

# ARTICLES

## TAX: DIFFERENT, NOT EXCEPTIONAL

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*“Tax law is law unto itself.”\*\**

*Tax is different from other fields of law, just as any field of law is different from others. But tax scholarship, judicial opinions in tax litigation, and public attitudes toward taxation have long claimed more than difference in doctrinal details. They have claimed that tax is different in kind from other fields of law—that it is unique. Some scholars have gone so far as to distinguish between “the legal system” and “the tax system.”*

*Even though the Supreme Court seemed to kill tax exceptionalism in its 2011 decision in *Mayo Foundation for Medical Education & Research v. United States*, claims of tax exceptionalism have hardly abated. In this article we take on the concept of tax exceptionalism directly. We begin by accepting that scholars, judges, and taxpayers experience tax as different from other fields of law, but we then tackle the question whether these differences add up to tax exceptionalism. Our view is that they do not, and we believe that pragmatism provides a useful framework for identifying just what is mistaken about claims of tax exceptionalism.*

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\*\* *United States v. Henderson Clay Prods.*, 324 F.2d 7, 12 (5th Cir. 1963).

*From a pragmatist perspective, the question is whether it is useful to believe that the accumulation of the various differences between tax and other fields of law makes tax fundamentally different. We conclude and demonstrate that it is not useful to characterize tax as exceptional; questions about the differences between tax and other fields of law can be fully answered by focusing on a specific issue and then deciding whether there is something about tax that requires that particular issue to be treated differently in tax. That is precisely what the Supreme Court did in Mayo. Rather than treat tax as different in kind from other fields of law, the Mayo Court treated the tax issue before it as it would any other issue in any other field, thereby rejecting the very premise of tax exceptionalism.*

*In prior work we have claimed that tax exceptionalism has had the insidious effect of stunting the growth of a robust tax jurisprudence by insulating tax from other fields of law, disparaging the lessons that tax can learn from careful attention to those other fields, undermining the legitimacy of tax administration, and perhaps even contributing to the relative lack of diversity in the tax bar. But here our focus is different. In light of the persistence of the concept of tax exceptionalism, which we believe is fueled by the salience of the differences between tax and other fields of law, we tackle the significance of those differences directly. We do not minimize them or deny their existence; rather, we show that despite their existence and their number, they should not lead to the conclusion that tax is exceptional because the concept of tax exceptionalism is analytically empty. It is useless.*

Introduction .....	665
I.Sources of Tax Exceptionalism .....	672
A. Early Exceptionalism .....	672
B. The Ascendency of Economists .....	674
C. Why Tax Feels Extraordinarily Different from Other Fields of Law .....	679
1. The Failure to Internalize Tax Norms .....	680
2. Cognitive Biases—Magnifying the Differences .....	682
3. The Pervasiveness of Encounters with the Tax System....	683
II.Is Tax Really Exceptional? .....	685
A. Tax and Social Policy .....	686
B. The Demand for Hyper-Clarity .....	689
1. The Normative Argument for Hyper-Clarity: Legitimacy .....	691
2. The Structural Argument for Hyper-Clarity: Complexity .....	693
3. The Case against Hyper-Clarity .....	696
C. Tax is Different .....	697
III.Different ≠ Exceptional .....	697
A. The Sorites Paradox .....	697
B. The Jamesian Pragmatist Reframing .....	700
IV.Is Tax Exceptionalism Useful? .....	703

A. Judicial Examples .....	703
B. Scholarly Examples .....	706
Conclusion: Tax is Law .....	715
Appendix A.....	718

## INTRODUCTION

Is tax exceptional?

Of course, tax is *different*. In terms of doctrine and animating values, tax is different from, say, contract law, tort law, property law, or criminal law, as well as from other regulatory law—environmental law, securities law, and so forth. But is tax *exceptional*?

Tax exceptionalism has been described as “the view that tax is unique”<sup>1</sup> and “the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.”<sup>2</sup> As former Treasury officials have put it: “Federal tax statutes and the legislative process that produces them differ from other legislation in such degree that the difference is tantamount to a difference in kind.”<sup>3</sup> Some scholars have gone so

1. Steve R. Johnson, *The Rise and Fall of Chevron in Tax: From the Early Days to King and Beyond*, 2015 PEPP. L. REV. 19, 20 (2015).

2. Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?* 63 DUKE L.J. 1897, 1901 (2014); *see also* Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Ruling*, 57 OHIO ST. L. REV. 637, 637 (1996); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow to be Tax Lawyers*, 13 VA. TAX REV. 517, 537 (1994) [hereinafter Caron, *Tax Myopia*].

3. Bradford L. Ferguson, Frederic W. Hickman & Donald C. Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 806 (1989). Among the ways in which the process for enacting tax legislation differs from other types of legislation is the role and importance of revenue estimates and distributional tables, which provide analysis of the expected effects of specific pieces of proposed tax legislation. *See* Michael Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 612 (1995) (providing examples of this “increased reliance on distributional tables and revenue estimates as outcome-determinative factors in tax legislation,” such as enacting “sizeable penalties on marriage . . . for high-income taxpayers in 1993 for the sole purpose of conforming to a specific combination of revenue and distributional targets”). Another major difference is the backlash that inevitably accompanies new tax laws. *See* Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 158 (1996). Because of the ways tax is perceived to be different from other fields of law, some commentators have advocated for a specific National Court of Tax Appeals. *See* Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1153 (1944).

far as to distinguish the “legal system” and “legal rules” from “tax.”<sup>4</sup>

But if that distinction is correct, then tax is not law at all. And as we have argued in previous scholarship, conceiving of tax as not law can have the insidious effect of stunting the growth of a robust tax jurisprudence by insulating tax from other fields of law,<sup>5</sup> disparaging the lessons that tax can learn from careful attention to those other fields,<sup>6</sup> undermining the legitimacy of tax administration,<sup>7</sup> and perhaps even contributing to the relative lack of diversity in the tax bar.<sup>8</sup> Tax exceptionalism is therefore a way of conceiving

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4. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994); Kyle Logue & Ronen Avraham, *Rediscovering Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 176–78 (2003); cf. Tsilly Dagan, *The Global Marketplace for Tax and Legal Rules*, 21 FLA. TAX REV. 148 (2017) (distinguishing between “tax” and “legal rules” in the title, thus suggesting that tax rules exist outside the sphere of legal rules, although the article itself treats tax rules as a type of legal rules).

5. We have developed this claim in a series of articles, beginning with *Defining Income*, 11 FLA. TAX REV. 295 (2011), in which we argued that exceptionalist thinking had resulted in wide acceptance of the unexamined assumption that all tax provisions are to be interpreted as rules. Abandoning tax exceptionalism opens tax to a variety of interpretive options, including the possibility of interpreting some tax concepts as standards. We posited that the concept of income should be interpreted as a standard and showed that doing so resolves puzzles that have bedeviled tax scholars for decades. We underscored that point in *It’s Not a Rule: A Better Way to Understand the Definition of Income*, 13 FLA. TAX REV. 101 (2012), in which we responded to one noted scholar’s attempts to resolve persistent puzzles in the tax law; we showed that simply moving to an interpretation of the concept of income as a standard had immediate explicatory power. We make the point more generally in *The Rule of Law as the Law of Standards: Interpreting the Internal Revenue Code*, 64 DUKE L.J. ONLINE 53 (2015), <http://dlj.law.duke.edu/2015/01/the-rule-of-law-as-a-law-of-standards-interpreting-the-internal-revenue-code/>.

6. See, e.g., Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183 (1996) (arguing principles of civil procedure should be used in tax procedure); cf. Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists and the role of the Legal Academy*, 83 CORNELL L. REV. 365, 367 (1998) (discussing the isolation of tax).

7. In *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 TAX LAW. 493 (2016), we showed that stubborn adherence to the concept of tax exceptionalism constrained tax administration and threatened the very legitimacy of the Internal Revenue Service (IRS) because it prevented it from being transparent about the reasons for some actions it took, including its reluctance to acknowledge that sometimes it was simply exercising enforcement discretion, like any other law enforcement agency.

8. See Alice G. Abreu & Richard K. Greenstein, *Rebranding Tax / Increasing Diversity*, 96 DENVER L. REV. 1 (2018). Because data is available that show members of racial and ethnic minorities are more likely to claim that they are interested in the law as a way of improving society or doing socially responsible work, it could be that the normative view of tax as a field

of tax or, more loosely, an attitude toward tax that places tax outside the realm of law.<sup>9</sup>

To be sure, many individuals experience tax as different from other fields of law. These include scholars,<sup>10</sup> as well as taxpayers.<sup>11</sup> But, again, the question is whether these differences add up to tax exceptionalism. In 2011, the Supreme Court appeared to kill the very idea of tax exceptionalism in *Mayo Foundation for Medical Education & Research v. United States*.<sup>12</sup> The *Mayo* Court refused “to carve out an approach to administrative review good for tax law only” and held that tax regulations should receive the same degree of judicial deference as other regulations.<sup>13</sup> The *Mayo* decision seemed to kill tax exceptionalism, and others that followed seemed to add nails to its coffin.<sup>14</sup> In

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concerned only with raising revenue (a view which, if accurate, would indeed make tax exceptional because it would be the only field of law concerned with the promotion of only one value) contributes to the relative lack of diversity in the tax bar.

9. Although tax exceptionalism is a concept used to characterize taxation generally, we will discuss examples specifically from the income tax because the charge that tax is exceptional has often had particular salience in that context. Other types of taxation—e.g., transfer taxes, employment taxes, and excise taxes—do not generate the kind of exceptionalist rhetoric typically used in connection with the income tax.

10. See *infra* Section IV.B.

11. See *infra* Section I.C.

12. 562 U.S. 44, 55 (2011). Commentary following *Mayo* reflected the view that the decision had killed tax exceptionalism. See, e.g., Jeremiah Coder, *Year in Review: Tax Law's Vanity Mirror Shattered*, 134 TAX NOTES 35 (2012); Gene Magidenko, Comment, *Tax Exceptionalism: Wanted Dead or Alive*, 45 U. MICH. J.L. REFORM CAVEAT 26 (2012); see also Roger Dorsey, *Mayo and the End of 'Tax Exceptionalism' in Judicial Deference*, 87 PRAC. TAX STRATEGIES 63 (2011).

13. Noting that “[*National Muffler* and *Chevron* . . . call for different analyses of an ambiguous statute,” *Mayo*, 562 U.S. at 54, the *Mayo* Court explicitly rejected the Court of Appeals’ reliance on *National Muffler*. *Mayo*, 562 U.S. at 57. *National Muffler* applied a “multifactor analysis,” *Mayo*, 562 U.S. at 53, to determine the reasonableness of a Treasury regulation. Instead, the *Mayo* Court applied “*Chevron* step two, under which we may not disturb an agency rule unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’” *Mayo*, 562 U.S. at 53 (citing *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242 (2004) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001))).

14. The terminal nature of the discourse on tax exceptionalism that followed *Mayo* was evident not only from the titles of the written commentary that attended it, see Dorsey, *supra* note 12, but also from the imagery that accompanied presentations at gatherings such as meetings of the Tax Section of the American Bar Association. See Appendix A for an example of the imagery. The cartoon reproduced there was the brainchild of now-Judge Ronald L. Buch of the U.S. Tax Court. It was shown as the last slide on a panel discussion held at the meeting of the Committee on Administrative Practice held at the Midyear Meeting of the Tax Section of the American Bar Association on January 21, 2011. The panel consisted of Gilbert S.

quick succession, the District Court for the District of Columbia applied the Administrative Procedure Act (APA) to Notices issued by the Internal Revenue Service (IRS),<sup>15</sup> and a unanimous Tax Court in *Altera Corporation & Subsidiaries v. Commissioner*<sup>16</sup> invalidated an important Treasury regulation for failure to satisfy the “reasoned decisionmaking” requirements of the APA.<sup>17</sup>

But now it seems premature to have thought tax exceptionalism was dead. Instead, tax exceptionalism is hot. A divided Ninth Circuit reversed the Tax Court in *Altera* but then shook the tax world when it withdrew its opinion,<sup>18</sup> only to restore relative calm by issuing a second divided opinion again reversing the unanimous Tax Court.<sup>19</sup> There is also a burgeoning scholarly literature that challenges the proposition that *Mayo* killed tax exceptionalism in all areas of the tax law, for all time.<sup>20</sup> In addition, the IRS itself has con-

Rothenberg, Acting Deputy Assistant Attorney General; Kathryn A. Zuba, Special Counsel, IRS Office of Chief Counsel; and Ronald L. Buch, then at Bingham McCutchen LLP, and was moderated by Christopher Rizek, partner at Caplin and Drysdale.

15. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 142–43 (D.D.C. 2012) (finding that an IRS Notice was legally binding and required notice-and-comment rulemaking), *aff'g* *Cohen v. United States*, 578 F.3d 1, 6–12 (D.C. Cir. 2009). Before being decided on the merits, the case bounced back and forth between the District Court and the Court of Appeals on procedural issues which also implicated the different treatment of tax: The application of the Anti-Injunction and Declaratory Judgment Acts as well as the doctrine of exhaustion of administrative remedies. In reaching its decision on the merits, the District Court began by observing that “[t]he parties agree that the Circuit’s opinion may suggest that defendant violated the APA by failing to comply with the required notice-and-comment procedures.” *In re Long-Distance*, 853 F. Supp. 2d at 140, *reh’g en banc granted in part, opinion vacated in part*, *Cohen v. United States*, 599 F.3d 652 (D.C. Cir. 2010), *on reh’g en banc rev’d in part*, 650 F.3d 717, 736 (D.C. Cir. 2011) (en banc), *and remanded*.

16. 145 T.C. 91 (2015), *reversed by* *Altera Corp. & Subsidiaries v. Comm’r*, Nos. 16-70496, 16-70497, 2018 WL 3542989 (9th Cir. July 24, 2018), *opinion withdrawn by Altera*, 898 F.3d 1266 (9th Cir. 2018) (withdrawing opinion to allow time for a reconstituted panel to reconsider the appeal; panel reconstituted due to the death of one of the judges who heard the oral argument but died before the decision was issued).

17. 145 T.C. at 133. Subsequent history is described *infra* note 18.

18. 2018 WL 3542989, *opinion withdrawn by Altera*, 898 F.3d at 1266.

19. *Id.*

20. *Id.* at n.4 (providing a comprehensive bibliography of scholarship resisting the notion that tax exceptionalism is dead); *see also* Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax’s Exceptional Regulatory Process*, 35 VA. TAX REV. 553 (2016) (arguing that forcing Treasury to follow the APA process with respect to tax guidance would be harmful to the tax development and administration of the tax law); James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, U. Mich. Pub. L. Res. Paper No. 391, U. Mich. L. & Econ. Res. Paper

tinued to hold on to tax exceptionalism, maintaining that most of its regulations are not subject to the notice-and-comment requirements of the APA<sup>21</sup> and that the APA's reasoned decisionmaking standard applies differently to tax.<sup>22</sup> And although some Treasury Regulations now undergo review by the Office of Information and Regulatory Affairs (OIRA), that review is limited in specific ways.<sup>23</sup> Far from dead, the concept of tax exceptionalism has gone from backdrop to focal point, which brings us back to the original question: Is tax exceptional?

The answer is no. An accumulation of differences between tax and other fields of law does not add up to tax exceptionalism. Put another way, an accumulation of differences does not produce a different kind of law or something that is not law at all. If we analogize each of those differences to

No. 14-005 1, 44 (Oct. 2014), available at <http://ssrn.com/abstract=2402047> or <http://dx.doi.org/10.2139/ssrn.2402047>; Daniel Hemel, *Bullock v. IRS And The Future Of Tax Administrative Law* (Part II), Aug. 21, 2019, [https://taxprof.typepad.com/taxprof\\_blog/2019/08/hemel-bullock-v-irs-and-the-future-of-tax-administrative-law-part-ii.html#more](https://taxprof.typepad.com/taxprof_blog/2019/08/hemel-bullock-v-irs-and-the-future-of-tax-administrative-law-part-ii.html#more); Zelenak, *supra* note 2, at 1900; Magidenko, *supra* note 12.

21. Internal Revenue Manual pt. 32.1.5.4.7.5.1(2) (Sept. 30, 2011) (“[M]ost IRS/Treasury regulations will be interpretative regulations because they fill gaps in legislation or have a prior existence in the law.”); *see also* Kristin Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1736–37 (2013); James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1070–73 (2015).

22. In 2016, the IRS Chief Counsel explained that when the courts hear tax rule challenges on the merits, they are expected to rule on the law, not to hold the IRS and Treasury “to requirements of fact-finding, scientific reviews, economic analysis and the like . . . . Yet all these things exist in the rest of the federal regulatory ecosystem.” John Herzfeld, *IRS Chief Counsel Warns Against Bids to Tie Up Rules*, BLOOMBERG BNA (June 27, 2016), [https://convergen.ceapi.bna.com/ui/content/articleStandalone/24506496000000620/372617?emailAddress=\\$\\$\\$\\$EMAILADDRESS\\$\\$\\$&reportGuid=E4D0BEAF-01A0-4EE6-9AAA-CE9FBF3F2C1F](https://convergen.ceapi.bna.com/ui/content/articleStandalone/24506496000000620/372617?emailAddress=$$$$EMAILADDRESS$$$&reportGuid=E4D0BEAF-01A0-4EE6-9AAA-CE9FBF3F2C1F); *see also* Tax Analysts, *IRS Chief Counsel Describes Administrative Pressures From Non-Tax Law*, TAX NOTES, June 10, 2011, 2011 TNT 113-70.

23. The Memorandum of Agreement between the Office of Information and Regulatory Affairs (OIRA) and Treasury provides that:

A tax regulatory action will be subject to review by OIRA under section 6 of Executive Order 12866 if it is likely to result in a rule that may:

(a) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (b) raise novel legal or policy issues, such as by prescribing a rule of conduct backed by an assessable payment; or (c) have an annual non-revenue effect on the economy of \$100 million or more, measured against a no-action baseline.

Brent J. McIntosh & Neomi Reo, *Memorandum of Agreement*, OIRA (Apr. 11, 2018), [https://www.whitehouse.gov/wp-content/uploads/2018/04/OIRA-TreasuryMOA\\_4.11.18.pdf](https://www.whitehouse.gov/wp-content/uploads/2018/04/OIRA-TreasuryMOA_4.11.18.pdf) (last visited Nov. 5, 2019).

a grain of sand, we might well conclude that collectively the grains constitute a heap of sand. The heap would have been created by adding one grain to another and would arguably constitute something fundamentally different. But this produces a well-known paradox. The Sorites Paradox states that, although with each addition of a grain we are doing nothing different in kind from what we did before, at some point something different in kind comes into being: a heap. The paradox flows from the fact that each act is the same as the others and no specific act creates a heap, but yet a heap of sand comes into being.<sup>24</sup>

We believe that pragmatism provides a way of resolving the Sorites Paradox.<sup>25</sup> For pragmatists the question of whether the accumulated grains of sand constitute a heap is a question about whether it is useful, at some point, to think about the accumulation of sand as a heap. Hence, there is no specific point at which the sand becomes a heap. Rather, if it becomes useful to treat an accumulation of sand as a heap, we will characterize the accumulation as a heap. For example, if A wants a sizable quantity of sand to complete her sandcastle, she can ask B to bring over a heap of sand. A's saying that she wants a heap of sand will allow B to identify what A wants; B will not just bring a couple of grains or even a handful of sand. Being able to identify a quantity of sand as a heap allows B to satisfy A's needs.<sup>26</sup> It is useful.

Hence, only if it becomes useful to treat the accumulated differences between tax and other fields of law as making tax different in kind, should tax be characterized as exceptional. The question, then, is whether imposing the exceptionalist characterization on the accumulation of differences provides anything that is useful. We believe it does not. Unlike A, who is able to convey useful information to B by asking for a heap of sand, neither Congress, nor courts, nor the IRS, nor scholars, nor tax practitioners, nor taxpayers, give or receive any useful information by characterizing tax as exceptional.<sup>27</sup> On the contrary, questions about the effect of the differences between tax and other fields of law can be fully answered by focusing on the specific issue and then deciding whether there is something about tax that requires that particular issue to be treated in a different way. In addition,

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24. For a more detailed discussion of the Sorites Paradox, see *infra* Section III.A.

25. For a discussion of the pragmatist framework for our analysis, see *infra* Section III.B.

26. What is important is not that asking for a heap is the only way that A can get the quantity of sand she wants, but that referring to an accumulation of grains as a heap is useful; it allows her to communicate information to B, which B can use in responding.

27. The tax law is replete with examples of the way in which the phenomenon captured by the Sorites Paradox and the application of the pragmatist concept of usefulness intersect. See *infra* Sections III.A & III.B.



characterizing tax as exceptional obfuscates the analysis; it impedes identification of the precise difference and examination of why the difference should lead to a different result.

The Supreme Court in *Mayo* famously refused to characterize tax as exceptional. Faced with the issue of whether Treasury regulations should be accorded *Chevron* deference, like regulations in other fields, the Court considered whether it had been presented with any justification for treating tax differently in that particular respect. Concluding that it had not, the Court applied *Chevron* to the Treasury regulation before it. Writing for the Court, Chief Justice Roberts explained, “We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”<sup>28</sup> Hence, in *Mayo* the Court explicitly considered the possibility of treating tax as exceptional but rejected it. And we believe the Court was correct in doing so because tax exceptionalism would have added nothing to the Court’s analysis. It would not have been useful. On the contrary, it would have gotten in the way, as it did in the Eighth Circuit’s analysis in the same case.<sup>29</sup>

In this Article we develop the claim that tax exceptionalism is never useful and that all analysis of tax issues should proceed in the deliberate, issue-by-issue manner the Court adopted in *Mayo*. Tax is different from other fields of law, but that does not make it exceptional. Indeed, we believe that the conflation of tax *difference* with tax *exceptionalism* has been affirmatively harmful to the tax system, and, as noted above, we have so argued in other scholarship.<sup>30</sup> But here our focus is different. In light of the persistence of the concept, which we believe is fueled by the salience of the differences between tax and other fields of law, we tackle the effect of those differences directly. We do not minimize them or deny their existence; rather, we show that despite their existence and their number they should not lead to the conclusion that tax is exceptional.

To develop our claim we begin by identifying the sources of the concept of tax exceptionalism in Part I. We challenge tax exceptionalism in Part II, where we examine in detail and then refute three important arguments for tax exceptionalism. In Part III, we invoke the Sorites Paradox to determine whether an accumulation of differences between tax and other fields of law suffices to render tax exceptional. We develop the pragmatist argument sketched earlier in this Introduction to show that the idea of tax exceptionalism does no useful work. In Part IV, we analyze two judicial opinions and five works of scholarship to make the case that treating tax simply as law

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28. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56 (2011).

29. See *infra* notes 162–71 and accompanying text.

30. See *supra* notes 5–9.

allows us to focus more profitably on ways in which tax is different and might require different treatment in specific circumstances.

## I. SOURCES OF TAX EXCEPTIONALISM

In this Part, we explore some historical, political, and sociological factors that may help account for the belief that tax is exceptional. In Section A, we trace exceptionalist thinking to the law reform efforts of the Roman Emperor Justinian and then jump 2,000 years forward to the origins of U.S. taxation.

Section B describes two complementary twentieth-century developments regarding how the income tax is conceived. The first is the emergence of the dogma that the only legitimate purpose of the income tax is the raising of revenue, rather than the regulation of behavior or the pursuit of substantive public policies. The second is the ascendancy of public finance economists as the most powerful influence on the evolution of that revenue raising dogma.

Section C focuses on how taxpayers experience the tax law. Here, we argue that the pervasiveness of taxpayers' encounters with the tax system, the reliance of that system on norms that are not generally internalized by taxpayers, and the influence of various cognitive biases work together to make the tax law *feel* very different from other fields of law—so much so that it makes tax feel exceptional.

### A. *Early Exceptionalism*

Tax exceptionalism is not only ubiquitous; it is also old. The belief that tax is fundamentally different from other fields of law has ancient roots. Tax was notably absent from the Emperor Justinian's *Corpus Juris Civilis*, in which he sought to compile all of the existing law so that it could be found in one place and be applied uniformly throughout the Empire, even though taxation was quite crucial to the Roman Empire.<sup>31</sup> The reason for the exclusion of taxation from the *Corpus Juris Civilis* was that tax was seen as the exclusive province of the Emperor.<sup>32</sup> In other words, Justinian did not want taxation to be either

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31. See Timothy G. Kearley, *The Creation and Transmission of Justinian's Novels*, 102 L. LIBR. J. 377, 378–79 (2010) (describing the process Justinian used to create the code including a first compilation in 529, the issuance of the “fifty decisions” resolving differences among classical jurists and adding new laws in 530 and 531, and the issuance of the second edition integrating the new legislation into the code and superseding the first edition in 534).

