

The IRS's EITC Compliance Regime: Taxpayers Caught in the Net

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Joanette did not know what to do when the letter from the Internal Revenue Service (IRS) arrived. She had always paid her taxes. The letter said that the IRS was freezing her almost \$4,000 refund pending an “examination” of her 2000 federal tax return. Two-thousand had been a difficult year. Joanette’s husband had left her and her three children in Georgia in May. Months later, she and the kids were forced to move to Philadelphia, where she had family, to try to make ends meet. She had earned a total of only about \$12,000 to support herself and her three children that year. For the first time, she had filed her taxes as a “head of household,” and she had a substantial refund due her largely attributable to the Earned Income Tax Credit (EITC).

After she read the letter, Joanette was distraught. She needed that refund to cover a security deposit and first month’s rent on a safer apartment for her and her children. When Joanette called the IRS to plead her case, the official explained that, in order for her to get her refund, she would have to send in “proof of her supporting her kids and paying the household costs when in Georgia” and proof that her kids actually lived with her for over half of the year. [\[FN1\]](#) Joanette had no documentation to prove any of *352 this. She did not even have the money for the long distance calls needed to retrieve the Georgia school records that would show that her kids had lived with her there. She had no idea how she could prove her case to the IRS and obtain the money that she needed and was entitled to under the law.

While each year the IRS makes myriad determinations that affect millions of taxpayers, there are few provisions in the Internal Revenue Code (Code) that have the disproportionate impact on low-income taxpayers as does the EITC. [\[FN2\]](#) Yet in administering the EITC, the IRS’s practices and procedures do not reflect the special circumstances that attend taxpayers who are entitled to the EITC. [\[FN3\]](#) Those IRS procedures seem based upon the traditional notion as to its constituents, namely middle- or upper-middle class taxpayers who historically have been the individual targets of IRS compliance and who are ordinarily assumed to be equipped to deal with IRS practices or able to hire professionals to do so for them. That notion simply does not apply to EITC- eligible taxpayers.

Through the EITC, the Code provides an indirect subsidy to qualifying low- income [\[FN4\]](#) taxpayers. Among the Code’s array of credits available to offset income tax liability, the EITC is the most significant refundable credit, that is, one that provides a tax refund even if no tax is due. The EITC is excessively complicated in its application and can have significant and sometimes unforeseen consequences on the lives of those who are the provision’s beneficiaries, largely the working poor, of whom great numbers are racial minorities and women.

This Article reveals how the intersection of IRS standard practices *353 in examinations and the lives of those entitled to the EITC increase the likelihood of erroneous determinations of their correct tax liabilities. Congress should assist EITC eligible taxpayers through the compliance process by expanding the opportunities for these low-income taxpayers to have access to low- or no-cost professional representation. [FN5] Increasing low-income taxpayer access to counsel is a relatively inexpensive and extremely effective way for the tax system to deal with the huge obstacles that many low-income taxpayers face in dealing with IRS compliance efforts. This approach will not adversely affect the IRS's legitimate efforts to stamp out taxpayer fraud and erroneous claims, problems long associated with the EITC.

Policymakers and academics have praised the EITC for its high participation rates relative to other federally funded programs *354 benefiting the poor. [FN6] At the same time, many of those policymakers and academics have recognized that along with high EITC participation, high rates of noncompliance are a characteristic of the EITC. [FN7] While fraud and error are significant problems with the EITC, IRS compliance efforts that are not sensitive to the challenges facing the EITC community create possibilities of significant hardship to those who are otherwise the intended beneficiaries of the EITC, and who in fact properly claimed it on their tax returns. Among policymakers, there has been a significant focus on reducing the rate of erroneous EITC *355 claimants, but little discussion of how efforts to stamp out EITC errors may result in EITC eligible taxpayers losing their benefits in the process.

This Article is an effort to focus attention on why audit activity directed at reducing EITC error rates is likely to result in significant external costs for a group of taxpayers intended to benefit from the EITC and least able to help themselves. To help resolve this tension between the government's legitimate interest [FN8] in reducing error and fraud, this Article considers the effectiveness of policies the IRS and Congress have put in place that are designed to benefit lower-income taxpayers in the audit process. In particular, this Article suggests that federal support for free or low-cost tax representation in the EITC audit process can, at a reasonable cost to the tax system, help resolve the tension between the legitimate government interest in reducing EITC error rates through compliance efforts directed at low-income taxpayers and ensuring that the EITC's intended beneficiaries continue to receive the support to which they are entitled.

Part I of this Article analyzes the EITC provisions as well as IRS compliance efforts regarding the EITC. These efforts have been growing in recent years and have become a significant portion of all IRS compliance activities so that lower-income taxpayers are now more likely to get audited than higher-income taxpayers. Part II briefly traces the growing legislative and scholarly attention to taxpayer rights and to IRS procedures that impact those rights. It identifies IRS trends in the aftermath of its widely-publicized modernization, like centralization of compliance activities and the shift to a correspondence-based examination process, that have made and will continue to make the IRS's job of reaching adjudicative [FN9] decisions more difficult.

*357 Part III considers problems and challenges the IRS faces in examinations involving compliance with the EITC. It examines the special circumstances of many working poor taxpayers, such as a shortage of housing, illiteracy, a fear of government and a mistrust of financial institutions, and suggests how current IRS practices and procedures are likely to lead to inaccurate and unacceptable tax results for

lower-income taxpayers. This is likely to be somewhat controversial because, as mentioned above, there has been a history of noncompliance, both inadvertent and fraudulent, that has resulted in billions in refunded and credited EITC dollars going to ineligible taxpayers [FN10] at rates higher than *358 that of other federally-funded transfer programs. [FN11] Part III also considers how IRS compliance is susceptible to the sorts of administrative problems collectively known as bureaucratic disenfranchisement, often associated with other federally-based transfer programs but not generally considered with tax administration. Part III takes a reconstructive approach and examines the effectiveness of certain policies designed in part to help lower-income taxpayers navigate the sometimes dangerous waters of tax administration. It looks at federally funded low-income taxpayer clinics (LITCs), the increased powers of the IRS Taxpayer Advocate Service (TAS), and at IRS Problem Solving initiatives.

Underlying this Article is a belief that while practices and procedures that focus on the interests and life experiences of low-income taxpayers will often improve the accuracy of the IRS's examination procedures, they will also have strong societal benefits beyond increasing the accurate delivery of benefits. [FN12] *359 Though the administration of the tax laws has not often been viewed through the lens of those on the margins or outside of society's mainstream, a failure to do so can frustrate the achievement of important goals and have far-reaching negative consequences for the affected taxpayers. [FN13] As the IRS, through the *360 EITC, increasingly becomes a gatekeeper of benefits to the working poor, a failure to consider their perspectives will contribute to greater dissatisfaction with the IRS, a wasted opportunity to learn from those who have worked with these communities, and the possibility that even the most well-intentioned national policies will fail or fall short in their implementation. [FN14]

I

The Growing Importance of IRS EITC Adjudications for Low-Income Taxpayers

It may come as a surprise that low-income taxpayers have issues that subject them to the IRS's adjudicatory processes. [FN15] How could poor people have tax issues of great financial and psychological importance? The Code is used as a vehicle for social policy, and many of its provisions are intended to benefit low- and lower-middle-income taxpayers. [FN16] These taxpayers *361 have issues and matters with significant effects upon their lives before the IRS. [FN17] This Part of the Article focuses on the EITC, because of its overall importance to society and the importance of these provisions on the lives of those seeking the EITC. [FN18] To set the stage for a consideration of those issues, the following is a brief summary, [FN19] highlighting its growing importance.

A. The EITC: Form and Function

1. How the EITC Works

The EITC is a refundable tax credit targeted primarily at eligible low-income workers with children. The credit is measured by multiplying the taxpayer's earned income [FN20] (up to a specified amount) by a credit percentage. [FN21] The EITC is a progressive *362 credit that rises as income rises, flattens

at a certain income level and phases out or decreases as earnings increase. While the EITC is available to taxpayers with or without children, the rate of the credit varies according to the amount of qualifying income and the number of “qualifying children,” and the amount of the EITC is significantly higher for taxpayers with “qualifying children.” [FN22] Certain facts can disqualify receipt of the EITC even if the above threshold requirements are met. For example, married taxpayers cannot file using a married filing separate status, [FN23] investment income must remain below minimum levels, [FN24] and claimants and qualifying children (if any) must have social security numbers. [FN25]

For taxpayers with at least one qualifying child, the amount of the EITC can in fact be significant. In 2001, for taxpayers with one qualifying child, the maximum credit was \$2,428; it began to phase out when income reached \$13,090 and was completely phased out when income reached \$28,281. For taxpayers with two or more qualifying children, the maximum credit was \$4,008; it began to phase out when income reached \$13,090, and it was *363 completely phased out when income reached \$32,121. [FN26] Because the EITC is refundable, if the total amount of the credit exceeds the amount of tax owed by a taxpayer, the individual receives a refund for the difference. [FN27]

2. The EITC’s Growth Coupled With Changes in the Welfare Laws

Since its adoption in 1975, the EITC has grown dramatically, [FN28] both in terms of the amount of the credit and the number of families receiving the credit. In 1975, the maximum credit amount a taxpayer could receive was \$400. While only slightly more than 6 million taxpayers claimed the EITC in 1975, in 2000 over 20 million taxpayers claimed the EITC. In 1975, total government expenditures on the EITC amounted to only \$1.25 billion; by 2000, that amount rose to over \$30 billion.

The cost of the EITC now exceeds total federal and state *364 spending on Temporary Assistance to Needy Families (TANF), [FN29] the 1996 successor welfare program to AFDC that was ushered in under 1996’s Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). [FN30] TANF, through its five-year time lifetime limitations on the receipt of many benefits and its requirements that states reduce their caseloads, [FN31] encourages previously unemployed or underemployed people to enter or remain in the workforce. [FN32] The growth of the EITC during the 1990s was an essential ingredient of President Clinton’s plan to change the manner in which the government would support lower-income individuals:

“Ending welfare” was Mr. Clinton’s most famous poverty pledge, but not his only one. He coupled it with a parallel promise to “make work pay” through aid to the working poor By far, Mr. Clinton’s most significant legacy to the working poor is in a large program of wage subsidies with an opaque name, the earned-income tax credit. . . . With little public fanfare, Mr. Clinton pushed through a vast expansion of the [EITC] program in 1993 . . . Since then, spending on the wage supplements. . . is nearly twice what the federal government spent on the old welfare program, [AFDC], even at the *365 [sic] its peak. [FN33]

As Professor Handler notes, the 1996 welfare changes are based upon deep-seated concerns about separating the deserving poor from the so-called undeserving poor, i.e., those that are able-bodied and can work are more worthy of government help than those that are unwilling to be part of the workforce. [FN34] The harsh time limitations of TANF and the increased amount of EITC were the linchpins of the Clinton Administration’s effort to try to create additional disincentives to those low-income people who were not in the workforce and to further reward with a wage subsidy those who left the welfare

rolls. [FN35] TANF allows states to request waivers from federal welfare policy rules and to impose even shorter limitations on the receipt of benefits, which many states did. While welfare caseloads have decreased, [FN36] for many former welfare recipients, as discussed below, the EITC became the primary means for “[keeping] millions of individuals out of poverty.” [FN37]

*366 3. Who Benefits from the EITC and How They Are Benefitted

The EITC benefits America’s working poor. Because minorities, like Hispanics and African Americans, heavily populate the ranks of the working poor, [FN38] the EITC is particularly significant for these two groups. For example, in 1999, black and Hispanic households accounted for approximately 25.7% and 34.2%, respectively, of all households claiming the EITC, and the EITC is credited with boosting 1.2 million Hispanics and 1.1 million African Americans out of poverty. [FN39] Moreover, the EITC disproportionately benefits women. Single parents have received over two-thirds of the EITC, [FN40] and single-parent households are largely headed by women. [FN41]

Recent studies have shown that the EITC is an especially valuable tool in increasing the value of low-wage work and creating incentives to enter and remain in the work force. [FN42] Moreover, *367 the EITC has been widely praised for its role in lifting many families out of poverty. [FN43] Following welfare reform, these features of the EITC, that it encourages and rewards work and acts as a redistributive program providing income support to the working poor, are two important EITC attributes. [FN44]

4. The Use of the EITC

The way taxpayers spend the dollars they receive through the refundable EITC is an essential element to understanding its importance to those taxpayers. Because of the large size of the EITC relative to many families’ after-tax income and savings, and the fact that it is often received in a lump-sum amount, [FN45] the EITC takes on great significance in households. As mentioned above, federal policy directed to lower-income Americans emphasizes the importance of earnings-related benefits (i.e., wages and the EITC), rather than pure means-based government transfers. [FN46] Unlike regular wages, which are often paid weekly or *368 semi-weekly, or other transfer programs like food stamps and TANF, which generally transfer benefits evenly over the calendar year, taxpayers receive EITC-generated refunds after they file tax returns in one-time payments between January and May of the calendar year following the year of eligibility. [FN47] According to data from 2000, eighty-seven percent of the EITC earned was refunded to taxpayers as direct payments. [FN48] For many taxpayers, the EITC amounts to a forced-saving program, with its use different from that if it were received incrementally. The lump-sum nature of the EITC allows families to manage purchases that they otherwise could not afford. For example, recent studies found that many families use the EITC-generated refund to benefit their children with items such as school clothes or tuition [FN49] or large capital purchases [FN50] that help with their social mobility, like down payments on homes or used car purchases. [FN51]

*369 B. Compliance and the EITC

1. The Legislative and Administrative Focus on EITC Noncompliance

One weakness of the EITC program has been the EITC's susceptibility to erroneous taxpayer claims. [FN52] An IRS report evaluating the EITC claimed in 1997 found that taxpayers erroneously claimed \$9.3 billion, or 31% of the EITC, while an IRS report considering the error rate in 1994 found that \$4.4 billion, or 26% of EITC claims, were incorrect. [FN53] Relative to other transfer programs, these error rates are high. For example, there was a 6% overpayment rate for the nation's pre-1996 welfare program, Aid to Families with Dependent Children (AFDC). [FN54] Erroneous EITC claims are likely to exceed that of traditional welfare programs which employ caseworkers who meet face-to-face with potential recipients to determine eligibility prior to the payment of *370 benefits. [FN55] No such prepayment scrutiny has traditionally accompanied the claiming of the EITC.

Notwithstanding the high rate of EITC errors, there is no reliable data on the extent to which EITC errors are attributable to genuine taxpayer mistakes as compared with intentional errors. [FN56] As the amount or existence of an EITC for a taxpayer is dependent upon many variables, including income, children, and filing status, there are ample opportunities for taxpayers to misstate on their tax returns information relating to these variables. To maximize the EITC, savvy taxpayers with low or no earned income may have the counter-intuitive incentive to overstate income or not claim deductions associated with a trade or business; while taxpayers with higher incomes may have the traditional tax incentive of understating income. Moreover, because the amount of the EITC can increase substantially with the presence of one or two qualified children, taxpayers may have an incentive to overstate the number of children residing in a household. Likewise, taxpayers may have an incentive to misstate their filing status, because the EITC is not eligible for taxpayers that are still married but choose to or have to file separate tax returns. [FN57] Taxpayers may also feel emboldened about intentionally not complying with EITC because not all information related to the variables necessary to establish EITC eligibility is subject to reporting to the IRS by third parties. [FN58] When information necessary *371 to determine a taxpayer's correct tax liability is not subject to reporting or when the IRS does not match reports to particular taxpayers, there is likely to be a higher level of noncompliance. [FN59]

While intentional actions account for a significant amount of EITC errors, the EITC's complexity makes it more likely that taxpayers, or their preparers, are making innocent mistakes regarding eligibility. [FN60] For example, the lack of a uniform definition of dependent children for purposes of the income exemption amount allowed for personal dependents and qualifying children *372 among related Internal Revenue Code provisions sows taxpayer confusion and contributes to erroneous EITC claims. [FN61] Moreover, there is a high degree of misunderstanding of the Internal Revenue Code's complex filing status definitions, contributing to good-faith errors among EITC claimants. [FN62]

Whatever the source of EITC errors, policymakers generally agree that EITC noncompliance is a problem. Reports of EITC abuse are ammunition for politicians who wish to limit or roll-back expansion of the EITC. [FN63] For those wishing to expand the EITC to further alleviate poverty or increase incentives to enter or remain in the workforce, there is a desire to limit compliance problems to help ensure political support. [FN64] Reports of erroneous EITC claims have contributed to Congress' taking a number of steps in recent years to combat taxpayer errors and intentional cheating, including

increasing penalties for non-compliant taxpayers; [FN65] requiring that all EITC claimants provide a valid Social Security number for themselves and all qualifying children; [FN66] allowing the IRS to use simplified “math error” procedures to disallow the EITC in certain situations; [FN67] imposing new due *373 diligence requirements on paid preparers; [FN68] giving the IRS access to the Federal Case Registry of Child Support Orders; [FN69] and over a five-year period increasing the discretionary appropriation cap to provide approximately \$750 million in funding for additional and improved compliance activities. [FN70]

In response to this general congressional mandate and specific appropriation to increase EITC compliance activities, low-income taxpayers in general and the EITC in particular have been subject to significant IRS compliance activity. [FN71] In light of congressional *374 pressure on the IRS to reduce error rates, EITC audit activity has become a significant aspect of all IRS examinations. In 2000, low-income taxpayers accounted for approximately forty- four percent of all IRS audits, with the odds of audit for low-income taxpayers approximately one in ninety while for everyone else the risk of an audit was approximately one in 370. [FN72] The IRS audited approximately 617,765 individual taxpayers in fiscal year 2000, with just over 237,500 taxpayers in face-to-face audits at a taxpayer’s place of business or at an IRS office, and the rest through the mail from an IRS Service Center in what is called a correspondence audit. [FN73] Of the 380,204 correspondence audits, 325,654 of the correspondence audits related to EITC claims investigated by the IRS, resulting in the IRS recommending hundreds of millions of dollars in reversed EITC. [FN74]

To understand better how low-income taxpayers may be particularly disadvantaged by IRS compliance activities, this Article next examines IRS examination procedures generally and IRS EITC compliance examinations specifically.

*375 2. The Practice and Procedure of EITC Audit Activity

a. The General Procedure

The Code authorizes the IRS to examine a taxpayer’s books and records or other information for the purposes of determining the correctness of a taxpayer’s tax return. [FN75] To do so, the IRS conducts varying types of examinations, depending upon the nature of the issues involved in a particular return. The most common types of examinations are those conducted at a taxpayer’s place of business, at an IRS office, or by correspondence. [FN76] In correspondence examinations, a taxpayer is expected to establish the correctness of positions taken solely by exchanging documents and correspondence with an IRS examiner.

With respect to the income tax, deficiency [FN77] procedures apply whenever the IRS determines after an examination that the taxpayer’s position taken on a tax return is incorrect. The deficiency procedures permit a taxpayer to get pre-payment administrative and judicial review of IRS determinations that a taxpayer’s correct tax liability exceeds that shown on the taxpayer’s return. If at the conclusion of the examination, the IRS believes that a taxpayer’s return is incorrect, it will issue to the taxpayer proposed changes that reflect the IRS’s adjustments. [FN78] Under the deficiency procedures, if a taxpayer agrees with the examination’s findings, the taxpayer can sign a form authorizing the IRS to assess [FN79] the additional tax liability.

For a taxpayer who disagrees with the examination, under the IRS's procedural rules, a taxpayer generally may challenge a revenue agent or tax auditor's proposed adjustments in an administrative *376 appeal before the IRS Appeals Office. [FN80] The examination results are referred to as RARs, short for Revenue Agent Reports, and are accompanied by a cover letter, often referred to as a "thirty-day letter" because it explains that the taxpayer has the right to appeal the determination to the Appeals Office within thirty days of the date of the IRS letter accompanying the IRS examination results. The Appeals Office (sometimes referred to simply as "Appeals") considers a taxpayer's position or a settlement proposal and evaluates the position or the proposal based on the merits of the opposing views and the hazards that would exist if the case were litigated. [FN81]

Under the deficiency procedures, if the taxpayer failed to protest the findings of the examination, failed to convince the Appeals Officer of the merits of her position, or failed to settle the tax controversy with Appeals, the IRS will issue a statutory notice of deficiency, also called a "ninety-day letter" because it affords the taxpayer the opportunity to petition the United States Tax Court [FN82] within ninety days [FN83] for a redetermination of the deficiency. *377 Generally, the IRS can not assess additional taxes attributable to a deficiency until it issues the statutory notice of deficiency. [FN84]

Unlike access to Appeals, the right to de novo Tax Court review is statutorily mandated. To permit judicial review of a proposed deficiency to occur before the IRS seeks to collect what it believes the taxpayer owes, the IRS is precluded from assessing income, estate tax, and gift tax arising from its deficiency determination until a taxpayer has had an opportunity for Tax Court review. [FN85] If a taxpayer files a timely petition to the Tax Court, the statute of limitations on assessment is suspended and collection *378 activity is thereby precluded until the Tax Court decision becomes final. [FN86] Under the IRS's procedural rules, taxpayers who have ignored the thirty-day letter but who have filed a Tax Court petition are given another opportunity to meet with an IRS Appeals Officer to consider an alternative resolution of the case. [FN87] If the taxpayer does not file a timely petition, the IRS may begin collection actions upon the expiration of the time a taxpayer has to respond to the statutory notice of deficiency, i.e., generally ninety days. [FN88]

b. The Deficiency Procedures Applied in the EITC Context

The IRS's auditing of the EITC comes within the general procedural scheme applicable to audits of all taxpayers, i.e. the taxpayer will complete a tax return in which she may claim the EITC, and the IRS may audit or examine the taxpayer's return, focusing on the EITC, and possibly other issues as well. [FN89] The general deficiency procedures described above apply to taxpayers [FN90] subject to compliance activity directed toward establishing eligibility for the EITC. There are, however, a few aspects of IRS compliance specific to EITC examinations. First, as mentioned above, the large majority of examinations relating to the *379 EITC are correspondence examinations. [FN91] Further, the deficiency procedures apply irrespective of whether the determination is made before the crediting or refunding, [FN92] or after the *380 crediting or refunding has been made. [FN93] While the deficiency procedures described above apply even if the reduction or elimination of the EITC results in no net tax liability, [FN94] the IRS actually issues a thirty-day letter to taxpayers before it asks to receive *381 verification of the position taken on the taxpayer's return upon it in EITC examinations. [FN95] Taxpayers whose EITC returns are getting examined receive one letter from the IRS advising them that their refund is being frozen pending an upcoming audit. The next notice informs the taxpayer that she

must provide documentation to establish eligibility within thirty days or else face the issuance of a ninety-day letter. [FN96] Finally, taxpayers wishing to challenge the IRS's disallowance are eligible to elect the Tax Court's small case procedures. [FN97] These procedures simplify the judicial process even for pro se taxpayers [FN98] but are limited in effect, as traditionally fewer than five percent of all taxpayers receiving a notice of deficiency will challenge an IRS deficiency determination in Tax Court. [FN99]

Part III of this Article considers correspondence examinations in more detail, and how taxpayers subject to these examinations face difficulties in adequately responding to IRS requests for EITC eligibility verification. In the next part, this Article examines how structural changes within the IRS, after a decade of intense legislative scrutiny, are making the IRS's adjudicatory functions more difficult to implement, especially when those determinations involve the types of taxpayers benefiting from the EITC.

*382 II

IRS Modernization and the Increased Emphasis on Taxpayer Rights

While the EITC's importance has been growing over the past decade, at the same time, the IRS has undergone significant internal change following intense legislative scrutiny. [FN100] The intersection of these two events, that is, EITC expansion and IRS reform, has significance for the manner in which the IRS administers its EITC compliance function. This Part describes the IRS's reorganization in general and then considers how these significant changes affect low-income taxpayers that are brought within IRS compliance action as a result of EITC examination activity.

A. The 1998 IRS Restructuring and Reform Act

Since the early 1950s, the IRS organization was based on a *383 multi-functional National Office, with a decentralized geographic structure composed of regional and district offices. The geographic units were then organized along functional lines, such as examination and collection. [FN101] In 1998, during the aftermath of highly publicized hearings [FN102] detailing supposed IRS abuses of taxpayer rights and outside panels' recommendations to create a more responsive organization, Congress passed the IRS Restructuring and Reform Act (RRA). The RRA required the IRS to implement a new organizational structure based upon operating units serving taxpayers with similar needs regardless of geographic location. [FN103] The theory behind the change was that by providing end-to-end responsibility for serving a particular group of taxpayers, IRS personnel would better understand and serve taxpayers. [FN104] The IRS now has four divisions organized around taxpayer classification, or customer lines: Wage and Investment; Small Business/Self-Employed; Tax Exempt and Government Entities; and Large and Mid-size Business.

The RRA, in addition to mandating significant operational change to promote a greater emphasis on taxpayer service, contains seventy-one separate provisions regarding taxpayer rights, including (1) giving taxpayers so-called collection due process notice and hearing rights both before the IRS can move against a taxpayer to collect assessed taxes by levy, and after the IRS protects its security interest

by filing a notice of federal tax lien; [\[FN105\]](#) *384 (2) expanding the opportunities for the IRS to compromise liabilities when it would be a hardship for the taxpayer to pay fully; [\[FN106\]](#) and (3) liberalizing relief from joint and several liability through the so-called innocent spouse and separation of liability provisions. [\[FN107\]](#) The RRA's taxpayer rights provisions or its broad *385 restructuring provisions alone would have resulted in very significant administrative challenges for the IRS, especially in light of the agency's ongoing responsibilities during tax return filing season and collecting revenues from recalcitrant taxpayers. The upheaval in IRS job responsibilities and positions following restructuring, as well as the significant resources the IRS has had to dedicate to comply with the statutory rights provisions in the RRA, have strained the IRS. [\[FN108\]](#) The state of flux following reorganization has contributed to a delay in the implementation of certain RRA's rights provisions, [\[FN109\]](#) as well as adversely affecting the level of service directed to some taxpayers.

