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Invisible Taxpayers

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I. Introduction

"Only the little people pay taxes."[1] So said Leona Helmsley to her maid. That maid is one of millions of other little people who are largely anonymous in the legal regime that regulates taxation. They pay their bills without taking advantage of avoidance schemes, tax planning, or discretionary administrative largesse. They are legally invisible, even while they are economically indispensable. The paradigm tax dispute involves a taxpayer on one side and the government on the other, what this Article calls the "traditional dyad." In adjudicating disputes, only the taxpayer in that dyad matters—even though the interrelatedness of taxpayers across the fiscal system means that one dyadic outcome often affects the interests of many other taxpayers who are not part of it. Everyone outside the dyad is invisible to the legal system; they are faceless taxpayers without enforceable rights in the administrative or judicial structure. These taxpayers pay the public's bills, but they lack standing to challenge the unconstitutionality of laws, regulations, or tax administration—except when they are fighting over their own tax returns.[2] Nor do they have any institution charged with protecting their interests. Taxpayer invisibility produces injustice for individuals and undermines the rule of law.

Courts have made taxpayers invisible by adopting a narrow understanding of injury in standing doctrine that shuts taxpayers out of court,[3] and by characterizing revenue-reducing provisions in the tax law as Congress abstaining from legislation.[4] Congress has made tax-

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

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

3 See Section III.A.

4 See Section III.B.

payers invisible by running deficits that impose costs on people who do not yet exist, and by using budget gimmicks that pretend there is no cost to government spending. Treasury's "Taxpayer Bill of Rights" makes taxpayers invisible by recognizing tax fairness issues only in the traditional dyad.[5] Scholars have made taxpayers invisible by isolating the tax system from the rest of fiscal analysis, and by assuming in tax policy discussions that tax collected gets thrown into the sea.[6] All these institutions fail to recognize the complex relationship that taxpayers have with one another. A web of overlapping, complementary, and conflicting interests creates a common bond that every taxpayer shares.

No one has considered the effect of taxpayer invisibility on the operation, conceptualization, and fairness of the tax system. This Article starts to fill that void by showing how the no-taxpayer-standing rule has been applied too broadly for both doctrine and policy. It explains why invisibility has denied taxpayers both economic and political rights. It argues that taxpayers should have standing to challenge the illegal and unconstitutional burdens of taxation that they bear. Illegal tax burdens are application of law that are clearly contrary to the terms of a statute or interpretations of the Supreme Court. Unconstitutional tax burdens are laws and their application that violate constitutional constraints. If taxpayers are not permitted to sue, another institutional mechanism should protect their interests.

Consideration of invisible taxpayers enriches the debate on tax fairness. Recognizing people excluded from the traditional dyad shows how tax fairness demands that government institutions treat taxpayers as people. Because of its vast reach, the tax system may offer the best test of whether we govern ourselves fairly. This Article develops the idea of *democratic fairness* in taxation as a norm that is separate and independent of economic fairness. People are autonomous individu-

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[5] Adopted on June 10, 2014. IRS Adopts "Taxpayer Bill of Rights;" 10 Provisions To Be Highlighted on IRS.gov, in Publication 1, https://www.irs.gov/uac/newsroom/irs-adopts-taxpayer-bill-of-rights-10-provisions-to-be-highlighted-on-irsgov-in-publication-1 (last visited June 14, 2016). The bill of rights includes the following principle:

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

See IRS, Taxpayer Bill of Rights (2016), https://www.irs.gov/pub/irs-pdf/p1.pdf.

[6] Walter J. Blum & Harry Kalven, Jr., The Uneasy Case for Progressive Taxation, 19 U. Chi. L. Rev. 417, 517 (1952).

> The traditional way of proceeding analytically has been simply to ignore the expenditure side altogether and to assume that none of those who pay the taxes covering these expenditures receive any offsetting economic benefits. In effect this results in treating the collection of taxes as though it were only a common disaster—as though the tax money once collected were thrown into the sea.

als and citizens with rights, and the tax system must respect and reinforce those rights. No tax is justly imposed on an individual if it fails to satisfy the basic rules of statutory adoption and constitutionality. Every individual is entitled to be protected against taxes that are illegal or unconstitutional. Democratic fairness is generally ignored in the tax policy literature, but it is a crucial element of tax justice.

Invisibility has led to substantial injustice for real people. It has allowed unconstitutional taxation to proceed without challenge. Judicial abstention has reduced the role of courts in taxation to a very narrow one, while simultaneously allowing unchecked discretion for both Congress and the Internal Revenue Service. Courts are the primary defenders of individual rights against government coercion, but the standing rules keep taxpayers out of the litigation process, so their interests are never considered.[7] Tax expenditures contain important policies that privilege some taxpayers over others. Congress (by designing a provision as a tax expenditure) and the IRS (by choosing to treat a taxpayer better than allowed by law) have the power to deprive the federal courts of the opportunity to review their actions, even if those actions are unconstitutional. There is an imbalance of power in this structure. As the tax law is increasingly the locus of important federal policy, it is increasingly troubling that the scope for judicial review of its potential unconstitutionality is contracting. We need a legal mechanism to consider invisible taxpayers because distributive justice and democratic values demand that they be taken into account under the law. Anyone who cares about fairness in taxation should be concerned about the contracting universe in which legal disputes about taxation are resolved.

This Article proceeds as follows. In the next Part, I describe three important constitutional tax cases in which people with substantial interests were not clearly part of the government-taxpayer dyad. These cases are intended to illustrate the problem of invisible taxpayers, and they provide concrete examples for the later analysis. Unconstitutional taxation is the most troubling legal consequence of invisible taxpayers, and the most important opportunity for courts to intervene. Part III takes a closer look at why some taxpayers are legally invisible. It examines the doctrines that produce invisibility, first explaining how the standing rules create invisibility for taxpayers and how tax expenditures create invisibility for laws. Part III.A argues, as a doctrinal

[7] See Lynn D. Lu, Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules, 66 Admin. L. Rev. 73, 95 (2014) ("Standing doctrine has played a crucial role in restricting parties' access to federal court to seek judicial review of government agency action and to enjoin violations of federal law."); Gene R. Nichol Jr., Standing for Privilege: The Failure of Injury Analysis, 82 B.U. L. Rev. 301, 304 (2002) (the standing rule "systematically favors the powerful over the powerless").

matter, that conventional standing doctrine can accommodate broader taxpayer access if courts acknowledge the financial interrelatedness of taxpayers. It proposes a theory of injury determined by "legal tax shares" composed of validly adopted tax rules that are consistent with the Constitution; taxpayers suffer injuries when they are obligated to pay more than their shares. The argument maintains that taxpayers outside the traditional dyad who pay more than their legal share suffer injuries that suffice for standing, consistent with current law standing doctrine.

Part III.B discusses tax expenditures. It analyzes tax expenditures as tax *law*, challenging the conventional tax policy approach that assumes that tax expenditures should be legally analyzed like their economically equivalent direct spending programs.[8] Consequently, it argues that tax expenditures should be subject to constitutional review, along with every other provision of the tax law, and that the Supreme Court's 2011 decision to shield tax expenditures from judicial review[9] produces unfairness.

Reflecting on invisible taxpayers and invisible laws, Part IV contains the Article's policy arguments about the rule of law. It contends that invisibility deprives taxpayers of fairness in two ways: (1) economically, by misallocating financial burdens, and (2) democratically, by denying procedural justice and disregarding taxpayer interests in the public ordering. While tax policy regularly focuses on financial burdens, democratic fairness in taxation has received little attention.

While this Article's main contribution is in making the invisible apparent, Part V considers some solutions to the problem of invisibility, with practicality as a primary goal. It concedes that prudential standing limitations may be appropriate to prevent a flood of taxpayer challenges, even where legal-share injury would satisfy constitutional standing requirements. It proposes an institutional structure for bringing suit on behalf of invisible taxpayers in order to channel litiga-

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[8] Analyzing tax expenditures economically is the main contribution of tax expenditure analysis. See Stanley S. Surrey, Pathways to Tax Reform vii (1973); Stanley S. Surrey & Paul R. McDaniel, Tax Expenditures 3 (1985) (governments can grant monetary assistance in many forms, including tax provisions that depart from a normative baseline). The examination of tax expenditures as their economic equivalents is standard in the tax policy literature. See, e.g., Edward D. Kleinbard, The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes, 36 Ohio N.U. L. Rev. 1, 3 (2010); Edward D. Kleinbard, The Hidden Hand of Government Spending, Regulation 18 (Fall 2010), http://www.cato.org/pubs/regulation/regv33n3/regv33n3-2.pdf; Victor Thuronyi, Tax Expenditures: A Reassessment, 1988 Duke L.J. 1155, 1186-88. The debates in the literature consider whether an item is a tax expenditure or a base defining provision, but they do not challenge the conventional treatment of tax expenditures on economic terms. See, e.g., Douglas A. Kahn, Accelerated Depreciation—Tax Expenditure or Proper Allowance for Measuring Net Income?, 78 Mich. L. Rev. 1, 12 (1979).

[9] See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 152 (2011).

tion in the public interest. Short of increased litigation, administrative procedures within the IRS and more expansive decisionmaking in cases involving the traditional dyad may go a long way towards recognition for those who are currently invisible. Acknowledgement that there are invisible taxpayers who suffer injuries that the tax system should protect is an important first step toward tax justice.

II. Constitutional Tax Cases Without Plaintiffs

The problem of invisible taxpayers is most troubling in constitutional cases. While it is frustrating that people cannot complain that their neighbors are cheats, unconstitutional taxation is a more serious matter. Some constitutional cases simply require finding a proper plaintiff—in the tax context that means someone who has personally suffered from the government's application of the law to his tax determination. But there are a surprising number of important constitutional tax cases in which there is nobody with standing to sue under current law. This is troubling as a policy matter, even if it is acceptable as a legal matter.[10]

Two of the leading precedents on standing are tax cases: *Eastern Kentucky Welfare Rights Organization v. Simon*[11] and *Allen v. Wright*.[12] The former attacked the government's newly adopted standards for granting tax exemption to hospitals and the latter attacked the IRS' allowance of tax exemption to racially discriminatory schools. The plaintiffs in each case were not the potentially exempt taxpayer. Nevertheless, they were people with real personal interests in the cases and who should have been beneficiaries of the policies behind the exemption. Even though the purpose of exemption is to subsidize private organizations that produce third-party benefits, those third parties have no standing to complain.[13] The issue of tax exemption for charities only makes its way to court on the request of the party seeking exemption. That party can even get a declaratory judgment on its eligibility.[14] But only the government can question whether an exemption should be revoked. As a practical matter, that means exemption cases are rarely litigated, and there is a dearth of

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

[11] 426 U.S. 26 (1976).

[12] 468 U.S. 737 (1984).

[13] For an excellent discussion of these cases, see Lu, note 7.

[14] IRC § 7428.

case law on the meaning of charity as a result.[15] Possibly the most important litigated exemption case concerned Bob Jones University.

A. *Bob Jones University: Racial Discrimination*

In *Bob Jones University v. United States*,[16] the Supreme Court upheld the denial of tax exemption for racially discriminatory schools on the ground that exempt organizations may not violate public policy. Even though the Court declined to embrace a constitutional holding, the issue of tax exemptions for racially discriminatory schools was certainly an issue of equal protection.[17] Exemption cases are particularly likely to raise constitutional questions because exemption is inconsistent with activities that are contrary to public policies.[18] Standing was not initially an issue in *Bob Jones* because the university brought suit when the IRS revoked its exemption. If the IRS had insisted on taxing the institution, then the government would have effectively represented all others who were harmed by that exemption, either directly (like potential students) or indirectly (like taxpayers not entitled to exemption for any reason). But the twist in the *Bob Jones* story is that the government changed its mind midway, and attempted to abandon the revocation,[19] which would have allowed Bob Jones to remain exempt.

The traditional dyad would have then broken down because the taxpayer (the University) and the government would have been in agreement. Only the third-party outsiders were aggrieved by both the government and the university. But being outside the dyad, they would not have standing to demand that the exemption be revoked. If it had succeeded, the Reagan Treasury's change of mind would have deprived the Supreme Court of jurisdiction. A separate ruling by the D.C. Circuit in the nick of time[20] made that position untenable for the

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[15] See Richard L. Schmalbeck, Declaratory Judgments and Charitable Borders (2011), http://www1.law.nyu.edu/ncpl/resources/documents/RichardSchmalbeckNCPLPaperwithAppendices.pdf.

[16] 461 U.S. 574 (1983).

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

[18] That is what the *Bob Jones* Court said. *Bob Jones Univ*., 461 U.S. at 591 ("The purpose of a charitable trust may not . . . violate established public policy.").

[19] See Olatunde C. Johnson, The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence 15-17 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 9184, 2010), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1076&context=columbia_pllt.

[20] See Wright v. Regan, No. 80-1124 (D.C. Cir. Feb. 18, 1982).

government, so it relented.[21] But Treasury still maintained that the government should not revoke the University's exemption. [22]

In its opinion, the *Bob Jones*' majority recognized the injury suffered by taxpayers who were not party to the litigation. It wrote: "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors' . . ."[23] This is extraordinary language given the invisibility of all those other taxpayers in the legal structure that governs tax cases. But it offers a model of how courts might consider those interests as part of its deliberation in cases where there is a traditional dyad that affects many others.[24]

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

B. Windsor*: Sexual Orientation Discrimination*

The Supreme Court's decision in *United States v. Windsor*,[25] the most important case about equality and taxation in a long time, only happened because the government maneuvered to maintain a case or

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21 See Johnson, note 19, at 17.

22 At that point, since the government was not really at odds with the taxpayer, the Supreme Court appointed an amicus curiae to argue the case for affirming the Fourth Circuit's court's denial of the exemption. See Johnson, note 19, at 18. In a footnote, the Court explained:

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

Bob Jones, 461 U.S. at 585 n.9.

23 *Bob Jones*, 461 U.S. at 591.

24 See Section V.

25 133 S.Ct. 2675 (2013).

controversy against its own legal judgment. The Supreme Court's *Windsor* decision struck down a crucial part of the Federal Defense of Marriage Act (DOMA)[26] and held that it was unconstitutional for the government to discriminate against same-sex couples. While generally known as the first same-sex marriage case, *Windsor* was more technically a case about taxes. The specific issue was whether the plaintiff should be entitled to spousal benefits under the federal estate tax, despite DOMA's refusal to treat her as a spouse for federal tax purposes.

