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TAKING ADMINISTRATIVE LAW TO TAX

Foreword

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Not too long ago, an academic symposium titled *Taking Administrative Law to Tax* would have been just that—academic. For decades, tax law sat comfortably isolated from administrative-law doctrines that governed other areas of law. For example, while administrative-law scholars and practitioners explored the contours of the *Chevron* doctrine and challenged agencies that did not observe the Administrative Procedure Act's requirements, tax kept plugging along, with its unique set of deference standards and general indifference to Treasury's frequent APA violations.

But things have now changed. Scholars in this Symposium, along with others, have successfully pushed the tax community to take a fresh look at long-overlooked administrative-law doctrines and explore how those doctrines may shape tax practice. Consequently, in recent years, courts have validated APA–based challenges to Treasury and IRS actions, when such challenges were not even on the radar screen a few years ago.

Somewhat ironically, the biggest opening for challenges to Treasury and IRS actions came through a government victory. In *Mayo Foundation for Medical Education & Research v. United States*,[1] the Supreme Court rejected a taxpayer's claim that tax-specific precedents governed the degree of deference owed to a Treasury

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

regulation.[2] The Court instead "expressly 'recognized' the importance of maintaining a uniform approach to judicial review of administrative action" and would not "carve out an approach to administrative review good for tax law only."[3] Thus, consistent with the government's arguments, the Court held that *Chevron*, and not *National Muffler*, provides the appropriate deference framework for Treasury regulations.[4]

By so rejecting tax exceptionalism in the regulatory-deference context, the Court may have brought general administrative-law doctrines to several areas of tax administration, with possibly adverse consequences for the government. For example, under the APA, an agency generally must provide a reasoned explanation for its actions, or else face a challenge that it acted arbitrarily and capriciously under the APA. Although the reasoned-explanation requirement often proves manageable in the context of quasi-legislative functions (like rulemaking), Professor Steve Johnson, in his contribution to this Symposium, explains that the extension of this requirement to IRS adjudication could raise serious practical and policy problems for the IRS.[5] Several statutes in the Internal Revenue Code require written determinations for various IRS adjudicative activities, including jeopardy determinations, collection due process determinations, trust fund recovery penalty determinations, and deficiency notices.[6]

Practically speaking, it would be impossible for the IRS to provide an extensive explanation for each of these written determinations. Thus, if a robust reasoned-explanation requirement applies broadly to the IRS, much of the agency's day-to-day work could be disregarded as arbitrary and capricious.[7] Luckily, Professor Johnson concludes that both blackletter law and policy considerations militate against the extension of the APA's reasoned-explanation requirement to most IRS determinations.[8] However, Professor Johnson concludes that collection due process determinations do not warrant such an exception.[9] If Professor Johnson is right, there could

2. *Id.* at 713.

3. *Id.* (some punctuation omitted).

4. *Id.* at 712.

5. Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771, 1776–77 (2014).

6. *Id.* at 1775–76.

7. *Id.* at 1813.

8. *Id.* at 1833–34.

9. *Id.*

be significant consequences for the collection due process regime, and Professor Johnson's arguments merit close attention.

Although the broad extension of general administrative-law doctrines could pose challenges for some areas of tax administration, that extension seems perfectly appropriate when Congress uses the tax code to accomplish objectives unrelated to core tax policy. No one seriously doubts, for example, that the APA's notice-and-comment requirements apply to the various agencies that prescribe labor regulations, political activity regulations, healthcare regulations, and so on. When the tax code contains a grant of regulatory authority related to those areas, the policy arguments for exceptions from the APA become especially weak—the mere placement of a labor statute in one title as opposed to another shouldn't dramatically alter how the relevant agency head implements that statute. And in any event, the tax code contains only a few items unrelated to the core tax provisions, so applying the APA to nontax regulatory projects imposes a fairly small burden on Treasury and the IRS.

