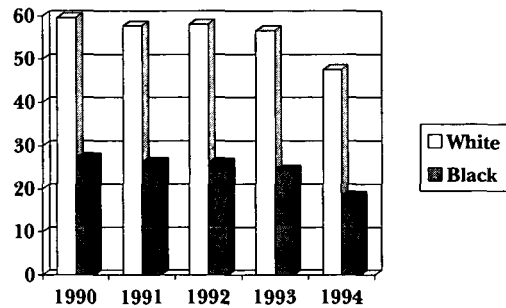
CHART 4: MARRIED AND EITC-ELIGIBLE<sup>203</sup>

Chart 4 shows that more than half of white EITC-eligible families (and about a quarter of black EITC-eligible families) are married couples (for all years except 1994). The downward trend in marriage rates leveled off in the mid-1990s and has started rising again.<sup>204</sup> As a result, those who support “family values” should find these taxpayers particularly “deserving.”<sup>205</sup> Evidence exists that focusing on married EITC-eligible families may help change the perception of low-income taxpayers. President Bush and the Republican Congress provided tax relief for married EITC-claimants in 2001.<sup>206</sup> The tax relief minimized the penalties paid by two-wage-earner couples.<sup>207</sup>

I believe the data just presented hold the key to changing the unfair targeting of EITC claimants. The racial composition of the EITC claimants must be widely disseminated to the public in order to change its perception. EITC claimants are hardworking, barely above the poverty

203. *Id.* at 827 (reprinted with permission).

204. Cf. Robert I. Lerman, *Family Structure and Childbearing Before and After Welfare Reform*, in *Welfare Reform: The Next Act* 33, 43 (Alan Weil & Kenneth Finegold eds., 2002) (“Another positive trend is that the decline in married couples as a share of all couples with children leveled off in the mid-1990s.”). White women are far more likely to marry than black women. See R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 *Mich. J. Race & L.* 115, 119 (2005) (“Analyses of data from the 2000 Census . . . [show for] women ages 40–44, 10% of White women and nearly 30% [of] Black women have never married.”).

205. Cf. Stephanie Simon, *Evangelicals Branch Out Politically: A Growing Movement Sees Myriad Causes Beyond Abortion and Gay Marriage*, *L.A. Times*, Jan. 31, 2006, at A7 (“Citing Jesus’ concern for the most vulnerable, evangelicals last month led a protest against a proposed federal budget that would cut deeply into *food stamps*, subsidized health insurance and student aid.” (emphasis added)).

206. Congress approved the Economic Growth and Tax Relief Reconciliation Act of 2001, H.R. 1836, 107th Cong., on May 26, 2001, and President George W. Bush signed it into law on June 7, 2001. See Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.).

207. Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 *Wash. & Lee L. Rev.* 1469, 1480 (1997) (“The EITC marriage penalty is a function of its phase-out provisions being identical for single and married individuals.”). A marriage penalty exists wherever a married couple would pay a greater amount of taxes than they would have had they not married.

line, and should not have a harder time claiming their tax benefits than their middle-income and wealthier counterparts.

When the white majority—and their elected officials—come to realize that over half of all EITC eligible taxpayers are white, they will have more empathy for low-income taxpayers. In all likelihood they will find the harsh treatment received at the hands of the IRS and precertification to be unacceptable. Without some Herculean effort to protect low-income taxpayers, EITC taxpayers will continue to be targeted. EITC claimants should not be treated differently than all other taxpayers, and I believe that the solution lies in acknowledging the stereotyping that is occurring and working to refute it.

The media, however, will have a crucial role to play in the transformation of the views of the public about low-income taxpayers.<sup>208</sup> One extensive study of the coverage of poverty in *Time*, *Newsweek*, and *U.S. News and World Report* magazines over a forty-five year period<sup>209</sup> shows how they use pictures of poor blacks in unsympathetic poverty stories and pictures of poor whites in sympathetic poverty stories.<sup>210</sup> Put another way, pictures of blacks are most likely to be used to illustrate the most negative aspects of poverty and the least sympathetic portrayals of the poor.<sup>211</sup>

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208. Professor Martin Gilens describes the problem as follows:

But for many white Americans, the stereotype of blacks as lazy grows out of a belief that the American economic system is essentially fair, and that blacks remain mired in poverty despite the ample opportunities available to them. These perceptions in turn are fed by media distortions that neglect the “deserving poor” in general and portray poor blacks in a particularly unsympathetic light.

