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AND PUBLIC FINANCE

.

“Invisible Taxpayers”

Linda Sugin
School of Law
Fordham University

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Vanderbilt Hall-208
Time: 4:00-5:50 p.m.
Number 5

SCHEDULE FOR 2015 NYU TAX POLICY COLLOQUIUM

(All sessions meet on Tuesdays from 4-5:50 pm in Vanderbilt 208, NYU Law School)

1. January 20 – Brigitte C. Madrian, Harvard Kennedy School. "Does Front-Loading Taxation Increase Savings? Evidence from Roth 401(k) Introductions."

2. January 27 – David Kamin, NYU Law School. "In Good Times and Bad: Designing Legislation That Responds to Fiscal Uncertainty."

3. February 3 – Kimberly Blanchard, Weil, Gotshal & Manges. "The Tax Significance of Legal Personality: A U.S. View."

4. February 10 – Eric Toder, Urban Institute. "What the United States Can Learn From Other Countries' Territorial Tax Systems."

5. **February 24 - Linda Sugin, Fordham University, School of Law. "Invisible Taxpayers."**

6. March 3 – Ruth Mason, University of Virginia Law School. "Citizenship Taxation."

7. March 10 – George Yin, University of Virginia Law School. "Protecting Taxpayers from Congressional Lawbreaking."

8. March 24 – Leigh Osofsky, University of Miami School of Law, "Tax Law Non-Enforcement."

9. March 31 – Shu-Yi Oei, Tulane Law School. "Human Equity? Regulating the New Income Share Agreements."

10. April 7 – Lillian Mills, University of Texas Business School. "Topics [to be determined] in Financial Reporting and Corporate Tax Compliance."

11. April 14 – Lawrence Zelenak, Duke University School of Law. "Up in the Air over the Taxation of Frequent Flyer Benefits: the American, Canadian, and Australian Experiences."

12. April 21 – David Albouy, University of Illinois Economics Department. "Should we be taxed out of our homes? Leisure and housing as complements and optimal taxation."

13. April 28 – David Schizer, Columbia Law School. "Tax and Energy Policy."

14. May 5 – Gregg Polsky, University of North Carolina School of Law, "Private Equity Tax Games and Their Implications for Tax Practitioners, Enforcers, and Reformers."

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INVISIBLE TAXPAYERS

Linda Sugin[*]

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[*] Professor of Law, Fordham Law School.

I. INTRODUCTION

"Only the little people pay taxes."[1] So said Leona Helmsley to her maid. That maid — along with millions of other little people — are largely anonymous in the legal regime that regulates taxation. They pay their shares without taking advantage of avoidance schemes, tax planning, or discretionary administrative largesse. They are legally invisible, even while they are economically indispensible.

The paradigm tax dispute involves a taxpayer on one side and the government on the other, what this article calls the "traditional dyad." Only the taxpayer in that dyad matters in adjudicating disputes, even though the interrelatedness of taxpayers across the fiscal system means that one dyad often affects the interests of many other taxpayers who are not part of it. Everyone else is invisible to the legal system; they are faceless taxpayers without enforceable rights in the administrative or judicial structure. They are taxpayers who pay the public's bills, but they lack standing to challenge the unconstitutionality of laws, regulations or tax administration − except when they are fighting their own increased liability.[2] Neither do they have any government institution charged with protecting their interests.

Invisible taxpayers are primarily a judicial phenomenon, but not entirely. Congress has made taxpayers invisible by running deficits that impose costs on people who don't yet exist, and by using budget gimmicks that pretend there is no cost to government spending. Scholars have made taxpayers invisible by isolating the tax system from the rest of fiscal analysis, and by assuming in tax policy discussions that tax collected gets thrown into the sea.[3] The Treasury Department is also responsible. The "Taxpayer Bill of Rights" reflects a narrow institutional perspective in

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[1] Attributed to Leona Helmsley, by her maid. See Maid Testifies Helmsley Denied Paying Taxes, NY Times, July 12, 1989, available at http://www.nytimes.com/1989/07/12/nyregion/maid-testifies-helmsley-denied-paying-taxes.html?smid=pl-share.

[2] "[T]he law of standing does not permit self-appointed guardians of the public interest to challenge the IRS's unusually lenient treatment of other taxpayers." Lawrence Zelenak, Custom and the Rule of Law in the Administration of the Income Tax, 62 Duke L. J. 829, 847 (2012).

[3] "The traditional way of proceeding analytically has been simply to ignore the expenditure side altogether and to assume that none of those who pay the taxes covering these expenditures receive any offsetting economic benefits. In effect this results in treating the collection of taxes as though it were only a common disaster-as though the tax money once collected were thrown into the sea." Walter J. Blum & Harry Kalven, Jr., "The Uneasy Case for Progressive Taxation" 19 U. Chi. L. Rev. 417, 517 (1952).

which tax fairness concerns only the traditional dyad.[4] Like the judicial model, the Taxpayer Bill of Rights understanding imagines only a single taxpayer against the state. The institutional structure fails to recognize the complex relationship that taxpayers have with one another, and the variety of overlapping, complementary, and conflicting interests that they have.

The broad no-taxpayer-standing-rule that has kept taxpayers out of court is not a particularly controversial aspect of standing doctrine – virtually everyone can agree that taxpayers should not be allowed to challenge every government decision in the federal courts. But nobody has considered the effect that the no-taxpayer-standing rule has had on the operation, conceptualization, and fairness of the tax system. The purpose of this article is to bring attention to invisible taxpayers so that they come into view under the law, and illuminate tax policy.

The rule barring taxpayer challenges has been around for decades.[5] However, it is particularly alarming now because the Supreme Court has recently narrowed other avenues for tax litigation, enlarging the discretion of the IRS and the power of Congress to adopt taxes without the specter of judicial oversight.[6] The Court's current jurisprudence has made all tax expenditures — provisions of the tax law that are functionally equivalent to direct spending[7] — essentially non-reviewable.[8] In 2011, the Supreme Court chose to characterize tax expenditures as the absence of taxation, making them legally insignificant. Instead of treating tax expenditures as reviewable state action that favors some taxpayers compared to others, the Court concluded that tax expenditures simply allow individuals to spend their own money.[9] The Court's conclusion is inconsistent with the government's estimates that tax expenditures cost the federal fisc a trillion

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[4] June 10, 2014. IRS website. The bill of rights includes the following principle:

"The Right to a Fair and Just Tax System: Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely."

[5] It dates from 1923. Frothingham v. Mellon, 262 U.S. 447 (1923). Part III, infra, discusses that case.

[6] This was the central thesis of my article, The Great and Mighty Tax Law: How The Roberts Court Has Reduced Constitutional Scrutiny Of Taxes And Tax Expenditures, 78 Brook. L. Rev. 777 (2013).

[7] The official definition is in terms of revenue losses, rather than spending, but they are equivalent: "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 297, 299.

[8] ACS v. Winn, 131 S. Ct. 1436 (2011). See Part IV, infra.

[9] ACS v. Winn, 131 S. Ct. 1436, 1447 (2011).

dollars in foregone annual revenue.[10] Tax expenditures are an increasingly important tool of federal policy,[11] so it is alarming that the courts may have no opportunity to consider their constitutionality.

The combination of (1) no standing in cases in which the IRS undertaxes, and (2) no review for tax expenditures because they are not state action, removes the majority of revenue reducing actions from judicial review. Revenue raising actions are always subject to attack because any taxpayer challenging his increased liability is entitled to a day in court. Consequently, taxpayers can attack the government's revenue raising attempts, but nobody can challenge the government's decisions to forego revenue — even if those decisions are illegal or unconstitutional.[12] This creates a bias against revenue raising because only the government's revenue losses are nonreviewable under these rules. We have a system in which only attempts to raise revenue — and not to give it away — are subject to judicial review. But revenue loss is not the reason to be most concerned about these developments. Justice is the reason.

In a just tax system, everybody pays a fair share. Fairness is both procedural and substantive. Substantive fairness in taxation is an economic measure and procedural fairness in taxation is a legal measure. Economic fairness depends on the money value of relative shares: A fair tax system allocates economic burdens according to a defensible economic principle, such as ability to pay or standard of living. This is the kind of tax fairness

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[10] Tax expenditures are quantified by the government's budget experts and treated as revenue losses that reduce tax collections. The Treasury Department and the Joint Committee on Taxation each measure the revenue loss from tax expenditures annually. See Office Of Mgmt. & Budget, Exec. Office Of The President, Analytical Perspectives, Budget Of The United States, Fiscal Year 2014 (2013); Staff Of Joint Comm. On Tax'n, 112th Cong., Estimates Of Federal Tax Expenditures For Fiscal Years 2013-2017 (Joint Comm. Print 2014).

[11] Excluding defense spending, the federal government spends more through the tax law than it spends through direct appropriations. Compare Thomas Hungerford, Cong. Research Serv., Rl34622, Tax Expenditures And The Federal Budget 13 (May 26, 2010) (tax expenditures produce over a trillion in revenue loss) with Office Of Mgmt. & Budget, Exec. Office Of The President, Fiscal Year 2012: Historical Tables 167 tbl.8.7, 346 tbl.15.4 (2010) (showing $658 billion in discretionary spending, excluding defense)

[12] Even members of Congress may be unable to object. Members of Congress lack standing to challenge administrative application of a federal statute. See Comment, The Impact of Illegal Tax Guidance: Notice 2008-83, 62 Tax Law. 867, 885 (2008-09). See also Suzanne Goldberg, Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest, 61 U. Pa. L. Rev. Pennumbra 164, 171 (2012)("it is not clear that Article III does or should permit the federal government to bifurcate its standing for purposes of having federal courts resolve policy disputes between the executive and legislative branches"). The Windsor Court held that BLAG had standing. United States v. Windsor, 133 S.Ct. 2675, 2686-88 (2013).

that the tax policy literature generally acknowledges; welfarists take it for granted. As a substantive matter, fair tax shares depend on both the benefits of government and the burdens of taxation. Concerns about substantive fairness require consideration of economic effects. But economic analysis does not always map precisely onto legal analysis in tax policy.[13] Economic fairness is important, but it is not enough for a tax system to be just.

This article presents the idea of *legal fairness* in taxation as a separate and independent norm. Legal fairness incorporates procedural justice and the interests of taxpayers as citizens. It also requires fair tax shares. As a procedural matter, fair shares depend on the legal system that divides public property from private property. Congress decides how much revenue to collect and how much the government will spend carrying out its functions. Legal rules define the relative obligations of individuals within that division. No tax is justly imposed on an individual if it fails to satisfy the basic rules of statutory adoption and constitutionality. Every individual is entitled to be protected against taxes that are illegal or unconstitutional.

Because no institution of government exerts more coercive power over more people than the tax system, it is appropriately a test of whether we govern ourselves fairly. Fairness demands that government institutions treat taxpayers as *people*, rather than as income deciles or other primarily economic points. People are autonomous individuals and citizens with rights, and the tax system must respect and reinforce those qualities. This concept of legal fairness is generally ignored in the tax policy literature, but it is recognizable from other areas of the law. Legal fairness in taxation demands that the tax system treat individuals with respect and consideration. It requires that public institutions protect individuals from unconstitutional or other illegal applications of the law.

The current state of judicial abstention in tax disputes undermines legal fairness. Examination of invisible taxpayers and invisible laws reveals some troubling truths about the tax system. Invisibility has led to substantial injustice for real people. It has allowed unconstitutional taxation to proceed without challenge. And it has reduced the role of courts in taxation to a very narrow role, while simultaneously allowing unchecked discretion for both Congress and the Internal Revenue Service. Courts are the primary defenders of individual rights against government coercion, but the standing rules shut out taxpayers from the litigation process, so their interests are never considered.[14] Tax expenditures contain important policies and

[13] See Sugin, The Great and Mighty, supra note 6 at 781 (discussing the "tension between the economic effect and legal logic that is ubiquitous in the tax law").

[14] See Gene Nichol Jr., Standing for Privilege The Failure of Injury Analysis, 82 B.U. L. REV. 301, 304 (2002) (standing rules "systematically favors the powerful over the

privilege some taxpayers compared to others. Without judicial oversight, Congress (by designing a provision as a tax expenditure) and the IRS (by choosing to treat a taxpayer better than allowed by law), have the power to deprive the federal courts of the opportunity to review their actions, even if they are unconstitutional. There is an imbalance of power in this structure. As the tax law is increasingly the locus of important federal policy, contracting its scope for judicial review of unconstitutionality is increasingly troubling.

There is always a cost to someone in taxation, and a cost borne by invisible people is much easier for everyone else to accept. Judicial recognition of only the traditional dyad in tax litigation ignores the burden on those outside it. Tax policy is inconsistent in ignoring invisible taxpayers as a legal matter, even while they are economically indispensable. We need a legal mechanism to consider invisible taxpayers because distributive justice and democratic values demand that they be taken into account under the law. Anyone who cares about fairness in taxation should be concerned about the contracting universe in which legal disputes about taxation are resolved.

This article proceeds as follows. In the next section, I describe three important constitutional tax cases in which people with substantial interests were not clearly part of the government-taxpayer dyad. These cases are intended to illustrate the problem of invisible taxpayers, and they provide concrete examples for the later analysis. Unconstitutional taxation is the most troubling legal consequence of invisible taxpayers, and the most important circumstance for courts to intervene. Part III takes a closer look at legally invisible taxpayers, and explains how the standing rules create invisibility in the legal system. It defines tax-based injury for taxpayers outside the traditional dyad by reference to legal shares,[15] and argues that current doctrine could accommodate broader taxpayer standing if courts acknowledged the financial interrelatedness of taxpayers. Part IV discusses tax expenditures and analyzes the Supreme Court's decision carving them out of judicial review. It argues that tax expenditures should be subject to constitutional review, along with every other provision of the tax law, and that their privileged status produces unfairness. Reflecting on invisible

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powerless."); Lynn Lu, Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules, 65 ADMIN. L. REV. 100, 123 (2014)("Standing doctrine has played a crucial role in restricting parties' access to federal court to seek judicial review of government agency action and to enjoin violations of federal law.")

[15] Legal shares consist of the set of rules under validly adopted tax law, consistent with the Constitution.

taxpayers and invisible laws, Part V contains the article's main arguments about fairness. It contends that invisibility deprives taxpayers of both economic and legal fairness. Part VI considers some mechanisms to better protect those who are currently invisible. It considers how invisible taxpayers might be represented in an institutional way that would allow more judicial review, particularly for their constitutional complaints. It also advocates for more responsive administrative decisionmaking.

II. CONSTITUTIONAL TAX CASES WITHOUT PLAINTIFFS

The problem of invisible taxpayers is most troubling in constitutional cases. While it is frustrating that people can't complain that their neighbors are cheats, unconstitutional taxation is a more serious matter. Some constitutional cases simply require finding a proper plaintiff – in the tax context that means someone who has personally suffered from the government's application of the law to his tax determination. But there are a surprising number of important constitutional tax cases in which there is nobody with standing to sue under current law. This is troubling as a policy matter, even if it is acceptable as a legal matter.[16]

Two of the leading precedents on standing are tax cases: Eastern Kentucky Welfare Rights Org. v. Simon[17] and Allen v. Wright.[18] The former attacked the government's newly adopted standards for granting tax exemption to hospitals and the latter attacked the IRS's allowance of tax exemption to racially discriminatory schools. The plaintiffs in each case were not the potentially exempt taxpayer. Nevertheless, they were people with real personal interests in the cases and who should have been beneficiaries of the policies behind the exemption scheme. Even though the purpose of exemption is to subsidize private organizations that produce third-party benefits, those third parties have no standing to complain.[19] The issue of tax exemption for charities only makes its way to court on the request of the party seeking exemption. That party can even get a declaratory judgment on its eligibility.[20] But only the government can question whether an exemption should be revoked. As a practical matter,

[16] "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

[17] 426 U.S. 26 (1976).

[18] 468 U.S. 737 (1984).

[19] For an excellent discussion of these cases, see Lu, Standing in the Shadow of Tax Exceptionalism, supra note 14.

[20] IRC §7428.

that means exemption cases are rarely litigated, and there is a dearth of case law on the meaning of charity as a result.[21] Possibly the most important litigated exemption case concerned Bob Jones University.

A. Bob Jones University: Racial Discrimination

In Bob Jones University v. United States,[22] the Supreme Court upheld the denial of tax exemption for racially discriminatory schools on the ground that exempt organizations may not violate public policy. Even though the Court declined to embrace a constitutional holding, the issue of tax exemptions for racially discriminatory schools was certainly an issue of equal protection.[23] Exemption cases are particularly likely to raise constitutional questions because exemption is inconsistent with activities that are contrary to public policies.[24] Standing was not initially an issue in *Bob Jones* because the university brought suit when the IRS revoked its exemption. If the IRS had insisted on taxing the institution, then the government would have effectively represented all others who were harmed by that exemption, either directly (like potential students) or indirectly (like taxpayers not entitled to exemption for any reason). But the twist in the *Bob Jones* story is that the government changed its mind mid way, and attempted to abandon the revocation, which would have allowed BJU to remain exempt.

The traditional dyad would have then broken down because the taxpayer (BJU) and the government would have been in agreement. Only the third-party outsiders would have a complaint with both the government and the university. But being outside the dyad, they would not have standing to demand that the exemption be revoked. If it had succeeded, the Reagan Treasury's change of mind would have deprived the Supreme Court of jurisdiction. A separate ruling by the D.C. Circuit in the nick of time made that position untenable for the government, so it relented. But the Treasury still maintained that the government should not revoke BJU's exemption.[25]

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[21] See Richard L. Schmalbeck, Declaratory Judgments and Charitable Borders, 23 N.Y.U. Nat'l Center on Philanthropy & L. Conf. sec. A (2011).

[22] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[23] See Linda Sugin, Tax Expenditure Analysis and Constitutional Decisions, 50 Hastings L. J.407, 447-49 (1999).

[24] That's what the BJU court said.

[25] At that point, since the government was not really at odds with the taxpayer, the Supreme Court appointed an amicus curiae to argue the case for affirming the Fourth Circuit's court's denial of the exemption. In a footnote, the Court explained:

> After the Court granted certiorari, the Government filed a motion to dismiss,

In its opinion, the Bob Jones' majority recognized the injury suffered by taxpayers who were not party to the litigation. It wrote: "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors. …all taxpayers share in their support." This is extraordinary language given the invisibility of all those other taxpayers in the legal structure that governs tax cases. But it offers a model of how courts might consider those interests as part of its deliberation in cases where there is a traditional dyad that affects many others.[26]

Bob Jones illustrates how the IRS might deprive all possible plaintiffs of standing by giving the one taxpayer who has a right to complain what it wants. Fortunately, the Supreme Court did not allow the government to snatch away its ability to hear the case, and the precedent continues to stand for nondiscrimination in tax-exempt educational organizations. Unfortunately, *Bob Jones* is not the only important constitutional tax case in which substantial maneuvering was necessary for the court to hear the case.

B. Windsor: Sexual Orientation Discrimination

The Supreme Court's recent decision in United States v. Windsor -- the most important case about equality in a long time – only happened because the government maneuvered to maintain a case or controversy against its own legal judgment. The Supreme Court's *Windsor* decision struck down a crucial part of the Federal Defense of Marriage Act (DOMA) and held that it was unconstitutional for the government to discriminate against same-sex couples. While it is generally known as the same-sex

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informing the Court that the Department of Treasury intended to revoke Revenue Ruling 71–447 and other pertinent rulings and to recognize § 501(c)(3) exemptions for petitioners. The Government suggested that these actions were therefore moot. Before this Court ruled on that motion, however, the United States Court of Appeals for the District of Columbia Circuit enjoined the Government from granting § 501(c)(3) tax-exempt status to any school that discriminates on the basis of race. Wright v. Regan, No. 80–1124 (CADC Feb. 18, 1982) (per curiam order). Thereafter, the Government informed the Court that it would not revoke the revenue rulings and withdrew its request that the actions be dismissed as moot. The Government continues to assert that the IRS lacked authority to promulgate Revenue Ruling 71–447, and does not defend that aspect of the rulings below.

Bob Jones Univ. v. United States, 461 U.S. 574, 585, n. 9 (1983).

[26] See Part VI D.

marriage case, *Windsor* was more technically a case about taxes. The specific issue was whether the plaintiff should be entitled to spousal benefits under the federal estate tax, despite DOMA's refusal to treat her as a spouse for federal tax purposes.

In *Windsor*, the Supreme Court's jurisdiction to hear the case ultimately hung by a thread. If the government had refunded Windsor's money (as it had been ordered to do), or if Windsor had simply never paid the disputed tax (which would have been the case if she had started in the Tax Court), the case could not have happened. In its decision, the Supreme Court made much of the fact that there was a justiciable case or controversy under the Constitution because the government held onto Windsor's refund. Physically retaining the money was sufficient even though the government and the taxpayer did not actually disagree about the correct interpretation of the Constitution; they both thought that Windsor should get her money back. The government held onto Windsor's refund *despite* the fact that the Obama administration agreed that Windsor was right on the merits.

This jurisdictional maneuver is curious from a tax law perspective. A taxpayer is entitled to an adjudication of tax liability without paying in advance; she must bring her case in the Tax Court.[27] Only if she loses does the government receive any funds. The plaintiff in *Windsor* chose to bring her case in a federal district court, rather than in the Tax Court, so she paid the contested amount and sued for a refund, according to the procedure for district court litigation. The important fact to note is that payment is relevant to venue, but payment is not determinative of whether a person is entitled to litigate a tax liability. The overwhelming majority of tax disputes are litigated in Tax Court.[28]

If the IRS had simply decided to allow all same-sex married couples to treat themselves as married for federal tax purposes – in clear defiance of DOMA -- then no taxpayer would have been allowed to complain. Because a taxpayer disputing her own tax liability and the government must always be the counterparties in a tax case, there can be no other litigation that raises

[27] The Tax Court is an Article I court, so it is not bound by the jurisdictional rules in Article III. But Tax Court cases are appealable to Article III courts, and taxpayers are not required to pay in order to be heard by the federal courts of appeals. If Congress expanded jurisdiction in the Tax Court to allow broader taxpayer standing, the legality of this scheme would need to be determined. See David Krinsky, How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals, 57 Case W. Res. L. Rev. 301, 304 (2007).

[28] Compare district court cases , available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02Sep13.pdf with Tax Court cases, available at http://www.irs.gov/pub/irs-soi/13databk.pdf Table 27.

the issue of constitutionality of a tax statute; a tax statute's constitutionality simply cannot arise in litigation between private parties. If taxation were the only context in which DOMA applied, the IRS could have created a legal stalemate. Same-sex couples would have nothing to complain about, and other taxpayers would not have been part of the dyad allowed to raise the issue. The statute would have remained on the books, but the executive branch would have not enforced it, leaving DOMA in an awkward limbo, and depriving everyone of a final Supreme Court determination about DOMA's constitutionality. The constitutionality of DOMA, and the larger question of equality for same-sex couples, was important to millions of people who had no direct interest in Windsor's tax refund. It was vital that the Supreme Court decide the case.

Despite its belief that DOMA was unconstitutional, the Obama administration realized the importance of a Supreme Court determination on the constitutionality of DOMA. So the Justice Department and the taxpayer cooperated to ensure that there would be an injury onto which the Supreme Court could attach a case or controversy. The government held the money, the Supreme Court invalidated DOMA, and a great day for equality was celebrated.

C. Hernandez: Establishment of Religion

Not all cases have such a happy ending. Where the IRS administers the law in an unconstitutional way, the Supreme Court may be deprived of any opportunity to review the practice. This is the story of Hernandez v. Commissioner,[29] which concerned the charitable deduction allowance for payments made to the Church of Scientology. In *Hernandez,* the Court refused to allow Scientologists to deduct their payments to the Church for "auditing and training."[30] The grounds for its decision were statutory -- the Court relied on its interpretation of the statutory requirements for the charitable deduction, which include the making of a "contribution or gift."[31] The Court held that the payments did not satisfy the statute because they were a *quid pro quo* for services received from the church, rather than a contribution or gift.[32] In treating the payments as purchases, rather than

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[29] 490 U.S. 680 (1989).

[30] From a tax perspective, it is an unfortunate name for Scientologists to use for their form of devotional activity.

[31] IRC 170(c).

[32] "A gift in the statutory sense … proceeds from a 'detached and disinterested generosity',… 'out of affection, respect, admiration, charity or like impulses.'"C.I.R. v. Duberstein, 363 U.S. 278, 285 (1960) (citations omitted).

contributions, the Court concluded that the payments did not qualify for the section 170 deduction. Just to be clear: at the Supreme Court, the government won and the Scientologists lost.

After the Court's decision, the IRS – which had prevailed in the litigation – changed its position and decided to allow Scientologists to deduct their auditing payments as charitable contributions. The IRS entered into an agreement with the Church of Scientology detailing the change, and revoked its prior guidance disallowing members' deductions.[33] The IRS essentially overruled the Supreme Court.[34]

Of course, the IRS lacked the power to overrule the result in *Hernandez*; *Hernandez* was a Supreme Court case interpreting a statutory provision. The Treasury Department is bound by statute, and by the Court's interpretation of a statute. If the Supreme Court interprets a statute contrary to Congressional intent, Congress has the power to clarify by amending the law. Congress could have made clear that the Supreme Court's interpretation was inconsistent with its policies by explicitly adopting a deduction for Scientologists. But Congress chose not to do so during the four years between the *Hernandez* decision and the IRS's closing agreement. Its reticence is not surprising, given the Establishment Clause concerns raised by special treatment for a single religion. It is unlikely that Congress would ever adopt a special deduction provision only for Scientologists.

Twenty years later, the status quo holds. Nobody can attack the IRS's excessively generous treatment of members of the Church of Scientology. Scientologists have no complaint, and other taxpayers have no standing to complain. Other taxpayers can complain about their own tax liability because that is the only circumstance in which they are part of the traditional dyad with a case or controversy. While they failed to get the relief they wanted, that is precisely what one family did, twice.[35]

The taxpayers in Sklar v. Commissioner are observant Jews who claimed a charitable deduction for the cost of religious school tuition paid for their children. The IRS disallowed the deduction because there is long-established precedent that no deduction is allowed for religious school

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[33] See Rev. Rul. 93-73, 1993-2 C.B. 75, obsoleting Rev. Rul. 78-189, 1978-1 C.B. 68. Although the closing agreement was allegedly secret, it was, in fact, widely available. See Scientologists and IRS Settle for $12.5 Million, Wall St. J. Dec 30, 1997 at A12; 97 TNT 251-24, Tax Analysts Doc 98-383.

[34] The same problem has also arisen in non-constitutional contexts. See Gregg Polsky, Can Treasury Overrule the Supreme Court? 84 B.U. L. Rev. 185 (2004).

[35] Sklar v. Comm'r I, 282 F3d 610 (9th Cir. 2002) and Sklar v. Comm'r II (9th Cir. 2008).

tuition.[36] The government's rejection of the Sklars' claimed deduction increased their tax liability, entitling them to a judicial determination about whether the IRS's additional assessment was warranted. They clearly had standing to argue that they should be allowed the deduction.

In making their case, the Sklars argued that they should be allowed a deduction for their payments because the IRS was allowing members of the Church of Scientology to deduct their equivalent payments for religious training. They alleged that the restriction of the deduction to members of a single religion violated the Establishment Clause, so that either their deduction (and equivalent claims by all religions) should be allowed, or the Scientologists should not be allowed the claim the deduction.[37] Even though standing was not an impediment to the Sklars, they were still unable to get the court to rule on the constitutional question that *really* brought them there.

The Ninth Circuit pointedly refused to decide the constitutional question, even though it had a lot to say about the government's Scientology policy. It wrote: "we would likely conclude, were we to reach the issue, that the [pro-Scientology] policy must be invalidated on the ground that it violates either the Internal Revenue Code or the Establishment Clause."[38] It further stated: "Because the facial preference for the Church of Scientology embodied in the IRS's policy regarding its members cannot be justified by a compelling governmental interest, we would, if required to decide the case on the ground urged by the Sklars, first determine that the IRS policy constitutes an unconstitutional denominational preference under Larson [v. Valente]."[39]

Despite its clear view of the merits, the court did not decide the constitutional question because it concluded that the Sklars' payments to their religious schools were distinguishable from the Scientology payments.

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[36] See DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962); Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972), Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972).

[37] The determination to allow the deductions by Scientologists was an administrative determination, not a legislative determination. That distinction would have been relevant if the challengers were claiming standing as taxpayers under Flast v. Cohen, 392 U.S. 83 (1968), because the Supreme Court had previously narrowed *Flast* to exclude administrative determinations. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). But the Sklars were not taxpayer plaintiffs complaining about the government's decision to favor a single religion – they were challenging their own tax liability, which is always sufficient to give them a day in court, so they did not need to rely on *Flast*.