32. See R.I. Frank, *Ammianus on Roman Taxation*, 93 AM. J. PHIL. 70, 70 (1972) (describing the origins of taxation in the Roman Republic as a tool for Emperors for raising money for emergencies in wartime meant to be reimbursed later on); see also ARNOLD H. M. JONES, *THE ROMAN ECONOMY* 82–83 (P. A. Brunt ed. 1974) (commenting on the lack of documented

transparent or uniform, which is what he wanted for other fields and why he caused the compilation of other laws into the *Corpus Juris*. On the contrary, he wanted to retain the power to determine the level and manner of taxation differently for different populations within the empire<sup>33</sup> and to keep the exercise of the taxing power opaque. In this case, it was useful to characterize taxation as exceptional; Justinian banished tax from the realm of law that was known to the public, instead retaining it as an imperial prerogative.

By contrast, nearly 2,000 years later, on the other side of the Atlantic, those struggling to forge a country out of thirteen rebellious colonies sought to subordinate tax to the rule of law by constraining the taxing power of the government they were attempting to create. Therefore, they provided very limited taxing powers in the Articles of Confederation. When that proved nearly fatal to the viability of the emerging nation, they provided greater authority in the Constitution but circumscribed it by requiring apportionment and by vesting only the populist House of Representatives with authority to introduce tax legislation.<sup>34</sup>

The introduction of the federal income tax in the United States early in the twentieth century required a Constitutional amendment.<sup>35</sup> Amending the Constitution is an extraordinary event, but it is a legal event. The amendment was necessary because the Supreme Court had found an earlier income tax unconstitutional.<sup>36</sup> This created a legal problem, which required a legal solution. Law—the Constitution—was the solution. In other words, the birth of the income tax took place entirely within the realm of law. That the income tax required a Constitutional amendment makes it different from most other fields of law, but it does not make it exceptional. Characterizing tax as exceptional would add nothing to our knowledge of how the income tax came into being. It would not be useful.

The income tax differs from other fields of law in yet another way. As Professor Charlotte Crane has observed, the income tax “was perhaps the

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figures about the rate of agriculture taxation during most of the Roman Empire and the difficulty of estimating the relation of the tax to the yield of the land except for a couple of registrars from the cities of Antaeopolis and Ravenna which show rents amounting to staggering rates of over fifty percent of the gross yield of the land).

33. See Tony Weir, *Two Great Legislators*, 21 TUL. EUR. & CIV. L.F. 35, 38 n.17 (2006) (describing Justinian’s Novels, which did deal mostly with public and tax law but which were an unofficial collection of laws enacted after the codification was complete and were not fully enacted until Justinian’s death; rather, they were evidence of Justinian’s “obsession with controlling everything”).

34. U.S. CONST. art. I, § 2, cl. 1, 3; *id.* art. I, § 7.

35. See U.S. CONST. amend. XVI.

36. *Pollock v. Farmer’s Loan & Trust Co.*, 157 U.S. 429, 583 (1895) (holding the 1894 income tax law unconstitutional).

first tax ever born as a concept, not just as an administrative expedient aimed at raising revenue in the most politically congenial way possible,” and because that concept was grounded in economics—a science—it held out the promise of scientific rationality.<sup>37</sup> According to Professor Crane,

The income tax has also always been one under which, uniquely among taxes, the taxpayer’s liability is supposed to be determined by the objective application of a set of *well-defined rules*. It, in contrast to most other existing taxes, holds out the promise of being administered under the rule of law.<sup>38</sup>

We agree with Professor Crane that the income tax is perceived as having an “aura of rationality”<sup>39</sup> that has produced an “aspiration toward rational perfection,”<sup>40</sup> unmatched in other fields of law. As we explain below, this aspiration has generated an exceptionalist attitude toward the income tax. Indeed, the hallmark of contemporary tax exceptionalism is an extravagant demand for transparency and uniformity—for clarity, certainty, and predictability—which we will refer to as a demand for hyper-clarity. However, as we will argue, hyper-clarity does not actually characterize the income tax. No field of law, including the income tax, is defined only by the application of “well-defined rules.”

Hence, although the income tax differs from other fields of law in the degree to which it has produced an “aspiration toward rational perfection,” the aspiration is not matched by the reality. If tax were in fact hyper-clear then it would be exceptional; accordingly, it would not be law because no field of law is, or can be, limited by the “objective application of a well-defined set of rules.” Indeed, as we have shown in previous scholarship, tax is not a field defined exclusively by rules. Like other fields of law tax contains both rules and standards.<sup>41</sup>

### B. *The Ascendancy of Economists*

Central to the claim that tax is exceptional is the idea that tax is the only field of law which has as its sole legitimate purpose the raising of revenue, not the regulation of human behavior or the pursuit of other substantive social policies. In the specific case of the income tax, that purpose seems to put economics at the core of the field. As noted above, the income tax “was perhaps the first tax ever born as a concept, not just as an administrative

37. Charlotte Crane, *The Income Tax and the Burden of Perfection*, 100 NW. U. L. REV. 171, 176 (2006). The concept was ability to pay. *Id.* at 175.

38. *Id.* at 176–77 (emphasis added).

39. *Id.* at 177, 180.

40. *Id.* at 178.

41. See articles discussed in *supra* note 5.

expedient aimed at raising revenue in the most politically congenial way possible,”<sup>42</sup> and economists were the ones who developed and then championed the concept.<sup>43</sup> Indeed, the heart of the income tax law—the definition of income—is founded on the definition propounded by a duo of economists: Robert Haig and Henry Simons.<sup>44</sup>

Of course, before the ideas of the economists could become legal obligations, they had to be embodied in law. Professor Ajay Mehrota has provided a lucid account of both the role of economists in the development of the ideas that comprised the foundation of the income tax and the ways in which economists interacted with legislators and with the legal system to craft the early twentieth century income tax.<sup>45</sup>

The early tax acts were minimalist, at least by comparison to the highly articulated provisions that are the hallmark of contemporary tax legislation. Calculation of the tax base began with “gross income” from which a few items such as “gifts” were excluded, and other items such as “ordinary and necessary,” “expenses” of “carrying on,” a “trade or business” were deducted, but none of those terms were defined. Hence, the job of defining these terms fell initially on the tax administrators and eventually on the courts. Judicial involvement meant that the process of defining key terms in tax became a quintessentially legal process. Iconic judicial figures like Oliver Wendell Holmes and Benjamin Cardozo wrote significant tax opinions in which they tried to provide the necessary definitions.<sup>46</sup> Those opinions continue to be cited today.

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42. Crane, *supra* note 37, at 178.

43. As Professor Crane explains, “Economists in the late nineteenth century saw in the income tax a refreshingly rational and coherent set of criteria for imposing in tax burdens.” *Id.* at 180. For a historical explanation of the development of the income tax and the role of economists in it, see Ajay K. Mehrota, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLAL. REV. 1793 (2005).

44. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938). This is sometimes referred to as the Schanz-Haig-Simons definition but is most often referred to as just the Haig-Simons definition, perhaps because of the substantial interval between the publication of Schanz’s work and Haig’s. See Carl S. Shoup, *The Schanz Concept of Income and the United States Federal Income Tax*, 42 FINANZARCHIV/PUBLIC FINANCE ANALYSIS 433 (1984); see also Crane, *supra* note 37, at 182; Mehrota, *supra* note 43, at 1861–62 (discussing the depth of influence of Haig’s work).

45. See Mehrota, *supra* note 43.

46. See, e.g., *Gregory v. Helvering*, 293 U.S. 465, 468–69 (1935) (opinion written by Justice Sutherland holding that “a transfer of assets by one corporation to another” must be made in “relation to the business” to be considered a taxable event); *Welch v. Helvering*, 290 U.S. 111, 114 (1933) (opinion written by Judge Cardozo defining “ordinary” expenses not as those

As the income tax evolved from a class tax to a mass tax, it also joined the academy. When Erwin Griswold compiled the first casebook on federal income taxation, to be followed by a competing volume from Stanley Surrey and William Warren, tax entered the roster of courses taught at law schools nationwide.<sup>47</sup> Scholarly debate flourished and the American Law Institute (ALI) made substantial contributions to the re-codification effort that began at the conclusion of World War II and resulted in the Internal Revenue Code of 1954.

In those early days the income tax was not regarded as exceptional. It was analyzed like other fields of law. Indeed, Professors Surrey and Warren, writing as Reporters for the ALI project, explained:

In the income tax, as in other complex legislation, the need is for a standard which will project our present aims into the future and serve as the vehicle for solving the unforeseen cases as they arise. The legislative function is not denied or thwarted when other branches of the Government are relied upon by Congress to perform substantial tasks in the application of statutes. Administration and judicial interpretation are necessary parts of the overall process of legislation. The income tax is no exception.<sup>48</sup>

Surrey and Warren thus suggested that tax legislation was to be treated like any other kind of complex legislation, using the interpretive tools generally available to administrators and judges, and that is precisely how the early courts treated tax law. Those courts did not turn to or develop precise and technical rules just for tax. Rather, they drew on their own experience and on other fields of law. For example, Justice Holmes invoked the fruit-and-tree metaphor to explain assignment of income in *Lucas v. Earl*<sup>49</sup> and Justice Cardozo famously looked to “life in all its fullness”<sup>50</sup> to determine

that are “habitual or normal” but as those which are “common and accepted”); *Lucas v. Earl*, 281 U.S. 111, 114–15 (1930) (opinion written by Justice Holmes holding 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 skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew).

47. See ERWIN N. GRISWOLD, *CASES AND MATERIALS ON FEDERAL TAXATION* (1st ed. 1940); STANLEY S. SURREY & WILLIAM C. WARREN, *FEDERAL INCOME TAXATION: CASES AND MATERIALS* (1st ed. 1953).

48. Stanley S. Surrey & William C. Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions, Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 HARV. L. REV. 761, 775 (1953).

49. 281 U.S. at 111, 115 (1930). See *supra* text accompanying note 46.

50. Because it is difficult to determine what constitutes “necessary expenses,” Justice Cardozo explained that such a determination must be based on “life in all its fullness” or, in other words, the specific facts of a case. *Welch*, 290 U.S. at 113–15.

what was an ordinary expense.<sup>51</sup> Somewhat more recently, Justice Brennan defined a gift as a transfer that proceeds from the “detached and disinterested” generosity of the donor, determined by reference to the “mainsprings of human conduct.”<sup>52</sup>

But despite the role of lawyers and legal process in mapping out the contours of the tax law, its origins in public finance economics were never far behind. For example, scholars engaged in a public and lengthy debate on the desirability of establishing a comprehensive tax base (CTB).<sup>53</sup> This debate revealed the tension between the advocates of the kind of evolutionary, organic approach typical of law development generally (e.g., Boris Bittker),<sup>54</sup> and those who craved more pointed, technical definitions consonant with the precision demanded by the science of economics (e.g., Charles Galvin).<sup>55</sup>

Similarly, although in many respects Surrey advocated the application of conventional legal analysis to tax,<sup>56</sup> he seems to have taken a page out of the economist’s playbook when, together with Paul McDaniel, he developed the concept of tax expenditures.<sup>57</sup> Surrey and McDaniel pointed out that there were two different types of provisions in the tax law. One type was intended to promote the raising of revenue—the principal and only germane objective of a system of taxation derived from principles of public finance economics.

51. Justice Cardozo explained that “language is to be read in its natural and common meaning” to determine the meaning of the word ordinary. *Id.* at 114 (citing *Old Colony R.R. Co. v. Comm’r*, 284 U.S. 552, 560 (1932); *Woolford Realty Co. v. Rose*, 286 U.S. 319, 323 (1932)).

52. *Comm’r v. Duberstein*, 363 U.S. 278, 285, 289 (1960).

53. “The comprehensive income tax base is an attempt to achieve fairness by forcing taxable income to match economic [income, and the] purposes of this equivalence are: (1) to compel universal tax liability, and (2) to ensure that those who earn the same amount of income pay the same amount of tax.” Beverly Moran, *Stargazing: The Alternative Minimum Tax for Individuals and Future Tax Reform*, 69 OR. L. REV. 223, 241–42 (1990).

54. Bittker argued that “a systematic and rigorous application of the ‘no preference’ or [comprehensive tax base (CTB)] [] approach would require many more sweeping changes in the existing tax structure than have been acknowledged,” and accused advocates of a CTB of “hop[ing] for a simplified tax structure in a complex society.” Boris I. Bittker, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 934 (1967).

55. Galvin critiqued Bittker’s position, pointing to the Canadian Taxation Commission Report to conclude that a CTB system is workable and equitable; the Commission Report concluded “that taxes should be allocated according to the changes in the economic power of individuals and families.” Charles O. Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA’s CSTR*, 81 HARV. L. REV. 1016, 1029 (1968) (citing CANADA, REPORT OF THE ROYAL COMMISSION ON TAXATION, VOL. 1, 9–10 (1966)).

