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## Welfare by Any Other Name: Tax Transfers and the EITC

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# Welfare by Any Other Name: Tax Transfers and the EITC

## **Abstract**

Tax credits, particularly refundable tax credits, are viewed increasingly as a social policymaking magic bullet. Indeed, the tax instrument can be a particularly effective and efficient mechanism for delivering social welfare benefits. However, deploying uniform refundable credits or universal tax subsidies will not solve all anti-poverty woes. In particular, over-reliance on the tax instrument blinds policymakers to a more fundamental conundrum that has plagued government transfers for over thirty years: What exactly is the government trying to accomplish by delivering social welfare benefits through the tax system? The Article explores this systemic question, and poses two further questions. First, what and who are policymakers targeting when they advocate tax-transfer programs like the EITC? And second, are current tax-transfer efforts effectively assisting the targeted beneficiaries? In addition, the Article examines the current political and administrative state of the EITC, and recommends several ways the program can further expand its reach and efficacy. In the process, it offers a sharp rebuttal to recent scholarship suggesting that the EITC is in political danger.

## **Keywords**

Refundable tax credits, Social tax policy, Earned Income Tax Credit

# WELFARE BY ANY OTHER NAME: TAX TRANSFERS AND THE EITC

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## TABLE OF CONTENTS

Introduction.....	1261
I. Clarifying the Goals and Outcomes of the EITC.....	1264
II. How We Can “Save” the EITC .....	1272
III. Charting the EITC’s Future: Reducing Errors, Raising Awareness, and Expanding Coverage.....	1276
Conclusion .....	1280

## INTRODUCTION

Tax credits—particularly refundable tax credits—are seen increasingly as a social policy magic bullet. In late 2005, President Bush’s Tax Reform Panel<sup>1</sup> recommended substituting uniform work and family credits for the earned income tax credit (“EITC”),<sup>2</sup> the child tax credit (“CTC”),<sup>3</sup> personal exemptions,<sup>4</sup> and the standard deduction.<sup>5</sup> In his 2006 book, *Making America Work*, Jonathan Barry

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1. THE PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, FINAL REPORT, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA’S TAX SYSTEM (2005), available at <http://www.taxreformpanel.gov/final-report/>. The final report was issued on November 1, 2005.

2. I.R.C. § 32 (2000).

3. *Id.* § 24.

4. *Id.* § 151.

5. *Id.* § 152.

Forman, a long-time participant in tax-transfer debates, proposed substituting all existing welfare programs with refundable tax credits, including a universal \$2,000 per-person credit.<sup>6</sup> And in an extremely important article appearing in the October 2006 issue of the *Stanford Law Review*, Lily Batchelder, Fred Goldberg, and Peter Orszag argued that the optimal delivery mechanism for all socially valued incentives embedded in the tax code is the uniform refundable tax credit.<sup>7</sup>

Each of these efforts addresses longstanding shortcomings associated with tax-transfer systems, including: (1) multiple phase-outs of crisscrossing, uncoordinated tax, and transfer programs; (2) inequitable and inefficient marriage penalties on low-income workers; and (3) distortionary work versus leisure incentives whereby low-income taxpayers face marginal tax rates that can exceed 100 percent.<sup>8</sup>

For at least twenty years, tax policy experts have studied and publicized the problems endemic to running social programs through the tax code.<sup>9</sup> Concerns among economists and policy

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6. JONATHAN BARRY FORMAN, *MAKING AMERICA WORK* (2006). A universal benefit could simplify the current collection of tax credits, particularly with respect to standardizing qualifying definitions, coordinating phase-outs, and eliminating marriage penalties. However, thoughtful commentators have questioned the prudence of running all social welfare programs through the tax code. According to Janet Holtzblatt of the Treasury Department's Office of Tax Analysis, for instance, doling out social welfare benefits through the tax system could overwhelm the administration of the federal income tax and raise compliance costs for low-income claimants unfamiliar with participating in the positive tax system. For a summary of Holtzblatt's remarks, see Kurt Ritterpusch, *Proposal to Revamp Low-Income Benefits with Refundable Credits Lauded, Criticized*, DAILY TAX REP., Nov. 8, 2006, at G-4 (describing Holtzblatt's concerns about a universal tax credit, though noting her overall sense that the proposal is "appealing").

7. See Lily L. Batchelder, Fred T. Goldberg, Janet Holtzblatt & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credit*, 59 STAN. L. REV. 23, 24 (2006) (predicting that such credits would provide "a much more even and widespread motivation for socially valued behavior than the current set of tax incentives").

8. See Daniel N. Shaviro, *Effective Marginal Tax Rates on Low-Income Households*, 84 TAX NOTES 1191, 1200 (1999) (illustrating that "at some margins—including even an earnings increase from \$10,000 to \$25,000 for some households—the marginal rate exceeds 100 percent"). Recent legislative changes to tax rules affecting low-income taxpayers, particularly expansions to the standard deduction and personal exemption as well as a new ten percent tax bracket, have mitigated somewhat these extreme effects.

9. Economist Gene Steuerle has been particularly indefatigable in educating policymakers as to the counterproductive labor supply effects of the U.S. transfer system. See, e.g., C. EUGENE STEUERLE, *THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA* 124 (1992) (reporting that due to expansions to the EITC in 1986, combined direct marginal tax rates on low-income workers, including state income taxes, topped forty-five percent); Steuerle, *Combined Tax Rates And AFDC Recipients*, 69 TAX NOTES 501, 501 (1995) (writing that despite increases to the EITC, "it is virtually unprofitable" for the typical welfare recipient "to work in the formal or above-ground economy"); Steuerle, *Giving Jobs to Welfare Recipients: The Tax Rates They*

experts over high marginal tax rates for the poor have animated policy discussions over tax-transfer programs since at least 1969 when President Nixon introduced his ill-fated Family Assistance Plan (“FAP”) and its cornerstone negative income tax.<sup>10</sup> Heeding the advice of experts, however, will not solve all of the problems associated with tax-transfer programs. Coordinating phase-outs, eliminating marriage penalties, and deploying uniform refundable tax credits or universal tax subsidies will not address a more fundamental conundrum that has plagued tax transfers for over thirty years: What *exactly* are we trying to accomplish by delivering social welfare benefits through the tax system? This article will explore this systemic question, and pose two further questions. First, what and who are we targeting when we advocate tax-transfer programs like the EITC? And, second, are our current efforts effectively assisting the targeted beneficiaries? In addition, this article will discuss the current political and administrative state of the EITC, and recommend several ways in which the EITC, already the largest anti-poverty program in the United States, can further expand its reach and efficacy.

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*Face*, 69 TAX NOTES 641, 641 (1995) (finding marginal tax rates for welfare recipients above seventy-five percent); Steuerle, *Moynihan Was Right: The Health Issue Is Welfare and Taxation*, 63 TAX NOTES 1051, 1051 (1994) (noting that for persons living just above the poverty level, “the current combined marginal tax rate is already about 50 percent”); Steuerle, *The True Tax Rate Structure*, 69 TAX NOTES 371, 371 (1995) (noting that phase-outs of tax-transfer and direct-transfer programs create the perverse result whereby “the highest marginal rates are faced at low- and moderate-income levels”); C. Eugene Steuerle & Paul Wilson, *The Taxation of Poor and Lower-Income Workers*, 34 TAX NOTES 695, 696 (1987) (observing that “[w]hen the implicit tax rates from the phasing out of welfare and other transfer programs are combined with the implicit and explicit tax rates in the direct tax programs . . . low-wage workers often face higher marginal tax rates than most other groups in society”).

