ARTICLE

DEMOCRATIC ACCOUNTABILITY AND TAX ENFORCEMENT

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ABSTRACT

One of the most powerful charges that can be leveled against the IRS is that it is targeting taxpayers. Charges of political targeting have dogged the IRS for over a century, including in major controversies such as the alleged Tea Party auditing scandal in 2013. Commentators and scholars have long critiqued the IRS for focusing audit resources on some of the lowest-income Americans. And, most recently, a group of researchers estimated that the IRS audits Black taxpayers at a 2.9 to 4.7 times greater rate, as compared to non-Black taxpayers. In response, legislators demanded action, there was widespread public consternation, and IRS officials stated that they were "deeply concerned by these findings." These, and other, controversies suggest deep disdain for the targeting of taxpayers by the IRS, as well as general confusion about what it even means for the IRS to "target" taxpayers.

Despite the fact that "targeting" is a powerful accusation often leveled at the IRS, it turns out that it is a significant challenge to pinpoint what "targeting" means. This question is complicated by the fact that the IRS must focus its resources on some taxpayers, but not others. Moreover, how best to allocate tax enforcement resources is not a question that has a clear, technocratic answer. Rather, it depends on normative questions, such as how much we should prioritize taxpayers who face greater vulnerabilities. And the law provides little help in deciding when tax enforcement choices are out of bounds, as antidiscrimination law plays no real, practical role in curbing the IRS's tax enforcement decisions.

This Article identifies how these factors lead to a democratic accountability problem at the heart of tax enforcement. Which taxpayers to pursue is a deeply value-laden question, and the IRS is left to answer it with few legal guidelines, little ex ante oversight by the accountable branches of government, and little transparent dialogue with the public. This state of affairs inevitably leads to targeting controversies, which harm both the IRS and the public. Having identified this central problem, this Article begins to chart a path toward more democratically accountable tax enforcement. Dialogue with the public about difficult, normative tax enforcement decisions can, and should, be consistent with a successful enforcement regime.

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> *We face tough choices each year regarding where to deploy limited resources given the breadth of our responsibilities, but our choices are guided by fair and impartial audit plans throughout the process.*
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> — IRS Deputy Commissioner Douglas O'Donnell[1]

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[1] U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104960, TAX COMPLIANCE: TRENDS OF IRS AUDIT RATES AND RESULTS FOR INDIVIDUAL TAXPAYERS BY INCOME 39 (2022).

> *IRS has not defined fairness or program objectives for audit selection that would support its mission of treating taxpayers fairly.*
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> — U.S. Government Accountability Office[2]

> *If you've got the IRS operating in anything less than a neutral and nonpartisan way, then that is outrageous, it is contrary to our traditions, and people have to be held accountable, and it's got to be fixed.*
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> — President Barack Obama[3]

I. Introduction

What is inappropriate targeting? This question is a perennial source of concern across disciplines. Often, a claim of targeting, in and of itself, is meant to condemn behavior as wrong, or potentially even illegal. The American Civil Liberties Union ("ACLU") describes racial profiling as "targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion or national origin," and provides, as a notorious example, "the targeting, ongoing since the September 11th attacks, of Arabs, Muslims and South Asians for detention on minor immigrant violations in the absence of any connection to the attacks on the World Trade Center or the Pentagon."[4] In National Collegiate Athletic Association ("NCAA") football, targeting can be broadly understood as "aiming at an opponent for purposes of attacking, or forcible contact beyond making a legal tackle or legal block."[5] It carries one of the most severe penalties in football—automatic player disqualification.[6] And, in the tax enforcement context, accusations in 2013 of the Internal Revenue Service ("IRS") targeting conservative-leaning section 501(c)(4) tax-exempt organization applicants, the alleged "Tea Party auditing scandal," linger a decade after the purported events occurred and continue to hinder IRS auditing

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[2] U.S. Gov't Accountability Off., GAO-16-103, IRS Return Selection: Certain Internal Controls for Audits in the Small Business and Self-Employed Division Should Be Strengthened 2 (2015).

[3] ABC News, *President Obama Calls IRS Targeting of Conservative, Tea Party Groups 'Outrageous*,' YouTube (May 13, 2013), https://www.youtube.com/watch?v=3jjDsGr92to [https://perma.cc/YWG2-WAKD].

[4] *Racial Profiling: Definition*, Am. C.L. Union (Nov. 23, 2005), https://www.aclu.org/other/racial-profiling-definition [https://perma.cc/4NRD-VYS4].

[5] Leah Vann, *What is Targeting? The Least-Favorite Penalty in College Football is Difficult to Define. Here's Why.*, Advocate (Oct. 28, 2022), https://www.theadvocate.com/baton_rouge/sports/lsu/what-is-targeting-the-least-favorite-penalty-in-college-football-is-difficult-to-define-heres/article_50062efa-cc44-5823-b85d-7e18a2575967.html [https://perma.cc/WB2H-CQK5].

[6] *Id.*

practices.[7] In all these cases, targeting is meant not just as a descriptive claim, but also as a serious normative condemnation.[8]

Indeed, throughout its history, the IRS has been haunted by charges of tax enforcement targeting. For over a century, the IRS has been accused of targeting particular people, or political views, with heavier tax enforcement as a means of exerting political power.[9] Scholars and policymakers have also examined and critiqued how the IRS allocates its resources among different income groups and geographically, with particular focus on whether the IRS is targeting low-income taxpayers who claim the Earned Income Tax Credit ("EITC").[10] These concerns have been echoed in recent interrogations of how the IRS will spend funding from the Inflation Reduction Act of 2022.[11] The Biden administration promised that taxpayers with income at or below $400,000 would not see their audit rates increase, and detractors attacked and sowed doubt about this claim, ultimately causing Congress to claw back a substantial portion of the funds.[12] Most recently, research has suggested that the IRS audits Black taxpayers at a rate 2.9 to 4.7 times greater than non-Black taxpayers.[13] Legislators demanded action, there was widespread public consternation, and the IRS promised major changes to its auditing practices in

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[7] *See* Fred Stokeld, *IRS-Tea Party Episode Continues to Stir Debate*, 91 Exempt Org. Tax Rev. 325, 328–29 (June 2023) (discussing lingering effects a decade after the scandal). *See generally* Treas. Inspector Gen. for Tax Admin., Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (2013) [hereinafter Treas. Inspector Gen. for Tax Admin. (2013)] (describing Treasury investigation of Tea Party auditing scandal). For media reaction, see, for example, Paul Caron, *The IRS Scandal, Day 738*, TaxProfBlog (May 17, 2015), http://taxprof.typepad.com/taxprof_blog/2015/05/the-irs--1.html [https://perma.cc/S2B4-P3GS]; Marc A. Thiessen, *How Obama's IRS Scandal Harms National Security*, Wash. Post: Opinions (Aug. 5, 2013), https://www.washingtonpost.com/opinions/marc-thiessen-how-obamas-irs-scandal-harms-national-security/2013/08/05/9fea9616-fde1-11e2-96a8-d3b921c0924a_story.html [https://perma.cc/PL7C-YLGE]; Molly Wharton, *Issa to IRS Commissioner: 'You Have a Problem Maintaining Credibility,'* Nat'l. Rev.: The Corner (June 24, 2014), https://www.nationalreview.com/corner/issa-irs-commissioner-you-have-problem-maintaining-credibility-molly-wharton/ [https://perma.cc/8KJ4-3LDF]. For scholarly discussion, see Ellen P. Aprill, *The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulation*, 13 Pitt. Tax Rev. 43, 43 (2015); George K. Yin, *Reforming (And Saving) the IRS By Respecting the Public's Right to Know*, 100 Va. L. Rev. 1115, 1162–64 (2014). *But see generally* Treas. Inspector Gen. for Tax Admin., Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review (2017) [hereinafter Treas. Inspector Gen. for Tax Admin. (2017)] (describing, again, Treasury investigation of Tea Party auditing scandal); Neil H. Buchanan, *Remember the IRS Scandal? It was Fake News All Along*, Newsweek (Oct. 10, 2017), https://www.newsweek.com/remember-irs-scandal-it-was-fake-news-all-along-681674 [https://perma.cc/CG4H-CERS].

[8] Indeed, former President Trump's recent claims of "selective prosecution," another variant of a targeting charge, illustrate the way that targeting accusations can be meant, or at least used as, a moral, or institutional, condemnation. *See, e.g.*, Fox & Friends First, *Trump Indictment Is 'Selective Prosecution': Kaylee McGhee White*, Fox News (June 12, 2023), https://www.foxnews.com/video/6329267437112 [https://perma.cc/45ZG-LLQA].

[9] *See infra* Part II.A.

[10] *See infra* Part II.B.

[11] *See infra* text accompanying note 59.

[12] *See infra* text accompanying notes 59–63.

[13] *See infra* text accompanying notes 70–80.

response.[14] These, and other, controversies suggest deep disdain for the IRS's targeting of certain groups of taxpayers with higher audit rates.

These controversies also convey something else: general confusion about what it means for the IRS to "target" taxpayers.[15] Targeting critiques are in tension with another facet of tax enforcement: due to limited resources, the IRS always focuses on some taxpayers more than others.[16] There are often good enforcement reasons for the IRS to focus on certain groups of taxpayers. Indeed, scholars, commentators, and policymakers have even critiqued the IRS at times for *not* engaging in sufficiently focused enforcement.[17] These realities of tax enforcement put the IRS in a difficult position: the IRS must focus its enforcement resources, but doing so places the IRS at risk of criticism for targeting.

This dilemma yields several questions: what is tax enforcement targeting, and what is an acceptable, or even desirable, focusing of enforcement resources? These questions have no easy answer. As we explain in this Article, whether the IRS should focus on a particular group of taxpayers often does not depend on straightforward, technocratic analysis of revenue yields and auditing costs. Rather, deciding how to deploy IRS enforcement resources can also depend on normative questions, and underlying differing political values can lead to vastly different answers. For instance, how much to focus, or not focus, on taxpayers claiming the EITC depends on one's views about how relative vulnerability should impact government policy.[18]

Antidiscrimination law does not make this determination easier, as it supplies few boundaries around tax enforcement decisions.[19] Our legal system uses antidiscrimination law to distinguish between legitimate differences in treatment by the government on the one hand, versus illegitimate discrimination on the other.[20] In theory, antidiscrimination law could apply to tax enforcement and other forms of enforcement. It would ask what personal characteristics of taxpayers should be free from undue burdens from tax enforcement, and when burdens on such personal characteristics would be justified by other, countervailing considerations.[21] However, antidiscrimination law does not functionally apply to tax enforcement.[22] Congress does not police enforcement through statutory antidiscrimination law. And Equal Protection doctrine serves no functional role because of its lack of disparate

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[14] *See infra* text accompanying notes 83–84.

[15] Congressional appropriations have even included statements that the IRS may not use appropriated funds to "target groups for regulatory scrutiny based on their ideological beliefs." *See, e.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4657 (2023). This has not solved the problem of IRS targeting accusations.

[16] *See infra* text accompanying notes 107–111.

[17] *See infra* text accompanying notes 112–122.

[18] *See infra* Part III.B.

[19] *See infra* Part III.C.

[20] *See id.*

[21] *See id.*

[22] *See id.*

impact liability, the difficulty in bringing a disparate treatment claim, and deference to agency enforcement decisions.[23]

This Article identifies how these factors lead to a democratic accountability problem at the heart of tax enforcement. Making policy decisions considering background disagreement about values is, of course, a central feature of government policymaking. However, the IRS is making these decisions with few legal guidelines, little *ex ante* oversight by the accountable branches of government, and little transparent dialogue with the public.[24] This democratic accountability problem inevitably leads to targeting controversies, which impose harm on both the IRS and the public.

Having identified the problems with the IRS making enforcement decisions largely in a democratic accountability vacuum, we suggest a new paradigm of greater transparency and dialogue. We argue that the IRS should communicate more clearly its enforcement values and constraints, and how it is responding to them. We propose several specific reform measures, including the following: the publication of an annual IRS Priority Enforcement Plan, public disclosure of statistics that would reflect the impact of tax enforcement on taxpayers with different personal characteristics, increased disclosure of audit factors for individual tax returns, and encouragement of external participation and partnerships in tax enforcement policy and research.[25] These proposals can enable the IRS to engage in more accountable dialogue both within the government and with the public at large about the value-laden enforcement decisions that the IRS inevitably must make.

Critically, we not only argue for a new paradigm of greater tax enforcement transparency, but also explain how this can be consistent with effective tax enforcement. There are several ways in which we might conceive of effective tax enforcement. It is not clear that secrecy is critical for achieving success. Rather, if the tax enforcement goal is to incentivize taxpayers to pay the largest share of the taxes they owe, greater publicity about enforcement may very well help the IRS achieve success. In circumstances in which providing enforcement information to the public is likely to reduce tax compliance, the IRS can still increase dialogue about enforcement within the Executive Branch, enhancing democratic accountability. In light of the democratic accountability issues we have identified at the heart of the IRS's tax enforcement, the IRS should default to an approach of greater transparency and public engagement, using secrecy as a weapon only when likely to be helpful for compliance. Dialogue with the public about difficult, normative tax enforcement decisions can, and should, be consistent with a successful enforcement regime.

This Article proceeds as follows. Part II lays out some of the major targeting controversies in tax enforcement. Part III identifies the difficulty in

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23 *See id.*
24 *See infra* Part IV.B.
25 *See infra* Part IV.C.

distinguishing between tax enforcement targeting and an acceptable, or desirable, focus of enforcement resources. Part IV identifies the democratic accountability problem at the heart of tax enforcement. Part IV then charts a more democratically accountable tax enforcement path forward and explores how this can be consistent with successful tax enforcement.

II. "Targeting" Controversies in Tax Enforcement

Throughout its history, the IRS has been accused of high-profile instances of "targeting" taxpayers. This Part highlights some of the major tax enforcement controversies underlying these "targeting" accusations. These controversies both reveal how damaging accusations of IRS "targeting" can be and raise the question of what it even means for the IRS to "target" taxpayers.

A. *Political Targeting*

Since the birth of the modern IRS,[26] the agency has faced charges that it has targeted specific taxpayers because of their political activity and viewpoints. As the following examples show, these allegations often involve the implication that the President has, directly or indirectly, ordered IRS agents to launch investigations of political opponents and other adversaries.

Roosevelt Administration. President Franklin D. Roosevelt is alleged to have used, or attempted to use, the IRS as a political weapon to intimidate and silence political adversaries in the 1930s, including Senator Huey Long of Louisiana, who opposed the New Deal legislation,[27] former Secretary of the Treasury Andrew Mellon, and newspaper publisher William Randolph Hearst, among others.[28] In response, Elliot Roosevelt, son of the former President, has been quoted as theorizing that his father "may have been the originator of the concept of employing the IRS as a weapon of political retribution."[29]

Nixon Administration. Decades later, President Richard Nixon attempted to use the IRS in similar ways by creating a list of political enemies whom

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[26] *See IRS History Timeline*, Internal Revenue Serv. (Jan. 18, 2024), https://www.irs.gov/irs-history-timeline [https://perma.cc/JD27-M3Q9].

[27] *See, e.g.*, David Burnham, A Law Unto Itself: The IRS and the Abuse of Power 231 (1989); William Ivy Hair, The Kingfish and His Realm: The Life and Times of Huey P. Long 287 (1991).

[28] *See* Dena Aubin, *Factbox: IRS's Rich History of Scandals, Political Abuse*, Reuters (May 16, 2013), https://www.reuters.com/article/idUSBRE94F16V/ [https://perma.cc/5PSQ-HUAR]; The Daily, *How the I.R.S. Became a Political Boogeyman*, N.Y. Times (Apr. 18, 2023), https://www.nytimes.com/2023/04/18/podcasts/the-daily/irs-reform-taxes.html [https://perma.cc/E6HF-GT3V]; The Week Staff, *The IRS as a Political Weapon*, Week (Jan. 8, 2015), https://theweek.com/articles/463613/irs-political-weapon [https://perma.cc/S6VH-DJZJ].

[29] Burton W. Folsom Jr., New Deal Or Raw Deal?: How FDR's Economic Legacy Has Damaged America 146 (2008).

he wanted the IRS to investigate.[30] The Watergate investigation produced evidence that Nixon had personally requested tax investigations of political opponents and their campaign supporters.[31] While Nixon wanted the IRS to pursue his requested investigations, IRS officials refused.[32] As White House Counsel John Dean wrote, he and his associates were "unable to stimulate" the audits that Nixon requested.[33] Despite the failure of Nixon's efforts, in 1974, the House included Nixon's use of the IRS for political purposes in one of its articles of impeachment, noting that he had personally attempted to cause "tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner."[34]

Obama Administration. One of the most significant controversies of the Obama administration involved allegations that the IRS had engaged in unfair targeting of conservative political organizations. In May 2013, the head of the IRS Tax Exempt and Government Entities Division disclosed that, in reviewing applications by organizations to receive approval to be section 501(c)(4) tax-exempt "social welfare" organizations, her division had especially scrutinized organizations with terms in their titles that implied political activities, such as "Tea Party" or "Patriot."[35] (Section 501(c)(4) tax-exempt organizations are strictly limited in their ability to engage in political activities.)[36] Shortly after this disclosure, the Treasury Inspector General for Tax Administration ("TIGTA") issued a report alleging that the IRS had relied on "inappropriate criteria" based on political affiliation to review applicants for section 501(c)(4) status.[37] A media firestorm resulted, as critics accused the IRS of unfairly targeting conservative political organizations.[38] Attempting to calm

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[30] *See* The Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981 130–32 (1974); *see also* Joseph Thorndike, *Timelines in Tax History: Nixon Aide Tried to Weaponize the IRS by Pressuring the Commissioner*, Forbes (Mar. 13, 2023), https://www.forbes.com/sites/taxnotes/2023/03/13/timelines-in-tax-history-nixon-aide-tried-to-weaponize-the-irs-by-pressuring-the-commissioner/?sh=4a68a2147b43 [https://perma.cc/7WF4-3W3G].

[31] *See* Thorndike, *supra* note 30; Eileen Shanahan, *An Explanation: The Allegations Nixon's I.R.S. Interference*, N.Y. Times (June 14, 1974), https://www.nytimes.com/1974/06/14/archives/an-explanation-the-allegatoins-of-nixons-irs-interference-many.html [https://perma.cc/Y862-BMQW]; Reuters, *Nixon, on Tapes, Demanded Audits of Jews,* N.Y. Times (Dec. 8, 1996), https://www.nytimes.com/1996/12/08/us/nixon-on-tapes-demanded-audits-of-jews.html [https://perma.cc/V8YG-6VAT]; Carl Bernstein & Bob Woodward, *Woodward and Bernstein: 40 Years After Watergate, Nixon Was Far Worse Than We Thought*, Wash. Post (June 8, 2012), https://www.washingtonpost.com/opinions/woodward-and-bernstein-40-years-after-watergate-nixon-was-far-worse-than-we-thought/2012/06/08/gJQAlsi0NV_story.html [https://perma.cc/6NDZ-4RWD].

[32] *See generally* Michael Koncewicz, They Said No to Nixon: Republicans Who Stood Up to the President's Abuses of Power 31–71 (2018) (describing IRS Commissioner Johnnie Walters's resistance to President Nixon); Thorndike, *supra* note 30.

[33] Thorndike, *supra* note 30 (quoting John Dean).

[34] H.R. Rep. No. 93-1305, at 3 (1974).

[35] Stokeld, *supra* note 7, at 326.

[36] *See* I.R.C. §§ 501(c)(3)–(4).

[37] *See* Treas. Inspector Gen. for Tax Admin. (2013), *supra* note 7, at 5.

[38] *See, e.g.*, Caron, *supra* note 7; Thiessen, *supra* note 7; Wharton, *supra* note 7.

the outrage, then-President Barack Obama conceded that the IRS must "make sure everybody is being treated fairly."[39] Despite the controversy, a later review by TIGTA in 2017 showed that the IRS had scrutinized tax-exempt applications from both conservative and liberal organizations.[40] In response to the 2017 report, Professor Neil Buchanan characterized the "IRS scandal" as an "elaborate, innuendo-driven lie that many people repeated endlessly, trying to get you to believe that there was a scandal."[41]

Trump Administration. Former members of the Trump administration have alleged that then-President Donald J. Trump wanted his aides to request that the IRS investigate specific individuals who were political opponents or other adversaries. In 2022, *The New York Times* reported that John F. Kelly, White House Chief of Staff, had stated that, while in office, Trump "repeatedly" told Kelly that he "wanted a number of his perceived political enemies to be investigated by the Internal Revenue Service."[42] The next year, the paper reported that Kelly had "said in a sworn statement that Mr. Trump had discussed having the Internal Revenue Service and other federal agencies investigate two F.B.I. officials involved in the investigation into his campaign's ties to Russia."[43] In July 2022, when reports surfaced that two of the most prominent F.B.I. officials, former F.B.I. Director James B. Comey and F.B.I. Deputy Director Andrew McCabe, had been selected for highly intrusive National Research Program ("NRP") audits, commentators alleged that these unusual audits occurred as a result of their law enforcement actions against the Trump administration.[44] In December 2022, a subsequent TIGTA investigation concluded that it "did not identify misconduct" by IRS officials,

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[39] Comedy Central, *The Daily Show - Exclusive - Barack Obama Extended Interview*, YouTube (July 21, 2015), https://www.youtube.com/watch?v=L88H2HWEXrw [https://perma.cc/UB56-65RB].