[38] Sklar I, 282 F3d at 614.

[39] Sklar I, 282 F3d at 619.

By distinguishing those payments, the court was able to dispose of the case without deciding anything about the Scientology payments. To add insult to injury, in the Sklars' second trip to the Ninth Circuit, the court explicitly based its holding for the government on the authority of *Hernandez*,[40] even though the IRS had been ignoring that precedent as applied to Scientologists – the actual litigants involved in the case. The court also explicitly declined to rule on the constitutionality of the Scientology closing agreement.[41]

While the *Sklar* court's approach prevented it from overreaching, it was more likely too modest − there might not be another opportunity for a court to review the IRS's policy with regard to the Church of Scientology. No other taxpayer's payment is *precisely* the same as the payments made by Scientologists, so there will never be a case in which a court has no choice but to decide the constitutional question. Even so, the court could have found the payments to be legally comparable. Thus, despite their clear case or controversy allowing them access to the courts, the Sklars lost and members of the Church of Scientology are still allowed to claim deductions for auditing and training, contrary to the Supreme Court's holding in *Hernandez,* and in likely continuing violation of the Establishment Clause.

The closing agreement raises a constitutional issue that directly touches every person who pays for any kind of religious training, and indirectly affects everyone else who does not. And yet, nobody can challenge the constitutionality of the Scientology deduction pursuant to the Ninth Circuit's theory because no other religion operates quite like the Church of Scientology. The *Sklar* court's holding that the tuition payments at issue in the case were unlike the auditing and training payments of Scientologists allowed it to dispose of the case without reaching the question of whether the IRS operates in an unconstitutional manner. Since all payments are distinguishable from the ones allowed to be deducted by Scientologists, no court will ever be compelled to rule on the Scientology deduction, making permanent the IRS's ability to unilaterally flout the Constitution, without judicial oversight.

Since the story of *Hernandez* has an unhappy ending, this article will repeatedly return to it in an effort to imagine how the law might solve the problem that the Sklars faced in their constitutional challenge. The next section extrapolates from the Sklars' case to analyze the bigger policy issue created by the narrowness of the traditional dyad. It argues that the tax law's recognition of only the traditional dyad relegates millions of people to legal invisibility, despite their economic importance.

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[40] Sklar II, 549 F3d at 1259-60.
[41] Sklar II, 549 F3d at 1267.

III. LEGALLY INVISIBLE TAXPAYERS: NO STANDING TO SUE

The United States government collects almost three trillion dollars in revenue a year.[42] Every person who works pays federal tax. The super-rich each pay a lot of tax, but there aren't that many of them.[43] Consequently, the *people* who pay tax are average families who are in the mundane business of earning a living. The federal income tax has been called a "mass tax,"[44] and that mass is largely anonymous in the system as a whole.

From the perspective of the federal government, the total tax payments received from invisible taxpayers is tremendous. Individuals paying their modest bills may not each matter to the treasury, but the aggregation of tax payments enables the existence of the modern state. Any legal institution that considers the perspective of the state cannot ignore the economic substantiality of the taxes paid by invisible taxpayers. But that is precisely what the traditional dyad in tax analysis does by focusing on a single taxpayer and recognizing only its conflict with the government, in isolation from the rest of the fiscal system.

The cost to invisible taxpayers is what makes tax law unlike other regulatory schemes. All taxpayers are interdependent. Aggregate tax collections enable the state to function, so tax issues matter to every taxpayer – nobody who shares any of the burden of taxation is wholly disinterested in any aspect of the system. Taxation is about money, and each person's share is a determinable value. People who have no recognizable existence in the legal system have real out-of-pocket costs. These costs are wholly created by government – not by nature, not by other individuals. Taxation is solely the product of public decisionmaking, so government responsibility is absolute in taxation. Consequently, it is important to change the way we approach questions of taxation to make invisible people part of the analysis.

This part first explains why some taxpayers are treated as legally invisible under current law, and then examines that doctrine to determine whether they might be more visible within its current contours. It argues that taxpayers suffer real injuries, but that current jurisprudence fails to

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[42] 2013 total receipts were $2,775,103,000,000. OMB, Historical Table, Table 1.1 at http://www.whitehouse.gov/omb/budget/Historicals/.

[43] There are only about 300,000 tax returns with AGI in excess of $1 million, out of 146 million total tax returns. IRS, SOI at http://www.irs.gov/uac/SOI-Tax-Stats-Tax-Stats-at-a-Glance.

[44] Carolyn Jones, Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax during World War II, 37 BUFF. L. REV. 685 (1988–89).

recognize those injuries because it does not recognize the interrelatedness of taxpayers. This part concludes by arguing that constitutional problems are supplemented by concerns about revenue, making the status quo problematic from different perspectives.

A. The Standing Rules that Make Taxpayers Disappear

Article III of the Constitution requires that courts hear only cases and controversies. The standing rules implement that requirement, and ensure that the parties in a litigation have adverse interests. The Supreme Court has summarized the "irreducible constitutional minimum of standing" as composed of three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized …; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'…. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." ... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[45]

This standard is easily satisfied in the traditional dyad, when a taxpayer and the government disagree about the taxpayer's liability as reflected on his own tax return. When a taxpayer is forced to pay money that would otherwise be his to keep, the injury is clearly real -- a dispute over who is entitled to a particular pot of money is the quintessential example of a case or controversy. Consequently, taxpayers always have standing to complain about their own bills, and the paradigm tax case is one involving a taxpayer trying to pay less and the government trying to extract more. In that situation, the court is in a good position to resolve the dispute.

The paradigm case is also a good structure for the government to protect the interests of taxpayers who are *not* before the court. Taxpayers not before the court enjoy an economic benefit (albeit small) if the Treasury succeeds in the case. Since all taxpayers pay into the same revenue pot and receive the benefits of government, if my neighbor pays more than his proper share, then I receive the benefit of government funding without paying the full price for it. My economic interest is served by a government that takes too much money from my neighbor and spends it on me. Thus, in the traditional dyad, the government's interest parallels the interest of

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[45] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61(1992)(citations omitted).

taxpayers not before the court because those taxpayers will pay a smaller relative share if the government prevails in the case.

Matters get trickier outside of that paradigm, and standing becomes more difficult because of the injury prong of the analysis. It is axiomatic that a taxpayer has no standing to complain about an excessive tax levy on another. Where my neighbor pays too much tax, I suffer no injury -- he is the one with a case against the government, and he must bring it himself. In fact, I should be pleased because I enjoy a free ride on his excess. While we generally do not think about our neighbors' taxes in this way, focusing on it shows how all taxpayers are interrelated, for both good and bad. Even though the legal rules separate taxpayers into distinct units, each of which is in conflict with the government over how much an individual's liability should be, every taxpayer's ultimate package of government benefits and burdens depends on every other taxpayer's package as well. Taxpayers have multiple axes of conflict of cooperation, but the legal structure encourages us to focus only on the conflicted taxpayer-government dyad.

When the government's substantive position changes from imposing taxpayer liability to reducing that liability, the axes realign. The government's generosity to identifiable taxpayers imposes no direct injury on anyone. But taxpayers who are not part of the traditional dyad suffer. Every other federal taxpayer is harmed when a favored few pay less tax. Widely shared harm can be just as real as harm suffered by just a few, as is abundantly clear from mass torts and products liability.[46] Under current law, those other taxpayers lack standing to sue over the government's generosity. The benefitted taxpayer remains the party whose tax liability is directly at issue. He is the only one potentially with standing to litigate his liability, but that taxpayer has no complaint (and no injury at all). My neighbor's charitable contribution deduction does not directly increase my tax bill, so the law treats his deduction as none of my business. If my taxes increase directly by raising the amount that appears on my tax return, I would have standing to challenge my liability. But that's not how the tax system operates.

By failing to notice the interrelatedness of taxpayers, courts can assert that one taxpayer suffers no injury when another taxpayer receives unwarranted generosity.[47] Given the total number of taxpayers and the enormity of total tax collections, the effect of any interrelatedness is small -- one individual is unlikely to suffer much from any change in her overall

[46] See Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 483-85 (2008) ("the doctrine requires only that injury be "concrete and particular," and not "abstract or hypothetical"; it does not impose any numerosity limitation.")

[47] This is what the ACS v. Winn court said. 131 S. Ct at 1437.

benefits and burdens as another individual's tax liability goes up or down. Because the federal tax system is so large, it is tempting to ignore the interrelatedness as too complex and any individual burden too miniscule to worry about. So it is not surprising that the Supreme Court has done precisely that in analyzing the injury-in-fact requirement necessary for standing to sue.

The Supreme Court has also conceptualized the tax system as functionally separable from the fiscal system as a whole, allowing it to ignore the injuries that individuals in an interrelated fiscal system suffer on account of that interdependence. In denying standing to taxpayers challenging a state credit for businesses, the Court said "[p]laintiffs' alleged injury is…'conjectural or hypothetical' in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit."[48] This analysis reveals a truncated approach to the fiscal system because it narrowly focuses only on direct tax liabilities. It is flawed to consider only the tax system in measuring government burdens, while ignoring the combination of benefits and burdens within the fiscal system as a whole.[49] Burdens depend on the net effect of taxes and spending, so an evaluation of injury must consider both sides of that coin. Accounting for interrelatedness, as this article advocates, makes injury on either the taxing or the spending side relevant.

The Supreme Court wasn't always so dismissive of broad taxpayer injury. Its approach was more nuanced in its earlier considerations of taxpayer standing, and municipal taxpayers have always been granted standing more broadly than federal taxpayers.[50] In Frothingham v. Mellon, the first Supreme Court case to analyze taxpayer standing, the Court described a taxpayer's injury—qua taxpayer—as "remote, fluctuating and uncertain."[51] It concluded that a taxpayer's "interest in the moneys of the treasury… is shared with millions of others, is comparatively minute and

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[48] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006).

[49] See Edward Kleinbard, We are Better Than This (Oxford 2014) (arguing that evaluating the fiscal system as a whole is the only reasonable way to approach tax policy questions); Linda Sugin, "Theories of Distributive Justice and Limitations on Taxation," 72 Fordham L. Rev. 1991, 1997 (2004)("it matters little what the tax itself looks like [if] the spending side of the budget corrects or adjusts the distributional consequences overall").

[50] See Nancy Staudt, Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine, 52 Emory L. J. 771 (2003)(analyzing cases of municipal taxpayer standing in federal court).

[51] 262 U.S. 447 (1923).

indeterminable,"[52] so a complaining taxpayer raised no case or controversy allowing for judicial review. This analysis shows that the *Frothingham* court recognized the real economic cost and interrelatedness of taxpayers, but found the interest too small to be legally significant. Even in 1983, when the Court decided *Bob Jones*, it recognized the costs that taxpayers incur from the interdependence of the tax system.[53] That recognition is important because it allows for a toe-hold that might support standing.[54]

The Supreme Court's approach has changed. Unlike *Frothingham* and *Bob Jones*, the Court's most recent cases fail to recognize a taxpayer's injury altogether; that is significantly different from recognizing an injury, but treating it as too small to worry about. In its latest discussion of taxpayer standing, in Arizona Christian Schools (ACS) v. Winn, the Court rejected any notion of interrelatedness and its corresponding interest: "When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. … It would be 'pure speculation' to conclude that an injunction against a government expenditure or tax benefit would result in any actual tax relief for a taxpayer-plaintiff."[55] The Court's explanation for completely ignoring the interrelatedness was based on dubious economic assumptions.[56]

Nevertheless, the legal effect remains: as a matter of Article III standing, taxpayers have no interest at all in the tax liabilities of others because they have no injury at all. Despite a real − albeit small− economic interest, a taxpayer is invisible in the legal regime unless he is complaining about the liability that appears on his own tax return. The standing rules treat him as though he does not exist, and therefore, the substantive rulings that courts make on tax issues ignore his interests.

The restrictive rules about standing would make better tax-policy sense if they aided the government in revenue collection. For example, the anti-injunction act prohibits suits to restrain the collection of tax so as to allow the government to more easily collect revenue.[57] But the restrictive

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[52] Frothingham v. Mellon, 262 U.S. 447, 487 (1923)

[53] It noted that "the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.' ... all taxpayers share in their support." 461 U.S. 574 (1983).

[54] Aggregation can then make all the difference as a practical matter. See Part VI B, infra.

[55] ACS v. Winn, 131 S. Ct. 1436, 1437, 1444 (2011). See also, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006).

[56] I analyzed those assumptions in Linda Sugin, The Great and Mighty Tax Law: How The Roberts Court Has Reduced Constitutional Scrutiny Of Taxes And Tax Expenditures, 78 Brook. L. Rev. 777, 817-19 (2013).

[57] Code §7421 ("no suit for the purpose of restraining the assessment or collection of

rules about standing impede the collection of revenue because they prevent suits that might produce more revenue. Since taxpayers can always challenge their own tax bills, the standing rules create a bias in favor of suits that produce less revenue.

B. Invisible Taxpayers Have Real Legal Injuries

An examination of the contours of taxpayer injury shows that invisible taxpayers suffer injuries that should be cognizable under current law standing doctrine. Taxpayer injury can be identified by reference to the legal rules that define economic rights in the tax system.[58] Any taxpayer who is assessed more than her legal share has economic harm justifying legal redress. This concept of "legal shares" differentiates a tax burden that is unjustifiable under the law from a valid burden imposed intentionally by the legislature.[59] The law defines where that baseline is.[60] Of course, constitutional limitations are also part of that definition, so legal shares only include taxes imposed by Congress that are also constitutional. The tax must be properly adopted by the legislature, and administered so as not to deny individuals their constitutionally guaranteed rights. The key to thinking about legal shares is that unconstitutional laws (and administration that is contrary to law) cannot be part of a just baseline for determining shares. As long as a tax is properly adopted by Congress and faithfully executed by the IRS, that tax should be part of the presumptive baseline. Any unconstitutional largesse by the government increases the shares paid by invisible taxpayers beyond their legal limit. This analysis identifies the small subset of complaining taxpayers who have something they should be allowed to complain about in an Article III court.

Legal shares of tax do not depend on whether government benefits

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any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.")

[58] While this paper is limited to taxpayer injuries, this approach to legal injuries could be applicable more broadly under the law.

[59] For example, renters should not have standing to challenge the home mortgage interest deduction because it is part of the legal structure that defines tax obligations. Renters' legal obligation to pay tax includes a liability that attaches to amounts used to pay for housing, even though homeowners are legally permitted to enjoy housing on a tax-free basis. See Part V.B. infra for a discussion of this standard as related to fairness.

[60] See Cass R. Sunstein Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1479 (1988) ("the question whether an injury is merely ideological or instead legal is one of positive law; there is no pre- or post-legal metric for distinguishing between the two.")

are commensurate with taxes paid. The balance of government benefits and burdens is an important question for tax fairness, and must be considered in designing tax rules.[61] Nevertheless, the concept of legal shares can be understood without evaluating the fiscal system as a whole. For example, deficit spending means that future generations will likely finance some of our current public consumption. Our grandchildren have cause to be angry with us, but not because it is illegal for our generation to live beyond its means. Any legal injury in this generation must be with reference to the legal rules currently in effect – regardless of their wisdom or morality. In investigating legal shares, this section takes both the requirements of standing doctrine and the substantive legal tax rules as fixed. Consequently, the arguments about taxpayer injury are primarily doctrinal arguments that relate to procedural justice in the tax system.

If courts grappled with the interdependence of taxpayers − and its implications for defining injury − they might be more likely to find a case or controversy in some taxpayer complaints. While most taxpayer plaintiffs would still be barred, current standing doctrine leaves enough room for taxpayers to litigate about whether they are paying more than their legal share of the costs of government. Nobody likes paying taxes, but not everyone has an injury from doing so, even under this standard. The prohibition on taxpayer standing needs to be broken into categories so that claims based on paying more than one's legal share are distinguished from general attacks on legislative policies.[62] The no-taxpayer-standing rule, as it currently exists, fails to distinguish these very different claims, and explains why the no-taxpayer-standing rule seems necessary.[63]

Frothingham was a case about government spending, not taxing. The complaining taxpayer in that case was challenging a government appropriation, alleging that the federal statute, which allocated funds to states for carrying out maternal and infant health initiatives, was a taking, "under the guise of taxation, without due process of law."[64] The prohibition against taxpayer standing is most compelling in a context like *Frothingham*

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[61] Part V, infra, analyzes economic fairness, apart from procedural fairness, which is the concern here. I have argued that benefits taxation is intellectually incoherent. See Linda Sugin, Don't Give Up on Taxes, Tax Notes Dec 22, 2014 at 1373, 1375. See John Stuart Mill, Principles of Political Economy, Book V, Chap. 2.7 (1848).

[62] Justice Scalia has argued that standing doctrine is designed to prevent courts deciding matters better left to legislatures. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983). But see Heather Elliott, The Functions of Standing, supra note 46 (arguing that Justice Scalia's concerns are about Article II, not Article III).

[63] See, Elliot, The Functions of Standing, supra note 46 at 480.

[64] Frothingham v. Mellon, 262 U.S. 447, 480 (1923).

because the taxpayer's complaint was essentially a naked policy challenge. The taxpayer was dissatisfied with Congress' decision to legislate on a certain matter in a particular way. It was a challenge to Congress' reasoned decision about what national health policy should be – the core function of the legislature.[65]

As applied to spending challenges, the no-taxpayer-standing rule makes sense. The courts are not the proper place to challenge laws you don't like – that's the function of the ballot box. It would be impossible for courts and legislatures to operate in the face of constant judicial challenges to every federal policy on takings arguments.[66] The *Frothingham* court said: "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same ... The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."[67]

However, Frothingham was not in the position of invisible taxpayers because she was not complaining that her tax bill was more than the legal share she owed − she wasn't actually complaining about her taxes at all. A careful application of standing doctrine that acknowledges the injuries that taxpayers suffer in paying more than their legal shares would not open the floodgates that the *Frothingham* court feared. Treating only illegal shares as injuries does not mean that *anyone* should be able to complain about any government spending decision.

While the no-taxpayer-standing rule currently prohibits individual taxpayers from second-guessing Congress' judgment about what federal policy should be, it operates more broadly than that to reach the invisible taxpayers with legal complaints about their shares. Federal taxpayers – as taxpayers — are never allowed to be heard in a court, even when their complaints are substantially narrower, and even when the nature of their complaints are about how they are being overtaxed compared to others. As the *Frothingham* court recognized, taxpayers have injuries, as taxpayers, when they finance more than their share of the public purse, so a subset of all taxpayer complaints are about one's legal share. This kind of complaint resembles the classic taxpayer complaint in the traditional dyad.

In order to identify these taxpayers, it is necessary to recognize when a person pays more than his share. The determination of a person's

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[65] See Scalia, supra note 62 (advocating for standing doctrine to address this). But see, Gene Nichol Jr., Abusing Standing: A Comment on Allen v. Wright, 133 U. Pa.L. Rev. 635 (1985) (critical of the separation of powers approach to standing).

[66] See Eric Schnuer, More Than an Intuition, Less Than a Theory: Toward a Coherent Doctrine of Standing, 86 Colum. L. Rev. 564 (1986)

[67] 262 U.S. at 487.

proper share is a product of law, including both constitutional law and legislation. The legal share must be the baseline in determining whether an injury exists because the legal rules determine whether the money belongs to the taxpayer or must be paid over to the government and essentially shared by the community. I suffer when my neighbor is taxed less than his legal share because that undertaxation means that my package of government benefits and burdens is more expensive to me than the law authorizes.

This notion of injury is much narrower than the *Frothingham* plaintiff's notion of taxes as takings. The courts have properly dismissed taxpayer standing in the takings type of challenge; the plaintiff in *Frothingham* was challenging the baseline that determined her legal share of government benefits and burdens. Her complaint was beyond judicial review because a legal package of benefits and burdens produces no injury. She was not complaining about being forced to pay more than her legal share.

Under established doctrine, a small injury is crucially different from none at all. Class actions exist because individuals with small injuries have no incentive to sue, not because they lack standing to do so. Taxpayers who contribute more than their legal share because others pay less than theirs, as an economic matter, suffer a "concrete" and "actual" injury that should satisfy the *Lujan* standard. Consequently, the Constitution's case or controversy requirement should not prevent taxpayers from having a day in court in cases like these. Once understood as a complaint about departures from a legal baseline, taxpayer claims fit well into the legal paradigm − the plaintiff taxpayer is arguing that her own bill is too high. In the traditional dyad, the argument is based on the government's application of the law to the complaining taxpayer. But the same result should follow when the effect arises from the government's application of the law to another taxpayer. In both cases, the economic injury is to the taxpayer, and in both cases, the disagreement is between the taxpayer and the government.

This category of legal share disputes seems well suited to judicial determination because the disputes resemble the traditional-dyad cases in which taxpayers dispute their own bills. They are about money − the quintessential subject of tax adjudication. The invisible taxpayers and the government – because it is aligned with a favored taxpayer − have clearly adverse interests, a key consideration for courts in judging standing.[68] Except for the small size of taxpayers' legal share injuries, they closely

[68] See Michael Herz, United States v. United States: When Can The Federal Government Sue Itself? 32 Wm. & Mary L. Rev. 893, 906 (1991)(Art III requires adversity).

resemble the injuries that standing doctrine generally vindicates. Recognizing a legal share injury applicable to taxes does not create a case or controversy with respect to government spending decisions. The question for taxation is who should pay, which is distinct from the question of what's being paid *for*.

When a taxpayer suffers an injury that affects him only as a taxpayer, and when that injury is a real legal injury because the taxpayer has a right to be protected from whatever the government is doing, there is a strong argument for judicial review. This legal share approach to taxpayer injury focuses on the plaintiff's role as a taxpayer. In that way, it is reminiscent of the theory adopted by the Supreme Court in the only circumstance in which third-party taxpayer injury has been sufficient for standing. In Flast v. Cohen, taxpayers were allowed to challenge a government policy providing books to religious schools.[69] The *Flast* rule allowed taxpayer standing because government funding of religion in violation of the Establishment Clause related to the plaintiff's status as a taxpayer and created a taxpayer-relevant injury.[70] While the continuing vitality of *Flast* — as applied to individuals bringing Establishment Clause challenges to spending programs — is unclear,[71] its theory remains compelling.

Given the injury's diminutive size for any individual in the cases contemplated here, there are legitimate concerns that might justify prudential limits on taxpayer standing in such cases. However, it is important to recognize that these concerns are not constitutional bars to standing for invisible taxpayers. For example, the slightly overcharged taxpayer may have insufficient incentive to vigorously argue a case, even if there are many others who share his fate. Similarly, taxpayers are generally unlikely to be anxious to complain about the liabilities of their neighbors, given the cost and aggravation of litigation. Consequently, there is a legitimate worry that primarily tax protestors or other harassers might be the only ones to come forward. Even though the *Lujan* standard is satisfied for some taxpayers when we conceptualize the tax system as I have described, there may be good reasons to limit access to courts for legal share complaints. Under current law, the courts' standing jurisprudence contains both constitutional and prudential components, so the Supreme Court has a

[69] Flast v. Cohen, 392 U.S. 83 (1968).

[70] See Sugin, The Great and Mighty Tax Law, supra note 56 at 799.

[71] Justice Scalia observed that the majority's opinion in ACS v. Winn eviscerated the taxpayer standing authorized in Flast, essentially ending the era of taxpayer standing in Establishment Clause cases. ACS v. Winn 131 S Ct., 1436, 1450 (Scalia, J., concurring).

great deal of discretion over how these disputes might proceed.[72] Prudential standing rules can effectively keep disgruntled taxpayers off the courts' dockets. If limitations on the legal-share justification for taxpayer standing are prudential, they can be abrogated where appropriate. Thus, courts can consider when justice would be served by allowing litigation over the too generous treatment that the government is bestowing on some taxpayers. The point here is that the constitutional contours of standing should not prevent legal-share suits. In Part VI, I will discuss some possible mechanisms that Congress and the courts might employ to allow some invisible taxpayer cases to proceed.

IV. LEGALLY INVISIBLE LAWS: TAX EXPENDITURES

Some taxpayers are invisible in the legal system because laws determining their tax treatment are not considered government action at all. This is a recent development in tax law jurisprudence, and a particularly troubling one. In 2011, in ACS v. Winn, the Supreme Court made tax expenditures disappear from legal analysis by treating them as the government declining to impose tax.[73] The Court thereby transformed tax expenditures from the economic equivalent of government spending (with *some* legal resemblance to direct spending) into private action completely beyond legal review. Making tax expenditures legally invisible — despite their central role in affecting the distribution of government benefits and burdens — was a radical departure from their traditional legal treatment.

Tax expenditures are fundamental elements of the tax law and courts should have the power to review their constitutionality. Analyzing tax expenditures as part of the tax system should mean that their role in determining legal shares is subject to judicial review. Because tax expenditures are adopted by Congress, they present a somewhat narrower question compared to administrative decisions of the IRS. The IRS's decision with respect to the Church of Scientology, for example, was contrary to both statute[74] and the Constitution,[75] and a court should be able to strike it down on either ground. Tax expenditures only need to be reviewed for violations of the Constitution. While that is a limited scope of review, it is far broader than where the Supreme Court has left them.

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[72] Heather Elliott argues that *Frothingham*'s taxpayer standing rule is prudential, not constitutional. See Elliot, supra note 62 at 471 n.65.

[73] ACS v. Winn, 131 S. Ct. 1436, 1447 (2011).

[74] IRC 170, as interpreted by the Supreme Court in Hernandez.

[75] According to the Ninth Circuit's dictum in Sklar II.

A. Tax Expenditures are Tax Law

Tax expenditures are crucial in producing legally invisible taxpayers because tax expenditures are often the source of invisible taxpayers' injuries. Unlike revenue raising provisions, tax expenditures provide benefits that reduce tax liability for people able to claim their benefits, leaving those who are not entitled to them with the bill for a greater share of public expenses. Tax expenditures create winners rather than losers in the tax system, so the "regulated" taxpayer under a tax expenditure is one with a reduced tax bill, and consequently no complaint with his treatment. Those excluded from tax expenditure largesse have financial cause to complain, but lack legal means for redress.

Tax expenditures are provisions included in the tax law that are the functional equivalent of direct government spending. Instead of the government allocating funds for particular programs, tax expenditures allow taxpayers to reduce their tax liabilities by participating in various activities enumerated in the statute. The statute creates entitlements for people who can fit into its definitions. For example, the government can subsidize mortgage interest obligations of individuals by either sending cash subsidies to borrowers (to help them finance their payments), sending cash payments to lender-banks on behalf of borrowers[76] (to reduce what borrowers need pay), or by reducing the tax bills of borrowers by the same amount. The federal government has chosen to do the latter,[77] designing the mortgage interest subsidy as a tax expenditure, but the other choices would have been economically indistinguishable. Unlike base-defining tax provisions, tax expenditures are not designed to describe the thing to be taxed (i.e. income).[78] Instead, they reduce the amount of revenue that the tax law would otherwise collect, and consequently subsidize individuals to the extent their tax bills have been reduced.

Tax expenditure *analysis* – the mode of thinking about tax expenditures as direct spending equivalents -- was developed to provide an appropriate method to evaluate these provisions. It identifies sections in the tax law based on statutory function, and evaluates tax provisions that

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[76] See Bipartisan Policy Center, Restoring America's Future, Nov 2010 (proposing this design).

[77] I.R.C. §163(h)(3).

[78] Tax expenditures were defined by Congress as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." See Congressional Budget Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 297, 299 (1974).

resemble spending on the same terms as spending provisions.[79] Tax expenditure analysis was developed to be a budgetary tool, not a legal tool, so tax expenditure analysis does not mandate a particular legal methodology.[80]

The legal treatment of tax expenditures has always diverged some from their economic equivalents. As an economic matter, tax expenditures operate the same as direct spending. But as a legal matter, tax expenditures reduce tax liability; they are an integral part of the tax system.[81] Taxes and spending are legally distinct, and tax expenditures are in the legal category of taxes. This classification separating taxes from spending is important because it make tax expenditures part of the definition of tax liability — tax expenditures allow individuals to pay less money in taxes than they otherwise would. This conception of tax expenditures gives individuals a legal claim to pretax income that would otherwise have been subject to a tax lien. It furthers the property rights that people have in their pre-tax earnings by denying the presumptive tax that attaches to all earnings in our tax system. Legally, tax expenditures are integral to the tax system, and not part of the appropriations system that determines what should happen to collected revenue. Consequently, tax expenditures are crucial in defining legal tax shares.

