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Nontaxpayer Litigation of Income Tax Disputes

Paul B. Stephan III*

Outside the tax area, the law of standing reflects the general proposition that a citizen not directly subject to regulation may under some circumstances go to court to challenge government action or inaction. Although a lack of clarity in the Supreme Court's decisions makes it impossible to say exactly when standing exists, the unregulated citizen clearly has some opportunities to sue to obtain the benefits of government intervention in someone else's affairs.1

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1. The leading administrative law cases include Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (homeowners in vicinity of nuclear power plant construction site granted standing to challenge constitutionality of Price-Anderson Act limiting liability of nuclear plant operators); United States v. SCRAP, 412 U.S. 669 (1973) (student organization granted standing to challenge ICC compliance with NEPA in regulating railroad freight rate surcharges); Barlow v. Collins, 397 U.S. 159 (1970) (non-participating tenant farmers granted standing to challenge amendment of cotton crop financing program); and Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970) (data processing service granted standing to challenge ruling regulating bank provision of data processing services to bank customers). To illustrate the unpredictability of results and the instability of doctrine, compare, Heckler v. Mathews, 104 S.Ct. 1387 (1984) (though challenge to pension offset exception did not claim particular benefits, claim of unequal treatment which asserted an injury traceable to illegal conduct and redressable by court action was sufficient to allow standing), and Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) ("... the sole requirement for standing to sue under § 812 [Fair Housing Act] is the Art. III minima of injury in fact"), and Watt v. Energy Action Educational Foundation, 454 U.S. 151 (1981) (California claim that "distinct and palpable injury" to its finances was "fairly traceable" to the Secretary of Interior's failure to select an adequate system of bidding for offshore leases was sufficient to allow standing to challenge the existing bidding system), and Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (allegation that petitioner's conduct was destroying the integrated nature of respondent's neighborhood asserted a "distinct and palpable injury" sufficient under Article III to allow respondent standing), and Orr v. Orr, 440 U.S. 268 (1979) (though husband's equal protection attack on Alabama alimony laws would not free him from the appealed State judgment, his personal stake in the result guaranteed the "concrete adverseness" necessary to support standing), with Block v. Community Nutrition Institute, 104 S. Ct. 2450 (1984) (express Congressional intent to bar consumer challenges to milk market orders precluded consumer standing), and City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (past exposure to illegal conduct did not establish the future threat of "real and immediate" injury necessary for standing to obtain injunctive relief prohibiting police use of chokeholds), and Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (organization dedicated to separation of church and state did...
By contrast, when a dispute involves the federal income tax, standing doctrine has served to bar most third-party suits. Generally a citizen can neither challenge a tax levied on someone else, even if the citizen would end up bearing some of its burden, nor sue to compel the government to collect more tax, even if nontaxation injures him by benefiting his competitors. The contrast with other areas of public law is striking and invites inquiry. What is it about federal income tax disputes that justifies such different rules governing their judicial review?

Commentators have heaped more scorn than praise on the Supreme Court’s restrictive income tax standing decisions. Much of the criticism rests on unexamined premises about the large benefits and low costs of judicial review of tax disputes. This article will argue that increasing the opportunities for nontaxpayers to litigate a controversy over the interpretation of the Internal Revenue Code entails greater costs than these scholars have considered, and that fewer benefits may flow from these suits than proponents of relaxed standing rules have claimed. I conclude that the balance between these considerable costs and uncertain benefits justifies the courts’ hostility to nontaxpayer litigation of income tax disputes.

not suffer injury in fact necessary for standing to challenge HEW conveyance of surplus property to church related college), and Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) (organization’s claim that hospitals unfairly denied services to poor patients did not assert an injury to the organization redressable by court action; organization, therefore, denied standing), and Warth v. Seldin, 422 U.S. 490 (1975) (petitioners’ failure to assert tangible harm from exclusionary zoning practices was sufficient to deny standing), and Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) (alleged nonobservance of incompatibility clause by Reserve Members of Congress produced only an abstract injury insufficient to satisfy the case or controversy requirement for standing).

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Two Supreme Court decisions this past Term provide a focus for this inquiry. *South Carolina v. Regan*\(^3\) involved a state that paid no taxes to the federal government, but wanted to protect the right of others to claim a federal income tax exclusion for interest paid on state bonds. *Allen v. Wright*\(^4\) involved the parents of schoolchildren who challenged the granting of charitable exemptions to schools with allegedly discriminatory admissions policies. Together the cases serve as examples of why plaintiffs who do not directly owe the Treasury anything might attack a rule that collects either too much tax (the *South Carolina* claim) or too little (the *Allen* claim).

This article will proceed in three parts. In part I, I review the background of the *South Carolina* and *Allen* litigation and explore the different results the Court and Congress have reached with respect to nontaxpayer suits that seek to lower or raise someone else’s income taxes. Part II examines the costs and benefits of nontaxpayer standing. I will argue that the pervasiveness, neutrality, and intricacy of the income tax distinguish it from other areas of federal law and justify a reluctance to permit nontaxpayers to invoke judicial review of disputes over the interpretation of income tax rules. Finally, in Part III, I return to the *South Carolina* and *Allen* decisions to discuss the choices the courts and Congress now face with respect to nontaxpayer standing.

I. The Doctrinal Background of Nontaxpayer Standing

*South Carolina* and *Allen* typify two different forms of nontaxpayer standing problems, each with distinct doctrinal underpinnings. *South Carolina* involves *jus tertii* standing, by which the nontaxpayer asserts an interest in preventing the taxation of someone else, usually because the nontaxpayer bears the real incidence of the tax. In effect, the litigant attempts to assert another’s right to resist a tax. Traditionally, the Supreme Court has treated the question of *jus tertii* standing in the income tax area as coterminous with its interpretation of the Anti-Injunction Act,\(^5\) an 1867 statute that restricts lawsuits interfering with the collection of federal taxes. Before *South Carolina*, the Court had given broad effect to the Anti-Injunction Act and barred *jus tertii* claims even when the plaintiff could show that he/she bore the full burden of a tax nominally levied on another,

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and that the imposition of the tax interfered with a right arguably protected by the Constitution.⁶

Allen involves enforcement standing. In such cases, the nontaxpayer asserts an interest, either moral or economic, in seeing that an adversary or competitor pays its taxes in full. The plaintiff wishes to step into the Internal Revenue Service's shoes to prosecute a claim for taxes owed to the government. Simon v. Eastern Kentucky Welfare Rights Organization⁷, the only modern case before Allen in which the Court gave plenary consideration to enforcement standing, suggested an unwillingness, if not a flat refusal, to recognize such suits. Although later I will try to show the common problems these two forms of nontaxpayer standing present, a review of their separate characteristics may clarify what each puts at stake.

A. Jus Tertii Standing

In South Carolina, the state wanted the Court to address the constitutionality of Section 103(j) of the Internal Revenue Code,⁸ which denies owners of state and municipal bonds issued after June 30, 1983 the traditional interest exclusion unless the issuer has put the obligation in registered form. Although the nominal tax liability under this provision falls on bond holders, issuers have powerful reasons to believe that they will bear most of the economic costs of taxation. South Carolina invoked jus tertii standing to assert its bondholders' right to exclude interest from unregistered bonds, largely because the state's own material stakes were so closely tied to the bondholders' tax liability.

An important feature of South Carolina's claim to standing was the importance of timing. The mechanism by which the incidence of the tax on bond interest would shift to the state would be contracts with the bond purchasers, and these bargains would be struck at the outset of the transaction. Unless the state somehow could make the size of its interest obligation contingent on a subsequent challenge to Section 103(j), it would bear the cost of the inclusion even if bondholders subsequently prevailed in a suit attacking that provision's constitutionality. For those bonds issued in advance of a bondholder courtroom victory, the state would get no relief from

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the allegedly unconstitutional provision unless it could maintain a pretransactional suit.

A suit by prospective bond purchasers could also clear up the uncertainty over Section 103(j)'s validity, but such litigation would run afoul of the well-established limits on the right of nominal taxpayers to litigate the tax consequences of a transaction that has not yet occurred. The dominant legislative signal in this area has been the Anti-Injunction Act. This provision declares that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."9 The statute's message, which courts generally have taken to heart, is the exclusivity of the authorized procedures for taxpayers to challenge a tax. These normally require both a completed transaction that has resulted in a tax and a taxpayer who opposes the assessment.10

South Carolina's strategy was to find an implied exemption from the Anti-Injunction Act. Arguing that it constituted the kind of nontaxpayer that ought to have the right to challenge a tax, the State hoped to obtain an even greater benefit: freedom from the Act's additional requirement that litigation follow assessment. In other words, South Carolina sought jus tertii standing not simply to establish its right to sue, but more importantly to open a path for pretransactional litigation of its constitutional claim.

In two earlier cases similarly situated nontaxpayers had failed to carve such an exemption out of the Anti-Injunction Act. Bob Jones University v. Simon (Bob Jones I)11 involved a school that, because of a change in government policy toward racially discriminatory private education, faced the loss of the charitable exemption it had enjoyed for thirty years. Although a lost exemption would have had some direct impact on the school's taxes, donors who no longer could deduct contributions would have borne the most serious tax consequences. The school believed that it would absorb the economic cost of these lost deductions, because donors would give to other charities rather than make nondeductible contributions. Asserting the right of its contributors to deduct their donations, the University asked a district court immediately to restore its exemption by ruling

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10. The normal procedure for contesting an income tax assessment requires either a deficiency notice by the Internal Revenue Service which a taxpayer then may challenge in the Tax Court, see I.R.C. §§ 6212-13, or payment of the tax followed by a refund suit in either a district court or the claims court, see I.R.C. § 7422 (1984); 28 U.S.C. § 1346(a)(1). For the instances where the Code authorizes pre-assessment litigation, see note 13 infra.
either that the government had misinterpreted the statutory requirements for charitable exemption, or that the statute as interpreted violated various First Amendment, equal protection and due process rights.

Alexander v. "Americans United," Inc.\textsuperscript{12} presented different facts but similar legal issues. A nonprofit educational organization devoted to promotion of separation of church and state faced a loss of exempt status because it had violated Section 501(c)(3)'s explicit ban on attempts to influence legislation. The organization still enjoyed freedom from income tax because it qualified as an exempt social welfare organization under Section 501(c)(4), but its supporters lost their contribution deductions. Also asserting its contributors' right to deduct contributions, "Americans United," without waiting for an actual tax assessment, asked a court to rule that the restrictions on legislative lobbying violated the First Amendment.