Or so we all thought. In *Administering the Tax System We Have*, Professor Kristin Hickman acknowledges that the tax code is "routinely recognized as a tool in the regulatory toolbox."[10] Though Congress has long used the tax code for purposes other than revenue raising, "recent decades have seen a dramatic escalation"[11] in this practice. And although conventional wisdom dictates that Treasury and the IRS generally treat nontax provisions as ancillary to the core tax provisions, Professor Hickman's novel empirical research shows otherwise. Of 449 recent major rulemaking projects, a "substantial portion" relate to nontax policy objectives.[12] This undeniably shows that Treasury and the IRS do, in fact, devote substantial resources towards administering nontax policies, and legislators concerned with the proper functioning of the IRS should take this into account as they inevitably burden the IRS with more tasks unrelated to the collection of revenue.[13]

Courts should also take into account Professor Hickman's empirical findings. Those findings may substantially alter current judicial attitudes towards pre-enforcement review of Treasury

10. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1726 (2014).

11. *Id.* at 1728.

12. *Id.* at 1747.

13. *Id.* at 1760–61.

regulations and the extent to which Treasury can enact retroactive rules. Although Professor Hickman leaves detailed analysis of these issues to her future scholarship, her contribution at this stage already provides the bedrock for informed and intelligent debate.[14]

The new challenges and uncertainties facing Treasury rulemaking might leave one wondering whether Congress should take a more active role in setting tax policy. In *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention Under Federal Tax Law*, Professor Ellen Aprill addresses this question against the backdrop of the so-called Tea Party scandal.[15] That scandal, which involves allegations of improper targeting by the IRS of conservative advocacy groups, stems largely from the sad state of guidance under I.R.C. § 501(c)(4), which grants an income tax exemption to social welfare organizations. Regulations implementing the statute nebulously allow any organization to claim the exemption "if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[16] All agree, or should agree, that this standard requires clarification.

Reformers have proposed both legislative and regulatory changes, with many believing that a legislative response would give Treasury and the IRS the most flexibility needed to issue guidance.[17] But Professor Aprill astutely explains why the opposite might be so.[18] The breadth of the current statutory language provides substantial room for the tax agencies to issue and modify guidance as time passes. Yet, if Congress steps in and provides tighter definitions in § 501(c)(4), any issued regulations could face the "risk that a court would hold them invalid as inconsistent with congressional intent."[19] If one wants to ensure agency flexibility in this area (reasonable persons might disagree with that goal), Treasury should take the first step and issue final regulations under existing § 501(c)(4), and flesh out any ambiguities with other forms of guidance. Courts may more be more likely to validate agency guidance under this model than

14. *See id.* at 1761 (noting that although her study was a preliminary analysis, the findings should undoubtedly "give some pause" to supporters of tax exceptionalism).

15. Ellen P. Aprill, *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention Under Federal Tax Law*, 63 DUKE L.J. 1635, 1641 (2014).

16. Treas. Reg. § 1.501(c)(4)–1(a)(2)(i) (as amended in 1990).

17. Aprill, *supra* note 15, at 1641.

18. *Id.*

19. *Id.*

under a regime in which guidance stems from a new, tightly worded § 501(c)(4).

Speaking of courts, Professor Leandra Lederman explores issues related to tax exceptionalism in the judicial context.[20] Although federal appellate courts usually review legal questions decided by a trial court *de novo*, the Supreme Court, in *Dobson v. Commissioner*,[21] granted deference to the Tax Court on questions of tax law.[22] Congress seemingly overruled *Dobson* when it enacted a statute now codified in I.R.C. § 7482(a)(1), which directs courts to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."[23] Yet some believe that the statute leaves *Dobson* alone, insofar as review of legal questions go. Thus, an exceptional review standard would apply to questions of tax law—the Tax Court would receive deference for its legal conclusions, whereas the federal district courts and the Court of Federal Claims would not.