In *Windsor*, the Supreme Court's jurisdiction to hear the case ultimately hung by a thread. If the government had refunded Windsor's money (as it had been ordered to do),[27] or if Windsor had simply never paid the disputed tax (which would have been the case if she had started in the Tax Court), the case could not have happened. The Supreme Court made much of the fact that there was a justiciable case or controversy under the Constitution because the government held onto Windsor's refund. Physically retaining the money was sufficient even though the government and the taxpayer did not actually disagree about the correct interpretation of the Constitution; they both thought that Windsor should get her money back. The government held onto Windsor's refund *despite* the fact that the Obama administration agreed that Windsor was right on the merits.

This jurisdictional maneuver is curious from a tax law perspective. A taxpayer is entitled to an adjudication of tax liability without paying in advance; to do so she must bring her case in the Tax Court.[28] Only if she loses does the government receive payment. The plaintiff in *Windsor* chose to bring her case in a federal district court, rather than in the Tax Court, so she paid the contested amount and sued for a refund, following the procedure for district court litigation. The important fact to note is that payment is relevant to venue, but payment is not determinative of whether a person is entitled to litigate a tax liability. The overwhelming majority of tax disputes are litigated in Tax Court.[29]

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[26] Defense of Marriage Act, Pub. L. 104-199, § 3, 110 Stat. 2419, 2419-20 (1996).

[27] See Windsor v. United States, 833 F.Supp.2d 394 (S.D.N.Y. 2012).

[28] The Tax Court is an Article I court, so it is not bound by the jurisdictional rules in Article III. But Tax Court cases are appealable to Article III courts, and taxpayers are not required to pay in order to be heard by the federal courts of appeals. If Congress expanded jurisdiction in the Tax Court to allow broader taxpayer standing, the legality of this scheme would need to be determined. See David Krinsky, How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals, 57 Case W. Res. L. Rev. 301, 304 (2007). The Tax Court has indicated that constitutional standing rules apply to it. Anthony v. Commissioner, 66 T.C. 367, 371 (1976).

[29] Compare U.S. Courts, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2012

If the IRS had simply decided to allow all same-sex married couples to treat themselves as married for federal tax purposes—in clear defiance of DOMA—then no taxpayer would have been allowed to complain. Because a taxpayer disputing her own tax liability and the government must always be the counterparties in a tax case, there can be no other litigation that raises the issue of constitutionality of a tax statute; a tax statute's constitutionality simply cannot arise in litigation between private parties. If taxation were the only context in which DOMA applied, the IRS could have created a legal stalemate. Same-sex couples would have had nothing to complain about, and other taxpayers would not have been part of the dyad allowed to raise the issue. The statute would have remained on the books, but the executive branch would have not enforced it, leaving DOMA in an awkward limbo, and depriving everyone of a final Supreme Court determination about DOMA's constitutionality. The constitutionality of DOMA, and the larger question of equality for same-sex couples, was important to millions of people who had no direct interest in Windsor's tax refund. It was vital that the Supreme Court decide the case.

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

C. Hernandez*: Establishment of Religion*

Not all cases have such a happy ending. Where the IRS administers the law in an unconstitutional way, the Supreme Court may be deprived of any opportunity to review the practice. This is the story of *Hernandez v. Commissioner*,[30] which concerned the charitable deduction allowance for payments made to the Church of Scientology. In *Hernandez,* the Court refused to allow Scientologists to deduct their payments to the church for "auditing and training."[31] The grounds for its decision were statutory—the Court relied on its interpretation of the statutory requirements for the charitable deduction, which include

and 2013, at 4 (2013), http://www.uscourts.gov/statistics/table/c-2/judicial-business/2013/09/30 (1113 tax cases in district courts), with IRS, Data Book, 2013, at 61 (2013), https://www.irs.gov/pub/irs-soi/13databk.pdf (21,837 cases in Tax Court).

[30] 490 U.S. 680 (1989).

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

the making of a "contribution or gift."[32] The Court held that the payments did not satisfy the statute because they were quid pro quo for services received from the church,[33] rather than a contribution or gift.[34] In treating the payments as purchases, rather than contributions, the Court concluded that the payments did not qualify for the § 170 deduction.[35] Just to be clear: At the Supreme Court, the government won and the Scientologists lost.

After the Court's decision, the IRS—which had prevailed in the litigation—changed its position and decided to allow Scientologists to deduct their auditing payments as charitable contributions. The IRS entered into an agreement with the Church of Scientology detailing the change, and revoked its prior guidance disallowing members' deductions.[36] The IRS essentially overruled the Supreme Court.[37]

Of course, the IRS lacked the power to overrule the result in *Hernandez*; *Hernandez* was a Supreme Court case interpreting a statutory provision. Treasury is bound by statute, and by the Court's interpretation of a statute. It is unlawful for a government to impose tax inconsistent with that interpretation. If the Supreme Court interprets a statute contrary to congressional intent, Congress has the power to clarify by amending the law.[38] Congress could have made clear that the Supreme Court's interpretation was inconsistent with its policies by explicitly adopting a deduction for Scientologists. But Congress chose not to do so during the four years between the *Hernandez* decision and the IRS closing agreement. Its reticence is not surprising, given the Establishment Clause concerns raised by special treatment for a single religion.

Twenty years later, the status quo holds. No one can attack the IRS' excessively generous treatment of members of the Church of Scientology. Scientologists have no complaint, and other taxpayers have no standing to complain. Taxpayers can only complain about their own tax liability and hope that a court will direct the IRS to

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32 IRC § 170(c).

33 *Hernandez*, 490 U.S. at 692-94.

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

35 *Hernandez*, 490 U.S. at 694.

36 Rev. Rul. 93-73, 1993-2 C.B. 75, obsoleting Rev. Rul. 78-189, 1978-1 C.B. 68. Although the closing agreement was allegedly secret, it was, in fact, widely available. See Elizabeth MacDonald, Scientologists and IRS Settle for $12.5 Million, Wall St. J., Dec. 30, 1997, at A12; Closing Agreement Between IRS and Church of Scientology, 97 TNT 251-24 (Dec. 31, 1997), LEXIS, Tax Analysts File.

37 The same problem has also arisen in nonconstitutional contexts. See Gregg D. Polsky, Can Treasury Overrule the Supreme Court?, 84 B.U. L. Rev. 185 (2004).

38 See generally William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991).

revise its application of precedent. While they failed to get the relief they wanted, that is precisely what one family did, twice.[39]

The taxpayers in *Sklar v. Commissioner* are observant Jews who claimed a charitable deduction for the cost of religious school tuition paid for their children. The IRS disallowed the deduction because there is long-established precedent that no deduction is allowed for religious school tuition.[40] The government's rejection of the Sklars' claimed deduction increased their tax liability, entitling them to a judicial determination about whether the IRS' additional assessment was warranted. They clearly had standing to argue that they should be allowed the deduction.

In making their case, the Sklars argued that they should be allowed a deduction for their payments because the IRS was allowing members of the Church of Scientology to deduct their equivalent payments for religious training. They alleged that the restriction of the deduction to members of a single religion violated the Establishment Clause, so that either their deduction (and equivalent claims by all religions) should be allowed, or Scientologists should not be allowed to claim the deduction.[41] Even though standing was not an impediment to the Sklars, they were still unable to get the court to rule on the constitutional question that *really* brought them there.

The Ninth Circuit pointedly refused to decide the constitutional question, even though it had a lot to say about the government's Scientology policy. It wrote: "[W]e would likely conclude, were we to reach the issue, that the [pro-Scientology] policy must be invalidated on the ground that it violates either the Internal Revenue Code or the Establishment Clause."[42] It further stated:

> Because the facial preference for the Church of Scientology embodied in the IRS's policy regarding its members cannot be justified by a compelling governmental interest, we would, if required to decide the case on the ground

[39] See Sklar v. Commissioner I, 282 F.3d 610 (9th Cir. 2002); Sklar v. Commissioner II, 549 F.3d 1252 (9th Cir. 2008).

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

[41] The determination to allow the deductions by Scientologists was an administrative determination, not a legislative determination. That distinction would have been relevant if the challengers were claiming standing as taxpayers under *Flast v. Cohen*, 392 U.S. 83 (1968), because the Supreme Court had previously narrowed *Flast* to exclude administrative determinations. See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 481-83 (1982). But the Sklars were not taxpayer plaintiffs complaining about the government's decision to favor a single religion—they were challenging their own tax liability, which is always sufficient to give them a day in court, so they did not need to rely on *Flast*.

[42] *Sklar I*, 282 F.3d at 614.

> urged by the Sklars, first determine that the IRS policy constitutes an unconstitutional denominational preference under *Larson [v. Valente]*.[43]

Despite its clear view of the merits, the court did not decide the constitutional question because it concluded that the Sklars' payments to their religious schools were distinguishable from the Scientology payments. By distinguishing those payments, the court was able to dispose of the case without deciding anything about the Scientology payments. To add insult to injury, in the Sklars' second trip to the Ninth Circuit, the court explicitly based its holding for the government on the authority of *Hernandez*,[44] even though the IRS had been ignoring that precedent as applied to Scientologists—the actual litigants involved in the case. The court also explicitly declined to rule on the constitutionality of the Scientology closing agreement.[45]

While the *Sklar* court's approach prevented it from overreaching, it was more likely too modest—there might not be another opportunity for a court to review the IRS policy with regard to the Church of Scientology. No other taxpayer's payment is *precisely* the same as the payments made by Scientologists, so there will never be a case in which a court has no choice but to decide the constitutional question. Even so, the court could have found the payments to be legally comparable. Thus, despite their clear case or controversy allowing them access to the courts, the Sklars lost. As a result, members of the Church of Scientology are still allowed to claim deductions for auditing and training, contrary to the Supreme Court's holding in *Hernandez,* and in likely continuing violation of the Establishment Clause.[46]

The closing agreement between the IRS and the Church of Scientology is not a simple matter between two parties. It raises a constitutional issue that directly touches every person who pays for any kind of religious training, and indirectly affects everyone else who does not. And yet, nobody can challenge the constitutionality of the Scientology deduction pursuant to the Ninth Circuit's theory because no other religion operates quite like the Church of Scientology. The *Sklar* court's holding that the tuition payments at issue in the case were unlike the auditing and training payments of Scientologists allowed it to dispose of the case without reaching the question of whether the IRS operated in an unconstitutional manner. Since all

[43] Id. at 619.

[44] *Sklar* II, 549 F.3d at 1259-60.

[45] Id. at 1267.

[46] If a court were determining the tax status of Scientologists, the church would have a legitimate interest in being joined. But the issue was res judicata on account of *Hernandez*.

payments can be distinguished from the ones allowed to be deducted by Scientologists, no court will ever be compelled to rule on the Scientology deduction, making permanent the IRS' ability to unilaterally flout the Constitution, without judicial oversight.

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

III. Why Invisibility Is a Legal Problem

The Supreme Court has substantially narrowed possible avenues for constitutional challenges to taxation by taxpayers, while enlarging both the discretion of the IRS and the power of Congress. While there are many old cases in which the Court decided the merits of taxpayer challenges on constitutional issues without even considering whether the complaining taxpayer had standing to sue,[47] recent decisions aggressively employ standing to slam the courthouse doors and immunize tax benefits from judicial review.[48] Tax expenditures—provisions of the tax law that are functionally equivalent to direct spending[49]—have become nonreviewable because the Court now characterizes them as the absence of taxation, rather than state action favoring some taxpayers over others.[50] The Court's conclusion that tax expenditures simply allow individuals to spend their own money[51] is inconsistent both with its own precedents and the government's estimates that tax expenditures cost the federal fisc a trillion dollars in forgone annual revenue.[52] Tax benefits are an increasingly important

47 See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 152 (2011) (Kagan, J., dissenting) ("Until today, this Court has never so much as hinted that litigants in the same shoes as the Plaintiffs lack standing. . . . To the contrary: We have faced the identical situation five times—including in a prior incarnation of this very case!—and we have five times resolved the suit without questioning the plaintiffs' standing.").

48 See, e.g., id. (majority opinion).

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

50 See *Winn*, 565 U.S. at 142-44; see also Part IV.

51 See *Winn*, 565 U.S. at 142.

52 Tax expenditures are quantified by the government's budget experts and treated as revenue losses that reduce tax collections. Treasury and the Joint Committee on Taxation

(and expensive) tool of federal policy,[53] so it is alarming that the courts may be deprived—from two directions—of the opportunity to consider their constitutionality.[54]

A. Legally Invisible Taxpayers: No Standing to Sue

As a matter of Article III standing doctrine, taxpayers have no interest at all in the tax liabilities of others because they have no legally cognizable injury. Standing jurisprudence treats taxpayers as atomistic parties in potential conflict only with the state in the traditional dyad. In such a framework, the implicit assumption is that no taxpayer is affected by anyone else's package of taxes and tax benefits. That assumption is false.

Contrary to the legal framework, all taxpayers are interdependent; nobody who shares any of the burden of taxation can be wholly disinterested in any aspect of the system. People who are treated as outside the framework have real—albeit small—out-of-pocket costs that are wholly created by government. These government-imposed burdens distinguish tax law from other regulatory schemes. Standing doctrine ignores taxpayer burdens and treats real economic injuries as though they do not exist; a taxpayer is invisible in the legal regime unless he is complaining about a liability that appears on his own tax return. The standing rules treat him as though he has no complaint, with the consequence that substantive rulings that courts make on tax issues ignore his interests.

This narrow dyadic framework is inconsistent with the perspective of the federal government. Aggregate tax collections enable the state to function, so the design and operation of the tax system matters to every taxpayer. Individuals paying their modest bills may not each matter to the treasury, but the aggregation of their tax payments en-

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each measure the revenue loss from tax expenditures annually. See Office of Mgmt. & Budget, Exec. Office of the President, Analytical Perspectives, Budget of the United States, Fiscal Year 2016 (2015), https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/spec.pdf; Staff of Joint Comm. on Tax'n, 112th Cong., Estimates of Federal Tax Expenditures for Fiscal Years 2015-2019 (Comm. Print 2015), https://www.jct.gov/publications.html?func=startdown&id=4857.

