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America's (D)evolving Childcare Tax Laws

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AMERICA'S (D)EVOLVING CHILDCARE TAX LAWS

Shannon Weeks McCormack[*]

Proponents touted the Tax Cuts and Jobs Act (the TCJA)—enacted in the twilight of 2017—by claiming it would help American working families. But while the TCJA expanded some benefits available to parents with dependent children, these parental tax benefits may be claimed regardless of whether or to what extent childcare costs are incurred to work outside the home. To help working parents with these (often significant) costs, Congress might have turned to two other mechanisms in the tax law—the "child and dependent care credit" and the "dependent care exclusion." While these childcare tax benefits are only available to working parents that pay for childcare, stringent limitations have kept many from recovering anything near their actual costs, particularly in the critical years before children reach school-age. As a result, the Code was taxing families with different childcare needs inequitably. And because the TCJA left these childcare tax laws untouched, it did nothing to address this problem. By exploring critical junctures in their development, this Article seeks to understand how America's tax laws have (d)evolved in this manner and, in doing so, situates some of the TCJA's alleged reforms into their historical context.

America's childcare tax laws have not always been so limiting. In the seventies and eighties, the Code evolved significantly to allow working parents to claim relief for

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a relatively substantial portion of their childcare costs, resulting in more equitable taxation of family models. But in the decades following this evolution, Congress generally failed to adjust childcare tax benefits—even for inflation—allowing them to devolve in real value as childcare costs rose. Meanwhile, Congress created new and expanded existing tax benefits available to all parents even if they did not need childcare. Thus, over the past several decades, Congress not only restored but also perpetuated the inequitable taxation of different family models that had been remedied by earlier reforms. The changes made by the TCJA are, therefore, just the latest iteration of a decades-old trend.

In addition to revealing that the TCJA was a tepid if not specious attempt to address the working family's plight, this history raises broader questions of political feasibility. This Article identifies several factors such as increased legal complexity, sophistic political rhetoric and changed normative expectations to explain the electorate's seeming apathy to our childcare tax laws' (d)evolution. Using this context, this Article argues that even modest changes to our childcare tax laws, while incapable of enacting systemic changes on their own, could nevertheless enact historically significant reform and revive dormant debates about the role the American government should play in supporting parents.

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INTRODUCTION

Increasingly, American working parents find themselves in a "care crisis,"[1] struggling to pay childcare costs, which can exceed rent and college tuition[2] and are reportedly rising faster than both inflation[3] and their salaries.[4] At least when campaigning, politicians and lawmakers from the left, right and center seem to agree that this problem must be addressed.[5] There is, of course, far less agreement about how to do so.

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[1] *See* RUTH ROSEN, THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA 360 (2d ed. 2006) [hereinafter ROSEN, WORLD SPLIT OPEN] (referring to the lack of options for affordable, accessible childcare as a problem "most American women suffered privately, without realizing that the care crisis [i]s a pandemic problem among working- and middle-class families"); *see also* Ruth Rosen, *The Care Crisis,* THE NATION (Feb. 27, 2007), https://www.thenation.com/article/care-crisis/ ("Although we have shelves full of books that address work/family problems, we still have not named the burdens that affect most of America's working families. Call it the care crisis.").

[2] CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILDCARE 20 (2017), https://usa.childcareaware.org/wpcontent/uploads/2017/12/2017_CCA_High_Cost_Report_FINAL.pdf.

[3] *See* LYNDA LAUGHLIN, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILDCARE ARRANGEMENTS: SPRING 2011 17 (2013), https://www.census.gov/prod/2013pubs/p70-135.pdf (finding costs of childcare have increased substantially since 1985, even when dollars are adjusted to constant value); Eric Morath, *Soaring Child-Care Costs Squeeze Families*, WALL STREET J. (July 1, 2016, 7:23 PM), https://www.wsj.com/articles/soaring-child-care-costs-squeeze-families-1467415411 (reporting that "[c]hild care expenses alone have climbed nearly twice as fast as overall prices since the recession ended in 2009"). *But see* Andrew Flowers, *The Cost of Child Care Might Not be Skyrocketing*, FIVETHIRTYEIGHT (July 23, 2015), https://fivethirtyeight.com/features/the-cost-of-child-care-might-not-be-skyrocketing/ (questioning whether childcare costs are rising as quickly as some reports imply).

[4] During her run for President, Hillary Rodham Clinton explained that "[t]he cost of child care has increased by nearly 25 percent during the past decade, while the wages of working families have stagnated." *Early Childhood Education*, THE OFFICE OF HILLARY RODHAM CLINTON, www.hillaryclinton.com/issues/early-childhood-education/ (reproducing campaign proposal) (last accessed Jan. 1, 2019).

[5] *See, e.g.*, Zachary A. Goldfarb & Juliet Eilperin, *Childcare Issues Move to Political Forefront as Both Parties Position for Midterms*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/politics/child-care-issues-move-to-political-forefront-as-both-parties-position-for-midterms/2014/06/22/01db633c-f986
11e3a3a542be35962a52_story.html ("Paid leave and access to child care are surging to the top of the nation's political debate as Democrats and Republicans seek to win votes and advance policies to address the economic struggles of families trying to raise children and hold jobs.").

Proponents of the Tax Cuts and Jobs Act (TCJA)[6] created a sticky narrative, which painted it as a relief measure for working families.[7] But while the TCJA expanded some benefits available to parents with dependent children, these parental tax benefits do not depend on whether or to what extent childcare costs are incurred to earn income.[8]

To address these expenses, Congress could have reformed two provisions in the Internal Revenue Code (the "Code"), which allow working parents to recover some childcare costs. Due to strict limitations, many working parents—especially those with preschool aged children—were only able to claim tax relief for a fraction of their annual costs.[9] As a result, the Code was taxing families with different childcare needs inequitably. The TCJA, however, did not alter these "childcare tax laws" and thus failed to address this problem.[10] By exploring critical junctures in the development of these laws, this Article seeks to understand how America came to tax parents in this inequitable manner.

The story starts with a case called *Smith v. Commissioner*.[11] Decided in the 1930s when, according to the Board of Tax Appeals

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[6] Pub. L. No. 115-97, 131 Stat. 2051 (codified as amended in scattered sections of 26 U.S.C.). Many commentators refer to this legislation as the "Tax Cuts and Jobs Act" or "TCJA," although it was not the official name of the Act that was passed and signed into law.

[7] Following House passage of the Tax Cuts and Jobs Act, Congressman Jack Bergman stated, "Today, for the first time in 30 years, the U.S. House of Representatives voted to reform the tax code and provide much needed relief for working families . . . ." Press Release, Congressman Jack Bergman, Tax Cuts and Jobs Act (Nov. 16, 2017), https://bergman.house.gov/news/documentsingle.aspx?DocumentID=136. Advocating for the TCJA in late November, President Donald J. Trump claimed that "[t]he beating heart of [the] plan is a tax cut for working families." President Donald J. Trump, Remarks on Tax Reform (Nov. 29, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-tax-reform-2/. Majority Whip Scalice commented, "The good news is, that changes today with this tax cut plan that finally puts money back in the pockets of working families." Representative Steve Scalise, Remarks on the Tax Cuts and Jobs Act (Nov. 2, 2017), https://scalise.house.gov/press-release/scalise-tax-cuts-and-jobs-act-families-are-going-get-more-their-paychecks.

[8] *See infra* Part III.C.

[9] *See generally* Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559 (2016) [hereinafter Weeks McCormack, *Overtaxing the Working Family*].

[10] *See infra* Part III.C.

[11] 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940).

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(B.T.A.), "the working wife [wa]s a new phenomenon,"[12] the Code did not yet explicitly address whether working parents could recover childcare costs in order to reduce their taxable income.[13] Instead, the Smiths asked to deduct these costs under general sections of the Code that allow taxpayers to fully deduct expenses "ordinary" to a trade, business, or other profit-seeking venture.[14] The B.T.A. declined, deciding that the expenses were personal.[15] When a "wife has chosen to employ others to discharge her domestic function" in order to venture into the external workplace, she may not, the B.T.A. concluded, deduct the costs of doing so to reduce her federal income taxes.[16]

After *Smith*, lawmakers began to debate the (then explicitly gendered) question of whether working mothers should be able to recover the costs of childcare when calculating their tax liability.[17] In 1954—a year in which the Code was so massively reorganized that it was re-codified in its entirety[18]—this question was the subject of robust debates, which centered on whether the government should provide tax relief only to mothers that needed to work outside the home or also to mothers that participated in the external workplace when financial necessity did not require it. One congressperson, for instance, spoke scornfully of the "women . . . who . . . neglect [their family] obligations . . . to work and earn money which they can spend upon themselves in spite of the fact that their husbands are earning enough for a pretty fair living."[19]

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[12] *Id.* at 1039. As will be discussed later, women of color had long been in the workforce, but white women were in the workforce at much lower numbers. *See, e.g.,* BART LANDRY, BLACK WORKING WIVES: PIONEERS OF THE AMERICAN FAMILY REVOLUTION 79–81 (2000).

[13] *See Smith*, 40 B.T.A. at 1039 (noting that "the expenses in issue are now. . . commonplace [but] yet have not been the subject of legislation, ruling, or adjudicated controversy.").

[14] *See id.*

[15] *Id.*

[16] *Id.*

[17] *See infra* Sections I.C.

[18] *See* S. REP. NO. 83-1622, at 1 (1954) (stating that the 1954 Code represented "the first comprehensive revision of the internal-revenue laws since before the turn of the century and the enactment of the income tax"); *see also* H.R. REP. No. 83-1337, at 1 (1954) (same).

[19] *General Revenue Revision: Hearings before the H. Comm. on Ways & Means on Forty Topics Pertaining to the General Revision of the Internal Revenue Code*, 83d Cong. 63 (1953) (statement of Rep. Noah M. Mason); *see also* John R. Nelson, Jr. & Wendy E. Warring, *The Child Care Tax Deduction/Credit*, *in* MAKING POLICIES FOR CHILDREN: A STUDY OF THE

Congress ultimately crafted the 1954 laws to provide tax relief only to mothers that had to enter the paid labor force. Regardless of their means, single mothers and "widowers"[20] were entitled to deduct (i.e. subtract from their taxable income) childcare expenses up to a dollar maximum designed to cover most, if not all, of their childcare costs.[21] But for "working wives," the full deduction was only available if she and her spouse earned less than a designated amount. This amount hovered around the median income for all American families and was slightly less than the median income for two-earner families at the time.[22] The deduction was phased out once a family's income exceeded this level and lost completely once it exceeded an amount close to the median income for two-earner families in 1954 (about 120% of the median income for all American

FEDERAL PROCESS 206, 216–18 (Cheryl D. Hayes ed., 1982) (discussing legislators' concerns about the proposed child care deduction).

[20] I.R.C. § 214 (c)(2) (1954) (repealed 1976) (defining a widower as including "an unmarried individual who is legally separated from his spouse under a decree of divorce or of separate maintenance").

[21] I.R.C. § 214(b)(1) (1954) (repealed 1976); *see also* Nelson & Warring, *supra* note 19, at 219–20 ("The bill specified that the deduction could not exceed $600 — a figure based on the estimated median monthly cost of childcare, $50.").

[22] See I.R.C. § 214(b)(2) (1954) (the deduction for "[w]orking wives . . . shall be reduced by the amount (if any) by which the adjusted gross income of the taxpayer and her spouse exceeds $4,500"). Because the deduction is capped at $600, it would be lost completely once income reached $5,100. For consistency in reporting median income figures, this Article relies on U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES: HOUSEHOLDS, tbl.F-12, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html (last visited Aug. 10, 2017) [hereinafter *Census Historical Income Tables*] (providing family income based on number of earners in "current" and 2017 CPI-U-RS adjusted dollars from 1947 through 2017) According to this table, median income in 1954 was $4,167 and $5,000 for "all families" and "two earners" families. Thus, $4,500 (the point at which the phase-out began) was about 108% and 90% of median for all and two earner families, respectively while $5,100 (the point at which the phase out was complete) represented 122% and 102% of median for all and two earning families, respectively. Another Census source reports that median income for all U.S. families in 1954 at $4,173, and the median income of families "with wife in paid labor force" at $5,336. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, 296 tbl.G 179–188 (1976), https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-chG.pdf?# [hereinafter CENSUS, HISTORICAL STATISTICS]. Thus, $4,500 (the point at which the phase-out began) represented about 108% of the median income of all families and 84% of the median for families with wife in the paid labor force, while $5,100 (the point at which the phase out was complete) represented about 122% of the median for all families and about 96% of the median for families with wife in the paid labor force.

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families that year).[23] The Code, therefore, taxed single parents and widowers rather equitably, as well as married parents of low and moderate means. But by deliberate design, the Code favored the one-breadwinner model for married families of above-moderate means.

Starting in the 1960s, however, some highly visible, feminist groups[24] pressured lawmakers for legal reforms that would make childcare affordable for all working mothers, sometimes even identifying tax reform as part of that agenda. In its founding documents, for example, the National Organization for Women (NOW) demanded "[i]mmediate revision of [the] tax laws to permit the deduction of home and child-care expenses for working parents"[25] and organized a "Baby Carriage Brigade" outside of the U.S. Tax Court to support a working mother claiming the constitutional right to deduct childcare costs.[26] Pushing strollers, demonstrators protested what they viewed as a sexist tax code that allowed all sorts of business expenses to be deducted but severely limited the ability of women to recover the childcare expenses they incurred to participate in the paid, public sphere. The demonstration's slogan—"Are Children As Important As Martinis?"[27]—poignantly raised a fundamental question of tax policy that remains unresolved today: Why don't we allow all working parents to recover childcare expenses like so many other costs of earning income?

Congress has never been willing to allow parents to deduct all childcare expenses. But reforms in the mid-seventies and early eighties brought the Code closer than it has ever been before or since. During this time, income limitations were eliminated and dollar limits were raised to historically generous levels, allowing all working parents to claim tax relief for a relatively substantial

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[23] *See Census Historical Income Tables, supra* note 22; *see also* CENSUS, HISTORICAL STATISTICS, *supra* note 22, at 296 tbl.G, 179–188.

[24] A more inclusive discussion of "Second Wave feminism" will be provided in Section IV.A.

[25] *See NOW Bill of Rights*, *reprinted in* "TAKIN' IT TO THE STREETS:" A SIXTIES READER, 473–75 (Alexander Bloom & Wini Breines eds., 1995) [hereinafter *NOW Bill of Rights*].

[26] ROSEN, WORLD SPLIT OPEN, *supra* note 1, at xxiiixxii (providing a chronology which lists as an event occurring in 1971: "New York NOW forms a 'Baby Carriage Brigade' to demonstrate its support of women's right to deduct childcare expenses. 'Are Children As Important As Martinis?' is their slogan.").

[27] *Id.*

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portion of their childcare expenses.[28] America's childcare tax laws, therefore, evolved to tax families with different childcare needs much more equitably.

The story of what happened next is deceptively simple: since the mid-eighties, Congress has increased the childcare tax law's dollar limitations only once, not even keeping limits indexed for inflation.[29] Today's childcare tax laws are, for many families, more restrictive than they have been at many points in history.[30] The story of why our childcare tax laws devolved in this manner is more complex. Since 1981, lawmakers have proposed hundreds of bills to modify these laws.[31] In the 114th Congress alone, at least two-dozen bills were introduced and ultimately perished in Committee.[32]

But since the mid-eighties, instead of making significant adjustments to the childcare tax laws, Congress created new and expanded existing tax benefits for parents with dependent children. For instance, during the childcare tax law's devolutionary period, Congress created and expanded the Earned Income Tax Credit (EITC) and Additional Child Tax Credit (ACTC), available to working poor families.[33] Thus, as it has historically done, the Code continued to provide substantial (which is not to say adequate) tax benefits to working poor families that must, out of economic necessity, work outside the home.

Yet Congress did not stop there. In the mid-nineties, it expanded the tax benefits available to families in the middle and upper-middle classes by, for instance, creating the child tax credit—also known as the CTC and not to be confused with the child*care* tax credit.[34] And it consistently increased the pre-existing personal exemption and standard deduction amounts available to all parents.[35] But none of these benefits depend on whether or to what extent a family incurs childcare costs and, therefore, do nothing to

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[28] *See infra* Section II.B.

[29] *See infra* Section III.A. For a discussion of the method that this article uses to index amounts for inflation, please see *infra* note 143.

[30] *See infra* Section III.A.

[31] *See infra* Section III.A.

[32] *See supra* note 262.

[33] *See infra* Section III.B.

[34] *See* Taxpayer Relief Act of 1997, § 101, Pub. L. No. 105–34, 111 Stat. 788, 796–99 (1997) (codified as amended at I.R.C. § 24) (establishing a $500 credit per child).

[35] *See infra* Section III.B.2.

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stymie the gradual erosion of childcare tax benefits or reduce the inequitable taxation of families with different childcare needs. Because the TCJA's parental tax "reforms" expanded parental tax benefits like the CTC while leaving the childcare tax laws unaltered,[36] Congress simply continued its already decades old trend.

In addition to showing that the TCJA's changes were an inadequate, if not spurious, response to the working family's "care crisis", the (d)evolution of our childcare and parental tax laws raises questions of political feasibility. While one would expect vehement objections from some constituencies, such as dual-earner and single-parent families, nothing resembling the backlash of the seventies and eighties has occurred. Where are the demonstrations asking whether children are more important than martinis? Why aren't working families demanding change? This Article explores several reasons for the apparent indifference.

Today's parental tax laws are more complex than they were in the seventies and eighties, consisting of an alphabet soup of benefits, whose different purposes may not be readily discernible to the non-tax expert.[37] Further, the rhetoric employed to defend this stew is superficially persuasive.[38] Whereas their predecessors were bald in their assertions about gender roles, today's lawmakers utilize arguments that can appear normatively sterile.[39] Extending benefits to all parents through mechanisms like the CTC, some lawmakers claim, allows each family to choose the earning arrangement that is best for them.[40] These arguments are specious—the Code already favors families that do not incur these expenses and does not tax families neutrally.[41] But these argumentative flaws may not be readily apparent to the untrained eye.

Moreover, parent's expectations about the role the American government should play in their lives have changed dramatically since the seventies. In 1971, after it passed both Houses of

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[36] *See infra* Section III.C.
[37] *See infra* Section III.B.
[38] *See infra* Section IV.A.
[39] *See infra* Section IV.A.
[40] *See infra* Section IV.A.
[41] *See infra* Section I.A.

Congress, President Nixon surprised activists by vetoing the Economic Opportunity Amendments of 1971 that would have made universally subsidized childcare available to all parents, regardless of means.[42] But today, working parents of small children were probably not born when that bill was vetoed, or far too young to remember it. As one expert writes, "[w]hile a number of developed countries provide early child care the same way they provide kindergarten, most Americans take it as a given that they are on their own" unaware "that the government has [ever] seriously considered offering anything more than a patchwork system to help the very poor."[43] Today, the peculiarly American norm of individualism—"the belief that we should be self-sufficient in providing [child] care, without any need for government support"[44]—is often accepted without examination.

Finally, once put in its broader political context, the history of our childcare and parental tax laws can inform debates about their future. Reflecting our politics, recent proposals have spanned historical extremes. On one side of the spectrum, politically liberal plans call for the creation of government programs like universal preschool that compare in ambition and scope to those contemplated by the vetoed Economic Opportunity Amendments.[45] In contrast, other politically conservative proposals seem to put even the existence of the childcare tax laws into question.[46] Between these two extremes lie reforms to our (d)evolved childcare tax laws. Such reforms, while not capable of enacting system-wide changes on their own, might nonetheless tax families more equitably, move the tax law in directions that have been historically resisted, and revive long dormant debates about the role the American government should play in the lives of parents.

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[42] *See* 117 CONG. REC. 46,057–59 (1971) (reporting on President Nixon's veto message concerning the Economic Opportunity Amendments of 1971); *see also* GAIL COLLINS, WHEN EVERYTHING CHANGED: THE AMAZING JOURNEY OF AMERICAN WOMEN FROM 1960 TO THE PRESENT 286 (2009) (explaining that through the Economic Opportunity Amendments of 1971, the optional childcare would have been free for lower-class households, most middle-class households would have received a subsidy, and households in the top 25 percent would have paid the full fee).

[43] COLLINS, *supra* note 42, at 285.

[44] Lonnie Golden, *Robert W. Drago's Striking a Balance: Work, Family, Life*, 62 INDUS. & LAB. REL. REV. 622, 623 (2009) (book review).

[45] *See infra* Section IV.B.

[46] *See infra* Section IV.B.

