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REWORKING THE REVOLUTION: TREASURY RULEMAKING & ADMINISTRATIVE LAW

*David Berke**

Abstract

How administrative law applies to tax rulemaking is an open and contested question. The resolution of this question has high stakes for the U.S. tax system. The paradigm is shifting away from so-called "tax exceptionalism"—where Treasury action is considered effectively exempt from the Administrative Procedure Act (the "APA") and related administrative law doctrines. This paradigm-shift is salutary. However, currently prevailing anti-exceptionalist theory—an administrative framework for tax that is rapidly gaining credence within both the federal judiciary and the legal academy—threatens to destabilize the U.S. tax system. This formalistic approach to administrative law in tax rulemaking has the potential to invalidate a wide swath of existing Treasury regulations and to preclude the timely promulgation of new tax rules.

This Article argues that these two existing theories of tax administration—exceptionalism and anti-exceptionalism—are inadequate, often for complementary reasons. This Article's critique then supports its proposals for tax rulemaking processes that comply with the APA, but in a workable manner that does not upend established tax law. These proposals provide an intellectual and practical middle ground between the exceptionalists and anti-exceptionalists.

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Introduction

There is an ongoing revolution in how administrative law applies to tax. The paradigm for Treasury's administrative function is shifting from so-called "tax exceptionalism"—where Treasury rulemaking, adjudication, and other action are considered largely exempt from the Administrative Procedure Act[1] (the "APA") and related administrative law doctrines—to a more traditional model of APA-compliant practice.[2] This change is salutary. However, this Article intervenes in this paradigm-shift to moderate the excesses of both the revolutionaries and counterrevolutionaries, to ensure that the outcome for U.S. tax administration is more American than French Revolution.

The core problem that this Article addresses is twofold. First, the path-breaking legal scholarship that fomented this administrative paradigm-shift—chiefly the work of Professor Kristin Hickman[3]—has imported into

1. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012)).

2. The Supreme Court effectively announced this shift with its *Mayo Foundation* decision. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011) ("[W]e 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.'" (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)); *see* sources cited *infra* note 37.

3. *E.g.*, Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L.

the tax law an overly formalistic interpretation of the APA and what it requires. This formalistic APA interpretation has made the paradigm-shift into a destabilizing force in tax administration, given that it threatens, for instance, to invalidate a wide swath of Treasury Regulations[4] and thus to imperil the integrity of the tax system more broadly. Second, at the other end of the spectrum, tax exceptionalism maintains scattered support. Certain scholars and commentators push against the paradigm-shift and advocate for some version of tax exceptionalism as the superior model.[5] Their arguments are unconvincing, and this pro-exceptionalism school contributes to continued confusion and upheaval in tax administration, as opposed to a smoother transition to APA compliance.

Professor Hickman and the holdout tax exceptionalists are on opposite sides of the argument, but the issues that their scholarship and commentary create are interconnected. Professor Hickman's formalistic portrayal of the APA has such potential to destabilize the tax law that people cling to tax exceptionalism. Continued advocacy of tax exceptionalism distracts from more dynamic discussion of how the APA applies to tax.

This Article critiques both viewpoints to solve their complementary problems together. In the process, it sketches a vision of tax rulemaking that complies with the APA, but in a workable manner that does not upend established tax law. Specifically, this Article considers these viewpoints in the context of Treasury rulemaking, which is a natural prism through which to consider these administrative law issues.[6] The general principles estab-

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REV. 1727 (2007) [hereinafter Hickman, *Coloring*]; Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153 (2008) [hereinafter Hickman, *Responding*].

4. *E.g.*, Hickman, *Coloring*, *supra* note 3, at 1795 ("[A] substantial percentage of the projects studied present APA compliance issues that render the resulting Treasury regulations susceptible to legal challenge on procedural grounds."); Erin McManus, Altera *Decision Casts Shadow over Proposed and Adopted Rules*, Daily Tax Rep. (BNA), No. 208, at 1-2 (Oct. 28, 2015) (quoting Professor Hickman: "After *Altera*, many final and temporary Treasury regulations are likely to be susceptible to legal challenge under APA Section 706 and *State Farm*.").

5. *E.g.*, Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553 (2016); James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067 (2015).

6. Indeed, most recent legal developments in tax administration have involved rulemaking. Given rulemaking's centrality both to tax law and to core administrative law principles, rulemaking is a natural focus for this Article's project. However, the general principles established in this Article can be applied across tax law. Moreover, it would take a full book to address the administrative-law implications for all forms of Treasury action. Others have examined the administrative law dimensions of other forms of Treasury action. *See, e.g.*, Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 [hereinafter Hickman, *IRB Guidance*]; Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771 (2014).

lished in this Article can also be applied to other domains of Treasury action.

This Article proceeds as follows: Part I provides the historical and theoretical background for Parts II & III, which apply that theory to ongoing debates in tax administration.

Part I establishes first principles. Part I.A recounts the recent legal developments in tax administration that have triggered this paradigm-shift from tax exceptionalism to APA compliance, and also considers the potentially destabilizing consequences of this shift, due to prevailing anti-exceptionalist theory. Part I.B provides background on general administrative law principles and reviews the history and judicial interpretation of the APA. This review demonstrates that, contrary to its portrayal by Professor Hickman,[7] the APA is not a strict or "settled" template of procedural requirements. To the contrary, the APA's statutory language is vague and open-textured by design. The APA is, as applied, at least as much judicial construction as statute.

With this APA argument established, Part II.A then turns to the remaining vestiges of tax exceptionalism. It demonstrates why tax exceptionalism is no longer an acceptable paradigm for tax administration. However, Part II.B argues that, while tax exceptionalism has been rightfully overthrown per Part II.A, exceptionalism was the prevailing law of tax administration until the last decade or so. Tax exceptionalism was an era, not an error. It is not that Treasury has been flagrantly violating the APA and only recently called to account; Treasury's exceptionalist practice was, in effect, the law for quite some time. Part II.B demonstrates this historical argument by reviewing the legal history of the interpretive exception to APA notice and comment, as applied in tax rulemaking.[8] Part II.B concludes that this perspective on exceptionalism's historical validity influences how courts and administrators should manage and police Treasury's transition to APA compliance moving forward.

These conclusions in Parts I and II feed into Part III, which analyzes anti-exceptionalist administrative theory in the context of tax rulemaking. First, Part III.A provides empirical context for anti-exceptionalist claims that Treasury is egregiously non-compliant with the APA's rulemaking requirement for pre-promulgation notice and comment—a claim that is foundational to the prevailing anti-exceptionalist arguments. However, this

7. *E.g.*, Hickman, *Coloring*, *supra* note 3, at 1795 (describing the APA as "fairly settled"); Kristin E. Hickman, Swallows Holding Ltd. v. Commissioner*: Limited Progress in Rejecting Tax Exceptionalism in Administrative Law*, ENGAGE, June 2008, at 4, 4 (stating "many of the governing rules and standards [of administrative law doctrines] are relatively settled").

8. *See* 5 U.S.C. § 553(b)(A) (2012).

context shows that, as an initial matter, the Treasury Department is about average in terms of its empirical avoidance of APA notice and comment for rulemaking.

Moving from empiricism to doctrine, Part III.B then examines the anti-exceptionalist view of when Treasury is doctrinally required, under the APA, to engage in pre-promulgation notice and comment. Specifically, Part III.B examines debates over (i) Treasury's application of the interpretive and good cause exceptions to APA rulemaking and (ii) Treasury's use of so-called "temporary regulations"[9] to avoid pre-promulgation notice and comment. For the interpretive and good cause exceptions, Part III.B.1-2 argues that current anti-exceptionalist scholarship imposes a formalist view of these exceptions to notice and comment that is inaccurate. Through its analysis, this Article proposes middle-ground solutions that are APA-compliant, but that avoid the destabilizing doctrinal conclusions of current anti-exceptionalist theory.[10] For temporary regulations, while refraining from a conclusion, Part III.B.3 at least problematizes current statutory interpretation that effectively eliminates temporary regulations as a means for Treasury to avoid pre-promulgation notice and comment.

Part III.C then moves from exceptions to the substance of notice and comment. It considers what the APA and the related *State Farm* doctrine[11] require of tax rulemaking when Treasury undertakes notice and comment. Part III.C then puts forward an understanding of what constitutes adequate reason-giving for *State Farm* purposes in tax rulemaking. APA § 553 and *State Farm* apply to tax law like any other field, but the nature of reason-giving within tax law is necessarily a contextual question that can often produce a workable answer.

Two quick points of definition before this analysis begins. When this Article refers to "tax administration," it is referring to how administrative law principles operate in U.S. tax law. "Tax administration" commonly refers to the day-to-day operation of the tax system,[12] but this Article employs the term in a much narrower sense. Second, the term "tax exceptionalism" is also often used in a more general sense than is meant here, to refer to the concept that tax is (administratively and otherwise) "fundamentally differ-

9. I.R.C. § 7805(e) (2012).

10. Professor Richard Murphy has gestured toward something similar to this argument in preliminary terms. *See* Richard Murphy, *Pragmatic Administrative Law and Tax Exceptionalism*, 64 DUKE L.J. ONLINE 21 (2014).

11. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

12. *E.g.*, Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1129 (2015) (referring to "tax administration" as the overall process of taxation and tax collecting).

ent from other areas of law."[13] The term is also used to refer to certain anti-competitive[14] aspects of U.S. international taxation.[15] Neither of those meanings is intended here.

I. Background: Legal Developments & the APA

A. *Tax Administration: The Revolution So Far*

Before proceeding, it is necessary to recount what this Article has termed a "revolution" in tax administration.[16] The potentially destabilizing consequences of this revolution are then considered.

Until the last decade or so, "generally applicable administrative law was not applied to taxation under the doctrine of tax exceptionalism."[17] In rulemaking, Treasury took the position that it was largely exempt from the APA, including the statute's required rulemaking procedures[18] and the APA's more general requirement for contemporaneous reason-giving in agency action.[19] These positions were the opposite of the usual default in

13. Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 Va. Tax Rev. 517, 531 (1994).

14. *See* John M. Samuels, *American Tax Isolationism*, 123 Tax Notes 1593, 1593-94 (2009).

15. *E.g.*, Rosanne Altshuler et al., Tax Pol'y Ctr., Lessons the United States Can Learn from Other Countries' Territorial Systems for Taxing Income of Multinational Corporations 33, 38 (2015), http://www.taxpolicycenter.org/publications/lessons-united-states-can-learn-other-countries-territorial-systems-taxing-income/full.

16. *Cf.* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 974 (7th Cir. 1998) ("As one might expect in a case involving the interpretation of the tax code and its accompanying regulations, a certain amount of dry exposition is necessary to lay out the controversy.").

17. Note, *Administrative Law - Judicial Review of Treasury Regulations*, 126 Harv. L. Rev. 1747, 1747 (2013) [hereinafter *Judicial Review*].

18. *See* 5 U.S.C. § 553 (2012). As Professor Hickman has documented, Treasury traditionally took the position that it was, in effect, mostly exempt from the APA's notice-and-comment requirements, though it voluntarily chose to comply. Hickman, *Coloring*, *supra* note 3, at 1729 nn.8-10.

19. As codified in the seminal *State Farm* case, the APA's "arbitrary and capricious" standard requires that, when an agency acts, they 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." Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted); *see* 5 U.S.C. § 706(2)(A). By contrast, as of 2011, the "Internal Revenue Manual provision dealing with drafting regulations and preambles explicitly instruct[ed] IRS personnel that 'it is not necessary to justify the rules that are being proposed or adopted or alternatives that were considered.' This statement essentially instructs IRS employees to draft preambles in a way that violates the arbitrary and capricious standard." Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 Tax Notes 271, 274 (2012) (quoting IRM 32.1.5.4.7.3(1) (Sept. 30, 2011)).

administrative law—that the APA normally applies, subject to exceptions. At the same time, APA-based challenges to tax rulemaking (and to other Treasury actions, for that matter) were rare to non-existent.[20] Tax was thus a "special case"[21] in administrative law that operated, for the most part, in its own separate sphere of administrative practice.[22]

This tax exceptionalism also manifested itself in other administrative law doctrines logically linked to the APA. Most prominently, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established its doctrine of judicial deference to agency statutory interpretation.[23] For nearly a quarter century after *Chevron*, commentators, courts[24] and scholars debated whether Treasury's statutory interpretations were subject to *Chevron* deference or to the preceding, tax-specific deference regime of the *National Muffler Dealers Ass'n v. United States*.[25] Until *Mayo Foundation for Medical Education & Research v. United States* (discussed *infra*), tax exceptionalism in judicial deference prevailed as an empirical matter, for the Court generally applied *National Muffler* to tax cases rather than *Chevron*.[26]

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20. *See* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 359 (1991) ("Few tax cases have considered whether the Treasury has complied with APA requirements in its rulemaking."); Hickman, *IRB Guidance*, *supra* note 6, at 261, 271-72 (stating that "I know of no contemporary cases in which taxpayers have challenged the validity of IRB guidance for failing to satisfy APA procedural requirements for legislative rules," except for the *Cohen* case referenced *infra* note 39); Hickman, *Coloring*, *supra* note 3, at 1764-65 ("[T]axpayers rarely challenge Treasury regulations on procedural grounds . . . ."); Patrick J. Smith, Mannella, State Farm*, and the Arbitrary and Capricious Standard*, 131 TAX NOTES 387, 390 (2011) ("*State Farm* and the arbitrary and capricious standard are rarely cited in tax cases . . . .").

21. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1108 (2008) ("[T]he Court rarely applies *Chevron* to IRS interpretations. If a deference regime is applied, it is usually the pre-*Chevron* regime associated with *National Muffler Dealers v. United States*.").

22. Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 TAX LAW. 493, 498-99 (2016).

23. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

24. *Compare* Snowa v. Comm'r, 123 F.3d 190, 197 (4th Cir. 1997) (accepting the *National Muffler* standard for certain Treasury regulations) *with* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 983 (7th Cir. 1998) (applying *Chevron*, rather than *National Muffler*, to tax regulations).

25. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979); *see* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) [hereinafter Hickman, *Mead*] (arguing that *Chevron* deference should apply in tax rather than *National Muffler*).

26. Eskridge & Baer, *supra* note 21, at 1108-09 ("[T]he Court rarely applies *Chevron* to IRS interpretations. If a deference regime is applied, it is usually the pre-*Chevron* regime associated with *National Muffler Dealers v. United States*."); Linda Galler et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 721 (2004) [hereinafter

Initially, critiques of tax exceptionalism fomented in the academy.[27] In the mid-nineties, Professor Paul Caron published a wide-ranging article that argued against the "myth that tax law is fundamentally different from other areas of law."[28] On tax administration, Professor Caron admonished the tax bar for "neglect[ing] insights learned in other administrative law areas."[29] Other challenges to various aspects of tax exceptionalism percolated in the academic and professional literature,[30] but they remained fairly inchoate.

Then, in a series of articles, Professor Hickman (almost singlehandedly) built anti-exceptionalism into a bona fide legal movement.[31] Within a few years, largely due to Professor Hickman's academic work and court-oriented advocacy,[32] tax exceptionalism was judicially moribund. It is hard

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ABA Report] ("[I]t is uncertain whether *Mead* and *Chevron* will be the primary authorities governing the tax law. In tax cases, the Supreme Court has relied instead on a separate line of Supreme Court tax jurisprudence asking whether a tax regulation is reasonable.").

27. For some additional discussion of this scholarship, *see* Lawrence Zelenak, *Maybe Just A Little Bit Special, After All?*, 63 DUKE L.J. 1897 (2014).

28. Caron, *supra* note 13, at 531.

29. *Id.* at 554.

30. *E.g.*, Asimow, *supra* note 20; Naftali Z. Dembitzer, *Beyond the IRS Restructuring and Reform Act of 1998: Perceived Abuses of the Treasury Department's Rulemaking Authority*, 52 TAX LAW. 501, 508 (1999) ("As an administrative agency, the Service and the Treasury request public comments from interested persons under the format prescribed by the Administrative Procedure Act of 1946. Arguably, the Service has been delinquent in its duty."); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 341 (1989) (criticizing Treasury avoidance of APA pre-promulgation notice-and-comment requirements through use of the "good cause" exception); Toni Robinson, *Retroactivity: The Case for Better Regulation of Federal Tax Regulators*, 48 OHIO ST. L.J. 773 (1987) (criticizing the application of APA to tax law); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 570-75 (2002) (explaining idiosyncratic distinction between interpretative and legislative rules in tax law); Karla W. Simon, *Constitutional Implications of the Tax Legislative Process*, 10 AM. J. TAX POL'Y 235, 237-39 (1992); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 HOUS. BUS. & TAX L.J. 248, 253 (2003) ("Even though this seemingly required use of the APA procedures seems inevitable, the Treasury's use of two exceptions has all but obliterated the APA's notice-and-comment procedures.").

31. *See* Kristin E. Hickman, *Administrative Law's Growing Influence on U.S. Tax Administration*, 3 J. TAX ADMIN. 82 (2017); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013) [hereinafter Hickman, *Unpacking*]; Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. 89 (2011); Kristin E. Hickman, *The Promise and the Reality of U.S. Tax Administration*, *in* THE DELICATE BALANCE: TAX, DISCRETION AND THE RULE OF LAW 39 (Chris Evans et al. eds., 2011); Hickman, *IRB Guidance*, *supra* note 6; Hickman, *Responding*, *supra* note 3; Hickman, *Coloring*, *supra* note 3; Hickman, *Mead*, *supra* note 25.

32. *E.g.*, Brief of Prof. Kristin E. Hickman as Amicus Curiae Supporting Respondent, Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011) (No. 09-837),

to overstate the impact and impressiveness of Professor Hickman's achievement.[33] While the legal academy has become more and more irrelevant to the practical workings of the law,[34] Professor Hickman represents a happy exception.

To date, four key opinions have struck strong blows against tax exceptionalism. The first and foremost is the *Mayo Foundation* case, which expressly overruled the tax-specific deference regime of *National Muffler*.[35] The deference regime for agency interpretations is inextricably linked to issues of APA compliance and related administrative law doctrines.[36] Thus, as has been recognized,[37] the Court's decision to apply the trans-substantive *Chevron* standard to tax likely represents a broader orientation against tax exceptionalism. The Court expressly stated it was "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.'"[38] That statement strongly portended the beginning of the end for tax exceptionalism.

That same year, an en banc D.C. Circuit opinion—*Cohen v. United States*[39]—similarly conveyed an anti-exceptionalist bent. The case concerned IRS refund procedures for certain erroneously collected excise taxes.[40] The

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2010 WL 3934618; Brief of Prof. Kristin E. Hickman as Amicus Curiae Supporting Plaintiffs-Appellants, Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011) (Nos. 08-5088, 08-5093, 08-5174), 2010 WL 5779109.

33. *See* Ann Murphy, *A Sea Change in Court Analysis of Treasury Regulations*, 35 ABA TAX TIMES 21, 21 (Feb. 2016), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/16feb/16feb-ac-murphy-a-sea-change-in-court-analysis-of-treasury-regulations.html.

34. *See, e.g.*, RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 12-13 (2016) (describing the "estrangement between the judiciary and the academy").

35. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011); *see* Kelsey C. Mellette, Note, *The Service and the APA in* Dominion Resources, Inc. v. United States*: A Chance at Redefinition and Mandating Administrative Law Universality*, 66 TAX LAW. 819, 831 (2013) (noting *Mayo Foundation*'s role in "[t]he movement toward[ ] universality between the Treasury and the rest of administrative law").

36. *See* Hickman, *Mead*, *supra* note 25, at 1617-18.

37. *See, e.g.*, Amandeep S. Grewal, Foreword, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625, 1626 (2014) ("By so rejecting tax exceptionalism in the regulatory-deference context, the Court may have brought general administrative-law doctrines to several areas of tax administration . . . ."); Jeremiah Coder, *Tax Law's Vanity Mirror Shattered*, 134 TAX NOTES 35, 35 (2012) ("[B]y and large the [tax] field assumed for decades that its unique set of issues required specialized legal treatment when it came to . . . administrative procedures. That notion was turned on its head when the Supreme Court decided [*Mayo Foundation*]"); Kristin E. Hickman, *Goodbye Tax Exceptionalism*, ENGAGE, Nov. 2011, at 4, 4-5.

38. *Mayo Found.*, 562 U.S. at 55 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

39. Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011).

40. *Id.* at 719-20.

plaintiffs challenged the IRS Notice implementing the refund procedures as procedurally invalid for failure to comply with the APA.[41] Significantly, the court strongly rejected the idea that tax receives special treatment under the APA. As the court stated, "The IRS is not special . . . no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA."[42] In that passage, the court was specifically discussing the APA's sovereign immunity waiver,[43] but the court's sharp statement seems intended to carry far broader implications.

