

A HISTORY OF TAX REGULATION PRIOR TO THE ADMINISTRATIVE PROCEDURE ACT

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ABSTRACT

The relationship of the Administrative Procedure Act (APA) to tax administration has been the subject of increasing scrutiny from scholars and courts. Some of this scrutiny has critiqued the long-held view of the Department of Treasury that tax regulations issued under the general grant of authority in I.R.C. § 7805(a) are interpretative regulations within the meaning of the APA. This Article reviews the almost 150-year history of tax administration before the enactment of the APA to show the origins and basis for this long-held view. The Article also argues that the application of the general terms of the APA to tax administration must be informed by this pre-APA history of tax regulation.

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INTRODUCTION

The 2014 *Duke Law Journal* Administrative Law Symposium is titled “Taking Administrative Law to Tax.” The title flows from some excellent recent scholarship that properly urges those who study and practice tax administration to be more aware of general administrative-law principles. This same scholarship, however, has created a constraining conceptual box labeled “tax exceptionalism.” The idea is that tax administration has been granted exceptional treatment in the application of the law and thus now operates outside the bounds of administrative law in general and the Administrative Procedure Act¹ (APA) in particular.

This Article pushes back. This Symposium could have been titled “Taking Tax to Administrative Law.” As this Article argues, general principles of administrative law can be, and indeed since the early nineteenth century have been, informed by the particulars of tax administration. The APA contains general commands about how agencies must make rules. Surely no one doubts that the APA applies to the agencies charged with administering tax laws. But the APA is neither the source nor the summation of administrative-law principles. An exploration of pre-APA administrative law helps to understand both what the law *is* and what the law *should* be. Professors Jerry Mashaw and Ann Woolhandler, among others, have studied early administrative law on a broader scale.² Their studies, however, do not give much attention to tax administration. Thus this study fills a bit of a gap there as well.

The goal of this Article is to reorient the discussion about the relationship of tax administration and administrative law away from metaphysical abstractions about legislative rules and interpretative rules and toward a more concrete understanding of where those terms came from. This Article’s review of the intellectual history of tax administration may help general administrative-law scholars and

1. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

2. See generally Jerry L. Mashaw, *Administration and “The Democracy”*: *Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008) [hereinafter Mashaw, *Administration and “The Democracy”*]; Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007) [hereinafter Mashaw, *Reluctant Nationalists*]; Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

others at least start in the right place. Part I delineates the current tax exceptionalism claim to which this Article responds. Parts II and III then review the legal history of tax administration up to the APA to show how the idea of tax regulations evolved and suggest why it was commonly believed that the APA requirements of notice and comment did not generally apply to tax regulations.

I. THE GUIDANCE PROBLEM AND THE TAX-EXCEPTIONALISM CLAIM

A. *The Problems of Issuance and Authority*

An important part of any agency's work is to guide employees, as well as the regulated community, on how to both apply and comply with the law the agency administers.³ Agency guidance includes a variety of documents meant for internal or external use, some labeled "regulations" and some given other labels. However denominated, this guidance presents problems both of issuance and authority. The first problem concerns how an agency must publicize and disseminate the rules for compliance. The second problem concerns how courts should review guidance when someone disputes its validity. Problems of issuance and authority are present both in administrative law generally and in tax law in particular.

Contrary to popular belief, the Internal Revenue Service (Service) is not the agency Congress made responsible for administering the tax laws. Rather, Congress has placed the awesome responsibility of administering the entire tax system on the Secretary of the Treasury (Secretary)⁴—and with that awesome responsibility comes awesome powers. Every Secretary since Alexander Hamilton, however, has delegated those powers to a spectrum of subordinates.⁵ Since 1862⁶ one of those subordinates has been the Commissioner of Internal Revenue (Commissioner), whose position is currently

3. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (describing the authority of agencies to "elucidate a specific provision of [a] statute by regulation"). Although agencies exercise many different powers, this Article focuses on their power to issue guidance. Agency power to adjudicate is the other main branch of study in administrative law. This Article does not consider that subject.

4. I.R.C. § 7801(a)(1) (2012).

5. See *infra* notes 71–76 and accompanying text; see also Mashaw, *Reluctant Nationalists*, *supra* note 2, at 1669 (discussing how, in the early operation of the Treasury Department, Secretary Gallatin used circulars to delegate authority to the collectors, among other purposes).

6. Act of July 1, 1862, ch. 119, § 1, 12 Stat. 432, 432–33.

codified at § 7803 of the Internal Revenue Code (I.R.C.).⁷ I.R.C. § 7803, however, generally grants the Commissioner only the “duties and powers as the Secretary may prescribe.”⁸ The Secretary has broadly delegated to the Commissioner the responsibility “for the administration and enforcement of the Internal Revenue laws.”⁹ In turn, the Commissioner has delegated some of these responsibilities to other subordinates.¹⁰

With the authority to administer and enforce comes the authority to issue guidance. Congress has given general authority to the Secretary to make “all needful rules and regulations for the enforcement of this title.”¹¹ In addition, Congress has specifically reiterated the Secretary’s power to make rules in hundreds of specific sections of the I.R.C.¹² With thousands of separate sections in the I.R.C. to administer and approximately one hundred thousand employees to administer them, the number and variety of guidance documents is overwhelming and constantly changing. At any one time there are between ten and twenty categories of documents that are used by Service employees and the public to guide their understanding of and compliance with the tax laws.¹³

Most of these guidance documents are issued by offices within the Service. Typical of these are revenue rulings, revenue procedures, service announcements, Office of Chief Counsel notices, actions on decision, general counsel memoranda, forms, form instructions, publications, and that capacious compendium containing reams of

7. I.R.C. § 7803(a) (2012).

8. *Id.* § 7803(a)(2).

9. I.R.S. Treas. Order 150-10 (Apr. 22, 1982), available at <http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to150-10.aspx>.

10. The Commissioner’s delegation of various powers to various subordinates are collected and published in the Internal Revenue Manual. See IRM 1.2.40–64.

11. I.R.C. § 7805(a).

12. Professor John Coverdale writes that there are more than a thousand such sections. John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 52 (1995). Professor Kristin Hickman writes that there are several hundred. 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, 1735 & nn.37–38 (2007) (citing her own search, which resulted in 293 such grants of authority, and another study, which claimed over 550 hits).

13. See Peter A. Lowy, U.S. Federal Tax Research, 100-2d Tax Mgmt. Portfolio (BNA) A-23 (2011) (“The body of guidance emanating from the IRS is a constantly changing collection of documents. At any one time, it may include anywhere from 10–20 different types and forms of guidance, like revenue rulings, general counsel memoranda, field service advice, and publications.”).

rules, the Internal Revenue Manual (IRM). Some of these office documents are meant for public use. Others are written for internal use but are made public thanks to the tireless efforts of the nonprofit organization Tax Analysts, Inc.¹⁴

One important subset of guidance documents, Treasury Regulations, are issued only after the review and approval of U.S. Department of the Treasury (Treasury) personnel outside the Service.¹⁵ Treasury Regulations are drafted by attorneys in the Office of Chief Counsel of the Service in coordination with the various Service offices affected by the subject matter of the regulation.¹⁶ These regulations are not promulgated, however, until they are substantively reviewed by personnel within Treasury, a process that ends only with the decision of the Secretary.¹⁷ One common mistake is to refer to Treasury Regulations as “IRS regulations.”¹⁸ This habit creates potentially unreliable analyses of administrative-law concerns and overlooks a potentially useful functional distinction between types of guidance documents.

14. Tax Analysts is a nonprofit organization that has sued the government multiple times to secure the release of “secret” law in the form of internal memoranda. *History of Tax Analysts*, TAX ANALYSTS, <http://www.taxanalysts.com/www/website.nsf/Web/HistoryOfTaxAnalysts> (last visited Mar. 31, 2014).

15. For an overview of the entire process through which Treasury Regulations are implemented, see 1 MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 3.02[2] (rev. 2d ed. 2005).

16. See IRM 32.1.1.4.4 (Aug. 11, 2004) (“The Office of Associate Chief Counsel is solely responsible for issuing published guidance. However, on some projects, members of Operating Divisions may be involved in the development of a project.”); see also Treas. Reg. § 601.601(a) (as amended in 1987) (“Regulations . . . are prepared in the Office of the Chief Counsel.”).

17. See Treas. Reg. § 601.601(a) (“The most important rules are issued as regulations and Treasury decisions prescribed by the Commissioner and approved by the Secretary or his delegate. . . . After approval by the Commissioner, regulations and Treasury decisions are forwarded to the Secretary or his delegate for further consideration and final approval.”).

18. See, e.g., Patrick J. Smith, *The APA’s Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271, 274 (2012) (discussing the decision in *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011), but referring to the Treasury Regulations at issue there as “IRS regulations”). Experienced federal district judges also misuse the term. See, e.g., *Halbig v. Sebelius*, No. 13-0623 (PLF), 2014 WL 129023, at *28 (D.D.C. Jan. 15, 2014) (“[P]laintiffs here bring a pre-enforcement challenge to a final agency rule, rather than individualized adjudications of tax liability. The dispute before the Court is purely legal and ripe for review. Any administrative challenge would be futile, as the Secretary of the Treasury can be expected to deny plaintiffs’ complaint as contrary to the issued IRS regulations.”). There are indeed “IRS regulations.” That is, the Service does issue guidance without the review and approval of Treasury, which is published in the Federal Register and the Code of Federal Regulations. This guidance is labeled “Procedural Rules” and is found in Part 601 of Title 26 of the Code of Federal Regulations.

However denominated, all of these tax guidance documents are “rules” under the APA. That is because the APA definition of rule is exceedingly broad: a rule is any “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”¹⁹ Though the APA separates rules into various subclassifications—policy statements or interpretative rules, for example—the broad definition of rule sweeps every conceivable agency guidance document within the ambit of the APA’s operation.

B. Issuance, Authority, and the New Orthodoxy

Both courts and commentators have claimed that tax-guidance documents—most notably Treasury Regulations—have erroneously escaped application of general administrative-law principles, as to both issuance and authority. This critique, though not without its precursors, has become something of a new orthodoxy among tax scholars and courts.

1. *Recent Examples.* Most recent examples of this phenomenon deal with the problem of authority. The Supreme Court, for instance, addressed the authority problem in the 2011 case *Mayo Foundation for Medical Education & Research v. United States*.²⁰ There, the taxpayer argued that the Supreme Court should evaluate a Treasury Regulation under a standard of deference the Court had articulated specifically for tax regulations in *National Muffler Dealers Ass’n v. United States*.²¹ The Court instead decided to use *Chevron* deference, the same standard used to evaluate regulations from other agencies.²² The Court’s opinion noted that the taxpayer “has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency.”²³ Without such justification, the Court was “not

19. 5 U.S.C. § 551(4) (2012); cf. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 142–43 (D.D.C. 2012) (holding that a Service notice violated the APA’s notice-and-comment requirement for rules).

20. *Mayo*, 131 S. Ct. 704.

21. *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472 (1979).

22. *Mayo*, 131 S. Ct. at 714.

23. *Id.* at 713.

inclined to carve out an approach to administrative review good for tax law only.”²⁴

Commentators have lauded the Supreme Court’s *Mayo* decision for “dispos[ing] of tax exceptionalism, the notion that tax administration is exempt from the rules governing other areas of regulation.”²⁵ Pointing to *Mayo*, Professor Steve Johnson has argued that courts should evaluate the recent attempt to regulate tax-return preparers by the same standards used to review the attempts of other agencies to change long-held interpretations of statutes, such as the Food and Drug Administration’s attempt to regulate tobacco.²⁶

As to the problem of issuance, Professor Kristin Hickman’s 2007 study of 232 tax regulations has convinced her that tax regulations are routinely issued in violation of the APA under what she characterizes as misguided claims for exceptional treatment.²⁷ She has since followed up with a careful study of the force-of-law concept to identify when tax regulations must follow the APA notice-and-comment process.²⁸

More recently, the D.C. Circuit has joined the tax-exceptionalism parade. In *Cohen v. United States*,²⁹ the court decided that there is nothing special enough about tax administration to justify reading § 702 of the APA any differently for suits challenging tax regulations than other types of regulations.³⁰ In *Cohen*, taxpayers asked the court to invalidate a refund procedure the Service had

24. *Id.* Apparently the Supreme Court had not read Professor John Coverdale’s excellent article on just this point. *See generally* Coverdale, *supra* note 12 (arguing against the *Chevron* standard and for an administrative review specific to tax law only).

25. Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 279 (2012).

26. Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Return Preparation*, 60 VILL. L. REV. (forthcoming 2015) (manuscript at 66–70), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326526; *cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 142–43 (2000) (invalidating the FDA’s attempt to regulate tobacco products).

27. Hickman, *supra* note 12, at 1728–31. Most of the violations Professor Hickman finds relate to the immediate issuance of temporary regulations. *Id.* at 1759. She explores the historical justifications the Treasury has given for its issuing temporary regulations without notice and comment and concludes that these are claims for exceptional treatment that do not survive critical study. *See id.* at 1759–86.

28. *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 542 (2013).

29. *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc).

