

# Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS

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## I. Introduction

The central perspective which animates the concept of a Taxpayer Bill of Rights is taxpayer rights as experienced by the taxpayer. Although understanding the taxpayer's experience is vital to the crafting of meaningful taxpayer rights, we believe that there is another side to the taxpayer experience coin, and that failing to look carefully at that side produces a lack of transparency that threatens the legitimacy of the tax system and the agency that administers it. That other side of the taxpayer experience coin consists of

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the views of those who mediate the taxpayer's experience with the tax law. We refer here to the thousands of tax scholars, judges, lawyers, accountants, administrators, and other professionals, whose view of the tax law shapes and is shaped by the taxpayer experience. These individuals affect the taxpayer experience by interpreting and framing the system in both formal and informal ways. Their views of the tax system are reflected in opinions, guidance, scholarly publications and even the accounts of the tax system that appear in the popular press. Their views also inform the way they explain the system to clients and the advice they give. Together, these communications create a picture of the tax system that can determine how it is perceived by taxpayers, regardless of whether they receive the communications directly, as do the over 70% of taxpayers who receive some professional assistance in tax preparation,<sup>1</sup> or indirectly through the portrayal of the tax system in media and other accounts.

That tax professionals serve as mediators who both shape and are shaped by the taxpayers' experience is important. If tax professionals view the tax system and its administrators as illegitimate, they will likely convey that view

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<sup>1</sup>IRS Strategic Plan 2014-2017, at 7 (June 2014), *available at* <https://www.irs.gov/pub/irs-pdf/p3744.pdf> (finding more than 75.6 million electronically-filed individual returns were submitted to the IRS through paid preparers, accounting for 64% of all individual income tax e-filers; similarly, in FY 2012, 43.5 million individual taxpayer returns were completed using software, an increase from 39.6 million in 2011); 2014 NAT'L TAXPAYER ADVOCATE ANN. REP., EXECUTIVE SUMMARY: PREFACE & HIGHLIGHTS 11, *available at* <http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report-to-Congress-Executive-Summary.pdf> (finding VITA and TCE programs prepared 3,472,696 returns in FY 2014, an increase of about 27% over the FY 2009 level and VITA and TCE sites that received funding from the IRS alone prepared more than 1.4 million and 1.3 million returns, respectively, during FY 2014).

to taxpayers and those taxpayers will, in turn, be less likely to be fully compliant.<sup>2</sup> Legitimacy is vital to any legal institution, but in the case of the IRS legitimacy has been discussed and analyzed only in the face of catastrophic assaults. These include attempts by a President to use the IRS to persecute political enemies;<sup>3</sup> allegations of serious abuse of taxpayers by IRS agents, which led to Senate Finance Committee hearings involving witnesses with electronically disguised voices testifying behind security screens and ultimately to the Reform and Restructuring Act of 1998;<sup>4</sup> and most recently allegations that conservative organizations seeking section 501(c)(4) status were

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<sup>2</sup>As Nina Olson, the National Taxpayer Advocate and principal organizer of this International Taxpayer Rights Conference, has recently observed, “If most taxpayers believe that the tax agency exercises its power legitimately, they will be comfortable cooperating and engaging with the agency and more likely to defer to its directions and decisions.” Nina E. Olson, *Procedural Justice for All: A Taxpayer Rights Analysis of IRS Earned Income Credit Compliance Strategy*, 22 *ADVANCES IN TAXATION* 1-35 (2014). Legitimacy has been defined by scholars in various, often complementary, ways. Throughout this Essay we adopt Professor Tom Tyler’s definition of term legitimacy:

Legitimacy, therefore, is a quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directives. This feeling of responsibility reflects a willingness to suspend personal considerations of self-interest, because a person thinks that an authority or a rule is entitled to determine appropriate behavior within a given situation or situations.

Thomas Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 *OHIO ST. J. CRIM. L.* 307, 313-14. We adopt this definition not only because it is the definition which Nina Olson adopts in *Procedural Justice for All*, *supra*, but also because it captures the link between legitimacy and the individual’s response to law, and hence to compliance with the law; see also THOMAS TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006) (defining legitimacy as “an acceptance by people of the need to bring their behavior in line with the dictates of an external authority,” (at 25), citing Gerstein and Freedman, and citing David Easton for “suggesting that legitimacy exists when the members of a society see adequate reason for feeling that they should voluntarily obey the commands of authorities.” (*Id.*)) One of us has used a more succinct definition, with less emphasis on compliance: legitimacy is “the community’s belief that an action by a government official is proper and justified.” Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 *WASH. U. J. JUR. REV.* 1, 9 (2015).

<sup>3</sup>See *Tax History: Auditing Your Enemies Away: Russian and U.S. Experiences*, 105 *TAX NOTES (TA)* 1183 (2004) (describing President Nixon’s infamous list of about 300 liberal politicians, actors, activists, journalists, and newspapers as a failed attempt to punish his political enemies and media critics for his own gain); see also Amy Hamilton, *The Ghosts of IRS Past, Present, And Future?*, 90 *TAX NOTES (TA)* 17 (2001) (describing the three IRS commissioners during the Nixon administration as “paying a personal price” for resisting White House attempts to attack members of the list using IRS resources).

<sup>4</sup>See *IRS Oversight: Hearing Before the S. Comm. on Fin.*, 105th Cong. 96-99 (1998) (statements of Sen. Frank Murkowski and Sen. Kent Conrad) (describing the “gestapo-like” efforts employed by the IRS in abusing taxpayers by raiding small businesses); see also Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified in various sections of the I.R.C.) (including provisions mandating the replacement of regional divisions of the IRS with units dedicated to serving particular categories of taxpayers, providing a five-year term of office for the Commissioner, and creating an IRS oversight board to protect taxpayers from improper treatment by IRS employees).

disproportionately singled out for intrusive scrutiny and delay,<sup>5</sup> which have led to the initiation of impeachment proceedings against the Commissioner.<sup>6</sup>

While these instances have posed significant threats to the agency's legitimacy, what we explore here is more subtle, more pervasive, and hence, more invidious and threatening. It is the way in which the unexamined assumption of tax exceptionalism—the idea that tax is different—has produced a situation in which the tax law and its administrators are viewed by tax professionals, and eventually by the taxpaying public, as behaving in ways that are not understood, are therefore misperceived, and are ultimately judged illegitimate.

