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## Context, Purpose, and Coordination in Taxation

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## Article

### Context, Purpose, and Coordination in Taxation

BLAINE G. SAITO

*A great deal of scholarship focuses on whether we should place social safety net and redistribution programs within the tax sphere and under the responsibility of the IRS. But much of this literature misses a key point. These programs are here, and they are unlikely to leave the tax sphere. But little is said about how to approach administering them.*

*This Article suggests the IRS administer these programs under a new framework called contextualized purpose. The idea is that these tax programs should be organized and managed in a way that comports with the broader context of the social safety net and redistribution in which they exist. In applying this approach, the IRS would discern the various purposes, values, and goals of these programs and note how they interrelate with other purposes, values, and goals within the tax system and the broader social safety net. To that end, contextualized purpose often requires that the IRS coordinate with other agencies to avoid administrative cross-purposes and that the agencies iteratively grow through learning by doing.*

*The Article uses contextualized purpose to examine and suggest administrative changes to key income support programs like the earned income tax credit (EITC), the child tax credit (CTC), and the pandemic economic impact payments (EIP). It then discusses some of the advantages and concerns with this approach and how this approach fills the gap left by traditional discussions of tax programs to effectuate social policy.*

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# Context, Purpose, and Coordination in Taxation

BLAINE G. SAITO\*

## INTRODUCTION

The tax system often serves as a mechanism for delivering social goods, particularly those related to redistribution and the social safety net.<sup>1</sup> Frequently, scholarship focuses on whether the tax system is the best place to put these policies and whether the IRS has the capacity to administer such programs.<sup>2</sup> But these discussions miss a vital point. They do not provide any framework to enable the tax system to deliver these social goods. They also fail to acknowledge that such programs are here to stay and proliferate in the tax sphere.

This Article focuses on a different question: How can one improve the delivery of social policies through the tax system? This analysis fills a gap in the existing literature, and it reckons with the reality that the tax system is

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<sup>1</sup> See generally Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 794 (2014) (discussing a broad array of programs to address poverty); MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM 15, 17 (2019) (discussing the EITC and CTC and providing policy reforms); Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995) (also discussing the EITC and operational concerns); Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PA. L. REV. 1451, 1458–59 (2022) (noting the broad redistribution in the tax system and citing numerous sources to that end); Blaine G. Saito, *Collaborative Governance and the Low-Income Housing Tax Credit*, 39 VA. TAX REV. 451, 474 (2020) (discussing a program to increase the low-income rental housing stock).

<sup>2</sup> See generally Alstott, *supra* note 1 (noting problems in administration and advocating for removing matters from the tax system); Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014) (similarly pointing toward reorganization of administration of social safety net tax programs outside of the tax system); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004) (developing an approach to analyze whether safety net programs should involve the tax system); STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985) (labeling many of these safety net programs as tax expenditures and suggesting that they be removed from the tax system).

designed to do more than raise revenue. Both the way the tax system is designed and its interconnections with other parts of government contain values that support the concepts of redistribution and social welfare provisions. Drawing on that realization, this article develops its key approach.

That approach is called contextualized purpose. It comes from the idea that when a social policy program is put in the tax system and administered by the IRS, it is in context with other social safety net programs. The contextualized purpose approach requires that the IRS discern the purposes, values, and goals of a particular program in light of other safety net programs and values of the tax system and administer it along these lines.

While social safety net policy is often made in fits and spurts, which denies an overarching detailed plan,<sup>3</sup> contextualized purpose can help the IRS administer these programs in ways that reduce the potentiality for cross-purposes in administration and management. This view also calls on the IRS to coordinate with other agencies in administering these tax programs and perhaps for other agencies to work with the IRS in administering some of their own social safety net programs.<sup>4</sup> Contextualized purpose can guide tax coordination and help the IRS and other agencies discern what coordination tools are necessary.

The IRS should determine contextualized purpose publicly. It should, in discerning the process, use purposivist statutory interpretation methods and draw on the numerous available legislative history tools. The IRS can then use the discerned purpose to begin engaging and coordinating with other agencies in that policy space, and perhaps even develop and change its understanding. Contextualized purpose should lead toward a push and pull of growth and change over time as agencies develop new capacities and Congress also engages in the dialogue.

This framework is useful even in programs that are often seen as tied well into the tax system, such as the income support programs of the earned income tax credit (EITC),<sup>5</sup> the child tax credit (CTC),<sup>6</sup> and the COVID-19 economic impact payments (EIP).<sup>7</sup> This Article shows how contextualized purpose can help form better connections in administering these programs

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<sup>3</sup> See Jonathan H. Choi, *Beyond Purposivism in Tax Law*, 107 IOWA L. REV. 1439, 1460–65 (2022) [hereinafter Choi, *Beyond Purposivism in Tax Law*] (discussing the flaws in an overarching structural clear purpose in tax law from Congress, given the way Congress works as a series of political compromises).

<sup>4</sup> For some literature on coordination, see generally Blaine G. Saito, *Tax Coordination*, 38 GA. ST. U. L. REV. 735 (2022); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961 (2019); U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-1022, *MANAGING FOR RESULTS: KEY CONSIDERATIONS FOR IMPLEMENTING INTERAGENCY COLLABORATIVE MECHANISMS* (2012) [hereinafter GAO, *MANAGING FOR RESULTS*].

<sup>5</sup> I.R.C. § 32.

<sup>6</sup> I.R.C. § 24.

<sup>7</sup> I.R.C. §§ 6428, 6428A, 6428B.

with other social safety net programs, and how benefit administration processes can be streamlined if agencies work together. Taking this view of contextualized purpose would also focus the IRS on trying to increase uptake and avoid some of the harsh—and potentially pyrrhic—enforcement practices in this area. Finally, this analysis suggests additional capacities that the IRS and other agencies may need to better administer and manage these and other related programs.

Contextualized purpose has some key advantages. Notably, it brings questions of values into policy administration. It also comes with an understanding that many of the problems that the social safety net addresses are complex, and it recognizes history and path dependency. Rather than calling for a wholesale revision or trying to undo the placement of social policies in the tax system, it seeks to find ways to make it work. Also, by having the IRS publicly identify the purposes, values, and goals of a program and administering programs accordingly, it provides useful means to measure the efficacy of the IRS's actions and choices. Finally, it provides a useful framework for determining how to make agency coordination work.

Not only does contextualized purpose fill a gap in the tax literature to show how to implement social safety net and redistribution programs within the tax system, but it also pushes back against a view that somehow the tax system is exceptional and exists solely for revenue raising. It thus raises a further examination of the values, goals, and purposes of the tax system itself. It also pushes back against the existing literature's bias toward excluding almost all social policy from the tax system. While inclusion is not always ideal, this adverse view provides few workable ways forward for administering a tax system that by its own terms is full of values of redistribution and equity.

While this Article is focused mainly on the unique features of the tax system and its interactions with social welfare policy, some of the lessons are also more broadly generalizable to other agencies and contexts. Tax is unique, but it is not exceptional. The lessons here are not necessarily bound to the tax system but are relevant to any area where interagency collaboration could lead to more effective policy implementation.

The Article proceeds as follows. Part I outlines the concept of contextualized purpose, noting how the tax system is used, its particular benefits, and its own underlying purpose. It also provides greater detail as to how to undertake the discernment of contextualized purpose and how it connects with agency coordination. Part II then takes contextualized purpose and applies it to the EITC, CTC, and EIP. It notes changes in administration and how to better knit these programs into other parts of the social safety net. Part III then outlines the benefits and potential pitfalls of this approach. It also seeks to locate this framework within the ongoing discussion of the use of the tax system to deliver social welfare goods.

## I. CONTEXTUALIZED PURPOSE

This Part introduces the concept of contextualized purpose in the administration of tax programs that provide social safety net goods. The reason for using contextualized purpose to guide the administration of such programs in the tax system stems from the realization that the tax system will constantly be a site for these programs.

This Part first discusses why the tax system is often used for social programs outside of revenue raising. It then outlines contextualized purpose and what it is. It then describes how the IRS can use contextualized purpose in tax programs designed to provide social policy benefits, and to connect with other redistribution and social safety net programs.

### A. *Why Social Safety Net Programs Use the Tax System*

The tax system is used as a key means to deliver social safety net items and social goods. This Section explores some of the reasons why the tax system is used and why it often should work in conjunction with other systems and agencies in delivering social safety net programs and redistribution. It starts with the purpose of the tax system; discusses how the tax system, through the mass income tax, has a broad reach; discusses the benefits of civic virtue; and explores political reasons why the tax system is often used.

#### 1. *Purpose of the Tax System*

One of the reasons why the tax system is often used for redistribution and other social safety net policies is that it resonates with some of the key values and purposes of the tax system itself. These values and purposes of the tax system should also undergird how to administer these programs, which is part of where the contextualized purpose approach trains its focus. While a full explanation of the purposes of the tax system is beyond the scope of this piece, this discussion is important for understanding why contextualized purpose in tax administration is important.

The widely acknowledged justification for the tax system is that it raises revenue for the government.<sup>8</sup> Traditionally, the idea is that the tax system should focus almost exclusively on raising revenue in the most efficient and equitable ways to fund the operations of government.<sup>9</sup> In this view, other purposes are at best a distraction; at worst, they undermine the tax system.<sup>10</sup>

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<sup>8</sup> See SURREY & MCDANIEL, *supra* note 2, at 1–3 (noting that the revenue-raising function is the major part of the tax system most people consider and defining tax expenditures as a deviation from the necessary definition of the income tax base).

<sup>9</sup> Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 686 (2019) (noting that people who argue for tax exceptionalism argue that it is the primary focus on revenue raising and that it should pursue *no* social policy outside of revenue raising).

<sup>10</sup> Hickman, *supra* note 2, at 1720–21, 1723–26 (discussing the view of revenue raising as the primary focus but noting that there are significant competing values involved too).

But that view is cramped. Even if raising revenue is the major focus, as Alice Abreu and Richard Greenstein argue, raising revenue requires answering other questions that embed other values and purposes into the system.<sup>11</sup> The tax system cannot then escape embedding other values and ideas within itself, no matter how hard it tries by applying objective measures and hyper-clear rules.<sup>12</sup> Indeed, as Tessa Davis notes, the focus on revenue raising, economics, hyper-clear rules, data, measurement, and objectivity tends to obscure the underlying values within what we measure and how we define certain matters.<sup>13</sup>

Additionally, according to some macroeconomists, revenue raising may not be the only goal. Some adherents to the heterodox Modern Monetary Theory (MMT) believe the tax system's revenue function is not as important as once thought.<sup>14</sup> Under that view, a government that is sovereign in its currency, like the federal government, need not borrow nor raise revenue through taxes to finance its spending—it can simply float its currency.<sup>15</sup> Rather, the tax system becomes a way to reduce activity to prevent economic overheating and inflation.<sup>16</sup> In this view, then, revenue raising is not the point.

Even if one does not take a strict adherence to MMT, some of its insights and critiques of macroeconomic policy reduce the centrality of revenue raising. As Brian Galle and Yair Listokin show, the tax system is still the primary means to fund government activity.<sup>17</sup> But in certain circumstances, including the period between 2008 and 2021, monetary financing along the lines of what MMT advocates claim often is cheaper and better to finance government activity.<sup>18</sup> Thus, while not wholly in the MMT camp, this view challenges both the traditional monetarist macroeconomic framework and the centrality of revenue-raising functions.<sup>19</sup>

But there is more. The federal tax system is not merely about funding the government but has always had a tenor as a progressive redistribution

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<sup>11</sup> Abreu & Greenstein, *supra* note 9, at 685–89. Kristin Hickman also shares this view. Hickman, *supra* note 2, at 1723–27 (discussing competing functions to revenue raising such as regulatory taxes and incentive functions).

<sup>12</sup> Abreu & Greenstein, *supra* note 9, at 689–97 (noting hyper-clarity and rules allow for legitimacy through promulgation and allow tax discussions to avoid moral norms, but also noting that the courts have not always viewed tax law in that manner, citing *Bob Jones University v. United States*, 461 U.S. 574 (1983), which denied § 501(c)(3) status based on the institution's segregationist nature).

<sup>13</sup> Tessa R. Davis, *Taxing Choices*, 16 FIU L. REV. 327, 331–33 (2022).

<sup>14</sup> WILLIAM MITCHELL, L. RANDALL WRAY & MARTIN WATTS, *MACROECONOMICS* 13–15 (2019). Mitchell, Watts, and Wray authored the main textbook espousing MMT for undergraduate intermediate microeconomics courses.

<sup>15</sup> *Id.* at 13.

<sup>16</sup> *Id.* at 323–25.

<sup>17</sup> Brian D. Galle & Yair Listokin, *Monetary Finance*, 75 TAX L. REV. 137, 140–43 (2022).

<sup>18</sup> *Id.*

<sup>19</sup> *See, e.g.*, Abreu & Greenstein, *supra* note 9, at 686–88.



tool.<sup>20</sup> This background has made it susceptible to instituting programs for redistribution and filling in part of the safety net. This redistribution purpose traces back to the push for the permanent income tax, which dates to the Progressive Era and the ratification of the Sixteenth Amendment.<sup>21</sup> Part of the goal of instituting the income tax, along with other taxes like the estate tax, was to provide a check on the rich and powerful.<sup>22</sup> Thus, a sort of distributive justice goal, though not necessarily called that, was embedded into the tax system and the push for making it permanent during the Progressive Era.

These points only grew during the presidency of Franklin D. Roosevelt, which spanned the Great Depression and World War II.<sup>23</sup> As the government grew, the reach of the income tax and the revenues it collected grew too.<sup>24</sup> But the system continued to seek progressivity for redistribution even as it turned into a mass tax.<sup>25</sup> The tax system thus not only provided revenue for

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<sup>20</sup> See *id.* (noting that values and progressivity seep into the discussion of tax even in developing key definitions).

<sup>21</sup> AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929*, at 8, 11–13, 25 (2013). As Mehrotra argues in his book, during the rise of the income tax, the moves toward fairness in the tax system, and the state, focused a great deal on the ability to pay. *Id.* Indeed, the focus for redistribution was based mainly on the use of the tax system and its progressivity, which in turn crimped the idea of regressive taxes for progressive spending. *Id.* at 16–17. While revenue raising was an important aspect of creating the income tax, Mehrotra also states that:

For these historical actors, taxation was about much more than just raising revenue. It was also about social justice, democratic civic identity, and rational and effective administration. “Whereas in former years the income tax was adopted chiefly from considerations of revenue,” noted progressive political economist Edwin Seligman in 1894, “there is of late a growing tendency, especially in the more democratic communities, to utilize the income tax as an engine of reparation—a means of attaining greater justice.”

*Id.* at 25. See also DAVID HENKIN & REBECCA MCLENNAN, *BECOMING AMERICA: A HISTORY FOR THE 21ST CENTURY* 560, 603 (2015) (noting that the Sixteenth Amendment, and the passage of the Revenue Act of 1916, was part of the Progressives’ agenda to redistribute wealth).

<sup>22</sup> MEHROTRA, *supra* note 21, at 25. See generally HENKIN & MCLENNAN, *supra* note 21, at 603.

<sup>23</sup> Meredith R. Conway, *Money, It’s a Crime, Share It Fairly, but Don’t Take a Slice of My Pie!: The Legislative Case for the Progressive Income Tax.*, 39 J. LEGIS. 119, 150–54 (2013); Randolph E. Paul, *History of Taxation in the United States*, in *THE HISTORY AND PHILOSOPHY OF TAXATION* 5, 10–12 (1955).

<sup>24</sup> Price Fishback, *How Successful Was the New Deal? The Microeconomic Impact of New Deal Spending and Lending Policies in the 1930s*, 55 J. ECON. LITERATURE 1435, 1436, 1438–42 (2017) (noting that the Great Depression led to a dramatic expansion of the federal government’s role in the economy, as well as its spending and tax policies); Eric A. San Juan, *From Tax Collector to Fiscal Panopticon: A Social History of a Century of Federal Income Taxation*, 15 RUTGERS J.L. & PUB. POL’Y 128, 153–55, 160, 162 (2018) (documenting the significant expansion of the income tax during the Great Depression and World War II).

<sup>25</sup> San Juan, *supra* note 24, at 153–55 (noting the transformation of the income tax into a mass tax, and a shift in the country’s perception of public spending from stimulating the economy to providing help to its citizens).

some progressive ends but also was itself part of the progressive architecture of the New Deal thinking.<sup>26</sup>

Even the Reagan era, which ended much of the New Deal thinking, did not close the door on this other purpose of the tax system. While many focus on the early Reagan tax cuts, which were regressive, President Reagan's main tax policy achievement was the Tax Reform Act (TRA) of 1986.<sup>27</sup> While it appears that the TRA reduced rates, it also substantially helped to stop some of the avoidance measures undertaken by the wealthy, who managed to avoid paying sky-high rates through llama farms or other tax shelters.<sup>28</sup> Thus, even here, a point of the tax system was redistribution and the restoration of progressivity.

There is another key purpose to the tax system that also makes it a useful site for redistribution. The tax system is meant to create a link between people and their government and in many respects represents a way in which we all contribute to a broader common good.<sup>29</sup> This is true even if we do not like paying taxes or dealing with the IRS. The income tax became a mass tax, and as a result, it became part of our civic duty.<sup>30</sup> The mass tax, along with the various forms of other programs it funded, stood to bind our common destiny together. Even as these concepts got blunted, they remain as another animating force and value set of the tax system.

