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THE RULE OF LAW AS A LAW OF STANDARDS: INTERPRETING THE INTERNAL REVENUE CODE

ALICE G. ABREU† & RICHARD K. GREENSTEIN††

INTRODUCTION

In a recent essay on what he identifies as "customary deviations" from the dictates of the Internal Revenue Code, Professor Larry Zelenak asserts that the Internal Revenue Service has regularly created administrative deviations from the Code that produce taxpayer-favorable results that cannot be challenged in the courts because taxpayers lack standing to bring such challenges.[1] He worries that "the lack of any judicial check on unauthorized giveaways by tax administrators threatens rule-of-law values,"[2] and he concludes by proposing "legislation aimed at retaining the practical advantages of

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† James E. Beasley Professor of Law, Temple University's Beasley School of Law.

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1. *See generally* Lawrence A. Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829 (2012) (evaluating administratively created customary deviations from the Internal Revenue Code).

2. *Id.* at 833.

customary deviations while assuaging rule-of-law concerns."[3] To illustrate the customary deviations that he identifies, Professor Zelenak analyzes the IRS's announced decision not to take the position that employee-retained frequent flyer miles earned on employer-funded or business travel produce income when used for personal travel by employees, but observes that other examples abound.

As Professor Zelenak notes, we have devoted some effort to exploring the gap between the expansive literal meaning of various statutory and judicial definitions of income and the narrower meaning that emerges from IRS policies and practices.[4] Professor Zelenak's concern is that our view "stretches beyond the breaking point the concept of what counts as an interpretation."[5] As he explains:

> According to Professors Abreu and Greenstein, the statutory definition of gross income (as glossed by *Glenshaw Glass*) "gives the IRS the flexibility to navigate the shoals of social opinion regarding income taxation, thereby . . . permitting the evolution of a concept of income that serves . . . important values in taxation," including "a variety of noneconomic values." This stretches beyond the breaking point the concept of what counts as an interpretation. Nothing in the language or legislative history of § 61, and nothing in *Glenshaw Glass*, suggests (for example) that employee-retained frequent-flier miles are not within the definition of gross income.[6]

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3. *Id.*

4. *See generally* Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295 (2011) [hereinafter Abreu & Greenstein, *Defining Income*] (suggesting that the IRS considers both economic and noneconomic values when applying the definition of income); Alice G. Abreu & Richard K. Greenstein, *It's Not a Rule: A Better Way to Understand the Definition of Income*, 13 FLA. TAX REV. 101 (2012) [hereinafter Abreu & Greenstein, *It's Not a Rule*] (suggesting that standards are superior to rules in interpreting the definition of income).

5. Zelenak, *supra* note 1, at 836–37.

6. *Id.* (citing Abreu & Greenstein, *Defining Income*, *supra* note 4, at 300) (alterations in original). Professor Zelenak goes on to observe:

> Moreover, the IRS has never stated that frequent-flier miles are not within the scope of § 61. In fact, the IRS's most significant pronouncement on the topic—its 2002 announcement—implies the opposite when it states that "the IRS has not pursued a tax enforcement program" with respect to frequent-flier miles and notes that "[a]ny future guidance on the taxability of these benefits will be applied prospectively." Thus, far from claiming that its position is an interpretation of the statute, the IRS acknowledges that it is not enforcing the law.

Id. at 837 (alterations in original) (citations omitted). But the most that can be said about these IRS pronouncements is that they are ambiguous. Perhaps, as Professor Zelenak believes, the agency is "acknowledg[ing] that it is not enforcing the law." *Id.* Alternatively, the IRS may be saying that it is not sure what the law is and is foregoing enforcement pending clarification of

While there is actually much that the three of us agree about, disagreement remains: What we view as interpretation, Professor Zelenak views as deviation. A deviation requires identifying a clear path (or rule) from which the deviation occurs. Professor Zelenak finds that path in what he refers to as "the Code as written."[7] It seems that, for him, the Code provides rules that are to be strictly interpreted, so IRS positions that are inconsistent with that strict interpretation are deviations. We offer a different analysis. We posit that what may look like a rule can, upon closer inspection, reveal itself to be a standard. Such a closer inspection involves consideration of how the provision has been administered. In the specific case of the definition of income under section 61(a) of the Code,[8] we asserted in *Defining Income* that both the IRS and the courts have treated the definition of income as a standard rather than a rule, and that acknowledging the provision to be a standard clarifies its non-linear construction.[9] If there is no rule that all accessions are income, there is no need to find an exception or posit a deviation in order to conclude that a particular accession is not income. In short, where Professor Zelenak sees a deviation that threatens rule-of-law values, we see a non-exceptional, fully lawful interpretation of a standard. We do not claim that all provisions of the Code are standards. Many are rules—but not the definition of income.

Professor Zelenak's essay makes an important contribution by clearly identifying a central concern regarding the IRS's treatment of income: respect for the rule of law. Professor Zelenak's concern is that

> [t]o anyone who takes the rule of law seriously, it is troubling to contemplate that the Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code enacted by Congress, as long as those revisions are in a taxpayer-favorable direction. It is especially

the law's meaning. Or, perhaps, the IRS believes that employee-retained frequent flyer miles are not income.

7. *Id.* at 840.

8. Section 61(a) provides that: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items . . . ." I.R.C. § 61(a) (2012). The canonical definition of "gross income" comes from *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). *See infra* note 31 and accompanying text.

9. Abreu & Greenstein, *Defining Income*, *supra* note 4, at 346. *See also* Abreu & Greenstein, *It's Not a Rule*, *supra* note 4, at 103–04 (discussing the argument from *Defining Income* that income should be interpreted as a standard).

> troubling to think that the relatively innocent customary deviations in the gross income context may have bred a disrespect for the rule of law on the part of the Treasury and the IRS, so that tax administrators now believe they have the power and the authority to disregard *any* Code section when doing so would further their notion (*not* Congress's notion) of good tax policy.[10]

Addressing this concern directly allows us to refine our analysis of the role of rules and standards in federal income tax law. For Professor Zelenak, respect for the rule of law entails an obligation of the Treasury and the IRS not to "disregard [the] Code,"[11] i.e., to follow the dictates of the statute. This, in turn, assumes that the Code, properly interpreted, specifies the answers to questions about its correct application—answers that Treasury and the IRS are bound to follow. In other words, it assumes that the Code is properly read as a compendium of rules whose meaning is independent of the interpreter.

This Essay seeks to demonstrate that the interpretive use of standards in applying provisions of the Code is not inconsistent with the rule of law. Part I discusses the relationship between rules and the rule of law and explains why we think so many tax scholars are drawn to a view of the tax law as consisting primarily of rules. We then demonstrate that the definition of income is properly understood as a standard. Part II addresses the descriptive dimension of this claim, summarizing and expanding our previous discussion of the definition of income to determine whether the term is susceptible to construction as a rule. We show that even a brief trip through some of the litigation required to determine whether certain items are income leads to the conclusion that the definition of income is not a rule. Part III addresses the normative dimension of our claim. There, we tease

10. Zelenak, *supra* note 1, at 851. Professor Zelenak limits his definition of customary deviations to taxpayer-favorable interpretations and worries about their potential corrosive effect on rule of law values because a pro-taxpayer interpretation is effectively immune from challenge, given that taxpayers directly affected would have no interest in challenging it and others would lack standing to do so. *Id.* at 847–52. We agree that anti-taxpayer positions are much more likely to be challenged—and indeed nearly all tax litigation consists of such challenges—but we do not think that anti-taxpayer positions are fundamentally different from pro-taxpayer positions for that reason alone. Anti-taxpayer positions will be challenged when the amounts are large enough and the taxpayers are wealthy enough or have sufficient access to free or low-cost representation to bring a challenge, but too often the Service's assertion of an anti-taxpayer position produces a compromise or capitulation by the taxpayer because of the cost of mounting a challenge.

11. *Id.* at 851.

out the functions served by interpreting income as a standard and question where the interpretive authority lies with respect to the Code in order to argue that income *ought to be* treated as a standard. Part IV turns to several examples of what Professor Zelenak regards as either a "disregard" or an "underenforcement" of the law to clarify our understanding of interpretation. We then conclude by observing that the Code does not "read itself": Deciding whether a provision is itself a rule or a standard is itself an act of interpretation. Moreover, interpreting a provision as a standard is fully consistent with the rule of law.

I. RULES AND THE RULE OF LAW

Exploring the connection between the rule of law and the use of rules has occupied many scholars. One notable example is Justice Antonin Scalia. Nearly a quarter century ago, in the context of judicial decisionmaking, Justice Scalia linked the rule of law to the use of rules,[12] and the lucidity of his exposition and his explicit discussion of the role of values make his analysis a particularly good point of departure. Justice Scalia identified a set of values—rule of law values—promoted by rules. He described one of these values as "the appearance of equal treatment,"[13] arguing that "equality of treatment is difficult to demonstrate"[14] when *ad hoc* evaluations of the situation following from a "discretion-conferring approach"[15] are the basis for judgment. When two similar cases have opposite outcomes, Justice Scalia argued, our "sense of justice," is not satisfied by the mere fact that the two cases are, in fact, different, but rather by their being "*seen to be so*."[16] And application of "a clear, previously enunciated rule that one can point to in explanation of the decision"[17] is more likely to address our desire for justice than is a decision supported only by the totality of the circumstances.

A second rule-of-law value Justice Scalia identified is certainty. "[U]ncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must

12. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (analyzing the dichotomy between rule of law and judicial discretion).

13. *Id.* at 1178.

14. *Id.* at 1182.

15. *Id.* at 1177.

16. *Id.*

17. *Id.*

have the means of knowing what it prescribes."[18] The rule of law allows us to avoid punishment by conforming our conduct to the law's dictates. We would add, more generally, that the rule of law speaks to our desire to assert some control over our lives by being able to anticipate the legal consequences of our conduct—for example, by making enforceable wills and enforceable agreements. Certainty, Justice Scalia argued, is undermined by the "totality of the circumstances" approach that is characteristic of standards.[19] Rules offer a better route to certainty and its cousins, uniformity and predictability. Indeed, these values are so important to him that he believes that "[t]here are times when even a bad rule is better than no rule at all."[20]

Finally, again in the context of judicial decisionmaking, Justice Scalia saw the use of rules as providing an "effective check upon arbitrary judges . . . . Only by announcing rules do we hedge ourselves in."[21] Indeed, this "check" on the power of government officials is perhaps the most powerful of the rule-of-law values. And while Justice Scalia was concerned with the power of judges, limiting the power of the Executive is arguably even more important, given its direct control of severe, even deadly, coercive power.

At the core of these three rule-of-law values—the appearance of equal protection, certainty about what the law requires, and constraining the power of officials—is predictability, and rules seem to promise the desired predictability insofar as they involve, as conventionally understood, *ex ante* resolutions of the various competing considerations that the all-things-considered approach associated with standards performs *ex post.*[22] To use a favorite rules-standards chestnut, a rule prohibiting speeds on the highway in excess of fifty-five miles per hour seems to tell us *in advance* most of what we need to know about what the law requires. By contrast, a standard requiring prudent driving seems less predictable as it appears to leave

18. *Id.* at 1179.

19. *See id.* (arguing that adopting the "totality of the circumstances" test would signify that uniformity is unimportant).

20. *Id.*

21. *Id.* at 1180.

22. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. REV. 557, 559–60 (1992); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999); David A. Weisbach, *Ten Truths about Tax Shelters*, 55 TAX L. REV. 215, 248 (2002); David A. Weisbach, *An Economic Analysis of Anti-Tax Avoidance Doctrines*, 4 AM. L. & ECON. REV. (2002).

much of the judgment to the *post hoc* assessment of some decisionmaker.

It is hardly surprising, then, that there seems to be a strong motivation to read the Internal Revenue Code as a compendium of rules.[23] People do not like paying taxes, by and large, and thus demand that the Code be administered in a consistent and even-handed way. No taxpayer wants penalty exposure, and even compliant taxpayers do not want to overpay. All taxpayers, therefore, expect certainty about what the tax law requires.[24] Finally, there is a long libertarian tradition in this country of distrust of government and resentment of the taxing authority in particular (after all, the Revolutionary War was motivated in large part by resistance to taxation), so constraining the power of IRS officials seems important.[25] One way of capturing the confluence of these important goals is to invoke what is perhaps the most salient characteristic of our income tax system: the need of taxpayers to account, on an annual or more frequent basis, to the government, on specific forms, containing specific lines, requiring specific computations, involving precise numbers. Reading the Code as a compendium of rules offers the hope of just the kind of predictability that will serve this need.

