

NOTES

TAXING SINGLE MOTHERS: A CRITICAL LOOK AT THE TAX CODE

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Single mothers are responsible for raising one in five American children. They are disproportionately poor women of color. This Note explores the Internal Revenue Code's provisions that, though facially neutral, disadvantage single motherhood in effect. Although the tax code's progressivity does some work to alleviate poverty among single mothers, major income tax provisions intended to support families fail many single mothers precisely because of their low-income status. Many of the benefits go to higher-income families, who tend to be married couples. This Note argues that the tax code should do more to support single mothers. Specifically, this Note argues that the existing federal child and dependent care credit should be made refundable so that it reaches more single mothers and better functions as an incentive to procure quality care for children.

INTRODUCTION	2147
I. A PROFILE OF SINGLE MOTHERS	2149
A. <i>Single Motherhood Among American Households</i> ..	2150
B. <i>Single Mothers and Poverty</i>	2152
II. THE TAX CODE AND SINGLE MOTHERS	2154
A. <i>Progressive Nature of the Code</i>	2155
B. <i>Child-Related Tax Credits Fail to Help Many Single Mothers</i>	2160
C. <i>Other Tax Provisions Also Affect Single Mothers Unfairly</i>	2166
III. PROPOSAL FOR REFORM	2169
A. <i>Proposal: Fully Refundable Child Care Credit</i>	2170
B. <i>Counterarguments and Solutions</i>	2174
CONCLUSION	2181

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INTRODUCTION

About forty percent of childbirths in the United States take place outside of marriage,¹ and most American children live in a female-headed household at some point in their lifetimes.² This significant demographic is disproportionately low-income and has “difficulty taking advantage of government programs structured around the majority’s norms.”³ Raising children is expensive, even in a two-earner household.⁴ Yet single mothers as taxpayers have largely escaped tax scholars’ attention.

This Note fills this gap in the literature. It also continues the tradition of critical tax theory—scholarship on how biases about race, gender, and sexual orientation permeate the facially neutral tax code⁵—by analyzing the tax code from the perspective of single

¹ See U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: 2008, at 7 (2010) [hereinafter FERTILITY REPORT], <http://www.census.gov/prod/2010pubs/p20-563.pdf> (“Of the 4 million women 15 to 44 years old who had a birth in the last year, 1.5 million (38 percent) were to women who were not married, who were separated, or married but with an absent spouse.”). But in many cases, these single mothers have cohabitating partners. See *id.* at 1 (reporting that women in cohabitational relationships “made up 28 percent of births to women who were not married, who were separated, or married but with an absent spouse”); see also Tamar Lewin, *Many Single Mothers Have a Live-In Partner, Census Bureau Finds*, N.Y. TIMES, Nov. 6, 2010, at A17 (reporting that more than a quarter of single mothers who gave birth between July 2007 and June 2008 were living with a partner).

² See Anastasia R. Snyder et al., *Household Composition and Poverty Among Female-Headed Households with Children: Differences by Race and Residence*, 71 RURAL SOC. 597, 597 (2006) (citing Deborah R. Graefe and Daniel T. Lichter, *Life Course Transitions of American Children: Parental Cohabitation, Marriage, and Single Motherhood*, 36 DEMOGRAPHY 205 (1999) (finding that “a majority of [American] children will live in a female-headed household” at some point)).

³ Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 HARV. L. REV. 1319, 1320 (1992).

⁴ See MARK LINO, U.S. DEP’T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2011, at iv (2011), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2011.pdf> (reporting that the average expenses related to a child ranged between about \$9000 to \$24,000, depending on household income level). See generally TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000) (discussing the economic stress facing middle class families).

⁵ See, e.g., Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971) (observing and criticizing work disincentives for married women that are embedded in the federal tax code); Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What’s Tax Policy Got to Do with It?*, 21 U. ARK. LITTLE ROCK L. REV. 759 (1999) (observing racial disparities in the implementation of the federal tax laws); Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 TUL. J.L. & SEXUALITY 97 (1991) (illustrating multiple ways in which the tax code disfavors unmarried same-sex couples); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605 (proposing mandatory individual filing to accommodate diverse family styles in America); Marjorie E. Kornhauser, *A Legislator Named Sue: Re-Imagining the Income Tax*, 5 J. GENDER, RACE & JUSTICE 289 (2002) (examining how the tax laws might change if the legislature was controlled by women); Marjorie E. Kornhauser, *The Rhetoric of the*

mothers. It is the first to synthesize the effects of the tax code on single mothers in particular.⁶

Many scholars who analyze gender and tax focus on the marriage penalty,⁷ a tax burden applicable to some married couples. But this debate has failed to take into account the growing population of single, female taxpayers with children. Single mothers' experiences warrant attention because over 20% of children in America grow up in single-mother families.⁸ There is also a normative concern at play: If individual tax provisions are supposed to reflect our society's view of fairness,⁹ taxation of this growing segment of the population should

Anti-Progressive Income Tax Movement: A Typical Male Reaction, 86 MICH. L. REV. 465 (1987) (discussing and refuting objections to progressive taxation). In particular, Professor Shurtz has written extensively on the issue of women and taxation. See, e.g., Nancy Shurtz, *Sweden, Singapore, and the States: A Comparative Analysis of the Impact of Taxation on the Welfare of Working Mothers*, 55 ST. LOUIS U. L.J. 1087 (2011) (comparing the impact of three countries' tax policies on working mothers).

⁶ Some may question my focus on single mothers as opposed to single parents. Single fathers account for approximately 15% of all single-parent households. A 2009 report from the U.S. Census Bureau estimates that in 2007 there were over 5.2 million households headed by single fathers. See ROSE M. KREIDER & DIANA B. ELLIOTT, U.S. CENSUS BUREAU, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2007*, 3 tbl.1 (2009), <http://www.census.gov/population/www/socdemo/hh-fam/p20-561.pdf> (estimating the number of single-father families using a sample population study). The percentage is growing. See DAPHNE LOFOUIST ET AL., U.S. CENSUS BUREAU, *HOUSEHOLDS AND FAMILIES: 2010*, at 5 tbl.2 (2012) [hereinafter *HOUSEHOLDS AND FAMILIES*], <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (showing that single-father households grew 27.3% in number, from 2.1 million to 2.8 million, between 2000 and 2010). In many regards, single fathers and mothers face similar challenges, from the cost of child care to stigma. See, e.g., Parvin R. Huda, *Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse*, 7 WM. & MARY J. WOMEN & L. 341, 346 (2001) ("Single-parent families traditionally have been deemed a part of the underclass; broken and deviant, as compared to the nuclear, traditional, patriarchal family." (internal quotation marks omitted)). But I have chosen to limit my focus to single mothers because single mothers are more numerous and face unique costs as women in the workforce. Poverty is more common among single-mother families as compared to other types of families. See *infra* notes 27–31 and accompanying text.

⁷ See, e.g., *Infanti*, *supra* note 5, at 606 (arguing that the joint return is "fundamentally inconsistent with an inclusive approach to determining who is family for tax purposes"); Lawrence A. Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000) (discussing possible policy alternatives for the joint filing scheme in place in order to diminish or eliminate marriage penalties). For a pioneering work in this field, see EDWARD J. McCAFFERY, *TAXING WOMEN* (1999) (discussing how the tax code discourages women from working outside of the home).

⁸ See *infra* notes 18–19 and accompanying text. In addition, single-parent households made up an estimated 29.5% of households with children in the United States in 2008. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2012*, tbl.1337 (2012) [hereinafter *STATISTICAL ABSTRACT*], <http://www.census.gov/compendia/statab/2012/tables/12s1337.pdf>. Comparable percentages for Canada, the United Kingdom, and the Netherlands in 2008 were 24.6%, 25.0%, and 16.0%, respectively. See *id.*

⁹ See, e.g., JOEL B. SLEMRD & JON M. BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 58 (4th ed. 2008) (discussing the political discourse

be scrutinized. This debate implicates both horizontal and vertical equity concerns.¹⁰ By analyzing tax provisions that disproportionately affect single mothers, and low-income single mothers in particular, I argue that the facially neutral tax provisions aimed at children and low-income taxpayers fail to treat single mothers fairly. Furthermore, I propose that the existing federal child care tax credit be made refundable in order to rectify this imbalance. This facially neutral change will work in favor of single mothers given their low earnings and high child care costs. It will also counter state-level tax code changes that are making child care less affordable.

This Note proceeds in three parts. Part I provides background on the demographics of single motherhood, illustrating characteristics of this group of taxpayers. Part II discusses the tax system's implicit bias against single-mother taxpayers and in favor of married taxpayers. I argue that this favoritism is a problem because it widens the economic disparity between married and single-mother households and fails to help single mothers work full time to attain higher earnings. Part III proposes instituting a refundable child care tax credit in order to counteract this disparity.

I

A PROFILE OF SINGLE MOTHERS

What images does the term “single mother” evoke? American movies depict a bewildering range of characters,¹¹ reflecting the

on fair taxation going back to the Boston Tea Party); Dennis J. Ventry, Jr., *Equity Versus Efficiency and the U.S. Tax System in Historical Perspective*, in TAX JUSTICE: THE ONGOING DEBATE 25, 27 (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002) (“A historical examination of tax justice in the United States, from the founding of the republic to the present, reveals that Americans have perceived taxation as an instrument of social justice.”).

¹⁰ Horizontal equity requires that those in similar circumstances should pay the same amount of tax and receive the same amount of benefits. See C. Eugene Steuerle, *And Equal (Tax) Justice for All?*, in TAX JUSTICE: THE ONGOING DEBATE, *supra* note 9, at 253, 258 (defining horizontal equity); David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 43 (2006) (noting that horizontal equity is “universally accepted as one of the more significant criteria of a ‘good tax’”); Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113 (1990) (discussing horizontal equity as an ideal independent of vertical equity). Vertical equity requires that “those with less ability [to earn] be treated favorab[ly] relative to those with greater ability.” Steuerle, *supra*, at 258; Musgrave, *supra*, at 113 (“The call for equity in taxation is generally taken to include a rule of horizontal equity (HE), requiring equal of equals, and one of vertical equity (VE), calling for appropriate differentiation among unequals.”).

¹¹ See, e.g., ERIN BROCKOVICH (Jersey Films 2000) (portraying a single mother of three who sues a utility company for ground water contamination and ultimately wins); PRECIOUS (Lionsgate 2009) (depicting the life of a teenager who has given birth to two children as a result of rape by her father); THE SWITCH (Mandate Pictures 2010) (narrating

heterogeneous nature of this group. Yet poverty is a factor that many single mothers do share. This Part discusses the demographics of single motherhood in the United States. Single-mother households are increasingly common;¹² single mothers are disproportionately poor and disproportionately women of color.¹³ Many single mothers work¹⁴ but face high costs of child care as a result. Part I concludes that the pre-tax economic outlook for most single mothers is bleak.

A. *Single Motherhood Among American Households*

Households headed by single mothers¹⁵ accounted for 7.2% of United States households in 2010.¹⁶ Compared to married couples with children, who accounted for 20.2% of all United States households in the same year,¹⁷ this is a small segment of taxpayers. However, statistics on housing arrangements for children highlight the important role that single mothers play. Over 20% of children under age eighteen in the United States live with single mothers,¹⁸ and as

the story of a New York City career woman who has a baby with the help of a sperm donor).

¹² See *infra* notes 15–19 and accompanying text (discussing the growth in single-mother households in the United States).

¹³ See *infra* notes 23–24 and accompanying text.

¹⁴ See Pamela Gershuny, *The Combined Impact of PRWORA, FMLA, IRC, FRD, DPPA, and BAPCPA on Single Mothers and Their Children*, 18 WM. & MARY J. WOMEN & L. 475, 483 (2012).

¹⁵ I define single mothers as female parents who care for their own children (biological, adopted, or stepchildren) under eighteen, in line with the U.S. Census Bureau's definition of "female householder with own children." HOUSEHOLDS AND FAMILIES, *supra* note 6, at 4, 5 tbl.2.

¹⁶ *Id.* at 5 tbl.2. The rate was the highest in Mississippi (10%) and the lowest in North Dakota (5.2%). *Id.* at 10 tbl.4. The national percentage remained unchanged from 2000 to 2010, at 7.2%. *Id.* at 5 tbl.2. The U.S. Census Bureau defines "household" as "all of the people who occupy a housing unit." *Id.* at 4. A "family," in turn, "consists of a householder and one or more other people living in the same household who are related to the householder by birth, marriage, or adoption." *Id.*

¹⁷ Husband-wife households with their own children accounted for 20.2% of all United States households in the 2010 Census. See *id.* at 3 tbl.2.

¹⁸ Single mothers as a portion of parents saw a rapid rise between 1970 and 1990, with the proportion of children living with their mother without their father present doubling from 11% to 22%. See ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2009, at 2 figs.1, 3, 13 (2011) [hereinafter LIVING ARRANGEMENTS], <http://www.census.gov/prod/2011pubs/p70-126.pdf> (showing percentage changes between 1880 and 2009, describing these historical shifts, and noting that during the 1990s "[t]wenty-four percent of all children lived with their unmarried mother without their father present"); see also MICHAEL GREENSTONE & ADAM LOONEY, THE HAMILTON PROJECT, WHAT IS HAPPENING TO AMERICA'S CHILDREN? A LOOK AT THE WIDENING OPPORTUNITY GAP FOR TODAY'S YOUTH 2 (2011), available at http://www.hamilton-project.org/files/downloads_and_links/100711_jobs_greenstone_looney.pdf (reporting that about three in ten children are now in single-parent or unmarried families). Single parents are more common in the United States than in many other industrialized countries. See,

many as half of U.S. children today live with a single parent at some point in their lifetimes.¹⁹ While single fathers form a significant minority among single parents,²⁰ the vast majority of single parents (about 85%) are single mothers.²¹ To be sure, single-mother households may include the mother's unmarried partner or parents,²² but much of the data I use do not take these situations into account.

