

Embracing the TBOR

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This report explains why the Taxpayer Bill of Rights is not a mere cosmetic but has the potential to transform tax administration. It develops three arguments that support the proposition that courts should provide enforcement of at least some of the rights listed in the TBOR, in the hope that taxpayers and their representatives will consider asserting those arguments in appropriate cases. At least one notable taxpayer has already done this. On November 8, Facebook filed a complaint against the IRS, citing the TBOR as the basis for its request that the court “issue an injunction or mandamus-like relief ordering Defendants to provide Facebook access to IRS Appeals.” We believe that Facebook is just the first of many taxpayers who will formally embrace the TBOR as a source of rights and as the basis for drafting remedies to enforce those rights.

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I. Abstract

When Congress codified the Taxpayer Bill of Rights (the TBOR) in 2015, the tax bar largely shrugged, but that is a mistake. Section 7803(a)(3) is not just another iteration of the phrase Congress used to christen legislation designed to reign in perceived IRS abuses in the 1980s and 1990s, when Congress enacted three different pieces of legislation that bore the name “Taxpayer Bill of Rights.” Despite their lofty titles, none of those enactments contained a single amendment to the Internal Revenue Code that used the word “right” or used the language of rights. By contrast, section 7803(a)(3) actually refers to “taxpayer rights” and lists 10 items. Therefore, despite the claims of its promoters that the 2015 legislation simply restates rights already provided by the code, the codification of the TBOR has the power to transform the tax practice and the relationship between taxpayers and the IRS. In this report we explain why.

Specifically, we make three arguments. First, construing the 2015 codification of the TBOR as a meaningless gesture ignores the well-established canon of statutory construction against surplusage, as well as its important corollary: When Congress amends a statute it intends to change something. Second, the TBOR significantly enhances taxpayers' normative basis for demanding legal remedies for violations of their rights because it invokes procedural justice, using the language of rights where only government duties existed before. Third, the TBOR may have actually created taxpayer rights.

We do not argue that all taxpayer rights should be enforced either all the time or to the same extent, because that could be disruptive or even catastrophic for tax administration and may not be necessary to allow the TBOR to achieve its goals. But we do maintain that the codification of the TBOR can transform the legal environment so that demands for enforcement can be weighed by the courts on a case-by-case basis in light of all the facts and circumstances, which include the identity and attributes of the taxpayer.

Recent events confirm the importance of the TBOR and suggest that the tide of taxpayer indifference has begun to turn. On November 8, Facebook filed a complaint against the IRS, citing the TBOR's "right to appeal a decision of the Internal Revenue Service in an independent forum" (section 7803(a)(3)(E)) as the basis for its request that the court "issue an injunction or mandamus-like relief ordering Defendants to provide Facebook access to IRS Appeals." We believe that Facebook is just the first of many taxpayers who will formally embrace the TBOR as a source of rights and as the basis for crafting remedies to enforce those rights.

II. Introduction

The TBOR is the federal Taxpayer Bill of Rights, and if you did not recognize the acronym or know that the IRS had adopted a TBOR and that Congress had inserted it into the code, you are likely (but unfortunately) in good company.¹ And that is what we want to change with this

report. To do that, we explain how the TBOR came to be and why it is important. The key player in the story of the TBOR is National Taxpayer Advocate Nina E. Olson; the key plot components are the role of voluntary compliance in the federal income tax system, the relationship between the government and taxpayers, and the expressive function of law. At the heart of the TBOR's story is an ironic twist that likely facilitated its adoption and enactment but that also threatens to doom it to obscurity. We explain why its obscurity would be harmful to the tax system.

The IRS adopted a TBOR, and Congress added it to the code, because the national taxpayer advocate believed it to be central to the promotion of voluntary compliance.² As Olson explained when she made congressional enactment of a TBOR the first "key legislative recommendation" in her 2007 annual report to Congress:

The United States tax system is based on a social contract between the government and its taxpayers — taxpayers agree to report and pay the taxes they owe, and the government agrees to provide the service and oversight necessary to ensure that taxpayers can and will do so. Without that unspoken agreement, tax administration in a modern democratic society could not function. Thus, the government's ability to raise revenue through voluntary tax compliance — the most efficient and economical form of tax compliance — rests on taxpayers' belief that the government will honor its end of the social contract.

The National Taxpayer Advocate believes that it is in the best interests of taxpayers and tax administration for this unspoken agreement to be articulated in a formal Taxpayer Bill of Rights. Although Congress, in three major pieces of legislation, has expressly identified numerous rights that are crafted to ensure

¹The IRS adopted a TBOR in 2014 (see IR-2014-72), and Congress codified it in 2015. See section 7803(a)(3).

²Many commentators, including the IRS itself, have observed that the term "voluntary compliance" is something of a misnomer. See, e.g., IRS, "Anti-Tax Law Evasion Schemes — Law and Arguments (Section I): The Voluntary Nature of the Federal Income Tax System."

a fair and just tax system and protect all taxpayers from potential IRS abuse, there is no single document that sets forth these rights in simple, clear language.³

The national taxpayer advocate's logic was straightforward and powerful:

- voluntary compliance is vital to the functioning of the federal income tax system;
- taxpayers are more likely to comply voluntarily with obligations they see as the legitimate product of the implicit bargain they have made with the government;
- because the enactment of a TBOR makes the government's end of the bargain patent, it will enhance the legitimacy of its demand for tax compliance and increase the likelihood that taxpayers will comply voluntarily;⁴ and
- because the rights already exist, there should be no objection to their articulation in a formal TBOR.

The proposal was elegant in its simplicity. By making patent the rights already in the code, Congress could increase the legitimacy of the tax system and taxpayers' willingness to comply with it. The TBOR was a win-win: It would raise taxpayers' awareness of rights they already had, and that knowledge would benefit both them and the tax system.

Ironically, the very feature that likely made enactment of the TBOR possible has also proven to be its Achilles' heel. Appearing not to add any new taxpayer rights or remedies may have hastened the adoption of the TBOR, but it also carried the seeds of its dismissal by the tax

community. It made the proclamation of those rights seem like an empty gesture — window dressing at best, and cynical spin at worst.⁵

Section 7803(a)(3), the codification of the TBOR, is explicit in its incorporation of other provisions of the code: "In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights *as afforded by other provisions of this title, including*" the 10 listed rights proposed by the national taxpayer advocate and adopted by the IRS. (Emphasis added.)

Accordingly, the TBOR does not purport to confer any additional rights on taxpayers or impose any additional duties on the commissioner or any IRS employee. A cynic might therefore be justified in thinking that section 7803(a)(3) merely reminds the commissioner to do his job.

But dismissing the importance of the TBOR's codification would be wrong. Although the TBOR does not purport to confer any new rights on taxpayers and provides no new remedies for the violation of existing rights, that does not mean it lacks substance and should be dismissed. The purpose of this report is to make that case.⁶

The initial and perhaps most straightforward reason to reject the claim that the TBOR is meaningless comes from the application of traditional canons of statutory construction. Concluding that the TBOR is meaningless does violence to the canon that advises that statutes should be construed so that no portion is rendered "inoperative or superfluous, void or

³Olson, "National Taxpayer Advocate 2007 Report to Congress," vol. 1, at 478 (Dec. 31, 2007); John H. Farrar, foreword to Duncan Bentley, *Taxpayers' Rights: An International Perspective*, at iii (1998).

⁴See Olson, "Procedural Justice for All: A Taxpayer Rights Analysis of IRS Earned Income Credit Compliance Strategy," 22 *Advances in Taxation* 1 (2015) (summarizing empirical research on the connection between compliance and perceptions of legitimacy, as well as the development of the national taxpayer advocate's commitment to the enhancement of taxpayer rights). See also Alex Raskolnikov, "Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement," 109 *Colum. L. Rev.* 689, 691 (2009) (analyzing taxpayer attitudes toward compliance with the tax law).

⁵The sentiment was captured by one of the few items of reader reaction that appeared in *Tax Notes* after the IRS announced the adoption of its TBOR on June 10, 2014 — a highly critical anonymous letter to the editor released the following day, discussed *infra*. This reaction is not unique to the TBOR or to the United States. See, e.g., Creighton R. Meland Jr., "Omnibus Taxpayer Bill of Rights Act: Taxpayers' Remedy or Political Placebo?" 86 *Mich. L. Rev.* 1787 (1988). Similarly, many professional bodies criticized the adoption of the Australian Tax Office's proposal for a taxpayer charter that reflects "existing legal rights and administrative concessions." See Bentley, *supra* note 3, at 2. But the U.S. reaction is perhaps more troubling because the general indifference with which the professional tax community greeted the adoption and enactment of the TBOR is a greater impediment to its efficacy than denunciation. See *infra* note 48.

⁶Although the arguments we develop here apply in many respects to the TBORs that more than 40 states have adopted, discussion of the state TBORs is beyond the scope of this project. For a good discussion of how state TBORs may help taxpayers faced with state tax controversies, see Peter L. Faber, "Using Taxpayer Bill of Rights Laws," *State Tax Notes*, Sept. 4, 2017, p. 947.

insignificant.”⁷ Even if that canon is not an absolute command, it strongly encourages a search for meaning. For the TBOR, that search produces important results.

There are at least two arguments in support of the proposition that the TBOR does more than merely restate existing rights, both of which depend on the underlying view of the relationship between the government and taxpayers. First, the assertion that the rights enumerated by the TBOR are rights taxpayers already had derives from the assumption that the duties the code imposes on government officials create correlative rights in the taxpayers to whom the duties are owed.⁸ This is a plausible assumption if the relationship between taxpayers and the government is, as the national taxpayer advocate said in her recommendation for the enactment of a TBOR, an implicit social contract under which “taxpayers agree to report and pay the taxes they owe, and the government agrees to provide the service and oversight necessary to ensure that taxpayers can and will do so.” The correlative nature of rights and duties is consistent with that reciprocal view of the relationship.⁹ Still, by translating the existing code provisions, which are couched in the language of duties, into a new language — the language of rights — the enactment of the TBOR has an important consequence: enhancing the normative basis for taxpayers to demand specific remedies for violations of their rights.

And what if that reciprocal view does not describe the relationship between taxpayers and the government? What if the relationship is actually more contentious because of a power imbalance? And what if the government is, as a result, viewed as a threat to taxpayer rights? In that case, it would not follow that the duties of tax officials would directly translate into rights for the taxpayers who stand to benefit from the

performance of those duties. Under that more adversarial view, rights and duties would be asymmetrical — taxpayer rights would necessarily imply government duties, but the converse would not necessarily be true.¹⁰

Hence, our second argument for the importance of the TBOR stems from our belief that the latter, more contentious view of the relationship between taxpayers and the government more closely reflects the sentiments of most taxpayers — and of Congress.¹¹ If we are correct, the codification of the TBOR actually created rights that did not previously exist. That is a significant development that deserves more scholarly and professional attention than it has received to date.

This second argument is bolstered by examining not only what Congress codified but also what it failed to codify: a list of taxpayer responsibilities that formed a part of the TBOR proposed by the national taxpayer advocate. Although the idea of including both taxpayer rights and taxpayer responsibilities followed logically from the rationale for the national taxpayer advocate’s proposal — the reciprocal nature of the relationship between the government and taxpayers, reflecting the social contract — Congress’s decision to codify the rights but not the responsibilities suggests its affinity with the more contentious view of that relationship. Moreover, because we believe that the more contentious view resonates with most taxpayers, we think Congress need not reconsider its rejection of a codified list of taxpayer responsibilities.

Thus, regardless of which of these views of the taxpayer-government relationship is preferred, the TBOR makes a significant contribution and

⁷ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

⁸ That is a reasonable assumption in U.S. jurisprudence, long familiar from the work of Wesley Newcomb Hohfeld on the correlative nature of rights and duties. See Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 23 *Yale L.J.* 16, 28-58 (1913).

⁹ The classic statement of a social contract based on reciprocity between the individual and the government is Plato’s *Crito*. See Kent W. Smith, “Reciprocity and Fairness: Positive Incentives for Tax Compliance,” in *Why People Pay Taxes* 223, 225 (1992).

¹⁰ For a more extended argument that rights and duties are asymmetrical, see Richard K. Greenstein, “Toward a Jurisprudence of Social Values: Legal Rights” (June 17, 2017) (unpublished manuscript; on file with authors). (Portions of the discussion that follows are paraphrased from that paper and are only sometimes set off by quotation marks.) The literature sporting that adversarial view is vast. See Robert Nozick, *Anarchy, State, and Utopia* (1974).

