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## ARTICLES

### THE TAX TREATMENT OF CHILDREN: SEPARATE BUT UNEQUAL\*

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#### ABSTRACT

Tax credits for children are found in two separate tax provisions. The Earned Income Tax Credit ("EITC") and the Child Tax Credit ("CTC") are similar in many ways, yet in crucial respects EITC recipients are disadvantaged when compared with CTC recipients. This Article seeks an explanation for the disparity and ultimately finds that the only plausible explanation is a race based one.

Politicians recently played the “race card” by analogizing the EITC to welfare. Academics argue, without empirical support, that low-income taxpayers who receive the EITC are Black and disproportionately benefit from the credit. This Article provides the first comprehensive empirical analysis of low-income taxpayers and shows that the majority of EITC-eligible taxpayers are White and that a greater percentage of Blacks are ineligible for the EITC than are eligible. Accordingly EITC provisions that disadvantage EITC recipients will disadvantage Whites. By making the EITC a problem of low-income Blacks, academics, and politicians have ignored the larger class issue.

### INTRODUCTION

This Article considers the question of why the Internal Revenue Code has two separate provisions that effect children, namely the Earned Income Tax Credit (“EITC”) and the Child Tax Credit (“CTC”). They are separate but serve similar purposes, and they are unequal because CTC families receive far greater tax benefits than EITC families.<sup>1</sup> This Article seeks to uncover why there is a need for two tax credits which benefit children differently and concludes that the only plausible explanation is related to race.

The CTC increases for every child in the household, while the EITC does not.<sup>2</sup> There is a maximum EITC, but no maximum CTC.<sup>3</sup> CTC taxpayers do not have to work to receive the credit, but EITC recipients do. Moreover, the CTC targets those with higher incomes than does the EITC,<sup>4</sup> and recent

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<sup>1</sup> The estimated revenue loss from the CTC for 2004 is \$17.9 billion, which is more than four times the estimated revenue loss of \$4.4 billion from the EITC. STAFF OF THE JOINT COMM. ON TAXATION, 107TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2001–2004, JCS-1-01, at 21 (Comm. Print 2001). Providing tax benefits to low income taxpayers generally is politically unpopular. See David Cay Johnston, *Even for Wealthy, Tax Plan’s Benefits Could Vary Widely*, N.Y. TIMES, May 15, 2001, at C1 (“The Heritage Foundation and other supporters of the president’s plan say that the top tax rates are unfairly high and that the most economically productive taxpayers would be even more productive if their tax rates were significantly reduced. They add that because most taxes are paid by high-income Americans, most of the savings should go to them.”); Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES, Sept. 14, 2003, § 6, at 54 (“The 2001 tax cut phases out the inheritance tax, which is overwhelmingly a tax on the very wealthy: in 1999, only 2 percent of estates paid any tax, and half the tax was paid by only 3,300 estates worth more than \$5 million. The 2003 tax act sharply cuts taxes on dividend income, another boon to the very well off. By the time the Bush tax cuts have taken full effect, people with really high incomes will face their lowest average tax rate since the Hoover administration.”).

<sup>2</sup> See *infra* note 161 and accompanying text.

<sup>3</sup> See *infra* note 162 and accompanying text.

<sup>4</sup> See *infra* note 164 and accompanying text.

activity in Congress suggests that in the future the difference could be even greater.<sup>5</sup> Beginning in 2004, for the first time ever, certain low-income taxpayers had to prove their eligibility for the EITC *before* receiving their refund.<sup>6</sup> There is no such requirement for CTC recipients. EITC recipients have been the targets of increased audits, while CTC recipients have not.<sup>7</sup> In fact, EITC taxpayers are more likely to be audited than high-income taxpayers.<sup>8</sup>

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<sup>5</sup> See, e.g., Edmund L. Andrews, *House Bill Expands Child Tax Credit*, N.Y. TIMES, May 20, 2004, at A18 (“The new House bill would offer the full tax credit to families with incomes of up to \$250,000, and it would offer a partial tax credit to families with incomes as high as \$309,000.”); Editorial, *Leave No Rich Child Behind*, WASH. POST, May 19, 2004, at A22 (“The House of Representatives plans to take up a bill this week that would provide new tax breaks to families earning as much as \$309,000, while doing next to nothing for those at the low end of the income scale.”).

<sup>6</sup> See, e.g., Robert Greenstein, *The New Procedures for the Earned Income Tax Credit*, 99 TAX NOTES 1525, 1525 (2003) (“The Internal Revenue Service plans to institute major changes in the procedures for applying for the earned income tax credit. The new procedures, which would be phased in over several years, could ultimately impose increased burdens on as many as 25 percent to 30 percent of all low-income working families with children applying for the EITC—or up to four million to five million such families.”); Philip J. Harmelink et al., *The Challenge of the EITC*, 100 TAX NOTES 955, 960 (2003) (“The Treasury plans to rapidly implement [the precertification] program. At first, a sample of 45,000 (revised to 25,000) taxpayers will be required to provide documentation as to eligibility (in essence, a large pilot study). By 2005, the initially proposed program was to precertify two million taxpayers on the relationship test. However, [the IRS] states . . . [it now] will be limited to residency certification.”) (internal quotation marks omitted); Mary Williams Walsh, *I.R.S. Tightening Rules for Low-Income Tax Credit*, N.Y. TIMES, Apr. 25, 2003, at A1 (“The Internal Revenue Service is planning to ask more than four million of the working poor who now claim a special tax credit to provide the most exhaustive proof of eligibility ever demanded of any class of taxpayers.”).

<sup>7</sup> See *infra* notes 74–110 and accompanying text.

<sup>8</sup> See DAVID CAY JOHNSTON, PERFECTLY LEGAL 130 (2003) (“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.”); John Connor, *IRS Audit Rates Drop for the Rich*, GAO Study Finds, WALL ST. J., May 24, 1996, at B13D (“Internal Revenue Service 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, the General Accounting Office said. IRS officials attributed the increase in audit rates for lowest-income individuals to the agency’s recent emphasis on dealing with people who don’t file tax returns and to reviews of the earned-income tax credit, the GAO said in a new report.”); see also Leslie Book, *The IRS’s EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 374 (2002) (“In 2000, low-income taxpayers accounted for approximately forty-four percent of all IRS audits, with the odds of audit for low-income taxpayers approximately one in ninety while for everyone else the risk of an audit was approximately one in 370.”); cf. 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) (“Congress also directed the Service to devote more audit resources to EITC issues largely for political reasons.”). Professor Lee also describes how former Secretary of Treasury Paul O’Neill stated “that the IRS must ‘examine the devil out of’ those receiving the tax credit, which, to be frank, is a form of welfare . . . . O’Neill observed correctly that all this auditing firepower recovered very little money for the government because people claiming the tax credit pay little or no income taxes.” *Id.* at 293–94 n.106 (citations omitted); Robert J. Barro, *Workfare Still Beats Welfare*, WALL ST. J., May 21, 1996, at A22 (“Serious fraud, however, appears to exist. For example, IRS audit data for 1985 and 1988 indicate that one-third of EITC claims were invalid, mainly because the claimants

Several race-neutral explanations must be explored before concluding that the differences between the CTC and the EITC are attributable to race. First, the purposes of each of the credits may be so different that they necessitate the disparity between EITC and CTC provisions. That explanation is unsatisfactory; they were both enacted to benefit families with children. Thus their purposes are virtually identical.

A second race-neutral explanation could be that the differences in the two provisions make them easier to administer. That explanation is equally dissatisfying because the differences between the two credits increase their complexity and potential for error.<sup>9</sup>

A third race-neutral explanation could be that the harsher treatment EITC recipients receive is justified by the high error rates associated with the EITC. That explanation is also unpersuasive; other provisions have high error rates and cost the government far more in lost tax revenue, yet those other provisions are ignored. In addition, there have been no similar studies of the CTC's error rates.

Finally, the most frequently articulated argument for treating EITC recipients more harshly than CTC recipients is that the EITC is "welfare." When examined closely, this argument is very revealing and ultimately provides support for the conclusion that the separate and unequal treatment of the CTC and the EITC is related to race.

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lacked a qualifying child . . . . However, census data for 1990 indicate that only 13% of claimants had no child at all living in their household . . . .").

<sup>9</sup> See *infra* note 135 and accompanying text (discussing the CTC limits for those eligible for the EITC).

The political discourse surrounding welfare is not race neutral. As Professor Sheryll Cashin has written “while 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.”<sup>10</sup> The American public largely dislikes welfare.<sup>11</sup>

Regarding that dislike, Professor Dorothy Roberts has stated that

[r]acial politics has so dominated welfare reform efforts that it is commonplace to observe that “welfare” has become a code word for race. When Americans discuss welfare, many have in mind the mythical Black “welfare queen” or profligate teenager who becomes pregnant at taxpayers’ expense to fatten her welfare check.<sup>12</sup>

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<sup>10</sup> Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 593 (1999).

<sup>11</sup> See *infra* notes 178–95 and accompanying text; see also JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 2 (1991) (“Indeed, few other social policies attract so much public attention, and are subject to such heated attacks from all sides of the political spectrum. It is a policy that has marginal legitimacy and is steeped in negative images and controversy.”); DOROTHY K. NEWMAN ET AL., *PROTEST, POLITICS, AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS, 1940–1975*, at 255 (1978) (“The official view of welfare had changed dramatically by the 1960s. Officials and the public with them had come to regard it as a program for the ‘undeserving.’”); 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, 1290 (2004) (“[T]he overwhelming majority of the public nevertheless disapproves of ‘welfare.’ As a result, most politicians, interest groups, and foundations have been leery of supporting any program regarded as ‘welfare.’”).

<sup>12</sup> Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1563 (1996) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994)); see also 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.”); NEWMAN ET AL., *supra* note 11, at 255 (“And when, in addition, the public thought AFDC 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.”); Richard Dvorak, *Cracking the Code: ‘De-Coding’ Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 624 (2000) (“In the 1980s, words like ‘fairness,’ ‘welfare,’ and ‘groups’ took on racial meanings in a backlash to the liberal policies of the 1960s . . .”). What is so curious about welfare being synonymous with Blacks is that the Aid to Families with Dependent Children (“AFDC”) program as originally enacted excluded Blacks. See Roberts, *supra* note 12, at 1569 (“Although much of the American public now views welfare dependency as a Black cultural trait, the welfare system systematically excluded Black people for most of its history.”) (internal citations omitted); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 723–24 (1992) (“The small program that covered children living with their mothers, Aid to Dependent Children (ADC), assisted the children of women who were white, widowed, and had been connected to men for a substantial portion of their lives . . . . In some states, African-American single mothers were intentionally excluded from the welfare rolls.”).

As a result, “notwithstanding the numbers, the public perception of welfare is raced black.”<sup>13</sup> Therefore, whenever EITC recipients are compared to welfare recipients, there is a racial overtone—whether or not one was intended.<sup>14</sup> The message is clear—children in EITC-eligible homes are not as deserving of tax benefits as other homes with children.

Efforts to construct a race-neutral definition of “welfare” that can justify the disparate treatment of EITC recipients are equally flawed. EITC recipients are considered welfare recipients, but farmers who receive government subsidies are not.<sup>15</sup> The EITC does not meet a race-neutral definition of welfare any more than farm subsidies do. The key distinction, however, is that the typical EITC or “welfare” recipient is perceived to be Black<sup>16</sup> and the typical farm subsidy recipient is perceived to be White.<sup>17</sup>

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<sup>13</sup> Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 966 (1997) (“Thus, regardless of the actual impact of [AFDC] regulations, their implementation is perceived as affecting blacks, even though this perception does not reflect reality. 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 NEWMAN ET AL., *supra* note 11, at 255 (“It mattered little that only about a third of poor black families were getting any welfare aid at the height of the sixties’ ‘welfare crisis,’ or that those who did usually got too little to escape from poverty . . . . The public perception has been that idle black welfare recipients lived on Easy Street, despite the fact that in the only terms that count—money—welfare took only a little over 10 percent of the black households it helped out of poverty, but two times as many of the whites.”); A. Mechele Dickerson, *America’s Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 29–30 (1999) (“The modern stereotype of the non-deserving welfare mother is the well-known ‘welfare queen.’ The welfare queen was portrayed as a long-term dependent, unmarried, urban black woman who (1) had a herd of illegitimate children, (2) felt she had a God-given right to stay home full-time to rear those children, (3) steadfastly refused to work in the labor market to earn income to support those children, but (4) wore designer clothing while driving her Cadillac to the grocery store to buy filet mignon with her food stamps. Rather than assume that the welfare queen profile was either an outright myth or an aberrant exception, welfare reform proceeded as if all welfare recipients were welfare queens and welfare mothers were lazy and chose not to work to support their families.”) (citations omitted); Williams, *supra* note 12, at 743 (“[T]he average citizen considers all AFDC recipients as part of the ‘underclass,’ i.e., African-American, long-term welfare recipients who live in inner-city ghettos and regularly have babies. The stereotype also holds that unlike whites, these undeserving poor have warped values, which do not include the desire for such things as good schools, jobs, or safe streets.”) (citations omitted).

<sup>14</sup> See Cahn, *supra* note 13, at 966; Dvorak, *supra* note 12, at 615 (“Through the use of ‘code words,’ defined as ‘phrases and symbols which refer indirectly to racial themes, but do not directly challenge popular democratic or egalitarian ideals,’ legislators can appeal to racist sentiments without appearing racist. More importantly, they can do so without leaving evidence that can be traced back as an intent to discriminate.”).

<sup>15</sup> See *infra* notes 201–14 and accompanying text.

<sup>16</sup> See *infra* notes 188–95 and accompanying text.

<sup>17</sup> See *infra* notes 213–16 and accompanying text.

The general public similarly views EITC benefits flowing largely to African-Americans.<sup>18</sup> Finally, academic discourse surrounding the EITC is not race-neutral. Academics have conveyed racial messages about EITC recipients. They have argued that EITC benefits disproportionately flow to Blacks,<sup>19</sup> that Blacks are more likely to be poor and therefore eligible for the EITC,<sup>20</sup> and that EITC provisions are “pro-Black.”<sup>21</sup> Disappointingly, they have made these assertions with little or no empirical support.<sup>22</sup>

This Article provides the first comprehensive empirical analysis of EITC-eligible recipients to show that contrary to conventional wisdom, the typical EITC-eligible recipient is White.<sup>23</sup> The data also shows that most Blacks are ineligible for the EITC and that many EITC provisions that academics have argued favor Blacks in fact do not.

I hope this empirical analysis of EITC-eligible taxpayers based upon race will further the cause of EITC reform. By showing that the majority of EITC-eligible taxpayers are White, I demonstrate that the disadvantages associated with EITC recipients will continue to have a significantly greater impact on Whites than Blacks. This empirical data assists EITC reform efforts because, according to Professor Derrick Bell’s seminal article announcing the interest-

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<sup>18</sup> See, e.g., Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2537 (2001) (describing an email regarding the issue of black reparations: “Don’t we [whites] get any credit for the \$4 trillion spent on AFDC and federal housing? What about the earned income tax credit?”) (emphasis added). See also *infra* note 172 and accompanying text.

<sup>19</sup> See Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 754 (“[O]ther tax benefits that we have not studied (such as the earned income credit) may offer greater benefits to blacks.”); Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1523–24, 1568 (1998) (“It seems likely the benefits [of the earned income tax credit] go disproportionately to blacks.”).

<sup>20</sup> See James D. Bryce, *A Critical Evaluation of the Tax Critics*, 76 N.C. L. REV. 1687, 1695 (1998) (because Blacks are more likely to be poor, they are more likely to receive the EITC).

<sup>21</sup> See *supra* note 19.

<sup>22</sup> See *infra* Part III.C. Only one academic, Professor Bryce, made any attempt to provide empirical data; however, the data he used was an inappropriate proxy for analyzing the EITC. See generally Bryce, *supra* note 20.

<sup>23</sup> Certain scholars have provided limited empirical data on the racial impact of EITC-eligible recipients. See, e.g., John Karl Scholz, *The Earned Income Credit: Participation, Compliance, and Antipoverty Effectiveness*, 47 NAT’L TAX J. 63, 86 tbl.1 (1994) (providing that 24.1% of the EITC-eligible households in 1990 were Black); George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals To Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL’Y 225, 250 (1994) (“A profile of the EITC-eligible population in 1990 reveals [that] . . . 24.3% of the eligible households in that year were Black . . . .”); cf. Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1824 (1998) (“[I]t is entirely possible that higher black unemployment rates would lead to the conclusion that [the EITC] actually disadvantages blacks as a group at any given income level, since the sources of their incomes may be somewhat less likely to qualify them for this credit.”).

convergence thesis, the interests of Blacks are only accommodated when they coincide with the interests of Whites.<sup>24</sup> Once the empirical data is disseminated, tax policy efforts can be marshaled to ensure that low-income children have the same tax advantages available to middle-income children.<sup>25</sup> EITC reform is necessary to assist all low-income families, especially if it is discovered that they are being treated separately and unequally under the tax laws because of erroneous perceptions held by policymakers about their race.<sup>26</sup>

Part I describes and compares the EITC and the CTC. It describes the relatively harsh treatment received by EITC recipients as compared with CTC recipients. It then critiques race-neutral explanations for those differences.

Part II focuses on assertions that the EITC's disparate treatment is justified because the credit is "welfare." To understand the connotations of the "welfare" label, it describes how the public views welfare and how welfare has a racial context in American history. It shows that drawing an analogy between the EITC and welfare was the equivalent of playing the race card and designed to galvanize opposition against EITC recipients. To verify this conclusion, it compares the EITC with another set of government subsidies that are not widely considered "welfare"—farm subsidies. It finds in many important ways farm subsidies are more "welfare-like" than the EITC. This Part therefore concludes race is the only plausible explanation for the disparity in labeling.

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<sup>24</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[T]his principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."); see also Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 184 (2003); James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 943 (2004); Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 39-40 (1998); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1592 (2004).

<sup>25</sup> See Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 645 (1993) ("We are well aware, of course, that a progressive tax system affects different people differently, although we try to minimize the differing effects through formal concepts such as horizontal equity, with its mandate to treat like cases alike."). But see Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989) (critiquing the horizontal equity principle).

<sup>26</sup> Cf. NEWMAN ET AL., *supra* note 11, at 255 ("Although there were always black welfare recipients, until the seventies blacks were more likely to get lower benefits. And there have always been other anomalies in the system: fewer black men approved for welfare on the basis of incapacity despite demonstrably higher rates of disability; fewer black children approved for benefits despite their being in needy families of the same or larger size.") (citations omitted).

Part II then describes how academics have also placed the EITC in a racial context by stating that Blacks disproportionately benefit from the EITC. Part II then explores how academics have targeted EITC taxpayers and shows how those perceptions are inextricably linked to the recipients' race. It demonstrates the absence of valid empirical support for the perceptions. Part II concludes by describing the "political" nature of the EITC targeting by academics and their hostility towards analyzing federal tax policy from a race-based perspective.<sup>27</sup> Analyzing federal tax laws from a race-based perspective is important if societal goals of racial equality are to extend to tax policy. However, in order to be helpful, it must be based upon far more careful analysis than has previously been applied to the EITC.<sup>28</sup>

Part III tests these academics' assumptions and finds them wanting. It examines data from the Survey of Income and Program Participation ("SIPP")<sup>29</sup> to provide an empirical analysis of the EITC.<sup>30</sup> SIPP data are used because the Internal Revenue Service ("IRS") does not collect tax return information based upon race.<sup>31</sup> Part III discredits several myths surrounding the EITC: First, the data show that Whites are twice as likely as Blacks to be eligible for the EITC, and that the percentage of the EITC-eligible population that is White exceeds the combined percentages of Black and Hispanic eligibles.<sup>32</sup> Second, the data disclose that Blacks are far more likely to be *ineligible* for the EITC than eligible. Third, the data demonstrate that Blacks are very likely to be subject to the marriage penalty provisions in the EITC, even though fewer Blacks are married. Fourth, because the EITC (unlike the

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<sup>27</sup> Cf. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 572-78 (1984) (discussing how an inner circle of white, male scholars who were at the center of civil rights scholarship regularly excluded the voices of scholars of color) [hereinafter Delgado, *The Imperial Scholar*]; Richard Delgado, *The Imperial Scholar Revisited: How To Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1351 (1992) ("My conclusion is that mainstream figures who control the terms of discourse marginalize outsider writing as long as possible.") [hereinafter Delgado, *The Imperial Scholar Revisited*].

<sup>28</sup> This Article is not intended to discourage tax professors from applying critical race theory to federal tax policy. See, e.g., Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 105 (stating that "[e]veryone has to do black scholarship if it is to succeed").

<sup>29</sup> See *infra* note 313 and accompanying text.

<sup>30</sup> This Article is concerned with Black and White households. Although a richer examination would also include an examination of household income for other racial and ethnic groups, the taxpayer data concerning Asian-American and Native-American taxpayers is generally too small to perform statistical analysis with much confidence.

<sup>31</sup> Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 91 (1997).

<sup>32</sup> See *infra* Table 2.

CTC) does not increase with family size beyond two children, the EITC formula disadvantages Blacks and advantages Whites. Fifth, and most importantly, low-income EITC families are being severely disadvantaged when compared to their middle-income CTC counterparts.<sup>33</sup> The Article concludes by observing that the empirical data provided herein presents a unique opportunity for EITC reform.

## I. TAX BENEFITS FOR FAMILIES WITH CHILDREN

This Part describes the EITC and the CTC. It shows the complexity involved when an EITC recipient is also eligible for the CTC. It describes the differences in the two provisions as well as the differences in the treatment of EITC recipients when compared with CTC recipients. It then considers the race-neutral explanations for those differences.

### A. *Earned Income Tax Credit*

#### 1. *Who Is Eligible?*

Numerous articles have been written about the social policy implications of the EITC.<sup>34</sup> What follows is a brief overview of the EITC's provisions. Low-

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<sup>33</sup> The definition of the middle class is open to disagreement. See, e.g., Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967 (1997) ("American social scientists do not share a single definition of what it means to be 'middle-class[]' . . . ."); see also MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 95–104 (1995) (discussing the distinct differences between black middle-class and white middle-class families); MARY PATTILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* (1999) (discussing how the Black middle class is different from the White middle class because of enduring White racism); Richard Delgado, *Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 140 (1998) ("The black middle class . . . stands on quite a different footing from that of the white middle class. A black family with a yearly income of \$75,000 is apt to consist of a bus driver making \$45,000 and a nurse earning \$30,000, while the white family is apt to consist of a male engineer making that amount and a mother who stays home or works part-time.") (citations omitted); Malamud, *supra*, at 967–88 (discussing the differences between Black and White middle-class people in the areas of housing, work, income security, and education, among others); Wayne Washington, *Middle-Class Blacks Face Election Quandry: Many Side with GOP on Key Issues, but Don't Trust Party*, STAR TRIB. (Minneapolis-St. Paul), Sept. 17, 1996, at 10A ("Half of white households make more than \$35,000 a year, which is about the median national income. Barely a quarter of black households make that much.").

<sup>34</sup> See, e.g., Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995) [hereinafter Alstott, *The Earned Income Tax Credit*]; Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996) [hereinafter Alstott, *Tax Policy and Feminism*]; Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 290–93 (2002); Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997); Nancy C. Staudt,

income taxpayers are eligible to receive the EITC because Republican President Gerald Ford<sup>35</sup> established it in 1975 as an alternative to welfare.<sup>36</sup> The primary requirement of the EITC is that it only applies to “earned income.”<sup>37</sup> It provides a refundable credit for the working poor, which means low-income taxpayers may receive a refund in excess of their income tax withholding<sup>38</sup> and, in certain instances, in excess of their social security withholding.<sup>39</sup> In many instances, EITC-eligible families would live below the poverty line without the EITC refund.<sup>40</sup>

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*Taxing Housework*, 84 GEO. L.J. 1571, 1636–41 (1996); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004); Lawrence Zelenak, *Taxation: The Myth of Pretax Income*, 101 MICH. L. REV. 2261, 2263–64 (2003).

<sup>35</sup> See, e.g., Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–1999*, 53 NAT’L TAX J. 983, 995 (2000) (“With the economy slipping into recession in 1974, President Ford introduced the Tax Reduction Act of 1975, hoping that tax cuts would bring stimulative effects . . . . As part of the bill’s tax-cutting features, Congress established for one year, section 32 of the Internal Revenue Code, a refundable credit for taxpayers with incomes below \$8,000. The ‘Earned Income Credit’ (EIC) equaled 10 percent of the first \$4,000 of earned income, or \$400. It phased out at 10 percent, and vanished completely at \$8,000.”).

<sup>36</sup> *Id.* (stating that the Finance Committee report suggested that the EITC would “assist in encouraging people to obtain employment, reducing the unemployment rate and reducing the welfare rolls”) (internal quotation marks omitted); see also S. REP. NO. 94-938, at 119 (1976); S. REP. NO. 94-36, at 11 (1975) (demonstrating that the Senate Finance Committee emphasized that the primary goal was to encourage those on welfare to obtain employment and only granted the credit initially to taxpayers with dependant children); HANDLER, *supra* note 12, at 143 (“The EITC was conceived and developed as a distinct *alternative* to welfare reform.”) (emphasis in original); 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, 45–55 (1988) (providing an excellent discussion of the early legislative history regarding the enactment of the EITC).

<sup>37</sup> I.R.C. § 32(a) (2000).

<sup>38</sup> See 2 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES & GIFTS* § 37.1.1 (3d ed. 2004). (“Section 32, enacted in 1975 but repeatedly revised since then, provides a refundable credit to taxpayers with relatively small amounts of earned income.”) (citations omitted). The EITC is also designed to refund to the taxpayer amounts withheld from their paychecks for their share of social security contributions. See *infra* note 39 and accompanying text; see also H.R. REP. NO. 94-19, at 29 (1975) (“[I]t is appropriate to use the income tax system to offset the impact of the social security taxes on low-income persons . . . .”); Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 534 (observing that the EITC is “a means of offsetting the adverse distributional and incentive effects of federal income and payroll taxes on low-income workers”); Ventry, *supra* note 35, at 995 (“It would also offset payroll tax burdens for low-income families.”); Yin et al., *supra* note 23, at 230 (“An important goal of the [EITC] program is to offset the Social Security taxes paid by low-income workers.”).

<sup>39</sup> 2 BITTKER & LOKKEN, *supra* note 38, § 37.2 (“For most of the credit’s history, this relief amounted to no more than an exemption from income tax and a partial refund of social security taxes on the taxpayer’s wages. As Congress repeatedly increased the size of the credit, particularly in 1993, the credit has come to produce tax refunds exceeding social security taxes for many wage earners.”).

<sup>40</sup> JOHNSTON, *supra* note 8, at 129 (“[A]bout 19 million Americans . . . each year apply for a tax break for the working poor called the earned income tax credit. About five million of these families are lifted above the official poverty line because of the credit . . . .”); see also HANDLER & HASENFELD, *supra* note 11, at 159 (“It was estimated that among those families eligible for EITC, about 35% had incomes below the poverty line . . . . It is further estimated that EITC can lift about 5% of all poor families with dependent children above the

As originally enacted, the EITC did not increase for family size.<sup>41</sup> Subsequent amendments now allow the EITC to increase both for family and low-income wage earners without children.<sup>42</sup>

Calculating the EITC is quite complicated. The IRS publication which explains the EITC is over fifty pages long.<sup>43</sup> The majority of EITC returns are prepared by tax practitioners.<sup>44</sup> One estimate places the total costs paid to those practitioners to be \$1.75 billion.<sup>45</sup> The EITC's complexity is proven by the fact that EITC errors are made by taxpayers, tax preparers, and IRS staff.<sup>46</sup>

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poverty line.”) (internal citation omitted); Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461, 462 (“Without the EITC, an average of 4.3 million working American households, including 2.2 million children, would live in poverty.”).

<sup>41</sup> S. REP. NO. 1230, at 425–26 (1972) (showing that the Senate Finance Committee was concerned that the EITC eligibility rules may encourage taxpayers to have additional children as a way of increasing their EITC amount and decided not to vary benefits by family size so as not to provide an “economic incentive for having additional children”); cf. *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding that states may choose not to increase welfare benefits for additional children in the home); David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 702 (2004) (“Dissenting in *Dandridge v. Williams*, Justice Marshall complained that Maryland’s ceiling on the size of AFDC grants, although nominally denying all benefits ‘with respect to needy dependent children in excess of four or five’ was in fact a fractional reduction in all family members’ benefits.”).

<sup>42</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13131, 107 Stat. 312, 433–35 (1993). The EITC for taxpayers without children, however, is quite small. See *infra* note 67 and accompanying text.