The Supreme Court has long treated tax expenditures as involving more important individual action — compared to government action — than does direct spending. For example, tax expenditures to benefit religion have been a standard fixture of federal, state, and local law for a century. The Internal Revenue Code's charitable deduction explicitly authorizes a tax reduction for individuals who make gifts to religious organizations, and many localities explicitly exempt religious institutions from property taxation.[82] The economic equivalent of these provisions, direct government payments to religious organizations, is precisely the sort of thing that is prohibited by the Establishment Clause.[83] Nevertheless, the Supreme Court was never much troubled by support for religion in tax-based form.[84]

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[79] See Stanley S. Surrey & Paul R. McDaniel, TAX EXPENDITURES 25-26 (1985).

[80] Linda Sugin, Tax Expenditures, Reform, and Distributive Justice, 3 Colum. J. Tax L. 1, 3 (2012).

[81] They are deductions, exclusions and credits, just like normative provisions in the law. See Joint Committee description, supra note 7.

[82] IRC 170 allows a deduction for gifts to religious organizations by dint of their nature as religious. See e.g. NYS Real Prop. Tax L. 420-b.

[83] See, e.g., Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding that state maintenance and repair grants and tuition reimbursements violated the establishment clause, but that income tax benefits to parents were constitutional).

[84] Walz v. Tax Commission of New York, 397 U.S. 664 (1970) (upholding property

The Court's jurisprudence has made clear that there are factors other than financial support that are important in the constitutional determination of religious establishment. The Court has been particularly concerned about the appearance of government sponsorship of religion, and has allowed financial support to flow to sectarian institutions as long as that support does not carry a message of government endorsement.[85] Similarly, entanglement with religion is a purely legal concern in establishment clause doctrine that has nothing to do with economic support.[86] Since a direct subsidy via government bureaucracy is likely to involve greater entanglement than is tax-based support, direct subsidies are more legally suspect than economically equivalent tax expenditures. Justice Brennan observed that "tax exemptions and general subsidies ...are qualitatively different [t]hough both provide economic assistance."[87] The "qualitative" legal treatment of tax expenditures has been more nuanced than their quantitative economic analysis.

B. ACS v. Winn Made Tax Expenditures Disappear

The Supreme Court's most recent treatment of tax expenditures continues to distinguish tax expenditures from direct spending. In addition, it distinguishes them from any legally meaningful congressional action. This is a radical change in the judicial approach to tax expenditures. The Court's treatment of tax expenditures has moved about as far as can be imagined from treating them as the legal equal of direct government spending because now they are treated essentially as nothing legal at all. The Court's 2011 decision in *ACS v. Winn* is the linchpin of this development.[88]

In *ACS v. Winn*, the Court was asked to review a state tax credit that allowed individuals to reduce their state tax liability if they made payments to qualifying scholarship-granting organizations (STOs). For each dollar a taxpayer transferred to an STO (subject to a limit), the state would reduce

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tax exemption for churches).

[85] See Mueller v. Allen, 463 U.S. 388 (1983)(upholding state tax deduction for parents' expenses incurred in connection with parochial school attendance of their children). For a discussion of the establishment clause standard as applied to tax expenditures, see Sugin, Tax Expenditure Analysis and Constitutional Decisions, supra note 23 at 465 (1999)(citing cases).

[86] Sugin, Tax Expenditure Analysis and Constitutional Decisions, supra note 23 at 466-67.

[87] *Walz*, 397 U.S. at 690 (Brennan, J., concurring).

[88] My recent article, The Great and Mighty Tax Law, supra note 56, fully analyzes that case. Much of the discussion in this section comes from that article.

the taxpayer's obligation to the state by a dollar. In the universe of tax expenditures, this particular credit resembled direct state funding more than most since the state reimbursed the taxpayer's entire out-of-pocket cost. Plaintiffs in the case argued that since the organizations were primarily religious, the tax credit was unconstitutional as an establishment of religion. They claimed standing to sue under Flast v. Cohen, but lost on that issue.[89] The Court interpreted *Flast* to require both actual taxing and spending, and not their economically equivalent tax expenditure. The Court's literal application of both a taxing and a spending requirement did not include a tax credit that collapsed those functions by operating to forego tax collection as long as the taxpayer devoted resources to expenditures favored by the statute.

In the process of limiting the application of *Flast*, the Court had to characterize the state tax credit as something else, other than taxing and spending. So it treated the tax credit as a legislative decision to *not* tax, turning STO contributions into private action instead of state action, even though the tax credit financed the entire outlay that individuals made, dollar for dollar.[90] The Court held that the tax credit was not constitutionally reviewable state action, characterizing it instead as abstention from legislative action.[91] It was a short step from the Court's statement that the credit is declining to impose a tax, to its ultimate conclusion that taxpayers claiming the credit simply "spend their own money."[92] The credit was treated as a simple reduction in tax liability, unconnected to any government program to spend funds on identified purposes. Tax expenditures became a footnote to taxation – an absence of tax.

The *ACS v. Winn* Court's approach to tax expenditures was analytically problematic, in addition to legally novel. For the Court to conclude that taxpayers were spending their own money, it had to ignore the larger institutional structure in which the payments to STOs occurred. Taxpayers can only spend their own money if the legal rules entitle them to control over that money, or if individuals have a pre-legal right to those dollars. The Court assumed that taxpayers had more robust property rights than the legal system defining those rights actually contemplated. The legal regime determines what is, in fact, a taxpayer's own money, and the tax law at issue in *ACS v. Winn* first established that the money properly belonged

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[89]The Court held that the taxpayers lacked standing. *ACS v. Winn*, 131 S. Ct. 1436, 1449 (2011).

[90] *Id.* ("When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers.").

[91] *Id.* at 1447 ("[T]he government declines to impose a tax" when it awards a credit.).

[92] *ACS v. Winn*, 131 S. Ct. 1436, 1447 (2011).

to the state, and then determined that it should be credited to taxpayers who made payments to STOs. The *ACS v. Winn* Court treated the amounts at issue as the taxpayer's own money because it assumed taxpayer "ownership" without consideration of the state's legal rules, which included an income tax. Under an income tax, part of a taxpayer's income is deemed to be the property of the state.

The tax law is an institution that determines the contours of private property – it is one element necessary in deciding what counts as a person's own money. I can only spend my own money if the tax law (and other rules) determine that it is, in fact, my money to spend. While the legal analysis of tax rules can — and sometimes do — treat economic consequences as irrelevant to the legal standard, that approach is impossible when the legal rules control the economic status. Legal and economic analysis must sometimes converge because the relationship between them is interdependent.

The conception of government adopted by the *ACS v. Winn* majority treats taxation as fundamentally illegitimate — a legitimate tax system treats presumptive tax amounts as belonging to the state. This conception contributes to the legal invisibility of tax-based spending. Because the challenged actions were treated as private choices that individuals made about their own money, they were beyond the Court's concern. What could have been analyzed as a question of legislative preference for religion, instead morphed into a case about individual liberty to privately spend one's own money without state interference.

It was a mistake for the Court to treat the case as involving only private action, rather than state action.[93] The opinion recognized that a government's decision to collect revenue and spend it is a government choice,[94] but it did not acknowledge that the decision to allow tax credits is also a government choice. It was that decision — to adopt the tax credit in its existing form — that clearly constituted state action, and should have been legally important. The clear lesson of the case is that as long as the legislature designs a preference for religion as a tax benefit, it is beyond judicial review and legally invisible.

This result is substantially more radical than the separation between legal and economic analysis of tax expenditures demands. It was not necessary to treat the tax credit as the precise legal equivalent of government spending to acknowledge the economic importance of the legal rule. The *ACS v. Winn* Court could have recognized the role of law in determining economic rights by treating the tax expenditure as the

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[93] See Sugin, The Great and Mighty, supra note 56 at 803-04.
[94] *ACS v. Winn*, 131 S. Ct. at 1438.

government's choice to reduce tax for some people. The Court could have treated the reduction in tax as state action in the tax system, consistent with the traditional legal classification of tax expenditures. As integral components of the tax system, tax expenditures are elements that reduce tax, regardless of whether they are economically equivalent to direct government spending.

Every provision that allows one taxpayer to pay less tax than another demands justification on legal grounds. That legal justification is generally easy — Congress has the power to place a heavier tax burden on some people than on other people. For example, it can decide that people with greater income must pay a greater percentage of that income in tax; the graduated rate structure is an exercise of that power. However, not every choice to raise the tax of some would pass muster under the Constitution.[95] So, Congress may not impose higher rates on the income of black people or Jews, simply because of their race or religion. The same analysis should apply to Congress' decisions to reduce the tax of some people, but not others. A renter cannot challenge the home mortgage interest deduction on the ground that homeowners are treated better than renters because renters have no constitutional (or other enforceable legal) protections giving them the right to be treated as well as homeowners. The political process is the place to go to argue over the home mortgage deduction, just as it is the place to debate whether the government should grant direct housing subsidies.

However, where a taxpayer claims to pay more than his fair share because he is unconstitutionally deprived of a deduction allowed to others on account of his race or religion, the legal question should be on the same footing as the increased rates. The legal system allows the person subject to the higher rate for blacks and Jews to argue that the rate structure violates the Constitution. But the legal system does not allow the person deprived of the deduction for equally unconstitutional reasons to argue that he is being overtaxed, even though his overtaxation is equivalent.

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[95] Most attention to the constitutionality of federal taxation has been under the direct tax clause in Article I sec 2, not the individual rights provisions. See e.g., Alan O. Dixler, Direct Taxes Under the Constitution: A Review of the Precedents, TAX NOTES, Dec. 25, 2006, p. 1177; Erik M. Jensen, The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional? 97 COLUM. L. REV. 2334 (1997); Bruce Ackerman, Taxation and the Constitution, 99 COLUM. L. REV. 1 (1999); Gene Magidenko, Is a Broadly Based Mark- to-Market Tax Unconstitutional? TAX NOTES, May 26, 2014, p. 952; Erik M. Jensen, The Constitutionality of a Mark-to-Market Taxing System, TAX NOTES, June 16, 2014, p. 1299; Calvin Johnson, The Four Good Dissenters in Pollock, 32 J. OF SUPREME COURT HISTORY 162 (2007) and Fixing the Constitutional Absurdity of the Apportionment of Direct Tax, 21 CONSTITUTIONAL COMMENTARY 295 (2004).

Under the Supreme Court's current approach to tax expenditures, government spending via the tax law gets a legal pass because it is not characterized as state action. Even though tax expenditures contain important federal policies in many areas.[96] Tax expenditures are rarely revisited and repealed once adopted. They are important in determining the shares that individuals pay. Their legal invisibility is a substantial fairness concern.

V. WHY INVISIBILITY IS A FAIRNESS PROBLEM

The last two sections analyzed the legal rules that make taxpayers invisible and argued that the standing rules in tax litigation and the privatization of tax expenditures create invisibility, treating some people unfairly. This section develops the fairness argument further in the context of a more robust theory of just government institutions. It identifies some fundamental elements necessary to fair taxation and applies them to invisible taxpayers, allowing the requirement that government institutions guarantee equal respect and concern for all individuals to serve as the guiding principle. Analyzing the problem of invisible taxpayers reveals a dual nature to tax fairness, half of which has been ignored in the tax policy literature. This section revisits the classic tax policy notions of horizontal and vertical equity to argue for a new, more nuanced understanding of tax fairness under those labels. It distinguishes economic fairness in taxation from legal fairness in taxation, and argues that both types of fairness are necessary for a fully just tax system.

A. A Just Tax System Treats People Equally

The design of the tax system matters for justice because the institution of taxation is widespread, coercive, and intrusive into the lives of individuals. Because of its reach, the tax system may offer the best test of whether we govern ourselves fairly. While people disagree about what constitutes the measure of a fair tax system,[97] most agree that taxation can

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[96] Education policy: §25A, §221, §222. Housing policy: §163(h)(3), §121. Health policy §. Energy policy: §Retirement Policy §. The list goes on. See Table 1 in ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014-2018, JCX 97-14, at https://www.jct.gov/publications.

[97] The precise terms of fair taxation differ under different theories of distributive justice.

be just.[98] There is a common thread in much contemporary political theory that treats people as equally important,[99] and under that approach, a fair tax must treat individuals as equal and autonomous individuals.

John Stuart Mill – an intellectual forebear to our tax system − described a fair tax system as one requiring "equal sacrifice" by individuals.[100] Welfarists – who represent the dominant philosophical approach to tax policy today − believe that a fair tax system maximizes social welfare. Welfarism incorporates an equality norm because social welfare derives from individual welfare, with equal importance attached to each individual's welfare. A Rawlsian approach to tax fairness is also egalitarian because it demands that each person be treated equally in the design of all social institutions.[101] As a government institution, Rawls demands that taxation treat people as "free and equal rational beings."[102]

Because taxation is one component in a larger government structure of coercion and social organization, taxation is only one part of the just government puzzle − albeit an important part. The fairness of any particular tax depends on the background institutions against which it is levied – a more equal social structure can tolerate a less intrusive tax, while a society with great inequality might require a tax system to do more work toward achieving justice. The complexity of this evaluation should not be underestimated.[103] Neither does it mean that there is nothing to be said about fairness in taxation, particularly when we consider the background institutions in our own society. As an institution that defines economic claims, the tax system divides pieces of the social product between individuals and the community. A government mandate of equal respect and concern is a useful touchstone in looking both broadly and narrowly at how taxation carries out that function. Since it is a limiting principle in the

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[98] Some people believe that no tax system can be fair because all taxes are coercive thefts of private property. This is what Robert Nozick says in Anarchy State and Utopia p. 171.

[99] Will Kymlicka, Contemporary Political Philosophy: An Introduction p. 5 (Oxford 1990).

[100] John Stuart Mill, Principle of Political Economy, book V (1848).

[101] See John Rawls, A Kantian Conception of Equality, in Collected Papers 254, 255 (Samuel Freeman ed., 1999). Linda Sugin, A Philosophical Objection to the Optimal Tax Model, 64 Tax. L. Rev. 229 (2011) develops Rawls' approach as applied to taxation.

[102] John Rawls, A Theory of Justice at 252 (1971).

[103] The importance of institutional context suggests that many disparate tax regimes can be fair, depending on other institutions. Consequently, I have argued that scholars should consider what limitations theories of justice impose on tax systems, rather than mandates required by such theories. See Linda Sugin, Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems, 72 Fordham L. Rev. 1991 (2004).

design of every social institution, there is no overall balance of equal respect that allows disrespect in one institution to be overcome by excess concern in another. Equal respect and concern demands that all who are affected by tax policy should be considered – even if not fully satisfied – in the public ordering that determines those claims.

From the perspective of equal respect and concern, invisible taxpayers are problematic because they are ignored. They are absent from the institutions that administer the tax system. Their interests are counted less than the interests of those with a more conventional relationship to the tax authorities. Current standing doctrine and the Court's privatization of tax expenditures push invisible taxpayers outside the legal system. As a consequence, they are unprotected by the Constitution whenever their rights are implicated by someone else's tax treatment. Their rights to equal protection and religious freedom are less secure and valued in this system than are the same rights of taxpayers who are part of the traditional dyad.

Outsider status is a fairness problem, even if it produces no economic disadvantage for those forced outside. Procedural justice is an independent demand on government. Economic advantage cannot make up for a failure to give each person equal respect and concern in the institutional structure; government failure to protect basic rights cannot be cured by economic advantages. Rawls' theory of justice is composed of two basic principles in a hierarchical relationship, with economic rights (in the second principle) subordinate to political rights (in the first principle). Legal invisibility is a problem for the more important first principle of justice because it is about whether a person is being treated as an equal and autonomous individual by the state. Any economic benefit that reduces tax liability is accounted for under the inferior second principle. Consequently, invisible taxpayers must be included in the institutional structure in order for the tax system to be fair.

Taxpayers are treated with particular disregard when tax rules and administration *favor* others because their interests are not even represented by government proxy. In the classic case of an identifiable taxpayer at odds with the government, the economic interests of invisible taxpayers coincide with the government's interest, so their concerns are heard. The traditional dyad protects the economic interests of unrepresented taxpayers through the government's participation, but only when the government is attempting to collect revenue. Where the government treats identified taxpayers better than others, the losers are never the ones the legal system sees.

B. Pre-Tax Income is an Unjust Baseline

There is no natural, neutral starting point to evaluate fairness in taxation. Some kinds of widely shared harms may not really be harms at all – we need to determine the baseline of expectations to decide when a person is treated badly. Similarly, not all taxation is ultimately injury – there is a baseline of just taxation, and nobody should be able to complain about being required to pay her fair share. However, any tax in excess of one's fair share should be understood as an injury to that taxpayer. The baseline might fall at different places in different societies, so that excessive taxation in one country might be fair in another. There are few tax regimes that are categorically unjust.[104]

Consistent with the demands of equal concern and respect in designing institutions, the rights and interests of all individuals must be incorporated in establishing baselines. Baselines should reflect what individuals should be entitled to own and what is justly allocated to communal resources. We cannot craft a theory of fair taxation without talking about desert. Fair taxation must consider what we each deserve as our share of the social product, and what we each deserve to bear as our burden of society's costs. The most fundamental tax fairness question asks what should be treated as private property and what should be treated as social product – how to carry out the basic function of taxation in dividing those shares.

There are many points along the spectrum from private rights to communal ownership that people can legitimately claim as appropriate for the baseline against which tax fairness is measured. The baseline itself is a product of social decisionmaking since it is composed of laws. There is no pre-social division between private property and public entitlement – it is the function of government to determine the proper distribution of the returns to social cooperation. Some of those returns will go to individuals and some will be shared, but which individuals should have claims is an issue to be decided by social process – democratic forces in the U.S. The existence of private property is the product of conventions created by law.[105] Understood this way, there is no redistribution, only distribution that gives effect to entitlements created on principles that consider moral desert.

Invisible taxpayers are cheated in the definition of baselines under current law because the baseline most widely used in tax policy analysis is pre-tax income. Pre-tax income is a normatively empty concept because it assumes that people have entitlements to amounts that are properly attributable to social factors. Pre-tax income assumes that individuals are deserving of particular shares without examining whether that entitlement is

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[104] I have argued that an endowment tax on individual abilities would be such a tax. See Sugin, A Philosophical Objection to the Optimal Tax Model, supra note 101.

[105] Murphy and Nagel, THE MYTH OF OWNERSHIP

justified. Presumptive claims to pre-tax income avoids the difficult − but necessary − task of establishing moral bases for the specific distribution of identifiable returns to individuals.

Pre-tax income imagines the individual taxpayer as an autonomous pre-social earner. Recognizing interrelatedness between taxpayers and accepting the reciprocal social obligations carried out through taxation, are inconsistent with the notion of any taxpayer as a pre-social earner. When we recognize the interrelatedness of individuals across the tax system, invisible taxpayers need to be acknowledged and considered in the distribution of shares. Taxpayers are invisible because we pretend that it does not matter to one taxpayer what happens to another taxpayer in the system. Shifting from a pre-tax baseline to a perspective in which there are no rights without legal institutions demands consideration of all individuals, including invisible taxpayers. Since all individuals are interdependent, both contributing to and benefitting from social enterprise, the definition of rights and obligations in taxation should consider everyone. Fairness in taxation demands it.

C. Tax Fairness Requires Both Economic Fairness and Legal Fairness (Rethinking Horizontal and Vertical Equity)

Fairness in taxation has both economic and legal dimensions; how to treat people with equal concern and respect depends on the dimension. The economic dimension requires that we account for the real economic costs of taxation to each person. Economic fairness is concerned with levels of well-being, resources, or opportunities.[106] These are the terms on which debates about tax fairness generally take place, and they are important considerations in designing tax institutions. Nevertheless, we should recognize that these debates are limited in the sense of considering tax fairness only in economic – and not legal – terms. Legal fairness is a separate, and independent, measure of tax fairness. It consists of treating individuals as autonomous people with rights and interests that are important to consider in designing and applying rules. An examination of economic fairness compared to legal fairness clarifies the conceptual distinction between the traditional tax equity notions of horizontal and vertical equity.[107] A just tax system must satisfy the demands of both economic and legal fairness.

Economic fairness is not a concept that exists in isolation; it is about

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[106] See, e.g., Shaviro, Alstott, Dodge

[107] The debate about whether there is a distinction between horizontal and vertical equity has produced somewhat of a stalemate. See Kaplow, Repetti and Ring.

relative shares in society, and is primarily a matter of social organization. Tax fairness is only meaningful in the context of other non-tax public (and private) institutions, and across individuals in society. Economic fairness requires considering the gross amount of tax that any individual pays, but also depends on how public funds are used and the levels of individual well-being in society.[108] An individual's fair share depends both on his relative level of well-being in the society and/or his share of public benefit. Fair shares can account for both abilities to pay and social distribution.

There is no pre-political, natural level of taxation that governments must strive to reach. Countries vary in the size of the public sector compared to the private sector, so the gross level of taxation appropriately differs.[109] However, economic justice requires that government collect sufficient revenue to finance the institutions necessary for political equality, equal opportunity, and basic welfare necessary for individual agency and political participation. Overtaxation is only meaningful by reference to relative burdens within the context of a given level of government revenue and spending. Without knowing the extent of burdens across the population, it is impossible to measure whether individuals are being treating fairly.

Thus, an individual's tax liability must be sensitive to: (1) total governmental burdens and benefits to that individual, and (2) total benefits and burdens across the community as a whole. Parsing these two dimensions helps illuminate tax fairness. First, consider the balance of government burdens and benefits on an individual basis. It is tempting to argue that confiscatory taxation – where the state takes all of a person's pre-tax earnings, for example -- is *per se* economically unjust. But even confiscatory taxation depends on context. It is one thing for the state to take all of a person's earnings and leave him to starve, but it is completely different to take all of a person's earnings and simultaneously satisfy his every desire. While we might not find such a system attractive, the problem cannot be solely economic if there is no economic deprivation. From the individual perspective, economic fairness requires considering whether a person is deprived of something necessary.[110] The objection to confiscatory taxation without economic deprivation is on legal or political, not

[108] Bill Gale, Eugene Steuerle on progressivity, Tax Notes.

[109] The United States is projected to collect 18.3% of GDP in revenue in 2015. See Congressional Budget Office, An Update to the Budget and Economic Outlook: 2014 to 2024, Aug 27, 2014 at https://www.cbo.gov/publication/45653. Western European countries collect substantially more. See OECD, Revenue Statistics Comparative Table at http://stats.oecd.org/index.aspx?DataSetCode=REV (showing the U.S at 25.4% for 2013, compared to the OOECD average of 34.1%)(OECD and CBO use different measurements).

[110] See Sugin, Theories of Distributive Justice, supra note 49 at 2007.

economic, grounds.

It is worth drilling down further into the meaning of economic fairness in taxation, and how equal concern and respect in the design of institutions plays out. All income in the social system is not the same – some returns are more appropriately allocated to social forces and consequently more appropriate for taxation than are others. In a society (like ours) in which there is substantial income and wealth concentrated among very few individuals,[111] economic fairness requires that the tax system consider the crucial role of the social system in producing income and wealth. Where there is no good explanation for the very highest earners to receive so much more than others for their capital or labor, the tax system must account for the substantial contributions of the social system.

Once we account for social institutions, it becomes obvious that we all *deserve* very little of what we have. A huge part of everyone's income and wealth is attributable to social factors. The share of income and wealth attributable to being in society increases as income and wealth go up. The benefits to high income individuals provided by the social structure and the government extend beyond anything that looks like a transfer, or even a public good because the basic infrastructure of society benefits the wealthy much more than the poor. That infrastructure includes the operation of markets, the monetary system, military stability, the rule of law, and everything else that makes America an attractive place to live, work and invest. Social forces and social cooperation produce many tangible and intangible things that contribute to income and wealth. The advantage of being in society is enormous for people who do well.

Opportunity is also fundamental to determining the returns to social cooperation – those with greater opportunity to earn and invest should be required to pay more from the fruits of that opportunity than those who did more with less. Greater opportunities for some arise on account of the social system, which includes educational institutions and social connections. Accounting for disparate opportunities is one way in which the tax system can be sensitive to the balance of benefits and burdens over lifetimes, since opportunities at one time may affect returns at another.

Nevertheless, it is important not to overemphasize the importance of opportunity in the design of fair taxation. Economic justice is not solely a matter of equalizing opportunity to earn. It is not enough to start everyone off in the same place. This is the difference between libertarian and liberal

[111] The top 400 earners had an average of $265 million in income in 2010, earning 1.31% of total income earned by all taxpayers. See IRS, SOI Tax Stats Top 400 Individual Income Tax Returns with the Largest Adjusted Gross Incomes at http://www.irs.gov/pub/irs-soi/10intop400.pdf.

egalitarian theories of economic fairness. Libertarian theories are more amenable to "starting gate" fairness: While Robert Nozick recognized that a just distribution is impossible where people enter society with different resources, he believed that justice would be achieved as long as everyone starts off equal – regardless of the ultimate distribution.[112] Ronald Dworkin explicitly rejected the starting gate notion by explaining that a just economic system continually intervenes to affect distribution over time, as arbitrary differences between individuals produce disparate economic returns.[113]

A tax system that is at all concerned with welfare must be sensitive to outcomes. Ability to pay, the most widely held norm relating to fair taxation, cannot be measured on an ex ante basis since that ability ultimately depends on how opportunities translate into outcomes.[114] An emphasis on equal opportunity implies a high normative regard for merit. If economic justice consists only of equalizing opportunities, then individuals are entitled to anything they can earn in a level playing field. That conception is not without internal difficulties − there are different interpretations of a level playing field, and individual talent is a sticky issue for philosophers who believe in rewarding talent. But even ignoring those problems, that conception is incomplete. Even assuming that opportunity is equalized, social institutions still contribute to disparate outcomes for individuals. An economically fair tax system will account for how those institutions contribute to the pre-tax distribution of wealth and income. Merit can only explain a small part of pre-tax distributions. Merit distinctions − like hard work − explain so little of the ultimate economic difference between individuals.

Even if we could all agree about what constitutes truly equal opportunity, and even if we could guarantee equal opportunity for all, we would still not be finished designing an economically just system because markets do not necessarily reward social value. The conventional notion of merit maps poorly onto market-based returns. There are many things to be valued that are not valued in the market. Thus, even if fair shares are

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[112] This is Nozick's challenge to Rawls. He offers that the initial distribution can be whatever the reader prefers, including complete equality, because his point is that freedom to trade after that moment will necessarily disrupt whatever the pattern of distribution was at the start. Robert Nozick, Anarchy State and Utopia 160-63(1974).

[113] Ronald Dworkin, What is Equality? Part 2: Equality of Resources, 10 Philosophy and Public Affairs 283 (1981).

[114] See Mark Kelman, Time Preference and Tax Equity, 35 STAN. L. REV. 649, 656 (1983); Alvin Warren, Would a Consumption Tax Be Fairer Than an Income Tax?, 89 YALE L.J. 1081 (1980).

sensitive to desert and recognize the role of merit in distribution,[115] there is still wide room for taxation to account for non-market values. Economic justice requires recognizing social contributions that individuals make that do not produce economic gains for them. The fiscal system should account for the benefits that teachers, homemakers, and other underpaid individuals in the market contribute to the social product.[116]

As an economic matter, we expect that a fair tax system will impose economic burdens that are allocated according to a defensible economic principle, such as ability to pay or standard of living – the two norms underlying taxes on income, consumption, and wealth. These norms are generally treated as "the" standards for tax fairness, with no attention to the fact that they are economic standards.[117] As economic standards, ability to pay and standard of living see individuals as points on an economic spectrum compared to others at different economic points. For example, ability to pay compares income earners to other income earners, and justifies greater taxation for those with greater income. Consequently, economic fairness maps onto the vertical equity norm in traditional tax policy analysis because individuals can only be judged visa vis others in different places along the same dimension. Scholars who argue that there is no independent content to tax policy's traditional horizontal equity norm analyze taxation solely in economic terms.[118] From an economic perspective, treating equal earners the same is derivative of treating differing earners differently.

The legal dimension of fairness is distinct. Starting from the same commitment to equal respect and concern in the legal context requires that we treat each person's economic and non-economic rights as meaningful and protect them through the legal system. It is important to understand the tax system as a legal institution as well as a system that allocates resources. As such, the norms for fairness look different from a legal perspective, and tax-law related fairness imperatives more resemble the norms in other areas of the law.[119]

As a legal matter, we expect that a fair tax system will impose rules

[115] Not everyone agrees that they should be. Liam Murphy argues that economic justice has nothing to do with merit, (TLR draft), but philosophers like Ronald Dworkin and libertarians believe that merit is important in determining a just distribution.

[116] I have suggested that these contributions might be considered in lieu of tax payments in money. See Sugin, Philosophical Objection, supra note 101.

