America's Failure to Rescue Parents: A Narrative of Inequitable Tax "Reform"

Shannon Weeks McCormack | swm8@uw.edu
University of Washington School of Law

Shannon Weeks McCormack, *America's Failure to Rescue Parents: A Narrative of Inequitable Tax "Reform,"* __ UC L.J. __ (forthcoming).

AMERICA'S FAILURE TO RESCUE PARENTS:
A NARRATIVE OF INEQUITABLE TAX "REFORM"

Shannon Weeks McCormack[*]

Abstract

Other developed nations provide a slew of direct benefits to parents, such as paid parental leave and affordable childcare. America instead takes a circuitous route, heavily relying on the Internal Revenue Code (the "Code") to provide tax breaks to certain parents. In addition to being indirect and comparatively stingy, these "parental tax benefits" are not awarded equitably. Instead, they favor nonpoor one breadwinner families, ignore the plight of nonpoor working parents incurring substantial childcare and other work-related costs, exhibit an outright hostility towards poor parents and raise a host of other distributional concerns. This preferentialism is sticky—when Congress alters parental tax benefits, it rarely deviates from these patterns.

That is, until the COVID pandemic. Signed into law on March 11, 2021, the American Rescue Plan Act (the ARPA) provided much needed relief to parents attempting to maintain jobs and care for children during this global health crisis. As is America's tendency, the ARPA leaned extensively on the Code to do so. But it abandoned its consistent preferentialism for nonpoor one breadwinner parents, expanding the various tax benefits available to nonpoor working parents and poor parents in historically significant ways.

This was short-lived. These benefits have now expired, leaving parents back where they started. And while it initially appeared that the ill-fated "Build Back Better Act" would resurrect many of the ARPA's expanded parental tax benefits, Congress ultimately let them all lapse. Because the ARPA was born in an emergency (and expired well before it ended), it will be easy to dismiss it as crisis legislation. I resist this narrative and create a counter one. By situating the ARPA within a broader historical context, an accurate narrative is developed—one where the ARPA's expansion of parental tax benefits was neither hasty nor creative but instead enacted long overdue adjustments that began to correct the distributionally problematic way in which America has historically favored some families over others.

Preserving this historic narrative is imperative. It underscores the alarming failure of Congress to extend any of the ARPA's parental tax benefits. It provides context for temporary expansions passed by the House, which, despite making grand headlines, constitute a remarkably modest step towards treating poor parents similarly to nonpoor parents. And of critical import, the narrative of inequitable tax reform developed in this project, supported by history rather than politics and bias, should ground imminent conversations that will shape the future of how parents in America are taxed. The Tax Cuts and Jobs Act, which amplified Congress' inequitable treatment of families and favoritism towards nonpoor one breadwinner families, expires in 2025, providing a date certain on which Congress must revisit its method of taxing parents. During these imminent and other future conversations, a mastery of the historical context preserved in this Article should arm those who advocate for a more inclusive method of supporting parents attempting to raise children in the United States.

[*] Charles I. Stone Endowed Professor of Law, University of Washington School of Law.

INTRODUCTION

America has never made it particularly easy to be a parent.[1] Unlike other developed nations, when Congress seeks to provide benefits to parents, it is both stingy and indirect. Distinct from its peers, the American government does not provide much by way of direct benefits like affordable childcare or paid parental leave.[2] In addition to this comparative lack of generosity, the United States takes a circuitous route when providing the benefits it does offer, heavily relying on the Internal Revenue Code (the "Code") to provide a variety of tax breaks to certain parents. These "parental tax benefits" have been heavily criticized[3] as being over- and under-

[1] *See e.g.*, Kendra Hurley, *The U.S. Leaves Parents on Their Own for a Reason*, THEATLANTIC.COM, Jun. 5, 2022, https://www.theatlantic.com/family/archive/2022/06/us-paid-parental-leave-child-welfare-tax-credit/661276/. ("On so many measures of family hardship, young children and their parents in the U.S. suffer more than their counterparts in other high-income nations. Babies are more likely to die and children are more likely to grow up in poverty. The U.S. is the only rich country in the world without national paid family leave. And while other wealthy countries spend an average of $14,000 each year per child on early-childhood care, the U.S. spends a miserly $500.") (citations omitted).

[2] For instance, the U.S. is the only developed nation that does not guarantee parents any paid leave. *See, e.g., supra* note 1. *See also*, Gretchen Livingston and Deja Thomas, *Among 41 Nations, only U.S. Lacks Paid Parental Leave*, PEW RESEARCH CENTER, Dec. 16, 2019, *available at* https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/. ("[T]he U.S. is the only country among 41 nations that does not mandate any paid leave for new parents, according to data compiled by the Organization for Economic Cooperation and Development (OECD) and current as of April 2018. The smallest amount of paid leave required in any of the other 40 nations is about two months.") (citation omitted).

[3] This list is non-exhaustive. *See, e.g.*, Shannon Weeks McCormack, *America's (D)evolving Childcare Tax Laws*, GA. L. REV. (2018).

inclusive,[4] overly complex,[5] gendered, [6] heteronormative,[7] classed[8] and raced.[9]

While Congress has over the years enacted a somewhat dizzying (which is not to say generous) array of tax benefits for parents, it favors some benefits greatly over others. When Congress alters parental tax benefits, it follows a predictable pattern, enthusiastically expanding some benefits while neglecting others. This "benefits preferentialism," in turn, reflects a consistent favoritism towards nonpoor one breadwinner families—*i.e*. the statistically declining family model in which children are raised by two married parents one of whom earns all income in the paid workforce while the other remains available to engage in unpaid household labor including childcare.[10] Meanwhile, Congress wantonly neglects benefits that can help nonpoor working parents defray the substantial childcare costs they must

---

4 *See, e.g.*, Keeva Terry, *Divorce Without Marriage: Taxing Property Transfers Between Cohabiting Adults*, 89 U. CINN. L. REV. 882 (2020); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV . 605 (2010) (hereinafter *Decentralizing Family*).

5 *See, e.g.*, Amir El-Sibaie, *Illustrating the Earned Income Tax Credit's Complexity*, TAX FOUNDATION, June 14, 2016, *available at* https://taxfoundation.org/illustrating-earned-income-tax-credit-complexity/.

6 *See* supra note 4. *See also,* Pamela B. Gann, *The Earned Income Deduction: Congress's 1981 Response to the "Marriage Penalty" Tax*, 68 CORNELL L. REV. 468, 469, 475–84 (1983) (hereinafter *The Earned Income Deduction)*; Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Edward McCaffery, TAXING WOMEN (The University of Chicago Press, 1999).

7 *See, e.g,* Infanti, *Decentralizing Family, supra* note 4; Nancy Knauer, *Heteronormativity and Federal Tax Policy*, 101 1. Va. L. Rev. 129 (1998).

8 *See, e.g.* Dorothy Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 791 (2007); Dorothy Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY LAW REVIEW 756 (2005) (hereinafter *Separate But Unequal*).

9 *See, e.g.*, *supra* note 8; Ariel Jurow Kleiman, Amy K. Matsui, and Estelle Mitchell, *Faulty Foundations in the Tax Code: Gender and Racial Bias in our Tax Laws* (NATIONAL WOMEN'S LAW CENTER, 2019), https://nwlc.org/wp-content/uploads/2019/11/NWLC-The-Faulty-Foundations-of-the-Tax-Code-Accessible-FINAL.pdf. (This report examines the outdated assumptions and gender and racial biases embedded in the U.S. tax code. It highlights tax code provisions that reflect and exacerbate gender disparities, with particular attention to those that disadvantage low-income women, women of color, members of the LGBTQ community, people with disabilities, and immigrants.)

10 *See generally* Section I.A.

incur to earn income, but that one breadwinners can avoid.[11] And Congress exhibits open hostility towards expanding refundable benefits for poor parents, making them less generous than those available to nonpoor parents.[12] This sticky benefits preferentialism and consistent favoritism towards nonpoor one breadwinners raises a host of distributional concerns.[13]

For a brief moment, however, Congress changed course. The COVID-19 pandemic amplified the hardships faced by American parents, in part because it forced families who had been relatively immune from certain challenges to experience them with the many other families that had been fielding them all along.[14] As the campaign website for President Biden and Vice President Harris put it, "[t]he pandemic … laid bare just how hard it is for people in [the United States] to find access to quality caregiving they need for themselves, or to juggle the responsibilities of working and also caring for family members."[15] Signed into law on March 11, 2021, the American Rescue Plan Act (the ARPA)[16] provided much needed relief to families attempting to maintain jobs and care for children during the pandemic. As is America's tendency, the ARPA leaned extensively on the Internal Revenue Code to do so, expanding the tax benefits already available to certain groups of parents. But it also made a myriad of historically significant adjustments that broke out of Congress' traditional patterns, expanding childcare tax benefits aimed at nonpoor working families (*e.g*. dual earning and solo parents but not one breadwinners), which it has traditionally neglected and

---

[11] *See* Section I.A.2.

[12] *See* Section II.

[13] *See* Section I.B and II.E.

[14] Anna North, *The Problem is Work*, VOX (Mar. 15, 2022), https://www.vox.com/22321909/covid-19-pandemic-school-work-parents-remote. ("Long before Covid-19 hit, Americans were expected to work like they didn't have families. Some call it the myth of the "ideal worker" — the idea that the perfect employee is someone "unencumbered by any other problem other than your job," Andrea Rees Davies, associate director of the Stanford Humanities Center and a historian who has worked on gender in the workplace, told Vox.").

[15] *Joe Biden's Plan to Build Back Better for American Workers*, https://joebiden.com/joe-bidens-plan-to-build-back-better-for-american-workers/ (now defunct and comically informs the reader that they have "found dark Brandon").

[16] H.R. 1319, 117th Cong. (2021-2022). (hereinafter, "ARPA"). *See also*, U.S. Dep't. of Treasury, *FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families, Child Tax Credit*, (Mar. 18, 2021), *https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families*.

even benefits for poor parents, towards which it has been historically hostile.[17]

This, however, was all short-lived. These expanded tax benefits have now expired, reverting the Code back to its pre-pandemic state.[18] And while there initially seemed to be strong momentum towards resurrecting the ARPA's expansions in the ultimately ill-fated Build Back Better Act, these hopes are now extinguished[19]—not a single expansion survived. Admittedly, the chain of events that lead to the ARPA's momentary expansion of parental tax benefits was chaotic on many levels. The legislation was born in an emergency and expired even before it ended. And negotiations which might have revived them were, to put it mildly, non-linear and to put it bluntly, dysfunctional.[20] It will, therefore, be easy (and for some politically expedient) to characterize the ARPA as crisis legislation.

This Article resists this narrative and, by situating the ARPA within a broader historical context, creates a counter one. As someone who has studied the taxation of the family—including its history—for some time now,[21] I was stunned by the package of tax benefits provided to parents in the short-lived ARPA. Through this legislation, Congress enacted a bundle of benefits for which scholars and lawmakers have argued *for decades*. In fact, the enactment of even one of these tax benefits—no less so many of them—

---

[17] *See* Section III.

[18] *See, e.g.* Deepa Shivaram, *The Expanded Child Tax Credit Expires Friday as Congress Fails to Renew It,* NPR (Dec. 30, 2021), HTTPS://WWW.NPR.ORG/2021/12/30/1069143123/EXPANDED-CHILD-TAX-CREDIT-EXPIRES-FRIDAY-CONGRESS.

[19] It is not necessary for purposes of this Article to declare time of death. One possible point may be when Joe Manchin declared the Act "dead." Alan Fram, *Sen. Joe Manchin says Build Back Better bill is 'dead,'* PBS (Feb. 1, 2022), https://www.pbs.org/newshour/politics/sen-joe-manchin-says-build-back-better-bill-is-dead. Another possibility might be the passage of the Inflation Adjustment Act (sometimes referred to as Build Back Better Light), which cuts out completely tax benefits for parents.

[20] See Section IV.A.1. *See also* Chris Stirewalt, *Build Back Better Gets the Zombie Treatment*, THE DISPATCH (Jul. 11, 2022), https://thedispatch.com/p/build-back-better-gets-the-zombie/.

[21] Weeks McCormack, *America's (D)evolving Childcare Tax Laws, supra* note 3; Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559 (2016); Shannon Weeks McCormack *Postpartum Taxation and The Squeezed Out Mom*, 105 GEO L. J. (2017); Shannon Weeks McCormack, *Caregivers and Tax Reform: Before and After Snapshots* VA. TAX. REV. (2020) (hereinafter *Caregivers and Tax Reform*); Shannon Weeks McCormack, *Taxing Parents: Welfarist Theories*, BYU L. REV. (2020).

has almost entirely eluded advocates. By providing this context a more grounded narrative emerges, which reveals that the ARPA's expansion of parental tax benefits was neither hasty nor creative. Instead, it enacted a series of long overdue adjustments that begin to correct the distributionally problematic way in which America, through the Code, has historically favored nonpoor one breadwinner families at the expense of all others.

Preserving this historic narrative of the ARPA is imperative. In the short term, it underscores the alarming failure of Congress to extend any of the ARPA's parental tax benefits. It provides context for the expansions passed by the House of Representatives in the Temporary Relief for American Families and Workers Act, which if passed by the Senate would remain effective through 2025. Despite making grand headlines, these changes constitute a remarkably modest step towards treating poor parents similarly to nonpoor parents.[22]

And of critical import, the narrative of inequitable tax reform developed in this project, supported by history rather than politics and bias, should be used to ground imminent conversations that could shape the future of how parents in America are taxed. There are few moments in which these conversations are so destined to take place. But the Tax Cuts and Jobs Act, which enacted a panoply of parental tax benefits that amplified Congress' inequitable treatment of families and favoritism towards nonpoor one breadwinner families, expires in 2025, providing a date certain on which Congress must revisit its method of taxing parents. The historic account preserved in this piece can inform and ground these inevitable conversations in critical ways.[23] And in the longer term, memorializing the ARPA helps maintain a broader narrative of America's tepid approach towards parents, which is a story of inequitable, incremental, glacially paced tax "reform."[24]

This project proceeds as follows. Section I discusses America's distributionally problematic history of taxing nonpoor parents, in which it enthusiastically expands certain benefits well beyond what is required to keep pace for inflation while completely neglecting benefits that could help working parents defray high childcare and other work-related costs, resulting in a valorization of nonpoor one breadwinner families and raising a host of distributional concerns. Section II discusses America's even more problematic history of taxing poor parents, in which Congress exhibits outright (and often explicitly voiced) hostility towards allowing poor parents to claim the same benefits as nonpoor parents, subjecting the former group to

---

[22] Section IV.A.2.

[23] Section IV.B.1.

[24] Section IV.B.2.

additional requirements and limits. Section III explains how Congress was momentarily able to enact historically significant reform in the American Rescue Plan Act, breaking away from its sticky preferentialism for nonpoor one breadwinners and addressing some of these distributional concerns. However, as Section IV will explain, even the COVID-19 pandemic could not change Congress' ways for long and America has already reverted to its original, inequitable manner of taxing (and treating) parents. Section IV discusses the import of preserving the historical account found in the previous sections, how this account should inform the inevitable discussions that will occur in 2025 when the TCJA expires, as well as future discussions about how to provide more inclusive support for parents attempting to raise children in the United States.

I. AMERICA'S DISTRIBUTIONALLY PROBLEMATIC HISTORY OF TAXING NON-POOR PARENTS

To properly memorialize the ARPA's temporary parental tax reforms, we must situate its fleeting changes within a broader historical context. This Section will survey America's distributionally problematic history of taxing nonpoor parents (to be better defined below). But before beginning this historical discussion, I'd like to say a few words about how the U.S. federal government supports parents generally. If I was writing about how another developed government supports parents, the discussion of how they were being taxed would be a far smaller piece of the conversation. Parents in other developed nations are often entitled to all sorts of direct aid, like paid parental leave, vacation, sick days, and access to governmentally subsidized childcare.[25]

America, however, isn't generally willing to provide direct aid. For those in or near poverty, there are some means-tested public assistance programs[26] that offer directly transferred aid. These include programs like SNAP (the Supplemental Nutrition Assistance Program)[27] and TANF (providing

[25] *See, e.g.*, YOUR EUROPE, *Family Benefits* (May 5, 2022), https://europa.eu/youreurope/citizens/work/unemployment-and-benefits/family-benefits/index_en.htm.

[26] U.S. CENSUS BUREAU, *About Program Income and Public* Assistance (Oct. 3, 2022), https://www.census.gov/topics/income-poverty/public-assistance/about.html. ("Public assistance refers to assistance programs that provide either cash assistance or in-kind benefits to individuals and families from any governmental entity... There are two major types of public assistance programs; social welfare programs and social insurance programs. Benefits received from social welfare programs are usually based on a low income means-tested eligibility criteria.").

[27] *See* BENEFITS.GOV, *Supplemental Nutrition Assistance Program (SNAP)*, available

Temporary Assistance for Needy Families).[28] But aside from these means-tested programs, America relies almost entirely on the Internal Revenue Code when it wants to provide aid to parents. As a result, understanding the tax benefits the Code provides to parents brings one a long way towards understanding the entire parental support system offered by the U.S. federal government.

I have written extensively about the history of our parental tax laws in precise detail in other work.[29] Here, I'd like to synthesize that scholarship and develop a narrative grounded in historical context that can counter the narratives so firmly entrenched in past and present discourses about taxing parents.

We begin with the parental tax benefits available to nonpoor parents (*i.e.* nonrefundable benefits). The Code has several "parental tax benefits" which have different eligibility requirements—*e.g.* these benefits are available to different (though sometimes partially overlapping) subsets of nonpoor parents.[30] But while Congress created all these benefits, it favors some greatly over others, reflecting a favoritism for nonpoor one breadwinner families. Here we find a story of favoritism and neglect.

A. Favoritism and Neglect: The Nonrefundable Portions of The Child Tax Credit and Working Childcare Benefits

For decades, when Congress has decided to alter the array of tax benefits it offers nonpoor parents, it ends up following a predictable pattern in which it enthusiastically expands some benefits while completely neglecting others. This "benefits preferentialism," in turn, reflects a favoritism towards nonpoor

---

at https://www.benefits.gov/benefit/361 ("The Supplemental Nutrition Assistance Program (SNAP) is the largest federal nutrition assistance program. SNAP provides benefits to eligible low-income individuals and families via an Electronic Benefits Transfer card."), *see also Id.*

[28] *See* BENEFITS.GOV, *Temporary Assistance for Needy Families (TANF)* available at: https://www.benefits.gov/benefit/613 ("The Temporary Assistance for Needy Families (TANF) program provides grant funds to states and territories to provide families with financial assistance and related support services. State-administered programs may include childcare assistance, job preparation, and work assistance"). Lawrence Zelenak, Tax or Welfare? The Administration of the Earned Income Tax Credit, 52 UCLA L. REV. 1867 (2005).

[29] *See* Weeks McCormack, *America's (D)evolving Childcare Tax Laws, supra* note 3.

[30] INTERNAL REVENUE SERVICE, *Tax Information for Parents*, https://www.irs.gov/individuals/parents/

one breadwinner families—*i.e*. the statistically declining family model in which children are raised by two living together married parents, one of whom earns all income outside the home while the other remains available to engage exclusively in unpaid, household labor like childcare (hereinafter "nonpoor one breadwinners").

This part will now discuss the various benefits available to nonpoor parents, starting with Congress' "golden child"—the nonrefundable portion of the Child Tax Credit, which is Congress' most favorite benefit.

1. The "Golden Child:" The Non-Refundable Portion of the Child Tax Credit

Congress really likes a benefit it created in the late 1990s, located in Section 24 of the Code. It is called the Child Tax Credit, or CTC for short. But we need to be more specific. Congress really likes the *non-refundable portion* of the CTC benefit (hereinafter NRP-CTC) — that is, the portion of the CTC benefit available to parents that earn enough income to have positive tax liabilities (hereinafter, "relatively nonpoor parents" or "nonpoor parents"). The NRP-CTC must be distinguished from the *refundable portion* of the CTC, available to parents that do not earn enough income to have a positive tax liability (hereinafter, "relatively poor parents" or "poor parents"). As will be discussed later, Congress is not so fond of the refundable portion of this benefit (or of refundable benefits, generally).

