

Villanova University Charles Widger School of Law

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Bureaucratic Oppression and the Tax System

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Bureaucratic Oppression and the Tax System

LESLIE BOOK*

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* Professor of Law, Villanova University School of Law. I wish to thank my co-panelists Keith Fogg, Alice Abreu, Scott Schumacher, and moderator and conference organizer Nina Olson, and all of the participants at the 2015 International Taxpayer Rights Conference for comments on a talk I gave on this topic. While this Article does not directly draw on international rights charters or norms in situating the challenges the IRS faces in administering the EITC, this Article is based on my belief that agencies respect the rights of taxpayers when they treat individuals as people rather than pieces in a large administrative cog. The conference and its bringing together differing perspectives on the issues of taxpayer rights allowed me to think more broadly about some of the issues I discuss herein. I wish to thank Zach Kinetz, Villanova University Charles Widger School of Law, J.D. 2016, and Chris Bibb, Villanova University Charles Widger School of Law, J.D. 2017 (expected), for their research assistance with this Article.

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Introduction

Observers of the Service's administration of the earned income tax credit (EITC) have leveled one main criticism, that the Service has been unable to reduce stubbornly high error rates.¹ Congress has generally focused attention on this problem with many legislative initiatives, including unprecedented (for the tax system) penalties for improper claims, special due diligence rules for preparers submitting returns with EITC claims, and a lessening of pre-assessment right to judicial review of Service rejections of EITC claims.

In this Article I wish to shift attention to the Service's poor service to EITC claimants.² In particular, I wish to broaden the inquiry to reflect the insights of nontax scholars who have looked at the ways that administrative agencies interact with low-income individuals who rely on benefits that agencies administer.

Some observers have tried to situate IRS service shortfalls within broader notions of fairness and to explicitly recognize the Service's importance in delivering benefits. For example, in the 2015 Annual Report to Congress, the

¹There are two main measures of EITC noncompliance, improper payments and overclaims. Improper payments are an annual measure of credit improperly claimed net of IRS enforcement; overclaims do not reflect IRS enforcement actions. For a useful summary of the compliance problem with the EITC, see MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., R43873, *THE EARNED INCOME TAX CREDIT (EITC): ADMINISTRATIVE AND COMPLIANCE CHALLENGES* (2015) (discussing how Treasury releases information on improper payments annually but IRS has only periodically reported on gross overclaims, with the last overclaim studies released in 1999 and 2014). For fiscal years 2010 through 2013, the Service's improper payments ranged between 22% and 26%, that is, between \$13.3 billion and \$15.6 billion annually. INTERNAL REVENUE SERV., IRS PUB. NO. 5162, *COMPLIANCE ESTIMATES FOR THE EARNED INCOME TAX CREDIT CLAIMED ON 2006-2008 RETURNS 2* (2014).

²Most observers who have considered the administration of the EITC have focused attention on the compliance issues, such as Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867 (2005). There are some noteworthy exceptions. See Dorothy Brown, *Implicit Bias and the Earned Income Tax Credit*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., Cambridge Univ. Press 2012) (discussing how racial bias contributes to Congress perceiving ineligible claimants as welfare cheats). There have been some articles directly addressing how the characteristics of claimants may contribute to the need for administrative reforms. See Jonathan Schneller, *The Earned Income Tax Credit and the Administration of Tax Expenditures*, 90 N.C. L. REV. 719 (2012) (recommending moving toward a more inquisitive based model of adjudicating EITC eligibility disputes); Jonathan P. Schneller et al., *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176 (2012) (suggesting a number of changes to improve service in connection with administering the EITC, including that IRS revise its mission statement, and emphasize free return filing through increased use of programs such as VITA and review of eligibility disputes).

National Taxpayer Advocate (NTA) lamented that “in the current customer service environment, procedural justice is undermined by the IRS’s failure to provide tailored education and assistance to low income taxpayers, coupled with an examination strategy that creates significant burdens for EITC taxpayers trying to prove their eligibility.”³ In addition, the NTA has recommended that the Service change its mission statement to identify that it has dual roles, one as revenue collector and the other as benefits administrator.⁴ In leveling her criticism, the NTA has called on the Service in administering the EITC to recognize some of the characteristics of low income taxpayers, including low literacy rates, less access to internet and technology generally, and an inability to readily secure documentation that the Service may request in response to correspondence relating to eligibility.⁵

The above points are crucial if the agency wishes to set policies and procedures that will allow it to deliver service to all individuals, not just those with resources to delegate to third parties or the skills to navigate the agency on their own. This Article builds on some of the NTA criticism and takes the small but I believe important step of looking at the general challenges that agencies face when administering programs that benefit lower-income individuals and situating some of the Service’s challenges in that framework. Many have looked at those general challenges outside tax, but observers of the tax system have not applied those insights to tax administration. It is my hope that those insights can further assist in both better identifying the problems the Service faces and also with proposing and implementing solutions.

One of the best sources of insight when it comes to general challenges agencies have when administering programs that benefit the poor is Edward Rubin. In his 2012 article *Bureaucratic Oppression: Its Causes and Cures*, Professor Rubin describes how and why agencies tend to mistreat individuals who apply for benefits.⁶ As he notes, agencies engage in bureaucratic oppression when the agency or its employees “impose unnecessary and harmful burdens on private parties.”⁷ The term includes agency actions that are not necessarily illegal or even against agency guidelines and includes employees “following rules when doing so imposes burdens for no purpose.”⁸

The underlying theme behind this Article is that in fashioning its approach to administering the EITC (or any other provision that is directed to lower-income individuals) the Service should learn from and apply insights from those who

³2015 NAT’L TAXPAYER ADVOCATE ANN. REP., EARNED INCOME TAX CREDIT 243 [hereinafter NTA 2015 Ann. Rep.].

⁴*Improper Payments in the Administration of Refundable Tax Credits: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 112th Cong. 23 (2011) (written statement of Nina Olson, National Taxpayer Advocate).

⁵NTA 2015 ANN. REP., *supra* note 3, at 235-37.

⁶Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291 (2012).

⁷Rubin, *supra* note 6, at 300.

⁸Rubin, *supra* note 6, at 300.

have studied how in distributing benefits, agencies tend to mistreat individuals, or as Professor Rubin frames the discussion, engage in bureaucratic oppression. The Service and Congress can best ensure improvements to administering the EITC when policymakers understand both the specific functions that are associated with delivering benefits and the common barriers that low-income individuals face when interacting with government agencies. This Article applies insights from scholars outside the tax perspective who have examined functions associated with benefits programs and barriers associated with successful benefit delivery. Those perspectives reveal that the Service faces many challenges if it wishes to administer the program well. By isolating the functions and barriers in the context of the delivery of benefits, this Article advances the discussion surrounding the Service's important role in the nation's efforts to combat poverty and provide incentives to the working poor.

This Article will proceed in the following way. I will first provide some additional background on the EITC. I will then discuss the various functions that are associated with delivering benefits, drawing on a listing of functions that Professor David Super identifies in an article discussing the merits of private sector involvement in the delivery of benefits to the poor.⁹ I will then describe barriers that often prevent lower-income individuals from receiving benefits, drawing on the work of Professor Rubin. In the next Section, I will briefly identify solutions as a source of checking bureaucratic oppression. In the next Section, I identify areas for future research on some key topics that critics such as the NTA and the Government Accountability Office have raised when it comes to taxpayer service and the EITC in particular. I then apply the insights in the article to one particular challenging aspect of the IRS administration of the EITC, the ban on claiming that credit following claims that the IRS has determined are reckless or fraudulent.

I. Brief Background

The EITC is a credit that entitles recipients to a benefit irrespective of whether there is a tax liability. The maximum credit that a taxpayer with three or more qualifying children can receive in 2016 is \$6,269.¹⁰ It is subject to a phase-in range, a plateau and a phase-out range, with the credit varying according to earned income, whether the claim arises on a joint return and the amount of qualifying children.

The following shows the ranges of the credit subject to some of the above variables, with Table 1 looking at benefits for single claimants with one child, Table 2 identifying EITC parameters for single claimants without and with children, and Table 3 looking at the EITC parameters for claimants filing joint tax returns:

⁹David A. Super, *Privatization Policy Analysis and the Poor*, 96 CALIF. L. REV. 393 (2008).

¹⁰2016 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates, INTERNAL REVENUE SERVICE, last accessed Mar. 13, 2016, <https://www.irs.gov/Credits-&-Deductions/Individuals/Earned-Income-Tax-Credit/EITC-Income-Limits-Maximum-Credit-Amounts-Next-Year>.