Gilens, *supra* note 22, at 173. Numerous articles have been written discussing the impact the media have on public perceptions surrounding blacks. See, e.g., Adeno Addis, “Hell Man, They Did Invent Us:” The Mass Media, Law, and African-Americans, 41 *Buff. L. Rev.* 523, 542 (1993) (“[T]he communications industry has been one of the most effective institutions in perpetuating a particular image of African Americans in the consciousness of European Americans.”); Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 *Cornell L. Rev.* 1258, 1285–88 (1992) (discussing shortcomings of free expression doctrine in treating racial depiction); Jerry Kang, *Cyber-Race*, 113 *Harv. L. Rev.* 1131, 1167 (2000) (“Images delivered by the mass media are designed to generate profit from a mass audience. Thus, they feature exaggerated generalizations because it makes market sense for them to do so.” (footnote omitted)).

209. Gilens, *supra* note 22, at 111 (“To assess changes in news media portrayals of poverty over the past forty-five years, I examined three weekly newsmagazines, *Time*, *Newsweek*, and *U.S. News and World Report*.”).

210. *Id.* at 127–28 (“The news media’s tendency to use pictures of poor blacks in unsympathetic poverty stories and pictures of poor whites in sympathetic stories can also be observed among various topics in poverty coverage over the entire 1950–1992 period.”).

211. *Id.* at 129 (“[P]ictures of African Americans are disproportionately used to illustrate the most negative aspects of poverty and the least sympathetic subgroups of the poor.”).

Television, however, is a more significant influence on public perception.<sup>212</sup> In television, blacks were overrepresented in poverty stories to a greater extent than in the print media.<sup>213</sup> Television news also exaggerates the extent that blacks make up the percent of the population that are poor.<sup>214</sup> The challenge then in “selling” the EITC will be to either focus the media’s attention on low-income blacks who work or perhaps focus its attention exclusively on the *white* working poor.<sup>215</sup>

Programs built around work often succeed in garnering widespread support. Professor David Super has written about the recent turnaround of the FSP in the post welfare-reform years.<sup>216</sup> The FSP was so closely identified with AFDC that it too almost suffered the fate of AFDC, and in 1996 was almost turned entirely into a state-administered block grant program.<sup>217</sup> Generally there is widespread public support for the FSP.<sup>218</sup> The public, however, is far more hostile toward welfare than toward the FSP.<sup>219</sup>

Proof of the FSP’s continuing enhanced status is the fact that in February 2002, President George W. Bush proposed increasing food stamp benefits.<sup>220</sup> More recently, in December 2005, Congress rejected any budget cuts in the FSP.<sup>221</sup> Professor Super attributes the turnaround as

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212. *Id.* (“In recent surveys, about 70% of the American public identifies television as the source of ‘most of your news about what’s going on in the world today.’” (footnote omitted)).

213. *Id.* at 131 (“In fact, in each of the three periods examined, television news exaggerated the percentage of blacks among the poor to an even greater extent than did the newsmagazines.”).

214. *Id.* (“Television news also substantially exaggerates the extent to which blacks compose the poor . . .”).

215. Another challenge will be getting journalists to move past their own stereotypes. See *id.* at 132 (“Journalists are professional observers and chroniclers of our social world. But they are also residents of that world and are exposed to the same stereotypes and misperceptions that characterize society at large.”).

216. See, e.g., Super, *Quiet “Welfare” Revolution*, *supra* note 29.

217. *Id.* at 1284–86 (describing how FSP was saved because of focus on food stamp recipients who worked).

218. See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 *Hastings L.J.* 79, 85 n.26 (1992) (citing Theodore R. Marmor et al., *America’s Misunderstood Welfare State: Persistent Myths, Enduring Realities* 47–48 (1990), and indicating that Marmor et al. note “widespread public support for Medicare, Food Stamp, and Social Security programs”); Jill Gauling, Note, *Race, Sex, and Genetic Discrimination in Insurance: What’s Fair?*, 80 *Cornell L. Rev.* 1646, 1689 (1995) (“There is already widespread public support for entitlement programs such as Medicare, Food Stamps, and Social Security.”).

