The Administration of Tax Expenditures: The Case of the Earned Income Tax Credit

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THE ADMINISTRATION OF TAX EXPENDITURES: THE CASE OF THE EARNED INCOME TAX CREDIT

While scholars and policymakers have had considerable difficulty arriving at a simple, workable definition,¹ tax expenditures may be roughly, if imprecisely, described as spending programs that are implemented through the tax code.² Former Assistant Secretary of the Treasury for Tax Policy Stanley Surrey first formulated the concept of tax expenditures, and famously argued that tax expenditures are a problematic mechanism for federal spending programs both because they avoid the scrutiny to which direct expenditures are subjected,³ and because they often have a regressive cast, serving as “upside-down subsidies” that provide the greatest benefit to well-off individuals who face high marginal tax rates.⁴ Surrey thus pioneered the field of “tax expenditure analysis,” anticipating that once tax expenditures were clearly identified in the federal budget as government spending programs, policymakers would recognize their pathologies and come to rely on them less in formulating spending policy.⁵

Surrey’s hopes have not been realized. In fact, since he first introduced the concept of “tax expenditures” to policy discussions in the late 1960s, Congress’s use of tax expenditures as a policy tool has increased dramatically. In 1972, when Congress’s Joint Committee on Taxation first catalogued tax

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¹ See, e.g., JOINT COMMITTEE ON TAXATION, RECONSIDERATION OF TAX EXPENDITURE ANALYSIS (2008) (detailing “new paradigm for classifying tax provisions as tax expenditures” that “cover[s] much the same ground as does the current definition of tax expenditures, and in some cases extend[s] the application of the concept further,” id. at 1).
³ See, e.g., JOINT COMMITTEE ON TAXATION, supra note 1, at 2.
⁵ See JOINT COMMITTEE ON TAXATION, supra note 1, at 2-3.
expenditures, the committee tabulated 60 tax expenditures in the federal budget.\textsuperscript{6} Its 2007 analysis tabulated some 170,\textsuperscript{7} and one recent study estimated that even excluding tax expenditures claimed by businesses, the annual cost of tax expenditures in 2007 was $750 billion—a figure approximately 50 percent higher than the budget for non-defense discretionary spending that year.\textsuperscript{8} Recognizing that tax expenditure analysis has failed to slow the growth of tax expenditures, the Joint Committee on Taxation has, in recent years, attempted to redefine the field’s goals, stating in a recent report that the failure of tax expenditure analysis to effect expenditure control “does not mean . . . that tax expenditure analysis has failed, but rather that its principle utility appears to have been as a tool of tax policy and tax distributional analysis.”\textsuperscript{9}

This Article seeks to build on the recognition that tax expenditures are an established and resilient feature of the American policy landscape, and that the nature of tax expenditure analysis must change to reflect this reality. To this end, it highlights a known and glaring deficiency of tax expenditures: the administrative vacuum that typifies spending programs implemented through the tax code. Tax expenditures are generally not administered in any meaningful sense, but rather operate through the mechanical processes of the tax system: tax returns are submitted, checked for errors by the IRS, and tax payments or refunds are delivered. While this process fits the IRS’s traditional revenue-collection mission well, its complete insensitivity to policy context is problematic as the

\begin{footnotesize}
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\item[6] Id. at 4.
\item[7] Id.
\item[9] JOINT COMMITTEE ON TAXATION, supra note 1, at 6. See also id. (stating that tax expenditure analysis “in fact can provide a successful framework by which to judge the fairness, efficiency and administrative consequences of many ‘incentive’ proposals.”).
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basis for administering tax expenditures, under which hundreds of billions of dollars are annually disbursed in pursuit of a range of policy objectives, ranging from environmental protection to promotion of homeownership.

Traditional critics of tax expenditures (most notably Surrey himself) regarded this administrative void as an argument for the repeal of tax expenditures.\(^\text{10}\) However, given that tax expenditures, often supported by politically powerful constituencies,\(^\text{11}\) have emerged as a central pillar of the American political economy, scholarship focused on reforming tax expenditures may be more realistically capable of positively influencing policy outcomes than is scholarship focused on eliminating them.\(^\text{12}\) This Article focuses on one particularly promising avenue for the reform of tax expenditures: the use of hybrid administrative practices by which traditional tax procedure is selectively modified to promote tax expenditures’ non-revenue-collection policy objectives. Tax administration need not involve only the mechanical sorting of tax returns. Rather, this Article argues that where a tax provision serves policy objectives other than revenue collection, the traditional hallmarks of tax administration can be supplemented or modified to achieve superior policy outcomes.

\(^{10}\) See, e.g., Surrey & McDaniel, supra note 105, at 26 (“If the task of administering 105 spending programs is then added to this enormously difficult and complex task of normative income tax administration, the load becomes too great. . . . The Commissioner of Internal Revenue cannot also serve as the Secretary of Health and Human Services . . . and every other cabinet official and properly perform either his or her prescribed role as Commissioner.”).

\(^{11}\) See, e.g., Daryl Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 658, 687 (2011) (“The home mortgage interest deduction, for example, creates a constituency of homeowners (joined by mortgage lenders and other beneficiaries) that is deeply committed to, and formidable capable of, preserving the entitlement.”).

\(^{12}\) This Article’s focus on reforming the administration of tax expenditures is not intended to minimize the importance of scholarship and advocacy calling for the elimination of tax expenditures. Even if such scholarship has not succeeded in slowing the growth of tax expenditures, it has helped bring greater transparency to the federal budget and acquainted policymakers with the tradeoffs and consequences of implementing spending through the tax code. See, e.g., Batchelder, et al., supra note 2. Furthermore, the insights of such scholarship could prove invaluable if Congress were to act upon its occasional flirtation with comprehensive tax reform. See, e.g., Bernie Becker, GOP: Push for Comprehensive Tax Reform, On the Money: The Hill’s Finance & Economy Blog (Jan. 26, 2011, 12:49 AM), http://thehill.com/blogs/on-the-money/domestic-taxes/140273-gop-push-for-comprehensive-tax-reform. However, this Article argues that notwithstanding these valuable contributions, so long as tax expenditures remain a central pillar of the American political economy scholars seeking to promote superior policy outcomes may do well to focus not only upon the possibility of eliminating tax expenditures, but also on the possibility of reforming them.
The Article explores this possibility through an in-depth case study of the Earned Income Tax Credit (EITC), a tax expenditure that has become the nation’s largest welfare program and has also been the subject of extensive legal scholarship. The EITC is administered via the tax system as a refundable tax credit. Applicants apply for the credit by submitting a tax return indicating that they meet certain income and family criteria, and eligible recipients receive a credit against their tax liability. If (as is often the case) the size of the credit exceeds their tax liability, they receive a refund check from the Treasury for the difference. The EITC provides a valuable case study in the potential benefits of administrative experimentation because, as many commentators have observed, tax administration—which has traditionally been geared toward collecting revenue from middle- and upper-income individuals—is a particularly poor fit for the administration of an anti-poverty program that seeks to distribute benefits to low-income workers. However, whereas critics of the EITC’s tax-based administration (perhaps following in Surrey’s footsteps) have traditionally argued for removing the program from the tax system or otherwise overhauling

13 NATIONAL TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS (2009) (reporting that since the mid-1990s federal spending on the EITC has significantly exceeded spending on Temporary Assistance to Needy Families (TANF), the nation’s largest traditional welfare program).


15 See Alstott, supra note 14, at 534 (“Although the EITC is styled a ‘refundable tax credit,’ in fact it is a kind of welfare program — or, in economists’ terms, an income-transfer program. It uses the rules and procedures of the federal income tax system to make payments to low-income workers based on their earnings and total income.”).

16 See infra notes 22-25.

17 Id.


19 See, e.g., Alstott, supra note 14 (arguing that the EITC’s administrative pathologies counsel for “greater tolerance of separate tax and transfer systems.”).
it, this Article argues that the program’s pathologies can be constructively addressed through creative thinking about administration. The EITC is a welfare program implemented through the tax code, and its administration ought be reconsidered to reflect its hybrid nature. Where an inflexible reliance on traditional tax-collection practices impedes the program’s anti-poverty mission, administrative experimentation may provide superior outcomes without necessarily requiring that the EITC abandon tax procedure altogether.

This Article uses a case study of the EITC to illustrate a method by which administrative and tax law scholars can analyze the administration of tax expenditures more generally. It does not presume to provide comprehensive solutions for the EITC’s pathologies. Rather it seeks to open a neglected line of inquiry with the potential to significantly improve the operation of the EITC and other tax expenditures, by exploring how administrative experimentation geared toward effectuating the underlying policy objectives of tax expenditures can improve policy outcomes. More than 40 years after Stanley Surrey began his crusade against tax expenditures, it is clear that tax expenditures are a permanent feature of the American policy and tax systems. It is time for tax and administrative law scholars to accept this reality, and change focus accordingly.

The Article proceeds in five parts.

Part I provides an account of the policy dilemmas that have arisen as a result of the EITC’s use of tax administration. It highlights the EITC’s problematic reliance on “self-certification,” by which applicants for the EITC

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certify their own eligibility by submitting a tax return indicating that they satisfy the program’s various requirements. This tax-based eligibility mechanism has predictably bred a high level of non-compliance and error in the EITC. These problems, which have drawn extensive attention from scholars and become focal points for the attacks of EITC critics, demonstrate the difficulties inherent in efforts to administer an anti-poverty program through conventional tax channels.

Part II first describes and critiques scholars’ uncritical acceptance of unmodified tax procedure as the basis for administering the EITC, explaining that the widespread scholarly assumption that the EITC must be administered using conventional tax procedure is based on false premises. It proceeds to argue that non-tax administrative practices can be applied to the administration of tax expenditures to create “hybrid” administrative forms that reflect a tax expenditure’s non-tax policy objectives, and thus result in policy outcomes superior to those provided by pure tax administration.

Part III provides a case study demonstrating the potential benefits of hybrid administrative practices to the EITC. It analyzes in detail one feature of tax administration that is decidedly ill-suited to the EITC’s anti-poverty mission, and where the potential benefits of administrative hybridity are thus particularly striking: the use of adversarial procedure in United States Tax Court to adjudicate EITC non-compliance cases. It finds this practice impossible to justify given the disadvantages that unrepresented low-income litigants face in a demanding adversarial setting. It accordingly proposes an alternative
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adjudicative structure that deviates from traditional tax court practices, but better reflects the EITC’s anti-poverty focus.

Part IV identifies several other opportunities to improve the operation of tax expenditures through the use of hybrid practices. It first describes two further potential administrative reforms to the EITC, before addressing how recent controversies regarding an alternative energy tax credit could have potentially been addressed using hybrid administrative practices. These examples demonstrate that hybrid administrative practices provide extensive opportunity for future scholarly inquiry with respect to both the EITC and other tax expenditures.

Part V concludes.

I.

The Earned Income Tax Credit (EITC) has long been an idiosyncratic part of the American social policy landscape. At once a refundable tax credit and a central pillar of American welfare policy, the EITC’s hybrid tax-transfer character defies straightforward categorization and confounds efforts at critical evaluation.21 As a refundable tax credit, the EITC is processed through the administrative channels of the federal income tax system.22 Thus, though an EITC claim is essentially a claim for welfare benefits, its administrative treatment is in many respects indistinguishable from that accorded to the tax return of a typical upper- or

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21 See, e.g., Ventry, supra note 14, at 1263 (“Coordinating phase-outs, eliminating marriage penalties, and deploying uniform refundable tax credits or universal tax subsidies will not address a more fundamental conundrum that has plagued tax transfers for over thirty years: What exactly are we trying to accomplish by delivering social welfare benefits through the tax system?”).

22 See Alstott, supra note 14, at 534 (“Although the EITC is styled a ‘refundable tax credit,’ in fact it is a kind of welfare program — or, in economists’ terms, an income-transfer program. It uses the rules and procedures of the federal income tax system to make payments to low-income workers based on their earnings and total income.”).
middle-income taxpayer. A claim for EITC benefits begins with the submission of a tax return reporting the claimant’s annual income and family status, and specifying the size of the credit to which the claimant is entitled. As with typical income tax submissions, the IRS subjects the vast majority of such claims only to mechanical screening for mathematical or clerical errors, and in the absence of such errors, it issues a refund check to the claimant. Investigations of suspected EITC noncompliance generally involve correspondence audits of the sort the IRS employs in a wide array of minor investigations. And, like other taxpayers, claimants alleged to have erroneously claimed EITC benefits are provided opportunities to vindicate their claims in United States Tax Court.

The EITC’s use of tax channels to pursue welfare objectives has entailed some advantages over traditional welfare administration. The lack of a cumbersome eligibility apparatus of the sort associated with traditional welfare programs is commonly thought to both reduce the program’s administrative costs and increase participation rates among eligible individuals. Additionally, by employing tax-based administration, the EITC avoids the fraught political

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23 This is not to say that standard tax administration procedures are wholly unmodified when applied to the EITC. There are a number of respects in which EITC claims are subjected to differential treatment. Most notably, the IRS has experimented with a variety of enforcement efforts aimed at combating what are perceived as troublingly high rates of EITC noncompliance. The cumulative effect of such initiatives, which are discussed infra in the text accompanying notes 77-84, is a regime in which EITC claims are significantly more likely to be audited than are conventional tax returns. However, despite the fact that EITC claims may be subject to higher scrutiny than conventional tax returns, their administrative treatment is in key respects indistinguishable. EITC claims are processed in the same institutional setting as are more conventional tax returns, subject to near-identical administrative procedures.

24 See Zelenak, supra note 14, at 1876.

25 Id.

26 Id. at 1877; see also Internal Revenue Service, Fiscal Year 2006 Enforcement and Service Results: Statement of IRS Commissioner Mark W. Everson, http://www.irs.gov/newsroom/article/0,,id=164435,00.html (noting the IRS’s general reliance on “correspondence, or letter exams”).

27 See, e.g., Vasquez v. Commissioner, T.C. Memo 2007-6 (U.S. Tax Ct. 2007).

28 See Ventry, supra note 14, at 1264. While these putative benefits of self-certification are widely repeated in scholarly literature, they are not incontestable. The notion that self-certification involves administrative savings is particularly open to question, given that, as is discussed below, the EITC’s complexity forces claimants to spend significant sums each year on private tax preparation, text accompanying notes 55-60, and that self-certification leads to billions of dollars of EITC payments being diverted to ineligible recipients. See text accompanying notes 69-72.
connotations of traditional welfare programs. But these advantages entail significant costs. Reliance on tax-based administration has instilled an element of inflexibility into EITC program design, constraining the range of options available to institutional designers interested in refining the EITC to better serve its anti-poverty objectives. The tax system’s administrative apparatus evolved largely to determine and act upon the tax liability of middle-income, upper-income, and corporate taxpayers. Its processes for both ex ante determination and ex post verification of tax liability are thus tailored to the needs and capabilities of such taxpayers, presuming a relatively sophisticated taxpayer with the resources to navigate demanding administrative processes. This pedigree is an awkward fit for the central task of EITC administration: to process, evaluate, and act upon over twenty million welfare claims each year.

One unique feature of the EITC inheres in the program’s tax-based administrative form and distinguishes it from traditional transfer programs: its reliance on applicant self-certification of eligibility. Responsibility for determination of EITC eligibility rests with the applicant, who in submitting a tax return is charged with both certifying her own eligibility and determining the size of the refund to which she is entitled. The EITC’s reliance on self-certification poses a number of administrative dilemmas that have been the source of considerable scholarly attention: most saliently, that because of the

29 See Zelenak, supra note 14, at 1903 ("The EITC is a transfer program with the protective coloration of a tax program.").
30 See Book, supra note 18, 81 at 352 (" . . . IRS procedures seem based upon the traditional notion as to its constituents, namely middle- or upper-middle class taxpayers who historically have been the individual targets of IRS compliance and who are ordinarily assumed to be equipped to deal with IRS practices or able to hire professionals to do so for them.").
EITC’s complex eligibility criteria, the program’s reliance on self-certification predictably leads to a high rate of non-compliance and error. 32

This Article does not purport to detail a specific solution for the policy dilemmas arising from the EITC’s reliance on self-certification. However, self-certification and its attendant pathologies strikingly illustrate the difficulties inherent in using the tax code to administer a welfare program (or, for that matter, any program with non-tax policy objectives), and thus provide a valuable starting point for discussion of EITC administration, and administration of tax expenditures in general. Moreover, this Part discusses the decision to delegate \textit{ex ante} eligibility assessments to low-income taxpayers who are generally not equipped to accurately undertake them, and is thus an essential preface to Part III, which critiques the use of adversarial process in United States Tax Court to conduct \textit{ex post} trials of noncompliance when the IRS accuses those same taxpayers of having erroneously claimed the credit.

\textbf{A. Self-Certification: Improvising an Eligibility Apparatus}

Traditional welfare programs, such as the Food Stamp Program, require that a bureaucratic entity—most often, a field-level welfare office\textsuperscript{33}—precertify an applicant’s eligibility prior to the disbursement of any benefits.\textsuperscript{34} To gain precertification, applicants seeking benefits under traditional welfare programs generally must visit a field office.


\textsuperscript{33} See, e.g., 7 C.F.R. § 273.2 (a) (1) (prescribing Food Stamp Program eligibility verification processes for states) (“State agencies must establish procedures governing the operation of food stamp offices that the State agency determines best serve households in the State . . . .”).

\textsuperscript{34} See Zelenak, \textit{supra} note 14, at 1878 (“In sharp contrast with the self-declared eligibility norm for the EITC, self-declared eligibility is unheard of for transfer programs such as [Temporary Assistance for Needy Families]. Indeed, the requirement that an applicant establish eligibility to the satisfaction of a government agency before receiving benefits is at the core of welfare-based administration.”). This absolute requirement of an \textit{ex ante} determination of eligibility has been aptly described by Professor Zelenak as a “universal precertification” requirement. \textit{See id.} at 1916.
during regular business hours (often multiple times), complete detailed application forms, submit to in-person interviews with welfare office personnel, and provide any supporting documentation needed to verify eligibility. Applicants must be periodically recertified for eligibility, a task usually involving return trips to welfare field offices. As a practical matter, this traditional mode of welfare administration is labor-intensive, relying on dispersed cadres of “street-level” intake workers both for initial determinations of eligibility and for periodic recertifications.

The EITC presents a stark contrast to this traditional approach. The program lacks a bureaucratic eligibility apparatus, instead employing applicant self-certification via the tax return as the predicate for receipt of benefits. Applicants declare their eligibility by submitting a tax return specifying the size of the credit to which they are entitled, and the vast majority of such returns are subjected only to routine, mechanical scrutiny for mathematical or clerical error.

