

# Tax (Dis)Conformity, Reverse Federalism, and Social Justice Reform

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## I. INTRODUCTION

State tax systems may seem like an odd place to look for social justice reform strategies. Yet, in the United States, state and local governments frequently use tax law to remedy “injustices in areas in which traditionally subordinated groups are often vulnerable.”<sup>1</sup> The federal tax system, in particular, has long been used to remedy “poverty, access to housing, . . . hunger, and access to health care.”<sup>2</sup> A large body of research analyzes and critiques these federal programs, which have both promising bright spots and glaring gaps.<sup>3</sup> Such

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<sup>1</sup> W. Edward Afield, *Social Justice and the Low-Income Taxpayer*, 64 VILL. L. REV. 347, 358 (2019).

<sup>2</sup> *Id.* See, e.g., Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791 (2014) (describing the use of federal taxation as an anti-poverty tool); Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871 (1993) (describing how federal tax law is used to promote access to affordable housing); Afield, *supra* note 1, at 368–69 (describing how federal tax law is used to provide sustenance).

<sup>3</sup> Recent legal scholarship analyzing tax-based transfer programs that target low-income communities include: Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, 131 YALE L.J.F. 535 (2021); Jacob Goldin, *Tax Benefit Complexity and Take-up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59 (2018); MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM (2019); Susannah Camic Tahk, *Converging Welfare States: Symposium Keynote*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 465 (2019). Recent legal scholarship analyzing federal tax incentives that target places where low-income communities live and work include: Brandon M. Weiss, *Opportunity Zones, 1031 Exchanges, and Universal Housing Vouchers*, 110 CAL. L. REV. 179 (2022); Michelle D. Layser, *Subsidizing Gentrification: A Spatial Analysis of Place-Based Tax Incentives*, 12 U.C. IRVINE L. REV. 163 (2021) [hereinafter Layser, *Subsidizing Gentrification*]; Michelle D. Layser, *How Place-Based Tax Incentives Can Reduce Geographic Inequality*, 74 TAX L. REV. 1 (2020) [hereinafter Layser,

research often recommends reforms that would be initiated by federal legislators. But in the current political and legal climate, Congress is often stuck in partisan gridlock,<sup>4</sup> and the balance of power is increasingly tilting toward the states.<sup>5</sup> For these reasons, this Article proposes an alternative social justice tax reform strategy that targets states—not Congress—as the initiators of national reform.

The proposed strategy relies on the theory of “reverse federalism.”<sup>6</sup> Recall that a key feature of federalism is the opportunity for states to act as laboratories to experiment with policies, allowing the federal government to learn about policy outcomes prior to adopting federal laws.<sup>7</sup> In a reverse federalist system, states no longer serve as “‘laboratories’ of democracy . . . but rather as ‘repair shops,’ replacing a declining federal regime with a revised state-by-state system” that is informed by the *federal* experience with policies.<sup>8</sup> This

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*Geographic Inequality*]; Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82 (2020); Tracy A. Kaye, *Ogden Commons Case Study: A Comparative Look at the Low-Income Housing Tax Credit and Opportunity Zone Tax Incentive Programs*, 48 FORDHAM URB. L.J. 1067 (2020); Kirk McClure, Anne R. Williamson, Hye-Sung Han & Brandon M. Weiss, *The LIHTC Program, Racially/Ethnically Concentrated Areas of Poverty, and High-Opportunity Neighborhoods*, 6 TEX. A & M J. PROP. L. 89 (2020); Blaine G. Saito, *Collaborative Governance and the Low-Income Housing Tax Credit*, 39 VA. TAX REV. 451 (2019).

<sup>4</sup> Jonathan Weisman, *Congress Ends “Horrible Year” with Divisions as Bitter as Ever*, N.Y. TIMES (Jan. 4, 2022), <https://www.nytimes.com/2021/12/18/us/politics/congress-gridlock-democracy.html> (describing legislative setbacks in 2021). *But see* Jeb Barnes, *Debunking the Myth of Legislative Gridlock*, THE CONVERSATION (Feb. 17, 2021), <https://theconversation.com/debunking-the-myth-of-legislative-gridlock-154329> (arguing that congressional paralysis is better described as a “legislative stalemate,” and inaction with respect to social policy constitutes a “policy drift” that has shrunk the social safety net).

<sup>5</sup> Perhaps the most salient evidence of this shift is the Supreme Court’s recent decision to overturn *Roe v. Wade*. *See* *Dobbs v. Jackson Women’s Health Org.*, 144 S. Ct. 2228, 2284 (2022). In the tax context, recent examples include *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (expanding the constitutionally permissible scope of the State’s tax nexus in the context of remote sellers) and *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (limiting a taxpayer’s ability to sue states in other states’ courts).

<sup>6</sup> *See, e.g.*, Jake Laperruque, *Preserving the Right to Obscurity in the Age of Facial Recognition*, CENTURY FOUND. (Oct. 20, 2017), <https://tcf.org/content/report/preserving-right-obscurity-age-facial-recognition/?agreed=1>.

<sup>7</sup> Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1304 n.54 (2013).

<sup>8</sup> Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 180 (2008). *See also* Julianna Meely, *Federal Execution Protocols: Lessons Learned in Grammar and Reverse Federalism*, 24 RICH. PUB. INT. L. REV. 137, 164 (2021) (arguing that in the execution context, “reverse federalism” has

Article explores how state tax systems can function as an important corrective to federal law that promotes social justice reform.

In doing so, this Article revisits a familiar administrative feature of state income tax law—federal-state tax conformity—through a reverse federalism lens. Federal-state tax conformity refers to the process by which states incorporate aspects of federal law into their state income tax codes.<sup>9</sup> As explained in more detail below, states may choose to adopt federal definitions of income, or they may simply enact state-level tax laws that parallel federal laws. Even when state law does “conform” to the federal law, however, differences may arise when a state legislature declines to adopt *all* aspects of federal law, or when a state enacts legislation to partially decouple from the federal law.<sup>10</sup>

These acts of “disconformity,” when state tax laws are derived from—but are not identical to—federal law, are key to operationalizing the reverse federalism potential for state tax reform. Ultimately, reverse federalist reform strategies rely on states to push national policy, either by encouraging lateral conformity across states or by spurring changes to federal law.<sup>11</sup> Where others have argued that disconformity can help minimize federal encroachment on state tax systems,<sup>12</sup> this Article argues that strategic disconformity can help push national policy and promote social justice goals. This theory of disconformity shifts the focus away from its defensive role within a federalist system, highlighting its capacity to serve as a powerful corrective to federal law.

This Article proceeds as follows. Part II explains how states incorporate versions of federal tax laws into their tax codes and how states can use selective departures from federal law to fight injustice. To demonstrate, Part II revisits states’ historic responses to the taxation

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blossomed,” and it is possible for the federal government to lead by example so that states can follow “not because they must, but because they can”); Sheldon H. Nahmod, *State Constitutional Torts: Deshaney, Reverse-Federalism and Community*, 26 RUTGERS L.J. 949, 953 (1995) (arguing that “constitutional torts present a valuable ‘reverse-federalism’ opportunity for the states to learn from the federal experience what to do (and what not to do) regarding state constitutional torts and affirmative state constitutional duties”).

<sup>9</sup> See Mason, *supra* note 7, at 1269.

<sup>10</sup> “Decoupling” is a process whereby state legislators amend state tax law to ensure that it does *not* incorporate federal law. *Id.* at 1271–72.

<sup>11</sup> See Lapperruque, *supra* note 6.

<sup>12</sup> Mason, *supra* note 7, at 1336–37 (describing how states can prevent federal encroachment on state autonomy and protect their own interests in the national policy arena by decoupling).

of same-sex partners prior to federal recognition of same-sex marriage, applying a reverse federalist frame. This Article then turns to modern examples. Part III describes how states have enacted versions of three federal tax laws: the Earned Income Tax Credit (EITC), the Child Tax Credit (CTC), and the Opportunity Zones tax preference. A key insight in this Article is that states can learn what works (and what does not work) from the federal experience of laws like these to achieve their desired policy goals. Part IV applies that insight and argues that selective federal-state disconformity informed by the federal experience may be an effective social justice reform strategy.