In this Essay we explore tax exceptionalism and the manner in which it threatens the legitimacy of the IRS. We also offer a suggested path to the reclamation of legitimacy. In a nutshell, our claim is that tax professionals should abandon the notion that tax is exceptional and accept that tax is Everylaw, no different in any fundamental way from any other law. It will then follow that the IRS is an agency like any other, possessing the same powers and subject to the same constraints as any other agency. This recognition can free the IRS

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<sup>5</sup> See Lindsey McPherson & Meg Shreve, *Lawmakers Demand Answers in IRS Scandal*, 139 TAX NOTES (TA) 983 (2013) (reporting based on findings by the Treasury Inspector General that IRS employees in Cincinnati had referred applications for further review based on the use of terms like “Tea Party” or “patriot” in the organizations’ names); see also William Hoffman, Lindsay McPherson, Meg Shreve & Fred Stokeld, *EO Scandal Rocks IRS*, 139 TAX NOTES (TA) 829 (2013) (reporting the IRS targeting of conservative organizations leading to the resignation of Acting Commissioner Steven Miller, the announcement of investigations by Treasury’s Inspector General and multiple congressional committees, a criminal probe by the Justice Department, and the need for damage control by the Obama administration). *But see* U.S. DEP’T OF JUSTICE, OFFICE OF LEG. AFFAIRS, OPINION LETTER (Oct. 23, 2015), available at <http://online.wsj.com/public/resources/documents/IRS1023.pdf> (explaining the decision not to criminally prosecute the IRS for mishandling the processing of tax-exempt applications for conservative groups).

<sup>6</sup> See Wesley Elmore, *House Republicans Introduce Resolution to Impeach Koskinen*, 2015 TAX NOTES TODAY 208-3 (Oct. 28, 2015) (citing H.R. 494, 114th Cong. (2015), which calls for impeaching of IRS Commissioner Koskinen for “high crimes and misdemeanors” involving Commissioner Koskinen’s alleged failure to comply with subpoenas ordering him to locate and preserve IRS records related to congressional investigations of the IRS’s handling of conservative groups’ exemption applications, lying regarding the emails of Lois Lerner, “fail[ing] to act with competence and forthrightness in overseeing the investigation” and “act[ing] in a manner inconsistent with the trust and confidence placed in him as an Officer of the United States”); see also William Hoffman, *Koskinen Says He Testified Truthfully ‘Every Time’*, 2015 TAX NOTES TODAY 209-4 (Oct. 29, 2015) (stating impeachment is a rare tool used by Congress that has never been used to impeach an IRS Commissioner and outlining the difficulty of success of impeachment because the resolution must first go to a vote in the House Judiciary Committee followed by a simple majority vote in the full House and a conviction by a two-thirds majority in the Senate trial); Lisa Rein, *The Republican Campaign to Impeach IRS Commissioner: What Comes Next?*, WASH. POST Oct. 30, 2015, <https://www.washingtonpost.com/news/federal-eye/wp/2015/10/30/the-republican-campaign-to-impeach-the-irs-commissioner-what-comes-next/> (claiming it is likely the resolution will at least make it through the Judiciary panel controlled by Republicans, who outnumber Democrats 23 to 16, and led by Chairman Bob Goodlatte (R-Va.)).

to be transparent in its actions, stating clearly when it is interpreting the law, when it is declining to enforce the law (exercising prosecutorial discretion for reasons consistent with the values important in the tax law), and when its actions reflect aspects of both interpretation and enforcement. We begin by exploring tax exceptionalism.

## II. Tax Exceptionalism

### A. *What Is It?*

Taxpayers experience the tax law as different from other areas of law. One important reason for this is that tax law is complex and its impact pervasive. It imposes multiple reporting requirements and requires annual or more frequent accountings. And it requires arithmetic—lots of arithmetic. No other field of law is thought to be so complex or to compel so many to regularly bare their financial souls to the government just to be in compliance with the law. You cannot just mind your own business and stay out of the way of the tax law; you have to account to the government, and in many cases, you have to pay. Through the tax system, the government is in your face. The approach of April 15 produces an annual ritual that surpasses national holidays in its impact because for most taxpayers there is no choice but to participate, in some way. It is therefore not surprising that taxpayers experience the tax law as exceptional, different from other areas of law.

This experience of difference—tax exceptionalism—is so prevalent that it extends to the way that tax scholars, most of whom are also taxpayers, think of the tax law. And it has led them to think of tax as different from other fields of law and, in some cases, even as something separate from law. For example, Louis Kaplow and Steven Shavell, two respected and prolific scholars at the Harvard Law School, distinguished the “legal system” from “the income tax” in such a profound way that the distinction appears in the title of an important article,<sup>7</sup> (*Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*), and that distinction is repeated in the scholarly dialog that ensued.<sup>8</sup> Other scholars have examined ways in which the

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<sup>7</sup>Louis Kaplow and Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

<sup>8</sup>Subsequent work leaves no doubt that Kaplow and Shavell were invoking the tax system as a whole. The opening sentences of a subsequent article state that: “In prior articles, we demonstrated in a natural model that *legal rules* should not be adjusted to favor the poor in order to further redistributive objectives. The reason is that the income tax and transfer system is a superior instrument for redistributing income.” Louis Kaplow and Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) (emphasis added, footnote omitted). And Kaplow and Shavell are not alone in their treatment of the tax system as different from the ‘legal’ system. Chris Sanchirico challenges some of their claims in an article tellingly titled *Taxes versus Legal Rules as Instruments for Equity: A More Equitable View*. Chris William Sanchirico, *Taxes versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000).

characterization of tax as different affects its role in the law school curriculum and its attraction as an area of practice.<sup>9</sup>

Tax exceptionalism is not a specific idea. Rather, it is a way of conceiving of tax or, still more loosely, an attitude toward tax. At its simplest, tax exceptionalism is “the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.”<sup>10</sup> As former Treasury officials have put it: “Federal tax statutes and the legislative process that produces them differ from other legislation in such degree that the difference is tantamount to a difference in kind. The unique nature of the Internal Revenue Code is widely acknowledged . . . .”<sup>11</sup> This exceptionalist quality is strongest in the income tax, and has caused the income tax to be regarded, in contrast to other fields of law and even to other taxes, as composed principally of rules. As Professor Charlotte Crane has observed, the income tax

was perhaps the first tax ever born as a concept, not just as an administrative expedient aimed at raising revenue in the most politically congenial way possible. The income tax has also always been one under which, uniquely among taxes, the taxpayer’s liability is supposed to be determined by the objective application of a set of well-defined rules. It, in contrast to most other existing taxes, holds out the promise of being administered under the rule of law.<sup>12</sup>

The income tax has thus been imbued with an “aura of rationality”<sup>13</sup> that has produced an “aspiration toward rational perfection,”<sup>14</sup> unmatched in other fields of law. This quest for rational perfection has contributed to the perception of tax as doctrinally exceptional and has constrained the analytical growth of the field.

Nowhere has tax exceptionalism had such profound effects and been subject to greater scrutiny than in the area of administrative law.<sup>15</sup> For decades Treasury and the IRS had taken the position that unlike regulations in other areas of law, tax regulations were not subject to the notice and comment process provided by the Administrative Procedure Act, and were thought to

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<sup>9</sup>Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994); see also John Prebble, *Income Taxation: a Structure Built on Sand*, Sydney University Law School, Parsons Lecture, 14 June 2001, 24 SYDNEY L. REV. 301 (2002).

<sup>10</sup>Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?* 63 DUKE L.J. 1897, 1901 (2014).

<sup>11</sup>Bradford L. Ferguson, Frederic W. Hickman & Donald C. Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 806 (1989).

<sup>12</sup>Charlotte Crane, *The Burden of Perfection*, 100 NW. U. L. REV. 171, 175-76 (2006).

<sup>13</sup>*Id.* at 180.