Table 1¹¹

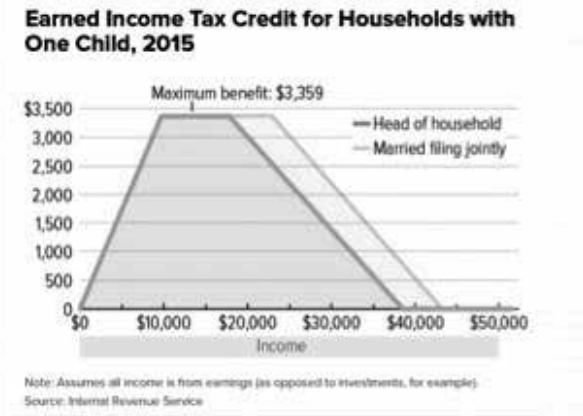


Table 2¹²

**2015 Earned Income Tax Credit Parameters
(Filing status single ^{a)})**

	Phase-in rate	Phase-in ends	Maximum credit amount	Phase-out begins	Phase-out rate	Phase-out ends
Childless	7.65%	\$6,580	\$503	\$8,240	7.65%	\$14,820
1 Child	34%	\$9,880	\$3,359	\$18,110	15.98%	\$39,131
2 Children	40%	\$13,870	\$5,548	\$18,110	21.06%	\$44,454
>2 Children	45%	\$13,870	\$6,242	\$18,110	21.06%	\$47,747

^a Note: Unmarried filers who claim children for the purposes of the EITC usually file as heads of household; the parameters for each family size are the same as for single filers.

Table 3¹³

**2015 Earned Income Tax Credit Parameters
(Filing status married filing jointly)**

	Phase-in rate	Phase-in ends	Maximum credit amount	Phase-out begins	Phase-out rate	Phase-out ends
Childless	7.65%	\$6,580	\$503	\$13,750	7.65%	\$20,330
1 Child	34%	\$9,880	\$3,359	\$23,630	15.98%	\$44,651
2 Children	40%	\$13,870	\$5,548	\$23,630	21.06%	\$49,974
>2 Children	45%	\$13,870	\$6,242	\$23,630	21.06%	\$53,267

Source: Internal Revenue Code, 26 U.S.C. §32(b).

¹¹ *The Earned Income Tax Credit*, CENTER ON BUDGET & POLICY PRIORITIES, Jan. 15, 2016, <http://www.cbpp.org/sites/default/files/atoms/files/policybasics-eitc.pdf>, at 1, 4.

¹² *The Earned Income Tax Credit*, *supra* note 11, at 4.

¹³ *The Earned Income Tax Credit*, *supra* note 11, at 4.

There is a rich literature discussing the EITC, and its current place in the mainstream of federal policy addressing poverty and incentivizing low-wage work.¹⁴ It is now a crucial part of federal policy. In FY 2013, around 26.7 million recipients shared \$63 billion in total federal EITC expenditures.¹⁵ About 85% of credit dollars claimed are refunded.¹⁶ Participation rate is high, approaching close to 80% overall and even higher among individuals with two or more qualifying children.¹⁷

How did we get to the place where the Service holds the keys to the welfare of millions of Americans? A major change in federal policy accompanied welfare reform in the mid-1990s, when President Clinton helped usher out traditional means-based benefits in favor of benefits attached to time limitations and a shift to benefits administered through the tax code in the form of refundable credits to supplement earned income.¹⁸ There are a number of studies that trace the growth of the EITC, and this Article will not attempt to detail that path.¹⁹ 2014 marked the fiftieth anniversary of Lyndon Baines Johnson's announcement of a national war on poverty.²⁰ Since then, much has changed, including the ways that the government funds programs are meant to alleviate poverty. Yet poverty is still with us, and while poverty's causes and solutions engender at times a deeply partisan reaction,²¹ there is a growing consensus among the left and the right that the federal government has a role to play in alleviating the effects of an entrenched lack of mobility among the nation's poor and near poor.²²

¹⁴ An excellent place to start is with Austin Nichols & Jesse Rothstein, *The Earned Income Tax Credit (EITC)* (NBER, Working Paper No. 21211, 2015).

¹⁵ Nichols & Rothstein, *supra* note 14, at 3.

¹⁶ Nichols & Rothstein, *supra* note 14, at 12.

¹⁷ For a good summary of participation data, including changes over time and variables, including by taxpayer demographics, see Nichols & Rothstein, *supra* note 14, at 29.

¹⁸ Nichols & Rothstein, *supra* note 14, at 9.

¹⁹ The Appendix to this Article provides the EITC parameters since the program's inception. For good discussion of the government's pivot to the EITC, as well some of the EITC limitations, especially in considering the plight of the extreme poor who may not have sufficient earned income to generate EITC-eligibility, see Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, LAW & CONTEMP. PROBS., Winter 2010, at 285, available at <http://www.jstor.org/stable/20779055>. For excellent earlier work discussing the history of the EITC see Steve Holt, *The EITC at 30: What We Know*, BROOKINGS INSTITUTION RESEARCH BRIEF, Feb. 2006, http://www.brookings.edu/~media/research/files/reports/2006/2/childrenfamilies%20holt/20060209_holt.pdf and Dennis Ventry, *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–99*, NAT'L TAX J., Dec. 2000, at 983.

²⁰ *LBJ School Marks 50th Anniversary of President Johnson's Landmark Civil Rights Legislation with '0 for 50' Initiative*, LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, last accessed Mar. 21, 2016, <http://www.utexas.edu/lbj/news/2014/lbj-school-marks-50th-anniversary-president-johnson-s-landma>.

²¹ Eduardo Porter, *The Republican Party's Strategy to Ignore Poverty*, N.Y. TIMES, Oct. 27, 2015, <http://nyti.ms/1KCGL2Y>.

²² *Opportunity, Responsibility, and Security: A Consensus Plan for Reducing Poverty and Restoring the American Dream*, BROOKINGS, last accessed Mar. 22, 2016, <http://www.brookings.edu/events/2015/12/03-plan-for-reducing-poverty-restoring-american-dream>.

The EITC and, to a lesser but still important extent, the Child Tax Credit (CTC) are popular with advocates, politicians on both sides of the aisle,²³ tax return preparers, and the recipients themselves who increasingly depend on the tax system to meet basic needs, make one-time special expenditures and escape poverty.²⁴

As a result of the increased importance of tax credits, millions of poor or near poor people now rely on the tax system to address definite needs: unpaid medical utility or rent bills, a deposit on an apartment that might be in a neighborhood with better schools, the means to buy a car that will allow the person to avoid an hour and a half bus ride to drive herself to work and still get home in time to cook dinner or help a child with homework, to name just a few.

It comes as no surprise that the tax system in the United States (and elsewhere for that matter)²⁵ has a function well beyond the collection of revenues. That the tax system furthers social and economic goals is something that has been part of our tax system since its inception.²⁶ Yet the advent of the use of refundable credits in the tax system has fundamentally changed the relationship between the Service and those who increasingly depend on the tax system to meet basic needs. The failure of the Service and Congress to fully appreciate that change is what contributes to the agency's shortfall in delivering appropriate levels of service.

There are a number of explanations for the placement of the EITC within the tax code rather than with laws that are more traditionally associated with benefits.²⁷ For example, the EITC's placement in the tax code and connection to earned income connects the benefit to participation in the formal economy thus lessening or eliminating the stigma associated with traditional welfare programs.²⁸ Second, the placement allows for a facially simple means of administering the benefit without the typical cadre of caseworkers necessary for intake and eligibility determinations. Moreover, there is a political

²³For a discussion of the bipartisan political support, see Nichols and Rothstein, *supra* note 14, at 3. *But see* Chris Edwards & Veronique de Rugy, *Earned Income Tax Credit: Small Benefits, Large Costs*, TAX AND BUDGET BULL. (CATO INST., D.C.), Oct. 2015 (arguing that high EITC error and program costs impose burdens on other taxpayers, with the EITC's phase-out range and investment income limitation reducing recipients' incentives "to work, invest, and pursue other productive activities").

²⁴*Opportunity, Responsibility, and Security: A Consensus Plan for Reducing Poverty and Restoring the American Dream*, BROOKINGS, 2015, <http://www.brookings.edu/~media/Research/Files/Reports/2015/12/aei-brookings-poverty-report/Full-Report.pdf?la=en>.

²⁵The United Kingdom (Working Tax Credit) and Australia (Family Tax Benefit), for example, each uses its tax system to deliver tax credits based on family status. The administration of family tax credits in other countries is a topic that warrants further inquiry.

²⁶Nichols & Rothstein, *supra* note 14, at 22.

²⁷Nichols & Rothstein, *supra* note 14, at 22.

²⁸An early and perceptive discussion of the benefits from the claimants' perspective is Anne Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995).

advantage associated with placing the benefit in the tax code, as the outlays do not typically count toward spending caps.

Whatever the reason, the EITC's home in the tax code means that the Service's administration of the EITC has a major impact on the lives of adults and for children of adults who claim the credit.