## II. TAX DISCONFORMITY AND REVERSE FEDERALISM

### A. *A Brief Introduction to Tax Base Conformity*

Nearly every state tax code incorporates federal income tax law to some degree through a process called federal-state “tax base conformity.”<sup>13</sup> By harmonizing state and federal tax law, tax base conformity minimizes differences between state and federal tax bases.<sup>14</sup> In addition, states’ widespread use of conformity minimizes differences among *states’* tax bases.<sup>15</sup> This has benefits for both states and taxpayers. Conformity “eases taxpayer compliance, enhances state enforcement efforts, and conserves state legislative resources.”<sup>16</sup> It also provides a unique opportunity for reformers. To show why, this Part revisits the concepts of tax base conformity, and more significantly, *disconformity*, through a reverse-federalism lens. It begins with the basics.

States take different approaches to tax base conformity, but a common approach under state law is to adopt a federal definition of income (either adjusted gross income or taxable income) as the starting point for state-level adjustments (e.g., additions and subtractions).<sup>17</sup> A consequence of tax base conformity is that federal tax preferences structured as deductions or exemptions, which affect the federal definitions of income, may be incorporated into state tax

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<sup>13</sup> See Kirk J. Stark, *The Federal Role in State Tax Reform*, 30 VA. TAX REV. 407, 423 (2010) (“The availability of the federal income tax base as a starting point in calculating state tax liability is an unqualified benefit.”).

<sup>14</sup> Mason, *supra* note 7, at 1279.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1275–76.

law.<sup>18</sup> Tax credits, on the other hand, are not incorporated through tax base conformity because they do not affect the federal definition of income.<sup>19</sup> As explained below, however, states frequently enact their own versions of federal tax credits, often with a high degree of conformity to federal law.

Mechanically, states may take any one of three approaches to tax base conformity: rolling, static, or selective.<sup>20</sup> In states that use rolling conformity, the state tax code automatically conforms to the current version of the federal tax code as it is amended.<sup>21</sup> On the other hand, in states that adopt static conformity, amendments to federal law are not automatically incorporated into the state tax code.<sup>22</sup> Instead, the state law conforms to elements of the Internal Revenue Code as it existed on a particular date.<sup>23</sup> Accordingly, when changes are made to federal tax law, state legislators must decide whether to amend the tax code to conform with the most updated version of the Internal Revenue Code. Finally, in selective conformity states, the law only conforms to select provisions in the federal law.<sup>24</sup> When the federal law is amended, legislators in selective conformity states must review the changes and determine whether corresponding changes should be made in state tax law.<sup>25</sup> If they conclude that the change should be made, they enact legislation to amend the state tax law.

In addition to tax base conformity, some states adopt laws that mirror provisions in federal law that do not affect the tax base. For example, some states require election conformity, whereby taxpayers must use the same filing elections (e.g., married filing jointly, married filing separately) for state tax purposes as they used to file their federal taxes.<sup>26</sup> Some states conform to federal administrative requirements,

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<sup>18</sup> *Id.*

<sup>19</sup> *See id.* at 1274 (noting that “the default under base conformity is that states do not incorporate federal [tax] credits”).

<sup>20</sup> Jared Walczak, *Toward a State of Conformity: State Tax Codes a Year After Federal Tax Reform*, TAX FOUND. 3 (Jan. 28, 2019), <https://files.taxfoundation.org/20190201130844/Toward-a-State-of-Conformity-State-Tax-Codes-a-Year-After-Federal-Tax-Reform-FF-631.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.* at 3–4.

<sup>26</sup> *See generally* Heather M. Field, *Binding Choices: Tax Elections & Federal/State Conformity*, 32 VA. TAX REV. 527 (2013) (discussing the policy implications of election conformity).

such as the requirement that taxpayers provide a social security number to claim certain tax credits, or that taxpayers without a social security number provide an Individual Taxpayer Identification Number (ITIN).<sup>27</sup> And many states engage in what might be referred to as “tax credit conformity,” whereby states enact tax credits that mirror and supplement analogous federal tax credits.<sup>28</sup> Tax credit conformity may result in state-level tax credits that are identical to federal law, or they may significantly diverge to constitute separate stand-alone programs.

## B. *Disconformity and Reverse Federalism*

### 1. The Theory

Despite its prevalence, federal-state tax conformity has been subject to rigorous federalist critiques. In the leading article on this topic, Professor Ruth Mason explains:

When states conform to the federal tax base, they cede to the federal government at least three types of authority. First, they relinquish the ability to determine structural and definitional aspects of their income taxes, such as whether to tax imputed income and how to treat married taxpayers. Second, they cede authority to determine tax incentives. Finally, tax-base conformity allows the federal government to set the policy agenda for state income taxation.<sup>29</sup>

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<sup>27</sup> See Francine Lipman, *State and Local Tax Takeaways Redux*, 101 TAX NOTES STATE 683, 684 (discussing exceptions to the general rule that states follow the federal rule that requires taxpayers to furnish a social security number to claim state earned income tax credits). Note that several states have recently amended their laws to permit ITIN filers to claim the earned income tax credit. *Id.* See also, Jacqueline Lainez Flanagan, *Reframing Taxigration*, 87 TENN. L. REV. 629, 655 n.107 (2020) (“[t]he ITIN, introduced in 1996, allows those without a valid SSN to file federal and state returns.”).

<sup>28</sup> See Mason, *supra* note 7, at 1278 (“Many states also incorporate federal tax credits.”). Unlike deductions and exemptions, tax credits do not affect the federal definitions of income that are the starting point of federal-state tax base conformity. *See id.* at 1334–35. Federal taxpayers determine their taxable income (the definitional step that ultimately defines the federal tax base), and then they calculate their tax liability using the relevant tax rates applied to that base. *Id.* Federal tax credits are applied *after* these steps are completed, reducing taxpayers’ final tax bill on a dollar-for-dollar basis. *Id.* at 1335. For these reasons, tax credits are never automatically incorporated into states’ definitions of income through tax base conformity. *Id.* at 1336. Instead, states that wish to adopt state-level tax credits that parallel the federal laws must affirmatively enact legislation to implement the laws. *See id.* at 1274, 1278.

<sup>29</sup> *See id.* at 1278, 1289.

In other words, federal-state tax conformity results in a loss of state autonomy that may have significant consequences for federalism. For example, it may result in a democratic loss for state residents whose policy preferences are supplanted by federal policy.<sup>30</sup> It may “undermine[] the ability of state voters to hold their representatives accountable for unwanted tax policies.”<sup>31</sup> And it may “erode[] another traditional benefit of federalism: that federalism allows the states to conduct regulatory experiments.”<sup>32</sup>

No state, however, is *required* to conform to federal tax law. Within Constitutional restraints, all states are free to implement tax laws that make sense for their jurisdiction.<sup>33</sup> In states that use static or selective approaches to conformity,<sup>34</sup> departures from federal law may be as simple as inaction: by failing to affirmatively adopt federal law, they effectively depart from it. In states with rolling conformity, the state legislature must take affirmative steps to reject federal law.<sup>35</sup> Professor Mason has argued that selective decoupling from federal tax law in these ways “crucially safeguards state tax autonomy . . . while at the same time allowing states to secure most of the administrative benefits of conformity.”<sup>36</sup> In other words, to the extent the federal-state conformity threatens federalist values, disconformity can be understood as a defense against federal encroachment on state autonomy.

But the value of disconformity is not limited to its defensive role. Rather, disconformity may be an essential mechanism to effectuate national change through reverse federalism. States can piggy-back on—and then improve upon—established federal programs to increase their effectiveness and responsiveness to state and local need. Armed with knowledge about the experience and outcome of federal laws, states can use strategic disconformity to improve distributive

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<sup>30</sup> *Id.* at 1301.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1304.

