SPILLOVER TAX PRECEDENT

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We know that pro se litigants often lose. However, we know almost nothing about the circumstances in which they win. One such circumstance, this Article finds, is when they can take advantage of favorable precedent. This Article calls those favorable precedents for pro se litigants "spillover precedents." Spillover precedents are cases with redistributive downward ripple effects that subsequently benefit pro se litigants. This Article is the first to examine the potential redistributive effects of precedent. To focus the inquiry, this Article presents an empirical study of tax court cases from 2015–2019 in which pro se litigants won. This analysis revealed the major role of spillover and details how pro se taxpayers use spillover precedent, describing major examples and identifying patterns in them. This Article then examines the normative implications of spillover precedent, suggesting policy interventions, focusing in particular on the potential role of low-income taxpayer clinics, and considering the distinguishing features of the tax context.

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INTRODUCTION

Jesus Rodriguez was a special-education aide in Texas.[1] His teenage daughter had severe disabilities.[2] He and his wife Juanita spent much of their time caring for their daughter, which often involved driving her to and from the services she received.[3] The situation took a toll on their finances, and the couple, with their credit card debt in collections, filed for bankruptcy.[4]

The Rodriguezes attempted to deduct some of the expenses associated with their daughter's care.[5] For instance, they tried to deduct as business expenses some of the mileage associated with the trips to and from her appointments.[6] The couple took an educator's expense deduction for supplies they used.[7] They also claimed their daughter as a dependent for purposes of the additional child tax credit.[8] However, the Rodriguezes failed to document their mileage expenses sufficiently.[9] Juanita Rodriguez may have educated her daughter, but she did not work in a school for at least 900 hours during the tax year in question, so she could not deduct educational supply costs.[10] The Rodriguezes' daughter was dependent on her parents, but she was too old to qualify for the additional child tax credit.[11] Accordingly, the IRS denied the couple's deductions and additional child tax credit claim.[12] Furthermore, the IRS assessed an "accuracy-related penalty" equal to 20% of the tax underpayment.[13] Thereafter, the Rodriguezes took their case to tax court, where they appeared pro se, without a lawyer to dispute the IRS's positions.[14]

Lawrence Graev is the chairman and president of the Glenrock Group, a private equity investment and advisory firm located in New York City.[15] His residences include or have included an $8.4 million townhouse

1. *Rodriguez v. Comm'r*, No. 1690-15S, 2019 Tax Ct. Summary LEXIS 4, at *2 (Mar. 5, 2019).
2. *Id.* at *3.
3. *Id.* at *3–4.
4. *Id.* at *4–5.
5. *Id.* at *5–7.
6. *Id.* at *5–6.
7. *Id.* at *5.
8. *Id.* at *7.
9. *Id.* at *11–12.
10. *Id.* at *12–13.
11. *Id.* at *14.
12. *Id.* at *7.
13. *Id.* at *1–2.
14. *Id.*
15. *Lawrence G. Graev*, FORDHAM UNIV. SCH. OF L., https://www.fordham.edu/info/23645/g_-_h/7838/lawrence_g_graev [https://perma.cc/L98L-VSWP] (last visited Sept. 18, 2021).

on New York's Upper East Side,[16] a $7.5 million house in New York's Dutchess County,[17] and a $5 million beachfront property in Palm Beach, Florida,[18] where he and his wife, a French aristocrat,[19] are members of the social scene.[20]

In 1999, Mr. Graev and his wife purchased property in a historic preservation district in New York State for $4.3 million.[21] In 2004, he contributed a "conservation easement" on this property to the National Architectural Trust,[22] and in 2005 he deducted a charitable contribution of about $1 million.[23] However, in 2004, the IRS issued administrative guidance indicating its intent to disallow certain charitable deductions taken for conservation easements.[24] Following this action, the IRS denied the Graevs their deduction and imposed, as one of two alternative penalties, an "accuracy-related penalty" equal to 20% of the tax underpayment.[25]

The Graevs took their case to the tax court, where they appeared with a team of lawyers from several firms.[26] The team included lawyers from Alston & Bird, a prominent national law firm recently named Tax Law Firm of the Year in *U.S. News – Best Lawyers "Best Law Firms."*[27] The

16. Lawrence Graev Public Records Search, LEXIS ADVANCE, https://advance.lexis.com/publicrecordshome/ (follow "Locate a Person (Nationwide)" hyperlink; then search first name field "Lawrence" and search last name field for "Graev") [hereinafter Graev Records]; *232 E. 61st St.*, ZILLOW.COM, https://www.zillow.com/homedetails/232-E-61st-St-New-York-NY-10065/31535881_zpid/ [https://perma.cc/KRN8-8ZMZ] (last visited Sept. 18, 2021).

17. Graev Records, *supra* note 16; *1190 Chestnut Ridge Rd.*, ZILLOW.COM, https://www.zillow.com/homedetails/1190-Chestnut-Ridge-Rd-Dover-Plains-NY-12522/80013719_zpid/ [https://perma.cc/9D5Y-EK6R] (last visited Sept. 18, 2021).

18. Graev Records, *supra* note 16; *150 Bradley Pl., Apt. 901*, ZILLOW.COM, https://www.zillow.com/homedetails/150-Bradley-Pl-APT-901-Palm-Beach-FL-33480/46844116_zpid/ [https://perma.cc/2DN3-5FTC] (last visited Sept. 18, 2021).

19. *A Genealogical Survey of the Peerage of Britain as Well as the Royal Families of Europe*, THE PEERAGE, https://www.thepeerage.com/p8865.htm [https://perma.cc/AF6V-8NUC] (last visited Sept. 18, 2021).

20. *See, e.g.*, *Palm Beach Social Scene Hits Upper East Side*, PAGE SIX (May 25, 2013, 4:00 AM), https://pagesix.com/2013/05/23/palm-beach-social-scene-hits-upper-east-side/ [https://perma.cc/7287-TYXP].

21. *Graev v. Comm'r*, 140 T.C. 377, 380 (2013).

22. *Id.* at 383–84.

23. *Id.* at 386–87.

24. *Id.* at 380–81.

25. *Graev v. Comm'r*, 149 T.C. 485, 486–87 (2017).

26. *Id.* at 485.

27. *Tax Controversy,* ALSTON & BIRD, https://www.alston.com/en/services/practices/tax/tax-controversy/ [https://perma.cc/8UCD-E7S7] (last visited Sept. 18, 2021).

team also included Frank Agostino, a well-known New Jersey-based tax controversy lawyer.[28]

To assess certain penalties, Internal Revenue Code section 7491(c) places the burden of production upon the IRS, which is satisfied when the IRS "present[s] sufficient evidence to show that it is appropriate to impose the penalty in the absence of available defenses."[29] Further, under section 6751(b), for the IRS to assess penalties, "the initial determination of such assessment [must be] personally approved (in writing) by the immediate supervisor of the individual making such determination."[30] The Graevs' lawyers argued that these two provisions, taken together, placed on the IRS the burden of showing that the proper supervisor had signed off on the attempted accuracy-related penalty.[31] The tax court agreed, finding that "[i]n the light of our holding that compliance with section 6751(b) is properly at issue in this deficiency case, we also hold that such compliance is properly a part of respondent's burden of production under section 7491(c)."[32] In other words, the IRS now had to show that the correct supervisor approved the assessed penalty in writing. On the tax procedure blog *Procedurally Taxing* Harvard's Keith Fogg wrote of the holding: "kudos go to Frank Agostino for paying attention to a [Tax Code] provision . . . that everyone else seemed to overlook."[33]

Now, to assess the accuracy-related penalty in the Rodriguezes' case, the IRS also had to show that the relevant employee obtained the required written approval.[34] However, the IRS failed to do so.[35] As a result, although the tax court denied the Rodriguezes' other purported tax benefits, the court, citing *Graev*, did not allow the IRS to assess the accuracy-related penalty.[36] That result saved the Rodriguezes an amount equal to more than a third of their unpaid credit card debt.[37]

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28. *Frank Agostino, Esq.*, AGOSTINO & ASSOCS., https://agostinolaw.com/agostino-associates/agostino-associates-team/team-frank-agostino-esq/ [https://perma.cc/7Q8P-8DQB] (last visited Sept. 18, 2021).

29. *Graev*, 149 T.C. at 493 (citing *Higbee v. Comm'r*, 116 T.C. 438, 446 (2001)).

30. I.R.C. § 6751(b).

31. *Graev*, 149 T.C. at 493.

32. *Id.*

33. Keith Fogg, *Tax Court Reverses Itself a Year After a Fully Reviewed Opinion Acknowledging a "*Graev*" Mistake*, PROCEDURALLY TAXING (Dec. 20, 2017), https://procedurallytaxing.com/tax-court-reverses-itself-a-year-after-a-fully-reviewed-opinion-acknowledging-a-graev-mistake/ [https://perma.cc/37H4-NASE].

34. *Rodriguez v. Comm'r*, No. 1690-15S, 2019 Tax Ct. Summary LEXIS 4, at *19 (Mar. 5, 2019).

35. *Id.*

36. *Id.* at *12–14, *18–19.

37. *Id.* at *1, *5, *19. The money figure is from the author's own calculations, used to calculate the underpayment, the amounts of the denied deductions, the denied credit, and the taxpayers' marginal rate based on their adjusted gross income.

The Rodriguezes' case presents a puzzle for the accepted view of pro se litigants: namely, that they lose. On some of their issues, so did the Rodriguezes.[38] However, on one important issue, they won.[39] The extensive academic literature on pro se litigants identifies the many circumstances in which pro se litigants lose. It tells us almost nothing, however, about the circumstances in which they *win*.

What made the Rodriguezes' accuracy-related penalty issue different from their other issues and from the hundreds of issues that losing pro se litigants raise each year in tax court and in other courts? The difference was the Graevs, Frank Agostino, and the Graevs' team of lawyers. The Rodriguezes benefited from the spillover effects of *Graev*.[40] This Article will call *Graev* and other precedents on which pro se litigants rely "spillover precedents."[41] This Article defines "spillover precedents" as cases that pro se victories cite for favorable propositions of law.[42] Spillover precedents are cases with downward (or sometime sideways) ripple effects that subsequently benefit pro se litigants. In other words, spillover precedents have redistributive effects.[43]

This Article is the first to examine the potential redistributive effects of precedent.[44] To do so, this Article takes the novel approach of studying the legal circumstances in which pro se litigants win. To focus the inquiry, this Article carried out an empirical study of tax court cases in which pro se litigants won. The study did so by identifying all tax court cases from the 2015–2019 period in which a pro se litigant won on at least one issue—for a total of approximately 200 cases. My goal was to understand what

38. *See generally Rodriguez*, 2019 Tax Ct. Summary LEXIS 4, at *12–14.

39. *Id.* at *19.

40. *Id.*

41. Following civil procedure scholar Maggie Gardner, I here use the term "precedent" broadly to include all prior judicial opinions, whether or not they are binding on the citing court and whether or not they are published in a formal reporter. *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1628 (2020). For this reason, I also use precedent to refer to all types of tax court decisions. As I will discuss below, Tax court opinions fall into three categories: Division Opinions, Memorandum Opinions, and Summary Opinions. Only the first have binding precedential value, but as a practical matter judges cite all three types of cases for propositions of law, so again following Gardner, I use the term "precedent" to encompass all three.

42. All precedents have spillover effects because all precedents have the potential to impact litigants beyond those in the initial case. However, here, I use the term "spillover precedents" to refer specifically to cases that produce benefits for pro se litigants.

43. Another useful way to think about spillover precedents is as precedents that generate externalities. Thanks to Eleanor Wilking for this point.

44. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2619–24 (1995); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-party Involvement in Settlements*, 75 NOTRE DAME L. REV. 221, 222 n.6, 224, 226–27, 231 (1999); *see generally* Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 790–96 (2002).

these victories had in common or, in other words, what features they shared that would shed light on the conditions under which pro se litigants succeed.

Among those features was how these cases used precedent. To study this, I compiled a complete list of every precedent on which a winning pro se litigant relied for a major proposition of law during this five-year period. I then reviewed all of these cases to determine the characteristics of the precedent that enabled the pro se litigants to win. This analysis revealed the major role of spillover precedent. This analysis yielded several distinct empirical findings. For one, many of the spillover precedent cases were not themselves pro se cases. Rather, pro se parties relied on previous cases in which taxpayers had lawyers. In fact, in 65.5% of all the cases analyzed, the precedent that undergirded the pro se win came from a case in which the taxpayer had retained an attorney. For another, procedural issues were the most common source of spillover precedent. Low-income taxpayers were more likely to find themselves in circumstances procedurally analogous to those of their higher-income counterparts than in factually overlapping ones. In contrast, the particular factual problems that low-income taxpayers might face did not emerge often in the spillover precedents.

By using the term "spillover precedent," I do not mean to suggest that all precedents do not have spillover effects. Of course they do. Here, however, I am defining the term more narrowly as shorthand for cases that have spillover effects for pro se litigants and then studying those in particular. One way to think about the constrained set of spillover effects studied here is to consider them as both intertemporal and cross-sectional spillover effects, effects that flow from earlier case to later case, but also between sectors of litigants (often, as noted above, from well-resourced to under-resourced). In contrast, the broader group of spillover effects that all precedents have is intertemporal only, flowing from earlier to later cases.[45]

This Article develops the concept of spillover precedent by examining tax court cases. I used tax court cases for three reasons. First, studying a relatively delimited pool of cases allowed me to look into every one in which a pro se litigant won in a given time period. Second, as discussed below, tax court cases present several sources of variation that allowed me to understand more clearly the potential dynamics that spillover precedents present.[46] Third, tax cases present particular opportunities for the interests of parties who do not have resources to overlap with those of parties who do. Tax may be exceptional in this

45. Keith Marzilli Ericson & David Laibson, *Intertemporal Choice* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25358, 2018). Thank you to Eleanor Wilking for this point.

46. Thank you to Eleanor Wilking for this point.

regard, or it may not.[47] This project grew out of my earlier research on taxpayer rights bills, which found that legislation establishing taxpayer rights benefited wealthy taxpayers and low-income taxpayers alike.[48] This finding suggested that as caselaw develops from such legislation, powerful tax lawyers battling on taxpayer rights issues might unintentionally make arguments that help unrepresented litigants.[49]

That forecast came true. In the mid-2000s, the National Taxpayer Advocate, Nina Olson, a dogged combatant for low-income taxpayers and their rights, proposed creating a "taxpayer bill of rights," which the IRS adopted administratively several years later.[50] After further efforts by Olson, Congress enacted a new piece of taxpayer rights legislation by codifying this bill of rights.[51] Codifying the list raised the question of what, if any, legal force the rights would have beyond what was already in existing statutes.[52] This question had major implications for low-income taxpayers.[53] Nevertheless, the first significant case to take up this question was a battle between the IRS and a well-resourced company, Facebook.[54] Facebook hired some of the country's top tax lawyers to brief the issue extensively.[55] The Chamber of Commerce employed some more to write

47. The extent to which tax law is exceptional here is something I take up in Section III.C of the paper and will continue to explore in subsequent work.

48. *See* Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875 (2018).

49. *Id.* at 900.

50. *See* 1 TAXPAYER ADVOC. SERV., INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE 2007 ANNUAL REPORT TO CONGRESS 485 (2007), https://www.irs.gov/pub/tas/arc_2007_vol_1_legislativerec.pdf [https://perma.cc/8MRK-PSZJ]; 1 TAXPAYER ADVOC. SERV., INTERNAL REVENUE SERV., NATIONAL TAXPAYER ADVOCATE 2013 ANNUAL REPORT TO CONGRESS 18–19 (2013), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/09/2013-ARC_VOL-1.pdf [https://perma.cc/HW3Z-YKM2]; TAXPAYER ADVOC. SERV., INTERNAL REVENUE SERV., TOWARD A MORE PERFECT TAX SYSTEM: A TAXPAYER BILL OF RIGHTS AS A FRAMEWORK FOR EFFECTIVE TAX ADMINISTRATION 2–4 (2013), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/TOWARD-A-MORE-PERFECT-TAX-SYSTEM.pdf [https://perma.cc/Z3PX-CXE7].

51. I.R.C. § 7803(a)(3). The Taxpayer Bill of Rights (TBOR) was officially codified as part of the Consolidated Appropriations Act, which was signed into law on December 18, 2015. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (codified as amended at I.R.C. § 7803(a)(3)).

52. *See generally* T. Keith Fogg, *Can the Taxpayer Bill of Rights Assist Your Clients?*, 91 TEMP. L. REV. 705, 707–08 (2019) (taking up this specific question).

53. *See* Nina Olson, *A Brave New World: The Taxpayer Experience in a Post-sequester IRS*, 139 TAX NOTES 1189, 1191 (2013) (discussing the potential impact of TBOR).

54. Fogg, *supra* note 52, at 709.

55. Facebook's Opposition to Defendant's Motion to Dismiss at 4–6, *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. Apr. 12, 2018), http://proceduralltaxing.com/wp-content/uploads/2018/03/Facebook-challenge-1.pdf [https://perma.cc/DL32-3CNE].

a hefty amicus brief.[56] While Facebook eventually lost on this issue, the fact that so much legal firepower was brought to bear on a taxpayer-rights question that was so relevant to powerless, low-income taxpayers attested to the redistributive possibility that my earlier research had raised.

The concept of spillover precedent adds to two major literatures within legal scholarship. The first concerns pro se and low-resourced litigants in general. Extensive research documents the problems that litigants of this kind face. This work includes Marc Galanter's pathbreaking article, *Why the Haves Come Out Ahead*.[57] There Galanter found that the "haves" of litigation, i.e., parties with resources and lawyers, play the long game of litigation.[58] Rather than concentrate solely on one-shot victories, they attempt to establish favorable precedents that allow them to win repeatedly.[59] Much subsequent scholarship has documented the operation of the phenomena Galanter identified.[60] In

56. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae at 5, *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. Apr. 12, 2018).

57. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

58. *Id.* at 100.

59. *Id*.

