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The New Welfare Rights

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INTRODUCTION

Participating in the tax system gives rise to rights. These rights range from a fundamental property right in a tax refund to the robust taxpayer rights found in statutes. In the past three decades, Congress and the IRS have continued to protect, strengthen and build on these rights.[1]

Several foundational ideas underlie all the taxpayer rights and perhaps partially explain ongoing political interest in sustaining them. For one, in the tax context, U.S. taxpayers have become particularly interested in maintaining both property rights themselves and rights limiting what the government can do in connection with its taxing power. For another, taxpayers submit to the taxing power and sustain the government through their contributions. Those taxes serve as consideration in a

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[1] I will discuss in detail later in the paper, multiple pieces of legislation with the title "Taxpayer Bill of Rights." *See, e.g.*, Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6226, 102 Stat. 3342, 3730 (containing the "Omnibus Taxpayer Bill of Rights," known as "TBOR 1"); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1, 110 Stat. 1452 (1996) (known as "TBOR 2"); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3000, 112 Stat. 685, 726 (containing the Taxpayer Bill of Rights 3, known as "TBOR 3"); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 401, 129 Stat. 2242, 3117 (2015). For an excellent discussion of these bills, see Amanda Bartmann, *Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency's Operations*, 69 TAX LAW. 597 (2016) (describing these efforts briefly and making policy recommendations for agency reforms that would incorporate the legislation).

social compact.[2] As a result, tax law sustains a potentially robust rights framework, particularly in the past three decades.

At the same time, another law and policymaking trend has emerged. The federal government has increasingly been embedding social policy in the tax code.[3] One area in which this has occurred is in its approach to fighting poverty.[4] Many of the U.S.'s antipoverty programs now appear in the tax code. For example, the Earned Income Tax Credit (EITC) is currently the federal government's largest antipoverty program.[5] The Child Tax Credit has also become a major income support program.[6] Accompanying it are the Child Care Tax Credit[7] and Dependent Care Assistance Exclusion,[8] which jointly subsidize the childcare expenses of middle- and low-income families. The American Opportunity[9] and Lifetime Learning[10] credits assist middle- and low-income individuals in paying educational expenses. The Premium Assistance Credit partially covers health insurance

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[2] Putting aside the theoretical foundations of the idea of a social compact, to which I will return briefly later, research has shown that norms of reciprocity motivate many taxpayers not just to pay some taxes, but to comply as best they can with the letter of tax law. *See* Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 691, 696 (2009) (arguing for different types of tax compliance regimes for "rational gamer[s]" and taxpayers motivated by norms of reciprocity or other social norms).

[3] For a discussion of that phenomenon, see generally Susannah Camic Tahk, *Everything is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67 (2013) (describing the many social-policy areas that the tax code now encompasses and highlighting some of the advantages of conducting social policy through the tax code).

[4] *See generally* Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791 (2014) (detailing the antipoverty programs now contained in the tax code and describing some of the reasons for and implications of this tax-code shift); Len Burman & Elaine Maag, *The War on Poverty Moves to the Tax Code*, TAX POL'Y CTR. (Jan. 6, 2014), http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/1001711-The-War-on-Poverty-Moves-to-the-Tax-Code.PDF [https://perma.cc/QN95-GCZW] (covering briefly some of the tax provisions that address poverty).

[5] I.R.C. § 32 (2012); John Karl Scholz et al., *Trends in Income Support*, 26 FOCUS 43, 43–49 (2009) (measuring the size of various federal antipoverty programs); *see also* Jennifer Bird-Pollan, *Who's Afraid of Redistribution? An Analysis of the Earned Income Tax Credit*, 74 MO. L. REV. 251, 254 (2009) (considering the EITC generally in light of its growth over the past several decades); Hilary Hoynes, *The Earned Income Tax Credit, Welfare Reform, and the Employment of Low-Skilled Single Mothers*, *in* STRATEGIES FOR IMPROVING ECONOMIC MOBILITY OF WORKERS: BRIDGING RESEARCH AND PRACTICE 65–77 (Maude Toussaint-Comeau & Bruce D. Meyer eds., 2009) (noting how substantial the EITC has become relative to other federal antipoverty programs); Jonathan P. Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719, 725 (2012) (discussing the significance of EITC growth along with some of its administrative problems).

[6] I.R.C. § 24 (West 2015).

[7] *Id.*

[8] *Id.* § 129 (2012).

[9] *Id.* § 25A(i).

[10] *Id.* § 25A(c).

costs for middle- and low-income taxpayers.[11] Then, more indirectly, the Low-Income Housing Credit aims to help with the housing shortage that poor Americans face.[12] Furthermore, the New Markets Tax Credit[13] stimulates investment in low-income communities and the Work Opportunity Credit[14] provides incentives to create jobs for members of hard-to-employ social groups. Finally, organizations concerned with poverty relief receive tax subsidies in the form of tax exemptions and the ability to receive tax-deductible contributions.[15]

As the United States has bolstered and amplified taxpayer rights and moved a substantial volume of its antipoverty policy into the tax code, a third development has unfolded—the decline of "welfare rights." Scholars and advocates working in poverty law have lamented the decline of what had historically been called "welfare rights." During the War on Poverty in the 1960s, lawyers and grassroots social movements had once worked to build a rights framework for low-income individuals through the welfare system. Historians and legal academics, however, have noted the ways in which that effort fell short of expectations.[16]

After that, the welfare reform bill of 1996 specified that, in contrast to past direct-spending income support programs, its welfare program, Temporary Assistance to Needy Families (TANF) would not be an "entitlement."[17] That provision called into doubt even the limited welfare rights that courts had recognized during the War on Poverty.[18]

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[11] *Id.* § 36B.

[12] *Id.* § 42.

[13] *Id.* § 45D.

[14] *Id.* § 51.

[15] *Id.* §§ 501(a), (c)(3).

[16] For example, historian of the welfare rights movement Martha F. Davis has described the War on Poverty welfare rights litigation strategy as an "ultimate failure," in large part due to the "short duration" of the accompanying social movement and the lack of "time to develop a legal strategy tailored to the dynamics of poverty advocacy." MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 143 (1993).

[17] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2113 (1996) (codified as amended at 42 U.S.C. § 601 (2012)). 42 U.S.C. § 601(b) mandated that TANF shall not be construed "to entitle any individual or family to assistance."

[18] Legal historian Karen Tani summarized a widespread view in the *Yale Law Journal* when she wrote that "[t]he 1996 Personal Responsibility and Work Opportunity Reconciliation Act 'ended welfare as we know it' in large part by eliminating rights claims." Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 381 (2012) (quoting MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE 1 (1st ed. 2001); *see also* FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 185 (2007) ("The welfare rights era has ended . . . ."); Lucy A. Williams, *Welfare and Legal Entitlements: The Social Roots of Poverty*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 569–70 (David Kairys, ed., 3d ed. 1998). Randal

Even as courts and Congress have cast doubt upon low-income individuals' welfare rights, however, tax law has opened the door to a new set of rights—the same rights that any taxpayer has. Despite the increasingly shaky legal foundations of welfare rights, the growing number of people who receive increasingly large benefits through the tax code have associated rights. The substantial literature on low-income individuals' weakening rights after the end of the 1960s War on Poverty and welfare reform has not sufficiently recognized that in fact low-income individuals have other substantial rights under the tax code. Those rights are merely grounded in tax law rather than welfare law and can be more fully pursued in that way. As the federal government has moved away from direct-spending antipoverty programs toward the tax code, so has the basis of beneficiaries' rights claims. Rights derived from tax law have strong legal foundations, both theoretical and practical. These are not rights that lawmakers are attempting to weaken, but rather, they are rights that lawmakers are attempting to strengthen. In addition, low-income individual's rights through the tax system would not only be theoretically and practically robust in and of themselves, but would also offer a vision of equal citizenship that welfare rights did not.

Notably, rights derived from the tax system have the advantage that they would not distinguish between deserving and undeserving taxpayers, rich taxpayers and poor taxpayers,

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Jeffrey has written that, "The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 threatens the due process protections that, for over thirty years, have applied to public assistance programs throughout the country." Randal S. Jeffrey, *The Importance of Due Process Protections After Welfare Reform: Client Stories from New York City*, 66 ALB. L. REV. 123, 123, 125–27 (2002) (footnote omitted) (studying due process in action in the years immediately following welfare reform). The case that considered this issue, *Weston v. Cassata*, held that at least in Colorado, welfare recipients do retain some due-process rights protections. Weston v. Cassata, 37 P.3d 469, 477 (Colo. App. 2001). For further discussion of the issue of welfare reform and rights, all expressing some degree of uncertainty or pessimism about the issue, see Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO J. ON POVERTY L. & POL'Y 89, 125–32 (2002); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 603–23 (2001); Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 618–23 (1998); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1337–38 (2012); Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 36 (1997). In his landmark book, *The Price of Citizenship*, historian Michael Katz wrote broadly that welfare reform and concurrent policy developments "suggested that rights are contingent—they may be withdrawn as well as extended, contracted as well as expanded." MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE 345 (2d ed. 2008). [hereinafter, KATZ, 2008] (citing Robert Henry Cox, *The Consequences of Welfare Reform: How Conceptions of Social Rights Are Changing*, 27 J. SOC. POL'Y 1 (1998)); *see generally* William E. Nelson, *Two Models of Welfare: Private Charity versus Public Duty*, 7 S. CAL. INTERDISC. L.J. 295 (1998).

or taxpayers who take advantage of widely available benefits and taxpayers whose benefits are narrowly tailored. Property rights in a tax refund are the same rights afforded in principle, offering the same legal protections, regardless of whether the taxpayer is a large publicly-traded corporation or an EITC recipient. The legislative and administrative rules written to safeguard taxpayer rights apply to any taxpayer sending a return to the IRS or disputing a liability or collections action. As a result, the IRS must improve how it helps poor taxpayers navigate a system not designed for them.

Recognizing the rights of poor taxpayers would also bring with it many concrete implications for policy, law and administration. Considering the legal framework of taxpayer rights opens many potential paths for low-income taxpayers to mobilize these rights. I will highlight two in this paper. First, the rights framework offers avenues for challenging IRS and even legislative practices. This paper will discuss a few examples of situations in which poor recipients of tax benefits can make rights-based legal claims. Second, focusing on the rights that poor taxpayers may assert suggests ways to improve administrative design, particularly to address access to justice issues. This article will present preliminary results from a pilot survey experiment aimed to address this problem. This experiment is only one of many possible interventions that explicitly uses rights-based ideas to help tax administration protect poor taxpayers' rights more effectively. Poor taxpayers have the right, grounded in both general property rights theory as well as specific legislation, to pay no more than the correct amount of tax. When the IRS audits a poor taxpayer, however, standard practice is to freeze at least part of the refund until the taxpayer submits additional documents substantiating her credit claim.[19] Data show that, at least in the case of EITC recipients, 60–70 percent of taxpayers never respond to Form CP-75, the letter asking for the documents.[20] As a result, many poor taxpayers, even those with the legal right to the full refund, lose their refund. My proposed intervention focuses on the

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[19] AM. BAR ASS'N, LOW-INCOME TAXPAYER CLINICS, DISCUSSION POINTS FOR EITC AUDITS (2008), https://www.americanbar.org/content/dam/aba/administrative/taxation/migrated/eitc.authcheckdam.pdf [https://perma.cc/5J6J-P8EA]; *see also* Email from Michelle Lyon Drumbl, Assoc. Clinical Professor of Law, Washington & Lee Law School, to author (Mar. 22, 2014, 11:20 PM CDT) (on file with author).

[20] Michelle Lyon Drumbl, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113, 137 (2013); *Understanding Your CP75 Notice*, IRS (last updated Mar. 6, 2018), https://www.irs.gov/individuals/understanding-your-cp75-notice [https://perma.cc/S2XM-QBSD] (notice sent to taxpayer alerting them that the IRS is requesting "documentation to verify the Earned Income Tax Credit . . . claimed").

rights of poor taxpayers to solve this problem. The pilot experiment provides evidence that incorporating taxpayer rights more explicitly into Form CP-75 may help to protect those.

The article proceeds from here in two parts. Part I argues that, in contrast to current narratives about the decline of low-income individuals' rights, low-income individuals actually have and have yet to fully realize robust rights arising from the fact that they obtain their benefits through the tax system. Part II then moves to the practical implications of recognizing poor taxpayers' rights, suggesting a few ways in which poor taxpayers might assert or otherwise use rights claims in their interactions with the IRS. In particular, the Part looks at one potential example: Form CP-75. This Part presents the results of a pilot survey experiment aimed at testing a rights-based improvement to that form.

I. RIGHTS ASSOCIATED WITH TAX BENEFITS

Literature from poverty law on welfare rights has observed that since the direct-spending War on Poverty, welfare rights have never been particularly robust. The 1996 welfare reform law cast uncertainty upon even these rights. Additionally, welfare rights were rooted in a system stemming from the colonial period that created hierarchical tiers of government beneficiaries. In the past three decades, however, the war on poverty has moved into the tax code. Benefits administered through the tax system bring with them their own robust rights. As a result, low-income recipients of government benefits now have a new set of rights: the rights associated with having paid taxes and having a tax refund. These rights rest on a deep theoretical foundation and have manifested themselves concretely in case law, statutes, and administrative guidance. Indeed, they present a vision of equal citizenship across the range of government beneficiaries.

A. Rights in Direct-Spending Antipoverty Programs

Historically, the United States has fought poverty through direct-spending programs. These have included income-support programs like Aid to Families with Dependent Children (AFDC) and TANF, as well as programs subsidizing other needs of poor families and individuals, such as housing assistance, food

stamps, and health care.[21] These direct-spending programs proliferated and expanded during President Lyndon Johnson's War on Poverty, which began in 1964.[22] In its wake, a grassroots "welfare rights" movement and its lawyers attempted to establish rights for recipients of direct-spending antipoverty programs.[23] Those efforts led to courts setting forth rights for government beneficiaries.[24] The scope of those rights, however, remained somewhat uncertain and relevant case law reflected some of the theoretical difficulties of the welfare rights movement, including its hierarchies among different types of beneficiaries. Then, in 1996, the federal government reformed welfare in a way that cast further doubt on the rights associated with receiving antipoverty benefits.[25] The academic literature in poverty law expressed concern about what it saw as an accelerated weakening of low-income individuals' rights.[26]

1. Welfare Rights Law in the 1960s War on Poverty

During the earlier War on Poverty, as poverty law professor Stephen Loffredo wrote, "scholars, lawyers and community organizers recognized that law reform might play an important catalytic role in promoting movements for social change."[27] The movement that emerged in this period counted as

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[21] For a recent overview of these programs, see KAREN SPAR & GENE FALK, CONG. RESEARCH SERV., R44574, FEDERAL BENEFITS AND SERVICES FOR PEOPLE WITH LOW INCOME: OVERVIEW OF SPENDING TRENDS, FY2008-FY2015 (2016).

[22] President Lyndon Baines Johnson, 1964 State of the Union Address, C-SPAN (Jan. 8, 1964), http://www.c-span.org/video/?153275-1/state-union-address [https://perma.cc/4SBZ-2XLV]. Programs contained in President Johnson's War on Poverty included among others, the Office of Economic Opportunity, the Job Corps, Volunteers in Service to America, Upward Bound, Head Start, Legal Services, the Neighborhood Youth Corps, the Community Action Program, small business loan programs, rural programs, migrant worker programs, remedial education projects, local healthcare centers, food stamps, and Medicare and Medicaid. *See* Kent Germany, *War on Poverty, in* POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS AND POLICY 774–82 (Alice O'Connor & Gwendolyn Mink eds., 2004).

[23] *See generally* DAVIS, *supra* note 16.

[24] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that indigent women seeking to dissolve their marriages could obtain access to courts); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding procedural due process required a hearing before a decision to terminate welfare benefits); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding certain residency requirements for welfare unconstitutional); Thorpe v. Housing Auth. of Durham, 386 U.S. 670 (1967) (holding that public housing evictions similarly required hearings). For a description of these and other cases in the War on Poverty, see generally Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?* 19 HASTINGS CONST. L.Q. 745 (1992).

[25] *See, e.g.*, Cimini, *supra* note 18, at 125–32; Jeffrey, *supra* note 18, at 125–27.

[26] *See, e.g.*, Cimini, *supra* note 18, at 125–32; Jeffrey, *supra* note 18, at 125–27; Tani, *supra* note 18, at 381.

