ADMIN LAW AND THE CRISIS OF TAX ADMINISTRATION*

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The IRS is struggling. Phone calls from confused taxpayers ring unanswered, paper returns pile up, aggressive tax filers are confident they are unlikely to be audited. Congress piles new responsibilities on the agency while (so far) maintaining its budget at close to modern lows.

This is a strange time, then, to launch perhaps the largest-ever experiment in tax administration. Yet that is what some courts and executive decisions, encouraged by some tax law scholarship, have begun. In at least four distinct ways, the IRS and its regulatory partner, the U.S. Treasury, are now facing greater procedural obstacles to their efforts to guide and constrain the taxpaying public. Recent judicial decisions would suggest the IRS must reissue existing administrative guidance, going back for an uncertain period, but at least six years, using costly and time-consuming "notice and comment" procedures. A 2021 Supreme Court decision narrowly applied the 100-year-old Anti-Injunction Act to allow litigants for the first time to challenge IRS anti-tax shelter guidance on a pre-enforcement basis in court. And in 2018 the White House and Treasury agreed that many more tax rules would be subject to Office of Management and Budget cost-benefit analysis review, though that policy was recently reversed.

Supporters of these changes argue that they simply are bringing tax administration more in line with the administrative law governing other agencies, but these claims overlook key ways in which tax administration differs from other rulemaking. As other scholars have observed, tax administration must thread the impossible needle of communicating rules that touch every aspect of modern life to an audience of hundreds of millions of individual taxpayers,

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some of whom do not even speak English, let alone have the capacity to parse legislative text.

Our contribution is to identify and explore the implications of another key difference: the systematic "tilt" of administrative law against revenue. IRS and Treasury effectively cannot be challenged in court for an action or decision that favors taxpayers, causing the government to lose money. The agencies' decisions to eschew enforcement against particular taxpayers are invisible to the public. These simple facts have profound implications, particularly when combined with the increasing obstacles to the agencies' action we have just mentioned. As action becomes more costly and more time-consuming, the option to do nothing becomes ever more appealing. We review literature suggesting the power this asymmetric effect has had on tax rulemaking. We then examine how the tilt should affect the way that administrative law is applied to tax rulemaking.

INTRODUCTION

"The era of big government is here."[1] The tax system to support it is not.[2] By most objective measures, the modern Internal Revenue Service ("IRS") is struggling to do its job. Are you a millionaire? Congratulations, you were 80 percent less likely to be audited in 2018 than in 2011.[3] Applicants for tax-exempt status are *ten times* less likely to have their submission rejected than at the peak of scrutiny a decade ago.[4] The IRS increasingly has shifted its activity to automated "correspondence" audits, the plurality of them aimed at low-income households, because those are "the most efficient use of IRS' limited examination resources."[5] At the same time, the IRS has refused to pursue projects that would make its task easier, such as a truly effective "free file"

1. David Brooks, *How the Democrats Won the War of Ideas*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/opinion/democrats-republicans-big-government.html [https://perma.cc/DM6H-JHJL (dark archive)]. Brooks cites a New York Times/Siena poll that revealed 66 percent support for both a public option in health insurance and a Biden $2 trillion investment in renewable energy and energy-efficient infrastructure, and 72 percent support for another $2 trillion in COVID-19 relief to individuals and sub-national governments. *Id.* While some of these fiscal items have been scaled back, others have been added, including commitments to assist Ukraine in defending against Russia's illegal invasion and annexations of Ukrainian territory. *See, e.g.*, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Pub. L. No. 117-180, § 157(c)(2), 136 Stat. 2114, 2126–27 (2022) (codified in scattered sections of 21, 38, 42, and 47 U.S.C.).

2. FY 2021 federal receipts exceeded $4 trillion and the deficit was $2.8 trillion, down from a deficit of $3.1 trillion in the first pandemic year 2020. Tbl. 1.1: Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2028, rows 121 and 122 U.S. OFF. OF MGMT. & BUDGET, *Historical Tables*, WHITE HOUSE, https://www.whitehouse.gov/omb/budget/historical-tables/ [https://perma.cc/LFG7-EFSY (staff-uploaded archive)] (click "Table 1.1.—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2028"). As we write, the total federal debt held by the public is about $24 trillion. U.S. TREASURY, *Debt to the Penny*, FISCAL DATA, https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny [https://perma.cc/CQ3X-GVXZ]. This figure includes amounts held by the Federal Reserve, although arguably those amounts should not be included. *See* Brian Galle & Yair Listokin, *Monetary Finance*, 75 TAX L. REV. 137, 172–73 (2022).

3. Paul Kiel, *It's Getting Worse: The IRS Now Audits Poor Americans at About the Same Rate as the Top 1%*, PROPUBLICA (May 30, 2019, 10:16 AM), https://www.propublica.org/article/irs-now-audits-poor-americans-at-about-the-same-rate-as-the-top-1-percent [https://perma.cc/ZNZ3-VVG8 (staff-uploaded archive)].

4. *For Profit College Conversions: Examining Ways to Improve Accountability and Prevent Fraud*: *Hearing Before the H. Comm. on Educ. & Lab.*, 117th Cong. 39–40 (2021) (prepared statement of Brian Galle, Professor of Law, Georgetown University Law Center) (citing *SOI Tax Stats - Closures of Applications for Tax-Exempt Status - IRS Data Book Table 12*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-closures-of-applications-for-tax-exempt-status-irs-data-book-table-12 [https://perma.cc/89C6-PTDR]); *see* David Farenthold, Troy Closson & Julie Tate, *76 Fake Charities Shared a Mailbox. The IRS Approved Them All.*, N.Y. TIMES (July 3, 2022), https://www.nytimes.com/2022/07/03/us/politics/irs-fake-charities.html [https://perma.cc/D7BU-A7BJ (dark archive)] (noting IRS denies "only one application in 2,400").

5. Kiel, *supra* note 3.

program that would allow most taxpayers to file electronically.[6] Instead, the existing program is, in good measure, a grift that enriches software companies.[7]

We would therefore refine David Brooks's big government epiphany. Though the federal budget has grown recently[8]—and many other important government efforts, such as health insurance subsidies for women and individuals with serious medical conditions, sit off-budget and slightly out of sight[9]—well-funded efforts continue to slowly undermine the nation's capacity to fund itself, with distributive consequences that favor the rich over the poor.

Beginning with the Reagan administration, what had been a bipartisan commitment to maintain the tax system, to support taxpayer morale through fair rules and fair enforcement, and to fund needed IRS infrastructure, has eroded.[10] Many current IRS struggles are the product of congressionally-

6. *See* Justin Elliott & Paul Kiel, *Inside TurboTax's 20-Year Fight to Stop Americans from Filing Their Taxes for Free*, PROPUBLICA (Oct. 17, 2019, 5:00 AM), https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free [https://perma.cc/LCP2-8QBX (staff-uploaded archive)]. For a description of how an effective system could operate, see Joseph Bankman, *Using Technology To Simplify Individual Tax Filing*, 61 NAT'L TAX J. 773, 774–83 (2008). Encouragingly, the Inflation Reduction Act ("IRA") directed the IRS to report to Congress on a potential IRS-run free direct e-file tax return system. Inflation Reduction Act, Pub. L. No. 117-169, § 10301(1)(B), 136 Stat. 1818, 1832 (2022) (to be codified in scattered sections of 26 and 42 U.S.C.). That report showed taxpayer support for a free direct e-file system and reviewed the costs and benefits of such a system. INTERNAL REVENUE SERV., U.S. DEPT. TREASURY, IRS REPORT TO CONGRESS: INFLATION REDUCTION ACT § 10301(1)(B) IRS-RUN DIRECT E-FILE TAX RETURN SYSTEM 7 (2023), https://www.irs.gov/pub/irs-pdf/p5788.pdf [https://perma.cc/97RP-6ZG8]. Treasury Secretary Yellen has asked the IRS to undertake a pilot to gather additional data. Letter from IRS Comm'r. Daniel I. Werfel to Treas. Sec'y Janet L. Yellen (May 16, 2023), https://www.irs.gov/pub/newsroom/letter-to-secretary-yellen-direct-file.pdf [https://perma.cc/MYP4-6WYJ].

7. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., COMPLEXITY AND INSUFFICIENT OVERSIGHT OF THE FREE FILE PROGRAM RESULT IN LOW TAXPAYER PARTICIPATION 4–5 (2020), https://www.treasury.gov/tigta/auditreports/2020reports/202040009fr.pdf [https://perma.cc/6LAH-W7X4] (finding that existing free file program is "fraught with complexity and confusion" that results in more than 40 percent of users paying fees for their "free" filing); Dennis J. Ventry Jr., *The Fix Was In: Mitre's 'Independent' Review of Free File*, 166 TAX NOTES FED. 875, 880–85 (2020). The Inflation Reduction Act includes $15 million for the IRS to study options to provide a free filing alternative to taxpayers. Justin Elliott & Paul Kiel, *Inflation Reduction Act Will Require IRS To Study Free File Options*, PROPUBLICA (Aug. 16, 2022, 12:45 PM), https://www.propublica.org/article/files-taxes-free-inflation-reduction-act [https://perma.cc/5CPA-EWLE].

8. *Federal Net Outlays as Percent of Gross Domestic Product*, FRED ECON. DATA, https://fred.stlouisfed.org/series/FYONGDA188S [https://perma.cc/8SV5-RP63] (last updated Mar. 30, 2023).

9. *See* John Brooks, Brian Galle & Brendan Maher, *Cross-Subsidies: Government's Hidden Pocketbook*, 106 GEO. L.J. 1229, 1243–47, 1275–79 (2018).

10. *See* Paul Kiel & Jesse Eisinger, *How the IRS Was Gutted*, PROPUBLICA (Dec. 11, 2018, 5:00 AM), https://www.propublica.org/article/how-the-irs-was-gutted [https://perma.cc/YB7K-3G8J (staff-uploaded archive)]; *see also* JANE MAYER, DARK MONEY 64–65, 90–91, 290 (Doubleday 2016) (describing American history of efforts to weaken IRS enforcement capacity). *See generally* Sutirtha Bagchi, *The Political Economy of Tax Enforcement: A Look at the Internal Revenue Service from 1980 to 2016*, 36 J. PUB. POL'Y 335 (2016) (examining extent of political influence over IRS budget).

imposed budget austerity, not substantive law.[11] Multiple decades of anti-tax rhetoric in pursuit of small government have taken a toll on commitment to funding the IRS so that the IRS has not shared in the growth of expenditures.[12] As Natasha Sarin and Larry Summers have calculated, the IRS's budget fell by 16 percent in inflation-adjusted dollars between 2011 and 2019, while over the same time period its workload expanded, so that the actual amount of enforcement resources per potential dollar of revenue fell by 35 percent.[13] The "starve the beast" metaphor has been applied disproportionately to the IRS.[14] The recent passage of a much-needed $80 billion in funding over the next decade will largely halt attrition, but is not expected to restore much of the IRS's lost capacity.[15]

This has occurred as demands on the IRS have expanded. Not only must the IRS raise the revenue necessary to support public functions performed by the federal government, but it also serves as administrator (alone or in cooperation with other agencies) of tax expenditures designed to achieve

11. *See* CONG. BUDGET OFF., TRENDS IN THE INTERNAL REVENUE SERVICE'S FUNDING AND ENFORCEMENT 1 (2020), https://www.cbo.gov/publication/56467#_idTextAnchor037 [https://perma.cc/UG4Y-R2DD]; NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 1–2 (2021) (noting that individual income tax returns increased by 19 percent while the IRS's budget declined by 20 percent in real terms over the period 2010–2020); Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 82–83 (2015) ("[T]he IRS faces an enforcement dilemma of Congress' own making.").

12. *See* Kiel & Eisinger, *supra* note 10; Helaine Olen, *Frustrated with the IRS? Call a Republican*, WASH. POST (Apr. 15, 2022, 8:00 AM), https://www.washingtonpost.com/opinions/2022/04/15/frustrated-with-irs-call-republican/ [https://perma.cc/C27D-CQUH (dark archive)].

13. Natasha Sarin & Lawrence H. Summers, *Understanding the Revenue Potential of Tax Compliance Investment* tbl.1-a (Nat'l Bureau of Econ. Rsch., Working Paper No. 27571, 2020).

14. Some small government anti-tax advocates have been less than pristine in their commitment to their own narrative. *See generally* Stephen E. Shay, *Turning to the Government (for PPP Money) in Time of Need*, 168 TAX NOTES FED. 841 (2020) (describing how Americans for Tax Reform Foundation received a Paycheck Protection Program ("PPP") loan that funded parts of salary paid to Grover Norquist and other employees of both Americans for Tax Reform and the Americans for Tax Reform Foundation). The Foundation loan, for $290,800, was approved with a 100 percent Small Business Administration guaranty on April 28, 2020, and repaid on November 11, 2021. *PPP FOIA*, U.S. SMALL BUS. ADMIN., https://data.sba.gov/dataset/ppp-foia [https://perma.cc/78M7-4VSN (staff-uploaded archive)] (last updated Apr. 5, 2023) (click "Explore" then "Download" next to "public_150k_plus_YYMMDD.csv").

15. Naomi Jagoda, *IRS Eyes Hurdles, Prepares To Spend $80 Billion Funding Increase*, BLOOMBERG NEWS (Aug. 11, 2022, 4:45 AM), https://news.bloombergtax.com/daily-tax-report/irs-eyes-hurdles-prepares-to-spend-80-billion-funding-increase [https://perma.cc/CG33-KBF4 (staff-uploaded, dark archive)]. The additional funding is under pressure in the 118th Congress. One of the first orders of business for the GOP-controlled House in the 118th Congress was to pass H.R. 23, the Family and Small Business Taxpayer Protection Act, a bill that rescinds roughly $71 billion appropriated to the IRS in the Inflation Reduction Act. H.R. 23, 118th Cong., § 2 (2023). Already, a side agreement between the Biden Administration and the House GOP not included in the legislative text of the debt-limit compromise would rescind $20 billion of the $80 billion IRS funding passed in the IRA in FY 2024 and FY 2025. *Wrinkles and Curveballs in the Debt Ceiling Bill*, POLITICO (May 28, 2023, 11:09 PM), https://www.politico.com/news/2023/05/28/debt-ceiling-bill-curveballs-00099146 [https://perma.cc/T2JY-Z9ZB].

significant regulatory objectives, such as supporting and incentivizing U.S. private pension systems and administering critically important parts of the nation's social safety net, including the earned income tax credit. And this was before the additional demands placed on tax system services by bipartisan responses to the COVID-19 pandemic.[16]

Clearly, investment in the IRS in relation to the demands placed on it is an important part of the puzzle regarding the IRS's inability to keep up. Others have addressed approaches to improve IRS enforcement.[17] Our principal focus in this article is on the legal and administrative law framework governing the IRS and its effect on the IRS's role in protecting and realizing the revenue collections authorized by Congress. We consider how procedural and administrative law surrounding the substantive tax law creates a structural bias for the IRS to forego actions that would preserve or increase revenue.

Over roughly the same time as IRS budget cuts were deepening, the law and procedure of tax rulemaking evolved to make tax administration slower, costlier, and generally more difficult. Beginning with a somewhat innocuous-seeming 2011 Supreme Court decision, *Mayo Foundation for Med. Educ. & Res. v. United States*,[18] which applied Administrative Procedure Act ("APA") procedural formalisms to a range of guidance under delegated authority, it has become more and more difficult for the IRS and its regulatory partner, the Treasury Department, to adopt so-called "subregulatory" guidance.[19] These are pronouncements, such as "revenue rulings" and "notices," that do not share all the formal features of traditional rulemaking, but which the IRS has long used to communicate its legal views to the public.[20] *Mayo* likely reduces the degree of deference courts will grant these forms of guidance.[21] But even more

16. *See, e.g.*, Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 4003, 134 Stat. 281, 470–76 (2020) (codified as amended at 15 U.S.C. § 9042); *cf.* Brian Galle, *The American Rescue Plan and the Future of the Safety Net*, 131 YALE L.J.F. 561, 569–71 (2021) (describing challenges the IRS faced in administering pandemic aid relief).

17. Fred Goldberg & Charles Rossotti, *Make Tax System Fairer, Easier for Taxpayers While Collecting $1.4 Trillion Owed But Not Paid*, BLOOMBERG TAX (Feb. 17, 2021, 4:00 AM), https://news.bloombergtax.com/daily-tax-report/make-tax-system-fairer-easier-for-taxpayers-while-collecting-1-4-trillion-owed-but-not-paid [https://perma.cc/VRH6-62TC (dark archive)]; Charles O. Rossotti, *Recover $1.6 Trillion*, *Modernize Tax Compliance and Assistance*, 166 TAX NOTES FED. 1411, 1411–12 (2020). *See generally* Sarin & Summers, *supra* note 13 (discussing the relationship between investment in the IRS and its revenue-generating abilities).

18. Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44, 57 (2011) (declining to apply the tax-specific *National Muffler* standard and instead applying *Chevron* deference to agency rule interpreting ambiguous tax statute). For obvious reasons, the case name has also been a boon to law professors with an appetite for food puns, a group to which one of us shamefully admits he belongs.

19. *See infra* Section I.A. For an introduction to subregulatory guidance, see Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468–69 (1992) [hereinafter Strauss, *The Rulemaking Continuum*].

20. Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 TAX LAW. 245, 252–64 (2020) [hereinafter McMahon, *Classifying*].

21. *See infra* Part I.B.

problematically, it seemingly has invited lower courts to strike down guidance for failures to follow the costly and time-consuming procedures courts demand of more formal rulemaking without regard to whether the procedural defect has substantive consequences or amounts to a harmless error.[22] These judicially-erected procedural barriers provide opportunities for well-resourced private litigants to defeat or delay new rules.[23]

In 2021, the Supreme Court added another barrier, deciding in *CIC Services, LLC v. Internal Revenue Service*[24] that some forms of tax guidance can now be challenged before even going into effect.[25] While pre-enforcement challenges are common in administrative law outside of tax, since 1867 the Anti-Injunction Act has compelled taxpayers to wait until after the IRS has brought an enforcement action against them in order to challenge its legal positions or the procedures by which it reached them. [26] CIC and its supporters convinced the Court to create a new exception for challenges to IRS-imposed reporting requirements. As we will explain, the decision will predictably sap incentives for tax agencies to adopt rules that may draw taxpayer objection, encourage agency-granted elections and other taxpayer favorable rules, consume litigation resources, and slow the flow of government revenues. The scope and meaning of the Court's new exception will be key battlefields for the tax agencies and their litigation opponents in the years ahead.

On top of all these impediments, in 2018 the Treasury Department agreed with the White House's Office of Management and Budget ("OMB") decision to remove a key exception from additional OMB review previously enjoyed by tax regulation.[27] Whereas most major rules issued by other agencies are subject to cost-benefit analysis by OMB experts, only a small portion of tax rules were considered major and thus subject to OMB's process, which often forms a significant roadblock to timely completion, or to completion at all. Though the

22. *See infra* Part I.A.

