

TAX ENFORCEMENT AT THE INTERSECTION OF SOCIAL WELFARE AND VULNERABLE POPULATIONS

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This Essay engages with Professor Bernadette Atuahene’s theory of stategraft in the context of tax administration and the role that the Internal Revenue Service (IRS) plays in implementing certain social welfare benefits, including the Earned Income Tax Credit (EITC). Specifically, it considers whether the IRS’s denials of the EITC to those who might otherwise be eligible and entitled to it constitutes a wrongful taking by the state or a violation of basic human rights. While this Essay concludes that denials of the EITC generally do not fit within Atuahene’s definition of stategraft, it highlights two particularly problematic concerns with modern EITC enforcement and frames those within the context of Professor Atuahene’s broader concerns about how state actions affect vulnerable populations.

One concern is the racially disparate EITC audit outcomes that have come to light. Though the IRS does not collect information on taxpayer race and ethnicity, a recent report found that, among all taxpayers claiming the EITC, Black taxpayers are statistically more likely to be audited than non-Black taxpayers. The other concern relates to the so-called two-year ban, which can be imposed by the IRS following a determination that a taxpayer wrongly claimed the EITC or Child Tax Credit due to reckless or intentional disregard of rules and regulations. Though the ban is not imposed frequently, this Essay highlights due process and fairness concerns related to this authority. This Essay concludes with brief remarks about the IRS’s enforcement priorities and efforts to curtail improper payment rates of refundable tax credits.

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INTRODUCTION

In 2012 and 2013, Rita Lopez lived with her two minor daughters trying to make ends meet in New York City.¹ Though not licensed as a cosmetologist, Ms. Lopez was a hairdresser who provided regular services at her apartment, mostly to neighbors and friends.² Her customers paid her cash.³ Ms. Lopez did not issue receipts or maintain contemporaneous business records, though she did report gross income from this business on her individual income tax return.⁴ Ms. Lopez’s reported annual income of approximately \$17,500 was below the poverty guideline for a household of three people.⁵ Ms. Lopez did not owe any federal income tax. To the contrary, for each year, Ms. Lopez claimed a federal income tax refund of approximately \$5,000.⁶ This refund arose because Ms. Lopez was entitled in each year to two refundable tax credits: the earned income tax credit (EITC)⁷ and the additional child tax

1. See *Lopez v. Comm’r*, T.C. Summ. Op. 2017-16, 2017 WL 1032772, at *1 (T.C. Mar. 16, 2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*; 2012 HHS Poverty Guidelines, DEP’T HEALTH & HUM. SERVS., <https://aspe.hhs.gov/2012-hhs-poverty-guidelines> [https://perma.cc/BFB6-8E3W] (providing that the poverty guideline for a household of three persons in 2012 was \$19,090).

6. *Lopez*, 2017 WL 1032772, at *1.

7. I.R.C. § 32.

credit (CTC).⁸ By design, these credits result in a large lump-sum tax refund intended to help low-income workers support their families.

Ms. Lopez's story illustrates the way in which Congress has tasked the Internal Revenue Service (IRS) as the administrator of social benefits that serve a critical function in the U.S. social safety net. Beginning in 1975, the Internal Revenue Code has provided for the distribution of social benefits to the lowest earners through the refundable EITC. When first introduced, the EITC was conceived of as an incentive for the poorest individuals to work instead of relying on welfare.⁹ As it has been amended and expanded over a period of decades, the EITC has grown into one of the largest federal antipoverty programs.¹⁰ Since 1997, the CTC, refundable in part, has supplemented this antipoverty function. Together these two credits provide a significant safety net to families. On occasion, Congress has used the IRS as the conduit to swiftly distribute other types of additional temporary stimulus payments to taxpayers. For example, in the early days of the COVID-19 pandemic, Congress turned to the IRS to deliver relief to the public via economic impact payments that were based on size of household.¹¹ During the pandemic, Congress also temporarily expanded the amount, scope, and availability of the CTC for tax year 2021 so that families would have extra relief during the economic disruption; the IRS was able to utilize its existing structures and database to make monthly advance payments to families.¹²

There are many advantages to tasking the IRS with this dual mission of revenue collection and social benefit administration,¹³ including high

8. I.R.C. § 24. The CTC is refundable only in part; the refundable portion is often distinguished as the "Additional Child Tax Credit." For simplicity, I refer to CTC throughout the Essay, using that term to encompass the refundable portion.

9. See S. REP. NO. 94-36, at 11 (1975) ("[T]he new credit, in effect, provides an added bonus or incentive for low-income people to work, and therefore, should be of importance in inducing individuals with families receiving Federal assistance to support themselves.").

10. For a detailed legislative history of the EITC, see MARGOT L. CRANDALL-HOLLYCK, CONG. RSCH. SERV., R44825, THE EARNED INCOME TAX CREDIT (EITC): A BRIEF LEGISLATIVE HISTORY (2018).

11. Three separate legislative acts authorized these payments: the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (CARES Act); the Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, 134 Stat. 3038; and the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (American Rescue Plan).

12. See American Rescue Plan Act of 2021, § 9611(a)(i). For 2021 only, the amount of CTC available per child was increased, the amount was fully refundable, the CTC was distributed in part in advance monthly payments, and the CTC was made available to all individuals with children, even those who did not earn income.

13. See MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM 28-36 (2019).

participation rates,¹⁴ inexpensive administration of the program, and positive taxpayer perceptions.¹⁵ I have written extensively about the disadvantages, which include enforcement challenges related to self-declaration as well as return preparer misconduct and predatory lending practices.¹⁶ Unfortunately, Ms. Lopez's story further provides an illustration of the enforcement challenges: the IRS selected her tax year 2012 and 2013 income tax returns for examination and disallowed the credits, determining deficiencies of \$5,048 and \$4,888, respectively.¹⁷ Ms. Lopez could not persuade the IRS during the examination process that she was entitled to the credits; she had to litigate her eligibility in the U.S. Tax Court. Though she ultimately prevailed as to eligibility by producing notarized written statements from her regular customers,¹⁸ the court determined that her net business income was only \$10,000 in each year,¹⁹ not \$17,000 as reported on her return, and her total EITC refund was adjusted downward accordingly.²⁰

This Essay engages with Professor Bernadette Atuahene's theory of stategraft in considering whether the IRS's denials of refundable credits to those who might otherwise be eligible and entitled to them constitutes a wrongful taking by the state or a violation of basic human rights.²¹ While this Essay ultimately concludes that EITC denials generally do not fit within Atuahene's definition of stategraft, it highlights two particularly problematic concerns with current EITC enforcement.

One concern is racially disparate enforcement, which is an issue that has received heightened attention since a January 2023 report finding that

14. *Id.* at 30. The take-up rate of the EITC is typically around eighty percent of eligible individuals, which is similar to participation in the Supplemental Nutrition Assistance Program but considerably higher than the take-up rate for programs such as Temporary Assistance for Needy Families and Supplemental Security Income.

15. See SARAH HALPERN-MEEKIN, KATHRYN EDIN, LAURA TACH & JENNIFER SYKES, IT'S NOT LIKE I'M POOR: HOW WORKING FAMILIES MAKE ENDS MEET IN A POST-WELFARE WORLD 67 (2015); 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, 522-23 (2013).

16. DRUMBL, *supra* note 13, at 46-82.

17. *Lopez v. Comm'r*, T.C. Summ. Op. 2017-16, 2017 WL 1032772, at *1 (T.C. Mar. 16, 2017).

18. *Id.* at *2

19. *Id.* at *3 (acknowledging that "[a]ny inexactitude inherent in our finding is attributable to petitioner's lack of contemporaneous records").

20. *Id.* While the opinion does not provide any figures, reducing her gross income by this amount would have resulted in a reduction in the tax credits of more than \$2,000 total. See I.R.S., PUBL'N 596, EARNED INCOME CREDIT (EIC) 40, 42 (2012); I.R.S., PUBL'N 972, CHILD TAX CREDIT (2012).

21. See Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 3 (2023).

among all taxpayers claiming the EITC, Black taxpayers are statistically more likely to be audited than non-Black taxpayers.²² Following the release of that report, IRS Commissioner Daniel Werfel acknowledged that, while the IRS does not collect data on race or consider race in its case selection and audit process, initial findings by the IRS are consistent with the conclusions of the report.²³ In May 2023, Werfel assured Congress that the IRS is “dedicating significant resources to quickly evaluating the extent to which IRS’s exam priorities and automated processes, and the data available to the IRS for use in exam selection, contribute to this disparity.”²⁴ In September 2023, the IRS announced plans to substantially reduce the number of audits focused on EITC and other refundable credits, as well as changes to EITC case selection processes that it expects will reduce racial disparities.²⁵ This issue is sure to receive continued attention from researchers, scholars, and members of Congress.

The other concern I address in this Essay relates to the congressional authorization for the IRS to impose on taxpayers a two-year disallowance period during which the EITC and CTC cannot be claimed if there is a final determination that the taxpayer claimed the credits “due to reckless or intentional disregard of rules and regulations”²⁶ This disallowance period is commonly referred to as a ban. If imposed, the ban applies even if the taxpayer is otherwise factually eligible during the

22. Hadi Elzayn, Evelyn Smith, Thomas Hertz, Arun Ramesh, Robin Fisher et al., *Stan. Inst. Econ. Pol’y Rsch., Measuring and Mitigating Racial Disparities in Tax Audits* 3 (Jan. 30, 2023) (unpublished manuscript), <https://drive.google.com/file/d/1kA7CG3cLq6eWmwBVgTDOIMhXuGZwRJ5O/view> [<https://perma.cc/XZN9-AXAJ>] [hereinafter *Stanford Report*].

23. Alan Rappeport, *I.R.S. Acknowledges Black Americans Face More Audit Scrutiny*, N.Y. TIMES, <https://www.nytimes.com/2023/05/15/us/politics/irs-black-americans-tax-audit.html> (May 16, 2023). *See also* Letter from Daniel Werfel, I.R.S. Comm’r, to Sen. Ron Wyden, Chairman, Sen. Comm. on Fin. (May 15, 2023), https://www.finance.senate.gov/imo/media/doc/werfel_letter_to_sen_wyden.pdf [<https://perma.cc/XS4X-RZQG>] (“While there is a need for further research, our initial findings support the conclusion that Black taxpayers may be audited at higher rates than would be expected given their share of the population.”).

24. Werfel, *supra* note 23.

25. Letter from Daniel Werfel, I.R.S. Comm’r, to Sen. Ron Wyden, Chairman, Sen. Comm. on Fin. (Sept. 18, 2023), https://www.finance.senate.gov/imo/media/doc/091823_wyden_letter_from_irs_eitc_audit_disparities.pdf (announcing two alternative pilot programs for EITC case selection). *See also* Alan Rappeport, *I.R.S. Changes Audit Practice that Discriminated Against Black Taxpayers*, N.Y. TIMES (Sept. 18, 2023), <https://www.nytimes.com/2023/09/18/us/politics/irs-audits-black-taxpayers.html>.