<sup>43</sup> Harmelink et al., *supra* note 6, at 958–59 (“Determining eligibility for the earned income credit is a multi-stage process [requiring that one turn several times to] . . . *Publication 596, Earned Income Credit* (55 pages), for guidance . . . . [W]orking correctly through [the EITC] steps involves a substantial level of effort that in all practicality is rarely put forth, which results in half the returns having errors.”); Marjorie E. Kornhauser, *A Legislator Named Sue: Re-Imagining the Income Tax*, 5 J. GENDER RACE & JUST. 289, 315 n.56 (2002) (“The credit is extremely complex. For example, IRS Publication 596, dealing with the EIC, is 54 pages long and the error rate is high (a 1994 study revealed a 26% error rate.”); Lipman, *supra* note 40, at 464 (“*IRS Publication 596* explains the EITC in fifty-three pages, including multiple tables and six separate worksheets.”); Sheryl Stratton, *Policy Group Debates EITC and Regulating Return Preparers*, 88 TAX NOTES 465, 465 (2000) (“*IRS Publication 596*, which explains all aspects of EITC, is 54 pages long, including 6 separate worksheets . . .”).

<sup>44</sup> Lipman, *supra* note 40, at 465 (“Sixty-eight percent of tax filers who received the EITC hired paid tax practitioners to prepare their income tax returns. The American marketplace has responded to the demand and carved out a profitable business niche. Many of these tax services offer not only assistance in preparing and filing returns, but also provide refund anticipation loans (RALs), refund transfers, and other products intended to help taxpayers obtain their critical dollars quickly.”); Stratton, *supra* note 43, at 465 (“A recent IRS report revealed that 60 percent of earned income tax credit returns were signed by a paid preparer . . .”).

<sup>45</sup> Lipman, *supra* note 40, at 466 (“Tax practitioners exact significant fees and costs for providing these services. These fees and costs consume a significant portion of available EITC dollars. An estimated \$1.75 billion of the EITC intended to benefit low-income working families and their neighborhoods has been shifted to profitable paid tax practitioners.”).

<sup>46</sup> See GEN. ACCOUNTING OFFICE, GAO/GGD-95-5, TAX ADMINISTRATION: CONTINUING PROBLEMS AFFECT OTHERWISE SUCCESSFUL 1994 FILING SEASON 2 (Oct. 1994) (“The Earned Income Credit (EIC) was the source of many errors by taxpayers and tax practitioners in preparing returns. Those errors, along with

The IRS, however, has not provided any data comparing the EITC noncompliance rate for returns prepared by taxpayers with returns prepared by others.<sup>47</sup>

To be eligible, the taxpayer with a child must satisfy a relationship,<sup>48</sup> residence,<sup>49</sup> and age<sup>50</sup> test. The taxpayer without a child must also satisfy a relationship,<sup>51</sup> residence,<sup>52</sup> and age test.<sup>53</sup> Married couples must file joint returns.<sup>54</sup>

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errors by IRS staff in following IRS procedures for handling EIC claims, increased IRS' error resolution workload and delayed taxpayers' receipt of benefits."); *cf.* TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2004-40-154, IMPROVEMENTS ARE NEEDED TO ENSURE TAX RETURNS ARE PREPARED CORRECTLY AT INTERNAL REVENUE SERVICE VOLUNTEER INCOME TAX ASSISTANCE SITES 2 (Aug. 2004) ("Volunteers incorrectly prepared all 35 tax returns they prepared based on the facts in scenarios TIGTA auditors presented while making anonymous visits to 44 VITA sites." The tax returns included EITC calculations.)

<sup>47</sup> See GEN. ACCOUNTING OFFICE, GAO/T-GGD-97-105, TAX ADMINISTRATION: EARNED INCOME CREDIT NONCOMPLIANCE 10 (1997) [hereinafter GAO REPORT, EARNED INCOME CREDIT NONCOMPLIANCE] ("IRS has provided no data comparing the noncompliance rate for returns done without the help of a preparer and those done by preparers, much less volunteer preparers.")

<sup>48</sup> If the taxpayer has a qualifying child, the relationship test is satisfied if the "qualifying child" is either a child, descendant of a child, stepchild, or an "eligible foster child." I.R.C. § 32(c)(3)(B) (2000). A married person cannot be a "qualifying child" unless the taxpayer claiming the EITC can take a dependency exemption for the married person or would be so entitled but for an arrangement incident to a divorce or marital separation that gives the exemption to the non-custodial parent. *Id.* § 32(c)(3)(B)(ii); 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.1. If an individual would otherwise be a qualifying child of two or more persons the child is treated as a qualifying child of the person with the highest modified adjusted gross income. I.R.C. § 32(c)(1)(C); *see also* *Lestrangle v. C.I.R.*, 74 T.C.M. 685 (1997).

<sup>49</sup> Except in the case of foster children, a qualifying child must have the same place of abode as the credit-claiming taxpayer for at least one-half of the taxable year. I.R.C. § 32(c)(3)(A)(2). The residence test is satisfied in the case of a foster child if the individual has the same principal address as the taxpayer claiming the EITC for the entire taxable year. *Id.* § 32(c)(3)(B)(iii)(III).

<sup>50</sup> The age test is satisfied where "the qualifying child" is under the age of 19 unless a full-time student for at least five calendar months during the year, and in that instance must be under the age of 24, or the "qualifying child" must be "permanently and totally disabled" at any time during the taxable year. *Id.* § 32(c)(3)(C).

<sup>51</sup> No other individual is allowed a dependency deduction for the taxpayer claiming the EITC. 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.2 ("No other taxpayer is allowed a dependency deduction for the individual for a taxable year beginning during the same calendar year as the individual's taxable year.")

<sup>52</sup> The taxpayer's "principal place of abode" is in the United States for more than half of the taxable year. I.R.C. § 32(c)(1)(A)(1). The principal place of abode of a member of the U.S. Armed Forces is the United States whenever the person is stationed outside the country on extended active duty. *Id.* § 32(c)(4).

<sup>53</sup> The taxpayer at year end is at least twenty-five years old but less than sixty-five. *Id.* § 32(c)(1)(A)(ii)(II). For a married couple this requirement is deemed met by both spouses if either satisfies it. *Id.*

<sup>54</sup> *Id.* § 32(d).

The EITC creates marriage bonuses and marriage penalties in certain households.<sup>55</sup> Marriage bonuses occur when the spouses pay less in taxes (or receive a greater refund) as a result of marriage.<sup>56</sup> Marriage penalties occur when the spouses pay more in taxes (or receive a smaller refund) as a result of marriage.<sup>57</sup> In 2001, the EITC was amended to minimize the marriage penalty paid by EITC-eligible taxpayers.<sup>58</sup> Although the EITC phase-out amounts are currently \$1000 higher if the taxpayer is married, that \$1000 does very little to reduce the marriage penalties associated with the EITC.<sup>59</sup> Married taxpayers in equal wage-earning households are most likely to pay a marriage penalty.<sup>60</sup>

The EITC has several additional requirements. For the 2004 taxable year, the EITC was not available to taxpayers with investment income in excess of

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<sup>55</sup> Numerous scholars discuss the marriage bonuses and penalties inherent in the EITC. See, e.g., Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 559–64; Alstott, *Tax Policy and Feminism*, *supra* note 34, at 2039; Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1479–81 (1997); Edward J. McCaffery, *The Burdens of Benefits*, 44 VILL. L. REV. 445, 485 (1999) (“[W]e see that two-earner households are punished, even among the poor, and even at a time when they form the vast majority of two-parent households.”); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 995–96, 1014–20 (1993); see also CONG. BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 21 (1997) (showing an example where a married couple under the EITC would suffer a marriage penalty of almost 17% of their adjusted gross income). See generally Stacy Dickert-Conlin & Scott Houser, *EITC and Marriage*, 55 NAT’L TAX J. 25 (2002); Stacy Dickert-Conlin & Scott Houser, *Taxes and Transfers: A New Look at the Marriage Penalty*, 51 NAT’L TAX J. 175 (1998); Jonathan Barry Forman, *What Can Be Done About Marriage Penalties?*, 30 FAM. L.Q. 1, 8 (1996); Gene Steuerle, *Is It Worth Spending Money To Reduce Marriage Penalties?*, 79 TAX NOTES 1629 (1998); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 46–57 (2000).

<sup>56</sup> Brown, *supra* note 31, at 92–93; Brown, *supra* note 55, at 1479; Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287, 288–89 (1999); Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What’s Tax Policy Got To Do with It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 760 (1999).

<sup>57</sup> See *supra* note 56.

<sup>58</sup> 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 (2001).

<sup>59</sup> See Allan J. Samansky, *New Developments in Marriage Penalties and Bonuses*, 96 TAX NOTES 1745, 1745–46 (2002) (“To reduce the marriage penalty for low-income persons, the Economic Growth and Tax Relief Reconciliation Act of 2001 . . . has increased the income level at which the EITC begins to be phased out for married couples who file jointly. This change, however, reduces marriage penalties by a maximum of \$211 in 2002, the first year it is effective, and by a maximum of \$632 in 2008, when it is fully phased in. These are rather modest changes when equal-earning, low-income persons have been subject to marriage penalties exceeding \$3,000.”).

<sup>60</sup> See *id.* at 1748 (“Equal-earning, low-income married couples with two children have been subject to some of the highest marriage penalties, relative to income, imposed by the Internal Revenue Code . . . .”) (citing Zelenak, *supra* note 55, at 46–47); see also CONG. BUDGET OFFICE, *supra* note 55, at 17–23; Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 559–64.

\$2650 or to taxpayers with incomes derived from sources other than wages or self-employment.<sup>61</sup> As previously mentioned, the EITC generally is available only to workers. In order to receive the EITC, the return must include the social security numbers of the taxpayer and, if married, the taxpayer's spouse.<sup>62</sup> The EITC is not available to a nonresident alien unless that individual is married to a U.S. citizen or resident and elects to be taxed as a resident.<sup>63</sup>

## 2. EITC Calculations: How Much?

Table 1: EITC Limitations (2004)<sup>64</sup>

	0 Children	1 Child	2 or More Children
Maximum Credit	\$390	\$2604	\$4300
Earned Income Amount	\$5100	\$7660	\$10,750
Threshold Phase-Out Amount	\$6390	\$14,040	\$14,040
Married Filing Jointly	\$7390	\$15,040	\$15,040
Phase-Out Ends—(No EITC)	\$11,490	\$30,338	\$34,458
Married Filing Jointly	\$12,490	\$31,338	\$35,458

<sup>61</sup> The income that can cause the EITC to be denied if it is in excess of \$2650 includes interest and dividends includible in gross income, tax-exempt interest, net rents and royalties, capital gain net income, and net income from passive activities. I.R.C. § 32(i) (2000). While the statute specified \$2200 instead of \$2650 as the threshold figure, this figure is adjusted annually to account for inflation. *Id.* § 32(j). Earned income does not include workfare payments under the 1996 Welfare Reform Act (I.R.C. § 32(c)(2)(B)(v)) or any amount received for services performed while the taxpayer is an inmate at a penal institution. *Id.* § 32(c)(2)(B)(iv); *see also* Rev. Proc. 2003-85, 2003-49 I.R.B. 1187-88; 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.3.

<sup>62</sup> I.R.C. § 32(c)(1)(F).

<sup>63</sup> *See id.* § 32(c)(1)(E).

<sup>64</sup> Rev. Proc. 2003-85, 2003-49 I.R.B. 1187.

Table 1 provides the basics of the EITC. The EITC varies based upon income and the number of children in the taxpayer's household.<sup>65</sup> The EITC is greatest for households with two or more children.<sup>66</sup> It is the least for households with no children.<sup>67</sup> The EITC amount does not increase for households with more than two children. The EITC per child is greatest for households with one child since the EITC calculation for two or more children is not twice the value of the one child EITC amount. For example, the maximum EITC is \$2604 for households with one child. The maximum EITC for a household with two children is not \$5208 (twice the EITC for one child households), but is \$4300.

The credit amount increases as long as income increases, up to a certain level of income.<sup>68</sup> Professor Anne Alstott referred to this as the earnings subsidy.<sup>69</sup> Once income reaches a certain level ("the earned income amount"), the credit remains the same even as income continues to increase.<sup>70</sup> As the taxpayer's income reaches another level ("threshold phase-out amount"), the

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<sup>65</sup> See 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.1.

<sup>66</sup> For households with two or more children, in 2004, the maximum EITC was \$4300. See *supra* Table 1.

<sup>67</sup> For households with no children, the greatest EITC was \$390. See *supra* Table 1.

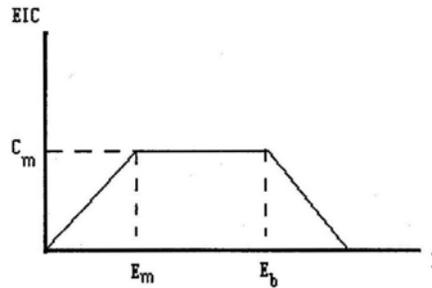
<sup>68</sup> Generally, the EITC is calculated by multiplying the "credit percentage" by the taxpayer's earned income until the taxpayer's earned income reaches an "earned income amount." See I.R.C. § 32(a)(1) ("In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to the credit percentage of so much of the taxpayer's earned income for the taxable year as does not exceed the earned income amount."). The "credit percentage," the "earned income amount," the "phaseout percentage," and the "phaseout amount" are all based upon the number of the taxpayer's qualifying children. See *id.* § 32(b)(1). For taxable year 2004, the "credit percentage" is 40% for taxpayers with two or more qualifying children, 34% for taxpayers with one qualifying child, and 7.65% for taxpayers with no qualifying children. See *id.* § 32(b)(1)(A). The "phaseout percentage" is 21.06% for a taxpayer with two or more qualifying children, 15.98% for a taxpayer with one qualifying child, and 7.65% for a taxpayer without a qualifying child. *Id.*; see 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.3.

<sup>69</sup> See Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 541 ("[T]he EITC provides an earnings subsidy equal to an extra forty cents for every dollar of earnings.").

<sup>70</sup> After the taxpayer's earned income reaches the "earned income amount," the EITC is calculated by multiplying the "credit percentage" by the taxpayer's "earned income amount." When the taxpayer's earned income exceeds the "earned income amount," but is less than the "threshold phaseout amount," the EITC is calculated by multiplying the "credit percentage" by the taxpayer's "earned income amount." In this income range, the taxpayer's earned income increases, but their EITC remains the same. As a result, this income range is commonly referred to as the "flat range."

credit begins to decrease as income increases.<sup>71</sup> This resembles a means test.<sup>72</sup> As income increases, the EITC decreases. Eventually, as income continues to increase, the credit will decrease to zero. Consider the following diagram which visually explains the mechanics of the EITC.

Figure 1: EITC Calculations<sup>73</sup>



In Figure 1,  $C_m$  represents the credit amount,  $E_m$  represents the earned income amount, and  $E_b$  represents the income level where the EITC begins to decrease. The EITC is the greatest for families with at least two children. However, the threshold phase-out amount is greater for families with children than for families with no children, though families with children have the same threshold phase-out amount regardless of the number of children they have.

<sup>71</sup> Once the taxpayer's earned income exceeds a "threshold phase-out amount," the EITC is also phased out. How that phase-out occurs adds significantly to the EITC's complexity. Once the taxpayer's earned income reaches the "threshold phase-out amount," the EITC credit calculation formula changes in order to reduce the taxpayer's EITC. The phase-out calculation has two parts. The first part is calculated by multiplying the "credit percentage" by the taxpayer's "earned income amount" (hereinafter the "first half amount"). The second part will produce an amount that will be subtracted from the first half amount. The second part begins by subtracting the "phase-out amount" from the taxpayer's earned income once the taxpayer's earned income exceeds the "threshold phase-out amount." See I.R.C. § 32(a)(2). The result is then multiplied by a "phase-out percentage" (hereinafter the "phase-out sum"). The phase-out sum will then be subtracted from the first half amount to arrive at the taxpayer's EITC. See *id.* § 32(a)(2). When the phase-out amount equals the first half amount, the EITC will be zero and the phase-out will be complete. See *id.* § 32(a)(2)(B). Technically, the Internal Revenue Code provides that the phase-out percentage is multiplied by either "the modified adjusted gross income or if greater, the earned income of the taxpayer." *Id.* Therefore modified adjusted gross income of the taxpayer will have to be compared with the earned income of the taxpayer. I have eliminated this step in the text by using the term "earned income" for simplicity's sake.

<sup>72</sup> Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 541 ("[At this income level] the EITC resembles a traditional income-transfer program, which reduces benefits as earnings increase.").

<sup>73</sup> Timothy J. Eifler, Comment, *The Earned Income Tax Credit as a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 710 (1994) (reprinted with permission).

The EITC is reduced to zero at higher earned income amounts for families with at least two children when compared with families with one child. The EITC is reduced to zero at higher earned income amounts for families with one child when compared to households with no children.

### 3. *Government Scrutiny and the EITC*

Over the past decade, the EITC has been the subject of scrutiny by members of Congress. The government has focused significant resources and energy on these efforts. Numerous General Accounting Office (“GAO”) reports were published and governmental hearings were held addressing the EITC.<sup>74</sup> Most of these reports and hearings, if not all, focused on noncompliance issues.

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<sup>74</sup> See GAO REPORT, EARNED INCOME CREDIT NONCOMPLIANCE, *supra* note 47; GEN. ACCOUNTING OFFICE, GAO/GGD-97-69, EARNED INCOME CREDIT: CLAIMANTS’ CREDIT PARTICIPATION AND INCOME PATTERNS, TAX YEARS 1990 THROUGH 1994 1 (1997) (Analyzing “tax years 1990 through 1994, [EITC] claimants’ patterns of claiming the credit, changes in their income in the years following an [EITC] claim, and their income and filing status after leaving the [EITC].”); GEN. ACCOUNTING OFFICE, GAO/GGD-96-172, EARNED INCOME CREDIT: IRS’ 1995 CONTROLS STOPPED SOME NONCOMPLIANCE, BUT NOT WITHOUT PROBLEMS 1 (1996) [hereinafter GAO REPORT, IRS’ 1995 CONTROLS STOPPED SOME NONCOMPLIANCE] (“This report responds to your request for information on Earned Income Credit (EIC) noncompliance. Specifically, our objective was to provide information on and our analysis of the results of the Internal Revenue Service’s (IRS) efforts to reduce noncompliance in calendar year 1995.”); GEN. ACCOUNTING OFFICE, GAO/GGD-98-150, EARNED INCOME CREDIT: IRS’ TAX YEAR 1994 COMPLIANCE STUDY AND RECENT EFFORTS TO REDUCE NONCOMPLIANCE (1998) [hereinafter GAO REPORT, 1994 COMPLIANCE STUDY]; GEN. ACCOUNTING OFFICE, GAO/T-GGD-95-179, EARNED INCOME CREDIT: NONCOMPLIANCE AND POTENTIAL ELIGIBILITY REVISIONS (1995) [hereinafter GAO REPORT, POTENTIAL ELIGIBILITY REVISIONS]; GEN. ACCOUNTING OFFICE, GAO/GGD-97-120R, EARNED INCOME CREDIT: NONCOMPLIANCE RELATIVE TO OTHER COMPONENTS OF THE INCOME TAX GAP (1997) [hereinafter GAO REPORT, NONCOMPLIANCE RELATIVE]; GEN. ACCOUNTING OFFICE, GAO-02-449, EARNED INCOME CREDIT: OPPORTUNITIES TO MAKE RECERTIFICATION PROGRAM LESS CONFUSING AND MORE CONSISTENT 2 (2002) [hereinafter GAO REPORT, OPPORTUNITIES TO MAKE RECERTIFICATION PROGRAM] (“Administering the EIC is not an easy task for IRS. IRS has to balance its efforts to help ensure that all qualified persons claim the credit with its efforts to protect the integrity of the tax system and guard against fraud and other forms of noncompliance associated with the EIC.”); GEN. ACCOUNTING OFFICE, GAO/GGD-96-122BR, EARNED INCOME CREDIT: PROFILE OF TAX YEAR 1994 CREDIT RECIPIENTS 1 (1996) (“This report . . . is the latest in a series of reports and testimonies responding to your interest in the Earned Income Credit (EIC).”); GEN. ACCOUNTING OFFICE, GAO-03-794, EARNED INCOME CREDIT: QUALIFYING CHILD CERTIFICATION TEST APPEARS JUSTIFIED, BUT EVALUATION PLAN IS INCOMPLETE (2003) [hereinafter GAO REPORT, QUALIFYING CHILD CERTIFICATION TEST]; GEN. ACCOUNTING OFFICE, GAO/GGD-95-122BR, EARNED INCOME CREDIT: TARGETING TO THE WORKING POOR 1 (1995) [hereinafter GAO REPORT, TARGETING TO THE WORKING POOR] (“This is our second report responding to your interest in the Earned Income Credit (EIC).”); GEN. ACCOUNTING OFFICE, GAO/T-GGD-95-136, EARNED INCOME CREDIT: TARGETING TO THE WORKING POOR (1995); GEN. ACCOUNTING OFFICE, GAO-01-263, HIGH-RISK SERIES: AN UPDATE 155 (2001) (“Earned Income Credit (EIC) noncompliance exposes the federal government to billions of dollars of risk.”); GEN. ACCOUNTING OFFICE, GAO-03-109, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: DEPARTMENT OF THE TREASURY 11 (2003) [hereinafter

Noncompliance has been defined to include “erroneous [EITC] claims caused by negligence, mistakes, confusion, and fraud.”<sup>75</sup> Most of the studies did not consider taxpayers who were eligible to receive EITCs but did not claim them.<sup>76</sup> One recent study, however, provides that “for every three households that claimed the credit, there was an additional eligible household that did not.”<sup>77</sup>

Audit rates for EITC taxpayers are higher than for other income groups. Beginning in 1962, the IRS started the Taxpayer Compliance Measurement Program (“TCMP”).<sup>78</sup> The TCMP allowed the IRS to perform line-by-line audits on a random sample of tax returns.<sup>79</sup> TCMP audits covered eleven different types of tax returns<sup>80</sup> and were done every three years until Congress decided to end the program in 1994.<sup>81</sup> In 1988, when the last TCMP examined

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GAO REPORT, MAJOR MANAGEMENT CHALLENGES] (“There are significant compliance problems associated with the earned income credit that have led us to list IRS’s administration of the credit as a high-risk area for the federal government.”); GEN. ACCOUNTING OFFICE, GAO-01-158, TAX ADMINISTRATION: ASSESSMENT OF IRS’ 2000 TAX FILING SEASON 25 (2000) [hereinafter GAO REPORT, 2000 TAX FILING SEASON] (“During the past several filing seasons, IRS has undertaken several efforts aimed at reducing noncompliance with the EIC eligibility requirements . . . . In 2000, IRS continued these efforts and began a new effort directed at tax return preparers.”); GEN. ACCOUNTING OFFICE, GAO/GGD-95-27, TAX ADMINISTRATION: EARNED INCOME CREDIT—DATA ON NONCOMPLIANCE AND ILLEGAL ALIEN RECIPIENTS (1994); GEN. ACCOUNTING OFFICE, GAO/GGD-99-21, TAX ADMINISTRATION: IRS’ 1998 TAX FILING SEASON 22 (1998) [hereinafter GAO REPORT, 1998 TAX FILING SEASON] (“Because of concerns about noncompliance and fraudulent claims, IRS has given increased attention to EIC claims during the past few filing seasons.”); GEN. ACCOUNTING OFFICE, GAO/GGD-93-145, TAX POLICY: EARNED INCOME TAX CREDIT: DESIGN AND ADMINISTRATION COULD BE IMPROVED (1993).

<sup>75</sup> GAO REPORT, POTENTIAL ELIGIBILITY REVISIONS, *supra* note 74, at 4 n.2.

<sup>76</sup> GAO REPORT, 1994 COMPLIANCE STUDY, *supra* note 74, at 1.

<sup>77</sup> GAO REPORT, MAJOR MANAGEMENT CHALLENGES, *supra* note 74, at 12.

<sup>78</sup> GEN. ACCOUNTING OFFICE, GAO/T-GGD-95-207, TAX COMPLIANCE: 1994 TAXPAYER COMPLIANCE MEASUREMENT PROGRAM 1 (1995) [hereinafter GAO REPORT, TAXPAYER COMPLIANCE]; Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1020 (2003) (“The foundation of the compliance figures was substantially eroded by the abandonment of the Taxpayer Compliance Measurement Program (TCMP) in 1994, leaving the 1988 TCMP data as the most recently gathered.”).

<sup>79</sup> GAO REPORT, TAXPAYER COMPLIANCE, *supra* note 78, at 1.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; Johnson, *supra* note 78, at 1020 (“The foundation of the compliance figures was substantially eroded by the abandonment of the Taxpayer Compliance Measurement Program (TCMP) in 1994, leaving the 1988 TCMP data as the most recently gathered.”); Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 917 (2002) (“It is difficult to determine how much of the everyday type of tax evasion occurs because there are no accurate measures of voluntary compliance since the last IRS measurement of compliance occurred in 1988 under the now suspended Taxpayer Compliance Measurement Program (TCMP).”). Recently, however, the National Research Program was created to audit 46,000 individual income tax returns for 2001. Allen Kenney, *New IRS Estimates Show Slight Widening of Tax Gap*, 107 TAX NOTES 7 (2005) (“Policymakers and government

individual tax returns, the IRS found that 42% of EITC recipients were not entitled to some or all of their claimed EITC.<sup>82</sup> The EITC has undergone significant controls and changes since then that have reduced the EITC noncompliance rate.

For the 1994 tax year, the “IRS estimated that 25.8% of the [EITC], or \$4.4 billion, was overclaimed . . . .”<sup>83</sup> For the 1997 tax year, the IRS estimated that 25.6% of the EITC, or \$7.8 billion was overclaimed.<sup>84</sup> For the 1999 tax year, the IRS estimated that between 30.9% and 35.5% of the EITC, or between \$9.7 billion and \$11.1 billion was overclaimed.<sup>85</sup> However, these error rates are not without controversy.

The last year studied, 1999, does not take into account recently enacted changes designed to reduce errors.<sup>86</sup> One estimate concludes that EITC

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officials have been eagerly awaiting the results of the study, known as the National Research Program, hoping to get a better picture of the problems underlying the country’s tax administration system.”)

<sup>82</sup> GAO REPORT, IRS’ 1995 CONTROLS STOPPED SOME NONCOMPLIANCE, *supra* note 74, at 4.

<sup>83</sup> GAO REPORT, NONCOMPLIANCE RELATIVE, *supra* note 74, at 1.

<sup>84</sup> GAO REPORT, 2000 TAX FILING SEASON, *supra* note 74, at 27–28.

<sup>85</sup> GAO REPORT, OPPORTUNITIES TO MAKE RECERTIFICATION PROGRAM, *supra* note 74, at 5. The GAO report acknowledges that “[i]t is not known how much of the overclaims was due to simple error versus negligence or fraud.” *Id.* at n.6. *But see* GEN. ACCOUNTING OFFICE, GAO-03-962R, MAY 20 OVERSIGHT HEARING ON THE INTERNAL REVENUE SERVICE—QUESTIONS FOR THE RECORD 3 (2003) [hereinafter GAO REPORT, MAY 20 OVERSIGHT HEARING] (“[F]or tax year 1999 . . . overpayments for the EIC are estimated to be between 27 and 32 percent of dollars claimed or between \$8.5 billion and \$9.9 billion.”); GAO REPORT, QUALIFYING CHILD CERTIFICATION TEST, *supra* note 74, at 6 (“The most current data available, for tax year 1999, show EIC overclaim rates estimated to be between 27 and 32 percent of dollars claimed or between \$8.5 billion and \$9.9 billion. IRS has limited data on underclaims, which for tax year 1999 were estimated to be between \$710 million and \$765 million.”). The fourth study during this time frame considered electronic returns filed over a two-week period. While acknowledging that “reliable noncompliance measures do not exist for the entire EIC program,” the GAO report goes on to analyze electronic returns filed in January 1994 and “found that an estimated 29 percent of those recipients received too much EIC, and 1 percent intentionally claimed too much.” GAO REPORT, TARGETING TO THE WORKING POOR, *supra* note 74, at 1. A complete IRS analysis of tax year 1994 EIC filers showed that 25.8% was overclaimed. GAO REPORT, EARNED INCOME CREDIT NONCOMPLIANCE, *supra* note 47, at 4.

<sup>86</sup> Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145, 1146–47 (2003) (“[T]he most recent study of EITC noncompliance relates to 1999, prior to the time that many of the most significant legislative approaches to reduce EITC noncompliance were effective . . . .”); Robert Greenstein, *What Is the Magnitude of EITC Overpayments?*, CENTER ON BUDGET & POL. PRIORITIES, July 23, 2003, at 1, available at <http://www.cbpp.org/5-20-03eitc3.pdf> (“The magnitude of current EITC overpayments is not known. 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, including two significant measures enacted in 1997 but only partially in effect by 1999, and four further changes enacted in 2001.”).

changes enacted in 2001 could reduce EITC overpayments by almost \$2 billion a year.<sup>87</sup> The methodology used by the IRS has come under attack as well.<sup>88</sup>

While the IRS estimate of the EITC noncompliance rate is high, it is not the highest. The IRS estimates that taxes owed but unpaid by individual and corporate taxpayers is over \$100 billion (the "tax gap").<sup>89</sup> In addition, the IRS states that its enforcement efforts only resulted in the collection of about 25% of the tax gap.<sup>90</sup> Underreported income by self-employed taxpayers was nearly \$30 billion of the tax gap.<sup>91</sup> The estimated tax gap for the EITC exceeded \$1 billion.<sup>92</sup> The EITC therefore represents less than 1% of the tax gap.

