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Converging Welfare States: Symposium Keynote

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Converging Welfare States: Symposium Keynote

Susannah Camic Tahk*

Table of Contents

| | |
|-----------------------------|-----|
| I. Introduction..... | 465 |
| II. Public Opinion..... | 467 |
| III. Legal Frameworks | 477 |
| IV. Administration | 482 |
| V. Normative Concerns | 489 |

I. Introduction

Thank you so much for having me. This is such a wonderful conference, and I am so excited to see the area of overlap between tax and poverty becoming its own field of study. The fact that we are all here today to talk about tax and poverty is in fact just more evidence of the growing extent to which the federal government relies on tax tools to fight poverty. When using the tax code against poverty started, when the EITC first took root decades ago, the tax anti-poverty programs supplemented direct-spending programs like welfare and food stamps.¹ As those programs have contracted, and as the tax antipoverty programs expanded, in terms of the

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1. See John Karl Scholz, Robert Moffitt & Benjamin Cowan, *Trends in Income Support*, in *CHANGING POVERTY, CHANGING POLICIES* 203–41, 232 (2009) (discussing historical data on social insurance and antipoverty spending by program in the 1970–2007 period).

numbers of recipients and the generosity of the relevant legislative provisions, the tax antipoverty provisions have become more important to the nation's antipoverty agenda: Bigger in scale and higher in visibility.²

The question that I want to talk about today: To what extent do the particular advantages of the tax antipoverty programs persist as the tax antipoverty programs take center stage? Can tax programs, once distinguished from their direct-spending counterparts on the grounds of relative popularity and legal and administrative ease of access maintain those hallmarks as the tax-based welfare state grows in size and scope?³ The first of the tax antipoverty programs was the EITC, a small, nimble program easily administered on a tax return, often meant to encourage

2. See generally Margot L. Crandall-Hollick, *The Earned Income Tax Credit: A Brief Legislative History*, Congressional Research Service, in CONG. RES. SERV. (Mar. 20, 2018) (“After various legislative changes over the past 40 years, the credit is now one of the federal government’s largest antipoverty programs. Since the EITC’s enactment, Congress has shown increasing interest in using refundable tax credits for a variety of purposes.”) For data on the EITC’s size in recent years relative to other federal antipoverty programs, see Karen Spar & Gene Falk, *Federal Benefits and Services for People with Low Income: Overview of Spending Trends, FY2008-FY2015*, in CONG. RES. SERV., 9 (July 29, 2016).

3. See generally Susannah Camic Tahk, *Everything is Tax*, 50 HARV. J. ON LEGIS. 67 (2013). For arguments about the administrative ease of programs run through the tax code, see *id.* at 101–04; Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 829–32 (2014); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1223 (2006); David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1830–42 (2006); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 1010–12 (2004). For arguments about relative popularity, see Conor Clarke, *New Research on the Stubborn Persistence of Tax Expenditures*, 150 TAX NOTES 1462 (2016); Conor Clarke & Edward Fox, Note, *Perceptions of Tax Expenditures and Direct Outlays: A Survey Experiment*, 124 YALE L.J. 1252 (2015); Christopher Faricy & Christopher Ellis, *Public Attitudes Toward Social Spending in the United States: The Differences Between Direct Spending and Tax Expenditures*, 36 POL. BEHAV. 53 (2013); Jake Haselswerdt & Brandon Bartels, *Public Opinion, Policy Tools, and the Status Quo: Evidence from a Survey Experiment*, 68 POL. RES. Q. 607 (2015). For further reading, see also Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797, 799 (2005) (finding that participants in a survey experiment were less likely to view property tax exemptions, as opposed to direct subsidies, as interfering with volunteer firefighters’ status as volunteers).

people who might otherwise be receiving welfare to go to work.⁴ Now, the EITC at the foundation of our federal antipoverty apparatus.⁵ What are the consequences? How much have the EITC and its now-lengthy list of companion tax antipoverty programs, retained the advantages of the supplemental welfare state it once was? Or, instead, are the tax antipoverty programs starting to resemble the behemoth direct-spending programs they've replaced in the center of the U.S.'s social policy landscape? To what extent can we expect tax programs become more like direct-spending programs, or "welfare" over time? That's the question I want to consider in this talk: Will the trajectories of the tax antipoverty programs and the direct-spending programs converge?

My goal here to take seriously potential threats that emerge from relying on the tax code as the primary federal means to accomplish antipoverty goals? To talk about this question, I want to focus on three ways that tax antipoverty programs have differed from their direct-spending counterparts and consider how each might change as the tax programs grow in scale and salience. First, I will discuss public opinion, second, legal frameworks, namely the fact that the tax programs are in the Internal Revenue Code and the non-tax ones are not, and third, administration. I will then offer a few concluding reflections on the normative implications of these differences and their possible persistence.

II. Public Opinion

First, I want to look the relative popularity of the tax antipoverty programs. In my past work, I've written about the growing body of evidence that tax antipoverty programs are substantially more popular than their direct-spending counterparts.⁶ A commenter on a paper of mine one said that

4. See Crandall-Hollick, *supra* note 2, at 2–4 (discussing the various characteristics of the EITC).

5. See Spar & Falk, *supra* note 2, at 9 (characterizing the EITC as one of the federal government's "top four" programs for people with low incomes).

6. See Tahk (2014), *supra* note 3, at 829–32 ("While conventional wisdom might suggest that the poor do not know to file tax returns and for that reason miss out on available benefits, data reveal that the take-up rates, at least for the EITC, are substantially higher than for nontax welfare programs."); see also

tax-based anti-poverty programs are “statism for anti-statists;” they take something unpopular: Welfare, and repackage it in the anti-statist trappings of tax benefits.⁷ In this way, they make welfare policy more palatable to the public, to political leaders and to beneficiaries.⁸ We see this in both what has happened to the tax antipoverty programs and the way people view them, each of which I will now discuss.

What has happened: The tax anti-poverty programs continue to be popular enough with political elites so as to enable their growth. Most recently, take the Tax Cuts and Jobs Act, passed by two Republican-controlled houses of Congress and signed by President Trump.⁹ While not enhancing the EITC, the bill did not cut it, either, and of course did substantially expand the child tax credit,¹⁰ including lowering the earned income threshold.¹¹ In fall 2018 in Wisconsin, a new child credit was one of the signature plans in the midterm election from Republican governor, Scott Walker.¹²

Clarke *supra* note 3, at 1463–64 (discussing how “[t]he public consistently prefers spending through the tax code to spending outside of it”); Clarke & Fox, *supra* note 3, at 1279–82 (discussing “some limitations and hypotheses that we hope will provide a basis for future research on why taxpayers prefer spending through the tax code”); Faricy & Ellis, *supra* note 3, at 6 (discussing “why citizens support or oppose particular social spending programs”); Haselswerdt & Bartels, *supra* note 3, at 615–19 (discussing an “experimental study [that] makes an important contribution to our understanding of citizen preferences regarding government programs”).

7. Thanks to Ajay Mehrotra for this point.

8. Thanks to Ajay Mehrotra for this point.

9. For votes on this bill, see 163 CONG. REC. H10214 (daily ed. Dec. 19, 2017); 163 CONG. REC. S8141–42 (daily ed. Dec. 19, 2017). For President Trump’s signing statement, see Remarks by President Trump at Signing of H.R. 1, Tax Cuts and Jobs Bill Act, and H.R. 1370 (Dec. 22, 2017), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1-tax-cuts-jobs-bill-act-h-r-1370/>.

10. See Tax Cuts and Jobs Act of 2017 (“TCJA”) § 11022(a), I.R.C. § 24 (2018) (increasing and modifying the child tax credit).

11. See *id.* (same)

12. See *Walker Proposes New Child Tax Credit*, WIS. RADIO NETWORK (Sep. 24, 2018), <https://wsau.com/news/articles/2018/sep/24/walker-proposes-new-child-tax-credit/> (discussing Scott Walker’s “proposal to provide a new child care tax credit) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

On the subject of public opinion, a spate of published studies in the past few years has consistently found that people are more likely to support tax-embedded social programs than their non-tax counterparts.¹³ Researchers have found this to be true across policy areas.¹⁴

The question on the public opinion side then becomes, to what extent will the tax credits remain relatively popular as they become more central to the country's antipoverty agenda? Welfare and other direct-spending programs were historically unpopular,¹⁵ which is perhaps one reason why we do not have Aid to Families with Dependent Children anymore,¹⁶ and may be part of why enrollment in these programs continues to decline.¹⁷ Can we expect the same thing to happen to the tax antipoverty programs?