26. *See* I.R.C. § 32(k)(1)(B)(ii). The statute provides a ten-year ban in the case of a final determination that the taxpayer’s claim of the credit was due to fraud. I.R.C. § 32(k)(1)(B)(i).

two-year disallowance period.²⁷ In its audit of Ms. Lopez, the IRS proposed the two-year ban due to her failure to maintain business records.²⁸ Had Ms. Lopez not challenged the examination outcome in the Tax Court and prevailed based upon her notarized statements from clients, she would have been banned from claiming the EITC for two years following the final determination, even though she was otherwise eligible for and entitled to receive the credit; this would have negatively impacted her ability to support her daughters, undermining the intended social policy. While the EITC ban is imposed relatively infrequently,²⁹ the IRS's use of it has raised due process concerns that deserve further attention.³⁰

The Essay proceeds in four parts. Part I briefly explains the types of social benefits administered by the IRS. Part II provides context on the heightened enforcement around these refundable tax credits. Part III examines Professor Atuahene's theory of stategraft and considers how the IRS's denial of refundable tax credits might fit within that paradigm. Though Part IV concludes that the IRS's denials of such credits does not meet the definition of stategraft, it discusses how these two particular aspects of EITC enforcement align with Professor Atuahene's broad concerns about how state actions affect vulnerable populations. The Essay concludes with brief remarks about the IRS's enforcement priorities.

I. THE INTERNAL REVENUE SERVICE AS A SOCIAL BENEFIT ADMINISTRATOR

The EITC is a tax credit designed to support low- and moderate-income households. The amount of EITC a taxpayer will receive varies depending upon the number of qualifying children in the taxpayer's

27. I.R.C. § 32(k)(1)(A).

28. *Lopez v. Comm'r*, T.C. Summ. Op. 2017-16, 2017 WL 1032772, at *2 (T.C. Mar. 16, 2017). Because the Tax Court determined that Ms. Lopez did have gross income in both years, her credits were not entirely disallowed in either year, with the presumptive result that the ban is not applicable. *Id.* at *3. In dicta, the court admonished the taxpayer for her failure to keep business records. *Id.* (“Consequently, we make no comment in this proceeding regarding the application of section 32(k). We note, however, that the failure to maintain adequate records to support items shown on a return can support a finding of negligence for purposes of [I.R.C.] section 6662(a).”).

29. See *infra* note 160 and accompanying text.

30. See, e.g., TAXPAYER ADVOC. SERV., STUDY OF TWO-YEAR BANS ON THE EARNED INCOME TAX CREDIT, CHILD TAX CREDIT, AND AMERICAN OPPORTUNITY TAX CREDIT 241 (2019) [hereinafter 2019 TAXPAYER ADVOCATE SERVICE ANNUAL REPORT]; TAXPAYER ADVOC. SERV., EARNED INCOME TAX CREDIT: THE IRS INAPPROPRIATELY BANS MANY TAXPAYERS FROM CLAIMING EITC 103 (2013) [hereinafter 2013 TAXPAYER ADVOCATE SERVICE ANNUAL REPORT].

household and the amount of earned income.³¹ A modest amount is available even to workers without qualifying children at low income levels; in 2023, unmarried taxpayers without qualifying children who earn less than \$17,640 may receive an EITC of up to \$600.³² The biggest beneficiaries of the EITC, however, are parents of qualifying children. In 2023, the maximum EITC available for taxpayers with one qualifying child was \$3,995; for two qualifying children was \$6,604; and for three or more qualifying children was \$7,430.³³

The EITC is a refundable credit, meaning that the amount of the credit first offsets any federal income tax due with the remainder being received as a tax refund. A taxpayer with no federal income tax liability will receive the full amount of the credit as a lump-sum tax refund.³⁴ Many EITC recipients are also eligible for the CTC,³⁵ which is also

31. See I.R.C. § 32(b). To some extent, it also varies depending on whether the taxpayer is married; this is mostly true with respect to the phase-out for eligibility and whether the taxpayer uses the married filing joint status. I.R.C. § 32(b)(2)(B).

32. Rev. Proc. 2022-38, 2022-45 I.R.B. 445 § 3.06. These figures are adjusted annually for inflation. Taxpayers earning below the “earned income amount” will receive less than the maximum (sometimes referred to as “phase-in”), and a taxpayer earning above the threshold phaseout amount will receive less than the maximum EITC. *Id.* For tax year 2023, the threshold phaseout amount for an unmarried taxpayer with no qualifying children is \$9,800, with the \$600 maximum being reduced at income levels higher than that until the income reaches the completed phaseout amount of \$17,640. The income threshold phaseout amount is higher (\$16,370), as is the completed phaseout amount (\$24,210), for married taxpayers filing jointly (though the maximum EITC available is the same). *Id.*

33. *Id.* The income threshold phaseout amount for unmarried taxpayers with any number of qualifying children is \$21,560 and is \$28,120 for married taxpayers filing jointly. *Id.* Above those income thresholds, the amount of EITC is gradually reduced until the income exceeds the completed phaseout amount, which varies according to number of children and filing status. A married couple with three or more children is eligible to receive some amount of EITC until their income exceeds \$63,398. *Id.*

34. The lowest earning households owe no federal income tax because of the standard deduction available to all filers, which for tax year 2023 was \$13,850 for single filers and \$27,700 for married couples filing a joint return. See, e.g., Howard Gleckman, *The Number of Those Who Don't Pay Federal Income Tax Drops to Pre-Pandemic Levels*, TAX POL'Y CTR. (Oct. 27, 2022), <https://www.taxpolicycenter.org/taxvox/tpc-number-those-who-dont-pay-federal-income-tax-drops-pre-pandemic-levels> [<https://perma.cc/N636-3NGS>] (“About 90 percent of households making less than \$30,000 (the lowest-income 20 percent of households) pay no federal income tax as do about half of those making between \$30,000 and about \$60,000 (the next 20 percent).”).

35. I.R.C. § 24. The eligibility criteria for the two credits overlap but are different in significant respects. For example, the income threshold for CTC eligibility is much higher than for EITC, with the result that even relatively affluent households are eligible for the CTC. Compare I.R.C. §§ 24(b)(2), (h)(3), with Rev. Proc. 2022-38, 2022-45 I.R.B. 445 § 3.06. However, the age requirement is different: the CTC is only available for qualifying children under the age of seventeen, while the EITC is available for qualifying children under the age of nineteen or a qualifying child who is a full-time student under the age of twenty-four. Thus, a low-income taxpayer with a qualifying

refundable in part.³⁶ The CTC amount is determined per child.³⁷ Unlike the EITC, the CTC does not vary in amount according to income until it begins to phase out.³⁸

Together, these two tax credits play a significant role in lifting millions of working families out of poverty.³⁹ In 2022, more than 29 million tax refunds included a refundable CTC, and more than 32.4 million included a refundable EITC.⁴⁰ Empirical studies reveal how meaningful these credits are to families, both in short-term and long-term impact.⁴¹ These include non-financial benefits to children, including improved birth weight and health, higher test scores, higher graduation rates, and increases in college enrollment.⁴²

child who is aged seventeen or eighteen may be eligible for the EITC but not the CTC. *Compare* I.R.C. § 24(c)(1), *with* I.R.C. § 32(c)(1)(A). Another difference is that a taxpayer must earn at least \$2,500 to qualify for any amount of the CTC, whereas a taxpayer earning even \$1 is eligible for the EITC. *Compare* I.R.C. §§ 24(d)(1)(B)(i), (h)(6), *with* I.R.C. § 32.

36. It is not fully refundable. While the credit is currently \$2,000 per qualifying child, I.R.C. § 24(h)(5) limits the refundability to \$1,400 per qualifying child; this number is adjusted for inflation and in 2023 is \$1,600. I.R.C. § 24(h)(5). Rev. Proc. 2022-38, *supra* note 32, § 3.05. The refundable portion is often referred to as the Additional Child Tax Credit. For simplicity's sake, this Essay refers to the CTC as encompassing both the refundable and nonrefundable portion.

37. I.R.C. § 24(a).

38. The CTC is not limited to three children. It is available in full to unmarried individuals earning up to \$200,000 and to married couples filing jointly who earn up to \$400,000; the CTC phases out with a reduction of \$50 for every \$1,000 above these income levels. I.R.C. § 24(b). MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R41873, THE CHILD TAX CREDIT: HOW IT WORKS AND WHO RECEIVES IT 2 tbl.1 (2021).

39. CTR. ON BUDGET & POL'Y PRIORITIES, THE EARNED INCOME TAX CREDIT 3 (2023) (citing census data demonstrating that these two tax credits lifted 10.6 million people above the poverty line in 2018, including 5.5 million children, and reduced the severity of poverty for an additional 17.5 million people, including 6.4 million children).

40. I.R.S., DEP'T OF THE TREASURY, PUBL'N 55-B, INTERNAL REVENUE SERVICE DATA BOOK, 2022, at 2 (2023). In fiscal year 2022, 160.6 million individual income tax returns were filed. *Id.*

41. *See, e.g.*, CLASP, RESEARCH SHOWS LONG-LASTING BENEFITS OF EITC (2017), <https://www.clasp.org/wp-content/uploads/2022/04/Research-shows-long-lasting-benefits-of-EITC-5.pdf> [<https://perma.cc/45PG-LWFE>]. *See also* Jennifer Sykes, Katrin Križ, Kathryn Edin & Sarah Halpern-Meehin, *Dignity and Dreams: What the Earned Income Tax Credit (EITC) Means to Low-Income Families*, 80 AM. SOCIO. REV. 243 (2015); Ruby Mendenhall, Kathryn Edin, Susan Crowley, Jennifer Sykes, Laura Tach et al., *The Role of Earned Income Tax Credit in the Budgets of Low-Income Households*, 86 SOC. SERV. REV. 367 (2012); HALPERN-MEEKIN, EDIN, TACH & SYKES, *supra* note 15; Greene, *supra* note 15.

42. ELAINE MAAG, WILLIAM J. CONGDON & EUNICE YAU, OPRE REP. 2021-34, THE EARNED INCOME TAX CREDIT: PROGRAM OUTCOMES, PAYMENT TIMING, AND NEXT STEPS FOR RESEARCH 13-14 (2021).

While traditional forms of welfare require a claimant to establish their eligibility to an agency in order to receive benefits, taxpayers self-declare their eligibility for the EITC and CTC and receive the amounts as a tax refund unless their return is selected for examination.⁴³ Due to this design, the direct administrative and overhead costs are far less than traditional welfare programs; however, the absence of upfront screening results in far higher error rates.⁴⁴ As a consequence of the error rates, the credits are a targeted area of post-filing enforcement for the IRS.