The sheer number of claimants and amounts that are claimed are a good indicator of the overall importance of refundable credits in terms of federal policy directed at improving the lot of low-wage workers. It is well known that the EITC and related family status credits such as the CTC have a major impact on poverty.²⁹ The EITC and CTC reduce current poverty and inequality in at least two ways: (1) by supplementing the wages of low-paid poor or near-poor workers; and (2) by encouraging work. Recent research suggests the income from these tax credits leads to benefits at virtually every stage of life. For instance, children in families receiving the tax credits do better in school, are likelier to attend college, and can be expected to earn more as adults and help provide incentives to boost Social Security retirement benefits. The research suggests that the benefits associated with credits have a multiplier effect that goes far beyond the important but incomplete tabulation of the credits' impact on poverty rates in a particular year.

Despite the EITC's significance, the Service itself does not embrace the implications of its role as deliverer-in-chief of benefits to the poor or near poor.³⁰ For example, the Service's mission does not in any way connect to delivering benefits. Instead, the Service states that its mission is to "provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all."³¹ To be sure, the Service does dedicate separate resources to EITC, including offering a dedicated EITC web page that states that Service goals with the EITC are to "increase participation while reducing error."³² On the participation front, the Service does promote EITC awareness day³³ and it publicizes a state-by-state breakdown on the credit's take up rate.³⁴

While improving take up of the credit is a Service program goal, the Service is much more active on the compliance side when it comes to the EITC. For example, it has set up an automated correspondence-based exam processing system that allows it, with minimal employee involvement, to take what the

²⁹Nichols & Rothstein, *supra* note 14, at 33-40.

³⁰2010 NAT'L TAXPAYER ADVOCATE ANN. REP., THE IRS MISSION STATEMENT DOES NOT REFLECT THE AGENCY'S INCREASING RESPONSIBILITIES FOR ADMINISTERING SOCIAL BENEFITS PROGRAMS 15, available at https://www.irs.gov/pub/tas/2010arcmsp2_irsmission.pdf.

³¹I.R.M. 1.1.1.2(1) (2015).

³²See EITC CENTRAL, last accessed Mar. 22, 2016, <https://www.eitc.irs.gov/EITC-Central/main>.

³³See, e.g., *On the 10th Anniversary of EITC Awareness Day: IRS Alerts Workers of Significant Tax Benefit*, INTERNAL REVENUE SERVICE, Jan. 29, 2016, <https://www.irs.gov/uac/Newsroom/On-the-10th-Anniversary-of-EITC-Awareness-Day-IRS-Alerts-Workers-of-Significant-Tax-Benefit>.

³⁴*EITC Participation Rate by States*, EITC.IRS.Gov, last updated Oct. 21, 2015, <https://www.eitc.irs.gov/EITC-Central/Participation-Rate>.

NTA calls a “production line approach to individual audits.”³⁵ Of the 1.5 million tax returns examined in FY 2013 (inclusive of individual and corporate income tax returns, as well as excise and estate and gift tax returns) more than one-third involved examination of EITC eligibility.³⁶ The Service’s emphasis on EITC is noteworthy, given that recent estimates of the tax gap peg underreporting from other areas (such as reporting small business) as much more material than EITC, with EITC accounting for about 6% of the overall individual income tax noncompliance, and small business income underreporting at about 51.9%.³⁷ The administrative attention is matched by Congress, which has enacted numerous EITC specific compliance provisions which have a major impact on Service administration.³⁸

NTA Nina Olson has forcefully argued that the Service’s self-identification as a law enforcement agency rather than an agency that administers and delivers social benefits puts taxpayers at risk:

The conversion of an agency that has historically viewed itself as a law enforcement agency into an agency that determines eligibility and entitlement to social benefits targeted to low income individuals is not an easy one. It requires a conscious recognition that the very nature of the agency’s mission has changed, requiring different strategies for taxpayer interaction

³⁵Nina E. Olson, *Procedural Justice for All: A Taxpayer Rights Analysis of IRS Earned Income Credit Compliance Strategy*, 22 ADVANCED TAX’N 1, 15 (2015).

³⁶CRANDALL-HOLLICK, *supra* note 1, at 6.

³⁷CRANDALL-HOLLICK, *supra* note 1, at 3-4. The IRS estimates that about 6.9% of all additional estimated tax owed due to examinations comes from EITC audits. *Id.* at 6.

³⁸Congress’s undue attention to EITC noncompliance as compared to other systemic issues of income tax noncompliance may in part be due to a direct bias against redistributive policies, with that contributing to a heightened concern for EITC errors as compared to other areas of individual income tax noncompliance. See Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1896 (2005); Karie Davis-Nozemack, *Unequal Burdens in EITC Compliance*, 31 LAW & INEQ. 37 (2012); Leslie Book, *EITC: Do Attitudes on Redistribution Fuel a Particular Focus on Errors?*, PROCEDURALLY TAXING, Oct. 31, 2013, <http://www.procedurallytaxing.com/eitc-do-attitudes-on-redistribution-fuel-a-particular-focus-on-errors/>. Professor Zelenak situates the concern with a bias against redistributive policies:

When a person fails to pay a tax he is keeping his own money, and a person’s keeping his own money is not a terribly objectionable result. The ghost of the claim to one’s pretax income survives the enactment of the tax statute requiring one to pay part of that income to the government. This contrasts sharply with the everyday libertarian view of overpayments of welfare. Neither the substantive legal rules nor everyday libertarianism gives a person any semblance of a right to a welfare overpayment. Far from being viewed as a mere keeping of one’s own money, receipt of a welfare overpayment is viewed as the wrongful taking of the pretax income of others, and as such it is an unmitigated wrong.

Zelenak, *supra* note 38, at 1902. Interestingly, Zelenak notes that there may be a greater tolerance for EITC noncompliance as compared to other more traditional benefits programs’ noncompliance, like food stamps, which is likely a product of the EITC’s placement in the tax system. *Id.* at 1903 (identifying the “protective coloration of a tax program” as the reason why EITC occupies a middle ground between traditional tax error and traditional welfare errors).

and promoting compliance. To the extent that a tax agency ignores the implications of delivering social benefits through the tax system it will fail in its new mission and impose unnecessary and undue burden on the taxpayers, thereby undermining if not negating all the projected advantages of using the tax system in the first place.³⁹

The NTA's words are a call to action. But what does it mean for the Service to take a "conscious recognition" of its role as benefits administrator? Whether the Service directly changes its mission statement or not, few would disagree with the Service's importance as a benefit agency. To that end the next Section discusses the various functions that agencies generally perform when delivering benefits, with the hope that if the Service is more aware of the distinct activities necessary to deliver benefits it can perhaps improve the experience for those who rely on the Service for their welfare.

II. To Understand the Challenge Requires an Understanding of What Agencies Do in Delivering Benefits

The prior Section both provides a description of the EITC as well a general background on its importance. In this Part, I begin the process of better situating the Service's challenges in administering the EITC by identifying on a more granular level the various functions that are associated with the task of delivering benefits. Nontax scholars looking at agencies have systematically identified the functions associated with delivering benefits. For example, Professor David Super in his article *Privatization, Policy Paralysis, and the Poor*⁴⁰ divides the function of delivering benefits into distinct activities, including the following:

- 1) Prospective claimants require some assistance in applying for the program;
- 2) Someone must set eligibility criteria and procedures;
- 3) Someone must determine whether each claimant meets those eligibility criteria and procedural requirements;
- 4) Someone must keep records of those eligibility decisions;
- 5) Someone must issue benefits to claimants found eligible;
- 6) Someone must resolve disputes with claimants concerning eligibility and issuance;

³⁹Olson, *supra* note 35, at 2.

⁴⁰Super, *supra* note 9, at 403-05 (2008). Professor Super undertook his description as part of his attempt to analyze the relative roles of the private and public sectors in the task of delivering benefits. He is one of the few nontax scholars looking at poverty law to attempt to incorporate some of the insights from the IRS's administration of the EITC and in particular the role that the private sector (commercial preparers and software developers) play in delivering benefits.

- 7) Someone must review performance at each of these steps to protect the program integrity.⁴¹

An additional complication in the tax system, unlike many though not all benefits programs, is that it relies to a large extent on the private sector in the form of commercial tax return preparers and software developers who assist (for healthy fees) in the claim application process, as well as at times in the issuance or delivery of the benefits (also for fees). That private sector involvement ensures that there are dynamics present in the tax system that are not generally found in other programs.⁴² The presence of the private sector in performing what may be thought of as essential functions in the administration of benefits has highlighted areas where there may be in fact a divergence of interests between the private sector actors, the government and the beneficiaries.⁴³

For purposes of this Article, I wish to focus attention on assistance in applying for benefits, setting rules in determining eligibility, resolving disputes regarding eligibility, and reviewing performance of the agency, as they are the areas most directly related to EITC administration, where the Service faces many challenges and where I believe there is significant room for improvement. I will briefly discuss those tasks below, highlighting some key features.