¹¹ The most notorious of the three pieces of legislation bearing the name “Taxpayer Bill of Rights” enacted between 1988 and 1998 (see *infra* discussion in note 16) followed highly publicized reports of taxpayer abuse by the IRS. This supports our belief that the TBOR may have been introduced into the code piecemeal, “but the aim was to identify, specifically, potential abuses of power by the [IRS] and to provide taxpayers with the necessary legislative protection against those abuses.” Bentley, *supra* note 3, at 26.

should not be casually dismissed. This report advances that thesis. We examine the national taxpayer advocate's argument that the TBOR creates new and substantial incentives for voluntary compliance, and we expand on previous work¹² by developing the arguments summarized above regarding the nature of the relationship between the government and taxpayers. We also provide two examples of how taxpayers and their representatives can use the TBOR to alter the course of their interactions with the IRS.¹³ We begin by exploring the origins of the TBOR.

III. The Birth of the TBOR

The TBOR owes its existence to Olson. As noted earlier, the national taxpayer advocate began to discuss the importance of taxpayer rights in 2007,¹⁴ when she identified congressional enactment of a TBOR as her number one legislative recommendation in that year's annual report to Congress.¹⁵ Although Congress had previously enacted three pieces of legislation titled "Taxpayer Bill of Rights," which created "specific rights in certain instances,"¹⁶ none of them created "a thematic, principles-based list of

overarching taxpayer rights."¹⁷ Olson proposed the enactment of a bill of rights with just such a list because she believed that taxpayers would "be reassured in the essential fairness of the tax system and more disposed to voluntarily comply with the tax laws if they [could] see and understand a clear declaration of their rights as taxpayers."¹⁸

The national taxpayer advocate's 2007 recommendation was informed by work undertaken by the OECD in 1988, when it surveyed its member states to determine the extent to which their tax systems provided for taxpayer rights and obligations. Two years later the OECD published the results of that study.¹⁹ Although a few countries had gone so far as to adopt taxpayer charters that set forth specific

¹² Alice G. Abreu and Greenstein, "The U.S. Taxpayer Bill of Rights: Window Dressing or Expression of Justice?" *J. Tax Admin.* (forthcoming).

¹³ Our thanks to professor Katherine Pratt for suggesting one of these examples after hearing us present a draft of this report at the SEALS Conference on August 4. See Pratt, "The Tax Definition of 'Medical Care': A Critique of the Startling IRS Arguments in *O'Donnabhain v. Commissioner*," 23 *Mich. J. Gender & L.* 313 (2016).

¹⁴ Olson, "National Taxpayer Advocate 2011 Report to Congress," vol. 1, at 494 (Dec. 31, 2011).

¹⁵ 2007 annual report, *supra* note 3, vol. 1, at 462.

¹⁶ Olson, "Toward a More Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration," at 1, n.5 (Nov. 4, 2013) (framework report); see also Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647, section 6226 (TBOR 1); Taxpayer Bill of Rights 2, P.L. 104-168 (1996) (TBOR 2); Internal Revenue Service Restructuring and Reform Act, P.L. 105-206, section 3000 (1998) (TBOR 3).

¹⁷ Framework report, *supra* note 16; see also Abe Greenbaum, "United States Taxpayer Bills of Rights 1, 2, and 3: A Path to the Future or Old Whine in New Bottles?" in Bentley, *supra* note 3, at 347. As Greenbaum observes, although Congress enacted three pieces of legislation that bore the name "Taxpayer Bill of Rights" in 1988, 1996, and 1998, the names were misnomers because "in all three instances the legislation was merely an omnibus law which provided a variety of procedural changes to the [code] without any coherent scheme." *Id.* As Congress attempted to enact yet more taxpayer rights legislation in 2000, professor Leandra Lederman made similar observations, mounted a persuasive critique of the congressional approach, and proposed the enactment of a code provision specifically providing for civil damages — including attorney fees — for material violations of the code, any Treasury or IRS regulation, any revenue procedure, or any provision of the Internal Revenue Manual. Leandra Lederman, "Of Taxpayer Rights, Wrongs, and a Proposed Remedy," *Tax Notes*, May 22, 2000, p. 1133. See also Lederman, "Taxpayer Rights in the Lurch: A Response to Professor Johnson," *Tax Notes*, Aug. 21, 2000, p. 1041 (expanding the description of her proposed remedy in responding to Steve Johnson, "A Residual Damages Right Against the IRS: A Cure Worse Than the Disease," *Tax Notes*, July 17, 2000, p. 395).

¹⁸ 2007 annual report, *supra* note 3, vol. 1, at 485.

¹⁹ OECD Commission on Fiscal Affairs, "Taxpayer Rights and Obligations — A Survey of the Legal Situation in OECD Countries" (1990) (OECD study).

taxpayer rights and obligations, most had not.²⁰ Still, the OECD found that the tax systems of most member states provided taxpayer rights and imposed taxpayer obligations even when they lacked explicit charters.²¹ The OECD's 1990 study provided guidelines for developing a charter of taxpayer rights and obligations, and a practice note issued in 2003 included a sample charter.²² The OECD's work was likely intended to facilitate the adoption of charters by other countries, and it apparently did: For example, in 1997 Australia adopted a taxpayers' charter, the development of which was influenced by the OECD's 1990 study.²³

The national taxpayer advocate's 2013 proposal contained many of the features of the sample taxpayer charter provided in the OECD's practice note, infused with an added dose of U.S. political history. Drawing on the U.S.

Constitution's Bill of Rights,²⁴ the national taxpayer advocate proposed the enactment of a TBOR listing precisely 10 taxpayer rights.²⁵ It also set forth five taxpayer responsibilities,²⁶ as taxpayer charters typically do. In effect, the proposed TBOR was actually a TBOR plus a list of taxpayer obligations and responsibilities.

Significantly, that proposal did not purport to add anything to what was already provided in the code; rather, it intended to simply make patent, for easy taxpayer consumption, what was already there regarding both taxpayer rights and taxpayer obligations. In this respect, the proposed TBOR also followed the pattern described in the OECD's 1990 study, which reported that the countries that had adopted charters saw them "as a useful way of informing taxpayers of their rights and reaffirming a government's commitment to ensure that these basic rights are protected. For the most part, they do not extend the guarantees given to taxpayers."²⁷

The national taxpayer advocate's reasons for including both rights and obligations in her proposal were sensible and straightforward:

²⁰ Twenty-two of the 24 countries surveyed responded to the question regarding charters, and out of those only four had adopted an official document outlining taxpayer rights. *Id.* at 19, 70. These included Canada (Declaration of Taxpayers' Rights adopted in 1985), France (Taxpayer Charter adopted in 1987), New Zealand (Statement of Principles adopted in 1986), and the United Kingdom (Taxpayer Charter adopted in 1986). *Id.* Although the OECD listed the United States as having adopted a taxpayer bill of rights in 1988, that reference is almost certainly based on the legislation that bore that name but simply enacted several provisions that imposed specific duties on government officials but did not include a thematic list of taxpayer rights. See framework report, *supra* note 16; see also Greenbaum *supra* note 17, at 347. The Chartered Institute of Taxation, a London-based group, claims the United Kingdom was the first country in the world to adopt a taxpayers' charter: Chartered Institute of Taxation, "A Taxpayers' Charter for the United Kingdom," at 7 (2008). That assertion was likely made because the Canadian effort was styled as a declaration of taxpayer rights rather than as a charter. See Jiyun Li, "Taxpayers' Rights in Canada," 7 *Revenue L.J.* 83, 85 (1997).

²¹ See OECD study, *supra* note 19, at 70 (Table 15). The study does not contain information that would allow us to determine whether what it refers to as taxpayer rights are formulated using the language of rights or, as was the case with the United States, using the language of duties.

²² See *id.* See also OECD Committee of Fiscal Affairs Forum on Tax Administration, "Taxpayers' Rights and Obligations — Practice Note" (2003) (practice note). That work was advanced substantially in 2015 by the Asia Oceania Tax Consultants' Association, the Confédération Fiscale Européenne, and the Society of Trust and Estate Practitioners. See Michael Cadesky, Ian Edward Hayes, and David Russell, "Towards Greater Fairness in Taxation — A Model Taxpayer Charter" (2015).

²³ Simon James, Kristina Murphy, and Monika Reinhart, "The Taxpayers' Charter: A Case Study in Tax Administration," 7 *J. Austl. Tax'n* 336, 340-343, 345 (2004).

²⁴ See Olson, "National Taxpayer Advocate 2013 Annual Report to Congress," vol. 1, at 5 (Dec. 31, 2013).

²⁵ *Id.* at 11-12.

²⁶ *Id.* at 13. The term "obligations" is used in most taxpayer charters, according to the OECD study (see OECD study, *supra* note 19, at 15). In previous proposals, the national taxpayer advocate had also used the term "obligations" (see 2007 annual report, *supra* note 3, vol. 1, at 480), but this was later replaced with the term "responsibilities" (see 2013 annual report, vol. 1, *supra* note 24, at 13), likely because it has a less coercive tone. We refer to taxpayer duties, obligations, and responsibilities interchangeably.

²⁷ See OECD study, *supra* note 19, at 12. The broad question whether the adoption of a TBOR or taxpayer charter gives taxpayers anything they did not have before subsumes at least three more pointed questions: (1) whether the TBOR provides additional substantive rights; (2) whether there is a mechanism for enforcement of the enumerated rights; and (3) whether the rights have the force of law. Although none of those questions provoked scholarly or other public discussion before the IRS's adoption or the congressional enactment of the TBOR in the United States, the situation was different in Australia, which adopted a taxpayer charter nearly two decades earlier. There, those questions received significant scholarly and practitioner attention when adoption of a taxpayer charter was being considered. See, e.g., Bentley, "A Taxpayer's Charter: Opportunity or Token Gesture?" 12 *Australian Tax Forum* 1 (1995); and Bentley, "The Taxpayers' Charter: More Than a Mission Statement," in *Taxation in Australia*, vol. 4, at 259 (red ed. 1995-1996) (arguing that despite the absence of legislative enactment, the taxpayer charter provided more of a safety net for taxpayers than might initially have been apparent because it gave them the opportunity to make arguments based on common law doctrines, such as estoppel, in response to some alleged violations, and it displayed the tax administrators' commitment to taxpayer rights). We make and extend similar arguments here.

Taxpayer rights do not exist in a vacuum. That is, a tax system that embeds rights also expects its taxpayers to conduct themselves in such a manner as to ensure those rights are not abused. To this end, the Taxpayer Bill of Rights should incorporate not only a clear statement of taxpayer rights but also a statement of taxpayer obligations.²⁸

That rationale reflects the same reciprocal view of the relationship between taxpayers and the government that underlies the claim that the code's imposition of duties on government tax officials produces correlative rights in taxpayers. It is also consistent with the OECD's explanation of why taxpayer charters should not only provide taxpayer rights but also impose taxpayer obligations:

Basic taxpayer rights also imply basic obligations. There is a set of behavioural norms expected of taxpayers by Governments. These expected behaviours are so fundamental to the successful operation of taxation systems that they are legal requirements in many, if not most, countries. Without this balance of taxpayers' rights *and* obligations taxation systems could not function effectively and efficiently.²⁹

As noted earlier, the IRS adopted and Congress enacted only the TBOR portion of the 2007 proposal — not the list of taxpayer obligations. In Section IV we offer some possible explanations for that.

The national taxpayer advocate's 2007 proposal did not stop with the TBOR, however. Although by its terms the TBOR did not go beyond restating rights or duties already provided in the code, the second proposal Olson made in her first key legislative recommendation did. Apparently inspired by the practice followed in the United Kingdom and Australia, Olson proposed that Congress appropriate a fixed amount from which the Taxpayer Advocate Service would have the authority to make de

minimis "apology payments" to taxpayers who incurred excessive expense or suffered an undue burden as a result of IRS actions.³⁰ Those payments would be in addition to other compensation provided by the code.³¹

In proposing the apology payments, the national taxpayer advocate was motivated by the same impulse that served as her basis for proposing the TBOR: increasing the legitimacy of the tax system and hence voluntary compliance. As she explained, the proposed payments would:

restore taxpayer confidence in that system and encourage future compliance on the part of taxpayers who may be downtrodden or discouraged by their experience. A monetary apology to a taxpayer who has suffered emotionally and financially due to an improper handling of his or her situation may not make the taxpayer whole, but it will show the ability of the tax system to recognize and try to correct its mistakes. A tax system that is fair and just encourages taxpayer compliance.³²

Like the proposed TBOR, the apology payment proposal was grounded in a reciprocal view of the relationship between taxpayers and the government, in which a wrong would be countered by a right.

