2023

Against Anti-Tax Exceptionalism

David A. Weisbach

Against Anti-Tax Exceptionalism

David A. Weisbach†

January 14, 2023

Forthcoming, Tax Law Review, Volume 77:1

Abstract

This paper examines the arguments found in what has become known as the anti-tax exceptionalism literature. That literature seeks to apply the rules of administrative law to tax procedures. The core claim is that the procedures used by the Internal Revenue Service and the Treasury routinely violate the requirements of administrative law. Secondarily, that literature argues that this is normatively bad: the Treasury and Internal Revenue Service should not be treated differently from other administrative agencies because the tax system is not exceptional. Promoting the goals of administrative law, that literature argues, requires that the tax system conform to standard procedures.

This paper addresses both claims. First, it shows that the procedures used by tax administrators substantially comply with administrative law requirements. The central doctrinal claim of the anti-tax exceptionalism literature is incorrect. Second, the paper considers normative concerns of the anti-tax exceptionalism literature, focusing on three: (i) uniformity versus exceptionalism, (ii) information flows, and (iii) accountability. Regarding uniformity, even assuming that current tax procedures do not comply with administrative law requirements, uniformity would not be a desirable goal. Administrative law is, and should remain, flexible, adapting to the needs of widely varying agencies. Moreover, the goal of reforms to tax procedures should be to improve the operation of the system, not conform it to procedures used by agencies that operate in different contexts. The framing of uniformity versus exceptionalism misstates the issue. Regarding information flows and accountability, the remedies suggested by the anti-tax exceptionalism literature, notably greater use of notice and comment procedures and more supervision of tax administration by courts, are not good ways of meeting those goals. The paper offers alternative, better methods of improving information flows and accountability. The paper concludes that we should reject the claims of the anti-tax exceptionalism literature on both positive and normative grounds.

---

† Walter J. Blum Professor, The University of Chicago Law School. I thank Will Baude, Charlotte Crane, Jake Gersen, Daniel Hemel, Leandra Lederman, Stephanie McMahon, Susan Morse, Jen Nou, James Puckett, Clint Wallace, and participants at the University of Chicago Work in Progress lunch for comments. I especially thank Meena Kandallu, who, in work for credit at the University of Chicago Law School, did much of the early research for Part I. This paper builds off her work, which is available upon request.

In *Mayo Foundation for Medical Ed & Research v. United States*,[1] the Supreme Court held that the *Chevron* standard of review applies to tax regulations. Prior law had sometimes used the somewhat less deferential standard of review found in *National Muffler Dealers*.[2] In overruling *National Muffler Dealers*, the Court stated that absent a good justification, it was "not inclined to carve out an approach to administrative review good for tax law only."

Mayo Foundation has been viewed by many commentators as the death knell for what has been called "tax exceptionalism."[3] Tax exceptionalism is the idea, arising more from experience and path-dependent development of the tax system rather than explicit theorizing, that because of the particular nature and goals of the tax administrative process, the Treasury and IRS should be subject to a different set of administrative procedures than are other agencies. *Mayo Foundation*, commentators argue, ended tax exceptionalism.[4] It is now, finally, time for the Internal Revenue Service (the IRS) and

---

[1] 562 U.S. 44 (2011).

[2] National Muffler Dealers Assn, Inc. v United States, 440 U.S. 472 (1979).

[3] See, e.g., Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 466 (2013) ("[T]he Supreme Court rejected tax exceptionalism . . . "); Kristin E. Hickman, *Administering the Tax System We Have Forty-Fourth Annual Administrative-Law Symposium: Taking Administrative Law to Tax*, 63 DUKE L.J. 1717, 1718 (2013) ("In Mayo Foundation for Medical Education & Research v. United States, the Supreme Court rejected tax exceptionalism from administrative-law requirements and doctrines absent justification."); Jeremiah Coder, *Year in Review: Tax Law's Vanity Mirror Shattered*, 134 TAX NOTES 35 (2012); Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 279 (2012) ("the Mayo Court disposed of tax exceptionalism"); Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014) (The death of tax exceptionalism is perhaps best exemplified by the Supreme Court's 2011 decision in Mayo Foundation for Medical Education & Research v. United States.). For an overview, see Amandeep S. Grewal, *Taking Administrative Law to Tax: Foreword*, 63 DUKE LAW JOURNAL 1625 (2014).

[4] See sources cited in note 3. Pre-*Mayo* work arguing against tax exceptionalism includes Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1993); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2005); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2006).

Treasury to comply with administrative law, to, in the words of a symposium on the topic, "take administrative law to tax."[5]

The anti-tax exceptionalism scholarship has led to a substantial number of attacks in court on the validity of tax guidance on procedural grounds, with some successes.[6] Administrative Procedure Act (APA)[7] noncompliance is now a standard arrow in the tax litigator's quiver. To change metaphors, it is a free lottery ticket in tax litigation. Given the ambiguity of administrative law and the large element of randomness of judicial decisions, an APA challenge might pay off in any in any given case, so why not throw it in?

And courts sometimes bite. For example, in a recent case, the 11th Circuit threw out a 40-year old regulation because it thought that the preamble, written in the 1980's and unchallenged since then, was insufficient.[8] The flaw was that Treasury hadn't responded to a number of comments that the court thought important. In another case, the Sixth Circuit protected a taxpayer who had engaged in an egregious tax shelter from having

---

[5] Grewal, *supra* note 4.

[6] See *Green Valley Investors LLC v. Commissioner*, 159 T.C. No. 5 (2022); *Mann Construction Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022); *Oakbrook Land Holdings LLC v. Commissioner*, 28 F.4th 700 (6th Cir. 2022); *Hewitt v. Commissioner,* 212 F4th 1336 (11th Cir. 2021); *Altera v.* Commissioner, 926 F.3d 1061 (9th Cir. 2019); *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011 (en banc); *Liberty Glob., Inc. v. United States*, Civil Action No. 1:20-cv-03501-RBJ, 2022 U.S. Dist. LEXIS 62482 (D. Colo. Apr. 4, 2022); *GBX Associates, LLC, v. United States*, 1:22cv401 (N.D. Ohio, Nov. 14, 2022); *Rogerson v. Commissioner*, T.C. Memo 2022-49; *CIC Servs., LLC v. IRS*, No. 3:17-cv-110, 2022 U.S. Dist. LEXIS 105376 (E.D. Tenn. June 2, 2022); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig*., 853 F. Supp. 2d 138 (D.D.C. 2012).

[7] Administrative Procedure Act, 5 U.S.C. §§ 551-559

[8] *Hewitt v. Commissioner,* 212 F4th 1336 (11th Cir. 2021) (invalidating a regulation because the preamble was inadequate). See also *Altera v.* Commissioner, 926 F.3d 1061 (9th Cir. 2019) (sustaining a regulation against a challenge concerning the adequacy of the preamble).

The extraordinary time periods in many challenges to tax guidance are a result of the unique procedures for tax litigation including a prohibition on pre-enforcement challenges. For a discussion of the statute of limitations issues, see Susan Morse, *Out of Time? APA Challenges to Old Tax Regulations and the Six-Year Default Limitations Period*, SSRN Working Paper 4191798 (Nov. 3, 2022).

to disclose its participation in the scheme, invalidating a 15-year old guidance document that required disclosure of the shelter because the guidance document hadn't gone through notice and comment.[9] The Tax Court recently followed the Sixth Circuit, throwing out a different guidance document to protect a taxpayer's use of an egregious tax shelter.[10] Other cases are percolating through the system.[11]

Given that the lottery ticket of a procedural challenge is almost free, we can expect more challenges in the future. The claims made by the opponents of tax exceptionalism present a genuinely serious challenge to the administration of the tax laws. Depending on one's views, this may be for the better—there may be dozens or hundreds of invalid guidance documents that need to be tossed out—or for the worse.

In this paper, I address both the legal and normative arguments concerning tax exceptionalism. Part 1 addresses legal issues. It focuses on the claim that the IRS and Treasury routinely violate the Administrative Procedure Act. The anti-tax exceptionalism commentators argue that tax exceptionalism needs to end because the APA, administrative law more generally, and the Internal Revenue Code do not allow it. It is time, they claim, to end these illegal practices.

Although no agency is perfect, and there are examples of the Treasury and IRS cutting procedural corners, I will show in Part I that the claim that the Treasury and IRS routinely violate the requirements of administrative law is false. The IRS and Treasury do not color outside the lines, to use one scholar's phrase.[12] Accordingly, I reject the hypothesis that tax is exceptional in the sense that the administration of the tax system systematically deviates from the requirements of administrative law.

Part II addresses the underlying normative goals of the anti-tax exceptionalism literature, focusing on three. First, and primarily, the anti-tax exceptionalism literature

---

[9] *Mann Construction*, 27 F.4th 1138.

[10] *Green Valley Investors*, 159 T.C. No. 5.

[11] See cases listed in note 6, *supra*.

[12] See Hickman, *supra* note 5.

frames issues regarding tax procedures as ones of uniformity versus exceptionalism. It argues that tax procedures should conform to procedures used by other agencies and to those required by administrative law more generally. Part I showed that the premise of this framing is false because the tax law does comply with the requirements of administrative law. Even assuming, however, that there are administrative law problems with tax procedures, that framing relies on a chimera, namely that there is a single uniform set of administrative law requirements that tax should conform to.

In fact, the wide variety of federal administrative agencies use a wide variety of administrative procedures. There is no single administrative law to take to tax. This overall lack of uniformity—put more positively, this tailoring of administrative procedures for the needs of each agency—is also desirable. There is a broad set of goals that administrative law should seek to advance, and some commonalities in the ways that agencies should seek to advance those goals, but how each agency operates on the ground does, and should, vary. The IRS should not operate the same way as the Environmental Protection Agency, the Army Corps of Engineers, the National Labor Relations Board, or the Department of Energy because its mission, its structure, and its relationship with regulated parties, is not the same as the missions and structures of those agencies. Uniformity is neither an accurate description of administrative law nor a desirable goal.

Second, the anti-tax exceptionalism literature seeks to improve information flows to the Treasury and IRS. The primarily recommendation for achieving this is greater use of notice and comment procedures. This is misguided. Notice and comment is not an effective way to provide information to the IRS and Treasury. As has been observed in numerous other contexts, information flows to agencies occur in many ways, most outside of notice and comment. Improving these other paths for information to make its way to the IRS and Treasury would be more effective.

A third goal of the anti-tax exceptionalism literature is to improve accountability and responsiveness of the tax system, primarily through court-enforced procedures such as notice and comment and lengthier, more detailed preambles to regulations. These are not good ways of ensuring accountability and responsiveness, and may in fact be counter-productive. Courts are not well-equipped to supervise the tax system, and there are numerous supervisory bodies, both in the executive branch and the legislative branch that already closely supervise tax administration. Rationalizing and improving the operation of these bodies would do far more to ensure accountability and responsiveness than greater scrutiny of the IRS and Treasury by courts.

I conclude that we should reject the core claims of the anti-tax exceptionalism literature on both positive grounds and normative grounds. The anti-tax exceptionalism literature has played an important role in raising issues about the functioning of tax administration. Unfortunately, its focus has tended to be on relatively narrow legal issues when the real problems lie elsewhere. Research on tax administration should focus more on how best to administer our tax system and less on administrative law and not at all on whether the tax system is exceptional. The goal of research on tax administration should be to understand how the tax system operates and to make it operate better.[13]

Complex and intractable problems abound, including making tax filing simpler and auditing more effective, preventing evasion and avoidance, and better delivering the numerous social programs that are now administered through the tax system. If we are to tax globally-mobile capital, we must design procedures for doing so at a reasonable cost. Right now, the IRS has trouble even answering the phones. There are genuine and difficult problems of tax administration to solve. More narrowly, if we are to focus on traditional procedural administrative law issues, scholars might focus on how to ensure broad participation in the tax regulatory process, how to improve regulatory outcomes, or how best to ensure fairness in the audit and litigation process. The anti-tax exceptionalism literature can contribute to these issues by bringing to tax the best practices used by other agencies, focusing on ways to improve tax administration rather than making it conform.

---

[13] For an example of the type of work on tax administration that has the potential to bring real value, see Joseph Bankman, Clifford Nass & Joel Slemrod, *Using the Smart Return to Reduce Evasion and Simplify Tax Filing*, 69 TAX L. REV. 459 (2015); HENRY AARON & JOEL SLEMROD, THE CRISIS IN TAX ADMINISTRATION (2004); Joseph Bankman, *Using Technology to Simplify Individual Tax Filing*, 61 NATIONAL TAX JOURNAL 773 (2008); Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725 (2015); William Gale G & Janet Holtzblatt, *On the Possibility of a No-Return Tax System*, 50 NATIONAL TAX JOURNAL 475 (1997); Dhammika Dharmapala, *Cross-border tax evasion under a unilateral FATCA regime*, 141 JOURNAL OF PUBLIC ECONOMICS 29 (2016); Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. REV. 304 (2012); MICHAEL GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES (2007).

I am not the first to argue against the anti-tax exceptionalism literature. I build on, and extend, prior work, including work by Stephanie McMahon,[14] James Puckett,[15] Clint Wallace and Jeffrey Blaylock,[16] Leslie Book,[17] and others. Moreover, as will be discussed in Part 2, there is a literature in administrative law more generally about the value and costs of uniformity versus tailoring of administrative procedure, and I build on that work as well.

I. COLORING INSIDE THE LINES

The central claim of the anti-tax exceptionalism literature is that the Treasury and the IRS routinely violate the APA. I examine the details of this claim here, starting with *Mayo*, and then turning to claims about particular procedures that the IRS or the Treasury use.

Before turning to this task, a word about nomenclature. The Internal Revenue Service, headed up by the Commissioner of Internal Revenue, is a subunit of the Treasury Department, whose head is the Secretary of the Treasury (but who has delegated most tax decisions to the Assistant Secretary of the Treasury (Tax Policy)). Tax guidance documents are issued by both the parent—the Treasury—and the subunit—the IRS. The Treasury issues all documents published in the Federal Register, with the final documents known as Treasury Decisions but called "regulations" by people who work in the field. Treasury Decisions are issued in close consultation with the IRS and are signed by both the Chief Counsel of the IRS and the Commissioner, so they are in a

---

[14] Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553 (2015).

[15] James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067 (2014); James M. Puckett, *Reasonable Tax Rules: Advancing Process Values with Remedial Restraint*, 24 FLA. TAX REV. 277 (2020).

[16] Clinton G. Wallace & Jeffrey M. Blaylock, *Administering Taxes Democratically?*, 94 TEMP. L. REV. 49 (2021).