60. *See generally* MARC GALANTER, WHY THE HAVES COME OUT AHEAD: THE CLASSIC ESSAY AND NEW OBSERVATIONS (2014) (reprinting the article and summarizing the literature since); IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (reviewing extensive empirical work on Galanter's piece); Shauhin Talesh, *How the "Haves" Come Out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV. 519, 529 (2013) (documenting, among other things, how the "haves" use private ordering systems to preserve their advantages); Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 LAW & SOC'Y REV. 463, 490 (2012) (examining how the "haves" come out ahead in private dispute resolution systems); Shauhin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 LAW & SOC'Y REV. 527, 553–54 (2009) (looking at how the "haves" shape legal meaning in private dispute resolution procedures); Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 868, 893, 899 (1999) (finding the Galanter pattern in the context of employment litigation); Karyl A. Kinsey & Loretta J. Stalans, *Which "Haves" Come Out Ahead and Why? Cultural Capital and Legal Mobilization in Frontline Law Enforcement*, 33 LAW & SOC'Y REV. 993, 993, 1004 (1999) (identifying the importance of occupational prestige and experience to why the "haves" come out ahead); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 21–22, 60–61 (1999) (looking at patterns of influence in alternative dispute resolution systems and proposing reforms); Donald R. Songer, Reginald S. Sheehan & Susan B. Hair, *Do the Haves Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, 33 LAW & SOC'Y REV. 811, 827 (1999) (demonstrating that repeat-player litigants have a substantial advantage in U.S. courts of appeals); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 254 (1992) (finding that litigation resources are correlated with success in U.S. courts of appeals).

addition, extensive scholarship on low-resourced litigants examines pro se parties empirically, detailing[61] the many disadvantages that face parties appearing in court without lawyers. Based on qualitative and quantitative analyses, this large body of work shows how often pro se litigants lose and identifies why.[62]

However, neither literature following Galanter nor empirical literature on pro se cases has addressed the question of when, despite the odds, a pro se litigant might win.[63] Granted, that the "have-nots" usually come out behind, when might they hope to catch up a bit? When can pro se litigants overcome the significant obstacles they face and win on an issue? What types of precedent help? Even the literature documenting the dismal win rates for unrepresented persons reports that in a non-trivial number of cases, pro se litigants actually succeed.[64] In tax court during the past five years, they succeeded in 27.8% of all cases.[65] Precedent may be a small piece of the story, but understanding its role is a first step toward

61. *See, e.g.*, Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145 (2020) (examining the experiences of low-income litigants, sometimes pro se, in family court); Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 910 (2015) [hereinafter Sandefur, *Elements of Professional Expertise*]; D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 906 (2013); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 69–70 (2010) [hereinafter Sandefur, *The Impact of Counsel*] (reporting the results of a meta-analysis of twelve different studies on the effects of representation); Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 739–45, 765–66 (2002); Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 821 (1997).

62. *See, e.g.*, Sandefur, *The Impact of Counsel*, *supra* note 61, at 69–71.

63. *See* Shauhin A. Talesh, *Foreword* to MARC GALANTER, WHY THE HAVES COME OUT AHEAD: THE CLASSIC ESSAY AND NEW OBSERVATIONS, at iii–vi (2014).

64. Sandefur, *The Impact of Counsel*, *supra* note 61, at 69 ("[L]awyer-represented people do better—on average, lawyer-represented people are more likely to win than are unrepresented people in every study. But, though this difference consistently indicates that lawyer-represented parties enjoy better outcomes than do unrepresented parties, just how much better varies considerably across studies—from a study where lawyer-represented people are 19% more likely to win than unrepresented people, to studies where lawyer-represented people are three or four times more likely to win, to a study which finds that lawyer-represented people are almost fourteen times (odds ratio = 13.79) more likely to win than are unrepresented people.").

65. *See infra* Section II.A.

a fuller account of the conditions under which pro se litigants win. Understanding precedent can also bring into focus the problem of what I call "precedent deserts," or legal areas into which the benefits of precedent do not spill, where pro se litigants do not have favorable precedent available to them.

The second literature to which this Article contributes is a vast one about the role of precedent generally.[66] Civil procedure scholars and others have looked extensively at what precedent is and at what it does.[67] To date, however, the literature on precedent has not considered precedent's possible redistributive effect.[68] A spillover effect involves taking some litigants' legal resources and channeling them into the service of others—here, litigants who lack resources. Scholars have not reflected on the downward redistributive potential of precedent.[69] Nor have scholars considered the particular pathologies that can emerge when such redistribution fails to occur.[70] This Article adds to the literature on precedent by treating precedent as a resource, the benefits of which can be distributed and redistributed unevenly, and by then considering the consequences of the distribution pattern.

This Article begins in Part I by situating this project in these literatures. Section I.A considers, in general terms, the disadvantages under which pro se litigants operate in the American legal system. Section I.B examines, more specifically, existing research showing that pro se litigants fare worse than represented parties in court, and Section I.C discusses research into the reasons for this disparity in outcomes. Section I.D briefly introduces the subject of precedent. Section I.E intersects the topics of precedent and pro se litigants, identifying major gaps in our understanding of this intersection. Part II steps into that gap: the specific question about pro se litigants who win. This Part develops the concept of spillover precedent by analyzing the pro se victories in tax court and the victor's use of precedent. Section II.A describes how I identified spillover precedent cases, Section II.B discusses patterns in the cases and gives examples, and Section II.C explains what the research adds to the literature reviewed in Part I. Part III then looks at normative implications and next steps. Section III.A considers the difficulties that spillover precedent presents for already-disadvantaged pro se litigants, including the ways in

66. *See* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 252 (1976).

67. For an excellent critical look at this literature, see Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS. 62 (2018).

68. *See* Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 22–23 (2004).

69. *See id.*

70. *See id.*

which the dynamics of spillover precedent exacerbate racial injustice. This Section also introduces and discusses the concept of precedent deserts, legal areas that lack relevant favorable precedent for pro se litigants. Section III.B looks for potential upsides in the spillover precedent concept and considers potential policy interventions, emphasizing in particular a potential role for low-income taxpayer clinics. Section III.C reflects on the distinguishing features of the tax setting for the project and sets the stage for future research.

I. PRO SE LITIGANTS AND PRECEDENT

A. Pro Se Obstacles

Appearing in court without a lawyer is not easy. As legal scholars Victor Quintanilla, Rachel Allen, and Edward Hirt put it, "[w]hen claimants press their claims without counsel, they fail at virtually every stage of civil litigation and overwhelmingly fail to obtain meaningful access to justice."[71] Looking at empirical evidence about the fate of pro se litigants in federal district courts, researcher Spencer Park concurs:

> [L]itigation involving pro se litigants poses distinct challenges to the equal administration of justice in federal courts.
>
> . . . The litigant handles all case matters and often faces great difficulty navigating the intricacies of the judicial system. Specifically, pro se litigants often neglect time limits, miss simple court deadlines, and fail to understand the procedural and substantive law of the federal courts. Furthermore, pro se litigants many times have problems applying basic, yet crucial, legal concepts such as precedent and determining the relevancy of facts.[72]

In September 2017, Judge Richard Posner abruptly resigned from the Seventh Circuit, explaining that he did so in part because of the overwhelming difficulties pro se litigants faced there.[73]

Understanding the obstacles that pro se litigants face becomes all the more important because the number of people appearing in court without

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71. Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091, 1091 (2017).

72. Park, *supra* note 61, at 821.

73. Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1822 (2018) (citing David Lat, *The Backstory Behind Judge Richard Posner's Retirement* (Sept. 7, 2017, 1:44 PM), https://abovethelaw.com/2017/09/the-backstory-behind-judge-richard-posners-retirement/ [https://perma.cc/X9S3-3T9E]) (finding that "a wide range of reforms undertaken by federal district courts have not significantly impacted case outcomes for pro se litigants.").

lawyers is growing. In a recent article, magistrate judge Lois Bloom and legal scholar Helen Hershkoff reported a "rise in pro se cases in the Article III system" that is "consistent with a parallel rise of filings by unrepresented litigants in state judicial systems across the country."[74] Sociologist Rebecca Sandefur cited research to the effect that "at least 80% of the legal needs of the poor go unmet."[75] What is more, "[w]hen members of the public do seek resolution from a court or tribunal, they often appear as self-represented litigants."[76] Indeed "[s]ome states report that as many as 90 percent of certain kinds of cases involve at least one self-represented litigant."[77]

Further, pro se litigation poses serious racial justice problems.[78] Recent research has found that "race matters in representation rates."[79] In their 2016 study, sociolegal researchers Amy Myrick, Robert Nelson, and Laura Beth Nielsen reported data showing that "racial and ethnic minorities, in particular African Americans, are much less likely to have lawyers than white plaintiffs."[80] Specifically, "[c]ompared to white plaintiffs (the reference group), African Americans are 2.5 times as likely to file pro se."[81] Moreover, according to this study, cases alleging racial discrimination were "about 1.8 times more likely to be filed without the benefit of counsel," even controlling for the race of the litigant.[82]

This evidence is consistent with Sandefur's argument about the importance of "[r]ace, class, and gender differences in turning to law, in getting the attention of legal institution staff, such as lawyers, clerks who control the dockets of the lower courts, or Supreme Court justices, and in

74. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 481 (2002).

75. Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES (Mar. 15, 2013), https://www.nytimes.com/2013/03/16/us/16gideon.html [https://perma.cc/UAY8-NK4P].

76. Sandefur, *The Impact of Counsel*, *supra* note 61, at 60.

77. *Id.*

78. *See generally* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (explaining why Black people with civil justice problems are less likely than their white counterparts to seek formal legal assistance with civil justice problems). *See also* Tonya L. Brito, David J. Pate & Jia-Hui Stefanie Wang, *"I Do for My Kids:" Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3027–30 (2015) (looking at how attorney representation affects civil court proceedings for low-income litigants using critical race empiricism).

79. Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Racial Disparities in Legal Representation for Employment Discrimination Plaintiffs*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 107, 107 (Samuel Estreicher & Joy Radice eds., 2016).

80. *Id.* at 109.

81. *Id.* at 111.

82. *Id.*

the results of attempts to mobilize law."[83] The Myrick, Nelson, and Nielsen data support the analysis that legal scholar and sociologist Sara Greene provides in her recent access to justice study, in which "[B]lack respondents . . . were less likely than white respondents to have sought, or considered seeking, legal help for their civil legal problems," a difference that was "primarily explained by racial differences in trust in institutions."[84] While Greene, Sandefur, and the Myrick team call for more research on race and access to justice, so far all of their findings suggest that lack of legal representation is a problem more likely to affect Black Americans than white Americans.[85]

B. Pro Se Litigant Losses

The many disadvantages that pro se litigants face suggest that they will often lose. Empirical evidence sustains this conclusion. In her meta-level analysis of existing research on the pro se experience, Sandefur finds that "on average, lawyer-represented people are more likely to win than are unrepresented people in every study."[86] She continues, "a meta-analysis of twelve studies revealed that securing legal representation increased the likelihood of receiving a favorable outcome anywhere between 1.19 times to 13.79 times compared to the likelihood of receiving a favorable outcome when *pro se*."[87] Citing Sandefur, Quintanilla reports that "[t]he magnitude of this difference turned on the complexity of the legal context, procedures, and problems involved."[88] Sandefur's analysis demonstrates that in fields of average complexity in trial courts, pro se claimants are on average 6.5 times more likely to lose than counseled claimants.[89]

Experimental evidence further supports this conclusion. In one study, a team of researchers randomly assigned counsel to unrepresented tenants

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83. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 352 (2008).

84. Greene, *supra* note 78, at 1268.

85. *Id.* at 1268–69; Myrick, Nelson & Nielsen, *supra* note 79, at 122; Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 447, 459 (2016).

86. Sandefur*, The Impact of Counsel*, *supra* note 61, at 69.

87. Quintanilla, Allen & Hirt, *supra* note 71, at 1092 (citing Sandefur, *The Impact of Counsel*, *supra* note 61); *see also* Seron, Van Ryzen, Frankel & Kovath, *supra* note 61, at 423–27 (explaining the findings of a randomized controlled trial in which litigants in New York's housing court were randomly assigned lawyers); Schoenholtz & Jacobs, *supra* note 61, at 766, 739–45, 765–66 (examining disparities in outcomes between represented and unrepresented litigants in immigration court).

88. Quintanilla, Allen & Hirt, *supra* note 71, at 1092–93 (citing Sandefur, *The Impact of Counsel*, *supra* note 61).

89. *Id.* at 1093.

who were awaiting hearings in landlord-tenant cases in New York.[90] The study found that represented claimants were substantially more likely than pro se tenants to retain possession of their apartments.[91] Other researchers investigating landlord-tenant court[92] likewise found large differences between the outcomes for unrepresented and represented litigants.[93] To take yet another example, a team of researchers examining unemployment appeals found that "[c]laimants for whom a representative appears win a significantly greater amount of the time when no representative appears for the other party, 90.5%, as compared to when representation appearance is balanced, 71.5%."[94] In the tax court context, research has reported that "in a tried case with the mean amount [of money] at stake, hiring an attorney would save the taxpayer an average of $553,262 in tax liability."[95] In sum, in most circumstances, representation by a lawyer substantially enhanced the degree of litigant success.

C. Reasons Why Pro Se Litigants Fare Worse

An extensive scholarly literature has addressed the question of why pro se litigants are likely to lose. To this question, researchers have proposed five main answers, several of which overlap.

One: Pro se litigants are disadvantaged because they lack the substantive expertise that lawyers have.[96] According to access-to-justice scholars Colleen Shanahan, Anna Carpenter, and Alyx Mark, the substantive legal knowledge lawyers bring to their work "consists of legal theories, common law rules, statutes, doctrine, case law, and other content-based knowledge. In their work, lawyers draw on this knowledge to determine what law is relevant to a given client's case."[97] Pro se litigants almost always lack this knowledge.[98] As a result, they have difficulty articulating their claims in legal terms and countering legal arguments made by the other side.[99]

Two: Pro se litigants lack the procedural expertise that lawyers possess. Shanahan and her co-authors explain, "[o]nce constructed as

90. Seron, Van Ryzen, Frankel & Kovath, *supra* note 61, at 420, 423.

91. *Id.* at 429.

92. Greiner, Pattanayak & Hennessy, *supra* note 61, at 906–07.

93. *Id.* at 908–09.

94. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 488 (2016).

95. Leandra Lederman & Warren B. Hrung, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1255 (2006).

96. Sandefur, *Elements of Professional Expertise*, *supra* note 61, at 911.

97. Shanahan, Carpenter & Mark, *supra* note 94, at 490 (footnote omitted).

98. Sandefur, *Elements of Professional Expertise*, *supra* note 61, at 911.

99. *Id.* at 924.

legal, problems can be acted on through formal legal processes, which involve forms, motions, pleadings, and hearings that must be completed accurately."[100] Pro se litigants typically do not know how to navigate these legal processes.[101] This finding is consistent with Sandefur's evidence that lawyers have especially significant effects on outcomes in areas of law that are "procedurally complex."[102] In particular, Sandefur demonstrates that represented parties take more procedural steps to further their cases.[103] In contrast, pro se parties are less likely, for instance, to make written pleadings,[104] by which litigants can raise potentially relevant precedents that support their case. Without written pleadings, pro se parties may struggle to convince judicial decision-makers.

Three: Pro se parties lack the strategic expertise that lawyers often have.[105] Strategic expertise includes the ability to think about which arguments are most likely to convince a judicial decision-maker. It incorporates, too, what access-to-justice scholars call "relational expertise,"[106] or the fact that lawyers often know and have built relations of trust with judges, with lawyers on the opposing side, and with other court players.[107] In contrast, pro se litigants appear in courtrooms where they usually know nobody and have no sense of what to do to appeal to the persons determining their legal fate.[108]

Four: Pro se parties may have cases that judges, correctly or incorrectly, view as less legitimate.[109] Judges may view a lawyer's very presence as a positive signal about the case,[110] operating on the assumption

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100. *Id.* at 911.

101. *Id.* at 910–11.

102. Sandefur, *The Impact of Counsel*, *supra* note 61, at 73 ("The figure reveals a striking finding: the observed difference is much greater for cases in those fields of law that lawyers rate as involving greater procedural complexity. This is true even when such cases are heard in simplified forums such as tribunals and small claims courts.").

103. Shanahan, Carpenter & Mark, *supra* note 94, at 508 ("[R]epresented parties on both sides appear[ing], introduc[ing] testimony, and disclos[ing], introduc[ing], and admit[ting] documents at higher rates, as compared to unrepresented parties, is a logical result because it reflects the procedural expertise of the representative.").

104. *See* Sandefur, *The Impact of Counsel*, *supra* note 61, at 78.

105. Shanahan, Carpenter & Mark, *supra* note 94, at 510.

106. Sandefur, *Elements of Professional Expertise*, *supra* note 61, at 909–10 ("In some instances, lawyers appear to affect outcomes because their presence on a case acts as an endorsement of its merits, and their presence in a courtroom encourages the court to follow its own rules. In these instances, lawyers' relevant expertise is less substantive (their knowledge of the law) than relational (their relationship to the court).").

107. *See* Sandefur, *The Impact of Counsel*, *supra* note 61, at 78 (describing what happens when a potential litigant has a case that is sympathetic on the facts but lacks legal merit).

108. *Id.*

109. *See* Sandefur, *Elements of Professional Expertise*, *supra* note 61, at 924–25.

110. *Id.* at 925.

that lawyers choose cases that have legal merit.[111] Moreover, a lawyer's very involvement may indicate to a judge a more credible litigant, regardless of legal arguments.[112] Research shows too that litigants who secure lawyers display better communication skills and better self-presentation in court.[113]

Five: Judicial decision-makers may stereotype pro se litigants.[114] Quintanilla and his research team conducted a randomized controlled experiment in which they asked subjects to read the facts of a hypothetical case and award damages to one of the parties.[115] Some subjects were instructed to award damages to a represented party, others to a pro se party.[116] The researchers found that subjects trained in law awarded lower settlement amounts to hypothetical litigants who appeared pro se than to their represented counterparts.[117] Subjects in the experiment also rated the pro se litigants as less competent than litigants with lawyers.[118]

D. The Role of Precedent

In addition to the scholarship on pro se litigants, a separate literature, also relevant to this project, considers the general role of precedent. A full account of this extensive body of work is beyond the scope of this paper. Put briefly, scholars of precedent have theorized its many benefits. These include predictability, equality, judicial restraint, credibility, and judicial efficiency.[119] In outlining these benefits, scholars acknowledge that precedential decisions have positive effects that go beyond any particular case.[120] Legal scholar Catherine Albiston summarizes this view when she describes precedent "as a public good, socially owned, and with profound

111. *Id.* at 924–25.

112. *See* Sandefur, *The Impact of Counsel*, *supra* note 61, at 61.

113. *Id.* at 70 ("We might expect that people with the qualities of language facility, organization, persistence, and good communication skills would have been more likely to win their cases even without lawyers to represent them.").