<sup>33</sup> Darien Shanske, *States Can and Should Respond Strategically to Federal Tax Law*, 45 OHIO N.U. L. REV. 543, 543–46 (2019).

<sup>34</sup> See Jared Walczak, *Toward a State of Conformity: State Tax Codes a Year After Federal Tax Reform*, TAX FOUND. FISCAL FACT NO. 631 3–4 (Jan. 28, 2019), <https://taxfoundation.org/state-conformity-one-year-after-tcja> (explaining that in static conformity states, states must conform to the federal tax year by enacting legislation, and in selective conformity states, states only conform to select provisions in the federal tax code).

<sup>35</sup> See *id.* at 3.

<sup>36</sup> Mason, *supra* note 7, at 1313.

outcomes or provide more equal treatment of persons who face injustice under federal law. At a minimum, disconformity has the potential to improve outcomes in the state adopting the change. Yet, a key insight of this Article is that disconformity also has the potential to spur national change as other states follow in suit.

This may happen for at least two reasons. The first reason is rooted in federalism itself. Namely, when one state adopts a legal change, other states have the “opportunity . . . to learn from one another by observing the consequences of a policy in another state before adopting the policy themselves.”<sup>37</sup> The second reason is rooted in economic theories that predict that jurisdictions’ regulatory and tax policies affect residents’ location choices.<sup>38</sup> Specifically, when policies adopted by one state have economic effects on other states, it may encourage competition among the states.<sup>39</sup> Together, these dynamics may encourage national trends in state law. As one group of researchers explains, “[a]lthough *learning* and *economic competition* are fundamentally different forms of intergovernmental relations, both result in the diffusion of policy across states—i.e., in a process in which the policy choices of one state are influenced by the choices made by others.”<sup>40</sup>

This theory of legal change suggests that advocates pushing for *federal* tax reforms can instead target states, beginning with those that are most likely to be receptive. The initial goal of such reforms would be to encourage disconformity to aspects of federal law. In some cases, federal law may be so problematic that states should be encouraged to fully decouple from the law. In other cases, the federal law may have significant positive outcomes that can be leveraged through conformity—but the state could nevertheless improve upon the law through partial decoupling. Once a critical number of states have adopted these changes and experienced positive outcomes, other states may follow, helping to advance a national policy via the states. Ultimately, such changes may also lay the groundwork necessary to generate political support for federal reforms. The next section turns to a historical case as evidence that federal-state tax disconformity has the potential to promote social justice nationally.

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<sup>37</sup> Brady Baybeck et al., *A Strategic Theory of Policy Diffusion via Intergovernmental Competition*, 73 J. POL. 232, 232 (2011).

<sup>38</sup> See Kirk J. Stark & Daniel J. Wilson, *What Do We Know About the Interstate Economic Effects of State Tax Incentives?*, 4 GEO. J.L. & PUB. POL’Y 133, 154–55 (2006).

<sup>39</sup> Baybeck et al., *supra* note 37, at 232.

<sup>40</sup> *Id.*



## 2. Historical Evidence

A particularly salient historical example of how strategic disconformity has spurred national change can be seen in states' tax laws prior to the federal recognition of same-sex marriages. Prior to 2013, the federal government did not recognize same-sex marriages, even if they were valid under state law.<sup>41</sup> In other words, many same-sex couples were treated as married under state law but single under federal law.<sup>42</sup> This had tax consequences. Since same-sex marriages were not recognized at the federal level, same-sex couples were prohibited from filing joint tax returns.<sup>43</sup> For many couples, the inability to file jointly resulted in them experiencing higher (or lower) tax liability than similarly situated opposite-sex married couples.<sup>44</sup> This unequal treatment violated both vertical and horizontal equity principles, and it violated many peoples' senses of social justice.<sup>45</sup> Yet, federal law that defined "marriage" as between a man and a woman necessitated this outcome under federal tax law.<sup>46</sup>

States, on the other hand, were not obligated to conform to the federal tax filing status rules—and several chose to decouple. By 2009, "eight states—California, Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, Oregon, and Vermont—plus the District of Columbia permit[ed] same-sex spouses or partners to file joint state

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<sup>41</sup> See *United States v. Windsor*, 570 U.S. 744, 752, 775 (2013) (striking down Section 3 of the Defense of Marriage Act, which defined marriage for federal purposes as between a man and a woman).

<sup>42</sup> Michelle D. Laysner, *Tax Justice and Same-Sex Domestic Partner Health Benefits: An Analysis of the Tax Equity for Health Plan Beneficiaries Act*, 32 U. HAW. L. REV. 73, 79 (2009).

<sup>43</sup> *Id.*

<sup>44</sup> The unequal outcomes are caused by the so-called marriage bonus or marriage-penalty that results when taxpayers switch from single filing status to joint filing status. Many married couples will experience a marriage bonus when they file jointly. A "marriage bonus occurs whenever a married couple pays less in federal income taxes as a result of being married than they would have paid had they remained single," and it is "largely a result of the different tax brackets used by single taxpayers and married taxpayers." Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y. L. SCH. J. HUM. RTS. 287, 288 (1999). In practice, a marriage bonus is most likely to occur when one spouse has significantly more income than their partner. In contrast, when both spouses have similar income levels, they may experience a marriage penalty, whereby they face higher taxes when filing jointly than they would have faced if single.

<sup>45</sup> See Laysner, *supra* note 42, at 101 (describing the tax equity implications of treating same-sex and opposite-sex marriages differently).

<sup>46</sup> See *Windsor*, 570 U.S. at 752.

tax returns.”<sup>47</sup> Of these states, all but three—Massachusetts, Iowa, and New Hampshire—would have otherwise required election conformity, whereby taxpayers who filed as single individuals for federal tax purposes would be required to make the same election for state purposes.<sup>48</sup> Nevertheless, these states chose to decouple in the context of same-sex spouses, allowing taxpayers to choose a different filing status under state law.

For the following reasons, this example illustrates how disconformity can serve as *both* a defense of federalism and as an example of reverse federalism. First, decoupling to reject the federal definition of marriage defended federalism by maintaining state autonomy and providing more complete recognition of same-sex marriage under state law. Second, such strategic decoupling also reflected reverse federalism in that it served to mitigate injustice caused by federal law and set the stage for national change. Where federal law created clear inequities between same-sex and opposite-sex couples—unequal treatment that would later be found unconstitutional and a violation of fundamental rights<sup>49</sup>—states that allowed same-sex couples to file jointly recognized the full equality of

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<sup>47</sup> Laysner, *supra* note 42, at 81–82.

<sup>48</sup> See CAL. REV. & TAX. CODE § 18521(a)(1) (West 2006) (providing that taxpayers generally must use the same filing status for California state law as they use for federal tax filing); CONN. GEN. STAT. § 12-702(c)(1) (2012) (“Any husband and wife who elect to file a joint return under the federal income tax for any taxable year shall be required to file jointly with respect to such taxable year for purposes of this chapter.”); N.J. REV. STAT. § 54A:8-3.1(c) (2021) (specifying that if the tax liabilities of a husband and wife are determined on a joint return for federal income tax purposes, they must also file a joint tax return for New Jersey state tax purposes); OR. ADMIN. R. § 150-316-0150(1) (2017) (specifying the general rule that filing status for taxpayers’ federal return determines their filing status under Oregon state tax law); VT. DEP’T OF TAXES, TECHNICAL BULLETIN TB-55 (2010), <https://tax.vermont.gov/sites/tax/files/documents/TB-66.pdf> (discussing the general rule of filing status election conformity and the exception for same-sex spouses in 2010). Iowa law specifies that married taxpayers who file a joint return with the IRS “*may* file a joint return with the Iowa department of revenue,” but does not specifically require election conformity. See IOWA ADMIN. CODE r. 701-39.4 (2022). Similarly, in Massachusetts, taxpayers’ state filing status may differ from their federal filing status. See *Learn About Filing Status on Massachusetts Personal Income Tax*, MASS. DEP’T OF REV. (Dec. 23, 2021), <https://www.mass.gov/service-details/learn-about-filing-status-on-massachusetts-personal-income-tax>. Note that New Hampshire does not have a personal income tax; the state does not require election conformity when filing dividend and interest tax returns. See *Frequently Asked Questions – Interest & Dividend Tax*, N.H. DEP’T OF REV. ADMIN., <https://www.revenue.nh.gov/faq/interest-dividend.htm> (last visited Oct. 3, 2022) (specifying that if one spouse is a nonresident, no joint tax return is required).