Single motherhood is more common among racial minorities than the general population,²³ and the percentage of children living with single mothers varies significantly across racial groups.²⁴ Whether a single mother ever married is relevant for a variety of reasons: Divorced mothers tend to be older, more educated, and economically better off.²⁵ Again, this split varies among racial groups. Among White single mothers, two-thirds (66%) were previously married, compared with under half (48%) of Latino single mothers and a third (34%) of African-American single mothers.²⁶

e.g., STATISTICAL ABSTRACT, *supra* note 8, at tbl.1337 (reporting that recent single-parent households accounted for 29.5% of all households with children in the United States, 24.6% in Canada, 19.8% in France, and 16% in the Netherlands).

¹⁹ Snyder et al., *supra* note 2, at 597. In addition, 38% of childbirths in the United States in 2008 took place outside of traditional two-parent marriage. See FERTILITY REPORT, *supra* note 1, at 7 (“Of the 4 million women 15 to 44 years old who had a birth in the last year, 1.5 million (38%) were to women who were not married, who were separated, or married but with an absent spouse.”).

²⁰ See *supra* note 6 (discussing the rise of single-father households).

²¹ See LIVING ARRANGEMENTS, *supra* note 18, at 9 fig.6 (showing that 85.6% of children living with only one parent are living with their mothers).

²² See *id.* (finding that just under 10% of children living in single-mother households also live with their mothers' cohabitating partners); Snyder et al., *supra* note 2, at 599 (“Over half of single mothers spend some time living in a household with other adults, usually in response to a crisis (divorce, nonmarital birth), and they most often live in households with their parents or with a cohabiting male partner.”) (internal citations omitted); FERTILITY REPORT, *supra* note 1, at 1 (reporting that women in cohabitational relationships “made up 28% of births to women who were not married, who were separated, or married but with an absent spouse”); see also Lewin, *supra* note 1 (reporting that more than a quarter of mothers who gave birth between July 2007 and June 2008 were living with a partner).

²³ HOUSEHOLDS AND FAMILIES, *supra* note 6, at 8 tbl.13. Single motherhood is less common among Asian Americans, however. See *id.*

²⁴ About one-sixth (16%) of White children live in single-mother families, compared with one-fourth (27%) of Latino children and one-half (52%) of African-American children. See MARK MATHER, POPULATION REFERENCE BUREAU, U.S. CHILDREN IN SINGLE-MOTHER FAMILIES 1 (2010), available at <http://www.prb.org/pdf10/single-motherfamilies.pdf>.

²⁵ U.S. CENSUS BUREAU, CENSUS BRIEF: CHILDREN WITH SINGLE PARENTS—HOW THEY FARE 1 (1997), <http://www.census.gov/prod/3/97pubs/cb-9701.pdf>.

²⁶ MATHER, *supra* note 24, at 1. In 2009, 53% of single mothers had been married at some point. *Id.*

B. *Single Mothers and Poverty*

Poverty is pervasive among single-mother households.²⁷ In 2011, 40% of such households lived below the national poverty line.²⁸ In contrast, the poverty rate among married-couple families with children is just under 10%.²⁹ Poverty is even more prevalent among single mothers of the youngest children—57% of children under six living with single mothers experience poverty.³⁰ And single-mother families experience more extreme poverty than married-couple families or single-father families.³¹

A host of factors contribute to the high poverty rate among single mothers. First, their household has only one income earner supporting children.³² Second, women earn less than men on average.³³ And

²⁷ The Heritage Foundation, a conservative think tank, has called marriage “America’s greatest weapon against child poverty.” See ROBERT RECTOR, HERITAGE FOUND., MARRIAGE: AMERICA’S GREATEST WEAPON AGAINST CHILD POVERTY (2012), available at <http://www.heritage.org/research/reports/2010/09/marriage-america-s-greatest-weapon-against-child-poverty>. Most of the studies cited in this Note use official poverty measures calculated by the U.S. Census Bureau. See U.S. CENSUS BUREAU, HOW THE CENSUS BUREAU MEASURES POVERTY, <http://www.census.gov/hhes/www/poverty/about/overview/measure.html> (last visited Oct. 17, 2013).

²⁸ U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2011 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT (last visited Oct. 17, 2013) [hereinafter SOCIAL AND ECONOMIC SUPPLEMENT], http://www.census.gov/hhes/www/cpstables/032011/pov/new07_100_01.htm. The statistic is similar when measured from children’s perspectives. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 17 (2012) [hereinafter INCOME, POVERTY], <http://www.census.gov/prod/2012pubs/p60-243.pdf> (reporting the poverty rate among children living with female householders as 31.2% in 2011).

²⁹ See SOCIAL AND ECONOMIC SUPPLEMENT, *supra* note 28 (reporting the poverty rate among married-couple households to be 8.8%); see also INCOME, POVERTY, *supra* note 28, at 17 (reporting that in 2011 the poverty rate of married-couple families was 6.2%). Using a different measure of poverty, the Population Reference Bureau also reports that “[s]even in 10 children living with a single mother are poor or low-income, compared to less than a third (32 percent) of children living in other types of families.” MATHER, *supra* note 24, at 2.

³⁰ See INCOME, POVERTY, *supra* note 28, at 16 (“More than half (57.2 percent) of related children under age 6 in families with a female householder were in poverty.”); see also MATHER, *supra* note 24, at 2 (discussing poverty among single-mother households with young children, estimating that 77% of young children in single-mother families in 2008 were poor or low-income, and explaining that such mothers tend to have less education and work experience).

³¹ See INCOME, POVERTY, *supra* note 28, at 20 tbl.6 (reporting that the average deficit—the difference between a family’s income and its poverty threshold—for single-mother families in poverty is over \$10,000 a year, as compared to \$8887 for married-couple families in poverty and \$8409 for single father families in poverty; the per capita deficits were \$3069, \$2334, and \$2887, respectively).

³² Congress partially relied on this point when it narrowed the gap between the standard deduction for a married couple and the standard deduction for a head of household: “[T]he costs of maintaining a household for an unmarried individual and a dependent

single mothers earn less than all women and men.³⁴ Furthermore, many single mothers do not receive child support from the children's fathers.³⁵ And without any additional "dispensation to raise their children . . . , [working mothers] are often forced to work part time, take pay cuts, sacrifice job security, and lose government-provided or -subsidized social insurance benefits."³⁶

Poverty among single mothers also intersects with race. A study shows that in 2009, 33.6% of families headed by White mothers lived below the poverty line.³⁷ In contrast, 47.7% of families headed by Black mothers, and 48.9% of families headed by Hispanic mothers, were in poverty.³⁸ Precise percentages vary across studies,³⁹ but it is undisputed that minority single mothers and their children experience more poverty than White single-mother families.

Looking at the data in sum, we are left with a bleak picture of single motherhood in America. Single mothers collectively support and nurture more than a fifth of American children. They are also likelier on average to be undereducated, impoverished, and to receive insufficient support from their children's fathers. While these data points are problematic in and of themselves, the tax structures that ignore the needs of these families are even more troublesome.

more closely resemble the situation of a married couple than that of a single individual without children." S. REP. NO. 99-313, at 36, *reprinted in* 1986-3 C.B. 1, 36.

³³ See INCOME, POVERTY, *supra* note 28, at 12 (reporting that women made seventy-seven cents on every dollar earned by men). Low-income single mothers are also likely to be less educated. See MATHER, *supra* note 24, at 3 (reporting that 61% of low-income single mothers have not attended college, compared to 40% of higher-income single mothers).

³⁴ See Gershuny, *supra* note 14, at 483 (reporting that compared to all women and men, single mothers constitute an overwhelming majority of full-time employees earning an average of \$15,000 per year or less).

³⁵ Only 40% of custodial mothers receive child support from the children's fathers, according to the Census Bureau. See TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 3 tbl.1 (2011), <http://www.census.gov/prod/2011pubs/p60-240.pdf> (reporting that although 54.9% of single mothers had child support agreements or awards in 2009, only 70.5% of that group actually received any amount that year).

³⁶ Karen Kornbluh & Rachel Homer, *The New Family Values Agenda: Renewing Our Social Contract*, 4 HARV. L. & POL'Y REV. 73, 74 (2010).

³⁷ LIVING ARRANGEMENTS, *supra* note 18, at 20 tbl.8.

³⁸ *Id.*

³⁹ See, e.g., MATHER, *supra* note 24, at 2 fig.1 (showing that low-income children living in single-mother families had a 42% poverty rate across all racial groups with 35% for Whites and 66% for African Americans).

II

THE TAX CODE AND SINGLE MOTHERS

The tax code facilitates approximately \$117 billion of poverty relief in the United States every year.⁴⁰ A portion of these benefits affects the economic well-being of single mothers and their children.⁴¹ I start the discussion by exploring the tax code's progressive nature, which helps low-income taxpayers in general. Single mothers comprise the biggest recipient group when it comes to refundable tax credits⁴² that phase out with income levels. This is largely due to the high poverty rate among single mothers. However, despite its progressive structure and refundable credits, the United States tax code falls short because child-specific measures in the tax code disfavor single mothers. In discussing these provisions, I will show that single mothers do not receive the same tax benefits as their married counterparts.

Fairness is a fundamental question in this discussion. Tax scholars often frame fairness in terms of horizontal equity⁴³ and vertical equity.⁴⁴ I argue below that single mothers are excluded from many benefits accrued on the basis of parenthood and families. To couch this argument in terms familiar to the tax literature, taxation of single mothers fails to achieve horizontal equity. Fair taxation is not an objective that can be achieved easily,⁴⁵ but my goal is to examine the

⁴⁰ See Kornbluh & Homer, *supra* note 36, at 85 ("The combined value of just the . . . Personal Exemption for Dependent Children, the Child Tax Credit (CTC), the Earned Income Tax Credit (EITC), and the Child and Dependent Care Tax Credit (CDCTC) . . . is about \$117 billion annually." (quoting FIRST FOCUS, FAMILY TAX POLICIES: WHAT THEY ARE AND WHY THEY MATTER 1 (2007), available at http://www.firstfocus.net/sites/default/files/f.2007_familytax.pdf)). In comparison, in 2007 Head Start funding was \$6.8 billion and TANF program funding was \$17.1 billion. *Id.* Overall, income tax provisions including the EITC have reduced the United States poverty rate from 23.7% to 21.5%, exclusive of other government transfers. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2009 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, at tbl.2 (last visited Oct. 17, 2013), http://www.census.gov/hhes/www/cpstables/032010/rdcall/2_001.htm.

⁴¹ Cf. ROBERT GREENSTEIN, CTR. ON BUDGET & POL. PRIORITIES, THE EARNED INCOME TAX CREDIT: BOOSTING EMPLOYMENT, AIDING THE WORKING POOR 3 (2005), available at <http://www.cbpp.org/archiveSite/7-19-05eic.pdf> ("[T]he EITC lifts more children out of poverty than any other single program or category of programs."); Daniel P. Gitterman et al., *Expanding the EITC for Single Workers and Couples Without Children: Tax Relief for All Low-Wage Workers*, 15 GEO. J. ON POVERTY L. & POL'Y 245, 245 (2008) (reporting that the EITC, "the nation's largest anti-poverty program, now provides tax benefits of roughly \$39 billion . . . a year to over 21 million households").

⁴² Some tax credits are refundable in that they do not only reduce tax liability but can actually result in a positive payment to a taxpayer.

⁴³ See *supra* note 10 (describing the idea that those in similar circumstances should pay the same amount of tax and receive the same amount of benefits).

⁴⁴ *Id.* (describing the idea that those with less ability to earn be treated favorably relative to those with greater ability).

⁴⁵ Cf. SLEMRD & BAKIJA, *supra* note 9, at 60 ("Fairness in taxation . . . involves ethical issues and value judgments that, by their nature, cannot be decisively resolved.").

status quo and consider what can be done in the context of this important demographic.

A. *Progressive Nature of the Code*

Any discussion of ill-apportioned tax benefits must acknowledge that U.S. personal income taxation is progressive.⁴⁶ While critics argue the U.S. tax system's progressivity is diminishing,⁴⁷ it is a long-standing characteristic.⁴⁸ The lowest quintile of taxpayers have a negative federal income tax liability, while the top quintile pays 83% of all federal individual income tax paid.⁴⁹ Thanks to the credits discussed below—mainly the earned income tax credit (EITC) and child credit—as well as personal exemptions and standard deductions, a single mother filing as a head of household with two children owes no income tax until her income reaches \$43,000.⁵⁰

This is not to say that low-income individuals do not pay any federal tax, however. Payroll taxes⁵¹ have become increasingly vital in

⁴⁶ Progressivity in the personal income tax context means that an individual's tax rate increases as their income increases. See, e.g., Chris William Sanchirico, *Progressivity and Potential Income: Measuring the Effect of Changing Work Patterns on Income Tax Progressivity*, 108 COLUM. L. REV. 1551, 1566 (2008) ("The tax code is progressive if those with greater income pay a larger proportion of that income in tax. The proportion of income paid in tax is called the average tax rate."); see also Vada Waters Lindsey, *The Widening Gap Under the Internal Revenue Code: The Need for Renewed Progressivity*, 5 FLA. TAX REV. 1, 3 (2001) ("Progressivity is also established by techniques such as the earned income tax credit, the income tax exemption, phase-out of deductions for high-income taxpayers, corporate taxation and estate and gift taxation.").

⁴⁷ See, e.g., Lindsey, *supra* note 46, at 23–37 (arguing that progressivity has weakened as income disparity has widened); Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1021–44 (2004) (arguing that the federal tax system has failed to respond to increasing income inequality and as a result it has become an unfair system); James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409 (2010) (discussing the current tax system's inadequate progressivity).

⁴⁸ In 1914, the inaugural year of the federal income tax system, less than 0.5% of the total U.S. population filed personal tax returns because everyone but the wealthiest could claim enough personal exemptions to avoid it; in 2008, the proportion of the U.S. population filing is 45%. See SLEMROD & BAKIJA, *supra* note 9, at 19.

