MAYBE JUST A LITTLE BIT SPECIAL, AFTER ALL?

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ABSTRACT

The attitude—common among tax professionals—that tax is special (mostly because of its supposedly unique complexity), and that special legal rules should apply in the tax context, has been described and excoriated by scholars as "tax exceptionalism" or "tax myopia." The Supreme Court dealt tax exceptionalism a grievous blow in its 2011 opinion in Mayo Foundation for Medical Education & Research v. United States*, in which it held that the* Chevron *standard for determining the validity of regulations applied in tax just as it applied in other fields. One commentator gleefully celebrated* Mayo *as the death knell of tax exceptionalism, declaring, "The tax world finally recognized a stark fact of life in 2011: Tax law is not special." This Article offers, with numerous hedges and qualifications, a defense of the exceptionalists and of exceptionalism. It makes three points for the defense. First, it is not so much tax professionals who think tax is special; rather, the view of tax as a thing apart is held most strongly by everyone else. Second, to the extent tax professionals do believe that tax is special, they resemble antitrust lawyers who think that antitrust is special, bankruptcy lawyers who think that bankruptcy is special, and so on. In other words, there is nothing exceptional about tax exceptionalism. And, finally, to the extent tax professionals not only think tax is special but also think it is more special than, say, antitrust lawyers think that antitrust is special, they may not be altogether wrong. Maybe tax really is just a little bit special, after all.*

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INTRODUCTION

In two provocative and oft-cited articles published more than a decade apart, Professors Paul Caron and Kristin Hickman have accused tax lawyers of wrongly believing that tax law is special.[1] In his 1994 article, Caron identifies, criticizes, and labels as "tax myopia" the "myth that tax law is fundamentally different from other areas of law."[2] In Caron's view, the myth has had unfortunate effects on both tax law and the law more generally: "[T]his misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate. Similarly, other areas of law have been impoverished by the failure to consider how tax law can enrich their development."[3] Writing twelve years later, Hickman describes and condemns the same phenomenon. Her "tax exceptionalism" label for the phenomenon is less pejorative than Caron's "tax myopia," and her focus—on the level of judicial deference to be afforded to tax regulations—is narrower than Caron's comprehensive review of tax-is-special arguments and attitudes, but her bottom line is the same as Caron's:

> [A] perception of tax exceptionalism . . . intrudes upon much contemporary tax scholarship and jurisprudence. The view that tax is different or special creates, among other problems, a cloistering effect that too often leads practitioners, scholars, and courts considering tax issues to misconstrue or disregard otherwise interesting and relevant developments in non-tax areas, even when the questions involved are not particularly unique to tax.[4]

For those who persist in believing that tax is special, being excoriated in the law reviews is bad enough. But having your position rejected by a unanimous Supreme Court is much worse. For more than a quarter century following the Supreme Court's landmark 1984 opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*

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1. *See generally* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994); Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006).

2. Caron, *supra* note 1, at 518, 531.

3. *Id.* at 518.

4. Hickman, *supra* note 1, at 1541 (footnote omitted).

Inc.,[5] it was unclear whether *Chevron*'s deferential standard for judicial review of the validity of regulations—under which an agency is free to choose, by regulation, any reasonable interpretation of an ambiguous statute—applied in the tax context. Adherents to the tax-is-special school of thought argued that a tax-specific Supreme Court opinion calling for a less deferential standard of review—*National Muffler Dealers Ass'n v. United States*[6]—had survived *Chevron*.[7] Some lower courts, including the U.S. Tax Court (Tax Court), agreed,[8] and for years the Supreme Court left the issue unresolved. Finally, in its 2011 opinion in *Mayo Foundation for Medical Education & Research v. United States*,[9] the Court firmly announced (as urged by Hickman in both her tax exceptionalism article[10] and in an amicus brief in *Mayo*[11]) that there was nothing special about tax in this context. Writing for the Court, Chief Justice Roberts declared, "[W]e are not inclined to carve out an approach to administrative review good for tax law only. . . . We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."[12]

In a *Tax Notes* article reviewing the major tax developments of 2011, *Mayo* provided both the headline and the lead. Under the headline *Year in Review: Tax Law's Vanity Mirror Shattered*,[13] contributing editor Jeremiah Coder highlighted the *Mayo* decision as the most significant tax event of 2011. As an opponent of the tax exceptionalists, he made no effort to conceal his glee:

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

6. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979).

7. *See, e.g.*, John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 59 (1995); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL. PROP. PROB. & TR. J. 731, 749–50 (2002); Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 740–41 (2004).

8. *See, e.g.*, Snowa v. Comm'r, 123 F.3d 190, 197 (4th Cir. 1997); Swallows Holding, Ltd. v. Comm'r, 126 T.C. 96, 131 (2006), *vacated*, 515 F.3d 162 (3d Cir. 2008). For an excellent survey of the confused state of the law on this question (as of 2006), see Hickman, *supra* note 1, at 1556–59.

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

10. Hickman, *supra* note 1, at 1540–42.

11. Brief of *Amicus Curiae* Professor Kristin E. Hickman in Support of Respondent at 22, *Mayo*, 131 S. Ct. 704 (No. 09-837), 2010 WL 3934618, at *22.

12. *Mayo*, 131 S. Ct. at 713.

