

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

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*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 toward 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-19 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. The ARPA's expanded parental tax benefits were only available in 2021 and have now expired, leaving parents back where they started. And while it initially appeared that the "Build Back Better Act" would resurrect many of these benefits, Congress ultimately let them all lapse. Because the ARPA was born in a crisis, there is a danger that this fleeting legislation will be viewed as having little historical relevance beyond the emergency context in which it was enacted. I resist this narrative and create a counter one. By situating the ARPA within a broader historical context, an alternative narrative is developed—one where the ARPA's expansion of parental tax benefits enacted long overdue adjustments that began to correct the distributionally problematic way in which America has historically favored some families over others.*

*Preserving this historical narrative is imperative. It underscores the alarming failure of Congress to extend any of the ARPA's parental tax benefits. And even more importantly, the narrative of inequitable tax reform developed in this project—supported by history—should ground imminent conversations that will shape the future of how parents in America are taxed. The parental tax*

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*benefits effectuated in the Tax Cuts and Jobs Act amplified Congress's inequitable treatment of families and favoritism towards nonpoor, one-breadwinner families. These benefits, however, will expire at the end of 2025, providing a date certain on which Congress must revisit its method of taxing parents. During these imminent 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.*

## TABLE OF CONTENTS

INTRODUCTION .....	755
I. AMERICA'S DISTRIBUTIONALLY PROBLEMATIC HISTORY OF TAXING	
NONPOOR PARENTS .....	759
A. FAVORITISM AND NEGLECT: THE NONREFUNDABLE PORTIONS OF THE CHILD TAX CREDIT AND WORKING CHILDCARE BENEFITS .....	760
1. The "Golden Child": The Nonrefundable Portion of the Child Tax Credit .....	760
2. Working Childcare Benefits for Nonpoor Parents: Outright Neglect .....	765
B. DISTRIBUTIVE CONCERNS RAISED BY CONGRESS'S PREFERENTIAL BENEFITS .....	769
C. A SEGUE .....	773
D. TINKERING WITH STATUTORY RATES .....	773
1. Benefits for Unmarried Parents Made Dependent on Benefits for (Even Childless) Married Couples that File Joint Returns .....	774
a. Head of Household Benefits .....	775
b. MFJ Income Splitting Benefits & Parental Adjacency....	777
2. Tinkering With the Zero Bracket Amount.....	784
E. SUMMARY OF INEQUITABLE TAX BENEFITS FOR NONPOOR PARENTS.....	786
II. THE SCAPEGOAT: REFUNDABLE TAX BENEFITS FOR RELATIVELY POOR	
PARENTS .....	786
A. THE EARNED INCOME TAX CREDIT ("EITC").....	788
B. REFUNDABLE CHILD TAX CREDITS FOR POOR PARENTS .....	791
C. REFUNDABLE WORKING CHILDCARE BENEFITS .....	794
D. REFUNDABILITY SUMMARY .....	795
E. REFUND RHETORIC & DISTRIBUTIONAL ISSUES .....	795
F. SUMMARY OF CONGRESSIONAL PREFERENTIALISM.....	799
III. AMERICAN RESCUE PLAN ACT: FLEETING REFORM THAT SHOULD NOT BE FORGOTTEN .....	799
A. CONGRESS'S FAVORITE: THE NONREFUNDABLE PORTION OF THE CHILD TAX CREDIT (EXPANDED, AS USUAL) .....	800
B. NONPOOR, WORKING CHILDCARE BENEFITS: A BREAK FROM THE NEGLECT .....	802
1. Child and Dependent Care Tax Credit (Nonrefundable Portion) .....	802
a. Increased Dollar Caps on Employment-Related Expenses .....	802

b. Increased Applicable Percentage and Income Phase-Outs .....	803
2. Dependent Care Exclusion .....	805
3. Summary of Expansions to the Nonrefundable Portion of Working Childcare Benefits .....	805
C. ARPA DIDN'T TINKER .....	806
D. HISTORICALLY SIGNIFICANT CHANGES TO REFUNDABLE PARENTAL TAX BENEFITS .....	806
E. ARPA, RIP .....	808
IV. THE ARPA'S AFTERMATH & NAVIGATING A POST-TCJA WORLD .....	809
A. THE ARPA'S IMMEDIATE AFTERMATH .....	809
1. Failure to Rescue, No Less Build Back Better .....	809
2. Tax Relief for American Families and Workers Act (2023 to 2025) .....	810
B. 2025 AND BEYOND .....	812
1. Bracket Parameters with Intent .....	813
2. Childcare Needs to Plant Itself as an Elephant in the Room .....	815
a. Inflation, Inflation, Inflation .....	815
b. The Benefits Need to be Kept Straight .....	816
c. Realize the States are Watching .....	816
3. Emancipate Parental Tax Benefits from Parental Adjacent Guardians .....	817
4. <del>Retiring</del> Reclaiming Refund Rhetoric .....	818
CONCLUSION .....	819

## INTRODUCTION

America has never made it particularly easy to be a parent.<sup>1</sup> 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.<sup>2</sup> 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<sup>3</sup> as being over- and under-inclusive,<sup>4</sup> overly complex,<sup>5</sup> gendered,<sup>6</sup> heteronormative,<sup>7</sup> classed,<sup>8</sup> and raced.<sup>9</sup>

Congress has, over the years, enacted a somewhat dizzying (which is not to say generous) array of tax benefits for parents. But when Congress alters parental tax benefits, it follows a predictable pattern, enthusiastically expanding some benefits while neglecting others. This “benefits preferentialism,” in turn,

1. See, e.g., Kendra Hurley, *The U.S. Leaves Parents on Their Own for a Reason*, ATLANTIC (June 15, 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. *Id.*; see also Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <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*, 53 GA. L. REV. 1093, 1150 (2019).

4. See, e.g., Keeva Terry, *Divorce Without Marriage: Taxing Property Transfers Between Cohabiting Adults*, 89 U. CIN. L. REV. 882, 891 (2021); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 614–15 (2010).

5. See, e.g., Amir El-Sibaie, *Illustrating the Earned Income Tax Credit’s Complexity*, TAX FOUND. (July 14, 2016), <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, 484 (1983); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 52 (1971); EDWARD J. MCCAFFERY, *TAXING WOMEN* 11 (1997).

7. See, e.g., Infanti, *supra* note 4, at 611–12; Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 132 (1998).

8. See, e.g., Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 810 (2007) [hereinafter Brown, *Race and Class Matters*]; Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755, 765 (2005) [hereinafter Brown, *Separate but Unequal*].

9. See, e.g., *supra* note 8; ARIEL JUROW KLEIMAN, AMY K. MATSUI & ESTELLE MITCHELL, NAT’L WOMEN’S L. CTR., *THE FAULTY FOUNDATIONS OF THE TAX CODE: GENDER AND RACIAL BIAS IN OUR TAX LAWS* 6 (2019) (examining the outdated assumptions and gender and racial biases embedded in the United States tax code, and highlighting 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).

reflects consistent favoritism toward nonpoor, one-breadwinner families—that is, 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.<sup>10</sup> Meanwhile, Congress neglects benefits that can help nonpoor, working parents defray the substantial childcare costs they must incur to earn income, but that one-breadwinner families can avoid.<sup>11</sup> Congress exhibits open hostility toward expanding refundable benefits for poor parents, making them less generous than those available to nonpoor parents.<sup>12</sup> This sticky benefits preferentialism and consistent favoritism toward nonpoor, one-breadwinner families raises a host of distributional concerns.<sup>13</sup>

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.<sup>14</sup> Signed into law on March 11, 2021, the American Rescue Plan Act (the “ARPA”)<sup>15</sup> provided much-needed relief to families attempting to maintain jobs and care for children during one year of 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.<sup>16</sup> But it also made a myriad of historically significant adjustments that broke out of Congress’s traditional patterns, expanding childcare tax benefits aimed at nonpoor, working families (such as dual-earning and solo parents but not one-breadwinner families), which it has traditionally neglected, and even benefits for poor parents, towards which it has been historically hostile.<sup>17</sup>

This deviation from the historical norm, however, was all short-lived. These expanded tax benefits have now expired, reverting the Code back to its pre-

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10. See generally *infra* Subpart.I.A (discussing “benefits preferentialism,” the bias favoring nonpoor, one-breadwinner families, where one parent works for income while the other manages unpaid household labor).

11. See *infra* Subpart.I.A.2.

12. See *infra* Part.II.

13. See *infra* Subpart.I.B, II.E.

14. Anna North, *The Problem Is Work*, VOX (Mar. 15, 2022, 8:00 AM PDT), <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.”). *Joe Biden’s Plan to Build Back Better for American Workers*, BIDEN HARRIS, <https://joebiden.com/joe-bidens-plan-to-build-back-better-for-american-workers/> (last visited Apr. 1, 2025) (now defunct and comically informs the reader that they have “found dark Brandon”).

15. American Rescue Plan Act of 2021, H.R. 1319, 117th Cong., Pub. L. No. 117-2, 135 Stat. 4); see also *FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. DEP’T. OF TREAS. (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families> [hereinafter *FACT SHEET*].

16. *FACT SHEET*, *supra* note 15.

17. See *infra* Part.III.

pandemic state.<sup>18</sup> And while there initially seemed to be strong momentum towards resurrecting the ARPA's expansions, these hopes are now extinguished<sup>19</sup>—not a single expansion was extended. Admittedly, the chain of events that led to the ARPA's momentary expansion of parental tax benefits was chaotic on many levels. The legislation was born in an emergency and expired before the World Health Organization declared that COVID-19 no longer constituted a public health emergency of international concern.<sup>20</sup> And negotiations that might have revived these benefits were, to put it mildly, non-linear and, to put it bluntly, dysfunctional.<sup>21</sup> Because the ARPA was born in a crisis, there is a danger that this fleeting legislation will be viewed as having little historical relevance beyond the emergency context in which it was enacted.

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,<sup>22</sup> 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, many of which scholars and lawmakers have discussed for decades.<sup>23</sup> In fact, the enactment of even one of these tax benefits—no less so many of them—has almost entirely eluded advocates. By providing this context, a more grounded

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18. See, e.g., Deepa Shivaram, *The Expanded Child Tax Credit Expires Friday as Congress Fails to Renew It*, NPR (Dec. 30, 2021, 2:03 PM ET), <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 the Act's 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 NEWS (Feb. 1, 2022, 3:48 PM EST), <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 tax benefits out completely for parents.

20. Expanded parental tax benefits in ARPA expired at end of 2021. *Child Tax Credit*, U.S. DEP'T OF TREAS., <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/child-tax-credit> (last visited Apr. 1, 2025). In May 2023, WHO declared that COVID-19, while still "an established and ongoing health issue[.]" was "no longer [] a public health emergency of international concern (PHEIC)." *Statement on the Fifteenth Meeting of the IHR (2005) Emergency Committee on the COVID-19 Pandemic*, WORLD HEALTH ORG. (May 5, 2023), [https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic).

21. See *infra* Subpart IV.A.1; see also Chris Stirewalt, *Build Back Better Gets the Zombie Treatment*, THE DISPATCH (Oct. 9, 2022), <https://thedispatch.com/p/build-back-better-gets-the-zombie>.

22. See, e.g., Weeks McCormack, *supra* note 3, at 1097; Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559, 560 (2016); Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed out Mom*, 105 GEO L.J. 1323, 1324 (2017); Shannon Weeks McCormack, *Caregivers and Tax Reform: Before and After Snapshots*, 40 VA. TAX. REV. 53, 57 (2020) [hereinafter Weeks McCormack, *Caregivers and Tax Reform*]; Shannon Weeks McCormack, *Taxing Parents: Welfarist Theories*, 46 BYU L. REV. 85, 90 (2020).

23. In particular, lawmakers and scholars have argued for increased refundability for benefits discussed throughout this article. See Brown, *Separate but Unequal*, *supra* note 8, at 784–85; Weeks McCormack, *supra* note 3, at 1141–42. Pamela Gann discusses dual earner deduction and fact that dual earners incur more expenses than sole earners and produce less imputed income but nonetheless have very similar statutory incomes, and therefore tax liabilities. Pamela B. Gann, *Earned income deduction: Congress' 1981 response to the marriage tax penalty*, 68 CORNELL L. REV. 468, 471–75 (1983).

narrative emerges, revealing that the ARPA's expansion of parental tax benefits enacted a series of long overdue adjustments that began 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 historical narrative of the ARPA is imperative. First, it underscores the alarming failure of Congress to extend any of the ARPA's parental tax benefits.<sup>24</sup> Second, the narrative of inequitable tax reform developed in this project—supported by history—should 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 enacted a panoply of parental tax benefits that amplified Congress's inequitable treatment of families and favoritism towards nonpoor, one-breadwinner families, and these benefits expire at the end of 2025. This provides a date certain on which Congress must revisit its method of taxing parents. The historical account preserved in this piece can inform and ground these inevitable conversations in critical ways.<sup>25</sup> Finally, turning to the longer term, memorializing the ARPA can help maintain a broader narrative of America's tepid approach toward parents: a story of inequitable, incremental, and glacially paced tax "reform."<sup>26</sup>

This project proceeds as follows. Part I discusses America's distributionally problematic history of taxing nonpoor parents, in which Congress enthusiastically expands certain benefits well beyond what is required to keep pace for inflation. Meanwhile, benefits that could help working parents defray high childcare and other work-related costs are neglected, resulting in a valorization of nonpoor, one-breadwinner families and raising a host of distributional concerns. Part II discusses America's even more problematic history of taxing poor parents, in which Congress exhibits (often explicitly voiced) hostility toward allowing poor parents to claim the same benefits as nonpoor parents, subjecting the former group to additional requirements and limits. Part 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-breadwinner families and addressing some of these distributional concerns. However, as Part IV will explain, even the COVID-19 pandemic could not change Congress's ways for long, and America has already reverted to its original, inequitable manner of taxing (and treating) parents. Part IV discusses the importance of preserving the historical

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24. The ARPA's narrative also provides context for recently proposed but ultimately failed expansions passed by the House of Representatives in the Temporary Relief for American Families and Workers Act. Despite making grand headlines, provoking predictable objections and ultimately perishing in the Senate, these changes would have constituted a remarkably modest step towards treating poor parents similarly to nonpoor parents. *See infra* Subpart.IV.A.2.

25. *See infra* Subpart.IV.B.1.

26. *See infra* Subpart.IV.B.2.



account found in the previous Parts, how this account should inform the inevitable discussions that will occur in 2025 when the parental tax benefits enacted through the TCJA expire, 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 NONPOOR PARENTS

To properly memorialize the ARPA's temporary parental tax reforms, we must situate its fleeting changes within a broader historical context. This Part will survey America's distributionally problematic history of taxing nonpoor parents (to be better defined below). But before beginning this historical discussion, I would like to say a few words about how the United States 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 likely 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.<sup>27</sup>

America, however, does not generally provide direct aid. For those in or near poverty, there are some means-tested public assistance programs that offer directly transferred aid.<sup>28</sup> These include programs like the Supplemental Nutrition Assistance Program ("SNAP")<sup>29</sup> and the Temporary Assistance for Needy Families ("TANF") program.<sup>30</sup> 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 toward understanding the entire parental support system offered by the United States federal government.

I have written extensively about the history of our parental tax laws in precise detail in other work.<sup>31</sup> Here, I would like to synthesize that scholarship

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27. See, e.g., *Family Benefits*, YOUR EUR. (Apr. 9, 2024), [https://europa.eu/youreurope/citizens/work/unemployment-and-benefits/family-benefits/index\\_en.htm](https://europa.eu/youreurope/citizens/work/unemployment-and-benefits/family-benefits/index_en.htm).

28. *About Program Income and Public Assistance*, U.S. CENSUS BUREAU (May 12, 2023), <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.").

29. See *How to Apply for Food Stamps (SNAP Benefits) and Check Your Balance*, USA GOV (Jan. 3, 2025), <https://www.benefits.gov/benefit/361>.