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<sup>26</sup> Arlene Lazarowitz, *Hiram W. Johnson: The Old Progressive and New Deal Taxation*, 69 CAL. HIST. 342, 349–51 (1990).

<sup>27</sup> Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986). Indeed, when the outlines of the first plan came from Treasury, William Niskanen voiced the view of many of President Reagan's aides who saw this plan as a rollback of their 1981 campaign promises, saying: "Walter Mondale would have been proud." JEFFERY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 63–64 (1987). But eventually, with significant changes, Reagan kept the broad outlines and spoke to the nation in a televised speech about restoring fairness. *Id.* at 94–95. That opened the doors for the Democratic Ways and Means Chairman, Dan Rostenkowski (D-Ill.) to join the effort, and he noted in his speech: "This time, it's a Republican president who's bucking his party's tradition as protectors of big business and the wealthy." *Id.* at 96, 98–99. Thus, even though it lowered the highest individual rates, by eliminating certain preferences it managed to increase the taxes of the top income earners while lowering taxes for a broad stroke of Americans. *Id.* at 289.

<sup>28</sup> BIRNBAUM & MURRAY, *supra* note 27, at 9–11 (discussing the fact that people felt that the tax system was no longer progressive and noting the growth in tax shelters like llama-breeding farms, expense-account living, and the safe-harbor leasing provisions).

<sup>29</sup> This idea is captured best by Lawrence Zelenak, who calls it "fiscal citizenship." The idea is that the mass income tax and the filing of returns are important in creating a direct link between citizens and the government. Filing the annual Form 1040 serves "the important civic purpose of recognizing and formalizing the financial responsibilities of citizenship." LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 3–4 (2013); *see also* MEHROTRA, *supra* note 21, at 12–13 (discussing the new concepts of fiscal citizenship). This view also appears in the quote on the front of the IRS building in Washington, attributed to Justice Oliver Wendell Holmes, Jr.: "Taxes are what we pay for civilized society." Stephen Gold, *How High a Price for Civilization?*, FOUND. FOR ECON. EDUC. (Feb. 1, 1996), <https://fee.org/articles/how-high-a-price-for-civilization/>.

<sup>30</sup> *See* Tahk, *supra* note 1, at 828–29 (noting that recipients of the EITC feel like citizens, wage-earners, and taxpayers fulfilling a civic duty rather than welfare recipients).

These additional values and purposes make the tax system a key point for policy makers seeking to undertake redistribution, which is reflected in today's programs within the tax system that provide social safety net—types of goods. Furthermore, those approaching administration of the tax system and such programs within it must hold these values in mind along with the revenue-raising values. Thus, this broader sense of purpose in the tax system requires administration of the tax system have these motivations too.

## 2. *The Reach of the Mass Income Tax*

Another reason why social programs are placed in the tax system is based on the tax system's reach. The income tax is a mass tax.<sup>31</sup> It reaches numerous individuals, families, and business entities.<sup>32</sup> Nearly everyone who receives an income above a certain threshold files taxes and thus has contact with the tax system.<sup>33</sup> Tax policy and the tax system, then, embed themselves deeply in our lives. The system has the potential to influence almost every person or business entity's decision-making.<sup>34</sup> Because of its broad reach, it also can have broad-reaching effects outside of mere revenue collection and affect other areas of social policy, depending on whether it chooses to act or not act.<sup>35</sup> Furthermore, because it measures income, the tax system is often helpful when policy makers decide they want to means-test programs based on income.<sup>36</sup>

To administer this tax, the IRS also has a significant amount of machinery to collect certain key pieces of information. This information includes not only raw information about income but also the sources of income, family size, addresses, and bank accounts.<sup>37</sup> Many of these pieces of information are also backed up by third-party reporting of such information on tax forms like the W-2 and 1099.<sup>38</sup> The IRS also has expertise in tracing financial fund flows.

These should inform the administration of social programs within the tax system. Because it is so large, the tax system will intentionally or

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<sup>31</sup> San Juan, *supra* note 24, at 155.

<sup>32</sup> Abreu & Greenstein, *supra* note 9, at 683–84.

<sup>33</sup> *Id.*; see also ZELENAK, *supra* note 29, at 3–4.

<sup>34</sup> See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711–12 (1970) (listing examples of tax expenditure that could potentially induce behaviors both in individuals and businesses).

<sup>35</sup> CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* 21–24 (1997) (noting the misconception that the Code was solely for raising revenue and presenting the broad reaches it has into other areas of social policy).

<sup>36</sup> See Alstott, *supra* note 2, at 564–66 (noting that there are benefits to using the tax system to administer means-tested welfare programs but highlighting some concerns).

<sup>37</sup> See *Form 1040: U.S. Individual Income Tax Return*, IRS, <https://www.irs.gov/pub/irs-pdf/fl1040.pdf> (last visited Jan. 23, 2022).

<sup>38</sup> U.S. GOV'T ACCOUNTABILITY OFF., *GAO-21-102, TAX ADMINISTRATION: BETTER COORDINATION COULD IMPROVE IRS'S USE OF THIRD-PARTY INFORMATION REPORTING TO HELP REDUCE THE TAX GAP* (2020).

unintentionally touch other policy spheres. Since one of the purposes of the tax system is to provide some level of progressive redistribution, failing to involve the tax system in a thoughtful way could undermine programs in trying to deliver social goods. Thus, in administering the tax system's social programs, officials should have some level of awareness of this size and scope. The IRS should leverage the system's reach to aid programs' contact with potential beneficiaries and work with other agencies to improve benefit delivery.

Most directly, the tax system can and should be administered in conjunction and communication with other systems to reduce barriers to access to social safety net goods. Many social programs are means-tested and depend on income and wealth for eligibility and generosity.<sup>39</sup> The tax system collects vast information about income of people and can often be used as a first cut for qualifications for numerous social benefits.<sup>40</sup> Currently, many an individual and family must apply for other forms of benefits in addition to filing taxes. Frequently, those other programs allow applicants to use tax returns and other tax forms as verification.<sup>41</sup> But often the program requires the applicant to reproduce the tax information that the IRS, a separate part of the government, already has.<sup>42</sup> Rather than the IRS supplying this information to the relevant agency, many of these people, who often do not have major swings in income year-to-year,<sup>43</sup> must themselves find either their prior tax returns or other documentation to substantiate their income. Finding these documents and constantly verifying eligibility to

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<sup>39</sup> For example, Medicaid is means-tested, and in states that expanded it under the Affordable Care Act, Medicaid was provided to those with incomes up to 133% of the federal poverty level. *See* 42 U.S.C. § 1396a(a)(10)(A)(i). SNAP also depends on income levels, though it can vary depending on the state. *See SNAP Eligibility*, USDA: FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/recipient/eligibility> (last visited Jan. 23, 2022) (choose "What are the SNAP income limits" from the "Frequently Asked Questions" menu).

<sup>40</sup> MARGOT L. CRANDALL-HOLLIK ET AL., CONG. RSCH. SERV. R45971, THE IMPACT OF THE FEDERAL INCOME TAX CODE ON POVERTY 2–3 (2020).

<sup>41</sup> For example, Medicaid and the Premium Tax Credits (PTC) under the Affordable Care Act use prior years' returns to determine the proper amount to deliver. DEP'T OF HEALTH & HUM. SERVS. OFFICE OF INSPECTOR GEN. & TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF THE ACCOUNTING STRUCTURE USED FOR THE ADMINISTRATION OF PREMIUM TAX CREDITS 1–2, 2 n.10 (2015) [hereinafter PTC ACCOUNTING STRUCTURE], <https://oig.hhs.gov/oei/reports/oei-06-14-00590.pdf>.

<sup>42</sup> *See, e.g.*, CTRS. FOR MEDICARE & MEDICAID SERVS., CMS PRODUCT NO. 11954, GUIDE TO CONFIRMING YOUR INCOME INFORMATION 5–7 (2021), [https://www.healthcare.gov/downloads/consumer\\_guide\\_for\\_household\\_income\\_booklet.pdf](https://www.healthcare.gov/downloads/consumer_guide_for_household_income_booklet.pdf) (providing instructions for submitting one's tax return to determine Health Insurance Marketplace eligibility).

<sup>43</sup> *See Policy Basics: The Supplemental Nutrition Assistance Program (SNAP)*, CTR. ON BUDGET & POL'Y PRIORITIES (June 9, 2022), <https://www.cbpp.org/research/food-assistance/the-supplemental-nutrition-assistance-program-snap> (noting that most SNAP participants work jobs that, while vulnerable to volatility, have low income ceilings); *see also* GREGORY MILLS ET AL., URBAN INSTITUTE, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., UNDERSTANDING THE RATES, CAUSES, AND COSTS OF CHURNING IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) FINAL REPORT 67–80 (2014), <https://fns-prod.azureedge.us/sites/default/files/ops/SNAPChurning.pdf> (demonstrating that SNAP churn rates have less to do with income eligibility and more to do with complicated administrative procedures).

social service agencies can hinder access to these programs. Using the reach of the tax system to provide an initial eligibility check could help ease the administration of programs by linking agencies toward a common goal.<sup>44</sup> Should greater responsiveness be needed, a coordinating agency or, if administered through the tax system, the IRS could ask for substantiation of changes in income. Furthermore, should the need arise, the IRS could use tools like more frequent reporting by employers of wages to determine potential income in real time. But the fact remains that the tax system has this information and drawing on it as a first cut, even if annualized, provides easier access to benefits.

Furthermore, the size of the tax system also allows it to direct beneficiaries to programs, furthering its goal of redistribution. For example, because the IRS has the income data and often family data for those who file, it can help to identify social programs for which filers could potentially qualify.<sup>45</sup> The IRS could then serve a channeling and salience-raising function and provide a means for information sharing. Implementation of such a system recognizes how the tax system and its data collection fit into the broader sphere of delivering social goods.

A few concerns have arisen here. First, involving the tax system could reduce uptake of benefits. But frequently, social welfare programs, given their varied and often disorganized approaches, also suffer uptake problems.<sup>46</sup> At least for the working poor, filing taxes is often beneficial. Many receive either withholding refunds or refundable credits.<sup>47</sup> Thus, uptake is often relatively good when compared to other social safety net delivery mechanisms. This shows that even though uptake may not be astounding for benefits delivered through the tax system, this method does

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<sup>44</sup> Indeed, this streamlined process is how the IRS and the Centers for Medicare and Medicaid Services (CMS) have established the administration of the PTC and Medicaid. *See* PTC ACCOUNTING STRUCTURE, *supra* note 41, at 1–2. Streamlining the process and sending information from tax returns has therefore simplified the benefits application process.

<sup>45</sup> *See* CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 42, at 1–3, 8 (demonstrating that social programs like Marketplace already use tax returns as proof of income to determine an applicant's eligibility).

<sup>46</sup> For example, the EITC, the main safety net program in the tax laws that directly benefit poorer Americans, has an uptake rate, estimated by the IRS and the Census Bureau, of about 78% in 2017. *EITC Participation Rate by States Tax Years 2012 Through 2019*, IRS, <https://www.eitc.irs.gov/eitc-central/participation-rate/eitc-participation-rate-by-states> (last visited Nov. 29, 2022). But other benefit uptake rates are similar. SNAP uptake rates are around 82% for all eligible people but drop to 74% for the working poor, implying that the working poor are less likely to apply. *SNAP Participation Rates by State, All Eligible People*, FOOD & NUTRITION SERV., <https://www.fns.usda.gov/usamap> (last visited Nov. 29, 2022). Medicaid and CHIP have much higher rates at 92.8%. *Medicaid & CHIP Participation Rates*, INSUREKIDSNOW.GOV, <https://www.insurekidsnow.gov/campaign-information/participation-rates/index.html> (last visited Nov. 29, 2022). TANF, on the other hand, suffers from a low participation rate: about 27.6% in 2014. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS. & OFF. OF FAM. ASSISTANCE, TEMPORARY ASSISTANCE TO NEEDY FAMILIES, 12TH REPORT TO CONGRESS, FISCAL YEARS 2014 AND 2015, at 22–23 (2018).

<sup>47</sup> *See* NAT'L TAXPAYER ADVOCATE, 2021 ANNUAL REPORT TO CONGRESS 2 (2022) (discussing refunds and available tax credits for low-income taxpayers).

have advantages. Thus, using the tax system to deliver benefits can be a key strategy for implementing redistribution programs.

Second, despite its reach and attempts to connect citizens to the government, the tax system is not universal. There are gaps in its reach, and that is especially problematic when it comes to the poorest set of people and families.<sup>48</sup> But that said, its reach is often greater than that of many other systems. And the whole point of contextualized purpose, as described below, is that it can reveal gaps in any one agency's approach and capacities. This shows that coordination with other agencies is vital. While difficult, collaboration between the IRS and other agencies can fill these gaps. If instead the tax system were uninvolved, those agencies administering social safety net programs may have a harder climb to find and determine beneficiaries' eligibility. Even with blind spots, the tax system's broad reach is still helpful.

Thus, the size of the tax system makes it useful as a tool to deliver social welfare goods. In administering these social good programs within it, the tax system should take advantage of its reach. It should be administered in a way that interconnects with other agencies seeking to build the safety net and provides them with some of the benefits of the IRS's reach.

### 3. *Dignity and Civic Virtue*

Related to the above discussion of the size of the tax system is the concept of perceived civic participation, and how using the tax system can enhance dignity, especially of the poor.

Scholars like Susannah Camic Tahk have noted that using the tax system and requiring the filing of a tax return helps these dimensions in several ways.<sup>49</sup> First, this process often provides people greater dignity.<sup>50</sup> When the tax system is used as the primary means to determine and distribute benefits, beneficiaries do not need to subject themselves to the frequent probing of welfare agents, who often second-guess them.<sup>51</sup> Instead, what is reported on a tax return is often taken as true (absent an audit), and that keeps their dignity intact. Furthermore, even if the tax system is not used to administer the social program, tax returns and return information carry a presumption of

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<sup>48</sup> See Kleiman, *supra* note 1, at 19–20, 25 (discussing barriers and a filing threshold for individual income taxes). These people may still have contact with the tax system through filings made by employers and remittances of payroll taxes, if they are employed. *Id.* at 55. Some individuals may also receive a version of Form 1095 reported by private insurers on the marketplace, off the marketplace, or through employer-sponsored insurance. The government health care programs report directly to the IRS. See Ann Cairns, *The 1095 Tax Form for Health Care Coverage: What You Need to Know*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/31/your-money/taxes/form-for-health-care-coverage-what-you-need-to-know.html> (discussing the three versions of Form 1095).

<sup>49</sup> Tahk, *supra* note 1, at 827–28 (acknowledging that welfare is demeaning,” and beneficiaries are stigmatized (quoting Jonathan B. Forman, *Let's Keep (and Expand Upon) the Earned Income Credit*, 56 TAX NOTES 233, 233 (1992))).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

correctness and good faith when presented to another agency, and thus use of that information can help maintain the individual's dignity.<sup>52</sup> And there is a significant level of dignity in avoiding having to refile the same information constantly, which can not only add to a sense of inconvenience but also creates a sense that the state does not care about one's needs and time.

Second, linking these benefits to the tax system involves greater civic participation.<sup>53</sup> While much maligned, filing a tax return is seen as a key civic duty, so, recipients of tax-based welfare programs may feel like they are participating within a broader civic duty.<sup>54</sup> Having the tax system and tax forms as part of the process for administering and delivering welfare benefits promotes and nurtures this other value. It may even induce a few of these recipients to pay greater attention to the overall functioning of the tax system, thereby increasing democratic understanding and participation. Thus, the administration of a social policy program in the tax system should seek to preserve these two related benefits. It also counsels connecting the tax system with other parts of the state to reduce some of the negative badges safety net programs bring.

#### 4. *Policy Action*

Another reason that these social good delivery programs fall within the tax system is that this placement makes their policies more likely to be implemented. When addressing large and complex problems, the bias of the system of government toward inaction can mean that no solutions, even second-best ones, get tried. Because of both institutional and political structures, the programs often fall into the tax system to come into being.

The use of the tax system to provide social goods is useful for numerous political reasons. Tax legislation is the province of two of the most powerful committees in Congress, the Senate Finance Committee and the House Ways and Means Committee.<sup>55</sup> Compared to other matters, tax legislation also has fewer veto points, which furiously clog the congressional process, inhibiting regulatory changes and new programming.<sup>56</sup> Tax legislation also can take advantage of budget reconciliation to overcome the Senate's filibuster.<sup>57</sup>

Additionally, social policy in the tax laws solves an important political problem. Most of the American public wants more redistributive outcomes

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<sup>52</sup> *Id.* at 828–29.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> HOWARD, *supra* note 35, at 179–80.

<sup>56</sup> *Id.*

<sup>57</sup> See Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 L. & CONTEMP. PROBS. 61, 62, 64–65 (2018) (discussing how reconciliation overcomes issues of the filibuster and how the Byrd Rule requires that legislation affect revenues or outlays).

and wants to support the poor.<sup>58</sup> But many people want smaller government.<sup>59</sup> Additionally, people tend to prefer the delivery of social safety net and redistribution of goods through the tax system rather than through other means.<sup>60</sup> Thus, providing social programs through the tax system as its primary locus helps to build significant political coalitions and generally makes people feel better about receiving benefits.