In both cases, the Supreme Court held that disruption in donations caused by a threatened loss of tax exemption did not justify reading another exception into the Anti-Injunction Act. Instead the institutions would have to surrender their exemptions and then bring refund suits to get them back. The Court recognized that most of the nominal tax liability fell on benefactors, not the institutions. It accepted the premise that the diversion of contributions during the period of uncertain deductibility would cause the institutions to suffer irreparable losses, and it understood that both asserted constitutional claims for which the federal judiciary provided the most appropriate forum. The Court nevertheless concluded that none of these factors justified preenforcement judicial interference with the tax system.\textsuperscript{13}

Bob Jones University and "Americans United" each faced some direct liability under the federal unemployment tax as a result of the

\textsuperscript{12} 416 U.S. 752 (1974).

\textsuperscript{13} Congress responded to these holdings two years later by enacting I.R.C. § 7428, which permits an organization denied exempt status under, \textit{inter alia}, Section 501(c)(3), to seek a declaratory judgment reviewing its classification. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1306(a), 90 Stat. 1520, 1717. This procedure was modeled partly on I.R.C. § 7476, which since 1974 has permitted the Tax Court to issue declaratory judgments concerning the qualification of employee benefit plans. Sections 7428 and 7476 subsequently provided a model for I.R.C. § 7478, which permits issuers of state or municipal bonds to obtain Tax Court review of decisions concerning the exclusion of their interest under I.R.C. § 103. The 1976 Act also added I.R.C. § 7477, which permitted the Tax Court to issue declaratory judgments as to whether certain transfers of domestic corporate property to foreign corporations have a tax avoidance purpose, but Congress recently repealed this provision. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 131(e)(1), 98 Stat. 494, 664. These are the only exceptions to the Anti-Injunction Act expressly authorized by Congress.
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loss of charitable status. Because of this burden, each institution could obtain post-assessment judicial review of its constitutional claims. The cases left open the questions whether the Act would apply where the aggrieved party has no direct access to judicial review, and whether the possibility of a related party's refund suit could substitute for a lack of direct access. South Carolina forced the Court to answer these questions, because the state would not owe any taxes to the federal government regardless of the status of its bonds under the Internal Revenue Code. In terms of payments to the U.S. Treasury, South Carolina had only its bondholders' liability to defend.

Seizing on the no-direct-access opening, the South Carolina Court created the exception to the Anti-Injunction Act that the State needed to get pretransactional clearance. The majority ruled that the Act does not bar jus tertii standing in any case where a person asserts only the tax claims of third parties and therefore has no power to bring a refund suit. It dismissed the possibility that bondholders could vindicate the state's interests. Even though the tax liability fell on the holders, the Court explained, the constitutional rights at stake belonged to the state. Moreover, the Court saw no guarantee that holders who bought unregistered bonds would contest their taxability.

Having swept aside the Anti-Injunction Act, the Court did not look for positive congressional authorization to entertain a suit seeking prospective relief. It seemed to regard the Anti-Injunction Act as the exclusive barrier to jus tertii standing, rather than as only one obstacle faced by nontaxpayer suits to resist taxation. Perhaps the Court believed no further inquiry was necessary, as the case otherwise fell within the Court's original jurisdiction, the state had an unmistakable economic interest in the litigation, the cause of action could be implied directly from the Constitution, and prospective relief is customary for plaintiffs who can show a live case or controversy. The decision may turn on nothing more than a particular conception of the federalism rights asserted by the state that enforcement exclusively by individual citizens might demean. The assertion of states' rights by private citizens, however, is the norm in

15. See 416 U.S. at 746, 747 n.21.
16. 104 S. Ct. at 1115-16.
17. The federal judiciary traditionally has entertained lawsuits based on constitutional claims without looking for express legislative authorization. See, e.g., Ex parte Young, 209 U.S. 123 (1908).
suits involving state immunity from federal taxation. Moreover, none of the state's constitutional claims seem substantial on the merits. Absent an upheaval in the constitutional law of federalism, it is inconceivable that Section 103(j) impermissibly encroaches on any protected area of state autonomy. Nor can the decision easily be explained as a product of the peculiar features of the Court's original jurisdiction. Three justices offered just such a rationale for the result, but the others avoided this path.

By failing to confine its holding either to original jurisdiction cases or to constitutional claims, the Court left open the possibility that it will permit a suit attacking a tax, including a potential tax on a prospective transaction, whenever the plaintiff can show that the taxation of some other party will affect its economic interests and that it has no direct means of challenging the tax. If the Court means to entertain this possibility, then *jus tertii* standing has taken on new and potentially gigantic dimensions. In the absence of any ready means of cabining the decision, its indeterminacy invites expansion. Although *South Carolina* by no means realizes the full potential of *jus tertii* standing in federal tax cases, it has opened a door that had seemed tightly shut.

B. Enforcement Standing

*Allen* involved citizens who believed the government was not collecting enough taxes. The plaintiffs, parents of black children attending public schools in the process of desegregation, asserted that the Internal Revenue Service too readily recognized the charitable exemption of private schools that may practice racial discrimination. They contended that this underenforcement of the Code's...
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implicit "no-exemption-for-discrimination" principle encouraged white flight that frustrated the right of their children to an integrated education. They asked for an injunction ordering the Service to require private schools located in or serving desegregating school districts to implement a strict affirmative action program if they wished to enjoy the charitable exemption.

The idea that private citizens have some power to step into the shoes of the federal government to prosecute violations of regulatory legislation has been around a long time, although its doctrinal labels have varied. When the citizen seeks relief for some discrete
injury traceable to a violation of a federal statute, the Court usually asks whether the legislation contains an implied cause of action for private parties. When the relief sought is not specific to the citizen, but rather a generalized effort to end some illegal course of action, the Court tends to talk about the issue in terms of standing and to use doctrinal formulations of its own devise—"injury in fact," "causation," and "zone of interests"—to determine whether the citizen can sue. In both cases, however, the core question is whether a private plaintiff can share in the government's power to enforce a particular norm or limitation. The Court has never discussed why it treats these functionally equivalent problems so differently, looking to legislative signals in the case of implied causes of actions, and to its own common law for standing.

At some level the differences are unjustified. When the claim of illegality rests on a statutory violation, the lurking question always is whether private enforcement conforms to the legislative scheme or otherwise serves the purposes of Congress. As the Court observed on one occasion, "[e]ssentially, the standing question . . . is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."22 Couched this way, the existence of enforcement standing becomes a problem for which no universal solution exists, but rather a matter courts must confront anew with each statutory scheme. The most that the Supreme Court can do is articulate general principles of interpretation so that lower courts and Congress can know which aspects of legislation will signal the existence of private enforcement, and which will not.

The implied-cause-of-action decisions come close to such a statute-specific approach, although the failure of the Court to agree on general interpretive principles has led to a hodge-podge of outcomes in the cases.23 When the Court instead employs general

22. Warth v. Seldin, 422 U.S. 490, 500 (1975). David Currie has pronounced this statement "the soundest sentence the Supreme Court has uttered on this troublesome subject within human memory." Currie, Misunderstanding Standing, 1981 Sup. Ct. Rev. 41, 41. As he immediately points out, however, "the Court has generally ignored its own good counsel." Id.

23. The fullest debate among the Justices over this issue appears in Cannon v. University of Chicago, 441 U.S. 677 (1979); id. at 717-18 (Rehnquist, J., concurring); id. at 718-50 (White, J., dissenting); id. at 730-49 (Powell, J., dissenting). Among the current members of the Court, it appears that Justices Brennan, Marshall, and Stevens would imply private enforcement power absent some clear countervailing signal from Congress; that Chief Justice Burger and Justices O'Connor, Powell, and Rehnquist would apply the opposite presumption; and that Justices Blackmun and White take an ad hoc approach to this question. For the views from the academy, see generally Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263.
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standing doctrine, the linkage of its analysis to the particular features of a legislative scheme is less direct. To have standing to enforce a federal statute, a private person must allege "injury in fact," show that the injury affects something within the "zone of interests" protected or regulated by the statute, and demonstrate that his injury is "fairly traceable" to the alleged violation of the statute. Of these three tests, only the "zone of interests" inquiry explicitly looks to signs of legislative purpose. A review of the cases suggests that, at least for the Supreme Court, standing decisions turn largely on the majority's sympathies toward particular regulatory schemes, but only dissenters and academic commentators openly make this assertion.

Indeterminancy in the application of doctrine does not obscure one indisputable feature of the standing cases: outside the tax area, the Court has shown substantial, albeit intermittent, leniency in granting standing, but in tax cases the Court has never found an acceptable occasion for private enforcement. Before Allen, the Court had given plenary consideration to only one case, although it had ignored the issue in two others. Simon v. Eastern Kentucky Welfare Rights Organization ruled that indigents who had been refused service at private hospitals lacked standing to attack those institu-

80 (1982); Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195 (1982).

24. See the cases cited in note 1 supra. With respect to nonconstitutional cases, Judge Scalia has argued for collapsing standing doctrine into an implied-cause-of-action inquiry through reshaping of the "zone-of-interests" prong into a congressional-intent test. Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 898-99 (1983). In at least one recent case, the Court appears to have followed this path. Block v. Community Nutrition Institute, 104 S. Ct. 2450 (1984). For an excellent review of the zone-of-interests standard that also points in this direction, see the discussion of the doctrine in Leaf Tobacco Exporters Ass'n, Inc. v. Block, 749 F.2d 1106, 1110-13 (4th Cir. 1984) (Wilkinson, J.).

25. E.g., Allen v. Wright, 104 S. Ct. 3315, 3341 at n. 10 (Brennan, J., dissenting) (citing academic commentators).

26. In Bob Jones II, what had been at the time of the grant of certiorari a traditional taxpayer's suit resisting an exaction became, as a result of a reversal of the government's position shortly before briefing and oral argument, a nontaxpayer suit to enforce collection. See note 21 supra. Perhaps because of the timing of this unusual turn of events, the Court did not address the standing question. In Coit v. Green, 404 U.S. 997 (1971) (per curiam), aff'd Green v. Connally, 330 F.Supp. 1150 (D.D.C. 1971) (three-judge panel), the Court affirmed without oral argument or full briefing a judgment in a case that had begun as a nontaxpayer enforcement suit challenging the charitable status of racially discriminatory schools. Coit's procedural posture mirrored that of Bob Jones II: a mid-litigation switch in the government's position had eliminated the dispute between the plaintiffs and the government, but intervenors whose future tax liability was affected by the ruling then appealed. See note 21 supra. The Court's brief order did not attempt to untangle the standing issue, and a disparaging footnote in Bob Jones I appeared to undercut whatever precedential force Coit otherwise might have. 416 U.S. at 740 n.11.

tions' tax exemptions. The plaintiffs wished to reverse a Revenue Ruling that had dropped free service to the poor as a prerequisite to the Service's recognition of a hospital's charitable exemption.  