[53] Excluding defense spending, the federal government spends more through the tax law than it spends through direct appropriations. Compare Thomas L. Hungerford, Cong. Research Serv., Rl34622, Tax Expenditures and the Federal Budget 13 (June 1, 2011), https://www.fas.org/sgp/crs/misc/RL34622.pdf (tax expenditures produce over a trillion dollars in revenue loss), with Office of Mgmt. & Budget, Exec. Office of the President, Fiscal Year 2012: Historical Tables 167 tbl.8.7, 346-47 tbl.15.4 (2010), https://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hist.pdf (showing $658 billion in discretionary spending, excluding defense).

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

ables the existence of the modern state. Any legal institution that considers the perspective of the state cannot ignore the economic substantiality of the taxes paid by invisible taxpayers. Yet that is precisely what the traditional dyad of tax analysis does by focusing on a single taxpayer and recognizing only its conflict with the government, in isolation from the rest of the fiscal system.

This Section explains the courts' interpretation of the injury requirement in standing doctrine, and why that interpretation makes some taxpayers legally invisible under current law. It considers whether a reconceptualization of tax injury that recognizes taxpayer interdependence would satisfy the requirements of standing doctrine, and argues that taxpayers suffer real injuries that courts should appreciate. There is room in current standing doctrine to recognize invisible taxpayers, and the failure to do so creates both constitutional and revenue problems that demand attention.

1. *The Standing Rules That Make Taxpayers Disappear*

The broad no-taxpayer-standing rule that has kept taxpayers out of court is not a particularly controversial aspect of standing doctrine—virtually everyone agrees that allowing taxpayers to challenge every government decision in the federal courts would produce chaos.[55] Article III of the Constitution requires that courts hear only cases and controversies.[56] The standing rules implement that requirement, and ensure that the litigating parties have adverse interests.[57] The Supreme Court has summarized the "irreducible constitutional minimum of standing" as composed of three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized . . .; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " . . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the

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[55] See, e.g., T.W. by Enk v. Brophy, 124 F.3d 893, 896 (7th Cir. 1997) (Posner, J.) ("Without such a limitation, not only would the federal courts be flooded by 'cause' suits (*really* flooded), but people who did have concrete stakes in a litigation would often be thrust aside by the ideologues." (emphasis in original)).

[56] U.S. Const., art. III, § 2.

[57] Some scholars believe that adversity is not required under the Constitution. See, e.g., James E. Pfander & Daniel D. Birk, Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction, 124 Yale L.J. 1346, 1355 (2015) ("federal courts may constitutionally exercise not *one* but *two* kinds of judicial power: power to resolve disputes between adverse parties and power to entertain applications from parties seeking to assert, register, or claim a legal interest under federal law").

> challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[58]

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

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

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

[58] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (alterations in original) (citations omitted).

of conflict and cooperation, but the legal structure encourages us to focus only on the conflicted taxpayer-government dyad.

When the government's substantive position changes from imposing taxpayer liability to reducing that liability, the axes realign, and the government is not a good representative for taxpayers not before the court. The government's generosity to identifiable taxpayers imposes no direct injury on anyone. But taxpayers who are not part of the traditional dyad suffer. Every other federal taxpayer is harmed when a favored few pay less tax. Widely shared harm can be as real as harm suffered by just a few, as is abundantly clear from mass torts and products liability.[59] Yet under current law, those other taxpayers lack standing to sue over the government's generosity. The benefitted taxpayer remains the party whose tax liability is directly at issue. He is the only one potentially with standing to litigate his liability, but that taxpayer has no complaint (and no injury at all). My neighbor's charitable contribution deduction does not directly increase my tax bill, so the law treats the government's decision to allow him a too-generous deduction as none of my business. Only if my taxes increase directly by raising an amount that appears on my tax return do I have standing to challenge my excessive payment to the fisc. But that is not how the tax system operates. It is important to emphasize that the action I would like to challenge is the government's decision; I do not blame my neighbor for paying as little tax as the government allows.

By failing to notice the interrelatedness of taxpayers, courts can assert that one taxpayer suffers no injury when another taxpayer receives unwarranted generosity.[60] Given the total number of taxpayers and the enormity of total tax collections, the effect of interrelatedness is small—one individual is unlikely to suffer much change in her overall benefits and burdens as another individual's tax liability goes up or down. Because the federal tax system is so large, it is tempting to ignore its integration as too complex and to discount any individual burden as too miniscule to worry about. So it is not surprising that the Supreme Court has done precisely that when analyzing the injury-in-fact requirement necessary for standing to sue.

In its latest discussion of taxpayer standing, the Supreme Court rejected any notion of interrelatedness and the broad interest that interrelatedness implies for any one taxpayer. The majority opinion stated: "When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. . . . It would be 'pure specula-

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

[60] See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 143-44 (2011).

tion' to conclude that an injunction against a government expenditure or tax benefit 'would result in any actual tax relief' for a taxpayer-plaintiff."[61] The Court's understanding of "actual tax relief" was evidently the narrowest possible interpretation, consistent with the traditional dyad paradigm, but divorced from the economic reality of the tax system as a whole.[62] The Court limited its understanding of tax relief to only reducing the bottom-line number on a particular taxpayer's return. The holding seems to demand that a taxpayer—in order to get a foot in the courthouse door—show that revoking an (unconstitutional) benefit for another taxpayer translates into a demonstrable reduction in dollars paid by him. No taxpayer can ever make that showing. The Court's conception of remedy, limited to the number on a tax return, is disconnected from the larger structure of benefits and burdens of government, in which a taxpayer does enjoy "actual tax relief" if her share of the costs of government declines relative to the shares paid by others. Although a taxpayer may be able to prove that she pays more than her constitutional share of the costs of government, the legal effect remains for purposes of Article III standing: An individual taxpayer has no injury when her *share* of total revenue collected increases, as long as her total bill, in *dollars*, remains the same.

The Supreme Court has conceptualized the tax system as functionally separable from the fiscal system as a whole, allowing it to ignore the injuries that individuals in an interrelated fiscal system suffer on account of that interdependence. In denying standing to taxpayers challenging a state credit for businesses, the Court said:

> Plaintiffs' alleged injury is . . . "conjectural or hypothetical" in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit. . .[63]

This analysis reveals a truncated approach because it narrowly focuses only on direct tax liabilities of an identifiable taxpayer; it is flawed to limit analysis to a single "tax bill." Beyond that, it is flawed to consider only the tax system in measuring injuries that arise in connection with the fiscal system, while ignoring the combination of benefits and

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[61] Id. at 136; see also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006).

[62] The Court also based its explanation on dubious economic assumptions. I analyzed those assumptions in Sugin, note 54, at 817-19.

[63] *DaimlerChrysler*, 547 U.S. at 344.

burdens within the fiscal system as a whole.[64] Burdens depend on the net effect of taxes and spending, so an evaluation of injury must consider both sides of that coin. Accounting for interrelatedness, as this Article advocates, makes both injury and benefits on either the taxing or the spending side relevant.

The restrictive rules about standing would make better tax policy sense if they aided the government in revenue collection. For example, the anti-injunction act prohibits suits to restrain the collection of tax so as to allow the government to more easily collect revenue.[65] But the restrictive rules about standing impede the collection of revenue because they prevent suits that might produce more revenue. Since taxpayers can always challenge their own tax bills, the standing rules create a bias in favor of suits that ultimately produce less revenue. Government attempts to collect revenue, rather than give it away, are always subject to attack because any taxpayer challenging his increased liability is entitled to a day in court. Constitutional challenges have been foreclosed only where the government is too generous to taxpayers. Thus, individual taxpayers can attack the government's revenue raising attempts, but nobody can challenge the government's decisions to forgo revenue—even if those decisions are illegal or unconstitutional.[66]

2. *Invisible Taxpayers Have Real Legal Injuries*

Invisible taxpayers suffer injuries that should be cognizable under current law standing doctrine because they have real legal injuries, defined by the tax law. Taxpayer injury should be identified by reference to the legal rules that define economic rights in the tax system.[67]

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

[65] IRC § 7421 ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.").

[66] Even members of Congress may be unable to object because they lack standing to challenge administrative application of a federal statute. See Nathaniel S. Cushman, The Impact of Illegal Tax Guidance: Notice 2008-83, 62 Tax Law. 867, 885 (2008); see also Suzanne B. Goldberg, Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest, 61 U. Pa. L. Rev. Online 164, 172 (2012) ("[I]t is not clear that Article III does or should permit the federal government to bifurcate its standing for purposes of having federal courts resolve policy disputes between the executive and legislative branches."). The *Windsor* Court held that the Bipartisan Legal Advisory Group had standing. United States v. Windsor, 133 S.Ct. 2675, 2686-88 (2013).

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

Any taxpayer who is assessed more than what this Article calls her "legal share" has economic harm justifying legal redress—harm that should count as injury under current standing doctrine. For purposes of identifying injury from taxation, it is important that the law defines the legal baseline. The concept of legal shares is a doctrinal one that determines rights and obligations of taxpayers and government. It establishes the relative burdens of government that the law imposes on taxpayers in a regime that recognizes the significance of interrelatedness. Constitutional limitations are necessarily part of the definition because legal shares can only include taxes imposed by Congress that are also constitutional. A properly adopted tax must also be administered so as not to deny individuals their constitutionally guaranteed rights. Unconstitutional laws (and administration that is contrary to law) cannot be part of the baseline for determining legal shares.

Not every tax paid constitutes an injury. The concept of legal shares differentiates a tax burden that is unjustifiable under the law from a valid burden that is imposed intentionally by the legislature. For example, renters should not have standing to challenge the home mortgage interest deduction because it is part of the legal structure that defines tax obligations. Renters' legal obligation to pay tax includes a liability that attaches to amounts used to pay for housing, even though homeowners are legally permitted to enjoy housing on a tax-free basis. Though it might be inequitable, the home mortgage interest deduction does not create an injury.

Congress has broad authority to adopt tax laws, and Treasury has broad discretion in applying that law to individual taxpayers. But where either body oversteps its legal or constitutional authority, taxpayers are forced to pay more than their legally justified shares of tax. Any unconstitutional largesse by the government increases the relative shares paid by invisible taxpayers beyond their legal limit. For example, if the IRS decided to allow some renters to claim the home mortgage interest deduction—without any statutory basis for such allowance—other taxpayers, who did not receive the bonus, would be paying more than their legal shares. The agency's decision in that case would be illegal because the government would not be exercising its allowable discretion, but would be purposely administering the tax system contrary to law. If the IRS refused to follow a Supreme Court interpretation of the Code, the action would be illegal. So, if the government continued to grant exemption to schools that discriminated on the basis of race after the Court's decision in *Bob Jones*, that policy would be illegal because it would be explicitly contrary to the Supreme Court's determination of eligibility for exemption. If the IRS had allowed same-sex couples to file joint returns prior to *Windsor*, that would have been illegal under DOMA. Under conventional analysis, taxpayers who did not receive the bonus mortgage interest deductions (in the first example), or did not receive tax exemptions (in the second example), or did not file jointly (in the third example) have no injury. Those other taxpayers would not see their total tax liability increase on account of the unlawful benefit granted to others. But their share of total tax paid would increase, so they would have a greater relative responsibility for the costs of government. This is what an interpretation of injury that acknowledges taxpayer interrelatedness would recognize as an injury in fact.

The bonus mortgage interest deductions allowed to renters would be illegal, but not unconstitutional unless the government's largesse was based on a constitutionally suspect classification, such as race. Since the Supreme Court's analysis in *Bob Jones* was statutory, rather than constitutional, the government's hypothetical contrary policy is clearly contrary to statute. It could also be unconstitutional. The *Hernandez/Sklar* story is also an example that includes the constitutional component. The Supreme Court held that auditing payments made to the Church of Scientology are not deductible under § 170, establishing the law of charitable deductions on those facts. When the IRS allows those payments to be deducted, in blatant conflict with the interpretation of the law by the Court, it increases the tax shares paid by other taxpayers. It would have been enough for this analysis that the Court held that the payments were not deductible, because the IRS' largesse to Scientologists is contrary to law. But in addition, that largesse is also unconstitutional because it favors one religion over others, as the court in *Sklar I* described.

Because Congress defines the legal baseline—with the help of the courts interpreting the statute, illegal tax shares are likely to arise from determinations made by the IRS administering the law. Where the IRS refuses to follow the statute or the Supreme Court's interpretation of it, tax collections are not made consistent with the law. Congress' power to design the tax law is very broad under both Article I, section 8, and the Sixteenth Amendment. But it is not unlimited because Congress may not adopt tax laws that deny individuals rights, and unconstitutional tax shares can arise when either the IRS or Congress trample those rights. Unconstitutional tax collections may arise from either administrative actions or the statute itself. Those taxpayers have been denied access to the courts, but their legal–share injuries mean they have something they should be allowed to complain about in an Article III court.

The Supreme Court was not always so dismissive of legal share taxpayer injury. The Court's approach was more nuanced in its earlier considerations of taxpayer standing than it has been lately. In *Frothingham v. Mellon*, the first Supreme Court case to analyze taxpayer standing, the Court described a taxpayer's injury—qua taxpayer—as "remote, fluctuating and uncertain."[68] It concluded that a taxpayer's "interest in the moneys of the treasury . . . is shared with millions of others, is comparatively minute and indeterminable."[69] Though the Court concluded that the complaining taxpayer raised no case or controversy allowing for judicial review, its analysis shows that the *Frothingham* Court recognized the real economic cost and interrelatedness of taxpayers. It denied standing because it found the interest too small to be legally significant. Again in 1983, when the Court decided *Bob Jones*, it recognized the costs that taxpayers incur on account of the interdependence of the tax system by noting that "the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'"[70] In addition, municipal taxpayers—who each pay a larger percentage of a smaller budget—have always been granted standing more broadly than federal taxpayers because their injuries have always appeared to be substantial.[71] This history of judicial recognition of taxpayer injury is important because it contrasts with the Supreme Court's current approach, and allows for a toe-hold that might support standing for some taxpayers today.

It is significantly different to deny that an injury exists (as the Court's recent precedents do), and to recognize it (as *Frothingham* and *Bob Jones* did), but think it too small to worry about. Under established doctrine, a small injury is crucially different from none at all. Class actions exist because individuals with small injuries have no incentive to sue, not because they lack standing to do so. Taxpayers who contribute more than their legal share to the federal treasury because others pay less than theirs, as an economic matter, suffer a "concrete" and "actual" injury that should satisfy the *Lujan*[72] standard. Consequently, the Constitution's case or controversy requirement should not prevent taxpayers from having a day in court in cases of illegal tax collection. Once understood as taxpayer complaints about government departures from a legal baseline, taxpayer claims that they are paying too much tax fit well into the legal paradigm—the plaintiff taxpayer is arguing that her own share is too high because the

68 262 U.S. 447, 487 (1923).