[117] See David Bradford, Blueprints for Basic Tax Reform; Dodge, supra note

[118] Kaplow. Utilitarians are less likely to separate out rights-based concerns from purely economic concerns because utilitarianism can collapse both concerns into a single metric.

[119] Due process

in an evenhanded way, and that the tax system will respect each person's rights and legal entitlements equally. This is how to best interpret the horizontal equity notion in taxation. Understood this way, horizontal equity is a completely different kind of norm than is vertical equity.[120] It is more procedural and concerned with rights, compared to vertical equity, which is more concerned with money. Horizontal equity demands that we examine the administration of the law, and every taxpayer's position vis a vis the state and other taxpayers. At a minimum, it demands that the law not be applied in an arbitrary fashion. More expansively, it looks behind the economic locus points that provide an easy shorthand for evaluating fairness, and asks whether people pay their fair shares, taking into consideration every relevant question for their tax liability compared to everyone else's.[121]

The legal understanding of tax fairness is more robust than the economic understanding because it can answer many more questions about how the system should be designed. It can consider the proper role of non-financial differences to tax liability. For example, when deciding on the appropriate unit for taxation, the demand to treat everyone with equal concern and respect offers a framework for comparing people who live together with others and those who do not. Reasonable people can differ about the proper tax under that standard, and whether households or individuals should be tax units. Nevertheless, it is important that the idea of legal fairness invites consideration of how the tax system affects identity, autonomy, and citizenship.[122] Economic fairness has nothing to say along those lines.

Legal fairness challenges decisionmakers to look behind income, consumption or wealth and evaluate the burdens placed on different kinds of people. Our system taxes undocumented workers without giving them the rights that citizens earn from paying those same taxes.[123] Our system taxes people who work for a living much more heavily than people who invest capital.[124] Legal fairness demands justification for these disparate burdens. Beyond economic comparisons, it can incorporate personal well-being, choices, and rights into consideration in the design of taxes. When we ask whether the tax system treats people fairly, it is important to

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[120] Murphy and Nagel treat horizontal equity as an incoherent norm because they understand it as a free-standing economic judgment. See The Myth of Ownership at .

[121] Dworkin's concern that individuals bear the costs of their lives for others informs this concern. See Equality of Resources.

[122] See Tsilly Dagan

[123] See Francine Lipman

[124] See Sugin, Payroll Taxes, Mythology and Fairness, 51 Harv. J. Legis. 113 (2014).

remember that the question is about people, not money. That inquiry necessarily includes whether we have incorporated peoples' interests in designing the rules. Legal fairness is also the rubric under which the tax system offers individuals protections from unconstitutional or otherwise illegal application of the law. The economic approach to fairness − useful though it is − cannot accommodate non-economic interests and legal rights.

All of this brings us back to invisible taxpayers because their injuries are most significant as legal unfairness. Under current doctrine, the only cognizable tax injury is an economic injury, but legal injury – where a person's rights and interests are disrespected in the institutional structure – is not actionable. Because the plaintiff must be complaining about his tax bill, violations of his rights that do not translate into demonstrably identifiable tax liability are not redressable. The only kind of injury that exists in the tax law is the direct economic injury of being asked to pay an identifiable tax. The cases highlighted in this article all involve constitutional rights implicated by the tax law. Tax fairness – in the legal sense – demands that the tax system respect and protect these non-economic interests. It is in the legal context that the rights of invisible taxpayers are lost because they have no opportunity to be heard.

The tax system imposes many injuries that are not primarily economic at all. For example, by favoring certain activities (like energy exploration and real estate investment) or people (like families with children) compared to others, the tax system endorses particular social values. Activities and people outside the favored groups are less valued in the social structure, which is unfair under the guiding principle. The plaintiffs in *Allen v. Wright* – black families challenging the IRS's allowance of tax exemption for racially discriminatory schools − understood that their injury from the tax system could be the law's perpetuation of a status quo disrespectful of them as equal citizens. They were the same people with a real interest in the outcome in *Bob Jones*. Edith Windsor knew that her injury did not really come from the government's withholding her refund despite the court's order; her injury came from the tax system's operation to treat her marriage as less legitimate than the marriage of a heterosexual couple. The Sklars could not have reasonably expected their deduction for religious school tuition to be allowed; their injury arose because the government favored members of the Church of Scientology over them.

The legal and the economic concerns merge to the extent that the legal right is itself economic in nature. But not every interest implicated by the tax system is economic. There are many legal rights in the tax law that are properly independent of economic concerns. Taxation is an omnipresent a force in everyone's life, and raises the most fundamental questions of the appropriate relationship of the individual to the state. Tax policy scholarship must do a better job evaluating that relationship along all the dimensions that taxation touches. The tax law's broad scope and its awesome influence over so many non-economic policies requires justification. Tax scholars have fallen short outside the economic arena – even though taxation has long been about much more than money. The most important function that tax policy scholarship can serve is evaluating the justice of the government's relationship with the people through taxation.

VI. MECHANISMS FOR LEGAL REDRESS

Some scholars have suggested that the Supreme Court reconsider its standing doctrine to allow broader challenges by taxpayers. Lynn Lu examines Allen v. Wright to argue that the tax context of some cases has created bad law.[125] Samuel Brunson proposes a radical broadening of standing doctrine to enable more plaintiffs to bring challenges to tax administration, in order to rein in IRS discretion.[126] Heather Elliott's comprehensive approach to de-constitutionalizing much of today's standing doctrine would likely enable more taxpayer litigation.[127] While all noble ideas, I am skeptical that the Supreme Court will soften its standing doctrine in any of the ways scholars have suggested. To the contrary, the Roberts court seems inclined to use standing more aggressively.[128] Allen v. Wright is an old and important precedent, and the standing holding in ACS v. Winn, along with its sweeping categorization of tax expenditures, indicates that a majority of the current court is not interested in opening the courthouse doors. Those who care about just application of the tax law will need to look elsewhere. I contend that there are other ways to address this problem without betting on an unlikely constitutional reinterpretation.

It is fair for the tax system to impose burdens on taxpayers as long as the government has properly considered their interests in adopting the policies that burden them. Invisible taxpayers can legitimately be expected to finance the state only if the tax laws are designed and administered consistently with the Constitution. Under current law, taxpayers are invisible because they have no standing to complain about tax regimes that

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[125] See Lu, supra note 14.

[126] See Brunson, supra note 131 (advocating that Congress allow "fire-alarm standing" to individual litigants).

[127] Elliott, supra note 46

[128] See Jonathan Adler, Standing Still in the Roberts Court, 59 Case W. Res. L. Rev. 1061 (2009).

disrespect them or unconstitutional tax benefits granted to others. The taxpayer-government dyad that enjoys institutional recognition fails to protect the interests of others whenever the taxpayer and government in that pair are not really at odds with one another, and whenever the absent taxpayers' interest fails to map precisely onto the state's interest. The solution is to institutionalize invisible taxpayers so that their common interests can be considered by courts and the IRS.

Protecting the interests of invisible taxpayers does not require courts to interfere with Congressional prerogative or administrative discretion, nor would it inexorably lead to an avalanche of litigation.[129] Rather, it would strengthen the rule of law. Guaranteeing fair treatment for everyone does require acknowledging the existence of invisible taxpayers and making them visible in the legal regime. Since the political process is unlikely to solve the fairness problems described in this article, this section considers potential institutional approaches to improving fairness for invisible taxpayers, without unleashing a torrent of frivolous claims or requiring heroic interpretive changes by the Supreme Court.

A. The Political Process Will Not Solve this Problem

In addition to erecting barriers for invisible taxpayers, article III's procedural hurdles perform a crucial separation of powers function. Courts are best equipped to handle cases and controversies, but Congress is in a better position to make contested political choices.[130] The putative plaintiffs complaining about Bob Jones' exemption, a charitable deduction for Scientologists, and the privileged tax status of heterosexual couples all faced the specter of a closed courthouse. Could they have gotten redress in the political process?

Who should pay more tax is generally a legislative question. Taxation is politically salient, and elections are won and lost over tax policy. Core questions of tax fairness depend on contested theories of distributive justice about which reasonable people can disagree. Since there are no right or wrong (only inconsistent) beliefs about distributive justice, tax law should reflect whatever theory resonates best with the governed. The political process is the best way to reveal those preferences. The legal framework also suggests that the legislature should be king in matters of taxation. Under the Constitution, Congress has broad discretion in imposing

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[129] Maintaining and controlling IRS discretion are both essential. See Lily Kahng, The IRS Tea Party Controversy and Administrative Discretion, 99 Cornell L Rev Online 41 (2013).

[130] See Scalia, supra note

and designing taxes, and taxes are determined primarily by reference to a dense and complex statutory code. Finally, the tax burden on invisible taxpayers is shared by many people, and the political process is a place where people can meet to further their common interests.

Nevertheless, the political process is unlikely to resolve the problems faced by invisible taxpayers. For precisely the same reason that courts won't hear these cases – because the harm to each taxpayer is so small – individuals may not even recognize their unfair burdens. Very few voters know about the tax system's beneficial treatment of a few taxpayers – how many regular people know about the IRS's policy of allowing the deduction for Scientologists? The nature of tax benefits for favored groups is narrow – many tax expenditures have an asterisk in the revenue cost tables because they are smaller than rounding errors in the federal budget – though of course very substantial for the favored taxpayers. Taxpayers are rationally apathetic; it is not worth the average taxpayer's trouble to pay attention to how the tax laws are being administered for others. Consequently, legislators are unlikely to be interested in solving these problems.[131]

Even where public interest might be heightened enough to spark legislative interest, such as the *Windsor* case, there is no guarantee that the political process will produce a constitutional result. Congress might affirmatively decide to discriminate against gay couples (or racial or religious minorities). But that doesn't make the constitutional violation any less serious. Constitutional violations that favor majorities demand the most serious attention from the courts – a tax benefit administered in a way that reduces the taxes of Christians (only) would be both unconstitutional and politically popular. "As Allen v. Wright demonstrates, the Court sometimes uses standing to evade what it has elsewhere asserted as its proper role. … The Allen plaintiffs − African Americans seeking integrated schools in the South − were precisely the kind of plaintiffs who, as a discrete and insular minority, could not seek political redress and whom Carolene Products said the Court must protect."[132]

I am not advocating greater judicial access for taxpayers to challenge policy decisions that Congress makes about taxation. Instead, I am arguing for greater recognition of legal claims, and a more flexible approach to identifying a claim as legal, rather than political. The claim

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[131] Samuel Brunson, Watching the Watchers: Preventing IRS Abuse of the Tax System, 14 Fla. Tax Rev. 223, 261 (2013)("Though ending the I.R.S.'s abuse of the tax system helps taxpayers generally, the benefits are diffuse, and no legislator is likely to benefit politically from engaging in such oversight.")

[132] Elliott, supra note 46 at 487.

that the Sklars made was a legal − not a political claim − because it was about the government violating a right they had. *Bob Jones* and *Windsor* also involved individuals who were being denied their constitutional rights by the administration of the tax law. Taxpayers suffer injuries as citizens, but those injuries manifest as increased tax shares.

B. Institutional Structure for Invisible Taxpayers

The problem with allowing taxpayer standing based on the theory of legal shares described in Part III.B stems from the insignificance of any individual taxpayer's contribution in the context of the whole. With each financial interest so small, individual litigation is not a good fit. The problems are systemic and go to the integrity of government; it is the accumulation of millions of slivers of tax injustice that make these issues important. Consider *Hernandez*: a single taxpayer has a miniscule economic interest in the deduction that Scientologists have under the IRS closing agreement and current practice. But the aggregation of all taxpayers allows consideration of the total cost to the Treasury of the allowance, transforming tiny injuries into a significant public concern. An unconstitutional deduction for Scientologists costs taxpayers enough to justify judicial consideration, even with prudential limitations on standing.

The challenge is to institutionalize disparate taxpayers into one party who can sue to vindicate the rights of all. Various forms are possible to fulfill this function, both private and public. Incorporated aggregation in a public party that represents the interests of invisible taxpayers holds real promise.[133] Private parties are also possible, but they present more difficulties. Compared to private parties, an independent public institution's managerial discretion could more effectively be limited by fiduciary obligations to taxpayers, as well as procedural requirements. An official public protector of invisible taxpayers would be in a position to evaluate the myriad claims of illegality and unconstitutionality that taxpayers have, and bring suit only where a strong legal case can be made.

Congress could empower an official public monitor solely with respect to constitutional issues, leaving the IRS its customary broad discretion over cases that do not raise constitutional questions.[134] The mere

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[133] This could be considered a "public right of action to sue to vindicate [citizens'] private rights." Seth Davis, Implied Public Rights of Action, 114 Col. L. Rev. 1 (2014).

[134] Some commentators are more broadly concerned about IRS overreach than I am. See Brunson, supra note 131; Zelenak, supra note 2. Professors Brunson and Zelenak are concerned that the IRS is insufficiently bound by the rule of law. But see Alice Abreu and Richard Greenstein, Defining Income, 11 Fla Tax Rev. 295 (2011)(explaining

existence of a constitutional monitor with the potential to intervene might be sufficient to remind the IRS about invisible taxpayers. Such an institutional structure could inspire the IRS to better recognize issues that the traditional dyad treats as peripheral to its conflict. A separate institution representing the interest of invisible taxpayers would operate as a filter between taxpayer complaints and access to courts, choosing only the most worthy cases.

There is precedent for such an institutional solution in the Taxpayer Advocate. Under current law, the Taxpayer Advocate is sympathetic to taxpayers who have been treated badly in the system, and is empowered to resolve disputes with the IRS.[135] She could be legally designated to act as a representative of invisible taxpayers, with powers to intervene, sue, and otherwise protect their interests. As would be necessary for any institution charged with protecting invisible taxpayers, the Taxpayer Advocate currently enjoys some independence from the executive branch. Independence is important because protecting invisible taxpayers will require litigation against the IRS and pursuing constitutional challenges to legislation. Under current law, the Taxpayer Advocate has no authority to initiate suits against the government, and its focus of concern is individual and identifiable taxpayers, not the invisible ones. Nevertheless, Congress could expand the Taxpayer Advocate's role to include this function.

As an alternative to expanding the role of the Taxpayer Advocate, Congress could create a new institution, independent of both Congress and the President, with authority to sue on behalf of invisible taxpayers and which could serve as a general legal monitor for their interests.[136] The new institution would need to be independent of the IRS, and would have fiduciary duties to taxpayers as a whole, filling in the now empty space between the IRS and individual taxpayer litigants. A public actor not connected to any current tax institution might offer better representation and more independence than the Taxpayer Advocate, since the Advocate is part of the extant tax enforcement framework.

Another option could be empowering private individuals to represent public interests. This is an attractive option if people are skeptical of the ability of public institutions to behave in the interest of invisible taxpayers. There is a long tradition of private attorneys general bringing so-

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interpretations that undertax as administrative necessity).

[135] Its powers are limited under current law. See Brunson, supra note 131 at 252.

[136] There are many complex legal issues that would arise in creating such an institution, the precise contours of which are beyond the scope of this article. For a general discussion, see Michael Herz, United States v. United States: When Can the Federal Government Sue Itself? 32 Wm. & Mary L. Rev. 893 (1991).

called "qui tam" suits to enforce various public rights. In that tradition, Congress creates rights that give individuals standing to bring suit.[137] The authority for qui tam actions comes from Congress – which drafts statutory provisions giving individuals the right to bring suit.[138] Qui tam actions have withstood standing attacks. Private qui tam plaintiffs represent the legal interests granted by Congress to the public at large.[139] Individuals serve as representatives of the public to enforce policy.[140] Because the suit relates to an action on the government's behalf, the government, not the relator, is considered the real plaintiff and if the government succeeds, the relator receives a share of the award.[141]

However, qui tam is not an easy fit for invisible taxpayers. Qui tam is most common where the government has been defrauded by a private party.[142] There are mechanisms in place to combat tax fraud,[143] and invisible taxpayers are not victims of fraudulent individuals – they are victims of government largesse. Unlike in most qui tam proceedings, the government does not perceive itself to be the harmed party -- the taxpayers shouldering more than their fair shares are individually harmed. Since the government granted the favored taxpayer the challenged benefit, a private party bringing a qui tam action would essentially be suing on behalf of the government over tax benefits that the government has, itself, bestowed. Qui tam has not previously been used in this way, although the government has been known to sue itself.[144]

While private enforcement might be effective and manageable in some areas of the law, it could prove problematic in the tax context. Taxpayers can be uniquely hostile and unrelenting in refusing to pay their legal share, and any invitation into the courts therefore requires a strong gatekeeper to separate the frivolous from the serious. Private attorneys general in the tax context raise the specter of zealous tax protesters overwhelming meritorious cases and swamping the system. Consequently,

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[137] See generally, Evan Caminker, Qui Tam Actions, 99 Yale L. J. 341 (1989).

[138] See id.

[139] Priebe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting)

[140] Id.

[141] Cornell Law Encyclopedia, http://www.law.cornell.edu/wex/qui_tam_action.

[142] Today, the most widely used qui tam action is to pursue violators of the federal False Claims Act. That statute authorizes qui tam actions against parties who have defrauded the federal government. 31 U.S.C. § 3279 et seq.

[143] Franziska Hertel, Qui Tam for Tax?: Lessons from the States, 113 Colum. L. Rev. 1897 (2013) ("the IRS whistleblower program, state false claims acts implicitly authorizing qui tam for tax, and the New York False Claims Act.")

[144] See generally, Herz, supra note 136

private enforcement seems less desirable than public enforcement by a specially authorized institution. The Taxpayer Advocate or an independent counsel created for this purpose would be more able than a private mechanism to prevent a crack in the courthouse door from opening too wide.

C. Mandating IRS Procedures

It might not be necessary to burden the courts with additional litigation if the IRS could do a better job following the law and upholding the Constitution. A less cumbersome solution to the problem of invisible taxpayers than creating an institutional plaintiff could involve administrative process. Administrative process might actually be a more effective way to vindicate constitutional rights for invisible taxpayers, since courts are not as interested in their role as protectors of individual rights as they once were.

The simplest administrative approach might be educating the IRS about invisible taxpayers, and allowing it to include their interests in its decisionmaking procedures. Where the harm to the system from invisibility is small, allowing the IRS discretion to consider invisible taxpayers might be sufficient to prevent the most egregious errors. For example, the IRS could be required to flag any revenue-reducing agreements it enters into with specific taxpayers, and justify its decision in writing. That procedure would allow the IRS to devote extra attention and resources to decisionmaking when it knows that no court will be able to adjudicate the question.

Where the issues are legally important or the revenue loss substantial, more demanding administrative consideration would be appropriate. Treasury or Congress could mandate public consideration of invisible taxpayers in some circumstances. To guarantee that consideration, the IRS could be required to file a public acknowledgement every time it decides to adopt a revenue-reducing position. That acknowledgement could explain the government's decision to be generous to a particular class of taxpayers, along with a description of how it considered the population of taxpayers as a whole.

Somewhat more process might be appropriate for the most significant decisions. In those cases, the IRS could be required to follow notice and comment processes, similar to the procedures used for rulemaking under the Administrative Procedure Act. For example, the IRS could have been required to solicit comments on its decision to allow the charitable deduction for Scientologists. There could have been a multi-stage process imposing hurdles before the decision could go into effect.

The process itself might have made the IRS more reflective about the substance of the closing agreement. The transparency produced by such a process might also be a monitoring force.[145] Nobody knows how many unconstitutional private agreements the IRS has concluded with individual taxpayers because they are not public. A comment process would have given other taxpayers the opportunity to argue that the Scientology closing agreement was an unconstitutional reversal of the Supreme Court's decision in *Hernandez*. People with an interest in challenging the unconstitutional administration of the tax law —like tax law professors— are likely to participate in that context. When taxpayers believe that proposed Treasury regulations are unconstitutional, they are not shy about commenting.[146] Where there is a substantial outcry, the Treasury Department has no choice but to examine its policies more closely.[147]

Procedures that require the Treasury to more closely examine the constitutionality of its administration is a good idea. Nevertheless, internal Treasury procedures cannot wholly substitute for judicial review in constitutional cases since courts are the final arbiters of constitutionality.[148] Better administrative procedure should complement judicial review. As the three featured cases make clear, there are constitutional issues that arise in tax cases that are so important that the Supreme Court needs to resolve them. Recall that the Obama administration bent over backwards in *Windsor* to make sure that the courts would retain jurisdiction. In *Bob Jones*, the Supreme Court itself appointed an amicus to argue the government's position, rather than lose the opportunity to decide the case.

Administrative process might be sufficient for cases in which the IRS gives a taxpayer particularly generous treatment, but do not raise constitutional questions. One example in this category is the Service's recent decision to interpret section 382 in a way that allowed some troubled banks to use net operating losses to reduce their tax liabilities.[149] Many people believed that the IRS lacked the authority to issue that guidance,

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[145] The Scientology closing agreement was leaked — presumably by someone who worked at the IRS — to the Wall Street Journal, so it was not actually secret. Nevertheless, the drafters of the agreement expected that it would not be disclosed.

[146] Sometimes by the tens of thousands, as in the case of regulations proposed to govern the political activities of section 501(c)(4) organizations. See http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501(c)(4)-Organizations (over 150,000 written comments received).

[147] The 501(c)(4) regulation was proposed in November 2013, and its ultimate fate is not resolved as of this writing. In May 2014, the Treasury announced that it was considering all of the comments. See id.

[148] Marbury v. Madison.

[149] IRS Notice 2008-83, 2008-2 C.B. 905; IRS Notice 2010-2, 2010-1 C.B. 251.

given the language in the statute.[150] Nevertheless, other taxpayers who are stuck with the consequences of section 382's limitations are not in a position to attack the government's decision to help the big banks. Like the Sklars, they can complain about their bad treatment, but not about another taxpayer's better treatment.

The difference between the section 382 losers and the Sklars is that the Sklars have a constitutional claim, while the section 382 losers have a claim about the interpretation of a statute. While it is not desirable for the IRS to play favorites among taxpayers, statutory and constitutional favoritism could be treated differently. Judicial intervention might only be necessary where constitutional violations of individual rights are alleged. The line between permissible exercise of discretion and IRS overreach is not always clear. A wholly internal process, in which the IRS deliberates on its own decisions, without oversight by a court, might be sufficient to address the most egregious cases of statutory favoritism. Simply identifying the biases created by invisible taxpayers might be sufficient to reduce their effects.

D. Judicial Recognition of Invisible Taxpayers

Courts themselves can also take initiative in making taxpayers more visible by considering the implications of its decisions for invisible taxpayers. No change in standing doctrine would be necessary. Rather, courts would need to recognize the invisibility of most taxpayers, and the injustice of continuing to place them outside the legal regime. They would need to acknowledge the far reach that their current rulings have on all the taxpayers who will never have standing to complain. The scope of judicial decisions already affects invisible taxpayers, but nobody currently considers their interests.

The *Sklar* court could have ruled more broadly than it did. It noted the unconstitutionality of the IRS's treatment of the Church of Scientology. But it left the status quo alone. The court had a party with standing before it since the Sklars were arguing about their own tax liability. It also had the IRS in court, as happens in every tax dispute. The IRS knew that the Sklars were trying to get the benefit of the Scientology ruling, and the government had ample opportunity to defend its policy before the court. If the Ninth Circuit had declared the IRS's Scientology policy in violation of the

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[150] See Comment, The Impact of Illegal Tax Guidance: Notice 2008-83, 62 Tax Lawyer 867 (2009); J. Mark Ramseyer and Eric Rasmussen, Can Treasury Exempt Its Own Companies from Tax? The $45 Billion GM NOL Carryforward, 1 Cato Papers on Pub Pol 1 (2011); Zelenak, supra note 2 at 846-7.

Establishment Clause, the Sklars would still have lost, but justice overall would have been better served.

People should have an incentive to raise constitutional issues that courts cannot otherwise decide, as long as those issues are related to the question of their own tax liability. While the precedent on religious school was well settled by the time the Sklars brought their case, they had a colorable claim that they should be entitled to the tax benefits enjoyed by Scientologists. Allowing collateral attack on IRS policy by taxpayers who might benefit from it allows courts to identify the interrelationships among taxpayers, and to protect the interests of taxpayers who are not before the court. Taxpayers arguing about their own liabilities can assist the IRS and the courts in recognizing the effect of tax policies on individuals who are outside the traditional dyad.

In addition, courts should have an interest in protecting judicial precedents. The IRS policy on Scientologists is in clear conflict with the Supreme Court's holding in *Hernandez*. Once there is a clear constitutional determination that applies to the very circumstance, it is a matter of the courts reinforcing their own decisions. This is another distinction between Sklar and the IRS's notice on net operating losses. Where the IRS flouts a statute, the interbranch conflict involves the IRS and Congress. Congress is more likely to be interested in correcting an IRS mistake about the application of legislation (like section 382) that it is in correcting an erroneous application of case law (like *Hernandez*). Furthermore, it is not hard to imagine a situation in which Congress adopts a statute, the IRS enforces it, and then a court declares the statute unconstitutional. The IRS and Congress are on the same page throughout, but the courts are not.

A recently reversed decision on the parsonage exemption is a good example, and the lower court's decision might be a good model, if the Supreme Court allows the lower courts to take initiative. There is a tax exemption for housing provided to clergy that is not generally available to others who receive housing from their employers.[151] The so-called parsonage exemption has been part of the Code for decades, but the first judicial decision to hold it unconstitutional was decided in 2013.[152] Some

[151] I.R.C. §107.

[152] "I conclude that § 107(2) violates the establishment clause under the holding in *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), because the exemption provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise." Freedom from Religion Found., Inc. v. Lew, 11-CV-626-BBC, 2013 WL 6139723 (W.D. Wis. Nov. 22, 2013). An earlier challenge survived a motion to dismiss. Freedom From Religion Found., Inc. v. Geithner, 715 F. Supp. 2d 1051 (E.D. Cal. 2010).

maintain that the exemption is constitutionally acceptable,[153] while others disagree, and the issue might be on its way to the Supreme Court.[154] The district court in *Freedom from Religion v. Lew* allowed the atheist plaintiffs to proceed "because it is clear from the face of the statute that plaintiffs are excluded from an exemption granted to others." While the atheists can surely complain that they are being taxed too much, that is a distinct claim from arguing that others are being taxed too little. While the district court could (and did) reach the constitutional question in the parsonage case, it alternatively could have disposed of the plaintiffs' claims without doing so, as the *Sklar* court did, and as the Seventh Circuit said it should have done. By reaching the constitutional question, the district court protected the interests of many taxpayers not before the court, and placed the litigant before it in a larger context, where tax fairness requires demands that fair shares are in relation to one another.

Every branch of government has an obligation to see that the tax system is legal, so courts should not ignore the constitutional questions that stare them in the face when presented with ordinary tax cases. Courts often decide issues that affect taxpayers other than the one before the court – any determination about the interpretation of a statute necessarily implicates other taxpayers. Taxpayers challenging their own liabilities on one side and the IRS defending its position to collect that revenue on the other, present a clear controversy, and courts would be in comfortable territory adjudicating matters between adversaries. Given the policies at stake, and the real danger that unconstitutional administration will continue indefinitely, courts should be more open to deciding constitutional questions that are raised by taxpayers with standing, even if it is not mandatory that they decide those questions to narrowly resolve the case before it.

VII. CONCLUSION

The invisibility of taxpayers in the legal system creates a substantial problem for tax justice, both substantive and procedural. The courts' application of standing doctrine, as well as its conceptualization of tax expenditures as not involving state action, has narrowed the opportunity for judicial review for tax-reducing actions taken by both Congress and the

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[153] See Edward Zelinksy, Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes, 33 Cardozo L. Rev. 1633 (2012)(concluding that the exemption is constitutionally permitted, but not required).

[154] The Seventh Circuit reversed in November. Slip op. No. 14-1152

IRS. These developments fail to protect individuals, even when they have substantial individual rights claims under the Constitution.

This article examined the contours of tax justice along economic and legal dimensions by focusing on invisible taxpayers, who have a great stake in the fairness of the tax system but no legal rights to challenge injustice. It argued that the application of standing doctrine to taxpayer challenges has been more stringent than the constitutional rules require, and that mechanisms to allow invisible taxpayers a day in court could better strengthen the rule of law. Invisible taxpayers have gone mostly unnoticed in the literature because tax policy debates about fairness focus primarily on issues of economic fairness, while ignoring issues of legal fairness. Given the broad reach of the tax system, it is crucial that taxation satisfy the most demanding standards for procedural fairness. Social institutions that allow taxpayers to remain invisible cannot be just. Congress, the IRS, and the courts all have roles to play in making the legal system see those who are now invisible.