A formal assessment from an institutional design perspective would suggest that the EITC replaces an extensive eligibility bureaucracy consisting of state offices, case-workers, and annual recertification with a handful of entries on a tax return indicating that an applicant meets EITC eligibility criteria and is entitled to a reduced tax burden or a refund. The EITC has thus been lauded for

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35 See Weisbach & Nussim, supra note 14, at 1000 (describing application process for Food Stamp Program); see also 7 C.F.R. § 273.2(d) (describing Food Stamp Program eligibility process) (“To determine eligibility, the application form must be completed and signed, the household or its authorized representative must be interviewed, and certain information on the application must be verified. If the household refuses to cooperate with the State agency in completing this process, the application shall be denied at the time of refusal.”).

36 Weisbach & Nussim, supra note 14, at 1000-01.

37 See Alstott, supra note 14, at 564-65 (“Welfare administration is labor-intensive, expensive, and heavily dependent on ‘street-level’ bureaucrats, who may administer programs in a manner at odds with their formal terms.”).

38 See Zelenak, supra note 14, at 1876. I.R.C. § 6213(b)(1) provides the IRS with “math error authority” to withhold refund checks when, due to mathematical or clerical error, a tax return overstates the size of a refund to which a taxpayer is entitled. Section 6213(b)(1) identifies a number of clerical errors unique to the EITC, and in 2002 math error notices led to the delay of 1.1 million EITC claims out of the 19 million claims filed that year. Id.
its simplicity vis-à-vis the elaborate infrastructure associated with traditional
transfer programs. Scholars have noted the administrative convenience that
comes with the EITC’s decision to piggy-back on existing systems of tax
administration,39 and have linked the program’s administrative minimalism to its
high participation rates and the reduced stigma facing EITC applicants.40

However, the EITC’s reality belies its ostensible minimalism. The EITC
has not eliminated the administrative burdens associated with traditional welfare
programs, so much as it has outsourced them, both to the taxpayers charged with
self-certification and to the private tax-preparers to whom such taxpayers often
turn. This schema has predictably led to troubling levels of noncompliance:
EITC claimants have had difficulty navigating the credit’s complex rule structure
while private preparers face financial incentives to turn a blind eye to (or even
encourage) ineligible taxpayers applying for the credit.

Specifically, three features of EITC administration interact to undermine
the program’s promise of simplicity, instead creating a shadow bureaucracy that
fuels noncompliance. The first of these is self-certification itself. In order to
claim the EITC, low-income taxpayers with no tax liability are required to file
income tax returns certifying their eligibility and specifying the size of the credit
to which they are entitled. This requirement imposes a significant burden upon

39 See, e.g., Weisbach & Nussim, supra note 14, at 981-82 (“[T]he one considers government policy as a whole, integration [of welfare
programs] with the tax system may often be a choice for simplicity. Integration is a choice to take advantage of the infrastructure of the
tax system at the cost of less accuracy in program design than would be achieved through a separate agency.”).
40 See generally Alstott, supra note 14 at 534 (“[A]dvocates argue, because the EITC is part of the federal tax system, it is simpler and
cheaper to administer than programs run by the welfare bureaucracy and affords greater dignity and privacy to beneficiaries.”). See
also Jeffrey B. Liebman, 12 TAX. POLICY AND THE ECONOMY 83, 109-110 (1998) (“The higher take-up rates for the EITC may be
because there is no stigma to claiming the EITC and because of the low costs of claiming the credit (most EITC recipients would have
filed a tax return in the absence of the EITC).”); John Karl Scholz, The Earned Income Tax Credit: Participation, Compliance, and
Antipoverty Effectiveness, 47 Nat’l Tax J. 63, 71 (1994) (“There is little or no stigma associated with the EITC, while stigma
associated with transfer programs such as AFDC and food stamps may discourage participation in those programs.”) (citing Robert
Moffitt, An Economic Model of Welfare Stigma, 73 AM. ECON. REV. 1023 (1983)).
EITC claimants, many of whom would not be required to file tax returns in the absence of their EITC claim, and who may lack the sophistication of more well-off taxpayers. This arrangement creates opportunities for claimants to file erroneous returns, whether due to simple mistake or deliberate fraud.\(^{41}\)

Second, EITC eligibility is determined by a complex rule structure that does not lend itself to decentralized administration by low-income workers. A 1997 statement of the American Institute of Certified Public Accountants describes the credit’s eligibility criteria as a “nightmare of eligibility tests, requiring a maze of worksheets.”\(^{42}\) The statement noted that application for the credit requires a claimant to consider:

- nine eligibility requirements; the number of qualifying children—taking into account relationship, residency and age tests;
- the taxpayer’s earned income—taxable and non-taxable;
- the taxpayer’s adjusted gross income (AGI); the taxpayer’s modified AGI; threshold amounts; phase out rates; and varying credit rates.\(^{43}\)

The statement concludes that, “it is unreasonable to expect those individuals entitled to the credit (who will almost certainly NOT be expert in tax matters) to deal with this complexity. Even our members, who tend to calculate the credit for taxpayers as part of their volunteer work, find this area to be extremely challenging.”\(^{44}\)

The complexity of this maze-like rule structure is compounded by the EITC’s effort to impose formal definitions of family structure upon the fluid and unconventional family arrangements often confronting EITC claimants. Crucial

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\(^{43}\) *Id.*

\(^{44}\) *Id.*
to a claimant’s eligibility is the presence of a “qualifying child” in the claimant’s household;\textsuperscript{45} to qualify, a child must reside in the taxpayer’s place of abode for more than half of the tax year, must be the taxpayer’s child or sibling (including stepchildren and stepsiblings), a descendant of the taxpayer’s child or sibling, or a foster child, and, unless a full-time student, must not have reached the age of nineteen.\textsuperscript{46} These bright-line criteria generate significant ambiguity when applied to unconventional custodial arrangements, such as households featuring extended families under the care of one or more providers.\textsuperscript{47} Likewise, because the EITC requires that married claimants file joint tax returns unless they are separated for more than half the year, it may be difficult for estranged couples with unconventional custody arrangements to meet EITC qualifying criteria.\textsuperscript{48} Section III.B below discusses individual cases in which these rules generate harsh results for arguably deserving taxpayers with unconventional family arrangements. However, for the purposes of the present discussion it is sufficient to note that complexity of the EITC’s elaborate set of bright-line rules is exacerbated by the fact that those rules do not neatly map onto the realities confronting many low-income workers, and that this complexity is almost certain to lead to error and noncompliance.

\textsuperscript{45} The EITC is primarily a credit for low-income workers with children. Childless taxpayers are eligible for a relatively miniscule EITC benefit. See 26 U.S.C. § 32(b)(1)(A) (providing eligible individuals with no qualifying children a credit equivalent to 7.65 percent of earned income, as compared to a credit of 34 percent for eligible individuals with one qualifying child and 40 percent for eligible individuals with two qualifying children).


\textsuperscript{47} See, e.g., Perez v. Commissioner, 76 T.C.M. (CCH) 1004 (1998) (ruling that EITC claimant who resided with an extended family network could not claim his nephew as a qualifying child absent care that he cared for the nephew “as his own child” (“[T]here is not sufficient evidence in this record indicating that petitioner cared for Tirone as his own child. There were other members of petitioner's household, including Tirone's mother, who were available to care for the child.”)).

\textsuperscript{48} See Holtzblatt and McCubbin, supra note 80, at 155; see also Diaz v. Commissioner, T.C. Memo. (CCH) 2004-145 (deeming claimant ineligible for EITC for failure to conclusively demonstrate that he and his wife separated in June, rather than July, of the relevant tax year).
Third, a majority of low-income workers are driven by the EITC’s complexity to turn for help, often at considerable expense, to private tax-preparers with perverse incentives.\textsuperscript{49} Recent studies have estimated that as many as 73 percent of taxpayers claiming the EITC hire private tax preparation services to assist them in preparing and filing their returns.\textsuperscript{50} Such services are often accompanied by Refund Anticipation Loans (RALs), high-interest loans made in anticipation of the EITC benefit.\textsuperscript{51} While the existing empirical studies of paid EITC preparation are dated, they indicate that a significant proportion of EITC funds is diverted each year to private tax preparers. In 1999, for example, an estimated $1.75 billion in EITC funds were siphoned toward private tax preparers for services such as tax preparation, electronic filing, and refund loans.\textsuperscript{52} A 2002 Brookings Institution study found that in Washington, D.C., taxpayers claiming an EITC of $1,500 spent, on average, more than 10% of their benefit on tax preparation services.\textsuperscript{53} Such figures are striking: EITC recipients by definition live near or below the poverty line, and tax preparation is relatively costly. That EITC claimants would devote such a significant proportion of their credit to tax preparation services suggests that self-certification, far from serving as a simplifying device that expands EITC availability, may well present a


\textsuperscript{50} \textsc{National Taxpayer Advocate, National Taxpayer Advocate’s 2008 Annual Report to Congress}, 423 (2008) (discussing rates of paid preparer use by 2006 EITC filers).

\textsuperscript{51} See Lipman, supra note 32, at 472.

\textsuperscript{52} \textsc{Alan Berube et al., Brookings Institution, The Price of Paying Taxes: How Tax Preparation and Refund Loan Fees Erode the Benefits of the EITC} 1 (2002).

\textsuperscript{53} Id.
barrier rendering many low-income workers incapable of claiming the benefit without expensive assistance.  

For two reasons, the emergence of the EITC paid preparer industry weakens claims that self-certification yields meaningful administrative efficiencies by avoiding the expenses associated with an eligibility bureaucracy. First, paid tax preparation services constitute a hidden expense of EITC administration, an expense that has simply been shifted from the program to EITC claimants. Private-sector tax-preparers have come to serve as a de facto front-end eligibility apparatus, conduits through which a significant number of claimants must pass to receive EITC funds. The $1.75 billion in EITC payments that were diverted toward private-sector tax preparers in 1999 constitute expenditures diverted from the program’s intended recipients, and as such are appropriately viewed as costs of administration. This diversion amounts to approximately 5.6 percent of the $31.3 billion of EITC funds disbursed that year. While this figure is smaller than the administrative costs of comparable transfer programs such as TANF (10 percent) and the Food Stamp Program (25 percent), it is nonetheless a significant hidden programmatic expense that casts doubt upon self-certification’s cost-effectiveness.

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54 It should be noted that the available studies examining EITC claimants’ use of paid preparers all date to the beginning of this decade, and thus predate the recent explosion in online filing. The impact of web-based filing upon EITC recipients presents a potentially valuable opportunity for empirical inquiry. This Article presumes that the trends identified by these studies continue to hold, due both to lack of evidence to the contrary, and to the fact that the most prominent online preparation services are fee-based.

55 See Alstott, supra note 14, at 590 (“The cost of return preparation . . . is properly viewed as a hidden administrative cost of the EITC program.”); David A. Super, Privatization, Policy Paralysis, and the Poor, 96 CAL. L. REV. 393, 433-34 (2008) (“The costs of administering public benefit programs inevitably are divided between claimants and the government. . . . For example, EITC claimants bear virtually all the costs of applying.”).

56 See id. at 435-37.

57 See INTERNAL REVENUE SERVICE, COMPLIANCE ESTIMATES FOR EARNED INCOME TAX CREDIT CLAIMED ON 1999 RETURNS 3 (2002).

58 See Zelenak, supra note 14, at 1882.

59 See Weisbach & Nussim, supra note 14, at 1011-12.

60 See Zelenak, supra note 14, at 1881.
The second reason why pervasive paid EITC preparation undermines claims regarding the administrative efficiency of self-certification is that private sector tax-preparers are distinct from traditional welfare eligibility bureaucracies in a key respect: the accuracy of their results. Whereas the organizing principle of traditional welfare bureaucracies is the need to efficiently render an accurate determination of eligibility,\(^6\) private-sector tax preparers are motivated by the need to collect fees from clients. Paid preparers have economic incentives to file EITC claims on behalf of ineligible claimants because a significant portion of their revenue is derived from services—such as refund anticipation loans and check-cashing fees—purchased via EITC payments.\(^6\) Erroneous EITC claims filed by paid preparers, a phenomenon Professor Leslie Book has dubbed “brokered noncompliance,”\(^6\) account for a significant proportion of noncompliant EITC claims: 57 percent of EITC overclaims in 1999 were the product of tax returns filed by paid preparers.\(^6\) The emergence of the paid EITC preparation industry has thus helped contribute to a noncompliance epidemic that is estimated to divert approximately 30 percent of EITC payments to ineligible recipients.\(^6\) Like EITC funds diverted to paid preparers, this noncompliance—amounting annually to billions of dollars of misdirected payments—must be regarded as a hidden and significant cost of EITC administration.\(^6\)


\(^6\) Id. At 116-17. In addition to these perverse incentives to generate erroneous EITC claims, there is also evidence that many paid preparers may prepare erroneous claims out of simple incompetence. See Book, supra note 32, at 1146.


\(^6\) See NATIONAL TAXPAYER ADVOCATE, 2003 ANNUAL REPORT TO CONGRESS 270 (2003).

\(^6\) See TAN 69-72.

\(^6\) See Zelenak, supra note 14, at 1915 (“If total administrative costs of a transfer program are defined as direct administrative costs plus overpayments of benefits, then the costs of tax-based administration of the EITC and welfare-based administration of Food
In response to these trends, the IRS has recently expanded scrutiny of paid preparers as part a Paid Preparer Compliance Program that promises to increase audits of paid preparers and impose civil penalties upon preparers who fail to comply with IRS due diligence standards.\(^67\) This is not the first time the IRS has undertaken such efforts, and enforcement of paid preparer standards has, in the past, been anemic.\(^68\) It remains to be seen whether this initiative is a token gesture or bona fide intensification of oversight. However, the threatened fines—ranging from $100 for failure to meet due diligence standards on a given EITC return to $5000 for intentional or reckless understatement of tax liability—are small in relation to the profits generated by private EITC claim preparation, and absent broad enforcement they seem unlikely to significantly impact the incentives confronting private tax preparers.

Thus, far from creating a simple eligibility mechanism that avoids the extensive bureaucracy associated with traditional transfer programs, the EITC places the burden of complex eligibility determinations upon low-income taxpayers. This institutional design choice is certain to create a high level of inaccurate claims and this dynamic is exacerbated by the emergence of private tax-preparers with incentives inapposite to their delegated role as benefit gatekeepers. The ongoing controversy over EITC noncompliance (discussed in the following section) must therefore be understood as a direct consequence of an institutional design that relinquished governmental responsibility for \textit{ex ante} Stamps are very similar (adjusted for program size). The difference, however, is that most of the Food Stamp costs are direct costs of administration, whereas most of the EITC costs are overpayments.”).\(^67\) Internal Revenue Service, EITC Due Diligence Compliance Program, http://www.irs.gov/individuals/article/0,,id=179024,00.html.\(^68\) See, \textit{e.g.}, \textsc{National Taxpayer Advocate}, \textit{supra} note 64, at 270 (reporting that “for the period from FY 2001 to FY 2003, the IRS has assessed only 165 EITC due diligence penalties, amounting to $666,250, and has collected only $233,724 of those penalties”).
eligibility determinations, and, as will be argued in Part III, so too must the
government’s employment of adversarial procedures for *ex post* adjudication of
alleged taxpayer noncompliance.

**B. The EITC’s Non-Compliance Problem**

The above-described eligibility apparatus, featuring complex eligibility
criteria and relying on low-income workers and paid preparers to certify EITC
eligibility, has predictably led to a significant rate of noncompliance among
EITC applicants. The IRS estimates that for TY 2004, between $9.6 billion and
$11.4 billion in erroneous EITC payments were made, approximately a quarter of
the $41.3 billion in EITC claims paid for that year.\(^69\) A 2002 study of EITC
payments in TY 1999 found similarly high rates of noncompliance, estimating
that the IRS made between $8.5 billion and $9.9 billion in erroneous payments
(between 27% and 32% of that year’s total EITC payments).\(^70\) The prevalence of
such errors should come as no surprise. In light of the unique challenges faced
by low-income workers, a system that relies on them to carry out challenging
eligibility determinations will inevitably produce error in abundance.

That so significant a proportion of the EITC’s annual budget appears to be
diverted to ineligible claimants raises serious concerns about the program’s
efficiency: such expenditures must be paid for through either higher tax rates or

\(^{69}\) **Treasury Inspector General for Tax Administration, The Earned Income Tax Credit Program Has Made Advances; However, Alternatives to Traditional Compliance Methods Are Needed to Stop Billions of Dollars in Erroneous Payments**, Dec. 31, 2008, at 1.

reduced expenditures on deserving claimants.\textsuperscript{71} And such efficiency concerns necessarily entail serious equity concerns, as well. As Janet McCubbin notes:

> When noncompliance is undetected, noncompliant taxpayers are better off than compliant taxpayers with the same income and family characteristics, violating horizontal equity. In addition, to the extent that cheating reduces the targeting of the EITC, it might reduce the progressivity of the tax system and reduce the value of the EITC to policymakers and taxpayers.\textsuperscript{72}

Not surprisingly, the EITC's noncompliance rates have long attracted negative attention. In 1995, after an IRS report had revealed significant EITC noncompliance, the United States Senate Committee on Governmental Affairs held hearings on the future of the EITC, to “determine the extent of fraud, waste, and abuse,” associated with the program.\textsuperscript{73} The hearings culminated in the introduction of ultimately unsuccessful legislation to reduce the size of the EITC and enhance anti-fraud efforts.\textsuperscript{74} The tone of a 1997 House Ways and Means Committee hearing on the topic of EITC compliance\textsuperscript{75} was sufficiently heated to lead Professor Lawrence Zelenak to worry that “influential members of Congress could respond to high levels of EITC noncompliance by replacing tax-based administration with welfare based administration, or by repealing the program in its entirety.”\textsuperscript{76}

Whether or not the IRS shared Professor Zelenak’s perception that noncompliance issues posed an existential threat to the EITC, it responded to this political scrutiny by escalating enforcement initiatives targeting EITC claimants.

\textsuperscript{72} Id. at 238.
\textsuperscript{73} See Administration of the Earned Income Tax Credit and Design and Effectiveness of the Earned Income Tax Credit: Hearings before the S. Comm. Governmental Affairs, 104\textsuperscript{th} Cong. 3 (1995) (statement of Sen. William V. Roth, Chairman, S. Comm. On Governmental Affairs).
\textsuperscript{74} Roth Bill, S. 889, 104th Cong. (1995).
\textsuperscript{75} Internal Revenue Service’s 1995 Earned Income Tax Credit Compliance Study: Hearing Before the H. Comm. On Ways and Means, 105\textsuperscript{th} Cong. (1997) [Hereinafter EITC Compliance Hearing].
\textsuperscript{76} See Zelenak, \textit{supra} note 14, at 1916 (discussing 1995 House hearings).
For instance, in 2003, the IRS announced an experimental precertification initiative, requiring 45,000 expected EITC claimants “to provide more information on their relationship to and/or residency status of the qualifying child listed on their [2002] return.”\textsuperscript{77} The IRS announced an intention to expand the precertification program to cover as many as 2 million EITC claimants by the following year.\textsuperscript{78} A firestorm of negative publicity protested heightened burdens upon low-income taxpayers, and the IRS retreated.\textsuperscript{79} Meanwhile, less visible enforcement efforts flourished. Following the mid-1990s noncompliance firestorm, the proportion of IRS audits targeting EITC claimants underwent a dramatic increase.\textsuperscript{80} By 2004, an EITC household was 1.76 times more likely to be audited than a household with an annual salary over $100,000, and in 2005 a full 43 percent of IRS audits of individual taxpayers involved an EITC claim.\textsuperscript{81} These audits employed aggressive tactics and often led to wrongful determinations of noncompliance. The National Taxpayer Advocate’s 2004 report to Congress found that IRS EITC audits were “characterized by confusing correspondence; unnecessary, inconsistent and burdensome documentation requests; and lengthy audit cycles.”\textsuperscript{82} The report found that 43 percent of


\textsuperscript{78} Zelenak, \textit{supra} note 14, at 1870.