<sup>49</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

same-sex marriages. For same-sex couples seeking full equality under the law, this was a step in the right direction.

Due to disconformity in these states, however, same-sex married couples often had a dual filing status, whereby they were obligated to file as single individuals under federal law, but they were permitted to file with married-filing-jointly status under state law. The process was onerous. Where opposite-sex taxpayers benefited from the simplicity of federal-state tax conformity—whereby they could calculate their joint income under federal law and then import it to their state returns for adjustments—same-sex couples were often forced to calculate their taxes in three steps.<sup>50</sup> First, they determined their federal tax liability as single individuals.<sup>51</sup> Second, they determined their hypothetical joint income under federal law—a dummy return that would never be filed.<sup>52</sup> Third, they imported the numbers from their dummy return to their state tax returns in order to calculate their state income.<sup>53</sup> As a result, filing was time consuming, complicated, and sometimes expensive.<sup>54</sup> Though burdensome, this consequence of disconformity arguably helped push national policy by setting the stage for judicial changes to federal law.

In 2013, the Supreme Court noted this context in *United States v. Windsor*.<sup>55</sup> In its analysis of the consequences of the Defense of Marriage Act (DOMA), which defined marriage for federal purposes as between a man and a woman, the Court observed that “[i]t forces them to follow a complicated procedure to file their state and federal taxes jointly.”<sup>56</sup> Of course, it was not DOMA, standing alone, that created this complexity—the complexity arose from states’ deliberate disconformity from federal tax law. Ultimately, the Court held in *Windsor* that failure to treat same-sex marriages the same as opposite-sex marriages was a violation of the Fifth Amendment.<sup>57</sup>

Following that ruling, the Internal Revenue Service announced that same-sex couples who were married under state law would be permitted to file jointly under federal law.<sup>58</sup> Two years later, in

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<sup>50</sup> See Laysen, *supra* note 42, at 83.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See *id.*

<sup>55</sup> 570 U.S. 744 (2013).

<sup>56</sup> *Id.* at 773.

<sup>57</sup> *Id.* at 775.

<sup>58</sup> Rev. Rul. 2013-17, 2013-38 I.R.B. 201-02.

*Obergefell v. Hodges*, the Court ruled that the Due Process and Equal Protection clauses of the Fourteenth Amendment protect same-sex marriage.<sup>59</sup> Though recent Supreme Court decisions have cast some doubt on *Obergefell* and the future of same-sex marriage,<sup>60</sup> there is no question that same-sex spouses can file jointly for both state and federal tax purposes under current law. Thus, this historical example provides powerful evidence of the reverse federalism potential of disconformity to help correct injustices under federal law.

With this background in mind, the remainder of this Article will take a closer look at reverse federalism in the context of current law. This Article will focus on a handful of particularly clear examples of laws that have the potential to help (or harm) low-income communities: the Earned Income Tax Credit, the Child Tax Credit, and the Opportunity Zones tax preference. The federal experience of these laws has revealed areas of potential, as well as significant limitations, in their capacity to benefit low-income communities. For reasons to be explained more fully in Part IV below, disconformity to substantive aspects of these federal laws may help improve their state-level outcomes. In addition, the outcomes of some of these laws may be affected by states' approach to election conformity and administrative conformity.

### III. THE CASES: CONFORMITY TO THE EARNED INCOME TAX CREDIT, CHILD TAX CREDIT, AND OPPORTUNITY ZONES

#### A. *Conformity to Federal Tax Credits: Earned Income Tax Credit and Child Tax Credit*

The federal government commonly uses tax preferences to deliver financial assistance to low-income individuals.<sup>61</sup> For this purpose, tax credits have several advantages over other forms of tax preferences. For example, tax credits are often more equitable than tax deductions. Tax deductions work by reducing a taxpayer's taxable income. As a result, they are only available to taxpayers that *have* taxable income to reduce. Many low-income individuals do not have

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<sup>59</sup> *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

<sup>60</sup> See *Dobbs v. Jackson Women's Health Org.*, 144 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

<sup>61</sup> See generally Tahk, *supra* note 2, at 796–820.

taxable income, making deductions valueless to them.<sup>62</sup> Less obviously, tax deductions are always more valuable to taxpayers with high marginal tax rates than to taxpayers with lower marginal tax rates.<sup>63</sup> This means that, when progressive tax rates apply, the deductions will be more valuable to higher income taxpayers than to lower income taxpayers. Tax credits, on the other hand, reduce taxpayers' tax liability on a dollar-for-dollar basis. For this reason, they are not affected by taxpayers' marginal tax rates and have equal value to higher income and lower income taxpayers.

Of course, there is a catch: a taxpayer who has little or no tax liability—those same taxpayers who had little use for deductions—may not be able to use all their tax credits either.<sup>64</sup> For example, assume a low-income taxpayer owes \$100 in taxes before applying tax credits. If the taxpayer is entitled to a \$350 tax credit, then they may be unable to use \$250 of the credit (the taxpayer can reduce their tax liability to zero, but no further). To solve this dilemma, some tax credits targeted to low-income taxpayers are structured as “refundable” tax credits. Refundable tax credits are not limited by a taxpayer's tax liability.<sup>65</sup> In the example above, the taxpayer would simply receive a check or bank deposit from the government equal to \$250 in a transaction that “resembles other tax refunds in administration and public perception.”<sup>66</sup>

Two federal tax credits that target low-income taxpayers and have refundable features are the Earned Income Tax Credit (EITC),<sup>67</sup> which is fully refundable, and the Child Tax Credit (CTC),<sup>68</sup> which is partially refundable. This section provides a brief overview of each and explains how states have incorporated them into their tax codes. Later Parts will consider potential social justice reforms through strategic disconformity to these laws.

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<sup>62</sup> Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 28–29 (2006).

<sup>63</sup> *Id.* at 24.

<sup>64</sup> *See id.* at 28–29.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> 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, 530 (2013).

<sup>67</sup> I.R.C. § 32.

<sup>68</sup> I.R.C. § 24.

### 1. Earned Income Tax Credit

“The EITC is a refundable tax credit that supplements the earnings of low-income workers,”<sup>69</sup> and as such, it is a key component of the country’s social safety net. Briefly, the EITC provides a tax credit to qualifying low-income taxpayers in an amount equal to a percentage of their “earned income” for the taxable year.<sup>70</sup> Earned income generally includes “wages, salaries, tips, and other employee compensation” plus the “taxpayer’s net earnings from self-employment.”<sup>71</sup> The size of the tax credit varies depending on the number of “qualifying children” in the taxpayer’s household.<sup>72</sup> In 2022, the maximum tax credit available to taxpayers with no children was \$560,<sup>73</sup> an amount that only partially offsets the taxpayer’s payroll tax liability.<sup>74</sup> The credit amount increases with the number of children in the taxpayer’s household, with the maximum credit available to families with three or more children set at \$6,935 for the 2022 tax year.<sup>75</sup> At low income levels, the dollar amount of the credit increases as earned income increases, regardless of the number of children in the taxpayer’s household.<sup>76</sup>

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<sup>69</sup> Greene, *supra* note 66, at 530.