The answer to that depends on why the tax antipoverty programs were relatively popular in the first place. Unfortunately, we do not yet have much empirical evidence to help us sort this out. I want to talk a bit about my different hypotheses and what

13. See Clarke, *supra* note 3, at 1463–64 (discussing why “[t]he public believes tax expenditures are cheaper than equivalent spending program”); Clarke & Fox, *supra* note 3, at 1279–82 (discussing why taxpayers prefer spending through the tax code); Faricy & Ellis, *supra* note 3, at 70–71 (“Both Republicans and Democrats support the mortgage interest and retirement programs less when they are framed as direct payments rather than tax credits.”); Haselswerdt & Bartels, *supra* note 3, at 615–19 (discussing the data pertaining to why taxpayers prefer spending through tax programs).

14. See Clarke & Fox, *supra* note 3, at 1277–78 (finding this preference in the case of homeownership subsidies); Faricy & Ellis, *supra* note 3, at 64 (finding it in the case of retirement-saving and homeownership subsidies); Haselswerdt & Bartels, *supra* note 3, at 612 (finding it in the case of homeownership, parental-leave and job-training subsidies).

15. See, e.g., MARTIN GILENS, WHY AMERICANS HATE WELFARE 26 (1999) (explaining data that “support the popular impression that Americans are uniquely hostile toward, or at least uniquely unsupportive of, government responsibility for social welfare”).

16. See *id.* at 24–25 (discussing the influence of public opinion on development of the welfare state).

17. See Gene Falk, *The Temporary Assistance for Needy Families (TANF) Block Grant: Responses to Frequently Asked Questions*, in CONG. RES. SERV. 5 (Jan. 28, 2019) (analyzing “a long-term historical perspective on the number of families receiving assistance from TANF or its predecessor program, from July 1959 to September 2017”).

each implies for the potential future trajectory of the tax-based welfare state. I will call them hypotheses A, B and C.

Hypothesis A is about work. It says, the tax antipoverty programs are relatively more popular than their direct-spending counterparts because the tax programs involve work. The tax antipoverty programs either are explicitly linked to earned income,¹⁸ or have earned income thresholds¹⁹ or, in the case of more indirect tax antipoverty programs like the low-income housing credit, they are for business taxpayers who presumably have tax liability against which to offset the credits.²⁰ When I present data on the tax program's public-opinion advantage, the fact that tax antipoverty programs require recipients to work is probably the hypothesis is always the first one that audiences suggest.

However, that story has to be a little more complicated, especially now that the tax benefits' relative place in the antipoverty landscape is changing. Lots of direct-spending antipoverty programs including temporary assistance to needy families²¹ and food stamps do now explicitly mandate work,²² and

18. *See, e.g.*, I.R.C. § 21(a)(1) (2018) (requiring that expenses eligible for the child care credit be "employment-related"); *see also, e.g.*, I.R.C. §§ 32(a)(1), (c)(2)(A) (2018) (specifying that the EITC requires earned income and then defining earned income as income from work).

19. *See, e.g.*, I.R.C. § 24(d)(1)(B)(i) (2018), (h)(6) (2018) (setting the refundability threshold, then lowering it from \$3000 to \$2500 for the years 2018–2025).

20. *See, e.g.*, I.R.C. § 38 (b)(6), (10) (14) (2018) (identifying the low-income housing credit, the empowerment zone employment credit and the new markets tax credit as parts of the general business credit, which is nonrefundable and, by definition, only able to be offset against tax liability).

21. *See* 42 U.S.C. § 607(c)(1)(B)(i) (2018) (explaining the requirements for an individual in a 2-parent family to be considered as engaged in work for a month for a fiscal year).

22. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, PUB. L. NO. 104-193, § 815, 110 Stat. 2278 (amending sec. 6(d) of the Food and Agriculture Act of 1977 to disqualify from receiving food stamps able-bodied adults without dependents who refuse to register for employment, participate in an employment or training program, or accept an offer of employment). In addition, many states have additional work requirements for food stamp recipients. For instance, six states disqualify the entire household from receiving food stamps if the head of household fails to comply with work requirements. *See Snap Work Requirements Fact Sheet*, NAT'L CONF. OF ST. LEGIS., <http://www.ncsl.org/research/human-services/snap-work-requirements-fact-sheet.aspx#2018%20Legislation> (last visited Feb. 13, 2019) (analyzing 2018 state

have for more than 20 years.²³ While the EITC has earned income in its name, I am not sure how many people know that the child tax credit has an implicit work requirement in the form of the earned income threshold. Further, at this point, the threshold is low enough that it is a much less stringent work provision than the direct-spending programs have.²⁴ Commentators might reply, people think the tax programs lean more heavily on work rules than welfare does. The public may think that, but the fact that it is not true anymore just raises the question, what is it about the tax programs that makes the public think they necessarily require work? And more importantly for this talk, would people keep thinking that if, for instance, Congress did lower the earned income threshold of the child tax credit to five dollars, or to 0? Will people always associate tax-embedded social policy with work? How non-work-oriented can the tax credits become without losing their work halo? If strong work associations are what makes the tax antipoverty programs particularly popular, how enduring that popularity will be would depend on how strong those associations are, and whether they can withstand the potential decreasing relative importance of work to some of the tax programs.

legislation regarding work requirements) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

23. See the Personal Responsibility and Work Opportunity Act, P.L. 104-193, 110 Stat. 2105, (setting up TANF and adding work requirements for food stamps; was passed on August 22, 1996).

24. An earned income threshold means that the recipient of the credit must have at least \$2,500 of earned income to take the credit. To see how this calculation works, see Conf. Rept. No. 108-696 P.L. 108-311, 34; Conf. Rept. No. 107-84. P.L. 107-16, 133. Current SNAP law requires, in essence, able-bodied adults to work 30 hours a week or enroll in a comparable work training program or school. See Food and Nutrition Act of 2008, Pub. L. No. 110-246, §§ 4001–4407 (describing the Food Stamp Program and its requirements); see also 7 C.F.R. § 273.24 (same). For a summary of these requirements, see United States Dep't. of Agric., *Food and Nutrition Service*, in SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM—CLARIFICATIONS ON WORK REQUIREMENTS, ABA WDS, and E&T (May 2018), <https://fns-prod.azureedge.net/sites/default/files/snap/Clarifications-on-WorkRequirements-ABAWDS-ET-May2018.pdf> (on file with the Washington & Lee Journal of Civil Rights & Social Justice). At the federal minimum wage of \$7.25/hour, the earned income threshold of \$2,500 amounts to a requirement that the child credit recipient work only 7 hours a week. In addition, none of the SNAP law about what counts as work, or whether this work get done over the course of a year or in a few weeks, applies to the child credit, which merely requires the recipient to earn \$2,500, however the person would like to do it.

My second hypothesis as to why the tax anti-poverty programs are relatively popular, Hypothesis B, posits tax programs are relatively popular because they are framed as tax cuts, as reducing people's taxes. The story of hypothesis B goes: Conventional wisdom holds that taxes are not popular,²⁵ so anything that purports to lower tax burdens gains a public opinion advantage. That advantage would among both people who take themselves take advantage of the credits and people who do not. With regard to the recipients themselves, the tax-credit framing may be part of why even low-income recipients of tax antipoverty programs report experiencing less stigma around the tax benefits than around welfare benefits.²⁶ With regard to people who themselves do not take the credits, some of the relative popularity of the tax credits may come from the idea that, even if the person herself is not seeing her taxes go down with something like the EITC, someone, somewhere, is getting a tax cut.

A couple of possible complicating facts for hypothesis B: One, there is new research including Vanessa Williamson's recent book on the topic, showing that taxes may not be as unpopular as conventional wisdom holds.²⁷ According to Williamson's research, Americans in fact like paying taxes and are proud to do so.²⁸ As a result, they may not in fact place particular value on tax cuts. Another complicating fact for hypothesis 2: Refundable credits are also popular relative to direct-spending programs.²⁹ The most common explanation I have heard used to be: That is because

25. See VANESSA S. WILLIAMSON, *READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES* ix–xi (2017) (describing the “truism” that Americans hate paying taxes).