\textsuperscript{79} \textit{See, e.g., Editorial, The I.R.S. Goes After the Poor, N.Y. TIMES, Apr. 27, 2003, § 4 at 12 (“If the I.R.S. wants to harass the poor, and undermine a key incentive for taking low-wage jobs, it should keep doing what it is doing: But if it is interested in increasing tax compliance, and bringing in more lost tax dollars, it should start focusing its enforcement efforts higher up the income scale.”).}

\textsuperscript{80} \textit{See, e.g Janet Holtzblatt and Janet McCubbin, Issues Affecting Low-Income Filers in THE CRISIS IN TAX ADMINISTRATION 148, 159 (Henry Aaron and Joel Slemrod eds., 2004).}

\textsuperscript{81} \textit{See Stephen D. Holt, Keeping it in Context: Earned Income Tax Credit Compliance and Treatment of the Working Poor, 6 Conn. Pub. Int. L.J. 183, 190-91 (2007) (“While audit rates have generally fallen, the odds of being audited have increased for low-income filers relative to other filers. In 1988 the audit rate among 1040A nonbusiness filers with positive income below $25,000 was 1.03 percent, while the average audit rate among all filers was 1.57 percent. By 2000 the audit rate was 0.49 percent for all taxpayers, but it was 0.6 percent among 1040A nonbusiness filers with income under $25,00 and 1.4 percent among EITC claimants.”) (footnote omitted).}

\textsuperscript{82} \textit{NATIONAL TAXPAYER ADVOCATE SERVICE, 2004 ANNUAL REPORT TO CONGRESS: EARNED INCOME TAX CREDIT RECONSIDERATION STUDY i (2004).}
taxpayers who sought reconsideration of unfavorable audits received additional EITC credit beyond that for which the audit had found them eligible; on average, such taxpayers received 96 percent of the sum claimed on their original tax return.\(^{83}\) Thus, the report concluded, EITC “audit results did not accurately reflect [a taxpayer’s] eligibility for the EITC. Rather, the audits merely show that the taxpayer flunked the IRS audit process.”\(^{84}\)

The political scrutiny that the EITC’s noncompliance problem has engendered appears to presuppose that the EITC’s noncompliance problem can, as then-Senator Roth suggested, be attributed to “fraud, waste, and abuse.”\(^{85}\) However, there is reason to believe that a significant proportion of EITC noncompliance is attributable not to deliberate taxpayer fraud, but rather to unintentional error arising from the limitations of the tax-based eligibility apparatus described in the previous section.\(^{86}\) Despite the extensive scholarly and political scrutiny of EITC noncompliance, there is surprisingly little data as to how the estimated levels of EITC noncompliance break down between intentional and unintentional noncompliance.\(^{87}\) There is, however, evidence that a substantial amount of noncompliance results from inadvertent errors made when low-income workers attempt to navigate the EITC’s labyrinthine structure. A 2000 study of EITC noncompliance found that the incidence of qualifying child errors on TY 1994 EITC claims was “correlated with lower levels of education, income, and wealth,

\(^{83}\) Id.
\(^{84}\) Id.
\(^{85}\) See TAN 75-76.
\(^{86}\) Indeed, during the mid-1990s, when welfare reform elevated the EITC to an increasingly prominent position in the American welfare system, scholars anticipated that the program’s tax-based administration would entail high rates of non-compliance. See, e.g., Alstott, supra note 14, at 535.
\(^{87}\) See Holtzblatt and McCubbin, supra note 80, at 169; Leslie Book, EITC Noncompliance: What We Don’t Know Can Hurt Them, TAX NOTES, June 23, 2003, at 1821, 1824 (“Even though the IRS has studied and reported on EITC noncompliance in three separate studies in the past decade, there is very little data relating to how much EITC noncompliance relates to intentional conduct and how much relates to unintentional error.”).
perhaps because less-educated taxpayers are more likely to make unintentional errors.” 88 Tellingly, in TY 1999 about $2.1 billion in EITC overclaims (almost one-fifth of total overclaims) were attributable to a taxpayer’s employing a filing status of “married filing separately,” which renders a claimant automatically ineligible for the EITC. 89 That a large number of EITC claimants select an instantly disqualifying filing status on their returns indicates that taxpayer confusion is responsible for a nontrivial proportion of EITC noncompliance.

In sum, the EITC’s use of unmodified tax administration is a two-edged sword. Tax administration is often touted as a major strength of the EITC. It is said to lower administrative costs, raise participation rates, and help the program avoid the politically toxic associations of traditional welfare 90. However, certain aspects of unmodified tax administration generate serious waste, raise significant normative concerns, and subject the program to political attack. The question, then, is whether there is any way for the EITC to retain the beneficial aspects of tax administration while ameliorating the various pathologies associated with it.

II.

The account provided in Part I is consistent with the observations of other scholars, who have long recognized the deep-seated pathologies afflicting the EITC, and further recognized that these pathologies are the direct byproduct of the program’s reliance on tax administration. 91 However, those scholars have failed to explore a seemingly obvious corollary of their insights: that

88 Id. (citing same).
89 Id. at 169.
90 See, e.g., Brown, supra note 14.
91 This line of scholarship dates at least to 1995, when Anne Alstott argued that, “the tax system’s limitations render the EITC inherently inaccurate, unresponsive, and vulnerable to fraud and error in ways that traditional welfare programs are not.” Alstott, supra note 14, at 535.
administrative innovations that retain the core features of tax administration but flexibly deviate from it to reflect the EITC’s anti-poverty mission can yield significant improvements in the program’s fairness and efficiency. This notion is highly intuitive. There is no logical reason to expect that an elaborate system that evolved to process middle- and upper-income tax returns could be shoehorned, unmodified, into an anti-poverty redistributive setting without significant difficulty. One might therefore expect that both scholars and policymakers would contemplate administrative experiments tailored to reflect the EITC’s unique status a hybrid creature of tax and welfare policy. However, such experimentation is, to a surprising extent, absent in both theory and practice. Rather, the dominant scholarly approach has adopted a binary view of the EITC’s administration, based upon the assumption that policymakers implementing welfare programs face a constrained choice between pure tax administration and traditional welfare administration.92

This Part begins to illustrate this Article’s central premise—that this strict dichotomy between pure tax and pure welfare administration is misguided. The Part proceeds in two sections. The first section critiques the pervasive assumption that if the EITC is to be administered through the tax system, it must rely on unmodified tax administration. The second section sets forth an alternative approach based upon administrative experimentation that deviates from pure tax administration as necessary to enhance the EITC’s efficiency and fairness.

A. *The Dominant Binary Conception of the EITC*

92 For the most straightforward and explicit example of this binary view, see Weisbach & Nussim, supra note 14.
Though the scope of Anne Alstott’s comprehensive 1995 *Harvard Law Review* article reached far beyond the subject of administration, Alstott’s comments on EITC administration foreshadowed subsequent scholarly treatment of the subject. Alstott first identified profound dilemmas arising from the EITC’s reliance on tax administration. Having done so, Alstott suggested that those dilemmas counseled for “greater tolerance of separate tax and transfer systems,” elaborating that, “improving the performance of the EITC or other tax-based transfer programs requires either compromising the benefits of tax-based administration or undertaking a major restructuring of basic institutions of the federal tax system.” This conception of EITC administration as posing a binary choice between tax administration and traditional welfare administration subsequently came to dominate EITC scholarship. As a result of this binary conception, even the most ambitious proponents of EITC reform have generally declined to advocate for serious administrative modifications of the program. Instead, reformers have argued either for restructuring the benefit within the tax system or for palliatives such as subsidized professional representation to help low-income taxpayers more effectively navigate standard IRS procedures.

There are three possible explanations for the current unspoken consensus that the EITC’s tax-based administration implicates a binary choice between tax and welfare administration. First, the binary conception of the EITC can be

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93 Alstott, supra note 14.
94 Id. at 535.
95 Id.
97 See, e.g., Book, supra note 30, at 411-426 (arguing for greater assistance to low-income taxpayers, including subsidized counsel and expansion of low-income tax clinics).
understood as an intellectual legacy of tax expenditure analysis, which advocated for the outright elimination, rather than the administrative reform, of inefficient tax expenditures. Second, the current approach may reflect the desire of EITC proponents to avoid the politically problematic “taint of welfare,” by maintaining a minimal (and minimally visible) administrative apparatus. A third possible explanation for scholars’ reluctance to explore administrative reform of the EITC is the notion that such reform risks compromising crucial institutional design benefits that derive from the EITC’s reliance on pure tax administration. Upon closer examination, none of these three explanations provides a compelling basis for EITC scholarship’s rigid binary conception of the program’s administration.

1. The Legacy of Tax Expenditure Analysis

In a 2004 article in the *Yale Law Journal*, David Weisbach and Jacob Nussim framed welfare administration in general as presenting institutional designers with a binary choice between tax administration and welfare administration, stating, “[a]ny program can be implemented in at least two ways. It can be implemented through a direct spending program or a tax program. The question is how to make this choice.”98 Largely because the EITC’s status as a wage-supplement makes responsiveness to short-term income fluctuations a less pressing concern than in welfare programs such as Food Stamps, Weisbach and Nussim conclude that the program is properly administered as a tax, rather than direct spending, program.99 The notion that a welfare program’s administrative

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99 Id. at 1025.
form could include features of both tax and traditional welfare administration is wholly absent from Weisbach and Nussim’s analysis.

Weisbach and Nussim’s analytical method—which regards all programs as capable of being administered as either tax expenditures or direct expenditures and simply asks which method is more appropriate for a particular program—can be traced directly to the project of tax expenditure analysis, the scholarly project pioneered by Stanley Surrey in the late 1960s. Based upon the belief that tax expenditures were poorly-targeted “upside-down subsidies” tax expenditure analysis, as a discipline, was conceived with the goal of reducing or eliminating tax expenditures, rather than reforming or perfecting them. Its practitioners framed tax expenditures and direct outlay programs as “alternative means of accomplishing similar budget policy objectives,” and focused on the question of whether the tax system is preferable to a direct outlay as a format for implementing a particular program.

In tax expenditure analysis, “direct spending” and “tax administration” represent distinct concepts that are defined in strict opposition to one another. The fundamental inquiry of the enterprise is whether a given program should be administered through the tax system or as a direct outlay, and an operating premise is that tax administration is generally undesirable because it leads to inequitable, poorly targeted outcomes. Given this binary framework and pro-

100 See text accompanying notes 1-9.
101 See text accompanying note 4.
102 See, e.g., JOINT COMMITTEE ON TAXATION, RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 2 (2008) ("[Tax expenditure pioneer Stanley] Surrey believed that a close analysis of tax expenditures could lead to better ‘expenditure control’ by the Congress, through a more complete accounting for government expenditures regardless of their form.").
direct-outlay bias, it is unsurprising that administrative reform of tax expenditures has not emerged as a particularly prominent concern of tax expenditure analysis. While Stanley Surrey and Paul McDaniel recognized that tax expenditures impose upon the IRS “the task of administering 105 spending programs [in addition to] the enormously difficult and complex task of normative income tax administration,” they saw this observation not as counseling toward a greater focus on administrative reform, but rather as raising questions as to “whether it would be administratively more efficient to recast the various tax expenditures as direct programs.”

The intellectual legacy of tax expenditure analysis provides arguably the most straightforward explanation for the dominant conception of the EITC as presenting a binary choice between tax and welfare administration. In this account, scholars of the EITC have inherited from tax expenditure analysis an inclination to view tax administration and traditional welfare administration as counterposed alternatives, each with distinct policy advantages and disadvantages. Tax expenditure analysis counsels that if a tax expenditure produces undesirable results, the logical solution is not to reform its administrative apparatus but to eliminate it or recast it as a direct spending program. The bulk of the discussion of the EITC’s administration has followed this same paradigm.

This account may help explain why EITC scholars have neglected administrative reform, but it clearly cannot justify that neglect. There may well

106 Id. at 27.
have been a time when it seemed politically realistic to eliminate a significant number of tax expenditures (or to recast them as direct spending programs), and therefore appropriate to ask simply whether a given tax expenditure should be eliminated or retained. However, as advocates of tax expenditure analysis have recently begun to acknowledge, the discipline’s traditional goals of “expenditure control” through budget transparency have not materialized. Accordingly, as a recent Joint Committee on Taxation report makes clear, advocates of tax expenditure analysis have refocused their sights:

There is scant evidence that tax expenditure analysis has succeeded in its first mission of “expenditure control.” That does not mean, however, that tax expenditure analysis has failed, but rather that its principal utility appears to have been as a tool of tax policy . . . . The rhetoric of tax expenditure analysis . . . in fact can provide a successful framework by which to judge the fairness, efficiency and administrative consequences of many “incentive” proposals.

If tax expenditure analysis is to be reoriented to reflect the political resiliency of tax expenditures, opportunities for administrative reform represent a particularly fruitful realm of inquiry. Now that it is apparent that tax expenditures such as the EITC are an enduring component of the American policy landscape, it is logical to focus not only on whether a given tax expenditure should be eliminated or recast as a direct spending program, but also to focus on the arguably more politically realistic question of whether a given tax expenditure can be reformed to produce fairer or more efficient results. Therefore, although EITC scholars’ reluctance to propose administrative reforms is consistent with that of tax expenditure analysis more generally, now may well

107 See JOINT COMMITTEE ON TAXATION, supra note 102, at 4 (“Surreys original hope that tax expenditure analysis would have a salutary effect on budget transparency (and through that, on actual budget outlays) has not been realized.”).
108 Id. at 6.
be an opportune moment to set that reluctance aside and consider how such reforms might benefit the program.

2. Avoiding the Taint of “Welfare”

The scholarly tendency to perceive the EITC as presenting a binary choice between tax and welfare administration can also be understood as a reflection of the political anxieties afflicting EITC advocates. Proponents of the EITC are perpetually vigilant against the specter of “welfare.” The anti-welfare political consensus of the 1980s and 1990s led to the dismantlement of broad vast swaths of the nation’s social safety net. While the bulk of anti-welfare sentiment was directed at traditional transfer programs such Aid to Family with Dependent Children (AFDC), the EITC, too, was subjected to political attack from skeptics who perceived the program as akin to traditional redistribution. To the extent that the EITC survived the “welfare reform” movement intact, it was largely by dint of the program’s success in distinguishing itself from traditional transfer programs.

In the wake of this history, it has become an article of faith among EITC proponents that the program should avoid association with “welfare” in the national political consciousness. Thus, Professor Dorothy Brown argues that references to the EITC as a “welfare” program pose an existential threat, writing that, “when the EITC is referred to as ‘welfare,’ ‘EITC’ becomes a racially and politically charged word. By referring to low-income taxpayers as welfare recipients, politicians have jeopardized their

111 See Brown, supra note 14.
tax benefits.”112 Similarly, Professor Lawrence Zelenak frames the EITC as “a transfer program with the protective coloration of a tax program.”113 He argues that the ideology of “everyday libertarianism,” which has led to the dismantlement of various entitlement programs, operates to “make underpayment of tax seem a less serious concern than overreceipt of transfers.”114

While Professors Brown and Zelenak are certainly correct that the phrase “welfare” carries problematic political connotations, such political sensitivities ultimately cannot justify EITC scholarship’s unwillingness to explore administrative experiments for three reasons. First, administrative experimentation can be undertaken with an eye toward preserving the widespread perception of the EITC as a tax program. Even if the IRS were to adopt relatively ambitious administrative reforms involving practices traditionally associated with welfare—for example, by establishing field offices in low-income neighborhoods to help EITC applicants complete their tax returns—there is every reason to believe that so long as the program continued to be administered by the IRS and structured as a refundable tax credit, it would continue to be perceived as a tax program.

Second, such political sensitivities probably overstate the extent to which the EITC’s political viability is dependent on its being perceived as a tax, rather than welfare, program. While the EITC no doubt benefits politically from the perception that it is a tax program, a no less important source of the program’s political viability is the fact that, unlike traditional welfare programs, it establishes paid employment as a prerequisite for

112 Id. at 810-11.
113 Zelenak, supra note 14, at 1903.
114 Id. at 1875.
the receipt of benefits. Politicians touting the EITC consistently emphasize the benefits that the program provides for “working families” or the “working poor.” For example, in his 1994 State of the Union Address, Bill Clinton exalted the expansion of the EITC by emphasizing the program’s work requirement:

Instead of taxing people with modest incomes into poverty, we helped them to work their way out of poverty by dramatically increasing the earned-income tax credit. It will lift 15 million working families out of poverty, rewarding work over welfare, making it possible for people to be successful workers and successful parents. Now that’s real welfare reform.

Similarly, when Barack Obama made EITC expansion a prominent part of his economic platform during the 2008 presidential campaign, media coverage framed the proposal not as a transfer policy but rather as a part and parcel of Obama’s general promise of tax cuts for working families. When, as part of a massive federal stimulus, the American Recovery and Reinvestment Act of 2009 increased the size of the credit available to families with three or more children and lowered the EITC’s marriage penalty, the expansion was touted by the Obama White House as a key part of a broader effort to provide tax relief to working Americans. This recent expansion of

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See, e.g. Anne L. Alstott, *Why the EITC Doesn’t Make Work Pay*, 73 LAW & CONTEMP. PROBS. 285, 287 (2010) (“From its earliest days, the EITC prospered politically because it appeared to promote and reward paid work—helping answer the charge that the negative income tax would support the idle.”); see also Amy L. Wax, *52 EMORY L.J.* 1, 3 (2003) (“Few outside the academy openly question the reigning tenet that the government should help only those who help themselves. Politically there is widespread acceptance of the idea that the “quid pro quo” for public assistance is the willingness to perform some kind of gainful activity.”).

It is worth noting that the EITC’s emphasis on providing benefits to families may also be a political asset. The EITC provides a far larger credit to low-income families with children than those without. CENTER FOR BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT 1 (2009) (reporting that in 2007, the average EITC for a family with children was $2,488, as compared to a credit of $243 for a family with no children).