As a result, the tax system will continue to be a place where social policy, especially policy focused on redistribution and constructing a safety net, gets done. The question, then, is what framework can guide the administration of these tax programs in these messy circumstances. It is here that conceptualized purpose can help guide the IRS in administering these programs, coordinating with other agencies, and supporting other agencies' programs.

### B. *The Concept*

Given that there is always going to be a push to put social policies into the tax system, and given that there may be other programs outside the tax system that overlap with tax programs, determining how to administer both types of programs is a key question. It is here that the contextualized purpose approach helps.

Contextualized purpose is a way to examine and think about how to organize and coordinate resources within the federal government to administer a social safety net tax program. It takes as a given the political and legislative barriers to progress in Congress and the need for multiple viewpoints and approaches to the complex problem of creating a social safety net. Contextualized purpose then focuses on how the IRS and other agencies can administer matters, considering their muddled situation.

The basic idea of contextualized purpose is that any program to deliver social welfare goods has a set of values and goals that guide it. Thus, contextualized purpose requires that the IRS first examine the underlying values and goals of a particular program. It asks what Congress wanted to do and what set of values motivate the program. Administering a program should be done in a way that best effectuates those values.

But contextualized purpose also has a broader lens. It recognizes that every program, because of the nature of Congress, is one part of and one approach to addressing broader problems of inequity and the social safety

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<sup>58</sup> See KIMBERLY J. MORGAN & ANDREA LOUISE CAMPBELL, *THE DELEGATED WELFARE STATE: MEDICARE, MARKETS, AND THE GOVERNANCE OF SOCIAL POLICY* 37–45 (2011) (describing and using survey data to show that Americans generally want both smaller government and a more robust safety net); SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 16–19 (2011) (describing how the use of tax expenditures and the like allow a harmonization between liberals and conservatives).

<sup>59</sup> MORGAN & CAMPBELL, *supra* note 58, at 37–45; METTLER, *supra* note 58, at 16–19.

<sup>60</sup> MORGAN & CAMPBELL, *supra* note 58, at 37–45; METTLER, *supra* note 58, at 16–19.



net. Contextualized purpose thus looks at the underlying policy context and the various safety net programs existing both within and outside of the tax system. The goal is to administer and manage programs in ways that assist in these goals and do not create cross-purposes with other programs' goals and purposes.

Finally, contextualized purpose seeks to ensure that a tax program that delivers social safety net goods or redistribution also pragmatically coheres within the tax system. The IRS should administer a program in a way that prevents cross-purposes with other parts of the Internal Revenue Code and regulations. The goal is to make the system cohere in a reasonable, if imperfect, manner.

Contextualized purpose reveals two important points. First, contextualized purpose means that the IRS, in delivering social welfare goods, must undertake some amount of agency coordination. Coordination is necessary to develop an understanding of the context and see how programs interact with one another. It also allows agencies to then consider the capacities and expertise they can bring to particular programs. This process also allows the IRS to ensure that the tax programs and other programs do not create cross-purposes within the tax system. Thus, contextualized purpose goes hand in hand with coordination.

Second, when it comes to programs involving redistribution or social goods, the tax system itself is an integral part of the matter. As noted in the previous Section, this link stems from the connection developed over time between the underlying values and purposes of the tax system and its functionality.

Contextualized purpose also requires an iterative process. Once these purposes and interconnections are understood, the set of agencies working together must evaluate what they are doing. They then should look and see if their administration reaches the values, goals, and purposes of the programs and the broader policy context. They should evaluate whether they think those purposes are correct. And they should use that information to restructure their coordination arrangements.

These purposes and arrangements should be public. The goal of using contextualized purpose in administration is not only to rationalize it but also to put these values first as a guidepost and a means to aid coordination. The goal is also to engage in a broader dialogue of values that should allow the public, as well as Congress, to provide input.

Finally, this approach does not mean that all of the views of expertise and capacities fall aside. It instead takes the view that capacities that do not fit neatly into the established divisions of government will need to be reconfigured more frequently. Where it really differs is that it looks to these goals and values first rather than lionizing mere efficiency. Thus, capacities and expertise still play a role, but they serve as the handmaidens to these contextualized purposes.

Thus, the idea is, on paper, simple. The next Section explains why the tax system is central to contextualized purpose and the administration of social welfare policies.

### C. Undertaking Contextualized Purpose

Using contextualized purpose and making it real for social policy based in the tax system involves some analysis and requires the use of coordination tools. This section starts by assigning the discernment of a social program's purpose to the IRS. It then outlines how the IRS can discern that purpose. It then discusses how coordination tools can effectuate contextualized purposes and proposes a framework for building and growing coordination and the realization of contextualized purpose.

#### 1. Who Discerns Purpose

In contextualized purpose, a great deal hinges on who decides. In the ideal world, Congress would act clearly and provide the exact purpose and method for how a new social safety net program would fit in with the rest of the scheme. Of course, that is not how Congress works.<sup>61</sup>

Instead, the IRS should be the one to decide contextualized purpose and to weigh the various values and goals. The reasons are numerous. First, there is a pragmatic reason. The IRS is the entity that must do the work of implementing the program and managing it within the broader tax system. It needs a way to guide its thinking and deployment of resources. Without understanding the purpose or purposes of a particular program and its context, the IRS likely cannot properly manage the program. Failing to understand these values and goals also means that it cannot figure out what other programs or agencies the program may implicate. All these factors are necessary for the successful delivery of the policy in a manner that allows the tax system to cohere.

Second, while the IRS is criticized as having a democratic deficit,<sup>62</sup> undertaking this analysis in a public manner can help provide greater transparency and responsiveness. Whatever discerned contextualized

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<sup>61</sup> See Choi, *Beyond Purposivism in Tax Law*, *supra* note 3, at 1460–65 (2022) (discussing the flaws in an overarching structural clear purpose in tax law from Congress, given the way Congress works as a series of political compromises); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 334–35 (1990) (noting multiple public purposes, the wheeling and dealing nature of Congress, and a public choice theory view of legislating to show that Congress does not have a unified coherent sense of purpose); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1204–08 (2006) (discussing the disjointed nature of Congress vis-à-vis social safety net policy programs).

<sup>62</sup> Much of this critique and its change stems from the work of Kristin Hickman on highlighting some of the flaws in the promulgation of Treasury Regulations and how notice-and-comment worked in the tax sphere. Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1730–31 (2007) (finding that Treasury does not generally follow the APA in rulemaking and criticizing that situation).

purposes are found, they can and should be reported publicly when issuing regulations.<sup>63</sup> The publicity can do two things. First, it can engage Congress in a dialogue between the IRS and Treasury on these matters. That itself serves a democracy-enhancing function. Congress then can use various tools at its disposal, not all of which require statutory changes, to address and channel purpose. For example, appropriations riders can be a way for Congress to reassert control. Even mechanisms like holding hearings or having committee members send letters to the IRS can help redirect the agency and bolster a dialogue between the agent and the policy principals in Congress.

Additionally, publicly disclosing the contextualized purpose of a program can open a way for the public to engage with this discourse, too. Such public discussions of purposes can both engage the public and better connect it to the government and what the government stands for, potentially reducing some negative policy feedback loops.

Giving the IRS the power to discern also allows it to develop metrics to aid in the process. Metrics are important in trying to understand how effectively a program is administered. They can also aid Congress and the public in monitoring the IRS and any potential collaborators. Metrics serve to underline and help communicate the goals and values of a program and its administration.

## 2. *How to Discern Purpose*

The other key issue is how the IRS can discern the purpose or purposes of a social safety net program in context with the tax law, other existing programs, and broader goals. Here, some of the theories of purposivism in statutory interpretation and the use of legislative histories can provide help beyond the text of the statute.

While the statutory text is the basis of purpose, determining the underlying values and purposes and how a program exists in context often requires looking outside of the statute itself.<sup>64</sup> Unlike the courts, which are generally less accountable to congressional control, agencies can undertake

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<sup>63</sup> Changes in preambles have highlighted greater transparency in the promulgation of at least formal regulations. Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of Mayo and Chevron*, 38 YALE J. ON REGUL. 818, 842–43 (2021) [hereinafter Choi, *Legal Analysis*]. There are still some of the problems of subregulatory guidance, which do not fit this framework and may have become more common. See Clinton G. Wallace & Jeffrey M. Blaylock, *Administering Taxes Democratically?*, 94 TEMP. L. REV. 49, 71–76 (2021) (observing a decline in the number of temporary regulations and most forms of subregulatory guidance when comparing the 1986 Tax Reform Act and the 2017 Tax Cuts and Jobs Act, but also noting a decline in actual regulations and a massive increase in so-called “FAQs”). This Article advocates for most of this work happening in public fora through the Federal Register and in regulatory preambles.

<sup>64</sup> See Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 199–200, 206–09 (2020) [hereinafter Choi, *Substantive Canons*] (discussing how anti-abuse doctrines, which are a purpose of the Code, are in tension with a strict textualist approach).

examinations outside a textualist approach. Indeed, the approach to finding purpose through statutory interpretation should be rooted in purposivism.

While the process of discerning contextualized purpose or purposes sounds as though there is a coherent structure, it rejects structural purposivism and the sense that there is a single-minded purpose to any program.<sup>65</sup> That type of purposivism imagines that Congress created an overarching structure with each intricate program and regulatory matter to deliver social welfare planned out so that all the agencies must do is read carefully to find the structure and single goal or outcome.<sup>66</sup>

Rather, the approach that it should take is one of pragmatic purposivism, as outlined by Jonathan H. Choi.<sup>67</sup> This type of approach tries to discern what a reasonable legislator would have intended for the statute.<sup>68</sup> Trying to read the statutory language with that hat on can help identify some of the motivating values and policy goals a reasonable legislator may have had for the program. It also takes the view that reasonable legislators could want different approaches to a complex problem and likely would not want one agency's administration to undermine that of another's different, but potentially still vital, approach.<sup>69</sup>

The value of this approach and doing it publicly is that it fits within some of the formal structures of administrative law, like the *Chevron* deference space.<sup>70</sup> Such an approach can also work for the IRS because it tends to function in an ex ante manner. When the discerned purpose is publicized, people can broadly find out what the IRS views as the underlying values, goals, and outcomes of a particular social policy tax program and how it coheres in the broader safety net. Thus, the pragmatic purposivist lens provides a useful means and framework for the IRS to discern the contextualized purpose.

There are other sources that can aid the IRS in discerning contextualized purpose using pragmatic purposivism. These are the tools of legislative history in the broadest sense, like examining the development of legislative language, statements in the Congressional Record, committee reports, unanimous consent agreements for consideration in the Senate, special rules and reports from the House committee on rules, and section-by-section analyses by proponents of legislation and the Congressional Research Service.

Additionally, programs housed in the tax system garner an additional useful source for determining this contextualized purpose. Tax legislation

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<sup>65</sup> Choi, *Beyond Purposivism in Tax Law*, *supra* note 3, at 1461–63.

<sup>66</sup> Choi, *Substantive Canons*, *supra* note 64, at 201–04.

<sup>67</sup> Choi, *Beyond Purposivism in Tax Law*, *supra* note 3, at 1469–73.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (holding that an agency's interpretation of an ambiguity in the text of a statute that it administers can receive controlling deference).

often benefits from the special institution in Congress known as the Joint Committee on Taxation (JCT).<sup>71</sup> An unusual creature, the JCT exists mainly for its staff to provide expertise and analysis to support all aspects of federal tax legislation.<sup>72</sup> It plays numerous roles, from analyzing the cost of tax expenditures to providing grades for tax legislation.<sup>73</sup> But most relevant here is how JCT provides a support function in legislation and then turns that work into some form of understanding.<sup>74</sup>

Because JCT staff is often in the room with members of Congress when there is any legislation affecting the tax system, its reports can help in the discernment of purpose, at least for the narrow tax-focused matter. Throughout the entire legislative process, JCT staffers work with members of Congress and their staff on drafting legislation and outlining its intended purpose.<sup>75</sup> They are often in the room during hearings and negotiations, too.<sup>76</sup> Based on the observations made in these roles, the JCT staff, usually at the end of each session of Congress, prepares a special committee report known colloquially as the “Bluebook.”<sup>77</sup> The Bluebook summarizes every piece of tax legislation that is enacted into law during each session in Congress.<sup>78</sup> The Bluebooks draw on the understanding of the JCT staff, based on its conversations and observations of the process, to distill a useful view of Congress’s various purposes in enacting a particular tax provision.<sup>79</sup> Thus, as noted by Clinton Wallace, the IRS and agencies should consider Bluebooks when making regulations.<sup>80</sup> But more importantly for the discussion here, they are another important and perhaps valuable source of

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<sup>71</sup> *Overview*, JOINT COMM. ON TAX’N, <https://www.jct.gov/about-us/overview/> (last visited Nov. 24, 2022).

<sup>72</sup> See Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 196–203 (2017). Wallace notes a few ways that JCT participates in the process. First, it works with Congress’s members and their staff to draft the statutory language. *Id.* at 197–98. Second, for scoring, it often relies on discussions by Congress’s members and their staff about the goals and operations of a particular provision. *Id.* at 198 & n.85. Third, they are involved in almost all of the hearings, negotiations, and markups with JCT staff presenting and sitting in the room. *Id.* at 200–01. JCT itself describes its role on its website. *Role of JCT*, JOINT COMM. ON TAX’N, <https://www.jct.gov/operations/role-of-jct/> (last visited Sept. 11, 2022).

<sup>73</sup> *Role of JCT*, *supra* note 72.

<sup>74</sup> *Overview*, *supra* note 71. The Joint Committee is established under I.R.C. §§ 8001–8005, 8021–8023. Its role in providing revenue estimates is codified at 2 U.S.C. § 601(f). It also plays a role in refund suits by reviewing any refund or credit of taxes exceeding \$2 million. I.R.C. § 6405.

<sup>75</sup> Wallace, *supra* note 72, at 197–98.

<sup>76</sup> *Id.* at 200–01.

<sup>77</sup> *Id.* at 201–02. The JCT Bluebooks are generally published annually, though not always. Sometimes major tax legislation, like the Tax Cuts and Jobs Act of 2017, gets its own Bluebook. See STAFF OF JOINT COMM. ON TAX’N, 115TH CONG., GENERAL EXPLANATION OF PUBLIC LAW 115-97 (Comm. Print 2018).

<sup>78</sup> Wallace, *supra* note 72, at 201–02.

<sup>79</sup> *Id.*

<sup>80</sup> See *id.* at 211–12 (noting that following the understanding outlined by the JCT in their compiled legislative history has a democracy-enhancing virtue).

the purposes, values, and goals behind a social welfare program or redistribution effort tucked into the tax law.

Finally, in undertaking this contextualized purpose, the IRS should remember that it operates in context with other programs and regulations in a nontax policy sphere. This requires communication with and awareness of the work of other agencies. In making the discernment of purpose, the IRS must start some coordination measures, discussed in the next Subsection, to aid in this process. The goal is to find ways to make these programs fit together in some reasonable manner. After all, while Congress does not intend a clear and complete structure, pragmatically, Congress does not want programs to undermine each other. Thus, in discerning purpose, the IRS must engage in a discussion with other agencies that work in that particular policy sphere.

Even with pragmatic purposivism and an eye toward making things work reasonably well, and even with the tools of legislative history, contextualized purpose often involves countervailing values and goals. After all, legislation in Congress is generally a compromise, and members vote for or against legislation for their own reasons. In some ways, there will still need to be judgment calls made by the agency in weighing these countervailing matters.

But some key points should serve as a guide. When legislation is meant to deviate from the tax base, the IRS, given the tax system's historical goal of redistribution, should try to favor that outcome. Should Congress disagree, it can engage in dialogue with the IRS and Treasury through legislation and its oversight powers. Such a view can guide Congress and assist it in deftly resolving sometimes-complicated issues.

Thus, there are numerous tools to help the IRS and Treasury, or any other agency, to discern purpose of a social safety net program. But when that is done, contextualized purpose requires an understanding of agency coordination.

### 3. *Starting Coordination to Effectuate Contextualized Purpose*

Contextualized purpose understands that no one program, approach, or agency can solve a major social policy problem. And it also recognizes that there are overlaps, intentional and unintentional, created by Congress in various safety net programs.<sup>81</sup> Furthermore, as this Article has shown, many of these programs are in the tax system and administered by the IRS for various reasons.<sup>82</sup> As a result, contextualized purpose requires that the IRS and other agencies at least know about the social safety net programs that overlap.

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<sup>81</sup> See Staudt, *supra* note 61, at 1204–05, 1217, 1222.

<sup>82</sup> See *supra* Subsection I.A.1.