II. HEIGHTENED ENFORCEMENT AROUND REFUNDABLE CREDITS

Taxpayers claiming the EITC are more likely to be audited than the average individual income tax filer.⁴⁵ This is not a new phenomenon, and it is a phenomenon that has held steady over time. From tax years 2010 to 2019, audit rates of individual returns decreased at all income levels, with the average audit rate dropping from 0.9 percent in tax year 2010 to 0.25 percent in tax year 2019.⁴⁶ The IRS attributed this decline to decreased funding and staffing.⁴⁷ Despite this overall decrease in audit

43. In describing the EITC as having a hybrid status as tax and transfer, Lawrence Zelenak writes:

When the EITC is compared with other tax benefits, as to which self-declared eligibility is the norm, even considering a precertification regime for the EITC seems to reflect discrimination against the working poor. When the EITC is compared with other welfare-type transfer programs, however, it is surprising—almost shocking—that the government is willing to send checks for thousands of dollars to EITC claimants simply on their say-so, without any bureaucratic confirmation of eligibility.

Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1873 (2005).

44. See NAT'L TAXPAYER ADVOC., 3 SPECIAL REPORT TO CONGRESS 3, 54 fig.A.9, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume3.pdf [https://perma.cc/BW9Q-TCF2] [hereinafter NTA SPECIAL REPORT] (showing that, when overhead costs and error rates are aggregated, the total cost of the EITC as a percentage of benefits paid out is similar to the Children's Health Insurance Program and the School Lunch Program and less expensive than the Women, Infants, and Children Program).

45. In some years, a taxpayer claiming the EITC was twice as likely to be audited as a taxpayer not claiming the EITC. See, e.g., TAX POL'Y CTR., *How Do IRS Audits Affect Low-Income Families?*, in BRIEFING BOOK (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/how_do_irs_audits_affect_low_income_families.pdf [https://perma.cc/9GLJ-BG56] (citing data from fiscal year 2018).

46. GAO, GAO-22-104960, TAX COMPLIANCE: TRENDS OF IRS AUDIT RATES AND RESULTS FOR INDIVIDUAL TAXPAYERS BY INCOME 6 (2022).

47. *Id.* at 7–8.

rates, at the time of writing, EITC filers continue to be disproportionately selected for audit relative to all but the wealthiest taxpayers.⁴⁸

A. *Why?*

The IRS has prioritized EITC enforcement because of the high error rates related to refundable tax credits. The EITC regularly appears on the list of federal high-priority programs deemed susceptible to significant improper payments, defined as a program for which agencies report estimated monetary loss in excess of \$100 million.⁴⁹ Four IRS programs appear on this list in the most recent fiscal year: the EITC, the CTC, the American Opportunity Tax Credit, and the refundable Premium Assistance Tax Credit.⁵⁰ In fiscal year 2022, the estimated improper payment rate of the EITC is 31.6 percent (amounting to over \$18 billion in improper payments), while the estimated improper payment rate of the CTC is 15.8 percent (over \$5 billion in improper payments).⁵¹ Despite enhanced enforcement, these improper payment figures have remained stubbornly high over a period of two decades.⁵²

48. See I.R.S., *supra* note 40, at 36 tbl.17 (showing a 0.9% examination rate for those claiming the EITC in tax year 2020, which is a higher rate than all income levels except for returns reporting \$10 million or higher, which had a 2.4% audit rate). See also Paul Kiel, *It's Getting Worse: The IRS Now Audits Poor Americans at About the Same Rate as the Top 1%*, PROPUBLICA (May 30, 2019, 10:16 AM), <https://www.propublica.org/article/irs-now-audits-poor-americans-at-about-the-same-rate-as-the-top-1-percent> (“Audits of the rich continue to plunge while those of the poor hold steady, and the two audit rates are converging.”). In 2018, “the top 1% of taxpayers by income were audited at a rate of 1.56%. EITC recipients, who typically have annual income under \$20,000, were audited at 1.41%.” *Id.*

49. GAO, GAO-23-106285, IMPROPER PAYMENTS: FISCAL YEAR 2022 ESTIMATES AND OPPORTUNITIES FOR IMPROVEMENT 10 (2023). In 2022, twenty-nine government programs at eleven agencies met this definition. *Id.*

50. *Id.* at 11 tbl.1.

51. *Id.* While these two credits serve a similar function as a social safety net for the working poor, the difference in improper payment rate is likely attributable to the fact that the EITC amount varies by income while the CTC amount is tied to number of children (with a phase-in for refundability but otherwise as a fixed amount per child).

52. Since 2003, the estimated improper rate has exceeded 20 percent, and the most recent figure of 31.6 percent is on the higher end historically. See Michelle Lyon Drumbl, *Beyond Polemics: Poverty, Taxes, and Noncompliance*, 14 EJOURNAL TAX RSCH. 253, 254 (2016); TREASURY INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2021-40-036, IMPROPER RATES FOR REFUNDABLE TAX CREDITS REMAIN HIGH 3 (2021), <https://www.tigta.gov/sites/default/files/reports/2022-02/202140036fr.pdf> [<https://perma.cc/YFL4-UV3G>].

These EITC improper payments are sometimes broadly mischaracterized as fraud⁵³ when the reality is far more nuanced.⁵⁴ The Treasury Department asserts that the root causes of improper refundable tax-credit payments include the overly complex eligibility requirements, the unavailability of third-party data available to the IRS to verify eligibility, and the high error rates on returns prepared by unenrolled return preparers.⁵⁵ Some degree of intentional noncompliance is perpetrated by unscrupulous tax return preparers, often without the knowledge of the taxpayer.⁵⁶ As to inadvertent errors and complexity of the requirements, this is likely exacerbated by the fact that the EITC recipient population has a high degree of turnover; the IRS estimates that approximately one-third of the population eligible to receive the credit changes each year.⁵⁷

Whatever the underlying reasons for the high rate of noncompliance, the IRS cannot simply ignore the improper payment rates⁵⁸ and the public perceptions that result.⁵⁹ Unless Congress redesigns the EITC to make it easier to administer, the IRS will continue what is described as an “enforcement-oriented” approach to the administration of the credit.⁶⁰

53. See, e.g., Phil Gramm & Jodey Arrington, Opinion, *Biden’s IRS Chases Chump Change*, WALL ST. J. (Aug. 10, 2023, 5:37 PM), <https://www.wsj.com/articles/bidens-irs-chases-chump-change-food-stamps-enforcement-fraud-pandemic-9217ee2> (noting that, in 2022, the IRS made an estimated \$25.4 billion in improper payments in only three programs: earned income tax credits, additional child tax credits, and American opportunity tax credits—remarking that “none of the \$80 billion in new IRS funding is specifically earmarked to deal with fraud in the welfare programs funded with tax credits and administered by the IRS”).

54. For a comprehensive discussion contextualizing the improper payment figures within the broader realm of taxpayer noncompliance, see Drumbl, *supra* note 52.

55. GAO, *supra* note 49, at 16.

56. The tax return preparation industry is largely unregulated; there is no federal regulation, and only a handful of states regulate the industry. Among those EITC claimants who rely on a paid preparer, the majority use an unregulated return preparer; studies have shown these preparers have a higher rate of error. For a full discussion of this, see NTA SPECIAL REPORT, *supra* note 44, at 23–27.

57. *Id.* at 6.

58. Under the Payment Integrity Information Act of 2019, federal agencies are required to take actions to reduce and recover improper payments. Pub. L. No. 116-117, 134 Stat. 113, 114–16 (2020).

59. See, e.g., STEVE HOLT, AM. ENTER. INST., *THE ROLE OF THE IRS AS A SOCIAL BENEFIT ADMINISTRATOR* (2016), <https://www.aei.org/wp-content/uploads/2016/07/The-Role-of-the-IRS.pdf?x91208> [<https://perma.cc/EC5B-LXXU>] (detailing the different types of noncompliance and putting it into the broader context of the overall tax gap). Acknowledging the differing views for noncompliance, Holt observes: “Whatever the case, compliance must be addressed to improve the integrity and effectiveness of the EITC and of the IRS’s role as an administrator of social benefits.” *Id.* at 6.

60. NTA SPECIAL REPORT, *supra* note 44, at 2.

From a government resource perspective, it is extremely cost efficient to audit EITC returns. This is true because—relative to other types of audits—the issues are more limited in scope, the process is more automated, and the audit is typically conducted by correspondence instead of in person.⁶¹ The IRS reports that the average time to complete an EITC audit is five hours per return; in contrast, a typical audit of a higher-income individual routinely takes years to resolve.⁶² Thus, by comparison to other types of audits, EITC audits result in higher amounts of recommended additional tax per audit hour.⁶³

Further, EITC audits yield the highest collection rate of recommended additional taxes resulting from individual taxpayer audits. This is due to the fact that the IRS conducts approximately eighty percent of EITC audits prior to issuing the refund; it freezes the disputed amount pending the outcome, meaning the taxpayer never received the refund after filing.⁶⁴ An unfortunate consequence of this is that taxpayers whose refunds are frozen, yet ultimately prevail in proving their entitlement to the EITC, sometimes wait a year or longer to receive the refund.⁶⁵ Of course, this delay is problematic for the individuals who are working and depending on that lump-sum refund to make ends meet for their families.

B. Critiques

The disproportionate enforcement of poor people has been noted for some time. The critique of this practice became particularly pronounced in the late 2010s as the IRS experienced budget cuts and had fewer enforcement resources yet continued to overly emphasize enforcement of low-income taxpayers.⁶⁶ By one estimate, the rate of labor-intensive audits of the highest earners declined by approximately eighty percent during the period of 2011 to 2018, while the automated correspondence audits of EITC claimants declined only by thirty-four percent.⁶⁷

61. GAO, *supra* note 46, at 16.

62. Letter from Douglas W. O'Donnell, Deputy Comm'r, I.R.S., to James R. McTigue, Jr., Dir., Strategic Issues, U.S. Gov't Accountability Off. (Apr. 28, 2022), *in* GAO, *supra* note 46, app. V.

63. *Id.* at 18–19. In a study of years 2010 to 2021, only audits of those earning \$5 million and above had a higher average recommended additional tax per audit hour. *Id.* at 18 fig.6.

64. *Id.* at 16 n.27.

65. For further discussion, see DRUMBL, *supra* note 13, at 149–50.

66. Paul Kiel & Jesse Eisinger, *Who's More Likely To Be Audited: A Person Making \$20,000 — or \$400,000?*, PROPUBLICA (Dec. 12, 2018, 5:00 AM), <https://www.propublica.org/article/earned-income-tax-credit-irs-audit-working-poor>.