[17] Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517 (2012).

sense, joint products of the Treasury and the IRS.[18] The Treasury, however, also issues many other regulations unrelated to tax such as regulations governing banks, which means that a reference to Treasury regulations is ambiguous. To avoid confusion, I will refer to tax regulations (Treasury Decisions) as issued by the Treasury and the IRS, and non-tax Treasury regulations as issued by the Treasury. Sub-regulatory guidance is thought to be issued directly by the IRS, though much of it, but by no means all of it, is done in close consultation with the Treasury and is approved by the Assistant Secretary for Tax Policy. I will refer to sub-regulatory tax guidance as IRS guidance and treat it as issued by the IRS.

A. Mayo Foundation:

Mayo is the foundational case in the debate over tax exceptionalism. *Mayo* addressed the validity of a regulation defining the term "student" for purposes of the FICA tax. After many years of relying on a facts and circumstances test, the Treasury issued a regulation attempting to provide additional clarity.[19] Among other things, the new regulation made clear that medical residents were not full time students and, therefore, were subject to the FICA tax. The Mayo Foundation, which employed medical residents, sued, with the sole issue in the litigation being whether the regulation was valid. The Mayo Foundation argued that the appropriate standard of review was the standard found in *National Muffler Dealers Assn, Inc. v United States*,[20] and under that standard, regulations that changed long-standing positions were held to a higher level of scrutiny than other regulations. Because the new regulation defining "student" changed a long-standing position, the Mayo Foundation argued that it was invalid under *National Muffler Dealers*. The government argued that the *Chevron* standard applied, and that under the *Chevron* standard, the regulation was valid. The Court held that the regulation was valid, applying the *Chevron* standard and rejecting *National Muffler Dealers* and related cases that applied a different, more exacting standard of review to tax regulations.

---

[18] For a description of the tax regulatory process, see McMahon, *supra* note 13.

[19] Treas. Reg. §31.3121(b)(10)-2(d)(3)(i).

[20] 440 U.S. 472 (1979).

It is common to view *Mayo* as the end of tax exceptionalism.[21] *Mayo Foundation*, however, says nothing of the sort. The case was about one issue within administrative law, the standard of review courts should give Treasury regulations. Here is the central holding:

> Aside from our past citation of *National Muffler*, Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly "[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action." *Dickinson v. Zurko*, 527 U. S. 150, 154 (1999).
>
> . . .
>
> We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.

One might interpret this language, particularly the citation to *Dickinson v. Zurko*, as indicating an overall stance or direction that the Court is inclined to take regarding deviations from administrative law rules generally. That reading may be correct, although it remains to be seen. The Court, however, considered only the issues regarding standard of review, finding no reason for tax regulations to have a lower standard of review than other regulations. Issues regarding other administrative procedures may present other considerations, and generate other conclusions.

[21] See the citations in Note 3, supra. The sources mentioned in Note 3 are academic publications. Courts have also made this mistake. For example, a recent case in the Sixth Circuit, *Mann Construction Inc. v. United States*, misread *Mayo Foundation*. As will be discussed, the case concerned the issue of whether a particular form of sub-regulatory guidance needed to go through notice and comment, not the level of deference given to tax guidance documents. The court, however, using the claim that "[t]he U.S. Supreme Court has already rejected the idea that tax law deserves special treatment under the APA" to support its holding. This is simply not what the Court said.

Mayo Foundation was a victory for the Treasury and the IRS. It did not involve a claim that the IRS and Treasury violated the APA or other elements of administrative law. Before moving to more particular claims that the IRS and Treasury in fact violate the APA, it is worth making two comments about *Mayo Foundation*.

First, it is not clear what to make, in 2022, of a 10-year old case confirming the application of *Chevron* deference more generally. The Supreme Court may, at this point, have abandoned *Chevron*.[22] Unless *Mayo Foundation* is read to be about other issues in administrative law, it may have little meaning because its central holding may be defunct. Perhaps all that remains of the holding is that whatever ends up replacing *Chevron* applies to the Treasury and IRS as well as other agencies, though even that is not clear because it depends on where the law ultimately lands. It might have been appropriate for *Chevron* to apply across all agencies including the Treasury and IRS, but its replacement might require specific tailoring to individual agencies. We do not know at this point. We can only wait for the undoubtedly clear and cogent guidance that the Supreme Court will soon provide.

Second, even if *Chevron* remains good law, debates about the precise wording of the standard of review for regulations were, and are, ridiculous. The differences between *National Muffler Dealers* and *Chevron* are minor. There is so much ambiguity in these standards that judges can use either standard to decide any case however they want. The *Mayo* versus *National Muffler Dealers* debate was about unimportant verbiage that only law professors and perhaps desperate litigators, could care about.[23] It is unlikely to have an effect on the outcome of any cases.

[22] Cass R. Sunstein, *Chevron without Chevron*, 2018 THE SUPREME COURT REVIEW 59 (2019).

[23] Ernest Gellhorn and Glen Robinson, in a famous early article on administrative law put it this way: "It is perhaps a testament to lawyers' awe of words that they have invested words such as "arbitrary and capricious" and "substantial evidence" with importance when experience immediately shows them to be virtually devoid of practical content. . . . [T]he rules governing judicial review have no more substance at the core than a seedless grape." Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975). See also Matthew C. Stephenson & Adrian Vermeule, *Chevron has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that different standards of review all amount to a judgment about reasonableness).

There is a closely related literature on whether different standards of deference matter, comparing *Chevron*, *Skidmore*,[24] and de novo review. That literature has problems. It is not able to identify causal effects. Instead, it looks at raw data on agency success rates, ignoring endogeneity in the cases that are brought and in agency procedures. Be that as it may, the data suggests that *Chevron* does not seem to matter in the Supreme Court in that it has no effect on agency win rates.[25] Moreover, the Supreme Court has always cited *Chevron* inconsistently, sometimes relying on it and sometimes not, with little discernable pattern.[26] This literature, which struggles to find that *Chevron* matters, examines standards of review that purport to be far more different from one another than the *National Muffler Dealers* and *Chevron* standards are. Given the doubt that widely differing standards of review matter, it is hard to believe that the difference between *National Muffler Dealers* and *Chevron* matters at all.

With this background, we can turn to specific issues regarding the Treasury's and IRS's administrative procedures.

B. Temporary regulations

The most important argument supporting the view that the Treasury and IRS do not comply with the APA is the claim that the Treasury and IRS improperly use temporary regulations. The argument was first made by Kristin Hickman.[27] Hickman surveyed tax regulations issued between 2003 and 2005. After combining related regulations (e.g., treating proposed and final regulations as a single regulation), she identified 232 tax regulations during that three year period. Of those, she estimated that 36 percent were issued as temporary regulations with simultaneous issuance of a Notice

---

[24] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[25] David Zaring, *Reasonable Agencies*, 96 VIRGINIA LAW REVIEW 135 (2010) (Table 1, summarizing studies and showing little difference for different standards of review).

[26] THOMAS W. MERRILL, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022). A recent study, looking at the circuit courts finds differences between *Chevron* and more stringent standards of review there. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (finding differences among circuit courts but not at the Supreme Court).

[27] Hickman, *supra* note 5.

of Proposed Rule Making (NPRM). Another 5 percent were final regulations issued without notice and comment, although a number of these were ministerial. The remainder (59%) were issued as proposed regulations before finalization.

Hickman argues that the use of simultaneous temporary regulations and proposed regulations violates the APA. She calls this process post-promulgation notice and comment and argues that the APA, and in particular section 553 of the APA, requires pre-promulgation notice and comment. Because the Treasury and IRS often, 36 percent of the time in her study, rely on post-promulgation notice and comment, she argues that they systematically fail to comply with mandatory procedural requirements.

Clint Wallace and Jeffrey Blaylock performed a similar survey.[28] They compared six years in three different time periods, 1986, 1988, 2001, 2003, 2017, and 2019, examining 864 guidance documents. These periods correspond to the times immediately after three large tax changes, the 1986 Tax Reform Act, the 2001 tax cut, and the 2017 Tax Cut and Jobs Act. The types and forms of guidance changed over this time period, with some of the change likely due to changes in technology. There was a shift in the 2017-2019 period towards more informal guidance, such as FAQ's and fact sheets. Relevant here, the use of temporary regulations declined dramatically, with 57 temporary regulations issued in 1986-1988 compared to just one in the 2017-2019 period. Part of this decline is in the use of temporary regulations is likely in anticipation of a statement issued by the Treasury in 2019 limiting the circumstances in which it would use temporary regulations.[29]

I performed a similar count for the most recent years available—all of 2021 and the first half of 2022. The period may be unusual because it included a presidential transition and because outside of the flurry of regulations issued around the time of the transition, the pace of guidance appears to be unusually slow (in fact, dramatically so). During this year and a half, I counted only 35 regulatory projects as compared to 232 during Hickman's 3-year period, and of these, 13 were issued around the time of transition.

[28] Wallace and Blaylock, *supra* note 15.

[29] See DEP'T OF TREASURY, POLICY STATEMENT ON THE TAX REGULATORY PROCESS (2019) (limiting the circumstances in which Treasury would use temporary regulations and committing to invoke the good cause exception to the AP A for any such use).

This dramatic reduction in the pace of regulatory guidance could be because the new administration needed time to get up to speed, because of much of that time period was during the COVID pandemic, or because of a conscious decision to slow the pace of guidance. Regardless, the period may not be typical.

Be that as it may, during this period, 63% of the regulations were issued as final regulations after notice and comment, 26% were issued as proposed regulations, and 11% (4 in total) were issued as simultaneous temporary and proposed regulations. This modest increase in the use of temporary regulations may be just a coincidence[30] or it may be that the current administration is not as opposed to the use of temporary regulations as the prior administration.

Before turning to the merits, it is worth noting that the pattern seen in recent years—little use of temporary regulations rather than a lot—is what makes tax regulations exceptional. The practice seen by Hickman in 2003-2005 in fact seems to conform to the practice in other agencies rather than deviates from it. In particular, the GAO found that between 2003 and 2010, "agencies issued 47 percent of all major final rules . . . without an NPRM as interim rules.[31] The Treasury's and IRS low use of temporary regulations not their high use, is what is exceptional. We can, however, interpret the concerns about the use of temporary regulations as about the validity of the Treasury's actions, not about whether they are exceptional. Nevertheless, we should

---

[30] Within the group of temporary/proposed regulations, 3 of the 4 were issued jointly with HHS, DOL, and OPM and all three of those related to the No Surprises Act on medical billing. Only one temporary regulation (TD 9953, relating to recapture of excess employment tax credits) was issued solely by the Treasury.

[31] See U.S. Gov't Accountability Office, GAO-13-21, Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments 13 (2012). Although the GAO report is not entirely clear on the issue, there appears to be wide variances in practice across agencies, with some agencies regularly issuing rules without notice and comment and others rarely or never doing so. As a result, the 47 percent number in the text does not mean that most agencies issue 47 percent of their regulations without notice and comment. The GAO report does not give enough information to allow us to compute how the IRS and Treasury compare to other agencies, measured by the number of regulations issued without notice and comment as a fraction of their total. See also Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 Virginia Law Review 889 (2008) (finding the use of interim final rules common and increasing over time).

keep in mind that if the use of temporary regulations is not allowed, Treasury is exceptional is *better* complying with the APA than many other agencies.

Turning to the merits, the claims about the problems with temporary regulations are wrong. Although it was not clear at the time these claims were made, we now know that that post-promulgation notice and comment complies with the APA. We know this because the Supreme Court has explicitly told us so, in a case that happens to have involved a Treasury and IRS regulation.

In particular, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[32] the IRS and Treasury, joint with HHS, and DOL, issued an Interim Final Regulation (equivalent to a temporary regulation) that governed exemptions from a mandate that employers provide contraception coverage as part of employer provided health insurance. The Interim Final Regulations asked for comments, and the Treasury and IRS simultaneously issued an NPRM.[33] The regulations were issued in final form about a year later.[34] Pennsylvania challenged the regulations as invalid, both substantively (that is they were an impermissible interpretation of the statute) and procedurally.

The Court rejected both of Pennsylvania's claims. Relevant here, the Court held that the final regulations were valid under the APA because the public was given the opportunity to comment, the rules included the required "concise statement" explaining their basis and purpose, and they did not become effective for more than 30 days after being published. They "fully complied with the maximum procedural requirements [that] Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[35] Although two justices dissented, they did so only on

---

[32] 591 U.S. __, 140 S.Ct. 2367 (2020)

[33] 82 Fed. Reg. 47792 (October, 13, 2017).

[34] 82 Fed. Reg. 57536.

[35] [pp 25-26 of the slip opinion]

substantive grounds, not on the procedural issues—the opinion was at least 7-2 on the procedural issue and possibly 9-0.[36]

In short, the Supreme Court has explicitly blessed the procedure that Hickman finds troubling, in a decision about Treasury and IRS regulations. While one may disagree with the decision, if we are just trying to determine what the law requires, and not being normative, there is nothing more to say. The procedure that the Treasury and IRS used was, and remains, valid.[37]

That leaves only 5% of the regulations in Hickman's study potentially problematic, and, as mentioned, some of those were entirely ministerial. If we take out the ministerial regulations, the IRS and Treasury has fully complied with the APA (at least for this particular practice) more than 95% percent of the time in the period Hickman studied and 100% of the time in the most recent period studied here.

This analysis, however, leaves one loose end, which is whether the temporary regulations, as opposed to the final regulations that were issued later, were themselves

[36] One unfortunate procedural twist that potentially muddles the otherwise clear holding of *Little Sisters* is that all three agencies were specifically given authority to issue interim final rules. See 26 U.S. C. § 9833 (Treasury), 29 U. S. C. §1191c (Labor), and 42 U. S. C. §300gg–92 (Health and Human Services). The interim final rules include a finding that they were authorized by those provisions. In addition, they included a finding that there was a good cause exception from notice and comment under section 553(b) of the APA. The Court mentioned the good cause finding in its statement of the facts, but did not mention the specific authority to issue interim final rules. The Court, however, did not rely on either the specific authority or the good cause finding for its holding. Moreover, the Court did not base is holding on the validity of the final rules on the authority for the use of interim final rules. Instead, it reasoned that the final rules met the usual APA standards.