Although the national taxpayer advocate continued to make the case for a TBOR in her annual reports for the next five years, it was not until she made taxpayer rights a cornerstone of her Woodworth Lecture in May 2013 that the idea seemed to catch fire.³³ She followed the Woodworth Lecture with the issuance later that year of a 66-page report urging the adoption of a TBOR "as a framework for effective tax administration," and even made that phrase part of the title.³⁴ Like her prior proposals, this one did not claim that the TBOR would add any rights or

²⁸ 2007 annual report, *supra* note 3, vol. 1, at 478.

²⁹ Practice note, *supra* note 22, at 3 (emphasis in the original).

³⁰ 2007 annual report, *supra* note 3, vol. 1, at 462.

³¹ *See id.*

³² *Id.* at 485-486 (footnote omitted).

³³ *See* Olson, "A Brave New World: The Taxpayer Experience in a Post-Sequester IRS," *Tax Notes*, June 3, 2013, p. 1189 (transcript of Olson's remarks at the Laurence Neal Woodworth Memorial Lecture).

³⁴ Framework report, *supra* note 16.

remedies. The framework report was explicit on this point: “A TBOR would make taxpayers aware of the general rights they already have. Thus, a TBOR does not create new rights, but provides organizing principles — a framework — for statutory rights.”³⁵ It underscored that the TBOR would only make patent what the law already contained by including an appendix that listed the sources of each right under existing law.³⁶

In her 2013 annual report to Congress, the national taxpayer advocate listed the absence of a TBOR as the first of “the most serious problems encountered by taxpayers.”³⁷ Like the 2007 proposal, the TBOR proposed in 2013 identified 10 taxpayer rights and five taxpayer responsibilities.³⁸ Olson’s report also included an “Updated Draft Version of Publication 1” titled “Taxpayer Bill of Rights,” which tracked her proposal.³⁹ However, unlike the 2007 proposal, the 2013 proposal urged only IRS adoption of the TBOR, not codification by Congress. It also had no provisions concerning apology payments.

In June 2014 the IRS adopted a TBOR.⁴⁰ That TBOR contained the 10 rights listed in the national taxpayer advocate’s 2013 annual report, but it did not mention taxpayer responsibilities.

In her 2014 annual report, the national taxpayer advocate renewed the call for codification she had first made in 2007. She observed that the IRS’s adoption of the TBOR “was a significant achievement for increasing taxpayers’ awareness of their rights, and an important first step toward integrating taxpayer rights into all aspects of tax administration.” She continued, however:

More can be done to cement these fundamental concepts as a permanent part of our tax system. Specifically, placing a list of the ten core taxpayer rights and five

taxpayer responsibilities in the Code would reassure taxpayers that these rights are a fundamental part of our tax system. Furthermore, it would reinforce the unwritten social contract between taxpayers and the IRS by laying out in clear language what is expected of taxpayers and what rights they can expect the IRS to honor.⁴¹

Like the TBORs Olson had proposed in 2007 and 2013, the TBOR proposed in the first legislative recommendation of the national taxpayer advocate’s 2014 annual report provided for taxpayer rights as well as responsibilities.⁴²

In December 2015 Congress enacted the TBOR as section 7803(a)(3). Like the version adopted by the IRS, the codified TBOR contained the 10 taxpayer rights of the national taxpayer advocate’s original proposal but no list of taxpayer responsibilities. In her 2015 annual report to Congress, issued less than a year after codification of the TBOR, Olson was exultant:

On the evening of the first day of the International Conference on Taxpayer Rights [held in November 2015], I stood in the Rotunda of the National Archives and viewed the documents on which the United States is founded — the Declaration of Independence, the Constitution, and the Bill of Rights. I was struck by James Madison’s language quoted in a display about our nation’s path to adopting a Bill of Rights: “I think we should obtain the confidence of our fellow citizens in proportion as we fortify the rights of the people against the encroachments of the government.”

³⁵ *Id.* at 6.

³⁶ *Id.* at 52. For example, for the first listed right — the right to be informed — the appendix listed 13 different sources. *Id.*

³⁷ 2013 annual report, vol. 1, *supra* note 24, at 5.

³⁸ *Id.* at 11-13.

³⁹ *Id.* at 18-19.

⁴⁰ See IR-2014-72. However, the TBOR adopted by the IRS contained only the 10 rights that the national taxpayer advocate had identified; it did not contain the five taxpayer responsibilities. See *id.* See also Olson, “National Taxpayer Advocate 2014 Annual Report to Congress,” vol. 1, at 310 (Dec. 31, 2014).

⁴¹ 2014 annual report, vol. 1, *supra* note 40, at 275 (footnote omitted).

⁴² See *id.* at 277-310. The wording of some of the TBOR provisions that were proposed in 2013 (see 2013 annual report, vol. 1, *supra* note 24, at 11-13) and later adopted by the IRS and codified in section 7803(a)(3) differed slightly from those of the 2007 proposal (see 2007 annual report, *supra* note 3, vol. 1, at 479-480), which used the language of the OECD charter (see practice note, *supra* note 22, at 4-5). However, the changes were slight and involved only the specific words, not the principles conveyed. For example, “the right to be assisted” became “the right to quality service”; the “right to be heard” became the “right to challenge the IRS’s position and be heard”; the “right to appeal” became the “right to appeal and challenge IRS decision in an independent forum”; the “right to certainty” became the “right to finality”; and the “obligation to be honest” became the “responsibility to be honest.”

It is fitting that, less than one month after I read this statement at the historic conference, Congress passed and the President signed into law legislation that codified the provisions of the Taxpayer Bill of Rights (TBOR), an act I have been advocating for since 2007. The need for and protections afforded by the TBOR cannot be overstated. In today's environment of low confidence and even distrust of the federal government and the IRS, the agency's adherence to the principles of the TBOR will demonstrate to taxpayers that they have reason to trust that it will administer the nation's tax laws fairly and justly.⁴³

Codification of the TBOR has not abated the national taxpayer advocate's crusade for the recognition of taxpayer rights. Not only did she convene the inaugural International Conference on Taxpayer Rights referenced in the foregoing quote, she followed the success of that conference by convening the second International Conference on Taxpayer Rights in March 2017 in Vienna. The third and fourth conferences are scheduled for May 2018 (Amsterdam) and 2019 (Minneapolis).⁴⁴ The conferences have been resoundingly successful — the Vienna conference, for example, drew participants from more than 40 countries, including government officials, scholars, and practitioners.⁴⁵ The national taxpayer advocate has also increased the prominence of taxpayer rights by making a "Taxpayer Rights Assessment" part of her annual report in 2016, with the expectation that it will

"grow and evolve over time,"⁴⁶ and by adding the impairment of taxpayer rights as an independent criterion for the acceptance of cases by TAS.⁴⁷

And yet, despite the zeal with which Olson has quested for a TBOR, neither the IRS's adoption of the TBOR nor Congress's codification elicited significant — or indeed even a little — commentary from the community of scholars or tax professionals in the United States.⁴⁸ Indeed, the one item of commentary that appeared in *Tax Notes* after the IRS's adoption of the TBOR was highly critical.⁴⁹ That anonymous letter to the editor charged:

The recently announced so-called Taxpayer Bill of "Rights" is no more than a cynical move by the IRS to stave off further regulation by Congress. I put the word "rights" in quotes because the fact of the matter is many of the enumerated items are not actually rights — the IRS is not compelled to respect them and the taxpayer has no legal remedy when they are violated (and the ones that are in fact legal rights were already enacted by Congress, not the IRS).⁵⁰

The writer then quoted *Marbury v. Madison* for the proposition that "the Government of the

⁴⁶ Olson, "National Taxpayer Advocate 2016 Annual Report to Congress," vol. 1, at 42 (Dec. 31, 2016).

⁴⁷ IRM section 13.1.7.2.

⁴⁸ We do not mean to imply that there was no reaction at all to the announcement of the IRS's TBOR. The *Tax Notes* article that described the announcement (IR-2104-72) included several positive reactions from directors of low-income taxpayer clinics, and the Procedurally Taxing Blog sometimes posts on items affecting taxpayer rights. See, e.g., Keith Fogg, "Public Policy Cases Accepted by the Taxpayer Advocate Service," *Procedurally Taxing* (Jan. 20, 2016). But neither *Tax Notes* nor Bloomberg's *Daily Tax Report* contained explanatory or analytical reports or reader commentary regarding either the IRS's adoption of the TBOR or its later codification. Taxpayer rights have yet to become a topic of general discussion in the tax literature, and the acronym TBOR is still unknown to many tax professionals, although U.S. tax scholars participated in both the first and second international conferences, and some of the papers presented at those conferences have been or will be published. See, e.g., Olson, "Introduction — Selected Papers From the Inaugural International Conference on Taxpayer Rights," 69 *Tax Law.* 491 (2016) (That issue of *The Tax Lawyer* includes articles by Abreu and Greenstein, Fogg and Sime Jozipovi, Leslie Book, and Amanda Bartmann). See also Abreu and Greenstein, *supra* note 12. This may be changing, since at least one well-known scholar has begun to explore the potential of the TBOR. See Susannah Camic Tahk, "The New Welfare Rights," *Brooklyn L. Rev.* (forthcoming). Nevertheless, the scholarly and professional attention paid to the TBOR remains grossly disproportionate to its transformative power.

⁴⁹ See *supra* note 5 and accompanying text.

⁵⁰ *Id.*

⁴³ Olson, "National Taxpayer Advocate 2015 Annual Report to Congress," vol. 1, at vii-viii (Dec. 31, 2015) (footnote omitted).

⁴⁴ See International Conference on Taxpayer Rights, "Save the Date."

⁴⁵ National taxpayer advocate release (Apr. 10, 2017).

United States has been emphatically termed a government of law, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." The letter concluded by asserting that "in light of this proud history, I am offended that the IRS spin doctors' self-congratulatory release claims that the IRS pronouncement is 'similar to the U.S. Constitution's Bill of Rights.'"

However, the general response from the community of tax professionals was indifference,⁵¹ probably because it was not the TBOR's intended audience. Olson's objective in promoting the TBOR was to raise taxpayer awareness of existing rights in the code. The TBOR's chief audience was therefore the taxpayers, who would come to know that they had specific rights. It is not surprising that the audience of tax professionals essentially shrugged; whatever the importance of the TBOR, it had nothing to say to them, as it might have if it had added remedies. We believe that this view — that the TBOR has nothing to say to tax professionals — is mistaken.

IV. The Value of the TBOR

We understand the temptation to claim that the TBOR, as adopted by the IRS and codified by Congress, is meaningless because it fails to provide remedies and does not purport to compel government officials to do anything they were not already compelled to do. The statutory language would seem to support that claim. Section 7803(a) is the provision that creates the position of commissioner of internal revenue. Subsection (1) describes the appointment process, and subsection (2) outlines the duties of the office. Subsection (3), the TBOR, provides that "in discharging his duties, the Commissioner shall ensure that [IRS] employees . . . are familiar with and act in accord with taxpayer rights as afforded

by other provisions of this title, including" the 10 rights proposed by the national taxpayer advocate and adopted by the IRS.

Because subsection (2) already stated that the commissioner's duties include the duty to "administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party," as we said before, subsection (3) could be interpreted as doing nothing more than reminding the commissioner to do his job.⁵²

But there is a good jurisprudential reason to resist the idea that the TBOR adds nothing of significance to the code: the traditional principle that, in the words of the Supreme Court, "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."⁵³ When the question involves an amendment to a statute — and the TBOR is an amendment to section 7803(a) — an important variant of the non-surplusage principle is the maxim that "when Congress alters the words of a statute, it must intend to change the statute's meaning."⁵⁴ Indeed, there is a "general presumption that Congress contemplates a change whenever it amends a statute."⁵⁵

Those principles of statutory construction compel the presumption that subsection (3) is neither superfluous nor insignificant, and that when Congress amended section 7803(a) to add

⁵² See section 7803(a)(2)(A). Technically, section 7803(a)(2) gives the commissioner "such duties and powers as the Secretary may prescribe, including the power" to administer, etc., as listed in subsection (a)(2)(A). However, the flush language in section 7803(a)(2) requires the Treasury secretary to notify Congress of the non-delegation of any power. Hence, in the absence of any such notification, the commissioner would seem to have all the powers listed in subsection (a)(2)(A), which include the power to administer and manage the internal revenue laws, and those laws must include the code. For that reason, the commissioner would have the duty to ensure that the provisions already in the code were observed, even if subsection (a)(3) had not been enacted.