⁴⁹ Tax Policy Ctr., *T12-0200—Baseline Tables: Federal Tax Burden by Cash Income Percentile* (Sept. 13, 2012), <http://taxpolicycenter.org/numbers/Content/PDF/T12-0200.pdf>.

⁵⁰ As a head of household, the gross income level at which any income tax is owed is \$20,650 in 2013, net of standard deduction and personal exemptions. See Rev. Proc. 2013-15, 2013-5 I.R.B. 444, *available at* http://www.irs.gov/irb/2013-05_IRB/ar06.html. The complete phase-out of the EITC happens at \$43,038. *Id.*

⁵¹ Payroll taxes are payable by all wage earners regardless of their income level. There are two federal payroll taxes: Social Security, introduced in 1935, and Medicare, introduced in 1966. See Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935); Tax Adjustment Act of 1966, Pub. L. No. 89-368, 80 Stat. 38 (1966). The Social Security tax rate is 6.2%. I.R.C. § 3101(a) (2006). The "fiscal cliff" deal struck at the beginning of 2013 will raise the Social Security tax rate by 2% across all workers unless they earn more than

U.S. taxation.⁵² This change especially impacts the lower income level:⁵³ The effective income tax rate might be at or near zero, but these individuals still pay over 7% of their income in payroll taxes. Every wage earner pays payroll taxes at a flat rate up to the maximum earnings ceiling,⁵⁴ making the payroll taxes functionally regressive.⁵⁵ Almost two-thirds of American families pay more in payroll taxes than income taxes.⁵⁶

It is against this backdrop that I discuss single mothers and the tax code. I use the following fictional characters to illustrate my point

\$113,700. *Compare* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 1001, 126 Stat. 156, 158 (2012) (extending payroll tax cut through calendar year 2012), with American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013) (failing to extend the holiday into 2013); see Joseph Henchman, *Why Your 2013 Paychecks Are 2 Percent Less*, TAX FOUND. (Jan. 9, 2013), <http://taxfoundation.org/blog/why-your-2013-paychecks-are-2-percent-less> (quantifying impact and explaining surrounding law). The Medicare tax rate is 1.45% of all income. I.R.C. § 3101(b) (2006). In addition, the Patient Protection and Affordable Care Act of 2010 introduced the Additional Medicare Tax, applicable to wages exceeding \$250,000 for joint returns and \$200,000 for other returns. Pub. L. 111-148, tit. IX, § 9015, 124 Stat. 870, 870–71.

⁵² See Deborah A. Geier, *Integrating the Tax Burdens of the Federal Income and Payroll Taxes on Labor Income*, 22 VA. TAX REV. 1, 2 (2002) (“[A]bout as much federal revenue is collected from the payroll taxes (Social Security and Medicare) as from the personal income tax.”).

⁵³ See *id.* (noting that the payroll taxes are regressive). The Congressional Budget Office also reports that the shift from income to payroll tax has reduced the extent to which federal taxes lessen the degree of income inequality. CONG. BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007, at 26–29 (2011). The standard deduction is a dollar amount that reduces the amount of income on which you are taxed. I.R.C. § 63(b)–(c) (2006). An individual may elect the standard deduction by filing a return claiming no itemized deductions.

⁵⁴ The maximum taxable earnings for Social Security payroll tax is \$113,700 for 2013. SOC. SEC. ADMIN., FACT SHEET: 2013 SOC. SEC. CHANGES (2012), available at <http://www.ssa.gov/pressoffice/factsheets/colafacts2013.pdf>.

⁵⁵ See Geier, *supra* note 52 (highlighting the regressiveness of payroll taxes); Dan Seltzer, *Attacks on a Tax: An Alternative to the Earned Income Tax Credit to Remedy the Unfairness in the Payroll Tax System*, 77 S. CAL. L. REV. 187, 188 (2003) (noting that the poor and middle-class pay a much higher percentage of their income in payroll taxes than the rich). This is due to the flat rate structure, the capping of the taxable wage base, and exclusion of capital income from the base. See Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313, 354 (2011) (finding that payroll taxes are less progressive than income taxes for those reasons, but noting that the combined tax and benefits structure of Social Security is progressive).

⁵⁶ See Andrew Chamberlain & Gerald Prante, *Which Taxes Weigh Most Heavily on Americans with Different Incomes?*, TAX FOUND. (Mar. 26, 2007), <http://www.taxfoundation.org/files/ff80.pdf> (finding that on average federal payroll taxes per household outweighed federal income taxes); Andrew Mitrusi & James Poterba, *The Distribution of Payroll and Income Tax Burdens, 1979–1999*, 53 NAT’L TAX J. 765, 771 tbl.2 (2000) (reporting that payroll taxes exceed income taxes for 62% of all families); Seltzer, *supra* note 55, at 188 (pointing out that the majority of Americans earning less than \$100,000 pay more in payroll taxes than in income taxes).

along the way. Ethel is a single mother of two young children (ages two and four) and earns \$25,400 a year—the approximate median income of single mothers⁵⁷—working as an insurance agent. Anna is also a mother of two young children (ages two and four), but is married to John. Anna and John both work and together earn \$78,700 a year—the approximate median income of married couples with children.⁵⁸

The most obvious way in which the tax code differentiates between married parents and single-mother taxpayers is filing status.⁵⁹ Heads of households have a distinct tax schedule.⁶⁰ A single mother is a “head of household” if she maintains a household either for her child (whether or not she claims the child as her dependent) or for related dependents and if she also lives in the household.⁶¹ Head-of-household taxpayers’ tax bracket thresholds fall between those of single individuals and married couples filing jointly.⁶² Similarly, the

⁵⁷ See U.S. Census Bureau, *Table F-10. Presence of Children Under 18 Years Old All Families by Median and Mean Income: 1974 to 2011*, http://www.census.gov/hhes/www/income/data/historical/families/2011/F10AR_2011.xls (last visited Oct. 17, 2013) (reporting that the median income for female householders with one or more children under eighteen was \$25,353 in 2011; the mean income was \$35,230).

⁵⁸ See *id.* (reporting that the median income for married households with one or more children under eighteen was \$78,699 in 2011; the mean income was \$99,396).

⁵⁹ A taxpayer’s filing status is used to determine his or her filing requirements, standard deduction, eligibility for certain credits and deductions, and correct tax. There are five filing statuses: Single, Married Filing Jointly, Married Filing Separately, Head of Household, and Qualifying Widow(er) with Dependent Child. INTERNAL REVENUE SERV., PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 5–9 (2012), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>.

⁶⁰ Tax schedules determine the marginal tax rate for each income bracket. See I.R.C. § 1(a)–(d) (2006) (providing the tax schedules for married individuals filing joint returns, heads of households, unmarried individuals, and married individuals filing separate returns). Head of household status is available to an unmarried taxpayer maintaining her home as the principal place of abode for a qualifying child or certain other dependents. I.R.C. § 2(b)(1) (2006).

⁶¹ See I.R.C. § 2(b)(1) (2006) (defining “head of household”). Alternatively, she can file as head of household if she maintains a household for a parent, whether or not she lives with the parent. INTERNAL REVENUE SERV., *supra* note 59, at 8. Because of the requirement that head of household taxpayers be custodial parents if the qualifying individual is a child, many parents whose children do not live with them for more than 50% of the year do not qualify, even if they are covering half of his or her expenses.

⁶² See Rev. Proc. 2013-15, *supra* note 50, § 2.01 (listing the tax rate tables for 2013). For instance, the lowest tax bracket’s threshold is \$17,850 for married individuals filing jointly, \$12,750 for heads of households, and \$8925 for unmarried individuals other than surviving spouses and heads of households. *Id.* If you are a single householder, you will pay more tax than a married couple with the same income, per taxpayer. If you are unmarried-couple householders, you will sometimes pay more, and sometimes less, than married couples. The effect is commonly called marriage bonus and penalty, on which much has been written. See, e.g., Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 851–55 (2008) (calling for a federal definition of domestic partnership in order to eradicate marriage penalties or bonuses); Infanti, *supra* note 5, at 606–07 (proposing individual filing to

standard deduction⁶³ available for this class of taxpayers is \$8950 in 2013, compared to \$12,200 for married couples filing jointly and \$6100 for singles and married couples filing separately.⁶⁴

The progressivity of the tax code is at work here. From her \$25,400 gross pay, Ethel can subtract \$8950 and \$11,700 as personal exemptions for herself and her two children.⁶⁵ Her taxable income is now \$4750,⁶⁶ to be taxed at 10%.⁶⁷ Her effective income tax rate is therefore 1.9%.⁶⁸ Anna and John's taxable income after the standard deduction and personal exemptions is \$54,800.⁶⁹ Their marginal tax rate is 15%,⁷⁰ and their effective tax rate is 11.7%.⁷¹

Another way in which the U.S. tax system achieves progressivity is the EITC.⁷² The EITC lifts millions of single mothers and their

accommodate diverse family styles in America); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1543–52 (2006) (proposing that the current marriage-based criterion for income splitting be expanded to include unmarried couples); see also William P. Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 405–12, 442–45 (2005) (arguing that Congress should recognize same-sex relationships for federal income tax purposes, including allowing joint filing by same-sex couples); Zelenak, *supra* note 7, at 2–3, 11–12 (exploring different alternatives to the current system in order to address marriage penalty concerns).

⁶³ "The standard deduction is a dollar amount that reduces the amount of income on which you are taxed." *Supra* note 53.

⁶⁴ Rev. Proc. 2013-15, *supra* note 50, § 2.07(1); see also I.R.C. § 63(c)(2), (4), (5) (2006) (describing the basic standard deduction, adjustments for inflation, and limitations in the case of certain dependents).

⁶⁵ A taxpayer can take one exemption for herself unless another taxpayer is claiming her as a dependent. See I.R.C. § 151(a) (2006) ("In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income."). A taxpayer may also take one exemption for each person she can claim as a dependent. See I.R.C. § 151(c) ("An exemption of the exemption amount for each individual who is a dependent (as defined in section 152) of the taxpayer for the taxable year.").

⁶⁶ \$25,400 - \$8950 - \$11,700 = \$4750.

⁶⁷ The tax rate for heads of households with taxable income under \$12,750 is 10%. See Rev. Proc. 2013-15, *supra* note 50, § 2.01 tbl.2.

⁶⁸ \$475 ÷ \$25,400 = 1.9%.

⁶⁹ \$78,700 - \$12,200 - \$11,700 = \$54,800.

⁷⁰ The tax rate for married individuals filing jointly with taxable income under \$17,250 is 10%, with 15% on the excess up to \$72,500. See Rev. Proc. 2013-15, *supra* note 50, § 2.01 tbl.1. Anna and John's tax liability comes to \$9238.

⁷¹ \$9238 ÷ \$78,700 = 11.7%.

⁷² See Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285, 285 ("Today, the EITC stands as the largest cash-transfer program for low-income workers with children, providing \$47 billion in benefits each year to 24 million families."); Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 301, 301 n.1 (2004) (reporting that, at \$33 billion, the EITC is the largest federal antipoverty program). Low-income, working taxpayers are eligible for the EITC. I.R.C. § 32 (2006). The EITC has provoked rich academic and political debate. My Note's treatment of the EITC is necessarily limited to the extent that the credit affects single mothers.

children out of poverty.⁷³ It offsets low-income taxpayers' tax liability up to an inflation-adjusted threshold.⁷⁴ Because the EITC is limited to individuals who earn a wage, many believe it promotes work among the poor.⁷⁵ Indeed, the expansion of the EITC in the 1980s and 1990s increased employment among low-income single parents, especially single mothers.⁷⁶

The credit is especially helpful to single mothers, our focus here.⁷⁷ The marginal credit on each earned dollar increases as earned income increases, plateaus as the income level hits roughly \$20,000,⁷⁸ and phases out gradually down to zero. Because the EITC is a refundable credit, taxpayers receive a check for any remaining balance of the credit, net of other tax liabilities.⁷⁹ These refunds account for over 80% of EITC dollars.⁸⁰ Due to their low income and the de facto

⁷³ See Gitterman et al., *supra* note 41, at 260 (reporting based on IRS-provided data that "single mothers make up the largest group of EITC recipients"). The federal EITC lifts 6.6 million Americans, including 3.3 million children, out of poverty each year, making it the nation's largest and most successful antipoverty program. *Earned Income Tax Credit, TAX CREDITS FOR WORKING FAMILIES*, <http://www.taxcreditsforworkingfamilies.org/earned-income-tax-credit> (last visited Aug. 19, 2013).

⁷⁴ Claimants must meet a list of eligibility requirements, which include factors such as income level, family size, age, immigration status, marital status, and investment income. See I.R.C. § 32(c).

⁷⁵ See, e.g., STEVE HOLT, BROOKINGS INST., *THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW 13* (2006), available at http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_holt/20060209_Holt.pdf (describing how the expansion of the EITC allows low-wage workers to support their families without falling below the poverty line); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013) (noting that recipient interviewees indicated that the EITC "provides them with motivation to work"); V. Joseph Hotz et al., *Examining the Effect of the Earned Income Tax Credit on the Labor Market Participation of Families on Welfare* (Nat'l Bureau of Econ. Research, Working Paper No. 11968, 2006), available at <http://www.nber.org/papers/w11968> (using empirical evidence to show the EITC's large effect on labor force participation of single women with children).

⁷⁶ Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 799–800 (2007); see also CONG. RESEARCH SERV., *THE EARNED INCOME TAX CREDIT (EITC): AN OVERVIEW 14–15* (2007), available at http://assets.opencrs.com/rpts/RL31768_20070315.pdf (noting that the EITC has had "a significant positive impact on participation in the labor force, particularly for single mothers" (internal citations omitted)).

⁷⁷ See Megan Newman, *The Low-Income Tax Gap: The Hybrid Nature of the Earned Income Tax Credit Leads to Its Exclusion from Due Process Protection*, 64 TAX LAW. 719, 724 (2011) ("The credit targets low-income families, particularly those headed by a single parent.").