219. Gilens, *supra* note 22, at 29 (“And welfare is even more unpopular than food stamps; 60 percent to 70 percent of those polled think we are spending too much for welfare (or for ‘people on welfare’) . . .”).

220. Super, *Quiet “Welfare” Revolution*, *supra* note 29, at 1382.

221. Rob Hotakainen & Aaron Blake, *Senate Blocks Arctic Drilling: Democrats Protected Refuge from Oil Exploration, While GOP Prevailed on Budget Cuts*, *Minneapolis Star Trib.*, Dec. 22, 2005, at 1A (“Coleman [(R-Minn.)] said that the [spending] bill is ‘by no means perfect’ but that it ‘keeps intact my top considerations.’ He

largely due to focusing on benefits to be received by the working poor under a slightly revised FSP.<sup>222</sup>

Only about one-third of Americans who view blacks as hardworking wanted to cut welfare spending, while almost half thought welfare spending should be increased.<sup>223</sup> Almost two-thirds of Americans who view blacks as lazy wanted to cut welfare spending, and fifteen percent thought welfare spending should be increased.<sup>224</sup> Support for the EITC, which is only available to those who work, should resonate with the American public. What worked for the FSP should work for EITC taxpayers.

One such example occurred in 1999, when then-Texas Governor George W. Bush was the frontrunner for the Republican Party's presidential nomination. He championed low-income taxpayers when he declared that the party should not "balance the budget on the backs of the poor."<sup>225</sup> He was responding to a House Republican plan to balance the federal budget by delaying payments of the EITC.<sup>226</sup> The plan died when Sen. John McCain (R-Ariz.), another Republican candidate for President, joined other Republican senators in opposing it.<sup>227</sup>

Professor Super has not addressed the impact of race in the transformation of the FSP, however. Race has been a part of the explanation for why low-income taxpayers are targeted, and perhaps race can be a part of the solution.

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stressed the absence of . . . cuts for sugar producers or food stamps."); Susan Milligan, Party Support in Senate Erodes Around Frist, *Boston Globe*, Dec. 22, 2005, at A36 ("GOP moderates and Democrats balked at the package because it cut popular programs such as food stamps, scientific research, and the No Child Left Behind education programs.").

222. Super, *Quiet "Welfare" Revolution*, *supra* note 29, at 1286 ("Working within the themes of reform by reaching out to the *working* poor strengthened the program's image politically.").

223. Gilens, *supra* note 22, at 68 ("[A]mong those who most strongly viewed blacks as hardworking . . . only 35 percent wanted to decrease welfare spending, while 47 percent thought spending for welfare should be increased.").

224. *Id.* at 68–69 ("At the other end of the scale, however, 63 percent of respondents who viewed blacks as lazy preferred to cut welfare spending, while only 15 percent thought welfare spending should be increased.").

225. Dan Balz, *Bush Shows a Shadow of Clintonism: Criticism of Hill GOP Mirrors President's 'Triangulation,'* *Wash. Post*, Oct. 7, 1999, at A1; Editorial, *Bush—Gasp!—Takes on the GOP*, *Chi. Trib.*, Oct. 8, 1999, at 30.

226. Editorial, *supra* note 225; see also Foster, *Memo to GOP: Leave Tax Credit for Poor Alone*, *Milwaukee J. Sentinel*, Oct. 8, 1999, at 20 ("But House Republicans, led by Majority Whip Tom DeLay (R-Texas), figured out recently that by spreading the [EITC] payments over 12 monthly installments, they could save \$8.7 billion in fiscal 2000 and push much of the program's cost over into the following budget year.").

227. See Kathy Kiely, *House GOP Backing Off Budget Plan*, *USA Today*, Oct. 5, 1999, at 1A ("[T]he consensus seemed to be that the proposal is doomed in the face of strong opposition from not only Republican presidential contenders [Bush and McCain] but also from Senate Republicans.").