<sup>70</sup> I.R.C. § 32(a). To be eligible for the EITC, a taxpayer must (i) have a qualifying child, or (ii) (a) has its “principal place of abode” in the United States for more than half the taxable year, (b) is between 25 and 64 years old, and (c) is not a dependent of another taxpayer. I.R.C. § 32(c)(1)(A). “[N]onresident alien individual[s]” are not eligible for the EITC. I.R.C. § 32(c)(1)(D). The maximum income level for eligible taxpayers varies by the number of children in the household and is based on filing status. I.R.C. § 32(b). For single or head of household filers in 2022, income must be less than: (a) No children: \$16,480, (b) One child: \$43,492, (c) Two children: \$49,399, (d) Three or more children: \$53,057. Rev. Proc. 2021-45 § 3.06. For married filing jointly in 2022, income must be less than: (a) No children: \$22,610, (b) One child: \$49,622, (c) Two children: \$55,529, (d) Three or more children: \$59,187. *Id.*

<sup>71</sup> I.R.C. § 32(c)(2).

<sup>72</sup> See I.R.C. § 32(b). With some exceptions, the phrase “qualifying child” includes the taxpayer’s children, or a “brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative,” assuming certain conditions are met. I.R.C. §§ 32(c)(3)(A), 152(c). To be eligible, the child generally must (i) live with the taxpayer for more than half the taxable year, (ii) be under 19 (or a student under age 24), and (iii) must not have filed a joint return with a spouse. *Id.*

<sup>73</sup> Rev. Proc. 2021-45 § 3.06.

<sup>74</sup> Ariel Jurow Kleiman, *Low-End Regressivity*, 72 TAX L. REV. 1, 15 (2018).

<sup>75</sup> Rev. Proc. 2021-45 § 3.06.

<sup>76</sup> See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 541-43 (1994). The credit amount, however, is subject to a cap, and once the taxpayer’s income reaches a threshold level, the credit begins to phase out and ultimately reduces to zero. *Id.*

During the 2020 tax year, the EITC delivered approximately \$60 billion of tax credits to twenty-five million low-income workers.<sup>77</sup> The average amount of EITCs received by eligible taxpayers was about \$2,411,<sup>78</sup> with some receiving as much as \$6,728.<sup>79</sup> The EITC lifts “millions of families out of poverty and reduce[s] poverty for many others.”<sup>80</sup> The law is associated with the improvement of children’s well-being, including “improved infant health and increased math and reading test scores.”<sup>81</sup> It is also “broadly associated with increasing labor force participation among single mothers.”<sup>82</sup> Though researchers have critiqued aspects of the EITC, with some going as far as to describe the program as a “broken” safety net, EITC recipients’ own assessment of the program is “overwhelmingly positive.”<sup>83</sup> Recipients feel favorably about the program not only because it “provides much-needed financial relief, but also because it allow[s] them to feel . . . like ‘a real American.’”<sup>84</sup>

According to the National Conference of State Legislatures, as of 2022, thirty states and the District of Columbia offer some form of state-level EITC that supplements the federal law.<sup>85</sup> For the reasons explained above, tax credits like the EITC are not automatically incorporated into state tax laws, and the states that have EITCs all took affirmative steps to adopt their own versions.<sup>86</sup> Despite this, many states simply specify that the state EITC equals a percentage of the EITC available under federal law.<sup>87</sup> In doing so, these states effectively

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<sup>77</sup> *EITC Fast Facts*, INTERNAL REVENUE SERV., <https://www.eitc.irs.gov/partner-toolkit/basic-marketing-communication-materials/eitc-fast-facts/eitc-fast-facts> (last visited Oct. 4, 2022).

<sup>78</sup> *Id.*

<sup>79</sup> *Income Limits and Range of EITC*, INTERNAL REVENUE SERV., <https://www.eitc.irs.gov/eitc-central/about-eitc/income-limits-and-range-of-eitc/income-limits-and-range-of-eitc> (last visited Aug. 1, 2022).

<sup>80</sup> Kleiman, *supra* note 74, at 11.

<sup>81</sup> *Id.* (footnotes omitted).

<sup>82</sup> *Id.* at 11–12.

<sup>83</sup> Greene, *supra* note 66, at 538.

<sup>84</sup> *Id.* at 539.

<sup>85</sup> *EITC Enactments 2009–2022*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/state-earned-income-tax-credit-enactments.aspx> (last visited Oct. 4, 2022).

<sup>86</sup> *See supra* Part 0.A.

<sup>87</sup> *State and Local Backgrounders: State Earned Income Tax Credits*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-earned-income-tax-credits> (last

conform to all aspects of the federal law, including eligibility rules and administrative requirements. In Part IV, this Article will identify areas in which disconformity may help correct problems with the federal program, but it is worth noting here that several states already depart from the federal model in ways that respond to social justice critiques. For example, some states make the tax credits available to populations that are ineligible to claim the federal tax credits.<sup>88</sup> These departures will be discussed in Part IV below.

## 2. Child Tax Credits

The CTC is another federal tax credit program that provides important financial assistance to many low-income families with children.<sup>89</sup> Like the EITC, the CTC requires that taxpayers have “earned income” to claim the credit, thereby limiting the program to working families.<sup>90</sup> Assuming the taxpayer is eligible, the CTC provides maximum tax credits of \$2,000 per qualifying child, and it is partially refundable in amounts up to \$1,500.<sup>91</sup> The government calls the refundable portion of the CTC the “additional child tax credit.”<sup>92</sup> Although the CTC is not limited to low-income families, the size of the credit phases out for high-income couples, beginning at \$400,000 for married-filing-jointly taxpayers.<sup>93</sup>

According to the Center on Budget and Policy Priorities, as of 2022, “[n]ine states have already enacted and funded a CTC . . . and states continue to enact new credits and improve existing ones.”<sup>94</sup> In at least two of those states—Oklahoma and Colorado—the state CTC is always calculated as a percentage of the federal CTC.<sup>95</sup> In those

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visited Oct. 4, 2022). The percentage varies, and “[i]n tax year 2022, state credits as a percentage of the federal EITC ranged from a refundable 3 percent in Montana to a nonrefundable 104.17 percent in South Carolina.” *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See Tahk, *supra* note 2, at 804–05.

<sup>90</sup> Kleiman, *supra* note 3, at 536.

<sup>91</sup> I.R.C. § 24; Rev. Proc. 2021-45 § 3.05 (applying inflation adjustments to specify that the refundable amount in 2022 is \$1500). [Sec. 3.05]

<sup>92</sup> *What Is the Child Tax Credit?*, PETER G. PETERSON FOUND. (Apr. 13, 2021), <https://www.pgpf.org/budget-basics/what-is-the-child-tax-credit>.

<sup>93</sup> *Id.*

<sup>94</sup> Samantha Waxman & Iris Hinh, *States Should Create and Expand Child Tax Credits*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 22, 2022, 10:00 AM), <https://www.cbpp.org/blog/states-should-create-and-expand-child-tax-credits>.

<sup>95</sup> OKLA. STAT. tit. 68, § 2357(B)(2) (2022) (providing for a tax credit equal to 5 percent of the CTC allowed under the federal Internal Revenue Code); COLO. REV.



states, the CTC effectively conforms to the federal law in its entirety. But most states that have enacted CTCs have adopted their own formulas for calculating the credits.<sup>96</sup> Nevertheless, many states that use their own formulas have retained the federal eligibility requirements, maintaining a high degree of conformity to federal law.<sup>97</sup> In Part IV below, this Article highlights areas in which states might consider departing from the federal model, including different eligibility requirements.

#### B. *Conformity and the Opportunity Zones Tax Preference*

In contrast to tax credits like the EITC and CTC, which direct benefits to low-income individuals, some tax laws are designed to improve the places where low-income people live and work.<sup>98</sup> Often, these laws are designed to provide assistance to real estate developers and other business owners.<sup>99</sup> A recent—highly controversial—example of such a place-based policy is the federal Opportunity Zones law.<sup>100</sup> This program provides tax preferences for investment in designated areas called “qualified opportunity zones.”<sup>101</sup> When it emerged with the Tax Cuts and Jobs Act in 2017, the law’s backers claimed it would benefit low-income communities by promoting investment in their neighborhoods.<sup>102</sup> Since then, the law has drawn

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STATS. § 39-22-129 (2021) (providing for a state CTC calculated as a percentage of the federal CTC). *See also* I.R.C. § 24 (federal child tax credit).