⁷⁸ The threshold phase-out amount is \$17,530 for head of households and singles with one or more children and \$22,870 for married couple filing jointly. See Rev. Proc. 2013-15, *supra* note 50, § 2.05(1).

⁷⁹ See *id.*

⁸⁰ See CONG. RESEARCH SERV., *supra* note 76, at 13 (reporting that 88.3% of EITC credits were refunded to taxpayers); Leslie Book, *The Poor and Tax Compliance: One Size*

marriage penalty embedded in the EITC provisions,⁸¹ single mothers comprise the biggest group of recipients of the EITC (6.2 million), followed by married couples with children (5.2 million).⁸² Ethel is eligible for the EITC, for example. Because her income is below the maximum earnings threshold of \$43,038,⁸³ she qualifies for a credit of \$3714.⁸⁴ Because her tax liability is already very small (\$475), she will receive a refund of \$2501.⁸⁵ In contrast, Anna and John earn too much to benefit from the EITC.

The two provisions discussed thus far may suggest that the tax code is not hostile to single mothers. After all, scholars disagree on how much progressivity is desirable.⁸⁶ That said, when it comes to the following tax expenditures focused on families, single mothers fare much worse.

B. Child-Related Tax Credits Fail to Help Many Single Mothers

An important tax provision for parents is the child tax credit (CTC),⁸⁷ and single mothers are less likely to be able to take full advantage of this credit. The CTC allows taxpayers with qualifying

Does Not Fit All, 51 U. KAN. L. REV. 1145, 1159 (2003) (noting that approximately 80% of the total EITC claims are refunded to taxpayers).

⁸¹ See generally I.R.C. § 32(b)(2)(A)–(B) (2006). Joint returns only have a slight increase in phase-out amounts, making it an advantage to file as single. An unmarried couple with two children, where each parent earns \$14,000 in wages and each parent claims a child as an exemption and for EITC purposes for the taxable year, will receive a combined EITC of \$6086. In contrast, if they are married, they will only receive \$3642.

⁸² Gitterman et al., *supra* note 41, at 260; see also CONG. RESEARCH SERV., *supra* note 76, at 11 tbl.5 (reporting that in tax year 2004, heads of households accounted for 52.0% of all returns claiming an EITC and 64.7% of total EITC). Single mothers accounted for about 37% of all EITC recipients in 2002. Gitterman et al., *supra* note 41, at 261 tbl.3.

⁸³ The completed threshold is set at \$43,038 for tax year 2013. Rev. Proc. 2013-15, *supra* note 50, § 2.05(1).

⁸⁴ The credit amount is calculated as follows: \$5372 - (\$5372 - [(25,400 - 17,530) ÷ (\$43,038 - 17,530)]).

⁸⁵ \$3714 - \$475 = \$3239.

⁸⁶ See, e.g., SLEMRD & BAKIJA, *supra* note 9, at 59–67 (discussing various views on progressivity); Barbara H. Fried, *Why Proportionate Taxation*, in TAX JUSTICE: THE ONGOING DEBATE, *supra* note 9, at 149, 176–83 (arguing against proportionate taxation); Musgrave, *supra* note 10, at 113 (noting that progressivity is “a matter of social taste and political debate”).

⁸⁷ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101(a), 111 Stat. 788, 796–98 (codified at I.R.C. § 24 (2006)). For a detailed discussion on the child tax credit, see generally Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267 (2002) (explaining the biases of current tax law against dependent children in nontraditional families); Allan J. Samansky, *Child Care Expenses and the Income Tax*, 50 FLA. L. REV. 245 (1998) (examining whether providing tax benefits to working parents discriminate against families with a stay-at-home parent); Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407 (1999) (critiquing a strong version of tax expenditure analysis); Donald B. Tobin, *Investing in Our Children: A Not So Radical Proposal*, 73 U. CIN. L. REV. 457 (2004) (proposing that the nation shift to a model

children⁸⁸ younger than seventeen to reduce their tax liabilities by up to \$1000 per child.⁸⁹ Congress instituted the CTC with middle-class families in mind;⁹⁰ the credit does not target low-income taxpayers. Unlike the EITC's thresholds, the CTC's phase-out thresholds are high: \$110,000 for married taxpayers filing jointly and \$75,000 for single parents.⁹¹ Most middle-income families can access the credit.⁹² Indeed, only 24% of the outlay goes to taxpayers with adjusted gross income of \$30,000 or less, whereas 32% of it reduces tax liabilities of those with adjusted gross income (AGI) of \$75,000 or more.⁹³

Single mothers are less likely to realize the full benefit of the CTC because it is currently only refundable up to the lesser of the full \$1000 amount or 15% of earned income over \$3000.⁹⁴ This feature disadvantages single mothers for two reasons. First, the

of human capital investment in children which they would be required to repay once they begin working).

⁸⁸ The Internal Revenue Code defines "qualifying child" using factors like relationship, place of residence, age, source of support, and disability. I.R.C. § 152(c) (2006). For the child tax credit purposes, the age limit is seventeen. See I.R.C. § 24(c)(1).

⁸⁹ I.R.C. § 24(a), (c)(1); see also *Ten Facts About the Child Tax Credit*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/Ten-Facts-about-the-Child-Tax-Credit> (last visited Oct. 17, 2013) (explaining various factors used to determine child tax credit eligibility).

⁹⁰ See 143 CONG. REC. 11341 (1997) (statement of Rep. Kingston) ("We seem to be in a gridlock . . . the way the Republican bill is, is that middle-class families with children under 17 years of age and with household incomes of under \$110,000 will get a \$500-per-child tax credit . . . [W]e have at stake 11 million middle-class children . . .").

⁹¹ See I.R.C. § 24(b)(2) (setting thresholds for phase-outs at \$110,000 for married taxpayers filing jointly, and \$75,000 for head of household taxpayers); INTERNAL REVENUE SERV., PUBLICATION 972, CHILD TAX CREDIT 3 (2012), available at <http://www.irs.gov/pub/irs-pdf/p972.pdf> (same).

⁹² Cf. Zelenak, *supra* note 72, at 306 ("Unlike the EITC, which is aimed at low-wage working parents, the other two provisions primarily benefit middle-income parents."); Leonard E. Burman & Laura Wheaton, *Who Gets the Child Tax Credit?*, 2005 TAX NOTES 387, 390, available at http://www.urban.org/UploadedPDF/411232_child_tax_credit.pdf ("The CTC is a middle-class tax benefit."). Because of "differences in income, family composition, and employment status," only half of Hispanic children and 46% of Black children qualified for a full \$1000 credit, compared with 62% of Whites in 2005. *Id.* at 392.

⁹³ See JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017, 46 tbl.3 (2013) [hereinafter JCT REPORT], available at https://www.jct.gov/publications.html?func=download&id=4504&chk=4504&no_html=1 (reporting that about \$13.8 billion of the \$56.7 billion tax expenditure associated with the child tax credit will benefit taxpayers in the income classes of \$30,000 or less, and \$18.4 billion will benefit those in the \$75,000 or above classes; \$24.5 billion will benefit those in the \$30,000–\$75,000 income classes).

⁹⁴ I.R.C. §§ 24(d)(1)(B), (d)(4). The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 lowered the baseline from \$10,000 to \$3000. Pub. L. No. 111-312, § 103(b), 124 Stat. 3296 (2010). Prior to this change, Ethel would have received only \$1450. $(\$19,000 - \$10,000) \times 15\% = \$1450$. Before ARRA, the minimum earned income amount was set to rise to \$12,550. See *ARRA and Additional Child Tax Credit*, INTERNAL REVENUE SERV. (Oct. 31, 2011), <http://www.irs.gov/uac/ARRA-and-the-Additional-Child-Tax-Credit>.

aforementioned EITC has the effect that single mothers often have no income tax liability for the credit to offset.⁹⁵ Second, single mothers are less likely to earn enough to take full advantage of the refundability provision. Taxpayers earning less than \$3000 do not receive any CTC benefit. Further, many single mothers at very low income levels (above \$3000 but below \$19,600) do not qualify for the full credit of \$1000.⁹⁶ In 2008, when the minimum earning requirement was \$10,000, 6.5 million children in low-income working families were entirely excluded from the CTC.⁹⁷ Today, thanks to the lower phase-in earnings level, the CTC is more accessible to single mothers, at least for another five years.⁹⁸ The expanded refundability has turned this credit much more friendly to low-income taxpayers, and is estimated to result in approximately \$30 billion in refunds per year.

⁹⁵ See *Tax Expenditures: What Are They and How Are They Structured?*, TAX POLICY CTR., fig.3, <http://www.taxpolicycenter.org/briefing-book/background/shelters/expenditures.cfm> (last visited Aug. 19, 2013) (reporting that 80% of head-of-household tax units are without current tax income liability); see also *supra* notes 27–28 and accompanying text (discussing poverty in single-mother households).

⁹⁶ The full realization income level for a single mother of one child is \$9667, and \$16,333 for a mother of two children. There are special provisions for parents of three or more children. This was a much more common problem before 2008. The minimum earning requirement has been lowered from \$12,050 to \$8500 to \$3000. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1003, 123 Stat. 115, 313 (codified as amended at I.R.C. § 24(d)(4) (2006)); MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., *THE CHILD TAX CREDIT: CURRENT LAW AND LEGISLATIVE HISTORY* 4, 7 (2013), available at http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R41873_03252013.pdf.

⁹⁷ See Aviva Aron-Dine, *Improving the Refundable Child Tax Credit: An Important Step Toward Reducing Child Poverty*, CTR. ON BUDGET & POL'Y PRIORITIES (May 19, 2008), <http://www.cbpp.org/cms/index.cfm?fa=view&id=766>. Differences in income eligibility translate into differences in eligibility by race and ethnicity. See Burman & Wheaton, *supra* note 92, at 392 tbl.3 (noting that over 45% of Hispanic and 49% of Black households with qualified children were ineligible for the full credit because they earned too little, compared to 18.2% of White households).

⁹⁸ See JCT REPORT, *supra* note 93, at 41 (estimating a \$30.8 billion outlay associated with the CTC's refundable portion for tax year 2013). The change to the minimum earning requirement is temporary. In fact, the 2009 lowering of the minimum requirement was set to sunset at the end of 2012. See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 103(b) (extending the minimum earnings reduction through 2012). After weeks of an unknown future, the lower minimum earnings requirement was extended for another five years in January 2013 as part of the congressional bargain that prevented the “fiscal cliff.” See American Taxpayer Relief Act of 2012, *supra* note 51, § 103(b); see also Blake Ellis, *Fiscal Cliff Deal Protects Family Tax Breaks*, CNN (Jan. 3, 2013), <http://money.cnn.com/2013/01/03/pf/taxes/family-tax-breaks-fiscal-cliff/index.html> (reporting that the fiscal cliff deal extended the more generous child tax credit provisions). The \$3000 minimum provision is, however, temporary—it is scheduled to sunset at the end of 2017. See I.R.C. § 24(d)(4) (2006) (“[I]n the case of any taxable year beginning after 2008 and before 2018 the dollar amount in effect for such taxable year under paragraph (1)(B)(i) [(the refundable child tax credit)] shall be \$3,000.”); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 103(b), 126 Stat. 2313 (2013).

Ethel is eligible for a full refund of \$2000 for her two children.⁹⁹ Together with her EITC refund, she will receive a check for \$5239.¹⁰⁰ But the CTC still leaves out many minimum-wage workers. If Ethel were working full time at the federal minimum wage of \$7.25,¹⁰¹ she would not qualify for a full refund even under the current CTC provisions.¹⁰² Anna and John are eligible for the full credit of \$2000 against their income tax liability since their joint income is below the \$110,000 phase-out threshold.¹⁰³ This lowers their effective federal income tax rate from 11.7% to 9.2%.

Next on the list of tax expenditures beyond the reach of low-income single mothers is the child and dependent care tax credit (CDCTC).¹⁰⁴ Under this provision, a taxpayer may claim a credit up to 35% of her qualifying dependent care expenses. The percentage declines by 1% for each \$2000 (or portion thereof) of a taxpayer's adjusted gross income¹⁰⁵ in excess of \$15,000, down to the minimum of 20%.¹⁰⁶ The amount of eligible expenses is capped at \$3000 for one

⁹⁹ This is because 15% of her earnings above the \$3000 minimum is \$3360, which is greater than \$2000. She is eligible to receive the full \$2000 credit, which is refundable.

¹⁰⁰ The refundable portion of her EITC is \$3239. *See supra* note 85 and accompanying text. She would have barely made the threshold under the pre-2008 minimum earnings requirement. $15\% \times (\$25,400 - \$12,050) = \$2002.50$.

¹⁰¹ *See* Fair Labor Standards Act of 1938, Pub. L. No. 112-238, 126 Stat. 1631 (2012) (codified as amended at 29 U.S.C. § 206 (Supp. 2011)) (extending the statutory minimum wage of \$7.25 through 2017). Women represent 60% of all minimum wage workers and 60% of all workers earning one dollar or less above the federal minimum wage. Bekah Mandell, *Race and State-Level Earned Income Tax Credits: Another Case of Welfare Racism?*, 10 RUTGERS RACE & L. REV. 1, 12 (2008). Women of color are overrepresented in the service and hospitality sectors, where minimum wage jobs and just-above-minimum wage jobs are concentrated. *Id.*

¹⁰² This assumes that she works forty hours a week, fifty weeks a year, earning \$14,500. Her refund will be \$1725. $15\% \times (\$14,500 - \$3000) = \$1725$. A family with two children that earns between \$3000 and \$16,333 receives only a partial credit. Such a family would, however, likely qualify for poverty relief transfer programs like the federal food stamp program or TANF.

¹⁰³ *See supra* note 91.