[27] Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173, 173 (2001).

two of its many goals as "establish[ing] legal protections for welfare recipients" and "chang[ing] the face of social policy."[28] As Professor Davis described, the legal component of the welfare rights movement had "positive aspects"[29] but ended in a "failure"[30] with "bruising defeats."[31]The case law developed during the welfare rights movement has been the subject of numerous articles and casebook chapters. It is too long to review fully here.[32]

Perhaps the cases most relevant for this discussion, and also some of the best known, consider the property rights that attach to welfare payments. In the landmark case of *Goldberg v Kelly*, the Supreme Court held that recipients of public cash assistance have at least some property right in their benefits and are therefore entitled to procedural due process under Due Process Clause of the Fourteenth Amendment, specifically, a pre-termination hearing before an impartial adjudicator.[33] *Goldberg* considered welfare recipients in New York City whose cash assistance had been terminated after the welfare agency had merely sent a notification letter.[34] The court held that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them."[35] "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'"[36] and then, "whether the recipient's interest in avoiding that loss

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[28] PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES xiv (2005).

[29] DAVIS, *supra* note 16, at 143.

[30] *Id.*

[31] Redlich, *supra* note 24, at 747.

[32] For some of the various components and issues addressed in these cases, see, e.g., Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security disability benefits and children with unmarried parents); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (food stamps and unrelated household members); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (school financing); James v. Strange, 407 U.S. 128 (1972) (indigent peoples' court costs); Lindsey v Normet, 405 U.S. 56 (1972) (due process and eviction); Pease v. Hansen, 404 U.S. 70 (1971) (certain categories of illegitimate children); Graham v. Richardson, 403 U.S. 365 (1971) (non-citizens and state welfare residency tests); Boddie v. Connecticut, 401 U.S. 371 (1971) (indigent peoples' court costs); Wyman v. James, 400 U.S. 309 (1971) (welfare caseworkers' visits); Williams v. Illinois, 399 U.S. 235 (1970) (imprisonment and involuntary nonpayment of fines); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare residence requirements); King v. Smith, 392 U.S. 309 (1968) (unmarried couples and welfare); Thorpe v. Hous. Auth. of Durham, 386 U.S. 670 (1967) (due process and eviction).

[33] Goldberg v. Kelly, 397 U.S. 254 (1970).

[34] *Id.* at 258.

[35] *Id.* at 262.

[36] *Id.* at 262–63 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

outweighs the governmental interest in summary adjudication."[37]

The Court noted that the lack of a hearing for these plaintiffs caused them to become "immediately desperate," something they found to be a sufficiently "grievous loss."[38] The Court held that, "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[39] Specifically, "[i]t is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker."[40] The Court found that, "[w]ritten submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance,"[41] "do not afford the flexibility of oral presentations,"[42] and "do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important."[43] In particular, "where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."[44]

The *Goldberg* decision rested in large part on an influential law review article, Charles Reich's *The New Property*.[45] In it "Reich argued for a new vision of government benefits that would give them the status of more traditional property."[46] As Professor Davis described, this idea was "quickly taken up by legal services lawyers," enthusiastic about the opportunity to enshrine legally this broad concept of property.[47] In litigating *Goldberg*, advocates grappled with the extent to which they should base their arguments on the article's expanded view of property, "afraid that it would scare the justices."[48]

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[37] *Id.* at 263.

[38] *Id.* at 263–64 (quoting *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 168).

[39] *Id.* at 268–69.

[40] *Id.* at 269.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[46] DAVIS, *supra* note 16, at 85; *see also* Reich, *supra* note 45.

[47] *Id.* at 86 (citing Edward V. Sparer, The New Public Law: The Relationship of State Administration to the Legal Problems of the Poor, Presentation before the Conference on the Extension of Legal Services to the Poor, Dep't of Health, Educ. & Welfare, Washington, D.C. (Nov. 12, 1964), *reprinted in* 23 LEGAL AID BRIEFCASE (1965), *and* Edward V. Sparer, *Social Welfare Law Testing*, 12 PRAC. LAW. 30 (1966)). Sparer graduated from Brooklyn Law School and, in 1985, the school established a public interest fellowship program in his name. *See Sparer Fellowship*, BROOK. L. SCH., https://www.brooklaw.edu/academics/sparerpublicinterestlawfellowship/overview? [https://perma.cc/BCX2-93JS].

[48] DAVIS, *supra* note 16, at 104.

Similarly, the lawyers involved in the War on Poverty cases struggled with how much to rest their approach on a broad "right to live." Edward Sparer, sometimes considered the movement's legal leader, felt it "imperative" that the lawyers "use *Goldberg* to advance the theory."[49] However, Lee Albert, one of the lawyers who argued the case before the Supreme Court "maintained that it was a kooky idea that would never be adopted by the Supreme Court."[50] In fact, it became one of the primary points of controversy at oral argument (and in the justices' later deliberations over the case).[51] Advocates "knew that it was important to respond to [the Court's] concern that if the plaintiffs won the case it would henceforth be impossible for Congress to repeal any government benefit program."[52] "Ironically, that was the ultimate goal of the welfare rights litigation strategy: a guaranteed minimum income constitutionally secured by the right to live."[53] The decision eventually included some of the right-to-live language, noting that, "[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders"[54] and that "forces not within the control of the poor contribute to their poverty"[55] Further, "[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community" and therefore is "a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'"[56] Justice Brennan included more along those lines in his initial draft of the opinion, but cut back after Justice Harlan labeled the additional material "offensive" and Justice White "flatly refused to accept it."[57]

The Court's skepticism surrounding a "right to live" was what eventually led to the demise of the welfare rights litigation movement. In 1967, Congress passed a bill that would curtail AFDC by setting up mandatory work training programs and cutting benefits by freezing the number of children covered by

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[49] *Id.*

[50] *Id.* at 103.

[51] *Id.* at 106–18 (describing in detail both the oral argument and the deliberations).

[52] *Id.* at 109.

[53] *Id.*

[54] Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970).

[55] *Id.* at 265.

[56] *Id.*

[57] DAVIS, *supra* note 16, at 113 (citing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 378 (1988)); Draft Letter from John M. Harlan to William J. Brennan, Jr., Justice John M. Harlan Papers, Seeley G. Mudd Manuscript Library, Princeton University, B378 F62)).

federal matching grants.[58] Welfare rights advocates took the position that the family maximums "ha[d] the effect of treating needy children differently based on an arbitrary standard not related to the purpose of AFDC—the size of the family," also in violation of the equal protection clause.[59] In *Dandridge v. Williams*, lawyers were able to raise the equal protection argument before the Supreme Court, and the parties' briefs specifically referenced the right to live, saying that the family maximums "affects the availability of the fundamental rudiments of human existence."[60] The Court, however, rejected this argument, ruling 5–3 in favor of the family maximums.[61] Justice Stewart's decision "went out of his way to repudiate [earlier suggestions] that had fueled hopes that the Court would eventually uphold a fundamental right to live."[62] The Court decided several other cases involving the 1967 welfare law during this period,[63]and in all of them, Court stepped away from developing government beneficiaries' rights.

On the specific question discussed in *Goldberg* of what level of process is sufficient to satisfy procedural due process requirements, rights advocates after *Goldberg* have faced similar challenges. In *Mathews v. Eldridge*, decided six years after *Goldberg*, the Supreme Court considered the due process protections required for terminating federal Social Security disability benefits.[64] The former recipients argued that they had a property right in their benefits, and therefore the Social Security Administration needed to give them a fair hearing before termination as a matter of procedural due process under the Fifth Amendment.[65]

The Court rejected this position. Citing *Morrissey v. Brewer*, it held only that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[66] Specifically, the Court set forth the now-famous three-factor test

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[58] *Id.* at 119 (citing *Poverty: The Welfare Labyrinth*, NEWSWEEK, Aug. 28, 1967, at 25).

[59] *Id.* at 130.

[60] Brief of Amici Curiae: The Center on Social Welfare Policy and Law, National Welfare Rights Organization, Associated Catholic Charities, and Seven Neighborhood Legal Services Offices Now Prosecuting Similar Cases at 16, Dandridge v. Williams, 397 U.S. 471 (1970) (No. 131), 1969 WL 119897 [hereinafter Amici Curiae Brief].

[61] *Dandrige*, 397 U.S. at 472–88; DAVIS, *supra* note 16, at 132 (citing Amici Curiae Brief, *supra* note 60).

[62] DAVIS, *supra* note 16, at 132.

[63] *See, e.g.*, Rosado v. Wyman, 397 U.S. 397 (1970); Rothstein v. Wyman, 303 F. Supp. 339 (S.D.N.Y. 1969), *vacated*, 398 U.S. 275.

[64] Mathews v. Eldridge, 424 U.S. 319 (1976).

[65] *Id.* at 324–25.

[66] *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

for satisfying procedural due process in the benefits context. In identifying possible procedural due process problems, courts must weigh (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[67]

In light of those three factors, the Court in *Matthews* held that Social Security termination process did not violate the dictates of procedural due process.[68] Of particular importance to the Court was the fact that, in its view, Social Security beneficiaries did not need their assistance as badly as the welfare recipients in *Goldberg* needed theirs.[69] In fact, "[e]ligibility for disability benefits, in contrast, is not based upon financial need."[70] and is "unrelated the worker's income or support from many other sources."[71] Moreover, "[i]n addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places worker or his family below the subsistence level."[72] As a result, when dealing with the Social Security Administration did not need to provide pre-termination hearings as a matter of procedural due process.[73]

After these cases, lawyers working on issues pertaining to government benefits and rights hit a wall. As Professor Davis described, "[L]awyers and welfare recipient activists cast about for a plan of action to frame legislative and litigation efforts [but] . . . no plan was forthcoming."[74] Summarizing the outlook of the approximately thirty prominent welfare-rights lawyers she interviewed, she terms their efforts overall a "failure."[75] To take another example, assessing the current state of welfare rights law, Professor Loffredo writes:

> By the 1970s, the Supreme Court had definitively placed positive rights outside the domain of federal constitutional law, rejecting not only a narrow welfarist conception of minimum entitlements, but also the broader idea that the Constitution embraces a right of social

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[67] *Id.* at 335.
[68] *Id.* at 348.
[69] *Id.* at 342.
[70] *Id.* at 340.
[71] *Id.* at 340–41.
[72] *Id.* at 342.
[73] *Id.* at 348.
[74] DAVIS, *supra* note 16, at 4–5.
[75] *Id.* at 18.

> citizenship. Moreover, by applying only the most feeble and deferential form of rationality review to laws affecting the poor, the Court allowed state and federal welfare programs to function as instruments of subordination that debased and stigmatized the poor and served to perpetuate inequality and indignity.[76]

Further, Professor Loffredo makes the point that the legal component of the antipoverty movement has never rebounded because "[t]he number of lawyers engaged in legal work for the poor has declined over the last two decades, and the dominant political culture structurally and affirmatively discourages civic participation and activism by [low-income individuals]."[77]

In addition to the legal barriers that the War on Poverty lawyers eventually encountered, persistent hierarchies undergirded the system of public benefits advocated worked within. A number of scholars have documented that the welfare state was "two-tiered," as a result of race and gender stereotypes, as well as related ideas about the "deserving" and "undeserving" poor. The tier-structures had a number of deficiencies but central to the deficiencies was the notion that some government beneficiaries merited higher status and stronger rights with regard to their benefits than others.

2. Welfare Rights After 1996 Reform

At the start of the 1990s, uncertainty surrounded low-income individuals' rights regarding government benefits. The 1960s and 1970s movement to enshrine those rights had met a troubled end. At the same time, the benefits programs continued to espouse the view that the federal government owed different things to different groups of citizens. The 1996 welfare reform legislation cast further doubt on low-income individuals' rights.[78]

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[76] Loffredo, *supra* note 27, at 179–80 (footnotes omitted).

[77] *Id.* at 175 (citing LEGAL SERVS. CORP., TWENTY-FIFTH ANNIVERSARY ANNUAL REPORT 8 (1998–99); Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at A1 http://www.nytimes.com/2000/08/17/business/legal-firms-cutting-back-on-free-services-for-poor.html. [https://perma.cc/U55F-9D3E]); *see also* Redlich, *supra* note 24, at 757–74 (documenting the decline in legal services in the past several decades and exploring its consequences for poverty law)).

[78] This bill changed the legal framework surrounding cash welfare, and only had secondary consequences for other antipoverty programs which remained more or less subject to the same rights as before the legislation passed. In terms of due process, those rights rested on the holding in Mathews. Those programs also each have their own statutory rights. In the case of many antipoverty programs, these depend on federal legislation but also on state statutes that are of course different in all fifty states. A review of all the rights for all of these programs goes beyond the scope of this article, but for a helpful overview, see generally David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633 (2004). For an excellent discussion of the rights issues in disability programs, see generally Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996).

In that year, Congress passed and President signed the Personal Responsibility and Work Opportunity Act (PRWORA),[79] overhauling the federal legislation governing cash assistance. The bill implemented the TANF program in place of the former AFDC. PRWORA limited lifetime receipt to sixty months[80] and restricted eligibility for cash assistance in a number of ways.[81] Most prominently, the bill required recipients to work in exchange for benefits, allowing states discretion over how to implement this mandate,[82] thus giving the states substantial authority to develop their own rules for cash assistance. Whereas the federal government had administered AFDC directly, the bill allotted block grants to states to run TANF.[83]

Along with the changes to the current law, the bill specified that while AFDC had been a federal "entitlement," the new program would not be considered an entitlement.[84] The word "entitlement" appeared many times throughout the Senate and House Congressional reports on the bill.[85]

As part of the legislation, federal lawmakers also shut down one of the main avenues by which courts could define the scope of the entitlement provision. Regulations promulgated under the bill's authority prohibited legal-services organizations—the

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[79] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of titles 8 and 42 of the U.S.C.).

[80] 42 U.S.C.A. §§ 608(a)(7)(A), (C)(ii) (West 1997).

[81] *Id.* §§ 408(a)(1)–(8); *id.* §§ 601–603.

[82] *Id.* §§ 601–603.

[83] *Id.* §§ 603, 604.

[84] *Id.* § 601(b) ("This [legislation] shall not be interpreted to entitle any individual or family to assistance.").

[85] For example, from the Senate report on the bill:

> Senator Cohen: Those [1988] reforms did not do enough to help us distinguish those who had fallen on hard times and needed a helping hand from those who simply refused to act in a disciplined and responsible manner. When welfare is a Federal entitlement, it is very difficult to make that distinction. . . . The Federal Government is ending the 60-year philosophy that anyone at anytime is entitled to cash assistance.

142 CONG. REC. S9399 (daily ed. Aug. 1, 1996) (statements of Sen. Cohen)

> Senator Nickles: Mr. President, this bill changes the way we do welfare. The so-called AFDC, [A]id to [F]amilies with [D]ependent [C]hildren, will no longer be a cash entitlement. We are reforming its entitlement status. The current program says that if you meet eligibility standards—in other words, if you are poor—you can receive this benefit for the rest of your life. There is no real incentive to get off.

142 CONG. REC. S9356 (daily ed. Aug. 1, 1996) (statement of Sen. Nickles). Or, from the House report, Representative Meyers: "The Personal Responsibility Act is a good start toward reforming our welfare system. Because of the block grant, the entitlement nature of the program is ended." 142 CONG. REC. H9398 (daily ed. July 31, 1996) (statement of Rep. Meyers).

primary drivers of the welfare rights litigation during the initial War on Poverty—from "participat[ing] in . . . litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system."[86] This rule substantially reduced the amount of welfare rights litigation in the United States, causing legal aid caseloads to fall by millions of cases and putting hundreds of legal aid lawyers out of work.[87] In addition, PRWORA set in place a handful of what public benefits expert David Super has called "paltry" legal rights,[88] including the right for recipients to not be sanctioned for failing to work because of a lack of child care for preschoolers[89] and to receive assistance from secular providers when the state elects to contract with religious organizations.[90]

Following PRWORA's promulgation, states developed their own entitlement provisions. In her study of these provisions, Professor Cimini found that five states developed explicit statutory provisions creating an entitlement to cash assistance,[91] and seventeen states enacted statutory provisions that expressly denied such an entitlement.[92] The remaining states remained silent on the entitlement question. According to Professor Cimini, "[n]otwithstanding such express provisions, some ambiguity still exists as to whether states explicitly denying a statutory entitlement have created state statutory entitlements to assistance."[93]

Only a handful of states have taken up the question of whether due process or other rights that might attach to cash assistance. In *Weston v. Cassata*, the Colorado Court of Appeals held that TANF recipients do have some procedural due process rights.[94] *Weston* was a class action challenging the validity of pre-termination TANF sanction notices.[95] The "notices did not include full or accurate information about the sanctions and the appeal process."[96] The court discussed the history of the 1996 reforms, noting that, "Congress intended to eliminate the 'entitlement

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[86] 45 C.F.R. § 1639.3 (2017). For a description of these regulations, see Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Law Practice: 1975—2004*, 84 N.C. L. REV. 1591, 1616–17 (2006); Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 LAW & SOC. INQUIRY 919, 925 (2011).

[87] Zaloznaya & Nielsen, *supra* note 86, at 925.

[88] Super, *supra* note 78, at 638.

[89] 42 U.S.C.A. § 607(e)(2) (West 1997).

[90] *Id.* § 604a(e)(1).

[91] Cimini, *supra* note 18, at 101.