30. *Id.* at 723.

created and announced in a document called “Notice 2006–50”³¹ on the grounds that it “did not comply with the notice and comment procedures required under the [APA].”³² The en banc majority first rejected the government’s attempt to assert sovereign immunity, albeit not with the clearest syntax: “The IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA.”³³ It then turned to the government’s argument that the taxpayers should do exactly what taxpayers have traditionally had to do: file a refund claim, then test the Service’s denial of the claim in court.³⁴ Siding with the taxpayers, the court drew on general administrative-law precedents to hold that because the taxpayers’ challenge was to the adequacy of the IRS’s procedures, they need not overcome an exhaustion requirement to obtain equitable relief.³⁵

The court of appeals went on to find that Notice 2006–50 operated as a substantive rule because it was “bind[ing]” on the IRS and taxpayers alike.³⁶ On remand, the District Court used that finding to hold that Notice 2006–50 should have been promulgated as a regulation using notice and comment procedures.³⁷

This is the new orthodoxy: it is wrong to treat tax administration differently from the work of other administrative agencies. There is no better evidence of orthodoxy than to find the idea encapsulated in a student note that dutifully summarizes the story this way: “For years, generally applicable administrative law was not applied to taxation under the doctrine of tax exceptionalism.”³⁸

31. *Id.* at 720–21; *see generally* I.R.S. Notice 2006-50, 2006-1 C.B. 1141 (describing the reasons for the refund and procedures for obtaining one).

32. *Cohen*, 650 F.3d at 721. The taxpayers also challenged Notice 2006–50 as being “substantively flawed because it undercompensates many taxpayers for the actual excise taxes paid.” *Id.*

33. *Id.* at 723. The D.C. Circuit chided the government for its tax administration insularity: “The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority.” *Id.* at 726.

34. *Id.* at 731.

35. *See id.* at 731–33 (citing *McCarthy v. Madigan*, 503 U.S. 140, 147–49 (1992); *Barry v. Barchi*, 443 U.S. 55, 60–62 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 567–68 (1973)).

36. *Id.* at 723.

37. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 143 (D.D.C. 2012).

38. Recent Case, *Dominion Resources, Inc. v. United States*, 681 F.3d 1313 (*Fed. Cir.* 2012), 126 HARV. L. REV. 1747, 1747 (2013).

2. *Precursors to the New Orthodoxy.* The current crop of critics is not the first to caution tax lawyers about the need to understand more general principles of administrative law, as to either the problem of issuance or the problem of authority. In 1926, writing in *National Income Tax Magazine*, attorney J. Hardy Patten started off his three-part study of judicial review of tax regulations with the observation that “there is no field in which the scope and extent of court review is so unsettled as in internal revenue taxation.”³⁹ He urged his readers to remember that tax administration “has as its background the application of the basic principles of administrative and constitutional law” and that these areas of law were “too often neglected by the practicing tax lawyer.”⁴⁰

Similarly, some fifteen years after Patten first explored the problem, eminent scholars debated what they termed “the regulations problem,”⁴¹ that is, “the problem of the effect which should be given to Treasury Regulations in the construction and application of the Federal Revenue Acts.”⁴² Much of this debate was over the usefulness of the reenactment doctrine, which seemed exceptionally applicable to tax administration due to the frequency of congressional reenactment of taxing statutes in the years before codification.⁴³

3. *A Critique.* The new orthodoxy is troublesome to me because it skews the relationship between the APA and the organic statute—here, the I.R.C.—by assuming that the APA is the proper starting point for determining the proper relationship between tax and administrative law. That is, scholars start their analyses with the APA. They then tend to measure the compliance of tax administration with “administrative law” by its compliance with

39. J. Hardy Patten, *Judicial Review of Treasury Regulations*, 4 NAT'L INCOME TAX MAG. 373, 373 (1926).

40. *Id.*

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

42. *Id.* at 398; see also A.H. Feller, *Addendum to the Regulations Problem*, 54 HARV. L. REV. 1311 (1941) (responding to Professor Erwin Griswold's article); cf. Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 535 (1945) (“[T]he present state of administrative paralysis is attributable . . . to a variety of interlocking factors, such as the concept of specific legislative intention, the virtual delegation of administrative power to the courts, and an awkward system of appellate review which is conducive to confusion rather than administration.”).

43. See Feller, *supra* note 42, at 1314 (“The factor which differentiates tax administration is the periodic reenactment of the basic statute.”). For further discussion, see *infra* notes 209–13 and accompanying text.

specific provisions of the APA. Only then do they look to see whether the organic statute trumps the APA. In short, these scholars use a top-down approach that presumes that the APA is the primary source of law regulating administrative behavior, and they fail to consider what came *before* the APA.⁴⁴

One example of this approach is Professor Hickman's close study of Treasury Regulations.⁴⁵ Hickman studies 232 separate Treasury regulatory projects and concludes that "[a]lmost as often as not, Treasury does not follow the traditional APA-required pattern of issuing [a notice of proposed rulemaking], accepting and considering public comments, and only then publishing its final regulations."⁴⁶ She comes to this conclusion by counting how many of the regulatory projects used the APA's traditional notice-and-comment process.⁴⁷ She then examines those projects that did not use the notice-and-comment process to see whether they fell within any of the statutory exceptions created by the APA.⁴⁸ She carefully considers what she calls the "interpretive rule exception," the "procedural rule exception," and the "good cause exception," and concludes that none apply.⁴⁹

Professor Hickman's study relies on the notion that "[t]he APA is *the* law."⁵⁰ She starts with the APA as her baseline. Only then does she consider provisions in the I.R.C. that, in her view, "supplement APA section 553."⁵¹ Notably, she considers I.R.C. § 7805—a general grant of rulemaking authority—and questions whether that section gives an "I.R.C.-specific departure from APA rulemaking requirements."⁵² In particular she examines whether § 7805(e) represents "a tax-specific exception from APA rulemaking requirements"⁵³ and concludes it does not.

44. See, e.g., Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 572 (2011) ("In view of these legislative balances, whether agency-specific precedents are legally justified depends on the extent to which distinctive features of the agency justify deviation or variation from the consistent and universal application of the APA and other generally applicable administrative law.").

45. See generally Hickman, *supra* note 12.

46. *Id.* at 1730.

47. *Id.* at 1730, 1744–48.

48. *Id.* at 1745.

49. See *id.* at 1760, 1773, 1778, 1786.

50. *Id.* at 1795 (emphasis added).

51. *Id.* at 1735.

52. *Id.* at 1738.

53. *Id.* at 1740.

Professor Leandra Lederman follows the same reasoning in her study of what deference courts owe to “‘fighting’ regulation[s]”—that is, those regulations promulgated during litigation and then used as a sword in the litigation.⁵⁴ Lederman aims to compare deference standards for regulations generally with deference standards for tax regulations.⁵⁵ She begins her analysis with the claim that “administrative law recognizes two categories of rules—legislative and interpretative—that receive different levels of deference.”⁵⁶ She locates that distinction, however, in the APA, which is the starting point for her inquiry.⁵⁷

Certainly some scholars have argued vigorously that the APA should be the sum and substance of administrative law.⁵⁸ I disagree, at least with respect to tax administration. Analysis of tax guidance—whether considering how guidance should be issued or how courts should weigh it—should not start with the APA. Instead, the proper place to start is with the precedents established in tax-administration cases.⁵⁹ Though the APA is *a* law, it is not *the* law. The APA was built on already existing concepts, notably the concepts of legislative

54. Leandra Lederman, *The Fight over “Fighting Regs” and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 648 (2012).

55. *Id.* at 649.

56. *Id.* It is interesting that the earliest cases I could find in which a federal court used the exact term “interpretative regulation” came in pre-APA tax cases. *See* *Comm’r v. Bryn Mawr Trust Co.*, 87 F.2d 607, 610 (3d Cir. 1936) (“It will thus be seen that two Circuit Courts of Appeals have interpreted the statute to refer only to a consideration benefiting the decedent and have in effect added to the statutory definition of consideration the clause ‘received therefor by the decedent’ which the Commissioner actually did add to his interpretative regulation.”); *see also Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 113–14 (1939) (holding that the term “gross income” was “so general in its terms as to render an interpretative regulation appropriate”).

57. *See* Lederman, *supra* note 54, at 649 (“Under current law, the [APA] is the principal source of the legislative/interpretative distinction.” (footnote omitted)).

58. *See, e.g.,* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998). Professor John Duffy argues descriptively that “this administrative common law of judicial review is beginning to abate; it is being replaced, albeit slowly, by doctrine grounded in the judicial review provisions of the APA and other statutes.” *Id.* He also argues that the move from common law to statutory law is, in general, a good thing. *Id.*

59. I thus disagree with Professors Richard Levy and Robert Glicksman’s intriguing article to the extent that it suggests that agency-specific precedent is undesirable. *Cf.* Levy & Glicksman, *supra* note 44, at 500 (“The proliferation of agency-specific precedents creates anomalies and inconsistencies in some cases and hampers the development of administrative law in others.”). I instead join those who believe that application of general principles of administrative law will look different when applied to different agencies.

regulations and interpretative regulations.⁶⁰ These concepts came into the law influenced by the history of tax guidance.

Unlike these past attempts to reconcile tax administration with principles of administrative law, the new orthodoxy is troublesome in no small part because it skews the relationship between the APA and the organic statute by overlooking the history of tax-guidance doctrines. By taking administrative law to tax—that is, by starting with the APA and only then looking to see whether tax guidance is special—the new orthodoxy risks distorting the proper relationship between tax administration and general administrative-law principles. The world of the APA started in 1947,⁶¹ but the world of U.S. tax administration began in 1789.⁶² An understanding of that history is necessary for a proper understanding of the relationship between administrative law and tax. The next section seeks to explain that history.

60. I use the word “interpretative” as a complete synonym with “interpretive.” I have always wondered why the APA uses the five-syllable word instead of the four-syllable word. There is no explanation for the choice of terminology in either the Attorney General’s Final Report on the APA, *see* ATT’Y GEN.’S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941), or the Attorney General’s Manual, *see* TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947). Judge Milton Shadur concluded in 1988 that it was just a stylistic point. *See* *Am. Med. Ass’n v. United States*, 688 F. Supp. 358, 361 n.4 (N.D. Ill. 1988). I agree. Eighteenth- and nineteenth-century courts used the word “interpretative” as a synonym for “constructive,” as in “[c]onstructive, or interpretative treasons.” *United States v. Mitchell*, 26 F. Cas. 1277, 1279 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 15,788). It was also used as a more direct synonym for “interpretive” in describing the ability of courts to construe a statute. *See, e.g.,* *Trs. of the Phila. Baptist Ass’n v. Hart’s Ex’rs*, 17 U.S. (4 Wheat.) 1, 18 (1819), *overruled by* *Vidal v. Girard’s Ex’rs*, 43 U.S. (2 How.) 127 (1844). For example, *Hart’s Executors* involved the question of whether an English statute, repealed after the creation of a will, could save a bequest that would be void but for operation of the statute. *Id.* at 2–3. The Court there asked, “If, then, the jurisdiction of the Court of Chancery over charitable bequests, cannot be derived from the letter of the statute of Eliz., can it be supported from ancient adjudged cases, *interpretative* of that statute?” *Id.* at 17–18 (emphasis added). In the latter part of the nineteenth century “interpretative” appeared mostly in patent disputes, in which courts asked what interpretative effect various phrases used in patent claims have on the scope of the patent protection. *See, e.g.,* *Crown Cork & Seal Co. v. Sterling Cork & Seal Co.*, 217 F. 381, 387 (6th Cir. 1914). Only in a few cases, however, was the term “interpretative” used in the sense we think of “interpretive” in today’s administrative-law lexicon—as a term to describe a power that is not legislative power. *See, e.g.,* *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 61–62 (1821) (“[The Court’s] province is interpretative, as in the case of other laws and it can no more assume the treaty-making power, than any other legislative power.”).

61. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2012)).

62. Act of July 4, 1789, ch. 2, 1 Stat. 24.

II. TAX GUIDANCE FROM 1789 TO 1862

It is commonly assumed that the Interstate Commerce Commission (ICC), established in 1887,⁶³ was the first regulatory agency.⁶⁴ This assumption is correct in the important sense that tax administration is not the same kind of “regulation” as that done by the ICC and other agencies created after 1887. Moreover, the very existence of this assumption reinforces one of the points this Article seeks to make: tax is different.

This assumption is incorrect, however, in the nontrivial sense that it undervalues tax administration’s pre–Civil War impact on the development of general administrative-law principles.

One significant administrative-law development prior to the Civil War was the explicit acknowledgement that administrative departments could issue regulations. Tax law played an important role in how courts worked out the legal effect of such administrative regulations.⁶⁵

Between 1789 and 1862, Congress filled the federal fisc mainly through external taxes, in the form of tariffs, or customs duties, imposed on imported goods.⁶⁶ Congress divided the country into

63. Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383.