B. IRS Reform and Compliance Efforts Directed toward Eliminating EITC Errors

To make its broad reorganization a success, the IRS must (1) provide quality service for taxpayers while placing a greater emphasis on taxpayer protections; (2) ensure continued taxpayer compliance; [\[FN110\]](#) and, in doing both, (3) efficiently allocate its limited *386 resources. As the GAO and the IRS itself have recognized, achieving the potentially conflicting goals of service, taxpayer compliance, and agency efficiency depends, in large part, upon improving the procedures in which the IRS contacts and interacts with taxpayers. [\[FN111\]](#) As IRS compliance is one area where taxpayers have direct contact with the administration of our nation's tax laws, how the IRS administers its pre-collection enforcement will have a significant impact on whether its reorganization succeeds. As mentioned above, the IRS, both before the RRA and even more so following the RRA, is relying on centralized correspondence-based examinations of taxpayers to determine EITC eligibility. [\[FN112\]](#) IRS reliance on remote centralized offices conducting *387 correspondence-based EITC compliance is consistent with the tenor of IRS reorganization, where the location of IRS activities is de-emphasized in favor of central office specialization revolving around taxpayer groups. It appears that the IRS believes that its three goals of providing taxpayer services, ensuring taxpayer compliance, and efficiently using government resources, are best balanced when EITC examination activity revolves around correspondence-based examination.

The IRS's approach to examining EITC eligibility also reflects the high-tech world in which we live, and borrows from corporate management styles. Business today is conducted over high-speed data lines, and videoconferencing ties in disparate locations all over the globe. The IRS's use of its Service Centers (also oddly called Campuses in this post-RRA world) to conduct EITC examinations reflects an attempt to use technological advances to increase the efficiency of its processes. This approach is consistent with recent corporate behavior. [\[FN113\]](#) Unlike some corporations, which may use these information technologies to speed distribution or production of goods or provide services to other end-users to assist in their production or distribution, the IRS looks to use these technologies allowing it to access information regarding eligibility from taxpayers themselves. Further, centralizing IRS decision making can also facilitate more uniform application of rules and ease employee training. By setting up adjudicatory processes far removed from the taxpayers themselves, the IRS believes that it can more efficiently allocate its *388 compliance resources, while, at the same time, use technological advances to ensure taxpayer service.

Can there be high quality customer service when taxpayers are far removed from those responsible for determining EITC eligibility? In theory, the IRS's plans make strong policy sense, as verifying EITC eligibility is reducible to documentary evidence for many of the taxpayers claiming the EITC. In contrast, some IRS decisions, which hinge on credibility determinations [\[FN114\]](#) do not necessarily lend themselves to a paper-based examination process administered by employees potentially many thousands of miles removed from taxpayers or witnesses. [\[FN115\]](#) For example, certain types of tax issues, such as determining whether a victim of domestic violence believed that her spouse might pay a tax liability (relevant in a determination under the so-called equitable relief innocent spouse rules), [\[FN116\]](#) are not easily reduced to a paper-based eligibility review process. [\[FN117\]](#)

***389** The EITC is not inherently impossible to verify via correspondence. To be sure, the IRS faces challenges in considering EITC eligibility because it is not exclusively relying on third-party information to assess eligibility. To maximize or establish eligibility for the EITC, self-employed or unemployed taxpayers may have an incentive to overstate or create income and understate deductions (or, if in the phase-out range, the more traditional tax incentives of understating income and overstating deductions). Reviewing the books and records of these taxpayers raises significant administrative challenges for any taxpayer. [\[FN118\]](#) Moreover, there are some situations, especially relating to satisfaction of the requirement that a putative qualifying child reside with the taxpayer for more than half of the year, where there may not be readily available documentation to verify EITC eligibility. [\[FN119\]](#)

***390** Notwithstanding these challenges, from the taxpayers' perspective, those taxpayers in the mainstream of society who were in fact eligible for the EITC, yet subject to examination, would have very little difficulty faxing or sending via overnight mail birth certificates, social security cards, school records, medical reports, or other documentation to establish satisfaction of the tests necessary to establish eligibility. While the Service's middle-income constituency would be able to tackle these tasks, it provides a formidable obstacle for low-income taxpayers. The next Part of this Article describes why these seemingly simple tasks impose formidable burdens on low-income taxpayers, and examines why the characteristics of low-income taxpayers exacerbate the above problems and create altogether new ones.

III

The EITC: The New Constituency and the Challenges to EITC Compliance

A. Special Circumstances of the Working Poor

1. In General

There are special circumstances that make it difficult for the government to reach accurate and appropriate decisions when it considers eligibility of those taxpayers who are the intended beneficiaries of the EITC. This Part examines why, in light of the characteristics and circumstances of many EITC-eligible taxpayers, the IRS's procedures lead to the receipt of insufficient information for the IRS to accurately determine EITC eligibility.

Of the roughly 325,000 taxpayers receiving EITC-correspondence audits in the 2000 filing season, the IRS itself has estimated that almost seventy percent of the taxpayers chosen for an EITC correspondence examination either fail to respond or respond inadequately to the IRS's initial letter. [FN120] In addition, *391 among taxpayers who respond to an initial IRS letter, many do not respond to subsequent IRS written requests for more information. [FN121] There is a growing awareness that IRS compliance efforts are causing the IRS to prevent payment of or recover a previously paid EITC to a significant number of otherwise eligible taxpayers. [FN122] The current National Taxpayer Advocate, speaking before her appointment, estimated that approximately twenty-five percent of taxpayers denied the EITC through IRS compliance actions are in fact entitled to the EITC. [FN123]

In addition to the strong societal and individual interests associated with the proper receipt of the EITC, [FN124] there is likely a particularly pernicious effect on those taxpayers who are eligible for EITC, but for whom the IRS challenges eligibility and denies the credit. Receipt of the EITC follows the citizen-affirming act of filing a tax return. [FN125] For those truly eligible who are audited and then have their eligibility denied, there is often a sense of defeatism, i.e., that the system just does not work for them. [FN126] While initial denial of the EITC is followed by the issuance of a statutory notice of deficiency that allows the taxpayer to challenge the IRS's determination in court, [FN127] few will file a Tax Court petition and pay a sixty dollar filing fee to preserve pre-assessment judicial review of IRS action. [FN128] For those audited *392 taxpayers who have only just entered or reentered the workforce from the welfare rolls, scrutiny from yet another government agency can lead to further alienation from the establishment. [FN129]

On the part of those in government who have relatively little personal or institutional exposure to the IRS's new constituency, there is a tendency to minimize the challenges low-income taxpayers may face in dealing with the IRS. The argument is as follows: for higher-income and corporate taxpayers, IRS examination activity is intrusive, often taking place at IRS offices or the taxpayers' place of business. For these taxpayers, a determination may involve numerous meetings and perhaps a negotiated settlement taking place over many months and involving a significant amount of IRS and taxpayer resources. For lower-income taxpayers subjected to an EITC examination, the taxpayer merely has to answer a non-threatening letter asking for information or documentation pertaining to EITC eligibility, such as proof of a child's residence or child's age through medical records, school information, birth certificates, social security cards, and the like. This misguided minimization of the effects of compliance activity among lower-income taxpayers is likely what prompted former House Ways and Means Chair William Archer (R-TX) to defend the IRS, and Congress for its legislatively-mandated EITC compliance initiatives, against media reports that the IRS was dedicating too much of its compliance activity to lower-income taxpayers at the expense of auditing more well-off taxpayers: "Getting a simple letter from the IRS and undergoing months of a face-to-face, let's-see-your-books audit by the IRS are two entirely different things. It's like comparing a jog around the block to running the New York Marathon in a hailstorm." [FN130]

While no one, wealthy or poor, likes getting mail from the IRS *393 (apart from a refund or rebate check), [FN131] many individuals and corporations will delegate the task of responding to an office or field audit to a paid professional, such as an accountant or lawyer. For many higher-income taxpayers subjected to a field or office audit, the dislike stems from the costs associated with the professional's time, and the possible dollar adjustments to the person's tax liability stemming from the audit itself. Reality for lower-income taxpayers is often that there is no means of response to IRS correspondence.

The following considers what that reality is like for many low-income taxpayers subject to EITC compliance actions.

2. Specific Barriers to Effective EITC Compliance Action

a. Transiency and Homelessness

One of the biggest issues affecting many low-income taxpayers and their relationship with the IRS is their tendency to be transient or even temporarily homeless. [\[FN132\]](#) Low-income taxpayers move often, and may not leave forwarding addresses with the post office, or send a change of address to the IRS. [\[FN133\]](#) Among *394 the working poor who are most likely to receive the EITC and who may often experience work instability, there is a growing crisis of temporary homelessness. [\[FN134\]](#) According to the Department of Housing and Urban Development, a large number of working poor live on the edge of homelessness. [\[FN135\]](#) High rents and housing shortages [\[FN136\]](#) have led to growing numbers of working poor spending intermittent periods of time in cars, vans, friends or relatives' houses, and temporary shelters. [\[FN137\]](#) Some of *395 the problems associated with working poor families spending time in cramped temporary quarters like shelters or motels are visible, such as safety and nutrition, [\[FN138\]](#) but one overlooked problem is that this lifestyle makes taxpayers less likely to be able to comply with requests for EITC eligibility. As the completion of a correspondence examination may take many months, [\[FN139\]](#) a temporary disruption, either with a move to a short-term motel or homeless period spent at a friend's house, can result in an eligible taxpayer failing to receive initial or follow-up IRS correspondence. The result can be an IRS assessment of a liability or a refund freeze becoming more permanent with the IRS issuance of a notice of deficiency.

Even assuming receipt of IRS correspondence, the involuntarily transient taxpayer may be harder-pressed to come up with the types of documents necessary to establish eligibility. Consider the challenges associated with attempting to prove a qualifying child's residency, the most common EITC error. [\[FN140\]](#) Frequent moves may lead to documentation like school or medical records indicating one or more addresses different than that on the tax return. Without further detailed explanation, this documentation would be insufficient to establish eligibility. In any event, an explanation without documentation is not sufficient, as IRS examiners are instructed not to accept, as proof, statements that are not accompanied by corroborating documentation. [\[FN141\]](#) As many EITC recipients use the proceeds from an EITC generated refund to help pay for security deposits or down payments on a house, [\[FN142\]](#) this problem seems especially challenging: establishing *396 EITC eligibility may depend on a taxpayer having stable housing, but the refund from the EITC itself for many taxpayers is essential to making the move from temporary quarters to an apartment or part of a multi-family house.

b. Literacy

Literacy is another major issue affecting low-income taxpayers and their relationship with the IRS. The IRS's continued reliance on centralized review procedures and initial determinations made almost exclusively through correspondence and exchange of documentation makes the literacy of taxpayers a critical consideration. [\[FN143\]](#) Assuming that a taxpayer does receive all of the IRS's correspondence, theoretically can prove eligibility, and can actually gather the documents the IRS requires to establish EITC eligibility, literacy problems present a special challenge. [\[FN144\]](#) The limited literacy of low-

income taxpayers, especially those outside the mainstream, can have a significant effect on the likelihood of accurate communication with the IRS.

While literacy issues affect all segments of society, there is data suggesting there is a strong correlation between low literacy levels and low income. [\[FN145\]](#) Adults who possess the lowest literacy skills are far more likely to live in poverty than other Americans. [\[FN146\]](#) The EITC is structured so that it benefits low-income taxpayers, or those taxpayers who either live in poverty or close to the poverty line. This, when combined with the literacy statistics, tends to indicate that a large number of taxpayers eligible to receive the EITC are in the lowest levels of literacy. Within the tax community there is a growing understanding that many taxpayers who claim the EITC have limited literacy skills, with this *397 factor contributing to the growing use of paid return preparers for low-income taxpayers. [\[FN147\]](#)

Likewise, literacy affects the working poor who have to deal with the IRS after April fifteenth, during an examination. Accordingly, it is not surprising that there is a high nonresponse rate for the working poor receiving EITC benefits who are contacted by the IRS in an examination. These taxpayers may not be able to perform simple tasks necessary to respond to IRS correspondence, like providing the proper social security cards or birth certificates for the particular child claimed as a qualifying child. Even more basically, a taxpayer may not understand what is being asked of him in the correspondence. This lack of understanding may lead the taxpayer to simply ignore the correspondence or to respond inadequately.

While there has been no empirical research linking literacy levels to the nonresponse or incomplete response rate in EITC correspondence, a study that concerned literacy and errors in the 1990 Census indicated that an individual's literacy skills are associated with errors made in Census information. [\[FN148\]](#) The plain implication of this study is that in relation to responding to even basic requests for information like that contained in EITC correspondence requests, a large number of low-income filers likely do not have the capacity to respond to the IRS. [\[FN149\]](#)

c. Lack of Understanding of the EITC

It is a simple truth that the tax code generally is complex, [\[FN150\]](#) *398 and the EITC is a hideously complex statutory provision. [\[FN151\]](#) Scholars, [\[FN152\]](#) legislators, [\[FN153\]](#) and practitioners [\[FN154\]](#) have wrestled with understanding it. If those who work with it have difficulty, pity the poor taxpayer, particularly if the poor taxpayer is functionally illiterate. This complexity, and the concomitant lack of taxpayer understanding about the EITC, contributes to otherwise eligible taxpayers failing to respond, either at all, or sufficiently, to IRS requests for information.

Consider, for example, how the lack of a uniform definition of qualifying child might impact a taxpayer's response to an IRS EITC correspondence audit. A taxpayer's child may be a qualifying child for purposes of the EITC but not for purposes of the dependency exemption, or vice-versa. [\[FN155\]](#) If that taxpayer, in *399 good faith and in a timely fashion, responds to the IRS's inquiry about an EITC qualifying child with information that pertains to a qualifying child for dependency purposes, she may well lose absent an alert and knowledgeable revenue examiner.

My experience in directing a low-income taxpayer clinic is that taxpayers are hard-pressed to understand these distinctions, and think of the children as uniformly being "my children" for purposes of

an income tax return. The difference between an exemption and a credit, and that a child may qualify for purposes of the EITC but not another provision, often baffles taxpayers and frustrates their efforts to respond to IRS compliance actions. More pernicious than just confusion, the complexity contributes to inaction, because often, in an EITC correspondence examination, the IRS will ask for documentation and evidence to justify the taxpayer's qualifying for the dependency exemption and filing status; at the same time it asks for documentation to justify treating a child as a qualifying child for purposes of the earned income credit. Documentation requests to prove eligibility for the EITC focus on the age, residency, and relationship of the child satisfied through providing medical records, school records, or birth certificates, while requests for information pertaining to filing status or dependency exemption also require satisfaction of a support test, i.e., that the taxpayer incurred more than half of the support for the putative dependent or more than half of the costs of maintaining the household. [FN156] This support information *400 is often difficult to obtain, as many taxpayers, especially Hispanic taxpayers, [FN157] claiming the EITC do not have bank accounts, and have complex means of ensuring that basic costs are satisfied. [FN158] Because of the confusion regarding the relationship of issues like dependency exemption, filing status and EITC, many taxpayers wrongfully, but understandably, believe that their inability to gather support documentation is a bar to the EITC's receipt. As many taxpayers cannot gather all that the IRS asks for, they often do not respond to IRS queries for information. [FN159] Eligibility for the EITC is often worth substantially more in tax dollars than the value of a dependency exemption or the difference between single and head of household filing status, [FN160] and linking compliance queries among issues that contain differing complex eligibility requirements no doubt contributes to taxpayers failing *401 to respond at all to requests to verify eligibility for myriad benefits targeted to low-income taxpayers.

The IRS itself has acknowledged the complexity of its rules and the information it provides to taxpayers. As part of its reform efforts, the IRS has begun rewriting its most frequently used communications with taxpayers, including correspondence to taxpayers in EITC examinations. [FN161] This comes as a result of recognition, both with the government and the IRS, of the importance of using plain language in their communications with taxpayers. The IRS is also working to rewrite a number of its most frequently used pamphlets to make them more understandable to taxpayers who are not fortunate enough to have tax or law backgrounds or paid advisors who do. Moreover, the IRS has dedicated substantial resources to educate taxpayers about the EITC, especially during filing time. [FN162] Notwithstanding these efforts, it is difficult to get around the sheer difficulty of the EITC, a problem that only Congress has the capacity to mitigate.

d. Fear of Government

Another factor that contributes to a lack of response to IRS correspondence is a general fear of government, especially among immigrants. Many immigrants who are legally residing in the United States and eligible for employment (and thus generally eligible for the EITC) [FN163] are concerned that the IRS will share information with the INS regarding the make-up of their household, especially if the taxpayer is housing relatives or friends who may be undocumented. [FN164] Even though the IRS is *402 generally prohibited from sharing with other agencies information it receives from a taxpayer in an examination, [FN165] taxpayers often do not know that and are reluctant to describe the composition of their household to the IRS. Even when there are no immigration issues lurking, there is evidence suggesting that because of their prior experiences with their home governments, immigrants' mistrust of government in general is so strong that they will refuse to trust any governmental official or form.

[\[FN166\]](#) This undoubtedly contributes to the strong non-response rate, especially among the immigrant community.

Further, my experience is that most EITC recipients do not understand the provision's eligibility requirements for the reasons just discussed, [\[FN167\]](#) and even for those for whom eligibility is not a question, an IRS letter raises doubts in the taxpayer's mind as to whether the taxpayer really was eligible for the EITC. Many taxpayers are unsure what would happen if they tried to validate eligibility, and do not want to get in trouble by compounding what they believe might have been an initial error on their part, even if in fact they were right in the first instance.

e. Distrust or Lack of Use of Financial Institutions

Certain minorities tend to have not only a fear of the government, but also a distrust of financial institutions as well. [\[FN168\]](#) This distrust leads to particular challenges associated with EITC compliance. Wariness of using financial institutions is especially true of the growing Hispanic population in the United States. [\[FN169\]](#) Even among those who are in the country legally and are entitled to work, there are a number of factors that can account for this distrust. *403 Immigrants may distrust banks from their previous experiences in their home country, where banks may have been unstable and apt to close without notice. [\[FN170\]](#)

This fear of financial institutions can affect taxpayers who need to provide documentation proving their eligibility to receive the EITC. For example, self-employed taxpayers may be required to provide proof of the income and expenses attributable to their trades or businesses. That the amount or even the existence of the EITC may be dependent on earned income places the IRS in the somewhat unusual posture of examining an EITC-claiming taxpayer to determine whether she has overstated income or understated deductions. [\[FN171\]](#) Similar problems also exist for married taxpayers who are not legally divorced or separated and wish to claim the EITC. A taxpayer whose filing status is married filing separately is not eligible to claim the EITC. [\[FN172\]](#) For a taxpayer separated from her spouse, but not divorced, she is only eligible to claim the EITC if she is "considered unmarried." [\[FN173\]](#) In order to be considered unmarried, a taxpayer must have lived separately from her spouse for the last six months of the taxable year, must have a child, and must have provided more than one half of the support for keeping up her home. [\[FN174\]](#) Establishing either a taxpayer's net business income or the level of support provided to a household via correspondence is difficult even with ready access to information like canceled checks or bank statements, but close to impossible without them.

f. Language Barriers

Language barriers also strongly affect low-income taxpayers *404 and their ability to respond adequately to EITC correspondence examinations. Recently, the national government has come to recognize the importance of addressing the needs of those individuals with limited English proficiency (LEP). In [August 2000, President Clinton issued Executive Order 13166](#) which mandated that every federal agency design and implement a plan in order to improve access to government services for non-English speaking persons. [\[FN175\]](#)

In response to this mandate, the IRS outlined the services it currently offered to non-English speaking persons, as well as the plans it has to increase its services. [\[FN176\]](#) According to the IRS, it already

produces a number of letters and publications in Spanish and offers interpretation services for non-English speaking individuals who call IRS offices with questions, including information relating to the EITC. Despite the IRS's attempt to meet the needs of non-English speaking individuals, although a number of the IRS's letters have been printed in Spanish, the IRS still does not use Spanish language, or any other language apart from English, in its initial correspondence in EITC examinations. In essence, the IRS's EITC compliance procedures do not seriously take non-fluency into account, rendering ESL taxpayers (some of *405 whom may be suffering from the disadvantages described above) at an additional disadvantage.

B. Bureaucratic Disentitlement and the EITC

Those who have studied the administration of public programs that provide benefits to lower-income persons have identified a dissonance between national policies and those policies' implementation. [FN177] The disconnect between the protection of formal rights to which a person is entitled by law and the way a street-level government employee treats that person on the ground is referred to as bureaucratic disentitlement. [FN178] It is widely understood that the welfare system, with its decentralized administration, is highly susceptible to contradictions between statutory entitlements and ground-level benefits. [FN179] The effect of this disconnect is that the structure and operation of welfare offices become an important determinant of eligibility and termination of benefits. This is a factor that can affect the IRS's administration of the EITC.

Because credits administered through the tax system are not dependent upon initial eligibility interviews at government agency offices, bureaucratic disentitlement has not been thought of as a characteristic of tax administration. In fact, in terms of the EITC, the structure of the credit, and its lack of a concomitant stigmatizing eligibility process, has been seen as largely an antidote to the bureaucratic disentitlement associated with other governmentally funded programs, such as welfare and housing benefits. [FN180] Advocates of the EITC relative to other transfer *406 payment programs have touted its administrative efficiencies and the lack of stigma associated with applying for and receiving benefits. [FN181] For example, Professor Alstott notes that proponents of the EITC have argued that it is cheaper to administer and less likely to be dependent upon "street-level bureaucrats" who may administer programs in a manner different from formal eligibility requirements. [FN182] Specifically, the common perception was that the EITC more or less administers itself, with receipt of the benefit tied to undertaking the citizenship-affirming act of filing a tax return, [FN183] and taxpayers not having invasive pre-entitlement contacts with administrators. [FN184]

Reality is different from perception, and the administration of the EITC is not without features of bureaucratic disentitlement. As mentioned above, while eligibility itself is still tied to the filing of a tax return, the IRS has in effect, through its increasing correspondence-based compliance activities and refund freeze program, introduced a bureaucratic layer between taxpayers and receipt of the EITC. [FN185] There are teams of IRS employees based at IRS Campuses, or Service Centers largely dedicated to EITC correspondence compliance activities. Their actions on the ground assume a level of great importance in determining whether taxpayers ultimately get the EITC, particularly given the infrequency of taxpayers challenging initial IRS determinations in court.

It is true that the IRS EITC compliance bureaucracy is different from traditional welfare bureaucracies. For example, IRS *407 correspondence examination is highly centralized (and, as discussed above in Part II.B.2, becoming more so) and there is still little direct contact between taxpayers and agency employees. Nonetheless, how the IRS replies to a taxpayer who actually responds and seeks to establish eligibility is an important aspect of whether an otherwise qualifying taxpayer will be able to establish eligibility in the original examination. [\[FN186\]](#)

To be sure, IRS modernization, with an increasing reliance on standardization in forms, centralized compliance activities, and employee performance review, mitigates against agency-level disentanglement. Yet, IRS ground-level actions in the course of IRS compliance activities that might influence whether an otherwise qualifying taxpayer gets the EITC include a delay in responding to taxpayer letters, duplicative or onerous requests for documentation or substantiation, IRS employees providing incorrect or incomplete information regarding eligibility or the substantiation needed to prove eligibility, either on the telephone with a person involved in the examination or in person at a customer service walk-in area, and busy signals or long waiting times for taxpayers attempting to telephone the IRS employee assigned to the examination.

Consistent with IRS modernization efforts described above, [\[FN187\]](#) the IRS has attempted to measure the quality of its service and how its compliance personnel perform in terms of business results measures, such as the quantity of EITC cases that IRS employees close and the quality of their work. [\[FN188\]](#) It is obviously easier to gauge the quantity of performance rather than quality of the work, and the IRS has placed great emphasis on the number of cases closed, regardless of how those cases are closed. [\[FN189\]](#) *408 With respect to EITC compliance, the IRS has emphasized the return to the system for its compliance dollars expended, meaning that IRS compliance efforts are measured in part by the amount of erroneous EITC claims prevented by the correspondence-driven compliance activity. [\[FN190\]](#) This emphasis on numbers alone parallels developments in other areas of public benefits law, where caseworkers are under pressure to reduce the welfare rolls. [\[FN191\]](#) Both the general emphasis on reducing caseloads and the specific effort to prevent EITC noncompliance create incentives for IRS employees perhaps to engage in some activities that would contribute to the IRS's not finding eligibility in certain cases, such as requiring excessive documentation or failing to place or return phone calls when the documentation is ambiguous.

While there has been no systematic study of this phenomenon in the tax system, the GAO has criticized the quality of IRS EITC correspondence examinations, [\[FN192\]](#) noting that the IRS inconsistently *409 treats similarly situated taxpayers and that the quality of eligibility review was spotty. While those who practice in this area have experienced clients facing some of these hurdles, the extent of this problem is in need of further study. How IRS workers view their role is essential. My sense is that IRS street-level employees are sensitive to Congress' concern of abuse and fraud with the EITC and are likely not to view themselves as problem-solvers. With respect to the many ineligible taxpayers, this approach is valuable. But, given all of the obstacles facing eligible taxpayers caught in the compliance process, and the evidence of disentanglement in other public transfer programs, ignoring its possibility puts innocent taxpayers in peril. [\[FN193\]](#)

IV

The Means to Provide a Voice For the New Constituency Taxpayer

The factors discussed above strongly suggest that many thousands of eligible taxpayers who are subjected to EITC examination do not receive the EITC after examination, resulting in taxpayers losing millions of dollars in EITC. Few of those taxpayers have the staying power or resources to challenge IRS determinations in court or in administrative appeals. Even if they do, there is a long delay before those matters may be heard either administratively or judicially. [FN194] This delay increases the odds that evidence to prove eligibility becomes stale. In addition, the benefits of the EITC are not enjoyed during this delay. [FN195] One *410 suggested solution would be that the IRS should scale back its compliance activities for the EITC. This would be a mistake.