The IRS estimates that self-employed individuals generally underreport their income by 64%, and self-employed individuals who operate in a cash business underreport their income by 89%.<sup>93</sup> Small corporations and sole proprietors constitute 29% of the tax gap.<sup>94</sup> Thus, significant noncompliance areas that generate greater revenue losses than are estimated for the EITC go unaudited.<sup>95</sup>

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<sup>87</sup> See Greenstein, *supra* note 86, at 1 (citation omitted).

<sup>88</sup> *Id.* at 2 (citing TREASURY INSPECTOR GEN. FOR TAX ADMIN., THERE ARE SIGNIFICANT WEAKNESSES IN THE INTERNAL REVENUE SERVICE'S EFFORTS TO MEASURE EARNED INCOME TAX CREDIT COMPLIANCE (2001)). "[T]he study was not developed well enough to be able to distinguish different sources of error . . . . [T]he study does not tell us approximately what percentage of errors are due to two people filing for the same child, and how often such double filing involves filers living apart or together." *Id.* at 3.

<sup>89</sup> See GEN. ACCOUNTING OFFICE, GAO/GGD-94-123, TAX GAP: MANY ACTIONS TAKEN, BUT A COHESIVE COMPLIANCE STRATEGY NEEDED 2 (1994) [hereinafter GAO REPORT, COMPLIANCE STRATEGY NEEDED] ("The Internal Revenue Service (IRS) has estimated that individual business taxpayers owed but did not voluntarily pay over \$100 billion in 1992 income taxes (i.e., gross tax gap)."). A more recent IRS estimate for tax year 1998 puts the tax gap at almost \$280 billion. Robert E. Brown & Mark J. Mazur, *The National Research Program: Measuring Taxpayer Compliance Comprehensively*, 51 U. KAN. L. REV. 1255, 1256 (2003) ("For tax year 1998, the IRS estimates that the overall size of the tax gap is approximately \$280 billion.") (citation omitted).

<sup>90</sup> *Id.* ("IRS further estimated that its enforcement programs did not collect about three-quarters of the gross tax gap (i.e., net tax gap).").

<sup>91</sup> *Id.* at 52.

<sup>92</sup> *Id.* at 45.

<sup>93</sup> GAO REPORT, POTENTIAL ELIGIBILITY REVISIONS, *supra* note 74, at 4-5.

<sup>94</sup> GAO REPORT, COMPLIANCE STRATEGY NEEDED, *supra* note 89, at 7. ("As a starting point, IRS could focus more of its efforts on highly noncompliant groups, such as small corporations and sole proprietors, who make up 29 percent of the tax gap.")

<sup>95</sup> See Harmelink et al., *supra* note 6, at 960 (showing that individual noncompliance was estimated at \$132 billion, offshore noncompliance at \$70 billion, corporate noncompliance at \$46 billion, and partnership noncompliance at \$30 billion, compared with the estimates for EITC noncompliance which was placed at \$10 billion).

In 1997, a GAO report advised that “concern about EITC noncompliance [must] not become so encompassing that other areas of noncompliance are neglected.”<sup>96</sup> Former Treasury Secretary Lawrence H. Summers “warned that illegal corporate tax shelters were costing taxpayers at least \$10 billion a year.”<sup>97</sup> Yet since 1988, the *only* studies of taxpayer compliance have been in the EITC area, and four of them have been done between 1993 and 1999.<sup>98</sup>

Congress stopped the IRS from conducting TCMP studies generally because “the filers selected for review when past studies of general noncompliance were conducted were subject to excessive burdens and intrusion.”<sup>99</sup> As a result, audit rates have generally decreased since fiscal year 1988 for the highest-income taxpayers, while rates have increased for the lowest-income individuals.<sup>100</sup> IRS officials acknowledge this is mainly a result of the recent emphasis on nonfilers and EITC claims.<sup>101</sup>

Generally, “audits of the highest-income groups resulted in as much as 4 to 5 times more additional tax recommended per return . . . than did audits of the

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<sup>96</sup> GAO REPORT, EARNED INCOME CREDIT NONCOMPLIANCE, *supra* note 47, at 11.

<sup>97</sup> Lee, *supra* note 8, at 301 (“Former Treasury Secretary Lawrence H. Summers [sic] is reported to have warned in February 2000 that ‘illegal corporate tax shelters were costing taxpayers at least \$10 billion a year.’”); *see also* Harmelink et al., *supra* note 6, at 955 (“In April 2002, then-acting IRS Commissioner Robert Wenzel identified [the following] six major noncompliance areas . . . : 1. the array of tax schemes marketed to taxpayers; 2. hiding income in trusts and offshore devices; 3. corporate tax shelters of an abusive nature; 4. high income taxpayers and underreporting income; 5. nonpayment of high amounts of employment tax; and 6. invalid EITC payments.”).

<sup>98</sup> Greenstein, *supra* note 6, at 1528 (“The disparity between the treatment of the EITC and the treatment of the much larger losses caused by noncompliance with other features of the tax code also can be seen in the attention paid to determining the level of such losses. 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 Compliance Measure Program study. However, the IRS undertook four studies on noncompliance among EITC claimants between 1993 and 1999.’”) (citation omitted); *see also infra* notes 107–10 and accompanying text.

<sup>99</sup> Greenstein, *supra* note 6, at 1528; *see also* GEN. ACCOUNTING OFFICE, GAO-02-769, TAX ADMINISTRATION: NEW COMPLIANCE RESEARCH EFFORT IS ON TRACK, BUT IMPORTANT WORK REMAINS 4 (2002) (“However, IRS last measured voluntary reporting compliance over a decade ago when it did line-by-line audits of about 50,000 individual tax year 1988 tax returns. IRS planned to measure reporting compliance using 1994 returns in an ambitious effort involving over 150,000 randomly selected returns, including 92,000 individuals (including sole proprietorships and farmers) as well as corporations, partnerships, and S-corporations. Before beginning the audit process, however, IRS cancelled the study because of its cost and because of criticism from Congress, the media, tax community, and taxpayers about the size of the sample and the burden imposed by the audits on compliant taxpayers.”).

<sup>100</sup> *See supra* note 8.

<sup>101</sup> GEN. ACCOUNTING OFFICE, GAO/GGD-96-91, TAX ADMINISTRATION: AUDIT TRENDS AND RESULTS FOR INDIVIDUAL TAXPAYERS 3 (1996).

lowest-income groups.”<sup>102</sup> However, audits of high-income taxpayers are far more time-consuming than audits of low-income taxpayers.<sup>103</sup>

While the budget for IRS audits has generally decreased because Congress considers them to be “intrusive” to taxpayers,<sup>104</sup> the budget for EITC taxpayer

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<sup>102</sup> *Id.* at 11.

<sup>103</sup> *Id.* at 3–4 (“IRS examination officials told us that although audits of the highest-income individuals usually result in substantially greater additional tax recommended per audit, they tend to be more complex and time consuming than do audits of the lowest-income individuals, which tend to focus on single issues and take very little time to complete.”). Consider also the case of Jack Welch, former chairman and chief executive of General Electric Company, who received significant retirement benefits. See Amelia H.C. Ylagan, *Corporate Watch: Executive Salaries and Perks*, BUSINESSWORLD, Oct. 7, 2002, at 4, available at LEXIS, News Library, BusinessWorld File (noting the benefits included “24-hour access to a GE Boeing 737 . . . the plush apartment fronting Central park, lavishly interior-decorated and provided with food and valet/maid service . . . continued membership including dues and charge accounts in three prestigious golf clubs . . . lifetime guaranteed tickets to Wimbledon, the US Open and other Majors, VIP seats at the opera, courtside seats at the New York Knicks games, a box at the Red Sox and Yankees and all social and sports events sponsored by GE-owned NBC”); see also Rachel Emma Silverman, *Here’s the Retirement Jack Welch Built: \$1.4 Million a Month*, WALL ST. J., Oct. 31, 2002, at A15 (describing how Jack Welch “was granted the use of numerous company facilities in an employment contract signed in 1996”). These benefits were not disclosed to shareholders, because the disclosure rules did not require it. See Ylagan, *supra*, at 4 (“[T]he U.S. Securities and Exchange Commission [investigated] whether these [perks] were disclosed to the GE shareholders, and if reportorial requirements on executive pay and perks were complied with. GE’s immediate response was that executive salaries and perquisites are posted (in summation only) on the company website, and no SEC regulations or reportorial requirements were violated. SEC requires disclosure of perks if they are worth 25% of the value of all company perks.”).

Without the divorce proceedings these arrangements would never have come to light. See *Senator John McCain (R-AZ) Holds a Hearing on CEO Compensation in the Post-Enron Era*, May 20, 2003, available at LEXIS, News Library, FDCH Political Transcripts File (statement of Peter Clapman, Senior Vice President and Chief Counsel of Corporate Governance, TIAA-CREF) (“Well, in my written comments, Senator Lautenberg, I indicate that current disclosure rules are inadequate to really understand fully about executive compensation. We’re partly an insurance company. And when we look at what’s called supplemental employee retirement benefit or whatever, SERPS is the acronym for them, and try to value them, even with actuaries we can’t do it. It took a divorce proceeding to disclose fully the Jack Welch retirement package. It was not disclosed in any proxy statement, which I guess shows the benefit of long-term marriages, to avoid having that problem to deal with.”). Once the facts became public in court filings, Jack Welch agreed to pay for his personal use of most company facilities and services. Silverman, *supra*, at A15 (“Mr. Welch and GE came under fire when Mrs. Welch revealed many details of the GE-provided benefits, including Mr. Welch’s personal use of a company apartment in Manhattan, in a filing last month. Soon after the document was filed, Mr. Welch said he would pay for his personal use of most company facilities and services.”). Whether Jack Welch paid income taxes on the value of those perks is an open question, but one worthy of further IRS investigation. See Ylagan, *supra*, at 4 (“[W]hether Jack Welch paid taxes on the perks and other non-cash benefits is a matter for the IRS.”).

<sup>104</sup> Greenstein, *supra* note 6, at 1528 (“This failure to conduct comprehensive studies since 1988 on noncompliance is a result of action by Congress to bar the IRS from conducting further such studies, on the grounds that the filers selected for review when past studies of general noncompliance were conducted were subject to excessive burdens and intrusion. Congress continued, however, to encourage the IRS to conduct comparable studies of noncompliance among low-income EITC filers. (Congressional objections to studies of noncompliance in other parts of the tax code have recently been overcome, and the IRS plans to resume these

audits has increased.<sup>105</sup> Since 1998, almost \$900 million has been appropriated specifically for earned income compliance initiatives (“EIC”).<sup>106</sup>

In 1998, the IRS began its “EIC compliance initiative.”<sup>107</sup> This was the result of new laws enacted by Congress<sup>108</sup> and funding specifically approved by Congress for IRS-directed EITC activities.<sup>109</sup> Between 1998 and 2003, Congress made special appropriations of almost \$900 million for the IRS’s EITC compliance initiatives.<sup>110</sup>

Significant taxpayer dollars are being spent on EITC audits when compared with the revenue that is being generated.<sup>111</sup> While the assumption has often

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studies in coming years in modified form.”).

<sup>105</sup> GAO REPORT, MAY 20 OVERSIGHT HEARING, *supra* note 85.

<sup>106</sup> *Id.*

<sup>107</sup> See GAO REPORT, 1994 COMPLIANCE STUDY, *supra* note 74, at 2–3.

<sup>108</sup> I.R.C. § 32(k) (2000); see 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.2 (“Concerned about high error and fraud rates on returns claiming the credit, Congress, in 1997, imposed several sanctions designed to encourage better compliance with the credit limitations. If a taxpayer’s credit claim for any year is finally determined to be ‘due to fraud,’ the credit is disallowed for each of the succeeding 10 years. If a claim of credit is found to be ‘due to reckless or intentional disregard of rules and regulations (but not fraud),’ credit is denied for each of the following two taxable years.”); GAO REPORT, 1998 TAX FILING SEASON, *supra* note 74, at 23 (“Since 1997, the IRS has had the authority to disallow, through its math error program, any deductions and credits associated with an invalid SSN.”); *id.* at 26 (“TRA97 provides that taxpayers who fraudulently claimed the EIC beginning with tax year 1997 (i.e. returns filed in 1998) would be denied the credit for the next 10 years, and that those who negligently claimed the credit (through reckless or intentional disregard of the regulations) would be denied the credit for the next 2 years.”).

<sup>109</sup> See GAO REPORT, 1994 COMPLIANCE STUDY, *supra* note 74, at 2.

<sup>110</sup> GAO REPORT, MAY 20 OVERSIGHT HEARING, *supra* note 85, at 3.

<sup>111</sup> Cf. Leslie Book, *EITC Noncompliance: What We Don’t Know Can Hurt Them*, 99 TAX NOTES 1821, 1822 (2003) (“The IRS, at Congress’s behest and in light of specific appropriations approaching \$1 billion over the last seven-year period, has undertaken a far-reaching EITC compliance program that includes outreach and education directed at preparers and taxpayers, heavy use of correspondence examination and math error procedures, and selected criminal enforcement of illicit return preparers.”) (citations omitted); Heidi Glenn, *Sides Square Off Over EITC Precertification*, 99 TAX NOTES 1741, 1741 (2003) (“The steering committee of the National Community Tax Coalition distributed literature at the conference that outlined its opposition to [EITC] precertification, suggesting that the \$100 million earmarked for the initiative should go to improving and increasing regulation of paid preparers who complete returns, increase education and outreach about eligibility for the credit, and fund free tax preparation centers and increase funding for low-income clinics.”); Janet Spragens et al., *Professors Comment on EITC Precertification*, 100 TAX NOTES 847, 847 (2003) (“The latest of such studies, released in February 2002, and based on 1999 returns, concluded that between 27 percent and 31.7 percent of total EITC claims was paid out erroneously, for a total of between \$8.5 billion and \$9.9 billion in erroneous payments.”).

Illustrations of the importance of EITC examination coverage relative to other examination activities can be found in TREASURY INSPECTOR GEN. FOR TAX ADMIN. (TIGTA), 2003-30-078, TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2002, at figs.21–28 (2003). In fiscal years 1999, 2000, and 2001, there were approximately 600,000, 270,000, and 400,000 EITC correspondence audits, respectively. *Id.* at fig.21. During the same period, TIGTA illustrates the decline in audit coverage for taxpayers with incomes over \$100,000. *Id.* at fig.24; see also GAO REPORT, 1998 TAX FILING SEASON, *supra* note 74, at 24 (“IRS allocated

been made that errors on EITC returns are the result of fraud,<sup>112</sup> given the credit's complexity one could easily imagine alternative explanations for the errors.<sup>113</sup> It is entirely possible that the belief that EITC errors are the result of fraud is a function of racial stereotyping about EITC recipients.<sup>114</sup>

One of the recently enacted EITC laws designed to assist the IRS with its compliance initiatives is § 32(k), which allows the IRS to impose sanctions on taxpayers.<sup>115</sup> Congress has also given the IRS the ability to impose a \$100 penalty on paid tax return preparers who "fail to exercise due diligence" in calculating a client's EITC.<sup>116</sup> For the year 2000 filing season, the IRS instituted an EITC initiative targeted at paid tax return preparers.<sup>117</sup> The IRS levied penalties on fewer than 15% of those examined,<sup>118</sup> even though IRS data indicates that 62% of EITC returns were prepared by paid tax professionals.<sup>119</sup>

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staff to audit as many as 140,000 taxpayers who had used about 92,000 duplicate qualifying child SSNs in both tax years 1995 and 1996.").

<sup>112</sup> Book, *supra* note 111, at 1823 ("At the center of the debate on the Initiative is the belief that the EITC is riddled with taxpayer cheating.").

<sup>113</sup> *Id.* at 1824. Professor Book stated that:

Even though the IRS has studied and reported on EITC noncompliance in three separate studies in the past decade, there is very little data relating to how much EITC noncompliance relates to intentional conduct and how much relates to unintentional error. A sometimes quoted study pegs the intentional EITC noncompliance rate at about 30 percent; IRS estimates considered the intentional error rate closer to 50 percent, but one thoughtful observer commenting on the 50 percent estimate doubted its accuracy and stated that "it is virtually impossible to distinguish taxpayer confusion from intentional misreporting."

*Id.* (citations omitted); *see also* Lee, *supra* note 8, at 294 n.106 ("While fraud may be widespread in the tax credit, there's a good argument to be made for confusion. [Former Treasury Secretary] O'Neill said the IRS has 54 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.") (quoting Editorial, *O'Neill's Refreshing Candor*, ROCKY MOUNTAIN NEWS (Denver), Apr. 19, 2002, at 49A).

<sup>114</sup> *See infra* Part II.

<sup>115</sup> *See* I.R.C. § 32(k) (2000). If a credit is due to fraud, no credit is allowed for any of the succeeding 10 years. *Id.* If a credit is due to reckless or intentional disregard of rules and regulations, the credit is denied for each of the following two taxable years. If a credit is denied for a mathematical mistake, the IRS may require additional information to demonstrate eligibility is a subsequent year. Section 6695(g) of the Internal Revenue Code imposes a penalty of \$100 on a preparer's failure to comply with the due diligence requirements of the IRS for determining eligibility for the earned income tax credit. *See* I.R.S. Notice 97-65, 1997-2 C.B. 326.

<sup>116</sup> I.R.C. § 6695(g); 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.2 ("Another rule enacted in 1997 imposes a penalty of \$100 on a preparer's failure, in preparing a return or refund claim, to 'comply with due diligence requirements imposed by the' IRS for determining eligibility for the earned income tax credit of § 32.").

<sup>117</sup> *See* GAO REPORT, 2000 TAX FILING SEASON, *supra* note 74, at 44 ("According to IRS, revenue agents proposed penalties totaling about \$435,000 for 143 of the 1,105 preparers who received either a limited or comprehensive due diligence visit.").

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 27.

One study suggests that regulating certain tax preparers could decrease the EITC error rate from 30% to 18%.<sup>120</sup>

In the summer of 2003, Congress denied tax benefits to 12 million children who lived in low-income taxpayer households, but benefits were granted to children who lived in middle-income households.<sup>121</sup> Beginning in 2004, certain EITC-eligible taxpayers will have to be precertified—namely, they must prove to the IRS prior to receiving the credit, that they are eligible.<sup>122</sup> EITC filers who are not married parents claiming their children or who are single fathers claiming their children are subject to the new precertification procedures.<sup>123</sup> These taxpayers must prove they have the proper relationship to the child for EITC purposes before they will be able to receive their EITC.<sup>124</sup>

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<sup>120</sup> Lipman, *supra* note 40, at 494 (citing Michael A. O'Connor, *Tax Preparation Services for Lower-Income Filers: A Glass Half Full, or Half Empty?*, 90 TAX NOTES 231, 250 (2001)).

<sup>121</sup> Jonathan Alter, *Between the Lines, Online: Whacking the Waitresses*, NEWSWEEK, May 30, 2003 (Web Exclusive), available at LEXIS, News Library, Newsweek File (“[F]amilies earning \$10,000 to \$25,000 who don’t make enough to pay federal income taxes but are eligible for refundable tax credits. They and their 12 million children get nothing from this bill. While more comfortable middle-class Americans will find their child tax credits and marriage-penalty relief accelerated, these folks will not.”); David Firestone, *Fight or Flight? G.O.P. Split Over Tax Credits*, N.Y. TIMES, June 8, 2003, at N30 (“Representative Jan Schakowsky, an Illinois Democrat, said: ‘It seems as if we have hit a nerve here. We are supposedly talking about a bill that would make it easier to get checks, and the Republicans are clearly embarrassed that there are a whole lot of people, in fact 12 million children, whose families are not going to get checks.’”); Joe Klein, *Blessed Are the Poor—They Don’t Get Tax Cuts*, TIME, June 9, 2003, at 25 (“There are moments in public life when all is revealed, when the true priorities of a politician or a political party—as opposed to the boilerplate and blather—stand naked in the public square. George W. Bush had one last week. The White House and the Republican congressional leaders were desperate to squeeze the Bush tax cut into the \$350 billion limit set by the Senate. There were plenty of ways to do this; all sorts of accounting flummeries had already been perpetrated, but a final tweak was needed. So the Republicans decided that the working poor, who pay little or no income taxes—families with incomes from \$10,500 to \$26,625—should not receive the expanded child tax credit. Almost 12 million children were effectively denied stipends of up to \$400.”).

<sup>122</sup> See I.R.S. Announcement 2003-40, 2003-1 C.B. 1132; Greenstein, *supra* note 6, at 1525 (“Under the IRS’s plan, all EITC filers ultimately would be subject to these procedures, other than married parents claiming their children for the EITC and a single female parent claiming her children. Thus all low-income working grandparents, aunts, uncles, and other such relatives who are raising their grandchildren or nieces or nephews—as well as single fathers raising their children, stepparents, and foster parents—would be subject to the new procedures as a condition of receiving the EITC.”); Spragens et al., *supra* note 111, at 851 (“There is no pre-certification requirement for any other tax benefit in the Internal Revenue Code. We recognize that the IRS is necessarily concerned about the high error/fraud rate reflected in its EITC studies. But even if these studies are correct (and there is considerable anecdotal evidence from the clinics which handle credit controversies that their results are overstated), the earned income tax credit is not the only area of the tax laws where fraud and taxpayer overreaching exist. The tax gap has been estimated at \$280 billion per year, including \$40 billion–\$70 billion in underpayments by 1 million–2 million taxpayers using offshore bank accounts.”) (citations omitted).

<sup>123</sup> Greenstein, *supra* note 6, at 1525. For the first year only 25,000 such taxpayers will be subject to the procedures.

<sup>124</sup> *Id.* at 1530. For a description of the relationship test, see *supra* note 48 and accompanying text.

For 2005, the IRS will also apply the precertification test to 25,000 taxpayers, but a portion of the 25,000 will be drawn from a single community, with the balance being drawn from all over the country. The City of Hartford was selected as that single community and it recently filed suit against the IRS seeking injunctive relief to prevent the placement of precertification focus on Hartford residents.<sup>125</sup>

If you rob banks because “that’s where the money is,”<sup>126</sup> then current tax enforcement policy makes little sense indeed. Auditing low-income taxpayers will not result in as much additional revenue for the Treasury as auditing high-income taxpayers or corporate tax shelters.<sup>127</sup> In addition, focusing so much effort on EITC recipients detracts from the larger issue, which is that the tax advantages available to middle-income families are not available to low-income families. I next examine how non-EITC families are treated under the Internal Revenue Code.

## B. Child Tax Credit

### 1. Who Is Eligible?

There are numerous articles discussing the CTC, so it will only be described briefly here.<sup>128</sup> The CTC was passed by Congress and signed into law by Democratic President William Clinton in 1997.<sup>129</sup> The CTC is

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<sup>125</sup> Oshrat Carmiel, *City Sues IRS Over Fraud Test*, HARTFORD COURANT, Nov. 30, 2004, at B1 (“The city of Hartford filed a lawsuit against the Internal Revenue Service Monday, claiming that the federal agency, which is singling out about 4,000 city residents for a special fraud prevention test, is violating those residents’ civil rights.”).

<sup>126</sup> *But see* PAUL F. BOLLER, JR. & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, AND MISLEADING ATTRIBUTIONS 121 (1989) (noting that a newspaper reporter rather than Willie Sutton said, “I rob banks because that’s where the money is.”).

<sup>127</sup> *Cf.* Richard Yancey, Editorial, *The Department of Internal Resentment*, N.Y. TIMES, Apr. 14, 2004, at A27 (“Squeezed between a complex tax code that favors big business and an agency that marshals the entirety of its resources against him, the little guy doesn’t stand a chance. He doesn’t have the money to pay or to find a way out of paying.”). *See supra* notes 102–03.

<sup>128</sup> *See, e.g.*, Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267 (2002); Allan J. Samansky, *Child Care Expenses and the Income Tax*, 50 FLA. L. REV. 245 (1998); Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407 (1999); Donald B. Tobin, *Investing in Our Children: A Not So Radical Proposal*, 73 U. CIN. L. REV. 457 (2004).

<sup>129</sup> Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §101, 111 Stat. 788, 797 (1997). The credit was originally \$400 per child for each child and increased for taxable years after 1998, to \$500. *See id.*; *see also* Sara J. Buehler, *Child Care Tax Credits, the Child Tax Credit, and the Taxpayer Relief Act of 1997: Congress’ Missed Opportunity To Provide Parents Needed Relief from the Astronomical Costs of Child Care*, 9 HASTINGS WOMEN’S L.J. 189, 209 (1998) (“After intense debates among Congress and between Congress and the White House, on July 31, 1997 Congress passed a landmark tax bill, the Taxpayer Relief Act of 1997.

commonly referred to as middle-class tax relief.<sup>130</sup> There is no requirement that the taxpayer have only earned income. Therefore a trust fund beneficiary with a child who does not work is eligible for the CTC.<sup>131</sup> The CTC was enacted to support families with children. The legislative history provides that the decision to increase the CTC for each child was necessary because of the reduced ability to pay taxes as family size grows.<sup>132</sup>

A taxpayer is entitled to the CTC for each “qualifying child.”<sup>133</sup> Each “qualifying child” must be less than seventeen years of age.<sup>134</sup> In addition, there is a limitation on the CTC if you are eligible for the EITC.<sup>135</sup> Finally,

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President Clinton signed this bill on August 5, 1997.”) (citations omitted); Arthur Andersen, LLP, *The Taxpayer Relief Act of 1997*, 76 TAX NOTES 817, 817 (1997) (“President Clinton August 5 signed into law the Taxpayer Relief Act of 1997, which, along with a companion spending bill, implements a landmark balanced-budget agreement negotiated earlier this year by congressional leaders and the administration. The tax measure includes over 100 revenue-losing provisions for a net tax cut of \$96 billion affecting a wide range of individual and business taxpayers. However, most of the tax relief is concentrated in five areas: a \$500 child credit, expanded IRAs, educational tax incentives, estate tax relief, and a reduction in the capital gains tax rate for individuals.”).

<sup>130</sup> 143 CONG. REC. H3895 (daily ed. June 18, 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). Congressman Robert Ehrlich (R-Md.) stated, “Democrats claim the Ways and Means bill is unfair because it offers a nonrefundable credit to *middle-income families*.” *Id.* at H4611 (daily ed. June 25, 1997) (emphasis added). Congressman Jack Kingston (R-Ga.) also stated, “we have at stake 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.” *Id.* at H3895 (daily ed. June 18, 1997) (emphasis added).

<sup>131</sup> *Cf.* Tobin, *supra* note 128, at 487 (stating that a “person who has \$30,000 from a trust fund would receive the full credit”).

<sup>132</sup> S. REP. NO. 105-33, at 3 (1997) (“The Committee believes that the individual income tax structure does not reduce tax liability by enough to reflect a family’s reduced ability to pay taxes as family size increases . . . . The Committee believes 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.”); *see also* H. R. REP. NO. 105-48, at 310 (1997).

<sup>133</sup> I.R.C. § 24(a) (2000); *see also* 2 BITTKER & LOKKEN, *supra* note 38, § 37.2.1 (“A qualifying child is a son, daughter, grandchild, stepchild, or eligible foster child who, at year-end, is age 16 or younger and a U.S. resident and for whom the taxpayer is allowed a dependency exemption for the year.”). Nonresident children must be citizens in order to be considered a “qualifying child.” Martin J. McMahon, Jr., *The New Child Credits: Explainable Mechanics and Unfathomable Policy*, 76 TAX NOTES 1625, 1625 (1997) (“Nonresident children who are not citizens do not qualify.”). In addition, the CTC will be allowed if the taxpayer’s return includes the name and taxpayer identification number of each child. 2 BITTKER & LOKKEN, *supra* note 38, § 37.2.1 (“The credit is conditioned on the taxpayer’s return including the name and taxpayer identification number of each qualifying child.”).

<sup>134</sup> I.R.C. § 24(c)(1)(B).