23. *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1686 (2017) (describing rise in administrative-law challenges to tax rules). The Xilinx-Altera saga over including stock-based compensation costs in a pool of costs to be shared in a cost-sharing arrangement from 1995 until the Supreme Court denied certiorari in 2020 is the poster child for industry's use of procedural claims to delay full implementation of a substantive tax rule (and financial statement recognition) using procedural objections.

24. 141 S. Ct. 1582 (2021).

25. *Id.* at 1590–91.

26. For a helpful overview see Leslie Book & Marilyn Ames, *The Morass of the Anti-Injunction Act: A Review of the Cases and Major Issues*, 73 TAX LAW. 773 *passim* (2020). Another area where the well-resourced interested parties have brought their weight to bear is in filing amicus briefs in tax cases. Amicus briefs filed by interested businesses and associations of businesses and occasionally professionals on behalf of litigating taxpayers vastly outnumber amicus briefs filed in support of government positions that would protect public revenues. That subject, however, is beyond the scope of this article.

27. *See infra* Part I.D.

Biden administration OMB recently unwound this agreement,[28] that unwinding has been subject to some criticism and likely will be a future area of contention.[29]

Compared to just a decade ago, efforts to produce new tax guidance face more internal executive review, more judicial review, and earlier judicial challenge, and receive less deference. And this, again, is at a time when the IRS budget is in sharp decline, tax laws continue to change, and taxpayers clamor for guidance.

And yet to some recent commentators and courts, the scales are not tilted far enough. These sources claim that the IRS receives special exemptions from administrative procedures that govern elsewhere.[30] They see little or nothing unique or relevantly different about tax law and its regulation, and thus argue that the tax rulemaking agencies should face the same forms of oversight as other agencies.[31] Instead, they say, holding the IRS and Treasury to administrative law developments of recent decades will protect the rule of law and make those agencies more effective.[32]

As other scholars have ably argued, there are good reasons to believe that tax administration in fact differs in important and relevant ways from most other forms of administration, and that as a result administrative law should treat tax differently.[33] No other agency faces the combination of legal and operational challenges that confront the IRS and Treasury: the need to implement a massively complex body of law, designed to address nearly every facet of modern economic life and resist efforts at regulatory arbitrage, while

28. Memorandum of Agreement Between the Department of the Treasury and the Office of Management and Budget, Review of Treasury Regulations Under Executive Order 12866 (June 9, 2023) [hereinafter Memorandum].

29. *See, e.g.*, Kristin E. Hickman (@khickmanjd), TWITTER (June 12, 2023, 11:36 PM), https://twitter.com/khickmanjd/status/1668281120989888515 [https://perma.cc/GU87-D9N4] (calling the decision a "sad retreat").

30. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1718–22 (2014) [hereinafter Hickman, *Administering*]; *see* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1759–94 (2007) [hereinafter Hickman, *Coloring*]; Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269, 279 (2012); *see also* Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 669 (2019).

31. Hickman, *Coloring*, *supra* note 30, at 1759–94; Johnson, *supra* note 30, at 273.

32. Hickman, *Coloring*, *supra* note 30, at 1805–06; Johnson, *supra* note 30, at 300–07.

33. For prior efforts to criticize the "tax exceptionalism" arguments, see generally Stephanie Hunter McMahon, *The Perfect Process is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553 (2016) [hereinafter McMahon, *Perfect Process*]; James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067 (2015) [hereinafter Puckett, *Exceptionalism*]; Lawrence Zelenak, *Maybe Just a Little Special, After All?*, 63 DUKE L.J. 1897 (2014) [hereinafter Zelenak, *Maybe Just a Little*]. For another notable work that appeared publicly as our article was in press, see David Weisbach, *Against Anti-Tax Exceptionalism*, 77 TAX L. REV. (forthcoming 2024). As we explain here, we agree with many of these authors; our distinctive contribution is to introduce the concept of the tilt against revenue, and to revisit the tax exceptionalism debate in light of its powerful implications.

still making that body of law easy enough to understand that tens of millions of taxpayers can apply it on their own (or with only modest assistance) every year.[34] Tax administration touches many millions of taxpayers directly and, through its revenue-raising function, indirectly the life of every American. Without regulatory guidance, millions of taxpayers would have to guess about the tax law, perhaps altering their behavior to avoid what they (wrongly) imagine the IRS's position would be. And without the IRS's ability to respond swiftly to changing events, the funds for public security, social welfare, and other public goods, as well as every other regulator, will diminish.

Our intended contribution is to introduce what we call administrative law's "tilt" against revenue and to explain why it indeed makes tax law exceptional. As administrative law scholars have long recognized, procedural rules favor the status quo over new rules.[35] An agency can be easily challenged when it acts to regulate, but rarely challenged when it chooses to go easy, forbear, or lift existing burdens on private actors. Predictably, then, the agency has a strong incentive to choose the path of least resistance, conserving its scarce resources for the few instances where it chooses to act. These effects are sometimes called a bias in favor of "inaction."

For most of tax administration, we will argue, this bias is more dramatic, and more damaging, than in regulatory areas where the public has some recourse when an agency is silent. Citizens can sue to enforce the Clean Water Act and can petition the Food & Drug Administration to act on a promising new pharmaceutical.[36] At a minimum, the public can often see—or in the case of the Clean Air Act, smell—that nothing is happening. But since the 1980s, the Supreme Court has said that the Constitution prohibits the public from challenging favorable agency treatment of taxpayers.[37] And because individuals' tax information is secret, in many instances we have no way of knowing whether the IRS is doing its job.[38]

When translated to tax administration, administrative law's bias towards inaction becomes a tilt against revenue. Most often this is also a bias against the poor. IRS decisions effectively are unreviewable as long as they lose money, whether that money-losing position is the status quo or providing a taxpayer an

34. *See infra* Part II.A.

35. *See infra* Part II.B.

36. *See infra* text accompanying note 186.

37. Allen v. Wright, 468 U.S. 737, 753–66 (1984).

38. The secrecy accorded taxpayer information, purportedly on the grounds of privacy, started when very few Americans paid income taxes. The Revenue Act of 1934 required public disclosure of limited tax information, including taxes paid, but was swiftly repealed as a result of a skillful public relations campaign using "rhetorical appeals to the 'common man' [that] harnessed the hopes and fears of everyday people to support a policy that not only did not affect them, but that helped the rich who were subject to the tax." Marjorie Kornhauser, *Shaping Public Opinion and the Law: How a "Common Man" Campaign Ended a Rich Man's Law*, 73 LAW & CONTEMP. PROBS. 123, 123–24 (2010).

election or an outright giveaway. Since we have a progressive income tax, all else equal, any loss of tax revenue will tend to favor those who would have paid more (the rich) over those who would have paid less (everyone else). The tilt is also regressive because it leads the IRS and Treasury to close off ready opportunities for public input and influence, leaving more opaque "back channel" communication that is typically most useful for the well-counseled and well-connected.

This bias for allowing rules to be diluted or unenforced, or for revenue to go uncollected, is evident in dozens of substantive tax rules. The "carried interest" rule—that is the one that allows private equity billionaires to pay half the tax rate of everyone else—was created, then reinforced again, by regulation.[39] The IRS has not visibly enforced the prohibition against political spending by charities in a decade.[40] Recent Treasury rules installing the 2017 changes to the international tax system are estimated to have sacrificed billions of dollars over the next ten years.[41]

In a world where the law is already tilted so steeply against revenue, seemingly benign tweaks to tax administration can have deeply damaging, even perverse, effects. We are not opposed to judicial review of agency action—indeed, we think it is essential to accountability and the rule of law. But in our tilted legal regime, the recent move to add more judicial "hard look" review of subregulatory guidance will undermine the rule of law and distort the substance of tax administration.

Think of an agency's incentives.[42] Imagine that for every decision, the IRS stacks cost and benefit considerations on either side of a scale. Should it adopt new guidance on, say, free filing? If it does, it faces an increasingly long and difficult gauntlet of reviews and challenges. If tax software makers assert IRS lacks statutory authority to proceed, the deference the IRS's interpretation will receive in court may well now be lower than it would have been ten years ago,

39. *See* Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U L. REV. 1, 3–4, 11–12 (2008).

40. Maya Miller, *How the IRS Gave Up Fighting Political Dark Money Groups*, PROPUBLICA (Apr. 18, 2019, 5:00 AM), https://www.propublica.org/article/irs-political-dark-money-groups-501c4-tax-regulation [https://perma.cc/2ZU8-R54F (staff-uploaded archive)].

41. *See infra* Part II.C.2. One of the more aggressively pro-taxpayer 2017 rules was an election. In most circumstances even a generously pro-taxpayer regulation has at least a possibility of being challenged by a taxpayer with nonparadigmatic or unusual tax attributes. A revenue giveaway by regulatory election combines loss of revenue with no losers (assuming that only persons who benefit will make an election). This inoculates the provision from challenge. Stephen E. Shay, *Legal Fictions, Elections and Tax Law Boundaries*, *in* THINKER, TEACHER, TRAVELER: REIMAGINING INTERNATIONAL TAX 513, 524–25 (Georg Kofler, Ruth Mason & Alexander Rust eds., 2021). Indeed, within its confines, a regulatory election is worse than inaction from a revenue perspective because it confirms two alternative interpretations of a statute instead of leaving the text as is *and* it is immune from attack. *Id.*

42. We develop the arguments in this paragraph *infra* Part III.

increasing the odds the court will throw out the IRS's efforts and force it to start over. So the costs of action are higher, the benefits lower. Our scales, already tilted towards doing nothing, angle even more steeply. Resources matter, too: in a challenging budget environment, every decision becomes more crucial, as the agency has few resources to spare on long administrative processes that will yield uncertain returns. In tax, there is limited room for any public push-back or accountability. The greater the obstacles to acting, the more incentive there is for the IRS to do nothing, to leave revenue uncollected. And these decisions to do nothing cannot be reviewed by anyone, potentially frustrating congressional design.

We have suggestions to turn things around.[43] We would roll back the campaign against effective tax administration. IRS critics have argued against straw men, claiming that the IRS is exempting itself from the APA. In fact, the APA was written in broad abstractions whose details have since been mostly filled in by judges. On several key questions of administrative law, we explain, courts have given themselves room to apply case-by-case judgment about how key terms, such as "interpretive" rules and "good cause," should be applied. When courts apply those concepts to tax guidance, they should take into account tax law's operational context and circumstances.[44] For instance, while the IRS may not have "good cause" for streamlined administrative procedures for all guidance, courts should be much more willing to find good cause, because unnecessary or excessive procedural requirements deepen the already steep tax tilt towards inaction or delay (its functional equivalent).

In concrete terms, that means allowing the IRS to issue more guidance that binds the public without requiring years of notice, comment, and legal challenge before it can take effect. We also would unwrap the layers of red tape recently wrapped around tax rulemaking, such as the Trump-era deal between the Treasury and the OMB subjecting more tax regulations to additional "cost-benefit" analysis. Some of these changes could be adopted by judicial decision or executive action, but some recent Supreme Court mischief may require repair by statute.

43. We explain the basis for the arguments in this paragraph *infra* Part IV.

44. Professor Hickman, while a leading critic of differing administrative law treatment of taxation, acknowledges the significance of the tax system's revenue-raising function. She argues, however, that the revenue-raising rationale, reflected in a series of legislatively directed deviations from administrative law doctrine, should be interpreted to minimize the deviation. *See* Hickman, *Administering*, *supra* note 30, at 1723. Moreover, she would distinguish tax law's increasing nonrevenue raising roles or dual-purpose roles. While we have a materially different take on the relation of tax expenditures and other tax provisions to revenue raising (and, indeed, revenue loss), there is a broad consensus regarding the need to protect the revenue-raising system and understanding of revenue protection as Congress's rationale for a series of tax law exceptions to administrative law doctrine. *Id.* at 1719–20 (providing examples of legislated deviations from administrative law doctrine).

In the end, we think continuing on the path towards greater procedural formalism in crafting tax guidance will undermine the good government and rule-of-law values that assertedly justify formalism. We leave for the reader to decide whether those values in fact support greater procedural formalism in the context of taxation, or whether they are a purportedly neutral wrapper around a small government agenda to wither IRS capacity to fund the modern state.

The rest of the Article proceeds in four parts. Part I sets out in more detail the recent evolution in tax rulemaking procedure and provides some brief background on administrative law principles offered to justify greater procedural formalism. Part II explores the contexts in which tax differs from other regulatory contexts, first sketching prior authors' comparisons of tax with nontax contexts, then developing our arguments that the revenue-raising function of tax law is unique and that formalistic constraints on tax law processes causes tax guidance to be tilted against fully realizing revenue collection authorized in legislation. In Part III we show how this tilt interacts with moves towards greater administrative procedure formalism to undermine the supposedly neutral principles that are claimed to justify formalism in the first place. Part IV plays out the implications for how administrative law should be applied to the making of tax guidance. We then conclude.

I. THE NEW PROCEDURAL FORMALISM IN TAX GUIDANCE

In this part we summarize four major areas where legal developments have increased the difficulty or reduced the net benefits of issuing tax guidance. We then wrap up Part I by exploring some possible "neutral" explanations for these simultaneous trends. Readers who have followed these developments closely can safely skip to Part II.

A. *Notice and Comment Requirements*

Under modern "hard look" review, an agency has to explain its reasons for reaching its decisions.[45] It must justify these reasons with evidence developed during the promulgation of its regulation, and it must make its plans and its reasons for them known to the public[46] through the so-called "notice and comment" process. If commenters raise questions or offer evidence that contradicts the agency's evidence, the agency must document that it has considered the challenges, and if it finds them unpersuasive, its reasons for rejecting them must also be part of the documented record.[47] If an agency

45. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56–57 (1983). For an accessible overview, see Dan A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1152–53 (2014).

46. *See Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

47. *Id.* at 43–46.

ignores a challenge raised during the rulemaking process, and then that challenge is repeated in court, the reviewing court can stop the implementation of the rule and remand it back to the agency for reconsideration of the challenge; this is sometimes called "hard look review."[48]

Regulated parties have developed legal strategies for using the notice and comment process to thwart regulation. A standard approach is to inundate the regulator with comments, especially comments that raise factual challenges to the basis for regulation.[49] If the regulator fails to rebut any one of these many empirical claims, the private parties then use this failure as grounds for legal challenge.[50] Even if the regulator addresses the empirical claim, parties in recent years have sometimes succeeded in convincing courts that the agency's response wasn't detailed enough, and to remand for further consideration.[51]

This strategy reached the shores of tax guidance in *Altera Corporation v. Commissioner*.[52] In brief, *Altera* was a dispute about where to tax the income of a multinational business, in which a key question was how to account for the stock-based compensation paid to the firm's executives and employees.[53] During the notice and comment period, firms submitted comments arguing that the Treasury was relying on incorrect empirical information about certain compensation practices.[54] After the regulation was finalized, they renewed these arguments in court, claiming that the Treasury had failed to fully explain its supposedly incorrect use of compensation data.[55] The Tax Court agreed[56] before ultimately being reversed on appeal.[57] In the end, the Treasury won the legal

48. *See id.* at 54–57; Michigan v. EPA, 576 U.S. 743, 750–51, 759–60 (2015). Agencies that fail to explain their rationales may also face less deferential judicial review of their interpretation of a statute. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222–24 (2016).

49. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 394 (2019) [hereinafter Bagley, *Procedure Fetish*]; *see* McMahon, *Perfect Process*, *supra* note 33, at 590–91.

50. *See* Bagley, *Procedure Fetish*, *supra* note 49, at 394; Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1364–65 (2010).

51. *See* Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 354–55 (2016).

52. *See* Altera Corp. v. Comm'r, 145 T.C. 91, 119 (2015) (noting that "the Supreme Court has never, and this Court has rarely, reviewed Treasury regulations under" hard look review). There were some lower-court precursors, however. *E.g.*, *In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 853 F. Supp. 2d 138, 143 (D.D.C. 2012).

53. Altera Corp. v. Comm'r, 926 F.3d 1061, 1073 (9th Cir. 2019).

54. *Id.* at 1081.

55. *Id.* at 1082.

56. *Altera Corp.*, 145 T.C. at 120–31.

57. *Altera Corp.*, 926 F.3d at 1082–86, *cert. denied*, 141 S. Ct. 131 (2020). Interested parties continued their efforts to defer the outcome of the Ninth Circuit's decision for the government, filing amicus briefs supporting a rehearing *en banc*. *See, e.g.*, Brief for the U.S. Chamber of Comm. as *Amicus Curiae* Supporting Rehearing *En Banc* at 2, 4, Altera Corp. v. Comm'r, 926 F.3d 1061 (9th Cir. 2019) (Nos. 16-70496, 16-70497) ("Businesses, moreover, critically depend on the procedures and protections that the APA provides against arbitrary or otherwise unlawful agency action."). The petitioner's

battle, but it may have lost the war. The challengers succeeded in tying up agency resources for more than five years, showing that the inundation strategy has serious promise for obstructing tax rulemaking. This tactic has been catching on.[58]

Even more concerning is the possibility that the *Altera* model for resistance and delay threatens the validity of literally thousands of distinct pieces of tax guidance. To understand this threat, we first need to take a small detour into the world of informal tax guidance and the rules that traditionally governed it.

While agency deliberation is an important feature of the regulatory state, there is no hard look review for office supply procurement, and for good reason.[59] Some things need to be decided quickly, cheaply, or both. Somewhere on the spectrum between "blue pens or black?" and "how should we regulate greenhouse gasses?" there is a dividing line, necessarily drawn inexactly, for when we should demand and judicially enforce maximum deliberative care. Many forms of agency guidance are therefore exempt from notice and comment requirements, including those that are merely procedural, "interpretive," or where the agency otherwise establishes "good cause."[60]

Unfortunately, the scope of these exceptions is famously unclear.[61] Agency pronouncements that meet the uncertain "force and effect of law" test are sometimes held to require formal, on-the-record deliberation, and even notice and comment, or face remand so those procedures can be followed.[62] The meaning of this key phrase eludes our ready summary, but is often said to correspond with whether the agency's guidance "binds the public."[63]

unavailing 2020 petition for *certiorari* provides a hint at the billions of dollars at stake, reporting that Alphabet alone reported a reserve for the issue of $4.4 billion through 2016. Petition for a Writ of Certiorari, *Altera Corp.*, 926 F.3d 1061.

58. *E.g.*, Mann Constr., Inc. v. United States, 27 F.4th 1138, 1142–48 (6th Cir. 2022); Hewitt v. Comm'r, 21 F.4th 1336, 1345–53 (11th Cir. 2021); Oakbrook Land Holdings, LLC v. Comm'r, 154 T.C. 180, 190–95 (2020); SIH Partners LLLP v. Comm'r, 150 T.C. 28, 37–40 (2018); *see* Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 188 (2017) (noting that recent doctrinal developments "are making procedural challenges to tax regulations especially attractive").

59. Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1330 (2017) [hereinafter McMahon, *Pre-Enforcement*].

60. *Id.* For a general overview of guidance documents, see Nicholas R. Parrillo, *Federal Agency Guidance and the Power To Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 167–69 (2019); Strauss, *The Rulemaking Continuum*, *supra* note 19, at 1468–69. For a summary of tax guidance documents, see McMahon, *Classifying*, *supra* note 20, at 256–65.

61. Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1708 (2007).

62. *Id.* at 1708–13, 1718.

63. *Id.* at 1712; Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 346 (2011).

The IRS has long utilized a vast array of guidance tools that do not involve notice and comment.[64] There are plenty of tax regulations: collected and printed, the income-tax regulations alone occupy most of an IKEA bookshelf.[65] But tax practitioners also regularly comb through a hierarchy of "revenue rulings," "notices," "technical advice memoranda," "revenue procedures," and . . . the list continues.[66]

Understanding how the IRS views the legal import of these different forms of guidance requires a careful parsing of yet another document, the Internal Revenue Manual ("IRM").[67] In the IRM, the IRS instructs its staff that they should challenge taxpayer legal positions that are contrary to a "revenue ruling."[68] In contrast, the IRM teaches that a "revenue procedure" constrains the positions that IRS staff may take, but that staff need not necessarily challenge taxpayer positions contrary to a revenue procedure.[69] Again, without meaning to offer an opinion on whether either has the "force and effect of law," we might say that in the IRS's view, revenue rulings bind both the IRS and the public (though not necessarily the courts), while revenue procedures bind only the IRS, not the public.[70]

Returning to *Altera*, the case can be read to suggest that much of this guidance will now be required to undergo notice and comment and be subject to hard look review. The Tax Court took the position that "interpretive" rules, which are exempt from any notice-and-comment obligation, are similarly exempt from hard look review.[71] Before it subjected the challenged rule to a hard look, therefore, it first considered whether the rule could qualify for the "interpretive" exception.[72]

Although the Tax Court's reasoning was somewhat opaque, it seemingly concluded that the rule was not "interpretive" because the "Treasury intended for the final rule to have the force of law."[73] The key element of that conclusion appears to have been that the government's position "can be sustained only on

64. *See* David Berke, *Reworking the Revolution: Treasury Rulemaking & Administrative Law*, 7 MICH. J. ENV'T & ADMIN. L. 353, 358–59 (2018).

65. *See* Andrew L. Grossman, *Is the Tax Code Really 70,000 Pages Long?*, SLATE (Apr. 14, 2014, 11:56 PM), https://slate.com/news-and-politics/2014/04/how-long-is-the-tax-code-it-is-far-shorter-than-70000-pages.html [https://perma.cc/VZQ2-2K92]. We each can recommend using the printed IRS regulations as a good test of whether the shelf has been properly assembled.

66. *See* Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the Separation of Powers*, 72 RUTGERS U. L. REV. 281, 281–82 (2020).

67. *Internal Revenue Manuals*, I.R.S., https://www.irs.gov/irm [https://perma.cc/SUQ2-TPP2].

68. IRM 32.2.2.4, 32.2.2.10; *see* Treas. Reg. § 601.601(d)(2)(v)(d).

69. IRM 32.2.2.10.

70. *See id.* (claiming that revenue rulings do not have "force and effect" of regulations but "provide precedents to be used in the disposition of other cases"); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 80–81, 85 (1995).

71. *See* Altera Corp. v. Comm'r, 145 T.C. 91, 116 (2015).

72. *Id.*

73. *Id.* at 116–17.

the basis of the final rule."[74] That is, in the Ninth Circuit and D.C. Circuit precedents the Tax Court leaned on, a rule is not interpretive if it "create[s] rights, impose[s] obligations, or effect[s] a change in existing law."[75] Apparently, the parties agreed that the taxpayer would have to win if the challenged rule were not in force, and so it was easy for the Tax Court to conclude that it effected a "change in existing law."[76] The Ninth Circuit never addressed this question at all, in effect assuming for the sake of argument that a hard look was needed, but finding the regulation would survive a hard look if one were required.

If that is the standard for an "interpretive rule," a large fraction of existing tax guidance might be invalid for its failure to engage in notice-and-comment rulemaking.[77] Revenue Procedures, which do not purport to bind the public, would probably be safe, because they do not create new "obligations" (although arguably they do create new "rights"). But many other forms of guidance will be at risk. Almost by definition, tax guidance is issued in cases where it is not clear what the correct legal outcome is.[78] Taxpayers will thus usually be able to argue that the guidance "effect[s] a change in law." The question is what it means to "change" law. If the best reading of prior guidance would have favored the government, and the guidance makes that even clearer, has there been a "change"? Is there a "change" whenever any person's legal position has been altered, i.e., whenever there are winners and losers from the guidance?

B. *Deference*

Even as courts have made it harder for the IRS and the Treasury to issue new guidance, there have been suggestions they will also make that guidance less meaningful. Under the *Chevron*[79] doctrine, courts defer to reasonable agency interpretations of a statute.[80] The precise scope of which kinds of guidance are entitled to *Chevron* deference is uncertain and has been the subject of debate.[81] Further, for several decades it was uncertain whether *Chevron*

74. *Id.* at 117.

75. *Id.* at 111 (citing Hemp Indus. Ass'n v. Drug Enf't Admin., 333 F.3d 1082, 1087 (9th Cir. 2003); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993)).

76. *Altera Corp.*, 145 T.C. at 111, 117. For later Tax Court development of this principle, see Oakbrook Land Holdings, LLC v. Comm'r, 154 T.C. 180, 189–90 (2020) ("Because the regulation imposes a requirement not explicitly set forth in the statute, it is appropriately treated as a legislative rule.").

77. *See* McMahon, *Classifying*, *supra* note 20, at 258–59.

78. *See* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 329 (2018) (pointing out that agencies do not go to the effort of issuing guidance when the answer is already obvious).

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

80. *Id.* at 842–43.

81. For a thorough, if slightly dated, analysis, see Irving Salem, Ellen P. Aprill & Linda Galler, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX L. 717, 750–66 (2004).

applied to tax guidance, but in the *Mayo* case the Supreme Court ruled that it does.[82]

The key implication of *Mayo* for our deference-tilt analysis is less for formal rules than for the many kinds of informal guidance the IRS relies on. While these often commanded substantial deference before *Mayo*, under modern applications of *Chevron* it is unclear whether revenue rulings and their ilk will receive as much judicial respect.[83] For example, the private litigants in *Altera* argued to the Tax Court that if the rule they were challenging were only an "interpretive" rule, it would not receive *Chevron* deference; the court did not reach that question.[84] Recent developments outside tax have shaken the deference underpinnings further, with justices revisiting deference to agency interpretations of their own rules (sometimes called *Auer*[85] or *Seminole Rock*[86] deference, after two prominent cases in which it was invoked) or even *Chevron* itself.[87] *Mayo* seems also to have been understood to encourage lower courts to apply a more intensive version of administrative law restrictions to tax rules generally.[88]

C. *Pre-Enforcement Judicial Review*

Another simmering development that has been the target of small government adherents is judicial interpretation of the Anti-Injunction Act ("AIA").[89] With certain exceptions, the AIA bars any "suit for the purpose of restraining the assessment or collection of tax."[90] Taxpayers who disagree with

82. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53–58 (2011).

83. *See* Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 666 (2012); McMahon, *Perfect Process*, *supra* note 33, at 576.

84. *See* Altera Corp. v. Comm'r, 941 F.3d 1200, 1209–10 (9th Cir. 2019) (Smith, J., dissenting from denial of rehearing *en banc*).

85. Auer v. Robbins, 519 U.S. 452 (1997).

86. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

87. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.") (Kennedy, J., concurring); Michigan v. Env't Prot. Agency, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (describing *Chevron* as "a judge-made doctrine for the abdication of the judicial duty"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2154 (2016) (criticizing *Chevron* as "indeterminate" and "antithetical to the neutral, impartial rule of law"); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2416–18 (2019) (setting out some limitations on judicial deference to agency interpretations of their own ambiguous rules).

88. That is how we read the evidence summarized in Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REGUL. 818, 852–55 (2021).

89. Some may prefer to self-characterize as "limited government" adherents. While one may distinguish small from limited government, when discussing the IRS, the two concepts align pretty closely.

90. 26 U.S.C. § 7421(a).

the IRS and want to challenge its views or procedures in court must first file their taxes, go through audit, and appeal the auditor's determination to the internal IRS appellate unit.[91] Only then are they allowed to file in a federal district court (after paying the deficiency) or the U.S. Tax Court.[92] Thus, the AIA is usually described as barring "pre-enforcement" review.[93]

Critics of the AIA emphasize that this limitation also effectively bars what we might call pre-planning suits: Private parties must decide whether to act, potentially with adverse tax consequences, before they are allowed to invite a federal court to weigh in.[94] Parties who know or expect the IRS will disagree with them thus must gamble on their ability to later convince a court.

This was the core argument pressed by plaintiffs and their supporters in the *CIC Services* case, decided by the Supreme Court in 2021.[95] Briefly, CIC wanted to offer a kind of insurance contract that their advertising materials termed a "legal tax shelter."[96] IRS guidance requires sellers of such contracts to disclose that fact to the IRS, and failure to disclose triggers a penalty tax.[97] At the time of the decision, CIC hadn't sold any of these shelters and wasn't yet subject to any penalty.[98] Instead, CIC sought to challenge the disclosure requirement, arguing that the IRS notice imposing that obligation should have been but was not issued after notice and comment.[99] Lower courts blocked the suit, citing the AIA.[100]

The Supreme Court reversed.[101] It held that CIC's suit was only seeking to block a disclosure obligation, not a tax (even though failure to disclose would

91. *Id.* § 7433.

92. For a good basic summary, see Keith Fogg, *Access to Judicial Review in Nondeficiency Tax Cases*, 73 TAX LAW. 435, 447–48 (2020).

93. Hickman & Kerska, *supra* note 23, at 1687–1704; McMahon, *Pre-Enforcement*, *supra* note 59, at 1344.

94. A surprise amicus in the CIC case was the Center for Taxpayer Rights, founded by former IRS Taxpayer Advocate Nina Olson, represented by the Harvard Law School low-income tax clinic. The Center's interest was to highlight that low-income taxpayers cannot file refund suits for matters in which Tax Court review is not available without paying the full amount of tax due under the *Flora* rule. Flora v. United States, 357 U.S. 63, 73–76 (1958), *aff'd on reh'g* 362 U.S. 145 (1960); *see* Fogg, *supra* note 92, at 444–47 (arguing that low-income taxpayers should have access to court without paying first). Accordingly, expansion of rights to pre-enforcement challenges to IRS rules would reduce the detriment from the *Flora* rule. In our view, this could be accomplished more effectively by providing limited relief from the *Flora* rule, targeted at middle- and low-income taxpayers, rather than narrowing the protections for tax enforcement of the AIA.

95. CIC Servs., LLC v. I.R.S., 141 S. Ct. 1582, 1588 (2021).

96. Brief for Former Gov't Offs. as Amici Curiae Supporting Respondents at 12–13, *CIC Servs., LLC*, 141 S. Ct. 1582 (No. 19-930).

97. *Id.* at 1589; *see* I.R.S. Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 21, 2016).

98. *CIC Servs., LLC*, 141 S. Ct. at 1588.

99. *Id.*

100. *Id.*

101. *Id.* at 1585.

necessarily trigger the tax).[102] It is not clear yet how broad this holding will prove. The Court's effort to distinguish the CIC situation from other "regulatory taxes" was not especially clear or convincing: taxes triggered by the purchase of motor fuel seem quite similar to taxes imposed on a failure to report. The only difference the Court really points to is that compliance with a reporting requirement imposes costs distinct from those of the tax itself,[103] but one could equally say that of the costs of substituting an untaxed fuel option.

D. *OIRA Review*

Finally, yet another procedural hurdle slowed IRS action for a period between 2018 and 2023. Beginning in 1983, IRS regulations were largely exempt from a cost-benefit analysis by the President's Office of Management and Budget, sometimes known as "OIRA" review (since it is conducted by the Office of Information and Regulatory Affairs).[104] But a 2018 agreement between the IRS and OMB required that an expanded concept of "major" tax rules undergo review.[105] As other scholars describe, OIRA review adds time and "veto gates," or obstacles to enactment controlled by a small number of actors, to the adoption of any rule.[106]

The OIRA review considers whether the cost-benefit standards of Circular A-8 are met,[107] a test that was of limited application to IRS regulations for decades without apparent harm. OIRA's mandate does not extend to whether the IRS interpretation of the law is correct or whether it has been sufficiently firm in protecting the tax base, issues for which it lacks expertise. Rather, it

102. *Id.* at 1590–91.

103. *Id.* at 1591.

104. *Treasury Docs Show Agreement Waiving OMB Review for IRS Rulings*, TAX NOTES TODAY (Sept. 23, 2016), https://www.taxnotes.com/tax-notes-today-federal/tax-system-administration/treasury-docs-show-agreement-waiving-omb-review-irs-rulings/2016/09/23/g8tj [https://perma.cc/9WEN-YXRX (staff-uploaded, dark archive)] (detailing the 1983 Memorandum of Agreement ("1983 MOA") for the "Treasury and OMB Implementation of EO 12291," and a letter dated December 22, 1993, from Sally Katzen—the Administrator of the Office of Information and Regulatory Affairs—to Jean E. Hansen—the General Counsel for the Department of the Treasury—extending the 1983 MOA).

105. *See Treasury, OMB Come to Agreement on Tax Reg Review*, TAX NOTES TODAY (Apr. 11, 2018), https://www.taxnotes.com/tax-notes-today-federal/tax-system-administration/treasury-omb-come-agreement-tax-reg-review/2018/04/13/27ytb [https://perma.cc/B7S6-8PEA (staff-uploaded, dark archive)] [hereinafter 2018 MOA] (reporting text of Memorandum of Agreement between the Department of the Treasury and the Office of Management and Budget on Review of Tax Regulations under Executive Order 12866).

106. *See* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059, 1064–67 (1986). For discussion about the IRS-OMB deal in particular, see Martin A. Sullivan, *Economic Analysis: OMB-Treasury Memo Creates Guidance Uncertainty and Delay*, 159 TAX NOTES 443, 443–46 (2018).

107. Kristin E. Hickman, *An Overlooked Dimension to OIRA Review of Tax Regulatory Actions*, 105 MINN. L. REV. HEADNOTES 454, 455 (2021) [hereinafter Hickman, *OIRA*].

applies its own peculiar form of cost-benefit analysis which is not particularly suited for tax and lacks any distributive element.[108]

As with judicial review, there are positive things to be said about cost-benefit analysis,[109] though also some trenchant critiques, probably most notably from Frank Ackerman and Lisa Heinzerling.[110] Our more limited point is that OIRA review layered on top of budget cuts, procedural formalism, and declines in deference cumulatively makes for an increasingly formidable set of obstacles to effective IRS action.[111] Indeed, Professor Hickman's argument *in favor* of

108. The FATCA regulations (requiring enhanced disclosure of overseas accounts) are an example of rules whose costs were substantial for affected banks and whose direct revenue effects were in the low billions of dollars. What is very hard to quantify with available information, and to fit within the regulatory cost-benefit rubric, is the benefit of deterrence and, more importantly, the effect on overall taxpayer morale, in a system that still relies heavily on voluntary reporting in the largest part of the tax gap—the cash-based economy. Why would a handyperson report all their cash income if their wealthy clients hide money in offshore bank accounts? In addition to the difficulties of quantifying the deterrence effects of a tax rule, layering on a distributive analysis is nontrivially difficult. The 2018 MOA between Treasury and OMB reflects this awkward fit by in effect exempting tax rules from OMB review unless their nonrevenue impact is economically significant ($100 million or more). 2018 MOA, *supra* note 105, § 1(c). Evaluations of the 2018 MOA are divided. *See, e.g.*, GREG LEISERSON, COST-BENEFIT ANALYSIS OF U.S. TAX REGULATIONS HAS FAILED: WHAT SHOULD COME NEXT? 5 (Wash. Ctr. for Equitable Growth 2020); Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the Sec. 199A Regulations*, 69 EMORY L.J. 209, 255–71 (2019); Jerry Ellig, *Economic Analysis of Tax Regulations: An Assessment of the First Year*, 163 TAX NOTES 1181, 1181–86 (2019); David A. Weisbach, Daniel J. Hemel & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507, 1507–28 (Sept. 10, 2018); GREG LEISERSON & ADAM LOONEY, A FRAMEWORK FOR ECONOMIC ANALYSIS OF TAX REGULATIONS 1 (Brookings Inst. & Wash. Ctr. for Equitable Growth 2018). We conclude from this literature that the extension of regulatory cost-benefit analysis preceded development of a coherent approach to its application to tax regulations. Logical questions to be asked include whether the regulatory outcomes during the thirty-five-year history of limited OIRA review justified change based on the criticisms levied (other than as a matter of doctrinal purity) and whether the quality of subsequent regulations (a number of which are criticized in this article) justified the additional costs (again disregarding doctrinal purity). We leave for other work our criticisms of the limitations of the regulatory report card framework utilized by some scholars and originated by the late Jerry Ellig.

109. *E.g.*, Morrison, *supra* note 106, at 1064. Professor Hickman, for example, argues that OMB review encourages tax agencies to be more deliberative and transparent. Hickman, *OIRA*, *supra* note 107, at 465–76. For examples of other advocates, see Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1361–77 (2013); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1854–57 (2013).

110. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING passim (2004) (criticizing the growing trend of making policy decisions based on a cost-benefit analysis); *see also* Farber & O'Connell, *supra* note 45, at 1168–70.

111. Bagley, *Procedure Fetish*, *supra* note 49, at 362–63; Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 447 (2003) ("OMB regulatory analysis and other forms of regulatory impact review have also contributed to 'paralysis by analysis.'"); Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 944–47 (2020) (noting asymmetric rules at OIRA that favor deregulatory actions).

OIRA review is exactly that it "offers a more systematic way to prod Treasury and the IRS . . . toward greater compliance with the APA."[112]

Treasury and OIRA agreed to withdraw the agreement while our article was in press.[113] Nonetheless, we expect that the question of OIRA review of tax guidance, as well as of other regulations having fiscal impact, will remain an area of continuing dispute.[114]

E. *Why Procedural Formalism?*

It is worth pausing to understand why formalistic constraints on agencies seem to have advanced on so many fronts.[115] Certainly there are political and ideological explanations; some may see constraints on the IRS as a way of reducing their tax burdens. But we want to credit any potential "neutral" arguments for formalism.[116] What does administrative law hope to accomplish with its procedures?