10. A negative income tax (“NIT”) provides a lump-sum payment to persons with zero income. It phases out the payment at some percentage rate (typically around fifty percent) as income rises from zero to a specified point at which benefits disappear entirely. During the phase out of the NIT payment, taxpayers effectively incur marginal taxes in addition to those imposed by the positive tax system, resulting in effective tax rates exceeding the statutory rates. For a discussion of Nixon’s Family Assistance Plan and the political and economic history of negative income taxation, see Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit*, in MAKING WORK PAY: THE EARNED INCOME TAX CREDIT AND ITS IMPACT ON AMERICAN FAMILIES 15-31 (Bruce D. Meyer & Douglas Holtz-Eakin eds., 2001); see also VINCENT J. BURKE & VEE BURKE, NIXON’S GOOD DEED: WELFARE REFORM (1974) (examining the political forces behind Nixon’s proposal to expand the welfare state); DANIEL PATRICK MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN (1973) (recounting the author’s participation in the unsuccessful FAP legislation).

## I. CLARIFYING THE GOALS AND OUTCOMES OF THE EITC

*Question #1: What exactly are we trying to accomplish by delivering social welfare benefits through the tax system?*

Historically, advocates of tax-transfer programs have perceived multiple benefits to administering social-welfare programs through the tax code. These benefits include obvious, structural advantages such as lower administrative costs. In the case of the EITC, would-be tax-transfer claimants self-declare eligibility simply by filing a tax return. Delivering benefits through the tax code can also be more efficient and even operate as a counter-cyclical device, particularly if transfer payments are reflected in regular paychecks, a feature offered—but severely underutilized—in the current EITC’s “advance payment” option.<sup>11</sup> The structural advantages of tax-transfer programs such as the EITC also include a less intrusive administrative presence. Unlike traditional transfer programs administered outside the tax system, tax-transfer programs do not require claimants to interact with social welfare workers to initiate or continue receiving benefits. Generally, a claimant need only prove eligibility by filing an extra form with the Internal Revenue Service, the Schedule EIC.<sup>12</sup>

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11. I.R.C. § 3507 (2000). Receiving EITC benefits in regular paychecks is the equivalent of receiving a steady percentage of one’s tax refund throughout the year; the taxpayer gets the advantage of having the money sooner rather than later, and the government foregoes the benefit of what would otherwise amount to a tax-free loan from the taxpayer. There is no consensus among policy experts as to why such a small percentage of low-income workers (under ten percent) take advantage of the advance payment option. Janet Holtzblatt of the U.S. Department of Treasury’s Office of Tax Analysis has speculated that the low take-up rate could involve a reluctance among low-income workers “to provide their employers with more information about their family or financial situations. It is also likely that employees do not request advances of the EITC because of the costs it would impose on employers who must [] compute and track advance payments.” Interview with Janet Holtzblatt, Deputy Director of the Individual Taxation Division in the Department of the Treasury’s Office of Tax Analysis, in 8 GEO. PUBLIC POL’Y REV. 54, 63 (2002) [hereinafter *Holtzblatt Interview*]. Moreover, for workers, “there is also a risk that they may receive too much of the credit in advance and end up having to pay some of it back at the end of the year.” *Id.*

12. I.R.S., Schedule EIC (Form 1040A or 1040): Earned Income Credit Qualifying Child Information, available at <http://www.irs.gov/pub/irspdf/fl040sei.pdf> (last visited Mar. 28, 2007). While the administrative interaction may be less intrusive for EITC claimants than for welfare claimants, the process of claiming benefits can still be intimidating and time-consuming. IRS Publication 596 assists would-be eligibles in claiming the credit, but for tax year 2006, the publication was an astonishing fifty-eight pages long. The complexity of EITC eligibility requirements forces the majority of EITC claimants to use paid return preparers, burdening claimants with costs that reduce the value of their EITC benefits, and making them vulnerable to incompetent and even fraudulent return preparation services. *Infra* notes 77-81 and accompanying text. Leslie Book has argued that the lack of interaction with tax administrators—described above as a benefit—results in

The sum total of these administrative benefits results in lower costs and higher participation rates relative to direct transfer programs. The IRS administers the EITC at a cost between 1.00 and 1.85 percent of benefits paid.<sup>13</sup> By comparison, estimated administrative costs for Food Stamps range between twenty and twenty-five percent of program benefits, while administrative costs for welfare programs equal ten percent of benefits.<sup>14</sup> In addition, considerably higher percentages of EITC eligibles participate compared to other transfer programs. The EITC boasts participation rates as high as eighty-nine percent,<sup>15</sup> while the Food Stamps program achieves a participation rate closer to seventy percent.<sup>16</sup>

It should already be clear that these benefits—lower administrative costs, greater efficiency, less intrusion and coercion—are all defined vis-à-vis “welfare.” In fact, one of the primary explanations for why we deliver transfer payments through the tax system is to position these programs opposite welfare.

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deficient customer service for low-income taxpayers as well as higher noncompliance rates. Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 355 (2002). Book suggests implementing free or low-cost tax representation in the EITC audit process to “help resolve the tension between the legitimate government interest in reducing EITC error rates through compliance efforts directed at low-income taxpayers and ensuring that the EITC’s intended beneficiaries continue to receive the support to which they are entitled.” *Id.*

13. Compare Janet Holtzblatt & Janet McCubbin, *Issues Affecting Low-Income Filers*, in *THE CRISIS IN TAX ADMINISTRATION* 161 n.26 (Henry J. Aaron & Joel Slemrod eds., 2004) (placing the cost estimate at one percent of benefits), with Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1884 (2005) (concluding the cost is no more than 1.85 percent of benefits).

14. Zelenak, *supra* note 13, at 1881-82 (placing the total administrative cost of Food Stamps at \$4 to \$5 billion annually, out of \$20 billion total, and the cost of TANF at \$2.3 billion of \$23.2 billion annually).

15. David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 1004-05 (2005). Weisbach and Nussim base their eighty-nine percent figure on a 2001 study conducted by the General Accounting Office, which tallied participation as a percentage of total credit that households were eligible to claim rather than strictly as a percentage of participating eligible households. See U.S. GEN. ACCOUNTING OFFICE, EARNED INCOME TAX CREDIT ELIGIBILITY AND PARTICIPATION 3 (2001), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-02-290R> (“The amount foregone by nonparticipating households represented about 11.1 percent of the total credit that households were eligible to claim.”). Until a more recent study is conducted using tax return microdata (such a study is currently underway as a joint project of the IRS and Treasury), Janet Holtzblatt suggests representing the participation rate as a range between seventy-five and eighty-six percent, reflecting the conclusions of the three most prominent studies of EITC participation rates since 1994. Telephone Interview with Janet Holtzblatt, U.S. Treasury Department, Office of Tax Analysis, in Washington, D.C. (Feb. 21, 2007) [hereinafter Telephone Interview with Janet Holtzblatt].