30. See *Welfare Benefits or Temporary Assistance for Needy Families (TANF)*, USA GOV (Jan. 3, 2025), <https://www.benefits.gov/benefit/613> ("Temporary Assistance for Needy Families (TANF) is a federally funded, state-run program. Also known as welfare, TANF helps families pay for: Food; Housing; Home Energy; Child Care."); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1867 (2005).

31. See Weeks McCormack, *supra* note 3, at 1093.

and develop a narrative grounded in historical context to counter the narratives repetitively raised in past and present discourses about taxing parents.

We begin with the parental tax benefits available to nonpoor parents (that is, nonrefundable benefits). Here, we find a story of favoritism and neglect. The Code has several “parental tax benefits” which have different eligibility requirements—for example, these benefits are available to different (though sometimes partially overlapping) subsets of nonpoor parents.<sup>32</sup> But while Congress created all these benefits, it favors some greatly over others, reflecting a favoritism for nonpoor, one-breadwinner families.

#### 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 favoritism toward nonpoor, one-breadwinner families—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-breadwinner families”).

This Part will now discuss the various benefits available to nonpoor parents, starting with Congress’s most favored benefit—its “golden child”—the nonrefundable portion of the Child Tax Credit.

##### 1. *The “Golden Child”: The Nonrefundable Portion of the Child Tax Credit*

Congress really likes a benefit it created in the late 1990s, located in section 24 of the Code.<sup>33</sup> It is called the Child Tax Credit (“CTC”). But we need to be more specific. Congress really likes the *nonrefundable portion* of the CTC benefit (hereinafter “NRP-CTC”)—that is, the portion of the CTC benefit available to parents who earn enough income to have positive tax liabilities (hereinafter, “relatively nonpoor parents” or “nonpoor parents”).<sup>34</sup> 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

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32. *Tax Information for Parents*, IRS (Nov. 29, 2024), <https://www.irs.gov/individuals/parents>.

33. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 796 (codified as amended at I.R.C. § 24). For more history on the Child Tax Credit (CTC), see Jennifer McGroarty, Note, *Time for the Child Tax Credit to Grow Up: Preserving the Credit’s Availability and Enhancing Benefits for Families*, 2 COLUM. J. TAX L. 301, 306–10 (2011).

34. See, e.g., Weeks McCormack, *supra* note 3, at 1146 (chronicling history of CTC and Additional Child Tax Credit (ACTC)); MARGOT L. CRANDALL-HOLLIICK, CONG. RSCH. SERV., R45124, THE CHILD TAX CREDIT: LEGISLATIVE HISTORY 2 (2021).

(hereinafter, “relatively poor parents” or “poor parents”).<sup>35</sup> 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).<sup>36</sup> 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 (such as minor dependent children living in one’s household).<sup>37</sup> 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”—that is, families with two parents sharing the responsibilities of caregiving and earning income outside the home—and to nonpoor “solo parent families”—that is, families in which one parent bears the main or entire responsibility of caring for children and earning income. Of course, these types of families might incur substantial childcare and other work-related costs in order to earn income outside the home.

But the CTC does not differentiate based on these costs, which is why this benefit is Congress’s golden child. It is equally available to nonpoor, one-breadwinner families, just defined above. It is even available to nonpoor, “no-earner families”—that is, 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’s 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.<sup>38</sup> At this time, “it was a relatively modest nonrefundable tax credit for middle-income families with children.”<sup>39</sup> The credit (which was completely unavailable to poor parents with negative tax liabilities) was set at \$400 per child in 1998 and \$500 per child after that year.<sup>40</sup>

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35. I.R.C. § 24(d).

36. *See, e.g., Gann, supra* note 6, at 470 (“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.”).

37. I.R.C. § 24(a)–(c) (requiring only existence of qualifying child to claim).

38. § 101, 111 Stat. at 796.

39. CRANDALL-HOLLICK, *supra* note 34.

40. *See Weeks McCormack, supra* note 3, at 1146.

However, just four years after its enactment, The Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) increased the nonrefundable portion of the credit from \$500 to \$600 for tax years 2001 to 2004.<sup>41</sup> This more than adjusted for inflation.<sup>42</sup>

The original idea under EGTRRA was to gradually ratchet up the CTC in the years preceding 2004 so that the NRP-CTC would reach \$1,000 per child in 2010. But Congress did not wait that long and accelerated the process, so by 2004 the nonrefundable portion of the child tax credit was up to \$1,000 per child.<sup>43</sup> This increase was far more than required to adjust for inflation.<sup>44</sup>

Then comes the Tax Cuts and Jobs Act (“TCJA”), effective for tax years 2017 to 2025. Here, Congress fully doubled the nonrefundable portion of the child tax credit from \$1,000 to \$2,000 per child.<sup>45</sup> This again, far more than outpaced what inflation adjustments would require. The NRP-CTC was last increased in 2004 to \$1,000. To adjust for inflation since that time, Congress would have only had to increase the amount to about \$1,300.<sup>46</sup> If Congress were adjusting the original \$400 credit enacted for tax year 1998, the NRP-CTC would only need to be set around \$613.<sup>47</sup>

To better understand the mechanics of the nonrefundable portion of the child tax 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 modified adjusted gross income of \$100,000, 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 (\$4,000 total) for a final

41. Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L. 107-16, § 201, 115 Stat. 38, 45 (codified at I.R.C. § 24(a)) [hereinafter EGTRRA].

42. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Apr. 1, 2025). I use this calculator to provide rough estimates needed to make general comparisons, whose general patterns hold even if slightly different time periods are used. For instance, \$500 on January 1999 (the year Taxpayer Relief Act was enacted) is, according to this calculator, has the same buying power of about 530 \$550 in January 2001 and about \$560 in January 2004. Alternative formulations (e.g., last day of each of these years, first day of tax year law took effect) would obviously lead to different dollar comparisons but don’t undermine general points.

43. CRANDALL HOLICK, *supra* note 34 (“Many of the scheduled changes in EGTRRA were accelerated by subsequent legislation, namely the Jobs and Growth Tax Relief Reconciliation Act (JGTRRA; P.L. 108-27) and the Working Families Tax Relief Act (WFTRA; P.L. 108-311). Because of these accelerations, by 2004, the credit was \$1,000 per child, with the credit amount phasing in for low-income families at 15% of earned income above \$10,000 (this amount was indexed annually for inflation).”).

44. INTERNAL REVENUE SERV., FS-2003-13, ADVANCE CHILD TAX CREDIT PAYMENTS (2003); *IRS Releases Inflation Adjusted Tables for 2004*, TAXNOTES (Nov. 19, 2003), <https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/irs-releases-inflation-adjusted-tables-for-2004/dp9h>. For instance, according to the Bureau of Labor Statistics CPI calculator, \$500 in January 1999 had the same buying power as about \$560 in January 2004.

45. I.R.C. § 24(h); *see* Rev. Proc. 2018-57, 2018-49 I.R.B. 827.

46. *CPI Inflation Calculator*, *supra* note 42. \$1000 in January 2004 has the same buying power as \$1,311.23 in January 2017 and \$1338 in January 2018. \$400 in January 1998 has the same buying power as about \$613 in January 2018 (2018 is year TCJA first applied).

47. *Id.* \$500 has the same buying power in January 1997 as \$763.16 in Jan 2017 and \$778.97 in January 2018.

tax liability of \$21,000 (\$25,000 less the \$4,000). The nonpoor 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 nonpoor parents engage in paid labor, the NRP-CTC does diminish once modified adjusted gross income (MAGI) exceeds a designated amount (the MAGI phase-out threshold).<sup>48</sup> Since its enactment in 1997 and until the TCJA, the phase-out began once MAGI hit \$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 Part I.C).<sup>49</sup> Once MAGI exceeds 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 so long as MAGI did not exceed \$110,000.<sup>50</sup> But after that point, the credit phased down in \$50 increments until it was lost completely to those MFJs with MAGI above \$130,000. 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).<sup>51</sup>

Unlike the actual credit amount, which has ratcheted up well beyond what inflation required, these phase-out 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 1998 (first year The Taxpayer Relief Act took effect) and 2018 (when the TCJA took effect), it would have increased the MAGI phase-out threshold to about \$170,000 for MFJs and \$115,000 for HHs, respectively.<sup>52</sup>

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 phase-out thresholds—while the TCJA is in effect, the NRP-CTC is available to married couples filing joint returns until MAGI reaches \$400,000, and for unmarried parents, the full credit is available until MAGI exceeds \$200,000.<sup>53</sup> This \$400,000 marker appears to be a flash point for various politicians,<sup>54</sup> but we do not have to enter this debate to see that this MAGI threshold extends the

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48. I.R.C. § 24(b)(1).

49. *Id.* § 24(b)(1)–(2).

50. CRANDALL-HOLLYCK, *supra* note 34, at 5.

51. GLORIA GUZMAN & MELISSA KOLLAR, U.S. CENSUS BUREAU, P60-279, CURRENT POPULATION REPORTS: INCOME IN THE UNITED STATES: 2022, at 1 (2023).

52. *CPI Inflation Calculator*, *supra* note 42. \$110,000 in January 1998 has the same buying power as about \$170,000 in January 2018. \$75,000 in January 1998 has same about buying power as \$115,000 in January 2018.

53. I.R.C. § 24(h)(3).

54. Robert Frank, *Biden Defines \$400,000 a Year as ‘Wealthy’: Here’s What That Buys in a Big City*, CNBC (Oct. 6, 2020, 5:37 PM EDT), <https://www.cnbc.com/2020/10/06/biden-defines-400000-a-year-as-wealthy-how-far-it-goes-in-a-city-.html> (“By national measures . . . [those earning or otherwise receiving over \$400,000] . . . belong to a rarified group . . . [and] represent the top 1.8 [percent] of taxpayers, earning about 25 [percent] of the nation’s income.”).

full child tax credit to taxpayers at a much higher echelon than was previously the case.<sup>55</sup>

The takeaway from this brief tour of history is the following: The nonrefundable portion of the CTC has Congress's 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 phase-out ranges to make the full credit available to far more nonpoor parents, excluding only those with MAGI over \$400,000 and \$200,000 for MFJ and unmarried taxpayers, respectively). Further, except for when the ARPA's temporary benefits expired (to be discussed later), Congress has never decreased benefits under the CTC or lowered phase-out thresholds (though it did fail to adjust these thresholds for inflation for quite some time).

As will be discussed more in Part III, this pattern is about to be tested—the TCJA's dramatic expansion of the NRP-CTC expires at the end of 2025.<sup>56</sup> Therefore, as will be discussed more in Part 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 substantially as it returns to pre-TCJA levels. When the TCJA expires, the NRP-CTC reverts back to half value (\$1,000 per child) and the phase-out range will decrease dramatically, significantly reducing the number of parents that can claim the full (or any) CTC.<sup>57</sup>

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 (such as dual-earner families 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”—that is, benefits that are available only to dual-earner families 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 completely neglected them.

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55. Daniel de Visé, *A Strong Economy Means More Americans Are Earning \$400k. What's It Mean for Their Taxes?*, USA TODAY (Mar. 31, 2024), <https://www.usatoday.com/story/money/2024/05/31/400000-tax-hike-more-americans-affected/73890456007>. Between 2019 and 2023, the number of American households earning more than \$400,000 swelled by nearly half, from 2.6 million to an estimated 3.8 million out of roughly 131 million households. The figures come from census data compiled by the Economic Innovation Group, a public policy think tank based in Washington, D.C.

56. I.R.C. § 24(h); Noah Peterson, *The Short Form: Parts of the TCJA Are Expiring Soon, Here's What That Means for You*, TAX FOUND. (Dec. 1, 2023), <https://taxfoundation.org/blog/tcja-expiring-means-for-you>.

57. *Id.*

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

Many developed countries provide working parents access to governmentally provided childcare at relatively low cost.<sup>58</sup> The United States is not one of these countries.<sup>59</sup> Instead, childcare in the United States is almost entirely privatized, difficult to find, and is extremely expensive.<sup>60</sup> In fact, it is often one of the highest costs in a household budget.<sup>61</sup>

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 largely neglected these benefits for decades, allowing them to deflate in value dramatically.<sup>62</sup>

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).<sup>63</sup> All nonpoor, working parents who incur these expenses can claim some benefit under the nonrefundable portion of the Child and Dependent Care Credit ("NRP-CDCC" or "working childcare credit").<sup>64</sup> 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 percent to 20 percent, depending on the family's income.<sup>65</sup> But because the phase out is so fast, almost all parents will end up receiving credit for only 20 percent of their expenses (subject to another limitation to be discussed soon).

How fast? Remember how the NRP-CTC (Congress's golden child) began to phase out once MAGI hit \$110,000 for MFJs and \$75,000 for HHs, respectively, and how the TCJA nearly quadrupled those thresholds so that all parents could fully benefit until MAGI exceeded \$400,000 and \$200,000 for MFJ and UM taxpayers, respectively?

The phase out for the working childcare credit (or NRP-CDCC) available to working parents (but not one-breadwinners) which helps defray the cost of

58. See, e.g., *Paid Family Leave Across OECD Countries*, BIPARTISAN POL'Y CTR. (Sept. 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.").

59. *Id.*

60. Christin Landivar, *New Childcare Data Shows Prices Are Untenable for Families*, U.S. DEP'T OF LAB. BLOG (Jan. 24, 2023), <https://blog.dol.gov/2023/01/24/new-childcare-data-shows-prices-are-untenable-for-families>.

61. *Id.*

62. See Weeks McCormack, *supra* note 3, at 1163.

63. I.R.C. § 21 (a)(2) (creating a 20% floor for percentage credit phaseout, so that all qualifying parents may claim at least a 20% credit for allowable expenses); I.R.C. § 129 (containing no phase out, so that all qualifying parents with positive taxable income can claim).

64. *Id.*

65. *Id.* § 21(a)(2).

childcare, is, to put it mildly, quite a bit different. The 35 percent starts to phase down once a family earns adjusted gross income (AGI) of—wait for it—\$15,000 and bottoms out at 20 percent once AGI exceeds \$43,000. This is nowhere close to the median income for present families.<sup>66</sup> In fact, the poverty line for a family of four in 2025 is \$32,150.<sup>67</sup>

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<sup>68</sup> and \$6,000 for two or more children.<sup>69</sup> This represents a small fraction of the annual childcare costs many working parents can be expected to incur.<sup>70</sup>

When the dust clears, the maximum credit (available to working parents with AGI under \$43,000) is \$1,050 for one child and \$2,100 for two or more children. And for almost all working parents (all those with AGI over \$43,000) the maximum credit for one child will be \$600 (20% times \$3,000) and for two or more children, \$1,200 (20% times \$6,000).<sup>71</sup>

How did this benefit become so ungenerous? In previous work, I have chronicled the full history of this working childcare credit.<sup>72</sup> But the short answer is this: It happened because of sheer neglect. In the 1970s and 1980s, as more nonpoor, white women began to engage in paid labor after they had children (women of color and those of low means had long been doing so), Congress greatly liberalized the benefits available to working parents who incurred childcare costs to work outside the home.<sup>73</sup> 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.<sup>74</sup>

But after the 1980s Congress only once adjusted the dollar cap discussed above in 2001, and then never again (not even for inflation, no less for changed circumstances such as skyrocketing childcare costs). Here is the short 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

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66. *Income in the United States: 2023*, U.S. CENSUS BUREAU (Sept. 10, 2024), <https://www.census.gov/library/publications/2024/demo/p60-282.html#:~:text=Highlights,median%20household%20income%20since%202019>.

67. *Poverty Guidelines*, HHS: OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines> (last visited Apr. 1, 2025).

68. I.R.C. § 21(c)(1).

69. *Id.* § 21(c)(2).

70. See Landivar, *supra* note 60.

71. I.R.C. §§ 21(a)(2), 21(c).

72. Weeks McCormack, *supra* note 3, at 1104.

73. *Id.* at 1100–01; see also Economic Recovery Tax Act of 1981, Pub. L. No 97-34, § 124(a), 95 Stat. 172, 197–98 (codified at I.R.C. § 21).