56. See Surrey & Warren, *supra* note 48.

57. See Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 679 (1976).

The other type was intended to promote social or economic objectives unconnected with the raising of revenue.<sup>58</sup>

In developing, coining, and ultimately enshrining the concept of tax expenditures in the legislative process during his tenure as Assistant Treasury Secretary for Tax Policy, Surrey succeeded in explicitly divorcing revenue raising objectives from everything else (e.g., the promotion of home ownership or capital investment).<sup>59</sup> Accordingly, provisions aimed directly at raising revenue were seen as properly within the ambit of tax policy and embodying the values of public finance economics, which include equity, efficiency, and administrability. But provisions directed at promoting some objective other than raising revenue—tax expenditures—were relegated to the status of “other,” specifically to the category of spending rather than taxing.<sup>60</sup>

This bifurcation of tax into “proper” revenue raising provisions and “other” social or economic provisions, contributes to the sense that tax is exceptional. It creates a normative vision of tax as a field of law concerned exclusively with a single value—raising revenue—and unconcerned with social values. If either of those things were true, tax would indeed be exceptional, for no other field of law limits itself to the pursuit of a single value or rejects the promotion of social values. But tax is not exceptional; as we will show below, tax is necessarily concerned with multiple, heterogeneous social values, just as other fields of law are.<sup>61</sup>

The apparently monogamous marriage of economics and tax-as-revenue raising, which leaves provisions that carry out other values outside the realm of tax, has only strengthened in the decades since Surrey and McDaniel developed the concept of tax expenditures. As former IRS Commissioner Larry Gibbs has observed, the role of economists in the legislative process

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58. As Surrey and McDaniel explained, the requirement that government produce an annual tax expenditure budget “represents the most concrete recognition taken by any country that tax subsidies constitute a form of government spending and thus are essentially linked to the methods of government spending traditionally covered in budget documents.” *Id.* at 679.

59. The Congressional Budget Act of 1974, Act of July 12, 1974 Pub. L. No. 93-344, § 601(e), 88 Stat. 297 (1974) (requiring the promulgation of an annual Tax Expenditure Budget).

60. *But see* Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3, 23–24 (2006) (arguing that the basic goals of taxation include “steer[ing] private sector activity in the directions desired by the government” and that tax expenditures are an effective tool for accomplishing this). In other work we have suggested a way in which the conceptual bifurcation of the tax law, which follows from the concept of tax expenditures, may contribute to the relative lack of diversity in the tax bar. *See* Abreu & Greenstein, *supra* note 8.

61. We first explored this concept in *Defining Income* and have continued to develop it in subsequent work. *See* Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 WASH. U. JURIS. REV. 1, 4–5 (2015); Abreu & Greenstein, *supra* note 5.



expanded over the 1970s and 1980s. Both Treasury and the Joint Committee on Taxation developed staffs of economists who generated revenue estimates and distributional analyses on proposed legislation.<sup>62</sup> And the importance of those estimates not only grew but sometimes even became determinative of the prospects for enactment.<sup>63</sup> In addition, the importance of economic theory continued to grow. This resulted from the prominence of work published by academic economists and from the increasing importance of the work produced by think tanks such as the Tax Policy Center, which are staffed principally by economists.<sup>64</sup> Indeed, one legal scholar has worried that “legal scholars are gradually losing influence to economists and other social scientists, and only occasionally are [tax] lawyers’ insights of interest to nontax authors.”<sup>65</sup> In short, he feared that tax legal scholars had become little more than “second-tier economists.”<sup>66</sup>

### C. *Why Tax Feels Extraordinarily Different from Other Fields of Law*

In addressing the sources of tax exceptionalism, we focused in Section A on its historical antecedents and in Section B on its roots in public finance economics. In this section we focus on the experiential sources of tax exceptionalism, i.e., the experiences of taxpayers that make the tax law feel radically different from other fields of law.<sup>67</sup>

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62. George K. Yin, *How Codification of the Tax Law and the Emergence of the Staff of the Joint Committee on Taxation*, 71 TAX L. REV. 723, 725–28 (detailing the history of the Joint Committee); see also WILLIAM E. SIMON, DEP’T OF THE TREASURY, FOREWORD TO BLUEPRINTS FOR BASIC TAX REFORM (1977) (citing the work of Deputy Assistant Secretary of the Treasury David Bradford in producing the study that led to the publication of this piece).

63. See Yin, *supra* note 62, at 778 (concluding that “[r]evenue estimating, described as largely an ‘afterthought’ in 1972, has since become much more sophisticated and important.”).

64. See *About the Tax Policy Center*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/about> (last visited Nov. 5, 2019). Since the 1990’s the output of organizations such as the Tax Policy Center has increased dramatically. For example, in 1996, the Tax Policy Center published only nine research reports, while, in 2016, that institution published sixty-four research papers. *Research & Commentary*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/research-commentary> (last visited Nov. 5, 2018).

65. Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 367 (1998).

66. *Id.* at 435. Although Professor Livingston’s concern was more broadly about the role of legal scholarship in the face of the increasing influence of movements such as law and economics, he used tax as the focus of his discussion because he thought that the “isolation of the tax field, and the long history of lawyer-economist cooperation in it, make it . . . an odd prism through which to examine the prospects for contemporary legal scholarship.” *Id.* at 367.

67. See Magidenko, *supra* note 12, at 29 (observing that “the general sense is that the tax laws somehow feel ‘different’”).

Only the tax law seems to require a transfer of wealth from the private sector to the government in the absence of wrongdoing or the voluntary assumption of a pecuniary obligation. However, that apparent uniqueness results only from the salience of the transfer. As Professor Joshua D. Rosenberg has pointed out, tax law is not actually unique in this respect: “by proscribing and penalizing certain behaviors, every law ‘takes,’ both from individuals who would otherwise engage in those behaviors, and from those who continue to engage in those behaviors and must then pay the price.”<sup>68</sup> For example, the criminal law and the law of torts can both be seen as not only providing protection from certain behavior (e.g., stealing or acting negligently) but also as constraining that behavior—detering someone from either stealing or behaving negligently. By constraining the behavior that those fields of law address, criminal law and the law of torts take from those who would or do engage in such behavior.

Professor Theodore P. Seto has pointed out that a similar analysis reveals that the law of property “deprives humans of their natural liberty. Taxation and the resulting investment in capital then permits civilization to make payment for this deprivation and justify the resulting forced labor. This is civilization’s grand bargain.”<sup>69</sup> In this view, the difference between systems of tax and property is not that one system takes but the other does not—it is in the salience of the taking.

In addition to the salience of the taking function of tax there are at least three explanations for the persistence of tax exceptionalism. These are first, that taxpayers have not internalized the sharing norms that underlie the tax law; second, that cognitive biases predispose taxpayers to magnify the significance of the constraining effects of the tax law; and third, that the pervasiveness of taxpayers’ encounters with the tax law further magnifies the feeling of difference. We address each of these reasons in turn.

### 1. *The Failure to Internalize Tax Norms*

One important difference between tax and many (although certainly not all) fields of law is that the general public has not internalized the general norms that define income taxation. Individuals routinely conform their behavior to the norms of contract law, tort law, property law, and criminal law, scarcely noticing that they are doing so; conforming seems consistent with what they want to do anyway. They do not distinguish between what they

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68. Rosenberg, *supra* note 3, at 162–63.

69. See Theodore P. Seto, *A Forced Labor Theory of Property and Taxation*, in PHILOSOPHICAL FOUNDATIONS OF TAX LAW 193, 195–96 (Monica Bhandari ed., 1st ed. 2017) (inspired by a presentation by Professor Neil Buchanan); Neil Buchanan, *National Tax Association Annual Meeting: Forced Labor, and Taxation as Theft: Debunking Some Confused Philosophical Attacks on the Income Tax*, Presentation at the Nat’l Tax Ass’n Annual Conference on Taxation (Nov. 15, 2014).

want to do and what the law requires because the two coincide. Hence, individuals generally abide by contractual obligations, try to behave non-negligently, respect property rights, and avoid committing crimes because they think that is what they ought to do, not because they believe it is what they are legally compelled to do.

For example, we suspect that most people would say that they refrain from killing others because it is morally wrong to kill, not just or even primarily because it is illegal. Similarly, we suspect that most people refrain from taking other people's property, or behaving negligently, not because theft and negligence could result in imprisonment or pecuniary liability but because they believe theft and negligence are morally wrong.<sup>70</sup> Generally, behavior that conforms to the dictates of many areas of law does not usually feel coerced by law. Most people have internalized the values of those fields of law and therefore do not perceive the law as an external force compelling performance. By contrast, tax law feels external and compliance with the tax law feels coerced.

Specifically, there are two sharing norms fundamental to taxation, neither of which is generally internalized.<sup>71</sup> One is the sharing of resources; the other is the sharing of private information. Because taxpayers have not internalized these norms, taxation feels like a direct assault; when the tax system demands that taxpayers share both their pecuniary resources and their private information, the demands feel external and coercive. Even if people would find some way of sharing resources with others and information with the government in the absence of the tax law, such sharing would not take the regimented, formalized form that compliance with the tax law imposes, and it would likely not require divulging substantial amounts of private information to the government. The tax law's taking of both money and privacy therefore feels extraordinarily coercive.

The tax law is not the only field of law that feels imposed from outside. Environmental law, occupational health and safety law, and other forms of regulatory law that compel behavior are also perceived by many as coercive. Nevertheless, the tax law is the only one that is of broad, nearly universal application to individuals who are simply going about the business of working to support themselves and perhaps their loved ones. And even though the difference between tax and regulatory fields like environmental law may be

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70. We are speaking here of a substantial part of ordinary behavior by individuals; we recognize that different motivations might animate corporate or profit-driven behavior.

71. We have previously argued that, unlike in most other fields of law, these norms that define income taxation have not generally been internalized by taxpayers. For further discussion of this topic, see Alice G. Abreu & Richard K. Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281, 1303 (2017).

one of degree and not of kind, the degree of difference is of such magnitude in terms of breadth and depth of application that the burden of the tax law feels extraordinarily coercive.

Moreover, among the core social values most members of our society have not only embraced but internalized are the values of private ownership of property and protection of personal information. Income taxation is a direct external assault on those values. Thus, not only have individuals not internalized the two sharing norms that underlie tax (sharing of resources and information), but those sharing norms also conflict with the strongly internalized norms of private property and privacy.

## 2. *Cognitive Biases—Magnifying the Differences*

The salience of the coercive aspect of tax is exacerbated by various cognitive biases. For example, the cognitive bias of loss aversion aggravates the salience of the taking effected by the income tax because it causes individuals to perceive giving up something already possessed as worse than never having had it, even though the two things are economically equivalent.<sup>72</sup>

In addition, the payment of taxes is “removed from the actual *behavior* that generates the tax”<sup>73</sup> (e.g., performing work or realizing gain). That is, individuals perceive the earning of money as a distinct event that makes the amount earned theirs, and they perceive the imposition of a tax as a subsequent event that takes what was theirs.<sup>74</sup> As Professor Rosenberg observes, “This behavioral, or functional, separation leads us to perceive tax payments as punishment for having succeeded financially.”<sup>75</sup>

This separation creates dissonance between the taxing and the earning. Psychological research suggests that such dissonance produces substantial adaptive distortions and creates substantial antagonism towards the perceived punishment.<sup>76</sup> This dissonance further reinforces the perception that tax collection, in contrast to the operation of other fields of law, is simply a “taking” of what is “really” the property of the taxpayer. That perception, in turn, contributes to the belief that tax is exceptional.

We acknowledge that the coercion of tax law is different from the coercion of other fields of law. Tax coerces by requiring the taxpayer to disgorge wealth over which the taxpayer has exercised dominion. It therefore constrains the

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72. See Rosenberg, *supra* note 3, at 173–75 (citations omitted).

73. *Id.* at 183 (emphasis in original).

74. *Id.* at 183–85.

75. *Id.* at 183.

76. *Id.* at n.67.

freedom to retain wealth. Contract law constrains the freedom to break promises; criminal law, the freedom to, say, kill our enemies; tort law, the freedom to act in ways that unreasonably harm others; and so forth. So, tax is like other law in that it also constrains. All law constrains; each field of law constrains in particular ways, to serve particular goals. While it is true that the constraints imposed by the tax law are different from those imposed by the criminal law or by tort law, it is also true that the constraints imposed by the criminal law differ from those imposed by the law of torts, or contract. We have tried to show that if taxpayers perceive the constraints of the tax law as *fundamentally* different—as exceptional—that perception is grounded in human psychology, not in the reality of law or its effects.