[40] *See* Treas. Inspector Gen. for Tax Admin. (2017), *supra* note 7, at 3; Press Release, U.S. Treasury Inspector General for Tax Administration, Agency Statement on Audit Report: "Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review" (Oct. 5, 2017), https://www.tigta.gov/articles/press-releases/agency-statement-audit-report-review-selected-criteria-used-identify-tax [https://perma.cc/SS2Z-UCL4].

[41] Buchanan, *supra* note 7.

[42] Michael S. Schmidt, *Trump Wanted I.R.S. Investigations of Foes, Top Aide Says*, N.Y. Times (Nov. 13, 2022), https://www.nytimes.com/2022/11/13/us/politics/trump-irs-investigations.html [https://perma.cc/R2BV-272W].

[43] Michael S. Schmidt, *Trump Asked About I.R.S. Inquiry of F.B.I. Officials, Ex-Aide Says Under Oath*, N.Y. Times (July 7, 2023), https://www.nytimes.com/2023/07/07/us/politics/trump-kelly-irs-fbi-strozk-page.html [https://perma.cc/8QN5-E7PP].

[44] *See, e.g.*, Frank Figliuzzi, *The 'Random' IRS Audit of Trump's Enemies Leaves Me Deeply Suspicious*, MSNBC (July 9, 2022), https://www.msnbc.com/opinion/msnbc-opinion/irs-auditing-james-comey-andrew-mccabe-concerning-n1296936 [https://perma.cc/Q6KC-VBV4]; Matt Ford, *The Suspicious Swing of Trump's Taxman's Axe*, New Republic (July 8, 2022), https://newrepublic.com/article/167017/comey-mccabe-irs-audit-trump [https://perma.cc/K4XQ-7N58].

but that it would take "additional steps to assess the process used to select" returns for NRP audits.[45]

B. Income, Geographic, and Related Forms of Targeting

Scholars and policymakers have also often examined and critiqued how the IRS allocates its resources among different income groups and geographically, with particular focus on whether the IRS is targeting low-income taxpayers who are claiming the EITC. First introduced in the 1970s, the EITC is a tax credit available for low-income taxpayers who have labor (or "earned") income.[46] Legislative history suggests that the EITC was meant to encourage work and help a "hard-pressed group in the population" by offsetting payroll taxes on such a group.[47] A significant body of research has explored the efficacy of the EITC, with much work suggesting that it is effective at increasing work while reducing poverty, alongside other work that has challenged such claims.[48]

Putting aside questions of how much the EITC affects work and poverty levels, tax scholars, policymakers, and other commentators have long argued that the IRS has targeted taxpayers claiming the EITC ("EITC taxpayers") through disproportionate audits of the EITC. For instance, Professor Dorothy Brown has identified disproportionate political focus on potential false claims of EITC taxpayers, how EITC taxpayers have been subject to higher audit rates, and how EITC taxpayers have been subject to greater precertification requirements.[49] Senator Ron Wyden (D-Or.) has lamented that "[t]hose struggling to make ends meet are being unfairly audited while the fortunate few dodge taxes without consequence."[50] And the Transactional Records Access Clearinghouse has argued that "[a] large increase in federal income tax audits

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[45] Treas. Inspector Gen. for Tax Admin., National Research Program Tax Return Selection Process for Tax Years 2017 and 2019 9 (2022).

[46] I.R.C. § 32. For discussion of the history and evolution of administration of the EITC, see generally Janet Holtzblatt, *Administering Refundable Tax Credits: Lessons from the EITC Experience*, *in* Proceedings of the Eighty-Fourth Annual Conference on Taxation 180–86 (Nat'l Tax Ass'n ed., 1991); Dennis Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–99,* 53 Nat. Tax J. 983 (2000).

[47] S. Rep. No. 94-938, at 119 (1976).

[48] *Compare, e.g.*, Hilary W. Hoynes & Ankur J. Patel, *Effective Policy for Reducing Inequality? The Earned Income Tax Credit and the Distribution of Income* 29–30 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21340, J2015) http://www.nber.org/papers/w21340 [https://perma.cc/2E7Y-WGA2] ("[T]hese estimates provide important evidence on the efficacy of this central element of the U.S. safety net not only to encourage work, but to potentially reduce inequality, raise family income, and move families out of poverty."), *with* Henrik Kleven, The EITC and the Extensive Margin: A Reappraisal, Univ. & Nat'l Bureau of Econ. Rsch. (2019) ("Overall and contrary to consensus, the case for sizable extensive margin effects of the EITC is fragile.").

[49] *See* Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 Colum. L. Rev. 790, 800 (2007).

[50] Paul Kiel & Jesse Eisinger, *Who's More Likely to Be Audited: A Person Making $20,000 – or $400,000?*, ProPublica (Dec. 12, 2018), https://www.propublica.org/article/earned-income-tax-credit-irs-audit-working-poor [https://perma.cc/2C6Q-JPFB].

targeting the poorest wage earners allowed the Internal Revenue Service to keep overall audit numbers from further declines for Americans as a whole," while asking how long taxpayers would continue to voluntarily comply with the tax system "when IRS targets low-income taxpayers because they are simply easier to audit while those with higher incomes escape any examination."[51] These critiques reflect a wider and persistent concern about disproportionate treatment of EITC taxpayers.[52]

Recent Congressional Research Service analysis has buttressed these critiques. In June 2022, the Congressional Research Service produced a report stating that "[s]ome policymakers are concerned that the IRS is auditing low-income taxpayers—in particular taxpayers who claim the earned income tax credit (EITC)—at disproportionately high rates compared to higher-income taxpayers."[53] The report concluded that "[a]udit rates for EITC returns are disproportionately high" and that "[t]hese estimates are in line with trends over the past decade."[54]

The disproportionate auditing of EITC taxpayers drives other discrepancies. For instance, Kim Bloomquist, former senior economist in the IRS Office of Research and former research analyst in the Taxpayer Advocate Service, has documented a geographic impact.[55] Bloomquist shows that, in the recent history of IRS audits, "[a]udit intensity is generally highest in the Southern states and some counties in the Northern Plains, Mountain, and Western states" and attributes this, in part, to the disproportionate rate of EITC audits.[56] In the years that Bloomquist studied, "[e]ight of the ten counties with the highest audit intensity [were] in Mississippi. In tax year 2015, 51 percent of the taxpayers in these 10 counties claimed the EITC."[57]

These longstanding concerns regarding how enforcement resources are being allocated amongst different income groups, and what secondary effects such choices might have, have been echoed in the recent spate of examination of how the IRS will spend a new infusion of $80 billion in ten-year funding

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[51] Transactional Records Access Clearinghouse, *IRS Audits Poorest Families at Five Times the Rate for Everyone Else* (Mar. 8, 2022), https://trac.syr.edu/tracirs/latest/679/ [https://perma.cc/N8HN-6GX5].

[52] For a sample of this scholarship and commentary, see, for example, Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 Or. L. Rev. 351, 352 (2002); Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 Wis. L. Rev. 461, 465 (2003); Kenna Titus, *The Wealthy Get Tax Loopholes, the Poor Get Audited*, Nat'l Women's L. Ctr. (Aug. 3, 2022), https://nwlc.org/the-wealthy-get-tax-loopholes-the-poor-get-audited/ [https://perma.cc/6BUF-MXV8]; Karie Davis-Nozemack, *Unequal Burdens in EITC Compliance*, 31 Law & Inequality 37, 57 (2013).

[53] Margot Crandall-Hollick, Audits of EITC Returns: By the Numbers 1 (2022).

[54] *Id.* at 3.

[55] *See* Kim M. Bloomquist, *Regional Bias in IRS Tax Audit Selection*, Tax Notes (2019), https://www.taxnotes.com/tax-notes-today-federal/audits/regional-bias-irs-audit-selection/2019/03/19/2957w [https://perma.cc/P8DY-3WXR].

[56] *Id.*

[57] *Id.*

from the Inflation Reduction Act of 2022.[58] In anticipation of these concerns, the Biden administration committed that taxpayers with incomes at or below $400,000 would not see their audit rate increase and directed the IRS to follow this commitment.[59] Detractors attacked and sowed doubt about this claim. House Republicans declared that "independent analysis shows the actual number of audits on working class families will skyrocket due to the massive new enforcement force at the IRS," and that "the vast majority of the impact will be felt by Americans making far less than $400,000 a year."[60] The concerns persisted after the passage of the legislation. For instance, Senate Republicans declared that "all 50 Senate Democrats voted to give the IRS nearly $80 billion, most of which will target taxpayers with audits and other enforcement."[61] Persistent, false rumors began to swirl on social media and elsewhere that the IRS was using the increased funding to hire 87,000 armed agents.[62] Ultimately, a significant portion of the funding was clawed back as part of the 2023 debt ceiling negotiations, due in part to concerns that the IRS would use the new funding to engage in politically-motivated targeting and targeting of taxpayers with modest means.[63]

C. Race-Based Targeting

The disproportionate focus of the IRS on low-income taxpayers, and EITC taxpayers in particular, often aligns with another major charge of IRS targeting: race-based targeting. There are several ways in which disproportionate EITC auditing intersects with race-based targeting. First, the types of EITC issues that the IRS tends to audit may have different racial impacts. For instance, recent research suggests that "[r]elative to White children, Black, Hispanic, and especially Asian children are much more likely to have another

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[58] An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14., Pub. L. No. 117–169, 136 Stat. 1818.

[59] Letter from Janet Yellen, Secretary of the Treasury, to Charles Rettig, Commissioner of the IRS (Aug. 10, 2022), https://home.treasury.gov/system/files/136/JLY-letter-to-Commissioner-Rettig-Signed.pdf [https://perma.cc/AV2V-LKVS].

[60] Press Release, GOP Ways and Means, Brady on Manchin-Biden Bill: Attention Wal-Mart Shoppers–More IRS Audits Headed Your Way (Aug. 6, 2022), https://waysandmeans.house.gov/brady-on-manchin-biden-bill-attention-wal-mart-shoppers-more-irs-audits-headed-your-way/ [https://perma.cc/RG7T-72KD].

[61] Senate Republican Policy Committee, *How the $80 Billion Democrats Gave the IRS Hurts Taxpayers*, Sen. Republican Pol'y Comm. (Sept. 27, 2022), https://www.rpc.senate.gov/policy-papers/how-the-80-billion-democrats-gave-the-irs-hurts-taxpayers [https://perma.cc/3VTJ-G3QJ].

[62] *Fact Check – The IRS is Not Hiring Thousands of Armed Agents, Job Ads Show Opening for Specialized Unit*, Reuters (Aug. 17, 2022), https://www.reuters.com/article/factcheck-irs-armed/fact-check-the-irs-is-not-hiring-thousands-of-armed-agents-job-ads-show-opening-for-specialized-unit-idUSL1N2ZT296 [https://perma.cc/DM4Z-2BTC].

[63] *See* Jim Tankersley & Alan Rappeport, *New Details in Debt Limit Deal: Where $136 Billion in Cuts Will Come From*, N.Y. Times (May 30, 2023), https://www.nytimes.com/2023/05/29/us/politics/debt-ceiling-agreement.html [https://perma.cc/NNQ8-RHF3] (describing debt ceiling deal, including funding reductions to the IRS).

relative residing in the household who could potentially claim them as a qualifying child."[64] Non-white taxpayers, and, in particular, Black taxpayers, are more likely to have family living arrangements that subject them to complexity, confusion, and the possibility of error for EITC dependents, an issue highly subject to IRS audit.[65] Second, to the extent that systemic inequalities cause non-white taxpayers to have relatively lower incomes, those taxpayers are more likely to be eligible for the EITC, and therefore subject to higher rates of audit as a result of being EITC claimants.[66] However, as Professor Dorothy Brown has explained, government assistance, like the EITC, has also been oftentimes mistakenly "raced," in that people assume a greater proportion of people receiving such government assistance are non-white taxpayers than is actually the case.[67] Brown argues that this incorrect perception of EITC claimants as disproportionately non-white, combined with racial bias, may be part of what has motivated targeting of EITC taxpayers.[68]

Recently, a group of researchers from Stanford University, the University of Michigan, the University of Chicago, and the Treasury Department has produced evidence that, even putting aside the impact of disproportionately auditing EITC taxpayers, the IRS disproportionately audits Black taxpayers. Since race currently cannot be observed directly on U.S. tax returns,[69] this research (the "Stanford study") uses a partial identification strategy to observe audit differences based on race.[70] It determined that, in the tax years under study, the IRS audited Black taxpayers "at between 2.9 and 4.7 times the rate

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[64] Katherine M. Michelmore & Natasha V. Pilkauskas, *The Earned Income Tax Credit, Family Complexity, and Children's Living Arrangements*, 8 Russell Sage Found. J. Soc. Sci. 143, 151 (2022).

[65] *See id.*; *see also id.* at 156 (describing how ambiguity in EITC leads to increased filing errors and that this is especially common among Black families).

[66] *Cf., e.g.*, Chye-Ching Huang & Roderick Taylor, *How the Federal Tax Code Can Better Advance Racial Equity*, Ctr. on Budget and Pol'y Priorities (July 25, 2019), https://www.cbpp.org/research/federal-tax/how-the-federal-tax-code-can-better-advance-racial-equity [https://perma.cc/S5EL-Z8XL] (arguing that "inadequate tax enforcement among wealthy filers and large corporations likely weakens detection and prosecution of criminal corruption, with the beneficiaries of that lack of greater enforcement being disproportionately white").

[67] Brown, *supra* note 49, at 798.

[68] *See id.* (explaining how welfare stereotypes and race have influenced the targeting of low-income taxpayers).

[69] *See* Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 Tax L. Rev. 1, 2 (2019) (identifying that "not only does the Form 1040 not ask about race, but the IRS Statistics of Income Division (SOI), the Treasury Office of Tax Analysis (OTA), and the Joint Committee on Taxation (JCT) do not include race or ethnicity in their published tax data analysis . . . ."); Lily Batchelder & Greg Leiserson, *Disparities in the Benefits of Tax Expenditures by Race and Ethnicity*, U.S. Dep't of Treasury (Jan. 20, 2023), https://home.treasury.gov/news/featured-stories/disparities-in-the-benefits-of-tax-expenditures-by-race-and-ethnicity [https://perma.cc/L7KU-TXDB] ("The IRS does not collect information on race and ethnicity on tax returns, so to facilitate analysis of disparities in tax policy, the Treasury Department has developed an approach to impute race and ethnicity in tax data, which it will continue to refine.").

[70] For more description of this methodology, see Hadi Elzayn, Evelyn Smith, Thomas Hertz, Arum Ramesh, Robin Fisher, Daniel E. Ho & Jacob Goldin, *Measuring and Mitigating Racial Disparities in Tax Audits* 13–22 (Stanford Inst. Econ. Policy Rsch., Working Paper, 2023).

of non-Black taxpayers."[71] Largely, this difference is attributable to disparities in audit selection within the EITC, although disparities also exist in audit selection of Black and non-Black taxpayers who do not claim the EITC.[72]

Based on the data from the tax years under study, the Stanford study goes on to explain that different choices in audit selection have different impacts on racial auditing discrepancies. In particular, the study finds that an audit approach that prioritized taxpayers based on total dollar amount of underreporting would select "Black taxpayers for audit at a lower rate than non-Black taxpayers."[73] So would an audit approach that prioritized taxpayers based on predicted, rather than actual, underreporting.[74] In contrast, an audit selection process that targets taxpayers based on predicted presence of any underreporting of at least $100 (irrespective of the size of underreporting) selects Black taxpayers at higher rates than non-Black taxpayers.[75] Other audit selection choices matter as well. Selecting taxpayers based on overclaiming certain refundable tax credits (namely the EITC, the Additional Child Tax Credit, and the American Opportunity Tax Credit) leads to auditing Black taxpayers at a higher rate, while detecting substantially less total underreporting.[76] Audits of EITC tax returns without substantial business income also result in higher audits of Black taxpayers (relative to an audit strategy that focused more on EITC tax returns with substantial business income).[77]

In response to the Stanford study, many have called for reforms that would make the tax auditing system more equitable.[78] In February 2023, following the release of the report, President Biden issued an executive order, which requires agencies to "coordinate the implementation of equity initiatives and ensure that their respective agencies are delivering equitable outcomes for the American people."[79] Among other things, the order requires agencies to "support ongoing implementation of a comprehensive equity strategy that uses the agency's policy, budgetary, programmatic, service-delivery, procurement,

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[71] *Id.* at 24.

[72] *See id.* at 27 (explaining how the audit rate disparities are largely influenced by racial audit disparity within EITC but are also influenced by disproportionate auditing of EITC returns and audit selection among non-EITC returns).

[73] *Id.* at 33.

[74] *See id.* at 33–35 (describing how using a model based on predicted underreporting also led to lower rates of auditing for Black taxpayers).

[75] *See id.* at 35–36 (discussing the difference in Black taxpayer audit selection between a regression model and a classifier model).

[76] *See id.* at 37–38 (explaining how the "model trained on refundable credits selects Black taxpayers at a higher rate for all audit budgets" considered).

[77] *See id.* at 38–39 (describing how substantial business income as a variable creates a difference in auditing rates for Black and non-Black taxpayers).

[78] *See, e.g.*, Lauren Loricchio, *Werfel's Promised Report on Racial Disparities Seen as First Step*, 178 Tax Notes Fed. 1397, 1398 (2023) (noting a call by NYU's Tax Law Center for Congress to require the IRS to create "effective and transparent safeguards on its use of AI to prevent biased algorithms from disproportionately targeting certain taxpayers").

[79] Exec. Order 14,091, 88 Fed. Reg. 35, 10,825 (Feb. 16, 2023). This order builds on an order that President Biden issued on the day of his inauguration that called for the Federal Government to further "equity for all." *See* Exec. Order 13,985, 86 Fed. Reg. 14, 7,009 (Jan. 20, 2021).

data-collection processes, grantmaking, public engagement, research and evaluation, and regulatory functions to . . . yield equitable outcomes for all Americans, including underserved communities," and it specifically warns against the dangers of "algorithmic discrimination," which "refers to instances when automated systems contribute to unjustified different treatment" based on any "classification protected by law."[80]

The IRS has responded with promises to research the issues and address any "unfair treatment."[81] The IRS's 2023 strategic plan indicates that it "will conduct research and partner with others to understand any potential systemic bias and identify disparities across dimensions including age, gender, geography, race and ethnicity."[82] In a May 15, 2023 letter, IRS Commissioner Daniel Werfel provided an interim update regarding the IRS's examination of the issue. Werfel reported, "[w]hile there is a need for further research, our initial findings support the conclusion that Black taxpayers may be audited at higher rates than would be expected given their share of the population."[83] Werfel promised that, in addition to continuing to examine the issue, the IRS is also "evaluating the potential impact of methodological changes to case selection (e.g., optimizing on broader tax issues rather than focusing on EITC overclaims)."[84] The IRS later highlighted the role of a variety of factors in driving the audit rate discrepancy, including, for instance, the fact that the IRS has a program of auditing more heavily "'unscrupulous return preparers,' whose clients are disproportionately drawn from minority communities."[85] Most recently, in September 2023, Commissioner Werfel issued a letter to Congress validating the findings of the Stanford study and "announcing sweeping efforts to overhaul compliance efforts to improve tax administration."[86] As discussed in greater detail in Part IV.E below, Werfel promised that this overhaul would reduce the tax gap and also reduce disparities in auditing.[87]

Underscoring how fraught claims of taxpayer "targeting" can be, calls for reform by government officials have themselves generated claims of targeting by political opponents. For instance, in response to President Biden's February 2023 executive order regarding equity initiatives, the America First

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[80] Exec. Order 14,091, *supra* note 79.

[81] Letter from Daniel Werfel, IRS Comm'r, to Sen. Ron Wyden, Chairman of S. Comm. on Fin. (May 15, 2023) [hereinafter Letter from Daniel Werfel], https://www.finance.senate.gov/imo/media/doc/werfel_letter_to_sen_wyden.pdf [https://perma.cc/FN32-J3J6] .

[82] Memorandum from Daniel Werfel, IRS Comm'r, on Internal Revenue Service Inflation Reduction Act Strategic Operating Plan, FY 2023-2031 to Janet Yellen, Sec'y of Dep't of Treasury 78 (Apr. 5, 2023).

[83] Letter from Daniel Werfel, *supra* note 81.

[84] *Id.*

[85] Jonathan Curry, *IRS: 'Unscrupulous' Paid Preparers a Key Factor in Racial Audit Gap*, 179 Tax Notes Fed. 2237, 2237 (2023).

[86] Letter from Daniel Werfel, IRS Comm'r, to Members of Congress (Sept. 18, 2023), https://www.irs.gov/pub/newsroom/091823-letter-to-congress-audit-disparity.pdf [https://perma.cc/HZ42-QHFE].

[87] *See infra* Part IV.E.

Legal Foundation filed a FOIA request.[88] America First Legal is headed by Stephen Miller, who served as Senior Advisor to the President throughout the duration of the Trump administration.[89] The FOIA request asserted that, "[w]hen read in context with the Department of the Treasury's ongoing efforts to racialize tax policy, the new Executive Order signals that the Biden Administration intends to alter Internal Revenue Service's (IRS) audit algorithms to target white, Asian, or mixed-race taxpayers."[90] The FOIA request asked for the correspondence of a long list of Treasury and IRS officials that used any of a number of prescribed terms including, for instance, "discrimination," "race," "Black," "White," "algorithmic," and "selection."[91]

D. Impact on IRS

As the following discussion shows, when taxpayers accuse the IRS of engaging in improper targeting, the IRS suffers negative consequences: decreased trust in the IRS as an institution, reduced funding, and hampering of agency functioning. This is the case even if subsequent factual investigations ultimately disprove the targeting allegations.