The desire to read the Code as a compendium of rules supports, in turn, the appeal of a "plain meaning" approach to statutory interpretation. As Justice Scalia noted, "the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one's method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules,

23. As Professor Weisbach has observed, "The tax law is the paradigmatic system of rules." *See* David A. Weisbach, *Formalism in the Tax Law*, *supra* note 22, at 860.

24. *See* David A. Weisbach, *Ten Truths about Tax Shelters*, *supra* note 22, at 247–51. Professor Weisbach argues that rules provide certainty because they specify "the law in advance of taxpayers acting." *Id.* at 247. He provides an excellent discussion of the relationship between certainty, complexity, and compliance, and the use of rules or standards, which is consistent with the well-documented connection between compliance, type of income, and third-party reporting. *See also* Andrew Johns and John Slemrod, *The Distribution of Income Tax Noncompliance*, 63 NAT'L TAX J. 397, 403 (2010) (noting that taxpayer noncompliance is smallest with respect to items subject to third-party reporting to the IRS).

25. While a discussion of this subject is beyond the scope of this paper, we want to acknowledge the competing view offered by historian Robin Einhorn, who has made the compelling and provocative claim that American distrust of government and taxation is rooted not in the value of liberty but in the legacy of slavery. ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 7 (2006).

because I am more inclined to adhere closely to the plain meaning of a text."[26] In short, the affinity between the plain meaning approach and rules lies in the fact that both reflect the core rule-of-law quality of predictability.

Our point is not that Professor Zelenak and Justice Scalia share a full-blown jurisprudence. But they do share a devotion to the rule of law, and both are attracted to interpreting statutory texts as rules to promote rule-of-law values. Moreover, just as Justice Scalia finds that the plain meaning approach advances that project, Professor Zelenak asserts that the IRS has a duty to apply the Code "as written" and that customary deviations, such as the failure to count employee-retained frequent flyer miles as income, are violations of that duty.[27]

But if we apply section 61(a)[28] "as written," does it really tell us that employee-retained frequent-flier miles are gross income?[29] Our claim is that in order to answer that question, we must first determine whether the definition of income is to be interpreted as a rule, or as a standard.

II. INCOME AS RULE OR STANDARD?

In this Part we argue that the term "gross income" in section 61(a) has been interpreted as a standard. It is important to distinguish this claim—a descriptive claim about what the law is—from the claim we will make in Part III: a normative claim that the definition of income *should* be treated as a standard. Here, we argue that the long history of determining what items are included in "gross income" reveals a consistent practice by the Internal Revenue Service and by the courts of treating income as a standard. And we insist that a consistent practice of treating income as a standard by those charged with the administration of federal income tax law *makes it a standard.* Put another way, the meaning of a provision of law like section 61(a), including whether it is a rule or a standard, is not determinable at the time of its promulgation; rather, its meaning emerges from the way that it is regarded and used by those having interpretive and

26. Scalia, *supra* note 12, at 1183–84.

27. Zelenak, *supra* note 1, at 840, 844, 851.

28. *See supra* note 8 and accompanying text.

29. In this Essay we adopt the practice of using the terms "gross income" and "income" interchangeably.

enforcement authority.[30] Accordingly, we can determine whether a provision like section 61(a) is a rule or a standard by examining that historical practice.

Section 61(a) is famously circular. It defines gross income as "all income from whatever source derived," but does not further define the term "income." That task fell to the Supreme Court, which defined income in *Glenshaw Glass* as "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[31] Following *Glenshaw Glass*, section 61 should therefore be read to provide that gross income is "all undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion from whatever source derived." Given the breadth of this language it is not surprising that both scholars and courts often talk about the "all-inclusive language of § 61(a)."[32] Yet, the only language in section 61 itself that might be described this way is "all" and "from any source derived." Anything else has to come from what the Court has defined as income, and an analysis of what the Court has defined as income confirms that it has not sought to establish a rule. Rather, in defining income, the Court in *Glenshaw Glass* and the other courts that followed it, as well as the IRS, have made it clear that the definition of income is subject to precisely the type of evolutionary development typical of standards, rather than the rigid application of a rule.

The dynamic evolution of the definition of income is revealed by considering some of the litigation over what constitutes income. This litigation includes Supreme Court decisions on issues such as whether the "mere conversion of capital assets" produces income,[33] whether a

30. *See* Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 WASH. U. JURIS. REV. (forthcoming 2015), *available at* http://ssrn.com/abstract=2516380.

31. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

32. MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 26 (12th ed. 2012); *see also* Zelenak, *supra* note 1, at 834 (noting "the sweeping language of I.R.C. § 61"); *Glenshaw Glass*, 348 U.S. at 432 ("The definition of gross income has been simplified, but no effect upon its present broad scope was intended.").

33. Doyle v. Mitchell Bros. Co., 247 U.S. 179, 184 (1918). This case is an example of the IRS standing firm in its position and fighting a losing battle through the court system. The IRS began litigation and lost in the District Court. Mitchell Bros. Co. v. Doyle, 225 F. 437, 441 (W.D. Mich. 1915). The Circuit Court of Appeals affirmed the District Court's ruling and denied the IRS's request for a rehearing. Doyle v. Mitchell Bros. Co., 235 F. 686, 693 (6th Cir. 1916). Ultimately, the Supreme Court agreed with the District and Circuit Courts. *Mitchell Bros.*, 247 U.S. at 189.

pro-rata stock dividend is income to a shareholder,[34] whether payment of an employee's taxes by the employer is income to the employee,[35] and whether punitive damages are income.[36] And indeed, this evolution is so dynamic that the Supreme Court has come to opposite conclusions on the very same issue: it concluded in *Commissioner v. Wilcox*[37] that embezzled funds were not income but then concluded in *James v. United States*[38] that they were. Other examples of the Court's difficulty of defining income abound.[39] The lower federal courts have

34. Eisner v. Macomber, 252 U.S. 189, 199 (1920). The Supreme Court ruled against the IRS in affirming the judgment for the taxpayer. *Id.* at 219.

35. Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 720 (1929). This case began when the Commissioner notified the taxpayer of deficiencies in his income tax resulting from a failure to report the income received by payment of his taxes by his employer. The issue was heard by the Board of Tax Appeals, which agreed with the Commissioner. Old Colony Trust Co. v. Comm'r, 7 B.T.A. 648, 652 (1927). The Court of Appeals reviewed and affirmed the Board's decision. Old Colony Trust Co. v. Comm'r, 33 F.2d 891, 891 (1st Cir. 1929). The Supreme Court ultimately affirmed. *Old Colony Trust*, 279 U.S. at 731.

36. *Glenshaw Glass*, 348 U.S. at 429. Here, the Tax Court agreed with the taxpayers that punitive damages were not income. Glenshaw Glass Co. v. Comm'r, 18 T.C. 860, 872 (1952). The taxpayers also won in the Court of Appeals. Comm'r v. Glenshaw Glass Co., 211 F.2d 928, 934 (3d Cir. 1954). However, the IRS won in the Supreme Court, which reversed. *Glenshaw Glass*, 348 U.S. at 433. *See also* William Goldman Theatres, Inc. v. Comm'r, 19 T.C. 637, 641 (1953) (holding the opposite, but decided prior to *Glenshaw Glass*).

37. Comm'r v. Wilcox, 327 U.S. 404, 410 (1946). The long-running debate over whether embezzled funds are income started in the Tax Court, which ruled in favor of the government (income). On appeal, the decision of the Tax Court was reversed (not income). Wilcox v. Comm'r, 148 F.2d 933, 935 (9th Cir. 1945). Finally, the government lost again when the Supreme Court affirmed the Court of Appeals's decision that the embezzled funds were not income. *Wilcox*, 327 U.S. at 410.

38. James v. United States, 366 U.S. 213, 222 (1961). The government won in the District Court and Court of Appeals. United States v. James, 273 F.2d 5, 7 (7th Cir. 1959). It won again when the Supreme Court overruled its previous decision in *Wilcox* and affirmed the lower courts' decisions, holding that embezzled funds are income to the embezzler. *James*, 366 U.S. at 222.

39. For example, in *Commissioner v. LoBue*, 351 U.S. 243 (1956), the IRS changed its position several times on whether the bargain element in an employee stock option was income. It litigated and lost the issue in the Tax Court, *LoBue v. Commissioner*, 22 T.C. 440, 445 (1954), then acquiesced in that decision, 1954 C.B. 2, but then withdrew the acquiescence, 1955-2 C.B. 10 n.9. It appealed and lost again in *Commissioner v. LoBue*, 223 F.2d 367, 371 (3d Cir. 1955), but ultimately won in the Supreme Court. *LoBue*, 351 U.S. at 250. In *United States v. Kirby Lumber Co.*, 284 U.S. 1, 2 (1931), where the issue was whether a corporation's repurchase of its bonds at less than the issue price generated income to the corporation, the Court of Claims ruled in favor of the taxpayer, finding no income. Kirby Lumber Co. v. United States, 44 F.2d 885, 887 (Ct. Cl. 1930). The Supreme Court, however, reversed and found income. *Kirby Lumber*, 284 U.S. at 3. In *United States v. Lewis*, 340 U.S. 590, 590–91 (1951), the issue was whether receipt of amounts in error produced income in the year of receipt even if the amounts were returned in a subsequent year. The Court of Claims agreed with the taxpayer that there was no income in the year of receipt, Lewis v. United States, 91 F. Supp. 1017, 1022 (Ct. Cl. 1950), but the United States Supreme Court reversed. *Lewis*, 340 U.S. at 592. In *Edwards v.*

considered whether the following constitute income: meals and lodging received by an employee and his wife for the convenience of the employer;[40] farm produce grown and eaten by the farmer[41] or in-store groceries consumed by the store owner;[42] and amounts received by a taxpayer from his lawyer to compensate for federal income tax paid as a result of bad tax advice.[43]

Though necessarily incomplete, this brief survey reveals that the definition of income cannot be obvious. It requires much litigation to discern and produces in the same case different conclusions by different courts. Even the IRS has changed its position with respect to the includability of amounts like the bargain element in stock options[44] and compensation for excessive federal income taxes paid as a result of bad tax advice.[45]

The long saga over the treatment of interest-free loans provides yet another view of the evolution of the definition of income and the interaction of the IRS, the courts, and the legislature in that evolution. The IRS's position evolved from asserting in a published

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Cuba Railroad Co., 268 U.S. 628, 631 (1925), where the issue was whether subsidies paid by the Cuban government to a U.S. corporation were income, the District Court ruled in favor of the taxpayer. Cuba R.R. Co. v. Edwards, 298 F. 664, 666 (S.D.N.Y. 1921). The Supreme Court agreed and affirmed the earlier decision. *Cuba R.R. Co.*, 268 U.S. at 633.

40. Benaglia v. Comm'r, 36 B.T.A. 838, 838–39 (1937). The Board of Tax Appeals disagreed with the Commissioner and announced what became known as the convenience of the employer doctrine, later codified in section 119. *Id.* at 841.

41. Morris v. Comm'r, 9 B.T.A. 1273, 1273 (1928), *acq*., VII-2 C.B. 75 (1928). In this case, the Court ruled against the government in favoring the taxpayer's position that the crops produced on his farm for his personal benefit are not income to the farmer. *Id.* at 1281. The government abandoned its previous position on the matter and acquiesced to the ruling. VII-2 C.B. 75 (1928).

42. Dicenso v. Comm'r, 11 B.T.A. 620, 620–21 (1928).

43. Clark v. Comm'r, 40 B.T.A. 333, 333–34 (1939), *nonacq*., 1939-2 C.B. 45, *acq*., 1957-1 C.B. 4. The IRS lost this case. *Id.* at 335. Here, the government and the taxpayer disagreed about whether payment from the taxpayer's tax practitioner for his error in computing the taxpayer's return should be considered a payment of taxes, as it would if governed by *Old Colony Trust*, or compensation for loss of capital. *Id.* at 334–35. The Court favored the taxpayer and ruled that there was no income to the taxpayer. *Id.* at 335. This proved to be another example of the IRS changing its position on the matter, as it did not acquiesce to this decision in 1939, but nearly 20 years later, in 1957. 1957-1 C.B. 4.

44. *LoBue*, 351 U.S. at 250.