⁵³ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

⁵⁴ *United States v. Wilson*, 503 U.S. 333, 336 (1992).

⁵⁵ *Id.* See generally Larry M. Eig, "Statutory Interpretation: General Principles and Recent Trends," Congressional Research Service, at 13-14 (Dec. 19, 2011).

⁵¹ See *supra* note 5 and accompanying text.

the TBOR, it intended to change the statute's meaning.⁵⁶ We must therefore conscientiously explore just how the TBOR changes the law. That is, what does it add? Answering that question sensibly begins with the objective that motivated the national taxpayer advocate's promotion of the TBOR in the first place: the creation of effective incentives for voluntary compliance with the tax law.

Accordingly, we dissect the ways in which the TBOR supports voluntary compliance by enhancing (1) taxpayer awareness of rights, (2) the respect shown taxpayers through the use of rights-based language, and (3) the legitimacy of the tax system and the IRS through the invocation of procedural justice. But we also show that codification of the TBOR does more: It creates a powerful normative basis for enforcement of those rights, and it may even create the rights themselves.

A. Supporting Voluntary Compliance

Voluntary compliance has been central to the national taxpayer advocate's thinking about tax administration. As she explained in the framework report:

The U.S. tax system is built on voluntary compliance. The IRS estimates that that it collects 85.5 percent of all tax owed. Of that amount, 83.1 percent is paid timely and voluntarily. Only two percent is collected late or through enforcement.

For the government, voluntary compliance is much cheaper than enforced compliance, because the government does not have to spend money to collect amounts that are voluntarily paid. Thus,

the IRS's overriding goal is to maximize voluntary compliance.⁵⁷

In her 2007 annual report, the national taxpayer advocate proposed the adoption of a TBOR in part because she believed that taxpayers would be "more disposed to voluntarily comply with the tax laws if they can see and understand a clear declaration of their rights as taxpayers."⁵⁸ Volume 2 of that report included an extensive survey and discussion of the literature on voluntary compliance.⁵⁹ In 2010 Olson proposed specific research on noncompliance,⁶⁰ and in 2012 she reported on the results of that research.⁶¹ Then, in her 2013 annual report, the national taxpayer advocate identified the lack of a TBOR as the most serious problem facing taxpayers. She explained:

Taxpayer rights are central to voluntary compliance. If taxpayers believe they are treated, or can be treated, in an arbitrary and capricious manner, they will mistrust the tax system and be less likely to comply with the laws voluntarily. If taxpayers have confidence in the fairness and integrity of the tax system, they will be more likely to comply.⁶²

That rationale is captured by the concept of legitimacy. Professor Tom Tyler has described legitimacy as:

a quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directives. This feeling of responsibility

⁵⁶Of course, no canon of statutory construction is absolute, and that includes the canon against surplusage. See *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). However, the legislative problems recounted in *King* that led the Supreme Court to effectively suspend the usual canons of statutory interpretation seem inapplicable to the enactment of the TBOR. The Court in *King* observed that the "inartful drafting" of the Affordable Care Act resulted in an act that "does not reflect the type of care and deliberation that one might expect of such significant legislation." *Id.* at 2492. No legislative history suggests similar aberrations infecting the enactment of the TBOR. Indeed, the fact that the TBOR is a specific amendment, inserted into the code with expert precision (it is not just a new section of the code, but a paragraph added to two existing paragraphs of section 7803(a)) would seem to foreclose any serious argument against application of the presumption against interpreting a statutory amendment as lacking significance.

⁵⁷Framework report, *supra* note 16, at 1 (footnotes omitted).

⁵⁸2007 annual report, *supra* note 3, vol. 1, at 485.

⁵⁹See *id.*, vol. 2, at 138-180.

⁶⁰Olson, "National Taxpayer Advocate 2010 Annual Report to Congress," vol. 2, at 71-88 (Dec. 31, 2010).

⁶¹Olson, "National Taxpayer Advocate 2012 Annual Report to Congress," vol. 2.

⁶²2013 annual report, *supra* note 24, vol. 1, at 5. See Eric Posner, "Law and Social Norms: The Case of Tax Compliance," 86 *Va. L. Rev.* 1781, 1799 (2000) ("If citizens trust officials . . . they are likely to cooperate with them when governance requires popular participation.").

reflects a willingness to suspend personal considerations of self-interest, because a person thinks that an authority or a rule is entitled to determine appropriate behavior within a given situation or situations.⁶³

The legitimacy of the tax system and of the IRS is vital to voluntary compliance because it creates “an acceptance by people of the need to bring their behavior in line with the dictates of an external authority.”⁶⁴ It exists “when the members of a society see adequate reason for feeling that they should voluntarily obey the commands of authorities.”⁶⁵ Voluntary compliance with the law is bolstered by a normative commitment to obedience based on legitimacy, which induces compliance because those who need to comply believe that “the authority enforcing the law has the right to dictate behavior.”⁶⁶

1. Taxpayers’ awareness of their rights.

The first way in which a TBOR can enhance voluntary compliance is, as Olson noted, by making taxpayers aware of the rights they already have. The national taxpayer advocate’s 2007 and 2013 recommendations that the IRS adopt a TBOR focused on that objective, but it was in the 66-page framework report that Olson provided a detailed blueprint for how increased taxpayer awareness of taxpayer rights could be achieved. For example:

Every user — any taxpayer who visits the official IRS site at any time, via any computer or mobile device — should find a banner titled “Know Your Rights as a Taxpayer” on the IRS home page, which would link to another page spelling out the full list of rights (and responsibilities),

which in turn would link to further pages with details about how these rights apply in specific situations.⁶⁷

In the framework report, Olson announced that TAS had recently obtained its own “channel” on the IRS website “to allow for enhanced placement of taxpayer rights on various pages,” and that TAS would develop “a complete suite of taxpayer rights products to support the awareness campaign.”⁶⁸ Olson also suggested extensive revisions to IRS Publication 1, “Your Rights as a Taxpayer,”⁶⁹ including the creation of various versions that could target specific phases of a tax controversy. She recommended enhancing distribution by amending the Internal Revenue Manual to instruct IRS employees on the points at which Publication 1 should be provided to taxpayers.⁷⁰ Moreover, Olson called for extensive IRS employee training on taxpayer rights.⁷¹

Although the national taxpayer advocate’s 2013 annual report was necessarily not as detailed as the framework report, it too recommended specific steps the IRS could take to increase taxpayer awareness of taxpayer rights. It proposed an extensive revision of Publication 1⁷² to set forth the 10 taxpayer rights and five responsibilities in clear, concise language with crisply designed graphics.⁷³ The report also recommended the following:

- that the IRS prominently display a link on its homepage to a taxpayer rights page;
- that when appropriate, the IRS use taxpayer rights language on the business operating division pages of its website and that those pages contain information about (or links to) TAS, low-income taxpayer clinics, specific taxpayer rights and responsibilities, and the Tax Court;

⁶³ Tyler, “Legitimacy and Criminal Justice: The Benefits of Self-Regulation,” 7 *Ohio St. J. Crim. L.* 307, 313-314 (2009). Not surprisingly, the national taxpayer advocate also subscribes to Tyler’s definition of legitimacy. See Olson, “Procedural Justice for All,” *supra* note 4.

⁶⁴ Tyler, *Why People Obey the Law* 25 (2006) (citing Lawrence L. Friedman, *The Legal System: A Social Science Perspective* (1975); and Robert S. Gerstein, “The Practice of Fidelity to Law,” 4 *Law & Soc. Rev.* 479 (1970)); see Marjorie E. Kornhauser, “The Tax Morale Approach to Compliance: Recommendations for the IRS,” 8 *Fla. Tax Rev.* 599, 614 (2007).

⁶⁵ Tyler, *supra* note 64, at 25 (citing David Easton, “The Perception of Authority and Political Change,” in *Authority* (1958)). See also Greenstein, “Toward a Jurisprudence of Social Values,” 8 *Wash. U. Jur. Rev.* 1 (2016); and Abreu and Greenstein, “Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS,” 69 *Tax Law.* 493, 495, n.2 (2016).

⁶⁶ Tyler, *supra* note 64, at 4.

⁶⁷ Framework report, *supra* note 16, at 16. An appendix provided a mockup of the modified homepage.

⁶⁸ *Id.*

⁶⁹ Publication 1 is one of the most ubiquitous of the IRS’s publications. “In many cases, Publication 1 is the first legally required notice of rights provided to taxpayers when the IRS contacts them.” *Id.* at 18-19.

⁷⁰ *Id.* at 20-22.

⁷¹ *Id.* at 23-36.

⁷² See 2013 annual report, *supra* note 24, vol. 1, at 18.

⁷³ See *id.* at 12-13.

- that the IRS require all its sites and offices that are open to the public to display a poster and brochures about the TBOR; and
- that the IRS require that all its operating divisions and functions, when proposing initiatives, include in their business case an analysis of the proposed operations in terms of the TBOR.⁷⁴

The framework report and the 2013 annual report showed that much could be done to enhance taxpayer awareness of taxpayer rights, and a study described in the 2013 annual report confirmed that taxpayers “had little knowledge of, but high interest in, the list of taxpayer rights in [the] proposed TBOR, and [that] they reacted very positively to it overall.”⁷⁵ Further, taxpayers “felt that learning about their rights made them view the IRS in a more favorable light.”⁷⁶

2. The language of rights.

Important as it is to make taxpayers aware of their rights, we believe the TBOR does more than that. Although the rights enumerated in the TBOR may have already been part of the tax law, they were not described in the code as rights.⁷⁷ What the TBOR calls “rights” were cast in the code as legal obligations imposed on the Treasury secretary and other tax officials.⁷⁸ The TBOR

performs an important function in expressing those government duties in the language of taxpayer rights. At the very least, it makes explicit that those government duties provide rights for their intended beneficiaries.

For example, section 6751(a) provides that “the Secretary shall include with each notice of penalty under this title information with respect to the name of the penalty, the section of this title under which the penalty is imposed, and a computation of the penalty.”⁷⁹ Similarly, section 7524 provides: “Not less often than annually, the Secretary shall send a written notice to each taxpayer who has a tax delinquent account of the amount of the tax delinquency as of the date of the notice.”⁸⁰ Although taxpayers clearly benefit from the obligations those provisions impose on the secretary, the benefit seems incidental to the duty imposed — that is, the language used seems to give the benefit the character of legislative grace.

What the TBOR does is translate those duties into the language of rights. By using that language, the TBOR recasts the existing obligations of IRS officials into entitlements possessed by taxpayers. In this way the language of rights shows a new level of respect toward taxpayers — a level that resonates strongly with U.S. legal and political history. As Olson pointed out, the inspiration for her endorsement of a TBOR was the United States’ founding documents, including the Bill of Rights. By evoking that document, the TBOR reinforces the message of legitimacy, thereby supporting voluntary compliance.

3. Procedural justice.

Another important way the TBOR reinforces tax law’s legitimacy is that the rights it enumerates are immediately recognizable as demands of procedural justice⁸¹ having to do with how members of the polity — taxpayers — should be treated by the government. For example, the fourth of the rights listed in the TBOR — the right

⁷⁴ *Id.* at 17.

⁷⁵ *Id.* at 16 (footnote omitted).

⁷⁶ *Id.* (footnote omitted). However, that study also showed that taxpayers “felt that publishing the rights alone would have little effect on tax compliance.” *Id.* The national taxpayer advocate noted that such a finding was “consistent with the observation that it is how rights are protected and implemented that has the greatest impact on compliance” (*id.*), and that is one of the reasons we feel it is important to detail the value of a TBOR, beyond making taxpayers aware of their rights.

⁷⁷ This is true notwithstanding the enactment of three different pieces of legislation bearing the heading “Taxpayer Bill of Rights” as described above. See TBOR 1, TBOR 2, and TBOR 3, *supra* note 16 and accompanying text. Despite the ambitious headings, the actual operative provisions added to the code by that legislation did not use the language of rights but either imposed duties on government employees or gave taxpayers the ability to bring actions against the government for engaging in behavior that harmed the taxpayer. None of those provisions uses the language of rights. See, e.g., sections 7430-7435 and 7426 (allowing actions by persons harmed by wrongful levies).