<sup>14</sup>*Id.* at 178.

<sup>15</sup>Indeed, Professor Crane has wondered “Why is the administration of the income tax so much more dominated by a drive to be conceptually consistent and to provide a set of base-defining rules than other taxes and, perhaps, more than any other area of administrative law?” *Id.* at 178.

merit a lesser level of judicial deference than other regulations.<sup>16</sup> Then, in 2011 the United States Supreme Court seemed to kill tax exceptionalism in the administrative law context when it held in *Mayo* that tax regulations were entitled to the same degree of deference as any other regulations.<sup>17</sup> Many rejoiced and a new era promised to dawn. Yet tax exceptionalism has refused to die.<sup>18</sup>

Perhaps the tenacity of tax exceptionalism reflects its age; tax exceptionalism seems to have existed as far back as the Roman Empire, when rendering unto Caesar was really thought to be a rendering to the Emperor, distinct from other legal obligations. This exceptionalist view of tax is captured by its absence from the *Corpus Juris Civilis*, of which the Emperor Justinian was the chief architect.<sup>19</sup> In the *Corpus Juris Civilis*, the Emperor Justinian sought to capture all of the existing law so that all of the law could be found in one place and be applied uniformly throughout the Empire. By codifying all existing law into one text, the *Corpus Juris Civilis*, Justinian sought to

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<sup>16</sup> See, e.g., Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) (discussing, and then arguing against, the reasons for different deference standards in the tax context, including the severity of penalties on taxpayers who take a position contrary to regulations, the importance and uniqueness of the revenue collection function, the superior expertise required to interpret the Code, and the desire to preserve the longstanding tradition of special deference in the tax context).

<sup>17</sup> *Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44 (2011).

<sup>18</sup> See Kristin E. Hickman, *Administering the Tax System We Have*, 66 DUKE L.J. 1717, 1719 (2014) (explaining that even post-*Mayo*, tax lawyers and administrators continue to label general authority Treasury regulations as “interpretive rules” even when those regulations are legally binding and are actually legislative rules, and claim that such rules don’t require notice-and-comment rulemaking procedures under the APA); see also Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?* 89 TEX. L. REV. 92 (2011) (suggesting deliberate ignorance of the difference between general and agency-specific precedents to avoid having to comply with general administrative law doctrine); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 496 (2013) (citing Public Inspection of Material Relating to Tax Exempt Organizations, T.D. 9581, 77 Fed. Reg. 12,202-01, 12,203 (Feb. 29, 2012), which claims that APA section 553(b) is inapplicable to regulations issued under I.R.C. section 7805 general authority). More recently, in *Altera Corp. & Subs. v. Commissioner*, 145 T.C. No. 3 (July 27, 2015), the Tax Court pointedly held Treasury regulations to the same standards required of other regulations under the Administrative Procedure Act, showing that while the judiciary seems to have abandoned tax exceptionalism, the IRS seems to persist in keeping it on life support. For perceptive commentary on *Altera*, see Kristin E. Hickman, *Tax Court Delivers an APA-Based Smack-down*, TAXPROF BLOG, July 28, 2015 [http://taxprof.typepad.com/taxprof\\_blog/2015/07/hickman-altera-corp-subsv-commissioner-the-taxcourtdelivers-an-apa-based-smackdown.html](http://taxprof.typepad.com/taxprof_blog/2015/07/hickman-altera-corp-subsv-commissioner-the-taxcourtdelivers-an-apa-based-smackdown.html).

<sup>19</sup> CHARLES PHINEAS SHERMAN, ROMAN LAW IN THE MODERN WORLD 114-15 (1917); see CODE JUST. 10.17.2-3 (Honorius & Theodosius 416) (mentioning taxation in passing when compelling all landowners to pay the amount of tax determined in the “delegation” or the tax levy, but giving no explanation as to how this tax would be determined).

ensure that law would be both transparent and uniform.<sup>20</sup> Hence, the *Corpus Juris Civilis* included much of what we would identify as law today: torts, contracts, property, and crimes.<sup>21</sup> But it did not include much on tax, even though taxation had long been in existence.<sup>22</sup> The reason for the exclusion of taxation—for its exceptionalist treatment—is that taxation was then seen as the exclusive province of the Emperor.<sup>23</sup> In other words, the Emperor did not want taxation to be either transparent or uniform. On the contrary: he wanted to retain the power to determine the level and manner of taxation differently for different populations within the empire.<sup>24</sup> By keeping taxation largely out of the codification that became the *Corpus Juris*, he could ensure precisely that. And that motivation—the preservation of power that could be exercised opaquely—illustrates what we believe is the trouble with tax exceptionalism. Tax exceptionalism produces the very opacity that Justinian and other Roman emperors may have wanted; but because of that, it threatens the legitimacy of the tax system and of the agency that administers it.

### B. *Two Types of Exceptionalism*

Although tax exceptionalism may have its roots in a desire by the sovereign to preserve greater prerogative over taxation than other areas of law, we do not believe that its longevity is attributable to any similarly sinister motive.

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<sup>20</sup> *Id.* at 115-16; see Timothy G. Kearley, *The Creation and Transmission of Justinian's Novels*, 102 *LAW LIBR. J.* 377, 378-79 (2010) (describing the process Justinian used to create the code including a first compilation in 529, the issuance of the “fifty decisions” resolving differences among classical jurists and adding new laws in 530 and 531, and the issuance of the second edition integrating the new legislation into the code and superseding the first edition in 534).

<sup>21</sup> *Id.* at 115-16.

<sup>22</sup> Of course, showing that the *Corpus Juris Civilis* did not include much on tax is attempting to show a negative—a difficult if not impossible proposition. But finding secondary sources related to tax provisions in the *Corpus* is exceedingly difficult, which strongly suggests that tax, if included at all, was not included very prominently and certainly was not treated in the way that other fields of law were. A literature search on this subject yielded many analyses of law regarding the social issues of Justinian's day, including treatment of slaves and the status of women, but legal scholars seem to have avoided analyzing the range of tax law compiled during the massive project. For a brief explanation of how the *Corpus* was compiled, see Alan Watson, *Justinian's Corpus Juris Civilis: Oddities of Legal Development and Human Civilization*, 1 *J. COMP. L.* 461 (2006).

<sup>23</sup> See R.I. Frank, *Ammianus on Roman Taxation*, 93 *AM. J. PHIL.* 70 (1972) (describing the origins of taxation in the Roman Republic as a tool of Emperors for raising money for emergencies in wartime meant to be reimbursed later on); see also ARNOLD H. M. JONES, *THE ROMAN ECONOMY* 82-83 (P. A. Brunt ed., 1974) (commenting on the lack of documented figures about the rate of agriculture taxation during most of the Roman Empire and the difficulty of estimating the relationship of the tax to the yield of the land except for a couple registrars from the cities of Antaeopolis and Ravenna which show rents amounting to staggering rates of over 50% of the gross yield of the land).

<sup>24</sup> See Tony Weir, *Two Great Legislators*, 21 *TUL. EUR. & CIV. L.F.* 35, 38 n.17 (2006) (describing Justinian's novellae, which did deal mostly with public and tax law, but which were an unofficial collection of laws enacted after the codification was complete and were not fully enacted until Justinian's death, as evidence of Justinian's “obsession with controlling everything”).