See *OBAMA FOR AMERICA, BARACK OBAMA’S COMPREHENSIVE TAX PLAN 2* (2008) available at http://www.barackobama.com/pdf/taxes/Factsheet_Tax_Plan_FINAL.pdf (“Obama will increase the number of working parents eligible for EITC benefits, increase the benefits available to noncustodial parents who fulfill their child support obligations, increase benefits for families with three or more children, and reduce the EITC marriage penalty, which hurts low-income families.”).

See, e.g., Steven Greenhouse, *For Incomes Below $100,000, a Better Tax Break in Obama’s Plan*, N.Y. TIMES, Oct. 30, 2008, at X.


See id. at § 1002(a)(3)(A); id. at § 1002(a)(3)(B).

the EITC, which engendered very little political controversy, suggests that the EITC is on a far firmer political footing than some of its more pessimistic proponents may be inclined to believe. In short, the worry that deviation from pure tax procedure could harm the EITC’s political viability likely overestimates the political threats to the EITC and underestimates the political benefits of the EITC’s focus on working families.

Third, beyond overestimating the EITC’s political vulnerability, a heightened concern with welfare politics may be counterproductive. As Professor Alstott notes, disguising the EITC’s redistributive functions and framing the program strictly as an alternative to welfare is risky insofar as it “reinforces negative attitudes about welfare that, in the long run, may jeopardize the cause of the EITC and of poverty relief more generally.”123 No less important, if anticipatory political defensiveness entails uncritical acceptance of incongruous program features that result in suboptimal effectiveness, this may amount to cutting off the program’s nose to spite its face. For example, to the extent that the EITC’s relatively high noncompliance rate (a direct product of self-certification) is a major flashpoint for political attacks upon the program,124 the EITC’s reliance on unmodified tax administration may itself entail significant political liability.

While the EITC, like all significant federal programs, must be managed with an eye to long-term political viability, administrative reforms that stand to render the program more effective in fulfilling its anti-poverty mission should not be reflexively rejected due to traumas tracing to the mid-1990s.

3. Institutional Design Considerations

123 Alstott, supra, note 14, at 537.
124 See Ventry, supra note x, at 1005-06 (discussing mid-1990s political
A third possible explanation for scholars’ binary conception of EITC administration is that it is borne of EITC proponents’ attachment to the practical programmatic benefits of tax-based administration. In this account, the pathologies that afflict the EITC are inextricably linked to the benefits that make the program appealing to many of its advocates, especially to the extent that both the pathologies and the benefits are traceable to the program’s reliance on self-certification. Although self-certification may be a major cause of the EITC’s troubling levels of non-compliance,\textsuperscript{125} it is also said to reduce the stigmatic harms of traditional welfare and explain the higher levels of participation in the EITC as compared to traditional welfare programs.\textsuperscript{126} The EITC enjoys significantly higher participation rates than the federal food stamp program, which is administered through traditional welfare channels: 89 percent of eligible individuals participate in the EITC, as compared to a 70 percent participation rate in the food stamp program.\textsuperscript{127} Moreover, EITC advocates may view the EITC’s non-compliance epidemic as a programmatic feature, rather than a bug, saving significant sums on administration while resulting only in “overpayments to the near-poor.”\textsuperscript{128} This position gains strength if one accepts the arbitrariness of the poverty thresholds on which EITC eligibility criteria are based.\textsuperscript{129}

\textsuperscript{125} See supra Part I.
\textsuperscript{126} See, e.g., Zelenak, supra note 14, at 1915 (“In addition, the participation rate (that is, the percentage of eligible persons who receive benefits) is much higher with the EITC’s self-declared eligibility than with the Food Stamp program’s precertification requirement.”). See also, Weisbach & Nussim, supra note 14, at 1004 (observing that the EITC enjoys significantly higher participation rates than the federal food stamp program, which is administered through traditional welfare channels: 89 percent of eligible individuals participate in the EITC, as compared to a 70 percent participation rate in the food stamp program.).
\textsuperscript{127} Weisbach & Nussim, supra note 14, at 1004 (2004). It should be noted that the high participation rates ascribed to the EITC have been disputed.
\textsuperscript{128} Zelenak, supra note 14, at 1915
\textsuperscript{129} See, e.g., Alstott, supra note 115, at 291-92 (“Most discussions of the EITC [make] reference to the official U.S. poverty line, but as many scholars have pointed out, the official statistics incorporate an unreasonably low standard of living, meaning that they treat as ‘poor’ only those families in extreme distress. Today’s official poverty statistics adopt a low poverty threshold, but the nature of the measure is hidden by its methodology and its aura of ‘official’ quality.”).
Such arguments from institutional design are not without a degree of force, but ultimately cannot justify an inflexible binary conception of EITC administration. For one, the purported benefits of tax-based administration are not unqualified. There is little empirical foundation for the claim that the EITC is less stigmatizing than traditional welfare. To the degree that the EITC does carry less stigma, this phenomenon may be attributable to the fact that the program targets the working poor, rather than the utterly destitute. Likewise, a variety of qualifications are in order when considering the EITC’s participation rates. First, there is evidence that these high participation rates hold only among applicants with a pre-existing legal obligation to file tax returns. A 2005 study found that while 89.0 percent of such filers participate in the EITC, among eligible individuals who have no pre-existing obligation to file a tax return, participation rates are far lower, between 30.6 and 39.0 percent. Second, scant attention has been paid to the possibility that the EITC’s relatively high participation rates may be attributable in significant part to the fact that it targets a working-poor clientele, rather than the indigent participant base of traditional welfare initiatives such as the Food Stamp Program. While there is little empirical work on the subject, it seems highly likely that the desire to seek out a job and the ability to secure one correlate positively with a likelihood to apply for available benefits. Third, the fact that 68 percent of EITC recipients effectively engage a privatized welfare bureaucracy by hiring private tax preparers to negotiate the credit’s

130 See TAN 115-122.
132 Blumenthal et al. argue in a similar vein that the EITC’s relatively high participation rates may be attributable to the fact that the programs to which it is frequently compared, such as Food Stamps and Aid to Family with Dependent Children, typically “target a large share of all benefits to low-income households with no legal filing requirement.” Id.
complexities suggests that self-certification alone cannot explain the EITC’s relatively high participation rates.\footnote{See Berube et al., supra note 50, at 2.}

Despite these qualifications, the EITC’s relatively high participation rates are among its most distinctive features, and militate in favor of retaining some form tax administration. Even so, while the institutional design account might counsel toward caution in experimentation, it cannot serve to justify a wholesale neglect to consider administrative novelties. The perceived advantages of tax administration, namely, high participation rates, low administrative costs, and reduced dignitary harms, can serve as guiding principles for institutional designers who seek to improve the EITC while retaining the qualities that have driven its success. For example, while creation of EITC “outreach centers” featuring eligibility specialists who assist applicants in completing their tax returns may well bear a resemblance to traditional welfare administration, there is no reason to believe that such an initiative, if executed with due regard for the EITC’s programmatic goals, would compromise the benefits of self-certification. The notion of EITC outreach centers is discussed at greater length in Part IV below. For the purposes of the present discussion, it is sufficient to note that such a proposal does not inherently stand to compromise the EITC’s programmatic effectiveness, and that anxiety about participation rates and stigmatic harms cannot license a complete unwillingness to explore administrative experimentation.

\textit{B. Embracing Hybridity}

Given that there is no adequate justification for the prevailing scholarly assumption that the EITC’s administrative form presents a binary choice between
tax and welfare administration, this Article advocates that scholars explore an alternative approach to the program’s administration, which it labels *administrative hybridity*. The concept of administrative hybridity can be defined as the selective implementation of non-tax administrative processes in order to ensure that reliance on tax administration does not compromise a tax expenditure’s non-tax policy objectives. The concept rests on two simple assumptions. The first is that because the tax system’s administrative form evolved in response to revenue-collection imperatives rather than social policy objectives, tax administration may often be a poor fit for implementing social policy. Part I’s discussion of the EITC’s administrative pathologies provides ample evidence that, at least in the case of the EITC, this assumption is valid. The second assumption on which the concept of administrative hybridity relies is that tax administration can be selectively modified, with attention to the policy context and goals of specific tax expenditures, in order to produce superior policy outcomes.

To fully illustrate the concept of administrative hybridity, it may be helpful to examine features of the EITC that do not constitute hybrid administration. The EITC already has administrative features tailored to reflect the program’s unique goals. For example, the unusually high audit rates of EITC recipients, discussed in Part I.B, *supra*, can be framed as a deviation from ordinary tax administration that reflects the EITC’s anti-poverty focus and the heightened compliance concerns (legitimate or not) that arise from that focus. Similarly, whereas the IRS generally sends audited parties one letter providing
notice of proposed adjustments to a tax return, and a second letter notifying a taxpayer of her administrative appeal rights, in EITC audits the IRS combines those two letters into a single “combination letter.” Such procedures reflect distinct efforts to customize tax administration to reflect the EITC’s anti-poverty objectives, but arguably do not amount to examples of administrative hybridity because they do not involve the integration of non-tax administrative concepts into tax administration. While there is ample room to debate whether a given administrative feature involves “tax” or “non-tax” approach, administrative hybridity entails more than just tinkering with tax procedure—it involves a thorough consideration of alternative modes of administration that may be applied to advance a tax expenditure’s underlying policy objectives.

The concept of administrative hybridity reflects the intuition that the simplistic “tax vs. welfare” analysis that currently dominates EITC scholarship masks an array of more subtle and particularized institutional design choices at all stages of the program’s administration, beginning with the use of IRS posters and websites to publicize the program, and ending with the use of IRS tax courts to adjudicate claims of EITC non-compliance. These choices should not be regarded as rigidly pre-determined by an initial decision to use either “tax” or “welfare” administration. Rather, each such institutional design choice is mutable and susceptible to individualized examination, presenting trade-offs and potential dynamic effects that merit focused scholarly attention.


135 Although it is notable that they do so by imposing harsher administrative practices upon EITC recipients.
A 2009 National Taxpayer Advocate report acknowledged the possibility and potential benefits of administrative hybridity.\textsuperscript{136} The report noted the incongruity between the tax expenditures’ social policy objectives and the IRS’s administrative focus on revenue collection,\textsuperscript{137} and suggested that “[w]ith the growth of [social] programs administered by the IRS, the agency could consider revising its mission statement to explicitly acknowledge its dual roles: tax compliance and social program delivery.”\textsuperscript{138} New Zealand’s experience would be instructive in this regard. In 2004, New Zealand passed a comprehensive social welfare program that is administered through the country’s tax system, Inland Revenue.\textsuperscript{139} The Inland Revenue accordingly undertook a comprehensive “analytical redesign process” to change the culture, structure, and emphasis of the agency, in recognition of its new dual mission.\textsuperscript{140}

While such fundamental structural reform of the IRS may be unrealistic in the near term, EITC proponents can still identify opportunities to apply hybrid administrative tools in order to better match the EITC’s administrative form to its anti-poverty mission. The remainder of this Article illustrates how the concept of administrative hybridity can be deployed to improve the EITC, as well as tax expenditures more generally. The mode of analysis that follows—in which discrete administrative practices are subjected to critical scrutiny under the assumption that administrative form matters to program results—is not new. Indeed, a vast body of scholarship under the heading of

\begin{itemize}
  \item[\textsuperscript{136}] National Taxpayer Advocate, 2009 Annual Report to Congress Volume II: Research and Related Strategies 85-86 (2009).
  \item[\textsuperscript{137}] National Taxpayer Advocate, 2009 Annual Report to Congress Volume II: Research and Related Strategies 85-86 (2009).
  \item[\textsuperscript{138}] Id. at 86.
  \item[\textsuperscript{140}] See Robert Russell, Managing Expanding Responsibilities: Inland Revenue New Zealand, in Tax Administration: Safe Harbours and New Horizons (Chris Evans & Michael Walpole eds., 2009).
\end{itemize}
“institutional design” applies such analysis as a matter of course. The fundamental premise of this Article is that EITC proponents should bring a critical institutional design lens to bear on the EITC’s myriad pathologies, and refuse to be constricted by the limitations of tax administration. By the same token, policymakers and scholars analyzing tax expenditures other than the EITC should devote greater attention to questions of administrative form, rather than simply assume that any program implemented through the tax code must be administered using unmodified tax administration.

III.

This Part uses a case study to illustrate how the concept of administrative hybridity can be applied to improve EITC administration. Specifically, it examines the use of adversarial hearings in United States Tax Courts to adjudicate the cases of EITC claimants deemed ineligible for the credit following an IRS audit, and asks whether alternative non-tax practices might provide superior outcomes. Much like self-certification, adversarial procedure in Tax Court is a feature of tax administration that even at first glance seems like a poor fit for the EITC. While a formal, adversarial setting may be well-suited for the corporate and high-income taxpayers that are parties to typical tax court proceedings, the low-income and often pro se taxpayers typically found in EITC cases are not well-positioned to vindicate their claims in an adversarial setting. Moreover, the practice of subjecting low-income taxpayers to adversarial tax court proceedings raises significant fairness concerns given that, as the Part I

demonstrates, a high degree of error and ambiguity is built into the EITC’s eligibility apparatus. This Part considers whether this practice can be justified by analyzing a sample of reported EITC Tax Court cases. Finding that the use of adversarial hearings raises significant concerns regarding fairness and efficiency, the Part sets forth an alternative hybrid (i.e. non-tax) administrative approach that might provide superior results.

It is not my claim that the discussion that follows in this Part offers a comprehensive solution for the EITC’s many problems. The use of Tax Court procedure in the EITC context affects only the small number of EITC claimants who both navigate the IRS’s audit process and affirmatively seek relief in Tax Court. Rather, the discussion that follows is intended to provide a concrete, in-depth case study of how the concept of administrative hybridity can be applied to the EITC to improve the program’s fairness and efficiency. The use of adversarial tax court hearings is a fitting subject for such a case study both because of the practice’s limited reach—which allows alternative administrative techniques to be considered with minimal concern for unanticipated dynamic effects—and because of the fact that, as the following discussion makes clear, the practice is quite difficult to justify. Thus, while this Part does not set forth a panacea for the EITC’s various pathologies, it illustrates a mode of analysis that stands to substantially improve the EITC by bringing its administrative form into line with its anti-poverty mission. That same mode of analysis can be applied to analyze and improve upon other tax expenditures, as well.

A. The Tax Court Context of EITC Adjudication
Tax Court adjudication of EITC claims takes place as part of the IRS’s “deficiency procedure,”\(^{142}\) the process by which the IRS resolves disputes with taxpayers. When the IRS concludes that an individual has underreported her tax liability, the Service initiates an audit process that provides the individual with an opportunity to present information concerning questionable entries on her return.\(^{143}\) The initial step of the audit process requires a decision by the IRS as to which of three audit types to employ:\(^{144}\) a correspondence audit, in which the taxpayer is contacted and furnishes requested information by mail;\(^{145}\) an office audit, in which the taxpayer visits an IRS field office and submits to an interview;\(^{146}\) and a field audit, in which IRS agents examine a taxpayer’s records at the taxpayer’s home or place of business.\(^{147}\) Correspondence audits are generally employed for disputes involving relatively simple tax liability issues, such as itemized deductions for interest and medical expenses,\(^{148}\) while field audits are reserved for complex issues involving sophisticated accounting questions.\(^{149}\)

The vast majority of EITC audits are correspondence audits. For example, Lawrence Zelenak estimates that in 2002, the IRS conducted 367,314 EITC correspondence audits, as compared to just 5,790 EITC field audits, and 4,655 EITC office audits.\(^{150}\) These correspondence audits begin with the mailing of a


\(^{144}\) See Saltzman, supra note 143, at ¶ 8.03[1].

\(^{145}\) Id. at ¶ 8.05[1].

\(^{146}\) Id.

\(^{147}\) Id. at ¶ 8.06.

\(^{148}\) Id. at ¶ 8.05[1].

\(^{149}\) Id. at ¶ 8.06.

\(^{150}\) Zelenak, supra note 14, at 1885 n.74.
“thirty-day letter,” which notifies the taxpayer of the alleged deficiency in her return and provides a thirty-day window for the taxpayer to file an administrative appeal and furnish any additional documentation the taxpayer feels may favorably resolve the alleged deficiency.151 Taxpayers unable to successfully resolve their disputed tax liability via correspondence may file an appeal with the IRS Office of Appeals, which reviews the IRS audit record and may meet with either the taxpayer or the auditing agent before issuing its findings.152

If the appeals procedure does not result in a settlement, the Appeals Office issues a “notice of deficiency,” to the taxpayer.153 Minutiae aside, a “deficiency” is essentially the amount by which a taxpayer’s true tax liability, as determined by the IRS after an audit and appeal, exceeds the taxpayer’s self-reported liability.154 Following the issuance of a notice of deficiency, the taxpayer has a ninety-day window in which to seek a hearing before a United States Tax Court.155 The Tax Court proceedings with which this Part is concerned begin if a taxpayer seeks such a hearing.156

Tax Court proceedings are hugely consequential to a taxpayer whose return is disputed by the IRS: if a Tax Court finds that a taxpayer’s return is, indeed, deficient, or if the taxpayer does not respond to the Notice of Deficiency within ninety days, an assessment is entered against the taxpayer. An assessment

152 See I.R.M. 8.1.1.1 (2001); Camp, supra note 143, at 25. Although the appeals process’s provision for conferences suggests an inquisitorial process of the sort that this Article advocates for tax court, this process is of uncertain value in assuring fairness to EITC claimants because a taxpayer’s request for a conference can be summarily denied by the IRS. See Saltzman, supra note x, at ¶ 9.03[1] (discussing cases establishing that statutory provision for conferences is directive, not mandatory, and that denials of requests for a conference do not deprive taxpayers of due process of law).
153 See Saltzman, supra note 143, at ¶ 9.03[3][c][i]
serves two significant functions in the tax determination process: first, it culminates the deficiency procedure, providing the IRS’s final determination of taxpayer liability for a given reporting period; second, it allows the IRS to collect any unpaid, assessed tax liability via administrative channels, with judicial review precluded under the so-called “pay-first rule” until the taxpayer has paid the full amount of the assessed deficiency. In this sense, an assessment is analogous to a final administrative judgment of tax liability.

Tax Court procedure resembles the procedure followed in a federal district court sitting without a jury. Most importantly for the purposes of this Article, the Tax Court employs adversarial procedures. Cases are tried before Special Trial Judges (presidentially appointed judges who serve 15-year terms of office) using rules of procedure similar to the Federal Rules of Civil Procedure. The Commissioner of the IRS is represented by attorneys from the Office of the IRS Counsel. This adversarial enterprise has a decidedly pro-governmental tilt: the IRS’s determinations of a deficiency are presumptively correct and the taxpayer faces the burden of proof for establishing error.