74. See Weeks McCormack, *supra* note 3, at 1101.



multiple children. This adjustment did not even fully reflect inflation between 1981 and 2001.<sup>75</sup>

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,<sup>76</sup> but its story similarly leads 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<sup>77</sup> and allows a taxpayer to exclude a portion of taxable income if, but only if, their employer (the parent must be an employee) actually provides a childcare option like on-site daycare (which few do) or, more commonly, the employer has gone through the task of establishing a qualified dependent care assistance plan (“DCAP”) for their employees.<sup>78</sup> In the latter instance, parents may elect to divert a portion of their pre-tax salary into the DCAP plan,<sup>79</sup> 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, since 1986 “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.”<sup>80</sup>

But what about 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

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75. *Id.* at 1134.

76. One cannot double up on this benefit and the Child and Dependent Care Credit—if properly advised, one will choose the one that maximizes tax savings. I.R.C. § 21(c) (noting the amount determined under paragraph (1) or (2) (whichever is applicable) shall be reduced by the aggregate amount excludable from gross income under section 129 for the taxable year).

77. I.R.C. § 129(a)(2).

78. *Id.*

79. *Topic No. 602, Child and Dependent Care Credit*, IRS (Jan. 2, 2025), <https://www.irs.gov/taxtopics/tc602>.

80. Weeks McCormack, *supra* note 3, at 1134 (internal citation omitted).

life[] . . . .”<sup>81</sup> 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 fully available to all but those whose MAGI exceeded \$400,000 (if MFJ) and \$200,000 (if unmarried), Congress continued its long streak of neglecting tax benefits that allow working families to recover some of the childcare costs incurred to engage in paid labor.<sup>82</sup> Not one adjustment was made under the TCJA.<sup>83</sup>

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 nonrefundable portion of the child tax credit, expanding it relatively frequently and well beyond what is required to keep pace with inflation;<sup>84</sup> at the same time, it has consistently failed to adjust benefits available to nonpoor, 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 that others, especially one-breadwinner families, can avoid).<sup>85</sup> To be clear, childcare costs are only one example of the types of costs one-breadwinner families can avoid or minimize compared to other families that do not have a partner fully available to provide services inside the home.<sup>86</sup> 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, might 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.<sup>87</sup>

This all ends up disproportionately benefitting nonpoor, one-breadwinner families—they benefit from the enthusiastic expansion of the “golden child” benefit—the nonrefundable portion of the Child Tax Credit—while losing

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81. ANDREW SCHWARTZ & GALEN HENDRICKS, CTR. FOR AM. PROGRESS, ONE YEAR LATER, THE TCJA FAILS TO LIVE UP TO ITS PROPONENTS’ PROMISES 2 (2018), <https://www.americanprogress.org/wp-content/uploads/sites/2/2018/12/TCJA-Anniversary-brief1.pdf>.

82. Press Release, Adrian Smith (NE-3), Representative, House of Representatives, Smith: Economic Opportunity for Every American Is What This Country Is All About (Apr. 6, 2022), <https://adriansmith.house.gov/media/press-releases/smith-economic-opportunity-every-american-what-country-all-about> (“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.”).

83. See *supra* Subpart.I.A.1.

84. See *supra* Subpart.I.A.1.

85. See, e.g., Gann, *supra* note 6, at 476.

86. *Id.* at 475–76.

87. *Id.*

nothing by the degradation of the neglected benefits for working childcare expenses (not to mention nonexistent 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'S PREFERENTIAL BENEFITS

Some of the distributive implications of Congress's preferential benefits 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's favorite child tax credit well beyond what was required to reflect inflation.<sup>88</sup> Entitled *We Need Real Tax Reform That Empowers Families*, Rubio wrote the following:

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.<sup>89</sup>

The historical account of favoritism and neglect just developed reveals the speciousness of this narrative. This faux libertarianism has superficial appeal. However, the argument that increasing Congress' golden child benefit—the nonrefundable portion of the child tax credit—creates neutrality among family arrangements fails on its own terms. In order to earn income, working parents—such as dual-earning couples and solo, working parents—incur additional costs that families with a stay-at-home parent avoid. As a result, Congress's consistent pattern of increasing the (“golden”) nonrefundable portion of the 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”<sup>90</sup> 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.

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88. See Marco Rubio, *We Need Real Tax Reform That Empowers Families*, BREITBART (Aug. 3, 2017), <http://www.breitbart.com/big-government/2017/08/03/marco-rubio-we-need-real-tax-reform-that-empowers-families>.

89. *Id.*

90. *Id.*

As Professor Sugin puts it, the Internal Revenue Code reveals that American lawmakers think the “traditional family is best.”<sup>91</sup> 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.”<sup>92</sup>

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.”<sup>93</sup>

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.<sup>94</sup> There are race and demographic components to this erasure. Here is 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 [w]hite, non-Hispanic children and Hispanic children.<sup>95</sup>

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 solo parents [that is, those not cohabiting]] the vast majority (81%) are mothers; only 19 [percent] are fathers. This gender difference is even more pronounced among [B]lack solo parents: 89 [percent] are mothers and just 11 [percent] are fathers.”<sup>96</sup>

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 seem to imagine. Surely, they are theoretically available for some subset of two-parent

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91. Linda Sugin, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 YALE L.J.F. 403, 404 (2018).

92. *Id.* at 405.

93. Rubio, *supra* note 88.

94. See Sugin, *supra* note 91, at 408–09.

95. Paul Hemez & Chanell Washington, *Percentage and Number of Children Living with Two Parents Has Dropped Since 1968*, U.S. CENSUS BUREAU (Apr. 12, 2021), <https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html>.

96. GRETCHEN LIVINGSTON, PEW RSCH. CTR., *THE CHANGING PROFILE OF UNMARRIED PARENTS* 6 (2018), <https://www.pewresearch.org/wp-content/uploads/sites/20/2018/04/Unmarried-Parents-Full-Report-PDF.pdf>.

families that have an earner whose salary alone can support the household (and to some other subset of workers 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.<sup>97</sup>

And really, we have only gotten started. Congress's preferential benefits raise a host of other distributional questions that have complicated and non-static answers given the rapidly changing dynamics of families. For instance, among two-parent families, what are the race implications of favoring one-breadwinner families at the expense of dual-earners? Historically, this bias was likely to disproportionately benefit non-Black families.<sup>98</sup> 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.<sup>99</sup> However, since then, these racial disparities seem to have reduced considerably. For instance, recent data suggest that two-parent, white families utilized the dual-earner model (disfavored by the Code) roughly as often as two-parent, Black families.<sup>100</sup> 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—for example, 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's preferentialism for one-breadwinner families over dual-earner families has gender bias. Historically, many scholars

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97. 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.

Tesa E. Leonce, *The Inevitable Rise of Dual Income Households and Intertemporal Effects on Labor Markets*, 52 COMP. & BENEFITS REV. 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 (that is, 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 Part II. See *infra* Part.II.

98. See, e.g., Howard Hayghe, *Husbands and Wives as Earners: An Analysis of Family Data*, 104 MONTHLY LAB. REV. (SPECIAL ISSUE) 46, 49 (1981) (showing that the incidence of dual earner families was higher in Black families than white and Hispanic families in 1978).

99. See Julie Sullivan, *Comparing Characteristics and Selected Expenditures of Dual- and Single-Income Households with Children*, U.S. BUREAU OF LAB. STAT. (Sept. 2020), <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, *supra* note 97.

100. *Id.*

have argued the taxation of the family disproportionately favors males over females.<sup>101</sup> This scholarship, however, has often relied on aggregate statistics that suggest women are disproportionately the secondary wage earners in two-earner families.<sup>102</sup> 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.<sup>103</sup> However, scholars like Professor Dorothy Brown warn that these arguments obscure historical racial differences.<sup>104</sup> For instance, she points out that, among Black families, Black women have often taken on the role of primary breadwinner.<sup>105</sup> 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.<sup>106</sup>

There are numerous other avenues to explore. One might ask how the preference for one-breadwinner families over dual-earners is enjoyed among opposite sex vis-à-vis same-sex parents?<sup>107</sup> One should notice that the Code’s rigid, 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.<sup>108</sup>

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’s persistent preference for the (“golden”) nonrefundable portion of the child tax credit and simultaneous neglect of benefits for working families that incur additional childcare expenses because a nonwage earner is not fully available to provide unpaid care 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 repeatedly: favoring a one-breadwinner model that fewer and fewer parents are able to use while failing to address the soaring childcare costs many working families incur to earn income.

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101. Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1477 (1997) (surveying this literature).

102. *Id.* at 1474.

103. *Id.* at 1474, 1477.

104. *Id.* at 1471.

105. *Id.* at 1490.

106. Sarah Jane Glynn, *Breadwinner Moms Continue To Be the Norm*, CTR. FOR AM. PROGRESS (May 10, 2019), <https://www.americanprogress.org/article/breadwinning-mothers-continue-u-s-norm>.

107. The preference for one-breadwinner families 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. LAUREN BAUER, VERONICA CLEVENSTINE & MORIAH MACKLIN, EXAMINING THE ECONOMIC STATUS OF SAME-GENDER RELATIONSHIP HOUSEHOLDS 5 (2022), [https://www.hamiltonproject.org/assets/files/LGBTQ\\_Blog\\_Technical\\_Appendix\\_v3.pdf?\\_ga=2.91806938.1771578605.1687904112-293759678.1687904112](https://www.hamiltonproject.org/assets/files/LGBTQ_Blog_Technical_Appendix_v3.pdf?_ga=2.91806938.1771578605.1687904112-293759678.1687904112).

108. Infanti, *supra* note 4, at 606–07.

### C. A SEGUE

The one-breadwinner model is no longer the norm, and most parents are using other arrangements.<sup>109</sup> It is, therefore, reasonable to ask—how is Congress continuing to adhere to its preferentialism for a nondominant model without invoking ire from the majority of parents using other arrangements? There are so many avenues toward which this question could lead. But one that seems at once obvious but still underappreciated: Few parents can be reasonably expected to comprehend how these tax laws interact.

First, what I have just described is not exactly a model of lucidity. And as I will discuss more in Part 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 in order to engage in paid labor. 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 actors’ minds, even though the benefits share such unfortunately similar names.

However, we have not 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 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 (for example, 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 actions which obscure distributional impacts. 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. The TCJA provides an example of these obscuring effects.

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 tinker with the statutory tax rates.

### D. TINKERING WITH THE STATUTORY RATES

America has a statutory tax rate structure that is progressive—that is, as one’s taxable income increases, “higher” increments of income will be taxed at higher statutory rates.<sup>110</sup> There are many levers outside of the statutory rate structure that Congress can (and does) pull to tinker with the ultimate level of

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109. See Sullivan, *supra* note 99 (“[E]ven among households with children, dual-income households make up two-thirds (66 percent) of the total.”).

110. Tracey M. Roberts, *Bracket: A Historical Perspective*, 108 NW. U. L. REV. 925, 926 (2014).

progressivity achieved—that is, understanding the statutory rate structure only provides a starting point for understanding how progressive the U.S. tax laws really are.<sup>111</sup> But to even understand the basic contours of the statutory rate structure and how the Code initially distributes burdens among and between caregivers and non-caregivers, one must understand four different benefits that are the subject of this Part. These four benefits are:

- (i) The so-called “income splitting” benefits available to married couples that file joint returns (“MFJs”);<sup>112</sup>
- (ii) The beneficial rates available to heads of household (“HHs”), which historically allow for half the income-splitting benefits available to MFJs;<sup>113</sup>
- (iii) The standard deduction;<sup>114</sup> and
- (iv) The personal exemption amount.<sup>115</sup>

The second and the fourth benefits 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 benefits) 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 often alters 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 has been historically 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) Married Couples that File Joint Returns*

Section 1 of the 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.<sup>116</sup> Even taking a clue from these titles, one can guess that the statutory rates largely depend on whether one is married or unmarried, and not on whether one has dependents.<sup>117</sup> However, the head of household status applies

111. See, e.g., MOLLY F. SHERLOCK, CONG. RSCH. SERV., R44787, STATUTORY, AVERAGE, AND EFFECTIVE MARGINAL TAX RATES IN THE FEDERAL INDIVIDUAL INCOME TAX: BACKGROUND AND ANALYSIS 24 (2017); see also THE NAT’L ECON. COUNCIL, THE BUFFETT RULE: A BASIC PRINCIPLE OF TAX FAIRNESS 1–2 (2012).

112. Nick Kasprak, *Joint Filing in the Tax Code*, TAX FOUND. (June 26, 2013), <https://taxfoundation.org/joint-filing-tax-code>.

113. I.R.C. § 1(b).

114. *Id.* § 63(b)(1).

115. *Id.* § 151.

116. *Id.* § 1(a)–(c).

117. See, e.g., Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 20 (1980).



only to unmarried taxpayers that can claim a dependent (it does not matter how many, curiously).<sup>118</sup> Heads of households can use a rate structure that is more favorable (that is, produces less tax) than the one other unmarried taxpayers must apply.<sup>119</sup> 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 (for example, a minor child over whom the taxpayer has primary custody).<sup>120</sup> 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.<sup>121</sup>

A bit of history is helpful to understanding the benefits that attend this status, such as it is. After the joint filing status was created, Congress recognized that one-parent families (in particular, widowers who found themselves raising children due to the “blameless” tragedy of having a dead spouse) might face different challenges than married, two-parent families (which were far more common at the time than they are today) and unmarried taxpayers without children (who were, at the time, subject to the same rates as unmarried taxpayers with dependents).<sup>122</sup> This, enough members of Congress believed, justified taxing unmarried caregivers less than other unmarried taxpayers. Buoyed by this realization, Congress created the head of household status in 1951.<sup>123</sup>

What benefits did Congress provide? Remembering that the (“golden”) child tax credit (born in 1997) was not yet a twinkle in Congress’s eye<sup>124</sup> can

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118. Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parent*, 71 TAX L. REV. 367, 369 (2018).

119. I.R.C. § 1(b).

120. I.R.C. § 2(b).

121. See, e.g., Infanti, *supra* note 4; Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 743 (2013).

122. LIVINGSTON, *supra* note 96, at 4; see, e.g., JOSEPH A. PECHMAN, TAX REVISION COMPENDIUM: COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE 481–82 (1959) (“This curious provision was enacted in 1951 to mitigate what was regarded as the harsh treatment accorded to widows, widowers, and other single persons with dependents under the 1948 act. The problem it was designed to alleviate may be illustrated by the following example: Assume two executives, each with a wife and two children, have identical homes. They receive the same incomes and, in general, spend their incomes in substantially the same manner. Now, suppose the wife of one of the executives dies. In the following year, he was required under the original income splitting amendment to pay much higher taxes than his neighbor—even though he had to incur larger expenses to run the household than when his wife was alive—because he was automatically denied the benefits of the double tax brackets used by married couples by virtue of his status as a single person. If his taxable income was \$20,000 before his wife died, he paid a tax of \$5,280. After his wife died, his taxable income was \$20,600, and his tax was increased by \$2,256 to \$7,536. The loss of the exemption was worth only \$336 in tax, so that the loss of income splitting accounted for \$1,920 of the tax increase. In the meantime, his more fortunate neighbor continued paying a tax of \$5,280.”).

123. H.R. 4473, 82nd Cong. (1951) (enacted as the Revenue Act of 1951, Pub. L. No. 82-183, 65 Stat. 452).

124. See *supra* Subpart I.A.1.

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 somewhat 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<sup>125</sup>

<b>Tax Rate</b>	<b>Income Band UM</b>	<b>Income Band HH</b>
10 percent	\$0 and \$9,325	\$0 to \$13,500
15 percent	Between \$9,326 and \$37,950	\$13,501 and \$50,801
25 percent	Between \$37,951 and \$91,900	\$50,801 and \$131,200
28 percent	Between \$91,901 and \$191,650	\$131,201 and \$212,500
33 percent	Between \$191,651 and \$416,700	\$215,501 and \$416,700
35 percent	Between \$416,701 and \$418,400	\$416,701 and \$444,550
39.6 percent	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 percent, whereas the HH taxpayer can earn \$13,500 before moving beyond the 10 percent rate. This advantage continues through the entire bracket structure (in other words, the HH income bands break later than the bands for UM taxpayers).