Targeting controversies often diminish trust that the IRS is enforcing the law fairly. For example, immediately following the 2013 tax-exempt organization controversy, according to opinion surveys, less than a third of individuals stated that they believed the IRS was fairly enforcing the tax law.[92] While trust in an institution like the IRS is an important value in and of itself, there may also be negative, instrumental outcomes from such reduced trust. Studies have suggested that reduced belief in fairness of governance may affect compliance with the law.[93] In particular, taxpayers other than those directly subject to enforcement may change their tax compliance behavior in response to allegations of unfair enforcement.[94]

Even more clearly, targeting controversies often cause Congress to reduce funding to the IRS. For example, following the 2013 allegations that IRS officials had engaged in politically-motivated targeting during the tax-exempt application review process, Congress cut the IRS's overall budget as a result

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[88] FOIA Request from America First Legal to Dep't of Treasury (Feb. 21, 2023), https://aflegal.org/wp-content/uploads/2023/02/02212023_FOIA_Treasury-IRS_Racial-Equity-in-Tax-Enforcement.pdf [https://perma.cc/F8JR-52WF].

[89] *See About: Leadership*, AM. FIRST LEGAL, https://aflegal.org/about/ [https://perma.cc/HXM7-76XH] (describing Stephen Miller's former position).

[90] FOIA Request from America First Legal to Dep't of Treasury, *supra* note 88.

[91] *Id.*

[92] *Just 31% Trust the IRS*, RASMUSSEN REPS. (Mar. 27, 2015), http://www.rasmussenreports.com/public_content/business/taxes/march_2015/just_31_trust_the_irs [https://perma.cc/5VW8-STHZ].

[93] *See, e.g.*, Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, *in* WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259, 259 (Joel Slemrod ed., 1992); John T. Scholz & Mark Lubell, *Trust and Taxpaying: Testing the Heuristic Approach to Collective Action*, 42 AM. J. POL. SCI. 398, 408 (1998).

[94] *Id.*

of, in the words of some legislators, the IRS's "recent history of inappropriate behavior."[95] These funding cuts, in addition to the resignations of several senior IRS officials in response to the controversy, "roiled the [IRS] for years."[96] As another example, as a result of the allegation by some legislators that the IRS would use new Inflation Reduction Act funding[97] to "unleash its fearsome power against political opponents,"[98] Congress voted in 2023 to rescind a portion of the funding over the next two years.[99]

Finally, Congress may respond to targeting scandals by introducing rules that could hamper the IRS's tax enforcement efforts. Following the 1998 congressional hearing that featured witnesses who spoke of IRS abuses in vivid terms, Congress passed, with bipartisan support, legislation that forced the IRS to shift its focus from tax enforcement to high-quality customer service.[100] While many of the 1998 witness accounts were later characterized as overstatements, and even fabrications,[101] the public outcry over stories of inappropriate IRS targeting motivated Congress to introduce measures that ultimately hampered the IRS's tax enforcement efforts.[102]

III. Tax Enforcement Targeting Versus Tax Enforcement Focusing

The accusations of tax enforcement targeting presented in Part II are important. But these critiques are in tension with another facet of tax enforcement: due to limited resources, the IRS is always focusing on some taxpayers more than others.[103] This is an inherent and essential part of tax enforcement. Where is the line between unacceptable tax enforcement targeting and acceptable, or even desirable, focusing of tax enforcement resources? This Part illustrates how answering this question can depend on value judgments, about which there are likely to be differing views.[104] Case law does not make this determination easier, as it supplies very limited boundaries around tax

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[95] Eric Yoder, *'Draconian' Cut to IRS Budget Advances*, Wash. Post (June 11, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/06/11/draconian-cut-to-irs-budget-advances/ [https://perma.cc/TM6S-KBGL] (quoting Rep. Ander Crenshaw (R-Fla.)).

[96] Jackie Calmes, *Senate Report Cites I.R.S. Mismanagement in Targeting of Tea Party Groups*, N.Y. Times (Aug. 5, 2015), http://nyti.ms/1ImpJsq [https://perma.cc/N7DN-AF8Z]; *see also* Aprill, *supra* note 7.

[97] *See* An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14., Pub. L. No. 117-169, § 10301, 136 Stat. 1818, 1831–33 (2022).

[98] Editorial Board, *The IRS Makes a Strange House Call on Matt Taibbi*, Wall St. J. (Mar. 27, 2023), https://www.wsj.com/articles/irs-matt-taibbi-twitter-files-jim-jordan-daniel-werfel-lina-khan-84ee518 [https://perma.cc/L6SP-78VX].

[99] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 102, 137 Stat. 15, 30 (2023).

[100] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1205, 112 Stat. 685, 722 (1998) (codified in scattered sections of I.R.C.).

[101] *See* David Cay Johnston, Perfectly Legal 145–48 (2003); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 Kan. L. Rev. 971, 979–83 (2003).

[102] *See supra* note 100 and accompanying text.

[103] *See infra* Part III.A.

[104] *See infra* Part III.B.

enforcement decisions.[105] As important as the distinction between tax enforcement targeting and acceptable focusing of tax enforcement resources is, there is little to guide the IRS in making the distinction.

A. *Need to Focus IRS Resources*

In response to the Stanford study, several popular news outlets, including NPR, produced stories with titles such as "Does the IRS audit some people more often than others?"[106] Framing the study in this way suggests that any time the IRS focuses on some taxpayers more, there may be a targeting problem.

However, this idea is in tension with the reality that focusing enforcement resources is an inherent part of tax enforcement. While the IRS recently received an infusion of resources from the Inflation Reduction Act,[107] the IRS has historically been chronically underfunded.[108] The Inflation Reduction Act funding will increase resources for the IRS but not change the fact that the IRS will still remain resource-constrained.[109] Indeed, the IRS's strategic operating plan (in the wake of the Inflation Reduction Act) emphasizes, as one of its key planks, "focus[ing]" the IRS's enforcement capacity on "taxpayers with complex tax filings and high-dollar noncompliance."[110] In this regard, the Inflation Reduction Act frees the IRS to make more focused enforcement decisions.[111]

Indeed, commentators and policymakers even praise and promote certain instances of the IRS focusing on certain taxpayers. Notably, policymakers and commentators sometimes use the word "targeting" in a positive sense in describing tax enforcement. As one prominent example, in 2012, the U.S. Government Accountability Office ("GAO") produced a report titled "IRS Could Significantly Increase Revenues by *Better Targeting* Enforcement

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[105] *See infra* Part III.C.

[106] *See* Steve Inskeep, *Does the IRS Audit Some People More Often than Others?*, NAT'L PUB. RADIO (Feb. 1, 2023), https://www.npr.org/2023/02/01/1153150854/does-the-irs-audit-some-people-more-often-than-others [https://perma.cc/2PM8-FHB9]; Kelley R. Taylor, *Does the IRS Audit Some Taxpayers More than Others?,* KIPLINGER (Feb. 2, 2023), https://www.kiplinger.com/taxes/irs-audit-certain-taxpayers-more [https://perma.cc/2TJJ-SGTA].

[107] *See* BRENDAN MCDERMOTT, CONG. RSCH. SERV., IN11977, IRS-RELATED FUNDING IN THE INFLATION REDUCTION ACT 1–3 (2022) (describing Inflation Reduction Act funding of the IRS, and ways such funding was allocated). The IRS's Inflation Reduction Act funding was carved back as part of the 2023 debt ceiling negotiation. *See supra* note 63 and accompanying text.

[108] *See, e.g.*, CTR. ON BUDGET AND POL'Y PRIORITIES, CHART BOOK: THE NEED TO REBUILD A DEPLETED IRS (2022), https://www.cbpp.org/research/federal-tax/the-need-to-rebuild-the-depleted-irs [https://perma.cc/84KH-BQ8Q].

[109] *See, e.g.*, Peter J. Reilly, *Inflation Reduction Act Will Restore IRS Staffing to 1995 Level by 2026*, FORBES (Aug. 9, 2022), https://www.forbes.com/sites/peterjreilly/2022/08/09/inflation-reduction-act-will-restore-irs-staffing-to-1995-level-by-2026 [https://perma.cc/SW4Z-VUAM].

[110] INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE INFLATION REDUCTION ACT STRATEGIC OPERATING PLAN, FY2023-2031 2 (2023), https://www.irs.gov/pub/irs-pdf/p3744.pdf [https://perma.cc/SAU8-52GQ].

[111] *Id.* at 23, 67–73 (describing difficulty of auditing high-income and high-wealth taxpayers, as well as large business taxpayers, and the ways that the Inflation Reduction Act funding will free the IRS to make more enforcement decisions about auditing these taxpayers).

Resources."[112] The report concluded that, by better focusing enforcement on certain groups of taxpayers, rather than others, "there is potential for IRS to increase the direct revenue yield of selected enforcement programs by hundreds of millions of dollars per year without significant (if any) adverse effect on the indirect effect that examinations have on revenues."[113] In this regard, the GAO was embracing targeting certain groups of taxpayers.[114]

Tax compliance scholars have likewise suggested that targeting can, at times, be an important, positive tool in tax enforcement. Professor Alex Raskolnikov has suggested that different taxpayers have different motivations to pay taxes.[115] He argued that, if we can separate taxpayers based on their tax-paying motivations, we can better target the right tax enforcement to the right taxpayer types, yielding an overall improvement in compliance.[116] Tax law commentators have more generally encouraged the IRS to "become better at targeting its enforcement efforts toward noncompliant taxpayers."[117] And both authors of this Article have explored both positive and negative aspects of targeting taxpayers in certain contexts.[118]

Current and former government officials have likewise made clear that focusing on certain groups of taxpayers is sometimes necessary to achieve specific enforcement goals. For instance, former IRS Commissioner Charles Rossotti noted that "historically there has been little enforcement activity targeting partnerships."[119] The IRS has engaged in well publicized efforts to crack down on problematic forms of tax noncompliance, especially in the

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[112] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-151, TAX GAP: IRS COULD SIGNIFICANTLY INCREASE REVENUE BY BETTER TARGETING ENFORCEMENT RESOURCES (2012) (emphasis added), https://www.gao.gov/assets/gao-13-151.pdf [https://perma.cc/8XMN-AV66].

[113] *Id.* at 15.

[114] It is not clear that the analysis by the GAO was correct in this case. As illustrated by later research by the IRS as well as outside analysts, the GAO report relied on average revenue / cost metrics for different taxpayer groups. This can yield "suboptimal [auditing] outcomes" relative to an approach that utilizes marginal revenue / cost metrics. *See* Ronald H. Hodge II, Alan H. Plumley, Kyle Richison, Getaneh Yismaw, Nicole Misek, Matt Olson & H. Saneth Wijesinghe, *Estimating Marginal Revenue / Cost Curves for Correspondence Audits*, 2015 IRS RSCH. BULL. 3, 3 (2015). Of course, any analysis is also sensitive to what the data is at a particular time (including the resource constraints the IRS faces, as well as the compliance of various taxpayer groups at that time). As a result, the point here is not to embrace or reject the particular auditing recommendations by this GAO report as an auditing strategy, but rather to emphasize a prominent instance in which the GAO promoted more efficient "targeting" of taxpayers.

[115] *See* Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 689 (2009).

[116] *Id.*

[117] Jonathan Curry, *IRS Compliance Restructuring Plan Faces Steep Road to Reality*, 179 TAX NOTES FED. 693, 695 (Apr. 24, 2023).

[118] *See* Joshua D. Blank & Ari Glogower, *Progressive Tax Procedure*, 96 N.Y.U. L. REV. 668, 697 (2021) (characterizing this approach as a "beneficial, but incomplete, response to high-end noncompliance"); Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325, 347 (2014) (describing how "concentrating" enforcement on certain sectors of taxpayers at certain times results in a crackdown-like effect).

[119] Lauren Loricchio, *IRS Needs to Rethink Its Compliance Strategy, Ex-Commissioner Says*, 178 TAX NOTES FED. 2226, 2226 (Mar. 27, 2023).

international sector.[120] The IRS has lauded enforcement "targeting untrustworthy or incompetent return preparers."[121] And Treasury officials have defended the IRS's Inflation Reduction Act budget increases by arguing that the money will "bee[f] up the IRS's capacity to go after wealthy tax cheats."[122]

Public commentary also reflects the view that focusing on certain taxpayers at specific times may be positive, and that the failure to do so may be problematic. Part of the IRS's enforcement strategy relies on random auditing. In particular, the IRS has conducted random audits of taxpayers through the now-discontinued Tax Compliance Measurement Program ("TCMP") (dubbed by some as "audits from hell")[123] and, currently, through the NRP.[124] Pursuant to the NRP, the IRS "collect[s] data on reporting, payment and filing compliance of taxpayers."[125] As the IRS describes,

> The IRS needs to use its resources where they are of most value in reducing noncompliance while ensuring fairness, observing taxpayer rights, and reducing the need to burden those who do comply. NRP examinations enable the Service to determine what key areas of noncompliance to address and what treatments to apply to maximize the use of its limited resources.[126]

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[120] *See, e.g.*, Corbett Daly, *IRS Launches Crackdown on Offshore Tax Evasion*, Reuters (Mar. 26, 2009) https://reuters.com/article/us-financial-taxevasion/irs-launches-crackdown-on-offshore-tax-evasion-idUSTRE52P58M20090326/ [https://perma.cc/MG8A-8AD6] (describing one such effort).

[121] Internal Revenue Serv., Progress Update: Putting Taxpayers First: Fiscal Year 2022 18 (Jan. 9, 2023), https://www.irs.gov/pub/irs-pdf/p5382.pdf [https://perma.cc/C6XP-JD4E].

[122] Scott Horsley, *The IRS Just Got $80 Billion to Beef Up. A Big Goal? Going After Rich Tax Dodgers*, Nat'l Pub. Radio (Aug. 14, 2022), https://www.npr.org/2022/08/14/1117317757/irs-tax-evaders-dodgers-inflation-reduction-act-enforcement [https://perma.cc/6PL7-GSDV] (quoting Natasha Sarin, who was, at the time, a counselor for tax policy and implementation at the Treasury Department).

[123] Eric Toder, *Tax Policy Center Report Argues Tax Gap Measures Would Raise Little Revenue*, Tax Notes (July 3, 2007), https://www.taxnotes.com/research/federal/other-documents/washington-roundup/tax-policy-center-report-argues-tax-gap-measures-would-raise/xt1k [https://perma.cc/DN2N-JDD7].

[124] *See* IRM 4.22.1.1.1 (Mar. 7, 2023). For discussion of TCMP and NRP, see Robert E. Brown & Mark J. Mazur, *The National Research Program: Measuring Taxpayer Compliance Comprehensively*, 51 U. Kan. L. Rev. 1255, 1261–63 (2003); Nina E. Olson, *Minding the Gap: A Ten-Step Program for Better Tax Compliance*, 20 Stan. L & Pol. Rev. 7, 9–10 (2009). A line of literature from the criminal justice context militates in favor of increasing randomness in tax enforcement. *See, e.g.*, Bernard E. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age 5 (2007) (proposing increased randomization generally); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. Chi. L. Rev. 809, 866–67 (2011) (promoting random tax audits). Sarah Lawsky has also made a convincing case that random tax auditing (without compensation) is, in fact, consistent with luck egalitarianism. *See* Sarah B. Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 Conn. L. Rev. 161, 170–80 (2008). However, Lawsky notes that this does not change the fact that the public seems to have a distaste for random auditing, based on a perception of its unfairness. *Id.* at 191–94.

[125] IRM 4.22.1.1 (Mar. 7, 2023).

[126] IRM 4.22.1.1.1 (Mar. 7, 2023).

While the NRP utilizes randomized auditing to better hone IRS enforcement capacity, it relies on the intuition that "[w]hen a compliant taxpayer is unnecessarily or ineffectively contacted by the IRS, the public's perception of the effectiveness and fairness of the federal tax system could be damaged."[127] In other words, the NRP relies on randomized auditing in order to reduce the likelihood of a broader swath of "compliant" taxpayers being audited by the IRS.

Although the IRS may have good reasons for using random tax auditing, it has been subject to criticism due to the randomness of the TCMP and NRP. This critique was most poignant in 1998, a time in which the IRS came under attack for alleged, aggressive tax collection practices.[128] One of the powerful accusations leveled against the IRS was that it was inappropriately randomly auditing taxpayers.

In 1998, Senator Coverdell (R-Ga.) voiced this concern on the congressional floor. Referring to TCMP audits, Senator Coverdell complained,

> Over the past several years, all of us have seen news accounts of regular, average citizens who have become the targets of grueling IRS audits. These individuals were neither wealthy nor powerful; in fact, they were most often ordinary, law-abiding taxpayers who earned a modest wage, ran a small business, or operated a family farm. Some struggled just to make ends meet, and many were understandably confused about what wrong they had committed to justify the scrutiny of the IRS. The truth is they committed no wrong. They were simply unfortunate victims of a scandalous IRS practice called "random audits[.]"[129]

To be sure, Senator Coverdell connected his disdain for random audits with concerns that this practice resulted in disproportionate audits of certain groups of taxpayers. For instance, Senator Coverdell further argued: "[T]he IRS has been specifically targeting the State of Georgia for random audits. Nearly twice as many random audits took place in Georgia between 1994 and 1996 than in all the New England states combined and Georgians are three-times more likely to be randomly audited than their California counterparts."[130] Coverdell also connected this critique to concerns about low-income taxpayers being audited disproportionately when he complained that "the IRS has been targeting thousands of poor taxpayers and small businesses for random audits" and declared that "[t]he IRS' belief that low-income families are more

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[127] IRM 4.22.1.2 (Mar. 7, 2023).

[128] *See, e.g.*, David Cay Johnston, *Senate Committee Is Told of a Vast Range of Abuses by I.R.S.*, N.Y. Times (Apr. 29, 1998), https://www.nytimes.com/1998/04/29/us/senate-committee-is-told-of-a-vast-range-of-abuses-by-irs.html [https://perma.cc/GZG3-6J5M].

[129] 144 Cong. Rec. 17655 (daily ed. July 29, 1998).

[130] *Id.*

likely to cheat than others serves as a disturbing sign of how far it has strayed from the principles of American justice."[131]

The fact that Senator Coverdell could, in the same statement, critique the IRS both for insufficient focus of enforcement resources and for too much focus on certain groups underscores the dilemma the IRS faces. As explored below, choosing to focus on certain taxpayers is integral to the IRS's enforcement efforts, and the IRS even gets criticized for failing to have a focused enough enforcement strategy. But there is also widespread disdain for "targeting" taxpayers. Drawing the distinction between what is taxpayer targeting, on the one hand, and what is appropriate focusing of enforcement resources, on the other, is a central problem at the heart of tax enforcement.

B. Value Judgments

Making matters more complicated, distinguishing between tax enforcement targeting and an appropriate focus of enforcement resources can often depend on deep-seated, and conflicting, value judgments. The example of disproportionate auditing of EITC taxpayers illustrates this point. What is the "right" level of auditing such taxpayers is not a straightforward question, but rather, can depend significantly on one's views about how relative vulnerability should impact government policy.

One consideration for the IRS in making audit decisions is return on enforcement resources invested. As it turns out, the IRS faces relatively low costs in auditing EITC taxpayers.[132] This stands in contrast to the costs of auditing high-income and business taxpayers, which can be much higher.[133] Indeed, in 2019, the Commissioner of the IRS defended EITC audits, in part by arguing

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[131] *Id.*

[132] *See* Letter from Charles Rettig, IRS Comm'r, to Sen. Wyden 1–2 (Sept. 6, 2019) (on file with authors) (explaining different costs to IRS associated with different types of audit); *see also* U.S. Gov't Accountability Off., GAO-22-104960, Tax Compliance: Trends of IRS Audit Rates and Results for Individual Taxpayers by Income 9 (2022), https://www.gao.gov/assets/gao-22-104960.pdf [https://perma.cc/3MBA-EH3L] (noting that "IRS officials explained that the EITC audit rates can be higher than audit rates for some higher-income taxpayers because EITC audits are limited in scope and less time consuming").

[133] *See* Letter from Charles Rettig, *supra* note 132, at 1–2 (explaining different costs to IRS associated with different types of audits); U.S. Gov't Accountability Off., GAO-22-104960, *supra* note 132 (explaining that "[l]ower-income audits are generally more automated, allowing IRS to continue these audits even with fewer staff"); *see also* Kathleen Bryant & Chye-Ching Huang, New Evidence on Racial Disparities in IRS Audit Selection Calls for Immediate Action 10 (Mar. 2, 2023), https://www.law.nyu.edu/sites/default/files/New%20Evidence%20on%20Racial%20Disparities%20in%20IRS%20Audit%20Selection%20Calls%20for%20Immediate%20Action_0.pdf [https://perma.cc/H72L-FL8J] (finding that "the majority of EITC claimants undergoing correspondence audits either do not respond at all or respond insufficiently to IRS inquiries and have the credit denied by default"); *Joint Hearing on Minding the Tax Gap: Improving Tax Administration for the 21st Century Before the Select Revenue Measures Subcomm. and Oversight Subcomm. of the H. Ways and Means Comm.*, 117th Cong. 1 (2021) (statement of Janet Holtzblatt, Senior Fellow, Urban-Brookings Tax Pol'y Ctr.) (noting that return on investment from in-person audits declined from 2010–2017 and suggesting that one possible explanation for the decline is "greater reliance on [IRS] workers at lower pay

that correspondence examinations, which are the principal way that the IRS conducts audits of tax returns claiming the EITC, are "the most efficient use of IRS's examination resources . . . ."[134] EITC audits often turn up high error rates, and thus predictable revenue (as a result of relatively few "no-change[s]" in tax liability)[135] per audit.[136] In a recent examination of relative audit rates, the GAO reported that "[a]udits of the lowest-income taxpayers, particularly those claiming the EITC, resulted in higher amounts of recommended additional tax per audit hour compared to all income groups except for the highest-income taxpayers."[137] As a recent Congressional Research Service report explained, the combination of these factors may mean that EITC audits "may be cost effective from the IRS's perspective, as they lead on average to higher recommended tax amounts per audit hour than non-EITC audits . . . ."[138] Further, the pay-scale for auditors of EITC audits is lower than for auditors of high-income taxpayers, making it even more cost-efficient for the IRS to audit EITC taxpayers.[139] While recent research has suggested high returns from auditing very high-income taxpayers, this research restricted its analysis to in-person audits, rather than correspondence audits.[140] As a result, this recent research does not clearly change the conclusion that correspondence audits of EITC taxpayers may be relatively cost-effective. There is thus some case to be made for focusing resources, at least to some extent, on EITC audits.