16. MATHEMATICA POLICY RESEARCH, INC., TRENDS IN FOOD STAMP PROGRAM PARTICIPATION RATES: 1994-2000 2-5 (2002), available at <http://www.fns.usda.gov/oan/e/MENU/Published/FSP/FILES/Participation/Trends94-00.pdf>.

The history of the EITC is a case in point. Congress enacted the low-income credit in 1975 because politicians viewed it as a work-oriented alternative to existing welfare programs.<sup>17</sup> It flourished when beneficiaries were perceived as deserving workers. But it faced increasing threats when claimants began to resemble the apocryphal welfare cheat who bilked the government and lived off the dole; that is, when noncompliance rates for the program skyrocketed to thirty-five and forty percent in the 1980s and 1990s.<sup>18</sup> Only after supporters of the EITC mounted a protracted effort demonstrating the program's pro-work, anti-welfare features did the threats subside.<sup>19</sup>

Thus, delivering transfer payments through the tax system requires a precarious balancing act. Tax transfers must navigate not only administrative and economic priorities surrounding social welfare policy. They must also negotiate the treachery of welfare politics, and, in particular, avoid all associations with the moniker, "welfare."

While tax transfers can be effective in shielding work support programs from the politics of welfare, we may view the policy trend toward tax transfers and away from direct transfers as an opportunity to jump directly into the lion's den, re-imagining our definition of welfare itself. Indeed, one could argue that the sum of "ending welfare as we know it" plus "making work pay" equals a twenty-first century, work-oriented welfare state. Rather than restrict our notion of welfare, we expand it to include the "deserving poor" in the form of the working poor.

This goal is fraught with difficulties. "Welfare" has fallen almost completely off the public agenda since 1996, the year Congress

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17. Ventry, *supra* note 10, at 23-26.

18. In fact, according to the IRS Taxpayer Compliance Measurement Program ("TCMP") study for tax year 1985, as many as forty-six percent of taxpayers who claimed the EITC may not have been entitled to the payment received. The overclaim rate for that year, calculated as the dollar amount claimed in error divided by the total dollar amount claimed, was closer to thirty-nine percent. John Karl Scholz, *The Earned Income Tax Credit: Participation, Compliance, and Antipoverty Effectiveness*, 47 NAT'L TAX J. 63, 69 tbl.2 (1994). The Treasury responded to high error rates with a simplification package designed to increase compliance by clarifying EITC eligibility rules and enhancing IRS verification of claims. See Janet Holtzblatt, *Administering Refundable Tax Credits: Lessons from the EITC Experience*, in PROCEEDINGS OF THE EIGHTY-FOURTH ANNUAL CONFERENCE ON TAXATION 180-86 (Nat'l Tax Ass'n ed., 1991). The 1988 TCMP study, released in 1992, reported a drop in the overclaim rate from 39.1 to 35.4%. See Scholz, *supra*. Notwithstanding the concentrated compliance efforts and steady reduction in error rates, analysts critical of the program continued to report that EITC error rates hovered around fifty percent. See MALCOLM K. SPARROW, FRAUD IN THE ELECTRONIC FILING PROGRAM: A VULNERABILITY ASSESSMENT (Sept. 1993) (unpublished report prepared for the Internal Revenue Service).

19. See Ventry, *supra* note 10, at 37-41 (describing the counterattack and IRS analysis used to defend the EITC).

devolved national welfare policy to the states, and replaced the much-maligned Aid to Families with Dependent Children (“AFDC”) with Temporary Assistance for Needy Families (“TANF”).<sup>20</sup> Attempts to reignite public discourse over welfare, and expand rather than contract its constituent parts could prove disastrous. If tax credits like the EITC became linked with welfare, they might cease to exist. Ideally, the poor and disadvantaged would be better off with a system of social provisions that recognized public assistance as a matter of right—as an entitlement—much like the basic income guarantees in many countries throughout the world.<sup>21</sup> In re-conceiving longstanding notions of “welfare,” and expanding the inventory of “welfare” programs to include tax-transfer programs and their beneficiaries, however, we raise the possibility of losing our most effective anti-poverty programs.

We might have more success in expanding our notion of “work” rather than of “welfare.” Recently, Noah Zatz has compared the definition of work in the EITC and TANF, showing that “work” for EITC purposes equates exclusively with earnings from employment or self-employment, while “work” for TANF purposes is substantially more flexible, and includes unsubsidized employment, subsidized private sector employment, work experience, on-the-job training, job search and job readiness assistance, community service programs,

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20. Two of the most thoughtful welfare reform scholars and advocates of the last thirty years, Joel Handler and Yeheskel Hasenfeld, have recently written that after President Clinton signed the 1996 welfare reform legislation, “welfare” “dropped out of the political discourse and is virtually forgotten.” JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 1 (2007). For the 1996 welfare law, see Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

21. The basic income guarantee (“BIG”)—also called a universal basic income, guaranteed annual income, negative income tax, universal tax credit, among others—has been adopted in some form or another in Brazil, Portugal, Belgium, the Netherlands, the United Kingdom, and even the state of Alaska, which guarantees each resident a share of the state’s oil reserves from the Alaska Permanent Fund Dividend. In the United States, the U.S. Basic Income Guarantee Network (“USBIG Network”), founded in 1999, has promoted the idea of a basic income, which it defines as “a government insured guarantee that no citizen’s income will fall below some minimal level for any reason.” The U.S. Basic Income Guarantee Network, <http://www.usbig.net/> (last visited Mar. 30, 2007). All citizens, according to the USBIG Network, “would receive a BIG without means test or work requirement.” *Id.* The USBIG website includes an extensive bibliography (over 2000 citations) on basic income plans, both in the United States and throughout the world. *See id.* For two reviews of recent scholarship on the basic income concept, *see* Karl Widerquist, *Perspectives on the Guaranteed Income, Part I*, 35 J. ECON. ISSUES 749 (2001) and Karl Widerquist, *Perspectives on the Guaranteed Income, Part II*, 35 J. ECON. ISSUES 1019 (2001). For an excellent philosophical discussion of basic income guarantees, *see* Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1 (2003).

vocational educational training, and providing child care services to persons participating in community service.<sup>22</sup> If TANF claimants perform at least twenty hours of “work” from the above activities, moreover, they may also participate in three additional forms of work, all unpaid: job skills training directly related to employment; education directly related to employment for non-high school graduates; and high school or GED coursework for non-high school graduates.<sup>23</sup> Although the list of what qualifies as work under TANF emphasizes the attainment of paid employment, it is considerably more expansive than the narrow category of work recognized for receipt of EITC benefits. Among the states, there is further variation with respect to permitting TANF recipients to satisfy work requirements from unpaid activities, which includes unpaid community service, care for family members suffering from physical disabilities or severe health problems, and subsistence production to meet basic household needs.<sup>24</sup>

Two points are worth emphasizing in comparing “work supports” in the nation’s largest tax-transfer program and its largest direct-transfer program. First, “welfare” in the twenty-first century requires that recipients work, seek work, or develop sufficient skills to attain work. There are no free lunches under the welfare state as we have come to know it. Second, unlike welfare, the EITC “makes work pay” only if the work takes place in the paid labor market. The EITC does not reward unpaid work, efforts to find work, or skills training that facilitates paid employment. “Work” under the EITC remains categorical, strictly limited to current paid employment, and generally less inclusive than “work” for welfare purposes.