[92] *Id.*

[93] *Id.* at 103.

[94] Weston v. Cassata, 37 P.3d 469, 477 (Colo. App. 2001).

[95] *Id.* at 472.

[96] *Id.*

mentality' behind the existing welfare system by removing individual entitlement to cash benefits and making welfare benefits temporary and conditional."[97] On the other hand, the court also considered the language in PRWORA mandating payment to eligible individuals.[98] The court therefore concluded that although cash assistance recipients no longer have "absolute" entitlement like they did under AFDC, recipients do retain a more limited entitlement that was sufficient to trigger due process protections.[99]

Then, in *State ex rel. K.M. v. W. Va. Dep't of Health & Human Res*, the Supreme Court of Appeals of West Virginia specifically held that *Goldberg*'s due process requirements no longer applied to cash assistance post-PRWORA.[100] The case concerned TANF recipients who had lost or were about to lose their benefits as a result of the sixty-month time limit. These beneficiaries challenged the loss on constitutional grounds, alleging, among other things, that because of the precedent set in *Goldberg* West Virginia needed to conduct a pre-termination hearing.[101] The West Virginia court observed that Congress and the West Virginia legislature had "made sweeping changes to this area of the law," in 1996, "chief among them" the "no entitlement" provisions.[102] The court found that, as a result, "Congress and the Legislature intended a clear break with the past practice of providing cash assistance of unlimited duration to the poor."[103] Additionally, the "primary authority on this issue is inapposite, as *Goldberg* was written before the 1996 Act and concerned rights under the old benefit scheme."[104]

As a result of cases like these, the nature of legal rights attaching to direct-spending cash assistance remains unclear. Public benefits expert Professor Super has written that some of this confusion stems from the fact that "[t]o a lawyer, an entitlement is a legally enforceable right. . . . That usage, however, although sensible enough, is generally not what participants in legislative debates have in mind when they attack or defend 'entitlements.'"[105] Unfortunately, the case law has, as discussed, heavily weighed the statutory use of the word "entitlement" when defining public benefits recipients' legal

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97 *Id.* at 474.

98 *Id.* at 474–75.

99 *Id.* at 475–77.

100 State *ex rel.* K.M. v. W. Va. Dep't of Health & Human Res., 575 S.E.2d 393, 402 (W. Va. 2004).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 Super, *supra* note 78, at 638 (footnotes omitted).

rights. As a result, the 1996 legislation muddied the rights landscape for these beneficiaries. Scholars working in this area have observed that PRWORA and the subsequent murky case law step away from the position that cash assistance recipients have robust right (insofar as they ever did). For instance, administrative law professor Jon Michaels has written that the goal and result of the bill were "to shift the terms of public assistance away from a rights-oriented entitlement."[106] As quoted above, Professor Tani has written that, welfare reform accomplished its goals "in large part by eliminating rights claims."[107] "Under the terms of the new law," she says, "welfare payments were an incentive, not a right; their termination was an unobjectionable form of discipline, not a rights violation."[108]

While historians, and legal scholars were focused on the paucity of the rights claims successfully made during the War on Poverty, another shift was occurring in U.S. antipoverty policy. The war on poverty was being waged through the tax code. A previously unrecognized consequence of these continued efforts are additional rights.

This war's standard-bearer, the EITC, has grown substantially since its enactment during the Nixon administration.[109] The EITC provides cash assistance to low-

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[106] Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 595 (2004) (citing Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1560 (2001)).

[107] Tani, *supra* note 18, at 381.

[108] *Id.*

[109] For a snapshot of the extensive scholarship about this program, see generally Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Bird-Pollan, *supra* note 5; Marsha Blumenthal et al., *Participation and Compliance With the Earned Income Tax Credit*, 58 NAT'L TAX J. 189 (2005); Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, 2006 WIS. L. REV. 1103 (2006); Dorothy A. Brown, *Race & Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Nada Eissa & Hilary Williamson Hoynes, *The Earned Income Tax Credit and the Labor Supply of Married Couples*, NAT'L BUREAU OF ECON. RES. (1998); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013); Hoynes, *supra* note 5; David Neumark & William Wascher, *Using the EITC to Help Poor Families: New Evidence and a Comparison With the Minimum Wage*, 54 NAT'L TAX J. 281 (2001); Kerry Ryan, *EITC As Income (In)Stability?*, 15 FLA. TAX REV. 583 (2014); Jonathan P. Schneller et al., *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX. L. 177 (2012); Schneller, *supra* note 5; David A. Super*, Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 438–41 (2008); Laura Tach & Sarah Halpern-Meekin, *Tax Code Knowledge and Behavioral Responses Among EITC Recipients: Policy Insights from Qualitative Data*, 33 J. POL'Y ANALYSIS & MGMT. 413 (2014); Dennis J. Ventry, Jr., *Welfare By Any Other Name: Tax Transfers and the EITC*, 56 AM. U.L. REV. 1261 (2007); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004); Laura Wheaton & Elaine

income families in proportion to their earned income up to a certain limit, above which the credit phases out.[110] The EITC is fully refundable,[111] meaning that the recipient gets a refund from the IRS to the extent that the credit amount exceeds tax liability. For example, if a taxpayer has $2,000 in tax liability and is entitled to a $10,000 refundable credit, the credit will cut the taxpayer's tax bill to zero, and the taxpayer will get $8,000 from the IRS. To calculate her annual EITC, each taxpayer begins with her "earned income" below a "ceiling amount" and multiplies it by her "credit percentage."[112] The credit phases out for taxpayers whose adjusted gross income exceeds a set amount.[113] Above that amount, a taxpayer must reduce the otherwise available credit by the "phaseout percentage."[114]

While traditional welfare has declined in terms of outlays in recent history, the EITC has continued to grow. It expanded under both Republican and Democratic presidential administrations, in eras of partisan gridlock, under Democratic and Republican Congressional control, across business cycles, and amidst changing public attitudes about welfare.[115]

The EITC began during President Richard Nixon's administration. Economists, such as Milton Friedman, advocated for a "negative income tax" which would create additional work incentives for low-wage individuals. Through this period, the credit came to become the government's largest antipoverty program "responsible for about 60 [percent] of the [downward] shift from the mid-1980's to 2011."[116]

Then in 2015, a Republican Congress worked with the Obama administration to overcome their general reputation for lack of policy consensus to make those expansions of the anti-poverty tax credits permanent.[117] This bipartisan step, along

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Sorensen, *Tax Relief for Low-Income Fathers Who Pay Child Support*, *in* 90 NAT'L TAX ASS'N, PROC. CONF. 260 (1997); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867(2005).

[110] *See generally* I.R.C. § 32 (2012).

[111] I.R.C. § 32 is part of subpart C of part iv of subchapter A of Chapter 1 of the Code, entitled "Refundable Credits." Refundability arises from the lack of statutory limitation of the credit to tax liability. *Id.*; *see also* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 37.1 (3d ed. 2000).

[112] I.R.C. § 32(a)(1)–(2), 32(j).

[113] *Id.* § 32(a)(2)(B).

[114] *Id.* § 32(a)(2).

[115] A number of sources have discussed the history of the EITC. The most detailed I have seen is in found the most detailed account in Christopher Howard's, *The Hidden Welfare State*, from which the following discussion will draw. CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE (1997).

[116] David Kamin, *Reducing Poverty, Not Inequality: What Changes in the Tax System Can Achieve*, 66 TAX L. REV. 593, 634 (2013).

[117] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).

with similar moves regarding the Child Tax Credit "strengthen[ed] the credits' anti-poverty impact by about 20 percent."[118] This legislation benefitted approximately 50 million Americans, including 25 million children.[119] Most recently, Speaker of the House Paul Ryan included the EITC as part of his "A Better Way" legislative blueprint.[120]

Applicable for years after 1997, the Child Tax Credit costs the federal government roughly the same amount as the EITC.[121] This program provides a tax credit for each "qualifying child" of a taxpayer equal to $1,000 per child.[122] It phases out above certain threshold incomes and is not available at all above a series of higher thresholds.[123] The benefit reaches higher income levels than the EITC and is partially refundable for incomes over $3,000, but only individuals with income are eligible to receive the credit.[124] The Child Tax Credit also has grown steadily throughout its history. The Taxpayer Relief Act of 1997 and the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) temporarily increased the credit from $500 to $1,000 per child, made it refundable for a larger number of families, and allowed families that pay the Alternative Minimum Tax to take the credit.[125] The stimulus bill temporarily lowered the refundability threshold, and the Job Creation Act of 2010 and the American Taxpayer Relief Act of 2012 together extended lower threshold, along with the earlier temporary

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[118] Chuck Marr, *Tax Deal Makes Permanent Key Improvements to Working Families Tax Credits*, CTR. FOR BUDGET & POL'Y PRIORITIES (Dec. 16, 2015), https://www.cbpp.org/research/federal-tax/tax-deal-makes-permanent-key-improvements-to-working-family-tax-credits [https://perma.cc/3FNV-5HXK].

[119] *Id.*

[120] TASK FORCE ON POVERTY, OPPORTUNITY AND UPWARD MOBILITY, A BETTER WAY: OUR VISION FOR A MORE CONFIDENT AMERICA: POVERTY, OPPORTUNITY AND UPWARD MOBILITY 13–14 (2016).

[121] STAFF OF JOINT COMM. ON TAX'N, 113TH CONG. ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017, JCS-1-13 45 (Comm. Print 2013).

[122] I.R.C. § 24(a) (2012).

[123] *Id.* § 24(b).

[124] *Id.* § 24(d)(1), (3)–(4). The credit is refundable above $3,000 of income. Below $3,000 of income, a taxpayer would not have any tax to pay, so would not be able to take advantage of a nonrefundable credit. *Id.*

[125] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 796;Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 201, 115 Stat. 38, 45; MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., R41873, THE CHILD TAX CREDIT: CURRENT LAW AND LEGISLATIVE HISTORY 12 (2016) ("EGTRRA allowed the child tax credit to offset AMT tax liability for tax years 2002 through 2010"); *Taxation and What is the Child Tax Credit (CTC)?*, TAX POL'Y CTR (2013), http://www.taxpolicycenter.org/briefing-book/key-elements/family/ctc.cfm [https://perma.cc/7KU5-UXKF].

changes, for additional years.[126] Those expansions became permanent as part of the 2015 bipartisan legislation.[127]

The tax code also includes large federal programs subsidizing child care, education and health care for poor and middle-income taxpayers. With the Child Care Credit, taxpayers may take a nonrefundable credit of between 20 percent and 35 percent of expenses for the care of "qualifying individuals."[128] Congress enacted the Child Care Credit in 1976, after several decades of offering less generous deductions for employment-related childcare expenses.[129] After small changes to the benefit in 1981, Congress has not revised either it or its companion child-care subsidy, the Dependent Care Credit.[130] The tax code also has two major tax credits for education, the Hope Credit (now the American Opportunity Credit, a partially refundable credit) and the Lifetime Learning Credit.[131] As with the other antipoverty tax statutes, the history of both credits has been one of consistent growth and expansion. Since temporarily replacing the Hope Credit with the more generous American Opportunity Credit, Congress has broadened the credit twice.[132] In addition, the Premium Assistance Credit subsidizes the purchase of certain health insurance plans for low- and middle-income families.[133] Individuals receive the Premium Assistance Credit based on income and the cost of the health insurance plan.[134]

The other antipoverty programs in the tax code are indirect subsidies that provide incentives to private actors to

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[126] American Recovery and Investment Act of 2009, Pub. L. No. 111-5, § 1003, 123 Stat. 115, 313; Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296, 3298 (also referred to as simply the Job Creation Act); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2315.

[127] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 101, 129 Stat. 2242 (2015).

[128] I.R.C. §§ 21(a)(1)–(2); 129.

[129] BITTKER & LOKKEN, *supra* note 111, at ¶ 37.2; *see also* Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL'Y REV. 173, 177 (1995) (discussing the history and critically analyzing the credit).

[130] Heen, *supra* note 129, at 176–77.

[131] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 201, 111 Stat. 788, 799. For a critical overview of the credits, see generally Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1 (2008); Phyllis C. Smith, *The Elusive Cap And Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 181 (2008).

[132] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296, 3298; American Taxpayer Relief Act of 2012, Pub. L. 112-240, §§ 101-02, 126 Stat. 2313, 2315–19.

[133] Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 213.

[134] I.R.C. § 36B (2012).

meet the needs of the poor. Congress enacted the Low-Income Housing Tax Credit in 1986 as "efficient mechanism for encouraging the production of low-income rental housing" and to consolidate nontax low-income housing programs that, according to the credit's legislative history, "failed to guarantee that affordable housing would be provided to the most needy low-income individuals."[135] The credit equals a percentage, up to 70 percent, of the amount that a developer spends on a project involving a long-term commitment to low-income housing.[136] The incentives are larger for projects serving the lowest-income tenants and projects committed to serving low-income tenants for the longest periods.[137] In the wake of the credit's enactment,, Congress and the IRS have made minor changes to the credit, and it has since become one of the federal government's largest affordable-housing programs.[138] The smaller New Markets Tax Credit gives incentives to invest in low-income communities. This provision provides benefits to "qualified community development entit[ies]" (CDE) that serve "low-income communit[ies]."[139] The credit equals a certain percentage of a "qualified equity investment" in the CDE,[140] and since its creation, Congress has expanded or extended this credit several times.[141] The similarly designed Work Opportunity Credit allows an employer to take a nonrefundable credit of 25 percent or 40 percent of a set amount (usually $6,000) of the first-year wages paid to certain employees, such as long-term recipients of various federal assistance programs like SNAP and TANF.[142] Congress enacted the Work Opportunity Credit on a temporary

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[135] STAFF OF JOINT. COMM. ON TAX'N, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, JCS-10-87 152 (Comm. Print 1987). For the credit itself, see I.R.C.§ 42.

[136] I.R.C. §§ 42(g)(3)(A), 42(b)(1)(B).

[137] *Id.* § 42(m)(1)(B)(ii). For the debate in the legal literature about the effectiveness of this and other provisions of the credit, see Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 234 (2003); David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537 (1998); Stephen Malpezzi & Kerry Vandell, *Does the Low-Income Housing Tax Credit Increase the Supply of Housing?*, 11 J. HOUSING ECON. 360, 370 (2002); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Law*s, 52 U. MIAMI L. REV. 1011, 1012 (1998).

[138] *See* CONG. BUDGET OFFICE, FEDERAL HOUSING ASSISTANCE FOR LOW-INCOME HOUSEHOLDS (2015) (detailing the size of other programs).

[139] I.R.C. § 45D(c)(1), (e)(1).

[140] *Id.* § 45D(a).

[141] *See, e.g.*, Tax Relief and Health Care Act of 2006, Pub. L. 109-432, § 102, 120 Stat. 2922, 2934;); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 302, 122 Stat. 3765, 3866; American Jobs Creation Act of 2004, Pub. L. 108-357, §§ 221–23, 118 Stat. 1418, 1431–32.

[142] I.R.C. § 51. For the inclusion of TANF, see H.R. REP. NO. 106-1033, at 1027 (2000).

basis in 1996 and has expanded or extended it almost every year since.[143] Finally, the tax code exempts from income tax organizations "organized and operated" for certain defined purposes, including poverty relief,[144] and taxpayers may deduct from income tax contributions made to these organizations.[145]

As the stories of these tax war on poverty provisions illustrate, Congress and presidential administrations across party lines have consistently expanded and extended the programs containing these "war on poverty" provisions. Moreover, this growth happened while the cash welfare rolls were shrinking. Though the conventional scholarly wisdom previously discussed holds that the past four decades have seen welfare-state retrenchment, that is only part of the story—the tax components of the welfare state have been growing substantially.

Underlying this article's proposal to build on the consequences of this move for low-income individuals' rights is the question how could the tax welfare state have expanded so significantly as the direct-spending one was contracting? Prior research has discussed this question in some detail, and has come up with several answers, two of which are particularly relevant here. First, tax benefits have been able to attract favor from both major political parties. The EITC history summarized above highlights the credit's support from, for example, political leaders as disparate in views as President Nixon, President Obama and Speaker Ryan. By way of example, in the 113th Congress, "219 [r]epresentatives and 37 [s]enators," almost all Republican, signed conservative activist Grover Norquist's "Taxpayer Protection Pledge."[146] In so doing, they promised "to oppose changes in tax deductions or credits that increase the net

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[143] Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1201, 110 Stat. 1755, 1768–72. Then, see, e.g., Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 796; Tax and Trade Relief Extension Act of 1998, Pub. L. No. 105-277, § 1002, 112 Stat. 2681, 2681–888; Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 1(a)(7), 114 Stat. 2763, 2763; Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 303, 118 Stat. 1166, 1179; Tax Relief and Health Care Act of 2006, Pub. L. 109-432, § 102, 120 Stat. 2922, 2934; Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, 121 Stat. 190; Hiring Incentives to Restore Employment Act, Pub. L. 111-147, § 101, 124 Stat. 71, 74 (2010); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296, 3298; American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313. For a discussion of this credit, see generally Francine J. Lipman, *Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives*, 53 AM. U.L. REV. 393 (2003).