But as noted by the Government Accountability Office (GAO), numerous social welfare programs interact with the tax system or are primarily housed there.<sup>83</sup> Many agencies outside of the IRS do not even know about the existence of these programs or how they interact with each other.<sup>84</sup> Similarly, the IRS may not know how the social welfare programs it oversees interact with those in other agencies.<sup>85</sup>

Making contextualized purpose work, then, requires the IRS to note which parts of the tax law are geared toward providing for the social safety net or redistribution.<sup>86</sup> Under this approach, the IRS would use the contextualized purpose analysis to identify those programs. Once the identification work is done, it must then begin the process of reaching out to other agencies in the government, which may have other expertise, programs, regulations, or approaches to understand the deeper levels of interaction. The IRS can also get assistance from the Office of Information and Regulatory Affairs (OIRA), which can use its regulatory review process, which now applies to tax Treasury Regulation, to serve a convening function if it also determines that a certain tax program affects another part of the social safety net.<sup>87</sup>

Revealing this information to other agencies, though, requires more than just alerting them to programs that may benefit from their expertise. It requires some discussion as to how the IRS is administering the programs. It also requires these agencies to know about the size of the IRS's programs. On the flip side, the IRS should get a general sense as to which programs the other agencies administer and manage that may also interact with a tax system social welfare program. The IRS must also know what the other agencies' expertise and capacities are.

These interconnections are important to providing the context in which any policy or program exists. Without understanding what else is out there in the policy environment, any attempt to create a pragmatic contextualized purposeful approach would founder. The first step in avoiding cross-purposes and creating some level of pragmatic coherence for attacking a large problem is to know what other agencies have done and plan to do with their programs. This visibility, and perhaps discussions about the

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<sup>83</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-622, TAX EXPENDITURES: OPPORTUNITIES EXIST TO USE BUDGETING AND AGENCY PERFORMANCE PROCESSES TO INCREASE OVERSIGHT 23–25 (2016) [hereinafter GAO, TAX EXPENDITURES].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See id.* at 26–28 (arguing that the IRS and Treasury, along with the Office of Management and Budget, should identify certain tax programs that may affect other agencies and notify these agencies to see if it fits with another agency's goals).

<sup>87</sup> Freeman & Rossi, *supra* note 4, at 1178–79 (raising the point that OIRA review can help with agency coordination); Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1854–55 (2013) (discussing, based on his role as OIRA Administrator, that much of OIRA review is ensuring input from across the various federal government agencies and even highlighting these roles).

operation of their programs and how they potentially interact, can also reveal novel and interesting approaches to various points of the larger redistribution problem.

Finally, this process, which should be constant, helps to foster two key building blocks needed for effective and efficient coordination. The first is communication. By undertaking this analysis, serving as a central point for these discussions, and reaching out to other agencies, lines of communication are established. What is important is that establishing communication at this base level of simply alerting each other to relevant programs is a basis on which the agencies can build. Not only can they create formal communication structures and processes, but personnel in the IRS and nontax agencies can also develop informal contacts, allowing them to reach out to each other with additional questions and potentially smoothing the agencies' relationship toward increased coordination.

Undertaking this outreach and awareness-building effort also starts the process of building trust. Trust is important for the development of tax coordination and to effectuate contextualized purpose. Without trust in the competency and motivations of other agencies, there is no way for them to work together.<sup>88</sup> By actively seeking out these agencies and alerting them to a social safety net tax program that overlaps with another agency's sphere, the IRS and its personnel can begin to build trust. Going in with an open mind; trying to suss out these types of purposes, goals, and values; and trying to understand the viewpoint of nontax agencies also increases trust. So, this initial process undergirds trust, which can then aid the agencies in coordinated work to effectuate the purposes, values, and goals of various safety net programs.

#### 4. *Building and Growing*

Once the IRS and other agencies determine the contextual purpose of a program and begin the process of communicating with each other and building up awareness, then the real work of administration and program management begins. This work often requires additional coordination tools.<sup>89</sup> But determining which coordination tools to deploy and the roles of the IRS and other agencies in administering safety net programs both in and out of the tax system is an iterative trial-and-error process. Using contextualized purpose, though, helps to guide this iterative process.

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<sup>88</sup> Saito, *supra* note 4, at 796–99; EUGENE BARDACH, GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP 252–55 (1998); Marisam, *supra* note 4, at 195–200; GAO, MANAGING FOR RESULTS, *supra* note 4, at 13–15.

<sup>89</sup> For descriptions of coordination tools that would serve the administration of social safety net or redistribution programs, see Freeman & Rossi, *supra* note 4, at 1155–81 (discussing interagency consultation and agreements, joint policy-making, and presidential management of coordination); Saito, *supra* note 4, at 789–807 (discussing both institutional changes and more informal managerial tools); GAO, MANAGING FOR RESULTS, *supra* note 4, at 5 fig.1 (listing various mechanisms including interagency positions and liaisons, co-location, and joint budgeting and training).



For example, the IRS and a nontax agency may realize that having joint teams of line-level employees is necessary for monitoring programs in a holistic manner toward these goals.<sup>90</sup> But exactly what these teams' functions are and what types of work they do could vary depending on the set of programs and their various purposes. In some instances, purposes would push toward having teams work at providing outreach and greater technical support. In other instances, they may do more monitoring and enforcement.

Additionally, using contextualized purpose to guide this iterative process will often reveal gaps in the capacities of both the IRS and other agencies. The actual capacities necessary may just not exist. The iterative process would then point toward having the IRS or a coordinating agency build out these capacities to improve administration and better deliver on the purposes and goals of their collaborative programs.<sup>91</sup> Unlike previous approaches, contextualized purpose and the iterative process realize that agencies' capacities are not fixed, and that they are able to grow or change over time. Furthermore, as problems get solved in one facet, new areas of the problem may cause issues, requiring new energy and approaches. Having these purposes in mind can help agencies working together to determine a means toward developing new capacities and expertise in addressing problems.

Finally, the results of this process of learning by doing and gathering information can also be relayed back to Congress, which can help development at the higher policy level.<sup>92</sup> Such coordination and new capacities may reveal gaps in statutes or statutory cross-purposes that Congress may need to address. Additionally, providing this information to Congress can also give it some control over the process of coordination and new capacities in a dialogue with the administrative state. Congress can also use this information to help push new capacities that it notices the IRS and nontax agencies need to respond to these purposes. Thus, the contextualized purpose approach provides a way to organize thinking, action, and growth within the government to address difficult problems.

## II. CONTEXTUALIZED PURPOSE AND INCOME SUPPORT PROGRAMS

The approach outlined above can help in improving the administration of many tax programs for social policy as well as other parts of the safety net. This Part applies that approach to a few specific programs in the tax system that are key components of the social safety net and redistribution: the EITC, the CTC, and the recent stimulus checks in the CARES Act and the American Rescue Plan Act (ARPA). This Part starts with an explanation

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<sup>90</sup> Saito, *supra* note 4, at 800–03; BARDACH, *supra* note 88, at 117–19; GAO, MANAGING FOR RESULTS, *supra* note 4, at 5 fig.1.

<sup>91</sup> See GAO, MANAGING FOR RESULTS, *supra* note 4, at 7–8 (discussing the need sometimes to increase capacity in a coordination effort; here specifically focusing on training of staff).

<sup>92</sup> Staudt, *supra* note 61, at 1243–49 (advocating for performance-based budgeting related to efficacy assessments of welfare programs as a potential means of rationalizing the various welfare programs).

of each program and some of the changes that occurred during the COVID-19 pandemic. It then outlines how this approach can help to improve these programs' reach and interaction, even if a pure functionalist approach would say that keeping it within the tax system and not coordinating is more efficient.

A. *The Programs, Recent Changes, and Proposals*

1. *The Earned Income Tax Credit*

The EITC's origin comes from a rejection of a negative income tax to provide relief to the poor.<sup>93</sup> Instead, the idea, put forward by then-Senator and Finance Committee Chair Russell Long (D-La.), was to provide some support for the poor tied to employment in the formal economy.<sup>94</sup> The original EITC temporarily provided that support to poor workers with children by crediting their payroll taxes for Social Security and Medicare, which are levied on the first dollar and are thus regressive.<sup>95</sup>

Over time, the EITC expanded to become more generous. It became not only an income support program for workers but also an income support program for children, in concert with the CTC.<sup>96</sup> One of the largest expansions came in the 1990s during the Clinton-era welfare changes.<sup>97</sup> In ending cash welfare, the idea was to expand the EITC to provide additional cash to employees whose wages were too low, an incentive for greater labor market participation compared to older cash welfare programs, and more support to children.<sup>98</sup> This expansion happened in concert with the end of the relatively non-time-restricted Aid for Families with Dependent Children (AFDC) and its replacement with a time-bound welfare program for working parents that required them to work or seek a job, the Temporary Assistance for Needy Families program (TANF).<sup>99</sup> Thus, the EITC in this era became a major part of how welfare was delivered. Recent evidence shows that in terms of the labor force participation goals, the EITC has been successful.<sup>100</sup> Anecdotal points have shown that for many workers with children, it is incredibly helpful.<sup>101</sup>

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<sup>93</sup> DRUMBL, *supra* note 1, at 5–6.

<sup>94</sup> MARGOT L. CRANDALL-HOLLIK, CONG. RSCH. SERV., R44825, THE EARNED INCOME TAX CREDIT (EITC): LEGISLATIVE HISTORY 2 (2022).

<sup>95</sup> DRUMBL, *supra* note 1, at 8.

<sup>96</sup> See I.R.C. §§ 24(a), 32(b) (showing the amounts of EITC and CTC increase based on the number of the taxpayer's qualifying children).

<sup>97</sup> DRUMBL, *supra* note 1, at 15–16.

<sup>98</sup> Rebecca M. Blank, *Evaluating Welfare Reform in the United States*, 40 J. ECON. LITERATURE 1105, 1107–08 (2002).

<sup>99</sup> *Id.* at 1106.

<sup>100</sup> MARGOT L. CRANDALL-HOLLIK & JOSEPH S. HUGHES, CONG. RSCH. SERV., R44057, THE EARNED INCOME TAX CREDIT (EITC): AN ECONOMIC ANALYSIS 8–9 (2018) (describing the increased labor force participation of unwed mothers).

<sup>101</sup> *Id.*

The EITC is a refundable tax credit, meaning that if a taxpayer has no tax liability, they receive cash.<sup>102</sup> It has a structure with a phase-in range, a plateau, and a phase-out range.<sup>103</sup> Initially, as a worker earns more, the amount of the credit grows.<sup>104</sup> At some point, the credit amount levels off.<sup>105</sup> No additional earned wage income will increase the amount of the credit.<sup>106</sup> At some point, there is a phase-out, where more income reduces the credit until one no longer receives an EITC.<sup>107</sup> The size of the credit is also scaled to family size, so that childless adults get a smaller credit.<sup>108</sup> The credit amount increases significantly with one qualifying child claimed.<sup>109</sup> It increases again for two qualifying children claimed and again for three qualifying children claimed.<sup>110</sup> Beyond three children, though, there is no additional credit.<sup>111</sup> Beneficiaries of the EITC must file a tax return with the appropriate schedule to receive the credit.<sup>112</sup> They then receive most of the credit as a lump sum payment as a tax refund.<sup>113</sup>

The most recent expansion of the EITC, under ARPA, expanded significant portions of the credit.<sup>114</sup> First, it ended the requirement that a child needed a social security number to qualify.<sup>115</sup> That opened the credit to families with children who are undocumented, closing a major gap.<sup>116</sup> Second, it improved the situation for separated spouses.<sup>117</sup> A spouse that is separated and has the qualifying child living with them for more than half a year no longer counts as married for the purpose of the credit.<sup>118</sup> This allows for a significant relaxing of the credit's marital constraints. Finally, for 2021, the credit increased the amount given to childless adults, lowered the minimum qualifying age, eliminated the maximum age, and made it easier for foster youth to receive the credit.<sup>119</sup>

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<sup>102</sup> I.R.C. § 32.

<sup>103</sup> *Id.* § 32(b).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Schedule EIC (Form 1040)*, IRS, <https://www.irs.gov/pub/irs-pdf/f1040sei.pdf> (last visited Sept. 19, 2022).

<sup>113</sup> DRUMBL, *supra* note 1, at 28.

<sup>114</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9621–9626, 135 Stat. 4, 152–58 (codified at I.R.C. § 32).

<sup>115</sup> § 9622, 135 Stat. at 153 (codified at I.R.C. § 32(c)(1)).

<sup>116</sup> The elimination of I.R.C. § 32(e)(1)(F) through the American Rescue Plan Act of 2021 allows taxpayers to claim a qualifying child without providing a social security number, thus effectively enabling families with undocumented children to claim a larger EITC benefit. *See id.*

<sup>117</sup> § 9623, 135 Stat. at 153–54 (codified at I.R.C. § 32(d)(2)(B)).

<sup>118</sup> *Id.*

<sup>119</sup> §9621, 135 Stat. at 152–53 (codified at I.R.C. §§ 32(b)(2)(B), (n)(1)(B), (n)(3)).

Overall, then, the purposes of the EITC focus on three key policy values: providing wage support for poor workers,<sup>120</sup> encouraging formal labor force participation and making up for paltry wages,<sup>121</sup> and providing material support for children.<sup>122</sup>

## 2. Child Tax Credit

The CTC is another refundable tax credit. Unlike the EITC, which is fully refundable, historically, the CTC was only refundable in part.

Until the changes wrought by the COVID-19 pandemic and the passage of ARPA, taxpayers were allowed a credit against tax of \$1,000 per qualifying child.<sup>123</sup> For the years 2018 to 2025, excluding 2021, the amount is \$2,000 per qualifying child.<sup>124</sup> In 2021, during the pandemic, the amount was \$3,000 per qualifying child.<sup>125</sup> With the exception of 2021, only part of the credit is refundable.<sup>126</sup> After reducing the credit by the amount of tax, an additional child tax credit is allowed as a refundable portion.<sup>127</sup> That amount is either the lesser of \$1,400, adjusted for inflation, or fifteen percent of a taxpayer's earned income that exceeds \$2,500 for the taxable years of 2018 to 2025.<sup>128</sup> Under this scheme, a taxpayer must have earned income of at least \$16,667 in order to receive any credit.<sup>129</sup> The credit eventually phases out above certain income thresholds.<sup>130</sup>

The CTC has a purpose that is similar and in some ways broader than the EITC.<sup>131</sup> Given its higher phaseout thresholds, the CTC provides support to a broad array of parents to help with child-related expenses.<sup>132</sup> It also has

<sup>120</sup> DRUMBL, *supra* note 1, at 23–24.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., IF11077, THE CHILD TAX CREDIT 2 (2020); I.R.C. § 24(a).

<sup>124</sup> I.R.C. § 24(h)(1)–(2).

<sup>125</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 145 (codified at I.R.C. § 24(i)(3)).

<sup>126</sup> I.R.C. § 24(d)(1)(B); *see* MARGOT L. CRANDALL-HOLLICK ET AL., CONG. RSCH. SERV., R46839, THE CHILD TAX CREDIT: THE IMPACT OF THE AMERICAN RESCUE PLAN ACT (ARPA; P.L. 117-2) EXPANSION ON INCOME AND POVERTY 2–3 (2021); American Rescue Plan Act § 9611, 135 Stat. at 144–50 (codified at I.R.C. § 24(i)(1)(A)) (excluding subsection § 24(d), thus effectively make the child tax credit fully refundable).

<sup>127</sup> *See* I.R.C. § 24(d)(1)(B).

<sup>128</sup> I.R.C. § 24(d)(1)(B)(i), (h)(1)–(2), (h)(5)–(6); *see* Sec. 24. *Child Tax Credit*, BLOOMBERG TAX, [https://irc.bloombergtax.com/public/uscode/doc/irc/section\\_24](https://irc.bloombergtax.com/public/uscode/doc/irc/section_24) (last visited Dec. 16, 2022).

<sup>129</sup> If a taxpayer makes \$16,667, 15% of their income is \$2,500. *See id.* § 24(d)(1).

<sup>130</sup> *Id.* § 24(b)(1)–(2), (h)(3).

<sup>131</sup> HILARY HOYNES & JESSE ROTHSTEIN, TAX POLICY TOWARD LOW-INCOME FAMILIES 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22080, 2016) (noting that although both programs have the primary goal of redistribution, CTC's aim seems to focus on a broader spectrum of economic classes rather than just the lowest-income families).

<sup>132</sup> *Compare* I.R.C. § 24(h)(3), *with* I.R.C. § 32(b)(2)(A) (for a single parent taxpayer with one qualifying child, the EITC starts to phase out at \$11,610, while CTC for the same taxpayer will only start to phase out at \$200,000).

a major redistributive quality.<sup>133</sup> Since a significant amount is also refundable, it often can complement the EITC to provide support to poorer working families.<sup>134</sup> But the threshold to qualify for the refundable portion of the credit limited some of its reach.<sup>135</sup> That said, it still is a powerful tool in addressing some of the costs of raising children and addressing some of the issues of child poverty.<sup>136</sup>

In response to these concerns and to make the CTC even more accessible, ARPA dropped the earned income requirements and allowed the credit to be fully refundable for 2021.<sup>137</sup> It also created a mechanism to allow for the advanced payment of the credit on a monthly basis.<sup>138</sup> These changes represent, perhaps, one of the biggest expansions in the effort to make the credit more universal and use it as a tool to fight child poverty.<sup>139</sup> Furthermore, while perhaps not as large as the moves made under ARPA, plans to expand the CTC and its refundable portion to address child poverty has support from Democrats as well as Republicans like Senators Marco Rubio of Florida and Mitt Romney of Utah.<sup>140</sup>

Given the value of supporting working families, not only should the IRS administer it in a way that limits cross-purposes with other programs in the tax system that support these families, but it must think about how its administration of the CTC fits in a broader scope with many other programs. Increasing uptake is perhaps the largest concern, as well as trying to integrate the CTC with broader redistributive programs for families.