The Court ruled that the causal link between the tax exemption and service to indigents was too speculative. It believed that whatever injuries the plaintiffs had suffered were not "fairly traceable" to the government's allegedly incorrect interpretation of the charitable exemption.  

Allen followed Eastern Kentucky in relying on the causation requirement to deny standing. The plaintiffs claimed that the Service, through lackluster enforcement, was disobeying the Code's implicit prohibition of charitable exemption for racially discriminatory private schools, and that this inaction promoted racial segregation in the public schools their children attended. Justice O'Connor, writing for the majority, responded that this allegation failed to identify an injury that was "fairly traceable" to the claimed violation of law. The plaintiffs had not alleged either that private schools had drained off substantial numbers of white students from the public schools their children attended, nor that the segregated private schools in their environs would change their practices if the Service stepped up enforcement of the charitable exemption prohibition. Nor could the plaintiffs seek judicial relief for the denigration inflicted on all black people when the government supports racial discrimination. Absent some evidence that they had suffered in some particular way from the granting of the exemption, the plaintiffs could not attack it.

While Eastern Kentucky and Allen have the virtue of consistency, each gives its critics plenty of ammunition. Any decision resting on causation requires assumptions about the way the world works that cannot be made with complete assurance, but that in Allen seem especially vulnerable to attack. If the charitable exemption has no behavioral consequences, a proposition on which Allen's standing analysis seems to rest, one wonders why the Court went to so much

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29. 426 U.S. at 42-44. Justice Stewart, in a concurrence, declared that he could not "now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." Id. at 46.  
30. 104 S. Ct. at 3326-30. Allen, unlike Eastern Kentucky Welfare Rights Organization, was not unanimous. Justice Brennan, who had joined the judgment but not the opinion in Eastern Kentucky, dissented in Allen, as did Justice Stevens, who had not participated in the earlier case, and Justice Blackmun, who had joined the Court opinion in Eastern Kentucky. Justice Marshall, who had joined Justice Brennan's opinion in Eastern Kentucky, did not participate in Allen.
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trouble a year earlier in Bob Jones University v. United States (Bob Jones II)\(^{31}\) to forbid the exemption of discriminatory schools. Although one may read Bob Jones II as dealing only with the symbolic wrong entailed in any government involvement with discrimination, much of the opinion seems to express the belief that tax exemption actually encourages the exempted activity and thereby, if extended to segregated schools, would increase the amount of discrimination in the world.\(^{32}\)

Allen's feeble effort to distinguish Coit v. Green,\(^{33}\) the summary affirmation of the case that originally developed the no-exemption-for-discrimination rule, fuels the fire. The Court observed that Coit had involved only private schools in Mississippi, where overwhelming evidence documented the use of private schools to frustrate public school desegregation and the importance of tax exemption to these institutions.\(^{34}\) This observation, however, seems to confirm the standing of the Allen plaintiffs to seek some relief, although not necessarily on a nationwide basis. Presumably the exact claims made in Allen may be resurrected in the still ongoing Coit litigation, unless the distinction drawn represents simply an inept attempt to avoid overruling an ill-considered precedent.\(^{35}\)

One can also subject Eastern Kentucky and Allen to a different kind

\(^{31}\) 461 U.S. 574 (1983). The contrast between the two cases seems even starker when one recalls that the government in Bob Jones II withdrew its suggestion of mootness only because of the lower court injunction, which Allen later threw out. See id. at 585 n.9; note 21 supra.

\(^{32}\) "[T]he enacting § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." 461 U.S. at 587-88. See also id. at 587 n.10: "[The exemption] seek[s] to achieve the . . . basic goal of encouraging the development of certain organizations through the grant of tax benefits." Justice Stevens' dissent in Allen makes the point even more explicitly: "If the granting of preferential tax treatment would 'encourage' private segregated school [sic] to conduct their 'charitable' activities, it must follow that the withdrawal of the treatment would 'discourage' them, and hence promote the process of desegregation." 104 S. Ct. at 3343.

\(^{33}\) 404 U.S. 997 (1971).

\(^{34}\) 104 S. Ct. at 3331-32.

\(^{35}\) The Court's attempt to distinguish Norwood v. Harrison, 413 U.S. 455 (1973), which affirmed a lower court injunction forbidding a state from providing free textbooks to racially discriminatory private schools, reinforces this conclusion. The plaintiffs in Norwood also were parties to a school desegregation order covering the same state. In the eyes of the Allen majority, this preexisting court order created the legal interest that the state's aid to segregated private schools injured. If a prior court order suffices to bootstrap standing, then the original plaintiffs in Coit apparently have an interest that the Service's allegedly lackluster enforcement injures. The upshot of Allen, then, would be a simple amendment to the complaint to include some Mississippi plaintiffs, who then would have standing to seek at least statewide relief against the Internal Revenue Service.
of criticism. By focusing on causation rather than the zone-of-interests inquiry, the Court has neglected what could be a crucial issue: what is there in the language of the statute, its legislative or administrative history, its structure or purpose to support an inference of private enforcement? If Congress meant to provide for private enforcement of the obligations it created in the Internal Revenue Code, why should the Court obstruct this choice?36 If, on the other hand, one fairly can infer a more general congressional decision not to include claims like those asserted by the Allen plaintiffs within the zone of interests protected by the Internal Revenue Code, then why leave open the prospect of other suits that succeed in surmounting the causation hurdle?

Consider the standing issue in a recent case. Palestinian mayors from the West Bank asked a federal court to compel the revocation of exemptions enjoyed by various Jewish charities.37 The plaintiffs alleged that Israel discriminates against Palestinians, a class to which they belong, and that the charities pass on funds to Israel that support this discrimination. For purposes of deciding the standing question, a court must accept as true the factual allegations of discrimination. In addition, the legal argument that the promotion of such misconduct will disqualify an organization from enjoying the charitable exemption has some superficial plausibility after Bob Jones II.38 If all that remained for the case to proceed was an allegation of personal injury caused by behavior the exemption encourages, then surely these Palestinians met this burden. Unlike the Allen plaintiffs, who did not purport to represent any child who had been denied admission to discriminatory private schools, the Palestinian plaintiffs asserted that they have suffered directly from Israel’s allegedly discriminatory acts.39

36. The Court tends to regard the express congressional authorization of enforcement as precluding the causation inquiry. One device it employs to blink away Article III objections to standing is the assertion that by empowering identifiable persons to sue, Congress has created an interest that statutory violations injure. E.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982). See generally Logan, Standing to Sue: A Proposed Separation of Powers Analysis, 1984 Wis. L. Rev. 37, 59-70, 77-81.
38. See Stephan, supra note 21, at 71-77. Although the public policy violation alleged in Khalaf is distinguishable on the ground that the misconduct involves the acts of a foreign state against its own subjects, some authority exists for the proposition that United States involvement in actions by a foreign government injuring its subjects will be considered illegal if the same behavior, carried out directly by our government against United States citizens, would violate our Constitution. Compare United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), with Stephan, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va. J. Int’l L. 777, 778-91 (1980).
39. In dismissing the suit for lack of standing, Judge Jackson ruled that the Palestin-
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It hardly seems likely that the same Court that threw out the *Allen* litigation would want a tax enforcement suit to become a vehicle for putting Israel on trial for its West Bank policy. If it has any principled basis, *Allen* must mean that the expansion of *Bob Jones II*’s public policy limitation on the charitable exemption should proceed by way of a dialogue between the IRS and Congress, without the hectoring of private lawsuits. If this is *Allen*’s objective, however, the causation inquiry does not do the job.

Another drawback of *Allen*’s focus on causation is the resulting failure to distinguish constitutional from statutory standing. The parents asserted two grounds for attacking the Service’s approach to segregated schools: Section 501(c)(3) requires the denial of charitable exemption for schools that do not make a stronger showing of nondiscrimination than the Service currently requires, and the Fifth Amendment prohibits these exemptions even if the Internal Revenue Code does not. By following *Eastern Kentucky*, a case that involved only statutory issues, the Court seemed to treat the constitutional claim as indistinguishable from the statutory one. But it hardly seems self-evident that private enforcement of constitutional rights should turn on the same considerations as private enforcement of statutory regulation. When the Constitution is the source of the right asserted, the question of “zone of interests” becomes one of constitutional interpretation, not one of deciphering legislative intent. It may be that the constitutional issue in *Allen* was insubstantial, as some of the Court’s other decisions suggest; such an inquiry falls outside the scope of this article.40 The vice of the

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40. Of the various opinions in *Allen*, only Justice Stevens’ dissent acknowledges that the parents’ claim rests in part on the Constitution. 104 S. Ct. at 3347 (Stevens, J., dissenting). The Court faced a similar argument in *Bob Jones II*—that the inclusion of racially discriminatory schools within the charitable exemption amounted to promotion of segregation in violation of the Due Process Clause—but by resting its decision on statutory grounds it avoided the constitutional issue. See 461 U.S. at 599 n.24.

Some of the Court’s decisions over the past fifteen years suggest a judgment, admittedly not articulated, that tax advantages generally, and the charitable exemption in particular, are the kind of benefit that a government can either withhold or extend without triggering substantial constitutional constraints. Compare *Bob Jones II*, 461 U.S. 574 (1983) (denial of charitable exemption for church property does not implicate free exercise protection), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (denial of charitable exemption does not trigger free speech protection), with *Walz v. Tax*
causation inquiry is that it allows the Court to elide this point. As a result, the relevance of *Allen* to nonconstitutional assertions of private standing to enforce the federal income tax remains obscure.