64. See, e.g., Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 950 (2011) (“The creation in 1887 of the first major national regulatory agency, the Interstate Commerce Commission, reflected a similar pattern.”). This is a longstanding assumption. See Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 297 (1948) (“In 1887 [Congress] entered on a program of vesting the executive with broad regulatory powers over economic and social matters of national concern, and enacted the original Interstate Commerce Act. During the half century and more since that date a network of important economic and social regulatory measures has been spread over the pages of the Statutes at Large.”).

65. It appears, in fact, that until the mid-twentieth century, the usual association of the term “regulation” was with statutory provisions and not administrative rules. For example, section 5 of the Tariff Act of 1789 provided: “[I]t shall be the duty of the collector to receive all reports, manifests and documents made or exhibited to him by the master or commander of any ship or vessel, conformably to the regulations prescribed by this act.” Act of July 31, 1789, ch. 5, § 5, 1 Stat. 29, 36.

66. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945*, at 295–98 ser. P 89–98 (1949). My thanks to the *Duke Law Journal* editors who ran this table through a spreadsheet to calculate that tariffs made up approximately 85 percent of federal revenue until the Civil War. The table shows that the other 15 percent came mostly from land sales. For a short period of time, Congress did impose some modest internal excise taxes on those who produced certain tobacco and alcohol products. See *THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY* 246 (Joseph J. Cordes, Robert D. Ebel & Jane G. Gravelle eds., 2d ed. 2005). As I learned in sixth grade, the farmers of the Whiskey

collection districts, each one headed by a collector of customs, appointed by the President with the advice and consent of the Senate.⁶⁷ These taxes were collected based on identification and valuation of the goods subject to tax.⁶⁸

Early tariff administration was chiefly regulated by statute, and not by what we would now consider administrative regulations.⁶⁹ The First Congress filled twenty pages in the Statutes at Large with detailed instructions on tariff administration.⁷⁰ Within days of his confirmation as the first Secretary in 1789, Alexander Hamilton was writing letters to various collectors of customs, giving directions.⁷¹ These handwritten letters were meant to be circulated to all other collectors and thus were titled “circulars.”⁷² In response to some doubt over Hamilton’s authority, Congress provided in the Tariff Act of 1792⁷³ “[t]hat the Secretary of the Treasury shall direct the superintendence of the collection of the duties on impost and tonnage as he shall judge best.”⁷⁴ This was the only statutory direction given as to the scope of administrative power over taxes that I found before 1832.

Hamilton issued over sixty circulars during his time in office.⁷⁵ However, they appear to have had little effect on the day-to-day operations of tax.⁷⁶ Actual implementation of the circulars tended to be local, with each collector “allowed to use his own common sense

Rebellion did not think these excise taxes so modest. MARGARET G. MACKEY, *YOUR COUNTRY’S HISTORY* 173 (1966).

67. John Dean Goss, *A History of Tariff Administration in the United States, from Colonial Times to the McKinley Administration Bill*, in 1 *STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW* 75, 98–99 (N.Y., Columbia Univ. 2d ed. 1897).

68. See Act of July 31, 1789 § 5, 1 Stat. at 43.

69. Even the term “regulation” tended to refer to statutes. See *infra* note 120.

70. See Act of July 31, 1789 §§ 1–40, 1 Stat. at 29–49.

71. See PAUL LEICESTER FORD, *A LIST OF TREASURY REPORTS AND CIRCULARS ISSUED BY ALEXANDER HAMILTON, 1789–1795*, at 3–4 (Brooklyn 1886) (listing several circulars that Alexander Hamilton sent within a month of his confirmation). Alexander Hamilton’s appointment was confirmed on September 11, 1789. RICHARD BROOKHISER, *ALEXANDER HAMILTON, AMERICAN* 80 (2011).

72. For a reprinting of one so titled, see BUREAU OF INTERNAL REVENUE, U.S. TREASURY DEP’T, *THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE* 9 (1948).

73. Act of May 8, 1792, ch. 37, 1 Stat. 279.

74. *Id.* § 6, 1 Stat. at 280.

75. See generally FORD, *supra* note 71.

76. Professors Jerry Mashaw and Avi Perry agree with this evaluation. Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 *MICH. ST. L. REV.* 7, 14.

and business ability with regard to the direction of office methods and details of the administration, and [to] please himself as to the forms of most of the documents . . . required to pass through his hands.”⁷⁷

The first explicit authorization for Treasury to issue guidance called “regulations” was hedged with qualifications. Congress reorganized the country’s tariff administration in the Tariff Act of 1832,⁷⁸ a lesser known aspect of the great Nullification Crisis.⁷⁹ The language in the Tariff Act of 1832 is notable for its caution. First, although the grant of authority allowed the Secretary to “establish such rules and regulations . . . as the President of the United States shall think proper,” that authority could not be exercised in a manner “inconsistent with the laws of the United States.”⁸⁰ Second, the grant of authority was not just to the Secretary alone but was to “the Secretary of the Treasury, under the direction of the President.”⁸¹ Third, along with the authority to establish “rules and regulations,” Congress imposed the “duty . . . to report all such rules and regulations, with the reasons therefor, to the then next session of Congress.”⁸²

It was not immediately clear what the Tariff Act of 1832 added to the Secretary’s authority to issue tax guidance. Both before and after its adoption, when there arose questions about the implementation of the tariff laws, collectors would write to the

77. Goss, *supra* note 67, at 102.

78. Act of July 14, 1832, ch. 227, 4 Stat. 583.

79. For the standard description of the Nullification Crisis, see REBECCA BROOKS GRUVER, *AN AMERICAN HISTORY* 353–54, 372–77 (1972). The Tariff Act of 1832 was set to take effect in March 1833. Act of July 14 § 2, 4 Stat. at 583. Its substantive provisions, however, never went into effect because of blowback from various states. See WILLIAM MCKINLEY, *THE TARIFF IN THE DAYS OF HENRY CLAY AND SINCE: AN EXHAUSTIVE REVIEW OF OUR TARIFF LEGISLATION FROM 1812 TO 1896*, at 1–11 (N.Y., Henry Clay Publ’g Co. 1896); F.W. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* 109–12 (8th ed. 1964). The Compromise Tariff of March 2, 1833, was, officially, just a modification of the new administrative structure created by the Tariff Act of 1832 (the official title of the Compromise Tariff was “[a]n Act to modify the act of the fourteenth of July, one thousand eight hundred and thirty-two, and all other acts imposing duties on imports”). See Act of Mar. 2, 1833, ch. 55, 4 Stat. 629, 629. Thus, although the substantive provisions of the Tariff Act of 1832 never went into effect, the administrative provisions were carried forward, unchanged, into the Compromise Tariff. See Act of Aug. 30, 1842, ch. 270, § 26, 5 Stat. 548, 566; see also *Aldridge v. Williams*, 44 U.S. 9 (1845) (discussing the relationship between the Tariff Act of 1832 and the Tariff Act of 1842).

80. Act of July 14, 1832 § 9, 4 Stat. at 592.

81. *Id.*

82. *Id.*

Secretary and ask for his decision on the matter.⁸³ The reply would often take the form of a circular and thus grew the idea of a Treasury “decision.”⁸⁴ Why would collectors actually want, much less ask the Secretary for, direction and supervision of their fiefdoms? The reason is the oldest rule of bureaucracies: CYA. Collectors could raise the Treasury Decisions as a liability shield against taxpayer suits.

Being sued by taxpayers came with the job of being a collector.⁸⁵ In theory, the official method for taxpayers to contest a tariff was to give a bond for payment to the collector, then renege on the bond; only then, when the collector sued on the bond, could the taxpayer litigate the dispute.⁸⁶ In practice, taxpayers early on convinced courts that if they paid the collected tax they could file a common-law action for assumpsit against the collector personally, because no suits would lie against the sovereign United States.⁸⁷ The Supreme Court

83. For example, in a Circular dated August 27, 1792, Alexander Hamilton gave his decision on the “true construction” of the law to resolve a reported “difference of opinion between the Collectors and Supervisors.” BUREAU OF INTERNAL REVENUE, U.S. TREASURY DEPT., *THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE* 9 (1948).

84. For an example of collector–Secretary dialogue, see Professor Mashaw’s discussion of Treasury Secretary Albert Gallatin’s use of circulars to administer the Embargo of 1807. See Mashaw, *Reluctant Nationalists*, *supra* note 2, at 1668 (“The Treasury Department was also in daily correspondence with the collectors. Specific questions regarding permits, detentions, and interpretations of the embargo laws were sent to Gallatin, who responded with binding advisory letters . . .”).

85. For example, in the three-year period during which Jesse Hoyt was the collector for the Port of New York, from 1838 until 1841, *see* Hoyt v. United States, 51 U.S. (10 How.) 109, 132 (1850), he was sued multiple times. *E.g.*, Hardy v. Hoyt, 38 U.S. (13 Pet.) 292 (1839); Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839); Hughes v. Hoyt, 12 F. Cas. 836 (C.C.S.D.N.Y. 1839) (No. 6846); Dorr v. Hoyt, 7 F. Cas. 926 (C.C.S.D.N.Y. 1840) (No. 4007); Hadden v. Hoyt, 11 F. Cas. 147 (C.C.S.D.N.Y. 1840) (No. 5891); Hall v. Hoyt, 11 F. Cas. 226 (C.C.S.D.N.Y. 1840) (No. 5934).

86. *See* Act of Mar. 2, 1799, ch. 22, § 65, 1 Stat. 627, 676–77 (outlining the procedures for initiating a suit for the nonpayment of a bond and challenging the underlying assessment). Taxpayers could also find a friendly congressman and get relief in a private bill. *See* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 175 (1998) (“Before the middle of the nineteenth century, contract claims directly against the federal government were barred by sovereign immunity and contract claims against federal officers would not lie. Unable to get relief in the courts, individuals with federal contract claims frequently petitioned Congress for private bills as an alternative.”).

87. *See* William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 685–88 (1947). Because taxpayers tended to sue in state courts, Congress passed the Force Act in 1833 that not only gave federal courts jurisdiction over such actions regardless of diversity of citizenship but also allowed collectors to remove state-filed cases to federal court. Force Act of 1833, ch. 57, §§ 2–3, 4 Stat. 632, 633–34. Otherwise, federal courts would not have had subject-matter jurisdiction when the taxpayer and the collector were from

approved this practice in 1836, so long as taxpayers paid under explicit protest and permitted the collector to hold back the money from Treasury in anticipation of the personal suit.⁸⁸ The problem of collectors holding back money, however, quickly became so great that Congress created a statutory duty to turn over the money to Treasury.⁸⁹

Collectors embraced the concept of Treasury guidance when they could use it as a shield in litigation. For example, *Tracy v. Swartwout*⁹⁰ involved a dispute about a bond. F.A. Tracy and other merchants landed casks of syrup and tendered a bond of 15 percent of the value of the cargo to secure their promise to pay the import duty.⁹¹ The Collector of the Port of New York, Samuel Swartwout, refused to accept the bond, “acting under the instructions of the Secretary of the Treasury.”⁹² His instructions from Treasury required him to demand a much larger bond because there was doubt as to whether the syrup was supposed to be taxed by its value or by its weight (three cents per pound).⁹³ Tracy and the merchants refused to provide a larger bond, and the syrup sat deteriorating in storage for over

the same state; modern federal-question jurisdiction was not available until 1875. Judiciary Act of 1875, ch. 137, §§ 1–2, 18 Stat. 470, 470–71 (current version at 28 U.S.C. § 1331 (2012)).

88. *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 154–55 (1836).

89. After *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836), collectors started holding back in earnest to protect themselves from suit and, for some, to enrich themselves personally. See *Cary v. Curtis*, 44 U.S. (3 How.) 236, 243 (1845) (“It is matter of history that the alleged right to retain . . . had led to great abuses, and to much loss to the public; and it is to these two subjects, therefore, that the [1839] act of Congress particularly addresses itself.”). Money held back was money *not* getting to Treasury. Congress quickly revised tax procedure to require collectors to pay all collections to Treasury, even those made under protest and threat of suit. Act of Mar. 3, 1839, ch. 82, § 2, 5 Stat. 339, 348. At the same time, Congress authorized the Secretary to refund improperly collected money to taxpayers, but only when the taxpayers could show actual overpayment. *Id.*, 5 Stat. at 348–49. Congress also created a statutory refund action, still nominally against the collector. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727, 727. Eventually, the Supreme Court recognized that action for what is really was, an action against the United States. See *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 31–32 (1915) (“The objection to the jurisdiction pressed by the Government is that the only remedy is a suit against the Collector. . . . However gradually the result may have been approached in the earlier cases it now has become accepted law that claims like the present are founded upon the revenue law.” (quotation marks omitted)). For full discussion of this transformation, see generally Plumb, *supra* note 87.

90. *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80 (1836).

91. *Id.* at 93. Apparently, Mr. Swartwout was something of a scoundrel in his own right. See Mashaw, *Administration and “The Democracy,” supra* note 2, at 1686.

92. *Tracy*, 35 U.S. at 93.