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AND PUBLIC FINANCE

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"Invisible Taxpayers"

Linda Sugin
School of Law
Fordham University

February 24, 2015
NYU Law School
Vanderbilt Hall-208
Time: 4:00-5:50 p.m.
Number 5

SCHEDULE FOR 2015 NYU TAX POLICY COLLOQUIUM

(All sessions meet on Tuesdays from 4-5:50 pm in Vanderbilt 208, NYU Law School)

1. January 20 – Brigitte C. Madrian, Harvard Kennedy School. "Does Front-Loading Taxation Increase Savings? Evidence from Roth 401(k) Introductions."

2. January 27 – David Kamin, NYU Law School. "In Good Times and Bad: Designing Legislation That Responds to Fiscal Uncertainty."

3. February 3 – Kimberly Blanchard, Weil, Gotshal & Manges. "The Tax Significance of Legal Personality: A U.S. View."

4. February 10 – Eric Toder, Urban Institute. "What the United States Can Learn From Other Countries' Territorial Tax Systems."

5. **February 24 - Linda Sugin, Fordham University, School of Law. "Invisible Taxpayers."**

6. March 3 – Ruth Mason, University of Virginia Law School. "Citizenship Taxation."

7. March 10 – George Yin, University of Virginia Law School. "Protecting Taxpayers from Congressional Lawbreaking."

8. March 24 – Leigh Osofsky, University of Miami School of Law, "Tax Law Non-Enforcement."

9. March 31 – Shu-Yi Oei, Tulane Law School. "Human Equity? Regulating the New Income Share Agreements."

10. April 7 – Lillian Mills, University of Texas Business School. "Topics [to be determined] in Financial Reporting and Corporate Tax Compliance."

11. April 14 – Lawrence Zelenak, Duke University School of Law. "Up in the Air over the Taxation of Frequent Flyer Benefits: the American, Canadian, and Australian Experiences."

12. April 21 – David Albouy, University of Illinois Economics Department. "Should we be taxed out of our homes? Leisure and housing as complements and optimal taxation."

13. April 28 – David Schizer, Columbia Law School. "Tax and Energy Policy."

14. May 5 – Gregg Polsky, University of North Carolina School of Law, "Private Equity Tax Games and Their Implications for Tax Practitioners, Enforcers, and Reformers."

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INVISIBLE TAXPAYERS

Linda Sugin[*]

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[*] Professor of Law, Fordham Law School.

I. INTRODUCTION

"Only the little people pay taxes."[1] So said Leona Helmsley to her maid. That maid — along with millions of other little people — are largely anonymous in the legal regime that regulates taxation. They pay their shares without taking advantage of avoidance schemes, tax planning, or discretionary administrative largesse. They are legally invisible, even while they are economically indispensible.

The paradigm tax dispute involves a taxpayer on one side and the government on the other, what this article calls the "traditional dyad." Only the taxpayer in that dyad matters in adjudicating disputes, even though the interrelatedness of taxpayers across the fiscal system means that one dyad often affects the interests of many other taxpayers who are not part of it. Everyone else is invisible to the legal system; they are faceless taxpayers without enforceable rights in the administrative or judicial structure. They are taxpayers who pay the public's bills, but they lack standing to challenge the unconstitutionality of laws, regulations or tax administration − except when they are fighting their own increased liability.[2] Neither do they have any government institution charged with protecting their interests.

Invisible taxpayers are primarily a judicial phenomenon, but not entirely. Congress has made taxpayers invisible by running deficits that impose costs on people who don't yet exist, and by using budget gimmicks that pretend there is no cost to government spending. Scholars have made taxpayers invisible by isolating the tax system from the rest of fiscal analysis, and by assuming in tax policy discussions that tax collected gets thrown into the sea.[3] The Treasury Department is also responsible. The "Taxpayer Bill of Rights" reflects a narrow institutional perspective in

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[1] Attributed to Leona Helmsley, by her maid. See Maid Testifies Helmsley Denied Paying Taxes, NY Times, July 12, 1989, available at http://www.nytimes.com/1989/07/12/nyregion/maid-testifies-helmsley-denied-paying-taxes.html?smid=pl-share.

[2] "[T]he law of standing does not permit self-appointed guardians of the public interest to challenge the IRS's unusually lenient treatment of other taxpayers." Lawrence Zelenak, Custom and the Rule of Law in the Administration of the Income Tax, 62 Duke L. J. 829, 847 (2012).

[3] "The traditional way of proceeding analytically has been simply to ignore the expenditure side altogether and to assume that none of those who pay the taxes covering these expenditures receive any offsetting economic benefits. In effect this results in treating the collection of taxes as though it were only a common disaster-as though the tax money once collected were thrown into the sea." Walter J. Blum & Harry Kalven, Jr., "The Uneasy Case for Progressive Taxation" 19 U. Chi. L. Rev. 417, 517 (1952).

which tax fairness concerns only the traditional dyad.[4] Like the judicial model, the Taxpayer Bill of Rights understanding imagines only a single taxpayer against the state. The institutional structure fails to recognize the complex relationship that taxpayers have with one another, and the variety of overlapping, complementary, and conflicting interests that they have.

The broad no-taxpayer-standing-rule that has kept taxpayers out of court is not a particularly controversial aspect of standing doctrine – virtually everyone can agree that taxpayers should not be allowed to challenge every government decision in the federal courts. But nobody has considered the effect that the no-taxpayer-standing rule has had on the operation, conceptualization, and fairness of the tax system. The purpose of this article is to bring attention to invisible taxpayers so that they come into view under the law, and illuminate tax policy.

The rule barring taxpayer challenges has been around for decades.[5] However, it is particularly alarming now because the Supreme Court has recently narrowed other avenues for tax litigation, enlarging the discretion of the IRS and the power of Congress to adopt taxes without the specter of judicial oversight.[6] The Court's current jurisprudence has made all tax expenditures — provisions of the tax law that are functionally equivalent to direct spending[7] — essentially non-reviewable.[8] In 2011, the Supreme Court chose to characterize tax expenditures as the absence of taxation, making them legally insignificant. Instead of treating tax expenditures as reviewable state action that favors some taxpayers compared to others, the Court concluded that tax expenditures simply allow individuals to spend their own money.[9] The Court's conclusion is inconsistent with the government's estimates that tax expenditures cost the federal fisc a trillion

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[4] June 10, 2014. IRS website. The bill of rights includes the following principle:

"The Right to a Fair and Just Tax System: Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely."

[5] It dates from 1923. Frothingham v. Mellon, 262 U.S. 447 (1923). Part III, infra, discusses that case.

[6] This was the central thesis of my article, The Great and Mighty Tax Law: How The Roberts Court Has Reduced Constitutional Scrutiny Of Taxes And Tax Expenditures, 78 Brook. L. Rev. 777 (2013).

[7] The official definition is in terms of revenue losses, rather than spending, but they are equivalent: "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 297, 299.

[8] ACS v. Winn, 131 S. Ct. 1436 (2011). See Part IV, infra.

[9] ACS v. Winn, 131 S. Ct. 1436, 1447 (2011).

dollars in foregone annual revenue.[10] Tax expenditures are an increasingly important tool of federal policy,[11] so it is alarming that the courts may have no opportunity to consider their constitutionality.

The combination of (1) no standing in cases in which the IRS undertaxes, and (2) no review for tax expenditures because they are not state action, removes the majority of revenue reducing actions from judicial review. Revenue raising actions are always subject to attack because any taxpayer challenging his increased liability is entitled to a day in court. Consequently, taxpayers can attack the government's revenue raising attempts, but nobody can challenge the government's decisions to forego revenue — even if those decisions are illegal or unconstitutional.[12] This creates a bias against revenue raising because only the government's revenue losses are nonreviewable under these rules. We have a system in which only attempts to raise revenue — and not to give it away — are subject to judicial review. But revenue loss is not the reason to be most concerned about these developments. Justice is the reason.

In a just tax system, everybody pays a fair share. Fairness is both procedural and substantive. Substantive fairness in taxation is an economic measure and procedural fairness in taxation is a legal measure. Economic fairness depends on the money value of relative shares: A fair tax system allocates economic burdens according to a defensible economic principle, such as ability to pay or standard of living. This is the kind of tax fairness

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[10] Tax expenditures are quantified by the government's budget experts and treated as revenue losses that reduce tax collections. The Treasury Department and the Joint Committee on Taxation each measure the revenue loss from tax expenditures annually. See Office Of Mgmt. & Budget, Exec. Office Of The President, Analytical Perspectives, Budget Of The United States, Fiscal Year 2014 (2013); Staff Of Joint Comm. On Tax'n, 112th Cong., Estimates Of Federal Tax Expenditures For Fiscal Years 2013-2017 (Joint Comm. Print 2014).

[11] Excluding defense spending, the federal government spends more through the tax law than it spends through direct appropriations. Compare Thomas Hungerford, Cong. Research Serv., Rl34622, Tax Expenditures And The Federal Budget 13 (May 26, 2010) (tax expenditures produce over a trillion in revenue loss) with Office Of Mgmt. & Budget, Exec. Office Of The President, Fiscal Year 2012: Historical Tables 167 tbl.8.7, 346 tbl.15.4 (2010) (showing $658 billion in discretionary spending, excluding defense)

[12] Even members of Congress may be unable to object. Members of Congress lack standing to challenge administrative application of a federal statute. See Comment, The Impact of Illegal Tax Guidance: Notice 2008-83, 62 Tax Law. 867, 885 (2008-09). See also Suzanne Goldberg, Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest, 61 U. Pa. L. Rev. Pennumbra 164, 171 (2012)("it is not clear that Article III does or should permit the federal government to bifurcate its standing for purposes of having federal courts resolve policy disputes between the executive and legislative branches"). The Windsor Court held that BLAG had standing. United States v. Windsor, 133 S.Ct. 2675, 2686-88 (2013).

that the tax policy literature generally acknowledges; welfarists take it for granted. As a substantive matter, fair tax shares depend on both the benefits of government and the burdens of taxation. Concerns about substantive fairness require consideration of economic effects. But economic analysis does not always map precisely onto legal analysis in tax policy.[13] Economic fairness is important, but it is not enough for a tax system to be just.

This article presents the idea of *legal fairness* in taxation as a separate and independent norm. Legal fairness incorporates procedural justice and the interests of taxpayers as citizens. It also requires fair tax shares. As a procedural matter, fair shares depend on the legal system that divides public property from private property. Congress decides how much revenue to collect and how much the government will spend carrying out its functions. Legal rules define the relative obligations of individuals within that division. No tax is justly imposed on an individual if it fails to satisfy the basic rules of statutory adoption and constitutionality. Every individual is entitled to be protected against taxes that are illegal or unconstitutional.

Because no institution of government exerts more coercive power over more people than the tax system, it is appropriately a test of whether we govern ourselves fairly. Fairness demands that government institutions treat taxpayers as *people*, rather than as income deciles or other primarily economic points. People are autonomous individuals and citizens with rights, and the tax system must respect and reinforce those qualities. This concept of legal fairness is generally ignored in the tax policy literature, but it is recognizable from other areas of the law. Legal fairness in taxation demands that the tax system treat individuals with respect and consideration. It requires that public institutions protect individuals from unconstitutional or other illegal applications of the law.

The current state of judicial abstention in tax disputes undermines legal fairness. Examination of invisible taxpayers and invisible laws reveals some troubling truths about the tax system. Invisibility has led to substantial injustice for real people. It has allowed unconstitutional taxation to proceed without challenge. And it has reduced the role of courts in taxation to a very narrow role, while simultaneously allowing unchecked discretion for both Congress and the Internal Revenue Service. Courts are the primary defenders of individual rights against government coercion, but the standing rules shut out taxpayers from the litigation process, so their interests are never considered.[14] Tax expenditures contain important policies and

[13] See Sugin, The Great and Mighty, supra note 6 at 781 (discussing the "tension between the economic effect and legal logic that is ubiquitous in the tax law").

[14] See Gene Nichol Jr., Standing for Privilege The Failure of Injury Analysis, 82 B.U. L. REV. 301, 304 (2002) (standing rules "systematically favors the powerful over the

privilege some taxpayers compared to others. Without judicial oversight, Congress (by designing a provision as a tax expenditure) and the IRS (by choosing to treat a taxpayer better than allowed by law), have the power to deprive the federal courts of the opportunity to review their actions, even if they are unconstitutional. There is an imbalance of power in this structure. As the tax law is increasingly the locus of important federal policy, contracting its scope for judicial review of unconstitutionality is increasingly troubling.

There is always a cost to someone in taxation, and a cost borne by invisible people is much easier for everyone else to accept. Judicial recognition of only the traditional dyad in tax litigation ignores the burden on those outside it. Tax policy is inconsistent in ignoring invisible taxpayers as a legal matter, even while they are economically indispensable. We need a legal mechanism to consider invisible taxpayers because distributive justice and democratic values demand that they be taken into account under the law. Anyone who cares about fairness in taxation should be concerned about the contracting universe in which legal disputes about taxation are resolved.

This article proceeds as follows. In the next section, I describe three important constitutional tax cases in which people with substantial interests were not clearly part of the government-taxpayer dyad. These cases are intended to illustrate the problem of invisible taxpayers, and they provide concrete examples for the later analysis. Unconstitutional taxation is the most troubling legal consequence of invisible taxpayers, and the most important circumstance for courts to intervene. Part III takes a closer look at legally invisible taxpayers, and explains how the standing rules create invisibility in the legal system. It defines tax-based injury for taxpayers outside the traditional dyad by reference to legal shares,[15] and argues that current doctrine could accommodate broader taxpayer standing if courts acknowledged the financial interrelatedness of taxpayers. Part IV discusses tax expenditures and analyzes the Supreme Court's decision carving them out of judicial review. It argues that tax expenditures should be subject to constitutional review, along with every other provision of the tax law, and that their privileged status produces unfairness. Reflecting on invisible

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powerless."); Lynn Lu, Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules, 65 ADMIN. L. REV. 100, 123 (2014)("Standing doctrine has played a crucial role in restricting parties' access to federal court to seek judicial review of government agency action and to enjoin violations of federal law.")

[15] Legal shares consist of the set of rules under validly adopted tax law, consistent with the Constitution.

taxpayers and invisible laws, Part V contains the article's main arguments about fairness. It contends that invisibility deprives taxpayers of both economic and legal fairness. Part VI considers some mechanisms to better protect those who are currently invisible. It considers how invisible taxpayers might be represented in an institutional way that would allow more judicial review, particularly for their constitutional complaints. It also advocates for more responsive administrative decisionmaking.

II. CONSTITUTIONAL TAX CASES WITHOUT PLAINTIFFS

The problem of invisible taxpayers is most troubling in constitutional cases. While it is frustrating that people can't complain that their neighbors are cheats, unconstitutional taxation is a more serious matter. Some constitutional cases simply require finding a proper plaintiff – in the tax context that means someone who has personally suffered from the government's application of the law to his tax determination. But there are a surprising number of important constitutional tax cases in which there is nobody with standing to sue under current law. This is troubling as a policy matter, even if it is acceptable as a legal matter.[16]

Two of the leading precedents on standing are tax cases: Eastern Kentucky Welfare Rights Org. v. Simon[17] and Allen v. Wright.[18] The former attacked the government's newly adopted standards for granting tax exemption to hospitals and the latter attacked the IRS's allowance of tax exemption to racially discriminatory schools. The plaintiffs in each case were not the potentially exempt taxpayer. Nevertheless, they were people with real personal interests in the cases and who should have been beneficiaries of the policies behind the exemption scheme. Even though the purpose of exemption is to subsidize private organizations that produce third-party benefits, those third parties have no standing to complain.[19] The issue of tax exemption for charities only makes its way to court on the request of the party seeking exemption. That party can even get a declaratory judgment on its eligibility.[20] But only the government can question whether an exemption should be revoked. As a practical matter,

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[16] "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

[17] 426 U.S. 26 (1976).

[18] 468 U.S. 737 (1984).

[19] For an excellent discussion of these cases, see Lu, Standing in the Shadow of Tax Exceptionalism, supra note 14.

[20] IRC §7428.

that means exemption cases are rarely litigated, and there is a dearth of case law on the meaning of charity as a result.[21] Possibly the most important litigated exemption case concerned Bob Jones University.

A. Bob Jones University: Racial Discrimination

In Bob Jones University v. United States,[22] the Supreme Court upheld the denial of tax exemption for racially discriminatory schools on the ground that exempt organizations may not violate public policy. Even though the Court declined to embrace a constitutional holding, the issue of tax exemptions for racially discriminatory schools was certainly an issue of equal protection.[23] Exemption cases are particularly likely to raise constitutional questions because exemption is inconsistent with activities that are contrary to public policies.[24] Standing was not initially an issue in *Bob Jones* because the university brought suit when the IRS revoked its exemption. If the IRS had insisted on taxing the institution, then the government would have effectively represented all others who were harmed by that exemption, either directly (like potential students) or indirectly (like taxpayers not entitled to exemption for any reason). But the twist in the *Bob Jones* story is that the government changed its mind mid way, and attempted to abandon the revocation, which would have allowed BJU to remain exempt.

The traditional dyad would have then broken down because the taxpayer (BJU) and the government would have been in agreement. Only the third-party outsiders would have a complaint with both the government and the university. But being outside the dyad, they would not have standing to demand that the exemption be revoked. If it had succeeded, the Reagan Treasury's change of mind would have deprived the Supreme Court of jurisdiction. A separate ruling by the D.C. Circuit in the nick of time made that position untenable for the government, so it relented. But the Treasury still maintained that the government should not revoke BJU's exemption.[25]

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[21] See Richard L. Schmalbeck, Declaratory Judgments and Charitable Borders, 23 N.Y.U. Nat'l Center on Philanthropy & L. Conf. sec. A (2011).

[22] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[23] See Linda Sugin, Tax Expenditure Analysis and Constitutional Decisions, 50 Hastings L. J.407, 447-49 (1999).

[24] That's what the BJU court said.

[25] At that point, since the government was not really at odds with the taxpayer, the Supreme Court appointed an amicus curiae to argue the case for affirming the Fourth Circuit's court's denial of the exemption. In a footnote, the Court explained:

> After the Court granted certiorari, the Government filed a motion to dismiss,

In its opinion, the Bob Jones' majority recognized the injury suffered by taxpayers who were not party to the litigation. It wrote: "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors. …all taxpayers share in their support." This is extraordinary language given the invisibility of all those other taxpayers in the legal structure that governs tax cases. But it offers a model of how courts might consider those interests as part of its deliberation in cases where there is a traditional dyad that affects many others.[26]

Bob Jones illustrates how the IRS might deprive all possible plaintiffs of standing by giving the one taxpayer who has a right to complain what it wants. Fortunately, the Supreme Court did not allow the government to snatch away its ability to hear the case, and the precedent continues to stand for nondiscrimination in tax-exempt educational organizations. Unfortunately, *Bob Jones* is not the only important constitutional tax case in which substantial maneuvering was necessary for the court to hear the case.

B. Windsor: Sexual Orientation Discrimination

The Supreme Court's recent decision in United States v. Windsor -- the most important case about equality in a long time – only happened because the government maneuvered to maintain a case or controversy against its own legal judgment. The Supreme Court's *Windsor* decision struck down a crucial part of the Federal Defense of Marriage Act (DOMA) and held that it was unconstitutional for the government to discriminate against same-sex couples. While it is generally known as the same-sex

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informing the Court that the Department of Treasury intended to revoke Revenue Ruling 71–447 and other pertinent rulings and to recognize § 501(c)(3) exemptions for petitioners. The Government suggested that these actions were therefore moot. Before this Court ruled on that motion, however, the United States Court of Appeals for the District of Columbia Circuit enjoined the Government from granting § 501(c)(3) tax-exempt status to any school that discriminates on the basis of race. Wright v. Regan, No. 80–1124 (CADC Feb. 18, 1982) (per curiam order). Thereafter, the Government informed the Court that it would not revoke the revenue rulings and withdrew its request that the actions be dismissed as moot. The Government continues to assert that the IRS lacked authority to promulgate Revenue Ruling 71–447, and does not defend that aspect of the rulings below.
Bob Jones Univ. v. United States, 461 U.S. 574, 585, n. 9 (1983).

[26] See Part VI D.

marriage case, *Windsor* was more technically a case about taxes. The specific issue was whether the plaintiff should be entitled to spousal benefits under the federal estate tax, despite DOMA's refusal to treat her as a spouse for federal tax purposes.

In *Windsor*, the Supreme Court's jurisdiction to hear the case ultimately hung by a thread. If the government had refunded Windsor's money (as it had been ordered to do), or if Windsor had simply never paid the disputed tax (which would have been the case if she had started in the Tax Court), the case could not have happened. In its decision, the Supreme Court made much of the fact that there was a justiciable case or controversy under the Constitution because the government held onto Windsor's refund. Physically retaining the money was sufficient even though the government and the taxpayer did not actually disagree about the correct interpretation of the Constitution; they both thought that Windsor should get her money back. The government held onto Windsor's refund *despite* the fact that the Obama administration agreed that Windsor was right on the merits.

This jurisdictional maneuver is curious from a tax law perspective. A taxpayer is entitled to an adjudication of tax liability without paying in advance; she must bring her case in the Tax Court.[27] Only if she loses does the government receive any funds. The plaintiff in *Windsor* chose to bring her case in a federal district court, rather than in the Tax Court, so she paid the contested amount and sued for a refund, according to the procedure for district court litigation. The important fact to note is that payment is relevant to venue, but payment is not determinative of whether a person is entitled to litigate a tax liability. The overwhelming majority of tax disputes are litigated in Tax Court.[28]

If the IRS had simply decided to allow all same-sex married couples to treat themselves as married for federal tax purposes – in clear defiance of DOMA -- then no taxpayer would have been allowed to complain. Because a taxpayer disputing her own tax liability and the government must always be the counterparties in a tax case, there can be no other litigation that raises

[27] The Tax Court is an Article I court, so it is not bound by the jurisdictional rules in Article III. But Tax Court cases are appealable to Article III courts, and taxpayers are not required to pay in order to be heard by the federal courts of appeals. If Congress expanded jurisdiction in the Tax Court to allow broader taxpayer standing, the legality of this scheme would need to be determined. See David Krinsky, How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals, 57 Case W. Res. L. Rev. 301, 304 (2007).

[28] Compare district court cases , available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02Sep13.pdf with Tax Court cases, available at http://www.irs.gov/pub/irs-soi/13databk.pdf Table 27.

the issue of constitutionality of a tax statute; a tax statute's constitutionality simply cannot arise in litigation between private parties. If taxation were the only context in which DOMA applied, the IRS could have created a legal stalemate. Same-sex couples would have nothing to complain about, and other taxpayers would not have been part of the dyad allowed to raise the issue. The statute would have remained on the books, but the executive branch would have not enforced it, leaving DOMA in an awkward limbo, and depriving everyone of a final Supreme Court determination about DOMA's constitutionality. The constitutionality of DOMA, and the larger question of equality for same-sex couples, was important to millions of people who had no direct interest in Windsor's tax refund. It was vital that the Supreme Court decide the case.

Despite its belief that DOMA was unconstitutional, the Obama administration realized the importance of a Supreme Court determination on the constitutionality of DOMA. So the Justice Department and the taxpayer cooperated to ensure that there would be an injury onto which the Supreme Court could attach a case or controversy. The government held the money, the Supreme Court invalidated DOMA, and a great day for equality was celebrated.

C. Hernandez: Establishment of Religion

Not all cases have such a happy ending. Where the IRS administers the law in an unconstitutional way, the Supreme Court may be deprived of any opportunity to review the practice. This is the story of Hernandez v. Commissioner,[29] which concerned the charitable deduction allowance for payments made to the Church of Scientology. In *Hernandez,* the Court refused to allow Scientologists to deduct their payments to the Church for "auditing and training."[30] The grounds for its decision were statutory -- the Court relied on its interpretation of the statutory requirements for the charitable deduction, which include the making of a "contribution or gift."[31] The Court held that the payments did not satisfy the statute because they were a *quid pro quo* for services received from the church, rather than a contribution or gift.[32] In treating the payments as purchases, rather than

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[29] 490 U.S. 680 (1989).

[30] From a tax perspective, it is an unfortunate name for Scientologists to use for their form of devotional activity.

[31] IRC 170(c).

[32] "A gift in the statutory sense … proceeds from a 'detached and disinterested generosity',… 'out of affection, respect, admiration, charity or like impulses.'"C.I.R. v. Duberstein, 363 U.S. 278, 285 (1960) (citations omitted).

contributions, the Court concluded that the payments did not qualify for the section 170 deduction. Just to be clear: at the Supreme Court, the government won and the Scientologists lost.

After the Court's decision, the IRS – which had prevailed in the litigation – changed its position and decided to allow Scientologists to deduct their auditing payments as charitable contributions. The IRS entered into an agreement with the Church of Scientology detailing the change, and revoked its prior guidance disallowing members' deductions.[33] The IRS essentially overruled the Supreme Court.[34]

Of course, the IRS lacked the power to overrule the result in *Hernandez*; *Hernandez* was a Supreme Court case interpreting a statutory provision. The Treasury Department is bound by statute, and by the Court's interpretation of a statute. If the Supreme Court interprets a statute contrary to Congressional intent, Congress has the power to clarify by amending the law. Congress could have made clear that the Supreme Court's interpretation was inconsistent with its policies by explicitly adopting a deduction for Scientologists. But Congress chose not to do so during the four years between the *Hernandez* decision and the IRS's closing agreement. Its reticence is not surprising, given the Establishment Clause concerns raised by special treatment for a single religion. It is unlikely that Congress would ever adopt a special deduction provision only for Scientologists.

Twenty years later, the status quo holds. Nobody can attack the IRS's excessively generous treatment of members of the Church of Scientology. Scientologists have no complaint, and other taxpayers have no standing to complain. Other taxpayers can complain about their own tax liability because that is the only circumstance in which they are part of the traditional dyad with a case or controversy. While they failed to get the relief they wanted, that is precisely what one family did, twice.[35]

The taxpayers in Sklar v. Commissioner are observant Jews who claimed a charitable deduction for the cost of religious school tuition paid for their children. The IRS disallowed the deduction because there is long-established precedent that no deduction is allowed for religious school

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[33] See Rev. Rul. 93-73, 1993-2 C.B. 75, obsoleting Rev. Rul. 78-189, 1978-1 C.B. 68. Although the closing agreement was allegedly secret, it was, in fact, widely available. See Scientologists and IRS Settle for $12.5 Million, Wall St. J. Dec 30, 1997 at A12; 97 TNT 251-24, Tax Analysts Doc 98-383.

[34] The same problem has also arisen in non-constitutional contexts. See Gregg Polsky, Can Treasury Overrule the Supreme Court? 84 B.U. L. Rev. 185 (2004).

[35] Sklar v. Comm'r I, 282 F3d 610 (9th Cir. 2002) and Sklar v. Comm'r II (9th Cir. 2008).

tuition.[36] The government's rejection of the Sklars' claimed deduction increased their tax liability, entitling them to a judicial determination about whether the IRS's additional assessment was warranted. They clearly had standing to argue that they should be allowed the deduction.

In making their case, the Sklars argued that they should be allowed a deduction for their payments because the IRS was allowing members of the Church of Scientology to deduct their equivalent payments for religious training. They alleged that the restriction of the deduction to members of a single religion violated the Establishment Clause, so that either their deduction (and equivalent claims by all religions) should be allowed, or the Scientologists should not be allowed the claim the deduction.[37] Even though standing was not an impediment to the Sklars, they were still unable to get the court to rule on the constitutional question that *really* brought them there.

The Ninth Circuit pointedly refused to decide the constitutional question, even though it had a lot to say about the government's Scientology policy. It wrote: "we would likely conclude, were we to reach the issue, that the [pro-Scientology] policy must be invalidated on the ground that it violates either the Internal Revenue Code or the Establishment Clause."[38] It further stated: "Because the facial preference for the Church of Scientology embodied in the IRS's policy regarding its members cannot be justified by a compelling governmental interest, we would, if required to decide the case on the ground urged by the Sklars, first determine that the IRS policy constitutes an unconstitutional denominational preference under Larson [v. Valente]."[39]

Despite its clear view of the merits, the court did not decide the constitutional question because it concluded that the Sklars' payments to their religious schools were distinguishable from the Scientology payments.

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[36] See DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962); Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972), Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972).

[37] The determination to allow the deductions by Scientologists was an administrative determination, not a legislative determination. That distinction would have been relevant if the challengers were claiming standing as taxpayers under Flast v. Cohen, 392 U.S. 83 (1968), because the Supreme Court had previously narrowed *Flast* to exclude administrative determinations. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). But the Sklars were not taxpayer plaintiffs complaining about the government's decision to favor a single religion – they were challenging their own tax liability, which is always sufficient to give them a day in court, so they did not need to rely on *Flast*.