### 3. *The Pervasiveness of Encounters with the Tax System*

The impact of taxpayers' failure to internalize the tax system's underlying norms and of the cognitive biases that magnify the effect of these failures is aggravated by the pervasiveness of taxpayers' encounters with the tax system. Neither paying taxes nor filing tax returns is an isolated or infrequent event. The burden of the tax law is repetitive and never-ending. Income tax returns must be filed every year in which income exceeds a relatively small threshold, and for the financially fortunate may extend to the period after death, if a federal estate tax return must be filed.

As noted earlier, the income tax was “born as a concept, not just as an administrative expedient aimed at raising revenue in the most politically congenial way possible.”<sup>77</sup> The concept is ability to pay.<sup>78</sup> In our tax system, which privileges equity over administrability in this context, determining ability to pay necessitates consideration of many factors within the personal knowledge of the taxpayer. These must, in turn, be catalogued and communicated to the taxing authorities. The result is a system that is necessarily intrusive; requires repetitive, involuntary engagement with the government; and therefore affects taxpayers in ways different from any other field of law.

Some features of taxpayers' encounters with tax law suggest a common-sense account for why tax is experienced as being so different from other fields of law. Those features include: the time-consuming obligation to file annual returns, which compels regular interaction between taxpayers and the government; the imposition of a liability that requires an explicit transfer from the private to the public sector; the expression of the liability in dollars, which are expressed in numbers, the determination of which would seem to

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77. Crane, *supra* note 37, at 176.

78. *See id.* at 175.

require mathematical precision;<sup>79</sup> the contemporary pervasiveness of automation in tax administration, which requires operations that can be performed by a machine, automatically and uniformly;<sup>80</sup> the significant involvement of non-legally trained professionals (accountants) and even non-professionals (enrolled agents and unregulated tax return preparers) in the administration of the tax law, which results in uncertainty over how much of tax practice is the practice of law (rather than accounting or something else) and hence how much of tax is law;<sup>81</sup> the proliferation of information reporting by third parties, which compels disclosure of private transactions to the government without explicit taxpayer consent; the invasion of personal and fiscal privacy perpetrated by the annual reporting requirement;<sup>82</sup> the much-reviled girth and complexity of the Code and the related regulations; and the prominence of tax in political discourse. Furthermore, every taxpayer's contact (or sometimes even absence of contact) with the tax system is subject to review and scrutiny by the most dreaded of all federal agencies: the IRS.

In short, tax law is complex, intrusive, and pervasive. Taxpayers are reminded of that with metronomic regularity, enhancing the salience of contrasts between tax and other fields of law. It is undeniable that for a large segment of the public, encounters with the income tax system are dramatically unlike their encounters with other fields of law. The alien quality of some of the tax law's most important underlying norms (sharing of wealth and private information), the magnifying effect of the cognitive biases triggered by encounters with the tax system, and the reinforcing effect of the pervasiveness of the tax system, combine to produce the perception of tax as exceptional.

The intensity of this experience can lead to reification, to treating the accumulation of differences as a difference in kind. But that is a mistake. Tax

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79. See Graetz, *supra* note 3, at 678–79.

80. Eric A. San Juan, *From Tax Collector to Fiscal Automaton: Demographic History of Federal Income Tax Administration, 1913–2011*, 2 NAT'L TAXPAYER ADVOC. ANN. REP. TO CONGRESS 1, 4–5 (2011), [https://taxpayeradvocate.irs.gov/userfiles/file/IRS%20TAS%20ARC%202011\\_VOL%202.pdf](https://taxpayeradvocate.irs.gov/userfiles/file/IRS%20TAS%20ARC%202011_VOL%202.pdf).

81. The line between the practice of tax law and accounting featured prominently in the debate regarding the ethical ramifications of multidisciplinary practice at the end of the twentieth century. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 110–12 (2000); John H. Matheson & Peter D. Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L.J. 577, 580–82 (2001). Concern that accountants were often performing the same sort of work as lawyers regarding the determination or reporting of a client's tax liability led to the enactment of I.R.C. § 7525, extending the common law attorney-client privilege to all “federally authorized tax practitioner[s].” *Id.*

82. Adam B. Thimmesch, *Tax Privacy*, 90 TEMP. L. REV. 375, 382–85 (2018).

is different from other fields of law in many ways, but it does not follow that tax is exceptional. Determining that requires a different inquiry, to which we now turn. In the next Part, we proffer and defend the thesis that tax is not really exceptional.

## II. IS TAX REALLY EXCEPTIONAL?

The belief in tax exceptionalism may simply be a byproduct of vanity. Professor Lawrence Zelenak has suggested that tax exceptionalism is an illusion borne of a desire of tax professionals and scholars to feel special by claiming an exalted status.<sup>83</sup> In this view of the matter, tax exceptionalism is nothing more than one instantiation of the more general phenomenon of “subject-matter exceptionalism.”<sup>84</sup> To be sure, a review of legal scholarship finds similar claims in other areas of law: patent exceptionalism, copyright exceptionalism, immigration law exceptionalism, first amendment exceptionalism, antitrust exceptionalism, bankruptcy exceptionalism, and property exceptionalism, among others. So, tax exceptionalism might actually reflect one way that tax is just like other areas of law. Or as Professor Zelenak has put it: “[T]here is nothing exceptional about tax exceptionalism.”<sup>85</sup> Stated somewhat differently: All fields of law are different from one another,<sup>86</sup> but specialists tend to hyper-inflate the significance of the difference between their field and other fields and consequently infer that theirs is different in kind from the others.

However, we think there is more to tax exceptionalism than the desire, shared by other professionals, to feel special or especially smart. That more is the implicit claim that tax law’s exceptionalism requires that tax law be immune from the jurisprudential techniques that apply in other areas of the law—that is, that tax is objectively exceptional. That implicit claim must be dissected, analyzed, and exposed as a myth; it has impeded the development of a robust jurisprudence of tax and threatens the very legitimacy of the tax law and the agency that administers it. In this Part we describe three serious arguments for tax exceptionalism that demand attention.<sup>87</sup>

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83. See Zelenak, *supra* note 2, at 1910–13.

84. See *id.*

85. See *id.* at 1901.

86. The differences derive from the fact that every field of law is constituted by a unique configuration of social goals and values. See Greenstein, *supra* note 61, at 4–5.

87. Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 TAX LAW. 493, 501 (2016) (explaining our concern that amongst the reasons that we think it is important to refute tax exceptionalism is our belief that its powerful influence on tax scholarship, administration, and adjudication threatens the legitimacy of the tax law and of the agency that administers it).

The first of these is an argument about tax and social policy. More precisely, it is the position noted in Part II.B that tax—uniquely among fields of law—should pursue *no* social policies. Rather, it should pursue exclusively the social policy-empty goal of raising revenue. The second argument is that the moral status of income taxation supports an unusual attitude toward obedience. The third argument is that the daunting complexity of the Code requires that it be understood as a compendium of rules, strictly interpreted according to their plain meaning, unlike other fields of law, which consist of both rules and standards.

Each of these arguments seems to point to the same conclusion: That tax law should—indeed, must—be treated differently from all other areas of law. The first argument insists that tax, alone among fields of law, should ideally avoid social policy objectives. The second and third arguments together support a demand for hyper-clarity in the tax law. In this Part we consider and counter these arguments for tax exceptionalism.

### A. *Tax and Social Policy*

One of the strongest arguments for tax exceptionalism is the claim that the only proper goal of tax law is raising revenue and that tax law should not pursue substantive social policies. If this claim is true, then tax is fundamentally different from all other fields of law because law generally regulates human behavior or otherwise pursues substantive social policies. But this claim is incorrect, and a thought experiment reveals why.

The thought experiment begins by accepting the premise that the ideal tax system should be concerned exclusively with raising revenue. That is, the ideal tax system should not be concerned with pursuing substantive social policies like promoting home ownership or taking care of the poor or facilitating the development of clean energy. What would such an ideal tax system look like?

To design the ideal tax system, we would have to answer a number of specific questions:

1. **What will the system tax?** Keeping our attention on the goal of raising revenue will not answer that question because we can raise revenue by taxing different things. To answer the question, we must make a choice among competing social policies. For example, if we want to design the system around taxpayers' ability to pay, we might choose to tax income. On the other hand, if we wish to promote the availability of resources for public use, we might choose to tax consumption. And if we decide to do both, we would produce a hybrid system, which is precisely what we have. Our point is not to pass judgment on the merits of hybridity



versus purity but rather to point out that keeping our eye fixed on the goal of raising revenue does not determine whether we choose to tax income, consumption, or a mixture of the two. Decisions of social policy determine that.

2. **Who will be taxed?** Decades ago, Boris Bittker demonstrated that it is impossible to treat all individuals alike and all married couples alike and still have a progressive tax system.<sup>88</sup> If we cannot do all three simultaneously, we must choose among them in order to design the tax system.<sup>89</sup> But keeping our eye fixed on the goal of raising revenue does not determine that choice. Instead, we must decide which social policy goal or goals we are willing to sacrifice. The current system favors progressivity over the equal taxation of individuals and married couples, creating the marriage penalties and marriage bonuses so familiar to tax scholars, as well as to many taxpayers. But the point is that other choices are possible and making them requires deciding among competing social policies.
3. **What will the rate structure look like?** Vertical equity means taxing based on the ability to pay, but that does not necessarily mean that rate of taxation should increase as ability to pay increases; instead, we could tax in direct proportion to ability to pay or even regressively, increasing tax burdens as ability to pay decreases. Keeping our eye fixed on the goal of raising revenue does not determine that choice. Policy considerations not directly related to raising revenue come into play, e.g., promoting investment or insuring a minimum level of subsistence. More generally, the choice of rate structure is a choice among different competing visions of what a just society looks like.
4. **Will the ideal tax system reflect horizontal equity?** Answering that question again requires consideration of what a just society looks like. Suppose the answer is yes. That will mean that similarly situated taxpayers should be similarly taxed. But taxing similarly situated taxpayers similarly requires a determination of what it means for two taxpayers to be similar. If income is the tax base, is a working taxpayer who receives \$100 of wages like an impoverished taxpayer who receives \$100 of welfare benefits? If consumption is the tax base, is a taxpayer who consumes \$100 of food like one who consumes \$100 of manicures? Furthermore, is

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88. See Bittker, *supra* note 54.

89. See Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1725 (2014) (“Congress seems doomed to choose between disfavoring single individuals or married couples in determining the income tax rate brackets and the standard deduction.”).

a taxpayer who consumes \$100 of vegetables like one who consumes \$100 of sugary drinks? Keeping our eye fixed on the goal of raising revenue does not answer questions like these. Rather, the answers depend on choices among different social policies.

And once those decisions are made, we are not done. Even if we decide to treat wages like welfare benefits (or not) or to treat food like manicures (or not), we still need to decide what counts as wages, welfare, food, and manicures. How do we decide any of these things? Fixing our attention on the goal of raising revenue will not answer these questions.

This thought experiment was designed to test a powerful argument for tax exceptionalism: That tax should be concerned solely with raising revenue. The conclusion should be apparent: It is not that the goal of raising revenue is irrelevant to the design of the tax system; it is that there are many, many ways of raising revenue. If raising revenue is the goal, those who design the tax system must decide how to achieve it. We began our thought experiment by assuming that tax system designers were concerned only with raising revenue and not with pursuing substantive social policies (promoting home ownership, taking care of the poor, facilitating the development of clean energy, and the like). But we have shown that it is impossible to pursue exclusively the goal of raising revenue. Achieving this goal requires choices among competing social policies, among competing social values, or among competing visions of a just society. If that is true, then raising revenue cannot be disengaged from those policies, values, and visions.<sup>90</sup>

As we first suggested in Part II, Professor Surrey's development of the concept of tax expenditures had the effect of conceptually dividing the tax law into taxing provisions and spending provisions.<sup>91</sup> While the concept of tax expenditures has proven analytically useful, if not uncontroversial, we believe it also created a path to the segregation of social values as features of spending, and by extension, not of taxing. It is this segregation that we attack, for it has contributed to the notion that taxation is only about raising revenue, and because of that, tax law is objectively exceptional. But as we have shown, tax can never be just about raising revenue. Whether tax expenditures are, or are not, a proper part of the tax system, social values underlie provisions that would not be classified as tax expenditures.

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90. See Greenstein, *supra* note 61, at 30 (“[L]aw is social values all the way down.”).

91. Perhaps because Congress itself separates those two functions, lodging taxing in the Ways and Means Committee and spending in the Appropriations Committee, Professor Surrey's insight resonated with many and was enshrined in legislation that requires the annual production of the Tax Expenditure Budget. Joint Committee on Taxation, *A Reconsideration of Tax Expenditure Analysis*, JCX-37-08, at 2–3 (2008) (citing STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* 6 (1973)).