⁷⁸ In a few cases, taxpayer rights proceed from provisions that allow taxpayers to take action against the government, as described *supra* note 77. But even in those cases, the statute does not use the language of rights. For example, section 7431(a)(1) allows taxpayers to bring a civil action for unauthorized viewing or disclosure of return information. Therefore, it is not unreasonable to conclude that taxpayers have the right to bring the action — but our point is that the provision itself does not use the language of rights, and that the use of that language matters.

⁷⁹ Section 6751(a).

⁸⁰ Section 7524.

⁸¹ We are neither alone nor first in connecting taxpayer rights to procedural justice. See, e.g., Farrar, *supra* note 3, at iii (“If we look at the content of taxpayer rights we see that many of them are rights of due process, emphasizing process values that underlie a sound system of public administration.”).

to challenge the IRS's position and be heard — corresponds to a widely shared understanding that procedural justice requires that people have “an opportunity to present their arguments, [be] listened to, and [have] their views considered by the authorities.”⁸² Law's legitimacy is closely tied to perceptions of procedural justice: the perception that the outcomes we receive from our interactions with legal authorities result from fair procedures.⁸³ By tying the tax law to the demands of justice, the TBOR bolsters the tax system's legitimacy, thereby promoting voluntary compliance.

4. A caveat.

Compelling as the foregoing arguments are, we feel obliged to point out a potential flaw: The arguments are founded on the assumption that taxpayers will actually learn that the TBOR exists. That is much easier to propose than accomplish. The problem is that all the suggestions for the dissemination of information about the TBOR we have surveyed involve having the IRS serve as the communicator, with the implicit assumption that the IRS is communicating directly with taxpayers. That model presents at least two obstacles to success. The first is that many, if not most, taxpayers do not trust the IRS.⁸⁴ The second is that most taxpayers do not interact with the IRS directly, at least in the return filing process. Indeed, former IRS Commissioner John Koskinen estimates that about 90 percent of taxpayers use an intermediary to fill out and file their tax returns.⁸⁵ Those taxpayers are unlikely to be reached by IRS publications, posters, or placards. So at the very moment when inducing voluntary compliance is most important — upon the completion and filing of a return — the public's reliance on intermediaries makes it less likely that the IRS's message of taxpayer rights actually reaches its intended audience.

⁸² Tyler, *supra* note 64, at 163.

⁸³ *Id.* at 161-178; see Kornhauser, *supra* note 64, at 614 (“Procedural fairness, or justice, is a major determinant of tax morale generally.”).

⁸⁴ See Jeffrey M. Jones and Lydia Saad, “Americans Sour on IRS, Rate CDC and FBI Most Positively,” Gallup (May 23, 2013).

⁸⁵ Written testimony of John A. Koskinen, “Hearings Before the Senate Finance Committee on Regulation of Tax Return Preparers,” 113th Cong. 1 (Apr. 8, 2014).

These factors combine to make the community of tax professionals — the intermediaries — the front line in the effort to disseminate information on taxpayer rights. And that is one of the chief reasons we have undertaken this project: to make the importance of the TBOR salient to that very community. Intermediaries are in the best position to not only convey the existence of taxpayer rights but also to attempt enforcement. Yet neither role can be accomplished if the intermediaries do not know that taxpayers actually have rights and that there are strong arguments for enforcement of those rights.

B. Creating a Normative Basis for Enforcement

Recall the twofold basis for skepticism over the significance of the TBOR: first, that the TBOR purported to be only a repackaging of rights already contained in the code; and second, that the TBOR included no explicit legal remedies available to taxpayers for violations of the enumerated rights. Even though both of those things are true, we argue that the TBOR is a significant addition to the law beyond the enhancement of incentives for voluntary compliance because it helps create a normative basis for taxpayer demands for enforcement of the enumerated rights. It does this, we assert, by using the language of rights — and words matter.

One way words matter is that their mere utterance can have significant performative effect. When a judge in court says of an accused, “Guilty as charged!” those words matter: They change the legal status of the accused. If A says to B, “I offer you my 2004 Prius for \$500,” and B says, “I accept,” those words matter: They create an enforceable contract that did not exist before.⁸⁶ Also, context matters: If the judge says of the accused, “Guilty as charged!” to her friend over lunch, the words do not have the same performative effect. Nor do they if an ordinary citizen who has been following the trial says, “Guilty as charged!”

The adoption of the TBOR by the IRS and its codification by Congress had just that kind of performative effect. Its adoption by the IRS

⁸⁶ See J.L. Austin, *How to Do Things With Words* 4-7 (1962).

committed the agency to respect the enumerated rights. Its enactment as part of the code gave it the force of law. The combined effect was to strengthen taxpayers' normative basis for enforcement (NBE). The IRS's adoption of the TBOR puts taxpayers in a stronger position to demand that the agency respect taxpayer rights and thereby follow through on the commitment it made by that adoption. Codification of the TBOR puts taxpayers in a stronger position to demand that the government provide legal remedies for violations of the enumerated rights and thereby follow through on the TBOR's status as law.

This latter point — that the enactment of the TBOR gave it the force of law — is especially significant. As noted by the anonymous critic of the IRS's adoption of the TBOR, the Supreme Court has said, "The Government of the United States has been emphatically termed a government of law, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."⁸⁷ If that is correct — if it is an embarrassment to the law to have a right without a remedy — enacting taxpayer rights as an explicit part of the code significantly enhances taxpayers' normative foundation for demanding that the rights be enforced by the positive law — that is, taxpayers' NBE.

A second way the words of the TBOR matter concerns its specific language. Language can evoke meaning beyond what is explicit in the words used.

More generally, to give something a new verbal label can change what it is. For example, when a particular constellation of behaviors was first labeled sexual harassment, four things happened. First, the disparate behaviors became a unified concept. Second, that now-unified concept was imbued with particular value judgments — that is, it was no longer regarded as acceptable behavior. Third, the constellation of behaviors could be experienced in a different way

— for example, as offensive. Fourth, the combined effect of those three things changed the normative environment, which in turn paved the way for the creation of legal remedies for sexual harassment.

For the rights enumerated in the TBOR, recall that they were already in the code but formulated as duties imposed on tax officials. By redescribing those duties in the language of rights, the TBOR revealed that they were connected to the demands of procedural justice, which concern how members of the polity should be treated by the government as a matter of justice. Because the rights enumerated in the TBOR invoke the familiar language of procedural justice, the TBOR describes how taxpayers should be treated by the government as a matter of justice.

Further, to say that these taxpayer rights are demands of procedural justice is to say that their source is independent of positive law — that their source is justice itself.⁸⁸ As a result, a taxpayer whose TBOR rights have been violated is in a stronger normative position to demand a remedy for enforcement when the argument proceeds not just from the fact that section 7803(a)(3) recognizes those rights, but also from the fact that justice, independent of the law, also demands them. In that environment, the failure to enforce taxpayer rights would itself appear to be a failure of justice.

In sum, even if the TBOR does not provide explicit remedies to back up taxpayer rights, it strengthens a taxpayer's hand in demanding those remedies. It is well established that courts

⁸⁸ Whether justice is an independent source of rights that the law must recognize is a matter of long-standing debate in jurisprudence. The answer depends significantly on whether we take justice to be a defining feature of law. Natural law theorists take the position that justice is an essential quality of law. See, e.g., John Finnis, *Natural Law and Natural Rights* (1980); and Ronald Dworkin, *Law's Empire* (1986). On the other hand, positivists characteristically deny that justice is an essential quality of law. See, e.g., John Austin, *The Province of Jurisprudence Determined* (1832); and H.L.A. Hart, *The Concept of Law* (3d ed. 2012). For those theorists, if justice supports the recognition of a particular right, positive laws should recognize that right (because a positive law should be just), but the failure to do so does not touch the integrity of the positive law. The position we take in the text — that legal rights can have their source in justice itself — does not require resolution of that ancient debate. Our position finds support in federal and state jurisprudence, which has identified sources of legal norms, including rights, outside positive laws. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights."); and *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) ("All laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law . . . dictated by public policy, [and having] their foundation in universal law administered in all civilized countries.").

⁸⁷ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

have the power to design remedies not provided for in legislation, as evident from the case law finding private rights of action.⁸⁹ Indeed, courts have gone as far as to allow the award of damages as well as injunctive relief for violations of constitutional rights even though the Constitution by its terms is silent on the provision of remedies.⁹⁰

A fully developed analysis of the proposition that codification of the TBOR provides the basis for a private right of action is beyond the scope of this report, and we are not suggesting that any such right should exist for all violations of taxpayer rights. But our arguments about the performative effect of codification and the normative power of the language of rights support that claim, and we hope that taxpayers and practitioners will deploy those arguments in appropriate cases. Courts would then have the opportunity to determine the appropriateness of relief after considering all the facts and circumstances.⁹¹

That the TBOR strengthens taxpayers' NBE through the combination of its performative effect and its invocation of procedural justice is nicely explained by professor Cass R. Sunstein. He argues that in addition to controlling behavior directly, law also has an expressive function: It "make[s] statements."⁹² Sunstein points out that "legal 'statements' might be designed to change social norms."⁹³ The TBOR does that. Its use of the language of procedural justice, when coupled with the performative meanings that flow from its adoption by the IRS and its enactment by Congress, powerfully enhances taxpayers' NBE, thereby changing social norms. That combination

strengthens taxpayers' normative position to insist that the demands of procedural justice set out in the TBOR actually be satisfied by the actions of government officials and that the law provide remedies for noncompliance.

The idea that the legal recognition of rights can enhance the NBE is not unique to the tax law. A recent decision by the European Court of Human Rights provides an illuminating example. The court held that laws requiring transgender persons be sterilized as a condition for changing their names on official government documents violated article eight of the European Convention on Human Rights (ECHR). *The New York Times* reported:

The ruling does not mean immediate legal change in any of the countries, and none of them have so far changed their laws. The court does not possess a strong enforcement mechanism that can make lawmakers pass new legislation, and activists cautioned that it may take several more court cases before legal change comes to individual countries.⁹⁴

Yet many greeted the holding as an important milestone. "The European Court of Human Rights is very much respected in Europe, and we can expect that in the majority of countries where this issue comes up, this ruling will be respected as the new precedent," said Richard Köhler, the senior policy officer at Transgender Europe. He said the first effects of the decision may be seen in upcoming court cases in Bulgaria and Macedonia.⁹⁵

The court's decision did not itself require member states to permit transgendered persons to change their names on official documents without first undergoing sterilization, but it did change the normative environment for demanding enforcement of the court's holding. The TBOR's use of the language of rights, its

⁸⁹ Courts have the power to design rights of action even in the absence of an explicit provision in the positive law. See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975) (implied statutory cause of action for damages).

⁹⁰ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (implied constitutional cause of action for damages); and *Home Telegraph & Telephone Co. v. Los Angeles*, 227 U.S. 278 (1913) (implied constitutional cause of action for injunctive relief).

⁹¹ We believe that case-by-case determination of the appropriateness of enforcing taxpayer rights is optimal; we therefore disagree with Lederman's suggestion, made in response to the apparent impotence of the 20th-century legislation cast as various TBORs, that Congress enact a specific Code provision allowing taxpayers to recover damages for material violations. Lederman, "Of Taxpayer Rights," *supra* note 17.

⁹² Sunstein, "On the Expressive Function of Law," 144 *U. Penn. L. Rev.* 2021, 2024 (1996).

⁹³ *Id.* at 2024-2025.

⁹⁴ Liam Stack, "European Court Strikes Down Required Sterilization for Transgender People," *The New York Times*, Apr. 12, 2017. For information on the implementation of ECHR rulings, see Council of Europe, "Department for the Execution of Judgments of the European Court of Human Rights" (listing rulings made, recommendations for implementation, and governmental action in response). The foregoing shows that judicial recognition of a right can provide the normative support that results in change in the positive law.

⁹⁵ *Id.*

adoption by the IRS, and its codification by Congress had a similar effect. That contribution to the changing of taxpayers' NBE is, we believe, an important practical consequence of the TBOR. It also shows that the lack of explicit enforcement remedies is an insufficient reason for the tax community to ignore the TBOR.