Taken together, *South Carolina* and *Allen* indicate that the rules for standing in income tax disputes are more restrictive than those in other areas of federal law, but each suggests that much remains up for grabs and that some expansion of nontaxpayer standing is conceivable. *South Carolina* seems to have more immediate potential for subverting traditional restrictions on nontaxpayer standing, as it opens up the prospect of persons bearing the incidence of some other party's tax having full rights to sue to oppose assessment. At first blush *Allen*, like *Eastern Kentucky* before it, seems to forbid all forms of enforcement standing. But by relegating the issue to an ad hoc and malleable causation inquiry, while not addressing the more definitive zone-of-interests test, *Allen* may contain the seeds of a future expansion of enforcement standing.

These openings permit other courts and Congress to consider whether to cabin judicial review of tax disputes within the present limits, or to broaden the opportunities for nontaxpayers to challenge the government’s interpretation of the law. When they make this choice, these bodies must grapple with a central question: In light of the particular characteristics of the federal income tax system, what are the costs and benefits of judicial review of disputes over the meaning of the Internal Revenue Code? To this I now turn.

II. *The Costs and Benefits of Judicial Supervision of the Tax System*

It would be equally absurd to argue either that judicial supervision provides unalloyed benefits to society, or that it inflicts only costs on an unwitting polity. Without judicial review, the interpretation of legislation would turn on the desires of those currently in control of the executive branch and, to a lesser degree, the actions

Commission, 397 U.S. 664 (1970) (allowance of exemption for church property does not violate establishment clause). This judgment, to the extent it can be justified, seems to reflect a kind of right/privilege distinction that recognizes the constitutional insignificance of some governmental actions and inactions. *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (issuance of liquor license to racially discriminatory club does not constitute sufficient state involvement to trigger constitutional protection). That some forms of governmental activity are too mundane to demand searching constitutional scrutiny seems a reasonable, although not an inevitable, proposition; that the charitable exemption should constitute such a form is far more debatable, although my own uneasy belief is that it may. *See generally* Bittker & Kaufman, *supra* note 2; note 67 infra and accompanying text.
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of current members of Congress. A Congress facing the enactment of legislation would have no means of projecting its will into the future.41 With total judicial review, on the other hand, we would sacrifice both administrative expertise and democratic accountability.

As usually is the case, some balance must be struck. In determining how much judicial review of the income tax system we should want, a conventional cost-benefit analysis seems an appropriate approach. My contention is that because of three important characteristics of the federal income tax—what I will call its pervasiveness, neutrality, and intricacy—judicial review may entail substantial costs without great benefits. The risk that expanded opportunities to invoke judicial review will cause more harm than good should deter courts from arrogating to themselves more supervisory power than Congress has explicitly provided. In practice, this means courts should avoid purposive interpretations of the Internal Revenue Code that would permit nontaxpayer suits in situations where Congress has not positively authorized such litigation. Legislative decisions to permit greater judicial review in turn should reflect full consideration of the costs and benefits identified below.

A. The Distinctive Aspects of the Federal Income Tax

Rather than offer a general critique of private enforcement of public law, I will focus on the particular problems created by nontaxpayer litigation of federal income tax issues. Although some of the points I will make about the costs and benefits of these suits may apply to other areas of law such as environmental regulation or civil rights, several aspects of federal income taxation are sufficiently distinct to suggest that a special cost-benefit calculus applies. As a result, one can have reservations about nontaxpayer litigation of tax disputes without necessarily opposing more active judicial review of other matters.

1. Pervasiveness

Three characteristics of the income tax seem especially relevant to debates over the structure of dispute resolution and enforcement. First, the income tax is pervasive. Unlike other forms of federal legislation, which affect discrete areas of activity, the Internal Revenue

Code touches most households and most forms of economic behavior. Roughly a hundred million individual tax returns are filed each year, which with joint returns and dependents means that the overwhelming majority of Americans directly participate in the income tax system. Moreover, there are few decisions a person can make that do not have federal income tax consequences, whether the choice involves kinds of livelihood (taxable salary versus untaxed leisure, intangible satisfaction, or fringe benefits), living arrangements (deductible home mortgage interest or nondeductible rent), marital status (different rate tables) or number of children (dependents).

Because of the income tax's pervasiveness, the reservoir of potential disputants and the overall amounts of liability that disputes can put at stake are enormous relative to other kinds of public law. Although suits can be both expensive and risky, a challenge by even a single foolhardy individual can implicate a substantive rule that may affect millions of taxpayers and billions of dollars. As a result, any increase in the uncertainty of the system, when multiplied by the enormous number of instances in which the uncertainty can affect behavior, will have distinctively high costs.

In addition, the huge number of returns makes voluntary compliance essential to the system's continued operation. Uncertainty and controversy can demoralize taxpayers as a group by encouraging them to resolve more doubts in their own favor. Any decrease in voluntary cooperation with the taxing authorities will increase the costs of the system by making necessary the substitution of less desirable means of enforcement.42

2. Neutrality

Second, many of the rules in the Internal Revenue Code have no regulatory object. Indeed, a generally accepted goal of tax law is neutrality, that is, the minimization of distortion in the making of economic choices. Many counter-examples exist, of course, as purposively interventionist incentives and penalties enter the Code with increasing frequency. The Treasury's Tax Expenditure Budget attempts to list these provisions, although some of its designations are controversial and few of the quasi-subsidies it identifies represent new manipulations of the tax system.43 Nevertheless, a surprisingly

43. See, e.g., Andrews, Personal Deductions in an Ideal Income Tax, 86 HARV. L. REV. 309
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large number of income tax rules do not classify taxpayers or transactions as good or bad. As a result, the number of instances in which groups have occasion to compete for rewards or to fight over penalties are fewer than with most other statutory schemes.

The degree of neutrality attained by the present system is to a large extent a product of its pervasiveness. Because federal income taxation embraces so many individuals and transactions, it is harder to isolate any clearly defined interest group with a significantly disproportionate incentive to influence the administrative process. The theory of public choice teaches that regulations that affect many members of a large group with various and opposing interests will tend to impose some hardship on everyone, rather than produce obvious victories for particular participants. Although the income tax's pervasiveness does not guarantee that the Treasury can remain immune from what administrative law scholars call "capture," it does decrease the likelihood that the taxing authorities systematically will favor discrete groups at the expense of the general public.

The most recent evidence that the system attains a surprisingly high degree of neutrality in practice comes from the 1984 tax reform proposals put out by the Department of the Treasury. The Treasury's claim that its plan can fundamentally reshape and simplify the federal income tax without disproportionately harming any major class of taxpayers suggests that most taxpayers bear a share of the costs of flaws in the status quo, even though in isolation different provisions seem to impose unfair burdens on particular groups. It appears that even the present system's blunders are fairly neutral. And to the extent that tax rules, by design or inadvertence, do not create particular classes of beneficiaries, there exist no individuals who can assert a special interest in their enforcement.

3. Intricacy

A third aspect of the income tax, one related to the second, is its intricacy. The provisions of the Code are complex, and often they complement and offset each other in ways not immediately apparent to the casual observer. Although many rules, in isolation, seem to


offer tax breaks to a few, in aggregate these provisions touch so many taxpayers that virtually everyone benefits to some degree.\textsuperscript{46} No other federal legislative scheme has so many feints and parries, so many benefits and burdens that are dispensed with one hand and promptly erased by the other. The result is a system that permits well-organized interests to believe they enjoy special benefits, when the reality is one of standoff.

Intricacy, of course, hardly guarantees neutrality. It is conceivable that complex rules may have a mystifying effect. Perhaps convolution in the tax law enables discrete groups to escape with tax preferences that could not survive if expressed in straightforward terms. A famous example is former Section 1240, a facially neutral and complex provision of the Internal Revenue Code designed to benefit a class of one (movie magnate Louis B. Mayer, who wanted to cash out of a retirement plan at capital gains rates).\textsuperscript{47} Other examples abound.

Whether the Code’s intricacy promotes or detracts from neutrality depends not only on the effect of intricacy on the legislative process, but also on the response of the government’s enforcement practices to the problems and opportunities created by elaborate and interrelated rules. Benign tax administrators can exploit intricacy to create offsetting advantages that hold interest groups at bay while achieving substantial neutrality among taxpayers. Corrupt ones can use it to disguise the handing out of special favors. My impression is that the taxing authorities are honest but overburdened, and that the only substantial bias that may exist in enforcement concerns large taxpayers versus small ones. Even this kind of discrimination, if it exists at all, is ambiguous. The Internal Revenue Service may back away from wealthy taxpayers because of the greater resources employed to resist enforcement, but it also may target this group for more aggressive surveillance because of the larger stakes involved. The tax system’s intricacy can further either of these purposes.

\textsuperscript{46} See Bittker & Kaufman, supra note 2, at 86: “[T]he Internal Revenue Code is a pudding with plums for everyone.” For a graph that illustrates the evenness of the distribution of “tax preferences” over income classes, see J. Pechman, Federal Tax Policy 76 (4th ed. 1983).

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A less obvious implication to be drawn from the system's intricacy is the difficulty of telling when a provision promotes or detracts from neutrality. Judicial elimination of some special-interest provisions might upset the balance Congress or the Treasury may have struck between competing interest groups. The fact of intricacy suggests that those who must pass judgment on the system should maintain a degree of diffidence toward claims that particular rules are invalid products of undue influence by groups hostile to the general interest.

B. The Overlooked Costs

Enforcing even the most desirable rules entails costs. Some costs are intended as the heart of the rule, such as the penalties rule breakers must bear. Some are direct and easy to grasp, such as the investment of resources in the resolution of disputes over the rules. Less obvious, but of potentially great significance, are the indirect costs resulting from the avoidance of socially desirable behavior by persons who fear incurring the more direct enforcement costs. When the operators of a private school, to use *Allen* as an example, shut down their establishment because they want to avoid a dispute over their charitable exemption, society has lost whatever benefit the school had produced. More aggressive law enforcement—whether in the form of more prosecutions or greater penalties—increases all these costs.  

It is also a commonplace that uncertainty in the legal rules tends to increase both dispute resolution and avoidance costs. Unclear rules invite both regulators and regulated to guess about the legality of particular actions, which leads to more disputes with their attendant litigation costs. Moreover, as uncertainty spreads the risk of illegality over wider ranges of conduct, a broader class of actors faces an incentive to seek other, safer pursuits.

One should keep in mind, of course, that either increased enforcement or less precision in the statement of rules may produce benefits that outweigh these costs. More enforcement may increase the deterrence of harmful behavior. More flexibility in the definition of rules frustrates their evasion. The point is that one reasonably can speak of an optimal level of law enforcement, namely the degree of enforcement at which the marginal benefits equal the mar-


original costs, and that enforcement in excess of this level can cause as much social harm as can inadequate enforcement.