¹⁰⁴ I.R.C. § 21 (2006). Subject to strict limitations, § 21 allows a credit for amounts paid for child care and household services if the taxpayer has at least one child under thirteen or an incapacitated dependent or spouse, and if the amounts are paid in order to enable the taxpayer to be gainfully employed. Costs of nursery school, preschool, or similar programs for children below the level of kindergarten are considered to be for the child's care. *See* Treas. Reg. § 1.21-1(d)(5) (2009). Costs of kindergarten or a school at a higher grade cannot qualify, but costs of before-school or after-school care of a child in kindergarten or grade school may qualify. *See id.*

¹⁰⁵ Adjusted gross income (AGI) is gross income (any earnings) minus allowable deductions, such as unreimbursed business expenses, medical expenses, alimony, and deductible retirement plan contributions. I.R.C. § 62 (2006).

¹⁰⁶ I.R.C. § 21(a)(2). At \$43,000, the applicable percentage is 21%. $35\% - [(\$43,000 - \$15,000) \div \$2000] \times 1\% = 21\%$. An AGI greater than \$43,000 puts a taxpayer in the 20%

child and \$6000 for two or more children.¹⁰⁷ This means that any taxpayer may claim at most \$1050 for one child and \$2100 for two or more children together.¹⁰⁸

The CDCTC is of limited use to many single mothers. First, the maximum tax credit she could theoretically receive—\$2100 for two or more children—is vastly inadequate to cover the actual cost of child care.¹⁰⁹ Second, because it is not refundable, the CDCTC does not significantly benefit low-income taxpayers. Nonrefundable tax credits and deductions are often called “upside-down” subsidies, since they are worth more to taxpayers in higher tax brackets.¹¹⁰ Additionally, unlike the standard deduction and personal exemption amounts, the sliding scale thresholds are not indexed for inflation.¹¹¹ This means, for instance, that no single mother can benefit from the highest credit rate of 35%. If she has an adjusted gross income of less than \$15,000, the threshold for the 35% credit rate, the standard deduction and personal exemptions for herself and her child alone reduce tax liability to zero.¹¹² If left unfixed, fewer and fewer families will receive the

bracket. INTERNAL REVENUE SERV., FORM 2441, CHILD AND DEPENDENT CARE EXPENSES (2012), available at <http://www.irs.gov/pub/irs-pdf/f2441.pdf>.

¹⁰⁷ I.R.C. § 21(c).

¹⁰⁸ $\$3000 \times 35\% = \1050 and $\$6000 \times 35\% = \2100 .

¹⁰⁹ See *infra* note 156 and accompanying text (estimating the average annual child care expenditure of single mothers to be around \$6600).

¹¹⁰ Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 77–78 (2013) (discussing nonrefundable credits as “upside-down” subsidies); see also Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 590 (2005) (“Those with incomes below the poverty line are ineligible for the credit . . .”); Barbara Reisman, *The Economics of Child Care: Its Importance in Federal Legislation*, 26 HARV. J. ON LEGIS. 473, 489 (1989) (“[B]ecause most low-income families have limited tax liability and because the credit is not refundable, the Dependent Care Tax Credit does little to help them buy quality child care.”).

¹¹¹ I.R.C. § 21(a)(2). The original threshold was set at \$10,000, which the 2001 Bush tax cuts (known as EGTRRA) increased to \$15,000. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 204(b), 115 Stat. 38, 49. It has remained at that level for the past ten years. See I.R.C. § 21(a)(2). In contrast, the filing requirement (the minimum amount of gross income above which one must file a tax return) for a head of household under the age of 65 has increased from \$7000 to \$12,500. Compare INTERNAL REVENUE SERV., PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 19 tbl.7 (2003), available at <http://www.irs.gov/pub/irs-prior/p501-2003.pdf>, with INTERNAL REVENUE SERV., *supra* note 59, at 2 tbl.1. Given a 78% increase in the filing threshold for heads of households under 65 (from \$7000 to \$12,500) the child credit threshold should similarly be increased to \$26,000.

¹¹² The standard deduction for heads of household is \$8700, and the personal exemption is \$3800. INTERNAL REVENUE SERV., *supra* note 59, at 9, 24 tbl.6. The tax threshold for heads of household with one child or dependent is over \$15,000, and over \$19,000 if they have two or more qualifying children.

benefit of the credit's low-income targeting over time.¹¹³ While Congress did raise the threshold from \$10,000 to \$15,000 in 2001, future adjustments are not automatic.¹¹⁴ As a result of this structure, low-income families are severely disadvantaged: Only a fraction of 1% of the credit goes toward assisting families earning under \$10,000 per year, and less than 10% of CDCTC funding goes to families earning less than \$30,000 per year.¹¹⁵ What is more, given the work requirements of federal welfare provisions, it is essential to make it easier for single mothers to obtain paid work.¹¹⁶

Ethel bears the brunt of both the low threshold and nonrefundability. If she spends more than \$6000 in child care, her gross CDCTC is \$1740.¹¹⁷ Because the CDCTC is offset against income tax liability before the earned income tax credit is calculated,¹¹⁸ it erases Ethel's tax liability of \$475. Her EITC check will increase by the same amount; her tax refund is now \$5714. But the remaining \$1265 of the CDCTC is lost on her because it is not refundable. The effective credit is therefore \$475,¹¹⁹ compared to the \$6000 she spent on child care in order to work full-time.¹²⁰ Anna and John

¹¹³ See NAT'L WOMEN'S LAW CTR., MAKING CARE LESS TAXING 12–13 (2011), available at http://www.nwlc.org/sites/default/files/pdfs/nwlc-mclt2011-without_report_card_inside_and_bookmarked.pdf (“[T]he targeting to lower-income families provided by the sliding scale is eroding as fewer and fewer families have incomes low enough to claim the credit's highest percentages of expenses.”); Samansky, *supra* note 87, at 265–67 (“Because those who do not owe any taxes receive no benefit from the child care credit, the number of low income persons who can utilize the child care credit has been reduced.”).

¹¹⁴ As such, this was another provision that was almost nixed by the “fiscal cliff.” See *supra* note 98.

¹¹⁵ In 2012, an estimated \$335 million of the \$3.3 billion child care tax credit outlay went to taxpayers in income classes below \$30,000. See JCT REPORT, *supra* note 93, at 45 tbl.3 (showing distribution by income class of child care credit).

¹¹⁶ See Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 823 (1994) (discussing federal welfare provisions that mandate single mothers of young children to work, just like all other able-bodied welfare recipients).

¹¹⁷ Her adjusted gross income is \$25,400 (the same as her gross income, assuming no above-the-line deductions), and as a result the percentage at which her child care expenditure is converted to the credit is 29.8%. $35\% - [(\$25,400 - \$15,000) \div \$2000] \times 1\% = 29.8\%$; $\$6000 \times 29.8\% = \1788 .

¹¹⁸ See I.R.C. § 21(d)(1) (2006) (“[T]he amount of the employment-related expenses incurred during any taxable year which may be taken into account under subsection (a) shall not exceed—(A) in the case of an individual who is not married at the close of such year, such individual's earned income for such year”).

¹¹⁹ $\$1740 - \$475 = \$1265$.

¹²⁰ If Ethel were to work part-time and pursue education part-time, she would not be able to take advantage of this credit at all. The credit is available only for full-time workers and students. See Dixon, *supra* note 110, at 590–91 (arguing that the credit falls short of furthering gender equality).

will see their tax liability decrease by \$1200 thanks to the child care tax credit.¹²¹ Their effective tax rate is now 7.7%.¹²²

C. Other Tax Provisions Also Affect Single Mothers Unfairly

Due to their disadvantaged economic circumstances, single-mother households on the whole fail to take advantage of various tax incentives and provisions. Take tax incentives related to homeownership,¹²³ the beneficiaries of which are overwhelmingly higher-income taxpayers.¹²⁴ The total amount of tax expenditure associated with homeownership exceeds \$100 billion, almost double the EITC expenditure.¹²⁵ Although homeownership-related tax provisions are facially neutral, single-mother taxpayers are far less likely to have the means to take advantage of these benefits. In 2012, the rate of homeownership among single parents was 39.2%.¹²⁶ In contrast, 75% of two-parent households owned the house in which they lived.¹²⁷

¹²¹ This assumes that they spend more than \$6000 on child care. Because their household income exceeds the phase-out threshold of \$43,000, the percentage at which the credit is calculated is 20%. See *supra* note 106 and accompanying text. Their credit is therefore \$1200. $\$6000 \times 20\% = \1200 .

¹²² Anna and John's tax liability was \$7238 net of the child tax credit. Subtracting \$1200, it is now \$6038 vis-à-vis their gross income of \$78,700.

¹²³ The federal government "has long promoted homeownership through a host of incentives and protections: nontaxation of imputed rent, property tax deductions, the home mortgage tax deduction, favored capital gains treatment, and, most recently, foreclosure relief." Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 893 (2011); see also William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1157–58 (1974) (discussing exclusion of imputed income as a policy choice); Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 338 (2009) ("Homeowners are allowed to deduct from their income their mortgage interest expenses and real property taxes in computing their tax liability, yet imputed rental income . . . is excluded from income.").

¹²⁴ Less than 2% of returns claiming mortgage interest deductions are filed by taxpayers earning under \$30,000. See JCT REPORT, *supra* note 93, at 48 tbl.3 (suggesting, through basic calculations, that 667,000 returns out of over 34 million returns claiming mortgage interest deductions were filed by taxpayers with incomes of \$30,000 or less). This segment of taxpayers receives 0.4% of the tax expenditure. See *id.* (showing, through basic calculations, that \$284 million were spent on taxpayers earning \$30,000 or less, as compared with \$68.2 billion in total). By comparison, taxpayers earning \$75,000 or more accounted for 73% of the total number of returns claiming the tax benefit (24,847,000 returns out of the 34 million), which accounted for 88% of the total value of the benefit claimed nationally (\$59.9 billion of the \$68.2 billion). See *id.*

¹²⁵ According to the congressional Joint Committee on Taxation, mortgage interest deductions cost the federal government \$68.5 billion in 2012, property tax deductions cost \$24.5 billion, and exclusion of capital gains on sales of principal residences cost \$22.3 billion. *Id.* at 33 tbl.1. The EITC outlay amounts to about \$59 billion. *Id.* at 45 tbl.3.

¹²⁶ *Homeownership by Family Structure*, CORP. FOR ENTER. DEV., <http://scorecard.assetsandopportunity.org/2013/measure/homeownership-by-family-structure> (last visited Oct. 17, 2013).

¹²⁷ *Id.*

Furthermore, low-income taxpayers benefit less from the home mortgage interest deduction even as homeowners because their income tax liability is already so low. As such, 98% of taxpayers with an AGI less than \$15,000 receive no tax benefit from homeownership.¹²⁸

Ethel is unlikely to own a house¹²⁹ and therefore will not benefit from the wide array of tax incentives available for homeowners. Anna and John are more likely to own a home, in which case they may fully deduct their mortgage interest as follows.¹³⁰ Assume that Anna and John have a mortgage for \$350,000¹³¹ and pay \$10,600 in mortgage interest payments¹³² and \$4500 in property tax in 2013. The total exceeds the applicable standard deduction by \$2900.¹³³ Since their marginal tax rate is 15%, the mortgage interest deduction further reduces their tax liability by \$435. This brings down their effective tax rate to 7.1%.¹³⁴

¹²⁸ “The over 70% of Americans who take the standard deduction cannot benefit from the home mortgage interest deduction.” Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1359–60 (2000). Furthermore, homeownership results in a tax deduction for only 16% of taxpayers with an AGI between \$15,000 and \$30,000. Brown, *supra* note 123, at 344. The percentage for taxpayers earning between \$30,000 and \$40,000 is 34%. *See also id.* (explaining that because most homeowners do not elect to itemize their deductions, they do not benefit from the mortgage interest deduction benefit).

¹²⁹ *Supra* note 126 and accompanying text.

¹³⁰ Anna and John’s deduction is limited to interest on debts secured by a principal residence or a second home. *See* I.R.C. § 163(h)(4)(A)(i) (2006) (defining “qualified residence”). Interest is deductible on only the first \$1 million of debt used for “acquiring, constructing, or substantially improving any qualified residence of the taxpayer,” or the first \$100,000 of home equity debt regardless of the purpose or use of the loan. *See* I.R.C. § 163(h)(3)(B)–(C).

¹³¹ I chose this number for illustrative purposes. The median price for new homes sold in the United States in 2010 was \$221,800. U.S. CENSUS BUREAU, *MEDIAN AND AVERAGE SALES PRICES OF NEW HOMES SOLD IN THE UNITED STATES* (last visited Oct. 17, 2013), <http://www.census.gov/const/uspriceann.pdf>.

¹³² This assumes that the interest rate on the mortgage is 3.7%, in line with the national average for 2012. *30-Year Fixed-Rate Mortgages Since 1971*, FREDDIE MAC, <http://www.freddiemac.com/pmms/pmms30.htm> (last visited Oct. 17, 2013).

¹³³ The standard deduction for Anna and John is \$12,200 for tax year 2013. *Supra* note 64 and accompanying text.

¹³⁴ Further, since they are now itemizing their deductions, they can claim other deductions, such as the charitable donation deduction under § 170. Other tax provisions that confer benefits on taxpayers with sizable disposable incomes include the student loan interest deduction, education credits, and lower tax rates for capital gain income. *See* JCT REPORT, *supra* note 93, at 47 tbl.3 (suggesting, through basic calculations, that less than 6% of the overall student loan interest deduction goes to taxpayers with incomes less than \$30,000, while 53% of the deduction benefits taxpayers earning over \$75,000, and additionally, less than 7% of the education credits benefit taxpayers with incomes less than \$30,000, while 45% of the credits benefit those earning over \$75,000).