### 3. *The COVID Economic Impact Payments*

During the COVID-19 pandemic, beyond some of the changes to the EITC and the CTC mentioned above, the IRS administered another temporary program quite quickly. EIP, under the CARES Act and ARPA, provided

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<sup>133</sup> HOYNES & ROTHSTEIN, *supra* note 131, at 1.

<sup>134</sup> *Id.* at 18 (estimating EITC and CTC, in 2014, had lifted 9.8 million people, including 5.2 million children, out of poverty).

<sup>135</sup> CRANDALL-HOLLICK ET AL., *supra* note 126, at 6 (estimating the threshold limitation on an additional child tax credit resulted in only about fifty-two percent of poor families receiving the child credit prior to ARPA).

<sup>136</sup> Jacob Goldin & Katherine Michelmore, *Who Benefits from the Child Tax Credit?* 12–13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27940, 2021) (noting that the CTC, despite limitations on refundability, provides partial credit to help certain households with children that are below the poverty line).

<sup>137</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 144–45 (codified at I.R.C. § 24(i)(1)(A)).

<sup>138</sup> § 9611, 135 Stat. at 145–46 (codified at I.R.C. §§ 7527A(a)–(b)(2)).

<sup>139</sup> *E.g.*, CRANDALL-HOLLICK ET AL., *supra* note 126, at 5–6; CHUCK MARR ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, AMERICAN RESCUE PLAN ACT INCLUDES CRITICAL EXPANSIONS OF CHILD TAX CREDIT AND EITC (2021), <https://www.cbpp.org/sites/default/files/3-12-21tax.pdf>.

<sup>140</sup> Nicholas Wu, *Biden's COVID-19 Relief Plan Includes a Child Tax Credit Boost Popular with Democrats but a "Nightmare" to Republicans*, USA TODAY (Mar. 3, 2021, 9:04 PM), <https://www.usatoday.com/story/news/politics/2021/03/03/biden-covid-19-relief-bill-heads-senate-3-600-child-tax-credit/6875120002>.

checks to people up to a certain income threshold.<sup>141</sup> Technically, the payments were written as refundable tax credits administered by the IRS.<sup>142</sup> Unlike the EITC and the CTC, they were not contingent on work.<sup>143</sup> Instead, the program was a direct, means-tested grant of cash to all Americans.<sup>144</sup>

Part of the purpose of these checks was to maintain the economy in a sort of medically induced coma state and provide support during the unprecedented shutdown during the COVID-19 pandemic.<sup>145</sup> Along with expanded pandemic unemployment insurance, eviction moratoria, and other interventions, these checks aimed to help a broad array of Americans.<sup>146</sup> The checks were designed to work with these other programs amid a huge attempt to redistribute cash to the poorest people.<sup>147</sup>

These purposes required that the IRS undertake an unprecedented effort to coordinate with other agencies to deliver the funds to people. Many of the beneficiaries the EIP targeted did not file a tax return because their income was below the amount required to file.<sup>148</sup> To find them, the IRS established and publicized a web portal for people to apply, and it also worked with other agencies to encourage people to apply for the funds.<sup>149</sup> This effort allowed the program to be relatively successful in delivering relief during this crisis.<sup>150</sup>

#### B. *Contextualized Purpose Aiding Administration*

Contextualized purpose can help improve the administration of these programs and make connections between them and other programs. Indeed, what it calls for, unlike the functional-product approach or a tax-expenditure approach, is coordination even in these programs that seemingly function well within the tax laws.

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<sup>141</sup> CARES Act, Pub. L. No. 116-136, § 2201, 134 Stat. 281 (2020); American Rescue Plan Act § 9601, 135 Stat. at 138.

<sup>142</sup> See I.R.C. § 6428; see also I.R.C. § 6428A (characterizing the payments as tax rebates).

<sup>143</sup> See I.R.C. § 6428.

<sup>144</sup> See *id.* § 6428(c).

<sup>145</sup> John B. Taylor, *The Economic Impact of the Economic Impact Payments 1* (Hoover Inst., Working Paper No. 21109, 2021).

<sup>146</sup> Krista Ruffini & Abigail Wozniak, *Supporting Workers and Families in the Pandemic Recession: Results in 2020 and Suggestions for 2021*, at 2 (Brookings Paper on Econ. Activity, BPEA Conference Draft, 2021).

<sup>147</sup> See I.R.C. § 6428; see also I.R.C. § 6428A (imposing no minimum household income, employment, or qualifying dependent requirements, thus reaching the poorest people that are ineligible for other benefits such as EITC and CTC).

<sup>148</sup> See Ruffini & Wozniak, *supra* note 146, at 15.

<sup>149</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2021-26-006, SYSTEMS PROCESSING ECONOMIC IMPACT PAYMENTS PERFORMED WELL AND THE GET MY PAYMENT APPLICATION SECURITY VULNERABILITIES ARE BEING REMEDIATED 1–2 (2020); *Get My Payment*, IRS, <https://www.irs.gov/coronavirus/get-my-payment> (last visited Sept. 20, 2022).

<sup>150</sup> Kalee Burns et al., *Two Rounds of Stimulus Payments Lifted 11.7 Million People Out of Poverty During the Pandemic in 2020*, U.S. CENSUS BUREAU (Sept. 14, 2021), <https://www.census.gov/library/stories/2021/09/who-was-lifted-out-of-poverty-by-stimulus-payments.html>.

### 1. *Uptake and Administrative Frictions*

One of the major benefits of contextualized purpose is that administration of these programs can improve if there are greater levels of coordination with other safety net programs. As noted, one of the major concerns for each of the three programs outlined in the previous Section was the matter of uptake. Numerous people eligible for the EITC, the expanded 2021 CTC, and the pandemic payments do not regularly file income tax returns.<sup>151</sup> Thus, they often cannot access these programs.

But other parts of the safety net may be points of access for them, too. Many who do not file returns because they do not meet the income thresholds for filing or did not have any income tax withheld over the year receive other forms of government assistance.<sup>152</sup> For example, those receiving Social Security, Railroad Retirement, or Veterans' Disability benefits may get substantial amounts of income but may not reach the threshold for filing a return.<sup>153</sup> Communicating with these agencies and coordinating to get that information as a means to verify how to get these people their benefits could help. Additionally, other programs like the Supplemental Nutrition Assistance Program (SNAP), TANF, and Medicaid, can reach people and encourage them to apply for these benefits or file returns.

Indeed, given the broad reach of the expanded CTC and the various pandemic tax credit checks, the IRS recognized these purposes and interactions and moved to coordinate. While the IRS set up a web portal for non-tax filers to claim these programs, contextualized purpose and the value of getting this cash out to people as soon as possible also created a government-wide effort to find people who slipped through the cracks.<sup>154</sup> That led to massive information exchanges and coordination among numerous social service agencies.<sup>155</sup> When that first happened with the EIP,

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<sup>151</sup> *Here Are Reasons People Who Don't Normally File Should File a 2021 Tax Return*, IRS (Jan. 13, 2022), <https://www.irs.gov/newsroom/here-are-reasons-people-who-dont-normally-file-should-file-a-2021-tax-return>.

<sup>152</sup> See Ellen Chang & Kemberley Washington, *Do I Have to File a Tax Return*, FORBES (Mar. 17, 2022, 1:39 PM), <https://www.forbes.com/advisor/taxes/do-i-have-to-file-a-tax-return>.

<sup>153</sup> See, e.g., IRS, PUB. 915, SOCIAL SECURITY AND EQUIVALENT RAILROAD RETIREMENT BENEFITS 3, 6 (2021); *Special Tax Considerations for Veterans*, IRS (Apr. 5, 2022), <https://www.irs.gov/individuals/military/special-tax-considerations-for-veterans>.

<sup>154</sup> *Use IRS Non-Filers: Enter Payment Info Here Tool to Get Economic Impact Payment; Many Low-Income, Homeless Qualify*, IRS (Apr. 28, 2020), <https://www.irs.gov/newsroom/use-irs-non-filers-enter-payment-info-here-tool-to-get-economic-impact-payment-many-low-income-homeless-qualify>.

<sup>155</sup> CHUCK MARR ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, AGGRESSIVE STATE OUTREACH CAN HELP REACH THE 12 MILLION NON-FILERS ELIGIBLE FOR STIMULUS PAYMENTS 2–3 (2020) (describing coordination of the IRS, Social Security Administration, Railroad Retirement Board, and Veterans Administration to automatically send the EIP to some nonfilers).

it was rocky, but it eventually got going relatively smoothly.<sup>156</sup> Later, when the 2021 advanced CTC came forward, that infrastructure was there and the various purposes could be discerned effectively.<sup>157</sup> That infrastructure allowed the IRS and other agencies to design processes to find those people who did not file returns and fill in the gaps.<sup>158</sup>

On the flip side, contextualized purpose can inform coordination and information sharing from the tax system out toward other programs. Many of the people who would qualify for the EITC based on their income, for example, could also qualify for programs like Medicaid and SNAP, which also have income thresholds. Some may be unaware of the programs or there may be a stigma attached to using their benefits. Contextualized purpose may involve reaching out to notify people about programs for which they may qualify. It can also countenance information-sharing to help identify people to contact and help streamline application processes.

For example, one could imagine that SNAP applications could be streamlined if the IRS were able to, with the applicant's consent, give tax return income and location information to a state agency and then have the applicant applying for SNAP certify that their situation is somewhat the same in terms of income and family as what appeared on the tax return. That can reduce the need for long interviews and for potential beneficiaries to have to pull up a lot of paperwork. This system, in fact, happens currently for student loan income-driven repayment schemes.<sup>159</sup> This type of information exchange and streamlined application also happens under the ACA for Medicaid applications.<sup>160</sup> People can then, by filing their tax returns, easily qualify for these income programs like the EITC and the CTC and receive their Medicaid benefits if offered by their state.<sup>161</sup> By reducing

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<sup>156</sup> *Id.* at 2, 4 (noting that of the estimated 12 million people that the automatic EIP missed, 9 million of them could be reached through state agencies that administer benefits like SNAP and Medicaid); KRIS COX ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, STIMULUS PAYMENTS, CHILD TAX CREDIT EXPANSION WERE CRITICAL PARTS OF SUCCESSFUL COVID-19 POLICY RESPONSE (2022), <https://www.cbpp.org/sites/default/files/6-22-22fedtax.pdf>.

<sup>157</sup> COX ET AL., *supra* note 156, at 5–8.

<sup>158</sup> *Id.* at 2 (noting that agencies' pandemic response "spurred new approaches to delivery—such as an online portal for people with low incomes who don't ordinarily file tax returns—that will have lasting value for providing improved access to IRS-delivered benefits").

<sup>159</sup> I.R.C. § 6103(l)(13) ("Disclosure of return information to carry out the Higher Education Act of 1965"); *An Income-Driven Repayment Plan Could Save You Money*, FED. STUDENT AID, <https://studentaid.gov/articles/idr-plan-could-save-money/> (last visited Dec. 17, 2022) ("The easiest way to [provide income information] is by using the IRS Data Retrieval Tool to transfer your IRS tax return information directly into your application.").

<sup>160</sup> *See Medicaid & CHIP Coverage*, HEALTHCARE.GOV, <https://www.healthcare.gov/medicaid-chip/getting-medicaid-chip/> (last visited Oct. 9, 2022); *About the Affordable Care Act*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/healthcare/about-the-aca/index.html> (last visited Oct. 9, 2022).

<sup>161</sup> *See* KRIS COX ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, STATE AND LOCAL CHILD TAX CREDIT OUTREACH NEEDED TO HELP LIFT HARDEST-TO-REACH CHILDREN OUT OF POVERTY 4 (2021), <https://www.cbpp.org/sites/default/files/7-29-21tax.pdf>.



these administrative friction points through coordination between the IRS and other agencies, contextualized purposes of these programs are furthered.

Contextualized purpose in this instance counsels against coordination with certain agencies. Given that some of these programs are available to undocumented aliens, particularly the 2021 expanded CTC,<sup>162</sup> in the effort to fulfill the purposes of the program and the broader redistributive efforts, the IRS should not coordinate with immigration enforcement. This concern requires the IRS, in coordination with partner social service agencies, to work to limit information sharing within themselves when a beneficiary decides to authorize an automatic transfer of their tax return information in a situation like applying for SNAP benefits. Allowing the flow of information to immigration authorities would fundamentally undermine not only the goals of these income support programs but also other safety net programs.

## 2. *Enforcement*

Relatedly, contextualized purpose can also help to inform enforcement. Contextualized purpose shows that these income support programs are designed to support people with low or moderate incomes. For example, the EITC serves as wage support for those who have wages that may be too low. The CTC's refundable portion provides working families with needed help in paying for child-related expenses. The EIPs were meant to get cash into people's hands quickly in light of massive unemployment, economic disruptions, and an economic cratering linked to pandemic control measures.<sup>163</sup>

These purposes counsel against overenforcement of these provisions. While many of these tax filers are easy targets for examination, given these purposes, delivering these social goods far outweighs the gain of additional revenue. Also, given the intrusiveness of other social safety net services, like interviews for continuing SNAP benefits, cutting off these benefits in an examination or forcing repayment could put people already in a precarious situation at even greater risk of being unable to provide for themselves and their families.<sup>164</sup> It also requires grappling with the fact that while these audits may be easy to undertake through correspondence, the actual amount raised through them does not advance the revenue-raising goals in the tax system.

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<sup>162</sup> *Basic Qualifications*, IRS, <https://www.eitc.irs.gov/tax-preparer-toolkit/frequently-asked-questions/basic-qualifications/basic-qualifications-2> (Apr. 21, 2022) (noting that filers using an individual taxpayer identification number (ITIN) are eligible to receive CTC).

<sup>163</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-106044, *STIMULUS CHECKS: DIRECT PAYMENTS TO INDIVIDUALS DURING THE COVID-19 PANDEMIC* (2022), <https://www.gao.gov/assets/gao-22-106044.pdf>.

<sup>164</sup> See Justin Schweitzer, *How to Address the Administrative Burdens of Accessing the Safety Net*, CTR. FOR AM. PROGRESS (May 5, 2022), <https://www.americanprogress.org/article/how-to-address-the-administrative-burdens-of-accessing-the-safety-net>.

Furthermore, embedded in this program is a matter of equity and equitable treatment. That also means that in undertaking this analysis, the IRS also needs to consider the context of income and wealth disparities that these programs are meant to blunt. That in turn requires an understanding of racial disparities to avoid administering and enforcing programs in a way that heightens these disparities. Unfortunately, the IRS is not great at issues of race. Numerous commentators have noted the toll that the heightened enforcement around these income support programs has had on communities of color.<sup>165</sup>

Contextualized purpose thus reveals that the IRS needs to be aware of its racial disparities in its enforcement and to weigh that against other goals like protecting the revenue base. Such awareness would counsel it to be careful about over-auditing beneficiaries of this tax program. It also requires the IRS to become more conscious about the potential for its enforcement actions overall to affect communities of color by creating disparate impacts. Of course, to do that, the IRS would probably need better data on race, which it problematically does not collect.<sup>166</sup>

Regardless, of these issues, thinking about contextualized purpose likely means that the continuing focus on noncompliance with the EITC, for example, as a source of many audits, is misguided. Over-auditing EITC compliance undermines the goals and values of the program.

### 3. *Pushing Capacity*

Another key benefit of contextualized purpose is that it also reveals gaps in the IRS and other agencies' capacities. For example, in each of the programs explored in this Section, there are significant questions about identifying people, promoting uptake, and shielding them from problematic enforcement practices. There are also key questions about delivery of the benefits. How often are benefits delivered and how responsive are the systems? How do beneficiaries receive the benefit?

On the issue of timing, while traditionally many of these income support programs were distributed only on an annual basis, both the EIP and the 2021 CTC allow payment outside the annual return cycle.<sup>167</sup> Contextualized purpose demands that the IRS build out a means not only to distribute the payments early, but also to allow people to state changes in their income. That requires new capacities for receiving information early. This then suggests further coordination with other agencies. Some of these

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<sup>165</sup> See generally DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021).

<sup>166</sup> Wally Adeyemo & Lily Batchelder, *Advancing Equity Analysis in Tax Policy*, U.S. DEP'T OF TREASURY (Dec. 14, 2021), <https://home.treasury.gov/news/featured-stories/advancing-equity-analysis-in-tax-policy>. A contextualized purpose approach would allow the IRS to collect this information from other agencies and then interpolate its findings into those agencies' datasets.

<sup>167</sup> *Child Tax Credit*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/child-tax-credit> (last visited Sept. 9, 2012).

questions, though, also should eventually cause the IRS to rethink how it gathers information and its time scales. These changes, though, do more than serve the purpose of a particular program. By allowing better collection of data on individuals in something closer to real time, new capacities could not only improve administration of a permanent advanced CTC but also support changes to the EITC to allow it to be distributed more frequently.<sup>168</sup> Such a move, when considering the investment in capacities, could also help with other purposes of the tax system, like the collection of revenue, by allowing something closer to real-time reporting of wages and other income for taxpayers.

Another capacity for the IRS and other agencies to develop based on the contextualized purpose framework is in the delivery of the benefits. Many of the beneficiaries of these programs often are not banked, meaning that handing out checks often leads toward significant leakage as the beneficiaries are forced to use high-fee check cashers.<sup>169</sup> Contextualized purpose points out that this is a capacity gap and encourages the IRS and other agencies to work together to develop creative solutions. It also adds to the dialogue with Congress and other policy principals to help consider how to improve agency capacities to address these issues.