It is not a mystery why the NRP-CTC has won "golden child" status. Unlike some other, less favored benefits discussed later, the NRP-CTC applies equally to all nonpoor married taxpayers (something Congress really likes).[31] As a default matter, the nonrefundable portion of the CTC allows all nonpoor parents to reduce their tax bills by a fixed dollar amount for each of their qualifying children (*e.g.* minor dependent children living in one's household). It does not matter if childcare costs are incurred to work, or whether or to what extent parents engage in paid labor at all. The nonrefundable portion of the CTC is, therefore, available to nonpoor "dual earner families"—*i.e*. families with two parents sharing the responsibilities of caregiving and earning income outside the home—and to nonpoor "solo parent families"—*i.e*. families in which one parent bears the main or entire responsibility of caring for children and earning income. Of course, these types of families may incur substantial childcare and other work-related costs in order to earn income outside the home.

[31] *See, e.g.* Gann, *The Earned Income Deduction supra* note 6. (Congress adopted the view that "married couples with equal statutory income should pay equal taxes," although their actual economic income and ability to pay taxes may be substantially dissimilar").

But the CTC does not differentiate based on these costs, which is why this benefit is Congress' golden child. It is equally available to nonpoor one breadwinners, just defined above. It is even available to nonpoor "no earner families"—*i.e.* families in which neither parent spends much time in the paid workforce but instead receives income from capital investments, perhaps even inherited assets. When it comes to doling out benefits for nonpoor parents, the NRP-CTC does not meddle into how these families do (and do not) earn income.

Why do I say that the NRP-CTC is Congress' golden child? When Congress expands benefits for nonpoor parents, this is their "go to" benefit. Congress expands this benefit with relative frequency and when it does so, makes expansions that go well beyond what is required to adjust for inflation. Even a brief history reveals a lot.

The CTC was enacted as part of The Taxpayer Relief Act of 1997.[32] At this time, "it was a relatively modest nonrefundable tax credit for middle-income families with children."[33] The credit (which was completely unavailable to poor parents with negative tax liabilities) was set at $500 per child.[34]

However, just four years after its enactment, The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) increased the non-refundable portion of the credit from $500 to $600 for tax years 2001-2004.[35] This more than adjusted for inflation, which only would have required an adjustment of about $550-$580 over those years.[36]

The originally idea under EGTRRA was to gradually ratchet up the CTC in years proceeding 2004, so that the NRP-CTC would reach $1,000 per child in 2010. But Congress could not wait that long to keep expanding this benefit, and in 2004 just accelerated the whole process, increasing the credit to $1,000 for years 2005 onward. This was far more than the $580 that would have been needed to keep pace with inflation ($500 in 1997 equates to about $580 in 2005 adjusted dollars).[37]

---

32 The Taxpayer Relief Act of 1997 (TRA97; P.L. 105-34).

33 CONGRESSIONAL RESEARCH SERVICE, *Child Tax Credit: Legislative History*, *available at* https://sgp.fas.org/crs/misc/R45124.pdf.

34 *See* Weeks McCormack*, America's (D)evolving Childcare Tax Laws, supra* note 3.

35 Economic Growth and Tax Reconciliation Relief Act of 2001, P.L. 107-16 (hereinafter EGTRRA).

36 U.S. BUREAU OF LABOR STATISTICS, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm

37 INTERNAL REVENUE SERVICE, *Advance Child Tax Credit Payments*, FS-2003-13

Then comes the Tax Cuts and Jobs Act (TCJA), effective for tax years 2017-2025. Here, Congress fully doubled the non-refundable portion of the child tax credit from $1,000 to $2,000 per child.[38] To account for inflation since the last big increase to $1,000, Congress would have only had to increase the amount to $1,400.[39] If Congress were adjusting the original $500 credit enacted in 1997, the NRP-CTC would only need to be set to about $775.[40]

To better understand the mechanics of this rapidly increasing credit, here is a simple example. Assume that a childless couple is married and files a joint return while the TCJA is in effect, and has $100,000 taxable income, which results in a (made up) tax liability of $25,000. If that same couple added two dependent children to their family, that couple could reduce this tax bill by two $2,000 CTCs (AKA $4,000) for a final tax liability of $21,000 ($25,000 less the $4,000). The non-poor family with two children saves $4,000 in tax under the TCJA compared to the childless couple.

Now, although eligibility for the NRP-CTC does not depend on whether or to what extent non-poor parents engage in paid labor, the NRP-CTC does diminish once parents earn a designated amount of income (the phase-out threshold).[41] Since its enactment in 1997 and until the TCJA, the phaseout has begun at $110,000 for couples who are married and filing jointly (hereinafter MFJs) and $75,000 for heads of household (hereinafter HHs, to be discussed more in Section I.C). Once families earn more than these applicable amounts, the credit begins to gradually phase-down, until it is lost entirely. For instance, before the TCJA took effect, MFJs with one dependent child were eligible for a $1,000 credit if adjusted gross income did not exceed $110,000.[42] But after that point, the credit phased down in $50 increments until it was lost completely to those MFJs earning above (roughly) $140,000.

(May 2003), https://www.irs.gov/pub/irs-news/fs-03-13.pdf. INTERNAL REVENUE SERVICE, Rev. Proc. 2003-85, Sec. 3.04, https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/irs-releases-inflation-adjusted-tables-for-2004/dp9h.

38 INTERNAL REVENUE SERVICE, Rev. Proc. 2018-57, Section 3.05, https://www.irs.gov/pub/irs-drop/rp-18-57.pdf.

39 U.S. BUREAU OF LABOR STATISTICS, CPI Inflation Calculator, (hereinafter CPI Inflation Calculator), available at https://www.bls.gov/data/inflation_calculator.htm

40 *Id.*

41 26 U.S.C. § 24(b)(1).

42 CONGRESSIONAL RESEARCH SERVICE, *Child Tax Credit: Legislative History*, *supra* note 33.

In this way, the CTC has generally been available to nonpoor parents of moderate to upper moderate means (the real median income for households in 2022 was around $75,000).[43]

Unlike the actual credit amount, which has ratcheted up well beyond what inflation required, these phaseout thresholds were not adjusted for inflation since 1997, which means they had decreased in real value over time. By how much? If Congress wanted to account for inflation between 1997 and 2017 (when the TCJA was enacted), it would have increased the phaseout threshold to about $175,000 and $120,000 for MFJs and HHs, respectively.[44]

But through the TCJA, Congress took things in a very different direction, dramatically expanding the availability of the now doubled credit to almost all nonpoor parents. More specifically, it more than tripled (nearly quadrupled) the phaseout thresholds— while the TCJA is in effect, the NRP-CTC is available to married couples filing joint returns until their income reaches $400,000 and for unmarried parents, the full credit is available until income exceeds $200,000.[45]

This $400,000 marker appears to be a flash point for various politicians––is a couple uber wealthy, they vehemently debate, if they earn over this amount? Without having to enter this milieu, "…[b]y national measures…[those earning over $400,000]…belong to a rarified group…[and] represent the top 1.8% of taxpayers, earning about 25% of the nation's income."[46] As a result, while the TCJA's almost quadrupled phase out thresholds are in effect, only about 2% of parents will find themselves ineligible to claim a tax credit of $2,000 per child.[47]

The takeaway from this brief tour of history is the following: the non-refundable portion of the CTC has Congress' highest affections—since its enactment, Congress has shown eagerness to increase its benefits well beyond what is required to keep pace with inflation (and recently in the TCJA, dramatically increased phaseout ranges to make the full credit available to all nonpoor parents, except the highest echelon of earners).

---

43 UNITED STATES CENSUS BUREAU, *Household Income: 2022* https://www.census.gov/library/publications/2023/demo/p60-279.html

44 CPI INFLATION CALCULATOR, supra note 36.

45 26 U.S.C. § 24(h)(3).

46 Robert Frank, *Biden Defines $400,000 a year as 'wealthy': Here's what that buys in a big city, available* at https://www.cnbc.com/2020/10/06/biden-defines-400000-a-year-as-wealthy-how-far-it-goes-in-a-city-.html

47 *Id.*

Congress has, at no time outside the pandemic, decreased benefits under the CTC or lowered phaseout thresholds (though it did fail to adjust these thresholds for inflation for quite some time).

As will be discussed more in Section III, this pattern is about to be tested––the TCJA's dramatic expansion of the NRP-CTC expires at the end of 2025.[48] Therefore, as will be discussed more in Section IV, Congress will be faced, for the first time since the CTC was enacted in 1997, with the possibility that the NRP-CTC will contract—and substantially so. When the TCJA expires, the NRP-CTC reverts back to half value ($1,000 per child) and the phaseout range will decrease dramatically, significantly reducing the number of parents that can claim the full (or any) CTC.[49]

But we are getting ahead of ourselves. The NRP-CTC allows nonpoor one breadwinner families (which Congress really likes) to benefit right along with working families (*e.g.* dual earner and solo parents), even though the former families can avoid all sorts of costs, not the least of which are childcare expenses. But I said that this was a story of favoritism and neglect.

Does the Code provide benefits for working parents who do have to incur these costs? It does provide "working childcare benefits"—*i.e.* benefits that are available only to dual earner and working single parents who incur childcare costs to earn income (and that are, therefore, not available to one breadwinner families who can avoid these costs). But historically Congress has not only disfavored these benefits but has also outright neglected them.

2. Working Childcare Benefits for Nonpoor Parents: Outright Neglect.

.

Many developed countries provide working parents access to governmentally provided childcare, at low or no cost.[50] The United States is not one of these countries.[51] Instead, childcare in the United States is almost entirely privatized, difficult to find and can be extremely expensive.[52] In fact,

---

[48] Noah Peterson, *The Short Form: Parts of the TCJA are Expiring Soon, Here's What that Means for You*, available at https://taxfoundation.org/blog/tcja-expiring-means-for-you/

[49] *Id.*

[50] *See, e.g.*, *Paid Family Leave Across OECD Countries*, Bipartisan Policy Center (Sep., 2022) https://bipartisanpolicy.org/explainer/paid-family-leave-across-oecd-countries/ ("The U.S. is the only OECD member country—and one of only six countries in the world—without a national paid parental leave policy.").

[51] *Id.*

[52] Christin Landivar, *New Childcare Data Shows Prices Are Untenable for Families*, U.S. DEP'T OF LABOR BLOG (Jan. 24, 2023) https://blog.dol.gov/2023/01/24/new-childcare-

it is often one of the highest costs in a household budget.[53]

Given America's propensity to shun direct benefits like affordable childcare and instead rely circuitously on the Code to provide aid, it is not surprising that Congress chose to provide some relief for these high childcare costs through tax breaks. What should be surprising is how meager these benefits are. And what is often missed is how these benefits came to be so insufficient. In short, Congress has simply neglected these benefits for decades, allowing them to deflate in value dramatically.[54]

There are two benefits that nonpoor working parents may claim to defray costs of childcare "necessary for gainful employment" (the Code's words, not mine).[55] All nonpoor working parents that incur these expenses can claim some benefit under the nonrefundable portion of the Child and Dependent Care Credit (NRP-CDCC or working childcare credit).[56] But there are a few limitations which conspire to make this benefit almost bizarrely ungenerous.

The NRP-CDCC allows working parents to claim a percentage of their working childcare expenses. The percentage ranges from 35% to 20%, depending on the family's income.[57] But because the phase-out is so fast, almost all parents will end up receiving credit for only 20% of their expenses (subject to another limitation to be discussed soon). How fast? Remember how the NRP-CTC (Congress' golden child) began to phase out at $110,000 and $75,000 for MFJs and HHs, respectively and how the TCJA nearly quadrupled those thresholds so that all but the top 2% of parents could benefit?

The phase out for the working childcare credit (NRP-CDCC) available to working parents (but not one breadwinners) which helps defray the cost of childcare is, to put it mildly, quite a bit different. The 35% starts to phase down once a family earns taxable income of—wait for it—$15,000 and bottoms out at 20% once income exceeds $43,000. This is nowhere close to the median income for present families[58] and, in fact, the poverty line for a

---

data-shows-prices-are-untenable-for-families.

[53] *Id.*

[54] See, Weeks McCormack, *America's (D)evolving Childcare Tax Laws, supra* note 3.

[55] 26 U.S.C. § 21.

[56] 26 U.S.C. § 21.

[57] 26 U.S.C. § 21(a)(2).

[58] *Id.*

family of four in 2023 is $31,200.[59]

But this is not the only limitation. There is also a dollar cap on the childcare expenses to which this percentage can apply. Taxpayers cannot claim a credit for more than $3,000 of annual childcare expenses for one child[60] and $6,000 for two or more children.[61] This represents a small fraction of the annual childcare costs many working parents can be expected to incur.[62]

When the dust clears, the maximum credit (available to working parents earning under $43,000) is $1,050 for one child and $2,100 for two or more children. And for almost all working parents (*i.e.* all those earning over $43,000) the maximum credit for one child will be $600 (20% x $3,000) and for two or more children, $1,200 (20% x $6,000).

How did this happen? In previous work, I have chronicled the full history of this working childcare credit.[63] But the short answer is this: it happened because of sheer neglect. In the 1970s and 1980s, when lawmakers began to accept the fact that even nonpoor white women were going to engage in paid labor after they had children (women of color and those of low means had always been doing so), Congress greatly liberalized the benefits available to working parents who incurred childcare costs to work outside the home.[64] At this point, all but higher earning parents could claim tax relief that could be expected to cover a substantial portion of childcare costs incurred while working.[65]

But after that time—the 1980s, which is nearly three and half decades from the present moment—Congress never once adjusted the various limitations discussed above, even for inflation, no less for changed circumstances (such as skyrocketing childcare costs). Here is the short

---

[59] OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, *Poverty Guidelines*, *available at* https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines

[60] 26 U.S.C. § 21(c)(1).

[61] 26 U.S.C. § 21(c)(2).

[62] Landivar, *New Childcare Data Shows Prices Are Untenable for Families*, *supra* note 52

[63] Weeks McCormack, *America's (D)evolving Childcare Tax Laws*, *supra* note 3.

[64] *Id. See also* Economic Recovery Tax Act of 1981, Pub. L. No 97-34, § 124(a), 95 Stat. 172, 197-98 (1981) (codified at 26 U.S.C. § 21).

[65] *Id.*

version of this historical neglect:

> Since 1981, the childcare credit's dollar caps and income phase- downs have changed exactly once. In 2001—twenty years after the last change—Congress allowed families to take a percentage credit of childcare expenses up to $3,000 (up from $2,400) for one child and $6,000 (up from $4,800) for multiple children. This adjustment did not even fully reflect inflation between 1981 and 2001. [66]

Resultingly, these benefits have deflated in real value so that today, many working parents will receive tax relief for only a small fraction of their very high childcare costs.

There is an alternative mechanism to this working childcare credit,[67] but its story is quite similar, leading to the same endpoint: this benefit provides only fractional relief for nonpoor working parents incurring the often-high costs of inaccessible, often inadequate, private childcare incurred to earn income. This alternative mechanism is offered in Code Section 129[68] and allows a taxpayer to exclude a portion of income if but only if their employer (the parent must be an employee) actually provides a childcare option like onsite daycare (which few do) or, more commonly, the employer has gone through the task of establishing a qualified "dependent care assistance plan" for their employees. In the latter instance, parents may elect to divert a portion of their pre-tax salary into the DCAP plan[69] which allows the parent to avoid tax on a portion of their otherwise taxable income (so long as it can be shown that the sum was used to pay for childcare costs needed for gainful employment). In the former, less common instance, a parent may exclude a portion of the employer provided childcare even though the value of that service would ordinarily be included in income.

But here come limits. The dollar cap for this exclusion is $5,000, a mere fraction of many working parents' actual costs. And the benefit is so stingy for the same reasons that the working childcare credit is so inadequate—Congress completely neglects it. As I have previously explained:

---

[66] McCormack *America's (D)evolving Childcare Tax Laws, supra* note 3.

[67] One cannot double up on this benefit and the DCDD—if properly advised, one will choose the one that maximizes tax savings.

[68] 26 U.S.C. § 129(a)(2).

[69] INTERNAL REVENUE SERVICE, *Child and Dependent Care Credit & Flexible Benefits Plans*, available at https://www.irs.gov/faqs/childcare-credit-other-credits/child-and-dependent-care-credit-flexible-benefit-plans

> Since § 129 was enacted [in 1981], Congress has never changed the maximum exclusion available ($5,000). The cap has not been indexed for inflation in over three decades, despite the fact that childcare costs are certainly rising with (and perhaps faster than) inflation.[70]

But what of the TCJA, which so drastically expanded the "golden child" NRP-CTC? The TCJA was touted as a great windfall for working parents—"a huge tax cut … [that would] be rocket fuel for our economy [and whose] biggest winners w[ould] be everyday families, from all backgrounds, from all walks of life..."[71] Surely, now would be the time for some adjustment to working childcare benefits.

The TCJA ignored them completely and again. While Congress doubled the NRP-CTC for all parents and made it available to all but those earning over $400,000 (if MFJ) and $200,000 (if unmarried), Congress continued its long streak of completely neglecting working childcare benefits.[72] Not one adjustment was made.[73]

It is worth now pausing to sketch some of the many possible distributive implications of this story of favoritism and neglect. Congress has shown consistent favoritism for the non-refundable portion of the child tax credit, expanding it relatively frequently and well beyond what is required to keep pace with inflation;[74] at the same time, it has consistently failed to adjust benefits available to working parents, such as solo working parents and dual earners, which could help defray the often-high costs of childcare they must incur to earn income (but others, especially one breadwinner families can

---

[70] Weeks McCormack *America's (D)evolving Childcare Tax Laws, supra* note 3 at 38-39 (internal citation omitted).

[71] THE WHITE HOUSE, "Remarks by President Trump on Tax Reform," October 11, 2017, available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-tax-reform/.

[72] *Hearing about Policies to Support American Families Before the H. Ways and Means Comm.*, 117th Cong. (Apr. 6, 2022) "And once you are working, the Child Tax Credit Republicans doubled in tax reform provides more economic help for families. We all want every parent to have access to high quality, affordable childcare that meets their needs." (statement of Rep. Adrian Smith (R-NE)) https://adriansmith.house.gov/media/press-releases/smith-economic-opportunity-every-american-what-country-all-about.

[73] *Supra* note 81.

[74] Supra section I.A.1.

avoid).[75] And to be clear, childcare costs are only one example of the types of costs one breadwinner families can avoid or minimize compared to all other families that do not retain a partner fully available to provide services inside the home.[76] Dual earners, for instance, will have to double up on commuting costs and costs of work attire compared to one breadwinner families. Solo working parents and dual earner couples will have less time to devote to household care when compared to those families that retain a stay-at-home partner and, to make up for this time deficit, may rely more on outsourced home services. In other words, "working families" incur higher cost burdens to earn income than their one breadwinner counterparts—or put one more way, due to the Code's failure to recognize these differential burdens, when dual earners and solo parents have the same statutory taxable income, they will be taxed very similarly even though their actual economic incomes are very different.[77]

This all ends up disproportionally benefitting nonpoor one breadwinner families—they benefit from the enthusiastic expansion of the golden child tax credit while losing nothing by the degradation of the neglected working childcare benefits (not to mention non-existent benefits for other work-related expenses). In this next Part, I will pause our coverage of the taxation of nonpoor parents to outline in broad strokes some of the distributional concerns raised by this benefits preferentialism. The aim is not to be conclusory or exhaustive but to give the reader a sense of the sometimes clearly problematic but often-times uncertain distributional effects of these decisions, all of which should be concerning to actors who aim to tax parents equitably.