We believe that the stubborn persistence of tax exceptionalism is due to an important but previously unidentified and unexplored feature. Tax exceptionalism has two distinct aspects: a visceral aspect and an objective aspect. The visceral aspect is what we described above—tax is experienced as exceptional—exceptionally complex, intrusive, and pervasive. We do not challenge the reality or the intensity of that experience. But we believe that the experience of difference has been reified, so that tax law is thought to be *really* different—objectively different in kind from other fields of law or, as we said earlier, perhaps not even law at all. It is this second aspect of tax exceptionalism—the objective aspect—which we want to challenge, for its powerful influence on tax scholarship, administration, and adjudication threatens the legitimacy of the tax law and of the agency that administers it.

Our central claim is that when tax is viewed as objectively exceptional—that is, when tax is thought to be fundamentally different in kind from other fields of law—it is deprived of the analytical tools and vocabulary commonplace in other fields of law. That constraint makes tax law appear opaque and the operation of the IRS inscrutable, creating a shroud of mystery and murkiness and contributing to taxpayers' visceral experience of tax exceptionalism, thereby perpetuating the cycle. Unmasking and then abandoning that objective aspect of tax exceptionalism, therefore, has significant implications for tax law, tax administration, and the legitimacy of the IRS. It will allow the IRS to exercise both interpretive authority and enforcement discretion in ways that are open and transparent and that communicate to the public precisely what it is doing and why it is doing it.

### III. Interpretation and Enforcement

Several features of the tax system combine to generate a powerful desire for certainty and predictability: the pervasiveness of taxation; the structure of the income tax system, which invites taxpayers to engage in specific transactions in specific ways to produce a specific tax result; and the need to account to the government on a regular basis. Accordingly, taxpayers' visceral experience of tax exceptionalism includes a longing for rules, for a strictly limited interpretive role for the IRS, and for a rejection of any kind of robust enforcement discretion on the part of that agency. Standards, interpretive authority, and enforcement discretion feel like the enemies of certainty and predictability.

But a conclusion that tax is objectively exceptional need not follow from this visceral experience. That is, just because many, if not most, taxpayers long for certainty and predictability (for understandable reasons), it does not follow that tax law *really* consists almost entirely of rules and that the IRS *really* lacks strong interpretive authority and enforcement discretion. We argue that tax law and tax administration are not objectively exceptional. That is, we believe that tax is law and as such is composed of standards as well as rules, and that the IRS has the same powers and is subject to the same constraints that all administrative and enforcement agencies have.

### A. *Interpretive Authority*

We turn first to the matter of rules and standards and their relationship to the IRS's interpretive authority. As noted above, one of the ways in which tax is thought to be objectively exceptional manifests itself in the assumption that the tax law is composed exclusively of rules. Of course, certain features of the tax law invite that assumption: the existence of a massive, detailed, and complicated codification, the need to reduce tax liability to a specific number, and the importance of treating similarly situated taxpayers similarly, all seem to demand the clarity and consistency that are the hallmark of rules. In addition, the frequency with which taxpayers turn to tax professionals for a prediction of how the tax law will apply makes those professionals long for clear, consistent rules.

Nevertheless, nothing in the theory or policy of taxation demands that the tax law be composed exclusively of rules when other fields of law are acknowledged to be composed of both rules and standards, or, more accurately, of provisions that lie at various points in the rules–standards continuum. If the criminal law can deprive an individual of life and liberty based on provisions that are acknowledged to be standards, why not the tax law? The criminal law has rules, but ‘reasonable doubt’—that is a standard.

We believe that like the criminal law the tax law employs both rules and standards, but the failure to acknowledge that impedes analytical clarity. An example will help to explain.

In prior work we have claimed that the unexamined assumption that the tax law is composed only of rules has led to much handwringing over the definition of income.<sup>25</sup> As all United States tax lawyers know, the statute provides that “except as otherwise provided . . . , gross income is income from whatever source derived . . . ,”<sup>26</sup> and the United States Supreme Court in *Glenshaw Glass*,<sup>27</sup> put meat on those bones by explaining that income consisted of “all undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”<sup>28</sup> Yet, the IRS has asserted that government

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<sup>25</sup> See Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295 (2011) [hereinafter *Defining Income*]. Given the specifically international context of this Conference it is interesting to note that scholars in other countries, writing about other tax systems, have struggled with precisely the questions we addressed in *Defining Income*. Notably, Lotta Bjorklund Larsen, a Swedish scholar, has wrestled with precisely the definitional issue we have, examining the concept of income in the Swedish income tax in *Common Sense and the Swedish Tax Agency: Transactional boundaries that separate taxable and tax-free income*, SCIENCE DIRECT, Aug. 31, 2015, <http://www.sciencedirect.com/science/author/S1045235415000520/20150808T215300Z/1?md5=14efcf2d625e894d91afbc186fd2e84f&cookieChk=y>. We see common ground in what she describes as a ‘common sense’ approach to determining the definition of income and what we describe as interpretation of a standard informed by reference to the values relevant in a field of law, as all standards are.

<sup>26</sup> I.R.C. § 61(a).

<sup>27</sup> *Commissioner v. Glenshaw Glass*, 348 U.S. 426, 431 (1955).

<sup>28</sup> *Id.*

transfer payments are not income,<sup>29</sup> although they are clearly accessions to wealth, clearly realized, and nothing in the statute excludes them. Although this “general welfare exclusion”<sup>30</sup> is eminently sensible as a matter of policy, the technical and theoretical rationale for it has befuddled scholars and commentators: If all accessions are income unless excluded by statute, how can the IRS categorically maintain that such a broad and economically significant category of accessions is not income absent a statutory exclusion? How can the receipt of cash, not as a gift, not be income?

We believe that untangling this conundrum is easy. It only requires acknowledging that tax law, like other fields of law, is composed of both rules and standards and that the definition of income is a standard, constructed by the values that inform that field of law. Treating government transfer payments as income would run counter to the values important in taxation, so of course it should not be done.

Analyzing the definition of income as a standard resolves the conundrum. It allows the IRS to interpret the term so as to reach a sensible result that comports with the values that animate the tax law and explains the law as administered.<sup>31</sup> If the IRS acknowledged that the definition of income is a standard and that it is exercising its interpretive authority in defining income, its actions would be transparent and legitimate. The IRS would not need to create an exclusion in the face of statutory language confining exclusions to the Code, which seems lawless and illegitimate. Interpreting the term “income” as a standard, the application of which results in a conclusion of no income in a particular case, offers transparency and legitimacy.

Transparency would also make the tax law more predictable. If tax advisors, and eventually taxpayers, know that the IRS interprets “income” as a standard informed by tax values that implicate what it is reasonable and administratively feasible to include in the tax base, they can more accurately predict whether the IRS would likely interpret a particular item as constituting income.