These harsh trial procedures are mitigated somewhat by the small-case procedures provided for in the Tax Court’s Rules of Practice and Procedure for deficiency proceedings in which the amount in dispute does not exceed $50,000

158 See Camp, supra note 143, at 20-21 (“[T]he idea of assessment is the critical demarcation between the tax determination and tax collection processes. Assessments serve as the Service's administrative judgment of what taxes a taxpayer owes the government. A properly recorded assessment is the functional equivalent of a judgment against the taxpayer.”).
159 See MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE, ¶ 1.06[1].
160 Id. at ¶ 1.06[1][b]. For instance, the Tax Court’s Rules of Practice and Procedure explicitly incorporate federal district court rules governing evidence. See UNITED STATES TAX COURT RULES OF PRACTICE AND PROCEDURE, Rule 143 (“Trials before the Court will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia.”).
161 See I.R.C. § 7443. 
162 Id. at ¶ 1.07[2] (citing IRC § 7452). 
163 Id.
for a given tax year. Such proceedings, commonly referred to as “S” cases, entail a number of procedural compromises intended to facilitate pro se representation: after filing a petition, the taxpayer is not required to file a reply to the government’s answer; neither briefs nor oral arguments are required; and trials are “conducted as informally as possible consistent with orderly procedure[].” However informal “S” cases may be, the proceedings retain the fundamental incidents of a trial: the burden of proof remains on the taxpayer, who is still opposed by an IRS attorney.

This deficiency procedure, consisting of correspondence-based audits and adversarial Tax Court hearings, may be well-suited to the middle- and upper-income taxpayers typically associated with Tax Court proceedings. However, these procedures present a number of dilemmas when applied without modification to low-income taxpayers who, for a variety of reasons, are not optimally situated to zealously vindicate their claims in such a setting. The next section examines a sample of EITC Tax Court cases to evaluate how EITC claimants tend to fare in tax court.

B. The Adversarial Procedure in Practice: A Case Analysis

To evaluate whether adversarial tax court proceedings are an appropriate method for the adjudication of EITC cases, consider a sample of EITC Tax Court cases reported by the CCH Research Network. As will be explained more fully

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165 See DAVID M. RICHARDSON, JEROME BORISON & STEVE JOHNSON, CIVIL TAX PROCEDURE 222 (2d. ed. 2008).
166 Id.
167 U.S. Tax Ct. R. 173(c), 174(c), 174(b).
168 The cases selected were those reported under the “Earned Income Credit: Eligibility” heading on the CCH Internet Tax Research Network in April 2009, Earned Income Credit: Eligibility, CCH-ANNO, 2009FED¶4082.35. The forty-six cases listed under this heading were culled to remove post-assessment cases taking place in United States District Court, cases involving patently frivolous claims, and cases involving issues far-removed from mainstream EITC compliance controversies, such as those addressing prison inmate EITC eligibility. The remaining twenty-nine cases, which involved Tax Court adjudication of standard EITC compliance
below, these cases suggest that adversarial process is an inappropriate vehicle for EITC adjudication in two respects. First, a number of the analyzed cases were “easy cases”—cases in which the taxpayer’s compliance or non-compliance was easily ascertainable through a cursory examination of the relevant and easily-ascertained facts. In such cases, adversarial adjudication arguably provides too much process, siphoning both government and defendant resources toward resolution of issues that could be conclusively adjudicated in a less resource-intensive manner. Second, in closer “hard cases,” adversarial process appears to pose serious obstacles to low-income, often pro se taxpayers who may lack the skills and resources needed to effectively present their case in an adversarial litigation setting. In such hard cases, the mismatch between the exigencies of adversarial litigation and the resources of EITC litigants arguably leads to inaccurate and unfair results. In short, adversarial tax court hearings employ too much process to resolve easy cases and inappropriate process to resolve hard ones.

1. Overview of Results

issues between 1996 and 2008, were then examined to determine how Tax Court procedures impact EITC litigants. It should be noted that in few of the cases was the EITC the sole issue being adjudicated; in most, credits and deductions often claimed by low-income working families—such as the child tax credit and the dependent care exemption—were adjudicated as well. Although this Article restricts itself to the EITC it is worth noting that many of the pathologies and anomalies produced by adversarial adjudication of the EITC may well hold in these related contexts.

This sample is limited in some respects. First, and most notably, it is small in size, consisting, as it does, of only twenty-nine cases that took place over thirteen years. Second, the cases in the sample may be atypical because the vast majority of EITC deficiency cases never arrive in Tax Court. Tax Court jurisdiction is not invoked unless a taxpayer invokes the option for a hearing within ninety days of receiving a deficiency notice. Given the unique challenges that face working poor recipients of the EITC, it may be that large numbers of EITC claimants lack the time, resources, or skills required to pursue the option of Tax Court adjudication. Third, the sample is limited due to the opacity of the criteria by which cases are selected for inclusion in CCH’s reports. The reports may consist of a casually compiled sample, or they may reflect deliberate criteria with the potential to substantively skew the sample along a number of vectors that are difficult to detect.

Notwithstanding these limitations, the sample provides an instructive window into the actual practice of EITC adjudication in tax courts. To that end, this subsection discusses broad trends evident throughout the sample, as well as the specifics of particular cases. This descriptive exercise, in turn, can help answer whether the use adversarial tax court proceedings to adjudicate instances of EITC non-compliance is either efficient or otherwise normatively desirable.
Two notable phenomena stand out in this sample. First, the EITC claimants did not often prevail in their tax court deficiency proceedings. Claimants were awarded the credit in only five of the twenty-nine cases examined. In the other twenty-four cases examined, the taxpayer claiming the EITC was deemed ineligible. Second, the claimants in this sample tended to enter tax court without professional representation. Only five of the twenty-nine cases involved taxpayers represented by counsel; the remaining twenty-four involved pro se taxpayers.\(^\text{169}\)

The sample does provide one potential explanation for the fact that the claimants tended to fare poorly in Tax Court: nineteen of the twenty-nine cases examined were “easy” cases of noncompliance that the court dispatched with little difficulty. These cases frequently turned on straightforward bright-line rules such as a married individual’s failure to file a joint tax return (eleven cases) and the taxpayer’s clear failure to establish the residency of a qualifying child (three cases). Of the remaining ten cases in the sample, only two constituted straightforward cases of taxpayer compliance, in which the court awarded the credit with little difficulty, while three others were difficult cases which the taxpayer ultimately won. Finally, five of the twenty-nine cases were hard cases in which complex questions of fact were decided unfavorably to taxpayer. What is troubling in looking at these hard cases decided unfavorably to the taxpayer is that the process employed appears to have disfavored the

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\(^\text{169}\) Although, for the reasons stated above, this Article refrains from generalizing too broadly on the basis of this sample, the notion that EITC claimants enjoy limited access to counsel is consistent with both the work of other commentators, such as Book, supra note 18, at 411-420, and with the common-sense notion that the relatively small amount in controversy in such proceedings renders professional representation unrealistic. See William C. Whitford, The Small Case Procedure of the United States Tax Court: A Small Claims Court that Works, 1984 AM. B. FOUND. RES. J. 797, 797 (describing creation of tax court’s small-claims procedure as response to needs of pro se litigants in cases where the amount in controversy rendered retention of legal counsel “economically impractical”).
Table 1: Summary of Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>EITC Issue</th>
<th>Taxpayer Pro Se</th>
<th>Prevailing Party</th>
<th>Hard/Easy</th>
</tr>
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<tbody>
<tr>
<td>Sutherland v. Commissioner</td>
<td>81 T.C.M. 1001</td>
<td>Qualifying Child</td>
<td>No</td>
<td>IRS</td>
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<tr>
<td>Cotton v. Commissioner</td>
<td>80 T.C.M. 594</td>
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<tr>
<td>Biore v. Commissioner</td>
<td>80 T.C.M. 559</td>
<td>Proof of Income</td>
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<td>IRS</td>
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<td>Rasco v. Commissioner</td>
<td>T.C. Memo. 1999-169</td>
<td>Qualifying Child</td>
<td>Yes</td>
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</tr>
<tr>
<td>Vidmar v. Commissioner</td>
<td>77 T.C.M. 2030</td>
<td>Qualifying Child</td>
<td>Yes</td>
<td>Taxpayer</td>
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</tr>
<tr>
<td>Perez v. Commissioner</td>
<td>76 T.C.M. 2030</td>
<td>Qualifying Child</td>
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<td>Manukainiu v. Commissioner</td>
<td>75 T.C.M. 1919</td>
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<td>Lestrange v. Commissioner</td>
<td>74 T.C.M. 685</td>
<td>Qualifying Child</td>
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<td>Smith v. Commissioner</td>
<td>74 T.C.M. 1344</td>
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<td>Mischel v. Commissioner</td>
<td>74 T.C.M. 253</td>
<td>Filing Status</td>
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<td>Presley v. Commissioner</td>
<td>72 T.C.M. 1530</td>
<td>Filing Status</td>
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<td>Madrigal v. Commissioner</td>
<td>76 T.C.M. 537</td>
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<td>Newsom v. Commissioner</td>
<td>78 T.C.M. 415</td>
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<td>Chiosie v. Commissioner</td>
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<td>Toney v. Commissioner</td>
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<td>Wooten v. Commissioner</td>
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<td>Hughes v. Commissioner</td>
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<td>Chappell v. Commissioner</td>
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<td>Baker v. Commissioner</td>
<td>T.C. Memo. 2006-60</td>
<td>Qualifying Child</td>
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<td>Anderson v. Commissioner</td>
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<td>Powers v. Commissioner</td>
<td>79 T.C.M. 1287</td>
<td>Proof of Income</td>
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<td>IRS</td>
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<td>Coats v. Commissioner</td>
<td>85 T.C.M. 1030</td>
<td>Qualifying Child</td>
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<td>Hard</td>
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<td>Merritweather v. Commissioner</td>
<td>84 T.C.M. 294</td>
<td>Qualifying Child</td>
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<td>Haywood v. Commissioner</td>
<td>84 T.C.M. 442</td>
<td>Qualifying Child</td>
<td>Yes</td>
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<td>Diaz v. Commissioner</td>
<td>T.C. Memo. 2004-145</td>
<td>Marital Status</td>
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<td>IRS</td>
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<td>Lear v. Commissioner</td>
<td>T.C. Memo. 2004-253</td>
<td>Qualifying Child</td>
<td>Yes</td>
<td>IRS</td>
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<td>Shinault v. Commissioner</td>
<td>T.C. Memo 2006-136</td>
<td>Filing Status</td>
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<td>Rowe v. Commissioner</td>
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<td>Redmond v. Commissioner</td>
<td>T.C. Memo. 2008-274</td>
<td>Qualifying Child</td>
<td>No</td>
<td>IRS</td>
<td>Hard</td>
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taxpayer to such an extent that there is little basis for confidence that the cases were properly (i.e. accurately) decided. The remainder of this section first looks at these hard cases more closely, before analyzing whether, given the prevalence of easy cases and the dilemmas posed by hard cases, the use of tax court for EITC adjudication can be justified.

2. The Hard Cases

In all five of the “hard cases,” the dispute ultimately came down to a low-income taxpayer’s inability to provide affirmative evidence for a complex proposition in the face of an unfavorable burden of proof.¹⁷⁰ Crucially, such cases often turn on unconventional family arrangements and income sources that may be very difficult for a low-income taxpayer to conclusively establish several years after-the-fact. In more than one case, the Tax Court itself recognized the plausibility of the taxpayer’s contentions and invoked the failure to meet the burden of proof as its reason for rejecting the taxpayer’s case.

Because a wide variety of adjudicatory mechanisms will presumably be effective in resolving easy cases, an adjudicatory mode might be fairly evaluated by its success in disposing of hard cases. These five cases suggest that in the EITC context, tax court may tend to produce results that are both unfair to low-income claimants and of questionable accuracy. Admittedly, these five cases provide only a glimpse into the realities of EITC adjudication. But it is nonetheless a troubling glimpse of a system that, in difficult cases, asks low-

¹⁷⁰ See, e.g., Gary Blore v. Commissioner, 80 T.C.M. (CCH) 559 (“Petitioner bears the burden of proving the determinations set forth by [the IRS] in the statutory notices of deficiency to be in error.”) (citing Welch v. Helvering, 290 U.S. 111 (1933)).
income litigants with limited resources and expertise to overcome an unfavorable burden of proof in a formal, one-off setting.

**Baker v. Commissioner**\(^ {171}\)

EITC criteria require the taxpayer to establish that a claimed qualifying child had “same principal place of abode as the taxpayer for more than one-half of such taxable year.”\(^ {172}\) The taxpayer in *Baker* claimed that his daughter was a qualifying child for purposes of EITC eligibility. The taxpayer lived separately from the child’s mother and the couple had no custody agreement, although the child’s mother received public assistance for the child’s benefit from the State of Delaware, which listed her as the daughter’s custodial parent. A family friend of the taxpayer regularly babysat the daughter, although she did so in her own home and did not observe the daughter in the defendant’s home until he moved to a new property late in the tax year.

In support of his claim that his daughter resided with him for more than one-half of the tax year, the taxpayer provided his own testimony, that of his mother, and that of the child’s babysitter. The court straightforwardly rejected this evidence:

> We found the testimony of petitioner to be in material respects conclusory, vague, self-serving, and uncorroborated by reliable evidence. We found the testimony of petitioner's mother to be in material respects not based upon her personal knowledge, conclusory, and serving the interests of her son petitioner. We found the testimony of Ms. Srase [the babysitter] to be in material respects not based upon her personal knowledge, conclusory, and serving the interests of her longtime friend petitioner. We are not required to, and we shall not, rely on the testimonies of petitioner, his mother, and Ms. Srase in order to establish petitioner's position with respect to the issues presented in this case.

Having thus rejected the testimony provided by the taxpayer, the court found the record “devoid of evidence that we consider to be reliable supporting [the taxpayer’s]

\(^{171}\) T.C. Memo. (CCH) 2006-60 (2006).
position that . . . he maintained as his home a house-hold that constituted the principal
place of abode, as a member of such household, of his daughter . . . for more than one-
half of that year.” It accordingly invalidated the taxpayer’s EITC claim.

Diaz v. Commissioner

The EITC’s eligibility criteria require that married individuals file joint tax
returns in any year for which they claim the credit, but provide an exception for “Certain
Married Individuals Living Apart” if “during the last 6 months of the taxable year, such
individual’s spouse is not a member of such household.” In Diaz, the taxpayer’s EITC
claim was disallowed by the IRS because the taxpayer had failed to file a joint return with
his wife, who left the United States for Mexico during the tax year. At issue in Diaz was
whether the taxpayer’s wife had remained in the taxpayer’s household for six months in
2001—that is, whether she had left for Mexico before July.

The court found that that the taxpayer, who appeared to have limited English-
language proficiency, “made vague and inconsistent assertions as to when his wife left
his household[.]” Specifically, it found the taxpayer’s credibility undermined by two
statements, neither of which was facially inconsistent with the taxpayer’s claim that his
wife was not a member of his household during the last six months of the tax year.
Noting that the record contained ambiguity as to whether the defendant’s wife left in June
or July of the tax year, the court held that, “[i]n the absence of reliable evidence that she

173 T.C. Memo. (CCH) 2004-145.
174 I.R.C. § 7703(b).
175 First: “I believe she left between June and July of 2001.” T.C. Memo. (CCH) 2004-145. Second: “But she was not living with me
during the whole period of 2001, because, when I moved, it was about six months that she was not even living with me. She moved—
she moved—she left the apartment with her mother that came from Mexico and she decided to leave.” Id. Though not rife with detail,
it is not readily apparent what aspects of this testimony were sufficiently vague or unclear as to undermine the taxpayer’s testimony.
The court emphasized that “[o]nly in his answering brief does petitioner state categorically that his wife left in June,” and refused to
credit the brief as evidence. Id. However, the second of the taxpayers aforementioned statements could certainly be read as a
statement that his wife left in June. The court’s emphasis on “categorical statements” appears to disadvantage the taxpayer, who,
based upon his testimony and certain briefings excerpted in the decision, appears to have had limited English-language proficiency.
left prior to July 2001, petitioner is not entitled to the earned income tax credit under section 32(a).”

_Blore v. Commissioner_\textsuperscript{176}

In _Blore_, the taxpayer sought the EITC for income he claimed to have earned from freelance architectural drafting conducted over the course of three years. The IRS disallowed the taxpayer’s credit because the income reported on the W-2 forms submitted in support of the claim was never reported to the IRS by any of the listed employers. In addition to the W-2s, the taxpayer provided an array of hand-written receipts for the services, the sums of which did not correspond to income stated on the W-2s. According to the taxpayer’s testimony, the firms employing him were run by an individual who changed his name during the course of the taxpayer’s employment and issued several bad checks, leading to an arrangement in which the taxpayer was typically paid in cash.

Two witnesses testified on the taxpayer’s behalf. The taxpayer’s son testified to observing a meeting between the petitioner and his putative employer “for a brief moment,” apparently contradicting the taxpayer’s claim that the son was present “almost every time the [putative employer] came by, especially whenever he would pay me.”\textsuperscript{177} The taxpayer’s neighbor testified to sitting in a truck several years previously while the petitioner cashed a check, and could not recall having met the putative employer, apparently contradicting the taxpayer’s testimony that he had met the employer on several occasions.\textsuperscript{178} After summarizing the evidence, the Court concluded that “[a]lthough petitioner produced some evidence tending to show that he received wages for services rendered in 1995 through 1997, viewing the record as a whole we find that

\textsuperscript{176} T.C. Memo 2000-326.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
this evidence is outweighed both by the inconsistencies in the testimony of the witnesses, noted above, and by the dearth of evidence in several key areas.”

**Redmond v. Commissioner**

The taxpayer in *Redmond* provided care for two children of a woman she claimed was her half-sister while the woman recovered from cancer. Under the EITC’s qualifying child criteria, in order to qualify for the credit it was necessary for the taxpayer to establish that the children’s mother was, in fact, her half-sister. The taxpayer sought to establish this relationship on the basis of information received during childhood that she and the children’s mother were fathered by the same man. However, neither her birth certificate nor that of her putative half-sister listed a father, and the attorney representing the IRS submitted a Social Security Administration database result contradicting the taxpayer’s claim as to her father’s identity. While the court recognized that the IRS’s evidence was potentially flawed and credited the taxpayer’s testimony as to her father’s identity as sincere, it nevertheless held that the taxpayer did not satisfy the relationship test by a preponderance of the evidence, and denied her claim.

**Perez v. Commissioner**

In *Perez*, the taxpayer seeking the EITC lived in a household with an extended family network that included his stepfather, his wife, his wife’s sister, and his wife’s nephew. The taxpayer claimed that his wife’s nephew constituted a “qualifying child” for purposes of EITC eligibility. Because he was neither the taxpayer’s child or step-

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179 Id.
181 See I.R.C. § 32(c)(3)(a) (defining qualifying children with reference to I.R.C. § 152(c), which provides that “an individual bears a relationship to the taxpayer described in this paragraph if such individual is . . . a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative.” I.R.C. § 152(c)(2)).
182 Particularly, the court noted that the database from which the document was derived is not completely reliable and that because the document was based on information received when the taxpayer was thirteen years old, the its accuracy as to the taxpayer’s birth father was suspect.
183 76 T.C.M. (CCH) 1004 (1998).
child, the taxpayer’s nephew could qualify as an eligible child under the law at the time (since amended) only if he was an “eligible foster child” who had the same principal place of abode as the taxpayer throughout the relevant tax year and for whom “the taxpayer care[d] for as his own child.”