<sup>96</sup> *State Tax Credits*, TAX CREDITS FOR WORKERS AND FAMILIES, <https://www.taxcreditsforworkersandfamilies.org/state-tax-credits> (last visited Oct. 4, 2022). *See, e.g.*, CAL. REV. & TAX. CODE § 17054 (West 2021) (specifying dollar amount for the dependent exemption credit); IDAHO CODE § 63-3029L (2012) (specifying dollar amount for the state CTC); N.Y. TAX LAW § 606(c-1) (2022) (specifying dollar amount for the empire state child credit).

<sup>97</sup> *See, e.g.*, IDAHO CODE § 63-3029L (2012) (incorporating the definition of “qualifying child” from federal law); N.Y. TAX LAW § 606 (2022) (incorporating the definition of “qualifying child” from federal law).

<sup>98</sup> Laysner, *Geographic Inequality*, *supra* note 3, at 1–2.

<sup>99</sup> *See, e.g.*, I.R.C. § 42 (Low-income housing tax credit); I.R.C. § 45D (New markets tax credit); I.R.C. § 1400Z-2 (Special rules for capital gains invested in opportunity zones).

<sup>100</sup> *See* I.R.C. §§ 1400Z-1, 1400Z-2.

<sup>101</sup> I.R.C. § 1400Z-1.

<sup>102</sup> *See generally* DAVID WESSEL, ONLY THE RICH CAN PLAY (2021).

extensive criticism from academics,<sup>103</sup> anti-poverty advocates,<sup>104</sup> and journalists,<sup>105</sup> many of whom argue that the law is unlikely to help residents of low-income communities.

Despite the critiques of Opportunity Zones, twenty-eight states have incorporated the federal Opportunity Zones law into their state laws without significant changes.<sup>106</sup> Eleven states automatically incorporated the federal Opportunity Zones law through rolling conformity, and seventeen states took affirmative steps to conform through static or selective conformity processes.<sup>107</sup> Another nine states also conform to the federal Opportunity Zones law, but with state-specific modifications.<sup>108</sup> In states that conform to the federal Opportunity Zones law, taxpayers with cash derived from capital gains can invest it in an Opportunity Fund to receive state-level capital gains tax deferrals and exemptions. As a result, the state laws effectively supplement the federal law, making Opportunity Zones investment more valuable than it would be under federal law alone.

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<sup>103</sup> See, e.g., Weiss, *supra* note 3, at 182; Laysner, *Geographic Inequality*, *supra* note 3, at 51–56; De Barbieri, *supra* note 3, at 92.

<sup>104</sup> See, e.g., Heather Tirado Gilligan, *Philadelphia Colleges Are Using Trump's Opportunity Zones to Speed Up Gentrification*, TALK POVERTY (Nov. 2, 2020), <https://talkpoverty.org/2020/11/02/philadelphia-colleges-using-trumps-opportunity-zones-speed-gentrification>; Samantha Jacoby, *Potential Flaws of Opportunity Zones Loom, as Do Risks of Large-Scale Tax Avoidance*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 11, 2019), <https://www.cbpp.org/research/federal-tax/potential-flaws-of-opportunity-zones-loom-as-do-risks-of-large-scale-tax>.

<sup>105</sup> See, e.g., WESSEL, *supra* note 102; Jeff Ernsthansen & Justin Elliott, *An Opportunity for the Rich*, WNYC STUDIOS: TRUMP, INC. (June 19, 2019), <https://www.wnycstudios.org/podcasts/trumpinc/episodes/trump-inc-opportunity-for-rich>; Robert Frank, "Opportunity Zones" Fall Short on Helping Low-Income Communities, *Study Finds*, CNBC (June 17, 2020, 12:50 PM), <https://www.cnbc.com/2020/06/17/opportunity-zones-fall-short-on-helping-low-income-communities-study.html>; Kathryn Kranhold, *There's No Evidence That Opportunity Zones Benefit Low-Income Residents and Their Neighborhoods*, MOTHER JONES (June 29, 2020), <https://www.motherjones.com/politics/2020/06/theres-no-evidence-that-opportunity-zones-benefit-low-income-residents-and-their-neighborhoods>; Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html>; Eric Lipton & Jesse Drucker, *Symbol of '80s Greed Stands to Profit From Trump Tax Break for Poor Areas*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2019/10/26/business/michael-milken-trump-opportunity-zones.html>.

<sup>106</sup> MICHELLE LAYSNER, MULTI-STATE SURVEY OF STATE OPPORTUNITY ZONES LAWS 1–9 (2022), [https://doi.org/10.13012/B2IDB-4303513\\_V1](https://doi.org/10.13012/B2IDB-4303513_V1).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

By making the Opportunity Zones incentive more valuable to developers, conformity may contribute to an increase in Opportunity Zone investment—including investment that may not benefit low-income communities. For example, if the Opportunity Zones tax preferences are merely giveaways to investors as some critics suggest, then conformity by states only sweetens the deals. If Opportunity Zone investment contributes to gentrification by accelerating investment in gentrifying communities, then conformity by states may accelerate the process. In short, conformity by states amplifies the extent that the federal Opportunity Zones law fails to promote social justice goals.

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The federal EITC, CTC, and Opportunity Zones laws are examples of federal laws to which states often conform, sometimes with modification, but frequently without. To the extent that these laws produce desirable outcomes, such conformity is an administratively efficient way to double down on those benefits, amplifying their positive outcomes within state borders. Such administrative simplicity is a major driver of federal-state conformity. But a more mindful approach to federal-state *disconformity*, which is informed by the federal experience, has the potential to promote more just outcomes in areas where the federal law falls short. The next section examines disconformity as a social justice reform strategy, using the EITC, CTC, and Opportunity Zones laws as case studies.

#### IV. DISCONFORMITY AS A STRATEGY TO IMPROVE THE EITC, CTC, AND OPPORTUNITY ZONES

##### A. *Reforming the EITC*

###### 1. Lessons and Critiques

Anti-poverty advocates widely view the EITC as a successful program; the most common critiques focus on its scope. Despite its benefits, the federal EITC is not available to all taxpayers. Among the excluded groups are childless workers under the age of twenty-five and those who lack a social security number.<sup>109</sup> These restrictions prevent many young low-income taxpayers and most immigrant workers from claiming EITC benefits. Moreover, taxpayers without qualifying

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<sup>109</sup> I.R.C. § 32(c)(A)(ii)(II) (childless adults must have attained age twenty-five to claim the EITC); I.R.C. § 32(m) (specifying that the identification requirements in I.R.C. § 32(c)(1)(E) and (c)(3)(D) can only be met with a social security number).

children are only eligible for a limited amount of EITCs.<sup>110</sup> Advocates for EITC reform have often called for expansions that would allow the EITC to better serve these populations, and Congress temporarily enacted versions of some of those reforms during the COVID-19 pandemic.<sup>111</sup> The American Rescue Plan of 2021 reduced the eligibility age to nineteen for most taxpayers, and increased the size of the credit for workers without qualifying children.<sup>112</sup>

In addition, some otherwise eligible married taxpayers may be barred from the program if they do not file using a joint tax return.<sup>113</sup> This feature of the EITC has drawn criticism from observers who point out that some married taxpayers have compelling reasons to file separately from their spouses.<sup>114</sup> Many of these reasons relate to nontax circumstances. For example, a taxpayer may be separated or estranged from their spouse, but still legally married.<sup>115</sup> A taxpayer may be a victim of spousal abuse or abandonment, or he or she may have a spouse who refuses to sign a joint return.<sup>116</sup> Under such circumstances, low-income taxpayers face a difficult choice: attempt to file jointly with potentially harmful consequences, or file separately and forgo the federal EITC. During the COVID-19 pandemic, these restrictions were lifted for some separated spouses.<sup>117</sup> Though a full

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<sup>110</sup> I.R.C. § 32(b); Kleiman, *supra* note 3, at 546.