The standard answers include accuracy, predictability, accountability, and transparency.[117] By announcing its plans before it implements them, an agency notifies the public about what to expect, giving private parties a chance to weigh in on the plan and to arrange their own affairs in response.[118] The optimistic view is that private participation can give the agency new data and new ideas, improving potential outcomes.[119] The pessimistic view is that public participation is a fig leaf for regulatory capture by interested parties with superior resources.

Procedural rules also have an important influence on agency incentives.[120] Since we emphasize this point in later discussion, it is worth unpacking in a bit more detail.

112. Hickman, *OIRA*, *supra* note 107, at 467. APA compliance would seem to be an objective more aligned with the expertise of the DOJ than that of OMB.

113. *See* Memorandum, *supra* note 28.

114. *Cf.* Chye-Ching Huang, *Modernizing Tax Regulatory Review*, YALE J. ON REGUL. NOTICE AND COMMENT BLOG (June 29, 2023), https://www.yalejreg.com/nc/modernizing-tax-regulatory-review-by-chye-ching-huang/ [https://perma.cc/6MTH-679H] (discussing how the revised memorandum would apply to other fiscally-important rules).

115. Nicholas Bagley labels this overall trend in administrative law "proceduralism"; we are not particularly attached to our label over his. *See* Bagley, *Procedure Fetish*, *supra* note 49, at 351.

116. *See, e.g.*, Hickman, *Coloring*, *supra* note 30, at 1805–06.

117. MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 9–17 (2018).

118. Farber & O'Connell, *supra* note 45, at 1149; Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755–57 (1996).

119. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 155–57 (1969); *see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2336–38 (2001).

120. *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 78, 83–106 (2013).

Failure to meet procedural requirements causes an agency to pay in the currency of time and staff effort.[121] Time, because when a rule fails on procedural grounds, the reviewing court often blocks implementation of the new rule, remanding it instead to the agency so the agency can remedy the procedural flaw. The agency generally must then again give the public an opportunity to comment, must respond to these comments, and so on. While all this happens, the world continues without the benefit (in the agency's view, presumably) of the proposed new rule: securities are offered to unwitting buyers, threatened fish are harvested, oil sits in the ground, and revenue is lost.[122]

This threat of invalidity or remand informs all the processes that lead up to the issuance of a reviewable rule.[123] The agency must ensure it has staff with expertise in the APA processes, in the substance of what the regulation affects, in developing relevant data and persuasively evaluating regulatory alternatives and possible external challenges.[124] It must give credible reasons for its actions and at least appear plausibly to have weighed competing considerations. To do these things, it must imagine itself in the shoes of an outsider, parrying the blows a skeptic might send its way.

A long literature in social science suggests these steps lead to better regulation. Constructing teams of experts with diverse views, being forced to imagine and answer challenges, and deliberation (sometimes even just its pretense), change the ways humans think.[125] They allow us to see insights we would not have, escape a bit from groupthink and confirmation bias, and have more empathy for others who are differently situated.[126] Deeper still, genuine openness to public comments gives the electorate a sense of participation and

121. *Id.* at 79.

122. We have not seen an estimate of the revenue consequence from the delay in implementation of the previously invalid interpretation and then rule that included stock-based compensation in costs to be shared under a cost-sharing agreement. Based on briefs filed in support of a petition for *certiorari* to the Supreme Court in the *Altera* case, the amounts at stake are in the many billions of dollars. *See* Altera Corp. v. Comm'r, 145 T.C. 91, 120–31 (2015). Presumably, the taxpayers paid deficiency interest on the additional liability and the public realized additional taxes on the reinvestment of taxes saved. The affected taxpayers were public companies, many of which did not reserve for the tax liability, so their earnings were inflated with the resulting effects on their shareholders and potential investors. It often is the financial statement results that drive tax planning of public companies (and some private companies expecting to go public).

123. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390–91 (2004).

124. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1976 (2008); Livermore & Revesz, *supra* note 109, at 1371.

125. *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 523–24 (2002); Glenn Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1279–83 (2009).

126. *See* Seidenfeld, *supra* note 125, at 516–17, 523–34.

control over the bureaucracy that likely contribute importantly to its felt legitimacy.[127] These virtues are every bit as relevant to agency decisions to abstain from acting as decisions to act.[128] These actions and characteristics also are the hallmarks of any well-run organization, whether public or private and whether or not operating under mandated procedures. The test for procedures should be whether they improve outcomes for relevant constituencies rather than whether a box has been checked on a procedural checklist.

II. TAX IS DIFFERENT

We are not the first to notice the growing ossification of tax rulemaking. As other commentators have argued, the circumstances of tax guidance are unique in the U.S. administrative state. In this Part, we first briefly summarize, and add our gloss to, some of the ways in which the Treasury and the IRS face problems few other agencies need to confront. Our focus, though, is on a critical difference that other commentators have not mentioned: the systematic "tilt" of administrative law against revenue (and, on average, against poorer taxpayers who cannot afford tax advice or lobbyists). We argue that the tilt, in combination with the features others have mentioned, is unique to tax guidance.

A. *The Debate So Far*

To give full credit where it is due, a good deal of the momentum for the new tax formalism derives from academic work by Kristin Hickman. In a series of articles, Professor Hickman has argued that the IRS and the Treasury have seemingly gotten a pass on procedural obligations that other agencies face.[129] Some of these points are well taken. For instance, the IRS has taken an expansive stance on the "good cause" exception, apparently taking the position that there routinely is good cause for it to forego notice and comment.[130]

In many other ways, however, tax guidance indeed is different from other areas of regulation in ways that should be given weight in applying the broad APA standards. Most obviously, taxes make government possible.[131] As Stephanie McMahon has argued, Congress has made clear that it expects few impediments to prompt assessment and collection of the money needed to fund

127. *See* SANT'AMBROGIO & STASZEWSKI, *supra* note 117, at 16–17; Staszewski, *supra* note 125, at 1282–83. These observations support deference to agency decisions that satisfy these standards. While deference ostensibly is a subject for another day to the extent it invokes priors regarding the relations between Articles II and III, the scope of deference is highly relevant to agency incentives.

128. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1691 (2004) (making this point about other related advantages of reasoned agency deliberation).

129. *See* Hickman, *Administering*, *supra* note 30, at 1718–22; Hickman, *Coloring*, *supra* note 30, at 1759–94.

130. *See* McMahon, *Perfect Process*, *supra* note 33, at 581.

131. *See* Bull v. United States, 295 U.S. 247, 259–60 (1935).

the republic.[132] For example, the historic basis for the Anti-Injunction Act was Congress's frustration at judicial decisions that slowed revenues, threatening the nation's ability to pay its Civil War debts.[133] In addition to other attributes of the federal tax system differentiating tax from other regulatory domains, the longstanding congressional recognition in the AIA and sister exception to the Declaratory Judgment Act of the critical nature of the government's revenue-raising function are the clearest expressions of congressional recognition of the critical role played by the IRS in assuring tax revenues are not frustrated by procedural obstacles.[134]

We would go further and argue that revenue is so basic to a functioning society that those who participate in the revenue-raising process owe special obligations to protecting it.[135] Revenue preservation should get special weight when balancing it against other administrative objectives. At the same time, we would acknowledge that a good deal of the business of the modern IRS is not concerned with these kinds of fundamental revenue decisions, but instead with economic regulation enacted via the tax system, such as through research and development tax credits or charitable contribution deductions. Even in these examples of tax expenditure-like provisions, cabining unintended revenue loss is a significant regulatory objective. Unlike appropriated expenditures, tax expenditures rarely have a cap on revenue loss, whether annual or even for the life of the provision. Most often tax expenditures are "permanent," meaning they can have an unlimited life, and there is no process for review, whether periodic or one-off.[136]

It might be argued that if the effect on revenue is so important, why are there no revenue estimates for regulations as there are for legislative proposals? That is, while the Congressional Budget Office and Joint Committee on Taxation estimate the revenue impact of legislation, there is no such requirement for tax rulemaking. There are several reasons. As the discussion of the billions of dollars at stake in the *Altera* stock-based compensation regulation case demonstrates, it is *not* because the dollars are small (though in many cases they are). One reason is purely doctrinal and has no empirical foundation. Since

132. *See* Stephanie Hunter McMahon, *Tax as Part of a Broken Budget: Good Taxes Are Good Cause Enough*, 2018 MICH. ST. L. REV. 513, 576–78 (2018); *see also* Nina E. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 TAX L. 227, 230–33 (2010).

133. *See* Brief for Former Gov't. Offs. As Amici Curiae Supporting Respondents, *supra* note 96, at 4–5.

134. *See* Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 NOTRE DAME L. REV. 81, 93–94, 111 (2014).

135. *See* Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323, 1346–52 (2008).

136. Professors Abreu and Greenstein argue that taxes should not receive special treatment because tax policy implicates policy goals other than revenue. Abreu & Greenstein, *supra* note 30, at 688–89. But that argument gets things backwards. Even if tax shares common principles with other rulemaking, revenue *is* relatively unique to the tax system, and if there is something special about revenue, that special feature might call for special procedures.

regulations are a faithful interpretation of the law as passed by Congress, they do not raise or reduce revenue. Whatever revenue a validly issued regulation raises is, like the heat of Goldilocks's porridge, just right.

The second reason, more practical, relates to the first. To measure the revenue effect of a regulation, it is necessary to have a baseline. How does the regulation increase or decrease revenue from the baseline? One baseline is no regulation. But we do not have prior revenue estimates of such a baseline, the only revenue estimates made are *ex ante* estimates made before the legislation is passed, and those estimates change based on economic assumptions at that time. None of those estimates are broken down among issues that will be addressed by regulation. Added to this is the fact that revenue estimates are devilishly difficult and fraught with sources of error. A blessing for the revenue estimator is that errors offset, but the more specific the item estimated, the more likely it is that errors will not be offset. All revenue estimates carry with them a false promise of precision and reliability. They are neither precise nor reliable. In short, we do not estimate the revenue impact of tax guidance because those estimates would frequently offer only the façade of a real measurement. Thus, the absence of revenue "scores" for tax rules is not a reflection of the potential revenue significance of rulemaking.

A second distinctive feature of the tax system is its vast scale, reaching nearly every resident (and all nonresident citizens, as well).[137] Tax compliance still is initiated by individual taxpayers, and so in effect every American taxpayer must interpret the law every year.[138] Tax guidance produces social welfare gains simply by sparing tax filers time and mental effort.[139] More

137. *See* McMahon, *Perfect Process*, *supra* note 33, at 555; Wallace, *supra* note 58, at 215–16; Parrillo, *supra* note 60, at 246–47 (explaining that "ratio of agency resources to volume of work" determines typical agency's approach to guidance).

138. *See* Abreu & Greenstein, *supra* note 30, at 683; Puckett, *Exceptionalism*, *supra* note 33, at 1107–08, 1112.

139. *See* Abreu & Greenstein, *supra* note 30, at 691, 693–94 (arguing that "taxpayers believe they need clarity, certainty, and predictability in order to comply" with tax law); Parrillo, *supra* note 60, at 245 (reporting that regulated parties often rely on guidance to reduce costs of planning or obtaining special exceptions); Strauss, *The Rulemaking Continuum*, *supra* note 19, at 1483 (making this point about the benefits of subregulatory guidance generally); *cf.* McMahon, *Perfect Process*, *supra* note 33, at 599–600 (noting that guidance allows taxpayers to reduce planning costs). For a colorful example, see Oei & Osofsky, *supra* note 108, at 245. The authors highlight a plea to IRS from a weary accountant:

> [O]ne exasperated CPA from Reno, Nevada asked, "Why can't IRS simply make it clear by stating that rental property DOES or DOES NOT qualify for the new 199A deduction?" This same CPA underscored with frustration that: "I urge IRS to make this issue abundantly clear and to do so PROMPTLY. Tax preparers all across the country are now in the process of advising their clients with year-end tax planning, and we're all in the dark about this important matter."

guidance also better redirects money, as leaving sophisticated taxpayers without guidance from IRS would increase demand for and expenditures on private tax planning.[140] A lack of guidance can increase the economic distortions caused by taxation, as taxpayers alter their behavior not only to tiptoe around the tax law, but also around what the tax law *might be*.[141]

Of course, these private tax compliance burdens would be a minor matter if tax rules were simple and easy. Many sets of agency-made law are dense and complex, but tax is an outlier in two respects.[142] For one, its complexity derives in part from the fact that it must reach and define almost literally every aspect of life: nearly every exchange, from caring for a neighbor's child, to working remotely, to using cryptocurrency, is a tax-relevant event.[143] Many regulatory regimes are aimed at limited subsets of upstream market participants whose behavior will have effects on the chain to end consumers or users. To a great extent, tax regulations directly affect final consumers or users. Consequently, tax guidance must reach ordinary individuals, not just the well-counseled businesses who generally are also the compliance targets of other regulators. Tax law's audience often will find complexity more challenging to absorb.[144]

Tax law is also somewhat unusual in how easily it can be "arbitraged," or avoided or subverted through narrow legal distinctions. A polluting factory cannot usually avoid sanctions by arguing that its emissions are not "pollution": either it is emitting sulfates, or it is not. In contrast, many simple transactions have less-simple alternatives that reach similar economic results for the transacting parties.[145] Often, there is a legal question about whether the law reaches the less-simple alternative. Efforts to close off one "loophole" sometimes open others.[146] A central challenge for tax regulators is to ensure that

Id. (footnote omitted). In no other area of law are regulations more eagerly and uniformly sought by the affected constituency. Virtually no comment on tax regulations says withdraw and please do not provide guidance, with rare outlier exceptions in the context of an unanticipated third-party reporting obligation.

140. *See* McMahon, *Perfect Process*, *supra* note 33, at 593–94 (arguing that guidance can reduce need for audits or other enforcement).

141. *Cf.* Charles D. Kolstad, Thomas S. Ulen & Gary V. Johnson, *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888, 888–900 (1990) (modeling claim that uncertainty about legal standards reduces deterrence).

142. *See* Zelenak, *Maybe Just a Little*, *supra* note 33, at 1905, 1910–12.

143. *See* Abreu & Greenstein, *supra* note 30, at 684, 691.

144. *See id.* at 683–84.

145. *See* Alvin C. Warren, Jr., *Financial Contract Innovation and Income Tax Policy*, 107 HARV. L. REV. 460, 462–70 (1993); David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 228 (2002).

146. *See* Weisbach, *supra* note 145, at 237.

individuals and businesses cannot escape tax through these kinds of manipulations.[147]

These kinds of considerations suggest that there should be room for intermediate guidance that balances any benefits of administrative formalism against the inevitable losses on these alternate dimensions that heightened procedures would demand.[148] In a legal regime as complex and all-encompassing as our tax system, changes in the real world demand constant updates and clarifications to existing law, on top of the congressional assignment to interpret and enforce the regular parade of new legislation.[149]

To be sure, other fields of law each share some of these features.[150] The Department of Defense and the Centers for Disease Control and Prevention could lay equal claims to being essential to the nation. Education and Health and Human Services both govern vast sectors, if still an order of magnitude smaller than the IRS oversees. Immigration, social security, and unemployment insurance rules must speak to ordinary citizens obliged to navigate their

147. *See id.* at 224, 232–36 (arguing that tax planning reduces social welfare and describing tradeoffs involved in reducing it). The vast preponderance of taxpayers (by number not by taxes due) and their preparers can rely on forms and publications as well as preparation software. Guidance properly targeted should be about revenue protection from depredations of the well advised and burden reduction for others. *See* Martin D. Ginsberg, A Uniquely Distinguished Service, Address Accepting the ABA Tax Section's 2006 distinguished Service award (May 5, 2006), *in* 10 GREEN BAG 2D 173, 173 (2007) ("I am flattered and delighted to receive the Tax Section's Distinguished Service Award. Every prior recipient has been richly deserving. . . . A disproportionate part of my professional life has been devoted to protecting the deservedly rich from the predations of the poor and downtrodden, and it is not easy to see why that deserves a medal."). His humor and modesty aside, Ginsburg devoted substantial uncompensated professional time to improving the federal income tax system before becoming a full-time tax teacher. *See id.* at 173.

148. *See* McMahon, *Classifying*, *supra* note 20, at 271.

149. *See id.* at 287–88 (arguing that quick guidance may be needed to respond to taxpayer planning opportunities that would unfairly favor aggressive taxpayers). Berke argues that notice and comment can be consistent with rapid guidance because many tax rules will be relatively simple statutory interpretations that don't call for detailed evidence. *See* Berke, *supra* note 64, at 414–18. We take his point to be more aspirational than descriptive. That is, judges who are concerned about choking off tax guidance could in theory adopt an approach to hard look review that is relatively flexible, allowing for short and rapid rulemaking. The real world so far looks otherwise. *See, e.g.*, Altera Corp. v. Comm'r, 926 F.3d 1061, 1095–96 (9th Cir. 2019) (O'Malley, J., dissenting). As long as there are judges who impose demands like the *Altera* dissenters, IRS and Treasury cannot easily risk short and simple rulemaking. The material increase in page lengths of tax regulation preambles read by the authors suggests that IRS is responding to the risk, though there is little evidence to date that this has improved the lives of the target taxpayers. Tax professionals may complain, but the additional work ultimately translates into additional fees.

150. *See* Berke, *supra* note 64, at 374–75 (arguing that size and complexity do not justify exceptions to APA requirements, as other fields also face them).

complex bureaucracies.[151] Financial regulators struggle with legal arbitrage.[152] But none of these agencies seem quite to combine all the features together. We now want to address one other, and we think it is of central importance.

B. *A Tilt Against the Fisc*

1. Administrative Law's Inaction Bias

Under the rationale of protecting democratic values, modern administrative law tilts its scales of justice steeply in favor of the regulated.[153] Think of the law of administration as balancing the rights of the regulated to do as they please against the interests of citizens who are helped or protected by some underlying statute. As many observers have now noted, a series of U.S. Supreme Court decisions, beginning around the time of the arrival of justices appointed by Ronald Reagan, systematically favor the regulated over those citizens.[154]

The 1984 decision in *Allen v. Wright*,[155] a tax case, nicely illustrates how the tilting works. *Wright* was part of the long struggle to implement school desegregation. Almost from the day *Brown v. Board of Education*[156] was decided, segregationists plotted to avoid its mandate by moving education from public schools to roughly identical, and certainly equally segregated, private schools.[157] As part of their fight against this tactic, the NAACP tried to enlist the IRS in removing government subsidies for racist schools. Dissatisfied with efforts by the Nixon and Ford Treasury departments, the organization brought suit trying to force the IRS to revoke federal tax exemption for those private schools that continued to be segregated two decades after *Brown*.[158]

151. *Cf.* Parrillo, *supra* note 60, at 186–91 (offering examples of regulatory contexts where agency guidance is essential to regulated parties); Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1549–50 (2018) (noting that an agency's need to communicate its enforcement plans may be very different when it must communicate to millions of private actors, as in immigration or drug enforcement policy).

152. *See* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 250–51 (2010); Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997).

153. *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1238–40 (2014).