45. *Clark*, 40 B.T.A. at 333–34. Even the most ordinary business transactions raise questions that require defining income. For example, if an enterprise facilitates a prospective investor's decision whether to invest by subsidizing the investor's (and spouse's) investigatory trip, is that income to the investor? The IRS said yes; the District Court said no, Gotcher v. United States, 259 F. Supp. 340, 345 (E.D. Tex. 1966); and the Court of Appeals split the difference, finding no income with respect to the investor's expenses, but income with respect to his wife's, United States v. Gotcher, 401 F.2d 118, 124 (5th Cir. 1968).

ruling in 1955 that the "mere making available of money does not result in realized income to the payee,"[46] to litigating precisely the opposite position six years later in *Dean v. Commissioner*[47] and numerous other cases. The issue was decided more than two decades later by the Government's victory in *Dickman v. Commissioner*[48] and the enactment of section 7872, which treats foregone interest as income, or a gift, depending on the circumstances.

The items that caused the litigation in these cases are not instances of bizarre types of accessions to wealth—marginal cases that might be disputed in the application of any legal category. Rather, the fact that they are subject to litigation, the variety of judicial opinions with respect to the same item,[49] and the changes to the IRS's own positions before and after litigation,[50] show that the definition of income is not patent. If employee-retained frequent flyer miles are, as Professor Zelenak argues, a straightforward example of income, then one might well think that embezzled funds are, too; however, *Wilcox* involved a disagreement among the various federal courts that heard

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46. Rev. Rul. 55-713, 1955-2 C.B. 23.

47. Dean v. Comm'r, 35 T.C. 1083 (1961).

48. Dickman v. Comm'r, 465 U.S. 330 (1984). *Dickman* addressed the gift tax aspect of interest-free loans, but it was clear that if foregone interest were property of value so as to constitute a gift, it would also constitute income when the loan occurred in a compensatory context rather than in a donative context. Congress clearly agreed, since the legislative response to *Dickman*, the enactment of section 7872, covers both types of loans. *Id*. at 338. *See generally* Phillip J. Closius, *Below Market Loans: From Abuse to Misuse—A Sports Illustration*, 37 CASE W. RES. L. REV. 484 (1987) (discussing enactment of section 7872); H.R. REP. NO. 98-861, at 1011 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 1445, 1699.

49. For example, in *Lewis*, the U.S. Court of Claims ruled in favor of the taxpayer, only for the decision to be reversed by the Supreme Court. *See* United States v. Lewis, 340 U.S. 590, 592 (1951). In *Kirby Lumber*, the taxpayer won in the Court of Claims, but lost in the Supreme Court. *See* United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931). The Tax Court in *Wilcox* agreed with the government, while the subsequent Circuit Court and Supreme Court decisions were pro-taxpayer. *See* Comm'r v. Wilcox, 327 U.S. 404, 410 (1946). The taxpayers in *Glenshaw Glass* won in the Tax Court and the Court of Appeals only to lose in the Supreme Court. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 433 (1955). In *LoBue*, the taxpayers won in the Tax Court and the Circuit Court, but lost in the Supreme Court, *see* Comm'r v. LoBue, 351 U.S. 243, 250 (1956), and the IRS changed its position along the way. Finally, though less dramatically, in *Gotcher* the District Court found in favor of the taxpayers, while the Circuit Court found no income in the case of one taxpayer but income in the case of the other, both affirming and reversing the lower court decision. *See* United States v. Gotcher, 401 F.2d 118, 124 (5th Cir. 1968).

50. In *LoBue* the IRS initially acquiesced to the Tax Court's pro-taxpayer decision, but later withdrew its acquiescence and appealed the issue. *See LoBue*, 351 U.S. at 247. Although it lost in *Clark*, the IRS acquiesced in the decision eighteen years later. *See* Clark v. Comm'r, 40 B.T.A. 333, 334 (1939). After losing in *Morris*, the IRS quickly acquiesced. *See* Morris v. Comm'r, 9 B.T.A. 1273, 1281 (1928).

the case,[51] and *James* resulted in the Supreme Court's overruling its own fifteen-year-old precedent (*Wilcox)*. The very controversy over the inclusion of fringe benefits, which Professor Zelenak so comprehensively describes,[52] reveals the uncertainty: first, the IRS did not seek to include the benefits in employees' income; then, it announced that it would include them; Congress disagreed; and finally, a legislative enactment provided a compromise and some certainty.[53]

The project we began in *Defining Income* was initially motivated by the need to understand why the IRS and the courts in so many instances have failed to tax various accessions to wealth, notwithstanding the absence of statutory provisions excluding those accessions from the definition of income. This problem arises because the introductory language of section 61(a)—"*Except as otherwise provided in this subtitle*, gross income means all income from whatever source derived"—is generally taken to mean that exclusions from the definition of income require statutory authorization.[54] Consequently, interpreting the definition of income as a rule requires justification for the creation of many exceptions for which no statutory authority exists.

For example, although the IRS initially ruled that the retention of unsolicited books by a book reviewer was income,[55] it later changed its position, ruling that receipt alone would not result in income.[56] After describing this, Professor Marvin Chirelstein asked, "Can the Commissioner simply disregard the all-inclusive language of § 61(a) when it suits him, and exclude what would otherwise be includable?

51. The Tax Court held that embezzled money was income, but the 9th Circuit and the Supreme Court disagreed and found no income. *See* Comm'r v. Wilcox, 327 U.S. 404, 410 (1946). In *James*, a few years later, the District Court agreed with the government that embezzled funds were income, and the Circuit Court and the Supreme Court also agreed, although this required the remarkable step of having the Supreme Court overrule its fifteen-year-old decision in *Wilcox*. *See* James v. United States, 366 U.S. 213, 216–17 (1961). In *Glenshaw Glass*, the IRS lost in the Tax Court and Court of Appeals but eventually prevailed in the Supreme Court. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 433 (1955).

52. Zelenak, *supra* note 1, at 842–44.

53. *See* Military Family Tax Relief Act of 2003, Pub. L. No. 108-121, 117 Stat. 1335 (codified at I.R.C. § 132 (2012)).

54. I.R.C. § 61(a) (2012) (emphasis added).

55. Rev. Rul. 70-330, 1970-1 C.B. 14.

56. Rev. Rul. 70-498, 1970-2 C.B. 6.

Answer: yes."[57] Implicit in Professor Chirelstein's assertion that the Commissioner was disregarding the language of section 61 is the assumption that the language of section 61 and hence of the *Glenshaw Glass* definition, must be read as a rule. We agree that if "all accessions" inflexibly means "all" accessions, unsolicited samples would come within the definition of income, and the IRS's failure to tax them would amount to an exclusion unsupported by statutory authorization. But we believe that the language has not, need not, and should not be so construed.

Consider the distinction drawn in *Benaglia* between wages paid by a hotel to its on-site manager (gross income) and meals and lodging furnished to that same manager (not gross income).[58] Although both were provided in connection with employment and both benefitted the employee, as the court acknowledged (the meals and lodging "may relieve [the employee] of an expense which he would otherwise bear"),[59] only the former was deemed "compensation." And although both were provided by the employer in order to further its business interests, only the latter was characterized as having been furnished "solely for the convenience of [the] employer."[60] Thus, applying the concept of income as a rule, pursuant to which all accessions are income, does not support the court's distinction.

While treating section 61 as setting forth a rule does not explain the court's reasoning and decision in *Benaglia* or the IRS's ruling with respect to unsolicited samples, treating the definition of income as a standard pursuant to which many factors are relevant, does. The conclusions of the court in *Benaglia* and the IRS in the unsolicited samples ruling reflect consideration of a variety of factors. For example, as Professor Chirelstein has suggested with respect to *Benaglia*:

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57. MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 25 (11th ed. 2005). *See also* CHIRELSTEIN & ZELENAK, *supra* note 32, at 26 (discussing the different IRS approaches determining whether or not the retention of unsolicited textbooks is income).

58. We are not the only ones who have questioned this. Professors Chirelstein and Zelenak have made a similar observation: "The emphasis in *Benaglia* and in § 119 on the *employer's* convenience has been questioned by many writers." CHIRELSTEIN & ZELENAK, *supra* note 32, at 20. They go on to provide a persuasive critique of the emphasis on the convenience of the employer.

59. Benaglia v. Comm'r, 36 B.T.A. 838, 840 (1937).

60. *Id.* at 838.

> Perhaps, however, the "convenience-of-the-employer" rule is really a short-hand way of acknowledging the factor of restricted preference . . . . In *Benaglia* . . . , there is an element of personal compulsion which raises doubt about the value of the benefit to the recipient. Thus the hotel-manager must live on the hotel premises if he is to do his job (or at least the court in *Benaglia* so found).[61]

And, with respect to the unsolicited samples ruling:

> On reflection, the Commissioner must have decided that the administrative effort—identifying the textbook recipients (thousands of school-teachers), persuading them that the books were indeed "income," placing a value on the books, and then checking individual tax returns to be sure the correct amounts were reported—was not worth the auditing expense that such an effort would entail.[62]

We agree that both the distinction made in *Benaglia* and the conclusion in the unsolicited samples ruling reflect a variety of important concerns, but our point is that precisely because of that, neither can be said to flow from the text of section 61(a) "as written."[63] And it is because such concerns cannot be ignored that it is so difficult to define income.

Indeed, income is so hard to define that, in addition to the cases that purport to set forth a definition (e.g., *Glenshaw Glass*, *Macomber*) and decide the treatment of specific items (e.g., meals and lodging and illegal gains), courts have felt the need to develop a variety of doctrines to further limn the contours of the term. Examples abound: claim of right,[64] assignment of income,[65]

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61. CHIRELSTEIN, *supra* note 57, at 21. *See also* CHIRELSTEIN & ZELENAK, *supra* note 32, at 21 (discussing possible explanations for "the convenience-of-employer" rule).

62. CHIRELSTEIN, *supra* note 57, at 25. *See also* CHIRELSTEIN & ZELENAK, *supra* note 32, at 26–27 (discussing the IRS's change of position on the textbook-income rule).

63. The tenuous nature of the distinction can also be seen in the Supreme Court's decision in *Commissioner v. LoBue*, in which the Court explicitly rejected the Tax Court's reasoning that the bargain element in an employee stock option was not income because the option was granted by the employer to give the employee a proprietary interest in the business. Comm'r v. LoBue, 351 U.S. 243, 247 (1956).

64. *See* N. Am. Oil Consol. v. Burnet, 286 U.S. 417, 424 (1932) (holding "[i]f a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."). *See also* United States v. Lewis, 340 U.S. 590, 592 (1951) (finding that a taxpayer cannot retroactively adjust tax payment in a previous year if repayment occurred in a subsequent year).

constructive receipt,[66] constructive dividends,[67] and so forth. Treating the definition of income as a standard whose contours are shaped by a variety of considerations provides a theoretically satisfactory explanation for the decisions of the courts and the IRS, as well as for the development of the doctrines that have come to be crucial in determining the existence of income.

65. The assignment of income doctrine, treating amounts as income to the earner or owner of property that generated the income was born in 1930 when the Supreme Court refused to allow a valid contract to dictate the tax consequences of earnings, explaining, "[t]here is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully [*sic*] devised to prevent the salary when paid from vesting even for a second in the man who earned it." Lucas v. Earl, 281 U.S. 111, 114–15 (1930). *See also* Helvering v. Horst, 311 U.S. 112, 120 (1940) (finding that when a father maintains control of bonds that he has purchased for his son and merely transfers the coupon to his son, the father must pay the tax on the income from coupons); Comm'r v. Banks, 543 U.S. 426, 438 (2005) (finding that a litigant's recovery constitutes income to the litigant even with respect to the portion of the recovery due to the attorney on a contingency basis); United States v. Basye, 410 U.S. 441, 457 (1973) (finding payments into a retirement trust for a partnership are includible in gross income and taxable to the beneficiary partners).

66. The doctrine of constructive receipt treats an amount as income when it is either actually or "constructively" received:

> Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Treas. Reg. § 1.451-2(a) (as amended in 1979). As the Tax Court has explained, "[t]he basis of constructive receipt is essentially unfettered control by the recipient over the date of actual receipt." Hornung v. Comm'r, 47 T.C. 428, 434 (1967). *See also* Carter v. Comm'r, 40 T.C.M. (CCH) 654 (1980) (finding a cash basis taxpayer has taxable income for the year in which his wages were actually received because although they were due to him in the prior year, he could not have obtained them in that prior year as a result of a bureaucratic mistake); Fetzer Refrigerator Co. v. United States, 437 F.2d 577, 580 (6th Cir. 1971) (finding a controlling shareholder constructively received rents due to him by the corporation because he had the authority to draw checks for the company).