13. Jeremiah Coder, *Year in Review: Tax Law's Vanity Mirror Shattered*, 134 TAX NOTES 35 (2012).

> The tax world finally recognized a stark fact of life in 2011: Tax law is not special. It took an explicit Supreme Court statement for the tax bar to become aware of its run-of-the-mill status, but that statement has prompted soul-searching . . . . [B]y and large the field assumed for decades that its unique set of issues required specialized legal treatment when it came to litigation postures, judicial deference, and administrative procedures. That notion was turned on its head [by *Mayo*] . . . . What, a princess no longer, and in its place nothing but a common maid? The Supreme Court is not afraid to be blunt.[14]

In the rhetorical war between the tax exceptionalists and their opponents (call them the anti-exceptionalists), only the latter conceived of the struggle in global terms. On the anti-exceptionalist side, there are two articles (by Caron and Hickman, respectively) identifying tax myopia or exceptionalism as a pervasive phenomenon among tax specialists. These articles argue at considerable length that tax is not special—not merely that it is not special with respect to judicial deference to regulations, or any other particular issue, but rather that it is not special in any respect. Also on the anti-exceptionalist side, there is Coder triumphantly dancing on the grave of tax exceptionalism. Although there are certainly law review articles arguing, for example, that particular characteristics of the tax laws justify the existence of tax-specific rules for determining the validity of regulations,[15] or require a tax-specific approach to statutory interpretation,[16] there is nary an article comparable in scope and generality to the efforts of Caron and Hickman that takes the opposing tax-is-special position across-the-board. Nor did any proponent of tax-is-special take *Mayo* as an occasion to publish a mournful eulogy for tax exceptionalism as a counterweight to Coder's gloating article.

The exceptionalist position is, if not exactly correct, at least more defensible than might be suggested by the anti-exceptionalist critiques and by the failure of the exceptionalists to offer any general defense of tax exceptionalism. The purpose of this Article is to offer—with numerous hedges and qualifications—a defense of the exceptionalists and of exceptionalism. Part I reviews the charges against the

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14. *Id.* at 35.

15. *See supra* note 7.

16. *See, e.g.*, Bradford L. Ferguson, Frederic W. Hickman & Donald C. Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 806 (1989).

exceptionalists, with a focus on the Caron and Hickman articles. Part II makes three points for the defense. First, it is not so much tax professionals who think tax is special; the view of tax as a thing apart is held most strongly by everyone else. Second, to the extent tax professionals do believe that tax is special, they resemble antitrust lawyers who think that antitrust is special, bankruptcy lawyers who think that bankruptcy is special, and so on. In other words, there is nothing exceptional about tax exceptionalism. And, finally, to the extent tax professionals not only think tax is special but think it is *more* special than, say, antitrust lawyers think that antitrust is special, they may not be altogether wrong. Maybe tax really is just a little bit special, after all.

I. THE BILL OF PARTICULARS AGAINST THE TAX EXCEPTIONALISTS

To begin with a bit of brush clearing, the term "tax exceptionalism" has several different meanings in the tax policy literature. In a usage originated by Professor Kyle Logue, the term refers to an unreasonable and impractical insistence on "[k]eep[ing] the tax laws clean of tax preference provisions, henceforth and forever."[17] In the international tax context, scholars occasionally refer to American "tax exceptionalism"—the tendency of the United States to adopt and maintain tax rules different from those prevailing in the rest of the world.[18] The concern here, however, is not with tax exceptionalism in either of these senses. Rather, it is with tax exceptionalism as the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.

In his attack on the "myth that tax law is fundamentally different from other areas of law,"[19] Caron describes and critiques the

17. Kyle D. Logue, *If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Transition Debate*, 67 U. CHI. L. REV. 1507, 1525 (2000). For other examples of the same usage (following Logue), see STAFF OF J. COMM. ON TAXATION, 110TH CONG., NO. JCX-37-08, A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 35 (2008); and David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 968–69 (2004).

18. *See, e.g.*, Ajay K. Mehrotra, *The Public Control of Corporate Power: Revisiting the 1909 U.S. Corporate Tax from a Comparative Perspective*, 11 THEORETICAL INQUIRIES L. 497, 502–03 (2010); Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 57 (2012).

19. Caron, *supra* note 1, at 531.

operation of the "myth" in several areas, including approaches to statutory interpretation, the application (or nonapplication) of *Chevron*, and the analysis of choice-of-forum questions.[20] In all of the areas he considers, Caron's basic thesis is the same—that tax specialists must "start opening up the tax law to the light of nontax insights."[21]

Much of Caron's discussion of statutory interpretation focuses on the role of legislative history in the interpretive process. After describing at some length the competing views among tax specialists on this issue,[22] Caron complains that "[m]any of the tax cognoscenti . . . have not listened as statutory construction has evolved over the past ten years into one of the hottest areas of academic and judicial inquiry."[23] As Caron documents, at least some of those experts justified their failure to listen on the grounds that tax is so different from other fields that those developments had little or no relevance to tax. His smoking gun is a passage from an article by three former high-level U.S. Department of Treasury (Treasury) officials:

> Much of what has been said in the literature and the case law about the uses of legislative history rests on conclusions about the nature of the legislative process generally, or in particular cases, that do not apply in the tax area today. Federal tax statutes and the legislative process that produces them differ from other legislation in such degree that the difference is tantamount to a difference in kind. The unique nature of the Internal Revenue Code is widely acknowledged . . . .[24]

Caron also, however, approvingly notes some then-recent nonmyopic tax scholarship, in which tax scholars either "enter [into] the general statutory construction debate by using tax cases to illustrate their particular broad theoretical perspective," or "undertake tax-specific work that generates insights into the process of statutory construction generally."[25]

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20. *See generally id.*

21. *Id.* at 589.

22. *Id.* at 532–38.

23. *Id.* at 539.

24. Ferguson et al., *supra* note 16, at 806. This passage, with the exception of the last sentence, is quoted in Caron, *supra* note 1, at 535.