Now, compare these rates to those that apply in 2018, when the TCJA took effect:

TCJA TAX RATES FOR UM AND HH FILERS<sup>126</sup>

<b>Tax Rate</b>	<b>Income Band UM</b>	<b>Income Band HH</b>
10 percent	\$0 and \$9,525	\$0 to \$13,600
12 percent	\$9,525 and \$38,700	\$13,600 and \$51,800
22 percent	\$38,701 and \$82,500	\$51,801 and \$82,500
24 percent	\$82,501 and \$157,500	\$82,501 and \$157,500

125. I.R.C. § 1(a)–(c).

126. I.R.C. § 26(j)(2)(A)–(C).

<b>Tax Rate</b>	<b>Income Band UM</b>	<b>Income Band HH</b>
32 percent	\$157,501 and \$200,000	\$157,501 and \$200,000
35 percent	\$200,001 and \$500,000	\$200,001 and \$500,000

Here, the tax rate structure is only beneficial for heads of households earning under \$51,800. After that point, the UM and HH structures are identical. But continuing the historically erratic pattern, when the TCJA expires, the HH rates will go back to the 2017 rates.<sup>127</sup>

Here too, there is a historical story to tell that provides context, though not exculpation for this somewhat erratic pattern.<sup>128</sup> 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) philosophically 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 have not a thing to do with caregiving). This is not exactly a paradigm of logic—but Congress has generally 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 have generally been dependent.

#### b. MFJ Income Splitting Benefits & Parental Adjacency

Many moons ago (that is, before 1948), the United States did not have a joint filing system.<sup>129</sup> Each taxpayer, even if married, filed a separate tax return and all taxpayers used the same rate schedule. Here is a simple one I have made up:

<b>Taxable Income</b>	<b>Rate for that Increment</b>
\$0 to \$25,000	10 percent

127. See *Historical U.S. Federal Individual Income Tax Rates & Brackets, 1862-2021*, TAX FOUND. (Aug. 24, 2021), <https://taxfoundation.org/data/all/federal/historical-income-tax-rates-brackets>.

128. See Goldin & Liscow, *supra* note 118; John C. O’Byrne, *The Revenue Act of 1951: Its Impact on Individual Income Taxes*, 36 MINN. L. REV. 832, 834–35 (1952); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1428 (1975).

129. See, e.g., Bittker, *supra* note 128, at 1391; see also Kasprak, *supra* note 112; Daniel Hemel, *Beyond the Marriage Tax Trilemma*, 54 WAKE FOREST L. REV. 661, 661 (2019) (“For decades, the well-known ‘marriage tax trilemma’ has played a central role in discussions of the tax treatment of the family unit. The ‘trilemma’ refers to the mathematical impossibility of constructing a tax system that imposes the same tax liability across all married couples with the same income (couples neutrality), neither encourages nor penalizes marriage (marriage neutrality), and taxes higher income individuals at higher rates (progressivity).”).

\$25,000 to \$50,000	20 percent
\$50,000 to \$75,000	30 percent
\$75,000 to \$100,000	40 percent

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 percent marginal tax bracket—the “last” \$25,000 of income (increment \$75,000 to \$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 property state or an equitable distribution state.<sup>130</sup> We do not 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 compromises must be made.<sup>131</sup> 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 historically depend on them.

A quick overview suffices. When first creating the new rate structure for MFJs, Congress’s initial rate structure was as generous to married couples as was rationally possible<sup>132</sup>—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.”<sup>133</sup> To calculate taxable income, the MFJ couple aggregates each of their taxable incomes and the MFJ rate structure will produce a tax liability that is equal to the sum of the tax liabilities that would be produced 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 is a simplified example to explain what I am saying:

Taxable Income		
Rate	Unmarried	Married Filing Jointly
10 percent	\$0 to \$25,000	\$0 to \$50,000

130. See, e.g., Stephanie Hunter McMahon, *Gendering the Marriage Penalty*, in *CONTROVERSIES IN TAX LAW* 27, 29–31 (Anthony C. Infanti ed., 2015).

131. This is not a controversial statement and is well accepted in all spheres that I am aware of. See, e.g., Bittker, *supra* note 128, at 1396.

132. 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.

133. Weeks McCormack, *Caregivers and Tax Reform*, *supra* note 22, at 60; PECHMAN, *supra* note 122, at 475 (income splitting “permit[s] married couples filing joint returns to calculate the tax liability on half their income on the basis of the rate schedule used by single persons and then to multiply the result by two.”).

20 percent	\$25,000 to \$50,000	\$50,000 to \$100,000
30 percent	\$50,000 to \$75,000	\$100,000 to \$150,000
40 percent	\$75,000 to \$100,000	\$150,000 to \$200,000

Please return to our example above. Before A married B, A's \$100,000 moved A all the way to a 40 percent 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 percent 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 married 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.<sup>134</sup> 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.<sup>135</sup> In our hypothetical, an unmarried taxpayer earning \$100,000 is hit in part by the 40 percent bracket, while the married couple with the same income never moves out of the 20 percent bracket. But if Congress wishes to mitigate the disparity between unmarried persons and married couples (in other words, it does not think this much of a disparity is justified), Congress has to curtail the income-splitting benefits that create it. But the only way to curtail income splitting benefits is to change the MFJ bands so that they do not break at double the point at which the UM bands break (the doubling creates the income splitting). This keeps 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 does not allow for full income splitting:

Taxable Income		
Rate	Unmarried	Married Filing Jointly
10 percent	\$0 to \$25,000	\$0 to \$50,000
20 percent	\$25,000 to \$50,000	\$50,000 to \$100,000

134. See, e.g., McMahon, *supra* note 130, at 33; see also Gann, *supra* note 6, at 472; Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 793 (1996); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 791 (1997).

135. Brown, *supra* note 134, at 788.

30 percent	\$50,000 to \$75,000	\$100,000 to \$150,000
40 percent	\$75,000 to \$100,000	\$150,000 to \$200,000

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 still greatest for one-breadwinner families and diminishes as earnings become more equal. Take a UM taxpayer with \$100,000 taxable income—the marginal rate of tax is 40 percent (that is, the “last” \$25,000 of income will be taxed at that rate). But if that UM taxpayer marries a spouse who does not have taxable income, they will still enjoy a marriage bonus even though the bands do not fully double—most of the \$100,000 income is now taxed in the 10 percent and 20 percent brackets, only \$10,000 gets taxed at 30 percent bracket, and they skip the 40 percent 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, but they also might suffer a marriage penalty. Take two single taxpayers, each with a \$50,000 income. When single, each would have moved only through the 20 percent bracket. But now if these equal earners marry, because the bands do not double and 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 percent.

It is well recognized that Congress cannot resolve one of these disparities without creating another<sup>136</sup>—at least so long as the Code maintains joint filing and progressive statutory rates.<sup>137</sup> 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 comes back.

It is, therefore, of no surprise that these income-splitting benefits ebb and flow, depending on Congress's 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 (in other words, stopped doubling the bands) for those with taxable income exceeding that amount.<sup>138</sup> This also comes as no surprise since the TCJA amplified the already entrenched preference for nonpoor, one-breadwinner families and income-splitting benefits create the greatest marriage bonus for these families (while providing little to no bonus to more equal earners). By contrast, before the TCJA

136. See Bittker, *supra* note 128, at 1395; see also David Hemel, *Beyond the Marriage Tax Trilemma*, 54 WAKE FOREST L. REV. 661, 663 (2019).

137. The problem does not come up with a flat rate system because you cannot jump brackets with one rate.

138. See Kasprak, *supra* note 112.

was enacted and after these rates expire in 2025,<sup>139</sup> income splitting was and will not be available to so many MFJs, and will instead remain available for MFJs with taxable income under \$76,000, which is right around the median income in 2023.<sup>140</sup>

What can still be a surprise is that this has anything to do with the real parental tax benefits (that is, benefits contingent on having dependents like minor children) available to heads of households. In 1951, focused mainly on the plight of widowers who were raising children alone due to the death of a spouse, Congress decided to treat “heads of household” differently than other unmarried taxpayers. At that time, income-splitting benefits centered prominently in individual tax debates.<sup>141</sup> 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.<sup>142</sup> And since then and until the TCJA was enacted, Congress has generally continued with this pattern, whereby heads of household benefits are dependent on the income-splitting benefits afforded to MFJs.<sup>143</sup>

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 (right before the TCJA took effect) with MFJ rates added:

139. See, e.g., I.R.C. § 1(j)(1) (stating modifications to the tax rates only applying to taxable years beginning before January 1, 2026).

140. *Id.* § 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 \$18,650
15%	Between \$9,326 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	\$233,351 and \$416,700
35%	Between \$416,701 and \$418,400	\$416,701 and \$470,000
39.6%	Above \$418,400	Above \$470,700

141. Stanley S. Surrey, *Federal Taxation of the Family: The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1103–04 (1948); see also Pechman, *supra* note 122 (discussing focus on widowers whose spouse died and, therefore, were now raising children alone and also lost the benefit of income splitting because they could not longer file as married filing jointly).

142. JANE G. GRAVELLE, CONG. RSCH. SERV., RL33755, FEDERAL INCOME TAX TREATMENT OF THE FAMILY 3 (2016).

143. *Federal Individual Income Tax History*, TAX FOUND. (2013), [https://files.taxfoundation.org/legacy/docs/fed\\_individual\\_rate\\_history\\_nominal.pdf](https://files.taxfoundation.org/legacy/docs/fed_individual_rate_history_nominal.pdf).

2017 TAX RATES FOR UM, HH AND MFJ FILERS<sup>144</sup>

Tax Rate	Income Band UM	Income Band MFJ	Average	Income Band HH
10 percent	\$0 and \$9,325	\$0 and \$18,650	\$0 to \$13,987	\$0 to \$13,500
15 percent	Between \$9,326 and \$37,950	\$18,651 and \$75,900	\$13,988 and \$56,925	\$13,501 and \$50,801
25 percent	Between \$37,951 and \$91,900	\$75,901 and \$153,100	\$56,926 and \$122,500	\$50,801 and \$131,200
28 percent	Between \$91,901 and \$191,650	\$153,101 and \$233,350	\$122,501 and \$212,500	\$131,201 and \$212,500
33 percent	Between \$191,651 and \$416,700	\$233,351 and \$416,700	\$212,501 and \$416,700	\$215,501 and \$416,700
35 percent	Between \$416,701 and \$418,400	\$416,701 and \$470,000	\$416,701 and \$444,200	\$416,701 and \$444,550
39.6 percent	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 might be) available to MFJ taxpayers.

And only now can one understand the precarious situation the HH tax rate benefits find themselves in—they are hitched to the nonparental, MFJ income-splitting benefits which ebb and flow due to philosophical instability. The precariousness of these benefits is further underscored by the TCJA. As discussed above, the TCJA dramatically increased the MFJ benefit. However, it did so without correspondingly increasing the HH benefit—a historical first.<sup>145</sup>

144. I.R.C. § 1(a), (b), (c), (i).

145. *Id.* § 1(j)(2)(A)–(C).

Tax Rate	Income Band UM	Income Band MFJ	Average	Income Band HH
10%	\$0 to \$9,525	\$0 to <del>\$18,650</del> \$19,030	<del>\$0 to</del> \$14,277	\$0 to <del>\$13,500</del> \$13,600
<del>15%</del> 12%	<del>\$9,325</del> \$9,525 to <del>\$27,950</del> \$38,700	<del>\$18,650</del> \$19,030 to <del>\$75,900</del> \$77,400	<del>\$14,278 to</del> \$58,050	<del>\$13,500</del> \$13,600 to <del>\$50,800</del> \$51,800
<del>25%</del> 22%	<del>\$37,951</del> \$38,701 to <del>\$91,900</del> \$82,500	<del>\$75,901</del> \$77,401 to <del>\$153,100</del> \$165,000	<del>\$58,051 to</del> \$123,750	<del>\$50,801</del> \$51,801 to <del>\$131,200</del> \$82,500
<del>28%</del> 24%	<del>\$91,901</del> \$82,501 to <del>\$191,650</del> \$157,500	<del>\$153,101</del> \$165,001 to <del>\$233,350</del> \$315,000	<del>\$123,751 to</del> \$236,250	<del>\$131,201</del> \$82,501 to <del>\$212,500</del> \$157,500



More specifically, Congress expanded income splitting for MFJ couples through the 32 percent bracket, but discontinued HH benefits after the 12 percent bracket. After the 12 percent bracket, HH's would apply the same rates as unmarried taxpayers.

The TCJA, therefore, expanded income-splitting benefits to all MFJ taxpayers outside the small percentage of taxpayers with taxable income over \$400,000.<sup>146</sup> These benefits are (i) greatest for the statistically dwindling one-breadwinner model; (ii) dwindle as earnings among partners become 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 historical practice 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 percent poverty level for a family of three (for example, head of household with two children) was \$51,640.<sup>147</sup> And because this was all accomplished by tinkering with the rates, one can see how these distributive implications could be, for most, severely obscured.

This all might 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 use of assisted reproductive technology to conceive children without a partner.<sup>148</sup> 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 are not even done discussing the benefits Congress may adjust to change the statutory rate structure. There is a second pair of benefits that together define a “zero bracket amount”—that is, an amount of taxable income under which a taxpayer will not have any tax liability. Similar patterns emerge when we see how Congress can adjust this pair of benefits. One of these

<del>32%</del>	<del>\$101,650</del> \$157,501 to	<del>\$233,350</del> \$315,001 to	\$236,251 to	<del>\$212,500</del> \$157,501 to
32%	\$416,700 \$200,000	<del>\$416,700</del> \$400,000	\$300,000	<del>\$416,700</del> \$200,000
35%	<del>\$416,701</del> \$200,001 to	<del>\$416,701</del> \$400,001 to	\$300,001 to	<del>\$416,701</del> \$200,001 to
	<del>\$418,400</del> \$500,000	<del>\$470,000</del> \$600,000	\$550,000	<del>\$444,550</del> \$500,000
<del>30.6%</del>	Above <del>\$418,400</del>	Above <del>\$470,000</del>	Above	Above <del>\$444,550</del>
37%	\$500,000	\$600,000	\$550,000	\$500,000

146. Rev. Proc. 2024-40, 2024-45 I.R.B. 1100.

147. *Archive: I-942P Supplement, Income Guidelines for Reduced Fees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-942p> (June 3, 2024).

148. See, e.g., John Beattie, *Why Are Dual Earner Families on the Rise?*, THE ECON. REV. (Dec. 5, 2023), <https://theeconreview.com/2023/12/05/why-are-dual-income-families-on-the-rise> (discussing how Nobel Prize winner Dr. Claudia Goldin's research explains the increasing propensity of American women to enter the workforce); Stephanie Kramer, *U.S. Has World's Highest Rate of Children Living in Single Parent Households*, PEW RSCH. CTR. (Dec. 12, 2019), <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>.

benefits depends on caregiving obligations while one does not. But when Congress adjusts both of them it can create confusing net effects. Again, this does not suggest that Congress takes this opportunity deliberately, but shows how the stage is set to allow for it. The changes made through the TCJA once again provide an example of this obscuring effect.

## 2. *Tinkering With the Zero Bracket Amount*

As the reader can see, section 1's statutory tax rates (found in tables above), do not contain an explicitly stated 0 percent bracket.<sup>149</sup> Without more, the tax rates found in section 1 would lead one to believe that their first dollar of taxable income will be taxed at a 10 percent rate. However, the Code has long contained a zero-bracket amount ("ZBA") beneath which one will not be subject to federal income tax liability.<sup>150</sup> 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.<sup>151</sup>

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.<sup>152</sup> By contrast, setting aside the head of households for a moment, the standard deduction amount is available based on marital status and so is not a parental tax benefit.<sup>153</sup> However, as will be seen through the TCJA, the standard deduction is sometimes parental adjacent; Congress sometimes moves these benefits in tandem, which can obscure distributional effects among and between caregivers and non-caregivers.

