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COMMENT

TAX EXCEPTIONALISM: WANTED DEAD OR ALIVE

Gene Magidenko*

Tax law has just not been the same since January 2011. Did Congress pass earthshaking legislation affecting the Internal Revenue Code? Did the IRS dramatically change regulations? If only it were that exciting. Instead, eight jurists sitting at One First Street in our nation's capital transformed tax law in a less bloody, but no less profound, way. The thought must have gone through many a tax mind – is tax exceptionalism dead?

THE SUPREME COURT, TAX POLICY, AND *MAYO FOUNDATION*

Most citizens, and indeed many lawyers, do not think of the Supreme Court as having any considerable role in shaping tax policy. The general perception is that tax law originates exclusively from the statutory behemoth of the Internal Revenue Code and the even larger and drier accompanying body of tax regulations. However, anyone who has taken a course in tax law (and paid attention) is surely familiar with a number of cases having a profound effect on the field. Names like *Crane*, *Duberstein*, *Kirby Lumber*, *Macomber*, and of course an entire mélange of *Helverings* have run through the frantic mind of many a law student as he prepared for his income tax class examination.

And since the beginning of this year, there is one more name to add to the list – *Mayo Foundation*.¹ In its unanimous decision,²

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1. *Mayo Found. for Med. Educ. & Research v. United States*, __ U.S. __, 131 S. Ct. 704 (2011).

2. Justice Elena Kagan did not participate in the case.

the Supreme Court held that courts should apply *Chevron*³ deference to Department of Treasury regulations, just as they already do with regulations issued by other agencies. Before *Mayo Foundation*, Treasury regulations were evaluated under the less deferential and more nuanced standard established in *National Muffler*.⁴ But in *Mayo Foundation*, the Supreme Court relied on the practical consideration of simplifying courts' review of regulations. Indeed, Chief Justice Roberts wrote: "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."⁵

AN ASIDE ON TAX EXCEPTIONALISM

The reasoning behind *Mayo Foundation* suggests that tax regulations should not be treated differently from regulations in other fields because tax law is not fundamentally different. Although the Supreme Court did not directly address it, the debate over "tax exceptionalism" – the idea that tax law is special – has been a hot topic among scholars for years. The recent trend has been toward a rejection of tax law's uniqueness.⁶ The idea is both positive and normative. Positively, opponents of exceptionalism assert that there is already extensive cross-pollination among fields within the law, and it is nonsensical to deny the fact. Normatively, the argument goes that legal discourse can be enriched through interdisciplinary interaction.

Foes of tax exceptionalism understandably see much to celebrate in *Mayo Foundation*. The reasoning in the case seems to reject the idea that tax is different.⁷ The Court noted with little ado that since the taxpayer had "not advanced any justification for applying a less deferential standard of review to Treasury regulations," absent such justification, there would be no reason "to carve out an approach to administrative review good for tax

3. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

4. See *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979).

5. *Mayo Found.*, 131 S. Ct. at 713.

6. See, e.g., Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 Va. Tax Rev. 517 (1994); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537 (2006).

7. See Roger Dorsey, *Mayo and the End of 'Tax Exceptionalism' in Judicial Deference*, 87 Practical Tax Strategies 63, 63 (2011).

law only.”⁸ But it may be too soon to read tax exceptionalism’s eulogy quite yet.

THE CASE FOR TAX EXCEPTIONALISM

The Supreme Court’s opinion in *Mayo Foundation* – and specifically the part quoted above – leaves open the possibility that there may be reasons justifying a different approach to tax regulations. If someone could advance a justification for tax exceptionalism, then perhaps a different standard of review might be warranted. I am willing to take on the challenge by suggesting two reasons why tax law *is* different. The first is a constitutional-origin theory. The second is an eminently practical one.