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grades for correspondence audits and a greater reliance on higher-grade [IRS] examiners for in-person audits, and a 24 percent increase in the average hours per in-person audit").

134 Letter from Charles Rettig, *supra* note 132, at 1–2; *see also* U.S. Gov't Accountability Off., GAO-22-104960, *supra* note 132, at 8 (discussing difficulty with auditing high income taxpayers in terms of staffing and other issues).

135 *See IRS Audits*, Internal Revenue Serv. (Dec. 18, 2023), https://www.irs.gov/businesses/small-businesses-self-employed/irs-audits#notification [https://perma.cc/G968-4DR6] ("No change: an audit in which you have substantiated all of the items being reviewed and results in no changes.").

136 For instance, in 2019, the no-change rate for tax returns claiming the earned income tax credit was 11.52% (when taking into account the number of returns examined with no change, relative to the returns that had been examined and closed for the tax year); the no-change rate for tax returns with $10 million or more in income was 15.15%, and the no-change rate for tax returns with at least $1 million but less than $5 million in income was 53.21%. *See* Internal Revenue Serv., 2021 Data Book 36 tbl.17 (2022), https://www.irs.gov/pub/irs-prior/p55b--2022.pdf [https://perma.cc/XF4C-AHU7].

137 U.S. Gov't Accountability Off., GAO-22-104960, *supra* note 132.

138 Crandall-Hollick, *supra* note 53, at 5. Put more colloquially, some scholars have referred to EITC audits as "the proverbial low-hanging fruit." Davis-Nozemack, *supra* note 52, at 57.

139 *See* Letter from Charles Rettig, *supra* note 132, at 4 (on file with authors) (explaining that only certain auditors are trained to conduct audits of high-income, high-wealth taxpayers, and that training requirements as well as attrition affect how resources can be allocated or reallocated); Kim Bloomquist, *IRS: We're Not Unfair to Earned Income Tax Credit Taxpayers*, Bloomberg Tax (Jan. 13, 2021), https://news.bloombergtax.com/daily-tax-report/irs-were-not-unfair-to-earned-income-tax-credit-taxpayers [https://perma.cc/4FXF-P99L].

140 *See* Will C. Boning, Nathaniel Hendren, Ben Sprung-Keyser & Ellen Stuart, *A Welfare Analysis of Tax Audits Across the Income Distribution* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31376, June 14, 2023), https://cdn.policyimpacts.org/cms/Welfare_Audits_ad1284984d.pdf [https://perma.cc/E995-L7HW].

Yet revenue raised per amount expended on audit is not the only consideration of what makes an appropriate choice of auditing resources. There are important additional factors to consider. First, the high error rate on EITC tax returns can be traced, in significant part, to the complex nature of the EITC and the difficulty that taxpayers have in understanding and applying its provisions.[141] Second, the EITC, by definition, applies to low-income taxpayers, who are likely to be under-resourced relative to high-income and business taxpayers. This means that EITC taxpayers are less likely to have sophisticated guidance in filling out their returns and are less likely to be able to assert their entitlements during the audit process.[142] Indeed, a high amount of the revenue that comes from EITC audits results from the fact that EITC taxpayers simply do not respond to IRS queries for more information, thus resulting in the loss of EITC benefits.[143] Since the EITC has been characterized as a payment program from the federal government, the EITC is subject to more IRS scrutiny than other issues on tax returns.[144] Logistically, most audits of EITC taxpayers occur prior to the IRS issuing a refund.[145] As a result, the IRS can freeze the claimed refund, and request additional documentation to support the refund before issuing it.[146] Even if taxpayers are entitled to the refund, the documents can be confusing and can request information that may be difficult for EITC taxpayers to obtain.[147] The benefits to the IRS of auditing EITC taxpayers

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[141] *See, e.g.*, Lipman, *supra* note 52, at 465 (describing the "inconceivable complexity" of claiming the EITC). *But see generally* Jacob Goldin, *Tax Benefit Complexity and Take-Up: Lessons from the Earned Income Tax Credit*, 72 Tax L. Rev. 59 (2018) (arguing that the rise of assisted preparation methods has greatly reduced the complexity that would hinder EITC take-up).

[142] *See* Davis-Nozemack, *supra* note 52, at 38 (documenting that essentially no EITC taxpayers are represented on audit, and explaining the difficult documentation requirements they face).

[143] John Guyton, Kara Leibel, Dayanand S. Manoli, Ankur Patel, Mark Payne & Brenda Schafer, *The Effects of EITC Correspondence Audits on Low-Income Earners* 4, 22 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24465, 2019) ("The analysis of audit outcomes shows that roughly 76% and 80% of the EITC correspondence audits for the self-employed and wage earner analysis samples have EITC benefits disallowed due to undelivered mail, nonresponse, or insufficient response."); U.S. Gov't Accountability Off., GAO-22-104960, *supra* note 132, at 13–14, 16 (explaining that "[w]hen taxpayers provide inadequate documentation or no response, IRS is able to use automated processes to quickly close these audits with the recommended tax change," and also that with EITC audits, unlike high-income taxpayer audits, the IRS has more information at its disposal already in the form of information reporting and the like).

[144] *See generally* Davis-Nozemack, *supra* note 52, at 43–70 (describing background of improper payment law and application to EITC).

[145] U.S. Gov't Accountability Off., GAO-22-104960, *supra* note 132, at 22–23.

[146] *Id.* at 16 n.27.

[147] *See, e.g.*, Guyton et al., *supra* note 143, at 10 (describing the CP-75 form that EITC taxpayers receive, which asks them to submit additional information and documentation to support the claimed tax credits); *Improper Payments in the Administration of Refundable Tax Credits: Hearing Before H. Subcomm. on Oversight of the H. Comm. on Ways and Means*, 112th Cong. 11–14 (2011) (written statement of Nina Olson, National Taxpayer Advocate) (describing difficulties EITC taxpayers face in meeting "byzantine requirements" for documenting entitlement to EITC).

thus can be traced to systemic disadvantages faced by EITC taxpayers, which derive from both inside and outside the taxpaying system.[148]

In considering whether the IRS should focus on EITC taxpayers, there is the question of whether the impact of such audits should be part of the calculus. EITC taxpayers' systemic vulnerability can mean that audits are more likely to have negative, and compounding, downstream effects. Scholars have documented how, in the year after facing an EITC audit, taxpayers "receive roughly $0.55 of every dollar of tax refunds that they would have been eligible for in the absence of the EITC correspondence audits," and that "for every $1 that is audited roughly $0.63 to $0.73 is unclaimed in years after the audits."[149] EITC noncompliance is also punished more severely than other forms of tax noncompliance, further exacerbating the risks to EITC claimants of disproportionate EITC audit rates.[150]

To make plain the considerations suggested by the analysis above, whether one believes that focusing audit resources on EITC taxpayers is justifiable depends on conflicting normative choices. There may be revenue-raising benefits to focusing audit resources on EITC taxpayers, to the extent these audits produce relatively predictable collections of tax revenue, at relatively low auditing cost. These collections may be used to fund other social services. To the extent that these audits prevent cheating on tax returns, they may even promote some version of equity between taxpayers. On the other hand, there are significant costs to focusing audit resources on EITC taxpayers. EITC taxpayers tend to be systematically vulnerable relative to other taxpayers, and auditing them may tend to increase their vulnerabilities. There are also considerable equity concerns about the IRS focusing on EITC taxpayers rather than higher income taxpayers, the latter of which may be cheating more, even if they are harder to catch.[151] The generalizable point here is that there are significant tradeoffs in considering the impact of audit policy both in the context of the EITC and more generally.

One species of normative legal theory, welfarism, is directed toward answering the sorts of normative questions raised by the IRS's auditing decisions. Welfarism seeks to maximize overall well-being, such that a government

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[148] *See, e.g.*, Bryant & Huang, *supra* note 133, at 4 (explaining that "[a]lgorithms that 'learn' from historical audit outcomes which tax filers are least likely to successfully navigate burdensome audit processes may compound racial audit disparities over time, by disproportionately selecting those with the steepest barriers to defending themselves during an IRS audit.").

[149] Guyton et al., *supra* note 143, at 4, 22.

[150] *See* Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. Rev. 1867, 1894 (2005) (describing penalty regime for EITC noncompliance, including potential bans on future claiming of EITC in the case of fraud or reckless or intentional disregard of rules and regulations); *see also* I.R.C. § 32(k).

[151] Interestingly, there may be some analogies between IRS and prosecutor incentives in this regard. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 784 (2006) (describing how "law enforcement agencies' budget pressures[] pus[h] local police and prosecutors to focus too much attention on the crimes of the poor and too little on the crimes of the middle class").

policy that produces the highest overall well-being should be preferable.[152] Determining how to weigh ease of revenue raised from EITC audits against costs imposed on a vulnerable group is the exact type of analysis contemplated by and that may be guided by welfarist theory.[153]

To weigh countervailing considerations regarding EITC audits, then, the IRS must engage in its own normative analysis, which may be a function of a particular social welfare function—or weighting of well-being of different people in society as against the revenue-raising benefits from focusing audits on certain taxpayers. The problem is that choosing between different social welfare functions is, as Professor Matthew Adler has put it, "an ethical matter."[154] Adler elaborated, "it is for each ethical deliberator to locate her own point of reflective equilibrium—to determine which [social welfare function] she favors, on balance and after reflection."[155] Or, focusing on this through the lens of prioritarianism,[156] philosopher Derek Parfit has explained, "benefits to the worse off could be morally outweighed by sufficient benefits to the better off. To decide what would be sufficient, we must simply use our judgement."[157]

This is not to say that there are no strong philosophical cases that could be made for each social welfare function. There are, in fact, many such cases that have been made.[158] Utilitarianism suggests that the state of the world that produces the highest individual well-being is preferable.[159] Such a view does not place any particular value on equality or inequality with respect to the distribution of well-being among different individuals.[160] In contrast, other social welfare functions transform individual measures of well-being into overall social welfare in ways that reflect greater concern with the distribution of well-being among a population. The extent to which distribution of well-being should matter can be thought of as the "ethics of distribution" of well-being.[161]

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[152] *See generally* Matthew D. Adler, Measuring Social Welfare: An Introduction 7–40 (2019) (explaining welfarism).

[153] *See generally* N. Gregory Mankiw, Matthew Weinzerl & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. Econ. Persps. 147 (2009) (summarizing and applying some of the major insights of optimal tax theory).

[154] Adler, *supra* note 152, at 161.

[155] *Id.* at 115.

[156] Derek Parfit, Equality or Priority? 19 (1995).

[157] *Id.* at 20.

[158] For just a sample of important works in the moral philosophical literature, see generally John Rawls, A Theory of Justice (1971) (famously setting forth the "veil of ignorance" exercise for determining a just society, which supports a maximin prioritization); Roger Crisp, *Equality, Priority, and Compassion*, 113 Ethics 745 (2003) (providing the sufficientist case); Parfit, *supra* note 156 (describing the foundational case for prioritarianism); Utilitarianism and Beyond (Amartya Sen & Bernard Williams eds., 1982) (offering an important collection of works regarding utilitarianism); Larry S. Temkin, *Egalitarianism Defended*, 113 Ethics 764, 768–69 (2003) (providing the case for egalitarianism).

[159] Amartya Sen & Bernard Williams, *Introduction to Utilitarianism and Beyond*, *in* Utilitarianism and Beyond 4 (Amartya Sen & Bernard Williams eds., 1982).

[160] *See* Adler, *supra* note 152, at 15.

[161] Parfit, *supra* note 156, at 2.

A set of approaches, referred to as prioritarianism, values to a greater extent well-being improvements of those who are worse-off.[162] This is not because of a belief that inequality, in and of itself, is bad, but rather because those who are worse off are worse off at an absolute level.[163] Egalitarian welfarism also prioritizes those who are worse off, but this is because of a belief that relative or comparative fairness is morally important.[164] And "sufficientist" welfarists modify prioritarian approaches by valuing well-being benefits to those who are less well-off to a greater extent only below certain levels of well-being.[165] The choice between these different views of social welfare, each of which is based in deeply contested philosophical cases, would have to be at the heart of a welfarist analysis of evaluating disproportionate burdens on EITC taxpayers as part of a broader revenue-raising strategy.

As if choosing a particular social welfare function is not complicated enough, welfarism itself is but one possible normative way to ask whether countervailing considerations may justify any disproportionate burden on EITC taxpayers. While we believe that welfarist theory is particularly well-suited for balancing the potential for revenue raising from audits against the vulnerability of EITC taxpayers, there are certainly other normative approaches to formulating legal and enforcement policy.[166] One major debate is between welfarism, a consequentialist theory, and fairness, a deontological theory.[167] A variety of normative political theories may be thought of as altogether distinct from moral philosophies that are consequentialist or deontological.[168] The goal here is not to suggest that welfarism is the only, or necessarily right, approach to the question of when a disproportionate burden on EITC taxpayers may be justified but rather to use welfarism to illustrate how difficult enforcement decisions can be. When the IRS makes choices about enforcement, like those about when any disproportionate burden on EITC taxpayers is justified, it is engaging in these normative questions. There is no

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[162] *Id.* at 19.

[163] *Id.* at 22–23.

[164] ADLER, *supra* note 152, at 42–43; *see also, e.g.*, Temkin, *supra* note 158, at 768 (describing a form of telic egalitarianism that is "concerned with inequality's impact on the goodness, or desirability, of outcomes.").

[165] ADLER, *supra* note 152, at 43–54; *see also, e.g.*, Crisp, *supra* note 158, at 757 (exploring why we should "give priority to those who are worse off when, and only when, those worse off are themselves badly off.").

[166] *See, e.g.*, Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. PA. L. REV. 279, 282 (2006) (describing welfarism, fairness, rights, and justice as potential approaches to what they refer to as "social choice," by which they mean how to decide important societal questions).

[167] For examples of major works on both sides of the fairness versus welfarism debate, see generally LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); RONALD DWORKIN, *Hard Cases*, *in* TAKING RIGHTS SERIOUSLY 81, 84 (1977); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

[168] *See, e.g.*, Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1463–64 (2006) (suggesting as much with respect to, among others, theories of libertarianism, egalitarianism, and civic republicanism).

single right answer to these questions, but rather a set of background views, based on different underlying values.

C. *Lack of Case Law Boundaries Around Tax Enforcement*

As this section demonstrates, case law does not make it easier to determine where the IRS should (and should not) focus its enforcement resources. Case law supplies few boundaries around tax enforcement decisions. This is true even though some IRS auditing decisions, such as many of those identified by the Stanford study, seem to not only map onto racial hierarchies in the United States, but also actively participate in re-making these hierarchies.[169]

As an initial matter, the fact that the IRS makes enforcement choices that treat some taxpayers differently than others is not a unique problem. The government regularly enacts laws that treat people differently.[170] As the Supreme Court has explained, the legal system can draw distinctions between different people, but these "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[171]

1. *Antidiscrimination Principles*

Antidiscrimination law amplifies this analysis of distinctions in the legal system in ways that are sensitive to historical, and continuing, power dynamics, as well as other constitutional rights.[172] As a constitutional matter, these

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[169] *See, e.g.*, Michael Omi & Howard Winant, Racial Formation in the United States x (3d ed. 2015) (explaining how race is "continually being made and remade in everyday life"); Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 Yale L.J. 2497, 2508–09 (2023) (describing law as "a place and a language where power is shaped and contested, and where relations of class, race, gender, and ability are made and remade").

[170] Any number of examples illustrate this fundamental point. As just one, taxpayers who conduct business in the form of a partnership are treated one way, whereas taxpayers who conduct business in the form of a corporation are treated another. *Compare* I.R.C. Subchapter K, *with* I.R.C. Subchapter C.

[171] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[172] For instance, the Justice Department Manual notes the "growing body of social psychological research" that reflects continued discrimination based on race in the United States, and the need to address it with legal tools, including the application of disparate impact. U.S. Dep't of Just., Title VI Legal Manual § 7.A, at VII-2 (2021), https://www.justice.gov/d9/books/attachments/2021/02/03/titlevi_legal_manual_rev._ed.pdf [https://perma.cc/2LQY-BXVW] (citing the work of psychologists, as well as legal scholars, including, for example, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 954–59 (2006); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 Soc. Just. Rsch. 143 (2004); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241 (2002); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Calif. L. Rev. 969 (2006); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Calif. L. Rev. 1, 5–9 (2006)).

dynamics result in heightened levels of scrutiny for laws that discriminate based on certain suspect classes, such as race[173] and sex,[174] and rational basis review for other allegations of discrimination.[175] The constitutional result is protection against discrimination "'based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of protected statutory and constitutional rights."[176] Federal, state, and local laws have enlarged the classes of people who receive heightened protection against discrimination and enabled claims of discrimination not just for disparate treatment but also for disparate impact.[177]

It is possible to imagine how antidiscrimination law could be applied to police tax enforcement. Indeed, the objections to many of the taxpayer targeting controversies described in Part II could be framed in terms of an antidiscrimination framework. For instance, in the alleged Tea Party auditing scandal, the IRS was accused of using political affiliation as a way of making auditing decisions.[178] In addition, as described earlier, several Presidents have been accused of attempting to order the IRS to engage in tax enforcement, such as audits, against political opponents and their supporters.[179] These allegations are potentially problematic under antidiscrimination law because they may implicate First Amendment rights. The Court has held that there is a First Amendment right to associate with political parties,[180] which may be infringed by disproportionate auditing.

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[173] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

[174] *See* United States v. Virginia, 518 U.S. 515, 558, 560–61 (1996) (Rehnquist, C.J., concurring) (explaining history of scrutiny for gender-based discrimination).

[175] *See* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 761 (2011) (discussing rational basis review and explaining that "[t]he inability of new groups to have discrimination against them receive formal heightened scrutiny has profoundly negative effects on their equal protection claims").

[176] Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)) (citing United States v. Goodwin, 457 U.S. 368, 372 (1982)).

[177] *See, e.g.*, N.Y. Exec. Law § 296 (Consol. 2023) (prohibiting discrimination on the basis of "age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence"); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545–46 (2015) (holding that disparate impact claims are cognizable under the federal Fair Housing Act). In New York City, a plaintiff can state a claim of discrimination as a result of disparate impact based on sexual orientation. N.Y.C., N.Y., Admin. Code § 8-107 (2023); Levin v. Yeshiva Univ., 754 N.E.2d 1099, 1105 (N.Y. 2001) (applying disparate impact in the context of a university's housing policy).

[178] *See supra* notes 35–41 and accompanying text.

[179] *See supra* Part II.A.

[180] *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 256 (2006) (discussing the "particularly important political right, the right to associate in a political party," and citing other cases regarding the First Amendment right to associate with a political party). Targeting political opponents may also implicate the Supreme Court's "class of one" doctrine, whereby it is an Equal Protection violation to intentionally treat a similarly situated individual differently with no rational reason. *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

The IRS cannot directly observe race on tax returns.[181] Race-based targeting thus cannot be the result of the IRS directly using an inappropriate, personal characteristic to make tax enforcement decisions.[182] Rather, the argument would be that, by using other characteristics (such as, for instance, low likelihood of no-change rate on audit),[183] the IRS disproportionately burdened taxpayers based on an inappropriate, personal characteristic: race. This result would arguably be due to a correlation between purportedly neutral enforcement choices and a personal characteristic.[184] The resulting disproportionate burden based on race appears inconsistent with the racial antidiscrimination principles at the heart of both constitutional and statutory antidiscrimination law, as described previously.[185]

Income-based targeting is also best understood as a case of arguable disproportionate burden. While it is possible for the IRS to choose to focus on taxpayers directly based on their income (and, indeed, the IRS has promised to do so for high-income taxpayers),[186] accusations of inappropriate "targeting" based on income are typically concerned with lower-income taxpayers.[187] The IRS likely is not choosing to focus on such taxpayers *because* they are low-income. Rather, the IRS's decisions can be better explained by other factors—such as high error rate on the EITC, and the IRS's ability to collect revenue easily by denying a refund claim.[188] Nonetheless, to the extent these

[181] *See supra* note 69.

[182] *But see* Jeremy Bearer-Friend, *Colorblind Tax Enforcement*, 97 N.Y.U. L. Rev. 1, 17–21 (2022) (refuting the notion that not listing race on a tax return eliminates racial bias in enforcement, and specifically pointing out that the IRS has a substantial amount of information from tax returns that may allow agents to make inferences about, and discriminate based on, race); Dorothy A. Brown, *The IRS Is Targeting the Poorest Americans*, The Atlantic (July 27, 2021), https://www.theatlantic.com/ideas/archive/2021/07/how-race-plays-tax-policing/619570/ [https://perma.cc/GJ8H-DDV7] (pointing out that "[r]esearch suggests that employers discriminate against applicants with stereotypically Black names, and the IRS has access to taxpayer names on tax returns," and asking, therefore, how the IRS can be sure that it is "not discriminating on the basis of race when it comes to audits").