114. Quintanilla, Allen & Hirt, *supra* note 71, at 1107 (The research "reveal[s] the emergence of a signaling effect of *pro se* status among law students and a substantial signaling effect among practicing lawyers when awarding settlement values. Among the law-trained samples, the presence of a claimant's *pro se* status caused a substantial decrease in the settlement value at each successive stage of the dispute pyramid: presuit demand, summary judgment, and trial.").

115. *Id.* at 1098.

116. *Id.*

117. *Id.* at 1103, 1107.

118. *Id.* at 1116 ("In sum, we observe that *pro se* claimants are perceived as less competent than counseled claimants and that these stereotypes explain why the law-trained award uncounseled claimants lower settlement awards.").

119. *See* Varsava, *supra* note 67, at 80.

120. Again, all precedents do in fact have spillover effects. *See supra* notes 44–45 and accompanying text.

social meaning,"[121] adding that "[t]raditional conceptions of the rule of law *presume* that judicial decisions have meaning beyond the resolution of individual disputes."[122]

Similarly, in a landmark article, legal scholars William Landes and Richard Posner treat precedent as a public good, marveling at how "it has been possible for the Anglo-American legal system to rely, for almost a thousand years, on the uncompensated efforts of litigants to create most of the legal rules administered by the legal system."[123] In an effort to model the benefits that precedent produces, Landes and Posner "treat the body of legal precedents created by judicial decisions in prior periods as a capital stock that yields a flow of information services which depreciates over time as new conditions arise that were not foreseen by the framers of the existing precedents."[124] For them, one implication of the model is that treating precedent as a resource-producing good raises the possibility that some of it can be particularly valuable. For instance, "in areas of the law that affect more people, legal capital should be relatively more valuable."[125] This prediction turns out to be important for understanding the spillover effects of precedent.

E. Precedent and Litigation's "Haves" and "Have-Nots"

Legal scholar Marc Galanter's landmark work concerns both of the two topics discussed in the literatures described above: the problems of disadvantaged litigants and the benefits of precedent. According to Galanter, the people he calls litigation's "haves"—repeat litigants with lawyers and resources—are more likely to establish precedents favorable to themselves than are the "have-nots."[126] While Galanter does not consider pro se litigants explicitly, in the legal world he envisions, pro se litigants almost inevitably would face the disadvantages of his paradigmatic "have-not."[127]

Galanter's foundational piece argues that "[b]ecause of differences in their size, differences in the state of the law, and differences in their resources, some of the actors in the society have many occasions to utilize the courts (in the broad sense) to make (or defend) claims; others do so only rarely."[128] For him, litigants fall into two categories, "claimants who

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121. Albiston, *supra* note 60, at 905.

122. *Id.* (emphasis in original).

123. Landes & Posner, *supra* note 66, at 272. *See also* Lederman, *supra* note 44 (analyzing the competing goals of encouraging settlement and producing precedent). As Eleanor Wilking points out, precedent is a non-rivalrous, non-excludable public good.

124. Landes & Posner, *supra* note 66, at 251–52.

125. *Id.* at 266.

126. Galanter, *supra* note 57, at 102.

127. *See id.* at 97–98.

128. *Id.* at 97.

have only occasional recourse to the courts (one-shotters or (OS) and repeat players (RP)) who are engaged in many similar litigations over time."[129] The RP is "a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests."[130]

Galanter spells out a series of potential advantages for the RP that pertain to the RP's long-term outlook. In any given case, the RP looks not just at the immediate situation but at future potential litigation.[131] That approach means that "RPs can play for rules as well as immediate gains."[132] Those rules may include statutes for which the RP lobbies, and they may also include judge-made law.[133] As Galanter explains,

> *RPs can also play for rules in litigation itself, whereas an OS is unlikely to*. . . .
>
> . . . [I]f RP is interested in maximizing his tangible gain in a series of cases 1 . . . n, he may be willing to trade off tangible gain in any one case for rule gain (or to minimize rule loss). . . . Since they expect to litigate again, RPs can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules.[134]

In a way particularly pertinent to my analysis, Galanter continues, "we would expect the body of 'precedent' cases—that is, cases capable of influencing the outcome of future cases—to be relatively skewed toward those favorable to RP[s]."[135]

Galanter writes of OSs and RPs and does not specifically take up the issue of pro se litigants. Nonetheless, the pro se litigant, particularly in the tax court context, shares many of the same attributes of Galanter's OS. None of the pro se litigants in the data I will report below appears to have been to tax court before; certainly, the litigants did not show up more than once in the five-year period I studied. Furthermore, there is no reason to believe that any of these litigants anticipated repeated litigation. The literature on pro se litigants cited above indicates that, like OSs, they lack substantive and procedural expertise, not to mention a hired lawyer with specialized knowledge about these things.

The extent to which the characteristics of the OS and the pro se litigant overlap suggests that, if we accept Galanter's theory, pro se

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129. *Id.*
130. *Id.* at 98.
131. *Id.* at 100.
132. *Id.*
133. *Id.*
134. *Id.* at 100–01 (emphasis added).
135. *Id.* at 102.

litigants should also suffer from an absence of precedent. If pro se litigants have no reason to anticipate a return to tax court, they have no reason to care about creating favorable rules for next time. Consequently, pro se litigants would have no incentive to settle an otherwise promising case because of the precedent it creates. As a result, to paraphrase Galanter, we would expect precedent cases—that is, cases capable of influencing the outcomes of future cases—to be relatively skewed against the pro se litigant.[136]

Empirical researchers have tested Galanter's prediction on precedent by examining whether "haves," or RPs, do in fact develop favorable precedent. In a seminal article on precedent in the employment law context, Albiston finds that, in regard to employment law cases, the "haves"—for Albiston, employers—win more often, an outcome that enables them to build up a body of favorable precedent.[137] Albiston finds that "[e]mployers prevailed two to one against employees on motions to dismiss, nearly three to one against employees on motions for summary judgment, and four to one on appeal."[138] Crucially, these discrepancies had consequences not just for the individual litigants but for the law itself because "judges reviewing the state of the law and practitioners deciding whether to take on a case will find that the published case law suggests that employees seldom prevail."[139] The precedent discrepancy "may also affect the future mobilization of rights" given that "[p]ublished opinions showing successful claims may encourage wronged individuals to 'name' their injury and claim a remedy or may energize a social movement."[140]

Albiston's finding is consistent with earlier data showing a disparity between "haves" and "have-nots" in case publication rates. For instance, political scientist Donald Songer and his research team "classified the litigants in their cases as 'upperdogs' (government and corporations) and 'underdogs' (labor unions, individuals, minorities, aliens, and convicted criminals)."[141] Songer and his team write that "[t]he publication rate for cases in which 'upperdogs' were the appellants was higher than for cases in which the 'underdogs' were the appellants, and this difference was statistically significant."[142] Further, "in civil rights cases in particular, only 49% of cases in which the 'underdog' was the appellant were published, compared with the 80% publication rate for cases in which the 'upperdog' was the appellant."[143] As a result "[t]o the extent that 'upperdogs' are also

136. Albiston, *supra* note 60, at 893.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 889.
142. *Id.*
143. *Id.*

repeat players under Galanter's framework, this finding lends some support to the idea that repeat players have greater influence over the development of legal precedent than one-shot players."[144]

Also agreeing with Galanter, federal judge Nancy Gertner offers a similar perspective about "have-nots." Writing of antidiscrimination cases, she says, "[w]hen the defendant successfully moves for summary judgment in a discrimination case, the case is over."[145] Then, "[u]nder Rule 56 of the Federal Rules of Civil Procedure, the judge must 'state on the record the reasons for granting or denying the motion,' which means writing a decision."[146] In contrast, "when the plaintiff wins, the judge typically writes a single word of endorsement—'denied'—and the case moves on to trial."[147] "The result of this practice, [i.e.] written decisions only when plaintiffs lose is," she argues, "the evolution of a one-sided body of law."[148]

This evidence bearing out Galanter's predictions is in line with research by legal scholar Merritt McAlister on unpublished judicial decisions.[149] In a recent article, McAlister finds that "[o]ver the last fifty years, federal courts have increasingly relied on the so-called 'unpublished decision' to combat a caseload volume 'crisis.'"[150] Notably, "[t]hese decisions are not precedential and make no law; they are often short, perfunctory, unsigned opinions drafted for the benefit of the parties, not the public,"[151] and "[e]ven their greatest judicial defender once referred to unpublished decisions as 'not safe for human consumption.'"[152] This disparity disproportionately affects pro se litigants. She writes,

> Traditional appellate process—including oral argument and judicial scrutiny—continues for the system's haves. But for its have-nots, the promise of an appeal as of right has become little more than a rubber stamp: "You lose." Data, historical accounts,

144. *Id.*

145. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113 (2012), https://www.yalelawjournal.org/forum/losers-rules [https://perma.cc/EA46-8JZ7].

146. *Id.* (quoting FED. R. CIV. P. 56) (footnote omitted).

147. *Id.*

148. *Id.* at 114.

149. *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020) [hereinafter McAlister, *"Downright Indifference"*]; *see also* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101 [hereinafter McAlister, *Missing Decisions*]. That said, if the decisions in question were unfavorable to pro se litigants, those litigants might be better off having them unpublished.

150. McAlister, *"Downright Indifference," supra* note 149, at 535 (citing Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112, 1112 n.9 (2011)).

151. *Id.* (footnote omitted) (citing Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36, 38).

152. *Id.* (quoting Kozinski, *supra* note 151, at 37).

> and anecdotal evidence all suggest that the unpublished decision revolution aligns closely with the rise of pro se appeals—the appellate justice system's "have-nots." Appeals from these vulnerable litigants occupy *half* of the federal appellate docket, but they surely receive far less than half of judges' attention. Instead, resource-strapped courts shift their attention to more complex and well-lawyered civil disputes.
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> . . . Decisional atrophy disproportionately affects pro se litigants because their cases are more likely to receive the second-class treatment that produces . . . poorly or lightly reasoned unpublished decisions.[153]

For McAlister (as for Galanter), these developments are alarming. Maintaining that "[i]n a common-law system, reason-giving is effectively lawmaking and thus an essential requirement of published, precedential decisions,"[154] McAlister deplores the trend not to publish, observing that the trend "has insulated thousands of appellate decisions from public scrutiny, stripped them of any precedential value, and deprived litigants of a meaningful response to their appeals."[155] The phenomenon McAlister documents is one that corroborates the problems that Galanter, Albiston, Gertner, and the Songer team found. Not publishing decisions in pro se cases deprives future pro se litigants of the ability to rely on them. In this way, law develops skewed in favor of the "haves."

What Galanter and the many scholars applying his pioneering work have not yet considered, however, is that law skewed toward the "haves" also may have spillover effects for the "have-nots." Even though the "have-nots" may, for all of the reasons described above, face obstacles in developing their own favorable precedent, the "have-nots" can sometimes piggyback on precedent that the "haves" create. This Article is the first to explore that possibility, which it does in the next Part by describing the phenomenon of "spillover precedent."

II. SPILLOVER PRECEDENT

A. Research on Spillover Precedent Cases

At the outset of this Article, I defined "spillover precedents" as cases that pro se litigants cite for favorable propositions of law.[156] Emerging from court decisions that benefited the original winning parties, spillover

153. *Id.* at 536, 538.
154. *Id.* at 538.
155. *Id.* at 541.
156. *See supra* note 42 and accompanying text.

precedents are cases with downward (or sometime sideways) ripple effects that subsequently benefit unrepresented litigants.[157]

To examine the incidence and content of these cases, I conducted a study of all tax court cases (approximately 200) in which a pro se litigant succeeded on any issue. As discussed above, I chose the tax court context for several reasons. First, I hoped to narrow the inquiry to one manageable in scope. Second, anecdotal evidence about the Taxpayer Bill of Rights and its legal development suggested that precedent dynamics might be particularly instructive to study in the tax context.[158] Third, tax court offers sources of variation that give rise to potential research questions. For instance, as discussed below, pro se litigants win often enough in Tax Court to yield a rich field of examples to study. In addition, tax court litigants do vary substantially in resources as opposed to those in other areas of the law—say, landlord-tenant or criminal law—in which the majority of litigants may be low-income.[159]

The data I collected showed that pro se litigants were more likely than their represented counterparts to lose their cases during the period studied but that *they still had some significant success*. In 2015, pro se litigants appeared in 173 cases and won 50 (at least in part); in 2016, they won 52 of 162; in 2017, 41 of 172; in 2018, 36 of 124; and in 2019, 23 of 94. Overall, the win rate was 202 out of 725 cases, or 27.8%.

These pro se wins regularly relied on precedent. My next step, therefore, was to investigate how that worked. What types of precedent helped pro se parties win? With the help of research assistants, I compiled a list of every precedent on which a winning pro se litigant relied for a key proposition of law. By this process, I identified 116 spillover precedents—in other words, precedents on which pro se litigants relied for a favorable proposition of law.[160] I then investigated questions such as the following: For what specific proposition of law was each precedent cited? What sub-areas of tax law seemed particularly likely to contain spillover precedents? Are there any factual situations that produced a disproportionately high volume of spillover precedents?

Before turning to these questions, I would clarify that "Tax Court issues three types of opinions: Division Opinions, which have precedential value and are officially published; Memorandum Opinions, which have no official precedential value," but are available through legal search engines; "and Summary Opinions[,] . . . which have no official precedential value"

157. *See supra* note 43 and accompanying text.

158. Tax court does provide some written assistance to pro se litigants, evident in its 39-page reference guide, U. S. TAX CT., INFORMATION FOR PERSONS REPRESENTING THEMSELVES BEFORE THE U.S. TAX COURT (2010).

159. *See* William C. Whitford, *The Small-Case Procedure of the United States Tax Court: A Small Claims Court that Works*, 1984 AM. BAR FOUND. RSCH. J. 797, 805–06.

160. Some spillover precedents were cited by more than one pro se victory.

and have been available through legal search engines since 2001.[161] Division Opinions address new legal questions; Memorandum Opinions apply (purportedly clear) law to new facts; and Summary Opinions do the same for cases small in dollar amount.[162] However, as a practical matter, tax court judges cite all three types of cases,[163] and the spillover precedents were a mix of the three types. As a result, following precedent scholarship that uses the term to refer not just to binding case law, I refer to all three as "precedent" throughout this Article.[164]

My research demonstrated a dynamic between "have-not" litigants and precedent that Galanter's theory does not consider. "Have-nots" sometimes succeed in court. When they do, they use precedent just as the "haves" do. To the question of when pro se litigants win, they win when they are able to take advantage of a precedent with spillover effects. The majority of those spillover precedents come from the relative "haves": litigants with lawyers. When circumstances of the "haves" and the "have-nots" overlap, the "have-nots" have an opportunity for favorable law they can use to win. As a result, even a body of law that, following Galanter, skews toward the "haves" can produce benefits for the "have-nots."

B. Spillover Precedent Patterns

The first pattern to emerge from the data was that only a minority of the spillover precedents were themselves pro se cases. Instead, pro se parties relied more often on cases that *represented* taxpayers had previously litigated. In about two-thirds of cases (76/116), the precedent that undergirded the pro se win came from a case in which the taxpayer had a lawyer. This result squares with a second pattern, which is that precedents based on cases with lawyers were more highly cited than previous pro se cases. In my data, the mean number of citations for a pro se spillover precedent was 106 citations; for a lawyered spillover precedent, it was 1117.9. The corresponding medians were 22 citations for a pro se spillover precedent, for a lawyered one, 25.[165]

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161. For an explanation of the different kinds of tax opinions, see LEANDRA LEDERMAN AND STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE 385–86 (4th ed. 2018). For a broader discussion of that point, see Amandeep S. Grewal, *The Un-precedented Tax Court*, 101 IOWA L. REV. 2065 (2016).

162. Tax court has a set of simplified procedures in general for small tax cases. For discussion of these procedures and how well they work, see generally Whitford, *supra* note 159.

163. Grewal, *supra* note 161, at 2067–68.

164. *See* Gardner, *supra* note 41, at 1628.

165. The data do not, unfortunately, tell us anything about why the spillover precedents were more likely to be cases with lawyers. One hypothesis is that pro se litigants are less likely to win and give rise to favorable precedents. *See, e.g.*, Sandefur, *The Impact of Counsel*, *supra* note 61, at 69. Another is that pro se litigation results in shorter decisions that are less likely to be useful as precedents. *See, e.g.*, Scott Rempell, *Unpublished*

Considering cases with represented litigants, those that subsequently became spillover precedents were fairly split between cases with business taxpayers and with high- to middle-income taxpayers, with a tilt toward the latter group. To take an example of the former, in the mid-1990s, PepsiCo engaged in a complicated series of transactions involving payments made to its Dutch subsidiaries.[166] For tax purposes, PepsiCo characterized these payments as stock, or equity.[167] Instead, the IRS deemed them debt and, as a result, assessed additional taxes against PepsiCo.[168] PepsiCo's lawyers from the elite law firm Davis Polk and Wardwell successfully argued that the key fact was whether PepsiCo had intended to repay the alleged debt.[169] Looking at the documents and facts, the tax court found that PepsiCo and its subsidiaries had not intended a repayment obligation.[170] Therefore, the payments were equity,[171] and PepsiCo saved $363 million in taxes.[172]

In a case a decade later, Floetta Bullock's son and daughter-in-law purchased a used pickup truck with a loan from a credit union.[173] Intending to co-sign the loan, Ms. Bullock unwittingly signed paperwork taking on primary responsibility for the loan.[174] Even so, the son and daughter-in-law had been making the payments to the credit union.[175] The truck was then stolen, and the policy insuring it did not cover the full amount still owed to the credit union.[176] However, once the insurance company remitted its portion to the credit union, the son and daughter-in-law stopped making their payments.[177] The credit union made no effort to collect the remaining balance, $8,164, from Ms. Bullock.[178] The IRS took the position that the $8,164 was "cancellation of indebtedness" income to Ms. Bullock such that she owed taxes on it.[179] The case went to tax court, where Ms. Bullock appeared pro se.[180] Citing the *PepsiCo* case as

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Decisions and Precedent Shaping: A Case Study of Asylum Claims, 31 GEO. IMMIGR. L.J. 1, 16 (2016)

166. *PepsiCo P.R., Inc. v. Comm'r*, 104 T.C.M. (CCH) 322, 329–32 (2012).

167. *Id.* at 333.

168. *Id.*

169. *Id.* at 322, 333–45.

170. *Id.* at 343.

171. *Id.* at 343, 345.

172. *PepsiCo Wins Debt-vs-Equity Dispute in U.S. Tax Court*, REUTERS (Sept. 25, 2012, 2:45 PM), https://www.reuters.com/article/us-pepsi-tax-idUSBRE88O19R20120925 [https://perma.cc/A4QW-GG55].