[144] I.R.C. §§ 501(c), 527–28; Treas. Reg. § 1.501(c)(3)–1(d)(2).

[145] I.R.C. § 170(c)(1).

[146] *Federal Taxpayer Protection Pledge: 113th Congressional List*, AM. FOR TAX REFORM, https://cusdi.org/wp-content/uploads/2016/03/113th-Congress-ATF-Pledge.pdf [https://perma.cc/6KU6-QJD4].

tax burden on Americans."[147] To cut any of the tax antipoverty programs, those members of Congress would have had to break that promise. Similarly, in a polarized political environment in which the House Freedom Caucus struggled to find common policy ground with the Obama Administration, one of the few bills to become law in 2015 extended the Child Tax Credit and the EITC.[148]

Second, and relatedly, public opinion favors tax benefits relative to their direct-spending counterparts. A spate of published studies in the past few years has consistently found that people are more likely to support tax-embedded social programs than their non-tax counterparts.[149] In another unpublished survey experiment conducted in June of 2016, Alex Tahk and I again found this to be true across policy areas, particularly when comparing direct-spending programs to tax deductions.[150]

Preference for the tax antipoverty programs may stem in part from the fact that middle and higher-income taxpayers also benefit from some of these programs. Four experimental studies by different research teams, however, have now shown that when given descriptions of two programs that are otherwise substantively identical, one tax-embedded and the other not, respondents regularly favor the tax version.[151] As tax and economics scholars Conor Clarke and Edward Fox have written, "the public strongly prefers tax expenditures even when the economic substance of the proposed policies is identical."[152]

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[147] *Federal Taxpayer Protection Pledge Questions and Answers*, AM. FOR TAX REFORM (June 1, 2011, 3:22 PM), https://www.atr.org/federal-taxpayer-protection-questions-answers-a6204 [https://perma.cc/2LQP-FVMR].

[148] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 101, 129 Stat. 2242 (2015).

[149] Conor Clarke, *New Research on the Stubborn Persistence of Tax Expenditures* 150 TAX NOTES 1462 (2016); Conor Clarke & Edward Fox, Note, *Perceptions of Tax Expenditures and Direct Outlays: A Survey Experiment* 124 YALE L.J. 1252 (2014); Christopher Faricy & Christopher Ellis, *Public Attitudes Toward Social Spending in the United States: The Differences Between Direct Spending and Tax Expenditures*, 36 POL. BEHAV. 53 (2013); Jake Haselswerdt & Brandon Bartels, *Public Opinion, Policy Tools, and the Status Quo: Evidence from a Survey Experiment*, 68 POL. RES. Q. 607 (2015); *see also* Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797, 799 (2005) (finding that participants in a survey experiment were less likely to view property tax exemptions, as opposed to direct subsidies, as interfering with volunteer firefighters' status as volunteers).

[150] *See generally* Alexander M. Tahk & Susannah Tahk, *Tax-Embedded Programs and the Politics of Public Policy*, (June 2016) (unpublished manuscript on file with author).

[151] *See* Clarke, *supra* note 149; Clarke & Fox, *supra* note 149; Faricy & Ellis, *supra* note 149; Haselswerdt & Bartels, *supra* note 149.

[152] Clarke & Fox, *supra* note 149, at 1252.

B. Tax Rights for the Poor

The use of tax law to fight poverty has consequences for low-income individuals' rights. This section will explore these consequences, both as a matter of theory and as a matter of practice. The picture that emerges shows a potentially robust regime grounded in ideas of equally situated citizens all subject to the same social contract. This rights landscape contrasts with the narrative about the decline of welfare rights.

1. Theoretical Foundations

Tax benefits come with rights. These rights accrue to poor recipients of tax benefits much as they do to wealthy individuals or businesses who obtain subsidies through the tax code—from a rights perspective, tax law situates a poor taxpayer taking the EITC identically to a partner in a hedge fund, or to the hedge fund itself. These rights arise from participating in the tax system.

Tax rights for all rest on twin theoretical foundations: the meaning of the social contract and the meaning of private property. To first discuss the social contract, subjecting oneself to a country's taxing power and paying the resulting taxes serves as consideration in a social contract.[153] By giving up unfettered domain over one's property, a U.S. citizen or resident relinquishes something valuable to them. Doing so triggers the reciprocal obligations on the part of the taxing government.[154]

The idea that status as a taxpayer creates a contractual stake in a society appears commonly in public discourse. Anyone who "as a taxpayer" has ever complained about the government has appealed to this intuition. The question then becomes, what

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[153] *See generally* THOMAS HOBBES, LEVIATHAN (1651); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 36 (1690); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

[154] Lucy Madison, *Fact-checking Romney's "47 percent" comment*, CBS NEWS (Sept. 25, 2012), https://www.cbsnews.com/news/fact-checking-romneys-47-percent-comment [https://perma.cc/8XUE-7L6K]; Subjecting oneself to the taxing power not only represents an abstract surrender of liberty, but has concrete effects on daily life. This is true whether the citizen pays net income taxes or not. For example, even a member of the infamous "47 [percent]" who, in 2012, did not pay net income taxes in that year shaped her behavior subject to the dictates of the code imposing the income tax law. As a practical matter, U.S. workers pay net payroll tax every year, and perhaps more importantly, whether someone has net tax liability changes from year to year, and different people owe zero in different years. *See* Lily L. Batchelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 HARV. J. ON LEGIS. 395, 415 (2003) (documenting income volatility and frequent movement, especially by low-income taxpayers, through different provisions and brackets). Even if some citizens never paid net income tax, however, by subjecting themselves to the taxing power, they would still be giving up something valuable and altering their daily lives accordingly.

must the government provide in return? Political philosophers for centuries have been trying to answer that question. Different stakeholders have different expectations. Protecting the rights of the individual, however, is at least part of the government's responsibility. As a result, under the social contract theory, the answer to "why does a citizen have rights?" becomes "because the government has agreed to provide them in exchange for payment of taxes." That answer fundamentally links taxpayer status and rights claims. The taxpayer signs the social contract again every year when she fills out her tax return. This vision of social citizenship stresses the "participation" piece of what equal-dignity citizenship theorist Kenneth Karst has called "two related and overlapping values: participation and responsibility."[155] For him, "[t]o be a citizen is not merely to be a consumer of rights, but to be responsible to other members of the community."[156] The contribution made through the tax system heeds constitutional law scholar Nan Hunter's call for more "elaboration of the responsibility branch" in that vision.[157]

Second, and related, the existence of private property implicates tax rights. The benefits obtained through the U.S. system for this point in time come as part of tax refunds. All taxpayers have property rights in those tax refunds. The concept of a refund is that the government is returning to the taxpayer money he earned. Federal law allows the IRS to withhold taxes, but can only keep them to the extent that the taxpayer legally owed them, and thus a taxpayer has at least some property interest in his refund. In his article, *A New New Property*, Professor Super wrote that,

> Property law is the guardian of the line between individual and state. It is the foundation of individual autonomy and independence. Individuals lacking property rights are left dependent on the state, and "[d]ependence creates a vicious circle of dependence." Individuals whose interests lack the protection of property law lose their ability to resist intrusive, often arbitrary government regulation and may even become abettors of the state's power over them[158]

Giving low-income individuals rights through tax refunds would collapse this distinction between dependent

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[155] Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8–9 (1977).

[156] *Id.*

[157] Nan D. Hunter, *Health Insurance Reform and Intimations of Citizenship*, 159 U. PA. L. REV. 1955, 1963 (2011) (citing THOMAS JANOSKI, CITIZENSHIP AND CIVIL SOCIETY 53 (1998)).

[158] David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1794 (2013) (alteration in original) (footnotes omitted) (quoting and citing Reich, *supra* note 45, at 733, 737, 749, 751, 758).

government beneficiaries with no property rights and autonomous citizens with property rights. People who receive their benefits as part of their refunds acquire all the property rights that otherwise attach to those refunds. One does not need a particularly expansive Reichian view of new property for property rights to extend to tax refunds. In fact, the few tax cases to consider the question simply assume that they do.[159]

Both social-contract theory and the concept of private property would provide sufficient bases for any citizen subject to the taxing power to make rights claims. Business, wealthy, and middle-income taxpayers in fact do this all the time. Plugging "rights" into a legal search engine of tax cases yields thousands of cases in which taxpayers have asserted various rights, some grounded in the Constitution, others in legislation, still others in individual moral intuition. Taxpayers presumably make millions more in administrative disputes both formal and informal every tax year.

As a practical matter, taxpayers with access to greater resources appear to make more of these arguments than taxpayers with fewer resources at their disposal. When individuals continuously assert rights, however, those rights become stronger and are bolstered by favorable court and agency-level decisions. As a result, taxpayers with fewer resources could be able to take advantage of the reinvigorated rights. To give a concrete example, business taxpayers have been maintaining their rights to privacy before the IRS for 74 years.[160] If a poor taxpayer now wants to argue for her right to privacy, she may base her position in the precedents that her wealthier counterparts have put into place. Conversely, the law she establishes will in turn apply to them, so it may be safe to assume that many wealthy individuals would support her claim.[161]

To give another, in *Facebook v. Internal Revenue Serv.*, high-resource taxpayer Facebook, represented by one of the largest law firms in the United States, is suing the IRS over whether the company has a right to appear before the IRS's

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[159] *See, e.g.*, Caldwell v. Obama, 6 F. Supp. 3d 31, 46 (D.D.C. 2013) ("[a]ssuming, *arguendo,* that the plaintiff has a legitimate claim of entitlement to and protected property interest in the 2005 tax refund"); Games v. Cavazos, 737 F. Supp. 1368, 1377 (D. Del. 1990) ("A taxpayer has a property interest in his tax refund sufficient to entitle him to the protections of procedural due process before he is deprived of his refund."). The interesting question here, which I will return to later in the article, is whether the same property rights accompany the refundable portion of a refundable credit as accompany the rest of the refund. As I will discuss, courts have not considered the refundable-portion question directly.

[160] *See* Sellmayer Packing v. Comm'r, 146 F.2d 707 (4th Cir. 1944).

[161] Another example of this concerns refundable credits.

Office of Appeals.[162] At issue in the case, among other things, is whether the 2015 Taxpayer Bill of Rights legislation, discussed below, creates a statutory right to appeal an IRS decision.[163] The breadth and substance of the 2015 legislation is an issue that applies to low-income taxpayers as well as to taxpayer giants like Facebook. The extent to which Facebook's suit creates taxpayer-friendly precedent on this point, low-income taxpayers will be able to rely on it.

Similarly, strengthening taxpayer rights may call forth unusual and broad coalitions of support, as tax-benefits issues so often do. For one, the rights claims that poor beneficiaries make in the context of the tax system may resonate with and affect not just wealthy taxpayers, but also could affect ordinary taxpayers. For example, if the government were to argue that a taxpayer does not have a property interest in his refund, the approximately 100 million taxpayers who received refunds in 2015 might object, saying something along the lines of, "Wait, my tax refund isn't mine?"

Taxpayer rights claims may even cross traditional party lines. Calls for stronger taxpayer rights often come from the right, even from its fringes in the tax protestor community,[164] but demands for more robust rights in government benefits frequently emerge from the left, as was true of the welfare rights movement. Private-property enthusiasts and low-income community organizers can find common ground in advocating that the government should do more to protect taxpayer rights. Part of this overlap may stem from the fact that favoring rights for those who participate in the tax system is consistent with social and economic rights but favoring those rights does not require parties to embrace those rights. As described in detail earlier, part of what doomed the War on Poverty litigation strategy was the extent to which it brought in the right to subsistence.[165] Most decisionmakers in that period never agreed, however, that the U.S. Constitution guarantees a right to subsistence. That remains a contested issue, yet taxpayer rights do not implicate social and economic rights to the extent that welfare rights did. Fighting for taxpayer rights does not undermine the

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[162] *See* Complaint for Declaratory and Injunctive or Mandamus-Like Relief, Facebook, Inc. & Subsidiaries v. Internal Revenue Serv., Case No. 3:17-cv-06490-LB (N.D. Cal. Nov. 8, 2017).

[163] Facebook's Opposition to Defendant's Motion to Dismiss, 3:17-cv at 10, Case No. 3:17-cv-06490-LB (N.D. Cal. Apr. 12, 2018).

[164] *See, e.g.*, United States v. Sather, 3. F. App'x 725 (10th Cir. 2001); Grell v. Obama, Misc. No. 15–51 (JRT/BRT), 2015 U.S. Dist. LEXIS 144049 (D. Minn. Oct. 21, 2015); Lenz v. Brellenthin, No. 14-CV-481-JPS, 2014 U.S. Dist. LEXIS 101696 (E.D. Wis. July 25, 2014).

[165] DAVIS, *supra* note 16, at 132.

battle for social and economic rights and may in fact assist in it.[166]

Observing the widespread potential support for taxpayer rights highlights the fact that the tax-based welfare state does not operate along two tiers. In fact, it presents a one-tiered vision of equal citizenship. The concern about a welfare state that divides beneficiaries into two groups, one deserving of rights and benefits and the other less so, does not apply as cleanly to the tax system. As discussed above, neither the social-contract nor the private-property foundations of taxpayer rights distinguish among different classes of signatories to the social contract or property holders. Of the historical origins of the two-tiered welfare state, T.H. Marshall wrote, that direct cash assistance traditionally "treated the claims of the poor not as an integral part of the rights of the citizen, but as an alternative to them—as claims which could be met only if the claimants ceased to be citizens in any true sense of the word."[167] Awarding benefits by virtue of the poor recipient's taxpayer status does the opposite—tying the benefits directly to the process by which he asserts his citizenship stake in U.S. society.

The single tier of the tax-based welfare state plays itself out practically. As mentioned above, over a hundred million taxpayers filed for and received refunds in 2015.[168] All of them filled out one of a few forms and faced the same set of administrative and legislative procedures for resolving disputes. In fact, data suggest that the benefits that taxpayers take vary substantially from year to year. For example, the National Taxpayer Advocate found that one-third of EITC claimants turn over from year to year.[169] A taxpayer might take the EITC one year, the home-office deduction the next, and then both the following year. Putting aside abstract notions about equal human dignity, the administrative cost of

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[166] Different taxpayer rights claims may relate differently to ideas about social and economic rights. I am not sure that, for instance the taxpayer right to privacy has much to do with social and economic rights, although it does help people who are deriving subsistence in part from their tax benefits. On the other hand, a creative advocate might be able to use the right to a fair and just tax system, to support some vision of social and economic rights.

[167] Tani, *supra* note 18, at 321 (quoting T.H. Marshall, *Citizenship and Social Class* (1949), *reprinted in* T.H. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 30 (1964)).

[168] *Treasury Inspector General for Tax Administration: Results of the 2015 Tax Filing Season*, TREASURY (Aug. 31, 2015), https://www.treasury.gov/tigta/auditreports/2015reports/201540080fr.html [https://perma.cc/U7RV-BBQC].

[169] NAT'L TAXPAYER ADVOCATE, 1 2015 ANNUAL REPORT TO CONGRESS 248–49 (2015), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1.pdf.

having a different rights framework applied each year to a particular person would be prohibitive.

One example of the way that this equal-citizenship vision has exhibited itself concretely is in the relative lack of stigma in applying for tax benefits. Scholars (myself included) have discussed this in other work.[170] While many beneficiaries report that applying for TANF, food stamps and other direct-spending benefits specifically humiliates low-income individuals, the process of applying for a tax refund treats all applicants across income groups in the same way.[171] Taxpayers across races, social classes, and genders heavily rely on tax preparers, either in person or as software.[172] An extensive literature has accurately documented problems with the private return-preparer industry, but no research has described it as stigmatizing.[173] In fact, many taxpayers who are eligible for the antipoverty tax programs do not even realize that they are until showing up at H & R Block or loading TurboTax.[174] Indeed, many of these individuals may not even know that the credits for which they qualify have income ceilings.

2. Procedural Due Process for Tax Rights

As described above in *Mathews*, the Supreme Court rejected the need for a pre-termination hearing in cases related to the denial of federal Social Security disability benefits.[175] It applied a three-factor test for satisfying procedural due process

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[170] Tahk, *supra* note 4, at 828; *see also* Greene, *supra* note 109, at 535.

[171] Tahk, *supra* note 4, at 828.

[172] John A. Koskinen, Comm'r of Internal Revenue Serv., Written Testimony Before the Senate Finance Comm. on Regulation of Tax Return Preparers 1 (Apr. 8, 2014), http://www.finance.senate.gov/imo/media/doc/Koskinen%20Testimony.pdf [https://perma.cc/3CE5-6MYW] ("Each year, paid preparers are called upon by taxpayers to complete about 80 million returns, or about 56 percent of the total individual income tax returns filed, while another 34 percent of taxpayers use tax preparation software, for a total of 90 percent who seek some form of assistance.").