Professor Lederman rejects that approach, showing that commentators who believe that the *Dobson* rule survived have misread the relevant legislative history. Nonetheless, even though *Dobson* may have been formally overruled, that case continues to cast a "long shadow."[24] Courts have not quickly embraced § 7482(a)(1), and one still finds language in appellate court opinions suggesting that the Tax Court enjoys deference on legal questions. Arguably, policy concerns justify the courts' practice in this regard. However, Professor Lederman examines those concerns and finds that an exceptional approach to the Tax Court is "completely unwarranted."[25]

Professor Lederman's work highlights a possibly unintended consequence of Congress's attempt to strengthen the Tax Court. In I.R.C. § 7441, Congress removed the Tax Court from the executive branch and placed it "under article I of the Constitution of the United

20. Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014).

21. Dobson v. Comm'r, 320 U.S. 489 (1983).

22. *See id.* at 498–503 (explaining the congressional intent behind the formation of the Tax Court and stating that its findings should be disturbed only when they result from "a clear-cut mistake of law").

23. 26 U.S.C. § 7482(a) (2012).

24. Lederman, *supra* note 20, at 1868.

25. *Id.* at 1893.

States,"[26] whatever that means.[27] If Congress wanted to exalt the Tax Court through this denomination, its statute might have had the opposite effect. Had the Tax Court remained an agency, its administrative interpretations may have earned *Chevron* deference,[28] but as a trial court its legal interpretations earn none, aside from whatever's left of *Dobson*. Of course, insofar as the Tax Court's influence goes, whether *Chevron* applies reflects only one piece of the overall analysis. But *Mayo*'s rejection of tax exceptionalism complicates and possibly diminishes the Tax Court's role vis-à-vis other government actors in the tax system.

Returning to *Mayo*, the Court's clear and unanimous rejection of tax exceptionalism might suggest that proponents of an exceptional approach were either excessively naïve or unabashedly imperious. But in *A History of Tax Regulation Prior to the Administrative Procedure Act*, Professor Bryan Camp shows that tax has actually been at the forefront of administrative law. As he writes, "The world of the APA started in 1947, but the world of U.S. tax administration began in 1789."[29] In fact, tax law confronted fundamental administrative-law questions long before other fields did. Thus, Professor Camp argues, the APA should not stand as the be-all and end-all for issues related to tax administration. Tax has a rich history, and that history can inform issues related to an agency's authority to issue retroactive regulations,[30] to the proper weight afforded different types of agency guidance,[31] and so on. In other words, rather than

26. 26 U.S.C. § 7441 (2012).

27. The idea that Congress can, through a statutory label, determine the constitutional role played by a government actor seems a bit strange. *See* Mistretta v. United States, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting) ("I doubt whether Congress can 'locate' an entity within one Branch or another for constitutional purposes by merely saying so."). Nonetheless, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), the Supreme Court accepted the concept of an Article I court. But the acceptance of that concept does not cure its inherent contradiction. (How about an Article III president? Or an Article II legislature?) Given the inherent contradiction between an Article I entity and the exercise of the Article III judicial power, litigation over the exact constitutional status of the Tax Court will continue. *See generally* Marie Sapirie, *The Presidential Power To Remove Tax Court Judges*, 137 TAX NOTES 459 (2012) (discussing the recent challenge to the President's removal power over Tax Court judges and concluding that "much more might still be said about the Tax Court's constitutional status").

28. Lederman, *supra* note 20, at 1878–79.

29. Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1684 (2014).

30. *Id.* at 1709–10.