154. *See* Rachel E. Barkow, *Overseeing Government Enforcement*, 84 GEO. WASH. L. REV. 1129, 1131–33 (2016); Bressman, *supra* note 128, at 1664–74; Livermore & Revesz, *supra* note 109, at 1379.

155. 468 U.S. 737 (1984).

156. 349 U.S. 294 (1955).

157. *See* Olatunde Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES 127, 131 (William N. Eskridge, Phillip P. Frickey & Elizabeth Garrett eds., 2011); *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1437–38, 1438 n.16 (1973).

158. *See Allen*, 468 U.S. at 743–45.

The Supreme Court threw out the suit, finding that the plaintiffs lacked standing to sue.[159] According to the majority, the Constitution does not permit Article III courts to hear "generalized grievances."[160] A successful plaintiff must present a "distinct and palpable" injury that is "fairly traceable" to the conduct of the defendant.[161] That is, if the only harm the plaintiff suffers is one that is indistinguishable from the claims of any other taxpayer, she cannot ask courts for relief. It is up to the President, and her executive branch officials, to protect these kinds of broadly diffused interests. If she chooses not to pursue any given case, that is her prerogative as the constitutional official charged to "take [c]are" that the laws are enforced.[162] And then, of course, she must pay any political consequences that follow from her decision.

Another decision around the same time, *Heckler v. Chaney*,[163] announced the presumption of unreviewability of agency nonenforcement decisions under the Administrative Procedure Act[164] "if the statute in question is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[165] According to *Heckler*, an agency's decision not to commence enforcement in any particular case presumptively is not reviewable under the APA.[166] Among other reasons, the Court suggested that individual enforcement decisions reflect a balancing of considerations that are outside courts' expertise but squarely within the agency's: How serious is this individual violation, how many agency resources would have to be sunk enforcing it, could those resources be better spent elsewhere?[167] Commentators call this rule the presumption against reviewability of "agency inaction."[168]

159. *Id.* at 753–66.

160. *Id.* at 751 (citing Valley Forge Christian Coll. v. Am.'s United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982)).

161. *Id.* (citing *Valley Forge Christian Coll.*, 454 U.S. at 472; Gladstone v. Vill. of Bellwood, 441 U.S. 91, 100 (1979)).

162. *Id.* at 761 (citing U.S. Const. art. II, § 3).

163. 470 U.S. 821 (1985).

164. 5 U.S.C. § 501 (setting forth the APA).

165. *Heckler*, 470 U.S. at 830.

166. *See* Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 457–62 (2020) (contrasting agency "interpretative underreach" by disclaiming authority or by refusing to undertake action, described as "Type II" error, with Type I error of regulating beyond agency authority and claims "the movement against deference and delegation demonstrates no serious concern with Type II error"); Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1805–08 (2019) (describing ways agencies do not take action); Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 159 (2014) (describing agency deferral as inaction).

167. *Heckler*, 470 U.S. at 831–33.

168. Bressman, *supra* note 128, at 1664–65. For a comprehensive overview that is a bit more optimistic about the possibility of judicial review of inaction, see Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENV'T L.J. 461, 464–67, 470–97 (2008).

As a number of prior authors have explained, the combination of standing and limits on review of inaction over time push regulatory outcomes towards deregulation.[169] Most simply, the asymmetric possibility of judicial review means that law will tend to reflect whichever institution takes a more deregulatory view, courts or agencies.[170] Imagine that policy outcomes can be drawn on a single line ranging from most deregulatory at the bottom to most regulated at the top. If the agency's position is lower than the court's—it chooses not to enforce in cases above that point—no one can challenge that decision. On the other hand, if a reviewing court thinks the law requires a point lower than the agency's, a regulated party subject (or, in many instances, potentially subject) to an enforcement action by the agency can ask the court to intervene, and the court may well reject the agency's interpretation or the method it used for reaching it.

These rules also affect how the agency makes decisions.[171] Suppose that agencies do not like spending years and resources defending their positions in court. All else equal, the agency would prefer to take an approach that minimizes judicial review.[172] One such approach is to do nothing.[173] Judicial review also shapes agency behavior more directly, as courts can reward agencies with deference (when the agency follows procedures the court prefers) or punish them with delays and denials (when it does not).[174] Thus, whatever procedural protections courts may believe necessary for effective, democratic,

169. *See* Bressman, *supra* note 128, at 1664–74; William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 764–65 (1997); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186–88, 195–97 (1992) [hereinafter Sunstein, *Standing After* Lujan].

170. *See* Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 634–50, 666–67 (2015).

171. *See* Bressman, *supra* note 128, at 1691–92; Wasserman, *supra* note 170, at 670; Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 405–07 (1985) (noting evidence that the IRS reduced its revenue rulings by 70 percent because of increasing costs of issuance).

172. Wasserman, *supra* note 170, at 670. This is sometimes called the "ossification" hypothesis, and it has many proponents. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1449 (1992); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489–90, 514 (1997). *See generally* Edward Rubin, *It's Time To Make the Administrative Procedure Act More Administrative*, 89 CORNELL L. REV. 95 (2003) (proposing an updated Administrative Procedure Act in response to the modern administrative state). For evidence, see Raso, *supra* note 120, at 83–106 (2013); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1416–23 (2012). The Yackees argue that on average increased procedural burdens did not slow the rulemaking process, but we agree (and our own personal experiences suggest) that the better reading of the evidence is that such burdens matter a great deal for higher-stakes rules where the agency cares about the outcomes. Shapiro & Murphy, *supra* note 51, at 354.

173. *See* Bagley, *Procedure Fetish*, *supra* note 49, at 362.

174. *See* McGarity, *supra* note 172, at 1411; Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 215 (2006).

or accountable agency behavior are unavailable when it comes to individual decisions by agencies not to enforce.[175]

For example, consider the final outcome in *Wright*. Although another Supreme Court decision, *Bob Jones University v. United States*,[176] forced the IRS to withdraw tax-exempt status for universities that declared expressly racist policies (a ban on interracial dating, in the case of Bob Jones University), the Reagan administration did not revisit the *de facto* segregation that was the heart of the *Wright* litigation.[177] The 1971 revenue ruling on that subject, issued under President Nixon, remains on the books today.[178] IRS has never explained why. Tellingly, the 1971 ruling itself was the result of a settlement agreement the IRS entered into with the NAACP in pre-*Wright* litigation.[179] Without the spur of further possible litigation, there have been few further regulatory developments.

2. The Tax Tilt

Administrative law's now-familiar tilt in favor of the regulated is even more pronounced in the case of the IRS, where process also is tilted in favor of those who owe or might owe taxes to the government. Of course, the main thing a tax system does is raise money.[180] For this purpose, administrative law's tilt is not against regulation, but against revenue. We will call those who owe money "individual taxpayers," even where they might include multinational firms, just to distinguish them from the general interest we all share in the public fisc. If the IRS chooses not to audit a taxpayer who owes money, or settles too readily, or issues a blanket proclamation that it will not enforce some tax provision, dollars remain in the pockets of individual taxpayers.

This tilt against raising revenue, in favor of smaller government or more honestly, deficit-financed modern government, contrasts with the older and more longstanding legislative design to protect the government's ability to raise

175. *See* Bressman, *supra* note 128, at 1692.

176. 461 U.S. 574 (1983).

177. *See* NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 31–58 (1988) (describing the administration's efforts to oppose desegregation).

178. Rev. Rul. 71-447, 1971-2 C.B. 230.

179. Green v. Connally, 330 F. Supp. 1150, 1155 (D.D.C. 1971), *aff'd mem. sub nom*. Coit v. Green, 404 U.S. 997 (1971).

180. Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3 (2006). As previously observed, the federal income tax also performs regulatory and social safety net functions. *See id.* at 4.

money. This is what the Anti-Injunction Act,[181] first adopted in 1867,[182] is about. Essentially, the AIA protects against taxpayer efforts to use pre-assessment (and for matters outside Tax Court jurisdiction, pre-enforcement) procedural roadblocks to frustrate the federal revenue-raising function, thereby assuring the government of the revenues needed to operate.[183]

This is not to say that every instance of unreviewable IRS inaction harms the fisc. There is evidence that many taxpayers fail to claim tax benefits to which they're lawfully entitled. For instance, because the Earned Income Tax Credit ("EITC") is so complex, and taxpayers are responsible for asserting in the first instance that the government owes it to them, a number of eligible low-income households do not get it.[184] In California, there was a brief period when the state's Franchise Tax Board pre-filled low-income households' tax returns, based on information reported from employers. A similar federal system could improve take up not only of the EITC but other benefits delivered through the tax system, such as the Affordable Care Act's marketplace health insurance subsidies. It is likely no one currently has the right to sue the IRS for its failure to pursue these money-losing policies. Still, on net we think that most inaction tends to favor the powerful and those with higher incomes; indeed, the absence of pre-filled returns is mostly a story about the lobbying influence of Intuit, the makers of the TurboTax tax preparation software.

As *Wright* illustrates, tax law also serves a number of fairly ordinary regulatory functions. It delivers subsidies to parties who engage in actions government wants to encourage—usually, this describes schools, if not those in *Wright*. And it imposes penalties on those who do disfavored things. Over the last century, the tax code has included provisions penalizing lobbying and drug dealing (not necessarily at the same time),[185] and taxing fake butter, guns, and people who don't buy health insurance.[186] IRS inaction on these kinds of provisions looks a lot like inaction on the part of other regulators.

181. The AIA provides, with certain exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). This is complemented by the exclusion of federal taxes from the scope of declaratory relief under the Declaratory Judgment Act. 28 U.S.C. § 2201(a). The Tax Injunction Act first extended protections similar to the AIA to state revenues in 1937. Tax Injunction Act, Pub. L. No. 75-332, ch. 726, 50 Stat. 738 (1937) (codified as amended at 28 U.S.C. § 1341).

182. Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475 (codified as amended at 26 U.S.C. § 7421 (2018)).

183. *See* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

184. *See generally* Jacob Goldin, Tatiana Homonoff, Rizwan Javaid & Brenda Schafer, *Tax Filing and Take-Up: Experimental Evidence on Tax Preparation Outreach and EITC Participation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28398, 2021) (assessing the impact of policies that encourage tax filing on EITC claims).

185. I.R.C. §§ 162I, 280E.

186. *See* Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 407, 416 (2010).

And yet that inaction is often harder for the public to overcome. One notable difference is that the Tax Code lacks any meaningful citizen suit or citizen petition provisions, even in respect of nonrevenue-raising actions by the IRS. In areas ranging from antitrust to the environment to civil rights, federal statutes commonly authorize individuals to bring suit against private parties for their failure to comply with federal law, even if there exists an agency that also could bring a similar action.[187] Tax law has none of these. There is a tax "whistleblower" statute of relatively recent vintage to bring information to the attention of the IRS.[188] But the IRS is not obligated to follow up on any lead it receives from outside whistleblowers, and thus far few claims seem to have come to any timely and remunerative resolution.[189]

Similarly, Article III standing limitations prevent those who might want to challenge the IRS from relying on standard administrative law that has developed elsewhere.[190] And standing limitations tend to favor trade associations whose members include one or more with standing in their own right and disfavor other advocacy groups whose members lack standing (including public interest groups) no matter the level of engagement their members have in the issue at hand.[191]

Though they are skinny, there are crevices in the *Heckler* doctrine through which some private suits can slip. For instance, if an agency has previously bound itself to following certain procedures when deciding whether to take a

187. David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 400–07, 411–14 (2020); Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 327–32, 345 (2010); Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENV'T L. REV. 175, 190–94 (2019). Like other agencies, the Treasury technically is open to "citizen petitions," or requests for agency action. 5 U.S.C. § 553(e) (2006). But this mechanism is not binding on the agency and is seldom if ever used in the tax context.

188. 26 U.S.C. § 7623.

189. Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 ADMIN. L. REV. 321, 322, 334–37 (2015).

190. Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 847–49 (2012) [hereinafter Zelenak, *Custom and the Rule of Law*]. As Professor Zelenak also explains, taxpayers cannot manipulate statutes of limitations to generate standing, either. *Id.* For example, imagine that in 2012 Lima repairs business equipment and receives an immediate deduction under the overly-generous rules governing some repairs. In 2022, Lima sells the equipment. Since she took a deduction, she did not increase her basis in 2012. In 2022, after the statute of limitations for the 2012 tax year has run, she might now sue the IRS, claiming the deduction rule was wrong, and that her basis should thus be increased. That tactic fails because the Tax Code would trigger a re-opening of the 2012 tax year, leaving Lima no better off if she were to win her suit. Thus, she usually will lack standing. *Id.*

191. *See* Chamber of Com. of the U.S. v. IRS, No. 16-CV-944, 2017 WL 4682050, at *1–3 (W.D. Tex. Oct. 6, 2017) (finding that U.S. Chamber of Commerce has standing because Allergan plc, a member of the Greater Waco Chamber of Commerce, asserted that the challenged rule denied tax benefits causing Allergan to not go forward with an announced merger), *app. dismissed on appellant's motion*, No. 17-51063, 2018 WL 3946143, at *1 (5th Cir. July 26, 2018).

regulatory action, and it then fails to follow those procedures, courts sometimes allow challenges to the agency's failure to follow its own rules.[192] The same is true if a statute arguably gives the agency no discretion to avoid acting, such as if there is a deadline for approving or disapproving some application.[193]

Typically, these openings are interpreted narrowly or are closed to potential tax plaintiffs.[194] What injury do you or we two authors suffer when Apple pretends its U.S. profits were earned in Ireland, resulting in little U.S. corporate income tax, and the IRS looks the other way? For the most part, our injuries are all roughly the same: we have lost a tiny share of what could have been the U.S. spending budget, or our individual tax contribution must be some immeasurable amount larger. Even Jeff Bezos only contributes a minuscule fraction of the U.S. budget.[195] And so, *Wright* tells us, neither you nor we nor Jeff can sue, since we have only a "generalized grievance."[196] To be sure, there might be some instances where tax's regulatory functions yield potential litigants who have a more direct harm—indeed, one might have thought that the Black plaintiffs in *Wright* itself had such a claim when it came to segregated schools.[197] But our goal here is to interpret the APA, and so we work within the constitutional standing rules *Wright* and its progeny give us, instead of repeating many prior (and, we think, cogent) arguments about its incoherence.

IRS actions, and inactions, are also almost uniquely opaque to the public, and we think this likely furthers the tilt. Federal law makes it a crime for any government employee to disclose tax "returns or return information" to any unauthorized person.[198] The IRS has long viewed this provision broadly to include even such basic facts as whether a given taxpayer is under audit, let

192. Richard J. Pierce, Jr., *Making Sense of Procedural Injury*, 62 ADMIN. L. REV. 1, 2 n.4 (2010).

193. Norton v. S. Utah Wilderness All., 542 U.S. 55, 64–65 (2004) ("[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."). A helpful survey is Diana R.H. Winters, *Intractable Delay and the Need to Amend the Petition Provisions of the FDCA*, 90 IND. L.J. 1047, 1052–57, 1074–78 (2015).

194. *See* Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 630–35, 646–47 (2016); Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 652 n.183 (1999).

195. Indeed, Mr. Bezos' contribution is small even for one of his wealth. *See America's Top 15 Earners and What They Reveal About the U.S. Tax System*, PROPUBLICA (Apr. 13, 2022, 5:01 AM), https://www.propublica.org/article/americas-top-15-earners-and-what-they-reveal-about-the-us-tax-system [https://perma.cc/6S7C-KH88].

196. Allen v. Wright, 468 U.S. 737, 751, 756 (1984).

197. Lynn D. Lu, *Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules*, 66 ADMIN. L. REV. 73, 87, 98–104 (2014) (noting that *Wright*'s definition of individual injury was "impossibly strict"). Justice O'Connor's majority opinion acknowledges these plaintiffs had more than a generalized grievance but dismisses their causal argument that tax exemption could plausibly affect the likelihood that any one of them would be able to attend an integrated school. *Wright*, 468 U.S. at 756–59. Justice Brennan's dissent provides a deeper understanding of the real harm inflicted. *See id.* at 771–78 (Brennan, J., dissenting).

198. I.R.C. § 6103.

alone the outcome of that audit.[199] Taxpayers are free to volunteer their own tax information if they wish.[200] Here, again, we have an asymmetry that works, somewhat subtly, to undermine the fisc. Taxpayers who believe they have been unfairly targeted can complain as loudly as they please. But the IRS is powerless to respond even if many others in similar positions have been treated similarly.[201]

More fundamentally, the IRS faces little accountability for its enforcement decisions. Unless the Treasury Inspector General or the IRS Taxpayer Advocate gets wind of an issue and pursues it to a public report, there is almost no way for the public to know whether the IRS is performing as their faithful agent.[202] We cannot see who the IRS chooses to audit, nor why they chose that taxpayer and not someone else.[203] There are other invisible crimes, of course. But usually constituents can get a rough sense of when a prosecutor or enforcer is failing at her job, as they experience first-hand excess burglaries or turbid water.[204] At a minimum, it is typically possible for independent observers to collect data that reflects on the regulator's performance, whereas only the IRS can know (if they choose to) whether taxpayers are paying what the law commands.[205] That fact seems hard to reconcile with the Supreme Court's view that political accountability is what justifies committing enforcement discretion to the executive.[206]

We want to be clear that in our view the modern IRS generally does an outstanding job and provides Congress and the public with reasonable if not robust data about its own performance, writ large. The Service has an entire unit, the Statistics of Income group, devoted to studying aggregate and

199. George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right To Know*, 100 VA. L. REV. 1115, 1131–34 (2014).

200. Kevin McCoy & David Jackson, *IRS: Trump Can Release Tax Returns Regardless of Audit*, USA TODAY (Feb. 26, 2016, 3:29 PM), https://www.usatoday.com/story/news/politics/onpolitics/2016/02/26/donald-trump-internal-revenue-service-audits/80996086/ [https://perma.cc/PG8C-S7XD].

201. Yin, *supra* note 199, at 1133–34.

202. We do not mean to ignore congressional oversight, including investigations by the Permanent Subcommittee on Investigations, but congressional attention is most naturally directed at items for which there are potential legislative solutions. Those represent the tip of the iceberg and for a variety of reasons, including exposure of their staffs to legal risks associated with disclosure of taxpayer information, staffs outside of the Joint Committee on Taxation generally avoid contact with taxpayer information.

203. Yin, *supra* note 199, at 1133; *cf.* Osofsky, *supra* note 11, at 94–98 (arguing that increasing the public salience of IRS nonenforcement decisions would improve its legitimacy).

204. *Cf.* Velikonja, *supra* note 151, at 1562 (arguing that regulated parties can "read the tea leaves" to identify when enforcement effort has declined).

205. *Cf.* Barkow, *supra* note 154, at 1177–80 (exploring use of inspectors general as a source of oversight for enforcement activities); Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 986–89 (2017) (surveying mechanisms for public oversight of agency enforcement decisions).