<sup>135</sup> When first enacted, the CTC was refundable only for families with three or more qualifying children. *See* 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.4 (“For years before 2001, Congress utilized the refundability of the earned income credit to create a complicated interrelationship between this credit and the child tax

there is a limit on your CTC eligibility if your income is too great.<sup>136</sup>

The interaction between the CTC and the EITC adds a great deal of complexity to the EITC,<sup>137</sup> and is a result of the decision to make the CTC partially refundable while the EITC is fully refundable. The decision to make the CTC partially refundable was a conscious one: Congressman Robert Ehrlich (R-Md.) observed that “[a]ll working Americans with kids deserve a tax break. Middle-income workers should not be responsible for subsidizing the payroll taxes paid by low-income workers.”<sup>138</sup> Congressman Jack Kingston (R-Ga.) stated that making the CTC refundable to low-income taxpayers would be giving “another welfare benefit to people who are not

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credit. For these years, the child tax credit was not refundable, but a supplemental child credit was essentially an increment of the refundable earned income credit based on the amount of the child tax credit.”); Gregg Esenwein, *CRS Reports on Status of Child Credit After Tax Relief Act of 2001*, 2001 TNT 159-15 (Aug. 16, 2001), available at LEXIS, Legal News Library, Tax Analysts Tax Notes Today File (“When first enacted, the child tax credit was refundable only for families with three or more qualifying children. The maximum refundable child tax credit was limited to the extent that the taxpayer’s Social security taxes and income taxes exceeded the taxpayer’s earned income tax credit.”) (citations omitted).

Now the CTC is partially refundable regardless of the number of children in the family. Economic Growth and Taxpayer Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 201, 115 Stat. 38, 46 (2001). While eligibility is not determined by reference to family size, the amount of the refundable portion is determined in part by reference to whether the taxpayer has three or more children. I.R.C. § 24(d). For calendar years 2005 and following, 10% is raised to 15%. *Id.* § 24(d)(1)(B)(i). For calendar years 2002 and following, the \$10,000 income level is indexed for inflation. *Id.* § 24(d)(3). For families with less than three children, the maximum refundable CTC can not be greater than 10% of a taxpayer’s earned income that is in excess of \$10,000, which will be adjusted for inflation. *Id.* For families with three or more children, the test is slightly more complicated. The maximum refundable CTC is calculated using two alternative tests, with the taxpayer taking the greater amount. *Id.* § 24(d)(1)(B). The first test is the same as that for families with less than three children, namely the extent to which 10% of the taxpayer’s earned income is greater than \$10,000 adjusted for inflation. *Id.* § 24(d)(1)(B)(i). The second test is the same as prior law and is the extent to which the taxpayer’s social security taxes and income tax liability are greater than the taxpayer’s EITC. *Id.* § 24(d)(1)(B)(ii). In that instance, the taxpayer can receive the CTC to the extent of the excess. Economic Growth and Taxpayer Relief Reconciliation Act of 2001, § 201, 115 Stat. at 46. For taxpayers earning \$10,000 or less with at least three children, their EITC offsets their income tax liability and social security taxes. This makes them ineligible for any refundable CTC. *See also* Samansky, *supra* note 59, at 1745 (providing calculation of EITC when taxpayer is also eligible for the CTC at various income levels); *cf.* McMahon, *supra* note 133, at 1626 (showing calculation of EITC and CTC for taxpayers with \$20,000 of income). *See generally* Tobin, *supra* note 128, at 481 (describing CTC calculations).

<sup>136</sup> I.R.C. § 24(b).

<sup>137</sup> *See* McMahon, *supra* note 133, at 1625 (“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.”).

<sup>138</sup> 143 CONG. REC. H4611 (daily ed. June 25, 1997) (statement of Rep. Ehrlich) (“Democrats claim the Ways and Means bill is unfair because it offers a nonrefundable credit to middle-income families. Over 18 million low-income families in this country receive a tax break already. It is called the earned income tax credit, and we spend \$26 billion on that earned income tax credit.”).

paying taxes.”<sup>139</sup> He continued by observing that there are “11 million middle-class children whose parents desperately need tax relief for education needs, for medical needs, for shelter, for food . . . .”<sup>140</sup> Then Speaker Newt Gingrich (R-Ga.) stated that giving “an additional \$500-per-child tax credit to those who pay no taxes is welfare, plain and simple.”<sup>141</sup> Congressman Bill Archer (R-Tex.) stated that the Democratic proposal which would make the CTC refundable “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>142</sup> Congressman Archer also was reported to have said that extending the CTC to low-income working families would amount to “a welfare payment.”<sup>143</sup> Congressman Ken Bentsen (D-Tex.) provided a counterargument when he said that the bill “denies the full \$500 per child tax credit to 15 million working, taxpaying, wage-earning parents because it doesn’t let them count the credit against their payroll taxes.”<sup>144</sup>

The maximum refundable CTC is allowed only to the extent the taxpayer’s social security taxes and income tax liability exceed the taxpayer’s EITC.<sup>145</sup> At lower income levels, the standard deduction and personal exemptions will

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<sup>139</sup> *Id.* at H3895 (daily ed. June 18, 1997).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at E1365 (daily ed. July 8, 1997).

<sup>142</sup> *Id.* at H4802 (daily ed. June 26, 1997).

<sup>143</sup> Richard W. Stevenson, *Main G.O.P. Tax Writer Balks at a Credit that Clinton Wants*, N.Y. TIMES, July 17, 1997, at A18 (“The Republican, Representative Bill Archer of Texas, the chairman of the Ways and Means Committee, said he would not include the costs of providing the proposed \$500 per child credit to low-income working families who have no Federal income tax liability . . . . Instead, Mr. Archer said, he would consider it a welfare payment, not a tax cut.”).

<sup>144</sup> 143 CONG. REC. H4804 (daily ed. June 24, 1997).

<sup>145</sup> 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.4 (“The supplemental credit was the lesser of (1) the amount by which the child tax credit increased the taxpayer’s nonrefundable credits (as limited by § 26 to the excess of regular tax liability over the tentative minimum tax) or (2) the excess of all credits (including the earned income credit) over the sum of regular tax liability and social security taxes.”); Esenwein, *supra* note 135, at 159-15 n.2 (“For example, in tax year 2000, a taxpayer with three qualifying children, \$26,350 of income, and filing a joint return would have had a federal income tax liability, before any tax credits, of \$750. The taxpayer would have been entitled to an earned income tax credit of \$1,011 and child tax credits of \$1,500. If the taxpayer paid \$2,016 of Social Security taxes, then the taxpayer’s Social Security taxes and income taxes combined would have equaled \$2,766 and would have exceeded the taxpayer’s earned income tax credit by \$1,755. Hence, the \$1,500 in child tax credits would have been fully refundable for this taxpayer even though he would have paid no income taxes.”); McMahon, *supra* note 133, at 1625 (“If a taxpayer has three or more children, however, section 24(d) allows the child credit to be refundable to the extent that the taxpayer’s social security taxes exceed the sum of any other nonrefundable credits plus the taxpayer’s earned income credit. In other words, otherwise unusable child credits are allowable to obtain a refund of FICA taxes.”); *see also* Samansky, *supra* note 59, at 1745 (showing the interaction of the EITC and CTC with calculations at various income levels).

eliminate the income tax liability of many families,<sup>146</sup> making the CTC only available to the extent that the employee's share of social security taxes exceed their EITC amount. However, it is at the lower income levels that the EITC is at its highest.<sup>147</sup> As a result, many low-income parents will not receive the full amount of the CTC. In those households, their social security taxes and their income tax liability will not be greater than their EITC, which makes them ineligible for the CTC.<sup>148</sup>

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<sup>146</sup> For 2002 the head of household standard deduction amount is \$6900 and each personal exemption is \$3000. *See* Rev. Proc. 2001-59, 2001-2 C.B. 623. Taxpayers who have one child would have to earn \$12,900 (\$6900 + \$3000 + \$3000) before any income tax liability would result. Taxpayers with two children would have to earn \$15,900 (\$6900 + \$9000) before any income tax liability would result. Taxpayers who have three children would have to earn \$18,900 (\$6900 + \$12,000) before any income tax liability would result. For 2003, the head of household standard deduction is \$7000 and each dependency exemption is \$3050. *See* Rev. Proc. 2002-70, 2002-2 C.B. 845. In 2003, taxpayers who have one child would have to earn \$13,100 (\$7000 + \$3050 + \$3050) before any income tax liability would result. Taxpayers with two children would have to earn \$16,150 (\$7000 + \$9150) before any income tax liability would result. Taxpayers who have three children would have to earn \$19,200 (\$7000 + \$12,200) before any income tax liability would result.

<sup>147</sup> For 2002, the maximum EITC for families with one child is for households earning between \$7370 and \$13,520 (\$14,520 if married). *See* Rev. Proc. 2001-59, 2001-2 C.B. 623. For 2002, the maximum amount of the EITC for families with more than one child is for households earning between \$10,350 and \$13,520 (\$14,520 if married). *Id.* For 2003, the maximum amount of the EITC for families with one child is for households earning between \$7490 and \$13,730 (\$14,730 if married). *See* Rev. Proc. 2002-70, 2002-2 C.B. 845. For 2003, the maximum amount of the EITC for families with more than one child is for households earning between \$10,510 and \$13,730 (\$14,730 if married). *Id.* For 2004, the maximum amount of the EITC for families with one child is for households earning between \$7660 and \$14,040 (\$15,040 if married). *See supra* Table 1. For 2004, the maximum amount of the EITC for families with more than one child is for households earning between \$10,750 and \$14,040 (\$15,040 if married). *Id.*

<sup>148</sup> Changes as a result of the 2003 Act provide that for families with less than 3 children, the CTC will only result in a refund for taxpayers with income in excess of \$10,000 (adjusted for inflation). For 2003, that amount is \$10,500. For 2004, that amount is \$10,750. *See* Rev. Proc. 2003-85, 2003-49 I.R.B. 1187. Accordingly, only those taxpayers with incomes in excess of \$10,500 in 2003 were eligible to receive any refundable CTC, and only to the extent of 10% of the excess—not the full \$1000 per child. The additional CTC credit of \$400, however, would not be available to all taxpayers, due to the refundable CTC limitations. Numerous bills were introduced to try to change this outcome, however, none were successful. For example, Congressman Charles Rangel (D-N.Y.) introduced H.R. 2286, which “[l]owers to \$7500 (from \$10,500) the amount of the wages a family must have before refundability of the child credit begins.” Charles B. Rangel, *Rangel Summary of Working Families Tax Credit Act of 2003*, 2003 TNT 107-25 (June 4, 2003), available at LEXIS, Legal News Library, Tax Analysts Tax Notes Today File. Consider the following examples:

Example 1: A taxpayer with two children earning \$12,000 in 2003 would only receive a \$150 CTC refund—not a \$2000 CTC refund. The refund is calculated at 10% of the excess of \$12,000—\$10,500 or 10% of \$1500 which equals \$150.

Example 2: A taxpayer with two children earning \$10,000 in 2003 would not receive any CTC refund. In order to be eligible for the CTC refund, the taxpayer must make at least \$10,500 in 2003. For taxpayers with three children or more, recall that the refundable portion of the CTC is more complicated. I.R.C. § 24(d)(1)(B)(i) (2000).

Example 3: Take for example a taxpayer with three children who earns \$12,000. The first part of the test will be the same as calculated earlier, \$150. The first part of the test, namely the 10% limit, produces \$150 CTC calculation for the taxpayer. The second part of the test will be considered next. I.R.C. § 24(d)(1)(B)(ii);

The second limitation on CTC eligibility is the taxpayer's income.<sup>149</sup> The CTC is reduced by \$50 for each \$1000, or part of each \$1000, by which the taxpayer's "modified adjusted gross income"<sup>150</sup> exceeds \$110,000 for joint return filers, \$55,000 for married taxpayers who file separately, and \$75,000 for unmarried taxpayers.<sup>151</sup> The CTC can be used to offset a taxpayer's alternative minimum tax liability.<sup>152</sup>

The House recently passed House Resolution 4359 on May 20, 2004,<sup>153</sup> which would increase the income limits making the CTC available to married couples earning \$250,000.<sup>154</sup> Because Congress members make \$158,100, if the resolution becomes law they will be able to qualify for the CTC, while they cannot under existing law. As Congressman Sander Levin (D-Mich.) stated,

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*see also* McMahon, *supra* note 133, at 1625 ("If a taxpayer has three or more children, however, section 24(d) allows the child credit to be refundable to the extent that the taxpayer's social security taxes exceed the sum of any other nonrefundable credits plus the taxpayer's earned income credit."). The taxpayer with \$12,000 of income has \$918.00 of social security tax liability and an EITC of \$4300. For standard deduction and dependency amounts for taxpayers, see Rev. Proc. 2002-70, 2002-2 C.B. 845.

Example 4: For 2003, assuming the taxpayer filed as head of household the standard deduction is \$7000 and the personal exemption for the parent and each of the three children would total \$12,200. It would not be until the taxpayer earned more than \$19,200 that there would be an income tax liability. The EITC would be \$4300 (\$10,750 x .40). The taxpayer would use the earned income amount of \$10,750 and not their earned income of \$12,000 because the taxpayer is in the flat range of the EITC here. The taxpayer's income would increase, but the EITC would not increase. *See supra* notes 68-71 and accompanying text. The social security taxes on \$12,000 of wages is \$918.00 (\$12,000 x .0765). *See id.* There is no excess amount of social security liability over the taxpayer's EITC and the second part of the test would result in zero refundable credit. The taxpayer therefore would receive the \$150 CTC, not the \$3000 CTC.

<sup>149</sup> Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §101, 111 Stat. 788, 796 (1997).

<sup>150</sup> I.R.C. § 24(b)(1)-(2); *see* 2 BITTKER & LOKKEN, *supra* note 38, § 37.2.1 n.5 ("Adjusted gross income is modified for this purpose by adding in amounts excluded by § 911 (up to \$75,000 of foreign source earned income of citizens residing in other countries), § 931 (bona fide residents of Guam, American Samoa, or the Northern Mariana Islands), or § 933 (residents of Puerto Rico).").

<sup>151</sup> I.R.C. § 24(b)(1); *see* 2 BITTKER & LOKKEN, *supra* note 38, § 37.2.1 ("For higher income taxpayers, the credit is phased out by reducing it by \$50 for each \$1,000 (or portion thereof) that adjusted gross income exceeds a 'threshold amount,' which is \$110,000 for a joint return, \$75,000 for an unmarried individual, and \$55,000 for a married person filing separately."); McMahon, *supra* note 133, at 1625 ("The credit is reduced by \$50 for each \$1,000 (or fraction thereof) by which the taxpayer's 'modified AGI' exceeds \$110,000 in the case of joint returns (\$55,000 in the case of married taxpayers filing separately) and \$75,000 for unmarried taxpayers . . ."); Leonard E. Burman & Mohammed Adeel Saleem, *Income Tax Statistics for Sample Families*, 2003, 102 TAX NOTES 413, 413 (2004) ("[T]he child tax credit starts to phase out; it is phased out entirely at an income of \$129,001 for a family with one child, \$149,001 for a family with two children, and so on."). These income limits are not adjusted for inflation.

<sup>152</sup> Economic Growth and Tax Reconciliation Act of 2001, Pub. L. No. 107-16, § 201(b), 115 Stat. 38, 45 (2001).

<sup>153</sup> Jonathan Weisman, *House Votes To Keep Tax Credit for Children; Higher-Income Families Would Be Eligible*, WASH. POST, May 21, 2004, at A3.

<sup>154</sup> *Id.*

“This is not a tax break mainly for middle-income families . . . . It’s a tax break for members of Congress who have kids.”<sup>155</sup>

## 2. CTC Calculations: How Much?

The Jobs and Growth Tax Relief Reconciliation Act of 2003 (“JGTRRA”) amended the CTC<sup>156</sup> so that in 2003 and 2004, taxpayers receive \$1000 per child.<sup>157</sup> Interestingly, JGTRRA did not accelerate the increase for low-income taxpayers.<sup>158</sup> Therefore assuming a taxpayer in 2004 has seven children, it will be eligible for a \$7000 CTC. For taxable years 2005 through 2009, the Working Families Tax Relief Act of 2004 keeps the CTC at \$1000.<sup>159</sup>

## C. Comparison of the EITC and the CTC

The CTC is rather straightforward and only becomes complex when taxpayers are also eligible for the EITC. The EITC is complex from beginning to end and the subject of serious government scrutiny, while the CTC receives no government scrutiny. The EITC is only available for taxpayers with earned income, while the CTC is available to taxpayers with income from any source.<sup>160</sup> The EITC does not increase after the taxpayer has two children,

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<sup>155</sup> *Id.*

<sup>156</sup> The Jobs and Growth Tax Relief Reconciliation Act of 2003, H.R. 2, was approved by Congress and signed into law by President George W. Bush on May 28, 2003. Pub. L. No. 108-27, 117 Stat. 752 (2003); ADAM CARASSO ET AL., POLICY BRIEF: TAX REFORM FOR FAMILIES: AN EARNED INCOME CHILD CREDIT 1 (2003), available at <http://www.brookings.edu/dybdocroot/es/wrb/publications/pb/pb26.pdf>. (“In May 2003, the Jobs and Growth Tax Relief Reconciliation Act (JGTRRA) accelerated the phase-in of the value of the credit (but not the refundability provisions), thereby increasing the CTC from \$600 to \$1,000 . . .”). See *supra* notes 145–48 and accompanying text for a discussion of why lower income taxpayers are not eligible for the refundable CTC.

<sup>157</sup> Pub. L. No. 108-27 § 101, 117 Stat. 753–54; I.R.C. § 24(a) (2000); 2 BITTKER & LOKKEN, *supra* note 38, § 37.1.2 (“Section 24, which applies for years after 1997, provides a ‘Child Tax Credit’ for each ‘qualifying child’ of the taxpayer of \$400 for 1998; \$500 for 1999 and 2000, \$600 for 2001 and 2002, \$1,000 for 2003 and 2004, \$700 for 2005 through 2008, \$800 for 2009, and \$1,000 for years after 2009.”).

<sup>158</sup> JGTRRA did not, however, change the refundability provisions of the CTC in order to make it available to low-income taxpayers. CARASSO ET AL., *supra* note 156, at 1. JGTRRA provided that taxpayers were scheduled to receive \$400 checks for each of their qualifying children beginning in July 2003, as a result of the increase in the CTC from \$600 per qualifying child to \$1000. Patti Mohr, *Bush Signs \$350 Billion Tax Cut, State Aid Package*, 99 TAX NOTES 1295, 1295 (2003) (“Bush said Treasury will begin sending in July income tax payers with children checks of \$400 per qualifying child.”). It is the calculation of the refundable portion of the CTC that caused a political firestorm last summer. See *supra* notes 145–48.

<sup>159</sup> Pub. L. No. 108-311, § 101, 118 Stat. 1166, 1167 (2004).

<sup>160</sup> See *supra* note 131 and accompanying text.

while the CTC increases with every child.<sup>161</sup> There is a maximum EITC, while there is no maximum CTC.<sup>162</sup> The legislative history of the EITC was concerned with not providing economic incentives to large families, while the legislative history of the CTC was concerned with lessening the economic burdens of large families. The EITC is fully refundable, while the CTC is only partially refundable.<sup>163</sup> The CTC phase-out for married couples, when compared to singles, is far more generous than the phase-outs for the EITC.<sup>164</sup> This results in very high marginal tax rates for EITC recipients.<sup>165</sup> The CTC permits married taxpayers to file separately and receive the credit, but the EITC does not.<sup>166</sup> There is no CTC for taxpayers with no children, while there is an EITC, albeit a small one, for taxpayers with no children.<sup>167</sup> The amount of the EITC and the CTC are a function of taxpayer's income and the number of children present in the household.<sup>168</sup> Qualifying children for EITC purposes

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<sup>161</sup> See *supra* Table 1. The EITC threshold phase-out amounts are identical for families with one child as for families with two or more children. See *supra* Table 1. There have been attempts to increase the EITC for family size. See, e.g., Family Equity Act of 1989, H.R. 147, 101st Cong. (1989) (increasing the EITC credit percentages for three qualifying children and four or more qualifying children); Family Living Wage Act, H.R. 1104, 101st Cong. (1989) (increasing credit for family size provided not more than four children would be taken into account); Child Services Improvement Act of 1989, H.R. 1618, (1989) (increasing the amount of the credit by adding a category three or more qualifying children).

<sup>162</sup> See *supra* Table 1. The maximum EITC for 2004 is \$4300 and will be received by taxpayers with more than one child who earn at least \$10,750 but no more than \$14,040, if single, or \$15,040, if married. The taxpayer's EITC is eliminated when the taxpayer has \$34,458 of earned income, if single, or \$35,458, if married. *Id.* Other than the maximum income limits, the only limits found in the CTC are whether the CTC will be refundable, which in turn is a function of the taxpayer's tax liability before the CTC. See *supra* notes 145–48 and accompanying text. The CTC can be used to offset the taxpayer's alternative minimum tax liability. See *CRS Reviews Changes to Child Credit in Recent Tax Cut Act*, 92 TAX NOTES 1074, 1074 (2001) (“The Economic Growth and Tax Relief Reconciliation Act of 2001 made three changes to the child tax credit, according to a Congressional Research Service report: the credit increases gradually until its peak of \$1,000 in 2010; the credit is refundable for all families regardless of the number of children in the family; and the credit is allowed to offset a taxpayer's alternative minimum tax liability.”).

<sup>163</sup> See *supra* note 137 and accompanying text.

<sup>164</sup> The single CTC begins to phase-out at \$75,000 while the married CTC phase-out is \$110,000. The EITC phase-outs for married taxpayers are \$1000 greater than the amounts for single taxpayers. See *supra* Table 1.

<sup>165</sup> Cf. Shaviro, *supra* note 34, at 426 (“[M]any poor households face astoundingly high marginal rates, at times approaching or even exceeding 100 percent.”).

<sup>166</sup> See *supra* note 54 and accompanying text.

<sup>167</sup> See *supra* Table 1.

<sup>168</sup> *Id.*; see also Alstott, *supra* note 34, at 548–49. Professor Alstott stated,

[T]he EITC combines three distinct elements: an earnings subsidy, a “stationary” range, and a “phase-out” or income test. For workers with earnings in the earnings subsidy range, the EITC acts as a proportional pay increase . . . . In contrast, workers with incomes in the stationary range, who receive an EITC benefit that does not vary with earnings, face a potential work disincentive . . . . For workers with earnings in the EITC phase-out range, additional earnings

must be under nineteen, while for CTC purposes qualifying children must be under seventeen.<sup>169</sup>

Given that the CTC was enacted to take into account the decrease in the ability to pay taxes as family size increases, it is indeed curious that the CTC is not fully refundable to low-income taxpayers. The CTC's legislative history provides that the CTC should be increased for every child because of the "reduced ability to pay taxes as family size increases."<sup>170</sup> The ability to pay is, at worst, no less a concern for low-income taxpayers than it is for middle-income taxpayers, and at best, more of a concern. One can explain the decision on political grounds, but it is more difficult to explain on policy grounds.<sup>171</sup>

#### *D. Separate but Unequal: The CTC and the EITC*

This Section considers race-neutral explanations for why the provisions of the EITC and the CTC are so different and why EITC recipients are singled out for such harsh treatment. One explanation could be that the tax credits benefit such different groups that the disparity is justified. Both tax credits, however, were enacted to benefit families with children. (Only within the last ten years was the EITC amended to permit a nominal EITC for households with no children.) The tax credits' purposes do not provide an adequate explanation for the disparity in the tax provisions. Nor does their purposes provide adequate explanation for why the EITC originally did not increase for family size because of fear that it would provide an "economic incentive for having

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reduce EITC benefits, just as in a traditional income-transfer program. This incremental benefit reduction as income rises is analogous to a tax on income: although the tax does not add to the government's coffers, the worker keeps less than a dollar for each additional dollar earned. This benefit reduction, like any actual tax, reduces the net monetary reward for extra work. EITC recipients who also pay income and payroll taxes or who participate in other income-transfer programs can find that multiple marginal tax rates apply to the same dollars of earnings, and cumulative potential work disincentives can be quite large. For example, the EITC's benefit reduction rate is twenty-one percent, but EITC recipients who also pay federal income and payroll taxes face a cumulative marginal tax rate as high as forty-four percent, without taking into account state taxes or benefit reductions in other income-transfer programs.

*Id.*; see *supra* notes 145–48 and accompanying text (regarding the CTC).

<sup>169</sup> Cf. McMahon, *supra* note 133, at 1626 ("Perhaps the most elusive policy rationale, however, is why 'under 17' instead of 'under 19.'").

<sup>170</sup> See *supra* note 132.

<sup>171</sup> Cf. McMahon, *supra* note 133, at 1626 ("In the end, although the pattern of 'who gets how much of what credit' is easy to discern, a policy-based, as opposed to electoral politics-based, rationale is difficult to discern.").

additional children,” while the CTC originally increased for every child in the household.

Another possible explanation is that it is easier to administer the provisions if they are separate. Yet the interaction between the EITC and the CTC exponentially increases the CTC’s complexity. The interaction occurs when a taxpayer is eligible for the EITC and the CTC and when the CTC is only partially refundable. Ease of administration similarly does not explain the disparity.

Another explanation could be that the EITC recipients receive such harsh treatment because they deserve it. The error rate associated with the EITC that results in the \$6 billion tax gap attributable to all tax credits, including the EITC, justifies the targeting of EITC recipients. But the \$6 billion tax gap is only slightly more than 5% of the total \$100 billion tax gap and the IRS is not pursuing any other taxpayer group with such vigor. The IRS is also not pursuing EITC tax preparers to the extent it is pursuing EITC recipients. It cannot be fairly said that EITC recipients deserve harsher treatment than taxpayers who promote and benefit from the corporate tax shelters that cause a greater percentage of the tax gap.

The publicly provided explanation for the disparity, however, is that EITC recipients do not deserve additional benefits because the EITC is welfare. Several members of Congress referred to EITC-eligible taxpayers as welfare recipients.<sup>172</sup> Republican members used the analogy to seek public support for their decision to deny 12 million low-income families tax benefits, while at the same time providing those tax benefits to more “deserving” middle-income families.<sup>173</sup> In the debates that considered extending the CTC to EITC-eligible

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<sup>172</sup> See *infra* notes 196–99 and accompanying text. Members of the general public also refer to EITC recipients as welfare recipients. See, e.g., Scott Arighi, Letter to the Editor, *No Tax Cut for Non-Taxpayers*, OREGONIAN, June 10, 2003, at B08 (“Most of the low-income non-taxpayers . . . pay little or nothing in income taxes but get a direct payment of our tax dollars from the Treasury through the earned income tax credit . . . . If Congress wants to reward these folks for having children, then Congress can appropriate additional welfare payments for them.”); Kitty Carr, Readers’ Opinions, *Estate Tax Hurt Farms, Businesses*, BIRMINGHAM NEWS, Oct. 7, 2002, at 8A (“What about the Earned Income Tax Credit? This is promoted as a tax credit when it’s really a welfare program.”).

<sup>173</sup> Kathy M. Kristof, *Checks Are in the Mail this Summer for Parents; Latest Tax Cut Means Immediate Refunds of Up to \$400 Per Child for 25 Million Households*, L.A. TIMES, May 29, 2003, at C1. (“The refund checks, offspring of the tax cut plan signed Wednesday by President Bush, will go to about 25 million households that claimed the child tax credit on 2002 returns.”); see *supra* note 121 and accompanying text.

taxpayers several Republican members of Congress also described the EITC as analogous to welfare.<sup>174</sup>

This Article argues, however, that the analogy between EITC refunds and welfare payments is a poor one.<sup>175</sup> EITC recipients who work in the paid-labor market pay income, property (even if renters), sales, social security, and medicare taxes and do not fit the traditional definition of welfare recipients.<sup>176</sup> Calling taxpayers welfare recipients and their refund “welfare” is inappropriate.<sup>177</sup> Yet, the analogy is a powerful one, and it worked.

Having exhausted several potential race-neutral explanations, the next Part considers a race-based explanation. It argues that EITC families are perceived to be disproportionately Black, and therefore less deserving of tax benefits, and that CTC families are perceived to be disproportionately White, and thus worthy of tax benefits.

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<sup>174</sup> Tobin, *supra* note 128, at 31 (“In recent debates in Congress regarding President Bush’s proposal to accelerate the phase in of the Child Tax Credit, some have argued that expanding the tax credit to low-income people is welfare, as if calling it welfare clearly indicates that the payment is improper.”).

<sup>175</sup> While there is a legitimate distinction between paying a tax and receiving a subsidy, it is unlikely that the Congressional statements discussed in this Article turned upon such subtleties. Regarding the EITC, taxpayers are receiving amounts in excess of their income tax liability and in certain instances also in excess of their social security and medicare payments. As a result, it isn’t a refund, but a governmental subsidy. Yet the EITC is only available when a taxpayer works. Therefore it does not satisfy the traditional definition of “welfare.” Since the recent Welfare Reform Act, however, the welfare/work distinction is more blurred. *See also supra* note 121 and accompanying text.

<sup>176</sup> Although it is true that this argument falls into the “deserving” and “undeserving poor” dichotomy, the EITC’s political support has come from it not being attached to the “undeserving poor.” *See infra* notes 217–20 and accompanying text. *But see* Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 537.

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.

*Id.* (citations omitted).

<sup>177</sup> *Cf. infra* notes 201–12 and accompanying text (describing Congressional statements about farmers receiving payments under the Agricultural Market Transition Act).