31. *Id.* at 1700–06.

take administrative law to tax, maybe we should take tax to administrative law.[32]

Professor Camp acknowledges that his approach reflects an inversion of the conventional wisdom. That is, to most, the APA reflects the general, overarching statute that governs administrative procedure, and specific statutes, like I.R.C. § 7805(b), reflect deviations or exceptions from the APA's default framework. Professor Camp rejects this "top-down approach that presumes the APA is the primary source of law,"[33] and instead concludes that "the proper place to start is with the precedents established in tax-administration cases."[34]

To the extent that Professor Camp argues that tax and administrative law should include "a two-way conversation,"[35] it's hard to quibble with his analysis. Congress did not enact the APA in a vacuum, nor does the APA operate in one. Surely, courts should not turn a blind eye to the Internal Revenue Code or to the history of tax administration when applying the APA. But Professor Camp assumes a primacy of tax-specific authorities that might run counter to *Mayo*. One must eagerly await Professor Camp's future scholarship that explores that issue and builds on the historical foundation he neatly lays here.

Professor Lawrence Zelenak, in *Maybe Just a Little Bit Special After All?*, offers a more blunt (if qualified) critique of those who gleefully "danc[e] on the grave of tax exceptionalism."[36] It's not just tax lawyers who believe tax is special, Professor Zelenak argues. Rather, pretty much everyone views tax as a "uniquely byzantine"[37] area of the law, and the frightening complexity of the Internal Revenue Code perhaps earns it some special treatment.

It's hard to dispute that the tax laws are difficult to understand, but the widespread recognition of that complexity probably stems more from the annual filing requirements than from tax law's complexity vis-à-vis other areas of code-based law. If, à la the filing of a Form 1040, every individual had to annually determine the priority

32. *Id.* at 1674.

33. *Id.* at 1682.

34. *Id.* at 1683.

35. *Id.* at 1715.

36. Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1900 (2014).

37. *Id.* at 1908.

of her creditors' claims under the bankruptcy code or had to measure her vehicle's pollutants under the environmental laws, complaints about bankruptcy complexity or environmental complexity would permeate popular culture, just as complaints about the tax laws do. And although many lawyers express fear of tax even outside of the filing context—in shying away from enrolling in tax courses during law school, for example[38]—that probably has more to do with the heavy focus of the common law tradition than tax law's unique complexity. That is, the law school curriculum, especially during the first year, displays a heavy bias towards reading judicial opinions and away from careful statutory analysis. Thus, in their formative first year, law students are taught to view the world through the lens of an English common law judge,[39] and they naturally come to believe that tax, with its focus on statutory and regulatory interpretation, reflects a quirky and unique body of law.

In the end, the relationship between tax complexity and tax exceptionalism remains open for debate, but Professor Zelenak skillfully presents other defenses of tax exceptionalism. The grave dancers, Professor Zelenak argues, should recognize that tax is hardly unique in claiming some degree of exceptionalism. Specialists in any field tend to think that their area is, well, special.[40] In this way, "there is nothing exceptional about tax exceptionalism."[41] And even if broad issues like agency deference standards do not merit tax-specific rules, that hardly eliminates the justification for limited forms of tax exceptionalism in other contexts.[42] Professor Zelenak argues, for example, that there is nothing necessarily exceptional about interpreting technical tax statutes differently from vague antitrust statutes. The different interpretive methods may flow from the application of a general principle (for example, reading detailed statutes differently than vague ones),[43] rather than a deliberate effort to carve out unique interpretive methodologies for tax alone. Viewed this way, the "anti" tax exceptionalists overstate the extent to which

38. *See id.* at 1908.

39. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7 (1998) ("[The case method] explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind.").

40. *See* Zelenak, *supra* note 36, at 1909–10.

41. *Id.* at 1910.

42. *Id.* at 1919.

43. *Id.* at 1916.

tax departs from general principles, especially in the statutory interpretation area.

In reading Professor Zelenak's contribution and the other Articles in this Symposium, one finds himself hopelessly conflicted. On the one hand, each Article presents forceful arguments, and the reader will find himself agreeing with much of what each author says. On the other hand, each Article reflects a unique viewpoint that may stand in tension with some of the others. *Mayo*'s rejection of tax exceptionalism thus has not ended debate regarding the relationship between tax law and administrative law. Instead, the case may have just started the conversation. Tax and administrative-law scholars should both thank the *Duke Law Journal* for opening the dialogue.