B. *Majority Will Support the EITC, Once It Is "Properly" Raced*

This section builds upon the scholarship in the area of school finance reform, which found that white majority taxpayers supported redistributive legislation when they believed that it was primarily going to benefit white children,<sup>228</sup> and welfare literature that shows less opposition to welfare when whites believe that whites are the primary beneficiaries—or put another way, when whites believe that blacks are not the primary beneficiaries.<sup>229</sup> Scholars have shown that “just as race seems to be an influential undercurrent in welfare policy and debate, so too does it appear to influence school finance litigation and reform.”<sup>230</sup>

Two studies provide support for the theory “that race does play a role in popular (and by presumption legislative) opposition to the equalization of resources.”<sup>231</sup> The studies indicate that whites perceive school finance reform as primarily benefiting blacks and oppose the efforts, even though *in reality* blacks are not primarily benefiting.<sup>232</sup> Minority school districts therefore do not fare as well as white school districts in school finance litigation.<sup>233</sup> Predominantly white school districts have an easier time gaining legislative reforms than predominantly black school districts.<sup>234</sup> One study found that “‘race was a far better predictor of support or opposition’” to legislation reforming school financing than either the perceived effects of the legislation or the parents’ income.<sup>235</sup> All other variables held constant, “‘white parents were far more likely to op-

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228. See Ryan, *School Finance Reform*, supra note 45, at 432–33. Regarding the school funding litigation in New Jersey and Texas, Professor Ryan states:

[Two] . . . studies indicated that white citizens in [Texas and New Jersey] inaccurately perceived school finance reform as primarily benefiting blacks. [One] study also indicated that nonwhites tended to support school finance reform more than whites, and [the other] study revealed that the level of support among whites depended as much upon racial attitudes as it did upon self-interest—e.g., some whites whose school districts stood to gain from school finance reform opposed such reform for reasons apparently having to do with their attitudes toward blacks.

Id. (footnotes omitted).

229. See Gilens, supra note 22, at 173 (“[T]he racial component of white opposition to welfare seems to reflect the most important nonracial basis of welfare opposition: the perception that recipients are undeserving.”); Fox, supra note 25, at 597 (“Therefore, there is support for the proposition that the more Latinos or blacks in a state, the less whites in those states want to spend on welfare.”).

230. Ryan, *School Finance Reform*, supra note 45, at 432–33; see also Brown, *Invisibility Factor*, supra note 45, at 214–22 (describing role of race in legislative reforms in New Jersey school districts).

231. Ryan, *School Finance Reform*, supra note 45, at 473.

232. See, e.g., Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 *Law & Soc’y Rev.* 175, 211–12 (1998); Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 *J. Pol.* 628, 638–39 (1994).

233. See Reed, supra note 232, at 211–12; Tedin, supra note 232, at 646–47.

234. See Ryan, *School Finance Reform*, supra note 45, at 474–75.

235. Id. at 474 (quoting Reed, supra note 232, at 212).

pose the [legislation], and nonwhite parents were far more likely to support the [legislation].’<sup>236</sup> The other study found that hostility or prejudice toward blacks was just as likely to explain opposition to the equalizing legislation as was living in the district that was going to lose the funds.<sup>237</sup> The studies, which went further than Professor Ryan was willing to go, suggest that “whites tend to perceive school finance reform as primarily benefiting minorities, even when inconsistent with reality, and that ‘racial hostility’ appears to play a ‘major role in explaining the level of support for the reform of school financing.’”<sup>238</sup>

As a result, we would expect that if the white majority could be convinced of the fact that the primary beneficiaries of the EITC were white, they would support the elimination of the targeting of low-income taxpayers. One issue would be whether or not they could be convinced, since in the education funding context, the voters were ignoring the facts. Nevertheless, in states where whites are the primary beneficiaries of welfare, support for welfare is high.<sup>239</sup> A remaining issue would be whether the white majority could be convinced to put aside long-held beliefs about blacks not being committed to hard work, given that there will still be blacks receiving the EITC.<sup>240</sup>

### C. *EITC Will Be Reformed to Reduce Its Complexity*

Assuming, however, that the hurdles just described can be overcome and the EITC is “raced” white, the stereotypes that apply to low-income taxpayers will dissipate. They will no longer be perceived as untrustwor-

236. *Id.* (quoting Reed, *supra* note 232, at 212).

237. *See id.* (discussing Tedin, *supra* note 232).

238. *Id.* at 475 (quoting Tedin, *supra* note 232, at 638).