67. Kiel, *supra* note 48.

One unfortunate reason that EITC audits require fewer IRS resources and result in a high collection rate is that these audits have a high nonresponse rate.⁶⁸ In other words, in many cases the largely automated determination to deny the EITC is finalized without the taxpayer substantively engaging in the process. Studies suggest that this lack of engagement is due to a variety of reasons, including lack of functional or financial literacy, inability to obtain the specific documents verifying eligibility, and an inability to contact an IRS representative to ask questions.⁶⁹

Even when taxpayers do engage with the audit, they often struggle to provide the examiners documents that are deemed acceptable for substantiating eligibility. One reason for this is that EITC audits are not assigned to a specific examiner who handles the case throughout, resulting in inefficiency; taxpayers often do not receive an adequate explanation of what documentation is required.⁷⁰ Studies show that many taxpayers who are determined ineligible for the EITC at the audit level are in fact eligible for the credit; a large percentage prevail when they pursue an appeal and are able to discuss their circumstances with a specific IRS appeals officer or chief counsel attorney.⁷¹

These outcomes have rippling effects beyond the current tax year, whether the effect is the two-year ban⁷² or, more commonly, an

68. GAO, *supra* note 46, at 19. *See also EITC Audits Will Once Again Begin; Proactively Responding to an EITC Audit Is Crucial*, TAXPAYER ADVOC. SERV.: NTA BLOG, <https://www.taxpayeradvocate.irs.gov/news/nta-blog-eitc-audits-will-once-again-begin-proactively-responding-to-an-eitc-audit-is-crucial/> [https://perma.cc/N82D-H3JH] (Feb. 6, 2024) (reporting a non-response rate for EITC audits between thirty-six and forty-three percent between fiscal years 2018 and 2021).

69. KATHLEEN BRYANT, CHYE-CHING HUANG, LESLIE BOOK, T. KEITH FOGG & NINA E. OLSON, TAX L. CTR. & CTR. FOR TAXPAYER RTS., EXCLUSIONARY EFFECTS OF THE IRS CORRESPONDENCE AUDIT PROCESS WARRANT FURTHER STUDY 1 (2022), https://www.law.nyu.edu/sites/default/files/TLC%20CTR%20Memo%20on%20Need%20for%20EITC%20Audit%20Study_TLC%20Site.pdf [https://perma.cc/2FBD-V54V] (citing a survey of EITC filers with claims under audit, in which “more than 25 percent of them did not understand the IRS audit notice was telling them they were under audit, and about half didn’t understand what they needed to do in response to the audit letter”).

70. NAT’L TAXPAYER ADVOC., 2 2012 ANNUAL REPORT TO CONGRESS 78 (2012).

71. *Id.* at 92. *See also* BRYANT, HUANG, BOOK, FOGG & OLSON, *supra* note 69, at 5 (citing a 2004 study in which “43% of EITC recipients whose claims were originally denied or reduced during audit received additional benefits after [having completed] the IRS audit reconsideration process”).

72. Part IV, *infra*, discussing the Section 32(k) ban, includes an example of this: an IRS research study found that in nineteen percent of cases in which the IRS imposed bans, the taxpayer did not participate in the audit or mail to the taxpayer was returned as undeliverable. This is a glaring due process concern.

outstanding tax liability that will be subject to offset from future EITC refunds.⁷³ The effects are more indirect, as well: researchers report that EITC correspondence audits “affect real economic activity” in the sense that wage earners have changes in the likelihood of having wage employment in the years after being audited.⁷⁴

In addition to the socioeconomic critique of heightened enforcement of low-income taxpayers, Part IV discusses concerns raised by scholars that tax administration can be formally “colorblind” yet result in racially disparate outcomes.⁷⁵ As noted, the IRS has recently confirmed these racially disparate outcomes.⁷⁶

The next Part considers EITC denials through the lens of Professor Atuahene’s theory of stategraft.

III. PROFESSOR ATUAHENE’S THEORY OF STATEGRAFT

Professor Bernadette Atuahene’s theory of stategraft describes how public officials refill the public coffers through illicit extraction,⁷⁷ specifically, by transferring property of “persons to the state in violation of the state’s laws or basic human rights.”⁷⁸ This Part first outlines the essential elements of her definition, and then engages with some of the ways EITC denials meet those elements while emphasizing that, overall, such denials do not constitute stategraft.

A. Essential Elements of Stategraft

Professor Atuahene defines stategraft to include five principle elements: “(1) state agents, (2) transferring property, (3) from residents to the state, (4) in violation of the state’s own laws, (5) to the detriment

73. See I.R.C. § 6402 (providing the authority to offset a tax refund against an outstanding tax liability). For more about how the refund offset procedure frustrates the purpose of the EITC, see DRUMBL, *supra* note 13, at 176–202.

74. John Guyton, Kara Leibel, Dayanand S. Manoli, Ankur Patel, Mark Payne & Brenda Schafer, *The Effects of EITC Correspondence Audits on Low-Income Earners* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24465, 2019), <http://www.nber.org/papers/w24465> [<https://perma.cc/M6JQ-QACJ>].

75. See Jeremy Bearer-Friend, *Colorblind Tax Enforcement*, 97 N.Y.U. L. REV. 1 (2022). See also Dorothy Brown, *Race and Tax: Colorblind No More*, JOTWELL (Feb. 25, 2021), <https://tax.jotwell.com/race-and-tax-colorblind-no-more/> (reviewing Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019)); Diane Kemker, *Do Black Taxpayers Matter? A Critical Analysis of IRS Audit Practices*, STAN. J. C.R. & C.L. (forthcoming).

76. Werfel, *supra* note 25.

77. Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 294–95 (2018).

78. Atuahene, *supra* note 21, at 3.

of a vulnerable group.”⁷⁹ Furthermore, stategraft by its very terminology includes an element of graft or corruption.⁸⁰ By this, Atuahene distinguishes stategraft from the concept of corruption for private gain; she means it to encompass “state agents acting to advance the state’s financial interests by stealing from those under its authority.”⁸¹

B. Earned Income Tax Credit Denials Do Not Constitute Stategraft

On balance, I find that EITC denials do not constitute stategraft. With that said, certain elements of the concept are met, and that is helpful in thinking about the specific ways in which the current pattern of EITC denials can be problematic. This Section explores each element.

1. ELEMENT ONE: ACTION BY STATE AGENTS

The first element of Professor Atuahene’s definition is met. IRS employees are state agents and have some degree of discretion in reviewing taxpayer responses to requests for substantiation.

2. ELEMENTS TWO AND THREE: A TRANSFER OF PROPERTY FROM RESIDENTS TO THE STATE

What about elements two and three: is an EITC denial a transfer of property from the residents to the state? In the most obvious sense, an EITC denial operates in the other direction—a denial is the failure for the state agents to transfer property (money) to one of its residents. However, Professor Atuahene defines the element of transferring property broadly to include tangible and intangible property as well as entitlements.⁸² Because refundable credits are social welfare benefit entitlements, one could conceive of the denial as a transfer of one’s right to receive the EITC to the state.⁸³

There are two categories of government entitlement programs: insurance-based programs such as Social Security and Medicare, which are financed by federal trust funds, and needs-based programs paid out

79. Atuahene & Hodge, *supra* note 77, at 298–99.

80. *Id.* at 295 (“The term intentionally combines the words statecraft and graft or corruption.”).

81. *Id.* at 295–96.

82. Atuahene, *supra* note 21, at 13.

83. In his essay, Spencer Headworth refers to the government denying a public assistance benefit as “preemptive stategraft.” Spencer Headworth, *Stategraft in Public Assistance Programs*, 2024 WIS. L. REV. 503, 504.

of general revenues.⁸⁴ The needs-based programs operate as income redistribution programs to combat illness and poverty.⁸⁵ The EITC fits this definition, as it is a needs-based program that is a form of income redistribution intended to reduce poverty.⁸⁶ Though refundable credits are a type of tax expenditure,⁸⁷ the federal government classifies the EITC as a type of entitlement spending.⁸⁸

In that respect, an EITC denial can be viewed as a transfer of property from an individual resident to the state, meeting the second and third elements of Professor Atuahene's definition of stategraft, particularly if the person has established their eligibility and yet is still denied the EITC.

3. ELEMENT FOUR: IN VIOLATION OF THE STATE'S OWN LAWS

The element of stategraft that I believe is clearly missing from an EITC denial is the fourth element, that of a state violating its own law. An EITC denial is not an illegal extraction, nor is it an abrogation of a treaty or a violation of legislation, judicial decision, administrative rule, or policy.⁸⁹

84. Joseph Delfico, Assoc. Dir. Hum. Res. Div., U.S. Gen. Acct. Off., Statement before Task Force on Entitlements & Hum. Assistance Programs, U.S. Gen. Acct. Off. 2 (Oct. 4, 1983), <https://www.gao.gov/assets/122637.pdf>.

85. *Id.*

86. In the original enactment of the EITC in 1975, the legislative intent was to provide incentive for low-income individuals to work, provide relief for rising food and energy costs, and stimulate the economy. DRUMBL, *supra* note 13, at 9 (citing S. REP. NO. 94-36, at 11 (1975)). Over time, the credit was significantly expanded and, by 1993, was explicitly framed as an antipoverty program. *Id.* at 15–16.

87. Each year the Treasury Department releases a report on tax expenditures, providing fiscal year estimates. The report provides the following explanation and definition of tax expenditures (of which the EITC is one):

The Congressional Budget Act of 1974 (Public Law 93–344) requires that a list of “tax expenditures” be included in the Budget. Tax expenditures are defined in the law as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.” These exceptions may be viewed as alternatives to other policy instruments, such as spending or regulatory programs.

OFF. OF TAX ANALYSIS, U.S. DEP'T OF TREASURY, TAX EXPENDITURES 1 (2023), <https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2024-update.pdf> [<https://perma.cc/PV3W-9GHN>].

88. Delfico, *supra* note 84, at 3 (“The Government effectively incurs these [tax expenditure] expenses, no less than if each beneficiary were paid out of congressionally appropriated funds.”).

89. Atuahene includes all of these within her definition of laws for the purpose of identifying stategraft. Atuahene & Hodge, *supra* note 77, at 300.

In her first article about statecraft, Professor Atuahene uses the example of a state agency violating the state constitution in its assessment practices.⁹⁰ Professor Atuahene refers to these unconstitutional assessments and the ensuing takings during foreclosures as theft.⁹¹ Here I wish to be clear that I do not view an EITC denial as theft, nor have I seen other scholars characterize it as such. The denial of EITC is not a taking. It is a determination that an individual has not proven that they are eligible for the benefit. While I am critical of many facets of the IRS's enforcement, it is important also to recognize that taxpayers have several layers of due process rights during EITC audits. Further, any injustice that results from EITC enforcement should be recognized as distinct from illegality.

a. The IRS Is Not Exceeding Its Authority

In auditing taxpayers who claim the EITC, the IRS is not exceeding its statutory or constitutional authority. The agency must follow statutory due process requirements during the audit. Though there is a lot to critique about IRS examination practices, specifically in the context of the EITC, there is no evidence to suggest the IRS is violating applicable laws.

There are layers of due process. First, taxpayers have the ability to provide documents substantiating their eligibility for the credit; if these efforts result in a denial at the examination level, the taxpayer can make an administrative appeal and further has the right to appeal the case in the U.S. Tax Court.⁹² Moreover, it is not cost prohibitive to do so: taxpayers who are income-eligible for the EITC have access to free legal representation through a nationwide network of low-income taxpayer clinics that are funded in part by Congress through a program administered by the IRS's Office of the Taxpayer Advocate.⁹³ The cost of filing a petition in the U.S. Tax Court is \$60,⁹⁴ which is relatively low

90. *Id.* at 291.