26. See Tahk (2014), *supra* note 3, at 828 (comparing the social stigma surrounding recipients of tax benefits versus welfare benefits); see also Laura Tach & Sarah Halpern-Meehin, *Tax Code Knowledge and Behavioral Responses Among EITC Recipients: Policy Insights from Qualitative Data*, 33 J. POL'Y ANALYSIS & MGMT. 413 (2014) (“[B]uild[ing] on the robust quantitative literature on behavioral responses to the Earned Income Tax Credit (EITC).”); Jonathan B. Forman, *Let's Keep (and Expand Upon) the Earned Income Credit*, 56 TAX NOTES 233, 233 (1992) (analyzing the EITC).

27. See generally Williamson, *supra* note 25.

28. See, e.g., *id.* at 44, 165 (describing interviews about the things surveyed individuals like about paying taxes).

29. See Clarke & Fox, *supra* note 3, at 1276–78 (discussing a survey of preferences for receiving direct subsidies relative to tax credits).

people do not understand that refundable credits are in fact government outlays. However, lack of understanding cannot be the full story. In their study, researchers Conor Clarke and Edward Fox found that people's preference for the refundable credits, in the study's words, "did not change when they were given clear information about the mechanics of the tax expenditure. Even when respondents were given *explicit* information about what a refundable credit is, their preference for the tax programs over the direct-spending ones persisted."³⁰

If nonetheless, hypothesis B is the right answer, and the tax antipoverty programs are relatively popular because they are framed as tax cuts, that advantage is likely to be an enduring one. Benefits received through the tax code are set up as reducing people's tax liability.³¹ However, it is possible that despite the Clarke and Fox finding, people will catch on to increased use of refundability as a policy design feature and come to grapple more seriously with the fact that tax anti-poverty programs are not always tax cuts. On the other hand, the more that policymakers experiment with alternatives like refundability against payroll taxes, the more persistent the effect of the tax-cut frame might be.³²

The Clarke and Fox finding also poses a challenge to a competing hypothesis of mine, hypothesis C, coming from Suzanne Mettler's work on the submerged state. My Hypothesis C is that the tax programs are popular relative to welfare because they are hiding under the tax code's giant blanket. In Mettler's terms, tax

30. *Id.* at 1287.

31. *See, e.g.*, I.R.C. §§ 21(a)(1) (2018) (regarding married individuals filing joint returns and surviving spouses); (24)(a)(1) (regarding the child tax credit); 32 (a)(1) (providing examples of provisions providing for credits against tax liability); 62(a) (allowing taxpayers the benefit of "above-the-line" deductions); 63(b) (allowing taxpayers the benefit of the standard deduction); 63(d) (listing the other "itemized" deductions that may benefit taxpayers).

32. *See, e.g.*, Marco Rubio, *Analysis: Tax Relief for Working Families Hinges on Child Tax Credit Expansion*, MARCO RUBIO, U.S. SENATOR FOR FLORIDA, <https://www.rubio.senate.gov/public/index.cfm/2017/10/analysis-tax-relief-for-working-families-hinges-on-child-tax-credit-expansion> (last visited Feb. 14, 2019) (discussing the release of an "analysis showing an enhanced child tax credit remains the best way to provide meaningful tax relief for working American families") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

benefits are “submerged” in the tax code, which obscures the programs’ true natures as government spending programs and dooms any future effort at direct expenditures.³³ For this reason, tax-embedded social policy is a “policy terrain that presents immense obstacles to reform itself and to the public’s perception of its success.”³⁴ To her, tax antipoverty programs are part of a “submerged state . . . [that] eludes most ordinary citizens: they have little awareness of its policies or their upwardly redistributive effects, and few are cognizant of what is at stake in reform efforts.”³⁵ A more upbeat spin on hypothesis C comes from the commenter I quoted earlier as saying, tax anti-poverty programs are “statism for anti-statists,” allowing the government to hide otherwise unpopular welfare using this one neat trick.³⁶

What would Hypothesis C mean for how likely tax antipoverty programs’ relative popularity is to persist? This hypothesis suggests that the increased scale and salience of the tax-based welfare state is in fact a serious threat. If tax antipoverty programs are popular because they are submerged, as they start to surface, becoming bigger and more visible, they should become relatively less popular. To take a minor but recent example, just two weeks ago, Senator Harris proposed a bill called the LIFT the Middle Class Act, which included a new refundable tax credit of up to \$500 a month for families earning less than \$100,000 a year.³⁷ In response, conservative commentator Ben Shapiro tweeted, “[T]his isn’t a tax plan at all, but simply cutting checks to people who pay

33. SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 32 (2011).

34. Suzanne Mettler, *Reconstituting the Submerged State: The Challenges of Social Policy Reform in the Obama Era*, 8 *PERSP. ON POL.* 803, 803 (2010).

35. *Id.*

36. *Supra* note 7.

37. See Kamala D. Harris, *Harris Proposes Bold Relief for Families Amid Rising Costs of Living*, KAMALA D. HARRIS, U.S. SENATOR FOR CALIFORNIA, <https://www.harris.senate.gov/news/press-releases/harris-proposes-bold-relief-for-families-amid-rising-costs-of-living> (last visited Feb. 14, 2019) (“Today, U.S. Senator Kamala D. Harris announced the *LIFT (Livable Incomes for Families Today) the Middle Class Act*, legislation to provide middle class and working families with a tax credit of up to \$6,000 a year—or up to \$500 a month—to address the rising cost of living.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

little or no income tax in the first place.”³⁸ Seven thousand people liked or retweeted the observation.³⁹ If that reaction continued to take hold on a larger scale, it could decrease the relative popularity of tax-embedded antipoverty programs.

The first three hypotheses I have discussed have firm roots in the literature on the tax-based welfare state. But before leaving the question of sustaining relative popularity, I want to consider the possible importance of two additional hypotheses that have received little to no attention in the literature so far. One pertains to race. The evidence on why welfare is relatively unpopular, summed up in Martin Gilens’s *Why Americans Hate Welfare*, answers that question exhaustively, and does so with a single word: Race.⁴⁰ Americans have a lot of racist stereotypes of welfare recipients.⁴¹ What that literature has not yet probed is the fact that Americans may have fewer racist stereotypes of recipients of tax-embedded benefits. In a recent online commentary for Brookings, researchers Cecile Murray and Elizabeth Kneebone look not at perceptions but just at the recipient racial breakdown itself.⁴² They argue that,

38. Ben Shapiro, TWITTER (Oct. 18, 2018, 6:56 AM), <https://twitter.com/benshapiro/status/1052921391140364288> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

39. See *id.* (showing 1,241 retweets and 5,300 likes).

40. See, e.g., Hana Brown, *The New Racial Politics of Welfare: Ethno-Racial Diversity, Immigration, and Welfare Discourse Variation*, 87 SOC. SERV. REV. 586, 596, 606 (2013) (discussing welfare discourse); Gilens, *supra* note 15, at 167, 204–06, 213–16 (reviewing survey data about racial stereotypes in thinking about welfare); Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV., 415, 434–45 (1999) (discussing racial politics and welfare reform); Martin Gilens, “Race Coding” and *White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 593–95 (1996) (discussing attitudes towards welfare).

41. See Gilens, *supra* note 15, at 173 (“The cynicism that white Americans express toward welfare recipients is fed by their belief that blacks lack a commitment to work, in combination with their exaggerated impressions of the extent to which African Americans populate the country’s welfare rolls”).

42. See Cecile Murray & Elizabeth Kneebone, *The Earned Income Tax Credit and the White Working Class*, AVENUE (Apr. 18, 2017), <https://www.brookings.edu/blog/the-avenue/2017/04/18/the-earned-income-tax-credit-and-the-white-working-class/> (discussing the EITC and racial and educational lines) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

The EITC should still have bipartisan appeal today because it reaches across the demographic divides that characterized the 2016 election, particularly those of race and education . . . about half of all EITC-eligible taxpayers are white. Furthermore, white taxpayers who do not have a college degree—the so-called white working class—make up fully 40 percent of all taxpayers eligible for the EITC. At the same time, the EITC benefits the black and Latino working class, who combined also account for 40 percent of all taxpayers eligible for the credit.⁴³

The racial breakdown of TANF recipients is a little different: In 2016, 37% of recipients were Hispanic, 29% were black and only 28% were white.⁴⁴

While most people who answer public opinion polls presumably could not cite those numbers, many of the direct-spending antipoverty programs do come with racially charged historical baggage that the tax credits may lack.⁴⁵ I am trying to untangle the race thread in a current survey experiment of my own, but I have not looked at any of the data yet. Given that we do not know the extent to which racial stereotyping currently accounts for the public opinion advantage the tax programs have, it is even more difficult, though perhaps important, to predict how possible disparate racial coding of the two programs might change as the tax programs gain importance in the antipoverty landscape.