67. A constructive dividend is an item that was not in form a dividend declared by a corporation but which is treated as a dividend for tax purposes: "It is well established that any expenditure made by a corporation for the personal benefit of its stockholders or the making available of corporate-owned facilities to stockholders for their personal benefit may result in the receipt by the stockholders of constructive dividends." Ashby v. Comm'r, 50 T.C. 409, 417 (1968). *See also* Dean v. Comm'r, 57 T.C. 32, 45 (1971) (finding that a corporation's purported loan was actually a constructive dividend); Stan Frisbie, Inc. v. Comm'r, 60 T.C.M. (CCH) 440 (1990) (finding that the rent-free use of a corporate sailboat was a constructive dividend); Hood v. Comm'r, 115 T.C. 172, 182 (2000) (finding that a corporation's payment of legal fees for its sole shareholder's criminal tax evasion litigation constituted a constructive dividend).

III. Standards and Interpretive Authority

If, as argued in Part II, the IRS and the courts historically interpreted "gross income" as a standard, the question arises: Is that proper? Accordingly, we turn here to the normative dimension of our claim. In Section A, we identify two practical reasons why it is important to interpret income as a standard: the need for the Code to be able to address new and unanticipated forms of wealth, and the need for tax law generally to respond to changing social needs, social conditions, and social and political values. We then show that viewing income as a standard best responds to values that animate the tax law. In Section B, we assert that Treasury and the IRS have the initial authority to determine whether a provision of the Code ought to be interpreted as a rule or a standard, but that what is ultimately desirable in tax law is a robust conversation among the three branches of the federal government as to the meaning of the Code.

A. The Function of a Standard

Reflecting on the administrative and judicial difficulties encountered in defining income reveals why the definition of income must be allowed to evolve through the process of considering successive disputes over what is and is not to be included within that category. First, as in the case of all statutes, when enacting section 61, Congress could not have possibly anticipated all the new phenomena that might become candidates for inclusion as income.[68] New and creative forms of wealth not conceived of at the time of the Code's promulgation (employee-retained frequent-flier miles, for instance), demand assessment as the future unfolds.

Second, tax touches virtually all facets of life. Hence, the number of values relevant to determining answers to doctrinal questions in tax law is great.[69] The large number of relevant values, in turn, has critical implications. Those charged with interpreting and applying the tax law (administrators and judges) must be able to respond to current, as

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68. Eric Solomon, *The Process for Making Tax Policy in the United States: A System Full of Friction*, 67 THE TAX LAWYER 547, 556 (2014) ("The [Internal Revenue] Code is the foundation of the U.S. federal tax system. However, it does not answer all the tax questions that arise in a complex economy . . . . Because there are so many unanswered questions in the Code, the Treasury Department has issued thousands of pages of regulations.").

69. *See* Abreu & Greenstein, *It's Not a Rule*, *supra* note 4, at 128.

well as temporary, changes in conditions.[70] Thus, for example, empirical research suggests that judges are more likely to embrace pro-government interpretations of the Code during times of national emergency in order to serve the contemporaneously ascendant value of raising revenue.[71] Moreover, the effectiveness of tax law depends on a perception of its legitimacy by both the public and Congress, which requires that those charged with interpreting and applying tax law be especially committed to getting it right. Hence, we have described instances of the IRS reassessing and sometimes changing its view about interpretations of the tax law (e.g., whether interest-free loans generate income), and we have seen the same thing in the courts (e.g., whether embezzled amounts are gross income).[72]

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70. Reflecting on the importance of keeping public officials from becoming insular when carrying out their responsibilities to interpret the law, Eric Solomon has observed that although the interchange of individuals between the government and the private sector can lead to the unfortunate perception of capture or the acquisition of inside information, it is nevertheless "beneficial because it enables government policymakers to understand current trends and issues." Solomon, *supra* note 68, at 554–55.

71. *See generally* NANCY STAUDT, THE JUDICIAL POWER OF THE PURSE: HOW COURTS FUND NATIONAL DEFENSE IN TIMES OF CRISIS (2011). Professor Staudt observes that "the Court has gone so far as to suggest that it has a role to play in raising the revenue necessary to meet the nation's wartime needs." *Id.* at 2. Professor Staudt uses the Court's own words to support this assertion. In explaining the rationale for a decision in a World War II tax case the Court explained that "we all realize it is necessary to raise every dollar of additional revenue that can be raised without seriously disturbing or shattering our national economy." *Id.* (quoting Putnam v. Comm'r, 352 U.S. 82, 91 n.16 (1956)) (emphasis omitted). The quoted passage from *Putnam* appears in the portion of the opinion in which the Court struggles to ascertain Congressional intent. It is significant to us, as to Professor Staudt, that the Court considers the explicitly stated revenue-raising objective in determining Congressional intent and ultimately holding for the Government. Professor Staudt's thesis that revenue needs affect judicial decisions is further supported by the differing outcomes in two cases familiar to every tax lawyer, *Comm'r v. Court Holding*, 324 U.S 331 (1945), and *United States v. Cumberland Public Serv. Co.*, 338 U.S 451 (1950). As she observes, "The justices considered *Court Holding* at a time when the United States was fighting major wars against enemy states on several fronts, but *Cumberland* emerged after World War II had dissolved into peacetime." *Id.*

72. This distinguishes interpretation of the Internal Revenue Code from the usual approach to interpreting statutes, which affords greater *stare decisis* effect to statutory interpretation than to interpretation of the Constitution. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938) (abandoning previous diversity jurisdiction approach because "the unconstitutionality of the course pursued has now been made clear and compels us to do so"); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948) (discussing the power of the Constitution in overturning previous Supreme Court decisions); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940) (adhering to precedent in light of no legislative response); c*f.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting) (discussing how the Court has overturned its previous decisions on constitutional grounds).

Because of both the inevitability of unanticipated forms of wealth and the need for the Code's interpreters to be exquisitely sensitive to social needs, changing conditions, and social and political values, it is especially crucial that the meaning of income be open to evolution. And that need suggests an explanation for the particular textual structure of section 61(a) and its predecessors: Section 61 is laid out in the classic form of *ejusdem generis*, i.e., it defines gross income by setting out a list of examples, preceded by the words "including (but not limited to) the following items." *Ejusdem generis* is normally taken by the courts as an invitation to define the term case-by-case through analogy—by comparing a candidate for inclusion within the term to the list of examples[73]—and thereby permitting the definition of the term to evolve and expand.[74]

Classically, *ejusdem generis* imposes significant constraints on interpretation. After all, it requires the use of a specific list as the analytical starting point. Nevertheless, when interpreting the meaning of income, courts often ignore the constraints of *ejusdem generis*. For example, the criteria announced in *Glenshaw Glass* ("accessions to wealth clearly realized, and over which the taxpayers have complete dominion") are not supported by reference either to the Code's list or even to precedent.[75] Indeed, the Court in *Kirby Lumber* explicitly

73. The classic illustration of employing the canon of *ejusdem generis* is *McBoyle v. United States*, in which the Court was asked to decide whether a statute which made it a crime to steal "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails," also made it a crime to steal an airplane. McBoyle v. United States, 283 U.S. 25, 26 (10th Cir. 1931). Two lower courts, finding an airplane to fit within the statute given that it is a "self-propelled vehicle not designed for running on rails," had upheld the thief's conviction. *See* McBoyle v. United States, 43 F.2d 273, 275 (1980). Nevertheless, a unanimous Supreme Court reversed. Applying the canon of *ejusdem generis*, Justice Holmes considered what the enumerated items had in common and compared those characteristics to those of an airplane. Concluding that none of the enumerated items "can be supposed to leave the earth," he concluded that an airplane was not the type of "self-propelled vehicle not designed for running on rails" covered by the statute. *McBoyle*, 283 U.S. at 27. The thief's conviction was therefore reversed. *Id.* at 27.

74. *E.g.*, Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 729 (1929) (citing § 213 of the Revenue Act of 1916 to determine "[t]he payment of the tax by the employers was in consideration of the services rendered by the employee, and was again derived by the employee from his labor"); Morris v. Comm'r, 9 B.T.A. 1273, 1278 (1928) ("Products of a farm consumed by the operator thereof and his family do not appear to come within any of the categories of income enumerated in the taxing statutes and the administrative regulations of the Commissioner.").

75. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (analyzing whether punitive damage award constitutes income); s*ee also* Benaglia v. Comm'r, 36 B.T.A. 838, 840 (1937) (distinguishing an employee's "compensation" (income) from an employee's benefits provided "solely for the convenience of his employer" (not income)).

rejected the use of precedent, stating that there was "nothing to be gained by the discussion of judicial definitions."[76]

If the courts are not always anchoring their interpretation of gross income in the statutory list or in precedent, what then are they drawing upon? Case-by-case determination is, of course, familiar from the common law approach to developing the scope of doctrinal standards. The meaning of, say, the common law standard of "reasonable care" in tort law evolves through case-by-case consideration of specific sets of facts. It permits the evolution of that standard to proceed incrementally, responsive to changes in our understanding of the values that define tort law. Similarly, the use of this approach to define the scope of tax concepts such as income permits the definition of those concepts to evolve incrementally in response to the shifting social and political values that inform tax law.[77]

We developed the idea that standards are especially sensitive to values in *Defining Income*, where we offered an account of the rules-standards distinction. A field of law is constituted by a unique collection of values.[78] What these values are emerges and evolves from the ongoing experience with answering important questions that arise within the field. While a specific set of values will uniquely

76. United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931).

77. We see the fruits of this evolution in, for example, the amendment of the Code following *Kirby Lumber* to add the category held in that case to constitute income—"discharge of indebtedness"—to the section's list of illustrative categories constituting the definition of gross income and in the Treasury regulation that supplements the list, including the addition of some of the items recognized as income in the cases mentioned above: punitive damages (*Glenshaw Glass*, 348 U.S. 426), "[a]nother person's payment of the taxpayer's income taxes" (Treas. Reg. 1.61-14(a) (as amended in 1993)), and illegal gains (James v. United States, 366 U.S. 213).

78. For a general discussion of the problem of defining a field of law, see Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry into Legal Taxonomy*, 95 CORNELL L. REV. 221, 226–51 (2010). Professor Aagaard notes that "it is useful to conceptualize a legal field as the interaction among four underlying constitutive dimensions of the field: factual context, policy trade-offs, values and interests, and legal doctrine." *Id*. at 238. It is our contention that "values" are fundamental in that they illuminate the relevant "factual context," determine what count as plausible and persuasive "policy trade-offs," and shape "legal doctrine." On this last point, see our discussion of "aptness" in Abreu & Greenstein, *Defining Income*, *supra* note 4, at 325–33. *See also* Einer R. Elhauge, *Can Health Law Become a Coherent Field of Law?*, 41 WAKE FOREST L. REV. 365 (2006) (suggesting that the definition of a legal concept can be assessed by its function in furthering multi-faceted goals and values); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996) (discussing the benefit of developing uniform principles in a field of law and then applying them to specific instances rather than defining the field narrowly, around specific instances).

constitute a particular field, some of the values might be shared with other fields.[79] Moreover, some values play a significant role in all fields of law—that is, they are transcendent *law* values. They are things important to law generally and include justice, administrability, and the rule of law. The value of justice expresses a desire to achieve the overall "best" answer to a legal question within a field; the value of administrability captures the importance of the efficient and effective functioning of each field; and as we have discussed above, the value of the rule of law reflects a yearning for predictability.

To be successful, provisions of law within the field must promote some set of values from among the universe of those that define the field.[80] The more values a provision promotes—the more questions that must be answered to apply the provision and thus the more facts that become relevant to answering those questions—the more the provision will operate as a standard.[81] Conversely, a provision that promotes only a few of the constitutive values or that gives strong priority to one value will make relatively few facts relevant and will operate more as a rule.[82]

In the case of tax law we have argued that a large set of values constitutes the field. Some of these are economic values: revenue raising and efficiency are especially important here. Some are values having to do with the vertical and horizontal equity of the tax system. Some are values having to do with public policy. This latter group of values is important not only because our income tax law addresses public policy by design,[83] but because taxation has a potentially

79. For example, autonomy is a core value in both contract and tort law, albeit in different ways. Similarly, community safety is a fundamental concern in the fields of both criminal procedure and food-and-drug regulation.