## II. WELFARE, POLITICS, AND THE UNDESERVING POOR

### A. Introduction

This Part places into context the view that the EITC is welfare and therefore EITC recipients should be treated differently than CTC recipients. It begins by describing the stereotypes associated with welfare recipients and how those stereotypes impact the political process. It tests the definition of welfare by contrasting the traditional definition of welfare with another government benefit—farm subsidies. The only way to explain why farm subsidies are not considered welfare is through a race-based analysis: Welfare is perceived to disproportionately benefit Blacks, and farm subsidies are perceived to disproportionately benefit Whites.

This Part then leaves the political arena to enter the academic realm. Without empirical support, academics have stereotyped EITC recipients as being disproportionately Black. In many instances, academics gave no explanation for their conclusions that the EITC disproportionately benefits Blacks. Both scholars who support the examination of federal tax policy from a race-based perspective and scholars who oppose any such examination have failed to carefully analyze the racial impact of the EITC. This Part concludes by encouraging scholarship that analyzes federal tax policy from a race-based perspective, because it is an important part of attaining racial equality.

### B. *What Is Welfare?: Political Discourse and Race*

[T]he American public strongly supports most aspects of the welfare state and in most cases believes that government should be doing more to assist its citizens. Large majorities of Americans, for example, think the government should be spending more money to fight poverty and homelessness, to improve our nation's education and health care, and to assist displaced workers and the elderly. One exception stands out, however: when it comes to "welfare" itself, widespread support turns to widespread opposition.<sup>178</sup>

When the term "welfare" is used, it generally refers to Aid to Families with Dependent Children ("AFDC"),<sup>179</sup> or its replacement, Temporary Assistance to

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<sup>178</sup> MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 11–12 (1999).

<sup>179</sup> 42 U.S.C. §§ 601–15 (1994) (repealed in 1996); HANDLER, *supra* note 12, at 1 ("Although there are many assistance programs for the poor, when people say 'welfare,' they mean Aid to Families with Dependent

Needy Families (“TANF”).<sup>180</sup> One consistent theme of U.S. welfare policy has been to differentiate between the “deserving” and the “undeserving” poor.<sup>181</sup> No one readily admits to being part of the “undeserving” poor because they would then be ineligible for governmental benefit. Being viewed as part of the “deserving” poor becomes the goal. Welfare policy is therefore best understood as producing symbols designed to validate societal norms and values—thereby making welfare recipients the “deserving” poor.<sup>182</sup> One of those societal norms and values is encouraging the work ethic.<sup>183</sup>

The presence of a means test in a federally funded program increases the stigma attached to its recipients.<sup>184</sup> The absence of a means test is intended to show that the recipient is legitimate and deserving.<sup>185</sup> For example, Social Security benefits are not means tested.<sup>186</sup> In fact, Jack Welch, the former

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Children (AFDC)—the program essentially for single mothers and their children.”); MICHAEL B. KATZ, *THE UNDESERVING POOR* 75 (1989) (“Public assistance has become synonymous with welfare; it carries the old stigma of relief. Its recipients are the modern paupers.”); Super, *supra* note 11, at 1290 (“‘Welfare,’ however, is a notoriously difficult term to define. No federal programs, and few if any state programs, go by that name. Certain cash-assistance programs historically have been perceived as the epitome of welfare: AFDC, which provided monthly cash-assistance payments to low-income families, and state and local general assistance (GA) or general relief programs that provide monthly cash payments to low-income individuals living alone and to homes whose family arrangements failed to meet AFDC’s specifications. But virtually every redistributive public spending program may be, and has been, tarred with the brush of ‘welfare’ by its opponents.”).

<sup>180</sup> 42 U.S.C. §§ 601–17; see also Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 123 (2002).

<sup>181</sup> 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.’”).

<sup>182</sup> HANDLER & HASENFELD, *supra* note 11, at 17 (“Welfare policy, then, to a large extent, may be understood as the institutionalized production of *symbols* whose primary purpose is to affirm the dominant social values of work, family and gender roles, and social status.”).

<sup>183</sup> *Id.* (“The most consistent, animating part of welfare policy is to reinforce the work ethic.”). Additional symbols include maintaining family and gender roles, maintaining the status quo regarding race, ethnicity, and class, eliminating threats to the social order, and providing charity.

<sup>184</sup> *Id.* at 18–19.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 19; see also Roberts, *supra* note 12, at 1577 (“For example, the government pays citizens Social Security benefits that are unencumbered by behavioral conditions, caseworker investigations, or social stigma.”). The decision over whether a program should be means tested is an important part of defining what constitutes welfare. HANDLER & HASENFELD, *supra* note 11, at 21. Handler and Hasenfeld state:

For example, contrary to interpretation, the early aid to dependent children (ADC) programs—called “mothers’ pensions”—did not represent a major change in policy toward the poor single mother, because, in fact, the vast majority of poor single mothers were excluded . . . White widows were defined in terms of the Other—the *excluded* single mothers; the latter were still part of the paid labor force. The myths and ceremonies of the mothers’ pension movement thus spoke to *both* the nonpoor and the poor. The values of patriarchy and the “proper” female role were

chairman and chief executive of General Electric Co., reportedly receives \$1000 a month after taxes in social security benefits, even though he nets \$357,128 a month from his pension and continues to earn income from his consulting business.<sup>187</sup> The decision of whether to have a means test is therefore a reflection of whether the recipients are “deserving.”

Professor Martin Gilens explains that American opposition to welfare is a result of public perception that most welfare recipients are undeserving, primarily for two reasons.<sup>188</sup> First, Americans believe that most welfare recipients are Black.<sup>189</sup> Second, Americans believe that Blacks are not as committed to working as non-Blacks.<sup>190</sup> As a result, welfare has become synonymous with African-Americans:<sup>191</sup> “[W]elfare is the code word for the inner-city, African-American young woman, most likely a substance abuser, having children to stay on welfare, and breeding a criminal class.”<sup>192</sup>

Blacks are not like Whites because they have “warped values” and do not want their children to attend good schools, do not want good jobs, and do not

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rewarded; and the nonconforming poor, those who were morally degraded to begin with (people of color, never marrieds, and those who were divorced, separated, or deserted) need not apply.

*Id.* at 21–22.

<sup>187</sup> Silverman, *supra* note 103, at A15 (estimating that Jack Welch earns an additional \$377,000 a month from his consulting business).

<sup>188</sup> GILENS, *supra* note 178, 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.”).

<sup>189</sup> *Id.* at 3 (“First, the American public thinks that most people who receive welfare are black . . .”).

<sup>190</sup> *Id.* (“[S]econd, the public thinks that blacks are less committed to the work ethic than are other Americans.”).

<sup>191</sup> HANDLER & HASENFELD, *supra* note 11, at 26 (“As part of the dominant social and economic order, welfare policy has served the societal values of racial hostility, discrimination, subordination, and exclusion.”); JILL QUADAGNO, *THE COLOR OF WELFARE* 6 (1994).

Efforts to use government intervention to extend positive liberties to African Americans clashed with the negative liberties of whites to dominate local politics, to control membership in their unions, and to choose their neighbors . . . . [T]hese conflicts established a racial fault line in public policy that subsequently provided the rationale for welfare state retrenchment.

*Id.*; GILENS, *supra* note 178, at 3 (“There exists now a widespread perception that welfare has become a ‘code word’ for race.”).

<sup>192</sup> Handler, *supra* note 181, at 137; *see also* Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 25 (1993) (arguing that it is “the image of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check” that is used to sell programs to the public that will adversely affect women); Williams, *supra* note 12, at 743 (“In the current variation of ‘otherness,’ the average citizen considers all AFDC recipients as part of the ‘underclass’ i.e., African-American, long-term welfare recipients who live in inner-city ghettos and regularly have babies.”).

wish to live in safe neighborhoods.<sup>193</sup> The centuries old stereotype of Blacks being lazy and not hard working is still firmly believed by a significant majority of the White population.<sup>194</sup> As a result, the public views them as “undeserving” and properly excluded from receiving benefits until their behavior changes.<sup>195</sup>

Given the lack of public support for welfare, political leaders who describe funding programs as “welfare” are inviting a hostile reception by Whites. Whether payments are characterized as welfare will be a strong factor in determining the strength of public support of the program. If a Congress member wants a program to garner widespread support, she will avoid characterizing the program as welfare. If a Congress member wants to garner opposition against the program, all she needs to do is characterize it as welfare. You can see this clearly when you compare statements made about EITC recipients with those made about another group of recipients of government largesse—farmers. EITC recipients receive welfare, but to describe farmers in similar terms is deemed “an insult.” Anyone looking for consistency in the definition of welfare is left sorely disappointed.

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<sup>193</sup> Williams, *supra* note 12, at 743 (“[U]nlike whites, [Blacks] have warped values, which do not include the desire for such things as good schools, jobs, or safe streets.”).

<sup>194</sup> GILENS, *supra* note 178, at 3 (“[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.”); *see also* DOUGLAS S. MASSEY & NANCY DENTON, *AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS* 95 (1993) (describing how Blacks are perceived to be violent, lazy, and less intelligent); Lawrence D. Bobo, *Racial Attitudes and Relations at the Close of the Twentieth Century*, in *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 264, 277–78 (Neil J. Smelser et al. eds., 2001) (describing common stereotypes of Blacks including laziness and providing data that approximately 50% of Whites polled hold these stereotypes); 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, 1261–67 (1992) (describing negative stereotypes about Blacks throughout American history including the stereotype that Blacks are lazy); David Rosenfield et al., *Effect of an Encounter with a Black Panhandler on Subsequent Helping for Blacks: Tokenism or Confirming a Negative Stereotype?*, 8 *PERSONALITY & SOC. PSYCHOL. BULL.* 664, 669 (1982) (“Research has shown that part of the whites’ stereotype of blacks is that blacks are lazy and lacking in ambition and industriousness.”) (footnote omitted); Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 *YALE L.J.* 625, 652 (2001) (book review) (“Although there is evidence that stereotypical thinking has declined in recent decades, the stereotype persists that blacks are lazy, unintelligent, and impulsive.”).

<sup>195</sup> GILENS, *supra* note 178, at 3; *cf.* Pearson Liddell, Jr. et al., *Welfare Reform in Mississippi: TANF Policy and Its Implications*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 1107, 1108 (2003) (citing Rosalee A. Clawson & Rakuya Trice, *Poverty as We Know It: Media Portrayals of the Poor*, 64 *PUB. OPINION Q.* 53, 54 (2000) (“reporting that in a study of news magazines, the media typically portrayed poverty as ‘black,’ although less than one-third of the poor are black”)); *id.* at 1113 (citing Franklin G. Gilliam, Jr., *The ‘Welfare Queen’ Experiment: How Viewers React to Images of African-American Mothers on Welfare*, 53 *NIEMAN REP.* 49, 50 (1999) (“discussing the ‘intersection of race and gender’ as a narrative script successfully employed by President Reagan to create negative images of the welfare program”)).

Congressman Spencer Bachus (R-Ala.) stated 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.’”<sup>196</sup> Congressman Robert Portman (R-Ohio) stated that the EITC “is not a tax issue—it’s a government transfer payment to people who do not pay income taxes.”<sup>197</sup> Congressman Ernest Istook (R-Okla.), chairman of the Appropriations subcommittee, which has authority over the IRS budget, stated that “[t]he problem is that welfare payments are being mislabeled as tax rebates, [t]o end the confusion, we should stop putting the ‘tax refund’ label on government checks that are actually public assistance.”<sup>198</sup> Finally, House Majority Leader Tom DeLay (R-Tex.) stated “[t]o me, it’s a little difficult to give tax relief to people that don’t pay income tax.”<sup>199</sup> Congressman Delay ignored the fact that all wage earners pay social security and Medicare taxes.

Seeking consistency in treatment of taxpayers, some Democratic members of Congress tried to argue that payments to farmers under the Agricultural Market Transition Act (“AMTA”)<sup>200</sup> constituted welfare.<sup>201</sup> (It is important to

<sup>196</sup> 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.

<sup>197</sup> David Firestone, *Fight or Flight? G.O.P. Split Over Tax Credits*, N.Y. TIMES, June 8, 2003, at A23.

<sup>198</sup> Chris Casteel, *Senators Explain Votes, Say Low-Income Families Off Tax Roles*, DAILY OKLAHOMAN, June 7, 2003, at 30. Congressman Istook has been in the news recently on a non-EITC matter. Congressman Istook 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.

<sup>199</sup> David Firestone, *DeLay Rebuffs Move To Restore Lost Tax Credit*, N.Y. TIMES, June 4, 2003, at A1.

<sup>200</sup> H.R. 2854, 104th Cong. (1996). It was originally called the Freedom to Farm Act. See 142 CONG. REC. H1415 (daily ed. Feb. 28, 1996) (“It was originally called freedom to farm, and is now before us as the Agricultural Market Transition Act.”); cf. Christopher Edley, *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy*, 60 ALB. L. REV. 425, 455 (1996) (“Instead of government dependency, this trait might be defined as tax breaks and corporate welfare. What is the difference?”).

<sup>201</sup> Payments that were funded by the AMTA were described as “high-priced welfare.” 142 CONG. REC. H1419 (daily ed. Feb. 28, 1996) (statement of Rep. Volkmer) (“There is something wrong here, folks. This is not getting government off your backs. This is 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 Food Stamp Program, these are thousands of dollars, and over a period of years, over \$1 million to some farmers, over \$1 million to a farmer.”); see also *id.* at H1420 (statement of Rep. Dooley) (“[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.”).

Senator Dale Bumpers (D-Ark.) went one step further and stated “I suppose you could argue that welfare is what you give to people who need it, which may not be the case with these freedom-to-farm handouts.” *Id.*

point out that the Welfare Reform Bill and AMTA were both discussed in Congress in 1996.) The efforts to have a consistent definition of welfare applied to all taxpayers were unsuccessful. Not only did the AMTA pass, but the efforts to describe farmers as welfare recipients garnered a stinging rebuke.

Several members of Congress responded to the arguments that payments under AMTA constituted welfare. They were compelled to defend the character and integrity of farmers. Some members of Congress stated that to call this welfare was insulting to farmers.<sup>202</sup> They stated that the payments were simply not welfare.<sup>203</sup>

Check Webster's—Agriculture doesn't fit the definition of welfare:  
One of the most unfair arguments against farmers is to say that

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at S3084-85 (daily ed. Mar. 28, 1996). Several members of Congress placed the AMTA payments in the context of the recent welfare bill, 42 U.S.C. §§ 601-17 (2000). 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]." 142 CONG. REC. H3150 (daily ed. Mar. 28, 1996). 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 the poor and the lavish and gentle treatment that goes to the favored political few is outrageous." *Id.* at H3156. Congressman Gene Taylor (D-Miss.) recalled the recent "welfare debate" and stated,

Unfortunately, in this bill there is a plan to pay people up to \$80,000 a year per individual for 7 years to do nothing. You do not have to plant a crop, you do not have to work a field, you do not have to work fences, you do not have to start the tractor, you do not have to do anything. You do not even have to try to farm, and you get \$80,000 a year . . . [Y]ou can never wean people off Government dependence by paying them to do nothing, whether they are a welfare mother or whether they are a father who happens to be a farmer.

*Id.* at H3156. Congressman Harold Volmer (D-Mo.) also criticized the AMTA and stated,

If anybody would come to this House and say that I have been on welfare, I have been on AFDC, or on food stamps once in the last 5 years, and therefore I am entitled to 7 more years of it, we would say they are crazy, they are lunatic, that is crazy. But that is what [the AMTA] is. That is identical to what this is.

*Id.*

<sup>202</sup> *Id.* at H1531 (daily ed. Feb. 29, 1996) (statement of Rep. Roberts) ("The gentleman [Rep. Dooley] calls it a welfare payment. Again, I think 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."); *see also id.* at H3163 (daily ed. Mar. 28, 1996) (statement of Rep. Roberts) ("[F]arm programs are not welfare and partisan statements equating farm programs with welfare do a disservice to farmers and ranchers.").

<sup>203</sup> *Id.* at S3089 (daily ed. Mar. 28, 1996) (statement of Sen. Burns) ("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. This act will provide for the future of the American farmer in a way that Congress has not had the nerve to address for almost 60 years. This bill will assist many young farmers to have access to the land and allow for the future development of agricultural production in this country.").

agriculture payments—of any kind—are welfare payments. Under current law, to receive “welfare,” whether it’s food stamps or Aid to Families with Dependent Children (AFDC), an individual simply meets the definition of “disadvantaged” to receive government assistance. In total contrast, farmers work on their land, and receive a payment for agreeing to a variety of conditions.<sup>204</sup>

According to Congressman Roberts, because farmers work on their land and receive their payments in exchange for agreeing to certain conditions, those payments did not constitute “welfare.”

Farmers were characterized as “independent folks, [who are] looking forward to getting some of the burden of big government off their backs.”<sup>205</sup> We were told they were “pretty conservative folks . . . [who] care about the future of their children, and grandchildren.”<sup>206</sup> Farmers were worthy of our trust.<sup>207</sup> They would not stop farming as a result of receiving government payments.<sup>208</sup> We were told that farmers did not want welfare.<sup>209</sup> They worked hard—and they wanted to work.<sup>210</sup> Farmers were proud.<sup>211</sup> In fact, we were told that the AMTA would hurt farmers because the public would view them negatively as being welfare recipients.<sup>212</sup>

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<sup>204</sup> *Id.* at H3163 (daily ed. Mar. 28, 1996) (statement of Rep. Roberts).

<sup>205</sup> *Id.* at H1419 (daily ed. Feb. 28, 1996) (statement of Rep. Lewis).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at H1420 (statement of Rep. Lightfoot) (“I guess it boils down to where do you put your faith? Do you trust farmers, or do you trust bureaucrats and political appointees? I am going to go with the farmers. The farmers want the liability to produce for the market instead of a Government program. They want the ability to manage their land in a resourceful type fashion, without burdensome controls and regulations. This legislation must be passed now.”).

<sup>208</sup> *Id.* at H1416 (statement of Rep. Roberts) (“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.”).

<sup>209</sup> *Id.* at S3082–85 (daily ed. Mar. 28, 1996) (statement of Sen. Harkin).

<sup>210</sup> *Id.* at S3082–83 (“Farmers work very hard for their money. They are proud people. They want to get their income from the market and not from the mailbox.”).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* Senator Harkin stated that:

Some people get pretty edgy and touchy when they hear it said that this farm bill makes farmers vulnerable to criticism that they are receiving welfare payments. If this bill becomes law, I can only say, get used to it; get used to it. The national press, who have never been friendly to agriculture, will have plenty of new material. There will be television stories and the same editorial writers at the New York Times, the Washington Post, and others will go to work. You mark my words. There will be editorials about USDA making large payments to large farmers no matter how much money they are making from the market.

The editorial writers do not understand what is going on in agriculture anyway, but what I am concerned about is the damage this bill threatens to do to the public’s image of farmers and of

Government subsidies to farmers has a racial component. Professor Jim Chen stated that government subsidies to farm owners are “an almost perfectly race-matched system of affirmative action for whites.”<sup>213</sup> Farm owners are 98% White, which is one of the highest percentages of White owners in any segment of American business.<sup>214</sup> Professor Chen further provided that “[l]egislative statements favoring ‘family farms,’ . . . create in their aggregate a *de facto* preference for white enterprise.”<sup>215</sup> In addition, the racially disparate impact of the benefits flowing to Black farmers was the subject of a lawsuit against the Department of Agriculture that was recently settled.<sup>216</sup>

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agriculture programs. 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.

*Id.*

<sup>213</sup> Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1307 (1995).

<sup>214</sup> *Id.* at 1306–07 (“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 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*, 17 RURAL AMERICA 55, 55 (2002) (“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.”).

<sup>215</sup> Chen, *supra* note 213, 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.*

<sup>216</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 85–86 (D.D.C. 1999). The court stated that “the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs.” *Id.* at 85. The court went on to describe how the U.S. Department of Agriculture’s credit and benefit programs are federally funded but “the decisions to approve or deny applications for credit or benefits are made locally at the county level.” *Id.* at 86. The court noted that the locally elected county committees who were responsible for the decision making “[did] not represent the racial diversity of the communities they serve. In 1996, in the Southeast Region, the region in the United States with the most African American farmers, just barely over 1% of the county commissioners were African American (28 out of a total of 2469).” *Id.* at 87; *see also* Kristol Bradley Ginapp, *Jim “USDA” Crow: Symptomatic Discrimination in Agriculture*, 8 DRAKE J. AGRIC. L. 237, 243 (2003) (“In 1920, black farmers comprised one in every seven farmers, but by 1992, they were only one in every one hundred farmers in the United States. A 1990 congressional report found that black-owned farms were going out of business at a rate of three times that of white farms.”); Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL’Y REV 333, 333 (2001) (“The United States Department of Agriculture’s (USDA) loan qualification scheme allows locally elected farmers—who, with few exceptions, are white—to make substantive decisions regarding an applicant farmer’s creditworthiness. For many African-American farmers, this structure has resulted in a sustained lack of access to USDA’s low-cost funds and, eventually, to land loss.”); Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 615–16 (1999) (“In 1999, the U.S. Department of Agriculture agreed to pay \$300 million dollars to settle a sixteen year-old law suit in which Black farmers proved that the department had discriminated against them by denying loans and other subsidies. Sadly for many Black farmers, the acknowledgment of discrimination came too late. In 1920, 14 percent of the nation’s farms were owned by Blacks; by 1992, the number had dwindled to one percent.”).

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 hard-working, low-income taxpayers are expected to accept the same insult. Farmers who do not have to work to receive government payments are hard-working, proud, and independent, while low-income taxpayers receive “public assistance.” Farmers care about their children and their grandchildren—low-income taxpayers presumably do not.

Historically, the EITC has avoided the gender and racial undertones that are commonplace in general welfare discourse.<sup>217</sup> Professors Handler and Hasenfeld observed that the “EITC draws its political strength, in part, because it is not associated with welfare.”<sup>218</sup> Professor Handler emphasizes the point when he states that “[t]o attach the EITC politically to welfare reform would probably cause a decline in its bipartisan support.”<sup>219</sup> After President Clinton expanded the EITC in 1993, he stated that the EITC ‘reward[s] work over welfare . . . . Now that’s real welfare reform.’<sup>220</sup> Yet, with tremendous foresight, both Professor Handler<sup>221</sup> and Professor Alstott<sup>222</sup> predicted waning political support for the EITC and the current crisis.

### C. *Who Is an EITC Recipient?: Academic Discourse and Race*

Academics describing the racial implications of the EITC uniformly agree that Blacks disproportionately benefit from the EITC.<sup>223</sup> The literature that

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<sup>217</sup> HANDLER & HASENFELD, *supra* note 11, at 160. (“Because the EITC does not apply to most welfare mothers—those who do not earn, those who are most stigmatized—it escapes much of the debate over the domestic code, and it is generally devoid of the gender and racial undertones that have beset much of the controversy on AFDC.”).

<sup>218</sup> *Id.* at 166.

<sup>219</sup> HANDLER, *supra* note 12, at 143.

<sup>220</sup> Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 539. In addition, congressional supporters of the 1993 expansion emphasized that the EITC was “the furthest thing from a handout” and was “not welfare.” *Id.* (citing 139 CONG. REC. H5504–05 (daily ed. July 29, 1993) (statements of Representatives Price and Wise)).

<sup>221</sup> HANDLER, *supra* note 12, at 143 (“Conservatives are already noticing its significant transfer effects, as well as its error rates, and they are, predictably, beginning to raise objections.”).

<sup>222</sup> Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 537 (“Recent attacks on the EITC that condemn it as ‘welfare’ and as a ‘handout’ suggest that this danger is more than theoretical.”).

<sup>223</sup> See Bryce, *supra* note 20, at 1695 (“The structure of the earned income tax credit benefits not poor parents in general, but poor parents who are not married . . . . Blacks are much more likely not only to be poor, but also to be unmarried.”) (footnotes omitted). Professor Zelenak provides no citation but merely asserts that the EITC “is a massive subsidy . . . for the working poor. It seems likely the benefits go disproportionately to blacks.” Zelenak, *supra* note 19, at 1568. Professors Moran and Whitford observe “other tax benefits that we have not studied (such as the earned income credit) may offer greater benefits to

concludes that Blacks disproportionately benefit from the EITC is analytically based upon three primary factors. First, Blacks are disproportionately poor and more likely than Whites to be eligible for the EITC. Second, Whites are more likely to marry than Blacks and more likely to suffer from the EITC's marriage penalties.<sup>224</sup> Third, Blacks have more children than Whites and because the EITC increases with the number of qualifying children the taxpayer has, Blacks are more likely to be eligible for a higher EITC.<sup>225</sup> Whites, who have fewer qualifying children, will be eligible for a lower EITC. The next section will consider each of those factors in turn and briefly point out the weak empirical support found in the existing literature for each.<sup>226</sup>

1. *Blacks Are Disproportionately Poor and More Likely than Whites To Receive the EITC*

Professor Bryce states that Blacks are "more likely" to be poor and as a result are more likely to receive the EITC.<sup>227</sup> Professor Bryce concludes that "[i]t is therefore not surprising that economists have estimated that about 24% of earned income tax credit recipients are black."<sup>228</sup> Presumably, Professor Bryce compared 24% with the percent of Blacks in the population, roughly 12%, to conclude that Blacks were more likely to be EITC recipients, although he never explicitly makes that comparison.<sup>229</sup> Professor Bryce ignores the EITC requirement that in order to be eligible for the EITC one must have

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blacks." Moran & Whitford, *supra* note 19, at 754. *But see* Scholz, *supra* note 23, at 86 tbl.1 (author did not state Blacks disproportionately benefit from the EITC based on their eligibility percentages); Yin et al., *supra* note 23, at 250 (a profile of the EITC-eligible population in 1990 showed that 24.3% of the eligible households in that year were Black.). Note again, the authors did not conclude that Blacks disproportionately benefited based upon their eligibility percentages. *See also* Schmalbeck, *supra* note 23, at 1824 ("[I]t is entirely possible that higher black unemployment rates would lead to the conclusion that [the EITC] actually disadvantages blacks as a group at any given income level, since the sources of their incomes may be somewhat less likely to qualify them for this credit.").

<sup>224</sup> After the articles were written that suggested Whites would be more likely to suffer from the marriage penalty provisions of the EITC than Blacks, the EITC was amended to decrease the impact of the EITC. *See supra* note 64 and accompanying text. The marriage penalty legislative fix did not eliminate the marriage penalty in the EITC.

<sup>225</sup> This statement is incorrect because the EITC does not increase for households with more than two children and the greatest EITC per child is for households with one child. *See supra* Table 1.

<sup>226</sup> *See infra* Part III for a more detailed analysis regarding the weak empirical support found in the existing literature.

<sup>227</sup> Bryce, *supra* note 20, at 1695.

<sup>228</sup> *Id.* at 1696 (emphasis added).

<sup>229</sup> The statistic he cited, however, referred to the EITC-eligible population and did not address the percentage of Blacks who actually received the EITC.

earned income.<sup>230</sup> You can be too poor to be eligible for the EITC. If you have no earned income, you will be ineligible for the EITC. In addition, Professor Bryce's use of the Statistical Abstract was not the best proxy for analyzing the EITC.<sup>231</sup> The Statistical Abstract is both over- and under-inclusive in terms of what types of income is eligible for the EITC.<sup>232</sup>

Although Professor Bryce states that being poor is one factor that causes Blacks to be more likely to receive the EITC,<sup>233</sup> most of the other scholars who address the issue fail to provide any rationale. Professors Moran and Whitford concede that although they have not studied the racial implications of the EITC, the EITC "may offer greater benefits to blacks."<sup>234</sup>

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<sup>230</sup> See *infra* note 38 and accompanying text. Professor Leslie Book states that:

The EITC benefits America's working poor. Because minorities, like Hispanics and African Americans, heavily populate the ranks of the working poor, the EITC is particularly significant for these two groups. For example, in 1999, black and Hispanic households accounted for approximately 25.7% and 34.2%, respectively, of all households claiming the EITC.

Book, *supra* note 8, at 366. Professor Book does provide statistical support, however the statistical support does not include data on the percentage of the EITC-eligible population that is White. Cf. *infra* Table 4 and accompanying text.

<sup>231</sup> Bryce, *supra* note 20, at 1695 n.48 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, at 49 tbl.49 (1996 figures)) (showing that 30.3% of Black families, compared to 11.6% of White families, had income under \$15,000 (1996 figures)); see also BUREAU OF THE CENSUS, *supra*, at 475 tbl.736 (showing that 29.3% of Black families, compared to 11.2% of White families, were below the poverty level (1995 figures)); *id.* at 475 tbl.737 (showing that 41.5% of Black children, compared to 15.5% of White children, were living in families below the poverty level (1995 figures)). These statistics are particularly ill-suited to be a proxy for the EITC because they include income that will disqualify you for the credit if received in an amount in excess of \$2650 such as interest, dividends, rents, and royalties. The statistics are also a poor proxy in that it includes items of income that are not "earned income" for purposes of the EITC, such as public assistance, pension or retirement income, unemployment compensation, and workers' compensation. See U.S. Census Bureau, *Current Population Survey: Definitions and Explanations*, available at [www.census.gov/population/www/cps/cpsdef.html](http://www.census.gov/population/www/cps/cpsdef.html) (description of definitions used in census statistics) (last revised Jan. 20, 2004).