173. *Bullock v. Comm'r*, 114 T.C.M. (CCH) 525, 525 (2017).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

precedent, the court held that "without an intention for petitioner to repay the debt, there was no bona fide primary obligation between petitioner and the credit union."[181] Without a debt, there was no cancellation of indebtedness income and Ms. Bullock owed no tax.[182]

Take an example of a spillover precedent originating with an individual rather than a corporate litigant. In 2007 in *Judge v. Commissioner*,[183] Robert Judge, an individual taxpayer, had (for reasons not discussed in the case) accrued $200,000 in unpaid taxes that the IRS intended to collect.[184] He elected to have what is called a "collection due process," or CDP hearing, at which he planned to negotiate an installment plan.[185] In advance of the CDP hearing, the relevant officer from the IRS Appeals Office could not find one of the required forms that Mr. Judge submitted.[186] The officer requested a new one.[187] On the phone with the appeals officer four weeks later, Mr. Judge's lawyer asked for an extension of time to fill out the replacement form.[188] The appeals officer refused.[189] The case went to tax court, where the lawyer, a tax controversy specialist from upstate New York,[190] argued that in denying the extension, the officer had abused his discretion.[191] The tax court agreed.[192]

Then in 2019, in *Dodd v. Commissioner*,[193] Mr. Judge's win became relevant for Taryn Dodd, a pro se litigant who also had a CDP hearing before the IRS and who, believing she did not owe the taxes in question, appealed the results.[194] In advance of her hearing, the officer in charge sent her a boilerplate letter with a bullet point tacked on asking her to file an amended return for the year in question.[195] At the second CDP hearing, the officer asked for the amended return, and the taxpayer indicated that she planned to submit it.[196] Nonetheless, the officer closed the case the next day and proceeded with an attempt to collect the taxes.[197] The case went

181. *Id.* at 526.
182. *Id.*
183. 97 T.C.M. (CCH) 1781 (2009).
184. *Id.* at 1781.
185. *Id.*
186. *Id.*
187. *Id.* at 3.
188. *Id.*
189. *Id.*
190. *Meet Howard M. Koff, J.D., LL.M. (Tax)*, THE KOFF LAW FIRM, PLLC https://kofflaw.com/About-Our-Attorney [https://perma.cc/SZ6L-PYUW] (last visited Sept. 19, 2021).
191. *Judge*, 97 T.C.M. (CCH) at 1781.
192. *Id.* at 1782.
193. 118 T.C.M. (CCH) 186 (2019).
194. *Id.* at 186.
195. *Id.* at 187.
196. *Id.*
197. *Id.*

to tax court, where Ms. Dodd appeared pro se, and the IRS moved for summary judgment.[198] Citing Mr. Judge's case, the tax court found that "an abuse of discretion may be found where the taxpayer was not afforded a reasonable amount of time to comply with document requests and deadlines" and ruled against the IRS.[199]

As in *Judge*, many of the spillover precedents here concerned procedural issues because[200] high-income and business taxpayers were more likely to share procedural circumstances with their pro se counterparts than they were to share broader life circumstances. The fact that procedural cases were particularly likely to yield downward spillover benefits may be surprising in light of existing scholarship on the "paradox of process," which views procedure as tilted toward the "haves."[201]

The case of *Martin v. Commissioner*[202] is another example that runs counter to this paradox. In 1968, Evelyn Martin met her husband, Glen, whom she believed at the time and throughout their relationship to be a successful insurance agent.[203] As the tax court explained, "Mr. Martin's success in the insurance business permitted the Martins . . . to build a palatial home" and purchase items including "Rolls Royce and Lamborghini automobiles, a 60-foot yacht, several other luxury automobiles, 2 airplanes, 5-carat and 12-carat diamond rings given . . . as gifts by Mr. Martin, and 4 Rolex watches."[204] In addition, "[t]he Martins employed several household staff members and a full-time gardener. [Mrs. Martin] was involved in high profile charitable and political fund raisers and threw lavish parties at the Martins' home."[205] However, Mr. Martin mischaracterized several payments and transactions for tax purposes, and the IRS attempted to hold Mrs. Martin jointly liable for the taxes owed, $2,707,872 in 1986 and $1,725,692 in 1987.[206] Her lawyers argued that she had not been aware of the transactions and should escape liability under a provision called "innocent spouse relief."[207] The tax court judge

198. *Id.* at 186–87.

199. *Id.* at 188.

200. *See* Landes and Posner, *supra* note 66, at 269.

201. *See, e.g.*, Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1453–54 (2016) (describing the paradox of process as follows: "as procedural safeguards increase to preserve democratic access or rights, elite economic interests will perversely be better able to navigate those complexities").

202. 80 T.C.M. (CCH) 665 (2000).

203. *Id.* at 666.

204. *Id.* at 667.

205. *Id.*

206. *Id*. at 666–68.

207. *Id.* at 665, 669.

ruled in her favor, holding that the IRS had the burden of proof in showing that Ms. Martin was aware of her husband's tax schemes.[208]

Then, in *Merlo v. Commissioner*,[209] James Merlo's wife received $4,628 in disability income, reported to her on a W-2 in 2012.[210] Mr. Merlo had a joint checking account with his wife, who also had a separate account into which she deposited the money.[211] Soon after, she moved out of their house and filed for divorce.[212] Mr. Merlo then proceeded to file their joint tax return for the previous year but did not include the $4,628.[213] The IRS attempted to hold him liable for the associated tax bill, but he claimed he had never known that she received the money.[214] The case went to tax court, where Mr. Merlo appeared pro se.[215] Citing *Martin*, the court found that the IRS had the burden of showing that he was aware of the disability proceeds, a burden that it could not meet.[216] Mr. Merlo won his case.[217]

To take another example of a procedural spillover precedent, in *Naftel v. Commissioner*,[218] Donald Naftel, an investor, along with his former lawyer, entered into a business partnership in the late 1970s.[219] At the time he became involved with the partnership, Mr. Naftel believed that the partnership would generate enough losses and credits in his first year so that he would receive refunds of taxes withheld and paid in previous years.[220] As a result, Mr. Naftel filed for refunds in those years.[221] However, Mr. Naftel alleged that his business partner stole the refund checks, leaving him unable to cash them.[222] The IRS argued that Mr. Naftel owed about $11,907 (or $28,796 in 2021 dollars) in taxes for the years in which he had filed for, but never received, the refunds.[223] Mr. Naftel's lawyers argued that he overpaid taxes in the amount of the refund checks

208. *Id.* at 670.

209. No. 10366-14S, 2018 Tax. Ct. Summary LEXIS 48 (Sept. 24, 2018).

210. *Id.* at *1.

211. *Id.* at *3, *11.

212. *Id.* at *3.

213. *Id.* at *6.

214. *Id.*

215. *Id.* at *1.

216. *Id.* at *8. Because Mr. Merlo's spouse opposed innocent spouse relief here, the IRS had to meet its burden by the preponderance of the evidence. *Id.* at *9.

217. *Id.* at *14.

218. 85 T.C. 527 (1985).

219. *Id.* at 528.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* For the conversion, see US INFLATION CALCULATOR, https://www.usinflationcalculator.com/ (last visited Sept. 19, 2021) (type "1985" in the "If in" box, "2021" in the "then in" box, and "11907" in the "I purchased an item for $" box, then click "CALCULATE").

he never cashed.[224] In determining how much Mr. Naftel owed, the IRS should have subtracted the overpayments.[225] The IRS disagreed and moved for summary judgment, but in 1985 the tax court ruled in Mr. Naftel's favor, finding that a factual issue existed with regard to the overpayments and that the IRS must take any overpayments into account in calculating taxes owed.[226]

Twenty-three years later in *Moss v. Commissioner*,[227] the tax court considered the case of Peter Moss, who filed a 2008 tax return for himself and his wife showing an overpayment of $823.[228] His wife, however, was suffering from a mental illness for which she was intermittently hospitalized and that, among other things, made her "highly suggestible to news programs."[229] From watching them, she learned about the well-known Madoff Ponzi scheme and developed a delusion that she had lost money in the scheme.[230] As a result, she filed her own tax return claiming a Madoff theft loss deduction.[231] The IRS assessed taxes against Mr. Moss for a variety of issues, and he argued that he should get a credit of $823 against the taxes owed.[232] The case went to tax court, where he appeared pro se.[233] The tax court ruled in his favor, citing *Naftel* for the proposition that "[t]o determine whether there is an overpayment for the year . . . we may take into account payments by the taxpayer. One type of payment we may consider is a different year's overpayment claimed by a taxpayer on the return."[234]

However, even though many of the spillover precedent cases concern procedural issues like the ones discussed in the previous examples, substantive spillover precedents showed up as well. *Torrisi v. Commissioner*,[235] a case involving innocent spouse relief (a fertile ground

224. *Naftel*, 85 T.C. at 534.
225. *Id.*
226. *Id.* at 527, 531, 534.
227. No. 5287-12, 2017 Tax Ct. Memo LEXIS 27 (Feb. 8, 2017).
228. *Id.* at *2.
229. *Id.* at *3.
230. *Id.*
231. *Id.*
232. *Id.* at *5.
233. *Id.* at *1.
234. *Id.* at *11 (citations omitted).
235. 102 T.C.M (CCH) 338 (2011).

for spillover precedents),[236] considered the situation of Michelle Torrisi.[237] Her husband, Mark Torrisi, was an insurance agent who (for reasons not specified in the case) between 1997 and 2000 accumulated a tax debt of $114,843.[238] Ms. Torrisi, herself only a high school graduate, described her ex-husband as "controlling, manipulative, and verbally and physically abusive," someone who "screamed at [her], grabbed her, and scared her."[239] During the couple's marriage, his business generated substantial income.[240] She was not involved in it, but he once asked her to write a check to the IRS for taxes due.[241] The check was only for $2,000, but she testified that "she did not know that she and Mr. Torrisi still had a Federal income tax liability."[242] Her lawyers argued that these factors weighed in favor of granting her innocent spouse relief for the remainder of the tax debt, and the tax court agreed.[243]

In 2018, in *Heedram v. Commissioner*,[244] the tax court took up the circumstances of Jeffrey Heedram, an immigrant from Jamaica appearing pro se.[245] In 2014, he earned $5,631 from a company that installed fiber optic cables.[246] Mr. Heedram's then-wife filed their taxes that year but had

236. *See, e.g.*, *Camara v. Comm'r*, 149 T.C. 317 (T.C. 2017) (providing that a taxpayer can obtain innocent spouse relief if the couple had initially filed a joint return and the taxpayer had not filed their own); *Wang v. Comm'r*, 108 T.C.M. (CCH) 394 (2014) (explaining that lack of benefit received from the unpaid tax is a factor in favor of granting relief); *Haigh v. Comm'r*, 97 T.C.M. (CCH) 1794 (2009) (illustrating that poor mental or physical health are factors in favor of granting relief); *Pullins v. Comm'r*, 136 T.C. 432, 448 (2011) (similar); *Waldron v. Comm'r*, 102 T.C.M. (CCH) 583 (2011) (granting relief when the non-requesting spouse had indicated intent to pay a portion of the unpaid tax liabilities); *Greer v. Comm'r*, 595 F.3d 338 (6th Cir. 2010) (treating lack of financial education as a factor in favor of granting relief); *Charlton v. Comm'r*, 114 T.C. 333, 341 (2000) (like *Martin*, shifting the burden of proof to the IRS in innocent spouse cases); *Cheshire v. Comm'r*, 115 T.C. 183, 192 (2000) (demonstrating that, to deny relief the IRS must show the requesting spouse had "actual and clear" knowledge of an unreported item); *McKnight v. Comm'r*, 92 T.C.M. (CCH) 76 (2006) (considering potential economic hardship as a factor in favor of granting relief); *Culver v. Comm'r*, 116 T.C. 189, 195 (2001) (discussing more on the standard of proof that the IRS must meet in innocent spouse cases); *Hepler v. Comm'r*, 60 T.C.M. (CCH) 735 (1990) (granting relief in the case of embezzlement of which the requesting spouse was not aware); *Reser v. Comm'r*, 112 F.3d 1258 (5th Cir. 1997) (same as *Greer*); *Millsap v. Comm'r*, 91 T.C. 926, 937–38 (1988) (for allowing relief for spouses who had filed separate returns in years in which joint returns would not have been possible).

237. *Torrisi*, 102 T.C.M. (CCH) at 338.

238. *Id.* at 340.

239. *Id.* at 338.

240. *Id.* at 343.

241. *Id.*

242. *Id.*

243. *Id.* at 345–46.

244. No. 679-17, 2018 Tax. Ct. Memo LEXIS 26 (Mar. 7, 2018).

245. *Id.* at *1–2.

246. *Id.* at *3.

only a general understanding of the tax issues that the couple faced, and she "told him that she would arrange a payment plan for [any] outstanding tax debt."[247] Citing *Torrisi*, the tax court wrote that

> [w]e have held consistently that a requesting spouse carries his burden of proof to establish that he reasonably believed his spouse would pay an outstanding liability where the requesting spouse is not involved in the family finances or sophisticated about them and the nonrequesting spouse has the income to make the payments.[248]

Based on this reasoning, the court granted relief to Mr. Heedram.[249]

Commissioner v. Tufts,[250] a case familiar to all tax professors and Tax I students, is also a substantive spillover precedent.[251] The case concerned a real estate partnership that, in 1970, took out a $1,851,500 loan to build an apartment building in a Dallas suburb.[252] Neither the partnership nor the partners were personally liable for the loan, making it a "nonrecourse" loan.[253] Due to layoffs in the suburb, the value of the building fell to $1,400,000; as a result, the partnership could not make the payments on the loan, and the partners sold their shares in the partnership.[254] The partners took the position that they incurred losses; the IRS disagreed and said the partnership realized a gain.[255] Represented by a team of lawyers including "Texas Tax Legend" Ronald Mankoff,[256] the case went to tax court,[257] then to the Fifth Circuit,[258] and then to the U.S. Supreme Court. Without getting into the complex issues that the main holding raises, the Supreme Court also held that "[w]hen a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer."[259]

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247. *Id.* at *3–4.
248. *Id.* at *11.
249. *Id.* at *15 (citing *Torrisi*, 102 T.C.M. (CCH) 338 (2011)).
250. 461 U.S. 300 (1983).
251. *Id.* at 307.
252. *Id.* at 302.
253. *Id.*
254. *Id.* at 303.
255. *Id.*
256. Tax Section of the State Bar of Texas, *Ronald M. Mankoff 10/28/2010*, TAX SECTION OF THE STATE BAR OF TEX. (Oct. 28, 2010), http://www.texastaxsection.org/DrawLegalLegendVideos.aspx?VideoID=4 [https://perma.cc/8BR5-UZDJ].
257. *Tufts v. Comm'r*, 70 T.C. 756 (1978).
258. *Tufts v. Comm'r*, 651 F.2d 1058 (5th Cir. 1981).
259. *Tufts*, 461 U.S. at 307.

Given the case's prominence in tax law, many taxpayers have relied on *Tufts*. One such taxpayer, in *Nguyen v. Commissioner*,[260] was Chris Nguyen, an immigrant from Vietnam who spoke "limited English."[261] In 2008 and 2009, he operated a pottery business in California, relying on bookkeeping help from "an untrained 18-year-old woman," as well as on financial assistance from his mother, mother-in-law, and a close friend, including loans for $62,500 and $15,000.[262] The IRS attempted to include these amounts in Nguyen's income.[263] At trial in front of the tax court, appearing unrepresented, Nguyen testified that these proceeds were loans from his mother, mother-in-law, and friend.[264] His friend also appeared at trial to corroborate the testimony.[265] Citing *Tufts* for the proposition that "loan proceeds do not constitute gross income to a taxpayer," the tax court ruled that Nguyen was not liable for taxes on those amounts.[266]

The above examples illustrate that spillover precedents can be substantive as well as procedural. That said, substantive precedents, besides being fewer in number, are also less likely to be cited repeatedly. This factor of citation frequency points to a broader fact about the spillover precedents: some of these precedential cases stand out as particularly valuable. In other words, multiple pro se cases sometimes cite the very same precedent.

These frequently-cited cases seem to fall into the category of what Landes and Posner call "general precedents."[267] For Landes and Posner, a "general precedent" is

> one that [is] less likely to be rendered obsolete by a change in the social or legal environment in which the precedent is applied; for example, a decision laying down a broad principle of tort liability should retain its precedential force—be cited—for a longer period of time than one holding that railroads must station flagmen at certain crossings.[268]

Landes and Posner speak to the value of a general precedent: it is "like a machine that, being adaptable to a number of different uses, is less subject to technological obsolescence than one specialized to a particular

260. No. 20491-13, 2016 Tax Ct. Memo LEXIS 125 (June 29, 2016).

261. *Id.* at *3.

262. *Id.* at *3–4, *8.

263. *Id.* at *5–7.

264. *Id.* at *1, *7.

265. *Id.* at *8.

266. *Nguyen*, 2016 Tax Ct. Memo LEXIS 125, at *8 (quoting *Comm'r v. Tufts*, 461 U.S. 300, 307 (1983)).

267. Landes & Posner, *supra* note 66, at 268.

268. *Id.*

task."[269] As Landes and Posner argue, the general precedents function like public goods whose value substantially exceeds what they are worth to the individual recipients.[270] By extension, a general spillover precedent benefits a wide range of under-resourced litigants.[271]

Important new work by legal scholar Maggie Gardner examines why, in a world of online searches, certain cases accrue disproportionately large numbers of citations.[272] She writes that "[w]hen ordering search results, some of the databases determine relevancy in part by the number of times a case has been cited."[273] In addition, "Westlaw and Lexis draw on user search history to identify more important cases."[274] For Gardner, algorithms of this type pose a problem. She acknowledges that "[f]rom a practice perspective, [a search algorithm] may be appealing" because "[i]f I am trying to determine the content of the law quickly, I want to find the most widely known cases on my question."[275] However, this procedure "can be problematic for those researching the law in order to determine its future development."[276] For instance, "[t]hese search algorithms can encourage channeling that may lock in the decisions of early movers, marginalize alternative approaches, and obscure dissent."[277]

In terms of general tax precedents, some of these are cases that have amassed a large overall number of citations, whereas others are particularly common citations in the pro se cases. The former include the aforementioned *Tufts* case (209 cites[278]), as well as *Hoyle v. Commissioner*,[279] which holds that a tax assessment is invalid if the IRS's Appeals Office has failed to verify that the assessment notice was sent[280]

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269. *Id.*

270. *Id.* at 250–51, 250 n.2.