B. Distributive Concerns Raised by Congress' Benefits Preferentialism

Some of the distributive implications of Congress' benefits preferentialism can be discerned by looking at the tropes used to defend it. One very consistent narrative makes fallacious appeals to neutrality and free choice. Consider the op-ed written by Marco Rubio arguing for the TCJA's expansion of Congress' favorite child tax credit well beyond what was required to reflect inflation. Entitled *We Need Real Tax Reform That Empowers Families*, Rubio wrote the following:

75 *See, e.g.* Gann, *Earned Income Deduction*, *supra* note 6.

76 *Id.*

77 *Id.*

> Enhancing the Child Tax Credit . . . would . . . promote family flexibility. Families can claim the credit regardless of parenting or work arrangements, empowering working and stay-at-home parents equally and increasing their ability to choose the best parenting arrangement for their situation.[78]

The historical account of favoritism and neglect just developed reveals the speciousness of this narrative. This faux libertarianism has superficial appeal. But the argument that increasing the golden child tax credit creates neutrality among family models fails on its own terms. In order to earn income, working parents—*e.g.* dual earning couples and solo working parents—incur additional costs that families with a stay-at-home parents avoid. As a result, Congress' consistent pattern of increasing the golden child tax credit while ignoring working childcare benefits (and other work-related costs for which there is no benefit to even neglect) does not "empower working and stay at home parents equally" but instead amplifies the preference for nonpoor one breadwinner families that already exists in the Code. Rather than creating neutrality, the Code's preferentialism valorizes the one breadwinner family model over all others, overtaxing working families by ignoring the additional costs they incur to earn income.

As Professor Sugin puts it, the Internal Revenue Code reveals that American lawmakers think the "traditional family is best."[79] She continues:

> The tax law has long favored families with two parents, one breadwinner, and children living in the same home; the TCJA further increased the relative benefits to these 'traditional' families. The traditional family, in this paradigm is increasingly affluent and white and the tax law normalizes this paradigm further."[80]

And as Professor Sugin recognizes, the preference for the two parent, single earner family has distributive implications. Consider the rhetoric of Marco Rubio's op-ed suggesting that with just a little extra help from our tax laws, American families can be "empowered" to "choose the best parenting arrangement for their situation."[81]

---

[78] Marco Rubio, BREITBART (Aug. 3, 2017), http://www.breitbart.com/big-government/2017/08/03/marco-rubio-we-need-real- tax-reform-that-empowers-families/.

[79] Linda Sugin, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 Yale L. J. Forum 403 at 404 (2018).

[80] *Id*. at 405.

[81] Marco Rubio, BREITBART, supra 78.

Glaringly, it is not clear if these appeals consider one parent households at all—many solo parents have absolutely no ability to drop out of the workforce or reduce working hours in any substantial way, as they are the only caregiver that is available to earn income to support their children's needs.[82] There are race and demographic components to this erasure. Here's one—Black children are most commonly raised by single parents. According to a recent Census Bureau Report:

> Living with two married parents was the most common living arrangement for children of all race and origin groups other than Black children. Fewer than two-fifths of Black children were living with two married parents in 2020. These children were most likely to live with their mothers only, with nearly half living in this arrangement in 2020. Asian children were the most likely to live with two married parents, followed by White, non-Hispanic children and Hispanic children.[83]

There are also gender implications exhibited by the erasure of nonpoor solo parents from this misleading "let everyone choose" soundbite. Here are some statistics:

> Among truly solo parents [i.e. those not cohabiting)] the vast majority (81%) are mothers; only 19% are fathers. This gender difference is even more pronounced among black solo parents: 89% are mothers and just 11% are fathers…[84]

Are narratives like Rubio's just meant for two parent families? If so, certainly not all of them—class implications are also laid bare when we consider, for a moment, who has these full and free choice sets that lawmakers like Rubio seem to imagine. Surely, they are theoretically available for some subset of two parent families that have an earner whose salary alone can support the household (and to some other subset of workers

---

[82] *See Sugin, The Social Meaning of the Tax Cuts and Jobs Act, supra* note 82.

[83] Paul Hemez and Chanell Washington, *Percentage And Number of Children Living with Two Parents Has Dropped Since 1968*, available at https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html

[84] Gretchen Livingston, *The Changing Profile of Unmarried Parents*, Pew Research (2018), https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/

who enjoy unusual power and control in abnormally fluid work arrangements to decide precisely how much to work in any given year). But many parents of low or moderate means do not have such choices (nor is the American workforce lauded for its flexibility and grace), meaning an additional $1,000 per child is unlikely to expand most opportunity sets in any meaningful way. And this is increasingly true, as one recent article succinctly explains:

> The number of dual income households has been steadily increasing over the past few decades. …[G]iven a household's desire to remain above a minimum threshold standard of living, the rise in the number of dual earner households is inevitable mostly due to inflationary pressures in product markets including rising housing prices and childcare costs coupled with relatively flat wage trends. [85]

And really, we have only gotten started. Congress' benefits preferentialism raises a host of other distributional questions that have complicated and, given the rapidly changing dynamics of families, non-static answers. For instance, among two parent families, what are the race implications of favoring one-breadwinners at the expense of dual earners? Historically, this bias was likely to disproportionately benefit non-Black families.[86] Before the 1960s, when one breadwinner families were the aggregate norm, Black families were more likely to be using a dual earner model than their non-Black counterparts.[87] However, since then, these racial disparities seem to have reduced considerably. For instance, recent data

---

[85] Tesa E. Leonce, *The Inevitable Rise of Dual Income Households and Intertemporal Effects on Labor Markets*, 52 Compensation & Benefits Review 64 (2020). , https://journals.sagepub.com/doi/abs/10.1177/0886368719900032?journalCode=cbrb. Nor can one even rely too heavily on statistics about present arrangements to truly understand how many families need two incomes. Especially among lower income groups, parents may not be engaged in paid labor (*i.e*. may "code" as single earners), but it very well may not be by "choice." Underemployment and involuntary job disruptions are high for those in lower income brackets. I will discuss this more in Section II. Alstott, *Why the EITC Does Not Make Work Pay, infra* note 152

[86] Howard Hayghe, *Husbands and Wives as Earners: An Analysis of Family Data*, MONTHLY LABOR REVIEW (1981), available at https://www.bls.gov/opub/mlr/1981/02/art5full.pdf.

[87] *See* MONTHLY LABOR REVIEW, *Comparing Characteristics and Selected Expenditures of Dual- and Single-Income Households with Children* (2020), available at https://www.bls.gov/opub/mlr/2020/article/comparing-characteristics-and-selected-expenditures-of-dual-and-single-income-households-with-children.htm. *See also* Leonce, *The Inevitable Rise of Dual Income Households and Intertemporal Effects on Labor Markets*, *supra* note 87.

suggest that two parent white families utilized the dual earner model (disfavored by the Code) roughly as often as two parent Black families.[88] At the same time, one must be careful with these statistics for all sorts of reasons—for instance, it is not clear why these models are being used. Are there additional factors that cause parents of some races to forego an income even though they feel they need or want another earner in the paid workforce––*e.g*. differences in ability to attain jobs or lower wages due to wage gaps which could change the probability that work is actually profitable once costs like childcare are incurred?

We could also ask whether Congress' preferentialism for one breadwinner families over dual earner families has gender bias? Historically, many scholars have argued the taxation of the family disproportionately favors males over females.[89] This scholarship, however, has often relied on aggregate statistics that suggest women are disproportionately the secondary wage earners in two earner families. It has, as a result, been argued that laws that "encourage" a one breadwinner model will more frequently result in the mother foregoing her (usually lesser) income to provide unpaid services in the home.[90] However, scholars like Professor Dorothy Brown warn that these arguments obscure historical racial differences.[91] For instance, she points out that among Black families, Black women have often taken on the role of primary breadwinner.[92] Furthermore, aggregate statistics have changed quite a bit in recent decades and women of all races are increasingly likely to contribute substantially to a family's total earned income.[93]

There are numerous other avenues to explore. One might ask how the preference for one breadwinners over dual earners is enjoyed among opposite sex vis-a-vis same sex parents?[94] One should notice that the Code's rigid,

---

[88] *Id.*

[89] Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997). (surveying this literature)

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Sarah Glynn, *Breadwinner Moms Continue to be the Norm,* (2019) available at *https://www.americanprogress.org/article/breadwinning-mothers-continue-u-s-norm/.*

[94] The preference for one-breadwinners might disproportionately benefit straight couples over same sex couples since same sex married couples are more likely to be dual earners than opposite sex married couples.https://www.hamiltonproject.org/assets/files/LGBTQ_Blog_Technical_Appen

heteronormative categories—unmarried parents, dual earners and one breadwinners—erase all sorts of families by failing to acknowledge the variety of arrangements actually used today, such as cohabitant and multigenerational households.[95]

We must stop somewhere. Full projects could be (and have been) devoted towards exploring each of the concerns raised. But what is important to recognize here is that Congress' persistent preference for the golden childt tax credit and simultaneous neglect of benefits for working families that incur additional expense because they do not retain a nonwage earner in the home raises many concerns and unanswered questions about how the benefits of this bias are distributed. These questions are dynamic, complicated, and important. Meanwhile, Congress does the same thing over and over again: favoring a one breadwinner model that fewer and fewer parents are able to use while turning a blind eye to soaring costs most working families incur to earn income.

C. A Segue

The one breadwinner model is no longer the norm, and most parents are using other models (such as dual earner and solo parent models).[96] It is, therefore, reasonable to ask—how is Congress continuing to adhere to its preferentialism for a non-dominant model without invoking ire from the majority of parents using other arrangements? There are so many avenues towards which this question could lead. But one that seems at once obvious but still underappreciated: few parents can be reasonably expected to have any idea how these tax laws interact.

First, what I have just described isn't exactly a model of lucidity. And as I will discuss more in Section IV, there is good reason to believe that it is not only taxpayers but also lawmakers and politicians (including Presidents) who confuse the golden child tax credit (available to all nonpoor parents regardless of work arrangements) with the working childcare benefits (available to nonpoor working families that incur childcare costs because they do not retain an available caregiver in the home). But if these were the only two benefits with which one had to grapple, there might be a way to disentangle them in these varied actor's minds, even though the benefits share such unfortunately similar names.

---

dix_v3.pdf?_ga=2.91806938.1771578605.1687904112-293759678.1687904112

[95] Infanti, *Decentralizing Family*, supra note 4.

[96] *See,* MONTHLY LABOR REVIEW *Comparing Characteristics and Selected Expenditures of Dual- and Single-Income Households with Children*, supra note 87 (Even among households with children, dual-income households make up two-thirds (66 percent) of the total).

However, we haven't even gotten through the thickest part of the alphabet soup. We now turn to four benefits which largely define the contours of the Code's statutory progressive rate structure. By tinkering with these benefits, Congress can shift burdens among caregivers and between caregivers and non-caregivers in ways that are largely obscured. For one thing, some of these benefits are "real" parental tax benefits, available only to caregivers (*e.g*. parents) while others have nothing to do with caregiving but have become "parental adjacent" because Congress has made "real" parental tax benefits largely (if not entirely) dependent upon them. This opens the door for Congress to take largely performative actions which obscure the real impacts of what it is doing. This is not to say Congress always acts on this ability or that it is always done with intent, but the Code currently sets the stage to allow for it. And I believe the TCJA provides a poignant example of when Congress took that stage with flair.

We are about to enter a statutory morass. It is at moments like this that I often remind my students, and will here remind the reader, that I did not write the Code. With that established, let us turn to benefits that allow Congress to fiddle with the rates. It is, at best, a narrative of historical accident and path dependency, and at worst, a narrative of confusion and manipulative performativity.

D. Fiddlin' With the Rates: Historical Accidents, Path Dependency, and Manipulative Performativity

America has always had a statutory tax rate structure that is progressive––*i.e*. as one's taxable income increases, "higher" increments of income will be taxed at higher statutory rates.[97] There are many levers outside of the statutory rate structure that Congress can (and does) pull to tinker with how progressive final tax burdens end up being—*i.e*. understanding the statutory rate structure only provides a starting point.[98] But to even understand the basic contours of the statutory rate structure and how the Code initially distributes burdens among caregivers and between caregivers and non-caregivers, one must understand four different benefits that are the subject of this Part. These four benefits are:

[97] Tracey Roberts, *Brackets, a Historical Perspective*, 108 Northwestern Law Review 925 (2014) (hereinafter *Brackets*).

[98] *See, e.g.* Congressional Research Service, *Statutory, Average, and Effective Marginal Tax Rates in the Federal Individual Income Tax: Background and Analysis* (2017), available at https://crsreports.congress.gov/product/pdf/R/R44787; *See also* The National Economic Council, *The Buffett Rule: A Basic Principle of Tax Fairness* (2012), available at https://obamawhitehouse.archives.gov/sites/default/files/Buffett_Rule_Report_Final.pdf

(i) the so-called "income splitting" benefits available to married couples that file joint returns (MFJs); [99]

(ii) the beneficial rates available to heads of household (HHs), which allow for half the income splitting benefits available to MFJs;[100]

(iii) the standard deduction;[101] and

(iv) the personal exemption amount.[102]

The second and the fourth are "real" parental tax benefits— they can only be claimed if a taxpayer cares for a dependent, like a minor child—while the others (the first and third) are "parental adjacent"—they are available regardless of whether the taxpayer(s) has/have children or other dependents but (for various reasons to be explained) Congress may tinker with these benefits in tandem with real parental tax benefits.

This Part will identify two pairs of parental/parental adjacent tax benefits that define the contours of the Code's statutory rate structure. We will start with the "real" parental tax benefit provided to heads of household (like solo parents providing primary care to dependent children) and the parental adjacent benefit upon which it is entirely dependent—"income splitting" benefits offered to taxpayers who are married filing jointly even in cases when the couple has no caregiving obligations whatsoever.

1. Benefits for Unmarried Parents Made Dependent on Benefits for (Even Childless) MFJs

Section 1 of the Internal Revenue Code sets out the statutory rate structure for individual taxpayers of different filing statuses, including: couples that are married and filing joint returns (as most married couples do); unmarried taxpayers; and heads of household.[103] Even taking a clue from these titles,

---

[99] Nick Kasprak, *Joint Filing in the Tax Code*, TAX FOUNDATION (Jun. 26, 2013) https://taxfoundation.org/joint-filing-tax-code/.

[100] 26 U.S.C. § 1(b).

[101] 26 U.S.C. § 63(b)(1).

[102] 26 U.S.C. § 151.

[103] 26 U.S.C. § 1(a) - (c).

one can guess that the statutory rates largely depend on whether one is married or unmarried, and not on whether one has dependents.[104] However, the head of household status applies only to unmarried taxpayers that can claim a dependent (it doesn't matter how many, curiously).[105] Heads of households can use a rate structure that is more favorable (*i.e.* produces less tax) than the one other unmarried taxpayers must apply.[106] The head of household rates are, therefore, a "real" parental tax benefit.

(a) Head of Household Benefits

In general, head of household status may only be claimed by unmarried taxpayers with one or more dependents (*e.g.* a minor child over whom the taxpayer has primary custody).[107] To the extent that Congress was trying to capture truly solo parents, the fact that the status depends only on marriage and not on cohabitation or other markers of parental involvement ensures that the filter is both over-and under-inclusive in ways that are, at best, anachronistic and in reality, distributionally problematic.[108]

A bit of history is helpful to understanding the benefits that attend this status, such as it is. In 1951, Congress recognized that one parent families (which at the time were far rarer than they are today) might face different challenges than two parent families (which were far more common at the time).[109] This, enough members of that Congress believed, justified taxing unmarried caregivers less than other unmarried taxpayers. Buoyed by this realization, Congress created the head of household status in 1951.[110]

What benefits did Congress provide? Remembering that the golden child

[104] *See e.g.*, Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 10-24 (1980).

[105] Jacob Goldin and Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parent*, TAX L. REV. (2017).

[106] 26 U.S.C. §1(b).

[107] 26 U.S.C. §2(b).

[108] *See, e.g.* Infanti, *Decentralizing Family*, supra note 4; Anne Alstott, *Updating the Welfare State, Marriage, The Income Tax, and Social Security in the Age of Individualism*, 66 Tax L. Rev. 695(2012).

[109] Gretchen Livingston, *The Changing Profile of Unmarried Parents, supra* note 84

[110] Revenue Act of 1951, H.R. 4473 § 301, 82nd. Cong. (1951-1952).

tax credit (born in 1997) was not yet a twinkle in Congress' eye[111] can make the way in which Congress decided to confer benefits to heads of households (HHs) seem less odd—Congress decided to create a rate structure for heads of household that was more generous than the one that applied to unmarried taxpayers without dependents (UM) taxpayers.

The generosity of this head of household rate structure has varied widely over time, contracting and expanding erratically. Consider for instance, the head of household rates as they applied in 2017, immediately before the TCJA took effect.

Pre-TCJA. 2017 Tax Rates for HH and UM Filers.[112]

Tax Rate	**Income Band UM**	**Income Band HH**
10%	$0 and $9,325	$0 to $13500
15%	between $9326 and $37,950	$13501 and $50801
25%	between $37,951 and $91,900	$50,801and $131,200
28%	between $91,901 and $191,650	$131,201and $212,500
33%	between $191,651 and $416,700	$215,501 and $416,700
35%	between $416,701 and $418,400	$416,701 and $444,550
39.6%	above $418, 400	above $444,551

This set of rates provides a benefit to heads of household through all tax brackets, because heads of households "enjoy" the lower income bands for longer than other unmarried taxpayers do. For instance, a UM taxpayer can earn only about $9,300 before the next dollar of income is taxed at 15%, whereas the HH can earn $13,500 before moving beyond the 10% rate. This advantage continues through the entire bracket structure (*i.e.* the HH income bands break later than the bands for unmarried taxpayers).

Now compare these rates to those that apply while the TCJA is in effect:

TCJA Tax Rates for UM and HH Filers.[113]

Tax Rate	**Income Band UM**	**HH**
10%	$0 and $9,525	$0 to $13,600
12%	$9,525 and $38,700	$13,600 and $51,800

[111] *See supra* Section I.A.1.

[112] 26 U.S.C. §1(a), (b), (c) (i).

[113] 26 U.S.C. § 26(j)(2)(A), (B), (C).

Tax Rate	**Income Band UM**	**HH**
22%	$38,701 and $82,500	$51,801 and $82,500
24%	$82,501 and $157,500	$82,501 and $157,500
32%	$157,501 and $200,000	$$157,501 and $200,000
35%	$200,001 and $500,000	$200,001 and $500,000
37%	Above $500,000	$500,000

Here, the tax rate structure is only beneficial for heads of households earning under $51,800. After that point, the unmarried and HH structures are identical. But continuing the historically erratic pattern, when the TCJA expires, the HH rates will go back to the more generous, 2017 rates. This erratic pattern is typical across time.[114]

Here too, there is a historical story to tell that provides context, though not exculpation.[115] In 1951, when Congress created the beneficial rate structure for heads of households, it did not just create a new rate structure out of whole cloth. Instead, it worked within the rate structure that already applied to taxpayers of existing statuses—unmarried and married taxpayers filing jointly. It did so, even though that structure was already (and will always be) philosophical unstable, for reasons I will now explain.

More specifically, Congress directly tied the tax rate benefits available to heads of household (which require care of a dependent) to tax rate benefits available to MFJ taxpayers (even though these benefits haven't a thing to do with caregiving). This isn't exactly a paradigm of logic—but Congress has done this since the head of household status was created in 1951 (with the TCJA acting as a notable exception that will be discussed).

And so I now discuss this "parental adjacent benefit"—MFJ income splitting—upon which head of household benefits remain completely dependent.