80. We have called this quality "aptness." *See* Abreu & Greenstein, *Defining Income*, *supra* note 4, at 325–33.

81. It is this connection between apt provisions in a field of law and the collection of values animating the field that provides the limiting principle for the all-things-considered analysis typical of standards. The "things" that must be resolved to apply those standards are the facts that must be determined by virtue of the *relevant* values.

82. We believe that rules and standards are not binary opposites but rather are idealized ends of a continuum. Actual provisions will not be purely rules or standards, but will exhibit varying degrees of each. *See* Greenstein, *supra* note 30, at 23–24 (making this point in terms of the quality of "openness"). For purposes of the analysis presented here, however, it suffices to speak generally of rules versus standards.

83. Here we are referring to tax expenditures, such as the home mortgage interest deduction. We recognize that despite the persistence of the popular belief that the home mortgage interest deduction was intended to and does promote home ownership, there is substantial legal and economic scholarship that questions this popular belief and suggests that

significant impact on just about every facet of our lives. Thus, for example, we have argued that the American love of baseball is a relevant value in deciding whether to regard baseballs caught by fans at games as gross income.[84]

The transcendent law values mentioned above—administrability, the rule of law, and justice—appear to pull in different directions. The complex bureaucracy, the need to file returns that can be completed by taxpayers and administered by the IRS, the requirement of information reporting by a large number of parties,[85] our libertarian traditions, and our historical resistance to taxation all make it hardly surprising that taxpayers, tax professionals, and tax scholars are attracted to interpreting the Internal Revenue Code as a compendium of crystalline rules. Indeed, in many instances (e.g., section 63(c), the standard deduction provision) it is difficult to even imagine reading the provision as anything other than a rule. But justice seems to press in the other direction, urging interpreters of the Code to take more values and more facts into account so that a provision's application in particular cases gives us the right answer. That is, justice seems to suggest interpreting a provision of the Code as a standard. On the other hand, the rule of law might pull us back toward rules because predictability is so central to the rule of law and rules, as Justice Scalia argued, are especially good for that.

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the deduction increases the price of homes, rather than making home ownership more affordable. *See, e.g.*, Rebecca M. Morrow, *Billions of Tax Dollars Spent Inflating the Housing Bubble: How and Why the Mortgage Interest Deduction Failed*, 17 FORDHAM J. CORP. & FIN. L. 751, 771 (2012) (suggesting that the price of the deduction is not only the loss in tax revenue without an evident increase in the rate of home ownership, but also the effective subsidy provided to the real estate industry through price capitalization, which is "the increase in the price of an asset due to the increase of value of an asset caused by a subsidy or incentive"); Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 278–79 (2010) (charging the deduction with distorting "the cost of owner-occupied housing relative to other investments, resulting in economy-wide misallocation of capital stock, artificially elevated housing prices, overconsumption of large, expensive homes, and precariously high LTV ratios").

84. *See* Abreu & Greenstein, *Defining Income*, *supra* note 4, at 339–44. Even the Supreme Court has acknowledged baseball's important status in American life. *See* Flood v. Kuhn, 407 U.S. 258, 266–67 (1972) (quoting Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)) (upholding antitrust exemption for professional baseball).

85. Indeed, information reporting is among the factors that have generated a huge market in software that enables the relatively automated completion, filing, review, and audit of tax returns. For a discussion of the connection between automation and rules, see Tom C.W. Lin, *National Pastime(s)*, 55 B.C. L. REV. 1197, 1213–15 (2014) (analogizing machines to rules and humans to standards).

In reality, however, these three values interact in complex ways. Consider what happens if the desire to promote administrability and the rule of law leads us to interpret a provision as a rule, but that interpretation produces injustice, and that injustice, in turn, leads to resistance and even noncompliance. Now we have neither administrability nor the rule of law nor justice. Thus, the decision to interpret a provision cannot be made by resort to one of these three values alone.

Moreover, it turns out that all three of the transcendent law values can support the use of both rules and standards. Justice, with its emphasis on getting the optimal answer, presses toward considering more of the relevant values and more of the consequently relevant facts; hence, justice pushes toward interpreting a provision as a standard. On the other hand, justice is also served by meeting expectations—a task that rules perform especially well. Similarly, the rule of law can be served by the use of both rules and standards. The rule of law emphasizes predictability,[86] and that pushes toward interpreting a provision as a rule. On the other hand, predictability is also achieved by the consistent application of the values that animate the field—a task that standards perform especially well. Finally, administrability emphasizes clarity and simplicity in the service of predictability—a function served well by rules. But rules can produce injustice, which can generate resistance, which can undermine the efficiency and effectiveness that are the hallmarks of administrability.[87] Hence, both rules and standards can serve the three

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86. As Justice Scalia argued, predictability gives the appearance of equal treatment, suggests certainty about what the law requires, and imposes constraints on the power of officials. *See* Scalia, *supra* note 12 and accompanying text.

87. An even closer look reveals that administrability is multifaceted and that these different facets implicate a variety of different values. For example, Professor Douglas Kahn has pointed out the "huge administrative difficulties" that would attend attempts to tax "an exchange of services performed in a marital community." Douglas A. Kahn, *Exclusion from Income of Compensation for Services and Pooling of Labor Occurring in a Noncommercial Setting*, 11 FLA. TAX REV. 683, 687 (2011). Some of these—what Professor Kahn identifies as "valuation issues" and the difficulty of "discover[ing] the events where one spouse performed a service for the other"—have to do with simplicity, predictability, and ease of application. *Id.* Others implicate the "highly personal nature" of the services performed such that attempts to tax those services would threaten "an invasion of privacy and an intrusion into an individual's private noncommercial life, and that would be unacceptable in a free society." *Id.* at 687–88. Such an untoward intrusion into taxpayers' private lives would be problematical on its own. It would also likely generate resistance and thereby undermine the operation of the tax system.

Similarly, consider the example of attempting to tax the fair market value of a caught baseball. Here, administrability would be undermined by resistance caused by disrespect for the important role of baseball in American culture, see CHARLES O. ROSSOTTI, MANY UNHAPPY transcendent law values, leaving it, as we argue in the next section, to the interpreters of the law to decide whether a given provision should be interpreted as a rule or a standard.

B. Who Decides?

The core of our claim is that nothing intrinsic to the Code demands that we read its provisions as rules (or as standards). As argued above, competing considerations present us with the choice, and the choice is part of interpreting the Code. Hence, a crucial question arises: Who has interpretive authority? More simply, who decides?

Inevitably, Treasury and the IRS must initially interpret the Code. Treasury has long had the authority to issue regulations interpreting the Code,[88] which were entitled to deference even before the Supreme Court held that Treasury's tax regulations are entitled to *Chevron* deference.[89] Moreover, the Court has explicitly recognized "the primary authority of the IRS and its predecessors in construing the Internal Revenue Code,"[90] explaining that

> Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions. In the first instance, however, the responsibility for construing the Code falls to the IRS. Since Congress cannot be expected to

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RETURNS 95 (2005) (noting the observation by White House spokesman, Mike McCurry, that taxing Mark McGwire's seventieth homerun baseball was "about the dumbest thing I've ever heard in my life"), and by the impracticality of taxing each of the hundreds of thousands of baseballs retrieved by fans each season, many of which (unlike McGwire's record-breaking homerun ball) have a vanishingly low fair market value, but at least some of which may nevertheless have an ascertainable fair market value. And this is only the tip of the administrability iceberg. Although we believe teasing out the constituent parts of administrability is important to our project given the prominence of that concept in our interpretive analysis, its precise contours are not directly related to the thesis of this article. We will therefore refer generally to administrability in the text of this article without specifying the particular way in which administrability is implicated.

88. *See* I.R.C. § 7805 (2012).

89. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011). As between agency and judicial interpretations of the Code, Treasury's interpretations are entitled to strong deference from the courts. See *id*., applying the deference required by Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), to a Treasury regulation interpreting a provision of the Internal Revenue Code. Whether *Chevron* deference only applies to Regulations promulgated after notice and comment and not to less formal promulgations of rules and policies (e.g., temporary Treasury regulations and IRB guidance), is a matter of current debate. *See generally* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013) (discussing this point).

90. Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983).

> anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will. Administrators, like judges, are under oath to do so.[91]

As the Court observed, Congress can always determine the issue by legislation—whether the IRS's initial position is pro-taxpayer or not.[92] If Congress does not act, then a pro-taxpayer agency determination remains because, as Professor Zelenak points out, no one has standing to challenge it. Because interpretive authority is shared among Treasury, the IRS, the courts, and Congress, no branch necessarily has the final say. Rather, interpretation of the Code can more resemble a conversation among the branches.

Consider the story of Evelyn Gregory. Mrs. Gregory owned all of the stock of Monitor Securities Corporation. Monitor owned stock in United Mortgage Corporation. A buyer wanted to buy the stock in United Mortgage but the sale would have generated a large gain to Monitor, subject to the corporate income tax. So Monitor did not sell. Instead, Monitor transferred the stock of United Mortgage to a newly formed corporation, Averill, and Averill issued all of its shares to Mrs. Gregory. Averill then liquidated, distributing its only asset, the United Mortgage stock, to Mrs. Gregory. That transaction did not attract a tax at the corporate level, but it was taxable to Mrs. Gregory and resulted in the United Mortgage stock having a basis (in Mrs. Gregory's hands) equal to its fair market value. Mrs. Gregory then sold the United Mortgage stock to the buyer (at its fair market value), resulting in no additional gain or tax. At the end of the transaction, two important things had occurred: (1) Mrs. Gregory had the cash received from the buyer, and (2) there had only been one level of tax imposed on the gain, at capital gains rates to Mrs. Gregory. Had Monitor made the sale directly, there would have been a tax at the corporate level to Monitor, and when Monitor distributed the cash to Mrs. Gregory, she would have had to pay a tax on that dividend at ordinary income rates.

Mrs. Gregory took the position that Monitor and Averill engaged in a reorganization. The statute provided that a

91. *Id.* at 596–97.

92. This is illustrated by the recent section 382 saga recounted by Professor Zelenak, in which Congress did not agree with a pro-taxpayer position and reacted accordingly, overruling the agency's position by legislation. *See* Zelenak, *supra* note 1, at 845–48; *infra* notes 130–45 and accompanying text.

reorganization was "a transfer by a corporation of . . . a part of its assets to another corporation if immediately [thereafter] . . . the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."[93] The IRS disagreed with Mrs. Gregory's position. It argued that "the creation of the Averill corporation was without substance and must therefore be disregarded"[94] and therefore, that Averill was not a corporation and Monitor's transfer of United Mortgage stock was not "a transfer by a corporation . . . to another *corporation*."[95] The Board of Tax Appeals rejected that argument. Mrs. Gregory won.

On appeal, the Second Circuit agreed with the Board that Averill was a corporation and that the transaction meets the "dictionary definitions of each term used in the statutory definition [of a reorganization]."[96] Nevertheless, Mrs. Gregory lost. Despite the literal compliance with the words of the statute, Judge Learned Hand explained,

> [I]t does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition. It is quite true, as the Board has very well said, that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.[97]

The court held that there was no reorganization "because the transactions were no part of the conduct of the business of either or both companies; so viewed they were a sham, though all the proceedings had their usual effect."[98]

The Supreme Court affirmed the Second Circuit's judgment, holding that literal compliance with the Code is not necessarily sufficient. The purported reorganization was a "mere device"[99]—an

93. Revenue Act of 1928, ch. 852, § 112(i)(1)(B), 45 Stat. 791, 818.

94. Gregory v. Comm'r, 27 B.T.A. 223, 224 (1932).

95. Revenue Act of 1928, § 112(i)(1)(B) (emphasis added).

96. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

97. *Id.* at 810–11.

98. *Id.* at 811.

99. Gregory v. Helvering, 293 U.S. 465, 469 (1935).

"elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else."[100]

The *Gregory* litigation revealed that Congress had not said enough, so Congress said more. Eventually the very language the Supreme Court used to deny tax-free status to a "mere device" became a part of the statute.[101] The administrative agency further interpreted it by issuing regulations to identify such "mere devices."[102] The *Gregory* litigation and its aftermath illustrate the interaction among the three branches of government in the interpretation of the Code. The administrators are the first-order interpreters, either through litigation or the issuance of guidance, but their interpretation is neither the first nor last word on the subject.