The next year in 2012, the Federal Circuit actualized *Cohen*'s implications in *Dominion Resources, Inc. v. United States*.[44] In *Dominion*, the court invalidated a Treasury Regulation under the APA's *State Farm* standard for administrative reason-giving.[45] Treasury had viewed itself as effectively exempt from *State Farm* for quite some time,[46] so *Dominion* represented a dramatic rebuke of that exceptionalist position.

However, *Dominion* turned out to be not nearly as dramatic as *Altera v. Commissioner*,[47] a Tax Court opinion that is the most recent and most aggressively anti-exceptionalist of the four discussed here. The *Altera* opinion reached two important conclusions of law. First, the court summarily dismissed the Treasury Department's longstanding legal arguments for avoiding APA notice and comment, based on Treasury's broad interpretations of the interpretive and good cause exceptions (discussed in Part III.B.1-2 below).[48] The court did not cite to Professor Hickman on these points, but its reasoning matched hers. Second, building on *Dominion*, the Tax Court applied a stringent version of the APA's *State Farm* standard.[49] Specifically, the court found that *State Farm* required Treasury to contemporaneously justify the regulation at issue with complex and difficult-to-obtain empirical analysis, rather than less technical reason-giving.[50]

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41. *Id.* at 721-22.

42. *Id.* at 723.

43. 5 U.S.C. § 702 (2012).

44. Dominion Resources, Inc. v. United States, 681 F.3d 1313 (Fed. Cir. 2012).

45. *Id.* at 1319. For good measure, the court also found the regulation substantively invalid under *Chevron*, but its reasoning on that substantive invalidity is not relevant to this Article. *Id.* at 1317-19.

46. *See* sources cited *supra* notes 17-18.

47. Altera Corp. v. Comm'r, 145 T.C. 91 (2015), *appeal argued*, No. 16-70497 (9th Cir. Oct. 11, 2017). The case is currently on appeal to the Ninth Circuit.

48. *See id.* at 116-17.

49. *Id.* at 120-31.

50. *Id.* at 123-24.

Particularly with that first conclusion, the Tax Court—the judicial body that hears more than 95% of federal taxpayer litigation[51]—sent a strong anti-exceptionalist message to Treasury. Indeed, the *Altera* opinion was seemingly crafted to emphasize that message. To this end, the full court reviewed the opinion,[52] and in a rare show of unanimity, all the judges who reviewed the decision joined it, without a single concurrence or dissent.[53] If Treasury wants its regulations to be sustained in court, *Altera* seems to say, then Treasury must abandon its exceptionalist administrative practices.[54] In effect, the Tax Court directed Treasury to Professor Hickman's vision of APA compliance as the path forward.

This Article argues below that aspects of these opinions—in particular *Dominion* and *Altera*, which strongly reflect prevailing anti-exceptionalist theory—incorrectly conceive of how the APA operates.[55] Because of these flaws, the judicial paradigm-shift away from exceptionalism has the potential to impede tax rulemaking moving forward, for rulemaking will be subject to onerous procedural burden beyond what should be necessary under the APA. And even greater destabilization from these anti-exceptionalist judicial opinions—and, indeed, from prevailing anti-exceptionalist theory in general, as applied to rulemaking—results from retrospective application.[56]

In the tax context, there is no overarching statute of limitations for a claim that a tax regulation is invalid because the process of its promulgation violated the APA.[57] Because neither Professor Hickman nor the *Dominion*/

51. L. Paige Marvel, *The Evolution of Trial Practice in the United States Tax Court*, 68 TAX LAW. 289, 289, 292 (2015) (noting that the Tax Court is the "primary tax litigation forum for federal tax disputes" and that it "adjudicates more than 95% of the tax cases filed by taxpayers nationally and, for the fiscal year 2013, had approximately 71% of the total dollars in dispute . . . in its inventory").

52. *See* I.R.C. § 7460(b) (2012) (authorizing Chief Judge of Tax Court to direct full-court view of an opinion); Mary Ann Cohen, *How To Read Tax Court Opinions*, 1 HOUS. BUS. & TAX L.J. 1, 5-6 (2001) (noting full-court review is generally directed where a Treasury Regulation is invalidated and/or "in cases of widespread application where the result may be controversial").

53. Kristin Hickman, Altera Corp. & Subs. v. Comm'r*: The Tax Court Delivers An APA-Based Smackdown*, TAXPROF BLOG (July 28, 2015, 3:01 PM), http://taxprof.typepad.com/taxprof_blog/2015/07/hickman-altera-corp-subs-v-commissioner-the-tax-court-delivers-an-apa-based-smackdown.html ("[T]he fact that the Tax Court unanimously backed such a thorough and unequivocal application of general administrative law principles in reviewing a Treasury regulation is truly remarkable.").

54. Murphy, *supra* note 33 ("It seems clear that *Altera* is a bellwether of change for Treasury. It can no longer rely on tax exceptionalism to support a relaxed administrative-law standard.").

55. For the details of this argument, *see infra* Part III.B-C.

56. *See* sources cited *supra* note 4.

57. Within a given proceeding, a taxpayer is subject to statutes of limitations to contest a tax liability. *E.g.*, I.R.C. § 6511(a) (2012). One can also, of course, be barred from making

Altera opinions apply their APA interpretations for tax on a purely forward-looking basis,[58] theoretically, any regulation ever promulgated in accordance with exceptionalist practice is at risk of invalidation. Indeed, Professor Hickman has argued that approximately 41% of the regulations promulgated over a recent three-year period could be found procedurally invalid under the APA.[59] This risk of widespread invalidation could potentially wreak havoc on the tax system.[60] At the same time, as the cases in this Part show, APA-based challenges to tax regulations are ramping up,[61] and it may be becoming easier, as a matter of procedure in tax litigation, to bring APA-based challenges to tax regulations.[62]

B. *The APA: Doctrine & Theory*

As described in Part I.A, courts have chiefly acted in the negative, telling Treasury how its prior administrative practice is no longer acceptable. The obvious next question is what the positive vision is. What are the details of the administrative law doctrines with which Treasury has failed to comply? To provide that positive vision, Part I.B.1 provides basic doctrinal background on the APA. With those basics established, Part I.B.2 provides a theoretical understanding of how the APA's open-textured statutory language facilitates judicial oversight of the administrative state. As previously noted, recent tax scholarship presents an overly formalistic interpretation of the APA and what it requires. Part I.B.2 counters that portrayal, and when the APA is properly understood as an only somewhat-bounded vehicle for judicial policy monitoring (rather than a statute subject to settled, textualist interpretation), that necessarily undercuts any claim to authoritative or absolute interpretation of the APA's provisions in the context of tax administration.

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an APA-based claim in an individual proceeding if the claim is not timely raised. *See In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 901 F. Supp. 2d 1, 5-7 (D.D.C. 2012), *aff'd*, 751 F.3d 629 (D.C. Cir. 2014). However, no statute provides a global time limit to contest the administrative validity of a tax rule, as is the case in some non-tax contexts. *See* Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011).

58. *See, e.g.*, sources cited *supra* note 4.

59. Hickman, *Coloring*, *supra* note 3, at 1749 tbl.1. For additional context for this empirical claim, *see infra* Part III.A.

60. The same is true for other aspects of prevailing anti-exceptionalist theory that are beyond the scope of this Article. For instance, an invalidation of all penalties associated with sub-regulatory guidance. *See* Hickman, *IRB Guidance*, *supra* note 6.

61. *See, e.g.*, Patrick J. Smith, *Challenges to Tax Regulations: The APA and the Anti-Injunction Act*, 147 TAX NOTES 915 (2015).

62. *See* Chamber of Commerce v. IRS, No. 1:16-CV-944-LY, 2017 WL 4682050, at *3-4 (W.D. Tex. Oct. 6, 2017), *notice of appeal filed*, (5th Cir. Nov. 27, 2017).

1. Doctrine: APA Basics

The APA[63] was passed in 1946 as "a new, basic and comprehensive regulation of [agency] procedures."[64] The APA provides certain "general law about administrative procedure and control" that applies trans-substantively to the actions of federal agencies, in addition to any requirements in agency-specific statutes.[65] Whenever an agency acts, it must meet the applicable procedural standards that the APA imposes.

The APA provides two broad sets of interrelated procedural controls. The first, more diffuse control is the requirement for reasoned administration.[66] In what is commonly referred to as *State Farm* review,[67] courts can "set[ ] aside" agency action as " 'arbitrary' or 'capricious' "[68] under the APA because the agency failed to "articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made."[69] In other words, to avoid judicial invalidation, agency actions must be, in a broad sense, reasoned and reasonable. The agency must provide cognizable[70] and contemporaneous[71] reasons for its action. Certain types of agency action (and inaction) are excluded from this judicial reasonableness review,[72] but as elaborated in case law, agency action is *presump-*

63. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012)).

64. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 523 (1978) (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 70 (1950)).

65. Charles H. Koch, Jr. et al., Administrative Law and Practice § 2:30 (2016).

66. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (describing requirement for "reasoned decisionmaking" (quoting Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 374 (1998))); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1679-80 (1975) (describing the concept of "requir[ing]" an agency "to articulate the reasons for reaching a choice in a given case even though the loose texture of its legislative directive allowed a range of possible choices").

67. After the seminal Supreme Court case that has come to exemplify this reasonableness review. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

68. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (quoting 5 U.S.C. § 706(2)(A)).

69. *State Farm*, 463 U.S. at 43 (internal citation omitted).

70. Agencies can only cite types of reasons that they are permitted to consider under the statute or statutes authorizing their action. *See, e.g.*, D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1235 (D.C. Cir. 1971) (invalidating agency action because the agency made its decision based on impermissible political reasoning).

71. *See* SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 92-95 (1943).

72. 5 U.S.C. § 701(a)(1)-(2); *e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (finding agency prosecutorial discretion is presumptively unreviewable); Norton v. S. Utah Wilderness All., 542 U.S. 55, 61-67 (2004) (finding agency discretion as to broad, programmatic policy choices to be generally unreviewable under the APA).

tively reviewable by courts.[73] By contrast, as noted above, Treasury historically took the position that it is effectively exempt from this *State Farm* review,[74] at least in the rulemaking context,[75] even where none of the established exceptions to that review apply.

For its second set of procedural controls, the APA imposes more specific procedural requirements on given types of agency action. To establish the minimum procedures required for a given agency action, the APA "divides the universe of administrative action into two general decision-making categories, rulemaking and adjudication."[76] Different sets of procedural requirements apply to each category. The APA provides only unhelpful, circular definitions for the terms "rulemaking" and "adjudication."[77] However, the Supreme Court has differentiated rulemaking and adjudication for APA purposes based on the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards [i.e., rulemaking], on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other [i.e., adjudication]."[78] Processes that promulgate standards of broader applicability are rules; processes that apply law to an individual or small group based on particularized facts are adjudications.

Agency actions are also differentiated based on whether they were created by formal or informal processes.[79] A formal process is subject to more procedural requirements than an informal one. Thus, the APA taxonomy of agency actions can be conceived of as a 2-by-2 grid, with rulemaking and

73. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); Lincoln v. Vigil, 508 U.S. 182, 190 (1993) ("[W]e have read the APA as embodying a basic presumption of judicial review." (internal citation omitted)). *But see Lincoln*, 508 U.S. at 192 (finding agency decision regarding an appropriation unreviewable under the APA); Webster v. Doe, 486 U.S. 592, 599-601 (1988) (finding an agency action unreviewable under the APA).

74. *See* sources cited *supra* note 19 and accompanying text.

75. *See* IRM 32.1.5.4.7.3(1) (Sept. 30, 2011).

76. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265 (1986).

77. A "rule making" is defined as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Adjudication "means [the] agency process for the formulation of an order," with an order defined as "the . . . final disposition . . . in a matter other than rule making." *Id.* § 551(7), (10).

78. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 245 (1973). The court cited to the two iconic Supreme Court cases that illustrate this difference for purposes of the 14th Amendment. *Id.* at 244-45. *Compare* Londoner v. City & Cty. of Denver, 210 U.S. 373, 386 (1908) (finding an adjudicatory-type hearing procedure is constitutionally necessary for a property tax assessment on a small group of individuals) *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (concluding, for a property tax assessment applicable to a far larger group, that no adjudicatory-type hearing procedure is necessary for "a rule of conduct applies to more than a few people").

79. *See* KOCH, *supra* note 65, § 2:33.

adjudication on one axis and formal and informal on the other. The APA's formal and informal adjudication requirements are less relevant to tax law, given that tax-specific legislation has largely displaced APA adjudicatory procedures.[80]

Rulemaking, however, is central to the tax exceptionalism debate. The APA's trial-like formal rulemaking procedures apply if a rule must be made, according to the authorizing statute, "on the record after opportunity for an agency hearing."[81] These formal procedures are debilitating.[82] It is thus fairly rare to require formal rulemaking,[83] and when formal procedures are required, they are death by process.[84]

That leaves the "most important idea"[85] in the APA: informal rulemaking, which constitutes most agency rulemaking (and, I believe, all tax rulemaking). Under informal rulemaking, the agency must provide pre-promulgation notice in the Federal Register of its proposed rulemaking, including "the terms or substance of the proposed rule or a description of the subjects and issues involved."[86] Interested parties are then allowed to respond with "data, views, or arguments" to the proposed rule.[87] After "consideration of the relevant matter presented," the agency then publishes the final rule, along with "a concise general statement of [its] . . . basis and purpose."[88] Courts can then review the agency's decision-making process under the same "arbitrary [or] capricious" standard for general reasonableness review.[89] Reviewing courts can vacate or otherwise remand a rule for failure to comply with these APA requirements.[90]

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80. *See infra* Part II.A.1. Per the Introduction, this Article mostly discusses rulemaking and not adjudication.

81. *Id.* § 553(c). The authorizing statute must either expressly cross-reference to the APA's formal procedure sections or use those *exact* words to institute formal rulemaking requirements. *See Fla. E. Coast Ry. Co.*, 410 U.S. at 236-38.

82. *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.1 (2010).

83. *Id.* § 7.1 ("[F]ormal rulemaking procedure simply does not work."); Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 347 ("The formal rulemaking provisions have in fact been applied to very few programs of general rulemaking, where they have had predictably inefficient results.").

84. *E.g.*, PIERCE, *supra* note 82, § 7.2; Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 416 (1996).

85. Walter Gellhorn & Kenneth Culp Davis, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 507, 520 (1986).

86. 5 U.S.C. § 553(b)(3) (2012).

87. *Id.* § 553(c).

88. *Id.*

89. *Id.* § 706(2)(A).

90. *Id.* § 706(2)(D).

These informal rulemaking requirements are subject to several exceptions—types of rules (and other guidance) that the APA does not require to be subjected to this pre-promulgation notice and comment.[91] For tax administration, the two key exceptions are: (1) for "interpretative rules"[92] and (2) for rulemakings where the agency has "good cause"[93] to skip notice and comment. Until recently, Treasury took the position that virtually all of its rulemakings qualified for one or both of these exceptions, with the result that compliance with the APA's informal rulemaking procedures was essentially voluntary for Treasury.[94]

2. Theory: The APA & Judge-Made Law

State Farm review and informal rulemaking requirements seem simple on their face. Indeed, they derive from just a few plain words in the APA. However, these statutory minima have become the foundation for a complex and exacting law of administrative action. This law is, to a substantial degree, judge-made, and its contours and application are often a matter of judicial decision.[95] Judges themselves will rarely concede that their branch has, in many ways, created law under the APA, but the APA's requirements are so "vague" that they "have been left to be elaborated almost exclusively by judicial interpretation."[96] Indeed, as applied, the APA is at least as much judicial construction as statute.[97] That judicial construction is dynamic; it varies widely across (and within) time and jurisdictions. Accordingly, one cannot conceive of the APA as a formal checklist for agency actions. As a purposefully vague statute, its application has necessarily been varied and contextual.

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91. *Id.* § 553(a)(1)-(2), (b)(A)-(B).

92. *Id.* § 553(b)(A).

93. *Id.* § 553(b)(B).

94. *See* sources cited *supra* note 18.

95. *See, e.g.*, Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 901 (2007) (arguing that core aspect of administrative requirements that allegedly derive from the APA are judicial constructions); Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 419 (1981) (advocating that the Supreme Court clarify that the APA's statutory standard of review to establish the statutorily prescribed "primacy of agency control over the rulemaking process," in contrast to contrary judicial practice).

96. *See, e.g.*, Mashaw, *supra* note 84, at 417.

97. *See* Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986) ("[T]he APA is more like a constitution than a statute. It provides for flexibility in decision-making; it can be changed through interpretation without the need for amendment; its movements are more pendulum-like than linear.").

One can see how much of modern APA practice is judge-made[98] by simply charting the APA through time. In the wake of the APA's enactment, courts initially took a low-touch, deferential approach in their review of agency action, both for informal rulemaking and general arbitrary and capricious review.[99] This approach accorded with the language of the statute itself.

Take informal rulemaking. In promulgating a final rule under informal procedures, an agency must provide "a *concise general* statement of . . . basis and purpose."[100] As then-Professor Antonin Scalia wrote, "[t]here is no doubt that the burden meant to be imposed by this provision was minimal."[101] Indeed, the plain text indicates as much. The required "statement" is supposed to be merely "concise" and "general."[102] The 1947 Attorney General's Manual on the Administrative Procedure Act[103] breezily describes the required "statement": "[F]indings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued."[104] Not only were these procedural requirements simple, but also judicial review under the "arbitrary" and "capricious"[105] standard—the basis for reasonableness review of both informal rulemaking and agency action generally—was highly deferen-

98. *See, e.g.*, Jerry L. Mashaw, Reasoned Administration 70 (2017) (on file with author) ("[C]ase law determines much of the scope and content of reason-giving and reasonableness in American administrative law. Here, statutory interpretation is difficult to distinguish from federal common law."); PETER CANE, CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON 182, 515 (2016); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298 (2012) ("Twenty-five years ago, Professor Cass Sunstein remarked that '[m]uch of administrative law is common law,' and the same remains true today. Numerous administrative law doctrines are judicially created at their core." (quoting Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986))). *Cf.* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 485 (2010) ("Although some administrative law requirements are plainly constitutionally required and others clearly rooted only in statutory or regulatory enactments, a number of basic doctrines occupy a middle ground.").

99. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 456 (1986) (describing how courts took "a position of doing almost nothing in the forties and fifties" vis-à-vis APA review).

100. 5 U.S.C. § 553(c) (2012) (emphasis added).

101. Scalia, *supra* note 83, at 378.

102. 5 U.S.C. § 553(c).

103. *See* Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004) (noting that the 1947 AG's manual is "a document whose reasoning we [the Supreme Court] have often found persuasive").

104. Scalia, *supra* note 83, at 379 (quoting ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947)).

105. 5 U.S.C. § 706(2)(A).

tial.[106] Again, that deference accords with the plain meaning of those two words. As Professor Martin Shapiro colorfully described it, an action was judicially determined to be arbitrary or capricious if the agency "had acted like a lunatic."[107]

How much has changed. Beginning in the sixties and seventies, courts remade informal rulemaking—"invent[ing] a host of procedural requirements that turned rulemaking into a multiparty paper trial"[108] thereby "transform[ing] . . . simple, efficient notice and comment . . . into an extraordinarily lengthy, complicated, and expensive process."[109] Courts have likewise supercharged arbitrary and capricious review generally into "a thorough, probing, in-depth review,"[110] commonly known in the rulemaking context as *State Farm* review.[111] Nominally, the Supreme Court has precluded courts from mandating procedures that the APA does not itself require,[112] but this claim of textual fidelity to the APA is widely regarded as risible.[113]

Thus, when it comes to informal rulemaking requirements and *State Farm* review, the APA is not some technical statutory template that can be disinterestedly applied. It is true that the APA has often been presented as such. Ever since the APA's enactment, various stakeholders have attempted

106. Morrison, *supra* note 97, at 263 ("For many years, scholars and litigants had believed that almost any agency action would satisfy the 'arbitrary and capricious' standard, just as any statute examined under the equal protection rational basis test would survive."); *see also* Shapiro, *supra* note 99, at 453 ("Under the APA rulemaking generated no record to be reviewed, and the standard of review made an agency's decisions irreversible unless it had acted insanely.").

107. Shapiro, *supra* note 99, at 454.

108. *Id.* at 462; *see, e.g.*, Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 333-35 (D.C. Cir. 1968).

109. Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) [hereinafter Pierce, *Deossify*]; Murphy, *supra* note 10, at 24 ("Courts have essentially rewritten the APA's notice-and-comment provisions, transforming them from an easy and straightforward mechanism in 1946 into their current monstrous form.").

110. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); *see* Shapiro, *supra* note 99, at 462 (describing how courts "converted the 'arbitrary and capricious' test specified by the APA as the standard of judicial review of rulemaking from a lunacy test into the 'clear error' standard that empowers a court to quash a rule not only when it is crazy but also when the judges simply believe it is wrong"); Richard J. Pierce, Jr., *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, 5-12 (2014) [hereinafter Pierce, *Which Institution*].

111. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

112. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978).

113. *E.g.*, Scalia, *supra* note 83, at 395 ("[I]t would seem that *Vermont Yankee*'s demand for fealty to the APA must be taken with a grain of salt.").

to present the APA as "an administrative code . . . based on scientific principles"[114] or as a "*formula* upon which opposing social and political forces have come to rest."[115] Indeed, the "traditional depiction" of the APA is as "a product of reasoned deliberation by a handful of wise lawyers and legal academics."[116] As has been pointed out,[117] this portrayal of the APA as reasoned, technocratic, and apolitical serves to bolster its legitimacy (and thus, the legitimacy of the administrative state that it regulates). In truth, the APA was "an unprincipled jumble of political compromises" when passed,[118] and the consequent statutory vagueness has often allowed courts to construct a law of administrative procedure.

Nothing is necessarily wrong with this reality of judicial policymaking. Given the growth and perpetual evolution of the administrative state, it may be that courts require certain broad, common law-type flexibility to monitor agencies. At the same time, public admission that this judicial control of administration is often nakedly extra-statutory would, perhaps, undermine that control. Given broad delegations of power commonly granted to administrative agencies[119] and the toothlessness of the non-delegation doctrine,[120] plain-text (and thus narrow) interpretation of the APA could arguably cede too much unaccountable control to administrators, relative to courts. In any event, this Part's historically informed, substantive account of the APA shapes how one conceives of the APA on a policy level. Indeed, we will see this throughout this Article as it discusses more specific APA provisions below.

II. Against Tax Exceptionalism

With that background in Part I established, we can turn to the remaining case for tax exceptionalism. In discussing ongoing advocacy for exceptionalism, this Part does two things. First, Part II.A explains why continued advocacy for tax exceptionalism is misguided. To this end, it primarily re-

114. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1668 (1996).

115. *Vt. Yankee*, 435 U.S. at 523 (emphasis added) (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

116. Pierce, *supra* note 82, § 1.4.

117. Shepherd, *supra* note 114, at 1668-69.

118. *Id.* That is not to say the APA's statutory framework is arbitrary or incoherent. In many ways, the APA was a "best practices" document with built-in exceptions to take account of the heterogeneity of practice that the Attorney General's Report described in its background cases studies.

119. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81, 82 (1985) ("[A]rguments for broad delegations of authority to administrators are almost as continuous and ubiquitous as the statutes that they would justify.").

120. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

sponds to archetypal arguments from two pro-exceptionalism articles. Second, Part II.B argues that, while tax exceptionalism is no longer viable, it was the prevailing law of tax administration for a long time. To prove this point, this Part briefly examines the legal history of exceptionalist treatment of the interpretive rule exception to APA notice and comment.[121] Part II.B concludes with the present relevance of this history: this perspective on exceptionalism's past influences how Treasury should transition to APA compliance moving forward (as well as how courts should manage and police this transition).

A. *Refutation of Pro-Exceptionalist Arguments*

In responding to the pro-exceptionalism school, it is helpful to start with an overarching point. This Article's issue with the remaining tax exceptionalists could be viewed as more strategic than anything else. The legal world has turned against tax exceptionalism. Legal developments to date make that exceedingly clear, and this trend will accelerate moving forward. It will accelerate because, while these tax administration issues are not inherently political, anti-exceptionalism has two major political advantages: ideologically speaking, it has support that is both broad-based and partisan. Support is broad-based in that an ideologically diverse range of judges and justices has signed on to various aspects of the anti-exceptionalist project.[122] Support is also partisan, both for conservatives and liberals. On the conservative front, anti-exceptionalism dovetails with conservative concern over IRS overreach,[123] as well as a more general conservative sympathy for administrative standards that increase required procedures and narrow agency power.[124] Given the Republicans' 2016 electoral success, we can expect a push to actualize these anti-exceptionalist principles, both in the judiciary and the federal tax bureaucracy. One would also expect a liberal embrace of anti-exceptionalism insofar as it facilitates challenges to the Trump Treasury, especially as it withdraws Obama-era regulations.[125]

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121. 5 U.S.C. § 553(b)(A) (2012).

122. *See supra* Part I.A.

123. *See A Better Way: Our Vision for a Confident America*, SPEAKER.GOV 10 (June 24, 2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf ("Over the past three decades, the IRS has become a prime example of executive branch overreach, blatant misconduct, and government waste.").

124. *E.g.*, Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015), https://www.congress.gov/114/bills/hr185/BILLS-114hr185rfs.pdf.

125. Andy Grewal, *Trump's Broad Powers To Revoke Tax Regulations Issued by the Obama Administration*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 14, 2016), http://yalejreg.com/nc/trumps-broad-powers-to-revoke-tax-regulations-issued-by-the-obama-administration/.

All this is to say, in terms of real-world influence on tax administration, to speak for tax exceptionalism is to lose. As is elaborated upon below,[126] tax exceptionalism was valid in its own time, but that time has passed. To be anything but irrelevant in these tax administration debates, one needs to reason within the APA and associated general principles of administrative law, rather than rebel against them. Much can be accomplished through such argument, given the APA is naturally dynamic and unsettled.[127] The way to win the debate is to argue about what the APA means to tax administration *within* the idiom of the APA—going through the APA provision by provision, administrative law concept by concept—and *without* resorting to the bygone notion of exceptionalism.

With that in mind, we can turn to the arguments still put forward for exceptionalism. These arguments can be sorted into three groups: (i) structural argument about the IRS and its processes, discussed in Part II.A.1, (ii) argument that anti-exceptionalists misinterpret the APA, discussed in Part II.A.2, and (iii) argument about the APA's normative value, discussed in Part II.A.3.[128]

1. Structural Argument

The first argument is that Treasury needs special treatment as an administrative law matter because tax collection is a uniquely massive and complex undertaking. Professor Stephanie McMahon argues that "the wide reach of the federal tax system"—"over 240 million federal tax returns" filed and "1.4 million returns . . . audited" in 2014—makes tax "unique."[129] As she argues, "More people interact with the tax system than with any other part of the federal government."[130] Her claim is that the tax collection system, given its relative immensity, needs special administrative treatment.

In this view, the IRS not only faces the singularly massive task of tax collection, but also faces it without the necessary political support from the executive or legislature.[131] Treasury is "forced to do much with little," but has still managed to maintain a workable, respected system for rulemaking and guidance.[132] Increased administrative law requirements are untenable,

126. *See infra* Part II.B.

127. *See infra* Parts I.B, III.

128. While this Article overall is focused on tax rulemaking, these exceptionalism arguments (and their refutation) are mostly made at a more general, theoretical level. That is simply the nature of these exceptionalist arguments, but once they are dismissed, this Article naturally transitions to more rulemaking-targeted analysis.

129. McMahon, *supra* note 5, at 555.

130. *Id.*

131. *Id.* at 556.

132. *Id.* at 556-57.

given the scope of Treasury's duties and the resource constraints that it faces.

The tax system is also as dense as it is broad, and "[t]he sheer complexity of the law requires administrative flexibility,"[133] i.e., exceptionalism. As this argument goes, Treasury must be excused from APA compliance to cope with the challenges of this complexity. And not only that—tax *practitioners* also need exceptionalism for the same reason. Full APA compliance "would demand (1) the continued understanding of tax specific rules . . . plus (2) a newfound understanding of how those rules interact with other areas of the law."[134] This required scope of knowledge is too much for private practitioners to bear, given "[f]ew, perhaps many fewer, attorneys and advisors could hope to attain a working level of information" in this APA-compliant world.[135]

These arguments are unavailing. To take these points in turn, tax collection is certainly a herculean endeavor in scale and complexity, and the political challenges of adequate IRS funding are painfully real.[136] However, the federal government runs all sorts of colossal programs subject to scarce (and politically fraught) funding. Professor McMahon compares, among other things, the number of military personnel to the annual number of tax returns to demonstrate that, given the latter number vastly exceeds the former, the scale of tax collection is far grander than that of the armed forces.[137] But it is sophistic to compare 1040s with riflemen. The relative size of these numbers is meaningless, because the numbers mean qualitatively different things. To provide translatable figures, in fiscal year 2015, federal spending on the IRS was around $11 billion;[138] the defense budget was $582 billion,[139] almost 53 times bigger. The defense budget faces, among other things, the challenges of sequester,[140] just as IRS funding faces its own political obstacles.

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133. *Id.* at 604.

134. *Id.* at 611.

135. *Id.*

136. *E.g.*, Nat'l Taxpayer Advocate, Internal Revenue Serv., 2013 Annual Report to Congress: Vol. I 33-35 (2013), https://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf.

137. McMahon, *supra* note 5, at 555.

138. Internal Revenue Serv., Program Summary by Appropriations Account and Budget Activity 2 (2015), https://www.irs.gov/pub/newsroom/IRS%20Budget%20in%20Brief%20FY%202016.pdf.

139. Cong. Budget Off., The Federal Budget in 2015 (2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/graphic/51110-budget1overall.pdf.

140. Lynn M. Williams, Cong. Research Serv., R44039, The Budget Control Act and the Defense Budget: Frequently Asked Questions 1 (2017), https://fas.org/sgp/crs/natsec/R44039.pdf.

More importantly, these issues of scale and complexity do not logically support blanket elimination of administrative restraint through tax exceptionalism. Indeed, one can just as easily argue that the federal tax system should be administratively restrained *precisely because* it is so dense and pervasive. In that vein, scholars argue for greater administrative restraint in the defense context.[141] Moreover, if tax law is so impossibly complex, then all the more reason to impose *State Farm*-type reason-giving requirements. One can quite sensibly argue that such reason-giving helps practitioners better understand and rationalize complex IRS actions—like handrails on the M.C. Escher staircases of the tax law. Indeed, that counterclaim is far more plausible than the assertion that tax practitioners *lack the intellectual capacity* to simultaneously comprehend both tax and administrative law. More faith should be had in the mind of the tax lawyer. Other species of attorney certainly rise to this challenge. Environmental lawyers have to navigate both administrative law and the scientific and engineering complexity of EPA regulation.[142] How is their job description any less demanding than that of the tax practitioner?

Then there is the APA itself. Judge-made though its law may often be, the APA statutorily exempts certain subject matter from its rulemaking requirements.[143] If tax were meant to be administratively exceptional as a subject area because it is so massive and complex, it would have one of those statutory exemptions. It does not.[144] Beyond the APA's text, Congress has elsewhere statutorily given administrators authority to exempt actions from APA compliance,[145] but has not done so for the IRS.

Professor James Puckett makes a second structural argument for exceptionalism.[146] His argument is structural in a more concrete sense. He argues that tax is exceptional because tax rulemaking and adjudication statutorily

141. *E.g.*, Admin. Conference of the U.S., Recommendation 73-5: Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements (1973), https://www.acus.gov/sites/default/files/documents/73-5.pdf.

142. *E.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2714-26 (2015) (Kagan, J., dissenting) (describing an exhaustively technical EPA rulemaking process). The scientific complexity of EPA regulation, in contrast to much IRS rulemaking, is discussed *infra* in terms of what *State Farm* should and shouldn't require in the tax context. *See infra* Part III.C.

143. 5 U.S.C. § 553(a) (2012).

144. Interestingly given Professor McMahon's military comparison, the APA *does* exempt "military or foreign affairs" from informal rulemaking requirements. *Id.* § 553(a)(1).

145. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 231, 306 (authorizing the Secretary of Homeland Security to waive compliance with legal requirements, including the APA, for certain border security actions); Defs. of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007) (upholding that authority).

146. Puckett, *supra* note 5, at 1090-1108.

vary from the APA in material ways.[147] The variance in tax rulemaking is discussed *infra*,[148] so in responding to Professor Puckett, this Part will focus on adjudication.

Professor Puckett notes, quite rightly, that "[t]he adjudication of tax controversies is . . . very specialized."[149] Unlike the APA adjudication template, which contemplates in-agency adjudication,[150] tax controversies are adjudicated in the first instance either in the federal trial courts or Tax Court.[151] The differences from the APA template multiply from there, often shifting procedural power from the IRS to the taxpayer. For instance, these courts adjudicate factual issues *de novo*[152] (unlike the APA's deferential "substantial evidence" review of agency factual findings),[153] and these courts are less likely than regular APA tribunals to remand to the IRS for better reason-giving (and instead more likely to definitively decide legal issues against the IRS).[154] Professor Puckett argues that this tax-specific adjudicatory structure[155] both serves important policy ends[156] and illustrates that, definitionally, tax administration is different from administrative law generally.[157] In his view, exceptionalism lives in that difference.

But in administrative law, such difference is normal rather than exceptional. Particularly on the adjudicatory front, statutes frequently deviate from the APA template. Beyond the specific alterations that they make, these deviations are irrelevant to the applicability of general administrative

147. *Id.* at 1091 (discussing how his article "contrasts the modalities of tax administration with the APA template, pointing out that a striking degree of tax exceptionalism exists in terms of the structure of available modalities").

148. *See infra* Part III.B.3.

149. Puckett, *supra* note 5, at 1107.

150. 5 U.S.C. §§ 554, 556(b), 3105 (2012).

151. *See* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 115.1 (2017) ("When the IRS determines a deficiency, the taxpayer can litigate the matter in any one of three courts: the Tax Court, a federal district court, or the Claims Court."). Taxpayers end up in court to the extent that the IRS' dispute resolution processes fail to lead to a resolution.

152. Puckett, *supra* note 5, at 1107-08.

153. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

154. Puckett, *supra* note 5, at 1108.

155. As well as agency-specific quirks of tax rulemaking.

156. *Id.* at 1108-18.

157. *Id.* at 1118 ("Undertaking a comparative historical and structural analysis of tax administration side by side with typical agency administration, one important contribution of this Article is to clarify that applying *Mayo*'s mandate to apply a 'uniform' approach carries a very thin, residual effect. That is because the structure of tax administration—in terms of rulemaking and adjudication—is so exceptional.").

law principles.[158] For instance, it is true that the APA contemplates in-agency adjudication of administrative disputes.[159] Indeed, the APA embodied an express rejection of the so-called split-enforcement model for administrative controversy,[160] which vests prosecutorial discretion in one agency and judicial authority in a separate agency or judicial body. Instead, the APA vests prosecutorial and adjudicatory authority within the same agency, subject to internal separation between enforcement staff and the agency's administrative law judges.[161]

But it is unexceptional to deviate from this default, as is done for tax controversy. The Taft-Hartley Act, for example, divests the National Labor Relations Board of enforcement discretion, which is instead vested with the separately appointed General Counsel.[162] This bespoke agency structure is distinct from the default APA model, which would otherwise vest ultimate prosecutorial discretion in the Board itself.[163] In more dramatic breaks from the APA, certain agencies adjudicate through separate independent commissions, while others must litigate in federal trial courts, just as the IRS does. For its adjudications, the Occupational Safety and Health Administration ("OSHA") prosecutes cases, but the Occupational Safety and Health *Review Commission*[164]—a separate, presidentially appointed independent commission—judges those cases.[165] Similarly, the Federal Mine Safety and Health Act provides that same non-APA structure: the Mine Safety and Health Administration ("MSHA") prosecutes cases while an independent commission—the Federal Mine Safety and Health *Review Commission*—judges

158. *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (discussing Clean Air Act provision § 307(b), which only permits judicial review of "emission standards" in the D.C. Circuit within 30 days of the standard's promulgation).

159. 5 U.S.C. §§ 554, 556(b) (2012).

160. *See* Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877, 880-81 (1998) ("[T]he Attorney General's Committee rejected institutional separation as unnecessary to insure fairness and because it entailed unacceptable costs to the administrative process. The Attorney General's Committee therefore recommended a structure which has come to be known as the internal separation of functions. This administrative arrangement was later incorporated into the APA as a requirement for administrative agencies."); Shepherd, *supra* note 114, at 1671 (describing, when the APA was passed, conservative disappointment at the APA's lack of institutional separation between administrative prosecuting and judging).

161. 5 U.S.C. § 556(b)(3). Notably, the agency head or heads can also hear administrative cases. *Id.* § 556(b)(1)-(2).

162. 29 U.S.C. § 153(d) (2012); *see* Mintz, *supra* note 160, at 881-82.

163. *See supra* note 162.

164. *How OSHRC Works*, OCCUPATIONAL HEALTH & SAFETY REVIEW COMM'N, https://www.oshrc.gov/about/how-oshrc-works/ (last updated Apr. 2006).

165. *See* 29 U.S.C. §§ 659, 661.

them.[166] Then there are the agencies that, like the IRS, have to go to court. When the Secretary of Labor seeks to enforce the Fair Labor Standards Act, she generally has to sue in federal court.[167] As with tax controversy, there is no recourse to an administrative tribunal. The same is true for enforcement of certain other federal labor laws[168] and Title VII of the Civil Rights Act.[169]

As these examples illustrate, deviations from the APA adjudication template do not make tax exceptional as an administrative law matter. For Professor Puckett's structural argument to be valid, it would have to necessarily follow that these other areas of federal law for which the APA template is altered to roughly the same extent are also administratively exceptional.[170] Indeed, one could argue that that the OSHA and MSHA split-enforcement models—division between agency and independent commission—are *more* exceptional than administrative adjudication in federal courts, which at least has a long historical pedigree.[171] But of course, when it comes to administrative law, commentators do not adduce OSHA to claim occupational health exceptionalism or, for that matter, adduce MSHA to

166. 30 U.S.C. §§ 815(d), 823 (2012). For a brief overview of issues with this split-enforcement model, *see* ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 86-4: THE SPLIT-ENFORCEMENT MODEL FOR AGENCY ADJUDICATION (1986), https://www.acus.gov/sites/default/files/documents/86-4.pdf.

167. 29 U.S.C. §§ 216(c), 217; DANIEL B. ABRAHAMS ET AL., EMPLOYER'S GUIDE TO THE FAIR LABOR STANDARDS ACT ¶ 900 (2016).

168. Mintz, *supra* note 160, at 909 ("Several recently enacted labor regulatory programs have been modeled on the [Fair Labor Standards Act] structure, such as the Family and Medical Leave Act (FMLA), the Polygraph Protection Act, and the Worker Adjustment and Retraining Notification Act (WARN), requiring notice to employees of certain plant closings, in that adjudication of enforcement actions takes place in the U.S. district courts.").

169. *See* 42 U.S.C § 2000e-5(f) (2012); Mintz, *supra* note 160, at 883. Although not as relevant to this Article, bankruptcy law is also structurally anomalous relative to regular administrative function, since it functions *entirely* as adjudication in the federal courts. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012).

170. Professor McMahon makes a preliminary version of this argument when she argues administrative law should not be broadly applicable. McMahon, *supra* note 5, at 588. ("[A]n alternate approach recognizes the exceptional features of each agency. Not all scholars, including this one, accept that administrative law's goal should be a broadly applicable procedural law."). However, it is hard to conceive of what administrative law means when every agency is exceptional. The more workable approach is to recognize that the vague dictates of the APA and related administrative law doctrine are, in many respects, inherently contextual in application (and that agency-specific procedures refine that template rather than upend it). Recognizing that context-sensitivity within the doctrine contrasts with Professor McMahon's proposal to Balkanize administrative law and thereby create an unworkably particularized administrative law for every field.

171. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 65-78 (2012).

claim mine safety exceptionalism. The same goes for labor and wage law exceptionalism, as well as all the other areas of law just described. One should be attuned to agency-specific alterations of the APA template, but they do not support a finding of overarching exceptionalism.