1. The Cost of Reopening Settled Questions

Increased judicial review over income tax disputes entails greater enforcement costs, whatever benefits it might produce. Not only do increased opportunities to go to court mean more litigation expenses, but they necessarily create greater uncertainty. The power to challenge an IRS ruling means reopening what otherwise would be a settled, even if wrongheaded statement of the law. A clear statement of the IRS' position lets the taxpayer know where he stands and allows him to order his affairs accordingly. If the Service gives him what he wants, he has found a safe harbor;50 if it rules unfavorably, he can proceed to his second-best alternative (a different investment or transaction) without hesitation. But if the taxpayer knows that the Service does not have the final say, he faces a greater risk in making the choice between his intended course of action and the next best alternative. A private enforcement suit might destroy his safe harbor, or a successful challenge to an unfriendly ruling might make him regret passing up his preferred course. In short, judicial review decreases the reliability of IRS rulings, and this decrease is a cost.

Expanding judicial review of tax rulings also may have indirect effects on government behavior that further increase taxpayer uncertainty. The Treasury and the IRS might plausibly respond to increased review by cutting back on the opportunities for court challenges, either because they would want to avoid embarrassing courtroom losses or because the costs of litigation might weigh too heavily on their budgets. One way to deter challenges is to issue fewer pronouncements, and to have those that are issued say less. But a reduction in the number and breadth of regulations and advance rulings, either public or private, reduces the amount and quality of valuable information available to taxpayers about their rights and liabilities under the tax law.51 This decrease too is a cost.

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51. The NLRB serves as an extreme example of an administrative agency that exercises its interpretive function exclusively through adjudication rather than by rulemaking. Although no one questions the general right of an agency to proceed in this fashion, the costs are apparent. See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (upholding agency's right to proceed through adjudication but alluding to costs); Bernstein, The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,
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These uncertainty costs may seem small when viewed in isolation, but they can mount rapidly. The tax system’s pervasiveness multiplies them by inflicting uncertainty on so many individuals and transactions. To the extent that courts allow themselves a general discretionary power to decide when to permit increased judicial review (as is the case with the standing doctrine and judicially-crafted exceptions to the Anti-Injunction Act), review-produced uncertainty easily can spread throughout the system.

A pair of cases illustrate the unsettling effect on substantive law that nontaxpayer suits engender. In Tax Analysts and Advocates v. Blumenthal,52 the owner of a domestic oil well sued the Treasury to compel harsher taxation of overseas oil producers. His complaint contended, in essence, that the Treasury allowed his competitors to treat as creditable expenses, which reduce tax liability dollar-for-dollar, outlays for which the Code permitted only deductions. If the courts had allowed the suit to go forward, the entire tax structure of the overseas oil industry would have come under a cloud, with predictably adverse effects on energy consumers and investors. Refund suits by the oil companies in different circuits could have further muddied the waters. Although action by the Supreme Court or Congress might eventually have ended the turmoil, during the interval the oil industry would have had to act under conditions of substantial uncertainty with respect to its tax liability. If the suit did succeed in correcting a distortion in the tax burden facing foreign oil producers, of course, the benefits of standing might exceed these costs. It must be recognized, however, that allowing standing inescapably would have produced substantial costs.

The other example is Allen. That litigation cast in doubt the deductibility of almost all contributions to private schools during the period the suit was alive, as well as the potential tax liability of thousands of institutions. In the aggregate, the amount of taxes that single suit affected must have amounted to billions of dollars.53


53. Cf. Note, 93 HARV. L. REV. 378, supra note 2, at 406:
A court order should be framed to require the IRS to implement constitutionally satisfactory procedures for the identification of discriminatory private schools or to terminate the charitable tax exemption-deduction privileges for all private elementary and secondary schools. That choice is harsh, but is mandated by the Constitution’s hostility toward intentional racial discrimination. One wonders why the IRS may stop at private and secondary schools, given the Constitution’s equal hostility toward discrimination in university education. The “tax expendi-
Again, the benefits of the litigation might exceed these costs—I will return to this point in the next section—but this does not mean we should ignore the costs that do exist.

2. The Cost of Rules Generated by Courts

The fact of judicial review, with its implication that settled questions can be reopened, is not the only way in which expanded standing increases uncertainty costs. Wider opportunities to take disputes to court force more taxpayers to worry not only about whether the Service's position will stand, but also about what will replace it. Because of ingrained common-law conventions and unavoidable institutional constraints, rules generated by courts tend to increase, rather than diminish, the tax system's uncertainty. Relaxed standing requirements would provide the courts with more opportunities to exercise a method of decision-making that, whatever its benefits, would entail a substantial increase in the indefiniteness and inconsistency of tax rules.

a. Indefiniteness

To an extent unparalleled in other areas of federal regulation, the tax system uses precise if arbitrary numerical rules. The income tax's pervasiveness requires such bright-line rules, which in turn contribute to the system's intricacy. Unlike the customary approach of Congress and the Treasury, the common law method as traditionally practiced by federal judges frustrates the announcement of such definite guidelines. Although there is nothing inherent in the judicial function that precludes the creation of precise and categorical rules, judges in our federal courts adhere fairly closely to a style of decision-making that emphasizes the distinctive aspects of the case before them at the expense of general principles that might define rules to guide broad classes of future conduct.

Two instances are typical. When the courts first confronted the problem of grantor trusts used to shift tax liability to lower-bracket family members, the rules they announced to deter these avoidance devices were both broad and vague. "[N]o one fact is normally decisive," explained one opinion; instead a decisionmaker must survey "all considerations and circumstances" to decide whether the "ben-

— the estimated sum of taxes saved—for charitable contributions by individuals to educational institutions in fiscal year 1984 was $705 million. See Staff of the Joint Comm. on Tax’n, 98th Cong., 2d Sess., Estimates of Federal Tax Expenditures for Fiscal Years 1984-1989, at 14 (1984). When one adds in the value of the income, transfer, and unemployment tax exemptions to educational institutions and accounts for more than one tax year, the potential liability of schools and their benefactors climbs into the billions.
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efits directly or indirectly retained [by the grantor] blend so imperceptibly with the normal concepts of full ownership" that liability must follow.\textsuperscript{54} Although these admonitions had the desired result of discouraging abusive transactions, they also deterred socially desirable transfers by putting grantors to an all-or-nothing choice. Congress responded to the problem by doing something the courts, from lack of habit or expertise, generally will not: it picked a number. Under the grantor trust rules Congress wrote into the Code, taxpayers who wish to shift the tax burden of the income while not completely surrendering the principal know they must design the trust so that they do not regain the corpus for at least ten years. This safe harbor dramatically increases the predictability of tax law in this area without sacrificing much, if any, of its deterrence objective.\textsuperscript{55}

The second example involves sale-leasebacks, arrangements by which the user of a capital good (typically plant or equipment) sells his property to a third party and then rents it back. These useful financing devices present difficult tax issues. Too-easy recharacterization of loans as sales with return leases permits a commerce in tax attributes (principally depreciation deductions and investment credits) that many believe undesirable. Given the broad spectrum of financing terms that contract law permits, however, drawing a line between leases and loans at any particular point seems arbitrary. The Service published a revenue procedure that had at its heart a numerical rule: the putative lessor must show that at the end of the


\textsuperscript{55} See I.R.C. § 673(a) (1984). I hasten to add that the statutory grantor trust rules, although much more precise than their common-law predecessors, are quite complex. See id. §§ 671-79. A grantor must do much more than the simple statement in text suggests. The point is only that this complexity is distinguishable from, and less costly than, the uncertainty that preceded it.

At first blush the sequence of Clifford followed by the enactment of the statutory rules may suggest that imprecise common-law rules may have few costs because they provoke prompt legislative responses. Indeed, muddled common-law rules may even produce benefits by prodding Congress into enacting precise rules to clarify a previously unsettled area of law. But a court can better goad Congress into action by refusing to plug a hole in the system than by contriving an unsatisfactory solution. Compare the experience with interest-free loans, where courts refused to cooperate with the Service's attempts to close a lacuna that had emerged in the Code. Within four years of the first appellate decision rejecting the government's position, Congress enacted a statute giving the Treasury what it wanted. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 172, 98 Stat. 494, 699-703 (adding I.R.C. § 7872). In the sequence involving the lease-loan distinction, considered below, a precise administrative rule fell before judicial intervention, an event that made legislative rescue necessary. For a general discussion of the developmental structure through which imprecise common-law tax rules become precise statutory formulae, see Clark, The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform, 87 Yale L.J. 90 (1977).
lease the property still would be worth at least twenty percent of its original cost.\(^{56}\) The Supreme Court then rejected this bright line in favor of a much more amorphous inquiry: "[S]o long as the lessor retains significant and genuine attributes of the traditional lessor status, the form of the transaction adopted by the parties governs for tax purposes."\(^{57}\) But because no one knew with great confidence what qualified as "significant," "genuine," or "traditional," lenders either dithered or kept their financing arrangements within the twenty percent guideline until Congress enacted even more precise rules.\(^{58}\)

There is no reason to suspect that decisions in tax cases brought by nontaxpayers will attain any greater (or, for that matter, lesser) degree of precision than do those involving a dispute between a taxpayer and the government. The vice of relaxing nontaxpayer standing is that it increases the number of disputes that will wind up in court, and that judicial resolution will produce rules that generate greater uncertainty costs. In particular instances the benefits may outweigh these costs, but what is relevant here is that these costs will be present.

b. Inconsistency

Inconsistency in tax rules, like indefiniteness, produces uncertainty by reducing the ability of taxpayers to predict confidently the tax consequences of contemplated actions. To a degree not fully appreciated, the federal judiciary is organized in a way that promotes inconsistent decisions. The Internal Revenue Service, by contrast, is relatively monolithic, with interpretive functions confined to headquarters and discretion in the field closely policed by superiors in Washington. Unification of interpretive authority does not make consistency inevitable, but the IRS, at least during the tenure of each Commissioner, comes as close to being a single-minded rulemaker as any sizeable bureaucracy can. To the extent a relaxation of standing requirements permits courts to substitute their decisions for those of the Service, the likelihood of inconsistency and resulting taxpayer uncertainty is increased. At least three aspects of

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the federal court system disperse decision-making power in a way that encourages inconsistency: incomplete appellate review; division into circuits; and staggered appointments of Supreme Court justices. Even when a litigant believes a district court has misinterpreted the law, budgetary constraints may limit his ability to make an appeal. As a result, notional positions taken by courts of first instance can go uncorrected for some time. Because decisions of one court of appeals do not bind other circuits, case law made at the appellate level also can be contradictory. Supreme Court review is discretionary, and specialists persistently have complained about the Court's reluctance to supervise the development of tax law and even tolerance of longstanding intercircuit conflicts.