239. *See* Fox, *supra* note 25, at 614. As Professor Fox has stated:

If whites (politicians and public alike) oppose welfare because they think the benefits go to blacks and Latinos who are lazy and therefore undeserving, then support for more liberal policies should increase when the benefits are seen to go to whites. [A study has] found that this is the case. Holding constant various social, political, and economic factors, states with a higher proportion of blacks on the welfare rolls had stricter time limits, harsher sanctions, lower state welfare benefit levels, and were more likely to enact family cap policies than states with small proportions of blacks.

*Id.*

240. Gilens, *supra* note 22, at 3. Professor Gilens describes this dynamic as follows: In large measure, Americans hate welfare because they view it as a program that rewards the undeserving poor. To understand public opposition to welfare, then, we need to understand the public’s perceptions of welfare recipients, and here two important and related factors stand out. First, the American public thinks that most people who receive welfare are black, and second, the public thinks that blacks are less committed to the work ethic than are other Americans. . . . In particular, the centuries-old stereotype of blacks as lazy remains credible for large numbers of white Americans. This stereotype grew out of, and was used to defend, slavery, and it has been perpetuated over the years by the continuing economic disparities between black and white Americans.

*Id.*

thy and in need of increased government scrutiny. As a result, the discourse surrounding the error rates should change. There should be widespread support to eliminate the complexity currently faced by low-income taxpayers and to worry less about the error rate.

An alternative explanation for the error rate, and one that is more likely to be accepted once the EITC has been properly “raced” in the minds of the public, is complexity. *The majority of EITC taxpayers use paid preparers.*<sup>241</sup>

Low-income taxpayers, who need the EITC to stay out of poverty, have to pay to receive their EITC. One estimate of the costs paid to EITC preparers was \$1.75 billion. The EITC is so complicated that mistakes are made regardless of whether the returns are completed by taxpayers, their return preparers, or IRS staff.<sup>242</sup> The EITC’s complexity places an undue burden on low-income taxpayers.

Numerous scholars have described the EITC as complex.<sup>243</sup> The costs of filing the EITC are anything but insignificant; that these costs are borne by low-income taxpayers is reprehensible.

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241. Lipman, *supra* note 10, at 465 (“Sixty-eight percent of tax filers who received the EITC hired paid tax practitioners to prepare their income tax returns.”); Sheryl Stratton, Policy Group Debates EITC and Regulating Return Preparers, 88 Tax Notes 465, 465 (2000) (“A recent IRS report revealed that 60 percent of earned income tax credit returns were signed by a paid preparer . . .”).

242. See Brown, Children, *supra* note 5, at 767 & n.46 (citing Gen. Accounting Office, Continuing Problems, *supra* note 14, at 2 (“The Earned Income Credit (EIC) was the source of many errors by taxpayers and tax practitioners in preparing returns. Those errors, along with errors by IRS staff in following IRS procedures for handling EIC claims, increased IRS’ error resolution workload and delayed taxpayers’ receipt of benefits.”)).

243. See, e.g., Alstott, Limitations of Tax-Based Welfare Reform, *supra* note 172, at 548 (“[T]he EITC is complex . . .”); Anne L. Alstott, Work vs. Freedom: A Liberal Challenge to Employment Subsidies, 108 Yale L.J. 967, 1052–53 (1999) (“The rules governing [EITC] eligibility are complex. Critics have pointed out that complexity may decrease participation, increase error rates, and even reduce workers’ take-home credits, if they must pay high fees to commercial preparers.” (footnotes omitted)); Book, The IRS’s EITC Compliance Regime, *supra* note 10, at 397–98 (“[T]he tax code generally is complex, and the EITC is a hideously complex statutory provision. Scholars, legislators, and practitioners have wrestled with understanding it. If those who work with it have difficulty, pity the poor taxpayer, particularly if the poor taxpayer is functionally illiterate.” (footnotes omitted)); Book, The Poor and Tax Compliance, *supra* note 10, at 1155 (“[T]he EITC’s requirements can be opaque and complex . . .”); Brown, Children, *supra* note 5, at 788 (“The EITC is complex from beginning to end . . .”). Professors Zelenak, Weisbach, and Nussim do not refer to the EITC as complex. Weisbach and Nussim state: “Most individuals claiming the EITC must file a return anyway, so the additional cost of claiming the EITC is relatively low.” Weisbach & Nussim, *supra* note 10, at 1010 (emphasis added). Zelenak states: “[T]he 19 million EITC claimants receive the credit simply by declaring on their tax returns their eligibility for a specified amount of credit (attaching Schedule EIC if they have a qualifying child) and waiting for the credit check to arrive from the government.” Zelenak, *supra* note 11, at 1876 (emphasis added). Although I am convinced that Professor Zelenak did not intend to conjure up the image of a lazy individual waiting for their government check to arrive, there is a bit of that in the language that he uses.