Imputed income,¹³⁵ which is not taxable,¹³⁶ embodies another tax policy that works against single mothers. Not only does imputed rental income—that is, the money that a taxpayer could have earned by renting out his dwelling instead of living in it—go untaxed,¹³⁷ a whole array of domestic services that would otherwise cost money goes untaxed. Professor McCluskey compares how unpaid housework provided by the nonworking spouse in the breadwinner-homemaker household is normally an out-of-pocket expense for a single head of household (for example, cleaning, eating out, etc.).¹³⁸ By having one spouse work as a homemaker, the married couple saves the after-tax money that they would have spent on, for instance, child daycare.¹³⁹ Further, this one-earner marriage also allows the spouse breadwinner to work longer hours and relax when he or she comes home, while the other spouse takes care of “trivial stuff.”¹⁴⁰

Single mothers have fewer opportunities to derive imputed income.¹⁴¹ Alternatively, if they try to do everything by themselves

¹³⁵ An oft-quoted definition of imputed income is: “a flow of satisfactions from durable goods owned and used by the taxpayer, or from goods and services arising out of the personal exertions of the taxpayer on his own behalf.” Donald B. Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514, 514 (1943). In other words, imputed income refers to money a taxpayer saves by providing services for his own household; imputed income is not taxable, even though it would be taxable income were he to offer such services on the market.

¹³⁶ Although the Code does not explicitly exclude imputed income from taxable income, it has long been considered to be nontaxable. *See, e.g.,* *Morris v. Comm’r*, 9 B.T.A. 1273 (1928). Whether and how imputed income, and particularly that earned by stay-at-home spouses, should be taxed is a topic of academic debate. *See, e.g.,* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975) (discussing the failure to tax imputed income); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (exploring taxation of imputed income from a feminist perspective). Three major reasons often offered for not taxing imputed income are that “it is administratively difficult to value”; that “it is viewed as inconsequential for determining taxpayers’ ability to pay”; and that “to include imputed income in the tax base would be inconsistent with American values that require limited governmental interference with an individual’s private life.” Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307, 358 (1998).

¹³⁷ *See supra* note 123 (discussing nontaxation of imputed rental income).

¹³⁸ Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109 (2011).

¹³⁹ To be sure, the child care tax credit is not available to married couples where one spouse stays at home as caretaker. *See id.* at 175 (“[F]amily tax breaks targeted to care for dependents tend to be substantially less generous than the income-splitting benefit to family care for affluent breadwinners.”).

¹⁴⁰ *See id.* at 139 (pointing out additional benefits of the one-earner marriage model that are not monetized).

¹⁴¹ Of course, other individuals (for example, single individuals with no dependents, and married individuals in two-earner households) share the same dilemma, and various groups benefit from nontaxation of imputed income. *See* Bittker, *supra* note 136, at 1426 (pointing out that nontaxation of imputed income benefits an array of individuals, not just couples in

(or, more likely, simply cannot afford to outsource the labor), they are left with much less time for rest. This highlights the ways in which exemption of imputed income from the tax base disadvantages single householders financially.¹⁴² It would not be surprising if the fact that single householders have to take care of household matters outside of work affected their productivity at work. Furthermore, excluding at-home child care services from income has significant class, gender, and race implications.¹⁴³

In summary, the tax code excludes a large portion of single mothers from a number of tax expenditure provisions. Low-income single mothers like Ethel do enjoy a negative income tax rate, since they receive EITC refunds and, to a lesser extent, CTC refunds. Ethel, earning \$25,400 a year, receives a check of \$5714. Anna and John, earning \$78,700, paid \$5347 in income tax. The children- and homeownership-related deductions and credits reduced their tax liability by \$3635. Single mothers, who statistically earn much less than other parents, have to provide care for their children on much less after-tax income.

III

PROPOSAL FOR REFORM

In response to the economic reality of single mothers discussed in Part I and features of the tax code discussed in Part II, this Part proposes that the CDCTC be made refundable. Quality child care is

one-breadwinner marriages); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1001–05 (1993) (discussing how “[t]he failure to tax imputed income contributes to a bias against labor force participation by secondary earners”). But Anna and John likely earn more imputed income together, due to imputed rental income, *supra* note 123, and the fact that they can cooperate on household activity. See Bittker, *supra* note 136, at 1426 (“[E]ven if both spouses are employed, they may derive more untaxed income from household activity because they can cooperate—one can hold the ladder while the other is painting the ceiling, etc.—than two unattached individuals who live alone.”).

¹⁴² See McCluskey, *supra* note 138, at 139 (discussing disparate effects of the imputed income provision on married and unmarried taxpayers).

¹⁴³ See Fellows, *supra* note 136, at 386 (noting that “substantially higher salaries and wages paid to white married men places them in a better financial position to forgo their wives’ waged earnings and enjoy the tax-free benefits of her child-care services” and arguing for an unlimited tax deduction to rectify this wrong); Michael A. Johnson, Note, *A Gap in the Analysis: Income Tax and Gender-Based Wage Differentials*, 85 GEO. L.J. 2287, 2299–300 (1997) (“[T]he nontaxation of imputed income appears to be a factor in maintaining the status quo of gendered division of labor within the household and gendered wage differentials in the labor market.”).

enormously expensive.¹⁴⁴ Single mothers need child care, either paid or unpaid, in order to work outside of the home. Further, the lack of child care options prevents single mothers from pursuing jobs, especially full-time jobs.¹⁴⁵ The CDCTC should be made refundable so that single mothers can obtain gainful employment without sacrificing quality care for their children.

A. *Proposal: Fully Refundable Child Care Credit*

In addition to making the CDCTC refundable, it should be structured to incentivize low-income taxpayers to utilize child care providers that meet state regulations and quality standards. The CDCTC is now one of the major ways in which the tax code supports child-rearing.¹⁴⁶ A refundable CDCTC is good policy for two reasons: It will recognize the opportunity cost of single mothers earning a living (time when the mother is not able to care for children), and it will provide incentives and resources for better childrearing.¹⁴⁷ I address these two policy goals in turn.

If the CDCTC is supposed to account for unreimbursed business expenses, why aren't child care expenses treated like other employment-related expenses? An oft-heard rationale is that family costs are not deductible.¹⁴⁸ But child care costs fall upon single parents and second-earner spouses, not on primary earners whose spouses can provide care for free. A single mother has to find a family

¹⁴⁴ See *infra* notes 154–57 and accompanying text (discussing high costs of child care). For further discussion on the child care costs borne by workers, see Noah D. Zatz, *Supporting Workers by Accounting for Care*, 5 HARV. L. & POL'Y REV. 45, 46 (2011).

¹⁴⁵ The General Accounting Office reports that “reducing child care costs increases the likelihood that poor, near-poor, and nonpoor mothers will work.” U.S. GOV'T GEN. ACCOUNTING OFFICE, CHILD CARE SUBSIDIES INCREASE LIKELIHOOD THAT LOW-INCOME MOTHERS WILL WORK 2 (1994).

¹⁴⁶ See Kornbluh & Homer, *supra* note 36, at 87 (“The personal exemption for dependents was once the largest single source of federal spending on children. In 1960, it provided sixty-five percent of all monies spent on children. In recent years, the percentage has declined to sixteen percent.”). *Id.* at 87. “Until 1954 no provision in the Internal Revenue Code specifically allowed a tax benefit for child care expenses.” Samansky, *supra* note 87, at 258. It then became permissible to claim a deduction on employment-related child care costs. See Act of Aug. 16, 1954, Pub. L. No. 83-591, § 214, 68A Stat. 3, 70–71. The federal tax then replaced the deduction with a child and dependent care tax credit in 1976. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 504, 90 Stat. 1520, 1563–66. The current federal CADC credit is found at 26 U.S.C.A. § 21 (West 2010).

¹⁴⁷ Cf. Lawrence Zelenak, *The Income Tax and the Costs of Earning a Living*, 56 TAX L. REV. 39 (2002) (discussing in general how employment-related costs are not fully deductible).

¹⁴⁸ See I.R.C. § 262(a) (2006) (“[N]o deduction shall be allowed for personal, living, or family expenses.”). For an example of this familiar thinking, see *Smith v. Comm’r*, 40 B.T.A. 1038 (1939) (finding that payments to nannies were not deductible as business expenses).

member or a neighbor to take care of her preschool children,¹⁴⁹ or otherwise pay for a babysitter or day care services. The practice of relying on family help is more common among single-mother households¹⁵⁰ and low-income families more broadly.¹⁵¹ These informal networks are no panacea; they may break down at any time, leaving children and parents in a bind.¹⁵² The quality of care in such arrangements is inconsistent.¹⁵³

The alternative, non-family-based child care, is expensive. Census data shows that on average, working single mothers incur child care expenditures of \$112 per week.¹⁵⁴ The number is higher for working single mothers whose children are under five years old: approximately \$132 per child per week,¹⁵⁵ or \$6600 per year.¹⁵⁶ Nationally, center-based child care for a four-year-old child costs 31% of the median

¹⁴⁹ “[T]his is not a realistic option for most families since few parents have extended family members who are available to help with child care on a daily basis.” Debbie Kaminer, *The Child Care Crisis and the Work-Family Conflict: A Policy Rationale for Federal Legislation*, 28 BERKELEY J. EMP. & LAB. L. 495, 503 (2007). *But see* LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, WHO’S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2005/SUMMER 2006, at 5 (2006), <http://www.census.gov/prod/2010pubs/p70-121.pdf> (reporting that grandparents looked after 30% of preschoolers of working mothers, whereas 25% of fathers took care of them). Since 1985, the percentage of households with working mothers that rely on family-provided child care has been consistently about 50%. *Id.* at 8 tbl.3 (2006).

¹⁵⁰ In 2010, 56% of children of working mothers who were not married were cared for by family members. U.S. CENSUS BUREAU, SURVEY OF INCOME AND PROGRAM PARTICIPATION (SIPP), PRIMARY CHILD CARE ARRANGEMENTS OF PRESCHOOLERS UNDER 5 YEARS OLD LIVING WITH EMPLOYED MOTHERS BY SELECTED CHARACTERISTICS: SPRING 2010, <http://www.census.gov/hhes/childcare/data/sipp/2010/tab02A.xls>.

¹⁵¹ *See id.* (showing that relatives cared for 63% of children under five of working mothers living in households with monthly income of \$1500–\$2999). This number takes account of children living with married as well as unmarried working mothers.

¹⁵² Kornbluh & Homer, *supra* note 36, at 93.

¹⁵³ *See* CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE: 2012 REPORT 8 (2012), available at http://www.naccra.org/sites/default/files/default_site_pages/2012/cost_report_2012_final_081012_0.pdf (expressing concerns about informal child care arrangements with respect to “safety, health and school readiness”); *see also* Giselle Sered, *Day Care and Tax Policy*, 12 AM. J. TAX POL’Y 159, 173 (1995) (noting that even “licensed family day care quality varies more than organized day care quality”). *But see Into the Mouths of Babes*, *supra* note 3, at 1321-25 (arguing that many Latino families prefer family-based care for their children for cultural reasons).

¹⁵⁴ *Table 6: Average Weekly Child Care Expenditures of Families with Employed Mothers that Make Payments, by Age Groups and Selected Characteristics: Spring 2010*, U.S. CENSUS BUREAU (2011), <http://www.census.gov/hhes/childcare/data/sipp/2010/tab06.xls>.

¹⁵⁵ *See id.* (reporting that widowed, separated, or divorced mothers spent \$145 per week and mothers who had never married spent \$125). The \$132 figure is a weighted average of the two.

¹⁵⁶ Assuming she works fifty weeks per year, $\$132 \times 50 = \6600 .

income for a single mother.¹⁵⁷ Yet as Part II.B demonstrated, low-income single mothers often do not reap the CDCTC's benefits due to its lack of refundability. Single mothers often work, and as a result have less time to care for their children. The result is an increased need for costly child care. Refundability in the CDCTC will acknowledge the problem and assist working single mothers in meeting this need.

Refundability will also promote socially desirable activity by incentivizing single mothers to secure quality child care. Batchelder and others argue that uniform refundable credits have strong potential to increase efficiency¹⁵⁸ in promoting socially valued activities via tax expenditures.¹⁵⁹ Child care is socially desirable for two reasons: First, it allows parents to work outside the home, and second, child care can facilitate early education. But as seen in Part II, exclusions and deductions are unlikely to affect the behavior of low-income taxpayers.¹⁶⁰ Going back to Ethel, our hypothetical single mother, helps illustrate this point. The realized portion of Ethel's child care tax credit currently amounts to \$475.¹⁶¹ If the credit were refundable, she would receive an additional \$1265 to spend on child care. Moreover, it is among this economic group that quality and choice in child care are most lacking.¹⁶²

Refundable child care tax credits are not new—they currently exist at the state level. Of twenty-eight states that offer child care income tax credits or deductions to resident parent taxpayers,¹⁶³

¹⁵⁷ See CHILD CARE AWARE OF AM., *supra* note 153, at 27.

¹⁵⁸ Efficiency in this context means that a tax subsidy causes the consumer to fully internalize the benefits of his or her behavior, which results in the optimal level of behavior, in this case securing quality child care.

¹⁵⁹ See Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 43 (2006) (arguing that uniform refundable credits are more efficient than other tax incentives because such a credit “minimizes the deadweight loss associated with errors in an incentive’s application”).

¹⁶⁰ See, e.g., Bittker, *supra* note 136, at 1451–52 (noting that a refundable credit for dependents, as opposed to the existing personal exemption, would “benefit nontaxpayers as well as those with a positive tax liability”).

¹⁶¹ See *supra* note 119 and accompanying text (demonstrating Ethel's child care tax credit calculation).

¹⁶² See CHILD CARE AWARE OF AM., *supra* note 153, at 33–34 (noting that many working parents are forced to choose between inadequate and unaffordable child care options, and advocating federal support to make child care more affordable).

¹⁶³ The National Women's Law Center has identified these states as follows: “Arkansas (two provisions), California, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana (three provisions), Maine, Maryland (two provisions), Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon (two provisions), Rhode Island, South Carolina, Vermont (two provisions), and Virginia.” NAT'L WOMEN'S LAW CTR., *supra* note 113, at 14 n.30. “Fourteen states have a personal income tax but no child care credit provision—

thirteen have made them refundable.¹⁶⁴ The maximum value of the credit available to single mothers ranges from Arkansas's \$420 to New York's \$2310 per child per year.¹⁶⁵ Oregon's Working Family Child Care Tax Credit targets low-income families, and credits at most 40% of all eligible expenses.¹⁶⁶

I also propose that the new CDCTC should incentivize parents to use quality child care. Maine offers an interesting example of how this proposal could work. The Maine dependent care state tax credit is equal to 25% of the federal credit for child and dependent care expenses, but the credit doubles if the expenses are related to a quality child care provider.¹⁶⁷ The credit is also refundable up to \$500. "A Maine taxpayer who enrolls a child in a child care center or home with a Quality Certificate is eligible for a double child care tax credit on their state income tax return."¹⁶⁸ While small, the credit offers a good example of a tax incentive that will encourage single mothers not only to work but also to find quality care for their children.

