

Troubling Legislation

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Clint Wallace, [The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act](#), **Univ. of Chi. L. Rev. Online** (2020).

Clint Wallace's short essay, *The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act*, is well worth a read for tax scholars, non-tax scholars, and non-scholars alike. The essay addresses what may be thought of by some as one of the "esoteric" provisions of the CARES Act. The upshot is that, by using the very esoteric nature of the provision as cover, Congress slipped costly, regressive, unjustifiable legislation into the CARES Act, which was sold to the public as progressive, emergency relief from the COVID-19 disaster.

The essay is important for a number of reasons. First, it educates readers about how the CARES Act resurrects an unlimited pass-through deduction for high-income taxpayers. Second, by doing so, it helps readers understand how the CARES Act was actually regressive in important ways. Third, it more broadly cautions readers about some of the unseemly aspects of legislation, in which legislators benefit favored groups in ways that the public is unlikely to understand. Finally, by writing this short essay, Wallace models how scholars have a duty to shine a light on these aspects of the legislative process.

As Wallace describes, section 2304 of the CARES Act suspends section 461(l) of the tax Code. Passed as part of the Tax Cuts and Jobs Act in 2017, section 461(l) of the tax Code limited the ability of high-income taxpayers to use losses from pass-through businesses to offset other income. While not free from doubt, section 461(l) seemed to have been passed as a way to pay for other tax breaks for businesses enacted as part of the Tax Cuts and Jobs Act, including the qualified business income deduction. In any event, section 461(l) was clearly costly for high-income taxpayers and increased the overall progressivity of the Tax Cuts and Jobs Act. But section 2304 of the CARES Act undid such progressivity, and at a high cost. As Wallace details, congressional staff estimated that the revenue loss from section 2304 of the CARES Act was \$70.3 billion in 2020. By definition, this lost revenue to the government all benefitted very high-income taxpayers, who were earning more than \$1 million.

By exploring these details about section 2304 of the CARES Act, Wallace undermines the myth that the CARES Act was progressive legislation that helped low and middle-income individuals survive the COVID-19 economic disaster. The CARES Act did include large cash payments to struggling Americans, increased unemployment payments, and offered a forgivable loan program. However, Wallace describes that the over \$70 billion in direct payments to some of the highest-income taxpayers as a result of section 2304 of the CARES Act exceeded the payments made to any other income band.

By unearthing this more nuanced story about the CARES Act, Wallace shares a broader cautionary tale about how legislation actually works. Even at the height of an international health crisis that threatened homelessness, hunger, and many other problems that would be felt most acutely by the nation's most needy, Congress found a way to slip in a provision to help some of its most powerful constituents. While this is an old story, it merits remembering again and again. In this case, the fact that the Tax Cuts and Jobs Act contained a progressive provision designed to limit deductions for some of the highest income taxpayers predictably set the stage for well-connected taxpayers lobbying Congress to eliminate the provision at one of the first possible opportunities. Emergency legislation, combined with esoteric tax

provisions that few would understand, provided just that chance. The fact that the change happened so predictably makes it no less important. Rather, understanding the natural tendencies for congresspeople to use emergency and complexity as cover to help favored constituents remains important for the very reason that it so predictably happens and will happen again.

Wallace isn't the only person to have noticed what section 2304 of the CARES Act accomplished. The New York Times, for instance, ran an article, [Bonanza for Rich Real Estate Investors, Tucked Into Stimulus Package](#). Americans for Tax Fairness lambasted the "[millionaires giveaway](#)." And other media and advocacy sources chimed in as well. But the fact that Wallace wrote a scholarly essay about the provision is significant. In so doing, Wallace modeled how it is the job of scholars, and not just reporters or advocates, to examine and critique the work that Congress is actually doing. By engaging in this work in this short but consequential essay, Wallace contributes to scholars' understanding of what is really happening in the world, as well as the public's understanding of scholars' place in it.

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