For our purposes, the more fundamental point of the *Gregory* saga is this: It has never seemed remarkable to characterize what the IRS and the courts did in *Gregory* as interpretation, even though the statutory provision contained an explicit definition of "reorganization." Likewise, it has not seemed remarkable that the IRS interpreted the word "income" to include punitive damages or meals and lodging provided by an employer or many other things. Indeed, if the term "reorganization," which has an explicit definition in the statute, can be interpreted not to encompass transactions that satisfy all the "steps" set out in the statute,[103] then the term "income," which contains no such highly articulated definition, must perforce be susceptible of interpretation. Our claim is that the IRS's decision not to treat employee-retained frequent flyer miles or caught baseballs as income is as much an interpretation as its decision to treat punitive damages or meals and lodging as income, or what Mrs. Gregory did as not a reorganization.[104] The only difference is that the former decisions are pro-taxpayer, whereas the latter is anti-taxpayer.

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100. *Id.* at 470.

101. I.R.C. § 355(a)(1)(B) (2012).

102. The regulations provide that whether a transaction is a device depends on

> all the facts and circumstances, including, but not limited to, the presence of the device factors specified in paragraph (d)(2) of this section . . . , and the presence of the nondevice factors, specified in paragraph (d)(3) of this section . . . . However, if a transaction is specified in paragraph (d)(5) of this section, then it is ordinarily considered not to have been used principally as a device.

Treas. Reg. § 1.355-2(d)(1).

103. *See supra* note 95 and accompanying text.

104. Although we take this subject up directly elsewhere, we believe that the rule/standard analysis explains IRS interpretations outside of the definition of income, including interpretations in corporate taxation. For example, it seems to us that the rule/standard analysis explains why the IRS has taken the position that family hostility should not be taken into

As Professor Zelenak points out, a pro-taxpayer interpretation will usually be invulnerable to challenge. But whether the taxpayer or the government benefits from the interpretation does not affect its character as an interpretation.[105] For example, if the IRS decides that

account in applying the attribution provisions of section 318, ("the facts and circumstances of a particular case cannot contradict the mechanical determination under section 318 of how much stock a shareholder owns.") Rev. Rul. 80-26, 1980-1 C.B. 66. The IRS position treats section 318 as a rule and doing so respects the dominance of the value of administrability that the provision was designed to promote. Not surprisingly, the courts have been sharply divided. *Compare* David Metzger Trust v. Comm'r, 693 F.2d 459 (5th Cir. 1982) (finding family hostility does not prevent the application of the attribution rules), Cerone v. Comm'r, 87 T.C. 1 (1986) (finding family hostility irrelevant), Robin Haft Trust v. Comm'r, 61 T.C. 398 (1973) (finding family hostility irrelevant), *with* Robin Haft Trust v. Comm'r, 510 F.2d 43 (1st Cir. 1975) (taking family hostility into account), *rev'g* 61 T.C. 398 (1973), Rodgers P. Johnson Trust v. Comm'r, 71 T.C. 941 (1979) (hostility taken into account), Estate of Squier v. Comm'r, 35 T.C. 950 (1961) (taking hostility into account), *acq.* 1961-2 C.B. 5, *acq.* withdrawn and *nonacq.* substituted 1978-2 C.B. 4). Similarly, the pro-taxpayer results in Granite Trust Co. v. United States, 238 F.2d 670 (1st Cir. 1956) and George L. Riggs, Inc. v. Comm'r, 64 T.C. 474 (1975), *acq.* 1976-2 C.B. 2, are easily understood as following from the judicial interpretation of section 332 as a rule (and the rejection of the IRS's attempted interpretation as a standard). Rev. Rul. 75-521, 1975-2 C.B. 120, shows that the IRS now agrees with that judicial interpretation. *Gitlitz v. Commissioner*, 531 U.S. 206 (2001), also presented an interpretive dispute, with both sides arguing that the 'plain meaning' of section 108(d)(7)(A) supported their desired result, but the IRS (and Justice Breyer, in dissent) actually advocated a reading that had the virtue of "closing a loophole" and in effect advocated a more standard-like construction. *Gitlitz* also provides an example of the dynamic nature of interpretation, as Congress subsequently weighed in, amending section 108(d)(7)(A) to legislatively reverse *Gitlitz*. Job Creation and Worker Assistance Act of 2002, Pub. L. 107-147, 116 Stat. 21 (2002). The so-called *INDOPCO* regulations can easily be seen as revealing Treasury's decision to interpret the term capitalization as setting forth a standard within which safe harbor and *de minimis* rules provide some certainty; the iconic term "earnings and profits" used in section 316 to define a dividend has no statutory definition and judicial opinions have interpreted it as a standard, which appropriately allows the term to develop as corporate finance and accounting evolve. *See* Bangor & Aroostoock R.R. v. Comm'r, 193 F.2d 827 (1st Cir. 1951), *cert. denied*, 343 U.S. 934 (1952).

105. We agree that this is often the case, but of course, exceptions exist. For example, many assumed that the Check-the-Box regulations would be invulnerable to challenge when they became effective in January 1997 because their position was so pro-taxpayer. This assumption proved false when taxpayers argued in subsequent litigation that in issuing the regulations, the Treasury exceeded its authority to issue interpretive regulations. In *Littriello v. United States*, Mr. Littriello was the sole member of an LLC that had not made an election under the Check-the-Box regulations to be treated as a corporation. 484 F.3d 372, 374 (6th Cir. 2007). Under the Check-the-Box regulations, this made Mr. Littriello's LLC a disregarded entity and subject to pass-through taxation. As a result, the IRS argued that when the LLC failed to pay the required withholding and FICA taxes, Mr. Littriello was personally liable for those deficiencies. *Id*. Mr. Littriello argued that the regulations were invalid and therefore the taxes could not be imposed upon him, but the IRS won. *Id*. Since *Littriello*, the regulations' validity has repeatedly been upheld in analogous cases. *See, e.g.*, McNamee v. Dep't of the Treasury, 488 F.3d 100 (2d Cir. 2007); Med. Practice Solutions, LLC v. Comm'r, 132 T.C. 125 (2009), *aff'd sub nom.*; Britton v. Comm'r, 2010 U.S. App. LEXIS 19925 (1st Cir. 2010); Stearn & Co., LLC v. United States, 499 F. Supp. 2d 899 (E.D. Mich. 2007).

employee-retained frequent-flier miles are not income (a pro-taxpayer result), it will be engaging in interpretation just as it did when it decided that punitive damages are income (an anti-taxpayer result). Whether an interpretation is pro- or anti-taxpayer is independent of the act of interpretation. And even when the IRS reaches a pro-taxpayer conclusion, Congress can weigh in, as it did following the various section 382 Notices, which Professor Zelenak describes, and which are discussed in Part IV.

IV. THE VARIETIES OF INTERPRETATION

In *Custom and the Rule of Law in the Administration of the Income Tax*,[106] Professor Zelenak identifies what he describes as "the phenomenon of administratively created customary deviations from the dictates of the Internal Revenue Code."[107] He distinguishes customary deviations from three other phenomena that produce the conclusion that certain accessions to wealth are not treated as income: interpretations central to the "structure of the income tax,"[108] "dubious protaxpayer interpretations,"[109] and "mere underenforcement."[110] He treats these conclusions as justifiable exceptions to a general requirement that income be strictly interpreted as a rule.

In Section A, we show that if we interpret income as a standard, then the accessions discussed by Professor Zelenak are simply not income, and there is no need to treat them as exceptions, which nothing in the Code authorizes. In Section B, we move beyond the definition of income to further clarify our approach to interpreting the Code. We consider a dramatic example of an improper interpretation: *Notice 2008-83*, which was issued by the IRS to give guidance on the application of section 382 of the Code to banks during the financial crisis. Both Professor Zelenak and we agree that the *Notice* incorrectly interpreted section 382; we disagree, however, with respect to why the interpretation was incorrect.

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106. Zelenak, *supra* note 1.
107. *Id.* at 832.
108. *Id.* at 834.
109. *Id.* at 832.
110. *Id.*

A. *Structural Interpretations, Dubious Interpretations, and Underenforcement*

The first phenomenon that Professor Zelenak distinguishes from customary deviations is what he refers to as "a protaxpayer interpretation of the Code that may seem dubious or even insupportable in terms of the literal language of the Code, but which would almost certainly be adopted by the courts if the IRS were to reverse its position and taxpayers were to challenge the new IRS position."[111] Professor Zelenak's prime example is the "exclusion from gross income of imputed income from services (that is, the value of services one performs for oneself) and from property (that is, the rental value of owner-occupied housing and consumer durables)."[112] His justification is that "[t]he exclusion of such benefits dates from the dawn of the income tax and is so central to the structure of the income tax that it is inconceivable that the courts would support an administrative effort to reverse that exclusion."[113]

Professor Zelenak is not alone in concluding that imputed income is not income—almost all commentators would agree,[114] as do we—but we take issue with the assumption that imputed income should be thought of as an *exclusion* rather than as something that is not income at all within the meaning of section 61. Construing section 61 as a rule leads to that conclusion because it arguably brings within section 61 *all* accessions, including imputed income and even leisure

111. *Id*. at 833.

112. *Id.* at 834.

113. *Id*.

114. In a widely cited piece, Professor Donald B. Marsh suggests that imputed income is not income so as to "balance the exemption of leisure income and thus to restore in a measure the balance between work and leisure as alternative ways of using one's time." Donald B. Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514, 520 (1943). He notes that because it would be nearly impossible and impractical for the government to attempt to tax our leisure activities, the government must, in the name of equity, exempt imputed income from taxation. *Id.* Professor Dodge also agrees that imputed income does not constitute income because in his view, imputed income does not represent an accession to wealth. Joseph M. Dodge, *Accessions to Wealth*, *Realization of Gross Income, and Dominion and Control: Applying the "Claim of Right Doctrine" to Found Objects, Including Record-Setting Baseballs*, 5 FLA. TAX REV. 685, 688 (2000). For a graphic and recent illustration of the administrative difficulties of taxing imputed income, including managing public outrage and incomprehension, see Bruce Bartlett, *Taxing Homeowners as if They Were Landlords*, N.Y. TIMES ECONOMIX BLOG (Sept. 3, 2013, 12:01 AM), http://economix.blogs.nytimes.com/2013/09/03/taxing-homeowners-as-if-they-were-landlords (note especially the blogged reactions to Bartlett's discussion of the concept). *See also* Bruce Bartlett, *Taxing Medicare Benefits*, N.Y. TIMES ECONOMIX BLOG (Sept. 17, 2013, 12:01 AM), http://economix.blogs.nytimes.com/2013/09/17/taxing-medicare-benefits (providing additional discussion on these administrative difficulties).

and psychic benefits. But our project has been to question why that is the only or even the best construction of section 61. Construing section 61 as setting forth a standard to be determined after consideration of the relevant values produces a better, more transparent result than assuming the definition of income is an all-inclusive rule: if it is a rule, the only way that imputed income is not income is to exclude it, but no statutory authority for such an exclusion exists.[115] Construing section 61 as a standard, which permits consideration of important tax values like administrability, provides an explanation for the nontaxation of imputed income and thereby avoids the need to distinguish it from employee-retained frequent flyer miles. Under our construction, both items are not income as a matter of interpretation by the agency charged with interpreting the Code. They are the same in that neither is income as that term is interpreted when it is viewed as a standard.

Professor Zelenak describes the second category as "mere dubious protaxpayer interpretations of the Code by the Treasury Department or the IRS."[116] His example here is a set of

> proposed regulations issued in 1992, which would have extended the exclusion of I.R.C. § 101(a) for life-insurance proceeds 'paid by reason of the death of the insured' to 'qualified accelerated death benefits' that are paid by an insurer to a terminally ill insured within twelve months of the expected death of the insured.[117]

Professor Zelenak distinguishes items in this category from customary deviations in that these items purport to be the result of *interpretations* (however erroneous they might be), while in the case of customary deviations, the IRS is "simply conceding that it has no intention to enforce the law . . . ."[118]

Professor Zelenak's discussion of section 101(a) suggests that interpretation depends on ambiguity. For him, "by reason of the death of the insured"[119] is sufficiently ambiguous to leave room for

115. We assume that Professor Zelenak would put government transfer payments, which the IRS has announced are not income under the general welfare doctrine (*see* Abreu & Greenstein, *Defining Income*, *supra* note 4, at 308 n.50; Notice 99-3, 1999-1 C.B. 271), such as Medicare and Medicaid, into this category as well, and not classify them as customary deviations.