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22. Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1140-41 (2006).

23. *Id.* at 1140.

24. *Id.* at 1135. Far from perfect “laboratories of democracy,” the states nonetheless provide creative variations on the definition of work for welfare programs as well as on the design of state-level EITCs. Currently, twenty states (including the District of Columbia) offer state-level EITCs, as do two local governments, Montgomery County, Maryland and Denver, Colorado. Most states use the federal model as a starting point, but then offer variations designed to suit the needs of regional concerns. Minnesota, for instance, has extended the phase-in range of the credit due to concerns over high marginal tax rates for recipients in the phase-out range of other transfer programs. Wisconsin, meanwhile, includes a third tier for families with three or more children; the federal EITC only differentiates between families with one child and two or more children. See, e.g., IFIE OKWUJE & NICHOLAS JOHNSON, CTR. ON BUDGET & POLICY PRIORITIES, A RISING NUMBER OF STATE EARNED INCOME TAX CREDITS ARE HELPING WORKING FAMILIES ESCAPE POVERTY (2006), <http://www.cbpp.org/10-12-06sfp.pdf>; TAX POLICY CTR., STATE EARNED INCOME TAX CREDITS BASED ON THE FEDERAL EITC, TAX YEAR 2006 (2006), [http://www.taxpolicycenter.org/TaxFacts/TFDB/Content/PDF/state\\_eitc.pdf](http://www.taxpolicycenter.org/TaxFacts/TFDB/Content/PDF/state_eitc.pdf).

A fourth potential benefit of delivering social welfare through the tax system rather than through direct expenditure programs may involve our desire to hide these programs in the tax system. We might seek the cloak of the tax code for several reasons, including: (1) the hope that opponents of a generous social welfare state will not find out what we are doing, (2) to de-stigmatize and legitimize tax-transfer programs by tying them and their beneficiaries to the unassailable virtue of work, and (3) to prevent the programs from having to undergo the annual scrutiny of the general appropriations process. As to the last motivation, the EITC, for one, became a permanent part of the tax code in 1978,<sup>25</sup> and if Congress wants to defund it, it must do so explicitly.

Practically speaking, the “hidden” welfare state embedded in the tax code was exposed long ago.<sup>26</sup> Since 1974, Congress has required the Treasury Department to produce an annual, current-year accounting of tax expenditures to accompany the President’s direct expenditure budget.<sup>27</sup> Programs like the EITC remained under the radar for many years, because they were small in number and size. In 2005, however, social welfare provisions contained in the tax expenditure budget totaled \$576 billion, nearly sixty-five percent of all tax expenditures.<sup>28</sup> Tax-transfer programs no longer enjoy anonymity.

*Question #2: What and who are we targeting when we advocate tax-transfer programs like the EITC?*

Are we defending wage subsidies?<sup>29</sup> Income supplements? Negative income taxes? Are we providing a “work bonus”?<sup>30</sup> Are we defending progressivity by adding it to the bottom of the income

25. Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (1978).

26. For the tax expenditure budget as reflecting the “hidden welfare state,” see CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE* (1997); Jeffrey P. Owens, *Tax expenditures and direct expenditures as instruments of social policy*, in *COMPARATIVE TAX STUDIES* (Sjibren Cnossen ed., 1983).

27. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

28. Thomas L. Hungerford, *Tax Expenditures: Good, Bad, or Ugly?*, 113 TAX NOTES 325, 333 (2006). This figure reflects social welfare tax expenditures that cover all income classes, and include, in addition to the EITC and CTC, incentives to encourage retirement saving, charitable contributions, higher education, and homeownership.

29. Larry Zelenak, for instance, has argued recently that the EITC should be designed “to function as an adjustment to the minimum wage based on family size.” Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX. L. REV. 301, 302 (2004).

30. Senator Russell Long (D-LA), the political progenitor of the EITC, dubbed a similar predecessor plan the “work bonus.” Ventry, *supra* note 10, at 22.

scale rather than to the top? Are we bolstering a weak and ineffective social safety net? Or are we protecting what the Congressional Research Service recently called, when referring to the EITC, the country's "largest anti-poverty entitlement program?"<sup>31</sup>

Correspondingly, for whom are we fighting? Low-income workers? Their children? Persons below the poverty line? Persons above the poverty line? The transitionally unemployed? Or are we concerned about secondary earners who face significant disincentives to enter the labor market due to high marginal tax rates? Without yet offering answers to these questions, let us turn to our third thematic question.

*Question #3: Are our current tax-transfer efforts effectively assisting the targeted beneficiaries?*

Transfer programs that run through the tax code help persons who pay taxes. If you do not have taxable income, tax-transfer programs do not help you, at least currently. But "work," as discussed *supra* in connection with Professor Zatz's findings, is broader than paid employment.<sup>32</sup> In very real terms, the EITC, as a "work support" program, discriminates among different kinds of workers, and distributes anti-poverty benefits only to one category of persons living in poverty; it supplements the income of paid workers but neglects unpaid workers.<sup>33</sup> In addition, low-income individuals engaged in unpaid work may be ineligible for EITC benefits but considered "working" for other transfer programs, including TANF.<sup>34</sup> The different treatment of "work" under the two programs raises serious concerns about horizontal equity (that is, the equal treatment of equals). Two individuals, one "working" in paid employment and the other "working" in unpaid employment (with income from non-employment sources), and each with identical incomes, are treated differently under the EITC. Yet if both of these workers are equally deserving of assistance—they have equal incomes, after all, and are both engaged in work-oriented activities—then "it is hard to see—from an anti-poverty perspective" why one would be helped while the

31. CONGRESSIONAL RESEARCH SERVICE, THE EARNED INCOME TAX CREDIT (EITC): AN OVERVIEW 27 app. (2007) [hereinafter CRS REPORT ON EITC].

32. *Supra* notes 22-24 and accompanying text.

33. Zatz, *supra* note 22, at 1180-84.

34. *Id.* at 1177-78. In fact, the EITC explicitly excludes from "earned income" payments made to TANF recipients on condition that they perform "work experience" or "community service." See I.R.C. § 32(c)(2)(B)(v) (2000); Treatment of Certain Payments Received as Temporary Assistance for Needy Families (TANF), I.R.S. Notice 99-3, 1999-1 C.B. 271 (1999).

other would be on the outside looking in.<sup>35</sup> The discrimination is further unjustified after accounting for the observation that the EITC extends benefits to low-wage workers in non-poor families; that is, workers less “deserving” from an economic perspective than the hypothetical individual described above.<sup>36</sup>

If the target beneficiaries of tax transfers include all low-income, working Americans, running social welfare through the tax system excludes many members of that group. Of course, we could adopt a universal tax credit, such as the one proposed by Professor Forman,<sup>37</sup> which would provide benefits as a matter of right and not as a consequence of paid employment. But we tried that already, and it did not work; in fact, it failed miserably. The negative income tax component of President Nixon’s Family Assistance Plan provided higher payments to non-workers than to workers;<sup>38</sup> moreover, paid employment under the plan reduced a recipient’s benefits, providing unambiguous disincentives to work, much like the effect of a universal tax credit.<sup>39</sup> A universal credit is a negative income tax, and a negative income tax, at least in the popular imagination, equals welfare.