Thus, contextualized purpose, in these particular programs, can lead to improved administration and better overlap with other programs. The next Part outlines some of the benefits and costs of this approach.

### III. BENEFITS AND COSTS

The theory of contextualized purpose, as shown above, can improve overall delivery of social goods and provide a better framework for the IRS to use. It is also closer to the multivariate purposes of our tax system, too.

This Part first situates contextualized purpose within the broader discussion of tax policy. It highlights how contextualized purpose fills the gaps within two of the more dominant but problematic approaches to taxation: tax expenditure theory and the functional-product approach. This Part then outlines some of the key advantages of contextualized purpose and seeks to highlight and respond to some of its costs.

#### A. *Filling Gaps in Theory*

Many of the theories and discussions involved merely suggest avoiding the placement of almost any social policy in the tax system and preventing

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<sup>168</sup> See e.g., *Convening Discusses Periodic Payments of Tax Credits to Help Low-Wage Workers*, CMTY. ADVOC. PUB. POL'Y INST. (Apr. 26, 2021), <https://ppi.communityadvocates.net/news-events/blog.html/article/2021/04/26/convening-discusses-periodic-payments-of-tax-credits-to-help-low-wage-workers> (discussing the benefits of providing more frequent payment of tax credits).

<sup>169</sup> Jim Wang, *Where to Cash Your Stimulus Check Without a Bank Account*, FORBES (May 2, 2020), <https://www.forbes.com/sites/jimwang/2020/05/02/where-to-cash-your-stimulus-check-without-a-bank-account>.

the IRS from playing an administrative role. As a result, they do not address, nor provide a useful means for guiding, the IRS's and other agencies' roles in administration. Furthermore, the normative frame for which these theories advocate is unlikely to come into being, and by focusing efforts toward removing many programs from the tax system, they may unintentionally encourage the proliferation of such programs.

### 1. *Tax Expenditure Theory*

Tax expenditure theory has at least gained a place at the table in policy-making circles. It is influential in the various analyses of the federal budget and has significant proponents going back to Stanley Surrey, who first proposed the concept.<sup>170</sup> But its use in analyzing whether to use the tax system to deliver social goods is cramped and indeterminate.

Tax expenditure theory starts with the definition of the normal income tax base.<sup>171</sup> Using the traditional Haig-Simons definition of income, the base is essentially any increase in “net economic wealth between any two points of time plus consumption during that period.”<sup>172</sup> But the income tax base, importantly, allows for the deduction of expenditures for the production or creation of that income.<sup>173</sup>

Certain immediate business costs are deductible under this system as so-called “ordinary and necessary” business expenses.<sup>174</sup> Because investments in capital assets produce income over their entire useful life, the amount of the capital expense is spread out over the asset's useful life, and economic depreciation costs are deducted.<sup>175</sup>

On the flip side, personal consumption expenses are not deductible.<sup>176</sup> Indeed, part of the purpose of the Haig-Simons definition of income is to use it as a taxation base to tax the consumption ability of a particular taxable unit.<sup>177</sup>

Tax expenditure theory defines a tax expenditure, then, as any preference in the income tax system that deviates from this normal tax base.<sup>178</sup> These deviations are economically equivalent to a direct outlay from the government.<sup>179</sup> Tax expenditures thus include programs like the income support programs mentioned in the previous Section, as well as things like depreciation schedules, which allow faster depreciation than economic

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<sup>170</sup> See generally SURREY & MCDANIEL, *supra* note 2.

<sup>171</sup> *Id.* at 3.

<sup>172</sup> *Id.* at 4.

<sup>173</sup> *Id.* at 3.

<sup>174</sup> I.R.C. § 162.

<sup>175</sup> See SURREY & MCDANIEL, *supra* note 2, at 210.

<sup>176</sup> *Id.* at 3–4.

<sup>177</sup> See *id.*

<sup>178</sup> *Id.* at 3.

<sup>179</sup> *Id.*

depreciation.<sup>180</sup> This concept, which Surrey championed, is meant to show the parallel between the cost of providing a tax preference and actual outlays by the federal government.<sup>181</sup> Surrey's theory led to the eventual creation of a tax expenditure budget.<sup>182</sup>

The theory in many ways has become relatively successful, at least within the world of tax policy. For example, JCT, in its role as the scorekeeper for tax policy, makes an analysis every five years on tax expenditures.<sup>183</sup>

Despite its success, Surrey's theory has a significant shortcoming as a set of analysis for policy regarding whether to involve the tax system in delivering social goods or redistribution.

First is the matter of indeterminacy. Recall that tax expenditure theory does not characterize as a tax expenditure certain deductions, exclusions, and credits that help define the normal income tax base. But the theory does not clearly identify those deductions, exclusions, and credits.

One of the strongest critiques of this concept came from William Andrews.<sup>184</sup> Andrews showed how two deductions—for medical expenses<sup>185</sup> and charitable donations<sup>186</sup>—could count as part of the calculation of the normal tax base.<sup>187</sup> Since the purpose of using income as a metric for taxation is to get indirectly at the ability to pay and personal consumption, each of these deductions are properly not part of the normative tax base in Andrews's view.<sup>188</sup> Medical expenses help to restore people to where they were before their injury so that they may continue to create income.<sup>189</sup> It is not a personal source of consumption. With the charitable deduction, too, even if the funds go to an art museum, the point is that the funds are not used for any personal gain on private consumption but inures to the benefit of the larger public in the creation of a certain public good to be consumed by all.<sup>190</sup> Thus, tax expenditure theory does not work well as a means for determining the involvement of social policies in the tax system.

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at v, 1–2.

<sup>183</sup> JOINT COMM. ON TAX'N, No. JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024, at 1 (2020).

<sup>184</sup> William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 313–15 (1972).

<sup>185</sup> I.R.C. § 213.

<sup>186</sup> I.R.C. § 170.

<sup>187</sup> Andrews, *supra* note 184, at 313–14.

<sup>188</sup> *Id.*

<sup>189</sup> *See id.* at 335–36 (mentioning that medical expenses are only an intermediate good for producing good health, and how a greater portion of the differences between people in medical expenses are related to need rather than personal choices or taste).

<sup>190</sup> *Id.* at 357–58. Andrews also addresses the situation of pure redistributive giving to social services charities, which also seems to be a reduction in one's personal consumption power, and likely furthers redistributive aims of the government and the tax and transfer system. *Id.* at 347–48.

Relatedly, while tax expenditure theory presents itself as a value-neutral theory, it has a significant values valence.<sup>191</sup> It claims that labeling a program in the tax law as a tax expenditure is not some sort of value judgment. But within the tax policy world, calling a tax program a tax can often resemble a scarlet letter. Indeed, Surrey himself sought to push this matter forward to eliminate tax expenditures entirely and to return the federal income tax to a pure revenue-raising measure.<sup>192</sup>

These two failures lead toward major blind spots. One is the irony that by revealing the size, scope, and frequency of tax expenditures, the theory undermined its goal of eliminating them as policy makers became more aware of them. Thus, while tax policy scholars railed against tax expenditures, legislators in Congress saw them as a useful way to deliver social goods.<sup>193</sup> As a result, the number and size of tax expenditures grew, rather than decreased.<sup>194</sup>

Another major blind spot is that tax expenditure theory, because it is concerned with showing programs as deviant from the ideal base, does little to show how to normatively administer and run such programs.<sup>195</sup> It merely focuses on getting these programs out of the Code.<sup>196</sup> But, when considering both the unintended consequence of the visibility of tax expenditures as an enticing tool for legislators and the fact that, as a result, the IRS is tasked with managing and administering these programs, this blind spot is quite large. Just arguing that the IRS is ill-equipped to address these matters,<sup>197</sup> without developing some way in which institutional capacities can grow

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<sup>191</sup> See SURREY & MCDANIEL, *supra* note 2, at 5–6, 25–26 (noting that “[t]he classification of an item as a tax expenditure does not in itself make that item either a desirable or an undesirable provision,” but then also somewhat supporting the efforts at eliminating tax expenditures in tax reform efforts); Andrews, *supra* note 184, at 311 (characterizing the criticisms of the medical expense deduction and the charitable deduction from tax expenditure theory as “devastating”).

<sup>192</sup> See SURREY & MCDANIEL, *supra* note 2, at 26–27 (arguing that tax expenditures for purposes outside of revenue raising are administratively inefficient, thus implicitly arguing to remove these from the tax system).

<sup>193</sup> See METTLER, *supra* note 58, at 16–19 (discussing placement of matters in the tax system as a part of political compromise); HOWARD, *supra* note 35, at 21–24 (describing the broad reaches tax policy has into other areas of social policy).

<sup>194</sup> ALLISON ROGERS & ERIC TODER, TAX POL’Y CTR., TRENDS IN TAX EXPENDITURES, 1985–2016, at 9 (2011), <https://www.urban.org/sites/default/files/publication/27561/412404-Trends-in-Tax-Expenditures---.PDF>; SARAH CALAME & ERIC TODER, TAX POL’Y CTR., TRENDS IN TAX EXPENDITURES: AN UPDATE 18 (2021), [https://www.urban.org/sites/default/files/publication/104124/trends-in-tax-expenditures-an-update\\_1.pdf](https://www.urban.org/sites/default/files/publication/104124/trends-in-tax-expenditures-an-update_1.pdf) (showing, between the two reports, an overall increase in the number and size of tax expenditures since the low point of the Tax Reform Act of 1986, when tax expenditures were reduced to pay for tax reform, and represents, in some sense the high point of Surrey’s victory, even though it came after his death).

<sup>195</sup> Indeed, Surrey almost defers the question about the choice between using the tax system or not, much less actually addresses issues of managing programs through the tax system. SURREY & MCDANIEL, *supra* note 2, at 28.

<sup>196</sup> *Id.* at 26–27; see, e.g., Weisbach & Nussim, *supra* note 2, at 958.

<sup>197</sup> SURREY & MCDANIEL, *supra* note 2, at 26–27.

wisely in concert with the capacities and expertise of other parts of the government, is fruitless and unhelpful.

Contextualized purpose seeks to fill in the gaps. Tax expenditure theory can help with some of the analysis because it provides at least a first cut of some programs that likely may have purposes broader than the mere revenue-raising function of the tax system. But contextualized purpose adds something else. Instead of focusing on hidden values and the idea that the tax system exists solely for revenue, contextualized purpose says that values are always embedded in any decision that is made.<sup>198</sup> And instead of focusing on the question of whether a program should go into the Code, contextualized purpose seeks to take matters as they appear and forward those values into a plan for administration and management. It thus fills the gap and centers administration on the question of implementation rather than the frustrating question as to whether the program is a tax expenditure that Congress should eliminate.

## 2. *The Functional-Product Approach*

Others have noted some of the problems of tax expenditure theory and have suggested a different approach. This approach, which this Article calls the functional-product approach, stems from David A. Weisbach and Jacob Nussim's work.<sup>199</sup> It is a useful analysis. But this approach, too, falls short on many key matters and fails to definitively answer the question of which administrative framework to use, especially when the strict conditions outlined in the analysis are not met.<sup>200</sup>

Weisbach and Nussim's approach focuses on whether social welfare, redistribution, or social safety net programs should be in the tax system.<sup>201</sup> The overarching idea is that a social safety net program's place in the tax system depends on whether the program's administration aligns with the functional capacities of the tax system and the IRS.<sup>202</sup> Their approach draws on organizational theory and the theory of business firms and undertakes a functional analysis.<sup>203</sup>

The motivation for the functional-product approach is the observation that the government is like a complex business organization.<sup>204</sup> Like those

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<sup>198</sup> See Abreu & Greenstein, *supra* note 9, at 688 (arguing that "raising revenue cannot be disengaged from [social] policies, values, and visions [of a just society]").

<sup>199</sup> Weisbach & Nussim, *supra* note 2.

<sup>200</sup> Weisbach and Nussim have four major limitations to their analysis that they disclaim at the outset. First, they discuss only direct grants and tax subsidies and do not discuss regulatory programs through the tax system. Second, they exclude from consideration the issues of politics, the design of Congress, and the interactions between Congress and agencies. Third, they also exclude some of the capture and public choice theory ideas. Fourth, they also take agencies and institutions as given and do not allow for dynamic shifts. *Id.* at 964–66.

<sup>201</sup> *Id.* at 999.

<sup>202</sup> See *id.* at 960–61 (mentioning that the question is about the institutional design matters).

<sup>203</sup> *Id.*

<sup>204</sup> See *id.* at 986–87 (drawing on literature from theories regarding private firms).

large companies, the government must produce many different types of services and goods for the public ranging from national defense to health care.<sup>205</sup> Weisbach and Nussim note that there are often two means for creating organizations, the U-form and the M-form.<sup>206</sup>

In the U-form, which is often how smaller organizations operate, everything is divided solely on function.<sup>207</sup> In the example of a company, there is one inventory section, one finance section, and so forth.<sup>208</sup> These sections work across all product lines.<sup>209</sup>

But as companies get more complicated, they turn to the M-form,<sup>210</sup> which creates divisions or departments based partly on a functional analysis and partly on product lines.<sup>211</sup> It groups functions together to support certain product lines.<sup>212</sup> For example, an organization like a car company may divide itself up into divisions that specialize in luxury cars and divisions that specialize in more common cars. Sometimes companies divide themselves up on the basis of territories, with one division taking control of one market and another division taking control of others.<sup>213</sup>

The M-form is how the federal government is designed and operates.<sup>214</sup> Agencies in the government seek to produce and administer policy goods in the same way as product-line divisions in a company.<sup>215</sup> When determining which policies should get assigned to which agency, this modified functional-product-line analysis should be the means used in order to get the most efficient production and administration of policy and public good creation.

Overall, the functional-product approach changed the discussion on using the tax system in implementing key redistributive and social goals. But the theory also has gaps, which contextualized purpose can address.

First, the functional-product approach puts efficiency of “production” as the top value.<sup>216</sup> But mere efficiency by itself cannot be the end. After all, having the government efficiently produce a good or service that runs counter to broader goals or articulated political values is not desirable. Instead, efficiency must serve those broader goals and values. Weisbach and Nussim seemingly dismiss these concerns. They note that—unlike in business, where profit is the proper measure—there are no easy metrics for

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 987.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 987–88.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 988.

<sup>213</sup> *Id.* at 989–91.

<sup>214</sup> *Id.* at 988.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 988–89.



delivery of public goods, and they instead discuss the costs of accuracy.<sup>217</sup> In order to develop such metrics, though, value judgments must occur, and some understanding of public value must inform the goals of a program. Thus, functional-product analysis puts such ideas as the goals and efficacy of any policy program in the safety net outside of its bounds.

But it really is not much of an option to bracket these questions. After all, if efficiency in administration is not guided by some set of values and goals, it is empty. The act, too, of administering programs is itself a value-laden activity. Even if Congress is not entirely explicit in stating the values, purposes, and goals of a social policy tax program, the IRS or some other agency must make some judgment calls on those dimensions to administer the program. Failing to address this matter because it is difficult and potentially messy thus misses the mark.

Related to that point, the functional-product approach seems to be fine with cross-purposes in administration.<sup>218</sup> But administering competing programs and regulatory matters at cross-purposes not only frustrates beneficiaries and regulated parties, it also undermines the federal government's efficiency and its overall ability to deliver social programs, which can undermine the people's confidence in government. Furthermore, it also runs counter to pragmatic purposivism because reasonable legislators, while competing for credit and supporting different approaches to a problem, are unlikely to want agencies to undermine the work of another agency, unless explicitly required by statute. For example, while it may be more efficient to have the IRS administer deductions for certain farm expenses and the USDA-run farm programs, unless the agencies have a sense of the purposes and goals of each program and coordinate with each other, they can, and often will, unintentionally undermine each other even if the statutory structure is not inherently disharmonious. Brushing aside such concerns as the functional-product approach does, then, is a bit odd.<sup>219</sup>

Furthermore, the functional-product approach misunderstands how government goods and services differ from those in the private sector, because these goods are often more complicated.<sup>220</sup> Unlike a hotel chain with a luxury division and a budget division, governmental goods are unique in

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<sup>217</sup> *Id.* at 992–93.

<sup>218</sup> Indeed, Weisbach and Nussim state “desirable separation of functions into divisions is going to lead to a lack of coordination. An organizational form that produces better coordination may very well be inferior on other grounds and, therefore, the lack of coordination may be optimal.” *Id.* at 994–95.

<sup>219</sup> Most of Weisbach and Nussim's discussions about cross-purposes are laid at the principals and in the policy design phase. *Id.* at 992–96. But, as Freeman and Rossi point out, a great deal of the cross-purpose problems happen because of unintentional administrative and regulatory decisions. See Freeman & Rossi, *supra* note 3, at 1182–83 (noting that a lack of coordination in regulation and administration, not statutes, can frustrate regulated parties). The GAO says similarly. GAO, MANAGING FOR RESULTS, *supra* note 4, at 1 (explaining that interagency mechanisms “may reduce potentially duplicative, overlapping, and fragmented efforts”).