<sup>232</sup> The Statistical Abstract includes items of income which would disqualify a taxpayer from being eligible for the EITC, such as interest, dividends, rents, and royalties. Again, these statistics are particularly ill-suited to be a proxy for the EITC. See *supra* note 231 and accompanying text. The Statistical Abstract also includes items of income that are not included in the definition of "earned income." See *supra* note 231 and accompanying text. As a result, using the Statistical Abstract to show that Blacks are more likely to be poor than Whites and therefore more likely to benefit from the EITC misses the mark. Being poor is not the same as being the working poor. There is a significant percentage of poor Blacks who are not eligible for the EITC, because they are not the "working poor." See *infra* Figure 2.

<sup>233</sup> Bryce, *supra* note 20, at 1695.

<sup>234</sup> Moran & Whitford, *supra* note 19, at 754; see also Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1781 (1998) ("If the less affluent (and disproportionately black) have less in home ownership tax benefits, they do have an inflation-adjusted standard deduction under § 63(c) and a substantial refundable earned income credit under § 32.").

Professor Zelenak states “[i]t is not hard to think of provisions which appear to be pro-black . . . . The earned income tax credit . . . is one obvious candidate. [It] is a massive subsidy—almost \$27 billion in 1997—for the working poor. It seems likely the benefits go disproportionately to blacks.”<sup>235</sup> Professor Zelenak similarly provides no citation for why the EITC is pro-Black, nor does he define what he means when he states that EITC benefits go “disproportionately” to Blacks.<sup>236</sup> Professor Zelenak continues by speculating about “other likely candidates” in the tax code that are pro-Black.<sup>237</sup> They include the exclusion from income of welfare-type benefits.<sup>238</sup> He then turns to the other side of the equation, namely tax code provisions that are anti-White. Those include “wealth transfer taxes,”<sup>239</sup> “progressive marginal rates,”<sup>240</sup> and the “phasing out of personal exemptions and of itemized deductions.”<sup>241</sup> Professor Zelenak is not the only academic who believes that the progressive tax rate structure is anti-White.

Professor Bryce states “[t]he Code discriminates against whites. The progressive rate structure results in whites paying most of the federal income tax.”<sup>242</sup> Professor Schmalbeck also confesses that his initial reaction to

<sup>235</sup> Zelenak, *supra* note 19, at 1568; *see also* Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837, 1877 (1998) (“[Zelenak] complains further that studies of provisions that may reveal benefits advantageous to blacks, such as the Earned Income Tax Credit (EITC) or the head-of-household filing category, are omitted from consideration.”); William C. Whitford, *Remarkable*, 76 N.C. L. REV. 1639, 1646 (1998) (“[Zelenak] cites several provisions that he believes we should have studied, with particular emphasis given to the progressive rate structure—which he describes as a ‘massive anti-white aspect of the Code’—and the earned income tax credit—which he describes as a ‘massive subsidy . . . for the working poor,’ presumably disproportionately black.”).

<sup>236</sup> Even though I disagree with Professor Bryce’s analytical process, I do commend his refusal to make an assertion that the EITC disproportionately benefits blacks without any supporting citations. *Cf.* Whitford, *supra* note 235, at 1650 (“[Zelenak] offers no new evidence about the impact of tax on blacks and whites.”).

<sup>237</sup> Zelenak, *supra* note 19, at 1568 (“Other likely candidates for pro-black provisions, which Moran and Whitford do not mention, come readily to mind.”). He provided no empirical support for this statement.

<sup>238</sup> *Id.* (“The exclusion from income of welfare-type benefits probably disproportionately favors blacks.”). He provided no empirical support for his statement. Further there is a question as to what Professor Zelenak was using as a comparison to arrive at the disproportionate conclusion.

<sup>239</sup> *Id.* (“The very existence of wealth transfer taxes (estate, gift, and generation-skipping) disproportionately burdens whites, since whites transfer a disproportionate share of total wealth.”).

<sup>240</sup> *Id.* (“Progressive marginal rates mean that whites, with their higher average income than blacks, must pay a share of the total tax burden that is greater than their share of total income. This is a massive anti-white aspect of the Code.”). He provided no empirical support for this claim, but he did provide some analysis. “In addition, the standard deduction and personal exemptions function as a zero tax rate on the lowest levels.” *Id.* at 1568 n.240.

<sup>241</sup> *Id.* at 1568–69 (“Similarly, whites are disadvantaged by the phasing out of personal exemptions and of itemized deductions. These provisions function as hidden marginal rate increases on high income taxpayers.”). He provided no empirical support for this proposition. *See id.*

<sup>242</sup> Bryce, *supra* note 20, at 1689.

thinking about race and tax was that the progressive rate structure benefits African-Americans because they are “dramatically underrepresented in high- and middle-income groups and overrepresented in the lowest income groups.”<sup>243</sup>

I was once asked whether my work was relevant given that the progressive tax rate structure benefits Blacks because they are disproportionately poor. I responded that if the questioner were correct, then we’d all aspire to grow up to be poor so we wouldn’t have to pay taxes. When the laughter subsided, I responded that the ideal taxpayer is a trust fund beneficiary with income excluded from taxation and not subject to the alternative minimum tax. This type of income has been referred to in the international tax context as “white income.”<sup>244</sup> Both the questioner and the academics discussed herein who have all made the same point show how little tax scholars comprehend of the critical race theory project.

Critical race theory would not argue that the Internal Revenue Code is pro-Black because Blacks are overwhelmingly poor and not subject to the highest marginal tax rate. Critical race theory would examine the underlying assumption, namely whether Whites, who are more likely than Blacks to have high incomes, were in reality subject to the highest marginal tax rates, or whether they are more likely to receive “white income”—income that escapes taxation—either by being excluded or being offset by a deduction. While a complete analysis of this topic is outside the scope of this Article, the belief that progressive marginal rates hurts *all* Whites is an empirical question, worthy of further exploration.<sup>245</sup> I would point out, as a preliminary matter, what New York Times journalist David Cay Johnston observed, that “the richest 1 percent are taxed more lightly than the middle class . . . [and] the poor are taxed almost as heavily as the rich are—and even more heavily than the super rich.”<sup>246</sup>

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<sup>243</sup> Schmalbeck, *supra* note 23, at 1818.

<sup>244</sup> Lee Sheppard, *Companies Have Rights, Too: The European Court of Justice Speaks*, 103 TAX NOTES 42, 45 (2004) (“Thus, the income represented by those flows would be what Europeans call ‘white income’ and Americans call ‘nowhere income,’ taxable nowhere.”).

<sup>245</sup> One of my forthcoming projects will be to explore the impact of the progressive tax system from a critical race theory perspective.

<sup>246</sup> JOHNSTON, *supra* note 8, at 11.

2. *Blacks Are Less Likely than Whites To Marry and Less Likely than Whites To Be Subject to the EITC's Marriage Penalties*

The EITC is granted to individual taxpayers, but there is a requirement that married individuals file joint returns. The effect of these rules is an enormous marriage penalty on the working poor because the phase-out often eliminates the EITC when both spouses' incomes are included on their joint return.

The structure of the earned income tax credit benefits not poor parents in general, but poor parents who are not married . . . Blacks are much more likely not only to be poor, but also to be unmarried. Because low-income whites are more likely to be married, their earned income tax credits are reduced or eliminated by the phase-out; low-income blacks are less likely to be married and less likely to be affected by the phase-out.<sup>247</sup>

Professor Bryce makes the observation that since fewer Blacks marry, they are less likely than Whites to be subject to the EITC marriage penalties associated with the phase-out rules. Where the second spouse's income is added to the first spouse's, pushing the household into the phase-out amount, the household will receive fewer EITC dollars.<sup>248</sup> That decrease in household EITC as a result of marriage is the marriage penalty.<sup>249</sup> Since more Whites marry, Professor Bryce argues, they are more likely to be subject to the EITC marriage penalties. In support of his argument, Professor Bryce points to statistics, which provide that 46.1% of Black households with children consist of married couples, compared to 81.3% of White households with children, as support for the conclusion that since Blacks are less likely to be married, they are less likely to suffer from the EITC marriage penalties.<sup>250</sup> The statistics which Professor Bryce relies upon, however, are not limited to EITC-eligible families, so if marriage rates are different for those families, his data will not be a reliable proxy.

Professor Bryce also points to statistics to show that because 29.8% of Black households with children consist of a female with no spouse present, and only 8.5% of White households with children consist of a female with no spouse present, Whites are less likely to be single mothers, more likely to be

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<sup>247</sup> Bryce, *supra* note 20, at 1695–96 (footnotes omitted).

<sup>248</sup> See *supra* notes 225–27 and accompanying text.

<sup>249</sup> See *supra* note 247 and accompanying text (describing the marriage penalty).

<sup>250</sup> Bryce, *supra* note 20, at 1695 n.48 (citing BUREAU OF THE CENSUS, *supra* note 231, at 49 tbl.49 (1996 figures)).

married, and more likely to be subject to the EITC marriage penalties.<sup>251</sup> Because marriage is more likely entered into by Whites, and the EITC penalizes marriage, any tax detriment to marriage will disproportionately harm Whites—even low-income Whites.<sup>252</sup>

Conversely, Blacks are more likely to be single mothers not subject to the EITC marriage penalties.<sup>253</sup> Professor Bryce provides statistics which show “75% of white families with children consist of two-parent groups, while only 35% of black families with children consist of two-parent groups.”<sup>254</sup> Again, since Whites are more likely to be in two-parent groups than Blacks they are most likely to suffer from the EITC marriage penalties. Blacks, who are most likely not to be in two-parent groups, are most likely not to suffer from the EITC marriage penalties.

Professor Bryce never considers the racial implications of marriage bonuses in the EITC. Nor does he consider the possibility that a higher percentage of Blacks than Whites might still pay a higher marriage penalty, even though fewer Blacks are married.<sup>255</sup> The fact that lower percentages of Blacks are married than Whites does not answer the question of whether, among married EITC taxpayers, Whites or Blacks are more likely to pay a marriage penalty or receive a marriage bonus. None of the other scholars that addressed the racial impact of the EITC addressed the marriage penalty factor.

### *3. Blacks Are More Likely than Whites To Be Unmarried and Have Children Which Results in the Receipt of a Higher EITC than Whites*

Professor Bryce is also the only scholar to address the relationship based upon race between having children and qualifying for the EITC. Professor Bryce states:

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<sup>251</sup> *Id.* (citing BUREAU OF THE CENSUS, *supra* note 231, at 49 tbl.49 (1996 figures)).

<sup>252</sup> *But see infra* notes 332–37 and accompanying text (discussing how the joint return, which is filed by married couples, disproportionately disadvantages Blacks and advantages White married couples at all income levels).

<sup>253</sup> Bryce, *supra* note 20, at 1695–96.

<sup>254</sup> See STEVE RAWLINGS & ARLENE SALUTER, BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS: HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1994, at xvii fig.5 (1995).

<sup>255</sup> *Cf.* Brown, *supra* note 55, at 1501–04 (describing how a higher percentage of Blacks are in the marriage penalty category than are Whites at all income levels in spite of lower marriage rates).

The earned income tax credit is a refundable credit based on a percentage of the earned income of a taxpayer with dependent children—in essence a negative income tax for these taxpayers.

The structure of the earned income tax credit benefits not poor parents in general, but poor parents who are not married . . . Blacks are much more likely not only to be poor, but also to be unmarried . . . . If anything, the earned income tax credit seems designed to reward the black lifestyle.<sup>256</sup>

Professor Bryce concludes that because Blacks are more likely to be unmarried parents (and presumably have more children), they are more likely to qualify for the EITC in greater percentages than Whites and receive a higher EITC than Whites. None of the other scholars address this issue. Professor Bryce fails to take into account that the EITC does not increase for each child in the household once the taxpayer has two children.<sup>257</sup> If Blacks have more children than Whites, the provisions of the EITC would actually hurt Blacks.

The statements made by the academics discussed herein, however, need to be examined in a larger context. Academics failed to ground their discussions of the EITC in empirical data and also showed hostility towards those who did, especially those who applied a race based analysis to the EITC. The next Section explains why tax academics may be hostile to critical race theory in the federal tax context and the value added by examining how federal tax laws impact certain segments of society, previously ignored.

#### 4. *Academic Politics: The Imperial Tax Scholar?*<sup>258</sup>

In addition to making fairly definitive statements concerning the race of EITC recipients, many of those same academics are quite skeptical—even hostile—to the idea that race (and in certain instances gender) can ever be relevant when discussing tax policy. The major complaint is that the critical race tax project only selects tax provisions that disadvantage Blacks to study, while ignoring tax provisions that advantage Blacks.<sup>259</sup> Professor Zelenak

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<sup>256</sup> Bryce, *supra* note 20, at 1695–96.

<sup>257</sup> See *supra* Table 1.

<sup>258</sup> I adapted the title to this section from Professor Richard Delgado's first use of the phrase regarding constitutional law scholars. See Delgado, *The Imperial Scholar*, *supra* note 27, at 561; Delgado, *The Imperial Scholar Revisited*, *supra* note 27, at 1349.

<sup>259</sup> None of the scholars cited herein provided an empirical analysis which analyzes a tax provision which benefits Blacks. The EITC was the tax provision of choice advanced to support their "selection bias" argument; however, this Article hopefully has shown the inadequacies of their analysis. In addition, Professor Zelenak also complains that "the most serious problem is the failure to think through proposed solutions with

states that while he is “less convinced of the merits of the critical race tax project, although it is too early to dismiss the approach”<sup>260</sup> he remains quite convinced of the merits of the critical gender tax project.<sup>261</sup> He thinks “the basic project of feminist tax policy analysis . . . is worthwhile and important.”<sup>262</sup> In Professor Zelenak’s opinion, gender counts, but not race.

Professor Bryce states that “[r]ecent years have seen the spread of legal academia’s favorite obsession—sex and race as the origin of all of society’s ills—to the tax law . . . . [T]his is not a helpful development.”<sup>263</sup> Professor Bryce believes that analyzing the federal tax laws from sex and race based perspectives will not prove to be helpful.

Professor Jensen states “that the New Criticism isn’t taking us in a desirable direction.”<sup>264</sup> But his objection is milder than the others. He states that “[i]f a critic can demonstrate that the Internal Revenue Code has had unfortunate effects on particular groups . . . we certainly ought to know that.”<sup>265</sup> Professor Jensen has two objections to the “New Criticism.” First, he wonders whether feminism or critical race theory provide any analysis that could not have been discovered otherwise.<sup>266</sup> (The easy response is that it was not discovered otherwise.) Second, he objects to the tone of New Criticism scholarship.<sup>267</sup>

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sufficient care.” Zelenak, *supra* note 19, at 1524.

<sup>260</sup> Zelenak, *supra* note 19, at 1526; *see also* Charles O. Galvin, *Taking Critical Tax Theory Seriously—A Comment*, 76 N.C. L. REV. 1749, 1752 (1998) (“Like Professor Zelenak, I find the critical race theorists’ criticisms unconvincing.”).

<sup>261</sup> Zelenak, *supra* note 19, at 1526.

<sup>262</sup> *Id.* Professor Grace Blumberg is a scholar at the University of California, Los Angeles School of Law. Professor Zelenak cites the work of Professor Edward McCaffery as an example of “impressive” feminist tax policy analysis. *Id.* at 1526 n.32 (“In the past few years, the work of Edward McCaffery has been especially impressive.”). In the text of his article he acknowledges a few good examples of feminist tax scholarship. *Id.* at 1574–78. He describes the work of Grace Blumberg, Patricia A. Cain, and David L. Chambers as “good examples” of scholarship. *Id.* at 1574. He also speaks favorably of Professor Anne Alstott’s work, calling it “impressive.” *Id.* at 1578.

<sup>263</sup> Bryce, *supra* note 20, at 1687.

<sup>264</sup> Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1756 (1998).

<sup>265</sup> *Id.* at 1756–57.

<sup>266</sup> *Id.* at 1757 (“But even when New Criticism articles have merit, one might quibble about how much feminism or critical race theory helps us to understand discriminatory effects that could have been unearthed with more traditional analysis”).

<sup>267</sup> *Id.* (“[A]nd that could have been described without the loaded, offputting language that often accompanies the New Criticism.”).

The scholarly resistance that has met the application of race to federal tax policy is not without precedent in other areas of the law.<sup>268</sup> Professor Richard Delgado has shown how constitutional law scholars have ignored the contributions of scholars of color.<sup>269</sup> The difference between that situation and this one is that at least the White constitutional law faculty that Professor Delgado described were writing about the impact of the civil rights laws on people of color.<sup>270</sup> Here, White tax professors are not writing about the racial impact of federal tax policy, but they are criticizing those scholars who do.<sup>271</sup>

There are scholars however who do take the critical tax project seriously. For example, Professor Michael A. Livingston states that “the quality and originality of critical tax scholarship is higher than Zelenak indicates.”<sup>272</sup> Professor Richard Schmalbeck admits to being “tentatively persuaded that there really may be important features of the federal income tax that raise horizontal equity concerns along racial lines.”<sup>273</sup> Professor Nancy Shurtz describes Zelenak as “missing the point” of critical scholarship.<sup>274</sup> Professor

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<sup>268</sup> Delgado, *The Imperial Scholar*, *supra* note 27, at 566 (“It is even possible that, consciously or not, [white scholars] resist entry by minority scholars into the field [of civil rights law].”). Professor Edward McCaffery, a tax law professor, stated “[t]he puzzle and surprise is that the tax law academy has for the most part avoided . . . important issues such as . . . race and class.” Rebecca S. Rudnick, *Taxation and the Family*, 69 TAX NOTES 421, 421 (1995) (quoting Professor Edward McCaffery).

<sup>269</sup> Delgado, *The Imperial Scholar*, *supra* note 27, at 566.

<sup>270</sup> *Id.* at 567–68. Professor Delgado describes the problems inherent when Whites write about non-Whites:

A number of the [White] authors were unaware of basic facts about the situation in which minority persons live or ways in which they see the world. From the viewpoint of a minority member, the assertions and arguments made by nonminority authors were sometimes so naive as to seem incomprehensible and hardly merit serious consideration . . . . In addition to factual ignorance or naiveté, some of the writing suffered from a failure of empathy, an inability to share the values, desires, and perspectives of the population whose rights are under consideration.

*Id.*

<sup>271</sup> Professor Zelenak states that in order for critical tax theory to be taken seriously, the scholarship must be taken seriously by White men. Lawrence Zelenak, *The Meaning of Feminist Tax Scholarship: Feminism and “Safe Subjects Like the Tax Code”*, 6 S. CAL. REV. L. & WOMEN’S STUD. 323, 324 (1997) (“Not surprisingly, those at the top of the tax law professor hierarchy are overwhelmingly white men. It is simply a fact that ideas cannot be taken seriously by tax academia, as it is now constituted, unless those ideas are taken seriously by white men.”). Professor Zelenak, however, did not provide any citation for his statement that “those at the top of the tax law professor hierarchy are overwhelmingly white men.” *See id.*

<sup>272</sup> Michael A. Livingston, *Radical Scholars, Conservative Field: Putting “Critical Tax Scholarship” in Perspective*, 76 N.C. L. REV. 1791, 1807 (1998).

<sup>273</sup> Schmalbeck, *supra* note 23, at 1834.

<sup>274</sup> Shurtz, *supra* note 235, at 1847–48 (“I will demonstrate that Zelenak misses important substantive elements of the pieces he reviews, revealing a basic misunderstanding of the mission of critical scholarship. I believe this misunderstanding owes much to his adherence to a form of normative discourse that suggests

Marjorie Kornhauser states that “[a] primary virtue of critical tax theory is that it, like any outsider theory, reveals the assumptions hidden behind established thought and institutions.”<sup>275</sup> She continues, stating that “[c]ritical tax scholarship is valuable precisely because it helps explode the myth of neutrality.”<sup>276</sup>

One might ask why this is important. Professor Delgado framed the debate by asking “why get excited if the authors of certain articles play by odd rules?”<sup>277</sup> His answer is:

[W]hat law professors say in their elegant articles contributes to a legal climate, a culture. Their ideas are read and discussed by legislators, political scientists, and their own students. They affect what goes on in courts, law classrooms, and legislative chambers. Ideologies—perspectives, ways of looking at the world—are powerful. They limit discourse. They also enable the dominant class to maintain and justify its own ascendancy. Law professors at the top universities are part of this dominant class, and their writings contribute to the ideologies that class creates and subscribes to. These writings are not harmless; they have clout.<sup>278</sup>

Accordingly, the impact of the tax laws upon people of color is an important tax policy question. By ignoring the issue, tax law professors are able to “maintain and justify” the status quo.<sup>279</sup> People of color are disproportionately

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employment of a universal blueprint for scholarship which allows scant room for deviation from the mold. Zelenak’s stringent observance of a prescribed discursive form precludes him from discerning some of the intended meanings projected in these pieces by the authors whom he criticizes—in short, he misses the point.” (footnotes omitted).

<sup>275</sup> Marjorie E. Kornhauser, *Through the Looking Glass with Alice and Larry: The Nature of Scholarship*, 76 N.C. L. REV. 1609, 1623 (1998).

<sup>276</sup> *Id.* at 1626.

<sup>277</sup> Delgado, *The Imperial Scholar*, *supra* note 27, at 573.

<sup>278</sup> *Id.* Professor Delgado states,

My conclusion to this point is that there is a second scholarly tradition, that it consists of the exclusion of minority writing about key issues of race law, and that this exclusion does matter; the tradition causes bluntings, skewings, and omissions in the literature dealing with race, racism, and American law.

*Id.*

<sup>279</sup> *Cf.* Shurtz, *supra* note 235, at 1854 (“Zelenak embraces those articles that do not ‘rock the boat,’ so to speak, that frame their arguments within the safe contours of the existing political agenda and the terms of established tax policy criteria, seeking reforms that do not jeopardize the status quo. He rejects out of hand those pieces that share the common thread of challenging the basic premises of taxation policy, most notably some variation of the theme that taxation, far from being a neutral instrument of the polity, is permeated with all the biases of the ruling class that shapes and maintains its contours.”) (footnotes omitted).

poor not because of tax policy, which is neutral and objective, but because “stuff happens.” A recent study provides additional information that may help explain the reaction by tax law professors generally.<sup>280</sup>

Professors Merritt and Reskin performed an empirical analysis of all law professors who began their initial tenure-track appointments between Fall 1986 and Spring 1991.<sup>281</sup> They provide data on the number and percentages of men and women, by race and sex, who taught six subjects during their first few years of law teaching.<sup>282</sup> The subjects include corporate law, constitutional law, family law, skills, tax, and trusts and estates.<sup>283</sup> The balance of this Section focuses specifically on the tax law data.

White professors were significantly more likely than professors of color to teach tax and tax-related courses.<sup>284</sup> White women were the highest percentage of tax professors hired, at 36%, followed by White men (31%), women of color (18%), and men of color (15%).<sup>285</sup> Thus, White tax law professors were 67% of those hired and professors of color teaching tax were 33% of those hired.

As Professors Merritt and Reskin point out, the five years between 1986 and 1991 that is the basis of their data set were years in which the legal academy articulated a strong commitment to increasing racial diversity in faculty hiring.<sup>286</sup> Therefore, although their analysis is somewhat limited, there

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<sup>280</sup> Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 199 (1997). The study shows that more men of color were hired to teach constitutional law than White men, so perhaps over time things might improve in constitutional law scholarship. *Id.* at 259–61. The study showed however, that both White women and women of color had fewer opportunities to teach constitutional law when compared with men having similar credentials. *Id.* at 261. One area for further research would be to analyze whether feminist and critical race feminist scholarship is embraced or rejected by the constitutional legal scholarship community today.

<sup>281</sup> *Id.* at 206–07.

<sup>282</sup> *Id.* at 258.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 266 (“The white professors in our population were significantly more likely than professors of color to teach tax-related courses, but our regression analysis suggests that this pattern reflects primarily a difference in work experience.”) (citations omitted).

<sup>285</sup> *Id.* at 259 tbl.8 (9.7% of the 319 White women who were hired, were hired to teach tax; 8.5% of the 550 White men hired, were hired to teach tax; 4.9% of the 81 women of color hired, were hired to teach tax; and 4.2% of the 96 men of color hired, were hired to teach tax). I added the percentages, which totaled 27.3%. I then divided each percentage by 27.3% to arrive at the 36%, 31%, 18%, and 15% figures.

<sup>286</sup> *Id.* at 208 (“During the five years between 1986 and 1991, the legal academy professed a strong commitment to implementing affirmative action programs. Indeed, many observers reported that law faculties were extending clear preferences to women and minorities, hiring them rather than better qualified white men.”) (footnote omitted).

is reason to believe that the percentages of women and minorities in their study are higher than those concerning all tenured and tenure track tax law professors. Accordingly, the percentages of tax law faculty members of color may be even smaller. A study of the recent Association of American Law Schools directory is revealing and shows that the percentage of White, male constitutional law faculty is roughly equivalent to that of federal tax law faculty.<sup>287</sup>

Analyzing the Association of American Law Schools data base for 2003–2004 for all tenured or tenure-track federal tax faculty, 65.9% (335) are White men, 18.9% (96) are White women, 6.7% (34) are men of color, and 3.3% (17) are women of color.<sup>288</sup> White federal tax professors represent 84.8% of all tax professors, and professors of color teaching tax represent 10%.<sup>289</sup> The current statistics show that almost 85% of all tax law professors are White; there are over three times as many White men as White women, over eight times as many Whites as non-Whites, more than six times as many White men as people of color, and twice as many men of color as women of color.<sup>290</sup>

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<sup>287</sup> Richard A. White, Gender and Ethnic/Racial Composition of Law Faculty by Teaching Areas, (unpublished data compiled from the 2003–2004 Association of American Law Schools database of law teachers) (results on file with author) (2004). The data were categorized by subject matters taught and included 88 different subjects which were broken down by race and gender. Of Constitutional law faculty, 65.4% are White men, whereas 65.9% of federal tax faculty are White men. There were data missing in 6.6% of the entire data base. For tax law professors, there are twenty-six professors (or 5.1%) with missing racial and ethnic data.

<sup>288</sup> *Id.* Federal tax faculty statistics used here do not include state and local taxation, estate and gift taxation, or estate planning. Each of those statistics is broken out separately.

<sup>289</sup> *Id.* The missing data is 5.1%. The total is 99.9%. It does not add up to 100% because of rounding calculations as well as due to instances where racial and/or ethnic identity is unknown.

<sup>290</sup> To put the federal tax law faculty statistics in perspective, 76% of Antitrust faculty are White men, 70.6% of Law and Economics faculty are White men, and 65.4% of Constitutional Law faculty are White men. *See* White, *supra* note 287. Of the eighty-seven teaching areas (those other than federal tax), twenty-nine had higher percentages of White men than federal tax law faculty and fifty-eight had lower percentages of White men than federal tax law faculty. There were twice as many subject areas where White men were found in lower percentages when compared with tax faculty than were found in higher percentages. Put another way, the fewest percentage of non-White faculty are found in tax and twenty-nine other subject areas. Those subject areas include: accounting, administrative law, admiralty, agency and partnership, antitrust, consumer law, corporate finance, entertainment law, environmental law, equity, estate and gift taxation, estate planning, federal courts, government contracts, insurance, law and economics, law and psychiatry, law and science, law office management, legal history, military law, natural resources, oil and gas, products liability, regulated industries, sports law, trade regulation, water rights, and workers' compensation. *Id.*; cf. Eric A. Lustig, *Who We Are: An Empirical Study of the Tax Law Professoriate*, 1 PITT. TAX REV. 85, 97 (2003) (“[T]he academy of tax law professors seems slightly less ethnically diverse than the general population of law professors.”).

One explanation which may answer the hostility towards critical tax scholarship is the conservative nature of tax scholars.<sup>291</sup> Maintaining the status quo or ideas designed to gain political acceptance is the important thing. Any form of scholarship that is too forward thinking is subject to attack.

Perhaps another explanation for the hostility (or indifference) to the development of a critical race perspective on federal tax policy is the high percentage of White tax law faculty. This is not to say that all White tax law faculty are racist or indifferent to racism in federal tax policy. It is possible, however, that White tax faculty could be uncomfortable with this new scholarly direction because they feel ill-equipped to compete. White tax faculty may not believe they are on a level playing field with scholars of color looking at these issues. One response that would solve the dilemma would be to attack the scholarship or subject it to such a high level of scrutiny that it becomes difficult for the scholarship to continue.<sup>292</sup>

Professor Keith Aoki points out “how ‘attack’ scholarship in legal academia has tried to preempt and shut down debate and discussion” of race related issues by using a variety of tactics.<sup>293</sup> One tactic is for attackers to try

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<sup>291</sup> Livingston, *supra* note 272, at 1791 (“Yet tax scholars are a conservative breed, and—while all admit the political character of taxation—in practice their work tends to emphasize a series of rather dry and (to outsiders) technical issues, and their style of argument stresses the search for technically proficient, consensus solutions having appeal across the political spectrum.”).