[37] In conversations with administrative law scholars, they tend to question the scope of *Little Sisters of the Poor*, suggesting for unstated reasons that they are not sure that the Court would follow the holding in other contexts. The implicit claim is that there is a "Justice Thomas, religion case" exception. While it remains to be seen whether this is true, if we are just doing law, we have to take the Supreme Court at its word.

valid. The Court does not say anything about this issue. Its opinion in *Little Sisters of the Poor* appears to cover only the final rule.[38]

There is, however, a simple and straightforward answer to this question in the tax context. Section 7805(b)(1)(B) explicitly allows final regulations to be retroactive to the date the proposed were filed with the Federal Register.[39] A temporary regulation that is immediately effective, followed by notice and comment and a final regulation, is the same as, or often more generous than, a retroactive final regulation. The error, if there is one (see more on this below), is harmless, even in a world where courts are reluctant to find harmless error.[40]

To see this in more detail, compare (1) a temporary regulation that is effective immediately, followed some time later by a prospective final regulation and (2) an NPRM with a subsequent final regulation that is retroactive to the date of the NPRM. The two cases would be identical if the final regulation is the same as the temporary regulation, in which case there is no harm caused by following the first procedure rather than the second. If in the second case, the final regulation makes changes that are retroactive to the filing date of the NPRM, the two options (temporary then final and retroactive final) would be different, which means there could be harm to the taxpayer from following the first procedure if the changes make the regulation more generous. If, however, the final regulations (in the first procedure) gives taxpayers the option to apply either the final regulations or the temporary regulations during the relevant

---

[38] As discussed in note 36, *infra*, the Affordable Care Act provided specific authority for interim final rules in this case, which means that the validity of the interim final rules was not an issue in the litigation.

[39] Section 7805(b) provides:

(1) In general. Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates: . . .

(B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.

[40] For a discussion of the harmless error rule, see Hickman, *supra* note 5 at 1791–1795.

period at their choice, taxpayers can only be better off. This practice, however, is standard, and when it is followed, there is no harm.[41] That is, as long as final regulations that follow temporary regulations give taxpayers a choice of which one to follow during the temporary period, taxpayers cannot be made worse off because of the procedural choice to use temporary regulations.

As a result, any procedural flaw from using the temporary regulations format rather than the final regulation with a retroactive effective date format is harmless error. Very slightly different labels on documents (final plus a retroactive effective date) imposing identical or possibly less generous legal obligations on taxpayers would have been valid. Using the wrong labels does not harm anyone.

This logic alone settles the issue, but let us turn to the legal technicalities concerning whether the temporary regulations are themselves valid rather than merely harmless. There are three considerations: (i) section 7805(e) of the Internal Revenue Code; (ii) Section 553(b)(A) of the APA; and (iii) section 553(b)(B) of the APA. Because the harmless error analysis resolves the issue, I only sketch these additional arguments.

1. 7805(e) might justify the use of temporary regulations

---

[41] *Liberty Global Inc. v. United States,* No. 20-cv-03501 (D. Colo. Apr 4, 2022) held to the contrary. In that case, the IRS issued temporary and proposed regulations and then final regulations after notice and comment. The final regulations clearly followed valid procedures under *Little Sisters*. The final regulations gave taxpayers the choice of whether to comply with the final regulations or the temporary regulations. The court nevertheless held that the problems it found with the temporary regulations were not harmless error though the court's reason is opaque. It does not identify the harm that taxpayers suffered. Moreover, the court seems unaware of *Little Sisters*, which is directly on point, which makes the entire holding suspect.

Hickman discusses harmless error but does not mention section 7805(b) in that discussion. *Id.* at 1791–1794. She argues that the use of temporary regulations inhibits taxpayers from commenting on the simultaneous proposed regulations. There is no evidence for this. My experience in the Treasury Department, which admittedly was some time ago, was that taxpayers and the tax bar are not shy. A friend described my first public discussion of a proposed regulation as a senior lawyer in a large New York firm as "trying to rip my head off." I suspect that if that regulation had been issued as an immediately effective temporary regulation, the lawyer might have succeeded.

The first argument that temporary regulations are valid during the period that they are temporary (i.e., before they are finalized) is that Congress blessed this practice in 1988 when it enacted section 7805(e).[42] Section 7805(e) provides that (1) temporary regulations must also be issued as proposed regulations and (2) temporary regulations expire 3 years after the date of issuance.

The argument based on section 7805(e) is that Congress was well aware of the IRS practice of using temporary regulations when it enacted that section. The practice was widespread as indicated in the Wallace and Blaylock study. Congress chose to limit temporary regulations only in the two ways just mentioned, effectively approving of the rest of the practice. For example, a report issued by the Joint Committee on Taxation as part of the legislative process describes the use of temporary regulations and then describes the modification made in the statute as limiting their validity to two years (modified to three by the subsequent conference committee).[43] Clint Wallace and Jeffery Blaylock, reviewing this history, conclude, "[w]ith Section 7805(e), it appears that Congress has expressly endorsed the use of temporary regulations."[44]

Hickman demurs. She argues that the legislative history provides little guidance on the purpose of section 7805(e) and makes no mention of Congress's views on the existing practice.[45] It would be curious, however, to think that (1) the practice violated

---

[42] Public Law 100-647, Nov. 10, 1988.

[43] Staff of Joint Comm. on Tax'n, JCX-28-88, Explanation of Finance Committee Amendment to S. 2238 (Technical Corrections Act of 1988, as reported) 46 (1988). The Joint Committee stated that "[e]ach time the IRS issued temporary regulations, it would be required to simultaneously issue those regulations in proposed form. Temporary regulations would be permitted to remain in effect for no more than two years after issuance." For a more detailed discussion of this legislative history, see Wallace and Blaylock, *supra* note 15 at 87. Wallace and Blaylock further argue that the simultaneous enactment of section 7805(f) (pertaining to Small Business Administration review of regulations) provides further inferences regarding congressional intent.

[44] *Id.*

[45] The concurrence in *Intermountain Ins. Serv. of Vail v. Comm'r of Internal Revenue*, 134 T.C. 211, 245-46 (U.S.T.C. 2010) agreed with Hickman. While the regulation was still temporary during the litigation, the concurrence writing in 2016, however, held that it would have invalidated a succeeding final regulation, contrary to the (later decided) *Little Sisters of the Poor* decision, casting doubt on their overall reasoning. The Fifth Circuit, on appeal, invalidated the final regulation under *Chevron* step one, but held

the APA, (2) Congress knew about it, but (3) Congress chose to limit the practice only in discrete ways largely unrelated to the violations. Nevertheless, we cannot rule out the possibility that these three propositions all hold, which means there remains some uncertainty about the impact of section 7805(e).

2. There might be good cause

Section 553(b)(A) of the APA provides an exception to notice and comment when the agency, for good cause, finds that notice and comment are impracticable, unnecessary, or contrary to the public interest. Some of the temporary regulations might fall under this exception.

Because the good cause exception applies separately to each regulation, it is not easy to make generalizations about how often it applies. One question, raised by Stephanie McMahon, is how much budgetary or revenue considerations count toward good cause.[46] She argues that many tax law changes enacted by Congress both (1) assume immediate implementation for budgetary purposes and (2) require extensive and complex regulations to actually be implemented. She concludes that allowing immediately effective temporary regulations is the only way to reconcile these demands, which means that there is good cause for doing so. Hickman is skeptical of this argument as well, although most of her concerns relate to the lack of clear

---

in the alternative that "notice and comment after the final Regulations were enacted [was] not an acceptable substitute for pre-promulgation notice and comment." *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011). This holding is directly contrary to *Little Sisters*. The D.C. Circuit, the Federal Circuit, and the Seventh Circuit all held that the regulation was valid. *Intermountain Ins. Serv. of Vail*, 650 #.d at 709 (DC Circuit); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011); *Beard v. Comm'r*, 633 F.3d 616, 623 (7th Cir. 2011).

The recent district court decision, *Liberty Global Inc. v. United States,* No. 20-cv-03501 ((D. Colo. Apr 4, 2022) also addressed this issue, holding that a set of temporary regulations was invalid because of the lack of opportunity for notice and comment. As noted, however, this court seemed unware of basic Supreme Court decisions, including *Little Sisters of the Poor*, so the decision cannot be given very much weight.

[46] Stephanie Hunter McMahon, *Tax as Part of a Broken Budget: Good Taxes Are Good Cause Enough*, 2018 MICH. ST. L. REV. 513 (2018).

explanations of the reasons for good cause rather than whether there is in fact good cause.[47]

A separate argument for good cause is that taxpayers need guidance to file their annual returns. Taxpayers must sign their returns under penalty of perjury, and they need to know how to report their income. This creates pressure on the IRS and Treasury to issue regulations quickly.[48]

The IRS does not issue every regulation as temporary. Almost 60 percent of the regulations in Hickman's sample, and almost 90 percent in recent years, were issued as proposed regulations, not temporary regulations. The Treasury makes choices about when to issue a regulation as temporary. Perhaps it makes this choice too casually, but without detailed examination of each case, we cannot know. It is likely that, at least some of the time, Treasury's claim of good cause is valid. More generally, any claim that

[47] See Hickman, *supra* note 5 at 1778–1786. This is the case even when Hickman says she is discussing the merits. For example, Hickman argues that there was no good cause for temporary regulations regarding the reduction of tax attributes within consolidated groups upon the exclusion of income by a member under section 108. The regulations responded to a case that was decided two years prior to their issuance, which Hickman argues means that there cannot have been an immediate need for the regulations. In the preamble to the regulations, the Treasury claimed that current circumstances have made the need for guidance at this time. Hickman complains that "Treasury offered no argument that failing to address [the case] immediately through binding regulations would imperil the fisc." *Id.* at 1784. I thought that is what the Treasury did say, but regardless, her complaint is about the level of detail in Treasury's explanation, not the substance of the claim, which she (nor any of us) cannot evaluate.

[48] To take a recent example, in the summer of 2022, Congress passed two novel tax provisions. One is a new corporate minimum tax based on book income, (§ 10101 of Public Law 117-169, 136 Stat. 1818, 1818-1828 (August 16, 2022), codified in section 55 of the Internal Revenue Code), and the other is an entirely new excise tax on stock repurchases (Public Law 117-169, 136 Stat. 1818 ((August 16, 2022), codified in section 4501 of the Internal Revenue Code). The statutory language for both of these provisions is unclear but both became effective at the beginning of 2023, shortly after enactment. There was significant pressure on the Treasury and the IRS to issue guidance so that taxpayers knew how to comply with the law. To provide guidance, the IRS issued two notices stating their intent to issue proposed regulations and providing an indication of the expected content of those regulations. See Notice 2023-2 (guidance on the excise tax on stock repurchases) and Notice 2023-7 (guidance on the corporate alternative minimum tax). That guidance might have been better had it been issued as temporary regulations.

the Treasury violates the APA when it issues temporary regulations has to examine *each* temporary regulation for good cause. Any claim that does not undertake this inquiry[49] cannot make valid inferences about the extent of Treasury non-compliance with the APA.

3. Many of the temporary regulations might be interpretive

APA section 553(b)(B) includes an exception to the requirement of notice and comment for interpretative (now usually called interpretive) rules. The Internal Revenue Manual has long maintained that all regulations issued under the general authority of section 7805 are interpretive.[50] The only legislative (non-interpretive) regulations are those issued under specific grants of authority in particular code sections. If this is correct, the temporary regulations issued under 7805 as opposed to a specific grant of authority, would be valid notwithstanding the lack of notice and comment.

This issue, the scope of the interpretive regulation exception, is a morass. It is unlikely that there is a clear answer as to which, if any, temporary regulations are interpretive. Strong views, such as that few if any temporary regulations are interpretive,[51] are likely to be wrong in some, or possibly many, cases. Similarly, the view in the Internal Revenue Manual that all regulations issued under section 7805 are interpretive likely overstates the case.

The problem is that the APA does not define the term "interpretative" or give any guidance on how to distinguish interpretive rules from legislative rules. While the general concept seems to be that legislative rules makes policy judgments while interpretive rules merely interpret statutory or other authority, this distinction is not

---

[49] E.g., Hickman, *supra* note 5.

[50] See Internal Revenue Manual, § 32.1.5.4.7.5.1 ("Interpretative rules are not subject to the provisions of 5 U.S.C. [§] 553(b), (c), and (d). Although most IRS/Treasury regulations are interpretative, and therefore not subject to these provisions of the APA, the IRS usually solicits public comments on all NPRMs.")

[51] E.g., Hickman, *supra* note 5 at 1760–1773 ("Treasury's expressed reliance in all of its T.D.s on I.RC. § 7805[a]'s clear delegation of authority to promulgate regulations should be sufficient to render them legislative, given the general understanding that rules so promulgated are legally binding and the penalties imposed for failure to follow them.").

straightforward to apply in practice and is most likely altogether incoherent. As commentators have repeatedly pointed out, "it turns out to be maddeningly hard to devise a test that reliably determines which rules are legislative and which are not."[52] There is a now-standard list of adjectives describing the distinction drawn from the case law, including fuzzy, tenuous, blurred, baffling, and enshrouded in considerable smog.[53] Numerous articles have attempted to divine the difference.[54] Given the harmless error analysis, it is only worth highlighting basic contours of the issue here.

A recent survey described current law as follows: "The most prominent judicial approach to applying the interpretive rules exemption focuses on the substance of the position expounded in the rule and asks whether it can credibly be defended as an "interpretation" of the text that it purports to construe."[55] This, however, is not very helpful. It says that an interpretive rule is a rule that interprets.

Many commentators would add that the case law focuses on binding legal effect or similarly, the force of law. For example, one prominent commentator summarized the case law as follows: "To simplify, the [DC Circuit's] cases tend to ask the intertwined questions whether a nonlegislative rule has a 'binding' effect and, if so, whether that effect can be ascribed to 'interpretation.'"[56] Under this approach, a rule is interpretive if either (1) it is not binding, or (2) it is binding but it, sigh, interprets. This is a little bit

---

[52] David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L. J. 276, 278 (2010).

[53] See *Id.* at 287 (citing caes).

[54] See, e.g., Richard J. Jr. Pierce, *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000); Jacob E. Gersen, *Legislative Rules Revisited Essay*, 74 U. CHI. L. REV. 1705 (2007); John F. Manning, *Nonlegislative Rules Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit*, 72 GEO. WASH. L. REV. 893 (2003); Franklin, *supra* note 51.

[55] Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMINISTRATIVE LAW REVIEW 263, 322 (2018).

[56] Manning, *supra* note 53 at 893–894.

helpful because at least we know that if a rule is not binding that it is interpretive, though it is unclear what "binding" means.[57]

An alternative approach is to focus entirely on whether the rule is binding or similarly, has the "force of law". Under this approach, if a rule is binding or has the force of law, it is legislative, full stop.[58] If it not, it is interpretive.

This latter approach, however, is unworkable and cannot plausibly be a correct statement of the law. A key problem is that a large number of guidance documents issued by the IRS are, without question, legally binding, but are also not plausibly legislative rules.

An example is the monthly publication of the Applicable Federal Rates or AFRs. AFRs are used to determine the treatment of debt instruments issued for property under section 1274.[59] AFR's are mandatory, not discretionary, in the sense that taxpayers must use them. Section 1274(d)(1)(B) gives the authority to the Secretary to determine the AFR, and the IRS publishes the AFRs every month in a revenue ruling, without notice and comment. Section 1274(d)(1)(B) does not, however, exempt the determination of the AFR from the APA, which means that under the force of law approach, the IRS would have to go through notice and comment for each month's AFRs and make them

---

[57] For an examination of supposedly nonbinding guidance, see Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165 (2019).