[38] Sklar I, 282 F3d at 614.

[39] Sklar I, 282 F3d at 619.

By distinguishing those payments, the court was able to dispose of the case without deciding anything about the Scientology payments. To add insult to injury, in the Sklars' second trip to the Ninth Circuit, the court explicitly based its holding for the government on the authority of *Hernandez*,[40] even though the IRS had been ignoring that precedent as applied to Scientologists – the actual litigants involved in the case. The court also explicitly declined to rule on the constitutionality of the Scientology closing agreement.[41]

While the *Sklar* court's approach prevented it from overreaching, it was more likely too modest − there might not be another opportunity for a court to review the IRS's policy with regard to the Church of Scientology. No other taxpayer's payment is *precisely* the same as the payments made by Scientologists, so there will never be a case in which a court has no choice but to decide the constitutional question. Even so, the court could have found the payments to be legally comparable. Thus, despite their clear case or controversy allowing them access to the courts, the Sklars lost and members of the Church of Scientology are still allowed to claim deductions for auditing and training, contrary to the Supreme Court's holding in *Hernandez,* and in likely continuing violation of the Establishment Clause.

The closing agreement raises a constitutional issue that directly touches every person who pays for any kind of religious training, and indirectly affects everyone else who does not. And yet, nobody can challenge the constitutionality of the Scientology deduction pursuant to the Ninth Circuit's theory because no other religion operates quite like the Church of Scientology. The *Sklar* court's holding that the tuition payments at issue in the case were unlike the auditing and training payments of Scientologists allowed it to dispose of the case without reaching the question of whether the IRS operates in an unconstitutional manner. Since all payments are distinguishable from the ones allowed to be deducted by Scientologists, no court will ever be compelled to rule on the Scientology deduction, making permanent the IRS's ability to unilaterally flout the Constitution, without judicial oversight.

Since the story of *Hernandez* has an unhappy ending, this article will repeatedly return to it in an effort to imagine how the law might solve the problem that the Sklars faced in their constitutional challenge. The next section extrapolates from the Sklars' case to analyze the bigger policy issue created by the narrowness of the traditional dyad. It argues that the tax law's recognition of only the traditional dyad relegates millions of people to legal invisibility, despite their economic importance.

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[40] Sklar II, 549 F3d at 1259-60.
[41] Sklar II, 549 F3d at 1267.

III. LEGALLY INVISIBLE TAXPAYERS: NO STANDING TO SUE

The United States government collects almost three trillion dollars in revenue a year.[42] Every person who works pays federal tax. The super-rich each pay a lot of tax, but there aren't that many of them.[43] Consequently, the *people* who pay tax are average families who are in the mundane business of earning a living. The federal income tax has been called a "mass tax,"[44] and that mass is largely anonymous in the system as a whole.

From the perspective of the federal government, the total tax payments received from invisible taxpayers is tremendous. Individuals paying their modest bills may not each matter to the treasury, but the aggregation of tax payments enables the existence of the modern state. Any legal institution that considers the perspective of the state cannot ignore the economic substantiality of the taxes paid by invisible taxpayers. But that is precisely what the traditional dyad in tax analysis does by focusing on a single taxpayer and recognizing only its conflict with the government, in isolation from the rest of the fiscal system.

The cost to invisible taxpayers is what makes tax law unlike other regulatory schemes. All taxpayers are interdependent. Aggregate tax collections enable the state to function, so tax issues matter to every taxpayer – nobody who shares any of the burden of taxation is wholly disinterested in any aspect of the system. Taxation is about money, and each person's share is a determinable value. People who have no recognizable existence in the legal system have real out-of-pocket costs. These costs are wholly created by government – not by nature, not by other individuals. Taxation is solely the product of public decisionmaking, so government responsibility is absolute in taxation. Consequently, it is important to change the way we approach questions of taxation to make invisible people part of the analysis.

This part first explains why some taxpayers are treated as legally invisible under current law, and then examines that doctrine to determine whether they might be more visible within its current contours. It argues that taxpayers suffer real injuries, but that current jurisprudence fails to

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[42] 2013 total receipts were $2,775,103,000,000. OMB, Historical Table, Table 1.1 at http://www.whitehouse.gov/omb/budget/Historicals/.

[43] There are only about 300,000 tax returns with AGI in excess of $1 million, out of 146 million total tax returns. IRS, SOI at http://www.irs.gov/uac/SOI-Tax-Stats-Tax-Stats-at-a-Glance.

[44] Carolyn Jones, Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax during World War II, 37 BUFF. L. REV. 685 (1988–89).

recognize those injuries because it does not recognize the interrelatedness of taxpayers. This part concludes by arguing that constitutional problems are supplemented by concerns about revenue, making the status quo problematic from different perspectives.

A. The Standing Rules that Make Taxpayers Disappear

Article III of the Constitution requires that courts hear only cases and controversies. The standing rules implement that requirement, and ensure that the parties in a litigation have adverse interests. The Supreme Court has summarized the "irreducible constitutional minimum of standing" as composed of three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized …; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'…. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." ... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[45]

This standard is easily satisfied in the traditional dyad, when a taxpayer and the government disagree about the taxpayer's liability as reflected on his own tax return. When a taxpayer is forced to pay money that would otherwise be his to keep, the injury is clearly real -- a dispute over who is entitled to a particular pot of money is the quintessential example of a case or controversy. Consequently, taxpayers always have standing to complain about their own bills, and the paradigm tax case is one involving a taxpayer trying to pay less and the government trying to extract more. In that situation, the court is in a good position to resolve the dispute.

The paradigm case is also a good structure for the government to protect the interests of taxpayers who are *not* before the court. Taxpayers not before the court enjoy an economic benefit (albeit small) if the Treasury succeeds in the case. Since all taxpayers pay into the same revenue pot and receive the benefits of government, if my neighbor pays more than his proper share, then I receive the benefit of government funding without paying the full price for it. My economic interest is served by a government that takes too much money from my neighbor and spends it on me. Thus, in the traditional dyad, the government's interest parallels the interest of

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[45] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61(1992)(citations omitted).

taxpayers not before the court because those taxpayers will pay a smaller relative share if the government prevails in the case.

Matters get trickier outside of that paradigm, and standing becomes more difficult because of the injury prong of the analysis. It is axiomatic that a taxpayer has no standing to complain about an excessive tax levy on another. Where my neighbor pays too much tax, I suffer no injury -- he is the one with a case against the government, and he must bring it himself. In fact, I should be pleased because I enjoy a free ride on his excess. While we generally do not think about our neighbors' taxes in this way, focusing on it shows how all taxpayers are interrelated, for both good and bad. Even though the legal rules separate taxpayers into distinct units, each of which is in conflict with the government over how much an individual's liability should be, every taxpayer's ultimate package of government benefits and burdens depends on every other taxpayer's package as well. Taxpayers have multiple axes of conflict of cooperation, but the legal structure encourages us to focus only on the conflicted taxpayer-government dyad.

When the government's substantive position changes from imposing taxpayer liability to reducing that liability, the axes realign. The government's generosity to identifiable taxpayers imposes no direct injury on anyone. But taxpayers who are not part of the traditional dyad suffer. Every other federal taxpayer is harmed when a favored few pay less tax. Widely shared harm can be just as real as harm suffered by just a few, as is abundantly clear from mass torts and products liability.[46] Under current law, those other taxpayers lack standing to sue over the government's generosity. The benefitted taxpayer remains the party whose tax liability is directly at issue. He is the only one potentially with standing to litigate his liability, but that taxpayer has no complaint (and no injury at all). My neighbor's charitable contribution deduction does not directly increase my tax bill, so the law treats his deduction as none of my business. If my taxes increase directly by raising the amount that appears on my tax return, I would have standing to challenge my liability. But that's not how the tax system operates.

By failing to notice the interrelatedness of taxpayers, courts can assert that one taxpayer suffers no injury when another taxpayer receives unwarranted generosity.[47] Given the total number of taxpayers and the enormity of total tax collections, the effect of any interrelatedness is small -- one individual is unlikely to suffer much from any change in her overall

[46] See Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 483-85 (2008) ("the doctrine requires only that injury be "concrete and particular," and not "abstract or hypothetical"; it does not impose any numerosity limitation.")

[47] This is what the ACS v. Winn court said. 131 S. Ct at 1437.

benefits and burdens as another individual's tax liability goes up or down. Because the federal tax system is so large, it is tempting to ignore the interrelatedness as too complex and any individual burden too miniscule to worry about. So it is not surprising that the Supreme Court has done precisely that in analyzing the injury-in-fact requirement necessary for standing to sue.

The Supreme Court has also conceptualized the tax system as functionally separable from the fiscal system as a whole, allowing it to ignore the injuries that individuals in an interrelated fiscal system suffer on account of that interdependence. In denying standing to taxpayers challenging a state credit for businesses, the Court said "[p]laintiffs' alleged injury is…'conjectural or hypothetical' in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit."[48] This analysis reveals a truncated approach to the fiscal system because it narrowly focuses only on direct tax liabilities. It is flawed to consider only the tax system in measuring government burdens, while ignoring the combination of benefits and burdens within the fiscal system as a whole.[49] Burdens depend on the net effect of taxes and spending, so an evaluation of injury must consider both sides of that coin. Accounting for interrelatedness, as this article advocates, makes injury on either the taxing or the spending side relevant.

The Supreme Court wasn't always so dismissive of broad taxpayer injury. Its approach was more nuanced in its earlier considerations of taxpayer standing, and municipal taxpayers have always been granted standing more broadly than federal taxpayers.[50] In Frothingham v. Mellon, the first Supreme Court case to analyze taxpayer standing, the Court described a taxpayer's injury—qua taxpayer—as "remote, fluctuating and uncertain."[51] It concluded that a taxpayer's "interest in the moneys of the treasury… is shared with millions of others, is comparatively minute and

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[48] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006).

[49] See Edward Kleinbard, We are Better Than This (Oxford 2014) (arguing that evaluating the fiscal system as a whole is the only reasonable way to approach tax policy questions); Linda Sugin, "Theories of Distributive Justice and Limitations on Taxation," 72 Fordham L. Rev. 1991, 1997 (2004)("it matters little what the tax itself looks like [if] the spending side of the budget corrects or adjusts the distributional consequences overall").

[50] See Nancy Staudt, Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine, 52 Emory L. J. 771 (2003)(analyzing cases of municipal taxpayer standing in federal court).

[51] 262 U.S. 447 (1923).

indeterminable,"[52] so a complaining taxpayer raised no case or controversy allowing for judicial review. This analysis shows that the *Frothingham* court recognized the real economic cost and interrelatedness of taxpayers, but found the interest too small to be legally significant. Even in 1983, when the Court decided *Bob Jones*, it recognized the costs that taxpayers incur from the interdependence of the tax system.[53] That recognition is important because it allows for a toe-hold that might support standing.[54]

The Supreme Court's approach has changed. Unlike *Frothingham* and *Bob Jones*, the Court's most recent cases fail to recognize a taxpayer's injury altogether; that is significantly different from recognizing an injury, but treating it as too small to worry about. In its latest discussion of taxpayer standing, in Arizona Christian Schools (ACS) v. Winn, the Court rejected any notion of interrelatedness and its corresponding interest: "When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. … It would be 'pure speculation' to conclude that an injunction against a government expenditure or tax benefit would result in any actual tax relief for a taxpayer-plaintiff."[55] The Court's explanation for completely ignoring the interrelatedness was based on dubious economic assumptions.[56]

Nevertheless, the legal effect remains: as a matter of Article III standing, taxpayers have no interest at all in the tax liabilities of others because they have no injury at all. Despite a real − albeit small− economic interest, a taxpayer is invisible in the legal regime unless he is complaining about the liability that appears on his own tax return. The standing rules treat him as though he does not exist, and therefore, the substantive rulings that courts make on tax issues ignore his interests.

The restrictive rules about standing would make better tax-policy sense if they aided the government in revenue collection. For example, the anti-injunction act prohibits suits to restrain the collection of tax so as to allow the government to more easily collect revenue.[57] But the restrictive

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[52] Frothingham v. Mellon, 262 U.S. 447, 487 (1923)

[53] It noted that "the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.' ... all taxpayers share in their support." 461 U.S. 574 (1983).

[54] Aggregation can then make all the difference as a practical matter. See Part VI B, infra.

[55] ACS v. Winn, 131 S. Ct. 1436, 1437, 1444 (2011). See also, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006).

[56] I analyzed those assumptions in Linda Sugin, The Great and Mighty Tax Law: How The Roberts Court Has Reduced Constitutional Scrutiny Of Taxes And Tax Expenditures, 78 Brook. L. Rev. 777, 817-19 (2013).

[57] Code §7421 ("no suit for the purpose of restraining the assessment or collection of

rules about standing impede the collection of revenue because they prevent suits that might produce more revenue. Since taxpayers can always challenge their own tax bills, the standing rules create a bias in favor of suits that produce less revenue.

B. Invisible Taxpayers Have Real Legal Injuries

An examination of the contours of taxpayer injury shows that invisible taxpayers suffer injuries that should be cognizable under current law standing doctrine. Taxpayer injury can be identified by reference to the legal rules that define economic rights in the tax system.[58] Any taxpayer who is assessed more than her legal share has economic harm justifying legal redress. This concept of "legal shares" differentiates a tax burden that is unjustifiable under the law from a valid burden imposed intentionally by the legislature.[59] The law defines where that baseline is.[60] Of course, constitutional limitations are also part of that definition, so legal shares only include taxes imposed by Congress that are also constitutional. The tax must be properly adopted by the legislature, and administered so as not to deny individuals their constitutionally guaranteed rights. The key to thinking about legal shares is that unconstitutional laws (and administration that is contrary to law) cannot be part of a just baseline for determining shares. As long as a tax is properly adopted by Congress and faithfully executed by the IRS, that tax should be part of the presumptive baseline. Any unconstitutional largesse by the government increases the shares paid by invisible taxpayers beyond their legal limit. This analysis identifies the small subset of complaining taxpayers who have something they should be allowed to complain about in an Article III court.

Legal shares of tax do not depend on whether government benefits

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any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.")

[58] While this paper is limited to taxpayer injuries, this approach to legal injuries could be applicable more broadly under the law.

[59] For example, renters should not have standing to challenge the home mortgage interest deduction because it is part of the legal structure that defines tax obligations. Renters' legal obligation to pay tax includes a liability that attaches to amounts used to pay for housing, even though homeowners are legally permitted to enjoy housing on a tax-free basis. See Part V.B. infra for a discussion of this standard as related to fairness.

[60] See Cass R. Sunstein Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1479 (1988) ("the question whether an injury is merely ideological or instead legal is one of positive law; there is no pre- or post-legal metric for distinguishing between the two.")

are commensurate with taxes paid. The balance of government benefits and burdens is an important question for tax fairness, and must be considered in designing tax rules.[61] Nevertheless, the concept of legal shares can be understood without evaluating the fiscal system as a whole. For example, deficit spending means that future generations will likely finance some of our current public consumption. Our grandchildren have cause to be angry with us, but not because it is illegal for our generation to live beyond its means. Any legal injury in this generation must be with reference to the legal rules currently in effect – regardless of their wisdom or morality. In investigating legal shares, this section takes both the requirements of standing doctrine and the substantive legal tax rules as fixed. Consequently, the arguments about taxpayer injury are primarily doctrinal arguments that relate to procedural justice in the tax system.

If courts grappled with the interdependence of taxpayers − and its implications for defining injury − they might be more likely to find a case or controversy in some taxpayer complaints. While most taxpayer plaintiffs would still be barred, current standing doctrine leaves enough room for taxpayers to litigate about whether they are paying more than their legal share of the costs of government. Nobody likes paying taxes, but not everyone has an injury from doing so, even under this standard. The prohibition on taxpayer standing needs to be broken into categories so that claims based on paying more than one's legal share are distinguished from general attacks on legislative policies.[62] The no-taxpayer-standing rule, as it currently exists, fails to distinguish these very different claims, and explains why the no-taxpayer-standing rule seems necessary.[63]

Frothingham was a case about government spending, not taxing. The complaining taxpayer in that case was challenging a government appropriation, alleging that the federal statute, which allocated funds to states for carrying out maternal and infant health initiatives, was a taking, "under the guise of taxation, without due process of law."[64] The prohibition against taxpayer standing is most compelling in a context like *Frothingham*

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[61] Part V, infra, analyzes economic fairness, apart from procedural fairness, which is the concern here. I have argued that benefits taxation is intellectually incoherent. See Linda Sugin, Don't Give Up on Taxes, Tax Notes Dec 22, 2014 at 1373, 1375. See John Stuart Mill, Principles of Political Economy, Book V, Chap. 2.7 (1848).

[62] Justice Scalia has argued that standing doctrine is designed to prevent courts deciding matters better left to legislatures. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983). But see Heather Elliott, The Functions of Standing, supra note 46 (arguing that Justice Scalia's concerns are about Article II, not Article III).

[63] See, Elliot, The Functions of Standing, supra note 46 at 480.

[64] Frothingham v. Mellon, 262 U.S. 447, 480 (1923).

because the taxpayer's complaint was essentially a naked policy challenge. The taxpayer was dissatisfied with Congress' decision to legislate on a certain matter in a particular way. It was a challenge to Congress' reasoned decision about what national health policy should be – the core function of the legislature.[65]

As applied to spending challenges, the no-taxpayer-standing rule makes sense. The courts are not the proper place to challenge laws you don't like – that's the function of the ballot box. It would be impossible for courts and legislatures to operate in the face of constant judicial challenges to every federal policy on takings arguments.[66] The *Frothingham* court said: "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same ... The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."[67]

However, Frothingham was not in the position of invisible taxpayers because she was not complaining that her tax bill was more than the legal share she owed − she wasn't actually complaining about her taxes at all. A careful application of standing doctrine that acknowledges the injuries that taxpayers suffer in paying more than their legal shares would not open the floodgates that the *Frothingham* court feared. Treating only illegal shares as injuries does not mean that *anyone* should be able to complain about any government spending decision.

While the no-taxpayer-standing rule currently prohibits individual taxpayers from second-guessing Congress' judgment about what federal policy should be, it operates more broadly than that to reach the invisible taxpayers with legal complaints about their shares. Federal taxpayers – as taxpayers — are never allowed to be heard in a court, even when their complaints are substantially narrower, and even when the nature of their complaints are about how they are being overtaxed compared to others. As the *Frothingham* court recognized, taxpayers have injuries, as taxpayers, when they finance more than their share of the public purse, so a subset of all taxpayer complaints are about one's legal share. This kind of complaint resembles the classic taxpayer complaint in the traditional dyad.

In order to identify these taxpayers, it is necessary to recognize when a person pays more than his share. The determination of a person's

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[65] See Scalia, supra note 62 (advocating for standing doctrine to address this). But see, Gene Nichol Jr., Abusing Standing: A Comment on Allen v. Wright, 133 U. Pa.L. Rev. 635 (1985) (critical of the separation of powers approach to standing).

[66] See Eric Schnuer, More Than an Intuition, Less Than a Theory: Toward a Coherent Doctrine of Standing, 86 Colum. L. Rev. 564 (1986)

[67] 262 U.S. at 487.

proper share is a product of law, including both constitutional law and legislation. The legal share must be the baseline in determining whether an injury exists because the legal rules determine whether the money belongs to the taxpayer or must be paid over to the government and essentially shared by the community. I suffer when my neighbor is taxed less than his legal share because that undertaxation means that my package of government benefits and burdens is more expensive to me than the law authorizes.

This notion of injury is much narrower than the *Frothingham* plaintiff's notion of taxes as takings. The courts have properly dismissed taxpayer standing in the takings type of challenge; the plaintiff in *Frothingham* was challenging the baseline that determined her legal share of government benefits and burdens. Her complaint was beyond judicial review because a legal package of benefits and burdens produces no injury. She was not complaining about being forced to pay more than her legal share.

Under established doctrine, a small injury is crucially different from none at all. Class actions exist because individuals with small injuries have no incentive to sue, not because they lack standing to do so. Taxpayers who contribute more than their legal share because others pay less than theirs, as an economic matter, suffer a "concrete" and "actual" injury that should satisfy the *Lujan* standard. Consequently, the Constitution's case or controversy requirement should not prevent taxpayers from having a day in court in cases like these. Once understood as a complaint about departures from a legal baseline, taxpayer claims fit well into the legal paradigm − the plaintiff taxpayer is arguing that her own bill is too high. In the traditional dyad, the argument is based on the government's application of the law to the complaining taxpayer. But the same result should follow when the effect arises from the government's application of the law to another taxpayer. In both cases, the economic injury is to the taxpayer, and in both cases, the disagreement is between the taxpayer and the government.

This category of legal share disputes seems well suited to judicial determination because the disputes resemble the traditional-dyad cases in which taxpayers dispute their own bills. They are about money − the quintessential subject of tax adjudication. The invisible taxpayers and the government – because it is aligned with a favored taxpayer − have clearly adverse interests, a key consideration for courts in judging standing.[68] Except for the small size of taxpayers' legal share injuries, they closely

[68] See Michael Herz, United States v. United States: When Can The Federal Government Sue Itself? 32 Wm. & Mary L. Rev. 893, 906 (1991)(Art III requires adversity).

resemble the injuries that standing doctrine generally vindicates. Recognizing a legal share injury applicable to taxes does not create a case or controversy with respect to government spending decisions. The question for taxation is who should pay, which is distinct from the question of what's being paid *for*.

When a taxpayer suffers an injury that affects him only as a taxpayer, and when that injury is a real legal injury because the taxpayer has a right to be protected from whatever the government is doing, there is a strong argument for judicial review. This legal share approach to taxpayer injury focuses on the plaintiff's role as a taxpayer. In that way, it is reminiscent of the theory adopted by the Supreme Court in the only circumstance in which third-party taxpayer injury has been sufficient for standing. In Flast v. Cohen, taxpayers were allowed to challenge a government policy providing books to religious schools.[69] The *Flast* rule allowed taxpayer standing because government funding of religion in violation of the Establishment Clause related to the plaintiff's status as a taxpayer and created a taxpayer-relevant injury.[70] While the continuing vitality of *Flast* — as applied to individuals bringing Establishment Clause challenges to spending programs — is unclear,[71] its theory remains compelling.

Given the injury's diminutive size for any individual in the cases contemplated here, there are legitimate concerns that might justify prudential limits on taxpayer standing in such cases. However, it is important to recognize that these concerns are not constitutional bars to standing for invisible taxpayers. For example, the slightly overcharged taxpayer may have insufficient incentive to vigorously argue a case, even if there are many others who share his fate. Similarly, taxpayers are generally unlikely to be anxious to complain about the liabilities of their neighbors, given the cost and aggravation of litigation. Consequently, there is a legitimate worry that primarily tax protestors or other harassers might be the only ones to come forward. Even though the *Lujan* standard is satisfied for some taxpayers when we conceptualize the tax system as I have described, there may be good reasons to limit access to courts for legal share complaints. Under current law, the courts' standing jurisprudence contains both constitutional and prudential components, so the Supreme Court has a

[69] Flast v. Cohen, 392 U.S. 83 (1968).

[70] See Sugin, The Great and Mighty Tax Law, supra note 56 at 799.

[71] Justice Scalia observed that the majority's opinion in ACS v. Winn eviscerated the taxpayer standing authorized in Flast, essentially ending the era of taxpayer standing in Establishment Clause cases. ACS v. Winn 131 S Ct., 1436, 1450 (Scalia, J., concurring).

great deal of discretion over how these disputes might proceed.[72] Prudential standing rules can effectively keep disgruntled taxpayers off the courts' dockets. If limitations on the legal-share justification for taxpayer standing are prudential, they can be abrogated where appropriate. Thus, courts can consider when justice would be served by allowing litigation over the too generous treatment that the government is bestowing on some taxpayers. The point here is that the constitutional contours of standing should not prevent legal-share suits. In Part VI, I will discuss some possible mechanisms that Congress and the courts might employ to allow some invisible taxpayer cases to proceed.

IV. LEGALLY INVISIBLE LAWS: TAX EXPENDITURES

Some taxpayers are invisible in the legal system because laws determining their tax treatment are not considered government action at all. This is a recent development in tax law jurisprudence, and a particularly troubling one. In 2011, in ACS v. Winn, the Supreme Court made tax expenditures disappear from legal analysis by treating them as the government declining to impose tax.[73] The Court thereby transformed tax expenditures from the economic equivalent of government spending (with *some* legal resemblance to direct spending) into private action completely beyond legal review. Making tax expenditures legally invisible — despite their central role in affecting the distribution of government benefits and burdens — was a radical departure from their traditional legal treatment.

Tax expenditures are fundamental elements of the tax law and courts should have the power to review their constitutionality. Analyzing tax expenditures as part of the tax system should mean that their role in determining legal shares is subject to judicial review. Because tax expenditures are adopted by Congress, they present a somewhat narrower question compared to administrative decisions of the IRS. The IRS's decision with respect to the Church of Scientology, for example, was contrary to both statute[74] and the Constitution,[75] and a court should be able to strike it down on either ground. Tax expenditures only need to be reviewed for violations of the Constitution. While that is a limited scope of review, it is far broader than where the Supreme Court has left them.

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[72] Heather Elliott argues that *Frothingham*'s taxpayer standing rule is prudential, not constitutional. See Elliot, supra note 62 at 471 n.65.

[73] ACS v. Winn, 131 S. Ct. 1436, 1447 (2011).

[74] IRC 170, as interpreted by the Supreme Court in Hernandez.

[75] According to the Ninth Circuit's dictum in Sklar II.

A. Tax Expenditures are Tax Law

Tax expenditures are crucial in producing legally invisible taxpayers because tax expenditures are often the source of invisible taxpayers' injuries. Unlike revenue raising provisions, tax expenditures provide benefits that reduce tax liability for people able to claim their benefits, leaving those who are not entitled to them with the bill for a greater share of public expenses. Tax expenditures create winners rather than losers in the tax system, so the "regulated" taxpayer under a tax expenditure is one with a reduced tax bill, and consequently no complaint with his treatment. Those excluded from tax expenditure largesse have financial cause to complain, but lack legal means for redress.

Tax expenditures are provisions included in the tax law that are the functional equivalent of direct government spending. Instead of the government allocating funds for particular programs, tax expenditures allow taxpayers to reduce their tax liabilities by participating in various activities enumerated in the statute. The statute creates entitlements for people who can fit into its definitions. For example, the government can subsidize mortgage interest obligations of individuals by either sending cash subsidies to borrowers (to help them finance their payments), sending cash payments to lender-banks on behalf of borrowers[76] (to reduce what borrowers need pay), or by reducing the tax bills of borrowers by the same amount. The federal government has chosen to do the latter,[77] designing the mortgage interest subsidy as a tax expenditure, but the other choices would have been economically indistinguishable. Unlike base-defining tax provisions, tax expenditures are not designed to describe the thing to be taxed (i.e. income).[78] Instead, they reduce the amount of revenue that the tax law would otherwise collect, and consequently subsidize individuals to the extent their tax bills have been reduced.

Tax expenditure *analysis* – the mode of thinking about tax expenditures as direct spending equivalents -- was developed to provide an appropriate method to evaluate these provisions. It identifies sections in the tax law based on statutory function, and evaluates tax provisions that

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[76] See Bipartisan Policy Center, Restoring America's Future, Nov 2010 (proposing this design).

[77] I.R.C. §163(h)(3).

[78] Tax expenditures were defined by Congress as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." See Congressional Budget Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 297, 299 (1974).

resemble spending on the same terms as spending provisions.[79] Tax expenditure analysis was developed to be a budgetary tool, not a legal tool, so tax expenditure analysis does not mandate a particular legal methodology.[80]

The legal treatment of tax expenditures has always diverged some from their economic equivalents. As an economic matter, tax expenditures operate the same as direct spending. But as a legal matter, tax expenditures reduce tax liability; they are an integral part of the tax system.[81] Taxes and spending are legally distinct, and tax expenditures are in the legal category of taxes. This classification separating taxes from spending is important because it make tax expenditures part of the definition of tax liability — tax expenditures allow individuals to pay less money in taxes than they otherwise would. This conception of tax expenditures gives individuals a legal claim to pretax income that would otherwise have been subject to a tax lien. It furthers the property rights that people have in their pre-tax earnings by denying the presumptive tax that attaches to all earnings in our tax system. Legally, tax expenditures are integral to the tax system, and not part of the appropriations system that determines what should happen to collected revenue. Consequently, tax expenditures are crucial in defining legal tax shares.