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This Article proceeds in four sections. After summarizing current childcare tax laws, Section I tracks the early history of these laws, which were designed to benefit only mothers who needed to work and deliberately favored the one-breadwinner model for married families of above-moderate means. Section II turns to the seventies and eighties, during which our childcare tax laws evolved to allow most working parents to recover a significant portion of their childcare costs, and, therefore, taxed family models more equitably than predecessor laws. Section III describes the decades following this evolution, during which childcare tax benefits devolved while other parental tax benefits that did not depend on actual childcare costs were expanded. This history shows that the TCJA's supposed "reforms" are just another piece of a well-worn pattern that leads to the inequitable taxation of families with different childcare needs. Section IV discusses why this (d)evolution was politically feasible and couples these insights with the history developed in the first three sections to inform debates about future tax reforms that may actually address the American working family's "care crisis." A brief conclusion follows.

I. THE CHILDCARE TAX LAWS' EARLY HISTORY

While the Code allows parents to recover some of the childcare costs they incur to work outside the home, it contains many limits. Many working parents will receive tax relief for only a fraction of the costs they actually incur, particularly in the critical years before children reach school age. The first part of this section will show how our "childcare tax laws" have long resulted in the inequitable taxation of families with different childcare needs and how the TCJA did nothing to address these problems. Second, this section begins the task of understanding how we came to have these childcare tax laws by tracing their early historical development.

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A. PRESENT LAW AND A PRIMER ON BASIC TAX PRINCIPLES

1. Imputed Income is not taxed

Just as families are composed in many different ways, the ways in which families allocate the responsibilities of childrearing and earning income differ. The tax law has long built in a preference for families that do not need to purchase childcare on the external market by failing to tax the so-called imputed income produced when parents care for their children or secure other non-paid childcare arrangements with family members or neighbors.[47] By not taxing the value created (or, put another way, the money saved) from these internal arrangements, the Code taxes families with different childcare needs inequitably.

For instance, assume two couples, the As and Bs, are each married and file joint returns. Suppose that both couples earn $50,000 this year. The As adhere to the "one breadwinner model"—Mr. A earns all of the family's monetary income while Mrs. A cares for their two preschool aged children. By contrast, Mr. and Mrs. B are "dual-earners"—each work outside the home and, therefore, must purchase day care for their two preschool aged sons. While the As and Bs both earn the same monetary income, the As are better off because they do not have to pay for childcare to do so.

And for many families, especially those with young children, childcare is no small expense. During her run for president, Hillary Rodham Clinton explained that "[t]he cost of child care has increased by nearly 25 percent during the past decade, while the wages of working families have stagnated."[48] In the ten most expensive states, the annual cost of a day care center—the most common paid childcare arrangement[49]—ranges from $17,082 to $10,317 per year[50] for one infant and from $16,598 to $23,400[51] for two preschool aged children.

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[47] *See* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1576 (1996) (explaining that the U.S. does not tax the imputed income of childcare, which is "the value of childcare services provided by a family member" even though "the value of identical services provided by a neighbor or a childcare center would produce a tax burden").

[48] *Early Childhood Education*, *supra* note 4.

[49] CHILD CARE AWARE OF AM., *supra* note 2, 13 tbl.1.

[50] *Id.* at 14 tbl.1.

[51] *Id.* at 16 tbl.5.

Due to their savings on childcare costs, the As are significantly better off than the Bs, and should have higher taxable income than the Bs. The As' income could be accurately reflected by taxing the imputed income produced by Mrs. A—i.e. taxing the value of the care she provides to her children. But the Code has never done this, for reasons not limited to concerns about proper valuation, privacy and public perception.[52] As a result, the taxable income of one-breadwinner families such as the As is understated—and these families are, therefore, under-taxed—compared to two-earner couples like the Bs who must siphon off (sometimes significant) portions of their earned income to pay for childcare.

A similar inequity exists among single parent families, who may often file as "heads of household."[53] Suppose that single parents C and D earn the same taxable income. If C must pay for childcare while she is working, while D is able to secure non-paid care—with, for instance, a relative—the failure to tax the imputed income produced by D's internal childcare arrangement results in her being under-taxed compared to C.

2. Working Childcare Benefits Are Significantly Limited

Taxing the imputed income of non-paid care is not the only way to correct these inequities. The Code could instead allow parents to reduce their tax liability to reflect the costs of childcare incurred to work. But the Code has long limited parent's ability to do so and these limits remain unchanged by the TCJA. The Code (both pre- and post-TCJA) allows working parents to recover childcare costs in one of two ways. Working parents may claim the "dependent care exclusion" which allows them to exclude from their taxable income[54] up to $5,000 of the childcare costs they incur while working.[55] Alternatively, they may claim the "child and dependent care credit," commonly referred to as the "childcare credit," which allows them

[52] This is not to say it is not possible, and Professor Nancy Staudt has written an extremely lucid Article explaining not only how it could be done, but also the merits of doing so. *See generally* Staudt, *supra* note 47.

[53] *See* I.R.C. § 2(b) (2012) (defining head of household); Rev. Proc. 2015-53, 2015-44 I.R.B. 615 tbl.2 (promulgating 2016 tax rates applicable to heads of households).

[54] That is, they do not have to include $5,000 in taxable income, and therefore do not have to pay the tax that otherwise would be due on that portion of their income.

[55] I.R.C. § 129(2)(A) (2012).

to credit[56] a percentage of these childcare costs up to $3,000 for one child or $6,000 for multiple children.[57] (Hereinafter, the dependent care exclusion and child and dependent care credit will be referred to collectively as the "childcare tax benefits").

Working families may choose the childcare tax benefits that result in the greatest tax savings, so long as they do not duplicate claims.[58] But regardless of which benefits they claim, the applicable dollar caps represent only a fraction of the costs that many working families—particularly those with young children—will incur. For parents needing full time care for two preschool children in the most expensive states, for instance, the caps on the childcare tax benefits represent somewhere between 36% and 21% of total costs.[59]

In addition to dollar limitations, the childcare credit is subject to a steep income phase down—*i.e.* the allowable tax credit is reduced as taxable income increases beyond a certain threshold. Families earning less than $15,000 may claim a thirty-five percent credit, allowing for a maximum credit of $1,050 for one child and $2,100 for multiple children.[60] But the credit starts to phase down once a family earns more than $15,000—an amount that represents around 21% of the median income of all families in 2016[61] and about 15% of the median income of two-earner families that year.[62] Families earning anything more than $43,000—less than half the 2016 median income for American two-earner families[63] and about 60% of the median income for all families[64]—may claim only a twenty-percent credit, allowing a tax savings of no more than $600 for one child and $1,200 for multiple children.[65]

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[56] That is, they may reduce their tax liability dollar-for-dollar by the prescribed amount.

[57] I.R.C. § 21 (2012).

[58] I.R.C. § 21(c) (2012) (providing for a reduced credit when taxpayers take an exclusion under § 129).

[59] *See supra* notes 50–51 and accompanying text.

[60] I.R.C. § 21(a)(2) (2012) (noting that the "applicable percentage" before phase out is 35%).

[61] *See Census Historical Income Tables, supra* note 22 (reporting median income by number of earners). To approximate the median income of dual earning families, this Article looked at "two earner" families in Table F-12, *supra* note 22. It is possible that the two earners are not two adult parents (e.g. are adult children). But this figure suffices for this Article's purposes of making comparisons across time. *See id.* (reporting 2016 income for all families at $72,707 and $97,324 for "two earner" families)..

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See* I.R.C. § 21(a)(2) (2012) (credit phases down to floor of 20%).

Due to these phase-downs, families in higher-income ranges will generally benefit more from the dependent care exclusion. But the $5,000 cap ensures that many families who claim the exclusion will, like those claiming the credit, receive tax relief for only a fraction of their childcare costs, especially during the early years of their children's lives.[66] The tax savings offered by the dependent care exclusion increase with the taxpayer's marginal tax bracket, [67] and total savings will top out at $2,180 in 2016[68] and $2,050 in 2018 (because the TCJA lowered the top bracket to 37%).

One does not need to comprehend all of this detail in order to understand the consequences of these laws. The limitations contained in I.R.C. §§ 21 and 129, which respectively grant the childcare credit and dependent care exclusion, will often fall far short of the costs families actually incur, particularly for families with young children.[69] Thus, working families, such as our hypothetical Bs and single parent C, may recover only a fraction of the childcare costs they incur to work outside the home. The childcare tax benefits provided by §§ 21 and 129 will, in many instances, fail to compensate for the Code's failure to tax the imputed income produced by non-paid childcare arrangements. Put another way, when families are unable to fully recover their working childcare costs, they will be overtaxed compared to otherwise similarly situated families that do not incur these costs (or incur less of them).

3. The TCJA Did Not Address These Inequities

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[66] In 2016, a dual-earner couple filing a joint return would have benefited more from the exclusion than the credit once the couple earned above $80,000. A single custodial parent filing as head of household would generally benefit more from the exclusion once she earned above $55,000. At those income levels, taxpayers filing under either status moved into a 25% tax bracket that would render the $1,250 savings from a $5,000 exclusion more than the phased-down credit of $1,200. *See* Rev. Proc. 2015-53, 2015-44 I.R.B. 615 (promulgating 2016 tax rates).

[67] Of course, tax rates change each year and were altered under the TCJA. The significant points of this Article are not, however, undermined.

[68] The maximum tax savings will be enjoyed by those in the top marginal tax bracket, but the savings are still limited to $2,180—the value of the maximum exclusion (39.6% of $5,000) plus the $200 tax credit allowed under I.R.C. § 21(c)(2) (2012) (assuming the $6,000 maximum credit for two or more children, the $200 constitutes 20% of the $1,000 that would still be creditable).

[69] *See supra* notes 48–51 and accompanying text.

The TCJA was touted as a tax cut for working families.[70] One might have, therefore, expected that it would have significantly reformed our childcare tax laws. But the TCJA ignored them entirely, doing nothing to correct for the inequitable taxation of families with different childcare needs.[71]

Severely limiting the ability of families to recover their working childcare costs is questionable under fundamental principles of tax policy.[72] An income tax system generally seeks to tax profit and, therefore, often allows taxpayers to fully deduct many costs of earning income.[73] If, for instance, a shopkeeper earned $100 selling his wares but paid $70 to rent his storefront, he would generally deduct $70 and would have only $30 taxable income.[74] To the extent that childcare expenses are also costs of earning income, then some significant recovery of these costs is justified to ensure that working parents are only taxed on their profits. But our childcare tax laws sometimes stray far from this mark. I have argued at length elsewhere that policy makers should reform the Internal Revenue Code to treat working childcare expenses like other, recoverable costs of earning income.[75] I will, therefore, not press on these points further here. Instead, this Article explores a different question: How did we get here? How have we arrived at our current childcare tax laws, which create (sometimes severe) inequities between parents with different childcare needs?

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[70] *See supra* note 7 and accompanying text.

[71] *See infra* Section III.C.

[72] *See* Weeks McCormack, *Overtaxing the Working Family*, *supra* note 9 at 579 (explaining that "[s]ince its inception, the U.S. system of taxation has aimed to tax net income—that is, a taxpayer's profits" (citing Bank of Am. Nat'l Trust & Savings Ass'n v. United States, 459 F.2d 513, 518 (Ct. Cl. 1972))); *see also* Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed Out Mom*, 105 GEO. L.J. 1323, 1350–66 (2017) [hereinafter Weeks McCormack, *Postpartum Taxation*](arguing that the failure to treat childcare costs incurred by working parents as deductible costs of earning income leads to inequitable tax relief).

[73] Though this does not always hold true. To cite just two examples, taxpayers are not allowed to deduct commuting expenses and are limited in the extent to which they may deduct meal and entertainment expenses. Treas. Reg. § 1.262-1 (b)(5) (prohibiting deduction for commuting costs and limiting meal expense deductions to meals eaten while traveling away from home).

[74] I.R.C. § 162 (2012) (allowing deduction of ordinary and necessary business expenses).

[75] *See* Weeks McCormack, *Overtaxing the Working Family*, *supra* note 9, at 580; *see also* Weeks McCormack, *Postpartum Taxation, supra* note 78, at 1350–66.

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To answer these questions, we begin with the judiciary's early role in shaping these laws.[76]

B. THE JUDICIARY'S ROLE IN SHAPING OUR CHILDCARE TAX LAWS

Most stories about taxation and working childcare costs begin with *Smith v. Commissioner*,[77] decided in 1939, when Judge Opper, writing for the Board of Tax Appeals (B.T.A.), believed "the working wife [to be] a new phenomenon."[78] In this case, the B.T.A. determined that Mrs.[79] Smith could not deduct the childcare expenses she incurred to work outside the home.[80] At the time the case was considered, the Code did not contain provisions dealing explicitly with the recoverability of childcare costs. Thus, the Smiths argued, these expenses should be deductible under the general provisions of the Code—now §§ 162 and 212—which allow taxpayers to deduct expenses ordinary and necessary to the conduct of one's trade, business or other profit-seeking venture.[81]

The B.T.A. rejected the taxpayer's argument that Mrs. Smith's childcare expenses should be deductible under a "but for" test—i.e. "but for" the childcare expenses, Mrs. Smith could not work—and proceeded to list the other types of expenses that might be

[76] This Section, therefore, is very deliberate in its scope. For instance, it does not deal with the Personal Exemption or Child Tax Credit, which provide benefits without regard to whether costs are incurred to work and which are discussed *infra*, at Section II. Additionally, this does not deal with the EITC, which does not hinge on actual childcare costs, which is available only to families in or near poverty, and which is discussed *infra* in Section II.

[77] 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940). *Cf.* Edward J. McCaffery, *Taxing Women*, ENG'G & SCI., No. 4 1997, at 34, http://calteches.library.caltech.edu/3932/1/Women.pdf ("Our tax system has a strong bias against two-earner, married families. This bias came to be because of a series of decisions made in the 1930s, 1940s, and 1950s, and hardly reexamined since.").

[78] *Smith*, 40 B.T.A. at 1039. In fact, women of color had long been in the external workforce, so this assertion represents a very limited view. *See* LANDRY, *supra* note 12, at 82–83 (discussing how "in the early twentieth century few whites were prepared to accept this new paradigm" of women participating in the workforce).

[79] Mrs. is used to signal that Mrs. Smith is married and to be consistent with the language used in the case. It is not meant to undermine the general feminist preference for Ms.

[80] *See Smith*, 40 B.T.A. at 1039 (listing out "the very essence of those 'personal' expenses the deductibility of which is expressly denied").

[81] *See id.* (discussing "those activities, which, as a matter of common acceptance and universal experience, are 'ordinary' or usual as the direct accompaniment of business pursuits").

inappropriately deducted if it were to adopt the "but for" proposition the Smiths advocated.[82] It wrote:

> The fee to the doctor, but for whose healing service the earner of the family income could not leave his sickbed; the cost of the laborer's raiment, for how can the world proceed about its business unclothed; the very home which gives us shelter and rest and the food which provides energy, might all by an extension of the same proposition be construed as necessary to the operation of business and to the creation of income. Yet these are the very essence of those "personal" expenses the deductibility of which is expressly denied.[83]

Putting the acerbic tone aside, even students with a very elementary training in (any sort of) law should quickly identify the flaw in the Court's reasoning. Expenses incurred to see a doctor, to clothe oneself, and to attain shelter are not necessitated by the fact that one works. Expenses incurred to attain childcare during working hours are necessary.[84] Put another way, work is a "but for" cause of the childcare expenses, but not the other costs the B.T.A. notes.

After presenting this reasoning, such as it is, Judge Opper offered additional exposition:

> The wife's services as custodian of the home and protector of its children are ordinarily rendered without monetary compensation . . . . Here the wife has chosen to employ others to discharge her domestic function and the services she performs are rendered outside the home. They are a source of actual income and taxable as such. But that does not deprive the same work performed by others of its personal character nor

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[82] *See id.* at 1038 (noting that petitioners "propose that but for the nurses the wife could not leave her child; but for the freedom so secured she could not pursue her gainful labors; and but for them there would be no income and no tax").

[83] *Id.* at 1038–39 (footnote omitted).

[84] I thank Professor Edward J. McCaffrey for his lucid explanation of these logical flaws when commenting on my article, *Overtaxing the Working Family*, *supra* note 9, during the Loyola L.A. Tax Policy Colloquium (2015).

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> furnish a reason why its cost should be treated as an offset in the guise of a deductible item.[85]

In this thought cloud, Judge Opper seemed to display a rather unquestioned acceptance of the public/private sphere distinction widely identified in feminist discourse. The Court made clear its unexamined belief that the duties of men occupy the public sphere (men's duties are found within the external, paid workforce) whereas the duties of women occupy the private sphere (their duties consist of unpaid, household labor).[86] Doubling down, Judge Opper also seemed to convey a not so subtle disapproval of the mother who seeks to expand her duties to the paid, public sphere, seeming to insinuate that she's shirked her more important duties within the private one.[87]

What's more, Judge Opper made no attempt to chase down the quite basic, fundamental tax consequences of the circumscribed spheres he insisted exist. Indeed, had he done so, he may have come to the conclusion that principles of tax equity might necessitate a deduction for childcare expenses. If the duties of the non-paying private sphere are so disproportionately assigned to women when compared to men, women must bear a heavier cost in entering the paying, public sphere to earn income. A deduction for working childcare costs would reflect the often-invoked (which is not to say uncontroversial) notion that similarly situated taxpayers should be taxed similarly.[88]

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[85] *Smith*, 40 B.T.A. at 1039.

[86] *See, e.g.*, Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 16–17 (1993); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RIGHTS L. REPORTER 175, 178 (1982) (discussing Justice Bradley's concurrence in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873), where he noted the separate spheres ideology to conclude that the "paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother").

[87] *See Smith*, 40 B.T.A. at 1039 (declaring that the wife's services are unpaid, "as custodian of the home and protector of its children").

[88] *See, e.g.*, David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 43 (2006) ("The principle of horizontal equity demands that similarly situated individuals face similar tax burdens. It is universally accepted as one of the more significant criteria of a 'good tax.' It is relied upon in discussions of the tax base, the tax unit, the reporting period, and more." (citations omitted)). This is not to say there is not controversy: scholarly critique of the concept abounds. *See generally* Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989) (criticizing the concept of horizontal equity).

Despite the lack of persuasive reasoning in the B.T.A.'s opinion, the Second Circuit affirmed the B.T.A.'s pithy decision without comment[89] and, unsurprisingly, the IRS followed it. And so, while it was at least theoretically possible that working childcare expenses could have been interpreted to fall within the broad scope of expenses deemed recoverable under §§ 162 and 212—allowing taxpayers to deduct the ordinary and necessary costs of earning income—it was not to be.

After *Smith,* Congress would begin its long wade into the question of whether and to what extent parents could recover the costs of childcare incurred while working. As the next part will show, the cursory *Smith* decision foreshadowed themes that recurred throughout early Congressional debates about how the working mother should be taxed.

C. EARLY CONGRESSIONAL ACTION AFTER *SMITH*

In 1954, the Internal Revenue Code was re-organized and overhauled,[90] representing one of several times that the entire Code was re-codified. The subject of childcare expenses was debated extensively.

Some lawmakers and organizations, including the American Bar Association, American Institute of Accountants, and American Nurses Association, viewed childcare costs as business expenses and advocated that these costs, like many costs of earning income, be deductible and not subject to income or dollar limitations.[91] Representative Kenneth Roberts highlighted the inequity, asking why the "government . . . allows a lawyer to deduct entertainment

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[89] Smith v. Comm'r, 113 F.2d 114, 114 (2d Cir. 1940) (affirming the B.T.A.'s decision without comment).

[90] *See, e.g.*, T. Coleman Andrews, *The Internal Revenue Code of 1954*, TAX EXEC., Oct. 1954, at x (1954) ("With the enactment of the Internal Revenue Code of 1954, the Internal Revenue Service was confronted with an unprecedented task. This legislation, the most sweeping revision of the Federal tax laws in our Nation's history, makes it necessary to rewrite virtually all of our regulations and revise more than 200 forms used by taxpayers."); Roswell Magill & Henry W. de Kosmian, *The Internal Revenue Code of 1954: Income, Deductions, Gains and Losses*, 68 HARV. L. REV. 201, 201–02 (1954); Jay A. Soled, *Reforming the Grantor Trust Rules*, 76 NOTRE DAME L. REV. 375, 388 (2001) ("In 1954, Congress conducted a massive overhaul of the 1939 Code.").

[91] *See* Nelson & Warring, *supra* note 19, at 214 (discussing arguments in favor of allowing an above-the-line deduction as a business expense, as opposed to being deducted below-the-line, as itemized deductions).