25. Caron, *supra* note 1, at 541. As examples of the first type of scholarship, Caron cites William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988), and Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445

Writing a decade after the Supreme Court's *Chevron* opinion revolutionized the allocation of interpretive authority between courts and administrative agencies, Caron laments:

> [T]he revolution has not reached the tax front. Although *Chevron* is cited in an increasing torrent of cases and articles, it has gone virtually unnoticed in the tax area. For example, the Tax Court has cited *Chevron* in only one case . . . . Moreover, the leading tax treatises do not discuss *Chevron*, and the few tax articles citing the case generally do so only in passing.[26]

Caron does not offer a detailed analysis of *why* tax professionals are afflicted with tax myopia, though he offers several hints that at the core of the mistaken tax-is-special attitude is the belief that tax law is uniquely complex. For example, Caron quotes the view of the previously mentioned former high-level Treasury officials that the Internal Revenue Code (I.R.C.) is the "'lengthiest, most complex, most internally interrelated statute on the books today.'"[27] Similarly, he quotes the Tax Court's observation that a particular I.R.C. provision is "'part of a complex set of statutory provisions marked by a high degree of specificity.'"[28] Caron also notes that in a survey of Northwestern Law School professors and American Bar Foundation research specialists, "tax practice received [the] highest 'intellectual challenge score' of thirty legal specialties."[29]

For Caron, tax lawyers' disregard of *Chevron* is just one example of tax myopia. By contrast, the entire focus of Hickman's 2006 article is on the question of whether *Chevron* applies to tax regulations. She is careful, however, to situate the *Chevron* question in the broader context of pervasive and pernicious tax exceptionalism: "The ongoing debate over judicial deference toward tax regulations offers an especially frustrating example of this tax exceptionalism at work."[30]

(1993). Caron, *supra* note 1, at 541 nn.103–04. As examples of scholarship of the second type, he cites Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986), and Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991). Caron, *supra* note 1, at 542 n.107, 543 n.114.

26. Caron, *supra* note 1, at 556–57 (footnotes omitted).

27. *Id.* at 535 (quoting Ferguson et al., *supra* note 16, at 806).

28. *Id.* at 537 (quoting The "Miss Elizabeth" D. Leckie Scholarship Fund v. Comm'r, 87 T.C. 251, 260 (1986)).

29. *Id.* at 524 n.20 (citing JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 103 (1982)).

30. Hickman, *supra* note 1, at 1541.

Hickman presents a two-part challenge to the claim that the less deferential approach of *National Muffler Dealers*, rather than the more deferential approach of *Chevron*, does and should apply to challenges to tax regulations. First, in a tour de force of doctrinal analysis, she explains why "[t]he common understanding of a unique tax deference tradition simply does not accord with the Court's jurisprudence or the pre-*Chevron* scholarship."[31] Second, and of greater interest for present purposes, she considers and rejects four normative arguments offered by proponents of the post-*Chevron* survival of *National Muffler Dealers*.[32] Strikingly, the four arguments she identifies have little or nothing to do with the primary feature supporting the exceptionalists' belief that tax is special—complexity. Hickman begins by considering the proposition that the supposed tradition of a unique deference standard for tax regulations provides a normative (rather than merely a doctrinal) basis for maintaining that tradition.[33] She then turns to the argument that the allegedly unique severity of the penalties for disregarding tax regulations makes the civil tax context comparable to criminal law enforcement and that *Chevron* does not apply in the criminal context.[34] Next, she considers the claim that the Treasury and the Internal Revenue Service (IRS) have an interest in revenue maximization, for which there is no analogue in other agencies, and which leads to a systemic antitaxpayer bias in tax regulations.[35] Finally, she evaluates the argument that a high degree of judicial deference to regulations is appropriate when regulations are promulgated by agencies on the basis of their special nonlegal technical expertise (for example, on scientific or engineering matters), but that drafting tax regulations requires no such expertise, leading to the conclusion that tax regulations deserve less deference than nontax regulations.[36]

Hickman's refutations of these four arguments are all quite persuasive, and I agree with her conclusion that *Chevron* should be fully applicable in the tax arena (as the *Mayo* Court decided a few years later). The interesting point for present purposes, however, is how little the four Hickman-identified tax-exceptionalist arguments

31. *Id.* at 1589.
32. *Id.* at 1589–1600.
33. *Id.* at 1590–91.
34. *Id.* at 1592–96.
35. *Id.* at 1596–98.
36. *Id.* at 1598–1600.

have to do with the tremendous—exceptionalists would say unique—complexity of the tax laws underpinning the exceptionalists' belief that tax is special. Because of this complexity, the laws (according to the late public finance economist David F. Bradford) "can be understood (if at all) by only a tiny priesthood of lawyers and accountants."[37] Of the four normative arguments for exceptionalism that Hickman considers, two make no claim that tax is unique in any deep sense. Other areas of the law also have their traditions, and even if tax penalties happen to be unusually severe, that is an accidental, rather than essential, feature of the income tax. The third argument—the appeal to alleged agency antitaxpayer bias—does depend on the uniqueness of the tax-collecting function of government, but the uniqueness of that function is unrelated to the belief in the unique complexity of the income tax at the core of tax exceptionalism.[38] And the fourth argument—that the administration of the tax laws requires less nonlegal technical expertise than the administration of many nontax statutes—if anything cuts *against* complexity-based notions of tax exceptionalism. There is, in short, a disconnect between the reason that accusations of tax exceptionalism are plausible—that is, because it is easy to believe that tax experts think their field is uniquely complex—and the bill of particulars presented against the exceptionalists.

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37. DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 266 (1986). Bradford's statement is quoted, not quite accurately, by Caron, *supra* note 1, at 526.

38. As the text suggests, I disagree with Professor Leslie Book's view that the uniqueness of the tax-collecting function is at the core of tax exceptionalism. According to Book,

> [T]he current encroachment on tax exceptionalism specifically stems from the changing role of the Internal Revenue Code itself. The modern Tax Code is implicated in an alphabet soup of credits and provisions that address topics and behavior far from revenue collection. Accordingly, the justification for [tax exceptionalism] . . . becomes less compelling as the Code takes on other roles beyond pure revenue collection.

Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 539–40 (2012) (footnote omitted).

I suggest a thought experiment for any tax-specialist reader who, deep in her heart of hearts, is sympathetic to the notion that maybe the federal income tax is at least a little bit special. Do you feel the same way about state retail sales taxes, or the federal payroll tax? If, as I suspect, you do not, this suggests that your sense of the income tax as special is based on its complexity, and not on its character as a forced exaction.

II. A (LIMITED) DEFENSE OF TAX EXCEPTIONALISM

As promised, I offer here three points in defense of those tax professionals accused of tax exceptionalism and tax myopia (both the few accused by name and the unnamed multitudes).