91. *See id.* at 294.

92. Other procedural options include filing an audit reconsideration and filing a refund claim in federal district court.

93. *See* I.R.C. § 7526; I.R.S., PUBL'N 3319, LOW INCOME TAXPAYER CLINICS (2023). Access to pro bono representation is critical. One study found that "low-income filers with representation were twice as likely as their non-represented counterparts to emerge from an IRS audit with no change in their claimed EITC, at rates of 41.5% and 23.1%, respectively." BRYANT, HUANG, BOOK, FOGG & OLSON, *supra* note 69, at 5 (citing Adam S. Chilton, Jonathan P. Schneller & Joshua L. Boehm, *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176, 192 (2012)).

94. I.R.C. § 7451.

compared to filing fees in other court proceedings,⁹⁵ and a petitioner may request a fee waiver,⁹⁶ which are often granted. Rita Lopez's case provides an example of the level of access to justice afforded to taxpayers: she was represented in the matter by a legal aid society lawyer, her petition fee was waived, and upon being informed that she was fluent only in Spanish, the court made an interpreter available at the trial.⁹⁷

b. The Element of State Corruption Is Absent

As noted above, Professor Atuahene's conception of stategraft encompasses graft or corruption. She has applied her theory to describe ways in which state and local governments replenish public coffers "through the illicit extraction."⁹⁸ She frames this within the context of "neoliberalism and its accompanying austerity measures," which have shrunk government budgets despite pressing constituent needs.⁹⁹ This motivation is perhaps easier to conceive at the state or local level; at least in my mind, it is hard to conceptualize the replenishing of federal public coffers. Most states and localities are mandated by state law or state constitution to operate at a balanced budget.¹⁰⁰ However, it is well known that the federal government is not, which has resulted in a growing federal debt that exceeds \$30 trillion.¹⁰¹ From year to year, the federal government often operates at a staggering deficit. For example, the

95. In contrast to the \$60 fee to file a petition in Tax Court, the fee for filing a complaint in a civil case in the U.S. District Court in the Southern District of New York (where Ms. Lopez resided) is \$405. *District Court Fee Schedule and Related Information*, U.S. DIST. CT. S. DIST. N.Y. (Dec. 1, 2023), <https://www.nysd.uscourts.gov/programs/fees> [<https://perma.cc/V93G-C45W>].

96. TAX CT. R. PRAC. & P. 20(d). In more than fifteen years of directing the Washington and Lee University Tax Clinic, I have represented dozens of clients in Tax Court, and the fee waiver is routinely granted to low-income petitioners.

97. *Lopez v. Comm'r*, No. 20235-15S (T.C. filed Aug. 12, 2015), <https://dawson.ustaxcourt.gov/case-detail/20235-15> [<https://perma.cc/54QG-RZZP>] (showing that the petition fee was waived and providing a link to an order granting a motion to pay for the reasonable expenses of an interpreter).

98. Atuahene, *supra* note 21, at 2.

99. *Id.* at 1.

100. See TAX POL'Y CTR., *What Are State Balanced Budget Requirements and How Do They Work?*, in BRIEFING BOOK, https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book-may2022.pdf [<https://perma.cc/ZDN2-K8RT>] (reporting that all states except North Dakota and Wyoming have some restrictions, with the design and stringency of requirements varying across states).

101. U.S. TREASURY, *What Is the National Debt?*, FISCALDATA, <https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/> [<https://perma.cc/R3FU-RJAB>] (reporting that U.S. national debt is approximately \$34.38 trillion as of February 27, 2024).

federal deficit in fiscal year 2022 was \$1.38 trillion.¹⁰² The political acceptability of operating at a federal deficit coupled with the insurmountable overall federal debt make it inconceivable to me that the IRS is denying EITC as a way to refill the public coffers.

While the IRS is under political pressure to reduce the improper payment rate of the EITC and other refundable credits, there is no evidence that the Service is engaging in corrupt practices. If there is any benefit to the IRS in denying EITC claims, it is not a financial benefit but a reputational one for the agency. To the extent that the IRS can point to its audit rate and the corresponding dollars recovered, this answers those critics who espouse that the benefit program is rife with fraud and improper payments. I am open to the idea that this reputational benefit to the agency could be an expanded interpretation of Professor Atuahene's idea that IRS enforcement agents are acting to benefit the state. To me, this is a more credible benefit argument than the financial angle.

c. Illegality as Distinct from Injustice

In her article, "A Theory of Statecraft," Professor Atuahene says that there must be an illegality, not just an injustice.¹⁰³ Systemic inequities in the EITC enforcement context can certainly result in an injustice, and examples of this will be discussed further in Part IV. Yet, injustice is distinct from illegality.

As one example of illegality, Professor Atuahene discusses the city of Ferguson and how African-Americans there have been unconstitutionally targeted for civil and criminal fines that enrich the city.¹⁰⁴ In contrast to the Ferguson example, in which police were said to be consciously engaging in racial stereotyping, the IRS does not collect data on taxpayer race; accordingly, its enforcement actions are said to be "colorblind."¹⁰⁵ EITC audits are largely automated and selected based on computer algorithms.¹⁰⁶ This is not to say that algorithms cannot be

102. U.S. TREASURY, *What Is the National Deficit?*, FISCALDATA, <https://fiscaldata.treasury.gov/americas-finance-guide/national-deficit/> [https://perma.cc/N58M-5PBA].

103. Atuahene, *supra* note 21, at 22.

104. *Id.* at 4–5.

105. Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 2 (2019). Part IV, *infra*, discusses Bearer-Friend's scholarship in greater detail.

106. See I.R.S., POL'Y STATEMENT 1-236, FAIRNESS AND INTEGRITY IN ENFORCEMENT SELECTION (2016) (describing enforcement selection processes as using "scoring mechanisms" and "data driven algorithms" among other factors).

biased,¹⁰⁷ or that the use of algorithms justifies a disparate outcome.¹⁰⁸ An algorithm certainly can result in systemic injustice. But no one has alleged or shown *illegality* in the context of EITC enforcement, and that is a significant distinction from Professor Atuahene's other examples of stategraft.

In her second article on stategraft, Professor Atuahene expands the definition of an illegal act to include not just illegal acts by the state, but also state actions in violation of basic human rights.¹⁰⁹ While former IRS Taxpayer Advocate Nina Olson often framed taxpayer rights as human rights,¹¹⁰ Professor Atuahene's use of the phrase human rights is situated within state crime, such as torture, genocide, war crimes, and state terror.¹¹¹ Thus, even considering this more expansive definition of stategraft's fourth element, the IRS enforcement efforts around EITC denials do not involve illegal acts by the state.

4. ELEMENT FIVE: TO THE DETRIMENT OF A VULNERABLE GROUP

The fifth principle element in Professor Atuahene's definition of stategraft is that the action is to the detriment of a vulnerable group.¹¹² Though it is necessary to have an enforcement mechanism to prevent EITC overpayments, the methods used by the IRS work to the detriment

107. See, e.g., Isabelle Bousquette, *Rise of AI Puts Spotlight on Bias in Algorithms*, WALL ST. J., <https://www.wsj.com/articles/rise-of-ai-puts-spotlight-on-bias-in-algorithms-26ee6cc9> (Mar. 9, 2023, 4:40 PM) (“AI systems have been found to be less accurate at identifying the faces of dark-skinned people, particularly women; to give women lower credit-card limits than their husbands; and to be more likely to incorrectly predict that Black defendants will commit future crimes than whites.”).

108. In their exchange of letters following the release of the Stanford Report, Senator Wyden called the racial disparities “shameful” and said, “You cannot have equality in society if algorithms and other automated systems that affect people's lives treat them differently based on the color of their skin,” to which Commissioner Werfel responded, “The IRS is committed to enforcing tax laws in a manner that is fair and impartial. When evidence of unfair treatment is presented, we must take immediate actions to address it.” Rappoport, *supra* note 23. Senator Wyden's letter linked this to his broader concerns with racial bias in algorithms that are intended to be race neutral. See Press Release, Ron Wyden, Chair, Sen. Comm. on Fin., Wyden Statement on IRS Letter on Racial Bias in Audits (May 15, 2023), <https://www.finance.senate.gov/chairmans-news/wyden-statement-on-irs-letter-on-racial-bias-in-audits> [<https://perma.cc/YB77-DFZ7>].

109. Atuahene, *supra* note 21, at 3.

110. Nina Olson, *A Brave New World: The Taxpayer Experience in a Post-Sequester IRS*, 139 TAX NOTES 1189, 1190 (2013) (“At their core, taxpayer rights are human rights.”).

111. Atuahene, *supra* note 21, at 39.

112. Atuahene & Hodge, *supra* note 77, at 299.

of vulnerable groups, specifically, low-income individuals, children, those who lack English proficiency, and racial minorities.

The next Part details two concerns specific to these vulnerable populations.

IV. TWO PARTICULARLY PROBLEMATIC CONTEXTS OF EARNED INCOME TAX CREDIT DENIALS

Though not fitting within the contours of Professor Atuahene's statecraft definition, two particular and distinct issues around EITC denials deserve heightened attention. One is the data showing disparate racial enforcement of the credit, which the IRS has now acknowledged. The other is the denial of benefits to individuals who are factually eligible for the credit but are subject to the statutory ban due to prior noncompliance.

A. Racial Disparity in Enforcement

Part II described how taxpayers claiming the EITC are more likely to be audited than all but the highest-earning taxpayers.¹¹³ This has been observed for many years and largely critiqued on socioeconomic grounds, with headlines in the press such as "Who's More Likely to Be Audited: A Person Making \$20,000 — or \$400,000?"¹¹⁴ These socioeconomic critiques are based on the information made publicly available by the IRS in its annual IRS Data Book. Among other things, the Data Book includes tables showing the number of returns filed, taxes collected, refunds issued, and examination coverage.¹¹⁵ The data is presented in a variety of ways, including by state, type of tax, size of income, and information such as whether the taxpayer claimed the EITC.¹¹⁶ The data is not, however, presented by race or ethnicity, because the IRS does not collect that data.¹¹⁷

Lacking that demographic data from the IRS, scholars have looked to other sources of data to analyze tax policy through the lens of critical race theory. For example, many years prior to the release of her well-known book, *The Whiteness of Wealth*,¹¹⁸ Professor Dorothy Brown wrote about the racial dynamics of the EITC using data from the Survey

113. See *supra* text accompanying notes 45–48.

114. Kiel & Eisinger, *supra* note 66.

115. See generally I.R.S., *supra* note 40.

116. *Id.*

117. See *infra* text accompanying notes 141–43.

118. DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021).

of Income and Program Participation (SIPP) to discuss how factually incorrect perceptions of race influence views on tax policy.¹¹⁹ Professors Beverly Moran and William Whitford used SIPP data as well as U.S. Census data and data from the National Survey of Families and Households in discussing a number of tax expenditure provisions; their analysis showed how “members of the black community receive, on average, fewer of the tax benefits we have studied than the average member of the white community.”¹²⁰

Recent scholarship has continued to examine how tax expenditure design might exacerbate inequality.¹²¹ Following President Joe Biden’s January 2021 executive order directing each federal agency to “assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups,”¹²² the Treasury Department’s Office of Tax Analysis investigated this issue by applying imputed race and Hispanic ethnicity data to tax data.¹²³ The research studied eight of the fifteen

119. Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755 (2005) (providing a racial impact analysis demonstrating that the majority of EITC-eligible taxpayers are White and that a greater percentage of Black people are ineligible for the EITC than are eligible); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 796 (2007) (“The majority of low-income taxpayers eligible for the credit are white, and the majority of blacks can’t receive the credit because they’re ineligible. In other words, almost three-fourths of blacks are ineligible either because they have no wage income or because they have too much wage income.”).

120. Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 799. Discussing their conclusions drawn from the data, the authors note: “[W]e make no accusations of discriminatory intent. We suggest that the Code reflects systematic black political underrepresentation in the halls of power. As a result, black people are not in the consciousness of Congress as it enacts the Internal Revenue Code.” *Id.* at 801. These conclusions are consistent with the Treasury Department conclusions drawn using imputed race and Hispanic ethnicity data more than two decades later. *See infra* text accompanying notes 123–30.

121. *See, e.g.*, Francine J. Lipman, Nicholas A. Mirkey & Palma Joy Strand, *U.S. Tax Systems Need Anti-Racist Restructuring*, 168 TAX NOTES FED. 855, 861 (2020) (“A reevaluation of federal, state, and local tax expenditures is imperative. Most provide ‘upside-down tax breaks’ that benefit higher-income and disproportionately white households with less need for the financial incentives to build economic resources such as home ownership, college education, and retirement savings.”). *See also* TOM NEUBIG, COUNCIL ON ECON. POLICIES, *DISPARATE RACIAL IMPACT: TAX EXPENDITURE REFORM NEEDED 1* (2021) (“Although U.S. federal tax laws don’t have explicit differences in tax rules by race (disparate treatment), the outcomes of those facially ‘race-neutral’ rules can have differential effects across racial groups (disparate impact).”).

122. Exec. Order No. 13985, 86 Fed. Reg. 7009, 7009 (Jan. 20, 2021).

123. Julie-Anne Cronin, Portia DeFilippes & Robin Fisher, *Tax Expenditures by Race and Hispanic Ethnicity: An Application of the U.S. Treasury Department’s Race and Hispanic Ethnicity Imputation* (Off. of Tax Analysis, U.S. Dep’t of the Treasury,

largest individual income tax expenditures¹²⁴ and found that five of the eight tax expenditures disproportionately benefit White families.¹²⁵ For example, White families constitute 67% of the total number of families but receive 92% of the benefits of preferential rates for capital gains and qualified dividends, while Hispanic families receive 3% of the benefit of those rates and Black families receive 2% of those rates while constituting 15% and 11%, respectively, of the total number of families.¹²⁶ The three tax expenditures that do not disproportionately benefit White families are refundable credits, including the CTC and the EITC.¹²⁷ White families receive 66% of the benefits for the CTC and 49% of the EITC.¹²⁸ Hispanic families receive 22% of the CTC and 28% of the total EITC benefit, while Black families receive 9% of the CTC and 19% of the total EITC benefit.¹²⁹ The researchers also examined the distribution within income deciles and noted that among the lowest-income families, White families have higher benefit rates for the EITC than Black and Hispanic families, and, among higher-income families, Black families have lower average benefits for the CTC than White and Hispanic families.¹³⁰

Within the last several years, a number of scholars and researchers have drawn attention to racialized outcomes in the IRS's examinations.¹³¹ In 2019, former IRS economist Kim Bloomquist used census data to show that by willfully ignoring geographic data in its audit case selection, the IRS does not ensure balanced regional coverage.¹³² To the contrary, Bloomquist showed how the IRS's approach of ignoring geographic data coupled with an enhanced audit rate of EITC returns results in geographic bias, with audit intensity generally highest in the Southern states and some counties in the Northern Plains, Mountain, and Western states and generally lower in the upper Midwest, Mid-Atlantic, and New England

Working Paper No. 122, 2023). See also Robin Fisher, *Estimation of Race and Ethnicity by Re-Weighting Tax Data* (U.S. Dep't of the Treasury, Technical Paper No. 11, 2023).

124. For the definition of a tax expenditure, see *supra* note 87.

125. Cronin, DeFilippes & Fisher, *supra* note 123, at 29 tbl.5. The eight tax expenditures examined in the Treasury study included: (1) the exclusion of employer contributions for medical insurance; (2) preferential rates for capital gains and dividends; (3) the Child Tax Credit; (4) the deductibility of charitable contributions; (5) the Earned Income Tax Credit; (6) the twenty percent deduction allowed for certain pass-through income; (7) the premium tax credit; and (8) the mortgage interest deduction. *Id.*

126. *Id.*

127. *Id.* The third of these refundable tax credits is the premium tax credit.

128. *Id.*

129. *Id.*

130. *Id.* at 2, 37-39.

131. See, e.g., Kemker, *supra* note 75.

132. Kim M. Bloomquist, *Regional Bias in IRS Audit Selection*, 162 TAX NOTES 987, 987 (2019).

states.¹³³ To demonstrate this, Bloomquist used the IRS Data Book figures in conjunction with county-level tax data and U.S. Census data. He found that of the ten most heavily audited counties, all of which were in the South, 51% of taxpayers claimed the EITC in tax year 2015.¹³⁴ He further noted that the 2017 population of these ten counties was 79% non-White (nearly all Black or African-American); in contrast, among the ten counties with the lowest audit intensity (in which only 10% of taxpayers claimed the EITC in tax year 2015) just 7% of the 2017 population was non-White.¹³⁵ Bloomquist's report was followed shortly thereafter by a ProPublica article highlighting Bloomquist's audit rate map and the overlay between EITC claims, income, and race.¹³⁶

Congress followed up on these reports with pointed questions for the IRS commissioner at the time, Charles Rettig, with Congressman Charlie Crist explicitly posing the question of whether the IRS was "targeting black, Hispanic, and Native American populations for audit."¹³⁷ When Rettig replied "no,"¹³⁸ Crist discussed how "[d]isparate impact is an important way to identify racism in policies and procedures that may not deliberately and intentionally want to do so."¹³⁹

133. *Id.* at 989.

134. *Id.* at 989–91. Eight of the ten counties were in Mississippi, one was in Alabama, and the tenth was a parish in Louisiana. Louisiana has parishes, not counties, as its political subdivisions, but Bloomquist does not make that distinction in his description.

135. *Id.* (citing *Population Estimates by Age, Sex, Race and Hispanic Origin*, U.S. CENSUS BUREAU (June 21, 2018), <https://www.census.gov/newsroom/press-kits/2018/estimates-characteristics.html> [<https://perma.cc/X4WK-HK35>]).

136. Paul Kiel & Hannah Fresques, *Where in the U.S. Are You Most Likely To Be Audited by the IRS?*, PROPUBLICA (Apr. 1, 2019), <https://projects.propublica.org/graphics/eitc-audit> [<https://perma.cc/B47S-GXAT>]. Kiel and Fresques note a "very high" audit rate in "predominantly African American, rural counties in the Deep South[,] . . . South Texas' largely Hispanic counties, and in counties with Native American reservations, such as in South Dakota," as well as elevated audit rates in "[p]rimarily poor, white counties, such as those in eastern Kentucky in Appalachia." *Id.* By contrast, "[t]he states with the lowest audit rates tend to be home to middle income, largely white populations: places like New Hampshire, Wisconsin and Minnesota. Generally, the IRS audits taxpayers with household income between \$50,000 and \$100,000 the least." *Id.*

137. *Financial Services and General Government Appropriations for 2020: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 116th Cong. 24 (2019) (statement of Rep. Charlie Crist, Member, Subcomm. on Fin. Servs. & Gen. Gov't).

138. Following Crist's comments, Rettig stated that the IRS "has no filters whatsoever that identify individuals by race, religion, or any other capacity." *Id.* (statement of Charles P. Rettig, Comm'r, I.R.S.).

139. *Id.* Crist continued: "Sometimes, in order to find racial discrimination occurring, you have got to look back after the fact and analyze if the systems or the

Framing the issue as socioeconomic, but not in the context of race, Senator Ron Wyden also highlighted these reports at a Senate Finance Committee hearing with IRS Commissioner Rettig the same week:

Americans who work for a living have long understood that the tax code is rigged to favor the most fortunate. It is now becoming clear that tax enforcement is rigged in the same way.

According to newly released data, the audit rate of corporations and those at the top is in freefall. Audits of those with more than \$1 million in income were cut in half over a decade. Audits of the largest corporations, again, cut in half over a decade. . . . So the most fortunate are off the hook. What about people who work for a living? Another ProPublica report showed that in Humphreys County, MS there is a higher audit rate than any other county in America. It is not because it is packed to the county line with money launderers or shell corporations. It is because Humphreys County is poor. It is poor and most of those folks claim the Earned Income Tax Credit.¹⁴⁰

Because the IRS does not collect data on race, in response to these criticisms it has continued to rely on the explanation that enforcement is colorblind. Professor Jeremy Bearer-Friend has noted that “[a]cross multiple presidential administrations and in a variety of public and private fora, the IRS has repeatedly taken the position that, because it does not ask about race or ethnicity on its tax forms, it does not discriminate.”¹⁴¹

Bearer-Friend’s article highlights as an example of a June 30, 2020 congressional hearing in which Senator Sherrod Brown, stating the importance of viewing tax policy through the lens of racial justice, asked IRS Commissioner Charles Rettig for assurance that the IRS does not disproportionately (even if unintentionally) audit non-White taxpayers.¹⁴² Rettig replied that the IRS does not collect information related to the race or ethnicity of taxpayers, “[t]hus the IRS does not base any tax

algorithms that may be in use would violate or could violate individuals’ civil rights, even if you did not mean to.” *Id.*

140. *The 2019 Tax Filing Season and the 21st-Century IRS: Hearing Before the S. Comm. on Fin.*, 116th Cong. 4 (2019) (statement of Sen. Ron Wyden, Ranking Member, S. Comm. on Fin.). In connection with his remarks, Senator Wyden called for minimum standards for paid tax preparers.

141. Bearer-Friend, *supra* note 75, at 3.

142. *2020 Filing Season and IRS COVID-19 Recovery: Hearing Before the S. Comm. on Fin.*, 116th Cong. 34 (2020) [hereinafter *2020 Filing Season*] (statement of Sen. Sherrod Brown, Member, S. Comm. on Fin.). Jeremy Bearer-Friend cites this example in his article, *Colorblind Tax Enforcement*, *supra* note 75, at 2–3.

administrative actions and procedures on race or ethnicity.”¹⁴³ Bearer-Friend’s article goes on to describe in detail why the agency’s policy of colorblindness is problematic.