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fees lavished upon a prospective client" but "will not grant this privilege to the working mother who toils . . . in the hope that her children may have a better life."[92]

But the answer Roberts (perhaps rhetorically) sought is not really all that hard to discern—at least, not once one realizes the peripheral role principles of tax equity were playing in these debates. Rather than focusing on these fundamentals, the driving debate in Congress centered on whether mothers "should" work outside the home at all.[93] Lawmakers seemed to generally agree that single mothers and mothers of low means should receive tax relief for the childcare costs they incurred to work, since economic necessity required them to do so.[94] But the debate over whether relief should extend to those that chose to work was far more contentious. Arguing that it should not, Representative Noah Mason offered colorful contributions:

> I am thinking of the thousands, if not millions, of women who are married who have families who have responsibilities but who prefer to neglect these obligations and responsibilities in order to work and earn money which they can spend upon themselves in spite of the fact that their husbands are earning enough for a pretty fair living.[95]

Mason also worried about women displacing male jobs: "Just at present our employment is almost full capacity, but suppose we have a slight depression and we have several million unemployed men."[96] Should a married woman, Mason wondered, still "have the right to her career as well as her married privileges?"[97]

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[92] *Id.* (quoting *General Revenue Revision: Hearings before the H. Comm. on Ways & Means on Forty Topics Pertaining to the General Revision of the Internal Revenue Code*, 83d Cong. 63 (1953) (statement of Rep. Kenneth Roberts)).

[93] *See id.* at 217 (noting that "the question of eligibility brought the legislative debate into the realm of values and assumptions about family life").

[94] *See id.* at 217.

[95] *Id.* at 218 (*General Revenue Revision: Hearings before the H. Comm. on Ways & Means on Forty Topics Pertaining to the General Revision of the Internal Revenue Code*, 83d Cong. 63 (1953) (statement of Rep. Noah Mason)).

[96] *Id.*

[97] *Id.*

The sentiments of Congressmen like Mason moved Congress away from the debate of whether working childcare expenses should be viewed as costs of earning income. Instead, debates focused on how to determine which women needed to work and which were choosing to do so, so that relief could be limited to the former group.[98] Following the advice of the Eisenhower administration, the proposed House Bill limited deductions to widowers (regardless of gender), divorced women, and women with incapacitated spouses.[99]

The proposed Senate Bill modified these eligibility restrictions.[100] The enacted law, which followed the Senate Bill,[101] allowed single mothers and "widowers" to claim deductions up to a $600 dollar cap,[102] a figure that estimated the median monthly cost of childcare at the time ($50).[103] But "working wives" could only claim the full deduction if her income, when combined with her spouse's, did not exceed $4,500[104]—a figure which was about $300 higher than the reported median income for all families and about 90% of the reported median income of two-earner families in 1954.[105] After this point the deduction phased-out—that is, was reduced— and was lost completely when combined income reached $5,100[106]—about $900 higher than the median income reported for all families and slightly higher than the median income for two-earner families at the time.[107] Thus, the Code taxed single parents and widowers rather equitably, regardless of whether they incurred childcare expenses to work outside the home. It also did this for married parents of low and moderate means. But by deliberate design, the

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[98] *See id.* at 217.

[99] *See id.* at 219–20.

[100] *Id.* at 220.

[101] *Id.* at 220–22.

[102] *See* I.R.C. § 214(b)(1)(A) (1954) (repealed 1976).

[103] Nelson & Warring, *supra* note 19, at 219–20 (explaining that the $600 "figure [was] based on the estimated median monthly cost of childcare, $50").

[104] I.R.C. § 214(b)(2)(B) (1954) (repealed 1976).

[105] *Census Historical Income Tables, supra* note 22 (estimating median income for all families at $4,167 and for "two earners" at $5,000) *See also* CENSUS, HISTORICAL STATISTICS, *supra* note 22, at 296 tbl.G 179–188 (estimating median income of all families in 1954 at $4,173 and of families "with wife in paid labor force" at $5,336).

[106] I.R.C. § 214(b)(2)(B) (1954) (repealed 1976).

[107] *Census Historical Income Tables, supra* note 22; *see also* CENSUS, HISTORICAL STATISTICS, *supra* note 22, at 296 tbl.G 179–188 (estimating median income of all families in 1954 at $4,173 (total median income) and of families with "wife in paid labor force" at $5,336.).

Code favored the one-breadwinner model for married families of above-moderate means.

Considering the debates animating these laws, one might have, in 1954, reasonably lamented that not much had changed since *Smith*. Setting aside issues of tax equity, lawmakers held strong to the public/private distinction, viewing with suspicion and scorn the working mother who, in the words of Congressman Mason "neglect[ed] [her] . . . responsibilities" to care for her children,[108] or in the words of Judge Opper "chose[] to employ others to discharge her domestic function."[109] But the story of our childcare tax laws is far from over.

II. THE CHILDCARE TAX LAW'S EVOLUTIONARY PERIOD

In the sixties, cultural attitudes about the role of women in the American workplace started to change rapidly. The first part of this section discusses some of the cultural influences and political developments that catalyzed this shift. Despite these developments, however, reforms to the childcare tax laws during this decade remained modest, resulting in laws that continued to prefer the one-breadwinner model for married parents of above-moderate means. However, as the second part of this section shows, during the seventies and eighties, the childcare tax laws experienced a rapid evolution. During this time, most parents were able to recover a substantial portion of their childcare costs, resulting in more equitable taxation of parenting models.

A. A BIT ABOUT THE SIXTIES: A LOT OF ACTIVISM, MODEST CHILDCARE TAX REFORM

For many, the sixties bring to mind pictures of feminist activism. The feminist movements[110] are sometimes described as occurring in

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[108] Nelson & Warring, *supra* note 19, at 218 (quoting *General Revenue Revision: Hearings before the H. Comm. on Ways & Means on Forty Topics Pertaining to the General Revision of the Internal Revenue Code*, 83d Cong. 37–41 (1953) (statement of Rep. Noah Mason)).

[109] Smith v. Comm'r, 40 B.T.A. 1038, 1039 (1939).

[110] I have referred to movements in the plural intentionally, reflecting the work of scholars wishing to avoid the reductionist tendency to describe Second Wave feminism as one cohesive movement. *See, e.g.*, Sherna Berger Gluck et al., *Whose Feminism, Whose History?: Reflections on Excavating the History of (the) U.S. Women's Movement(s)*, *in* COMMUNITY ACTIVISM AND FEMINIST POLITICS: ORGANIZING ACROSS RACE, CLASS AND GENDER 31, 31 (Nancy A. Naples

waves, though other scholars have forcefully argued that this misrepresents the movements' true nature which was more continuous than this metaphor suggests.[111] Those that employ the metaphor most readily identify the first wave of feminism with the fight for women's suffrage and often mark its end in the 1920s when the Nineteenth Amendment was passed.[112]

Beginning in the early 1960s and fizzling in the 1980s, many popular accounts of Second Wave feminism[113] have focused on movements for women's equality in the workplace, and women's empowerment and liberation more generally.[114] Because this

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ed., 1998) ("Referring to women's movements in the plural . . . reflects a deepening awareness of how the multitudinous forms of women's activism throughout the world all work to challenge patriarchal hierarchies."); BENITA ROTH, SEPARATE ROADS TO FEMINISM: BLACK, CHICANA AND WHITE FEMINIST MOVEMENTS IN AMERICA'S SECOND WAVE 1 (2004) ("What I wish to do is develop a picture of second-wave feminisms, feminisms that were plural and characterized by racial/ethnical organizational distinctiveness.").

[111] *See, e.g.*, Nancy A. Hewitt, *Introduction* to NO PERMANENT WAVES: RECASTING HISTORIES OF U.S. FEMINISM 1, 1 (2010) (explaining that the book "engages the ongoing debates over the adequacy of the 'wave' metaphor for capturing the complex history of women's rights" and "offer[s] fresh perspectives on the diverse movements that constitute U.S. feminism, past and present"); Barbara Molony & Jennifer Nelson, *Introduction to* WOMEN'S ACTIVISM AND "SECOND WAVE" FEMINISM: TRANSNATIONAL HISTORIES 1, 3 (2017) ("The wave metaphor has been both embraced and challenged by feminists outside North America."); Robyn Warhol, *Second-Wave Feminism and After*, *in* THE CAMBRIDGE HISTORY OF POSTMODERN LITERATURE 230, 231 (Brian McHale & Len Platt eds., 2016) (stating that "dividing the movement into 'waves' oversimplifies the internal debates within feminism in each of its historical moments"); Verta Taylor, *Social Movement Continuity: The Women's Movement in Abeyance*, 54 AM. SOCIOLOGICAL REV. 761, 761 (1989) ("This article uses social movement and organization theory to develop a set of concepts that help explain social movement continuity. The theory is grounded in new data on women's rights activism from 1945 to the 1960s that challenge the traditional view that the American women's movement died after the suffrage victory in 1920 and was reborn in the 1960s.").

[112] As with many other facets of feminist history, it has been forcefully argued that this description is drastically oversimplified. *See* Taylor, *supra* note 111, at 761 (arguing that the first wave did not end with the attainment of suffrage). *See generally* NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM (1987) (arguing that once suffrage was attained, women were politically active in many other ways that are often overlooked in many popular accounts of "first wave" feminism).

[113] This term appears to have been first used by Martha Weinman Lear in *The Second Feminist Wave*, N.Y. TIMES MAG., Mar. 10, 1968, at 24.

[114] *See, e.g.*, Becky Thompson, *Multiracial Feminism: Recasting the Chronology of Second Wave Feminism,* 28 FEMINIST STUDIES 337, 337 (2002) (expressing "increasing[] concern[]" about "version[s] of Second Wave history that Chela Sandoval refers to as 'hegemonic feminism.' This feminism is white led, marginalizes the activism and world views of women of color, focuses mainly on the United States, and treats sexism as the ultimate oppression. Hegemonic feminism deemphasizes or ignores a class and race analysis, generally sees

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popularly-portrayed movement tended to focus on the interests of white educated women, it has been termed by some as "mainstream white feminism"[115] and by others as "hegemonic" feminism.[116]

In reality, there was far more to the feminist movements during the so-called Second Wave and it is more accurate to view feminisms as consisting of a series of movements with varied agendas that focused on many different types of oppression.[117] And a thorough chronicle of what catalyzed and propelled feminisms in the 1960s–1980s would identify varied and diverse agents, ranging from leaders of the Black Power movement,[118] to those in the LBGTQ community,[119] to a variety of other activist and minority groups.[120] This Section will focus on what will be referred to, interchangeably, as the mainstream or hegemonic movements because of their direct relevance to this Article—the actors in these movements demanded

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equality with men as the goal of feminism, and has an individual rights-based, rather than justice-based vision for social change.").

[115] *See, e.g.* ROTH, *supra* note 110, at 1 (discussing how women of color formed feminist movements that were "distinct from so-called mainstream white feminist groups.").

[116] The term appears to have been first used by Chela Sandoval, *US Third-World Feminism: The Theory and Method of Oppositional Consciousness in the Postmodern World*, *in* FEMINIST POSTCOLONIAL THEORY: A READER 75, 75 (Reina Lewis & Sara Mills eds., 2003); *see also* Thompson, *supra* note 114, at 337 (discussing Sandoval's usage of the term); Berger Gluck et al., *supra* note 110, at 31 (same).

[117] Berger Gluck et al., *supra* note 110, at 31; Thompson, *supra* note 114, at 337.

[118] *See, e.g.*, SHERIE M. RANDOLPH, FLORYNCE "FLO" KENNEDY: THE LIFE OF A BLACK FEMINIST RADICAL (2015). As one reviewer explained, "[m]ost scholarship on postwar feminist organizing views black feminism as emerging largely in protest against exclusion by white feminists or in opposition to black power's sexism. While several histories briefly list Flo Kennedy, they typically note her and other black feminists who worked in the movement as exceptions and offer little examination of their influence on second-wave feminism." Duchess Harris, *Florynce "Flo" Kennedy: The Life of a Black Feminist Radical*, 103 J. AM. HISTORY 831, 831 (2016) (book review).

[119] *See, e.g.*, Clark A. Pomerleau, *Empowering Members, Not Overpowering Them: The National Organization for Women, Calls for Lesbian Inclusion, and California Influence, 1960s–1980s*, 57 J. HOMOSEXUALITY 842, 842 (2010) (arguing that "[s]tandard accounts of the National Organization for Women (NOW) seriously underplay the duration of tensions between heterosexual and lesbian NOW members and the ways those tensions included both racialized analogies and tactical concerns").

[120] *See, e.g.*, ROTH, *supra* note 110, at 1; Amanda Hess, *How a Fractious Women's Movement Came to Lead the Left*, N.Y. TIMES MAG. (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/magazine/ how-a-fractious-womens-movement-came-to-lead-the-left.html.

reform of the tax laws to reflect the cost of childcare for working parents and had an apparent influence on their development.[121]

A discussion of the hegemonic movement's inception frequently includes Betty Friedan's infamous book entitled *The Feminine Mystique*, published in 1963.[122] While the book has now been widely criticized for its non-inclusivity, it is still credited as creating a widespread awakening among some women—mainly white, upper-class women.[123] Identifying the so-called "problem that has no name,"[124] Friedan's book focused on the oppression felt by a certain echelon of women who, despite being highly educated and capable, had abandoned their aspirations of working in the public sphere for a life of domesticity (often after they married and had children).[125] Friedan encouraged her readers to question the patriarchal gender norms that led them to this point.[126]

The election of John F. Kennedy, Jr. in 1960 is also cited as a catalyst for hegemonic feminist movements.[127] President Kennedy, understanding the significant contribution the women's vote made to his successful election (and that he hoped would play in his re-election), formed the President's Commission on the Status of Women (the "Women's Commission"), appointing Eleanor Roosevelt as Chairwoman.[128] In forming the Women's Commission, President Kennedy stated that "[w]omen should not be considered a marginal group to be employed periodically only to be denied opportunity to satisfy their needs and aspirations when unemployment rises or a

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[121] This focus is not meant to minimize the complexities of feminist history or the diversity of issues pursued by the equally diverse actors that pursued feminist goals during this time period. Nor does this focus reflect a judgment that the mainstream hegemonic movement was more important, influential or significant than other movements.

[122] BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963); *see also* Kira Cochrane, *1963: The Beginning of the Feminist Movement*, THE GUARDIAN (May 7, 2013), https://www.theguardian.com/lifeandstyle/2013/may/07/1963-beginning-feminist-movement ("A US debate that had started tentatively with President John F Kennedy's 1961 commission on the status of women blew up with Friedan's book . . . .").

[123] *See, e.g.*, BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 96–99 (1984).

[124] FRIEDAN, *supra* note 122, at 15.

[125] *Id.* at 17–18.

[126] *Id.* at 32 ("We can no longer ignore that voice within women that says: 'I want something more than my husband and my children and my home.'").

[127] Cochrane, *supra* note 122.

[128] *See* John F. Kennedy, Statement by the President on the Establishment of the President's Commission on the Status of Women, 1961 PUB. PAPERS 799, 800 (Dec. 14, 1961) [hereinafter Kennedy Statement].

war ends."[129] In other words, he rejected the views of Congressmen like Noah Mason who believed women should put their careers aside and be satisfied with their "married privileges"[130] when the economy was sluggish. In so doing, Kennedy vowed that his Administration's policies would aim to "improve family incomes so that women c[ould] make their own decisions" about whether to work outside the home.[131]

In 1963, the Women's Commission issued a nearly hundred-page report, making recommendations in six key areas, one of which was "Federal social insurance and tax laws as they affect . . . women."[132] At the time of the report, the maximum deduction for childcare expenses was $600.[133] This deduction was available to all single-parent families, but only available to dual-earner families earning less than $5,100.[134] But the Report explained, the median income for dual-earner families had risen to over $7,100.[135] As a result, "the majority of working couples [had become] ineligible" to claim deductions for childcare costs.[136] The Women's Commission recommended that "[t]ax deductions for child care expenses of working mothers . . . be kept commensurate with the median income of couples when both husband and wife are engaged in substantial employment."[137]

The Kennedy Administration proposed that Congress adopt changes that closely approximated the Women's Commission's recommendations.[138] Unhappiness that women were—and could reasonably be expected to continue—entering the paid, public workforce remained.[139] For instance, the Women's Commission's own Committee on Home and Community (perhaps unsurprisingly

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[129] *Id.* at 799.

[130] *Supra* note 97 and accompanying text.

[131] Kennedy Statement, *supra* note 128, at 799.

[132] PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN 7 (1963). [hereinafter AMERICAN WOMEN].

[133] *See infra* Section I.C. (discussing the legislative history behind the first childcare deduction).

[134] *See supra* notes 102–107 and accompanying text.

[135] AMERICAN WOMEN, *supra* note 132, at 21 (using figures from 1961 rather than from 1963, when the report was published).

[136] *Id.*

[137] *Id.* at 21–22.

[138] Nelson & Warring, *supra* note 19, at 225.

[139] *Id.* (noting that the Women's Commission viewed women in the workforce primarily as a matter of economic necessity).

given its name) "express[ed] the belief that child care services should be available and accessible to all women who choose to work . . . [though] found it . . . 'regrettable' that women with very young children sought employment."[140] But the rhetoric in Congress had diversified since the fifties. Alongside these sentiments of resignation were statements like those of Senator Maurine Neuberger, who argued that all parents should be able to deduct working childcare expenses to accord with basic principles of tax equity, not to mention the just-passed Equal Pay Act.[141]

Congress's initial response, however, fell short of those suggested by the Women's Commission. On one hand, Congress substantially raised the maximum deduction available to families with multiple children from $600 to $900 (though it did not adjust the $600 cap for families with one child).[142] That adjustment more than compensated for inflation since 1954, when the caps were last changed.[143] And while data about childcare costs in 1964 is spotty, one study estimated that full-time mothers typically spent about

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[140] *Id.* at 225.

[141] *Id.* at 228 (citing 109 CONG. REC. 18,730–31) (describing Sen. Neuberger's efforts to raise the income ceiling of the deduction).

[142] Revenue Act of 1964, Pub. L. No. 88-272, § 214(b)(1)(B), 78 Stat. 19, 49 (1964).

[143] $900 in 1964 had the same buying power as about $784 in 1954 using this Article's methodology, described immediately below. *See CPI Inflation Calculator*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, https://www.bls.gov/data/inflation_calculator.htm (calculated as of January of each relevant year).
Inflation adjustments in this Article will be based on the average Consumer Price Index for All Urban Consumers (CPI-U) published by the Department of Labor, Bureau of Labor Statistics. To make these adjustments, an inflation calculator available from the Bureau of Labor Statistics was used. *See CPI Inflation Calculator*, *supra.* Other tax scholars have utilized this methodology for similar projects. *See e.g.* Tracy Roberts, *Brackets: A Historical Perspective*, 108 NORTHWESTERN U. L. REV. 925, 929 nn.8–11 (2015) (explaining and using same methodology).. As Professor Roberts explains, until the passage of the TCJA, "Congress ha[d], by statute, specifically authorized the Commissioner of Internal Revenue to use the CPI-U to index the income tax brackets for inflation" though it also "…authorize[d] other indices for other inflation adjustments" Roberts at 1407, *citing* I.R.C. §§ 1(f)(5), 43(b)(3), 45(e)(2)(B). The TCJA "change[d] the measure used for inflation indexing, from the CPI-U to the chained CPI-U." *See* William G. Gale et.al., *Effects Of The Tax Cuts And Jobs Act: A Preliminary Analysis*, TAX POLICY CENTER 4 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf. (discussing the change and alleged reasons for it) Although this Author recognizes this change, the TCJA had not been enacted when this article was originally written and, the CPI-U seems more than sufficient for the general comparisons this article makes. For more on other methods of inflation adjustment *See e.g.* Roberts, *supra*, at 929 n.11 (citing Jim Chen, *The Price of Macroeconomic Imprecision: How Should the Law Measure Inflation?*, 54 HASTINGS L.J. 1375, 1403–29 (2003).