A. It's Mostly Nontax People Who Think Tax Is Special

The claims that the income tax is hopelessly and uniquely complex do not, by and large, come from tax professionals (who, given their career choice, must not find the complexity overwhelming). The claims come, rather, from everyone else—from the general public, and from lawyers who do not specialize in tax. On the popular culture front, the complexity of the income tax has been a recurring theme in tax-related situation comedy episodes from the 1940s to the present. For example, a 1949 radio episode of *Ozzie and Harriet* opens with the announcer setting the scene as Ozzie wrestles with his tax return: "Ozzie Nelson, American, is completely enmeshed in what is rapidly becoming one of America's most exasperating traditions. It calls for a complete mastery of arithmetic, trigonometry, surveying, semantics, foreign languages (including doubletalk and jabberwocky), not to mention mind reading, and—above all—the control of temper."[39] Four decades later, a 1990 episode of *Roseanne* sounds the same theme. Husband Dan complains as he works on the return, "This stuff's so complicated nobody can understand it."[40] Roseanne offers to help, but after a short review of the instructions she says, "OK, I give up. What language is this?"[41]

It is not just the average person who finds the income tax monstrously difficult. Even the most brilliant minds have expressed the same opinion. Judge Learned Hand, widely considered to be among the greatest jurists in American history, lamented his struggles to comprehend the federal income tax:

> In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—

39. *The Adventures of Ozzie and Harriet: Income Tax Problems* (NBC radio broadcast Mar. 13, 1949).

40. *Roseanne: April Fool's Day* (ABC television broadcast Apr. 10, 1990).

41. *Id.*

> leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.[42]

True, Hand offers the income tax as an example of out-of-control statutory complexity, rather than as the only instance. However, his choice of the income tax as *the* example seems far from random.

Outside the legal field, the man whose name is synonymous with genius echoes Hand's opinion. Albert Einstein is frequently quoted—including on the IRS website—as having said, "The hardest thing in the world to understand is the income tax."[43] Because the quotation seems a little too good to be true, and is almost always cited without adequate sourcing,[44] its authenticity has been questioned.[45] Strangely enough, however, there is strong evidence that Einstein did indeed say this or at least something very like it. The quotation first appeared in print eight years after Einstein's death, in a 1963 letter to the editor of *Time* magazine from Leo Mattersdorf, Einstein's longtime tax advisor and return preparer:

> One year while I was at his Princeton home preparing his return, Mrs. Einstein . . . asked me to stay for lunch. During the course of the meal, the professor turned to me and with his inimitable chuckle said: "The hardest thing in the world to understand is income taxes." I replied: "There is one thing more difficult, and that is your theory of relativity." "Oh, no," he replied, "that is easy."[46]

If arguably the world's greatest genius thinks the income tax is "the hardest thing in the world to understand," who are tax professionals to disagree?

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42. Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

43. *Tax Quotes*, IRS, www.irs.gov/uac/Tax-Quotes (last visited Mar. 16, 2014).

44. The IRS website's "Tax Quotes" is frequently cited in support of the quotation, but the website itself gives no source. *See id.*

45. For example, the authenticity of the quotation has been doubted by Snopes.com, a website devoted to separating fact from urban legend, which describes the Einstein income tax quotation as a "sentiment popularly attributed to Einstein which . . . began to appear only well after his death." *Compound Interest*, SNOPES.COM, www.snopes.com/quotes/einstein/interest.asp (last visited Mar. 16, 2014).

46. Leo Mattersdorf, Letter to the Editor, TIME, Feb. 22, 1963, at 12. For a wonderful essay on the evidence relating to the authenticity of the Einstein quotation, see *The Hardest Thing in the World To Understand Is Income Taxes*, QUOTE INVESTIGATOR (Mar. 7, 2011), http://quoteinvestigator.com/2011/03/07/einstein-income-taxes. In addition to the essay itself, the comments of David S. Miller (Leo Mattersdorf's grandson) in the comments section are well worth reading. *Id.*

The perception of the uniquely byzantine character of the income tax laws also pervades law-school culture, as Caron entertainingly details in *Tax Myopia*.[47] He describes second- and third-year law students selecting their courses as "follow[ing] the conventional wisdom that there are only two types of law school courses: tax and everything else."[48] He also notes the perennial phenomenon of candidates for entry-level teaching positions indicating on their form resumes that they are (heroically enough) willing and able to teach each and every subject in the entire law school curriculum, but for one predictable exception: "anything but tax."[49] Caron's observations on this topic are consistent with my own experience of how tax is viewed by law students and law faculty.

The bottom line is that the strongest evidence of tax-exceptionalist attitudes—in the sense of a belief in the unique complexity of the federal income tax—comes not from the statements and acts of tax professionals, but from the comments and behaviors of everyone else.

Moving from general attitudes to the specific question of whether there should be one approach for determining the validity of all nontax regulations (*Chevron*) and another less deferential approach applicable only to tax regulations (*National Muffler Dealers*), again the finger of blame (if blame there be) for tax exceptionalism does not point at tax professionals. Instead, the responsibility for the precarious survival of *National Muffler Dealers* for the twenty-seven year period separating *Chevron* and *Mayo* lies with the Justices of the Supreme Court, who—despite their immense wisdom—are decidedly *not* tax specialists.[50] Although the Court sometimes cited *Chevron* during that period in cases involving challenges to tax regulations,[51] the Court also cited and applied *National Muffler Dealers*.[52] Tax specialists can hardly be blamed for

47. Caron, *supra* note 1, at 519–24.

48. *Id.* at 520.

49. *Id.* at 521 n.9 (quotation marks omitted).

50. Caron recounts a number of amusing anecdotes concerning the lack of enthusiasm for tax cases among the Justices. *Id.* at 525–26. For example, Justice Souter reportedly explained his willingness to sing along with the Chief Justice at the Court's annual Christmas party: "I have to. Otherwise I get all the tax cases." *Id.* at 525 (citing Paul M. Barrett, *Independent Justice*, WALL ST. J., Feb. 2, 1993, at A1).

51. *See, e.g.*, United States v. Boyle, 469 U.S. 241, 246 n.4 (1985).