There is compelling evidence that billions of dollars in mistaken or fraudulently claimed EITC are paid to taxpayers every year. [FN196] At the same time, there is growing consensus that the EITC is an effective policy device that accomplishes important societal goals. [FN197] Continued high error rates that could go even higher if compliance activities are scaled back will likely weaken overall support for the EITC or other tax-based credits, with possible adverse effects on the nation's working poor. Nonetheless, to balance its efforts, the IRS should dedicate additional compliance resources to other issues susceptible to abuse, like unreported partnership and trust income, and substantiation of business expenses and income for self-employed taxpayers. [FN198] To ensure a continued respect for the system, all taxpayers, not just the working poor, should be held to the same compliance standards.

While some have observed that the IRS's administration and enforcement of the nation's tax laws will have an effect on many of the problems low-income taxpayers face, [FN199] not every problem *411 described above relates to the IRS's administration of its EITC compliance regime. While there are steps the IRS can take to mitigate some of the special challenges that low-income taxpayers present in EITC correspondence examinations, not even the most enlightened tax administration can completely overcome problems such as literacy, distrust of financial institutions, fear of government, and transiency. While these problems suggest the need for solutions from outside tax administration, as their effects go well beyond tax consequences, there are systemic solutions within the administration of the tax system that can mitigate their effect. [FN200] This section considers three such solutions: low-income taxpayers' access to counsel in controversies; the strengthening of the Taxpayer Advocate Service; and the IRS's use of Problem Solving Days.

A. Access to Counsel

Those who have considered how bureaucracies can remain accountable to ensure the delivery of statutorily mandated benefits in other contexts have noted the importance of individuals' legal representation. [FN201] That representation ensures that the program recipients' rights are validated and, importantly, it serves as a programmatic monitor.

Some of the problems described above in the context of the EITC are not unique to the tax system. Similar issues led Congress to create the Legal Services Corporation in the 1970s to promote equal access to the system of justice by making grants for the provision of high-quality civil legal assistance to those who would otherwise be unable to afford legal counsel. [FN202] However, *412 civil tax

controversies, administrative and judicial, fall outside that system. [FN203] Traditional legal service organizations have not represented taxpayers in tax controversies, partially because prior to the growth of both the EITC in the 1990s and the IRS's auditing of low-income taxpayers, tax adjudications have not generally been as important to the welfare of low-income individuals. [FN204] Moreover, lawyers tend to view tax law as an isolated discipline, requiring great specialization due to the area's complexity, both substantively and procedurally. [FN205] Further, the organized bar has not been broadly involved in providing pro bono services in tax controversies. [FN206]

1. The Growth of Tax Clinics

Starting in the late 1970s, the IRS gave special authorization for a few accredited law and business schools to set up student tax clinics where law students, under the guidance of a faculty member, could represent taxpayers in civil tax controversies before the IRS. [FN207] By the mid-nineties these student clinics had grown in number to about twelve, but they were expensive to run and provided access to representation to only a small portion of taxpayers who needed services. In addition, there were a few non-profit organizations that provided direct services to low-income taxpayers in tax controversies. These organizations served *413 only a select geographic area, so many low-income taxpayers had no access to legal representation.

By the 1990s, with the changes described in this Article underway; that is, welfare reform, IRS modernization, growth in the EITC, and increased EITC compliance initiatives, one of the directors of a student tax clinic, Professor Janet Spragens, testified before the IRS Restructuring Commission about the need for federal funding to encourage organizations to provide free or nominal cost legal representation to low-income taxpayers in controversies. [FN208]

In the RRA, Congress reacted positively, and enacted section 7526, which authorizes the Treasury to allocate up to \$6 million of IRS funding per year for matching grants to qualified low-income tax clinics (LITCs) at accredited law or business schools or not-for-profit organizations that represent low-income [FN209] taxpayers in controversies with the IRS or that educate ESL taxpayers about their rights and responsibilities under the Code. Under section 7526, grants may not exceed \$100,000 per clinic per year, are subject to the availability of appropriated funds, and must be matched on a dollar-for-dollar basis by the host organization. [FN210]

*414 While the amount of funds available is relatively small, in the three years in which LITC funding has been available, there has been incredible growth. As of 2001, there were 102 funded LITCs, and, in 2002, the number increased again to 127. [FN211] Of particular significance is the growth of LITCs at non-academic non-profit (NANP) organizations: in 1999, there were only thirteen NANP's awarded grants, and by 2001, the IRS awarded sixty-seven grants to NANPs. [FN212] Essentially, many of the NANP organizations receiving grants (or organizations related to the grant recipient) were involved in other aspects of support for the low-income community. NANPs may potentially reach many more unrepresented taxpayers than academic LITCs. Because students need close supervision on cases and because the educational objectives associated with student clinics often are tied to intense work on a few matters, tax clinics housed at academic institutions are limited in terms of the numbers of clients that can be represented. [FN213] NANPs, while also strapped for resources, potentially could serve many more clients than student tax clinics.

The LITC program has increased awareness among those providing the panoply of other services to the low-income community about the importance of the tax system and especially the EITC in achieving societal goals benefiting low-income people. The increased demand for federal funding in the last two years, especially among legal service organizations, reflects a growing understanding among those who work with the low-income population *415 that representation and education centering around tax issues is vitally important to our nation's working poor. LITCs are uniquely situated to represent low-income taxpayers facing EITC audits, and thus can provide a valuable service for those not familiar with either the EITC's complex provisions or the procedural challenges of working within the tax system. [\[FN214\]](#)

While the funding of tax clinics will not eliminate all obstacles that lead to inadequate taxpayer response to IRS requests for EITC eligibility, LITCs can mitigate many of them. [\[FN215\]](#) If represented by an advocate at an LITC, taxpayers would ordinarily sign a power of attorney (POA) authorizing a representative, such as an attorney, to communicate with the IRS on her behalf. [\[FN216\]](#) The POA authorizes the representative to receive copies or even originals of IRS-generated EITC correspondence. Assuming that an initial EITC audit-letter can get to the taxpayer, with a representative on board, subsequent taxpayer moves [\[FN217\]](#) *416 and literacy and language barriers should be less of a problem in ensuring that the taxpayer receives and understands IRS requests for verification. Representatives can allay the deep-seated fear of government many low-income taxpayers share that sometimes prevents their sending the information to the IRS.

Advocates at LITCs can help ensure that taxpayers have a fair chance of submitting information that will be sufficient to establish eligibility. Circumstances that are not self-evident on documentation, especially as they relate to the EITC's residency requirement, can lead to the IRS concluding that a taxpayer has not established eligibility even if she responds and provides all the requested documentation. For example, as discussed above, frequent taxpayer moves, which occur especially in times of housing shortages, [\[FN218\]](#) and complex living arrangements, which are more common among some minority populations, [\[FN219\]](#) may make naked documentation insufficient to satisfy an IRS examiner's application of the EITC eligibility requirements. The same literacy and language problems that would plague a taxpayer's understanding of IRS requests for information would likewise hinder an unrepresented taxpayer's chance of a response adequately explaining her circumstances. Moreover, LITC representatives, with taxpayer authorization, can perform tasks such as gathering documentation from schools or medical providers. These tasks, simple for most, are challenging to the low-income taxpayer in light of language barriers [\[FN220\]](#) that make it difficult or uncomfortable to ask for documentation, transportation obstacles, [\[FN221\]](#) and a lack of access to technology [\[FN222\]](#) that many take for *417 granted but makes writing letters a challenge.

For more complex issues that are not easily reduced to documentation, advocates at LITCs can ensure that taxpayer positions are fully explained with third party evidence, including affidavits. Moreover, access to counsel at an LITC helps ensure that taxpayers have the ability to benefit from lesser known elements of EITC eligibility, such as permitting previously undocumented workers to claim an EITC in an earlier year if they become permanent residents or citizens in a later year. [\[FN223\]](#)

2. Ensuring that LITCs Can Help More Unrepresented Taxpayers

How Congress and the IRS act with respect to the LITCs in the next few years will be important in determining whether LITCs become a more significant factor in ensuring that unrepresented taxpayers

subject to EITC audits have access to counsel. [\[FN224\]](#) Congressional authorization and appropriation of additional funds is the single most important issue affecting LITCs. LITCs still only represent a fraction of otherwise unrepresented low-income taxpayers in controversies, including EITC audits. In 2001, 102 LITC recipients exhausted the \$6 million authorization limitation, which prevented certain organizations from receiving full funding and others from receiving any funding at all. [\[FN225\]](#) In 2002, even with congressional appropriation at \$7 *418 million, organizations were seeking approximately \$10.6 million in funding.

While there are not nearly enough LITCs to handle all taxpayers who would wish to respond to EITC correspondence examinations, [\[FN226\]](#) expanding the size of the LITC program could help ensure that low-income taxpayers wishing to prove eligibility have the means to do so. The costs of the LITC program, especially when viewed in relation to the roughly \$150 million annually that the IRS has spent on EITC compliance, are reasonable. Doubling the size of the program, to allow for greater funding for existing organizations to provide service or the creation of new clinics, would help greatly.

In addition to Congress helping low-income taxpayers by increasing or eliminating the authorization limitation and appropriating funds for LITCs, the IRS can assist LITCs in achieving their goal of representing low-income taxpayers. The IRS presently provides very limited publicity for LITC services. [\[FN227\]](#) IRS-*419 generated publicity could be especially helpful in reaching taxpayers whose adjudications are conducted by correspondence. Some LITCs are working to increase their visibility so that taxpayers who receive notices like EITC correspondence examination letters will contact those organizations. [\[FN228\]](#) The IRS has not yet agreed to include so-called stuffers advising taxpayers of LITCs in their area in EITC correspondence audits; [\[FN229\]](#) although, the IRS is undertaking an internal evaluation of how best to promote low-income taxpayer awareness of LITCs. Because the EITC is the most important substantive provision for low-income taxpayers as a class, it is a natural fit for the IRS to encourage low-income taxpayers subject to compliance procedures to use LITC services. Many states are required to advise welfare recipients of local legal service organizations when they discontinue or reduce benefits. For example, Pennsylvania's state welfare regulations require that local legal service organizations' names and addresses be listed on many welfare notices. [\[FN230\]](#) In its correspondence examinations, the IRS should provide a toll-free phone number that would allow taxpayers to determine if a local LITC exists. While the IRS does have to wrestle with some logistical issues, [\[FN231\]](#) the IRS's broad publicity about LITCs is an easy way for the IRS to help taxpayers help themselves. Publicizing LITCs can be an excellent example of the government leveraging its resources [\[FN232\]](#) to ensure that private parties with a stake in the administration *420 of the tax system are directly working with taxpayers.

B. The Increased Role of the Taxpayer Advocate Service

In addition to funding LITCs, the RRA enhanced the role of the Taxpayer Advocate Service, which operates a system of local and area Taxpayer Advocates who report directly to the National Taxpayer Advocate (NTA). [\[FN233\]](#) For reasons different from the LITC program, the TAS has the potential for improving the participation and accuracy of EITC examinations. This potential has less to do with the TAS's powers to resolve individual disputes than to the TAS's ability to act as a consciousness-raising organization.

Today, the NTA's Office has the ability to help taxpayers by issuing so-called Taxpayer Assistance Orders (TAOs) when a taxpayer is suffering or is about to suffer significant hardship if relief is not granted and the taxpayer is properly entitled to relief under the law. [\[FN234\]](#) In addition to this formal power, the TAS has significant informal powers to ensure relief when the normal channels within the IRS break down. These powers can often help taxpayers and representatives cut through IRS red tape and resolve problems. [\[FN235\]](#)

While a TAS can help with some of the problems associated with low-income taxpayers discussed above in Part III.A.2, there are significant limitations in the TAS's ability to work on individual EITC correspondence examination cases. The TAS can help educate taxpayers about the process of EITC examination activities and the types of information necessary to establish eligibility, overcome some taxpayer language barriers, and assuage taxpayer *421 fears about IRS sharing of information with the INS or state or local agencies. However, it cannot serve as an advocate for individual taxpayers in the way that a lawyer or other representative can, and the office's name is misleading in that taxpayers might think that the TAS employee would act as an attorney would in representing a taxpayer. [\[FN236\]](#)

Consider, for example, that a lawyer's responsibilities to clients as set forth in state rules of professional conduct do not extend to TAS employees working on cases. One such aspect of the rules of professional conduct, the obligation that attorneys must not reveal information related to client representation, is a widely known component of our legal system and a fundamental distinction between attorneys and TAS employees. [\[FN237\]](#) While under the Internal Revenue Code, TAS employees have discretion not to reveal contact with or information provided by the taxpayer to other parts of the IRS, this is not mandatory, and apparently does not extend to information that a TAS employee might obtain from third parties, nor does it extend to requests from other government agencies, including the Department of Justice, that may be investigating the taxpayer. [\[FN238\]](#)

*422 Moreover, another limitation on the TAS's powers is that the TAS cannot work to circumvent any established process for administrative or judicial review in order to achieve a particular or equitable result. [\[FN239\]](#) Thus, for example, TAS will not intervene in the ordinary course of the IRS's deficiency procedures that apply to taxpayers facing an EITC examination. Nor will it overrule determinations made by other IRS employees in the proper exercise of their authority. [\[FN240\]](#) These limitations restrict TAS from playing an effective role in ongoing EITC examinations, especially when there is no procedural error. [\[FN241\]](#) The TAS itself is wrestling with the extent of its authority to resolve taxpayer problems directly. [\[FN242\]](#)

Notwithstanding these significant limitations relating to the *423 TAS's ability to work individual cases while an EITC examination is ongoing, the TAS can play a crucial role for low-income taxpayers, albeit a less direct role than that of LITCs. The RRA requires that the NTA have experience in representing individual taxpayers, [\[FN243\]](#) ensuring that the NTA herself will have the capacity and experience to be sensitive to issues affecting low-income taxpayers. The RRA's mandate that the NTA report directly to the Commissioner makes it more likely that she would be able to publicize the needs of low-income taxpayers within the IRS. [\[FN244\]](#)

Moreover, the RRA requires that the TAS advise Congress and the IRS itself on systemic problems with the tax system and suggestions for changes in the IRS's administrative practices to mitigate those problems. This can be a powerful means of giving otherwise excluded taxpayers a voice before other

functions of the IRS and Congress. In fact, the TAS has been critical of both the administration of and the substance of the EITC, [\[FN245\]](#) and also is involved in ensuring that the IRS refines EITC examinations to ensure that fewer eligible taxpayers are selected for audit. [\[FN246\]](#)

The 2001 NTA appointment of Nina Olson, a pioneer in the tax clinic movement and longtime representative of low-income taxpayers, highlights the NTA's potential as a consciousness-raising organization, especially with respect to the EITC. Consider Olson's inaugural testimony before the House Ways and Means Oversight Subcommittee:

Over the years I have been a consistent advocate for the rights *424 of low-income taxpayers. . . I will be vocal in my advocacy that the statute and procedures developed to reduce error and fraud . . . must also protect the rights of taxpayers. Too often, taxpayers who file for the EITC do not have professional representation and because of the burdens of poverty, language or literacy barriers cannot make an effective case for themselves. It is my firm belief that if we subjected middle class and more affluent taxpayers to the kind of intrusive inquiries we routinely subject a taxpayer to in an EIC audit, the entire EIC audit program would be shut down in response to taxpayer complaints. [\[FN247\]](#)

Like the role of LITCs, the TAS role is also evolving. The appointment of Olson, however, is strong evidence that it will play an important role in ensuring that the needs of low-income taxpayers facing EITC examinations will be before Congress and the rest of the IRS.

C. The Use of Problem Solving Days

Since 1997, the IRS has staged periodic "Problem Solving Days" "where taxpayers are encouraged to visit with IRS experts dedicated to resolving long- standing problems." [\[FN248\]](#) These days are meant to reflect the IRS's understanding that some taxpayers want to have face-to-face meetings, rather than written correspondence or phone calls, to resolve tax matters. [\[FN249\]](#) These days were designed to assist taxpayers by staffing IRS offices with employees from a number of different sectors, in order to facilitate the resolution of ongoing tax problems, such as those stemming from EITC examinations. These sessions are of limited use in encouraging low-income taxpayer participation in EITC correspondence examinations, as most taxpayers that attend these Problem Solving Days are already facing IRS collection activities. [\[FN250\]](#)

*425 Among scholars who have considered the effectiveness of less formal procedural protections, there is some disagreement. Some poverty law scholars believe that less formal procedures like "Problem Solving Days" may help poor people overcome the impersonalized bureaucratic structure typified of many public benefits programs, and could possibly lead to a "shared dialogue between caseworker and client." [\[FN251\]](#) On the other hand, other poverty law and feminist scholars caution the use of less formal methods of dispute resolution. These scholars warn that a lack of structure poses risks to those who negotiate from a subordinate position. Some leading poverty law and feminist scholars caution that the inherent power differentials between decision makers and poor people can exacerbate the effect of prejudice on decision making. [\[FN252\]](#)

One thoughtful scholar, Professor Zietlow, warns against advocating less formal measures, noting that those advocates often assume that the bureaucrat assigned to a matter is genuinely motivated to work with a participant on resolving the problem at hand. [\[FN253\]](#) While I genuinely do not doubt the

sincerity of IRS management in wishing to ensure that programs like the Problem Solving Days are successful, such informal measures leave great discretion in the hands of relatively low level IRS personnel. Agency actions undertaken without the possibility of further administrative or judicial scrutiny has often led to shoddy practice. [\[FN254\]](#) Throwing into the mix that these decisions will *426 increasingly be made with respect to those outside society's mainstream raises risks that seem too high to justify sole reliance on this measure as a panacea to the challenges facing administering EITC correspondence examinations. [\[FN255\]](#)

Conclusion

The IRS's administration of the EITC is a product of three important developments. First, there has been an incredible growth in the EITC in the last decade. More taxpayers are claiming the EITC than ever before, and the EITC is an increasingly important part of federal social policy. Second, there has been a concerted legislative and administrative effort to eliminate unacceptable levels of error among those claiming the EITC. IRS audit rates with respect to the EITC are at an all-time high. Third, there has been a seismic change in the organizational structure of the IRS following a period of intense legislative scrutiny of taxpayer rights. In the context of adjudications affecting low-income taxpayers, like those involving EITC eligibility, the IRS believes that selected IRS offices can perform compliance almost exclusively through correspondence-based examinations. In this time of significant growth in the EITC, pressure from Congress to reduce EITC noncompliance, and the administrative reorganization following direct legislative and popular scrutiny of IRS actions, taxpayers who have the least voice in the system may not receive the highest quality of service.

Understanding the characteristics of those taxpayers implicated by the EITC highlights the relationship between substance and procedure, [\[FN256\]](#) and can allow the IRS itself to facilitate the *427 achievement of goals that the EITC was meant to achieve. Further, an understanding of the problems facing this new constituency of taxpayers suggests that wholesale changes in the way the IRS goes about its business are not needed; in fact, Congress and the IRS have already put in place some essential ingredients to achieve these objectives, especially through the RRA's additional funding of low-income taxpayer clinics and increasing the TAS's powers and visibility. Moreover, the IRS Commissioner recently convened a task force for the IRS itself to consider how its practices can make it easier for taxpayers to comply with the EITC, which will hopefully provide the IRS with additional information about taxpayers' challenges. [\[FN257\]](#)

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[FN1]. As communicated to the author.

[FN2]. 26 U.S.C.S. § 32 (Law. Co-op. 2001).

[FN3]. Cf. Roy L. Brooks, *Critical Procedure* xxiii (1998) (noting that outsider experiences or values have not traditionally figured prominently in the development of fields outside of civil rights).

[FN4]. There is no uniform definition of a low-income taxpayer in the Internal Revenue Code of 1986. For purposes of this Article, it is someone who has income low enough to qualify for the EITC. See Janet Spragens & Nancy Abramowitz, *IRS Modernization and Low-Income Taxpayers*, 53 *Admin. L. Rev.* 701, 704 (2001) (considering this as the “generic” use of the term “low-income taxpayer”). In 2001, taxpayers with: (1) more than one “qualifying child” could have up to \$31,121 of earned income and receive the EITC; (2) one qualifying child could have up to \$28,281 of earned income and receive the EITC; and, (3) no qualifying child could have up to \$10,710 of earned income and receive the EITC. Internal Revenue Service, Publication 17 at 242 (2001), available at <http://www.irs.gov/pub/irs-pdf/p17.pdf> (last visited Nov. 6, 2002). See *infra* Part I.A.1 for a discussion of qualifying child and other EITC definitions and eligibility requirements.

[FN5]. The principal focus of this Article is the IRS’s administration of the EITC as it currently exists. It is outside the scope of this Article to consider substantive proposals to modify the EITC or change the mechanism for delivering benefits to lower-income workers. See, e.g., Annette Nellen, *Simplification of the EITC Through Structural Changes*, 3 *Joint Committee on Taxation* 205, 205 (2001) (suggesting that the EITC could be replaced by eliminating payroll tax withholding for lower-income levels); Regina T. Jefferson, *The Earned Income Tax Credit: Thou Goest Whither? A Critique of Existing Proposals to Reform the Earned Income Tax Credit*, 68 *Temp. L. Rev.* 143, 152-65 (1995) (considering proposals to reform the EITC); George K. Yin & Jonathan Barry Forman, *Redesigning the Earned Income Tax Credit Program to Provide More Effective Assistance for the Working Poor*, 59 *Tax Notes* 951, 957 (1993) (proposing replacing the EITC with an exemption from Social Security and income taxes). It is also outside the scope of this Article to consider simplification measures of the existing structure that could reduce the possibility that an examination might result in denying the EITC to an eligible taxpayer. See, e.g., *Joint Committee on Taxation, Recommendation of the Staff on the Joint Committee on Taxation*, 2 *Joint Committee on Taxation* 69-75 (2001) [hereinafter *Joint Committee on Taxation*] (suggesting a number of specific substantive proposals that would reduce confusion, including defining qualifying children consistently among tax provisions, modifying the definition of earned income to exclude nontaxable compensation, and simplifying so-called EITC tie breaker rules governing when a person can be considered a qualifying child with respect to more than one individual). The latter two proposals have been recently adopted. *Economic Growth and Tax Relief Reconciliation Act of 2001*, Pub. L. No. 107-16 § 303(b), 115 Stat. 38 (2001) (amending 26 U.S.C. § 32(c)(2)(A) by revising the definition of earned income); Pub. L. No. 107-16 § 901, 115 Stat. 38 (2001) (amending 26 U.S.C. § 32(c)(1)(C) and simplifying EITC tiebreaker rules, discussed *infra* note 155). Any EITC (or any tax expenditure) dependent in part on the requirement that qualifying children reside with the taxpayer for any substantial period of time implicates significant costs on the IRS and imposes substantial taxpayer burdens with respect to verifying eligibility. General Accounting Office, *Earned Income Credit IRS’s*

Tax Year Compliance Study and Recent Efforts to Reduce Noncompliance, GAO/GGD-98-150 at 2 (1998) [hereinafter Compliance Study] (“Thoroughly verifying qualifying child eligibility [is a] costly, time-consuming, and intrusive proposition.”).

[FN6]. See Carolyn J. Hill et al., EITC Eligibility, Participation and Compliance Rates for AFDC Households: Evidence from the California Caseload, prepared for the state of California, 2 n.2 (Apr. 1999) (“We note that the EITC participation rates are high compared to other public assistance programs.”); Anne L. Alstott, The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, 108 Harv. L. Rev. 533, 585 (1995) [hereinafter Alstott, The EITC and the Limitations of Tax-Based Welfare Reform] (noting that EITC seems likely to have higher participation than traditional welfare programs because the requirement of filing a tax return is less burdensome than having to “travel to a welfare office, wait in line, confront brusque or overworked caseworkers, or register for work or training programs.”); Jeffrey B. Liebman, Who are the Ineligible EITC Recipients?, 4 Nat. Tax J. 1165, 1183 n.34 (2000) (citing studies indicating that between eighty and eighty-six percent of eligible taxpayers receive the EITC, compared to welfare-eligible families only receiving seventy-five percent of the total dollars to which those families were entitled); John Karl Scholz, Comments by Treasury’s John Karl Scholz at EITC Hearing, 97 Tax Notes Today 90-30 (May 8, 1997) (“[P]articipation in the EITC tends to be higher than many other assistance programs targeted to low-income families.”); George K. Yin et al., Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program, 11 Am. J. Tax Pol’y 225, 240 (1994) (comparing high EITC participation rates with those of other federal programs directed at low-income individuals). See Lawrence Zelenak, Children and the Income Tax, 49 Tax L. Rev. 349, 395 (1994) (noting “the earned income tax credit does not seem to brand its recipients, despite being targeted at low income earners.”).

[FN7]. For these purposes, noncompliance means taxpayers who claim the EITC and are either eligible for a smaller EITC than claimed or are not eligible at all. For a discussion of the compliance problems associated with the EITC, see, e.g., Alstott, *supra* note 6, at 586 (noting that “[t]he EITC presents two intrinsic problems of compliance and enforcement: the unusual” incentive for taxpayers to overstate income to maximize the amount of the EITC “and the disproportionate cost of” recovering erroneously paid or credited EITC). In other transfer programs, policymakers have noted the tradeoff between participation and compliance, and the negative effects that efforts to ensure eligibility verification can have on eligible applicants. See Evelyn Z. Brodtkin, The False Promise of Administrative Reform: Implementing Quality Control in Welfare 44-45 (1986); Joel F. Handler, The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context, 16 N.Y.U. Rev. L. & Soc. Change 457, 481-82 (1987-88); Michael R. Sosin, Legal Rights and Welfare Change, 1960-1980, in *Fighting Poverty: What Works and What Doesn’t* 260, 276-77 (Sheldon H. Daziger & Daniel H. Weinberg eds., 1986).