206. *Cf.* Coglianese et al., *supra* note 111, at 949 (arguing that lack of transparency for regulatory "dispensations" undermines rule of law).

categorized taxpayer and enforcement data (cleaned of taxpayer identifying features).[207] The IRS holds research conferences and invites private partners to work with it to understand what collection and enforcement strategies work and what does not.[208] It even publicly assesses its own failings, publishing statistical measures of the "tax gap," or the amount of revenue that could have been collected under (its view of) current law, if only the IRS had been able to perfectly audit every taxpayer.[209]

Our point is different. These data shed no light on whether the IRS has taken unannounced legal or policy positions that *reduce* potential revenue. They offer no markers of agency "capture" or excessive influence by taxpayers with the best lawyers and connections. And as recent events unfortunately compel us to point out, the data do not and cannot tell an observer whether executive officials outside the IRS use their influence to obtain favorable outcomes for political allies, or even for themselves.

Lastly, all these factors have to be understood in light of the basic political economy of taxation. As many other writers have recognized, politics is stacked in favor of tax breaks: concentrated interest groups can easily organize for their own benefit, while the costs of the breaks (lower revenues) are spread thinly across the general population, which will rationally ignore or free ride on the efforts of others to identify revenue-losers.[210] This dynamic can easily lead to finger pointing and free riding between branches of government.[211] Law should aim to overcome these political market failures, but instead it compounds them.

207. *SOI Tax Stats - Purpose and Function of Statistics of Income (SOI) Program*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-purpose-and-function-of-statistics-of-income-soi-program [https://perma.cc/PT9S-GASS] (last updated Oct. 12, 2022).

208. *12th Annual IRS-TPC Joint Research Conference on Tax Administration*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/12th-annual-irs-tpc-joint-research-conference-on-tax-administration [https://perma.cc/FHS7-66T7] (last updated June 17, 2022).

209. *The Tax Gap*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/the-tax-gap [https://perma.cc/XS78-Q8JP] (last updated Oct. 28, 2022).

210. *E.g.*, James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 369 (James Q. Wilson ed., 1980) (describing the relationship between politics, tax breaks, and economics). For a good overview of these points, see Wallace, *supra* note 58, at 220–24. Again, tax may share this feature with other enforcement regimes. *See* Lemos, *supra* note 205, at 953–55 (describing public-choice analysis of civil enforcement proceedings).

211. Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633, 701–03 (2017). An implication of Hemel's argument is that extreme executive inaction may encourage greater legislative attention to revenue. *Id.* at 711. We agree this has some theoretical appeal, but as a practical matter we doubt Congress would ever solve, or even put a meaningful dent in, the inaction tilt. While Congress might occasionally act on a handful of high-profile issues the IRS lets fall to the wayside, there will remain thousands of individual bits of updates and guidance that only an agency has the time, staff, and relative lack of veto-gates to successfully address. *See* James R. Hines, Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 261 (2015) (noting that tax agencies have these advantages); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–96 (1985) (same, for agencies generally).

In addition to cutting off government funding, an anti-revenue tilt generally will disproportionately benefit richer taxpayers. To the extent that the tax system is on average progressive, or transfers money from richer to poorer, IRS abstention from collecting revenue would tend to have the opposite effect: it would leave the rich richer than they would be if the IRS had collected. Of course some enforcement decisions (say, relaxing standards of proof for low-income individuals who receive wage subsidies through the tax system) could be progressive.[212] Most scholars who have studied agency inaction, however, report that inaction tends to benefit sophisticated parties who have resources and connections to urge regulators towards leniency.[213] Tax shares this latter feature with other regimes, and we don't claim that in this respect the tax tilt is necessarily *more* regressive than in other areas.

212. *Cf.* Joshua D. Blank & Ari Glogower, *Progressive Tax Procedure*, 96 N.Y.U. L. REV. 668, 726–28 (2021) (suggesting the IRS implement procedural disadvantages for wealthier taxpayers).

213. Bagley, *Procedure Fetish*, *supra* note 49, at 364–65; Wasserman, *supra* note 170, at 676. The advantages of wealth extend beyond regulatory capture to pressing for inaction or reduced action in enforcement. Robert Smith assembled lawyers from Kirkland & Ellis; Skadden Arps; Caplin & Drysdale; and Hochman, Salkin, Rettig, Toscher & Perez to avoid indictment for hiding more than $200 million of income offshore. Neil Weinberg & David Voreacos, *How Robert Smith Avoided Indictment in a Multimillion-Dollar Tax Case*, BLOOMBERG (Feb. 3, 2021, 11:10 AM), https://www.bloomberg.com/news/features/2021-02-03/how-billionaire-robert-smith-avoided-indictment-in-multimillion-dollar-tax-case#xj4y7vzkg [https://perma.cc/EP9Y-RR6T (dark archive)] ("Smith began assembling a team of prominent attorneys after his tax problems surfaced in 2013. They included former Acting Attorney General Mark Filip and former Obama White House Counsel W. Neil Eggleston at Kirkland & Ellis, where [then Attorney General William] Barr had worked before going to the Justice Department. Charles Rettig, then in private practice and now IRS commissioner, was engaged, as were former Commissioner Fred Goldberg and Mark Matthews, a former deputy commissioner."). In a deferred prosecution agreement, Smith acknowledged committing crimes, paid $139 million and agreed to cooperate in ongoing investigations. Letter from U.S. Dep't of Just., Tax Div., to Mark Filip, Attorney, Kirkland & Ellis, LLP (Oct. 9, 2020), https://www.justice.gov/opa/press-release/file/1327906/download [https://perma.cc/5LL5-Y9XA]. Smith's case did lead to "the biggest U.S. tax fraud case ever filed," an indictment against his former investor, Robert Brockman. Miriam Gottfried & Mark Maremont, *The Billionaire Behind the Biggest U.S. Tax Fraud Case Ever Filed*, WALL ST. J. (Mar. 3, 2021, 10:32 AM), https://www.wsj.com/articles/the-billionaire-behind-the-biggest-u-s-tax-fraud-case-ever-filed-11614785519 [https://perma.cc/C2WX-TVKY (staff-uploaded, dark archive)]. Mr. Brockman died in 2022 before going to trial. Ken Dilanian, *Robert Brockman, Billionaire Charged in $2 Billion Tax Evasion Case, Dies at 81*, NBC NEWS (Aug. 6, 2022), https://www.nbcnews.com/news/us-news/robert-brockman-billionaire-charged-2-billion-tax-evasion-case-dies-81-rcna41882 [https://perma.cc/5SV5-ARE8].

The chart is a partial scorecard of the inaction bias:

Factor	**Bias–Advantage**	**Comment**
IRS resource deficit	Inaction–Taxpayer	Reduces enforcement
Nondisclosure of taxpayer information	Inaction–Taxpayer	Public access only to aggregated anonymized data
Comments on proposed regulations	Inaction–Taxpayer	Comments are overwhelmingly from interested taxpayers; for technical rules interested taxpayers have expertise and data not available to others; may use selectively
OIRA review	Inaction–Taxpayer	We are unaware of an OIRA review increasing revenue from proposal
Standing	Inaction–Taxpayer	Public may not challenge taxpayer advantage; interested parties may not challenge taxpayer detriment (but may finance taxpayer)
Anti-Injunction Act	Action–Gov't	Public and taxpayer may not advance challenge taxpayer or industry advantage or disadvantage
Judicial deference	Action–Gov't	Decreases risk of taxpayer challenge; under challenge, advantage is shrinking through judicial erosion

C. *GILTI as Charged?: Evidence of the Anti-Fisc Tilt*

The tilt is obvious to anyone who has seen the tax rulemaking process,[214] but we will offer a few different pieces of evidence here. First, several recent studies of tax rulemaking confirm that tax guidance systematically favors

214. Or, obvious to most. *Compare* Zelenak, *Maybe Just a Little*, *supra* note 33, at 1914 (emphasizing the abundance of "strikingly protaxpayer" rules promulgated by tax regulators), *with* Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP., PROB. & TR. J. 731, 758 (2002) (suggesting agency bias resulting from the agency's status as the taxpayer's adversary in litigation), *and* Salem et al., *supra* note 81, at 724–25 (suggesting agency bias resulting from a revenue-maximizing agenda).

taxpayers who are opposed to heavier burdens and excludes the voices of those who would benefit from greater government revenue. To give the reader a sense of the exact mechanisms of action, we also provide a more detailed snapshot of a high-profile recent instance of rulemaking gone wrong.

1. Prior Studies of Tax Rulemaking

The available evidence tends to confirm our hypothesis that voices favoring protection of the fisc are rarely heard in tax rulemaking. To be sure, regulated parties and industry groups are always major players in almost any regulatory effort, because of the familiar combination of resources and ease of political organization that comes with being a small group under common threat.[215] But opponents of revenue are especially prevalent.

For example, in Professor Wallace's study of the recent decade of tax rulemaking, he finds that public interests that might protect revenue were almost totally absent from the rulemaking process, with private interest commenters (i.e., those facing a higher tax bill) outnumbering the public seven-to-one.[216] Fewer than one-in-five rules attracted a single public-interested comment.[217] Professors Oei and Osofsky found a similar disparity in their deep-dive investigation into the making of recent rules affecting small businesses: "public interested perspectives" offered few comments, and those comments played no role at all in the final form of the rule.[218] Professor Osofsky tells a similar story in the development of the "carried interest" provisions allowing private equity managers to pay about half the tax rate as other wage earners.[219]

We further hypothesized that low participation and the other aspects of the anti-fisc tilt would mean that IRS tended to systematically favor money-losing provisions, and here too other researchers have found evidence consistent with that view. Perhaps the most convincing evidence that the Treasury and the IRS do not take the threat of challenges from pro-revenue forces seriously can be found in the preambles for final tax rules, which are "nothing like the sort of adversarial prelitigation document that is familiar in other rulemaking contexts."[220] As we have explained, to survive judicial review an agency must respond on the record with fairly detailed analysis of why it rejected suggestions from commenters. The absence of such responses from tax rules suggests the tax agencies are unconcerned: they have nothing to fear in court from those who

215. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 132 (2008); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006).

216. Wallace, *supra* note 58, at 182.

217. *Id.* at 219.

218. Oei & Osofsky, *supra* note 108, at 254–55.

219. Osofsky, *supra* note 11, at 104–07.

220. Wallace, *supra* note 58, at 181.

favor revenue and lack standing, while being fairly confident that few anti-tax commenters will have grounds to complain.

Indeed, Professor Zelenak examined all the observed instances where tax administrators deviate from how courts would plausibly view the Tax Code, and concluded that "deviations are always protaxpayer."[221] What is more, once adopted, the IRS has never abandoned such a position.[222] For example, through the 1970s, the IRS allowed taxpayers to omit reporting the value of more than forty types of employer-provided fringe benefits, such as "parking facilities, medical services, swimming pools, libraries, courtesy discounts, etc."[223] Both Democratic and Republican administrations have declared that corporations can make retroactive use of business losses, despite clear statutory language to the contrary.[224] As Professor Rosenberg describes, the IRS also took a narrow view of the codified economic substance doctrine—a provision Congress adopted to help the IRS fight abusive tax shelters—and discouraged its use.[225]

Professor Hemel examines the related question of why the executive so rarely pursues revenue-raising regulations that would plausibly lie within its power to adopt unilaterally.[226] He notes a series of high-profile legislative proposals that the IRS failed to pursue through regulation or guidance,[227] while acknowledging that in a handful of cases regulation did fill the place of legislative inaction.[228] He also provides several useful short case studies of the issue we highlight: voluntary giveaways of taxpayer money by the tax rulemaking agencies.[229]

2. The GILTI High-Tax Election and Doughnut Hole Regulations

One area where there is inherent disparity in public involvement in notice and comment rulemaking is that of international taxation. The area is arcane, the principal taxpayers are well-resourced multinational corporations, and the taxpayers are represented by sophisticated law and accounting firm advisors. To take as a recent example, the IRS adopted a taxpayer election to exclude foreign income subject to high foreign tax from the scope of "global low-taxed

221. Zelenak, *Custom and the Rule of Law*, *supra* note 190, at 833.

222. *Id.* at 838–39.

223. *Id.* at 843–44 (quoting Brief for the United States at 39, Rudolph v. United States, 370 U.S. 269 (1962) (No. 396)). It was Congress, not the IRS, that ended those exemptions. *See* I.R.C. § 132.

224. *See* Zelenak, *Custom and the Rule of Law*, *supra* note 190, at 846.

225. *See* Rebecca Rosenberg, *Codification of the Economic Substance Doctrine: Agency Response and Certain Other Unforeseen Consequences*, 10 WM. & MARY BUS. L. REV. 199, 212–34 (2018).

226. Hemel, *supra* note 211, at 639–41.

227. *Id.* at 658–75.

228. *Id.* at 680–85.

229. *Id.* at 689–96 (discussing check the box, INDOPCO, and carryback loss regulations).

intangible income" ("GILTI"), which would be advantageous for taxpayers in a position to take advantage of the election.[230]

The favorable interpretation read a statutory exclusion from "tested income," the underlying source of GILTI, beyond expansively to reach all tested income, instead of the subset of income that could have qualified for the Section 954(b)(4) election referred to in the legislative text. The exclusion from tested income reads in relevant part as "any gross income excluded from the foreign base company income (as defined in Section 954) and the insurance income (as defined in Section 953) of such corporation by reason of Section 954(b)(4),"[231] yet in the regulation is applied to all gross income underlying tested income.

Section 954(b)(4) permits an election to exclude certain categories of gross income from Subpart F income if the income is subject to a foreign effective tax rate of 90 percent or more of the highest U.S. corporate rate. If the election is not made and the income is included in Subpart F income, it also is excluded from GILTI.[232] By electing the exclusion from Subpart F income, the effect of being also excluded from GILTI means that the gross income net of deductions will be exempt when distributed to a U.S. shareholder (under Section 245A).[233]

As of the close of the comment period, disregarding a technical comment from a bar association that disavowed consideration of the election's validity, only one of thirty-five comments was from a measurably disinterested party.[234]

230. The IRS fashioned the election from a menu of taxpayer proposals seeking to narrow the impact of GILTI on taxpayers. The revenue loss from the election came in significant part from its interaction with rules allocating deductions for purposes of the foreign tax credit limitation. Income subject to the election was deferred from current U.S. income inclusion and, when distributed, was eligible for a 100 percent dividend received deduction. This exempt income attracted no deductions (notwithstanding what one of us has argued is potential for disallowance under Section 265). Stephen E. Shay, *Addressing an Opaque Foreign Income Subsidy with Expense Disallowance*, 172 TAX NOTES FED. 699, 700 (2021) [hereinafter Shay, *Opaque Foreign Income*]. Moreover, by not including the income as GILTI, the associated foreign taxes were not subject to the rigors of the foreign tax credit limitation. Exemption and loss of the taxes as credits altogether in many cases would be preferable to inclusion in income and limited credits. Obscure indeed.

231. 26 U.S.C. § 951A(c)(2)(A)(i)(III). Many supporters of expanding the scope of the election beyond the statutory words are textualists in assessing the permissible boundaries of rules that increase tax.

232. *Id.* § 954(b)(4).

233. *See* Stephen E. Shay, *A GILTI High-Tax Exclusion Election Would Erode the U.S. Tax Base*, 165 TAX NOTES FED. 1129, 1129–40 (2019). Since that article, Shay believes that the better view is that U.S. shareholder expenses allocable to dividend income exempt under Section 245A properly are disallowed under Section 265. *See* Shay, *Opaque Foreign Income*, *supra* note 230, at 716. While that changes the taxpayer calculus, it remains that a taxpayer making the election will be advantaged.

234. The comment was from a retired Joint Committee on Taxation staff revenue estimator pointing out anomalies in the allocation of expenses and their potential for revenue impact. Patrick Driessen, Comment Letter on Proposed Rules for Determining Stock Ownership and Global Intangible Low-Taxed Income (Sept. 19, 2019), https://www.regulations.gov/comment/IRS-2019-

The final regulations adopting the election put boundaries in the form of consistency requirements around the scope of the election, but adopted it notwithstanding the strain on the statutory authority.[235]

The final regulation's adoption of the high-tax election lost revenue, indeed, potentially substantial revenue. It strained any credible reading of the statutory text. Yet, it is difficult to imagine a realistic situation where any nonbenefitted person would have standing and the resources to seek a review of the regulation. Even during the regulatory process, there were no comments filed before the deadline that addressed all of the complex implications of the proposal. There is a limit to the benefits from public participation if it represents only a subset of stakeholders—those with direct tax interests. Indeed, to get meaningful, knowledgeable, and disinterested *ex ante* input, some other mechanism, possibly invitational and involving compensation, would be required. As in many cases of complex lawmaking, there are limits to what can be known about effects of a rule in advance. There is no systemic *ex post* review of outcomes.

Contrast this situation with another regulation in the international tax arena where the IRS has sought to protect the fisc. The GILTI legislation left a gap in effective dates between the time at which an exempt dividend could be received by a U.S. shareholder eligible for Section 245A dividend exemption (January 1, 2018) and when the GILTI inclusion rule would apply to the shareholder (the tax year beginning after December 31, 2017). As a result of the gap, any multinational with a noncalendar tax year would have a window within which to cause its controlled foreign corporation ("CFC") to distribute appreciated assets, obtain a tax step-up in the asset basis and be allowed a 100 percent dividends-received deduction with respect to the dividend. Multinationals like Federal Express and Qualcomm, working with and sometimes instigated by sophisticated advisors, planned transactions to obtain the double benefit.

The IRS issued proposed and temporary regulations, later finalized, to reduce the scope of the benefit roughly to what would have been allowed if GILTI had applied in a limited category of cases that provided indicia that the effective date hole was being planned into and exploited. The proposed regulations received extensive negative comments but were finalized with a preamble addressing the comments. Liberty Global, Inc. has filed a refund case

0029-0032 [https://perma.cc/5YD7-CT55 (staff-uploaded)] (commenting on REG-101828-19 and observing that proposed regulations do not appear to describe how U.S.-sited expenses would be allocated).

235. Jasper L. Cummings, Jr., *Not GILTI 'by Reason of' the High-Tax Exclusion*, 169 TAX NOTES FED. 89, 89–90 (2020).

in the Federal District Court for the District of Colorado,[236] and Oshkosh, Maxim Integrated Products, and Newell Brands have filed disclosures indicating they plan to challenge the validity of the regulations.

In sum, tax guidance *is* different. Other agencies face some of the rulemaking challenges and obstacles that confront the IRS and Treasury. But none face the same overwhelming combination of circumstances: funding the nation while juggling vast scale, deep complexity, potentially hundreds of millions of unsophisticated affected taxpayers, millions of highly sophisticated opponents, and a fundamental regulatory tilt against taking any action at all. We argue that under these circumstances demands for increasing formalism and layers of review actually undermine, rather than further, the supposed neutral goals of administrative procedure.