52. *See, e.g.*, Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560–62 (1991) (citing and applying Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979)); *see also* Boeing Co. v. United States, 537 U.S. 437, 448 (2003) (citing *Cottage Savings*, 499 U.S. at 560–

thinking that there might be a special deference analysis for tax regulations, given the nonspecialist Court's continued post-*Chevron* approval of *National Muffler Dealers.*

As Hickman has insightfully noted, the Court's lengthy delay in settling the *Chevron*-or-*National Muffler Dealers* question can be largely explained by the fact that until *Mayo*, neither parties nor amici had brought the question to the Court's attention.[53] As Hickman also points out, however, both taxpayers and the government had strategic reasons for not focusing the Court's attention on the difference between the *Chevron* and *National Muffler Dealers* standards, and for not pressing the Court to choose one or the other.[54] Taxpayers' lawyers continued to cite *National Muffler Dealers* not out of any deep-seated belief in tax exceptionalism, but because their challenges to the validity of regulations would fare better under that case than under *Chevron*.[55] They were able to assert the post-*Chevron* viability of *National Muffler Dealers* without challenge because the Office of the Solicitor General (Solicitor General) did not contest the point. For at least part of the post-*Chevron* period, the government doubted the Court's commitment to *Chevron* and was therefore careful not to provoke precedents that might explicitly limit *Chevron*'s scope.[56]

In short, for decades the nonspecialist Supreme Court sustained the viability of the claim that there was a tax exception to the *Chevron* doctrine. Although tax-specialist litigators were indeed slow to urge the Court to clarify the application or nonapplication of *Chevron* to tax, their reticence can be fully explained by litigation strategies. There is no need, therefore, to appeal to the prevalence of tax-exceptionalist attitudes among tax professionals. As with tax exceptionalism in general, so too with tax exceptionalism on the *Chevron* question: there is more evidence of tax exceptionalism outside the tax profession than within.

61, on the question of deference to regulations, thus implicitly following *National Muffler Dealers*).

53. *See* Kristin E. Hickman, Response, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. SEE ALSO 89, 108 (2010) ("Until the present term, no tax case before the Supreme Court offered anything remotely approximating clear briefing of the *Chevron* versus *National Muffler* issue with regard to general authority Treasury regulations.").

54. *See id.* at 110–11.

55. *Id.* at 110.

56. *Id.* at 110–11 (citing Thomas W. Merrill, *Confessions of a* Chevron *Apostate*, 19 ADMIN. L. NEWS, Winter 1994, at 1, 14).

B. And Besides, Everybody Else Does the Same Thing

Although I argue that a belief in the uniqueness of tax is most pervasive among the general public and lawyers in nontax fields, I do not deny that numerous tax professionals also harbor tax-exceptionalist attitudes—of which the previously cited invocation of "[t]he unique nature of the Internal Revenue Code" by three prominent tax attorneys is a classic example.[57] Practitioner belief in subject-matter exceptionalism is not, however, limited to tax practitioners. Specialists in other legal fields have similar beliefs about the specialness of their fields (although those beliefs are sometimes based on characteristics of the fields other than complexity). In one other field—bankruptcy—pejorative descriptions of "bankruptcy exceptionalism" appear in the scholarly literature with a frequency not far behind the scholarly references to tax exceptionalism.[58] But the phenomenon extends well beyond the areas in which it has been given a name. Labor lawyers are guilty of labor-law exceptionalism, environmental lawyers are guilty of environmental exceptionalism, and so on. In other words, there is nothing exceptional about tax exceptionalism. In fact, to the extent the anti-exceptionalists assume subject-matter exceptionalism is a phenomenon peculiar to tax, they are—ironically—engaging in a bit of tax exceptionalism of their own.

In the administrative-law context, the widespread nature of subject-matter exceptionalism is described in detail in a recent article by Professors Richard Levy and Robert Glicksman on agency-specific precedents.[59] Despite the purportedly trans-substantive character of the vast majority of administrative law, Levy and Glicksman demonstrate the existence of agency-specific deviations from general principles of administrative law in the case of five agencies. Yes, the IRS is one of the five agencies. The first IRS deviation discussed by

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57. Ferguson et al., *supra* note 16, at 806.

58. *See, e.g.*, Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207, 236–37 (2012) (discussing bankruptcy exceptionalism in the context of conflicts-of-interest rules applicable to bankruptcy attorneys); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 611–12 (2008) (considering bankruptcy exceptionalism in the constitutional law context); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 390–91 (2012) (discussing bankruptcy exceptionalism with respect to the administration of the law by the judiciary rather than by an agency).

59. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011).

Levy and Glicksman is the tax distinction between interpretive and legislative regulations for purposes of determining whether regulations must be promulgated using notice-and-comment procedures—a distinction which does not comport with general administrative-law doctrine.[60] The second deviation is the survival (according to a number of courts) of *National Muffler Dealers* for many years following the Supreme Court's *Chevron* decision.[61] The more interesting point, however, is that the other four agencies with agency-specific precedents examined by Levy and Glicksman—the Federal Communications Commission, the Social Security Administration, the Environmental Protection Agency, and the National Labor Relations Board[62]—are all charged with the administration of nontax statutes.

According to Levy and Glicksman, agency-specific precedents are attributable to the silo effect, a well-recognized phenomenon in the organizational management field.[63] They explain, "The isolated silo rising above the plains is an evocative metaphor for the propensity of departments or divisions within a large organization to become isolated, with a resulting failure to communicate and pursue common goals."[64] Silo effects are generally explained in terms of three types of costs: agency costs (in this context, an administrative agency pursuing goals different from those of the government as a whole), transaction costs (which make it difficult for agencies to cooperate with one another in furtherance of larger governmental goals), and information costs (of sharing information among agencies).[65] Levy and Glicksman suggest that these three types of costs explain the tendency of agencies to function as silos.[66]

That agencies may function as silos does not by itself explain the creation and maintenance of agency-specific precedents by generalist judges, but Levy and Glicksman plausibly suggest an explanation based on information costs: "[W]e think the critical factor is the

60. *Id.* at 515–23.