The other, and related, hypothesis that the literature has not explored is that people prefer the tax antipoverty programs to direct-spending antipoverty programs because any given survey recipient is much more likely to himself receive a tax-embedded benefit than a TANF or SNAP payment. This is because not only do most Americans presumably take some tax benefits, many middle- and upper-income taxpayers take the very same credits that are helping lift others out of poverty.⁴⁶ The best example of

43. *Id.*

44. *Id.*

45. See Tonya L. Brito, *supra* note 40 (discussing racial politics and welfare reform).

46. For instance, before TCJA, the child tax credit was available to couples with AGIs up to \$150,000/year, or in the top ten percent of the income distribution at the time. See Thomas L. Hungerford & Rebecca Thiess, *The Earned Income Tax Credit and the Child Tax Credit: History, Purpose, Goals, and Effectiveness*, ECON. POL'Y INST (Sep. 23, 2013), <https://www.epi.org/publication/ib370-earned->

that is of course the child credit, which is not as powerful an antipoverty tool as the EITC but does have its own substantial role in lifting families out of poverty.⁴⁷ After the 2017 tax legislation, many more families will be taking advantage of that credit.⁴⁸ If tax antipoverty programs are popular because they are widely available, more growth to these programs may in fact enhance, rather than diminish, their relative popularity.

III. Legal Frameworks

Moving on from relative popularity, the second major, and possibly persistent, difference between the tax antipoverty programs and their non-tax counterparts: Their different legal frameworks. By this I mean the legal consequences of the fact that tax antipoverty programs are tax law, living in the tax code, and the direct-spending antipoverty programs are not. This is something I have written about, but I am especially curious what others in the room, particularly experts on tax practice and

income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/ (providing a comprehensive overview of the EITC) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). To take another example, the child care credit does not have an AGI or other income ceiling, so even the highest-income taxpayers may be eligible for it.

47. The child credit lifted approximately 2.7 million people out of poverty in 2016, including about 1.5 million children and lessened poverty for another 12.3 million people, including 6.1 million children. See *Policy Basics: The Child Tax Credit*, CTR. FOR BUDGET AND POL'Y PRIORITIES, <https://www.cbpp.org/research/federal-tax/policy-basics-the-child-tax-credit?fa=view&id=2989> (last visited Feb. 19, 2019) (highlighting the positive effects of the CTC) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). In contrast, the EITC lifted about 5.8 million people out of poverty, including about 3 million children and reduced the severity of poverty for another 18.7 million people, including 6.9 million children. See *Policy Basics: The Child Tax Credit*, CTR. FOR BUDGET & POLICY PRIORITIES, <https://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit> (last visited Feb. 19, 2019) (highlighting the positive effects of the EITC) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

48. Starting in 2018, under TCJA, married taxpayers with a modified AGI of up to \$450,000 will be potentially eligible for the child credit. See *Phase Out*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/phaseout.asp> (last visited Feb. 19, 2019) (discussing the phase out for married taxpayers filing jointly) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

procedure, have to say about it. As tax lawyers know well, sections of the tax code are heavily interlinked.⁴⁹ Sections of the tax code reference each other, and some govern many others.⁵⁰ For instance, the Code sections on penalties and procedures apply, unless otherwise specified, to whatever programs live in the Code.⁵¹ As a result, a different set of attendant rules and rights attach to the tax antipoverty programs than to the non-tax ones.⁵²

To take a couple of examples: One example is the Taxpayer Bill of Rights, or, really, bills of rights, both the list of ten rights codified in 2015 and the various pieces of legislation passed in the 1990s.⁵³ These apply, with varying degrees of relevance, to the tax anti-poverty programs and do not apply at all to their non-tax counterparts. No corresponding body of federal rights law governs non-tax programs, most of which depend heavily on state law anyway. Perhaps for the public-opinion reasons I discussed above, the history of the non-tax anti-poverty programs has seen a lot of efforts to take away rights, rather than to build up more of them.⁵⁴

49. See Tahk (2013), *supra* note 3, at 88–89; see also STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 62 (1985).

50. See Tahk (2013), *supra* note 3, at 89 (discussing the tax code provisions that cross-reference each other often).

51. See, e.g., I.R.C. § 6001 (2018) (requiring “every person liable for tax under this title, or for the collection thereof” to keep relevant record); *id.* at 6011 (requiring “[e]very person required to make a return or statement” to provide required information on that return); *id.* at 7203 (imposing penalties on “[a]ny person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information.”).

52. The above-cited rules only apply to programs governed by the law under Title 26 of the U.S. Code, where the rules for programs based in the tax code are found, not to any other programs.

53. See, e.g., Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6226, 102 Stat. 3342, 3730 (containing the “Omnibus Taxpayer Bill of Rights,” known as “TBOR 1”); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1, 110 Stat. 1452 (1996) (being described as “TBOR 2”); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3000, 112 Stat. 685, 726 (containing the Taxpayer Bill of Rights 3, known as “TBOR 3”); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 401, 129 Stat. 2242, 3117 (2015) (discussing the “duty to ensure that Internal Revenue Service employees are familiar with and act in accord with certain taxpayer rights”).

54. See, e.g., Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO J. ON POVERTY L. & POL’Y 89, 125–32 (2002) (discussing the devolution of TANF and the attempts to strip it of effect); Michele Estrin Gilman,

Another example, various pieces of recipient-adverse case law that developed in the context of eroding welfare programs do not apply to the tax antipoverty programs. For instance, take the law on “entitlements.” The 1996 welfare legislation specified that while AFDC had been a federal “entitlement,” TANF would not be.⁵⁵ Courts have picked up on that language to hold that after welfare reform, welfare payments are entitled to less robust procedural due process protections.⁵⁶ It is true—and I think, possibly legally important—that the constitutional due process protections afforded to tax refunds are still unclear, but there is no reason to think that the particularly unfavorable statutory and case law on entitlements should apply to them.⁵⁷

Along similar lines, part of the 1996 welfare statute banned federally funded legal-services organizations from “participat[ing] in litigation, lobbying or rulemaking involving an effort to reform a Federal or State welfare system.”⁵⁸ Sociologists of public interest

Legal Accountability in an Era of Privatized Welfare, 89 CALIF. L. REV. 569, 603–23 (2001) (discussing the degradation of TANF through its privatization); Cynthia R. Farina, *On Misusing “Revolution” and “Reform”: Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 618–23 (1998) (explaining the limitations of AFDC and TANF); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1337–38 (2012) (highlighting the due process concerns of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996); Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 36 (1997) (explaining how AFDC was removed and absorbed by TANF).

55. 42 U.S.C.A. § 601(b) (West 1997) (“This [legislation] shall not be interpreted to entitle any individual or family to assistance.”).

56. See, e.g., *Weston v. Cassata*, 37 P.3d 469, 475–77 (Colo. App. 2001) (“The federal government may decide not to make funding available to the states for welfare programs, and may withhold funding from states that fail to follow federal standards. In either of these situations, individuals expecting welfare benefits cannot sue the states for benefits not given.”); *State ex rel. K.M. v. W. Va. Dep’t of Health & Human Res.*, 575 S.E.2d 393, 402 (W. Va. 2004) (“Therefore, in light of the specific dictates of the Congress and the [West Virginia] Legislature, we must reject petitioners’ argument that a pre-termination hearing is required before ending TANF cash assistance due to the expiration of the five-year time limit.”).

57. See Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875, 904–05 (2018) (“[T]he refund is, for the purposes of property law [and procedural due process], more like the salary the taxpayer earned in the first place than like a benefit that the government later decided to bestow.”).