69 Id.

70 Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).

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

72 Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

legal application of the law would allow her to pay a smaller share. In the traditional dyad, the argument is based on the government's application of the law to the complaining taxpayer. But the same result should follow when the effect arises from the government's application of the law to another taxpayer. In both cases, the economic injury is to the taxpayer, and in both cases, the disagreement is between the taxpayer and the government (and not between two taxpayers).

Legal shares of tax do not depend on whether government benefits are commensurate with taxes paid. The balance of government benefits and burdens is an important question for tax fairness, and must be considered in designing tax rules.[73] Nevertheless, *fair* shares are not the same as legal shares. The concept of *legal* share is a doctrinal one, and can be understood without evaluating the justice of the fiscal system as a whole. For example, deficit spending means that future generations will likely finance some of our current public consumption. Burdening them with our costs might be an unfair thing to do to our grandchildren, but it is not illegal for our generation to live beyond its means.[74] A legal injury is defined in reference to the legal rules currently in effect—regardless of their wisdom or morality. In conceptualizing legal shares, this Article accepts both the requirements of standing doctrine and the substantive legal tax rules. It challenges the concept of tax burdens, and argues that a more accurate understanding of the relationship of taxpayers to one another would produce different legal conclusions under current doctrine. Since the law (as established by the Supreme Court) denies charitable deductions to Scientologists, the legal baseline for tax shares should not allow the deduction. Because Scientologists are deducting more than their legal entitlement under current IRS policy, non-Scientologists are paying a larger share of the total revenue than the legal rules require. Taxpayers who are forced to pay for a greater share of government than the legal rules require should be allowed to complain in court even though their excess tax liability is indirect, just as they can when they are forced to pay more directly.

Non-Scientologists, and similar taxpayers who pay more than their legally required shares are harmed in being denied access to justice.

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[73] See John Stuart Mill, The Principles of Political Economy 621-22 (J. Laurence Laughlin ed., 2009). Part V analyzes economic fairness, apart from procedural fairness, which is the concern here. I have argued that benefits taxation is intellectually incoherent. See Linda Sugin, Don't Give Up on Taxes, 145 Tax Notes, 1373, 1375 (Dec. 22, 2014).

[74] It might not be unfair if investments today produce benefits for future generations that outweigh costs imposed on them. See, e.g., Louis Kaplow, Discounting Dollars, Discounting Lives: Intergenerational Distributive Justice and Efficiency, 74 U. Chi. L. Rev. 79 (2007). Intergenerational equity is a complicated question beyond the scope of this discussion.

Their indirect economic injury produces a procedural injustice. But they may not suffer an economic injustice because the legal rules may not define the most fair allocation of the tax burden – a theory of fair taxation is necessary to determine that.[75] Consequently, arguments about legal shares and taxpayer injury are primarily arguments about procedural justice in the tax system. A taxpayer's inability to challenge her own illegal share of tax liability is unjust because it denies her the protection of the law.

If courts grappled with the interdependence of taxpayers, they would be more likely to find a justiciable case where a taxpayer pays more than his legal share of tax collections. Legal shares are a way to distinguish tax liabilities that produce injuries from those that do not. The problem under current law is that courts are unable to open the door to some taxpayer complaints without inviting a flood of baseless complaints.[76] But legal–share injuries are a way to navigate this dilemma; it would not create a huge expansion of taxpayer standing, and most taxpayers would still be barred from court. But it would allow taxpayers who are paying a greater share than the legal rules demand of them to seek redress. The requirement of injury in current standing doctrine leaves enough room for taxpayers to litigate about whether they are overpaying because they have been assessed more than their legal share of the costs of government. Where the government has chosen to impose unconstitutional or otherwise illegal obligations on some taxpayers, protection of the rule of law requires that they have a day in court.

3. *Taxpayer Challenges to Taxes Are Distinguished from Challenges to Spending*

One explanation for why the broad no-taxpayer-standing rule is so well accepted is because courts and scholars have not distinguished two types of challenges that are very different from one another. One is a challenge to taxes that the complainant is being forced to pay, and the other is a challenge to spending that the government has chosen to finance with taxes. The no-standing rule makes sense where it forecloses objections to government spending choices, but not where it forecloses a taxpayer's opportunity to challenge his tax. The rules for taxpayer standing need to be separated into these two distinct categories so that claims based on paying more than one's legal share are

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[75] See Section IV.D.

[76] But see Susan L. Parsons, Taxpayers' Suits: Standing Barriers and Pecuniary Restraints, 59 Temp. L.Q. 951 (1986) (suggesting that fear of a flood of claims is based on an inference and not on empirical data).

distinguished from general attacks on legislative policies.[77] The no-taxpayer-standing rule, as it currently exists, fails to distinguish these very different claims. The no-taxpayer-standing rule seems necessary only in the spending context.[78]

Frothingham was a case about government spending, not taxing. The complaining taxpayer challenged a government appropriation, alleging that the federal statute, which allocated funds to states for carrying out maternal and infant health initiatives, was a taking, "under the guise of taxation, without due process of law."[79] The prohibition against taxpayer standing is most compelling when it is based on a takings claim, rather than a taxing challenge, because the taxpayer's complaint in *Frothingham* was essentially a naked policy challenge. The taxpayer was dissatisfied with Congress' decision to legislate on a certain matter in a particular way. The case was a challenge to Congress' reasoned decision about what national health policy should be—the core function of the legislature. [80]

As applied to spending challenges, the no-taxpayer-standing rule makes sense. The courts are not the proper place to challenge laws that taxpayers do not like—that is the function of the ballot box. It would be impossible for courts and legislatures to operate in the face of constant judicial challenges to every federal policy on takings arguments.[81] The *Frothingham* court said: "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."[82] Unlike Frothingham, invisible taxpayers do not need to rely on the takings clause because they make a narrower claim about the legality or constitutionality of their tax share.

The taxpayer in *Frothingham* was not in the position of invisible taxpayers because she was not complaining that her tax bill was more than the legal share she owed—she was not complaining about her

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[77] Justice Scalia has argued that standing doctrine is designed to prevent courts deciding matters better left to legislatures. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983). But see Elliott, note 59, at 514 (arguing that Justice Scalia's concerns are about Article II, not Article III).

[78] See Elliot, note 59, at 480.

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

[80] See Scalia, note 77 (advocating for standing doctrine to address this). But see Gene R. Nichol Jr., Abusing Standing: A Comment on *Allen v. Wright*, 133 U. Pa. L. Rev. 635 (1985) (critical of the separation-of-powers approach to standing).

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

[82] *Frothingham,* 262 U.S. at 487.

taxes at all. To the contrary, taxpayers who believe they are being overtaxed often have standing—as taxpayers—under current doctrine. That is the situation in the traditional dyad; a taxpayer has standing because she is a taxpayer. It is possible that the no-taxpayer-standing rule developed because courts failed to see any complaints about tax liability outside the traditional dyad. Without the legal-share conception of injury, the traditional dyad may present the sole situation in which a taxpayer has an injury connected to her tax liability. But the legal shares understanding of injury broadens the scope of overtaxation and makes clear that taxpayers can suffer injuries as taxpayers outside the dyad, when their shares are larger than a lawful, constitutional tax scheme would allow. Under post-*Hernandez* law, Scientologists are legally required to pay for auditing with after-tax dollars because the Supreme Court held that they are not eligible for the § 170 deduction. It is because of the violation of law as announced by the Supreme Court by the IRS closing agreement that the Sklars suffer legal–share injuries. Taxpayers suffer injuries when they pay too much tax on account of the goverment's unlawful decision to collect too little from others, as the *Hernandez* story makes clear.

A careful application of standing doctrine that acknowledges the injuries that taxpayers suffer in paying more than their legal shares would not open the floodgates that the *Frothingham* court feared. Treating only legal-share injuries as injuries does not mean that *anyone* should be able to complain about any government spending decision. Those who would challenge the legislature's decision about how much revenue to raise, or how to allocate that revenue to spending projects would still be barred from court. Political decisions about the size of government and its priorities would remain beyond challenge. But it is possible to carve out legal-share injuries from these political choices.

The narrow category of legal–share injuries is well suited to judicial determination because the disputes resemble the traditional-dyad cases in which taxpayers dispute their own bills. They are about money—the quintessential subject of tax adjudication. And the plaintiff is complaining about the government's action, just as in the traditional dyad. Because the government is aligned with a favored taxpayer, the invisible taxpayer and the government have clearly adverse interests, a key consideration for courts in determining standing.[83] Except for the small size of taxpayers' legal share injuries, they closely resemble the injuries that standing doctrine generally vindi-

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

cates. The question for taxation is who should pay, which remains distinct from the question of what is being paid *for*. Recognizing a legal–share injury applicable to taxes does not create a case or controversy with respect to government spending decisions. When a taxpayer suffers an injury that affects him only as a taxpayer, and when that injury is a real legal injury because the taxpayer has a right to be protected from whatever the government is doing, there is a strong argument for judicial review. This legal share approach to taxpayer injury focuses on the relevance of a plaintiff's role as a taxpayer.

Appreciating that an injury exists does not end the inquiry. Given the injury's small size for any individual in the cases contemplated here, there are legitimate concerns that might justify prudential limits on taxpayer standing in such cases. It is important to recognize that these concerns, however, are not constitutional bars to standing for invisible taxpayers. For example, the slightly overcharged taxpayer may have insufficient incentive to vigorously argue a case, even if there are many others who share his fate. Similarly, taxpayers are generally unlikely to be anxious to complain about the liabilities of their neighbors, given the cost and aggravation of litigation. Consequently, there is a legitimate worry that primarily tax protestors or other harassers might be the only ones to come forward. Even though the *Lujan* standard[84] is satisfied for some taxpayers when we conceptualize the tax system as I have described, there may be good reasons to limit access to courts for legal share complaints. Under current law, the courts' standing jurisprudence contains both constitutional and prudential components, so the Supreme Court has a great deal of discretion over how these disputes might proceed.[85] Prudential standing rules can effectively keep disgruntled taxpayers off the courts' dockets. If limitations on the legal-share justification for taxpayer standing are prudential, they can be abrogated where appropriate. Thus, courts can consider when justice would be served by allowing litigation over the too generous treatment that the government is bestowing on some taxpayers. The point here is that the constitutional contours of standing should not prevent legal-share suits. In Part V discuss some possible mechanisms that Congress and the courts might employ to allow some invisible taxpayers' cases to proceed, in light of prudential concerns that might limit review of all legal-share injuries.

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84 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

85 Heather Elliott argues that *Frothingham*'s taxpayer standing rule is prudential, not constitutional. See Elliot, note 59, at 471 n.65.

B. Legally Invisible Laws: Tax Expenditures

Some taxpayers are invisible in the legal system because laws determining their tax treatment are not considered government action at all. Without government action, there is nothing for taxpayers to complain about; all tax litigation has the government on one side. The vanishing of tax expenditures from the legal landscape is a recent development in tax law jurisprudence, and a particularly troubling one. In 2011, in *Arizona Christian Schools Tuition Organization v. Winn*, the Supreme Court made tax expenditures disappear from legal analysis by treating them as the government declining to impose tax.[86] The Court thereby transformed tax expenditures from the economic equivalent of government spending (with *some* legal resemblance to direct spending) into private action completely beyond legal review. Making tax expenditures legally invisible—despite their central role in affecting the distribution of government benefits and burdens—was a radical departure from their traditional legal treatment.

Tax expenditures are fundamental elements of the tax law and courts should have the power to review their constitutionality.[87] Analyzing tax expenditures as part of the tax system should mean that their role in determining legal shares is subject to judicial review. Because tax expenditures are adopted by Congress, they present a more limited set of issues than administrative decisions of the IRS. The IRS decision with respect to the Church of Scientology, for example, was contrary to both statute[88] and the Constitution,[89] and a court should be able to strike it down on either ground. Because Congress has broad authority to define what the tax law is, its decisions are law. Tax expenditures only need to be reviewed for violations of the Constitution. While that is a limited scope of review, it is far broader than the Supreme Court has allowed.

[86] 563 U.S. 125, 142 (2011).

[87] Many tax expenditures, including IRC §§ 107, 170, and 501, raise first amendment questions. Courts have sometimes acknowledged these constitutional issues. See e.g., Regan v. Taxation With Representation, 461 U.S. 540 (1983) (evaluating first amendment challenge to lobbying restriction in § 501(c)(3)); Freedom From Religion Foundation v. Lew, 983 F. Supp. 2d 1051 (W.D. Wisc. 2013), vacated and remanded, 773 F.3d 815 (7th Cir. 2014) (evaluating parsonage exemption under the establishment clause). Equal protection is also a potentially relevant constitutional limitation on the application of the tax law, although explicit racial and gender distinctions do not appear in the Code. See, e.g., McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (evaluating equal protection challenge to tax-exempt racially discriminatory fraternal orders).

[88] IRC § 170, as interpreted by the Supreme Court in Hernandez v. Commissioner, 490 U.S. 680 (1989).

[89] See *Sklar* V. *Commissioner* II, 549 F.3d 1252, 1259-60 (9th Cir. 2008) (dictum).

1. *Tax Expenditures Are Tax Law*

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

Tax expenditures are provisions included in the tax law that are the functional equivalent of direct government spending.[90] Instead of the government allocating funds for particular programs, tax expenditures allow taxpayers to reduce their tax liabilities by participating in various activities enumerated in the statute. For example, the government can subsidize mortgage interest obligations of individuals by sending cash subsidies to borrowers (to help them finance their payments), sending cash payments to lender-banks on behalf of borrowers (to reduce what borrowers need pay),[91] or by reducing the tax bills of borrowers by the same amount. The federal government has chosen to do the latter,[92] designing the mortgage interest subsidy as a tax expenditure. Yet the other choices would have been economically indistinguishable. Tax expenditures reduce the amount of revenue the tax law would otherwise collect, and thus, they subsidize individuals to the extent their tax bills have been reduced.