61. *Id.* at 524–25. Levy and Glicksman wrote their article shortly before the Supreme Court's decision in *Mayo*, although the article's publication date was shortly after the issuance of the Court's decision.

62. *Id.* at 526–51.

63. *See id.* at 510 & n.75 (collecting sources on the silo effect).

64. *Id.* at 510. To less peaceable minds, the image evoked by the silo effect may be of a missile silo, rather than a grain silo.

65. *Id.* at 512–14.

66. *Id.*

judicial-review process itself, in which the courts rely heavily on the attorneys representing the parties as providers of information regarding precedents."[67] Those attorneys tend to be specialists (in tax law, environmental law, or labor law, for instance), and "practitioner specialization affects marginal information costs so as to induce . . . silo effects because the marginal costs of finding and analyzing agency-specific precedents are small, while the costs of moving beyond the agency may be significantly greater and the marginal benefits of doing so are typically relatively small."[68]

Silo effects—and thus subject-matter exceptionalism—are to be expected in any specialized area of the law. When an area of the law is both highly specialized and large (in the sense of generating an impressive number of judicial precedents), as in the case of federal tax law, subject-matter exceptionalism is likely to be especially pervasive. The large quantity of reported cases makes it likely there will be cases on point from within the field, thus making it unnecessary—or at least not obviously necessary—to search for precedents from other areas of the law. And the difficulty of keeping up with even in-field legal developments leaves practitioners with little time for a hunt—seemingly unnecessary in any event—for relevant cases from outside the field.

As it happens, the everybody-does-it nature of subject-matter exceptionalism is well-illustrated in the specific context that has served as Exhibit A in the case against tax exceptionalism—standards of judicial deference to regulations in the post-*Chevron* era. Writing eight years after *Chevron*, Professor Thomas Merrill observes that the Supreme Court itself had applied "the *Chevron* framework . . . in only about half the cases that the Court perceive[d] as presenting a deference question."[69] Merrill also notes that the Court was especially disposed to ignore *Chevron* "in areas where there is a particularly rich tradition of pre-*Chevron* precedent on deference."[70] Merrill mentions five areas—Title VII, labor, tax, social security, and the

67. *Id.* at 557.

68. *Id.* at 561.

69. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992).

70. *Id.* at 983 n.56; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1107–08 (noting the Supreme Court's tendency to ignore *Chevron* in the contexts of labor law, immigration, treaty interpretation, sentencing, education, and regulated industries, in addition to tax).

environment—in which the Court "still tend[ed] to frame the deference standard in the terms expressed in earlier decisions specific to these areas, rather than in terms of *Chevron*."[71] It is not a coincidence that four of the five legal areas mentioned by Merrill are among the five areas used by Levy and Glicksman to illustrate the phenomenon of agency-specific precedents (despite the fact that Levy and Glicksman discuss the *Chevron* question only in the tax context).[72] The fields of labor, tax, social security, and the environment all feature the high degree of specialization and the substantial body of case law conducive to the development of subject-matter exceptionalism.

Thus, a more specific observation can be added to the general observation that lawyers (and judges) practice subject-matter exceptionalism in every specialized area of the law, not just tax: exceptionalism on the very issue that has been offered as the leading example of tax exceptionalism—deference standards in the aftermath of *Chevron*—turns out to be not exceptional.

C. What's More, It's Not Necessarily Wrong (Sort of)

If practiced with care and nuance, subject-matter exceptionalism—in tax or elsewhere—may be perfectly appropriate. Although it makes sense to place the burden of persuasion on those claiming (in whatever context) that tax is meaningfully different, in some cases they may be able to carry that burden. Whether the question is the proper approach to statutory interpretation, the extent of judicial deference to regulations, or any other issue, the same rules should apply trans-substantively to the extent the circumstances justifying the rule exist trans-substantively. But different rules may be appropriate to the extent that the change in the legal context changes the relevant circumstances. Hickman herself has made this point,[73]

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71. *Id.* (citing Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554 (1991) (tax); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (Title VII); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (the environment); Atkins v. Rivera, 477 U.S. 154 (1986) (social security); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (Title VII); NLRB v. Action Auto., Inc., 469 U.S. 490 (1985) (labor)).

72. *See supra* note 62 and accompanying text.

73. *See* Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1157–58 (2010) ("One of us [Hickman] has publicly rejected arguments favoring tax exceptionalism. We assume for now that tax and other regulatory regimes differ in degree rather than in kind, but accept as possible that further development of our theory may establish the tax regime as meaningfully different in kind . . . ." (footnote omitted)).

and the point is implicit in the Supreme Court's statement in *Mayo* that "*in the absence of such justification* [for a special rule for tax], we are not inclined to carve out an approach to administrative review good for tax law only."[74] Nevertheless, the point is easily missed in the general condemnation of tax exceptionalism and tax myopia.

As an example, consider the argument advanced by some tax exceptionalists that tax regulations should enjoy less deference than other regulations because Treasury and the IRS have an antitaxpayer bias that has no parallel outside the tax context. The idea is that the question of the validity of *nontax* regulations often arises in litigation between private parties, as to which the regulation-writing agency is a disinterested third party, whereas the question of the validity of *tax* regulations arises in tax litigation in which the agency is a party with a direct financial interest.[75]

Hickman is unpersuaded by this claim, largely because the number of "strikingly protaxpayer" tax regulations on the books undercuts the claim of a systemic antitaxpayer bias among tax regulation writers.[76] I share Hickman's view.[77] But what if the exceptionalists' empirical claims on this point happened to be more persuasive? Suppose that Treasury and the IRS were uniquely situated among agencies in having a direct financial interest in the application of their regulations and in their status as litigants in cases

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74. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) (emphasis added).

75. *See* Gans, *supra* note 7, at 758 (suggesting agency bias resulting from the agency's status as the taxpayer's adversary in litigation); Salem et al., *supra* note 7, at 724–25 (suggesting agency bias resulting from a revenue-maximizing agenda).