<sup>292</sup> Cf. Leti Volpp, *Talking “Culture”: Gender, Race, Nation and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1573–74 (1996). Volpp states:

Backlash scholarship attempts to preempt debate on the difficult questions raised by such subjects as multiculturalism and race. This attempt follows four strategies. First, backlash scholarship denies that scholarship such as critical race theory exists. Second, it asserts that such scholarship is invalid as scholarship qua scholarship—for example, by laying claims to legitimacy as “objective” and “neutral” scholarship, while critiquing other scholarship as “subjective.” Third, backlash scholarship redefines or appropriates key imagery, terms, and tropes that are distorted and redeployed in the service of what has been named “color-blind meritocratic fundamentalism.” Lastly, it tends to misrepresent previous literature that is the subject of attack.

*Id.* (citations omitted); *see also* Whitford, *supra* note 235, at 1652 (“In today’s world, scholars know that the charged nature of race as a topic provokes response, and that the response is often an attack on competence or motive. All this has a chilling effect. The safer course for a scholar concerned about professional reputation is not to write about race. Given the pervasiveness and persistence of American’s race problem, the incentives should be just the opposite. Ensuring that critiques are careful and responsible will help limit the perverse incentives that I fear are all too extant today.”).

<sup>293</sup> Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1471–72 (1996).

to show how the publication does not meet the standard of scholarship, while cloaking themselves in the agenda of “tough love.”<sup>294</sup>

Professor Zelenak purports to give “tough love” when he titles his article “Taking Critical Tax Theory Seriously”<sup>295</sup> and states that he is taking “feminist and other critical tax policy analysis seriously—more seriously than its proponents have taken it in many cases.”<sup>296</sup> While acknowledging that it is long overdue for tax academics to apply race and gender analysis to tax issues, he is “troubled that much of the work has not been carefully done.”<sup>297</sup> At the conclusion of the article he expresses his hope that his article “by someone outside the movement but sympathetic to some of its goals—will expand the dialogue.”<sup>298</sup>

Justice Blackmun recognized in 1976 that “[t]ax . . . statutes . . . may be more burdensome to the poor and to the average black than to the more affluent white.”<sup>299</sup> Uncovering racial disparities in tax statutes therefore should come as no surprise to tax scholars—yet it does.<sup>300</sup> Analyzing federal tax laws from a critical race perspective is the first step if our tax laws are to support, instead of hinder, the societal goal of racial equality. Once those racial disparities are uncovered, meaningful reform can take place.

Critical tax scholarship analyzes the effect of tax policy on women,<sup>301</sup>

<sup>294</sup> *Id.* at 1472.

<sup>295</sup> Zelenak, *supra* note 19, at 1521.

<sup>296</sup> *Id.* at 1526.

<sup>297</sup> *Id.* at 1523.

<sup>298</sup> *Id.* at 1580.

<sup>299</sup> *Washington v. Davis*, 426 U.S. 229, 248 (1976).

<sup>300</sup> *Cf.* Rudnick, *supra* note 268, at 421. Rudnick quotes Professor Edward McCaffery as saying that:

taxation of the family is political, just as all tax is political. The question is what would it mean not to have a political perspective on tax. *The puzzle and surprise* is that the tax law academy has for the most part avoided the topic of taxation and the family, and important issues such as gender bias, the definition of a family, family structure, savings patterns, same sex couples, race and class, and low-income individuals, and has focused on more narrow and technical issues in business and financial taxation.

*Id.* (emphasis added).

<sup>301</sup> *See, e.g.*, EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997); Alstott, *Tax Policy and Feminism*, *supra* note 34, at 2001; Grace Blumberg, *Sexism in the Code: A Comparative Study of the Income Taxation of Working Wives and Mothers*, 21 *BUFF. L. REV.* 49 (1972); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 *UCLA WOMEN'S L.J.* 301 (1995); Gwen Thayer Handelman, *Sisters in Law: Gender and the Interpretation of Tax Statutes*, 3 *UCLA WOMEN'S L.J.* 39 (1993); Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 *LAW & HIST. REV.* 259 (1988); Lily Kahng, *Fiction in Tax*, in *TAXING AMERICA* 25 (Karen B. Brown & Mary Louise Fellows eds., 1996); Marjorie E. Kornhauser, *Deconstructing the Taxable Unit: Intrahousehold Allocations*

people of color,<sup>302</sup> and gay and lesbian taxpayers.<sup>303</sup> Critical tax scholarship “challenge[s] the traditions of the tax field” by focusing on the effect of tax policy on historically subordinated groups.<sup>304</sup> There is value in showing how tax policy is a reflection of societal biases, that the tax law is not neutral and objective.<sup>305</sup> As a result, it is not surprising that traditional tax scholars have

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and the Dilemma of the Joint Return, 16 N.Y.L. SCH. J. HUM. RTS. 140 (1999); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

<sup>302</sup> See generally David A. Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336 (2004); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004); Brown, *supra* note 55; Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004); Brown, *supra* note 31; Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287 (1999); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in *TAXING AMERICA*, *supra* note 301, at 45; Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries*, 23 U. PA. J. INT'L ECON. L. 45 (2002); Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 CAL. REV. L. & WOMEN'S STUD. 223 (1998); Mary Louise Fellows, *Rocking the Tax Code (A Case Study of Employment-Related Child Care Expenditures)*, 10 YALE J.L. & FEMINISM 307 (1998); Laura Ann Foster, *Social Security and African American Families: Unmasking Race and Gender Discrimination*, 12 UCLA WOMEN'S L.J. 55 (2001); Moran & Whitford, *supra* note 19.

<sup>303</sup> See, e.g., Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387 (2002); Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267 (2002); Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000); Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Patricia A. Cain, *Tax and Financial Planning for Same-Sex Couples: Recommended Reading*, 8 LAW & SEXUALITY 613 (1998); Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471 (1997); Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359 (1995); Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998).

<sup>304</sup> Livingston, *supra* note 272, at 1797–98 (“[C]ritical tax scholars challenge the traditions of the tax field by focusing on issues like family taxation or the treatment of poor taxpayers.”); see also Michael A. Livingston, *Women, Poverty, and the Tax Code: A Tale of Theory and Practice*, 5 J. GENDER RACE & JUST. 327, 329 (2002) (“[A] ‘critical tax scholarship’ has emerged that in theory challenges the foundations of the entire tax field law and in practice means a liberal-left tax scholarship with a special emphasis on women’s and minorities’ issues.”).

<sup>305</sup> Cf. Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, “Globalization,” and the New Millennium*, 4 FLA. TAX REV. 731, 758–59 (2000). Livingston urges critical tax scholars to examine the progressive tax structure and describes the benefit:

[I]f the work of critical tax scholars were integrated with the mainstream debate on progressive taxation, rather than being treated as a separate, essentially peripheral concern . . . . I do mean that race and gender-based data should be taken into account, along with purely economic statistics, both in measuring the overall progressivity of the tax system and in assessing specific legislative proposals. Thus, in evaluating, for example, a consumption or flat tax system, scholars would consider its effect on women and minorities as well as on taxpayers in different economically defined income brackets. A tax system would be considered progressive only if it were fair to lower-income individuals, regardless of race or gender, but also if it dealt fairly with

“challenged” critical tax scholarship.<sup>306</sup>

The specific complaints from traditional tax scholars are that critical tax scholarship is one sided and incomplete,<sup>307</sup> not carefully done,<sup>308</sup> the result of selection bias in the code sections chosen to be analyzed,<sup>309</sup> not the result of a “detached and disinterested frame of mind,”<sup>310</sup> and with little attention paid to details.<sup>311</sup> This Section documents the number of instances where traditional tax scholarship that discussed the racial impact of the EITC was incomplete, not carefully done, and paid little attention to details. If tax scholars are interested in taking the endeavor of uncovering racial bias in the federal tax laws seriously, then they must put forth the effort and provide a meaningful analysis. Indeed, they must be held to the same standard they seek to apply to others.

### 5. Summary

The public makes the connection between welfare recipients and African-Americans. Politicians speak in racially coded language when they refer to EITC payments as welfare. The EITC is welfare, but farm subsidies are not. Additionally, academics have concluded that the EITC disproportionately benefits Blacks because they are disproportionately poor. The EITC is considered to be pro-Black because it purportedly reserves its highest benefits

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disadvantaged groups.

*Id.* (footnotes omitted).

<sup>306</sup> See *supra* notes 291–97 and accompanying text.

<sup>307</sup> Zelenak, *supra* note 19, at 1578 (“Although I cannot offer definitive proof, I believe there is something special—that problems of one-sidedness and incomplete analysis are more common in the critical tax literature than in the general academic tax policy literature.”).

<sup>308</sup> *Id.* at 1523. (“Precisely because of the importance of the endeavor [of examining the tax laws from a race, class, gender and sexual orientation bias perspective], however, I am troubled that much of the work has not been carefully done.”).

<sup>309</sup> *Id.* at 1523–24. In diagnosing the problems associated with the critical tax scholarship, Professor Zelenak states:

The first problem is an overeagerness to accuse the tax laws of hostility to . . . blacks . . . . [The next] problem (also closely related to the first) is selection bias, both in the aspects of the tax laws chosen for study, and in the analysis of those chosen aspects. This is especially true of critical race theorists, who focus on Tax Code provisions arguably disadvantageous to blacks, but pay no attention to Code provisions arguably favorable to blacks.

*Id.*

<sup>310</sup> *Id.* at 1578 (“One reason may be that participants in the critical tax project do not approach the tax laws in a detached and disinterested frame of mind.”).

<sup>311</sup> Bryce, *supra* note 20, at 1688 (“There is, however, very little *legal* analysis; in fact, the authors pay little attention to the details of the income tax as the law has developed.”) (emphasis in original).

for unmarried parents with lots of children, and academics view Blacks as far more likely to be unmarried parents with lots of children than Whites. The empirical data to support these statements are extremely sparse. At the same time, academics ignore key features of the EITC, such as the requirement that one has earned income and that the EITC does not increase for every child present in the household.<sup>312</sup> Academics are also hostile to scholarship that incorporates a critical race perspective into federal tax policy analysis. Part III shows why empirical data are important to understanding the racial impact of the EITC. The empirical data provided strike an optimistic chord and will be a necessary part of any successful EITC reform effort.

### III. EMPIRICAL DATA AND THE EITC

#### A. Introduction

This Part includes an analysis of data taken from the Survey of Income and Program Participation.<sup>313</sup> It includes data on all sample participants from 1990 through 1994 and can be analyzed by race.<sup>314</sup> Further, this Part provides a more textured analysis of the EITC than that found in the tax literature. Since the data are not actual taxpayer data, the focus is on whether the sample participants are EITC-eligible.

To the extent that EITC-eligible taxpayers are substantially different from actual EITC participants, any analysis based on eligibility would indeed be suspect. But one study found between 75% and 86% of EITC-eligible

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<sup>312</sup> See *infra* Part III for a further description of the errors made in the existing tax literature regarding the racial composition of EITC taxpayers.

<sup>313</sup> The empirical data in this Part were performed by Stacy Dickert-Conlin, an Associate Professor of Economics at Syracuse University, and Scott Houser, an Associate Professor of Economics at Colorado State University. These data examine 1990–1993 panels. They fixed family composition and income as of December 31 of each year and use every year that there is a complete year available. The panels run between thirty-two and forty months. The 1993 panel ran long enough to include 1995. SIPP is a random sample of 22,994 households which, when weighted, represent the civilian, noninstitutionalized U.S. population. Each of four staggered rotation groups is interviewed every four months about monthly labor market behavior, income sources, and household composition. For example, the 1990 file aggregates 1990 household information and fixes family composition as of December 31, 1990. See THOMAS B. JABINE ET AL., U.S. BUREAU OF CENSUS, SURVEY OF INCOME AND PROGRAM PARTICIPANTS (SIPP): QUALITY PROFILE (1990). The conclusions drawn herein are solely the author's.

<sup>314</sup> The 1990–1994 data set was selected because it included 1990, which was the basis of the one study mentioned by the tax academics.

taxpayers actually received the EITC.<sup>315</sup> Professor Scholz studied both eligibility and participation of Blacks and Whites in the EITC, and that study showed that Black and White families are no different in their participation decision.<sup>316</sup> Approximately 85% of Blacks eligible to participate did so and, similarly, 85% of Whites eligible to participate did so. A more recent study, however, suggests that Hispanic-Americans are less likely to apply for the EITC because they are unaware of it.<sup>317</sup> The study reported that White and Black taxpayers were the most likely to be aware of the EITC.<sup>318</sup> While this Part does not provide an in depth analysis of Hispanic-Americans and the EITC, further research in this area is warranted. This Part begins with data on all taxpayers and includes all racial groups. The balance of this Part will include data dealing with Blacks and Whites only.<sup>319</sup>

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<sup>315</sup> See Yin et al., *supra* note 23, at 244. ("Accordingly, our best estimate of the EITC participation rate in 1990 is between 75 and 86 percent."); *id.* at 252.

EITC participation rates in the range of 75 to 86 percent compare quite favorably to those of other federal programs directed toward low-income households. For example, food stamp participation was estimated to be 56 percent in 1989. An older study estimated food stamp and SSI participation to be between 50 to 60 percent in the late 1970s, and AFDC participation varying from 95 percent in the District of Columbia to 56 percent in Arizona in 1975–76. A more recent estimate indicates a 62–72 percent AFDC participation rate and a 54–66 percent food stamp participation rate using data from the 1986 and 1987 SIPP panels.

*Id.* (footnotes omitted).

<sup>316</sup> See Scholz, *supra* note 23, at 74 tbl.3 (The t-statistic on the Black coefficient shows that the coefficient is not statistically significant at any standard levels of comparison.).

<sup>317</sup> Philip Richardson, *Awareness and Use of the Earned Income Tax Credit Among Current and Former TANF Recipients*, MAXIMUS, Apr. 2002, at 1, available at [http://peerta.acf.hhs.gov/pdf/maximus\\_awareness.pdf](http://peerta.acf.hhs.gov/pdf/maximus_awareness.pdf) ("[A]wareness of the EITC among the survey respondents varied by ethnicity. Whites and blacks were the most likely to have heard of the tax credit. In New Mexico, Illinois, and San Bernardino County, Hispanics were much less likely to have heard of the tax credit than whites or blacks. For example, only 42% of Hispanic welfare recipients in New Mexico had heard of the tax credit, compared to 58% of blacks and 65% of whites."); see also Barbara J. Robles, *Latino Families: The Earned Income Tax Credit and the Child Tax Credit*, in ECONOMIC OPPORTUNITY: FAMILY ASSETS (2003) (prepared for the Annie E. Casey Foundation) ("In assessing the non-filing population, research indicates that Latino working families in the US do not benefit from [the EITC or CTC] . . . . Because this benefit works only through the US tax system, many working poor unfamiliar with tax preparation and filing requirements have not participated in the refundable EITC.").

<sup>318</sup> Richardson, *supra* note 317. The study was based on surveys conducted in California, Illinois, New Mexico, North Carolina, and South Carolina. While this Article presumes a high correlation between EITC-eligibility and actual EITC receipt, this is an area that would benefit from additional study based upon a nationwide data set.

<sup>319</sup> While a complete examination would include all racial and ethnic groups, in many instances, the data set was too small to allow any conclusions to be drawn. In addition, this issue has been primarily addressed from a Black or White perspective. Although as previously mentioned additional research is needed examining the EITC and Hispanic families.

This Part then analyzes the racial impact of the EITC. This point is far more complicated than the literature suggests.<sup>320</sup> On the one hand, the data show that there is a greater percentage of Blacks who are eligible for the EITC than Whites. However, when one looks at the EITC-eligible sample, the data show that Whites are more than twice as likely as Blacks to be eligible for the EITC. *Whites constitute more than 50% of the EITC-eligible population.* The data also show that *most* Blacks are ineligible for the EITC. By focusing on EITC-eligible Blacks and ignoring EITC-eligible Whites (as well as EITC-ineligible Blacks), the academics made the same mistakes those in the welfare discourse realm made. The tax academics paint the EITC as disproportionately benefiting Blacks, and painting the EITC as pro-Black can mislead those interested in using the tax code to strengthen Black families to believe that there is no work to be done in the EITC context. This Part shows the important question ignored by the existing literature: Why does the CTC provide more benefits for families with children than the EITC?<sup>321</sup>

The data explore two common misperceptions concerning EITC recipients. First, the data show that although a higher percentage of EITC-eligible Whites are married than EITC-eligible Blacks, Blacks are more likely to be found in marriage penalty households. Second, the data show that the EITC for Blacks and Whites are very similar. While it is true that Blacks are more likely than Whites to have four or more children, that factor militates against a conclusion that the EITC disproportionately benefits Blacks. Unlike the CTC, the EITC does not increase based upon number of children—once there are two children present. In fact, the EITC benefit for the second child is less than the EITC benefit for the first child. As a result, larger families are penalized under the EITC. Blacks are more likely to have four or more children, and accordingly are more likely to be penalized by the EITC calculation. Because Whites are slightly more likely to have either one or two children, Whites are slightly more likely to benefit from the child provisions of the EITC than Blacks.

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<sup>320</sup> I am reminded of the following expression: “[T]here are three kinds of lies: lies, damned lies, and statistics.” 1 MARK TWAIN, MARK TWAIN’S AUTOBIOGRAPHY 246 (1924) (attributing the remark to Benjamin Disraeli).

<sup>321</sup> I leave for another day the issue of whether the Internal Revenue Code is pro- or anti-Black. Cf. Moran & Whitford, *supra* note 19, at 758 (“[A]lthough we cannot possibly come to a definitive conclusion about the entire Internal Revenue Code, we will present evidence suggesting that certain provisions benefit whites more than blacks.”).

*B. Race-Based Analysis of General Sample Population*

Table 2: Percentage of Participants by Race<sup>322</sup>

Race	1990	1991	1992	1993	1994
Asian	2.71%	2.95%	3.03%	3.02%	3.01%
Black	12.58%	12.61%	12.64%	12.96%	12.78%
Native Am.	.64%	.61%	.74%	.65%	.71%
White	84.07%	83.83%	83.59%	83.37%	83.51%
Totals	100.00%	100.00%	100.00%	100.00%	100.00%

Table 2 provides the percentage of the sample population by race. The Table shows that over this five year time period, the sample percentage by race remained relatively stable.

*C. Racial Impact Analysis*

Table 3: Percentage of All EITC-Eligible Blacks and Whites<sup>323</sup>

Race	1990	1991	1992	1993	1994
Black	17.1%	16.7%	17.1%	18.1%	24.2%
White	9.3%	9.8%	9.8%	10.1%	15.0%

Table 3 provides the percentage of Blacks and Whites who comprise the EITC-eligible population part of the sample. From 1990 through 1993, the eligibility rates remained relatively steady for both Blacks and Whites.<sup>324</sup>

<sup>322</sup> This data comes from the SIPP panel. *See supra* note 313 and accompanying text. Since Hispanic is an ethnic, not a racial group, it is included in the other racial categories. The data set did not segregate Hispanic-Americans into a separate category.

<sup>323</sup> These data come from the SIPP panel. *See supra* note 313 and accompanying text.

<sup>324</sup> *See supra* Table 3.

However, between 1993 and 1994 there was a 50% increase in White eligibility and a 33 $\frac{1}{3}$ % increase in Black eligibility.<sup>325</sup> The increases are attributable to the change in the tax law that allowed childless taxpayers to be eligible for the EITC.<sup>326</sup> The impact of the change resulted in a higher percentage of Whites and Blacks becoming eligible for the EITC; however, White eligibility increased more than Black eligibility.<sup>327</sup>

Academics conclude that Blacks disproportionately benefit from the EITC.<sup>328</sup> Professor Bryce drew this conclusion based on a study by Professor Scholz showing that, in 1990, 24% of EITC-eligible taxpayers were Black. Professor Scholz's study did conclude that 24% of Blacks were *eligible* for the EITC; he did not make any statements regarding whether Blacks disproportionately benefit from the EITC.<sup>329</sup> He also did not make any statements regarding the percentage of EITC-eligible taxpayers that were White.<sup>330</sup> The other academics who conclude that Blacks disproportionately benefit from the EITC failed to cite to any authority.

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<sup>325</sup> See *supra* Table 3.

<sup>326</sup> See *supra* note 42 and accompanying text.

<sup>327</sup> See *supra* Table 3.

<sup>328</sup> See *supra* Part II.C.1.

<sup>329</sup> See Scholz, *supra* note 23, at 86 tbl.1; Yin et al., *supra* note 23, at 250 (A profile of the EITC-eligible population in 1990 reveals the following findings: "24.3% of the *eligible* households in that year were Black . . . .") (emphasis added). Professor Scholz's study is also interesting because it provides a list of characteristics that make it more likely that a taxpayer will not take advantage of the EITC. Those characteristics include having a larger family and being unmarried. Scholz, *supra* note 23, at 73–75. Professor Bryce, however, considers the facts that Blacks are more likely to be unmarried and have more children to lead him to a conclusion that is not supported by the very study he cited. See *supra* note 247 and accompanying text.

<sup>330</sup> See Scholz, *supra* note 23, at 86 tbl.1 (description of EITC-eligible taxpayer characteristics does not include Whites).

Table 4: EITC-Eligible Population By Race<sup>331</sup>

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

Another recently published study that examined the racial demographics of 1990 EITC-eligible recipients showed that 54% were non-Hispanic White, 24.5% were non-Hispanic Black, 17.9% were Hispanic, and 3.6% were non-Hispanic other. In 1990, over half of EITC-eligible recipients were White. The existing literature, however, never discussed the percentage of Whites that were EITC-eligible. They appeared to compare the percentage of Blacks eligible for the EITC with the percentage of Blacks in the population. That is the wrong comparison. The correct comparison is between similarly situated EITC-eligible Black and White taxpayers.

My prior scholarship addressed the racially disproportionate impact issue in the context of the marriage penalty and marriage bonus of the joint return provisions.<sup>332</sup> It focused on the horizontal equity question and compared the percentage of married Black couples with the percentage of married White couples in the marriage penalty and marriage bonus categories at all income levels.<sup>333</sup> It never compared the percentage of married couples with their population percentage. It was not the population that was married and subject to the marriage penalty, but just a smaller segment of the population. I concluded that White married couples disproportionately benefited from the marriage bonus when compared to the percentage of married Black couples

<sup>331</sup> 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 286–87 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001). The data included here on Blacks support Professor Scholz's study.

<sup>332</sup> See Brown, *supra* note 55, at 1498–1503.

<sup>333</sup> *Id.*

eligible for the marriage bonus.<sup>334</sup> There were significantly greater percentages of Whites in marriage bonus households than Blacks.<sup>335</sup> In addition, I found that married Black couples disproportionately paid the marriage penalty when compared to the percentage of White married couples eligible for the marriage penalty.<sup>336</sup> There were significantly greater percentages of Blacks in marriage penalty households than Whites.<sup>337</sup>

The 1990 Liebman study found a greater percentage of EITC-eligible taxpayers who are White than Black.<sup>338</sup> There are more than twice as many EITC-eligible taxpayers that are White than Black and more than three times as many EITC-eligible taxpayers that are White than Hispanic. The percentage of EITC-eligible taxpayers who are White is greater than the percentage of EITC-eligible taxpayers who are Black and Hispanic combined. Therefore Blacks are not disproportionately eligible for the EITC when compared to the percentages of Whites who are EITC-eligible.

That study is further supported by data from the 2001 National Survey of America's Families ("NSAF") that shows large race-based disparities among those who know about the EITC, with Hispanic parents being far less likely than Blacks or Whites to know about the EITC.<sup>339</sup> While 73.5% of White, non-Hispanic parents and 68% of Black, non-Hispanic parents report knowing about the EITC, only 27.1% of Hispanic parents so reported.<sup>340</sup> Similar results were also found using the 1998 NSAF.<sup>341</sup>

In reaching the conclusion that Blacks disproportionately benefit from the EITC, the academics also ignored two important considerations. Blacks may be ineligible to receive the EITC either because they have no earned income or because they have too much earned income. Figures 2 and 3 below illustrate these points.

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<sup>334</sup> *Id.* at 1499–1501.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 1501–03.

<sup>337</sup> *Id.*

<sup>338</sup> Liebman, *supra* note 331, at 286.

<sup>339</sup> Elaine Maag, *Disparities in Knowledge of the EITC*, 106 TAX NOTES 1323, 1323 (2005) ("Only a small portion (27.1) percent of low-income Hispanic parents know about the EITC—significantly less than their peers of other races and ethnicities.")

<sup>340</sup> *Id.* ("A smaller portion of Black, non-Hispanic parents report knowing about the EITC than other non-Hispanic parents (68.0 vs. 73.5 percent).")

<sup>341</sup> *Id.* ("These disparities in knowledge are of particular concern, because similar results were reported using the 1998 NSAF . . .") (citation omitted).

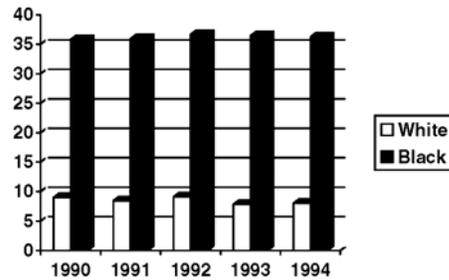
Figure 2: Percentage Ineligible Because No Earned Income<sup>342</sup>

Figure 2 provides that, for every year between 1990 and 1994, over 35% of potential Black taxpayers with children were ineligible because they had no income, and therefore no “earned income.”<sup>343</sup> For every year between 1990 and 1994, between 7% and 9% of potential White taxpayers were ineligible because they had no income. Blacks were at least four times as likely as Whites to be ineligible for the EITC because they had no income. More Blacks are ineligible for the EITC due to a lack of income than were eligible for the EITC because they failed the primary test of the EITC—having earned income.

As Professor Schmalbeck observed, it is far from clear that the EITC favors Black taxpayers when income is held constant.<sup>344</sup> Black unemployment rates are more than twice that of Whites.<sup>345</sup> Blacks are also twice as likely as Whites to be unemployed and unable to find employment.<sup>346</sup>

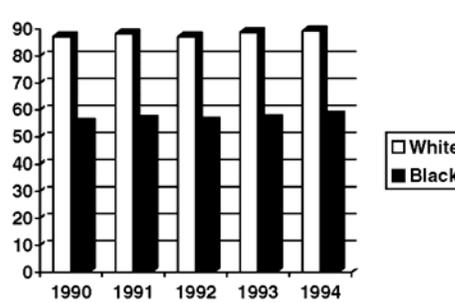
<sup>342</sup> See *supra* note 313 and accompanying text. These data are for taxpayers with children.

<sup>343</sup> See *supra* Figure 2.

<sup>344</sup> Schmalbeck, *supra* note 23, at 1824 (“[I]t is entirely possible that higher black unemployment rates would lead to the conclusion that [the EITC] actually disadvantages blacks as a group at any given income level, since the sources of their incomes may be somewhat less likely to qualify them for this credit.”).

<sup>345</sup> E.g., Eduardo Porter, *Job Growth Picks Up but Misses Forecast*, N.Y. TIMES, Feb. 7, 2004, at C1 (showing that in January 2004, the White unemployment rate was 4.9% and the Black unemployment rate was 10.5%). In February 2001, the unemployment rate for Blacks was 7.5% and for Whites was 3.7%. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION: FEBRUARY 2001, at 2 tbl.A (2001).

<sup>346</sup> Tannette Johnson-Elie, *Highly Educated; Opportunities*, MILWAUKEE J. SENTINEL, Feb. 11, 2004, at 1D, 3D (“African-Americans also represent a greater share of the long-term unemployed, 29.5% vs. 21.1% for whites, the National Urban League report found.”).

Figure 3: Percentage Ineligible Because Earned Income Was Too High<sup>347</sup>

The majority of EITC-eligible taxpayers—both Black and White—are ineligible for the EITC because their earned income is too high. Again, those who concluded that Blacks disproportionately benefit from the EITC never considered this possibility. Similar to welfare discourse, the fact that the majority of Blacks are not even eligible to receive the tax benefit is irrelevant to the stereotype.<sup>348</sup>

Contrary to what the academic analysis would suggest, being poor and Black makes you less likely to qualify for the EITC given the earned income requirement of the EITC. Poverty, therefore, is a weak proxy for EITC-eligibility. Race is also a weak proxy for being eligible for the EITC. The data reveal that over half of all Blacks with children earn too much income to be eligible for the EITC. If you add to that the 35% of Blacks with children who are ineligible for the EITC because they do not have earned income, you have at least 90% of Blacks with children who are ineligible for the EITC. The balance, or less than 10%, of Blacks with children are EITC-eligible. It does not appear that Blacks benefit disproportionately by any analysis.