The Supreme Court agrees. In *National Federation Independent Business v. Sebelius*,<sup>92</sup> the Court struck a crucial blow for the notion that tax is concerned with more than raising revenue. The issue in *Sebelius* was whether the penalty assessed for an individual's failure to comply with the so-called individual mandate under the Affordable Care Act could be properly interpreted as a tax and thus fall within the permissible scope of Congress' taxing power. In answering that question, the Court engaged directly with the argument that the penalty was not instituted principally to raise revenue:

Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. . . . (“the taxing power is often, very often, applied for other purposes, than revenue”). Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns.<sup>93</sup>

The Court concluded this passage with a sweeping claim: “Indeed, “[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.”<sup>94</sup> Although this statement could easily be dismissed as a simple rephrasing of the observation frequently made by economists that every tax has a deadweight cost,<sup>95</sup> we believe that its significance goes well beyond that. By acknowledging the inevitability of the connection between taxation and its effect on conduct and concluding that an exaction motivated primarily or even exclusively by its effect on conduct is indeed a tax, the Court confirmed that taxation is not exclusively about raising revenue. Moreover, because this confirmation repelled a claim of unconstitutionality, it gives the resultant view of taxation as an activity embracing more than the raising of revenue the stamp of constitutional legitimacy.

### B. *The Demand for Hyper-Clarity*

As we noted in Part II, the marriage of tax to economics has produced what Professor Crane has described as an “aspiration toward rational perfection”—what we have called an aspiration to hyper-clarity. That, in turn, has produced a normative preference for rules. It has resulted in the view

92. 567 U.S. 519, 530–32 (2012).

93. *Id.* at 567 (citations omitted).

94. *Id.* (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

95. See Gary S. Becker & Casey B. Mulligan, *Deadweight Costs and the Size of Government*, 46 J.L. & ECON. 293, 299 (2003) (defining the cost of any tax as the sum of tax revenue and the deadweight cost of taxes).

that in tax, analyses based on facts and circumstances are at best undesirable and at worst illegitimate because they can never be hyper-clear (e.g., determining what expenses are ordinary and necessary).

Contemporary tax legislation reflects the influence of this quest for hyper-clarity by being highly articulated and replete with detailed rules that attempt to create a crisp blueprint.<sup>96</sup> Sometimes, when Congress does not provide the detailed rules, it directs the Department of Treasury to provide them by explicitly delegating regulatory authority.<sup>97</sup> Moreover, the kind of capacious judicial interpretations acceptable in the early days of the tax law have become objects of derision among tax professionals. With rare exceptions, tax commentators do not accept the indeterminacy that inheres in formulations such as “life in all its fullness” or “detached and disinterested generosity”—an indeterminacy that characterizes other fields of law.

For example, giving the 2016 Griswold Lecture before the American College of Tax Counsel, Emily Parker, then managing partner of Thompson & Knight and formerly Acting Chief Counsel of the IRS, observed that:

Our tax system is governed by rules, not by individual, subjective judgments of tax policy, equity, or even logic. . . . Taxpayers and tax lawyers must be able to rely on the statutes, regulations, and other IRS pronouncements. If tax consequences are unpredictable and tax challenges are random, then both taxpayers and tax lawyers will develop disdain for the tax system. If no one can, with confidence, reasonably predict the outcome of a tax issue or case, then anything goes.<sup>98</sup>

We doubt that many tax lawyers would disagree with Parker’s observations. The idea that tax law is especially governed by rules is also captured in Judge Wisdom’s assertion that “Tax law is law unto itself. There are no equities in tax law.”<sup>99</sup> We believe that this view of tax is pervasive and proceeds from the deep association of tax with raising revenue and, hence, with economics. Moreover, as we noted in Part II.C, taxpayers expect tax law to be clear, certain, and predictable. This expectation of hyper-clarity differs from what taxpayers expect from other fields of law and has contributed to the sense that tax is exceptional.

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96. See, e.g., I.R.C. § 132, Pub. L. 98-369, div. A, title V, § 531(a)(1), July 18, 1984, 98 Stat. 877 (1984). This was added to the code in 1984 in an effort to systematize the tax treatment of fringe benefits with highly articulated rules about the fringe benefit excludable from income. The term “employee” is defined in very specific ways and non-discrimination tests are applied for some purposes but not for others.

97. See, e.g., 26 U.S.C. § 336(e) (2012) (stating that “certain stock sales and distributions may be treated as asset transfers” based on regulations prescribed by the Secretary of the Treasury).

98. Emily Parker, 2016 *Erwin Griswold Lecture Before the American College of Tax Counsel, Stroke of the Scrivener’s Pen: The Role of a Tax Planner and Litigator*, 69 TAX LAW. 477, 480 (2016).

99. *United States v. Henderson Clay Prods.*, 324 F.2d 7, 12 (5th Cir. 1963). Our thanks to Emily Parker for quoting Judge Wisdom in her Griswold Lecture.

Taxpayers expect the tax law to be clear, certain, and predictable for both normative and structural reasons. The normative reason is that clarity, certainty, and predictability are necessary for the legitimacy of the tax system. The structural reason involves the complexity of the Code. Because the Code is so complex, and because ours is a self-assessment system, taxpayers believe they need clarity, certainty, and predictability in order to comply with the law in the first instance. And tax administrators need clarity, whether it comes from the Code or is generated by the agency, so that they can administer the law fairly and efficiently, properly informing taxpayers of their tax obligations. In the next subsections we address these normative and structural considerations, and then we present the case against hyper-clarity.

### 1. *The Normative Argument for Hyper-Clarity: Legitimacy*

Successful administration of the tax law requires a substantial degree of voluntary compliance. That compliance, in turn, depends on the system being perceived as legitimate. Max Weber coined the term “Legitimitätsglaube” to describe the perception of legitimacy that produces compliance.<sup>100</sup> This is sociological legitimacy, i.e., legitimacy in the sense of the law’s being perceived as legitimate by the members of the community.<sup>101</sup> Sociological legitimacy could result if the community perceives the law as legitimate either because it has been properly promulgated (“proper promulgation”) or because it reflects moral norms widely accepted in the community (“accepted moral norms”).<sup>102</sup> A particular law, as well as an entire code of laws or an entire legal system, could be perceived as legitimate on either the proper promulgation ground or the accepted moral norms ground, or both.

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100. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 382 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., Free Press 1964).

101. See Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 832 (2002) (“[L]egitimacy ultimately rests on the populace’s beliefs and attitudes . . .”).

102. The categories of legitimacy discussed in the text resonate with Fritz Scharpf’s distinction between the contribution of “inputs” and “outputs” to “democratic legitimacy.” See Fritz W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL’Y 18, 19 (1997). However, they contrast with a different, commonly employed classification, viz., a distinction between “descriptive” and “normative” concepts of legitimacy, wherein the former is grounded in the perceptions of the community and the latter in objective standards for legitimacy independent of those perceptions. See generally Fabienne Peter, *Political Legitimacy*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta, Spring ed. 2014), <http://plato.stanford.edu/archives/spr2014/entries/legitimacy/> (last visited Nov. 5, 2019). In our account, normative (including moral) legitimacy is itself anchored in community standards and is, therefore, a subset of descriptive legitimacy.

With the exception of some tax protesters, taxpayers do not generally question that the tax law has been properly promulgated. Therefore, the tax law is regarded as legitimate on the proper promulgation ground. On the other hand, as we discussed in Part II.C, most taxpayers have not internalized the moral norms that underlie the tax law. Therefore, although the tax law enjoys sociological legitimacy because of proper promulgation, for many taxpayers that proper promulgation is the only source of the tax law's legitimacy.<sup>103</sup> By contrast, criminal law and tort law are perceived as legitimate both because they were properly promulgated and because their commands, proscriptions, and permissions reflect widely held moral norms. Individuals do not refrain from stealing or behaving negligently just because properly promulgated laws proscribe it, but also, and significantly, because widely held moral norms proscribe it.

The failure to view tax as reflecting accepted moral norms resonates, of course, with important events in American history. In the United States, our awareness of the issue of fairness with respect to taxation is anchored in our Revolution.<sup>104</sup> According to our "origin story," the American Revolutionary War was fought in significant part because of objection and resistance to King George III's discriminatory tax impositions on the American colonies.<sup>105</sup> As our Declaration of Independence explains:

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: . . . imposing Taxes on us without our Consent . . . .<sup>106</sup>

This antipathy continues to be reflected in contemporary attitudes toward taxation. For example, a recent poll found that as between two moral arguments about tax, 53% of Americans selected the argument, "People have a right to keep money they earn" as the stronger, while 37% chose the argument, "People have a duty to contribute money to public services."<sup>107</sup> These

103. That taxpayers comply with the tax law because they feel a duty to do so, rather than because it is the right thing to do is supported by a finding in a 2014 survey of U.S. adults that "94% agree it is every American's civic duty to pay their fair share of taxes, which includes 71% who 'completely' agree." See IRS OVERSIGHT BOARD, 2014 TAXPAYER ATTITUDE SURVEY 3, 7 (2014).

104. See Kornhauser, *supra* note 101, at 824–25.

105. See *id.* (arguing that the British tax was illegitimate on both of the grounds discussed earlier. It did not reflect accepted moral norms because it was discriminatory, and it was not properly promulgated: "no taxation without representation").

106. THE DECLARATION OF INDEPENDENCE para. 2, 19 (U.S. 1776).

107. Peter Moore, *Unlike Americans, Brits Think Taxation Is Moral*, YOU.GOV (Nov. 6, 2014),

poll results are consistent with the point we made above: unlike many areas of law, the moral norms that support the income tax have not been widely internalized among the taxpaying public.<sup>108</sup> Hence, the sociological legitimacy of the tax law depends primarily on the legitimacy of the process by which it has been promulgated.

The limited legitimacy of the tax law has significant implications for how the tax law will be obeyed. Because the legitimacy of the tax law depends primarily on the lawfulness of its promulgation, most taxpayers will pay, but only what is necessary to avoid violating the law. No moral value justifies anything more. This attitude—that we should pay our taxes, but not a penny more than what is legally due—demands that the Code be clear, certain, and predictable. Those are precisely the goals facilitated by a scientific, rational construction of income tax law along economic lines. It is therefore not surprising that in tax there is a desire for hyper-clarity, a clamor for rules that appear unambiguous, and an insistence that the tax law carry a “burden of perfection” not placed on other fields of law. The absence of a moral imperative for compliance therefore produces a heightened desire for precision in the law itself. When obedience carries with it material costs (loss of property, autonomy, etc.) but disobedience carries no moral stigma, there is little incentive to obey beyond what is necessary to avoid punishment.<sup>109</sup>

## 2. *The Structural Argument for Hyper-Clarity: Complexity*

Not only does the demand for hyper-clarity follow from the absence of significant moral legitimacy in the tax law, but it is abetted by the structure of the Code, which creates a tension between the need for a clear, precise system and the actual complexity of the Code. As currently configured, the tax system places important responsibilities on the taxpayers as well as on tax administrators. Taxpayers must make detailed and accurate reports to the

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<https://yougov.co.uk/news/2014/11/06/unlike-brits-americans-dont-think-tax-morally-right/>. Accordingly, our claim is not that there are not significant numbers of people who do accept the moral legitimacy of tax laws, but only that deep and widespread controversy on that point prevents tax from having the kind of moral legitimacy of, say, laws against homicide.

108. See, e.g., Jack Anderson & Michael Binstein, *Tax Consumption, Not Income, Ways and Means Chief Urges*, DESERET NEWS (May 15, 1995), <https://www.deseret.com/1995/5/15/19175499/tax-consumption-not-income-ways-and-means-chief-urges>.

109. For example, most people do not adopt a toeing-the-line approach to the legal prohibition of homicide. Their ordinary behavior stays well clear of homicidal conduct—in large part because of the moral opprobrium that attaches to killing other human beings. Accordingly, there is no demand for the kind of precision in the definition of homicide that we see with respect to definitions in the income tax system (even though the potential punishment for homicide is extraordinarily greater than for violating the tax law).

federal government, often under penalty of perjury and sometimes subject to criminal liability for malfeasance or nonfeasance. The law therefore imposes on taxpayers the need, in the first instance, to determine what the law is, and to apply that law to the facts of a particular individual's financial situation.<sup>110</sup> No field of law places that type of burden on individuals.