271. This is true of spillover general precedent, which, by definition, has benefits that spills over to pro se litigants. General precedent more generally could be helpful or non-helpful for pro se parties, depending on its content.

272. *See generally* Gardner, *supra* note 41 (highlighting the pathologies that may emerge when judges use optional case citations). We do not know where pro se litigants or the judges deciding their cases find the precedent they use, which would of course be interesting for this analysis. Legal search engines presumably play some role, especially for the judges and their clerks.

273. *Id.* at 1656 (citing Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, 403 (2017) (discussing the legal search engine Ravel Law)).

274. *Id.*

275. *Id.* at 1656–57.

276. *Id.* at 1657.

277. *Id.*

278. *Commissioner v. Tufts*, HEINONLINE, https://heinonline-org.ezproxy.library.wisc.edu/HOL/Page?public=true&handle=hein.journals/prvw9&div=138&start_page=11&collection=usreports&set_as_cursor=0&men_tab=srchresults (last visited Sept. 19, 2021).

279. 131 T.C. 197 (2008).

280. *Id.* at 204–05.

(192 cites[281]); *Iley v. Commissioner*,[282] which holds that the existence of tax fraud is a factual question that depends on the sophistication and education of the taxpayer[283] (112 cites[284]); *DiLeo v. Commissioner*,[285] which holds that, for certain penalty purposes, the IRS has the burden of showing taxpayer intent[286] (504 cites[287]); *Cheek v. Commissioner*,[288] which holds, again for the purposes of certain penalties, that when a taxpayer has demonstrated genuine confusion about how to calculate taxes, the IRS must show that the problem amounts to more than a misunderstanding[289] (1,025 cites[290]); and *Jacklin v. Commissioner*,[291] which holds that for the purposes of characterizing spousal support, a separation agreement need not state a specific amount as long as the document includes an "ascertainable standard" that the taxpayers can use[292] (397 cites[293]). Studying these tax general precedents and understanding what makes them so useful to litigants broadly speaking would be an interesting avenue for future research.

However, for purposes of this Article, the relevant question is, What kinds of tax cases are particularly valuable spillover general precedents for the pro se litigant? One way to assess this is to look at how novel the holding is—that is, whether it breaks new legal ground. The *Graev* case (discussed at the beginning of this Article) is an example of such a case.[294] Another way to assess a case's value to pro se litigants, as alluded to above, is simply to look at how often pro se cases cite it. Under that citation

281. *Hoyle v. Commissioner*, HEINONLINE, https://heinonline-org.ezproxy.library.wisc.edu/HOL/CaseLaw?1=1&native_id=8992222&cop=&collection=journals (last visited Sept. 19, 2021).

282. 19 T.C. 631 (1952).

283. *Id.* at 635.

284. *Iley v. Commissioner*, HEINONLINE, https://heinonline-org.ezproxy.library.wisc.edu/HOL/CaseLawAuth?cid=8788036&native_id=8788036&rest=1&collection=fastcasefull (last visited Sept. 19, 2021).

285. 96 T.C. 858 (1991).

286. *Id.* at 889.

287. *DiLeo v. Commissioner*, HEINONLINE, https://heinonline-org.ezproxy.library.wisc.edu/HOL/CaseLawAuth?cid=8796285&native_id=8796285&rest=1&collection=fastcasefull (last visited Sept. 19, 2021).

288. 498 U.S. 192 (1991).

289. *Id.* at 201.

290. *Cheek v. United States*, HEINONLINE, https://heinonline-org.ezproxy.library.wisc.edu/HOL/CaseLaw?1=1&native_id=368166&cop=&collection=journals (last visited Sept. 19, 2021).

291. 79 T.C. 340 (1982).

292. *Id.* at 354.

293. *Jacklin v. Commissioner*, HEINONLINE, https://heinonline-org.ezproxy.library.wisc.edu/HOL/CaseLawAuth?cid=8795544&native_id=8795544&rest=1&collection=fastcasefull (last visited Sept. 19, 2021).

294. *See Graev v. Comm'r*, 149 T.C. 485, 486 (2017). Thanks to Les Book for this point.

metric, one case that emerges as valuable is *Neonatology Associates v. Commissioner*,[295] also a penalty case.[296] There, in the early 1990s, three medical employers, represented by a large law firm, had been deducting contributions and taking other tax benefits for certain voluntary employment beneficiary plans.[297] The IRS disallowed the benefits, and the tax court agreed.[298] The IRS also attempted to assess a series of penalties.[299] Some of these succeeded and some of these failed, but all of them appear to have been hotly contested.[300] In this context, the tax court engaged in an extended discussion of the various penalty standards, issuing a clear statement that "[t]he good faith reliance on the advice of an independent, competent professional as to the tax treatment of an item" may be sufficient to allow a taxpayer to escape the accuracy-related penalty.[301]

Because pro se taxpayers often rely, unsurprisingly, on tax advice they receive from other people, the use of advice often comes up in pro se tax court cases. For instance, in *Tsehay v. Commissioner*,[302] Yosef Tsehay, whose first language was not English, worked as a custodian at a community college and lived in public housing with his five children.[303] Mr. Tsehay filled out his 2013 tax return with a tax preparer's help, but the IRS disallowed a number of the dependency exemption deductions, his earned income tax credit, and his child tax credit.[304] The IRS changed the filing status from head of household to single and assessed an accuracy-related penalty.[305] Despite appearing in tax court pro se, Mr. Tsehay prevailed on several of his substantive issues.[306] In addition, based on the *Neonatology Associates* standard, the tax court found that he reasonably relied on his preparer's advice and, for that reason, did not owe an

295. 115 T.C. 43 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002) (holding that contributions to a voluntary employee beneficiary assistance plan do not provide certain tax benefits to the employer and considering at length possible penalties for employers that had taken such benefits).

296. *Id.* at 99, 103.

297. *Id.* at 44–45.

298. *Id.* at 45, 103.

299. *Id.* at 97–103. Among the penalties debated, both employers' lawyers and the IRS's lawyers attempted to impose penalties on each other for taking frivolous positions. *Id.* at 101–02.

300. *See id.* at 97, 101–03.

301. *Id.* at 98.

302. No. 12761-15, 2016 Tax. Ct. Memo LEXIS 198 (Nov. 3, 2016), *nonacq.*, 2017-05 (July 6, 2017).

303. *Id.* at *1–2.

304. *Id.* at *2–3.

305. *Id.* at *3.

306. *Id.* at *1, *4–6.

"accuracy-related penalty."[307] In the period I studied, seven other pro se taxpayers received similar results by citing *Neonatology Associates*.[308]

In addition to *Neonatology Associates*, the other most commonly cited spillover general precedent was *Higbee v. Commissioner*,[309] also a penalty case.[310] *Higbee* is one of the roughly 33% of spillover precedent cases in which the taxpayers—here, business owners Earl and Lesley Higbee—were not represented.[311] The Higbees also lost.[312] Their suit raised a number of issues, including a claimed casualty loss and purported net operating losses from a small business.[313] The Higbees appeared pro se in tax court in 2001,[314] which was shortly after Congress passed a major piece of taxpayer rights legislation, the IRS Restructuring and Reform Act of 1998.[315] The bill required the IRS to "carry the 'burden of production'

307. *Id.* at *8–9.

308. *See Ting Cai v. Comm'r*, No. 10270-16, 2018 Tax Ct. Memo LEXIS 52, *11–12 (Apr. 16, 2018) (involving a software designer with "no background in taxation" who relied on a preparer); *Triggs v. Comm'r*, No. 14824-16S, 2018 Tax Ct. Memo LEXIS 60, at *16 (Dec. 26, 2018) (involving a construction worker who did "not have any training in finance or a background in accounting" and who "credibly testified that he relied upon his accountant's advice in claiming the disallowed unreimbursed employee expense"); *Tzivleris v. Comm'r*, No. 7780-14S, 2016 Tax Ct. Summary LEXIS 27, at *13–14 (June 20, 2016) (involving a steam cleaner who allegedly failed to include in income some canceled debt but was "neither 'educated school-wise' nor at all experienced in tax matters"); *Nordloh v. Comm'r*, No. 20097-12S, 2017 Tax Ct. Summary LEXIS 36, at *20–21 (May, 30 2017) (involving a couple that treated their Social Security benefits incorrectly for tax purposes but relied on a preparer); *Kennedy v. Comm'r*, No. 4103-14S, 2016 Tax Ct. Summary LEXIS 61, at *10 (Sept. 26, 2016) (involving a taxpayer who was not "experienced in tax matters" but "met with his return preparer and fully disclosed the facts"); *Lamas-Richie v. Comm'r*, No. 25662-14, 2016 Tax Ct. Memo LEXIS 61, at *2, *10–11 (Apr. 11, 2016) (involving the founders of thedirtyscottsdale.com, who "supplied their return preparer with all tax-related documents"); *Niemann v. Comm'r*, No. 28054-12 Tax Ct. Memo LEXIS 11, at *1, *19–21 (Jan. 19, 2016) (involving a house flipper whose various tax "mistakes" involved relying on a supposedly competent CPA).

309. 116 T.C. 438 (2001).

310. *Id.* at 449 (applying the accuracy-related penalty to taxpayers who had incorrectly taken business expense and other deductions). For a discussion of the case in the pro se context, see Carl Smith, *Must the Taxpayer Mention Section 6751(b)(1) in a Deficiency Case for the Tax Court to Have to Consider Compliance with that Section?*, PROCEDURALLY TAXING (Jan. 9, 2018), https://proceduralltaxing.com/must-the-taxpayer-mention-section-6751b1-in-a-deficiency-case-for-the-tax-court-to-have-to-consider-compliance-with-that-section/ [https://perma.cc/UCW9-PDH9].

311. *See supra* Section II.B; *Higbee*, 116 T.C. at 438, 445.

312. *Higbee*, 116 T.C. 443–46, 450.

313. *See id.* at 439–40.

314. *Id.* at 438.

315. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3730–52 (1988) (codified as amended in scattered sections of 26 U.S.C.); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. For a summary of the bill and its legislative history, see generally Tahk, *supra* note 48, at 907–08; Lawrence B. Gibbs, *Taxpayer Bill of Rights*, WM. & MARY ANN. TAX CONF. (1989);

in any court proceeding with respect to the liability of any penalty."[316] Acknowledging that "the statute does not provide a definition of the phrase 'burden of production,'" the tax court in *Higbee* then interpreted the phrase to mean that the IRS must "come forward with sufficient evidence indicating that it is appropriate to impose the relevant penalty."[317] With regard to the accuracy-related penalty, the IRS must show that the taxpayer failed to act "with reasonable cause and in good faith."[318]

The *Higbee* standard turned out to be relevant in eight other pro se cases in the period I studied. For instance, in *Gutierrez v. Commissioner*,[319] Santiago Gutierrez, whose wages totaled $12,893 for the year, lived with his partner, her daughter, and the partner's two grandchildren.[320] On his 2015 tax return, filed as head of household, Gutierrez claimed dependency exemptions for both grandchildren and took the child credit and the earned income tax credit.[321] The IRS denied these benefits, stating that the partner's child and the grandchildren failed to meet the statutory definitions for those benefits.[322] The IRS also assessed the accuracy-related penalty.[323] The case went to tax court, where Mr. Gutierrez appeared pro se, won with regard to the grandchildren, lost with regard to the child, and did not face the accuracy-related penalty because, while "unsophisticated in Federal tax matters," he had "relied upon a competent paid income tax return preparer" and in this way "made a reasonable attempt to comply with his Federal tax obligations."[324] This constituted "good faith" under *Higbee*.[325]

Higbee is just one instance of a spillover precedent in which the original taxpayer (for one reason or another) also appeared pro se. However, the parties in *Higbee* bear little factual resemblance to the parties in *Gutierrez*—or to those in a number of the other (downward) spillover cases that would cite *Higbee*. In contrast to *Higbee*, however, a

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Shannon Weeks McCormack, *Tax Abuse According to Whom?*, 15 FLA. TAX REV. 1, 36–38 (2013). For summary and analysis of the bill, see generally Elliot H. Hajan, *A Kinder, Gentler IRS*, L.A. LAW., Dec. 1998, at 28; Wm. Brian Henning, Comment, *Reforming the IRS: The Effectiveness of the Internal Revenue Service Restructuring and Reform Act of 1998*, 82 MARQ. L. REV. 405 (1999). The connection to this legislation is notable in light of Albiston's finding about the particular precedential value of cases interpreting a rights-based statute in the immediate aftermath of the statute's passage. *See supra* Sections I.D, I.E.

316. *Higbee*, 116 T.C. at 446.
317. *Id.*
318. *Id.* at 448.
319. No. 14996-17S, 2019 Tax Ct. Summary LEXIS 23 (Aug. 22, 2019).
320. *Id.* at *1–2.
321. *Id.* at *1–3.
322. *Id.* at *3.
323. *Id.*
324. *Id.* at *1, *9–11.
325. *Id.* at *11.

few (sideways) spillover precedents involve fact patterns that correspond with the fact patterns found in subsequent pro se cases.

In *Pavia v. Commissioner*,[326] for instance, Orelia Pavia was a school bus driver who earned approximately $1,100 a month and lived with her sister and her sister's two children, neither of whom received support from their father.[327] Ms. Pavia's sister's sole income came from occasionally cleaning houses.[328] The household also received help from the Supplemental Nutrition Assistance Program, which paid 70% of the costs of feeding the household, and Medicaid, which paid for each child to receive two teeth cleanings in 2005, the tax year in question.[329] On her 2005 return, Ms. Pavia claimed dependency exemption deductions along with other tax benefits.[330] For Ms. Pavia to take the dependency exemptions, she had to pass the statutory "support test" and establish that the children themselves did not provide over half of their economic support for the year.[331] The case went to tax court, where Ms. Pavia appeared pro se.[332] The tax court held that the public benefits were not self-provided support from the children and thus did not count against her for purposes of the support test.[333]As a result, Ms. Pavia could take the dependency exemptions.[334]

The facts in *Kaviro v. Commissioner*[335] are similar to those in *Pavia*. Mr. Kaviro earned wages of $10,734 and $16,975 in 2014 and 2015, respectively.[336] He had six children, three of whom lived with him during the relevant years.[337] The children received public assistance, including the Supplemental Nutrition Assistance Program and Medicaid.[338] Mr. Kaviro took, among other tax benefits, dependency exemptions.[339] The case went to tax court, where he appeared pro se.[340] Relying on *Pavia*, the court ruled in Mr. Kaviro's favor, holding that the public assistance did not count against him for the purposes of the support test, which he otherwise met.[341]

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326. 96 T.C.M. (CCH) 398 (2008).
327. *Id.* at 399.
328. *See id.*
329. *See id.*
330. *Id.*
331. *Id.* at 399–400.
332. *Id.* at 398.
333. *Id.* at 400.
334. *Id.*
335. Nos. 26634-16S, 6266-17S, 2018 Tax Ct. Summary LEXIS 58 (Dec. 6, 2018).
336. *Id.* at *3.
337. *Id.* at *2.
338. *Id.* at *2–3.
339. *Id.* at *9.
340. *Id.* at *1
341. *Id.* at *10.

A further example of a spillover precedent that originated from another pro se case shows the same kind of factual overlap. In *Rowe v. Commissioner*,[342] Cynthia Rowe lived with her two young children until June of 2002 when she was arrested.[343] She supported herself with wages and public benefits and claimed an earned income tax credit (EITC) for the year.[344] Taking the EITC requires the taxpayer to have "share[d] the same principal place of abode for more than half the taxable year."[345] The IRS denied the credit, stating that Ms. Rowe did not satisfy the requirement because she was in jail from June 5 onwards.[346] The case went to tax court, where Ms. Rowe appeared pro se.[347] The court disagreed with the IRS's interpretation, holding that pre-conviction incarceration is only a temporary absence from home.[348] As a result, Ms. Rowe still met the residency requirement and qualified for the EITC.[349]

Binns v. Commissioner[350] presented similar facts. Daniel Binns lived with his girlfriend and their child.[351] He had worked for an event rental company until he was incarcerated in January 2013.[352] Even while he was incarcerated, he used a tax refund, some savings, promise of future work for his landlord, and public benefits to support his family.[353] Upon his release in November 2013, he earned $11,000 for small apartment-related tasks for his landlord.[354] He then claimed the EITC for the year, which the IRS denied.[355] Mr. Binns appeared pro se in tax court on the issue, and the court, relying on *Rowe*, ruled in his favor.[356]

As spillover precedents, cases like *Rowe* and *Pavia* are especially valuable for pro se litigants. This is so because these cases offer applicable law *and* similar fact patterns. The taxpayers in *Pavia* and *Rowe* were situated in legal and factual circumstances closely analogous to those in which future pro se litigants (such as Mr. Kaviro and Mr. Binns) are likely to find themselves. In contrast, a case involving a well-resourced litigant with money to hire a lawyer could scarcely have created a precedent in the vein of *Pavia* because the court holding concerned public benefits.

342. 128 T.C. 13 (2007).
343. *Id.* at 14.
344. *Id.* at 14–15.
345. *Id.* at 15.
346. *Id.* at 15–16.
347. *Id.* at 13.
348. *Id.* at 16, 19–20.
349. *Id.* at 20.
350. No. 1781-15S, 2016 Tax Ct. Summary LEXIS 89 (Dec. 22, 2016).
351. *See id.* at *2.
352. *Id.*
353. *Id.* at *2–3.
354. *Id.* at *4.
355. *Id.*
356. *Id.* at *1, *8.

Similarly, because the EITC has income ceilings, cases interpreting the EITC statute also are unlikely to feature represented parties.[357]

Even so, despite the advantages of pro se spillover precedents like *Rowe* and *Pavia*, these cases lack the extensive discussion of legal arguments and relevant rules that make cases like *Graev*, *Martin*, *PepsiCo*, *Neonatology Associates*, and *Tufts* such useful spillover precedents. Many of the pro se cases are relatively short in length, and they contain no details about either the taxpayer's legal argument or the IRS's.[358] Nonetheless, there is one type of spillover precedent that involves *both* facts potentially relevant to subsequent pro se litigants *and* a litigation environment conducive to the development of detailed legal arguments. That is the clinic case.