[58] See, e.g., Hickman, *supra* note 4 at 475 ("The Supreme Court has explained that legislative rules carry the 'force and effect of law' while nonlegislative rules do not."). For support of that view, she cites the Supreme Court decision in *Chrysler v.* Brown, 441, US 281, 295 (1979). The *Chrysler* court, however, only held the first part of that proposition, that legislative rules carry the force of law. It did not hold the converse, that nonlegislative rules do not bind.

[59] More precisely, the applicable federal rates are part of the test for determining the "issue price" of debt instruments issued for property (a concept which is similar to the amount that is borrowed). See section 1274(b)(2).

applicable only 30 days after filing in the federal register. At that point, they would no longer be the current month's AFRs.[60]

There are numerous other similar examples.[61] For example, under section 6621, the IRS sets the interest rates for under-and over-payments of tax. These rates are binding and affect tens of millions of individuals each year. They are published without notice and comment. Similarly, the IRS sets the inflation adjustments which determine tax brackets without notice and comment. These adjustments are binding on hundreds of millions of taxpayers every year. And it sets the housing expense limit under section 911, the applicable interest rates for section 382, the maximum face amounts for Qualified Zone Academy bonds, and on and on. There is a vast quantity of binding guidance not issued through notice and comment. As far as I can tell, nobody thinks this guidance should go through notice and comment.

It is not plausible that all of these guidance documents are legislative. In almost every case, the IRS exercises only limited policy judgments. It mostly implements a formula in the statute.[62] They are the paradigm of interpretive. A "force of law" with no

[60] An alternative view is that the various rulings and notices that announce the AFRs, inflation adjustments and so forth are actually not binding. They are interpretations of the underlying statute, which is what binds. One problem with this argument is that many of these items are not entirely mechanical. The Treasury and IRS make some choices when they determine these items. More importantly, arguing that it is the statute not the ruling that is binding puts us back in the soup, arguing about what it means to interpret versus legislate.

[61] See e.g., the applicable interest rates for 382, 642, and 1288. Underpayment and overpayment interest rates under 6621. And corporate bond monthly yield curve under section 417(e)(3)(D). Possibly the inflation adjustments? Maximum face amounts of Qualified Zone Academy bonds. Interest rates under section 807. Inflation adjustments for 1274A. Housing expenses under section 911.

[62] For example, the short term rate under defined in section 1274(d)(1)(C)(i) as: "the average market yield (during any 1-month period selected by the Secretary and ending in the calendar month in which the determination is made) on outstanding marketable obligations of the United States with remaining periods to maturity of 3 years or less." There is a modicum of judgment here. The Secretary must select the 1-month period to be used.

exceptions, however, would treat every one of these guidance documents as legislative and require notice and comment.[63]

A second problem is that we know from *Mead* that some nonlegislative rules get deference. Here is the key quote:

> Delegation of such authority [to get Chevron deference] may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, *or by some other indication of a comparable congressional intent*.[64]

---

[63] Not all binding sub-regulatory guidance, however, is mechanical. An example that is not mechanical, that involves significant policy judgments are tax forms. Taxpayers are required to provide requested the information on the relevant forms and to sign them under penalty of perjury. The choice of what information to require on forms is not mechanical at all. It is a policy judgment.

The authority to issue forms stems from section 6011, which states

> When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Section 6011 seems likely to be an exemption from the notice and comment rules of the APA §553, although it does not expressly cross-reference the APA.

Forms do not go through notice and comment under the APA. They do, however, go through a similar process under the Paperwork Reduction Act. 44 U.S.C. 3501 et. seq. The PRA requires a 60-day comment period on a proposed collection of information and approval by the Office of Information and Regulatory Affairs. The effects of the PRA process, however, somewhat different than notice and comment under the APA. With the PRA, enforcement is effectively delegated to the Office of Management and Budget. OMB issues a control number for approved collections of information. The lack of a control number exempts persons from the paperwork requirement. 44 U.S.C. 3512. The implication is that with a control number, individuals must comply. With APA notice and comment, OMB approval of a regulation does not insulate it from court review.

[64] *Mead,* at 227 (emphasis added).

This means that there are guidance documents that get *Chevron* deference and, in the words of *Mead*, are "binding in the courts,"[65] but that did not go through notice and comment (and are not adjudication). If "force of law" is the test for requiring notice and comment, these rules do not have the force of law but also do receive deference.

This view was emphasized the next year in *Barnhart v. Walton*,[66] and *Edelman v. Lynchburg*.[67] In *Barnhart*, the Court gave *Chevron* deference to a rule that did not go through notice and comment.[68] In *Edelman*, the Court said it would have given deference to a rule that did not go through notice and comment but it did not need to because it agreed with the agency's interpretation.

If nonlegislative rules can get deference, what does it mean to say that they do not have the force of law? I have not been able to find any published work addressing this question, but administrative law scholars tell me in conversation, somewhat sheepishly, that the distinction is that what binds for legislative rules is the rule itself, while what binds for interpretive rules is the statute, which the agency is just interpreting. But this brings the "force of law" idea full circle to once again asking whether the rule makes policy or just interprets. If we are back to this initial question, the force of law concept does no work.

At the end of the day, courts and agencies have to make particularized judgments for each guidance document about whether it is merely interpretative or whether it makes policy, even if, for most intermediate cases, the judgment is hopelessly arbitrary.

---

[65] *Mead* at 227.

[66] 535 U.S. 212 (2002) (the fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking does not automatically deprive that interpretation of the judicial deference otherwise due").

[67] 535 U.S. 106, 111 (2002) ("deference under *Chevron* . . . does not necessarily require an agency's exercise of express notice-and-comment rulemaking power.")

[68] Cass Sunstein lists a number of lower courts that have followed Barnhart in giving deference to agency interpretations that did not go through notice and comment. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 217–218 (2006) (listing cases).For further discussion, see Manning, *supra* note 53 at 893–894.

It seems unlikely that the line is uniformly drawn by section 7805 so that all regulations issued under section 7805 are interpretive as suggested by the Internal Revenue Manual, but it is also unlikely to be the case that every temporary regulation in Hickman's list was legislative. As with the good cause exception, we have to look at each individual case to make valid judgments.

There is a separate line of argument on the legislative/interpretive distinction advanced by Bryan Camp. Camp focuses on the historical meaning of the terms "legislative" and "interpretative" within the tax context.[69] The key passages in Camp's article concern the history of the enactment of section 7805 (which gives general authority to the Treasury to issue regulations),[70] comparing section 7805 to the places where Treasury is given specific authority, such as the authority to write consolidated return regulations in section 1502. His claim is that there was a generally accepted distinction between these sources of authority, with the 7805 authority being narrower.

To illustrate, consider the grant of regulatory authority given to the Treasury under section 1502. It gives the Treasury the authority to override the general provisions of the tax code "in order that the tax liability of any affiliated group of corporations making a consolidated turn . . . may be . . . determined . . . in such manner as to clearly reflect the income tax liability" of the group.[71] This includes, for example, changing basic and

---

[69] Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE LAW JOURNAL 1673 (2014).

[70] The relevant part of section 7805 provides:

(a) Authorization

Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

[71] Section 1502 provides in its entirety:

The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various fundamental tax rules such as the realization rule: realized gain on sales of assets within the group may not be taken into account.[72] The basis of the stock in the usual case is fixed while the stock basis of members of the group adjusts up or down by the income of each member.[73] The Treasury would not remotely have the authority to issue rules of similar scope under section 7805.

Or consider the delegation in section 337(d). This provision gives the Secretary of the Treasury the authority to issue regulations to carry out the purposes of subtitle D of title VI of the Tax Reform Act of 1986 (known to tax cognoscenti as the repeal of the *General Utilities* doctrine) including "regulations to ensure that such purposes may not be circumvented through the use of *any provision of law*" (emphasis added). Read literally, this delegation gives the Treasury the authority to override any law, without limitation, if it is necessary to carry out the stated purposes. While it is not likely as broad as it seems, this is an entirely different level of delegation than section 7805.

Perhaps the APA did away with the distinction between these different levels of delegation, though this does not seem to be what *Mead* and *Barnhardt* hold. Camp argues that such a reading of the APA would be ahistorical. As a result, there are good, though uncertain, reasons to believe that temporary regulations issued solely under the authority of section 7805 and not under a specific grant of authority are interpretive and need not go through notice and comment.

———————

To summarize, it is now clear that final regulations issued pursuant to a combined temporary regulation and an NPRM are valid (at least absent some other reason for invalidity). A recent Supreme Court decision regarding temporary Treasury and IRS regulations has explicitly told us so. The Treasury also has authority to make those final

factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. In carrying out the preceding sentence, the Secretary may prescribe rules that are different from the provisions of chapter 1 that would apply if such corporations filed separate returns.

[72] See Treas. Reg. §1502-13 (deferring gain on sale of assets between members of a group).

[73] See Treas. Reg. 1502-32 (providing for the adjustments to stock basis, known as the investment adjustment rules).

regulations retroactive to the date of the NPRM, which means that immediately effective temporary regulations, if invalid, are harmless error. Moreover, there are solid reasons for thinking that immediately effective temporary regulations are valid leaving aside harmless error, including: (1) 7805(e) might permit them, (2) many might have good cause, and (3) many might be interpretive. This means that the central category of guidance documents Hickman identifies as "outside the lines" in fact are not. Within her study, over 95 percent of the examined guidance is most likely valid.[74] In the more recent period examined here, the number goes up to 100%.

C. Sub-regulatory guidance

A second concern with IRS guidance, is whether subregulatory guidance documents—revenue rulings, revenue procedures, notices and similar documents—are required to undergo notice and comment. Some scholars argue that they have the force of law and, therefore, they must.[75]

Requiring sub-regulatory guidance to go through notice and comment would devastate the tax administrative process. There are hundreds of such documents issued every year. The sheer hours that would have to be devoted to complying with the notice and comment process would be overwhelming. The delays would add further costs. Whatever one thinks of the force of law argument as applied to regulations or to other agencies, it is unworkable for sub-regulatory tax guidance documents.

I examine sub-regulatory guidance here, dividing the discussion into two categories: (1) general guidance documents and (2) a special set of guidance documents, mostly in the form of Notices, that trigger specific penalties for what are known as listed transactions. This latter category raises separate issues and was the subject of a recent

[74] It is difficult to determine a precise number here because much depends on the details of each guidance document. For example, some might not have made the ultimate final regulations retroactive, thereby not taking advantage of the harmless error approach. Others might not have good cause or be interpretive. And some might be invalid for entirely independent reasons, such as that they are impermissible constructions of the statute. Nevertheless, in broad strokes, about 95% of the guidance should be, or at least could be, valid.

[75] See, e.g., Hickman, *supra* note 4.

Sixth Circuit case, *Mann Construction*[76] and a Tax Court case, *Green Valley*.[77] It is likely to be subject to additional litigation as taxpayers seek to use these holdings to protect their tax shelters.

For the argument to have any force, we must start with the premise that rules that have the force of law must go through notice and comment. Although, as discussed, this reading of the law seems implausible, I will assume for this section that it is so.

1. General guidance

There are a large number of general guidance documents, including revenue rulings, revenue procedures, and notices (all of which are published in the Internal Revenue Bulletin and referred to as, IRB guidance). These documents, vastly outnumber formal regulations.[78] Although there is overlap among these documents, they have different core purposes.[79] The issue is whether IRB guidance has to go through notice and comment, assuming that if they have the force of law that they must.

The IRS has long maintained that sub-regulatory guidance is not binding on taxpayers[80] and, therefore, ordinarily wouldn't be thought to have the force of law. The

---

[76] *Mann Construction Inc. v. United States*, No. 21-1500 (6th Cir. Mar. 3, 2022).

[77] 159 T.C. No. 5 (2022).

[78] There appears to be about 200-300 IRS guidance documents published each year in recent years, with many more in the past.

[79] Revenue rulings are like mini-cases. They state a fact pattern, provide legal analysis, and draw a conclusion. Revenue procedures are nominally focused on procedural issues, such as how and when to make elections. Because procedural issues often bleed into substance, however, many revenue procedures have important substantive legal effects. For example, a revenue procedure might provide a safe harbor from challenge on audit. The safe harbor is nominally procedural but has the effect of channeling behavior similar to a substantive rule. Notices are a catch-all category used to provide information.

[80] The IRB includes the following statement, which is not a clear as it should be: "Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents." This statement is from 26 C.F.R. § 601.601(d)(2)(v)(d).

Supreme Court, in *Dixon v. United States*,[81] made this explicit. Sub-regulatory guidance is not binding.

Kristin Hickman, however, notes that failure to comply with sub-regulatory guidance exposes taxpayers to penalties. In particular, the IRS has issued a regulation under the penalty rules saying that failure to comply with certain types of sub-regulatory guidance can lead to penalties.[82] As a result, she argues, sub-regulatory guidance has the force of law notwithstanding *Dixon* and, therefore, must go through notice and comment (again assuming that the test is "force of law").[83]

A straightforward reading of the statute and regulations, however, shows that this argument is wrong. First, the language of 6662 itself makes it clear that penalties can be imposed because of noncompliance with rules that are not "regulations." The relevant language is in 6662(b)(1), which states that "this section shall apply to the portion of any underpayment which is attributable to . . . negligence or disregard of *rules or regulations*." (emphasis added) "Rules" are listed separately and, therefore, are distinct from regulations. In tax parlance regulations are the things that go through notice and comment, not rules.[84] The implication is that we cannot read section 6662 as creating an obligation to use notice and comment. The statute clearly implies that guidance that does not go through notice and comment can create penalty exposure. It is, effectively, a waiver of any notice and comment requirement, should one otherwise exist.

---

[81] 381 U.S. 68, 73 (1965) ("The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law."). Circuit court cases holding that revenue rulings are not entitled to Chevron deference. *Kornman & Assoc., Inc. v. United States*, 527 F.3d 443, 454 (5th Cir. 2008); *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 181 (6th Cir. 2003); *Omohundro v. United States*, 300 F.3d 1065, 1069 (9th Cir. 2002); *Del Commercial Props., Inc. v. Comm'r*, 251 F.3d 210, 214 (D.C. Cir. 2001); *First Chicago NBD Corp. v. Comm'r*, 135 F.3d 457, 459 (7th Cir. 1998).

[82] See Treas. Reg. §1.6662-3 (defining rules and regulations for penalty purposes to include IRB guidance).

[83] Hickman, *supra* note 4.

[84] This language does not quite track the APA language which refers to rules. In tax parlance, however, regulations are a different category than other forms of guidance and we must read the Internal Revenue Code consistent with the usage in the area.