58. 49 C.F.R. pt. 1639 (1996). For a study of these regulations and their effects, see Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and*

law have found that, in the words of one of their papers, that statutory language “drastically reduced the amount of welfare rights litigation in the United States, causing legal-aid caseloads to fall by millions of cases and putting hundreds of legal-aid lawyers out of work.”⁵⁹ There is no reason I can see, however, that this rule should apply to many of you in the room, tax lawyers who represent beneficiaries of tax-embedded social programs. Further, related to the point I made earlier about how some of the tax antipoverty programs are approaching near-universal availability, crafting a provision banning tax lawyers from similar activities would present some challenges. How would Congress write a law that says tax lawyers cannot participate in rulemaking for the child care credit, but they can for the home-mortgage interest deduction? They cannot for the low-income housing credit, but they can for the energy tax credits? Those distinctions would rest on somewhat theoretically shaky grounds and might get pushback from clients who like having their lawyers represent them in rulemaking, or from the tax bar itself.⁶⁰

The legal consequences of being in the tax code may be some of the most entrenched hallmarks of tax antipoverty policy, and the ones most likely to endure. As a matter of statute and case law, of law on the books, while legislators are able to, and have, passed specific rules that govern particular tax anti-poverty programs, the default is that the general tax legal framework will apply to anything in the tax code, and the general welfare—or SNAP, or Medicaid, or other legal framework—will not.⁶¹ Further, as a matter of law in action, of practical legal dynamics, the tax legal framework, unlike the welfare legal framework (or the SNAP framework, or the Medicaid legal framework), continues to develop

Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited, 36 L. & SOC. INQUIRY 919, 925 (2011) (discussing the history of the Legal Services Corporation); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Law Practice: 1975 – 2004*, 84 N.C.L. REV. 1591, 1616–17 (2006) (same).

59. Zaloznaya & Nielsen, *supra* note 58, at 925.

60. In addition, as mentioned above, the procedural provisions of the Internal Revenue Code generally apply to all programs housed within. See I.R.C. Regulations, *supra* note 51.

61. See *id.*

under circumstances where it affects everyone who interacts with the tax code, business and nonbusiness, rich and poor.⁶² That means that in many situations, the same rules apply to recipients of tax antipoverty programs as to taxpayers with more resources.⁶³ Taxpayers with more resources then are able to use those resources to influence how recipient-friendly the tax law becomes. The example I always used to use was the question of whether the refundable portion of a refundable credit is itself income. That is an unresolved issue where well-represented business taxpayers were presumably hoping to get a taxpayer-favorable answer and whatever success they had would also apply to poor recipients of refundable credits.⁶⁴ Another more recent example is the issue in the Facebook case about whether the 10-item Taxpayer Bill of Rights as codified gives rise to substantive legal rights.⁶⁵ While the magistrate in that case ruled against Facebook on that issue,⁶⁶ the case was still an instance in which a team of paid lawyers from Baker & McKenzie, working on behalf of Facebook, were arguing that the Taxpayer Bill of Rights affords taxpayers substantive protection, as was the U.S. Chamber of Commerce, represented by Skadden, Arps, Slate, Meagher & Flom.⁶⁷ That argument also has

62. See Tahk, *supra* note 57, at 900–01 (discussing the ramifications of *Facebook v. I.R.S.*).

63. See *id.* (same).

64. For a discussion of this issue, see Tahk (2013), *supra* note 3 at 95–98.

65. See *generally* Compl. for Declaratory and Injunctive or Mandamus-Like Relief, Facebook, Inc. & Subsidiaries v. Internal Revenue Serv., Case No. 3:17-cv-06490-LB (N.D. Cal. Nov. 8, 2017).

66. See *generally* Order Granting Mot. to Dismiss for Lack of Jurisdiction, Facebook, Inc. & Subsidiaries v. Internal Revenue Serv., Case No. 3:17-cv-06490-LB (N.D. Cal. May 14, 2018).

67. See Facebook’s Opposition to Def.’s Mot. to Dismiss, Facebook, Inc. & Subsidiaries v. Internal Revenue Serv., Case No. 3:17-cv-06490-LB at 10 (N.D. Cal. Mar. 09, 2018) (“A determination that Congress’s codification of TBOR created substantive taxpayer rights is thus fully consistent with the Supreme Court’s refusal to read statutes in a manner that renders the language as mere surplusage [sic].” (citations omitted)); Br. of the Chamber of Commerce of the United States of America as Amicus Curiae, Facebook, Inc. & Subsidiaries v. Internal Revenue Serv., Case No. 3:17-cv-06490-LB (N.D. Cal. Mar. 14, 2018) (“The Taxpayer Bill of Rights guarantees taxpayers the right to appeal a decision of the Internal Revenue Service . . .”).

the potential to help poor taxpayers who receive the EITC or the premium tax credit or any of the other tax antipoverty programs.

We do see political efforts to carve out the tax antipoverty provisions and differentiate them from the others, giving them, in essence, their own law. Most notably the PATH Act of 2015 applied specifically to some of the tax antipoverty programs, preventing retroactive claims of the EITC after the issuance of Social Security numbers and requiring the IRS to hold income tax refunds until February 15 if the tax return included a claim for the EITC or the additional child tax credit.⁶⁸ Will we see more of that? Perhaps as the tax antipoverty programs become more visible, we will. But the fact remains that most tax law, specifically most tax procedure, is not EITC-specific; it's for every tax benefit. That is a feature of tax antipoverty programs that may erode over time, but only slowly, and only with focused legislative intent. In contrast, welfare law is inherently welfare-specific, SNAP law is inherently SNAP-specific, and so forth. For this reason, while poverty tax law could, over a long period of time, become its own area of law, with its own statutes and case law, it will remain persistently distinct from the laws that govern the direct-spending programs.

IV. Administration

Third, major, and possibly persistent disparity between the tax anti-poverty programs and their non-tax counterparts: Administrative differences. This is an area where I see some real potential for the paths of the tax and non-tax antipoverty programs to converge. For reasons I will explain, I do not predict that the paths will come together completely, but I do see more of a possibility. Why? While the tax antipoverty programs have traditionally presented opportunities for administrative

68. See Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub. L. No. 114-113, §§ 201(b), 204 (2015) (“No credit or refund of an overpayment for a taxable year shall be made to a taxpayer before the 15th day of the second month following the close of such taxable year if a credit is allowed to such taxpayer under section 24 (by reason of subsection (d) thereof) or 32 for such taxable year.”). For an excellent discussion on the phenomenon of a separate low-income-specific body of tax law, see generally Leslie Book, *U.S. Refundable Credits: The Taxing Realities of Being Poor*, 4 J. TAX ADMIN. 71 (2018).

efficiencies, enormous federal antipoverty programs can only be so easy, and so cheap, to administer. Although once upon a time, the EITC was merely one more line on a tax return, it's not clear how feasible it ever was for that to remain the case. In their 2004 article, David Weisbach and Jacob Nussim, in an oft-cited (by me) line, found that “estimates have put the administrative costs of the EITC at . . . less than one-tenth the amount spent on the [food stamp program]. Even at this lower cost, the EITC is substantially larger than the FSP.”⁶⁹ They continue, “[n]otwithstanding the vastly higher administrative and compliance costs of the FSP, it is not clear that it is any more accurate.”⁷⁰ With figures like that, the tax programs looked like a wonderful administrative deal.

However, that deal was perhaps not sustainable, at least for the tax anti-poverty programs that require individual and family recipients affirmatively to claim the benefits for which they may be eligible. As the Taxpayer Advocate wrote in her, the EITC was “designed to have an easy ‘application’ process by allowing an individual to claim the benefit on his or her tax return. This approach dramatically lowered administrative costs, because it did not require an infrastructure of case workers and local agencies.”⁷¹ However, she added, “the easy application process of the EITC is also associated with a high improper payment rate.”⁷² In testimony from 2015, she constructs a measure of program efficiency where she takes the overhead costs of a variety of direct-spending antipoverty programs, adds that to the improper payments for each of those programs, and then takes that figure, overhead plus improper payments, as a percent of the total benefits the program pays out.⁷³ That measure, she implies, should tell us something

69. Weisbach & Nussim, *supra* note 3, at 1004.

70. *Id.*

71. Nat'l Taxpayer Advoc., ANNUAL REPORT TO CONGRESS 2018 61, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-JRC/JRC18_Volume1_AOF_06.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

72. *Id.*

73. See Written Statement of Nina E. Olson, U.S. House of Representatives Committee on Oversight and Government Reform, SUBCOMMITTEE ON GOV'T OPERATIONS 26 (Apr. 15, 2015) (final row of table listing “overhead costs + improper payments as a % of total”).