<sup>220</sup> See GAO, MANAGING FOR RESULTS, *supra* note 4, at 9.

their complexity to produce. Often there are numerous dimensions of expertise needed to solve a particular policy problem.<sup>221</sup>

Part of the reason why expertise is often arranged in ways that may not make sense for the current problem is the story of history and path dependency. Agencies come into existence in a somewhat ad hoc manner to address a key issue of the day.<sup>222</sup> Once an agency has addressed that policy problem, it must continue its work to prevent that problem from arising again.<sup>223</sup> It often develops expertise and an ability to address matters in that sphere.<sup>224</sup> But when a new problem arises, sometimes it does not fit well into that agency's expertise, and often, as we learn more, we see that many problems are deep and multifaceted.<sup>225</sup> Many of our social problems regarding inequality and the development of a social safety net are highly complex, and thus require an understanding of income and wealth levels, matters of historic racial injustices, economic development policy, housing, and health care, to name a few.<sup>226</sup> A view focused merely on a program's functions and products is often frustrated given this complexity and path-dependent history.

Another missing point is the institutional and political structures of the policy-making principal, Congress.<sup>227</sup> Congress as a body has diffuse power and is hemmed by strong political constraints. It also has numerous veto points. Nancy Staudt helpfully observes that there is competition between congressional committees and their members to claim credit for the creation of programs.<sup>228</sup> This often leads to duplications and slightly different approaches to addressing major policy problems, such as redistribution, that often get delegated to different agencies.<sup>229</sup> These policies, committees, and

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<sup>221</sup> *Id.*

<sup>222</sup> See LISA SCHULTZ BRESSMAN ET AL., *THE REGULATORY STATE* 435 (3d ed. 2020).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-317, *CLIMATE CHANGE: IMPROVEMENTS NEEDED TO CLARIFY NATIONAL PRIORITIES AND BETTER ALIGN THEM WITH FEDERAL FUNDING DECISIONS* (2011) (reporting on agencies' varied and often inconsistent definitions of climate change funding); Freeman & Rossi, *supra* note 4, at 1169–73 (describing the joint policy-making efforts of the EPA and the National Highway Traffic Safety Administration regarding standards for greenhouse gas emissions and fuel efficiency for new cars and trucks).

<sup>226</sup> See generally Michael D. King, *New Interactive Data Tool Shows Characteristics of Those Who Receive Assistance from Government Programs*, U.S. CENSUS BUREAU (May 24, 2022), <https://www.census.gov/library/stories/2022/05/who-is-receiving-social-safety-net-benefits.html> (analyzing “the demographic and socioeconomic characteristics of the individuals and households that received a range of social safety net benefits from 2013 to 2019”).

<sup>227</sup> Weisbach and Nussim specifically exclude this from their consideration. Weisbach & Nussim, *supra* note 2, at 965–66.

<sup>228</sup> See Staudt, *supra* note 61, at 1204–06, 1217–20 (outlining how social welfare is fragmented among various committees working in parallel, how this structure arises because new policy questions often do not fit squarely into the old models, and that there are significant political incentives for claiming credit).

<sup>229</sup> See *id.* at 1205 & tbl.1, 1228 (delineating the assignments of various social welfare programs to various agencies and committees in Congress).

agencies compete to find some of the best ways to deliver social goods, which is a complex problem.<sup>230</sup> But also implicit in Staudt's observation is that programs are not meant to be administered in a way by which management, regulations, and other administrative functions unintentionally and actively undermine each other.<sup>231</sup> Political pressures also often lead to compromises, including placing an agency in charge of a program that upon a functional analysis may not be the best choice.<sup>232</sup> But putting that program elsewhere may mean that such a program would cease to exist, undermining the government's ability, and those of policy principals in Congress, to provide aid to those vulnerable in society. Indeed, even conservative Americans often still profess to wanting greater redistribution and social safety nets; they just want it perhaps delivered differently or based on different group criteria.<sup>233</sup>

The functional-product approach also makes a problematic assumption regarding both the purposes of the tax system and the capacities of agencies. It first assumes that the purpose of the tax system is merely to collect revenue, and that the functions of the IRS are aimed at that "product line."<sup>234</sup> But, as noted above, that value judgment is not always true, and indeed, the tax system always had within it embedded values of redistribution.<sup>235</sup>

Furthermore, when it comes to the capacities of agencies, the functional-product approach assumes everything is fixed.<sup>236</sup> For example, functional-product analysis says SNAP should not be in the tax system while EITC should, contingent mainly on responsiveness.<sup>237</sup> While one can quibble with Weisbach and Nussim's statement of SNAP as a somewhat short-term benefit and that annual payment of the EITC is sufficient,<sup>238</sup> what

<sup>230</sup> See *id.* at 1205–06, 1219–20, 1228–29 (noting that there are varied and discrete problems that the poor face and discussing policy competition and its benefits).

<sup>231</sup> See *id.* at 1228 (making the point that on some level there is a desire to harness both the limitations on cross-purposes not only in administration but also policy design, and multiple expertise and approaches competing with one another for the complex problem of poverty).

<sup>232</sup> See METTLER, *supra* note 58, at 16–19 (discussing placement of matters in the tax system as a part of political compromise); Staudt, *supra* note 61, at 1219–20 (mentioning that fragmentation of matters into multiple committees leads toward greater compromises that allow final passage on the floor of each chamber of Congress).

<sup>233</sup> See MORGAN & CAMPBELL, *supra* note 58, at 37–45 (describing and using survey data to show that Americans generally want both smaller government and a more robust safety net); Staudt, *supra* note 61, at 1219 (observing that there is a political preference for in-kind benefits).

<sup>234</sup> See Weisbach & Nussim, *supra* note 2, at 1021–23 (discussing how responsiveness is not high in the tax system because the tax system measures income over a year for revenue-collection purposes, and making the system more responsive would undermine it).

<sup>235</sup> See *supra* Section I.A.

<sup>236</sup> Weisbach & Nussim, *supra* note 2, at 996.

<sup>237</sup> *Id.* at 1026–27.

<sup>238</sup> *Id.* at 1022–23, 1024–25. Some data point to SNAP as a program that is generally more long-term, though sometimes there is a responsiveness need, too. Two of the problems in SNAP seem to be churning and the failure to reregister. As for the EITC, more periodic payments may be preferred by beneficiaries, and one reason for the lack of uptake of the advanced EITC is the claw-back provisions. DRUMBL, *supra* note 1, at 40, 142–44.

they fail to realize is that while the current structure of the IRS itself may not work well with, for example, delivery of funds outside the current annual schedule, that could change.<sup>239</sup> Other countries have real-time wage and other income reporting that allows for precise withholding,<sup>240</sup> showing that capacities can change if the agency sees an important purpose for them.

The result, then, of these blind spots is twofold. First, like tax expenditure theory, it almost always points toward the idea that the tax system should not be used for anything other than revenue raising. Any policies that draw too much attention away from that function are marked as counterproductive. Indeed, it is difficult to think of a program outside of the EITC and potentially the CTC that fits well with functional-product analysis.

Second, these blind spots mean that functional-product analysis fails to grapple with the fact that many of these programs are currently in the Code and that they inevitably interact with other parts of the safety net. The approach's failure to work with this issue, plus its emphasis on efficiency, can lead to unhelpful cross-purposes in agency actions. It also does not give the IRS a useful guide as to how to manage these programs or coordinate with other agencies. The gap thus means that, like tax expenditure theory, the functional-product approach ends up having limited use for the agency and its need to make decisions.

Contextualized purpose helps to fill in these gaps. As noted, the approach focuses on how to go about administering a program and determining which types of coordination tools are necessary.<sup>241</sup> It also provides the metrics and goals for administration to enable tracking of the program's efficiency. And it does so in a way to prevent inadvertent cross-purposes in administration to get complex parts working together as best as they can.

Furthermore, contextualized purpose has a broader view of the purposes of the tax system and how it fits into the overall provision of social welfare goods. The functional-product approach, like tax expenditure, lionizes the IRS's revenue-raising function. But contextualized purpose adds a needed nuance. While it is not designed to answer the question as to whether Congress should place a social program into the tax system, it can give lawmakers an understanding of how to enable the agencies they direct, including the IRS, to meet their administrative needs.

Thus, while the dominant functional-product approach does have uses, it suffers from some significant problems. Contextualized purpose fills in some of these holes and provides a more workable way forward for agencies and others to work with what they have.

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<sup>239</sup> DRUMBL, *supra* note 1, at 159–61.

<sup>240</sup> *Id.* at 159.

<sup>241</sup> *See supra* Section II.B.

## B. *Advantages*

There are key advantages to contextualized purpose besides filling in the gaps in current theory. This Section outlines a few of them.

### 1. *Value-Laden Administration*

First, contextualized purpose is based on the idea that administration is a value-laden exercise. When policy decisions are made in the political arena of Congress, values and worldviews are evident. But when it comes to administration, institutional design, implementation, and program management, a lot of that discussion seemingly disappears. Instead, the discussion turns toward a focus on efficiency and technocratic work.<sup>242</sup>

But while many statutes providing social safety net products outline specific qualifications and mechanics, much of the administration is still left to the discretion of the agency to put forward in rules.<sup>243</sup> These types of rules give meat to the statute and make the program work. But even within the realm of reasonableness that is required under administrative law,<sup>244</sup> there are choices to make, and those decisions are laden with values.

Often, too, bureaucrats on the ground are required to make judgments that can affect who learns about and ultimately accesses certain programs and benefits. They inform matters of monitoring and enforcement. But each of these judgments, too, is laden with values.

Looking at the purposes of a program within a broad policy context brings values into the administrative question to help guide these decision points. Many other modes of thinking about social programming within the tax system avoid what is admittedly a hard discussion. Instead, often we just discuss rootless efficiency in delivery. But efficiency in and of itself, without some sort of end goal or a connection to values and purposes, is an empty matter. Thus, by undertaking this view, that key question of values returns to the discussion of administration.

### 2. *Complex Problems*

Examining contextualized purpose helps to reveal that most of our unsolved policy problems are multifaceted and complex. Indeed, the fact that these problems often exist means that there is some level of complexity involved. When policy problems are complex, it is almost impossible for

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<sup>242</sup> Indeed, this is the flavor of the functional-product approach. It sees administration as mostly a technocratic exercise solely based on expertise. Weisbach & Nussim, *supra* note 2, at 959.

<sup>243</sup> This concern as to how to undertake administration is the central idea in administrative law, looking at how agencies create regulations, fill the gaps, run programs, and enforce the law. It also looks at who decides.

<sup>244</sup> See Matthew C. Stephenson & Adrian Vermeule, Essay, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 601 (2009) (developing the concept of a zone of ambiguity for permissible interpretations).

any one person or specialist to have both the breadth and depth to address the matter.<sup>245</sup>

The provision of the social safety net and addressing poverty is itself a complex problem.<sup>246</sup> While initially it seems as though the problem is merely about how to move around money; the issues get more difficult when one zooms in.<sup>247</sup> One begins to find that no one silver bullet solves the problem. Rather, the issue of providing for social support and dignity in some redistributive contexts requires a lot of different policy levers. For example, there are needs beyond just cash payments. Perhaps health care is important. Perhaps we need people to be able to find housing in good neighborhoods, which may require demand-side interventions as well as supply-side interventions tied to broader economic and community development.

And even if we are primarily concerned with giving money to people, there is always a question as to how exactly to reach those who qualify to ensure that they get the cash in their hands in a way they can use. Such a matter requires contact and awareness as well as applications, screening, back-end enforcement, and actual fund delivery mechanisms.

When one looks at policy problems through that lens, it becomes apparent that addressing the problem requires certain expertise and information that no one agency can hold. It also may well require multiple approaches to the problem. Additionally, looking at these problems, even without our veto point-ridden system or congressional competition, it is unlikely that anyone could design a perfectly harmonious solution to the problems of developing and delivering an adequate safety net.

Thus, contextualized purpose, while grandiose in some ways, comes with the humility that there is no one silver bullet to address massive policy problems. It welcomes constructive disagreement and multiple approaches. It also provides provisional solutions through trial-and-error iteration of administration. In these ways, contextualized purpose provides a way for agencies to administer programs and work together to attack complex problems.

### 3. *History and Path Dependence*

Contextualized purpose also addresses the fact that social programs, both tax and nontax, do not come from on high on a blank slate. There often is, already, an extant set of programs and regulations that all seek to address one component of a complicated problem. There are numerous reasons for this result. Often legislation and changes happen piecemeal. Much as it is

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<sup>245</sup> See GAO, *MANAGING FOR RESULTS*, *supra* note 4, at 9–10 (outlining how complex problems, like climate change, require multiple agencies to work on them).

<sup>246</sup> See Staudt, *supra* note 61, at 1228 (“[P]oor individuals face shortages in food, healthcare, housing, education, pensions, and economic opportunities that may be best addressed through a complex arrangement of cash transfers and in-kind benefits . . .”).

<sup>247</sup> *Id.*

difficult for any one person or agency to get a handle on major social welfare problems, so too is it difficult for Congress.<sup>248</sup> Additionally, as discussed above, competition between members and committees in Congress to claim credit for social policies can lead to more regulations.<sup>249</sup> Administering policy with a contextualized purpose allows new and existing programs to work in the best possible way given this historical context. Such a view prevents some of the concerns of agencies working at cross-purposes.

Additionally, there is the problem of path dependency. As policy is implemented over time, small changes can lead to settled expectations that become difficult to undo, both politically and in a way that would limit chaotic disruption that undermines the intended outcomes. For example, one of the largest health programs is the tax exemption for employer-sponsored insurance (ESI).<sup>250</sup> That exemption, and the large ESI system that grew around it, led to expectations that are hard to undo and can be potentially disruptive.<sup>251</sup> Contextualized purpose, then, helps administrators to understand better how to make smoother transitions, large and small.

A related and important point is that the agencies of government also developed within a historical context and have their own path dependencies. One cannot always easily determine what function goes where or rearrange the various boxes on the organization chart into new agencies to suit the needs of new policies and problems. Frequently, the functions required to administer a program do not fit perfectly in almost any agency.<sup>252</sup> Contextualized purpose helps the IRS and other agencies to do the best they can in light of these realities, supplementing gaps through coordination with other agencies.

Indeed, history and path dependency also suggest that trying to quickly rearrange matters, through a reorganization of all social welfare functions under one agency or creation of a new agency to administer some subset of programs, could be costly and disruptive. Creating a new agency has significant start-up costs, and if not done properly, there could be costly duplication of functionality. Reorganizing hastily and without the right holding environment for that change can, as the development of the

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1218–19; *see supra* text accompanying notes 230–33.

<sup>250</sup> I.R.C. § 106(a).

<sup>251</sup> *See* Blaine G. Saito, Note, *The Value of Health and Wealth: Economic Theory, Administration, and Valuation Methods for Capping the Employer Sponsored Insurance Tax Exemption*, 48 HARV. J. LEGIS. 235, 236–39 (2011) (providing a historical outline of the ESI exemption).

<sup>252</sup> Staudt describes a similar issue in Congress, where the decision of assigning a program to an agency is made. Committees' jurisdictions often overlap, and it is often unclear with new and complex problems where exactly they go and which committee has jurisdiction and expertise. Staudt, *supra* note 61, at 1217. GAO also shows something similar regarding how climate change does not fit in any one agency. GAO, *MANAGING FOR RESULTS*, *supra* note 4, at 10.

Department of Homeland Security (DHS) shows, result in massive dysfunctionality and create other problems of overlap and coordination.<sup>253</sup>

By trying to coordinate instead and trying to encourage the IRS to discuss matters with other agencies, contextualized purpose seeks to find a middle ground and work within the existing constraints to develop better administration. Avoiding such disruptions helps not only create some level of stability but also ensures that there are no massive upheavals in administration that could undermine beneficiaries' continued access to safety net goods.

#### 4. Metrics

Contextualized purpose also provides a means to measure a program's efficacy as well as the efficacy of the administration of the program by the IRS and other agencies. Basing the metrics on the discerned goals and values of a program in the broader context of a complex policy problem can make determining the outcomes more viable. Using these purposes and the bigger policy issue can allow any agency to better measure their outcomes.<sup>254</sup> This result then can help these agencies retool what they are doing and rethink their administration of the program or regulatory environment they manage. Such metrics can also help point to whether they need to coordinate with other agencies, and if coordination is happening, how many coordination tools they must deploy.

Metrics can also help inform the policy principals in Congress. As noted, policy solutions to complex problems of our social safety net often arise in piecemeal fashion with different parts of Congress trying to claim credit. Staudt recommends performance-based budgeting as an approach.<sup>255</sup> This and other approaches seek a better and more organized method of creating policy, as opposed to the ad hoc disjointed measures of the mid-twentieth century.

But regardless of the approach taken, information and data are necessary and lacking. By taking this view of contextualized purpose, an agency or set of agencies can provide metrics based on that purpose. Should Congress find statutory cross-purposes that undermine the programs and regulatory

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<sup>253</sup> See Freeman & Rossi, *supra* note 4, at 1153–54 (discussing the controversy surrounding DHS's attempts at improving efficiency and noting some growing pains); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 219–20 (2011) (demonstrating that consolidation solves problems on one axis but creates others); Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375, 1391 (2017) (noting the significant conflict over turf and jurisdiction after FEMA, formerly an independent agency, became part of DHS).