<sup>111</sup> See generally Kleiman, *supra* note 3 (discussing temporary expansions of the EITC and CTC programs during the COVID-19 pandemic).

<sup>112</sup> *Looking Ahead: How the American Rescue Plan Affects 2021 Taxes, Part 1*, INTERNAL REVENUE SERV. (June 2, 2021), <https://www.irs.gov/newsroom/looking-ahead-how-the-american-rescue-plan-affects-2021-taxes-part-1>.

<sup>113</sup> See I.R.C. § 32(d)(1); James Maule, *Family and Household Transactions (Portfolio 513)*, BLOOMBERG TAX, <https://pro.bloombergtax.com/portfolio/family-and-household-transactions-portfolio-513> (last visited Oct. 4, 2022).

<sup>114</sup> Fred B. Brown, *Permitting Abused Spouses to Claim the Earned Income Tax Credit in Separate Returns*, 22 WM. & MARY J. WOMEN & L. 453, 454–55 (2016).

<sup>115</sup> Michelle Lyon Drumbl, *Joint Winners, Separate Losers: Proposals to Ease the Sting for Married Taxpayers Filing Separately*, 19 FLA. TAX REV. 399, 457 (2016).

<sup>116</sup> *Id.* at 411–12; see generally Brown, *supra* note 114 (analyzing the difficulties in claiming the EITC faced by abused spouses).

<sup>117</sup> See *COVID Tax Tip 2022-31: Changes to the Earned Income Tax Credit for the 2022 Filing Season*, INTERNAL REVENUE SERV. (Apr. 7, 2022), <https://www.irs.gov/newsroom/changes-to-the-earned-income-tax-credit-for-the-2022-filing-season>. See also I.R.C. 32(d)(2) (permitting married spouses to be treated as single under the EITC as long as the taxpayer (i) does not file a joint tax return with another individual, (ii) resides with a qualifying child of the individual for more than half of the taxable year, and (iii) has been living apart from their spouse for at least six months or is legally separated).

analysis of program outcomes under the emergency expansions of the EITC during COVID is not yet available, these changes, and those previously mentioned, have been celebrated by anti-poverty advocates.<sup>118</sup>

## 2. Disconformity as a Reform Strategy

The EITC confers meaningful benefits to low-income taxpayers, and conformity to the federal law allows states to enhance those benefits through supplemental tax benefits. To the extent that states calculate the EITC as a percentage of the federal program, such conformity has obvious advantages of reducing compliance burdens for taxpayers and administrative burdens for the states.<sup>119</sup> In other words, piggybacking onto the federal law has the potential to amplify positive outcomes under the EITC with clear benefits to the states. Nevertheless, states can also improve upon the federal EITC by choosing *not* to conform to federal eligibility requirements, filing election requirements, and social security number requirements.

In fact, some states have already begun to adopt these departures. According to an Urban Institute survey, seven states make EITC benefits available to childless workers under age twenty-five.<sup>120</sup> In 2020, two states—California and Colorado—decoupled from the social security number requirement, permitting immigrants with Individual Taxpayer Identification Numbers (ITINs) to claim state EITCs.<sup>121</sup> Since then, five other states—Maine, Maryland, New Mexico, Oregon, and Washington—have made similar changes to their state laws,<sup>122</sup> suggesting that reform efforts in California and Colorado may have started a national trend—an example of reverse federalism at work. That said, it is worth noting that ITINs are issued by the federal government, which has been experiencing significant processing

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<sup>118</sup> See, e.g., Areeba Haider & Galen Hendricks, *Now Is the Time to Permanently Expand the Child Tax Credit and Earned Income Tax Credit*, CTR. FOR AM. PROGRESS (May 21, 2021), <https://americanprogress.org/article/now-time-permanently-expand-child-tax-credit-earned-income-tax-credit>.

<sup>119</sup> See Mason, *supra* note 7, at 1269 (“Assessing state income taxes upon the federal tax base eases states’ legislative and enforcement burdens, and it reduces taxpayers’ compliance burdens.”).

<sup>120</sup> These states include Colorado, California, Maine, Maryland, Minnesota, New Jersey, and New Mexico. *State and Local Backgrounders: State Earned Income Tax Credits*, *supra* note 87.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

delays in issuing new ITINs.<sup>123</sup> As these states work to extend benefits to their immigrant populations, it may be worth adopting alternative documentation options that are less reliant on federal administration.

In addition, states could eliminate filing election conformity and permit married taxpayers to claim the EITC even if they file separately. In states with filing election conformity, taxpayers must use the same filing status for state taxes as they use for federal purposes. This means taxpayers who filed jointly under federal law—such as to claim the EITC—must also file jointly under state law. For most low-income taxpayers, this outcome is probably consistent with what they would choose absent election conformity. This is because joint tax filing often offers more favorable tax brackets than married-filing-separately status, allowing taxpayers to lower their effective tax rates.<sup>124</sup> Some taxpayers, however, may prefer to avoid joint filing for the reasons described above.<sup>125</sup> Through disconformity, states can provide these taxpayers with more freedom to choose their election status without sacrificing valuable EITC benefits.

## B. *Reforming the CTC*

### 1. Lessons and Critiques

Two features of the CTC have drawn criticism from scholars and advocates. The first is its partial refundability feature.<sup>126</sup> Unlike the EITC, which is fully refundable, the CTC is only partially refundable to low-income taxpayers.<sup>127</sup> This means that the lowest income taxpayers may not receive the full benefit from the tax credit.<sup>128</sup> The second feature that tends to draw criticism from advocates is the work

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<sup>123</sup> *United States—Delays Occurring for Issuance of ITINs, Certificates of Coverage*, KPMG (Dec. 15, 2021), <https://home.kpmg/xx/en/home/insights/2021/12/flash-alert-2021-307.html>.

<sup>124</sup> Alstott, *supra* note 76, at 577 n.164.

<sup>125</sup> *See supra* notes 113–117.

<sup>126</sup> Wendy A. Bach, *Poor Support/Rich Support: (Re)Viewing the American Social Welfare State*, 20 FLA. TAX REV. 495, 525 (2017) (noting that “the CTC is not available to the poorest households” because it is only partially refundable); SUNNY FROTHINGHAM ET AL., CTR. FOR AM. PROGRESS, STRENGTHENING THE CHILD TAX CREDIT WOULD PROVIDE GREATER ECONOMIC STABILITY FOR MILLENNIAL PARENTS 4 (2015), <https://cdn.genprogress.org/wp-content/uploads/2015/08/27122228/CTCmillennials-brief.pdf> (“Because the CTC is only partially refundable, it does not reach many of the lowest-income children.”).

<sup>127</sup> Bach, *supra* note 126, at 525.

<sup>128</sup> *See* Bach, *supra* note 126 and accompanying text.

requirement. Specifically, the refundable portion of the CTC is calculated as a percentage of a taxpayer's earned income in excess of inflation-adjusted \$2,500.<sup>129</sup> The phrase "earned income" is defined in I.R.C. § 32 and generally includes compensation income.<sup>130</sup> Critics argue that this work requirement limits the laws' capacity to mitigate childhood poverty for children whose parents are unemployed.<sup>131</sup>

During the COVID-19 pandemic, the American Rescue Plan temporarily eliminated the CTC's work requirement and increased the amounts to \$3,600 for children under age six and to \$3,000 for children ages six through seventeen.<sup>132</sup> It also made the credit fully refundable, significantly increasing its value to low-income taxpayers. A survey of CTC recipients in 2021 showed that 25 percent of recipients spent the extra money on mortgages or rent, a clear illustration of the importance of such assistance for maintaining housing stability.<sup>133</sup>

## 2. Disconformity as a Reform Strategy

The expanded federal CTC is no longer available to taxpayers, and many families may once again face economic insecurity. Notwithstanding the expiration of the federal law, states can make their own CTC programs permanent and can use the emergency legislation as a model. In fact, several states enacted or expanded their own state-level CTCs in 2021 or 2022, and many of those laws will be

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<sup>129</sup> See I.R.C. §§ 24(d)(1)(B) (calculating taxpayers' refundable CTC with referenced to "earned income" (within the meaning of the earned income tax credit rules) over \$3,000); 24(h)(6) (lowering the earned income segment threshold amount to \$2,500 for years 2018 through 2025).