76. Hickman, *supra* note 1, at 1596.

77. In fact, the IRS not infrequently takes positions so protaxpayer they cannot be reconciled with the Code. For a discussion, see generally Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829 (2012). For the most part, however, rather than displaying an anti- or protaxpayer bias, the IRS appears to make an honest attempt to adhere to the "Statement of Principles of Internal Revenue Tax Administration" that formerly appeared at the beginning of each Internal Revenue Bulletin:

> It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he or she is "protecting the revenue." The revenue is properly protected only when we ascertain and apply the true meaning of the statute.

See 1999-8 I.R.B. 2 (containing the last appearance of the "Statement of Principles"). In lieu of the "Statement of Principles," Internal Revenue Bulletins now announce that "[t]he IRS Mission" is to "[p]rovide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities," and to "enforce the law with integrity and fairness for all." *See, e.g.*, 2014-14 I.R.B. intro. The quoted language from the "Statement of Principles" originated (albeit without "or she") in Rev. Proc. 64-22, 1964-1 C.B. 689, which is still in force.

involving the validity of those regulations. Suppose also that objective observers concluded the result was a systemic antitaxpayer bias in tax regulations. If all that were true, there would be merit to the claim that courts should adopt a less deferential approach in their review of tax regulations than in their review of nontax regulations.

In such hypothetical circumstances, tax exceptionalism would be at least defensible, perhaps even compelling. Notice, however, that even then the exceptionalism would be accidental or contingent, in the sense that if the same circumstances—agency financial interest, adversarial status, and a resulting bias in the writing of regulations—could be shown to exist in some nontax context,[78] then the less deferential standard would apply just as much in that context as in the tax context. Whether this would still be exceptionalism (tax-and-something-else exceptionalism) is a question of labels, not of substance. The larger the number of agencies as to which the circumstances justifying less deference exist, the less it looks like exceptionalism and the more it looks like the application of a general rule that there are two deference standards—one for when the circumstances exist, and the other for when they do not. But the system could be described in precisely the same way even if tax happened to be the only area in which the circumstances obtained. Whether one describes that as exceptionalism or as the application of general principles to a set that happens to have only one member, the treatment would be justified. To be clear: the *particulars* of the antitaxpayer bias argument for less deference are far from persuasive, but the *structure* of that argument could legitimately be used (with better particulars) to make the case for subject-matter exceptionalism—but always with the caveat that the exceptional treatment would be extended to any other area in which the same special circumstances existed.

Essentially the same analysis applies to the question of whether the process of interpreting the I.R.C. is radically different from the interpretation of other statutes. It is at least arguable that a short and simple statute expressed in vague and general terms calls for a fundamentally different interpretive approach than a lengthy and

78. For example, similar circumstances could exist, at least to some extent, with respect to the regulations of the Federal Acquisition Regulation System.

intricate statute.[79] The Supreme Court's 1968 opinion in *Commissioner v. Gordon*,[80] a corporate tax case, suggests as much: "The requirements of [I.R.C. § 355] are detailed and specific, and must be applied with precision."[81] For the sake of the argument that follows, let us suppose that simple and complex statutes call for different interpretive approaches. If it happens that federal tax law is characterized by long and intricate statutory provisions and antitrust law, for instance, by short and vague provisions, then the differing approaches to interpreting the statutes in the two fields may be viewed as an instance of subject-matter exceptionalism.[82]

There is, however, another and better way to think about this. The same overarching interpretive rules—read simple statutes one way and complex statutes another—apply trans-substantively. Even if all tax statutes were complex and all antitrust statutes were simple, the resulting different ways of reading each statute could be viewed as the consistent application of the same overarching rules, rather than as subject-matter exceptionalism. But there is no need to argue that hypothetical case, because within the long and intricate I.R.C. lurk many short and simple (and vague) passages. Those passages are interpreted according to the rules for simple statutes; they are not interpreted as if they were complex merely because they are tax statutes and tax statutes are usually complex. A classic example is the Supreme Court's 1960 opinion in *Commissioner v. Duberstein*,[83] in which the Court was called upon to interpret the longstanding exclusion from gross income of "the value of property acquired by gift."[84] Guided by the simplicity and vagueness of the provision, rather than by the fact that it was a tax provision, the Court wrote: "We are of opinion that the governing principles are necessarily general . . . and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive

79. The two types of statutes might also call for different analyses under *Chevron* of the range of permissible regulatory interpretations; the regulation-writing agency would be more constrained by the lengthy and intricate statute than by the short and vague one.

80. Comm'r v. Gordon, 391 U.S. 83 (1968).

81. *Id.* at 91–92.

82. Whether one approach or the other is viewed as the exceptional case will depend on the viewer's understanding of the typical level of statutory complexity.

83. Comm'r v. Duberstein, 363 U.S. 278 (1960).

84. *Id.* at 279–80 (quotation marks omitted). The exclusion is now codified at I.R.C. § 102(a) (2012). In the years before *Duberstein*, the same language appeared at § 22(b)(3) of the 1939 Code. I.R.C. § 22(b)(3) (Supp. V 1939).

statement . . . ."[85] As long as the choice of interpretive approach is governed by the character of the specific provision to be interpreted, rather than by the character of the provision as a tax or nontax statute, I would argue that subject-matter exceptionalism is not being practiced—not even if 90 percent of the tax provisions at issue in the cases happen to be of the *Gordon* type rather than the *Duberstein* type.

Many years ago, I published an article arguing that the interpretation of the I.R.C. simultaneously was and was not special, for the same reasons expressed (much more succinctly) above.[86] The key passage on the special-or-not question read:

> Interpreting statutes is not a task unique to the practice of tax law. The principles that apply to the interpretation of any statute apply to the interpretation of the Code as well. But the unique complexity of the Code makes it more than just another statute, and for that reason the question of when nonliteral interpretations of the Code are appropriate merits separate discussion from the appropriateness of nonliteral interpretations of statutes in general.[87]

Was the former self who wrote that passage a tax exceptionalist suffering from tax myopia (although the terms were not yet in circulation), or did he see tax as part of the legal mainstream? Other scholars have disagreed on the answer to that question. Caron cites and discusses the article approvingly, as an example of nonmyopic "tax-specific work that generates insights into the process of statutory construction generally."[88] Professor Michael Livingston is of a different opinion in his 1996 article on the interpretation of tax statutes.[89] Except for the nonuse of the tax exceptionalism label (he refers to "tax essentialism" instead),[90] Livingston's article is to tax-is-special claims about statutory interpretation as Hickman's article is to

85. *Duberstein*, 363 U.S. at 284.