[183] *See, e.g.*, Elzayn et al., *supra* note 70, at 1 (finding that using algorithms that seem to minimize the no-change rate tend to increase audits of Black taxpayers); *see also* Curry, *supra* note 85, at 2237–38 (in which Tom Hertz of the IRS's Research, Applied Analytics, and Statistics division acknowledged the role of the no-change rate, among other factors, in driving the audit discrepancies but also defended its use).

[184] *See* Elzayn et al., *supra* note 70, at 22.

[185] *See supra* notes 172–173; *see also* Kim Forde-Mazrui, *Tradition As Justification: The Case of Opposite-Sex Marriage*, 78 U. Chi. L. Rev. 281, 321 (2011) ("Heightened scrutiny of suspect classifications is premised in large part on the proposition that the historical use of such classifications to pursue illegitimate purposes justifies skepticism toward such classifications today even when used for ostensibly legitimate purposes."); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 Calif. L. Rev. 323, 325 (2016) ("According to doctrine, a class is considered suspect if members of the class share an immutable, obvious, or distinguishable trait that is irrelevant to their ability to contribute to or perform in society; have suffered a history of discrimination; and are politically powerless.").

[186] *See* Letter from Janet Yellen, *supra* note 59.

[187] *See supra* Part II.B.

[188] *See infra* text accompanying notes 132–140 (discussing different considerations regarding EITC audits).

auditing choices exploit or worsen EITC taxpayers' existing vulnerabilities, the disproportionate burden may seem objectionable. While income status is certainly a less protected class than race in antidiscrimination law, some statutes do protect against discrimination based on income or based on receipt of public assistance.[189] These laws buttress the antidiscrimination intuition that it may be wrong for the IRS to disproportionately burden taxpayers who are low-income or claim the EITC.

2. *Lack of Functional Application of Antidiscrimination Law*

However, notwithstanding the fact that the IRS's decisions about how to audit seem to implicate antidiscrimination principles, antidiscrimination law does not functionally apply to tax enforcement. There is a vast legislative apparatus that polices various forms of discrimination across the legal system, such as in the contexts of employment,[190] housing,[191] lending,[192] public accommodations,[193] education,[194] and voting.[195] However, these laws do not apply to tax or other forms of enforcement. Rather, Congress sets forth the substantive law, and it is the executive's duty and prerogative to carry out the law.[196] While this separation of responsibilities is understandable considering separation of powers between the Legislative and Executive Branches,[197] it also means that the Legislative Branch of government does not provide guidance about what personal characteristics should and should not be the source of different forms of treatment when enforcing the tax law.

A good example of this dynamic exists with higher audit rates of low-income taxpayers. The IRS's focus on low-income taxpayers has been

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[189] *See, e.g.*, 15 U.S.C.A. § 1691(a)(2) (protecting against discrimination in lending transactions "because all or part of the applicant's income derives from any public assistance program"); *Source of Income Discrimination*, NYC HUM. RTS., https://www.nyc.gov/site/cchr/media/source-of-income.page [https://perma.cc/PJ8S-KGVQ] (describing how N.Y.C. Human Rights Law prohibits discrimination on the basis of source of income in the context of housing, which could otherwise be used to discriminate against tenants seeking to pay through the use of public assistance).

[190] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)–(n).

[191] *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3601.

[192] *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. §§ 1691(a)–(c).

[193] *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)–(e).

[194] *See, e.g.*, Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-2–9.

[195] *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[196] U.S. CONST. art. II, § 3, cl. 5 ("Take Care Clause").

[197] *See, e.g.*, David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REG. 800, 830 (2020) ("[A] federal agency's decision to initiate a civil enforcement action is, like a criminal prosecutor's charging decision, insulated from judicial review as a core executive responsibility committed to agency discretion by law."); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1837 (2016) (explaining that "the Court has treated the Take Care Clause as the source of the President's prosecutorial discretion—a power that, as recent events have shown us, may give the President room to reshape the effective reach of laws enacted by Congress").

criticized as seeming to exploit or worsen existing vulnerabilities.[198] It is possible for legislation to protect low-income status, or some characteristic associated with it, against discrimination. For instance, the Equal Credit Opportunity Act makes it "unlawful for any creditor to discriminate against any applicant . . . on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract),"[199] but also "because all or part of the applicant's income derives from any public assistance program."[200] If this applied to tax enforcement, it would be clear that the IRS could not discriminate on the basis of taxpayers receiving income from a public assistance program, but that the IRS could discriminate on other bases (such as income status more generally). In contrast, the Fair Housing Act (like most other antidiscrimination statutes) does not single out income status as a protected class.[201] As a result, it is not a violation of the Fair Housing Act to discriminate on the basis of income, but it is unlawful to discriminate (including through a disparate impact) based on a protected class (such as race).[202] If these sorts of rules applied to tax enforcement, these sorts of legislative delineations could provide rules for the IRS to follow. This would be true whether the legislation protected a certain status, like being low-income, or not. Either way, the rules could help set the bounds for the IRS's enforcement decisions. The rules could also help the IRS better communicate why it is allocating its enforcement resources in certain ways.

It is worth observing that while Congress has not provided tax enforcement law that binds the IRS, governing legal doctrine suggests that Congress *could* do so. *Heckler v. Chaney* is the leading Supreme Court authority regarding judicial review of agency enforcement discretion.[203] *Heckler* is best known for its conclusion that "agency refusal to institute proceedings is a decision 'committed to agency discretion by law.'"[204] However, *Heckler* was also clear that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."[205] Congress taking affirmative action would rebut the presumption of judicial unreviewability of enforcement discretion and provide courts with "law to apply."[206] Applying *Heckler*, Congress could, if it wished, set enforcement

[198] *See supra* Part II.B (discussing different forms of audit targeting relating to demographic and geographic factors).

[199] 15 U.S.C. § 1691(a)(1).

[200] 15 U.S.C. § 1691(a)(2).

[201] *See* 42 U.S.C. §§ 3604–06 (including, as protected classes, race, color, religion, sex, handicap, familial status, and national origin).

[202] *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act).

[203] 470 U.S. 821 (1985).

[204] *Id.* at 834.

[205] *Id.* at 833.

[206] *Id.* at 831.

priorities, or "otherwise circumscrib[e]" the IRS's ability "to discriminate among issues or cases."[207]

Aside from potential congressional creation of enforcement boundaries, agency enforcement decisions that violate constitutional rights are both formally subject to judicial review and impermissible.[208] For instance, at least as a formal legal matter, if an agency's failure to bring an enforcement action was based on the regulated party's speech, or willingness to forego certain types of political speech, the failure to enforce would be subject to judicial review.[209] The converse is even more apparent—affirmative acts of enforcement that violate constitutional rights, such as the right to equal protection or speech, are unconstitutional and should not, as a formal matter, be protected by deference to an agency's enforcement discretion.[210]

However, as a practical matter, these constitutional rights play little to no role in policing agency enforcement discretion. One of the principal reasons is because, under *Washington v. Davis*, disparate impact liability does not apply under the Equal Protection doctrine.[211] The Court in *Washington v. Davis* expressed its concern that "[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes . . . ."[212] The Court declined to adopt such a rule, instead requiring a showing of discriminatory purpose to claim an Equal Protection violation.[213] In *Wayte v. United States*, the Supreme Court elaborated that a selective prosecution case requires a showing of both discriminatory effect and discriminatory purpose.[214] With tax enforcement, as in many areas, the inability to bring a disparate impact claim can be fatal to the application of the Equal Protection doctrine. For instance, in the tax context, the fact that the IRS cannot directly observe race on tax returns all but eliminates any possibility of bringing a claim that the IRS was motivated by a racially discriminatory purpose.[215]

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[207] *Id.* at 833.

[208] *See, e.g.*, 5 U.S.C. § 706(2)(B) (stating that a reviewing court shall "hold unlawful and set aside agency action . . . contrary to constitutional right, power, privilege, or immunity"); Wayte v. United States, 470 U.S. 598, 608 (1985) ("Selectivity in the enforcement of criminal laws is subject to constitutional constraints.") (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979) (footnote omitted)).

[209] Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 676 (1985).

[210] This follows simply from the fact that there is no exception to the application of constitutional protections in the context of enforcement.

[211] *See* 426 U.S. 229 (1976).

[212] *Id.* at 248.

[213] *Id.* at 245.

[214] *See* 470 U.S. 598, 608 (1985).

[215] *But see* Brown, *supra* note 182 (questioning whether IRS agents might be discriminating based on race, even without race listed on the tax return).

Making matters more difficult, case law also all but forecloses obtaining discovery that might enable a showing of discriminatory purpose in the context of enforcement. In the criminal context, the Court has stressed that "[o]ur cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a 'background presumption' that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims."[216] For this reason, in *United States v. Armstrong*, the Court refused to allow discovery on whether the government had ever prosecuted non-Black individuals for a crack cocaine offense, even though the Court also held that "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."[217] In essence, the Court declared that defendants in enforcement actions had no right to discovery of the very thing they would have to show to make an effective selective enforcement claim. This shielding of enforcement decisions from public scrutiny compounds difficulties with bringing a selective tax enforcement claim because tax auditing practices are obscured from public view, and, under these deferential doctrines, courts are extremely unlikely to order their release to the public.[218]

Research confirms that the impact of these doctrines is to all but eliminate Equal Protection from the enforcement context. Professor David Cole has documented, in a 1996 article, that "no federal court ha[d] thrown out a prosecution" as unconstitutional based on race since 1886.[219] The tension between this finding and the longstanding evidence of racial discrepancies in policing and prosecution suggests that constitutional limitations do little to protect against discrimination in enforcement.[220] More recent scholarship has suggested as much, concluding, in the criminal context, that "[d]ecisions not to arrest or charge are essentially unreviewable, and questions of selective

[216] United States v. Armstrong, 517 U.S. 456, 463–64 (1996) (quoting United States v. Mezzanatto, 513 U.S. 196, 203 (1995)) (internal citations omitted).

[217] *Id.* at 465.

[218] *See, e.g.*, Robert E. McKenzie, 1 Rep. Audited Taxpayer § 1:11 (2023) ("The formulas used by the IRS in establishing DIF scores are a closely guarded secret within the IRS. All attempts to secure DIF formulas through the Freedom of Information Act have been unsuccessful."); *see also, e.g.*, I.R.C. § 6103(a) ("Returns and return information shall be confidential."); 5 U.S.C. § 552(b)(7) (exempting from the Freedom of Information Act certain records or information compiled for enforcement purposes).

[219] David Cole, *What's Criminology Got to Do with It?*, 48 Stan. L. Rev. 1605, 1611 (1996) (pointing to Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

[220] *See, e.g.*, Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop & Frisk Policy*, 10 Annals Applied Stat. 365, 366 (2016) (finding that Black and Hispanic people were disproportionately stopped by police during use of stop-and-frisk tactics); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1320, 1320 (2014) ("[B]lacks receive sentences that are almost 10 percent longer than those of comparable whites arrested for the same crimes. Most of this disparity can be explained by prosecutors' initial charging decisions.").

prosecution are similarly hard to get before a court."[221] Courts have underscored that similar dynamics apply for agencies.[222]

In theory, it is possible that some form of antidiscrimination law could apply to administrative agencies through the application of administrative law itself. The Administrative Procedure Act ("APA") provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in addition to those that are "contrary to constitutional right, power, privilege, or immunity . . . ."[223] Professors Cristina Ceballos, David Freeman Engstrom, and Daniel Ho have explored how arbitrary-and-capricious review should not only protect "small businesses, unmotorized vehicle users, and animal subgroups" from disparate treatment at the hands of administrative agencies but also should prevent disparate impact on protected classes of people.[224] In other words, the arbitrary-and-capricious review at the heart of judicial review of administrative law seems like it should provide another way to adjudicate whether agency policies are illegitimately targeting certain groups.

However, arbitrary-and-capricious review has not lived up to this promise. Under APA section 704, agency action is reviewable when "there is no other adequate remedy in a court."[225] As Ceballos, Freeman Engstrom, and Ho deftly describe, courts' application of APA section 704 "has effectively scrubbed antidiscrimination norms from the APA."[226] Courts have done so based on the theory that members of protected classes may bring legal claims protesting disparate treatment outside of the APA's arbitrary-and-capricious review, even when, as a result of practical and doctrinal limitations elsewhere, the reality is that this is not the case.[227]

The result is that members of protected classes are particularly vulnerable to discrimination in enforcement. The antidiscrimination legislative framework does not reach enforcement, constitutional law does not practically apply to prevent enforcement discrimination (even if it applies in theory) as a result of doctrines that defer to agencies and protect agency discretion, and administrative law provides no alternative remedy. This confluence of

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[221] Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1135 (2016).

[222] Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980) ("Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, and similar considerations have been found applicable to administrative prosecutors as well." (internal citations omitted)).

[223] 5 U.S.C. §§ 706(2)(A)–(B).

[224] Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 473 (2021).

[225] 5 U.S.C. § 704.

[226] Ceballos et al., *supra* note 224, at 391.

[227] *See id.* at 384–428. Ceballos, Freeman Engstrom, and Ho also present the "bracing conjecture" that "modern administrative law's empire – the steady judicialization of agency action from the 1960s onwards – may have been *constructed* by erasing race." *Id.* at 461.

limitations results in effective nonapplication of antidiscrimination law to enforcement—and an accompanying lack of legal framework regarding which enforcement practices and decisions may violate antidiscrimination norms.

While this point applies across agencies, it is worth emphasizing what this means for tax enforcement specifically. As a practical matter, the IRS is subject to few limits on its enforcement discretion. Under the Equal Protection Clause, if the IRS intentionally discriminated based on one of the small number of classes that is subject to a heightened level of scrutiny, such as race, and a taxpayer could prove it, a taxpayer may have a claim of discriminatory treatment.[228] But bringing such a claim would be a serious uphill battle, given judicial doctrines of deference and noninterference with enforcement decisions.[229] Practical experience from the criminal context suggests that bringing such a claim would be extremely difficult.[230] Outside of this narrow set of protected classes, taxpayers have little ability to claim that an instance of targeting violates the law. There is no statutory antidiscrimination apparatus in the enforcement context that would prevent enforcement against classes that fall outside of heightened constitutional protection.[231] Under the Equal Protection Clause, even classes of people not eligible for heightened constitutional protection should still be protected against arbitrary differences in enforcement.[232] However, the constitutional standard of non-arbitrariness is very low in practice. For instance, as long as an IRS choice to focus on personal characteristics, such as income status or even disability, had some rational relationship to the interest of collecting tax revenue (perhaps due to a correlation between the characteristic and likelihood of tax collection as a result of an audit), antidiscrimination law should not serve as a barrier to enforcement.[233]

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[228] *See supra* notes 208–209 and accompanying text.

[229] *See supra* notes 214–216 and accompanying text.

[230] *See supra* note 221.

[231] *See supra* notes 190–202 and accompanying text.

[232] *Supra* text accompanying note 171.

[233] *See, e.g.*, Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527–28 (1959) (upholding substantive tax scheme based on rational basis review and stating "[t]he State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' . . . [I]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it" (internal citations and quotations omitted)). There is the possibility of a "rational basis with bite" test, but it is unclear when courts would be willing to apply it. *See* Russell K. Robinson, *Unequal Protection*, 68 Stan. L. Rev. 151, 165 (2016) (arguing that the test has been applied sparingly); *see also* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367–68 (2001) (concluding that "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled," based on the legal standard, which the Court articulated as, "[u]nder rational-basis review, where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the

The result is that, while it is possible to imagine that antidiscrimination law might apply to help distinguish between appropriate focusing of resources, on the one hand, and inappropriate taxpayer targeting, on the other, antidiscrimination law does not do so.

D. Justifications for Lack of Judicial Engagement

There are both formal and functional justifications for lack of judicial engagement in agency enforcement decisions. From a formal perspective, courts, like Congress, are hesitant to usurp the enforcement discretion that is allocated to the Executive Branch. In *Heckler*, the Court explained that an agency's enforcement decision "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[234] The combination of doctrines that result in functional nonenforcement of antidiscrimination law to agency enforcement discretion at least in theory protects the Executive Branch's power under the Take Care Clause.

More functionally, courts worry about their competence to judge agency enforcement decisions, as well as weakening of the agency's competence that could result from judicial meddling in the enforcement process.[235] In *Heckler*, the Court explained that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities" necessitated by an enforcement decision.[236] In *Wayte*, even while affirming

disparity of treatment and some legitimate governmental purpose" (internal citations and quotation omitted)); Michael E. Waterstone, *Disability Constitutional Law*, 63 Emory L.J. 527, 529 (2014) (acknowledging that, in the wake of constitutional rational basis review for people with disabilities, protections have instead been found in statutory schemes but also arguing that there is value in pursuing a more progressive constitutional approach, in part because the existing statutory schemes leave significant gaps in protection).

[234] *See* 470 U.S. 821, 832 (1985) (quoting U.S. Const. art. II, § 3, cl. 5).

[235] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996) (explaining, in the context of prosecutorial discretion, both that "[j]udicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts" and that "[i]t also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function").

[236] 470 U.S. at 831–32. In *Heckler*, petitioners sought to force the Food and Drug Administration to take enforcement actions against drugs that allegedly violated the Federal Food, Drug, and Cosmetic Act. *Id.* at 823. One could wonder whether *Heckler* applies to IRS auditing. While it is not exactly the same as the enforcement actions at issue in *Heckler*, auditing fits comfortably under the rubric of enforcement actions generally. Many of the rationales of *Heckler* apply with even stronger force to IRS auditing actions. Given that IRS auditing actions are investigatory, and thus a greater step removed from punitive action, courts would likely conclude that discretion for the IRS in this area is even more important, and there would be even less concern about courts needing to oversee the coercive power of the state. *See, e.g.*, *id.* at 832 (suggesting that when an agency refuses to act, it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect).

that enforcement cannot violate the Constitution, the Court warned that judicial engagement should be limited because:

> Judicial supervision in this area . . . entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[237]

It is easy to see how this argument would apply with even greater force to the IRS, a notoriously unpopular agency.[238] One can imagine how making IRS enforcement decisions subject to routine judicial review based on claims of discrimination could quickly be weaponized, in particular by powerful interested parties, to grind the IRS and its enforcement arm to a halt.[239]

But, as illustrated in this Part, courts have gone further than hesitating to interfere with agency enforcement decisions. They have largely abandoned claiming any role for themselves in evaluating enforcement decisions. This has essentially undone doctrines like Equal Protection for agency enforcement. And it has left the IRS to make contestable, and contested, decisions about tax enforcement with few to no legal boundaries around its decisions.

IV. Democratic Accountability and Tax Enforcement

Making policy decisions against a background of disagreement about animating values is a central feature of government policymaking. However, the fact that the IRS is making these decisions with few legal guidelines, few

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[237] 470 U.S. 598, 607–08 (1985); *see also, e.g.*, Futernick v. Sumpter Twp., 78 F.3d 1051, 1058 (6th Cir. 1996) ("A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited.").

[238] *See* J. Baxter Oliphant & Andy Cerda, *Americans Feel Favorably About Many Federal Agencies, Especially the Park Service, Postal Service, and NASA*, Pew Rsch. Serv. (Mar. 30, 2023), https://www.pewresearch.org/short-reads/2023/03/30/americans-feel-favorably-about-many-federal-agencies-especially-the-park-service-postal-service-and-nasa/ [https://perma.cc/PSD2-J3HA] (identifying the IRS as the least popular federal agency, with the highest unfavorable rating in the survey); Ian G. Anson & John V. Kane, *Everyone Loves to Hate the IRS. That's a Problem.*, Wash. Post (Apr. 22, 2023), https://www.washingtonpost.com/politics/2022/04/22/irs-underfunded-messaging-republicans-democrats/ [https://perma.cc/GB7S-D89M] (explaining historic and "continuing negative attitudes toward the agency").

[239] *Cf.* Brian D. Galle & Stephen E. Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. Rev. 1645, 1652 (2023) (worrying generally about how application of administrative law to tax law can worsen an already systemic power imbalance that the agency faces).

transparent guidelines by the accountable branches of government, and little transparent dialogue with the public results in a democratic accountability deficit. This Part identifies this democratic accountability problem at the heart of tax enforcement.

A. The Democratic Accountability Problem Generally

On one level, the fact that the IRS is making value-laden enforcement decisions despite contested values should be neither surprising nor distressing. Any number of government policy decisions have to be made against a background of contested values, from those involving environmental regulation, to abortion, to gun control, to education policy. With these, and many other government decisions, there is often no one "right" answer, but rather different answers that reflect different values.

The central problem for tax enforcement, however, is what justifies administrative agencies making these decisions. If the enforcement decisions are often normative, and contestable, as Part III illustrated, then they cannot be justified as being mere administrative decisions best left to the tax law experts working in the IRS.[240] In the context of rulemaking, agencies oftentimes make normative, non-technocratic decisions.[241] However, many scholars believe that notice-and-comment procedures may legitimate agencies' decisionmaking by requiring agencies to exhaustively defend the rules and allowing challenges to those defenses.[242] Enforcement decisions, however, are not subject to the procedural requirements that apply to agency rule promulgation, such as notice-and-comment procedures, and thus cannot be justified by these procedures.[243] This makes more pressing the question of what justifies agencies making normative enforcement decisions.

In some ways, this question fits into a fraught current debate about the extent to which administrative agencies' decisions must be justified at all. Decades ago, fundamental respect for the role of administrative agencies in U.S. government was consistent with challenging the basis for such role. For instance, now-Justice Kagan emphasized in an important work about agency authority that "agency experts have neither democratic warrant nor special

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[240] *Cf., e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS, 23–25 (1938); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001) (describing the expertise and transmission belt models of agency legitimacy).