[FN8]. While inadvertent errors might warrant less concern than fraudulent claims, especially in light of the redistributive nature of the EITC (discussed *infra* notes 56-63 and accompanying text) and the likely lower-income levels of both intended and unintended beneficiaries, there are legitimate reasons to be concerned with high levels of EITC noncompliance. First, any noncompliance results in inequities between those taxpayers who are complying and those who are not. See Alstott, *The EITC and the*

Limitations of Tax-Based Welfare Reform, *supra* note 6, at 589. Further, there has been a strong negative public reaction to high EITC error rates, suggesting that the high error rates associated with the EITC may not be an acceptable cost of the program. *Id.*

[FN9]. For these purposes, the term “adjudicative” is used in the context of IRS decisions made pursuant to examination or audit of a taxpayer’s records concerning EITC eligibility. Under administrative law concepts, adjudications are administrative decisions which affect an individual’s property, rights, obligations, or opportunities. See 5 U.S.C.S. § 551(6)-(7) (Law. Co-op. 2001); Paul R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739, 739 n.1 (1976). IRS determinations, like matters involving EITC eligibility, that are subject to *de novo* judicial review in United States Tax Court or federal district court are exempt from the APA’s procedures governing adjudications. 5 U.S.C.S. § 554(a)(1) (APA’s adjudicatory provisions do not apply if the “matter is subject to a subsequent trial of the law and facts *de novo* in a court.”). See *infra* notes 89-99 and accompanying text, discussing procedures applicable to taxpayers challenging IRS determinations regarding EITC eligibility. In any event, the APA provides few procedural protections for so-called informal adjudications, those that are not required to be heard before a formal Administrative Law Judge. See Verkuil, *supra* at 744 (noting that the APA leaves “largely unaddressed” procedures relating to informal adjudication).

The Fifth Amendment procedural due process clause has also been a factor in gauging the level of procedural protections for individuals who have liberty, privacy or property interests affected by federal agencies. The Supreme Court has long held that the collection of tax is so essential to the nation’s lifeline that IRS adjudicative actions should remain largely untouched by procedural protections inherent in the Fifth Amendment Due Process Clause. See *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931) (finding that summary proceedings to ensure the prompt performance of tax obligations are not constitutionally inadequate if the taxpayer is afforded a later judicial opportunity to challenge the tax determination); *Cheatham v. United States*, 92 U.S. 85, 87-89 (1875) (emphasizing that procedures that could impede the prompt payment of taxes are inconsistent with American and English tradition of summary tax proceedings); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 275-82 (1855) (recognizing certain elements of the judicial trial as the essence of due process, but rejecting them in tax proceedings because the summary procedures that the federal government used were not in direct conflict with the Constitution, were consistent with historical practice, and were important to protect the taxing power); *Rodney L. Mott*, *Due Process of Law* 220 (1926) (stating due process provides for notice and hearing prior to a deprivation, “but in the administration of tax assessments such a procedure might have blocked the whole governmental machine”). Cf. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 60 (1993) (Phillips “relied upon the availability, and adequacy, of pre-seizure administrative procedures in holding that no judicial hearing was required prior to the seizure of property.”).

The Court’s modern procedural due process analysis, through its now familiar consequentialist tripartite balancing test, attempts to gauge the appropriate levels of procedural protections after it has been established that there is a protected property or liberty interest. *Matthews v. Eldridge*, 424 U.S. 319 (1976). While the mode of analysis inherent in the nineteenth century tax cases has largely been disfavored and replaced by interest balancing in procedural due process cases, the Court has continued to classify tax cases as an exceptional circumstance and has been reluctant to impose interest balancing upon evaluating the levels of procedural protections due taxpayers. *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972) (considering taxing powers, along with efforts to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs

and contaminated food as one of the few “extraordinary situations” warranting a deprivation of property without a constitutionally-mandated pre-termination hearing); see also *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974) (relying on refund procedures to uphold procedures that did not provide an organization the right to judicial protections prior to the IRS’s revocation of its exempt status). Cf. *Kahn v. United States*, 753 F.2d 1208, 1218-21 (3d Cir. 1985) (considering the constitutionality of the procedures with respect to the imposition of the frivolous return civil tax penalty under the due process clause and noting that many tax cases summarily relying on *Phillips* were “deficient in terms of offering a cogent analytical framework” and suggesting that courts should apply a balancing test to determine the adequacy of procedural protections even if a taxpayer is afforded a post-deprivation opportunity for judicial review). For a complete discussion of the early tax due process cases, see Jerry L. Mashaw, *Due Process in the Administrative State*, 53-93 (1985) (analyzing the early tax cases as consistent with a traditional judicial approach to procedural due process, that is, considering whether the procedures conformed to the usual processes of law using an analysis steeped in historical precedent and analogy).

The rationale of the nineteenth century tax cases has less force when considering procedures applicable to the EITC, when those adjudications often result not in a proper assessment of taxes owed to the government, but of benefits owing to taxpayers. The focus in many other areas of the law on constitutional procedural due process protections, including the doctrinal challenges concerning when there is a protected liberty, property or privacy interest, and the degree of constitutionally sanctioned procedural protections once one concludes that there is an affected interest, can sometimes obscure the importance of internal agency practice. See Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 *Hous. L. Rev.* 635, 638 (2000) (“While much of procedural design thinking revolves around constitutional principles, learning is and should be applied to statutory and administrative procedural design efforts.”). Cf. Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 *Colum. L. Rev.* 1973, 1998-99 (1996) (suggesting that we are undergoing a due process counterrevolution in which changes in statutory law will allow the Court to contract the scope of protected liberty and property interests, but that agencies and legislatures are better suited than courts to consider procedural safeguards). One important way to guarantee against erroneous governmental deprivations (what Fifth Amendment procedural due process jurisprudence is largely about anyway), is to focus on agency practice.

[FN10]. Of the estimated \$31.3 billion in EITC that taxpayers claimed in tax year 1999, the IRS estimates that between \$8.5 billion and \$9.9 billion should not have been credited. Internal Revenue Service, *Compliance Estimate for Earned Income Tax Credit Claimed on 1999 Returns* (Feb. 28, 2002), available at <http://www.irs.gov/pub/irs-utl/compesteitz99.pdf> [hereinafter 1999 EITC Compliance Study]; General Accounting Office, *Federal Taxes: Information on Payroll Taxes and Earned Income Tax Credit Noncompliance*, GAO-01-487T at 10 (2001) [hereinafter *Federal Taxes*] (looking at studies of 1994 and 1997 data suggesting EITC error rates of twenty-six percent and thirty-one percent, respectively). There have, however, been some studies suggesting that among certain classes of taxpayers, EITC participation rates are low. See Jeffrey B. Liebman, *The Impact of the Earned Income Tax Credit on Incentives and Income Distribution*, in *12 Tax Policy and the Economy* 83 (James M. Porterba ed., 1998) (discussing data indicating a participation rate of seventy percent for the phase-in range of the EITC). According to a number of studies conducted by groups outside the IRS from 1994 through 1998, the number of eligible taxpayers who claimed the EITC ranges from seventy to eighty-six percent. See *id.* at 110 (referring to various participation studies); Janet McCubbin, *EITC Noncompliance: The Determinants of the Misreporting of Children*, 53 *Nat’l Tax J.* 1135, 1137 (2000)

(noting significant taxpayer unclaimed or underclaims in the EITC). A recent General Accounting Office (GAO) study examining the 1999 tax year indicates that the participation rate varies considerably by the number of children in the household. General Accounting Office, *Earned Income Tax Credit Eligibility and Participation*, GAO-02-290R at 2 (Dec. 2001) (finding that for households with one and two qualifying children, the participation rates were 96% and 93%, respectively; while for households with three or more children and without qualifying children, the participation rates were 62.5% and 44.7%, respectively). The GAO also found that in 1999, nonparticipating households did not receive approximately \$2.7 billion of credits for which they were eligible, and that of a total of 17.2 million households that were eligible for the EITC, approximately 12.9 million claimed it. *Id.* at 2-3.

[FN11]. Liebman, *supra* note 6, at 1165-66 (noting that EITC error rates were at least 21% while the overpayment rate was only six percent for Aid to Families with Dependent Children (AFDC)).

[FN12]. There is social science research based on social identity theory strongly suggesting that the desire for fair treatment extends beyond maximizing one's outcome and reaches toward a desire for people to be considered as part of a larger accepted group. See, e.g., E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (1988). Other perspectives also encourage fair treatment and participation in the process. See, e.g., Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 *J. Legal Educ.* 47, 60 (1988) (arguing that feminist theory must search out excluded points of view and promote their participation). To be sure, IRS administrative action, by itself, does not produce social equality. Yet, IRS determinations, especially with respect to substantive provisions that fall largely on taxpayers often outside society's mainstream, significantly impact affected people. See *infra* notes 45-51 and accompanying text, discussing common uses of the EITC.

[FN13]. This Article is an invitation for policymakers and scholars to view IRS actions through the perspectives of others, and is in recognition that the IRS performs functions well beyond the still-crucial goal of collecting revenues from society's mainstream. Cf. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 *Colum. L. Rev.* 2001, 2004 (1996) [hereinafter Alstott, *Tax Policy and Feminism*] (noting the possibility of using tax law, in combination with other legislation, to substantially improve women's social and economic status); Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 *N.C. L. Rev.* 1837, 1840-41 (1998) (addressing failure to examine the role of taxation in improving status of women); Nancy C. Staudt, *The Theory and Practice of Taxing Difference*, 65 *U. Chi. L. Rev.* 653, 654 (1998) (noting that taxes must be changed to become fairer towards women); Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 *N.C. L. Rev.* 1521, 1538 (1998) (addressing the inability of legislation to substantially improve traditional gender roles).

Much of this important critical tax scholarship is addressed to substantive provisions, rather than the administration of substantive tax provisions. It is this Article's perspective, however, that it is difficult to separate procedure from substance, a perspective shared by those with often divergent views, like welfarists and some feminists. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *Harv. L. Rev.* 961, 1168-225 (2001). In their recent article that considers broadly the claim that a welfare-based approach should be used to evaluate all legal rules, including the level of procedural protections that individuals should enjoy, Professors Kaplow and Shavell employ a welfarist perspective of procedural rights; i.e., they examine from a normative standpoint whether a specific procedural right

is socially desirable by gauging the procedure's effect on individuals' well-being. This approach assumes that it is possible in some way to aggregate individuals' preferences, and that tastes for fairness or particular procedural protections are relevant only insofar as they serve instrumental purposes. Procedural rights are primarily viewed as subsets of substantive rights and have no independent intrinsic values. Cf. Larry Alexander, *Are Procedural Rights Derivative Substantive Rights*, 17 *Law and Philosophy* 19, 24-25 (1998) ("Procedural rights are merely substantive rights regarding risk-impositions through official adjudications. ... [They] represent a balancing of risks and resources."). One feminist perspective, like the welfarist view above, acknowledges the linking between substantive and procedural rules, and concludes that there is no clear distinction between the two. Rebecca E. Zietlow, *Beyond the Pronoun: Toward an Anti-Subordinating Method of Process*, 10 *Tex. J. Women & L.* 1, 29 (2000) ("procedural values are inseparable from substantive values, because procedural measures exist to protect substantive rights."). See also Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829, 843-44 (1990) (suggesting that the method often shapes the substantive results). As mentioned above in note 12, there is a body of social science research strongly suggesting that procedural rights have independent intrinsic values, largely based on their ability to provide a mechanism for affected individuals to gain social identity with a larger group. Lind and Tyler, *supra* note 12. See also Michael Wenzel, *The Impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Role of Taxpayers' Identity* 6 (Australian Nat'l Univ. Ctr. for Tax System Integrity, Working Paper No. 6, (2001)) (on file with author).

[FN14]. But see James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 371 (1989) ("An agency with a strong mission will give perfunctory attention, if any at all, to tasks that are not central to that mission."). The IRS's traditional mission has been that of efficiently collecting revenues, although a recent change in the IRS's mission statement emphasizes service to taxpayers and minimizes the IRS's compliance role. See *infra* note 110 for a discussion of the new mission statement.

[FN15]. Professor Janet Spragens of American University has been influential in ensuring that the IRS and Congress have understood that the new welfare laws, with their focus on work requirements, and the growth of the EITC, have created a new group of people with significant tax counseling needs. Janet Spragens, *Welfare Reform & Tax Counseling: Part of the Welfare Debate?*, 96 *Tax Notes Today* 205-94 (1996). In part attributable to the lobbying efforts of Janet Spragens and the current National Taxpayer Advocate Nina Olson, Congress passed section 7526, authorizing the Secretary of the Treasury to allocate up to \$6 million of IRS funding per year for matching grants up to \$100,000 per year to low-income taxpayer clinics. Tax clinics, which represent low-income taxpayers who have controversies with the IRS, can play an important role in ensuring taxpayers have a meaningful opportunity to establish eligibility during EITC examinations. See generally Leslie Book, *Tax Clinics: Past the Tipping Point and to the Turning Point*, 92 *Tax Notes* 1089 (Aug. 20, 2001) [hereinafter *Tax Clinics*] (discussing the vital role LITCs play in assisting low-income taxpayers). See *infra* Part IV for a discussion of the effectiveness of LITCs and the National Taxpayer Advocate in helping low-income taxpayers.

[FN16]. See, e.g., 26 U.S.C.S. § 21 (Law. Co-op. 2001) (child care credit); *id.* § 24 (Child Tax Credit, recently greatly expanded by the Economic Growth and Tax Relief Act of 2001); *id.* § 25A (Hope and

Lifetime Learning Credits). For a discussion of recent legislative changes to the child tax credit, see Robert Greenstein, *The Changes the New Tax Law Makes in Refundable Tax Credits for Low-Income Working Families*, Center on Budget and Policy Priorities, available at <http://www.cbpp.org/6-14-01tax.htm> (last modified June 18, 2001). The changes to the child tax credit, including increasing its refundability, will make it an increasingly important substantive provisions for lower-income taxpayers.

[FN17]. While the amounts in controversy may appear to be small in dollar terms, for many of these taxpayers the amounts represent a substantial portion of their assets or income. See Janet Spragens, Law Professor's Statement at IRS Commission Meeting on Taxpayer Rights, reprinted in 97 *Tax Notes Today* 39- 68 (Feb. 26, 1997) (noting that the amounts in controversy for taxpayers represented by the American University School of Law Federal Tax Clinic ranged between \$400 and \$10,000, which are "almost small by any standard, [but] for our clients these amounts are overwhelmingly, frighteningly large.").

[FN18]. The importance of targeted tax credits in terms of overall federal policy to help lower-income Americans is often overlooked. See, e.g., Diane Lim Rogers & Alan Weil, *Welfare Reform and the Role of Tax Policy* 53 *Nat'l Tax J.* 385, 391 (2000).

A common perception is that tax policy primarily affects high-income families, while transfer policy is used to redistribute resources to the lower-income population. That is too simplistic a view. ... the tax system can be used to assist people, and it is being used increasingly in such a way for low-income populations.

Id.

[FN19]. For a discussion of some of the economics literature on the EITC, see generally Stacy Dickert et al., *The Earned Income Tax Credit and Transfer Programs: A Study of Labor Market and Program Participation*, in 9 *Tax Policy and the Economy* 1 (James M. Poterba, ed. 1995) (discussing how EITC has affected labor market participation); Liebman, *supra* note 10 (discussing the impact of the EITC); Nada Eissa & Jeffrey B. Liebman, *Labor Supply Response to the Earned Income Tax Credit*, *Quarterly Journal of Economics* 605 (1996) (examining impact of expansion of EITC on labor force).

[FN20]. Earned income is generally defined to include annual wages or salary included in gross income, as well as net earnings from self-employment. 26 U.S.C.S. § 32(c)(2)(A) (Law. Co-op. 2001).

[FN21]. In 2001, the applicable credit percentage for taxpayers without any qualifying children is 7.65%. 26 U.S.C.S. § 32(b)(1)(A) (Law. Co-op. 2002). For taxpayers with one qualifying children, the applicable credit percentage is 34%. *Id.* For taxpayers with two or more qualifying children, the applicable credit percentage is 40%. *Id.*

[FN22]. For a child to be considered a "qualifying child" for the purposes of the EITC, he or she must meet certain residency, relationship and age tests. 26 U.S.C.S. § 32(c)(3)(A)(i)-(iii) (Law. Co-op. 2001).

For residency, the child must have the same principal place of abode as the taxpayer for more than one-half of such taxable year. Qualifying relationships include sons, daughters, stepchildren, and grandchildren; brothers and sisters, and their descendants (e.g., nieces or nephews) whom the taxpayer cares for as if they were the taxpayer's own children; and foster children placed with the taxpayer by an authorized placement agency. *Id.* § 32(c)(3)(B)(i)-(iv). As for the age requirement, it includes those under nineteen, any full-time students under twenty-four, and any age if the individual is disabled. *Id.* § 32(c)(3)(C). In 2001, the maximum credit available for a taxpayer with no qualifying children is \$364. For a taxpayer with one qualifying child, the maximum available credit is \$2,428. For a taxpayer with two or more qualifying children, the maximum available credit is \$4,008. *Id.* § 32(f) (credit amount determined by tables). Tables found in Internal Revenue Service, Publication 596 at 46 (2001), available at <http://www.irs.gov/pub/irs-pdf/p596.pdf> (last visited Nov. 6, 2002).

[FN23]. 26 U.S.C.S. § 32(d).

[FN24]. *Id.* § 32(i). In 2000, this amount was \$2,400. This, and other dollar amounts in the EITC, are adjusted annually for inflation. *Id.* § 32(j).

[FN25]. *Id.* § 32(c)(1)(F) (taxpayer identification number requirement for claimants); *id.* § 32(c)(3)(D) (taxpayer identification number requirement for qualifying children); *id.* § 32(m) (treating the taxpayer identification number requirement as being satisfied only by certain Social Security numbers issued by the Social Security Administration).

[FN26]. The EITC is far less significant for those without qualifying children. In 2001, for taxpayers with no qualifying children, the maximum credit was \$364, it begins to phase out, or decrease, when income reaches \$5,950, and it is completely phased out, or eliminated, when income reaches \$10,710. Internal Revenue Service, Earned Income Credit Publication 596 at 46- 47 (2001).

[FN27]. The IRS's authority to refund the excess EITC is found in 26 U.S.C. §§ 6401(a) and 6402(a). 26 U.S.C.S. § 6401(a) (Law. Co-op. 2001) (the excess of refundable credits like the EITC over a taxpayer's tax liability is treated as an overpayment); 26 U.S.C.S. § 6402(a) (Law. Co-op. 2001) (authorizing the Secretary to refund overpayments after applying the overpayment amount to any past tax liability).

[FN28]. In 1986, for example, total EITC expenditures amounted to only \$2.0 billion, compared with approximately \$30 billion in 2001. Payroll Taxes, *supra* note 10; Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-99*, 53 *Nat'l Tax J.* 983, 1005 (2000) (from 1986 through 1996, the EITC grew by 1191%). Increases have been largely attributable to raising credit rates, increasing incremental maximum credits for a second qualifying child, and the 1991 change eliminating the requirement that children be treated as dependents under 26 U.S.C. § 152 in order to be a qualifying child for purposes of the EITC. Prior to 1991, the qualifying

child had to be claimed as a dependent on the taxpayer's tax return, which generally requires the taxpayer to provide more than half of the child's support. 26 U.S.C. § 32 (c)(1) (prior to amendment by P.L. 191-508, Sec. 1111(a)). Treas. Reg. § 1.152-1(a)(2)(i) (1999) (comparing the amount of support furnished by the taxpayer herself with "the entire amount of support which the individual received from all sources"). This prior requirement meant that many mothers receiving public assistance, which is considered support but does not count as support provided by the taxpayer, were unable to treat their children as qualifying children. Bruce D. Meyer & Dan T. Rosenbaum, *Making Single Mothers Work: Recent Tax and Welfare Policy and its Effects*, 53 Nat'l Tax J. 1027, 1032 (2000) [hereinafter Meyer and Rosenbaum, *Making Single Mothers Work*]. This support test was a significant source of taxpayer error among EITC claimants. Yin et al., *supra* note 6, at 271.

[FN29]. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). TANF gives block grants to states, with the states required to move increasing numbers of recipients back into the work force. It also imposes time limitations for the receipt of TANF funds. Joel F. Handler, *The "Third Way" or the Old Way?*, 48 Kan. L. Rev. 765, 786-88 (2000) (describing how TANF's work requirements, in combination with the time limitations, are the means described to "end welfare as we know it.").

[FN30]. See generally Liebman, *supra* note 6. While there have been and continue to be a number of federal transfer programs (e.g., Social Security, Medicaid and food stamps), for many people, welfare was synonymous with AFDC. See A. Mechele Dickerson, *America's Uneasy Relationship With the Working Poor*, 51 Hastings L.J. 17, 21 n.5 (1999) (noting that most critics of welfare principally targeted AFDC); Joel F. Handler, *The Poverty of Welfare Reform 1* (1995) (same).

[FN31]. See Greg J. Duncan & Gretchen Caspary, *Welfare Dynamics and the 1996 Welfare Reform*, 11 Notre Dame J.L. Ethics & Pub. Pol'y 605, 610 (1997) (noting time limits on benefits received); Jennifer M. Mason, *Buying Time for Survivors of Domestic Violence: A Proposal for Implementing an Exception to Welfare Time Limits*, 73 N.Y.U. L. Rev. 621, 631-32 (1998) (same); Sara Rosenbaum & Kathleen A. Maloy, *The Implications of Welfare Reform for Children: The Welfare of Children After Welfare Reform: The Law of Unintended Consequences: The 1996 Personal Responsibility and Work Opportunity Act and its Impact on Medicaid for Families with Children*, 60 Ohio St. L.J. 1443, 1454 (1999) (same).

[FN32]. See Dickerson, *supra* note 30, at 35 (noting decreasing welfare rolls); Families USA Foundation, *Losing Health Insurance: Unintended Consequences of Welfare Reform* (May 1999), at <http://www.familiesusa.org/media/reports/uninten.htm> (noting decreasing number of people on welfare).

[FN33]. See Jason DeParle & Steven A. Holmes, *A War on Poverty Subtly Linked to Race*, N.Y. Times, Dec. 26, 2000, at A1 (noting Clinton's attempt to enact programs to benefit the poor). "Mr. Clinton's contentious drive to 'end welfare as we know it' stands as an embodiment of his broader approach to the problems of poverty and race." *Id.*

[FN34]. Handler, *supra* note 29, at 787.

[FN35]. Ventry, *supra* note 28, at 1008 (“The EITC... assumed new responsibilities thrust upon it by the work-oriented welfare reform consensus.”). Since enactment, other important EITC goals have included offsetting low-income workers’ Social Security taxes, providing income security for low-income workers, redressing the effects of regressive tax proposals, and providing a subsidy to take into account of the needs of raising children. Yin et al., *supra* note 6, at 230.

[FN36]. While the welfare rolls have dropped from 12.24 million in 1996 to 6.28 million in June of 2000, there are other criteria that measure the reform’s success. See Sanford F. Schram & Joe Soss, *Success Stories: Welfare Reform, Policy Discourse, and the Politics of Research*, 577 *Annals Am. Acad. Pol. & Soc. Sci.* 49, 56-75 (2001) (suggesting that the attention paid to the decreasing caseloads obscures other criteria relevant for determining the success of welfare reform including, reducing the poor’s social marginality, building leadership in poor communities, providing aid in a manner equitable across race and gender categories, reducing fraud or incompetence in administration, and instilling responsibility and other values in the poor). But see Kathy Chen, *After Years of Decline, Welfare Rolls Rise In 33 States Amid Persistent Recession*, *Wall St. J.*, Dec. 21, 2001, at A16. While rolls have decreased, research has found that many, especially women of color, have landed in low-paying insecure jobs. Linda Burnham, *Welfare Reform, Family Hardship and Women of Color*, 577 *Annals Am. Acad. Pol. & Soc. Sci.* 38, 40 (2001) (noting that women leaving welfare often face crises relating to housing, child-care and food costs).

[FN37]. Ventry, *supra* note 28, at 1008.

[FN38]. In 1998, almost 11.8% of Hispanics and 7.8% of African Americans who worked full time, and who had families with children were considered to be poor, compared with only 3.9% for white workers. See Sandra Gallardo & Eric Rodriguez, *Hispanic Families and the Earned Income Tax Credit*, NCLR Issue Brief, April 2000, at <http://www.nclr.org/policy/briefs/Issuebriefaprilone.pdf> (last visited July 3, 2001) (citing United States Census Bureau: 1998, *Poverty in the United States, Current Population Reports* (Sept. 1999)).

[FN39]. See *id.* (based on calculations from unpublished data from the U.S. Census Bureau, 1999). Census figures from 2000 indicate that African Americans and Hispanics comprise 12.3% and 12.5%, respectively, of the total United States’ population. United States Census Bureau, Table DP-1, *Profile of General Demographic Characteristics: 2000*, available at <http://www.census.gov/prod/cen2000/dpl/2khoo.pdf> (last visited Aug. 16, 2001).

[FN40]. Meyer and Rosenbaum, Making Single Mothers Work, *supra* note 28, at 1030 (citing U.S. House of Representatives, Green Book (1996)).

[FN41]. United States Census Bureau: Statistical Abstract of the United States: 2000, Table 64, Family Groups with Children Under 18 Years Old by Race and Hispanic Origin: 1980 to 1999, available at <http://www.census.gov/prod/2001pubs/statab/sec01.pdf> (last visited July 24, 2001) (indicating that among white, African American and Hispanic families, one-parent family groups maintained by the family's mother comprised 79%, 90%, and 84% respectively, of all single parent households). For a discussion of the growth in single parent families headed by women, see Eric Schmitt, For First Time, Nuclear Families Drop Below 25% of Households, N.Y. Times, May 15, 2001, at A1.

[FN42]. See generally Meyer and Rosenbaum, Making Single Mothers Work, *supra* note 28 (discussing effect of EITC on single parents). Meyer and Rosenbaum attribute the dramatic growth in the employment of single mothers in the last decade to the work incentive provided by the EITC. See *id.*; Bruce D. Meyer & Dan T. Rosenbaum, Welfare, The Earned Income Tax Credit, and the Labor Supply of Single Mothers, 12-14 (Nat'l Bureau of Econ. Research, Working Paper No. 7363, 1999) (finding large relative increases in the employment of single mothers with two or more children in the years when there was a substantially higher EITC for those taxpayers).