The legal treatment of tax expenditures has always diverged some from their economic equivalents. As an economic matter, tax expenditures operate the same way as direct spending. But as a legal matter, because tax expenditures reduce tax liability, they are integral to the tax system. Taxes and spending are legally distinct and tax expenditures are in the legal category of taxes. This classification matters; it makes tax expenditures part of the definition of tax liability. Thus a taxpayer's legal share is not simply determined by measurement of the tax base and application of the rates thereto; tax expenditures allow some taxpayers to pay less money than they otherwise would on that straightforward determination of tax liability.

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[90] See Congressional Budget Act of 1974, note 49.

[91] See Bipartisan Pol'y Ctr., Restoring America's Future 33-34 (2010), http://cdn.bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC%20FINAL%20REPORT%20FOR%20PRINTER%2002%2028%2011.pdf (proposing this design).

[92] IRC § 163(h)(3).

It is important that tax expenditures are appreciated as features of law because law creates rights and responsibilities. Tax expenditures give individuals legal claims to pretax income that otherwise would have been subject to an implicit tax lien. They bolster the property rights that people have in their pre-tax earnings by denying the presumptive tax that attaches to all income in our tax system. Consequently, tax expenditures are crucial in defining legal tax shares, and they should be evaluated on the same terms as other aspects of the tax law.

As elements of the legal landscape, tax expenditures should be analyzed like other tax laws, rather than like pure spending decisions that Congress makes. Consequently, a tax provision that raises taxes only on members of a particular group and an alternative that reduces taxes only on that group should be subject to the same level of review. If the group is defined by whether it has income from capital, or whether it owns a home, for example, the challenges should be nonjusticiable in either direction as long as Congress has defined the category of law. But if the group is defined by reference to a category that is constitutionally relevant, a constitutional challenge should not turn on whether the provision is designed as a tax increase or a tax expenditure.

2. ACS v. Winn *Made Tax Expenditures Unreviewable*

The Supreme Court's most recent treatment of tax expenditures distinguishes tax expenditures from direct spending, squarely rejecting a central tenet of tax expenditure analysis.[93] But instead of adopting the approach advocated here and treating tax expenditures as fundamental elements of tax law, the Court characterized them as Congress declining to act. This is a radical change in the judicial approach to tax expenditures. Although the Court had never fully embraced the equivalence with direct spending, it always recognized the legal significance of tax expenditures. Never before had the Court treated tax expenditures as neither taxes nor spending.[94]

In Arizona Christian Schools Tuition Organization v. Winn, the Court was asked to review a state tax credit that allowed individuals to reduce their state tax liability for payments they made to qualifying scholarship-granting organizations (STOs). For each dollar a taxpayer transferred to an STO (subject to a limit), the state would reduce the taxpayer's tax obligation to the state by a dollar. In the universe of

93 See Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011).

94 My article, The Great and Mighty Tax Law, note 54, fully analyzes that case. Some of the discussion in this Section comes from that article.

tax expenditures, the credit's design particularly resembled direct state funding since the state reimbursed the taxpayer's entire out-of-pocket cost for the payments made; taxpayers suffered no after-tax costs on account of their (so-called) contributions. Plaintiffs trying to challenge the state's decision to authorize the credit argued that since the recipient organizations were primarily religious, the tax credit was unconstitutional as an establishment of religion. They claimed standing to sue under *Flast v. Cohen*,[95] which had previously enabled establishment clause challenges to government taxing and spending on religion, but lost on the standing issue.[96] The Court interpreted *Flast* to require both actual taxing and spending, and not their economically equivalent tax expenditure. The Court's literal reading of both taxing and spending did not include a tax credit that collapsed those functions by forgoing tax collection as long as the taxpayer devoted resources to expenditures favored by the statute. In this way, the *Winn* opinion rejected the tax expenditure analysis equating tax expenditures with their economically equivalent direct spending alternatives. But it did not stop there.

In the process of limiting the application of *Flast*, the Court had to characterize the state tax credit as something other than taxing and spending. It treated the tax credit as a legislative decision *not* to tax, and instead as taxpayers simply spending their own money.[97] The Court held that the tax credit was the government declining to impose a tax, making it unreviewable.[98] The credit was treated as a simple reduction in tax liability, unconnected to any government program to spend funds on identified purposes. Tax expenditures became a footnote to taxation—an absence of tax. This is the step in the analysis that is most troubling because it is the one that places tax expenditures above the law. Tax expenditures do not need to be treated as the legal equivalent of spending to be subject to judicial review, but they do need to be treated as tax law.

3. *Legal Rules Must Determine Economic Rights*

The *Winn* Court's approach to tax expenditures was analytically problematic, in addition to legally novel. For the Court to conclude that taxpayers were spending their own money, it had to ignore the larger institutional structure in which the payments to STOs occurred.

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95 392 U.S. 83 (1968).

96 See *Winn*, 563 U.S. at 146.

97 See id at 142. ("When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers.").

98 Id.

Taxpayers can only spend their own money if the legal rules entitle them to control over that money, or if individuals have a prelegal right to those dollars. The Court assumed that taxpayers had more robust property rights than the legal system defining those rights actually contemplated. The legal regime determines what is, in fact, a taxpayer's own money, and the tax law at issue in *Winn* in its definition of the tax base established that the money properly belonged to the state, but also determined that it should be credited to taxpayers who made payments to STOs. Even as a technical matter, the definition of taxable income is prior to the application of credits, which are simply reductions in ultimate tax owed. The *Winn* Court treated the amounts at issue as the taxpayer's own money because it assumed taxpayer "ownership" without consideration of the state's legal rules, which included an income tax. Under an income tax, part of a taxpayer's income is presumptively the property of the state.

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

It was a mistake for the Court to treat the case as involving only private action, rather than state action.[99] The opinion recognized that a government's decision to collect revenue and spend it is a government choice,[100] but it did not acknowledge that the decision to allow tax credits is also a government choice. It was that decision—to adopt the tax credit in its existing form—that clearly constituted state action, and should have been legally important. Because the challenged actions were treated as private choices that individuals made about their own money, they were beyond the Court's concern. What could have been analyzed as a question of legislative preference for religion instead morphed into a case about individual liberty to privately spend one's own money without state interference. The clear lesson of the case for legislatures intent on providing government funding for religion is that as long as the legislature designs a preference for religion as a tax benefit, it is beyond judicial review and legally invisible.

This result is substantially more radical than the separation between legal and economic analysis of tax expenditures demands. It was not

[99] See Sugin, note 54, at 803-04.
[100] *Winn,* 563 U.S. at 142.

necessary to treat the tax credit as the precise legal equivalent of government spending to acknowledge the economic importance of the legal rule. The *Winn* Court could have recognized the role of law in determining economic rights by treating the tax expenditure as the government's choice to reduce tax for some people. The Court could have treated the reduction in tax as state action in the tax system, consistent with the traditional legal classification of tax expenditures. As integral components of the tax system, tax expenditures are elements of tax law, regardless of whether they are economically or legally equivalent to direct government spending.

Every provision that allows one taxpayer to pay less tax than another must make that distinction legally. Legal justification for nonuniform taxation is generally easy: Congress has the power to place a heavier tax burden on some people than on other people. For example, it can decide that people with greater income must pay a greater percentage of that income in tax; the graduated rate structure is an exercise of Congress' broad power to tax for the general welfare. Yet not every choice to raise the tax of some compared to others would pass muster under the Constitution.[101] The broad discretion that Congress has in taxation under Article I and the Sixteenth Amendment is constrained by the rights against the government that people enjoy. So, while Congress may apply different rates of tax, it may not impose higher rates on black people or Jews on account of their race or religion.

The same analysis that would (obviously) prevent a special tax charge on members of one religious group should also apply to Congress' decisions to reduce the tax of some people, but not others, on the same grounds. Where a taxpayer claims to pay more than his legal share because he is unconstitutionally deprived of a deduction allowed to others on account of his race or religion, the legal question should have the same gravity as it would if his taxes had been increased on that account. Under current law, a person subject to a higher rate imposed only on blacks or Jews may argue that the rate structure violates the Constitution. But the legal system does not allow the person

[101] Most attention to the constitutionality of federal taxation has been under the direct tax clause in Article I, section 2, not the individual rights provisions. See, e.g., Bruce Ackerman, Taxation and the Constitution, 99 Colum. L. Rev. 1 (1999); Erik M. Jensen, The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?, 97 Colum. L. Rev. 2334 (1997); Erik M. Jensen, The Constitutionality of a Mark-to-Market Taxing System, 143 Tax Notes 1299 (June 16, 2014); Calvin H. Johnson, The Four Good Dissenters in *Pollock*, 32 J. Sup. Ct. Hist. 162 (2007); Calvin H. Johnson, Fixing the Constitutional Absurdity of the Apportionment of Direct Tax, 21 Const. Comment. 295 (2004); Gene Magidenko, Is a Broadly Based Mark-to-Market Tax Unconstitutional?, 143 Tax Notes 952 (May 26, 2014); Alan O. Dixler, Direct Taxes Under the Constitution: A Review of the Precedents, 113 Tax Notes 1177 (Dec. 25, 2006).

deprived of a deduction for the same unconstitutional reasons to argue that he is being overtaxed, even though his overtaxation is economically and legally equivalent.

Just as it limits direct collections, the Constitution must also restrict the contours of allowable tax expenditures. Only where the Constitution has no proscriptions can Congress decide the categories of tax preference and liability. A renter cannot challenge the home mortgage interest deduction on the ground that homeowners are treated better than renters because renters have no constitutional (or other enforceable legal) protections giving them the right to be treated as well as homeowners. The political process is the place to go to argue over the rates applied to net income and home mortgage deduction. Under the Supreme Court's current approach to tax expenditures, government spending via the tax law gets a legal pass because it is not characterized as state action—even though tax expenditures contain important federal policies in many areas.[102] Tax expenditures are important in determining the shares that individuals pay. Their invisibility is a substantial legal problem.

IV. Why Invisibility Is a Fairness Problem

The prior Part analyzed the rules that make taxpayers invisible and argued that the standing rules in tax litigation and the privatization of tax expenditures create invisibility, undermining the rule of law. This Part shifts from doctrinal analysis to develop an explicit fairness argument grounded on the principle that government institutions guarantee equal respect and concern for all individuals. While the last Part focused on legal shares of tax, this Part is about fair shares of tax. The design of the tax system is a central concern for justice because the institution of taxation is widespread, intrusive, and coercive, and the invisibility of some taxpayers and some laws undermines fairness.

A. *Legal Shares Are Not the Same as Fair Shares*

A just tax system demands more than legal authority for disparate liabilities; it demands that everybody pay a fair share of the costs of society. While fair shares may be more elusive than legal shares, an examination of invisible taxpayers helps to illuminate what fair shares might look like. The principle of equal respect and concern highlights a dual nature to tax fairness, including both procedural and substantive elements, half of which has been mostly ignored in the tax policy

[102] See, e.g., IRC §§ 25A, 221, 222 (education policy); IRC §§ 163(h)(3), 121 (housing policy).

literature. Substantive fairness—which tax policy generally treats as the only fairness concern—is economic. As a substantive matter, fair tax shares depend on both the benefits of government and the burdens of taxation. Fairness depends on the money value of relative shares. A substantively fair tax system allocates economic burdens according to a defensible economic principle, such as ability to pay or standard of living, and evaluates economic effects. This is the kind of tax fairness that the literature generally acknowledges,[103] and welfarists take it for granted.

But economic analysis does not always map precisely onto legal analysis in tax policy.[104] Legal analysis is broader, and procedural fairness encompasses democratic values that are not reducible to dollars. Economic fairness is not sufficient for a tax system to be just. It must be accompanied by institutions that recognize that people (not dollars) are centrally important. Noneconomic fairness—what this Article calls "democratic fairness"—is institutional. It demands that government respect taxpayers as equal citizens in the design and administration of taxation, even where taxpayers suffer no substantial economic loss on account of government action. The small size of the economic injuries that have kept invisible taxpayers out of court have obscured the more substantial affront to dignity that the tax system sometimes imposes. Unconstitutional laws and administrative actions that produce noneconomic harms undermine tax fairness as much as outsized financial burdens even though economic harms provide the key necessary to unlock the courthouse. While legal-share injuries should give taxpayers access to courts, tax justice requires that judges maximize democratic fairness in deciding cases.

B. A Just Tax System Treats People as Equals

While people disagree about what constitutes the measure of a fair tax system,[105] a common theme in contemporary political theory treats people as equally important.[106] Under that approach, a fair tax must treat individuals as equal and autonomous individuals. John Stuart Mill, an intellectual forebear to our tax system, described a fair tax system as one requiring "equal sacrifice" by individuals.[107] Welfarism,

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[103] See, e.g., Joseph M. Dodge, Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles, 58 Tax L. Rev. 399 (2005) (comparing tax fairness theories and the tax basis they support).

[104] See Sugin, note 54, at 781 (discussing the "tension between the economic effect and legal logic that is ubiquitous in the tax law").

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

[106] See Will Kymlicka, Contemporary Political Philosophy 4-5 (2d ed. 2002).

[107] Mill, note 73, at 623.

the dominant philosophical approach to tax policy today, incorporates an equality norm because social welfare derives from individual welfare, with equal importance attached to each individual's welfare and welfare maximization as the goal. A Rawlsian approach to tax fairness is also egalitarian because it demands that each person be treated equally in the design of social institutions.[108] As a government institution, Rawls demands that taxation treat people as "free and equal rational beings."[109]

As an institution that defines economic claims, the tax system divides pieces of the social product between individuals and the community. A government mandate of equal respect and concern is a useful touchstone in looking both broadly and narrowly at how taxation carries out that function. Since it is a limiting principle in the design of every social institution, there is no overall balance of equal respect that allows disrespect in one institution to be overcome by excess concern in another. Equal respect and concern demands that all who are affected by tax policy should be considered—even if not fully satisfied—in the public ordering that determines those claims.

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

Outsider status is a fairness problem, even if it produces no economic disadvantage for those forced outside, because democratic justice is an independent demand on government. Economic advantage cannot make up for a failure to give each person equal respect and concern in the institutional structure; government failure to protect basic rights cannot be cured with economic advantages. The overall fairness of any particular tax depends on the background institutions against which it is levied—a more equal social structure can tolerate a less intrusive tax, while a society with great inequality might require a

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

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

tax system to do more for achieving justice. The work that a tax needs to do to achieve democratic justice depends on how well other institutions perform in guaranteeing equal respect and concern.