116. Zelenak, *supra* note 1, at 835.

117. *Id.* (citation omitted).

118. *Id.*

119. *Id.*

interpretation, and while the interpretation reflected in the proposed regulations might be "dubious," he believes that it is nonetheless interpretation because the ambiguity of section 101(a) of the Code permits it. By contrast, Professor Zelenak takes section 61(a) to be unambiguous and thus capable of being directly applied "as written." For all the reasons we discussed earlier, including the voluminous litigation required to define income, we disagree. If we are correct that the term "income" demands continual consideration and interpretation, then customary deviations are interpretations.[120]

More fundamentally, the ambiguity of a Code provision is not the beginning of the analysis; rather it is part of the conclusion reached when interpreting text. And because texts can be interpreted differently, analysts can disagree about whether the text is ambiguous. For example, it seems to us that Professor Zelenak believes that the term "income" is unambiguous and, therefore, not subject to interpretation; we disagree. By contrast, Professor Zelenak appears willing to accept that section 101(a) is ambiguous and, therefore, subject to interpretation, as former IRS Commissioner Fred Goldberg and also former ABA Tax Section Chair James Holden believed, although Professor Zelenak is troubled by the interpretation made by Treasury.[121] In this case it is Lee Sheppard who disagrees: for her, "death" is unambiguous and not subject to interpretation.[122]

We do not claim that Professor Zelenak is being inconsistent in finding ambiguity in one term and not in the other. Rather, we

120. Perhaps the following thought experiment will help to illuminate this point. Imagine a regulation that took the position that employee-retained frequent flyer miles were not income. Given the voluminous and sometimes contradictory history of litigation regarding the scope of section 61(a), it is unlikely that the Supreme Court would find the regulation invalid on the ground that the meaning of the term is unambiguous. (And despite the difficulty of challenging a generally pro-taxpayer position it could be the case that a given taxpayer wanted income so as to qualify for a greater tax benefit, such as the Earned Income Tax Credit, assuming the income would qualify as earned income.) By contrast, it is difficult to imagine that the Court would uphold a regulation that provided that banks were not corporations to which section 382 is applicable.

121. Zelenak, *supra* note 1, at 835 n.25 and accompanying text ("[T]he section 101(a) exclusion for payments 'by reason of the death of the insured' is broad enough to permit payments made by reason of imminent death . . . ." (alterations in original) (citation omitted)).

122. Zelenak, *supra* note 1, at 835 (noting that "a prominent commentator sharply criticized the proposed regulations as irreconcilable with the statutory language"). Professor Zelenak was referring to Lee Sheppard's observation that "'[b]y reason of the death of the insured' means what it says—death." *Id.* at 835 n.24 (citation omitted). Congress subsequently amended section 101 to essentially codify Commissioner Goldberg's interpretation. *See* I.R.C. § 101(g) (2012).

believe he is reaching different interpretive conclusions about different provisions. And that is the point: Ambiguity is not an intrinsic quality of a statutory text.[123] Rather, ambiguity emerges from context and use. For example, in the recent *Mayo* case, the Supreme Court confronted the question whether the statutory term "student" is ambiguous.[124] The Court considered the particular context of medical residency and concluded that in that context the meaning of the term "student" was ambiguous. In many ordinary contexts, the meaning of "student" is unambiguous and uncontroversial. But the word does not define itself, and the Court could not apply the Code "as written."

The third category is what Professor Zelenak characterizes as "simple underenforcement of the law without any indication (beyond the mere underenforcement) that the IRS acquiesces in widespread noncompliance with the Code."[125] His example is the 8 percent requirement for information reporting of tip income.[126] While we claim that the items in Professor Zelenak's first two categories result from interpreting the definition of income as a standard, we agree that underenforcement is completely different from interpretation. We also agree that fully or partially failing to require the payment of tax on a category of items that the IRS knows are income because it chooses to allocate its enforcement resources to other matters is different from treating the items as not income at all.

Still, it bears pointing out that the reasons for underenforcement must relate either to the values that define the field of tax law or to values relevant to the exercise of enforcement discretion in any field of law. As a recent controversy demonstrates, focusing tax enforcement efforts on a particular political group assumed to be disfavored by the current Administration is unacceptable.[127] And the

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123. That is not to say that interpretations cannot be criticized as better or worse, just as Lee Sheppard criticizes Treasury's interpretation of "by reason of the death of the insured" as mistaken. Zelenak, *supra* note 1, at 835 n.24.

124. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 710 (2011).

125. Zelenak, *supra* note 1, at 834.

126. I.R.C. § 6053(a), (c)(3)(A), (c)(4) (2012); Zelenak, *supra* note 1, at 834; *see also* United States v. Fior d'Italia, Inc., 536 U.S. 238, 240 (2002) (allowing the IRS to estimate aggregate tips received by restaurant employees when assessing FICA taxes on unreported tips due from the restaurant rather than estimating each individual employee's tip income).

127. *See* TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review, 2013-10-053*, at 5–9 (May 14, 2013), *available at* http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf. In mid-2013, the Treasury Inspector General for Tax Administration reported that in considering

straightforward reason is that such politically motivated action, if it occurred, would find no support in the values that animate federal tax law or, more generally, the exercise of enforcement discretion. By contrast, the practice that Professor Zelenak points to—that "the IRS is content to enforce the income tax on . . . tips subject to information reporting [requiring an allocation of 8 percent of gross receipts to certain tipped employees], without making a serious effort with respect to the other half (roughly speaking) of actual tip income"[128]—serves the relevant tax value of administrability.[129] While some tax values (e.g., horizontal equity) might be sacrificed, the tradeoff between accuracy and administrability can be plausibly accounted for within the universe of relevant values. In this respect the IRS is not acting in a way that differs materially from that of other administrative agencies that routinely exercise "prosecutorial discretion." In sum, we agree with Professor Zelenak that what he terms underenforcement is fundamentally different from interpretation.

B. Interpretation and the Story of the Section 382 Guidance

An interpretation of the Code is an understanding of the provision that can be justified by tax values. Whether it is correct or incorrect is determined by its fate: A correct interpretation is one that has achieved widespread (albeit provisional, or contingent), acceptance. Conversely, an incorrect interpretation is one that is

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applications for tax-exempt status, "the IRS used inappropriate criteria that identified for review Tea Party and other organizations . . . based upon their names or policy positions instead of indications of potential political campaign intervention." *Id.* at 2. The result was widespread public condemnation of the IRS and calls for firings, further investigations, and legal action. While this summary of the "scandal" is merely just that, a summary, and not to be construed as our beliefs on the matter, we do want to note in agreement that such a scandal could certainly weaken the public's trust in the impartiality expected from the IRS.

128. Zelenak, *supra* note 1, at 834; I.R.C. § 6053(a), (c)(3)(A), (c)(4) (2012); *see also* United States v. Fior d'Italia, Inc., 536 U.S. 238, 240 (2002) (allowing the IRS to estimate aggregate tips received by restaurant employees when assessing FICA taxes on unreported tips due from the restaurant rather than estimating each individual employee's tip income).

129. This observation does not depend on assumptions about people wanting to cheat. It is simply unrealistic to expect that either employers or employees will be able to reliably and consistently maintain the detailed records of *ad hoc* tips required to accurately calculate and report this income. Adjusting IRS practice to such realities is a critical part of serving the value of administrability.

foreclosed by some combination of congressional direction, relevant judicial decisions, history, and tradition.[130]

The holdings of *Gregory* identify both correct and incorrect interpretations of the Code proffered by the IRS. The correct interpretation is the familiar one described above: literal compliance with the terms of the Code does not suffice to make a transaction a reorganization. But in the very same case the IRS offered an incorrect interpretation of the statutory term, "corporation." The IRS argued that whether an entity was a corporation is to be measured by a standard pursuant to which an entity incorporated under state law would not be a corporation for tax purposes if it was incorporated to avoid income tax. The government sought to treat such an entity as a sham, but that argument was soundly rejected by the Board of Tax Appeals and later by Judge Learned Hand, writing for the Second Circuit, as well as by the Supreme Court.[131] It has also been consistently rejected by many other courts.[132]

It is important to see that the IRS's reading of "corporation" was an interpretation, even if incorrect, because it was justified in terms of the tax value of substance over form; the IRS sought to disregard corporations that were formed exclusively for the purpose of tax avoidance. The correct interpretation of "reorganization" was also grounded in tax values—again, the value of having tax follow economics so that particular tax consequences obtain only when a transaction is economically significant, i.e., when it has economic

130. The account of correct and incorrect interpretation in this subpart summarizes a more detailed discussion in Richard K. Greenstein's *Toward a Jurisprudence of Social Values*, *supra* note 30, at 9–12.

131. The Supreme Court confirmed that "[n]o doubt, a new and valid corporation was created." Gregory v. Helvering, 293 U.S. 465, 469–70 (1935).

132. *See, e.g.*, N. Ind. Pub. Serv. Co. v. Comm'r, 115 F.3d 506, 512 (7th Cir. 1997) ("[A] corporation *and the form of its transactions* are recognizable for tax purposes, despite any tax-avoidance motive, so long as the corporation engages in *bona fide* economically-based business transactions."); Weekend Warrior Trailers, Inc. v. Comm'r, T.C.M. (RIA) 2011-105 (2011) ("Even if a corporation was not formed for a valid business purpose, it nevertheless must be respected for tax purposes if it actually engaged in business activity."); Aiken Indus., Inc. v. Comm'r, 56 T.C. 925, 933 (1971) ("[W]hile we agree with the petitioner that Industrias was a 'corporation' for purposes of article IX, and that it therefore cannot be disregarded, we do not agree with the petitioner's conclusion that this factor alone was sufficient to qualify the interest in question for the exemption from taxation granted by article IX. Rather, we must determine whether the transaction in question conforms to the other requirements established by article IX.").

effects outside of tax.[133] What made the IRS's interpretation of reorganization correct and its interpretation of corporation incorrect was how the interpretations were received—i.e., which among the variety of relevant tax values the courts saw as most important. In the case of the definition of a corporation, the tax value of administrability was taken to be more important than the value of substance. Accordingly, courts have consistently refused to interpret "corporation" as a standard and have not required taxpayers to demonstrate a business purpose for corporate formation. Indeed, today the classification is even elective.[134] All this demonstrates that the interpretation of "corporation" as a standard lacks widespread acceptance and, for this reason, can be said to be incorrect. By contrast, the interpretation of "reorganization" as requiring more than literal compliance with the text of the Code has achieved widespread acceptance, thus establishing that interpretation as correct.

But sometimes an application of the Code cannot plausibly be justified in terms of any tax values at all. Consider the story of the section 382 guidance, discussed by Professor Zelenak. As he succinctly explains:

> Section 382 of the Code imposes strict limits on the deductibility of corporate net-operating-loss carryforwards and of unrealized built-in losses, following either an acquisition of a loss corporation by another corporation or a major change in the ownership of a loss corporation. In September 2008, as Congress was considering a massive bailout bill for the financial industry, the IRS of the Bush administration made its own contribution to the bailout effort by issuing *Notice 2008-83*, declaring—without making any attempt to explain or justify its conclusion—that the § 382 limitations on the use of built-in losses following an ownership change would no longer apply to banks. The primary purpose of the notice appears to have been the facilitation of the acquisition of failing Wachovia—by Wells Fargo, as it turned out. Although the notice generated considerable outrage in the media, among tax experts, and on Capitol Hill, it achieved the desired result. Early in 2009, Congress took the highly unusual step of enacting legislation specifically disapproving of *Notice 2008-83* as "inconsistent with the congressional intent" and describing the legal authority for the

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133. This concept is now codified in § 7701(o) to include both the existence of an economic (non-tax) effect and a business purpose. *See* I.R.C. § 7701(o) (2012).

134. Treas. Reg. § 301.7701-3 (2006).

> notice as "doubtful." The legislation, however, also declared that taxpayers could rely on the notice with respect to ownership changes occurring before January 17, 2009.[135]

Professor Zelenak, like many tax experts and Congress, believes that *Notice 2008-83* is not only not a correct interpretation of the Code, but that it is not an interpretation at all. We agree, but for a different reason. Whereas Professor Zelenak believes that *Notice 2008-83* is not an interpretation because it disregards the Code "as written," we believe that the *Notice* is not an interpretation because it is not grounded in relevant tax values.