The opinion’s finding of facts is sparse, tersely describing the taxpayer’s living situation, income, and rent obligations. The opinion makes no mention of any testimony being taken, and the facts appear derived entirely from the stipulation of the parties and certain exhibits. Based upon this limited record, the court held that although the taxpayer lived in the same residence as his claimed “qualifying child” for the entire tax year, there was no evidence that he cared for the child as his own, especially given the presence of other adults in the household who might have cared for the child. The court thus held that the child did not qualify as a “foster child,” and that the EITC’s relationship test was not satisfied. In doing so, the court adduced no evidence tending to disprove the taxpayer’s claim, finding simply that, “[T]here is not sufficient evidence in this record indicating that petitioner cared for Tirone as his own child. There were other members of petitioner's household, including Tirone’s mother, who were available to care for the child.”

3. **Lessons**

Both the hard and easy cases in the sample suggest that adversarial Tax Court adjudication may be a suboptimal mechanism for EITC adjudication. Beginning with the hard cases, it is possible that in each of the five cases discussed above, the claimant was, in fact, ineligible for the EITC and that the adversarial process produced a just and

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184 See Under I.R.C. § 32(c)(3)(B)(iii). The above summary describes the state of the “foster child” provision as it stood in 1996, when Perez was adjudicated; it has since been amended to require that the child be placed with the taxpayer by an authorized agency. 185 Id.
accurate result. However, these cases suggest that even were the claimants legitimately eligible for the credit, the Tax Court’s formal, adversarial process would have made it extremely difficult for them to prevail. The above cases suggest at least two structural obstacles to the success of low-income litigants in Tax Court.

The first is communicative. Both EITC claimants and any witnesses they might marshal in support of their claim will often be challenged to effectively communicate in a formal, adversarial setting. Low-income litigants may be functionally illiterate, speak English as a second language, lack fluency with legal concepts, and be unfamiliar with the idioms of middle-class English. Moreover, as Professor Lucie White notes, civil litigation, with its emphasis on formality and conflict, “evoke[s] feelings of terror for many poor people.” Based on her experience as an advocate for low-income litigants, White argues that:

[T]he majority of poor people perceive litigation as an alien or even hostile cultural setting. The talk and ritual of litigation constitute a discourse and a culture that are foreign to most poor people. Poor people obviously do not speak in the same dialect that lawyers, judges, and elite businesspeople use. Furthermore, their courtroom speech is routinely interrupted by lawyers and judges who use threatening tones in ordering them when not to talk and what not to say. Their stories are interpreted by black-robed authorities on the basis of rules that are rarely explained and norms that they seldom share.

The structured, rule-bound, and deliberative narrative mode associated with civil litigation is unnatural for many low-income individuals. In her empirical study of Baltimore rent courts, Professor Barbara Bezdek concluded that poor litigants were likely to engage in a communicative style associated with “politeness,” rather than a competing

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188 Id. at 542–43 (footnotes omitted).
form of expression associated with “transmission of factual knowledge.”\textsuperscript{189} Therefore, she found, low-income tenants in tax court are generally not “credited with accurate or trustworthy reporting.”\textsuperscript{190}

The formal setting of Tax Court proceedings thus has unique implications for the receipt of testimony. Low-income litigants and witnesses are more likely to be psychologically affected by the adversarial, high-stakes setting of a court proceeding than they would be by a more informal office encounter that typifies many welfare adjudications.\textsuperscript{191} In turn, because such witnesses may have trouble adequately performing the forms of expression required in litigation, judges may well be more inclined toward skepticism in the context of an adversarial hearing than they would be in a less formal encounter. Because so much of EITC eligibility rests upon questions of family circumstance, many of the questions that must be resolved in EITC cases will ultimately be heavily dependent on testimony. Household-specific questions—such as whether a taxpayer cared for a child residing in their household “as their own”\textsuperscript{192}—are not necessarily susceptible to proof via documentary evidence. The communicative challenges encountered by low-income litigants in tax court are also likely to be heightened by the fact that the IRS lawyers against whom EITC claimants square off are consummate repeat players, possessing expertise and fluency in Tax Court rituals.\textsuperscript{193}

The effects of such communicative barriers are readily apparent in the above discussion of \textit{Diaz v. Commissioner}, where the judge faulted a taxpayer who appeared to

\begin{itemize}
\item \textsuperscript{189} \textit{Id.} at 583-84.
\item \textsuperscript{190} \textit{Id.} at 585.
\item \textsuperscript{191} See Weisbach & Nussim, \textit{supra} note 14, at 1000.
\item \textsuperscript{192} See \textit{TAN} 183-185.
\item \textsuperscript{193} Cf. Bezdek, \textit{supra} note 186, at 575 (noting that landlord advocates in rent court enjoy a distinct communicative advantage by virtue of “know[ing] things that the tenant does not know, such as who the people are, who has certain authority, what to expect, the language used, and the procedure utilized”).
\end{itemize}
have significant difficulty with English for “vague and inconsistent assertions.”\textsuperscript{194} One might similarly view the predicament of the taxpayer of \textit{Baker v. Commissioner}—where, without providing explanation, the judge summarily rejected the testimony of the taxpayer and his low-income witnesses as conclusory, vague, and biased by the taxpayer’s interests—as evidencing the difficulty that low-income taxpayers face in surmounting judicial skepticism by using the “transmission of factual knowledge” idiom required to prevail in adversarial litigation.

The second structural obstacle to the success of low-income litigants in Tax Court is evidentiary. While the EITC’s rule-structure is replete with bright lines, the types of evidence required to demonstrate eligibility may be difficult for plaintiffs to anticipate, compile, and effectively present without the prompting of an experienced advocate. In all five of the above cases, taxpayers provided testimonial and documentary evidence that tended to varying degrees to corroborate their claims, and in all five cases this evidence was simply deemed insufficient to meet their burden of proof. The cases involve challenging evidentiary burdens for the taxpayers: What evidence, beyond provision of W-2s and receipts, will suffice to establish income for a taxpayer paid in cash by an unreliable independent contractor?\textsuperscript{195} What evidence will allow a taxpayer with unstable living arrangements and complex family circumstances to establish that his daughter resided in his place of abode for more than half of a given tax year?\textsuperscript{196} Presumably, every adjudicator has an answer to such questions. Current practices expect low-income taxpayers to divine the answer, unassisted, in anticipation of a formal, one-off hearing. In

\textsuperscript{194} See TAN 173.
\textsuperscript{195} See TAN 176–179.
\textsuperscript{196} See TAN 171–172.
light of the challenging circumstances often facing low-income taxpayers, this expectation may be both unrealistic and unfair.

While, again, it is perfectly possible that any or all of the taxpayers in the hard cases discussed above were not, in fact, eligible for the EITC, the cases nonetheless illuminate a procedural scheme that is structurally unfavorable to the efforts of low-income taxpayers. This observation raises two related concerns. The first pertains to accuracy, as the above cases suggest that meritorious EITC claims may be rejected due to the impediments that tax court procedures impose upon EITC claimants. The second is normative: troubling questions about fair treatment are raised by a system that first requires low-income workers to determine their own eligibility for welfare benefits based on complex criteria, and then requires them to defend their determination in a formal, adversarial system without assistance of counsel. These normative concerns are heightened when one considers the consequences of a finding that an EITC claimant was, in fact, ineligible for the credit: the claimant must generally repay the entirety of the credit received (often exceeding $2,000) with interest.

Given that Tax Court proceedings often conclude several years after the receipt of the credit, such a disposition can amount to a financial catastrophe for a low-income individual with limited savings.

The easy cases in the sample likewise suggest that Tax Court adjudication is not an ideal mechanism for adjudicating EITC cases. Each of those easy cases involves straightforward determinations of eligibility of the sort made regularly by welfare offices.

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197 See supra note 14 (discussing unique challenges often facing low-income workers, including transiency and homelessness, literacy, lack of understanding of the EITC, fear of government, distrust or unfamiliarity with financial institutions, and language barriers).

198 See, e.g., Baker v. Commissioner, T.C. Memo 2006-60 (entering assessment of $3556); Diaz v. Commissioner, T.C. Memo. 2004-145 (2004) (entering assessment of $5179); see also SALTZMAN, supra note 143, at ¶ 6.02 (“On assessment, the taxpayer will be sent a notice of the assessment of the tax and accrued interest, and demand for its payment. If the taxpayer fails or refuses to pay the assessment, the Service will take enforced collection action, such as a levy, against the taxpayer to collect tax, including interest.”).

199 It should be noted, however, that taxpayers who are unable to immediately repay the entirety of their liability can negotiate with the IRS for various alternatives to immediate full payment. See Bryan T. Camp, The Failure of Adversarial Process in the Administrative State, 84 Ind. L.J. 57, 65 (2008).
throughout the country using non-adversarial procedures. Even under the small-case procedure that is generally employed by the Tax Court for EITC disputes, the use of adversarial procedures to make these determinations is relatively resource-intensive: it requires the use of special trial judges, veteran tax lawyers based in Washington who must travel throughout the country to hear cases;\footnote{See Whitford, supra note 169, at 801-02 (describing role of special trial judges in hearing small-claim cases).} it requires an active prosecution provided by the office of the IRS Chief Counsel;\footnote{See TAN 163.} and, though less formal than regular tax court procedure, it requires the observation of certain formalities, such as the drafting of a taxpayer’s petition and the government’s answer, as well as the drafting of written opinions which must be reviewed by the Chief Judge of the United States Tax Court prior to issuance.\footnote{See Tax Ct. R. 182 (a).} To the extent that the decisions being made do not significantly differ in substance or complexity from conventional welfare eligibility decisions, the use of such intensive practices may be regarded as costly overkill.

C. The Lack of a Rationale for Adversarial Adjudication

The adversarial system is often defended with reference to what it is not: namely, the “inquisitorial” adjudicative model associated with European Civil Law systems and Cold War-era totalitarian regimes.\footnote{David Luban, The Adversary System Excuse, in THE GOOD LAWYER 91 (David Luban ed., 1983).} However, this oppositional justification is drastically undertheorized: even if mere rejection of an opposing concept could provide a full-fledged normative foundation for a procedural system, there is no consistent account as to what renders a given adjudicative system “inquisitorial,” let alone what might render such a system

\footnotetext[200]{See Whitford, supra note 169, at 801-02 (describing role of special trial judges in hearing small-claim cases).} \footnotetext[201]{See TAN 163.} \footnotetext[202]{See Tax Ct. R. 182 (a).} \footnotetext[203]{David Luban, The Adversary System Excuse, in THE GOOD LAWYER 91 (David Luban ed., 1983).}
objectionable. The preceding case analysis raises questions as to the efficiency, accuracy, and fairness of adjudicating EITC cases using adversarial tax court processes. It is appropriate, then, to ask what affirmative justifications might be invoked in defense of this practice, beyond the mere fact that it is not inquisitorial.

The discussion in this subsection is framed by Professor David Luban’s essay, *The Adversary System Excuse*. Luban seeks to determine whether the normative justifications for the adversarial system are sufficiently persuasive as to justify arguably immoral actions lawyers undertake by virtue of their duties as zealous advocates. His project provides a useful reference point for this discussion, because it seeks to assess whether adversarial procedure might be justified in a context in which it generates significant normative concerns. This sub-section examines the justifications catalogued by Luban, and concludes that though they may often be valid in the usual course of American criminal and civil litigation, they rest on a number of assumptions that simply do not hold in the context of EITC adjudication.

Luban identifies three possible consequentialist justifications for the adversarial system. The first is that an adversarial system provides the most effective means of discovering the truth. The second is that adversarial presentation is essential to safeguard individuals’ legal rights. Finally, Luban sets forth a justification rooted in the “ethical division of labor,” a “checks-and-
balances” approach which presumes that the excesses of zealous advocacy are justified by the fact that the opposing side is likewise provided with a zealous advocate.\textsuperscript{208}

These justifications are not particularly persuasive even on their own terms. For example, as Luban notes, the prevailing accounts as to why the adversarial system might be a superior means of discovering the truth are rooted in armchair psychology and lacking in empirical support.\textsuperscript{209} By the same token, the argument that adversarial adjudication is essential to safeguard legal rights may be deficient insofar as it fails to appreciate the role played by an opponent’s attorney, whose goal is to win the case, even if victory might entail arguable impingements upon the other party’s rights.\textsuperscript{210}

However, even if their general persuasiveness is accepted, these arguments fail to provide a compelling basis for employing adversarial procedures in the EITC context. The most striking feature of all three of these justifications is that even to the extent they are persuasive, their persuasiveness presupposes the presence of counsel: the truth-seeking function of the adversarial process cannot function absent effective representation of both parties; an individual’s legal rights cannot be safeguarded if the individual is unable to effectively assert them in court; and the “ethical division of labor” cannot justify adversarial procedures if an individual lacks the effective representation needed to counterbalance the government’s zealous advocacy. To this end, the fact that

\begin{itemize}
  \item \textsuperscript{208} Id. at 100-01.
  \item \textsuperscript{209} Id. at 93 (citing John Thibaut and Laurens Walker, \textit{Procedural Justice: A Psychological Analysis} (1975)). \textit{But see} John Thibaut, Laurens Walker, and E. Allan Lind, \textit{Adversary Presentation and Bias in Legal Decisionmaking}, 86 Harv. L. Rev. 386 (1972) (discussing results of psychological experiments suggesting adversary system provides modest advantages in counteracting adjudicator bias).
  \item \textsuperscript{210} Luban, supra note 205 at 98-99.
\end{itemize}
EITC Tax Court adjudications tend to pit an unrepresented and economically disadvantaged taxpayer against experienced government attorneys would appear to render incoherent consequentialist arguments for the use of adversarial procedures. Consequentialist justifications for adversarial procedures, sounding as they do in truth-seeking benefits and protection of individual rights, ring hollow when the adversarial process consists of a disadvantaged and unrepresented taxpayer, standing alone before the court with neither the resources nor the expertise to vindicate his claim against the government’s expert opposition.

The non-consequentialist justifications Luban identifies fare no better. He provides two such justifications: first, that there may be an “intrinsic good” in providing an adversarial advocate to an individual in legal jeopardy; second, that the adversarial system is a sufficiently entrenched part of the nation’s “social fabric” as to warrant its acceptance.211 Again, neither of these rationales withstands scrutiny in the context of EITC adjudication. Those who argue that there is an “intrinsic good” in adversarial adjudication premise this good on the lawyer-client relationship, which provides individuals in need of legal assistance with the most zealous advocacy available to them.212 Much like the consequentialist arguments for the adversarial system, this notion clearly carries little weight in the context of usually pro se EITC litigation. Luban’s second nonconsequentialist argument—that adversarial adjudication should be naturalistically accepted by dint of the system’s entrenchment in the American

211 Luban, supra note 42 at 105-111.
social fabric—likewise rings hollow in the EITC context. The EITC is a relatively young program, and institutional stability is clearly a lesser imperative than it is in criminal and civil law. Further, much of the American welfare apparatus continues to be administered via non-adversarial processes, suggesting that even if the American “social fabric” compels adversarial procedure in criminal or civil trials, it does not do so for administrative adjudication of welfare compliance.

There may well be other justifications for adversarial process beyond those provided in Luban’s taxonomy. But Luban’s account makes clear the central role that representation by counsel plays in any coherent defense of adversarial process. Indeed, the presence of counsel is invariably treated as a given in discussions of the adversary system’s merits.\textsuperscript{213} Absent counsel, adversarial proceedings that pit the state against a citizen begin to take on a decidedly troubling cast. As one commentator wrote in describing the small-case tax court procedure employed in most EITC cases, “litigation . . . resembles a small claims court case in which a business is collecting a debt from an unrepresented consumer.”\textsuperscript{214}

To be fair, the arguments against use of adversarial procedure in Tax Court may well extend to civil litigation by low-income litigants in a wide

\textsuperscript{213} See, e.g., Monne H. Freedman, \textit{Our Constitutionalized Adversary System}, 1 CHAPMAN L. REV. 57, 57-58 (1998) (“An essential function of the adversary system, therefore, is to maintain a free society in which individual human rights are central. In that sense the right to counsel is the most precious of rights, because it affects one’s ability to assert any other right.”) (Footnotes and internal quotations omitted). John Thibaut, Laurens Walker & E. Allan Lind, \textit{Adversary Presentation and Bias in Legal Decisionmaking}, 86 HARV. L. REV. 386, 388 (1972) (“In a pure adversary system, openly biased advocates urge their clients’ cases before a passive decisionmaker.”). Cite to fuller too.

\textsuperscript{214} Whitford, \textit{supra} note 169, at 798-99. Professor Leslie Book has suggested addressing this imbalance by investing in greater access to counsel for EITC claimants, specifically arguing for expansion of low-income tax clinics. See Book, \textit{supra} note 18, at 411-420. Such a measure certainly would be a desirable ameliorative, but would require significant resources and thus may be less politically feasible than the modification of Tax Court procedure that this Article argues for. Thus, while regarding Book’s proposal as preferable to the status quo, this Article proposes a more politically feasible procedural reform that addresses the fairness, accuracy, and efficiency concerns that plague the current approach.
variety of other contexts. Indeed, Justice Black’s declaration in *Gideon* that “[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel,” because “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of the law,” would seem to accurately capture the above critique of adversarial process, and its logic extends far beyond Tax Court proceedings. However, the EITC context presents a special case susceptible to analysis independent of broader critiques of civil litigation’s insensitivity to low-income litigants. As discussed above, the use of self-certification for a claim of EITC benefits constitutes a unique abdication of the government’s usual responsibility for *ex ante* verification of individuals’ welfare eligibility. The *ex post* use of conventional Tax Court procedure thus adds the insult of adversarial litigation to the injury of self-certification, raising unique normative concerns that may not be present in other civil litigation contexts. Moreover, EITC claims almost definitionally involve low-income litigants—thus, in contrast to other civil litigation contexts such as family law, medical treatment, and involuntary commitment, there is a one-to-one correspondence between EITC litigation and the ill-fit of adversarial process. Accordingly, unlike civil litigation generally, EITC procedure could be reformed without affecting litigation in which adversarial process is well suited to vindicate litigants’ rights.