Low-income taxpayer clinics (LITCs) are becoming an increasingly important part of the landscape for under-resourced taxpayers. As part of the IRS Restructuring and Reform Act of 1998, Congress first authorized funding for the LITC Program.[359] In 1999, the IRS created the LITC Program Office, now part of the Office of the Taxpayer Advocate, to award and administer the grants and oversee LITCs and prospective applicants.[360] New clinics join each year, and the program continues to expand coverage around the country.[361] Under the 2015 Taxpayer Bill of Rights, taxpayers who cannot afford to hire a representative have the right to be informed about their potential eligibility for assistance from an LITC.[362] At least 90% of the taxpayers whom the LITC represents must have a household income of less than 250% of the Federal Poverty Guidelines.[363] "In addition, when an LITC represents a taxpayer, the dollar amount in controversy for any tax year generally must not exceed . . . the limit on eligibility for special small case procedures in the U.S. tax court (currently $50,000)."[364]

LITCs must engage in three different activities: providing pro bono representation on clients' behalf in tax disputes with the IRS; educating clients about their rights and responsibilities as taxpayers; and identifying

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357. I.R.C. § 32(b)(1)–(2).

358. *Compare Pavia v. Comm'r*, 96 T.C.M. (CCH) 398 (2008) (spanning fewer than 3 full pages of the T.C.M. (CCH) Reporter), *with PepsiCo P.R. v. Comm'r*, 104 T.C.M. (CCH) 322 (2012) (spanning 34 pages of the T.C.M. (CCH) Reporter).

359. *See* IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3601, 112 Stat. 685, 774 (1998) (codified at I.R.C. § 7526).

360. TAXPAYER ADVOC. SERV., INTERNAL REVENUE SERV., LOW INCOME TAXPAYER CLINICS: 2022 GRANT APPLICATION PACKAGE AND GUIDELINES 3 (2021), https://www.irs.gov/pub/irs-pdf/p3319.pdf [https://www.irs.gov/pub/irs-pdf/p3319.pdf].

361. *Id.*

362. *Id.* at 1.

363. *Id.*

364. *Id.*

and advocating for issues that impact these taxpayers.[365] Tax disputes may include litigation.[366] In fact, the tax court sends information about clinics to pro se litigants.[367] The guide for unrepresented litigants,[368] as well as the tax court website,[369] also direct potential pro se parties to LITCs. Additionally, the tax court maintains a procedure called "calendar call" at which authorized clinics and bar pro bono programs maintain a presence at the court and offer assistance.[370]

Four clinic cases appeared in the set of tax spillover precedents.[371] Unsurprisingly, they are all relatively recent, litigated since the funding and growth of LITCs. These cases were particularly likely to be cited downstream by the pro se cases, with a mean of 2.25 pro se citations as compared to 1.4 pro se citations for the non-clinic cases, or a median of two citations versus one for non-clinic cases.

One of these four cases, *Pullins v. Commissioner*,[372] with 82 cites (including five among the pro se cases),[373] seems to be approaching general-precedent status. The case is another innocent spouse relief case. In it, Kathryn Sedo, the prominent director of the LITC at the University

365. *Id.*

366. *See id.* at 6.

367. U.S. TAX CT., DO YOU NEED HELP WITH YOUR TAX COURT CASE?, https://www.ustaxcourt.gov/resources/clinics/stuffer_notice.pdf [https://perma.cc/M9ML-QGBB] (last visited Sept. 19, 2021).

368. U.S. TAX CT., GUIDANCE FOR PETITIONERS 2, https://www.ustaxcourt.gov/resources/taxpayer/Guidance_for_Petitioners.pdf [https://perma.cc/Q5Y9-N6NK] (last visited Sept. 19, 2021).

369. *Clinics and Pro Bono Programs*, U.S. TAX CT., https://www.ustaxcourt.gov/clinics.html [https://perma.cc/USH6-RDT8] (last visited Sept. 19, 2021).

370. *Id.*

371. *Ibrahim v. Comm'r*, 788 F.3d 834 (8th Cir. 2015) (holding that single returns and head-of-household returns erroneously filed by married taxpayers do not constitute separate returns); *Knez v. Comm'r*, 114 T.C.M. (CCH) 444 (2017) (citing *Ibrahim*, 788 F.3d at 834); *Camara v. Comm'r*, 149 T.C. 317 (2017) (same). *Pullins v. Comm'r*, 136 T.C. 432 (2007) (for a variety of propositions related to innocent spouse relief); *Henry v. Comm'r*, No. 20138-16, 2019 Tax Ct. Memo LEXIS 22 (Mar. 27, 2019) (citing *Pullins*, 136 T.C. at 432); *Heedram v. Comm'r*, No. 679-17, 2018 Tax. Ct. Memo LEXIS 26 (Mar. 7, 2018) (same); *Neitzer v. Comm'r*, 116 T.C.M. (CCH) 309 (2018) (same); *Hudson v. Comm'r*, No. 20015-15S, 2017 Tax Ct. LEXIS 7 (Feb. 8, 2017) (same); *Boyle v. Comm'r*, No. 4666-09, 2016 Tax Ct. Memo LEXIS 86 (May 2, 2016) (same). *Bot v. Comm'r*, 353 F.3d 595 (2003) (8th Cir. 2003) (stating income "derived" from an activity implies a nexus between the income and the activity). *McCulley v. Comm'r*, 73 T.C.M. (CCH) 3163 (1997) (stating more or less the same proposition as *Cheek v. United States*, 498 U.S. 192 (1991)); *Mathews v. Comm'r*, 116 T.C.M. (CCH) 580 (2018) (citing *McCulley*, 73 T.C.M. (CCH) at 3163).

372. 136 T.C. 432 (2017).

373. *See Pullins v. Commissioner*, HEINONLINE, https://heinonline-org.ezproxy.library.wisc.edu/HOL/CaseLaw?cid=8742495&native_id=8742495&cite=Pullins%20v%20Commissioner,%20136%20T.C.%20432%20(T.C.%202011)&rest=18742495&collection=journals (last visited Sept. 19, 2021).

of Minnesota Law School,[374] represented taxpayer Suzanne Pullins.[375] Ms. Pullins had been married to a construction worker who omitted some construction income from his 1999, 2002, and 2003 tax returns.[376] The two then divorced, and soon after, she became seriously disabled.[377] The IRS denied Ms. Pullins's request for innocent spouse relief because she did not request it within two years of the IRS's first collection activity against her.[378] Two issues emerged in the case, both discussed at length in the tax court's opinion. The first issue concerned whether the amount for which Ms. Pullins was ultimately liable should have depended on what she computed for herself based on married-filing-separately status or on an allocation of the amount her husband computed.[379] The tax court ruled in favor of Ms. Pullins's calculation.[380] The second issue in dispute was a complex administrative law issue about the regulations that imposed the two-year deadline for relief.[381] Here the tax court found this regulation invalid.[382] The court granted Ms. Pullins relief on the merits of her case and, not fully bound by IRS guidance in the area, in part based on her disability at time of trial.[383]

C. Spillover Precedents and Existing Scholarship

Studying the spillover precedent cases described above contributes to the existing scholarship reviewed in Part I in two ways. First, the cases suggest circumstances in which pro se litigants win. As discussed above, the extensive literature on pro se parties focuses almost exclusively on pro se losses and on the many obstacles unrepresented parties face.[384] As a result, scholars have not been able to answer the question, When do pro se

374. Keith Fogg, *Kathryn Sedo Retiring Ending Tax Clinic Links to Early Formation*, PROCEDURALLY TAXING (May 31, 2016), https://procedurallytaxing.com/kathryn-sedo-retiring-ending-tax-clinic-links-to-early-formation/ [https://perma.cc/9C3E-LYR5].

375. *Pullins*, 136 T.C. at 433.

376. *Id.* at 434–35.

377. *Id.* at 436.

378. *Id.* at 433.

379. *Id.* at 440.

380. *Id.*

381. *Id.* at 441.

382. *Id.*

383. *Id.* at 454–55. In fact, the court's weighing of the innocent spouse factors going beyond the IRS guidance (in particular, weighing physical health at the time of trial) has become one of the more popular reasons to cite the case. *See, e.g.*, *Heedram v. Comm'r*, No. 679-17, 2018 Tax. Ct. Memo LEXIS 26, at *5, *14 (Mar. 7, 2018); *Henry v. Comm'r*, No. 20138-16, 2019 Tax Ct. Memo LEXIS 22, at *16 (Mar. 27, 2019); *Boyle v. Comm'r*, No. 4666-09, 2016 Tax Ct. Memo LEXIS 86, at *21 (May 2, 2016).

384. *See, e.g.*, Park, *supra* note 61.

parties win? This Article proposes one answer: when they have access to a spillover precedent.

The patterns revealed in the caselaw further refine that answer. First, the majority of the spillover tax precedents were from cases in which the taxpayer had a lawyer.[385] As a result, pro se parties win when their issues are ones that represented parties have previously litigated. Second, because the issues faced by both pro se and represented parties were often procedural, another circumstance in which pro se parties win is when their issues are procedural.[386] Conversely, the patterns above show that fact-specific, substantive spillover precedents are harder to find. As a result, pro se parties may lose more often when their issues are highly fact-dependent or matters of substantive law.

The spillover precedents here align with, and also perhaps add shading to, Galanter's theory about the "haves" and "have-nots" of litigation. Galanter treats "the body of 'precedent' cases—that is, cases capable of influencing the outcomes of future cases—as relatively skewed toward those favorable to" litigation's "haves."[387] To an extent, the spillover precedents I have examined confirm the difficulties that a pro se party faces, particularly in search of cases with similar facts or relevant substantive law. However, what Galanter's theory does not anticipate is that a precedent from a "have" may produce a real benefit for a "have-not."

Yet that dynamic is precisely what spillover precedent allows. As a well-resourced entity, the IRS is a repeat player and (in this sense) a paradigmatic "have"; so, too, are some of the impressively represented parties involved in the cases with spillover effects. Flush with resources, these parties may be able to accrue some of the advantages that Galanter associates with the repeat player.[388] While some of the represented litigants in spillover precedents probably never want to find themselves in tax court again, companies like Pepsi likely will continue to structure their deals to minimize future taxes and may find themselves on the wrong side of the IRS again. In another sense, many taxpayers are repeat players in the tax context even if they do not plan to go back to court: they pay taxes every year. Any favorable precedent they establish may affect future tax liability. For instance, the taxpayers in *Tufts* were real estate developers in an economically troubled community who may have had more than one building subject to a non-recourse loan.[389] In addition, the lawyers in many

385. *See* cases cited *supra* note 371.

386. *See supra* notes 193–99 and accompanying text.

387. *See* Galanter, *supra* note 57.

388. *Id.* at 97–103.

389. *See Comm'r v. Tufts*, 461 U.S. 300 (1983); David N. Narciso, Comment, *Some Reflections on* Commissioner v. Tufts*: Mrs. Crane Shops at Kirby Lumber*, 35 RUTGERS L. REV. 929, 929–30 (1983).

of the spillover precedents are themselves repeat players, often litigating the same issues over and over again.[390] In the case of a promoted transaction like the one in *Graev*, the lawyers may see virtually the same facts multiple times.[391] For them, the procedural win in a case like *Graev* provides a tool to use in any case in which the IRS tries to apply a penalty. Spillover precedents distribute some of the advantages that these "haves" attain to various "have-nots."

By way of qualifications, I would concede that my findings are only a narrow window into the pro se experience, even just in regard to tax court. After all, precedent is only a small part of this story. Multiple factors go into the result in any given case. Pro se litigants who win presumably benefit from all sorts of intersecting privileges, many systemic and many unearned. They may have the advantages of whiteness, of education, of class, of income, of ability, and of other indicia of both status and comfort in a courtroom setting. All of those variables affect what happens at trial, but they also impact how well these litigants are able to follow the complicated tax law in the first place and to take the many steps necessary even to wind up in tax court.[392] Presumably, all of these powerful social and political forces have much to do with understanding the circumstances in which pro se parties win, and the excellent empirical literature described above will help future researchers untangle the different threads.

What is more, this project is purely descriptive. It draws no causal conclusions. Answering the question of *why* pro se litigants win is a much more empirically challenging endeavor. To do so would require additional information about these cases, starting with basic demographic data about the litigants and including details about the judges, the amount of money at stake, the state of legal development in the relevant areas, and so forth. Unfortunately, very little of this data is available in the tax court records. Nonetheless, despite its limits, this study points to one potential cause of success that researchers can continue to explore as they add to their list of questions to investigate about the pro se experience.

The second contribution of this study, in addition to filling a gap in the literature about pro se wins, is what it adds to the existing scholarship on precedent and its functions. Conceiving precedent as a valuable resource whose benefits flow to pro se parties builds on Landes and Posner's view by introducing a distributional angle. Precedent is a public good whose production needs incentivizing;[393] and, like many public

390. *See, e.g.*, *Graev v. Comm'r*, 149 T.C. 485, 485–86 (2017); *Tseytin v. Comm'r*, 110 T.C.M. (CCH) 617 (2017).

391. *Graev v. Comm'r*, 140 T.C. 377, 381, 397 (2013).

392. *See* Michael Correll, *Finding the Limits of Equitable Liberality: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863, 866, 868, 872 (2011).

393. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 248, 261 (1979).

goods, its value spreads unevenly.[394] Considering the potential spillover effects of precedent highlights the fact that those effects are different for different litigants. Galanter holds that precedent may allow the rich to get richer in terms of litigation advantages.[395] But precedent also spills downward, conferring favors on some of the not-so-rich.[396] As my findings suggest, those favors, too, are not distributed evenly. For instance, both pro se litigants with procedural issues and pro se litigants with generalizable facts not rooted in their economic circumstances may reap disproportionate benefit from the store of precedent.

Conceptualizing precedent's spillover benefits as distributable goods also raises the question of *which* of precedent's benefits spill over and flow downward and how they do so. The precedential benefit that this Article has discussed so far is the one that accrues to an individual litigant from a favorable rule that raises her chances of a win. Separate from that benefit are at least four other general advantages of precedent. First, precedent provides predictability.[397] Predictability helps individual parties, but it also helps people—here, taxpayers—who will never litigate. For instance, *Torrisi* helped not only Jeffrey Heedram, but also unnamed, unsophisticated taxpayers whose spouses only tell them part of the story about having paid a tax bill. *Torrisi* makes what will happen to these taxpayers more predictable before any dispute even starts, as well as after the IRS opens an audit. In fact, considering spillover precedents as sources of predictability enlarges the pool of precedents that we might think of as offering spillover benefits. This Article classified as spillover precedents cases on which pro se taxpayers relied for favorable propositions. However, unfavorable precedents also offer predictability. If the tax court told Ms. Torrisi that she was liable for the taxes for which she wrote a partial check, future taxpayers who pay part of their tax bills would at least know that, in so doing, they had precluded innocent spouse relief.

A second frequently identified benefit of precedent is equality.[398] Legal scholar Nina Varsava cites Benjamin Cardozo on this point: "If a group of cases involves the same point, the parties expect the same decision. . . . If a case was decided against me yesterday when I was a

394. *See id.* at 261.

395. Galanter, *supra* note 57, at 103–04.

396. *See* Sections II.A, II.B.

397. Arthur Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 58 (1934). *See also* Gardner, *supra* note 41, at 1633–34.

398. Varsava and Gardner also consider the notion of "consistency" as a benefit of precedent that is perhaps separate from, but related to, equality, as well as, in Varsava's case, to predictability. *See* Gardner, *supra* note 41, at 1633; Varsava, *supra* note 67, at 75–76.

defendant, I shall look for the same judgment today if I am plaintiff."[399] Varsava adds that "[t]he equality justification is often described in terms of comparative or formal justice: regardless of whether people are otherwise treated badly (substantively unjustly), if they are treated equally, then justice in the formal sense is served."[400]

Does precedent's equality-enhancing capacity spill over? Arguably it does, but again, not evenly. The equality function of precedent is what creates the surprising result that PepsiCo's effort to preserve its $350 million tax deal also helped Floetta Bullock and her stolen pickup truck. The precedential weight of *PepsiCo* means that neither a multibillion-dollar corporation nor a low-income theft victim can enter into a debt contract without intending to do so. The equality benefit can also spill over to non-litigants: formally speaking, future low-income taxpayers who realize they have unwittingly taken on debt need to struggle with that debt only to the extent future corporations do. However, again, it is the precedent itself that allows formally equal treatment between PepsiCo and Floetta Bullock. For Floetta Bullock to be treated like a multibillion-dollar corporation, PepsiCo and its lawyers had to litigate their case.[401]

A third benefit of precedent is constraint on judicial power.[402] Like predictability and equality, this benefit also spills over, even to potential non-litigants. Spillover precedents prevent judges from exercising unrestrained discretion on future parties. For example, after *Neonatalogy Associates*, the tax court must take into account good faith reliance on a tax professional for the purposes of the accuracy-related penalty. Varsava quotes legal scholar Laurence Goldstein as saying that "if courts generally were entitled to disregard precedent, 'then inconsistencies, abuses and injustices—in short, chaos—would indeed very likely ensue.'"[403] If future litigants appear in court having relied on their preparer, judges cannot disregard that information as irrelevant. Upon learning that a taxpayer used a preparer, the judge will try to determine whether the taxpayer reasonably relied on the preparer in good faith rather than rely solely on her personal views about the value of preparers. This information is of course also useful to taxpayers who employ preparers and will never go to court and even to preparers themselves.

399. Varsava, *supra* note 67, at 72 (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33–34 (2010) (quoting W.G. MILLER, THE DATA OF JURISPRUDENCE 355 (1903))).

400. Varsava, *supra* note 67, at 72.

401. Equality is not always a benefit to the pro se litigant. For instance, a pro se litigant can suffer from an adverse precedent that a corporation has established.

402. *Id.* at 76–77.

403. *Id.* at 77 (quoting Laurence Goldstein, *Some Problems About Precedent*, 43 CAMBRIDGE L.J. 88, 106 (1984)).

A fourth benefit of precedent is really not for the litigants but for the courts themselves: legitimacy.[404] To quote Maggie Gardner quoting Frederick Schauer quoting Dave Barry, "this is the 'I'm not making this up' use of precedent."[405] Gardner argues that judges rely on even non-binding precedent to confer legitimacy.[406] As she explains,

> [A] judge might reason independently to a conclusion but then include what is essentially an "accord" citation to assure the parties that the conclusion is sound. Or a judge might include citations to cases that she considered in order to be transparent about her process of decision formation, even if the case citation is not required for decision justification.[407]

Admittedly, it is harder to see whether this benefit spills over. Do future pro se litigants or non-litigating taxpayers gain an advantage from judges viewing their own decisions, or their court's decisions, as legitimate? Perhaps, but mostly in ways connected with the first three advantages. For instance, judges may be more likely to rely on cases they view as legitimate. As a result, taxpayers can use those cases to anticipate outcomes more accurately, thereby benefiting from greater predictability. Also, as a result, taxpayers who face the same legal questions as well-resourced taxpayers will be more likely to get the same legal treatment and thus greater equality. In addition, pro se litigants might benefit from participating in a system with greater legitimacy. As a tool by which to distribute benefits, however, precedent is perhaps more powerful when it directly affects litigants.