A. Assistance in Applying for Benefits

In laying out the tasks, Professor Super also provided some useful context to help consider what agencies may need to do to fully perform their duties with respect to the distinct activities. In connection with applying for benefits, Professor Super notes that the “extent of the help [that agencies provide to applicants] varies: some may require only a copy of the application form

⁴¹ Professor Super identifies three other tasks that are not directly relevant in the context of improving administration: program funding, conversion of benefit and reimbursing those who may convert benefits. Super, *supra* note 9, at 404. As to the latter two tasks, the EITC itself is in the form of cash or an offset to a tax liability unlike some benefits provided in kind or in the form of vouchers, such as housing assistance or food stamps. This does highlight the IRS’s relationship with the private sector, as some claimants pay providers for the privilege of speedily obtaining cash refunds from the IRS.

As to the first factor not directly relevant, agency funding of a program, as the EITC is a tax expenditure provision, there is no specific annual appropriation, though Congress pays for the program through its net reduction in tax revenues and the Service’s administrative costs. While there are associated administrative costs that Congress must consider in light of the functions inherent in delivering benefits, and on occasion Congress has specifically appropriated moneys to be used to administer the EITC, the costs of the program are wrapped in to the Service’s general operating budget.

⁴² The discussion of the relative roles of the private and public sector in delivering benefits in the tax system is an important topic that is outside the scope of this Article, though a topic I hope to address in future research.

⁴³ High error rates, for example among unenrolled preparers who submit EITC claims, are a key reason why advocates have proposed regulating and the IRS has attempted to more directly regulate unlicensed preparers. See CRANDALL-HOLLOCK, *supra* note 1, at 21-25 (discussing differences in error rates among types of preparers).

and information about when and where to submit it; others may need help completing the form and gathering information required to complete the form or to persuade the program to accept the assertions on the application.”⁴⁴

What contributes to the varying need? Complexity of eligibility and the characteristics of the population are the main variables. It turns on the “complexity of substantive and procedural requirements, the extent of its measures to prevent incorrect awards of benefits, and the characteristics—such as education, disability, and living arrangements—of the individual claimant.”⁴⁵ Beyond complexity and characteristics, Super notes that agency efforts to address those complexities and beneficiary characteristics often revolve around values that the agency itself may emphasize: “[s]ome programs value eligible persons’ participation sufficiently to conduct outreach to inform prospective claimants of the procedures for applying.”⁴⁶ Unstated in Professor Super’s description but implicit in his discussion is the importance that society and the individuals themselves place on the benefit that the agency is administering.

B. *Determining Whether Claimants Meet Eligibility Criteria and Procedural Requirements*

An additional key task that agencies perform is determining who is eligible to receive the benefits the agency is charged with administering. The task includes addressing “a wide range of definitional questions relating to the substantive criteria and important details that must be supplied on procedural matters.”⁴⁷ As Professor Super notes, some of the agency decisions come in the form of formal agency guidance but others are in the form of less formal guidance such as manuals. Super notes that to help “inform policy-making, someone typically conducts at least informal research into the program’s operations and effectiveness.”⁴⁸ While Professor Super in his discussion focuses on the agency setting rules, agencies also have to apply those rules to specific applications. That division closely approximates the distinction in administrative law between rulemaking and adjudication, with the former focusing on the setting of general policies and rules and the latter focusing on applying those policies and rules to individuals.⁴⁹

⁴⁴ Super, *supra* note 9, at 403.

⁴⁵ Super, *supra* note 9, at 403.

⁴⁶ Super, *supra* note 9, at 403-04.

⁴⁷ Super, *supra* note 9, at 404.

⁴⁸ Super, *supra* note 9, at 403.

⁴⁹ I have discussed rulemaking versus adjudication before. See Leslie Book, *A Response to Professor Camp: The Importance of Oversight in IRS Collection Determinations*, 84 IND. L.J. SUPP. 63 n.7, 64-65 (2009) (discussing the distinction between rulemaking and adjudication in administrative law).

C. Resolving Disputes with Claimants Concerning Eligibility and Issuance

This task recognizes that despite eligibility rules and application procedures, there invariably will be disputes between the agency and individuals regarding eligibility for the benefits as well as perhaps the manner in which the agency issues the benefits. Some disputes can be resolved internally, while others may require a third party such as an administrative or judicial tribunal. Accordingly, Congress and agencies must concern themselves with setting out procedures with respect to disputes. From the agency perspective that includes ensuring that its employees and individual applicants understand the rights associated with challenges to agency determinations.

While Professor Super does not address this, this task seems closely connected to challenges in applying for benefits in the first place, including the complexity of the eligibility requirements and the characteristics of the population applying for benefits. To the extent individuals face challenges and uncertainty regarding eligibility it is likely that there will be more back-end disputes with the agency that may need to be adjudicated by the agency or a judicial tribunal.

D. Review of Performance to Maintain Integrity

This task recognizes that there is a need for regular review of how the agency performs the tasks associated with delivering benefits. This includes a need to evaluate the agency's procedures, as well as a review of the application of the rules to the individuals themselves. To perform this function well, it is important that the party charged with reviewing program integrity not only understand the various components associated with benefit delivery but also take a holistic view of the agency's performance. Consider, for example, an agency that fails to adequately assist in applying for benefits but which excels in determining whether an applicant that does apply meets eligibility criteria. Likewise, if an agency is successful in reducing program error but in doing so deters eligible individuals from applying or in fact disallows in whole or in part eligible claimants then that agency's performance is inadequate. A review function must therefore understand how any of its actions on one task relate to the overall goal of successfully administering the entire benefits program.

In addition, to the extent that a system (such as the tax system) relies on the private sector to perform key tasks associated with the delivery of benefits, any review of program integrity should include a mechanism to review the quality of the private sector's actions, including the private sector's impact on program integrity and claimant costs. A growing literature⁵⁰ recognizes the private sector may exploit consumer information shortfalls or cognitive biases, both of which may contribute to individuals having benefits siphoned

⁵⁰GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION (2015). Drawing on behavioral economics, the authors make the case that the market will step in to exploit information shortfalls and cognitive biases to extract fees or create demand for unneeded services or products.

off in the form of fees or claims that may in fact have a greater tendency to be erroneous, facilitated by preparers more than willing to take fees based in part on producing refunds, irrespective of eligibility.⁵¹ It is therefore crucial that program integrity take into account the ways that an agency either explicitly or implicitly relies on the private sector to perform any of the key functions associated with benefit delivery.

III. Bureaucratic Oppression: Why Agencies Tend to Act in A Way That Does Not Further Program Goals

In the prior Section, I identified the specific tasks that agencies engage in when delivering benefits. The next step in this Article is identifying the reasons why agencies tend to fail to deliver in their role as benefit administrator with a focus on the inherent challenges associated with the relationship between the government and individuals who receive benefits. Relying largely on Professor Edward Rubin's typology in this Section I describe the causes of bureaucratic oppression. Underlying the approach Professor Rubin and I advocate is the principle that "in order to fashion remedies it is necessary to understand its sources."⁵² As Professor Rubin notes, unfortunately, in looking to the problem's source "there is an embarrassment of riches: almost every feature of the governmental process seems to possess the potential to generate oppressive behavior."⁵³ Professor Rubin, in framing the discussion in this way, does provide a useful caveat; by identifying the ubiquity of the problem it should not lead to the conclusion that "government is invariably oppressive and that it never does anything correctly." That, Rubin notes, is "simplistic" and a "political vulgarity."⁵⁴ The goal of setting out the problem in a granular way is not to throw up one's hands and say that the government cannot do the job, but rather to help pave the way for understanding the sources of the problem so to allow for solutions that can help the government overcome some of the prevalent obstacles.

⁵¹It is outside the scope of this Article to fully examine the relative roles of the private and public sector in delivering tax benefits. As Professor Super identifies, the choice to use the private sector with respect to any task in delivering benefits is not binary; rather there is a continuum of private sector involvement in many of the tasks:

Public debates over privatization of government programs tend to have a misleadingly binary character. Either a program will be privatized, we are told, or it will not be. More sophisticated analysts may recognize that varying degrees of private involvement are possible, but fearing or desiring slippery slopes, advocates on both the left and the right prefer to draw lines in the sand.

Virtually every significant social welfare program is partially privatized; operating these programs without private entities performing some important roles is virtually unthinkable in our political culture.

Super, *supra* note 9, at 403.

⁵²Rubin, *supra* note 6, at 301.

⁵³Rubin, *supra* note 6, at 301.

⁵⁴Rubin, *supra* note 6, at 301.