#### *D. Marriage Penalties: Blacks Are Not Exempt*

This Section begins with a discussion of the differing marriage rates between Blacks and Whites who are eligible for the EITC. Although Whites are far more likely to be married than Blacks, at the EITC-eligible income level in 1994, the majority of both races are not married. Although Professor

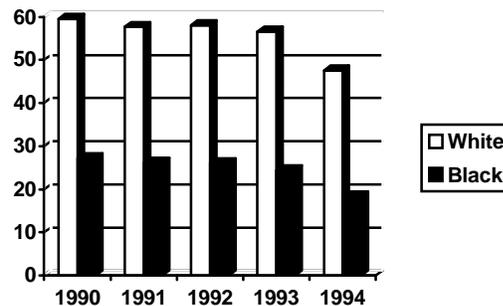
<sup>347</sup> See *supra* note 313 and accompanying text. These data are for taxpayers with children.

<sup>348</sup> See Cahn, *supra* note 13, at 966.

Bryce's analysis does not consider whether there are class-based differences in marriage rates, there are, and this Section considers those differences.

This Section then examines data to show if there are significant differences in the percentage of households that are subject to the marriage penalty. It begins by comparing the percentage of married EITC-eligible with those that are not married. Those that are unmarried are obviously not subject to the marriage penalty. The Section first describes those who are married but not subject to the marriage penalty because they are in single wage earner households. Then there is a description of two different situations where the marriage penalty can arise: (1) those in equal earner households; and (2) those who are ineligible for the marriage penalty because their income is close to the phase-out amount and their spouse's income puts them beyond the phase-out amount. This Section shows that *very few* households are subject to the marriage penalty; however the households most likely to suffer from the marriage penalty are Black households in the phase-out range who would become eligible for the EITC if their spouse's income was zero.

Figure 4: Married and EITC-Eligible<sup>349</sup>



Whites are more than twice as likely to be married and file joint returns than Blacks in EITC-eligible households.<sup>350</sup> Figure 4 shows that between 47% and 59% of White taxpayers filed joint returns, and between 18% and 26% of

<sup>349</sup> See *supra* note 313 and accompanying text.

<sup>350</sup> Recall that the EITC requires married taxpayers to file joint returns if they want to receive the EITC. See *supra* note 54 and accompanying text.

Black taxpayers filed joint returns.<sup>351</sup> Again Professor Bryce's statistics showing that "75% of white families with children consist of two-parent groups, while only 35% of black families with children consist of two-parent groups"<sup>352</sup> are inappropriate because they overstate marriage rates at EITC-eligible income levels.

First, they do not take into account class-based differences in marriage rates. At the EITC-eligible income level, his statistics overstate the percentage of both White and Black taxpayers who were married. For example, in 1994, the majority of EITC-eligible Whites were not married.<sup>353</sup> Slightly more than half of EITC-eligible Whites were married in years 1991–1993.<sup>354</sup> Since the marriage penalty is only paid by married couples, the class-based differences in marriage rates seriously undermine Professor Bryce's analysis.

Second, Professor Bryce's statistics do not take into account whether both spouses earn income. Marriage is not the triggering event for the marriage penalty. The marriage penalty applies only if both spouses are making financial contributions to the household and the household is subject to the phase-out provisions. In that instance, as a result of being married, the EITC is less than it would have been if the couple remained single.<sup>355</sup>

The data that follow show, however, the strong similarities in White and Black EITC-eligible married households. With these data, the answer regarding who bears the burden of the EITC's marriage penalties is not at all clear. Professor Bryce is correct that Whites are more likely to be married than Blacks; however, that does not mean that Whites are more likely than Blacks to pay the marriage penalty.

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<sup>351</sup> See *supra* Figure 4.

<sup>352</sup> Bryce, *supra* note 20, 1696 n.50; see STEVE RAWLINGS & ARLENE SALUTER, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1994, at xvii fig.5 (1995).

<sup>353</sup> See *supra* Figure 4.

<sup>354</sup> See *supra* Figure 4.

<sup>355</sup> Brown, *supra* note 55, at 1480–81 ("The basic rate structure marriage penalty does not begin until incomes are 20% apart, while the EITC marriage penalty begins with the first dollar earned by the second wage earner.").

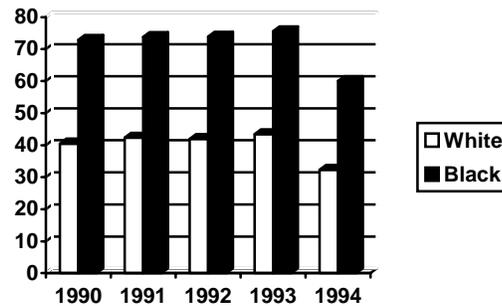
Figure 5: Unmarried and EITC-Eligible: Heads of Household<sup>356</sup>

Figure 5 provides data which support Professor Bryce's statements that Black EITC-eligible taxpayers are less likely to be married than White EITC-eligible taxpayers.<sup>357</sup> For EITC-eligible White taxpayers, between 32% and 43% were heads of household.<sup>358</sup> For EITC-eligible Black taxpayers, between 60% and 75% were heads of household.<sup>359</sup> There is a significant difference here—Black taxpayers were at least 1.5 times more likely to be heads of household than White taxpayers.

<sup>356</sup> See *supra* note 313 and accompanying text.

<sup>357</sup> See *infra* Figure 6.

<sup>358</sup> See *infra* Figure 6.

<sup>359</sup> See *infra* Figure 6.

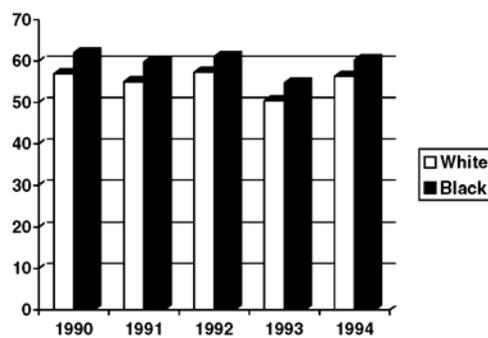
Figure 6: Single Wage Earner Married Households: No Marriage Penalty<sup>360</sup>

Figure 6 provides that Blacks are slightly more likely than Whites to have a single wage earner and not to be subject to the marriage penalty—but the differences are minimal.<sup>361</sup> Figure 6 shows that the *majority* of Black and White families do not experience the marriage penalty.<sup>362</sup> These data can be contrasted with the literature describing in great detail the severe marriage penalties associated with the EITC.<sup>363</sup> Perhaps EITC families, aware of the marriage penalties, are engaging in behavior that minimizes its impact.<sup>364</sup>

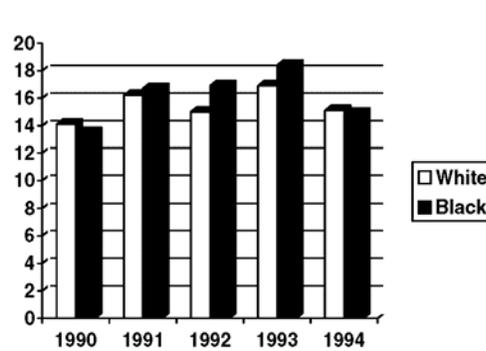
<sup>360</sup> See *supra* note 313 and accompanying text.

<sup>361</sup> See *supra* Figure 6.

<sup>362</sup> This result is consistent with my earlier scholarship that looked at 1990 Census Bureau data and showed that for households earning \$10,000 and less, 87% of White and 84% of Black married couples were in single wage earner households. For households earning between \$10,001 and \$20,000, 69% of White and 63% of Black married couples were in single wage earner households. For households earning between \$20,001 and \$30,000, 53% of Whites and 39% of Blacks were in single wage earner households. See Brown, *supra* note 55, at 1500 tbl.3.3.

<sup>363</sup> See, e.g., Alstott, *The Earned Income Tax Credit*, *supra* note 34, at 559–64; Brown, *supra* note 55, at 1479 (“Proportionately, however, the marriage penalty is greatest for low-income individuals due to the operation of the earned income tax credit . . . .”); Philip Jagolinzer & John M. Strefeler, *Marital Status and the Taxes We Pay*, 161 J. ACCT. 68, 74 (1986) (stating that “the earned income credit may produce one of the most extreme instances of marital discrimination”); Ellen E. Schultz, *Living in Sin To Cut Tax Bill Would Look Even Better to Some Under Clinton Plan*, WALL ST. J., Mar. 9, 1993, at C1 (“Calculations prepared for The Wall Street Journal by KPMG Peat Marwick show that the marriage penalty has the greatest impact on the lowest wage earners with children.”).

<sup>364</sup> Cf. Stacy Dickert-Conlin & Scott Houser, *EITC and Marriage*, 55 NAT’L TAX J. 25, 26 (2002). (“Existing research suggests that taxes influence marriage decisions and that the EITC can create particularly large marriage penalties for low-income families. Two studies that consider the effect of the EITC on marriage reach opposing conclusions . . . .”) (citations omitted).

Figure 7: Married and EITC-Eligible: Equal Earner Households<sup>365</sup>

In 1990 and 1994, Whites were slightly more likely than Blacks to be in households where the spouses contributed roughly equal amounts. Between 1991 and 1993, Blacks were slightly more likely than Whites to be in households where the spouses contributed roughly equal amounts. There are far more similarities between these households than differences. These findings are replicated in my earlier marriage penalty work that showed low-income families were more similar in the percentage of Black and White married couples living in single wage earning households than at any other income level.<sup>366</sup> The class effects here dominate the race effects.

<sup>365</sup> See *supra* note 313 and accompanying text.

<sup>366</sup> Brown, *supra* note 55, at 1498–1507.

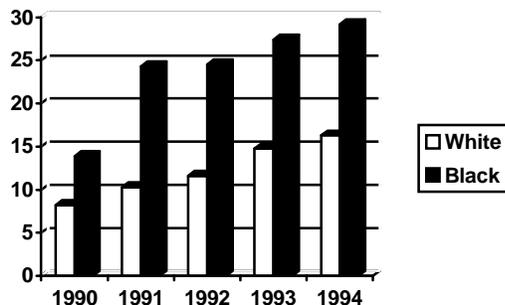
Figure 8: Married with Children and EITC-Ineligible: Subject to Penalty<sup>367</sup>

Figure 8 shows the significant marriage penalties that Blacks are subject to because there are more two wage earner Black married couples with incomes closer to the phase-out amount.<sup>368</sup> There is a greater percentage of Blacks and Whites subject to this form of marriage penalty in 1994 than were subject in 1990.<sup>369</sup> Professor Bryce's analysis did not take into account the possibility that Blacks could be subject to the marriage penalty to a greater extent than Whites, even though a smaller percentage of Blacks are married.<sup>370</sup> So, although fewer Blacks are married, and a greater percentage of Blacks are in marriage penalty free households, they still are subject to the marriage penalty in higher percentages than Whites. Because of the phase-out provisions of the EITC, a greater percentage of Blacks are subject to the marriage penalty than Whites.

Recall Professor Bryce's statements regarding the phase-out: "Because low-income whites are more likely to be married, their earned income tax credits are reduced or eliminated by the phase-out; low-income blacks are less likely to be married and less likely to be affected by the phase-out."<sup>371</sup> The

<sup>367</sup> See *supra* note 313 and accompanying text.

<sup>368</sup> See *supra* Figure 8.

<sup>369</sup> See *supra* Figure 8.

<sup>370</sup> Cf. Brown, *supra* note 55, at 1501-03 (discussing marriage penalties in the joint return provisions disproportionately felt by Black taxpayers); Moran & Whitford, *supra* note 19, at 796-97 (discussing marriage penalty differences in Black and White households).

<sup>371</sup> Bryce, *supra* note 20, at 1695-96.

data show that this is simply not true. Married Blacks are more likely to be subject to the phase-out provisions than married Whites.

*E. Children and the EITC: Blacks Are Not Eligible for Higher EITC Amounts*

The literature posits that Blacks receive a higher credit amount because they are more likely to have larger families. First, the data show that the average credit amount for Blacks and Whites are very similar. Blacks and Whites are in the wage subsidy, flat, and phase-out ranges in very similar percentages. Second, the data confirm the fact that Blacks are more likely to have more children than Whites; however, the EITC does not benefit large families. While it is true that the EITC provides very little benefit for families with no children, the EITC amount is greatest for families with exactly two children the most.<sup>372</sup> The data show that White families are slightly more likely than Black families to have exactly two children, therefore Whites benefit more from the family provisions of the EITC than Blacks. It is difficult to conclude that Blacks benefit under the EITC because they have larger families than Whites.

Figure 9: The Average EITC for Blacks and Whites<sup>373</sup>

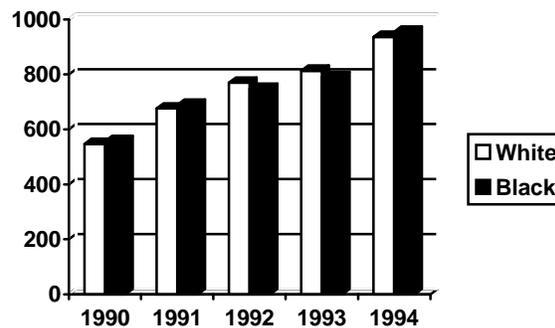


Figure 9 shows that the average EITC is very similar for Blacks and Whites.<sup>374</sup> The EITC calculation is a function of whether the taxpayer's earned

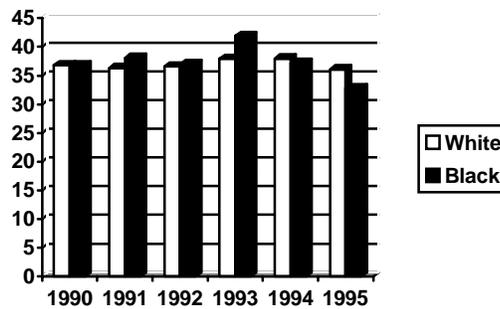
<sup>372</sup> See *supra* Part II.A.

<sup>373</sup> See *supra* note 313 and accompanying text.

<sup>374</sup> See *supra* Figure 9.

income is in the wage subsidy range, the flat range, or the phase-out range.<sup>375</sup> If a taxpayer's earned income is in the wage subsidy range the EITC amount increases as the taxpayer's earned income increases.<sup>376</sup> If a taxpayer's earned income is in the flat range, the taxpayer's EITC amount remains the same even though the taxpayer's earned income increases.<sup>377</sup> If a taxpayer's earned income is in the phase-out range, the EITC decreases as the taxpayer's earned income increases.<sup>378</sup> The average EITC is similar for Blacks and Whites because they are present in each of the three categories in very similar percentages. Consider the following.

Figure 10: Percentage of EITC-Eligibles in Wage Subsidy Range<sup>379</sup>



In the wage subsidy range, the taxpayer's EITC increases as earned income increases.<sup>380</sup> Blacks and Whites are very similar in their percentages of eligibility in the phase-in range. The wage subsidy range is where a taxpayer's EITC increases as the taxpayer's income increases.<sup>381</sup>

<sup>375</sup> See *supra* notes 68–71 and accompanying text.

<sup>376</sup> See *supra* notes 68–71 and accompanying text.

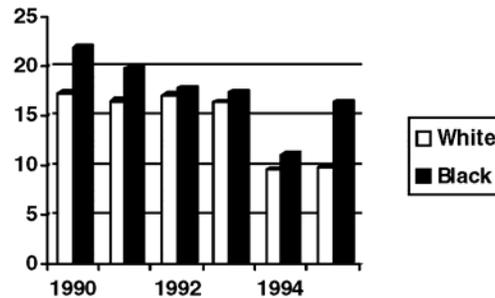
<sup>377</sup> See *supra* notes 68–71 and accompanying text.

<sup>378</sup> See *supra* notes 68–71 and accompanying text.

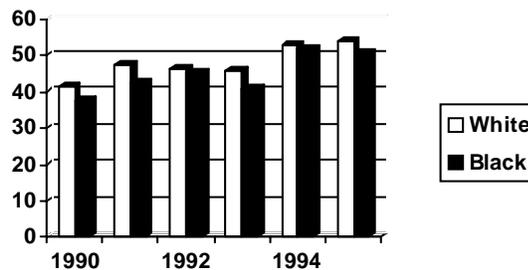
<sup>379</sup> See *supra* note 313 and accompanying text.

<sup>380</sup> See *supra* notes 68–71 and accompanying text.

<sup>381</sup> See *supra* notes 68–71 and accompanying text.

Figure 11: Percentage of EITC-Eligibles in Flat Range<sup>382</sup>

The flat range is where the taxpayer's earned income increases, but EITC does not increase—it remains the same.<sup>383</sup> Blacks were more likely than Whites to be found in the flat range when their credit was not increasing even though their earned income was increasing.<sup>384</sup> Figure 11 shows that for each year, Blacks were more likely to be in the flat range than Whites. As such, they were more likely to earn additional income, but not receive an increased EITC.

Figure 12: Percentage of EITC-Eligibles in Phase-Out Range<sup>385</sup>

<sup>382</sup> See *supra* note 313 and accompanying text.

<sup>383</sup> See *supra* Figure 11.

<sup>384</sup> See *supra* Figure 11.

<sup>385</sup> See *supra* note 313 and accompanying text.

The phase-out range is where the taxpayer's earned income increases and the taxpayer's EITC begins to decrease and is eventually reduced to zero.<sup>386</sup> In 1990, 41.4% of EITC-eligible Whites were in the phase-out range, while 37.8% of EITC-eligible Blacks were in the phase-out range.<sup>387</sup> In 1991, 47.2% of EITC-eligible Whites were in the phase-out range, while 42.2% of EITC-eligible Blacks were in the phase-out range.<sup>388</sup> In 1992, 46.5% of EITC-eligible Whites were in the phase-out range and 45.2% of EITC-eligible Blacks were in the phase-out range.<sup>389</sup> In 1993, 45.7% of EITC-eligible Whites were in the phase-out range and 40.7% of EITC-eligible Blacks were in the phase-out range.<sup>390</sup> In 1994, 52.5% of EITC-eligible Whites were in the phase-out range and 51.7% of EITC-eligible Blacks were in the phase-out range.<sup>391</sup> In 1995, 54.8% of EITC-eligible Whites were in the phase-out range and 50.8% of EITC-eligible Blacks were in the phase-out range.<sup>392</sup>

Notice that Whites were slightly more likely than Blacks to be in the phase-out range and therefore were more likely to have their EITC decreased because of their higher household income. Yet, anywhere between 37% and 51% of Blacks have been subject to the phase-out provisions as well.

White EITC-eligibles were slightly more likely to be in the wage subsidy and phase-out ranges, while Black EITC-eligibles were significantly more likely to be in the flat range. Nevertheless, significant percentages of Black EITC-eligibles were also likely to be in the phase-out range. As a result, considering the percentage of EITC-eligible Blacks and Whites in the three income ranges, it is easy to understand how the average EITC is very similar for Black and White EITC-eligible taxpayers.

Next, consider the issue of whether Blacks benefit more than Whites from the family provisions of the EITC.

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<sup>386</sup> See *supra* notes 68–71 and accompanying text.

<sup>387</sup> See *supra* Figure 12.

<sup>388</sup> See *supra* Figure 12.

<sup>389</sup> See *supra* Figure 12.

<sup>390</sup> See *supra* Figure 12.

<sup>391</sup> See *supra* Figure 12.

<sup>392</sup> See *supra* Figure 12.

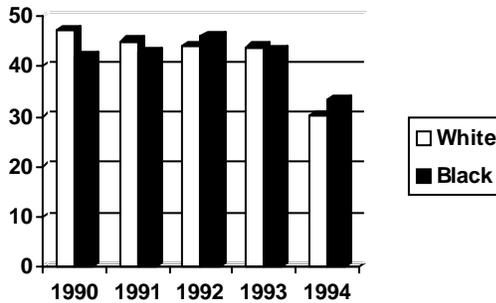
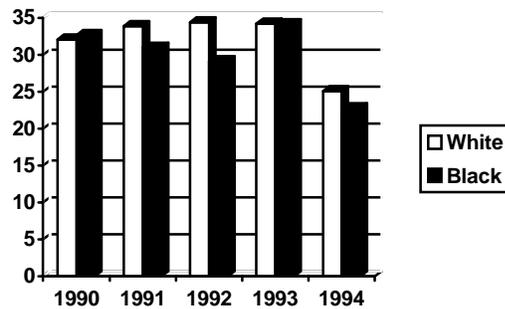
Figure 13: Percentage EITC-Eligible with One Child<sup>393</sup>

Figure 13 provides that for every year, except 1992, EITC-eligible Whites were more likely to have one child than EITC-eligible Blacks; however, the differences are not that great.<sup>394</sup> Recall that the maximum EITC for families with one child is \$2604 and that the greatest per capita EITC is for one child households.<sup>395</sup>

Figure 14: Percentage EITC-Eligible with Two Children<sup>396</sup>

<sup>393</sup> See *supra* note 313 and accompanying text. The data set does not include the calculations for EITC amounts for households with no children because that requirement began in the 1994 taxable year and to include it in 1994 would not allow a multi-year comparison with the earlier years of this data set.

<sup>394</sup> See *supra* Figure 13.

<sup>395</sup> See *supra* Table 1.

<sup>396</sup> See *supra* note 313 and accompanying text.

Figure 14 provides that in four of the five years, White EITC-eligibles were more likely than Black EITC-eligibles to have exactly two children.<sup>397</sup> The largest difference is in 1992 where the difference is almost five percentage points.<sup>398</sup> Recall that the maximum EITC for families with two children is \$4300.

Figure 15: Percentage EITC-Eligible with Four or More Children<sup>399</sup>

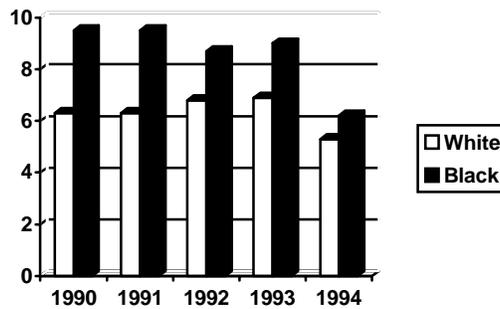


Figure 15 provides that *less* than 10% of Black EITC-eligibles and White EITC-eligibles have four or more children.<sup>400</sup> Nevertheless, there are some significant differences here.<sup>401</sup> Black EITC-eligibles for all years are more likely to have four or more children than White EITC-eligibles.<sup>402</sup> Given that the maximum EITC for families with two children is the same as the maximum EITC for families with four children, the EITC does not benefit larger families.<sup>403</sup>

Professor Bryce observes that “[t]he structure of the earned income tax credit benefits not poor parents in general, but poor parents who are not married . . . . Blacks are much more likely not only to be poor, but also to be

<sup>397</sup> See *supra* Figure 14.

<sup>398</sup> See *supra* Figure 14.

<sup>399</sup> See *supra* note 313 and accompanying text.

<sup>400</sup> See *supra* Figure 15.

<sup>401</sup> See *supra* Figure 15.

<sup>402</sup> See *supra* Figure 15.

<sup>403</sup> See *supra* note 41 and accompanying text that describes the legislative history for the earned income tax credit, which arguably was not designed to encourage large families.

unmarried.”<sup>404</sup> Professor Bryce is correct that a higher percentage of Black EITC-eligibles than White EITC-eligibles have four or more children, he is incorrect in his analysis that the structure of the EITC benefits poor parents who are not married. The EITC does not increase as the taxpayer has more children. It is not like the CTC in that respect.<sup>405</sup> As a result, larger families are penalized by the EITC, as there are more individuals to take care of without any increase in the amount of the EITC.

#### F. Summary

The SIPP data show that most Blacks are ineligible for the EITC. For the Blacks that are eligible, their average EITC is very similar to the average EITC for Whites. The disproportionate analysis starting point should be the EITC-eligible population—not the percentage of Blacks in the population.<sup>406</sup> At that point one can contrast EITC differences of similarly situated Black and White taxpayers. The fact that Blacks are more likely to be poor does not mean that Blacks are more likely to be the working poor, making them eligible for the EITC. That disproportionate analysis shows that there is a far greater percentage of the EITC-eligible population that are White than are Black.

Most EITC-eligible families are not subject to the marriage penalty. While most Blacks are not married, they are more likely to pay a marriage penalty because they are more likely to be found in the phase-out income levels. The fact that Blacks are less likely to be married does not mean that Whites are paying a disproportionate share of the EITC marriage penalty.

Finally, because Blacks are more likely to have more children than Whites, they are penalized by the EITC. White households are, however, slightly more likely than Black households to have two children, which is the category with the greatest EITC.

#### CONCLUSION

This Article shows that Whites are more likely than Blacks to be eligible for the EITC—in fact, the EITC-eligible pool includes twice the percentage of Whites as Blacks. By focusing on the racial impact issue, academics and

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<sup>404</sup> Bryce, *supra* note 20, at 1695.

<sup>405</sup> See *supra* note 132 and accompanying text.

<sup>406</sup> Cf. Brown, *supra* note 55, at 1490–1507 (analyzing the marriage penalty/bonus issue by race by beginning with taxpayers who were married and therefore eligible for the marriage penalty or marriage bonus).

politicians have ignored the larger class issue: Low-income families with children are treated very differently than middle-income families with children under federal tax laws.

Federal tax policy should not favor middle-income children over low-income children. This is especially true, if the reason for treating low-income children poorly is because they are perceived to be Black. The data presented herein shows the vast majority of EITC-eligible taxpayers are White. Low-income children are in greater need and at the very least should be treated as well as middle-income children. This Article seeks to start a dialogue among academics, politicians, and policymakers to ensure that federal tax policy treats all children equally.

Professors Merritt and Reskin observe that race or sex segregation in law teaching can be detrimental to the full development of legal theory by depriving some fields of the insights of scholars from diverse backgrounds.<sup>407</sup> Tax scholarship that seeks to uncover racial bias provides an important service to a society committed to achieving racial equality for all. Such scholarship can result in new legal theory which can then be used to provide solutions to problems, previously unidentified. By focusing on the racial impact of the earned income tax credit, previous tax scholarship has ignored the disparity between CTC and EITC benefits.

There is no reason to assume that what may be good for Black taxpayers has to be bad for White taxpayers. As mentioned earlier, Professor Derrick Bell's interest-convergence thesis argues the opposite.<sup>408</sup> It is only when tax provisions hurt Whites as well as Blacks that real change is possible. By assuming that the EITC disproportionately advantaged Blacks, academics never considered the possibility that Whites or Blacks were being disadvantaged when compared with their CTC counterparts.

The empirical data provided herein can provide the impetus for far reaching EITC-reform that will help Whites as well as Blacks. To the extent that current law benefits middle-income children to the detriment of low-income children, current law disadvantages low-income Whites as well as Blacks. Academics constructed the EITC as a benefit for Black taxpayers while

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<sup>407</sup> Merritt & Reskin, *supra* note 280, at 267–68 (“Race or sex segregation by teaching subject can also hinder the development of legal scholarship by depriving some fields of insights from scholars with diverse backgrounds. Any sex or race bias in teaching assignments should raise alarm.”) (footnote omitted).

<sup>408</sup> See *supra* note 24 and accompanying text.

ignoring the detriment to both Black and White taxpayers. Once the empirical data is examined, it is easy to get past race to see the larger class issue. The existing literature has maintained the status quo by focusing on proving that the EITC was a benefit to Blacks. This, in turn, has penalized all low-income taxpayers—Whites as well as Blacks. Consider the following as a possible model for reform.

My prior research, which uncovered the racial bias in the joint return showed that middle-income White married couples were the most likely of White married couples to pay the marriage penalty.<sup>409</sup> Any elimination of the marriage penalty will help both Black *and* White taxpayers. Recent legislation has minimized the marriage penalty.<sup>410</sup> That will help all taxpayers. I seek the same goals regarding all EITC-eligible families.

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<sup>409</sup> See Brown, *supra* note 55, at 1504–06 (showing that the marriage penalty that disproportionately impacted Blacks hurt middle-income Whites as well). Any solution to address the marriage penalty paid by Blacks would also address the marriage penalty paid by Whites.

<sup>410</sup> See *supra* note 59 and accompanying text. While I make no claim that my prior academic research was responsible for the recent legislative changes in the marriage penalty, it has been recognized in the press. See, e.g., Bruce Bartlett, *Looking Ahead*, WASH. TIMES, Jan. 5, 1998, at D17; Dorothy A. Brown, *A Tax Benefit for Whom?*, WASH. POST, Feb. 8, 2000, at A22; Dorothy A. Brown, *In Sickness, in Health, and in the Tax Code*, N.Y. TIMES, Jan. 25, 2004, § 4, at 15; Tom Herman, *Tax Report*, WALL ST. J., Apr. 17, 1996, at A1.