about the administrative ease of the different programs.⁷⁴ According to her figures, which do raise some methodological questions, the EITC, the only tax-based program in the data, is in the middle of the pack.⁷⁵ For the EITC, overhead costs plus improper payments equal 25% of the total benefits paid out.⁷⁶ For TANF, that figure is a remarkably similar 24.7%.⁷⁷ CHIP, the federal children's health insurance program, is the worst performer with a 44% costs plus improper payments figure, and SNAP, in contrast to the Weisbach and Nussim finding, actually does the best, with overhead plus improper payments equal to about 9% of the overall program costs.⁷⁸

In addition to the improper payments issue, there are take-up concerns. In the words of economists Saurabh Bhargava and Dayanand Manoli, who have recently been doing some very interesting experimental work on the problem, the EITC has “an estimated incomplete take-up rate of [twenty-five] percent, amounting to 6.7 million non-claimants each year.”⁷⁹ They continue, “[t]he consequences of incomplete take-up can be significant. The typical EITC non-claimant forgoes an estimated \$1,096, equivalent to [thirty-three] days of income.”⁸⁰ And, the authors add, what is more, “[t]hese non-claimants sacrifice other advantages, such as those related to health, education, or consumption, that may be linked to transfers” from the tax credits.⁸¹

74. *See id.* at 27 (“This table demonstrates that for a program of such significant size, administered at a federal level, the EITC reaches an extraordinary number and percentage of eligible taxpayers at a modest cost, when overhead and overclaims are considered together.”)

75. *See id.* (showing that the 25% figure for the EITC is somewhere in the middle of the programs listed in the table).

76. *Id.*

77. *Id.*

78. *Id.* For the Weisbach & Nussim point, see Weisbach & Nussim, *supra* note 3, at 1004.

79. Saurabh Bhargava & Dayanand Manoli, *Psychological Frictions and the Incomplete Take-up of Social Benefits: Evidence from an IRS Field Experiment*, 105 AM. ECON. REV. 1, 1 (2015).

80. *Id.* at 1–2.

81. *Id.* at 2.

In sum, administrative problems with the tax antipoverty programs have emerged—both regarding take-up and regarding compliance. It is not an accident that the Taxpayer Advocate includes EITC issues as one of the most serious problems facing the IRS in so many of her recent reports.⁸² For instance, in 2013, one of the “most serious problems” described in the report was the fact that, as a response to the perceived overpayments issue, “[t]he

82. See, e.g., NAT'L TAXPAYER ADVOC. ANNUAL REP. TO CONGRESS 91 (2018), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume1.pdf (highlighting the troubles of administering the EITC) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC. ANNUAL REP. TO CONGRESS 141 (2017), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_Volume1.pdf (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC., ANNUAL REP. TO CONGRESS 2015 235, 240, 248, 261 (2015), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1.pdf (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC., ANNUAL REP. TO CONGRESS 2013 103 (2013), <https://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf> (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); (NAT'L TAXPAYER ADVOC. ANNUAL REP. TO CONGRESS 2011 296 (2011), <https://taxpayeradvocate.irs.gov/userfiles/file/2011-annual-report/IRS%20TAS%20ARC%202011%20VOL%201.pdf> (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC., 2007 REP. TO CONGRESS 222 (2007), https://www.irs.gov/pub/tas/arc_2007_vol_1_cover_msps.pdf (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC., 2005 REP. TO CONGRESS 94 (2005), https://www.irs.gov/pub/tas/section_1.pdf (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC. ANNUAL REP. TO CONGRESS 26 (2003), https://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-042.pdf (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC., FY2002 ANNUAL REP. TO CONGRESS 36 (2002), https://www.irs.gov/pub/tas/arc2002_section_one.pdf (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC., FY2001 ANNUAL REPORT TO CONGRESS 26, https://www.irs.gov/pub/irs-utl/2001_tas.pdf (2001) (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); NAT'L TAXPAYER ADVOC., NAT'L TAXPAYER ADVOC.'S FY2000 ANNUAL REPORT TO CONGRESS 26 (2000), <https://www.irs.gov/pub/irs-utl/pub2104-2000.pdf> (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

IRS [is now] inappropriately ban[ing] many taxpayers from claiming the EITC.”⁸³ There are several ways in which that may be true, and in the 2013 report, the Taxpayer Advocate takes as her main example the Section 32(k) language authorizing the IRS to ban taxpayers from claiming the EITC for two years if the IRS determines they claimed the credit improperly, to quote the statute, “due to reckless or intentional disregard of rules and regulations.”⁸⁴ She found that in 2011, “[t]he IRS imposed the ban improperly almost forty percent of the time . . . [i]n only ten percent of the cases did a taxpayer’s response to the audit raise the possibility that he or she had the requisite state of mind to justify the two-year ban, [i]n [sixty-nine] percent of the cases, the ban was imposed without required managerial approval and [i]n almost ninety percent of the cases, neither IRS work papers nor communications to the taxpayer contained the required explanation of why the ban was imposed.”⁸⁵

Another example: In 2015, the Taxpayer Advocate found that the correspondence audits that the IRS initiates with regard to the EITC are not working well.⁸⁶ The IRS expends a lot of resources auditing the EITC.⁸⁷ In 2015, EITC audits made up thirty-five percent of all IRS audits, even though EITC claims were only on nineteen percent of returns filed.⁸⁸ The Taxpayer Advocate found

83. NAT’L TAXPAYER ADVOC. 2013 ANNUAL REPORT TO CONGRESS 103 (2013) <https://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf> (on file with the Washington & Lee Journal of Civil Rights & Social Justice); see NAT’L TAXPAYER ADVOC. (2013), *supra* note 82, at 103 (“The IRS Inappropriately Bans Many Taxpayers from Claiming EITC.”).

84. NAT’L TAXPAYER ADVOC. 2013 ANNUAL REPORT TO CONGRESS 103 (2013) <https://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

85. *Id.* at 103–04.

86. See NAT’L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 248–60 (2015) https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1.pdf (“The IRS is not adequately using the EITC examination process as an educational tool and is not auditing returns with the greatest indirect potential for improving EITC compliance.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

87. See generally *id.*

88. See *id.* at 249 (“In fact, EITC audits make up [thirty-five] percent of all IRS audits despite the fact that EITC returns account for only nineteen percent of all returns filed.”).

that these audits have a no-response rate of forty percent.⁸⁹ That means that in many of these cases, the audited individual very well might have a defense and simply does not attempt to offer it, probably due to a lack of understanding about what a defense might be and about how to assert it. Without ever finding out if that is true, the IRS goes ahead and assesses the tax and any penalties, possibly violating a number of now statutorily enshrined taxpayer rights.⁹⁰ The correspondence audit process may not cost as much as actual administrative hearings, but it is not clear that it is arriving at the right answers.

All of this is to say that the initial picture of the tax system as a miraculously cheap and accurate way to deliver benefits has become more complicated as the tax antipoverty programs have become bigger and more widely available. This is not a surprise. The tension between accuracy and cost is inherent to disbursing government benefits, even on a small scale. As the programs themselves scale up, so too does the tension.

On the other hand, both the government and academic researchers are working to find ways to improve administration of tax benefits, the EITC in particular. This new research offers low-cost opportunities to improve administrative problems like take-up and noncompliance.

What is notable about many of these suggestions for improvement is that they rely on efficiencies built into the tax system. For instance, in the Bhargava and Manoli paper, the two economists find, using a field experiment, that merely sending reminder notices to potential EITC claimants significantly increases take-up.⁹¹ In particular, eligible individuals were substantially more likely to claim the EITC when they received a reminder notice that was, in contrast to the standard IRS notice,

89. *See id.* (“The EITC audit program has a no-response rate of over [forty] percent . . .”).

90. *See id.* at 252 (“Moreover, a collection strategy based on ignorance and guesswork increases the risk of taking collection actions that are more intrusive than necessary, thereby undermining taxpayer trust in the system and undermining taxpayers’ *right to privacy*.”).

91. *See* Bhargava & Manoli, *supra* note 79, at 32 (“For example, we estimate that the mere distribution of a second mailing, approximately similar to the first reminder notice, would result in an addition 45,000 claimants . . .”).