Take, for example, the law as it existed in 2017—the year before the TCJA took effect—and to which it will revert at the end of 2025 when the TCJA expires (pre- and post-TCJA law). The standard deduction amounts were about \$6,000, \$12,000, and \$9,000 for UM taxpayers, MFJ taxpayers, and heads of household, respectively.<sup>154</sup> All MFJ and UM 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.<sup>155</sup> In 2017, it was about \$4,000.<sup>156</sup>

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149. I.R.C. § 1(a)–(d), (j)(2).

150. See Roberts, *supra* note 110, at 939–41.

151. *Id.* at 939.

152. I.R.C. § 151(c) (allowing additional personal exemption amount for dependents).

153. I.R.C. § 63(c)(2).

154. *Id.* § 63(c)(2), (4). For exact numbers in 2017, with inflation adjustments, see Rev. Proc. 2016-55, 2017-45 I.R.B. 489. 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.

155. I.R.C. § 151(c). For inflation adjustments, see Rev. Proc. 2016-55.

156. Rev. Proc. 2017-58, 2017-45 I.R.B. 489.

Assume that a MFJ couple without dependent children earned \$100,000 taxable income in 2017 and filed a joint return and we use the approximated numbers above. They could reduce their taxable income by the \$12,000 standard deduction and two \$4,000 personal exemption amounts (there are two adults) for \$80,000 taxable income (\$100,000 minus \$12,000 and \$8,000). At this point, they would apply the MFJ tax rate structure (tables above) to that \$80,000. 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 percent tax on their first \$20,000 of income before starting up the income tax rate ladder.

Assume that this MFJ couple also had two dependent children. They would now take the same standard deduction (because for MFJs that does not depend on caregiving responsibilities for a dependent) but would be able to reduce their taxable income by four personal exemption amounts, resulting in taxable income of \$72,000 (\$100,000 minus \$12,000 and \$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 percent 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 adjust these benefits in ways that obscure distributional effects. The TCJA provides a good example of how this can happen. For years in which the TCJA is in effect, Congress repealed the personal exemption amounts entirely<sup>157</sup> but approximately doubled the standard deduction to about \$12,000, \$24,000, and \$18,000 for unmarried taxpayers, MFJ taxpayers, and heads of household, respectively.<sup>158</sup> Returning to our hypothetical, because the personal exemption is repealed, now both of the hypothetical couples can reduce their taxable income by the same \$24,000 standard deduction amount (applicable to all couples that are married filing jointly regardless of caregiving obligations for dependents). In other words, 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 benefit” (the nonrefundable portion of the child tax credit) was expanded for nonpoor taxpayers. To a large extent, benefits likely netted out for many parents (the doubling of the “golden” child tax credit largely netted against the repeal of the personal exemption amounts). However, it is worth noting that high earners and, in particular, one-breadwinners, are one group that might be expected to enjoy net gains. Recall that when the TCJA is not in effect, MFJs with MAGI over \$110,000 were generally ineligible for the full NRP-CTC, over which it phased out. But while

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157. I.R.C. § 151(d)(5).

158. *Id.* § 63(c)(7).

the TCJA is in effect (through 2025), its amped up phase-outs allow all but those with MAGI over \$400,000 to claim the full \$2,000 per child credit.<sup>159</sup> That is 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-breadwinner families do not suffer a loss from the devalued and neglected working childcare benefits, as they can avoid working childcare costs entirely.

Because this is all so dizzying, the narrative is easily obscured. For instance, on its website immediately following the passage of the TCJA, the House Committee on Ways and Means boasted that it had enacted a tax cut to “help Americans from all walks of life.”<sup>160</sup> 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-breadwinner families.

#### 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. This pattern also ignores other work-related costs completely. This “benefits preferentialism” reflects a sticky favoritism toward nonpoor, one-breadwinner families. As just discussed, the TCJA further amplified these inequities.

This is a lot to take in. And yet, we have only discussed the parental benefits available to nonpoor parents—that is, 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—in other words, those that do not have taxable income over this amount. Given Congress’s decades-long neglect of nonrefundable working childcare benefits, one might think that we have already discussed Congress’s 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

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159. ELAINE MAAG, URBAN INST., SHIFTING CHILD TAX BENEFITS IN THE TCJA LEFT MOST FAMILIES ABOUT THE SAME 3 (2019).

160. H.R. COMM. ON WAYS AND MEANS, 115TH CONG., THE TAX CUTS & JOBS ACT TAXPAYER EXAMPLES: HOW THE TAX CUTS AND JOBS ACT HELPS AMERICANS OF ALL WALKS OF LIFE 1 (2017).

## PARENTS

If a taxpayer does not have taxable income exceeding the zero bracket amount in a given year (described above), the taxpayer does not have a positive tax liability that year. What this also means is, as a default matter, these taxpayers will not have access to parental tax benefits such as Congress's favorite child tax credit<sup>161</sup> and the working childcare benefits (which, meager as they are, do at least help defray some costs of childcare incurred while working).<sup>162</sup>

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 them to be as "refundable."<sup>163</sup> 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 its golden child—the nonrefundable portion of the child tax credit—and the wantonly neglected working childcare benefits refundable. To fully contextualize Congress's 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.<sup>164</sup> This potentially refundable credit is helpful but has many well-known limitations—it is, for instance, modest<sup>165</sup> and available only to a limited subset of parents able to work and earn enough income to qualify.<sup>166</sup>

As will then be discussed, despite these (and other) widely discussed limits, Congress seems to rest on the EITC's laurels when considering whether to make the ("golden") nonrefundable portion of the child tax credit and working childcare benefits refundable, exhibiting consistent skepticism and even hostility toward doing so.<sup>167</sup> When it comes to the child tax credit (available to all nonpoor parents, regardless of how or whether taxable income is earned through labor), 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.<sup>168</sup> But, as this part

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161. See *supra* Subpart.I.A.1.

162. See *supra* Subpart.I.A.2.

163. I.R.C. § 26(a) (creating a default rule that credits cannot exceed tax liability).

164. See MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R44825, THE EARNED INCOME TAX CREDIT (EITC): A BRIEF LEGISLATIVE HISTORY 1 (2018).

165. Benjamin M. Leff, *EITC for All: A Universal Basic Income Compromise Proposal*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 85, 111–12 (2019).

166. Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285, 289 (2010).

167. Leo P. Martinez, *A Critique of Critical Tax Policy Critiques (Or, You've Got to Speak Out Against the Madness)*, 28 BERKELEY LA RAZA L.J. 49, 59 (2018) (discussing view that EITC "Cures All").

168. CRANDALL-HOLLICK, *supra* note 34, at 7.

will next explain, the disparity is even greater for working childcare benefits—these benefits have never been refundable (except for when the ARPA’s expanded parental benefits were briefly available). This Part will conclude by surveying some of the distributional implications of the Code’s historical 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, constituting “the largest permanent federal needs-tested antipoverty program that provides cash assistance.”<sup>169</sup> Given the extreme import of its mission, not to mention its costliness,<sup>170</sup> a great deal of excellent scholarship has been written about the EITC.<sup>171</sup> 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 toward taxpayers with relatively little income. The EITC varies over several margins, including marital status, earned income, and number of qualifying children.<sup>172</sup> Congress has historically aimed the EITC mainly toward parents of low or moderate means.<sup>173</sup> 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.<sup>174</sup> 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

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169. CRANDALL-HOLICK, *supra* note 164 at 1 (“The EITC is the largest permanent federal needs-tested antipoverty program that provides cash assistance.”).

170. *Earned Income Tax Credit* (EITC), TAX FOUND., <https://taxfoundation.org/taxedu/glossary/earned-income-tax-credit-eitc> (last visited Apr. 1, 2025) (depicting a graph showing growing cost of EITC over time).

171. *See generally* Alstott, *supra* note 166 (discussing the history and perspective on EITC and its significance); Brown, *Race and Class Matters*, *supra* note 8 (arguing that the EITC has a “welfare” taint which may lead to its extinction); MICHELLE LYON DRUMBL, *TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM* (2019) (discussing EITC’s effectiveness in the United States and offering suggestions for its improvement); Leslie Book, *Bureaucratic Oppression and the Tax System*, 69 *TAX LAW* 567 (2016) (discussing the IRS’s inadequate service to EITC claimants); Nyamagaga R. Gondwe, *The Tax-Invisible Labor Problem: Care Work, Kinship, and Income Security Programs in the Internal Revenue Code*, 102 *B.U. L. REV.* 2389 (2022) (discussing that income security programs that disregard nonmarket labor limits women’s economic authority).

172. I.R.C. § 32.

173. *See* CRANDALL-HOLICK, *supra* note 164, at 4–5 (noting the EITC was enacted in 1975 but it was not until the 1990s that childless workers could receive any credit at all).

174. *Id.* at 9 (“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.”).

available to *working* parents—parents must *earn* a certain amount to qualify for the credit at all.<sup>175</sup> 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.<sup>176</sup>

For instance, in 2023, married parents with two qualifying children filing joint returns saw their EITC increase as income ranged from \$1 to approximately \$16,600 (the phase in range).<sup>177</sup> From earned income level \$16,600 through about \$28,000 (the plateau range) the credit remained constant, at its maximum \$6,604.<sup>178</sup> It then decreased and was no longer available to those earning over about \$59,200 (the phase out range).<sup>179</sup>

As a result, in order to claim the EITC, taxpayers must earn income (those without earned income are not eligible by the EITC’s terms) 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 means increase, 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 is the idea that poorer taxpayers only deserve benefits if they engage in a certain level of paid work and that they should 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 who are unable to work, for any number of reasons, even those that might lie largely outside the taxpayer’s control. As Professor 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.”<sup>180</sup> 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 have meaningful choices about how much they work and earn. Yet, particularly for those in lower income classes, this

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175. I.R.C. § 32(c)(1).

176. *Policy Basics: The Earned Income Tax Credit*, CTR. ON BUDGET & POL’Y PRIORITIES (Apr. 28, 2023), <https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit>.

177. MARGOT L. CRANDALL-HOLLICK, CONOR F. BOYLE, GENE FALK, CONG. RSCH. SERV., R43805, THE EARNED INCOME TAX CREDIT (EITC): HOW IT WORKS AND WHO RECEIVES IT 5 (2023) (“CRS calculations based on IRS Revenue Procedure 2022-38 and Internal Revenue Code §32.”).

178. *Id.* at 5–6.

179. *Id.* at 6.

180. Alstott, *supra* note 166, at 313.

assumption may be far from reality, with poorer taxpayers often experiencing involuntary spells of unemployment and job interruptions.<sup>181</sup>

The fact that this incentive structure is so attenuated from many low-wage earners' realities is not the only well-known limitation of the EITC. Even if it were available to all parents regardless of earned income, or if low-income parents had perfectly smooth labor decisions (that is, they had meaningful power to decide how many working hours to devote towards earning a desired amount of income), the credit amount is modest. As Professor Benjamin Leff writes:

[A]s 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).<sup>182</sup>

Along the same lines, Professor Anne Alstott has convincingly argued that several “features of U.S. law create and perpetuate disadvantage for low-income workers and their children [and when] [t]aken together, these legal structures constrain the capacity of the EITC—or any earnings or wage subsidy—to assist even those willing to work.”<sup>183</sup>

Here are a few more of the many well-known limitations of the EITC. The EITC is delivered in an annual lump sum. As discussed more below, for those consistently struggling to make ends meet, this method of delivery might not be particularly responsive to actual needs.<sup>184</sup>

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 often exceeds that of other nonrefundable benefits available to taxpayers of greater means.<sup>185</sup>

And, because the EITC is remarkably complex, studies confirm that many eligible taxpayers fail to claim it.<sup>186</sup>

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181. *Id.* (“The EITC enables a minimum-wage worker to support herself and up to three children at a level of extreme economic and social distress, *provided that* 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.”); *see also* Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46, 47 (2016).

182. Leff, *supra* note 165, at 112.

183. Alstott, *supra* note 166, at 297.

184. Andrew Greenlee, Karen Kramer, Flavia Andrade, Dylan Bellisle, Renee Blanks & Ruby Mendenhall, *Financial Instability in the Earned Income Tax Credit Program: Can Advanced Periodic Payments Ameliorate Systemic Stressors?*, 57 URB. AFFS. REV. 1626, 1642 (2021).

185. MARGOT L. CRANDALL-HOLLOCK, CONG. RSCH. SERV., IN11952, AUDITS OF EITC RETURNS: BY THE NUMBERS 3 (2022) (“Audit rates for EITC returns are disproportionately high compared to the share of taxpayers who claim the credit . . .”).

186. Jacob Goldin, *Tax Benefit Complexity and Take-up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59, 60 (2018).



These are just some of the many reasons why “[t]he EITC [w]orks [v]ery [w]ell—[b]ut [is] [n]ot a [s]afety [n]et by [i]tself.”<sup>187</sup> However, despite these recognized gaps, Congress seems reluctant to allow other parental benefits such as 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’s favorite child tax credit.

#### B. REFUNDABLE CHILD TAX CREDITS FOR POOR PARENTS

As discussed at length above, Congress has great affection for the nonrefundable 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 MFJ and UM taxpayers with MAGI exceeding \$400,000 and \$200,000, respectively).<sup>188</sup> But Congress’s 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 (only those who had enough taxable income to have positive tax liabilities were able to claim the credit to reduce that liability).<sup>189</sup> In 2001, Congress first made the CTC partially refundable—that is, made a portion of the CTC available to some poor parents who did not have enough taxable income to have a positive tax liability.<sup>190</sup> 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 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.<sup>191</sup>

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187. Sharon Parrott, *Commentary: The EITC Works Very Well—But It’s Not a Safety Net by Itself*, CTR. ON BUDGET & POL’Y PRIORITIES (Mar. 26, 2014), <https://www.cbpp.org/research/commentary-the-eitc-works-very-well-but-its-not-a-safety-net-by-itself>.

188. See *supra* Subpart I.A.1.

189. CRANDALL-HOLLICK, *supra* note 34, at 1.

190. *Id.*

191. Brown, *Separate but Unequal*, *supra* note 8, at 790.

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 earned income (for example, work) requirements.<sup>192</sup> But these earned income requirements operate a bit differently than those of the EITC. While the EITC phase in begins with the first dollar of earned income—that is, the phase-in range starts immediately<sup>193</sup>—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.<sup>194</sup> Poor taxpayers earning under the threshold amount are not entitled to any relief at all<sup>195</sup> (a feature that was meant to provide an additional incentive to work and earn income).

In 2001, the earned income threshold was \$10,000<sup>196</sup>—parents earning under this amount received no CTC benefit. In 2001, the poverty threshold for a family of two (such as a single parent and a dependent child) and three (for example, two parents and a dependent child or a single parent and two children) was about \$11,600 and \$15,000, respectively.<sup>197</sup>

In 2009, the threshold was lowered, so refundable CTC benefits started to phase in once poor parents earned \$3,000.<sup>198</sup> At this point, the credit increased as earnings rose (and when the credit amount available to all nonpoor parents was reached, the poorer parent was then entitled to claim it).<sup>199</sup> This threshold has remained fixed and will be reinstated in 2025 when the TCJA (changes to be discussed shortly) expires.

Here is a simplified example of how the refundable portion of the CTC might operate pre- and post-TCJA (I will ignore interactions with other credits like the EITC, which are certainly important<sup>200</sup> 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.<sup>201</sup> At that point, the refund amount ratchets up and will be equal to 15 percent of the difference

192. 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. See Zelenak, *supra* note 30, at 1912 (discussing use of ACTC to make EITC’s phase-out less steep).

193. See *Policy Basics: The Earned Income Tax Credit*, *supra* note 176; *supra* Subpart.II.A.

194. I.R.C. § 24(h)(6) (portion of the credit that is refundable).

195. A vast discussion on incentive effects, including cliff effects, exists but is well beyond the scope of this paper. For one of many interesting examples, see generally Joel Slemrod, *Buenos Notches: lines and notches in tax system design*, 11 *EJOURNAL TAX RSCH.* 259 (2013).