93. *Id.*

eighteen months.⁹⁴ Eventually, Swartwout received instructions to take the 15 percent bond.⁹⁵ Tracy and the other merchants sued to recover for the damages for the lost syrup.⁹⁶

Swartwout trotted out the Treasury instructions to raise the classic “just following orders” defense.⁹⁷ This worked well for him at the trial level. The court incorporated it into the jury instructions and, as a result, although the jury returned a verdict of nominal damages for the merchant (six cents), Swartwout escaped having to pay either compensatory or exemplary damages to the merchants.⁹⁸

The defense worked somewhat less well at the Supreme Court. The good news for Swartwout was the Court’s conclusion that a good-faith reliance on Treasury instructions would protect him from exemplary damages.⁹⁹

The bad news, however, was the Court’s conclusion that the instructions could not shield him from compensatory damages.¹⁰⁰ This was because “[t]he secretary of the treasury is bound by the law; and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law . . . , neither he nor those who act under him, can dispense with, or alter any of its provisions.”¹⁰¹ The resulting liability did not trouble the Court because it believed that Swartwout would be indemnified by the federal government.¹⁰² And indeed, per opinions of the Attorneys General over the years, there is evidence that indemnification of judgments was allowed out of general appropriations.¹⁰³

The Court’s reasoning in *Tracy* was that the administrative agency had the power to issue its own guidance—of course—as part

94. *Id.* at 82.

95. *See id.* at 93.

96. *Id.*

97. *See id.* at 82, 88.

98. *Id.* at 94.

99. *Id.* at 95.

100. *Id.* at 97, 99.

101. *Id.* at 95.

102. *Id.* at 98–99.

103. *See* Sec’y of the Navy To Satisfy a Judgment Against Commodore Elliott, 3 Op. Att’y Gen. 306, 306 (1838) (authorizing indemnification of a particular naval officer from general appropriations); *see also* Fees of Dist. Attorneys, 9 Op. Att’y Gen. 146, 148 (1858) (“When a ministerial or executive officer is sued for an act done in the lawful discharge of his duty, the government which employed him is bound, in conscience and honor, to stand between him and the consequences. It will not suffer any personal detriment to come upon him for his fidelity, but will adopt his act as its own . . .”).

of its job in carrying out the will of Congress, whether set out in circulars or letters or other documents. The Court gave no citation to statutory authority for none was needed. This guidance was either within the scope of the statutory law or outside its scope. Being outside the scope of the statute, however, did not make the guidance per se unlawful, for Swartwout was still bound to follow the guidance because it came from his supervisor. In other words, orders from above—even orders issued improperly or without authority—were binding on the collector.

One sees this same conceptualization in Justice Woodbury's opinion for the Court twelve years later in *Greely v. Thompson*.¹⁰⁴ The case involved iron imported from Wales that was to be assessed based on the iron's value at the port of origin.¹⁰⁵ In the time between purchase and loading, the price of iron had risen by one-fifth.¹⁰⁶ The issue was whether Congress had required valuation to be the fair market value at the time of purchase or the fair market value at the time of loading.¹⁰⁷ The statute was silent. Treasury had issued guidance to fill this statutory gap:¹⁰⁸ it instructed appraisers to value cargo as of the date it was loaded onto the ship.¹⁰⁹

The Court, hewing to the traditional notion that courts say what the law is, made two points about Treasury guidance, however denominated. First, as to statutory interpretation, the Court explained:

[The views] expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them, and importers, in cases of doubt, are entitled to have their right settled

104. *Greely v. Thompson*, 51 U.S. (10 How.) 225 (1850). That Justice Woodbury voiced the opinion of the Court is noteworthy because he had served six years as Treasury Secretary under Presidents Andrew Jackson and Martin Van Buren. CHARLES LEVI WOODBURY, MEMOIR OF HON. LEVI WOODBURY, LL.D. 5–6 (Bos., David Clapp & Son 1894). That, plus the fact that Chief Justice Roger Taney, too, had run Treasury, see INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, IRS HISTORICAL FACT BOOK: A CHRONOLOGY: 1646–1992, at 26 (1993), suggests that the Court was operating with some significant firsthand input on the administrative realities of the work done by Treasury.

105. *Greely*, 51 U.S. at 234–35.

106. *Id.* at 235.

107. *Id.* at 235–36 (citing Act of Mar. 1, 1823, ch. 21, § 5, 3 Stat. 729, 732).

108. *Id.* at 236.

109. *Id.*

by the judicial exposition of those laws, rather than by the views of the Department.¹¹⁰

The Court then flat out ignored the Treasury guidance and used the typical tools of statutory construction to conclude that the proper measure of fair market value was the time of purchase, not loading.¹¹¹

The Court's second point, however, ameliorated the first. That is, the Court recognized that though the Treasury guidance was just an interpretation, it was an interpretation that would bind Treasury employees.¹¹² The Court distinguished between the relationship of Treasury guidance to employees, on the one hand, and to taxpayers, on the other, noting that "as between the custom-house officers and the Department, the latter must by law control the course of proceeding, yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in the judicial tribunals."¹¹³

The 1850 *Greely* decision reflected not only the ideas in *Tracy* but also the intervening statutory developments. By 1842, the grant of authority to the Secretary to issue rules and regulations appeared problematic, so Congress added a "we really mean it" statute. The problem was that collectors would only follow Treasury Decisions when doing so helped protect them from liability; they ignored those Treasury Decisions that exposed them to greater liability. For example, after *Tracy v. Swartwout* allowed taxpayers to sue collectors if taxes were paid under protest, collectors became increasingly reluctant to turn over taxes to the government and repeatedly ignored instructions to do so.¹¹⁴ Even when collectors were willing to deposit monies in government accounts, it was unclear exactly where the government accounts were because of the collapse of the Second Bank of the United States.¹¹⁵ Treasury issued directives dealing with

110. *Id.* at 234.

111. *Id.* at 235–36.

112. *Id.* at 234.

113. *Id.*

114. One prominent example was Jesse Hoyt, the collector of the Port of New York, who refused to follow Treasury orders on how, where, and when to pay over the collected tariffs. *See Hoyt v. United States*, 51 U.S. (10 How.) 109, 136–43 (1850). Hoyt had received a Treasury circular dated March 13, 1839, and had refused to follow its instructions, allegedly out of concern that he would not be indemnified if sued by unhappy taxpayers. *Id.* at 111–12. He just traded one suit for another. The government ended up suing him for over \$200,000 in allegedly missing money. *Id.* at 138–39.

115. *See Mashaw & Perry, supra* note 76, at 24–25 (describing President Andrew Jackson's ultimately successful attempt to transfer funds out of the Second Bank of the United States).

both of these problems, but many collectors balked at obeying them.¹¹⁶

The “we really mean it” statute that Congress added in the Tariff Act of 1842¹¹⁷ placed collectors under an explicit statutory duty to “execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws.”¹¹⁸ It also explicitly gave the Secretary authority to interpret the law: “[I]n case any difficulty shall arise as to the true construction or meaning of any part of such revenue laws, the decision of the Secretary of the Treasury shall be conclusive and binding upon all such collectors and other officers of the customs.”¹¹⁹

The Tariff Act of 1842 reinforced two important concepts about administrative regulation of the tax system. First, Treasury Decisions, issued under the general authority to regulate, were the approved modality for interpretation of the statutes. The idea was that Treasury had the power to interpret and that the form of the interpretation would be “the decision” of the Secretary.¹²⁰

Second, tax guidance was inward-looking, in that it was directed at the actions of Treasury employees and not at the actions of taxpayers. Specifically, Treasury Decisions regulated Treasury employees’ actions in administering the tariff laws, and not the actions of the taxpayers who were subject to tariff. That is, if a taxpayer wanted to import iron from Wales, nothing in the Treasury regulations could prohibit the ability to import or not to import. Although tax guidance might affect the cost of importation, taxing iron imports was qualitatively different than prohibiting them. In contrast, section 28 of the same Tariff Act of 1842 flat out prohibited “the importation of all indecent and obscene prints, paintings,

116. *See supra* note 89.

117. Act of Aug. 30, 1842, ch. 270, § 24, 5 Stat. 548.

118. *Id.* § 24, 5 Stat. at 566.

119. *Id.*

120. One caution here. In the nineteenth century, the term “regulations” often referred to statutes more than to administrative guidance. For example, the authority of Treasury “regulations” administering the Tariff Act of 1842 was at issue in *Aldridge v. Williams*, 44 U.S. (3 How.) 9 (1845). A central dispute in the case was the meaning of the statutory phrase from the Compromise Tariff, “regulations . . . prescribed by law.” *Id.* at 10, 13 (citing Act of Mar. 2, 1833, ch. 55, § 3, 4 Stat. 629, 630). In Justice Taney’s opinion, “the most important regulations in relation to this part of the case are contained in the 7th, 8th and 9th sections of the act of July 14, 1832.” *Id.* at 28. Justice Taney reasoned that these sections survived the Tariff Act of 1842. *Id.* He then used the ninth section’s authorization for the Secretary to issue rules and regulations to hold that the Treasury instructions issued under the Tariff Act of 1832 also survived. *Id.* at 29.

lithographs, engravings, and transparencies.”¹²¹ This prohibition regulated the actions of the taxpayers themselves, and directly affected their ability to import certain items.¹²² Guidance issued relative to that subject would be both inward-looking (because it would regulate Treasury employees) and outward-looking (because it would either allow or disallow specific taxpayer acts).

III. TAX GUIDANCE FROM 1862 TO THE APA

Forget 1913.¹²³ The watershed year for the history of internal taxation in the United States was 1862. That was when, in desperate need of revenue to fund the Civil War, Congress passed a revenue act of unprecedented scope and complexity.¹²⁴ The Revenue Act of 1862¹²⁵ did not just toy with tariffs. It created a vast number of new *internal* taxes. These internal revenue taxes were paid not only by those who produced distilled spirits, but also by those who needed licenses¹²⁶ and who produced myriad articles of commerce, everything from candles to cloth to pickles.¹²⁷ Birthed along with this welter of new excise taxes was a new kind of tax called the income duty.¹²⁸ It was just the runt of this litter; private compilations of the tax laws published over the next several years did not even have “income” in their titles.¹²⁹ Few foresaw how big that runt would grow.

121. Act of Aug. 30, 1842, ch. 270, § 28, 5 Stat. 548, 566.

122. See Mashaw, *Reluctant Nationalists*, *supra* note 2, at 1647–50 (discussing Treasury’s implementation of the Embargo of 1807, in which both the law and the implementing rules affected the ability to import).

123. Underwood Tariff Act, ch. 16, § 2, 38 Stat. 114, 166 (1913).

124. Act of July 1, 1862, ch. 119, 12 Stat. 432. As one commentator put it: “The Civil War revolutionized the financial methods of the United States.” TAUSSIG, *supra* note 79, at 155. Actually, 1862 was Congress’s second try. The act it passed the previous year, Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, had so many problems that it never went into effect. See EDWIN R. A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 435–36 (2d ed. 1914).

125. Act of July 1, 1862, ch. 119, 12 Stat. 432.

126. See *id.* § 39, 12 Stat. at 446–47 (giving collectors authority over licenses for distilling).

127. See *id.* § 75, 12 Stat. at 462–66 (listing articles of manufacture subject to taxes “to be paid by the producer or manufacturer thereof”). There were also excise taxes on auction sales, *id.* § 76, 12 Stat. at 466, carriages, *id.* § 77, 12 Stat. at 467, railroads and other common carriers, *id.* § 80, 12 Stat. at 468, and banks, *id.* § 82, 12 Stat. at 470. Two years later Congress even added a proto-VAT tax on the manufacture of furniture. Act of June 30, 1864 § 174, 13 Stat. at 267.

128. *Id.* §§ 89–93, 12 Stat. at 473–75.

129. See generally GEORGE S. BOUTWELL, *A MANUAL OF THE DIRECT AND EXCISE TAX SYSTEM OF THE UNITED STATES* (Bos., Little, Brown & Co. 1863); CHARLES N. EMERSON, *EMERSON’S INTERNAL REVENUE GUIDE, 1867* (Springfield, Mass., Samuel Bowles & Co. 1867); CHARLES F. ESTEE, *THE EXCISE TAX LAW* (N.Y., Fitch, Estee & Co. 1863).

To administer these myriad new internal taxes Congress created a new nationwide tax-administration structure, following the pattern of the prior tariff acts. The Revenue Act of 1862 divided up the nation into administrative districts and authorized the President to appoint a collector of internal revenue for each district—analogueous to the collector of customs appointed for each port of entry—who in turn was authorized to hire assistants.¹³⁰ It also created in each district the position of assessor,¹³¹ whose duty was to evaluate each taxpayer's liability by reviewing each "list or return," and on that basis assess taxes¹³² and give the resulting list to the collectors who then collected the tax.¹³³ In this way, Congress separated the tax-determination function from the tax-collection function, a separation that remains a fundamental aspect of tax administration to this day and is part of what makes tax administration different from other regulatory regimes.¹³⁴

130. Act of July 1, 1862, ch. 119, §§ 2–5, 12 Stat. 432, 433–34; *see also* SELIGMAN, *supra* note 124, at 435–40 (describing actual operation of the Revenue Act of 1862).

131. Act of July 1, 1862 § 2, 12 Stat. at 433.

132. *Id.* §§ 6–7, 12 Stat. at 434–35.