Rawls' theory of justice is instructive in thinking about this aspect of fairness. His theory is based on two basic principles in a hierarchical relationship, with economic rights (in the second principle) subordinate to political rights (in the first principle). [110] Legal invisibility is a problem for the more important first principle of justice because it is about whether a person is being treated as an equal and autonomous individual by the state. Any economic benefit that reduces tax liability is accounted for under the inferior second principle. In this hierarchy, invisible taxpayers must be included in the institutional structure in order for the tax system to be fair because economic benefits cannot compensate for the denial of political rights.

Equal respect and concern can be guaranteed indirectly, so the institutional demands of justice do not imply unlimited access to the courts. As noted above, the government represents the interests of taxpayers not before the court when the traditional dyad imposes liability on a complaining taxpayer.[111] But there is no indirect protection of absent taxpayers by government proxy when the law or administration of the law unconstitutionally or illegally favors a taxpayer. In the classic case of an identifiable taxpayer at odds with the government, the economic interests of invisible taxpayers coincide with the government's interest, so their economic concerns are represented. In such a case, it is likely that taxpayers' noneconomic legal interests are also aligned with the government's. But this representation only holds when the government attempts to collect revenue. Where the government treats identified taxpayers better than others, the legal system fails to recognize the losers.

C. Tax Fairness Is About Distributing Social Returns

The project of tax fairness involves determining how the returns to social cooperation should be distributed in society. Taxation is a necessary institution in social structures. As long as the tax system is just, no one is harmed by being required to pay her fair share, and communities can expect to be made better off on account of taxation. Consistent with the demands of equal concern and respect in designing institutions, the rights and interests of all individuals must be incorporated in the project of designing the tax system. Fair shares can vary, depending on which baseline is chosen to measure what constitutes

[110] See id.
[111] See Subsection III.A.1.

gains from social cooperation. There is no natural, neutral starting point to evaluate fairness in taxation. Some harms may not really be harms at all—a baseline of fair expectations is necessary to decide whether a person is treated badly. Consequently, not all taxation is ultimately injury. Only tax in excess of one's fair share can be understood as an injury to a taxpayer.

Baselines should reflect what individuals should be entitled to preclusively control and what is justly allocated communally—we cannot craft a theory of fair taxation without talking about desert. Fair taxation must consider what we each deserve as our private share of the social product, and what we each deserve to bear as our fair burden of society's costs. The most fundamental tax fairness question asks what should be treated as individual property and what should be treated as social product—how to carry out the basic function of taxation in dividing those shares.

There are many points along the spectrum from private rights to communal ownership that people can legitimately claim as appropriate for the baseline against which tax fairness is measured. The baseline itself is a product of social decisionmaking since it is composed of laws. There is no pre-social division between private property and public entitlement—it is the function of government to determine the proper distribution of the returns to social cooperation. Some of those returns will go to individuals and some will be shared, but which individuals should have claims is an issue to be decided by social process—democratic forces in the United States. The ultimate distribution is the product of conventions created by law. [112]

Invisible taxpayers are cheated in the definition of baselines under current law because the baseline most widely used in tax policy analysis is pretax income. Pretax income assumes that people have entitlements to amounts that are properly attributable to social factors. It takes too much for granted in creating the baseline, without subjecting that baseline to the scrutiny that any just baseline must undergo. A baseline of pretax income creates rights without affirmative justification. It places taxation too late in the analysis of economic justice because taxation must be part of the definition of social entitlement.

The instinctive acceptance of pretax income as the baseline for analyzing tax justice may be responsible for the invisibility of some taxpayers in theoretical approaches to tax injury. The theoretical interrelatedness of taxpayers goes beyond the legal interrelatedness discussed in the last Part because it applies not just within the fiscal system, but throughout the whole economic system. Recognition of the web of relationships between taxpayers must inform fair shares.

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[112] Liam Murphy & Thomas Nagel, The Myth of Ownership 8-9 (2002).

Pretax income imagines the individual taxpayer as an autonomous presocial earner, but that perspective ignores the role of social systems in creating income. Both recognition of interrelatedness between taxpayers and acceptance of the reciprocal social obligations carried out through taxation are inconsistent with the notion of any taxpayer as a presocial earner. When we recognize the interrelatedness of individuals across the tax system, it is evident that invisible taxpayers need to be acknowledged and considered in the distribution of shares. Taxpayers are invisible because we pretend that it does not matter to one taxpayer what happens to another taxpayer in the system. The designers of tax law should recognize that benefits for some taxpayers create costs for others, even where those other taxpayers have no standing under either traditional standing doctrine or the interpretation I have advocated. [113] While Part III offered legal arguments for why some invisible taxpayers should have standing to sue, this Part argues that lawmakers should think more broadly about distributing the burdens of taxation across all taxpayers.

Shifting from a pretax baseline to a perspective in which there are no economic rights without legal institutions demands consideration of all individuals, including invisible taxpayers. Since all individuals are interdependent, both contributing to and benefitting from social enterprise, the definition of rights and obligations in taxation should consider everyone. Fairness in taxation demands it.

D. Tax Fairness Requires Both Economic Fairness and Democratic Fairness

If tax fairness is both economic and procedural, demanding equal respect and concern in both aspects, fair shares must reflect that norm. How to treat people with equal concern and respect depends on the dimension. The economic dimension requires that we account for the real economic costs of taxation to each person. Economic fairness is concerned with levels of well-being, resources, or opportunities.[114] These are the terms on which debates about tax fairness generally take place, and they are important considerations in designing tax institutions. Nevertheless, we should recognize that these debates are

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[113] Under my interpretation, taxpayers would only have standing if they suffer a burden that is not justified under the statute or the Constitution.

[114] See, e.g., Bruce Ackerman & Anne Alstott, The Stakeholder Society (1999) (opportunity); Joseph Dodge, Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles, 58 Tax L. Rev. 399, 407-10 (2005) (comparing approaches); James R. Repetti, Democracy and Opportunity: A New Paradigm in Tax Equity, 61 Vand. L. Rev. 1129 (2008) (opportunity); Daniel Shaviro, Why Worldwide Welfare as a Normative Standard in U.S. Tax Policy?, 60 Tax L. Rev. 155 (2007) (welfare); Daniel Shaviro, Commentary: Inequality, Wealth and Endowment, 53 Tax L. Rev. 397 (2000) (well-being);

limited in the sense of considering tax fairness only in economic and not procedural terms. Democratic fairness is a separate, and independent, measure of tax fairness. It consists of treating individuals as autonomous people with rights and interests that are important to consider in designing and applying rules. An examination of economic fairness compared to democratic fairness clarifies the conceptual distinction between the traditional tax equity notions of horizontal and vertical equity.[115] A just tax system must satisfy the demands of both economic and democratic fairness.

1. *Economic Fairness*

Economic fairness is not a concept that exists in isolation; it is about relative shares in society, and is primarily a matter of social organization. Tax fairness is only meaningful in the context of other nontax public (and private) institutions, and across individuals in society. Economic fairness requires considering the gross amount of tax that any individual pays, but also depends on both how public funds are used and levels of individual well-being in society.[116] An individual's fair share depends both on his relative level of well-being in the society and/or his share of public benefit. Fair shares can account for both abilities to pay and social distribution.

There is no prepolitical, natural level of taxation that governments must strive to reach. Countries vary in the relative sizes of their public and private sectors, so the gross level of taxation appropriately differs.[117] Excessive taxation in one country might be fair in another. There are few tax regimes that are categorically unjust.[118] Neverthe-

[115] James Repetti and Diane Ring started down this road in their discussion of horizontal equity. See James R. Repetti & Diane Ring, Horizontal Equity Revisited, 13 Fla. Tax Rev. 135, 145-53 (2012); see also Paul R. McDaniel & James R. Repetti, Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange, 1 Fla. Tax Rev. 607 (1993); Louis Kaplow, Horizontal Equity: Measures in Search of a Principle, 42 Nat'l Tax J. 139 (1989) (debating whether horizontal and vertical equity are independent and meaningful norms).

[116] See William G. Gale & Peter R. Orszag, Bush Administration Tax Policy: Distributional Effects, 104 Tax Notes 1559 (Sept. 27, 2004) (focusing on financing of tax cuts); C. Eugene Steuerle, Can the Progressivity of Tax Changes Be Measured in Isolation?, 100 Tax Notes 1187 (Sept. 1, 2003) (arguing for expenditure distribution information in addition to tax distribution information).

[117] The United States is projected to collect 18.3% of GDP in revenue in 2015. See Cong. Budget Office, An Update to the Budget and Economic Outlook: 2014 to 2024, at 20 (2014), https://www.cbo.gov/publication/45653. Western European countries collect substantially more. See OECD, Revenue Statistics—Comparative Table, http://stats.oecd.org/index.aspx?DataSetCode=REV (last visited June 14, 2016) (showing the United States at 25.4% for 2013, compared to the OECD average of 34.2%). The OECD and CBO use different measurements.

[118] I have argued that an endowment tax on individual abilities would be such a tax. See Sugin, note 108.

less, economic justice requires that government collect sufficient revenue to finance the institutions necessary for political equality, equal opportunity, and basic welfare necessary for individual agency and political participation. Overtaxation is only meaningful by reference to relative burdens within the context of a given level of government revenue and spending. Without knowing the extent of burdens across the population, it is impossible to measure whether individuals are being treated fairly.

It is worth drilling down further into the meaning of economic fairness in taxation, and how equal concern and respect in the design of institutions plays out. All income in the social system is not the same—some returns are more appropriately allocated to social forces and consequently more appropriate for taxation than are others. In a society (like ours) in which there is substantial income and wealth concentrated among very few individuals,[119] economic fairness requires that the tax system consider the crucial role of the social system in producing income and wealth. Where there is no good explanation for the very highest earners to receive so much more than others for their capital or labor, the tax system must account for the substantial contributions of the social system.

Once we account for social institutions, it becomes obvious that we all *deserve* very little of what we have. A huge part of everyone's income and wealth is attributable to social factors. The share of income and wealth attributable to being in society increases as income and wealth go up. Social forces and social cooperation produce many tangible and intangible things that contribute to income and wealth. The advantage of being in society is enormous for people who do well.

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

Nevertheless, it is important not to over-emphasize the importance of opportunity in the design of fair taxation. Economic justice is not solely a matter of equalizing opportunity to earn. It is not enough to

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

start everyone off in the same place. This is the difference between libertarian and liberal egalitarian theories of economic fairness. Libertarian theories are more amenable to "starting gate" fairness. While Robert Nozick recognized that a just distribution is impossible where people enter society with different resources, he believed that justice would be achieved as long as everyone starts off equal, regardless of the ultimate distribution.[120] Ronald Dworkin explicitly rejected the starting gate notion by explaining that a just economic system continually intervenes to affect distribution over time, as arbitrary differences between individuals produce disparate economic returns.[121]

A tax system that is at all concerned with welfare must be sensitive to outcomes. Ability to pay, the most widely held norm relating to fair taxation,[122] cannot be measured on an ex ante basis since that ability ultimately depends on how opportunities translate into outcomes.[123] An emphasis on equal opportunity implies a high normative regard for merit. If economic justice consists only of equalizing opportunities, then individuals are entitled to anything they can earn in a level playing field. That conception is not without internal difficulties. There are different interpretations of a level playing field, and individual talent is a sticky issue for philosophers who believe in rewarding talent. But even ignoring those problems, that conception is incomplete. Even assuming that opportunity is equalized, social institutions still contribute to disparate outcomes for individuals. An economically fair tax system will account for how those institutions contribute to the pretax distribution of wealth and income. Merit can only explain a small part of pretax distributions. Merit distinctions—like hard work—explain so little of the ultimate economic difference between individuals.

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

[120] This is Nozick's challenge to Rawls. He suggests that the initial distribution can be whatever the reader prefers, including complete equality, because his point is that freedom to trade after that moment will necessarily disrupt whatever the pattern of distribution was at the start. See Robert Nozick, Anarchy, State, and Utopia 160-64 (1974).

[121] Ronald Dworkin, What Is Equality? Part 2: Equality of Resources, 10 Phil. and Pub. Affs. 283 (1981).

[122] See, e.g., Dodge, note 114.

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

distribution,[124] there is still wide room for taxation to account for nonmarket values. Economic justice requires recognizing social contributions that individuals make that do not produce economic gains for them. The fiscal system should account for the benefits that teachers, homemakers, and other underpaid individuals in the market contribute to the social product.[125]

As an economic matter, we expect that a fair tax system will impose economic burdens that are allocated according to a defensible economic principle, such as ability to pay or standard of living—the two norms underlying taxes on income, consumption, and wealth. These norms generally are treated as the standards for tax fairness, with no attention to the fact that they are economic standards.[126] As economic standards, ability to pay and standard of living see individuals as points on an economic spectrum compared to others at different economic points. For example, ability to pay compares income earners to other income earners, and justifies greater taxation for those with greater income. Consequently, economic fairness maps onto the vertical equity norm in traditional tax policy analysis because individuals can only be judged vis-à-vis others in different places along the same dimension. Scholars who argue that there is no independent content to tax policy's traditional horizontal equity norm analyze taxation solely in economic terms.[127] From an economic perspective, treating equal earners the same is derivative of treating differing earners differently.

2. *Democratic Fairness*

The democratic dimension of fairness is distinct. Starting from the same commitment to equal respect and concern in the legal context requires that we treat each person's noneconomic rights and interests as meaningful and protect them through the legal system. It is impor-

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124 Not everyone agrees that they should be. Liam Murphy argues that economic justice has nothing to do with merit. Liam Murphy, Why Does Inequality Matter? Reflections on the Political Morality of Piketty's *Capital in the Twenty-First Century*, 68 Tax L. Rev. 613, 626 (2016 ("The tax code should not track any conception of worth, desert, or merit, at all."). But philosophers like Ronald Dworkin and libertarians believe that merit is important in determining a just distribution. See Dworkin, note 121, at 311 (explaining why equality of resources is "ambition-sensitive"); Nozick, note 120, at 171 (adopting Lockean property rights allowing individuals to "recapture benefits" of their labor).

125 I have suggested that these contributions might be considered in lieu of tax payments in money. See Sugin, note 108, at 249-50.

126 See David F. Bradford & U.S. Treasury Tax Policy Staff, Blueprints for Basic Tax Reform 35-39 (2d ed. 1984) (comparing tax bases under ability-to-pay and standard-of-living norms).

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

tant to understand the tax system as a government institution as well as a system that allocates market resources. As such, the norms for fairness look different from a democratic perspective, and tax-law related fairness imperatives more resemble the norms in other areas of the law.