2. Misinterpretation Argument

The second category of argument is that the anti-exceptionalists have misinterpreted how the APA applies to tax, particularly given tax-specific statutory alterations to the APA rulemaking template. Exceptionalism is presented as a defense to this misinterpretation. Professor Puckett follows this course in his response to Professor Hickman's arguments about, for instance, which "tax rules qualify as 'interpretative' " under the APA and "the validity of temporary tax regulations" vis-à-vis APA notice-and-comment requirements.[172] He reviews Professor Hickman's interpretation of how certain Code and APA provisions interrelate and explains how other anti-exceptionalists could build on her interpretive arguments to severely undercut tax administration.[173] Professor Puckett provides an alternative statutory interpretation that he believes better reflects statutory intent and avoids undercutting tax rulemaking.[174]

Regardless of the merits of Professor Puckett's interpretive arguments, they should not be made through tax exceptionalism. Unquestionably, important administrative law issues—like the interaction between the APA and related administrative law principles on the one hand and certain tax-specific statutory provisions on the other; and how certain inherently contextual APA provisions should be interpreted for tax—remain unsettled. But these issues can (and should) be argued and settled without resorting to exceptionalism. As explained above, there is nothing exceptional in the structural interaction of the APA and tax statutes. These same interactions arise in other, decidedly unexceptional areas of law. Moreover, for the strategic reasons detailed at the beginning of this Part, one should generally avoid the exceptionalist mode. Here, exceptionalism does not help to further arguments on these interpretive issues.

3. Normative Argument

A third pro-exceptionalism argument is that tax should be exceptional because APA compliance is normatively undesirable. The response here is

172. Puckett, *supra* note 5, at 1072.

173. *Id.* at 1097-1101.

174. *Id.* at 1097-98 (arguing for an IRS-friendly interpretation of I.R.C. § 7805, which the IRS could then, at least theoretically, employ to nullify court losses from APA procedural challenges).

twofold. First, what APA compliance means for tax is still unsettled (and, thus, whether that compliance is normatively desirable is also unsettled). Second, broader distaste for the APA is a question of general administrative law that is irrelevant to whether the APA applies to tax in the first instance.

To support this normative argument, Professor McMahon emphasizes the problems that APA compliance is commonly alleged to cause. Because arbitrary and capricious review occurs after the fact (and given that the APA is often as much judicial construct as statute), it is hard to anticipate how exacting courts will be in their review of agency reasoning.[175] That judicial unpredictability leads to: (1) over-allocation of agency resources to rulemaking processes and (2) overly commonplace judicial invalidation of promulgated rules. In the notice-and-comment process, agencies must respond to material comments that they receive, but especially in major rulemakings with potentially thousands of comments, it can be next-to-impossible to determine which comments a court will deem material.[176] Sophisticated parties can exploit this informational mire by using comments as a weapon to slow down the agency. To this end, these parties can also flood the agency with information to "capture" it.[177] As Professor McMahon notes, this burdensome process has arguably led to the "ossification" of agency rulemaking, with rulemaking processes allegedly slowing (and even halting) under these procedural burdens.[178] This ossification would be particularly poisonous to tax law, given the "[s]everal specialized tax statutes . . . enacted annually" and "[t]he trend toward short-term legislation with sunset provisions" that "increase[ ] the need for . . . more rapidly issued tax guidance."[179]

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175. McMahon, *supra* note 5, at 579 (noting "courts function as 'robbed [*sic*] roulette wheels' when reviewing agency guidance" (quoting JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 181 (1997))).

176. *Id.*; PIERCE, *supra* note 82, § 7.4 ("An agency can require years of time and tens of thousands of person-hours to identify, analyze, and respond to all the criticisms and suggested alternatives contained in comments in a manner that a court is likely to consider adequate . . . .").

177. McMahon, *supra* note 5, at 590 ("[A] taxpayer might inundate the Treasury Department with arguments and evidence with the goal of shaping guidance, possibly by drowning out other interested parties' voices.").

178. *Id.* at 579 ("Ossification is the idea that procedural constraints imposed on federal agencies have the undesirable consequence of making the process so burdensome that agencies routinely delay or defer issuing guidance."); *see, e.g.*, RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 72-93, 146-69 (2010); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1388 (1992) ("Important rulemaking initiatives grind along at such a deliberate pace that they are often consigned to regulatory purgatory, never to be resurrected again.").

179. McMahon, *supra* note 5, at 604.

Professor McMahon argues that, given these risks, tax exceptionalism should be maintained, at least for the time being. As she writes, "[s]imply shoehorning tax . . . into a general administrative procedure without assessing either the risks or likelihood of success for that shoehorning is dangerous."[180] Professor McMahon seemingly believes that Treasury's current administrative procedures work reasonably well under the circumstances, and that in any event, Treasury's "shortcomings are unlikely to be resolved with stricter adherence to APA procedure."[181]

This argument is unconvincing for two reasons. First, it presupposes that the Hickman school is correct about the burdensome and destabilizing way that the APA applies to tax. Indeed, it effectively concedes that argument by presenting tax exceptionalism as the foil. That response will fail, as tax exceptionalism continues its inexorable decline. As this Article argues, the burdensome and destabilizing aspects of the Hickman school can be countered by arguing *within* the APA rather than *against* it.

Second, any remaining, irresolvable problems with the APA and general administrative law doctrine are just that—problems of *general* administrative law. These problems should be subject to general administrative law reforms, however difficult the reform process may be. Indeed, the EPA cannot simply refuse to follow informal rulemaking procedures or other reasoned administration requirements because the agency finds flaws in certain aspects of the APA. The same is true for tax. Administrative law, like the Cleveland Browns (or, for that matter, any human endeavor), will always be in need of serious improvement. But it is not tenable to refuse the APA until its judicial implementation is, in some idealistic and immeasurable sense, good enough. The APA and related administrative law principles are trans-substantive by nature,[182] even if they are contextual in certain aspects of their implementation. The tax community should work toward administrative law reforms where appropriate, but given that undeniable trans-substance, we still need to operate within this administrative law in the interim.

B. *The Present Relevance of Exceptionalism's History*

Before turning to the major debates over APA-compliant tax rulemaking, it is important to give tax exceptionalism its due. Tax exceptionalism has been overthrown, and as established in Part II.A, the remaining arguments for it are unconvincing. But what's past is, of course, relevant to the present. Tax exceptionalism was the law of tax administration until the last

180. *Id.* at 589.
181. *Id.* at 601.
182. *See* 5 U.S.C. § 559 (2012).

decade or so. It is not that Treasury has been flagrantly violating the APA and only recently been called to account. Treasury practice was, in effect, the law for quite some time. Tax exceptionalism was an era, not an error. To illustrate this point, this Part II.B reviews the historical legitimacy of the now-vestigial "specific/general distinction" in tax rulemaking, a doctrinal fulcrum of tax exceptionalism. This historical review demonstrates the widespread acceptance of exceptionalism, including by the Supreme Court and the twentieth century's best tax and administrative lawyers.

This point is important to establish here because it is not just historical. It influences how the Treasury should transition to APA compliance moving forward (as well as how courts should manage and police this transition). When it comes to tax administration, courts are managing a transition from one established administrative practice to another. As such, courts should be thoughtful before they invalidate tax rules promulgated long ago, during the exceptionalist era in accordance with exceptionalist doctrine. To this end, courts should at least consider a recent proposal to employ the remedy of so-called "remand without vacatur" in some situations.[183]

1. Case Study: The Specific/General Distinction

Two key points support this historical account of tax exceptionalism. The first can be expressed briefly and concerns the APA itself. As discussed above,[184] the APA is amorphous and evolving (and thus sometimes a vehicle for a judge-made law of administrative control). The APA's language is so vague that, if one were so inclined, it could be colorably construed to facilitate many aspects of tax exceptionalism. That construction is not the prevailing or most reasonable one, but it is colorable nevertheless. If the APA were a technical checklist, then one could more readily depict tax exceptionalism as flagrant non-compliance. But that is not the nature of the APA.

Second, tax exceptionalism was not some hidden, rogue conspiracy. Until the last decade or so, exceptionalism was a widely accepted and theorized practice, all the way up to the Supreme Court. Historical views of Treasury's rulemaking authority exemplify this point. But before providing this history, some background is necessary.

In promulgating regulations under the Code, Treasury has two forms of statutory authority for its rulemaking: (1) specific grants of rulemaking authority in particular Code sections[185] ("specific authority") and (2) general authority under I.R.C. § 7805(a) to "prescribe all needful rules and regula-

183. *See Judicial Review*, *supra* note 17, at 1752-53.

184. *See supra* Part I.B.

185. N.Y. State Bar Ass'n Tax Section, Report on Legislative Grants of Regulatory Authority 2 (2006) [hereinafter NYSB Report], http://old.nysba.org/Content/ContentFolders

tions" ("general authority"). Historically, a key tenet of tax exceptionalism turned on the distinction between specific and general authority. The standard view was that I.R.C. § 7805(a) "authorize[d] only interpretive rules" while specific authority grants "authorized legislative rules."[186] Recall from Part I.B.1 that the APA exempts interpretive rules from its notice-and-comment requirements.[187] Hence, for quite some time, the prevailing understanding in the tax community was that tax regulations promulgated pursuant to general authority were interpretive (and thus exempt from the APA's notice-and-comment requirements), while specific authority regulations were legislative (and so subject to required pre-promulgation notice and comment).[188] Given regulations viewed as general authority outnumbered specific authority regulations, this convention allowed Treasury to claim that most of its regulations were exempt from APA notice and comment.[189] This differentiation between legislative and interpretive rules under the APA based on general and specific statutory authority was, indeed, exceptional; the convention was unique to tax law.[190]

This specific/general authority distinction—again, a cornerstone of exceptionalism because it exempted most Treasury rulemaking from pre-promulgation notice and comment—had an impressive intellectual pedigree. In the years leading up to the APA's passage, "several eminent tax scholars,"

20/TaxLawSection/TaxReports/1121Report.pdf ("[T]here are more than 550 individual provisions of the Code that provide grants of authority to promulgate regulations . . . .").

186. Merrill & Watts, *supra* note 30, at 574.

187. 5 U.S.C. § 553(d)(2).

188. *See* Hickman, *Coloring*, *supra* note 3, at 1761 ("The tax community generally tends to differentiate the two types of Treasury regulations by calling specific authority regulations 'legislative' and general authority ones 'interpretative.' "); NYSB Report, *supra* note 185, at 10 ("To a tax practitioner, the term 'legislative regulations' refers to regulations promulgated pursuant to a specific grant of authority by Congress to the Treasury Department Legislative regulations are often viewed as having the force and effect of law, because they entail an exercise of power delegated by Congress to the Treasury Department for a specific purpose. In contrast to legislative regulations, the term 'interpretive regulations' (at least as the term is used by tax practitioners) refers to Treasury regulations issued under the general grant of authority set forth in Section 7805(a).").

189. *E.g.*, IRM 32.1.5.4.7.5.1 (Sept. 30, 2011) ("[M]ost IRS/Treasury regulations will be interpretative regulations"); *see also* NYSB Report, *supra* note 185, at 11-12; Dembitzer, *supra* note 30, at 503 ("Treasury Regulations promulgated under the general rulemaking authority of section 7805 are classified as 'interpretive regulations' by the courts because they merely interpret statutory provisions enacted by Congress. By contrast, Treasury Regulations which are issued under a specific grant of rulemaking authority to the Secretary by Congress are 'legislative regulations.' "); Asimow, *supra* note 20, at 358 ("[T]ax authorities almost uniformly assume that regulations adopted pursuant to the Treasury's general rulemaking power in section 7805(a) of the Code are interpretive and that rules adopted pursuant to specific grants of rulemaking authority are legislative.").

190. *See* Merrill & Watts, *supra* note 30, at 570-75.

codified the distinction in "a series of articles."[191] The writers include the inimitable Stanley Surrey[192] and Erwin Griswold—a Solicitor General and Dean of Harvard Law School. Surrey's core argument for the specific/general distinction was that, without it, specific authority would be redundant to general authority.[193] Griswold cited favorably to Surrey's article and to another article arguing that legislative rules under general authority would violate the non-delegation doctrine.[194] Post-APA, the specific/general distinction found its way into the work of towering administrative law scholar Kenneth Culp Davis, who gave the distinction his imprimatur.[195] Given "the influential role that Davis's treatises played in the administrative law world, his attention to the tax scholars' writings and to the interpretive nature of Treasury's general rulemaking grant may have ensured the perpetuation of that understanding in the tax world."[196] In other words, this cornerstone of tax exceptionalism persisted, at least in part, because it had the backing of one of America's all-time great administrative law scholars.[197]

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191. *Id.* at 574; *e.g.*, Ellsworth C. Alvord, *Treasury Regulations and the* Wilshire Oil *Case*, 40 COLUM. L. REV. 252, 257 (1950) ("It is submitted that this difference is that Congress intended to confer a *legislative* power in [specific authority] to prescribe the details of a reasonable depletion allowance, and an *interpretative* power in [general authority] to assist in the execution of the statute by administrative officials."); Randolph E. Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 YALE L.J. 660, 683 (1940) (noting the "distinction between purely interpretative regulations issued under the general aegis of [general authority] and regulations specifically authorized by particular provisions of the statute."); *see* Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1714 (2014).

192. Donald C. Lubick, *As I Remember Stanley Surrey*, 24 TAX NOTES 1083, 1083 (1984) ("It is no exaggeration to compare Stanley Surrey's position in the field of tax policy to Shakespeare's in the field of drama or Aristotle's in philosophy. He was a giant whose like we are not apt to see again.").

193. Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 558 (1940).

194. Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 398 n.1, 400 n.10 (1941).

195. *E.g.*, Kenneth Culp Davis, *Administrative Rules-Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 930 (1948) ("A leading example of interpretative regulations is the huge bulk of tax regulations issued by the Treasury Department, most of which now rest upon [general authority]. But many provisions of the tax regulations . . . are legislative rules, because they spring from grants of power to create new law [specific authority].").

196. Merrill & Watts, *supra* note 30, at 575 n.612.

197. Decades later, Professor Davis recognized that case law was loose with the specific/general distinction, but his discussion also reinforces that the distinction *was* effectively the law for quite some time. KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5.03-3 (Supp. June 1976) (noting that the specific/general distinction "still has support in the case law. . . . [b]ut . . . the distinction between legislative and interpretive rules is much less sharp than it once was.").

The specific/general distinction not only garnered support among theorists, but also was effectively endorsed by the Supreme Court. Indeed, before *Mayo Foundation*, the distinction was so entrenched in Supreme Court jurisprudence that some believed "it will probably remain secure, unless and until Congress amends the Code."[198] The Court repeatedly affirmed the distinction when, pre-*Mayo Foundation*, it considered the specific/general distinction to determine the proper level of deference due to different Treasury regulations. These cases are not ancient. The Court followed the distinction in *Rowan Companies, Inc. v. United States*[199] in 1981 and again in *United States v. Vogel Fertilizer Co.* in 1982.[200] Indeed, it countenanced the distinction as late as 2003.[201] The distinction also persisted in many lower courts through the decades.[202] The Tax Court—not even ten years before repudiating exceptionalism in *Altera*—endorsed the distinction in 2006![203] This judicial acceptance buttresses the point about the APA's judicial construction. The statute was amorphous enough to support this exceptionalist construction and, in *Mayo Foundation*, to contravene it.

In addition, Congress acquiesced to the specific/general distinction. In its original form, the Regulatory Flexibility Act ("RFA"),[204] which imposes added procedural requirements on rulemakings that impact small businesses, only applied to rules required to go through § 553 notice and comment.[205] Because of the general/specific distinction, Treasury took the view that most of its regulations were exempt from the RFA.[206] In response, Congress expanded the RFA to apply when Treasury "publishes a notice of

198. Merrill & Watts, *supra* note 30, at 575 n.612.

199. Rowan Cos., v. United States, 452 U.S. 247, 253 (1981).

200. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982).

201. Boeing Co. v. United States, 537 U.S. 437, 448 (2003); *see also* Asimow, *supra* note 20, at 359 (accepting the specific/general distinction).

202. *E.g.*, Lomont v. O'Neill, 285 F.3d 9, 16 (D.C. Cir. 2002) (describing I.R.C. § 7805(a) as "nothing more than a general grant of *interpretative* rulemaking power" (emphasis added) (citing Alvord, *supra* note 191; Surrey, *supra* note 193; Asimow, *supra* note 20)); DeTreville v. United States, 445 F.2d 1306, 1311 (4th Cir. 1971); Allstate Ins. v. United States, 329 F.2d 346, 349 (7th Cir. 1964).

203. Swallows Holding, Ltd. v. Comm'r, 126 T.C. 96, 129 (2006), *vacated*, 515 F.3d 162 (3d Cir. 2008); *see* Lee A. Sheppard, *Tax Court Flunks the* Brand X *Test*, 110 TAX NOTES 585, 588 (2006). The Third Circuit overruled the Tax Court on this point two years later.

204. 5 U.S.C. §§ 601-12 (2012).

205. Regulatory Flexibility Act, Pub. L. No. 96-354, § 3(a), 94 Stat. 1164, 1166 (1980).

206. *E.g.*, 142 CONG. REC. E571, E573-74 (daily ed. Apr. 19, 1996) (statement of Rep. Henry J. Hyde). Treasury anticipated it would follow this interpretation well before the original RFA was even passed. *See The Regulatory Flexibility Act: Joint Hearing Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary and the Select Comm. on Small Bus.*, 95th Cong. 330 (1978) (letter of Henry C. Stookell, Jr., Deputy General Counsel, Department of the Treasury) ("We assume that the intent is not to reach such interpretative actions under [an early draft of the RFA]").

proposed rulemaking for an interpretative rule involving the internal revenue laws."[207] By providing this "special rule" for interpretive tax regulations in the RFA,[208] Congress effectively accepted (or at least chose not to repudiate) the specific/general distinction.

2. The Present Relevance to the Revolution

All this does not mean that the exceptionalist general/specific distinction should be continued. To the contrary, specific rulemaking grants in the Code are so scattershot and varied that it is hard to believe Congress uniformly intended them as legislative delegations, in contrast to solely interpretive power under § 7805(a).[209] Not to mention, this specific/general authority rule is entirely particular to tax and appears nowhere else in federal law.[210]

Rather, the point is that exceptionalism was not a mistake. It was the law. We are rightly transitioning away from it, but contrary to the tone in much anti-exceptionalist scholarship, Treasury was *not* historically violating the law, at least in many aspects of exceptionalism. When it comes to the revolution in tax administration, courts are managing a transition from one established administrative practice to another.

As such, courts should be thoughtful before they invalidate tax rules promulgated long ago, during the exceptionalist era in accordance with exceptionalist doctrine. If such a rule would have been considered validly promulgated in its time, it is potentially problematic to invalidate that rule because of modern evolution in doctrine.[211] Indeed, much of anti-exceptionalism's potentially destabilizing effect on the integrity of tax regulations derives from this administrative retroactivity. It is difficult to draw firm lines here, in terms of when Treasury should be considered "on notice" that its exceptionalist practices were no longer accepted (and, thus, courts should be less hesitant to invalidate). This Article does not develop a comprehensive judicial theory on this point, but merely states the principle that courts

207. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 241(a), 110 Stat 847, 864.

208. *ABA Report*, *supra* note 26, at 739.

209. NYSB REPORT, *supra* note 185, at 5 ("Within categories of grants, there can be significant variation in the wording employed by Congress. For the most part, this variation appears to be an accident of drafting rather than an intention to provide substantively different standards.").

210. Merrill & Watts, *supra* note 30, at 571-75.

211. *See* Camp, *supra* note 191, at 1714-15 ("Those who write in this area must not fall into the presentist fallacy of assuming that the terms of the APA contain meaning independent of history and of the administrative context to which they are applied."). *Cf.* CANE, *supra* note 98, at 511 (discussing "the law's mindfulness of time" (internal quotation marks omitted)).

should potentially judge Treasury rulemaking processes in their historical context.

As part of this historically informed approach,[212] courts could at least consider a recent proposal to employ the remedy of so-called "remand without vacatur" in some situations.[213] Through remand without vacatur, "a court may remand a faulty rule to an agency to fix a defect, but still allow the rule to remain in effect temporarily."[214] Treasury would thus be given time to cure a procedural defect while leaving the substantive rule operational. Where courts are uncomfortable with the procedural aspects of historical Treasury regulations, this remedy could perhaps address problems of now outdated historical practice without destabilizing the tax system.

III. APA-Compliant Rulemaking: Current Theory & Workable Alternatives

Part II contended with the past of tax administration. Part III now contends with the future. Based on the principles established in Parts I & II, Part III analyzes prevailing anti-exceptionalist administrative theory in the context of tax rulemaking. In this analysis, Part III provides critiques of (and alternatives to) prevailing anti-exceptionalist arguments about tax administration. The goal is to demonstrate that the APA can provide for more workable and far less destabilizing administrative standards than leading anti-exceptionalists claim.