133. *Id.* § 16, 12 Stat. at 437–38. The statutes use the terms "list" and "return" interchangeably when discussing the document to be prepared by the taxpayer and given to the government. For clarity, I refer to all such documents as "returns" and reserve the term "list" for documents prepared by government employees.

134. *See generally* Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1 (2004) (explaining the difference and analyzing how the inquisitorial nature of both the tax determination and tax collection processes is in tension with traditional notions of adversarial justice) [hereinafter Camp, *Tax Administration*]; Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227 (2009) (showing how the tax-determination function and tax-collection function have become depersonalized since World War II) [hereinafter Camp, *Theory and Practice*]. As I have written elsewhere: "This idea of tax determination as separate from the tax collection was thus built into the structure of the agency at its inception." Camp, *Theory and Practice, supra*, at 231 n.16. One sees this in one of Commissioner George Boutwell's earliest rulings, "that 'no Revenue Agent or Inspector, Assessor or Assistant Assessor, possesses any authority of law to receive money or checks in payment of taxes Nor have Revenue Agents, Inspectors, Collectors, or Deputy Collectors any authority of law to estimate or fix the amount of tax due from any individual.'" *Id.* (quoting Treasury Circular 22, *reprinted in* EMERSON, *supra* note 129, at 13 n.†); *see also* Review, INTERNAL REVENUE REC. & CUSTOMS J., Mar. 3, 1866, at 73 (quoting the same language). The division of functions remains an important concept today. For example, I.R.C. § 7433 gives taxpayers a statutory cause of action for damages caused by wrongful collection. I.R.C. § 7433(a) (2012). Courts routinely limit this provision to the post-assessment phase of tax administration. *See, e.g., Shaw v. United States*, 20 F.3d 182 (1994) ("In this case, although the IRS improperly assessed tax liability against Mrs. Shaw, it did not engage in improper collection procedures. Thus, Mrs. Shaw cannot collect damages under § 7433." (footnote omitted)); *see also* H.R. REP. NO. 82-2518, at 15–16 (1953) (explaining the division of function).

Along with a hugely expanded set of taxes and a national structure for their collection, Congress also created a new agency to supervise the collectors and assessors. Officially denominated the office of the Commissioner of Internal Revenue, Congress placed it as a subordinate office within Treasury.¹³⁵ Within a few years, the office became widely known as the Bureau of Internal Revenue (BIR),¹³⁶ and eventually, in 1954, it was renamed the Internal Revenue Service.¹³⁷

On July 17, 1862, the BIR's first Commissioner, the redoubtable George S. Boutwell, took office.¹³⁸ Boutwell wasted little time ramping up operations. He started with just three clerks in July 1862,¹³⁹ but by the end of 1862 he was supervising 3,882 employees with all but sixty scattered throughout the non-rebelling states.¹⁴⁰ As these numbers suggest, tax administration was in large part a field operation involving what one congressman denounced as an "army" of tax collectors.¹⁴¹ That army needed guidance.

To meet that need, Congress gave general authority to the Commissioner to make "all the instructions, regulations, directions, forms, blanks, stamps, and licenses . . . which may be necessary to carry this act into effect."¹⁴² Unlike the cautious language Congress

135. Act of July 1, 1862, ch. 119, § 1, 12 Stat. 432, 432.

136. See BUREAU OF INTERNAL REVENUE, *supra* note 72, at 3–4 (suggesting reasons for the name change).

137. The 1954 name change resulted from a wholesale reorganization of the BIR in the wake of corruptions scandals. INTERNAL REVENUE SERV., *supra* note 104, at 159. A good contemporary description of the changes can be found in HUGH C. BICKFORD, SUCCESSFUL TAX PRACTICE 183–202 (3d. ed. 1956). For a very nice history of various reforms in tax administration, see generally Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717 (2001).

138. INTERNAL REVENUE SERV., *supra* note 104, at 33.

139. BOUTWELL, *supra* note 129, at v.

140. Letter from George S. Boutwell, Comm'r of Internal Revenue, to S.P. Chase, Sec'y of the Treasury (Jan. 13, 1863), *reprinted in* ESTEE, *supra* note 129, at 309–10. After the income tax was allowed to expire in 1872, the number of personnel dropped considerably. See Camp, *Theory and Practice*, *supra* note 134, at 236.

141. During the debates over creating the system, Representative Roscoe Conkling of New York reflected the common view that "one of the most obnoxious—perhaps the most obnoxious—of all its features is that which creates an army of officers whose business it is to collect these taxes." CONG. GLOBE, 37th Cong., 1st Sess. 247 (1861) (statement of Rep. Conkling).

142. Act of July 1, 1862, ch. 119, § 1, 12 Stat. 432, 432–33. Later acts also contained "clean-up" authority for the Commissioner and the Secretary. For example, section 174 of the Revenue Act of 1864 authorized the Commissioner, supervised by the Secretary, "to make all such regulations, not otherwise provided for, as may become necessary by reason of the alternation of the laws in relation to internal revenue, by virtue of this act." Act of June 30, 1864, ch.

used when it gave the Secretary authority to regulate tariff administration, this general authority for the Commissioner to regulate internal taxes was hedged only by the qualification that the power be performed “under the direction of the Secretary of the Treasury.”¹⁴³

In addition to the general grant of regulatory authority, which was carried over from revenue act to revenue act, the early internal revenue acts contained a multiplicity of specific grants of authority. By my count, there were at least forty-three separate *additional* grants of authority to perform specific regulatory actions in the Revenue Act of 1864, twenty of which gave authority solely to the Commissioner, fourteen of which gave authority solely to the Secretary, and nine of which gave authority to the Commissioner but required approval by the Secretary.¹⁴⁴

173, § 174, 13 Stat. 223, 304. A subsequent section authorized the Secretary, in turn, to make regulations to collect any tax imposed by statute where “the mode or time of assessment or collection is not therein provided.” *Id.* § 176, 13 Stat. at 305.

143. Act of July 1, 1862, ch. 119, § 1, 12 Stat. 432, 432–33

144. The provisions granting authority solely to the Commissioner included: Act of June 30, 1864 § 8, 13 Stat. at 224 (rules for dividing assessment districts); *id.* § 29, 13 Stat. at 234 (rules for sale of seized property); *id.* § 59, 13 Stat. at 244 (rules for marking the quantity and proof of liquor); *id.* § 61, 13 Stat. at 245 (rules for accounting for leakages during transportation of liquor); *id.* § 82, 13 Stat. at 258 (rules for the form and detail of declarations of sales or deliveries by certain manufacturers); *id.* § 84, 13 Stat. at 259 (rules for sale of seized goods); *id.* § 94, 13 Stat. at 265 (broad discretion to write rules applying the statutes written for distillers of spirits to distillers of, among other things, coal-oil and naphtha); *id.* § 94, 13 Stat. at 269 (rules for returns, assessment, and collection of duties on wines not made from grapes, currents, rhubarb, or berries); *id.* § 102, 13 Stat. at 275 (rules for determining the number of slaughtered livestock subject to tax); *id.* § 109, 13 Stat. at 277 (rules for the form and manner of reporting returns made by certain businesses); *id.* § 110, 13 Stat. at 278 (rules for the form and manner of reporting returns made by banks); *id.* § 118, 13 Stat. at 282 (rules for the form and manner of claiming an exemption from the duty to provide a return); *id.* § 118, 13 Stat. at 283 (rules for form and manner for taxpayers to administratively appeal decisions of assistant assessors); *id.* § 122, 13 Stat. at 285 (rules for form and manner of income returns made by certain businesses); *id.* § 125, 13 Stat. at 286 (rules for form and manner of estate tax returns made by executors); *id.* § 143, 13 Stat. at 290 (very broad discretion to mash up the various classes of estate taxes “as he shall think fit,” discharge all successors when the mashed-up tax so determined, and extend time for payment “in special cases in which he may think it expedient so to do”); *id.* § 157, 13 Stat. at 293 (broad discretion to create rules for cancelling stamps “as substitute for, or in addition to, the method now prescribed by law, as he may deem expedient and effectual”); *id.* § 161, 13 Stat. at 294–95 (rules for the allowance of spoiled stamps); *id.* § 162, 13 Stat. at 295 (rules governing how taxpayers may obtain guidance on whether or not a particular instrument is subject to any stamp duty); *id.* § 170, 13 Stat. at 298 (rules for issuance and distribution of stamps prepayment).

The provisions giving authority solely to the Secretary included: *id.* § 2, 13 Stat. at 223 (rules governing the Commissioner’s keeping and paying of accounts); *id.* § 3, 13 Stat. at 224 (rules prescribing Commissioner’s duties); *id.* § 9, 13 Stat. at 225 (rules governing the collectors’ keeping of accounts and paying taxes collected); *id.* § 44, 13 Stat. at 239–40 (rules regulating the

The unprecedented scope of the new taxing statutes created an unprecedented demand for guidance, and Boutwell was up for the challenge. By his estimate, his office pumped out up to eight hundred letters per day.¹⁴⁵ His productivity came from his organizational skills: Boutwell reported that he divided his personnel into subject-matter areas and, as did Treasury, answered common questions with form letters.¹⁴⁶

The combination of statutory authority granted to the Commissioner and Boutwell's disciplined responses thus created a new level of guidance, unmediated by his boss, the Secretary. This Commissioner-level guidance made its first public appearance in Boutwell's *Manual of the Direct and Excise Tax System of the United States*, a remarkable compilation of tax guidance that Boutwell published in April 1863, just after his short, eight-month stay in office. The purpose of the compilation was "to furnish to the officers of the revenue, to business men, and to members of the legal profession, such authority and information for the transaction of business, as can be derived from the proceedings, experience, and decisions of the

power of the Commissioner to return erroneously assessed collected funds); *id.* § 56, 13 Stat. at 243 (rules for the inspection and gauging of spirits); *id.* § 61, 13 Stat. at 245 (rules for obtaining exception to excise tax by using bonded warehouses); *id.* § 90, 13 Stat. at 263 (rules for transporting manufactured tobacco, snuff, or cigars to bonded warehouses); *id.* § 94, 13 Stat. at 265 (broad discretion to write rules applying the statutes written for assessment and collection of duties on cotton to turpentine); *id.* § 97, 13 Stat. at 273 (rules on what qualifies as a federal government purchase contract entered into before the effective date of the statute that would be eligible for tax exemption); *id.* § 168, 13 Stat. at 296 (rules governing the manufacturing of certain articles intended for export); *id.* § 170, 13 Stat. at 297–98 (rules governing distribution and supply of materials to make stamps); *id.* § 171, 13 Stat. at 303 (general rules for how taxpayers may use certificates of drawback in lieu of payment); *id.* § 176 13 Stat. at 305 (rules for mode or time of assessment or collection of any tax if the mode or time of assessment is not in the statute); *id.* § 177, 13 Stat. at 305 (rules for taxpayers to show previous payments of tax on cotton).

The provisions giving authority to the Commissioner with the approval of the Secretary included: *id.* § 6, 13 Stat. at 224 (rules for the duties of subordinates); *id.* § 9, 13 Stat. at 225 (rules setting the amount of bonds which collectors were required to provide before assuming office); *id.* § 11, 13 Stat. at 225 (rules for form of returns); *id.* § 33, 13 Stat. at 236 (rules for how collectors were to make their deposits); *id.* § 46, 13 Stat. at 240 (rules for time and manner of collection of taxes in re-conquered territories); *id.* § 84, 13 Stat. at 259 (rules for sale of forfeited manufactured goods); *id.* § 117, 13 Stat. at 281–82 (rules for how to include and report certain income earned by U.S. government employees); *id.* § 119, 13 Stat. at 283 (rules for form and manner of warrants issued to seize property); *id.* § 171, 13 Stat. at 303 (rules for how taxpayers may use certificates of drawbacks in lieu of payments of duties on cotton).

145. BOUTWELL, *supra* note 129, at v.

146. *Id.*

Office of Internal Revenue.”¹⁴⁷ After setting out the statutes then in force, Boutwell then compiled all of the tax guidance issued to date, including the then-familiar Treasury circulars, some Treasury documents titled “regulations,” and some of Boutwell’s letters to collectors and taxpayers, which he denominated “rulings.”¹⁴⁸

It is the set of rulings from Boutwell that are most remarkable. They were different from any kind of guidance that had come before. First, they were issued at a level of authority that was lower than the President or Secretary.¹⁴⁹ Second, the rulings were summaries of various letters and, in some cases, the rulings simply used the exact language used in the letters.¹⁵⁰ In other cases, however, the rulings modified or reversed the original letters to reflect the experience of the office.¹⁵¹ As a consequence of these three features, Boutwell cautioned that “the Rulings should not be regarded as binding upon the Office of Internal Revenue, but rather as the opinions of the editor of this volume.”¹⁵² This distinction between rules created by the Commissioner and rules created by the Secretary has remained, and similar language can still be found in the preface to every Internal Revenue Bulletin today.¹⁵³

147. *Id.*; see also INTERNAL REVENUE SERV., *supra* note 104, at 33, 35 (noting Boutwell’s installation as Commissioner on July 17, 1862, and his resignation on March 4, 1863). Boutwell published a follow-up volume in 1866 to codify the many changes Congress made in the tax statutes in 1865 and 1866. See GEORGE S. BOUTWELL, *Preface* to THE TAX-PAYER’S MANUAL (Bos., Little, Brown & Co. 1866).