[173] *See, e.g.*, Alex H. Levy, *Believing in Life After Loving: IRS Regulation of Tax Preparers*, 17 FLA. TAX. REV. 437, 440 (2015); Jay A. Soled & Kathleen DeLaney Thomas, *Regulating Tax Return Preparation*, 58 B.C. L. REV. 151, 155 (2017); *see also* GAO, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, PREPARERS MADE SERIOUS ERRORS (2014), http://www.gao.gov/assets/670/662356.pdf [https://perma.cc/B2PM-KM9B]; TREASURY INSPECTOR GEN. FOR TAX ADMIN., MOST TAX RETURNS PREPARED BY A LIMITED SAMPLE OF UNCONTROLLED PREPARERS CONTAINED SIGNIFICANT ERRORS (2008), https://www.treasury.gov/tigta/auditreports/2008reports/200840171fr.pdf [https://perma.cc/CD6C-FZQP]; CHI CHI WU, NAT'L CONSUMER LAW CTR., RIDDLED RETURNS: HOW ERRORS AND FRAUD BY PAID TAX PREPARERS PUT CONSUMERS AT RISK AND WHAT STATES CAN DO 1 (2014), http://www.nclc.org/images/pdf/pr-reports/report-riddled-returns.pdf [https://perma.cc/7MWT-KTRC].

[174] Tahk, *supra* note 3, at 93–95 (borrowing a phrase from social welfare administration and calling this the "no wrong door" approach to social policy).

[175] Matthews v. Eldridge, 424 U.S. 319, 326 (1976).

in the benefits context: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[176] These prongs apply to all process—including both the hearings and the notice—that the government must provide in denying or terminating a property interest.[177]

While it does not appear that *Mathews* has been specifically applied to tax refunds, its analysis seems to suggest that denying tax benefits may require a pre-termination hearing. First, as described in the previous Part, the private interest that taxpayers have in their refund is probably relatively substantial.[178] Tax refunds represent money that the government withheld, possibly above the taxpayer's legal obligation to pay.[179] The statute allows the government to withhold for reasons of administrative convenience but does not entitle the government to hold property to which it has no legal right for an indefinite period. Colloquially, tax practitioners often refer to the refund as "interest-free loans to the . . . government."[180] As a result, the refund is, for the purposes of property law, more like the salary the taxpayer earned in the first place than like a benefit that the government later decided to bestow.

The more interesting theoretical question concerns the due-process protections required for the portion of the refund attributable to the refundable component of refundable credits. Is this more like the government paying out Social Security disability benefits or is it more similar to the government returning borrowed property? Advocates for either answer could make good arguments. Relevant law might include the IRS's mixed but taxpayer-friendly guidance on whether the refunds are taxable income and case law from bankruptcy court detailing whether refunds constitute property of the estate that creditors can seize.[181] The IRS otherwise takes the position that directly-

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[176] *Id.* at 335.

[177] *See id.*; *see also* Henry v. Gross, 803 F.2d 757, 767–68 (2d Cir. 1986).

[178] *See supra* Section B.1.

[179] Current Tax Payment Act of 1943, Pub. L. No. 78-68, ch. 120, sec. 2(a), §§ 1621–1622, 57 Stat. 126, 126–35.

[180] Megan McArdle, *Happy Tax Day. Now Stop Making Interest-Free Loans to the US Government*, DAILY BEAST (Apr. 14, 2013), https://www.thedailybeast.com/happy-tax-day-now-stop-making-interest-free-loans-to-the-us-government [https://perma.cc/8T64-ABQY].

[181] I have treated the former in an earlier article in which I concluded that the refundable portions are probably not taxable income. *See* Tahk, *supra* note 3, at 96–98.

administered government benefits are taxable income unless specifically excluded by statute or guidance.[182] If the refundable piece in that context was more like a return of borrowed property than a newly acquired government benefit, it suggests that the refundable piece entitles the recipient to the same due-process protections as the rest of the refund does. This is an example of another circumstance in which precedent concerning rights developed through cases with high-income taxpayers could affect their low-income counterparts. The taxpayers who take the largest individual refundable credits are probably companies taking hundreds of millions of dollars in refundable energy credits. If the IRS ever takes the position that refundable credits are taxable government subsidies, advocates for the rich and poor will presumably weigh in on this topic.

Bankruptcy courts have seen the emerging issue of whether the child tax credit is property of the estate in Chapter 7 bankruptcy proceedings. Some courts have held that both the refundable and nonrefundable portions are property of the estate.[183] Others have distinguished the refundable portion, holding it exempt as a public assistance benefit.[184] Still others have held the entire credit is exempt as a public assistance benefit.[185] As a result, neither the IRS's guidance nor bankruptcy court precedent provide a clear answer about the nature of the property interest in the refundable credits. Consequently, it remains to be seen how a court would rule on this question. At a minimum, the refundable portion would likely have the same property-interest status as the disability benefits in *Mathews*, or as other government benefits with clear statutory eligibility guidelines.[186]

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[182] BITTKER & LOKKEN, *supra* note 111, at ¶ 16.4 (citing Deason v. Comm'r, 590 F.2d 1377 (5th Cir. 1979)).

[183] *See In re* Law, 336 B.R. 780, 783 (B.A.P. 8th Cir. 2006) (holding that neither is exempt from creditors because both are "contingent interests" under bankruptcy law.

[184] *See In re* Hardy, 787 F.3d 1189, 1191–93 (8th Cir. 2015) (chapter 13 bankruptcy proceeding); *In re* Hatch, 519 B.R. 783, 792 (Bankr. S.D. Iowa 2014); *In re* Koch, 299 B.R. 523, 527–28 (Bankr. C.D. Ill. 2003). Relevant to these courts is what they see as Congressional intent to designate the refundable portion a "public assistance benefit."

[185] *See In re* Vazquez, 516 B.R. 523, 527–28 (Bankr. N.D. Ill. 2014). The court rested its holding on construing the term "public assistance benefit" broadly for bankruptcy purposes and on the fact that that the phase-out is a means test, and, in the court's view, it should not apply an additional means test in bankruptcy proceedings.

[186] *See, e.g.*, Cook v. Principi, 318 F.3d 1334, 1351 (Fed. Cir. 2002) (Gajarsa, J., dissenting) ("It is well established that recipients of statutory entitlements such as Social Security disability benefits have a property interest protected by the Due Process Clause . . . ."). Courts have found that statutes with "defined eligibility criteria" create the kind of entitlements that in turn give rise to property rights. *See* Kapps v. Wing, 404 F.3d 105, 113 (2nd Cir. 2004) ("In determining whether a given benefits regime creates a property interest protected by the Due Process Clause, we look to the statutes and regulations . . . . Where those statutes or regulations 'meaningfully channel[] official discretion by mandating a defined administrative outcome,' a property interest will be

As for the second *Mathews* prong, the chance of erroneous deprivation depends on the particular IRS process the taxpayer faced. In an audit, a taxpayer normally receives a refund and the IRS subsequently institutes proceedings to get the disputed portion back. The IRS cannot initiate a collections action until it has gone through a process called "collection due process" (CDP).[187] While low-income taxpayer assistance clinicians have reasonably criticized CDP hearings as poorly designed and overly burdensome for poor taxpayers, CDP actually includes a hearing that takes place before the IRS collects anything. As such, CDP carries with it a relatively low risk of erroneous deprivation, at least in comparison to the procedures concerning other government benefits. As will also be discussed below, however, the IRS does not always follow standard audit procedures in the case of low-income taxpayers. Not doing so might create a risk of erroneous deprivation, tipping the scales in the *Mathews* test.

Finally, and with regard to the third prong, the IRS deals with many more people than any traditional antipoverty agency. Any requirement the IRS must follow applies not just to poor taxpayers but to all taxpayers. As a result, the government may be able to argue in any tax case that the cost of additional procedure is substantial. On the other hand, a creative taxpayer advocate might be able to craft a remedy that would be relatively low-cost to the government. Nonetheless, balancing the three prongs, while the first is uncertain, the second two seem toto weigh in the favor of the government in most circumstances.

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found to exist." (alteration in original) (citation omitted) (quoting Sealed v. Sealed, 332 F.3d 51, 56 (2d Cir. 2003))); Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170, 175 (2d Cir. 1991). Taxpayers who have filed for the refundable portion of tax credits might be more like applicants for benefits than current beneficiaries facing termination. The Supreme Court has reserved judgment on the point, but every circuit to rule on the question has agreed that applicants for benefits should get the same due process protections as recipients facing termination. *See, e.g.*, Lyng v. Payne, 476 U.S. 926, 942 (1986); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320 n.8 (1985) (declining to rule on the issue); *Kapps* 404 F.3d at 115; Hamby v. Neel, 368 F.3d 549, 557–59 (6th Cir. 2004); Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998); Mallette v. Arlington Cty. Emps.' Supplemental Ret. Sys. II, 91 F.3d 630, 637–40 (4th Cir. 1996); Flatford v. Chater, 93 F.3d 1296, 1304–05 (6th Cir. 1996); Ward v. Downtown Dev. Auth., 786 F.2d 1526, 1531 (11th Cir. 1986); Daniels v. Woodbury County, 742 F.2d 1128, 1132–33 (8th Cir. 1984); Kelly v. Railroad Ret. Bd., 625 F.2d 486, 489–90 (3d Cir. 1980); Griffeth v. Detrich, 603 F.2d 118, 121–22 (9th Cir. 1979).

[187] I.R.C. §§ 6320, 6330 (2012); *see also Collection Appeal Rights*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-pdf/p1660.pdf [https://perma.cc/9A8W-K533]; *Collection Due Process (CDP)*, INTERNAL REVENUE SERV. (last updated Apr. 13, 2018), https://www.irs.gov/compliance/appeals/collection-due-process-cdp [https://perma.cc/QRN6-X5F3].

3. Legislative and Administrative Protection of Tax Rights

The tax code includes a number of provisions that protect taxpayer rights. As the National Taxpayer Advocate wrote in 2013, "The good news on this front is that the Internal Revenue Code provides dozens of taxpayer rights. Real rights. Substantive rights."[188] In the past several decades, Congress has strengthened these rights through bills known as Taxpayer Bills of Rights, as well as through legislation called the IRS Restructuring and Reform Act of 1998.[189] Toward this end the IRS consolidated these and other pre-existing statutory provisions in 2014 into a ten-right agency-level "Taxpayer Bill of Rights."[190] In late 2015, Congress codified this language and required the IRS Commissioner to ensure that all staff are familiar with and work to protect these ten rights.[191] Scholars and advocates for the poor have yet to explore the consequences.

Most recently, in late 2014, the IRS consolidated all of these legislative provisions, plus pre-existing sections of the tax code, into a "Taxpayer Bill of Rights," a list of ten rights "embracing a set of fundamental principles" to "guide all policies, practices and procedures."[192] Congress then incorporated these ten rights into the tax code in late 2015, along with a statutory

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[188] NAT'L TAXPAYER ADVOC. TOWARD A MORE PERFECT TAX SYSTEM: A TAXPAYER BILL OF RIGHTS AS A FRAMEWORK FOR EFFECTIVE TAX ADMINISTRATION, RECOMMENDATIONS TO RAISE TAXPAYER AND EMPLOYEE AWARENESS OF TAXPAYER RIGHTS 1 (2013) [hereinafter TOWARD A MORE PERFECT TAX SYSTEM], http://www.taxpayeradvocate.irs.gov/2013-annual-report/downloads/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf [https://perma.cc/6MFZ-GPZX].

[189] Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3730–52 (1988) (codified as amended in scattered sections of 26 U.S.C.); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. For a summary of the bill and its legislative history, see generally Lawrence B. Gibbs, *Taxpayer Bill of Rights*, *in* WILLIAM & MARY ANNUAL TAX CONFERENCE PAPER 199 (1989); Shannon Weeks McCormack, *Tax Abuse According to Whom?* 15 FLA. TAX. REV. 1, 36–38 (2013). For summary and analysis of the bill, see generally Elliot H. Hajan, *A Kinder, Gentler IRS*, 21 L.A. LAW. 28 (1998); Wm. Brian Henning, *Comment: Reforming the IRS: The Effectiveness of the Internal Revenue Service Restructuring and Reform Act of 1998*, 82 MARQ. L. REV. 405 (1999).

[190] INTERNAL REVENUE SERV., PUBLICATION 1, YOUR RIGHTS AS A TAXPAYER: TAXPAYER BILL OF RIGHTS (2016), https://www.irs.gov/pub/irs-pdf/p1.pdf [https://perma.cc/JX9W-DGWY] [hereinafter TAXPAYER BILL OF RIGHTS]; *see also IRS Adopts "Taxpayer Bill Of Rights;" 10 Provisions To Be Highlighted On IRS.Gov, In Publication 1*, INTERNAL REVENUE SERV. (June 10, 2014), https://www.irs.gov/uac/newsroom/irs-adopts-taxpayer-bill-of-rights-10-provisions-to-be-highlighted-on-irsgov-in-publication-1 [https://perma.cc/J8F2-5JW2].

[191] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 401, 129 Stat. 2242 (2015).

[192] Bartmann, *supra* note 1, at 598.

requirement that "the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including [the ten rights]."[193]

The ten taxpayer rights described in the 2014–2015 Taxpayer Bill of Rights build on dozens of tax code provisions. The first is the "right to be informed," under which "[t]axpayers have the right to know what they need to do to comply with the tax laws."[194] As a result, taxpayers are "entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence" and have "the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes."[195] The second right is the "[r]ight to [q]uality [s]ervice."[196] Taxpayers have "the right to receive prompt, courteous, and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the IRS, and to speak to a supervisor about inadequate service."[197] The third right is the "[r]ight to

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[193] Taxpayer Bill of Rights Act of 2015, H.R. 1058, 114th Cong. § 2(a).

[194] TAXPAYER BILL OF RIGHTS, *supra* note 190; *Taxpayer Bill of Rights*, INTERNAL REVENUE SERV., https://www.irs.gov/taxpayer-bill-of-rights [https://perma.cc/W82K-YLU7].

[195] *Id.* Each of the provisions of the Taxpayer Bill of Rights incorporates several statutory rights provisions. For the list of these provisions, as cited individually here, see TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 52. (This first right incorporates I.R.C. Sections 6402(l) (requiring the IRS to explain reasons for disallowing refunds); 6751 (requiring the IRS to explain penalty calculations); 7521 (requiring the IRS to explain to audited taxpayers the audit and collection processes); and 7522 (specifying the "[c]ontent of tax due notice, deficiency notice, and other notices"); Internal Revenue Service Restructuring and Reform Act (RRA) Sections 3501 (requiring the IRS to explain "joint and several liability" to potentially affected taxpayers); 3503 (requiring the IRS to include in its annual "Publication 1 the criteria and procedures for selecting taxpayers for examination"); and 3504 (requiring the IRS to include "[e]xplanations of examination and collection processes" with any first letter of proposed deficiency); and finally RRA Section 3506 and Treasury Regulation Section 301.6159-1(h) (requiring the IRS to issue an "[a]nnual statement of [any] installment agreement initial balance, payments made during the year, and remaining balance at year-end")).

[196] TAXPAYER BILL OF RIGHTS, *supra* note 190; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 52–53.(This right incorporates I.R.C. Sections 6212 (requiring any IRS "[n]otice of deficiency to include notice of the taxpayer's right to contact a local office of the Taxpayer Advocate"); 6304 (giving taxpayers the right to "fair collection practices."); 7526 (providing for "[l]ow income taxpayer clinics"); 7803(c) (creating and empowering the Office of the Taxpayer Advocate); and 7811 (setting forth procedures for "[t]axpayer assistance orders" for taxpayers in need for administrative help); as well as RRA Sections 3705 (requiring IRS correspondence to include the "name, phone number, and unique identifying number of an IRS employee that the taxpayer may contact with respect to that correspondence"); and RRA Section 3709 (requiring the IRS to list local telephone numbers and addresses in the area telephone book)).

[197] TAXPAYER BILL OF RIGHTS, *supra* note 190.

[p]ay [n]o [m]ore than the [c]orrect [a]mount of [t]ax" due[198] which entails "the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly."[199]

The fourth right is "[t]he [r]ight to [c]hallenge the IRS's [p]osition and [b]e [h]eard"[200] This procedurally-oriented right consists of "the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position."[201] Related is the fifth right, "[t]he [r]ight to [a]ppeal an IRS [d]ecision in an [i]ndependent [f]orum."[202] This right specifies that "[t]axpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties, and have the right to receive a written response regarding the [IRS's] Office of Appeals' decision."[203] Further "[t]axpayers generally have the right to take their cases to court."[204] Then, once the taxpayer has exhausted her procedural rights, she has right six, "[t]he [r]ight to [f]inality."[205]

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[198] *Id.*; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 53 (This right incorporates I.R.C. Sections 6402 (setting forth administrative procedures for refund claims); 6404 (providing, among other things, that "[t]he Secretary [of the Treasury] may abate tax where excessive in amount, barred by the statute of limitations, or erroneously or illegally assessed" and allowing for certain other powers); 7122 (allowing taxpayers with ongoing disputes to make offers in compromise); and 7524 (requiring the IRS to issue annual notices of tax delinquency where relevant); and RRA Section 3506 and Treasury Regulation Section 301.6159-1(h)).