In January 2023, a group of researchers released a study finding that, despite race-blind audit selection, the IRS audits Black taxpayers at 2.9 to 4.7 the rate that it audits non-Black taxpayers.¹⁴⁴ The study found this disparity in audit rates is primarily driven by differences in audit rates within the population of taxpayers claiming the EITC.¹⁴⁵ Though EITC claimants of any race are audited at higher rates than non-EITC claimants, and Black taxpayers are more likely than non-Black taxpayers to claim the EITC, the researchers note that this explains only a small portion (14%) of the racial disparity in the audit rate.¹⁴⁶ They find “the larger source of the disparity (78%) stems from the selection of returns for examination *within* the population of EITC claimants”¹⁴⁷ and find that “the disparity cannot be fully explained by racial differences in income, family size, or household structure.”¹⁴⁸

When presented with these findings, current IRS Commissioner Daniel Werfel acknowledged that the agency’s own initial findings supported that conclusion.¹⁴⁹ He described efforts the IRS is making to reevaluate its exam priorities and automated processes, and committed to “stay laser-focused on this to ensure that we identify and implement changes prior to next tax filing season.”¹⁵⁰ In a subsequent letter to Senator Wyden, Commissioner Werfel announced “sweeping efforts” to overhaul its compliance efforts, including a “rebalancing effort” that will center around “high-income and high-wealth individuals, complex partnerships, and large corporations who are not paying the taxes they

143. 2020 Filing Season, *supra* note 142, at 57 (statement of Charles P. Rettig, Comm’r, I.R.S.).

144. Stanford Report, *supra* note 22, (manuscript at 3). To investigate the connection between audits and race, the researchers used IRS data and imputed race data; the methods and data are fully described in their paper.

145. *Id.* at 3–4 (“Black taxpayers claiming the EITC are between 2.9 and 4.4 times as likely to be audited as non-Black EITC claimants.”).

146. *Id.*

147. *Id.* at 4 (“In contrast, we observe a much smaller, though still statistically significant, difference in audit rates between Black and non-Black taxpayers who do not claim the EITC.”); *id.* at 27 fig.5.

148. *Id.* at 4 (“For example, among unmarried men with children, Black EITC claimants are audited at more than twice the rate of their non-Black counterparts.”); *id.* at 29 fig.6 (showing audit rate disparities by EITC subgroup (single versus married, single male versus single female, and single male with dependents versus single male without dependents)).

149. Werfel, *supra* note 23, at 2.

150. *Id.*

legally owe, as well as any bad actors who victimize taxpayers.”¹⁵¹ Again acknowledging the Stanford Report and the agency’s internal findings that validated that research, Werfel announced that, beginning in fiscal year 2024, the IRS “will be substantially reducing the number of correspondence audits focused specifically on certain refundable credits,” including the EITC and CTC.¹⁵² In addition to this reduction of examination of low-income taxpayers and rebalancing to focus more resources on examinations of high-income taxpayers, Werfel announced that the IRS would devote more resources to addressing unscrupulous return preparers who target vulnerable populations.¹⁵³

This announcement is welcome news to researchers, scholars, and practitioners who work with low-income taxpayers, all of whom will be keeping an eye on the IRS to make good on this commitment. Meanwhile, other EITC enforcement challenges remain.

B. Statutory Bans on Taxpayers Despite Subsequent Eligibility

Internal Revenue Code Section 32(k) provides the IRS the authority to impose a subsequent disallowance period of the EITC in cases in which taxpayers are determined to have made specific types of improper claims.¹⁵⁴ This disallowance period is more commonly referred to as a ban. When imposed, the ban applies regardless of the taxpayer’s actual eligibility during the disallowance period. A taxpayer found to have made a fraudulent claim is subject to a ten-year ban on claiming the EITC;¹⁵⁵ a taxpayer found to have made an improper claim “due to reckless or intentional disregard of rules and regulations (but not due to fraud)” is subject to a two-year ban on claiming the EITC.¹⁵⁶ A parallel statutory provision exists for the CTC.¹⁵⁷

151. Werfel, *supra* note 25.

152. *Id.* at 3.

153. For a discussion of how unscrupulous return preparers prey upon low-income taxpayers, see DRUMBL, *supra* note 13, at 46–82; NTA SPECIAL REPORT, *supra* note 44, at 23–31.

154. I.R.C. § 32(k).

155. I.R.C. § 32(k)(1)(B)(i) (providing for disallowance of the EITC for “the period of 10 taxable years after the most recent taxable year for which there was a final determination that the taxpayer’s claim of credit under this section was due to fraud”).

156. I.R.C. § 32(k)(1)(B)(ii) (providing for disallowance of the EITC for “the period of 2 taxable years after the most recent taxable year for which there was a final determination that the taxpayer’s claim of credit under this section was due to reckless or intentional disregard of rules and regulations (but not due to fraud”).

157. I.R.C. § 24(g)(1)(B)(ii). Though outside the scope of this Essay, a similar provision also exists for the American Opportunity Tax Credit. *See* I.R.C. § 25A(b)(4)(A)(ii)(II).

In concept, the statute makes sense as a congressional response to address EITC noncompliance. It provides a stronger tool for the IRS to use when there is demonstrated evidence of intentional noncompliance. For example, the IRS's Internal Revenue Manual provides that an auditor should consider proposing the two-year ban if the taxpayer tells the auditor that some or all of the self-employment income reported on the return was made up so as to increase the amount of the EITC claimed.¹⁵⁸ The ban is a remedy available when the appropriate level of taxpayer intent can be ascertained and documented; IRS Chief Counsel guidance to the IRS provides that the mere failure of the taxpayer to respond to the audit is an insufficient basis for which to impose the ban.¹⁵⁹

The ban is not imposed with great frequency: while several hundred thousand EITC returns are audited annually, only a few thousand taxpayers are subject to an EITC ban annually.¹⁶⁰

However, as with EITC enforcement generally, the actual implementation of the ban has been shown to be problematic. The manual provides the IRS's examination employees with very specific guidance to follow when deciding whether to propose the ban; these rules provide safeguards, as well as discretion, in cases in which taxpayers make an inadvertent error due to the complexity of the rules.¹⁶¹ However, in a 2019 study, the National Taxpayer Advocate found that the IRS frequently does not follow its own procedures with respect to imposing the ban. Specifically, in a majority of cases the required managerial approval for imposing the ban was not secured (53% of cases); the IRS did not explain to the taxpayers why the ban was imposed (82% of cases), which it is required to do; the IRS auditor failed to speak to the taxpayer before imposing the ban when required to do so (61% of cases); and in 54% of cases in which the taxpayer submitted documents, the taxpayer

158. IRM 4.19.14.6.3(16) (Jan. 1, 2024).

159. Memorandum from Assistant Chief Couns., Tax Exempt & Gov't Entities, Off. of Chief Counsel, I.R.S., to Assoc. Area Couns.-Phila. 1-2 (Nov. 8, 2002), <https://www.irs.gov/pub/irs-wd/0245051.pdf> [<https://perma.cc/8S73-6TUA>].

160. For context, in tax year 2016, 2,888 taxpayers were subject to either the two- or ten-year EITC ban. NTA SPECIAL REPORT, *supra* note 44, at 74 fig.A.21. IRS Data Book figures show that 381,269 returns claiming the EITC were selected for examination in fiscal year 2017. See I.R.S., DATA BOOK, 2017, at 23 tbl.9a (2018). While these two figures line up contemporaneously, they are drawn from different data sources; in other words, this is not the number of bans that were imposed as a result of this pool of fiscal year 2017 examinations.

161. See IRM 4.19.14.7.1 (Jan. 3, 2023) (providing steps for how an auditor must document in workpapers the audit steps taken and fully explain the decision to assert or not assert the two-year ban; for example, the auditor is required to have a conversation with the taxpayer and weigh such factors such as whether it is the first year for which the taxpayer is audited on the issue and whether the taxpayer "indicates they clearly feel they are eligible" and does not understand the rules but has attempted to prove eligibility).

appeared to believe that he or she qualified for the credit yet the ban was imposed anyway.¹⁶² Similar concerns had been raised by the National Taxpayer Advocate in 2013 based on an analysis of IRS databases, with that report citing examples of the IRS not adhering to its manual and imposing the ban automatically despite Chief Counsel's guidance not to do so.¹⁶³ The National Taxpayer Advocate has announced its intention to perform a similar analysis in fiscal year 2024 in an effort to determine whether the IRS has improved its compliance with ban imposition procedures.¹⁶⁴

Meanwhile, the IRS Office of Chief Counsel has taken the position that the ban can be imposed even for a partial disallowance.¹⁶⁵ In internal guidance, it stated that the IRS can impose the ban in a scenario in which a taxpayer continues to claim three children for EITC purposes when one of the three children was previously disallowed, even though she is and would continue to be eligible for the EITC for the other two children.¹⁶⁶ Effectively, this is punishing the taxpayer (and her children) three times over for continuing to make one mistake—without requiring the IRS to prove the taxpayer's intent in doing so.

In addition to concerns about the IRS failing to adhere to the Internal Revenue Manual, other observers have raised concerns about the lack of Treasury regulations under Section 32(k) or other guidance clearly defining a standard for recklessness of intentional disregard of the rules¹⁶⁷ and the lack of a “clear and meaningful” way for a taxpayer to challenge ban impositions in Tax Court.¹⁶⁸ To the latter concern, the Tax Court has

162. 2019 TAXPAYER ADVOCATE SERVICE ANNUAL REPORT, *supra* note 30, at 241.

163. 2013 TAXPAYER ADVOCATE SERVICE ANNUAL REPORT, *supra* note 3030, at 103–05 (finding that the IRS was automatically imposing the two-year ban on certain taxpayers who did not respond to audit notifications, including in cases in which the audit notice sent by mail had been returned as undeliverable). The IRS subsequently updated the IRM.

164. TAXPAYER ADVOC. SERV., OBJECTIVES REPORT TO CONGRESS: FISCAL YEAR 2024, at 43 (2023).

165. Assertion of Ban with Partial Disallowance, I.R.S. Chief Couns. Advisory 201931008 (Aug. 2, 2019).

166. *Id.* (“The 2-year ban applies even though the taxpayer otherwise would have been entitled to the EIC for her other two children . . . assuming a final determination is made that the taxpayer’s claim for the other child was due to reckless or intentional disregard for the rules and regulations.”).

167. See John Plecnik, *Reckless Means Reckless: Understanding the EITC Ban*, 142 TAX NOTES 847, 847 (Feb. 24, 2014); David van den Berg, *IRS’s Use of EITC Ban Causes Concern About Other Credits*, TAX NOTES (Dec. 28, 2015), <https://www.taxnotes.com/tax-notes-today-federal/credits/irss-use-eitc-ban-causes-concern-about-other-credits/2015/12/28/g16s>.