[FN43]. See Center on Budget and Policy Priorities, New Research Findings on the Effects of the Earned Income Tax Credit (March 11, 1998), at <http://www.cbpp.org/311eitic.htm> (noting that the value of the EITC is a significant factor in lifting families out of poverty and increasing the wages of low-income individuals); Center on Budget and Policy Priorities, Strengths of the Safety Net: How the EITC, Social Security, and Other Government Programs Affect Poverty (March 9, 1998), at <http://www.cbpp.org/snd98-rep.htm> (analyzing how EITC has helped lift people out of poverty).

[FN44]. See Council of Economic Advisers, Good News for Low Income Families: Expansions in the Earned Income Tax Credit and the Minimum Wage (Dec. 1998), available at <http://clinton4.nara.gov/media/pdf/eitc.pdf> (noting that “[t]he EITC is one of our most successful programs for fighting poverty and encouraging work.”); Alstott, The EITC and the Limitations of Tax-Based Welfare Reform, *supra* note 6, at 568-69 (suggesting that the EITC's function of income support implicates traditional welfare policy concerns about accuracy, responsiveness and compliance). Alstott notes how increasing the amount of the EITC to a level that exceeded federal payroll taxes and adjusting the EITC according to family size have made its redistributive role more important over time. *Id.* at 569 n.139.

[FN45]. While taxpayers can elect to receive a portion of the EITC in advance, relatively few do. 26 U.S.C.S. § 3507 (Law. Co-op. 2001) (discussing advance payment of earned income credit). In 1998, 216,238 taxpayers, out of the total 12.7 million who received the EITC, received the credit through advance payment; in 1999, only 185,027 out of 19.4 million EITC recipients received the credit through advance payment; most recently, in 2000, only 169,002 out of 19.2 million EITC recipients received the

credit through advance payment. *Federal Taxes*, supra note 10, at 8. For a discussion of advance payment, see Yin et al., supra note 6, at 234-35.

[FN46]. Whether this shift to earnings has improved the fortunes of lower-income families is open to debate. See Randy Albelda, *Fallacies of Welfare-to-Work Policies*, 577 *Annals Am. Acad. Pol. & Soc. Sci.* 66, 67 (2001) (noting that the loss of public assistance often “swamps increases in earnings and tax credits, leaving families with about the same, or even less, income, despite the high levels of employment generated since welfare reform.”); Joel Handler, “Ending Welfare as We Know It”: The Win/Win Spin or The Stench of Victory, 5 *J. Gender Race & Just.* 131, 169 (2001) (noting that the current welfare debate is distorted for its failure to focus on the problems associated with poverty). Anne L. Alstott, *Work v. Freedom: A Liberal Challenge to Employment Subsidies*, 108 *Yale L.J.* 967, 969 (1999) (suggesting that despite the perception of success, the current approach to welfare reform is “fundamentally flawed because it ignores the woeful condition of the low-wage labor market,” including, below-poverty wages, little job security, and wages for women that are lower than their male counterparts).

[FN47]. See generally Lisa Barrow & Leslie McGranahan, *The Effects of the Earned Income Credit on the Seasonality of Household Expenditures*, 53 *Nat’l Tax J.* 1211 (2000) (contrasting the delivery mechanism of the EITC with other “social programs that transfer benefits evenly over the calendar year.”).

[FN48]. *Federal Taxes*, supra note 10, at 9.

[FN49]. Jennifer L. Romich & Thomas Weisner, *How Families View and Use the EITC: Advanced Payment Versus Lump Sum Delivery*, 53 *Nat’l Tax J.* 1245, 1259 (2000) (sampling forty-two families’ perceptions and use of the EITC in Milwaukee).

[FN50]. See Timothy M. Smeeding, Katherin Ross Phillips & Michael O’Connor, *The EITC: Expectation, Knowledge, Use, and Economic and Social Mobility*, 53 *Nat’l Tax J.* 1187, 1195-00 (2000) (noting “three key uses of the EITC to enhance social mobility: moving, paying tuition, or purchasing or repairing a car.”). The mainstream media has reported extensively about the importance of the EITC to taxpayers. See, e.g., Editorial: *Time is Right to Pass State Earned Income Tax Credit*, 23 *Crain’s Chicago Business* 10 (2000) (stating that the money received as a refund from the earned income credit is “used to pay bills, fix or buy cars and keep families afloat.”); Jean Hopfensperger, *Many Happy Returns Prepared at Sabathani*, *Star Tribune* (Minneapolis, MN), Apr. 14, 2000, at 1B (discussing that many people are using their refund money to help pay their bills and to increase their savings).

[FN51]. Transportation is a potentially important obstacle for individuals struggling to move from welfare to work. See Nicole Stelle Garnett, *The Road From Welfare to Work: Informal Transportation and the Urban Poor*, 38 *Harv. J. on Legis.* 173, 224-26 (2001) (noting that welfare recipients often face

shortages of reliable transportation to and from work, and arguing that government restrictions on low-cost jitney services, such as limitations on inflexible and informal service operations, and bans preventing them from operating on streets that serve as public bus thoroughfares, should be eased); Rich Stolz, *Race, Poverty & Transportation*, Poverty & Race Research Action Council, at <http://www.prrac.org/topics/mar00/stolz.htm> (March/April 2000) (stating that access to reliable transportation is a critical barrier to finding and keeping a job).

[FN52]. See, e.g., Sheryl Stratton et al., *EITC Error Rates Up; Review Process Slows Down*, 89 *Tax Notes* 28 (Oct. 2, 2000); Janet Holtzblatt, *Administering Refundable Tax Credits; Lessons from the EITC Experience*, NTA-TIA Proceedings, Proceedings of the Eighty-fourth Annual Conference, 180, 183 (1991).

[FN53]. *Federal Taxes*, supra note 10 (evaluating Internal Revenue Service, *Compliance Estimates for Earned Income Tax Credit Claimed on 1997 Returns* (Sept. 2000) and Internal Revenue Service, *IRS Compliance Study of EITC Filers for Tax Year 1994* (1997)). Even higher error rates were found in the IRS's study of EITC compliance in 1999. See *1999 EITC Compliance Study*, supra note 10.

[FN54]. Liebman, supra note 6. The noncompliance figure for AFDC may be low, as some researchers have found higher evidence of income underreporting among households receiving AFDC benefits. *Id.* at 1166 n.3 (noting that “AFDC quality control audits may not be of the same intensity as IRS audits.”) (citing Kathryn Edin, *There’s a Lot of Month Left at the End of the Money: How Welfare Recipients Make Ends Meet in Chicago* (1993)); Carolyn J. Hill, V. Joseph Hotz, Charles H. Mullins, and John Karl Scholz, *EITC Eligibility, Participation and Compliance Rates for AFDC Households: Evidence from the California Caseload*, Prepared for State of California (April 1999), available at <http://www.econ.ucla.edu/hotz> (last visited Nov. 6, 2002). That there is a higher rate of noncompliance among EITC claimants as compared with other transfer programs is not surprising. *Federal Taxes*, supra note 10 (noting that features of the EITC represent a tradeoff between compliance and other goals, including participation, and that other transfer programs have “staff who review documents and other evidence” while the tax system relies heavily on “self-reported qualifications” that are “difficult for the IRS to verify through its traditional enforcement procedures”).

[FN55]. Liebman, supra note 6, at 1180.

[FN56]. *Id.* at 1166 (“IRS rules regarding filing status and the claiming of children are complicated, and it is possible that many ineligible EITC recipients are making innocent errors in claiming the EITC.”); McCubbin, supra note 10, at 1142 (examining current IRS data and concluding that “it is virtually impossible to distinguish taxpayer confusion from intentional misreporting.”). In connection with the IRS’s 1994 study of EITC noncompliance, IRS examiners concluded that approximately one-half of the tax returns with an erroneous EITC claim and about two-thirds of the total amount claimed were due to intentional errors; however, these “assessments were judgmental and made without any specific criteria”

and thus “considered too imprecise to be included in the IRS’s report.” Federal Taxes, *supra* note 10, at 12.

[FN57]. There are five different filing statuses: married individuals filing joint returns, heads of households, unmarried individuals, married individuals filing separate returns, and surviving spouses. 26 U.S.C.S. § 1(a)-(d) (Law. Co-op. 2001). A taxpayer’s filing status generally affects her tax rate structure and the amount of the applicable standard deduction. *Id.* § 1 (tax rate structure); *id.* § 63(c) (providing the amount of the standard deduction for the various filing statuses).

[FN58]. As discussed below, the IRS is attempting to incorporate this matching element in EITC compliance. See *infra* note 119 (discussing IRS access to the Federal Case Registry of Child Support Orders to match EITC claimants with noncustodial parents). Information reporting by employers and financial institutions is a valuable tool to ensure compliance among individual taxpayers. See General Accounting Office, IRS Audit Rates, GAO-01-484 at 1 (Apr. 25, 2001) (noting information reporting is crucial to ensure compliance).

[FN59]. General Accounting Office, IRS Audit Rates, GAO-01-484 at 1 (Apr. 25, 2001) (noting concern that declining audit rates “could lead to a decline in taxpayers accurately reporting their tax liabilities”). While there has been great attention paid to errors in the EITC program, the EITC’s percentage of the overall tax gap is relatively small. Compared with other compliance issues, the EITC accounts for approximately eight percent of the source of the individual income tax gap, or \$6.2 out of \$73.1 billion. General Accounting Office, Earned Income Credit: Noncompliance Relative to Other Components of the Income Tax Gap, GAO/GGD-97-120R at 3 (June 13, 1997) [hereinafter Earned Income Credit] (looking at figures from 1992). The collection gap and the compliance gap collectively constitute the tax gap. The collection gap is the difference between the amounts due to the IRS that the IRS has identified and the amounts that will ultimately be collected. The compliance gap represents the difference between taxes that should be due and those the IRS identifies, whether through taxpayer self-assessment or assessments generated by IRS examination. General Accounting Office, Report on Composition and Collectibility of Unpaid Assessments to the Subcommittee on Government Management, Information and Technology, Committee on Government Reform and Oversight, GAO/AIMD-99-12 (Oct. 1, 1998) reprinted in 98 Tax Notes Today 231-13, Doc. 98-34853 (Dec. 2, 1998). According to the GAO, underreporting of income by the self-employed accounted for over five times the tax gap associated with the EITC. Earned Income Credit, *supra*, at 1. As self-employed taxpayers also have an opportunity to reflect items of income and deductions that are not necessarily correlated with information submitted to the IRS, one would also expect relatively high levels of noncompliance among this group of taxpayers.

[FN60]. Error rates among taxpayers self-preparing their returns are similar to those using paid preparers, although the error rates among nationally reputable paid preparers, as compared to local or sole practitioners, are lower. Michael O’ Connor, Tax Preparation Services for Lower-Income Filers: A Glass Half Full, or Half Empty?, 90 Tax Notes 231, 239 (2001) (reporting on data from the 1994 IRS’s EITC noncompliance study and noting a 26% error rate for self-prepared returns, a 23.1% error rate

among return preparers in national companies like H & R Block and Jackson Hewitt, and a 30.6% error rate for local or storefront preparers). To address these high error rates, especially among the local preparers, O'Connor advocates tax law simplification, Treasury Department regulation of tax return preparers, and an expansion of federal support to the Volunteer Income Tax Assistance (VITA) return preparation program. *Id.* at 246-49.

[FN61]. Joint Committee on Taxation, *supra* note 5.

[FN62]. See, e.g., Spragens & Abramowitz, *supra* note 4, at 711 (describing how the term “head of household” generates confusion among immigrant taxpayers who may view themselves as the heads of their household in the generic manner rather than as set forth under the technical definition under 26 U.S.C.S. § 2(b) (Law. Co-op. 2001)).

[FN63]. E.g., Statement of Bill Archer, in News from the Committee on Ways & Means (Sept. 22, 2000), reprinted in 2000 Tax Notes Today 186-85 (Sept. 25, 2000) (commenting on the high rate of erroneous EITC claims, Archer, then the Chair of the Ways & Means Committee, stated that:

One in four taxpayer dollars going to error and fraud is unacceptable. There's absolutely no reason why the EITC should be expanded until this terribly costly problem is fixed. Taxpayers should not have to pour money down the sink This is exactly, and unfortunately, what happens when politicians use the tax code as a mechanism for massive social spending programs.[]]

[FN64]. E.g., Letter from Bob Greenstein, Center on Budget and Policy Priorities, to Treasury Secretary Lawrence Summers (Sept. 29, 2000), reprinted in 2000 Tax Notes Today 203-24 (Oct. 19, 2000) (emphasizing the need to support proposals to buttress EITC compliance because they “may make it a bit easier for a Gore Administration to secure ... other EITC improvements”).

[FN65]. 26 U.S.C.S. § 32(k)(1)(B) (Law. Co-op. 2001) (imposing a two-year disallowance period for taxpayers who claim the EITC due to an intentional disregard of rules or regulations, and a ten-year disallowance period for those who fraudulently claim the EITC).

[FN66]. *Id.* § 32 (c)(1)(F).

[FN67]. *Id.* § 6213(g)(2) (Section (M) effective Jan. 1, 2004); Michael I. Saltzman, *IRS Practice and Procedure* § 10.04[1] (2d ed. 1991) (discussing math error procedures). See *infra* note 90 for a discussion of deficiency determinations.

[FN68]. 26 U.S.C.S. § 6695(g) (Law. Co-op. 2001). The due diligence rules require paid preparers to complete Form 8867, Paid Preparers Earned Income Credit Checklist (or a comparable form of their own) and the EIC Worksheet in the Form 1040, 1040A or 1040 EZ Instructions (or a comparable worksheet). Internal Revenue Service, Earned Income Tax Credit 2001 Tax Professional Kit 16-20 (2001), available at <http://www.irs.gov/pub/irs-pdf/P31071ks.pdf> (last visited Nov. 6, 2002). It also requires paid preparers to have no knowledge or reason to know that the information they used was incorrect, and it requires them to ask their clients if the information provided is correct. *Id.* Finally, it requires paid preparers to keep the completed Form 8867 and EIC worksheets (or comparable papers) as well as a record of how and when the information used to determine eligibility was obtained by the preparer (as well as the amount of the credit claimed) for the three years following preparation. *Id.* Failure to follow the due diligence rules may lead to a \$100 penalty for each failure to comply. 26 U.S.C.S. § 6695(g).

[FN69]. See *id.* § 6213 (allowing the IRS to identify noncustodial parents, and match potentially erroneous EITC claims for audit). Recent legislation allows for the IRS to use simplified math error procedures to disallow EITC claims from taxpayers who appear on the Federal Case Registry of Child Support Orders as the noncustodial parent of the qualifying child claimed on the tax return, and thus may not be able to satisfy the residency requirement discussed *supra* note 22. See *id.* (discussed *infra* note 91).

[FN70]. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 § 1085 (1997). See also Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000); Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430 (1999); Treasury, Postal Service, and General Government Appropriations, 1998, Pub. L. No. 105-61, 111 Stat. 1272 (1997). The IRS requested an additional \$149 million for a sixth year of the EITC compliance-related activities. George Guttman, The IRS Budget Wish List for Fiscal 2003, 93 Tax Notes 330 (Oct. 15, 2001). Congress appropriated \$146 million for EIC compliance. Treasury and General Government Appropriations Act 2002, H.R. 2590, 107th Cong. (2001).

[FN71]. In fiscal year 1999, the audit rate on individual returns with incomes over \$100,000 was 1.15%, while taxpayers with incomes under \$25,000 faced an audit rate of 1.36%. This was the first year that lower-income taxpayers faced a higher audit rate than taxpayers with incomes over \$100,000. TRAC, TRAC Release on Audit Rates, 2000 Tax Notes Today 75-13 (Apr. 16, 2000) (discussing audit figures that indicate low-income taxpayers are now more likely to be audited by IRS); TRAC, New Findings on Tax Collection and IRS Criminal Enforcement, TRAC website at <http://www.trac.syr.edu/tracirs/findings/aboutIRS/keyfindings.html> (last visited July 17, 2000) (on file with author) (analyzing decrease in audits among high income taxpayers). During fiscal years 1997 through 1999, the IRS has reduced audit coverage for large corporations by sixty percent, partnerships by forty percent and individuals generally by sixty-two percent. Decreases in general audit rates are attributable to an overall decline in IRS staff, while increases in audits for low-income taxpayers were largely attributable to special Congressional funding for EITC enforcement activities. *Id.* This environment of decreasing IRS compliance activities for all taxpayers except those at the lowest income strata raises fairness concerns, especially when one considers that low-income taxpayers, unlike other

taxpayers, may not be able to respond adequately to IRS compliance efforts. There seems to be an awareness that IRS examination activities may have shifted too far in its focus on low- income taxpayers. See H.R. Rep. No. 107-152, at 33 (2001) (acknowledging that because of document-matching, IRS compliance activity has become uneven among income classes, but noting that the audit among higher-income taxpayers whose returns often reflect income and deductions from sources not subject to document-matching has declined higher than the rate for all individuals).

[FN72]. David Cay Johnston, That Temptation to Cheat has the I.R.S. on Guard, N.Y. Times, Dec. 23, 2001, at Sec. 3, p.10.

[FN73]. General Accounting Office, Information on Selected IRS Tax Enforcement and Collection Efforts, GAO-01-589T, Table 1, (2001) [hereinafter IRS Tax Enforcement].

[FN74]. Department of the Treasury, Final Audit Report --Earned Income Credit was Paid to Taxpayers who did Not Provide Required Documentation During Audits, 2002-40-004 (Oct. 10, 2001). See TRAC Reports, District vs Service Center Audits Fiscal Year 1999, TRAC website, at http://www.trac.syr.edu/tracirs/findings/national/dist_vs_sc99.html (last visited July 17, 2001) (analyzing fiscal year 1999 data and noting that approximately twenty percent of face to face audits involved taxpayers with incomes of less than \$25,000).

[FN75]. 26 U.S.C.S. § 7602(a)(1)-(3) (Law. Co-op. 2001).

[FN76]. See Saltzman, *supra* note 67, at § 8.01.

[FN77]. A deficiency is a term of art in the tax code. For taxpayers who have filed a tax return, it is the amount by which the correct amount of tax exceeds the (1) sum of the tax calculated by the taxpayer, plus previously assessed taxes, over (2) any rebates. 26 U.S.C.S. § 6211(a) (Law. Co-op. 2001). A rebate is so much of an abatement, credit, refund, or other repayment as was made on the ground that the tax imposed was less than the excess of the (1) amount specified in Section 6211(a)(1) over (2) previously made rebates. *Id.* § 6211(b)(2). See Saltzman, *supra* note 67, at § 10.03[1].

[FN78]. 26 C.F.R. § 601.105(d) (2000). If the result of the examination is the IRS's acceptance of the return as filed, it will send the taxpayer a "no-change" letter. *Id.*

[FN79]. Cf. An assessment is the IRS's recording on its computers of a balance due. 26 U.S.C. § 6303 (2001). See Leslie Book, The New Collection Due Process Taxpayer Rights, 86 Tax Notes 1127, 1134 (Feb. 21, 2000) [hereinafter Collection Due Process] (noting that an assessment is critical because it is prerequisite to the IRS's substantial provisional collection powers).

[FN80]. The taxpayer must affirmatively request appeals consideration. 26 C.F.R. § 601.106(a)(1)(iii) (2000). The formality of the request varies depending upon the type of taxpayer, the type of examination and the amount in dispute. *Id.* § 601.106(a)(1)(iii)(a). The Appeals Office is functionally distinct from and is responsible for acting impartially to “determine the correct amount of the tax.” *Id.* § 601.106(f)(1); IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001, 112 Stat. 685 (1998). Courts have generally held that the IRS is not bound to follow its procedural rules, and that a taxpayer does not have a right to receive a thirty-day letter or to have an Appeals Office administrative conference. See generally *United States v. Caceres*, 440 U.S. 741 (1979) (stating that not requiring the suppression of a taxpayer’s incriminating statements recorded by the IRS in violation of its internal rules requiring the Attorney General’s advance authorization for the recording); *Luhring v. Glotzbach*, 304 F.2d 560 (4th Cir. 1962). For a discussion of the issues surrounding the IRS’s powers to vary from its internal procedures, see Saltzman, *supra* note 67, at 1-51 and 2001 supplement S1-32 n.28 (suggesting that to allow the IRS to vary from its rules offering taxpayers an administrative conference is “inconsistent” with Code provisions incorporating Appeals’ hearings as administrative remedies required to be exhausted before being eligible to recover costs in litigation against the IRS). As discussed *infra* note 85, a taxpayer who disagrees with the IRS’s determination may also choose to pay the liability and file a claim for refund and ultimately bring a suit for refund in either federal district court or the Court of Federal Claims.

[FN81]. 26 C.F.R. § 601.106(f)(2) (2000). Taxpayers may meet with an Appeals Officer at a conference where the taxpayer or her representative can discuss evidence and the issues raised in the examination. Proceedings at Appeals are informal. Testimony under oath is not taken, although matters alleged as facts may be required to be submitted in the form of sworn affidavits or declared to be true under penalties of perjury. 26 C.F.R. § 601.106(c).

[FN82]. See 26 U.S.C.S. §§ 6213-6214 (Law. Co-op. 2001). The United States Tax Court (Tax Court) is the successor tribunal to the Board of Tax Appeals (BTA) and the Tax Court of the United States. The BTA was created in 1924 to allow taxpayers a pre-payment forum to consider proposed tax liabilities. Revenue Act of 1924, Pub. L. No. 68-176, § 900(k), 43 Stat. 253 (1926). In 1942, the BTA’s name was changed to the Tax Court of the United States. Revenue Act of 1942, Pub. L. No. 77-753, § 619, § 504, 56 Stat. 798 (1942). In the Tax Reform Act of 1969, Congress afforded Article I judicial status to the Tax Court. Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951, 961, 83 Stat. 571 (1969). Prior to 1969, while performing judicial functions, its status was formally an independent agency within the executive branch. For a complete discussion of the history of the Tax Court. See generally Harold Dubroff, *The United States Tax Court --An Historical Analysis* (1979). In recent years, Congress has expanded the Tax Court’s jurisdiction to review additional IRS adjudications ancillary to deficiency determinations, largely on the basis as to whether the IRS abused its discretion in denying taxpayers relief related to the deficiency determination. See, e.g., 26 U.S.C.S. § 6330 (Law. Co-op. 2001) (providing judicial review of aspects of IRS collection action, including the propriety of collection alternatives); *Id.* § 6404(i) (reviewing IRS decisions with respect to requests to abate interest). For most of the Tax Court’s history, its main function has been to consider the propriety of proposed deficiencies.

See David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. Ill. L. Rev. 17, 22 (1995).

[FN83]. For notices addressed to taxpayers outside the United States, taxpayers are allowed 150 days to respond. 26 U.S.C.S. § 6213(a). A notice of deficiency must be issued within the statute of limitations for assessment. The mailing of the statutory assessment tolls the limitations period on assessment during the time that the IRS is prohibited from assessing, plus sixty days. *Id.* § 6212(a); *id.* § 6213(a).

[FN84]. See *id.* § 6212(a). The IRS is authorized to immediately assess tax liabilities and dispense with the deficiency procedures when the waiting period associated with the typical process could place the collection of taxes at risk. See *id.* § 6851 (providing powers for the IRS to terminate a tax year and assess tax); see *id.* § 6861 (relating to jeopardy assessments of prior year or years' liabilities).

[FN85]. *Id.* § 6213(a). As noted *supra* note 79, formal assessment of tax is a statutory prerequisite to collection action. An alternative to Tax Court review of IRS action is through refund procedures. The taxpayer could pay the proposed deficiency but continue to dispute the liability by filing a claim for refund. If the IRS denies the refund claim, or more than six months elapse without the IRS responding to the claim, the taxpayer can bring a suit for refund in either the federal district court or the Court of Federal Claims. 28 U.S.C.S. § 1346(a)(1) (Law. Co-op. 2001).

[FN86]. 26 U.S.C.S. § 6503 (Law. Co-op. 2001); *id.* § 7481. Section 6501(a) provides generally that the IRS must assess a tax within three years of the date in which the taxpayer filed his return. *Id.* § 6501(a). Section 6501(c) contains exceptions to the general rule (e.g., there is an unlimited statute of limitations on assessment when a taxpayer fails to file a return or files a false or fraudulent return with the intent to evade tax). *Id.* § 6501(c). Section 6501(e) provides a six-year statute of limitation on assessment when a taxpayer omits a substantial (i.e., exceeding twenty-five percent) amount of gross income from her return. *Id.* § 6501(e). Section 6503 suspends the general ten-year statute of limitations on collection for the period during which Section 6213 prohibits assessment. *Id.* § 6503.

[FN87]. 26 C.F.R. § 601.106(d)(3) (2001).

[FN88]. 26 U.S.C.S. § 6213(a) (Law. Co-op. 2001). If the notice is addressed to a taxpayer outside the United States, the ninety-day period is extended to 150 days.

[FN89]. It is often the case that when the IRS selects a return to audit to determine eligibility for EITC, it will also ask for verification of eligibility with other provisions, such as the taxpayer's ability to claim head of household filing status and eligibility to claim children as dependency exemptions. Compliance Study, *supra* note 5.

[FN90]. The general definition of deficiency described supra note 77 with respect to taxpayers claiming the EITC can be summarized by the following formula:

- a) Tax shown less EITC shown on return = tax on return;
- b) Correct tax less correct EITC = tax imposed;
- c) Tax imposed less tax on return = deficiency.