Second, the penalty standard is negligence. A negligence standard means taking into account all sources of authority. If sub-regulatory guidance is just the IRS's opinion but is informative, failing to consider the guidance can be an indication of negligence. Taxpayers can still argue that any given ruling or other sub-regulatory guidance document is wrong, unlike a regulation, which is binding.

The regulations are explicit and generous on this point. The relevant regulation is 1.6662-3(a), which includes the following language:

> In addition, if a position with respect to an item . . . is contrary to a revenue ruling or notice (other than a notice of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin . . . , this penalty does not apply if the position has a realistic possibility of being sustained on its merits.

A ruling's force depends on how persuasive it is.[85] This almost precisely lines up with Supreme Court jurisprudence on the point. Here, for example, is *Mead*:

> Agencies charged with applying a statute necessarily make all sorts of interpretative choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. The well-reasoned views of agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Mead at 227 (internal citations and quotations omitted). That is, even if one agrees that "force of law" is the relevant test, rulings do not have the force of law merely because of how they interact with the penalty provisions.

Requiring sub-regulatory guidance to go through notice and comment would dramatically increase the cost of issuing guidance, making it more difficult for taxpayers to determine what the law says and (one hopes) how to comply. Absent ironclad

[85] Note in addition that the "realistic possibility of success" standard is among the easiest standards for a taxpayer to meet. It is much more generous standard than the usual negligence standard.

statutory requirements for doing so, we should not adopt such a dramatic and devastating change to tax procedure.[86]

2. Listed Transactions and Section 6707A

A key loose end is a special penalty provision, section 6707A, which imposes a penalty for failure to include an information statement on what are known as "reportable transactions" on a return. reasury's implementation of section 6707A is the most plausible case that it has failed to comply with the APA, though I will argue, the IRS has substantial arguments on its side. The analysis is, unfortunately, messy and requires close parsing of a poorly drafted statute.

Section 6707A, first enacted in 2004, was enacted at a time of widespread use of abusive tax shelters and concerns about the resulting significant revenue loss. It was a key provision in the battle against those shelters, a battle that many viewed as almost existential for the tax system.[87]

Prior to the enactment of section 6707A, the Treasury had attempted to address tax shelters by requiring disclosure under its general authority under section 6011 to require taxpayers to make a return or statement. The underlying idea what that shelters thrive in secrecy, and by requiring disclosure, the IRS could learn about shelters and assess the appropriate tax and penalties. To this end, under regulations issued pursuant to section 6011, Treasury issued notices identifying shelters and requiring disclosure of those shelters.

Congress believed that this approach was not effective because the penalties for nondisclosure under section 6011 were not sufficiently high or sufficiently certain. It

---

[86] An alternative, suggested by Kristin Hickman is for the IRS and Treasury to issue regulations making sub-regulatory guidance not relevant for penalties. Hickman, *supra* note 4 at 534.This would also be detrimental to tax administration because it would raise the already high bar for penalties.

[87] For a description of the general battle against tax shelters see TANINA ROSTAIN & MILTON C. REGAN JR, CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY (2014).

enacted section 6707A to fix these problems. Section 6707A effectively codified the existing disclosure regime and added high and certain penalties for failure to disclose.

Following prior law, the category of transactions that must be disclosed to avoid the section 6707A penalty are known as reportable transactions. A reportable transaction is defined in section 6707A as

> any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion.

The regulations in turn define reportable transactions, breaking them down into categories. For our purposes, the key category is "listed transactions." A listed transaction is defined in the statute as

> a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011.

Treas. Reg. §1.6011-4(b)(2) further defines a listed transaction as

> a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

The IRS has identified 36 listed transactions, in each case by issuing a notice and placing it on a list on the IRS website.[88] Many of these were identified under the prior regime (the 6011 regime).

The question is whether this procedure—using a notice to identify listed transactions—violates the APA. As noted, a Sixth Circuit decision, *Mann Construction*

[88] https://www.irs.gov/businesses/corporations/listed-transactions

Inc. and a Tax Court decision, *Green Valley*, addressed the issue.[89] *Mann Construction* involved Notice 2007-83[90] which described a transaction involving abusive cash value life insurance arrangements. *Green Valley* involved Notice 2017-10, which regarded tax shelters using syndicated conservation easements.[91] Both courts held, though for different reasons, that the requirement to report is a legislative rule. As a result, it can only be imposed after notice and comment. Because the IRS did not follow notice and comment procedures when it issued either Notice, the reporting requirement is invalid.

All of the opinions—the Sixth Circuit opinion and each of the five separate opinions in the Tax Court (a majority opinion, two concurrences and two dissents)—agreed that the Notice was legislative. The Sixth Circuit relied on the "rule of law" argument for this holding, which as discussed above, I do not believe is correct. The common reasoning in the Tax Court opinions was that the definitions of reportable transaction and listed transactions (provided above) contain no content that can be interpreted. They simply delegate the determination to the Treasury. There is no requirement to disclose a particular transaction absent a notice (or other guidance). The taxpayer could not have interpreted section 6707A to know that it should have disclosed its tax shelter. It needed the Notice to know that it had a reporting obligation. Providing content to a general delegation of this sort, the Tax Court judges agreed, is legislative.

This does not mean that Notices identifying listed transactions have to go through notice and comment, however, because the statute might exempt them from the requirements of APA §553.[92] The crux of the disagreements in the various opinions are about how to read APA §559 requirement that §553 cannot be superseded or modified except to the extent that it is done so expressly, and whether the text and legislative

---

[89] In addition, a district court in the Sixth Circuit followed *Mann Construction* but invalidating the Notice at issue in *Green Valley*, Notice 2017-10. See *GBX Associates, LLC, v. United States*, 1:22cv401 (N.D. Ohio, Nov. 14, 2022)

[90] 2007-2 C.B. 960.

[91] 2017-4 I.R.B. 544.

[92] The government did not argue that it had good cause to issue the Notice without notice and comment.

history of section 6707A meets that requirement. The various Tax Court judges had different views of on these issues.

In particular, although APA §559 states that the requirements of §553 cannot be superseded or modified except to the extent that it is done so expressly, this requirement does mean using magic words such as a reference to the APA. Instead, the statutory scheme merely needs to be clear.[93] Moreover, as Justice Scalia suggested in *Lockhart v. United States*, there are good reasons to believe that a prior Congress cannot bind a subsequent Congress by requiring an express statement to change prior laws.[94] "Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them"[95]

The statutory language is muddled. Section 6707A defines a reportable transaction as a transaction "determined under regulations prescribed under 6011 . . ." Listed transactions are reportable transactions "identified by the Secretary as a tax avoidance transaction for purposes of section 6011." This seems to allow identification under the usual section 6011 rules, which includes the use of forms. Moreover, the regulations under section 6011 at the time of enactment explicitly allowed listed transactions to be

[93] See *Marcello v. Bonds*, 349 U.S. 302 (1955) (the Immigration and Nationality Act overrides the APA notwithstanding a specific clause superseding the APA); *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 398 (D.C. Cir. 1988 ("Congress sets forth specific procedures that express its clear intent that APA notice and comment procedures need not be followed, an agency may lawfully depart from the normally obligatory procedures of the APA.")

[94] 546 U.S. 142, __ (2005) (Scalia, concurring).

[95] *Id.* See also *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) ("one legislature may not bind the legislative authority of its successors." To be pedantic, suppose a prior Congress enacted a law that could only be repealed if the future Congress had its members sing the national anthem while standing on their heads drinking lemonade. Nobody would think such a requirement valid. Of course, an "express" requirement, unlike this sill example, has a purpose, but the example illustrates the problems of allowing prior Congresses to bind future Congresses. It has the potential to prevent the current, democratically elected representatives from passing laws that reflect the will of the people. For a discussion of these issues, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal Essay*, 111 YALE L.J. 1665 (2001); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule Essay*, 91 CALIF. L. REV. 1773 (2003).

identified using notices. That is, the statute requires reportable transactions be defined in regulations. Listed transactions are a subset of reportable transactions. But the definition of listed transactions might (or might not) exempt them from the regulations requirement because of the general cross-reference to 6011.

Anyone who was involved in the enactment of section 6707A would, I believe, be surprised by the conclusion that the notice regime used to identify listed transactions is invalid.[96] Section 6707A was intended to enhance Treasury's powers, not reduce them, and there is no hint that Congress sought to change the procedures Treasury was using.[97] Nobody was thinking, as far as I can determine, that the notices were legislative and, therefore, would need to go through notice and comment. As a result, nobody

---

[96] In particular, the legislative history suggests that the form/notice approach is not invalid. In describing the proposal in 2002, as it was being developed, the Joint Committee on Taxation stated as follows:

> The proposal would define a "listed transaction" and a "reportable transaction" by reference to the definition given to these terms in Treasury regulations under section 6011. A "large entity" would be defined as any entity with gross receipts in excess of $10 million in the year of the transaction or in the preceding year. A "high net worth individual" would be defined as any individual whose net worth exceeds $2 million, based on the fair market value of the individual's assets and liabilities immediately before entering into the transaction.

JCX-53-02 at 3.

Moreover, there is implicit Congressional approval of procedure used by the IRS in the legislative history. Section 6070A was enacted in 2004. Prior to that time, Treasury had issued disclosure regulations under 1.6011-4 that used the same procedure and terminology: listed transactions were subject to penalties and were identified by notice. As of 2004, the IRS had listed __ transactions. Section 6707A was not enacted to change those procedures. It was enacted to enhance the penalties for failure to disclose. The legislative history describes the pre-existing notice procedure and then lists reasons for change, which is "to provide the Treasury Department with additional tools to assist its efforts to curtail abusive transactions." H. Rept. 108-548 (Part 1), at 261 (2004). The Senate and the Conference followed the House with only minor, unrelated changes. See Conference Report—H. Rept. 108-755 (2004). There is no hint in the legislative history that the pre-existing procedure was to be changed.

[97] See the discussion in note 96 *supra*.

thought to expressly overrule that requirement. Taking §559 seriously imposes a burden on legislative drafters that may be excessive.

Given two courts have held that the procedure used to identify listed transactions is invalid, the Treasury should immediately fix this problem and do so with retroactive effect. It has, in fact, begun to do so. It recently issued a proposed regulation identifying certain syndicated conservation easement transactions as listed transactions.[98] It is not clear, however, why the Treasury issued proposed regulations for just this one listed transaction rather than all 36. The Treasury should, as quickly as possible, issue an addition, omnibus regulation that covers the other 35 listed transactions. Moreover, the regulations should be retroactive to the date of each of the 36 notices, which is allowed under section 7805(b)(1)(C) (which allows retroactivity to date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public). In addition, for any future transactions that need to be listed, the Treasury should issue an NPRM proposing a retroactive effective date under the authority of section 7805(b)(3), (which allows retroactivity to prevent abuse). The issue is simply too important to be left to the vagaries of administrative law and the courts.

D. Hard Look Review: aka preambles that are too concise to meet the concise statement requirement

A third possible problem with the Treasury's and the IRS's compliance with administrative law is whether they comply with the reasoned explanation requirement. Usually associated with *State Farm*,[99] courts take a "hard look" at the contemporaneous rationale for a rule. Agencies must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[100] In addition, an agency must "articulate a satisfactory

[98] Prop. Reg. §1.6011-9 (December 6, 2022).

[99] *Motor Vehicle Manufacturers Ass'n Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29,(1983)

[100] Id. at 44.

explanation for its action . . . . [It] must cogently explain why it has exercised its discretion in a given manner."[101]

Numerous precedents try to elucidate the precise contours of those requirements. For example, the Court recently stated that an "agency action is lawful only if it rests on a consideration of the relevant factors."[102] The contours of the requirement, however, remain elusive. In *State Farm* itself, for example, the Court split 5-4 on whether the agency appropriately considered certain factors.[103]

There is no simple way to know whether the Treasury and IRS systematically fail the reasoned explanation requirement. There are thousands of regulations and accompanying preambles. Given how difficult it is to know whether a court would find any one of them insufficient, there is no systematic way to estimate Treasury's compliance with this obligation.

There have been, to my knowledge, three circuit court opinions on the adequacy of preambles to tax regulations. The first was *Altera v. Commissioner*.[104] In that case, the Tax Court invalidated a transfer pricing regulation because it found that the Treasury failed to disclose any factual findings and failed to address significant comments in its final rule.[105] The Ninth Circuit, however, reversed, finding that the explanation of the regulations was sufficient.[106]

---

[101] *Id.* at 48-49.

[102] *Michigan v. EPA*, 576 U.D. 743, 750 (2015).

[103] *State Farm* at 54 (NHTSA should have considered whether drivers would unbuckle their seatbelts). *State Farm* at 58 (disagreeing on this point).

[104] 926 F.3d 1061 (9th Cir. 2019)

[105] *Altera Corporation & Subsidiaries v. Commissioner*, 145 T.C. 91 (2015).

[106] *Altera*, note 6, *supra*.

The other two cases both involve a 40-year-old regulation providing rules governing somewhat obscure aspects of the tax treatment of charitable contributions.[107] In the first case, *Hewitt v. Commissioner,*[108] the Eleventh Circuit found that the Treasury failed to respond to a number of significant comments and invalidated the regulation. The next year, the Sixth Circuit in *Oakbrook Land Holdings LLC v. Commissioner*[109] found that the Treasury had in fact responded to all significant comments and upheld the regulation. The disagreement between the two courts concerned which comments were significant.

We cannot say from this limited evidence that Treasury and IRS regulations systematically fall outside requirements of reasoned explanation and hard look review. It is even less clear that additional scrutiny of preambles would make tax administration better. The level of judicial review seen by the Tax Court in *Altera* and the Eleventh Circuit in *Hewitt* invites games, encourages defensive paperwork, and grants judges undue discretion.[110] In particular, the prospect of close scrutiny of preambles gives taxpayers incentives to submit unduly lengthy and detailed comments, with the hope that a court will find a lack of adequate response.[111] Submitting voluminous comments

---

[107] The regulation at issue was Treas. Reg. § 1.170A-14(g)(6)(ii).

[108] 21 F.4th 1336 (11th Cir. 2021).

[109] No. 20-2117 (6th Cir. 2022).

[110] There is a substantial literature on hard look review. For a summary of proposals to amend hard look review, and objections to those proposals, see Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the Hard Look*, 92 NOTRE DAME L. REV. 331, 355–361 (2016).