Consider why economic fairness is insufficient. Economic fairness demands that an individual's tax liability is sensitive to: (1) total governmental burdens and benefits to that individual, and (2) total benefits and burdens across the community as a whole. It is tempting to argue that confiscatory taxation—where the state takes all of a person's pretax earnings, for example—is per se economically unjust. But even confiscatory taxation may not be economically unfair if the benefits compensate for the tax paid—economic fairness looks at the balance of economic benefits and burdens. It is one thing for the state to take all of a person's earnings and leave him to starve, but it is completely different to take all of a person's earnings and simultaneously satisfy every material desire. While we might not find such a system attractive, the problem cannot be solely economic if there is no economic deprivation. From the individual perspective, economic fairness requires considering whether a person is deprived of something necessary.[128] From a social perspective, it must compare deprivations among individuals. The objection to confiscatory taxation without any economic deprivation is on political, not economic, grounds. Individual agency is a necessary component of tax fairness, even though it is not reducible to market goods. Nevertheless, it is a necessary element in a tax system built on the principle of equal respect and concern. Democratic fairness is necessary to protect the noneconomic interests affected by taxation.

As a legal matter, we expect that a fair tax system will impose rules in an evenhanded way, and that the tax system will respect each person's rights and legal entitlements equally. This is how to best interpret the horizontal equity notion in taxation. Understood this way, horizontal equity is a completely different kind of norm than is vertical equity.[129] It is more procedural and concerned with rights, compared to vertical equity, which is more concerned with money. Horizontal equity demands that we examine the administration of the law, and every taxpayer's position vis-à-vis the state and other taxpayers.[130] At a minimum, it demands that the law not be applied in an

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[128] See Linda Sugin, Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems, 72 Fordham L. Rev. 1991, 2007 (2004).

[129] Murphy and Nagel treat horizontal equity as an incoherent norm because they understand it as a free-standing economic judgment. See Murphy & Nagel, note 112, at 162-72.

[130] See Dodge, note 103, at 458.

arbitrary fashion. More expansively, it looks behind the economic loci that provide an easy shorthand for evaluating fairness, and asks whether people are treated with equal respect by the government, taking into consideration every relevant question for their tax liability compared to everyone else's.[131]

The democratic understanding of tax fairness is more robust (but less definitive) than the economic understanding because it can accommodate many more questions about how the system should be designed by considering the proper role of nonfinancial differences to tax liability. For example, when deciding on the appropriate unit for taxation, the demand to treat everyone with equal concern and respect offers a framework for comparing people who live together with others and those who do not. Reasonable people can differ about the proper tax under that standard, and whether households or individuals should be tax units. Nevertheless, it is important that the idea of democratic fairness invites consideration of how the tax system affects identity, autonomy, and citizenship.[132] Economic fairness has little to say along those lines.

Democratic fairness challenges decisionmakers to look behind income, consumption, or wealth to evaluate the burdens placed on different kinds of people. Our system taxes undocumented workers without giving them the rights that citizens earn from paying those same taxes.[133] Our system taxes people who work for a living much more heavily than people who earn by investing capital.[134] Democratic fairness demands justification for these disparate burdens. Beyond economic comparisons, it can incorporate personal well-being, choices, and rights into consideration in the design of taxes. When we ask whether the tax system treats people fairly, it is important to remember that the question is about people, not money. That inquiry necessarily includes whether we have incorporated peoples' interests in designing the rules. Democratic fairness is also the rubric under which the tax system offers individuals protections from unconstitutional or otherwise illegal application of the law. The economic approach to fairness, useful though it is, cannot accommodate crucial noneconomic interests and legal rights.

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131 Dworkin's concern that individuals bear the costs of their lives for others informs this concern. See Dworkin, note 121, at 288 (equality of resources requires that people choose the "lives to pursue against a background of information about the actual costs their choices impose on other people").

132 See Tsilly Dagan, Itemizing Personhood, 29 Va. Tax Rev. 93 (2009).

133 See Francine J. Lipman, The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation, 9 Harv. Latino Law Rev. 1 (2006).

134 See Linda Sugin, Payroll Taxes, Mythology, and Fairness, 51 Harv. J. on Legis. 113 (2014).

This investigation of noneconomic fairness relates to invisible taxpayers because their injuries are most significant as democratic unfairness. Under current standing doctrine, the only cognizable tax injury is a particular kind of economic injury, but noneconomic injury—where a person's rights and interests are disrespected in the institutional structure—is not actionable. Because the taxpayer must be complaining about his tax bill, violations of his rights that do not translate into demonstrably identifiable tax liability are not redressable. The only kind of injury that exists in the tax law is the direct economic injury of being asked to pay an identifiable tax. This Article has argued that there are economic injuries outside that model that should be sufficient for requesting redress, but the noneconomic injuries are far more significant. The cases highlighted in this Article all involve constitutional rights implicated by the tax law. Tax fairness—in the democratic sense—demands that the tax system respect and protect these noneconomic interests. It is in the democratic context that the rights of invisible taxpayers are lost because they have no opportunity to be heard.

Once democratic injury is acknowledged, its effect on taxation is readily apparent. For example, by favoring certain activities (like energy exploration and real estate investment) or people (like families with children), the tax system endorses particular social values. Activities and people outside the favored groups are less valued in the social structure, which is inconsistent with the guiding principle of equal respect and concern. The plaintiffs in *Allen v. Wright* [135]—black families challenging the IRS allowance of tax exemption for racially discriminatory schools—understood that their injury from the tax system could be the law's perpetuation of a status quo disrespectful of them as equal citizens. They were the same people with a real interest in the outcome in *Bob Jones*.[136] Edith Windsor knew that her injury did not really come from the government's withholding her refund despite the court's order; her injury came from the tax system's operation to treat her marriage as less legitimate than the marriage of a heterosexual couple. The Sklars could not have reasonably expected their deduction for religious school tuition to be allowed; their injury arose because the government favored members of the Church of Scientology over them. These taxpayers were all invisible in the tax system because their injuries do not exist in a world of only economic harms.

Democratic and economic fairness merge to the extent that a legal right is itself economic in nature. But not every interest implicated by

[135] 468 U.S. 737 (1984).
[136] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

the tax system is economic. There are many legal rights in the tax law that are properly independent of economic concerns. Taxation is an omnipresent force in everyone's life, and it raises the most fundamental questions of the appropriate relationship of the individual to the state. Tax policy scholarship must do a better job evaluating that relationship along all the dimensions that taxation touches. The tax law's broad scope as well as its awesome influence over so many noneconomic policies requires justification. Tax scholars have fallen short outside the economic arena—even though taxation has long been about much more than money. The most important function that tax policy scholarship can serve is evaluating the justice of the government's relationship with the people through taxation.

V. Mechanisms for Legal Redress

A. Institutionalize the Interests of Invisible Taxpayers

The central objectives of this Article have been to bring attention to invisible taxpayers, challenge the doctrinal framework that denies them redress, and explain why that denial is unfair. It is fair for the tax system to impose burdens on taxpayers as long as the government has properly considered their interests in adopting the policies that burden them. Invisible taxpayers can legitimately be expected to finance the state only if the tax laws are designed to achieve both economic and democratic fairness, and administered consistently with the Constitution. Under current law, taxpayers have no standing to complain about tax regimes that disrespect them or unconstitutional tax benefits granted to others. The taxpayer-government dyad that enjoys institutional recognition fails to protect the interests of others whenever the taxpayer and government in that pair are not really at odds with one another, and whenever the absent taxpayers' interest fails to map precisely onto the state's interest. This Part offers several possible solutions to ameliorate that unfairness by bringing invisible taxpayers' interests to the forefront in the kinds of cases described in Part II. It is intended to suggest the way we should think about developing solutions for invisibility, rather than as a complete blueprint for solving the problem. The solution must depend on developing institutional mechanisms that make invisible taxpayers more apparent. Only with established procedures and official recognition will their interests receive the consideration it deserves in the courts and at the IRS.

Institutionalizing the interests of invisible taxpayers does not require courts to interfere with congressional prerogative or administrative discretion, nor would it inexorably lead to an avalanche of litigation.[137] Rather, it would strengthen the rule of law. Since the political process is unlikely to solve the fairness problems described in this Article, this Part considers potential institutional approaches to improving fairness for invisible taxpayers, without unleashing a torrent of frivolous claims or requiring heroic interpretive changes by the Supreme Court.

Other scholars who have considered taxpayer standing have suggested that the Supreme Court reconsider its standing doctrine to allow broader challenges by taxpayers. Lynn Lu examines *Allen v. Wright* to argue that the tax context of some cases has created bad law.[138] Samuel Brunson proposes a radical broadening of standing doctrine to enable more plaintiffs to bring challenges to tax administration, in order to rein in IRS discretion.[139] Heather Elliott's comprehensive approach to de-constitutionalizing much of today's standing doctrine would likely enable more taxpayer litigation.[140] While all noble ideas, I am skeptical that the Supreme Court will soften its standing doctrine in any of the ways scholars have suggested. To the contrary, the Roberts court seems inclined to use standing more aggressively.[141] *Allen v. Wright*[142] is an old and important precedent, and the standing holding in *Arizona Christian Schools Tuition Organization v. Winn*,[143] along with its sweeping categorization of tax expenditures, indicates that a majority of the current Court is not interested in opening the courthouse doors. Those who care about just application of the tax law will need to look elsewhere. I contend that there are other ways to address this problem without betting on an unlikely constitutional reinterpretation.

In addition, it seems unlikely that the political process will solve the problem. Standing doctrine forecloses access to the courts for issues that demand legislative solutions; the Constitution's standing rules perform a crucial separation of powers function. Courts are best equipped to handle cases and controversies, but Congress is in a better position to make contested political choices.[144] The putative plain-

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

[138] See Lu, note 7.

[139] See Samuel D. Brunson, Watching the Watchers: Preventing I.R.S. Abuse of the Tax System, 14 Fla. Tax Rev. 223 (2013) (advocating that Congress allow "fire-alarm standing" to individual litigants).

[140] See Elliott, note 59.

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

[142] 468 U.S. 737 (1984).

[143] 563 U.S. 125 (2011).

[144] See Scalia, note 77.

tiffs complaining about Bob Jones' exemption, a charitable deduction for Scientologists, and the privileged tax status of heterosexual couples all faced the specter of a closed courthouse. Could they have gotten redress in the political process?

Who should pay more tax is generally a legislative question. Taxation is politically salient, and elections are won and lost over tax policy. Core questions of tax fairness depend on contested theories of distributive justice about which reasonable people can disagree. Since there are no right or wrong (only inconsistent) beliefs about distributive justice, tax law should reflect whatever theory resonates best with the governed. The political process is the best way to reveal those preferences. The legal framework also suggests that the legislature should be king in matters of taxation. Under the Constitution, Congress has broad discretion in imposing and designing taxes, and taxes are determined primarily by reference to a dense and complex statutory code. Finally, the tax burden on invisible taxpayers is shared by many people, and the political process is a place where people can meet to further their common interests.

Nevertheless, the political process is unlikely to resolve the problems faced by invisible taxpayers. For precisely the same reason that courts will not hear these cases—because the harm to each taxpayer is so small—individuals may not even recognize their unfair burdens. Very few voters know about the tax system's beneficial treatment of a few taxpayers—how many citizens know about the IRS policy of allowing the deduction for Scientologists? The nature of tax benefits for favored groups is narrow—many tax expenditures are not quantified in the revenue cost tables because they are smaller than rounding errors in the federal budget—though of course very substantial for the favored taxpayers.[145] Taxpayers are rationally apathetic; it is not worth the average taxpayer's trouble to pay attention to how the tax laws are being administered for others. Consequently, legislators are unlikely to be interested in solving these problems.[146]

Even where public interest might be heightened enough to spark legislative interest, such as with the *Windsor* case, there is no guarantee that the political process will produce a constitutional result. Congress might affirmatively decide to discriminate against gay couples (or racial or religious minorities). But that does not make the constitutional violation any less serious. Constitutional violations that favor majorities demand the most serious attention from the courts, a tax

145 The Joint Committee does not include amounts for tax expenditures that are less than $50 million. See Joint Comm., note 52, at tbl.1 n.4.

146 See Brunson, note 139, at 261 ("Though ending the I.R.S.'s abuse of the tax system helps taxpayers generally, the benefits are diffuse, and no legislator is likely to benefit politically from engaging in such oversight.").

benefit administered in a way that reduces the taxes of Christians (only) would be both unconstitutional and perhaps politically popular.[147]

I am not advocating greater judicial access for taxpayers to challenge policy decisions that Congress makes. Instead, I am arguing for greater recognition of legal claims, and a more flexible approach to identifying a claim as legal, rather than political. The claim that the Sklars made was legal, and not political, because it was about the government violating a right they had. *Bob Jones* and *Windsor* also involved individuals who were being denied their constitutional rights by the administration of the tax law. Taxpayers suffer injuries as citizens, but those injuries manifest as increased tax shares.

B. An Ombudsman for Invisible Taxpayers

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

The challenge is to institutionalize disparate taxpayers into one party who can sue to vindicate the rights of all. Various forms are possible to fulfill this function, both private and public. Incorporated aggregation in a public party that represents the interests of invisible taxpayers holds real promise.[148] Private parties are also possible, but they present more difficulties. Compared to private parties, an independent public institution's managerial discretion could more effec-

[147] Elliott, note 59, at 487:

> As *Allen v. Wright* demonstrates, the Court sometimes uses standing to evade what it has elsewhere asserted as its proper role. . . . The Allen plaintiffs—African Americans seeking integrated schools in the South—were precisely the kind of plaintiffs who, as a discrete and insular minority, could not seek political redress and whom Carolene Products said the Court must protect.

[148] This could be considered a "public right of action to sue to vindicate [citizens'] private rights." Seth Davis, Implied Public Rights of Action, 114 Colum. L. Rev. 1, 22 (2014).

tively be limited by fiduciary obligations to taxpayers, as well as procedural requirements. An official public protector of invisible taxpayers would be in a position to evaluate the myriad claims of illegality and unconstitutionality, and bring suit only where a strong legal case can be made.