(b) MFJ Income Splitting Benefits & Parental Adjacency

Many moons ago (*i.e*. before 1948), the U.S. didn't have a joint filing system.[116] Each taxpayer, even if married, filed a separate tax return and all

[114] Tax Foundation, *Historical US Federal Income Tax Rates and Brackets, 1862-2021*, available at https://taxfoundation.org/data/all/federal/historical-income-tax-rates-brackets/

[115] See Weeks McCormack, *Caregivers and Tax Reform*, *infra* note 120

[116] See, e.g., Boris Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975). See also Nick Kasprak, Joint Filing in the Tax Code, supra note 99

taxpayers used the same rate schedule. Here's a simple one I have made up:

Taxable Income	Rate for that Increment
$0-$25,000	10%
$25,000 – $50,000	20%
$50,000 – $75,000	30%
$75,000 – $100,000	40%

Suppose you have two people—A earns $100,000 taxable income and B does not earn any income at all. If unmarried, A will be in a 40% marginal tax bracket—the "last" $25,000 of income (increment $75,000-$100,000) will be taxed at that highest rate. Of course, B has $0 tax liability. If A and B marry, what happens? Before 1948, the answer depended on state law and resulted in the fairly absurd situation where married couple A and B would be taxed in a very different way depending on whether they lived in a community or non-community property state.[117] We don't need to get into that here because, in 1948, Congress created the joint filing system to harmonize the treatment between married couples.

But to create a new tax rate structure for MFJs, genuinely irreconcilable principles clash and normative decisions must be made.[118] This creates a philosophical instability that will, in turn, lead to the erratic expansion and contraction of both MFJ income splitting benefits and the HH benefits which continue to depend on them.

A quick overview suffices. Congress' initial rate structure was as generous to married couples as was rationally possible[119]— it gave MFJs the ability to fully achieve a benefit known as "income splitting." My students tend to find the term confusing and I see their point. Income splitting taxes MFJs ". . . as though they were two unmarried individuals each with half of the total income of the couple."[120] To calculate taxable income, the MFJ couple aggregates their income and the MFJ rate structure will produce a tax liability that is equal to the sum of the tax liabilities that would be produced

---

[117] *See, e.g.* Stephanie Hunter McMahon, *Gendering the Marriage Penalty,* (2015). Controversies in Tax Law (Anthony Infanti, ed., Ashgate Pub., 2015).

[118] This isn't a controversial statement and is well accepted in all spheres that I am aware of. *See, e.g.* Bittker, *Federal Income Taxation and the Family*, supra note 116

[119] I know of no proposal to actually let MFJ rates break at a point that is more than double the point at which UM rates break.

[120] Weeks McCormack *Caregivers and Tax Reform, supra* note 21 at 8 (quoting INTERNAL REVENUE ACTS OF THE UNITED STATES: 1950-1951 LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE 11).

if the partners were not married, each earned half the income and used the unmarried tax rates. It does this by allowing the tax rates to break at an income level that is twice that of an unmarried individual. Here's a simplified example to explain what I am saying:

Rate	UM	MFJ
10%	\$0-\$25,000	\$0-\$50,000
20%	\$25,000 – \$50,000	\$50,000-\$100,000
30%	\$50,000 – \$75,000	\$100,000-\$150,000
40%	\$75,000 – \$100,000	\$150,000-\$200,000

Please return to our example above. Before A married B, A's \$100,000 moved A all the way to a 40% marginal tax bracket. But if A marries B (with \$0 earnings), the income splitting benefits allowed by this rate structure allow the couple to enjoy the lower brackets longer, and only top out at the 20% bracket. This creates a marriage bonus for one breadwinner families like A and B.

However, what about couples who earn income more equally? Suppose A and B each earn \$50,000, an exact split. Here, no benefit is enjoyed by the new MFJ rate structure. Their combined tax stays exactly the same regardless of whether they are single and file their own returns or marry and file jointly. More generally, a tax rate structure that allows full income splitting will provide no benefit (but also no detriment) to equal earning MFJs but will create a marriage bonus that increases the more uneven earnings become.[121] The bonus is maximized for one breadwinner families, who (as we have discussed) Congress tends to prefer and have the most unequal earnings possible (all and nothing).

But this is philosophically unstable in various respects. For one thing, it is rather harsh on unmarried taxpayers, a fact which does not go unnoticed by that demographic when income splitting benefits are at their greatest.[122] In our hypothetical, an unmarried taxpayer earning \$100,000 is hit in part by the 40% bracket while the married couple with the same income never moves out of the 20% bracket. But if Congress wishes to mitigate the disparity between single persons and the married folks (*i.e.* does not think this much of a disparity is justified), Congress has to curtail the income splitting benefits that create it. This means the married bands can't fully double. This keeps

[121] *See, e.g.* Hunter McMahon, *Gendering the Marriage Penalty*, supra note 117. See also, Gann, Earned Income Deduction, supra note 31. See also Beverly Moran and William Whitford, *A Black Critique of the Internal Revenue Code*, 996 Wisconsin Law Review. 751 (1996). See also Dorothy Brown, *The Marriage Penalty/Bonus in Black and White*, 65 U. Cinn. L. Rev. 787 (2014).

[122] *Id.*

MFJs from getting so much more of their income taxed at the lower bands. But it creates other philosophical knots.

Here is a schedule that doesn't allow for full income splitting:

	UM	MFJ
10%	$0-$25,000	$0-$40,000
20%	$25,000 – $50,000	$40,000-$90,000
30%	$50,000 – $75,000	$90,000-$130,000
40%	$75,000 on	$130,000 on

Now this does narrow the gap between the unmarried earner and the MFJ couple earning the same amount, because the married couple's income moves through the brackets a bit quicker. But this does not rid the Code of the marriage bonus, which is greatest for one breadwinner families and diminishes as earnings become more equal. Take an UM taxpayer with $100,000 taxable income—the marginal rate of tax is 40% (*i.e*. the "last" $25,000 of income will be taxed at that rate). But if that UM taxpayer marries a spouse who does not have earned income, they will still enjoy a marriage bonus even though the bands don't fully double—most of the $100,000 income is now taxed in the 10% and 20% brackets, only $10,000 gets taxed at 30% bracket and they skip the 40% bracket entirely.

However, a new problem is created—it is now not only the case that more equal earners will enjoy little (or possibly no) marriage bonus, they also may suffer a marriage penalty. Take two single taxpayers, each with $50,000 income. When single, each would have moved only through the 20% bracket. But now if these equal earners marry, because the bands don't double and because their equal earnings brought them close to the bracket jump applicable to unmarried taxpayers, they will pay more than before they married —$10,000 of their income is now taxed at 30%.

It is well recognized that Congress cannot resolve one of these disparities without creating another[123] (at least so long as the Code maintains joint filing (which it has since 1948) and progressive statutory rates (which it always has)).[124] If the goal is to eliminate marriage penalties, there must be full income splitting but then the disparity between married couples and unmarried taxpayers earning equal statutory incomes enlarges. If Congress eliminates the disparity by curtailing income splitting, the marriage penalty

[123] *See* Bittker *supra* note 116; *See also* David Hemel, *Beyond the Marriage Tax Trilemma*, WAKE FOREST L. REV. (2017).

[124] The problem doesn't come up with a flat rate system because you can't jump brackets with one rate.

comes back.

It is, therefore, of no surprise that these income splitting benefits ebb and flow, depending on Congress' prevailing priorities at any given time. For instance, through the TCJA, Congress allowed for full income splitting for all MFJs earning under $400,000, and only tapered off the benefits (*i.e.* stopped doubling the bands) for that rarified group that earned more than that amount.[125] This also comes as no surprise since the TCJA amplified the already deeply entrenched preference for nonpoor one breadwinners and income splitting benefits create the greatest marriage bonus for these families (while giving little to nothing to more equal earners). By contrast, before the TCJA was enacted and after it expires in 2025,[126] income splitting will not be available for 98% of MFJs, though is still available for the substantial number of MFJs earning under $76,000, which is right around the median income in 2023.[127]

What can still be a surprise is that this has anything to do with the real parental tax benefits available to heads of households like solo parents. But in 1951, when Congress decided that it should treat heads of household differently than other unmarried taxpayers, income splitting benefits centered prominently in individual tax debates.[128] So when Congress decided to confer special benefits to heads of households, it ended up conferring half of the income splitting benefits conferred on married couples filing joint returns.[129] And since then and until the TCJA was enacted, Congress has

[125] See previous discussion.

[126] *See, e.g.*, 26 U.S.C. § 1(j)(1) (stating modifications to the tax rates only applying to taxable years beginning before January 1, 2026).

[127] 26 U.S.C. § 1(a), (c), (i).

2017 Tax Rates for Unmarried and MFJ Filers.

Tax Rate	**Income Band UM**	**Income Band MFJ**
10%	*$0 and $9,325*	*$0 and $18650*
15%	*Between $9326 and $37,950*	*$18,651 and $75,900*
25%	between $37,951 and $91,900	$75,901 and $153,100
28%	between $91,901 and $191,650	$153,101 and $233, 350
33%	between $191,651 and $416,700	$233,551 and $416,700
35%	between $416,701 and $418,400	$416, 701 and $470,000
39.6%	above $418, 400	Above $470,700

[128] Borris Bittker, *Federal Taxation of the Family: The Revenue Act of 1948*, 61 Harv. L. Rev. 1097(1948).

[129] Congressional Research Service, *Federal Income Tax Treatment of the Family* (2016) available at https://crsreports.congress.gov/product/pdf/RL/RL33755

continued with this pattern, whereby heads of household benefits are entirely dependent on the income splitting benefits afforded to MFJs.[130]

This can be mathematically accomplished in different ways, but is now accomplished by having the rates break at an income level that is (roughly) the average of the income breaks for unmarried taxpayers and MFJs—income splitting is achieved for MFJs by having rates break at double the UM point, so HH's can get half the benefit by having rates break at the average of the two breaking points. To illustrate what I recognize is a sentence with many words, consider again the tax rates applicable in tax year 2017, with MFJ rates added:

2017 Tax Rates for UM, HH and MFJ Filers.[131]

Tax Rate	**Income Band UM**	**Income Band MFJ**	***Average***	**Income Band HH**
10%	$0 and $9,325	$0 and $18650	*$0 to $13,987*	$0 to $13500
15%	between $9326 and $37,950	$18,651 and $75,900	*$13,988 and $56,925*	$13501 and $50801
25%	between $37,951 and $91,900	$75,901 and $153,100	*$56,926 and $122,500*	$50,801and $131,200
28%	between $91,901 and $191,650	$153,101 and $233, 350	*$122,501 and $212,500*	$131,201and $212,500
33%	between $191,651 and $416,700	$233,551 and $416,700	*$212,501 and $416,700*	$215,501 and $416,700
35%	between $416,701 and $418,400	$416, 701 and $470,000	*$416, 701 and $444, 200*	$416,701 and $444,550
39.6%	above $418, 400	above $470,700	*above $444, 200*	above $444,551

As the reader can see, the HH rates break at a point which is roughly the average point between the income levels at which the MFJ and UM rates break. This has the effect of giving HH's half the income splitting benefits (whatever they may be) available to MFJ taxpayers.

And only now can one understand the bizarrely precarious situation the HH tax rate benefits find themselves in—they are hitched to the non-parental, MFJ income splitting benefits which ebb and flow due to philosophically instability. The precariousness of these benefits is further underscored by the TCJA. As discussed above, the TCJA dramatically increased the MFJ benefit (discussed above), however did so without correspondingly increasing the

[130] Tax Foundation, *Federal Individual Income Tax History*, https://files.taxfoundation.org/legacy/docs/fed_individual_rate_history_nominal.pdf.

[131] 26 U.S.C. §(a), (b), (c) (i).

HH benefit—a historical first.[132] More specifically, Congress expanded income splitting for MFJ couples through the 32% bracket, but discontinued HH benefits after the 12% bracket. After the 12% bracket, HH's would apply the same rates as unmarried taxpayers.

The TCJA, therefore, expanded income splitting benefits to all MFJ taxpayers outside of the 2% of taxpayers that earn over $400,000. These benefits are (i) greatest for the statistically dwindling one breadwinner model; (ii) dwindle as earnings among partners becomes more equal (and are nonexistent for equal earners); and (iii) are available even if the couple has no caregiving obligations.

At the same time, Congress broke with history and failed to extend benefits to heads of household who have, by definition, substantial caregiving obligations, if their income exceeds $52,000—in 2024, the 200% poverty level for a family of three (*e.g.* head of household with two children) was

[132] 26 U.S.C. § 26(j)(2)(A), (B), (C).

Tax Rate	**Income Band UM**	**Income Band MFJ**	***Average***	**HH**
10%	$0 and $9,525	$0 and $~~18,650~~ $19,030	*$0 to $14,277*	$0 to ~~$13,500~~ $13,600
~~15%~~ 12%	$~~9,325~~ $9,525 and $~~37,950~~ $38,700	$~~18,650~~ $19,030 and $~~75,900~~ $77,400	*$14,278 and $58,050*	~~$13,500~~$13,600 and ~~$50,800~~ $51,800
~~25%~~ 22%	$~~37,951~~ $38,701 and $~~91900~~ $82,500	$~~75,901~~ $77,401 and $~~153,100~~ $165,000	*$58,051 and $123,750*	~~$50,801~~$51,801 and ~~$131,200~~ $82,500
~~28%~~ 24%	$~~91901~~$82,501 and $~~191,650~~$157,500	$~~153,101~~ $165,001 and $~~233,350~~ $315,000	*$123,751 and $236,250*	~~$131,201~~ $82,501 and $~~212,500~~ $157,500
~~33%~~ 32%	$~~191,650~~$157,501 and $~~416,700~~ $200,000	$~~233,350~~ $315,001 and$~~416,700~~ $400,000	*$236,251 and $300,000*	$~~212,500~~ $157,501 and $~~416,700~~ $200,000
35%	$~~416,701~~ $200,001 and $~~418,400~~ $500,000	~~416,701~~ $400,001 and $~~470,000~~ $600,000	*$300,001and $550,000*	$~~416,701~~ $200,001 and $~~444,550~~ $500,000
~~39.6%~~ 37%	above $~~418,400~~ $500,000	above $~~470,000~~ $600,000	*above $550,000*	$~~444,550~~ $500,000

$51,640.[133] And because this was all accomplished by fiddling with the rates, one can see how these distributive implications could be, for most, severely obscured. But while much remains murky, it seems quite clear that this is not a functional way to provide benefits to solo parents, who can be especially vulnerable (something I will discuss more in Section IV).

This all may renew a question posed earlier. The number of unmarried parents is on the rise, due to all sorts of factors including increased cohabitation, divorce rates and personal choices.[134] Why then does eliminating this benefit for heads of households seem to go relatively unnoticed even as more parents are affected? Again, there are many conversations to pursue but given the above, one part of the answer is likely––who can track this (no less organize a coherent movement to object to it)?

Moreover, we're not even done discussing the benefits with which Congress fiddles to change the statutory rate structure, creating these dizzying effects. There is a second pair of benefits that together define a "zero bracket amount"— *i.e.* an amount of taxable income under which a taxpayer will not have any tax liability. Similar patterns emerge when we see how Congress can toy around with this duo. One of these benefits depends on caregiving obligations while one does not. But Congress can play them against each other, confusing actual net effects. Again, this does not suggest that Congress always takes this opportunity or that this is always intentional, but it shows how the stage is set to allow for it. And once again, I believe the TCJA provides a nice example of when Congress took this stage with zeal.

2. Fiddlin' With the Zero Bracket Amount

As the reader can see, Section 1's statutory tax rate tables (found in tables above), do not contain an explicitly stated 0% bracket.[135] Without more, the tax rates found in Section 1 would lead one to believe that one's

[133] Medical Planning Assistance, 2024 Federal Poverty Guidelines, *available at* https://www.uscis.gov/i-942p

[134] *See, e.g.*, John Beattie, *Why Are Dual Earner Families on the Rise? The Economics Review*, available at *https://theeconreview.com/2023/12/05/why-are-dual-income-families-on-the-rise/ (*Nobel Prize winner Dr. Claudia Goldin's research explains the increasing propensity of American women to enter the workforce.) Stephanie Kramer, Pew Research Center, *U.S. has world's highest rate of children living in single parent households*, available at https://www.pewresearch.org/short-reads/2019/12/12/u-s-children-more-likely-than-children-in-other-countries-to-live-with-just-one-parent/

[135] 26 U.S.C. § 1(a)-(d).

first dollar of taxable income will be taxed at a 10% rate. However, the Code has long contained a zero-bracket amount (ZBA) beneath which one will not be subject to federal tax liability.[136] Only it is not found within the tax rate structure of Section 1 (of the Code which I did not write). Instead, the ZBA is generally defined by combining a "standard deduction amount" and a "personal exemption amount," which this Part will now explain.[137]

The personal exemption amount is available not only for each taxpayer (an MFJ couple claims two) but is also available for each dependent, making it a real parental tax benefit.[138] Setting aside head of households, the standard deduction amount is available based on marital status and so is not a parental tax benefit.[139] However, as will be seen through the TCJA, the standard deduction is parental adjacent–when –Congress moves these benefits in tandem, it obscures distributional effects among and between caregivers and non-caregivers.

Let's take, for example, the law as it existed in 2017—the year before the TCJA took effect—and to which it will revert in 2025 when the TCJA expires (pre-/post-TCJA law). The standard deduction amount was $6,000, $12,000 and $9,000 for unmarried taxpayers, MFJ taxpayers and heads of household, respectively.[140] All taxpayers could reduce their taxable income by the standard deduction amount applicable to their marital status, regardless of whether they had caregiving responsibilities. Also in 2017, taxpayers could further reduce their taxable income by a personal exemption amount for themselves and each of their dependents.[141] In 2017, it was about $4,000.[142]

Assume that a MFJ couple without dependent children earned $100,000 taxable income in 2017 and filed a joint return. They could reduce

---

[136] *See* Tracey Roberts, *Brackets supra* note 97.

[137] *Id.*

[138] 26 U.S.C. § 151. *See also* Congressional Research Service, *Federal Income Tax Treatment of the Family* (2016), *available at* https://crsreports.congress.gov/product/pdf/RL/RL33755

[139] 26 U.S.C. §63.

[140] 26 U.S.C. § 63(c)(2), (4). Rev. Proc. 2017-58. Note that the standard deduction for heads of household is the average of the UM and MFJ deductions, which is the same as creating a zero bracket that is the average of these income levels.

[141] 26 U.S.C. §151(d)(1), (4).

[142] Rev. Proc. 2017-58.

their taxable income by the $12,000 standard deduction and two $4,000 personal exemption amounts (there are two of them), for $80,000 taxable income ($100,000 less $12,000 less $8,000). At this point they would apply the MFJ tax rate structure (tables above) to that $84,000. Thus, the zero-bracket amount for childless MFJs was $20,000—taxpayers with taxable income under this ZBA paid zero tax and all taxpayers earning over this amount enjoyed 0% tax on their first $20,000 of income before starting up the income tax rate ladder.

Now assume that this MFJ couple also had two dependent children. Now they would take the same standard deduction (because for MFJs that doesn't depend on whether caregiving responsibilities) but would now be able to reduce their taxable income by four personal exemption amounts (now there are four of them), resulting in taxable income of $72,000 ($100,000 less $12,000 less $16,000). Thus, the ZBA for childless MFJs was $28,000—couples with taxable income under this ZBA paid zero tax and all taxpayers earning over this amount enjoyed 0% tax on their first $28,000 of income before starting up the income tax rate ladder.

Because of the parental/parental adjacent combination, the stage is set for Congress to tinker with the benefits in ways that obscure distributional effects. The TCJA provides a good example of how this can happen. For these years, Congress actually repealed the personal exemption amounts entirely[143] but doubled the standard deduction to $12,000, $24,000 and $18,000 for unmarried taxpayers, MFJ taxpayers and heads of household respectively.[144] Returning to our hypothetical, because the personal exemption is repealed, now both of the hypothetical couples can reduce their taxable income by $24,000. It no longer matters whether dependent children are involved. The zero bracket amounts will be the same for all MFJ filers.