To the extent we see tax credits as the solution to all of our anti-poverty woes, we are in serious trouble. Tax transfers can be powerful anti-poverty tools. Witness the combination of the EITC and the CTC, which, along with recent increases in the standard deduction and a wider fifteen percent tax bracket, provides a tax threshold of almost \$42,000 for a family of four and nearly \$62,000 for a family of six.<sup>40</sup> But we can lean on these programs only so much. If we shift our entire system of social provisions to the tax system, all the problems that previously plagued, say, welfare policy or health

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35. Zatz, *supra* note 22, at 1183.

36. See *Holtzblatt Interview*, *supra* note 11, at 62 (noting that “not all low-wage workers come from low-income families”).

37. *Supra* note 6 and accompanying text.

38. *Supra* note 10 and accompanying text.

39. The Nixon administration emphasized the work-oriented features of FAP, including its lower marginal tax rates compared to existing welfare programs, mandatory registration for claimants at employment offices for work or vocational training, and additional day care and transportation services. Ultimately, this campaign was unsuccessful as critics managed to associate the program with the dole, a government “handout” rather than a “hand up.” Ventry, *supra* note 10, at 19-23. A universal tax credit would have to employ either a phase out for benefits or a phase in of positive tax liability in order to mitigate the unambiguous disincentives to work associated with a lump-sum subsidy at the bottom of the income scale.

40. CONGRESSIONAL RESEARCH SERVICE, FEDERAL INCOME TAX THRESHOLDS FOR SELECTED YEARS: 1996 THROUGH 2006 3 tbl.1 (2005), available at <http://opencrs.cdt.org/document/RS22337>.

care policy will likely persist under the stewardship of tax officials. In fact, new problems will likely emerge as the tax system assumes responsibilities it was not designed to shoulder, and as policymakers shift responsibilities—perhaps for political rather than informed reasons—from direct expenditure programs to tax expenditure programs. The recent attempt by Senator Charles Grassley (R-IA) to expand the EITC's role as a wage subsidy in order to avoid raising the minimum wage is just one example of what can happen when policymakers begin to view tax credits as a policymaking panacea.<sup>41</sup>

## II. HOW WE CAN “SAVE” THE EITC

By raising so many questions as to the nature and purpose of low-income tax credits, I hope to clarify rather than problematize our reliance on tax-transfer programs. To be frank, however, there is an inherent danger in this clarification project. Tax-transfer programs like the EITC have enjoyed political success largely because of *confusion*—rather than *clarity*—over what they are and what they are not. Indeed, the EITC gained bipartisan support over the years because it has meant different things to different people. For Republicans, it is a reward for working, while for Democrats, it is an anti-poverty program. By clarifying with precision what we are trying to accomplish with tax-transfer programs such as the EITC, we run the risk of disturbing the delicate balance of bipartisanship that many of these programs currently enjoy.<sup>42</sup>

In fact, some commentators suggest that the EITC is already in mortal danger. Dorothy Brown raises the specter that the EITC may be “repealed outright,”<sup>43</sup> and that the program “is headed for extinction or at least the ‘end of the EITC as we know it.’”<sup>44</sup> Congress

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41. See CONGRESSIONAL BUDGET OFFICE, RESPONSE TO A REQUEST BY SENATOR GRASSLEY ABOUT THE EFFECTS OF INCREASING THE FEDERAL MINIMUM WAGE VERSUS EXPANDING THE EARNED INCOME TAX CREDIT 2 (2007), available at <http://www.cbo.gov/ftpdocs/77xx/doc7721/01-09-MinimumWageEITC.pdf> (examining the effect on low-wage hourly workers of hypothetical minimum wage raises and EITC expansions to predict that both “would have increased total EITC payments by roughly \$2.4 billion in 2004, with workers in poor families receiving \$1.4 billion of that total”).

42. Noah Zatz has made a similar observation with respect to “the sensitivity of work definitions,” and the “uneasy . . . alliance” of those “who purport to agree on the importance of work.” Noah Zatz, *What Welfare Requires From Work*, 54 UCLA L. REV. 373, 378 (2006).

43. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 810 (2007).

44. *Id.* at 1. A significant percentage of overclaims from the 1999 study (nearly twenty-five percent) was due to errors relating to the confusing qualifying child rules. INTERNAL REVENUE SERVICE, COMPLIANCE ESTIMATES FOR EARNED INCOME TAX CREDIT

reacted aggressively in 2003 upon learning that as much as 31.7% of total EITC claims for tax year 1999 should not have been paid.<sup>45</sup> Congressional pressure to reduce overpayments prompted the IRS to roll out a pilot “certification” program for a limited number of EITC claimants.<sup>46</sup> The program amounted to a pre-return audit for all EITC eligibles swept up in its net, a number the IRS hoped would reach ten percent of all EITC participants when fully phased in.<sup>47</sup> Compared to audit rates of less than one percent for the general taxpayer population, the scrutiny paid low-income taxpayers appeared draconian.<sup>48</sup> In addition, since 1998, the IRS has allocated over \$1 billion of its budget to auditing low-income taxpayers,<sup>49</sup> such that low-income audits comprised fifty percent of all individual income tax examinations between 2000 and 2003;<sup>50</sup> if you were poor during those years, you were audited more than four times as

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CLAIMED ON 1999 RETURNS 13 (2002), available at <http://www.irs.gov/pub/irs-utl/compesteitc99.pdf> [hereinafter COMPLIANCE ESTIMATES]. Congress responded by requiring that dependents report taxpayer identification numbers (typically, social security numbers), permitting the IRS to match EITC claimants with the Federal Case Registry of Child Support Orders, and enacting the Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, 118 Stat. 1166 (2004), which created a more uniform definition for tax purposes.

45. COMPLIANCE ESTIMATES, *supra* note 44, at 3.

46. I.R.S. Announcement 2003-40, 2003-26 I.R.B. 1132, available at <http://www.irs.gov/pub/irs-irbs/irb03-26.pdf>. For a summary of Announcement 2003-40, see *IRS Describes Changes, Seeks Comments on EITC Pilot Program*, TAX NOTES TODAY, June 16, 2003. For excellent discussions of the program, see James L. Rockney, *Prove It or Lose It: The Certification Program for Select Individuals Claiming the Earned Income Tax Credit*, 2 PITT. TAX REV. 49 (2004); Zelenak, *supra* note 13; Janet Spragens & Nancy Abramowitz, *Low-Income Taxpayers and the Modernized IRS: A View from the Trenches*, 107 TAX NOTES 1407, 1407 (2005).