Congress could empower an official public monitor solely with respect to constitutional issues, leaving the IRS its customary broad discretion over cases that do not raise constitutional questions.[149] That solution falls short of solving all the problems identified in this Article, but a public constitutional monitor would be easy and inexpensive to implement, and could address the most egregious injustices that arise. The mere existence of a constitutional monitor with the potential to intervene might be sufficient to remind the IRS about invisible taxpayers. Such an institutional structure could inspire the IRS to better recognize issues that the traditional dyad treats as peripheral to its conflict. A separate institution representing the interest of invisible taxpayers would operate as a filter between taxpayer complaints and access to courts, choosing only the worthiest cases.

There is precedent for such an institutional solution in the Taxpayer Advocate. Under current law, the Taxpayer Advocate is sympathetic to taxpayers who have been treated badly in the system, and is empowered to resolve disputes with the IRS.[150] The Taxpayer Advocate could be legally designated to act as a representative of invisible taxpayers, with powers to intervene, sue, and otherwise protect their interests. As would be necessary for any institution charged with protecting invisible taxpayers, the Taxpayer Advocate currently enjoys some independence from the executive branch. Independence is important because protecting invisible taxpayers would require litigation against the IRS and pursuing constitutional challenges to legislation. Under current law, the Taxpayer Advocate has no authority to initiate suits against the government,[151] and its focus of concern is individual and identifiable taxpayers, not invisible ones. Nevertheless, Congress could expand the Taxpayer Advocate's role to include this function.

As an alternative to expanding the role of the Taxpayer Advocate, Congress could create a new institution, independent of both Con-

[149] Some commentators are more broadly concerned about IRS overreach than I am. See, e.g., Brunson, note 139; Zelenak, note 2. Brunson and Zelenak are concerned that the IRS is insufficiently bound by the rule of law. But see Alice G. Abreu & Richard K. Greenstein, Defining Income, 11 Fla. Tax Rev. 295 (2011) (explaining interpretations that undertax as administrative necessity).

[150] The powers of the Taxpayer Advocate are limited under current law. See Brunson, note 139, at 252.

[151] See id.

gress and the President, with authority to sue on behalf of invisible taxpayers and which could serve as a general legal monitor for their interests.[152] The new institution would need to be independent of the IRS, and would have fiduciary duties to taxpayers as a whole, filling in the now empty space between the IRS and individual taxpayer litigants. A public actor not connected to any current tax institution might offer better representation and more independence than the Taxpayer Advocate, since the Advocate is part of the extant tax enforcement framework.[153]

Another option could be empowering private individuals to represent public interests. This is an attractive option if people are skeptical of the ability of public institutions to behave in the interest of invisible taxpayers. There is a long tradition of private attorneys general bringing so-called qui tam suits to enforce various public rights. In that tradition, Congress creates rights that give individuals standing to bring suit.[154] The authority for qui tam actions comes from Congress, which drafts statutory provisions giving individuals the right to bring suit.[155] Qui tam actions have withstood standing attacks. Private qui tam plaintiffs represent the legal interests granted by Congress to the public at large.[156] Individuals serve as representatives of the public to enforce policy.[157] Because the suit relates to an action on the government's behalf, the government, not the relator, is considered the real plaintiff and if the government succeeds, the relator receives a share of the award.[158]

Qui tam, however, is not an easy fit for invisible taxpayers. Qui tam is most common where the government has been defrauded by a private party.[159] There are mechanisms in place to combat tax fraud,[160] and invisible taxpayers are not victims of fraudulent individuals—they are victims of government largesse. Unlike in most qui tam proceed-

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152 There are many complex legal issues that would arise in creating such an institution, the precise contours of which are beyond the scope of this Article. For a general discussion, see Herz, note 83.

153 See Brunson, note 139, at 246-47.

154 See generally Evan Caminker, The Constitutionality of Qui Tam Actions, 99 Yale L.J. 341 (1989).

155 See id. at 342-43.

156 See Priebe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting).

157 Id.

158 Wex Legal Encyclopedia, http://www.law.cornell.edu/wex/qui_tam_action (last visited June 20, 2016).

159 Today, the most widely used qui tam action is to pursue violators of the federal False Claims Act. That statute authorizes qui tam actions against parties who have defrauded the federal government. See 31 U.S.C. § 3729 et seq. (2012).

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

ings, the government does not perceive itself to be the harmed party—the taxpayers shouldering more than their fair shares are individually harmed. Since the government granted the favored taxpayer the challenged benefit, a private party bringing a qui tam action would essentially be suing on behalf of the government over tax benefits that the government has, itself, bestowed. Qui tam has not previously been used in this way, although the government has been known to sue itself.[161]

While private enforcement might be effective and manageable in some areas of the law, it could prove problematic in the tax context. Taxpayers can be uniquely hostile and unrelenting in refusing to pay their legal share, and any invitation into the courts therefore requires a strong gatekeeper to separate the frivolous from the serious. Private attorneys general in the tax context raise the specter of zealous tax protesters overwhelming meritorious cases and swamping the system. Consequently, private enforcement seems less desirable than public enforcement by a specially authorized institution. The Taxpayer Advocate or an independent counsel created for this purpose would be in a better position to prevent a crack in the courthouse door from opening too wide.

C. Mandating IRS Procedures

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

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

[161] See Herz, note 83.

Where the issues are legally important or the revenue loss substantial, more demanding administrative consideration would be appropriate. Treasury or Congress could mandate public consideration of invisible taxpayers in some circumstances. To guarantee that consideration, the IRS could be required to file a public acknowledgement every time it decides to adopt a revenue-reducing position. That acknowledgement could explain the government's decision to be generous to a particular class of taxpayers, along with a description of how it considered the population of taxpayers as a whole. Not every ruling and closing agreement would need to be subject to such a procedure. Treasury or Congress could design the rule to apply only where the decision affects the interests of a constitutionally protected class. Additionally, the rule could establish a total revenue-loss threshold in cases lacking individual rights claims.

Somewhat more process might be appropriate for the most significant decisions. In those cases, the IRS could be required to follow notice and comment processes, similar to the procedures used for rulemaking under the Administrative Procedure Act or where the APA does not apply.[162] For example, the IRS could have been required to solicit comments on its decision to allow the charitable deduction for Scientologists. There could have been a multi-stage process imposing hurdles before the decision could go into effect. The process itself might have made the IRS more reflective about the substance of the closing agreement. The transparency produced by such a process might also be a monitoring force.[163] Nobody knows how many unconstitutional private agreements the IRS has concluded with individual taxpayers because they are not public. A comment process would have given other taxpayers the opportunity to argue that the Scientology closing agreement was an unconstitutional reversal of the Supreme Court's decision in *Hernandez*. People with an interest in challenging the unconstitutional administration of the tax law—like a tax law professor—would be likely to participate in that context. When taxpayers believe that proposed Treasury regulations are unconstitutional, they are not shy about commenting.[164] Where there is

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[162] See 5 U.S.C. § 553 (2012).

[163] The Scientology closing agreement was leaked, presumably by someone who worked at the IRS, to the Wall Street Journal, so it was not actually secret. See Scientologists and the IRS, note 36. Nevertheless, the drafters of the agreement expected that it would not be disclosed.

[164] Sometimes by the tens of thousands, as in the case of regulations proposed to govern the political activities of § 501(c)(4) organizations. See IRS Update on the Proposed New Regulation on 501(c)(4) Organizations, http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501(c)(4)-Organizations (last visited June 20, 2016) (over 150,000 written comments received).

a substantial outcry, the Treasury Department has no choice but to examine its policies more closely.[165]

Procedures that require the Treasury to more closely examine the constitutionality of its administration are a good idea. Nevertheless, internal Treasury procedures cannot wholly substitute for judicial review in constitutional cases since courts are the final arbiters of constitutionality. Better administrative procedure could be linked to limited expansion of judicial review. As the three featured cases make clear, there are constitutional issues that arise in tax cases that are so important that the Supreme Court needs to resolve them. Recall that the Obama administration bent over backwards in *Windsor* to make sure that the courts would retain jurisdiction. In *Bob Jones*, the Supreme Court itself appointed an amicus to argue the government's position, rather than lose the opportunity to decide the case.[166]

Administrative process might be sufficient for cases in which the IRS gives a taxpayer particularly generous treatment, but where the issues do not raise constitutional questions. One example in this category is the recent IRS decision to interpret § 382 in a way that allowed some troubled banks to use net operating losses to reduce their tax liabilities.[167] Many people believed that the IRS lacked the authority to issue that guidance, given the language in the statute.[168] If that is true, then applying the guidance to taxpayers would be illegal. Nevertheless, other taxpayers who are stuck with the consequences of § 382's limitations are not in a position to attack the government's decision to help the big banks. Like the Sklars, they can complain about their bad treatment, but not about another taxpayer's better treatment.

The difference between the § 382 losers and the Sklars is that the Sklars have a constitutional claim, while the § 382 losers have a claim about the interpretation of a statute. While it is not desirable for the IRS to play favorites among taxpayers, statutory and constitutional favoritism could be treated differently. Judicial intervention might only be necessary where constitutional violations of individual rights are alleged. The line between permissible exercise of discretion and IRS overreach is not always clear. A wholly internal process, in which

[165] The 501(c)(4) regulation was proposed in November 2013. 78 Fed. Reg. 71535 (Nov. 29, 2013). Congress has since prohibited the IRS from adopting regulations to define politicking organizations. See Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, div. E, tit. I, § 127, 129 Stat. 2242, 2433 (2015).

[166] See Johnson, note 19.

[167] Notice 2008-83, 2008-2 C.B. 905; Notice 2010-2, 2010-2 C.B. 251.

[168] See, e.g., Cushman, note 66; J. Mark Ramseyer & Eric Rasmussen, Can Treasury Exempt Its Own Companies from Tax? The $45 Billion GM NOL Carryforward, 1 Cato Papers on Pub. Pol'y 1 (2011); Zelenak, note 2, at 846-47.

the IRS deliberates on its own decisions, without oversight by a court, might be sufficient to address the most egregious cases of statutory favoritism. Simply identifying the biases created by invisible taxpayers might be sufficient to reduce their effects.

D. Judicial Recognition of Invisible Taxpayers

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

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

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

In addition, courts should have an interest in protecting judicial precedents. The IRS policy on Scientologists is in clear conflict with the Supreme Court's holding in *Hernandez*. Once there is a clear constitutional determination that applies to the very circumstance, it is a matter of the courts reinforcing their own decisions. This is another distinction between Sklar and the IRS notice on net operating losses.

Where the IRS flouts a statute, the interbranch conflict involves the IRS and Congress. Congress is more likely to be interested in correcting an IRS mistake about the application of legislation (like § 382) that it is in correcting an erroneous application of case law (like *Hernandez*). Furthermore, it is not hard to imagine a situation in which Congress adopts a statute, the IRS enforces it, and then a court declares the statute unconstitutional. The IRS and Congress are on the same page throughout, but the courts are not.

A recently reversed decision on the parsonage exemption is a good example, and the lower court's decision might be a good model, if the Supreme Court allows the lower courts to take initiative. There is a tax exemption for housing provided to clergy that is not generally available to others who receive housing from their employers.[169] The so-called parsonage exemption has been part of the Code for decades, but a court first held it unconstitutional in 2013.[170] Some maintain that the exemption is constitutionally acceptable,[171] while others disagree.[172]

The district court in *Freedom from Religion v. Lew* allowed the atheist plaintiffs to proceed "because it is clear from the face of the statute that plaintiffs are excluded from an exemption granted to others."[173] While the atheists can surely complain that they are being taxed too much, that is a distinct claim from arguing that others are being taxed too little. While the district court could (and did) reach the constitutional question in the parsonage case, it alternatively could have disposed of the plaintiffs' claims without doing so, as the *Sklar* court did, and as the Seventh Circuit said it should have done.[174] By reaching the constitutional question, the district court protected the interests of many taxpayers not before the court, and placed the liti-

169 See IRC § 107.

170 Freedom From Religion Found., Inc. v. Lew, 983 F.Supp.2d 1051, 1053 (W.D. Wis. 2013) (concluding that "§ 107(2) violates the establishment clause under the holding in *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), because the exemption provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise.") The Seventh Circuit vacated in November 2014. Freedom from Religion Found., Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014). An earlier challenge survived a motion to dismiss. Freedom from Religion Found., Inc. v. Geithner, 715 F.Supp.2d 1051 (E.D. Cal. 2010).

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

172 See, e.g., Phil Bednar, After Warren: Revisiting Taxpayer Standing and the Constitutionality of Parsonage Allowances, 87 Minn. L. Rev. 2016 (2003).

173 *Freedom From Religion Found.,* 983 F.Supp.2d at 1053.

174 *Freedom From Religion Found.,* 773 F.3d at 825.

gant before it in a larger context, where tax fairness requires demands that fair shares are in relation to one another.

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

VI. Conclusion

The invisibility of taxpayers in the legal system creates a substantial problem for tax justice, both substantive and procedural. The courts' application of standing doctrine, as well as its conceptualization of tax expenditures as not involving state action, has narrowed the opportunity for judicial review for tax-reducing actions taken by both Congress and the IRS. These developments fail to protect individuals, even when they have substantial individual rights claims under the Constitution. There is always a cost to someone in taxation, and costs borne by invisible people are much easier for everyone else to accept. By restricting judicial recognition to the traditional dyad, the structure of tax litigation ignores how burdens are shifted outside it. Tax policy is inconsistent—its legal analysis ignores these invisible taxpayers, while its economic analysis concedes they are indispensable.

Because this Article presented a theory of tax injury and tax fairness (and not a theory of standing), there are many potential plaintiffs and claims that are beyond the scope of its analysis. Nontaxpayers are invisible in the tax system, even though their interests are implicated in it, but the theory offered here is not directly relevant to them.[175] If nontaxpayer interests are considerably different from the interests of taxpayers outside the traditional dyad who would have standing under

[175] On account of the payroll tax, most households are taxpayers, even though a substantial number do not pay net income taxes. It is estimated that 43% of households do not pay income tax, but only 14% do not pay payroll taxes, primarily the elderly. See Urban-Brookings Tax Pol'y Ctr., Who Doesn't Pay Federal Taxes?, http://www.taxpolicycenter.org/taxtopics/federal-taxes-households.cfm (last visited Aug. 26, 2016).

this theory, then more work will be necessary to render them visible as well. Nevertheless, the analysis developed here is likely to remedy the problem of constitutional tax cases where no one has standing, so it may well be sufficient. Similarly, while the theory is primarily designed to recognize when a taxpayer has an injury from paying taxes, it may inform analysis of government spending as well.

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