A. *Status Differences*

The differences in socioeconomic status between government officials and the individuals who apply for benefits may contribute to oppressive behavior. The precise impact of differences in status is difficult to measure and may vary widely across programs. For example, Professor Rubin describes how in modern society officials who provide government benefits and services are located in the middle of the social hierarchy. On the one hand, “[g]overnment officials who provide assistance to disadvantaged citizens such as welfare workers are unambiguously superior because they have higher status and because their clients are automatically placed in a socially subordinate position by the nature of the benefits being provided to them.”⁵⁵ This is a contrast with government officials located in wealthier neighborhoods (like DMV employees) where the official may be “socially subordinate” though the official benefits from the authority inherent in the position.

External circumstances such as location of the individuals and the nature of the benefits have a great impact on whether status differences have a material impact on program quality. Professor Rubin describes research (albeit a bit dated) suggesting that government officials have tended to treat beneficiaries who have higher socioeconomic status with greater respect than recipients who are of lower status and when the benefits are not attached to merit:

In his study of the Social Security Administration, Jerry Mashaw observes that people who can claim disability benefits because they are eligible for Social Security were generally treated respectfully and conscientiously. This is consistent with the idea that status differences are partially responsible for bureaucratic oppression. While the poor, the unemployed and other recipients of government benefits are generally low status persons—that is, lower than public officials—Social Security recipients are not. Everyone grows old, including the wealthy, the well connected, and the skillfully vociferous. Moreover, Social Security is not regarded as welfare but as a return on payments made by working people, which is exactly what Franklin Roosevelt intended when he crafted the program. These features confer status on Social Security recipients and thus serve to secure respectful behavior by the agency.⁵⁶

For purposes of considering the distribution of benefits that may not be as connected to merit, the government official may in fact have further grounds to look down upon the individual seeking the benefit. More from Professor Rubin on this:

This process may also occur in reverse. Benefits that are regarded as a recompense for meritorious effort enjoy a generally positive reputation. Examples, in addition to Social Security benefits, include veterans’ benefits and federal home loan mortgage assistance. These benefits may sometimes confer status on their recipients, but at the very least, the recipients are not viewed as

⁵⁵ Rubin, *supra* note 6, at 304.

⁵⁶ Rubin, *supra* note 6, at 305 (footnotes omitted).

low-status individuals. In contrast, programs that provide benefits based on general eligibility, such as food stamps, public housing, and welfare, tend to be more controversial and often become the particular focus of anti-government rhetoric. This attitude may decrease the status of those receiving such benefits, because they are seen as undeserving.⁵⁷

While Professor Rubin states that there is a need for empirical research on this point, his description is useful as a possible source of either overt or subtle government mistreatment.

B. *Stranger Relations*

Professor Rubin notes that a closely related problem to status difference is that the government official and individual applying for benefits are likely strangers. Contrasting both historical practices when there was a greater familiarity between the state and the subjects and the modern regulatory state where some agency employees are cozy with the individuals working with the regulated entities, Professor Rubin identifies the anonymity that often accompanies the state and its apparatus used to administer benefit programs as a potential barrier in the delivery of benefits and a source of oppression.⁵⁸

In addition to the anonymity, Professor Rubin also notes that government employees often have sizeable caseloads. The sheer amount of the work that often accompanies a government official contributes to a depersonalizing of the applicants as well as creating a sense that it is futile to take steps to reduce the anonymity.⁵⁹

C. *Institutional Pathologies*

Professor Rubin looks to organizational theory as another source of potential oppressive behavior. While he notes that hierarchy and rules can constrain or prevent oppressive behavior “organizational theory documents a wide variety of pathologies, including in a large organization how midlevel managers often set intermediate goals whose consequence is to harm people they are supposed to help.”⁶⁰ Rubin singles out how employees may be particularly susceptible to external pressures that take the agency away from the goal of benefit delivery to “ensure survival or advance a subsidiary goal.”⁶¹

Professor Rubin also singles out red tape, noting that “one of best known and most notorious institutional pathologies is excessive formalism.”⁶² What is challenging is the distinction between appropriate rules and rules that the public perceives as unnecessary, with the latter constituting the commonly heard but less often defined red tape:

⁵⁷ Rubin, *supra* note 6, at 306-07 (footnotes omitted).

⁵⁸ Rubin, *supra* note 6, at 307-11 (footnotes omitted).

⁵⁹ Rubin, *supra* note 6, at 309.

⁶⁰ Rubin, *supra* note 6, at 312.

⁶¹ Rubin, *supra* note 6, at 313.

⁶² Rubin, *supra* note 6, at 313.

[W]hat makes rules and procedures qualify as red tape is the perception that they are unnecessary. Large numbers of rules and restrictions are unavoidable, but unnecessary rules and restrictions are truly oppressive precisely because they impose additional burdens on inherently burdensome processes for no good reason. Distinguishing the necessary from the unnecessary, however, is likely to be a difficult task. If one opens the typically thick office manual or employees' manual of a governmental agency, one is unlikely to find a statement that any particular requirement is unnecessary. What is needed is a microanalysis of the particular agency, a careful assessment that determines which rules and requirements are essential to the orderly operation of a large institution and which ones are imposed for the agency's convenience or as remnants of some now-forgotten practice.⁶³

This explanation leaves open a number of questions, including who should be charged with performing the micro-level analysis that Professor Rubin recommends and precisely how much discretion should be given to government employees in dispensing with rules that may have value on an aggregate though not individual basis.

D. *Divergent Incentives*

The problem of divergent incentives refers to the differing incentives that animate government employees, and in particular how there may be incentives that will discourage government employees from serving the interest of the benefit applicants. As a general matter the problem of divergent incentives with respect to government employees presupposes that people will act to maximize their own material self-interest rather than fulfilling their obligation to serve the needs of others.⁶⁴ This problem is closely related to public choice theory, which "is grounded on the premise that people maximize their material self-interest."⁶⁵

Professor Rubin notes that there has been some difficulty in applying the insights of public choice theory in the context of agency conduct. The main difficulty is identifying how or more precisely what interest a government employee may be attempting to maximize, though the divergence of incentives is often associated with government employees acting in a way to benefit the private sector so that a government employee can maximize potential for post-government employment with the entity the agency regulates.⁶⁶ Nonetheless he believes that a more convincing problem is that divergent

⁶³Rubin, *supra* note 6, at 314-15.

⁶⁴Rubin, *supra* note 6, at 316.

⁶⁵Rubin, *supra* note 6, at 316.

⁶⁶Regulatory capture is the process by which regulatory agencies eventually come to be dominated by the industries they were charged with regulating. *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

incentives in benefits programs may arise because bureaucrats may act to minimize work or hassle associated with performing their functions fully.⁶⁷

Professor Rubin notes that there is a lack of precision in applying the problem of diverging incentives to bureaucrats in the context of benefits targeted to the poor, with a need for perhaps some more precise cataloguing of the problem. Despite that lack of precision, he concludes that the problem is real and requires attention:

There can be little doubt, however, that government agents are subject to a vast and varied array of incentives and motivations, and that only some of these correspond to the behaviors that meet the expectations of the program's originators or advance the program's stated goals.⁶⁸

IV. How to Address the Problem of Bureaucratic Oppression: A Brief Discussion

As Professor Rubin notes, bureaucratic oppression is “hardly an obscure phenomenon . . . and every person is likely to have experienced it personally at one time or another.”⁶⁹ Despite that awareness there is also a sense that the problems are deeply entrenched in our basic structure of government. Professor Rubin notes that despite a sense of fatalism associated with that entrenchment, “it has also elicited thoughtful programs and proposals for fundamental change in governmental operations from a variety of perspectives.”⁷⁰

According to Professor Rubin there are four main perspectives that offer possible solutions to the problem, though each has limitations:

1. A judicial perspective with an emphasis on imposing due process standards on government agencies;
2. A legislative perspective, which includes an awareness of the role ombudspersons can play in protecting rights;
3. A management perspective, including proposals for client-centered administration; and
4. A microeconomic perspective, with a reliance on market incentives.⁷¹

⁶⁷Rubin, *supra* note 6, at 317. The presence of the private market in the delivery of tax benefits with large software companies and national chain commercial return preparers may in fact create a different agency incentive, one that takes into account private sector interests rather than the interests of the beneficiaries. See generally Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, 2006 Wis. L. REV. 1103 (2006).

⁶⁸Rubin, *supra* note 6, at 318.

⁶⁹Rubin, *supra* note 6, at 318.

⁷⁰Rubin, *supra* note 6, at 319.

⁷¹Rubin, *supra* note 6, at 319.