First, Part III.A provides empirical context that challenges the overarching, anti-exceptionalist claim that Treasury is egregiously non-compliant with the APA's requirement for pre-promulgation notice and comment. Moving from empiricism to doctrine, Part III.B then examines the anti-exceptionalist view of when Treasury is doctrinally required, under the APA, to engage in pre-promulgation notice and comment. Specifically, Part III.B examines debates over (i) Treasury's application of the interpretive and good cause exceptions to APA rulemaking and (ii) relatedly, Treasury's use of temporary regulations to avoid pre-promulgation notice and comment. Part III.B concludes that anti-exceptionalists are misguided when they claim that these exceptions are virtually non-existent in the tax law. Part III.C then moves from exceptions to notice and comment to its sub-

212. *Cf.* Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 Minn. L. Rev. 1151, 1154 (2010) ("Law is, of course, always a product of its history.").

213. *See Judicial Review*, *supra* note 17, at 1752-53. *Cf.* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 253 (2017) (advocating a more flexible and contextual approach to remedy in administrative law).

214. *Judicial Review*, *supra* note 17, at 1752.

stance. It argues that *State Farm* reason-giving—the required scope of which is necessarily a matter of context—does not need to be excessively burdensome in tax law.

A. *Empirical Context for APA Avoidance Claims*

As this Article offers a workable approach to APA-compliant tax administration, it is important to establish an empirical baseline. Even accepting, arguendo, Professor Hickman's interpretations of administrative law, Treasury is *not* egregiously non-compliant with the APA's informal rulemaking requirements, relatively speaking. Looking at overall statistics, Treasury "is not exceptional in its dismissal of notice and comment."[215] Average agency practice may itself be doctrinally insufficient, but this empirical frame is still important.

Based on her review of pre-*Mayo Foundation* tax administration, Professor Hickman has criticized "[w]idespread Treasury noncompliance with the APA"[216] because of, at least in part, Treasury's allegedly low use of § 553 pre-promulgation notice and comment. At least partially as a result of her conclusions, the narrative has become that Treasury is an outlier among administrative agencies in its egregious APA non-compliance. In her study of Treasury's APA practices, Professor Hickman found that Treasury failed to comply with APA § 553's notice-and-comment requirements in 40.9% of rulemakings during the studied period.[217] This study has become a key empirical basis for the anti-exceptionalist critique.

Broader empirical context demonstrates that, among federal agencies, Treasury is relatively typical in its notice and comment practice. As a recent study showed, "Agencies avoided the notice-and-comment process on almost 52% of rules on which final action was taken from 1995 to 2012."[218] (To 'avoid' the APA is to claim, rightly or wrongly, one of the APA's exceptions to required notice and comment.)[219] The 40.9% avoidance rate in Hickman's study is *below* the ~52% average for federal agencies in the broader APA study. To compare apples-to-apples, the broader APA study

215. McMahon, *supra* note 5, at 587.

216. Hickman, *Responding*, *supra* note 3, at 1157.

217. Hickman, *Coloring*, *supra* note 3, at 1749 tbl.1. Most of these notice-and-comment failures are instances where Treasury issued temporary regulations without pre-promulgation notice and comment, an issue that is discussed extensively below. *See infra* Part III.B.3.

218. Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 91 (2015); *see also* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800-01 tbl.1 (2015) (citing Professor Raso's study and other data to argue that such "unconventional rulemaking [without advanced notice and comment] . . . appears to be on the rise").

219. Raso, *supra* note 218, at 68.

found a 47.6% avoidance rate for Treasury,[220] again below the average. A separate GAO study found that, across 52 federal agencies from 2003-2010, 35% of major rules and 44% of nonmajor rules were issued without advance notice and comment.[221] If those GAO numbers are blended,[222] the 40.9% from Professor Hickman's study again roughly matches the average. One can argue over whether the studied agencies improperly invoke the exceptions to notice and comment—the good cause exception,[223] the interpretive exception,[224] etc. However, as these comparative studies show, this problem is common throughout administrative law and is not endemic to tax. Treasury is unexceptional in this regard, even though Professor Hickman's tax-specific work indicates the opposite.[225]

A dedicated descriptivist could make the argument that the law of the APA is a matter of metrics, defined by how the statute is applied through time. In this view, at least broadly speaking, insofar as the metrics of Treasury's APA practices match the agency average, Treasury is APA-compliant. This Article does not make that more provocative argument, but this comparative empirical background does, in certain respects, reframe current debates over tax administration. Even if unique in historical background and certain particulars, Treasury's APA compliance problems are, at the broadest level, in line with issues at other agencies. Much remains to be debated and improved in Treasury's APA practice, but viewed relatively, Treasury is not facing a unique crisis of APA compliance.

B. *Doctrinal Debates over Notice and Comment*

Work like that of Professor Hickman also argues that, on a doctrinal level, Treasury fails to comply with APA § 553. However, when the APA is properly understood as this Article has described above, it becomes clear that such critiques are not neutrally conveying immutable administrative law, but advocating judicial policy choices vis-à-vis how APA § 553 relates to tax law. These policy choices may be superior to current practice, but they do not represent some absolute law that cannot be debated.

Specifically with regard to § 553, Professor Hickman argues that Treasury has improperly invoked the interpretive and good cause exceptions to

220. *See id.* at 129 tbl.2.

221. U.S. Gov't Accountability Off., GAO-13-21, Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments 9 fig.1 (2012), http://www.gao.gov/assets/660/651052.pdf.

222. And weighted properly, given the vastly greater number of nonmajor rules.

223. *See infra* Part III.B.1.

224. *See infra* Part III.B.2.

225. *See* Hickman, *Unpacking*, *supra* note 31, at 472 (claiming "indiscriminate" APA noncompliance by Treasury).

notice and comment.[226] In doing so, she takes a formalistic approach to an area of administrative law that is deeply contextual and amorphous. As inherently contextual categories with decades of mixed and conflicting precedent, it is an open question how these exceptions apply to tax rulemaking. To be clear, it is *not* that tax is exceptional. Rather, these APA provisions, as applied to tax as to any other domain, are inherently unsettled and contextual. Professor Hickman offers arguments for applying these exceptions quite narrowly to tax, but other arguments can also be made.[227] Again, contrary to Professor Hickman's portrayal, the ultimate resolution here is, to a large degree, a matter of judicial policy choice. One view or another is not, in the pre-policy abstract, "the law."

This Article argues that, in the tax context, courts should adopt much of how Professor Hickman proposes to apply the interpretive exception (and, to a lesser extent, her thinking on the good cause exception).[228] However, in certain respects, her proposed applications are too narrow, both as a matter of policy and how these exceptions are commonly understood. When these overly narrow aspects of her proposals are removed, it goes a long way toward rectifying the crisis in tax administration that would otherwise result from her proposals.

1. The Interpretive Exception

This Part discusses the application to tax of the so-called interpretive exception to APA notice and comment. This discussion is broken down into a sketch of doctrinal background in Part III.B.1.a; a preliminary application of that doctrine to tax in Part III.B.1.b; and a rebuttal of Professor Hickman's far narrower application in Part III.B.1.c.

a. Interpretive Regulations in Administrative Law

In determining whether the APA's rulemaking requirements apply to an agency action, "[t]he most important distinction is between legislative rules and interpretative rules."[229] On a general level, an interpretive[230] rule is "an 'interpretation' of a statute or legislative regulation rather than . . . an

226. *See infra* Part III.B.1-2.

227. *See infra* Part III.B.1-2.

228. This argument is subject to this Article's expectations for tax reason-giving discussed *infra* in Part III.C.

229. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547 (2000) [hereinafter Pierce, *Distinguishing*].

230. While the statute refers to "interpre*ta*tive" rules, 5 U.S.C. § 553(b)(A) (2012) (emphasis added), the modern practice, which this Article follows, is to use the term "interpretive." *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 n.1 (2015).

exercise of independent policymaking authority."[231] In other words, interpretive rules clarify (or more narrowly elaborate on) existing statutes or legislative regulations, but do not themselves create new law.[232] By contrast, legislative rules more independently make law.

The APA exempts interpretive rules from notice and comment,[233] and that exemption "makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules."[234] However, "that convenience comes at a price," for interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."[235] Thus, interpretive rules are far easier to promulgate, but at least theoretically are accorded less weight by courts.

Beyond this circular definition that interpretive rules interpret rather than legislate,[236] what, exactly, qualifies as an interpretive rule? The term "is not . . . defined by the APA, and its precise meaning" provokes "much scholarly and judicial debate."[237] Indeed, courts and commentators perennially bemoan how unclear the definition of interpretive rule is.[238] However, even if it defines the problem more than solves it, one D.C. Circuit opinion—*American Mining Congress v. Mine Safety & Health Administration*, as modified by certain subsequent Supreme Court jurisprudence—has become the predominant test to determine if a rule is interpretive.[239] In terms of the precise test used in different courts of appeals, there is a good deal of messiness and variation.[240] For brevity's sake, this Article will only consider

231. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 916 (2004).

232. PIERCE, *supra* note 82, § 6.4 ("[A]n interpretative rule cannot impose obligations on citizens that exceed those fairly attributable to Congress through the process of statutory interpretation.").

233. 5 U.S.C. § 553(b)(A).

234. *Mortg. Bankers Ass'n*, 135 S. Ct. at 1204.

235. *Id.* (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

236. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) (describing interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers").

237. *Mortg. Bankers Ass'n*, 135 S. Ct. at 1204.

238. *E.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108-09 (D.C. Cir. 1993) (cataloguing colorful language in case law to this effect); Manning, *supra* note 231, at 893 ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'"); Pierce, *Distinguishing*, *supra* note 229, at 547-48 (also cataloguing).

239. PIERCE, *supra* note 82, § 6.4 at 454 ("[T]he *American Mining Congress* opinion was followed within the circuit and adopted by six other circuits."); *see also* Pierce, *Distinguishing*, *supra* note 229, at 548 ("[A] single 1993 opinion of the D.C. Circuit does an excellent job of identifying all of the criteria that are important in distinguishing between legislative rules and interpretative rules.").

240. *E.g.*, Hoctor v. USDA, 82 F.3d 165, 169-72 (7th Cir. 1996).

the *American Mining* framework. In any event, I believe the conclusions here would be largely the same across different judicial tests of the legislative/interpretive distinction.

The core facts of *American Mining* help exemplify what interpretive regulations do. In that case, the Department of Labor ("DOL") had promulgated legislative regulations that required mine operators to promptly report when miners were diagnosed with certain occupational illnesses, including the lung disease pneumoconiosis.[241] In response to inquiries from mine operators, the DOL released, without notice and comment, guidance that interpreted what constituted a diagnosis of pneumoconiosis for purposes of the regulation, based on a medical standard for analyzing chest x-rays.[242] The DOL argued that APA notice and comment was not required for that guidance because it was an interpretive rule. The D.C. Circuit agreed with the government, and the DOL guidance in that case can be viewed as illustrative of what constitutes an interpretive rule.

As modified by subsequent legal developments, the *American Mining* test for interpretive rules is as follows. A rule is interpretive if the rule and its legal context generally possess all the following characteristics: (1) the agency labels the rule as interpretive;[243] (2) "in the absence of the rule[,] there would . . . be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties;"[244] and (3) the rule does not "repudiate" and is not "irreconcilable with" an existing *legislative* rule.[245] The second prong does most of the work in the

241. *Am. Mining Cong.*, 995 F.2d at 1107-08.

242. *Id.*

243. *Id.* at 1110-11.

244. PIERCE, *supra* note 82, § 6.4; *see Am. Mining Cong.*, 995 F.2d at 1109 (explaining that a rule should be deemed legislative if "in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate"). I would argue that the judicial observations that a rule cannot be interpretive if it builds expansively upon a legislative regulation that is itself vague (or merely parrots a statute) are subsumed under this prong. *See* Gonzales v. Oregon, 546 U.S. 243 (2006); United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989).

245. *Am. Mining Cong.*, 995 F.2d at 1109 (quoting Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C.Cir. 1992)). The Supreme Court has, of course, mercifully overruled the D.C. Circuit's so-called "one-bite doctrine"—that an amendment to an *interpretive* rule must necessarily be legislative. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015). It is also fair to say that *American Mining*'s argument that CFR publication indicates a legislative rule has since come to a welcome demise. *See* Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 668 (7th ed. 2015) ("[T]he D.C. Circuit has since deleted publication in the C.F.R from this list [of interpretive rule criteria]."); Pierce, *Distinguishing*, *supra* note 229, at 560 (noting that *American Mining* factors have been "amended . . . to delete the CFR publication criterion").

analysis. By asking whether the rule is necessary to agency action, the *American Mining* test ensures that an interpretive rule does not "reflect excessive policymaking discretion, but rather reflects sufficient policy guidance from an antecedent statute or legislative regulation."[246] If a rule is necessary to an adequate legislative basis for agency action, then that rule involves too much agency policymaking to qualify as interpretive. The understandable logic is that such policymaking must be subject to § 553's constraints.[247]

b. Interpretive Regulations in Tax Rulemaking

In terms of how this paradigm applies to tax rulemaking, Professor Hickman brings us a long way toward a better answer. Her empirical and interpretive work demonstrates how the specific/general authority distinction—which, as discussed above, the IRS long-treated as the basis for delineating legislative and interpretive regulations[248]—fails to map on to the *American Mining* test (or anything like it). But this Article disagrees with her further argument—with which the Tax Court seemingly agreed in *Altera*[249]—that interpretive rules are effectively nonexistent in the tax law. Indeed, this portion of her argument swings tax administration from one extreme—most tax regulations are interpretive—to another extreme—virtually no tax regulations are *ever* interpretive. To the contrary, notwithstanding certain penalty provisions in the Code associated with interpretive rules, tax regulations may still qualify as interpretive. However, the inquiry is necessarily case-by-case, and one would expect the number of interpretive tax regulations to fall in the reasonable middle between what exceptionalists and prevailing anti-exceptionalists claim.

Let us begin with common ground with Professor Hickman. For tax, a notable facet of the *American Mining* test is that it is facially unconcerned with whether the statutory basis for issuing a rule is specific or general. As Professor Hickman has documented, notwithstanding the foundational importance of the specific/general distinction to tax exceptionalism, Treasury has been unsystematic in its invocation of general or specific statutory authority in relation to its compliance with APA notice and comment.[250] Subject to the historical validity of the specific/general distinction as discussed in Part II.B.2, Professor Hickman persuasively argues that the distinction is

246. Manning, *supra* note 231, at 894.
247. *See id.* at 920.
248. IRM 4.10.7.2.3.2; *see supra* Part II.B.1.
249. *See* Altera Corp. v. Comm'r, 145 T.C. 91, 116-17 (2015).
250. Hickman, *Coloring*, *supra* note 3, at 1757 ("In sum, the only pattern with respect to APA compliance that emerges from analyzing Treasury's reliance on specific as opposed to general authority is no pattern at all.").

inconsistent with modern administrative practice.[251] Indeed, the Supreme Court effectively agreed with her in *Mayo Foundation*, given the directly proportionate relationship between judicial deference and the force of law.[252]

How significant it is to repudiate the specific/general distinction should not be understated. At least as far as rulemaking goes, the specific/general distinction is foundational to tax exceptionalism, for it largely exempted Treasury from APA notice and comment.

However, this Article disagrees with Professor Hickman about how the interpretive exception applies to tax once the specific/general distinction is jettisoned. Before arguing against Professor Hickman's view that virtually *no* tax regulations are *ever* interpretive, this Article will provide its own positive vision of what the interpretive exception means in APA-compliant tax administration.

To start with the obvious, far more tax regulations—particularly the most consequential and controversial rules—are legislative under *American Mining* than under the specific/general distinction. One need simply look at the *American Mining* test to understand why. The key inquiry is whether "in the absence of the rule[,] there would . . . be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties."[253] For many tax regulations, the answer is no. Most obviously, many areas of the tax law are almost entirely defined through regulation. Regulations in such areas are necessarily legislative (unless they merely interpret existing legislative regulations). Transfer pricing is an excellent example. The statutory basis for the IRS' transfer pricing authority is two sentences.[254] The extremely technical regulations under that section fill 195 CFR pages with biblically dense text.[255] It is hard to argue that those two statutory sentences provide an "adequate legislative basis for en-

251. *Id.* at 1762-63 ("[A]t least outside of the tax area, specific versus general authority origins no longer distinguish legislative from interpretative rules. Regulations that bind both the government and regulated parties are legislative, whether promulgated pursuant to specific or general statutory authority. In other areas of administrative law, regulations adopted under general authority carry the same legal force and effect as those promulgated pursuant to specific authority.").

252. *See* United States v. Mead Corp., 533 U.S. 218 (2001).

253. PIERCE, *supra* note 82, § 6.4.

254. I.R.C. § 482 (2012).

255. *See* Treas. Reg. §§ 1.482-0 –1.482-9 (2015).

forcement"[256] for most (if not all) of the standards codified in those regulations.[257]

Legislative tax regulations are not limited to such acutely statute-sparse areas. Again, in the international context, consider the source rules for purchased inventory.[258] For purchased (rather than manufactured) inventory, the sales revenue is statutorily sourced as domestic or foreign based on where the purchased inventory is sold or exchanged—the "title passage" rule. However, even if one follows the title passage rule in both form and substance, the regulations create an additional rule of intent. If an inventory sale "is arranged in a particular manner for the primary purpose of tax avoidance," then the title passage rule does not apply (and a facts-and-circumstances test is imposed instead).[259] Taken by itself, this primary purpose requirement is a legislative rule. The statutory provisions, in themselves, do not provide for facts-and-circumstances sourcing on an inventory sale where the taxpayer's sourcing is accurate in both form and substance (but was primarily structured for tax avoidance).[260]

However, under general administrative law principles, interpretive regulations exist in tax law. Often, tax regulations are analogous to the guidance at issue in *American Mining*, which provided a medically precise interpretation of what constituted a diagnosis for a particular disease. Tax regulations are often similarly circumscribed as technical interpretations of reasonably bounded statutory concepts. Take, for instance, Treasury Regulation § 1.305-1. Section 305 is the *Macomber*-based[261] rule that C corp. stock-on-stock dividends are not generally treated as income. While other § 305 regulations may be legislative,[262] § 1.305-1 is a prime example of an interpretive tax rule. It describes the scope and general operation of how the statutory scheme for stock dividends operates;[263] incorporates statutory definitions into the regulations;[264] and provides an intuitive valuation scheme

256. *Id.*

257. One could have regulations under § 482 that qualify as interpretive because they interpret existing *legislative* regulations under § 482, but otherwise, all § 482 regulations would seem to be necessarily legislative.

258. I.R.C. §§ 861(a)(6), 862(a)(6), 865(b).

259. Treas. Reg. § 1.861-7(c).

260. The statutory language alone could arguably support agency action against a seller who formally conducts a sale in one location while, in substance, the sale occurred elsewhere, but substance is separate from purpose. Also, case law has effectively defanged this primary purpose requirement, but this case law development is irrelevant here. *See* A.P. Green Exp. Co. v. United States, 284 F.2d 383, 390 (Ct. Cl. 1960).

261. *See* Eisner v. Macomber, 252 U.S. 189 (1920).

262. *E.g.*, Treas. Reg. § 1.305-7.

263. *Id.* § 1.305-1(a), (c).

264. *Id.* § 1.305-1(d).

for stock dividends that follows naturally from the Code.[265] All this content can be safely described as interpretive. The IRS would have more than adequate legislative authority to assert these interpretive points absent the regulation. One finds a similarly interpretive regulation related to the treatment of joint interests under the estate tax.[266] The regulation again describes how the related statutory scheme operates,[267] provides valuation rules and a definition of joint interests that flow naturally from the statute,[268] and offers some clear-cut application examples that also follow naturally from the statutory language.[269]

c. Against the Doctrinal Elimination of Interpretive Regulations in Tax

Professor Hickman agrees that many tax regulations, like those under I.R.C. § 482 and the primary purpose regulation for title passage, are legislative regardless of the statutory authority for their promulgation, because, "many Treasury regulations . . . are sufficiently extensive to be essential to sustain an enforcement action, confer tax benefits, or impose obligations."[270] But she goes further than that to claim that *no* tax regulations are currently interpretive, not even those like Treas. Regulations §§ 1.305-1 & 20.2040-1, which are entirely interpretive in substance.