When the Court does act, it may not contribute much uniformity to the case law. It has many institutional virtues, but it lacks the ability to achieve consistency in a body of law involving frequently recurring questions that do not break down into simple binary choices. As long as individual justices have the freedom to approach those cases with different preferences and attitudes, over time they will be unable to attain consistency in either analysis or result. A comparison of Bob Jones I to South Carolina, or of Bob Jones II to Allen, illustrates how easy it is for the Court to arrive at conflicting postures in closely related cases.

I do not mean to suggest that judicial review is the only force in tax law promoting inconsistency and attendant uncertainty. Both Congress and the Treasury have the power and, on many occasions, the inclination to change the rules. Taxpayer doubts about the stability of legislative or administrative decisions can produce uncertainty costs as great as those resulting from inconsistent or indefinite judicial opinions. But increased judicial review will not reduce the tendency of Congress or the Treasury to reject, revise, or reform, and may even exacerbate these problems. An example is the sale-leaseback controversy, where the Supreme Court's willingness to substitute its own approach for precise Service guidelines sufficiently unsettled the law to provoke a series of legislative reactions.

59. Trial courts, whether U.S. District Courts or the Tax Court, do not regard themselves as bound to follow decisions of the courts of appeals other than those of the court to which an appeal lies. See, e.g., Kast v. Commissioner, 78 T.C. 1154 (1982).

60. E.g., Court Jurisdiction in Civil Tax Litigation: The Tydings Bills and the Rogovin Report, 22 TAX LAw. 687 (1969); Griswold, The Need for a Court of Tax Appeals, 57 HARV. L. REV. 1153 (1944).

61. Much of our recent awareness of the institutional impediments to consistent decision-making by a body like the Supreme Court is due to a provocative article by a scholar who now has an opportunity to apply his insights within the judicial process. See Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802 (1982).
I am also not arguing that judicial review initiated by nontaxpayers would produce decisional inconsistency at any greater rate than what taxpayer litigation already creates. The point again is that any increase in litigation because of nontaxpayer suits would spawn some growth in this cost. Given the pervasiveness of tax law and the multitude of potential disputes that exist, the incremental cost of this inconsistency could be substantial.

In sum, extending judicial review to more disputes over the interpretation of the income tax statutes would entail unavoidable costs. These include not only the direct expenses of litigation, but also those associated with the uncertainty produced both by calling into question otherwise settled government interpretations and by substituting potentially indefinite and inconsistent court decisions for what are more likely to be clear and consistent Service positions. Because the income tax is so pervasive, the costs of this uncertainty can mount rapidly.

C. The Uncertain Benefits

Litigation has benefits to the extent it vindicates rights. The least controversial case for judicial review of tax law interpretation—where the taxpayer disagrees with the government on an issue that will affect how much money he will pay into federal coffers—has the most obvious, or at least the most conventionally acceptable, benefits. At a fairly abstract level of justification, the litigation protects the citizen’s right not to suffer a taking of property without due process of law. On a more mundane level, it guards against misallocation of society’s resources by deterring unauthorized and nonconsensual wealth transfers.62

The distinctive benefits of nontaxpayer suits such as the South Carolina and Allen litigation fall into two general categories: enhanced pretransaction security and fuller tax enforcement. Preassessment litigation of an anticipated liability enables taxpayers to determine tax consequences of transactions before they become irreversible. Private enforcement fulfills the purposes underlying underenforced provisions. I will look at these benefits separately.

62. It should be obvious that the present world, which extends some protection to interests such as property rights, is not the only social ordering imaginable, and very well may not be the best possible world. In other systems, different claims may become paramount, and society in particular might attach a higher value to interests such as those raised in suits to combat racial and other types of discrimination. Although I may reveal an ideological bias by employing an analysis that presumes the status quo, I leave it to others to envision the better world that makes my outlook irrelevant.
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1. *The Value of Preclearance*

*Jus tertii* standing questions normally arise in the tax area because someone wants judicial preclearance of a transaction. The connection between *jus tertii* standing and preclearance is neither logical nor necessary—persons who bear the nominal burden of taxation also may want preclearance, and persons who bear the economic burden may want *jus tertii* standing even after a transaction is consummated if the nominal taxpayer refuses to defend against taxation. But the cases that have arisen during the last few decades suggest that the benefits from *jus tertii* standing are clearest when a nontaxpayer who will end up absorbing the cost of a tax needs a determination of the tax consequences in order to persuade the nominal taxpayer to undertake a transaction.

The Anti-Injunction Act and the cases that have interpreted it seem to reflect a consensus that for nominal taxpayers the benefits of preclearance generally do not justify its cost. The Service runs an extensive pretransaction review system for taxpayers through its private and published rulings. The incremental benefits of further judicial approval seem too small, as cautious taxpayers can rearrange their affairs and stubborn ones can incur the liability and litigate or appeal to Congress for a new rule. But where the nominal and economic incidence of taxation diverge substantially, nominal taxpayers are more likely to substitute a less risky transaction for a deal that might lead to litigation. In these cases there will be few or no transactions that will enable challenges to the Service's position unless nontaxpayers can use *jus tertii* standing to assert nominal taxpayers' rights, and thereby to seek prospective relief.63

As noted above, costs may accompany these benefits. Most preclearance suits would produce some negative externalities. First, as long as they do not have to internalize the full costs to government and the court system of the judicial process, some people will seek more preclearance than is optimal. Too often they will explore the tax consequences of marginal transactions from which they could walk away at little cost. A rough analogy exists in the criminal

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63. One way nontaxpayers who bear the major portion of a tax's burden can encourage nominal taxpayers to undertake a transaction that will permit a challenge to the tax is through side payments to the taxpayer. These are easily visualized in the case of municipal bonds. The borrowing state could simply pay sufficient interest to make the risk of a dispute with the IRS acceptable to the lender. The principal impediment would be state laws prohibiting dealings that look too much like graft or conflicts of interest. With charitable contributions, side payments would undermine the premise of the deduction and might constitute an independent ground for its denial. In some cases, an organization might be able to find donors with sufficient ideological commitment to its goals to risk a court test over the deductibility of a contribution.
justice system, where subsidies lead to a high level of frivolous appeals and certiorari petitions. In addition, preclearance seekers who are relatively indifferent to the uncertainty generated by an effort to overturn the government's position will not take into account the wishes of those taxpayers who have made their peace with the status quo.

On the other hand, that the benefits of preclearance outweigh its costs in some instances is suggested by congressional decisions to permit court review of administrative preclearance in four areas: charitable exemptions, employee benefit plans, municipal bonds, and (until recently) transfers of corporate property to foreign corporations. In each of these areas, there are ample reasons to believe that the economic incidence of taxation can shift substantially, and that otherwise desirable transactions will not take place without preclearance. All of these exceptions to the Anti-Injunction Act involve jus tertii standing, in that the person who may bring suit puts at issue not only his own tax status, but that of persons who will deal with him. Because Congress enacted the exceptions in an ad hoc fashion, reacting to litigation rather than surveying the field to determine the limits of a general preclearance policy, it seems plausible that other candidates for expanded jus tertii standing exist.

2. Private Enforcement

Taxation can be desirable in particular as well as in general: the levying of a tax on a specific event or transaction, instead of no levy at all, may produce benefits for both discrete groups and society as a whole. Enforcement suits are one means of ensuring the produc-

64. See, e.g., Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61 (1971). For a discussion of the role standing doctrine might play in countering the effects of litigation subsidies, see Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 670-83 (1973). The analogy between the criminal justice system and private litigation is only rough because the special subsidies for appeals of criminal convictions—primarily government-provided counsel and forma pauperis procedures—are far greater than the more general subsidy our society provides litigants through its refusal to make them internalize all of the costs of the process.

65. One might think that taxpayers always would want more pro-taxpayer rules, but notwithstanding the expanded choice theorem, at some point a proliferation of choices can be more trouble than it is worth. To the extent taxpayers bear different costs in seeking out the various alternatives but compete against each other in relatively efficient markets, the higher cost bearers will want some restriction of choices. For example, before the 1981 revisions of the depreciation deduction, taxpayers could choose among many methods for calculating depreciation. Competitive pressure forced businesses to survey the results of each method every year, thereby raising accounting and other transaction costs. Congress, when it imposed a uniform method through the ACRS system, believed it was removing a burden that fell disproportionately on smaller businesses. See Staff of Joint Comm. on Tax’n, 97th Cong., 1st Sess., General Explanation of the Economic Recovery Act of 1981, at 75 (Comm. Print 1981).

66. See supra note 13 and accompanying text.
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tion of such benefits. For example, an enforcement suit can protect a citizen's right to equal treatment by ensuring that those persons who share the citizen's salient characteristics shoulder their appropriate tax burden. Some claims to equality are bogus (for example, we do not recognize a right of all citizens to have equal marginal rates), but others have constitutional stature. A refusal to allow standing in the latter category of cases thwarts the fulfillment of those values that this body of constitutional law is meant to serve.

I do not intend to survey here the theories of constitutional law that support and oppose the recognition of the kinds of rights asserted in nontaxpayer suits. It should suffice to note that with respect to its constitutional dimensions, Allen is hard to justify except as a merits determination disguised as a standing decision. As an interpretation of the Constitution, of course, the result could be right or egregiously wrong; I leave it to the constitutional scholars to debate the point. My focus instead is on the benefits of suits brought by nontaxpayers to protect rights and interests sounding exclusively in the Internal Revenue Code.

Private enforcement of the tax laws could overcome those systemic barriers that currently prevent optimal collection. Supporters of nontaxpayer standing to compel enforcement suggest at least two distortions in the present system: "special interests" can bring disproportionate pressure on the Treasury and Congress; and judicial review only of assessments produces an anti-progressive asymmetry. Private lawsuits can counter each of these structural flaws.

a. Undoing Special Interest Underenforcement

Although current law achieves a surprisingly high degree of neutrality, it would be foolish to insist that the income tax does not contain many choices in favor of particular interests at the expense of the general welfare. Controversy exists only about the extent of such choices and their inevitability. Violations of neutrality—what I loosely will call special-interest rules—embody many evils: they distort economic decisions, redistribute political power, and, in some cases, offend fundamental notions of fairness.