The complexity of the tax law also places a burden on tax administrators, whose audience is taxpayers who depend on the administrators to inform them of their tax obligations. Indeed, taxpayers have a statutory right to be informed.<sup>111</sup> The self-assessment feature of our tax system requires that the content of the law be conveyed to and understood by average individuals who are simply living their lives and providing for themselves and their families. Thus, it becomes the tax administrator's job to explain the tax law to taxpayers in a way that they can understand. Absent that understanding, taxpayers will experience the tax law as arbitrary and hence inconsistent with accepted moral norms. That, in turn, would further undermine that ground for the tax law's sociological legitimacy.

But taxpayers' and tax administrators' need for clarity, certainty, and predictability in tax law is in tension with the notorious complexity of the Internal Revenue Code.<sup>112</sup> Complexity poses the danger of miscalculation—either because a crucial component of a tax formula is overlooked or because the Code's meaning is misunderstood. For although some provisions of the Code are simple, precise, and clear (the provisions prescribing the standard deduction and the rate structure come to mind)<sup>113</sup> and allow the system to

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110. We recognize that the tax law also imposes significant burdens on business and other entities as well, but we are restricting our discussion here to individuals because the burden on them is the most onerous. Individuals, whether employees, independent contractors, or owners of small businesses, are least likely to be in the position to retain the services of professionals to advise them on the correct application of the law to their specific situation absent the need to comply with the tax law. Moreover, individuals who are not entrepreneurs, such as employees, would not have to master a complex federal statute in order to be able to simply earn a living; hence the federal income tax imposes the most outsized burden on them. Federal labor and environmental protection laws may affect small businesses, but only when they reach a certain size or engage in specific activities. By contrast, the federal income tax has widespread application, regardless of size or kind of commercial activity.

111. I.R.C. § 7803(a)(3)(A) (2019).

112. So much has been written about the Code's complexity that a comprehensive citation would eclipse the rest of this essay. Nevertheless, for an accurate and amusing synopsis arguing that it is mostly "non-tax people" who see tax as unusually complex, see Zelenak, *supra* note 2, at 1906–08. For a historical account of the increasing complexity of the Code, see Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON INDEP. L. REV. 319, 322–24 (1994).

113. I.R.C. § 63(c) (2019).



function with transparency and predictability, many of the Code's provisions are exceedingly complex. They have layers of qualifications and special rules that produce sections that have not only subsections, paragraphs, and subparagraphs, but also sub-sub paragraphs and sub-sub-sub paragraphs.<sup>114</sup> In addition to the complexity of specific sections, the way in which the provisions interact exponentially increases the complexity of the system as a whole. The complexity of the Code makes the entire system unclear, imprecise, and indeterminate.

Taxpayers and third-party payors often address the tension between the need for clarity, certainty, and predictability, on the one hand, and the Code's confounding complexity, on the other hand, by employing tax professionals or, more recently, tax preparation software. An even more seductive response to this tension involves a two-pronged strategy: first conceiving the Code as a compendium of rules,<sup>115</sup> and second, interpreting those rules strictly in terms of their "plain meaning."<sup>116</sup> Indeed, the complexity of the Code alone makes interpreting the statutory text in terms of its plain meaning seem particularly attractive. As Judge Learned Hand explained: "[A]s the articulation of a statute increases, the room for interpretation must contract . . ."<sup>117</sup> Emily Parker's observation that "[o]ur tax system is governed by rules, not by individual, subjective judgments of tax policy, equity, or even logic," captures this attitude toward interpretation of the Code.<sup>118</sup>

In addition, the need to reduce tax liability to dollar amounts that can be reported on a specific line in a specific form lures taxpayers into falsely believing that the determination of tax liability is an exercise in binary, rule-based decisionmaking that can produce a precise and uniquely correct number. Like the considerations concerning legitimacy discussed above, these structural considerations exacerbate the demand that the income tax law be clear, certain, and predictable. Achieving those goals would seemingly be facilitated by a scientific, rational construction of income tax law along economic lines.

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114. See, e.g., I.R.C. § 199A.

115. See David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999).

116. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183–84 (1989); Abreu & Greenstein, *The Rule of Law as the Law of Standards*, *supra* note 5, at 59–60.

117. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935); see also *The "Miss Elizabeth" D. Leckie Scholarship Fund v. Comm'r*, 87 T.C. 251, 260 (1986) ("Where a statute is clear on its face, especially when that statute is part of a complex set of statutory provisions marked by a high degree of specificity, we require unequivocal evidence of legislative purpose before construing the statute so as to override the plain meaning of the words used therein."). For a recent example where a majority of the Supreme Court arguably found just such evidence, much to the consternation of Justices Scalia, Alito, and Thomas, see *King v. Burwell*, 135 S. Ct. 2480 (2015).

118. Parker, *supra* note 98, at 480.

### 3. *The Case against Hyper-Clarity*

As we explained above, the demand that the tax law be hyper-clear supports a particular manifestation of tax exceptionalism; namely, the view that tax should consist only of unambiguous rules, which are to be interpreted strictly in terms of their plain meaning. But as we have argued at length in our previous scholarship, the idea that the income tax consists or should consist of strictly construed rules is incorrect.<sup>119</sup> Income tax doctrine appropriately makes wide use of standards. Indeed, its most central concept—income—is defined not by an unambiguous rule, but by a standard.<sup>120</sup> We will not rehearse those arguments here.

Nevertheless, we must note that the Supreme Court agrees with us. Indeed, the Court has repeatedly resisted opportunities to read Code provisions as unambiguous rules. On the contrary, in cases like *Helvering v. Morgan's Inc.*,<sup>121</sup> *Bob Jones University v. United States*,<sup>122</sup> *Mayo Foundation for Medical Education & Research v. United States*,<sup>123</sup> and *King v. Burwell*,<sup>124</sup> the Court has preferred readings of the Code that find its provisions ambiguous and then has resolved those ambiguities by invoking legislative history,<sup>125</sup> legislative purpose,<sup>126</sup> deference to agency interpretation,<sup>127</sup> and values rooted in public policy, the common law, and the Constitution.<sup>128</sup>

Our point is that the Court in these cases has treated the Internal Revenue Code just like any other statute. Rather than reflexively regarding the Code as exceptional and limiting its interpretation of Code provisions to hyper-clear rules, the Court has instead applied to the Code the ordinary principles of statutory interpretation, sometimes reaching outside the statutory text for interpretive aids.

Why has the Court implicitly rejected the normative and structural arguments for treating Code provisions exclusively as hyper-clear rules? Our answer is that there are serious potential costs to treating the Code as consisting only of rules. For example, in *Bob Jones* the Court rejected the University's argument that the meaning of § 501(c)(3) should be derived from its plain

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119. See Abreu & Greenstein, *Defining Income*, 11 FLA. TAX REV. 295 (2011).

120. See *id.*

121. 293 U.S. 121 (1934).

122. 461 U.S. 574 (1983).

123. 562 U.S. 44 (2011).

124. 135 S. Ct. 2480 (2015).

125. *Morgan's Inc.*, 293 U.S. at 126–27.

126. *Bob Jones Univ.*, 461 U.S. at 600.

127. *Mayo*, 562 U.S. at 56–57.

128. *Bob Jones Univ.*, 461 U.S. at 602–03.

language.<sup>129</sup> Doing so, the Court pointed out, would require sacrificing the deeply important values against racial discrimination rooted in “the public policy of the United States as manifested in its Constitution and laws.”<sup>130</sup> Thus, the Court’s analysis suggests that adopting the University’s hyper-clear reading of § 501(c)(3) would undermine the very legitimacy that the normative argument for hyper-clarity seeks to promote because it would sacrifice the moral value of non-discrimination.<sup>131</sup>

### C. *Tax is Different*

Tax scholars, including us, have pointed out many ways in which tax differs from other fields of law. The accumulation of those differences has tempted judges, lawyers, scholars, and other tax professionals to conclude that tax is exceptional. The various factors we discussed earlier, including the failure to internalize tax norms, the pervasiveness of encounters with the tax system, the complexity of the Code, the importance of revenue raising, and the ascendancy of economists have reinforced this temptation to think of tax as exceptional.

In the next Part, we directly address the question whether accumulated differences between tax and other fields of law can, by virtue of their accumulation only, make tax different in kind from other fields of law. We will propose a framework—a framework derived from Jamesian pragmatism—for analyzing this question.

## III. DIFFERENT ≠ EXCEPTIONAL

### A. *The Sorites Paradox*

In the Introduction, we invoked the Sorites Paradox: the paradox of the heap. Through the process of adding together grains of sand, the grains turn into a heap. But there is no determinate point at which the addition of individual grains creates a heap.<sup>132</sup>

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129. *Id.* at 594–95.

130. *Id.* (quoting Exec. Order No. 11063, 3 C.F.R. § 652 (1959-1963 Comp.)).

131. *See supra* Section II.B.1. We do not claim that Code provisions should never be read as rules. Sometimes they should. But a pragmatist test should be employed: In any given instance the question should be whether there is a net benefit to adopting a plain-meaning, rule-like interpretation of the provision? This pragmatist approach can be applied to the larger question of tax exceptionalism itself: Is there a net benefit to treating the tax law as exceptional? In other words, is the idea of tax exceptionalism useful? We propose a framework for analyzing these questions in Part IV.

132. *See* Dominic Hyde & Diana Raffman, *Sorites Paradox*, THE STAN. ENCYCLOPEDIA OF

Law is full of examples of indeterminate boundaries between categories. In tax, a familiar example is the distinction between repairs, which are currently deductible, and improvements, which are capital expenditures and must therefore be capitalized.<sup>133</sup> A 2001 Revenue Ruling examining the treatment of “heavy maintenance” performed to a commercial airliner illustrates the indeterminacy of the boundary.<sup>134</sup>

The Ruling begins by describing a number of modifications which together constitute “heavy maintenance” and concludes that the modifications will be categorized as deductible repairs.<sup>135</sup> But when even more modifications are made, the accumulated modifications, including the “heavy maintenance” modifications, pass out of the category of repairs, which are deductible, and

PHIL. § 1 (Edward N. Zalta ed., Winter ed. 2014) (ebook), <http://plato.stanford.edu/archives/win2014/entries/Sorites-Paradox/> (explaining that the name, Sorites Paradox, derives from the Greek word  *Soros* (heap)). The Paradox is usually traced back to a puzzle attributed to the logician Eubulides of Miletus, a contemporary of Aristotle. *See id.* The puzzle version has been summarized as follows:

Would you describe a single grain of wheat as a heap? No. Would you describe two grains of wheat as a heap? No. . . . You must admit the presence of a heap sooner or later, so where do you draw the line?

Presented as a *logical* Paradox, the Sorites begins with an apparently true proposition: “1 grain of wheat does not make a heap.” That proposition becomes the antecedent of a conditional, if-then, proposition, “If 1 grain of wheat does not make a heap then 2 grains of wheat do not.” This is followed by a chain of conditional propositions, each of which takes as its antecedent (the “if” statement) the consequent (the “then” statement) of the preceding proposition:

1 grain of wheat does not make a heap.

If 1 grain of wheat does not make a heap then 2 grains of wheat do not.

If 2 grains of wheat do not make a heap then 3 grains do not.

. . .

If 9,999 grains of wheat do not make a heap then 10,000 do not.

10,000 grains of wheat do not make a heap.

*Id.* Each proposition in the chain appears to be true, but the conclusion—“10,000 grains of wheat do not make a heap”—appears to be false: a Paradox that exploits the indeterminacy of the predicate of each proposition, “do not make a heap.”

133. *See* I.R.C. § 263(a)(1) (2019); Treas. Reg. § 1.162-4(a) (2019) (indicating, as in the Sorites paradox, the lack of clarity regarding at what point a repair or series of repairs is substantial enough to constitute a “betterments made to increase the value of any property,” as all repairs necessarily increase the value of a property over what it was immediately before the repair, and the regulations allow a taxpayer to deduct “amounts paid for repairs and maintenance to tangible property”). As with the addition of any given grain of sand, it is unclear when doing one additional thing turns a repair into a betterment.

134. Rev. Rul. 2001-4, 2001-1 C.B. 295.

135. *Id.*

into the category of capital expenditures, which are not.<sup>136</sup> These modifications are like the accumulated grains of sand that have become a heap. The boundary between the repairs and the capital expenditures is indeterminate.<sup>137</sup>

The availability of these two categories—repairs and capital expenditures—is important because these categories respond to a crucial problem in the tax law: the correct measurement of income. The concept of capitalization allows the tax law to measure income correctly by matching the costs of generating income with the income generated.<sup>138</sup> It distinguishes mere repairs, which are properly matched with the income generated in the period incurred, from capital expenditures, which will last beyond that period and should therefore be matched with the income generated over the remaining period.<sup>139</sup> Put another way, the concept of capitalization is useful.