**D. A “Hybrid” Alternative**

The preceding discussion demonstrates that the tax system’s default procedure for adjudicating compliance—adversarial tax court adjudication—is a

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215 See *supra* Part I.
poor fit for adjudicating the claims of often pro se EITC claimants. The
principle of administrative hybridity\textsuperscript{216} counsels that institutional designers intent
on addressing such a poor fit should consider whether any non-tax administrative
practices might improve upon the tax system’s usual procedure. Here, one non-
tax administrative practice readily presents itself as an alternative to adversarial
EITC adjudication: the informal inquisitorial process used to adjudicate applicant
eligibility in various social benefit programs that are administered outside of the
tax system.\textsuperscript{217} While this Article does not set forth a detailed adjudicative
schema, it argues that such a collaborative, inquisitorial process could address
the above objections to adversarial adjudication of EITC cases.\textsuperscript{219}

While many readers might reflexively deem “inquisitorial” process as
contrary to the foundational principles of the American justice system, the
American system’s general reliance on adversarial process has been subjected to

\begin{footnotes}
\footnote{See supra Part II.B.}
\footnote{This Article’s suggestion that EITC compliance should make use of such inquisitorial processes builds upon line of current
scholarship, most prominently the work of Bryan Camp, arguing for greater use of collaborative and inquisitorial process in tax
administration. See, e.g., Camp, supra note 158; Dennis J. Ventry Jr., Cooperative Tax Regulation, 41 CONN. L. REV. 431 (2008);
Camp, supra note 143.}
\footnote{A full-fledged, top-to-bottom analysis of an adjudicative scheme would require far more attention than could be provided in the
course of a single article, let alone a single section. See, e.g., JERRY L. MASHER, BUREAUCRATIC JUSTICE (1983) (providing
comprehensive analysis of Social Security Disability Insurance adjudicative apparatus). In particular, the question of which
institutional actor would be responsible for the administration of such adjudications is beyond the scope of this Article. However, it is
worth noting in passing both that such adjudications could be carried out by U.S. Tax Courts using specialized procedures, or that the
National Taxpayer Advocate may possess the institutional competence to spearhead such a move toward collaborative ex post
adjudication. See e.g., Camp, supra note x, at 125-26 (discussing the potential for the National Taxpayer Advocate to conduct
inquisitorial adjudication of Collection Due Process Claims that are currently heard using adversarial adjudication in Tax Court)
roles of National Taxpayer Advocate as administrative loci for inquisitorial adjudication of Collection Due Process Claims currently
heard in Tax Court).}
\footnote{In making this proposal, this paper recognizes that the adversarial adjudications that take place in Tax Court are usually preceded
by audits that may well be termed “inquisitorial.” However, the mere availability of such non-adversarial audits—which tend to take
place via correspondence—at some point in the adjudicative process does not mitigate the concerns this paper raises about adversarial
Tax Court adjudication. Insofar as such audits are generally automated, take place via mail, and involve no face-to-face interaction
between a taxpayer and the IRS, they can hardly be termed “collaborative” in any meaningful sense. There is also reason to believe
that these audits are conducted in a manner that disadvantages EITC claimants. Forty-three percent of claimants who are deemed
ineligible for a credit following the audit are subsequently granted some or all of their claimed credit upon making a request for
reconsideration. NATIONAL TAXPAYER ADVOCATE SERVICE, 2004 ANNUAL REPORT TO CONGRESS: EARNED INCOME TAX CREDIT
RECONSIDERATION STUDY i (2004). Further, as Stephen Holt has noted, there are high non-response rates when EITC claimants are
subjected to such audits. “Challenging circumstances specific to the working poor can make an effective response problematic because
they complicate both receipt and comprehension of correspondence and documentation of eligibility.” See Holt, supra note 81, at
191.}
\end{footnotes}
significant criticism and should not be uncritically accepted. Recent scholarship suggests that the general rejection of inquisitorial modes of adjudication as “un-American” lacks a solid theoretical foundation, overlooks the historical role of inquisitorial processes in American law, and does not account for the increasing use of inquisitorial process in American civil litigation. American exceptionalism aside, there is little reason to dismiss a mode of adjudication employed without controversy in much of the Western world as inherently unjust or uniquely inaccurate.

Inquisitorial process is used here in its loosest sense, to denote an adjudicator-driven mode of decisionmaking in which the adjudicator, rather than the parties, bears responsibility for driving discussion, framing issues, and soliciting evidence. Two aspects of the inquisitorial system in particular appear well-suited for the adjudication of EITC compliance. The first is the inquisitorial adjudicator’s role as an advocate for one or both of the parties. Unlike adjudicators in adversarial settings, who are expected to serve as impartial observers, adjudicators in inquisitorial systems perform three roles: they serve as advocates for the government, critically scrutinizing the validity of

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220 See e.g., JEROLD S. AUERBACH, JUSTICE WITHOUT LAW (1983) (arguing that the adversarial system presents “a chilling Hobbesian vision of human nature [that] accentuates hostility, not trust.” Id. at vii); Marvin FRANKEL, PARTISAN JUSTICE (1980) (arguing that adversarial litigation places too low a value on truth-telling and too high a value on victory);
221 See generally, Sklansky, supra note 204.
223 See id. at 1190-1192 (describing turn toward inquisitorial process in civil litigation through phenomena such as Alternative Dispute Resolution (ADR)).
225 See Abraham S. Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 STAN. L. REV. 1009, 1018 (1974) (“The chief characteristic of inquisitorial procedure is that it is proactive: it imposes an affirmative obligation upon state officials to insure that state policies, both substantive and procedural, are carried out.”).
the position of the claimant or defendant;\textsuperscript{226} they serve as advocates for claimants or defendants who do not have professional representation;\textsuperscript{227} and they serve as adjudicators who must render a decision. Jerry Mashaw summarizes the centrality of such adjudicator-driven case development in his description of Social Security Disability Insurance (SSDI) adjudication:

\begin{quote}
The primary goal that emerges from the [Social Security adjudication manual's] developmental guidelines is the protection of the claimant's interest in full development and consideration of his or her claim. Although there is a technical sense in which the claimant has the burden of proof, that is, of producing evidence that will establish a disability, it seems clear from the manual that this burden is very modest, indeed. If the claimant or some other source provides sufficient information to give direction to a search for relevant evidence, the disability examiner is expected to follow up every reasonably pertinent lead.\textsuperscript{228}
\end{quote}

Such an active role for the adjudicator in identifying and obtaining relevant evidence could help compensate for the limited resources and expertise of EITC claimants. In Tax Court, EITC claimants face a significant burden in anticipating the types of evidence required to satisfy their burden of proof, as well as in gathering that evidence prior to a formal, one-off adversarial hearing. An active adjudicator can lighten this burden by informing the taxpayer of the specific types of evidence that could establish eligibility in a given case and providing the taxpayer with an opportunity to gather such evidence and submit it after a hearing—that is, by “giv[ing] direction to a search for relevant evidence”.


\textsuperscript{227} \textit{Id.} (citing \textit{Landess v. Weinberger}, 490 F.2d 1187, 1189 (8th Cir. 1974) (“[O]ur recent decisions have made it clear that the [Administrative Law Judge] has a duty to fairly and fully develop the matters at issue . . . . The administrative law judge in social security cases is in the peculiar position of acting as an adjudicator while also being charged with developing the facts . . . . This is especially true when the claimants appear without counsel.”).

\textsuperscript{228} MASHAW, supra note 218, at 128. \textit{See also}, Jon C. Dubin, \textit{Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings}, 97 Colum. L. Rev. 1289, 1325 (1997) (“In the non-adversarial or 'inquisitorial' [Social Security] administrative model, the [Administrative Law Judge] is charged with the duty of protecting the claimant's rights, developing the facts on the claimant's behalf, and identifying the issues, regardless of whether the claimant is represented.”)
Such an active adjudicator help avoid the normative concerns that arise when (as in the status quo) the burden of proof is placed upon a low-income worker who is pitted, unassisted, against an expert government bureaucracy in an adversarial tribunal.

The second feature of inquisitorial adjudication that could render it a superior adjudicative mode for EITC cases is its informality. Mashaw explains that adjudication of eligibility for unemployment insurance and other “mass justice” programs, emphasizes “active-adjudicator investigation, informal rules of evidence and procedure, and presiding officer control of issue definition and development.” For example, SSDI hearings
tend to be quite informal, compared with judicial trials. Hearings are generally held in the vicinity of the claimant’s home, often in a small conference room in the ALJ’s office or in an available state or federal building. In most hearings, the only persons present are the ALJ, the stenographer (unless a tape recorder is used), the claimant, the claimant’s representative, and the claimant’s witnesses (such as a relative, former coworker, friend, or family physician). Hearings are usually very short, averaging half a day in length. Once the participants are gathered, the ALJ makes a short explanatory statement and receives into evidence the pertinent parts of the file, such as medical and hospital reports. The claimant and his witnesses are then permitted to make statements. Each claimant is sworn in and questioned by the ALJ (and the claimant’s representative, if any). The ALJ may then call an independent vocational expert or medical advisor to review the record and help “interpret” it.

Such informality seems straightforwardly desirable for the first face-to-face encounter between an applicant and the bureaucracy that adjudges her claim, especially in the EITC context, where the hearing is generally preceded by the burden of self-certification, as well as a cumbersome correspondence audit.

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229 MASHAW, supra note 218, at 128.
Moreover, an informal setting stands to provide a more hospitable forum for claimants who face the unique challenges of many EITC-eligible workers. As discussed above, low-income workers may have little experience presenting themselves in formal settings and further may have a deep-seated fear of the government, resulting in intimidation and communications difficulties in the tax court context. In addition to altering the context in which testimony is given, a more informal setting might also alter the dynamic in which testimony is received. The nature of courtroom testimony in an adversarial setting may reflexively stoke an observer’s skepticism, a notion seemingly supported by the cursory rejection of testimony supporting the claimant in Diaz and Baker. A more informal dialogue might help mitigate such skepticism. In upholding the constitutional validity of the Social Security Disability Insurance (SSDI) program’s inquisitorial processes, the Supreme Court stated that the program’s emphasis on informal adjudication was “as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation.” The desirability of such informality is arguably even greater in the EITC context, which definitionally features a low-income litigant base.

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232 See Book, supra note x, at 401-02 (“Another factor that contributes to a lack of response to IRS correspondence is a general fear of government, especially among immigrants.”).

233 See supra Part III.B.2. Cf. also Bezdek, supra note 186, at 585 (“A short stay in Baltimore's [adversarial] rent court shows that the ‘powerless’ speech style predominates in tenants’ usage when speaking with the judge. It coincides in aggregate with tenants’ low success rate in Maryland's most-used court. [R]esearchers’ reports concerning hearers’ assessments of the speech signals of those who feel powerless mirror phenomena observed repeatedly in this local setting. Virtually all tenants who attempt to claim the protection of the law find, in those moments before the judge, that tenants are neither credited with accurate or trustworthy reporting, nor are they helped in scaling the hurdles of filing claiming . . . .”).

In addition to improving the fairness and accuracy of EITC adjudications, one might expect that a move to inquisitorial adjudication would yield gains in efficiency, as well. A major reason why inquisitorial adjudication is often preferred to adversarial adjudication in the context of “mass justice” programs is that such informal adjudication is decidedly less resource-intensive than adversarial adjudication.\(^{235}\) In the EITC context, where “easy cases” constitute the bulk of cases for which ex post eligibility determinations must be made, the SSDI model’s informality could potentially be more efficient than the current regime.\(^{236}\) Simple cases of ineligibility, such as those involving a married taxpayer who does not file a joint tax return, could be dispatched promptly, avoiding the procedural formality required under tax court procedures, as well as the seemingly unnecessary use of IRS prosecutorial resources.

**E. Conclusion**

The preceding analysis appears to confirm this Article’s premise that the usual procedures of tax administration will often be a poor fit for implementing a given tax expenditure’s policy objectives. Tax administration is focused primarily on revenue collection from middle- and upper-income individuals, as well as corporations, and its processes will thus have a tendency to generate suboptimal outcomes in other policy contexts. The use of adversarial Tax Court procedure to adjudicate EITC compliance provides a straightforward illustration of this tendency, since requiring unrepresented low-income litigants to bear the

\(^{235}\) See Dubin, *supra* note 228, at 1303.

\(^{236}\) Most Tax Court cases involving EITC claims address other tax issues as well, such as the taxpayer’s eligibility for head of household status or a dependency exemption. There is no reason, however, why those issues could not as a general rule be heard along with the EITC claims in an inquisitorial hearing, since there is generally significant overlap between the various facts and legal principles at issue in when the IRS challenges multiple aspects of a low-income taxpayer’s return. *See, e.g.*, *Rasco v. Commissioner*, T.C. Memo. 1999-169 (1999) (finding for the taxpayer on dependency exemption, head of household status, and EITC based upon factual findings that claimed children lived with petitioner throughout the duration of the tax year in question).
burden of proof in an adversarial setting not only raises significant concerns about fairness, but also seems unlikely to provide accurate assessments of eligibility for the EITC. By looking to non-tax programs that pursue policy objectives similar to the EITC, it is possible to identify a superior administrative practice, namely collaborative inquisitorial hearings that are characterized by their informality and by the role of the adjudicator in helping unrepresented parties develop their case.

While adversarial Tax Court adjudication of EITC noncompliance is a problematic practice that affects a relatively small proportion of EITC claimants, it nonetheless provides a valuable case study demonstrating the pathologies that ensue when traditional tax procedures are uncritically applied without regard to the policy context in which a given tax expenditure operates. There is no reason to believe that what is true of this one practice is not true of EITC administration more generally, or of the administration of other tax expenditures.

IV.

In light of the superior fairness, accuracy, and efficiency that could be realized by adoption of inquisitorial EITC adjudication, one cannot help but suspect that the reason adversarial adjudication continues to be employed to adjudicate EITC cases is that the issue has simply not been considered by either scholars or policymakers. The use of Tax Court to adjudicate EITC claims—much like the EITC’s administrative structure more broadly—seems to be the product not of deliberate institutional design, but rather of uncritical importation of tax administration due to the fact that the EITC is a tax expenditure.
However, path-dependency is not a policy justification. And if critical evaluation of EITC adjudication suggests ample opportunity to create a fairer, more accurate, and more efficient administrative mechanism, one would assume that there are abundant opportunities—both within the EITC, and in other tax expenditures—for institutional designers to apply hybrid administrative practices that will substantially improve program outcomes.

This Part builds on the analytical method of Part III—under which features of tax administration are subjected to critical scrutiny to evaluate their appropriateness for a given tax expenditure’s policy objectives—by tentatively exploring other areas in which administrative hybridity and critical institutional design stands to significantly improve the operation of tax expenditures. To that end, it first explores two other aspects of EITC administration where administrative hybridity may improve program outcomes. Then, to illustrate that administrative hybridity has potential ramifications far beyond the EITC context, it examines recent controversies over the Alternative Fuel Mixture Credit.237 It argues that failure to critically consider the administrative form of those credits resulted in costly outcomes decidedly at odds with their policy objectives.

This Part’s discussion of individual administrative practices is necessarily tentative. As the discussion in Part III suggests, each of the administrative practices discussed below is susceptible to extensive scholarly treatment—and indeed, such treatment is desirable if the EITC and other tax expenditures are to be administered in a logical manner that reflects their underlying objectives. The analysis below is offered not in the hope of conclusively resolving any given aspect of tax administration, but rather in the hope of illustrating the lines of

inquiry that are made possible by openness to hybridity in tax administration. To that end, it is my hope that the following discussion sparks a debate, among both policymakers and scholars, about the concrete details of how the EITC in particular and tax expenditures generally ought to be administered.

A. Hybridity in the EITC

In evaluating potential administrative reforms to the EITC, it is critical to appreciate the program’s tremendous complexity, and how reforms to one aspect of the program’s administration could potentially have implications far beyond their formal sphere. For instance, the reform of EITC adjudication proposed in Part III could potentially ramify far beyond ex post compliance assessment: policymakers writing eligibility criteria for tax benefits do so with acute awareness that the criteria will be applied via a tax system that requires arms-length rules capable of neatly sorting tens of millions of tax returns each year. It is thus possible that a move toward inquisitorial adjudication of EITC controversies could enable those drafting the EITC’s eligibility criteria to employ a more standards-based conception of a “qualifying child,” avoiding the confusion that arises from the rigid bright-line definition currently employed.

Thus, in considering the implications of administrative hybridity in the three brief vignettes that follow, it is important to recognize that seemingly unrelated administrative reforms—such as a shift from adversarial to collaborative adjudication—have cascading implications far beyond their immediate purview, expanding the universe of options.

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239 The SSDI adjudicative apparatus, which exists almost solely to adjudicate the question of whether a given impairment is sufficiently severe “to prevent an individual from doing any gainful activity, see 20 C.F.R. § 404, demonstrates that a standards-based approach to welfare administration is possible, if not unproblematic. See generally MASHAW, supra note 218.

240 See, e.g., Holtzblatt McCubbin, supra note 80, at 150 (discussing the uneasy interplay between the EITC’s myriad bright-line rules, and the complex family lives and living arrangements of many EITC recipients).
available to policymakers intent on transforming the EITC into a fairer and more effective anti-poverty program.

1. **EITC Intake Centers.** Consistent with its status as a tax program, the EITC currently has no physical footprint in the form of offices or personnel in the field. This trait is a stark contrast to traditional welfare’s reliance on field offices, which assist individuals in applying for benefits, render judgments on eligibility, and address other issues, such as wrongful termination of benefits.

The lack of such a physical footprint has a variety of implications for the EITC’s administration. The absence of field offices constitutes a policy choice to shift a variety of costs from the government to individuals seeking the credit. As David Super explains, in the absence of field offices, “claimants bear [the costs of] record keeping and at least part of the costs of learning a program’s rules and completing its application.”

A variety of the pathologies discussed in Part I, supra—such as inaccuracy and reliance on predatory paid preparers—may ultimately be linked, directly or indirectly, to the absence of a physical presence for administration of the EITC.

Thus, the use of intake centers for the EITC could substantially alter the face of the program and address many existing problems. Needless to say, such a proposal may have uncomfortable implications for those who value the EITC’s decentralized reliance on self-certification. However, if such an effort were undertaken with attention to the EITC’s programmatic goals, it would not necessarily undermine self-certification. Such offices could serve as optional, rather than mandatory, means for interested taxpayers to receive assistance in composing a tax return that

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242 See text accompanying notes 125-133.
accurately reflects their income and family circumstances. If marketed appropriately and geared to provide a quick and easy eligibility assessment of the sort currently provided by private tax preparers, they could well reduce the burden that self-certification imposes upon EITC claimants and also reduce the incidence of inadvertent noncompliance. And unlike the private tax preparers that they would presumably displace, such offices would be properly incented to provide accurate as well as easy eligibility assessments. A focus on customer service rather than eligibility determination—an “EITC Customer Service Center” open annually from January to April—could minimize stigma and avoid the politically problematic connotations of welfare offices. Further, if such offices reduce the incidence of noncompliance or the quantity of the EITC benefit currently diverted to private preparers, such intake centers may not require significant increases in administrative costs, and could conceivably yield savings.