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$16 per week on childcare services, or about $832 annually at that time.[144] This estimate would suggest that the 1964 dollar caps were at least close to the average cost of childcare for full-time mothers at that time.[145]

On the other hand, Congress's adjustments to the childcare deduction's income phase-outs were tepid. As had been true, those categorized as single parents—which now included a taxpayer that was an unmarried "woman or widower, or [wa]s a husband whose wife [wa]s incapacitated or [wa]s institutionalized"[146]—could still claim the deduction regardless of means. The point at which the deduction began to phase out for working wives—i.e. dual-earners—was raised to $6,000,[147] which was about 79% of the median income for two-earner families in 1964, and about 91% of the median income for all families.[148] The deduction was lost entirely once income exceeded $6,600 for one child or $6,900 for multiple children.[149] Using these data points, the income phase-outs in the 1964 childcare tax laws were arguably less generous than their 1954

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[144] *See* SHARON M. MCGRODER, U.S. DEP'T OF HEALTH & HUMAN SERVS., A SYNTHESIS OF RESEARCH ON CHILD CARE UTILIZATION PATTERNS 21 (1988), https://aspe.hhs.gov/system/files/pdf/74646/ccressyn.pdf [hereinafter MCGRODER, SYNTHESIS] ("In 1965, full-time mothers spent, on average, about $54 per week on child care" (citing SETH LOW & PEARL G. SPINDLER, U.S. DEP'T OF HEALTH, EDUC., & WELFARE & U.S. DEP'T OF LABOR, CHILD CARE ARRANGEMENTS OF WORKING MOTHERS IN THE U.S. 107 tbl.A–48 (1968))). This figure was reported in December 1984 dollars. MCGRODER, SYNTHESIS at 19 n.22. Thus, in January of 1964, the average cost would have represented about $16 weekly or $832 annually. *See CPI Inflation Calculator*, *supra* note 143. The authors who reported the underlying data estimated that most mothers paying for childcare at that time would have spent "between $10 and $19 a week" on child care, or between $520 and $988 annually. LOW & SPINDLER, *supra*, at 3.

[145] *See* MCGRODER, SYNTHESIS, *supra* note 144, at 21 (listing the average weekly expenditure on childcare); REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 99 (1968) ("[T]he value of the present deduction of $600 (or $900) is such a small part of the total cost of providing even a minimum type of care that it gives little incentive to low-income mothers . . . to make arrangements for paying someone to provide such care.").

[146] Revenue Act of 1964 § 212, (amending I.R.C. § 214(a)).

[147] *Id.* (amending I.R.C. § 214(b)(2)). The same phase-outs applied to "a husband whose wife is incapacitated." *Id.*

[148] *Census Historical Income Tables, supra* note 22 (reporting median income in 1964 as $6,569 for all families and $7,549 for two earner families); *see* CENSUS, HISTORICAL STATISTICS, *supra* note 22, at 296 tbl.G 179–188 (estimating median income in 1964 for dual-earner couples at $8,170 and for all families at $6,569).

[149] § 212, 78 Stat. at 49. The deduction amount limits were, respectively, 81% and 85% of the median income for dual-earners at the time, and about 100% of the median income for all families at the time. *See supra* note 148.

counterparts, which allowed a working wife to claim the maximum deduction as long as her income did not exceed a threshold that was about 90% of the median income of two-earner families in 1954[150] and which did not phase-out completely until the family earned roughly the median income for two-earners at the time.[151]

Thus, like their predecessors, the 1964 childcare tax laws continued to tax dual-earner families of above-moderate means inequitably compared to their one-breadwinner counterparts. But the childcare tax laws were about to experience an evolution, resulting in laws that taxed families with different childcare needs more equitably than they had done before or have since.

B. THE SEVENTIES AND EIGHTIES: THE CHILDCARE TAX LAW'S EVOLUTION

Sympathetic lawmakers remained unsatisfied with the childcare tax laws. Reflecting this, between 1964 and 1971, two authors identified approximately 43 proposed bills that would have liberalized these laws, including "15 bills to increase the amount of the allowable deduction, 9 to raise the income ceiling . . . [and] 5 to change childcare expenses from a personal to a business deduction."[152]

Beyond the halls of Congress, the public was starting to pay attention to the childcare tax provisions too. In 1966, the National Organization for Women (NOW) was co-founded by Betty Friedan.[153] The organization sought "true equality for all women" in "truly equal partnership with men"[154] and is widely remembered for the activism and demonstrations that ensued during the mainstream Second Wave movements' flow. In its original Bill of Rights, NOW demanded eight reforms it believed were essential for American society to achieve women's liberation and equality.[155] Among them, NOW demanded "[i]mmediate revision of tax laws to

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[150] *See supra* note 105 and accompanying text.

[151] *See supra* notes 106& 107 and accompanying text.

[152] Nelson & Warring, *supra* note 19, at 230.

[153] *Founding*, NAT'L ORG. FOR WOMEN, http://now.org/about/history/founding-2/ (last visited Jan. 22, 2019).

[154] Betty Friedan, *The National Organization for Women's 1966 Statement of Purpose*, NAT'L ORG. FOR WOMEN, http://now.org/about/history/statement-of-purpose/ (last accessed Jan. 22, 2019).

[155] *See NOW Bill of Rights*, *supra* note 25, at 473–75.

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permit the deduction of home and child care expenses for working parents."[156]

NOW even organized demonstrations for this tax reform. In 1971, a recent widow by the name of Elizabeth Barrett argued in the U.S. Tax Court that she had a constitutional right to deduct childcare expenses she incurred while earning income for her family.[157] To support her case, NOW organized a "Baby Carriage Brigade," a demonstration in which women brought strollers to protest what it viewed as a sexist tax code that allowed all sorts of business expenses to be deducted but did not allow mothers to recover the childcare expenses they needed to incur to participate in the paid, public sphere.[158] The demonstration's slogan—"Are Children As Important As Martinis?"[159]—poignantly captured a central question of tax policy: Why shouldn't working mothers be able to deduct the costs of childcare while they are working in the same way that other taxpayers are allowed to deduct many other costs of earning income? Even the New York Times took interest, running a story entitled "One Working Mother Against the I.R.S."[160] to cover Elizabeth Barrett's case, which she lost.[161]

Demonstrations also found their way to congressional floors. In one particularly colorful moment, a congressional committee rejected a proposal to expand the number of working mothers who could deduct childcare costs on the same day it passed a tax break for oil companies.[162] One Representative who had supported the proposal arranged for two of his staffer's children to appear in oil well costumes in the committee room, mordantly suggesting that children needed to look like oil wells to receive proper attention.[163]

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[156] *Id.* at 474.

[157] *See* Nammack v. Comm'r, 56 T.C. 1379, 1379–82 (1971), *aff'd mem.* 459 F.2d 1045 (2d Cir. 1972). The case refers to Ms. Barrett by her married name, Nammack.

[158] *See supra* notes 26–27 and accompanying text.

[159] *Id.*

[160] Lisa Hammell, *One Working Mother Versus the I.R.S.*, N.Y. TIMES (May 20, 1971), http://www.nytimes.com/1971/05/20/archives/one-working-mother-versus-the-irs.html.

[161] *Nammack*, 56 T.C. at 1385.

[162] *See* Nelson & Warring, *supra* note 19, at 248–49.

[163] *See id.*

https://digitalcommons.law.uga.edu/glr/vol53/iss3/6

As the sixties turned into the seventies, the participation of white married women in the labor force continued to rise.[164] African American and other minority women had long worked outside the home,[165] but it was the movement of white married women into the external workforce that seemed to finally attract the notice of lawmakers when it came to the childcare tax laws. The 1970s witnessed dramatic changes to these laws.

The 1971 childcare tax laws shed the gendered language used by their predecessors, granting the deduction to any "individual who maintains a household which includes as a member one or more qualifying individuals," such as children younger than fifteen years of age and certain other physically-incapable dependents.[166] In doing so, the tax laws eliminated the distinction between single parents (e.g. unmarried women and widowers) and dual-earners (e.g. working wives), which had previously existed. Thus, the same dollar limitations and income phase-outs applied to all families, even single parents to which phase-outs had not previously applied.

At the same time, Congress tripled the income beyond which the phase out would begin to $18,000[167]—an amount that represented more than 150% of the median income for both two-earner and all American families at the time[168] and over $109,000 in 2017 adjusted dollars.[169] Once a taxpayer's income exceeded that threshold, the

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[164] Chinhui Juhn & Simon Potter, *Changes in Labor Force Participation in the United States,* J. ECON. PERSPECTIVES, Summer 2006, at 27, 34 ("Thus, the dramatic rise in female participation that occurred during the 1970s and the 1980s was largely due to changing behavior among married white women with children—women who in 1970 were most likely to be part of a 'traditional' household with the husband as wage earner and the wife as the homemaker.").

[165] *See id.* at 33–34 & tbl.2; *see also* LANDRY, *supra* note 12, at 79–81.

[166] Revenue Act of 1971, Pub. L. No. 92-178, § 210, 85 Stat. 497, 518 (1971). Congress also expanded the types of expenses that could be deducted to include other "household services." *Id.*

[167] *Id.*

[168] *Census Historical Income Tables, supra* note 22 (reporting the median for all families at $10,285 and $11,741 for two earners); *see also* U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: CONSUMER INCOME P60-083, NUMBER OF FAMILIES AND UNRELATED INDIVIDUALS BY TOTAL MONEY INCOME IN 1971 1 tbl.A (1972) (reporting $10,290 median income for all families). For dual-earners, it was reported that the 1970 median income was $23,746 in 1980 dollars. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1982–83, 436 tbl.720 (1982). That amount would be the rough equivalent $11,537 in 1970 dollars. *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year).

[169] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

deduction was phased down.[170] The laws, somewhat oddly, differentiated between in-home and out-of-home care. For in-home care, the deduction was lost completely once a family earned $27,600[171] (close to $170,000 in 2017 adjusted dollars).[172] For taxpayers utilizing out-of-home care, the deduction was lost completely once income exceeded $22,800, $25,200, and $27,600 for one, two and three or more children, respectively[173] (or about $140,000, $154,000 and $170,000 in 2017 adjusted dollars).[174] Most of these amounts were more than double the median income for all American and two-earner families in 1971.[175]

Congress also raised the maximum allowable deduction significantly. Eligible families could deduct up to $4,800 in expenses for in-home care, an eight-fold increase from previous dollar caps,[176] which is equivalent to nearly $30,000 in 2017 adjusted dollars.[177] Families utilizing providers outside of their homes (e.g. day care) could deduct up to $2,400, $3,600, and $4,800 for one, two and three or more children, respectively.[178] While reliable data about childcare

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[170] § 210, 85 Stat. at 518–19 (amending I.R.C. § 214(d) to read, "If the adjusted gross income of the taxpayer exceeds $18,000 for the taxable year during which the expenses are incurred, the amount of the employment-related expenses incurred during any month of such year which may be taken into account under this section shall (after the application of sub-sections (e)(5) and (c)) be further reduced by that portion of one-half of the excess of the adjusted gross income over $18,000 which is properly allocable to such month. For purposes of the preceding sentence, if the taxpayer is married during any period of the taxable year, there shall be taken into account the combined adjusted gross income of the taxpayer and his spouse for such period.").

[171] *See id.* (amending I.R.C. § 214(c)(1) & (2)(A) to cap the deduction at $400 per month—or $4,800 annually—for in-home expenses). Thus, under amended I.R.C. § 214(d), the deduction was completely lost once a taxpayer's income exceeded $27,600 (half of the difference between $27,600 and $18,000 equals $4,800).

[172] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

[173] *See* § 210, 85 Stat. at 518–19. The phasedown in amended § 214(d) would have completely eliminated the deduction at the identified income levels (calculated using the same method described *supra* note 172).

[174] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

[175] *Census Historical Income Tables*, *supra* note 22; *see supra* note 168.

[176] *Compare* § 210, 85 Stat. at 518 (amending I.R.C. § 214(c)(1) to allow deduction of up to $4,800 per year for in-home care) *with* Revenue Act of 1964, Pub. L. No. 88-272, § 212, 78 Stat. 19, 49 (1964) (amending I.R.C. § 214(b)(1) to allow a yearly deduction of up to $600 for one child or $900 for multiple children).

[177] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year).

[178] *See* § 210, 85 Stat. at 518 (creating limits of $200, $300 and $400 a month under I.R.C. § 214(c)(2)(B) for care provided outside of the taxpayer's home to one, two and three or more children, respectively).

costs remains difficult to find during this time period, this cap represents about $14,650, $22,000 and $30,000 in 2017 adjusted dollars, which would seem to have quite soundly covered the cost of annual care for most families.[179]

Congress adjusted the income-phase outs even further in 1975, granting the full deduction to taxpayers whose income did not exceed $35,000[180]—more than double the median income for two-earner families reported at the time[181] and an amount that was about $163,000 in 2017.[182] The deduction phased out completely at higher income levels. For in-home care, the deduction was totally lost once income exceeded $44,600,[183] which was about $208,000 in 2017.[184] It phased out completely for out-of-home care for one, two and three or more children once income exceeded $39,800, $42,200 and $44,600, respectively[185] (or $185,500, $197,000 and $208,000 in 2017 adjusted dollars, respectively).[186] These amounts represented well over 200% of the reported median income for two-earner families in 1975.[187]

These changes greatly increased the number of households eligible to deduct childcare expenses. And generous dollar caps allowed these families to recover most—if not all—of their annual expenses. But there was, for liberal lawmakers, another pressing

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179 *See* MCGRODER, SYNTHESIS, *supra* note 144, at 19 n.22, 21 (finding that "[b]y 1975, [full-time mothers'] average [childcare] cost was $46" weekly, or approximately $2,400 annually, in December 1984 dollars). In January 1965 dollars, that figure would have been about $14 weekly, or $728 annually. *See CPI Inflation Calculator*, *supra* note 143. In January 2017 dollars, it would have been about $106 weekly, or $5,512 annually. *See id*.

180 Tax Reduction Act of 1975, Pub. L. No. 94–12, § 206, 89 Stat. 26, 32 (1975). See Table F-12, *supra* note 22, median income for two earners $16,058 in 1975 dollars.

181 *See* U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: CONSUMER INCOME P60-101, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1975 AND 1974 REVISIONS 9 tbl.1 (1976) (median income in 1975 for dual-earner couples was approximately $17,237).

182 *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

183 I.R.C. § 214(d) (1975) (repealed 1976) (reducing the allowable deduction by one half of adjusted gross income exceeding $35,000). Because the maximum deduction was $400 per month, or $4,800 annually, *see id.*, § 214(c)(1), a family earning $9,600 more than the income cap of $44,600 would earn enough to phase out the deduction completely.

184 *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

185 *See* I.R.C. § 214(c)(2) (1975) (repealed 1976). The phase out would thus eliminate the deduction for families earning $4,800, $7,200, or $9,600 more than the annual income cap, depending on the number of children. *See id.* § 214(d).

186 *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

187 *See supra* note 181.

problem. The childcare tax laws provided relief as a so-called itemized ("below-the-line") deduction. In general, taxpayers may choose to deduct either the aggregate of their itemized deductions or a pre-designated standard deduction. Because families in lower income classes are far more likely to use the standard deduction,[188] lawmakers were concerned that they were not benefitting from the newly liberalized childcare tax laws.[189]

This problem could have been solved directly and cleanly by moving the deduction "above-the-line"—or, more formally, by allowing the deduction to reduce a taxpayer's adjusted gross income. Unlike itemized deductions, above-the-line deductions can be claimed by all taxpayers with sufficient income to absorb them. And taxpayers can claim above-the-line deductions even when they also claim either below-the-line or the standard deductions. But this suggestion made less sympathetic policymakers queasy.[190] Above-the-line deductions are often associated with costs of earning income. And those policymakers did not want to put childcare expenses on par with those costs.[191] Thus, efforts to move the childcare deduction from below- to above-the-line repeatedly failed.

Congresspersons advocating for the change conceived a clever workaround that would, mathematically, achieve something close to the desired result—i.e. allowing families that claimed the standard deduction to benefit from the childcare tax laws—while settling the stomachs of lawmakers who did not want working childcare expenses to fall above-the-line with other business expenses.[192] These lawmakers proposed to change the itemized childcare deduction to a percentage dollar-for-dollar credit so that all taxpayers with sufficient tax liability could claim relief.[193]

Here is how it would work. Suppose that a taxpayer is able to claim a deduction of $100, allowing her to reduce her taxable income

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[188] *See, e.g.*, SEAN LOWRY, R43012, CONG. RESEARCH SERV., ITEMIZED TAX DEDUCTIONS FOR INDIVIDUALS: DATA ANALYSIS 2–3 (2014) (finding that of the 32% of filers that choose to itemize, a higher percentage of high-income filers itemize compared to lower-income filers).

[189] Nelson & Warring, *supra* note 19, at 243–44.

[190] *Id.* at 244.

[191] I have argued that taxpayers should be able to deduct childcare costs above-the-line elsewhere. *See generally* Weeks McCormack, *Overtaxing the Working Family*, *supra* note 9.

[192] *See* S. REP. NO. 94-938 at 14 (1976) ("The amendment converts the deduction into a 20-percent credit, so that it will be available to those who use the standard deduction as well as to itemizers . . . .").

[193] *See id.*

by that amount. The tax savings she will enjoy from this deduction depends on her marginal tax bracket, which is the rate at which an additional dollar of her income will be taxed. If she is in a 30% marginal tax bracket, she will save $30 in taxes from the hypothetical $100 deduction. If she is in a 20% marginal tax bracket, she will save $20, and so on.

Credits work differently. Rather than reducing one's taxable income, credits reduce one's actual tax liability dollar-for-dollar. After one has applied applicable rates to her taxable income, credits reduce the final liability amount. Thus, a credit of $100 results in $100 of tax savings. Lawmakers proposed to make the itemized, childcare tax deduction a percentage credit to approximate the value of the deduction while also allowing families that did not itemize to benefit.[194] For instance, a 30% credit of $100 would be mathematically equivalent to a $100 deduction for a taxpayer in a 30% marginal tax bracket.

The idea had legs. In 1976 Congress passed a new law that changed the childcare deduction to a percentage credit[195] and eliminated income limitations altogether. Specifically, Congress allowed all working parents (single or married) to claim a 20% credit regardless of whether they itemized and regardless of means.[196] At the same time, dollar limitations were adjusted. And the dubious distinction between in-home and out-of-home care was eliminated. Under the new law, qualifying taxpayers could claim the percentage credit of up to $2,000 of expenses for one child and $4,000 of expenses for multiple children.[197] This was less than the dollar caps of its 1971 and 1975 counterparts (even in non-adjusted dollars).[198]

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[194] *See id.* at 132 ("One method for extending the allowance of child care expenses to all taxpayers, and not just to itemizers, would be to replace the itemized deduction with a credit against income tax liability for a percentage of qualified expenses.").

[195] Tax Reform Act of 1976, Pub. L. No. 94-455, § 504, 90 Stat. 1520, 1563–65 (1976) (establishing dependent care credit, codified at I.R.C. § 44A (1976), and repealing I.R.C. § 214).

[196] *See* I.R.C. § 44A (1976) (current version at I.R.C. § 21 (2012)) ("In the case of an individual who maintains a household which includes as a member one or more qualifying individuals . . . there shall be allowed as a credit . . . an amount equal to 20 percent of the employment-related expenses . . . .").

[197] *Id.* § 44A(d).

[198] For comparison, $2,000 in 1976 would have been worth the same as about $1,900 in 1975 and $1,400 in 1971, while $4,000 would have been worth about $3,700 and $2,900, respectively. *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each

Nevertheless, these amounts represent nearly $8,740 and $17,470 in 2017 adjusted dollars,[199] close to triple the caps applicable to today's childcare tax credit.

In sum, the changes made to the childcare tax laws in 1976 were significant. First, the clever workaround—the percentage credit—ensured that all taxpayers, regardless of whether they itemized their deductions, could benefit. Second, by eliminating income limitations, these laws provided aid not only to those mothers that needed to work, but also to those that chose to work. Third, Congress explicitly rejected phase-outs, expressing its belief that working childcare expenses were "cost[s] of earning income" and thus not the type of expenses that should be based on income level.[200] This is probably the closest the Code has ever come to treating working childcare expenses like other costs of earning income. And in doing so, it drastically reduced the inequities produced by previous childcare tax laws.

In 1981, Congress made two notable changes to the childcare tax credit. First, Congress increased the percentage credit available for families of lower incomes. Families earning less than $10,000,[201] which was about 45% of the reported median income for all families at the time, and about 37% of the reported median income for two-earner families,[202] could claim a credit of 30% of their childcare expenses, up from 20%.[203] After a family earned more than $10,000, the percentage was reduced.[204] Families earning more than

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relevant year). In 1971 and 1975, however, the expense cap was $4,800. *See supra* notes 173–193 and accompanying text.

[199] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

[200] *See* S. REP. NO. 94-938 at 133 (1976) ("The committee views qualified child care expenses as a cost of earning income and believes that an income ceiling on those entitled to the allowance has minimal revenue impact, if the allowance is in the form of a credit. Therefore, it considers it appropriate and feasible to eliminate the income phaseout and to allow all taxpayers to claim such expenses regardless of their income level.").