She primarily argues that tax regulations are necessarily legislative because of the penalties associated with them. These penalties are dispositive in making all tax regulations legislative. She also puts forward ancillary arguments related to CFR publication and the nature and judicial treatment of general authority. Professor Hickman's arguments are unavailing when one: (1) conceives of interpretive tax regulations under the more circumscribed *American Mining* test rather than the specific/general distinction and (2) considers those penalty provisions in relation to the antecedent legislative authority that those interpretive regulations construe. Against Professor Hickman's conception, this Article finds that interpretive tax regulations exist in a reasonable middle between current exceptionalist and anti-exceptionalist thought—not pervasive, but also far from impossible.

The CFR argument is presented as the most tangential, so it can easily be dispensed with first. As Professor Hickman writes, while CFR publication "is merely nondispositive of agency intent," that Treasury publishes all

265. *Id.* § 1.305-1(b).
266. I.R.C. § 2040 (2012); Treas. Reg. § 20.2040-1.
267. Treas. Reg. § 20.2040-1(a).
268. *Id.* § 20.2040-1(a)(2), (b).
269. *Id.* § 20.2040-1(c).
270. Hickman, *Coloring*, *supra* note 3, at 1767.

regulations in the CFR "further mitigates [*sic*] against its claim that any of its regulations are merely interpretative."[271] The CFR publication factor is not "merely nondispositive" or, as Professor Hickman calls it elsewhere, "a potential additional indicator" of being legislative.[272] Rather, this factor is completely dead, as various authorities have recognized.[273] The D.C. Circuit opinion that deleted the CFR requirement is worded so one could argue, as Professor Hickman does, that CFR publication has relevance, if only to the slightest degree.[274] However, as administrative law authorities have recognized, that opinion's soft language is best read as a rhetorically gentle act of euthanasia, identical in substance to overruling. Thus, that Treasury publishes all its regulations in the CFR is of no moment.

The other ancillary argument concerns the nature and judicial treatment of general legislative authority. Professor Hickman argues that "Treasury's expressed reliance in all of its [regulatory issuances] . . . on I.R.C. § 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 . . . ."[275] In other words, all regulations issued under § 7805(a) *must* be legislative, because Treasury and the courts have, historically, "generally underst[ood]" them to be "legally binding."[276]

The chief problem with this anti-exceptionalist depiction of § 7805(a) is that it relies on historical practice under the specific/general distinction that it separately attacks as doctrinally wrong. It is true that historically, in the era of the specific/general distinction, courts and Treasury were sloppy in their treatment of legislative versus interpretive tax rules, with the latter often treated as legally binding.[277] But that largely derives from the specific/general distinction itself, since that distinction at least nominally made so much of tax rulemaking interpretive that it was hard not to treat interpretive rules as legally binding. Indeed, just such problems of the specific/general distinction are a big part of why tax exceptionalism is coming to an end. While we should recognize that the specific/general distinction was the

271. *Id.*

272. Hickman, *Unpacking*, *supra* note 31, at 482.

273. *E.g.* Pierce, *Distinguishing*, *supra* note 229, at 560 (noting that the *American Mining* factors have been "amended . . . to delete the CFR publication criterion").

274. Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (describing CFR publication as "a snippet of evidence of agency intent").

275. Hickman, *Coloring*, *supra* note 3, at 1767. I address this argument separately from the issue of penalties, although these two claims are deeply interrelated.

276. *Id.*; *see id.* at 1773. This argument creates a curious parallel between exceptionalism and anti-exceptionalism, which are both diametrically absolute in their characterization of rulemaking under § 7805(a).

277. *See* DAVIS, *supra* note 197, at § 5.03-3.

law until recently, we should not adduce problematic historical practices related to that distinction to justify how doctrine operates going forward.[278]

That leaves Professor Hickman's penalty argument, which is her core argument for why interpretive regulations do not currently exist in the tax law.[279] Her point can be summed up simply: all tax regulations are legislative because the IRS assesses penalties for noncompliance with all tax regulations. When noncompliance with rules is enforced through statutory penalties, that "represents the paradigmatic example of a congressional delegation of power to act with the force of law."[280] Professor Hickman cites to Supreme Court precedent and the Attorney General's Manual on the APA for the proposition that whether a regulation has the force of law is what fundamentally separates legislative and interpretive rules.[281]

However, despite her absolute conclusion for all tax rulemaking, Professor Hickman notes that "the presence or absence of statutory penalties for noncompliance is clearly not the *sine qua non* for concluding that agency pronouncements carry or lack the force of law."[282] Courts sometimes find the force of law for agency actions that lack statutory penalties. Inversely, in *United States v. Mead*, the Court found that the informal tariff adjudications at issue did not carry the force of law, despite consequences flowing from those adjudications that are "at least analogous" to monetary penalties.[283] Professor Hickman distinguishes *Mead* from tax rulemaking by labelling the

278. To support her legally binding claim, Professor Hickman cites to a case that, in summarizing the *American Mining* factors, describes what this Article labeled as prong one—whether the agency labeled the regulation as interpretive—as whether the agency invoked its "general legislative authority." Erringer v. Thompson, 371 F.3d 625, 630 (9th Cir. 2004). She seems to indicate that this language from *Erringer* supports her characterization of § 7805(a)'s general authority as always legislative, but her citation is not at all supportive of this claim. This *Erringer* language is merely providing a gloss on *American Mining* (and is not announcing any law about the scope of interpretive rulemaking vis-à-vis statutory grants of general rulemaking authority). More importantly, the *Erringer* court is using general authority not to refer to a statutory provision that provides for general rulemaking, but instead "the agency's *general* legislative authority, separate and apart from any particular statutory provision." *Id.* at 631. In other words, *Erringer*—a case that broadly construes the permissible scope of the interpretive exception, in any event—is entirely irrelevant to the treatment of general *statutory* authority like § 7805(a).

279. This "penalty elephant in the middle of the room," as she terms it, is so central that Professor Hickman wrote a separate article to expand it. Hickman, *Unpacking*, *supra* note 31, at 515.

280. *Id.* at 525.

281. *Id.* at 475.

282. *Id.* at 525. Thus, force of law is the animating concept underlying the *American Mining*-type factors.

283. *See id.* (citing EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 92-94 (2008)); United States v. Mead Corp., 533 U.S. 218 (2001). One must either pay the assessed tariff, or the subject goods cannot enter the country.

former "an informal adjudication with a limited coercive range."[284] The argument, although somewhat implicit, is that sanctions or penalties are a more dispositive factor for rulemaking than adjudication, and that these penalties in the tax context are less "limited" than the sanctions in *Mead*.

Before responding to this claim, it is necessary to sketch how these penalty provisions operate for tax regulations. Among the Code's "'mind-numbing assortment' of civil penalties,"[285] § 6662(b)(1) penalizes a taxpayer for underpayment that results from "negligence or disregard of rules or regulations," which includes all "temporary or final Treasury regulations."[286] The penalty is 20% of the underpayment to which § 6662 applies.[287] In this context, "'negligence' includes any failure to make a reasonable attempt to comply with the provisions of this title," and "'disregard' includes any careless, reckless, or intentional disregard."[288]

If the IRS assesses a § 6662(b)(1) penalty for noncompliance with a regulation, a taxpayer can rebut that assessment in two ways: the more factual "reasonable *cause*" defense and the more legal "reasonable *basis*" defense. First, the taxpayer can demonstrate that she had "reasonable cause" for her position and that the taxpayer took that position "in good faith."[289] Reasonable cause is, in essence, a factual determination that the taxpayer tried hard enough to be right.[290] For instance, a good-faith computational error or reliance on an erroneous W2 could both constitute reasonable cause.[291] Reasonable cause is determined "case-by-case,"[292] with the taxpayer's effort evaluated relative to her sophistication.[293]

A taxpayer can also rebut the penalty with the reasonable *basis* defense. To qualify, if the taxpayer took a position contrary to a regulation, the taxpayer must: (1) properly disclose her position to the IRS and (2) have, as a

284. Hickman, *Unpacking*, *supra* note 31, at 525.
285. Bittker & Lokken, *supra* note 151, ¶ 114.2.
286. Treas. Reg. § 1.6662-3(b)(2) (2015).
287. I.R.C. § 6662(a) (2012).
288. *Id.* § 6662(c); *see* IRM 20.1.5.7.2 (2016).
289. I.R.C. § 6664(c)(1).
290. Treas. Reg. § 1.6664-4(b)(1) ("[T]he most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability.").
291. *Id.*
292. *Id.*
293. Geary v. Comm'r, 235 F.3d 1207, 1211 (9th Cir. 2000). *Geary* also demonstrates that the legal nature of the underlying tax issue can affect the reasonable cause analysis. In that case, the "absence of case law on point" factored into the reasonable cause finding. *Id.* A "common issue" arises when a taxpayer claims reasonable cause based on "the advice of a professional tax advisor." Blum v. Comm'r, 737 F.3d 1303, 1317 (10th Cir. 2013); *see* Treas. Reg. § 1.6664-4(c)(1) (as amended in 2003). Especially when the tax advisor was promoting the transaction at issue, professional reliance is often insufficient to establish reasonable cause. *Blum*, 737 F.3d at 1317-19; Curcio v. Comm'r, 689 F.3d 217, 229 (2d Cir. 2012).

legal matter, a "reasonable basis" for the contrary position.[294] Courts have not hesitated to affirm penalties where either of those components is absent.[295] In the hierarchy of tax standards, reasonable basis is more rigorous than "not frivolous" and "not patently improper,"[296] but is "less stringent than the 'substantial authority' standard . . . which in turn is less stringent than the 'more likely than not standard.'"[297] For what it's worth, reasonable basis has been roughly translated into a 20-30% likelihood of success.[298]

Now, let us return to Professor Hickman's argument that these "statutory penalties for noncompliance with agency rules" imbue all tax regulations with the force of law (and thus make them legislative).[299] These details of the § 6662(b)(1) penalty generate two interrelated responses to Professor Hickman's argument. First, is § 6662(b)(1) really a statutory penalty for "noncompliance" in the relevant sense? And second, in the case of rules that could otherwise be characterized as interpretive, is § 6662(b)(1) in substance a penalty for noncompliance with those "rules"?

With regard to the first point, § 6662(b)(1) does not penalize noncompliance, in the sense that it does not penalize all taxpayers who fail to comply with a tax regulation. Instead, it penalizes something much narrower—*negligence or unreasonable disregard* toward those regulations that results in noncompliance. If the regulation at issue interprets an unsettled area of law, or if one can concoct a half-decent argument against the regulation based on some other legal authority (including the language of the antecedent statute),[300] then § 6662(b)(1) is probably inapplicable. Section 6662(b)(1) penalizes taxpayers when, given the state of *all citable legal authority*, it would be legally negligent to argue a position different than the one embodied in the regulation. Even then, the taxpayer can still make a factual case that any noncompliance should be excused for reasonable cause. This nuance matters here. The particular texture of the statutory penalty or sanction at issue should affect whether that penalty or sanction makes the related regulation legislative.[301] For § 6662(b)(1), given the provision's more "limited coercive

294. Treas. Reg. § 1.6662-3(a), (c)(1)-(2).

295. *E.g.*, Campbell v. Comm'r, 658 F.3d 1255, 1260 (11th Cir. 2011); Kovacevich v. Comm'r, 177 F. App'x 561, No. 04-71326, 2006 WL 991878 (9th Cir. 2006).

296. Treas. Reg. § 1.6662-3(b)(3).

297. Matthies v. Comm'r, 134 T.C. 141, 154 (2010).

298. Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301, 327 (2011). For issues of first impression that involve some statutory ambiguity or issues that are otherwise unsettled, a finding of reasonable basis is likely. *See Matthies*, 134 T.C. at 154.

299. Hickman, *Unpacking*, *supra* note 31, at 471.

300. Treas. Reg. § 1.6662-4(d)(3)(iii).

301. In light of the stubborn facts in *Mead*, this seems necessarily so. *See* United States v. Mead Corp., 533 U.S. 218 (2001).

range,"[302] the provision should not automatically make all tax regulations legislative.

This first point does not mean the penalty provision has no relevance to the legislative/interpretive distinction. Rather, this first point should be considered in conjunction with the second point mentioned above—the extent to which § 6662(b)(1) is penalizing noncompliance with *rules*. To illustrate this point, consider a tax regulation that, aside from this penalty issue, could be reasonably characterized as interpretive under *American Mining*. In that case, the substance of the regulation must be reasonably tethered to the statutory text that it interprets. If a taxpayer is penalized under § 6662(b)(1) for violating this regulation, then there is no other interpretation of the antecedent statute that has a reasonable basis.[303] At this point, the taxpayer is, in substance, being penalized for violating the antecedent statute rather than the interpretive regulation. Thus, for force-of-law purposes, the penalty is effectively for *statutory* noncompliance, not regulatory noncompliance. This logic does not hold for a regulation that is otherwise legislative. As an independent act of policymaking, the validity of a legislative regulation is not tethered to the substance of the antecedent statute in the same way.

The conclusion is thus that tax regulations can be interpretive just as regulations can be interpretive in other fields of federal law, notwithstanding § 6662(b)(1). This understanding that tax regulations can be interpretive goes a long way to avoid destabilizing tax administration. If some number of tax regulations can be plausibly described as interpretive, then they are not subject to risk of mass invalidation, as they are under Professor Hickman's theory. This Article now turns to the other key exception to notice and comment: the good cause exception.

2. The Good Cause Exception

This Part dissects the good cause exception just as the previous Part did the interpretive exception. It begins with brief doctrinal background. It then critiques Professor Hickman's application of this doctrine and, in the process, puts forward a vision of how good cause operates in tax.

Just as interpretive rules are exempt from § 553's notice-and-comment requirements, an agency can also exempt legislative rules if it has "good cause" because notice and comment would be "impracticable, unnecessary,

302. Hickman, *Unpacking*, *supra* note 31, at 525.

303. Another article has gestured toward this thinking. *See* Jasper L. Cummings, Jr., *Treasury Violates the APA*, 117 Tax Notes 263, 266-67 n.30 (2007).

or contrary to the public interest."[304] Generally speaking, good cause is invoked "when agencies perceive a high degree of urgency in issuing a rule or" see harm in giving advance notice "for a future change in rules."[305] Paradigmatic cases of urgency include a post-9/11 FAA regulation to allow the revocation of pilot certificates for foreign nationals who are deemed security threats,[306]and another FAA regulation instituted to prevent Hawaiian tour helicopter crashes after a spate of deaths.[307] For potential harm from advance notice, paradigmatic cases involved price control announcements, where prior notice of price changes threatened market disruption.[308]

Unsurprisingly, beyond such case-specific illustrations, what precisely constitutes good cause is "unclear."[309] Judicial conclusions about good cause are, by necessity, heavily fact-bound and contextual. Courts often note that the exception "should be interpreted narrowly,"[310] but one finds "inconsistency" in how exacting courts are in reviewing agency invocations of good cause.[311] Indeed, despite the rhetoric on narrow interpretation, the good cause exception is quite commonly invoked across federal agencies.[312]

Again, as with the interpretive exception, Professor Hickman takes an exceedingly narrow view of how the good cause exception applies to tax. As with the interpretive exception, this Article argues that her intervention goes a long way toward charting the path forward. However, again, her

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304. 5 U.S.C. § 553(b)(B), (d)(3) (2012). This Article will discuss together the good cause exceptions for notice and comment and the 30-day publication requirement. Good cause can be invoked separately with respect to each, but this distinction is not necessary to this broader discussion of tax administration policy.

305. PIERCE, *supra* note 82, § 7.10. Raso helpfully lists the factors that agencies commonly cite. Raso, *supra* note 218, at 88-89; *see* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1123 (2009) ("As the Attorney General's Manual put it, impracticability would arise where 'an agency finds that due and timely execution of its functions would be impeded' by compliance with notice-and-comment procedures.'").

306. Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

307. Haw. Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 214 (9th Cir. 1995).

308. *E.g.*, Reeves v. Simon, 507 F.2d 455, 458-59 (Temp. Emer. Ct. App. 1974); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974); *see* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485-86 (9th Cir. 1992).

309. JARED P. COLE, CONG. RESEARCH SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 2 (2016), https://www.fas.org/sgp/crs/misc/R44356.pdf.

310. Buschmann v. Schweiker, 676 F.2d 352, 357 (9th Cir. 1982); *see* Asimow, *supra* note 20, at 348 ("Numerous judicial decisions, well supported by the legislative history, establish that the good cause provision is narrowly construed.").

311. Raso, *supra* note 218, at 88.

312. *Id.* at 91-92 ("Agencies avoided the notice-and-comment process on almost 52% of rules on which final action was taken from 1995 to 2012. . . . Good cause was the primary exemption cited by agencies for both major and non-major rules." (citations omitted)).

portrayal of the APA in this context is in some ways overly narrow, and so her proposal for what good cause means in tax should be moderated.

Professor Hickman makes two key observations about the good cause exception, one procedural and one substantive. The procedural observation is that the good cause exception requires, by its terms, that the agency must expressly invoke good cause and provide a contemporaneous, reasoned explanation for why good cause exists.[313] As her work shows, Treasury has not been assiduous about this procedural requirement, to put it mildly.[314] Indeed, the Tax Court in *Altera* declined to apply the good cause exception because Treasury failed to follow this required procedure.[315] However, even if "courts have been inconsistent in requiring agencies to invoke the good cause exception explicitly,"[316] Professor Hickman's procedural point is well-taken in terms of how Treasury should operate as APA-compliant tax administration is implemented.

Professor Hickman's substantive observation is that "Treasury's reliance on the good cause exception is . . . often misplaced in light of jurisprudential trends."[317] She argues that Treasury's use of good cause is "often inappropriate" as a doctrinal matter.[318] While acknowledging the "fact-specific" nature of good cause, she compares the typical Treasury rulemaking with the two FAA rules referenced above, on post-9/11 revocation of pilot certificates and fatal helicopter crashes.[319] Relatively speaking, she concludes that the "circumstances in which Treasury issues" regulations for which Treasury invokes (or, by her logic, is implicitly invoking) good cause "are not particu-

313. 5 U.S.C. § 553(b)(B), (d)(3) (2012).

314. Hickman, *Coloring*, *supra* note 3, at 1786 ("Treasury leaves its good cause claims susceptible to legal challenge by not asserting the exception clearly or explaining its reasoning with specificity and particularity."). Of course, Treasury has probably been historically lax about this procedural requirement because it was operating under the prior assumption (one could say, prior law) that most of its regulations were interpretive, and so it did not need to rely on good cause in many situations where Professor Hickman now retroactively argues that the interpretive exception is inapplicable.

315. Altera Corp. v. Comm'r, 145 T.C. 91, 117 (2015).

316. Hickman, *Coloring*, *supra* note 3, at 1779. Importantly here, courts have been unsympathetic to systematic procedural failures on good cause invocation. *See, e.g.*, Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) (finding failure to invoke good cause "a technical violation of normal procedures, which we do not think warrants reversal, considering the expeditious nature of the proceedings and that good cause in fact was present. However, we warn that repeated technical noncompliance will not be tolerated.").

317. Hickman, *Coloring*, *supra* note 3, at 1731.

318. *Id.* at 1806-07.

319. *Id.* at 1783. She also offers the comparison of regulations that resolved judicial issues with overtime pay to avoid sizable financial liabilities for state and local governments, for which good cause was found. *Id.*

larly dire."[320] Her conclusion here is not quite as categorical as with interpretive regulations; she is not saying good cause *never* exists in tax law. However, her view seems to be that, even with proper procedural invocation, good cause is substantively quite rare in tax.

This Article takes issue with this substantive conclusion. First, on a broad level, whatever the judicial rhetoric about the narrowness of good cause, it is, in reality, invoked with some commonality.[321] As a practical matter, good cause is subject to limitation, but we should not overstate its narrowness.

Second, and more importantly, because good cause is so inherently contextual and fact-bound, when one applies it to tax, one can (and should) consider the particular exigencies of tax administration. In arguing against tax exceptionalism, this Article noted that these exigencies—while not sufficient to justify tax exceptionalism—should instead factor into necessarily contextual aspects of administrative doctrine.[322] The good cause exception is a prime vehicle for that incorporation. Given the scope of (and constraints on) the IRS' duties as described in Part II.A, courts should maintain a broader space for good cause in tax administration than Professor Hickman allows.[323]

Within this point, it is worth considering the comparison that Professor Hickman makes between tax rulemaking and paradigmatic good-cause cases of emergency like the *Hawaii Helicopters* case.[324] It is important to remember that these cases are paradigmatic because they are clear-cut. They are illustrative in their obviousness, but that should not be confused with defining the boundaries of good cause. And more than that, is tax rulemaking, as a general matter, less exigent than rules like the one for Hawaiian helicopter tours? The spate of chopper accidents that motivated that FAA rule is viscerally alarming,[325] but of course, the FAA gets the funding to be able to

320. *Id.*

321. Contrary to that practice, the APA's legislative history does indicate that the good cause exception was intended to be used at least somewhat narrowly. Vermeule, *supra* note 305, at 1123. However, according to that same legislative history, notice and comment was also intended to be a simple process with *extremely* low-touch judicial review, so it is hard to invoke original intent on one point and not the other. *See supra* Part I.B.2.