47. Zelenak, *supra* note 13, at 1870.

48. Stephen Joyce, *IRS Official Says Personal Audits to Rise, Corporate Audit Strategies Being Developed*, DAILY TAX REP., 245 DTR G-7 (Dec. 21, 2006). For the overwhelmingly negative response to the certification program from academics, practitioners, public interest organizations, and other special interests, see Robert Greenstein, *The New Procedures for the Earned Income Tax Credit*, 99 TAX NOTES 1525, 1525 (2003); Wade Henderson, *Civil Rights Coalition Comments on EITC Precertification*, 100 TAX NOTES 1265, 1265 (2003); Sandra Hernandez, *Community Foundation Opposes EITC Precertification*, 100 TAX NOTES 897, 897 (2003); *H&R Block Wants EITC Precertification Pilot Program Deleted*, 100 TAX NOTES 1264, 1264 (2003); Kerry Korpi, *Federation Opposes EITC Precertification*, 100 TAX NOTES 897, 897 (2003); Gifford Miller, *New York City Council Objects to EITC Precertification Pilot Program*, 100 TAX NOTES 1011, 1011 (2003); Paula Roberts, *Group Finds EITC Plan Troublesome*, 100 TAX NOTES 1265, 1265 (2003); Marybeth Shinn, *Professor Comments on EITC Precertification*, 100 TAX NOTES 1264, 1264 (2003); Janet Spragens, Nancy Abramowitz & Leslie Book, *Professors Comment on EITC Precertification*, 100 TAX NOTES 847, 847 (2003).

49. Brown, *supra* note 43, at 790. This figure includes \$150 million in annual earmarked appropriations to combat EITC error rates, the only such line-item compliance appropriation for any provision in the tax code. Holtzblatt & McCubbin, *supra* note 13, at 161.

50. TREASURY INSPECTOR GEN. FOR TAX ADMIN., TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2003 8 (2004).

frequently as any other taxpayer.<sup>51</sup> And just over a year ago, the Taxpayer Advocate Service (“TAS”) reported that between 2001 and 2005 nearly 1.6 million low-income taxpayers had their refunds frozen without notice and deemed fraudulent under the IRS’s “questionable refund program” (“QRP”).<sup>52</sup> In two-thirds of the cases, TAS found no evidence of fraud, and the wrongfully accused taxpayers ultimately received at least one hundred percent of the refunds originally claimed on their returns.<sup>53</sup>

These attacks on low-income taxpayers and their tax-transfer benefits are serious. But doomsayers overstate the threat. The EITC is neither in danger of being “repealed outright” nor “headed for extinction.”<sup>54</sup> This is not 1994 when the Republican Contract with America explicitly associated the EITC with the old welfare regime.<sup>55</sup> Nor is it 1995 when voices in the popular press were calling the EITC “the biggest . . . transfer swindle in the history of the nation,”<sup>56</sup> and members of Congress labeled the credit “the fastest growing, most fraudulent program that we have in Government today,”<sup>57</sup> which allowed low-income tax cheats to make “millions of dollars . . . by scam.”<sup>58</sup> Moreover, the certification program that some commentators point to as foreshadowing the “end of the EITC as we

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51. Book, *supra* note 12, at 374. See also DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 130 (2003) (reporting that the IRS audited 397,000 of EITC claimants in 2001, “eight times as many audits as it conducted of people making \$100,000 or more”); Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 777 (2005) (citing a similar figure of 4 times the audit rate for poor taxpayers).

52. For coverage and reaction to the QRP, see David Brunori, *The Refund Freeze Program Warrants Outrage*, 110 TAX NOTES 275, 275 (2006); Albert B. Crenshaw, *IRS Froze Refunds, Study Says; Taxpayers Had No Chance to Respond to Fraud Suspicions*, WASH. POST, Jan. 11, 2006, at D1; David Cay Johnston, *IRS Move Said to Hurt the Poor*, N.Y. TIMES, Jan. 11, 2006, at C1; Allen Kenney, *Capital Hill Hot Over Frozen Refunds*, 110 TAX NOTES 303, 303 (2006); Allen Kenney, *IRS to Review Frozen Refund Program, Everson Says*, 110 TAX NOTES 433, 433 (2006); Allen Kenney, *Olson Drops Refund Bombshell*, 110 TAX NOTES 183, 183 (2006); Crystal Tandon, *IRS to Give Taxpayers Notice of Frozen Refunds*, 110 TAX NOTES 698, 698 (2006).

53. Crenshaw, *supra* note 52; Johnston, *supra* note 52.

54. *Supra* notes 43-44.

55. See generally CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994) (exploring the Republican Contract with America and its implications for tax reform and the EITC).

56. MARTIN L. GROSS, THE TAX RACKET: GOVERNMENT EXTORTION FROM A TO Z 137 (1995); see also James Aley, *A Tax Credit for Crooks?*, FORTUNE, Oct. 4, 1993, at 24 (discussing the incidence of allegedly fraudulent returns under the EITC).

57. *Senate Begins Debate on Budget Bill, Remarks of Senator Don Nickles (R-OK)*, TAX NOTES TODAY, Nov. 7, 1995.

58. *Unofficial Transcript of June 8 Senate Finance Hearing on EITC, Remarks of Senator William Roth (R-DE)*, TAX NOTES TODAY, June 15, 1995.

know it,”<sup>59</sup> covers just twenty-five thousand of the twenty-two million EITC recipients, or slightly more than one-tenth of one percent of all recipients.<sup>60</sup> In 1995, critics of the EITC sponsored legislation to slash the program by \$50 billion over ten years; between 1996 and 2004, however, EITC payments jumped from \$26 billion to \$40.6 billion.<sup>61</sup>

To the extent a small number of EITC claimants are required to precertify their eligibility for benefits, or that otherwise EITC eligibles shown to have made erroneous claims in previous years are prevented from claiming the EITC for as many as ten years (for fraud),<sup>62</sup> is, to my mind, a realistic price to pay. Failure to sufficiently reduce compliance rates after nearly twenty years of legislative and administrative efforts and billions of compliance dollars forced Congress to adopt a more rigorous and intrusive compliance strategy, one that resembles traditional welfare programs.<sup>63</sup> Given the aggressive compliance efforts directed at direct-transfer programs, the “real surprise” is not that Congress and the IRS overreacted to EITC error rates (which continue to far outpace comparable rates for welfare programs), but that EITC recipients “are not made to go through the eligibility and verification gauntlet in the same manner as other benefits’ recipients.”<sup>64</sup>

Therefore, with respect to “how we can save the EITC,” the EITC does not need saving. The war over the future of the program was fought and won by its supporters ten years ago.<sup>65</sup> Recent compliance efforts directed at the EITC do not in any way endanger the program, unless, as others have argued,<sup>66</sup> we overreact to what amounts to reasonable oversight of the nation’s largest anti-poverty program.

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59. Brown, *supra* note 43, at 1.