<sup>254</sup> Weisbach and Nussim say that there is no agreed-upon metric here for effective policy delivery, but there should be some sort of measurement. Weisbach & Nussim, *supra* note 2, at 992–93. But most areas of public management, and especially in the area of agency coordination, call for accountability and some form of measurement. Saito, *supra* note 4, at 753–54; GAO, *MANAGING FOR RESULTS*, *supra* note 4, at 11.

<sup>255</sup> Staudt, *supra* note 61, at 1243–49.



environment, or if Congress disagrees with the purposes, it has the information it needs to act.

### 5. *Guiding Coordination and Capacity Growth*

Finally, contextualized purpose can help guide the amount of agency coordination involved in administering a set of programs focused on addressing problems of redistribution and provisions of the social safety net. It can also encourage new capacities for the agencies.

Contextualized purpose can help identify which aspects of a program agencies need to coordinate with each other. It also can help determine the coordination tools these agencies should deploy. Tying these tools in with the metrics and analysis allows agencies to undertake a smart trial-and-error process to get the amount of coordination correct.<sup>256</sup> It also provides a means to reassess when new programs, regulations, or other exigent changes to the policy environment arise.

Furthermore, as agencies work together and coordinate, they may develop new capacities and skills.<sup>257</sup> Over time, this could mean that an agency besides the IRS could undertake more functions of managing and administering a social safety net or social good production program in the tax system. Program leads, roles, and responsibilities can shift, and contextualized purpose and its iterative process of discernment and agency coordination offers a way to think about these types of changes. In that sense, too, contextualized purpose may, ironically, lead toward less of a burden for the IRS than the current system of tax administration of these safety net programs.

Thus, there are significant benefits to the contextualized purpose analysis. The next Section shows why, particularly with redistribution or other goods in the social safety net, the tax system should be involved and potentially even take the front seat.

### C. *The Costs of This Approach*

Using contextualized purpose to place social safety net matters in the tax system has advantages. But there are concerns and costs involved. This Section seeks to address these matters.

#### 1. *Democratic Accountability*

One of the biggest concerns about this approach is that it essentially calls on the agencies in general, and the IRS in particular, to undertake the

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<sup>256</sup> BARDACH, *supra* note 88, at 42–44 (discussing the need for “groping along,” a trial-and-error process to get coordination correct).

<sup>257</sup> GAO, *MANAGING FOR RESULTS*, *supra* note 4, at 7–8 (discussing how agency coordination mechanisms often lead to the development of new agency capacities).

required analysis. This raises a concern that it gives the agencies too much power and lacks the proper democratic accountability.<sup>258</sup>

But such concerns are likely overwrought. As noted in Part I, the discernment of purpose should be public, particularly in the development of regulations through the notice-and-comment process. Public discernment as part of notice-and-comment rulemaking helps to provide participation and additional viewpoints on discerning the purposes, as well as to avoid the democratic deficit.

Furthermore, publicity around some of these matters can lead to better congressional control. Too much of administration, program management, and coordination happens *sub silentio* in the executive branch and its administrative agencies. Again, by making these actions clearer, producing and creating information flows, and undertaking this analysis, Congress can better monitor agencies like the IRS. Congress can intervene more effectively if it feels agencies are going astray. Thus, there can be a democratic accountability gain here.

Another important failsafe for democratic accountability is that the Treasury, IRS, and most agencies coordinating with them are under the executive branch. This means that there is also political control from above.<sup>259</sup> Undertaking this search for contextualized purpose could also involve people from the White House and political actors in agencies overseeing it. If, in their opinion, matters fall too far out of line, they could exert certain tools to control them.<sup>260</sup>

Given that there are numerous ways for the political sphere to interact with agencies, structuring administration in this manner creates a useful dialogue. The interplay and dialogue should help prevent agencies from careening off from political control and could potentially create improved policy discussions.

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<sup>258</sup> In particular, Hickman espoused this view, noting that the IRS and Treasury traditionally are not great at complying with the Administrative Procedure Act, the major safeguard against this lack of democratic accountability, leading to significant democratic deficit concerns. Hickman, *supra* note 62, at 1730, 1805. That said, since Hickman's piece, there has been a change in the IRS and Treasury practice, largely because of her work of unification with administrative law. See Choi, *Legal Analysis*, *supra* note 62, at 823–24 (finding more detailed and normative preambles to regulations and noting that preambles referred to public comments more often post-*Mayo*).

<sup>259</sup> Justice Kagan is the source of this opinion in her (in)famous piece, *Presidential Administration*, where she argues that the main benefits of Presidential control over executive agencies and bureaucracy are increased transparency and an electoral link. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001).

<sup>260</sup> See *id.* at 2284–85 (outlining the use of OMB's process, formal directives, and Presidential appropriation of the regulatory process as means of control). There is some debate. Sunstein, in his experience at OIRA, said most of the process was focused on creating more interagency consultation and public participation. Sunstein, *supra* note 87, at 1841–43. Hickman finds that the democracy enhancement of OIRA review and presidential administration is less focused on presidential politics but instead on compliance with the APA. Kristin E. Hickman, Essay, *An Overlooked Dimension to OIRA Review of Tax Regulatory Actions*, 105 MINN. L. REV. HEADNOTES 454, 457–58 (2021).

## 2. *Overextension of the IRS's Mission and Revenue Collection*

Another concern about contextualized purpose is that it overburdens the IRS with matters outside of its mission and thereby undermines the ability to collect taxes and hampers revenue collection.

While this concern is warranted, especially considering recent IRS budgetary problems,<sup>261</sup> it fails to grapple with the fact that the tax system has broader goals and functions than mere revenue raising. As stated in Part I, the federal income tax system, along with certain other taxes of the Progressive and New Deal eras, came into being as a means not only to fund the state but also to provide redistribution.<sup>262</sup> The purpose of the tax system as designed, then, was to support both redistribution and a level of mass public connection. Thus, this support, too, is part of what the IRS is trying to undertake and a part of its mission. Trying to avoid such questions is problematic.

Second, using contextualized purpose points to how and when the IRS should coordinate with other agencies so it need not do all the work itself and can draw on other agencies' resources and expertise. Again, this suggests that there should be some form of communication and awareness of programs that the IRS administers, as well as an understanding of programs other agencies administer.<sup>263</sup> From there, additional discernment can help to reveal if more coordination is needed. While there are costs to coordination, these costs are often less than the cost of the IRS facing the problem alone.

Third, in a related way, many people point toward a reorganization that would remove the IRS from any role in delivering social welfare goods. But these views are also problematic. For one, trying to undertake reorganization rather than working together to effectuate contextualized purpose fails to understand the complexity of the tax system. Most often, touching the tax system in one area requires an understanding of other parts of the system. As some computer analyses have shown, the Code itself is perhaps the most complex system in the United States Code because it is highly self-referential. Without IRS involvement, there could be cross-purposes and undermining of other parts of the tax system. This could also happen if an agency views only its area of expertise and runs such a tax program.

Additionally, reorganization would eliminate one dimension of coordination costs only to spawn new ones.<sup>264</sup> Reorganization may be more costly in the long-term—especially if it creates some of the problems

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<sup>261</sup> See *IRS Budget and Workforce*, IRS, <https://www.irs.gov/statistics/irs-budget-and-workforce> (May 26, 2022) (showing long-term decline in expenditures based on 2020-adjusted dollars); Jesse Eisinger & Paul Kiel, *I.R.S. Tax Fraud Cases Plummet After Budget Cuts*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/business/economy/irs-tax-fraud-audit.html> (showing similar).

<sup>262</sup> See *supra* Section I.A.

<sup>263</sup> GAO, TAX EXPENDITURES, *supra* note 83, at 23–25.

<sup>264</sup> Marisam, *supra* note 253, at 219–20.

outlined above—than simply coordinating with other agencies and having the IRS play a significant role.

Fourth, keeping the IRS involved can help maintain oversight on information flows. The mass income tax and information it collects could be useful in helping to administer social welfare programs. But this information, garnered from tax returns, is also sensitive.<sup>265</sup> While information sharing is important, the IRS, as the collector and caretaker of tax return information, has a unique responsibility to ensure that other agencies are using the information properly in ways that further positive goals. Pushing the IRS entirely out of any part of administering such programs could hamper effective information sharing and control, and that in the end would lose the benefits of contextualized purpose and coordination to deliver redistribution goods to people more easily.

Finally, this view of excluding the IRS fails to understand what happens when social programming is removed from the Code and the tax system as a matter of politics. While people often push for these changes to improve the revenue-collection and -raising functions of the tax system, sometimes forcing a matter outside of the tax system can have the adverse effect of eliminating it entirely. Politics can play a substantial role in selecting agencies to administrate policies, as explained above.

Contextualized purpose tries instead to understand the ideas of these interconnections. Such context and interconnection are a key part of the analytical frame. It also works to understand that revenue collection exists in a broader frame of redistributive goals. Furthermore, thinking about administering policies in this type of framework also forces people to think more broadly about the tax and transfer system working together. The goal is that contextualized purpose can avoid creating policy and administrative dilemmas that could arise if the push were solely on the tax system to raise revenue and the IRS to administer only that domain.

### 3. *Costs of Coordination and Iteration*

Another critique is that the contextualized purpose view is costly because it requires coordination among divisions, and it calls for an iterative process. But those views are also mistaken.

On the issue of coordination costs, the critique says that these costs are often high.<sup>266</sup> That can be true. But a point critics seem to miss is that many problems about which we care, like developing a safety net, are highly

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<sup>265</sup> To this end, and to secure compliance, Congress enacted I.R.C. § 6103, one of the longest and most complex sections of the Code, to address privacy and the proper disclosure of tax returns and tax return information. The IRS takes § 6103 very seriously.

<sup>266</sup> See Weisbach & Nussim, *supra* note 2, at 985 (noting the costs of coordination between divisions are higher, and thus arrangements should fit the specialization of the divisions); Marisam, *supra* note 253, at 219–20 (noting that pushes for reorganization in government are often driven by the high costs of coordination between departments and duplicative efforts, but that often efforts to reorganize actually spawn new coordination costs).

complicated. This means that frequently limiting the administration of a program to one agency is difficult. As noted above, multiple agencies' expertise and approaches are often required.<sup>267</sup> Contextualized purpose aids in working through these complex problems. It provides a way to get agencies to work together and build their existing expertise and capacities in new ways. It seeks to find ways to ensure administration is done in as harmonious a manner as possible. In doing so, it avoids the other options, like creating a new agency or undertaking significant reorganizations, which are often more costly.

Furthermore, the view of costs here seems to focus only on costs in a narrow sense. The critique also tends to only view costs on the government side of the ledger. But administering programs in ways that lead them to run at cross-purposes is a cost for the beneficiaries or a regulated party. Taking this contextualized view and coordinating avoids that cost, which is substantial on those who are beneficiaries or regulated.

Additionally, contextualized purpose helps avoid other costs to the beneficiaries, such as having to undertake numerous different applications to programs and produce the same pieces of substantiation multiple times. This administrative sludge is a real cost and can inhibit people from accessing benefits and working with government.<sup>268</sup> Thinking in contextualized purpose allows the IRS and others to look at ways to reduce sludge.<sup>269</sup> Perhaps, for example, with SNAP, Medicaid, and TANF, applications could be streamlined to rely on an approved transfer of tax return information to the welfare office, with changes required only if income itself varied significantly from the last tax filing.<sup>270</sup> That could replace an entirely separate application whereby the beneficiary produces their own their tax return and tax return information. While creating improved systems to coordinate between agencies could be a large cost to the government, they reduce costs to the beneficiaries.

There are also critiques of the costs of the process. Note that contextualized purpose, once discerned, requires coordination, monitoring, and retooling to make it work. These types of procedures are costly and messy,

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<sup>267</sup> See *supra* Subsection III.B.2.

<sup>268</sup> See *supra* Subsection I.A.2.

<sup>269</sup> Richard H. Thaler, *Nudge, Not Sludge*, 361 *SCIENCE* 431 (2018). See also Cass R. Sunstein, Essay, *Sludge and Ordeals*, 68 *DUKE L.J.* 1843, 1859 (2019) (finding that often sludge harms the poorest, the elderly, and women—those very people who are supposed to benefit the most from the safety net). Of course, the IRS and the tax system itself are sources of sludge, and there are often efforts to reform them, but many reforms are destroyed by politics and the tax preparation industry, despite the fact that for so many, including the poorest people, the IRS has the data. Alex Mayyasi, *The Stanford Professor Who Fought the Tax Lobby*, *PRICEONOMICS* (Mar. 22, 2017), <https://priceonomics.com/the-stanford-professor-who-fought-the-tax-lobby>.

<sup>270</sup> Indeed, this is the design for filling out student-aid forms like the Free Application for Federal Student Aid (FAFSA) and for income-driven repayment schemes for student loans. Applicants can then provide additional substantiation if their income has changed substantially since the last tax filing. I.R.C. § 6103(l)(13).

given that there is a sense of this working through a trial-and-error, learning-by-doing process.

But these are costs that should be undertaken with almost any policy and program. In making and administering policy, it is, as noted, impossible to find the right calibration of factors.<sup>271</sup> While it would be nice to have an equation that could solve for some optimal administration, human systems are far more complex. The only way to apply contextualized purpose is through an iterative process with review. This process should happen more often with policy in general. Contextualized purpose, then, helps to foreground this important need and provide a means by which one can undertake this analysis. Thus, costs like these are costs that, if not undertaken, should be a part of the system.

Also, failing to undertake this iterative process guided by a purpose could lead to a result that is in the end more costly. The reason is that agencies will continue to operate relatively aimlessly as they always have.<sup>272</sup> Without any mechanisms for measuring effectiveness based on guiding purposes, it may be that even without other programs involved, the IRS or another agency may be unintentionally administering matters in a way that undermines key goals. What is often then missing when people bring up the costs of this type of process is that there is a real cost to doing nothing and keeping matters at the status quo. These costs are not only potential costs to the government in failing to meet long-term goals but also significant costs to beneficiaries who are unable to access a network of various policies to provide them with a hand up. When one tries to consider, then, the costs of doing nothing or keeping the status quo, the costs of iterative processes may decrease.

Overall, then, the critique of this method being too costly focuses on cost in too narrow a manner and fails to see how doing nothing or failing to undertake an iterative process is costly as well. Contextualized purpose can push back on that view, provide a more holistic sense of costs, and balance them.

#### 4. Complexity

A final cost is that taking this approach may encourage complexity in the tax system and potentially elsewhere. Such complexity carries significant problems and could harm progressivity, as only those with the means can interact with the system.

But a lot of the complexity stems not from the fact that there is a use of the tax system per se but from a desire to have private parties deliver public goods. The delegated welfare state, as some have called it,<sup>273</sup> appears within

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<sup>271</sup> See GAO, MANAGING FOR RESULTS, *supra* note 4, at 9–10 (outlining how complex problems, like climate change, require multiple agencies to work on them).

<sup>272</sup> See sources cited *supra* note 61.

<sup>273</sup> See MORGAN & CAMPBELL, *supra* note 58, at 49.

the tax system, but it also appears even in direct government outlays. Grant programs are also complex, and attempts to build out a system of monitoring private parties while harnessing some of their benefits breeds complexity. That said, this complexity may not be bad. It may lead toward higher quality delivery of social safety net goods and redistribution.

Another source of complexity is the political desire to ensure that direct benefits only fall to certain people.<sup>274</sup> Thus, many policies become complex because they require means-testing or the active search for employment in the formal labor sector. Placing such matters in the tax system does make it more complex, but regardless of where such a program is housed in the administrative state, it will always have complexities.

Here too, though, rather than creating more of a problem, contextualized purpose can help. By having administrators and systems coordinate with each other, complexity on the user end could decrease. Techniques like information sharing could help. There may be new ways to provide technical support, too, to users and beneficiaries. Furthermore, by coordinating, agencies can avoid administrative cross-purposes, which create a frustrating level of complexities that are often irresolvable, leaving private providers and beneficiaries in a lurch. And the additional information that stems from taking this contextualized purpose view can perhaps inform Congress and policy principals in a clearer way about where there may be gaps and problems. Thus, complexity can be a problem, but programs' placement in the tax system is not its source, and contextualized purpose may help alleviate those concerns.

#### CONCLUSION

Contextualized purpose fills an important gap in the tax policy literature. Rather than thinking about whether to place something in the tax system, it instead focuses on how to make a program placed in the tax system work. Unlike previous approaches, it places values not only on the programs themselves but also in the process of implementing, administering, and managing them. It provides a framework for the IRS to discern publicly the values, purposes, and goals of programs. It allows the IRS and other agencies to determine how a tax program fits within the broader context of redistribution and the social safety net. It provides a way to structure thinking about coordination with other agencies for further discernment and potential administration. It also provides a means to guide the growth and development of both the IRS and other agencies' capacities.

Within the context of key income support programs like the EITC, CTC, and the pandemic payments, contextualized purpose provides information about how to administer each program better. It can assist with uptake goals and reduce administrative frictions with other programs.

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<sup>274</sup> See *supra* Section II.A.

Contextualized purpose thus fits within the broader goal of making the state work more effectively at delivering goods for some of the citizens who are most vulnerable. It also brings forth into our discussion more prominently the importance of administrative efficacy and public management, topics that often get lost. Also, while this piece focused on tax, it can also apply to other policy areas. Contextualized purpose, thus, is an important tool that can help us build a more just and equitable society.