For example, with income-as-standard, the kerfuffle over the tax treatment of caught record-breaking baseballs need not have occurred. If income is a standard, it would not follow that because the indisputably valuable baseball

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<sup>29</sup>Examples are payments under the Temporary Aid to Needy Families (TANF) program, medical and hospitalization services provided by Medicaid and Medicare, and public education. See *Defining Income*, *supra* note 25, at 308-09.

<sup>30</sup>For a comprehensive history and description of the general welfare exclusion, see Robert W. Wood & Richard C. Morris, *The General Welfare Exception to Gross Income*, 109 TAX NOTES (TA) 203 (2005); Robert W. Wood, *Updating General Welfare Exception Authorities*, 123 TAX NOTES (TA) 1443 (2009). For a recent application see Notice 2011-14, 2011-14 I.R.B. 544.

<sup>31</sup>For a discussion of these values and their application, see *Defining Income*, see *supra* note 25, at 334-36, 339-48.

is a realized accession, it must be income.<sup>32</sup> The valuable baseball would only be income if interpreting the term income to include the caught baseball would be consistent with the values important in taxation, including administrability as informed by community expectations.<sup>33</sup>

It is the myth of income-as-rule that leads to the conclusion that catching the valuable baseball produces income, and it is the assumption of tax exceptionalism that leads to the myth of tax law as consisting only of rules. If the *Glenshaw Glass* definition of income were not viewed as a rule, the conclusion that catching the valuable baseball produced income would not have been seen by so many tax professionals, inside and outside the IRS, as inevitable.<sup>34</sup> A more nuanced analysis could have been undertaken from the start, and the calls for congressional action and the introduction of legislation could have been averted. The IRS could have simply stated that it was construing the term income so as to not include caught baseballs because including them would be contrary to important tax values, like administrability as informed by community expectations.

Instead, the agency had to scramble to come up with a rationale that would produce the obviously sensible no-income result while not acknowledging that what it was doing was interpreting the *Glenshaw Glass* definition as a standard. The rationale it came up with (an agency theory) plausibly resolved

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<sup>32</sup>As we explained in *Defining Income*:

When contemporary players began to threaten long established home run records [in the late 1990s], it was clear that any ball that broke such a record would become a collector's item worth substantial amounts of money. When the records began to be broken and a fan caught the record-breaking ball, the tax controversy erupted. Practitioners, academics, and former IRS Commissioners all agreed that catching the ball, like finding old currency in a used piano, which was held to be income in a case known to virtually every student of taxation, resulted in the realization of income. But the public and Congressional outcry at such a prospect was fierce . . . Scholarly articles were written and the question was debated, but the IRS's position remains unknown.

*Defining Income*, supra note 25, at 319 (footnotes omitted). The receipt and retention of the baseball is clearly a realization event because it changes the legal relationship of the recipient to the baseball, giving the recipient something she did not have before. *Cottage Savings v. Commissioner*, 499 U.S. 554 (1991); *Helvering v. Bruun*, 309 U.S. 461 (1940); see Lawrence A. Zelenak & Martin J. McMahon, Jr., *Taxing Baseballs and Other Found Property*, 84 TAX NOTES (TA) 1299, 1300 (1999) (reporting former IRS Commissioner Donald Alexander's opinion that a record-breaking baseball is income when caught by a fan, documenting that Alexander's opinion was "universally shared among tax experts," and attributing the "unanimity of expert opinion" to its reliance on the literal language of Treas. Reg. § 1.61-14); see also Joseph M. Dodge, *Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 5 FLA. TAX REV. 685, 691 (2000).

<sup>33</sup>We develop the role of values and conformity with community expectations in promoting administrability in *Defining Income*, and we point out that interpretations that run counter to community expectations are necessarily more difficult to administer and enforce than those that are consistent with such values and expectations. *Defining Income*, supra note 25, at 334-36, 345.

<sup>34</sup>See Zelenak, supra note 31; Dodge, supra note 31.

the question in the initial incident that began the controversy (caught baseball immediately returned to the batter) but left open the question of the treatment of other situations (caught baseballs kept by the fan). It did succeed in quelling the popular uproar, and that made legislation unnecessary.

The reason the IRS has not simply said that caught baseballs are not income remains shrouded in mystery. And the absence of an answer to the question why a valuable caught-and-kept baseball should not be treated as an accession to wealth caused a subsequent IRS Chief Counsel to cover his head with his hands and plead “please don’t ask me that.”<sup>35</sup>

But the drama over caught baseballs could have been avoided completely if the IRS had felt it could state transparently what it seems to us it was clearly doing: interpreting the definition of income as a standard, to be operationalized by the application of relevant values, such as administrability as informed by community expectations.<sup>36</sup> Had it done that, its actions would not have seemed out of touch, and in need of congressional correction. The predictability of the law would have been enhanced, as advisors could have clearly told the fortunate fans who caught valuable baseballs what the tax consequences of the happy event would be—no income until sale. And the legitimacy of the agency’s actions would also have been enhanced.

Similarly, if the definition of income is acknowledged to be a standard, pronouncements like Ann. 2015-22 (assuring taxpayers that the IRS will not treat as income identity protection services provided to victims of identity theft by employers or other organizations),<sup>37</sup> would not be regarded as surprising exercises of administrative largesse. They would be seen just as lawful and legitimate exercises of the administrative function.

The key to this more transparent, predictable view of tax administration is accepting that tax law is just law. This, in turn, requires abandonment of the objective aspect of tax exceptionalism. Stripped of its exceptionalist cloak, tax law becomes just law and the IRS just an administrative agency, subject to the same constraints, but able to exercise the same powers, as other agencies.

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<sup>35</sup>Tom Herman, *The Big Catch Could Have a Big Catch*, WALL ST. J. July 25, 2007, at D1. The Chief Counsel in question was Don Korb. *Id.*

<sup>36</sup>In this case the relevant community expectations include the expectation that going to a baseball game and being fortunate enough to catch the record-breaking baseball is not an appropriate occasion for taxation.

<sup>37</sup>Announcement 2015-22, 2015-35 I.R.B. 288, provides that:

The IRS will not assert that an individual whose personal information may have been compromised in a data breach must include in gross income the value of the identity protection services provided by the organization that experienced the data breach. Additionally, the IRS will not assert that an employer providing identity protection services to employees whose personal information may have been compromised in a data breach of the employer’s (or employer’s agent or service provider’s) recordkeeping system must include the value of the identity protection services in the employees’ gross income and wages. The IRS will also not assert that these amounts must be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to such individuals.

### B. *Enforcement Discretion*

Under the more nuanced analysis that we propose—tax as *Everylaw*—the public view of the administering agency can change, and otherwise obscure agency actions can become clear. Not only could the IRS use openly its interpretive authority, like other administrative agencies, but it could also openly use its enforcement discretion, even if that exercise takes the form of categorical nonenforcement.<sup>38</sup> A recent example illustrates this point.