168. Leslie Book, *Bureaucratic Oppression and the Tax System*, 69 TAX LAW. 567, 589 (2016).

jurisdiction to determine a deficiency in a given tax year that is before the court.¹⁶⁹ However, the court does not have jurisdiction to revisit the original determination of the ban during the subsequent tax years for which it applies.¹⁷⁰ Professor Leslie Book has raised the question of whether the Tax Court has jurisdiction to decide the ban at all, even when determining the ban in conjunction with a deficiency for the year before the court, because there is no proposed deficiency for the future years to which the ban would actually apply.¹⁷¹

There are not many Tax Court opinions that discuss Section 32(k) in connection with the deficiency for the year before the court,¹⁷² and those opinions that have discussed it have concluded that the ban was not applicable in the facts of the case. For example, in *Baker v. Commissioner*,¹⁷³ the taxpayer claimed his fiancée's two children as his dependents for the dependent exemption and as his qualifying children for the EITC and CTC.¹⁷⁴ Due to distinctions in the statutory eligibility

169. I.R.C. § 6214.

170. The National Taxpayer Advocate has made a legislative recommendation that Congress amend I.R.C. § 6214 to grant the Tax Court this jurisdiction to determine whether the ban was properly imposed during a proceeding concerning a year in the disallowance period and “to allow the affected credit if it finds a multiyear ban was improperly imposed and the taxpayer otherwise qualifies for the credit.” TAXPAYER ADVOC. SERV., 2023 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 23 (2022).

171. Leslie M. Book, *Tax Court Opinion in Ballard Highlights Fundamental Uncertainty of Its Jurisdiction To Rule on the IRS Power To Ban Taxpayers from Claiming Refundable Credits*, TAX NOTES (Feb. 19, 2016), <https://www.taxnotes.com/procedurally-taxing/tax-court-opinion-ballard-highlights-fundamental-uncertainty-its-jurisdiction-rule-irs-power-ban/2016/02/19/7h5pm?pt=1> [<https://perma.cc/VV7J-LDBP>].

172. A few cases consider or make mention of Section 32(k) in instances in which it was not before the court. For example, in *Degourville v. Comm’r*, 124 T.C.M. (CCH) 149 (2022), the Tax Court upheld the IRS’s imposition of a Section 6663 civil fraud penalty, specifically finding (among other things) that the taxpayer made multiple inaccuracies on her return that appeared to be “deliberate effort to fraudulently claim the EITC and avoid detection by tax authorities,” but the court declined to let the IRS amend its position at trial to impose the EITC ban; the opinion did not address the merits of the IRS’s position because it was not properly before the court. *Id.* at 16. In another case, *St. Hilaire v. Commissioner*, the IRS had not proposed the ban but the court raised it in dicta as a caution to taxpayers: “We have seen an increasing number of cases where there have been alleged convoluted living arrangements that have no discernable substance except for attempts to tax advantage of tax deductions and credits. . . . [T]hey may be subject to . . . the denial of otherwise allowable credits in future years.” T.C. Summ. Op. 2003-102, 7-8 (July 24, 2003). See also *Rand v. Comm’r*, 141 T.C. 376, 395-96 (2013) (describing differing policy and reach of the Section 6662 accuracy-related penalty as compared to the ban, which had not been proposed).

173. T.C. Summ. Op. 2014-57 (June 23, 2014).

174. *Id.* at 3-4.

requirements,¹⁷⁵ the court agreed with the IRS that the taxpayer was entitled to claim his fiancée's children as dependents but was not eligible to claim them for the refundable credits.¹⁷⁶ However, because he "testified credibly" that he relied upon his tax preparer's advice in doing so, the court found that he should not be subject to the two-year EITC ban.¹⁷⁷ Other examples are the *Lopez*¹⁷⁸ case, discussed previously,¹⁷⁹ and a similar outcome in *Garcia v. Commissioner*,¹⁸⁰ in which the court found that the taxpayer relied on a tax return preparer and did not recklessly or intentionally disregard the rules.¹⁸¹

As to the harshness of the ban, Congress has given the IRS other, less punitive, tools to address taxpayer noncompliance. For example, Internal Revenue Code Section 32(k)(2) provides that a taxpayer who has been determined ineligible for the EITC in a given year must provide additional information to demonstrate eligibility the next time EITC is claimed.¹⁸² Known as EITC recertification, taxpayers must file IRS Form 8862 providing specifics about how many days of the tax year each child lived with them and who else lived with the child.¹⁸³ It flags for the IRS the fact that the taxpayer had been deemed ineligible the prior year so that the IRS can review the return with extra scrutiny.¹⁸⁴ Recertification is a more appropriate and non-punitive way to determine what may have changed with respect to a taxpayer's EITC eligibility.

The EITC ban, on the other hand, should be reserved to address only the most extreme fact patterns, for example a taxpayer who has claimed someone else's child that he or she has never met and to which

175. For the year in question, the children were his "qualifying relatives" within the meaning of I.R.C. § 152(d), meaning he was entitled to claim the dependent exemption amount. *Id.* at 2. However, only a qualifying child as defined in Section 152(c), rather than a qualifying relative, can be claimed for EITC and CTC. *Id.* at 8.

176. *Id.* at 8.

177. *Id.* at 9.

178. *Lopez v. Comm'r*, T.C. Summ. Op. 2017-16, 2017 WL 1032772 (T.C. Mar. 16, 2017).

179. *See supra* notes 1-9 and accompanying text.

180. T.C. Summ. Op. 2013-28 (Apr. 3, 2013).

181. *Id.* at 16. The opinion notes that Mr. Garcia spoke limited English and relied on his tax return preparer. *Id.* at 18.

182. I.R.C. § 32(k)(2) ("[F]or any taxable year as a result of the deficiency procedures . . . no credit shall be allowed under this section for any subsequent taxable year unless the taxpayer provides such information as the Secretary may require to demonstrate eligibility for such credit.").

183. *See* I.R.S., FORM 8862, INFORMATION TO CLAIM CERTAIN CREDITS AFTER DISALLOWANCE 1, 4 (2023).

184. Recertification cannot cure the ban; a taxpayer subject to the ban cannot use the form to recertify until after the ban period has passed. *See* I.R.S., INSTRUCTIONS FOR FORM 8862, at 1(2023).

he or she has no actual connection, or a taxpayer who claims a nonexistent or deceased person to be a qualifying child. The manual specifically cites the latter as an example justifying the ten-year ban if the taxpayer provides false or altered substantiating documents such as birth certificate or school records.¹⁸⁵ Often (though not exclusively), such egregious examples arise in the context of fraudulent tax return preparers, as opposed to in the case of individuals trying to file their own tax returns. For example, there are cases in which tax return preparers have used the names and Social Security numbers of deceased taxpayers to fraudulently claim the EITC and other credits.¹⁸⁶ In such cases the taxpayer generally is a non-complicit victim, and there are criminal consequences to the tax return preparer, so the ban is not the appropriate tool. Return preparer fraud is a distinct problem with which Congress and the IRS should be and are concerned.¹⁸⁷

If Congress intends for these credits to function as a social safety net, then it is extraordinarily punitive to deny the credits for which one is currently eligible on the basis of a prior year error by that individual.¹⁸⁸ In doing so, it is also indirectly punishing the children, who did not engage in any wrongdoing and are the intended indirect beneficiaries of the credits. The IRS must be sure that it is strictly following its own due process procedures to ensure that the ban is only used when truly warranted.

CONCLUSION

Advocates of a strong social safety net should be concerned with the IRS's persistent inability to reduce the improper payment rate. These credits are a proven way to better the lives of low-income families. But

185. IRM 25.1.2.3(3) (Nov. 3, 2023).

186. See, e.g., Press Release, Off. of Pub. Affs., Dep't of Just., Las Vegas Man Sentenced to Prison for Fraudulent Tax Return Scheme (Oct. 7, 2020), <https://www.justice.gov/opa/pr/las-vegas-man-sentenced-prison-fraudulent-tax-return-scheme> [<https://perma.cc/PYJ5-SEMV>].

187. In his September 18, 2023, letter to Congress, IRS Commissioner Werfel stated that, in addition to reducing the number of correspondence audits focused on refundable credits, the IRS will be using its data to identify and address unscrupulous return preparers with questionable practices: "Our research suggests that these bad actors disproportionately file tax returns for vulnerable taxpayers, including low-income filers, filers of color, and those with limited English proficiency, which may contribute to higher audit rates for this taxpayer segment." Werfel, *supra* note 25, at 2–3.

188. NTA SPECIAL REPORT, *supra* note 44, at 44–48 (describing the punitive nature and recommending enhanced due process protections for taxpayers). "The refundable credit bans are not only at times more punitive than punishments in other benefits programs, they are also more punitive than most civil sanctions imposed on other taxpayers." *Id.* at 47.

so long as the high improper payment rate persists, there will be calls for better safeguards or enforcement, and it will jeopardize expansion of refundable credits for social benefits.¹⁸⁹ This makes it critical for Congress to maintain the statutory due process protections for taxpayers. It also underscores the watchdog role played by the Taxpayer Advocate IRS, researchers and scholars, and the tax press. Together, these protections and observers provide a counter pressure to the IRS, always pushing on the agency to do better for taxpayers both individually and systemically.

Though not squarely within Professor Atuahene's definition of stategraft, EITC denials do disproportionately harm economically vulnerable populations. We should not shoulder the weight of enhanced enforcement disproportionately on racial minorities or on eligible children whose parent may have been acting in good faith or led astray by a return preparer and then subjected to the EITC ban without due process.

As I have argued elsewhere,¹⁹⁰ the IRS instead ought to devote more resources to working with the Department of Justice to help identify unscrupulous return preparers who engage in intentional and large-scale fraud.¹⁹¹ Doing so is an appropriate way to curtail improper payments while enhancing protection to vulnerable taxpayers, and to ensure that the enforcement is not focused disproportionately on those taxpayers.

189. See, e.g., Letter from Kevin Brady and Mike Kelly, Members of Cong., to Gene Sperling, White House Am. Rescue Plan Coordinator (Apr. 11, 2021) (raising concern that “[t]he new CTC and other provisions in ARP . . . risk the loss of billions of taxpayer dollars in fraudulent and improper payments”).

190. See Michelle Lyon Drumbl, *When Helpers Hurt: Protecting Taxpayers from Preparers*, 145 TAX NOTES 1365, 1370 (2014); DRUMBL, *supra* note 13, at 46–82.

191. See, e.g., Press Release, Off. of Pub. Affs., Dep't of Just., Former Owner of Tax Preparation Business Convicted of Fraud, Identity Theft, and Money Laundering Crimes (Feb. 22, 2022) <https://www.justice.gov/usao-sdny/pr/former-owner-tax-preparation-business-convicted-fraud-identity-theft-and-money> [<https://perma.cc/7WDT-JPVX>] (describing how tax return preparer obtained hundreds of stolen minor identities and sold them as fraudulent dependents for use on tax returns).

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