[201] *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 124(a), 95 Stat. 172, 197–98 (1981) (codified at I.R.C. § 44A (1982)).

[202] *See Census Historical Income Tables, supra* note 22 (noting that 22,388 was the median income for all families and 26,860 for two earner families); *see* also U.S. CENSUS BUREAU, , *supra* note 61, tbl.H-12 (reporting 1981 median income for all *households* as $19,074); U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, CONSUMER INCOME P60-137, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1981, 2 tbl.A (1983) (reporting that dual-earner families in 1981 earned a median of about $26,860).

[203] *See* I.R.C. § 44A(a) (1982) (current version at I.R.C. § 21 (2012)) ("[T]he term 'applicable percentage' means 30 percent reduced. . . .").

[204] *See id.*; I.R.C. § 44A(a) (1976).

$30,000—more than 134% of the median income for all families and about 112% of median income for two-earners families,[205] and about $84,000 in 2017 adjusted dollars[206]—could claim a 20% credit, as they could have under prior laws. At the time, these changes allowed an increased credit for lower-income families while leaving the 20% credit for relatively wealthier taxpayers intact. But as just discussed, Congress had rejected income phase-downs just six years previously, reasoning that childcare costs were expenses of earning income that should be recoverable by taxpayers regardless of their means.[207]

Second, Congress raised the dollar limitations on the childcare credit to $2,400 (up from $2,000) and $4,800 (up from $4,000) of childcare expenses for one child and multiple children, respectively.[208] The increase did not fully reflect inflation over the preceding six years.[209] But when adjusted to 2017 dollars, the increase was still worth about $6,700 and $13,400, over double current dollar caps.[210]

In 1981, Congress also added another provision to the Code that helped working families bear the costs of childcare.[211] The first version of the new § 129 allowed taxpayers to exclude from their taxable income the value of employer-provided childcare benefits, such as on-site daycare.[212] Section 129 was originally enacted to encourage employers to establish such facilities.[213] But benefits

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[205] *See supra* note 202.

[206] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

[207] *See supra* note 200.

[208] *Compare* I.R.C. § 44A(d) (1982) *with* I.R.C. § 44A(d) (1976).

[209] In 1981 dollars, the equivalent of the $2,000 and $4,000 caps in place in 1976 would have been over $3,000 and $6,000, respectively. *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year).

[210] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017). The cap presently in force is $3,000 for one child and $6,000 for two or more children. I.R.C. § 21(c) (2012).

[211] *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, §124(e), 95 Stat. 172, 198–201 (1981) (codified as I.R.C. § 129 (1982)); *see also* Erin L. Kelly, *The Strange History of Employer-Sponsored Child Care: Interested Actors, Uncertainty, and the Transformation of Law in Organizational Fields*, 109 AM. J. SOCIOLOGY 606, 617–18 (2003).

[212] *See* I.R.C. § 129(a), (d) (1982).

[213] *See* Kelly, *supra* note 211, at 608 ("The 1981 tax law that eventually led to the establishment of dependent care expense accounts actually was intended by its congressional advocates to encourage employers to create new child care centers."); Ron Lieber, *Dependent Care Accounts, Hamstrung by Limits, Are Still Worth Exploring*, N.Y. TIMES (Nov. 7, 2014), https://www.nytimes.com/2014/11/08/your-money/taxes/dependent-care-accounts-

consultants quickly used their creativity to expand the scope of § 129. This expansion allowed employees to divert a portion of their salaries to so-called Dependent Care Account Plans, or DCAP plans, established by their employer free of tax.[214]

Congress approved of this expansion through a 1986 statutory amendment, allowing working parents to put pre-tax income into qualifying accounts, which could be used to pay for needed childcare.[215] At the same time, Congress set the dollar limit for the exclusion at $5,000,[216] which represents over $11,000 in 2017 adjusted dollars.[217] Thus, an employee could claim the exclusion if her employer provided in-kind childcare services or if she (the employee) diverted a portion of her salary to an employer-provided DCAP plan. There were now two childcare tax benefits. Families could claim what was worth most to them, but they could not double-up.[218]

Thus, as the eighties moved towards the nineties, the Code allowed most families to recover a relatively substantial portion of their childcare costs. The story of how the United States went from having these fairly liberal childcare tax laws to the restrictive, present day laws is superficially straightforward: Congress basically did nothing with the laws for the last three-plus decades. The next section of this Article explores this (d)evolutionary period in depth.

III. DECADES OF STAGNATION: THE CHILDCARE TAX LAW'S

hamstrung-by-a-28-year-old-limit-are-still-worth-exploring.html ("Congress laid the groundwork for the dependent care accounts in 1981, though it didn't actually mean to do so. As Erin L. Kelly, a sociology professor at the University of Minnesota, chronicled . . ., legislators were actually trying to encourage employers to start on-site day care centers or directly subsidize workers' child care costs.").

[214] *See supra* Part I.C; Kelly, *supra* note 211, at 608–09 ("Benefits consultants creatively linked dependent care expense accounts to another new program they were trying to market, 'cafeteria plans' or flexible benefits programs.").

[215] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1151(f), 100 Stat. 2085, 2506 (1986) (amending I.R.C. § 129(d) to accommodate "benefits provided through a salary reduction agreement").

[216] § 1163, 100 Stat. at 2510 (capping the amount of exclusion permitted under I.R.C. § 129(a)(2)).

[217] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of 2017).

[218] I.R.C. § 129(e)(7) (1982) (disallowing other deductions or credits "for any amount excluded from . . . gross income . . . by reason of this section").

(D)EVOLUTIONARY PERIOD

This section explores the childcare tax laws' (d)evolutionary period in three parts. The first part shows that while lawmakers have submitted hundreds of proposals to increase childcare tax benefits since the mid-eighties, Congress has failed to adjust these benefits even for inflation, keeping them nominally static. But since childcare costs have risen at least as fast as inflation, these benefits have steadily lost real value.

The second part of this section focuses on other parental tax reforms made since the mid-eighties but before the TCJA took effect. These reforms resulted in a significant shift in the way the Code taxes parents. Rather than adjusting childcare tax benefits during these decades, Congress instead enacted new and expanded existing parental tax benefits, none of which depended on whether or to what extent childcare expenses were incurred to work outside the home. Thus, while the reforms discussed in the previous section reduced the inequitable taxation of similarly situated families with different childcare needs, the reforms that occurred after the mid-eighties restored and perpetuated these inequities.

The third part tracks the changes made by the TCJA, revealing that Congress tread the same well-worn path it has used since the mid-eighties. By leaving the childcare tax laws untouched, the TCJA ensured that childcare tax benefits will continue to erode, allowing the inequitable taxation of families with different childcare needs to worsen.

A. THE EROSION OF CHILDCARE TAX BENEFITS: INACTION IS ACTION

Since § 129 was enacted, Congress has never changed the maximum exclusion available ($5,000).[219] 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.

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[219] *See* Lieber, *supra* note 219 ("But the dependent care account that employers offer alongside the health one, the one that goes toward child care and other expenses? Next year, the contribution limit will stay at $5,000, right where it was in 2014. And 2013. And every single year since Congress set the original limit in 1986.").

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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.[220] This adjustment did not even fully reflect inflation between 1981 and 2001.[221] It remains at this level today, untouched by the TCJA.

In 2001, Congress also modified the percentage credit mechanism. Since 1981, families earning less than $10,000 could claim a maximum 30% credit, and the percentage phased down to a minimum of 20% as income increased.[222] The 2001 laws allowed families earning less than $15,000, about 30% of the reported median income for all families in 2001,[223] to credit 35% of their childcare expenses.[224] The credit phased down to the 20% floor once income reached $43,000,[225] which was about 84% of the median income reported for all families in 2001.[226] These thresholds have not been changed in the eighteen years since and were left untouched by the TCJA.

A tabular representation of some of the most critical moments in the chronology provided in this and the preceding section helps make comparisons:

[220] *Compare* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, § 204(a), 115 Stat. 38, 49 (2001) (amending I.R.C. § 21(c) (2000)) *with* I.R.C. § 44A(d) (1982).

[221] The value of $2,400 in 1981 is equivalent to over $4,800 in 2001, and the value of $4,800 in 1981 is equivalent to over $9,600 in 2001. *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year).

[222] *See* I.R.C. § 44A(a) (1982).

[223] *See Census Historical Income Tables, supra* note 22 (noting that median income for all families was $51,407), By contrast, the 2001 median *household* income in the United States was $42,228. U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, CONSUMER INCOME P60-218, MONEY INCOME IN THE UNITED STATES: 2001 1 (2002), https://www.census.gov/prod/2002pubs/p60-218.pdf.

[224] § 204(b), 115 Stat. at 49 (amending I.R.C. § 21(a)(2) (2000)).

[225] *See* I.R.C. § 21(a) (2012).

[226] U.S. DEP'T OF COMMERCE, *supra* note 223, at 1.

	1954[227]	**1964**[228]	**1976**[229]	**1981**[230]	**2016**[231]
Mechanism	**Deduction**	**Deduction**	**20% credit**	**30% - 20% credit**	**35% - 20% credit**
Dollar Cap *(in 2017 adjusted dollars)*[232] One/Multiple Children	$5,400/ N/A	$4,700/ $7,100	$8,700/ $17,500	$6,700/ $13,400	$3100/ $6,200
Phaseout/ down?	Phase out	Phase out	None	30% phase down to 20%	35% phase down to 20%
Phase-out/down starting point (% median income two-earners/all families at time, F-12)[233]	Single/ widowed: N/A Two-earners: 90%/ 108%	Single/ widowed: N/A Two-earners: 79%/91%	N/A	37%/45%	15%/21%
Phase-out complete (% median income two-earners/all families at time)	Single/ widowed: N/A Two-earners: ~102%/ 122%	Single/ widowed: N/A Two-earners: 87-91%/ 100%- 105%	N/A	20% once over 112%/ 134%	20% once over 44%/ 59%
Other mechanisms	N/A	N/A	N/A	Exclusion for in kind	Exclusion for in kind and FSA
Section 129 Dollar cap	N/A	N/A	N/A	N/A (earned income limitation)	$5,100 regardless of number of children

As this table shows, recent childcare tax laws contain dollar ceilings that are lower than they have been at many points in history (once dollars are adjusted to an approximate constant

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[227] *See supra* notes 101–106 and accompanying text.
[228] *See supra* notes 146–149 and accompanying text.
[229] *See supra* notes 195–197 and accompanying text.
[230] *See supra* notes 211–215 and accompanying text.
[231] *See supra* notes 54–68 and accompanying text.
[232] Adjusted using *CPI Inflation Calculator*, *supra* note 143, as of January 2017. The numbers in this table are rounded to the nearest $100 in order to make general comparisons.
[233] *See Census Historical Income Tables, supra* note 22.

value).[234] The next question is how the actual tax relief available to working parents has changed. A full modeling is beyond the scope of this Article, but even a few general observations provide interesting insights.

For instance, consider the childcare tax benefits available to families in 1976 compared to more recent laws. As discussed, in 1976, the childcare tax laws provided a fixed percentage (20%) credit and benefits did not depend on income.[235] All families could therefore claim a credit worth roughly $1,750 for one child and $3,500 for multiple children in 2017 adjusted dollars.[236] But more recent versions of, the credit do depend on income and allow taxpayers in the lowest income brackets to claim a maximum (35%) credit equal to $1,050 for one child and $2,100 for multiple children.[237] Thus, the poorest taxpayers able to claim childcare tax benefits are likely entitled to less relief under recent laws than their counterparts were in 1976 (once approximate inflation adjustments are made).[238]

Turning to a comparison of the wealthiest parents, the bottom of the phase-down range of recent versions of the childcare tax credit hits quickly (as discussed at length above).[239] Families that earn more than $43,000 may claim a maximum credit of $600 for one child and $1,200 for multiple children.[240] But some taxpayers may also be eligible to claim § 129's $5,000 exclusion for amounts diverted into Dependent Care Flexible Spending Accounts, an option that was not available until 1986.[241] The tax benefit to which

[234] During the critical junctures explored in the previous parts and tabulated above, only one exception appears—the dollar cap applicable in 2016 for Section 21 for multiple children is worth more than it was in 1954, in constant dollars. This is likely due to the fact that the 1954 laws failed to differentiate by number of children, so that the dollar cap for multiple children under current Section 21 is $6,000 ($6,200 in adjusted dollars) whereas the 1954 laws allowed a maximum of about $5,400 2017 dollars for any number of children. I.R.C. § 21(c)(2) (2012).

[235] *See supra* note 200 and accompanying text.

[236] *See supra* notes 196–199 and accompanying text.

[237] *See supra* note 60 and accompanying text. This analysis would not change under TCJA's new rates because the credit does not depend on marginal tax rate. This analysis does assume poorest taxpayers will claim the credit, as it will generally produce more benefit than the exclusion because of their low marginal tax bracket (10% in both 2016 and 2018).

[238] *Id.*

[239] *See supra* notes 61–68 and accompanying text.

[240] *See supra* notes 63–65 and accompanying text.

[241] *See supra* note 58.

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any particular family is entitled under § 129 depends on the family's marginal tax bracket. Those earning enough income to find themselves in the top marginal tax bracket in 2016[242] could enjoy a maximum benefit from the childcare tax laws of $1,980 for one child and $2,180 for multiple children.[243] Thus, the maximum benefits wealthy families with one child could claim in 2016 were likely to be slightly greater than the benefits their counterparts could claim in 1976 (once adjusted to constant dollars). But these families would likely benefit significantly less if care for multiple children was required.[244] These figures will be altered somewhat in 2018 because the TCJA lowered the top marginal tax bracket to 37%, but the general pattern is likely to remain the same.[245]

Moving beyond the highest and lowest earners, how do families closer to the median incomes fare under recent childcare tax laws compared with their 1976 counterparts? Suppose a couple that was married and filing jointly earned the median income for all families in 2016—$72,707—and that they claimed the applicable standard deduction ($12,600) and three or four personal exemptions ($12,150 or $16,200)[246] for themselves and one or two dependent children. Their marginal tax rate would have been 15%. As a result, if they had two children they would have benefitted more from the childcare tax credit because their marginal tax bracket (15%) was not high enough to make the exclusion (that provides savings of $750 for them) more valuable than the $1,200 maximum credit.[247] However, if this median earning couple had only one child in 2016, they would have benefitted more from the exclusion, which would have still provided a maximum $750 savings (since the exclusion does not depend on number of children), compared to the $600 maximum savings offered by the credit (which does).

The analysis for married parents earning around the same income will change somewhat in 2018 due to changes made by the

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[242] Rev. Proc. 2015-53, 2015-44 I.R.B. 615 tbl.1 (promulgating 2016 tax rates). The top rate hit at $467,000 if married filing jointly.

[243] *See supra* note 68 and accompanying text.

[244] *See id.* See table below for exact comparisons in 2017 adjusted dollars.

[245] In 2018, the maximum relief at the top bracket (now 37%) would be $1,850 and $2,050 for one and multiple children (and slightly less in 2017 adjusted dollars).
to $1,800 and $3,600 (adjusted dollars) in 1976. .

[246] *See supra* note 61.

[247] *See supra* notes 66 & **Error! Bookmark not defined.**.

TCJA. Once income is reduced by the now-doubled standard deduction ($24,000), the marginal tax rate of parents earning around the median income may often fall to 12%. When this is the case, the family with multiple children should still claim the $1,200 credit (as the maximum exclusion will be worth even less than it was in 2016, when their marginal tax bracket was 15%). However, in 2018, the family with one child may now be indifferent between the exclusion and credit, as both offer a maximum $600 savings (when marginal tax bracket it 12%).

In 2016, the situation of single parents earning the median income for all families ($72,707) and who claim head of household status is interesting because their taxable income may fall close to the point where the 15% and 25% brackets "break," If the head of household claimed the standard deduction ($9,300) and two personal exemptions ($8,100) for her and one dependent child, she would likely maximize benefits by relying heavily on the exclusion since most of it would reduce income that would otherwise be taxed at 25%. Her maximum savings is likely around $1,240.[248]

A head of household with two children, however, may find herself more squarely "between brackets" in 2016, and might maximize benefits by claiming a combination of the exclusion (until the income that is taxed at 25% is reduced) and the credit (for the remaining income). This would have allowed her to claim a maximum benefit that is roughly the same as the head of household with one child.[249] In 2018, this analysis may be different due to rate changes and the repealed personal exemption.

Similar comparisons could be made between the childcare tax benefits available to families in 1981 compared to more recent laws. Recall that by 1981 the childcare tax credit phased-down by income. And while the dependent care exclusion was enacted that year, it only allowed for the exclusion of in-kind benefits and not for the

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[248] Around $100 of the $5000 exclusion will reduce income in the 15% bracket.

[249] The 25% and 15% rates break at $50,400. After $72,707 income is reduced by the standard deduction and three personal exemption amounts, taxable income is $51,257. She might claim a $857 exclusion to reduce her 25% bracket income, resulting in a savings of $214. The remaining $5,143 ($6,000 maximum less $857 claimed) could be claimed as a 20% credit ($1,028) for about $1,242 savings. It may be unlikely the average taxpayer thinks to do this. If she just claims the credit, her tax savings will be $1,200, also close to the savings a single mother with one child might claim if she claimed an exclusion that mostly reduced 25% bracket income.

exclusion of income diverted into an FSA (which was allowed in 1986 by statutory amendment.[250]) In 1981, the maximum credit available to taxpayers earning under $10,000, (about 45% of the median for all families at the time)[251] was worth about $2,010 for one child and $4,020 for multiple children in 2017 dollars.[252] At the bottom of the phase-down range, the maximum credit available in 1981 was $1,340 for one child and $2,680 for multiple children in approximate 2017 dollars.[253] And unlike today, taxpayers earning the median family income in 1981[254] would not have hit the end of the phase out range and would have been entitled to a 23% credit[255] worth, in 2017 dollars, about $1,540 for one child and $3,080 for multiple children.[256]

A tabular summary of approximate maximum childcare tax benefits available to parents of different filing statuses and earning varying levels of income in 1976, 1981 and 2016 follows. Numbers are expressed for one child and two children, respectively, and are adjusted to approximate 2017 dollars.[257]

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[250] *See supra* notes 211–215.

[251] *See supra* note 202 and accompanying text. Cross cite F-18 chart, (median income for all was $22,388).

[252] *See* I.R.C. § 44A(a), (d) (1982) (stating that the maximum credit was 30% of $2,400 for one child or $4,800 for multiple children, which equates to $720 or $1,440 in 1981 dollars). In 2017 dollars, these amounts are approximately $2,010 and $4,020. *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year).

[253] *See* I.R.C. § 44A(a), (d) (1982) (restricting the maximum phased-down credit to 20% of $2,400 for one child or $4,800 for multiple children, which equates to $480 or $960 in 1981 dollars). Thus, in 2017 dollars, the phased-down credits would be approximately $1,340 and $2,680, respectively. *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year).

[254] Table F-12, *supra* note 22. The 1981 median income for all families was $22,388. *See supra* note 202.

[255] Assuming the family also had AGI of $22,388. *See* I.R.C. § 44A(a) (1982) (providing that the credit would phase down from 30% to 20% of qualifying expenses by 1% for each fraction of $2,000 by which a taxpayer's AGI exceeded $10,000). Thus, the percentage would be reduced as follows: ($22,388 less $10,000)/$2,000 equals (once one rounds up as required) 7, so that applicable percentage will be 23% (30% - 7%).

[256] *See id.* § 44A(d) (1982) (setting dollar caps at $2,400 for one child or $4,800 for multiple children). The 23% credit would, therefore be worth $552 or $1,104 in 1981 dollars. In 2017 dollars, these credits would be worth $1,540 for one child and $3,081 for multiple children. s*See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

[257] Adjusted using *CPI Inflation Calculator*, *supra* note 143, to adjust to January 2017 dollars.

	1976[258]	**1981**[259]	**2016**[260]
Head of Household Median Income All Families	$1,750/ $3,500	$1,540/ $3,080	~$1,270/~$1,270
Married Filing Jointly Median Income All Families	$1,750/ $3,500	$1,540/ $3,080	$770/$1,230
Top Bracket	$1,750/ $3,500	$1,340/ $2,680	$2,030/$2,235 (exclusion + $200 credit)
Low Income Brackets - Income to Absorb All Benefits Available	$1,750/ $3,500	$2,010/ $4,020	$1,080/$2,150
Lowest Income Brackets - Income Does Not Exceed Benefits Available	Benefits Not Refundable		

There are many other comparisons that could be made but even these rough figures reveal interesting trends. The (d)evolution of our childcare tax benefits has not affected all families the same. Wealthy taxpayers that require care for only one child actually receive more relief under the 2016 childcare tax laws than their counterparts received in 1976 and 1981 (a result that is modified only slightly by the TCJA's rates applicable in 2018). But all of the other taxpayers represented above receive less childcare tax relief under current laws than their 1976 and 1981 counterparts (once adjustments are made to constant dollars). And as the table shows, the diminution of benefits is not equal across income—families at the median with multiple children, for instance, have been affected more than wealthier families.