196. CRANDALL-HOLLICK, *supra* note 34, at 7.

197. Annual Update of the HHS Poverty Guidelines, 66 Fed. Reg. 10695 (Feb. 16, 2001).

198. CRANDALL-HOLLICK, *supra* note 34, at 1.

199. *Id.*

200. For more, see Brown, *Separate but Unequal*, *supra* note 8, at 791.

201. I.R.C. § 24(d)(1)(B)(i).

between earned income and the \$3,000 threshold.<sup>202</sup> The phase-in continues until the credit available to nonpoor parents is reached (in post-TCJA years, \$1,000 per child). So, for instance, before the TCJA's changes, if a single mother with one child earned \$5,000, she would have been entitled to a \$1,000 credit if she had positive tax liability but because of the earned income requirements, she can only claim \$300 (15% of \$5,000 minus \$3,000). If she earned \$13,000, she could now claim the same \$1,000 credit as a nonpoor parent because she has "earned enough" according to the earned income formula (15% of \$13,000 minus \$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, if the TCJA's changes expire.

Now let us turn to the TCJA. Through the end of 2025, the earned income threshold was lowered from \$3,000 to \$2,500.<sup>203</sup> Note, however, that this happened at the same time that the "golden" nonrefundable portion of the child tax credit became fully available to all nonpoor parents with taxable income up to \$400,000 (if married filing jointly) and \$200,000 (if unmarried). Remember also that nonpoor parents saw their credit double from \$1,000 to \$2,000 per child. However, the TCJA did not allow this expansion to be fully realized by poor parents, even those who "earned enough" under the earned income tests imposed on them. The TCJA capped the refund amount for poor taxpayers to \$1,400 per child for tax year 2018,<sup>204</sup> \$1,600 for 2023,<sup>205</sup> and \$1,700 for 2024 and 2025.<sup>206</sup>

Whether poorer taxpayers fare better, worse, or the same, pre- and post-TCJA depends on how this all interacts but for poor parents with very low earned income, the increase will often be quite modest if 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 minus \$2,500), a \$75 increase from pre- and post-TCJA law.

If all of this seems peculiar, we are not 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- and 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

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202. *Id.* Taxpayers with three or more children may claim the greater of this amount and the amount provided in 24(d)(1)(B)(ii).

203. *Id.* § 24(h)(6).

204. *Id.* § 24 (h)(5)(A). For tax years after 2018 through 2025 (when the TCJA expires), this \$1,400 cap will be adjusted for inflation (even though the \$2,000 per child credit for nonpoor parents does not) in increments of \$100. *Id.* § 24(h)(5)(B).

205. IRS 2022 Pub. 17 (Mar. 27, 2023) at 1.

206. IRS 2023 Pub. 17 (Mar. 18, 2024) at 1; IRS 2024 Pub. 17 (Jan. 22, 2025) at 1.

mother of two children earning \$5,000 would receive the same \$300 to \$375 credit as the single mother of one child (instead of the \$2,000 credit she would have been entitled to without the refundability limitations or if she were a nonpoor parent with enough tax liability to absorb the full nonrefundable CTC).<sup>207</sup>

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 some recipients, who might be relying on payments to make ends meet, this delivery method may create additional hardship.<sup>208</sup>

In sum, while Congress has great affection for the nonrefundable portion of the CTC available to taxpayers of moderate means (and, while the TCJA is in effect, higher than moderate 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 dollar capped so that poor parents could not receive the full 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 hurdle parents face when trying to enter the workforce—would be refundable. One would be wrong.

### C. REFUNDABLE WORKING CHILDCARE BENEFITS

Except for when the ARPA was in brief effect, working childcare benefits have never been refundable.<sup>209</sup> As discussed in Part I.A.2, due to decades of 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.

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207. 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. See Zelenak, *supra* note 30, at 1912 (discussing use of ACTC to make EITC's phase-out less steep).

208. Of course, a vast literature exists on delivery method that is well outside scope of article. For one of many examples, see MICHELLE LYON DRUMBL, *TAX CREDITS FOR THE WORKING POOR, A CALL FOR REFORM*, 142-75 (2019).

209. See, e.g., Weeks McCormack, *supra* note 3, at 1165.

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

[I]n 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 . . . .”<sup>210</sup>

Senator Kennedy’s sentiments did not move Congress in 1976, and nothing has changed since then. In no year (outside of when the ARPA was in brief effect, to be discussed in Part III) have working childcare benefits been refundable in any way.

As discussed, the TCJA did not change working childcare benefits for nonpoor parents. It did not make them at all refundable for poor parents.

#### D. REFUNDABILITY SUMMARY

Taken together, Congress exhibits skepticism toward making its favorite child tax credit 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 is not willing to extend to nonpoor parents tax benefits that could help defray the costs of childcare to do so.

There are problematic distributional implications to this, reflecting deeply entrenched assumptions held by some 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 the laws just surveyed but also find explicit voice in legislative history, Congressional debates, and the various public and media statements made by past and current lawmakers.

#### E. REFUND RHETORIC & DISTRIBUTIONAL ISSUES

The design of both the EITC and ACTC (providing the refundable portion of the CTC) reflect a Congressional decision that poor people must work and earn sufficient income before they deserve federally provided cash benefits. In addition to presuming low-wage earners have robust and smooth labor opportunities, it also reflects the view that when poor taxpayers are given a benefit that is not tied to work, they may choose not to engage in paid labor, that this choice will be suboptimal (regardless of reasons, for instance need to attend to children who lack secure care), and that incentives must be created to ensure that they do engage in work activities that produce income.

This stands in contrast to the design of the nonrefundable portion of the CTC available to nonpoor parents. A one-breadwinner family’s choice to keep

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210. *Id.* (citing *Tax Reform Act of 1976: Hearing on H.R. 10612 Before the S. Comm. on Fin.*, 94th Cong. 227 (1976) (statement of Sen. Edward M. Kennedy)).

one partner out of the paid workforce to, for instance, care for children is no impediment to claiming the NRP-CTC—in fact, as discussed earlier, lawmakers often applaud the NRP-CTC’s ability to help families choose this arrangement as a selling point in favor of expanding it.<sup>211</sup> There is also no requirement that income be earned at all—any family with sufficient taxable income (as opposed to earned income) to absorb the credit may claim it, so income may be entirely unearned (for example, produced from investments rather than labor).

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 consistent themes used across time to justify the differential tax treatment of poor and nonpoor parents. As Professor Dorothy Brown has explained, the debate around refundable benefits for poor parents is both classed and raced.<sup>212</sup> One of the many ways to see this is to notice how consistently lawmakers tag refundable benefits to welfare across time.

As Professor Brown writes:

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.”<sup>213</sup>

That “[l]other welfare benefit” is the EITC, and comments, such as the ones above, illustrate a theme invoked across time among lawmakers—that is, the EITC is more than sufficient benefit to give relatively poor parents and anything more, such as a refundable CTC, would be an undeserved handout.<sup>214</sup> 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 federal taxes such as payroll taxes, as well as non-federal taxes like state and local and/or sales tax.<sup>215</sup>

Across time, when discussing refundable benefits, lawmakers sound these themes, equating refundable tax benefits to welfare. In 2003, when Congress passed legislation accelerating the previously enacted CTC expansions for other

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211. Rubio, *supra* note 88.

212. 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.

213. Brown, *Separate but Unequal*, *supra* note 8, at 784–85.

214. *Id.*

215. *Id.*; see also Mildred W. Robinson, *Martin Luther King, Jr. Lecture—“Skin in the Tax Game”: Invisible Taxpayers? Invisible Citizens?*, 59 VILL. L. REV. 729, 734 (2014) (discussing the damaging and inaccurate political rhetoric that poor taxpayer that do not have federal tax liability do not pay tax despite paying other taxes such as payroll and sales tax).

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.’” 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.<sup>216</sup>

In 2012, Presidential Candidate Mitt Romney “accused President Obama of using his power to weaken work requirements for welfare recipients.”<sup>217</sup> Tagging refundable benefits to welfare is now often recognized by scholars and even the media as rased. 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.<sup>218</sup>

So while many Professors, including this one, remember presidential debates that were replete with caricatures of food stamp recipients regularly dining on steak and lobster,<sup>219</sup> and the welfare queen—“a Black woman of indeterminate age who has [twelve] Social Security cards, mooches on benefits from four fake dead husbands and collects welfare payments under

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216. Brown, *Separate but Unequal*, *supra* note 8, at 797.

217. Frank James, *Romney Attacks Obama on Welfare; Obama Team Alleges Hypocrisy*, NPR (Aug. 7, 2012, 3:46 PM ET), <https://npr.org/sections/itsallpolitics/2012/08/07/158352531/romney-attacks-president-on-welfare-obama-team-alleges-hypocrisy>.

218. Jelani Cobb, *The Roots of Romney’s Remarks*, NEW YORKER (Sept. 18, 2012), <https://www.newyorker.com/news/news-desk/the-roots-of-romneys-remarks>; Claire Landsbaum, *The ‘Steak and Lobster’ Food-Stamp Myth Refuses to Die*, N.Y. MAG.: INTELLIGENCER (Feb. 19, 2016), <https://nymag.com/intelligencer/2016/02/steak-and-lobster-food-stamp-myth-lives-on.html>.

219. Landsbaum, *supra* note 218.

[eighty] bogus names while getting food stamps”<sup>220</sup>—America’s newest voters and entering law students may not. It is important to provide the context behind refund rhetoric—when politicians object to giving poor parents the 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 would like to mention some possible gender implications before moving on. Consider the following:

All told, 16 [percent] 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 [percent] 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 %).<sup>221</sup>

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

I will conclude by discussing Congress’s 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 is 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 should not be justified rationally by the existence of the EITC or 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 (such as 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 must 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 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 might not be able “to afford to work,” which, in turn, might lower her EITC and

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220. John Blake, *Biden Just Dethroned the Welfare Queen*, CNN (May 16, 2021, 9:15 AM EDT), <https://www.cnn.com/2021/05/16/politics/biden-welfare-queen-blake/index.html>.

221. LIVINGSTON, *supra* note 96, at 9.



ACTC amounts (for example, if she is on the “phase in” portion of the earned income curves). The unwavering failure to make working childcare benefits refundable in any way is, therefore, at best inequitable.

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 it has through many other important projects. I believe this brief summary is sufficient to provide a sense of the severity and importance 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 nonrefundable 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, how income is earned or if it is earned through labor at all;
- 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;
- Tinkers with the statutory rate structure erratically in ways that are unpredictable, with distributional effects that can be 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, Part III shows how the ARPA 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 ACT: 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.<sup>222</sup> As the campaign website for President Biden and Vice President Harris put it, “[t]he pandemic . . . laid bare just how hard it is for American families to find access to quality caregiving, or to juggle the responsibilities of working and also caring for family members.”<sup>223</sup>

Signed into law on March 11, 2021, the ARPA provided much-needed relief to parents attempting to maintain jobs and care for children during this global health crisis enacting benefits for tax year 2021. 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 dual earner and solo working parents and to relatively 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’s favorite parental tax benefit—the nonrefundable 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 and regardless of how and whether they earn income through paid labor. In keeping with historical trends, Congress 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 increased the long-neglected benefits available to dual and solo working parents that help defray childcare costs incurred to engage in paid labor. Further, Congress did not tinker with the various benefits that define the statutory rate structure in the ARPA, making it far easier to understand how the ARPA’s changes would actually affect parents. Finally, and of great historical significance, the ARPA (i) made the CTC fully refundable; (ii) untethered the refundable CTC benefit from work requirements; (iii) allowed taxpayers to receive some payments monthly rather than in an annual lump sum; and (iv) made the increased benefits available to defray working childcare costs fully refundable. But with tax year 2021 passed, all of these parental tax benefits have now expired. This Part hopes to memorialize the ARPA’s progress for future conversations, including the one that must inevitably take place by the end of 2025 when the TCJA’s parental tax benefits described previously expire.

#### A. CONGRESS’S FAVORITE: THE NONREFUNDABLE PORTION OF THE CHILD

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222. North, *supra* note 14 (“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.”).

223. *Biden Campaign Press Release—ICYMI: Kamala Harris Pens Op-ed for Parents.com on How a Biden Harris Administration Will Build Back Better for Parents*, THE AM. PRESIDENCY PROJECT (Oct. 21, 2020), <https://www.presidency.ucsb.edu/documents/biden-campaign-press-release-icymi-kamala-harris-pens-op-ed-for-parentscom-how-biden>.

## 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),<sup>224</sup> the ARPA allowed a per child credit as follows:

- For children ages six through eighteen years of age, the credit was raised from \$2,000 to \$3,000 per child—a 50 percent increase; and
- For children ages under age six, the credit was raised from \$2,000 to \$3,600 per child—more than a 75 percent increase.<sup>225</sup>

Viewed in absolute dollar terms, these expansions seem substantial. But the expansion is even more generous once put in historical context. As discussed in Part I.A.1, the “golden” (nonrefundable portion of the) child tax credit was enacted in 1997 and set at \$400 per child in 1998 and \$500 per child after that.<sup>226</sup> By 2004, it was increased to \$1,000 per child (far more than needed to adjust for inflation).<sup>227</sup> Then, in 2019, Congress doubled the credit from \$1,000 to \$2,000 per child (which again outpaced inflation).<sup>228</sup> 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 substantially.

Of course, once historical context is added, this is not particularly surprising. Once Congress decided to expand relief for families during a year of 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, which break with the historic patterns of favoritism, neglect and hostility discussed in the previous Section.

Let us start with the changes made to the long-neglected working childcare benefits available to nonpoor parents, like dual earning and solo working parents, that must incur childcare costs in order to earn income through paid work outside the home.

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

225. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611(a)(3), 135 Stat. 4, 145 (codified as amended in scattered sections of 26 U.S.C.).

226. See *supra* Subpart.I.A.1. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 796. For more history on the Child Tax Credit (CTC), see Jennifer McGroarty, Note, *Time for the Child Tax Credit to Grow Up: Preserving the Credit's Availability and Enhancing Benefits for Families*, 2 COLUM. J. TAX L. 301, 306–10 (2011).

227. See *supra* Subpart.I.A.1. Increased from 500-600 in 2001 through Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L. 107-16, § 201, 115 Stat. 38, 45 (codified at I.R.C. § 24(a)) [hereinafter EGTRRA]. CRANDALL HOLLICK, *supra* note 34 (“Many of the scheduled changes in EGTRRA were accelerated by subsequent legislation, namely the Jobs and Growth Tax Relief Reconciliation Act (JGTRRA; P.L. 108-27) and the Working Families Tax Relief Act (WFTRA; P.L. 108-311). Because of these accelerations, by 2004, the credit was \$1,000 per child, with the credit amount phasing in for low-income families at 15% of earned income above \$10,000 (this amount was indexed annually for inflation).”).

228. See *supra* Subpart.I.A.1; I.R.C. § 24(h).

B. NONPOOR, WORKING CHILDCARE BENEFITS: A BREAK FROM THE NEGLECT

Through the American Rescue Plan, Congress broke its decades-long streak of ignoring benefits for nonpoor, working families that provide some relief to reflect childcare costs needed to engage in the paid workforce. Here is a brief overview of how the ARPA accomplished this expansion for nonpoor parents.

1. *Child and Dependent Care Tax Credit (Nonrefundable Portion)*

To work through the ARPA's changes, it helps to remind the reader how the child and dependent care tax credit is calculated currently (and generally, when the ARPA's temporary benefits are not in effect). To calculate this credit, nonpoor, working parents 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).<sup>229</sup>

As a result, most parents (that is, with AGI exceeding \$43,000) receive a maximum credit of \$600 (20% of \$3,000) for one child and \$1,200 (20% of \$6,000) for two or more children.<sup>230</sup>

The ARPA increased the variables in this calculation. Let's start with dollar caps placed on (ii) employment-related expenses.