26 U.S.C.S. § 6211(a)-(b) (Law. Co-op. 2001).

[FN91]. See supra note 74. See also TRAC, TRAC Express, at http://www.fedprobe.syr.edu/index/aud_express_index.html (last visited Aug. 16, 2001) (of the approximately 307,000 taxpayers with incomes of less than \$25,000 audited in FY 2000, approximately 240,000 faced Service Center correspondence audits). As mentioned in supra note 69, a significant amount of IRS EITC compliance activity occurs under the aegis of the so-called math error provisions, which are not subject to the deficiency procedures described briefly above. 26 U.S.C.S. § 6213(b)(2)(A). Instead, when the IRS determines that the taxpayer has claimed all or part of the EITC erroneously because of a “math error,” it makes a summary assessment in respect of the incorrectly claimed credit. The general deficiency procedures and restrictions on assessment and collection do not apply to mathematical and clerical errors. Following the assessment, the IRS notifies the taxpayer in writing of the math error assessment. The math error notice explains that the taxpayer has sixty days to request an abatement. The Service’s math error authority includes several situations involving the EITC, and has recently again been expanded to include additional situations involving the EITC. *Id.* § 6213(g)(2)(F) & (L) (failure for the return to include the taxpayer or qualifying child’s social security number); *id.* § 6213(g)(2)(G) (when the taxpayer claims an EIC with respect to self-employed earnings when the taxpayer has failed to pay the self-employment tax due on the earnings); *id.* § 6213(g)(2)(K) (failure to include recertification forms for taxpayers previously denied the EITC). Effective January 1, 2004, math error procedures will also apply for taxpayers who appear on the Federal Case Registry of Child Support Orders as noncustodial parents with respect to qualifying children. *Id.* § 6213(g)(2)(L) (added by Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107- 16, § 303(g), 115 Stat. 38 (2001)). Under the statutory scheme applicable to math error assessments, if a taxpayer requests an abatement within sixty days, the IRS is forced to follow the deficiency procedures described above. While the statute is silent on the means in which a taxpayer makes an abatement request, the IRS has been liberal in terms of how a taxpayer may make the request and the manner in which the request is made. Office of Chief Counsel, Internal Revenue Serv., Requests for Abatement on Math Error Assessments, S.C.A. 1998-040 (Apr. 2, 1998) (discussing how the statute is silent in terms of how taxpayer requests for abatement need to be “filed” and concluding that oral requests for abatement are sufficient and consistent with Congress’ policy objectives of convenience and efficiency in respect of the math error procedures).

[FN92]. When the IRS determination is made before the taxpayer receives the benefit of the credited or refunded EITC, the matter is often referred to as a refund freeze. The following example, adopted from an IRS Chief Counsel advisory opinion, illustrates the application of the deficiency procedures (Office of Chief Counsel, Internal Revenue Serv., Whether to Issue a Notice of Deficiency for Disallowance of Earned Income Credit, S.C.A. 1997-002 (May 21, 1997)):

The taxpayer timely files a Form 1040, U.S. Individual Income Tax Return, setting out the following information:

Tax	--0--
Earned Income Credit	\$1,000
Refund	\$1,000

Assume that after a correspondence examination and prior to the IRS issuing the refund, the IRS determined that the taxpayer was not entitled to any EITC. Here, there would be a deficiency, as determined by reference to the above formula:

- a) Tax shown (\$0) less EITC credit shown (\$1000) = tax on return (-\$1000);
- b) Correct tax (\$0) less correct EITC (\$0) = tax imposed (\$0);
- c) Tax imposed (\$0) less tax on return (-\$1000) = deficiency (\$1000).

In this instance, there is a deficiency of \$1000; i.e., $(\$0 - (-\$1000)) = +\$1000$. Thus, the IRS cannot indefinitely freeze the taxpayer's refund without issuing a notice of deficiency allowing the taxpayer to attempt to redetermine the deficiency by proving eligibility to some or all of the EITC. The IRS has increasingly relied on refund freeze type activity to ensure that compliance efforts are undertaken before it issues refunds. See Stratton et al., supra note 52, at 30 (reporting that the IRS increasingly is relying on examinations prior to the release of the EITC-generated refund). In this situation, following six months after the filing of the tax return with the frozen refund, as an alternative to Tax Court litigation, a taxpayer is entitled to bring a refund suit in federal district court or the Court of Federal Claims, as the initial tax return is treated as a claim for refund. See supra note 85 (discussing refund procedures). For a discussion of the implications of statutes of limitations on refund suits as applied to disallowed EITCs see Office of Chief Counsel, Internal Revenue Serv., Disallowance of Earned Income Tax Credit, S.C.A. 2002-02069 (Nov. 30, 2001), which concluded that when an EITC is disallowed in whole or in part following the issuance of a notice of deficiency, the IRS may not issue a formal notice of claim disallowance, giving rise to the possibility that the period of limitations for filing a refund suit remains open indefinitely.

[FN93]. Consider the same facts as the previous example, supra note 92, except that the IRS has already refunded the taxpayer the \$1,000 EITC claimed on the return and then disallows the EITC following a correspondence audit. As in the above example, there would be a deficiency of \$1,000, triggering the deficiency procedures described above. Office of Chief Counsel, Internal Revenue Serv., Whether to Issue a Notice of Deficiency for Disallowance of Earned Income Credit, S.C.A. 1997-002 (May 21, 1997). In examinations where the IRS attempts to recover an amount in respect of erroneously credited or paid EITC, a taxpayer's access to Tax Court review is equivalent to the refund freeze EITC cases, that is, following the issuance of a notice of deficiency, she can petition the Tax Court for a redetermination; however, these cases result in a different path for taxpayers wishing to challenge these EITC determinations in federal district court or the Court of Federal Claims. Unless the taxpayer filed a separate refund claim and paid the \$1,000, she would not be able to bring a refund suit in federal district court or the Court of Federal Claims. See generally *Flora v. United States*, 362 U.S. 145 (1960) (holding that courts lack jurisdiction to hear refund suits unless the outstanding assessment is paid in full and the taxpayer has filed a timely refund claim with the IRS), *aff'd on reh'g* 357 U.S. 63 (1958).

[FN94]. When the IRS examination disallows part or all of a claimed EITC, the adjustment will result in a deficiency. 26 U.S.C.S. § 6211(b)(4). This was clarified in Section 1015(r)(2) of the Technical and Miscellaneous Revenue Act of 1988 (“Tax Court deficiency procedures apply to [the EITC] notwithstanding that the credits reduce the net tax to less than zero.”). H.R. Rep. No. 100-795 (1988); Office of Chief Counsel, Internal Revenue Serv., Disallowance of Earned Income Tax Credit, S.C.A. 2002-02069 (Nov. 30, 2001).

[FN95]. Sheryl Stratton, EITC Program Manager Explains Administrative Appeals Process, 93 Tax Notes 1260, 1261 (Dec. 3, 2001). For a simplified overview of the EITC correspondence audit process, see Appendix.

[FN96]. *Id.* at 1261. Among practitioners, there have been allegations that the IRS has not been responding to EITC taxpayers requesting to have a hearing before Appeals and prior to the issuance of a statutory notice of deficiency. Sheryl Stratton, IRS Not Giving All EITC Recipients Administrative Appeal Rights, 93 Tax Notes 1032, 1032 (Nov. 19, 2001).

[FN97]. See 26 U.S.C.S. § 7463 (Law. Co-op. 2001) (generally providing a \$50,000 per tax year cap on the amount in issue). Tax Court rules in small tax cases (known generally as S cases) simplify the process by easing pleading requirements and ensuring that cases will be conducted informally, including by relaxing formal evidentiary rules and foregoing either pre-trial memos or post-trial briefs. Tax Ct. R. Prac. And Proc. 180-82 (2001). While Tax Court matters are generally reviewable by federal circuit courts, S cases are not reviewable and also may not be cited as precedent for any other case. 26 U.S.C. § 7463(b).

[FN98]. See 26 U.S.C. § 7463 (describing IRS small case procedures); William C. Whitford, The Small-Case Procedure of the United States Tax Court: A Small Claims Court That Works, 4 Am. B. Found. Res. J. 797 (1984).

[FN99]. Sheryl Stratton, Tax Court Prepares for Collection Due Process Actions, 1999 Tax Notes Today 45-11 (Mar. 9, 1999). I believe that this figure is far lower for lower-income taxpayers.

[FN100]. In just over ten years, there have been three major pieces of legislation designed to improve taxpayers’ procedural protections and restore confidence in the American tax system, including 1998’s IRS Restructuring and Reform Act (RRA), which ushered in the most significant changes to the IRS’s organizational structure in over fifty years. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988) (Taxpayer Bill of Rights 1). The RRA is a watershed legislation in terms of its effect on the IRS’s structure and taxpayer rights. See Joseph J. Thorndike, Reforming the Internal Revenue Service: A Comparative History, 53 Admin. L. Rev. 717, 718 (2001) (identifying the 1998 tax reform

movement as resulting in the first significant reconstruction of the agency structure since 1954).

There is an emerging scholarly interest in the effectiveness of the legislation, and the root causes for this spike in legislative concern. See Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of Proof Rules*, 84 *Iowa L. Rev.* 413, 446 (1999) (noting “growing dissatisfaction with the IRS and the Code it administers” creating need for new legislation); Steve R. Johnson, *Unfinished Business on the Taxpayer Rights Agenda: Achieving Fairness in Transferee Liability Cases*, 19 *Va. Tax Rev.* 403, 404 (2000) (“The taxpayer rights movement has been a driving force of tax legislation and administration for over a decade.”); Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 *Tax Notes* 1133, 1133 (May 22, 2000) (“The very fact that Congress has enacted so many [taxpayer] bills of rights within a relatively short period raises questions about their effectiveness.”). Scholarly attention has not generally been given to how restructuring will affect low-income taxpayers. One exception is the work of Janet Spragens and Nancy Abramowitz. See generally Spragens & Abramowitz, *supra* note 4, at 701 (concluding that the reorganization’s emphasis on responsiveness and customer satisfaction holds the potential for significantly benefiting low-income taxpayers but that “additional attention is required to address the unique needs of this group”).

[FN101]. See Saltzman, *supra* note 67, at § § 1.02[4]-[6]. Regional offices were responsible for the management and coordination of the individual district offices and service centers, while sixty-three district offices, which carried out the compliance function of the IRS, were divided into several divisions. *Id.* Each district office had a separate Examination, Collection, Criminal Investigation, and Taxpayer Service Division, with certain district offices also having an Employee Plan and Exempt Organizations Division. The ten service centers, which were responsible for all of the geographic units and were accountable to the regional offices, were responsible for the mass processing of tax returns as well as performing mathematical verification of returns. *Id.*

[FN102]. See, e.g., Testimony of Ex-IRS Official Strauss at Finance Investigative Hearing on IRS, 97 *Tax Notes Today* 186-62 (Sept. 24, 1997); Unofficial Transcript of Senate Finance Committee Hearing on IRS Abuses, 97 *Tax Notes Today* 190-27 (Sept. 24, 1997). See also John M. Broder, *Director of IRS Issues an Apology*, *N.Y. Times*, Sept. 26, 1997 at A1; David Cay Johnston, *IRS Rewards Workers Who Told of Abuses*, *N.Y. Times*, Nov. 11, 1999, at A25; David Cay Johnston, *On Tax Day, IRS Prepared to Fire Star Whistle-Blower*, *N.Y. Times*, Apr. 17, 1999, at A1.

[FN103]. *IRS Restructuring and Reform Act of 1998* § 1001(a)(3) (establishing new organization of IRS based on “organizational units serving particular groups of taxpayers with similar needs”).

[FN104]. S. Rep. No. 105-174 (1998).

[FN105]. 26 U.S.C.S. § 6330 (Law. Co-op. 2001) (notice and hearing rights prior to proposed levy or seizures); *id.* § 6320 (notice and hearing rights following the filing of a notice of federal tax lien). For a description and analysis of the collection due process (CDP) provisions see *Collection Due Process*, *supra* note 79, at 1135-51. If a taxpayer neglects to pay an amount due following the IRS demand for

payment, a statutory lien on a person's property or rights to property arises in favor of the United States. 26 U.S.C.S. § 6321. To protect its interest against certain third parties, the United States may file notice of this federal tax lien. *Id.* § 6323. With additional notice, the IRS may also exercise its provisional administrative levy powers to collect unpaid tax assessments. *Id.* § 6331. The RRA's collection due process procedures provide additional notice and hearing rights to taxpayers following the IRS's filing of a notice of federal tax lien and prior to the exercise of the IRS's provisional levy powers.

[FN106]. 26 U.S.C.S. § 7122 authorizes the IRS to compromise tax liabilities. Prior to the RRA, if there was no doubt as to liability, and if the taxpayer had sufficient assets or income to pay a tax liability, the IRS would not compromise a liability. See 38 Op. Att'y Gen. 98, 99 (1934) (concluding that there was no authority to compromise a liability "merely appealing from the standpoint of equity..."). In the RRA, Congress directed the IRS to consider other factors apart from collectibility, and that the IRS should consider "equity, hardship, and public policy where a compromise of the ... liability would promote effective tax administration." H.R. Conf. Rep. 105-599, at 289 (1998). Following the RRA, the Treasury Department promulgated temporary regulations authorizing the IRS to compromise a liability where there is no doubt as to liability or collectibility, but where (1) collecting the liability would create economic hardship or (2) exceptional circumstances exist such that collecting the liability would be detrimental to voluntary compliance. 26 C.F.R. § 301(b)(3)(i)-(b)(3)(ii) (2001). Final regulations have recently been issued. T.D. 9007 (July 23, 2002). The final regulations provide additional guidance on these latter type of offers in compromise. For a discussion of some of the significant challenges the IRS faces in administering this new provision, see William Stevenson, *The OIC Program: Is This Effective Tax Administration?*, 93 Tax Notes 1495 (Dec. 10, 2001) (arguing that the IRS improperly views the compromise program as a compliance tool when it should treat taxpayer offers in compromise as a potential revenue enhancement program).

[FN107]. See 26 U.S.C.S. § 6015 (providing relief from joint and several liability on joint returns). For a discussion of some of the challenges the IRS faces in administering the new provisions, see Toni Robinson and Mary Ferrari, *The New Innocent Spouse Provision: 'Reason and Law Walking Hand in Hand'*, 98 Tax Notes Today 158-60 (Aug. 17, 1998) (noting technical and practical problems with the provisions, including complexity and how the provisions still fail to provide relief to some deserving taxpayers); Sheryl Stratton, *Innocent Spouse Issues Plague Practitioners, IRS, and Courts*, 2000 Tax Notes Today 115-4 (June 14, 2000) (noting that the number of claims and resulting delays in processing those claims have contributed to the provisions becoming "something of an administrative nightmare."). For another theoretical critical view on the innocent spouse provisions, see Kari Smoker, *Internal Revenue Service Restructuring and Reform Act of 1998: Expanded Relief for Innocent Spouses-at What Cost? A Feminist Perspective*, 60 Ohio St. L.J. 2045, 2087-88 (1999) (criticizing the new provisions because relief often hinges on the victimization of women and arguing instead for a repeal of joint and several liability).

[FN108]. General Accounting Office, *IRS Management: Formidable Challenges Confront IRS as It Attempts to Modernize*, T-GGD/AIMD-99-255 at 2 (July 22, 1999) (discussing challenges facing the IRS in its efforts to modernize); Charles O. Rossotti, *Hearing on the I.R.S. Restructuring and Reform Act, Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means*

(July 22, 1999) (noting “enormous strain on IRS’s resources” due to radical changes implemented pursuant to the RRA).

[FN109]. There have been reports, for example, of significant delays for the IRS in processing and administering requests for both offers in compromise and innocent spouse relief. See IRS Tax Enforcement, *supra* note 73, at 2 (noting that both programs have experienced additional demands since the RRA and that there are “concerns about the time taken to process cases”). The IRS has made significant improvements in its administration of the innocent spouse provisions. General Accounting Office, *The IRS’s Innocent Spouse Program Performance Improved; Balanced Performance Measures Needed*, GAO-02-558 at 2 (Apr. 2002).

[FN110]. To reflect the IRS’s change in emphasis on customer service, as of September 24, 1998, the IRS’s new mission statement is: “provide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.” Emmy Kondo, *Your New Best Friends?: The IRS Tries to Turn Over a New Leaf*, ABCNEWS.com, at <http://abcnews.go.com/sections/business/taxes99/taxreforms.html> (last visited Nov. 10, 2002). Previously, the Service’s mission statement emphasized the collection of revenue: “The purpose of the Internal Revenue Service is to collect the proper amount of tax revenue at the least cost, serve the public by continually improving the quality of our products and services, and perform in a manner warranting the highest degree of public confidence in our integrity, efficiency and fairness.” *Id.* There has been some concern, both among policy makers and in the mainstream media, that the IRS’s compliance efforts following the RRA have become dangerously low. Joint Committee on Taxation, *Study of the Overall State of the Federal Tax System, and Recommendations for Simplification Pursuant to Section 8022(3)(B) of the Federal Tax System*, JCS-3-01 (Apr. 2001) (noting that the decrease in IRS enforcement activities following the RRA has raised questions about tax compliance and fairness among those taxpayers complying with the law); Editorial: *IRS Audit Rate Plummets*, SmartPros (Feb. 22, 2001) at <http://www.accounting.smartpros.com/x29449.xml> (noting “As a result of both the decline in staff and the need to develop and implement procedures to comply with the new taxpayer rights provisions, enforcement actions have dropped precipitously since the enactment of RRA ‘98.”).

[FN111]. See General Accounting Office, *IRS Restructuring Act: Implementation Under Way But Agency Modernization Important to Success*, GAO/T- GGD-00-53 at 5 (2000) [hereinafter *IRS Restructuring Act*]; Preliminary IRS Modernization Conference Transcript: ‘Ask the IRS’s, 2000 Tax Notes Today 24- 69 (Feb. 4, 2000).

[FN112]. See *supra* note 74; Spragens & Abramowitz, *supra* note 4, at 712. For larger corporate taxpayers, IRS employees charged with examining those corporations often spend extended periods of time at the taxpayer’s place of business, while other corporate taxpayers have employees or representatives examinations at IRS offices. Robert E. Meldman & Richard A. Petrie, *Federal Taxation Practice and Procedure* 55-60 (4th ed. 1992) (discussing office and field audits). Because some determinations of EITC eligibility, especially in respect of the residency requirement, turn on personal information not necessarily reduced to documentation, and because of some of the difficulties with the

EITC audit process described above in Part II.B.2.b, requiring IRS employees to visit or meet with audited taxpayers claiming the EITC would likely produce more accurate outcomes than a pure correspondence-based audit process. It would also, however, be much more costly to administer. With any class of adjudications affecting individual taxpayers, there is a tension between efficiency and the accuracy of decisions. See Alexander, *supra* note 13, at 22-25 (noting that because decision makers are not infallible, society must consider the amount of resources it wishes to expend on procedures in furtherance of reducing the risk of an erroneous determination). With respect to low-income taxpayers, the type and extent of procedures employed to determine eligibility at the examination level are affected by the relatively small amount often at stake (e.g., an examination focusing on EITC issues may only be worth up to approximately \$4,000, the maximum amount of the credit), the large numbers of taxpayers subject to examination, and the ability, in theory, for those taxpayers to obtain additional administrative and ultimate judicial review of IRS EITC determinations. On the other hand, the importance of the EITC to the families claiming it and the likelihood that additional protections would produce more accurate determinations augurs for more extensive initial procedures. This balancing of interests is consistent with Supreme Court Fifth Amendment procedural due process jurisprudence, which, in determining on a case-by-case basis the minimum procedural safeguards required by due process considers the government's cost in applying additional procedures, the likely risk of an erroneous determination on the basis of current practice, and the importance of the individual interest at stake. See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[FN113]. See generally Caitlin Garvey, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology*, 25 U. Dayton L. Rev. 133 (1999) (discussing rapid changes in corporate America due to expanding technology); Nancy J. Jensen, *The Technically Skilled Worker and the Corporation: Dagwood, Dilbert and Beyond*, 31 U. Rich. L. Rev. 1497 (1997) (same); Robert J. Samuelson, *Reinventing Corporate America*, *Newsweek*, July 4, 1994, at 53 (same).

[FN114]. For example, the nature of an adjudication under section 6672, relating to whether a "responsible person" should be held personally liable for non-payment of an entity's trust fund taxes, may turn on witness credibility regarding control and authority over a corporation's funds, rather than just documents or information gathered in an examination or attached to a tax return, and suggests that there is a great chance of an erroneous IRS determination without an adequate hearing prior to an assessment. See James B. Sowell et al., *A Roadmap for Employment Tax Audits*, 96 *Tax Notes Today* 99-84 (May 20, 1996).

[FN115]. A similar justification has been used to justify dispensing requiring a preseizure notice or hearing under the Fifth Amendment Procedural Due Process Clause. See generally *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (upholding Louisiana sequestration provision allowing lienholder to have household goods sequestered without prior notice or hearing). *Mitchell* indicated that the nature of the issues at stake, i.e., the existence of the buyer's debt and the buyer's delinquency, minimized the chances of an erroneous deprivation even if there was no opportunity for a hearing prior to the sequestration, because those issues lent themselves to documentary proof. *Id.* at 606.

[FN116]. See 26 U.S.C.S. § 6015(f) (Law. Co-op. 2001) (providing that IRS may relieve taxpayer of all or part of a joint and several liability when considering circumstances, it would be unfair to hold her liable). See I.R.S. Rev. Proc. 2000-15 (with respect to tax returns filed with an underpayment of tax, stating that at the time the tax return was signed, whether the requesting spouse believed that her spouse was going to pay the tax liability is the most important factor in the test for so-called equitable relief under 26 U.S.C.S. § 6015(f)). Notwithstanding this difficulty, the IRS has essentially implemented a correspondence-based adjudicatory process for most innocent spouse determinations, including those cases where taxpayers are victims of domestic abuse. See General Accounting Office, IRS's Innocent Spouse Program Performance Improved, Balanced Performance Measures Needed, GAO- 02-558 at 25 (Apr. 2002) (providing information on the centralized site processing IRS innocent spouse requests).

[FN117]. For a discussion of the challenges that different abused women face in the context of the legal system, see Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1247-49 (1991) (describing how among immigrant communities establishing spousal abuse to qualify for a waiver under immigration law is difficult because of limited access to resources, cultural barriers, language barriers, and continued fear of spousal violence).

[FN118]. See Gene Steuerle, The IRS Cannot Control the New Subterranean Economy, 59 Tax Notes 1839 (June 23, 1993) (noting that the IRS has not been able to enforce the laws for those taxpayers who are self-employed, and that the perverse incentive of overstating income is a significant compliance problem with the EITC). While somewhat more obscure, similar issues arise with taxpayers failing to include all investment income. See 26 U.S.C.S. § 32(i) (Law. Co-op. 2001) (denial of EITC for taxpayers with excess investment income).

[FN119]. The GAO has acknowledged the difficulty establishing with certainty whether a child resides with a taxpayer for the requisite period. General Accounting Office, Opportunities to Make Recertification Program Less Confusing and More Consistent, GAO-02-449 at 14 (Apr. 2002) [hereinafter Recertification Program]; Federal Taxes, *supra* note 10, at 11-12. This is particularly difficult to establish for children not yet old enough for school or in a formal day care program. To establish residency, the IRS typically asks for (1) school records or a statement from a school official on school letterhead indicating the child's name, address, dates of care, the parent or guardian's name and address, and the name and taxpayer identification number of the childcare provider; (2) a statement on company letterhead or a notarized statement from a child care provider indicating the child's name, address, dates of attendance and the parent or guardian's name and address; or (3) medical records or an administrative statement from a health care provider containing the child's name, address, dates of medical care during the tax year, and the parent or guardian's name and address. I.R.S. Form 886-H (Mar. 2000). As discussed below, many low income taxpayers do not have regular or steady child care, see *infra* note 219. An IRS auditor assigned to a correspondence-based EITC examination does not accept either a taxpayer or third party's verbal information as proof of residence, so even when a taxpayer is able to speak with the auditor via telephone to discuss the matter, absent documentation, the IRS is unwilling to concede that the taxpayer has proved that the child or children reside with the taxpayer. Implementation of the Remote Examination Toll-Free Telephone Program is Ongoing, at

<http://www.ustreas.gov/tigta/2002reports/200240034fr.html>, Treasury Inspector General for Tax Administration (TIGTA) (Dec. 2001) [hereinafter TIGTA]. As mentioned supra note 69, the IRS is now being given some tools to use information- matching to help with its EITC compliance activities. Beginning with the Taxpayer Relief Act of 1997, Congress gave the IRS access to the Department of Health and Human Services' Federal Case Registry of Child Support Orders. See TRA '97, supra note 70; Federal Taxes, supra note 10, at 13. Access to this database allows the IRS to view information regarding child support payments, a process that can help identify erroneous EITC claims by noncustodial parents, but one which is dependent upon the accuracy of the HHS's database. See id.

[FN120]. Telephone interview with Candice Cromling, IRS National Office EITC Coordinator (Feb. 9, 2001).

[FN121]. Id.

[FN122]. McCubbin, supra note 10, at 1161 n.57 (suggesting that this “may be particularly true of the EITC claims that were denied after taxpayers failed to respond to IRS requests for additional information.”).

[FN123]. Sheryl Stratton et al., EITC Error Rates Up; Review Process Slows Down, 89 Tax Notes 28, 30 (Oct. 2000).

[FN124]. As mentioned in supra note 42 and accompanying text, proper receipt of the EITC is an essential component of welfare reform, notably by making low- wage work more desirable and decreasing poverty. See Ventry, supra note 28.

[FN125]. See Rogers & Weil, supra note 18, at 396 (noting that there are “psychological rewards for people receiving subsidies through filing taxes rather than taking time off to go to a welfare office to determine their eligibility”).

[FN126]. Depression among the poor often can also contribute to inaction in the face of adversity. See Andrew Solomon, Case Study: The Depressed Poor; Location: Washington D.C.; A Cure for Poverty, N.Y. Times, May 6, 2001, § 6 at 112 (noting that depression is usually the consequence of genetic vulnerability activated by external stress, and that among the poor the traumas are often terrible and frequent so checking for depression among lower-income classes is “like checking for emphysema among coal miners”). The effect of depression among those, like the poor, who view themselves as helpless can lead to particularly acute problems. See id. The depressed poor view themselves as supremely helpless, leading often to their failing to seek or embrace support. See id.

[FN127]. See *supra* notes 77-80.

[FN128]. As with other courts, the Tax Court does have procedures whereby indigent individuals can request that the Court waive the filing fee. Tax Ct. R. Prac. And Proc. 20(b).