A. *Due Process*

In his article, Professor Rubin sketches the twentieth century's expansion of due process hearing and notice rights to include interactions between agencies and regulated individuals, which he believes is in fact an "impressive conceptual success."⁷² A main underlying concern with due process protections is to prevent the government from making erroneous determinations that deprive an individual of a protected right. The extension in a flexible way to administrative settings including the right to receive benefits is a mechanism to prevent against improper government actions, though as Professor Rubin notes, it suffers from major limitations.

The first limit is that, while due process can protect, its reach generally requires the agency to reach a determination that would generally constitute an adjudication in administrative law parlance. This, according to Professor Rubin is a major weakness, as "most of the interactions that give rise to bureaucratic oppression lie well outside this category."⁷³ Moreover, even if the interactions did arise to the level of adjudications, the characteristics of those receiving benefits are likely to contribute to those individuals not asserting rights anyway: "many people who receive benefits or services from government—the disabled, the sick, the elderly, the young, the very young, the mentally deficient or deranged—are precisely those whose vulnerabilities impede assertion of their rights. Like consumers generally, they are more likely to 'lump it' than to enter the foreign and seemingly perilous territory of legal action."⁷⁴ A further caution Rubin raises is the challenge that many poor people feel once they do assert rights, with the procedures meant to protect those rights at times serving as a new source of oppression rather than a cure for existing issues.⁷⁵

B. *The Ombuds Role*

Professor Rubin identifies ombudsmen as an institution that he believes can assist with the problem and effects of agency oppression. The term is associated with an individual or office "that stands apart from the administrative hierarchy and is authorized to intervene in its procedures on behalf of private parties."⁷⁶ Professor Rubin traces their origin to Scandinavia and notes that many ombuds offices are situated within legislatures, though others (like the Taxpayer Advocate Service) are situated within the agencies themselves.

According to Rubin, there are three defining features of ombudspersons: "they are complaint driven, they are empowered to investigate, and they are independent of the administrative hierarchy."⁷⁷ This independence and power

⁷²Rubin, *supra* note 6, at 323.

⁷³Rubin, *supra* note 6, at 323-24.

⁷⁴Rubin, *supra* note 6, at 324.

⁷⁵Rubin, *supra* note 6, at 325-26.

⁷⁶Rubin, *supra* note 6, at 327.

⁷⁷Rubin, *supra* note 6, at 330.

to investigate leads Rubin to note the similarity between the protections offered by ombuds offices and the courts through due process:

They enable both ombudspersons and judges to redress specific wrongs or problems involving individuals, to do so on the basis of information about these wrongs and problems, and to act in a more neutral, more confrontational way toward administrative agents than those agents' superiors or colleagues in the administrative hierarchy.⁷⁸

A key limitation that Professor Rubin notes however is that there are many times the agency itself will tend to resist the ombudsperson's investigatory efforts and may in fact conceal rather than disclose information that would assist in a full consideration of the issue.⁷⁹ In addition, Professor Rubin notes that at times, the ombuds office has "no means of effecting change other than issuing empty threats."⁸⁰

C. *Client-Centered Administration: The Management Solution*

Professor Rubin also identifies as a possible solution management theory, an idea he notes is rooted in the disciplines of both sociology and engineering. Unlike the role of ombuds offices, the "management approach attempts to change the internal structure and procedures of the agency itself, enabling it to carry out its tasks more fairly and effectively."⁸¹ The primary goal of injecting principles of management theory is shift government employees to one of thinking of potential beneficiaries as clients who are deserving of high levels of service.⁸²

While Professor Rubin notes that although in theory adopting these principles may contribute to better interactions, they are unlikely in and of themselves to be successful, as "the real causes of bureaucratic oppression are deeply embedded structural factors discussed in the previous Section: status differences, stranger relations, institutional pathologies, and divergent incentives."⁸³ In effect, failing to account for structural differences will ensure that solutions based on attempts to impose a client-based customer-service ethos are likely to fail.

D. *Market Mechanisms*

Professor Rubin identifies the government's use of the private market to address bureaucratic oppression in two distinct ways. The first uses "market mechanisms by diminishing the scope of regulation, benefits, and services that the government provides."⁸⁴ The second injects principles of the market

⁷⁸Rubin, *supra* note 6, at 330.

⁷⁹Rubin, *supra* note 6, at 332.

⁸⁰Rubin, *supra* note 6, at 332.

⁸¹Rubin, *supra* note 6, at 330.

⁸²Rubin, *supra* note 6, at 333.

⁸³Rubin, *supra* note 6, at 337.

⁸⁴Rubin, *supra* note 6, at 341.

to assist in the manner that the government structures agencies. As Professor Rubin notes, while “these are independent solutions” they share the same theoretical underpinning, namely they hope to ensure that self-interest motivation of workers “opposes, rather than encourages, oppressive behaviors.”⁸⁵

The first mechanism (using the market directly) is more directly relevant to the tax system, as, unlike many other benefits programs, the tax system to a large extent does rely on the market in the form of commercial preparers and software to assist in the application process for benefits. There are multi-billion dollar industries with differing segments in each sector. Consumers have choice to purchase products or services, seeming to allow consumers choice and a mechanism to gain access to benefits, albeit at a cost in terms of fees.

Professor Rubin cautions that actors in the private sector may contribute in their own right to creating barriers for potential program beneficiaries, as those actors may “be governed by status differences, stranger relations institutional pathologies and divergent incentives.”⁸⁶ In particular, the last point seems most apt, especially in light of research which suggests that free markets will reach an equilibrium that may derive from business practices that assist in manipulating consumer judgment and exploiting information shortfalls that lead to individuals acting inconsistent with their self-interest.⁸⁷ The ability of (and some say the inevitability of) market actors to capitalize on information shortfalls and psychological biases should give caution to those who think that delegating governmental functions to the private sector is the means to ensure that individuals are treated well and avoid the pitfalls of oppressive behavior. There are interesting avenues for future research on how the government and private sector may work more closely together, especially in the context of tax administration, where commercial return preparers and software developers intersect with the vast majority of EITC claimants and play a key role in the application process and overall program integrity.

V. Case Study: The Ban on Claiming the EITC

This Article is an attempt at broadening the inquiry into the Service’s ability to administer the EITC and benefits programs generally. In evaluating legislative or administrative efforts with respect to the EITC, I believe that rather than start with a tax-centric perspective on administration the proper starting point is one that pivots off Service tasks in delivering benefits.

It is admittedly just a preliminary step, because the next step in the inquiry is to apply the insights from scholars such as Professors Super and Rubin to the specific aspects of the Service’s administration of the EITC and other

⁸⁵Rubin, *supra* note 6, at 340-41.

⁸⁶Rubin, *supra* note 6, at 342.

⁸⁷AKERLOF & SHILLER, *supra* note 50, at xi.

provisions more generally.⁸⁸ That inquiry must take into account current statutes, regulatory guidance, agency practice, the role of the courts, and sources that provide external nonjudicial checks on Service integrity, such as the National Taxpayer Advocate and Government Accountability Office. It must also consider private sector actors such as commercial return preparers and software companies, as well as public interest actors who are engaging the Treasury and the Service on rules that address low-income taxpayers and also coordinating on litigation.

As the inaugural International Taxpayer Rights Conference demonstrated, throughout the world, including in the United States, there is increased recognition of the importance of taxpayer rights.⁸⁹ In this Article, I have attempted to bring awareness to the realization that while recognizing, publicizing and even legislating taxpayer rights are important, the rights themselves may be lost in translation when an agency such as the Service takes up the particular task of administering benefits programs.

As some have noted, the characteristics of the individuals who benefit from tax credits such as the EITC do not necessarily mesh with general Service efforts to more efficiently deliver service, or with traditional means of ensuring eligibility.⁹⁰ Perhaps even more importantly, however, as Professor Rubin's description of the sources of bureaucratic oppression suggests, policymakers should directly consider how there may be barriers that may prevent the Service from performing its tasks, with those barriers potentially having a major effect on the concerns underlying many of the explicitly recognized taxpayer rights.

This is all a bit abstract until applied in a particular context, but as an example that illustrates the next step in the inquiry consider the penalty found in section 32(k)(1)(B)(ii), which authorizes the Service to ban individuals from claiming the EITC for two years if the Service determines that they claimed the credit improperly due to reckless or intentional disregard.⁹¹ There have

⁸⁸To be sure, many of the initial interactions between individuals and the Service derive from automated correspondence which may suggest a less prominent role for some of the sources of oppression described herein. Yet the presence of human discretion in setting operating rules to generate automated correspondence as well as in some of the tasks associated with distributing benefits even in the face of greater automation opens the door to the utility of the inquiry in this article.

⁸⁹DUNCAN BENTLEY, *TAXPAYERS' RIGHTS: THEORY, ORIGIN AND IMPLEMENTATION* (Kluwer Law Int'l 2007).