How has this happened? The (d)evolution of our childcare tax laws did not just escape the attention of our lawmakers. To the contrary, lawmakers have regularly introduced bills to increase childcare tax benefits since 1981.[261] In the 114th Congressional session alone, at least twenty-four different proposed bills to liberalize the childcare tax laws were introduced to an appropriate committee.[262] During this session, lawmakers submitted proposals

[258] *See supra* notes 202–205 and accompanying text.

[259] *See supra* notes 259–268 and accompanying text.

[260] *See supra* notes 54–68 and accompanying text. Note that inflation adjustments have been made from January 2016 to January 2017 to make all numbers constant.

[261] A full table of all bills introduced since 1984 is available with Author.

[262] *See* Working Parents Flexibility Act of 2016, H.R. 4699, 114th Cong. (2016); Pathways Out of Poverty Act of 2015, H.R. 2721, 114th Cong. § 1801 (2015); 21st Century Child Care Investment Act, H.R. 5828, 114th Cong. (2016); Right Start Child Care and Education Act of

to increase[263] and even repeal phase-outs,[264] a move which would have put the laws back in line with the generous childcare tax laws enacted in 1976.[265] Other lawmakers submitted proposals to make the childcare credit available as an above-the-line deduction, a move which would have fully embraced, for the first time, the view that childcare expenses are costs of earning income.[266] Another proposal would have raised the percentage credit for young children, reflecting the particularly high cost of care for preschool aged children.[267] Still other lawmakers proposed to significantly raise the dollar caps on the childcare tax credit and dependent care exclusion.[268] And still other proposals built in an inflation-adjustment mechanism, so that, like many other tax laws, designated dollar caps would automatically increase to account for annual inflation.[269]

Nor is the 114th Congress's activity anomalous. Each congressional session since 1984 has seen numerous proposals to change the childcare tax laws. Over fifteen proposals were introduced in the 113th Congressional Session to modify the

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2015, S. 446, 114th Cong. (2015); Right Start Child Care and Education Act of 2015, H.R. 2703, 114th Cong. (2015); Child Care Access and Refundability Expansion Act, H.R. 1492, 114th Cong. § 2 (2015); Family Care Savings Act, H.R. 750, 114th Cong. (2015); Helping Working Families Afford Child Care Act, S. 661, 114th Cong. (2015); Helping Working Families Afford Child Care Act, H.R. 1780, 114th Cong. (2015); Support Working Parents Act of 2015, H.R. 2184, 114th Cong. (2015); Access to Childcare Expansion Act, S. 3208, 114th Cong. (2016); Promoting Affordable Childcare for Everyone Act, S. 3233, 114th Cong. (2016); Working Families Relief Act, H.R. 4867, 114th Cong. (2016); Working Families Relief Act, S. 2879, 114th Cong. (2016);; Dependent Care Savings Account Act of 2015, S. 74, 114th Cong. (2015); Child and Dependent Care FSA Enhancement Act, S. 215, 114th Cong. (2015); Child and Dependent Care Tax Credit Enhancement Act of 2015, S. 820, 114th Cong. (2015); Child and Dependent Care FSA Enhancement Act, H.R. 1720, 114th Cong. (2015); H.R. 2891, 114th Cong. (2015); Middle Class Dependent Care Fairness Act of 2016, H.R. 6146, 114th Cong. (2016); H.R. 5971, 114th Cong. (2016); S. 180, 114th Cong. (2015); Working Parent Support Act of 2015, H.R. 964, 114th Cong. (2015); 161 Cong. Rec. S1905 (daily ed. Mar. 25, 2015) (listing Senate Amendment 633 to Senate Concurrent Resolution 11). A full table of these bills is on file with the author.

[263] *See* S. 820 (increasing the phase-out amount to $120,000).

[264] *See* H.R. 2184; H.R. 6146.

[265] *See supra* Section II.B.

[266] *See* S. 180 § 1(b); H.R. 964 § 2(b).

[267] *See* S. 820, § 2(a)(2)(A) (raising percentage credit to 50% for children under age five).

[268] *See, e.g.*, S. 180 § 1(a) (increasing caps to $7,000 and $14,000 for one and multiple children, respectively); H.R. 964, § 1(a) (increasing caps to $7,000 and $14,000 for one and multiple children, respectively).

[269] *See, e.g.*, S. 3208, § 3(a) (raising the limit on exclusion and adjusting also for inflation); S. 3233, § 3(a)(same).

childcare tax laws, almost all of which would have made the childcare tax laws more generous.[270] Well over one hundred bills to modify the childcare tax laws have been introduced into committee since 2001,[271] the last year in which adjustments were made.

But since 1986, rather than prevent childcare tax benefits from eroding, Congress has opted to create new or expand existing tax benefits for parents that do not depend on childcare expenses. The next part of this section tracks the evolution of these other parental tax benefits before the TCJA was passed.

B. THE EVOLUTION OF OUR PARENTAL TAX LAWS: MAKING ALPHABET SOUP

While Congress allowed childcare tax benefits to erode since the mid-eighties, it created new and expanded existing tax benefits that eligible parents could claim regardless of whether they incurred

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[270] *See* Pathways Out of Poverty Act of 2014, H.R. 5352, 113th Cong. § 1801 (2014) (providing inflation adjustments for the Child Tax Credit); Tax Reform Act of 2014, H.R. 1, 113th Cong. § 1102 (2014) (increasing the child tax credit); S. 1975, 113th Cong. (2d Sess. 2014) (allowing above-the-line deductions of $7,000 and $14,000 for one and multiple children, respectively); H.R. 5365, 113th Cong. (2014) (allowing above-the-line deductions of $7,000 and $14,000 for one and multiple children, respectively); Right Start Child Care and Education Act of 2013, S. 56, 113th Cong. (2013) (increasing the percentage of allowable expenses, income eligibility, and amount creditable); Right Start Child Care and Education Act of 2013, H.R. 3101, 113th Cong. (2013) (increasing the percentage of allowable expenses, income eligibility, and amount creditable); Tax Credit for Early Educators Act of 2013, S. 438, 113th Cong. § 4 (2013) (eliminating phase out of dependent care credit); Child Care Access and Refundability Expansion Act, H.R. 3740, 113th Cong. (2013) (making credit refundable and providing for inflation adjustment); Support Working Parents Act of 2013, H.R. 1978, 113th Cong. (2013) (eliminating the phase out of the dependent care credit); Child Care Flex Spending Act of 2013, H.R. 3497, 113th Cong. (2013) (increasing the exclusion amount for employer-provided assistance); Child Care Flex Spending Act of 2013, S. 1713, 113th Cong. (2013) (increasing the exclusion amount for employer-provided assistance); Helping Working Families Afford Child Care Act, S. 2565, 113th Cong. (2013) (increasing dependent care credit, adjusting for inflation, and making credit refundable); Families First Act, H.R. 5258, 113th Cong. (2014) (providing inflation adjustments); Middle Class Dependent Care Fairness Act of 2013, H.R. 2048, 113th Cong. (2013) (eliminating phase out); Dependent Care Savings Account Act of 2014, H.R. 5326, 113th Cong. (2014) (establishing dependent care savings accounts and providing deductions for amounts paid into them); Dependent Care Savings Account Act of 2014, S. 2806, 113th Cong. (2014) (establishing dependent care savings accounts and providing deductions for amounts paid into them); Child and Dependent Care FSA Enhancement Act, S. 2997, 113th Cong. (2014) (increasing the exclusion amount for employer-provided assistance and providing for inflation adjustment).

[271] A table of all bills is available with Author.

childcare costs to work outside the home. This part tracks the evolution of these parental tax benefits before the TCJA was passed.

1. The Earned Income Tax Credit (EITC)

As discussed above, Congress made significant changes to the childcare tax laws in 1976, eliminating income limitations entirely and allowing all parents to credit 20% of their childcare expenses up to historically generous dollar caps.[272] But this was not the most important change made to the parental tax laws around that time. In 1975, the first version of the still-existing Earned Income Tax Credit (EITC) was enacted.[273] Scholars have devoted substantial time chronicling the history behind the EITC[274] and it is unnecessary to replicate that work here. A cursory historical summary suffices.

The EITC was originally envisioned as a modest subsidy to aid poor, working families.[275] Specifically, parents earning at least $4,000 but not more than $8,000 were entitled to a credit,[276] which was designed to offset the payroll tax on salary income.[277] The maximum credit was $400,[278] or about $1,750 in current dollars.[279] The original EITC pursued humble goals such as "prevent[ing] the social security tax from taking away from the poor and low-income earners the money they need for support of their families."[280]

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[272] *See supra* Part II.B.

[273] Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (codified as amended in scattered sections of 26 U.S.C. (2012)).

[274] *See, e.g.*, Dennis Ventry, *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-1999,* 53 NAT'L TAX. J. 983, 996 (2000) ("[M]uch to everyone's surprise . . . at the end of the 1970s . . . [the EITC] would no longer comprise simply a modest work subsidy . . . [but would instead] represent an anti–poverty device . . . .").

[275] *See, e.g.*, Anne L. Alstott, *The Earned Income Tax Credit and the Limitations on Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 533 (1994) ("The earned income tax credit (EITC), which uses the federal income tax system to provide an earnings subsidy to low-income workers, has enjoyed support across the political spectrum as a 'pro-work, pro-family' alternative to traditional welfare programs.").

[276] *See id.*

[277] Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Sized Adjustment to the Minimum Wage*, 57 TAX L. REV. 301, 304 (2004) ("According to the legislative history, the purposes of the EITC included encouraging employment, reducing welfare rolls, and offsetting the burdens of the payroll tax.").

[278] *See id.*

[279] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January 2017).

[280] *See* 118 CONG. REC. 33010, 33011 (1972) (statement of Sen. Long).

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But the EITC soon emerged as a full-fledged "anti-poverty device" and by 1986 was well on its way towards being a vital tool in America's kit for alleviating poverty.[281] Unlike the childcare tax laws, the EITC amount was adjusted for inflation several times before 1986[282] and then, as part of the Tax Reform Act of 1986, was indexed for inflation permanently.[283]

Then came the nineties. President Clinton took office in 1993, vowing to "make work pay."[284] As part of this effort, the number of families eligible to claim the EITC expanded and the credit amount increased substantially.[285] These changes nearly tripled the annual cost of the EITC.[286]

In 2001, Congress made additional changes to the EITC. It again increased the number of families eligible to claim the credit by lowering the phase-in rate for married couples in an attempt to ameliorate the "marriage penalty." And it excluded certain amounts from the definition of earned income,[287] which allowed more taxpayers to qualify for the EITC because less income "counted"

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[281] Ventry, *supra* note 274, at 996, 1003.

[282] *See* Zelenak, *supra* note 277, at 304.

[283] *See id.* (citing Tax Reform Act of 1986, Pub. L. No 99-514, § 111, 100 Stat. 2085, 2107–08); Ventry, *supra* note 274, at 1002 ("Moreover, TRA 86 guaranteed the future integrity of the EITC by indexing it for inflation.").

[284] *See* William J. Clinton, President of the United States, Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Aug. 22, 1996), *in* 1996 Pub. Papers 1328, 1329–30 ("Combined with the newly increased minimum wage and the Earned Income Tax Credit—which this legislation maintains—H.R. 3734 will make work pay for more Americans.").

[285] *See* GENE FALK, CONG. RESEARCH SERV., RL 31768, THE EARNED INCOME TAX CREDIT (EITC): AN OVERVIEW 17–18 (2014) ("Fulfillment of [President Clinton's] pledge required a proposal to raise the EITC credit rates, especially for families with two or more children. [President Clinton's] proposal was enacted as part of OBRA of 1993 (P.L. 103-66) with little change by Congress.").

[286] *See* Ventry, *supra* note 274, at 1004–05 ("Under the changes produced by the 1990 and 1993 bills, the cost of the EITC almost tripled, jumping from $7.5 billion in 1990 to $21.1 billion in 1994 (current dollars) . . . . When examining over a longer time period, the expansion appeared more dramatic. From 1986 to 1996, EITC expenditures grew by 1,191 percent. . . .").

[287] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 301–03, 115 Stat. 38, 53–57 (2001).

when determining eligibility.[288] In 2009, Congress increased the credit amount available to families with three or more children.[289]

Today, "the [EITC] has grown into [America's] largest federal anti-poverty program,"[290] and offers refundable credits.[291] In 2016, a single mother with one, two, and three or more children would be entitled to claim some EITC so long as her income did not exceed $39,296, $44,648, and $47,955, respectively.[292] A married couple filing jointly could claim some EITC for one, two and three or more children so long as their income did not exceed $44,846, $50,198 and $53,505, respectively.[293] The maximum credit for one, two and three or more children is $3,373, $5,572 and $6,269, respectively.[294] These amounts are all substantially larger than the original credit amount available in 1976 when the EITC was enacted.[295]

The EITC is expensive. In 2016, it was estimated to cost $73 billion in foregone revenue and refund payments.[296] It is among one of the largest tax expenditures in the Code.[297] But the enactment of the EITC was not the only major change in parental tax laws made during the childcare tax law's (d)evolutionary period.

2. The Child Tax Credit (CTC) and the Additional Child Tax Credit (ACTC)

In the mid-1990s, Congress enacted a modest child tax credit (the CTC) that, at the time, benefitted mainly middle- and upper-

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[288] *Id.*

[289] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 1002, 123 Stat. 115, 312 (2009). Other changes were made in 2012. The American Taxpayer Relief Act of 2012, Pub. L. No.112–240, § 103, 126 Stat. 2313, 2319 (2012).

[290] *See* Zelenak, *supra* note 277, at 301 (citation omitted).

[291] I.R.C. § 32 (2012).

[292] *2016 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, INTERNAL REVENUE SERV., https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/eitc-income-limits-maximum-credit-amounts (last accessed Jan. 20, 2019).

[293] *Id.*

[294] The credit varies by income. *Id.*

[295] The original credit was $400 in 1976. Tax Reduction Act of 1975, Pub. L. No. 94-12 § 204, 89. Stat. 26, 30. $400 is worth approximately $1,750 in 2017 dollars. *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year).

[296] STAFF OF JOINT COMM. ON TAXATION, 115TH CONG., JCX-3-17, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016–2020 39 (2017), https://www.jct.gov/publications.html?func=startdown&id=4971 [hereinafter JCT REPORT].

[297] *See, e.g.*, Drew DeSilver, *The Biggest U.S. Tax Breaks*, PEW RESEARCH CTR. (Apr. 6, 2016), http://www.pewresearch.org/fact-tank/2016/04/06/the-biggest-u-s-tax-breaks/ (listing the EITC as the sixth largest tax expenditure).

middle-class families with children.[298] This credit should not be confused with the child*care* tax credit, upon which this paper has focused. Like the EITC, the CTC was and continues to be available to eligible families regardless of whether they incur expenses to work outside the home (or indeed whether they incur childcare expenses of any kind at all).

The original 1997 CTC allowed for a credit of $500 per child and was not refundable unless a family had three or more children.[299] The credit amount was lowered to $400 in 1998.[300] The credit phased out at higher income levels, starting at "$75,000 for single individuals, $110,000 for married couples filing jointly, and $55,000 for married individuals filing separately."[301]

In 2001, George W. Bush's Presidency began. During his first term, Congress passed significant tax breaks for families—often referred to colloquially as the "Bush Tax Cuts"[302]—through the Economic Growth and Tax Relief Reconciliation Act of 2001[303] and the Jobs and Growth Tax Relief Reconciliation Act of 2003.[304] In addition to tax changes that mainly helped high-income earners—such as lowering the top marginal tax rates and repealing the estate tax temporarily[305]—there were several changes that were aimed at the middle class. As part of these latter measures, the CTC was expanded and increased.[306] Specifically, in 2001, the CTC was set to increase from $600 to $1,000 over a period of years.[307] But two years later, the pace was accelerated and the CTC was increased to $1,000

[298] Taxpayer Relief Act of 1997, Pub. L. No. 105–34, § 101, 111 Stat. 788, 796 (1997) (codified as amended at I.R.C. § 24 (2012)). For more history on the CTC, see Jennifer McGroarty, *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).

[299] § 101, 111 Stat. at 796 (codified as amended at I.R.C. § 24 (2012)).

[300] McGroarty, *supra* note 298, at 307.

[301] *Id.*

[302] *See, e.g.*, Scott Greenberg, *Looking Back at the Bush Tax Cuts, Fifteen Years Later*, TAX FOUNDATION (June 7, 2016), https://taxfoundation.org/looking-back-bush-tax-cuts-fifteen-years-later/ ("[The Economic Growth and Tax Relief Reconciliation Act of 2001] is often referred to as the first of two 'Bush tax cuts.'").

[303] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

[304] Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (2003).

[305] §§ 101, 501, 115 Stat. at 41, 69.

[306] § 201, 115 Stat. at 45.

[307] *Id.*

per child.[308] The CTC was not changed again until the TCJA went into effect.[309]

Given the CTC's phase-outs (which were set in 1997 and not changed until the TCJA's passage), [310] the CTC does far more than provide aid to the working poor—instead, it provides benefits to parents of moderate and above-moderate means. In 2017, families earning between $100,000 and $200,000 received almost $10 billion of the $55 billion benefits provided through the CTC.[311] Families earning over $50,000 claimed over $26 billion of all claimed benefits, which is slightly more than the CTC and ACTC benefits claimed by families earning below $50,000 and over five times the total cost of the childcare tax credit and dependency care exclusion.[312]

In 2001, Congress reformed the CTC so that the credit could also benefit the working poor. Congress made the child tax credit partially refundable, providing benefits that supplement the EITC.[313] Once taxpayers surpassed an income threshold, below which no refund was available, the refundable portion of the credit increased as income rose until the maximum credit of $1,000 per child was attained.[314] Thus, like the EITC, the refundable portion of the child tax credit (often referred to as the additional child tax credit, or ACTC) requires a family to work but does not depend on whether childcare costs are incurred to do so.

In 2001, Congress set the refundability threshold for the ACTC at $10,000.[315] In 2009, the threshold was reduced to $3,000,[316] where it remained until the TCJA lowered it further.[317]

While the CTC and ACTC are not as costly as the EITC, both tax credits still bear a large price tag and together constitute one of the

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[308] §101, 117 Stat. at 753.

[309] INTERNAL REV. SERV., DEPT. OF TREASURY, PUB. 972, CHILD TAX CREDIT 2 (2016), https://www.irs.gov/pub/irs-prior/p972--2016.pdf.

[310] *Id.* at 3 (showing the AGI ceilings as $75,000 for single individuals, $110,000 for married couples filing jointly, and $55,000 for married individuals filing separately).

[311] JCT REPORT, *supra* note 296, at 48 (showing amount received at $9,696,000,000).

[312] *Id.* at 48 (totaling $26.34B).

[313] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 201(c), 115 Stat. 38, 46 (2001).

[314] *Id.*

[315] *Id.*

[316] Jobs Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 101, 117 Stat 753 (2003).

[317] Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, § 101, 129 Stat. 3040, 3044 (2015).

more expensive tax expenditure provisions in the Code. In 2016, for instance, the CTC was estimated to cost $55 billion in foregone tax revenue and refunds,[318] eleven times the estimated cost of the childcare tax laws.[319]

3. The Zero Bracket.

In addition to creating an alphabet soup of new tax benefits, the Code traditionally allowed parents to claim a personal exemption amount to reduce their taxable income for each dependent child in their primary care (though, as discussed below, the TCJA repealed it).[320] Thus, for instance, a couple that was married and filing jointly could historically claim four personal exemption amounts while a single parent with two children could have claimed three. Like the CTC, parents were able to claim the personal exemption regardless of whether childcare costs were incurred. Congress consistently adjusted the personal deduction amount for inflation since the mid-eighties.[321]

The personal exemption amount traditionally phased out, but at very high-income levels. In 2017, couples that were married and filed jointly would have been phased out of their benefits if their adjusted gross income exceeded $313,800 and benefits would have phased out completely if they earned more than $436,300.[322] For single filers, the phase out began at $261,500 and ended at $384,000.[323] Thus since the mid-eighties and until the TCJA's repeal, Congress maintained the personal exemption so that it provided relatively consistent benefits to parents in even the upper income strata regardless of childcare needs. And because the value of the personal exemption increased with the marginal tax bracket of the family claiming it, wealthier parents benefitted more than those of lesser means.[324]

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[318] JCT REPORT, *supra* note 296, at 37.