148. See generally BOUTWELL, *supra* note 129. The other contemporary compilations set out some of the same documents but give them different names. What Boutwell called “Rulings,” Charles Estee called “Decisions of the Commissioner” or sometimes “Regulations of the Commissioner.” See, e.g., ESTEE, *supra* note 129, at 214, 270. By the time Estee printed his compilation, the various instructions to field agents had been retitled as “Regulations” and had numbers associated with them. See, e.g., *id.* at 270. In addition to those of Boutwell and Estee, other private publications soon followed, many of which not only reproduced the statutes in force, but also reprinted much of the guidance issued by the Commissioner. E.g., EMERSON, *supra* note 129.

149. See BOUTWELL, *supra* note 129, at 300.

150. *Id.*

151. *Id.*

152. *Id.*

153. Here is the statement used in the very first Cumulative Bulletin issued in December 1919:

The Income Tax Rulings constitute a service of information from which taxpayers and their counsel may obtain the best available indication of the trend and tendency of official opinion in the administration of the income . . . provisions of the Revenue Acts. The rulings have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of law which has not been formally approved and promulgated by the Secretary of the Treasury.

These changes in the concept of administrative regulation, which were created by the Civil War tax statutes, played out in both of the problems addressed by this Article: the problem of authority and the problem of issuance. I will consider each in turn.

A. *The Problem of Authority*

The case law that developed between the Civil War and the enactment of the APA in 1946 did not draw a clear distinction between the authority of tax guidance issued by the Secretary and this new sub-Treasury guidance issued by the Commissioner without approval by the Secretary. This subsection gives two examples of ways in which courts addressed the issue of authority. First is a class of civil cases involving distilleries. These cases draw a sharp distinction between the legal effect of rules issued by the Commissioner and rules issued by the Secretary. The second example is a class of criminal cases that involve the oleomargarine tax. In these cases, the level of approval was less important than the specificity of the grant of regulatory authority. This subsection concludes by discussing authority problems caused by statutory change.

In a series of cases in the 1890s involving distilleries, courts distinguished between Treasury guidance and sub-Treasury guidance.¹⁵⁴ During this period, Congress taxed the production of alcohol,¹⁵⁵ regardless of whether it was legal or illegal in any particular state.¹⁵⁶ In state prosecutions against illegal distilleries, state courts demanded that collectors or their deputies turn over federal tax records of the alleged illegal distilleries.¹⁵⁷ When federal employees refused, the employees were thrown in jail and had to file habeas writs to be released.¹⁵⁸ Just as the collector of customs in *Tracy v. Swartwout* used Treasury instructions as a liability shield,¹⁵⁹ so did the

1 C.B. i (1919). That language now reads: "Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents." Introduction, 2014-11 I.R.B. 623.

154. See *infra* notes 161-65 and accompanying text.

155. E.g., Act of June 30, 1864, ch. 173, § 55, 13 Stat. 223, 243.

156. The plain language of the taxing acts did not condition the tax on the legality of the distilleries, thereby prompting this set of disputes. See generally *In re Hirsch*, 74 F. 928, 928 (C.C.D. Conn. 1896).

157. *Id.*

158. *Id.* at 929.

159. See *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80, 88 (1836); see *supra* notes 96-101 and accompanying text.

federal employees try to use instructions from their superiors as their get-out-of-jail card.¹⁶⁰

The effectiveness of this “just following orders” defense turned on the difference between Treasury guidance and sub-Treasury guidance. In the early 1890s, only rulings and circulars from the Commissioner instructed employees to withhold tax records from state courts. That was not good enough for the courts to grant the habeas writs. In *In re Hirsch*,¹⁶¹ the court conceded that “[r]egulations made by the head of one of the departments of the government, in pursuance of a statute authorizing them to be made, have the force of law over those to be affected thereby.”¹⁶² The problem was that the court could find no such regulations.¹⁶³ Instead, it could only find rulings of the Commissioner which it concluded were “not the regulations in regard to the assessment of the internal revenue which have the force of a statute.”¹⁶⁴ The court viewed these rulings as “instructions based upon the commissioner’s legal opinion.”¹⁶⁵

After *In re Hirsch*, Treasury incorporated the same instructions into Regulations, Series 7, No. 12.¹⁶⁶ After that, lower courts had no difficulty granting habeas writs.¹⁶⁷ Neither did the Supreme Court. In *Boske v. Comingore*,¹⁶⁸ Justice Harlan employed the following logic: First, Congress had the power to make all laws “necessary and proper for carrying into execution the powers vested by [the Constitution] in the Government of the United States or in any Department or officer

160. *In re Hirsch*, 74 F. at 930–32.

161. *In re Hirsch*, 74 F. 928 (C.C.D. Conn. 1896).

162. *Id.* at 931. *But see In re Huttman*, 70 F. 699, 701–02 (D. Kan. 1895) (“[T]he commissioner of internal revenue, with the approval of the secretary of the treasury, by statute is given the power to make such regulations as he deems necessary in the matter of the assessment and collection of internal revenue. . . . [S]uch regulations have the force of statutes.”).

163. *In re Hirsch*, 74 F. at 931.

164. *See id.* at 932 (“This letter and others of like character . . . are not the regulations in regard to the assessment of the internal revenue which have the force of a statute. They express the views of an officer of the government . . .”).

165. *Id.* A minority of courts disagreed with this analysis, with one court concluding that the ruling “must be regarded by all as having the same force as an act of congress.” *In re Huttman*, 70 F. at 701.

166. T.D. 19,245, in 1 TREASURY DECISIONS UNDER TARIFF AND INTERNAL REVENUE LAWS ETC. (D.C., Gov’t Printing Office 1898). The amendments are reprinted in *In re Comingore*, 96 F. 552, 559 (D. Ky. 1899), *aff’d sub nom. Boske v. Comingore*, 177 U.S. 459 (1900).

167. *See, e.g., In re Weeks*, 82 F. 729, 731–32 (D. Vt. 1897). Perhaps this is the first example of what Professor Lederman calls “fighting regs.” *See supra* notes 54–57 and accompanying text.

168. *Boske v. Comingore*, 177 U.S. 459 (1890).

thereof.”¹⁶⁹ Second, that power “was exerted by Congress when it authorized the Secretary of the Treasury to [write] regulations not inconsistent with law.”¹⁷⁰ Third, the regulations at issue were not “inconsistent with law.”¹⁷¹ Justice Harlan emphasized that the Secretary could not go “beyond the authority conferred upon him by Congress,” and the evaluation of that issue was the same as the evaluation “[that] controls when an act of Congress is assailed as not being within the power conferred upon it by the Constitution.”¹⁷² In other words, all regulations properly enacted should receive heightened deference. In Harlan’s opinion, there was neither a distinction between legislative and interpretative regulations, nor a distinction between specific and general regulatory authority.¹⁷³ Instead, Justice Harlan focused on the level of authority.

Second, and in contrast to the distillery cases, are criminal cases in which the government prosecuted taxpayers for violating the tax laws on oleomargarine. In these cases, the difference between success and failure of the regulatory effort was not the *level* of regulatory authority; rather it was the *specificity* of the regulatory authority.

On August 2, 1886, Congress passed a statute imposing an excise tax on the manufacture of oleomargarine.¹⁷⁴ Section 6 of the statute placed a duty on manufacturers to properly label their packages of oleomargarine in a manner “as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe” and provided criminal penalties for violation of the duty.¹⁷⁵ This duty was typical language in internal revenue statutes that imposed excise taxes.¹⁷⁶ Other sections of the statute created other duties and imposed criminal consequences for their violation,¹⁷⁷ with

169. *Id.* at 469 (citing U.S. CONST. art. I, § 8).

170. *Id.*

171. *Id.* at 468–70.

172. *Id.* at 470.

173. *See generally id.*

174. Oleomargarine Act of 1886, ch. 840, 24 Stat. 209. The statute was widely understood to be a protectionist measure in favor of butter producers. *See, e.g.,* Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 126–29 (1989).

175. Oleomargarine Act of 1886 § 6, 24 Stat. at 210.

176. *Cf., e.g.,* Act of June 30, 1864, ch. 173, § 59, 13 Stat. 223, 244 (requiring distillers to “mark upon the cask or other package containing such spirits, in a manner to be prescribed by said commissioner, the quantity and proof of the contents of such cask”).

177. *See, e.g.,* Oleomargarine Act of 1886 § 7, 24 Stat. at 210 (providing for a fine of \$50 for removing labels); *id.* § 15, 24 Stat. at 212 (providing for a fine of \$100–\$2,000 and a prison

section 18 being a catchall provision that imposed a \$1,000 penalty on any taxpayer who failed to do “any of the things required by law in the carrying on or conducting of . . . business.”¹⁷⁸ In addition, section 20 gave general authority to the Commissioner, with approval by the Secretary, to “make all needful regulations for the carrying into effect of this act.”¹⁷⁹

Although the specific grant of authority to regulate in section 6 and the general grant of authority to regulate in section 20 both required the same level of approval—that of the Secretary—it was the difference in specificity and not the level of approval that determined the success or failure of the government to prosecute a taxpayer for violations of regulations under the act. This difference in specificity is illustrated in the lower courts’ responses to the Supreme Court’s decision in *United States v. Eaton*.¹⁸⁰ In *Eaton*, the taxpayer was indicted for violating section 18 by failing to keep certain records required by Treasury Regulations.¹⁸¹ The regulations were issued under the general authority of section 20.¹⁸² In response to a certified question, the Supreme Court held that the phrase “required by law” in section 18 did not include Treasury Regulations.¹⁸³ The Court reasoned that, although a regulation imposing a duty not contained in the statute may well have the “force of law” for some purposes, “it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence.”¹⁸⁴

Despite the result in *Eaton*, prosecutions of taxpayers for violating marking regulations under section 6 succeeded. About one week after *Eaton* was decided, a district court upheld an indictment for violating regulations promulgated pursuant to section 6. In *United States v. Ford*,¹⁸⁵ the taxpayer was indicted for violating section 6 because he failed to mark containers of oleomargarine as required by Treasury Regulations.¹⁸⁶ The court distinguished *Eaton* by evaluating

sentence for removing revenue stamps); *id.* § 17, 24 Stat. at 212 (providing for, among other things, a \$500–\$5,000 fine and a prison sentence for evading the tax).

178. *Id.* § 18, 24 Stat. at 212.

179. *Id.* § 20, 24 Stat. at 212.

180. *United States v. Eaton*, 144 U.S. 677 (1892).

181. *Id.* at 678–79.

182. *Id.* at 686.

183. *Id.* at 688.

184. *Id.*

185. *United States v. Ford*, 50 F. 467 (E.D. Mo. 1892).

186. *Id.* at 467–68.

the relationship between the marking regulations and the alleged statutory violation:

The difficulty in the *Eaton Case* was that congress had not created any such offense as that for which the defendant was indicted. The commissioner had in fact assumed to amend the law. But in the case at bar there is no such difficulty. The offense charged in the indictment is one fully described in the sixth section of the act. The marks and brands prescribed by the commissioner are such as he was specially authorized to prescribe. In the case at bar, therefore, the indictment states an offense against the laws of the United States, unless the decision in *U.S. v. Eaton* is understood to mean that no regulation of the commissioner of internal revenue can have the force and effect of law.¹⁸⁷

Later courts, including the Supreme Court, consistently followed this rationale in upholding other indictments for violations of section 6.¹⁸⁸

So here we have a tax regulation issued under a specific statute that was sufficiently authoritative to support a criminal indictment. But the reason was not because the regulation did anything novel. The regulation did not impermissibly enlarge or modify or add to the statute. It interpreted the statute; the courts consistently describe the marking regulation as “a matter of executive detail in the enforcement of this revenue act, rather than of legislative action.”¹⁸⁹ Filling in these details fell within the traditional interpretative function of administrative rules and so “involved no unconstitutional delegation of power.”¹⁹⁰

Another thorny authority problem for tax guidance of all kinds—especially after Congress reinstated the income tax in 1913—was the relationship between tax rules and statutory changes.¹⁹¹ Each new

187. *Id.* at 468–69.

188. *See In re Kollock*, 165 U.S. 526, 533 (1897); *Wilkins v. United States*, 96 F. 837, 839–40 (3d Cir. 1899); *Prather v. United States*, 9 App. D.C. 82, 88–90 (D.C. Cir. 1896).

189. *Wilkins*, 96 F. at 839; *see also In re Kollock*, 165 U.S. at 533 (noting that the regulation was a “mere matter of detail”).

190. *In re Kollock*, 165 U.S. at 537. Thus, here, I respectfully part company with Professors Thomas Merrill and Kathryn Watts, who believe that “[b]y specifically providing for the imposition of sanctions for the violation of a given regulation, Congress resolved any question of authority and also sent an unambiguous signal of its intent that the resulting rules have the force of law.” Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 499 (2002).