[241] *See, e.g.*, Peter L. Strauss, *Legislation That Isn't – Attending to Rulemaking's "Democracy Deficit*,*"* 98 CALIF. L. REV. 1351, 1359 (2010) ("While 'expertise' may have been the hallmark of New Deal thinking about administrative action, any thought of rationalizing administration as *simply* the exercise of expertise—as if the necessary judgments could be reached by calculation and without the intrusion of values—has vanished." (emphasis in original)).

[242] *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 533–34 (2003) (speaking to how procedures can give the standards they create greater power).

[243] *See, e.g.*, MetWest Inc. v. Sec'y of Lab., 560 F.3d 506, 511 (D.C. Cir. 2009) ("OSHA was not required to engage in notice and comment rulemaking before it ramped up its enforcement.").

competence to make the value judgments—the essentially political choices—that underlie most administrative policymaking."[244] Kagan went on to argue that presidential control justified widespread agency decisionmaking.[245] In light of a more recent assault on administrative agencies in our system of governance,[246] many scholars have tried to shift the default from needing to justify agencies' roles[247] to arguing that they are justified based on some combination of constitutional or institutional structures.[248] Whatever one thinks of the default, however, the question remains regarding how significant normative enforcement decisions by agencies are justified.[249]

Political accountability is an important theory that potentially could justify such enforcement decisions. Political accountability is based on the premise that agency officials, though not themselves elected, are under the control of the politically accountable branches of government, namely the presidential administration, or Congress.[250] This provides some measure of electoral support for the decisions that are made.[251] If the decisions made

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[244] Kagan, *supra* note 240, at 2353.

[245] *Id.* at 2384.

[246] *See, e.g.*, Philip Hamburger, Is Administrative Law Unlawful? 2 (2014) (answering "yes"); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring) (quoting Justice Scalia while arguing that both the nondelegation doctrine and the major questions doctrine "serve to prevent 'government by bureaucracy supplanting government by the people'").

[247] *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253, 1256–57 (2009) (noting that "[a]ny scholar who advocates a meaningful role for unelected officials in making discretionary policy choices is therefore automatically on the defensive, because it is widely believed that such a position demands heightened justification").

[248] *See, e.g.*, Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 7 (2017) (arguing that, "far from being constitutionally suspect," the administrative state is "constitutionally obligatory"); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1302 (2021) (arguing that vesting administrators with broad rulemaking discretion was consistent with original constitutional practice).

[249] *See* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 Yale L.J. 1600, 1611 (2023) ("We do not claim that administrative agencies are accountable in some transhistorical, inherent way. Accountability inevitably depends on empirical realities that differ across circumstances: institutions can be more or less, and also differently, accountable depending on their participants, their structures, their cultures, and so on.").

[250] Judicial review is another option for legitimating agency action. For the reasons discussed in Part III, judicial review does not play a significant role with respect to agency enforcement decisions. For a canonical work legitimating agency action in terms of the named actors at the apex of our system of constitutional governance, see generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

[251] Indeed, this (and, specifically, control by the President) was the intuition behind *Chevron* deference. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."); *see also* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81, 95 (1985) ("[I]t may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate.").

are in conflict with democratic values, the politically accountable branches of government, in theory, can be held accountable for them through the electoral process.[252] As suggested previously, now-Justice Kagan famously promoted "presidential administration," claiming that presidential control of agencies legitimates agency action.[253] More recently, the Court seems to be trying to wrest control of agencies back from a presidential control model, requiring that Congress play a larger role, at least with respect to rulemaking.[254]

There are certainly challenges that exist for the political accountability theory. As many scholars have pointed out, most voters do not understand or even know the plethora of governmental decisions that are being made regularly.[255] It is even less likely that any candidate aggregates all of a voter's preferences on those many governmental decisions, or that voters vote for a candidate under the belief that political accountability is possible.[256] Other scholars have responded that political accountability generally, and presidential control over agencies specifically, may still be the best way to justify

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[252] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 498 (2010) (explaining that "granting the [Public Company Accounting Oversight] Board executive power without the Executive's oversight . . . subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts," which is "incompatible with the Constitution's separation of powers").

[253] *See* Kagan, *supra* note 240, at 2384; *see also supra* note 245 and accompanying text. *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23 (1995) (arguing in support of unitary executive); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) (examining the normative, constitutional, and historical case for a unitary executive).

[254] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 735 (2022) (concluding, with respect to the EPA's Clean Power Plan, that a "decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body").

[255] *See, e.g.*, Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. Pa. J. Const. L. 357, 381–82 (2010) (speaking to politicians' incentives and media action contributing to the overloading of "capacities of most voters"); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Tex. L. Rev. 441, 461 (2010) (discussing problems for electoral accountability, including lack of public knowledge of policy decisions, the issue of bundled preferences, and Presidents who buck public opinion). *See generally* Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and Why It Matters (1996) (finding very disparate levels of knowledge about American politics).

[256] Farina, *supra* note 255, at 383; *see also* Glen Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253, 1254 (2009) (drawing on political science literature to conclude that "[p]ublic officials are not held politically accountable for their specific policy decisions pursuant to periodic elections, and there are overwhelming reasons to believe that this will never be the case").

agency decisions.[257] This is true even if there is a loose link between such control and particular agency decisions.[258]

Other views of democratic accountability have turned against political accountability as being too thin a reed, too unrealistic a fit, and too inadequate relative to the extensive, alternative justifications for the administrative state. For instance, as an alternative, Professor Cynthia Farina has argued for a looser conception of democratic accountability theory:

> We must expect and challenge all the institutions of government—Congress, the President, the courts, and agencies themselves—to be part of an ongoing process through which democratic legitimacy is created and effective policy discovered, a process that must seek new and more effective ways to inform and engage citizens.[259]

More recently, Professors Anya Bernstein and Cristina Rodríguez counseled, in a similar vein, that the "relationships, structures, and practices that actually promote accountability—features of the administrative state that help head off arbitrariness, incorporate multiple perspectives, and encourage negotiated, provisional outcomes . . . are neither inherent nor eternal: they must be actively nourished."[260] Bernstein and Rodríguez advise that:

> At its most basic, accountability requires government actors to justify their positions so that others can evaluate, challenge, or override them. Such justification has distinct payoffs. It renders arbitrary or biased views more visible and contestable and pushes government actors to consider multiple perspectives in their decision-making.[261]

B. *The Democratic Accountability Problem and Tax Enforcement*

Tax enforcement faces democratic accountability challenges. While Congress at times weighs in after the fact regarding tax enforcement controversies,[262] there is little ex ante involvement by Congress in setting tax enforcement policy. Nor is it clear that any heavy ex ante involvement by Congress would be appropriate. The Constitution, after all, vests executive power

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[257] Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1036 (2013) ("[A]ttending to enforcement is at the core of presidential duty and power."); *see also* Richard J. Pierce, Jr., *Presidential Control Is Better Than the Alternatives*, 88 Tex. L. Rev. 113, 124 (2010) (defending presidential control as better than the alternatives, even given the fact that the President is not reliable "as a proxy for the preferences of the polity" with respect to agency decisionmaking).

[258] *See* Andrias, *supra* note 257, at 1037 (writing of different levels of presidential control over enforcement and rulemaking).

[259] Farina, *supra* note 255, at 422–23.

[260] Bernstein & Rodríguez, *supra* note 249, at 1600.

[261] *Id.* at 1605–06.

[262] *See, e.g.*, *supra* notes 95–99 and accompanying text (discussing Congress's cutting of the IRS's budget in response to perceived tax enforcement controversies).

in the President.[263] For this reason, in an extensive study of the President's enforcement power, Professor Kate Andrias explained that "[i]f the Constitution contemplates nothing else, it contemplates a law-enforcement executive who 'executes'—or at least oversees the execution of—the will of Congress."[264] Andrias has lamented that:

> [P]residential attention to problems of regulatory compliance—whether viewed in terms of efficiency, accountability, or rule-of-law values—has been too sporadic, crisis-driven, and opaque. Presidents have legitimately exercised great influence over agency enforcement policy. Yet they have failed to ensure that their administrations' policy decisions are well-disclosed and therefore have not always been held sufficiently accountable for uses of enforcement discretion. . . . [T]hey have developed few lasting mechanisms to further efficient and effective enforcement across the bureaucracy.[265]

The dynamics that concerned Andrias apply in the context of tax enforcement. Little public evidence exists of oversight of tax enforcement by the President. For instance, in response to the alleged Tea Party auditing scandal, President Obama disclaimed any prior involvement or knowledge of the auditing practices, stating that "I first learned about it from the same news reports that I think most people learned about this."[266] He then condemned any targeting, without taking personal responsibility for IRS auditing practices, or even rooting responsibility within the Executive Branch outside of the IRS. He explained:

> If, in fact, IRS personnel engaged in the kind of practices that have been reported on and were intentionally targeting conservative groups, then that's outrageous and there's no place for it. And they have to be held fully accountable, because the IRS as an independent agency requires absolute integrity, and people have to have confidence that they're . . . applying the laws in a nonpartisan way.[267]

This practice exemplifies significant IRS enforcement autonomy, met only by reactive executive action.

It is, of course, possible that the President's administration may be engaged in setting enforcement policy, even if the President distances

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[263] U.S. CONST. art. II, § 1, cl. 1.
[264] Andrias, *supra* note 257, at 1036.
[265] *Id.* at 1035.
[266] The White House, *Remarks by President Obama and Prime Minister Cameron of the United Kingdom in Joint Press Conference*, NAT'L ARCHIVES (May 13, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/13/remarks-president-obama-and-prime-minister-cameron-united-kingdom-joint- [https://perma.cc/DW87-HJAR].
[267] *Id.*

personally from it. Indeed, in their recent empirical research about what makes agencies accountable, Bernstein and Rodríguez found that the White House is "mindful of where and when their interventions would be successful and perceived as legitimate," on the one hand, versus when and where they should be reactive to agency policymaking.[268] However, Bernstein and Rodríguez also note that distance from agency policymaking, and a posture of reactivity, tends to be more appropriate where the decision implicates technical expertise.[269] Distance from and deference to IRS enforcement decisions cannot be justified as the mere function of agency expertise.

Moreover, beyond the distance from the President, personally, from IRS enforcement policy, there is typically no public claim by the presidential administration for the types of normative enforcement decisions that are made by the IRS. One significant recent exception was the broad-strokes promise by the Biden administration that Inflation Reduction Act funding would not be used to increase audits on taxpayers who earn $400,000 or less per year.[270] In some ways, the exceptional nature of this direction proves the general rule of lack of transparent engagement by higher level executive officials in IRS enforcement policy.

It is also possible that there are lines of communication between some levels of the presidential administration and the IRS's normative enforcement decisions.[271] These channels are important ways to infuse the IRS's decisions with the presidential administration's priorities. However, to the extent that these communications are happening in informal ways, which are not visible to outsiders and the public at large, it is difficult to hold the democratically elected presidential administration accountable for them. Informality also hampers the development of more systemic controls that will continue into future administrations. The lack of transparency regarding direction from higher levels within the administration also leaves the IRS vulnerable for decisions that were not entirely of its own making.

This disclaiming of responsibility by politically accountable actors mirrors similar problems in the criminal context. Then-Professor Debra Livingston has described, for instance, that "[p]olicing is a risky business, and distance between politicians and the police helps the former avoid blame when the latter become ensnared in controversy."[272] As in the policing context, unsupervised discretion over significant enforcement decisions puts tension on agency decisionmaking. For instance, Professors Barry Friedman and Maria Ponomarenko have argued that a lack of transparency and oversight regarding

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[268] Bernstein & Rodríguez, *supra* note 249, at 1621–22.

[269] *Id.* at 1622.

[270] *See* Letter from Janet Yellen, *supra* note 59 and accompanying text.

[271] *See, e.g.*, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) (President Biden's 2021 executive order on equity initiatives, which included establishment of working groups including representatives of the Treasury and the White House, among others).

[272] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 657 (1997).

policing methods undermines democratic accountability and the rule of law.[273] Scholars have also recognized the ways that unfettered discretion in agency enforcement may threaten agency governance.[274]

The lack of communication by the IRS itself regarding its enforcement values poses problems for a more diffuse sense of democratic accountability. It stymies the ability of the public to engage with the IRS's enforcement values, as well as the ability of executive officials outside of the IRS to engage with IRS enforcement policy prior to targeting accusations being made. While the IRS, like many agencies, publishes extensive documentation of its rules and procedures as a general matter,[275] how the IRS chooses its enforcement targets, and what distinguishes legitimate enforcement from illegitimate targeting, sits outside of this documented set of procedures.[276] The fact that the IRS is notoriously secretive about how it enforces the tax law[277] means that there is little opportunity for public debate or deliberation regarding these normative decisions. The predictable result is periodic flare-ups of controversies like those described in Part II, in which the IRS is accused of targeting taxpayers, with little broad-based conception of what, exactly, it means to target taxpayers, and how the IRS can avoid it. Only in the barest sense could changing policy in response to targeting controversies be seen as a democratically accountable system of enforcement.[278] As described below, the IRS can and should strive for more meaningful ways to engage with elected officials and the public at large.

C. Toward Democratic Accountability

If secrecy and the accompanying lack of dialogue, debate, and feedback undergird the democratic accountability problem at the heart of tax enforcement, then greater transparency and communication, both within the Executive Branch and with the public, are important for charting a path toward

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[273] *See generally* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827 (2015) (arguing that policing threatens civil liberties extensively and there ought to be more oversight on policing as a result).

[274] *See, e.g.*, *infra* notes 379–381.

[275] *See, e.g.*, IRM 1.11.6.1.2 (Apr. 8, 2020) ("By law, federal agencies are expected to document, publish, and maintain records of policies, authorities, procedures, and organizational operations. The IRM is the source for the IRS.").

[276] *See supra* note 218; *see also* Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. Pa. L. Rev. 1017, 1068–69 (2009) (explaining that tax enforcement projects are "sometimes, but not always, announced publicly before the projects begin" and that the main selection criteria the IRS uses, the Discriminant Index Function (DIF) score, is "secret, as is the cutoff score. No taxpayer knows how to determine her DIF score ex ante.").

[277] *See supra* note 276.

[278] *Cf.* Bernstein & Rodríguez, *supra* note 249, at 1653 (noting, in contrast to the possibility of getting post hoc feedback about an administrative decision in an election cycle, that "a critical time for responsiveness, we suggest, is *during* a decision-making process, when officials can learn about real-world situations and incorporate the views of people with different interests in the matter").

greater democratic accountability. Increasing dialogue can help protect the public from tax enforcement practices that are not sufficiently responsive to public sensibility regarding targeting. By engaging in greater ongoing dialogue, the IRS may also better protect itself from enforcement scandals.

Transparency is often described as the "publicness of the public business,"[279] where the government makes the information that it controls "available for examination and scrutiny."[280] When the government is transparent with the information that it holds, the public is empowered to perform two actions that are essential to democratic governance. First, transparency enables members of the public, through their representatives, to engage in informed debate and deliberation.[281] Without information, public debate based on knowledge and fact is not possible; instead, it depends on theory and speculation. Transparency is critical to a functioning democracy because it solidifies the power of the people over the government, by providing the public with the tools necessary to debate the plans and actions of the government. As Professor Frederick Schauer has argued, transparency permits "public control not for the purpose of facilitating better decisions, but instead as the embodiment of public control as an end in itself."[282]

Second, transparency allows the public to monitor the actions of government entities and officials and to hold them accountable for their actions.[283] Philosopher Jeremy Waldron has characterized the government as an agent of the public, much as a realtor is an agent of a homeowner who wishes to sell a house.[284] Waldron argues that the agent (the government) should provide information regarding its activities to the principal (the public) so that the principal can review the agent's actions and then ask questions and issue new directions.[285] Publicly available information is thus essential to democratic governance because it enables representatives of the public to review the actions of government agencies and to question whether they are fulfilling their legal obligations appropriately.

While transparency is essential to democratic governance, it should not be unlimited. Many scholars have argued that the government should not be

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[279] *See* Jeremy Waldron, *Accountability: Fundamental to Democracy* 11 (N.Y.U. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 14-13, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410812 [https://perma.cc/3NCA-T395].

[280] Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. Ill. L. Rev. 1339, 1343 (2011).

[281] *See, e.g.*, Mark Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 894 (2006) (speaking to transparent government's democratic nature); Schauer, *supra* note 280, at 1347; Waldron, *supra* note 279, at 11; Lawrence B. Solum, *Legal Theory Lexicon 015: Transparency*, Legal Theory Lexicon (Mar. 6, 2016), https://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le_1.html [https://perma.cc/XRL3-JXBS].

[282] Schauer, *supra* note 280, at 1349.

[283] *See* Fenster, *supra* note 281, at 898; *see also* Barkow, *supra* note 221, at 1176–79 (offering oversight and transparency recommendations regarding agencies' enforcement discretion).

[284] Waldron, *supra* note 279, at 2.

[285] *Id.*

required to publicly disclose information if such disclosure would prevent the government from enforcing the law and fulfilling its other responsibilities.[286] A surprise military action could be an example of a situation where the value of transparency is outweighed by the benefit of secrecy.[287] In such examples, Professor Ashley S. Deeks argues, the government should offer the public an explanation for its lack of public disclosure.[288] Further, some scholars have argued that the government could maintain transparency by providing the public with "bottom lines" rather than detailed data and explanations of its enforcement actions.[289] In any case, even advocates of transparency acknowledge that it is not always appropriate for all information regarding the government's operations to be available to the public.

At times, greater democratic accountability may exist through increased communication and dialogue within the government, even when it would not be optimal to provide the information to the public at large. An important line of administrative law literature has highlighted the ways that internal agency processes and procedures legitimate agency decisionmaking, even independent of more external forms of review and control.[290] This literature, which dates back to some of the origins of thought regarding administrative law,[291] would suggest that internal dialogue and debate, and the tensions, deliberation, and reason-giving that accompany them, may increase democratic accountability of enforcement policy. Sometimes this dialogue, deliberation, and reason-giving may be public-facing,[292] but other times it may occur within

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[286] *See, e.g.*, Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 666–79 (2020) (arguing that "secret reason-giving confers a number of benefits, which manifest themselves in a different way than in the public context"); Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 884 (2007); Schauer, *supra* note 281, at 1345 (noting the need "to recognize varying degrees of transparency"); William J. Stuntz, *Secret Service: Against Privacy and Transparency*, NEW REPUBLIC, Apr. 17, 2006, at 12.

[287] *See* Deeks, *supra* note 286, at 618.

[288] *Id.* at 615–16.

[289] *See, e.g.*, Stuntz, *supra* note 286, at 15.

[290] For examples focusing on legitimating internal aspects of administration and administrative law, see generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1261–62 (2006); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

[291] *See* BRUCE WYMAN, THE PRINCIPLES OF ADMINISTRATIVE LAW: GOVERNING THE RELATIONS OF PUBLIC OFFICERS, § 4, at 14 (The Lawbook Exch. 2014) (1903) ("Internal administrative law as defined deals with the relations of the officer in the administration to each other, and to the administration itself. . . . The internal law governs the processes by which the laws in general are carried into execution by the officers of the administration.").

[292] *See, e.g.*, Staszewski, *supra* note 247, at 1255 (arguing that "individual policy choices are democratically legitimate to the extent that they are supported by public-regarding explanations that could reasonably be accepted by free and equal citizens with fundamentally different interests and perspectives"); *see also, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1558 (1992) (explaining that, in the name of civic republicanism, "Congress and the President could require agencies to announce publicly and then to justify a policy-setting agenda").

the confines of the agency itself.[293] Below, we identify specific ways the IRS can increase its dialogue, either within or outside the government, or some combination of these two possibilities, to increase the democratic accountability of tax enforcement.

1. IRS Priority Enforcement Plan

An initial measure that IRS officials should consider is the annual publication of a "Priority Enforcement Plan" that describes the agency's planned areas of tax enforcement focus. Much like the Treasury's Priority Guidance Plan, which presents "guidance items that are most important to taxpayers and tax administration,"[294] an IRS Priority Enforcement Plan could describe how the IRS plans to allocate its audit and investigation resources during the upcoming year. It could also describe whether the IRS plans to increase its assertion of any specific civil tax penalties during certain types of tax controversies. The plan could address enforcement efforts among different types of taxpayers, such as individuals with varying amounts of adjusted gross income, corporations, partnerships, and S-corporations.[295]

In addition to preparing and publishing an annual Priority Enforcement Plan, the IRS should seek input on the plan from high-level Executive Branch officials. For example, an interagency council consisting of the Assistant Secretary of the Treasury for Tax Policy, the Commissioner of Internal Revenue, the IRS Chief Counsel, and representatives of the Executive Office of the President, as well as high-level career IRS officials, could be required to review and comment on a preliminary version of the plan each year. Once the IRS receives feedback and direction from this council, it could revise its preliminary Priority Enforcement Plan and publish the final version. All of these documents should be disclosed publicly.

The primary benefit of the Priority Enforcement Plan is that it would increase the democratic accountability of the IRS by requiring the agency to describe its planned enforcement efforts in full view of the public. Today,

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[293] *See, e.g.*, Bernstein & Rodríguez, *supra* note 249; *supra* note 290; Wyman, *supra* note 291.

[294] Internal Revenue Serv., Priority Guidance Plan (Oct. 5, 2023), https://www.irs.gov/privacy-disclosure/priority-guidance-plan [https://perma.cc/U974-KGZD].