[319] *Id.*

[320] *See* I.R.C. §§ 151(c), 152(a) (2012).

[321] I.R.C. § 63(c)(4) (requiring adjustments for inflation for years after 1988).

[322] Rev. Proc. 2016-55 § 3.24, 2016-45 I.R.B. 707.

[323] *Id.*

[324] Throughout the devolutionary period, the standard deduction and tax rates also changed significantly. For instance, in 1986, tax rates were slashed for all individual taxpayers. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 101, 100 Stat. 2085, 2096 (1986) (amending tax rates). And the standard deduction amount, created in 1971, has increased in value over time, particularly for married taxpayers who can now (but could not always) claim

Congress has, since 1971, also allowed taxpayers to claim a standard deduction amount, in lieu of itemizing their deductions. The standard deduction amount is not a parental tax benefit—the same deduction is available for taxpayers that are married and filing jointly, regardless of whether they have dependent children in their care. But it bears mentioning for two reasons. First, the standard deduction is generally discussed along with the personal exemption because together these two benefits define a "zero bracket" amount—i.e. an amount of income below which no federal income tax will be levied. Second, as will be seen below, the TCJA conflated the two benefits. In 2016, a married couple filing jointly was entitled to a standard deduction of $12,600 and a head of household was entitled to $9,300.[325] Like the personal exemption, the standard deduction amount has been consistently adjusted for inflation since the mid-eighties.

This Part concludes by putting this alphabet soup of parental tax benefits together and showing how the (d)evolution of our parental tax laws resulted in an important shift in spending priorities that perpetuated the inequities that had been addressed by previous reforms.

4. Shifted Priorities, Perpetuated Inequities

As the previous discussion has shown, while many working parents lost childcare tax benefits over the past several decades, Congress created new parental tax benefits during that time and expanded others that previously existed. This, of course, mitigated the financial sting for working parents whose childcare tax benefits had devolved. Nevertheless, through these parental tax reforms, Congress altered the way in which parents were taxed. In the process, it contributed to the inequitable taxation of families with different childcare needs.

The CTC and personal exemption provide the same benefits to families of the same size and earning the same income. They are

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double the deduction available to single filers. *See* Revenue Act of 1971, Pub. L. No. 92-178, §203, 85 Stat. 497, 511 (1971). But these changes apply equally to all taxpayers with the same filing status and thus are not even dependent on whether a taxpayer has children nor whether costs are incurred to care for them.

[325] *See* Rev. Proc. 2015-53, 2015-44 I.R.B. 615, § 3.14 (promulgating 2016 standard deductions).

facially neutral. But these laws do not exist in a vacuum. As discussed in Section I.A., unless the Code allows working parents to recover their childcare costs or taxes the imputed income of non-paid arrangements, the tax laws favor families that do not have to purchase childcare on the external market.[326] Giving all families the same tax benefit does nothing to narrow the magnitude of this inequity.

Moreover, the magnitude of this inequity has grown—and will, without further action, continue to grow. While the benefits available under the childcare tax laws have largely remained static in nominal terms, childcare costs have risen steadily to (at least) reflect inflation. Thus, the inequitable taxation of families with different childcare needs has worsened over time.

Despite this, however, the TCJA treaded the same well-worn path created by Congress over the prior three decades.

C. THE TCJA: MORE OF THE SAME

The Tax Cuts and Jobs Act (TCJA)—enacted in the twilight of 2017 through a historically rushed process[327]—was touted by its proponents as providing tax cuts to working families.[328] The TCJA did expand the relief available to working poor families. While it did not alter the Earned Income Tax Credit[329]—the primary mechanism by which the Code addresses the plight of families that are in or near poverty[330]—it expanded the benefits available under the refundable portion of the Child Tax Credit (*i.e.* the Additional Child Tax Credit). Most significantly, it raised the maximum per child refund to $1,400[331]—up from $1,000 though not up to the new

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[326] *See supra* Part I.A.

[327] *See, e.g.,* Bob Bryan, *Experts are Starting to Find Massive Errors in the GOP Tax Bill After it went through Congress at Lightning Speed*, BUSINESS INSIDER (Dec. 6, 2017, 3:49 PM), http://www.businessinsider.com/trump-gop-tax-reform-bill-mistakes-corporate-amt-2017-12 (noting that the TCJA "moved through both chambers of Congress at legislative light speed" and "experts are starting to find a slew of errors they say are most likely the result of a rushed process."); Thomas Kaplan & Alan Rappeport, *Senate Overcomes Hiccups to Advance Tax Overhaul in 51-48 Vote,* N.Y. TIMES, Dec. 19, 2017, at A15 (noting that Democratic Senator Charles Schumer "warned that Republicans would come to regret rushing the tax bill through Congress").

[328] *See supra* note 7.

[329] *See generally* Pub. L. No. 115-97, 131 Stat. 2054 (2017).

[330] *See supra* Part III.B.2.

[331] § 11022(a), 131 Stat. at 2073–74.

$2,000 per child credit available to parents with sufficient income to absorb it (and discussed below).[332] The TCJA also lowered the earned-income threshold so that parents can claim refunds once their earned income reaches $2,500, down from $3,000.[333] Thus, as it has historically done, the 115th Congress exhibited a continuing willingness to use the Code to provide aid to the working poor.

For parents that are not in or near poverty, the TCJA's parental tax reforms strongly resemble Congress' practices since the mid-eighties. In the name of simplification, the TCJA eliminated the personal exemption entirely,[334] (which depended on the number of dependent children in a parent's care) and doubled the standard deduction[335] (which does not depend on number of children). The TCJA then doubled the child tax credit from $1,000 to $2,000 for each dependent child, added an additional credit for non-child dependents such as elderly relatives, and dramatically raised the phase-out levels to $400,000 for taxpayers that are married filing jointly and $200,000 for all other filers.[336] But as mentioned throughout this Article, it left the childcare tax laws untouched so that none of the expanded relief depends on whether childcare costs are actually incurred.

The extent to which a particular family's tax bill will be lowered obviously depends on its particular situation. But one thing is quite clear: The TCJA did not address the inequitable taxation of families with different childcare needs and instead left childcare tax benefits to devolve further in value.

The final section of this article takes the history developed in these previous three sections to consider the future of America's childcare tax laws.

IV. USING THE PAST TO INFORM THE FUTURE OF AMERICA'S CHILDCARE TAX LAWS

The previous three sections have provided a holistic look at the (d)evolution of our childcare and parental tax laws. In order to use

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332 *Id.*
333 *Id.*
334 § 11041, 131 Stat. at 2082–85.
335 § 11021, 131 Stat. at 2072–73.
336 § 11022, 131 Stat. at 2073–74.

this history to inform future debates, the first part of this section turns to a still unanswered question: Why was this (d)evolution politically feasible? Why aren't working parents demanding reform of the childcare tax laws? Why doesn't anyone seem to be asking whether children are more important than martinis, organizing Baby Carriage Brigades, or dressing children as oil wells?

Coupling these political insights with the history developed throughout this Article, this section then discusses possible reforms to our childcare tax laws.

A. PUBLIC SENTIMENT: WHERE THERE WAS OUTRAGE, APATHY

As discussed above, Congress liberalized the childcare tax laws in the 1970s and 1980s,[337] more equitably taxing families with different childcare needs. But in the ensuing decades these laws have devolved, once again taxing family models inequitably. Demographics suggest that an increasing number of families are adversely affected by this devolution.

To start, the number of American families that consist of two earners seems to be consistently rising. In 1970 (around the time that Congress started to significantly liberalize the childcare tax laws), half of two-parent families consisted of one earner, who was almost always the father.[338] But today, a full two-thirds of two-

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[337] *See supra* Section II.B.

[338] *See* Kim Parker & Gretchen Livingston, *7 Facts About American Dads*, PEW RESEARCH CTR. (June 13, 2018), http://www.pewresearch.org/fact-tank/2018/06/18/fathers-day-facts/ ("About a quarter of couples (27%) who live with children younger than 18 are in families where only the father works. This marks a dramatic change from 1970, when almost half of these couples (47%) were in families where only the dad worked."); D'Vera Cohn et al., *After Decades of Decline, A Rise in Stay-at-Home Mothers*, PEW RESEARCH CTR. (Apr. 8, 2014), http://www.pewsocialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers/ ("The share of mothers who do not work outside the home rose to 29% in 2012, up from a modern-era low of 23% in 1999, according to a new Pew Research Center analysis of government data."); *see also* Sarah Jane Glynn, *The New Breadwinners: 2010 Update*, CTR. AM. PROGRESS (Apr. 16, 2012 9:00 am), https://www.americanprogress.org/issues/economy/reports/2012/04/16/11377/the-new-breadwinners-2010-update/ ("[M]ost children today are growing up in families without a full-time, stay-at-home caregiver. In 2010, among families with children, nearly half (44.8 percent) were headed by two working parents and another one in four (26.1 percent) were headed by a single parent. As a result, fewer than one in three (28.7 percent) children now have a stay-at-home parent, compared to more than half (52.6 percent) in 1975, only a generation ago.").

parent families are dual-earners,[339] meaning that both parents work outside of the home and earn income.[340] And there is reason to believe that the one-earner, two-parent model will continue its decline. For Millennials—defined roughly as those born between 1980 and the mid-1990's[341]— dual-earner households are likely to be the norm."[342] One report found that 78% of millennial couples consist of two earners, compared to 47% of couples in the so-called boomer generation[343]— individuals who were born between 1946 and 1964.[344]

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[339] Scott A. Hodge & Andrew Lundeen, *America Has Become a Nation of Dual-Income Working Couples*, TAX FOUND. (Nov. 21, 2013), http://taxfoundation.org/blog/america-has-become-nation-dual-income-working-couples ("Mothers worked during the 1960s but fewer than half of all married couples during that era were dual-earners. Today, that number has risen to 66 percent, more than twice the number of sole-earner married couples. This means that a large share of married couple tax returns have two incomes and thus are now clustered in the upper income groups facing the highest marginal tax rates.").

[340] *See Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RESEARCH CTR. (Nov. 4, 2015), http://www.pewsocialtrends.org/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/. Of course, there are many ways that families can share the burdens of income production and work inside the home. The Pew Research Center reports that "the share of two-parent households in which both parents work full time now stands at 46%, up from 31% in 1970," but "the share with a father who works full time and a mother who doesn't work outside the home has declined considerably; 26% of two-parent households today fit this description, compared with 46% in 1970 . . . . " *Id.*

[341] There is not yet any well-established, precise definition of Millennial. *See* Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RESEARCH CTR. (Apr. 25, 2016), http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/ ("Pew Research Center has established that the oldest "Millennial" was born in 1981. The Center continues to assess demographic, attitudinal and other evidence on habits and culture that will help to establish when the youngest Millennial was born or even when a new generation begins . . . . To distill the implications of the census numbers for generational heft, this analysis assumes that the youngest Millennial was born in 1997."(citations omitted)); *see also* Samantha Raphelson, *Amid the Stereotypes, Some Facts About Millennials*, NPR (Nov. 18, 2014, 5:23pm), http://www.npr.org/2014/11/18/354196302/amid-the-stereotypes-some-facts-about-millennials ("There is no consensus on the exact years that generations begin and end. For this post, we've defined millennials as those born between 1980 and 2000; Generation X, between 1965 and 1979; and baby boomers, between 1946 and 1964. Also, these charts represent averages—there will always be exceptions to these trends.").

[342] Dan Schawbel, *The Expanding Roles of Millennials in the Workplace*, FORBES (Dec. 13, 2011, 8:35am), http://www.forbes.com/sites/danschawbel/2011/12/13/the-expanding-roles-of-millennials-in-the-workplace/#533420f11d6c.

[343] *Millennials: "Generation Go",* ERNST & YOUNG LLP, https://www.ey.com/us/en/about-us/our-people-and-culture/ey-infographic-millennials-generation-go (last access Jan. 20, 2019).

[344] The definition of Baby Boomers, or Boomers, is relatively fixed (as opposed to the definition of Millennials). *See, e.g.,* Phillip Bump, *Here is When Each Generation Begins and Ends, According to Facts*, ATLANTIC WIRE (Mar. 25, 2014),

The number of families that consist of single mothers has risen dramatically over the past several decades, too.[345] The Center for Disease Control and Prevention found that in 2014, births to unmarried women constituted 40% of all births.[346] In 1980, births to unmarried women constituted less than 20% of all births.[347] And these numbers may continue to rise—approximately 57% of Millennials aged 26 to 31 have birthed children out of marriage.[348] "Single motherhood," it is reported, "has grown so common in America that demographers now believe half of all children will live with a single mom at some point before the age of 18."[349]

As the number of dual-earner and single parents rise, more American parents find themselves struggling with the high costs of private childcare, which have also risen since the 1970s and 1980s. Today, these costs may be one of the highest costs in an American family's budgets, sometimes exceeding rent and in-state college tuition.[350] One would, therefore, expect a growing number of

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https://www.theatlantic.com/national/archive/2014/03/here-is-when-each-generation-begins-and-ends-according-to-facts/359589/ ("I started by calling the Census Bureau. A representative called me back, without much information. 'We do not define the different generations,' she told me. 'The only generation we do define is Baby Boomers and that year bracket is from 1946 to 1964.'").

[345] *See* Emily Badger, *The Unbelievable Rise of Single Motherhood in America Over the Last 50 Years*, WASH. POST: WONKBLOG (Dec. 18, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/18/the-unbelievable-rise-of-single-motherhood-in-america-over-the-last-50-years/.

[346] Brady E. Hamilton et al., *Births: Final Data for 2014*, NAT'L VITAL STAT. REP., Dec. 23, 2015, at 7, http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf. Interestingly, this does represent a steady decline from 2007, when the single motherhood rate peaked at over 50%. *Id.* For purposes of this Article, however, the important observation is that single motherhood is becoming a common family composition, which, unlike single earning two parent families, very often requires outside childcare.

[347] *Id.*

[348] *See* Alexia Fernandez Campbell, *Why Are So Many Millennials Having Children Out of Wedlock?*, ATLANTIC (July 18, 2016), http://www.theatlantic.com/business/archive/2016/07/why-are-so-many-millennials-having-children-out-of-wedlock/491753/ (reporting on studies); *see also* John Fleming, *Gallup Analysis: Millennials, Marriage and Family*, GALLUP NEWS (May 19, 2016), http://www.gallup.com/poll/191462/gallup-analysis-millennials-marriage-family.aspx ("Most millennials have not yet married, and they are waiting longer to marry. For 34-year-olds, just over half (56%) are married, and of these, 83% have children. But a substantial number (46%) of those who have never been married and are well into their 30s have children. This may represent a seismic shift in the connection between marriage and child rearing because as recently as 2000, the comparable percentage of single/never married 30- to 34-year-olds with children was just 30%.").

[349] Badger, *supra* note 345.

[350] *See* CHILD CARE AWARE OF AM., *supra* note 2, at 4.

working parents to pressure congresspersons to at least adjust the childcare tax laws for inflation. But compared to the public outcry of the seventies and eighties, even working parents—the constituency most affected by our severe childcare tax laws—seem relatively apathetic.

There are obviously many ways in which the seventies and eighties differ from today. How can these differences help explain why even working parents seem unfazed by the devolution of our childcare tax laws? To start, today's parental tax laws are more complex than they were in the seventies and eighties, consisting of an alphabet soup of benefits whose different purposes may not be readily discernible to the untrained eye.[351] Further, as discussed above, the devolution of our childcare tax benefits occurred slowly through decades of inaction.[352] And because Congress created new and expanded existing parental benefits, the actual financial impact to any particular family was not felt as acutely as it otherwise would have been.

Moreover, the rhetoric employed to defend current parental tax laws can sound persuasive to the untrained ear. Whereas their predecessors were bald in their assertions about gender roles, today's lawmakers utilize arguments that can pass as normatively sterile. Lawmakers often claim that extending benefits to all parents, rather than just helping working parents with childcare costs, allows each family to choose the earning arrangement that is best for them.

For instance, a vociferous proponent of expanding the CTC, Republican Senator Marco Rubio wrote that "[e]nhancing 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."[353]

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[351] *See* Part III.B; *see also* ELAINE MAAG ET AL., INCREASING FAMILY COMPLEXITY AND VOLATILITY: THE DIFFICULTY IN DETERMINING CHILD TAX BENEFITS 19 (Mar. 3, 2016), *available at* https://www.urban.org/research/publication/increasing-family-complexity-and-volatility-difficulty-determining-child-tax-benefits.

[352] *See* Part II.

[353] Sen. 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/.

These appeals to neutrality are specious. As discussed in Section I.A., the Code already favors families that do not have to incur childcare costs to work. Its failure to tax the imputed income from non-paid care arrangements coupled with our restrictive childcare tax laws result in the inequitable taxation of parents with different childcare needs. And, as discussed in Section III.C, expanding benefits under provisions like the CTC which do not depend on actual childcare expenses does not correct for this discrepancy but instead allows it to grow. Nevertheless, these argumentative flaws can be easily (and understandably) lost on non-tax experts, which may help explain why today's parents seem relatively indifferent to our parental tax laws.

Additionally, expectations about the role the American government should play in parent's lives have changed. In 1971, the Comprehensive Child Comprehensive Child Development Act (CCDA) was passed by both houses of Congress and would have, in the words of one expert, "brought to fruition the feminist vision for universal childcare."[354] The CCDA allocated $2.1 billion, nearly $13 billion in 2017 dollars,[355] for a national childcare program that would have provided free care for families of lower-middle class backgrounds and provided care on a sliding-fee scale based on income exceeding a designated threshold.[356] Thus, the CCDA "came close to recognizing childcare as a universal right, rather than a means-based entitlement,"[357] which some feminist groups believed was indispensable if women were to attain full "social citizenship."[358] It is reported that some feminist advocates wept in Congress when it was passed.[359]

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[354] Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 415, 461 (2011).

[355] *See CPI Inflation Calculator*, *supra* note 143 (calculated as of January of each relevant year). The maximum value that the *CPI Inflation Calculator* can adjust is $10 million. Thus, this figure was calculated based on the January 2017 value of $10 million in January 1971 dollars, which is $61,014,824.

[356] Comprehensive Child Development Act, S. 1512, 92d Cong. (1st Sess. 1971). *See also* Dinner, *supra* note 354, at 461 ("The CCDA would have allocated $2.1 billion in its first year for childcare services available for free to lower-middle-income families and on a sliding-fee scale thereafter.").

[357] Dinner, *supra* note 354, at 461.

[358] SONYA MICHEL, CHILDREN'S INTERESTS/MOTHERS' RIGHTS: THE SHAPING OF AMERICA'S CHILD CARE POLICY 2 (1999) ("[C]hild care might be said to constitute part of what political theorist T.H. Marshall called 'social citizenship.'").

[359] ROSEN, WORLD SPLIT OPEN, *supra* note 1, at 90.

The victory, however, ultimately eluded them. President Nixon unexpectedly vetoed the legislation,[360] delivering a scathing message to Congress.[361] The CCDA, Nixon chided, ran the risk of "altering the family relationship" and "diminish[ing] both parental authority and parental involvement with children—particularly in th[e] decisive early years."[362] And the CCDA, he continued, would commit the "vast moral authority of the National Government to the side of communal approaches to child rearing over [and] against the family-centered approach,"[363] a message that was apparently a toned-down version of the one Senior Advisor Pat Buchanan wanted Nixon to deliver, which would have accused proponents of "Sovietizing" childcare.[364]

Nevertheless, the intent behind Nixon's message was concordant with Buchanan's hopes to not just veto the bill but to "kill" the idea of universal childcare completely.[365] That goal has been largely achieved. "Nixon's veto message," one expert explains, "was carefully crafted to cosset rightwing, anti-Communist, anti-feminist sentiment . . . and taint[ed] the concept of universal child care to such an extent that for years to come, few Republicans dared to support it."[366] Today, the fact that the CCDA garnered bipartisan support is difficult to comprehend.

But Nixon's veto did more than chill the support of politically conservative lawmakers. Since the demise of the CCDA, normative expectations about what role the American government can be expected to play in caring for children changed. Many of today's working parents, particularly those with young children, were not born when the CCDA was passed and vetoed or were far too young

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[360] MICHEL, *supra* note 387, at 248 ("[P]roponents of comprehensive federal policies toward children expected Nixon to sign the bill. Thus his eventual veto—expressed in rather harsh terms—came as something of a surprise.").