III. NORMATIVE IMPLICATIONS

The previous Part developed the concept of spillover precedent, uncovered patterns in how it works, and offered examples. It then used the concept to consider when pro se litigants win, as well as to contribute to theories of precedent. Part III now turns to some of the normative implications of spillover precedent.

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404. *Id.* at 78.

405. Gardner, *supra* note 41, at 1634 (quoting Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1950 (2008) (quoting DAVE BARRY, DAVE BARRY IS NOT MAKING THIS UP (2010))).

406. Gardner, *supra* note 41, at 1634–35; *see also* Schauer, *supra* note 405, at 1950.

407. Gardner, *supra* note 41, at 1634–35.

A. Spillover Precedent Has Negative Consequences

The fact that pro se taxpayers must rely on the spillover effect of other precedents raises a number of concerns. These concerns stem largely from the fact that the majority of the spillover precedents here were cases in which the original taxpayer had a lawyer. As a result, the legal fates of taxpayers who have few resources rest on the fates of taxpayers who do have resources. Earlier literature has focused on the obstacles pro se litigants face, and here is yet another.

One way that spillover precedent disadvantages pro se taxpayers is by creating what I call "precedent deserts." A precedent desert is a legal topic or issue on which there is little to no relevant precedent.[408] If no one has litigated an issue, pro se taxpayers have no precedent on it to use. Well-resourced taxpayers are the ones likely to litigate issues.[409] However, pro se taxpayers often face factual and legal circumstances that no well-resourced taxpayer has ever encountered. In particular, low-income, pro se litigants may lose more often when their fact-specific or substantive issues arise because of their lack of resources.[410] The spillover precedents that I examined above included dozens of penalty cases in which the relevant law affects rich and poor alike. In contrast, the spillover precedents included only a handful of cases that involved the earned income tax credit statute and that considered how public benefits relate to the tax code.

For instance, as I have discussed in earlier work, the federal government is increasingly using the tax code to fight poverty.[411] Some anti-poverty tax policy takes the form of universal or near-universal programs like the child tax credit or the child care credit.[412] Some of the policy also takes the form of incentives for third parties to pursue in order to address poverty, like the low-income housing credit or the controversial opportunity zones.[413] But some of the anti-poverty policy in the tax code takes the form of benefits targeted specifically at lower-income taxpayers.[414] These programs fall into precedent deserts.

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408. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 581 (1987).

409. Robert M. Howard, *Wealth, Power, and the Internal Revenue Service: Changing IRS Audit Policy Through Litigation*, 82 SOC. SCI. Q. 268, 371 (2001).

410. *See* Lederman & Hrung, *supra* note 95, at 1257, 1281; Levy, *supra* note 73, at 1829–30, 1838–39.

411. *See generally* Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791 (2014) (describing all of the ways the tax code fights poverty, most of them new to the past three decades).

412. *Id.* at 804–07.

413. *Id.* at 810–20. *See also* Michelle D. Layser, *A Typology of Place-Based Investment Tax Incentives*, 25 WASH. & LEE J. C.R. & SOC. JUST. 403, 449–52 (2019) (discussing the Opportunity Zones program).

414. Tahk*, supra* note 411, at 797–803.

The EITC is the best-known example of such a program.[415] Well-resourced litigants do not bring cases about a provision for which they do not qualify in the first place. As a result, teams of lawyers have no reason to be in tax court regularly making extended arguments about why judges should interpret the EITC statute in their clients' favor. In fact, when an EITC case appears in tax court, the IRS may have a lawyer and the taxpayer may not.[416] Unsurprisingly, the statistics on the success of these pro se litigants suggest that the taxpayer will be more likely to lose the issue.[417] As a result, a stock of pro-government precedents will build up. The pile of pro-taxpayer ones will be smaller. Looking for favorable precedents, a future judge or lawyer for a low-income taxpayer may come up dry. My own research revealed only a couple of EITC spillover precedents. Along similar lines, anecdotal evidence suggests that IRS lawyers are particularly likely to settle cases with low-income taxpayers if any grounds exist on which to do so, in which case relevant precedent may not develop.[418] In this way, the law on the EITC, as Galanter and Albiston would expect, may tilt away from low-income taxpayers.[419]

In contrast, take the tax penalty cases. The IRS attempts to assess penalties on well-resourced and under-resourced taxpayers alike.[420] My research for the current study identified a number of penalty cases. Given this relative stockpile, a taxpayer, lawyer, or judge will have plenty of options when looking to support the proposition that a confused taxpayer should not face the accuracy-related penalty. In fact, a taxpayer or lawyer hunting for relevant precedent on that topic will be able to sort among a stack of cases and pick the ones that provide the best matches for facts in the litigant's case. Tax law is baffling enough that even major corporations and wealthy individuals make good faith but unsuccessful efforts to comply with the law all the time.[421] Accordingly, even the best tax lawyers in the country have reason to be in tax court all the time arguing for taxpayer-friendly law on this point. Similarly, those same lawyers often devote their enormous resources to convincing tax court judges to interpret the Internal Revenue Code's penalty provisions in taxpayer-friendly

415. *Id.*

416. *See* Lederman & Hrung, *supra* note 95, at 1237; Tahk, *supra* note 411, at 836, 845.

417. Lederman & Hrung, *supra* note 95, at 1257.

418. E-mail from Michelle Lyon Drumbl, Dir., Washington & Lee Sch. of L. Tax Clinic, to Susannah Tahk (March 5, 2021, 3:59 PM) (on file with author). *See also* Janet Spragens & Nancy Abramowitz, *IRS Modernization and Low-Income Taxpayers*, 53 ADMIN. L. REV. 701, 706, 711 (2001).

419. *See supra* Section I.D.

420. *See supra* notes 285–96 and accompanying text.

421. *See supra* notes 285–96 and accompanying text.

ways.[422] Perhaps, as Galanter would predict, those lawyers and their clients are engaging in the kind of strategic law development work that is so common among the "haves."[423] They may be settling cases likely to produce unfavorable penalty law and litigating ones likely to result in law that will help their clients down the line. As a result, the penalty law may tilt in taxpayers' direction or at least achieve some balance between taxpayers and the IRS.

Attempting to litigate in a precedent desert poses challenges for the already disadvantaged pro se party.[424] Pro se litigants may already lack the resources, training, and expertise to conduct their own legal research.[425] Even if they are able to gain access to a legal search engine, even if they are able to figure out how to look for relevant caselaw, even a well-run search may come up empty. This problem may be particularly severe in tax, which is a relatively complicated area of law.[426] An inexperienced legal researcher may be unable to tell from reading a complex statute what the areas of ambiguity are. Judges often have room to interpret much of the statutory language, but without caselaw as a guide, the non-lawyer may assume that all of the terms have settled meanings. This is in fact one of the lessons that tax professors often teach: when a student asks what a word in the Code means, the answer may well be that multiple understandings are reasonable. The advocate's job, the professor explains, is to argue for the one most favorable to her case.

Caselaw can help guide a party trying to make legal arguments over interpretable terms by pointing out areas where similarly-situated parties have articulated these interpretations. Lacking knowledge of caselaw, a pro se litigant would have enough difficulty in navigating on her own the chain of statutory cross-references necessary to understand that the EITC statute requires the taxpayer and her children to share the same principal

422. *See, e.g.*, Michelle Lyon, *Tax Attorneys as Defenders of Taxpayer Rights*, 91 TEMP. L. REV. 813, 820–21 (2019).

423. *See* Galanter, *supra* note 57, at 99–100.

424. Unfortunately, while litigating in an area without relevant precedent is challenging, we have no way to determine whether, in any given case, a losing pro se taxpayer won *because* of a lack of precedent. In doing this research, I examined about fifty recent pro se losses, and in them, it appeared as if many evident factors may have contributed to the loss, among them, the complexity of the relevant law, the taxpayer's confusion in the face of difficult-to-follow law, the taxpayer's failure to respond to arguments that the IRS made, and so forth. In addition, in any of these cases, invisible factors also may have played a role, for instance, racial discrimination or the presence of relevant facts that the taxpayer did not know to raise (for instance, good faith reliance on the preparer). As a result, while cases without precedent certainly are harder to make, the absence of precedent likely only part of the reason for any given loss in most cases.

425. Dan Gustafson, Karla Glueck & Joe Bourne, *Pro Se Litigation and the Costs of Access to Justice*, 39 WM. MITCHELL L. REV. 32, 38 (2012).

426. *See, e.g.*, Scott A. Schumacher, *Getting to Yes, Sooner*, PROCEDURALLY TAXING (Sept. 17, 2015), https://procedurallytaxing.com/getting-to-yes-sooner/ [https://perma.cc/HGW5-AJ8M].

place of abode for more than half of the taxable year. However, even if she gets to this point, she might reasonably assume that "same principal place of abode" has a fixed meaning and that being in jail for most of the year is outside of that meaning. *Rowe*, however, signals that "same principal place of abode" is a term that courts can interpret in a variety of ways.[427] And then *Rowe* also supports the pro se litigant in arguing that she still meets the standard if she was in jail for most of the year.[428]

The same sorts of dynamics also influence how judges come to their conclusions. A judge can be sympathetic to a pro se litigant, but precedent checks the extent to which the judge can act on those sympathies. If *Rowe* had originally been decided the other way, the judge in *Billings* may have wanted to help Daniel Billings, but that judge would have been constrained in doing so had the earlier case prohibited interpreting the "principal place of abode" requirement to allow jail time. Or, to take the hypothetical of a judge who is otherwise genuinely undecided in a case, the existence of pertinent precedent may be what moves her in one direction or the other. Evaluating the weight of precedent is (presumably) much of what judges do.[429] If one party to the case has a lot of relevant precedent and the other does not, judges will be inclined to favor the side that does.[430]

In their research, McAlister and Gardner identify forces at play that may exacerbate the effects of what I am calling precedent deserts. McAlister highlights the troublesome connection between unpublished decisions and pro se cases.[431] She argues that "a perceived increase in prisoner and pro se litigation precipitated the development of the unpublished decision in at least some judicial circuits."[432] As a result of this trend, "pro se litigation continues to play a role in the use of unpublished decisions."[433] Turning to the data, McAlister continues: "pro se appeal volume positively correlates with the ever-increasing reliance on unpublished decisions . . . . As the percentage of pro se litigation as a fraction of the whole grows, so, too, does the unpublication rate."[434] Because a lack of published decisions means a paucity of precedent, precedent deserts may be particularly likely to emerge in exactly the areas, both geographic and substantive, where there are a lot of pro se litigants.

Similarly, Gardner describes the problem of "analogical heuristics."[435] She explains what judges do as "[r]easoning by analogy to

427. *Rowe v. Comm'r*, 128 T.C. 13, 16–17 (2007).

428. *Id.* at 19.

429. Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F., no. 1, 1999, at 5, 13.

430. Gardner, *supra* note 41, at 1663–66.

431. McAlister, *"Downright Indifference," supra* note 149, at 534–35.

432. *Id.* at 554.

433. *Id.* at 555.

434. *Id.* at 557.

435. Gardner, *supra* note 41, at 1658–59.

prior cases," which, she says, "is a form of inductive reasoning: a process of generalizing from a number of instances to discern a potential rule."[436] "Analogical heuristics," then, "are decisionmaking short cuts that simplify analogical reasoning into more binary and definitive answers."[437] As judges and their clerks take these shortcuts, errors accumulate, often in "one substantive direction."[438] Gardner gives the example of the "*rule of thumb*, which turns the treatment of facts in prior cases into rules for how such facts should be treated in future cases."[439] For instance, one such "rule" in the securities law context is "that nondisclosures or misstatements are immaterial if they only relate to a small portion of a corporation's overall business."[440] As she explains, analogical heuristics tend to favor the side that has more precedent:

> [I]t matters which decisions are more likely to be written (and thus available for later judges to cite). With dispositive motions, like motions to dismiss and summary judgment motions, judges are incentivized (due to immediate appellate review) to issue written decisions when they grant the motion. Thus if one side more often brings a dispositive motion, and decisions are more likely to be written up when that side wins, analogical heuristics will tend to develop in the side's favor, increasing the hurdles that the non-moving party must overcome.[441]

The same reasoning applies in the case of precedent deserts. Take *Skaggs v. Commissioner*.[442] In 2008, Kevin Skaggs "was sentenced to 310 months in prison after being convicted of several felony offenses."[443] From mid-2012 to mid-2016, Mr. Skaggs lived in the Larned State Hospital, which at the time housed a mental health facility for people convicted of crimes.[444] Mr. Skaggs earned income from performing part-time custodial duties for the hospital.[445] He filed for an EITC of $224, which the IRS denied because the statute prevents taxpayers from taking the credit for income earned "while an inmate in a penal institution."[446] The case went

436. *Id.* at 1658.
437. *Id.*
438. *See id.* at 1663.
439. *Id.* at 1659.
440. *Id.*
441. *Id.* at 1663 (footnote omitted).
442. 148 T.C. 367 (2017).
443. *Id.* at 367.
444. *Id.* at 368.
445. *Id.*
446. *Id.* at 368–69; I.R.C. § 32(c)(2)(B)(iv).

to tax court, where Mr. Skaggs appeared pro se.[447] He argued that while at Larned, he had been a patient rather than an inmate.[448]

Had there been an earlier favorable case, perhaps involving a person who likewise was serving a sentence in a mental health facility but who had a lawyer, Mr. Skaggs would have had precedent on which to base his argument. Or perhaps had there been several cases involving hybrid health care/correctional facilities, and had at least some of these cases been taxpayer wins, a rule of thumb would have developed about the amount of correctional activity required to trigger the statutory ban on the credit. As it was, however, the tax court cited no caselaw favorable to Mr. Skaggs. Instead, the court cited two pro se losses, drawn from outside of the health care context, in which EITC claimants whose earned income came from other semi-correctional settings were denied their credits.[449] Mr. Skaggs lost his case.[450]

Along similar lines, the case of *Perez v. Commissioner*[451] involved circumstances that seem as if they would recur frequently—frequently, that is, in the lives of poor, unrepresented taxpayers. The case involved Domingo Perez, who in 1996 was a restaurant worker and received $8,151 in wages.[452] He lived in an apartment with his soon-to-be wife, her sister's son Tirone, and other family members.[453] Mr. Perez claimed the EITC with regard to Tirone, which the IRS denied.[454] The case went to tax court, where Mr. Perez appeared pro se.[455] The IRS conceded that Mr. Perez supported Tirone and that Tirone satisfied all of the statutory tests except for the "relationship test."[456] Tirone was not related to Mr. Perez, which meant that, for Mr. Perez to take the EITC for him, Tirone had to be an "eligible foster child."[457] Under the statute at the time, the term "eligible foster child" meant an individual whom the taxpayer "cares for as his own child and who has the same principal place of abode as the taxpayer for the taxpayer's entire taxable year."[458] Tirone and Mr. Perez shared the same apartment all year.[459] However, the court concluded that "there is not sufficient evidence in this record indicating that [Mr. Perez] cared for

447. *Skaggs*, 148 T.C. at 367.
448. *Id.* at 368.
449. *Id.* at 371 (citing *Rogers v. Comm'r*, 88 T.C.M. (CCH) 392 (2004); *Wilson v. Comm'r*, 81 T.C.M. (CCH) 1745 (2001)).
450. *Skaggs*, 148 T.C. at 371.
451. 76 T.C.M. (CCH) 1004 (1998).
452. *Id.* at 1005.
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.* at 1006.
457. *Id.*
458. *Id.*; I.R.C. § 32(c)(3)(B)(iii).
459. *Perez v. Comm'r*, 76 T.C.M. (CCH) 1004, 1006 (1998).

Tirone as his own child" because "[t]here were other members of [Mr. Perez's] household, including Tirone's mother, who were available to care for the child."[460]

The decision did not indicate, however, the grounds on which the judge concluded that three adults in the home was too many; nor did it cite any precedent on the point. In contrast, had a previous case found that a member of a multi-adult household could still care for a child as his own, Mr. Perez would have had something on which to base his argument. This seems exactly the sort of situation that, had tax court seen many cases like Mr. Perez's, would have given rise to a rule of thumb. However, even though doubling up living arrangements is common among low-income families,[461] the tax court cited no prior cases that might have provided guidance about what facts might satisfy the "cared for as one's own child" standard. As a result, Mr. Perez found himself operating in a precedent desert and lost his case.[462]

In addition, the concept of spillover precedent raises the possibility of the reverse effect: cases in which unrepresented taxpayers establish negative precedent that affects all taxpayers going forward.[463] For instance, taxpayer rights advocates have highlighted the case of *Lewis v. Commissioner*.[464] In this case, a pro se taxpayer filed a tax form late, and the IRS assessed late filing and payment penalties.[465] The taxpayer submitted a request for penalty abatement, which the IRS denied.[466] The case went to tax court, where the judge held that the taxpayer could not challenge the penalties via a collection due process hearing because the taxpayer had had a "prior opportunity" to dispute these penalties under Internal Revenue Code Section 6330(c)(2)(B).[467] That section states that a taxpayer

> may also raise at [a collection due process hearing] challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of

460. *Id.* After 2004, the statutory language changed, and this is no longer the standard. *See* Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 205(a), 118 Stat. 1166.

461. Natasha V. Pilkauskas, Irwin Garfinkle & Sara S. McLanahan, *The Prevalence and Economic Value of Doubling Up*, 51 DEMOGRAPHY 1667, 1667–68, 1670 (2014).

462. *Perez*, 76 T.C.M. (CCH) at 1006.

463. Thanks to Rob Yablon and Les Book for this point and to the latter for pointing me to the case below.

464. 128 T.C. 48 (2007).

465. *Id.* at 49.

466. *Id.*

467. *Id.* at 53, 62.

> deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.[468]

Advocates believe this case was wrongly decided and have raised significant arguments to that effect.[469] Yet, as tax lawyer A. Lavar Taylor writes on *Procedurally Taxing*, "[b]ecause the taxpayer in *Lewis* was unrepresented, the concepts and arguments discussed in the blog post were not presented to, or considered by, the Court."[470] He adds, "That is most unfortunate, because we are now stuck with a result in Lewis [sic] that is in my view incorrect, barring a change of heart by the tax court, with or without a prompting by a Circuit Court of Appeals."[471]

Precedent deserts and reverse spillover effects also highlight another problem that emerges from pro se reliance on spillover precedent. Not focusing specifically on tax law, legal scholars have long recognized the pathologies that arise from promoting the interests of the powerless only when those interests dovetail with those of the powerful. Derrick Bell famously called this phenomenon "interest convergence."[472] Of *Brown v. Board of Education*,[473] Bell wrote, "the decision in *Brown* to break with the [Supreme] Court's long-held position on these issues cannot be understood without some consideration of the decision's [positive] value to whites."[474] After 1954, however, when those interracial interests started to diverge, *Brown* was left on shaky ground.[475] As Bell explained, "Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized."[476] Drawing out the implication of what happened with *Brown*, Bell continued: "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites."[477]

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468. *Id.* at 52; I.R.C. § 6330(c)(2)(B).

469. *See, e.g.*, A. Lavar Taylor, *When Can Taxpayers Challenge the Merits of the Underlying Liability in CDP Appeals: Why the Tax Court Was Wrong in* Lewis v. Commissioner *and Its Progeny*, PROCEDURALLY TAXING (Feb. 26, 2014), https://procedurallytaxing.com/when-can-taxpayers-challenge-the-merits-of-the-underlying-liability-in-cdp-appeals-why-the-tax-court-was-wrong-in-lewis-v-commissioner-and-its-progeny-2/ [https://perma.cc/RHX7-QHH9].

470. *Id.*

471. *Id.*

472. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

473. 347 U.S. 483 (1954).

474. *Id.* at 524.

475. *Id.* at 526–28.

476. *Id.* at 528.

477. *Id.* at 523.

Interest-convergence theory has its defenders as a method for social change,[478] and Bell's theory itself has its critics.[479] However, the litigation context of tax cases may mirror precisely the racial dynamic Bell lamented. Pro se litigants are more likely than not to be Black or to hail from another marginalized racial group.[480] While we do not have racial data about tax court litigants, the pattern in those data (were they to exist) might likely reflect larger racial inequities. Put differently, all or most of the tax litigants creating the spillover precedents are likely to be white (or businesses), while some number of the pro se parties benefiting from these precedents may be Black. In this way, the spillover precedent may replicate exactly the tenuous convergence that was, for Bell, so deeply pathological.

However, one does not have to agree fully with Bell to have concerns about a system in which advantages for the powerless emerge only as coincidental byproducts of advantages for the powerful. Those concerns may be magnified to the extent that the powerful may not have earned their advantages in the first place. Return, for instance, to *PepsiCo*.[481] Was it inarguably correct to apply an intent-based standard to PepsiCo and allow it the $350 million in credits? Probably not. Tax scholars and lawyers alike

478. *See, e.g.*, David A. Singleton, *Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform*, 34 N. KY. L. REV. 663, 671 (2007); Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell's Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 NW. J.L. & SOC. POL'Y 30, 31–32 (2007) (arguing that whites have interests in de-concentrating urban poverty); Bryan L. Adamson, *The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 174 (2006) (discussing interest convergence in the context of education law); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1115 (2006); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1505 (2004) (proposing opportunities for pension reform because employer-based pensions exclude many whites along with Blacks); Joseph Lubinski, Note, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC'Y 377, 411–12 (2003).

479. *See* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 164 (2011) ("Despite its continued vitality and widespread acceptance, the interest-convergence theory's explanatory power suffers from four principal analytical flaws.").

480. Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Racial Disparities in Legal Representation for Employment Discrimination Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 707, 720 (2012) (looking specifically at employment law context, finding that compared to white plaintiffs (the reference group), African-Americans "are 2.5 times more likely to file pro se," and the "Other" group—including other non-white racial groups— is 1.9 times more likely than whites to lack counsel at filing). No data currently exist extending this finding to tax court, which could be a worthwhile question for future research.

481. *See supra* Section II.B.

have debated at length the proper standard to apply in debt/equity cases.[482] Further, tax avoidance transactions of the kind in which PepsiCo engaged involved a fair amount of legal ambiguity and uncertainty in a fast-changing area of the law.[483] Both parties in the case presumably devoted the significant resources they did to that litigation in part because each thought that its side had a reasonable chance of prevailing. However, in major cases such as that one, the taxpayer generally outspends the IRS substantially in litigation alone, to say nothing of massive outlays for developing the transaction in the first place.[484] The IRS is often outmatched.[485] It is impossible to know whether PepsiCo won the case primarily because of its resources and power, but that is certainly possible. If so, is the resource inequality that allowed PepsiCo to win worth the precedential result, no matter how many Floetta Bullocks subsequently come along?

Then, as Bell's work suggests, relying on the powerful to advance the interests of the powerless runs into trouble once those interests diverge.[486] The tax context highlights one way in which that scenario is already happening in the tax court cases. The federal government recently estimated the dollar amount of the tax gap—i.e., the amount of tax that taxpayers owe but that the government is unable to collect—at $441 billion.[487] That large sum could fund income support programs for Floetta Bullock or any of the other low-income taxpayers described herein. In this sense, some of the wins for high-income, represented taxpayers may cost

482. *See, e.g.*, Matthew T. Schippers, *The Debt Versus Equity Debacle: A Proposal for Federal Tax Treatment of Corporate Cash Advance*s, 64 U. KAN. L. REV. 527 (2015) (reviewing the problems with the debt-equity distinction and suggesting alternatives); Nathaniel G. Dutt, *The Tax Law Puzzle of Preferred Stock: Some Minimal Guidance Could Be the Missing Piece*, 15 FL. COASTAL L. REV. 383 (2014) (analyzing the debt-equity distinction in the context of hybrid instruments); Katherine Pratt, *The Debt-Equity Distinction in a Second-Best World*, 53 VAND. L. REV. 1055 (2000) (tracing the history of the debt-equity distinction and observing problems in the relevant jurisprudence).

483. *But see* Joshua D. Blank & Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641, 1645–47 (2012) (discussing corporate tax avoidance and the atmosphere in which it operates).

484. For discussion of the resource mismatch problem, see Jesse Eisinger & Paul Kiel, *The IRS Tried to Take On the Ultrawealthy. It Didn't Go Well*, PROPUBLICA (Apr. 5, 2019, 5:00 AM), https://www.propublica.org/article/ultrawealthy-taxes-irs-internal-revenue-service-global-high-wealth-audits [https://perma.cc/ZMT3-R3VV].

485. *Id.*

486. *See, e.g.*, Patience A. Crowder, *Interest Convergence as Transaction*, 75 U. PITT. L. REV. 693, 694 (2014) ("[T]he unalignment of interests cannot only undo the outcome that resulted from a convergence of those interests but can actually abrogate any progress made during the period of convergence.")

487. *The Tax Gap*, INTERNAL REVENUE SERV. (Oct. 21, 2020), https://www.irs.gov/newsroom/the-tax-gap [https://perma.cc/CF65-DQ6K].

their low-income counterparts more in lost dollars than they gain in tax court victories.

B. Spillover Precedent Has Positive Consequences

The tax cases I discussed earlier in this Article all involve circumstances in which a pro se litigant, facing the many obstacles that come with that status, nonetheless won in court. In fact, some of the spillover precedents cited here gave rise to multiple wins. These wins represented victories for needy individual litigants and, in many cases, also for principles that accord with basic intuitions about fairness. For instance, *Neonatology Associates*, a case that the medical companies in the litigation did not even win, has come to stand for the proposition that a pro se taxpayer without tax expertise who relies on a preparer will not be liable for a penalty if the preparer makes a mistake.[488] *Torrisi* allows an abused spouse whose abuser asks that spouse to sign checks as part of a larger tax avoidance scheme to escape responsibility for that abuser's scheme.[489] Legal holdings like these make individual pro se litigants better off, but such holdings also arguably improve the functioning of the tax system.

Legal scholars must recognize that they sometimes need to accept second-best solutions. Research documents the hurdles that have plagued low-income legal assistance programs in the past several decades.[490] Examining these hurdles, many scholars might prefer an ideal world of legal services in which would-be pro se litigants could easily obtain lawyers cheaply or for free and in which those lawyers could pursue claims that advanced the interests of their individual clients and also of social justice more broadly. The existing scholarship on pro se litigants, as cited above, shows the distance between that ideal and reality.[491] In the imperfect world of U.S. twenty-first-century litigation, as seen in the tax court microcosm, having spillover precedent may be better for pro se litigants than having no precedent at all. The existence of spillover precedent does present an opportunity, however limited, that is not envisioned by the work of Galanter and other scholars who write on litigation's "have-nots."

The question then becomes how to encourage more, and better, spillover precedent. Valuably, in tax law, one answer may be doing more

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488. *See supra* Section II.B.

489. *See supra* Section II.B.

490. *See, e.g.*, Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 LAW & SOC. INQUIRY 919, 919, 925 (2011) (describing hurdles legal assistance lawyers face); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Law Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1616–17 (2006) (documenting trends in low-income legal assistance).

491. *See supra* Section I.C.

of something Congress is already doing: funding LITCs. Creating more spillover precedents is a yet-unacknowledged benefit of clinics. As described above,[492] tax clinics develop spillover precedent that is helpful primarily to pro se taxpayers; the citation rates for spillover precedent cases occurring since LITCs arrived on the scene are higher than for the other spillover precedent cases.[493] LITCs seem to litigate precisely the kinds of cases that are most useful to pro se taxpayers.

Further, clinic spillover precedents avoid the pathologies described in the previous subsection. As discussed, by statutory mandate LITCs have to accept clients below a certain income level.[494] For this reason, these clinics focus their efforts on exactly the sorts of low-income taxpayer issues that are unlikely to surface in the contexts of tax cases with represented parties—issues located in what I have called precedent deserts. Additionally, as also discussed above, LITCs appear to take cases with issues that are in need of legal development.[495] The published opinions that result from LITC cases tend to be detailed, thorough, and ample in the kind of careful reasoning and explication of legal standards more typically seen in opinions involving cases with higher-resourced taxpayers.[496] These opinions from LITC cases provide fuel for both advocates and decision-makers in search of clear, relevant precedent on which to base their arguments.

What is more, the clinics do not depend on interest convergences because the taxpayer in the original case and in the downstream case are both disadvantaged taxpayers. There is no reason to think that the interests of the taxpayers who walk into an LITC will diverge substantially in systematic ways from the interests of low-income taxpayers who do not. The dollar amounts at stake are small enough that, even aggregated, they take a small bite out of total government revenue.[497] The statutory mandate to establish LITCs does not prevent their lawyers from litigating issues that might bring about systemic change or challenge powerful interests. As a result, the clinics circumvent some of the conditions that engender pathological interest convergences.

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492. *See supra* Section II.B.

493. *See supra* Section II.B.

494. *See supra* notes 362–63 and accompanying text.

495. Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3, 4 (2013).

496. *See* cases cited *supra* note 371.

497. *See Low Income Taxpayer Clinics Represented 19,513 Taxpayers Dealing with an IRS Tax Controversy; See the Latest Program Report and the 2020 LITC Grant Recipient List*, INTERNAL REVENUE SERV. (Feb. 26, 2020), https://www.irs.gov/newsroom/low-income-taxpayer-clinics-represented-19513-taxpayers-dealing-with-an-irs-tax-controversy-see-the-latest-program-report-and-the-2020-litc-grant-recipient-list [https://perma.cc/TKU2-EDRM].

In addition, a growing movement among those providing low-income taxpayer assistance aims to offer greater resources and increased strategy to the litigation of LITC cases.[498] The Center for Taxpayer Rights, founded by former National Taxpayer Advocate, has been spearheading this movement, with weekly strategy calls and efforts to create a resource center.[499] These developments also have the potential to develop more and better spillover precedent.

Future research might uncover additional ways by which clinics help generate spillover precedent and make sure it gets used. Pro se guides like the one the tax court issues could include overviews of general precedents. The oft-cited precedents identified in this Article might be a useful starting point. When laying out landmark cases like *Tufts* in law school, textbooks and professors might highlight instances in which those cases also helped less well-resourced litigants. Not only might drafters and decision-makers on professional ethics issues underscore the ethical duty that lawyers have to disclose adverse precedent, but they might also extend this duty further in cases where the other party appears pro se.[500] In general, any reform that raises the salience of the spillover precedent cases and suggests their potential as such would help improve that potential.

C. Spillover Precedent and Tax Exceptionalism

This Article has developed the concept of spillover precedent by looking at a single context: tax court cases. That focus raises the question, Is spillover precedent specific to tax law, or do pro se cases in other fields of law also rely on spillover precedents?

Tax may be an exceptionally fruitful area for spillover precedents. In principle, most of tax law applies to all taxpayers—an expansive socioeconomic category that includes most of the adult American population and its businesses. Standing before the country's tax laws, all taxpayers appear, formally at least, on equal footing. A few provisions, like the EITC, apply only to low-to-middle-income taxpayers, but those provisions, while growing in number, are still unusual.[501]

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498. E-mail from Les Book, Bd. Member, Ctr. for Taxpayer Rts., to Susannah Tahk (Feb. 24, 2021, 8:55 AM) (on file with author).

499. *Id.*

500. "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . ." MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N. 1983); *see* Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 2, 28–30 (2011).

501. For a discussion of this fact, and its consequences, see Susannah Camic Tahk, *Converging Welfare States: Symposium Keynote*, 25 WASH. & LEE J. C.R. & SOC. JUST. 465, 489–96 (2019).

As a result, an enormous body of caselaw has emerged in response to the issues that businesses and high-income individuals face.[502] Thereafter, all of that caselaw is available as spillover precedent. As this Article has demonstrated, even caselaw that comes out of factual circumstances that low-income taxpayers will never face has the potential to be useful spillover precedent. Every time a high-end tax lawyer comes up with a questionable plan (like the conservation easement deduction Mr. Graev tried to take[503] or the transactions in which PepsiCo engaged[504]) and the IRS challenges it, we find a dispute that can generate spillover precedent. As long as well-resourced taxpayers want to reduce their taxes—which, history tells us, will always be extremely common[505]—a large volume of potential spillover precedent can build up.

Tax court cases have several other features that may make them particularly friendly to spillover precedent. For one, tax court judges are specialists who are familiar with relevant precedents and who may be more likely than other judges to have spillover precedents at their fingertips and cite them.[506] For another, IRS lawyers may be notably conscientious and more compliant than other lawyers with ethical rules requiring them to call attention to adverse precedent in their filings.[507] Additionally, tax court judges may be more likely to publish opinions than their non-tax counterparts, which allows more spillover precedent to develop.[508] Further, anecdotal evidence suggests that tax court judges may be particularly inclined to help pro se petitioners and to identify helpful cases.[509]

Other areas of law may not present such easy opportunities. This is so because many areas of law in which high-income and business taxpayers operate do not stretch in any obvious way to low-income or pro se litigants. For example, it is hard to see how a win for a company on a securities law issue impacts anyone who is low-income. Pro se litigants probably do not need much antitrust precedent. The employer-favorable law that Albiston identified in fact hurts pro se litigants rather than helps them.[510]

Conversely, setting tax law aside, many areas of law that do involve many low-income and pro se parties are relatively devoid of high-income

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502. *See supra* Section II.A.

503. *Graev v. Comm'r*, 140 T.C. 377, 378 (2013).

504. *See supra* notes 167–72.

505. Charlotte Crane, *The Income Tax and the Burden of Perfection*, 100 NW. U. L. REV. 171, 175 (2006) ("Nobody likes to pay taxes.").

506. Grewal, *supra* note 161, at 2066–68.

507. MODEL RULES OF PRO. CONDUCT, *supra* note 500.

508. Grewal, *supra* note 161, at 2066–68.

509. E-mail from Michelle Lyon Drumbl, *supra* note 418.

510. *See generally* Albiston, *supra* note 60 (describing how a lower-resourced group—employees—faces higher-resourced employers).

litigants creating any relevant precedent. Many public benefits are income-limited such that well-resourced parties neither qualify for them nor end up in disputes about them. Litigation about food stamps will not arise between a Fortune 500 company and the IRS. Indeed, McAlister found that pro se appellate litigation "predominately involves prisoner, civil rights, habeas corpus, and other civil proceedings affecting vulnerable communities (including individuals in economic distress, without permanent status in the United States, and with health crises or disabilities)."[511] No groups include substantial numbers of well-resourced litigants who could make spillover precedents.

These observations raise two related sets of questions. First, are there other areas of law that, like tax law, do frequently place low-income and high-income litigants in analogous situations? What kinds of law offer opportunities for spillover precedent, and how might we encourage them to do so? Does litigation that pits individuals against the government create particular potential in that regard? If yes, is this true of all such litigation? What programs, such as LITCs, may be functioning simultaneously to develop spillover precedents elsewhere? How might advocates for low-income parties working in those programs become aware of spillover precedents and use them?

Second, with regard to areas of law with less spillover precedent, on what law do successful pro se litigants base their arguments? Are pro se parties less likely to win in those areas? Insofar as they do win—which, again, Sandefur's data show they sometimes do[512]—what cases do the litigants and judges cite? What strategies can judges and advocates working in very dry precedent deserts use? My next project, a comparative study of spillover precedent, takes up these sets of questions.

CONCLUSION

This Article examined the spillover benefits of precedent in tax court for pro se litigants. To do so, it took the novel approach of empirically studying the circumstances in which pro se litigants win their tax cases. Reviewing all of these cases (approximately 200) for the 2015–2019 period demonstrated that, in those cases, pro se parties often relied on cases that their represented counterparts had previously litigated. In about two-thirds of cases, the precedent that undergirded the pro se win came from a case in which the taxpayer had a lawyer.

In addition, most of the pro se wins were in cases concerning procedural issues. Perhaps not coincidentally, the bulk of the spillover precedent was about procedure because pro se taxpayers sometimes find themselves in analogous procedural positions to those faced by

511. McAlister, *"Downright Indifference," supra* note 149, at 556.

512. *See* Sandefur, *The Impact of Counsel*, *supra* note 61, at 69.

represented parties. In contrast, taxpayers without lawyers rarely wound up in circumstances substantively similar to those of their well-resourced counterparts. This Article considered examples of spillover precedents demonstrating these and other dynamics.

A legal system in which pro se parties rely on spillover precedent presents certain pathologies. For one, spillover precedent does not flow everywhere. It leaves precedent deserts, substantial areas of the law where lawyers have established no precedents on which unrepresented parties can rely. Spillover precedent also creates what can be problematic interest convergences. However, spillover precedent also provides a partial answer to the question about how, despite substantial obstacles, pro se parties sometimes win. The connection between pro se wins and spillover precedent raises additional questions for future research.