60. Zelenak, *supra* note 13, at 1871-72.

61. CRS REPORT ON EITC, *supra* note 31, at 1.

62. I.R.C. § 32(k)(1)(B) provides a ten-year disallowance period if there is a final determination that the erroneous claim for EITC benefits was due to fraud. The same provision provides a two-year disallowance period if there is a final determination that the erroneous claim was due to reckless or intentional disregard of rules or regulations.

63. Error rates have fallen from a high of thirty-nine percent in the late 1980s, *see* Sholz, *supra* note 18, at 68, to between twenty-three and twenty-eight percent, Telephone Interview with Janet Holtzblatt, *supra* note 15, but still reached almost thirty-two percent as recently as 1999, COMPLIANCE ESTIMATES, *supra* note 44.

64. Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor through the Tax System*, 2006 WIS. L. REV. 1103, 1129.

65. For a discussion of this battle, *see* Ventry, *supra* note 10, at 32-41. In a recent telephone conversation with the author, Janet Holtzblatt (a Treasury economist and high-ranking official who has participated in the development of the EITC for more than fifteen years) stated that the “war was the 1990s.” Telephone Interview with Janet Holtzblatt, *supra* note 15.

66. Zelenak, *supra* note 13, at 1916 (“Vociferous objections [to recent compliance efforts] could easily backfire, in either of two ways. First, the objections

### III. CHARTING THE EITC'S FUTURE: REDUCING ERRORS, RAISING AWARENESS, AND EXPANDING COVERAGE

I do not mean to imply that proponents of low-income tax-transfer programs should rest on their laurels. Rather, as I have argued elsewhere, tax-transfer advocates must be mindful of social and political winds, and shape their advocacy accordingly.<sup>67</sup> There will always be critics who think refundable tax credits have “no business in the tax system,”<sup>68</sup> and that tax credits for the poor are “turn[ing] our income tax code into a welfare system.”<sup>69</sup> These criticisms are important and potentially devastating. They require tax-transfer advocates to acknowledge fairly the shortcomings associated with delivering transfers to low-income individuals through the tax system. They also require advocates and administrators to address directly those shortcomings, to reduce unacceptably high noncompliance rates, research the labor participation effects of tax-transfer programs, model optimal delivery of transfers through the tax code, and assist eligible low-income taxpayers in claiming the credit.

Some recent efforts are exemplary. In early 2007, responding not only to excessive noncompliance rates but also to growing nonparticipation rates (which may run as high as twenty-five percent<sup>70</sup>), the IRS launched an aggressive educational campaign to help eligible low-income taxpayers claim the EITC for tax year 2006. On February 1, 2007, Treasury Secretary Henry Paulson and IRS Commissioner Mark Everson announced “EITC Awareness Day” as part of a concerted effort to inform taxpayers about the EITC and the

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might lead Congress to reject the EITC-as-tax analogy in favor of the EITC-as-welfare analogy, and so to transfer the program from the IRS to the welfare bureaucracy (or to keep the program within the IRS but to require universal precertification). Second, Congress might initially defer to the objections and refrain from special EITC compliance initiatives, only to decide later that the level of noncompliance was unacceptable and that the entire credit should therefore be repealed.”). Book, *supra* note 64, at 1129 (agreeing with Zelenak and noting “how good EITC claimants have it”).

67. Ventry, *supra* note 10, at 47 (concluding that social policy alternatives run through the tax system must “complement rather than conflict with social and cultural forces to prove successful”).

68. *Transcript of Tax Analysts Conference on Tax Reform and Simplicity Now Available*, TAX NOTES TODAY, July 19, 2005 (quoting Don Alexander, former Commissioner of the IRS).

69. James Toedtman, *Tax Break for Working Poor; But House and Senate Measures Still Differ*, NEWSDAY, June 13, 2003, at A08 (quoting Republican Representative Spencer Bachus of Alabama); see also Kathy M. Kristof, *IRS Publicizes Tax Credit for Working Poor*, L.A. TIMES, Jan. 28, 2007, at C3 (“The earned income tax credit is more of a welfare program than a tax break.”).

70. I.R.S. News Release IR-2007-24 (Feb. 1, 2007), available at <http://www.irs.gov/newsroom/article/0,,id=167470,00.html>.

availability of free tax filing assistance.<sup>71</sup> More than 150 coalitions and partners across the country marked EITC Awareness Day with news conferences, press releases, and media coverage.<sup>72</sup> On January 31, 2007, the United Way and Bank of America announced a new national initiative, which included a \$500,000 grant to help low-income individuals obtain tax preparation assistance and unrealized tax refunds through the EITC.<sup>73</sup> In addition, at a Congressional hearing on February 13, 2007, lawmakers expressed less concern about EITC noncompliance than nonparticipation. “I would think the IRS would be outraged that so many who qualify are not applying for that money,” Representative Xavier Becerra (D-CA) told IRS witnesses.<sup>74</sup> He continued, “I hope that there is a sense within IRS that we should not tolerate this. We have to light a fire under IRS.”<sup>75</sup> Finally, on March 1, 2007, House Ways and Means Committee Chairman Charles Rangel (D-NY) visited a low-income tax preparation clinic with Secretary Paulson and Commissioner Everson to further raise EITC awareness at the grass-roots level.<sup>76</sup>

In addition to lawmakers and administrators, academics and policy experts have offered important proposals to improve the program. Francine Lipman has shown that a significant amount of EITC benefits (\$1.75 billion in 2002) go toward preparation and private-sector delivery costs of the program rather than to the low-income target beneficiaries.<sup>77</sup> Also mindful of the large percentage of EITC payments going to tax return preparers and banks, Leslie Book has argued for shifting compliance costs to the return preparation industry.<sup>78</sup> As a starting point in its noncompliance efforts, Book urges the government to “consider strategies that are less likely to require significant administrative costs or to decrease participation among eligible participants. To that end, the government should shift additional compliance costs onto commercial tax-return preparers.”<sup>79</sup> Book’s recommendation seems particularly appropriate given the disproportionate number of EITC claimants relying on paid

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71. *Id.*

72. *Id.*

73. *IRS, Treasury to Promote EITC Day*, DAILY TAX REP., Feb. 1, 2007, at G-14.

74. Diane Freda, *Lawmakers Say IRS Must Do More to Heighten Taxpayer Awareness of EITC*, DAILY TAX REP., Feb. 14, 2007, at G-10.

75. *Id.*

76. *Paulson, Everson, Rep. Rangel Move to Raise EITC Awareness*, DAILY TAX REP., Mar. 2, 2007, at G-5.

77. Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461, 470.