“single-sided, featured a larger and more readable font and a prominent headline” and came with a claim worksheet that was non-repetitive and with a cleaner layout and a different font.⁹² Take-up rates also substantially went up when eligible individuals received information on a mailer about how big their EITC benefit could in fact be.⁹³ The EITC never had a big a take-up problem as the non-tax antipoverty programs (the EITC participation rate among eligible claimants is about seventy-five percent, as opposed to forty-two percent for TANF, fifty-five percent for SNAP and forty-six percent for the oft-scapegoated SSI).⁹⁴ But this new research is showing that the IRS can make major strides to address even its smaller EITC take-up problem merely by changing the font and layout of its mailers.⁹⁵ The relatively efficient process where recipients claim their benefits simply by mailing a form, as it turns out, is also relatively easy to improve.

Similarly, the Taxpayer Advocate has used experiments to show the possible large effects of relatively low-cost administrative fixes on the compliance front.⁹⁶ For example, she found in her research, that EITC compliance went up substantially when her office sent a letter to previously noncompliant EITC claimants that “explained the requirements for claiming EITC in plain language, identified the specific requirement the recipient [had not] appear[ed] to meet [in the past], and suggested sources of additional information and assistance, including the Taxpayer Advocate Service itself.”⁹⁷ Then, she also found that when her office offered, in the same letter, the number for a dedicated “Extra Help” telephone line “staffed by TAS employees trained to answer

92. *Id.* at 12.

93. *See id.* at 21 (“Among treatments that provided information, the display of benefit information was the most potent.”).

94. *See id.* at 8 (“A recent analysis by the IRS based on data for TY 2005, which informs assumptions used in this study, suggests an overall program uptake rate of [seventy-five] percent . . .”).

95. *See id.* at 17 (“The comparison suggest a large net positive effect of simplification on response . . . as well as of information . . .”).

96. *See generally id.*

97. NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 15 (2017), https://taxpayeradvocate.irs.gov/Media/Default/Documents/ResearchStudies/AR_C17_Volume2_02_StudySubsequent.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

taxpayer questions about the letter and the EITC eligibility rules,⁹⁸ compliance increased even further.⁹⁹ Staffing a help line and sending an additional letter are not free, but again, they are relatively low-cost interventions that, according to Taxpayer Advocate data, have the possibility, taken together, to reduce erroneous EITC claims by about \$75 million a year.¹⁰⁰ Both of them take advantage of the relatively streamlined system by which people make EITC overclaims in the first place to introduce features that can substantially reduce those claims.¹⁰¹ Given that the application for most of the direct-spending programs was always more complex, it is hard to imagine equally cost-effective interventions that could as substantially reduce corresponding problems in those programs.

Taking all of this together, possible changes to public opinion, to the law itself, and to tax administration, the answer to whether the trajectories of tax anti-poverty programs and their non-tax counterparts will converge turns out, unsurprisingly, to be complicated. I hope that future research on some of these questions can help us to understand, and in fact to shape, these trajectories, and I am looking forward to seeing many of the people in this room conduct that research in the years to come.

V. Normative Concerns

Before concluding, I want to put aside for a minute the positive question of whether the future of the tax anti-poverty programs

98. *NTA Blog: TAS Research Shows that Education Improves EITC Compliance*, TAXPAYER ADVOCATE SERV. (Sept. 20, 2018), <https://taxpayeradvocate.irs.gov/news/nta-blog-tas-research-shows-that-education-improves-eitc-compliance> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

99. See NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 91, 102 (2018), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume2.pdf (giving the results of this experiment) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

100. NAT'L TAXPAYER ADVOC., *supra* note 97, at 14, 15.

101. See NAT'L TAXPAYER ADVOC., ANNUAL REPORT 91, 93 n.17 (2018) (defining "overclaims" as "the difference between the amount of EITC claimed by the taxpayer on his or her return and the amount the taxpayer should have claimed") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

will converge with the story of the direct spending programs. I am going to turn to the normative question: Insofar as they do converge, is that necessarily bad?

The easy answer to this question, and the one implicit in most of this talk so far, is yes. After all, from a political perspective, the big federal welfare program, AFDC, was unpopular and for this reason, eventually repealed.¹⁰² Its successor is smaller and for that reason, less adept at reducing the poverty rate.¹⁰³ Scholars have also exhaustively documented how, even when AFDC existed, it was the lower tier in a racialized two-tiered welfare state.¹⁰⁴ Recipients found it user-unfriendly and also stigmatizing.¹⁰⁵ From a legal perspective, poverty lawyers seem to agree that the body of law that developed around AFDC and TANF, and also around some of the other direct-spending anti-poverty programs, was full of recipient-adverse decisions and statutes that placed major hurdles in advocates' paths.¹⁰⁶ From an administrative

102. See *supra* Part I.

103. See Scholz et al., *supra* note 1, at 220–21 (showing in a graph the effect of transfers on poverty).

104. See, e.g., Karen M. Suzanne Mettler, *The Stratification of Social Citizenship: Gender and Federalism in the Formation of Old Age Insurance and Aid to Dependent Children*, 11 J. OF POL'Y HIST. 31, 31 (1999) (arguing that social citizenship became organized as a two-tiered system in terms of gender due to “political battles over the proper institutional arrangements for program administration”); Suzanne Mettler, *Dividing Social Citizenship by Gender: The Implementation of Unemployment Insurance and Aid to Dependent Children, 1935–1950*, 12 STUD. IN AM. POL. DEV. 303, 303 (1998) (noting that the American welfare state emerged as “two-tiered” or “two-track” in character, which divided American social citizenship by gender); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 318 n.12 (2012) (noting that in *Jefferson v. Hackney*, 406 U.S. 535 (1972), the Supreme Court “found no equal protection violation in a state law that set lower level benefits for AFDC recipients than for recipients of other need-based assistance programs”). See generally Suzanne Mettler, *Dividing Citizenship*, in DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998); NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY (1989).

105. See Jennifer Sykes et al., *Dignity and Dreams: What the Earned Income Tax Credit (EITC) Means to Low-Income Families*, 80 AM. SOC. REV. 243, 258–59 (2015) (explaining a single mother’s concern that welfare recipients “just sit on welfare” (citations omitted)).

106. See, e.g., Tani, *supra* note 104, at 381, 125–57; Cimini, *supra* note 54, at 125–32 (explaining how devolving policymaking to county and local officials risks the enforcement of procedural due process rights for TANF recipients); Tani,

perspective, it imposed substantial administrative burden.¹⁰⁷ As students of and participants in the tax system, we probably do not want any of that.

However, a few complications to the normative question. First, the voices most critical of the tax antipoverty programs focus on overpayments.¹⁰⁸ In calling for more guardrails against them, they are in fact envisioning a system that's more like welfare, in which there are different and stricter rules for poorer recipients. The IRS is moving in that direction with its high EITC audit rate and increasingly multilayered processing of EITC claims.¹⁰⁹ AFDC and TANF have never been perfect at reducing overpayments, and certainly complaints about welfare fraud were and remain common.¹¹⁰ However, direct-spending programs—perhaps because they are unpopular—have traditionally been more comfortable erecting barriers to participation so as to risk fewer overpayments.¹¹¹ I prefer the tradeoff that the tax programs make:

supra note 104, at 381 (“Critics have long alleged that when benefits come with rights, or are packaged as rights, policymakers lose flexibility, taxpayers suffer, and the poor lose incentive to work.”).

107. See Donald Moynihan et al., *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. PUB. ADMIN. RES. & THEORY 43, 44 (2015) (explaining how administrative burden in AFDC and TANF have reduced participation).

108. See, e.g., Michelle Malkin, *The \$16 Billion Tax-Credit Black Hole*, NAT'L REV. (June 1, 2016), <https://www.nationalreview.com/2016/06/eitc-fraud-honduran-scammers-steal-millions/> (arguing that the EITC “has ballooned into a massive welfare entitlement” to those who do not pay taxes) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Chris Edwards & Veronique de Rugy, *Earned Income Tax Credit: Small Benefits, Large Costs*, CATO INST. TAX & BUDGET BULLETIN 73 (Oct. 14, 2015), <https://www.cato.org/publications/tax-budget-bulletin/earned-income-tax-credit-small-benefits-large-costs> (arguing that the EITC “has a high error and fraud rate” and “creates a disincentive to increase earnings”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

109. See NAT'L TAXPAYER ADVOC., *supra* note 71, at 100 (suggesting that an affidavit be incorporated into the EITC audit process for a taxpayer to use for substantiating his or her claim to help reduce improper payment rate); Leslie Book, *U.S. Refundable Credits: The Taxing Realities of Being Poor*, 4 J. OF TAX ADMIN. 71, 80 (2018) (noting that program complexity is a “main driver of error”).