[295] Some of these items are also described as items in the IRS Priority Guidance Plan. *See* Internal Revenue Serv., 2021-2022 Priority Guidance Plan (Aug. 17, 2022), https://www.irs.gov/pub/irs-utl/2021-2022-pgp-4th-quarter-update.pdf [https://perma.cc/EP6D-HEPL]. As an illustration, consider the IRS Inflation Reduction Act Strategic Operating Plan, in which the IRS states that it plans to "increase enforcement activities to help ensure tax compliance of high-income and high-wealth individuals." Internal Revenue Serv., Inflation Reduction Act Strategic Operating Plan, Fiscal Year 2023-2031 (Apr. 5, 2023), https://www.irs.gov/pub/irs-pdf/p3744.pdf [https://perma.cc/Z4L8-GDL2]. Yet the IRS only issues such documents during extraordinary times, such as following the enactment of the Inflation Reduction Act of 2022. Even then, the IRS only addresses enforcement initiatives on five pages of the 150-page publication. *See id.* at 62–66.

when the IRS engages in tax enforcement efforts against groups of individuals or businesses that share common traits, the agency encounters claims of illegitimate targeting.[296] In many cases, such as the alleged 2013 IRS Tea Party auditing scandal, government officials have struggled to contain the resulting uproar after the taxpayer has made a public complaint.[297] In contrast, our proposal would require the IRS to provide the public with a list of its tax enforcement plans ex ante. For instance, the IRS could state in its plan that, during the upcoming fiscal year, it plans to increase its audits of high-income individuals who receive salary payments from Subchapter S corporations that they own. Even if taxpayers claim that the IRS is targeting small businesses without providing warning or notice, the IRS Priority Enforcement Plan would have described the IRS's plans to conduct these audits and investigations in advance. Further, the IRS could use this document not only to offer a list of enforcement priorities, but also to explain its reasoning for its choices.

In addition, the IRS could use the Priority Enforcement Plan as a means of deterring tax avoidance and abuse. Currently, the government attempts to deter abusive tax activities through different publicity measures. For instance, the IRS publishes a "Dirty Dozen" of tax scams that it advises taxpayers to avoid, which may involve fake charitable organizations, abusive charitable remainder annuity trusts, and offshore accounts and digital assets.[298] Similarly, as one of us has documented, the U.S. Department of Justice's Tax Division issues a disproportionately high number of tax enforcement press releases during the weeks immediately prior to Tax Day compared to the rest of the year.[299] While these types of publicity measures may deter taxpayers from engaging in tax noncompliance, they tend to reveal the IRS's future enforcement plans only indirectly. The IRS could use the Priority Enforcement Plan as an additional deterrence tool by providing more explicit and focused notice that its agents will scrutinize specific types of taxpayers and potential tax offenses during the upcoming year.[300]

2. Audit Factors

Another step toward transparency would be for the IRS to provide the public with more information about the factors that cause the agency to audit individual taxpayers. For individual taxpayers, for instance, the IRS could

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[296] *See supra* Part II.

[297] *See supra* notes 35–43 and accompanying text.

[298] *Dirty Dozen*, INTERNAL REVENUE SERV. (Apr. 5, 2023), https://www.irs.gov/newsroom/dirty-dozen [https://perma.cc/DF4P-VY7U].

[299] *See* Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1, 15–18 (2010).

[300] For discussion of deterrence and legal compliance, see, for example, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 209 (1968); Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 571 (2006).

publish a list of specific issues that may cause the IRS to audit a return, such as information reporting mismatches, deductions for items entered on Schedule C (Form 1040) (Profit or Loss From Business), and the involvement of fraudulent third-party tax return preparers and advisors. The IRS could describe this information without providing specific Discriminant Index Function ("DIF") score thresholds that trigger an audit.[301] Rather than publishing a detailed written manual, the IRS should seek to publicize this information in plain language and through media that is widely accessible to the public, such as through the IRS website and other online platforms.

While the IRS currently publishes "audit technique guides," our proposal would differ in several significant ways. The IRS website contains a list of lengthy audit technique guides that the IRS provides to its own examiners to use during audits of specific professionals, such as ministers, childcare providers, and entertainers.[302] The IRS notes that these guides are "also useful to small business owners and tax professionals who prepare returns."[303] In contrast, under our proposal, the IRS would provide information to members of the general public regarding the types of issues that may cause the IRS to flag a return for audit, not the types of questions examiners should ask taxpayers once an audit has commenced. Further, our proposal would encourage the IRS to provide accessible information to individual taxpayers on a wide range of issues, not just those that arise in highly specialized industries, such as the aerospace industry.[304]

This approach would enhance the democratic accountability of the IRS by allowing the agency to explain to the public in advance why it chooses to audit certain taxpayers. For example, consider the Stanford study, where the researchers found that the main source of disparity is differing audit rates by race among taxpayers claiming the EITC.[305] After the publication of the study, IRS officials attempted to explain the disparity and committed to investigating further.[306] Under our proposal, the IRS could have provided the public greater information in advance about the factors that cause its agents to audit specific EITC issues. This information could have included an explanation that

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[301] *See* I.R.S. Fact Sheet FS-2006-10: *The Examination (Audit) Process* (Jan. 2006), https://www.irs.gov/pub/irs-news/fs-06-10.pdf [https://perma.cc/3DDL-E6AA] (describing DIF score); *see also* Barkow, *supra* note 283, at 1173 ("The key is to get agencies to better publicize their enforcement practices and the relevant metrics.").

[302] *Audit Technique Guides (ATGs)*, Internal Revenue Serv. (Feb. 4, 2024), https://www.irs.gov/businesses/small-businesses-self-employed/audit-techniques-guides-atgs [https://perma.cc/BYS7-7LRG].

[303] *Id.*

[304] *Id.* The IRS does provide some discussion of "common errors for the Earned Income Tax Credit" on its website but does not discuss specific audit flags and their relationship to probability of audit selection. *See Common Errors for the Earned Income Tax Credit (EITC)*, Internal Revenue Serv. (Jan. 22, 2024), https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/common-errors-for-the-earned-income-tax-credit-eitc [https://perma.cc/65DC-R4GV].

[305] *See supra* note 70 and accompanying text.

[306] *See supra* notes 70–85 and accompanying text.

unscrupulous EITC return preparers, who may file hundreds of returns each year, may lead to highly concentrated audits in specific geographic regions.[307] In so doing, the IRS could have provided taxpayers with useful information to help them avoid a greater possibility of an audit.[308]

This greater transparency may help narrow discrepancies in information that different taxpayers have about factors likely to lead to an audit. Accountants who advise high-income taxpayers often deal with the IRS on a repeat basis and have knowledge of the "hot spots" that cause the IRS to audit issues on a return.[309] When individuals use third-party tax preparation software, such as certain versions of Intuit's TurboTax, they rely on the software's "Audit Risk Meter," which reviews the return and indicates whether the probability of an IRS audit is high or low.[310] Through the IRS's "Compliance Assurance Process," some corporate taxpayers resolve potential audit issues on their returns with the IRS before they even file their tax returns, thereby avoiding the possibility of audit and penalties.[311] In contrast, low-income taxpayers often do not use sophisticated third-party advisors or tax preparation software to complete their returns.[312] By providing individual taxpayers with more information about audit factors in plain language, the IRS could also address this informational inequity.

3. Tax Enforcement Statistics

To address speculation that the IRS engages in illegitimate targeting, the government should publish statistics regarding enforcement against individual taxpayers that include descriptions of taxpayers' personal characteristics.

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[307] *See supra* note 85 and accompanying text.

[308] The IRS can also provide additional information to taxpayers to encourage them to perform their own due diligence when selecting a tax return preparer or adviser. For example, the IRS currently offers a website that allows members of the public to search for tax professionals who have been censured for unethical conduct. *See Search for Disciplined Tax Professionals*, INTERNAL REVENUE SERV. (Jan. 17, 2024), https://www.irs.gov/tax-professionals/search-for-disciplined-tax-professionals [https://perma.cc/65DC-R4GV]. The IRS also allows taxpayers to review the credentials of anyone with a Preparer Tax Identification Number (PTIN). *See Directory of Federal Tax Return Preparers with Credentials and Select Qualifications*, INTERNAL REVENUE SERV. (Feb. 20, 2024), https://irs.treasury.gov/rpo/rpo.jsf [https://perma.cc/F5U8-W3HX]. The IRS could link such existing resources to its public statements regarding audit factors and tax professionals. State tax authorities have published similar resources for taxpayers. *See, e.g.*, *Tips for Hiring a Tax Preparer*, N.Y. DEP'T OF TAX'N & FIN. (Mar. 15, 2023), https://www.tax.ny.gov/pit/tips-hiring-a-preparer.htm [https://perma.cc/QJ7F-9RYS].

[309] *See, e.g.*, Lance Campbell, *Being Prepared for an IRS Audit*, HAWKINS ASH CPAS (Oct. 7, 2021), https://www.hawkinsash.cpa/being-prepared-for-an-irs-audit/ [https://perma.cc/DBU3-BZ5J] (discussing "audit hot spots").

[310] *Video: How TurboTax Protects You from an IRS Audit*, INTUIT TURBOTAX (Nov. 7, 2023), https://turbotax.intuit.com/tax-tips/brand/video-how-turbotax-protects-you-from-an-irs-audit/L0RVIYcAB [https://perma.cc/EP8E-DGVZ].

[311] *Compliance Assurance Process*, INTERNAL REVENUE SERV. (Feb. 6, 2024), https://www.irs.gov/businesses/corporations/compliance-assurance-process [https://perma.cc/G3QJ-EQCY].

[312] For further discussion, see generally Joshua D. Blank & Leigh Osofsky, *The Inequity of Informal Guidance,* 75 VAND. L. REV. 1093 (2022).

Each year, the IRS publishes an annual Data Book on the website of its Statistics of Income Division, which shows, in aggregate dollar amounts, anonymized information such as taxable income, tax deductions, tax audits, and tax penalties, among many other items.[313] A notable omission from this publication is information regarding tax enforcement statistics based on taxpayers' race, ethnicity, gender, disability, and other characteristics.[314] In response to an executive order signed by President Biden in 2021,[315] the IRS has committed to conducting "research and partner[ing] with others to understand any potential systemic bias and identify disparities across dimensions including age, gender, geography, race and ethnicity."[316] We propose that the Treasury and IRS should conduct analyses of the distribution of tax enforcement activities, organized according to individuals' personal characteristics, and publish these results in an annual publication, such as the IRS Data Book.

An immediate reaction to this proposal may be that the IRS cannot publish data on tax enforcement organized by taxpayers' personal characteristics, such as race, because it does not collect this information from taxpayers directly. Tax scholars have long noted the lack of racial and other demographic data in tax administration. Professor Dorothy Brown, for example, has documented the challenges she encountered when attempting to study the racial impact of tax law in the United States.[317] In a study of the IRS's approach to collecting racial data, Professor Jeremy Bearer-Friend has shown that the Treasury and IRS have not gathered racial data regarding taxpayers' reported taxable income, tax deductions, and tax credits.[318] An obstacle to including questions about taxpayers' race, gender, and other characteristics on tax returns is that doing so could cause taxpayers to fear that the IRS will use this information to engage in discrimination.[319] Even if the IRS provides a concurrent statement that the agency is only collecting the information for research and analysis purposes, some taxpayers may become less willing to claim tax benefits or engage in other aspects of the voluntary compliance tax system.[320]

As a promising alternative, the Treasury and IRS could conduct analysis of the effect of tax enforcement on different groups of taxpayers by engaging in indirect analysis of personal characteristics. In 2023, the Office of Tax Analysis ("OTA") produced a working paper that showed the impact

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[313] *See* Internal Revenue Serv., 2022 Internal Revenue Service Data Book Publ'n 55–B (2022), https://www.irs.gov/pub/irs-pdf/p55b.pdf [https://perma.cc/XJU2-YN54].

[314] *Id.*

[315] Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

[316] *See* Internal Revenue Serv., Inflation Reduction Act Strategic Operating Plan, Fiscal Year 2023-2031, *supra* note 295.

[317] *See* Dorothy A. Brown, *Tales from a Tax Crit*, 10 Pitt. Tax Rev. 47, 52 (2012).

[318] *See* Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 Tax L. Rev. 1, 2 (2019).

[319] *See id.* at 55–56.

[320] *See id.*

of specific tax expenditure provisions on individual taxpayers, organized by race.[321] The study found that, on an overall per capita basis, white taxpayers benefited disproportionately from tax expenditures such as charitable deductions, employer-provided health insurance deductions, home mortgage interest deductions, and preferential tax rates on net capital gain and dividend income.[322] The study also included an analysis of the racial distribution of certain tax credits, such as the EITC and the Child Tax Credit.[323] As a result of the lack of race and ethnicity data available from tax returns themselves, Treasury researchers developed an imputation method where they estimated that the primary filer on the tax return was Asian, Black, Hispanic, Native American, White, or Multiple Race using other information available in the tax data.[324] They then used these probabilities to create the estimates.[325]

The Treasury and IRS should extend this imputation method to data regarding specific tax enforcement actions, including tax audits, deficiency assessments, and tax penalties, and publish the results of this analysis. In response to such public tax enforcement data, policymakers, for instance, could question why certain tax credits result in disproportionately more tax enforcement against individuals with specific personal characteristics. These questions would encourage the IRS and other government officials to investigate and respond. Further, the annual publication of this data would allow the public to monitor, on a continuous basis, the IRS's efforts to address any disparate impact of its tax enforcement activities. Public disclosure of tax enforcement statistics, organized by taxpayers' personal characteristics, thus would encourage public debate and IRS accountability.

4. *External Participation*

The IRS should also bolster the transparency measures described above by inviting external actors to participate. These actors could be members of the public or sophisticated intermediaries, such as representatives of tax policy research centers, former government officials, and academic researchers. As we discuss below, the government should encourage external actors to provide input to the IRS on its tax enforcement initiatives and expand partnerships with external academic researchers.

The IRS should invite the public to submit comments and suggestions regarding the items that are featured on the Priority Enforcement Plan, an

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321 Julie-Anne Cronin, Portia DeFilippes & Robin Fisher, *Tax Expenditures by Race and Hispanic Ethnicity: An Application of the U.S. Treasury Department's Race and Hispanic Ethnicity Imputation* (U.S. Dep't of Treas., Off. of Tax Analysis, Working Paper No. 122, 2023), https://home.treasury.gov/system/files/131/WP-122.pdf [https://perma.cc/AFU3-6RBJ].

322 *Id.* at 43.

323 *Id.* at 28–30, 37–39.

324 *See id.* at 4–7, 12.

325 *Id.*

annual agenda of tax enforcement initiatives, which we proposed earlier.[326] When the Treasury publishes the Priority Guidance Plan, the document that describes a list of upcoming regulatory and other guidance projects each year, it encourages members of the public to submit comments and suggestions.[327] According to the Treasury, "[t]he published guidance process is most successful if the Treasury Department and the IRS have the benefit of the experience and knowledge of taxpayers and practitioners who must apply the rules implementing the tax laws."[328] The IRS should extend a similar invitation when it publishes the Priority Enforcement Plan. Especially if the IRS publishes more comprehensive tax enforcement statistics, external actors would possess the ability to analyze the data and offer suggestions for enforcement initiatives, which are based on revenue, equity, and other considerations. Certainly, organizations that represent specific taxpayers' interests would advocate for plans that benefit these taxpayers.[329] However, this invitation could also encourage representatives of external organizations that represent the public interest, such as the Tax Law Center at NYU Law, to conduct its own analysis and submit comments.[330]

An essential step that the government can take to show that it is investigating the impact of tax enforcement activities is to encourage and fund partnerships between the Treasury, IRS, and academic researchers. The Stanford study was the result of a collaboration between economists and academic researchers at Stanford University, the University of Chicago, the University of Michigan, and the Treasury.[331] The team of researchers for this study received access to review, with names of taxpayers anonymized, more than 148 million tax returns, and approximately 780,000 audits for the 2014 tax year.[332] Like the OTA study of the racial distribution of tax expenditures,[333] the Stanford study also features an indirect analysis of taxpayers' race based on first names, last names, and geographic location.[334] Congress should increase funding for these types of collaborative research projects between the Treasury, IRS officials, and academic researchers and increase availability of such

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[326] *See supra* Part IV.C.1.

[327] *See* Internal Revenue Serv., 2021-2022 Priority Guidance Plan, *supra* note 295, at 2.

[328] I.R.S. Notice 2022-21, 2022-20 C.B. 1057, https://www.irs.gov/pub/irs-drop/n-22-21.pdf [https://perma.cc/R4AV-KP8B].

[329] *See, e.g.*, Chye-Ching Huang, *Shaping the Government's "To-Do List" for Tax Guidance*, Medium (July 7, 2022), https://medium.com/@taxlawcenter/shaping-the-governments-to-do-list-for-tax-guidance-896389a41c62 [https://perma.cc/P8WD-K9B7].

[330] *See, e.g.*, Tax Law Center at NYU Law, Comment Letter on Recommendations for the 2022-2023 Priority Guidance Plan (June 6, 2022), https://www.regulations.gov/comment/IRS-2022-0007-0047 [https://perma.cc/6YYU-VK4X].

[331] *See generally* Elzayn et al., *supra* note 70.

[332] *Id.* at 18.

[333] *See* Cronin et al., *supra* note 321.

[334] *See id.* at 43; *see also* Katharine Miller, *IRS Disproportionately Audits Black Taxpayers*, Stan. L. Sch. (Jan. 31, 2023), https://law.stanford.edu/press/irs-disproportionately-audits-black-taxpayers/ [https://perma.cc/4WDM-GVNU].

partnerships because these studies show that the government is serious about investigating the impact of tax enforcement.

D. Questions and Limitations

1. Would Increased Transparency Threaten Tax Enforcement?

One central concern that our transparency proposals raise is that they could impair the IRS's enforcement efforts by providing the public with information regarding its audit techniques. For example, if all tax return information, including tax returns and the results of audits, were public, this information could enable sophisticated analysts to identify the types of tax positions that have the greatest probability of resulting in challenges from the IRS.[335] In response to this information, some taxpayers could adjust their behavior to engage in aggressive, and even abusive, tax planning that is unlikely to attract scrutiny from the IRS.[336] The basic intuition here is that secrecy may be a key weapon in the IRS's enforcement arsenal, and transparency may weaken this weapon.

To assess this concern, we first need to take a step back and ask what it means for the IRS to engage in successful enforcement. Successful enforcement could mean any number of things, from the use of fair procedures, on the one hand, to maximizing revenue, on the other. Even if we just focus on maximizing revenue, there are different potential ways to think about achieving the goal. When the IRS audits a taxpayer, there are at least three potential effects on revenue. First, to the extent the taxpayer underreported or underpaid taxes owed,[337] the IRS may collect taxes, and potentially penalties and interest, from that taxpayer—which may be thought of as the direct effect of auditing. Second, the taxpayer subject to enforcement may change her taxpaying behavior in future years—which may be referred to as the specific deterrence effect from auditing.[338] Third, in response to the IRS's auditing strategy, other taxpayers may change their taxpaying behavior—which may be referred to as the general deterrence effect of auditing.[339] One possible goal for enforcement

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[335] *See* Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & Bus. 31, 69–73 (2014).

[336] *See id.*

[337] One could conceivably propose that a goal for the IRS might be to just raise as much revenue as possible. This would credit the IRS for collecting revenue paid by mistake and the like. We set this possibility aside as fundamentally inconsistent with the IRS's duty to administer the tax law that Congress has passed.

[338] *See, e.g.*, Sebastian Beer, Matthias Kasper, Erich Kirchler & Brian Erard, *Do Audits Deter or Provoke Future Tax Noncompliance? Evidence on Self-employed Taxpayers* 4 (Int'l Monetary Fund, Working Paper No. 19/223, 2019) (examining the specific deterrence effect from auditing).

[339] *See generally* Michael Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. Pub. Econ. 323 (1972) (modeling the general compliance decision taxpayers at large face).

would be to collect as much revenue from audits as possible, maximizing the direct effect of audits. But another goal would be to maximize total revenue paid to the government, which may come from a variety of combinations of the different effects of audits. For instance, even if direct collections from audit went down, total tax revenue to the government may still be maximized if taxpayers pay higher tax revenue overall.

These different potential effects from audits reveal that there may be a tension between what the best goal of enforcement is from the IRS's perspective versus for the government and public more broadly. If the IRS is acting solely in its own interest, rather than more faithfully as an agent of the government and public at large, it could be the best outcome for the IRS to maximize the direct effect of audits. Being able to show high direct return per audit investment may be an important way for the IRS to defend its institutional value. But collecting the most revenue on audits may be perverse, and far from ideal, relative to what the government and public should want. At the extreme, it could mean using an audit strategy that encourages everyone to cheat and then collecting as much money as possible from those audited. At the other end of the spectrum, the best possibility for the government and public at large may be to have very high total revenue (that is owed) paid, which may result in lower amounts of revenue collected directly on audits by the IRS. Ideally, the IRS will pursue the enforcement goal that maximizes overall government policy.

These different ways to conceive of successful tax enforcement suggest that secrecy does not necessarily increase the success of tax enforcement. Rather, there may be many situations in which being transparent is consistent with maximizing enforcement, even when only focusing on revenue. For instance, in situations in which compliance norms are low, credibly telling taxpayers that they will be audited if they underreport in certain ways may cause taxpayers to report the taxes they would have otherwise avoided paying, thereby allowing a resetting of higher norms of compliance and better enforcement.[340] Direct collections on audit may be low, but overall taxpaying may be higher.[341] Recent research has bolstered this theory by showing situations in which an Italian policy of disclosing that audit risk drops above certain thresholds can stimulate tax compliance under certain conditions.[342] Even outside of situations where compliance norms are low, the same point may apply. If the IRS's goal is to get people to pay the taxes they owe as much as possible, telling them ways that the IRS knows that cheating occurs may help

[340] *See* Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325, 347–62 (2014) (setting forth case for concentrated enforcement).