191. *See* Carlton Fox, *Preface to 127 INTERNAL REVENUE ACTS OF THE UNITED STATES 1909–1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS* 1, 3–6

revenue act had to be correlated with prior law, yet the acts themselves were inconsistent: some repealed all provisions of prior acts and substituted new ones, others repealed only parts of prior acts, and still others had no clear directions either way.¹⁹² In response to this problem, an office in the BIR prepared new regulations, sometimes with new numbers and sometimes with the same number, for each new revenue act.¹⁹³ For example, Regulations 33 were published to guide taxpayers and BIR personnel on the subject of income taxes imposed by the Revenue Act of 1913.¹⁹⁴ But there was a *separate* Regulations 33 for the Revenue Act of 1916.¹⁹⁵ To cover the period between the new revenue act's effective date and the new regulations, the "decision" of the Secretary was that "income-tax regulations in force . . . are hereby extended and made applicable to the act of September 8, 1916, so far as not inconsistent with the provisions of that statute."¹⁹⁶

An additional question raised by the frequent statutory changes in tax laws was what authority regulations continued to have once the laws had changed, even when part of the particular subject of guidance had been cut and pasted from one statute into the next. This problem was exacerbated by the difficulties in creating a meaningful federal codification of the laws. The Revised Statutes of the 1870s had proved a failure, and efforts to recodify all federal statutes did not gain traction until well after World War I, with the U.S. Code first entering into force in 1925.¹⁹⁷ It is not surprising, then, that the

(Bernard D. Reams, Jr. ed., 1979) (explaining, in brief, the evolution of tax regulations from 1863 to 1936).

192. Generally, up until the revenue laws were once again consolidated into the Internal Revenue Code of 1939, each revenue law contained an extension provision like section 1100 of the Revenue Act of 1926: "All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act." Revenue Act of 1926, ch. 27, § 1100, 44 Stat. 9, 111.

193. 1 ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, U.S. DEP'T OF JUSTICE, MONOGRAPH NO. 22, ADMINISTRATION OF INTERNAL REVENUE LAWS: BUREAU OF INTERNAL REVENUE, BOARD OF TAX APPEALS, PROCESSING TAX BOARD OF REVIEW 144 (1940).

194. Regulations 33, T.D. 1944, 16 Treas. Dec. Int. Rev. 27 (1914).

195. Regulations 33 (rev.), T.D. 2690, 20 Treas. Dec. Int. Rev. 126 (1918).

196. T.D. 2367, 18 Treas. Dec. Int. Rev. 168, 168 (1916).

197. See Roy G. Fitzgerald, 1 U.S.C. preface (1926). For a more detailed history of this process, and for an example of the complexity this created with respect to just one issue of tax administration, see Camp, *Tax Administration*, *supra* note 134, at 36–51.

authority of Treasury Regulations was sometimes overtaken by statutory events, and yet no one would notice for decades.¹⁹⁸

B. *The Problem of Issuance*

Perhaps the most important consequence arising from the volume and complexity of administrative guidance issued as a result of the Civil War tax statutes was the need to convey guidance to both internal and external stakeholders. The new tax statutes imposed a new set of duties on citizens and, as today, required an understanding of those duties and cooperation in making the proper reports and paying the proper tax. Commissioner Boutwell and later Commissioners thus found themselves responding to questions from taxpayers as well as collectors and assessors.¹⁹⁹ Thus arose the problem of how to issue guidance in a timely and transparent manner.

Though the various collectors received guidance in the forms of circulars, serials, and Treasury Decisions, I have not discovered any official mechanism for distribution of the same guidance to the public at large before the 1890s. Rather, private publications collected both statutes and administrative rulings together and were published for both “subordinate revenue officers and the public.”²⁰⁰

After the Civil War, Treasury began issuing weekly editions of its Treasury Decisions, and in 1899 began publishing yearly volumes that cumulated the weekly editions.²⁰¹ It appears that every type of guidance issued was labeled as a Treasury Decision, whether it was what we would now distinguish as a regulation, a revenue ruling, a

198. See Camp, *Tax Administration*, *supra* note 134, at 48, 50 n.253 (recounting the story of *Rasquin v. Muccini*, 72 F.2d 688, 689–90 (2d Cir. 1934), in which the enforcement of a summons was denied when a Treasury Regulation was based on a codified statute that had lapsed).

199. Typical of these is Commissioner N.B. Scott’s response to a letter from one taxpayer, a Frank H. Platt, disputing the Commissioner’s interpretation of the revenue laws and suggesting “that the matter be immediately submitted by you to the United States attorney, with a view to having the question submitted to the United States court on an agreed statement of facts.” T.D. 20,459, 1 Treas. Dec. Int. Rev. 7 (1898). To this Scott replied: “[T]he internal-revenue tax is not collected through the courts The courts can be appealed to after the Commissioner’s decisions have been complied with, and not before.” *Id.* at 7–8.

200. EMERSON, *supra* note 129, at iii; see also ESTEE, *supra* note 129, at iii (“The compiler has endeavored to prepare a volume valuable to every officer of the law, also to every lawyer, merchant, manufacturer, and tax payer . . .”).

201. The decision to publish the first cumulative volume, which contained “decisions extant December 31, 1898,” was made in response to “the great demand . . . upon the Department for copies of these [weekly] decisions.” 1 Treas. Dec. Int. Rev. 5, 5 (1899). The first cumulative volume was so popular that a second was published the following year. See 2 Treas. Dec. Int. Rev. 5, 5 (1900).

private letter ruling, or just a report of a court case important to tax administration. Moreover, every type of guidance issued was labeled as a Treasury Decision irrespective of whether it was issued by the Commissioner alone or the Commissioner acting with approval from the Secretary.²⁰²

Beginning in 1919, the government gave income-tax guidance its own publication, published in a weekly Bulletin and compiled into twice-yearly Cumulative Bulletins.²⁰³ The nomenclature also changed. Tax guidance issued at the Treasury level was still labeled a Treasury Decision and was still published in the yearly volumes of Treasury Decisions, but sub-Treasury guidance documents were no longer labeled Treasury Decisions nor published in those yearly volumes. Instead, both Treasury Decisions and all sub-Treasury guidance were published in the Cumulative Bulletins, including rulings signed by the Commissioner as well as lower-level guidance, such as legal opinions, committee recommendations, and office (as opposed to Treasury) decisions.²⁰⁴ This arrangement sometimes led to a Treasury Decision being published in two places.²⁰⁵

The frequency of statutory change also created problems for the issuance of tax guidance. As regulations outlived their implementing statute, they were revised into different regulations with different numbers and were thus difficult to track.²⁰⁶ To fill the need for correlating guidance with the appropriate statutes, private companies

202. See, e.g., T.D. 21,875, 2 Treas. Dec. Int. Rev. 315 (1899) (letter “[t]o collectors of internal revenue and others” containing a list of drugs, the revenue from which was exempt from tax, signed by the Commissioner and the Secretary); T.D. 21,814, 2 Treas. Dec. Int. Rev. 314 (1899) (letter “[t]o collectors of internal revenue and others” amending a regulation, signed by the Commissioner and approved by the Secretary); T.D. 20,952, 2 Treas. Dec. Int. Rev. 95 (1899) (letter “[t]o collectors and other officers of internal revenue” circulating a federal court decision, signed by the Commissioner alone); T.D. 20,365, 1 Treas. Dec. Int. Rev. 27 (1898) (letter to a firm ruling on whether proposed transactions were subject to bankers’ special-tax liability, signed by the Commissioner alone); T.D. 19,739, 1 Treas. Dec. Int. Rev. 9 (1898) (letter interpreting a provision of the war-revenue act as applied to cattle sales, signed by the Commissioner alone).

203. 1 C.B. iii, iii, intro. (1919).

204. See, e.g., 3 C.B. 3, 3, preface (1920) (listing the various types of guidance documents published in that edition).

205. For example, Treasury Decision 3037 was published in the Cumulative Bulletin, T.D. 3037, 3 C.B. 93 (1920), and with the yearly compilation of Treasury Decisions, T.D. 3037, 22 Treas. Dec. Int. Rev. 311 (1920). This duplication ceased in 1942 when, to conserve paper, Treasury discontinued publishing the compilation of Treasury Decisions. See 36 Treas. Dec. Int. Rev. iii, iii (1942).

206. For one example of the difficulty in tracing regulations from 1918 through 1926, see generally Appeal of Blum’s, Inc., 7 B.T.A. 737 (1927).

created services that published multivolume serial sets.²⁰⁷ Treasury also published periodic compilations of the internal revenue laws in force as of a specific year, which contained heavily annotated reproductions of the relevant statutes and attempted to relate the various statutes to the relevant versions of the I.R.C.²⁰⁸

C. *The Impact of Regulatory Changes*

These problems of issuance and authority led to three important developments in tax administration in the period leading up to the APA's enactment: (1) the reenactment doctrine, (2) the retroactivity doctrine, and (3) the emergence of the idea of legislative and interpretative regulations.

First, the reenactment doctrine was the judicial work-around to the problem of regulations being overtaken by statutory changes.²⁰⁹ The doctrine was built on the idea that reenactment of statutory provisions with unchanged, previously used statutory language, represented an implicit approval of the prior administrative construction of that language.²¹⁰ Drawing from hints and suggestions in late-nineteenth-century cases, the Supreme Court fully embraced this idea by the late 1930s,²¹¹ and it became the subject of robust scholarly debate.²¹² The debate became particularly academic after the creation of an amendable I.R.C. in 1939, because Congress no longer had to reenact the entire body of tax statutes every time it wanted to change some aspect of federal taxation.²¹³ This

207. See, e.g., [1947] 1 Stand. Fed. Tax Rep. (CCH) iii (explaining that the Standard Federal Tax Reporter “stems from the first loose leaf tax *Reporter* which was published in 1913 for the express purpose of providing complete coverage of the first constitutional income tax law and the developments under it”); cf. 4 NAT'L INCOME TAX MAG. 405 (1926) (advertising special cabinets designed to hold Tax Services).

208. See, e.g., BUREAU OF INTERNAL REVENUE, U.S. TREASURY DEP'T, DOCUMENT NO. 2981, INTERNAL REVENUE LAWS IN FORCE APRIL 1, 1927 (1928).

209. For a summary of the history of the reenactment doctrine, see generally Norman J. Hearn, Comment, *Taxation: Effect of Re-Enactment of Revenue Statutes After Administrative Interpretation*, 27 CALIF. L. REV. 578 (1939).

210. See Griswold, *supra* note 41, at 400.

211. E.g., *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 116 (1939)

212. See Griswold, *supra* note 41, at 398 n.1 (listing just some of the articles contributing to the debate).

213. Statutes before 1939 reenacted the entire set of tax provisions. See generally Revenue Act of 1936, ch. 690, 49 Stat. 1648. Statutes after 1939 amended the Tax Code. See Revenue Act of 1940, ch. 247, 53 Stat. 862; see also Feller, *supra* note 42, at 1314 (noting that “we may have seen an end” to the periodic reenactment of the basic taxing statute).

development in tax administrative law spread into other substantive areas as well.²¹⁴

Second, the retroactivity doctrine was built on the idea that Treasury Decisions interpreting the taxing statutes were “merely declaring what the statute had meant all along, and therefore [were] necessarily retroactive.”²¹⁵ After all, as seen in Justice Harlan’s 1900 *Boske* opinion, Treasury Decisions were only as good as the authority given by Congress to issue them.²¹⁶ And the general authority to make all “needful regulations” was a license neither to add substance to a statute nor to interpret what was not there to be interpreted.²¹⁷ But insofar as Treasury Regulations were a proper exercise of authority, this same theory that limited the rulemaking power in one respect gave it enormous power in another respect: the regulations were automatically retroactive and Treasury was powerless to do anything about that.²¹⁸ The harshness of this rule was felt most when Treasury changed its regulations; the new regulation would then supersede the old, not just on a going-forward basis but also for all cases.

Accordingly, and at Treasury’s request, Congress added a provision to the Revenue Act of 1921²¹⁹ that gave Treasury the power to change regulations and Treasury Decisions *without* retroactive effect in what is now codified as I.R.C. § 7805(b).²²⁰ The presumption

214. See, e.g., Feller, *supra* note 42, at 1314 (“[T]here is still some question outside the tax field as to whether reenactment should be considered an aid in determining the weight to be given administrative constructions.”).

215. *Wis. Nipple & Fabricating Corp. v. Comm’r*, 581 F.2d 1235, 1237 (7th Cir. 1978).

216. See *Boske v. Comingore*, 177 U.S. 459, 470 (1900).

217. *Lynch v. Tilden Produce Co.*, 265 U.S. 315, 319–21 (1924). There, the statute imposed a tax on “adulterated butter,” defining that as butter that contained “abnormal” amounts of moisture. *Id.* at 319. Treasury Regulation No. 9, in turn, defined “abnormal” as any moisture content greater than 16 percent. *Id.* The Court held that “[t]he regulation prescribes a standard which Congress has not authorized the Commissioner or the Secretary to fix. It sets up a definition of adulterated butter which conflicts with that contained in the act.” *Id.* at 321.