[111] Richard Pierce describes precisely this dynamic for the National Highway Traffic Safety Administration. Richard J. Jr. Pierce, *Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision is Adequate: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 9 (2014). Lawyers for regulated firms that were opposed to a NPRM realized that they could make it easier to challenge the final rule by submitting lengthy and detailed comments. To do so, they hired consulting firms to produce lengthy reports purporting to criticize the proposed regulations. The strategy proved successful. The final regulations were subsequently invalidated because the NHTSA did not adequately respond to those manufactured comments. *Nat'l Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar*, 491 F.2d 31, 36-40 (D.C. Cir. 1974).

is like buying a lottery ticket. The prospect of such scrutiny likewise encourages defensive paperwork by the Treasury, making preambles less useful because they need to respond to every comment, whether the comment was useful or not (because you never know what a court will do). And each time a regulation is invalidated for having an inadequate preamble, the Treasury and IRS will now have to devote resources to reissuing the regulation, going through notice and comment once again, resources that could have been used for better purposes.

It is hard to object to good preambles. Reasoned decision making is a central element of administrative procedure, ensuring that interested parties have an opportunity for input and that agencies properly consider their views. Nevertheless, I doubt more court scrutiny of preambles would improve the regulatory process and suspect it would make it worse. Part 2 discusses alternative methods of ensuring that the Treasury and IRS decision process works well.

E. Summary: Coloring Inside the Lines.

The basic claim that the Treasury and IRS routinely violate the APA seems to have been accepted by many people. It is false. No agency is perfect, but the Treasury's and IRS's record is very good. Its use of temporary regulations is not inconsistent with the APA. The Supreme Court clearly held that final regulations issued after temporary (or interim) regulations can be valid. And for a number of reasons including the ability to have those final regulations apply retroactively, its use of temporary regulations is also valid. Most sub-regulatory guidance documents do not need notice and comment, either because they are interpretive (e.g., guidance about interest rates) or they do not carry the force of law notwithstanding how they interact with the penalty rules. The listed transaction regime using Notices to identify listed transactions, might be the one area that is problematic: where there are arguments on both sides, courts might conclude that the Notice system needs to instead use notice and comment. While seemingly inconsistent with the background of the listed transaction regime, the Treasury and the IRS should fix this problem. Preambles can always be better, but courts should not be in the business of policing this issue except for cases of egregious error. By any measure, Treasury colors inside the lines.

II. Evaluative and Normative Questions

Much of the anti-tax exceptionalism literature is purely doctrinal. It simply asks whether the IRS and Treasury are complying with the requirements administrative law as that law and the relevant provisions of the tax law currently exist. The analysis above for the most part followed that approach, attempting to set out the doctrinal requirements of current law and evaluate whether tax administrative procedures meet them.

The anti-tax exceptionalism literature, however, is also motivated by normative concerns. To understand the claims made in that literature, we need to evaluate whether those concerns are valid and whether changing tax administrative practices in the directions suggested by that literature would advance those goals.

While there may be others, that literature seems to be motivated by three goals. The first is implied by the overarching theme and the name given that literature: whether the IRS and Treasury should be treated differently than other agencies or conversely whether there should be uniformity in administrative practice. The second concerns information flows. Much of the tax-exceptionalism literature focuses on the need for greater use of, and earlier use of, notice and comment. A primary (but not the only) value of notice and comment is to ensure that regulators have information when the make decisions. The question, therefore, is whether additional use of notice and comment would be the best way to improve information flows to tax administrators. A final goal is to improve the accountability and responsiveness of the tax system. The question is more traditional APA procedures including more court supervision of the tax system is a good way to promote those goals.[112]

[112] The literature sometimes argues that lack of compliance with administrative law and in particular the use of notice and comment threatens the legitimacy of the tax system. See, e.g., Hickman, *supra* note 4 at 472, 532 ("Absent notice and comment, Chevron deference for IRB guidance would present substantial legitimacy issues."); Kristin E. Hickman, *Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements, A*, 76 Geo. Wash. L. Rev. 1153, 1206 (2007) ("By discouraging taxpayer participation in the notice-and-comment process, Treasury likely encourages, or at least offers little to mitigate, public cynicism about the tax system's legitimacy."). This seems implausible. While there are important problems with the legitimacy of the IRS and various IRS practices, it is hard to imagine that in a survey of the public perceptions of problems

The short answer in each of these cases is no. I elaborate why below.

A. Uniformity and exceptionalism

The core claim of the anti-tax exceptionalism literature is that the tax system is not, and should not be treated as, exceptional. This claim relies a prior claim that the tax system does not comply with the requirements administrative law. Part I established that that this premise is false. The tax system is not exceptional in the sense that it currently largely complies with the requirements of administrative law.

Let us assume, however, that some or all of the arguments in Part I are not correct, and that tax procedures sometimes violate the requirements of administrative law. Even so, there are two problems with the arguments about exceptionalism. First, the premise that there is uniformity outside the tax system is false. As far as we know, though research on the subject is limited, the procedures followed by the wide variety of agencies vary widely. There is no uniformity outside the tax system. Second, the framing is wrong: rather than focusing on uniformity, we should focus on how to improve tax administration. The underlying idea was expressed concisely by Stephanie Hunter McMahon: "Instead of forcing all agencies to conform to one set of principles, Congress and the courts should figure out which principles work in different contexts to accomplish administrative law's underlying objectives."[113] In short, the goal should be to figure out what works for tax administration.

The underlying debate—whether administrative procedures should be uniform across agencies—is as old as the APA itself. On the one hand, the APA seems to have been enacted to impose uniformity, or at least more uniformity, over widely disparate agency policies. As the Supreme Court stated in *Dickinson v. Zurko*,[114] "[t]he APA was meant to bring uniformity to a field full of variation and diversity."

---

with IRS legitimacy that notice and comment would make the top 100 or even the top 1,000 items. Simply being able to answer the phones would seem to be more important.

[113] McMahon, *supra* note 16 at 558.

[114] 527 U.S. 150, 155 (1999).

On the other hand, given wide variety of tasks, structures, histories, and other elements of different agencies, administrative law might need to apply differently to different agencies, at least if agencies are to operate effectively. The United States Administrative Conference of the United States Government Manual lists 305 unique agencies.[115] USA.gov, using a different definition of "agency", lists 405 different agencies. If we limit the analysis to agencies that have issued significant regulations, as defined in Executive Order 12,866, in the recent past, there are 123 different agencies.[116]

These agencies cover the entire spectrum of federal law. For example, the Park Service, Immigration and Customs Enforcement, the Securities and Exchange Commission, the Internal Revenue Service, and the Occupational Safety and Health Administration have missions that have little to do with one another. Designing and implementing a water quality trading system (done by the Army Corps of Engineers) has little to do with determining eligibility for disability insurance which in turn has little to do with determining immigration policies and border enforcement. Some agencies exercise their power through traditional notice and comment regulations, others primarily use adjudication, and others exercise vast powers through various other mechanisms such as grants, contracts (e.g., rules against discrimination in federal contracting[117]), or direct action in the market (e.g., the Federal Reserve setting the Fed Funds rate). As one would expect given this vast range of missions and approaches, corner solutions—perfect uniformity or no uniformity whatsoever—are unlikely.

Ernest Gellhorn and Glen Robinson addressed this point in 1975:

> Granted, at some level of generality the study of administrative procedures can be usefully studied independent of any particular substantive law context, just as civil procedure can be examined independent of contracts, torts, or other substantive law contexts which it happens to serve. The question is to what extent it is worthwhile to do so, given that most of the administrative process—

---

[115] The United States Government Manual (2016).

[116] JENNIFER L. SELIN & DAVID E. LEWIS, *Sourcebook of United States Executive Agencies*, 119 (2018) (Table 19, listing agencies issuing significant regulations in the 15 years prior to December 15, 2017).

[117] Executive Order 11246, as amended, 30 FR 12319 (1965)

> in contrast to the judicial process—is intimately connected with the substantive law of particular administrative functions.[118]

They continue, "[a]t some point, however, it becomes important to develop at least some rudimentary understanding of what the agency does, of the substantive policy issues involved."

This theme was taken up a decade after Gellhorn and Robinson by then Professor Stephen Breyer. He argued

> [T]here are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula.[119]

Ten years later, Judge Stephen Williams concurred:

> A second criterion is that interpretations should lend themselves to reasonable application across the range of agencies and agency activities governed by the statute. For example, a very demanding view of § 3(a)(2)'s requirement that an agency make its decisions "available for public inspection, " is well suited to the Social Security Administration with offices scattered over the country and tens of millions of clients, might be quite unsuitable for the Federal Energy Regulatory Commission. If one size must fit all, as in some sense it must under the APA, then those who define the permissible size must either build flexibility

[118] Gellhorn and Robinson, *supra* note 22 at 786.

[119] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMINISTRATIVE LAW REVIEW 363, 373 (1986).

into the definition (for example, "reasonable" availability) or find some other solution to the problem of variability.[120]

On the other hand, Justice Antonin Scalia was a strong proponent of uniformity.[121] Writing about *Chevron* deference, Scalia argued, "Chevron, however, if it is to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[122]

The question is how this debate has played out in actual agency practice. There is, unfortunately, limited work comparing procedures across agencies, a field we might think of as comparative (domestic) administrative law. Nevertheless, the scholarship we do have gives us an informative if crude map of the terrain.

For example, Richard Levy and Robert Glicksman studied how courts treat different agencies.[123] They looked at five different agencies—the IRS, the FCC, the SSA, the EPA, and the NLRB—and find that the agencies follow different practices and are treated differently by the courts. For example, they find differences across these agencies in the standard of review, of the distinction between interpretive and legislative regulations, in the requirement of reasoned decision making, the treatment of ex parte communications, and the standard for factual findings.[124]

---

[120] Stephen F. Williams, *The Era of Risk-Risk and the Problem of Keeping the APA Up to Date*, 63 U. CHI. L. REV. 1375, 1385 (1996).

[121] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989). Sunstein, *supra* note 67. discusses and compares the Breyer and Scalia views.

[122] Scalia, *supra* note 119 at 516.

[123] Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2010).

[124] *Id.* at 510–551. While Levy and Glicksman believe that agency-specific approaches are generally undesirable and arise due to silo effects, they also emphasize that it has some benefits.

In related work, Kent Barnett and Christopher Walker examine the effects of levels of deference in the circuit courts, examining how well different agencies fair.[125] They find a wide disparity in agency success rates.[126] It is not clear how to interpret this information, however. It is consistent with a uniform standard for all agencies but different agency quality, and with uniform agency quality and different standards for different agencies. It is likely some mix, though the latter would be more consistent with the Levy and Glicksman findings.

Nicholas Parrillo looks at how various agencies treat sub-regulatory guidance, which is relevant for understanding what it means to have the force of law.[127] Among other things, agencies treat sub-regulatory guidance quite differently, with some agencies insisting that regulatory parties follow sub-regulatory guidance and others approaching this guidance more flexibly. He posits that the differences are due to differences in both external pressures on agencies and the internal structure of the agencies.

Emily Bremer, in a pair of articles, looks at differences in administrative adjudication.[128] She looks at the procedures used by six different agencies (the Social Security Administration, the Patent Trial and Appeal Board, the Executive Office of Immigration Review, the Equal Employment Opportunity Commission, the Department of Agriculture, and the Board of Veterans' Appeals), finding a broad range of procedures used, even within this small snapshots of agencies. These differences often arise because of specific statutory rules and court acquiescence in agency choices for adjudication.[129]

---

[125] Barnett and Walker, *supra* note 25 at 52–56.

[126] The IRS has one of the worst records in the circuit courts, ranking 23rd out of 28 (above Justice, the FTC, Energy, HUD, and the EEOC). Barnett and Walker, *supra* note 25 (Table 3).

[127] Parrillo, *supra* note 56.

[128] Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351 (2019); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749 (2019).

[129] See Bremer, *supra* note 126 at 1775, Table 2 (detailing variation for 10 different elements of adjudication).

Finally, Anne O'Connell in a series of papers (with co-authors) emphasizes how the reality of administrative rulemaking deviates from the "Schoolhouse Rock" version of administrative law.[130] For example, work with Abbe Gluck and Rosa Po considers new forms of legislation and rulemaking, including omnibus laws, emergency laws, outsourcing (e.g., to commissions), and presidential rulemaking. All of these procedures change how agencies operate, the tasks they are given, their accountability, the flow of information to agencies, and numerous other factors. They note that "textbook understandings that form the basic assumptions underlying the doctrines and theories [of administrative law] are woefully outdated."[131] Work with Dan Farber is similar, highlighting the "lost world of administrative law" with the reality of actual rulemaking. They highlight, among other things, how many rules involve multiple agencies, the role of the White House (including executive orders and the Office of Information and Regulatory Affairs), and new criteria, such as cost-benefit analysis, for decisions and reason giving.[132]

The scholarship cited above looks across agencies, comparing them to one another. There is a related line of work that looks at how particular agencies or sets of agencies with common subject matters apply the APA and administrative law. These articles are not dissimilar to the tax-exceptionalism literature (though usually they are merely descriptive rather than seeking to impose new requirements on particular agencies), but looking at agencies other than the IRS.

For example, a number of papers look at how financial regulators issue guidance. Gillian Metzger, in a detailed study of financial regulators, focusing on the Federal Reserve, showed how their approach to regulation systematically deviates from the standard model (epitomized in her study by the EPA).[133] The Federal Reserve may be

---

[130] See, e.g., Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law,* 92 TEX. L. REV. 1137 (2013); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking Essays*, 115 COLUM. L. REV. 1789 (2015).

[131] Gluck, O'Connell, and Po, *supra* note 128 at 1994.

[132] Farber and O'Connell, *supra* note 128 at 1154–1175.

[133] Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW AND CONTEMPORARY PROBLEMS 129 (2015).

the most powerful agency in the government,[134] yet many of the Federal Reserve's most important actions, such as setting the federal funds rates, are taken without notice and comment. Financial regulators' approach to regulation tends to be collaborative, relying in informal oversight that is often hidden from public view, rather than formal regulations. Moreover, most financial regulators are protected from removal and often have budgetary autonomy, making them substantially independent from the President and Congress. There is, in her words, an "almost through-the-looking-glass quality when approaching financial regulation with an administrative law lens."[135]

David Zaring also addresses financial regulators, focusing, however, on the non-tax aspects of the Treasury such as the Office of the Comptroller of the Currency and the Office of Thrift Supervision, rather than the Federal Reserve.[136] He finds that the Treasury consistently deviates from the usual APA procedures. It rarely issues major rules, and when it does, it often does so without going through notice and comment.[137] It not often subject to litigation and faces less strict OMB review than other agencies. The administrative law paradigm of court review of notice and comment regulations does not describe the vast majority of Treasury's regulatory practice.

Zaring points to a number of reasons for these differences. One, similar to the Fed, is that regulations are often cooperative rather than adversarial. Its regulatory mission is not focused on consumer protection or the regulation of externalities, unlike, say, the

---

[134] Peter Conti-Brown, Yair Listokin & Nicholas R. Parrillo, *Towards an Administrative Law of Central Banking*, 38 YALE J. ON REG. 1, 3–6 (2021) (providing examples of the Fed's power).