[361] Emily Badger, *That One Time America Almost Got Universal Childcare*, WASH. POST: WONKBLOG (June 23, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/06/23/that-one-time-america-almost-got-universal-child-care/?utm_term=.19287240d790 ("Then Nixon (with the urging of Pat Buchanan, then working in the White House) vetoed it with scathing language denouncing the 'radical' idea that government should help rear children in the place of their parents.").

[362] 117 CONG. REC. 46,059 (1971).

[363] *Id.*

[364] COLLINS, *supra* note 42, at 288.

[365] *Id.*

[366] MICHEL, *supra* note 387, at 251.

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to remember it. Today, Professor Gail Collins writes, "most Americans take it as a given that they are on their own," and find it difficult to believe "that the government has. . . seriously considered offering anything more than a patchwork system to help the very poor."[367] Lacking historical perspective, American parents assume that "we should be self-sufficient in providing [child] care, without any need for government support."[368] The shift towards and acceptance of what Professor Robert Drago and others have termed the "norm of individualism"[369] likely plays a critical role in explaining the public's relative apathy towards our devolved childcare tax laws.

The veto of the CCDA also seemed to alter the feminist agenda, changing the reforms that were deemed feasible and advocated for in the public view. Professor Deborah Dinner, for instance, writes that Nixon's veto of the CCDA "contributed to a decline in rights-based childcare activism."[370] She references historian Sonya Michel's work, explaining that "the defeat of the CCDA marked a deepening bifurcation of childcare policy along class lines . . . toward public childcare for the poor and private, market-based childcare for the working and middle classes."[371] This shift, Dinner continues, "made it considerably more difficult for women of different class backgrounds to envision a political world in which they h[o]ld shared interests in childcare policy. In this constrained political context, feminists no longer claim[] the right to universal childcare."[372]

This change in emphasis is reflected in past and present feminist agenda. High-profile, hegemonic Second Wave feminist groups often demanded that the government play a central role in providing accessible and affordable childcare to all working women, regardless of means. The NOW Bill of Rights, for instance, demanded "[t]hat child-care facilities be established by law on the same basis as parks, libraries, and public schools, adequate to the needs of children, from the preschool years through adolescence, as

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[367] COLLINS, *supra* note 42, at 285.
[368] Golden, *supra* note 44, at 623.
[369] *Id.*
[370] Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism*, *1966-1974*, 28 L. & HISTORY REV. 577, 584 (2010).
[371] *Id.* (citing MICHEL, *supra* note 387, at 236–38).
[372] *Id.*

a community resource to be used by all citizens from all income levels."[373]

Similarly, the National Plan of Action, adopted at the National Women's Conference in Houston in 1977 demanded that "[t]he Federal government . . . assume a major role in directing and providing comprehensive . . . child care."[374] The Strike for Women's Equality, held in 1970, "made three central demands: universal childcare, equal employment opportunity, and free abortion on demand."[375] These feminist groups viewed "universal childcare as a prerequisite for equal citizenship."[376]

By contrast, some Third Wave (i.e. Post-Second Wave) feminist agendas fail to even mention the issue of childcare.[377] Other modern feminist agendas, such as the agenda drafted to support the 2017 Women's March in Washington D.C., mention the need for affordable childcare but do not identify it as a central priority, and do not specify how issues should be addressed, or by whom.[378]

The modern feminist agenda may also focus less on childcare because of an increased commitment to diversity, inclusion, and intersectionalism. Hegemonic Second Wave feminist groups, such as NOW, have been roundly criticized for their lack of inclusivity.[379] These groups tended to focus on a particular set of issues (e.g. the ability to pursue a "career" if one chose) felt mainly by upper-class white women and often ignored the distinct and varied issues faced by women of different socio-economic, racial, and other

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[373] NAT'L ORG. FOR WOMEN, BILL OF RIGHTS FOR WOMEN IN 1968, originally issued at NOW convention 1968, *reprinted in* THE SIXTIES IN AMERICA: PRIMARY SOURCES 87, 91 (Tom Pendergrast & Sara Pendergrast eds., 2004), *available at* http://www.encyclopediajudaica.com/pdf/samples/sp692484.pdf.

[374] NAT'L WOMEN'S CONFERENCE, NATIONAL PLAN OF ACTION (1977).

[375] Dinner, *supra* note 354, at 459.

[376] *Id.*

[377] ROSEN, THE WORLD SPLIT OPEN, *supra* note 1 at 359 ("One issue . . . that did not appear on the Third Wave feminist agenda was child care.").

[378] *Unity Principles*, WOMEN'S MARCH ON WASHINGTON 2017, https://www.womensmarch.com/principles/ (last accessed Jan. 20, 2019) ("All women should be paid equitably, with access to affordable childcare, sick days, healthcare, paid family leave, and healthy work environments.").

[379] Much has been written to this effect. *See, e.g.*, HOOKS, *supra* note 123, at 1 ("Feminism in the United States has never emerged from the women who are most victimized by sexist oppression.") Indeed, the book "heralded as having paved the way for contemporary feminist movement," THE FEMININE MYSTIQUE, "was written as if these women did not exist." *Id.*

backgrounds.[380] Women in lower income classes (statistically more often women of color), for instance, generally did not have a choice of whether to work and did not view their work as a "career" path towards self-fulfillment, but as a method of survival.[381] Hegemonic Second Wave feminists, therefore, had the relatively narrow task of devising an agenda that addressed the issues faced by the subset of women on which they focused. Women need affordable childcare, they easily understood, if they were to have meaningful choices to pursue careers, and the government, they believed, should help in that pursuit.

However, more inclusive, modern feminist movements sometimes press towards a more "non-essential" view of womanhood and reject the idea perpetuated by non-intersectional feminists that there is one unifying, singular circumstance that defines women[382]—and towards an intersectional feminism—i.e. one that recognizes the distinct issues and circumstances women of varying backgrounds confront.[383] An intersectional feminist agenda, therefore, must encompass far more diverse issues, which some modern feminist agenda at least attempt to do. The agenda for the 2017 Women's March, for instance, while by no means a perfect model for inclusivity or intersectionalism, still identified issues in criminal justice reform, racial profiling and racism, LGBTQ rights, and voting rights, along with women's economic empowerment in the workplace.[384]

Thus, while legal complexity, specious neutrality rhetoric, and norm entrenchment likely play a role in defining the modern feminist agenda and explaining the relative de-emphasis on affordable and widely available childcare, so too does a desire to focus on a more diverse set of issues, many of which did not find a place on the agenda of high-profile Second Wave feminist groups

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[380] *See id.* (describing how "middle and upper class, married white women" sought careers without considering who would then be called in to care for their children and households).

[381] *See id.* at 95–97 (noting that middle and upper class women "were so blinded by their own experiences" that they disregarded the women in lower-income classes who were already "working in jobs that neither liberated them . . . nor made them economically self-sufficient").

[382] *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

[383] *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

[384] *See Unity Principles*, *supra* note 378.

like NOW. This is not a critique. The task modern, intersectional feminists face when defining an agenda is necessarily messier and more difficult than those of their more singularly focused, hegemonic predecessors. These groups may well determine that their finite energies are better spent on issues even more critical than childcare reform. Nevertheless, to the extent that the demands of activist organizations help educate the public and define their expectations, today's working parents probably hear less about universal childcare reform from modern feminist groups than those parents raising children during feminism's so-called Second Wave.

Taking this political context alongside the historical context developed throughout this Article, this section concludes by asking: Where might we go from here?

B. CHILDCARE TAX LAW REFORM: INCREMENTAL, MONUMENTAL CHANGE

With the passage of the TCJA, political conservatives enacted a tepid version of parental tax reform that fails to directly address the problem of rising childcare costs faced by some, but not other, families. Numerous proposals have been suggested to truly address the care crisis faced by working families. During their recent Presidential runs, for instance, liberal candidates such as Hillary Rodham Clinton, Bernie Sanders, and Jill Stein proposed both tax and non-tax reforms that would help parents access quality and affordable childcare. Each of these proposals advocate for some sort of universal childcare program.

For instance, Democratic Presidential Nominee Rodham Clinton called for the establishment of universal preschool for all children under four years old so that every child would be entitled to the same "strong start."[385] Rodham Clinton also proposed a Respect and Increased Salaries for Early Childhood Educators (RAISE) initiative[386] aimed at increasing salaries for childcare workers. RAISE aspired to pay childcare workers a fair wage for their labor

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[385] *Early Childhood Education*, *supra* note 4.

[386] *Id.*

to, in turn, increase the availability of quality childcare options for parents, which are sorely lacking in the United States.[387]

During his Presidential run, sometimes Independent, sometimes Democratic Senator Bernie Sanders vowed to "provide all children . . . ages [six] weeks to kindergarten, with access to a full-time, high quality, developmentally appropriate, early care and education program."[388] And Green Party Presidential Candidate Jill Stein called for free childcare programs for all children.[389] Nor are universal childcare programs just the fodder for Presidential hopefuls. In September 2017, Democratic Senator Patty Murray and Representative Robert C. Scott introduced the Child Care for Working Families Act,[390] which builds off of Rodham Clinton's proposal and aspires to "address the current early learning and care crisis by ensuring that no family under 150% of state median income pays more than seven percent of their income on child care."[391]

These ambitious plans reimagine the programs contemplated by the vetoed CCDA. As one commentator noted, if such plans were enacted "the federal government would finally step in and take the kind of action that Nixon rejected in the 1970s."[392] They currently seem far from reach.

But as history shows, even modest adjustments to the childcare tax laws, while incapable of enacting systemic changes on their own, might address many of the tax inequities discussed throughout this Article. Rather than devise my own specific proposal, which I have

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[387] *Id.*; *see also* Jonathan Cohn, *The Hell of American Day Care*, NEW REPUBLIC (Apr. 15, 2013), https://newrepublic.com/article/112892/hell-american-day-care (discussing the quality issues commonly found in U.S. child care facilities).

[388] *Bernie Sanders on Education*, FEELTHEBERN.ORG, http://feelthebern.org/bernie-sanders-on-education/ (citing Foundations for Success Act of 2011, S. 294, 112th Cong. § 3 (2011)).

[389] *Jill Stein 2016 Platform: Our Power to the People Plan*, JILL 2016, https://www.jill2016.com/platform (last accessed Jan. 20, 2019).

[390] Child Care for Working Families Act, S. 1806, 115th Cong. (2017).

[391] Press Release, Senator Patty Murray and Representative Robert Scott, Child Care for Working Families Act (Sept. 13, 2017), available at https://www.help.senate.gov/imo/media/doc/Child%20Care%20for%20Working%20Families%20Act_9.13_final.pdf.

[392] Jonathan Cohn, *Clinton's Child Care Plan Could Get Very Expensive and Be Totally Worth It*, HUFFINGTON POST: POLITICS (May 18, 2016, 8:00 pm) (referring to President Nixon's veto of the Comprehensive Child Development Act in 1971).

done extensively elsewhere,[393] I will conclude by discussing some of the proposals submitted in recent Congressional sessions that would liberalize the childcare tax laws. As discussed in Part III.A., in the 114th Congressional session alone, at least 24 different proposed bills to modify the childcare tax laws were introduced to Committee, where they have generally perished.[394]

For instance, lawmakers submitted proposals to increase[395] or eliminate the childcare tax credit's income phase-downs.[396] To cite two examples, the Helping Working Families Afford Child Care Act[397] (referred to the House Committee on Ways and Means) and the Child and Dependent Care Tax Credit Enhancement Act of 2015[398] (referred to the Committee on Finance) would have increased the phase-down amount from its current $15,000 level to $110,000 and $120,000, respectively.[399]

Without debating the ideal design of the phase-down, recall from Part III.A. that due to decades of neglect, the current childcare tax credit phases down to its lowest level well before a family earns the median income for all earners. But these families may not have reached a high enough marginal tax bracket to make the exclusion worth their while. Increasing the phase-down levels of the childcare tax credit could mitigate this effect, which was not intended in the childcare tax law's past design.

In the 114th Session, other proposals aimed to raise significantly the dollar caps on either or both the childcare tax credit and dependent care exclusion.[400] For instance, both the Family Care Savings Act and Working Families Relief Act would have doubled the maximum exclusion and adjusted that amount automatically for

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[393] *See, e.g.*, Weeks McCormack, *Overtaxing the Working Family*, *supra* note 9; Weeks McCormack, *Postpartum Taxation*, *supra* note 72.

[394] *See supra* note 262.

[395] *See* Child and Dependent Care Tax Credit Enhancement Act of 2015, S. 820, 114th Cong. (2015) (phase-out amount increased to $120,000).

[396] *See, e.g.*, Support Working Parents Act of 2015, H.R. 2184, 114th Cong. (2015) (eliminating the phase-out entirely); Middle Class Dependent Care Fairness Act of 2016, H.R. 6146, 114th Cong. (2016) (repealing phase-out of credit).

[397] S. 661, 114th Cong. (2015).

[398] S. 820.

[399] S. 661 at § 2(a)(2); S. 820 at § 2(f).

[400] *See, e.g.*, S. 180, 114th Cong. (2015) (increasing cap to $7,000 and $14,000 for one and multiple children, respectively); Working Parent Support Act of 2015, H.R. 964, 114th Cong. (2015) (same).

inflation going forward.[401] Both the Helping Working Families Afford Child Care and Child Care Access and Refundability Expansion (CARE) Acts would have raised the limits on the childcare tax credit to $8,000 and $16,000, close to triple what they are today[402] and closer to the dollar limits available in the seventies and eighties (in inflation adjusted dollars).[403] The Child and Dependent Care Tax Credit Enhancement Act of 2015 would have raised the maximum percentage credit from 35% to 50% when care involves young children, reflecting the fact that cost of care is typically highest when children are in their preschool years.[404]

As its name implies, the CARE Act would also have made childcare tax benefits refundable, which they have never been. Lawmakers have long argued for this. In fact, in a 1976 hearing before the Senate Committee on Finance, which considered the merits of the childcare tax credit, Senator Edward Kennedy found the bill "seriously deficient" in its failure to make benefits refundable.[405] 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. . . ."[406] Thus, this is hardly a new idea and yet would be unprecedented.

Consideration of other recent proposals—even if not ultimately enacted—could revive dormant debates, such as why we do not treat childcare costs like other costs of earning income and what role we expect the government to play in helping non-poor working parents bear childcare expenses. For instance, the Middle Class Dependent Care Fairness Act of 2016 would have repealed phase-downs

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[401] *See* Working Families Relief Act, H.R. 2618, 115th Cong. § 2(a) (2017) (increasing the maximum exclusion from $5,000 to $10,500 and providing an inflation adjustment for such exclusions); Family Care Savings Act, H.R. 750, 114th Cong. §§2(a), (b) (2015) (discussing the increasing in exclusion from gross income and the inflation adjustment to such exclusions).

[402] *See* Child Care Access and Refundability Expansion Act, H.R. 1492, 114th Cong. § 2 (2015) (increasing the dollar limitations from $3,000 to $8,000 and from $6,000 to $16,000); Helping Working Families Afford Child Care Act, S. 661, 114th Cong. § 2 (2015) (same).

[403] *See supra* Part II.B (discussing the increases in allowable deductions during the seventies and eighties).

[404] *See* Child and Dependent Care Tax Credit Enhancement Act of 2015, S. 820, 114th Cong. § 2 (2015) (raising percentage credit to 50% for children under age five).

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

[406] *Id.*

entirely.[407] This would not be the first time that this was done. In 1976, Congress repealed phase-downs because it believed that childcare expenses were costs of earning income that should be claimed regardless of means. Repealing phase-downs would signal that childcare expenses are to be treated this way again.[408]

Several other recent proposals would allow taxpayers the option to claim some portion of their childcare expenses as an above-the-line deduction, if the relief available under that mechanism exceeded the benefits available under the dependent and childcare credit and/or exclusion.[409] There are sound reasons to be wary of using an above-the-line deduction as a mechanism for relief because of the fact that it creates an "upside-down-subsidy." Because the value of a deduction depends on one's marginal tax bracket, this is absolutely true as a matter of mathematics. When a taxpayer in a 40% marginal tax bracket deducts $100 from his taxable income, he saves $40 in taxes, whereas a taxpayer in the 20% bracket would save only $20 when taking the same deduction.

These concerns are very valid. But they are also concerns that exist for every single deduction allowed by the Code (whether it falls above- or below-the-line), including the deductions allowed for many other costs of earning income. Before dismissing the idea of allowing some parents to deduct expenses above-the-line, it is at least worth pausing to consider the historical significance this change would implement and remember how we first came to have the percentage credit mechanism that is utilized in today's childcare tax laws. As discussed in Part II.B, Second-Wave feminist groups like NOW demanded in its Bill of Rights that the Code allow mothers to deduct childcare costs like other business expenses and also demonstrated at the Tax Court in support of the reform.[410] In the 1970's, lawmakers sympathetic to the demands of feminist groups like NOW attempted to change the then-below-the-line deduction for childcare expenses to an above-the-line deduction, so that all taxpayers could benefit regardless of whether they itemized or

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[407] *See* H.R. 6146, 114th Cong. § 2 (2016).

[408] *See supra* Part II.B.

[409] *See, e.g.*, Working Parent Support Act of 2015, H.R. 964, 114th Cong. (2015) (allowing above-the-line deductions for childcare expenses); S. 180, 114th Cong. § 1(b) (2015) (same).

[410] *See NOW Bill of Rights*, *supra* note 25, at 474 (demanding that there be a "revision of tax laws to permit the deduction of home and child-care expenses for working parents").

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claimed the standard deduction. But because less sympathetic lawmakers were squeamish about treating childcare expenses like other costs of earning income, the percentage credit was conceived and used as a workaround.

Thus, allowing working childcare costs to be deducted above-the-line would move the Code to a place where lawmakers have never been willing to go before.[411] Allowing some women to deduct some portion of their childcare expenses like other costs of earning income might have strong symbolic value and effect.

This does not mean that an above-the-line deduction is ultimately preferable to a percentage credit. But it seems worthwhile to have a more robust debate that takes into account the history of our childcare tax laws. Even if it is ultimately decided that a percentage credit mechanism is superior—which it very well may be—it is worth asking why working childcare costs are singled out for different treatment than many other costs of earning income.

Moreover, if it were determined that there were compelling enough reasons to allow some parents to deduct childcare expenses like other costs of earning income, there are numerous ways that Congress could restore progressivity. For instance, Congress could increase the benefits available to lower and middle-income parents through a targeted modification of existing childcare tax laws. Or Congress could limit the rate against which an above-the-line deduction might be claimed, allowing the deduction to create the same tax savings to all families with sufficient income to claim it.

In short, there are many proposals that could respond to the inequities discussed in this Article. And even modest adjustments to our childcare tax laws might enact historically significant reform for working parents.

V. CONCLUSION

According to its proponents, the hastily passed TCJA provided much-needed relief to working parents. The TCJA did expand some benefits available to parents with dependent children. But all of these benefits can be claimed regardless of whether a family incurs childcare costs to earn income. To directly address these costs,–

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[411] *See* Weeks McCormack, *Overtaxing the Working Family*, *supra* note 109, at 580; *see also* Weeks McCormack, Postpartum Taxation, *supra* note 6278, at 1350–66.

– which may be one of the highest in a family's budget— Congress might have reformed the two provisions in the Internal Revenue Code that allow working parents to recover the childcare costs they actually incur. Due to strict limitations, many working parents—especially those with preschool aged children—had only been able to claim tax relief for a fraction of their annual costs. As a result, the Code was taxing families with different childcare needs inequitably. Because the TCJA did not alter these laws, it entirely failed to address these problems.

This Article explores the (d)evolution of our childcare and other parental tax laws in order to situate some of the TCJA's so-called reforms into their historical context. As shown, America's early childcare tax laws were deliberately designed to benefit only mothers who needed to work and deliberately favored the one breadwinner model for married families of above-moderate means. But in the seventies and eighties, our childcare tax laws evolved to allow all working parents to recover a much more significant portion of their childcare costs, and, therefore, taxed family models more equitably than predecessor laws. Yet in the decades following this evolution, Congress allowed childcare tax benefits to devolve while expanding other parental tax benefits that do not depend on actual childcare costs, restoring the inequitable taxation of families with different childcare needs.

This history shows that the TCJA's supposed "reforms" are just another piece of a well-worn pattern. It also informs debates about future tax reforms that might actually address the American working family's "care crisis." In short, while incapable of enacting the systemic changes contemplated by some, modest adjustments to our childcare tax laws could nevertheless move the law in directions that have been historically resisted. This move would at least begin to address the inequitable taxation of otherwise similarly situated families with different childcare needs and perhaps even revive dormant debates about the role the American government should play in supporting parents.

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