322. *See supra* Part II.A; Johnson, *supra* note 6, at 1833 ("The tradition of American administrative law is sensitivity to context, not straitjacketing or lock-step conformity.").

323. *See* McMahon, *supra* note 5, at 582.

324. Haw. Helicopter Operators Ass'n v. FAA, 51 F.3d 212, 214 (9th Cir. 1995).

325. Also, while the chopper crashes at issue were certainly serious in themselves, such Hawaiian tours had an estimated 400,000 annual passengers prior to the FAA rule's promulgation. Christopher Reynolds, *New High-Flying Rules Have Air-Tour Pilots Feeling Low*, L.A. TIMES (Nov. 4, 1994), http://articles.latimes.com/1994-11-06/travel/tr-59189_1_air-tour-operators. When one considers data on the number of crashes relative to all that flight time, the

promulgate such an exigent rule through the tax system. The tax system is the prime mover in the federal firmament.[326] At least to some extent, the administrative exigencies of all other agencies are subsumed within it. Again, this is not an argument for tax exceptionalism, but is an understanding of the factual context that necessarily informs the good cause analysis. Treasury certainly needs to improve its procedural housekeeping on good cause claims, per Professor Hickman's research, but in an APA-compliant world, the good cause exception does not need to be impossibly narrow for tax.

3. Temporary Regulations

This Article now considers another key concept in Treasury avoidance of APA notice and comment: so-called "temporary regulations."[327] In Professor Hickman's empirical work, most of Treasury's alleged violations of the APA result from Treasury's issuance of temporary regulations.[328] Typically, at least in Treasury's view, temporary regulations have been understood as equivalent to final regulations in terms of their legal effect. The difference from other final regulations is that Treasury "issue[s] temporary regulations without notice and comment, finalizing the regulations after subsequently receiving [post-promulgation] comments," a practice known elsewhere in administrative law as "the 'interim-final' method."[329] Thus, a temporary regulation has immediate effect, and the notice-and-comment process occurs while the regulation is already in effect, rather than before. Treasury has not hesitated to use temporary regulations in major regulatory projects, including, for instance, its controversial anti-inversion regulations.[330]

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problem becomes much less exigent than the qualitative description implies. *See* Wren L. Haaland et al., *Crashes of Sightseeing Helicopter Tours in Hawaii*, 80 AVIATION, SPACE, & ENVTL. MED. 637, 640 (2009). It is quite possible that, when these rules were issued, it was riskier to drive on an American road than to fly on a Hawaiian helicopter.

326. *Cf.* Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269, 279 (2012) ("In one respect, taxation is different from and more important than any other single federal activity. Revenue is the *sine qua non* for all other governmental activities. The modern welfare and regulatory state could not exist without a robust tax system.").

327. I.R.C. § 7805(e) (2012).

328. In her study, over 88% of Treasury's noncompliance with the APA was due to use of temporary regulations. Hickman, *Coloring*, *supra* note 3, at 1749.

329. James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA ST. U. L. REV. 349, 370 (2013) [hereinafter Puckett, *Embracing*].

330. Inversions and Related Transactions, 81 Fed. Reg. 20,857-21,222 (Apr. 8, 2016); *see* Chamber of Commerce v. IRS, No. 1:16-CV-944-LY, 2017 WL 4682050 (W.D. Tex. Oct. 6, 2017), *notice of appeal filed*, (5th Cir. Nov. 27, 2017); James A. Doering, *New Temporary Regulations Restrain Inversions*, TAXES, Oct. 2016, at 25.

Unlike this Article's treatments of the good cause and interpretive exceptions, this Article does not put forward a theory for how temporary regulations should be treated in APA-compliant tax administration.[331] Instead, this Article problematizes the anti-exceptionalist consensus on temporary regulations. This Part's argument is not that anti-exceptionalists are wrong in their treatment of temporary regulations, but that they assume the proper administrative treatment of temporary regulations is an easy question. In truth, the administrative treatment of temporary regulations implicates thorny issues of statutory interpretation.

The problem is how to square temporary regulations with the APA. Temporary regulations, by definition, do not go through pre-promulgation notice and comment, as required under APA § 553. Under IRC § 7805(e), when Treasury issues a temporary regulation,[332] (1) it must simultaneously issue the regulation in proposed form, which starts the post-promulgation notice-and-comment process and (2) the temporary regulation automatically expires three years after its issuance.[333] Broadly speaking, this problem has two solutions. One is that, given APA § 553, temporary regulations are only valid as an administrative law matter if they qualify for some APA-based exception to notice and comment, chiefly either the interpretive or good cause exceptions discussed above.[334] The other solution is that Treasury has authority, at least to some extent, to issue temporary regulations under § 7805(e) regardless of whether an APA-based exception applies.

Treasury has taken the latter position in litigation,[335] but somewhat of a scholarly consensus has developed that temporary regulations are invalid unless Treasury can invoke an APA-based exception[336] (and a district court has now endorsed that view).[337] The argument, which this Article will refer to as the "§ 559 argument" for reasons that will soon become apparent, is

331. Temporary regulations are too difficult a topic on which to provide a theory at this time.

332. "This rule only applies to temporary regulations issued after November 18, 1988. Purportedly temporary regulations issued before that date remain in effect today." BITTKER & LOKKEN, *supra* note 151, ¶ 110.5 n.18.

333. I.R.C. § 7805(e). If Treasury has not finalized that simultaneously proposed regulation, the temporary regulation automatically becomes ineffective after three years.

334. *See supra* Part III.B.1-2.

335. *See* sources cited *infra* note 356.

336. Asimow, *supra* note 20, at 361-64; John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings after* Mead, 55 ADMIN. L. REV. 39, 69-70 (2003); Hickman, *Coloring*, *supra* note 3, at 1736-40; Vasquez & Lowy, *supra* note 30, at 249-54; Eleanor D. Wood, Note, *Rejecting Tax Exceptionalism: Bringing Temporary Treasury Regulations Back in Line with the APA*, 100 MINN. L. REV. 839, 840-41 (2015). As with so much in tax administration, Professor Hickman has best articulated this position.

337. Chamber of Commerce v. IRS, No. 1:16-CV-944-LY, 2017 WL 4682050, at *6-7 (W.D. Tex. Oct. 6, 2017), *notice of appeal filed*, (5th Cir. Nov. 27, 2017).

based on straightforward statutory interpretation. APA § 559 states that the APA's requirements—which include, of course, notice and comment—cannot be waived by another statute unless that other statute "does so *expressly*."[338] IRC § 7805(e), which articulates how temporary regulations must operate, does not "expressly" waive APA § 553's notice-and-comment requirements.[339] Nothing in § 7805(e) or in any other Code provision, according to this argument, "expressly" waives APA § 553's applicability to temporary regulations.[340] Thus, APA § 553 remains fully applicable to temporary regulations, and like any other regulation issued without notice and comment, a temporary regulation is invalid unless an APA-based exception applies.

Before Professor Hickman's work and the modern turn away from tax exceptionalism, the § 559 argument had much less destabilizing potential. For instance, Professor Michael Asimow, an early proponent of the § 559 argument, also accepted the specific/general distinction for determining whether tax regulations are interpretive.[341] Under the specific/general distinction, so many tax regulations would qualify as interpretive that it would be easy for temporary regulations to commonly qualify for that APA exception.[342] Professor Asimow also only wanted to change administrative practice for temporary regulations on a go-forward basis, rather than destabilizing the tax system by threatening the validity of all existing temporary regulations (and final regulations that have ever resulted from temporary regulations).[343]

In modern tax administration, the § 559 argument now has higher stakes. Professor Hickman and, based on her work, the Tax Court[344] have rejected the specific/general distinction,[345] which this Article agrees is no longer defensible.[346] More than that, Professor Hickman's influential work effectively eliminates the interpretive exception from tax law (and comes close to doing the same to the good cause exception). If these exceptions are close to nonexistent, then virtually all temporary regulations are procedur-

338. 5 U.S.C. § 559 (2012) (emphasis added).

339. *Chamber of Commerce*, 2017 WL 4682050, at *6. Section 7805(e) merely (1) references a category of regulations known as temporary regulations and (2) requires simultaneous proposed rulemaking and that three-year sunset.

340. *Id.*

341. Asimow, *supra* note 20, at 357-64.

342. However, Treasury has used temporary regulations for specific authority regulations. Coverdale, *supra* note 336, at 69. Those inversion regulations are one example. *See* I.R.C. § 7874(c)(6), (g) (2012).

343. Asimow, *supra* note 20, at 372-73.

344. Altera Corp. v. Comm'r, 145 T.C. 91, 115-17 (2015).

345. Hickman, *Coloring*, *supra* note 3, at 1762-63.

346. *See supra* Part III.B.1.b.

ally invalid.[347] Moreover, Professor Hickman theorizes that any procedural taint on temporary regulations would also infect final regulations that are eventually promulgated from those simultaneously issued proposed regulations,[348] and she seems at least impassive at the prospect of the retroactive "amnesty" that Professor Asimow proposes. Demonstrating the influence of her thinking on temporary regulations, a Tax Court concurrence in 2010 wholly endorsed Professor Hickman's view,[349] and a recent district court decision strongly reflects her thinking.[350]

This Article has two points to make about temporary regulations, both of which help avoid this unnecessary destabilization of all regulations that have ever had a temporary form. The first point has already been made: the interpretive and good cause exceptions should not be applied as narrowly as Professor Hickman advocates. If one adopts this Article's view of how these exceptions operate in tax,[351] it goes a decent way toward ameliorating any potential crisis, even if one otherwise accepts the § 559 argument.

The second point requires more explanation. The § 559 argument is eminently reasonable; "expressly" is a plain word with a plain meaning. But the counterargument—that temporary regulations that comply with IRC § 7805(e) do not, at least to a certain degree, need to comply with APA § 553 pre-promulgation notice and comment, even if an APA-based exception is not squarely applicable—must be addressed more seriously. This Article does not assert that the § 559 argument is wrong,[352] but will argue that the issue is at least much more complicated than § 559 argument propo-

347. Hickman, *Coloring*, *supra* note 3, at 1786.

348. *Id.* at 1791-95; Puckett, *Embracing*, *supra* note 329, at 370 ("Hickman also has argued not only that a temporary regulation is invalid, but that it may taint the final regulation to which it relates, assuming no APA exception applies, such as for "good cause" or interpretative rules."). Treasury, unsurprisingly, disagrees. *See* Brief for the United States at 29-30, United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012) (No. 11-139), 2011 WL 5591822.

349. Intermountain Ins. Serv. of Vail v. Comm'r, 134 T.C. 211, 245-48 (2010) (Halpern, J. & Holmes, J., concurring), *rev'd*, 650 F.3d 691 (D.C. Cir. 2011), *cert. granted, judgment vacated*, 132 S. Ct. 2120 (2012); *see* Wood, *supra* note 336, at 847-48.

350. Chamber of Commerce v. IRS, No. 1:16-CV-944-LY, 2017 WL 4682050, at *5-7 (W.D. Tex. Oct. 6, 2017), *notice of appeal filed*, (5th Cir. Nov. 27, 2017).

351. *See supra* Parts II.B.2, III.B.1-2.

352. As a result, this Article will not analyze or endorse other potential constraints on temporary regulation authority if I.R.C. § 7805(e) is read, to some degree, as an authorization of regulatory power independent from APA § 553. For instance, instead of reviewing for APA § 553 compliance, one could instead review Treasury's decision to issue a temporary regulation for abuse of discretion or compliance with the arbitrary and capricious standard under APA § 706(2)(A). Additionally, based on this Article's argument that I.R.C. § 7805(e) has embedded within it exceptionalism-era assumptions about how the APA works in tax (e.g., the specific/general distinction), one could arguably review Treasury APA compliance for temporary regulations based on those prior assumptions.

nents often portray it to be.[353] Professor Hickman has called a variant of this counterargument "simply implausible;"[354] Professor Coverdale deemed it "a difficult position to sustain."[355] This Article will now explain some reasons why the counterargument should not be so easily dismissed.

First, IRC § 7805(e) arguably does not make much structural sense unless temporary regulations receive some leniency under APA § 553. Or, put a different way, temporary regulations do not make sense as a distinct category unless that is true. Professor Hickman argues that because APA § 553(b) "allows Treasury to issue temporary regulations if one of [the APA] exceptions apply, it is not necessary to read I.R.C. § 7805(e) as independent authorization for temporary regulations in order to give that provision effect."[356] To accept that argument in tandem with the rest of Professor Hickman's thinking, you have to believe the following: when Congress enacted IRC § 7805(e) in 1988,[357] this subsection was intended to impose *a unique disability* on Treasury, relative to all other federal agencies, in terms of issuing rules without pre-promulgation notice and comment.[358] For temporary regulations, not only must an APA exception apply to avoid pre-promulgation notice and comment, but even then, the regulation will *still* expire in three years (and proposed rulemaking must be undertaken simultaneously).

Why would Congress always want a simultaneous proposed rulemaking (and a three-year sunset) for a rule that otherwise qualified for one of the

353. Part of the problem is that, in responding to the § 559 argument, the government has put forward weak counterarguments. The government has made three core arguments: (1) I.R.C. § 7805(e) is a specific statute that supersedes the more general APA § 553, per the interpretive canon that the specific statute supersedes the conflicting general one, (2) that the § 559 argument would contravene another interpretive canon by rendering I.R.C. § 7805(e) "meaningless," and (3) that in any event, tax is exceptional. *See* Reply Brief for the Appellant at 6-8, Salman Ranch, Ltd. v. Comm'r, 647 F.3d 929 (10th Cir. 2011), *cert. granted, judgment vacated*, 132 S. Ct. 2100 (2012) (No. 09-9015), 2010 WL 2397312; *see* Respondent's Brief in Support of Motion To Vacate Order and Decision at 19-20, Intermountain Ins. Serv. of Vail v. Comm'r, 134 T.C. 211, 211 (2010), *cert. granted, judgment vacated*, 132 S. Ct. 2120 (2012) (No. 25868-06), 2010 WL 2285587; Wood, *supra* note 336, at 858-59 n.129 (citing the foregoing). The first argument is incorrect because it wrongly assumes the (allegedly) more specific and more general statutes are in conflict. The second argument is incorrect because I.R.C. § 7805(e) is rendered narrow, but certainly not meaningless. The third argument is wrong for the reasons discussed in Part II.A.

354. Hickman, *Coloring*, *supra* note 3, at 1740 n.65.

355. Coverdale, *supra* note 336, at 69.

356. Hickman, *Coloring*, *supra* note 3, at 1739.

357. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6232, 102 Stat. 3342, 3734-35.

358. This proposition is a sort of anti-exceptionalist exceptionalism, for it postulates that Treasury is special in administrative law, but in the inverse of the way that traditional exceptionalism argues.

APA exceptions when those exceptions are, in Professor Hickman's telling, so narrow in the tax context? One could argue that it is difficult to believe that the intent of Congress was to make APA compliance uniquely arduous for Treasury, by imposing § 7805(e) on top of APA § 553(b), particularly when the latter is interpreted as narrowly in the tax context as Professor Hickman argues. Section 7805(e)'s independent constraints on temporary regulations arguably make more sense if they apply to rules that are not so aggressively constrained under APA § 553(b). Indeed, if Professor Hickman's reading is correct, the category of temporary regulations would be a null set, for Treasury would never issue them. Instead, if a rule qualifies for an exception under APA § 553, a rational Treasury, attempting to avoid unnecessary administrative burden, would just issue that rule as final, as any other agency can. Even if Treasury wanted to engage in *post*-promulgation notice and comment, it would still issue the rule as final and then take subsequent comments. If there is no benefit to issuing regulations as temporary—i.e., leniency under APA § 553(b)—then it would arguably never make sense to accept the burdens of § 7805(e).

A different understanding is the following. When Congress passed § 7805(e), APA compliance in tax administration meant something very different than it does now. Congress passed § 7805(e) in 1988[359] against the legal backdrop discussed above, in the era of the specific/general distinction.[360] In that context, so much of tax rulemaking qualified for exceptions to APA notice and comment that this § 7805(e) issue was, if not moot, at least far less important.[361] Even if § 7805(e) was additive to APA § 553, Treasury could so commonly qualify for exceptions to pre-promulgation notice and comment that their combination was not lethal.[362]

Thus, when Congress used the term "temporary regulation" in § 7805(e), embedded in that term was an understanding of tax administration as it existed at passage in 1988. On a certain level, that conclusion is epistemologically obvious, for how could the 100th Congress of that year have an understanding of tax administration other than the predominant understanding at that time? But even putting that point aside, it is hard to avoid this conclusion that § 7805(e) has embedded within it a twentieth-century understanding of tax administration, both in looking at the legisla-

359. Technical and Miscellaneous Revenue Act of 1988, § 6232.

360. *See supra* Part II.B.1.

361. *See* Altera Corp. v. Comm'r, 145 T.C. 91, 115-17 (2015); Hickman, *Coloring*, *supra* note 3.

362. As discussed above, one sees this understanding in Professor Asimow's article, which was published shortly after § 7805(e) was passed.

tive history[363] and in rationalizing temporary regulations as a logically coherent category. To refine the issue somewhat, the problem is not whether § 7805(e) does or does not "expressly" abrogate APA § 553,[364] but whether § 7805(e) has embedded within it a particular understanding of what it means for Treasury to comply with APA § 553.

Thus, if we interpret statutory terms based on their originally intended meaning,[365] this statutory codification of the term "temporary regulation" imported contemporaneous tax administration assumptions into the Code. The problem is that § 7805(e)'s structural logic has these embedded assumptions, but now these assumptions are losing their validity. This problem is not a simple one. It is a wrenching conundrum of statutory interpretation. When passed, the statutory terms had certain meanings and (logically necessary) embedded assumptions, but the ground beneath those meanings and assumptions has shifted substantially as time has passed. Contending with this interpretive challenge occupies some of the greatest minds in the law.[366] Thus, proponents of the § 559 argument should not so easily dismiss this counterargument.

The § 559 argument also has a second major problem: its broader implications arguably threaten to destabilize tax administration beyond just temporary regulations. The basic issue is that, if one accepts the § 559 argument's view of I.R.C. § 7805*(e)*, then one must, inescapably, take the same view of how another subsection of I.R.C. § 7805—§ 7805*(b)*—relates to the APA. Under this logically necessary view of § 7805(b), Treasury almost entirely loses the power to make regulations retroactively effective.[367] As a result, Treasury loses an arguably important regulatory tool.

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363. In describing § 7805(e), the brief legislative history makes no mention of the interrelation with the APA. Thus, it seems logical to conclude that Congress accepted that interrelation as it existed at the time in contemporary law. *See* S. REP. NO. 100-309, at 7 (1988); H.R. REP. NO. 100-1104, at 217-18 (1988) (Conf. Rep.).

364. 5 U.S.C. § 559 (2012).

365. *See* NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2016) ("To interpret statutes, intent of the legislature is by far the most common such criterion." (internal citation omitted)). *Cf.* KENNETH R. THOMAS, CONG. RESEARCH SERV., R41637, SELECTED THEORIES OF CONSTITUTIONAL INTERPRETATION 8 (2011), https://fas.org/sgp/crs/misc/R41637.pdf ("This doctrine of objective 'original meaning' emphasizes how the text of the Constitution would have been understood by a reasonable person in the historical period during which the Constitution was proposed, ratified, and first implemented.").

366. *E.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

367. Professor Puckett expresses concern that anti-exceptionalists *could* apply the § 559 argument to I.R.C. § 7805(b). Puckett, *supra* note 5, at 1099-1100. I think he is much too modest. One *must* extend the § 559 argument in this manner. Professor Puckett makes a glancing, footnoted argument to the contrary. *Id.* at 1100 n.197. However, his claim that

Section 7805(b) provides limits on Treasury's ability to make regulations retroactively effective. Section 7805(b)(1) forbids Treasury from making any regulation effective "before the earliest of the following dates": (1) the first date on which the regulation is filed with the Federal Register in any form (i.e., a final regulation can be effective as of the date it was filed in proposed or temporary form) and (2) the date that Treasury publishes a notice "substantially describing the expected contents" of the regulation.[368] In certain specified circumstances, § 7805(b) loosens those outer limits on retroactivity. Most notably, Treasury is not precluded from making regulations retroactive as of an earlier date than permitted under § 7805(b)(1) "to prevent abuse."[369]

American law is generally suspicious of retroactivity.[370] However, retroactivity has a role in the tax law. Treasury is often the cat—and an underfunded and outmatched one at that—in the cat-and-mouse games of tax shelters. And even when abusive transactions are not at issue, if Treasury is changing the tax law through a regulatory project, its policy goals can arguably be thwarted if taxpayers alter transactions in the time between when Treasury announces the project and when it finalizes the resulting regulations.[371] Hence, Treasury often believes that it needs to make regulations retroactive to the date of an initial notice.