[135] Metzger, *supra* note 131 at 129. In related work, Peter Conti-Brown, Yair Listokin, and Nick Parrillo argue that the Federal Reserve can usefully adopt some of the principles of administrative law to improve its performance. Conti-Brown, Listokin, and Parrillo, *supra* note 132.

[136] David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010).

[137] *Id.* at 199–200. Zaring concludes that the administrative practices used by the Treasury may often be superior to the more standard administrative law practices. It gives bureaucrats flexibility and holds them accountable for results, similar to standard management techniques taught in business schools. *Id.* at 241.

EPA or the SEC. Another is that Treasury developed its administrative practices long before the APA and the development of modern administrative law.

Patent law also follows its own version of administrative law.[138] As Melissa Wasserman notes, "the patent system has historically suffered from a lack of serious engagement with administrative law."[139] Adam Mossoff notes that "throughout the twentieth century, administrative law and intellectual property law seemed as if they were hermetically sealed off from each other in both theory and practice."[140] While this has begun to change, traditionally, the Patent and Trademark Office (PTO) received no deference from courts, it was only in 1999 that the Supreme Court held that the APA applied to regulations promulgated by the PTO.[141] Decisions of the Patent Trial and Appeal Board still do not receive *Chevron* deference.[142]

Finally, Jen Nou looked at how administrative law principles apply to agencies that regulate elections.[143] A variety of federal agencies have election-related responsibilities, including the Electoral Assistance Commission (EAC), the Federal Election Commission (FEC), the Department of Justice, and the Department of Defense. These agencies as Nou observes, are "notable for their structural and substantive heterogeneity."[144] The EAC and the FEC are independent multi-member commissions where members serve staggered terms. Justice and Defense are executive agencies. Building on a detailed

---

[138] See Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959 (2012); Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA - What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269 (2006).

[139] Wasserman, *supra* note 136 at 1965.

[140] Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2002 (2008) (investigating the connection between IP law and administrative law).

[141] *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999).

[142] Stuart Minor Benjamin & Arti K. Rai, *Administratwive Power in the Era of Patent Stare Decisis*, 65 DUKE LAW JOURNAL 1563 (2016).

[143] Jennifer Nou, *Sub-Regulating Elections*, 2013 THE SUPREME COURT REVIEW 135 (2014).

[144] *Id.* at 144.

examination of how the agencies operate, Nou recommends an approach to the administrative law of elections based on agency structure and expertise.

There is room for much more work along these lines, teasing out how different agencies work and how administrative law applies to different agencies. Our understanding remains only limited. In particular, it is difficult to appreciate the full range of agency missions, structure, and operation from standard administrative law scholarship, which tends to emphasize a relatively small set of issues, such as the standards for judicial review.

To get a sense of how agencies vary, we can look at range of structures and missions of the 400 or so federal agencies. This is an enormous task—the federal government is large and complex. Among other items agencies vary along the following lines:

- Missions, ranging from solar system exploration (NASA), making disability determinations (SSA), evaluating pharmaceuticals or determining what medical care will be available to tens of millions of individuals (the FDA), to setting interest rates to control the overall economy (the Federal Reserve). These missions have little to do with one another.
- The type of information and expertise needed to pursue these wide-ranging missions. All agencies need smart, well-trained employees, but the training needed, and the type of information used across different agencies varies widely. Some agencies need highly specialized scientists, of various sorts, while others need specialists in particular industries, such as electricity, maritime shipping, firearms, or farming and others need specialists in fields that cut across industries, such as employment.
- The type and number of regulated parties. Some agencies regulate a small number of sophisticated entities (such as banks or utilities) and others regulate and interact with hundreds of millions individuals or entities (such as taxpayers). The way agencies interact with and communicate with these different types of entities or individuals will vary. For example, what it means to have broad participation in a rulemaking proceeding will be different if only a small number of sophisticated entities are regulated compared to millions of individuals.
- Information costs. Agencies differ in their access to information, whether through regulated parties (either through notice and comment or some other way) or more generally.

- Error costs. The effects of agency mistakes will not be the same. For some agencies, the costs of mistakes might be extremely high, while for others, mistakes might be easily corrected. Moreover, the costs may not be symmetric—over-regulating might have different costs than under-regulating—and the asymmetries will not be the same for different agencies.
- Costs of delay. Related to costs of error, the costs of delays will vary across agencies.
- Histories and internal sense of mission. Agencies have widely different histories, with some agencies dating from the founding era, others the progressive era, the New Deal, or more recent vintage. These histories affect the internal operation of the agency.
- The method of they use to regulate, such as the mix of rules, adjudication, and other mechanisms, with some agencies mostly using notice and comment rulemaking, others using informal guidance, adjudication, contracts, grants, or direct intervention in the market.
- How the agency interacts with regulated parties. Some agencies have adversarial relationships with regulated parties, and others have cooperative relationships.
- Agency structure, including number of heads, removal rules, number of lower level political appointees, and funding sources.
- Ability of the President and the ability of Congress to exercise oversight, which is partly a function of removal rules, agency structure (e.g., "independent" versus cabinet agencies), size of the agencies, and congressional structure.
- The structure of litigation and the ability of courts to exercise oversight, including whether cases go to the DC Circuit or some other specialized court, whether agency fact-finding gets deference, and the ability of parties to get pre-enforcement review.

In short, we know from the studies that exist that agencies operate differently, for example, in how they treat informal guidance, and courts treat them differently. Moreover, thinking about the functions of different agencies shows the tremendous variation in how agencies operate, how they are structured, their environment, and the types of decisions that they make. It would be surprising, almost to the point of implausibility, that a single set of procedures works for all of them. For example, if an agency must regularly act with urgency, a set of procedures designed for agencies that have a broader timeline for action would not work well, and vice versa. Similarly, agencies subject to close oversight by political actors such as the President or Congress, may be in a different position relative to the courts than agencies with little oversight.[145]

As with other agencies, the tax system presents its own unique problems. The issue is not tax exceptionalism. It is every-agency exceptionalism. Given the structure and purposes of the tax system, there is no reason to expect the IRS and the Treasury to mimic other agencies. Moreover, there are few or no reasons to want them to.

To summarize, the basic claim about tax exceptionalism fails. As discussed in Part I, the tax system is not exceptional in the sense that it already complies with the requirements of administrative law. Moreover, even if that claim were not true, there is little uniformity in administrative practice among agencies. There is no uniform administrative law that the tax system can conform to. The framing is based on a false premise. Finally, even if both these claims were not correct and the tax system failed to comply with the uniform procedures used elsewhere, the framing would still not be helpful. We need to determine which tax procedures are best, not which tax procedures conform to what other agencies are doing.

B. Information

As noted, the anti-tax exceptionalism literature would have the IRS and Treasury use notice and comment more extensively. There may be a number of reasons for this, one of which is to ensure that the guidance process is well informed.

Information is central to the guidance process. Regulators need good information to determine which projects to pursue and to determine the substance of those projects. Much of the relevant information, however, is held by private actors, either by taxpayers or by tax specialists. It is important to create pathways for information held in private hands to become known to regulators. The question is whether increased use of notice and comment is a good method of improving information flows or whether other methods would work better.

[145] Administrative law could always make the meta-move, that is, try to design an overarching set of principles that accommodates these differences. But that would still mean that the actual functioning of different agencies, on the ground, would look different from one another.

There are a small number of studies of how information flows to the Treasury and the IRS. In one study, Shu-Yi Oei and Leigh Osofsky examined the information flows during the issuance of regulations under a new code provision enacted in the 2017 tax law, section 199A.[146] Section 199A, which allows a 20% deduction for certain pass-through income, was both novel and affected a large number of taxpayers. As a result, the regulation process attracted a lot of interest. In addition to the usual notice and comment flow of information, Oei and Osofsky documented information flowing to the Treasury before the issuance of proposed regulations (so before the notice and comment period). This information came primarily from industry groups and professional associations. In addition, they found a substantial volume of what they call indirect commentary, which consists of blog posts, op-eds, academic research, and posts on other public mediums, such as Twitter.[147]

One finding, perhaps unsurprising, is that most of the comments suggested rules that favored private actors. This asymmetry differs from the comments other agencies often receive. For example, the EPA might receive comments both from industry groups, and from environmental groups, giving the EPA information on both sides of an issue. This is not necessarily the case for tax regulations, where comments tend to be more one-sided: there are few actors providing comments to counter industry comments.

A second study of information flows is a recent paper by Clint Wallace who studied participation in the notice and comment process for all proposed regulations during the three year period between 2013 and 2015.[148] Wallace's findings are consistent with Oei and Osofsky's findings. He finds that "notice and comment for tax regulations has not elicited broad or diverse input, and thus has not been a forum for soliciting reliable

---

[146] Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the Sec. 199A Regulations*, 69 EMORY L.J. 209 (2019).

[147] *Id.* at 239.

[148] Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179 (2017). Wallace's study shows that the 199A regulations examined by Oei and Osofsky were unusual in terms of the number of comments and public interest. In Wallace's data, about one-quarter of the regulations received no comments whatsoever, and the median regulation received three comments. *Id.* at 219.

information for Treasury experts to rely on in shaping tax regulations."[149] He continues, "the data show that the few participants have been heavily weighted towards private interests, often sophisticated business taxpayers seeking to reduce tax liability in ways that were wholly predictable and anticipated when Congress addressed the issue."[150] For example, leaving aside tax regulations related to the Affordable Care Act, public interest groups submitted just 3.5% of the comments on proposed regulations during the period Wallace studied.[151]

Much, but not all, of this conforms with my experience working in the Treasury Department (30 years ago).[152] We sought and received information from the public, but not primarily through the notice and comment procedure. For example, each year we solicited suggestions for what we called the business plan, or more formally, the Priority Guidance Plan, a process that started during my time at the Treasury as a way of both obtaining information and publicly committing the Treasury to issuing specified guidance.[153] Treasury and IRS attorneys also participate regularly in public meetings including bar association meetings and industry meetings where they get feedback (sometimes quite harsh) on recently issued guidance as well as suggestions for new guidance projects. Bar and accounting associations write reports, often outside of the notice and comment period.[154] We also asked private parties to come to the Treasury to

---

[149] Wallace, *supra* note 147 at 217.

[150] *Id.*

[151] *Id.* at 219.

[152] I was an attorney advisor and then associate tax legislative counsel in the Office of Tax Policy from 1992 until 1996.

[153] See https://www.irs.gov/privacy-disclosure/priority-guidance-plan The invitation for recommendations is now published as a Notice. See Notice 2021-28, ___.

[154] For example, the New York State Bar Association Tax Section submits a number of reports each year. See https://nysba.org/tax-section-reports/ Some of these concern proposed regulations but other do not. As I write, the New York State Bar Association Tax Section submitted a report (Report No. 1469, November 1, 2022) to the Treasury and IRS on forthcoming proposed regulations under newly enacted section 4501 (the excise tax on repurchases of corporate stock). This report is outside of the notice and comment period because it comes before the proposed regulations were issued.

discuss issues. In addition, we met with regulators at other agencies, read articles, and the followed the tax press. And we somewhat regularly received anonymous communications—envelopes with no return address—with information that we would otherwise never have received. While some of this may have changed over time (my time at the Treasury was before the internet), my understanding is that much remains the same.

All of this activity was to gather information and almost all of this was outside of the formal notice and comment process. While comments received during the formal notice and comment procedure could often be helpful, they were only a modest part of the information flowing to Treasury. Given the broad new channels of communication that have been developed since my time at Treasury, I suspect that this pattern has only strengthened. Moreover, as Oei, Osofsky, and Wallace all found, then as now organized groups—the bar and industry associations—dominated the discourse. There were few if any public-focused groups that provided comments on most regulations.

A separate source of information is the structure of the Office of Tax Policy itself. The office has a tradition of attorneys rotating from private practice into the office for several years before going back out into the world. The attorneys coming from practice bring with them information about current practices. They may, for example, know from practice about the need for guidance in a particular area, of problems with the guidance in a particular area, or of loopholes that need to be closed. As will be discussed below, there are some downsides to this, and it is likely that the system can be structured better, but there are clear upsides in terms of information flow.

The question is what can be done to improve the flow of information to the Treasury and the IRS.[155] I doubt increased use of notice and comment would be a good way of improving information flows. In a wide variety of fields, scholars have shown that notice and comment is not an effective way of channeling information to agencies.[156] As Don Elliott famously observed, "Notice and comment rulemaking is to

---

[155] Stephanie McMahon frames the question the same way. See McMahon, *supra* note 13 at 586.

[156] See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 THE SUPREME COURT REVIEW 201, 231–232 (2001) ("notice and comment often functions as a charade"); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 12 (1997) (Notice and comment also

public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[157]

In fact, Clint Wallace and Jeffrey Blaylock find that an increase in notice and comment obligations and a reduction in the use of temporary regulations may have *reduced* the flow of information to the Treasury.[158] Although there could be many compounding factors, they find that coinciding with the recent reduction in the use of temporary regulations, there has been fewer and longer guidance documents, fewer opportunities for public participation in the comment process, and a shorter time frame for participation. They conclude that "tax procedures may now better conform to procedures applied by other administrative agencies. But . . . this conformity . . . has set back the pursuit of more democratically grounded tax administration. Indeed, democratic goals may have been better served by approaching tax guidance in ways that Treasury has in the past, before the anti-tax exceptionalism reforms were instituted."[159]

Rather than seeking to enhance notice and comment, we should think about what information does not currently get to the regulators, and design methods to improve the flow of that information. One suggestion, by Leslie Book, is to try to use the National Taxpayer Advocate (NTA) as a source of information.[160] The NTA is an office internal to but, to a great extent, independent of, the IRS. Part of its function is to help individual taxpayers manage the bureaucracy. It has local offices in every state, with advocates

undermines the implementation of rules by failing to encourage dialogue and deliberation among the parties most affected by them").

[157] E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–1493 (1991).

[158] Wallace and Blaylock, *supra* note 15.

[159] *Id.* at 53.

[160] Book, *supra* note 16 at 570–573. For a history of the NTA and reflections of the most prominent holder of the office, see Nina E. Olson, *Institutionalizing Advocacy: Some Reflections on the Taxpayer Advocate Service's Evolution as an Advocate for Taxpayers Tribute to National Taxpayer Advocate Nina Olson*, 18 PITT. TAX REV. 11 (2020).

able to meet confidentially with taxpayers. The NTA, however, also has an informational role, including a requirement to submit reports to Congress twice each year. Some role for the NTA in the regulatory process, might be helpful as a counterweight to industry groups.

Another possibility is to broaden the base of attorneys in Treasury's Office of Tax Policy. Right now, my understanding is that most are recruited from large law firms or accounting firms, and those firms mostly have large companies as their client base. Recruiting attorneys with a different client base than the typical large law firm or from different backgrounds might bring in new information.