⁹⁰Schneller, *supra* note 2; Michelle Drumbl, *Those Who Know, Those Who Don't, And Those Who Know Better: Balancing Complexity, Sophistication, And Accuracy On Tax Returns*, 11 PITT. TAX REV. 113 (2013) (stating that characteristics of refundable credit claimants create particular challenges for those wishing to contest the IRS's imposition on civil penalties).

⁹¹The provision has its roots in traditional benefits programs; Congress adopted it in the Tax Reform Act of 1997. Pub. L. No. 105-34, § 1085, 111 Stat. 788, 955-56. The Service also has the right to impose a ten-year ban if the Service determines that the taxpayer fraudulently claims the EITC. I.R.C. § 32(k)(1)(B)(i). For a discussion of the ban, see John Plecnik, *Reckless Means Reckless: Understanding the EITC Ban*, 142 TAX NOTES (TA) 847 (Mar. 20, 2014).

been a number of critiques of the ban in the last few years. The criticism has focused largely on (1) the lack of defined standards to assist the Service in evaluating whether a claimant's conduct is truly reckless,⁹² (2) inadequate procedural protections in ensuring that parties subject to the ban understand what the Service is imposing and why they are imposing the ban,⁹³ and (3) a lack of clear and meaningful way for a claimant to challenge Service determinations in court.⁹⁴

TAS studies have shown that the Service has not performed well in administering the ban. For example, in the 2013 Annual Report to Congress, the NTA looked at a representative sample of 2011 cases where the Service imposed the ban.⁹⁵ The research found that the Service improperly imposed the ban almost 40% of the time. In almost 90% of the time the Service failed to explain to the taxpayer why in fact it was imposing the ban; in almost 30% of the cases the claimant did not participate in the audit where the Service proposed to impose the ban.

In addressing the research, the NTA sensibly noted that Service procedures do not reflect that many of the claimants who the Service imposes a ban on may be in need of education to learn why in fact the claims may be incorrect; in addition, the NTA noted that in over 70% of the cases where the Service imposed a ban the claimant had in fact used a paid preparer. As part of the NTA's recommendations, it suggested that the Service perform internal quality review and update its manual to reject automatic impositions of the ban and to allow taxpayers to explain why they believe the ban is not proper. NTA also suggested that Treasury issue guidance to help explain when actions would be reckless in this context. In addition, NTA suggested that the examiners prior to imposing the ban (1) attempt to speak to the taxpayer, (2) determine whether anything the taxpayer submitted is suggestive of a "sincere effort" to prove the EITC even if the efforts or documents submitted are insufficient, and (3) consider the role that a paid preparer may have played in submitting the claim. The NTA also recommended a legislative change that would shift the burden of proof on the Service when the Service proposes to impose the ban to help ensure a more meaningful chance to get court review of the ban.⁹⁶

In the context of the recently legislated taxpayer rights, the issues implicated in the critique of the Service's administration of the ban include the right to challenge the Service's position and be heard, the right to appeal a

⁹² See Plecnik, *supra* note 91.

⁹³ 2013 NAT'L TAXPAYER ADVOCATE ANN. REP., EARNED INCOME TAX CREDIT: THE IRS INAPPROPRIATELY BANS MANY TAXPAYERS FROM CLAIMING EITC 103 [hereinafter NAT 2013 ANN. REP.].

⁹⁴ Leslie Book, *The Ban on Claiming the EITC: A Problematic Penalty*, PROCEDURALLY TAXING, Jan. 23, 2014, <http://www.procedurallytaxing.com/the-ban-on-claiming-the-eitc-a-problematic-penalty/>.

⁹⁵ See NAT 2013 ANN. REP., *supra* note 93.

⁹⁶ NAT 2013 ANN. REP., *supra* note 93, at 312, 315.

Service decision in an independent forum and the right to a fair and just tax system.⁹⁷ The Service on the surface embraces those rights but the challenge is how to implement those rights in differing contexts. As Professor Super has identified, it is part of the agency's job in administering a benefits program to determine whether someone meets eligibility criteria and to resolve disputes concerning eligibility. The NTA study looking at the Service's imposition of the ban suggests that the Service has failed in ensuring that it protects taxpayer rights in this context. The insights of Professor Rubin suggest that there are likely barriers that may contribute to any agency's challenges in interacting with lower-income individuals. Without further qualitative review of the interaction between the individuals and the Service in the context of the ban it is difficult to isolate specifically which of the barriers may have contributed to the shortfalls TAS has identified. If the Service wishes to meaningfully improve its service it would, on its own, study not only outcomes but the reasons why its examiners took or did not take certain actions, as well as the challenges that its policies will create given the characteristics of the population and sources of barriers that tend to contribute to poor agency service. An awareness of the barriers that typically exist in this context can inform the type of review that the agency should perform, as well as limit the chances that the agency will engage in conduct that will oppress individuals and impinge upon rights.

Absent more qualitative information, we do know however that there are solutions to bureaucratic oppression in the form of meaningful court review, internal reviews such as that provided by strong ombuds office, and changes in management and employee culture.

All of those solutions warrant a detailed discussion. For these purposes consider judicial review. While court review has its own limitations, it can be, as Professor Rubin identifies, a possible external check on agency abuse. On this front the ban under section 32(k) comes up woefully short. I have previously written that there is substantial uncertainty as to whether the Tax Court even has jurisdiction to hear as part of its deficiency procedures the

⁹⁷NAT 2013 ANN. REP., *supra* note 93, at 16.

merits of a ban determination,⁹⁸ and there is little in the way of defined procedures that would allow parties to raise meaningful challenges to an agency ban imposition. Given that a challenge to a proposed ban may require the claimant to file a tax return with a claim in another year, challenging the ban is likely to attract additional claimant costs in terms of time and potential fees. In other programs (such as in proposed bans stemming from food stamp violations), there are defined procedures for administrative disqualification procedures, and expedited court review to hear challenges to those proposed disqualifications.⁹⁹

Rather than focus on taxpayer concerns in this process, in late 2015 Congress actually cut back on claimant procedural protections by allowing the Service to dispense with issuing a statutory notice of deficiency when a claimant files a return claiming the EITC during a time period that the ban is in place.¹⁰⁰ It did so without hearings or any requirement that the Service address some of the concerns that the NTA raised when it offered meaningful criticism of the ban in its prior studies.

The ball now is back in the Service's court. No doubt that the NTA will be looking at what the Service does, but the Service could anticipate the likely concerns by embracing the challenges it faces in making key eligibility

⁹⁸Leslie Book, *The Ban on Claiming the EITC: A Problematic Penalty*, PROCEDURALLY TAXING, Jan. 23, 2014, <http://www.procedurallytaxing.com/the-ban-on-claiming-the-eitc-a-problematic-penalty/>. In that blog post, I discussed an exchange I had with former clinic director, Carl Smith, who noted that "Section 6665 authorizes the deficiency procedures to apply to certain penalties imposed by Chapter 68, but that does not give the Tax Court jurisdiction to treat a section 32(k) determination as if it were a penalty imposed by Chapter 68. Finally, there is no provision in the Code giving the Tax Court independent declaratory jurisdiction to review the Service determination that 32(k) will apply to any EITC claim made in a later year."

I believe it likely that as a jurisdictional matter to challenge the ban in Tax Court a claimant would have to claim the EITC in a year that the claimant is prohibited from receiving the credit. That is because section 6214(a) generally provides that the Tax Court has jurisdiction to redetermine the correct amount of the deficiency. Section 6214(b) provides in relevant part that the Tax Court in redetermining the correct amount of a deficiency for any taxable year "shall consider such facts with relation to taxes for other years . . . as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year . . . has been overpaid or underpaid."

There are only two nonprecedential Tax Court opinions that have considered the Service's imposition of the ban in deficiency procedures, *Garcia v. Commissioner*, T.C. Summary Opinion 2013-28, and *Baker v. Commissioner*, T.C. Summary Opinion 2014-57. Neither discussed the potential jurisdictional issue though both considered it in the context of a deficiency proceeding arising from the year in which the conduct supposedly took place, and not during a year when the ban was in place.

⁹⁹See *Forester v. Ohio Dept. Human Services*, 122 Ohio App. 3d 750 (1997) (reviewing administrative disqualification hearing stemming from purported intentional food stamp eligibility violations).

¹⁰⁰Section 32(k), as amended by the Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub. L. No. 114-113 (extending the disallowance periods to the child tax credit (CTC) and American Opportunity Credit (AOC), as well as allowing the Service to use math error summary assessment procedures to disallow any EITC, CTC or AOC claim made during the disallowance period).

determinations. A true appreciation of the Service's role would look not only at the cost involved per claimant in making an assessment during the ban period but the challenges and costs associated from the claimant's perspective.