[199] TAXPAYER BILL OF RIGHTS, *supra* note 190.

[200] *Id.*; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 53 (This right incorporates I.R.C. Sections 6213(b) (giving the IRS limited "[m]athematical and clerical error summary assessment" authority that abridges standard dispute procedures); and Sections 6320 and 6330 (setting forth procedures for "[c]ollection due process hearings")).

[201] TAXPAYER BILL OF RIGHTS, *supra* note 190.

[202] *Id.*; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 53–54 (This right incorporates I.R.C. Sections 6159(e) (providing for "[i]ndependent administrative review of terminations of installment agreements"); 6212 and 6213 (setting forth procedures for taxpayers to petition to the U.S. Tax Court); 6320 and 6330; 7122(e) (requiring "[i]ndependent administrative review and appeal of any rejection of a proposed offer in compromise or an installment agreement"); 7123 (providing for "dispute resolution procedures, including early referral, mediation, and arbitration" within the IRS's Appeals division); 7422 (setting forth procedures by which taxpayers can sue for refunds in federal court); 7428 and 7476 through 7479 (providing for declaratory judgments); and 7429 (setting forth procedures for "review[s] of jeopardy levy or assessment"); and RRA Section 1001(a)(4) (concerning impartiality of appeals)).

[203] TAXPAYER BILL OF RIGHTS, *supra* note 190.

[204] *Id.*

[205] *Id.*; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 54 (This right incorporates I.R.C. Sections 6213; 6501 (setting forth statute of "[l]imitations on assessment and collection"); 6502 (setting forth the statute of "limitations on collection *after* assessment"); 6511 (also setting forth a statute of limitations, this time on "claim[s] for credit or refund"); 7121 (providing for "closing agreements" after certain

Rights seven and eight concern privacy and confidentiality. "The [r]ight to [p]rivacy" (to be free from unreasonable searches and seizures)" means that a taxpayer has "the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing"[206] Under the "right to confidentiality" taxpayers "have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law."[207] Additionally, taxpayers "have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information."[208]

The ninth right is the alliterative "[r]ight to [r]etain [r]epresentation," which encompasses "the right to retain an authorized representative of their choice to represent them in their dealings with the IRS," including "the right to seek assistance from a Low Income Taxpayer Clinic if they cannot afford representation."[209] Then, the final, and perhaps most broadly worded right is, "the [r]ight to a [f]air and [j]ust [t]ax [s]ystem."[210]

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administrative processes); 7122; 7481 (concerning the "[f]inality of U.S. Tax Court decision[s]"); and 7605(b) (restricting audits) (emphasis added)).

[206] TAXPAYER BILL OF RIGHTS, *supra* note 190; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 54. (This right incorporates I.R.C. Sections 6320 and 6330; 6331 (providing "[l]evy and distraint rules"); 6334 (exempting certain property from levy); 6335 (putting conditions on sale of seized property); and 6340 (setting forth procedures for accounting of "proceeds of sale of property"); and RRA Section 3421 (specifying an administrative approval process for "liens, levies, and seizures.")).

[207] TAXPAYER BILL OF RIGHTS, *supra* note 190.

[208] *Id.*; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 54–55 (This right incorporates I.R.C. Sections 6103 (providing for "[c]onfidentiality of taxpayer returns and tax return information"); 6713 and 7216 (imposing "[c]ivil and criminal penalties for disclosure or use of tax return information by a tax return preparer"); 7525 (setting forth the "[c]onfidentiality privilege for federally authorized tax practitioners"); 7602(c) (detailing rules for the IRS's third party contacts); and 7803(c)(4)(A)(iv) (putting in place requirements for the "discretion of [a] local [T]axpayer [A]dvocate" about whether to "disclose to the IRS the fact that taxpayer has contacted the [office]")).

[209] TAXPAYER BILL OF RIGHTS, *supra* note 190; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 55. (This right incorporates I.R.C. Sections 7430 ("awarding of attorneys' fees and administrative/litigation costs" in certain proceedings); 7521(b)(2) (specifying that "[a]n IRS officer or employee cannot require the taxpayer to attend an interview where represented by a power of attorney, unless pursuant to a summons"); 7521(c) (setting forth additional power of attorney rules); and 7526).

[210] TAXPAYER BILL OF RIGHTS, *supra* note 190; *see* TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 55. (This right incorporates I.R.C. Sections 6159 (providing for installment agreements generally); 6404; 6511(h) (relevant here, allowing "[t]olling of statute of limitations for refund claims during periods of taxpayer's financial disability due to a medically determinable impairment"); 6651 (allowing for penalty abatement regarding failure to file/failure to pay penalties); 6656 (allowing for penalty abatement regarding failure to deposit penalty); 6694 (allowing for penalty abatement

II. RIGHTS PROTECTION IN THE TAX WAR ON POVERTY

Recognizing that all recipients of tax benefits have the aforementioned rights has the potential to help the government to better protect those rights. While Congress has certainly been active in passing taxpayer-rights legislation, in practice, safeguarding and strengthening these rights depends on the IRS, on taxpayers, and on taxpayers' advocates. Acknowledging taxpayer rights is the first step to mobilizing all of the relevant parties.

The IRS has administered large-scale antipoverty subsidies for fewer than three decades, during which it has come under regular funding assault. As the longtime National Taxpayer Advocate, Nina Olson—herself a former lawyer in a low-income taxpayer assistance clinic—writes annually in her report to Congress, securing the rights of poor taxpayers presents particular challenges. As a result, the agency, along with taxpayers and their representatives, have work to do to protect these rights. In her 2016 report to Congress, issued in 2017, she argued that, "[i]ncorporating [t]axpayer [r]ights into [t]axpayer [a]dministration" should be an agency priority.[211] She wrote that, "[a] requirement for success appears to be making the TBOR part of the IRS's culture and a general way of doing things," and she suggested a number of ways for the agency to make these rights real.[212]

As her report advises, a focus on the fact that these rights do exist, and that these rights are substantial, would open up paths to build the rights of low-income taxpayers.[213] This article identifies two potential paths: enshrining rights through individual taxpayer disputes, and manipulating institutional design to take better advantage of the taxpayer-rights framework. The law-and-society literature finds that legal rights derive much of their power when affected individuals mobilize their rights.[214] The rest of this article

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with regard to return preparer penalties); 7122; 7803 (setting up the Office of the Taxpayer Advocate); 7811).

[211] NAT'L TAXPAYER ADVOCATE, 3 2016 ANNUAL REPORT TO CONGRESS 27 (2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume3.pdf.

[212] *Id.* at 29.

[213] I focus here on the federal government, but states also administer antipoverty programs through their tax codes. As a result, similar rights opportunities presumably exist at the state level.

[214] *See, e.g.*, Catherine Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 12 (2005); Catherine Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1089 (2007); Calvin Morrill et. al., *Legal Mobilization in Schools: The Paradox of Rights and Race Among Youth*, 44 LAW & SOC'Y REV. 651, 654 (2010).

suggests a few potential paths by which low-income taxpayers and their advocates might do so.

A. Taxpayer Rights in Individual Disputes

During the 1960s War on Poverty, as described above, poverty lawyers established welfare rights, in large part through representing government beneficiaries in individual disputes with welfare agencies. Those disputes gave rise to the landmark cases like *King* and *Goldberg*.[215] While movement leaders constantly struggled to balance the interests of individual recipients with system-wide advocacy, individual cases became major vehicles for fighting welfare-rights battles. The case-based model provides an example for traditional poverty lawyers and low-income taxpayer representatives alike looking to do the same with poor taxpayers' rights. These advocates have the same due process rights at their disposal, along with the legislative rights framework described above. Taken together, those two sets of rights combine provide a larger and more powerful set of rights tools than the War on Poverty lawyers had at their disposal decades ago. In addition, unlike the prohibitions on systemic advocacy in the case of post-welfare reform cash assistance, no specific legislation prohibits advocates from conducting systemic advocacy through tax cases. This article makes a few suggestions, but overall, by focusing on taxpayer rights, creative and experienced advocates can likely identify many more promising avenues to pursue and arguments to make to protect taxpayer rights.

To take one example, certain audit procedures that apply to the poor may raise procedural due process issues. When the IRS audits recipients of the low-income taxpayer benefits, its standard practice is to freeze at least part of the refund at the agency level, send the taxpayer a letter requesting documents, and only release the money upon satisfactory receipt.[216] This process may not satisfy the due process dictates following *Mathews*. Additionally, Form CP-75 may violate the statutory "right to be informed." As discussed above, in denying an application for benefits, the government's notice and hearing processes must comport with procedural due process.

To satisfy procedural due process, notices for low-income benefits must "provide claimants with enough information to understand the reasons for the agency's action."[217] In particular,

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[215] *See supra* Section I.A.1.

[216] AM. BAR ASS'N, *supra* note 19, at slide 2.

[217] Kapps v. Wing, 404 F.3d. 105, 123–24 (2nd Cir. 2004) (citing Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970)) ("This requirement, like the right to a fair hearing,

according to the Sixth Circuit the notice must include "(1) a detailed statement of the intended action . . . ; (2) the reason for the change in status . . . ; (3) citation to the specific statutory section requiring reduction or termination; and (4) specific notice of the recipient's right to appeal."[218] The documentation notice does not include all four of those items.[219] It arguably only includes the fourth.

First, the notice does not indicate that, if the respondent fails to respond, she will not receive the disputed part of the refund. In the survey experiment described below, more than fifty percent of applicants answered incorrectly when asked the consequences of failing to provide the documents.[220] The letter says that the IRS is "holding" the refund, and that the agency "[will] disallow" the items being claimed.[221] Does "holding" the refund mean that the IRS will send the taxpayer part of it eventually? Under what circumstances? The letter is not clear.

Further, the letter does not say how much of the refund the IRS is "holding." Determining how much of a refund is attributable to a particular exclusion, credit or deduction requires an elaborate reverse calculation on the tax return. The language obscures the fact that, if the recipient does not reply and does not file a petition in Tax Court, the IRS will deny him a set amount of benefit, usually anywhere from several hundred to several thousand dollars.[222] As the final part of the paper will discuss, the results of the survey experiment conducted here suggest that not understanding the consequences of failing to reply to the audit letter may be a primary reason why the majority of recipients do not in fact do so.

Second, this notice does not indicate why the IRS has opened an audit. The letter refers to more than one credit, so the taxpayer has no way to know where the problem lies if they have

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is a basic requirement of procedural due process. Claimants cannot know *whether* to challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with sufficient information to understand the basis for the agency's action." (emphasis added)).

[218] Garrett v. Puett, 707 F.2d 930, 931 (6th Cir. 1983).

[219] Internal Revenue Service Form CP-75 [hereinafter Form CP-75], https://www.irs.gov/pub/notices/cp75_english.pdf [https://perma.cc/95UN-23LE].

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

[221] Form CP-75, *supra* note 219.

[222] After the taxpayer receives the CP-75, if he does not respond within 30 days, he will get a "Notice of Deficiency," which reveals how much the IRS is holding along with any additional tax he owes. Then, he has 90 days to file a petition in Tax Court if he wants to contest that assessment. By the time the 30 days is over, he has exhausted his administrative remedies. For the IRS's interpretation of this process, see *Telephone Interview with Nancy LeBlanc, Campus Correspondence & Audit Resolution Process,* INTERNAL REVENUE SERV. (July 14, 2010), http://www.tax.gov/Professional/Collections/CampusCorrespondenceAuditProcessResolution [https://perma.cc/DH89-6NQK].

applied for more than one credit. Courts have specifically held that notices mentioning multiple potential reasons for the "change in status" do not comply with the second notice requirement.[223] Form CP-75 is a step behind reasons; it does not even say which program's status is at issue. The notices that courts have found inadequate, as reprinted in case law, at least all indicate which program they concern, such as "Food Assistance Program" or New York "Home Energy Assistance Program."[224] Also, it becomes impossible for the taxpayer to calculate how much money the IRS is in fact "holding" if the taxpayer has no idea which benefit the agency is denying.

Third, and perhaps most facially puzzling, the letter does not mention any statutory sections.

Fourth, the IRS attaches to this letter Document 3498-A, an eight-page description of the correspondence audit process.[225] The table of contents lists page five as about "the appeals process."[226] Some might argue that the ensuing material is a bit confusing, but the header is clear enough.

Representatives of low-income taxpayers who are more intimately familiar with problems these taxpayers normally encounter are best situated to evaluate potential additional ways IRS procedures violate taxpayer rights.[227] Another example that springs to mind from just scanning the relevant legislation, forms,

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[223] *See, e.g.*, Barry v. Corrigan, 79 F. Supp. 3d 712, 741–43 (E.D. Mich. 2015).

[224] *Id.* at 742; Kapps v. Wing, 404 F.3d. 105, 109–10 (2nd Cir. 2004).

[225] *See generally* Internal Revenue Service, Form 3498-A, https://www.irs.gov/pub/irs-pdf/p3498a.pdf [https://perma.cc/8YGB-K2DV].

[226] *Id.* at 1.

[227] For outstanding discussions of tax procedure and how it might affect the rights of low-income taxpayers, see generally Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX. REV. 517 (2012); Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, 2006 WIS. L. REV. 1103 (2006); Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 U. KAN. L. REV. 1145 (2003); Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351 (2002); Bryan T. Camp, *The Failure of Adversarial Process in the Administrate State*, 84 IND. L.J. 57 (2009); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1 (2004); Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429 (2008); Diane L. Fahey, *The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453 (2003); Leandra Lederman & Warren B. Hrung, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235 (2006); Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS. L. REV. 183 (1996); Leslie Book, *Refund Anticipation Loans and the Tax Gap*, 20 STAN. LAW & POL'Y REV. 85 (2009); Leslie Book, *A Response to Professor Camp: The Importance of Oversight*, (Villanova Univ. Charles Widger Sch. of Law, Working Paper No. 2008-21, 2008), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1126&context=wps [https://perma.cc/944N-UJC4]; PROCEDURALLY TAXING, http://proceduralltaxing.com/ [https://perma.cc/U6VW-JXW7].

and government-benefits cases is the fact that the IRS may further violate the "right to be informed in the way it explains its decision to audit a taxpayer. The "right to be informed" incorporates Section 3503 of the IRS Restructuring and Reform Act of 1998.[228] Under this section, the IRS must, in its Publication 1, include "a statement which sets forth in simple and nontechnical terms the criteria and procedures for selecting taxpayers for examination[,] . . . including whether taxpayers are selected for examination on the basis of information available in the media or on the basis of information provided to the Internal Revenue Service by informants."[229] Publication 1 currently states,

> The process of selecting a return for examination usually begins in one of two ways. First, we use computer programs to identify returns that may have incorrect amounts. These programs may be based on information returns, such as Forms 1099 and W-2, on studies of past examinations, or on certain issues identified by compliance projects. Second, we use information from outside sources that indicates that a return may have incorrect amounts. These sources may include newspapers, public records, and individuals. If we determine that the information is accurate and reliable, we may use it to select a return for examination.[230]

Beyond what this publication states, neither low-income taxpayers, nor their advocates know very much about how IRS selects returns for audit. Not even experts writing the tax literature appear to know very much about that issue. Selection appears to stem from computer matching and the nature of the credit for which the person applied.[231] Audit risk rise when an individual claims the EITC in the first place because the IRS perceives EITC fraud as widespread. Taking advantage of the EITC is in fact a criterion for selecting taxpayers for audit,[232] yet that is not evident from the Publication 1 language. The right to be informed suggests that the IRS should tell taxpayers before they take the EITC that they are significantly raising their chance of audit, and telling taxpayers this after the audit is in progress certainly falls within this statutory requirement about audit criteria. Additionally, the definition of a "compliance project" is not entirely apparent, and it strains credulity that the IRS takes the position that this is a "simple and nontechnical"

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[228] TOWARD A MORE PERFECT TAX SYSTEM, *supra* note 188, at 52.

[229] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3503(a), 112 Stat. 685, 771.

[230] TAXPAYER BILL OF RIGHTS, *supra* note 190.

[231] *See* NAT'L TAXPAYER ADVOCATE, *supra* note 169, at 255–56, 260.