78. Book, *supra* note 64, at 1109.

79. *Id.*

preparers,<sup>80</sup> as well as the large percentage of EITC overclaims associated with returns prepared and filed by commercial preparers.<sup>81</sup>

The most important task for proponents of the EITC will be to continue differentiating it and other tax-transfer programs from welfare. This will be no easy undertaking. Apart from the stubborn error rates, the EITC amounts to a hybrid tax-welfare program whether we want to admit it or not. As Larry Zelenak has artfully shown, the EITC operates as a welfare program in terms of its economic effect and as a tax program in terms of its administrative effect.<sup>82</sup> Consider that nearly eighty-eight percent of the EITC is refunded to claimants as cash payments, with only twelve percent offsetting taxes owed.<sup>83</sup> “Neither fish nor fowl,” Leslie Book has observed, “the EITC is part welfare, part tax credit.”<sup>84</sup>

Given the above refund-to-offset ratio, critics could argue quite credibly that the EITC is *disproportionately* welfare, and only *marginally* tax credit. Such an association with welfare is deadly, and almost killed the EITC in the 1990s. Although current political realities necessitate a strategy of defining tax-transfer programs opposite welfare, that approach is not without risk. As Anne Alstott observed in the midst of the 1990s battle over the EITC, cloaking the program

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80. In 2001, the percentage of lower-income EITC claimants paying someone to prepare their returns (67%) was measurably higher than that of non-EITC claimants (59.4%). INTERNAL REVENUE SERVICE, EARNED INCOME TAX CREDIT (EITC) PROGRAM EFFECTIVENESS AND PROGRAM MANAGEMENT FY 2002-FY 2003 4 (2003), available at [http://www.irs.ustreas.gov/pub/irs-utl/eitc\\_effectiveness.pdf](http://www.irs.ustreas.gov/pub/irs-utl/eitc_effectiveness.pdf). The number of EITC claimants using paid preparers continues to go up. Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145, 1173 (2003); see also Elaine Maag, *Tax Preparation for Low-Income Households, Knowledge of the EITC*, 108 TAX NOTES 555 (Aug. 2, 2005); ALAN BERUBE, THE BROOKINGS INST., THE NEW SAFETY NET: HOW THE TAX CODE HELPED LOW-INCOME WORKING FAMILIES DURING THE EARLY 2000S 9 (2006), <http://www.brookings.edu/rios/data/sources/report/bb76a464bdf9ff3f800089600a1415cb.xml> (reporting that seventy-one percent of EITC claimants used paid preparers in 2003).

81. Of the estimated \$11.1 billion in EITC overpayments in 1999, Holtzblatt and McCubbin, *supra* note 13, at 164, roughly fifty-seven percent were attributable to returns prepared by commercial preparers, INTERNAL REVENUE SERVICE, NATIONAL TAXPAYER ADVOCATE 2003 ANNUAL REPORT TO CONGRESS 270 (2003). This figure compares unfavorably to an error rate of 34.6% for all taxpayers using commercial preparers and 37.8% for those not using commercial preparers. Book, *supra* note 64, at 1117. See also ACORN FINANCIAL JUSTICE CENTER, INCREASING INCOMES & REDUCING THE RAPID REFUND RIP-OFF: EXPANDING ACCESS TO THE EARNED INCOME TAX CREDIT FOR WORKING FAMILIES WHILE REDUCING RELIANCE ON REFUND ANTICIPATION LOANS (2004), available at [http://www.acorn.org/fileadmin/ACORN\\_Reports/National\\_EITC\\_Report\\_Final\\_version\\_01.pdf](http://www.acorn.org/fileadmin/ACORN_Reports/National_EITC_Report_Final_version_01.pdf).

82. Zelenak, *supra* note 13, at 1873.

83. CRS REPORT ON EITC, *supra* note 31, at 9. The ratio of refund to offset has grown since the program's inception. In 1975, seventy-two percent of benefits were refunded as cash payments compared to eighty-eight percent in 2004. *Id.*

84. Book, *supra* note 64, at 1125.

in anti-welfare garb may in fact “attract maximum political support.”<sup>85</sup> But advocating the EITC “as the answer to the problems of welfare” could also fuel “inflated expectations about the capabilities of redistributive programs and reinforce[] negative attitudes about welfare that, in the long run, may jeopardize the cause of the EITC and of poverty relief more generally.”<sup>86</sup> Alstott is right: we must not ask too much of programs like the EITC. But proponents of tax-transfer programs, especially the EITC, may be able to exploit current welfare politics to their advantage. For instance, Noah Zatz has argued that work-oriented transfer programs and the obsession with traditional justifications for work, such as self-sufficiency, self-improvement, and the ethic of giving back to society, provide an opportunity to expand the membership of the “deserving” poor.<sup>87</sup> In particular, Zatz “challenges the dominance of market work” on its “home turf” by showing that familial caretaking and home work—excluded from the “privileged place historically granted to wage work”—provides the same benefits associated with paid market work.<sup>88</sup> In this way, Zatz paves the way for a politically viable integration of nonmarket care into market work, a truly revolutionary accomplishment.

Thus, welfare politics, somewhat counterintuitively, may provide opportunities for expanding rather than contracting social provision in the United States. Exploiting welfare politics may be a suboptimal way to advocate a more inclusive social welfare state. But the political arena often forces its participants to adopt imperfect solutions, particularly with respect to tax-transfer programs, which have thrived over the last generation because they were characterized as tax programs rather than as welfare programs. Political realities continue to force proponents of these programs to emphasize—even *over-emphasize*—the differences between transfer payments associated with work, and transfer payments received as a matter of right, as an entitlement of citizenship in a rich and democratic state.

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85. Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 537 (1995).

86. *Id.*

87. See Zatz, *supra* note 42 (discussing the legitimacy of work requirements linked to welfare receipt). See also Zatz, *supra* note 22, at 1136-37 (explaining three primary purposes for linking work with social benefit programs).

88. Zatz, *supra* note 42, at 461. According to Zatz, “family labor has all the versatility of paid work: It can contribute to immediate self-sufficiency (if care is acknowledged as a need), can provide a number of experiences sometimes associated with job satisfaction (depending in part on how care is organized), and can give back to society (if parent-to-child benefits count).” *Id.* at 457.

## CONCLUSION

In the United States, social welfare programs run through the tax code have been hugely successful, both from the standpoint of delivering benefits to needy recipients and generating bipartisan political support. Tax transfers enjoy lower administrative costs than direct transfers, as well as higher participation rates and less potential for arbitrary discretion at the hands of case workers. In addition, tax transfers such as the EITC reward work, thereby deflecting potential criticism that recipients are “living off the dole” and “becoming public charges.”

Still, the shadow of “welfare” hangs over all forms of social provision, whether run through the tax system or the direct expenditure budget. Policymakers need to remain sensitive to criticisms that tax transfers amount to welfare payments, and that tax-transfer recipients should be subject to the same administrative scrutiny and eligibility requirements as welfare recipients. Such sensitivity, however, also requires policymakers to extol the virtues of tax transfers without undermining the usefulness of direct-transfer programs. Celebrating the work incentive features of the EITC that emphasize paid employment, for instance, should not delegitimize the more expansive—and creative—work incentive features of TANF. Rather, such a comparison should encourage policymakers to consider what counts as “work” worthy of public support in a society where work takes all forms, both market as well as nonmarket and paid as well as unpaid. Broader conceptions of work translate into broader social supports, some of which should be delivered through the tax system—for administrative, political, cultural, or economic reasons—and some of which should be delivered through the direct expenditure budget. Indeed, for the U.S. tax-transfer system to build on its three-decade run of success, policymakers need not only appreciate the history of social welfare and the tax code, but also its untapped potential to further alleviate poverty and provide opportunity for low-income Americans.