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 working 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 incurred to engage in paid labor. Temporarily abandoning Congress' wanton neglect of these benefits, the ARPA 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.<sup>231</sup>

This seems substantial in absolute dollar terms. However, the picture gains more clarity once put into historical context. As I have written previously, in the 1970s and 1980s, the childcare tax credit was made substantially more generous than it previously was, allowing many parents to receive tax relief for what was

229. I.R.C. §§ 21(a), (c) (providing phased down percentage and dollar caps, respectively).

230. *Id.*

231. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9631(a), 135 Stat. 4, 159 (“(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.”).

likely a substantial amount of childcare costs incurred to work. However, as I have also written (and discussed above), after that time these benefits were largely neglected and allowed to devolve substantially in value:

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.<sup>232</sup>

Suppose for tax year 2021 (the year in which the ARPA's parental tax benefits were expanded to help parents cope with a global pandemic), Congress wished to adjust benefits for inflation tagged to the 1981 childcare tax credit benefits (when relief for substantial costs was given).<sup>233</sup> This would have required an adjustment to approximately \$7,300 and \$14,500.<sup>234</sup> So on one hand, the ARPA's increase to the childcare tax credit are substantial in absolute value terms and any increase is historically significant because of Congress's persistent neglect of these benefits. However, when viewed from a broader perspective, the ARPA's increases did little more than adjust for inflation since the 1980's (after which point Congress largely allowed the benefits to devalue for inflation through neglect).

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.

#### b. Increased Applicable Percentage and Income Phase-Outs

Except for the year in which the ARPA's temporary parental tax benefits were in effect, taxpayers could (and can) credit a maximum of 35 percent of employment-related expenses (not exceeding the cap just discussed).<sup>235</sup> But that percentage phased down quickly to a floor of 20 percent—the phase-out started at \$15,000 and all parents earning over \$43,000 hit the floor.<sup>236</sup> The ARPA increased the applicable percentage so that some taxpayers could credit up to 50 percent of expenses and began the percentage phase-down from there.<sup>237</sup>

232. Weeks McCormack, *supra* note 3, at 1134.

233. I did not choose to use 2001 numbers, the last adjustment, because, as discussed, Congress did not make inflation adjustments for twenty years between 1981 and 2001 and then the 2001 adjustment did not compensate for inflation.

234. *CPI Inflation Calculator*, *supra* note 42. The 1981 childcare tax credit dollar caps were \$2,400 and \$4,800, for one and two or more children respectively. \$2,400 in January 1981 had the same buying power as \$7,255.56 in January 2021. \$4,800 in January 1981 had the same buying power as \$14,511.12 in January 2021.

235. I.R.C. § 21(a).

236. See *supra* Subpart.I.A.2. I.R.C. § 21(a) (providing the phased down percentage).

237. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9631(a), 135 Stat. 4, 159 (“(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 ARPA also increased the income phaseout thresholds—rather than starting to phase out at \$15,000, the ARPA’s phase-out did not begin until adjusted gross income exceeded \$125,000.<sup>238</sup> This meant that parents with AGI under that amount were able to credit 50 percent of childcare expenses to work, using the increased dollar caps just discussed. For families with AGI of \$125,000 or less, this allowed for a credit of up to \$4,000 for one child and up to \$8,000 for multiple children, respectively (compared to the \$600 and \$1,200 allowed to parents with AGI over \$43,000 pre- and post-ARPA).<sup>239</sup>

Now, after AGI exceeded \$125,000, the ARPA phased down the now-50 percent applicable percentage until a 20 percent floor was reached.<sup>240</sup> Due to the raised dollar caps, even parents that hit this percentage floor saw a substantial increase in benefits under the ARPA. The ARPA would allow for \$1,600 for one child and \$3,200 for multiple children, respectively (again, as compared to \$600 and \$1,200).<sup>241</sup> There are taxpayers that may have lost benefits under the ARPA—that is, those with AGI over \$400,000.<sup>242</sup> For those earning above this amount, the ARPA removed the 20 percent floor—that is, after earnings exceeded \$400,000, the 20 percent phased down and could fall to zero.

These changes also are substantial when viewed in historical context. For instance, before the ARPA, the phase down from 35% began at \$15,000 and most parents phased down to a 20 percent credit once income exceeded \$43,000.<sup>243</sup> These thresholds have not been adjusted for inflation since 2001.<sup>244</sup> Under the ARPA, however, the phase down begins instead at \$125,000.<sup>245</sup> From this point of comparison, the ARPA’s changes to the phaseouts were extremely substantial increases, accomplishing far more than making inflation adjustments since 2001.<sup>246</sup>

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“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.”).

238. *Id.*

239. I.R.C. §§ 21(a), (c).

240. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9631(a), 135 Stat. 4, 159 (“(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’ . . . .”).

241. I.R.C. §§ 21(a), (c).

242. *See id.* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9631(a), 135 Stat. 4, 159 (“(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.”).

243. *See supra* Subpart I.A.1; I.R.C. §§ 21(a), (c).

244. *See Weeks McCormack, supra* note 3, at 1135.

245. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9631(a), 135 Stat. 4, 159 (“(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”.”).

246. According to the Bureau of Labor Statistic’s inflation calculator, \$15,000 in January 2001 had the same buying power as about \$22,000 in January 2021 (the year in which the ARPA’ expanded parental tax benefits

We now turn to the ARPA's changes to section 129's dependent care exclusion, discussed in Part 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 daycare). 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.<sup>247</sup> But like the ARPA's expansion of the childcare tax credit, while this is substantial in absolute terms, a historical lens provides important context. As I have previously noted, since 1986, "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."<sup>248</sup>

Thus, the increase in benefits made by the ARPA is not even sufficient to adjust for devaluation since the exclusion's last adjustment in 1986. For tax year 2021 (when the ARPA's expanded parental tax benefits were in effect), this would have required the cap to be raised to about \$12,000.<sup>249</sup>

## 3. *Summary of Expansions to the Nonrefundable Portion of Working Childcare Benefits*

The ARPA's 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 might view many of the increases made to these working childcare benefits—in particular dollar cap adjustments—differently than increases made to the child tax credit amount—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 generous increase. This provides useful context for future discussions about how to

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had effect). *CPI Inflation Calculator*, *supra* note 42. \$43,000 in January 2001 had the same buying power as \$65,000 in January 2021.

247. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9632(a), 135 Stat. 4, 160 ("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).'"

248. Weeks McCormack, *supra* note 3, at 1134.

249. *CPI Inflation Calculator*, *supra* note 42. \$5,000 in January 1986 had the same buying power as \$15,033.45 in January 2021.

equitably tax nonpoor parents, including the ones that will occur in 2025 when the TCJA expires.

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

### C. ARPA DIDN'T TINKER

One underappreciated virtue of the ARPA was that it did not tinker with the statutory tax rate structure (or the various parental and parental-adjacent benefits described in Part I.C). This allowed experts to absorb the distributional impacts of the ARPA's changes for nonpoor parents quickly and efficiently (while I am personally still, years later, occasionally discovering new inequities created by the TCJA's parental tax reforms).

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

### D. HISTORICALLY SIGNIFICANT CHANGES TO REFUNDABLE PARENTAL TAX BENEFITS

As discussed in Part 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's favorite child tax credit, the ARPA made the CTC fully refundable,<sup>250</sup> removing the TCJA's cap which maxed poorer parents at \$1,400 per child in 2017, \$1,600 per child in 2019, and \$1,700 per child in 2023 and 2024 (compared to the \$2,000 per child nonpoor parents could receive).<sup>251</sup>

Also recall that under previous iterations of the law, many poor taxpayers could not receive full benefits because of earned income requirements. The

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250. American Rescue Plan Act of 2021, Pub. L. No. 117-2, Section 9611, 135 Stat. 4, 144; I.R.C. § 24(i)(1) (making credit fully refundable for 2021). For commentary, see *How did the 2021 American Rescue Plan Act Change the Child Tax Credit*, TAX POL'Y CTR. (Jan. 2024), <https://taxpolicycenter.org/briefing-book/how-did-2021-american-rescue-plan-act-change-child-tax-credit#:~:text=Impact%20of%20the%202021%20CTC%20Expansion&text=Making%20the%20CTC%20fully%20refundable,credit%20under%20prior%20income%20requirements> (discussing the ARPA's making of the CTC fully refundable and removing the 15 percent phase-in were key: maximum benefits under the expansion reached the 19 million children whose families' earnings were too low to receive the full credit under prior income requirements).

251. I.R.C. § 24(h)(2) (increasing credit from \$1,000 to \$2,000 per child while TCJA in effect); I.R.C. § 24(h)(5)(A) (limiting refundable portion to 1,400 while TCJA in effect).



ARPA unhinged the ACTC from these limits as well,<sup>252</sup> allowing all poor taxpayers to receive the same CTC benefits as taxpayers with positive tax liabilities. This is of great historical significance. The refundable portion of the CTC has historically been tied to work—low-income taxpayers must cross an income threshold before they begin to receive any refundable benefit. As discussed, this has occurred at least in significant part because “refund rhetoric” but by making the CTC fully refundable, the ARPA showed an ability to momentarily overcome these entrenched narratives.

The ARPA also enacted other historically significant changes to the refundable portion of the CTC. 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.<sup>253</sup> More specifically, “half of the credit was automatically paid on a monthly basis to most families in advance of their filing a tax return. . . . [Though f]amilies could opt out of advance payments.”<sup>254</sup> Lawmakers and scholars have often debated whether delivering EITC refunds in an annual, lump sum creates hardships for some needy recipients.<sup>255</sup> Because families in or near poverty, like all other families, are not a homogenous group, the answer is likely family-dependent. One report summarizes as follows:

The form and timing of EITC payments creates potential challenges for recipients. If people prefer to use the EITC mainly to purchase large items or as a form of forced savings, a lump-sum payment may be the most appropriate delivery mechanism. However, to the extent that people prefer to use their EITC to pay down debt or meet basic needs, a more regular payment might be appropriate. Limited studies of refund use show that people do both. . . . Changes to the timing of EITC payments might have implications for carrying out the credit in general and create particular challenges in the transition from a lump sum to periodic payment. The government's administrative costs of periodic payment are likely to be somewhat higher than for lump-sum payments.<sup>256</sup>

The experience of allowing taxpayers to receive or opt out of some monthly payments and of delivering monthly payments to those who did not opt out can

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252. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611(a), 135 Stat. 4, 144; I.R.C. § 24(i)(1) (making credit fully refundable for 2021).

253. *Id.* § 9611(b), 135 Stat. at 145–49; I.R.C. § 24(i); I.R.C. § 7527A (requiring establishment of periodic payment of child tax credit for 2021).

254. TAX POL'Y CTR, *supra* note 250; see also *Advanced Child Tax Credit Payments in 2021*, IRS (Oct. 29, 2024), <https://www.irs.gov/credits-deductions/advance-child-tax-credit-payments-in-2021>; I.R.C. § 7527A (requiring establishment of periodic payment of child tax credit for 2021); *Advanced Child Tax Credit Payments in 2021*, IRS (Oct. 29, 2024), <https://www.irs.gov/credits-deductions/advance-child-tax-credit-payments-in-2021>.

255. Karen Z. Kramer, Flávia Cristina Drumond Andrade, Andrew J. Greenlee, Ruby Mendenhall, Dylan Bellisle & Renee Lemons Blanks, *Periodic Earned Income Tax Credit (EITC) Payment, Financial Stress and Wellbeing: A Longitudinal Study*, 40 J. FAM. & ECON. ISSUES 511, 511 (2019) (“limits recipients’ ability to handle financial emergencies that arise throughout the year.”); see also DRUMBL, *supra* note 171, at 25–45.

256. ELAINE MAAG, WILLIAM J. CONGDON & EUNICE YAU, *THE EARNED INCOME TAX CREDIT: PROGRAM OUTCOMES, PAYMENT TIMING, AND NEXT STEPS FOR RESEARCH 2* (2021), <https://acf.gov/sites/default/files/documents/opre/earned-income-tax-credit-timing-of-payments-and-program-outcomes%20feb%202021.pdf>.

provide valuable data about the challenges faced (and not faced) in executing such a program.

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, the ARPA made the working childcare credits fully refundable while its provisions were operable.<sup>257</sup>

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; (iii) allowed the option of receiving some CTC benefits monthly, rather than annually; and (iv) made tax benefits available to defray childcare costs fully refundable.

#### E. ARPA, RIP

The ARPA's expanded parental benefits were only in effect for tax year 2021, leaving parents back where they started before the pandemic. Obviously, this all happened against a chaotic backdrop, which can make it easy to dismiss the ARPA's changes as useful only in the context of a global health crisis. But by putting the ARPA in its historical context, this Article resists this narrative and creates a more accurate characterization. Once viewed through a historical lens, it becomes apparent that many of the ARPA's expansions of parental tax benefits 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 Part 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's parental tax benefits expire at the end of 2025, encouraging advocates for equitable reform to master the historical material offered in this Article and form accurate historical narratives to ground upcoming conversations.

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257. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9631(a), 135 Stat. 4, 159 (codified as amended in scattered sections of 26 U.S.C.) (“(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).’”); *see also* I.R.C. § 21(g) (making credit refundable for 2021).

#### 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*

In April 2021, knowing that the ARPA's parental tax benefits would soon expire, 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."<sup>258</sup> But the American Rescue Plan soon morphed into the Build Back Better Act, and Congress soon reverted to its historical patterns. It is unnecessary to provide a full account of the haggling that ultimately resulted in a complete failure to extend any of the ARPA's parental tax benefits but below is a basic account.

Soon after the release of the American Families Plan, discussions about keeping expansions to the childcare and dependent care benefits for dual-earning and single working parents quickly fell by the wayside, while discussions of retaining expansions to the "golden benefit"—the nonrefundable portion of the child tax credit—continued on for quite some time and to this day.<sup>259</sup>

Further, during Build Back Better's negotiations, discussions around whether relatively poor parents should receive refundable benefits without work requirements became a sticking point, along with revived refund rhetoric. Senator John Thune complained that "[m]ore and more Americans would rely on an expanded welfare state, receiving handouts without work requirements."<sup>260</sup> Joe Manchin, who played an outsized role in the negotiations, reportedly sounded a "repeating . . . call for a work requirement, [which he] suggest[ed] . . . [wa]s necessary for the payments to be 'accountable.'" Manchin also expressed concerns about a refundable credit without work requirements because he worried "that parents would waste the payments on drugs."<sup>261</sup> Lawmakers did not express similar concerns about how the nonworking parent

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258. *Fact Sheet: The American Families Plan*, THE WHITE HOUSE (Apr. 28, 2021), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/04/American-Families-Plan-Fact-Sheet-FINAL.pdf>.

259. Lance Lambert, *The Monthly Child Tax Payments Are Done—Here's What Will Replace It*, FORTUNE (Jan. 18, 2022, 4:00 AM PST), <https://fortune.com/2022/01/18/monthly-child-tax-credit-payments-end-build-back-better-manchin>.

260. John Thune, *'Build Back Better' Is Democrats' Down Payment on Socialism*, FOX NEWS (Dec. 9, 2021, 6:00 AM EST), <https://www.foxnews.com/opinion/build-back-better-democrats-down-payment-socialism>.

261. Ben Winck, *Joe Manchin Demands That Only Parents Working and Making Less Than \$200,000 Get the Full Child Tax Credit—Otherwise He'll Tank It*, BUS. INSIDER (Dec. 20, 2021, 9:53 AM PST), <https://www.businessinsider.com/joe-manchin-child-tax-credit-bbb-work-requirements-salary-limits-2021-12> (stating that 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).

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 quickly reverted to its historically biased manner of taxing parents inequitably. Not only did Congress fail to build back anything better for parents, but it also failed to even complete a competent rescue. Because this all happened against a chaotic backdrop, it will be easy to forget the ARPA, chalking it up to legislation born in an emergency and having little use outside of that crisis. But by providing historical context, we see that the many of the ARPA's expansions to parental tax benefits enacted long overdue adjustments that began to correct the distributionally problematic way in which America has historically favored some families over others. And it should make Congress's 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 another recent, yet ultimately failed attempt at expanding relief for parents through the so-called Tax Relief for American Families Workers Act (TRAFWA). Highly publicized as it passed through the House, TRAFWA was characterized as a bipartisan bill in which adjustments to the refundable portions of the child tax credit were traded against various expiring breaks for businesses.<sup>262</sup> As discussed now, although these adjustments would have been a modest expansion for poor parents, the Act perished in the Senate.