Absent some constitutional infirmity, decisions that Congress has written into positive law cannot be undone by private suits. Private enforcement suits, however, could reverse less visible, and therefore perhaps more pernicious, attempts to serve special interests

68. See passim sources cited in note 2 supra.
through underenforcement of their tax obligations. Enforcement standing produces benefits, then, to the extent it can overturn those bad rules that Congress will tolerate only tacitly. Conversely, it accomplishes nothing in those cases where those interests have sufficient influence to get the rules they want from Congress.69

The problem is that only a fraction of private enforcement suits would produce this benefit, but almost all will create the kinds of costs discussed in the previous section. Because of the system's neutrality, many if not most income tax rules have no regulatory purpose, and their intricacy makes the identification of those that do extremely difficult. Similarly, not all IRS decisions to collect less taxes than a literal reading of the Code might support disserve society in favor of discrete groups. Some reflect fair readings of congressional intent, and others result from a sensible assessment of the comparative costs and benefits of enforcement. Challenges to these decisions presumably would fail on their merits, but during the course of litigation substantial taxpayer uncertainty would be generated. Moreover, if the suits did succeed and courts substituted their own readings of the Code, there would be considerable danger that the courts' decisional rules would be more indefinite or at odds with related norms than those which were replaced.

For example, nothing in the Internal Revenue Code explicitly excludes the economic value of leisure from the tax base, which according to Section 61 comprises "all income from whatever source derived."70 The failure of the government to tax this benefit might count as underenforcement, but characterizing this decision as sub rosa service to special interests—here a hypothetical alliance of the leisure class and the unemployed—seems absurd. Lest the example seem unrealistic, consider the imbroglio over the taxation of fringe benefits, which involves many of the same substantive issues of base definition. Although Congress for some years frustrated the Treasury's efforts to formulate criteria for distinguishing taxable from excluded benefits, at no time did it explicitly forbid the inclusion of employee discounts, "no incremental cost" perquisites such as free air travel, and similar items. Indeed, the Court at one point hinted

69. One episode where Congress ratified a Treasury decision that private litigants had challenged as a special-interest giveaway involved the asset depreciation system used to calculate depreciation deductions. After the Treasury promulgated the system by regulation, a variety of anti-business groups filed suit to enjoin it. Congress then enacted I.R.C. § 167(m) to provide an explicit statutory basis for the new method. See Common Cause v. Connally, No. 71-1337 (D.D.C. filed Jun. 17, 1971; dismissed on motion of plaintiffs Jan. 13, 1972); Bittker, Treasury Authority to Issue the Proposed "Asset Depreciation Range System" Regulations, 49 Taxes 265 (1971); Tannenbaum, supra note 2, at 375.

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that the Service was flouting the clear meaning of the Code through its exclusion of one such benefit, namely supper money reimbursements given to employees who worked late.\textsuperscript{71} One even might have argued that organized labor and large employers had brought political pressure on the Treasury to produce this leniency, although classifying so many taxpayers as a discrete special interest seems improbable.

If courts had allowed private enforcement during this period, presumably these issues, as well as questions about the taxability of water coolers, attractively furnished offices, and other enhancements of the quality of work life, could have come before the courts. Given the indefiniteness and inconsistency that may arise from court-made rules, it seems unlikely that litigation would have produced predictable and reliable guidelines for employers and employees. Instead, the political process percolated without the benefit of judicial intervention, and after considerable study and debate Congress enacted a comprehensive set of tests for determining the taxability of these items.\textsuperscript{72} Although some might argue that Congress sold out to the unions when it chose these rules, the exclusions in the new law more likely suggest a defensible decision to avoid taxation where the costs of enforcement (principally indeterminate valuation and taxpayer uncertainty about liability) overwhelm the benefits of inclusion.

While not all Service underenforcement reflects undesirable influences, not all suits that challenge underenforcement would stem from disinterested efforts to improve the common weal.\textsuperscript{73} To be sure, a central premise of relaxed standing rules in other areas of law is the harnessing of private interests to oppose undesirable government choices.\textsuperscript{74} But, as discussed above, much in the income tax follows a pattern of offsetting privileges. This pattern extends beyond the positive rules contained in the Code to include administrative interpretation as well. Some actions of the Service concededly do not achieve such evenhandedness, but without sophisticated data about incidence as well as a global view of tax structure courts will have a hard time distinguishing Service interpretations catering to

\textsuperscript{71} Commissioner v. Kowalski, 434 U.S. 77, 92-93 at n.28 (1977).
\textsuperscript{73} In addition to vindicating client interests, these suits also benefit the lawyers who bring them. Victories bring prestige, which translates into more business and, for public interest litigators, more contributions. Successful litigants in tax cases also can recover attorneys' fees up to a maximum of $25,000. See I.R.C. § 7430 (1984). Pro bono litigators can recover fees at the same rate as for-profit law firms. See Blum v. Stenson, 104 S. Ct. 1541 (1984).
\textsuperscript{74} See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).
private interests from those designed to generate public revenues at an optimal cost.\textsuperscript{75}

In those cases where the Service exploits the Code's intricacy to give offsetting concessions to competing groups, the present barriers to private enforcement solve a kind of Prisoner's Dilemma. The competing groups are better off not investing in expensive suits that would only cancel out each other's benefits, but given the multiplicity of potential plaintiffs within each group (a product of the pervasiveness of income taxation), they could not make mutual amnesty agreements. For such taxpayers, the rule against private enforcement standing gives them the result they would have achieved if they could have bargained directly with their competitors.

Consider the two cases discussed in the previous section. One can conceive of the \textit{Tax Analysts} litigation as an economic battle between domestic and overseas oil producers, in which the former claimed that a liberal interpretation of the foreign tax credit gave an unfair advantage to the latter. As a class, however, owners of domestic oil wells have little to complain about with respect to either the positive rules governing the taxation of their gains or the Service's interpretation of them. To cite only one example, a longstanding if much disparaged Revenue Ruling that Congress did not embrace until the Deficit Reduction Act of 1984 incorporated it into the Code allowed limited partners in oil drilling ventures to take an immediate deduction for prepaid intangible drilling expenses.\textsuperscript{76}

Before the recent amendment, the Code appeared to give the government the power to postpone such deductions at least until the drilling commenced. In theory, unwarranted acceleration of deductions benefited all producers, but it had special appeal for tax shelter investors, who for the most part support domestic drilling.\textsuperscript{77} If the standing question had come out differently in \textit{Tax Analysts}, the overseas oil producers undoubtedly would have sought to strip away this advantage from their domestic competitors. After the dust had settled, the relative tax burdens of the two industries might have ended up unchanged.

\textsuperscript{75} When the service discriminates directly among competitors by applying different interpretations of the same provisions, the losers can assert their rights in a refund suit. \textit{See} IBM Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965), \textit{cert. denied}, 382 U.S. 1028 (1966). Private suits to compel increased taxes are necessary only for those cases where the Service discriminates in the enforcement of functionally equivalent, but formally different provisions.


As for cases involving ideological rather than economic claims (and disregarding constitutional claims), one should consider the role of public interest law firms in such litigation. While these firms play an important and commendable part in the protection of interests our society too easily neglects, they also derive more mundane rewards in the form of fees and prestige (which in turn can be converted into additional contributions and more business). Most of these firms enjoy the charitable exemption, one of the friendliest treatments known to the income tax. The Service did not formally recognize the charitable status of public interest firms until relatively recently, and Congress still has not expressly addressed the question of their exemption. Reasonable people can disagree over both technical and policy grounds for this interpretation of the Code. If underenforcement means any debatable Service interpretation that favors taxpayers, then public interest law firms benefit greatly from exactly such underenforcement. One can speculate that if the courts were to relax the requirements for enforcement standing, we soon would see counterclaims in many of the ideological suits attacking the tax status of the lawyers whose participation makes the litigation possible.

These examples may be exceptional rather than normal. Although no one to date has documented such a charge, the administrative process might produce substantially different winners and losers than those whose interests are vindicated and vanquished by Congress. The key question remains whether courts can successfully separate wasteful from beneficial enforcement suits, or rather would encourage a round of costly but ultimately valueless contests by competing interest groups.

Courts presumably work at a greater distance from the influences that create a “special interest” perspective. It may be that, in spite of the intricacies of the federal income tax, they will do a sufficiently good job of distinguishing desirable suits to discourage private enforcers from bringing all but meritorious claims. Moreover, I may be too complacent about the susceptibility of the Service to manipulation by private interests. In addition, the institutional laziness of Congress may lead to many instances of administrative underenforcement that cannot be corrected by the legislature, but which would not be endorsed by legislation if attacked by the courts. I am confident, however, that the claimed benefits of private enforce-

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78. See generally Houck, supra note 2, at 1438-54. Oliver Houck’s investigation into the use of public interest law firms by business interests documents both the ideological diversity of the firms claiming the charitable exemption and the difficulty of line-drawing in this area.
ment—undoing such special interest underenforcement as does exist in circumstances where Congress will not reverse the courts—are smaller than first may appear, and will come about in only a fraction of the private enforcement suits actually brought. The costs of private enforcement, however, will arise in almost every suit, and could be enormous.

b. Combatting Anti-Progressive Taxpayer Litigation

The other benefit claimed for private enforcement is correction of the fundamental protaxpayer bias and antiprogressive asymmetry of the present system of judicial review. When the government seeks to tax, a court can intervene; when the government withholds taxation, the judiciary has no say. Although no data exists on the question, it seems plausible that this bias disproportionately advantages persons with greater tax liability. The greater the amount of taxes an individual has at stake, the more likely it is he or she will seek judicial review of an assessment. High-bracket taxpayers with large potential liabilities, then, will invest the most in litigation to reduce their taxes, but there exists no mechanism by which private persons can invest in offsetting litigation to increase the taxes of the rich. Because of this imbalance in judicial pressure brought to bear on the IRS, the absence of private enforcement may systematically undercut the progressivity of taxation.