The decision brings to mind the 2010 divided Tax Court holding in *O'Donnabhain*.⁹⁶ In that case the court held that the costs of hormone treatment and gender confirmation surgery undertaken to treat gender dysphoria⁹⁷ qualified as medical expenses deductible under section 213(a) rather than as nondeductible cosmetic surgery. Despite the taxpayer's victory, some of the interactions between the taxpayer and the IRS raise issues that implicate taxpayer rights. In the course of that litigation, the IRS Office of Chief Counsel allegedly made "extreme arguments" that raised "concerns about discrimination against transgender persons."⁹⁸ Indeed, after examining the briefs, trial transcripts, and other documents in the case, professor Katherine Pratt charged that the IRS's arguments were "inexplicable as a matter of longstanding tax law" and were likely "an attempt to deny the taxpayer's deduction for reasons having nothing to do with tax law — namely animus towards transgender persons and moral outrage regarding [gender confirmation surgery]."⁹⁹

As Pratt explains:

During the *O'Donnabhain* tax controversy and litigation, the IRS and Office of Chief Counsel showed disrespect for transgender persons, including O'Donnabhain. The IRS briefs and arguments, for example, include various instances of transgender stereotyping. The IRS and its expert witness, Dr. Dietz, treated O'Donnabhain like a criminal paraphiliac, lumping together GID [gender identity disorder] and criminal forms of sexual deviance. . . . [T]he IRS relegated O'Donnabhain's therapists,

doctors, and GID experts to the "them" (*i.e.*, the "homo-trans" "other") outgroup to try to impugn their credibility. The IRS not only doubted O'Donnabhain's legal arguments regarding the proper interpretation of section 213(d) but also aggressively disputed the factual assertions made by O'Donnabhain, her therapists, her doctors, and Dr. Brown.

The IRS characterized O'Donnabhain as deceitful, deluded, or pathetic. . . .

In addition, the IRS attacked the credibility of O'Donnabhain's therapist and doctors because they did not adopt a doubting stance towards their patient; the IRS argued that they should have spoken to third parties to independently corroborate her assertions, which the IRS disputed, about the emotional distress she felt. This attack on medical professionals who are sympathetic to the stories of transgender persons is extreme. It is difficult to imagine that the IRS would criticize medical professionals for believing their patients' claims of emotional distress in other medical contexts. The IRS also impugned [Dr.] Coleman's medical assessment of O'Donnabhain specifically because Coleman is a trans man.¹⁰⁰

The IRS conduct described by Pratt raises the question of the potential effectiveness of TBOR-based responses to the agency's treatment of the taxpayer in that case and in other cases in which taxpayers experience IRS behavior that they believe is disrespectful or discriminatory.¹⁰¹ Consider, for example, whether the Tax Court might have been less divided if the taxpayer's counsel had asserted that the IRS's treatment of the taxpayer in the litigation violated her "right to pay no more than the correct amount of tax" and her "right to a fair and just tax system," and then invited the court to examine the actions Pratt

⁹⁶ *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010).

⁹⁷ The court used the term "gender identity disorder."

⁹⁸ Pratt, *supra* note 13, at 374-375.

⁹⁹ *Id.* at 374.

¹⁰⁰ *Id.* at 374-379. Dr. Alex Coleman was "the Ph.D. psychologist who provided the [gender confirmation surgery] second opinion." *Id.* at 349.

¹⁰¹ The IRS acquiesced in the Tax Court's decision in *O'Donnabhain*. AOD 2011-03. However, we do not believe the acquiescence moots the relevance of the taxpayer's experience as an illustration of the possible utility of the TBOR.

described from that perspective.¹⁰² Moreover, consider whether asserting a violation of taxpayer rights in a situation like O'Donnabhain's strengthens a taxpayer's argument that she is entitled to receive fees and costs under section 7430 on the ground that the IRS's position was not substantially justified as a matter of law but rather was motivated by religious or political beliefs or objectives.¹⁰³ Or consider whether the court might have entertained an argument that the use of experts with established, published ideological or religious affiliations or disrespectful attitudes toward transgender individuals violated "the right to quality service."

Although a full examination of those questions is beyond the scope of this report, we believe the answers may point to enforcement of the rights provided by the TBOR. To be clear, we are not suggesting that it will be easy for taxpayers to prevail in those positions or that they should prevail in all cases. As noted previously, this report does not consider whether codification of the TBOR provides grounds for the recovery of even nominal damages like the apology payments Olson proposed in 2007. What we are suggesting is that the enactment of the TBOR gives taxpayers such as O'Donnabhain additional arguments in support of their positions and may even increase the likelihood of recovery of costs and fees in egregious cases.

Another example of this proactive use of the TBOR is suggested by a post on the Procedurally Taxing blog by professor T. Keith Fogg. He describes how the language used by the IRS in collection due process notices of determination is misleading and has caused taxpayers to file Tax

Court petitions a day late, resulting in dismissal. Together with Carlton Smith, the low-income taxpayer clinic Fogg heads at the Harvard Law School is litigating the issue.¹⁰⁴ Might Fogg and Smith strengthen their claim by arguing that the misleading language violates the taxpayer's "right to be informed" — the very first right enumerated in the TBOR¹⁰⁵ — and that the violation should be redressed by estopping the IRS from taking a contrary position? We believe they might.

One more example implicating the right to be informed underscores our point. The IRS has long maintained that taxpayers are not entitled to rely on statements the agency makes in written documents it issues, such as publications and instructions to forms.¹⁰⁶ The courts have agreed, denying relief to taxpayers even when a "review of the relevant IRS publications reveals that the guidance given to taxpayers for the years at issue is less than clear and may even be misleading."¹⁰⁷ Despite expressing some sympathy for the plight of taxpayers in those situations, courts still conclude:

Unfortunately, the fact that an IRS publication is unclear or inaccurate does not help the taxpayer. Well-established precedent confirms that taxpayers rely on such publications at their peril. Administrative guidance contained in IRS publications is not binding on the Government, nor can it change the plain meaning of tax statutes. . . . The authoritative sources of Federal tax law are the statutes, regulations, and judicial

¹⁰² Judge Joseph H. Gale wrote the majority opinion, in which judges John O. Colvin, Mary Ann Cohen, Michael B. Thornton, L. Paige Marvel, Robert A. Wherry Jr., Elizabeth Crewson Paris, and Richard T. Morrison joined. Judges James S. Halpern, Mark V. Holmes, Joseph Robert Goeke, Maurice B. Foley, and David Gustafson wrote separately.

¹⁰³ Section 7430(c)(4)(B) (providing an exception to the award if the IRS's position was "substantially justified").

¹⁰⁴ Fogg, "IRS Takes Pugnacious Attitude Towards Mr. Mayweather," *Procedurally Taxing* (Aug 12, 2017); Fogg, "Collection Due Process Notice Continues to Mislead Taxpayers Into Filing Their Tax Court Petition Too Late," *Procedurally Taxing* (Oct. 4, 2017).

¹⁰⁵ Section 7803(a)(3)(A). The IRS explains in Publication 1, as well as on its website, as follows:

Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.

¹⁰⁶ Mitchell Rogovin and Donald L. Korb, "The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within," 46 *Duq. L. Rev.* 323 (2008).

¹⁰⁷ *Müller v. Commissioner*, 114 T.C. 184, 194 (2000).

decisions; they do not include IRS publications.¹⁰⁸

Although a full discussion of this topic is beyond the scope of this report, we believe the question of taxpayer reliance on IRS statements made in IRS documents that are specifically intended to provide guidance to taxpayers implicates issues of taxpayer rights. In future work we plan to explore how the arguments we make here apply to that question.

C. Creating New Rights

Our discussion so far has assumed that the rights enumerated in the TBOR were already in the code. We have made that assumption largely because it was a key part of the national taxpayer advocate's campaign for the TBOR. As she explained in her 2007 annual report to Congress, "since the U.S. tax system is a mature system, the rights . . . articulated in the Taxpayer Bill of Rights should be generally derived from provisions that are *already part of* the tax laws or procedures."¹⁰⁹ This understanding is reflected in the IRS's announcement of the adoption of the TBOR on June 10, 2014: "The Taxpayer Bill of Rights takes the multiple existing rights embedded in the tax code and groups them into 10 broad categories, making them more visible and easier for taxpayers to find on IRS.gov."¹¹⁰

Although the rights enumerated in the TBOR may have already been part of the tax law, it is important to recall that those provisions were cast in the language of legal obligations imposed on the Treasury secretary and other tax officials. Therefore, the national taxpayer advocate's contention that the rights were already part of the law depends on the conclusion that duties imposed on tax officials by the code entail corresponding taxpayer rights. That conclusion follows logically from Olson's deeper political vision, which embraces a particular version of the social contract: "The United States tax system is

based on a social contract between the government and its taxpayers — taxpayers agree to report and pay the taxes they owe, and the government agrees to provide the service and oversight necessary to ensure that taxpayers can and will do so."¹¹¹ This depiction of a cooperative relationship between the taxpayer and the government — a relationship cemented by reciprocal responsibilities — is hospitable to the notion that duties imposed on tax officials imply corresponding taxpayer rights.

But what if the relationship between the taxpayer and the government is different? What if even the most benevolent government poses a constant potential threat to individual liberty? If that is true, the nature of the relationship is essentially contentious, not cooperative, and the principal concern of a rights regime would be to protect individual liberty from abuses of government power. Under that view, the IRS, as an agency of the federal government, poses a threat of abusing its power and interfering with taxpayer rights. A widely perceived recent example involved the IRS's use in 2010 of what the Treasury Inspector General for Tax Administration described as "inappropriate criteria to identify organizations applying for tax-exempt status to review for indications of significant political campaign intervention."¹¹²

When the individual-government relationship is viewed as more contentious, rights and duties appear asymmetrical. It is still true that a statement of rights necessarily implies government duties. For example, in the Bill of Rights, the Sixth Amendment provides:

¹¹¹ 2007 annual report, *supra* note 3, vol. 1, at 478.

¹¹² TIGTA, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review" (May 14, 2013). See also Nicholas Confessore and Michael Luo, "Groups Targeted by I.R.S. Tested Rules on Politics," *The New York Times*, May 26, 2013. The scandal led to investigations by the FBI, the Department of Justice, and Congress. In the wake of the controversy, the acting commissioner of internal revenue, the commissioner of the Tax-Exempt and Government Entities Division, and the director of the exempt organizations division resigned, and Congress attempted to impeach the successor commissioner. Luca Gattoni-Celli and David van den Berg, "Koskinen Considers Succession Planning Amid Calls for Ouster," *Tax Notes*, Feb. 6, 2017, p. 678; William Hoffman, "Koskinen Impeachment Paused but Not Forgotten as Elections Near," *Tax Notes*, Oct. 10, 2016, p. 183; Stephen Dinan and Seth McLaughlin, "House Republicans Derail Impeachment of IRS Commissioner," *The Washington Post*, Dec. 6, 2016. Concern about IRS abuse had led to Congress's earlier enactment of legislation with the label "Taxpayer Bill of Rights." See *supra* note 17 and accompanying text. See also Lederman, "Of Taxpayer Rights," *supra* note 17.

¹⁰⁸ *Id.* at 194-195 (citations omitted).

¹⁰⁹ 2007 annual report, *supra* note 3, vol. 1, at 478 (emphasis added).

¹¹⁰ IR-2014-72.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The use of the language of rights in the Sixth Amendment directly implies government duties: The government is under a duty not to deny accused persons a speedy and public trial by an impartial jury. It is also under a duty to inform the accused of the nature and cause of the accusation and to permit the accused to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Those provisions are judicially enforceable.¹¹³

But from the perspective of the contentious view of the taxpayer-government relationship, duties do not necessarily entail rights. That is, the government may have a duty to behave in a particular way or to refrain from behaving in a particular way, but the existence of that duty does not itself necessarily confer any right as a matter of positive law (though there may still be a right as a matter of justice¹¹⁴). Without more, the government's duty does not necessarily entitle any person to enforcement of the prescribed government behavior.

The Supreme Court seems to agree. In *Richardson*,¹¹⁵ the Court considered the duty created by Article I, section 9, clause 7, of the Constitution, which provides: "No Money shall

be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Relying on that clause, an individual taxpayer sued to challenge the constitutionality of the provision of the Central Intelligence Agency Act that allows the CIA to account for its expenditures "solely on the certificate of the Director."¹¹⁶ Concluding that the suit should be dismissed for lack of standing, the Supreme Court held that a taxpayer may not "employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."¹¹⁷ Tellingly, the Court observed:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.¹¹⁸

The constitutional duty on the part of federal government officials to provide a regular statement and account confers no legally cognizable right on any individual to obtain that very statement and account. Similarly, the imposition of duties on tax officials does not necessarily create taxpayer rights.