How does this net out for parents? It depends on individual circumstances and the analysis is far from over because we must now loop back to other changes that have been previously discussed. In particular, while the personal exemption was repealed, the golden child tax credit was expanded for nonpoor taxpayers. By and large, therefore, benefits likely netted out for many parents (the doubling of the golden child tax credit netted against the repeal of the personal exemption amounts). That is, except for high earners and especially one breadwinners, who would enjoy net gains. Recall that MFJs earning over $140,000 are generally ineligible for the NRP-CTC. But while the TCJA is in effect (through 2025), its amped up phase-

[143] 26 U.S.C. § 151(d)(5).

[144] 26 U.S.C. § 63(c)(7).

outs allow all but the highest earners to claim a $2,000 per child credit.[145] That's not all—the drastic expansion of MFJ income splitting benefits deep into the bracket structure also inures to the benefit of richer, one breadwinner families (as that benefit increases the more unequal earnings are). And, of course, one breadwinners do not suffer a loss from the devalued and neglected working childcare benefits, as they can avoid working childcare costs entirely.

And because this is all so dizzying, lawmakers supporting the TCJA could obscure the narrative. For instance, on its website immediately following the passage of the TCJA, the Committee on Ways and Means boasted that it had enacted a tax cut to "help Americans from all walks of life."[146] But actually, the TCJA is just another chapter in a historical narrative in which America taxes nonpoor parents inequitably, awarding benefits that disproportionately favor nonpoor one breadwinners.

E. Summary of Inequitable Tax Benefits for Nonpoor Parents

The treatment of nonpoor parents in America is a story of favoritism and neglect. For decades, when Congress has decided to alter the array of tax benefits it offers nonpoor parents, it ends up following a predictable pattern in which it enthusiastically expands the nonrefundable portion of the child tax credit while completely neglecting benefits that could help working parents defray high childcare costs incurred to work outside the home. And it ignores other work-related costs completely. Moreover, distributional effects can be largely obscured when Congress tinkers with the various benefits that define the statutory rate structure. This "benefits preferentialism," reflects a sticky favoritism towards nonpoor one breadwinner families. As just discussed, the TCJA further amplified these inequities.

* * *

---

[145] Elaine Maag, Shifting Child Tax Benefits in the TCJA Left Most Families About the Same (2019), available at https://www.taxpolicycenter.org/sites/default/files/publication/157597/shifting_child_tax_benefits_in_the_tcja_left_most_families_about_the_same_0.pdf

[146] U.S. HOUSE OF REPRESENTATIVE, COMMITTEE WAYS AND MEANS, THE TAX CUTS AND JOBS ACT TAXPAYER EXAMPLES: TAX HOW THE TAX CUTS AND JOBS ACT HELPS AMERICANS OF ALL WALKS OF LIFE, https://republicanswaysandmeansforms.house.gov/uploadedfiles/taxpayerexamples.pdf. (now defunct but published in previous paper).

This is a lot to take in. And yet, we have only discussed the parental benefits available to nonpoor parents—*i.e*. parents earning enough to have positive tax liabilities because taxable income exceeds the zero-bracket amount now discussed. This brings us to the taxation of poor parents—*i.e.* those that do not earn over this amount. Given Congress' decades-long neglect of nonrefundable working childcare benefits, one might think that we've already discussed Congress' least favorite category of parental tax benefits. But there is a final category towards which many members of Congress are even more skeptical if not openly hostile—refundable parental tax benefits available to relatively poor parents.

II. THE SCAPEGOAT: REFUNDABLE TAX BENEFITS FOR RELATIVELY POOR PARENTS

If a taxpayer does not have taxable income exceeding the zero-bracket amount in a given year (described above), there can be no tax liability. What this also means is, as a default matter, these taxpayers will not have access to parental tax benefits like Congress' favorite child tax credit[147] and the working childcare benefits (which, meager as they are, do at least help defray some costs of childcare incurred while working).[148]

In order for these two benefits to be available to "relatively poor parents" whose taxable income does not exceed the ZBA, Congress must explicitly designate these benefits as "refundable."[149] That is, Congress must determine that relatively poor taxpayers may receive a "refund" to reflect the benefit that cannot be enjoyed through a reduction in tax liability (since that liability zeroed out before the full benefit could be claimed).

Congress, however, has been historically reluctant to make the benefits of the (golden) child tax credit and (wantonly neglected) working childcare benefits refundable. To fully contextualize Congress' skepticism towards these "refundable parental tax benefits," this part begins by discussing a different credit—the Earned Income Tax Credit (EITC), which plays a vital role in addressing American poverty for parents of low to moderate means.[150] This potentially refundable credit is helpful but has many well-known

[147] *See supra* section I.A.1.

[148] *See supra* section I.A.2.

[149] 26 U.S.C. § 26 (creating a default rule that credits cannot exceed tax liability).

[150] See *infra*, Congressional Research Service, *The Earned Income Tax Credit (EITC): A Brief Legislative History*, note 155.

limitations— it is, for instance, modest[151] and available only to a limited subset of parents able to work and earn enough income to qualify.[152]

As will then be discussed, despite these (and other) widely discussed limits, Congress seems to rest on the EITC's laurels when thinking about whether to make the golden child tax credit and working childcare benefits refundable, exhibiting consistent skepticism and even hostility towards doing so.[153] When it comes to Congress' favorite child tax credit, Congress has generally subjected poor parents to additional work and earned income requirements as well as other dollar limitations, so that many poor parents are entirely ineligible for the credit while many others are entitled to substantially fewer benefits than parents of greater means. [154] But as this part will next explain, the disparity is even greater for working childcare benefits—these benefits have never been refundable at all, outside of the pandemic. This part will conclude by surveying some of the distributional implications of the Code's historic taxation of poor parents and the entrenched narratives that reinforce them.

Let us start with the EITC.

A. The Earned Income Tax Credit (EITC)

In America, the Earned Income Tax Credit (EITC) is one of the primary mechanisms used to alleviate poverty.[155] Given the extreme import of its mission, not to mention its costliness,[156] a great deal of excellent scholarship

---

[151] See, Benjamin Leff, *EITC For All, supra* note 167.

[152] Anne Alstott, *Why the EITC Does not Make Work Pay*, 73 LAW AND CONTEMPORARY PROBLEMS 285 (2010).

[153] Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You 've Got to Speak Out Against the Madness*), 28 BERKELEY LA RAZA LAW JOURNAL 49 (2017) at 59 (discussing view that EITC Cures All).

[154] CONGRESSIONAL RESEARCH SERVICE, *Child Tax Credit: Legislative History*, *available* at https://sgp.fas.org/crs/misc/R45124.pdf

[155] Congressional Research Service, *The Earned Income Tax Credit (EITC): A Brief Legislative History*, available at https://crsreports.congress.gov/product/pdf/R/R44825/8 (After various legislative changes over the past 40 years, the credit is now one of the federal government's largest antipoverty programs).

[156] Tax Foundation, *Earned Income Tax Credit*, available at https://taxfoundation.org/taxedu/glossary/earned-income-tax-credit-eitc/ (graph showing growing cost of EITC over time).

has been written about the EITC. A full review of this important work is well beyond the scope of this paper. Here is a brief overview of how the Earned Income Tax Credit operates.

The EITC is designed to provide relief through a refundable tax benefit targeted towards taxpayers with relatively little income. The EITC varies over several margins, including marital status, earned income and number of qualifying children.[157] But Congress has historically aimed the EITC mainly towards parents of low or moderate means.[158] And while the EITC has more recently been made available to taxpayers without any "qualifying children," the EITC amount ratchets up substantially based on the number of "qualifying children" in the claimant's household and care.[159] For those that qualify, the credit is refundable—that is, if a taxpayer has so little taxable income that the full credit amount cannot be utilized because the taxpayer has already "zeroed out" their tax liability, the government will provide the remaining amount in the form of a refund.

Although the EITC is one of the primary mechanisms used to alleviate poverty in America, it has many well-known limitations. First, the EITC is only available to *working* parents—parents must earn a certain amount to qualify for the credit at all.[160] The design of the EITC can be summarized as follows:

> [W]orkers receive the credit beginning with their first dollar of earned income; the amount of the credit rises with earned income until it reaches a maximum level and then phases out at higher income levels ... The EITC is "refundable," meaning that if the value of the credit exceeds the amount of federal income tax a low-paid worker owes, the worker receives the difference in the form of a refund.[161]

For instance, in 2023, married parents with two qualifying children filing

[157] 26 U.S.C. § 32.

[158] See *supra*, Congressional Research Service, *The Earned Income Tax Credit (EITC): A Brief Legislative History*, note 155. (The EITC was enacted in 1975 but it was not until the 1990s that childless workers could receive any credit at all).

[159] *Id.* (In the 2000s, additional changes to the EITC credit formula were enacted by Congress. These legislative changes expanded the credit for certain recipients—namely married couples and larger families.)

[160] 26 U.S.C. § 32.

[161] Center on Budget and Policy Priorities, *Policy Basics: The Earned Income Tax Credit available* at https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit

joint returns saw their EITC increase as income ranged from $1 to approximately $16,600 (the phase in range).[162] From earned income level $16,600 through about $28,000 (the plateau range) the credit remained constant, at its maximum $6,604.[163] It then decreased and was no longer available to those earning over about $59,200 (the phase out range).[164]

As a result, to claim the EITC, taxpayers must earn income and, what's more, over the phase in range the credit actually increases as earned income increases. This might seem strange—one might expect benefits to phase down as income increases, reflecting the fact that the benefit is less needed. But the EITC phase in range is very intentional—as will be discussed more below, baked into the EITC's design one finds assumptions that poorer taxpayers only deserve benefits if they engage in a certain level of paid work and that they need to be incentivized to do so.

Because the EITC is only available to those who are able to work and earn income, it provides no benefits to poor parents that are unable to work, for any number of reasons, even those that may lie largely outside the taxpayer's control. As Anne Alstott explains, the EITC's incentive to work structure can only be effective if "the worker defies the profile of the typical low-income worker and manages to work full-time, year-round, without interruption due to unemployment, underemployment, disability, or family emergency."[165] In other words, the efficacy of achieving this incentivizing effect, for those who think it is needed and desirable, depends heavily on the assumption that poor taxpayers really have a choice about how much they work and earn. Yet particularly for those in lower income classes, this assumption is often far from reality, with poorer taxpayers experiencing involuntary spells of unemployment and job interruptions.[166]

The fact that this incentive structure is divorced from the low-wage earner's reality is not the only well-known limitation of the EITC. Even if it were available to all parents regardless of earned income, and/or low-income parents had perfectly smooth labor decisions (*i.e.* had the power to decide

---

[162] Congressional Research Service, *The Earned Income Tax Credit (EITC): How is Works and Who Receives It*, available at https://crsreports.congress.gov/product/pdf/R/R43805#:~:text=For%202023%2C%20the%20maximum%20EITC,with%20three%20or%20more%20children.

[163] *Id.*

[164] *Id.*

[165] Alstott, *Why the EITC Doesn't Make Work Pay*, supra note 152.

[166] *Id.*

exactly how many working hours to devote towards earning a desired amount of income), the credit amount is modest. As Professor Benjamin Leff writes:

> …as a transfer program for recipients with children, the credit leaves many families in poverty. Even with the maximum credit for a family with three children ($6431 in 2018), this amount is not enough to bring a family out of poverty ($25,750 for a family of four)—even when added to the wage a parent would earn if working minimum wage ($7.25) for 2000 hours ($14,500).[167]

Along the same lines, Professor Anne Alstott has convincingly argued, "U.S. law entrenches family poverty in the United States, making it impossible for the EITC—or any other modest earnings subsidy— to make meaningful reductions in poverty, even among workers."[168]

Here are a few more of the many well-known limitations of the EITC. The EITC is delivered in an annual lump sum. For those consistently struggling to make ends meet, this method of delivery may not be particularly responsive to actual needs.[169]

The EITC refund is often delayed because EITC claimants are subject to substantial scrutiny to confirm that eligibility requirements have been met, a scrutiny that exceeds that applied to other, non-refundable benefits available to taxpayers of greater means.[170]

And because the EITC is remarkably complex, studies confirm that many eligible taxpayers fail to claim it.[171]

These are just some of the many reasons why "The EITC Works Very Well—But [Is] Not a Safety Net By Itself."[172] However, despite these

---

[167] Benjamin Leff, *EITC For All: A Universal Basic Income Compromise Proposal,* 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 85 (2019) (hereinafter *EITC For All*).

[168] Alstott, *Why the EITC Doesn't Make Work Pay, supra* note 168.

[169] Andrew Greenlee, et al., *Financial Instability in the Earned Income Tax Credit Program: Can Advanced Periodic Payments Ameliorate Systemic Stressors*? 57 URBAN AFFAIRS REV. 1626 (2021).

[170] Congressional Research Service, *Audits of EITC Returns: By the Numbers*, *available at* https://crsreports.congress.gov/product/pdf/IN/IN11952/1 (Audit rates for EITC returns are disproportionately high compared to the share of taxpayers who claim the credit).

[171] Jacob Goldin, *Tax Benefit Complexity and Take-up: Lessons from the Earned Income Tax Credit,* 72 Tax L. Rev. 59 (2018)

[172] Sharon Parrot, *The EITC Works Very Well But It's Not a Safety Net By Itself, Center on Budget & Policy Priorities*, available at https://www.cbpp.org/research/commentary-the-

recognized gaps, Congress seems reluctant to allow other parental benefits––*e.g.* its favorite child tax credit and the working childcare benefits—to be fully (if at all) refundable.

Let us start with how Congress has failed to allow relatively poor parents to receive the same benefits available to nonpoor parents through Congress' favorite child tax credit.

B. Refundable Child Tax Credits for Poor Parents

As discussed at length above, Congress has great affection for the non-refundable portion of the CTC, expanding it frequently beyond what is required to keep pace with inflation (and, during the TCJA's reign, making it available to all but the top 2% of earners).[173] But Congress' fondness does not so freely extend to the refundable portion of the child tax credit—which is also referred to as the Additional Child Tax Credit (ACTC).

In short, Congress has generally not allowed relatively poor parents to claim the same CTC benefits as relatively nonpoor parents unless additional requirements are met (and sometimes not even then). At the time the CTC was enacted in 1997, it was not refundable at all—poor parents were not entitled to any relief whatsoever.[174] In 2001, Congress first made the CTC partially refundable —*i.e.* made a portion of the CTC available to nonpoor parents available (as a refund) to poor parents as well.[175] But historically many poor parents have been entitled to benefits that are substantially lower than the benefits nonpoor parents can claim while other poor parents are not entitled to benefits at all.

This results in "separate but unequal" treatment for poor and nonpoor children. As Professor Dorothy Brown has put it:

> 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

eitc-works-very-well-but-its-not-a-safety-net-by-itself#:~:text=The%20EITC%20is%20a%20critically,as%20our%20answer%20to%20poverty.

[173] *See supra* Section I.A.1.

[174] Congressional Research Service, *The Child Tax Credit: Legislative History*, available at https://sgp.fas.org/crs/misc/R45124.pdf

[175] *Id.*

increases." 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.[176]

What mechanisms keep poor parents from receiving the same CTC benefits as nonpoor parents? Like the EITC, before relatively poor parents can claim any CTC benefits, they must meet additional work requirements.[177] But the requirements operate differently than those of the EITC. While the EITC phase in begins with the first dollar of earned income—*i.e.* the phase in range starts immediately[178]— the refundable portion of the CTC is not available until an "earned income threshold" is reached, at which point CTC benefits become available and increase over a certain income range.[179] Poor taxpayers earning under the threshold amount are not entitled to any relief at all, a feature that was meant to provide an additional incentive to work (*i.e.* earn at least the Congressionally set amount or no benefit is available).

In 2001, the earned income threshold was $10,000[180]—parents earning under this amount received no CTC benefit. In 2001, the poverty threshold for a family of two (*e.g.* a single parent and a dependent child) and three (*e.g.* two parents and a dependent child or a single parent and two children) was about $11,600 and $15,000, respectively.[181]

In 2009, the threshold was lowered so refundable benefits started to phase in once poor parents earned $3,000, at which point the credit increased as earnings rose (and when the credit amount available to all nonpoor parents

---

176 Dorothy Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L. J. 790 (2005).

177 In fact, the ACTC was meant to act in conjunction with the EITC. Generally, the ACTC was meant to supplement the relief it provided and more specifically, the ACTC was conceived at least partly to correct a disincentive to marry that existed because of the way the EITC's phase out was designed. However, it was deemed politically easier to smooth this "marriage penalty" through a new provision rather than a direct alteration of the EITC. It is, therefore, no coincidence that the ACTC has always been tied to work and earnings. Larry Zelenak, *Tax or Welfare: The Administration of the EITC,* 52 UCLA LAW REV. 1867 (2005) (discussing use of ACTC to make EITC's phase-out less steep).

178 *See* Center on Budget and Policy Priorities, *Policy Basics: The Earned Income Tax Credit supra note* 161 and Section II.A.

179 26 U.S.C. § 24(d) (portion of the credit that is refundable).

180 Congressional Research Service, *The Child Tax Credit: Legislative History*, 2001 HHS Poverty Guidelines, available at https://sgp.fas.org/crs/misc/R45124.pdf

181 Office of the Assistant Secretary for Planning and Evaluation, https://aspe.hhs.gov/2001-hhs-poverty-guidelines

was reached, the poorer parent was then entitled to claim it) .[182] This threshold has remained fixed and will be reinstated in 2025 when the TCJA (small changes to be discussed shortly) expires.

Here is an example of how the refundable portion of the CTC worked and will work pre- and post- TCJA. (I will ignore interactions with other credits like the EITC which are certainly important[183] but ultimately unnecessary to absorb the general idea being conveyed here). Pre- and post-TCJA, no portion of the CTC is available as a refund until $3,000 is earned.[184] At that point, the refund amount ratchets up and will be equal to 15% of the difference between earned income and the $3,000 threshold.[185] The phase in continues until the credit available to nonpoor parents is reached (in post TCJA years, $1,000 per child). So, for instance, in 2025, if a single mother with one child earns $5,000, she would seem to be entitled to a $1,000 credit but because of the earned income requirements can only claim $300 (15% of $5,000 less $3,000). If she earned $13,000, she could now claim the same $1,000 credit as nonpoor parents because she has "earned enough" according to the earned income formula (15% of $13,000 less $3,000 exceeds $1,000, so she may receive a full $1,000 refund).

These refund features have remained fixed since 2001 and, as will be discussed, will revert back in 2025, when the TCJA expires. Now, how about the TCJA – that tax cut for families of all walks of life? After a great deal of posturing, the earned income threshold was lowered from $3,000 to $2,500,[186] at the same time that the golden child tax credit became fully available to all nonpoor parents earning up to $400,000 (if married filing jointly) or $200,000 (if single).

Remember that these nonpoor parents also saw their credit double from $1,000 to $2,000 per child. But the TCJA did not allow this expansion to be fully realized by poor parents, even those that "earned enough" under the earned income tests imposed on them. The TCJA capped the refund amount for poor taxpayers to $1,400 per child. Whether poorer taxpayers fare better, worse or the same pre-and post-TCJA depends on how this all interacts, but while many wealthy, nonpoor parents saw substantial increases (the MFJ couple earning $300,000 with two children went from having zero CTC to $4,000), the increased refund for poor parents will often be quite modest if

[182] *Id.*

[183] For more, see Brown, Separate But Unequal, supra note 176

[184] 26 U.S.C. § 24(d) (1)(B).

[185] *Id.*

[186] 26 U.S.C. § 24(g)(6).

there is any increase at all. For instance, take our single mother of one child who earns $5,000 while the TCJA is in effect. Her partial refund amount is $375 (15% of $5,000 less $2,500), a $75 increase from pre- and post-TCJA law.