The Constitution enumerates those powers that Congress may use to “promote the general Welfare.”⁹ Most of the modern regulatory state derives from congressional delegations under the Commerce Clause,¹⁰ a provision that has effectively become a catch-all for government regulatory authority (with some limited exceptions) since the Great Depression. The power to tax, however, originates from an entirely different source – the Taxing and Spending Clause.¹¹ Where Congress has the authority to regulate, that power is plenary, so it is tempting to conclude that legislation or delegation under one constitutional provision is just as good as that under another. Yet more than two centuries of constitutional jurisprudence have created a gloss that separates bodies of interpretive law governing the various parts of the Constitution. When the Supreme Court analyzes a Commerce Clause issue, it approaches the matter differently than when it analyzes a taxing power question. The Court follows different analytical structures and relies on different assumptions. History is important as well. Although the Commerce Clause’s interpretation is rather mercurial, it has never been *de jure* amended like the Taxing and Spending Clause. In other words, the Supreme Court does not approach all constitutional provisions equally, so there is no reason why it should assume that delegations under those provisions are coequal.

8. *Mayo Found.*, 131 S. Ct. at 713.

9. U.S. Const. pmb1.

10. *See* U.S. Const. art. I, § 8, cl. 3.

11. U.S. Const. art. I, § 8, cl. 1, *expanded by* U.S. Const. amend. XVI.

Constitutional arguments aside, anecdotal and empirical evidence suggest that the tax code is in some ways unique. Ask any given American how he views the Internal Revenue Code, and you are likely to receive a variety of responses. But the general sense is that the tax laws somehow feel “different.” It is telling that Title 26 of the United States Code is rarely referred to by its title number, with practitioners and laymen alike referring to it as the “Internal Revenue Code” instead. And no other set of laws is as specific. Tax provisions are by far the most substantively complicated and detailed. Congress is constantly adjusting, tweaking, and altering the tax code. A brief search through the Library of Congress THOMAS portal¹² of congressional bills over any given session shows that the Internal Revenue Code is the most popular target for proposed amendments.

The fact that Congress so regularly amends the tax laws suggests a level of oversight not present in other fields. Although some might conclude that this should merit an even-greater degree of deference than *Chevron*,¹³ I contend that the opposite is true.¹⁴ Constant congressional attention to the tax code suggests that the delegation of authority to the Treasury Department is *more limited* than that to other branches. Congress delegates because it cannot manage a vast regulatory apparatus on its own. Where Congress constantly oversees and alters a collection of laws,¹⁵ any delegation must inherently be narrower in scope. Congressional intention is more likely to displace agency interpretations, requiring a more rigorous analysis of reasonableness than *Chevron* can supply. Accordingly, agency actions under such delegation should be subject to greater

12. Thomas (Library of Congress), <http://thomas.loc.gov> (last visited Nov. 5, 2011).

13. The argument would ostensibly be that if Treasury promulgates a regulation with which Congress disagrees, Congress is more likely to correct it. That Congress has not corrected it implies agreement. This argument is problematic because it is not realistic to expect Congress to correct every (or any) improper Treasury regulation through legislative action. Indeed, Treasury itself often fails to repeal outdated or superseded regulations.

14. Treasury occasionally seeks to reverse losses sustained in the courts by issuing regulations. These so-called “fighting regulations” are likely to become more common with greater deference post-*Mayo*. See Clifford M. Sloan et al., *Supreme Court’s Mayo Foundation Opinion Grants Chevron Deference to Treasury Regulations*, The Tax Executive, Spring 2011, at 35, 40, available at http://skadden.com/content/Publications/Publications2434_0.pdf.

15. In practice, Congress only nominally oversees the effect of tax laws, while much of the actual oversight is in the hands of the Treasury Department. Treasury generally monitors the tax code and frequently suggests changes to Congress. No other constituency has as thorough or consistent access to the legislative tax apparatus.

scrutiny. In the pre-*Mayo Foundation* era, courts' capacity to overturn unreasonable interpretations of the ever-changing tax code by Treasury (by any account a prolific agency when it comes to issuing regulations and other guidance) was an important tool by which poorly functioning regulations were altered. Greater deference to Treasury interpretations removes this corrective process.

CONCLUSION

Tax lawyers will be discussing *Mayo Foundation* for years to come. The case itself left open more questions than it answered. Those will have to eventually be resolved in the courts. Although some may see *Mayo Foundation* as a facial rejection of tax exceptionalism, the situation is not quite so simple. The Supreme Court is unlikely to overrule the case anytime soon, but the distinction between tax law and other fields – a distinction with constitutional and logical bases – still has some vitality.