A refundable child care tax credit is facially neutral in that it does not differentiate between single mothers and other parents. Still, making the credit refundable would benefit single mothers by correcting the de facto inequities that exist in today's nonrefundable CDCTC system.¹⁶⁹

Alabama, Arizona, Connecticut, Illinois, Indiana, Michigan, Mississippi, Missouri, New Jersey, North Dakota, Pennsylvania, Utah, West Virginia, and Wisconsin." *Id.* The nine remaining states either have no personal income tax (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming), or limit income taxes to some kinds of nonwage personal income (New Hampshire and Tennessee). *Id.* Mississippi, one of the states with no child and dependent care tax credit, was the state with the highest percentage of single-parent families (47%) in 2011. *See Children in Single-Parent Families*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=106&dtm=430> (last visited Oct. 17, 2013).

¹⁶⁴ They are Arkansas, California, Colorado, Hawaii, Iowa, Louisiana, Maine, Minnesota, Nebraska, New Mexico, New York, Oregon, and Vermont. *See NAT'L WOMEN'S LAW CTR.*, *supra* note 113, at 27 & n.83.

¹⁶⁵ *See id.* at 16 n.44.

¹⁶⁶ STATE OF OREGON, LEGISLATIVE REVENUE OFFICE, IMPACT OF 1997 LEGISLATION - EARNED INCOME AND WORKING FAMILY CHILD CARE TAX CREDITS IN OREGON 3 (2004), available at http://www.leg.state.or.us/comm/lro/rr6_04earnedincome_taxcredit.pdf.

¹⁶⁷ ME. REV. STAT. ANN. tit. 36, § 5218 (2010); *see also* ME. DEP'T OF HEALTH AND HUMAN SERVS., *Child Care Tax Credits*, <http://www.maine.gov/dhhs/ocfs/ec/occhs/taxcredits.htm> (last visited Oct. 18, 2013).

¹⁶⁸ ME. DEP'T OF HEALTH AND HUMAN SERVS., *Quality Certificates*, <http://www.maine.gov/dhhs/ocfs/ec/occhs/quality.htm>; *see also* ME. DEP'T OF HEALTH AND HUMAN SERVS., *Child Care Tax Credits*, http://www.maine.gov/dhhs/ocfs/ec/occhs/qrs_application_manual.pdf (describing the quality rating system, and listing comprehensive criteria for certification).

¹⁶⁹ For instance, our hypothetical married couple, Anna and John, would not see any difference in their child care tax credit, because their tax liability is high enough to invoke the full credit.

B. Counterarguments and Solutions

In this section I discuss possible counterarguments and alternative solutions to my proposal. First is the argument that a refundable credit is a costly increase in government spending. Based on the available data on the number of filings claiming the credit, I estimate the national cost of making the CDCTC refundable to be under \$2 billion.¹⁷⁰ While this is not negligible, it is less than 2% of homeownership-related tax expenditures.¹⁷¹

Second, there are federalism concerns: Some scholars have argued that child care is a question that should be left to the states.¹⁷² In response, some argue that a federal policy is desirable because uniformity across the states is necessary.¹⁷³ But even those scholars arguing for a bigger role for the states in child care *regulation* do not necessarily oppose federal *subsidies* for child care.¹⁷⁴ As the fiscal health of state governments has deteriorated, the CDCTC has come under attack in many states despite its relatively small costs to the states' fiscal balances. Examples from Kansas and California are alarming and illustrate this point clearly.

In May 2012, Kansas Governor Sam Brownback enacted Senate Substitute for House Bill 2117,¹⁷⁵ making "revolutionary changes" in the Kansas tax laws.¹⁷⁶ As part of the overhaul, Kansas repealed its

¹⁷⁰ In 2012, just under 1.5 million tax returns below the \$40,000 income level claimed the benefit and received \$770 million in nonrefundable credits. JCT REPORT, *supra* note 93, at 45 tbl.3 (reporting that in 2012, taxpayers below the \$40,000 income level filed 1,380,000 returns claiming the CDCTC, amounting to \$770 million). Assuming, for the sake of simplicity, that they all had two children and qualified for a \$1800 credit per return (the actual credits will range from \$1200 to \$2100), the additional expenditure of refunding the balance would be about \$1.9 billion. [$\$1800 \times 1.5 \text{ million}$] - \$770 million = \$1.9 billion.

¹⁷¹ See *supra* note 125 and accompanying text.

¹⁷² See, e.g., Edward F. Zigler, *Addressing the Nation's Child Care Crisis*, 59 AM. J. ORTHOPSYCHIATRY 484, 487 (1989) (basing an argument for state control of child care on the fact that, like education, child care does not implicate a constitutional right); cf. William T. Gormley, Jr., *Day Care in a Federal System*, SOC. SERV. REV. 582 (1991) (arguing that direct regulation of day care programs is better left to the states, since the case for federal regulation is weak on factors like interstate externalities, redistribution, economies of scale, and state experimentation).

¹⁷³ See Dixon, *supra* note 110, at 659 (arguing for federal regulation so that families may move across state lines without worrying about child care policies); see also Kaminer, *supra* note 149, at 534–36 (arguing that the federal government is the only practical source of major child care funding).

¹⁷⁴ See Gormley, *supra* note 172, at 589–91 (arguing for federal subsidies for day care, mainly because of the existing prominence of such subsidies and their ability to support the redistributive goals of the federal tax code).

¹⁷⁵ Act of May 22, 2012, ch. 135, 2012 Kan. Sess. Laws 1041.

¹⁷⁶ See Martin B. Dickinson et al., *The Revolutionary 2012 Kansas Tax Act*, 61 U. KAN. L. REV. 295, 295 (2012) (describing significant changes to the state tax code); see also *Promoting High-Quality Care for Kansas Kids*, KANSAS ACTION FOR CHILDREN, <http://kac>.

child and dependent care credit as of the 2012 tax year.¹⁷⁷ In calendar year 2011, over 66,000 Kansas households utilized the state Child and Dependent Care Credit.¹⁷⁸ The expenditure cost the state \$8.7 million in 2011.¹⁷⁹ The cut was one of the many such measures implemented to make up for the revenue loss caused by the overhaul's concurrent tax break.¹⁸⁰ No debate on the record took place in either chamber of the legislature about the credit's elimination.

California is another state that scaled back on the child care tax credit. In 2011, the California legislature eliminated the state's child and dependent care tax credit¹⁸¹ for most low-income families by making it nonrefundable.¹⁸² The breakdown of the credit claimed by different income groups shows that even before the change, low-income families received limited benefits from this credit provision.¹⁸³ Despite California's high poverty rate (23.5% as opposed to the

org/wp-content/themes/KAC/images/PDFs/113-Child_Dependent_Care_Credit_brief.pdf (last visited Oct. 17, 2013) (calling for the legislature to reinstate the tax credit).

¹⁷⁷ This meant the loss of a 25% additional credit for child care expenses for Kansas taxpayers with children. See sec. 40, 2012 Kan. Sess. Laws at 1088 (repealing Kan. Stat. Ann. § 79-32,111a) (2012); Kan. Stat. Ann. §§ 79-3633 to -3639a, 79-4501 (1997 & Supp. 2011); see also Brent D. Wistrom, *Child Advocates Seek Restoration of Tax Credit*, WICHITA EAGLE (Feb. 13, 2013), <http://www.kansas.com/2013/02/13/2674518/child-advocates-seek-restoration.html> (reporting elimination of the credit and advocates' efforts to restore it).

¹⁷⁸ NICK JORDAN, KANSAS DEP'T OF REVENUE, TAX EXPENDITURE REPORT: CALENDAR YEAR 2011, at 6 (2011), available at <http://www.ksrevenue.org/pdf/taxexpreport.pdf>.

¹⁷⁹ *Id.*

¹⁸⁰ See Dickinson, *supra* note 176, at 99, 297 (providing the tax rate for each tier both before and after the Kansas tax overhaul, and detailing the credits and deductions that were repealed).

¹⁸¹ California established its credit in 2000, as the state's only refundable tax credit. See CAL. REV. & TAX CODE § 17052.6 (West 2012) (providing that a CDC tax credit shall be allowed for taxable years beginning on or after January 1, 2000); see also STATE OF CAL. FRANCHISE TAX BD., LAW SUMMARY: CALIFORNIA CHILD AND DEPENDENT CARE EXPENSES (CDC) CREDIT (2012), available at https://www.ftb.ca.gov/law/summaries/CDC_Credit.pdf (summarizing the requirements to qualify for the credit both before and after 2011); CAL. BUDGET PROJECT, REFUNDABLE TAX CREDIT AVAILABLE FOR FAMILIES WITH CHILD CARE EXPENSES 1 (2002), available at <http://www.cbp.org/pdfs/2002/020123TaxCredit.pdf> (describing the credit as "California's only refundable tax credit").

¹⁸² S.B. 86, 2011–2012 Sen., Reg. Sess. (Cal. 2011) ("This bill would make [the refundable dependent care expenses] nonrefundable."); see also *Changes to Form 3506, Child and Dependent Care Expenses Credit*, STATE OF CAL. FRANCHISE TAX BD. (Jan. 2012), https://www.ftb.ca.gov/professionals/taxnews/2012/January/Article_3.shtml; CA. REV. & TAX § 17052.6.

¹⁸³ The percentages of returns allowing credit by adjusted gross income class in 2008 were as follows: less than \$10,000 (2.4%); \$10,000 to \$19,999 (8.8%); \$20,000 to \$49,999 (42.9%); \$50,000 to \$99,999 (45.8%); over \$100,000 (0.0%). STATE OF CAL. FRANCHISE TAX BD., CALIFORNIA INCOME TAX EXPENDITURES: COMPENDIUM OF INDIVIDUAL PROVISIONS 27 (2011), available at https://www.ftb.ca.gov/aboutftb/Tax_Expenditure_Report_2011.pdf.

national average of 15.8%,¹⁸⁴ including a childhood poverty rate that has mirrored the high national average),¹⁸⁵ less than 20% of the tax expenditure went to low-income families with an adjusted gross income of \$19,999 or less.¹⁸⁶ These examples suggest the goal of making child care available to low-income children is better served by implementing a refundable tax credit at the federal level.

Some may also object that tax relief for single mothers amounts to “incentivizing” single motherhood, which they believe simply encourages the outcomes profiled in Part I. That is, detractors would say that my proposal would make it more attractive for single mothers to remain unmarried. Discourse on single motherhood remains rife with moral and normative judgments, especially against single mothers who have never been married.¹⁸⁷ Stereotypical assumptions about single mothers in the poverty context lurk in the background.¹⁸⁸

¹⁸⁴ See U.S. CENSUS BUREAU, *THE RESEARCH SUPPLEMENTAL POVERTY MEASURE: 2011*, 12 tbl.4 (2011), <http://www.census.gov/prod/2012pubs/p60-244.pdf> (displaying census data showing an estimated nationwide poverty rate of 15.8% in 2010). The supplemental poverty measure, the formula on which the report is based, is different from the traditional poverty rate calculation in that it takes into account additional money inflows (for example, food stamps and the earned income tax credit) and outflows (for example, child care expenses and child support payments). Using the traditional measure (what the Census Bureau calls the “official rate”), California was much closer to the national average of 15.0%, at 16.3%. See *id.*

¹⁸⁵ SUZANNE MACARTNEY, U.S. CENSUS BUREAU, *CHILD POVERTY IN THE UNITED STATES 2009 AND 2010: SELECTED RACE GROUPS AND HISPANIC ORIGIN* 9 tbl.1 (2011), <http://www.census.gov/prod/2011pubs/acsbr10-05.pdf> (providing data demonstrating that 19.9% of California children were below the poverty line in 2009, and 22% were below the poverty line in 2010—comparable to the national rates of 20% in 2009 and 21.6% in 2010).

¹⁸⁶ See STATE OF CAL. FRANCHISE TAX BD., *supra* note 183 (reporting that \$22.9 million out of \$137.5 million went to the income group).

¹⁸⁷ See Patricia Cooper, “A Masculinist Vision of Useful Labor”: *Popular Ideologies About Women and Work in the United States, 1820 to 1939*, 84 KY. L.J. 827, 860 (1996) (exploring the historic development of implicit and explicit discriminatory attitudes against women in the workplace). Two recurring themes appear to underlie many statements opposing benefits for single mothers: (1) Single mothers are on welfare, which in turn makes them lazy; and (2) single mothers shouldn’t look to the government for help when their predicament results from their choice to remain unmarried. See, e.g., 141 CONG. REC. H416, (daily ed. Jan. 20, 1995) (statement of Rep. Funderburk) (“We can no longer afford a government which subsidizes single mothers who continue to have more children.”); see also Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 68 (1996) (arguing that government social security programs divide society into deserving and undeserving contingents, and noting that “[t]he undeserving include . . . single mothers who are either divorced or never married rather than widowed”). However, the blame is not always placed on the single mother; some policy organizations do focus on the role of absent fathers. For instance, the National Fatherhood Initiative is devoted to preventing father absence through public awareness and education. NATIONAL FATHERHOOD INITIATIVE, <http://www.fatherhood.org/> (last visited Aug. 16, 2013).