[FN129]. Among taxpayers audited for EITC eligibility, a common response is frustration. In one meeting with a client of the Villanova Federal Tax Clinic who recently left the welfare rolls to take a low-wage job as a security guard at a Philadelphia hotel, the taxpayer summed up her feelings as follows: “I’m doing what I’m supposed to be doing, and now why is the IRS on my back?” See Dickerson, *supra* note 30, at 32 (noting that the 1996 welfare reform measures reflected the societal belief that able-bodied people should work and that government should not reward those unwilling to leave their homes to earn wages).

[FN130]. News Release from the House Committee on Ways & Means (Apr. 14, 2000), reprinted in 2000 Tax Notes Today 74-66 (Apr. 17, 2000).

[FN131]. Even the IRS’s issuance of a rebate check can draw scrutiny. See Editorial, The IRS’s Campaign Letter, The Hartford Courant, July 6, 2001 at A14 (noting that the IRS is wasting \$20 to \$30 million sending letters regarding 2001 tax rebates); Editorial, IRS Letter: It’s Not Just Shameless Self-Promotion, Newsday, June 22, 2001 at A44 (noting “[t]he [rebate] letters are blatantly political.”); Gail Collins, Editorial, Public Interests; You’ve Got Mail, N.Y. Times, June 22, 2001, at A21 (noting that the IRS letter announcing the rebate contains a “plug for President Bush”).

[FN132]. Taxpayers who are without a fixed address raise significant challenges. It is sometimes even difficult for me and my students, who are likely dealing with far fewer people than an IRS employee working EITC correspondence audits, to keep track of clients’ whereabouts. Many times correspondence in my Tax Clinic gets returned, and we will make the extra effort to track down the client, e.g., by calling her place of work or contacting third parties if given advance consent. Even with many lower income taxpayers having access to cell phones not tied to a physical location, it is often unlikely that the IRS examiner would independently contact by telephone the taxpayer or third-parties if the taxpayer initially did not respond or failed to respond to subsequent correspondence. See TIGTA, *supra* note 119 (noting many instances when the IRS examiners fail to attempt to phone the taxpayers to discuss information needed on an examination, even when the taxpayers provide their phone numbers to the IRS).

[FN133]. This problem may be alleviated by a new licensing agreement between the IRS and the U.S. Post Office providing that taxpayers who move after filing their tax returns will automatically have their addresses updated, even if they fail to fill out a change of address form. See Treas. Reg. § 301.6212-2(b)(2)(i) (2001) (giving the IRS access to the Post Office’s National Change of Address database). Taxpayers may submit a Form 8822 (Change of Address) to the IRS any time they move, but this new

agreement provides a safety net for taxpayers who fail to notify the IRS. Starting in January 2001, the IRS is using the post office's National Change of Address database in order to perform regular updates of its master tax files. The IRS receives a weekly as well as an annual update from the post office which it cross checks against its master tax files; if there is a match, the IRS will compare the address and make any necessary changes to its tax files. Kay Bell, New IRS Addresses Could Slow Your Refund if You're Not Careful, Bankrate.com at <http://www.bankrate.com/ndaq/itax/news/20010212a.asp> (posted Feb. 12, 2001) (describing mechanics of agreement between the IRS and the Postal Service).

[FN134]. See Hearing on "Housing and Community Development Needs: The FY 2003 HUD Budget", 2001 WL 26187967 (Nov. 29, 2001) (statement of F. Barton Harvey, Chairman and Chief Executive Officer, The Enterprise Foundation) ("The 1999 American Housing Survey reveals an absolute shortage of 2.8 million rental apartments affordable to extremely low-income people. And the problem is worsening rapidly. The number of apartments affordable to extremely low-income renters dropped by 750,000 nationwide between 1997 and 1999 alone, according to HUD."). See also Bronislaus B. Kush, The New Homeless: Lack of Available Housing is Behind the Recent Rise, Sunday Telegram (Worcester, Mass.), Jan. 6, 2002, at A1 (attributing rise in homelessness to nationwide housing shortage); Jennifer Loven, Working Poor Find Scarcity of Housing, Philadelphia Inquirer, Dec. 24, 2001, at A3 (discussing lack of affordable housing for low-income individuals); Jenny Freidman, No Place Like Home, Minneapolis-St.Paul Magazine, Sept. 1, 2001 at 64 (same); Eric Pera, More Women, Children Swell Ranks of Homeless in Polk; Lakeland's Homeless, The Ledger (Lakeland, Fla.), Jan. 6, 2002 at A1 (discussing shortage of affordable housing and shelters).

[FN135]. See Pera, supra note 134, at A1 (discussing shortage of affordable housing and shelters and describing growing transient population spending short periods of time in cars or vans in between staying in cheap motels); see also Department of Housing and Urban Development, Housing Study Shows Record 5.3 Million Households--Including Growing Numbers of Working Poor--Need Housing Assistance, HUD Press Release, Apr. 28, 1998 available at <http://www.hud.gov/library/bookshelf18/pressrel/pr98-178.html> (last visited July 26, 2001); Department of Housing and Urban Development, Rental Housing Assistance-- The Crisis Continues: The 1997 Report to Congress on Worst Case Housing Needs, at <http://www.huduser.org/publications/affhsg/rental3.html> (content updated July 11, 2002).

[FN136]. Elizabeth Lo, Housing Shortage Keeps Rent Prices High, The Star Ledger (Newark, N.J.) (Aug. 22, 2001) (discussing how many landlords have opted out of federally-subsidized housing programs because of the availability of higher rents in the private sector, and that the Census Bureau figures indicate that over the last five years, multi-family housing prices outpaced inflation by three to five percent).

[FN137]. See Lauren Terrazzano, Childhood on Hold; In a Tight Spot; Homeless Kids Struggle to Maintain Normalcy in Motels, Newsday, June 18, 2001 at A7 (discussing growing need to turn to motels for short-term housing, as shelters are increasingly full).

[FN138]. See Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* 25-29, 138-41, 169-75 (2001) (containing vivid examples of the housing crisis among working poor). Journalist Ehrenreich describes the difficulties meeting expenses with her income from various low-paying jobs that are typical employment destinations for the working-poor taxpayer, such as waitressing and housecleaning. The inability to find affordable housing and the inability to raise the large sums needed for security deposits at traditional rental properties contributed to the increased demand in temporary stays in motels, visits at friends and even short-term lodging in cars parked at Wal-Mart parking lots. See Terrazzano, *supra* note 137, at A7 (noting safety concerns because many motels are not meeting fire code and are often located far from schools, families, and friends).

[FN139]. Stratton, *supra* note 123, at 31 (noting that EITC correspondence examinations can take 240 days to complete).

[FN140]. For a complete discussion of the problems associated with demonstrating a child's residency requirement, see *supra* note 119.

[FN141]. TIGTA, *supra* note 119.

[FN142]. See *supra* note 50.

[FN143]. See IRS Tax Enforcement, *supra* note 73, at 5 (noting almost exclusive use of correspondence audits for EITC examinations).

[FN144]. See O'Connor, *supra* note 60, at 233-35 (suggesting that literacy problems among low-income taxpayers contribute to an increasing demand for paid tax preparation services); see also Nat'l Institute for Literacy, *The State of Literacy in America* 1-5 (1998) (analyzing results from National Adult Literacy Survey); Roberts Rehner Iversen et al., *How Much Do We Count? Interpretation and Error-Making in the Decennial Census*, 36 *Demography* 121 (1999) (analyzing results from 1990 census); Nat'l Center for Educ. Statistics, U.S. Dept. of Educ., *The National Adult Literacy Survey: An Overview* 3-9 (2001), http://nces.ed.gov/pubs2001/2001457_1.pdf (last visited June 27, 2001) (analyzing results from National Adult Literacy survey).

[FN145]. See Paul E. Barton & Lynn Jenkins, *Literacy and Dependency: The Literacy Skills of Welfare Recipients in the United States* 51-54 (1995).

[FN146]. *Id.*

[FN147]. See O'Connor, *supra* note 60, at 233, 235 (“Limited literacy among EITC filers presents another motivation for using tax preparation services. ... Literacy research data and the analysis of literacy and census errors indicate that a substantial majority of EITC filers have such limited literacy as to seriously compromise their capacity to prepare their own tax return.”).

[FN148]. See Iversen et al., *supra* note 144, at 126-28 (revealing results of field study conducted after 1990 census). According to the study, “[b]etween one half and three quarters of our respondents exhibited one or more instances in which reading skills created a problem in responding to a question on the form.” *Id.* at 126.

[FN149]. See Richard L. Roe, *Family Literacy and the Law*, 2 *Geo. J. on Fighting Poverty* 286 (1995). It has been recognized, in general, that “literacy is helpful, if not essential, for a person to put the promise of legal protections into practice. In order to obtain remedies to legal problems or prevent problems in the first place, people need some knowledge of their rights and protections.” *Id.* at 287.

[FN150]. See Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 *Geo. Mason Indep. L. Rev.* 319, 321 (1994) (noting “enormous complexity” in tax law); Congressman Michael A. Andrews, *Tax Simplification*, 47 *SMU L. Rev.* 37, 37 (1993) (same).

[FN151]. See James Toedtman, *Senate Moves to Tackle Tax Code; ‘Aged Problem’ of Complexity is Focus of Effort*, *Newsday*, Apr. 27, 2001, at A59 (noting complexity of tax laws concerning EITC); *Money News to Use: Complex Tax Laws Affect the Poor as Well as the Rich*, *St. Louis Post-Dispatch*, Feb. 29, 2000, at C6 (same).

[FN152]. See, e.g., Alstott, *The EITC and the Limitations of Tax-Based Welfare Reform*, *supra* note 6, at 548 (noting that the complexity of the statute may contribute to workers not understanding the “EITC benefits they receive.”); Yin et al., *supra* note 6, at 254-56 (discussing how complexity in EITC requirements “increases the cost of obtaining the EITC benefit.”).

[FN153]. Joint Committee on Taxation, *Study of the Overall State of the Federal Tax System and Recommendations for Simplifications, Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986: Volume II: Recommendations of the Staff of the Joint Committee on Taxation to Simplify the Federal Tax System* 44-66 (2001) (discussing problems faced by earned income credit recipients due to the confusing rules and requirements over the definition of a qualifying child).

[FN154]. James E. Williamson & Francine J. Lipman, *The New Earned Income Tax Credit: Too Complex For the Targeted Taxpayers?*, 57 *Tax Notes* 789 (Nov. 9, 1992). One practitioner notes:

Childhood dreams turn into adult nightmares for low-income parents trying to figure out the earned income tax credit. The credit has been changed 13 times since 1976 and now requires taxpayers to wind their way through a maze of eligibility tests and worksheets. This credit is one of the most error prone, complex provisions of the individual income tax.

Lynne Drake & Carol Ferguson, 10 Big Taxpayer Headaches That Could Be Cured Through a Little Tax Simplification, American Institute of Certified Public Accountants (Apr. 1998), at https://cpa2biz.com/ResourceCenters/Tax/Individual/1998_04_members_div_tax_headache_big_taxpayer_headache_03728.htm.

[FN155]. For example, a non-custodial parent may be entitled to claim a child as a dependent if the parents elect for such treatment, provided that other requirements of Sections 151 and 152 are satisfied. 26 U.S.C.S. § 152(e) (Law. Co-op. 2001). The noncustodial parent, however, is not entitled to treat the child as a qualifying child for purposes of the EITC, regardless of whether the child is considered a dependent for tax purposes. See *id.* § 32(c)(3)(A)(ii) (requiring a child to have the same principal place of abode as the taxpayer for more than half of the year). Likewise, a custodial parent may be able to claim her child as a qualifying child for purposes of the EITC, but not as a dependent if she fails to provide more than half of her child's support. *Id.* § 152(a) (requiring the taxpayer to provide greater than fifty percent of the child's support during the year). As mentioned at *supra* note 153, a recent report by the Joint Committee on Taxation recommended that there be a uniform definition of qualifying children for determining eligibility for the earned income tax credit, the dependency exemption, the child credit, the dependent care credit, and head of household filing status. See Joint Committee on Taxation, *supra* note 153, at 52 (calling for uniform definition of qualifying child). The Treasury Department and the National Taxpayer Advocate have made similar proposals for a uniform definition of a qualifying child. Department of the Treasury, Proposal for Uniform Definition of a Qualifying Child (Apr. 2002), available at <http://www.ustreas.gov/press/releases/docs/child.pdf>; Internal Revenue Service, National Taxpayer Advocate FY 2001 Annual Report to Congress 78 (Dec. 2001), available at <http://www.irs.gov/pub/irs-pdf/p2104.pdf>.

[FN156]. For a discussion of the challenges taxpayers have in establishing support for their children or in maintaining a household, see C. Garrison Lepow, The Flimflam Father: Deconstructing Parent-Child Stereotypes in Federal Tax Subsidies, 5 N.Y.U. J. Legis. & Pub. Pol'y 129 (2001-02) (identifying challenges in determining the amount of support in many modern family arrangements, including when non-parent relatives offer financial support or when parents fail to pay support timely); see also Marcus Schoenfeld, The Tax Concepts of "Dependent" and "Support": Their Impact on "Tax Indigents", 33 Val. U.L. Rev. 855 (1999) (noting that low-income taxpayers often are unable to demonstrate to the IRS that they have provided support).

[FN157]. See, e.g., Riva D. Atlas, Financial Services Industry Fails to Reach Many Hispanics, N.Y. Times, June 20, 2001, at C1 (noting survey in 1997 indicated that only fifty-eight percent of Hispanic households have deposit accounts with banks or brokers, compared with seventy-five percent of black households and ninety-three percent of white households); Tannette Johnson-Elie, A Lesson in Community Outreach; Bank Bridges a Culture Gap by Opening Branch in School, Milwaukee Journal

Sentinel, Jan. 16, 2001, at 1D (discussing minorities' fear of financial institutions); Jason Zengerle, Durham Diarist, *The New Republic*, July 30, 2001, at 50 (describing how Latino immigrants often come to United States with little faith in financial institutions).

[FN158]. See Robin Kaufman, "Living on the Cheap," *Is Barter Better?: Revenue Rulings and a Selective Analysis of the Effect of TRA 84 on Barter Transactions*, 37 U. Fla. L. Rev. 641 (1985) (noting growth of barter exchanges among taxpayers of all economic levels and inability to quantify these exchanges).

[FN159]. This all too common situation unfortunately provides a wonderful opportunity for me as a clinical teacher in instructing my students on the need to counsel their clients regarding the differences between exemptions, tax rates, and credits. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *Ariz. L. Rev.* 501, 508 (1990) (noting that a client-centered approach to lawyering relies heavily on clients' ability to understand legal and nonlegal consequences of decisions). Some clients in the Villanova Federal Tax Clinic choose to forego claiming either head of household status or dependency exemptions, to which they are entitled, when they understand the amount of evidence needed in relation to the amount of tax saved from establishing head of household status or entitlement to the dependency exemption.

[FN160]. In 2000, the value of each exemption was a \$2800 deduction, worth the taxpayer's marginal tax rate times the exemption amount. 26 U.S.C.S. § 151(d) (Law. Co-op. 2001). In 2001, the standard deduction for head of household was \$6,650, compared to \$4,550 for single taxpayers.

[FN161]. Internal Revenue Service, *FY 2000 National Taxpayer Advocate's Annual Report to Congress 22-26* (2001) (discussing IRS's efforts to rewrite forms and correspondence, especially in the area of the EITC).

[FN162]. *Id.* (noting IRS's attempts to educate taxpayers about the availability and the mechanics of the EITC in order to encourage an increase in the number of taxpayers claiming the credit). IRS education efforts are principally directed at current year eligibility issues, rather than the IRS's compliance process.

[FN163]. A taxpayer claiming the EITC must have a Social Security number that allows the taxpayer to work legally within the United States. See 26 U.S.C.S. § 32(m) (Law. Co-op. 2001).

[FN164]. See Anita C. Soucy, *Special Report: Immigration and Tax Consequences for the Low-Income U.S. Newcomer*, A.B.A. Section of Taxation Newsletter, Vol. 19, No. 4, 26 (2000) (discussing impact on immigrants "forced to interact with the tax administration in order to help alleviate his or her immigration-related problem."). See also Monica Whitaker, *Census Bureau Trying to Relieve*

Minorities' Fear of Government, *Tennessean.com* (Jan. 30, 2000), at <http://www.tennessean.com/sii/00/01/30/hispanic30.shtml>. For a discussion of how immigration status is affected by tax law compliance, see generally, Salik Farooqi and Fitzgerald Lewis, *Immigration and Tax Law: A Curious Intersection*, *The Community Tax Law Report* (Fall/Winter 2001), available at http://www.lewisatlaw.com/article/immigration_tax.pdf; Anita C. Soucy, *Barriers Between Immigrant Taxpayers and Compliance With the Tax System*, *The Community Tax Law Report* (Fall/Winter 2001).

[FN165]. See 26 U.S.C.S. § 6103(a) (requiring the IRS to keep confidential tax return information).

[FN166]. See Peter Skerry, *We're Overstating the Importance of the Undercount*, *The Wash. Post*, May 14, 2000, at B2 (suggesting that minorities' benefits of a proper census count are overstated and that the causes of the undercount are "beyond the bureau's power to remedy.").

[FN167]. For a discussion of EITC recipients' inability to understand eligibility requirements, see *supra* notes 150-62 and accompanying text.

[FN168]. See *supra* notes 163-67 and accompanying text for a discussion of minorities' fear of government.

[FN169]. *Id.*

[FN170]. See Zengerle, *supra* note 157 (noting Latino immigrants' fear of financial institutions).

[FN171]. See *Service Center Advice*, S.C.A. 200113002 (May 30, 2000) (discussing how the IRS may disallow the EITC on examination if a self-employed taxpayer fails to provide evidence of income or a lack of expenses associated with the activity). Often, the EITC may exceed a taxpayer's income or self-employment tax liability. For an early and perceptive discussion of this compliance problem, see Steuerle, *supra* note 118.

[FN172]. See 26 U.S.C.S. § 32(d) (Law. Co-op. 2001) (requiring married taxpayers to file a joint return to be eligible to claim the EITC).

[FN173]. *Id.* (referring to 26 U.S.C.S. § 7703 to determine whether a taxpayer is considered unmarried).

[FN174]. *Id.* § 7703(b). For these purposes, the taxpayer's child must be the taxpayer's son, daughter or stepchild, and that child must be able to be treated as the taxpayer's dependent or would be so entitled

but for the custodial parent releasing the exemption to the noncustodial parent. *Id.* (referring to 26 U.S.C.S. §§ 151, 152(e)(2)).

[FN175]. See Exec. Order No. 13,166, 65 Fed. Reg. 50, 121 (Aug. 11, 2000) (Order titled: Improving Access to Services for Persons With Limited English Proficiency).

[FN176]. In response to the president's mandate, the IRS established the Multilingual Initiative (MLI) and released their Multilingual Policy Statement and the Multilingual Decision Document. According to the documents, the IRS planned to "take necessary actions to help taxpayers understand and meet their tax responsibilities regardless of their inability to understand and speak English." Improving Access to Treasury's Services for Persons with Limited English Proficiency, Department of the Treasury at 11 (Dec. 2000). In order to further this goal, the IRS increased its Over the Phone Interpreter (OPI) services and made plans to expand other language services in its walk-in sites. *Id.* at 13. The IRS further plans to market its new services and policies to individuals with limited English proficiency. *Id.* The timeline for the implementation of the IRS's plan is fiscal year 2005. *Id.* The need for the IRS to expand its language services can be seen in the rapid growth of non-English languages spoken throughout the United States. As indicated by the 2000 Census, the number of individuals who speak a language other than English is increasing. Age By Language Spoken at Home By Ability to Speak English for the Population 5 Years and Over, U.S. Census Bureau, http://factfinder.census.gov/servlet/DTable?ds_name=D&geo_id=D&mt_name=ACS_C2SS_EST_G2000_P035&lang=en (last visited Feb. 6, 2001) (listing ability of non-English speakers to speak English). The Census results also indicate that besides the growing number of languages being spoken, there is also a growing segment of society that does not understand English well or even at all. *Id.* This makes the IRS's efforts to reach those individuals with limited English proficiency increasingly important.

[FN177]. Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. Rev. 1121, 1130-31 (2000) (noting that administration is not easily separated from policy, and that administrators on the ground can affect participation in public benefits programs without any change in eligibility conditions or requirements); Susan D. Bennett, "No Relief But Upon the Terms of Coming Into the House" - Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System, 104 Yale L.J. 2157, 2193 (1995); Sheri M. Danz, Note, *A Nonpublic Forum or a Brutal Bureaucracy? Advocates' Claim of Access to Welfare Center Waiting Rooms*, 75 N.Y.U. L. Rev. 1004, 1012-13 (2000); Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 Soc. Serv. Rev. 3 (1984) (discussing how "bureaucratic disentitlement" can arise from agency practices that frustrate attempts to apply for benefits).

[FN178]. See *id.*

[FN179]. See Diller, *supra* note 177, at 1131.

[FN180]. See Rogers and Weil, *supra* note 18, at 396 (noting that there are “psychological rewards for people receiving subsidies through filing taxes rather than taking time off to go to a welfare office to determine their eligibility.”); see also Alstott, *The EITC and the Limitations of Tax-Based Welfare Reform*, *supra* note 6, at 565. Alstott notes that proponents of the earned income tax credit tout the program as not sharing the same stigma and isolation associated with welfare programs, referring to David T. Ellwood, *Poor Support* 115 (1988).

[FN181]. See Alstott, *The EITC and the Limitations of Tax-Based Welfare Reform*, *supra* note 6, at 585 (noting that EITC participation rates are likely to be impressive because a tax-based program does not have the traditional disincentives associated with traditional welfare programs, as “recipients need not travel to a welfare office, wait in line, confront brusque or overworked caseworkers”).

[FN182]. See *id.* at n.124 (referring to Lipsky’s critique of other transfer programs’ susceptibility to bureaucrats making policy).

[FN183]. See Sharon C. Nantell, *The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private/Parental/Public Alliance*, 80 *Marq. L. Rev.* 879, 993 (1997).

[FN184]. Alstott, *The EITC and the Limitations of Tax-Based Welfare Reform*, *supra* note 6, at n.126 (citing Joel F. Handler & Yeheskel Hasenfeld, *The Moral Construction of Poverty* 160 (1991)) (“To receive the tax credit one must file a federal tax return, a symbol of an earned economic citizenship.”).

[FN185]. For a discussion of these changes, see *supra* notes 91-99 and accompanying text.

[FN186]. See Diller, *supra* note 177, at 1132. For a review of IRS examiners’ failure to telephone taxpayers during EITC examinations, see TIGTA, *supra* note 119. For a distressing view of IRS problems in administering its recertification of EIC-claiming taxpayers, see *Recertification Program*, *supra* note 119.

[FN187]. See *supra* Part III.

[FN188]. See *IRS Restructuring and Reform Act of 1998*, Pub. L. No. 105- 206, § 1201, 112 Stat. 685 (1998) (allowing the IRS to create a new “performance management system” that stresses “individual accountability” as a method of measuring success, instead of a system where success is measured by the amount of tax dollars collected).

[FN189]. IRS Restructuring Act, *supra* note 111, at 7 (referring to the IRS as “an agency still dealing with the repercussions of a performance system that was, for many years, based on enforcement statistics” and noting that in the past, “IRS employees’ performance [was] focused more on IRS’s objective of revenue production and efficiency than on taxpayer service.”). A similar emphasis on caseload reduction is an element of the administration of the new welfare provisions following 1996 welfare reform. Diller, *supra* note 177, at 1178 (“Numerous provisions of the [1996 welfare reform] law are intended to provide states with incentives to achieve the ‘outcome’ of caseload reduction.”).

[FN190]. For example, the IRS claims to have protected over \$5 billion in revenue on approximately \$716 million in EITC compliance appropriations during the period FY 1998 through FY 2002, Internal Revenue Service, EITC Program Effectiveness and Program Management 1 (Feb. 28, 2002), available at http://www.irs.gov/pub/irs-utl/eitcprogeff_progmgmt.pdf (last visited Nov. 6, 2002).

[FN191]. In the welfare context, Professor Diller suggests that employee performance measures include a recognition of measures that focus on process, as well as outcome. This measure would reward employees who treat people respectfully and consistently. See Diller *supra* note 177, at 1215. In the tax system, the IRS should reward employees who not only detect non-compliance, but who also work with eligible taxpayers to ensure that they are able to provide whatever evidence is needed to substantiate their claim.

[FN192]. General Accounting Office, IRS Audits: Weaknesses in Selecting and Conducting Correspondence Audits, GAO/GGD-99-48 (Mar. 31, 1999) (“GAO Correspondence Audit Report”). The GAO Correspondence Audit Report noted that there were significant increases in the use of correspondence audits to reflect Congressional concerns about EITC noncompliance. The GAO Correspondence Audit Report highlighted some significant problems with the IRS’s use of the correspondence audit technique, namely that the auditors did not always have adequate levels of documentation to support adjustments, that there were different levels of justification among IRS Service Centers for accepting EITC claims, there was inadequate review to ensure audit quality, and that there was an excessively high rate of nonresponsive taxpayers. See also Amy Hamilton, Taxwriter Zeroing in on Rapid Refund Loans, 2001 Tax Notes Today 67-3 (Apr. 6, 2001) (describing some of the problems low-income filers face, and how Senator Bingaman is considering legislation to help protect low-income taxpayers). A recent Treasury Inspector General for Tax Administration (TIGTA) report likewise faulted IRS performance on reviewing documentation in EITC correspondence examinations, focusing primarily on how IRS employees may have given the EITC to taxpayers who provided insufficient documentation. TIGTA, Earned Income Credit Was Paid to Taxpayers Who Did Not Provide Documentation During Audits, 2002-40-004 (Oct. 2001), reprinted in 2001 Tax Notes Today 206-16 (Oct. 24, 2001).

[FN193]. One approach to determine the extent of this problem would be to use “testers” who could pose as taxpayers subject to EITC correspondence examinations. These testers could attempt to reflect isolated problems endemic to the community subject to EITC examinations and provide additional information to evaluate how the IRS is doing in terms of providing service to low-income taxpayers.

Professor Diller suggests this approach to evaluate the performance of agency employees in the context of welfare reform. Diller, *supra* note 177, at 1215-16.