<sup>130</sup> See I.R.C. § 32(c)(2)(A) (defining earned income as "wages, salaries, tips, and other employee compensation" and certain net earnings from self-employment).

<sup>131</sup> FROTHINGHAM ET AL., *supra* note 126, at 4 (stating that the CTC's minimum earnings requirement "excludes many families whose budgets are the tightest, such as parents who are underemployed or looking for work").

<sup>132</sup> See I.R.C. §§ 24(i)(3) (increasing the credit amount); 24(i)(1) (eliminating the earned income requirements and permitting a fully refundable tax credit); 24(i)(2) (increasing the age limit for qualifying children to 17). These amounts were subject to a phase out that began at \$150,000 for married-filing-jointly taxpayers. See Nell Adkins & Charlene Henderson, *ARPA Expands Tax Credits for Families*, TAX ADVISER (July 1, 2021), <https://www.thetaxadviser.com/issues/2021/jul/arpa-expands-tax-credits-families.html>.

<sup>133</sup> Arohi Pathak, *Making CTC and EITC Expansions Permanent Would Reduce Poverty and Grow the Economy*, CTR. FOR AM. PROGRESS (Sept. 21, 2021), <https://www.americanprogress.org/article/making-ctc-eitc-expansions-permanent-reduce-poverty-grow-economy/>.

permanent.<sup>134</sup> For example, in 2022, Vermont enacted a new, fully refundable CTC worth \$1,000 per qualifying child five-years-old and younger.<sup>135</sup> That same year, New Jersey enacted a similar refundable CTC that provides up to \$500 per child five-years-old and younger.<sup>136</sup> In enacting state CTCs, states should consider making the CTC fully refundable and available to taxpayers without earned income. These departures from the federal law, which are modeled after the successful COVID-19 emergency legislation, would help serve taxpayers who do not have full access to the federal CTC under current law.

### C. Reforming Opportunity Zones

#### 1. Lessons and Critiques

A growing body of research suggests that Opportunity Zones investment often does not flow to the neighborhoods that need it most.<sup>137</sup> In addition, the projects subsidized through the Opportunity Zones program tend to be market rent real estate projects that are inaccessible to many low-income families that rely on below-market, “affordable” rentals.<sup>138</sup> For these reasons, many critics worry that Opportunity Zones are, at best, a giveaway to real estate developers—a

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<sup>134</sup> See TAX CREDITS FOR WORKERS AND FAMILIES, *supra* note 96.

<sup>135</sup> H.510, No. 138 (2022) (codified at 32 V.S.A. § 5830f); Lola Duffort, *Phil Scott Signs \$1,000 Child Tax Credit into Law*, VTDIGGER (May 27, 2022), <https://vtdigger.org/2022/05/27/phil-scott-signs-1000-child-tax-credit-into-law>.

<sup>136</sup> See N.J. Stat. §§ 54A:4-17.1. For a discussion of other state-level expansions of the CTC and EITC, see Iris Hinh & Samantha Waxman, *Many States are Creating or Expanding Tax Credits to Help Families Afford the Basics*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 10, 2022), <https://www.cbpp.org/blog/many-states-are-creating-or-expanding-tax-credits-to-help-families-afford-the-basics>.

<sup>137</sup> PATRICK KENNEDY & HARRISON WHEELER, NEIGHBORHOOD-LEVEL INVESTMENT FROM THE U.S. OPPORTUNITY ZONE PROGRAM: EARLY EVIDENCE 28 (“Among tracts designated as OZs, investors favored neighborhoods with higher income, educational attainment, home values, and pre-existing population and income growth. These neighborhoods have also experienced significant changes in their demographic composition over the past decade, with increasing shares of college educated adults and declining shares of non-white residents.”). See generally Layser, *Subsidizing Gentrification*, *supra* note 3 (providing evidence that analogous tax credits have disproportionately flowed to gentrifying neighborhoods); WESSEL, *supra* note 102 (providing anecdotal evidence that Opportunity Zones investment rarely targets deeply distressed communities).

<sup>138</sup> See generally Michelle D. Layser, *Financing Affordable Housing in Opportunity Zones*, 19 PITT. TAX REV. 1 (2021) (discussing barriers to using the Opportunity Zone preference for affordable housing development).



subsidy for investment that would have happened without the tax law. At worst, Opportunity Zones may accelerate gentrification in some neighborhoods, potentially displacing low-income residents as property values increase the cost of rents and property taxes.

## 2. Disconformity as a Reform Strategy

If states fully decouple from the federal Opportunity Zones law, such as by eliminating all state-level capital gains preferences for investment in Opportunity Zones, they may chill Opportunity Zone investment in their state. To the extent that simply slowing Opportunity Zones investment is the goal, this may be an effective strategy, as at least some investors are likely to migrate to other states that provide state-level benefits. State leaders, however, are often reluctant to enact policies that may be perceived as driving away investment and, more importantly, jobs.<sup>139</sup> In fact, there is evidence that some state leaders initially resisted enacting state-level Opportunity Zones laws, but ultimately yielded to pressure from the business community.<sup>140</sup>

Given this political reality, an alternative option for states may be to modify their state Opportunity Zones laws to make it more likely that the laws will benefit low-income communities. Here, the version of a state-level Opportunity Zones law enacted in Maryland may serve as a useful template. Maryland provides supplemental tax benefits to businesses that maintain accountability to opportunity zone residents through representation on their governing or advisory boards, or through use of a community benefit agreement (CBA) or strategic industry partnership negotiated with community groups.<sup>141</sup> Community benefits agreements are contracts between developers and community coalitions that require the developer to provide “economic benefits such as affordable housing, local hiring, and living wages to

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<sup>139</sup> See Edward W. De Barbieri, *Lawmakers as Job Buyers*, 88 *FORDHAM L. REV.* 15, 19 (2019) (discussing the political benefits of policies that promote economic development and job growth).

<sup>140</sup> See WESSEL, *supra* note 102, at 197–98 (recounting unsuccessful efforts by Oregon state Representative Nancy Nathanson to block state-level Opportunity Zones preferences in Oregon).

<sup>141</sup> MD. ECON. DEV. CODE ANN. § 6-1001(c)(2) (2022); see also *Maryland Opportunity Zone Enhancement Credits*, MD. DEP’T OF COM., <https://commerce.maryland.gov/fund/programs-for-businesses/opportunity-zone-enhancement-credits> (last visited Oct. 4, 2022).

communities where major developments are located.”<sup>142</sup> State-level modifications like these may help provide accountability to members of the targeted community, a feature that is notably absent from the federal law. In addition, states might consider adding conditions to their state-level Opportunity Zones laws that would require opportunity zone businesses to hire, serve, or house residents of the targeted communities. Such changes may help mitigate harms—and even increase the benefits—of the federal Opportunity Zones to low-income communities.

#### V. CONCLUSION

In the current political and legal environment, the greatest potential for social justice reform—including tax-based reforms—may be at the state level. For this reason, it is essential for reformers to understand how states can help drive national policy change. To that end, this Article has revisited a familiar feature of state tax systems, federal-state tax conformity and disconformity, applying a reverse federalism framework. In doing so, it has introduced a new theory of disconformity that shifts the focus away from its defensive role within a federalist system, and it highlights the capacity for disconformity to serve as a powerful corrective to federal law. To demonstrate this capacity, this Article has described how states can learn from the federal experience with the federal Earned Income Tax Credit, Child Tax Credit, and Opportunity Zones tax preference to implement strategic departures from the federal model. Strategic departures like these have the potential to promote nationwide social justice reform initiated at the state level.

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<sup>142</sup> Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities*, 37 CARDOZO L. REV. 1773, 1776 (2015).