2. Recoupment. When an assessment is entered against a taxpayer for underpayment of taxes, the IRS’s power to collect is “an awesome one.” Though certain notice and hearing requirements apply, the IRS generally is flexibly empowered to employ levies and liens to seize taxpayer property. Once an assessment is entered against a taxpayer, the IRS has “the equivalent of judgment obtained by a general creditor.” In Bull v. United States, the Supreme Court upheld the IRS’s expansive

\footnotesize{\textsuperscript{243}} See SALTZMAN, supra note x, at § 14.01.
\footnotesize{\textsuperscript{245}} See SALTZMAN, supra note x, at § 14.01.
\footnotesize{\textsuperscript{246}} Id.
\footnotesize{\textsuperscript{247}} 295 U.S. 247 (1935).}
collection power by stating that “taxes are the lifeblood of government, and their prompt and certain availability an imperious need.”

The assessments against low-income taxpayers who are deemed to have erroneously claimed the EITC can run in the range of several thousand dollars. For a low-income taxpayer, such sudden and substantial financial liability can have drastic consequences. Consider again, for example, the case of Daniel Aaron Baker, who, in 2006, was found liable to the IRS for $3,556. Baker’s total income in 2003 was $15,349, a portion of which was devoted to childcare expenses for Baker’s daughter, who was four years old. Assuming that at the time the assessment against Baker was entered three years later Baker’s income had not significantly increased, that Baker had not saved a significant amount of the credit, and that his child care expenses had not diminished, one must assume that the entry of a $3,556 assessment against him had significant financial consequences. While the IRS has statutory authority to negotiate repayment by installments, make offers-in-compromise, and designate certain assessments as not collectible, it can still be expected that there will be many circumstances in which such assessments will impose substantial financial hardships upon low-income workers, as when an EITC claimant owns real property, such as a mobile home, upon which the IRS might place a lien. The harsh effect that such substantial assessments have on individual taxpayers are difficult to justify in cases such as Baker’s, where the taxpayer’s erroneous EITC claim appears at most to be a product of

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248 Id. at 259.
250 See Baker v. Commissioner, T.C. Memo 2006-60.
251 Id. at *4.
253 See id. at § 7122.
254 Id. at § 6404(c).
inadvertence or poor record keeping, rather than deliberate fraud. Such consequences are especially troubling in light of the high error rate associated with EITC audits.\(^\text{255}\)

In social security administration, when an individual erroneously receives overpayments, the means by which the government can recoup its overpayments are narrowly circumscribed by statute to a modest range of procedures, including decreases in future social security payments or reduction in future tax refunds.\(^\text{256}\) Moreover, the government’s latitude to reduce such future payments is limited by the command that, “there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment would defeat the purpose of this subchapter or would be against equity and good conscience.”\(^\text{257}\) Social Security Administration regulations define this provision as prohibiting the government from “depriv[ing] a person of income required for ordinary and necessary living expenses”\(^\text{258}\) when the person “neither knew nor should have known that the overpayment or the information on which it was based was incorrect.”\(^\text{259}\)

A similar procedure in the EITC context could be structured in a number of ways. Reductions in future EITC payments could be preferenced over liens and levies as a means of recouping overpayments. Alternatively, the government’s lien and levy power could be left intact with the caveat that it not be exercised in such a manner as to “deprive a person of income required for ordinary and necessary living expenses.”\(^\text{260}\)

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\(^\text{255}\) NATIONAL TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS: EXECUTIVE SUMMARY: PREFACE & HIGHLIGHTS 11 (2009) (noting that 43 percent of EITC claimants who request reconsideration of an unfavorable audit are subsequently deemed eligible for the credit, receiving, on average, 96 percent of the amount claimed).


\(^\text{257}\) 42 U.S.C.A. § 404(b).

\(^\text{258}\) See 20 C.F.R. § 404.507.


\(^\text{260}\) See 20 C.F.R. § 404.508.
social security-style recoupment procedures into the EITC context would provide a paradigmatic illustration of how administrative hybridity stands to improve the EITC: the blunt assessment mechanisms provided by the Internal Revenue Code are decidedly ill-suited for the EITC’s low-income clientele, and administrative techniques transposed from the welfare context stand to significantly improve the fairness of IRS collection efforts.

B. Hybridity in Other Tax Expenditures

The EITC provides an excellent vehicle for illustrating the potential benefits of hybrid administration precisely because its social welfare objectives are so far removed from the tax system’s traditional goals of revenue correction. However, what is true of the EITC is true also of other tax expenditures. Recent controversy regarding the Alternative Mixed Fuel Credit makes clear that other tax expenditures, no less than the EITC, can benefit from administrative innovations tailored to reflect their underlying policy objectives.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA) of 2005,\textsuperscript{261} provided a refundable excise tax credit of 50 cents for every gallon of “alternative fuel mixture” used by certain taxpayers in “producing any alternative fuel mixture for sale or use in a trade or business of the taxpayer.”\textsuperscript{262} The credit’s criteria require that the alternative fuel be mixed with a taxable transportation fuel.\textsuperscript{263} As originally defined in SAFETEA, the alternative mixed fuel credit applied only to the use

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{261} Pub. L. 109-59 (2005).
    \item \textsuperscript{262} See id. at § 11113(b). Technically, the provision may arguably not be a tax expenditure because it is a credit not against the income tax, but against the federal motor fuels excise tax provided for by 26 U.S.C. § 4081. Cf. Gilbert Metcalf, \textit{Using Tax Expenditures to Achieve Energy Policy Goals} 6 (Nat’l Bureau of Econ. Research, Working Paper No. 13753, 2008). However, because the credit is refundable, its operation is effectively indistinguishable from that of a refundable income tax credit. As such, it is analytically indistinguishable from a tax expenditure for purposes of this discussion.
\end{itemize}
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of “liquid hydrocarbons derived from biomass.”\textsuperscript{264} In 2007 Congress amended the provision to eliminate any reference to “liquid hydrocarbons” and to instead allow the credit to be claimed by users of any “liquid fuel derived from biomass.”\textsuperscript{265} The Joint Committee on Taxation would later describe this amendment has having been enacted “to conform the statute to the legislative intent of the 2005 provision” by allowing fish oil producers to claim the credit.\textsuperscript{266}

Whatever the congressional intent behind it, this amendment had a significant unanticipated effect. In late 2008 American paper producers began registering with the I.R.S. as alternative fuel producers and claiming the alternative fuel mixture credit for their use of “black liquor,”\textsuperscript{267} a wood byproduct, generated during the papermaking process, that paper producers have burned for fuel since the 1930s.\textsuperscript{268} Because the credit required that an alternative fuel be mixed with a taxable transportation fuel, in order to qualify for the credit paper producers began to add diesel fuel to the black liquor they burned during the ordinary course of paper production.\textsuperscript{269} The addition of diesel fuel served no purpose except to qualify the burning of black liquor for the credit. One hedge fund analyst pithily explained the waste generated by the process: “You use the toilet every day. Imagine if you could start pouring a little gasoline into the bowl and get fifty cents a gallon every time you flushed.”\textsuperscript{270} Soon, paper companies began receiving refund

\begin{footnotes}
\item[265] See Pub. L. 110-172, § 5(a)(2).
\item[266] Joint Committee on Taxation, supra note 264, at 81-82. Because fish oil contains oxygen as well as hydrogen and carbon, it arguably did not qualify as a “liquid hydrocarbon.” Id.
\item[267] Steven Mufson, Obama Seeks to Halt Alternative Tax Fuel Credit for Paper Industry, WASH. POST., May 9, 2009.
\item[270] Hayes, supra note 269.
\end{footnotes}
checks from the Treasury worth hundreds of millions of dollars.\footnote{Martin A. Sullivan, New $25 Billion Tax Windfall for Paper Companies, TAX.COM, Oct. 15, 2009, available at http://tax.com/taxcom/taxblog.nsf/Permalink/MSUN-7WUGPT?OpenDocument.} When the credit had been enacted in 2005, the Joint Tax Committee had estimated that it would cost the treasury $44 million over ten years. In the first six months of 2009 alone, more than $2.5 billion in cash payments were distributed under the credit, the vast majority of which were claimed by paper manufacturers burning black liquor.\footnote{\textit{Joint Committee on Taxation}, supra note 264, at 82. These costs were compounded by the cellulosic biofuel producer credit which was added to the tax code by the Food, Conservation, and Energy Act of 2008. Pub. L. 110-234 § 15332. That provision provided a $1.01 per gallon income tax credit for production of qualified cellulosic biofuel. The cellulosic biofuel credit was, unlike the alternative mixed fuels credit, nonrefundable. However, it also differed from the alternative mixed fuels credit because it served as an income tax credit, rather than a credit against gasoline excise taxes, raising the poss}\footnote{Letter from Antonio de Aguiar Patriota, Ambassador of Brazil to the United States, Michael Wilson, Ambassador of Canada to the United States, Jose Golli, Ambassador of Chile to the United States, and John Bruton, Head of the European Commission Delegation to the United States, to Sen. Max Baucus, Rep. Charles Rangel, Sen. Charles Grassley, and Rep. Dave Camp (May 20, 2009) available at http://www.canadainternational.gc.ca/washington/offices-bureaux/media_room-salle_de_presse/black-noir-2.aspx?lang=eng.} Furthermore, the fact that the credit ultimately served primarily as a subsidy for the United States paper industry did not go unnoticed by foreign paper manufacturers or foreign governments. In May 2009, the Brazilian, Chilean, Canadian, and European Union ambassadors to the United States sent a joint letter to Congress calling for the credit’s immediate revocation.\footnote{Id.} The letter argued that the credit created “market distortions and imbalances” that risked depressing the global paper market by causing American manufacturers to overproduce paper during a period of low paper prices.\footnote{Id.} It also noted that the credit’s “windfall cash infusions . . . give[s] [companies in the United States] an immediate, artificial competitive advantage over their foreign and domestic competitors with longer-term impacts to the international market.”\footnote{Id.} The ambassadors’ letter ominously suggested that the credit was an “actionable subsidy and that any adverse effects caused by this tax credit could be subject to remedies in the [World Trade
Organization] or through domestic countervailing duty investigations.”

Soon after, commentators began to suggest that the tax credit could become the focal point of a major international trade dispute, and Canada enacted a massive counter-subsidy for its domestic paper industry.

The alternative mixed fuel credit was thus a catastrophic policy failure on many levels. For one, while the credit may well have subsidized certain uses of alternative fuel that would not have taken place in its absence, it ultimately served primarily to transfer hundreds of millions of dollars to domestic paper manufacturers for their continuing use of a decades-old process, and also may well have led to a net increase in overall fossil fuel consumption, insofar as the manufacturers unnecessarily added diesel fuel to black liquor for the sole purpose of creating a qualifying “fuel mixture.” The credit was also a policy failure with respect to its impact on the public fisc, as it resulted in payouts to the paper industry that dwarfed the modest original projections of its anticipated cost. And were those facts not sufficient to support a conclusion that the credit was an unmitigated disaster, the credit’s unanticipated effects triggered a significant international trade dispute.

This abject policy failure cannot be fully understood without reference to the processes of tax administration, which are characterized by a somewhat mechanical analysis of statutory provisions and are therefore often insensitive to a tax expenditures’

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276 Id.


279 Gilbert Metcalf, Tax Policies for Low-Carbon Technologies 15 (Nat’l Bureau of Econ. Research, Working Paper No. 15054, 2009) (“[T]he example from the paper industry is troubling beyond the inframarginal nature of the subsidy. If the tax credit is raising the demand for diesel fuel in order to make the biofuel eligible for the credit, then it is having the perverse effect of raising rather than lowering demand for petroleum products.”).
real-world policy objectives. For example, a June 3, 2009 memo by the IRS Office of Chief Counsel employed a hyper-literal reading of statutory and regulatory language and concluded that because black liquor is “an aqueous solution that has the consistency of molasses at the time it is introduced into the recovery boiler,” the substance is a “liquid fuel derived from biomass” that satisfies statutory criteria for the alternative fuel mixture credit.\textsuperscript{280} This policy-agnostic parsing of statutory and regulatory language is fairly typical of tax administration, in which interpretation of the tax code is regarded as a unique art that is methodologically distinct from other modes of statutory interpretation, let alone from the promulgation of legislative regulations by administrative agencies.\textsuperscript{281}

While some contend that such mechanical parsing is an appropriate method for statutory interpretation,\textsuperscript{282} there can be little doubt that literal-minded application of a complex and inflexible rule structure is a poor method for implementing programs that must address dynamic real-world policy problems.\textsuperscript{283} Such literal-mindedness is precisely how a tax provision intended to provide a modest incentive for innovative uses of alternative energy

\textsuperscript{280} Memorandum from IRS Associate Chief Counsel (Passthroughs & Special Industries) to Director, Specialty Tax, June 3, 2009. IRS CCA 2009-41011, 2009-329569.

\textsuperscript{281} See, e.g., Lawrence Zelenak, \textit{The Court and the Code: A Response to the Warp and Woof of Statutory Interpretation}, 58 Duke L.J. 1783, 1783 (2009) (“Most tax lawyers (myself included) believe there are features of the Internal Revenue Code that distinguish the art of interpreting the code from the interpretation of most other statutes.”); Rev. Proc. 64-22, 1964-1 C.B. 689 (“At the heart of administration is interpretation of the Code. It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he is ‘protecting the revenue.’ The revenue is properly protected only when we ascertain and apply the true meaning of the statute.”); David P. Hariton, \textit{Tax Benefits, Tax Administration, and Legislative Intent}, 53 Tax Lawyer 579, 613-14 (2000) (“It troubles me . . . that so much of the analysis of tax-motivated transactions seems narrow and technically focused. Practitioners provide their clients with long opinions full of detailed considerations of whether this, or that provision will or will not apply, and the Service goes through similar considerations in deciding whether a given transaction is vulnerable to attack. Yet the whole dialogue seems beside the point, like arguing about protocol on a sinking ship. . . . [W]e should not try to deny that judgment colors the technical analysis. Rather, we should try to make that judgment as deep and reflective as possible, taking into full account of the reasons why the relevant statutes were enacted to begin with.”).


\textsuperscript{283} Cf. Duncan Kennedy, \textit{Form and Substance in Private Law Adjudication}, 89 Harv. L. Rev. 1685, 1704-05 (1976) (“The difficulty of arriving at a consensus about the optimal social role of rules is best illustrated by the case of Article 2 of the Uniform Commercial Code, which governs commercial contracts. According to a persistent line of theorizing associated with Max Weber, this should be an area prototypically adapted to rules. The ‘social function of maintaining the market’ supposedly requires a formal approach here, if anywhere. Yet the drafters of Article 2 proceeded on the conviction that general commercial law was prototypically adapted to standards. This choice was explicitly based on the claim that ideas like ‘reasonableness’ and ‘good faith’ provide greater predictability in practice than the intricate and technical rule system they have replaced.”).
could transform into a multi-billion subsidy to paper manufacturers, increase overall consumption of fossil fuels, and precipitate an international trade war.

Much like the EITC’s noncompliance problems, the catastrophic policy failure of the alternative mixed fuels credit illustrates the serious pathologies that can ensue when tax expenditures are left to administer themselves. While crafting an administrative mechanism capable of addressing such outcomes may require imagination, it is surely not impossible. Congress, for instance, could have included a provision in the tax credit delegating to an administrative agency such as the Department of Energy authority to promulgate regulations governing the credit’s availability, or could have avoided subsidizing pre-existing inframarginal activities by requiring all entities claiming the credit to submit plans to the Department of Energy demonstrating innovative uses of alternative fuel technologies.

The Department of Energy has significant expertise in implementing programs and devising regulations intended to advance real-world energy policies, and one would expect that its analysis of whether a given fuel qualified for billions of dollars of federal energy subsidies would extend beyond the mere fact that the fuel was an “aqueous solution that has the consistency of molasses.” That is to say, as an administrative agency with extensive subject matter expertise, the department can be expected to be more effective in anticipating and avoiding undesirable policy outcomes than the IRS Office of Chief Counsel. While the details of such programs are best left to energy law specialists, there is no reason why the administration of a refundable tax credit for renewable energy could not more closely resemble that of analogous grant programs administered by the Department of Energy. While such administrative efforts are not
costless, both the alternative energy tax credits and the EITC demonstrate that there is often far more to be lost by neglecting administration.

V. CONCLUSION

This Article advances a simple thesis that few would deny, but that scholars of tax expenditures have ignored for far too long: administration matters. Whether a tax expenditure aims to fight poverty, promote use of alternative energies, or achieve any of the myriad other public policy objectives that Congress has embedded in the tax code, the examples of the EITC and the alternative fuel mixture credit suggest that a reliance on unmodified tax administration will often result in unanticipated results at odds with the tax expenditure’s policy objectives.

Tax expenditure scholars have long recognized, and indeed emphasized, that tax administration is ill-equipped to promote policy objectives beside revenue collection. But rather than focus on the possibility that the administration of tax expenditures might be reformed, scholars have instead focused on eliminating tax expenditures or recasting them as direct spending programs. While there may well have been a time when it seemed politically feasible to simply eliminate tax expenditures, in recent years it has become quite clear that tax expenditures are among Congress’s preferred policymaking tools. It follows that tax expenditure scholars should lessen their quixotic emphasis on the elimination of tax expenditures, and instead turn their focus to mitigating tax expenditures’ various pathologies.

Recent scholarship urging that tax expenditures should be crafted as refundable tax credits and not take into account a claimant’s marginal tax rate represent one such strand of scholarship focused on mitigating tax expenditures’ pathologies, rather than
eliminating tax expenditures outright. This Article hopes to initiate another, by arguing that a tax expenditure need not necessarily be administered using pure tax procedure, but rather that tax expenditures’ administration can be customized using practices developed and perfected in non-tax programs. The EITC provides a particularly compelling case study for the promise of such hybrid administrative procedures, since tax administration is not at all well-suited for promoting the program’s anti-poverty mission, and has been the source of profound and well-documented pathologies in the program. This Article builds upon the work of prior scholars who have identified those pathologies by arguing that administrative reform provides the most promising long-term avenue for improving the program. EITC scholars therefore need not uncritically accept the program’s use of unmodified tax administration, but rather should seek out opportunities to implement hybrid administrative practices that reflect the EITC’s anti-poverty mission and low-income clientele.

And the same holds true for tax expenditures more generally, as the example of the Alternative Fuel Mixture Credit illustrates. Tax expenditures are enduring policy tools that have withstood decades of calls for their elimination. In light of their near-permanence, neither scholars nor policymakers can afford to continue overlooking the significant policy improvements that can be attained through attention to how they are administered.

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284 Lily L. Batchelder and Eric J. Toder, *Government Spending Undercover: Spending Programs Administered by the IRS* 15 (New York Univ. L. & Econ. Working Paper No. 215 2010), available at http://lsr.nellco.org/nyu_lewp/215 (arguing that structuring tax expenditures as refundable tax credits and ensuring that they operate without regard to a claimant’s marginal tax rate can address the problematic tendency of tax expenditures to function as “upside-down subsidies” that provide the greatest benefit to the most well-off taxpayers).