The Supreme Court has long treated tax expenditures as involving more important individual action — compared to government action — than does direct spending. For example, tax expenditures to benefit religion have been a standard fixture of federal, state, and local law for a century. The Internal Revenue Code's charitable deduction explicitly authorizes a tax reduction for individuals who make gifts to religious organizations, and many localities explicitly exempt religious institutions from property taxation.[82] The economic equivalent of these provisions, direct government payments to religious organizations, is precisely the sort of thing that is prohibited by the Establishment Clause.[83] Nevertheless, the Supreme Court was never much troubled by support for religion in tax-based form.[84]

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[79] See Stanley S. Surrey & Paul R. McDaniel, TAX EXPENDITURES 25-26 (1985).

[80] Linda Sugin, Tax Expenditures, Reform, and Distributive Justice, 3 Colum. J. Tax L. 1, 3 (2012).

[81] They are deductions, exclusions and credits, just like normative provisions in the law. See Joint Committee description, supra note 7.

[82] IRC 170 allows a deduction for gifts to religious organizations by dint of their nature as religious. See e.g. NYS Real Prop. Tax L. 420-b.

[83] See, e.g., Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding that state maintenance and repair grants and tuition reimbursements violated the establishment clause, but that income tax benefits to parents were constitutional).

[84] Walz v. Tax Commission of New York, 397 U.S. 664 (1970) (upholding property

The Court's jurisprudence has made clear that there are factors other than financial support that are important in the constitutional determination of religious establishment. The Court has been particularly concerned about the appearance of government sponsorship of religion, and has allowed financial support to flow to sectarian institutions as long as that support does not carry a message of government endorsement.[85] Similarly, entanglement with religion is a purely legal concern in establishment clause doctrine that has nothing to do with economic support.[86] Since a direct subsidy via government bureaucracy is likely to involve greater entanglement than is tax-based support, direct subsidies are more legally suspect than economically equivalent tax expenditures. Justice Brennan observed that "tax exemptions and general subsidies ...are qualitatively different [t]hough both provide economic assistance."[87] The "qualitative" legal treatment of tax expenditures has been more nuanced than their quantitative economic analysis.

B. ACS v. Winn Made Tax Expenditures Disappear

The Supreme Court's most recent treatment of tax expenditures continues to distinguish tax expenditures from direct spending. In addition, it distinguishes them from any legally meaningful congressional action. This is a radical change in the judicial approach to tax expenditures. The Court's treatment of tax expenditures has moved about as far as can be imagined from treating them as the legal equal of direct government spending because now they are treated essentially as nothing legal at all. The Court's 2011 decision in *ACS v. Winn* is the linchpin of this development.[88]

In *ACS v. Winn*, the Court was asked to review a state tax credit that allowed individuals to reduce their state tax liability if they made payments to qualifying scholarship-granting organizations (STOs). For each dollar a taxpayer transferred to an STO (subject to a limit), the state would reduce

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tax exemption for churches).

[85] See Mueller v. Allen, 463 U.S. 388 (1983)(upholding state tax deduction for parents' expenses incurred in connection with parochial school attendance of their children). For a discussion of the establishment clause standard as applied to tax expenditures, see Sugin, Tax Expenditure Analysis and Constitutional Decisions, supra note 23 at 465 (1999)(citing cases).

[86] Sugin, Tax Expenditure Analysis and Constitutional Decisions, supra note 23 at 466-67.

[87] *Walz*, 397 U.S. at 690 (Brennan, J., concurring).

[88] My recent article, The Great and Mighty Tax Law, supra note 56, fully analyzes that case. Much of the discussion in this section comes from that article.

the taxpayer's obligation to the state by a dollar. In the universe of tax expenditures, this particular credit resembled direct state funding more than most since the state reimbursed the taxpayer's entire out-of-pocket cost. Plaintiffs in the case argued that since the organizations were primarily religious, the tax credit was unconstitutional as an establishment of religion. They claimed standing to sue under Flast v. Cohen, but lost on that issue.[89] The Court interpreted *Flast* to require both actual taxing and spending, and not their economically equivalent tax expenditure. The Court's literal application of both a taxing and a spending requirement did not include a tax credit that collapsed those functions by operating to forego tax collection as long as the taxpayer devoted resources to expenditures favored by the statute.

In the process of limiting the application of *Flast*, the Court had to characterize the state tax credit as something else, other than taxing and spending. So it treated the tax credit as a legislative decision to *not* tax, turning STO contributions into private action instead of state action, even though the tax credit financed the entire outlay that individuals made, dollar for dollar.[90] The Court held that the tax credit was not constitutionally reviewable state action, characterizing it instead as abstention from legislative action.[91] It was a short step from the Court's statement that the credit is declining to impose a tax, to its ultimate conclusion that taxpayers claiming the credit simply "spend their own money."[92] The credit was treated as a simple reduction in tax liability, unconnected to any government program to spend funds on identified purposes. Tax expenditures became a footnote to taxation – an absence of tax.

The *ACS v. Winn* Court's approach to tax expenditures was analytically problematic, in addition to legally novel. For the Court to conclude that taxpayers were spending their own money, it had to ignore the larger institutional structure in which the payments to STOs occurred. Taxpayers can only spend their own money if the legal rules entitle them to control over that money, or if individuals have a pre-legal right to those dollars. The Court assumed that taxpayers had more robust property rights than the legal system defining those rights actually contemplated. The legal regime determines what is, in fact, a taxpayer's own money, and the tax law at issue in *ACS v. Winn* first established that the money properly belonged

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[89] The Court held that the taxpayers lacked standing. *ACS v. Winn*, 131 S. Ct. 1436, 1449 (2011).

[90] *Id.* ("When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers.").

[91] *Id.* at 1447 ("[T]he government declines to impose a tax" when it awards a credit.).

[92] *ACS v. Winn*, 131 S. Ct. 1436, 1447 (2011).

to the state, and then determined that it should be credited to taxpayers who made payments to STOs. The *ACS v. Winn* Court treated the amounts at issue as the taxpayer's own money because it assumed taxpayer "ownership" without consideration of the state's legal rules, which included an income tax. Under an income tax, part of a taxpayer's income is deemed to be the property of the state.

The tax law is an institution that determines the contours of private property – it is one element necessary in deciding what counts as a person's own money. I can only spend my own money if the tax law (and other rules) determine that it is, in fact, my money to spend. While the legal analysis of tax rules can — and sometimes do — treat economic consequences as irrelevant to the legal standard, that approach is impossible when the legal rules control the economic status. Legal and economic analysis must sometimes converge because the relationship between them is interdependent.

The conception of government adopted by the *ACS v. Winn* majority treats taxation as fundamentally illegitimate — a legitimate tax system treats presumptive tax amounts as belonging to the state. This conception contributes to the legal invisibility of tax-based spending. Because the challenged actions were treated as private choices that individuals made about their own money, they were beyond the Court's concern. What could have been analyzed as a question of legislative preference for religion, instead morphed into a case about individual liberty to privately spend one's own money without state interference.

It was a mistake for the Court to treat the case as involving only private action, rather than state action.[93] The opinion recognized that a government's decision to collect revenue and spend it is a government choice,[94] but it did not acknowledge that the decision to allow tax credits is also a government choice. It was that decision — to adopt the tax credit in its existing form — that clearly constituted state action, and should have been legally important. The clear lesson of the case is that as long as the legislature designs a preference for religion as a tax benefit, it is beyond judicial review and legally invisible.

This result is substantially more radical than the separation between legal and economic analysis of tax expenditures demands. It was not necessary to treat the tax credit as the precise legal equivalent of government spending to acknowledge the economic importance of the legal rule. The *ACS v. Winn* Court could have recognized the role of law in determining economic rights by treating the tax expenditure as the

[93] See Sugin, The Great and Mighty, supra note 56 at 803-04.
[94] *ACS v. Winn*, 131 S. Ct. at 1438.

government's choice to reduce tax for some people. The Court could have treated the reduction in tax as state action in the tax system, consistent with the traditional legal classification of tax expenditures. As integral components of the tax system, tax expenditures are elements that reduce tax, regardless of whether they are economically equivalent to direct government spending.

Every provision that allows one taxpayer to pay less tax than another demands justification on legal grounds. That legal justification is generally easy — Congress has the power to place a heavier tax burden on some people than on other people. For example, it can decide that people with greater income must pay a greater percentage of that income in tax; the graduated rate structure is an exercise of that power. However, not every choice to raise the tax of some would pass muster under the Constitution.[95] So, Congress may not impose higher rates on the income of black people or Jews, simply because of their race or religion. The same analysis should apply to Congress' decisions to reduce the tax of some people, but not others. A renter cannot challenge the home mortgage interest deduction on the ground that homeowners are treated better than renters because renters have no constitutional (or other enforceable legal) protections giving them the right to be treated as well as homeowners. The political process is the place to go to argue over the home mortgage deduction, just as it is the place to debate whether the government should grant direct housing subsidies.

However, where a taxpayer claims to pay more than his fair share because he is unconstitutionally deprived of a deduction allowed to others on account of his race or religion, the legal question should be on the same footing as the increased rates. The legal system allows the person subject to the higher rate for blacks and Jews to argue that the rate structure violates the Constitution. But the legal system does not allow the person deprived of the deduction for equally unconstitutional reasons to argue that he is being overtaxed, even though his overtaxation is equivalent.

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[95] Most attention to the constitutionality of federal taxation has been under the direct tax clause in Article I sec 2, not the individual rights provisions. See e.g., Alan O. Dixler, Direct Taxes Under the Constitution: A Review of the Precedents, TAX NOTES, Dec. 25, 2006, p. 1177; Erik M. Jensen, The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional? 97 COLUM. L. REV. 2334 (1997); Bruce Ackerman, Taxation and the Constitution, 99 COLUM. L. REV. 1 (1999); Gene Magidenko, Is a Broadly Based Mark- to-Market Tax Unconstitutional? TAX NOTES, May 26, 2014, p. 952; Erik M. Jensen, The Constitutionality of a Mark-to-Market Taxing System, TAX NOTES, June 16, 2014, p. 1299; Calvin Johnson, The Four Good Dissenters in Pollock, 32 J. OF SUPREME COURT HISTORY 162 (2007) and Fixing the Constitutional Absurdity of the Apportionment of Direct Tax, 21 CONSTITUTIONAL COMMENTARY 295 (2004).

Under the Supreme Court's current approach to tax expenditures, government spending via the tax law gets a legal pass because it is not characterized as state action. Even though tax expenditures contain important federal policies in many areas.[96] Tax expenditures are rarely revisited and repealed once adopted. They are important in determining the shares that individuals pay. Their legal invisibility is a substantial fairness concern.

V. WHY INVISIBILITY IS A FAIRNESS PROBLEM

The last two sections analyzed the legal rules that make taxpayers invisible and argued that the standing rules in tax litigation and the privatization of tax expenditures create invisibility, treating some people unfairly. This section develops the fairness argument further in the context of a more robust theory of just government institutions. It identifies some fundamental elements necessary to fair taxation and applies them to invisible taxpayers, allowing the requirement that government institutions guarantee equal respect and concern for all individuals to serve as the guiding principle. Analyzing the problem of invisible taxpayers reveals a dual nature to tax fairness, half of which has been ignored in the tax policy literature. This section revisits the classic tax policy notions of horizontal and vertical equity to argue for a new, more nuanced understanding of tax fairness under those labels. It distinguishes economic fairness in taxation from legal fairness in taxation, and argues that both types of fairness are necessary for a fully just tax system.

A. A Just Tax System Treats People Equally

The design of the tax system matters for justice because the institution of taxation is widespread, coercive, and intrusive into the lives of individuals. Because of its reach, the tax system may offer the best test of whether we govern ourselves fairly. While people disagree about what constitutes the measure of a fair tax system,[97] most agree that taxation can

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[96] Education policy: §25A, §221, §222. Housing policy: §163(h)(3), §121. Health policy §. Energy policy: §Retirement Policy §. The list goes on. See Table 1 in ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014-2018, JCX 97-14, at https://www.jct.gov/publications.

[97] The precise terms of fair taxation differ under different theories of distributive justice.

be just.[98] There is a common thread in much contemporary political theory that treats people as equally important,[99] and under that approach, a fair tax must treat individuals as equal and autonomous individuals.

John Stuart Mill – an intellectual forebear to our tax system − described a fair tax system as one requiring "equal sacrifice" by individuals.[100] Welfarists – who represent the dominant philosophical approach to tax policy today − believe that a fair tax system maximizes social welfare. Welfarism incorporates an equality norm because social welfare derives from individual welfare, with equal importance attached to each individual's welfare. A Rawlsian approach to tax fairness is also egalitarian because it demands that each person be treated equally in the design of all social institutions.[101] As a government institution, Rawls demands that taxation treat people as "free and equal rational beings."[102]

Because taxation is one component in a larger government structure of coercion and social organization, taxation is only one part of the just government puzzle − albeit an important part. The fairness of any particular tax depends on the background institutions against which it is levied – a more equal social structure can tolerate a less intrusive tax, while a society with great inequality might require a tax system to do more work toward achieving justice. The complexity of this evaluation should not be underestimated.[103] Neither does it mean that there is nothing to be said about fairness in taxation, particularly when we consider the background institutions in our own society. As an institution that defines economic claims, the tax system divides pieces of the social product between individuals and the community. A government mandate of equal respect and concern is a useful touchstone in looking both broadly and narrowly at how taxation carries out that function. Since it is a limiting principle in the

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[98] Some people believe that no tax system can be fair because all taxes are coercive thefts of private property. This is what Robert Nozick says in Anarchy State and Utopia p. 171.

[99] Will Kymlicka, Contemporary Political Philosophy: An Introduction p. 5 (Oxford 1990).

[100] John Stuart Mill, Principle of Political Economy, book V (1848).

[101] See John Rawls, A Kantian Conception of Equality, in Collected Papers 254, 255 (Samuel Freeman ed., 1999). Linda Sugin, A Philosophical Objection to the Optimal Tax Model, 64 Tax. L. Rev. 229 (2011) develops Rawls' approach as applied to taxation.

[102] John Rawls, A Theory of Justice at 252 (1971).

[103] The importance of institutional context suggests that many disparate tax regimes can be fair, depending on other institutions. Consequently, I have argued that scholars should consider what limitations theories of justice impose on tax systems, rather than mandates required by such theories. See Linda Sugin, Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems, 72 Fordham L. Rev. 1991 (2004).

design of every social institution, there is no overall balance of equal respect that allows disrespect in one institution to be overcome by excess concern in another. Equal respect and concern demands that all who are affected by tax policy should be considered – even if not fully satisfied – in the public ordering that determines those claims.

From the perspective of equal respect and concern, invisible taxpayers are problematic because they are ignored. They are absent from the institutions that administer the tax system. Their interests are counted less than the interests of those with a more conventional relationship to the tax authorities. Current standing doctrine and the Court's privatization of tax expenditures push invisible taxpayers outside the legal system. As a consequence, they are unprotected by the Constitution whenever their rights are implicated by someone else's tax treatment. Their rights to equal protection and religious freedom are less secure and valued in this system than are the same rights of taxpayers who are part of the traditional dyad.

Outsider status is a fairness problem, even if it produces no economic disadvantage for those forced outside. Procedural justice is an independent demand on government. Economic advantage cannot make up for a failure to give each person equal respect and concern in the institutional structure; government failure to protect basic rights cannot be cured by economic advantages. Rawls' theory of justice is composed of two basic principles in a hierarchical relationship, with economic rights (in the second principle) subordinate to political rights (in the first principle). Legal invisibility is a problem for the more important first principle of justice because it is about whether a person is being treated as an equal and autonomous individual by the state. Any economic benefit that reduces tax liability is accounted for under the inferior second principle. Consequently, invisible taxpayers must be included in the institutional structure in order for the tax system to be fair.

Taxpayers are treated with particular disregard when tax rules and administration *favor* others because their interests are not even represented by government proxy. In the classic case of an identifiable taxpayer at odds with the government, the economic interests of invisible taxpayers coincide with the government's interest, so their concerns are heard. The traditional dyad protects the economic interests of unrepresented taxpayers through the government's participation, but only when the government is attempting to collect revenue. Where the government treats identified taxpayers better than others, the losers are never the ones the legal system sees.

B. Pre-Tax Income is an Unjust Baseline

There is no natural, neutral starting point to evaluate fairness in taxation. Some kinds of widely shared harms may not really be harms at all – we need to determine the baseline of expectations to decide when a person is treated badly. Similarly, not all taxation is ultimately injury – there is a baseline of just taxation, and nobody should be able to complain about being required to pay her fair share. However, any tax in excess of one's fair share should be understood as an injury to that taxpayer. The baseline might fall at different places in different societies, so that excessive taxation in one country might be fair in another. There are few tax regimes that are categorically unjust.[104]

Consistent with the demands of equal concern and respect in designing institutions, the rights and interests of all individuals must be incorporated in establishing baselines. Baselines should reflect what individuals should be entitled to own and what is justly allocated to communal resources. We cannot craft a theory of fair taxation without talking about desert. Fair taxation must consider what we each deserve as our share of the social product, and what we each deserve to bear as our burden of society's costs. The most fundamental tax fairness question asks what should be treated as private property and what should be treated as social product – how to carry out the basic function of taxation in dividing those shares.

There are many points along the spectrum from private rights to communal ownership that people can legitimately claim as appropriate for the baseline against which tax fairness is measured. The baseline itself is a product of social decisionmaking since it is composed of laws. There is no pre-social division between private property and public entitlement – it is the function of government to determine the proper distribution of the returns to social cooperation. Some of those returns will go to individuals and some will be shared, but which individuals should have claims is an issue to be decided by social process – democratic forces in the U.S. The existence of private property is the product of conventions created by law.[105] Understood this way, there is no redistribution, only distribution that gives effect to entitlements created on principles that consider moral desert.

Invisible taxpayers are cheated in the definition of baselines under current law because the baseline most widely used in tax policy analysis is pre-tax income. Pre-tax income is a normatively empty concept because it assumes that people have entitlements to amounts that are properly attributable to social factors. Pre-tax income assumes that individuals are deserving of particular shares without examining whether that entitlement is

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[104] I have argued that an endowment tax on individual abilities would be such a tax. See Sugin, A Philosophical Objection to the Optimal Tax Model, supra note 101.

[105] Murphy and Nagel, THE MYTH OF OWNERSHIP

justified. Presumptive claims to pre-tax income avoids the difficult − but necessary − task of establishing moral bases for the specific distribution of identifiable returns to individuals.

Pre-tax income imagines the individual taxpayer as an autonomous pre-social earner. Recognizing interrelatedness between taxpayers and accepting the reciprocal social obligations carried out through taxation, are inconsistent with the notion of any taxpayer as a pre-social earner. When we recognize the interrelatedness of individuals across the tax system, invisible taxpayers need to be acknowledged and considered in the distribution of shares. Taxpayers are invisible because we pretend that it does not matter to one taxpayer what happens to another taxpayer in the system. Shifting from a pre-tax baseline to a perspective in which there are no rights without legal institutions demands consideration of all individuals, including invisible taxpayers. Since all individuals are interdependent, both contributing to and benefitting from social enterprise, the definition of rights and obligations in taxation should consider everyone. Fairness in taxation demands it.

C. Tax Fairness Requires Both Economic Fairness and Legal Fairness (Rethinking Horizontal and Vertical Equity)

Fairness in taxation has both economic and legal dimensions; how to treat people with equal concern and respect depends on the dimension. The economic dimension requires that we account for the real economic costs of taxation to each person. Economic fairness is concerned with levels of well-being, resources, or opportunities.[106] These are the terms on which debates about tax fairness generally take place, and they are important considerations in designing tax institutions. Nevertheless, we should recognize that these debates are limited in the sense of considering tax fairness only in economic – and not legal – terms. Legal fairness is a separate, and independent, measure of tax fairness. It consists of treating individuals as autonomous people with rights and interests that are important to consider in designing and applying rules. An examination of economic fairness compared to legal fairness clarifies the conceptual distinction between the traditional tax equity notions of horizontal and vertical equity.[107] A just tax system must satisfy the demands of both economic and legal fairness.

Economic fairness is not a concept that exists in isolation; it is about

[106] See, e.g., Shaviro, Alstott, Dodge

[107] The debate about whether there is a distinction between horizontal and vertical equity has produced somewhat of a stalemate. See Kaplow, Repetti and Ring.

relative shares in society, and is primarily a matter of social organization. Tax fairness is only meaningful in the context of other non-tax public (and private) institutions, and across individuals in society. Economic fairness requires considering the gross amount of tax that any individual pays, but also depends on how public funds are used and the levels of individual well-being in society.[108] An individual's fair share depends both on his relative level of well-being in the society and/or his share of public benefit. Fair shares can account for both abilities to pay and social distribution.

There is no pre-political, natural level of taxation that governments must strive to reach. Countries vary in the size of the public sector compared to the private sector, so the gross level of taxation appropriately differs.[109] However, economic justice requires that government collect sufficient revenue to finance the institutions necessary for political equality, equal opportunity, and basic welfare necessary for individual agency and political participation. Overtaxation is only meaningful by reference to relative burdens within the context of a given level of government revenue and spending. Without knowing the extent of burdens across the population, it is impossible to measure whether individuals are being treating fairly.

Thus, an individual's tax liability must be sensitive to: (1) total governmental burdens and benefits to that individual, and (2) total benefits and burdens across the community as a whole. Parsing these two dimensions helps illuminate tax fairness. First, consider the balance of government burdens and benefits on an individual basis. It is tempting to argue that confiscatory taxation – where the state takes all of a person's pre-tax earnings, for example -- is *per se* economically unjust. But even confiscatory taxation depends on context. It is one thing for the state to take all of a person's earnings and leave him to starve, but it is completely different to take all of a person's earnings and simultaneously satisfy his every desire. While we might not find such a system attractive, the problem cannot be solely economic if there is no economic deprivation. From the individual perspective, economic fairness requires considering whether a person is deprived of something necessary.[110] The objection to confiscatory taxation without economic deprivation is on legal or political, not

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[108] Bill Gale, Eugene Steuerle on progressivity, Tax Notes.

[109] The United States is projected to collect 18.3% of GDP in revenue in 2015. See Congressional Budget Office, An Update to the Budget and Economic Outlook: 2014 to 2024, Aug 27, 2014 at https://www.cbo.gov/publication/45653. Western European countries collect substantially more. See OECD, Revenue Statistics Comparative Table at http://stats.oecd.org/index.aspx?DataSetCode=REV (showing the U.S at 25.4% for 2013, compared to the OOECD average of 34.1%)(OECD and CBO use different measurements).

[110] See Sugin, Theories of Distributive Justice, supra note 49 at 2007.

economic, grounds.

It is worth drilling down further into the meaning of economic fairness in taxation, and how equal concern and respect in the design of institutions plays out. All income in the social system is not the same – some returns are more appropriately allocated to social forces and consequently more appropriate for taxation than are others. In a society (like ours) in which there is substantial income and wealth concentrated among very few individuals,[111] economic fairness requires that the tax system consider the crucial role of the social system in producing income and wealth. Where there is no good explanation for the very highest earners to receive so much more than others for their capital or labor, the tax system must account for the substantial contributions of the social system.

Once we account for social institutions, it becomes obvious that we all *deserve* very little of what we have. A huge part of everyone's income and wealth is attributable to social factors. The share of income and wealth attributable to being in society increases as income and wealth go up. The benefits to high income individuals provided by the social structure and the government extend beyond anything that looks like a transfer, or even a public good because the basic infrastructure of society benefits the wealthy much more than the poor. That infrastructure includes the operation of markets, the monetary system, military stability, the rule of law, and everything else that makes America an attractive place to live, work and invest. Social forces and social cooperation produce many tangible and intangible things that contribute to income and wealth. The advantage of being in society is enormous for people who do well.

Opportunity is also fundamental to determining the returns to social cooperation – those with greater opportunity to earn and invest should be required to pay more from the fruits of that opportunity than those who did more with less. Greater opportunities for some arise on account of the social system, which includes educational institutions and social connections. Accounting for disparate opportunities is one way in which the tax system can be sensitive to the balance of benefits and burdens over lifetimes, since opportunities at one time may affect returns at another.

Nevertheless, it is important not to overemphasize the importance of opportunity in the design of fair taxation. Economic justice is not solely a matter of equalizing opportunity to earn. It is not enough to start everyone off in the same place. This is the difference between libertarian and liberal

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[111] The top 400 earners had an average of $265 million in income in 2010, earning 1.31% of total income earned by all taxpayers. See IRS, SOI Tax Stats Top 400 Individual Income Tax Returns with the Largest Adjusted Gross Incomes at http://www.irs.gov/pub/irs-soi/10intop400.pdf.

egalitarian theories of economic fairness. Libertarian theories are more amenable to "starting gate" fairness: While Robert Nozick recognized that a just distribution is impossible where people enter society with different resources, he believed that justice would be achieved as long as everyone starts off equal – regardless of the ultimate distribution.[112] Ronald Dworkin explicitly rejected the starting gate notion by explaining that a just economic system continually intervenes to affect distribution over time, as arbitrary differences between individuals produce disparate economic returns.[113]

A tax system that is at all concerned with welfare must be sensitive to outcomes. Ability to pay, the most widely held norm relating to fair taxation, cannot be measured on an ex ante basis since that ability ultimately depends on how opportunities translate into outcomes.[114] An emphasis on equal opportunity implies a high normative regard for merit. If economic justice consists only of equalizing opportunities, then individuals are entitled to anything they can earn in a level playing field. That conception is not without internal difficulties − there are different interpretations of a level playing field, and individual talent is a sticky issue for philosophers who believe in rewarding talent. But even ignoring those problems, that conception is incomplete. Even assuming that opportunity is equalized, social institutions still contribute to disparate outcomes for individuals. An economically fair tax system will account for how those institutions contribute to the pre-tax distribution of wealth and income. Merit can only explain a small part of pre-tax distributions. Merit distinctions − like hard work − explain so little of the ultimate economic difference between individuals.

Even if we could all agree about what constitutes truly equal opportunity, and even if we could guarantee equal opportunity for all, we would still not be finished designing an economically just system because markets do not necessarily reward social value. The conventional notion of merit maps poorly onto market-based returns. There are many things to be valued that are not valued in the market. Thus, even if fair shares are

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[112] This is Nozick's challenge to Rawls. He offers that the initial distribution can be whatever the reader prefers, including complete equality, because his point is that freedom to trade after that moment will necessarily disrupt whatever the pattern of distribution was at the start. Robert Nozick, Anarchy State and Utopia 160-63(1974).

[113] Ronald Dworkin, What is Equality? Part 2: Equality of Resources, 10 Philosophy and Public Affairs 283 (1981).

[114] See Mark Kelman, Time Preference and Tax Equity, 35 STAN. L. REV. 649, 656 (1983); Alvin Warren, Would a Consumption Tax Be Fairer Than an Income Tax?, 89 YALE L.J. 1081 (1980).

sensitive to desert and recognize the role of merit in distribution,[115] there is still wide room for taxation to account for non-market values. Economic justice requires recognizing social contributions that individuals make that do not produce economic gains for them. The fiscal system should account for the benefits that teachers, homemakers, and other underpaid individuals in the market contribute to the social product.[116]

As an economic matter, we expect that a fair tax system will impose economic burdens that are allocated according to a defensible economic principle, such as ability to pay or standard of living – the two norms underlying taxes on income, consumption, and wealth. These norms are generally treated as "the" standards for tax fairness, with no attention to the fact that they are economic standards.[117] As economic standards, ability to pay and standard of living see individuals as points on an economic spectrum compared to others at different economic points. For example, ability to pay compares income earners to other income earners, and justifies greater taxation for those with greater income. Consequently, economic fairness maps onto the vertical equity norm in traditional tax policy analysis because individuals can only be judged visa vis others in different places along the same dimension. Scholars who argue that there is no independent content to tax policy's traditional horizontal equity norm analyze taxation solely in economic terms.[118] From an economic perspective, treating equal earners the same is derivative of treating differing earners differently.

The legal dimension of fairness is distinct. Starting from the same commitment to equal respect and concern in the legal context requires that we treat each person's economic and non-economic rights as meaningful and protect them through the legal system. It is important to understand the tax system as a legal institution as well as a system that allocates resources. As such, the norms for fairness look different from a legal perspective, and tax-law related fairness imperatives more resemble the norms in other areas of the law.[119]

As a legal matter, we expect that a fair tax system will impose rules

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[115] Not everyone agrees that they should be. Liam Murphy argues that economic justice has nothing to do with merit, (TLR draft), but philosophers like Ronald Dworkin and libertarians believe that merit is important in determining a just distribution.

[116] I have suggested that these contributions might be considered in lieu of tax payments in money. See Sugin, Philosophical Objection, supra note 101.