The problem is that the § 559 argument necessarily applies to § 7805(b) as much as it applies to § 7805(e). The essence of the § 559 argument is that nothing in § 7805(e) "expressly" abrogates the simultaneous application of APA § 553. Looking at the language of § 7805(b), one cannot help but reach the same conclusion. Just like § 7805(e) with temporary regulations, the plain language of § 7805(b) does not independently authorize retroactive regulations. Rather, § 7805(b)'s language merely imposes limits on any retroactivity that may arise. The plain language certainly does not preclude other limits on retroactivity outside of § 7805(b). Indeed, the phrasing of § 7805(b) as an outer limit on retroactivity seems to *invite* those other limits. Enter the APA. Under APA § 553(d), a rule cannot be effective "less than 30 days" before its publication, unless exceptions apply like those for

§ 7805(b) would be rendered meaningless is incorrect. Section 7805(b) would be narrow, but not meaningless. That result exactly parallels the result with § 7805(e).

368. I.R.C. § 7805(b)(1) (2012).

369. *Id.* § 7805(b)(3).

370. *E.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988).

371. One can always question the wisdom of Treasury's various rulemaking projects, but that question is separate from whether Treasury has the administrative tools to accomplish its goals, whatever they may be. What's more, putting aside policy goals, it is sometimes disruptive and potentially quite inefficient to induce a transaction rush before rule promulgation.

interpretive rules/good cause.[372] If we accept Professor Hickman's interpretation of those § 553 exceptions, they are close to nonexistent. Thus, if we follow the § 559 argument and apply IRC § 7805(b) in tandem with APA § 553(d), Treasury's authority to issue regulations with some retroactive effect is, in essence, completely eliminated.

The anti-exceptionalist school applies the § 559 argument to § 7805(e) but, at least for the moment, *not* to § 7805(b).[373] Professor Puckett, trying to limit the reach of anti-exceptionalists, has (briefly) made a similar argument.[374] These attempts to apply APA § 559 to one subsection of I.R.C. § 7805 and not the other are unavailing. To distinguish between I.R.C. § 7805(b) & (e), Professor Hickman argues that "the potential for retroactive application [under § 7805(b)] is not necessarily inconsistent with the general rule of a delayed effective date" under APA § 553(d).[375] The logic seems to be that a retroactive rule may only become retroactively effective thirty days after it has been published, thereby formally complying with APA § 553(d). This argument is unconvincing. Professor Hickman seems to concede as much when she states that this view would render APA § 553(d) "superfluous."[376] Moreover, the two following actions are, substantively, "functionally equivalent"[377]: (1) promulgating a temporary regulation that is immediately effective on Date X and (2) publishing a proposed regulation on Date X that will become retroactively effective back to Date X (as of future Date Y that the regulation is finalized). In the second scenario, between Dates X and Y, a taxpayer would be forced to comply with the proposed regulation as if it had the same force as a temporary regulation, for the taxpayer knows about the coming retroactivity. One may prefer the potential for pre-promulgation notice and comment in scenario two, but that difference does not change the substantive result between Dates X and Y,

372. 5 U.S.C. § 553(d) (2012). Under APA § 553(d)(1), a rule that otherwise does not qualify for an exception can have an earlier effective date if it "grants or recognizes an exemption or relieves a restriction." That could alleviate this I.R.C. § 7805(b) problem to a minimal degree, but the real retroactivity issue is for rules that constrain taxpayers rather than relieve them.

373. Professor Hickman leaves open the door to applying the § 559 argument in the future. Hickman, *Coloring*, *supra* note 3, at 1738 (arguing certain amendments to I.R.C. § 7805(b) "*may* support a narrower interpretation of" that subsection).

374. *See supra* note 367 and accompanying text.

375. Hickman, *Coloring*, *supra* note 3, at 1738.

376. *Id.*

377. Jonathan Olsen, Note, *The Unique Case of Treasury Regulations Issued To Prevent Abuse*, 4 COLUM. J. OF TAX L. 174, 180 (2013).

which is taxpayer compliance with the proposed regulation as if it had the force of law.[378]

As promised, this Part has not provided a solution to the problems that it illustrates. For the reasons just discussed, temporary regulations will be a particularly acute sticking point in the transition to APA-compliant tax administration. As the revolution marches on, further scholarly analysis will be necessary to address the problem of temporary regulations.

C. *Reason-Giving in the Tax Rulemaking*

All of the issues discussed in Part III.B involve the threshold question of when, in promulgating rules, Treasury must undergo pre-promulgation notice and comment under APA § 553. This Part considers what must happen when pre-promulgation notice and comment occurs. More specifically, it examines what types of reason-giving should be sufficient for Treasury when it engages in § 553 notice and comment. When exceptionalists decry APA-compliant tax administration, they often invoke the bugaboo of onerous reason-giving requirements under the APA.[379] They argue that forcing this reason-giving on Treasury before it can issue rules will greatly delay rulemaking, if not grind it to a halt. This Part argues that, in some circumstances, APA-compliant reason-giving need not be overly onerous in the tax law. Some technical or expansive Treasury rules require fairly exacting notice-and-comment processes, but in general, these are regulations, like the recent regulations under § 385,[380] that require an exhaustive, reasoned back-and-forth with affected parties as an existing matter of good policymaking, in addition to what the APA requires. Thus, even if Treasury increases its use of pre-promulgation notice and comment in an APA-compliant world, that notice and comment need not (and should not) be particularly onerous in some circumstances.[381]

This Article has already reviewed the APA's reason-giving requirements in Part I.A. To briefly restate what was discussed above, agencies must pro-

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378. Professor Asimow recognized this functional equivalence. Because he is so troubled by temporary regulations untethered from APA § 553, he expects functionally equivalent retroactivity to be restrained in the same way (and so effectively concedes the § 559 argument must apply to both § 7805(b) & (e)). *See* Asimow, *supra* note 20, at 350 n.37.

379. *E.g.*, McMahon, *supra* note 5, at 578-80; Pierce, *Which Institution*, *supra* note 110, at 3-5.

380. *See* Alison Bennett, *Courts Likely to OK Debt-Equity Rules: IRS Attorney*, Daily Tax Rep. (BNA), (Oct. 31, 2016).

381. The scope of reason-giving requirements is relevant regardless of whether pre-promulgation notice and comment is required. Indeed, reason-giving is relevant to all forms of agency action. *See, e.g.*, Johnson, *supra* note 6. Thus, this discussion, while limited to rulemaking, is relevant to broader questions of IRS reason-giving.

vide contemporaneous and legally cognizable reasons for their actions. These reasons must provide "a satisfactory explanation for [the] . . . action[s] including a rational connection between the facts found and the choice made."[382] In judicial review of this reason-giving, "there is no formula for how much explanation is enough," and "[t]he sufficiency of the explanation depends on the circumstances."[383]

What worries the remaining exceptionalists is what adequate reason-giving has come to mean in non-tax contexts.[384] For a given rule, it can often take "many years and tens of thousands of person hours to complete" the rulemaking.[385] Professor Pierce provides the "illustrative" example of "[t]he process through which EPA issued new ozone and particulate standards in 1997."[386] For these pollution standards, the EPA had to interpret data from "one hundred-plus studies" to argue the new standards were necessary, and the agency received *over 100,000* comments on its proposed rules.[387] In all, the reason-giving for the rules required "several thousand pages."[388] It would indeed destabilize tax administration if such lengthy explanations were required before each rule is promulgated.

However, commentators should recognize that what constitutes necessary reason-giving is contextual, and in the tax context, as little as a few sentences can sometimes be sufficient to satisfy the APA's reason-giving requirements. While the answer will vary with every rule, reason-giving in tax should normally not require the effort in that EPA example. This is not because tax is special, but because Treasury and the EPA are different. EPA rules involve "scientific and technical needs" that are often entirely absent from tax rulemaking.[389] While complicated economic issues may bear on major tax rulemaking projects, such economic questions are somewhat less pervasive in the nitty-gritty of tax regulation than the "extremely complex scientific and economic issues in the midst of daunting uncertainties" involved in environmental rulemaking.[390]

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382. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

383. Johnson, *supra* note 6, at 1786.

384. *E.g.*, McMahon, *supra* note 5, at 578-80; Pierce, *Which Institution*, *supra* note 110, at 3-5.

385. Pierce, *Distinguishing*, *supra* note 229, at 551.

386. *Id.* at 550.

387. *Id.* at 550-51.

388. *Id.* at 551; *see* Pierce, *Deossify*, *supra* note 109, at 65 ("Even after an agency has devoted many years and vast resources to a single rulemaking, it confronts a 50 percent risk that a reviewing court will hold the resulting rule invalid.").

389. McGarity, *supra* note 178, at 1398.

390. *Id.*

Often, as Professor McMahon has documented, tax rules embody "heuristics" that provide administrable frameworks for taxpayers and the IRS.[391] Rather than intense economic reasoning, such heuristic rules often reflect two sets of principles. The first is that, in terms of providing regulatory guidance, making a choice is often, within reasonable bounds, more important than the choice made. Taxpayers need *an* answer more than they need *the* answer, and that principle often drives the actual reasoning behind rules. Second, while rules should not be economically irrational, an overriding concern for tax regulations—given the pervasive, "retail" reach of the tax law—is not economic exactitude based in intensive empirical research, but a rough balance of administrability and fairness (with concerns about abuse embedded in both of those concepts).[392]

In terms of their underlying reasoning in any particular context, these principles can generally be explained pithily, with reason-giving that is orders-of-magnitude less dense than the EPA example. During his tenure, then-IRS Chief Counsel William Wilkins gestured toward this reality. While his nomenclature was a bit different, he tried to distinguish between major tax rules that require lengthy and technically rigorous reason-giving and the raft of other rules that are more in the heuristic category (and for which reason-giving need not be as onerous).[393] This view of reason-giving in tax is reasonable; it should be cognizably valid under the APA.[394] It is true that "[c]ourts tend to frame" *State Farm* review "in expert and data-driven terms."[395] But this is a tendency, not the law. This heuristic reasoning, as one could call it, very much represents an expert judgment about the optimal approach to promulgating some tax rules. One can conceive of this heuristic reasoning in tax as situations where, because of the two principles described in the previous paragraph, the costs of producing lengthy, heavily empirical (and potentially infeasible)[396] economic reasoning in a given Treasury rulemaking outweigh the benefits.

A recent Federal Circuit case—*Balestra v. United States*[397]—aptly illustrates this point about reason-giving for some tax rules. *Balestra* concerned

391. McMahon, *supra* note 5, at 603.

392. *Cf.* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 586 (1933) (Cardozo, J., dissenting in part) ("Systems of taxation are not framed, nor is it possible to frame them, with perfect distribution of benefit and burden. Their authors must be satisfied with a rough and ready form of justice.").

393. Andrew Velarde, *Reg Process Could Get Slower and Less Stable, Wilkins Warns*, 152 TAX NOTES 33, 33-34 (2016).

394. *But see* McMahon, *supra* note 5, at 610 ("There is a risk the nation is moving away from heuristics in tax with . . . the move to increased APA procedures.").

395. Puckett, *supra* note 5, at 1093.

396. *See infra* pp. 80-81.

397. Balestra v. United States, 803 F.3d 1363 (Fed. Cir. 2015).

the imposition of Federal Insurance Contributions Act ("FICA") taxes on deferred compensation from nonqualified deferred compensation plans. Normally, FICA taxes are due on wages when those wages are "actually or constructively paid,"[398] but for deferred compensation from nonqualified plans, Congress specified a "special timing rule" for when FICA taxes are imposed.[399] Under this special rule, FICA taxes are imposed at "the later of . . . (i) when the services are performed, or (ii) when there is no substantial risk of forfeiture of the rights to such amount."[400] The problem is that FICA taxes are thus imposed before the employee actually receives the compensation. As a result, to determine the tax base for those FICA taxes when due, the taxpayer needs to calculate the "present value" of that deferred compensation.[401] Treasury promulgated regulations to provide a framework for that calculation of the "present value" of the "amount deferred."[402] Treasury dictated that, in calculating present value, taxpayers cannot discount value based on the creditworthiness (or lack thereof) of the employer.[403] This valuation rule creates the possibility, which the taxpayers in *Balestra* actually faced, that FICA taxes could be due on deferred compensation that ends up never being paid because the employer goes bankrupt before actual payment.[404] The Balestras sued for a refund, arguing the regulation was substantively contrary to the statute and procedurally invalid under *State Farm*.

For this Article, *Balestra* is important for the taxpayer's *State Farm* claim.[405] When Treasury subjected the (lengthy) underlying regulation to notice and comment, it did not provide reams of reason-giving. Between its notices of proposed and final rulemaking, Treasury provided a few pages of explanation, which mainly consisted of descriptions of the rule.[406] On this prohibition ("the prohibition") on factoring employer creditworthiness into present value, Treasury provided just a couple sentences of somewhat relevant reason-giving. Given the potential for "difficult valuations of future

398. Treas. Reg. § 31.3121(a)-2(a) (as amended in 2006).

399. *Balestra*, 803 F.3d at 1366.

400. *Id.* (quoting I.R.C. § 3121(v)(2)(A) (2012)).

401. *Id.* at 1366-67.

402. Treas. Reg. § 31.3121(v)(2)-1(c)(2)(ii).

403. *Id.* ("[T]he present value cannot be discounted for the probability that payments will not be made (or will be reduced) because of . . . the risk that the employer, the trustee, or another party will be unwilling or unable to pay . . . .").

404. *Balestra*, 803 F.3d at 1367.

405. The substantive claim was destined to fail, as it did, under *Chevron*.

406. Federal Insurance Contributions Act (FICA) Taxation of Amounts Under Employee Benefit Plans: Final Regulations, 64 Fed. Reg. 4,542, 4,542-46 (Jan. 29, 1999); Taxation of Amounts Under Employee Benefit Plans: Notice of Proposed Rulemaking, 61 Fed. Reg. 2,194, 2,194-98 (Jan. 25, 1996).

benefits," Treasury explained that it built valuation rules "to be workable, to minimize complexity, and to provide appropriate flexibility for taxpayers."[407] Elsewhere, Treasury indicated, although it did not explicitly state, that the prohibition helps to simplify the regulations.[408]

The Federal Circuit found this reason-giving to be sufficient under *State Farm*,[409] and the court was right to do so in this context. The court recognized that Treasury's goals were a balance of fairness and administrability.[410] In areas where taxpayer discretion could be reasonably monitored, Treasury gave taxpayers flexibility in their present value calculations.[411] However, Treasury understandably decided that permitting taxpayers to factor in employer creditworthiness would be unworkable. Because each employer's financial situation is unique and byzantine, Treasury would not be able to audit or to effectively prevent abuse. If Treasury makes this type of judgment call, then reason-giving that evinces that judgment call should be sufficient for *State Farm* purposes in some tax rulemaking contexts.

One can contrast *Balestra*'s reasoning with that of another Federal Circuit case, *Dominion Resources, Inc. v. United States*,[412] which is mentioned above in Part I.A. This Article will not delve as deeply into the *Dominion* facts, but the *Dominion* court invalidated a tax regulation for non-compliance with *State Farm*.[413] Even if that conclusion was correct, the opinion misconceives of *State Farm* in tax rulemaking because it fails to ever allow for heuristic-based reason-giving like the *Balestra* court did.[414] Notably, the concurrence in *Dominion* notes this flaw in the majority's reasoning.[415] The concurrence wants Treasury to at least briefly explain its heuristic reasoning for the regulation (which it failed to do in notice and comment), but the

407. Taxation of Amounts Under Employee Benefit Plans: Notice of Proposed Rulemaking, 61 Fed. Reg. at 2,195.

408. Taxation of Amounts Under Employee Benefit Plans: Final Regulations, 64 Fed. Reg. at 4,544-45.

409. *See Balestra*, 803 F.3d at 1373.

410. *See id.* at 1374 ("Treasury explained that it sought simple, workable, and flexible rules when valuing future benefits. It devised a regulation that satisfied these goals while comporting with the governing statute.").

411. *See* Treas. Reg. § 31.3121(v)(2)-1(c)(2)(ii) (2016). For instance, taxpayers are given flexibility to calculate their own reasonable discount rates based on their view of the interest rate environment and mortality risk. These accounting judgments are not narrowly contextual like the creditworthiness of an individual company.

412. Dominion Res., Inc. v. United States, 681 F.3d 1313 (Fed. Cir. 2012).

413. *Id.* at 1319. For good measure, the court also found the regulation substantively invalid. *Id.* at 1317.

414. *Id.* at 1317-18.

415. *Id.* at 1321 (Clevenger, J., concurring in part and concurring in the result).

concurrence is potentially willing to accept some rules based on such heuristic reasoning.

One final point on tax reason-giving. This divide between heuristic rules and those tax rules that require more exhaustive reason-giving is not obvious. Courts should be thoughtful in policing this divide. Because the tax law often regulates transactions with or between private parties, it can be difficult to assess, in an empirically rigorous way, whether a Treasury regulation reflects "market practice" for a given transaction (when market practice is relevant to the shape of the regulation). Treasury may need to be empirically rigorous in its reason-giving for such situations, but sometimes such empirical rigor may or may not be feasible. As currently interpreted, the *State Farm* standard contemplates situations like this.[416]

The *Altera* opinion's reasoning illustrates this issue.[417] The Tax Court found that the regulation failed *State Farm* because it decided "an empirical question" about how (often private) parties structure certain private cost-sharing transactions.[418] Incorporating this type of market intelligence about arm's-length transactions into regulations, when arm's-length practice is relevant under the statute, sounds reasonable. This seems like an occasion for more empirical reason-giving by Treasury. However, even if that is the case, the Tax Court failed to at least consider the feasibility of its empirical demands.[419] The Tax Court very well may have been right in its conclusion, but feasibility should have been more prominent in its reasoning. Elsewhere in the tax law, the Tax Court has effectively recognized that arm's-length practice sometimes needs to be intuited rather than empirically proven, given the practical difficulty of the latter when the market involves private parties in private transactions. Specifically, the Tax Court has conceded this point in the estate tax valuation rules of Chapter 14.[420] Projects like the rulemaking under § 385 certainly require exhaustive reason-giving and technical rigor, but courts should be thoughtful when they assert such empiricism as an absolute requirement. They may inadvertently preclude tax rulemaking if they do so incorrectly.

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416. *Cf.* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009) ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them.").

417. *See* Altera Corp. v. Comm'r, 145 T.C. 91 (2015).

418. *Id.* at 118-19.

419. *See* Brief of Anne Alstott et al. as Amici Curiae Supporting Appellant at 21-22, Altera Corp. v. Comm'r, 537 U.S. 418 (2003) (Nos. 16-70496, 16-70497).

420. David Berke, *Family Values: An Evaluation of Internal Revenue Code Sections 2703 and 2704(b)*, 41 ACTEC L.J. 197, 214-15 (2015) (describing how, in the wealth transfer tax context, the Tax Court moved away from requiring direct, empirical market data to satisfy the arm's length standard of § 2703(b)(3)).

Conclusion

This Article has covered a lot of ground: background concepts and developments in tax and administrative law in Part I; a rebuke of tax exceptionalism (with an appreciation for its historical importance) in Part II; and critiques of anti-exceptionalist theories of tax rulemaking (and proposed alternative theories of APA compliance) in Part III. Throughout, this Article has attempted to chart a middle course between remaining exceptionalists and prevailing theories and interpretations embedded in current anti-exceptionalist scholarship and judicial opinions. Its aim is to advocate APA-compliant tax rulemaking that does not unnecessarily destabilize existing tax law. This Article's theoretical arguments could be expanded to apply to other issues in tax administration outside of the particular rulemaking issues that it addresses.

In the end, this Article's breadth only illustrates how much remains unsettled in the administrative law of tax rulemaking. Indeed, even more remains unsettled in tax administration more broadly. While exceptionalism is moribund, the future of tax administration involves more open questions than settled answers. The revolution is closer to its beginning than its end.