The Constitution's Bill of Rights offers an interesting perspective on this point. As was the case with Article I, section 9, clause 7, which was at issue in *Richardson*, many of the items we have come to regard as rights in the Bill of Rights are not explicitly articulated as such. Rather, they are formulated as prohibitions on government action. For example, the First Amendment provides in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Viewed from what we have been calling the "contentious" perspective, these prohibitions on Congress's establishing a religion

¹¹³ See, e.g., *Barker v. Wingo*, 407 U.S. 514 (1972) (right to speedy trial); *United States v. Carll*, 105 U.S. 611 (1881) (right to notice of accusation); *Bruton v. United States*, 391 U.S. 123 (1968) (right to confront witnesses); and *Johnson v. Zerbst*, 304 U.S. 458 (1938) (right to counsel).

¹¹⁴ See *supra* note 88 and accompanying text.

¹¹⁵ *United States v. Richardson*, 418 U.S. 166 (1974).

¹¹⁶ *Id.* at 169 (quoting 50 U.S.C. section 403j(b)).

¹¹⁷ *Id.* at 174 (quoting *Flast v. Cohen*, 392 U.S. 83, 114 (1968)).

¹¹⁸ *Id.* at 179.

or banning the free exercise thereof did not alone necessarily create rights that can be enforced. Converting those prohibitions into rights arguably required something more — and that something was the Ninth Amendment.

One of the important functions of the Ninth Amendment is to confer on all of the first eight amendments the status of *rights*: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others reserved by the people.” The Ninth Amendment characterizes the first eight amendments as expressing rights, thereby imbuing them all with the linguistic meaning that comes with the language of rights. It does this even though the language of rights is not explicitly used in those amendments.¹¹⁹

Similarly, when the individual-government relationship is viewed as contentious, the TBOR arguably does not articulate rights that proceed from the duties previously imposed on tax officials. Converting a duty imposed on tax officials into a taxpayer right requires an extra step — an affirmative act of creating a legal right. Therefore, under the contentious view, taxpayer rights were not a part of the tax law until Congress made them so by enacting section 7803(a)(3), using the language of rights. And the absence of preexisting taxpayer rights that flow from preexisting government duties is consistent with the absence of positive legal remedies in the code — at least until the TBOR was enacted by Congress. As we argue in Section III.B above, the enactment of the TBOR greatly strengthened the normative basis for demanding that legal remedies be given for violations of taxpayer rights.

Therefore, the explicit recognition and protection of rights in the positive law is crucial to the conclusion that the rights exist: The presence of taxpayer rights cannot be assumed to be implied in all cases. This worry that when government power is not trusted, rights cannot be left to implication, fueled the debate that led to the ratification of the Bill of Rights in 1791 as amendments to the Constitution:

¹¹⁹ This reading of the Ninth Amendment seems supported by its plain meaning. See also *Griswold*, 381 U.S. at 486-499 (Goldberg, J., concurring).

One of the many points of contention between Federalists and Anti-Federalists was the Constitution’s lack of a bill of rights that would place specific limits on government power. Federalists argued that the Constitution did not need a bill of rights, because the people and the states kept any powers not given to the federal government. Anti-Federalists held that a bill of rights was necessary to safeguard individual liberty.¹²⁰

Understanding the TBOR not as a document that just uses new language to make explicit rights that proceed from preexisting duties, but as a document that actually brings taxpayer rights into existence, accords with the text of section 7803(a)(3). The statute provides that the commissioner will ensure that IRS employees are familiar with and act in accord with “taxpayer rights as afforded by other provisions of this title.”¹²¹ That is, section 7803(a)(3) instructs the IRS to read what is already given by other provisions in a new way — to read them now as taxpayer rights.

D. Recapitulation

We have made three arguments for concluding that the adoption and enactment of the TBOR was significant, that it added something important to the law. If the relationship between taxpayers and the government is one of cooperation in the joint enterprise of raising revenue, (1) the TBOR has heightened taxpayers’ awareness and understanding of their rights, thereby contributing to the perception of tax law’s legitimacy and creating incentives for voluntary compliance; and (2) the TBOR’s use of the language of rights and its adoption by the IRS and enactment by Congress have powerfully reinforced the NBE of taxpayer rights. But if we understand the relationship to be more contentious, as a relationship in which the IRS poses a constant potential threat to taxpayer liberty, the TBOR can be seen to have had the added effect of creating new taxpayer rights.

¹²⁰ Bill of Rights Institute, “Bill of Rights of the United States of America.”

¹²¹ Section 7803(a)(3) (emphasis added).

This last point has implications beyond the importance of taxpayer rights. Recall that as originally proposed by the national taxpayer advocate, the TBOR included a list of taxpayer obligations, which followed from her view of the relationship between the government and the taxpayer as reciprocal. But the TBOR ultimately adopted by the IRS¹²² and enacted by Congress did not contain that list.¹²³ Why not? If we view the relationship between taxpayers and the government as contentious, the answer to that question quickly emerges.

V. Taxpayer Obligations

We begin our examination of the relationship between the TBOR and taxpayer obligations by returning to the objective animating the national taxpayer advocate's proposed bill of taxpayer rights and responsibilities, which was to create effective incentives for promoting voluntary tax compliance. As she explained in her 2013 annual report to Congress:

The tax system will work best if we provide transparency, not only about taxpayer rights but also about taxpayer responsibilities. The National Taxpayer Advocate views the relationship between the government and its taxpayers as a social contract of sorts — the U.S. government requires its tax collector to treat taxpayers with courtesy and respect and asks taxpayers to cooperate with the tax collector. In recognition of this two-way relationship, we recommend the Taxpayer Bill of Rights also contain a section outlining taxpayer responsibilities. Overall, the document would lay out in general but very clear terms what taxpayers must do to comply with the tax laws and what rights taxpayers possess in that process. The document would serve to heighten

awareness of these rights and responsibilities among taxpayers and IRS employees alike.¹²⁴

Indeed, the national taxpayer advocate had been advocating the adoption of something like a taxpayer bill of responsibilities since she began promoting a TBOR in her 2007 annual report to Congress.¹²⁵ Her proposed statement of taxpayer obligations included the obligations to be honest, to be cooperative, to provide accurate and timely information and documents, to keep records, and to pay taxes on time.¹²⁶

Olson's rationale for including taxpayer duties in a bill of taxpayer rights echoed the OECD's explanation of why the taxpayer charters in various countries typically provide not only for taxpayer rights but also for obligations.¹²⁷ The drafters of a model taxpayer charter, who followed up on the work begun by the OECD, also included both rights and duties in the model they proposed. As they explained:

Recognizing and enshrining comprehensive Taxpayer Rights in legislation will contribute substantially to both the perception and reality of fairness and integrity in the tax system. Placing statements of Taxpayer Responsibilities in an over arching document reinforces the proposition that while holding rights, taxpayers must also shoulder responsibilities and do so in good faith.

The adoption of such a document may actually bring about the partnership philosophy of the taxpayer, the tax advisor, and the tax administration cooperating together. Consider that Taxpayer Rights are responsibilities for the tax administration and Taxpayer Responsibilities are rights of the tax

¹²⁴ 2013 annual report, *supra* note 24, vol. 1, at 6 (footnote omitted). See Kirsty Unger, "Ethics Codes and Taxpayer Charters: Increasing Tax Morale to Increase Tax Compliance," 12 *Ejournal Tax Res.* 285, 484 (2014); but see Leigh Osofsky, "Some Realism About Responsive Tax Administration," 66 *Tax L. Rev.* 121, 140-142 (2012) (arguing that responsive regulations ensuring procedural justice for taxpayers do not necessarily increase compliance).

¹²⁵ See 2007 annual report, *supra* note 3, vol. 1, at 462.

¹²⁶ *Id.*

¹²⁷ *Supra* note 27 and accompanying text.

¹²² See IR-2014-72.

¹²³ See section 7803(a)(3).

administration. This mirror image of rights and responsibilities, laid out and acted upon in a balanced and constructive way, should enhance the relationships between all stakeholders.¹²⁸

As we have noted, the political vision underlying the national taxpayer advocate's recommendations is one of a social contract between taxpayers and the government as partners in raising revenue. Of course, that vision has moral implications if parties to a contract have a moral obligation to further the contract's objectives. If that is the case, the government, as a party to the social contract, has a moral obligation to treat taxpayers justly, as the TBOR prescribes, and taxpayers, in response, have their own moral duty to contribute to the public fisc. Paying taxes, in this view, is a moral duty, and the list of taxpayer obligations included in the proposed TBOR was designed to remind taxpayers of that duty. Thus, when the list of obligations reminds taxpayers of their duty to timely pay the correct amount of taxes, it reminds them not only of what they are legally required to do as persons subject to the law but also of what they *ought* to do as members of a community.

However, we have also argued that there is an alternative way of viewing the relationship — one that is more contentious, in which the government is seen as a threat to liberty. Looking at the relationship through this lens brings into focus two features of U.S. culture that militate against the national taxpayer advocate's proposal to include within the TBOR a list of taxpayer obligations. The first of these features is specific to tax: the widespread failure of U.S. taxpayers to internalize the sharing norms at the core of the duty to pay taxes. The second is more general: a moral prejudice against imposing affirmative duties on individuals.

A. The Failure to Internalize Sharing Norms

We hypothesize that one important difference between tax and many (although certainly not all)

other fields of law is that the norms that define income taxation have not generally been internalized by the taxpaying public. According to the *Stanford Encyclopedia of Philosophy*:

Internalization is conceived as the process by which people develop a psychological need or motive to conform to a set of shared norms. When norms are internalized, norm-abiding behavior will be perceived as good or appropriate, and people will typically feel guilt or shame at the prospect of behaving in a deviant way.¹²⁹

Professor Christine Horne further explains that:

Norms may . . . be internalized when individuals come to value the behavior specified by the norm for its own sake: that is, they follow social norms because they want to. When seen in this way, the concept of internalized norms is consistent with the term “values.”¹³⁰

Individuals typically conform their behavior to the norms imposed by contract law, tort law, property law, and criminal law, scarcely noticing most of the time that they are doing so. The reason, we believe, is that those external legal norms generally coincide with individuals' internal moral norms: The law instructs them to do what is largely consistent with what they want to do anyway, since they believe it to be morally correct. Hence, individuals generally abide by contractual obligations, try to behave non-negligently, respect property rights, and avoid committing crimes — because they think that is what they morally ought to do, not merely because they believe it is what they are legally compelled to do. Consequently, behavior that conforms to the dictates of those other areas of law does not generally feel constrained or coerced by law.

By contrast, income tax law feels external, and compliance with it feels coerced, because the norms at the core of tax law are generally not

¹²⁹ Cristina Bicchieri and Ryan Muldoon, “Social Norms,” *The Stanford Encyclopedia of Philosophy* (Spring 2014).

¹³⁰ Horne, “Sociological Perspectives on the Emergence of Social Norms,” in *Social Norms* 4 (2001).

¹²⁸ See Cadesky, Hayes, and Russell, *supra* note 22.

internalized by the taxpaying public — that is, the public legal norms of tax do not coincide with personal moral norms. Put another way, although laws against murder are reinforced by an internalized moral norm against killing, in the absence of internalization of the sharing norms implicit in taxation, we do not think that most people would transfer their property to the government if there were no legal obligation to do so.

There are two sharing norms fundamental to income taxation: the sharing of resources, and the sharing of private information. The tax law requires individuals to share their wealth for the public good and to share information with the government to facilitate collection of the tax. Because those norms generally have not been internalized as moral norms, the tax system's demands that taxpayers share both their resources and their private information feel external and coercive. Even if people would find some way to share their resources with others and their private information with the government in the absence of the tax law, that sharing would likely not take the regimented, formalized form that compliance with the tax law requires.

And although tax law is not the only field of law that feels imposed from outside (environmental law, occupational health and safety law, and other regulatory fields that constrain behavior are also perceived by many as coercive), it is the only one of broad, nearly universal application to individuals who are engaged in the simple activity of earning money and supporting themselves and their loved ones. Even though the difference between tax and

regulatory fields like environmental law may be one of degree and not kind, the degree is of such magnitude in terms of breadth and depth of application that the burden of the tax law feels extraordinarily coercive.¹³¹

Income taxation is also a direct external assault on the capitalist norms that emphasize the private ownership of property and personal privacy. Thus, not only have individuals not internalized the sharing norms that underlie tax, but those sharing norms conflict with the strongly internalized capitalist norms of private property and privacy.