86. Zelenak, *supra* note 25, at 630.

87. *Id.* at 630 (footnote omitted). If I were revising this passage today, I would replace "unique" with "extreme" or "unusual," in recognition of my limited knowledge of the complexity of all other federal statutes.

88. Caron, *supra* note 1, at 541; *see id.* at 542–43 (quoting Zelenak, *supra* note 25, at 630, and discussing the article).

89. Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 (1996).

90. Livingston cites approvingly Caron's critique of "[t]ax [m]yopia," *id.* at 710, and in passing suggests a term of his own—"tax essentialism," *id.* at 711—but Livingston appears not much interested in naming the phenomenon he critiques.

tax-is-special claims in the *Chevron* context. In opposition to "[t]he sense . . . that tax law is somehow special, that it has nuances and pitfalls unfathomable to the outsider,"[91] Livingston poses a rhetorical question: "What right does any area of law have to set itself apart, proclaiming that its norms and methods are different from everyone else's?"[92] He cites and discusses my article as an example of this unfortunate tax-is-special attitude, in a section of his article with the heading "The (Allegedly) Special Case of Tax Law."[93]

I hope it is clear by now that I consider Caron's and Livingston's characterizations of my position—as tax exceptionalist or not—to be equally plausible, and that as long as the substance of the position is understood I am indifferent to how it is labeled. But too great a focus on labels can blur the substance. Although Livingston presents my views as being in opposition to his own, I in fact concur with his articulation of his own position: "If tax law is not unique, it may be at the extreme end of a continuum . . . . In this view, all statutes would utilize the same interpretive methods, but the balance between methods would depend on where on the continuum the particular statute was located."[94] I am not sure why my position is deemed tax essentialism but his virtually identical position is not.

To summarize: in statutory interpretation, and probably in a number of other legal contexts as well, tax is special, and it isn't. Undoubtedly other areas of the law are similarly both special and ordinary, each in its own fashion. Does this view qualify as tax exceptionalism (or essentialism, or myopia)? One can argue either way, and as long as tax exceptionalism is not understood as a term of opprobrium, I doubt anything turns on the decision.

CONCLUSION

To hear the anti-exceptionalists tell it, tax exceptionalism is pervasive among tax professionals. It is strange, however, that even as tax exceptionalism has been pummeled in the law reviews and dealt a grievous blow by *Mayo*, no one has risen in defense of tax exceptionalism as a general attitude. When a particular position is identified as tax exceptionalist, the identification is always in service of the condemnation of the position and never in its defense.

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91. *Id.* at 683.
92. *Id.* at 687.
93. *Id.* at 683–87.
94. *Id.* at 687.

And yet tax is special—at least in the sense that every legal specialty is special, but also in the stronger sense of being more special than the average specialty. Whether or not the I.R.C. "is the lengthiest, most complex . . . statute on the books today,"[95] it is certainly one of the leading contenders for that honor. It is special, however, not only for its complexity but also for its function of financing the operations of the federal government, and for its direct impact on the personal finances of the vast majority of the American population.[96] And the impact of the income tax goes far beyond bottom-line tax liabilities, because so many aspects of one's life are relevant to the tax liability determination. This point was eloquently articulated by former IRS Commissioner Sheldon S. Cohen: "[T]axation, in reality, is life. If you know the position a person takes on taxes, you can tell their whole philosophy. The tax code, once you get to know it, embodies all the essence of life: greed, politics, power, goodness, charity."[97] One could not plausibly say the same of admiralty, antitrust, secured transactions, or even federal courts.

Of course, it does not automatically follow from the special aspects of tax that, in any particular context, different legal rules should apply to tax than to the rest of the legal universe. As noted earlier, I favor a fairly strong presumption against special rules for tax, and I have no quarrel with the Court's analysis in *Mayo*. But acknowledging all that, tax is still special, and one cannot rule out the

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95. Ferguson et al., *supra* note 16, at 806.

96. As famously noted by Mitt Romney, in any given recent year only a little more than half of American households have paid any federal income tax. *Mother Jones Releases Complete Video of Romney at Private Fund-Raiser*, CAUCUS (Sept. 18, 2012, 2:47 P.M.), http://thecaucus.blogs.nytimes.com/2012/09/18/mother-jones-releases-complete-video-of-romney-at-private-fund-raiser. The income tax, however, also directly affects the finances of tax return filers receiving refundable tax credits—including the filers of more than twenty-five million returns claiming the refundable earned income tax credit in 2010. Justin Bryan, *Individual Income Tax Returns, 2010*, STAT. INCOME BULL., Fall 2012, at 5, 14 fig.H. Counting those with both positive and negative tax liabilities, in any given year the income tax directly affects the substantial majority of American households. In addition, the percentage of households with a net positive income tax liability over a twenty-year time frame is much higher than the percentage with a positive liability in any single year. Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 67–68 (2006).

97. JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 289 (1987) (quoting Sheldon Cohen). Novelist David Foster Wallace was sufficiently impressed with Cohen's observation to place it (very slightly altered) in the mouth of an admirable IRS official in his posthumously published novel, *The Pale King.* DAVID FOSTER WALLACE, THE PALE KING: AN UNFINISHED NOVEL 82 (2011).

possibility that upon occasion the force of that specialness may be enough to overcome the presumption against a special rule for tax. Whether the result should be labeled tax exceptionalism is debatable, because the same special rule should apply in any nontax area of the law in which the circumstances justifying the special tax rule also exist. In any event, if the position stated here makes me a tax exceptionalist, I gladly accept the label.