III. BLACK MIRROR: THE IRONIC EFFECTS OF TILTED TAX PROCEDURE

We have traced the anti-revenue tilt carefully because it interacts in critical ways with the surrounding administrative framework. That is, the extent and impact of the tilt depend on what other administrative procedures and resources are in place. In the presence of the tilt, therefore, changing administrative rules or applying them formally without regard to context may have a dramatically different impact than would be the case if the tilt were not in place. We argue that, in fact, the anti-revenue tilt transforms procedural formalism into a wicked reflection of itself, undermining the very goals formalism is supposed to advance.

To see the connection between formalism and the tilt more clearly, recall the ways in which the tilt is a product of agency incentives. For example, as we described above, when inaction is unreviewable, at the margin agencies will prefer inaction to action—for the IRS, that means less rather than more revenue—because that choice is cheaper.[237] It spares the agency the risk of reversal, and similarly spares it the investments needed to minimize reversal risk.[238] It follows that as the costs of review grow larger, the cost differential

236. Liberty Glob. Inc. v. United States, No. 20-cv-03501, 2022 WL 1001568, at *1 (D. Colo. Apr. 4, 2022). The district court granted summary judgment for the taxpayer on the grounds that the retroactive regulation was invalidly issued under the APA for failure to state good cause for departure from using a regular notice and comment procedure. *Id.* at *7.

237. In some instances, agencies may actually invite additional procedure because they value the benefits it can provide, such as additional information. *See* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 863–65 (2009); Raso, *supra* note 120, at 82–83. But that point does not alter our predictions, because the rules we critique involve instances where the agency is forced to undergo procedures it did not elect. By definition, then, we are focused on procedures the agency would prefer to avoid.

238. It could be argued that if the agency is truly indifferent between whether it enforces a provision or not, as it would be "at the margin," then being reversed should be costless: the agency has

between action and inaction similarly grows.[239] The more an agency has to spend to adopt its preferred guidance, and the lower the rewards to the agency from successful adoption, the more powerfully the agency is inclined to do nothing instead.[240]

These points about judicial review readily transfer to the new aspects of procedural formalism we have highlighted. For each of these recent changes, either the tax agencies' cost of issuing guidance is rising, the benefits of issuing that guidance is falling, or both. Each alone, and certainly in combination, helps to deepen the anti-revenue tilt.

Consider first *Altera* and the drift towards expanded notice and comment. Requiring notice and comment for guidance that once was exempt adds at least two kinds of major costs and also diminishes the agency's expected net benefit from undertaking to issue guidance. Most obviously, the process of conducting notice and comment is itself costly. As we have described, many of these costs are "upstream" from the process itself, as the agency must hire staff and design procedures that enable it to anticipate comments, assemble and analyze evidence in support of its position, communicate the analysis in proposed regulation preambles, in final regulations respond to comments, and then

lost nothing it wanted. Not so. When the agency is in equipoise between enforcement and nonenforcement, it is balancing the respective costs and benefits of each. It may strongly prefer one to the other, but that path may also carry higher costs. Changing the cost structure thus can importantly affect whether the agency maximizes its objectives (of course, we recognize that agencies are complex entities made up of many overlapping sets of goals and influences, but to simplify we describe them here as representing something like the average of those). For example, imagine the IRS believes policy X would deliver a benefit of $10 billion (again, for convenience and simplicity we render costs and benefits in dollars, but in the real world they are a combination of dollars and other forms of satisfaction and frustration). Declining to pursue policy X delivers net benefits of $0. Because of hard look judicial review, the costs of pursuing X are $10 billion. In this case, policy X is at the margin of the IRS's choice set: a few dollars this way or that, and it's viable, or not. If the decision not to pursue X were judicially reviewable, even under a much more deferential standard, the net benefits of declining to adopt the policy might fall to, say, negative $1 billion. The IRS would then presumably enact policy X. This is why we say that the failure to review inaction favors inaction.

239. To continue the example in the previous footnote, imagine that the IRS is also considering a policy Y, with expected benefits of $11 billion. If the average costs of enacting a reviewable policy remain $10 billion, the IRS pursues Y. If, however, the costs of judicial review for an average policy project rise from $10 billion to $11 billion, then the IRS cancels Y and prefers inaction instead.

240. Coglianese et al., *supra* note 111, at 951. James Puckett notes that if many tax regulations are struck down for procedural reasons, the IRS might turn to "enforcement by litigation rather than giving general guidance." Puckett, *Exceptionalism*, *supra* note 33, at 1096–97, 1102–03. That is possible, but we think a less common result than simply the turn to inaction. Litigation is time-consuming, expensive, and risky, Rosenberg, *supra* note 225, at 239, and unlike regulation, a win in one court does not usually settle an issue for the whole country. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105–17, 1121–22 (1987). Alternately, if the new formalism leaves aside some forms of highly informal guidance, we might expect the IRS to employ those methods, which are less transparent and informative to the public, more often. McMahon, *Perfect Process*, *supra* note 33, at 584–85. While better than complete inaction, this is also an undesirable outcome.

survive judicial challenge.[241] This is exactly the premise that the "inundation" strategy depends on: private litigants use notice and comment to overwhelm and outgun the agency.[242] Further, since the comment process lays the groundwork for hard look review challenges, the agency's expected benefits from issuing guidance are lower, as some guidance will be struck down and never go into effect.[243]

For both of these factors, the agency's resource environment also plays an important role, and of course the IRS's budget is under extreme stress that continues after the Inflation Reduction Act.[244] Resources deployed to draft guidance and survive judicial review cannot be used for other aspects of the agency's mission.[245] We have already described how Congress has systematically starved the IRS and the Treasury. Meeting the *Altera* threat means redeploying resources to gather data in support of new guidance, and repurposing analysts from monitoring and enforcement tasks to responding to comments. And the scarcest resource of all, the attention of agency leadership, now will be spent responding to all the challenges constructed by regulated parties' lawyers instead of focusing on their enforcement agenda.[246]

Perhaps more importantly, notice and comment simply takes time. Time is a crucial input into agency's decisions about whether to act. Time saps the will of agencies not only by reducing the present-discounted value of winning for the administrators, but also by diminishing political pressure on them to act.[247] It is hard enough to form a political coalition to encourage agency action for abstract goals, such as protecting the fisc, when the benefits will soon be visible to the coalition.[248] When benefits will instead arrive many years later, after several intervening elections, that task can become insurmountable.[249] Further, in the case of IRS rules, delays not only make the agency wait for its desired outcomes, but also diminish the outcomes themselves. While the IRS

241. *See supra* text accompanying notes 119–21.

242. Bagley, *Procedure Fetish*, *supra* note 49, at 394.

243. *See id.* (describing costs of notice and comment process for an agency).

244. *See* Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 808 (2015) (describing ways that budget pressure distorts the IRS's choice about how to regulate and what kinds of guidance to provide). For a description of IRA funding for the IRS, see *supra* note 15 and accompanying text.

245. *See* McMahon, *Perfect Process*, *supra* note 33, at 556, 563, 585.

246. *Id.* at 591; Bagley, *Procedure Fetish*, *supra* note 49, at 361; *see* Parrillo, *supra* note 60, at 248–51 (describing constraints imposed by limited time managers have to spend reviewing policy decisions).

247. *See* Bagley, *Procedure Fetish*, *supra* note 49, at 361–62 (describing how delays increase political challenges for rule makers).

248. *See* Brian Galle & Kirk J. Stark, *Beyond Bailouts: Federal Tools for Preventing State Budget Crises*, 87 IND. L.J. 599, 623–24 (2012).

249. *See id.* at 612–15.

plays whack-a-mole with comments and waits for litigation to resolve, revenue is slipping away, never to return.[250]

There is also a strategic element to delay. Presidents come and go. Guidance supported under one administration might be opposed by the next. Administrative law is structured to make it relatively more difficult for an agency to revoke an existing final rule.[251] Opponents may therefore try to delay finalization until a more sympathetic executive takes over.[252] The Congressional Review Act also allows Congress to nullify administrative actions, but only those that are relatively recent, so again delaying final guidance until close to the date of an election can be a tool for defeating it.[253]

In the particular case of the IRS, time also exacerbates the existing resource crunch. When the IRS cannot issue prompt guidance, confused taxpayers instead jam telephone help lines or file incorrect returns that must be reviewed, diverting audit staff from filers who are intentionally attempting to minimize their tax.[254] Guidance that limits private planning, such as by ruling on a potential tax shelter, also can economize on enforcement resources—unless it is delayed by the need to satisfy procedural formalism.[255] It is a truism of enforcement theory that deterrence substitutes for detection.[256] By establishing clearer rules and triggering penalties for failure to abide by them, the IRS can deter more taxpayers, rather than having to chase after potential rule breakers.

We can tell much the same story for pre-enforcement and OIRA review. Pre-enforcement review can delay the effective date of new guidance until after the initial challenge, an appeal from that challenge, and then potentially Supreme Court consideration of the appeal, a process that typically takes several

250. *See* Brief for Former Gov't Offs. as Amici Curiae Supporting Respondents, *supra* note 96, at 15–16 ("Tax shelter detection is thus a race against the clock."); *id.* at 16–17 (noting that passage of time makes it harder for the IRS to collect tax debts). Although the IRS can promulgate retrospective rules, *see* Puckett, *Exceptionalism*, *supra* note 33, at 1096–97, 1101, it is bound by the statute of limitations, which typically runs in three years. I.R.C. § 6501(a). Thus, if litigation to finalize a new position takes more than three years, many taxpayers who would have incurred tax at the time of the original position will not owe any money.

251. William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1371–73, 1390–1412 (2018).

252. Bagley, *Procedure Fetish*, *supra* note 49, at 361.

253. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 17 (2021), https://sgp.fas.org/crs/misc/R43992.pdf [https://perma.cc/N2F5-BEXQ (staff-uploaded)].

254. *See* McMahon, *Classifying*, *supra* note 20, at 278 (noting that guidance reduces administrative costs by helping taxpayers file more consistent returns); NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 3–4 (2021), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_Full-Report.pdf [https://perma.cc/K68D-WNRM] (describing massive backlogs in IRS responses to taxpayers, and noting, "[w]hen taxpayers can't get information . . . they call the IRS").

255. McMahon, *Classifying*, *supra* note 20, at 285.

256. A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 403, 420 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

years at best. Opening doors to litigants earlier in the regulatory process may also encourage more lawsuits overall.[257] OIRA review is usually much speedier, but potentially more costly in the sense that it adds yet another new set of constituencies—those with influence over the President—to the group that the agency must expect to review and challenge its decisions.[258] In response, the agency must again develop data, processes, and personnel that are capable of responding to the kinds of demands those constituencies will assert.[259] And of course OIRA adds some kinds of roadblocks, such as the possibility of cost-benefit analysis, that courts typically do not, increasing the threat that the guidance will be blocked before it can go into effect.[260]

Although it is more subtle, weakening deference to agency decisions can have a similar tilting effect. Although on their face deference rules don't categorically grant more deference to deregulatory interpretations, when inaction is unreviewable, the effect is the same. No judicial review at all is indistinguishable from super-strong deference in the sense that the agency always wins.[261] If agencies also get super-strong deference when they do act, then there is less imbalance. As deference diminishes and judicial scrutiny gets closer to *de novo* (or even a presumption of invalidity, conceivably), the gap between action and inaction widens: with diminishing likelihood of prevailing, the government's expected benefit from acting is shrinking.[262]

Put another way, if courts will defer equally to the agency whether or not it concludes, say, there was a good "reorganization," then deference doctrine will not affect the agency's decision whether to go forward. But what if courts would hardly defer at all to a conclusion that the transaction is taxable, but will give almost complete deference to a legal conclusion it is not? Again, the agency's incentives will be tilted towards nonenforcement.[263]

It is worth underlining how ironic these results are. Procedural formalism rules are said to legitimize rulemaking, make it visible to the public, improve the quality of its outcomes, and tie it to congressional control.[264] Yet in the presence of the tilt, they do the very opposite. The slower and costlier guidance is for agency actions, the greater the incentives of agencies to avoid it by

257. Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Law*, 76 GEO. WASH. L. REV. 1153, 1156, 1194–99 (2008).

258. Morrison, *supra* note 106, at 1064–67.

259. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1782–1803 (2013).

260. *See* Cathy Sharkey, *State Farm "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1617 (2014) (pointing out that OIRA imposes cost-benefit analysis obligations that judicial review typically does not).

261. Biber, *supra* note 168, at 470.

262. *Cf*. Wasserman, *supra* note 170, at 670 (modeling agency decision to act under differing deference rules).

263. Wasserman, *supra* note 170, at 670–71.

264. *See supra* notes 113–124 and accompanying text.

inaction. And deciding not to act, prior authors tell us, is more likely to escape public notice, public participation, and congressional oversight than anything else agencies decide. This is even more true for tax given the opacity of taxpayer outcomes. Further, in the presence of the tilt, rules of administrative procedure systematically favor some policy outcomes over others, without any consideration of whether those outcomes are desirable.

More than that, deepening the tilt risks making tax "law" lawless in effect.[265] The essence of the tilt is that inaction, and revenue giveaways in particular, cannot be reviewed. Judicial review ensures that agencies are constrained by law. Even under the strongest deference regime, courts will set aside agency decisions that are contrary to the clear meaning of a statute or actions that are contrary to the clear meaning of a regulation. In a sense, unreviewable agency action is potentially lawless: nothing prevents the Executive from doing what it pleases, despite anything Congress may have said to the contrary.[266]

We say "potentially" because Congress has some limited tools for reining in agencies with which it disagrees, such as scathing committee hearings and budget riders.[267] And other actors within the Executive, such as the Office of Legal Counsel, may centralize some elements of legal interpretation, limiting the extent to which a given agency might depart on its own agenda.[268] Internal compliance personnel within each agency, such as general counsel offices and inspectors general, can also serve that function (when permitted to do so).[269] Still, a determined Executive can overcome these points of resistance.

Of course, tax agencies should still face *some* procedural requirements. What we have described is an optimization problem: in some cases, external review and its accompanying procedures enhance agency outcomes.[270] But the more stringent and less targeted the procedures are at contexts where they likely will add value, the more they encourage the IRS and the Treasury to prefer

265. Andrew L. Lawson & William E. Foster, *Presidential Tax Discretion*, 73 ALA. L. REV. 291, 329 (2021); *cf.* Zelenak, *Custom and the Rule of Law*, *supra* note 190, at 851 (arguing that IRS deviations from defensible interpretations of the Code threaten rule of law values).

266. *See id.* ("Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code enacted by Congress, as long as those revisions are in a taxpayer-favorable direction."); Hickman & Kerska, *supra* note 23, at 1706 ("Without judicial review . . . the good government principles embodied by the APA are largely left to the IRS's good intentions.").

267. *See* Hemel, *supra* note 211, at 687–88 (noting indirect methods of congressional control); Love & Garg, *supra* note 153, at 1230–35 (same).

268. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1464, 1493, 1495 (2010); *see* Livermore & Revesz, *supra* note 109, at 1367–69 (noting that OIRA can also serve this function).

269. Gillian E. Metzger & Kevin Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1265–66 (2017).

270. *See* Bagley, *Procedure Fetish*, *supra* note 49, at 352 (making this point about procedural requirements in administration generally).

unreviewable inaction. Proponents of the new formalism have emphasized the first consideration while ignoring the second.

It is possible, but we think unlikely, that more procedure would move us closer to optimal.[271] We have reviewed evidence suggesting that the tilt is pervasive and difficult to address. The evidence is consistent with our experiences on both sides of the table as rule maker and private practitioner. Policies that further deepen the tilt are unlikely to improve matters. At a minimum, we think adopting four different policies simultaneously, and doing so in a moment of severe resource stress for the IRS and Treasury, is not the way to experiment with expanded procedural rules. Given the state of the status quo, we think that those who advocate for sweeping expansions of procedural rules, such as that existing revenue rulings and more should require notice and comment,[272] should bear a commensurate burden of proof in showing that these changes would be closer to, not farther from, the optimal balancing point.

In sum, it is true that many of the recent administrative law procedural changes on their surface appear to bring the administration of tax law more closely in line with other substantive areas. That rationale taken alone would represent a triumph of form over thoughtful analysis. The tilt against inaction is deep, and has additional distributive and anti-fisc implications, when it comes to the tax system. Thus, there should indeed be a recognition of agency context and competence in tax administrative law. When challenging inaction undermines the congressional objective to raise revenue, with resulting security, general welfare, and social costs, we should respond by making action easier.

IV. ADMINISTRATIVE LAW AND THE TAX TILT

We have argued that the inaction tilt offers a strong reason to reconsider the growing trend towards procedural formalism in tax rulemaking. As we have sketched, the Tax Court and some commentators seem to believe that broad swaths of current IRS guidance are invalid, either because the guidance was not issued after notice and comment, or because even after notice and comment the rule failed to explicitly set out adequate analysis of key considerations. Advocates of this position say that they are simply rejecting the idea that Treasury is "exempt" from the APA,[273] but that argument is a straw man.

Of course the APA "applies" to tax rulemaking, as it does to just about every agency, but what the APA requires in the tax context may be different

271. *Cf*. Bagley, *Procedure Fetish*, *supra* note 49, at 352 (noting that we "lack evidence about how most administrative procedures affect" the ideal balance of procedural values); Wendy E. Wagner, *Assessing Asymmetries*, 93 TEX. L. REV. 91, 94 (2015) (arguing that some biases against regulatory action may be intended or desirable).

272. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 471 (2013) [hereinafter Hickman, *Unpacking*].

273. *Id.* at 468.

than what it demands in many others.[274] Modern administrative law is almost entirely judge-made, building on the open-ended language of the APA.[275] If judges were so inclined, they could declare that tax is simply exempt from many of the complex requirements they have crafted.[276] We do not argue for anything that dramatic. Instead, we agree with the Tannenwald Prize winner David Berke that the APA's requirements (as elaborately embroidered by modern administrative law) are contextual.[277] In several key respects, application of the APA depends on balancing several competing considerations. In the next three subparts, we describe several of these balancing opportunities, and argue that the inaction tilt should be one of the considerations courts account for when they apply these rules.

A. *Interpretive Rules*

Consider first the matter of interpretive rules. Again, interpretive rules are exempt from the notice and comment requirement, so that if guidance would qualify as "interpretive" it cannot be invalidated for failing to employ notice and comment.[278] Professor Hickman and some courts adopt a highly restrictive definition of "interpretive."[279] In their view, new guidance cannot be interpretive if it purports to govern conduct that is not already "directly" governed by some existing rule or statute. That claim is built on a series of logical propositions we find dubious. For example, the claimants seem to move from the observation that legislative rules (which are by definition not "interpretive") have the "force and effect of law," to the inference that *only* legislative rules may have the "force and effect of law,"[280] a logical fallacy known as the illicit major.[281]

274. *See* Zelenak, *Maybe Just a Little*, *supra* note 33, at 1915–16 (emphasizing that review of tax administration that is distinct from judicial review of other rulemaking is not "exceptionalism" if we always apply the principle that administrative law should take into account the circumstances facing each agency); *see also* Abreu & Greenstein, *supra* note 30, at 702, 717 (suggesting that courts should ask the specific ways in which tax regulations are different, rather than just blandly asserting that they are "exceptional" or not).

275. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298 (2012); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986).

276. *See* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 485 (2010) (noting that many administrative law principles are not required by any textual source).

277. Berke, *supra* note 64, at 368, 389–90.

278. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 198 F.3d 944, 947 (D.C. Cir. 1999).

279. Hickman, *Unpacking*, *supra* note 272, at 475–82.

280. *Id.* at 475–82; Hickman, *Coloring*, *supra* note 30, at 1766, 1773; Mann Constr., Inc. v. United States, 27 F.4th 1138, 1143 (6th Cir. 2022).

281. Charlene Elsby, *Illicit Major and Minor Terms*, *in* BAD ARGUMENTS: 100 OF THE MOST IMPORTANT FALLACIES IN WESTERN PHILOSOPHY 60, 60–62 (Robert Arp, Steven Barbone & Michael Bruce eds., 2018).

But even accepting this overly cramped view of what defines an interpretive rule leaves vast room for courts to account for the special features of tax rulemaking. To apply the narrow view, a court has to decide whether new guidance governs conduct ungoverned by prior law, and that will rarely be an easy or obvious decision. The income tax is imposed annually on "income" but that term is not defined in the statute.[282] In a very real sense, almost any income-tax regulation can be said to be an interpretation of "income."[283]

Thus, it is arguable that if there is any plausible meaning of "income" that would include the situation described in the guidance, then the taxpayer's conduct is already governed by the statute.[284] Rules for whether the costs of refurbishing an airplane can be deducted in the year of the expenditure, or instead only reduce tax slowly over time through depreciation deductions?[285] Those are rules about the taxpayer's "income" in each year. Allocations of outside basis credit for partnership-level borrowing?[286] Again, these establish whether income will be reported in earlier years (for taxpayers who receive low basis) or later.

To be sure, some modern regulations seem quite remote from the definition of "income," such as the reporting requirements at issue in *CIC Services*.[287] In many cases, whether a new piece of guidance falls within the scope of some prior authority depends on a "level of generality" question.[288] Is outside

282. I.R.C. § 61.

283. *Cf.* Hines, Jr. & Logue, *supra* note 211, at 248–49 (observing that most tax statutes leave only "a modest amount of substance to be decided by the Treasury"). *But see* Berke, *supra* note 64, at 394–95 (arguing that "dense" IRS regulations based on short phrases of legislative text are probably not "interpretive" rules); Hickman, *Coloring*, *supra* note 30, at 1767–69 (arguing that tax law is too complex for most rules to be interpretive). As we argue below, we think there is no clear answer to the question of how closely a rule must track legislative text to be "interpretive," and that this is necessarily a judgment call that should depend on the policy objectives that are served by notice and comment review. So, while we likely differ from Berke in his application of the principle, we agree with the general point that whether a rule is interpretive depends on judicial judgments about the fit between statute and rule.

284. For this reason, we also would reject Professor Hickman's claim that tax rules cannot *ever* be interpretive because they can trigger penalties for noncompliance. Hickman, *Unpacking*, *supra* note 272, at 471, 524–29. As Berke also seemingly argues, our view is that when a taxpayer is penalized for ignoring an IRS position set out in regulations, the ultimate source of the penalty is the statute that authorizes the regulation. *See* Berke, *supra* note 64, at 401. That is, the taxpayer is being punished for violating the statute, where the statute is understood in the light of the IRS's gloss.

285. Treas. Reg. § 1.263(a)-2 (as amended in 2014).

286. Treas. Reg. §§ 1.752-1, -2(a), -2(b), -2(c)(1), -2(f), -2(g)(1), -2(h), -2(j)(1), -3, -4(a), -4(b)(1), -4(c), -4(d) (as amended in 2019).

287. CIC Servs., LLC. v. IRS, 141 S. Ct. 1582, 1587 (2021); *see also* Mann Constr., Inc. v. United States, 27 F.4th 1138, 1144 (6th Cir. 2022) (holding that IRS guidance identifying reportable "tax avoidance transactions" that were not otherwise described in statute were legislative rules).

288. *See* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992) ("Movements in the level of constitutional generality may be used to justify almost any outcome.").

basis really close enough to "income" for us to say that when IRS weighs in on how to calculate it the taxpayers were already "directly" governed by Section 61?

Our point is exactly that these are judgment calls, and so they leave room for policy discretion. How close of a "fit" to demand between new guidance and old authority is a key element of how the interpretive rule exception gets implemented in practice, and courts have room to vary the closeness of fit that they demand.[289] Professor Hickman claims that interpretive rules must be "directly" governed by prior law, that is, only where the new result is "required" by the old.[290] In contrast, Professor Pierce writes that a rule can be interpretive if it "imposes obligations that are . . . fairly attributable to Congress."[291] We argue that because of the tilt problem, courts should assess the needed connections between new tax guidance and prior authorities while taking account of the context of tax guidance we have outlined.

This approach to levels of generality is apparent in the Ninth Circuit's *Altera* decision. Recall that the core of the taxpayer's challenge was that the Treasury had not adequately explained its position. One dissenting judge agreed, pointing to the Treasury failures to explain certain nuances of its rejoinders to commenter responses to the Treasury's legal reasoning.[292] The majority, in contrast, found that a general reference in the final rule to some legislative history, from which it was possible for a reader to infer the Treasury's position, was "clear enough."[293] In other words, the majority was comfortable with a fit in which readers still had to do some of the intellectual work of parsing out the logic of the agency's position, whereas the dissent wanted every detail spelled out.[294] The majority got it right; requiring tax regulators to anticipate, in highly granular detail, every back-and-forth of every possible argument would add significantly both to the time and resources of rulemaking as well as making judicial rejections more likely. Neither of these is appealing in the highly tilted tax context.

Similarly, the interpretive rule exception leaves courts vast latitude in deciding how the exception applies to rules that are *partly* interpretive. Imagine that new guidance would change the definition of taxable income for 100 million taxpayers. Of these, 99,999,999 end up calculating income the same way, and report the same income they would have under prior law, while one person's outcome is different. Does this guidance have to undergo notice and comment,

289. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices.").

290. Hickman, *OIRA*, *supra* note 107, at 471–72.

291. 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.4 (2010).

292. Altera Corp. v. Comm'r, 926 F.3d 1061, 1095–96 (9th Cir. 2019) (O'Malley, J., dissenting).

293. *Id.* at 1082 (majority opinion).

294. *See id.* at 1096 (O'Malley, J., dissenting) ("The APA's safeguards ensure that those regulated do not have to guess at the regulator's reasoning . . . .").

because there is one person whose conduct was not "directly governed" by prior law? It cannot be that the guidance is invalid, and must be remanded for notice and comment, for some taxpayers but not others; notice and comment either happens or it does not.[295]

As best we can tell, current doctrine on interpretive rules takes no position on partly interpretive rules. That may be because of a kind of selection bias in which only individuals who are actually disadvantaged by a rule have standing to challenge it. Courts thus will tend to only see the one and miss the other ninety-nine million. Maybe that will lead some courts to take an absolutist view. It seems much more likely that courts, if they are alert to the ninety-nine million, will be more sensible and balance whatever incremental gains notice and comment provides against the costs of invalidating a rule.

And in that balancing, there again is room for courts to take note of, and factor in, the relatively unusual features of tax guidance. Tax rules should usually be treated as interpretive, as long as some significant core of conduct addressed by the new guidance was already affected by existing law.

B. *Good Cause and Harmless Error*

Agencies can also skip notice and comment when they have "good cause."[296] Courts have said "good cause" is supposed to be a fairly narrow exception, but the APA has little else to say about when the good cause exception applies.[297] In practice, good cause is extremely common, however.[298] Here, again, courts must fill in this gap,[299] and we would argue that any sensible understanding of good cause will reflect the unusual circumstances of tax regulation.[300] While we would not go so far as to say that the IRS and the Treasury always have good cause to skip notice and comment for tax guidance, we think the burden they should face for any particular item of guidance should

295. We distinguish this point from the question of who would have standing to challenge a "partly" interpretive rule. Generally, individuals cannot bring legal challenges to vindicate others' rights, so it's likely that only those whose conduct was *not* governed by prior law could bring a challenge.

296. 5 U.S.C. § 553(b)(3)(B), (d)(3) (2012).

297. Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 BULL SEC. TAX'N 343, 348 (1991); *see* Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 333–34 n.66 (1989) (collecting cases addressing the narrowness of the exception).

298. Raso, *supra* note 120, at 91–92 (2015) (reporting that good cause was the most common grounds cited in the more than 50 percent of instances in which an agency omitted notice and comment).

299. *Cf.* Xin-Chang Zhang v. Slattery, 55 F.3d 732, 743–56 (2d Cir. 1995) (engaging in balancing test, apparently invented by the court, to determine whether "good cause" exception applied).

300. *See* Berke, *supra* note 64, at 402, 404 (noting that "good cause" determinations are "heavily fact-bound and contextual" and so allow for consideration of "the particular exigencies of tax administration").

be modest, in light of the powerful structural reasons we have detailed.[301] These same arguments could also justify treating agency failures to utilize notice and comment as harmless error, as Nicholas Bagley explains.[302]

Having said that, we would argue that tax guidance's low substantive hurdle for good cause should come with procedural safeguards. If good cause is available most of the time, an agency might simply invoke it in every case reflexively, without considering whether some guidance genuinely needs public input. An agency might also opportunistically use good cause to shield important and controversial measures from scrutiny. Recall that public comments during rulemaking lay the groundwork for judicial challenges,[303] so invoking good cause might be a tool for narrowing the grounds on which opponents can haul the agency into court.

To mitigate these concerns, we would ask agencies to set out in advance their criteria for when they will invoke good cause, and grant the exception if the agency reasonably applies those criteria.[304] In this way, the agency should at least deliberate about whether its guidance should receive notice and comment, and explain to the public why it chose not to follow that route. Good faith application of rules made in advance will also make it harder for an agency to opportunistically invoke good cause at moments when that is politically or legally convenient. Of course, to provide those benefits the criteria must have some real content and could not be totally manipulable. For instance, good criteria probably would require notice and comment for guidance that depends on complex facts or would likely be of significant public importance. Courts could reject an agency's good cause claim if the agency's criteria are too weak or the agency's application of the criteria to a particular piece of guidance highly unconvincing.

C. *Treatment of Existing Guidance*

If courts reject the arguments we just set out and impose new procedural formalism obligations on tax guidance, they will have to decide how to apply

301. *Cf.* McMahon, *Perfect Process*, *supra* note 33, at 582 (noting that importance of tax revenues may be reason that many tax regulations have "good cause" to skip notice and comment).

302. Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 258–60 (2017) [hereinafter Bagley, *Remedial Restraint*]; *see also* James Puckett, *Reasonable Tax Rules: Advancing Process Values with Remedial Restraint*, 24 FLA. TAX REV. 277, 305–24 (2020) [hereinafter Puckett, *Reasonable Tax Rules*] (developing this argument in the tax context).

303. *See supra* text accompanying notes 47–51.

304. *Cf.* Buschmann v. Schweiker, 676 F.2d 352, 356–57 (9th Cir. 1982) (requiring agency to set out its good cause at the time of a rule's adoption in order for agency to rely on the good cause exception in litigation).

those obligations to the thousands of pages of existing guidance.[305] These were guidance items issued long before courts decided that the IRS and the Treasury would have to proceed using the new formalism.[306] Does it make any sense to throw out old rules for failing to follow procedures that did not yet exist? Already, litigants are asking courts to review guidance that was issued decades ago.[307] That way, we argue, lies madness.[308]

For one thing, if procedural formalism is given unlimited retroactive effect, our arguments about agency paralysis and "tilt" will apply literally tenfold or a hundredfold. The IRS would have to decide how to remediate the devastation in addition to the triage it already applies in determining the priority given to regulation projects. To repeat, there are thousands upon thousands of pages of existing tax guidance. If the IRS and the Treasury must renew even a fraction of this guidance under the supposed new rules, they could well spend years doing nothing else.[309] The pressure and incentives to change the content of those existing rules in ways that would minimize the need for added formalism will be overwhelming. Tough existing guidance will be transformed to be vastly more taxpayer-friendly because there will be no other way realistically for the guidance to get written and finalized.

More fundamentally, requiring notice and comment for guidance that has already been "in the field" for decades is pointless and wasteful. As we have explained, notice and comment rulemaking serves key participatory and data-gathering functions, in effect giving private actors time to plan, and helping the agency get a preview of how markets and voters will respond once it is in effect.[310] But we do not need previews for guidance that is already in effect; the agency gets feedback every day from parties who are subject to regulatory action, and it (and Congress) can observe the economic and social impact of the guidance directly.[311] It may be sensible in some cases to require notice and comment before some guidance can become effective, so that the guidance has

305. *See* Santos v. Comm'r, T.C. Mem. 2016-100, 2016 WL 2941216, at *3 (2016) (relying on *Altera* to raise an APA challenge to a 1967 regulation); Hickman, *Coloring*, *supra* note 30, at 1791–95 (appearing to suggest that all regulations initially issued as temporary, no matter how long ago, are procedurally invalid).

306. Berke, *supra* note 64, at 363–64.

307. *Cf.* Hickman, *OIRA*, *supra* note 107, at 469 (noting that for many years tax regulations failed, in Professor Hickman's view, to meet APA requirements, and suggesting these represent "an area of extensive litigation exposure for Treasury and the IRS").

308. Fortunately, Professor Susan Morse points us to the general six-year statute of limitations for civil suits against the United States as one means to mitigate the madness. *See* Susan C. Morse, *Old Regs*, 31 GEO. MASON L. REV. (forthcoming 2023) (citing 28 U.S.C. § 2401(a)).

309. *See* Puckett, *Reasonable Tax Rules*, *supra* note 302, at 343 (calling this possible burden "staggering"); *cf*. Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565, 573 (2021) (arguing that if *Chevron* were overruled, any suggestion that the thousands of rules upheld under it might now be invalid would be "preposterous").

310. *See supra* text accompanying notes 119–123.

311. *See* Bagley, *Remedial Restraint*, *supra* note 302, at 266, 289.

these key participation and accuracy virtues from day one. It is hard to see why we would invest significant agency and social resources in that process, though, long after the fact.[312]

No doubt courts must sometimes remand rules that have already been in effect back to an agency for failure to comply with procedural requirements known to the agency at the time of the guidance. Otherwise, agencies would not have incentives to implement the required procedures.[313] That logic does not hold, however, when the procedures did not even exist at the time the agency issued the guidance.[314]

In any event, treatment of guidance that predated the new procedural formalism era is yet another area where there is room for judicial balancing of potentially competing principles. Courts must decide whether there is any purpose served by reissuing old guidance, and weigh that against the (crippling, in our view) burden that remand would cumulatively impose on the IRS and the Treasury.[315] Here, too, there is room to take into account the unique features of tax guidance. Imagine the uncertainty that tax planners will face if literally every existing piece of tax guidance is potentially invalid until the IRS and the Treasury can reissue it. These kinds of considerations should weigh very powerfully against retroactively imposing the new procedural rules.

D. *Pre-Enforcement Review*

The rule of *CIC Services* allowing pre-enforcement review of an IRS reporting obligation potentially delays regulatory outcomes, but its impact appears somewhat narrow. Matters are a bit more dire if we understood the opinion to more broadly permit challenges to any IRS reporting obligations. Reporting obligations on employers, charities, and financial institutions, among others, form the backbone of modern tax enforcement.[316] So delays in issuing new guidance to reporting entities could have significant revenue impact.

Yet even the narrowest readings of *CIC* deepen the tax tilt. Burdens on IRS resources are cumulative. While pre-enforcement challenges do not directly delay other forms of guidance, they divert IRS time and attention. Again, what might be a minor issue for an agency with time and resources to spare can be the proverbial crippling straw for the massively overburdened

312. *Cf.* Puckett, *Reasonable Tax Rules*, *supra* note 302, at 347 (arguing that collecting comments after a rule is promulgated can be consistent with values of transparency and public participation).

313. *Id.* at 311–12; *see* Bagley, *Remedial Restraint*, *supra* note 302, at 261–62, 267 (describing but ultimately critiquing this argument).

314. *See* Bagley, *Remedial Restraint*, *supra* note 302, at 268; *cf.* Berke, *supra* note 64, at 386 (arguing that it is "problematic" to invalidate a rule based on procedural requirements the agency was not "on notice" of).

315. Puckett, *Reasonable Tax Rules*, *supra* note 302, at 344.

316. Leandra A. Lederman, *Reducing Information Gaps To Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1737–39 (2010).

camel that is the modern IRS. To limit this collateral damage, we would urge courts to read *CIC* as narrowly limited. For example, courts should reject Justice Kavanaugh's suggestion in his concurring opinion that the holding now permits suits to enjoin any "regulation backed by a tax penalty."[317]

CONCLUSION

Tax administration is distinguished from other fields of law by its combination of vast scale, reliance on widespread self-compliance requiring guidance, and, as we have emphasized here, its relatively unusual substantive "tilt" against revenue raising. Rules of administrative procedure should advance administrative law values, such as accuracy, accountability, and transparency, and should not systematically favor one side of contestable outcomes, particularly when they have undesirable distributive outcomes. Yet that is precisely what the rise of the new procedural formalism has done.

We have therefore argued that courts should turn against the creeping advance of procedural formalism, both with respect to rising calls for notice and comment and demands for pre-enforcement review of tax guidance. We have identified reasons that deference should be more available to tax guidance than it is for similar forms of guidance from other agencies and would further point readers to several fine examinations of whether judicial deference rules should vary across agencies.[318] Similarly, we have deferred to a later project any in-depth analysis of OIRA review. Let us say a word here about that follow-up project.

Our central argument so far has been that, given the unreviewability of most decisions to forego revenue, procedural formalism undermines, rather than advances, administrative law values. But what if at least some decisions to forego revenue were susceptible to some kind of meaningful review? That is difficult to imagine, since many of the most important limits are based on the Supreme Court's understanding of Article III constitutional limits on judicial review.[319] Nonetheless, in our follow-up project, we consider some legislative and even administrative options for enhancing review of what has until now been unreviewable. For now, with no such projects anywhere on the horizon, procedural formalism remains a significant threat to the effective administration of tax law.

317. CIC Servs., LLC v. IRS, 141 S. Ct. 1582, 1596 (2021) (Kavanaugh, J., concurring).

318. *E.g.*, Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 571–80 (2011); Richard Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, SUP. CT. REV. 1, 5 (2013).

319. *See* Sunstein, *Standing After* Lujan, *supra* note 169, at 200–01.