[232] NAT'L TAXPAYER ADVOCATE, 1 2012 ANNUAL REPORT TO CONGRESS 95–110 (2012), http://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Volume-1.pdf.

term, as required by the legislation, when tax experts like myself have to conduct research to ascertain the definition.[233]

Further, even in the benefits context where statutes may be less specific about rights to be informed, courts have been skeptical of denials based on computer matching programs.[234] For example, in *Febus v. Gallant*, a Massachusetts district court considered a situation in which a public-assistance agency was terminating benefits if it found the recipient's Social Security number on another state's rolls. Yet "[n]o effort was made by defendant to confirm actual duplication of benefits in two jurisdictions."[235] The court issued an injunction, ordering the department to refrain from terminating benefits under this process because the risk of improper termination was too high, and that the termination notice failed to comply with due process and minimal statutory notice requirements.[236] The same is true here, and moreover, taxpayers have a specific statutory right to know the criteria the IRS is using to select her for audit.

B. Tax Rights in Policy Design

In addition to offering opportunities for poverty-law advocacy through individual disputes, the taxpayer rights landscape leaves open the option to use these rights in policy design in both the legislative and administrative arenas. This is the area most fruitful for further academic research, and the final subpart of this paper considers several possibilities for doing so and will present results of a pilot survey-experiment exploring one of them.

The academic literature has not yet examined taxpayer rights to the extent necessary to consider how best to use them in law and policy design. The annual report from the Office of the National Taxpayer Advocate, however, points to some key possibilities. As a longtime proponent of the taxpayer rights framework, this independent figure within the IRS makes important policy recommendations to Congress and the agency each year, presumably with low-income taxpayers in mind and couches them specifically in the 2014 Taxpayer Bill of Rights.

For example, the bulk of low-income taxpayer audits are correspondence audits, in which the taxpayer receives the above-described letter. The Treasury Inspector General for Tax

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[233] Internal Revenue Service Restructuring and Reform Act of 1998 § 3503.

[234] For a description of this case law, see Danielle Keats Citron, *Technological Due Process*, 85 WASH. U.L. REV. 1249 (2008).

[235] Febus v. Gallant, 866 F. Supp. 45, 46-47 (D. Mass. 1994).

[236] *Id.* at 47.

Administration found that regarding the EITC, while "60 [percent] of EITC audits are conducted by correspondence before the credit[], . . . 70 [percent] do not respond to the audit inquiry letters [from the IRS], resulting in an EITC denial."[237] Further and perhaps most troubling, the Taxpayer Advocate found that, in a sample she selected "of these cases closed because there was 'no response' from the taxpayer, approximately 43 [percent] of taxpayers [eventually] prevailed at audit reconsideration and had some or all of the EITC restored."[238] The fact that the majority of recipients of the correspondence audit letters do not reply, and that of that group, almost half may have a right to that credit, is disturbing and is particularly problematic given that, as discussed above, these correspondence audit letters may violate taxpayer's due process rights[239]Even more troubling, the Taxpayer Advocate finds that taxpayers who do contest their correspondence audit often encounter erroneous decisions. In approximately 20 percent of the cases studied, the examiner who received documents from a taxpayer rejected them as insufficient, only to have the IRS's Appeals division or Chief Counsel's office accept them.[240] Additionally, in 5 percent of cases that reached Tax Court, the IRS had to concede in full because the examiner handling the audit had made a mistake of law.[241]

Given these problems with EITC audits, the most recent National Taxpayer Advocate's office report to Congress made six rights-based suggestions for improvement. For example, it recommended that the IRS "[c]onduct an EITC pilot with three different treatments: a regular correspondence examination, an office audit, and a correspondence examination with one auditor assigned."[242] It "should measure the following: direct time on case, no response/drop-out rate, agreed to rate, audit reconsideration rate, and future compliance rate."[243] In addition, "one employee should be assigned to the taxpayer's case until it is

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[237] Michelle Lyon Drumbi, *Those Who Know, Those Who Don't and Those Who Know Better Balancing Complexity, Sophistication and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113, 137 (citing NAT'L TAXPAYER ADVOCATE, 2 2011 ANNUAL REPORT TO CONGRESS 83 (2011), https://taxpayeradvocate.irs.gov/userfiles/file/2011-annual-report/TAS_arc_2011_vol_2.pdf).

[238] *Id.* at 137–38 (quoting NAT'L TAXPAYER ADVOCATE, *supra* note 237, at 83).

[239] *See supra* Section II.A.

[240] NAT'L TAXPAYER ADVOCATE, 2 2012 ANNUAL REPORT TO CONGRESS: TAS RESEARCH AND RELATED STUDIES 89 (2012); NAT'L TAXPAYER ADVOCATE, EARNED INCOME TAX CREDIT: THE IRS INAPPROPRIATELY BANS MANY TAXPAYERS FROM CLAIMING EITC (2013), http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/EARNED-INCOME-TAX-CREDIT-The-IRS-Inappropriately-Bans-Many-Taxpayers-from-Claiming-EITC.pdf.

[241] NAT'L TAXPAYER ADVOCATE, *supra* note 240, at 77.

[242] NAT'L TAXPAYER ADVOCATE, *supra* note 169, at 260.

[243] *Id.*

resolved."[244] Then, "[i]f the taxpayer calls back, he or she could have the option to speak to the next available employee or wait for the assigned employee to call back."[245] Further, "[t]he IRS should hire employees with a social work background or train existing auditors to conduct the audit."[246] According to the Taxpayer Advocate, these EITC audit issues affect taxpayers' "right to be informed," "right to pay no more than the correct amount of tax," "right to challenge the IRS and be heard, "right to retain representation and "right to a fair and just tax system."[247]

Similarly, the National Taxpayer Advocate has raised rights-based concerns about refund freezing.[248] In its report to Congress it found that "the IRS's screening processes in this program continue to harm taxpayers with legitimate returns."[249] The data that the report analyzed found a "'false positive' rate almost 35 percent" in 2015.[250] Taxpayers often cannot figure out if and why the IRS froze the refund. The program "does not have a dedicated phone number for taxpayers to call."[251] For this reason, "taxpayers whose refunds are frozen face lengthy hold times and courtesy disconnects trying to reach IRS Customer Service representatives . . . on a general line."[252] There was a mere 38.1 percent likelihood of getting a live employee on the phone in 2015, down from 64.9 percent in 2014.[253] To address these problems, the Taxpayer Advocate Service made six recommendations in 2015, such as, "Reinstate the Pre-Refund Program Executive Steering Committee to coordinate policy and other service-wide processes and business rules and include TAS in the steering committees as a charter voting member" and to "[e]stablish target false positive rates for each process and filter and create a process to adjust selection rates so that the false positive rates do not exceed the target rate."[254] In making these recommendations, the Taxpayer Advocate deemphasized that the refund freezing program affects taxpayers' "right to be informed," "right to quality service," "right to challenge the IRS's position and be heard."[255]

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[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.* at 248.
[248] It is not clear from reading this report whether these refund-freezing rates include everyone whose EITC, child credit or premium credit got frozen.
[249] NAT'L TAXPAYER ADVOCATE, *supra* note 169, at 45.
[250] *Id.*
[251] *Id.* at 52.
[252] *Id.*
[253] *Id.*
[254] *Id.* at 55.
[255] *Id.* at 45.

One research question that these recommendations opens concerns which rights-based interventions might be most effective in actually protecting the rights of low-income individuals through the tax system. There is very little evidence on this point. The literature on access to justice issues more generally, however, has just started to discover that data, particularly data gathered in randomized controlled trials (RCTs), can help identify low-cost ways to promote low-income individuals' rights within the justice system. Researchers through Harvard's Access to Justice Lab have recently conducted RCTs to evaluate various legal-assistance tools. They have looked at housing,[256] consumer debt,[257] and unemployment appeals.[258] They argue that

> the United States would be a better place if the legal profession were less hostile to objective, rigorous, scientific evidence about causation and the effectiveness of interventions. We think all this particularly true in the areas of (i) interventions for individuals unable to hire attorneys to address their legal problems, civil or criminal, transactional or litigation, and (ii) the construction and administration of adjudicatory systems. These two arenas, unlike those in which legal professionals and judges compete for business, lack the discipline that markets can sometimes impose on inefficient or wasteful practices.[259]

Among their various projects, Access to Justice Lab researchers Professors D. James Greiner and Andrea D. Mathews have conducted a field RCT to identify interventions that might lead low-income defendants to appear in bankruptcy court to prevent receiving default judgments.[260] Professors Greiner and Mathews contend that "one of the most existential threats to the legitimacy and effectiveness of the United States

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[256] *See generally* D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *How Effective are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (unpublished manuscript) (2012), http://a2jlab.org/publications/completed-lab-studies/ [https://perma.cc/43G3-BR34].

[257] *See generally* D. James Greiner, Dalié Jiménez, & Lois R. Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119 (2017); Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y. 449 (2013).

[258] *See generally* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

[259] D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession* 2 (Harvard Pub. Law Working Paper No. 16-06, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726614 [https://perma.cc/6J6E-CYZS].

[260] D. James Greiner & Andrea Mathews, *The Problem of Default Part 1* (unpublished manuscript) (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622140 [https://perma.cc/RQ4F-D477].

adversarial model of litigation comes from an obvious and everyday occurrence: routine default."[261] They clarify that "[b]y default, we mean when a plaintiff wins an adjudicatory contest because the defendant fails to appear to contest it."[262] To them, "[r]outine defendant default may be a greater threat to the legitimacy of United States adjudicatory systems than is a routine failure, or perhaps a routine inability, of putative plaintiffs to bring claims to the formal legal system."[263] This is so because, while with "both a defendant's default and a plaintiff's inability to file, no battle is joined, and thus an adversarial model has little hope of producing 'truth.'"[264] "But only in the former does the system, despite the absence of a battle, publicly declare a winner."[265] Further, "[r]outine default by human being defendants may also be a symptom of an access to civil justice problem[,] [p]articularly when there is reason to believe that defenses (perhaps excellent ones)" exist.[266] To combat this problem, Professors Greiner and Matthews sent carefully designed mailers to defendants in bankruptcy cases which explained in cartoon form, using a friendly character named "Blob," the steps to appearing in court.[267] There was a 12 [percent] increase in court appearances for individuals who received some form of the Blob mailer.[268]

Perhaps given the rising importance of RCTs and the seriousness of low-income taxpayer audit issues, Congress has similarly called for the IRS to experiment with potential interventions regarding EITC compliance.[269] Currently, four experiments are in progress as part of this initiative, and the Treasury issued a report this summer on its progress so far.[270] In addition, the National Taxpayer Advocate is itself carrying out an

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[261] *Id.* For more on people who simply do not contest legal outcomes, see Rebecca L. Sandefur*, The Importance of Doing Nothing: Everyday Problems and Responses of Inaction, in* TRANSFORMING LIVES: LAW & SOCIAL PROCESS 123 (Pascoe Pleasence, Alexy Buck, Nigel Balmer, eds., 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599755 [https://perma.cc/PN8C-2BHL]; Lucian A. Bebchuk & Alon Klement*, Discussion Paper No. 656: Negative- Expected-Value Suits*, (Harvard John M. Olin Center for Law, Econ., & Bus. Discussion Paper No. 656, 2009), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Bebchuk_656.pdf [https://perma.cc/8ETJ-2EQ5].

[262] Greiner & Matthews, *supra* note 260, at 2.

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.* at 2–3 (footnote omitted).

[267] *See generally id.*

[268] *Id.* at 30.

[269] *See generally* U.S. DEPT. OF TREAS., REPORT TO CONGRESS ON STRENGTHENING EARNED INCOME TAX CREDIT COMPLIANCE THROUGH DATA DRIVEN ANALYSIS (2016), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-EITC-Data-Driven-Compliance-2016.pdf [https://perma.cc/N6TG-SUDQ].

[270] *Id.*

RCT regarding EITC compliance and education.[271] In contrast to the academic RCTs, the government experiments are distinctly aimed at improving compliance.[272] The government is—unsurprisingly—particularly interested in enforcing the law. In addition, the IRS is well-situated to study questions whose answers require assessing penalties or accessing taxpayer information.

The first of the federal government's experimental efforts concerns one of the IRS's preferred approaches to low-income taxpayer issues: influencing tax preparer behavior.[273] It involves a variety of treatments for tax preparers including visits "by revenue agents to review preparers' compliance with due diligence requirements" and assess penalties, "[k]nock and [t]alk" visits to preparers by agents and criminal investigator, post-filing season audits and a variety of letters.[274] The study has indicated that it found both visits and issue-specific letters to be "effective."[275]

The second IRS experiment concerns taxpayers who fill out their own returns and claim the EITC.[276] It tests additional questions on tax preparation software Taxpayers in the treatment group used "a version of the tax preparation software that includes additional questions related to the residency test: taxpayers were asked to confirm they lived with each child claimed for the EITC for more than half the year and to provide the address at which they lived with these children the longest."[277] The treatment software "also provided clear language explaining that the IRS might ask for documentation to substantiate residency, and forced taxpayers to actively certify that the information they provided was correct."[278] The IRS reported to Congress that there was no evidence the additional questions influenced taxpayer behavior.[279]

The third IRS experiment used "soft notices" to notify non-audited taxpayers of potential compliance problems.[280] The IRS's "Dependent Database" "combines data from IRS and third-party sources such as the Social Security Administration and the

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[271] NAT'L TAXPAYER ADVOCATE, 2 2016 ANNUAL REPORT TO CONGRESS: TAS RESEARCH AND RELATED STUDIES 31–47 (2017), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume2.pdf.

[272] U.S. DEPT. OF TREAS., *supra* note 269, at 1.

[273] *Id.* at 2–12.

[274] *Id.* at 5.

[275] *Id.* at 9–12.

[276] *Id.* at 12–14.

[277] *Id.* at 13.

[278] *Id.*

[279] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, THE INTERNAL REVENUE SERVICE IS NOT IN COMPLIANCE WITH IMPROPER PAYMENT REQUIREMENTS (2018) 10, https://www.oversight.gov/sites/default/files/oig-reports/201840032fr.pdf [https://perma.cc/6C5A-25TY].

[280] *Id.* at 14–16.

Federal Case Registry."[281] The IRS uses this database to "score" taxpayers "for the probability of noncompliance" and in many cases, audits them.[282] Interestingly, "some segments of the population identified by DDb as making potentially erroneous EITC claims are unable to be examined by IRS due to limited audit resources."[283] This experiment sends members of those "segments" "soft notices" "identifying a potential compliance issue and providing instructions for self-correction" and determines if the DDb identifies the same taxpayers again in following years.[284] The IRS found that the notices had a small but significant effect on taxpayer compliance.[285]

Along similar lines the Office of the Taxpayer Advocate independently "develop[ed] a study to evaluate the compliance impact of outreach on potentially noncompliant [EITC] taxpayers." in 2016.[286] This study "identif[ied] taxpayers who were not audited in 2015, but who had similar risk scores to taxpayers who were audited" and drew "representative samples from this population to create separate control and test groups."[287] The office then "develop[ed] letters highlighting potential noncompliance concerns and sen[t] them to the test group of taxpayers at the beginning of the 2016 filing season."[288] The plan was then to "estimate the compliance of each of the above groups (i.e., the test group, the control group, and the group composed of taxpayers audited in 2015)."[289] The Taxpayer Advocate found that receiving the letter did in fact affect future noncompliance.[290]

The final experiment tested whether a "soft-touch postcard from the IRS could reduce income misreporting and improve EITC compliance."[291] This experiment mailed individuals with self-employment income postcards saying that "all business income must be reported and only allowable

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[281] *Id.* at 14.

[282] *Id.*

[283] *Id.*

[284] *Id.* at 15–16.

[285] NAT'L TAXPAYER ADVOCATE, 2 OBJECTIVES REPORT TO CONGRESS: FISCAL YEAR 2018 73–74 (2017), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-JRC/JRC18_Volume2.pdf [https://perma.cc/B6YX-SU3R].

[286] NAT'L TAXPAYER ADVOCATE, 1 OBJECTIVES REPORT TO CONGRESS: FISCAL YEAR 2016 95 (2015), http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2016-JRC/Volume_1.pdf.

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *Earned Income Tax Credit (EITC)-TAS Study Finds Informing Taxpayers Can Help Avert Future Noncompliance*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Oct. 11, 2017), https://taxpayeradvocate.irs.gov/news/nta-blog-eitc-TPLetters-avert-noncompliance.

[291] U.S. DEPT. OF TREAS, *supra* note 269, at 17.

business expenses can be deducted."[292] The postcard also "remind[ed] taxpayers that it is not permissible to maximize EITC benefits by claiming less than the full amount of eligible business expenses . . . [and] inform[ed] readers of penalties for both taxpayers and tax preparers for intentional errors in claiming EITC benefits."[293] Initial results were supposed to come out in August of 2016 but have not emerged yet.[294]

To respond further to the call for more experimental data in law reform as well as to incorporate the Congressional demand for information about EITC audits, and, perhaps most importantly here, to take a first step toward assessing how to use taxpayer rights in low-income tax policy design, I will now present a pilot survey experiment. Its goal is different from the goals of the government experiments. Rather than test compliance, my experiment explores how to protect low-income taxpayer rights more effectively and improve access to justice in the tax context.