In Notice 2014-23,<sup>39</sup> the IRS announced that a married individual who could not and did not file a joint return and whose only filing option under the relevant statutory provisions was to file a separate return, would nevertheless be treated as having filed a joint return. Specifically, the Notice provided that an individual would:

satisfy the joint filing requirement of § 36B(c)(1)(C) if the taxpayer files a 2014 tax return using a filing status of married filing separately and the taxpayer [indicates on his or her 2014 income tax return that the taxpayer . . . is living apart from the individual's spouse at the time the taxpayer files his or her tax return [and] . . . is unable to file a joint return because the taxpayer is a victim of domestic abuse . . . .<sup>40</sup>

Hence, pursuant to the Notice, some separate returns would be treated as if they were joint returns. For us, the crucial questions are: why and where does the IRS get the authority to say that a separate return is a joint return? Nowhere in the statute does it say that under some circumstances a separate return will be treated as a joint return, or even that the IRS has the specific authority to treat some separate returns as joint returns under some circumstances.

We do not quarrel with, and indeed we endorse, the policy objective that generated this result. Notice 2014-23 addresses the plight of victims of domestic abuse and abandonment who for a number of reasons cannot and in many cases emphatically should not file a joint return, but nevertheless would not qualify for the Head of Household (HOH) status that allows married individuals to file as not married.<sup>41</sup> Because the statute allows otherwise qualifying married individuals to obtain the health insurance “Premium Tax Credit” only if they file a joint return, a married individual who cannot file jointly as a result of domestic abuse or abandonment would necessarily forfeit the credit. That is a demonstrably unfair result.

Nevertheless, the statute does not contain an explicit safety valve. It has no provision for a waiver of the joint return requirement when such filing is precluded by exigent circumstances. It also has no provision specifically delegating to the Secretary of the Treasury the authority to promulgate regulations specifying circumstances under which a separate return may satisfy the

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<sup>38</sup> For discussion of categorical nonenforcement, see note 50, *infra*, and accompanying text.

<sup>39</sup> 2014-16 I.R.B. 942.

<sup>40</sup> Notice 2014-23, 2014-1 C.B. 942.

<sup>41</sup> I.R.C. § 7703(b).

statutory joint return requirement, even though numerous statutory provisions do provide such broad grants of regulatory authority.<sup>42</sup>

Although the result achieved by the Notice and confirmed and extended by the subsequent proposed and temporary regulation is clearly correct as a matter of policy, there is no theoretical justification for it under traditional tax analysis.<sup>43</sup> That is because the statute contains explicit, detailed provisions setting forth the very limited circumstances when a filing status other than married—HOH—will be available to an individual who is married under state law.<sup>44</sup> Therefore, saying that an individual who does not meet the statutory requirements for HOH status, and who must and does file a separate return, has filed a joint return cannot reasonably be said to be an interpretation. A separate return cannot reasonably be interpreted to be a joint return.

If the analysis were to stop there, the IRS's issuance of Notice 2014-23, however equitable and welcome by taxpayers, would have to be regarded as lawless. Nevertheless, we do not think such a conclusion is warranted. The reason is that when the tax law is not seen as objectively exceptional, but is seen as Everylaw, another lawful and even rather ordinary explanation reveals itself. That explanation is that the IRS was exercising the enforcement discretion that all administrative agencies possess. It was simply deciding not to enforce the law under circumstances that made enforcement unfair or unwarranted. And it was performing an important public function by announcing its decision *ex ante*. That action brings certainty and predictability to the law.

In short, in Notice 2014-23 the IRS was behaving like a District Attorney who announces that he will not prosecute individuals accused of possessing less than 30 grams of marijuana.<sup>45</sup> In such a situation the positive law has

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<sup>42</sup> See, e.g., I.R.C. §§ 336(e), 337(d), 338(b)(3)(A), 338(e)(3), 338(h)(8), (10), (15), and 338(i), all of which confer broad regulatory authority far beyond interpretation of specific statutory language. These provisions are properly read as narrowly focused congressional delegations of interpretive authority to Treasury, enabling it to achieve desirable results through the promulgation of specific interpretive regulations. As our discussion of Notice 2014-23 indicates, Treasury can, in the absence of such interpretive authority, achieve similar desirable results through the proper exercise of its enforcement discretion. This in turn illustrates the often complex relationship between an agency's interpretive authority and its enforcement discretion. We will develop this relationship in future work.

<sup>43</sup> T.D. 9683, 2014-33 I.R.B. 330.

<sup>44</sup> I.R.C. § 7703(b).

<sup>45</sup> See, e.g., Teresa Masterson, *Don't Flush That Dime Bag: DA Says It's (a) Fine*, NBC, Apr. 5, 2010, <http://www.nbcphiladelphia.com/news/local/-Dont-Flush-That-Dime-Bag-DA-Says-Its-a-Fine-89927182.html> (reporting on the announcement by Philadelphia District Attorney Seth Williams that individuals caught with up to 30 grams of marijuana will not be charged with a crime but will be treated as having committed a summary offence resulting in the imposition of a fine or community service). In this case, the District Attorney's exercise of prosecutorial discretion eventually led to the decriminalization of possession of up to 30 grams of marijuana when the Philadelphia City Council passed an ordinance amending the City Code, in 2014. See PHILA. CITY CODE § 10-2100 (2014), available at <https://phila.legistar.com/LegislationDetail.aspx?ID=1744588&GUID=F635B36F-4929-4925-A3A0-55E9EE5B B1C4&Options=ID%7CText%7C&Search=marijuana>.

not changed and the prosecutor is not purporting to interpret that law to no longer forbid possession of marijuana.<sup>46</sup> He is simply exercising prosecutorial discretion. Although the wisdom of that exercise can reasonably be debated, the very possibility of open debate lends it legitimacy. The announcement makes the decision transparent and, thus, subject to the democratic process.

Our claim is that the IRS should behave likewise, but it can only do so by embracing its status as an administrative agency, no more or less powerful than any other. Abandoning the objective aspect of tax exceptionalism allows that, and the resulting benefits are transparency and legitimacy. When the agency can articulate its motives clearly, those motives can be understood, debated, and accepted or rejected. Moreover, if tax advisors and other professionals can understand and explain the agency's actions to the taxpayers affected by them, those taxpayers can have increased confidence in the agency itself and in the legitimacy of its actions. Respect for the system and increased compliance should result.<sup>47</sup>

Put another way, taxpayer rights should include the right to be informed not only about the position the IRS has taken, but also why it has taken it. Abandoning the objective aspect of tax exceptionalism will give the IRS the freedom it needs to exercise the powers it has, and to bring that exercise to light, where full debate can occur.

We are not suggesting that the IRS relinquish its right to keep necessary secrets, such as the DIF score and other criteria for selecting returns for audit.<sup>48</sup> Nor are we suggesting that the IRS should not be permitted privacy in its deliberations. What we are saying is that when the IRS exercises its interpretive authority or its enforcement discretion, it is exercising its legitimate

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<sup>46</sup>In the case of the announcement by the Philadelphia District Attorney discussed in *supra* note 45, the reaction of the police, which refused to stop making arrests because the criminal status of the action had not changed, illustrates this vividly. See Masterson, *supra* note 45.