If all of this seems peculiar, we aren't done. Unlike the EITC and nonrefundable portion of the CTC, the earned income threshold calculation which limits the refund available for poor parents does not adjust for family size. To illustrate, take pre-/post- TCJA law. Recall the example above where a poor parent of one child earning $5,000 may receive a $300 credit (instead of the $1,000 credit she would have received under the partial refund mechanism). The same credit is available for a poor parent of multiple children because the formula does not multiply the credit to reflect multiple children—that is, a single mother of two earning $5,000 may receive the same $300 credit (instead of the $2,000 credit she would have been entitled to without the earned income limitations) as the single mother of one child.[187]

Finally, it is worth noting, that like the EITC, the aid that is given to nonpoor parents is delivered in one lump sum, after returns are filed and refunds processed. For these recipients, who may be relying on payments to make ends meet, this delivery method seems to present practical hurdles.

In sum, while Congress has great affection for the non-refundable portion of the CTC available to taxpayers of moderate (and, if the TCJA is any indication, high means), it is skeptical of providing the same benefits to those of lesser means. The CTC, like the EITC, has generally been subject to additional work and earned income requirements and through the TCJA was even capped so that poor parents could not receive the benefits available to nonpoor parents, under any circumstances.

This brings us to our next parental tax benefit—working childcare benefits for dual earner and solo parents. Since Congress conditions the receipt of important tax benefits on work and earned income, one might think that working childcare benefits— which can (albeit very modestly) lower one

[187] Or an alternative credit that assures her FICA taxes get covered. If this insistence that tax benefits be tethered to work sounds familiar, it should. This mechanism, whereby relatively poor taxpayers have to meet earned income requirements to qualify for benefits and, over a low-income range, actually see benefits increase as earnings increase—is also built into the EITC. Nor is this by accident. The ACTC was meant to act in conjunction with the EITC. Generally, the ACTC was meant to supplement the relief it provided and more specifically, the ACTC was conceived at least partly to correct a disincentive to marry that existed because of the way the EITC's phase out was designed. However, it was deemed politically easier to smooth this "marriage penalty" through a new provision rather than a direct alteration of the EITC. It is, therefore, no coincidence that the ACTC has always been tied to work and earnings. Larry Zelenak, *Tax or Welfare: The Administration of the EITC,* 52 UCLA LAW REV. 1867 (2005) (discussing use of ACTC to make EITC's phase-out less steep).

hurdle parents face when trying to enter the workforce—would be refundable. One would be wrong.

C. Refundable Working Childcare Benefits

Outside of the pandemic, working childcare benefits have never been refundable.[188] As discussed in Section I.A.2, due to decades of complete neglect, these benefits are extremely ungenerous for nonpoor taxpayers. Nevertheless, taxpayers with positive tax liabilities at least receive some tax relief that defrays the costs of childcare incurred while working. Poorer taxpayers with negative tax liabilities do not receive, nor have they ever received, any benefit at all.

It is not as though this has gone unnoticed. For instance, consider the following:

> In a 1976 hearing before the Senate Committee on Finance, which considered the merits of the childcare tax credit, Senator Edward Kennedy found the bill "seriously deficient" in its failure to make benefits refundable. He lamented: '[T]he one group that is excluded from any assistance for necessary childcare costs is the group that is most in need of federal financial aid—those parents who are presently below the poverty level income…'[189]

Senator Kennedy's sentiments did not move Congress in 1976. And nothing has changed since then. In no year (outside of the ARPA to be discussed in Section III) have working childcare benefits been refundable in any way. The TCJA did not change working childcare benefits for nonpoor parents and certainly didn't make them refundable for poor parents.

D. Refundability Summary

Taken together, Congress exhibits a deep skepticism, and even open hostility, towards making the golden child tax benefits and neglected working childcare benefits refundable. Congress conditions CTC benefits on poor taxpayers' ability to attain work and sufficient earnings. At the same time, Congress isn't willing to extend to nonpoor parents tax benefits that

[188] See e.g. Weeks McCormack, *America's Devolving Childcare Tax Laws, supra* note 3.

[189] *Id.*, citing *Tax Reform Act of 1975: Hearings Before the Comm. on Finance*, 94th Cong. 227 (1976).

could help defray the costs of childcare to do so.

There are problematic distributional implications to this, reflecting the deeply entrenched assumptions held by lawmakers across time, some of which I will survey below to help convey the great depth of concerns. These assumptions are not only evident from the design of these laws but also find explicit voice in legislative history, Congressional debates and the various public and media statements made by past and current lawmakers. The themes are eerily consistent.

E. Refund Rhetoric & Distributional Issues

The design of both the EITC and ACTC (refundable portion of the CTC) reflect a Congressional decision that poor people must work and earn sufficient income before they deserve benefits. In addition to suspending lived reality and pretending that low wage earners have robust and smooth labor opportunities, it also presumes that when poor taxpayers are given a benefit that is not tied to work, they will choose not to engage in paid labor, that this is suboptimal and that incentives must be created to ensure that they do.

This stands in contrast to the design of the non-refundable portion of the CTC available to nonpoor parents. A one breadwinner family's choice to keep one partner out of the paid workforce is no impediment to claiming the NRP-CTC—in fact, lawmakers (like Marco Rubio) applaud the NRP-CTC's ability to help families choose this arrangement as a selling point in favor of expanding it.

When it comes to providing parents CTC benefits, therefore, the Code draws class lines. This year, in my Tax and Social Justice seminar, I provided a handout entitled "refund rhetoric" which showed the startling consistent themes used across time to justify the differential tax treatment of poor and nonpoor parents. As Dorothy Brown has explained, the debate around refundable benefits for poor parents is both classed and raced.[190] One of the many ways to see this is to track how consistently lawmakers tag refundable benefits to welfare across time.

As Professor Brown writes:

[190] Brown, *Race and Class Matters*, *supra* note 8. To illustrate the contrast, Dorothy Brown has explained how other demographic groups, such as farmers, receive all sorts of subsidies, but are not subject to this judgment— in fact, the mere implication that refundable benefits for poor parents might be similar to farming subsidies invokes ire from lawmakers that defend the latter measures.

> The decision to make the CTC partially [but not fully] 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." 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 paying taxes."[191]

That "[]other welfare benefit" is the EITC and comments such as the ones above illustrate a common theme among lawmakers—that is, the EITC is more than enough to give relatively poor parents and anything more, such as a refundable CTC would be an undeserved handout.[192] (As an aside: another theme typified here is the factually incorrect statement that those with negative federal income tax liabilities "are not paying taxes," as they will often pay other taxes such as payroll taxes).

Time and again, when discussing refundable benefits, lawmakers sound these same themes, equating refundable tax benefits to welfare. In 2003, when Congress passed legislation accelerating the previously enacted CTC expansions for other taxpayers, it consciously declined to provide comparable treatment to low-income taxpayers. Professor Brown summarizes some comments:

> 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.'"1 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." 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." 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." Congressman Delay ignored the fact that all wage earners pay social security and Medicare taxes.[193]

---

[191] *Id.*

[192] *Id.* at 784-785.

[193] *See* Brown, *Separate But Unequal*, *supra* note 176.

In 2012, Presidential Candidate Mitt Romney "accused President Obama of using his power to weaken work requirements for welfare recipients."[194] Tagging refundable benefits to welfare is raced. A New Yorker article entitled "The Root of Romney's Remarks" helps remind younger readers why this is so:

> During the 1976 Republican Presidential primary, Ronald Reagan began telling an anecdote about a Chicago woman who had defrauded the welfare system by creating eighty aliases in order to collect a hundred and fifty thousand dollars a year in benefits. Newspapers reported that the woman, Linda Taylor, had used four aliases and collected about eight thousand dollars, but the legend of the "welfare queen" proved immune to fact-checking. The term emerged at a point when incendiary racial views were common, but the still recent national tumult over civil rights had changed the way those views could be expressed. "Welfare queen" heralded an era in which bigoted views could be euphemized, encoded, and then publicly pronounced thanks to their new patina of plausible deniability. Beyond this, it became a kind of shorthand for big government, a signifier that helped make the words "welfare state" a term of derision.[195]

So while many Professors, including this one, remember presidential debates that were replete with caricatures of food-stamp recipients dining regularly on steak and lobster,[196] and the Welfare Queen—"a black woman of indeterminate age who has 12 Social Security cards, mooches on benefits from four fake dead husbands and collects welfare payments under 80 bogus names while getting food stamps"[197]—our newest voters and entering law students may not. It is important to provide the context behind refund rhetoric—each time politicians object to giving poor parents the

---

[194] Frank James, *Romney Attacks Obama on Welfare; Obama Team Alleges Hypocrisy*, NPR (Aug. 2012), available at https://npr.org/sections/itsallpolitics/2012/08/07/158352531/romney-attacks-president-on-welfare-obama-team-alleges-hypocrisy

[195] Jelani Cobb, *The Roots of Romney's Remarks*, New Yorker (Sept. 2012), available at https://www.newyorker.com/news/news-desk/the-roots-of-romneys-remarks

[196] Food Stamps Organization, *Lobster and Steak Welfare Queen* (July 2018), https://foodstamps.org/Articles/Article/ID/204/the-lobster-and-steak-welfare-queen

[197] John Blake, *Biden Just Dethroned the Welfare Queen*, CNN (May 2021) https://www.cnn.com/2021/05/16/politics/biden-welfare-queen-blake/index.html

same benefits as nonpoor parents because it constitutes undeserved welfare, they are conjuring up these historical tropes.

In addition to being classed and raced, there are many other potential distributive implications of denying poor parents the same benefits as nonpoor parents. This part cannot touch on them all, but I'd like to mention some possible gender implications before moving on. Consider the following:

> Truly solo parents are much more likely to be living below the poverty line compared to two parent families. And solo mothers are much more likely to be living among the poverty line than solo parents. … All told, 16% of unmarried parents living with a partner are living below the poverty line, while about one-fourth (27%) of solo parents are. In comparison, just 8% of married parents are living in poverty. Among solo parents, mothers are almost twice as likely as fathers to be living below the poverty line (30% vs. 17%).[198]

Thus, limitations on refundable benefits disproportionately limit the aid available to poor single mothers and their children.

I'll conclude by discussing Congress' complete failure to make working childcare benefits refundable at any time in any way. These provisions have an embedded work requirement— relief for childcare costs are only available if used for gainful employment. Given lawmakers fixation with making sure poor taxpayers work for benefits, it would seem logically consistent to allow them relief so they can attain the childcare needed to attain that work.

The failure to extend these working childcare benefits to poor parents cannot be justified rationally by the existence of the EITC of ACTC. The well-known limitations of these benefits have been sketched above. But setting them aside, it is still strange to keep relatively poor parents from receiving working childcare benefits to defray childcare costs (or help them afford childcare). Suppose we have a relatively poor unmarried mother who is able to secure nonpaid care (*e.g.* through family members) while working and who has found employment that would allow her to earn $15,000 this year. This taxpayer will qualify for the same EITC and ACTC as a second unmarried mother with the same possible opportunity but who has to pay for childcare (because, for instance, she lacks trustworthy family or friends to keep her children safe). This is the childcare she needs to secure to earn the

[198] Gretchen Livingston, *The Changing Profile of Unmarried Parents*, Pew Research Center, available at https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/#:~:text=All%20told%2C%2016%25%20of%20unmarried,parents%20are%20living%20in%20poverty.&text=Among%20solo%20parents%2C%20mothers%20are,poverty%20line%20(30%25%20vs.

income Congress requires for her to qualify for the EITC and the ACTC in the first place. Given the high cost and inaccessibility of safe childcare, the second taxpayer may not be able "to afford to work," which, in turn, may lower her EITC and ACTC amounts (*e.g.* if she is on the "phase in" portion of the earned income curves). The unwavering failure to ever make working childcare benefits refundable in any way is, therefore, at best irrational but at worst indicative of something uglier —it is very hard to square without considering baser motivations.

A discussion about the disproportionate and concerning distributional impacts of America's method of taxing poor parents could continue on for quite some time and has through many other important projects. I believe this brief summary is sufficient to provide the reader a sense of the severity and import of the issue.

F. Summary of Congressional Preferentialism

When Congress decides to provide tax benefits to parents, it often follows a predictable path in which it:

- expands its favorite non-refundable child tax credit—that is, the CTC benefit available to parents with positive tax liabilities and which is available to all parents with dependent children regardless of whether costs are incurred to work outside the home;

- neglects benefits that would help nonpoor working parents defray the high costs of outside childcare needed to earn income;

- provides no recognition of the increased work costs some families incur compared to others;

- fiddles with the statutory rate structure erratically in ways that are unpredictable, with distributional effects that are very unclear to the average taxpayer, and which distract from broader conversations about how parental tax benefits are and should be distributed; and

- exhibits skepticism and even outright hostility towards the idea of allowing poorer taxpayers to receive refundable parental tax benefits, completely failing to make working childcare benefits refundable and designing the CTC to be less generous than the benefits available to taxpayers of greater means.

This preferentialism, as the above has shown, is very sticky. As also discussed, the TCJA amplified these inequities, which raise a host of distributional concerns only some of which I have been able to survey. With this context in hand, Section III shows how the American Rescue Plan Act enacted a myriad of historically significant changes that broke from these trends and should be memorialized for future conversations, including (but not limited to) the inevitable conversations that will take place in 2025 when the TCJAs parental tax "reforms" expire.

III. AMERICAN RESCUE PLAN: FLEETING REFORM THAT SHOULD NOT BE FORGOTTEN

The COVID-19 pandemic amplified the hardships faced by American parents, in part because it forced families who had been relatively immune from certain challenges to experience them with the many other families that had been fielding them all along.[199] As the campaign website for President Biden and Vice President Harris put it, "[t]he pandemic … laid bare just how hard it is for people in [the United States] to find access to quality caregiving they need for themselves, or to juggle the responsibilities of working and also caring for family members."[200]

Signed into law on March 11, 2021, the American Rescue Plan Act (the ARPA) provided much needed relief to parents attempting to maintain jobs and care for children during this global health crisis. As is America's tendency, the ARPA leaned extensively on the Internal Revenue Code to do so. But it abandoned its consistent preferentialism for nonpoor one breadwinner parents, expanding the various tax benefits available to working parents and poor parents in historically significant ways that made some long-overdue (which is not to say adequate) progress towards taxing parents more equitably.

I will begin by discussing the ARPA's changes to Congress' favorite benefit—the non-refundable portion of the child tax credit, available to all parents with positive tax liabilities regardless of whether they incur costs to work outside the home. In keeping with historical trends, Congress

---

199 Anna North, *The Problem is Work*, VOX (Mar. 15, 2022), https://www.vox.com/22321909/covid-19-pandemic-school-work-parents-remote. ("Long before Covid-19 hit, Americans were expected to work like they didn't have families. Some call it the myth of the "ideal worker" — the idea that the perfect employee is someone "unencumbered by any other problem other than your job," Andrea Rees Davies, associate director of the Stanford Humanities Center and a historian who has worked on gender in the workplace, told Vox.").

200 *Joe Biden's Plan to Build Back Better for American Workers*, https://joebiden.com/joe-bidens-plan-to-build-back-better-for-american-workers/.

substantially expanded the nonrefundable portion of the CTC despite its being just doubled through the TCJA.

But in many other ways, Congress departed from its historical habits. As I will next discuss, Congress actually increased the long-neglected benefits available to working parents that help defray childcare costs incurred to work. Further, it managed not to tinker with the various benefits that define the statutory rate structure, making it far easier to understand how the ARPA's changes would actually affect parents. Finally, for the first time in history, the ARPA: (i) made the CTC fully refundable; (ii) untethered the refundable CTC benefit from work requirements; (iii) allowed some monthly payments instead of making taxpayers receive payments in an annual lump sum and (iv) made the increased benefits available to defray working childcare costs fully refundable. All of this progress has now passed as the ARPA expired without Congressional extension. This Section hopes to memorialize the ARPA's progress for future conversations including the one that must inevitably take place in 2025 when the TCJA expires.

A. Congress' Favorite: The Non-Refundable Portion of the Child Tax Credit (Expanded, As Usual)

In keeping with usual patterns, the ARPA substantially expanded the relief available to relatively nonpoor families through the NRP-CTC. Specifically, for heads of household earning less than $112,500 and MFJ parents earning less than $150,000),[201] the ARPA allowed a per child credit as follows:

- for children ages 6-18 years of age, the credit was raised from $2,000 to $3,000 per child, a 50% increase; and

- for children 6 and under the credit was raised from $2,000 to $3,600 per child, an over 75% increase.[202]

Viewed on its own, these expansions are substantial. But it is even more noteworthy once put in historical context. As discussed in Section I.A.1, the golden child tax credit was enacted in 1997 and was set at $500 per child.[203]

[201] The NRP-CTC phased out at this point, creating an interested dual-phase-out-structure.

[202] H.R.1319 § 9611(a)(3).

[203] *See supra* Section I.A.A.

In 2003, it was increased to $1,000 per child (far more than needed to adjust for inflation).[204] Then in 2019, Congress doubled the credit from $1,000 to $2,000 per child (which again outpaced inflation).[205] So even though Congress has been periodically increasing the credit in a way that reflects far more than inflation, the ARPA once again increased the CTC dramatically.

Of course, once history is understood, this is not particularly surprising. Once Congress decided to expand relief for families during the pandemic, expanding the nonrefundable portion of the CTC is exactly what one would expect—it is what Congress traditionally does. However, we now turn to a spate of historically significant changes enacted by the ARPA.

Let us start with the changes made to the long-neglected working childcare benefits available to nonpoor parents.

B. Nonpoor Working Childcare Benefits: A Break from the Neglect

Congress broke its decades long streak of ignoring benefits for nonpoor working families to help with childcare costs. Here is a brief overview of how the TCJA accomplished this expansion for nonpoor parents.

1. Child and Dependent Care Tax Credit (Non-Refundable Portion)

To work through the ARPA's changes it helps to remind the reader how the child and dependent care tax credit was calculated before the ARPA was enacted—nonpoor working parents would multiply:

> (i) the applicable percentage (which ranged from 35% to 20%, with 20% applying to all households earning over $43,000) by
>
> (ii) their employment related expenses—caregiving expenses incurred to be gainfully employed (capped at $3,000 for one child and $6,000 for two or more children).

As a result, most parents could receive a maximum credit of $600 (20% x $3,000) for one child and $1,200 (20% x $6,000) for two or more children. The ARPA increased the variables in this calculation. Let's start with dollar caps placed on (ii) employment related expenses.

---

[204] *Id.*

[205] *Id.*

(a) Increased Dollar Caps on Employment Related Expenses

Due to decades of failing to adjust for inflation while costs rose, the low dollar caps encumbering the childcare tax credit substantially limit the relief available to working parents—for many families the savings offered represent a mere fraction of actual childcare costs. Temporarily abandoning its wanton neglect, the American Rescue Plan Act increased these dollar caps—in fact, it much more than doubled, indeed nearly tripled, the amounts. For one child, it raised the dollar cap from $3,000 to $8,000 and for two or more children, from $6,000 to $16,000.[206]

This is substantial in absolute terms. However, the picture gains more clarity once put into historical context. As I have written previously (and discussed above):

> Since 1981, the childcare credit's dollar caps and income phase- downs have changed exactly once. In 2001—twenty years after the last change—Congress allowed families to take a percentage credit of childcare expenses up to $3,000 (up from $2,400) for one child and $6,000 (up from $4,800) for multiple children. This adjustment did not even fully reflect inflation between 1981 and 2001. It remains at this level today, untouched by the TCJA. [207]

Thus, if the dollar caps had been adjusted for inflation since 1981, they would be set to, roughly, $7,216 and $14,432.[208] So on one hand, the increases are substantial in absolute value terms and are historically significant because of Congress' persistent neglect of these benefits. But once put in broader perspective, the ARPA's increases did little more than adjust for inflation since the last time Congress got around to adjusting these benefits decades ago.