[FN194]. It is not uncommon for Appeals conferences to take six months to be scheduled, and there is often at least a one-year lag between the filing of a petition in Tax Court and a matter being heard for trial. Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 *Case W. Res. L. Rev.* 315, App. A at 346 (1999).

[FN195]. If the taxpayer were ultimately to prevail, and the result of the victory would be a refund, she would be entitled to interest. See 26 U.S.C.S. §§ 6611(a), 6621(a) (Law. Co-op. 2001) (providing that individual taxpayers are entitled to interest on overpayments at the federal short-term rate, plus three percentage points).

[FN196]. For a complete discussion of mistaken or fraudulently claimed EITC funds, see *supra* notes 52-59 and accompanying text.

[FN197]. For a complete discussion of the effective policy goals achieved by the EITC, see *supra* notes 28-37 and accompanying text.

[FN198]. *The Cost of Ignoring Tax Evasion*, *N.Y. Times*, Apr. 16, 2001, at A18 (noting the decline in IRS compliance actions, and suggesting both that additional resources be given to fund IRS compliance because when tax evasion “takes place with impunity, it can become an epidemic, as honest taxpayers tire of subsidizing tax cheats.”); Johnston, *supra* note 72 (reporting that Commissioner Rossotti has estimated that the IRS may have lost taxes on \$100 billion of income attributable to income from partnerships and trusts because the IRS was not matching income statements on K-1 forms with taxpayers’ returns). The IRS recently announced that it intends to implement a new national research program to measure individual compliance with the tax law. Press Release, Internal Revenue Service, *IRS Moves to Ensure Fairness of Tax System; Research Program Works to Increase Compliance Program Effectiveness, Reduce Burdens on Taxpayers*, IR-2002-5 (Jan. 16, 2002) (outlining National Research Program (NRP)); *IRS Unveils New, Less Burdensome System for Assessing Compliance, Targeting Audits*, *Daily Tax Report at GG1* (Jan. 17, 2002) (discussing implementation of National Research Program). The IRS also intends to focus on other areas of individual noncompliance, including the use of offshore credit cards to hide income. See Internal Revenue Service, *IRS Sets New Audit Priorities*, FS-2002-12 (Sept. 2002).

[FN199]. Spragens & Abramowitz, *supra* note 4 at 715.

[FN200]. That this Article suggests that low-income taxpayers need substantial third party assistance to ensure that their rights are protected raises serious questions about the wisdom of relying on the tax

system in general and the EITC as currently structured to deliver benefits to the working poor. For various perspectives on this point, see *supra* note 6.

[FN201]. Consider Professor Diller's comments on the importance of funding for legal service organizations following welfare reform: "Legal services lawyers have both the skills and the independence to help individuals and to monitor the welfare system as a whole. Many vehicles for public access, such as notice and comment, are of little value ... without access to legal representation." Diller, *supra* note 177, at 1217.

[FN202]. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (1994). Congressional limitations on the activities of organizations funded through the Legal Services Corporation Act have created significant challenges for the legal service community. See Steven Epstein et al., *The Future of Legal Services: Legal and Ethical Implications of LSC Restrictions*, 25 *Fordham Urb. L.J.* 279, 280 (1998) (describing how following funding cuts, Congress further crippled the Legal Services Corporation by implementing restrictive guidelines on the types of funds and programs that could be provided with either federal funds or private donations); John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 *Tenn. L. Rev.* 101, 102 (2000) (discussing how following federal funding cuts, the Legal Services Corporation must change by promoting partnerships with the private sector and grounding its work in individuals' rights and dignity without focusing on "social policies, political considerations, and partisan agendas").

[FN203]. See Janet Spragens & Nina E. Olson, *Tax Clinics: The New Face of Legal Services*, 88 *Tax Notes* 1525, 1526-28 (Sept. 18, 2000).

[FN204]. *Id.*

[FN205]. Much has been written about the complexity of the tax code. See, e.g., John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 *Wash. L. Rev.* 1 (1993). For a thoughtful critique of the isolation of tax practice from the legal profession and the rest of the academy, see generally Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to be Tax Lawyers*, 13 *Va. Tax Rev.* 517 (1994).

[FN206]. Spragens & Olson, *supra* note 203, at 1529. Even if low-income taxpayers could afford to pay private counsel, the amounts involved in controversies are usually low enough to deter their hiring attorneys.

[FN207]. See *Taxpayer Education Handbook*, Internal Revenue Manual, IRM 6570 (17)00 (Feb. 27, 1990).

[FN208]. See National Commission on Restructuring the IRS, *A Vision for a New IRS* (June 25, 1997).

[FN209]. For a full discussion of the legislative history of the provision, see generally, Janet Spragens, *Testimony before the IRS Oversight Board* (Jan. 29, 2002) (transcript on file with author). For these purposes, a clinic focusing on tax controversy can constitute an LITC only if at least 90% of its clients have incomes which do not exceed 250% of the federal poverty level, as determined in accordance with criteria established by the Office of Management and Budget. 26 U.S.C.S. § 7526(b)(1)(B)(i) (Law. Cop. 2001). The LITC must also charge no more than a nominal fee for its services. *Id.* Individual clients can generally have no more than \$50,000 in taxes and penalties in dispute for any one taxable year. *Id.* § 7526(b)(1)(B)(ii).

[FN210]. Congress has not actually provided a line-item appropriation for the LITC program. Rather, for the fiscal years 2000 and 2001, Congress has approved 100% of the Administration's budget request for the IRS. Because the IRS has requested the full \$6 million authorized by Section 7526 in its budget requests for 2000 and 2001, that amount has been available for making grants. For 2002, the IRS budget specifically listed appropriation of \$7 million for LITCs. *Statement of Managers, Treasury and General Government Appropriations Act of 2002*, Pub. L. No. 107-67 (2001). Clinics must match IRS funding on a dollar-for-dollar basis. 26 U.S.C.S. § 7526(c)(5). The IRS may award multi-year grants for a period up to three years. Criteria for the awards is the following: the number of taxpayers who will be served by the clinic, including the number of ESL taxpayers in the clinic's geographic area; the existence of other LITCs serving the same population; the quality of the LITC program, including staff and volunteer qualifications and the LITC's record, if any, of serving low-income taxpayers; and the clinic's alternative funding sources, including grants and contributions as well as the sponsoring institution's endowment and other resources. *Id.* § 7526(c)(4). The IRS has published extensive grant guidelines contained in its grant application packages.

[FN211]. In the first year of the program, FY 1999, the IRS received forty-three grant applications and approved thirty-four grants totaling approximately \$1.46 million; in the second year, FY 2000, the IRS received eighty-eight grant applications and approved eighty-one grants totaling approximately \$5 million; in the third year, for the calendar year 2001, the IRS received 141 grant applications and approved 102 applications covering the full \$6 million authorized under section 7526. Leslie Book, *Tax Clinics: Past the Tipping Point and to the Turning Point*, 92 *Tax Notes* 1089 (Aug. 20, 2001). For 2002, the IRS received applications from 149 organizations requesting over \$10.6 million, and the IRS approved funding for 127 organizations, totaling \$7 million. *Press Release, Internal Revenue Service, IRS Awards \$7 Million to Tax Clinics Aiding Law Income Taxpayers* (Jan. 7, 2002), reprinted in 2002 *Tax Notes Today* 5-17 (Jan. 8, 2002).

[FN212]. See generally *Tax Clinics*, *supra* note 15 (describing the growth of tax clinics since 1998).

[FN213]. General Accounting Office, IRS' Low Income Taxpayer Clinic Program, GAO/GGD-00-83 at 11 (2000) (noting that students must work under close faculty supervision, and that a low faculty-to-student ratio limits the number of taxpayers the clinic can represent).

[FN214]. The types of controversies that low-income taxpayers may experience also extends far beyond EITC cases. Low-income taxpayers face tax controversies involving a wide range of issues. See Janet Spragens, Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means, Doc. 2001-19394, (July 12, 2001) (reprinted in 2001 Tax Notes Today 137-27) (discussing tax issues affecting low-income taxpayers, including matters relating to worker classification, tip income, social security income, and gambling income).

[FN215]. In addition to protecting the benefits of the EITC that may be improperly denied, access to counsel may limit the possibility of the IRS erroneously imposing draconian penalties to deny the EITC altogether. Under 26 U.S.C.S. § 32(k)(1)(B), the IRS can impose a two-year EITC disallowance period if it renders a determination that a taxpayer claimed the EITC due to a reckless or intentional disregard of rules or regulations, and a ten-year disallowance period if it determines that the taxpayer fraudulently claimed the EITC. These sanctions are in addition to the general civil penalty structure found in the Code, which impose a penalty equal to twenty percent of an understatement of tax liability attributable to a disregard of rules or regulations and a seventy-five percent penalty when the understatement is attributable to fraud. 26 U.S.C. § 6662 (disregard penalty); § 6663 (fraud). The IRS has concluded that there need not be a determination under either sections 6662 or 6663 to apply the two or ten-year sanction found in section 32(k)(1)(B). See Internal Revenue Service, Frozen Refunds and Earned Income Credits, Service Center Advice (SCA) 200113028 (Feb. 26, 2001) (concluding also that the amount of an underpayment for purposes of the application of the Code's civil penalty regime includes the amount of frozen EITC refund). The effect of the above is that the potential penalty imposed on a taxpayer who fails to respond to an IRS allegation of fraud or intentional disregard in an EITC correspondence examination can result in monetary penalties exceeding 1000% or 2000% of the disallowed EITC.

[FN216]. Saltzman, *supra* note 67, at § 1.08[4][a] (discussing requirements and use of power of attorney).

[FN217]. As IRS compliance action on the EITC is increasingly aimed at preventing erroneous refunds or credits applied from current tax returns, it will perhaps become more likely that an initial IRS-generated compliance letter will reach the taxpayer, especially if the IRS commences action on the current return close in time to the return's filing and the listing on that return of a taxpayer's current address.

[FN218]. For a discussion of the effect of housing shortages on taxpayers, see *supra* notes 134-42 and accompanying text.

[FN219]. See Emily Rosenbaum, Urban Children's Living Arrangements and their Economic Status: New York City, 1993, 59 *Amer. J. of Economics and Sociology* 217 (2000), available at http://findarticles.com/cf_0/m0254/2-59/63295363/print.jhtml (suggesting that people in low-income households choose to take in relatives to compensate or supplement the low wages of the household's primary earner); Andrew A. Green, Influx of Aliens Likely to Confound 2000 Census Officials Say, *Ark. Democrat-Gazette*, Jan. 3, 1999, at A1 (noting that immigrants often have more complex living arrangements than other groups, with extended families living together or more than one family living in the same house).

[FN220]. For a discussion of the effect of language barriers on taxpayers, see *supra* notes 175-76 and accompanying text.

[FN221]. For a discussion of the effect of documentation and transportation difficulties on taxpayers, see *supra* Part III A.

[FN222]. The lack of ready access to computers or the Internet is felt particularly by the working poor attempting to balance long work days with myriad local and federal requirements to provide or obtain information. See Jonathan Kaufman, Technology and Time for the Poor, *Wall St. Journal*, Aug. 16, 2001, at A1 (reporting that it is often difficult for the working poor to access information or services without ready access to computers and the Internet). One possible solution, as reported by Kaufman, is a "Kinko's for welfare recipients ... where welfare to work successes ... can go in the evening or on Saturdays to apply for all their government benefits." *Id.*

[FN223]. Earned Income Credit and Social Security Numbers, Chief Counsel Advisory Opinion, IRS CCA 200126030 (May 15, 2001) (concluding that a taxpayer who does not have a valid social security number may claim the EITC for that year in a late-filed or amended return if in the later year the taxpayer does receive a qualifying social security number).

[FN224]. Tax Clinics, *supra* note 15, at 1096.

[FN225]. The growth of LITCs, in combination with the annual \$6 million funding authorization limitation of section 7526(c)(1), has placed the IRS in a difficult situation that will only get worse. Tax Clinics, *supra* note 15, at 1092. In fiscal year 2001, 141 applicants sought grants totaling \$9.8 million, almost forty percent more than the statute's authorization amount. E-mail from IRS LITC Analyst Beverly Smith to Leslie Book (Apr. 10, 2001) (on file with the author). According to Smith, of those 102 organizations awarded funding for 2001, almost fifty percent of those organizations would have received additional funding if the \$6 million cap were higher and appropriated funds were available. *Id.* Moreover, according to the IRS, in 2001, the \$6 million funding limitation prevented eight otherwise qualifying organizations from receiving any funding at all. *Id.* The effect of this is that many otherwise

needy taxpayers in parts of the country are not able to receive representation, and many organizations that received only partial funding are not able to fully serve their communities. There still are twelve states without any LITC at all, and many large cities, especially those with significant ESL communities and high populations of those recently removed from the welfare rolls, could support more LITCs. Tax Clinics, *supra* note 15, at 1092.

[FN226]. The limited ability for LITCs to represent taxpayers in controversies is exacerbated by the IRS's interpreting section 7526 as permitting LITC funding to organizations that prepare income tax returns to the ESL community, a needed activity but one which dilutes the amount of organizations that focus on low-income tax controversy matters. See Tax Clinics, *supra* note 15, at 1093-94 (suggesting that additional legislation is needed to provide direct funding for tax return preparation clinics). The IRS currently does provide limited in-kind support for low-income tax preparation through its Volunteer Income Tax Assistance Program (VITA). O'Connor, *supra* note 60, at 244 (noting that VITA only prepares a small percentage of low-income taxpayers' tax returns).

[FN227]. See Treasury Inspector General for Tax Administration, Dept. of the Treasury, The Internal Revenue Service Should Continue to Make Improvements to the Low-Income Taxpayer Clinic Grant Program, 2002-10-024 at 4 (Nov. 2001) available at <http://www.treas.gov/tigta/2002reports/200210024fr.pdf> (suggesting that the IRS can better publicize the LITC program to ensure that areas with a high concentration of poverty and ESL taxpayers have greater access to tax clinics). The IRS is considering measures to promote LITCs. For example, the IRS has agreed to post flyers listing local LITCs at IRS offices. See Nina Olson, Statement Before American Bar Association Tax Section (Aug. 2, 2001) (attended by author).

[FN228]. Many LITCs publicize their efforts through mailings and postings of flyers to community organizations, radio and television public service announcements, and outreach presentations. See Tax Clinics, *supra* note 15, at 1096.

[FN229]. The Tax Court includes a stuffer letter describing the availability of tax clinics in its notices setting small cases for trial to unrepresented taxpayers. In some areas, such as in Connecticut and Rhode Island, the area LITCs and local IRS management have agreed to use combined LITC stuffer notices. See Combined U. Conn. School of Law Tax Clinic, Quinnipiac University School of Law Tax Clinic, and Rhode Island Tax Clinic stuffer (on file with the author). The IRS has placed this stuffer notice in correspondence covering all IRS controversy functions, including EITC correspondence examination letters originating from the Andover Service Center.

[FN230]. 55 PA Code § 133.4(e)(5) (2002) (requiring the listing of the local legal service organization on correspondence terminating or reducing welfare benefits).

[FN231]. See Tax Clinics, *supra* note 15, at 1095 (suggesting that some LITCs that do not focus on tax controversy representation might not wish to have taxpayers notified of their existence and that there may be insufficient LITCs to satisfy requests for representation).

[FN232]. That LITCs are required to match federal grants on a dollar-for-dollar basis helps ensure that others shoulder some of the burden for helping with the vast unmet needs of the working poor subject to IRS compliance activities. See John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 *Tenn. L. Rev.* 101, 112-13 (2000) (suggesting that to ensure bipartisan support for federally-supported legal services, private attorneys, law schools, and bar associations should “carry their share of the responsibility” for satisfying the un-met legal needs of the nation’s poor).

[FN233]. 26 U.S.C.S. § 7803(c) (Law. Co-op. 2001); National Taxpayer Advocate, *The National Taxpayer Advocate’s Fiscal Year 2002 Objectives Report to Congress 4* (June 30, 2001), available at <http://www.irs.gov/pub/irs-utl/tas02obj.pdf> [hereinafter National Taxpayer Advocate]. The TAS replaced the IRS’s Problem Resolution Program. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206 § 1102, 112 Stat. 685 (1998).

[FN234]. TAOs may either order the IRS to take or cease an action (a direct TAO), or review an action made or about to be made (a review TAO). 26 U.S.C.S. § 7811.

[FN235]. For example, in 2001, the local TAS office in Philadelphia that works with the Villanova Federal Tax Clinic has helped resolve three cases in our clinic to ensure other IRS functions perform as they should.

[FN236]. See Heather B. Conoboy, Note, *A Wrong Step in the Right Direction: The National Taxpayer Advocate and the 1998 IRS Restructuring and Reform Act*, 41 *Wm. & Mary L. Rev.* 1401, 1411-14 (2000) (criticizing the name “Taxpayer Advocate” because it suggests the TAS office will provide legal representation). As an example of this confusion over the TAS’s role, see IRS Restructuring and Reform Act of 1998 § 1102(b); 26 U.S.C.S. § 6212 (requiring the IRS to list the local TAS address and phone number on notices of deficiency, when the TAS contact will not suspend the ninety-day period to file a petition to Tax Court and the TAS cannot represent taxpayers in Tax Court). Despite criticisms, the office does perform important systemic advocacy functions, as discussed below.

[FN237]. See, e.g., PA. Rule of Prof’l Conduct 1.6(a) (providing that a lawyer shall not generally reveal information relating to the representation of a client); Model Code of Prof’l Responsibility DR 4-101(B) (1980) (providing that a lawyer shall not knowingly reveal a confidence or secret of a client). See Bruce Kayle, *The Tax Adviser’s Privilege in Transactional Matters: A Synopsis and a Suggestion*, 54 *Tax Law.* 509, 509 (2001) (noting that the secrecy of communications between an attorney and his client is among the “most widely known elements of our legal system”).

[FN238]. 26 U.S.C.S. § 7803(c)(4)(A)(iv) (Law. Co-op. 2001) (stating that the local taxpayer advocate “may, at the taxpayer advocate’s discretion, not disclose to the Internal Revenue Service contact with, or information provided by, such taxpayer”). Section 7214(a)(8) generally provides that all government employees have an obligation to report violations of the internal revenue laws, but the IRS has concluded that section 7803(c)(4)(A)(iv) trumps the general reporting requirements, and local TAS employees do not have to report such violations. See I.R.S. Notice CC-2001-40 (Aug. 16, 2001) (local taxpayer advocates have the authority to withhold information from the IRS relating to taxpayer contact or taxpayer-provided information). My experience has been that the TAS generally does not independently gather evidence that a taxpayer may need to establish that the taxpayer’s claiming of the EITC is correct. For example, while LITC staff will interview third-party witnesses and draft affidavits to gather evidence relating to EITC eligibility, TAS employees have not traditionally engaged in these actions. But see National Taxpayer Advocate, *supra* note 233, at 6 (stating that TAS employees can make sure that IRS employees making substantive determinations have “all of the information necessary for making an informed decision”). If TAS employees did attempt to gather information from third-parties, and that information was contrary to the taxpayer’s position (e.g., a neighbor says that a child did not live with the taxpayer), the limited statutory confidentiality protection leaves open the possibility, or even a requirement, that the TAS employee include this information in a taxpayer’s file that could be reviewed by other IRS personnel.

[FN239]. Memorandum from Charles O. Rossotti, Delegation of Authority to the National Taxpayer Advocate (Jan. 17, 2001), reprinted in 2001 Tax Notes Today 72-16 (Apr. 13, 2001). These limitations have led the current NTA to propose that Congress pass legislation to allow the NTA to recommend to the IRS Commissioner situations in which the Commissioner could grant equitable relief to taxpayers in situations when current laws or procedures bar relief. Hearing on Taxpayer Advocate Report and Low-Income Taxpayer Clinics Before the Subcommittee on Oversight of the House Committee on Ways and Means, 107th Cong. 7 (2001) (statement of Nina E. Olson, National Taxpayer Advocate).

[FN240]. Rossotti, *supra* note 239.

[FN241]. This should not necessarily be viewed as a weakness of the TAS; the power to intervene when there is no procedural error would create the possibility of the TAS becoming a shadow IRS. See Amy Hamilton et al., Taxpayer Advocate Nina Olson Opens IRS Reform’s Next Chapter, 91 Tax Notes 380, 383 (Apr. 16, 2001) (quoting Olson’s concern that “we might set the national taxpayer advocate service up as the watchdog or as a shadow IRS.”). It is interesting that in other contexts, there has been criticism of ombudsman programs’ ability to protect individuals’ rights. See Diller, *supra* note 177, at 1217 n.481 (criticizing state nursing home ombudsman programs (citing Elizabeth B. Herrington, Strengthening the Older Americans Act’s Long-Term Care Protection Provisions: A Call for Further Improvement of Important State Ombudsman Programs, 5 Elder L.J. 321, 325 (1997))).

[FN242]. National Taxpayer Advocate, *supra* note 233 at 2 (raising as open questions the TAS's authority to render substantive determinations and its role in taxpayer examinations that are open in other operating divisions).

[FN243]. 26 U.S.C.S. § 7803(c)(1)(B)(iii) provides that the NTA shall have a background in customer service, tax law and experience in representing individual taxpayers. 26 U.S.C.S. § 7803(c)(1)(B)(iii).

[FN244]. To this end, the Commissioner has given the NTA authority to issue so-called Taxpayer Advocate Directives (TADs), which address a system-wide administrative or procedural problem affecting many taxpayers. TADs address procedures that create undue taxpayer burdens, infringe upon taxpayer rights or create undue burdens and are reviewable only by the IRS's Commissioner and Deputy Commissioner. See Rossotti, *supra* note 239 (regarding delegation of authority to NTA).

[FN245]. See, e.g., FY 2001 Annual Report to Congress, Taxpayer Advocate Service, Internal Revenue Service (2002) available at http://www.irs.gov/pub/irs-utl/2001_tas.pdf (last visited Feb. 15, 2002); FY 2000 Annual Report to Congress, Taxpayer Advocate Service, Internal Revenue Service (2001) available at <http://www.irs.gov/pub/irs-utl/pub2104-2000.pdf> (last visited Feb. 15, 2002).

[FN246]. For example, the TAS will be working with on refining the operations of the IRS's rules relating to the selection of tax returns for EITC eligibility examination. Hearing on 2001 Tax Return Filing Season Before the Subcommittee on Oversight of the House Committee on Ways and Means, 107th Cong. (2000) (Statement of Nina E. Olson, National Taxpayer Advocates), reprinted in 2001 Tax Notes Today 70-42 (Apr. 11, 2001).

[FN247]. See Nina Olson, Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means Hearing on the 2001 Filing Season, 2001 Tax Notes Today 65-47 (Apr. 4, 2001). One measure Olson has proposed to address these problems is to create a closer connection between LITCs and the TAS, whereby TAS offices are to assist LITCs in publicizing their services to taxpayers. The first step in this is that the TAS is to ensure that LITC-generated publicity, like flyers and posters, are made available at IRS waiting rooms and walk-in offices.

[FN248]. See, e.g., Press Release, Internal Revenue Service, IRS National Problem Solving Day Set for November 3, 2001 (Oct. 23, 2001), available at <http://www.taxplanet.com/taxnews/irsnews/ir2001-102/ir2001-102.html>.

[FN249]. See General Accounting Office, Tax Administration: IRS's Problem-Solving Days, GAO/GGD-99-1 at 3 (Oct. 1998).

[FN250]. *Id.*; Press Release, Internal Revenue Service, National Problem Solving Day Set for June 16, Saturday Session Expands Service for Taxpayers, IR-2001-52 (May 29, 2001).

[FN251]. Zietlow, *supra* note 13, at 23 (citing Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 *UCLA L. Rev.* 999, 1103-08 (1988)); see William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *Yale L.J.* 1198, 1242 (1983); see also Alstott, *Tax Policy and Feminism*, *supra* note 13, at 2004; Bartlett, *supra* note 13, at 844; Kaplow and Shavell, *supra* note 13, at 1164-1225; Shurtz, *supra* note 13, at 1840-41; Staudt, *supra* note 13, at 654; Zelenak, *supra* note 13, at 1538.

[FN252]. Zietlow notes that “maltreatment by government officials is particularly acute for outsiders such as poor women, because it is easier for those officials to disassociate themselves from people whom they see as ‘other’ to themselves.” Zietlow, *supra* note 13, at 24. Zietlow concludes that while formal measures in public benefits programs have not fulfilled their promise of empowering outsiders, “it would be wrong to completely discard formalities without replacing them with some systematic means of enhancing the voice of the participant.” *Id.* The strengthening of the LITC program and continued use of the TAS as a consciousness-raising organization are such systematic means of enhancing the voice of taxpayers.

[FN253]. *Id.* at 21.

[FN254]. Ken Davis, *Administrative Law* § 12:13, at 461-62 (2d ed. 1979); Mary Ferrari, “Was Blind, But Now I See” (or What’s Behind the Notice of Deficiency and Why Won’t the Tax Court Look?), 55 *Alb. L. Rev.* 407, 453 (1991) (citing to Prof. Davis’ observation that judicial pressure is a major force in improving the administrative process).

[FN255]. *Cf.*, Colin S. Diver, *The Wrath of Roth*, 94 *Yale L.J.* 1529, 1542- 43 (1985) (reviewing Jerry L. Mashaw, *Due Process in the Administrative State* (1985)) (suggesting that legislatures may give discretion to an agency in administering public benefits programs because that “discretion facilitates impermissible discrimination against a disfavored subgroup (for example, blacks) within the larger benefited group”). Diver notes that within larger groups of beneficiaries, there are subgroups “who are the objects of quite ignoble legislative sentiments,” and that this juxtaposition of favored and disfavored groups can result in the “promise of generous assistance coupled with exposure to individualized tyranny.” *Id.* at 1543. Diver’s point suggests the value of ensuring that taxpayers have the means to check potentially improper agency action.

[FN256]. Alexander, *supra* note 13, at 24-25; Zietlow, *supra* note 13.

[FN257]. Natalia Radziejewska, *Rossotti Announces EITC Task Force*, 2002 *Tax Notes Today* 41-3

(March 1, 2002).