Although the diagnosis may be valid, the prescription of private enforcement does not necessarily follow. The question remains what branch of government has the comparative advantage to correct the anti-progressive bias of the current system. Nothing prevents the Service from budgeting its enforcement resources to enhance progressivity. Some crude data suggests that its audit strategies, for example, have increasingly focused on persons with greater tax burdens.79 Especially during periods of large deficits, Congress also is not unresponsive to citizens’ complaints about insufficient ambition on the part of the IRS and can act to correct this problem. Court review of underenforcement probably would not promote progressivity more than the combined efforts of the Service and Congress.80

79. According to figures cited by a former Commissioner, the average amount of additional tax recommended per return examined has increased from $543 in 1962 to $6882 in 1982. See Caplin, The Internal Revenue Service’s “Hart Wright Method,” 82 MICH. L. REV. 395, 395 n.1 (1983).

80. A parallel exists in criminal law, where courts have no power to review the decision not to initiate proceedings. For an argument that prosecutors generally are the optimal decisionmakers with respect to the question whether to bring charges, see Easterbrook, Criminal Procedure As A Market System, 12 J. LEG. STUD. 289, 298-308 (1983).
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In sum, allowing private enforcement of the income tax through relaxed standing rules promises uncertain benefits and risks significant costs. In light of this cost-benefit calculation, the hostility of courts to these suits is surely merited. Private enforcement of the income tax looks too much like an expensive and wasteful extravagance.81

III. The Future of South Carolina, Allen, and Nontaxpayer Standing

I have tried to identify the costs and benefits of both *jus tertii* and enforcement standing. What emerges is a sense that nontaxpayer standing can produce harmful confusion and unnecessary litigation expenses, and that finding the instances where its benefits outweigh these costs is extremely difficult. In this last section I will survey the contribution the Court’s recent pronouncements might make to the future development of the law of nontaxpayer standing.

Because it breaks with precedent and appears to assume a permissive stance toward nontaxpayer standing, *South Carolina* is a striking decision. It has no obvious limits, as the Court seemed not to rest its decision on any of the distinctive aspects of the case—the peculiarities of the Supreme Court’s original jurisdiction, the nature of the constitutional claim asserted, or the fact that the plaintiff raised constitutional rather than statutory issues.82 On its face, the decision seems to authorize *jus tertii* standing to attack any federal tax assessment that will produce economic burdens for someone other than the nominal taxpayer, as long as the burden-bearer has no direct liability it may challenge.83

81. I recognize, of course, that other moral and political arguments also matter. I will not rehearse here the many ways that private enforcement suits can both fulfill and frustrate values and theories that do not depend on utilitarianism and its balancing of goods and bads. Because my purpose has been to show how a cost-benefit analysis points toward restricting standing for nontaxpayers, I only will declare my colors with respect to these additional concerns and then withdraw.

For me, distributional issues underlying the allocation of the tax burden raise hard questions. Asking courts to override the judgment of the government, and implicitly of Congress, on these matters implies a willingness to trust unelected judges over elected officials. I realize that in the present era of the bureaucratic state, many people doubt whether the concept of democratic accountability has any continuing validity. For them, my worries will have no force. Still, I find extremely disturbing the prospect of tax exactions taking place at the initiative of a self-appointed private prosecutor and with the approval of a federal judge, but without the support of any person responsible to the electorate for his decisions.

82. *See supra* notes 18-20 and accompanying text.

83. To date the lower courts have used *South Carolina* sparingly, but they have not totally ignored the opportunities it presents. In Food Service and Lodging Institute, Inc. v. Regan, 583 F. Supp. 1018 (D.D.C. 1984), the court relied on *South Carolina*’s no-alternative-means-of-review exception in holding that the Anti-Injunction Act did not bar a restaurant employer’s suit that attacked reporting and withholding requirements.
One way of limiting *South Carolina* might be to tie it as closely to statutory moorings as possible. Congress already has authorized judicial review of administrative preclearance affecting municipal bonds. *South Carolina*’s claim did not fit neatly within the legislative mandate because the dispute involved a reading of the Constitution rather than of the Internal Revenue Code, but in all material respects it was the kind of case for which Congress had approved court review. In the parallel situation of judicial review of charitable exemption decisions, the Court has permitted litigants to raise constitutional claims as well as statutory ones.84 Perhaps the future of *South Carolina* will lie in its assimilation into this pattern of congressionally authorized preclearance.85

Any broader reading of the decision will force courts to risk litigation that causes more harm than good. Although other areas doubtlessly exist where judicial preclearance would have net benefits, identification of those cases seems especially difficult for a court that must act within the confines of the adversary process. Every private party that seeks *jus tertii* standing will claim that his case has the special characteristics that justify an extension of *South Carolina*, while the Service will be reluctant to take a position that sanctions some, but not all, exceptions to the Anti-Injunction Act. Courts will not know how to choose the worthy cases, and will end up either creat-

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affecting its employees. The decision may not portend much, both because it involves burdens other than the payment of a tax and because the court in question had reached the same result before *South Carolina*. Other cases have elided the Anti-Injunction Act issue by characterizing lawsuits against the Treasury as neither tax suits nor claims for a refund. See Nelson v. Regan, 731 F.2d 105 (2d Cir. 1984) (due process challenge to refund intercept program); Founding Church of Scientology of Washington, D.C., Inc. v. Director, FBI, 84-1 USTC (CCH) ¶ 9468 (D.D.C. 1984) (first amendment challenge alleging harassment from, *inter alia*, being listed as nonexempt ideological organization); Coughlin v. Regan, 584 F. Supp. 697 (D. Me. 1984) (due process challenge to refund intercept program).

84. See Bob Jones University II, 461 U.S. 574 (1983); Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983). These cases are slightly different in that Section 7248, the statute that authorizes declaratory judgments concerning charitable status, applies to federal district courts as well as the U.S. Claims Court and the Tax Court. Section 7478, which covers municipal bonds, permits only the Tax Court to give preclearance review. One may argue that an Article I court such as the Tax Court does not have as much authority to address constitutional questions. That it has no such authority, however, is clearly wrong.

85. Of course, the Court would have to swallow its pronouncement in *South Carolina* that the present declaratory judgment scheme for municipal bond issuers does not permit contests over the constitutionality of Section 103’s provisions. See 104 S. Ct. at 1114 n.17. This statement, which simply parroted the government’s contention, does not seem the kind of well-considered holding the repudiation of which would embarrass the Court. Although extending Section 7478 to include constitutional claims might stretch its language a bit, this construction does less violence to the reading of the statute than *South Carolina* did to the Anti-Injunction Act.
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ing exceptions at random or permitting *jus tertii* standing whenever a litigant plausibly can show he bears some incidence of a federal tax imposed on someone else.

However improvident *South Carolina* may seem if taken at face value, the decision may prove beneficial if it provokes Congress into rethinking the current declaratory judgment structure and tying it more explicitly to the Anti-Injunction Act. Congress probably should broaden the class of cases eligible for pretransaction declaratory judgments, but this will require decisions about what level of resources the Service should dedicate to litigation and to the identification of those disputes where preclearance promises clear benefits. In areas such as corporate reorganizations, for example, preclearance of some sort is essential, but the refusal of the Service to approve one form of a transaction usually does not close other paths for attaining the same substantive result. In these cases anti-taxpayer results are not as devastating, and judicial review might not justify its costs. In addition, Congress should put to rest the uncertainty generated by the implications of *South Carolina*. In the course of choosing where else to sanction court review of preclearance, Congress should bolster the Anti-Injunction Act to make clear that these authorized instances of pretransactional judicial review are meant to be exclusive.

As for *Allen*, its potential for future development is more latent, but also more significant, than *South Carolina*’s. At present the rule against nontaxpayer enforcement rests on tenuous assumptions about the behavioral impact of nontaxation. One need look only at the Court’s recent commerce clause and interstate commerce decisions to understand that it clearly does believe that nontaxation can materially harm identifiable groups of persons.86

It seems inevitable that some litigant eventually will surmount the causation obstacles erected by *Eastern Kentucky* and *Allen*. The Court will then face the task of answering candidly the question that it may already have decided implicitly: Has Congress in the course of creating the various duties and privileges found in the Internal Revenue Code done anything that private enforcement through the courts would improve?

Because no explicit congressional authorization exists, the question becomes whether courts should imply a private enforcement structure in the absence of clear congressional signals to the con-

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trary, and if so what kind. The basic difficulty is the same as with *jus tertii* standing: In the absence of legislative guidance, how can courts construct a system that reaches less than all possible disputes? Given the incentives to bring enforcement suits and the incomplete internalization of their costs, there is no reason to trust private prosecutors to select only worthwhile questions for judicial review, and widespread reopening of settled rules can wreak havoc on federal taxation. Yet in the absence of some settled understanding within the judiciary about the kinds of rights that most need vindication, either because of their significance or because of doubts about administrative enthusiasm for them, the existence of any private enforcement option tends to throw open almost any issue to litigation.

Again there is no way out of the dilemma until Congress acts, but unlike the case of *jus tertii* standing, few advantages from any congressional action are apparent here. If special interests can hold the Treasury captive, one wonders how Congress can overcome their opposition. If anything, the common wisdom has Congress in greater thrall to these groups than is the Treasury. Moreover, the assignment to the judiciary of the authority to exact taxes raises important issues about democratic accountability and political structure. On balance, the wiser course is to keep the courts closed to private enforcement actions.

A possible solution, perhaps no more than a fig leaf, would be the creation of an inspector general entity responsible for reviewing Treasury enforcement practice. This body could challenge IRS interpretations of the Code as well as investigate accusations of insufficient prosecutorial ambition. Rotation of personnel might prevent too many self-justifying charges by this entity, and a tradition of staggered, bipartisan appointments might deter too-rapid politicization. Moral authority and publicity would be its only tools, but perhaps these would do the most good while causing the least harm.

On the other hand, what criticism and moral guidance we need with respect to federal tax underenforcement may already be available from sources outside of government. Legal scholars often prefer addressing their complaints to the courts, in part because their distinctive skills generally are more congenial to judicial than political advocacy. But the community of tax specialists bears a special duty to chastise and harass the Service, Treasury, Congress, and the public. The real lesson of *Allen* may be that those who write about the income tax—academics, practitioners, and politicians alike—
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have an obligation to generate the intellectual tools that will enable the government to interpret and enforce the Internal Revenue Code in a manner that satisfies the basic needs of our society. In the long run, intelligent criticism may do more than any new executive agency to promote the fair and efficient administration of the federal income tax.