The ARPA also increased other variables in the childcare tax credit formula. We now turn to increases made to the applicable percentage amount and to the income phase-outs, which determine that percentage.

---

[206] H.R.1319 §9631 (a) "(2) INCREASE IN DOLLAR LIMIT ON AMOUNT CREDITABLE.—Subsection (c) shall be applied—(A) by substituting '$8,000' for '$3,000' in paragraph (1) thereof, and (B) by substituting '$16,000' for '$6,000' in paragraph (2) thereof."

[207] Weeks McCormack, *America's (D)evolving Childcare Tax Laws, supra* note 3 .

[208] CPI INFLATION CALCULATOR, *supra* note44

(b) Increased Applicable Percentage and Income Phase-Outs

Prior to (and after the expiration of) the ARPA, taxpayers could (and can) credit a maximum of 35% of employment related expenses (not exceeding the cap just discussed), but that percentage phased down quickly to a floor of 20%—–the phase out started at $15,000 and all parents earning over $43,000 hit the floor.[209] The ARPA increased the applicable percentage so that some taxpayers could credit up to 50% of expenses and began the percentage phase down from there.[210]

The ARPA also increased the income phaseout thresholds—rather than starting to phase out at $15,000, the ARPA's phaseout did not begin until $125,000.[211] This meant that parents earning under that amount were able to credit 50% of childcare expenses to work, using the increased dollar caps just discussed. For families earning $125,000 or less, this allowed for a credit of up to $4,000 and $8,000 for one and multiple children, respectively (compared to the $600 and $1,200 allowed pre- and post- ARPA).

Now after earnings exceeded 125,000, the ARPA phased down the now-50% applicable percentage until a 20% floor was reached. But because of the raised dollar caps, even those earners that hit this percentage floor saw a substantial increase in benefits under the ARPA. The ARPA would allow for $1,600 and $3,200 for one and multiple children, respectively (again, as compared to $600 and $1,200). The only taxpayers that may have lost benefits under the ARPA were those in the top 2%—*e.g.* over $400,000. [212]

---

[209] *See, supra* Section I.A.2.

[210] H.R.1319 §9631(a) "(3) INCREASE IN APPLICABLE PERCENTAGE.—Subsection (a)(2) shall be applied (A) by substituting '50 percent' for '35 percent', and by substituting '$125,000' for '$15,000'.

… "(4) APPLICATION OF PHASEOUT TO HIGH INCOME INDIVIDUALS.—

"(A) IN GENERAL.—Subsection (a)(2) shall be applied by substituting 'the phaseout percentage' for '20 percent'. (B) PHASEOUT PERCENTAGE.—The term 'phaseout percentage' means 20 percent reduced (but not below zero) by 1 percentage point for each $2,000 (or fraction thereof) by which the taxpayer's adjusted gross income for the taxable year exceeds $400,000.".

[211] H.R.1319 §9631(a) "(3) INCREASE IN APPLICABLE PERCENTAGE.—Subsection (a)(2) shall be applied—(A) by substituting '50 percent' for '35 percent', and(B) by substituting '$125,000' for '$15,000'.

[212] H.R.1319 §9631(a) "(4) APPLICATION OF PHASEOUT TO HIGH INCOME INDIVIDUALS.—(A) IN GENERAL.—Subsection (a)(2) shall be applied by substituting 'the phaseout percentage' for '20 percent'.(B) PHASEOUT PERCENTAGE.—The term

For those earning above this amount, the ARPA removed the 20% floor—*i.e.* after earnings exceeded $400,000 the 20% phased down and could fall to zero.

Once again, these increases are optically substantial. But they look quite different once placed in historic context. Before the ARPA, most parents phased down to a 20% credit once income exceeded $43,000.[213] This threshold had not been adjusted for inflation since 1981.[214] Under the ARPA, the phasedown begins instead at $125,000. According to the Bureau of Labor Statistic's inflation calculator, $43,000 in 1981 has the same buying power as $127,000 in 2019.[215] Historical context matters.

An extremely similar story emerges when we turn to the ARPA's changes to Section 129's dependent care exclusion, discussed in Section I.A.2, which provides families an alternative mechanism to recover childcare costs incurred to work.

2. Dependent Care Exclusion

As a reminder, the dependent care exclusion allows an alternative mechanism for working parents to claim some relief for childcare expenses. When applicable, working parents can exclude a portion of childcare costs diverted into a dependent care assistance account (or less commonly, when employers provide in kind services like on-site day care). But because of a $5,000 dollar cap, the relief often represents only a fraction of actual costs.

Departing once again from historical neglect, the ARPA more than doubled that dollar cap to $10,500.[216] But like the ARPA's expansion of the

---

'phaseout percentage' means 20 percent reduced (but not below zero) by 1 percentage point for each $2,000 (or fraction thereof) by which the taxpayer's adjusted gross income for the taxable year exceeds $400,000.".

[213] See Section I.A.1.

[214] *Id.*

[215] CPI INFLATION CALCULATOR, supra note 36.

[216] H.R.1319 § 9632. INCREASE IN EXCLUSION FOR EMPLOYER-PROVIDED DEPENDENT CARE ASSISTANCE.(a) IN GENERAL.—Section 129(a)(2) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:(D) SPECIAL RULE FOR 2021.—In the case of any taxable year beginning after December 31, 2020, and before January 1, 2022, subparagraph (A) shall be applied by substituting '$10,500 (half such dollar amount' for '$5,000 ($2,500").

childcare tax credit, while this is substantial in absolute terms, a historical lens provides important context. As I have previously noted:

> Since § 129 was enacted [in 1981], Congress has never changed the maximum exclusion available ($5,000). The cap has not been indexed for inflation in over three decades, despite the fact that childcare costs are certainly rising with (and perhaps faster than) inflation.[217]

Thus, the increase in benefits made by the ARPA is not even sufficient to adjust for devaluation since the exclusion's last adjustment in 1981. This would have required the cap to be raised to about $15,000.[218]

3. Summary of Expansions to the Non-Refundable Portion of Working Childcare Benefits

The ARPAs increases to working childcare benefits were historically significant in that Congress finally increased the benefits available to nonpoor working parents after decades of neglect. However, one should view the increases made to these benefits much differently than increases made to the golden child tax credit— while the former expansions did little more than (and in some cases did not even) make up for past failures to adjust for inflation, the latter represented a true windfall. This provides useful context for future discussions about how to equitably tax nonpoor parents, including the ones that will occur in 2025 when the TCJA expires.

But before moving to that conversation in Section IV, let us move to other historically significant moves made by the short-lived ARPA.

C. It Didn't Tinker

One underappreciated virtue of the ARPA was that it did not engage in any performative tinkering with the statutory tax rate structure (or the various parental and parental adjacent benefits described in Section I.C). I can say from personal experience, as an expert in federal taxation law whose scholarship focuses on the taxation of the family, I was able to absorb the distributional impacts of the ARPA's changes for nonpoor parents quickly and efficiently, whereas I am still, years later, occasionally discovering new inequities created by the TCJA's machinations.

***

[217] *Id.*

[218] CPI INFLATION CALCULATOR, supra note 36.

This now brings us to the way that the ARPA changed tax benefits for poor parents, towards which Congress has been consistently skeptical, if not hostile. These were extremely significant (which is not to say adequate) when placed in historical context.

D. Historically Significant Changes to Refundable Parental Tax Benefits

As discussed in Section II, Congress has historically exhibited skepticism and even outright hostility towards the idea of allowing poorer taxpayers to receive refundable benefits through the CTC and working childcare provisions. Congress either completely fails to make these benefits refundable (as is the case with working childcare benefits) or designs them to be less generous than the benefits available to taxpayers of greater means (as is the case with the golden child tax credit). However, the ARPA made historically significant reforms to both the refundable portions of the CTC and the childcare tax credits.

Starting with Congress' favorite child tax credit, the ARPA made the CTC fully refundable, removing the TCJA's cap which allowed poorer parents to max out at $1,400 per child (whereas nonpoor parents could receive a benefit of $2,000 per child).

However, recall that under all previous iterations of the law, many poor taxpayers could never receive maximum benefits because of earned income requirements. The ARPA unhinged the ACTC from these limits as well,[219] allowing all poor taxpayers to receive, for the first time, the same CTC benefits as taxpayers with positive tax liabilities. This is of great historical significance. The refundable portion of the CTC has always been tied to work—low-income taxpayers must cross an income threshold before they begin to receive any refundable benefit. And as discussed, this has occurred at least in significant part because "refund rhetoric" has always won the day. By making the CTC fully refundable, the ARPA showed an ability to momentarily overcome these entrenched narratives.

The American Rescue Plan Act also enacted other historic changes. For instance, it established a program that made some periodic payments to taxpayers, so they did not have to wait until the end of the tax year to receive benefits.[220] More specifically, many taxpayers were able to receive annual

[219] H.R.1319 § 9611(a).

[220] H.R.1319 § 7527A.

advance amounts of roughly 50% of their expected annual credit.[221] This is significant because lawmakers and scholars have often argued that an annual, lump sum delivery method "limits recipients' ability to handle financial emergencies that arise throughout the year."[222]

And that is not all. Despite Congress' conditioning the availability of refundable benefits on the ability to attain work and set earnings, Congress has never been willing to allow those same taxpayers to receive any tax benefit to defray the costs of childcare needed to participate in the paid workforce. But for the first time in history, the ARPA made the working childcare credits fully refundable while its provisions were operable. [223]

In sum, the ARPA made historically significant changes to the way poor parents were taxed. It (i) made the CTC fully refundable; (ii) untethered the benefit from work requirements; and (iii) made tax benefits available to defray childcare costs fully refundable.

E. ARPA, RIP

The ARPA has now expired, leaving parents back where they started before the pandemic. Obviously, this all happened against a chaotic

[221] *See, e.g.* Internal Revenue Service, *Advanced Child Tax Credit Payments 2021* (Mar. 23, 2023), https://www.irs.gov/credits-deductions/advance-child-tax-credit-payments-in-2021.

[222] *See, e.g.*, Karen Z. Kramer, Flávia Cristina Drumond Andrade, Andrew J. Greenlee, Ruby Mendenhall, Dylan Bellisle, and Renee Lemons Blanks, *Periodic Earned Income Tax Credit (EITC) Payment, Financial Stress and Wellbeing: A Longitudinal Study*, J. Fam. Econ. Iss. 40, 511–523, (2019), https://doi.org/10.1007/s10834-019-09618-2. *See also*, Michelle Lyon Drumbl, *Why the United States Uses Lump-Sum Delivery*, *in* Tax Credits for the Working Poor: A Call for Reform, 25–45 (2019), https://www.cambridge.org/core/books/tax-credits-for-the-working-poor/why-the-united-states-uses-lumpsum-delivery/B60DA3E491B0AB7FAC2A41956BB6F37F.

[223]H.R.1319 § 7527A. 9631 (a) IN GENERAL.—Section 21 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

"(g) SPECIAL RULES FOR 2021.—In the case of any taxable year beginning after December 31, 2020, and before January 1, 2022—

"(1) CREDIT MADE REFUNDABLE.—If the taxpayer (in the case of a joint return, either spouse) has a principal place of abode in the United States (determined as provided in section 32) for more than one-half of the taxable year, the credit allowed under subsection (a) shall be treated as a credit allowed under subpart C (and not allowed under this subpart).

backdrop, which can make it easy to dismiss the ARPA as crisis legislation. But by putting the ARPA in its historical context, this Article resists this narrative and creates a more accurate one. Once viewed through a historical lens, it becomes apparent that the ARPA's expansion of parental tax benefits was neither hasty nor creative. Instead, it can best be seen as the enactment of a series of long overdue adjustments that helped (if only for a moment) move away from the distributionally problematic way that Congress, through the Code, has historically favored some families over others.

The final Section of this Article first looks at the immediate aftermath following the ARPA's expiration. It then turns to the future and discusses what happens when the TCJA expires in 2025, encouraging advocates for equitable reform to master the historical material offered in this article and form accurate historic narratives that can ground upcoming conversations.

IV. The ARPA's Aftermath & Navigating a Post-TCJA World

A. The ARPA's Immediate Aftermath

1. Failure to Rescue, No Less Build Back Better

The ARPA expired well before the dangers of the pandemic had subsided, by most rational accounts. Immediately after the ARPA's expiration, President Joe Biden touted an American Families Plan aimed at "extend[ing] key tax cuts in the American Rescue Plan [even those] that benefit lower- and middle-income workers and families, including the Child Tax Credit, the Earned Income Tax Credit, *and [even] the Child and Dependent Care Tax Credit*."[224] Even I, aware of America's long history of neglecting the latter two categories of benefits, maintained a glimmer of hope that these changes might occur. After all, hadn't the COVID pandemic shown the brightest of lights on the challenges faced by working parents who do not retain a partner in the home to provide unpaid care?

But as Biden's American Rescue Plan morphed into the ultimately ill-fated Build Back Better Act, Congress reverted back to its historical patterns. I will spare the reader a full account of the dysfunctional and prolonged haggling that ultimately resulted in a complete failure to extend any of the ARPA's parental tax benefits, and instead point out a few lowlights.

For one, any discussion of keeping expansions to the childcare and dependent care benefits for dual earning and single working parents quickly

---

[224] Fact Sheet, The American Families Plan, April 28, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/

fell by the wayside while discussions of retaining expansions to the golden child tax credit continued on for quite some time.[225]

Further, during Build Back Better's negotiations, discussions around whether poorer parents should receive refundable benefits without work requirements became a sticking point, right down to the typical rhetoric. Senator John Thune complained that "[m]ore and more Americans would rely on an expanded welfare state, receiving handouts without work requirements."[226] Joe Manchin, who played a bizarrely outsized roll in the negotiations, demanding various things one day while reversing course the next, at one point demanded that "only parents working and making under $200,000 get the full child tax credit – otherwise he'[d] tank [Build Back Better]."[227] In his "repeating … call for a work requirement, [he] suggest[ed] that such a test [wa]s necessary for the payments to be 'accountable.'" He also expressed concerns about a refundable credit without work requirements because he worried "that parents would waste the payments on drugs."[228] Lawmakers did not express similar concerns about how the nonworking parent in nonpoor one breadwinner families might use the nonrefundable portion of their CTC.

And so, while the ARPA enacted historically significant reform for parents for a moment in time, Congress immediately reverted back to its historically biased manner of taxing parents inequitably. Not only did Congress fail to build back anything better for parents, it failed to even complete a competent rescue. Because this all happened against a chaotic backdrop, it will be easy (and for some, politically expedient) to forget the ARPA, chalking it up to legislation born in an emergency. But by providing historical context we see that the ARPA's expansion of parental tax benefits was neither hasty nor creative. Instead, it enacted long overdue adjustments that begin to correct the distributionally problematic way in which America

---

225 Lance Lambert, *The Monthly Child Tax Payments are Done – Here's What Will Replace It*, (Jan. 18. 2022) https://fortune.com/2022/01/18/monthly-child-tax-credit-payments-end-build-back-better-manchin/

226 John Thune, *'Build Back Better" is Democrats' Down Payment on Socialism,* https://www.foxnews.com/opinion/build-back-better-democrats-down-payment-socialism (Senator John Thune complains "More and more Americans would rely on an expanded welfare state, receiving handouts without work requirements.")

227 Ben Winck, *Joe Manchin demands that only parents working and making under $200,000 get the full child tax credit – otherwise he'll tank it* (Dec. 2021) https://www.businessinsider.com/joe-manchin-child-tax-credit-bbb-work-requirements-salary-limits-2021-12 (Joe Manchin, among his constantly evolving demands has with more consistency than most, insisted on a work requirement for the refundable portion of the CTC).

228 *Id.*

has historically favored some families over others. And it makes Congress' hasty reversion back to old patterns and its complete failure to extend any of the ARPA's benefits alarming.

The historical account now developed also helps contextualize the Tax Relief for American Families Workers Act—the highly publicized, three-year bargain that [almost?] passed through Congress by trading adjustments to the refundable portions of the child tax credit against various expiring breaks for businesses.[229]

2. Tax Relief for American Families and Workers Act (2023-2025)

In January 2024, the House of Representatives "overwhelmingly passed" the Tax Relief for American Families and Workers Act (TRAFWA) in which some expansions to the refundable portion of the CTC (and to provisions that encourage the construction of low-income housing) were, by all accounts and not to be inflammatory, exchanged for the restoration of a variety of corporate tax breaks (on which I take no opinion in this Article, it is well beyond the scope).[230]

The portion that is within the scope are the adjustments TRAFWA made to the refundable portion of the CTC, towards which Congress is historically skeptical (see Section II). TRAFWA's expansion of the refundable portion of the CTC is not anywhere near as generous as the ARPA's expansion. TRAFWA retains an earned income requirement (*i.e.* poor parents are subject to work requirements to receive benefits). TRAFWA maintains the income phase in threshold at the TCJA's $2,500 amount —parents earning under this amount receive no benefit.

TRAFWA does, however, change the weird design feature described in Section II.B., whereby poor parents at the lowest-income levels were eligible for the same refund regardless of the number of children in their care. Recall that the refundable portion of the CTC's phase in failed to adjust for number of children (like the EITC does and like the nonrefundable portion of the CTC does).[231] So arguably, the TRAFWA fixes a design flaw (I'd assume even some weary of refundable credits would think if we "had" to provide them, we'd differentiate based on number of children).

---

[229] [*note to editors; at the time of writing we don't know if this will pass. The changes will be miniscule if it is not. It will be worth discussing either way, since it passed through the House*].

[230] Kelsey Snell, *House passes bipartisan tax bill to expand child tax credit* (Jan. 2024), available at https://www.kacu.org/2024-01-31/house-passes-bipartisan-tax-bill-to-expand-child-tax-credit

[231] *See* Section II.

The TRAFWA also returns to the historical practice of at least allowing poor taxpayers that "earn enough" (as defined by lawmakers) to potentially claim the same benefits as nonpoor parents. Recall that the TCJA capped refundable benefits at $1,400 per child (whereas the nonrefundable benefit available to nonpoor parents was $2,000 per child). Pre-TCJA there was no dollar ceiling for poor taxpayers—at least some poor taxpayers, if they "earned enough," could claim the same per child credit as nonpoor parents. This move may, therefore, be reasonably viewed as a return to common practice.[232]

A remarkable amount of press coverage surrounded the remarkably long negotiations leading up to the [almost?] passage of this Bill. A historical context helps make sense of these [almost?] changes. On one hand, the expansion of the refundable portion of the CTC is not nearly as generous as the ARPA's expansion and are instead modest. More than one thing can be true at the same time—it is also true that, given their dire situation, even modest adjustments will significantly alter the lived realities of very poor children and we can experience joy at the improvement of poor children's situations without losing sight of broader historical context and overstating what has been done. Perhaps the most historically significant thing to say about TRAFWA is that it is somewhat amazing Congress did anything with refundable benefits considering its persistent hostility towards them. That is how the TRAFWA fits within a measured, historical context.

Understanding this historical context also helps us "code" some of the registered objections to TRAFWA that have been made in the media. I'll pick two. An advocacy group launched by former Vice President Mike Pence argued that TRAFWA "transforms the Child Tax Credit into yet another welfare program and decried it for not addressing 'anchor baby bonuses.'"[233] The Wall Street Journal Editorial Board insisted that Senator Ron Wyden (who led TRAFWA's negotiations) "knows he's pulled a fast one on gullible Republicans, [and] knows he's won the better end of the deal with a stealth welfare expansion of child tax credits."[234] The title of the op-ed is *The*

[232] At the time of this writing I do not know if the Bill should pass whether the income look back rule might come into play. I bookmark it in case it does.

[233] Emily Brooks, *GOP Leaders Face Conservative, Moderate Pushback On Bipartisan Deal* (January 2024), available at https://thehill.com/homenews/house/4430555-bipartisan-tax-deal-conservative-moderate-pushback/ (some children who are American citizens are eligible for the ACTC, even if their parents are undocumented.)