[341] *Id.* at 336–37.

[342] *See* Enrico Di Gregorio, Matteo Paradisi & Elia Sartori, Audit Rule Disclosure and Tax Compliance 1 (May 17, 2023) (unpublished manuscript), https://assets-global.website-files.com/5d8e3657fd776a7142924af1/6464cc11aa1042e7658449a7_digregorio_paradisi_sartori_summer_2023.pdf [https://perma.cc/4YYF-NERZ].

deter the cheating. Given the IRS's limited resources to audit taxpayers,[343] transparency may help enforcement.

At a general level, it is difficult to explain what the effects of IRS enforcement are, considering all the possible goals of enforcement, rather than just the direct effect of revenue from audit. The IRS is capable of assessing the revenue raised directly from audit. Beyond that, it is harder to say what the effects of enforcement are, and therefore, what the effects of keeping enforcement policy secret are. For instance, researchers have somewhat paradoxically identified a "bomb crater" effect from enforcement—whereby taxpayers subject to audit may reduce their taxpaying in subsequent years, perhaps due to a belief that their future likelihood of audit, after an initial audit, is low.[344] Audits also have different impacts on different taxpayers, depending on whether or not the taxpayers were found to be compliant.[345] And there are much bigger unknowns regarding how audit policy affects general deterrence. Auditing policy that violates certain norms may reduce compliance.[346] In light of the important democratic accountability values that flow from greater transparency, we should be hesitant to assume that increasing transparency is likely to hamper enforcement or reduce compliance.

Of course, there are some situations in which greater transparency could weaken enforcement. For instance, it may be the case that there are certain "tells" that the IRS has identified, which are easy to find, and which also let the IRS know that the taxpayer is likely engaging in much bigger forms of noncompliance. Just as one example, imagine that people who claim home office deductions tend to play fast and loose with their taxpaying generally. Imagine it is easy for the IRS to see if a taxpayer claims a home office deduction. As a result, the IRS can use this low-cost way to identify the likely presence of greater noncompliance, which may otherwise be difficult to detect. In this case, transparency about the "tells" may undermine enforcement efforts.

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[343] *See, e.g.*, *Compliance Presence*, INTERNAL REVENUE SERV. (Feb. 7, 2024) https://www.irs.gov/statistics/compliance-presence [https://perma.cc/88YC-UR3R] (describing recent audit rates).

[344] *See, e.g.*, Luigi Mittone, *Dynamic Behavior in Tax Evasion: An Experimental Approach*, 35 J. SOCIO. ECON. 813, 823–24 (2006) (identifying "bomb crater" effect).

[345] *See, e.g.*, Matthias Kasper & Matthew Rablen, *Tax Compliance After an Audit: Higher or Lower?*, 207 J. ECON. BEHAV. & ORG. 157, 157 (2023) (showing that "whether a tax audit increases or decreases subsequent compliance hinges on the balance of learning opportunities, misperception of audit risk, and the confounding effect of censoring").

[346] For just one line of this literature, see, in general, discussion of responsive tax regulation, which emphasizes a cooperative approach to encouraging tax compliance. Valerie Braithwaite, *Responsive Regulation and Taxation: Introduction*, 29 LAW & POL'Y 3 (2007) (a seminal work on responsive tax administration); *see also* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 25 (1992) ("When punishment . . . is in the foreground of regulatory encounters . . . people will find this humiliating, will resent and resist in ways that include abandoning self-regulation."). For a critique on the practical application of responsive regulation in tax administration, see generally Leigh Osofsky, *Some Realism About Responsive Tax Administration*, 66 TAX L. REV. 121 (2012).

In these cases, there may be a tradeoff between the values promoted by greater transparency and the cost to revenue. Even in this case, it is important to recognize that business taxpayers such as large corporations have repeat experience with the IRS and also have access to third-party advisors, such as law and accounting firms. Many of these types of taxpayers already have significant, if not complete, knowledge of the IRS's approach to tax controversies, including the IRS's interpretations of ambiguous statutes.[347] From an equity perspective, it is possible to argue that the IRS should similarly educate the general public regarding types of activities and tax positions that may result in an IRS audit, putting aside revenue concerns in doing so. In creating greater informational equity, the IRS may provide special attention to issues that are likely to affect low-income taxpayers. There would certainly be a tradeoff, in this case, between the equity interests at stake between taxpayers having different levels of information and the revenue benefits from secret enforcement.

However we resolve the tradeoff when equity and revenue values are in conflict, it is important to recognize that there are likely many cases in which there is no conflict. At present, the default approach of secrecy not only fails to reckon sufficiently with the equity and democratic accountability problems created by the secrecy, but it also overlooks the many situations in which greater transparency and democratic accountability are possible without sacrificing enforcement. For instance, some of our transparency recommendations, such as providing more information about demographics affected by tax enforcement and more partnerships with researchers to examine the effects and incidence of tax enforcement, are unlikely to have a negative impact on tax compliance. The important point is that the IRS should start first with a goal of greater transparency and evaluate when this is not possible because of revenue concerns. When it is not possible, the IRS should adopt other means of increasing democratic accountability. This presumption in favor of greater transparency and dialogue, rather than a default of enforcement secrecy, can create more accountable enforcement, without undue tax compliance sacrifice. Greater democratic accountability can, and should, be consistent with successful enforcement.

2. *Would Transparency Diminish Perceptions of the IRS?*

Another potential concern implicated by public release of data regarding tax enforcement is that it could weaken perceptions of the IRS. For example, consider disclosure of tax enforcement data that shows that the IRS has disproportionately audited Black taxpayers compared to non-Black taxpayers.[348] After reviewing this data, some commentators questioned the systemic or

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[347] *See* Blank, *supra* note 335, at 73–75.
[348] *See* Elzayn et al., *supra* note 70, at 1.

institutional racism present in the IRS's implementation of the tax laws.[349] If disclosure of tax enforcement statistics, which include demographic information, continues to show that certain taxpayers receive more scrutiny than others, this disclosure could cause the public to question whether all taxpayers are "being treated fairly under the tax laws,"[350] perhaps to an even greater degree than at present.

However, this risk cannot excuse hiding information that is essential for the public to hold the government accountable. From an accountability perspective, the fact that the public would have particular concerns about certain aspects of enforcement underscores the importance of releasing the information publicly. The release of the Stanford study in 2023, for instance, caused the IRS to address the racial disparities described in the study publicly, including aspects of the IRS's algorithm that generates audits of taxpayers.[351] The IRS should also use public disclosure of more detailed tax enforcement statistics to address the statutes that Congress has enacted that may be having unintended effects, including disparate racial impacts. This type of response could allow IRS officials to shift the focus to the Congress that passed, and the President that signed, legislation containing these provisions. The connection between information and public accountability is an essential hallmark of democratic institutions.[352]

Public disclosure of more detailed tax enforcement statistics also would allow the IRS to show the public that it is addressing problems. It is not possible to evaluate whether the IRS is making tax enforcement more equitable when the only relevant data that is available involves short periods of time or one specific year, at the behest of particular research projects.[353] To provide the public confidence that it understands and is attempting to respond to important disparities, the government must release tax enforcement statistics that contain demographic information on an annual basis. With multiple years of IRS data, academic researchers could develop a much more comprehensive view of trends.[354] If the IRS adjusts its tax enforcement practices, such as its

[349] *See, e.g.*, Michael Mechanic, *The IRS Over-Audits Black People. Why Won't the GOP Say Anything?*, MOTHER JONES (Feb. 3, 2023), https://www.motherjones.com/politics/2023/02/republicans-gop-quiet-irs-black-audit-race-discrimination-study/ [https://perma.cc/2XYY-EET2]; Amara Enyia, *Looking for Tax Money in All the Wrong Places: Structural Racism at the IRS*, NONPROFIT Q. MAG. (Apr. 19, 2023), https://nonprofitquarterly.org/looking-for-tax-money-in-all-the-wrong-places-structural-racism-at-the-irs/ [https://perma.cc/7PJH-NCZV].

[350] *Prepared Remarks of IRS Commissioner Danny Werfel – Swearing-In*, INTERNAL REVENUE SERV. (Apr. 4, 2023), https://www.irs.gov/newsroom/prepared-remarks-of-irs-commissioner-danny-werfel-swearing-in [https://perma.cc/T7S2-3ENW].

[351] *See* Letter from Daniel Werfel, *supra* note 81.

[352] *Supra* notes 280–285 and accompanying text.

[353] *See, e.g.*, Elzayn et al., *supra* note 70 (focusing primarily on 2014).

[354] *See* Barkow, *supra* note 221, at 1177–78 (arguing that "better internal record keeping and the maintenance of statistical data within enforcement offices" can help identify "racial discrimination or other disconcerting patterns").

use of the Dependent Database in its algorithm,[355] and shows improvement in the demographic distribution of audits, public disclosure may ultimately improve perceptions of the IRS.

3. *Would Tax Enforcement Become Politicized?*

Another question raised by our proposals is whether they could encourage more politicized tax enforcement and tax administration. For instance, would our proposal regarding the Priority Enforcement Plan cause the President to use the IRS to achieve political objectives? Such objectives could include audits of taxpayers in specific geographic regions, like states that consistently vote in favor of candidates from the opposing party, or even specific individuals, such as political opponents. Even if members of the public only perceived that Executive Branch officials used the IRS in this way, this perception could diminish beliefs in the neutrality of the agency and its tax enforcement efforts. However, we have three responses to this concern.

First, statutory provisions prevent the President and other Executive Branch officials from ordering particular IRS audits. Under section 7217 of the Internal Revenue Code, the President, Vice President, and any employees of the executive offices of the President and Vice President may not request "directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer."[356] If any IRS employee receives such requests, they are required by this statute to report the request to the Treasury Inspector General for Tax Administration.[357] Our proposal would not alter or amend these statutory prohibitions on improper influence.

Second, our proposal would by design ensure that no one party in the Executive Branch is determining IRS tax enforcement plans. As we discussed earlier, a council consisting of multiple parties, including tax officials who are political appointees and career officials, as well as representatives of the President, would review the IRS's Priority Enforcement Plan each year and offer comments and suggestions.[358] For example, if IRS officials plan to increase audits and investigations of high-income taxpayers especially, they should not appear to the public to be creating this plan by themselves. In contrast, our proposal would require the IRS to seek input from a council of high-level officials consisting of both political appointees and career officials, enabling the IRS to show the public that agency officials are not pursuing enforcement initiatives on their own. Making decisions shared and public may help better

[355] *See id.*; *see also* IRM 2.3.80.1.1 (Jan. 27, 2023) ("The Dependent Database (DDB) is a Rules Based selection application that is designed to identify Individuals (IMF) and Businesses (BMF) claiming unentitled tax returns.").
[356] I.R.C. § 7217(a).
[357] I.R.C. § 7217(b).
[358] *See supra* notes 295–301 and accompanying text.

protect the agency from attacks by reducing concern about secret agendas and influences in decisionmaking. Allocating responsibility more transparently across the Executive Branch may also better ensure that the agency adopts approaches that will not appear politicized.

Third, politicization is not necessarily the enemy of enforcement. The Constitution itself tasks the President, a quintessentially political figure, with taking care that the law is enforced.[359] Executive prerogative is one of reasons that courts hesitate to engage in judicial review of enforcement decisions.[360] The space constitutionally and judicially left for executive enforcement is thus designed to be a space with political influences. Political influence can be an important way to infuse agency decisionmaking with accountability that comes from sensitivity to public opinion, especially when this political influence has to be integrated with long-term and technical perspective that will come from career officials inside the agency.[361] The key, then, is not to remove political influence from the enforcement process but rather to ensure that it is one factor that is influencing, but not entirely dominating, the enforcement process.[362] This can happen by systematizing and publicizing enforcement decisions, including by making lines of control clear, in the ways that we have advocated in our reform recommendations.

E. Evaluating the IRS's 2023 Enforcement Announcement

As a postscript to several of the major auditing controversies explored in this work, on September 18, 2023, in the wake of the Stanford study, IRS Commissioner Daniel Werfel sent Congress a letter about the IRS's enforcement strategy.[363] The letter stated that "[f]ollowing a top-to-bottom review of enforcement and in line with our Strategic Operating Plan, IRS has begun announcing sweeping efforts to overhaul compliance efforts to improve tax administration."[364] The letter identified a new enforcement focus on "high-income taxpayers with more than $250,000 in recognized tax debt," as well as "large, complex partnerships, including 75 of the largest partnerships in the U.S. identified as higher risk for tax compliance," and promised, in the "near term," additional "stepped-up activities to address noncompliance among

[359] *See* notes 263–264 and accompanying text.
[360] *See supra* Part III.C.
[361] Bernstein & Rodríguez, *supra* note 249, at 1627–33 (discussing the productive tension between political and career officials within agencies).
[362] *See* Andrias, *supra* note 257, at 1038 (arguing that "institutionalizing presidential enforcement would improve the efficiency of administration, while also making it easier for the public and Congress to track and evaluate the political judgments that are ubiquitous in the exercise of enforcement discretion").
[363] *See* Letter from Daniel I. Werfel, *supra* note 86.
[364] *Id.*

large corporations."[365] The letter explains that this new enforcement focus "will significantly improve the IRS's ability to address the tax gap."[366]

The letter also promised to shift resources away from some groups of taxpayers. In particular, the letter stated that the IRS will be "substantially reducing the number of correspondence audits focused specifically on certain refundable credits, including the Earned Income Tax Credit . . . ."[367] The letter explained that "[t]his strategy will allow us to repurpose resources to focus on other work that better aligns with IRS' strategic priorities and further our core objectives of equitable and efficient tax administration."[368]

The letter also "validated" the findings of racial auditing discrepancies from the Stanford study.[369] The letter indicated that "the realignment to focus on high-end tax evasion and any bad actors who contribute significantly to the tax gap" would "help reduce this disparity . . . ."[370] The letter also promised: "We are taking additional steps to reduce audit rate disparities as well. We have implemented an initial round of changes to EITC case selection processes that testing suggests will increase the expected return on investment for cases selected while simultaneously reducing disparities."[371] It committed to "publicly report on the results of these pilots" and stated: "We anticipate it will take several months after the end of the next filing season to determine the impact of these changes, but we are committed to monitoring, sharing our findings, and making additional improvements."[372] In addition, the letter promised to devote "more resources to addressing unscrupulous preparers," explaining in part that "these bad actors disproportionately file tax returns for vulnerable taxpayers, including low-income filers, filers of color, and those with limited English proficiency, which may contribute to higher audit rates for this taxpayer segment."[373]

More generally, the letter described a shift away from "[o]ver-reliance on audits" and a shift toward "education and real time assistance" for taxpayers.[374] The letter concluded that the IRS is "making broad efforts to overhaul compliance efforts in a manner that robustly advances [its] commitment to fair, equitable, and effective tax administration."[375]

This letter offers a real-world opportunity to explore the application of the democratic accountability framework set forth in this Article. In many ways, the letter is a significant step in the right direction in terms of democratic

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[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.*
[369] *Id.*
[370] *Id.*
[371] *Id.*
[372] *Id.*
[373] *Id.*
[374] *Id.*
[375] *Id.*

accountability. The letter increases transparency about IRS audit resource allocations by stating publicly how the IRS will focus its resources between broad groups of taxpayers. The letter does so without sacrificing compliance. It does not tell taxpayers how they can avoid an audit, except to the extent that taxpayers react to the letter in ways that would be beneficial from a compliance perspective, such as by avoiding unscrupulous return preparers. Rather, taxpayer groups who are identified as at greater risk of enforcement simply will be subject to it by virtue of the IRS's policies.

The letter also represents improvement in terms of increasing dialogue with the public. It does not just offer a static view of changes the IRS is making, but rather it promises to report back to the public and make improvements in response to what the IRS learns, as well as, presumably, in response to public feedback. In this regard, the letter also does a good job of making plain the IRS's normative choices, thereby allowing the public to provide feedback about those choices. The IRS does so by saying that its focus on high-income taxpayers and partnerships will help close the tax gap (indicating that the IRS cares about revenue collection), but also by saying that change in EITC selection will increase expected return while reducing disparities (indicating independent concern about disparities in auditing borne by different racial groups).[376] By explaining, in broad strokes, not only how it plans to allocate its enforcement resources but also why it is making these choices, the letter provides a much better window into what this IRS stands for. The letter clarifies that this IRS is attempting to collect revenue from people who are not paying their taxes, especially high-income taxpayers, partnerships, and corporations, but it also explains that the IRS is not trying to extract taxes simply by virtue of lower-income individuals not understanding the law.[377] For the latter group, the IRS cares about offering assistance. This expression of values enables Congress, the President, and the public to better understand how the agency is making choices and better hold the agency accountable.

Our democratic accountability framework nonetheless counsels that there are still areas for improvement. For one, while the letter seems to set a more proactive tone going forward, it is still, in many ways, an ex post response to the controversy generated by the Stanford study. In the future, the IRS would ideally highlight the decisions it is making, and the reasons for those decisions, prior to the eruption of controversies.

While the letter also makes the IRS's normative choices plainer than they have been in the past, how the IRS will weigh normative considerations remains vague. For instance, the letter indicates that realigning resources to focus on high-income taxpayers and partnerships would both help reduce the tax gap and reduce racial auditing disparities. However, the letter does not elaborate on when, if ever, there would be conflict between its stated values

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[376] *Id.*
[377] *Id.*

and, if so, how the IRS would plan to resolve them. Prior research, including reports by the GAO and statements by the then-IRS Commissioner, had suggested significant return on auditing resources from auditing EITC taxpayers.[378] In explaining its plan to reduce audits of EITC taxpayers, the IRS could explain better whether this is no longer the case, or whether other values outweigh these considerations. The IRS letter states that testing on EITC tax returns suggests ways that the IRS could increase expected return on investment, while also reducing disparities in auditing rates. This leaves open the questions: Will the IRS only make changes that increase expected return on investment? Or will the IRS independently make changes that reduce disparities in audit rates?

The IRS letter also does not offer access to the data that allowed the IRS to draw its conclusions and caused the IRS to change its policies. In this regard, it is worth contrasting the information the public gets from the type of information that was necessary to produce the important work in the Stanford study. That study and its revelations were possible because of the data the IRS provided. To the extent possible, the IRS should aspire to make data available to the public, or through partnerships with other researchers, which will produce similar dialogue about tax enforcement proactively.

V. Conclusion

Throughout its history, the IRS has faced accusations that it has engaged in inappropriate targeting of taxpayers based on taxpayer characteristics such as political beliefs, race, income, and geography. This Article roots this history of accusations within a fundamental democratic accountability problem with tax enforcement. The IRS always must focus its resources on some taxpayers more than others. When it does so, there are often significant normative considerations underlying this treatment. But the law offers few, if any, boundaries around the IRS's choices. And the IRS often acts with few clear lines of input from democratically accountable government actors. The IRS has also historically provided little transparency to the public regarding its enforcement choices and the value judgments that are underlying them.

After identifying the democratic accountability problem at the heart of tax enforcement and the ways that the IRS's targeting controversies fall within it, the Article proposes a new paradigm of tax enforcement based on more open dialogue regarding the tax enforcement choices the IRS is making. We have proposed several specific transparency and accountability measures: the publication of an annual IRS Priority Enforcement Plan; public disclosure of tax enforcement statistics that would reflect the impact on taxpayers with different personal characteristics; increased disclosure of audit factors for

[378] *See supra* note 132 and accompanying text.

individual tax returns; and encouragement of external participation and partnerships in tax enforcement policy and research.

The lessons from this Article, while critical for better understanding charges of tax-enforcement targeting and the legal framework around it, also extend beyond tax enforcement. As illustrated by a spate of controversies regarding prosecutorial discretion,[379] as well as enforcement controversies throughout many other areas of law,[380] the question of how the law is enforced, and against whom, is extraordinarily fraught, with high stakes for both the enforcing agency and the public at large.[381] This Article may thus help advance the ongoing, important conversation regarding democratic accountability deficits throughout the legal system. This Article should be of interest to tax law scholars, administrative law scholars, scholars of enforcement and executive discretion more generally (in both criminal and civil law), and scholars and commentators focused on equity and the law.

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[379] For a small sample of the important literature on this topic, see, for example, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 163 (2007) (exploring how prosecutorial discretion can yield extreme inequities in application of law); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 921 (2009) (concluding that "[c]ontrolling prosecutorial discretion has troubled criminal law scholars for decades. But . . . what has changed, if anything, is that prosecutors now have even more power"); I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1564 (2020) ("What would it mean to replace a system where prosecutors hold a monopoly in deciding which cases are worthy of pursuit with a system in which 'we the people,' including those of us who have traditionally had little power, would be empowered to seek and achieve justice ourselves?").

[380] *See generally* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049 (2021) (exploring problem of arbitrary exercise of government power in the context of immigration); David M. Konisky, *Inequities in Enforcement? Environmental Justice and Government Performance*, 28 J. POL. ANALYSIS & MGMT. 102 (2009) (finding less environmental enforcement in poor counties); David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016) (exploring SEC discretion to bring claims to administrative law judges instead of federal courts).

[381] *See generally* Barkow, *supra* note 221 (highlighting problem of agency enforcement discretion in foreword to *Annual Review of Administrative Law*); Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006) (examining problem of extensive executive discretion generally, as well as audits as a solution); Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019) (exploring administrative regulatory monitors and arguing that understanding their role is "vital to designing democratic accountability"); Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1518 (2018) (empirically examining agency nonenforcement decisions based on importance of nonenforcement decisions).