¹⁸⁸ See Cooper, *supra* note 187, at 860 (“For many whites, there is only one image of welfare—a teenaged black woman with children.”); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 281–82 (1991) (discussing how the public

If a poor mother is not single as a result of death (or, perhaps, divorce), she is deemed a “bad” mother. Therefore the public may not mind, or may even approve, tax codes that deny benefits to single mothers.¹⁸⁹

discourse on welfare for single mothers often turns to blaming them for their plight); Edward J. McCaffery, *The Burdens of Benefits*, 44 VILL. L. REV. 445, 449 (1999) (“A moral language is invoked to blame the beneficiaries for their very non-core status. Why aren’t ‘they’ married?”); see also 141 CONG. REC. S13524-01, 1995 WL 542543 (statement of Sen. Duncan Faircloth) (proposing to exclude households in which there are two generations of single mothers from federal cash aid programs because welfare incentivizes out-of-wedlock births). For analysis of governmental promotion of marriage, see Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 820 (1994). Minow discusses what she calls “bridefare,” welfare provisions that incentivize recipient mothers to marry the father of her child, and cites Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (coining the term “bridefare,” and noting that “the idea behind all of these projects is the same: only those women and children who conform to majoritarian middle-class values deserve government subsistence benefits”). See also Wade F. Horn, *Wedding Bell Blues: Marriage and Welfare Reform*, 19 BROOKINGS REV. 39, 42 (arguing that the current welfare system is flawed in that it does not successfully promote traditional marriage, and proposing alternative welfare incentives, including monetary incentives, for childbirths that take place within marriage); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1052–53 (2004) (noting that debates surrounding the reauthorization of TANF have directed even more attention to “the state’s role in encouraging marriage among welfare recipients and low-income parents”).

¹⁸⁹ See Zelenak, *supra* note 7, at 38 (“[T]he social norm seems to be that people should be married most of their adult lives. Long-term singles may be looked upon as misfits, so that if the tax system penalizes those who *choose* to be single, most people may not mind, or may even approve.”). For one example of this debate in popular media, see Amy Davidson, *Megyn Kelly Dominates on Fox*, NEW YORKER (May 31, 2013), <http://www.newyorker.com/online/blogs/closeread/2013/05/megyn-kelly-dominates-on-fox.html> (discussing a debate between Fox News anchor Megyn Kelly and her male coworkers regarding the role of women in the workplace). Professor Zelenak argues that the 1969 change that favored singles came about because of the notion of “deserving” singles. Zelenak, *supra* note 7, at 38. World War II had left a shortage of men, creating a large cohort of women who were unmarried through no fault and no choice of their own. Zelenak claims that contemporary singles are deemed undeserving because they lack such extenuating factors. Similar arguments might be made regarding low-income taxpayers and children. For instance, the amount of EITC receivable does not increase proportionally as the number of children in a household increases. See I.R.C. § 32(c) (2006). In this regard, some argue, the EITC may reflect the embedded notion that “poor people will have children if it means they can get additional government dollars.” See Brown, *supra* note 76, at 819. *But see* Zelenak, *supra* note 72, at 312 n.54 (noting that no legislative record reveals why Congress did not provide an additional credit for families with more than two children). Although Professor Brown’s point still holds today, the Tax Relief and Job Creation Act signed into law in December of 2010 temporarily expanded the credit for workers with three or more qualifying children. *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, INTERNAL REVENUE SERV., <http://www.irs.gov/Individuals/EITC-Income-Limits,-Maximum-Credit—Amounts-and-Tax-Law-Updates> (last visited Oct. 17, 2013). So the earned income thresholds for single mothers were \$45,060 with three or more qualifying children, about \$3000 higher than with two qualifying children. *Id.* The increase is still not proportional. The American Tax Relief Act of 2012 retained the expanded credit

This line of thinking stems from the idea that being a single mother is a consumption choice. This may well be the case for many women. However, those who make this assumption are likely ignoring the multiple systemic factors working against marriage. First, the tax system itself discourages low-income individuals from marrying by instituting a very strong tax bias against having a second worker in lower-income households.¹⁹⁰ Second, marriage is not an economically realistic option for everyone. As early as in 1987, William Julius Wilson argued that the decline in marriage and rise in single parenthood among urban African Americans was a direct consequence of the declining economic fortunes of young African-American men.¹⁹¹ High rates of unemployment and incarceration meant that the local dating pool was populated by unmarriageable men—and the result was that African-American women chose to live independently.¹⁹² Marriage is also not an option for many men in lower income brackets.¹⁹³

Even if one still believes that remaining single is a matter of personal choice and those who do not exercise the option of marriage should be penalized, there is no comparable argument for penalizing children born to unwed parents. Americans may not agree about why poor people are poor, but they generally do agree that equal opportunity should be a priority.¹⁹⁴

for taxpayers with three or more qualifying children through December 31, 2017. See American Taxpayer Relief Act of 2012, *supra* note 51, § 103(c).

¹⁹⁰ See McCAFFERY, *supra* note 7, at 12 (arguing that the tax schedule for married couples is biased against stable two-earner family structures among the poor, and in favor of traditional single-earner households).

¹⁹¹ See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); cf. Angela Stanley, *Black, Female and Single*, N.Y. TIMES, Dec. 10, 2011, at SR1, SR6 (critiquing the popular assumption that most Black women will not marry, and discussing structural factors which make marriage more difficult among Black men and women).

¹⁹² Stanley, *supra* note 191, at SR6.

¹⁹³ See Michael Greenstone & Adam Looney, *The Marriage Gap: The Impact of Economic and Technological Change on Marriage Rates*, THE BROOKINGS INSTITUTE, <http://www.brookings.edu/blogs/jobs/posts/2012/02/03-jobs-greenstone-looney> (last updated Feb. 3, 2012) (finding a positive correlation between the rate of poverty and the rate of marriage, and analyzing the implications of this phenomenon).

¹⁹⁴ See Larry M. Bartels, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 131 tbl.5.1 (2010) (displaying data indicating that 60.2% of survey participants “agree strongly” with the proposition that “our society should do whatever is necessary to make sure that everybody has an equal opportunity to succeed”). Although such an ideal may be popular, a pro-children policy does not always garner society-wide support. See, e.g., Nancy Folbre, *Credits for Children*, N.Y. TIMES (July 16, 2012, 6:00 AM), <http://economix.blogs.nytimes.com/2012/07/16/credits-for-children/> (“Many factors, including racial and ethnic diversity, anti-immigrant sentiment and high income inequality probably help explain this lack of social solidarity [for state-supported child-rearing].”).

Furthermore, there is no dispute that childhood poverty costs society dearly. Research demonstrates that children face better educational and life outcomes when they participate in high-quality early childhood development and educational programs.¹⁹⁵ Children growing up in poverty are more likely to commit crimes and suffer poor health later in their lives.¹⁹⁶ One study estimates that children living in poverty cost the U.S. economy \$500 billion a year, or about 4% of GDP.¹⁹⁷ As such, the potential benefits of increased support for young children outweigh the purported social costs of my proposal.

Another likely objection is that direct spending on child care is preferable to indirect tax benefits.¹⁹⁸ The federal government already has a direct spending program that subsidizes child care for children growing up in low-income families.¹⁹⁹ The Child Care and Development Fund is a grant program that appropriates funds to the states for improving and expanding the availability of day care for children under thirteen and in low-income families.²⁰⁰ However, it does not reach all children living in poverty. The Department of Health and Human Services estimates that only 17% of eligible children receive child care subsidies.²⁰¹ Further, nearly one in five children who receive assistance is in unlicensed care.²⁰²

¹⁹⁵ Cf. Allison Harper, *Building on Traditional Lawyering by Organizing Parent Power: An Emerging Dimension of Early Childhood Advocacy*, 14 GEO. J. ON POVERTY L. & POL'Y 339 (2007) (arguing that support for child care should be implemented in a manner that directly involves families and communities).

¹⁹⁶ See, e.g., Harry J. Holzer et al., *The Economic Costs of Poverty in the United States: Subsequent Effects of Children Growing Up Poor* (Inst. for Research on Poverty, Discussion Paper No. 1327-07) (2007), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp132707.pdf> (exploring the connection between childhood poverty and health, earnings, and criminal propensity later in life).

¹⁹⁷ See *id.* at 2.

¹⁹⁸ For example, Professor Dixon argues for a national public child care system, calling it "the only system that will allow daycare to be sufficiently affordable, reliable, and available to enable all women to work." Dixon, *supra* note 110, at 572.

¹⁹⁹ See Act to Amend the Juvenile Justice and Delinquency Prevention Act of 1984, Pub. L. No. 102-586, § 8(c)(1), 106 Stat. 5036, codified as amended at 42 U.S.C. §§ 9858–9887 (2006). Another example of a direct subsidy for child care is the Head Start program, whereby the federal government provides funding to state and local providers of early educational opportunities for disadvantaged children. But because Head Start is a half-day program, it does not meet the needs of many working single mothers. See Kaminer, *supra* note 149, at 506.

²⁰⁰ *What We Do*, OFFICE OF CHILD CARE, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/occ/about/what-we-do> (last visited Oct. 18, 2013) (describing the basic parameters of the federal assistance program which aims to make child care more affordable).

²⁰¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., ASPE ISSUE BRIEF: ESTIMATES OF CHILD CARE ELIGIBILITY AND RECEIPT FOR FISCAL YEAR 2006 (2010), available at <http://aspe.hhs.gov/hsp/10/cc-eligibility/ib.pdf>.

²⁰² CHILD CARE AWARE OF AM., *supra* note 153, at 29.

My proposal is the more politically feasible one, since the United States has long used the tax code as a vehicle for incentivizing desirable social and economic behavior.²⁰³ By limiting the scope of the program to working parents who file taxes, the proposal avoids the politically fraught label of “welfare.”²⁰⁴ This tax benefit is also unlikely to incur substantial additional administrative costs, since low-income working families already file tax returns for the EITC.²⁰⁵ That credit is also already in the code, and therefore an extension will not require a new bureaucracy.²⁰⁶ Furthermore, embedding the benefit in the tax code will make it less susceptible to changes in the political climate.²⁰⁷

One caveat: Tax incentives like the one I propose may not influence individual single mothers’ decisions on whether to use paid child

²⁰³ See Tahk, *supra* note 110, at 67, 71 (noting that Congress has been relying increasingly on the tax code to implement social and regulatory programs, and taxpayers have grown habituated to the practice). The Affordable Care Act is a recent example of a major piece of social and regulatory legislation whose major elements took the form of tax code provisions. See *id.* at 68. Professor Tahk notes other similar examples in various fields of policy and regulation: the empowerment zone employment credit, I.R.C. § 1396 (2006) (incentivizing employers to hire individuals in economically distressed areas), the American Opportunity Tax Credit, I.R.C. § 25(a) (2006) (providing up to \$4000 tax credits for college-related expenses), the credit for electricity production from renewable resources, I.R.C. § 48 (2006). Professor Tahk’s Article offers a number of reasons a policymaker may pursue a tax code provision as opposed to a direct-spending program. See *id.* at 81–106 (arguing that tax-embedded programs are easier to legislate through Congress, they are more stable than their direct-spending counterparts, they grow more easily, and they have greater normative appeal); see also Dixon, *supra* note 110, at 562–63 (noting the difficulties Congress has experienced in passing child care legislation). A tax code provision may lack the expressive value of child care-focused legislation, however. See Kaminer, *supra* note 149, at 523 (emphasizing the importance of the message child care legislation would send to the public that the United States as a country supports child care).

²⁰⁴ Dennis J. Ventry, Jr., *Welfare by Any Other Name: Tax Transfers and the EITC*, 56 AM. U. L. REV. 1261, 1266–67 (2007) (discussing political unpopularity of “welfare”). That said, the proposed tax credit would not reach unemployed single mothers who need child care to look for work.

²⁰⁵ Lower administrative costs are often cited as an advantage of social-welfare programs through the tax code. See, e.g., *id.* at 1264–65 (2007) (noting lower administrative costs as one of the “structural advantages,” and reporting the EITC’s administrative costs to be below 2%, as opposed to 20–25% for the Food Stamps program).

²⁰⁶ See McCaffery, *supra* note 187, at 484 (“One advantage is that the EITC doesn’t require a separate bureaucracy to watch over it.”). Tax-transfer programs are also less intrusive than other social welfare programs because they do not require face-to-face interactions with administrators; cf. Ventry, *supra* note 204, at 1264 (noting that EITC recipients are not required to “interact with social welfare workers to initiate or continue receiving benefits”); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1873–74 (2005) (noting that EITC enforcement efforts are lax when compared with enforcement regimes for welfare benefits).

²⁰⁷ See *supra* note 203 (discussing why policymakers may prefer to embed spending programs in the tax code).

care service. Research has shown that the mortgage interest tax does not influence the decision of whether to buy a home; instead, it influences the size of the house purchased.²⁰⁸ This research casts doubt on the ability of tax credits to substantially influence consumer behavior.

CONCLUSION

Although facially neutral, the tax code favors the idealized “nuclear family” of married parents with children living in homes they own, and denies many benefits to single mothers. However, the number of American children who exist outside of that model is too great for policymakers and tax scholars to ignore. The challenges that face single mothers are exacerbated by the fact that the current U.S. tax system generally does little to remedy income inequality.²⁰⁹

This Note has proposed making the child care tax credit refundable. While this proposal will not cure all of single mothers’ ills, it will provide much-needed help to many single-mother families. Making the credit refundable at the federal level would also counter the ongoing changes at the state level, where a few states have already begun to cut back on child care credits. By making child care more affordable, the tax credit will not only promote work among single mothers, but will also give their children better opportunities for quality child care.

²⁰⁸ See Rebecca N. Morrow, *Billions of Tax Dollars Spent Inflating the Housing Bubble: How and Why the Mortgage Interest Deduction Failed*, 17 *FORDHAM J. CORP. & FIN. L.* 751, 755–88 (2012) (critiquing the mortgage interest deduction for its high cost and failure to achieve its asserted goals).

²⁰⁹ See generally CONG. BUDGET OFFICE, *AVERAGE FEDERAL TAX RATES IN 2007*, 6 tbl.1 (2010), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/115xx/doc11554/averagefederaltaxrates2007.pdf> (providing average federal tax rates by income tier).