A particular information problem faced by the Treasury and IRS is obtaining information about abusive transactions. These are kept secret both to avoid audit and to avoid a regulatory response. As mentioned, during my time in Treasury, we would find out about some of these through anonymous sources. There is no obvious answer to this problem—there are very strong incentives to hide information about shelters—but creative solutions might be worth trying. For example, a first-mover amnesty might be plausible, in which anyone who invents a shelter is immune from challenge for using that shelter if, but only if, all details are fully disclosed, perhaps in advance or soon after the shelter is first used. This creates an incentive to disclose. While the Treasury would lose the revenue from the first mover (the size would have to be capped), it would prevent further use of the shelter. In effect, it creates a bounty for publicly announcing loopholes, allowing the loopholes to be fixed.

Another information problem faced by the Treasury and IRS is obtaining information about compliance costs. Tax compliance costs are large, with estimates putting them at over $150 billion each year, or on the order of 1 percent of GDP.[161]

---

[161] One estimate puts the 2013 income-tax related compliance costs in the United States in excess of $150 billion or 0.9 percent of GDP that year. Another, using different methodology, puts compliance costs at 1.25 percent of GDP. See Rosemary Marcuss et al., *Income taxes and compliance costs: how are they related?*, 66 NATIONAL TAX JOURNAL 833 (2013); Youssef Benzarti, *How Taxing Is Tax Filing? Leaving Money on the Table Because of Compliance Costs*, 108 PROCEEDINGS. ANNUAL CONFERENCE ON TAXATION AND MINUTES OF THE ANNUAL MEETING OF THE NATIONAL TAX ASSOCIATION 1 (2015).

Following the usual terminology, I distinguish between the costs of tax administration, which are the costs incurred by the government to administer the tax law, and the costs of tax compliance, which are the private costs of complying. See Daniel J Hemel & David A Weisbach, *The Behavioral Elasticity of*

While a large fraction of these costs may be due to the basic design of our tax system, codified by legislation, some fraction of these costs are most likely generated by regulatory choices. Well-designed regulations would take compliance costs into account.[162] For example, if compliance costs are mostly a pure loss, in the sense that they have no benefits other than tax compliance, we should subtract them from any net benefits that a regulation generates.[163]

The Treasury and IRS, however, have little ability to determine how much a given piece of guidance, or guidance in the aggregate, change compliance costs. There is little reporting on the issue, and, as will be discussed below, there is no requirement that the Treasury and IRS take compliance costs into account when issuing guidance.

A possible route toward improving the treatment of compliance costs is to leverage the recent requirement that the Treasury perform cost-benefit analysis of significant tax regulations.[164] While it is not entirely clear what it means to perform a cost-benefit analysis of a tax regulation, compliance costs should certainly enter any reasonable complete analysis.[165] A requirement, enforced by OIRA, that the Treasury include a

---

Tax Revenue, 13 JOURNAL OF LEGAL ANALYSIS 381 (2021). The costs of tax administration are, roughly, equal to the budget for the Internal Revenue Service, or about $12 billion per year.

[162] For a discussion, see Hemel and Weisbach, *supra* note 184 at 391–396.

[163] Hemel and Weisbach distinguish between what they call "behavioral compliance costs" and "mechanical compliance costs. *Id.* at 391–396. Behavioral compliance costs are costs that arise because of behaviors that are chosen by the taxpayer and, therefore, are part of a taxpayer's optimization. Mechanical compliance costs are all other compliance costs. Hemel and Weisbach argue that only mechanical should be taken into account when estimating the efficiency of a marginal change to a tax provision.

[164] See Brent J. McIntosh & Neomi Reo, Memorandum of Agreement, The Department of Treasury and the Office of Management and Budget, Review of Tax Regulations under Executive Order 12866 (Apr. 11, 2018), https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf.

[165] For a discussion, see David A Weisbach, Daniel J. Hemel & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507 (2018).

reasonable accounting of compliance costs in its cost-benefit analysis might force the Treasury to seek that information.

Finally, an important source of information is from other agencies. As is well-known, a large number of "non-tax" programs are implemented through the tax system (non-tax is in scare quotes because if they are implemented through the tax system, they are tax in some basic sense). Often, regulations for these programs are issued in conjunction with another agency that has expertise in the relevant subject matter. For example, the regulations at issue in *Little Sisters of the Poor* concerned the contraception mandate under the Affordable Care Act, which is not a core area of expertise for the IRS or the Treasury. The regulations, however, were issued in conjunction with HHS.

It is hard to know precisely how much interagency coordination there is for tax regulations. Some regulations, such as the ACA regulations, are issued jointly by multiple agencies, in which case one supposes that there is some level of coordination. But regulations concern traditional tax issues with respect to particular industries, such as tax issues for banks, insurance companies, or energy companies. It is not clear how much coordination goes on in these cases. Does the Treasury, for example, gather information from the Federal Reserve when issuing regulations governing tax issues for banks? Depending on the answer to these types of questions, there may be room to improve information flows to the Treasury.

Summarizing, there is little evidence that notice and comment is a good method of providing information to agencies, including the Treasury. What information we have shows that information flows to the Treasury in many ways, most of which are outside of notice and comment. Moreover, thinking about ways to improve information flows points in other directions, not toward more notice and comment. As a result, there is little reason to think that more notice and comment, the primary recommendation of the anti-tax exceptionalism literature, would a good way to promote the goal of better information flows to tax administrators.

C. Accountability and responsiveness

Agencies need to be accountable to democratic actors and responsive to the concerns and views of those actors. One of the goals of the anti-tax exceptionalism literature seems to be to improve accountability and responsiveness, primarily through greater notice and comment, longer preambles, and other procedures claimed to be required by the APA. To understand whether this is a good method of ensuring accountability and responsiveness, we should look at the current ways that the IRS is held accountable and made responsive. This involves examining how political actors oversee the IRS (oversight) and how information about IRS actions is made public (transparency). Take each in term.

Oversight

At a formal level, supervision of Treasury's tax regulatory function is similar to standard model within the executive branch. The head of the Office of Tax Policy in the Treasury is Senate confirmed. The Commissioner of Internal Revenue is as well, though the Commissioner has a fixed 5-year term instead serving at pleasure of the President. Both report to the Senate confirmed Secretary of the Treasury, who is part of the cabinet.

This basic structure only tells us so much. We need to know the details to determine the true level of supervision. Oversight can be done by the President (e.g., through the Office of Management and Budget), by Congress, or by the courts, or some combination of the three. External expert bodies can also exercise oversight. Different agencies with the same nominal structure will face different levels of oversight, based, for example, on an agency's ability to assert independence from supervisors. Consider each possible supervisor in turn:

Congress. Clint Wallace has argued that Congress has substantial control over tax rulemaking. His key argument is that the Joint Committee on Taxation staff provides Congress with internal expertise that allows it to craft detailed instructions to the Treasury, in the form of both a highly detailed statute as well as legislative history that has additional instructions. He cites David Epstein's and Sharyn O'Halloran's study of agency delegation for the conclusion that the discretion given to the Treasury for tax regulations is low.[166]

This is true as far as it goes, and it tells us a lot about how Congress limits Treasury's discretion. It does not, however, tell us about congressional supervision of the actions

[166] Wallace, *supra* note 147 at 204. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 196–206 (1999).

of the Treasury that are within, or purportedly within, that level of discretion. Here, there seems to be only a modest level of oversight: the tax writing committees have regular hearings, though, to my knowledge, it is rare to have hearings on regulations.

The President. The President exercises the usual control of tax regulations through the chain of command from the President down to the Assistant Secretary and the Commissioner. Until recently, however, tax regulations were exempt from an additional form of Presidential control, review by the Office of Information and Regulatory Affairs (OIRA). In 2018, however, the Treasury and OIRA agreed to OIRA review of tax regulations, including providing a cost-benefit analysis of tax regulations.[167]

It is beyond the scope of this paper to explore whether this was a good idea. I have serious concerns that OIRA asked for cost-benefit analysis of tax regulations without having any idea what that would entail.[168] Leaving aside the particulars of cost-benefit analysis of tax regulations, however, enhanced OIRA review creates a new level of supervision of the Treasury.

Oversight bodies. Separate from the President and Congress, the IRS is subject to a tremendous amount of oversight through specialized bodies created over the decades. In addition to the Government Accountability Office and OMB, which provide oversight for a broad range of agencies, the IRS has (1) its own dedicated Inspector General (the Treasury Inspector General for Tax Administration) (2) the Electronic Tax Administration Advisory Committee (ETAAC); (3) the Information Reporting Program Advisory Committee (IRPAC); (4) Internal Revenue Service Advisory Council (IRSAC);

---

[167] See Brent J. McIntosh & Neomi Reo, Memorandum of Agreement, The Department of Treasury and the Office of Management and Budget, Review of Tax Regulations under Executive Order 12866 (Apr. 11, 2018), https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf.

[168] For a discussion, see Weisbach, Hemel, and Nou, *supra* note 161.

(5) the Taxpayer Advocacy Panel (TAP); and (6) the IRS Oversight Board.[169] The National Taxpayer Advocate also exercises an oversight function.

Courts. Finally, courts supervise tax guidance by interpreting and sometimes invalidating the guidance, including recently, invalidating guidance for procedural defects. Supervision by courts in the tax context is somewhat different than in other regulatory contexts because the procedures for challenging tax guidance are different than those for challenging other guidance.[170]

The anti-tax exceptionalists want courts to play a broader role in supervision the tax system. I am deeply skeptical that this is wise. As just described, there are already a large number of specialized bodies overseeing the IRS. Most courts and judges lack knowledge of the tax system that members of these bodies have. Moreover, because of the long timeframes involved in tax litigation—there is little pre-enforcement review and the audit process can take many years before litigation even starts—supervision by courts often comes too late. The tax regulatory process would be better with less supervision by courts and more, if needed, by the President and Congress.

One possible approach to increasing the supervision by the President, discussed above, is to have stronger OIRA review of compliance costs estimates. As noted, compliance costs are significant and do not seem to be taken seriously in the tax regulatory process. More stringent review of compliance costs estimates by OIRA might create incentives to account for compliance costs better.

At the same time, combining, eliminating, or at least rationalizing the large number of specialized bodies already overseeing the IRS (listed above) might improve tax

[169] See Leandra Lederman, *IRS Reform: Politics as Usual?*, 7 COLUM. J. TAX L. 36, 63, n. 228 (2016). See also Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, (2013).

[170] For a discussion of these procedures, see Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317 (2017); Ellen P. Aprill, *The impact of agency procedures and judicial review on tax reform*, 65 NATIONAL TAX JOURNAL 917 (2012); Camp, *supra* note 68; Daniel J. Hemel, *The Living Anti-Injunction Act Essay*, 104 VA. L. REV. ONLINE 74 (2018); Leslie Book & Marilyn Ames, *The Morass of the Anti-Injunction Act: A Review of the Cases and Major Issues*, 73 THE TAX LAWYER 773 (2020).

administration. It is not clear why the IRS needs so many different supervisors with seemingly overlapping jurisdiction.

Transparency

The tax system is subject to a somewhat unusual level of transparency because of a Freedom of Information Act lawsuit by Tax Analysts and the resulting settlement (some of which has been codified in section 6110).[171] Under this settlement, the IRS and Treasury routinely release all or almost all information would is subject to FOIA without a FOIA request. Tax Analysts publishes that information, though Tax Analysts' publications are only available for a fee.

As discussed, Shu-Yi Oei and Leigh Osofsky examined the regulatory process, including who had input into the regulatory process, for a new and prominent set of regulations under a novel code section enacted as part of the 2017 Tax Cut and Jobs Act.[172] Among other things, they found that notwithstanding the FOIA settlement and section 6110, there was no straightforward way to obtain communications with the Treasury about the regulations if the communications occur outside of the formal notice and comment period.[173] In their study, they found at least fifty-one comments submitted before the official notice and comment period, but that their content and even their existence was not transparent.[174]

It is hard to see how any of the suggestions in the anti-tax exceptionalism literature would improve transparency. The study by Oei and Osofsky involves a regulation that went through the ordinary notice and comment procedure, yet many of the communications with the Treasury and IRS were not transparent to the public. Nor would other APA requirements, such as longer preambles likely improve transparency.

---

[171] See *Tax Analysts and Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974).

[172] Oei and Osofsky, *supra* note 145.

[173] *Id.*

[174] The regulations they choose to study, the section 199A regulations, seemed to have generated an unusual level of comments. Most tax regulations attract only a handful of comments.

One possible implication of the Oei and Osofsky study is that the Treasury should be obligated to engage in additional disclosure of comments received outside of the formal process. The issue, however, is subtle. The optimal level of transparency is not clear. On the one hand, transparency helps reduce private deal making. On the other hand, it may reduce production of candid information.

The issue is made more difficult because neither commentators nor Treasury and IRS staff necessarily have the right incentives to release information. There will always be a temptation to keep information private or to selectively release information that is helpful to one's position. A vague standard requiring the release of more information when doing so is in the public interest (or some similar test) may not result in the optimal release of information. A bright line rule requiring the release of a broad category of information, even if overbroad, may be needed.

D. Summary

The normative goals of the tax exceptionalism literature do not square with its prescriptions. Its prescriptions largely draw from the APA and administrative law cases. They primarily involve greater use of, and earlier use of, notice and comment and greater court supervision of tax administration.

If the goal is more uniformity of administrative practice—making the IRS conform to what other agencies are doing rather than being exceptional—the goal rests on two false premises. One is that the IRS and Treasury do not already comply with the requirements of administrative law. The second, is that there is uniformity in how agencies operate. Neither premise is true. Moreover, even if these premises were true, the framing of the question is wrong. Rather than seeking uniformity, we should seek to make tax procedures better.

If the goal is to improve information flows, the kabuki show of notice and comment is unlikely to help. Currently, the IRS and Treasury receive a large fraction of their information outside of the notice and comment process. Improving information flows likely involves ensuring that these channels of information work better.

Finally, if the goal is improved accountability and responsiveness, additional court supervision is a terrible way to go. There are already a large number of bodies tasked with overseeing the IRS and there are already transparency requirements. Both can be improved, for example, by rationalizing oversight bodies and broadening transparency requirements.

III. Conclusion

My evaluation of the claims made in the anti-tax exceptionalism literature is that those claims are mostly not correct. It is important, however, to recognize that there is significant value in examining tax procedures to make sure that they are working well. The anti-tax exceptionalism literature raises important issues. The APA and administrative law, however, are the wrong places to look for procedures to make the tax system work better. Instead, we need to evaluate how well particular procedures work in advancing the goals of the tax system, including among other goals, fair and efficient application of the tax laws, compliance, cost-effectiveness, in the sense of lowering administrative and compliance costs, and accountability and responsiveness to political actors. There is much that can be improved along these lines, and much research to be done.