VI. Conclusion

Administering a benefits program is not easy. One perceived advantage of using the tax system to deliver benefits is its relatively low direct administrative costs. As this Article suggests, while the Service may be in a unique position to deliver benefits without the traditional use of costly on the ground caseworkers who make upfront eligibility determinations, to administer a program that confers needed benefits to claimants requires not only a major commitment of resources but an appreciation of the nature of the challenges before it. An agency that looks mainly at expedience and not at experience will jeopardize taxpayer rights and potentially undermine confidence in the tax system. The Article provides insights from nontax scholars who have considered the challenges of delivering benefits and takes the small but important step of situating the Service's tasks in light of those challenges.

Appendix Historical EITC Parameters¹⁰¹

Earned Income Tax Credit Parameters, 1975-2016
[Dollar amounts unadjusted for inflation]

Calendar year	Credit rate (percent)	Minimum income for maximum credit	Maximum credit	Phaseout rate (percent)	Phaseout range [1]	
					Beginning income	Ending income
2016						
No children	7.65	6,610	506	7.65	8,270	14,880
One child	34	9,920	3,373	15.98	18,190	39,296
Two children	40	13,931	5,572	21.06	18,190	44,648
Three children	45	13,930	6,269	21.06	18,190	47,955
2015						
No children	7.65	6,580	503	7.65	8,240	14,820
One child	34	9,880	3,359	15.98	18,110	39,131
Two children	40	13,870	5,548	21.06	18,110	44,454
Three children	45	13,870	6,242	21.06	18,110	47,747
2014						
No children	7.65	6,480	496	7.65	8,110	14,590
One child	34	9,720	3,305	15.98	17,830	38,511
Two children	40	13,650	5,460	21.06	17,830	43,756
Three children	45	13,650	6,143	21.06	17,830	46,997
2013						
No children	7.65	6,370	487	7.65	7,970	14,340
One child	34	9,560	3,250	15.98	17,530	37,870
Two children	40	13,430	5,372	21.06	17,530	43,038
Three children	45	13,430	6,044	21.06	17,530	46,227
2012						
No children	7.65	6,210	475	7.65	7,770	13,980
One child	34	9,320	3,169	15.98	17,090	36,920
Two children	40	13,090	5,236	21.06	17,090	41,952
Three children	45	13,090	5,891	21.06	17,090	45,060

¹⁰¹ *Historical EITC Parameters*, TAX POLICY CENTER, Jan. 5, 2016, <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=36>.

Calendar year	Credit rate (percent)	Minimum income for maximum credit	Maximum credit	Phaseout rate (percent)	Phaseout range [1]	
					Beginning income	Ending income
2011						
No children	7.65	6,070	464	7.65	7,590	13,660
One child	34	9,100	3,094	15.98	16,690	36,052
Two children	40	12,780	5,112	21.06	16,690	40,964
Three children	45	12,780	5,751	21.06	16,690	43,998
2010						
No children	7.65	5,980	457	7.65	7,480	13,460
One child	34	8,970	3,050	15.98	16,450	35,535
Two children	40	12,590	5,036	21.06	16,450	40,363
Three children	45	12,590	5,666	21.06	16,450	43,352
2009						
No children	7.65	5,970	457	7.65	7,470	13,440
One child	34	8,950	3,043	15.98	16,420	35,463
Two children	40	12,570	5,028	21.06	16,420	40,295
Three children	45	12,570	5,657	21.06	16,420	43,279
2008						
No children	7.65	5,720	438	7.65	7,160	12,880
One child	34	8,580	2,917	15.98	15,740	33,995
Two children	40	12,060	4,824	21.06	15,740	38,646
2007						
No children	7.65	5,590	428	7.65	7,000	12,590
One child	34	8,390	2,853	15.98	15,390	33,241
Two children	40	11,790	4,716	21.06	15,390	37,783
2006						
No children	7.65	5,380	412	7.65	6,740	12,120
One child	34	8,080	2,747	15.98	14,810	32,001
Two children	40	11,340	4,536	21.06	14,810	36,348
2005						
No children	7.65	5,220	399	7.65	6,530	11,750
One child	34	7,830	2,662	15.98	14,370	31,030
Two children	40	11,000	4,400	21.06	14,370	35,263
2004						
No children	7.65	5,100	390	7.65	6,390	11,490
One child	34	7,660	2,604	15.98	14,040	30,338
Two children	40	10,750	4,300	21.06	14,040	34,458

Calendar year	Credit rate (percent)	Minimum income for maximum credit	Maximum credit	Phaseout rate (percent)	Phaseout range [1]	
					Beginning income	Ending income
2003						
No children	7.65	4,990	382	7.65	6,240	11,230
One child	34	7,490	2,547	15.98	13,730	29,666
Two children	40	10,510	4,204	21.06	13,730	33,692
2002						
No children	7.65	4,910	376	7.65	6,150	11,060
One child	34	7,370	2,506	15.98	13,520	29,201
Two children	40	10,350	4,140	21.06	13,520	33,178
2001						
No children	7.65	4,760	364	7.65	5,950	10,710
One child	34	7,140	2,428	15.98	13,090	28,281
Two children	40	10,020	4,008	21.06	13,090	32,121
2000						
No children	7.65	4,610	353	7.65	5,770	10,380
One child	34	6,920	2,353	15.98	12,690	27,413
Two children	40	9,720	3,888	21.06	12,690	31,152
1999						
No children	7.65	4,530	347	7.65	5,670	10,200
One child	34	6,800	2,312	15.98	12,460	26,928
Two children	40	9,540	3,816	21.06	12,460	30,580
1998						
No children	7.65	4,460	341	7.65	5,570	10,030
One child	34	6,680	2,271	15.98	12,260	26,473
Two children	40	9,390	3,756	21.06	12,260	30,095
1997						
No children	7.65	4,340	332	7.65	5,430	9,770
One child	34	6,500	2,210	15.98	11,930	25,750
Two children	40	9,140	3,656	21.06	11,930	29,290
1996						
No children	7.65	4,220	323	7.65	5,280	9,500
One child	34	6,330	2,152	15.98	11,610	25,078
Two children	40	8,890	3,556	21.06	11,610	28,495
1995						
No children	7.65	4,100	314	7.65	5,130	9,230
One child	34	6,160	2,094	15.98	11,290	24,396
Two children	36	8,640	3,110	20.22	11,290	26,673

Calendar year	Credit rate (percent)	Minimum income for maximum credit	Maximum credit	Phaseout rate (percent)	Phaseout range [1]	
					Beginning income	Ending income
1994						
No children	7.65	4,000	306	7.65	5,000	9,000
One child	26.3	7,750	2,038	15.98	11,000	23,755
Two children	30	8,425	2,528	17.68	11,000	25,296
1993						
One child	18.5	7,750	1,434	13.21	12,200	23,050
Two children	19.5	7,750	1,511	13.93	12,200	23,050
1992						
One child	17.6	7,520	1,324	12.57	11,840	22,370
Two children	18.4	7,520	1,384	13.14	11,840	22,370
1991						
One child	16.7	7,140	1,192	11.93	11,250	21,250
Two children	17.3	7,140	1,235	12.36	11,250	21,250
1990	14	6,810	953	10	10,730	20,264
1989	14	6,500	910	10	10,240	19,340
1988	14	6,240	874	10	9,840	18,576
1987	14	6,080	851	10	6,920	15,432
1985-86	11	5,000	550	12.22	6,500	11,000
1979-84	10	5,000	500	12.5	6,000	10,000
1975-78	10	4,000	400	10	4,000	8,000

[1] Beginning in 2002, the values of the beginning and ending points of the phase-out range were increased for married taxpayers filing jointly. The values for these taxpayers were \$1,000 higher than the listed values from 2002-2004, \$2,000 higher from 2005-2007, \$3,000 higher in 2008, \$5,000 higher in 2009, \$5,010 higher in 2010, \$5,080 higher in 2011, \$5,210 higher in 2012, \$5,340 higher in 2013, \$5,430 higher in 2014, \$5,520 higher in 2015, and \$5,550 higher in 2016.

Sources:

1975-2003: Joint Committee on Taxation; Ways and Means Committee, 2004 Green Book.

2004-2009: Internal Revenue Service, Form 1040 Instructions.

2010-2013: Internal Revenue Service, Revenue Procedures from various years.

2014: Internal Revenue Service, Revenue Procedure 2013-35 downloaded January 23, 2014 from <http://www.irs.gov/pub/irs-drop/rp-13-35.pdf>.

2015: Internal Revenue Service, Revenue Procedure 2014-61 downloaded November 11, 2014 from <http://www.irs.gov/pub/irs-drop/rp-14-61.pdf>.

2016: Internal Revenue Service, Revenue Procedure 2015-53 downloaded January 5, 2016 from <https://www.irs.gov/pub/irs-drop/rp-15-53.pdf>.