218. See Paul Gordon Hoffman, Comment, *Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion Under 7805(b)*, 23 UCLA L. REV. 529, 532 (1976) (noting that, prior to the enactment of the Revenue Act of 1921, ch. 136, § 1314, 42 Stat. 227, 314, the judicial position was that “[a]n incorrect [Treasury] interpretation [of a statute] . . . did not alter the law’s meaning; only Congress could modify the law it had made,” and “[s]ince an incorrect interpretation was therefore a nullity, a correct interpretation necessarily operated retroactively to the date of adoption of the legislation”).

219. Revenue Act of 1921, ch. 136, 42 Stat. 227.

220. *Id.* § 1314, 42 Stat. at 314 (current version at I.R.C. § 7805(b) (2012)). The path from the 1921 language to the current language in § 7805(b) goes something like this: The original statute gave the discretion to *not* make regulations retroactive. *Id.* That discretion was extended in 1928 to cover new regulations, Revenue Act of 1928, ch. 852, § 605, 45 Stat. 791, 874, and in

of retroactivity remained, however, because Treasury Regulations were simply declarative, or interpretive, of the law. If Treasury did not exercise its discretion to make its Treasury Decisions operate prospectively, taxpayers bore a heavy burden to convince a court that Treasury had abused its discretion.²²¹

The 1921 discretion to make regulations prospective was given to all three classes of regulatory guidance discussed above:²²² it extended the discretion to any “regulation *or* Treasury decision relating to the internal revenue laws made by the Commissioner *or* the Secretary, *or* by the Commissioner with the approval of the Secretary.”²²³ By making no reference to any difference in the legal effect of regulations issued pursuant to a specific grant of authority and those issued pursuant to a general grant of authority, this statutory language suggests that all regulations were interpretative; otherwise there would be no need to permit their prospective application.

Third, there emerged the idea that tax regulations could be a legitimate exercise of legislative authority.²²⁴ As of 1920, all *legitimate* tax regulations were viewed as interpretative of the tax laws. Regulations that went beyond interpretations were invalid exercises of power precisely because they were legislative in character. The tariff cases, distillery cases, and oleomargarine cases are all consistent

1934 to cover the Commissioner’s rulings as well, Revenue Act of 1934, ch. 277, § 506, 48 Stat. 680, 757. The 1934 modification also eliminated the prior all-or-nothing approach by authorizing flexibility to determine “the extent, if any” to which regulations could not be retroactively applied. *See id.*; *see also* H.R. REP. NO. 73-704, at 38 (1934) (noting the possibility for “inequitable results” from retrospective application and thus the “desirab[ility]” of giving Treasury “the power to avoid these results”).

221. *See* Bryan T. Camp, Note, *The Retroactivity of Treasury Regulations: Paths to Finding Abuse of Discretion*, 7 VA. TAX REV. 509, 510–11 (1987). In 1996, Congress flipped the presumption to be one of prospective application only. At the same time, Congress authorized Treasury to issue regulations with retroactive effect from the date of the first public proposal or—if “filed or issued” within eighteen months of a statutory change or to “prevent abuse”—from the date of the statutory change. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101(a), 110 Stat. 1452, 1468–69 (1996) (codified as amended at I.R.C. § 7805(b) (2012)).

222. *See supra* note 144 and accompanying text.

223. Revenue Act of 1921 § 1314, 42 Stat. at 314 (emphases added).

224. My claim is not that this time period is when Congress started giving specific rulemaking grants as well as general ones. As I discuss above at note 144, the provisions of the Revenue Act of 1864 demonstrate the contrary. The extent to which Congress made specific rulemaking delegations before 1913 has been somewhat underappreciated. *Cf., e.g.*, Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1565 (2006) (“The Revenue Act of 1916 introduced a few specific rulemaking grants. Subsequent tax statutes included those and added more.” (footnote omitted)). Until I did this study, I would have agreed completely with Professor Hickman’s characterization.

with the view that tax regulations could not change, enlarge, or modify the substance of the law to be obeyed by taxpayers, even if regulations could legitimately control government employees.²²⁵ Thus, my claim here is not that there was no distinction between legislative and interpretative regulations before the APA. It is rather that the only legitimate tax regulations were those that *interpreted* the tax statutes.

More evidence that Treasury Regulations were viewed as functioning solely to interpret the statutes comes from the legal history of what is now I.R.C. § 7805(a), which grants general authority for the “Commissioner, with the approval of the Secretary,” to issue all “needful rules and regulations.”²²⁶ Recall that the Civil War statutes had contained not only similar general authority but also multiple specific-authority provisions.²²⁷ This pattern continued after the revival of the income tax in 1913, and by 1921 some legislators were troubled by it. In the debate over the Revenue Act of 1921, for example, Senator David Walsh complained that “[i]n more than 20 places in the bill the commissioner is given flexible authority for the first time. That is a great departure from previous tax legislation.”²²⁸ Eventually, however, Walsh explained his agreement to the various specific grants of authority:

I wish to say . . . the language of this bill is so involved and the meaning in many places is so obscure and almost nonunderstandable that somebody ought to have discretion in administering its provisions. . . . Under such circumstances there ought to be [e]ntrusted to some authority the power to interpret them and to exercise some discretion.²²⁹

Walsh’s statement provides support for the proposition that the specific delegations were no different in kind than the general ones: they were interpretative.

By 1924, some congressmen were concerned enough about Treasury’s discretion that they reintroduced the idea Congress used in the Tariff Act of 1832, that the general rulemaking authority could only be exercised if it was “not inconsistent with the laws of the

225. *See supra* Part III.A.

226. I.R.C. § 7805(a).

227. *See supra* note 144 and accompanying text.

228. 61 CONG. REC. 6559, 6576 (1921) (statement of Sen. Walsh).

229. *Id.*

United States.”²³⁰ The House bill proposed to put a similar qualifier in the Revenue Act of 1924 so that the Commissioner had, with the approval of the Secretary, the power to issue rules and regulations for enforcement of that Act, but only if the rules did “not enlarge or modify any provisions of this act and of any other law.”²³¹ The Conference Report accepted the Senate’s strike of that language.²³² Senator Reed Smoot explained that “[t]he words stricken out were omitted as surplusage. There is no necessity for the provision,” because “[n]o regulation of any department can set aside the law.”²³³

The first discussion of a new idea (new, at least, as to tax administration) that regulations could be both legislative and legitimate appears in J. Hardy Patten’s extensive 1926 treatment of the legal authority of Treasury Regulations, in which he strung together several Supreme Court decisions to claim that “[a]s long as Congress, in delegating legislative power to an executive or administrative agency, finds an adequate necessity for the delegation and prescribes a ‘standard’ or ‘rules of decision,’ it is not unconstitutional as a *pure* ‘delegation of legislative power.’”²³⁴ Accepting the idea that there could indeed be legitimate legislative regulations, Patten nonetheless concluded that the majority of the regulations administering the income tax were interpretative.²³⁵

The first example of legitimate legislative regulations in tax administration I can find came in 1928, when Congress explicitly gave the Secretary the authority to make a substantive decision about whom to tax. For years the question of how to tax a group of

230. Act of July 14, 1832, ch. 227, § 9, 4 Stat. 583, 592; *see supra* note 80 and accompanying text.

231. H.R. REP. NO. 68-844, at 31 (1924) (Conf. Rep.).

232. *Id.*

233. 65 CONG. REC. 7140 (1924) (statement of Sen. Reed Smoot). The qualifying language was not in the final provision. *See* Revenue Act of 1924, ch. 234, § 1001, 43 Stat. 253, 339.

234. Patten, *supra* note 39, at 473. Patten cites *Buttfield v. Stranahan*, 192 U.S. 470 (1904), and *Mahler v. Eby*, 264 U.S. 32 (1924). The latter case may be what caused concern to those who, in 1924, sought to put the “not inconsistent with the laws” qualifier back into the general authority statute. *Cf.* 65 CONG. REC. 3333 (1924) (statement of Rep. Joseph Deal) (“The Supreme Court has rendered some decisions that would indicate that Congress has the right to delegate the power of making rules and regulations, but there should be some limit as to the extent of those rules and regulations.”).

235. *See* Patten, *supra* note 39, at 376 (“Interpretative regulations comprise the largest and commonest variety [of Treasury Regulations].”). Note that I am not endorsing all of Patten’s ideas, just pointing out what his ideas were.

affiliated corporations had raged in the courts.²³⁶ In the Revenue Act of 1928, Congress decided to punt the problem to Treasury, and thus section 141 of the law specifically directed the “Commissioner, with the approval of the Secretary,” to “prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations . . . may be determined . . . in such manner as clearly to reflect the income and to prevent avoidance of tax.”²³⁷ Soon enough, Treasury revised Regulations 75, providing just such rules.²³⁸

The consolidated return statute was truly an unprecedented rulemaking power.²³⁹ It was more than just another one of the many provisions in specific sections that gave the Commissioner or the Secretary the authority to issue rules. This was the power to decide whom to tax, a qualitatively different delegation than any that had come before. Accordingly, the drafting of Regulations 75 resembled what Congress does when writing legislation: the regulation writers held three days of hearings to receive public input before writing the regulation.²⁴⁰ Professor Kenneth Davis also suggested that it was the consolidated return statute that gave rise to Treasury’s theory that the distinction between legislative and interpretative regulations lay in the specificity of the rulemaking grant from Congress.²⁴¹

This move by Congress became much more common in post–New Deal legislation. Contemporaries describe the period after 1933 as “marked by an unprecedented delegation of power to the President and other executive officers to prescribe regulations.”²⁴² The distinction between legislative regulations and interpretative regulations was quickly viewed as based on a notion of delegation of powers—a view which most administrative law professors still teach today.²⁴³

236. See generally J. Hardy Patten, *The Consolidated Return—1929 Model*, 7 NAT’L INCOME TAX MAG. 419 (1929).

237. Revenue Act of 1928, ch. 852, § 141, 45 Stat. 791, 831.

238. See Patten, *supra* note 236, at 420.

239. See *id.* (describing Regulations 75 as “an innovation in Federal tax administration,” which “present[s] the first production of legislative regulations *en masse*”).

240. *Id.* at 420 & n.9.

241. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 91 (1959). This is the student version of Davis’s *Administrative Law Treatise*.

242. Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 259 (1938) (footnotes omitted).

243. Both Professors Lederman and Hickman have given complete and thorough explorations of this concept in the context of the issue of authority. See generally Hickman, *supra* note 12; Lederman, *supra* note 54.

CONCLUSION

As a tax lawyer writing in the mid 1920's, J. Hardy Patten was of the opinion that most income-tax regulations were interpretative of the tax statutes and not legislative.²⁴⁴ Given the history detailed in this Article, it should not be surprising that the common view after enactment of the APA was the same, finding a doctrinal home in the idea that most Treasury Regulations fell into the APA's "interpretative" category of rules. Professor Davis put it this way: "The great bulk of Treasury Regulations under the tax laws clearly are interpretative rules, not legislative rules, *despite* the provision of § 7805 Without the grant of power by § 7805, the power of the Secretary or his delegate would be the same"²⁴⁵

Yet this common view made Treasury Regulations exceptional from the very start of the APA. Focus on the word "despite" in Professor Davis's quote. It implies that a general grant of authority would normally result in legislative rules. That is certainly how administrative scholars of the time defined legislative rules. For example, Professor A.H. Feller put it this way:

The legislative regulation is an exercise of a permissive authority to make a law to supplement or make effective the law passed by Congress. It is a response to the authorization: "the administrator may make such rules and regulations as are necessary to carry out the provisions of this section"²⁴⁶

If categorization of Treasury Regulations as "interpretative" is, in some sense, a pretextual fiction, it is one that has persisted.²⁴⁷ Whether it should be abandoned because of changes in either tax administration or administrative-law concepts since the APA is the subject for future articles. The point of this Article has been to caution against what Professor Richard Pierce might call a "hypertextual" approach to the APA.²⁴⁸ Those who write in this area

244. See *supra* note 235 and accompanying text.

245. DAVIS, *supra* note 241, at 87 (emphasis added). As others have well explained, some regulations issued pursuant to specific statutes, such as the consolidated return statutes, were viewed as subject to notice-and-comment process and were labeled "legislative." Professor Lederman gives an excellent summary of the contemporary thinking. See Lederman, *supra* note 54, at 654–59.

246. Feller, *supra* note 42, at 1320.

247. Professor Louis Eisenstein seemed to think so. See *generally* Eisenstein, *supra* note 42, at 509–24 (describing the categorization of Treasury Regulations as interpretative as a myth).

248. See Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752, 777–78

must not fall into the presentist fallacy of assuming that the terms of the APA contain meaning independent of history and of the administrative context to which they are applied. Certainly lessons from other areas of legal study, such as administrative law, can add great value to the study of tax administration.²⁴⁹ But it is not a one-way street; it should be a two-way conversation.

(1995) (criticizing the Court for relying too much on “the abstract meaning of a particular word or phrase” without considering other evidence of its meaning in a particular statute).

249. One outstanding example of this can be found in Leandra Lederman, “*Civilizing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*,” 30 U.C. DAVIS L. REV. 183 (1996).