Former Treasury Secretary Paul O'Neill also said the IRS has fifty-four pages of instructions for claiming the tax "for the lowest-income people who struggle to make a living. We've given them an impossible tax code to interact with and then we ridicule them" for not following it.<sup>244</sup> If low-income taxpayers were instead raced "white" it is possible that sympathy would take the place of ridicule. They could become "blameless" taxpayers and a move for eliminating the complexity of the EITC could begin. For example, the Internal Revenue Service Restructuring and Reform Act of 1998<sup>245</sup> was largely seen as an effort to force the IRS to treat taxpayers with dignity and respect.<sup>246</sup> A similar effort could be waged on behalf of low-income taxpayers.

Once the EITC is properly raced, politicians won't be able to use the word welfare regarding low-income taxpayers because the public wouldn't approve. Taking that assumption, one would expect widespread support for any movement to simplify the Internal Revenue Code—and that effort should begin with the provisions affecting low-income taxpayers.

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244. O'Neill Testimony, *supra* note 103.

245. Pub. L. No. 105-206, 112 Stat. 685 (codified as amended in scattered sections of 5, 23, 26, and 38 U.S.C.).

246. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 82 (2004). As Professor Camp has explained:

The rhetoric was hot: "Criminals have more rights in this country than taxpayers do. It shouldn't be that way. That's wrong, and we're going to fix it[.]" said Republican Bill Archer. Not to be outdone, Democrat Dick Gephardt in a separate news conference on the same day grimly declared: "Today, accused violent felons have more rights in court than law-abiding, tax-paying citizens. And that's wrong."

Id. (footnotes omitted). Professor Steve Johnson notes that:

Congress was responding to two conflicting forces: the desire to garner political advantage by chastising or curbing the IRS, and the reality that a true, general shift of the burden of proof would have enormous, adverse effects. Steering between these, Congress chose the path of symbolism. It enacted something that looks like a reassignment of the burden of proof (garnering political points) but which, practically, will have little or no effect on the outcomes of actual tax cases (avoiding the worst of the adverse effects).

Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 Iowa L. Rev. 413, 415 (1999); cf. Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239, 241 (1988). As Professor Martinez has described:

A recent proliferation of proposed legislation that calls for the enactment of procedural safeguards for taxpayers in the tax collection system provide concrete examples of this sentiment. Not surprisingly, this legislation seems to enjoy popular political support. This support is derived not only from the traditional enmity reserved for the tax collector, but also from documented incidents of abusive and, in a few cases, criminal conduct directed against taxpayers by Internal Revenue Service (IRS) employees. Predictably, one of the authors of these bills charges that under the current system, "the IRS has too many rights, and the taxpayer too few."

Id. (footnotes omitted).

## CONCLUSION

In order for the EITC to remain politically viable, several things must occur. First, the empirical data concerning the racial demographics of who benefits from the EITC must be widely disseminated and “sold” to the American public. As a result, EITC taxpayers will not be viewed as receiving welfare. Second, the EITC must remain within the tax system because it reminds the American public that you have to work to receive it.<sup>247</sup> Third, politicians and academics working to improve the lives of the working poor must stop referring to the EITC as welfare.

Finally, EITC taxpayers should not just accept the cards they’re dealt. Low-income taxpayers are being singled out for harsh retaliatory treatment for being poor—and for being perceived to be black. Interest-convergence theory provides hope for improving the future prospects of all low-income workers and their families. Race *and* class matter in tax policy discourse.

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247. Cf. Super, Quiet “Welfare” Revolution, *supra* note 29, at 1380–82 (describing how FSP was rescued from same treatment as AFDC by emphasis on working poor who received food stamps and program changes designed to increase number of working poor eligible for food stamps).