Section 382 as originally enacted in 1954 was a direct response to the difficulty of policing trafficking in loss corporations with only section 269, which permits the disallowance of tax benefits for transactions made for the "principal purpose . . . [of] evasion or avoidance of Federal income tax"[136] and has been consistently interpreted as a standard. By contrast to section 269, section 382 as enacted in 1954 provided detailed criteria which denied the deduction of a net operating loss if certain changes in the ownership of the corporation occurred between the time that the loss was incurred and

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135. Congress limited the effect of *Notice 2008-83* in the American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111-5, § 1261(a), 123 Stat. 115, 342–43 (2009) (finding that the IRS lacked authority to exempt "particular industries or classes of taxpayers" from section 382 and that the exemption in *Notice 2008-83* was "inconsistent with the congressional intent" with regard to section 382).

136. I.R.C. § 269(a) (2012). As Bittker and Eustice explain:

> On the ground that § 269 had proved to be ineffectual as a weapon against the traffic in loss corporations because it had required proof that tax avoidance was the primary purpose of the transaction, in 1954 Congress enacted two new restrictions on the net operating loss carryover. The first was § 382(a), applicable to changes of ownership through the purchase of stock, which provided for the complete disallowance of the carryover if, roughly speaking, 50 percent of the corporation's stock changed hands by purchase in a two-year period and the corporation's old trade or business was discontinued. The business-continuity requirement of § 382(a) presented many factual difficulties and resulted in extensive litigation, with often conflicting opinions that were difficult to reconcile. The second restriction was § 382(b), applicable only to changes of ownership to a tax-free reorganization, under which the carryover was reduced proportionately if the old owners received less than 20 percent of the stock of the reorganized corporation (and was totally eliminated if they received no stock). Neither restriction was dependent upon a showing of tax-avoidance purpose; the function of both restrictions was to reduce or eliminate the carryover in appropriate cases even though the transactions could not be brought within the scope of § 269.
>
> Desiring to combine the bifurcated approach of § 382 into a single regime and to clear up various uncertainties, including especially the business-continuity test, Congress amended § 382 in 1976.

BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 14.42[1] (2012). The 1976 amendments had a delayed effective date and were eventually supplanted by the 1986 amendments, without ever having come into effect. *Id*.

the time the deduction was to be taken. Subsequent amendments refined the criteria and operation of the provision.[137] Resort to motive was abandoned and replaced by mathematically ascertainable metrics.

The revisions to section 382 demonstrate the congressional desire to move from judicial doctrines and statutory provisions whose application depends on specific facts and circumstances to an administrable, if very complicated, rule.[138] Indeed, when it adopted the current version of section 382 in 1986, Congress made plain its intent to supplant a standard with determinable rules.[139]

As Professors Bittker and Eustice explain, the history of section 382 makes it clear that the provision was designed

> (1) to provide for tax neutrality on the disposition of corporations that possess favorable tax carryover characteristics (i.e., to eliminate both incentives and disincentives for the acquisition); (2) to limit the use of corporate tax benefits generated under one set of owners to the income attributable to the particular pool of capital that generated those benefits; and (3) to provide objective rules that could be applied and administered with greater certainty. With the

137. Prior to the 2008 Notice the most recent amendments had been enacted in 1986. The 1986 amendments were the only ones to take effect after section 382 was originally enacted. *Id.* ¶ 14.42[1]. Section 382 was first amended in 1976 to clarify the business continuity test and other uncertainties, but delays to the effective date of these changes ultimately prevented their implementation before the 1986 rewrite. *Id.*

138. *See, e.g.*, Libson Shops, Inc. v. Koehler, 353 U.S. 382 (1957). See also BITTKER & EUSTICE, *supra* note 136, ¶ 14.42, for a discussion of the original section 382, the enacted but delayed 1976 amendments, and the ultimate adoption of the current version of section 382 in 1986.

139. The Conference Report specifically states that the conferees intended "that the *Libson Shops* doctrine will have no application to transactions subject to the provisions of the conference agreement." H.R. REP. NO. 99-841 pt. 2, at 194 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 4075, 4282. *Libson Shops* denied the use of net operating losses following a merger under the provisions applicable before enactment of the 1954 Code. *Libson Shops*, 353 U.S. at 390. It was the uncertainty created by the standards-based facts and circumstances analysis represented by *Libson Shops* and similar cases that provided the impetus for the enactment of the first section 382 in 1954. BITTKER & EUSTICE, *supra* note 136, ¶ 14.46[2]. Commentators understood this and cheered, with Bittker and Eustice almost gleefully declaring that in the 1986 revision of section 382, "the *Libson Shops* doctrine was finally interred." *Id.* ¶ 14.42[2]. Moreover, in affirming the continuing application of section 269 to the net operating loss carryover provisions, Congress allowed the IRS to use the standards-based approach of that provision to protect the fisc when appropriate while fostering administrability in most cases through the enactment of clear, if complicated, rules.

> exception of a modification to the pool of capital approach, these objectives were clearly evident in the final version of § 382.[140]

Interpreting section 382 through the lens of this history would have precluded the deduction by Wells Fargo of losses incurred by Wachovia. By concluding that section 382 would not apply to banks, *Notice 2008-83* permitted those deductions, and made Wells Fargo's acquisition of Wachovia more attractive; the ability to deduct Wachovia's losses reduced the cost of the acquisition. The *Notice* thereby encouraged the very trafficking in loss corporations that section 382 was intended to discourage and prevent.[141] Hence, the position in the *Notice*—exempting banks from inclusion in the term "corporation"—not only is unsupported by relevant tax values but indeed contradicts them. *Notice 2008-83* could not be an interpretation of section 382 at all. In this we agree with Professor Zelenak.

But Professor Zelenak goes on to contend that:

> The recent § 382 notices should be troubling to anyone who values the application of the rule of law to tax administration. One can only speculate, but it is plausible that the § 382 notices never would have been issued but for the precedent of the § 61 customary deviations.[142]

In this we disagree with Professor Zelenak. The conclusion that *Notice 2008-83* is not an interpretation of section 382 does not require the further conclusion that it is an affront to the rule of law. Respect for the rule of law can be manifested by a variety of administrative actions. These actions include interpretation but also include proper exercises of enforcement discretion. Like a prosecutor exercising prosecutorial discretion, administrative agencies have the authority to decide whether and when to enforce the law.[143] Just as a prosecutor can decide not to charge a defendant with a crime in order to serve the greater good (for example, by obtaining important information from the defendant in exchange for non-prosecution), so the IRS can decide not to apply a provision under circumstances where non-

140. BITTKER & EUSTICE, *supra* note 136, ¶ 14.42[2] (footnotes omitted).

141. This is the neutrality objective that was at the top of the list provided by Professors Bittker and Eustice and which case law and commentary clearly show to be the dominant motive behind restrictions on the deductibility of net operating losses following a change in control. *See* BITTKER & EUSTICE, *supra* note 136, ¶ 14.42[2].

142. Zelenak, *supra* note 1, at 847.

143. *See, e.g.*, Moog Indus. v. Fed. Trade Comm'n, 855 U.S. 411, 413–14 (1958); Fed. Trade Comm'n v. Universal-Rundle Corp., 387 U.S. 244, 250 (1967).

application would also produce a greater good. In the case of *Notice 2008-83* we believe the IRS was doing precisely that: deciding that the greater good to the economy from facilitating the acquisition of a failing financial institution at a time of unexpected and severe financial crisis justified not applying section 382.

In other words, if instead of thinking of *Notice 2008-83* as an exercise of the IRS's interpretive authority, we think of it as an exercise of the IRS's enforcement discretion, the action can be viewed as legitimate.[144] We are not saying that an exercise of enforcement discretion of this sort is necessarily uncontroversial; our point is that the exercise of enforcement discretion can be consistent with the rule of law. Accordingly, we think that the difference between what the IRS did in issuing *Notice 2008-83* and what Professor Zelenak describes as permissible underenforcement with respect to reportable tips is one of degree, not one of kind. Both may be controversial and differ in the level of transparency with which they are communicated, but neither violates the rule of law.[145]

CONCLUSION

The Internal Revenue Code does not "read itself."[146] All applications of the Code require interpretation. It is, of course,

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144. As Professor Zelenak also points out,

> The Obama administration followed the Bush-era precedent, thus making pro-taxpayer administrative revisions of § 382 a bipartisan activity. The Obama-era IRS issued several § 382 notices of its own, including, most prominently, Notice 2010-2, which declared—again, without apparent support from the statute—that § 382 would not be triggered if the Treasury Department were to sell its shares of General Motors to the public. Although the notice attracted some sharp criticism, it remains in effect.

Zelenak, *supra* note 1, at 846 (footnotes omitted). Evaluating *Notice 2010-2*, 2010-1 C.B. 251, is less clear-cut than evaluating *Notice 2008-83.* The latter could not have been an interpretation; it could only have been an exercise in enforcement discretion. But *Notice 2010-2* could be either. The reasons for this are that it implicates another statute besides the Code, (the Emergency Economic Stabilization Act of 2008, P.L. 110-343, 122 Stat. 3765), the *sui generis* identity of the seller (the Federal Government, a non-taxpayer, to which section 382 could not have been intended to apply), the posture of the *Notice* as an announcement of the forthcoming issuance of regulations, and the existence of different provisions dealing with stock acquired in bankruptcy reorganizations (section 382(l)(5)). We will not engage in that analysis in this essay. However, we will take up the larger issue of distinguishing interpretation from enforcement discretion in a forthcoming article.

145. *See supra* notes 125–29 and accompanying text.

146. *See* Stanley Fish, *Consequences*, 11 CRITICAL INQUIRY 433, 446 (1985) ("The semantic meaning of the text does not announce itself; it must be decided upon, that is, interpreted . . . . In short, no text reads itself . . . ."). *See also* H.L.A. HART, THE CONCEPT OF LAW 126 (2d ed. 1994) ("[Rules do not] provide for their own interpretation. The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems

possible to anchor the interpretation of section 61 in language, legislative history, or case law, and we do not deny that doing so is an appropriate interpretive technique. But nothing requires that interpretation stop with that. For instance, Learned Hand did not limit himself to consideration of statutory language, legislative history, or case law to conclude that what Mrs. Gregory did (which appeared to track the statutory language precisely) did not constitute a reorganization.[147] He invoked purpose and context to reach this conclusion—also an appropriate interpretive technique.

Given the requirement of interpretation, we have argued that the IRS necessarily has the initial responsibility for interpreting the Code, sometimes subject to judicial oversight and always subject to correction by Congress. Part of that interpretive responsibility permits Treasury, the IRS, and the courts (in the service of tax law's values) to treat a Code provision as a rule or a standard.

Some provisions of the Code are better interpreted as rules. For example, the IRS has interpreted the statutory terms "marriage," "spouse," "husband and wife," "husband," and "wife," in accordance with a rule that defers to the place of celebration for determination.[148] This makes sense because it provides certainty and prevents government intrusion into very private relationships. On the other hand, in the *Gregory* litigation, the Second Circuit and the Supreme Court interpreted "reorganization" as a standard for all the reasons previously explained.[149]

Although we agree that the use of rules can serve the rule of law, we believe that the use of standards is also fully consistent with the rule of law. The rule of law requires predictability. What gives predictability to decisionmaking within any field of law is the use of the values that define the field to interpret and apply its judicial doctrines, legislative provisions, and administrative regulations. The IRS's treatment of the definition of gross income as a standard

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unproblematic or 'automatic,' are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms."); Richard K. Greenstein, *Text as Tool: Why We Read the Law*, 52 WASH. & LEE L. REV. 105, 117 (1995) ("We read texts for many reasons . . . . The way that we use texts to achieve a particular purpose is to interpret the text—that is, to determine the text's meaning. Just as any tool must be manipulated to be used, a text must be interpreted to be used.").

147. Helvering v. Gregory, 69 F.2d 809, 811 (2d Cir. 1934).

148. Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Aug. 29, 2013).

149. *See* discussion *supra* section III.B. The courts disagreed with respect to the term "corporation," but both the Court of Appeals and the Supreme Court agreed with respect to "reorganization."

illustrates this. Its decisions are not arbitrary. Rather, its determinations of what qualifies as income are justified by the values—both economic and non-economic—that animate the field of federal income tax law. This approach to the definition of income facilitates the definition's evolution and has allowed the IRS to address new questions that have arisen, involving caught baseballs, employee-retained frequent flyer miles, bitcoin, and the like. These interpretive decisions may be correct, dubious, or incorrect. In any case, they are not "deviations," but rather are legitimate exercises of a shared lawmaking authority that is part and parcel of the rule of law.