[234] The WSJ Editorial Board, *The Democratic Child Tax Credit Trojan Horse*, available https://www.wsj.com/articles/ron-wyden-child-tax-credit-republicans-deal-business-tax-breaks-ff502651

Democratic Child Tax Credit Trojan Horse.[235]

In addition to showing that refund rhetoric, with all its racial twinges, is very much alive, the historical context of this article can help diffuse some of these arguments. Congress is somewhat pathologically averse to expanding refundable benefits for poor parents. For those concerned that the modest, temporary adjustments made to refundable parental tax benefits through TRAFWA might serve as the proverbial camel's nose under the tent, history can provide great comfort that rapid progress towards a more equitable taxing scheme for poor parents would be dramatically out of line with past practices.

Another, more balanced commentator wrote the following of TRAFWA, providing a nice segue into the final piece of this Article:

> TRAFWA "… is a fairly modest tweak in the scheme of things…[that could], at the same time, … pave the way toward a broader conversation about what the purpose of the child tax credit is and how we can make it more possible for parents across the spectrum to raise a kid."[236]

Given our sticky history of inequitably taxing parents, one might be deeply skeptical that a broader conversation like this will happen any time soon. But we are in a very rare moment where it is inevitable—all of the TCJA's parental tax benefit expansions will expire in 2025 without further Congressional action. The United States is, therefore, approaching a critical moment that will shape the future of how parents are taxed in America. A firm grasp of the historical context set out in this article is an essential tool for those who wish to advocate for a rational, historically grounded conversation.

B. 2025 and Beyond

The Tax Cuts and Jobs Act, which enacted a panoply of parental tax benefits that reinforced Congress' inequitable treatment of families and entrenched its sticky preference for nonpoor one breadwinners[237] expires in 2025, providing a date certain on which Congress must revisit its method of taxing parents. This final Part discusses how the historic account developed in the previous Sections can guide these imminent conversations as well as

---

[235] *Id.* (I wish I were kidding).

[236] Claire Cain Miller, et. al., *Visualizing Who Would Benefits from the Child Tax Credit*, NY TIMES (Jan. 2024) https://www.nytimes.com/2024/01/30/upshot/child-tax-credit-poverty.html

[237] See Sections I and II.

inform the approaches of those who continue to advocate for a more inclusive method of supporting parents in the United States.

1. Bracket Parameters with Intent

Consider what may happen in 2025, upon the TCJA's expiration. It will be tempting, and for some politically advantageous, to haggle between the TCJA's benefits and those provided by the Code immediately after it expires. That is, discussions (in Congress, but also in the media that may exert outsized influence on public opinion) may focus on compromises lying between the parental tax benefits provided in the TCJA and those existing right after its expiration (the pre-TCJA law to which the Code reverts in 2025, hereinafter pre-/post-TCJA law). Maintaining a broader historical picture suggests these parameters to be shortsighted, distributionally problematic and offers a more inclusive and historically appropriate way to bracket these conversations and negotiations.

As this Article has shown, the story of how the American government approaches parents attempting to raise children in the United States is one of inequitable, incremental, glacially paced tax "reform." Rather than provide direct benefits to parents, Congress grants a dizzying (though not particularly generous) array of "parental tax benefits" which favors nonpoor one breadwinner families over all others, ignores the plight of nonpoor working parents incurring substantial childcare and other work-related costs, exhibits an outright hostility towards poor parents and raises a host of other distributional concerns. This has been the way.

The TCJA and ARPA represent two substantial shifts moving in opposite directions from the pre-/post-TCJA law. It would be far more inclusive and historically appropriate to bracket the parameters of negotiation around these two regimes. Let's expand and review.

The TCJA amplified Congress' historical preference (embedded within pre-/post-TCJA law) for nonpoor one breadwinner parents. I can think of no change, not one, enacted by the TCJA which moved towards a more equitable method of taxing parents. The TCJA drastically expanded the nonrefundable portion of the golden child tax credit, available to all nonpoor parents whether or not they incur childcare costs to earn income. The expansions went well beyond what would be required for inflation. The TCJA also opened eligibility for the that credit to all but the highest 2% of earners. Meanwhile, it made no increase to benefits that would help nonpoor working parents defray costs of childcare, continuing its decades long streak of wanton neglect that has allowed these benefits to dramatically devolve in value.

The TCJA made no meaningful moves towards equitable treatment for poor parents and magnified the disparity between poor and nonpoor parents in some cases. Although Congress made a slight $500 tweak to the income phase-in threshold so that poor parents could start claiming CTC benefits after earning $2,500 (instead of $3,000) it also departed from historical patterns by adding a $1,400 per child cap guaranteeing that no poor parent could claim the $2,000 NRP-CTC available to parents of greater means. And while the CTC held fast to the long-held view that poor parents must meet additional work requirements in order to claim benefits, it failed to make working childcare benefits refundable, which would have helped these poor parents afford the childcare they need to actually do that work.

Then there is the tinkering—through the TCJA, Congress tinkered in a largely performative manner with various parental and parental adjacent benefits which define the contours of the statutory rate structure. It allowed for full income splitting, which provides a large bonus for nonpoor one breadwinner families (even those with no caregiving obligations), but no benefit for families with equal earnings. It dramatically scaled back the head of household rate benefits, even though at all other points in history the two benefits move in tandem (an increase in benefits for MFJs historically results in a proportionate increase for heads of household). The TCJA eliminated the personal exemption amount, so that the golden child tax credit's expansion largely netted out for nonpoor parents of moderate means, though created clear gains for wealthier parents because of the amped up phased outs (*e.g.* families earning between $140,000 and $400,000 were completely ineligible for the NRP-CTC under pre-/post-TCJA law but fully eligible for the doubled benefit under the TCJA).

This is how the TCJA fits within the broader story of how America treats parents—it amplified Congress' already sticky preference for nonpoor one breadwinners and magnified the inequitable taxation of parents. The TCJA is likely to serve as a sticky anchor point when conversations resume in 2025. Since it will be the most recent regime in effect, it is hard to imagine how to avoid this. It is, therefore, critical to define counter reference points and I argue the ARPA should be used. The ARPA was recent in time, and as this Article has shown, cannot be accurately viewed (though some may try) as a hasty emergency measure, but rather a series of long overdue moves away from Congress' sticky preferentialism and towards a more equitable method of taxing parents.

To review, while the ARPA expanded the golden child tax credit in a manner that far outpaced inflation (a typical move), it also made the CTC fully refundable and untethered it from work requirements, allowing CTC benefits for poor parents to essentially mirror those for nonpoor parents. It expanded the working childcare benefits for dual earner and solo parents, in a way that at least (though only) adjusted for most of the value lost through inflation since its last adjustment decades earlier. It also made these benefits refundable to help poor parents afford the cost of care needed to work and earn the income on which their other parental tax benefits depend. The ARPA did not performatively tinker with benefits defining the statutory tax rates, allowing the distributive implications of the changes to be discernible. This is how the ARPA fits within the broader story of how America treats parents.

A conversation that thinks about compromises between these two pieces of legislation —the TCJA and ARPA—is a far different and more appropriate discussion than one which haggles between pre-/post-TCJA law (reflecting consistent Congressional preferentialism) and TCJA law (which amplified it). Setting and insisting firmly on this more appropriate zone of negotiation could go a long way towards keeping 2025's conversations historically grounded.

There are, of course, many other ways in which the historical account preserved in this Article can arm those who continue to advocate for a more inclusive method of supporting parents attempting to raise children in the United States, both in the near and long term. I'd like to sketch a few possibilities here that will, along with others, be more fully explored in future projects.

2. Childcare Needs to Plant Itself as An Elephant in the Room

For decades now, Congress has preferred the golden child tax credit over benefits that could help working parents defray the childcare costs they incur to earn income. It favors the one breadwinner model and politicians even promotes the NRP-CTC's ability to help more people use this model as a virtue under the guise of free choice. Here is a recent example (others have been discussed above):

> "Starting a family and raising children should not be a privilege only reserved for the wealthy. Millions of working people want to start a family and would like to care for their children at home, but current policies do not respect these preferences. American families should be supported, no matter how they choose to care for their kids."[238]

No matter how politicians twist their words there is a clear and undeniable fact—in a country that does not provide direct benefits to parents like accessible, affordable childcare, any foreseeable increase in the NRP-CTC will be completely insufficient to allow most people to drop out of the

[238] *Senator Hawley Introduces Parent Tax Credit—Historic Relief for Working Families*, available at https://www.hawley.senate.gov/senator-hawley-introduces-parent-tax-credit-historic-relief-working-families

workforce. Another undeniable fact is that many parents who need to be in the workforce (no less want to, given the fact that free choice is so applauded) will have to pay for childcare in order to work. Adjusting the working childcare benefits to reflect the fact that it is year 2025 should be an elephant that plants itself into every room where someone is having a conversation about how to tax parents following the TCJA's expiration. A few additional thoughts on how to plant this anchor more firmly.

(a) Inflation, inflation, inflation

This Article is replete with data showing how long it has been since working childcare provisions were adjusted for inflation and how devalued these benefits have become. The ARPA made adjustments that seemed substantial but in actuality only adjusted for inflation (sometimes not even). These changes, therefore, should be the anchor-point for expanding benefits in 2025.

(b) The Benefits Need to be Kept Straight

It will be hard to expand working childcare benefits if we can't keep straight what Code section provides them. This seems like a trite observation to make. But, somewhat startlingly, I have recently collected a series of transcripts in which high level politicians, including President Biden, blatantly confused the golden child tax credit with the childcare and dependent credit. Consider the remarks President Biden made in 2021 to promote the Build Back Better Act:

> My Build Back Better plan is going to … cut the cost of childcare for most Michigan families by more than half. It's going to extend the historic middle-class tax cut to the Child Care Tax Credit, which we passed in my American Rescue Plan.
>
> Now, most people don't know -- if you walk to the average informed person -- doctor, lawyer, whatever -- and said, "Child Care Tax Credit," they're not sure what that means. But what it means is, you know, if you were making a decent salary and you had two kids or three kids or four under the age of 18, you get to deduct $2,000 for each child off your bottom line of your taxes you owe.[239]

[239] President Biden Issues Remarks on Bipartisan Infrastructure Bill, Build Back Better Agenda, available at https://www.proquest.com/docview/2579312650/E00E034083C14771PQ/4?accountid=147

Only the childcare tax credit is not the $2,000 per child credit. The nonrefundable portion of the Child Tax Credit provides a $2,000 per child credit and has nothing to do with actual childcare expenses. This wasn't an isolated incident—I have on file other transcripts where politicians made substantially similar remarks.

The purpose of this is not to poke fun at these figures but to do the exact opposite. The names of these credits are really and unfortunately similar and some careful reflection on rhetoric seems in order. And it only benefits those lawmakers who would like to continue expanding the NRP-CTC while neglecting working childcare benefits if the public confuses them and thinks that the former somehow is targeted specifically towards working parents with high childcare costs, when it most certainly is not.

(c) Realize the States are Watching

Completely neglecting working childcare benefits at the federal level also depletes benefits available at the state level. "Many state tax supports mirror their federal counterparts, although there are often variations in the specific provisions (i.e., eligibility, credit rate, credit maximum)."[240] Some states allow a credit for working childcare expenses that is specifically tagged to the federal benefit. It is not uncommon for those states that provide for some state level childcare tax credit to allow a percentage of the federal childcare tax credit.[241] Congress' neglect, therefore, has rippling effects for parents attempting to afford childcare costs to work.

3. Emancipate Parental Tax Benefits from Parental Adjacent Guardians

As discussed in Section I.C., there are various benefits that define the statutory rate structure. There is no obvious way around some of the confusion (assuming the United States does not profoundly upend first order decisions by, for instance, abandoning joint filing (a practice used since 1948) or progressive tax rates (always used)). So long as these fundamentals remain intact, debates about how MFJs should be taxed vis-à-vis unmarried taxpayers will continue and the rate structures will vacillate depending on

84&sourcetype=Wire%20Feeds

[240] Bipartisan Policy Center, *State Child Care Tax Supports for Businesses and Parents*, available at https://bipartisanpolicy.org/report/state-tax-policies-working-parents/

[241] *Id.* (For instance, Georgia, Delaware and Iowa allows a CDCTC of 30%, 50%, and 30%-75% of the federal CDCTC, respectively).

Congressional priorities at the time. And so long as the United States continues to have some zero bracket amount—as I believe most rational people believe it should—there will need to be some method of calculating it. Some complexity is deeply embedded, so saying Congress should simply stop tinkering is too blithe.

It is not, however, necessary to perpetuate confusion by having both parental and parental adjacent benefits in the mix. Perhaps most obviously, given the discussion in Section I.D, it is hard to see a discernible reason for the head of household benefits to remain dependent on income splitting benefits for MFJs. It may have made sense in 1951 when the child tax credit was far from Congressional imagination. Even until recently, it might have been conceivable to argue some strategic value—*e.g.* Congress doesn't seem particularly concerned with solo parents and hitching head of household benefits to MFJ income splitting benefits that go primarily to one breadwinner families (with which Congress is perpetually concerned) may be a clever way to help these vulnerable parents. I'm certainly cynical enough to go along, but after the TCJA broke with historical patterns and increased MFJ income splitting benefits while curtailing head of household benefits, it seems to me time to seriously consider structuring the benefit in a separate, more lucid, visible manner, such as through a special child tax credit.[242]

Along similar lines, the zero bracket need not be defined by both a standard deduction (which does not depend on caregiving) and a personal exemption amount (which does). Maybe it did in 1913 when the personal exemption was conceived, and the child tax credit did not exist. But now that the CTC does exist, the two seem redundant and it seems well worth considering combining the two into the CTC.[243] This would make the parental tax structure simpler, more lucid, and eliminate the parental adjacency that allows Congress to play the personal exemption and standard deduction off each other to obscure distributional effects. The credit also allows a dollar- for-dollar reduction, eliminating the upside-down subsidy effects created by the personal exemption (whereby taxpayers in higher tax brackets receive greater savings).

4. ~~Retiring~~ Reclaiming Refund Rhetoric

Unfortunately, refund rhetoric has become an embedded part of our political discourse—whenever the subject of refundable benefits is raised,

[242] Goldin & Liscow, *Beyond Head of Household, supra* note 105.

[243] *See, e.g.* Elaine Maag, *The TCJA Didn't Change Benefits for Most Families, supra* note 145.

there is high likelihood that the specter of the welfare queen will be conjured moving discussions about who America believes is deserving to the forefront. The references are sometimes blatant—Manchin's concern that poor parents would use benefits for drugs reserved little for the imagination. But other times the invocations are more subtle—pithy statements like that of Representative Thomas Massie—"What is a refundable tax credit? It's welfare by a different name"—which were used to register predictable objections to the milquetoast adjustments the proposed TRAFWA would make to refundable parental tax benefits (alongside varied extensions of corporate tax breaks).[244]

Pretending refund rhetoric can be retired any time soon is probably at best pollyannish and at worst dangerous. It seems, therefore, important current law students and younger members of the public continue to be educated about the history behind refund rhetoric, as many have no memory of the welfare queen's birth. And it should be done in tax classes. This year (and now see I should have done this sooner), I began to incorporate resources and discussion providing background on these perverse caricatures. It was, on one hand, gratifying when my younger students looked incredulously at me when I first uttered the phrase "Welfare Queen." Unlike my generation, they did not grow up with these stories in the background on the family television. But this does not change the fact that welfare discourse is still quite alive, and perhaps more nefarious because of the now fading background knowledge of how it all began.

Just in 2015, to underscore the continued importance of this rhetoric, PRISM: The Initiative for the Study of Race, Gender, Sexuality and the Law hosted the following event:

> "[PRISM] convened twenty-five anti-poverty, critical race theory, and feminist legal theory scholars to take stock of the effects of the welfare queen construct and the cultural anxieties surrounding this figure. The symposium, Reframing the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Poverty Discourse, invited participants to examine the welfare queen construct's origins and prior mobilizations, to map its contemporary iterations, and to examine its broader social effects. The attendees' ambitions, however, were far greater: we sought to move anti-poverty conversations forward by "reframing the welfare queen." This reframing process called on us as scholars to use this discursive construct as an opportunity to uncover and explore the state's anxieties about family dependency, privacy, work, and reproductive

---

[244] See Section IV.A.2.

freedom.[245]

Writing for this symposium, one commentator states:

> The welfare queen construct is even more powerful now than it was in the 1990s, precisely because we are no longer even aware when anxieties associated with the construct are being triggered. However, we know that the welfare queen construct still profoundly shapes political conversation because it is virtually impossible to imagine any kind of long-term state-sponsored anti-poverty program, or to imagine an anti-poverty program that does not require able-bodied persons to engage in paid employment.[246]

While retiring the Welfare Queen would certainly be nice, it seems practical and responsible to follow the lead of scholars more skilled in these matters than myself and take their suggestion to attempt some reclamation of this caricature so consistently used in political tax discourse. Preserving a fulsome understanding of the history behind refund rhetoric can be an essential tool in combatting it and fostering a more competent discussion of how to more equitably tax parents, even (and particularly) those in the most vulnerable economic situations.

CONCLUSION

The story of how the American government supports parents is one of inequitable, incremental, glacially paced tax "reform." While other nations provide direct support to parents like quality childcare and paid parental leave, the United States takes a circuitous route, heavily relying on the Internal Revenue Code to provide tax breaks to certain parents.

These "parental tax benefits" are not awarded equitably. Instead, they favor nonpoor one breadwinner families over all others, ignore the plight of nonpoor working parents incurring substantial childcare and other work-related costs, exhibit an outright hostility towards poor parents and raise a host of other distributional concerns. This preferentialism has been very sticky across time—when Congress alters parental tax benefits, it rarely deviates from these patterns. And, in fact, the spate of parental tax "reforms" enacted in 2017 through the TCJA amplified these historic inequities, despite

[245] Camille Gail Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse, 25* Southern California Interdisciplinary Law Journal 257 (2015).

[246] *Id.*

many specious claims to the contrary.

And then, for a brief moment, Congress changed course. Signed into law on March 11, 2021, the American Rescue Plan Act provided much needed relief to parents attempting to maintain jobs and care for children during the COVID pandemic. While the ARPA still leaned extensively on the Code, it abandoned Congress' consistent preference for nonpoor one breadwinners and instead expanded various tax benefits available to nonpoor working parents and poor parents in historically significant ways.

And then that moment passed. The ARPA's benefits have now expired, leaving parents back where they started. Because the ARPA was born in an emergency (and expired well before it ended), it will be easy to dismiss it as legislation used only to move through acute crisis. I resist this narrative and create a counter one. By situating the ARPA within a broader historical context, an accurate narrative is developed—one where the ARPA's expansion of parental tax benefits was neither hasty nor creative but instead enacted long overdue adjustments that began to correct the distributionally problematic way in which America has historically favored some families over others.

It is imperative that this historic counternarrative be preserved and employed. It underscores the alarming failure of Congress to extend any of the ARPA's parental tax benefits. It provides context for the modest expansions [almost?] made through the Temporary Relief for American Families and Workers Act and effective through 2025 which, despite making grand headlines, constituted a remarkably modest step towards treating poor parents similarly to nonpoor parents. And of critical import, the narrative of inequitable tax reform developed in this project, supported by history rather than politics and bias, should be used to ground imminent conversations that will likely shape the future of how parents in America are taxed. There are few moments in which these conversations are so destined to take place. But the Tax Cuts and Jobs Act, which enacted a panoply of parental tax benefits that amplified Congress' inequitable treatment of families and favoritism towards nonpoor one breadwinner families expires in 2025, providing a date certain on which Congress must revisit its method of taxing parents. During these imminent and other future conversations, a mastery of the historical context preserved in this Article should arm those who advocate for a more inclusive method of supporting parents attempting to raise children in the United States.