## 2. *Tax Relief for American Families and Workers Act*

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 (mainly refundable portion of the) CTC<sup>263</sup> and to provisions that encourage the construction of low-income housing were, by most accounts, 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).<sup>264</sup>

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262. Alex Drante, Huaqun Li, William McBride, Alex Muresianu, Erica York & Garrett Watson, *Details and Analysis of the Tax Relief for American Families and Workers Act of 2024*, TAX FOUND. (Jan. 19, 2024), <https://taxfoundation.org/blog/bipartisan-tax-deal-2024-tax-relief-american-families-workers-act>.

263. H.R. Rep. No. 118-353, pt. 1, at 3 (2024). With respect to the nonrefundable portion of the CTC, TRAFWA would have adjusted the \$2,000 per credit amount for inflation (in increments of \$100) for tax years 2024 and 2025, likely leading to a CTC for non-poor taxpayers of \$2,100 for one or both of those years. ROBERT RECTOR, PRESTON BRASHERS, RICHARD STERN & JOEL GRIFFITH, *THE TAX RELIEF OR AMERICA WORKING FAMILIES ACT: LIGHT ON TAX RELIEF AND HEAVY ON WELFARE EXPANSION* 3-4 (2024), <https://www.heritage.org/taxes/report/the-tax-relief-american-families-and-workers-act-light-tax-relief-and-heavy-welfare>.

264. Kelsey Snell, *House Passes Bipartisan Tax Bill to Expand Child Tax Credit*, NPR (Jan. 31, 2024, 8:33 PM EST), <https://www.npr.org/2024/01/31/1228209266/house-passes-child-tax-credit-expansion> (“The House has overwhelmingly approved a bipartisan tax package that pairs a temporary expansion of the child tax credit with business tax breaks and credits to develop more low-income housing.”).

TRAFWA would have made three main adjustments to the refundable portion of the CTC. First, while TRAFWA retains an earned income requirement (in other words, poor parents are subject to work requirements to receive benefits) and maintains the income phase in threshold at the TCJA's \$2,500 amount—parents earning under this amount receive no benefit. TRAWA would have allowed parents to use earnings from either the current year or one year prior to qualify for relief.<sup>265</sup>

Next, TRAFWA would have changed the design feature described in Part 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.<sup>266</sup> 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).<sup>267</sup> The TRAFWA fixes this design feature by allowing the refundable portion to be calculated on a per child basis like the nonrefundable portion of the credit.<sup>268</sup>

Third, for tax years 2023 to 2025 only,<sup>269</sup> the TRAFWA would have moved closer to allowing some poor taxpayers (that is, those who “earn enough”) to claim the same, though still not all, benefits available to nonpoor parents.<sup>270</sup> Recall that the TCJA capped refundable benefits at \$1,400 per child in 2018, but then adjusted for inflation in increments of \$100,<sup>271</sup> adjusting the credit to \$1,600 credit for tax year 2023<sup>272</sup> and \$1,700 for tax years 2024 and 2025.<sup>273</sup> TRAFWA would have allowed a credit of \$1,800, \$1,900 and \$2,000 for those respective years.<sup>274</sup>

But TRAFWA perished in the Senate. A historical context helps situate the proposed (though ultimately unenacted) changes. TRAFWA's expansions of the refundable portion of the CTC were not nearly as generous as the ARPA's expansions. One commentator summarized: “[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.”<sup>275</sup>

Understanding historical context also makes it rather unsurprising that these temporary expansions did not ultimately pass through the Senate,

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265. H.R. Rep. No. 118-353.

266. *See supra* Part II.

267. *See supra* Part II.

268. H.R. Rep. 118-353, at 2 (per-child calculation of refundable portion of child tax credit).

269. H.R. Rep. 118-353, at 2 (showing increases for 2023, 2024, 2025).

270. I.R.C. § 24(a).

271. I.R.C. § 24(h)(5).

272. IRS 2022 Pub. 17 (Mar. 27, 2023) at 1.

273. IRS 2023 Pub. 17 (Mar. 18, 2024) at 1; IRS 2024 Pub. 17 (Jan. 22, 2025) at 1.

274. H.R. Rep. 118-353, at 2 (showing increases for 2023, 2024, 2025).

275. Claire Cain Miller, Alicia Parlapiano & Margot Sanger-Katz, *Visualizing Who Would Benefits from the Child Tax Credit*, N.Y. TIMES (Feb. 1, 2024), <https://www.nytimes.com/2024/01/30/upshot/child-tax-credit-poverty.html>. For later years, refundable CTC may have adjusted to \$2,100 if the nonrefundable portion of the CTC were increased.

considering Congress' persistent hostility toward them. And finally, our discussion of refund rhetoric helps understand some of the objections to TRAFWA that made their way into the media. For instance, 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.'"<sup>276</sup> 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."<sup>277</sup> The title of the op-ed is *The Democratic Child Tax Credit Trojan Horse*.<sup>278</sup> An article found on the website of the Heritage Foundation, titled *The Tax Relief or America Working Families Act: Light on Tax Relief and Heavy on Welfare Expansion*, argues that "the bill deliberately weakens" welfare work requirements and continues a long-standing push by Congress to dress up welfare benefits as "tax relief."<sup>279</sup> Refund rhetoric is very much alive.

Given our sticky history of inequitably taxing parents, one might be deeply skeptical that any type of broader conversation could happen any time soon. But we are in a rare moment where it is somewhat inevitable—the TCJA's parental tax benefit expansions expire at the end of 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's inequitable treatment of families and entrenched its sticky preference for nonpoor, one-breadwinners,<sup>280</sup> expires at the end of 2025. This provides a date certain on which Congress must revisit its method of taxing parents. This final Part discusses how the historical account developed in the previous Parts can guide these imminent conversations as well as inform the approaches of those who continue to advocate for a more inclusive method of supporting parents in the United States.

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276. Emily Brooks, *GOP Leaders Face Conservative, Moderate Pushback on Bipartisan Tax Deal*, THE HILL (Jan. 26, 2024, 5:30 AM EST), <https://thehill.com/homenews/house/4430555-bipartisan-tax-deal-conservative-moderate-pushback> (explaining that some children who are American citizens are eligible for the ACTC, even if their parents are undocumented).

277. *The Democratic Child Tax Credit Trojan Horse*, WSJ OPINION (Jan. 30, 2024, 6:43 PM EST), <https://www.wsj.com/articles/ron-wyden-child-tax-credit-republicans-deal-business-tax-breaks-ff502651>.

278. *Id.*

279. RECTOR ET AL., *supra* note 263.

280. See *supra* Parts I–II.

### 1. *Bracket Parameters with Intent*

Consider what might happen after 2025, upon the TCJA's expiration. It may seem natural 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 might exert outsized influence on public opinion) are likely to 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 after 2025). The broader historical picture developed in this Article offers the ARPA as an alternative reference point.

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, and 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. The TCJA and ARPA represent two substantial shifts moving in opposite directions from the pre- and post-TCJA law. Bracketing the parameters of negotiation around these two regimes would allow for more inclusive and historically appropriate discussions. Let's expand and review.

The TCJA amplified Congress's historical preference (embedded within pre- and post-TCJA law) for nonpoor, one-breadwinner parents. As the preceding discussion has now shown, the changes enacted by the TCJA further entrenched these preferences. The TCJA drastically expanded the nonrefundable portion of the golden child tax credit, available to all nonpoor parents, whether they incur childcare costs to earn income or not. The expansions went well beyond what would be required for inflation. The TCJA also opened eligibility for the credit substantially, now available to MFJ couples until adjusted gross income exceeds \$400,000 and to unmarried taxpayers until AGI exceeds \$200,000. 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 also made no meaningful moves toward 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 added a cap, guaranteeing that no poor parent could claim the full \$2,000 NRP-CTC available to parents of greater means.<sup>281</sup> 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

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281. See Subpart.I.A.1.

working childcare benefits refundable. This change would have helped relatively poor parents afford the childcare they need to do that work.

Then there is the tinkering with the statutory rate structure—through the TCJA, Congress altered the various parental and parental-adjacent benefits that define the contours of the statutory rate structure. It expanded income splitting benefits for MFJs, extending marriage bonuses far up the taxable income strata. These benefits will be enjoyed by nonpoor, one-breadwinner families (even those with no caregiving obligations), but this bonus diminishes as earnings become more equal and disappears for families with equal earnings. At the same time, the TCJA dramatically scaled back the head of household rate benefits, even though the two benefits have historically moved in tandem (an increase in benefits for MFJs historically results in a proportionate increase for heads of household). As for the zero-bracket amount, the TCJA eliminated the personal exemption while doubling the nonrefundable portion of the child tax credit and drastically increasing phaseout thresholds. For many, these changes largely end up netting out and the distributional effects of all these changes become largely obscured to the average taxpayer.

This is how the TCJA fits within the broader story of how America treats parents—it amplified Congress's already sticky preference for nonpoor, one-breadwinners and magnified the inequitable taxation of parents. The TCJA will obviously serve as one anchor point in conversations about its expiration. I argue that the ARPA should be used as a counter-reference point. The ARPA was recent in time and, as this Article has shown, should not be viewed as crisis legislation that was only useful for responding to challenges posed by a global pandemic. Instead, it is best seen as a series of long overdue moves away from Congress's historic preferentialism and toward 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 increased the dollar caps on working childcare benefits for dual-earners and solo parents in a way that largely adjusted for the value lost through inflation and decades of neglect. 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, like the EITC and ACTC, depend. The ARPA did not tinker with benefits defining the statutory tax rates, allowing the distributive implications of the changes to be easily 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 discussion than one that haggles between pre- and 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 toward keeping



the conversations in 2025 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 would like to sketch a few possibilities here that will, along with others, be more fully explored in future projects.

## 2. *Childcare, Childcare, Childcare*

For decades now, Congress has preferred the nonrefundable child tax credit over benefits that could help working parents defray the childcare costs they incur to earn income. It consistently expands the benefits available under the former while neglecting to even adjust the latter benefits for decades of inflation. This favors the one-breadwinner model, sometimes even explicitly so. 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.<sup>282</sup>

However, 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 workforce. Another undeniable fact is that many parents who need to be in the workforce (no less want to, given the invocation of free choice we find in statements like the one above) will have to pay for childcare in order to work. Adjusting the working childcare benefits to reflect the current realities of high childcare expenses should be a priority in conversations 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 to the dollar caps on these provisions that seem substantial but that can largely be characterized as inflation adjustments. Pointing out these facts makes the ARPA's increases seem far less dramatic and may allow them to serve as an anchor point for expanding benefits after 2025.

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282. *Senator Hawley Introduces Parent Tax Credit—Historic Relief for Working Families*, JOSH HAWLEY: U.S. SEN. FOR MO. (Apr. 26, 2021), <https://www.hawley.senate.gov/senator-hawley-introduces-parent-tax-credit-historic-relief-working-families>.

b. The Benefits Need to be Kept Straight

It will be hard to expand working childcare benefits if we cannot differentiate them from the child tax credit. But I have reason to think that these benefits are often conflated. Consider this transcript in which President Biden confused the “golden” child tax credit with the childcare and dependent credit in 2021 while promoting 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 up to the average informed person—doctor, lawyer, whatever—and say, “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.<sup>283</sup>

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 does not depend on actual childcare expenses incurred. One does not have to search far to discover 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 simply 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).”<sup>284</sup> 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.<sup>285</sup>

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283. *President Biden Issues Remarks on Bipartisan Infrastructure Bill, Build Back Better Agenda*, TARGETED NEWS SERV. (Oct. 6, 2021), <https://www.proquest.com/docview/2579312650/E00E034083C14771PQ/4?accountid=14784&sourcetype=Wire%20Feeds>.

284. *State Child Care Tax Supports for Businesses and Parents*, BIPARTISAN POL’Y CTR. (Nov. 22, 2024), <https://bipartisanpolicy.org/report/state-tax-policies-working-parents>.

285. *Id.* For instance, Georgia, Delaware and Iowa allow a CDCTC of 30%, 50%, and 30% to 75% of the federal CDCTC, respectively (as can be seen by using the interactive tool on the website which allows one to select by state and see details of each state’s CDCTC laws).

Congress's neglect, therefore, has rippling effects on parents attempting to afford childcare costs to work.

### 3. *Emancipate Parental Tax Benefits from Parental Adjacent Guardians*

As discussed in Part 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 or progressive tax rate). 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 Congressional priorities at the time. And so long as the United States continues to have some zero-bracket amount, there will need to be some method of calculating it. Some complexity is unavoidable, so saying Congress should simply stop tinkering with the statutory rate structure is far 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 Part 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—for example, Congress does not 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 whom Congress is consistently concerned) might be a politically expedient way to help these vulnerable parents. But after the TCJA broke with historical patterns and increased MFJ income-splitting benefits while curtailing head of household benefits, it seems time to seriously consider structuring the benefit in a separate, more lucid, and visible manner, such as through a special child tax credit, a proposal which has been made by others.<sup>286</sup>

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 depend on caregiving). Maybe it did 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.<sup>287</sup> This would make the parental tax structure simpler, more lucid, and eliminate the parental adjacency that allows Congress to tinker with various benefits and obscure distributional effects. The credit also allows a dollar-for-dollar reduction, eliminating the upside-down subsidy effects

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286. Goldin & Liscow, *supra* note 118, at 398.

287. See, e.g., MAAG, *supra* note 159, at 10–13.

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—when the subject of refundable benefits is raised, there is a high likelihood that the specter of the welfare queen will be conjured, moving discussions about who America believes to be 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.<sup>288</sup> But other times the invocations are more subtle—for example, pithy statements like that of Representative Thomas Massie—“What is a refundable tax credit? It’s welfare by a different name”<sup>289</sup>—which were used to register predictable objections to the modest adjustments the proposed TRAFWA would have made to refundable parental tax benefits (alongside varied extensions of corporate tax breaks).<sup>290</sup>

Pretending refund rhetoric can be retired any time soon is probably at best pollyannaish and at worst dangerous. It seems, therefore, important that 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-

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288. Rebecca Shabad, Garrett Haake, Frank Thorp V & Julie Tsirkin, *Manchin Privately Raised Concerns That Parents Would Use Child Tax Credit Checks on Drugs*, NBC NEWS (Dec. 20, 2021, 11:11 AM PST), <https://www.nbcnews.com/politics/congress/manchin-privately-raised-concerns-parents-would-use-child-tax-credit-n1286321>.

289. Forbes Breaking News, *‘It’s Welfare By A Different Name’: Thomas Massie Unleashes On ‘Gimmicks’ In New Tax Bill*, YOUTUBE (Feb. 2, 2024), [https://www.youtube.com/watch?v=MTC\\_-dgOFTQ](https://www.youtube.com/watch?v=MTC_-dgOFTQ).

290. See *supra* Subpart.IV.A.2.

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 freedom.<sup>291</sup>

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.<sup>292</sup>

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, and 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 toward 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 through the TCJA amplified these historical inequities, despite 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 in tax year 2021, during the COVID-19 pandemic. While the ARPA still leaned extensively on the Code, it abandoned Congress’s consistent preference for nonpoor, one-

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291. Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 259 (2016).

292. *Id.* at 267.

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 expanded parental tax benefits have now expired, leaving parents back where they started. Because the ARPA was born in an emergency, it will be easy to dismiss it as legislation used only to move through an acute crisis that provides few lessons outside that context. 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 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. And of critical import, the historical narrative of inequitable tax reform developed in this project 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 many of the provisions in the Tax Cuts and Jobs Act, which enacted a panoply of parental tax benefits that amplified Congress's inequitable treatment of families and favoritism toward nonpoor, one-breadwinner families, expire in 2025, providing a date certain on which Congress must revisit its method of taxing parents. During these imminent 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.