<sup>47</sup>This is where our perspective differs from that of many other advocates for taxpayer rights: our concern is not limited to the perceptions of taxpayers, but extends to those who interact with the tax system as tax scholars, judges, lawyers, and other professionals. As described earlier, these individuals mediate taxpayers' understanding of the tax system and IRS action. How those actors view the tax system therefore plays a crucial role in how taxpayers experience that system; whether in the public or private sector, these actors occupy the space between congressional enactments and the taxpayer's experience of the tax system. They are the priests who administer religion to the masses, not only through direct advice but also through commentary in the media, and how those priests view and portray the religion matters.

<sup>48</sup>The DIF score is the "discriminant index function" which the IRS develops and uses for selecting some returns for audit. Internal Revenue Manual § 4.1.3.2, (Aug. 10, 2012), <http://www.irs.gov/irm>.

powers as an agency and should, accordingly, be forthright about what it is doing.<sup>49</sup>

We recognize that we are treading on very controversial ground here. Recent presidential announcements of non-prosecution and other high-profile executive enforcement decisions have brought the subject of “categorical non-enforcement” to the forefront of both the public and academic agenda, and a rich literature is developing around it.<sup>50</sup> Nevertheless, bringing the actions of the IRS within that larger discussion is precisely our point. There is no question that the IRS exercises enforcement discretion, and sometimes it does so forthrightly, but those instances are rare.

For example, in Rev. Proc. 2015-57, the IRS announced that it would “not assert that certain taxpayers, whose Federal student loans are discharged under [two] Department of Education . . . discharge process[es], must recognize gross income as a result of [those] discharge process” or that such taxpayers would owe additional taxes as a result of previously having claimed any of a variety of education credits.<sup>51</sup> Here, the IRS did precisely what we advocate it should do routinely: it explained the reason for its decision to announce its categorical nonenforcement of a provision. The IRS first noted that many taxpayers would be able to exclude the discharges in question under one of a variety of statutory provisions. Nevertheless, it excused all taxpayers from having to determine the applicability of those provisions by explaining that:

determining whether one or more of these exceptions is available to each affected borrower would require a fact intensive analysis of the particular borrower’s situation to determine the extent to which the discharged amount is eligible for exclusion under each of the potentially available exceptions. The Treasury Department and the IRS are concerned that such an analysis would impose a compliance burden on taxpayers, as well as an administrative burden on the IRS, that is excessive in relation to the amount of taxable income that would result. Accordingly, the IRS will not assert that a taxpayer within the scope of this revenue procedure recognizes gross income as a result of the Defense to Repayment discharge process.<sup>52</sup>

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<sup>49</sup>We recognize that the concepts of interpretive authority and enforcement discretion are not necessarily binary or clearly distinct, but are often ends of a spectrum. See Alice G. Abreu & Richard K. Greenstein, *The Rule of Law as the Law of Standards: Interpreting the Internal Revenue Code*, 64 DUKE L. J. ONLINE 53, 81-86 (2015), available at <http://dlj.law.duke.edu/2015/01/the-rule-of-law-as-a-law-of-standards-interpreting-the-internal-revenue-code/> [hereinafter *Law of Standards*]. Nevertheless, we believe that at a minimum, in those cases in which the distinction can be made, the IRS should be open and forthright about making it.

<sup>50</sup>See, e.g., Leigh Osofsky, *The Case for Categorical Non-Enforcement*, 69 TAX L. REV. 489 (forthcoming 2016) [hereinafter *Categorical Non-Enforcement*]. These include the President’s action with respect to immigration (DACA, the Deferred Action for Childhood Arrivals program, and DAPA, the Deferred Action for Parental Arrivals program) the Department of Justice’s decision to let states who have legalized marijuana for medicinal or recreational purposes enforce their laws without interference from Federal law, which prohibits all use of marijuana, and the decision to defer implementation of certain portions of the Affordable Care Act. *Id.*

<sup>51</sup>Rev. Proc. 2015-57, 2015-51 I.R.B. 863.

<sup>52</sup>*Id.*

The precision and clarity of that explanation is a vibrant example of the kind of transparent exercise of enforcement discretion that we believe essential to the legitimacy of the agency and its actions. Our criticism is that the agency does not speak so forthrightly often enough.

Another example will illustrate this point. Most tax lawyers recall many of the events surrounding the collapse of the financial markets seven years ago, in Fall 2008, when some institutions were deemed to be “too big to fail.” Among those was Wachovia Bank.<sup>53</sup> It turned out that Wells Fargo was willing to acquire Wachovia and thus save it from collapse or the need for a government-funded rescue, but as is usually true, willingness to acquire depended on the price of acquisition.<sup>54</sup> In this case the problem was that section 382, which was enacted to provide clear rules limiting the use of pre-acquisition net operating losses subsequent to an acquisition, would have prevented Wells Fargo from using Wachovia’s very substantial losses after the acquisition. If Wells Fargo could not use the Wachovia losses to offset future tax liabilities, it might not have been willing to buy Wachovia, or it might not have been willing to offer enough to make the transaction possible. This is because use of the losses meant that a portion of the purchase price would be recovered through lower future tax payments.<sup>55</sup> However, section 382, which applies to “corporations,” would have prevented that, since banks are corporations and nothing in the statutory language exempts them from the operation of section 382.

Then the IRS issued Notice 2008-83.<sup>56</sup> In that Notice the IRS proclaimed, without any explanatory rationale, that it was “studying” the application of section 382 to banks and that until further notice, section 382 would not apply to banks. Commentators reacted swiftly and negatively, pointing out that nothing in the text or legislative history of section 382 even remotely suggested that the provision should not apply to corporations that happened

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<sup>53</sup> See *Symposium, New Paradigms for Financial Regulation in the United States and the European Union: Co-Sponsored by Brooklyn Law School Dennis J. Block Center for the Study of International Business Law: Article: Reforming Financial Regulation to Address the Too-Big-To-Fail Problem*, 35 BROOKLYN J. INT’L L. 707, 746 (2010) (discussing Wachovia’s status as the fourth-largest U.S. bank at the beginning of the financial crisis, as well as its rapid growth, leading to the bank’s subsequent collapse in 2008); Sunil Sheno, *Undoing Undue Favors: Providing Competitors with Standing to Challenge Favorable IRS Actions*, 43 U. MICH. J.L. REFORM 531, 536 (2010) (noting Wachovia’s \$74 million mortgage-related losses at the time Wells Fargo acquired Wachovia in 2008).

<sup>54</sup> See Sheno, *supra* note 53, at 537 (2010) (noting that Wells Fargo’s extraordinary tax savings, by way of Notice 2008-83, essentially paid for its acquisition of Wachovia).

<sup>55</sup> *Id.*

<sup>56</sup> Notice 2008-83, 2008-2 C.B. 195.

to be banks.<sup>57</sup> Of course, Wells Fargo and Wachovia likely rejoiced, for the acquisition proceeded, but the issuance of the Notice, and a similar one that followed in 2010 regarding the sale of the Government's stake in General Motors,<sup>58</sup> left distrust of the agency's action in its wake. Although Congress stepped in to undo the effect of the Notice, at least prospectively,<sup>59</sup> the IRS action hardly looked legitimate.