[117] See David Bradford, Blueprints for Basic Tax Reform; Dodge, supra note

[118] Kaplow. Utilitarians are less likely to separate out rights-based concerns from purely economic concerns because utilitarianism can collapse both concerns into a single metric.

[119] Due process

in an evenhanded way, and that the tax system will respect each person's rights and legal entitlements equally. This is how to best interpret the horizontal equity notion in taxation. Understood this way, horizontal equity is a completely different kind of norm than is vertical equity.[120] It is more procedural and concerned with rights, compared to vertical equity, which is more concerned with money. Horizontal equity demands that we examine the administration of the law, and every taxpayer's position vis a vis the state and other taxpayers. At a minimum, it demands that the law not be applied in an arbitrary fashion. More expansively, it looks behind the economic locus points that provide an easy shorthand for evaluating fairness, and asks whether people pay their fair shares, taking into consideration every relevant question for their tax liability compared to everyone else's.[121]

The legal understanding of tax fairness is more robust than the economic understanding because it can answer many more questions about how the system should be designed. It can consider the proper role of non-financial differences to tax liability. For example, when deciding on the appropriate unit for taxation, the demand to treat everyone with equal concern and respect offers a framework for comparing people who live together with others and those who do not. Reasonable people can differ about the proper tax under that standard, and whether households or individuals should be tax units. Nevertheless, it is important that the idea of legal fairness invites consideration of how the tax system affects identity, autonomy, and citizenship.[122] Economic fairness has nothing to say along those lines.

Legal fairness challenges decisionmakers to look behind income, consumption or wealth and evaluate the burdens placed on different kinds of people. Our system taxes undocumented workers without giving them the rights that citizens earn from paying those same taxes.[123] Our system taxes people who work for a living much more heavily than people who invest capital.[124] Legal fairness demands justification for these disparate burdens. Beyond economic comparisons, it can incorporate personal well-being, choices, and rights into consideration in the design of taxes. When we ask whether the tax system treats people fairly, it is important to

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[120] Murphy and Nagel treat horizontal equity as an incoherent norm because they understand it as a free-standing economic judgment. See The Myth of Ownership at .

[121] Dworkin's concern that individuals bear the costs of their lives for others informs this concern. See Equality of Resources.

[122] See Tsilly Dagan

[123] See Francine Lipman

[124] See Sugin, Payroll Taxes, Mythology and Fairness, 51 Harv. J. Legis. 113 (2014).

remember that the question is about people, not money. That inquiry necessarily includes whether we have incorporated peoples' interests in designing the rules. Legal fairness is also the rubric under which the tax system offers individuals protections from unconstitutional or otherwise illegal application of the law. The economic approach to fairness − useful though it is − cannot accommodate non-economic interests and legal rights.

All of this brings us back to invisible taxpayers because their injuries are most significant as legal unfairness. Under current doctrine, the only cognizable tax injury is an economic injury, but legal injury – where a person's rights and interests are disrespected in the institutional structure – is not actionable. Because the plaintiff must be complaining about his tax bill, violations of his rights that do not translate into demonstrably identifiable tax liability are not redressable. The only kind of injury that exists in the tax law is the direct economic injury of being asked to pay an identifiable tax. The cases highlighted in this article all involve constitutional rights implicated by the tax law. Tax fairness – in the legal sense – demands that the tax system respect and protect these non-economic interests. It is in the legal context that the rights of invisible taxpayers are lost because they have no opportunity to be heard.

The tax system imposes many injuries that are not primarily economic at all. For example, by favoring certain activities (like energy exploration and real estate investment) or people (like families with children) compared to others, the tax system endorses particular social values. Activities and people outside the favored groups are less valued in the social structure, which is unfair under the guiding principle. The plaintiffs in *Allen v. Wright* – black families challenging the IRS's allowance of tax exemption for racially discriminatory schools − understood that their injury from the tax system could be the law's perpetuation of a status quo disrespectful of them as equal citizens. They were the same people with a real interest in the outcome in *Bob Jones*. Edith Windsor knew that her injury did not really come from the government's withholding her refund despite the court's order; her injury came from the tax system's operation to treat her marriage as less legitimate than the marriage of a heterosexual couple. The Sklars could not have reasonably expected their deduction for religious school tuition to be allowed; their injury arose because the government favored members of the Church of Scientology over them.

The legal and the economic concerns merge to the extent that the legal right is itself economic in nature. But not every interest implicated by the tax system is economic. There are many legal rights in the tax law that are properly independent of economic concerns. Taxation is an omnipresent a force in everyone's life, and raises the most fundamental questions of the appropriate relationship of the individual to the state. Tax policy scholarship must do a better job evaluating that relationship along all the dimensions that taxation touches. The tax law's broad scope and its awesome influence over so many non-economic policies requires justification. Tax scholars have fallen short outside the economic arena – even though taxation has long been about much more than money. The most important function that tax policy scholarship can serve is evaluating the justice of the government's relationship with the people through taxation.

VI. Mechanisms for Legal Redress

Some scholars have suggested that the Supreme Court reconsider its standing doctrine to allow broader challenges by taxpayers. Lynn Lu examines Allen v. Wright to argue that the tax context of some cases has created bad law.[125] Samuel Brunson proposes a radical broadening of standing doctrine to enable more plaintiffs to bring challenges to tax administration, in order to rein in IRS discretion.[126] Heather Elliott's comprehensive approach to de-constitutionalizing much of today's standing doctrine would likely enable more taxpayer litigation.[127] While all noble ideas, I am skeptical that the Supreme Court will soften its standing doctrine in any of the ways scholars have suggested. To the contrary, the Roberts court seems inclined to use standing more aggressively.[128] Allen v. Wright is an old and important precedent, and the standing holding in ACS v. Winn, along with its sweeping categorization of tax expenditures, indicates that a majority of the current court is not interested in opening the courthouse doors. Those who care about just application of the tax law will need to look elsewhere. I contend that there are other ways to address this problem without betting on an unlikely constitutional reinterpretation.

It is fair for the tax system to impose burdens on taxpayers as long as the government has properly considered their interests in adopting the policies that burden them. Invisible taxpayers can legitimately be expected to finance the state only if the tax laws are designed and administered consistently with the Constitution. Under current law, taxpayers are invisible because they have no standing to complain about tax regimes that

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[125] See Lu, supra note 14.

[126] See Brunson, supra note 131 (advocating that Congress allow "fire-alarm standing" to individual litigants).

[127] Elliott, supra note 46

[128] See Jonathan Adler, Standing Still in the Roberts Court, 59 Case W. Res. L. Rev. 1061 (2009).

disrespect them or unconstitutional tax benefits granted to others. The taxpayer-government dyad that enjoys institutional recognition fails to protect the interests of others whenever the taxpayer and government in that pair are not really at odds with one another, and whenever the absent taxpayers' interest fails to map precisely onto the state's interest. The solution is to institutionalize invisible taxpayers so that their common interests can be considered by courts and the IRS.

Protecting the interests of invisible taxpayers does not require courts to interfere with Congressional prerogative or administrative discretion, nor would it inexorably lead to an avalanche of litigation.[129] Rather, it would strengthen the rule of law. Guaranteeing fair treatment for everyone does require acknowledging the existence of invisible taxpayers and making them visible in the legal regime. Since the political process is unlikely to solve the fairness problems described in this article, this section considers potential institutional approaches to improving fairness for invisible taxpayers, without unleashing a torrent of frivolous claims or requiring heroic interpretive changes by the Supreme Court.

A. The Political Process Will Not Solve this Problem

In addition to erecting barriers for invisible taxpayers, article III's procedural hurdles perform a crucial separation of powers function. Courts are best equipped to handle cases and controversies, but Congress is in a better position to make contested political choices.[130] The putative plaintiffs complaining about Bob Jones' exemption, a charitable deduction for Scientologists, and the privileged tax status of heterosexual couples all faced the specter of a closed courthouse. Could they have gotten redress in the political process?

Who should pay more tax is generally a legislative question. Taxation is politically salient, and elections are won and lost over tax policy. Core questions of tax fairness depend on contested theories of distributive justice about which reasonable people can disagree. Since there are no right or wrong (only inconsistent) beliefs about distributive justice, tax law should reflect whatever theory resonates best with the governed. The political process is the best way to reveal those preferences. The legal framework also suggests that the legislature should be king in matters of taxation. Under the Constitution, Congress has broad discretion in imposing

[129] Maintaining and controlling IRS discretion are both essential. See Lily Kahng, The IRS Tea Party Controversy and Administrative Discretion, 99 Cornell L Rev Online 41 (2013).

[130] See Scalia, supra note

and designing taxes, and taxes are determined primarily by reference to a dense and complex statutory code. Finally, the tax burden on invisible taxpayers is shared by many people, and the political process is a place where people can meet to further their common interests.

Nevertheless, the political process is unlikely to resolve the problems faced by invisible taxpayers. For precisely the same reason that courts won't hear these cases – because the harm to each taxpayer is so small – individuals may not even recognize their unfair burdens. Very few voters know about the tax system's beneficial treatment of a few taxpayers – how many regular people know about the IRS's policy of allowing the deduction for Scientologists? The nature of tax benefits for favored groups is narrow – many tax expenditures have an asterisk in the revenue cost tables because they are smaller than rounding errors in the federal budget – though of course very substantial for the favored taxpayers. Taxpayers are rationally apathetic; it is not worth the average taxpayer's trouble to pay attention to how the tax laws are being administered for others. Consequently, legislators are unlikely to be interested in solving these problems.[131]

Even where public interest might be heightened enough to spark legislative interest, such as the *Windsor* case, there is no guarantee that the political process will produce a constitutional result. Congress might affirmatively decide to discriminate against gay couples (or racial or religious minorities). But that doesn't make the constitutional violation any less serious. Constitutional violations that favor majorities demand the most serious attention from the courts – a tax benefit administered in a way that reduces the taxes of Christians (only) would be both unconstitutional and politically popular. "As Allen v. Wright demonstrates, the Court sometimes uses standing to evade what it has elsewhere asserted as its proper role. … The Allen plaintiffs − African Americans seeking integrated schools in the South − were precisely the kind of plaintiffs who, as a discrete and insular minority, could not seek political redress and whom Carolene Products said the Court must protect."[132]

I am not advocating greater judicial access for taxpayers to challenge policy decisions that Congress makes about taxation. Instead, I am arguing for greater recognition of legal claims, and a more flexible approach to identifying a claim as legal, rather than political. The claim

[131] Samuel Brunson, Watching the Watchers: Preventing IRS Abuse of the Tax System, 14 Fla. Tax Rev. 223, 261 (2013)("Though ending the I.R.S.'s abuse of the tax system helps taxpayers generally, the benefits are diffuse, and no legislator is likely to benefit politically from engaging in such oversight.")

[132] Elliott, supra note 46 at 487.

that the Sklars made was a legal − not a political claim − because it was about the government violating a right they had. *Bob Jones* and *Windsor* also involved individuals who were being denied their constitutional rights by the administration of the tax law. Taxpayers suffer injuries as citizens, but those injuries manifest as increased tax shares.

B. Institutional Structure for Invisible Taxpayers

The problem with allowing taxpayer standing based on the theory of legal shares described in Part III.B stems from the insignificance of any individual taxpayer's contribution in the context of the whole. With each financial interest so small, individual litigation is not a good fit. The problems are systemic and go to the integrity of government; it is the accumulation of millions of slivers of tax injustice that make these issues important. Consider *Hernandez*: a single taxpayer has a miniscule economic interest in the deduction that Scientologists have under the IRS closing agreement and current practice. But the aggregation of all taxpayers allows consideration of the total cost to the Treasury of the allowance, transforming tiny injuries into a significant public concern. An unconstitutional deduction for Scientologists costs taxpayers enough to justify judicial consideration, even with prudential limitations on standing.

The challenge is to institutionalize disparate taxpayers into one party who can sue to vindicate the rights of all. Various forms are possible to fulfill this function, both private and public. Incorporated aggregation in a public party that represents the interests of invisible taxpayers holds real promise.[133] Private parties are also possible, but they present more difficulties. Compared to private parties, an independent public institution's managerial discretion could more effectively be limited by fiduciary obligations to taxpayers, as well as procedural requirements. An official public protector of invisible taxpayers would be in a position to evaluate the myriad claims of illegality and unconstitutionality that taxpayers have, and bring suit only where a strong legal case can be made.

Congress could empower an official public monitor solely with respect to constitutional issues, leaving the IRS its customary broad discretion over cases that do not raise constitutional questions.[134] The mere

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[133] This could be considered a "public right of action to sue to vindicate [citizens'] private rights." Seth Davis, Implied Public Rights of Action, 114 Col. L. Rev. 1 (2014).

[134] Some commentators are more broadly concerned about IRS overreach than I am. See Brunson, supra note 131; Zelenak, supra note 2. Professors Brunson and Zelenak are concerned that the IRS is insufficiently bound by the rule of law. But see Alice Abreu and Richard Greenstein, Defining Income, 11 Fla Tax Rev. 295 (2011)(explaining

existence of a constitutional monitor with the potential to intervene might be sufficient to remind the IRS about invisible taxpayers. Such an institutional structure could inspire the IRS to better recognize issues that the traditional dyad treats as peripheral to its conflict. A separate institution representing the interest of invisible taxpayers would operate as a filter between taxpayer complaints and access to courts, choosing only the most worthy cases.

There is precedent for such an institutional solution in the Taxpayer Advocate. Under current law, the Taxpayer Advocate is sympathetic to taxpayers who have been treated badly in the system, and is empowered to resolve disputes with the IRS.[135] She could be legally designated to act as a representative of invisible taxpayers, with powers to intervene, sue, and otherwise protect their interests. As would be necessary for any institution charged with protecting invisible taxpayers, the Taxpayer Advocate currently enjoys some independence from the executive branch. Independence is important because protecting invisible taxpayers will require litigation against the IRS and pursuing constitutional challenges to legislation. Under current law, the Taxpayer Advocate has no authority to initiate suits against the government, and its focus of concern is individual and identifiable taxpayers, not the invisible ones. Nevertheless, Congress could expand the Taxpayer Advocate's role to include this function.

As an alternative to expanding the role of the Taxpayer Advocate, Congress could create a new institution, independent of both Congress and the President, with authority to sue on behalf of invisible taxpayers and which could serve as a general legal monitor for their interests.[136] The new institution would need to be independent of the IRS, and would have fiduciary duties to taxpayers as a whole, filling in the now empty space between the IRS and individual taxpayer litigants. A public actor not connected to any current tax institution might offer better representation and more independence than the Taxpayer Advocate, since the Advocate is part of the extant tax enforcement framework.

Another option could be empowering private individuals to represent public interests. This is an attractive option if people are skeptical of the ability of public institutions to behave in the interest of invisible taxpayers. There is a long tradition of private attorneys general bringing so-

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interpretations that undertax as administrative necessity).

[135] Its powers are limited under current law. See Brunson, supra note 131 at 252.

[136] There are many complex legal issues that would arise in creating such an institution, the precise contours of which are beyond the scope of this article. For a general discussion, see Michael Herz, United States v. United States: When Can the Federal Government Sue Itself? 32 Wm. & Mary L. Rev. 893 (1991).

called "qui tam" suits to enforce various public rights. In that tradition, Congress creates rights that give individuals standing to bring suit.[137] The authority for qui tam actions comes from Congress – which drafts statutory provisions giving individuals the right to bring suit.[138] Qui tam actions have withstood standing attacks. Private qui tam plaintiffs represent the legal interests granted by Congress to the public at large.[139] Individuals serve as representatives of the public to enforce policy.[140] Because the suit relates to an action on the government's behalf, the government, not the relator, is considered the real plaintiff and if the government succeeds, the relator receives a share of the award.[141]

However, qui tam is not an easy fit for invisible taxpayers. Qui tam is most common where the government has been defrauded by a private party.[142] There are mechanisms in place to combat tax fraud,[143] and invisible taxpayers are not victims of fraudulent individuals – they are victims of government largesse. Unlike in most qui tam proceedings, the government does not perceive itself to be the harmed party -- the taxpayers shouldering more than their fair shares are individually harmed. Since the government granted the favored taxpayer the challenged benefit, a private party bringing a qui tam action would essentially be suing on behalf of the government over tax benefits that the government has, itself, bestowed. Qui tam has not previously been used in this way, although the government has been known to sue itself.[144]

While private enforcement might be effective and manageable in some areas of the law, it could prove problematic in the tax context. Taxpayers can be uniquely hostile and unrelenting in refusing to pay their legal share, and any invitation into the courts therefore requires a strong gatekeeper to separate the frivolous from the serious. Private attorneys general in the tax context raise the specter of zealous tax protesters overwhelming meritorious cases and swamping the system. Consequently,

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[137] See generally, Evan Caminker, Qui Tam Actions, 99 Yale L. J. 341 (1989).

[138] See id.

[139] Priebe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting)

[140] Id.

[141] Cornell Law Encyclopedia, http://www.law.cornell.edu/wex/qui_tam_action.

[142] Today, the most widely used qui tam action is to pursue violators of the federal False Claims Act. That statute authorizes qui tam actions against parties who have defrauded the federal government. 31 U.S.C. § 3279 et seq.

[143] Franziska Hertel, Qui Tam for Tax?: Lessons from the States, 113 Colum. L. Rev. 1897 (2013) ("the IRS whistleblower program, state false claims acts implicitly authorizing qui tam for tax, and the New York False Claims Act.")

[144] See generally, Herz, supra note 136

private enforcement seems less desirable than public enforcement by a specially authorized institution. The Taxpayer Advocate or an independent counsel created for this purpose would be more able than a private mechanism to prevent a crack in the courthouse door from opening too wide.

C. Mandating IRS Procedures

It might not be necessary to burden the courts with additional litigation if the IRS could do a better job following the law and upholding the Constitution. A less cumbersome solution to the problem of invisible taxpayers than creating an institutional plaintiff could involve administrative process. Administrative process might actually be a more effective way to vindicate constitutional rights for invisible taxpayers, since courts are not as interested in their role as protectors of individual rights as they once were.

The simplest administrative approach might be educating the IRS about invisible taxpayers, and allowing it to include their interests in its decisionmaking procedures. Where the harm to the system from invisibility is small, allowing the IRS discretion to consider invisible taxpayers might be sufficient to prevent the most egregious errors. For example, the IRS could be required to flag any revenue-reducing agreements it enters into with specific taxpayers, and justify its decision in writing. That procedure would allow the IRS to devote extra attention and resources to decisionmaking when it knows that no court will be able to adjudicate the question.

Where the issues are legally important or the revenue loss substantial, more demanding administrative consideration would be appropriate. Treasury or Congress could mandate public consideration of invisible taxpayers in some circumstances. To guarantee that consideration, the IRS could be required to file a public acknowledgement every time it decides to adopt a revenue-reducing position. That acknowledgement could explain the government's decision to be generous to a particular class of taxpayers, along with a description of how it considered the population of taxpayers as a whole.

Somewhat more process might be appropriate for the most significant decisions. In those cases, the IRS could be required to follow notice and comment processes, similar to the procedures used for rulemaking under the Administrative Procedure Act. For example, the IRS could have been required to solicit comments on its decision to allow the charitable deduction for Scientologists. There could have been a multi-stage process imposing hurdles before the decision could go into effect.

The process itself might have made the IRS more reflective about the substance of the closing agreement. The transparency produced by such a process might also be a monitoring force.[145] Nobody knows how many unconstitutional private agreements the IRS has concluded with individual taxpayers because they are not public. A comment process would have given other taxpayers the opportunity to argue that the Scientology closing agreement was an unconstitutional reversal of the Supreme Court's decision in *Hernandez*. People with an interest in challenging the unconstitutional administration of the tax law —like tax law professors— are likely to participate in that context. When taxpayers believe that proposed Treasury regulations are unconstitutional, they are not shy about commenting.[146] Where there is a substantial outcry, the Treasury Department has no choice but to examine its policies more closely.[147]

Procedures that require the Treasury to more closely examine the constitutionality of its administration is a good idea. Nevertheless, internal Treasury procedures cannot wholly substitute for judicial review in constitutional cases since courts are the final arbiters of constitutionality.[148] Better administrative procedure should complement judicial review. As the three featured cases make clear, there are constitutional issues that arise in tax cases that are so important that the Supreme Court needs to resolve them. Recall that the Obama administration bent over backwards in *Windsor* to make sure that the courts would retain jurisdiction. In *Bob Jones*, the Supreme Court itself appointed an amicus to argue the government's position, rather than lose the opportunity to decide the case.

Administrative process might be sufficient for cases in which the IRS gives a taxpayer particularly generous treatment, but do not raise constitutional questions. One example in this category is the Service's recent decision to interpret section 382 in a way that allowed some troubled banks to use net operating losses to reduce their tax liabilities.[149] Many people believed that the IRS lacked the authority to issue that guidance,

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[145] The Scientology closing agreement was leaked — presumably by someone who worked at the IRS — to the Wall Street Journal, so it was not actually secret. Nevertheless, the drafters of the agreement expected that it would not be disclosed.

[146] Sometimes by the tens of thousands, as in the case of regulations proposed to govern the political activities of section 501(c)(4) organizations. See http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501(c)(4)-Organizations (over 150,000 written comments received).

[147] The 501(c)(4) regulation was proposed in November 2013, and its ultimate fate is not resolved as of this writing. In May 2014, the Treasury announced that it was considering all of the comments. See id.

[148] Marbury v. Madison.

[149] IRS Notice 2008-83, 2008-2 C.B. 905; IRS Notice 2010-2, 2010-1 C.B. 251.

given the language in the statute.[150] Nevertheless, other taxpayers who are stuck with the consequences of section 382's limitations are not in a position to attack the government's decision to help the big banks. Like the Sklars, they can complain about their bad treatment, but not about another taxpayer's better treatment.

The difference between the section 382 losers and the Sklars is that the Sklars have a constitutional claim, while the section 382 losers have a claim about the interpretation of a statute. While it is not desirable for the IRS to play favorites among taxpayers, statutory and constitutional favoritism could be treated differently. Judicial intervention might only be necessary where constitutional violations of individual rights are alleged. The line between permissible exercise of discretion and IRS overreach is not always clear. A wholly internal process, in which the IRS deliberates on its own decisions, without oversight by a court, might be sufficient to address the most egregious cases of statutory favoritism. Simply identifying the biases created by invisible taxpayers might be sufficient to reduce their effects.

D. Judicial Recognition of Invisible Taxpayers

Courts themselves can also take initiative in making taxpayers more visible by considering the implications of its decisions for invisible taxpayers. No change in standing doctrine would be necessary. Rather, courts would need to recognize the invisibility of most taxpayers, and the injustice of continuing to place them outside the legal regime. They would need to acknowledge the far reach that their current rulings have on all the taxpayers who will never have standing to complain. The scope of judicial decisions already affects invisible taxpayers, but nobody currently considers their interests.

The *Sklar* court could have ruled more broadly than it did. It noted the unconstitutionality of the IRS's treatment of the Church of Scientology. But it left the status quo alone. The court had a party with standing before it since the Sklars were arguing about their own tax liability. It also had the IRS in court, as happens in every tax dispute. The IRS knew that the Sklars were trying to get the benefit of the Scientology ruling, and the government had ample opportunity to defend its policy before the court. If the Ninth Circuit had declared the IRS's Scientology policy in violation of the

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[150] See Comment, The Impact of Illegal Tax Guidance: Notice 2008-83, 62 Tax Lawyer 867 (2009); J. Mark Ramseyer and Eric Rasmussen, Can Treasury Exempt Its Own Companies from Tax? The $45 Billion GM NOL Carryforward, 1 Cato Papers on Pub Pol 1 (2011); Zelenak, supra note 2 at 846-7.

Establishment Clause, the Sklars would still have lost, but justice overall would have been better served.

People should have an incentive to raise constitutional issues that courts cannot otherwise decide, as long as those issues are related to the question of their own tax liability. While the precedent on religious school was well settled by the time the Sklars brought their case, they had a colorable claim that they should be entitled to the tax benefits enjoyed by Scientologists. Allowing collateral attack on IRS policy by taxpayers who might benefit from it allows courts to identify the interrelationships among taxpayers, and to protect the interests of taxpayers who are not before the court. Taxpayers arguing about their own liabilities can assist the IRS and the courts in recognizing the effect of tax policies on individuals who are outside the traditional dyad.

In addition, courts should have an interest in protecting judicial precedents. The IRS policy on Scientologists is in clear conflict with the Supreme Court's holding in *Hernandez*. Once there is a clear constitutional determination that applies to the very circumstance, it is a matter of the courts reinforcing their own decisions. This is another distinction between Sklar and the IRS's notice on net operating losses. Where the IRS flouts a statute, the interbranch conflict involves the IRS and Congress. Congress is more likely to be interested in correcting an IRS mistake about the application of legislation (like section 382) that it is in correcting an erroneous application of case law (like *Hernandez*). Furthermore, it is not hard to imagine a situation in which Congress adopts a statute, the IRS enforces it, and then a court declares the statute unconstitutional. The IRS and Congress are on the same page throughout, but the courts are not.

A recently reversed decision on the parsonage exemption is a good example, and the lower court's decision might be a good model, if the Supreme Court allows the lower courts to take initiative. There is a tax exemption for housing provided to clergy that is not generally available to others who receive housing from their employers.[151] The so-called parsonage exemption has been part of the Code for decades, but the first judicial decision to hold it unconstitutional was decided in 2013.[152] Some

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[151] I.R.C. §107.

[152] "I conclude that § 107(2) violates the establishment clause under the holding in *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), because the exemption provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise." Freedom from Religion Found., Inc. v. Lew, 11-CV-626-BBC, 2013 WL 6139723 (W.D. Wis. Nov. 22, 2013). An earlier challenge survived a motion to dismiss. Freedom From Religion Found., Inc. v. Geithner, 715 F. Supp. 2d 1051 (E.D. Cal. 2010).

maintain that the exemption is constitutionally acceptable,[153] while others disagree, and the issue might be on its way to the Supreme Court.[154] The district court in *Freedom from Religion v. Lew* allowed the atheist plaintiffs to proceed "because it is clear from the face of the statute that plaintiffs are excluded from an exemption granted to others." While the atheists can surely complain that they are being taxed too much, that is a distinct claim from arguing that others are being taxed too little. While the district court could (and did) reach the constitutional question in the parsonage case, it alternatively could have disposed of the plaintiffs' claims without doing so, as the *Sklar* court did, and as the Seventh Circuit said it should have done. By reaching the constitutional question, the district court protected the interests of many taxpayers not before the court, and placed the litigant before it in a larger context, where tax fairness requires demands that fair shares are in relation to one another.

Every branch of government has an obligation to see that the tax system is legal, so courts should not ignore the constitutional questions that stare them in the face when presented with ordinary tax cases. Courts often decide issues that affect taxpayers other than the one before the court – any determination about the interpretation of a statute necessarily implicates other taxpayers. Taxpayers challenging their own liabilities on one side and the IRS defending its position to collect that revenue on the other, present a clear controversy, and courts would be in comfortable territory adjudicating matters between adversaries. Given the policies at stake, and the real danger that unconstitutional administration will continue indefinitely, courts should be more open to deciding constitutional questions that are raised by taxpayers with standing, even if it is not mandatory that they decide those questions to narrowly resolve the case before it.

VII. CONCLUSION

The invisibility of taxpayers in the legal system creates a substantial problem for tax justice, both substantive and procedural. The courts' application of standing doctrine, as well as its conceptualization of tax expenditures as not involving state action, has narrowed the opportunity for judicial review for tax-reducing actions taken by both Congress and the

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153 See Edward Zelinksy, Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes, 33 Cardozo L. Rev. 1633 (2012)(concluding that the exemption is constitutionally permitted, but not required).

154 The Seventh Circuit reversed in November. Slip op. No. 14-1152

IRS. These developments fail to protect individuals, even when they have substantial individual rights claims under the Constitution.

This article examined the contours of tax justice along economic and legal dimensions by focusing on invisible taxpayers, who have a great stake in the fairness of the tax system but no legal rights to challenge injustice. It argued that the application of standing doctrine to taxpayer challenges has been more stringent than the constitutional rules require, and that mechanisms to allow invisible taxpayers a day in court could better strengthen the rule of law. Invisible taxpayers have gone mostly unnoticed in the literature because tax policy debates about fairness focus primarily on issues of economic fairness, while ignoring issues of legal fairness. Given the broad reach of the tax system, it is crucial that taxation satisfy the most demanding standards for procedural fairness. Social institutions that allow taxpayers to remain invisible cannot be just. Congress, the IRS, and the courts all have roles to play in making the legal system see those who are now invisible.