B. The Prejudice Against Affirmative Duties

Importantly, the two sharing norms impose affirmative duties on taxpayers — that is, duties to take affirmative action to share wealth and to share information. And that creates a further problem because of a cultural prejudice against the legal imposition of affirmative duties. To understand this prejudice, it is helpful to take a brief detour into the philosophy of action.

The law tends to treat acts that cause harm differently from failures to act (omissions) that cause harm. As the British theorist P.J. Fitzgerald noted:

Crimes, for instance, consist more often of acts than omissions. Of this there are many examples besides the well-known failure-to-rescue cases.¹³² . . . So, for example, a finder of a lost article commits the offence of larceny if he takes the article and keeps

¹³¹ Clearly, taxpayers can comply with the tax law even if they have not internalized the norms that underlie it and perceive it as coercive. Aside from the questions raised about whether the U.S. tax system really depends on voluntary compliance (*supra* note 2), scholars have offered theories of voluntary compliance with social norms that do not rely on the internalization of those norms. *See, e.g.*, Bicchieri and Muldoon, *supra* note 129 (social identity theory); and Posner, *supra* note 62 (signaling theory). *But see* Dan M. Kahan, "Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms," 36 *U. Rich. L. Rev.* 367 (2003) (criticizing Posner's signaling theory). The point of our discussion in the text is to argue that the general failure to internalize tax's sharing norms is consistent with the contentious view of the taxpayer-government relationship. Although we recognize that voluntary compliance was an important motivating objective behind the national taxpayer advocate's promotion of the TBOR, explaining what motivates compliance with the tax law in the absence of that internalization is beyond the scope of this report.

¹³² Fitzgerald's reference here is to the contrast between causing harm by an affirmative act (*e.g.*, by shooting someone to death) and causing harm by refraining from acting (*e.g.*, by failing to rescue someone in mortal danger).

it for himself, but commits no offence by merely letting the article lie where it is, since the law does not require finders of property to drop everything in order to return it to its owner. In certain circumstances it may be a criminal or civil wrong to lie; but mere failure to speak the truth, i.e. by remaining silent, will not normally amount to fraud, unless, by virtue of some special relationship between the persons concerned, the law imposes a duty to reveal the truth. Although a contracting party can often avoid being bound by a contract which he entered into by reason of the other party's misrepresentations, mere silence does not generally amount in law to misrepresentation. In contracts of sale, for instance, the general rule is *caveat emptor*: the seller does not have to tell the buyer what is wrong with the goods. Again, the law of tort protects against intentional and negligent injury, and not in general against the non-performance of benefits. One may be liable in negligence for negligently injuring another, but not for not bothering to rescue that other.¹³³

Fitzgerald suggested:

This reluctance to penalise omissions is justified by the fact that to prohibit an act (by making its commission a crime or civil wrong) leaves the subject free to do many alternative acts; to prohibit an omission (by requiring the act to be performed) leaves him free to do only one act, the act which he is forbidden to omit; and this is a more severe burden to place on the citizen than if he is merely forbidden to perform an act.¹³⁴

In other words, requiring an individual to do something limits liberty to a much greater extent than prohibiting the individual from doing something. Consider Fitzgerald's larceny

example: "The law does not require finders of property to drop everything in order to return it to its owner."¹³⁵

Fitzgerald's analysis implies a moral point: If we care about liberty, we should be reluctant to impose duties on individuals to act. Of course, a deep and powerful cultural tradition in the United States values liberty.¹³⁶ And when we couple that cultural dedication to liberty with the absence of internalized sharing norms, which are at the heart of income taxation, we can see why a list of taxpayer responsibilities would fail to resonate with U.S. taxpayers. Indeed, such a list would rub salt in the wound by reminding taxpayers of the limitations on their liberty imposed by the tax law, and it would specifically remind them that they are required to act in accordance with norms that they do not generally consider morally binding.

The national taxpayer advocate recognized that difficulty. Even as Olson recommended in her 2013 annual report a TBOR that included a list of taxpayer responsibilities, she noted:

While the National Taxpayer Advocate believes a statement of taxpayer responsibilities would promote effective tax administration by providing taxpayers with greater clarity about what is expected of them, the IRS's obligation to respect taxpayer rights should not be contingent on whether a taxpayer has fulfilled these responsibilities. For example, a taxpayer who did not keep all records or did not pay all tax timely does not forfeit his right to retain a representative to assist him in dealing with the IRS.¹³⁷

There is an obvious tension within the 2013 annual report between this prioritization of taxpayer rights over taxpayer duties and the recognition of the two-way relationship between the government and taxpayers.¹³⁸ This tension was ultimately resolved when both the IRS and

¹³³ Fitzgerald, "Acting and Refraining," 27 *Analysis* 133, 138-139 (1967). See also Greenstein, "The Action Bias in American Law: Internet Jurisdiction and the Triumph of Zippo Dot Com," 80 *Temple L. Rev.* 21 (2007).

¹³⁴ Fitzgerald, *supra* note 133, at 139.

¹³⁵ *Id.* at 138.

¹³⁶ See generally Greenstein, "Action Bias" *supra* note 133.

¹³⁷ 2013 annual report, *supra* note 24, vol. 1, at 6 n.6.

¹³⁸ *Id.* at 6.

Congress adopted a TBOR that did not contain a list of taxpayer responsibilities.

The adoption and codification of a TBOR without an accompanying list of taxpayer responsibilities is not surprising. It reflects the contentious view of the relationship between taxpayers and the government — a view that assumes an imbalance of power between the government and taxpayers and a corresponding asymmetry between government duties and taxpayer rights. Under that view, taxpayers need protection from potential government overreach, and a TBOR is therefore crucial. However, because the relationship is seen as lopsided rather than reciprocal, explicitly setting forth taxpayer rights does not require explicitly setting forth taxpayer duties.

Further, recall that the reciprocal model has a moral dimension: moral obligations on both the government and taxpayers to fulfill their respective parts of the social contract. The more contentious model also has a moral dimension, but it is lopsided: The government is morally obligated to respect taxpayers' rights, but taxpayers are under a much more limited moral obligation to worry about the well-being of the government. Accordingly, it makes sense to have a formal enumeration of taxpayer rights but not taxpayer obligations.

Finally, the adoption and enactment of a TBOR without a list of taxpayer obligations resonates with deep cultural, political, and legal traditions in the United States. It resonates with the ideological origins of the country. (After all, the "indictment" against the King of Great Britain that launched the Revolutionary War charged him with "imposing Taxes on us without our Consent."¹³⁹) It resonates with the decision early in U.S. history to append a Bill of Rights to the Constitution.¹⁴⁰ And it resonates with the failure to internalize sharing norms and the prejudice against affirmative duties discussed above.¹⁴¹

¹³⁹ The Declaration of Independence, para. 19 (1776).

¹⁴⁰ See 2013 annual report, *supra* note 24, vol. 1, and accompanying text; and *supra* note 120 and accompanying text.

¹⁴¹ For data supporting the lack of internalization of sharing norms, see 2013 annual report, *supra* note 24, vol. 1, at 16 n.43 (reporting the results of a taxpayer focus group, which suggests that taxpayers interact with the IRS in instrumentalist ways rather than in ways driven by an internalized sharing norm).

VI. Conclusion

In the end, the national taxpayer advocate achieved the objective she sought — and more. Her focus was always to improve the position of taxpayers regarding their rights. Because of the TBOR, taxpayers are now more likely to be aware of those rights; they are more likely to voluntarily comply with the tax law; and their representatives, once acquainted with the TBOR, may both enhance that awareness and attempt enforcement, if necessary. Moreover, the adoption of the TBOR by the IRS, its enactment by Congress, and its use of language that invokes the demands of justice combine to enhance taxpayers' NBE of those rights. Finally, if the national taxpayer advocate was incorrect in her belief that the enumerated rights already existed in the tax law before the TBOR's adoption and enactment, the TBOR's effect was to create those rights by an act of Congress.

Our account has focused on the relationship between the taxpayer and the government. The national taxpayer advocate's view of that relationship has been one of reciprocity and cooperation in the enterprise of revenue raising. Codification of the TBOR's 10 rights is consistent with that reciprocal view, in which "taxpayers agree to report and pay the taxes they owe to enable their government to function, and the government agrees to provide the service and oversight necessary to ensure that taxpayers can and will do so."¹⁴² Respecting taxpayer rights is part of the service and oversight the government agrees to provide, and the enumeration of those rights increases the legitimacy of the tax system and makes it more likely that taxpayers will voluntarily comply. That was the objective Olson wanted to achieve with her proposal.

But it turns out that the alternative view of the taxpayer-government relationship as one of contention also supports her goal of codifying the TBOR. If taxpayers are vulnerable to overreach by a government with dangerously disproportionate power, writing new rights into the law is an important step toward taxpayer protection. And it remains important that taxpayers know about

¹⁴² *Id.* at 7.

their rights for the reasons the national taxpayer advocate identified in her proposal.

The adoption and enactment of a TBOR listing only taxpayer rights may not be precisely what Olson sought — after all, from the outset she promoted the inclusion of a list of taxpayer obligations. But Congress's failure to codify the list of taxpayer responsibilities does not detract from her achievement. The existence of taxpayer rights balances taxpayers' existing duty to pay — that is, the absence of a list of taxpayer duties can be seen as largely rhetorical because those duties already exist in the tax law and taxpayers are aware of them. Empirical research commissioned by TAS supports this. It revealed that taxpayers did not endorse the listing of taxpayer responsibilities largely because they thought it was unnecessary.¹⁴³ Moreover, the absence of the list of taxpayer obligations is consistent with the more contentious view of the taxpayer-government relationship, which is likely the dominant view in U.S. society. By contrast, taxpayers are largely unaware of the existence of taxpayer rights, as TAS's empirical research also confirmed.¹⁴⁴

The IRS's adoption of the TBOR and its codification in section 7803(a)(3) can change not only taxpayers' view of the tax system but also the normative environment for enforcing taxpayer rights in ways that were previously unavailable. What remains is for tax scholars and professionals to know that, so they can use the TBOR to protect their clients and to advocate for compensation for violations of taxpayer rights. Ultimately, it will be up to the courts to decide which taxpayer rights should be enforced and which should remain aspirational, but that is at it should be.

Fundamentally, the TBOR contains standards that govern interactions between taxpayers and the government; it fleshes out the rules previously provided by the various duties on government officials already imposed by the statute.¹⁴⁵ As with all standards, the provisions of the TBOR should

be interpreted based on multiple relevant factors — a function particularly suited to the judiciary. We anticipate that sometimes courts will decline to enforce the TBOR, perhaps fearing opening the floodgates of claims that could cripple tax administration. Indeed, some tax administrators have openly voiced those concerns. For example, the Australian commissioner of taxation “expressed particular concern that the introduction of a [taxpayer] charter should not clog the courts and impede efficient ATO [Australian Taxation Office] administration by opening the floodgates to a spate of legal actions against the ATO.”¹⁴⁶ But at other times courts will opt for enforcement or will use a TBOR violation as a factor that informs their decisions.

We expect that the identity and circumstances of the taxpayer will affect a court's decision on enforcement. In situations like that which O'Donnabhain faced, an assertion of taxpayer rights could produce judicial action to demand more respectful treatment from the government, an injunction, the award of damages, or perhaps an award of costs. Courts should be free to tailor the remedy to the severity of the violation, the reason for the violation, and the circumstances of the parties involved. Framing the TBOR as a set of standards, which is what its codification in section 7803(a)(3) does, will allow the courts to do precisely that. A one-size-fits-all approach dictating full enforcement or no enforcement would jeopardize either effective tax administration or taxpayer rights. Possibly unwittingly, in codifying the TBOR as it did, Congress got it just right. ■

¹⁴³ See *id.* at 17 (footnote omitted).

¹⁴⁴ *Id.* at 16.

¹⁴⁵ For a discussion of the relationship between rules and standards in the code, see Abreu and Greenstein, “The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code,” 64 *Duke L.J. Online* 53 (2015).

¹⁴⁶ Bentley, “Definitions and Development,” in *Taxpayers' Rights*, *supra* note 3.