This experiment considers how explicit attention to rights issues might solve one of the most pressing problems in the low-income taxpayer context: lack of responses to the correspondence audit letter, Form CP-75. I decided to begin to explore taxpayer rights and policy design in this context for three reasons. First, 60–70 percent of recipients, a substantial number of whom may have legitimate substantiating documents or other good legal defenses, are not responding to this letter. Second, as discussed above, the letter may present procedural due-process and statutory-rights concerns. The IRS may need to change this letter to comport with the dictates of *Goldberg*, *Mathews* and their progeny. Procedural due process does not depend on effect size. If the letter violates taxpayer rights, the IRS must bring the letter into compliance with the law regardless of potential impact on taxpayer behavior. I was also interested in whether a letter that better protected the rights of poor taxpayers would have the additional upside of coaxing out replies. Third, the IRS faces major funding shortfalls. Often, the IRS cannot afford to implement good policy reforms. On one hand, during the welfare-rights era, the *Goldberg* court in particular found that government agencies have to provide due process to citizens, even if doing so is very expensive. On the other hand, cost is an explicit part of the *Mathews* test. In addition, the problem with the letter is one of many problems the IRS is facing. I wanted to see if it would be possible to

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[292] *Id.* at 18.
[293] *Id.*
[294] *Id.*

address this one issue without significantly impacting the IRS budget. Altering the text of a single letter that the IRS already sends seemed as if it would not be an enormous additional expense. Here, I present a brief pilot study around this issue.

For this pilot, I worked with the survey research firm Qualtrics Research Services to recruit approximately nine hundred eligible taxpayers with children and household incomes under $50,000 a year. I selected this population in an attempt to mirror the group that already gets the letter in the context of the EITC, Child Tax Credit and Premium Tax Credit.

I randomly assigned respondents into one of four groups. The first was the control. I showed its members the existing letter which opens with the header "We're auditing your Form 1040." The second got a version of the letter that was identical except that the header did not mention an audit and instead said, "Tax return information needed." I designed this condition because, while I am primarily interested in rights-based interventions, I wondered if the mere word "audit" was confusing or scared respondents away from reading the letter. The next two conditions focused on rights. The third group saw a letter that was identical to the control but with the header, "You have the right to the correct amount of tax refund." I took this language from Taxpayer Bill of Rights #3, which the correspondence audit process implicates, but re-worded in what I believed was a somewhat more accessible way. The fourth group received a letter nearly identical to the control but had the actual right, "You have a right to pay no more than the correct amount of tax" in the header.

I asked all respondents the same questions about whichever form they had just seen and I instructed them to assume they had received it in the mail. The questions attempted to assess how well readers understood the letter and what they thought about it. I first asked a multiple-choice question, "How long would you have to respond to the letter?" I gave options of fifteen days, thirty days (correct), sixty days, ninety days and one year. Then, I asked a true/false question: "True/false. The letter asks you to call the IRS." The letter requires documents, not a call. The IRS customer-service number is printed on the letter, but does not instruct the recipient to call it, and in fact, if he does call, chances are no one will pick up the phone.[295] Next, I asked another true/false

[295] Brad Tuttle, *IRS Customer Service Is Even Worse Than You Thought*, TIME (July 16, 2015), http://time.com/money/3960833/irs-customer-service-phone-calls/ [https://perma.cc/A48X-XMRU] (citing a study that only 37 percent of calls made to the IRS customer-service number were answered from January to April 2015).

question, "True/false. The letter is asking you to provide the IRS with documents." That one was true.

After that, I asked another multiple-choice question: "If you received the letter in the mail but did not follow its instructions, which of the following would be true?" The options were, "You would receive the full tax refund you filed for," or, "You would receive a tax refund but it would be smaller than the amount you filed for," or "You would not receive a tax refund." Along the same lines, I asked "If you provided the requested documentation, how likely do you think it is that you would receive some or all of your tax refund?" I wrote these questions with an eye toward the premise from the post-*Mathews* case law that, to exercise one's due process rights with regard to a property interest, a benefits recipient must understand precisely the government's proposed action with regard to that interest. Then given that I could not, with this short pilot, actually measure reply rates, I asked respondents how likely they would be to answer the letter.

The final question attempted to approach recipients' property right to their refund from another angle. If recipients have a full property interest in their tax refund, they should be able to assign that interest to someone else. In particular, they could assign part of it to a commercial third-party who could comply with the cumbersome documentation requirement for them. Under this structure, the third party would pay an amount equal to some percent of the refund up front to the taxpayer. In exchange, the taxpayer would assign her full rights in the refund to the third party, who could then expend the time and expertise developed around the documentation requirements to pursue the audit. As discussed above, in many of these cases, the taxpayers do have good legal claims but lack the knowledge or cultural capital to engage successfully in the dispute with the IRS. As a result, a commercial third party who had those options might be willing to purchase that claim. Informal and brief inquiry into the behavioral economics literature suggests that this kind of intervention is perhaps most likely to get responses from individuals who would otherwise ignore letters from government agencies. This proposal is, of course, a bit more complicated to test and implement than a minor edit to letter text, but I wanted to take this survey as a chance to gauge interest.

I then developed several hypotheses. I expected respondents to understand the letter reasonably well, but not to recognize in full the consequences of not responding. In particular, I hypothesized that a significant majority of respondents in all four test groups

would understand that they had thirty days to reply to the letter and that they were supposed to provide documents rather than call.

My second hypothesis was that informing taxpayers about their rights would make them more likely to more closely read the letter. I expected that a small majority would say that they needed to send in the documents to get the refund, but that the percent of correct responses would be larger in the condition with the "rights" language.

My third hypothesis was that, across all conditions, if respondents believed that they needed to reply with documents to get the refund, they would report increased willingness to provide those documents. This hypothesis stemmed from due-process notice requirements and the premise that informing government beneficiaries of precise proposed government actions is necessary for people to exercise their due process rights.[296]

The results were as follows:

FIGURE 1: PERCEIVED LENGTH OF REPLY PERIOD

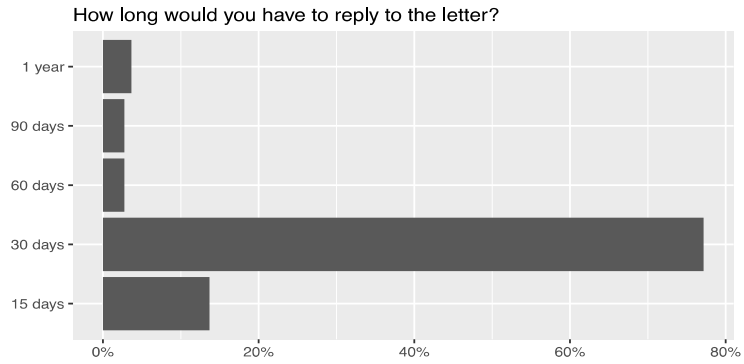
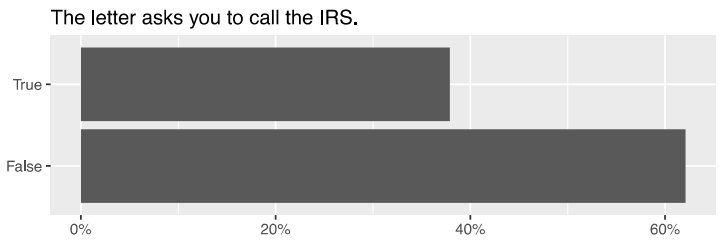


FIGURE 2: PERCEIVED PHONE CALL REQUIREMENT, ALL CONDITIONS



[296] I did not have a hypothesis about whether people would be interested in trying to assign part of their refund in exchange for money up front; this question was purely exploratory.

FIGURE 3: PERCEIVED PHONE CALL REQUIREMENT, SORTED BY CONDITION[297]

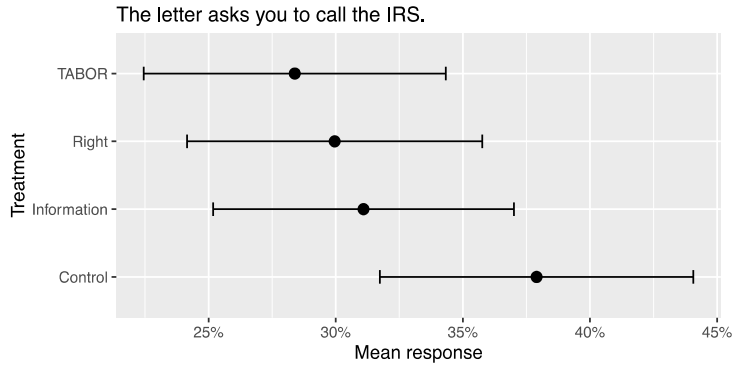
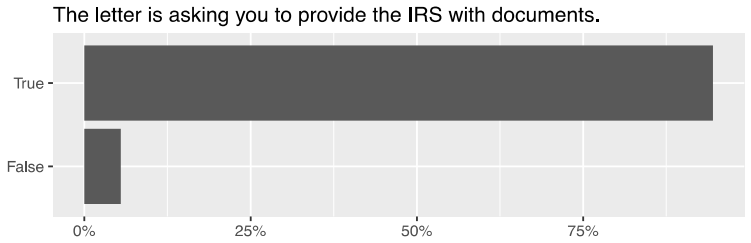


FIGURE 4: PERCEIVED DOCUMENT REQUIREMENT, ALL CONDITIONS



The figures above display the results concerning the first three questions, and my first hypothesis (that people would understand the letter reasonably well). They provide some support for what I hypothesized. Figure 1 shows that almost 80 percent of respondents answered correctly that they had 30 days to reply to the letter. The answers did not vary across experimental conditions. That was consistent with my hypothesis that a substantial majority of respondents in all conditions would understand that part of Form CP-75.

Figure 2 indicates the percent of respondents in all conditions that thought that Form CP-75 asks for a phone response. Approximately 60 percent of respondents answered gave the correct answer of "false." That figure is consistent with my second hypothesis that most people would also understand this part of the letter. The 60 percent number, however, is perhaps a bit lower than I would have anticipated. Figure 3

[297] The "TABOR" condition is the one with the language taken directly from the Taxpayer Bill of Rights, *see supra* Section I.B.3.

shows that individuals who saw the rights language from the Taxpayer Bill of Rights displayed right on top of their letter were the least likely to give the incorrect reply, although the difference was not significant at the 5 percent level. Figure 4 shows the percent of respondents who correctly replied that the letter asks for documents. Over 80 percent did, which is, again, consistent with my first hypothesis.

FIGURE 5: PERCEIVED CONSEQUENCES OF NONRESPONSE

Figure 5 shows how respondents perceived the consequences of failure to reply to Form CP-75. These results provide limited support for my second hypothesis. About half of the taxpayers surveyed understood that not replying to the letter meant that they would not receive any more money from the IRS. I had expected a somewhat higher rate of correct answers, but I did anticipate that the rate would be lower than the correct response rate for the first three questions, where correct responses are easier to glean from Form CP-75. I did predict, however, that the correct response rate would be higher in the conditions with rights language, and in fact there was no meaningful difference across conditions.

FIGURE 6: LIKELIHOOD OF RESPONSE, BY PERCEIVED CONSEQUENCE OF NONRESPONSE

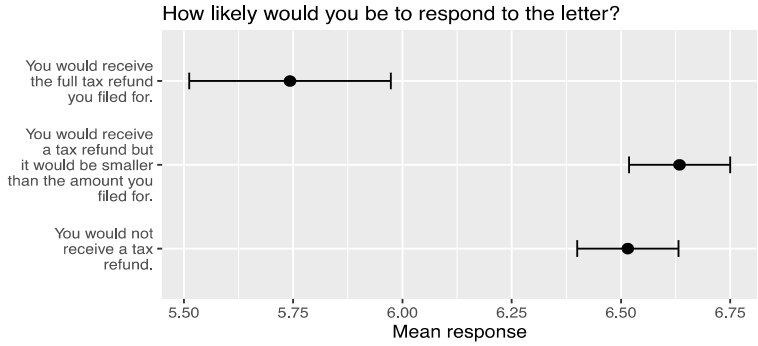
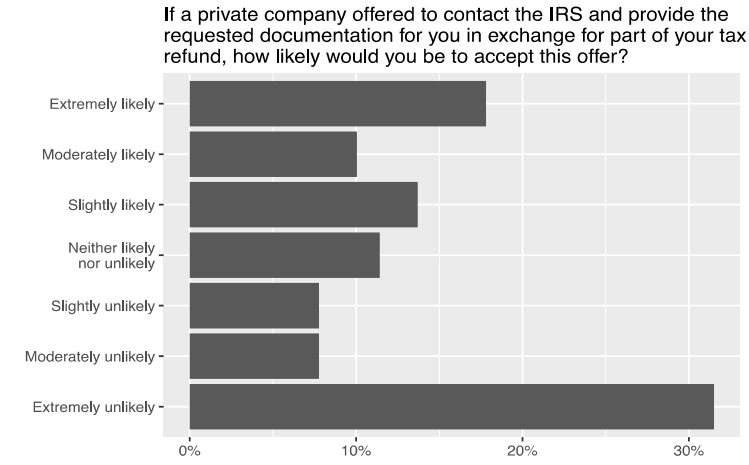


Figure 6 shows how likely respondents said they would be to reply to Form CP-75, sorted by perceived consequences are of not replying. These data provide support for my third hypothesis. Respondents who still believed that they would receive a full refund even if they do not reply were significantly less likely to do so. On a 7-point scale, respondents who thought they would get the full refund regardless rated their likelihood of replying to the letter at about 5.75 on average. In contrast, when individuals understood that failure to comply with Form CP-75 had refund consequences, they rated their likelihood of replying at an average of about 6.55. This difference was statistically significant at the 5 percent level.

FIGURE 7: LIKELIHOOD OF USING REFUND ASSIGNMENT PROGRAM



Finally, Figure 7 displays how likely respondents say they would be to use a program that would allow taxpayers to assign their rights to their refunds to commercial third parties. In exchange, the third parties would, with taxpayer consent, track down the required documentation and resolve the audit. About 40 percent of surveyed individuals reported they would be likely to use this program, with about 15 percent replying that they would be "extremely likely to do so."

The results of this experiment suggest how Form CP-75 might incorporate rights-based considerations. In addition, the results suggest how a field RCT might explore this question further. The data highlight three particular directions for future proposed interventions. First, and most basically, readers seem to have trouble understanding this letter. Respondents in this survey experiment performed most successfully on the question about the deadline. That question, however, only required them to spot a number within the letter's text, it was not necessary for them to comprehend any of the written substance of the text. Even so, almost 20 percent got the question wrong. Put in real-world terms, with regard to the EITC alone, about 500,000 taxpayers received this letter in 2014. The fact that 100,000 may not have correctly identified the response deadline indicates there is room for improvement. Further, respondents had a harder time with the questions about *how* they needed to comply. Almost 50 percent did not understand what would happen if they failed to do so. This result also indicates a need for clearer IRS instructions. Further research could test different kinds of instructions to see which, if any, yield more consistent understanding.

Second, how likely respondents said they would be to comply with Form CP-75 was negatively associated with whether they thought doing so would affect their refund. Readers were less likely to plan to reply if they thought they would get the full refund anyway. This was not an experimental effect, so we cannot infer causality. Yet, the result suggests that future research should explore the relationship between taxpayer behavior and its understood consequences in the low-income taxpayer context. Some of the 60–70 percent nonresponse rate may because taxpayers do not understand why they should answer Form CP-75. Future research should experiment with different ways of explaining this to taxpayers.

This question also bears on due process concerns outside of tax. Procedural due process case law mandates that notices to individuals include specific information about proposed

government action on the premise that rights holders need that information to contest the action. If an absence of specific information does in fact lead to inaction, demonstrates the empirical basis for this longstanding due process principle. Notably, while this experiment tested lower-income taxpayers, these due process rights apply with equal force to upper-income and business taxpayers. If the IRS determines how to improve its notices so that they comport better with the dictates of due process, taxpayers who, for example, invest in low-income housing will benefit, both in terms of ability to exercise the rights to which law in entitles them, and in terms of efficiency gains that will enhance the power of the relevant tax incentives.

CONCLUSION

The War on Poverty in the 1960s and 1970s led to several landmark cases about the rights that accompany government benefits. In the decades following, however, efforts to strengthen low-income individuals' rights did not capture new territory. In fact, most legal scholar and historians believe that the law retreated from the notion of benefits recipients as rights-holders. That retreat has become particularly dominant in the twenty years since welfare reform.

At the same time, the federal government was starting a new war on poverty through the tax code. Those provisions opened the possibility of tax-based rights for the poor in the U.S. These rights that accompany tax benefits are procedural due-process rights, and they are also substantial taxpayer rights found in legislation. As developing creatures of relatively recent legal developments, tax rights also bring with them the promise of legal change. Taxpayers and their advocates can realize this potential through individual disputes, and lawmakers can help taxpayers realize their rights through legislative and administrative designs that explicitly incorporate rights.