110. For a discussion of public perceptions of welfare fraud, see Gilens, *supra* note 15, at 63–64.

111. See Evelyn Z. Brodtkin & Malay Majmundar, *Administrative Exclusion: Organizations and the Hidden Costs of Welfare Claiming*, 20 J. OF PUB. ADMIN.

Easier access at the risk of more overpayments, but some might reasonably prefer a different one.

Then, I am so happy this conference includes a panel on universal basic income alternatives, because I want to talk for a minute about universality. Many of the most persistent advantages that the tax anti-poverty programs may have persisted because the tax system is so universal.¹¹² Why might the tax programs' relative popularity endure? At least in part because so many people get tax benefits. Even rich, white people get tax benefits. Why do the law governing tax programs remain so different from the law governing non-tax programs? Because that law applies to all taxpayers, not just EITC recipients.¹¹³ Why is the tax administrative apparatus relatively easy to fix? Because the same low-cost, non-stigmatizing application process, return filing applies to everybody.¹¹⁴

I have argued in my written work, and will happily continue to argue, that the universality of the tax antipoverty programs is not just the source of their most enduring features, but one of their best.¹¹⁵ Universality explains much of their success. Also, the vision of equal treatment of everyone in the U.S. standing before the same tax law, is one that holds enormous normative appeal for me. Participating in the tax system implies membership in the group collecting the taxes, in another word, citizenship.¹¹⁶ As Larry Zelenak has written, the act of filing a tax return is a form of active civic participation that implies a willingness to assume the responsibilities as well as the benefits of membership in a political community.¹¹⁷ Using tax returns as the means by which

RES. AND THEORY 827, 842 (2010) (discussing administrative barriers in the TANF context); Weisbach & Nussim, *supra* note 3, at 1001 (discussing administrative barriers in the food stamps context).

112. *See supra* Part I.

113. *See supra* Part II.

114. *See supra* Part III.

115. *See* Tahk, *supra* note 3, at 98–101 (arguing that the universality of the tax system fosters the inclusion of often times marginalized groups).

116. *See id.* at 99 (“Assuming the mantle of a taxpayer arguably confers on the recipient the sense that he or she is a stakeholder in the government that collects the taxes.”).

117. *See* Lawrence Zelenak, *Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement*, 61 TAX L. REV. 53, 61 (2007)

low-income people claim benefits allows them too to participate in this civic ritual and symbolically claim the associated responsibilities and rights of citizenship, placing them on equal footing with all the other participants.¹¹⁸

Conversely, citizenship is a troublingly exclusive concept, historically tied to membership in a dominant elite, defined by class, gender, and race.¹¹⁹ While using the tax code for antipoverty policy expands the definition of who gets to belong to the political community of citizens, tax-based social policy still implicates that fundamentally exclusive concept and implies that people who, often by reason of income or race or other disadvantage, do not qualify to participate, also do not deserve benefits. As a result, we are missing a program that's actually targeted at including the excluded. That leaves a hole in the social-policy landscape.

Welfare and other direct-spending antipoverty programs, are tailored, for better or worse, toward the genuinely disadvantaged in this country.¹²⁰ Benefits were available not as part of a quid pro quo for active citizenship, but because the U.S. decided that it should give particular help to people of particular need.¹²¹ The way to qualify for direct-spending anti-poverty programs was to demonstrate need. The fact that welfare is not universal and is instead targeted at people outside of the U.S. dominant race and class is arguably why welfare became unpopular, and why legal and political elites were so determined to erect legal and administrative barriers to entry. The U.S. replaced it with tax

(referring to tax return filing “as a valuable civic ceremony should be attractive to those who subscribe to a fairly wide range of republican or liberal political theories.”).

118. *See id.* (“The filing requirement also promotes the goal of political equality . . . by recognizing and formalizing the status of each tax return filer as a taxpayer—whether her tax liability happens to be \$1 or \$1 million.”).

119. Discussion of this point has been going on for millennia, but for two recent examples in the U.S. context, see Kenneth L. Karst, *Belonging to America, Equal Citizenship and the Constitution*, 43–49 (1989); Eileen Boris, *The Racialized Gendered State: Constructions of Citizenship in the United States*, 5 *SOC. POL.* 160, 165 (1998).

120. *See, e.g.*, 42 U.S.C. § 601 2018 (“The purpose of this part is to increase the flexibility of States in operating a program designed to . . . provide assistance to needy families . . .”).

121. *See id.* (same).

anti-poverty programs that are more popular, and legally and administratively more user-friendly perhaps because they are not tailored toward the most disadvantaged.

That raises several practical problems for the tax antipoverty programs. For one, the US has plenty of people living in extreme poverty who need help and are not getting it from these programs.¹²² For another, the tax-based social welfare programs distribute massive benefits to people who are not in fact in need.¹²³ Through these programs, the government is expending substantial resources on benefits for middle- and upper-income individuals¹²⁴. If the cost of an antipoverty program really now has to include major outlays on the nonpoor, that makes these programs much more expensive to run. On a moral rather than a practical level, I also find it disquieting to note that the U.S. is particularly willing and able to support a social-policy apparatus when it is not explicitly targeted toward the people most in need, many of whom are quite different in identity from the white middle-income voters who answer public opinion polls and the politicians who represent them. Directing low-income people through the tax return process to claim benefits may reassure members of dominant groups: Low-income people, they are just like us! But our goal as a society, I think, should be to offer relief even to people who are not like us.

The race angle perhaps puts the problem into starkest relief. The rise of the tax antipoverty programs and the fall of direct-spending programs means the fall of programs that racial groups take advantage of in equal measure and the rise of programs that are majority white.¹²⁵ But I can put the same

122. See Tahk, *supra* note 3, at 839 (discussing work requirements that accompany certain antipoverty provisions, which prevent many families in extreme poverty from benefiting from these tax programs).

123. See *What is the Child Tax Credit?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-child-tax-credit> (last visited Mar. 1, 2019) (stating that the families receiving the Child Tax Credit are highest among moderate and middle income families, and that the proportion of families in the highest income quintile receiving the CTC is 87%) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

124. See *id.* (stating that families in the lowest income quintile are less likely to benefit for the child tax credit than middle- and high-income families).

125. See Murray & Kneebone, *supra* note 42 (showing that about half of EITC eligible taxpayers are white).

problem in economic terms: We took away a program that was for low-income people and replaced it with programs that are available across the income ladder. As a practical result, some of the most disadvantaged members of U.S. society materially lose out, because they do not qualify for the tax antipoverty programs.¹²⁶ Even if we could – and as I have argued elsewhere, should—refine the tax antipoverty programs so that they reach even Americans with very low incomes, to the extent the increasingly tax-based U.S. social policy landscape continues to diverge from traditional welfare programs, the discourse around it reduces the salience of many of the U.S.’s most marginalized people and elides the question of what we as a society might owe them.¹²⁷

Then, to take a different normative question, how do these predictions about the future of tax anti-poverty policy affect what we do, as scholars and also as advocates, for clients sometimes, and also for a better system? I am not the most experienced scholar or advocate in the room, so I have more to learn from you than you from me. All I want to say is that the long-range perspective remains important. While, the direct-spending programs often serve as a negative foil in my work, one of the best moments I have had as a researcher was a fall morning two Octobers ago this year, reading about the history of the welfare-rights movement, and how the grassroots activists and lawyers behind that movement attempted to use their cases, and their systemic advocacy to enshrine in case law their robust view of social citizenship.¹²⁸ They started with the problems of the poorest welfare recipients and from there, developed a fully imagined picture of a legal system dedicated to protecting social and economic rights.¹²⁹ A lot of what the welfare rights movement did was not successful, and we might

126. See Tahk, *supra* note 3, at 839 (stating that many of the most extreme impoverished families are prevented from taking advantage of tax antipoverty programs due the fact that taxpayers who do not work often do not file tax returns).

127. See *id.* (“[T]o this day, the tax war on poverty has not seriously attempted to tackle deep poverty, and lawmakers should start to step into this gap.”).

128. See generally MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–1973 (1993).

129. See generally *id.*

not agree with everything it tried to accomplish. But today, still near the beginning of what I predict will be the tax code's long antipoverty history, we have the opportunity, as the welfare rights advocates did, to shape the long-term futures of the programs we care about, to avoid the pitfalls of the direct-spending programs, and to use all of this work to make major changes not just to the workings of these programs, but to concepts foundational to the legal system.