Now consider an alternative narrative, one in which instead of purporting to be "studying" the interpretation of section 382, the IRS felt free to acknowledge what many, including us, believe it was doing: exercising enforcement authority to suspend the application of section 382 because exigent circumstances—the threat of wholesale economic collapse—required it. In other words, imagine what might have happened if the IRS had been able to behave openly, like any other enforcement agency which has the ability to exercise enforcement discretion. We believe that if the IRS had acted with such candor and forthrightness, saying precisely what it was doing and why, it would not have been subject to the type of criticism that followed the issuance of the Notice. While such an action would not have been uncontroversial, it would have been transparent. The real question (whether extraordinary financial conditions not anticipated by Congress when it enacted the

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<sup>57</sup> See Lee A. Sheppard, *Technical Objections to the Bailout, Part 2*, 121 TAX NOTES (TA) 359 (Oct. 27, 2008) (claiming that issuance of Notice 2008-83 was an illegal use of IRS power to interpret the law and that "section 382 is not a well-drafted provision . . . but it is the law, and the Constitution says Congress makes the law"); see also *Built-In Loss Limit Rules: Didn't Congress Get the Memo?*, 121 TAX NOTES (TA) 627 (Nov. 3, 2008) (describing the decision to not inform Congress about Notice 2008-83 and abide by the congressional Review Act as a "blindside"); Paul Caron, *Tax Lawyers Decry Financial Bailout NOL Tax Break for Banks*, TAXPROF BLOG, Nov. 10, 2008, [http://taxprof.typepad.com/taxprof\\_blog/2008/11/tax-lawyers-decry-financial-bailout-nol-tax-break-for-banks.html](http://taxprof.typepad.com/taxprof_blog/2008/11/tax-lawyers-decry-financial-bailout-nol-tax-break-for-banks.html) (quoting George K. Yin, the former Chief of Staff of the Joint Committee on Taxation, on the issuance of Notice 2008-83, "Did the Treasury Department have the authority to do this? I think almost every tax expert would agree the answer is no."); Citizens for Tax Justice, *New IRS Ruling on Bank Acquisitions Imposes Major Federal Corporate Tax Cuts—And Will Hurt States Too*, CITIZENS FOR TAX JUSTICE, Nov. 7, 2008, <http://www.ctj.org/pdf/irsruling20081106.pdf> (claiming by issuing Notice 2008-83 the IRS "usurped the legislative role of Congressional tax writers" and the IRS had no power to make such substantive changes to the law); Sheno, *supra* note 53 (arguing there is "no textual basis" for providing an exception to section 382 for banks and that the notice was inconsistent with the text of section 382); Lawrence Zelenak, *Can Obama's IRS Retroactively Revoke Massive Bank Giveaway?*, 122 TAX NOTES (TA) 889 (Feb. 16, 2009); Victor Fleischer, *NOLs and the Rule of Law*, TAXPROF BLOG, Nov. 23, 2008, [http://taxprof.typepad.com/taxprof\\_blog/2008/11/nols-and-the-rule-of-law.html](http://taxprof.typepad.com/taxprof_blog/2008/11/nols-and-the-rule-of-law.html) (suggesting that it is unlikely that "Congress delegated lawmaking authority to the Treasury to make [a] new exception to the statutory language").

<sup>58</sup> Notice 2010-2, 2010-1 C.B. 25. We believe that Notice 2010-2 implicates somewhat different considerations than Notice 2008-83; we discuss these in *Law of Standards*, Abreu & Greenstein, *supra* note 49, at n.144.

<sup>59</sup> American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111-5, § 1261(a), 123 Stat. 115 (stating that the IRS lacked authority to exempt "particular industries or classes of taxpayers" from section 382 and that Notice 2008-83 was "inconsistent with the congressional intent" with regard to section 382).

section 382 limitations, justified suspension of those limitations in the case of an acquisition of a failing bank by another bank) could have been debated openly. The position taken in the Notice could then have been limited to the duration of the financial crisis, and the congressional action against the IRS action may well have been averted. Abandoning objective tax exceptionalism and acknowledging the IRS to be an agency like any other would permit such openness and the attendant transparency and legitimacy gains.

#### IV. Conclusion

We are not unmindful of the magnitude of the change we are calling for. The IRS has long thought of itself and of the tax law as exceptional, and we know that changing longstanding habits of thought and action will require a herculean effort.<sup>60</sup> But we think that the transparency and legitimacy gains are well worth that effort. Although the job of a tax collector is hardly likely to allow the IRS to win a ‘most popular Federal agency award,’ the suspicion and distrust with which the IRS is viewed in some quarters today pose a grave threat to the integrity of the tax system.<sup>61</sup> That alone justifies consideration of a shift in behavior. We propose that abandoning the objective aspect of tax exceptionalism be an integral part of that shift.

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<sup>60</sup> See *supra* note 18 and accompanying text.

<sup>61</sup> The recent proliferation of academic papers that provide mechanism for “saving the IRS” is indicative of the increasing severity of the problem. See, e.g., Donald B. Tobin, *The Internal Revenue Service and a Crisis of Confidence: A New Regulatory Approach for a New Era*, 16 FLA. TAX REV. 429 (2014); George K. Yin, *Saving the IRS*, 100 VA L. REV. ONLINE 22 (2014), available at [http://www.virginialawreview.org/sites/virginialawreview.org/files/Yin\\_final.pdf](http://www.virginialawreview.org/sites/virginialawreview.org/files/Yin_final.pdf); Ellen P. Aprill, *Reforming the Charitable Contribution Substantiation Rules*, 14 FLA. TAX REV. 275 (2013); Ellen P. Aprill, *Fixing the IRS: Clarify the Rules on Political Involvement*, CHRON. OF PHILANTHROPY, June 3, 2013, <http://philanthropy.com/article/article-content/139583> (suggesting that hard line rules on the prohibition of partisan politics for exempt organizations may help fix the IRS); Cindy M. Lott, *Fixing the IRS: Provide More Money for Enforcement*, CHRON. OF PHILANTHROPY, June 5, 2013, <https://philanthropy.com/article/Fixing-the-IRS-Provide-More/154757>; Lloyd Hitoshi Mayer, *‘The Better Part of Valour Is Discretion’: Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?*, COLUM. J. TAX L. (forthcoming 2016, available at <http://ssrn.com/abstract=2658325>). Despite the difficulty of imagining the IRS as anything other than the agency everyone loves to hate, it is worth observing that the mere fact that the agency’s chief task is the administration of the tax system need not doom it to unpopularity. As an example, Sweden has one of the highest tax burdens in the world, but its tax agency is one of the most popular in the country. As Lotta Bjurklund Larsen has observed:

Known as one of the most highly taxed populations in the world, Swedes contribute a large share of their wages as tax. How the Agency collects a considerable amount of money from each taxpayer (Sweden has one of the highest tax levels in the world) while being a governmental institution that Swedes currently in the highest esteem of all the nation’s government agencies (Ekonomistyrningsverket, 2012) makes the Agency an interesting object of study. The Agency is aware of its vulnerable position and works continuously with legitimacy questions. (Footnotes omitted).

Larsen, *supra* note 25 at 78.