This observation, that the concept of capitalization is useful because it allows the tax system to avoid the mismatch problem and to measure income accurately, points to a framework for thinking about Sorites problems; that framework is pragmatism. Pragmatism allows us to address the indeterminacy of boundaries. Instead of asking a metaphysical question—when does a heap come into being?—we can ask a pragmatist question: When is it useful to treat the accumulated individual grains as a heap?

Similarly, when is it useful to treat the accumulated modifications of an airplane as capital expenditures? Or, when is it useful to treat the accumulative differences between tax and other fields of law as making tax exceptional? Thus, the accumulation of grains of sand becomes a heap when it is useful to describe the accumulation as a heap. The modifications to the airplane become capital expenditures when it is useful to describe them as capital expenditures because doing so will allow the matching that the income tax requires.<sup>140</sup>

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136. *Id.*

137. *Id.*

138. *See* *INDOPCO Inc. v. Comm’r*, 503 U.S. 79, 84 (1992) (“Through provisions [allowing deductions for depreciation and amortization], the Code endeavors to match expenses with the revenues of the taxable period to which they are properly attributable, thereby resulting in a more accurate calculation of net income for tax purposes.”); *cf.* Deborah A. Geier, *The Myth of the Matching Principle as a Tax Value*, 15 AM. J. TAX POL’Y 17, 42–43 (1998) (explaining the dramatic economic effect of allowing a deduction for a capital expenditure).

139. *INDOPCO*, 503 U.S. at 84.

140. *See* Rev. Rul. 2001-4, *supra* note 134. It becomes useful to describe “heavy maintenance” modifications as capital expenditures when they are part of an activity that is tantamount to the acquisition of a new airplane because the useful life of the airplane has been extended. *Id.* Usefulness in this context implicates the important tax value of horizontal equity, pursuant to which taxpayers who are similarly situated ought to be treated similarly. If heavy maintenance is conducted in the context of making such extensive modifications that

And the differences between tax and other areas of law make tax exceptional when it is useful to describe tax as exceptional.

### B. *The Jamesian Pragmatist Reframing*

This focus on usefulness is derived from the pragmatism of William James.<sup>141</sup> James argued that the meaning of a word lies in its “practical cash-value,”<sup>142</sup> and the truth of a proposition lies in its usefulness.<sup>143</sup>

In other words, a true idea is one that proves useful in making sense of our experience and in enabling us to cope successfully with the world. For example, for a Jamesian pragmatist, what makes our belief in gravity true is that *disbelieving* gravity would make the world dangerous (if, say, we were inclined to jump out of windows). Belief in gravity makes sense of our experiences and helps us navigate safely in the world.

This idea that truth is ultimately measured against the ongoing flow of experience means that every claim about what is true is provisional: Its truth depends on its ability to hold up over time. Consider Russell’s chicken.<sup>144</sup> Every day at dawn a farmer comes into the barn and feeds the chicken.<sup>145</sup> So the chicken comes to believe that dawn necessarily means that she will be fed—until the day that the farmer enters the barn at dawn and cuts off the

the taxpayer has essentially acquired a new airplane, the taxpayer should be treated the same as one that has acquired a new airplane. In that case, treating the “heavy maintenance” modifications as capital expenditures produces horizontal equity and is thus useful. *Id.*

141. See Hyde & Raffman, *supra* note 132 (noting that classic responses regarding usefulness derive from logic because the Sorites Paradox is traditionally understood as a logical problem).

142. See WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 26, 41 (1907).

143. As James explained:

*True ideas are those that we can assimilate, validate, corroborate and verify. False ideas are those that we cannot. . . . The possession of truth, so far from being here an end in itself, is only a preliminary means towards other vital satisfactions. . . . You can say of [a true idea] then that “it is useful because it is true” or that “it is true because it is useful.” Both these phrases mean exactly the same thing, namely that here is an idea that gets fulfilled and can be verified.*

*Id.* at 138-40.

144. BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 62-64 (Oxford Univ. Press 1959) (1912). A different kind of example was the belief that Newtonian physics accurately described the nature of the physical universe—a belief widely held until upended by Einstein. Cf. The Right. Hon. Lord Kelvin (William Thompson), *Nineteenth-Century Clouds Over the Dynamical Theory of Heat and Light*, PHIL. MAG. & J. SCI. at 1-40 (1901) (broaching the concept of relativity as an alternative to Newtonian physics).

145. See Russell, *supra* note 144, at 62-64.

chicken's head.<sup>146</sup> The chicken's belief in a causal connection between dawn and food ultimately proved false.<sup>147</sup>

Following James, we argue that the truth of a predicate in a proposition (“makes a heap” in the context of the Sorites Paradox; “is a capital expenditure” in the context of capitalization; “is exceptional” in the context of tax exceptionalism) is a function of the extent to which it turns out to be useful to treat the predicate as true. In this sense, as James put it: “The truth of an idea is not a stagnant property inherent in it. Truth happens to an idea. It becomes true, and is made true by events. . . . Its validity is the process of its validation.”<sup>148</sup>

As we have noted, the concept of a heap of sand is useful because it can be used to address a problem—for example, acquiring sand needed to build a sand castle—by conveying information about the quantity of sand required. And the concept of capitalization is useful because it addresses a problem in the income tax law—accurately measuring income—by better matching the costs of generating income with the income generated.<sup>149</sup> This focus on usefulness replaces the brain-teasing question raised by the Sorites Paradox (at what point does the accumulated sand become a heap?) with a different question: When is it useful to think about the accumulated sand as a heap? Accordingly, within this pragmatist framework the question with which we began this Article (is tax exceptional?) should be replaced with a different question: When is it useful to think about tax as exceptional?

Following the sand and capitalization examples, we would approach this question of usefulness by searching for some problem in the tax law that can be successfully addressed by employing the concept of tax exceptionalism. We are convinced that there is no such problem. While there are many ways in which tax is different from other fields of law (just as there are many ways in which contracts is different from torts), and a particular difference may call for different treatment of an issue in tax than in other areas of the law, it is the analysis of the import of the specific difference that is useful. The concept of exceptionalism adds nothing. It is an empty vessel.

The concept of tax exceptionalism is an empty vessel even in the area where it has most flourished—the application of administrative law principles to tax. A recent example involves the ability of the Office of Management and Budget (OMB) to review Treasury (tax) regulations. From 1983 until April 11, 2018, Treasury and OMB had agreed that only rarely would

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146. *See id.*

147. *See id.*

148. JAMES, *supra* note 142, at 138 (emphasis in original omitted).

149. *INDOPCO Inc. v. Comm’r*, 503 U.S. 79, 84 (1992).

Treasury regulations be subject to review by OMB's OIRA,<sup>150</sup> and that was often cited as an example of tax exceptionalism because regulatory action by most other agencies was subject to OIRA review.<sup>151</sup> But under the Trump Administration that agreement came into question and on April 11, 2018, the Treasury Department and OMB entered into a new Memorandum of Agreement (MOA).<sup>152</sup> Under the new MOA, Treasury regulations are subject to more OIRA review than was the case under the 1983 agreement but are still not subject to the same quantum of OIRA review as regulations from other agencies.<sup>153</sup> The reason is that Treasury persuaded OMB that there were specific ways in which many Treasury regulations differed from other agency's regulations and therefore warranted different treatment.<sup>154</sup>

This example illustrates the need to determine whether Treasury regulations ought to be treated like regulations promulgated by other agencies. Identifying specific ways in which tax regulations are different allowed Treasury to show when and how Treasury regulations should be treated differently. It guided resolution of the problem. By contrast, taking the position that tax is exceptional would have added nothing to an understanding of the problem or provided any guidance for its resolution. But focusing on the differences helps us answer questions like: Is any level of review appropriate? If it is, who should perform the review? Over what period? To what end? The claim of tax exceptionalism does not help answer those questions. It is not useful.

But proving that the concept of tax exceptionalism is not useful involves proving a negative. While it is true that we are aware of no instances—from

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150. See Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 458–59, n.11, 472–73 (2018); Memorandum of Agreement, Treasury & Office of Mgmt. & Budget Implementation of Exec. Order 12291 (Apr. 29, 1983), <https://www.treasury.gov/FOIA/Documents/OMB%20MOA%2083-93.pdf>.

151. See, e.g., McMahan, *supra* note 20.

152. Memorandum of Agreement, The Treasury and the Office of Mgmt. & Budget Review of Tax Regulations Under Exec. Order 12866 (Apr. 11, 2018), <https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf>.

153. See Jonathan Curry, *Treasury and OIRA Still at Odds Over When Tax Regs Merit Review*, 116 TAX NOTES 114, 114–16 (2019); Clinton G. Wallace, *Thinking Through OIRA Review of Tax Regulations*, THE REGULATORY REVIEW (Aug. 13, 2018), <https://www.theregreview.org/2018/08/13/wallace-oira-review-tax-regulations/>; Wallace, *supra* note 150, at 479–82.

154. See Curry, *supra* note 153, at 114 (noting differences in the breadth of application of many Treasury regulations, the importance of providing guidance that carries the force of law and can therefore be relied on both by the IRS and taxpayers in interpreting the law, and the need for speedy guidance following the enactment of tax legislation); see also William Hoffman, *TCJA Reg Writers Earn Tax Notes' 2018 Person of the Year*, 149 TAX NOTES 1409 (2018) (highlighting the acute need for expedited guidance created by the enactment of new tax legislation on December 22, 2017 and applicable January 1, 2018).



Congress, from the IRS, from courts, from taxpayers, or from tax professionals—where the concept of tax exceptionalism has been successfully deployed to resolve an actual problem, that does not prove that there are no such instances or that there can be no such instances. Nevertheless, we offer seven pieces of evidence in support of our claim that tax exceptionalism is a useless concept: two judicial opinions in tax cases and five works of tax scholarship.

#### IV. IS TAX EXCEPTIONALISM USEFUL?

##### A. *Judicial Examples*

The first of the two judicial opinions provided the epigraph for this article. In *United States v. Henderson Clay Products*,<sup>155</sup> Judge Minor Wisdom observed: “Tax law is law unto itself.”<sup>156</sup> The issue in that case involved a provision of the Internal Revenue Code of 1939 allowing a deduction for the depletion of mineral resources, dependent on the “gross income from the property.”<sup>157</sup>

The court regarded the taxpayer’s position on this issue of interpretation as counterintuitive (describing it as “highly indigestible”),<sup>158</sup> and introduced its analysis with this passage: “Tax law is law unto itself. There are no equities in the tax law. And there is an area of permissible illogic in the tax law.”<sup>159</sup> But notwithstanding this straightforward invocation of tax exceptionalism, the court treated the issue as one of ordinary statutory interpretation.<sup>160</sup> Hence, the opinion considered the statute’s plain meaning, sought to determine legislative intent, applied Supreme Court precedent, and synthesized other judicial authority, analogizing and distinguishing various decisions of various courts. In short, the court did not actually treat the Code as a “law unto itself” but as an ordinary statute, whose meaning must be discerned through the use of the ordinary techniques of statutory interpretation.<sup>161</sup> Tax exceptionalism, although invoked, did not actually assist the court in the resolution of the case.

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155. 324 F.2d 7 (5th Cir. 1963).

156. *Id.* at 12.

157. I.R.C. § 114(b)(4)(A)(iii) (repealed 2004).

158. *Henderson*, 324 F.2d at 12.

159. *Id.*

160. *See supra* Section II.B.3 (explaining the Court has resolved ambiguities through ordinary statutory interpretation and by invoking legislative history, legislative purpose, deference to agency interpretation, and values rooted in public policy, the common law, and the Constitution). *See, e.g.*, *Helvering v. Morgan’s Inc.*, 293 U.S. 112, 125–28 (1934).

161. *Accord* *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (affirming tax provisions should be interpreted in accordance with generally applicable principles of statutory interpretation and the Court “should go beyond the literal language of a statute if reliance

By contrast, in the second judicial opinion the court both invoked tax exceptionalism and used it when deciding the case. We refer to the Eighth Circuit's opinion in *Mayo Foundation for Medical Education & Resources v. United States*,<sup>162</sup> which shows how tax exceptionalism substitutes conclusion for analysis. The issue in *Mayo* was whether medical residents were students and therefore exempt from the payment of Federal Insurance Contributions Act (FICA) taxes.<sup>163</sup> A Treasury regulation provided an answer by reference to the number of hours worked, and the taxpayer challenged the validity of that regulation.<sup>164</sup> The district court had held the regulation invalid because the statutory term "student" was not ambiguous and the regulation was therefore inconsistent with the plain meaning of the statutory language.<sup>165</sup>

Reversing the district court's decision, the Eighth Circuit did not deny that the relevant statutory language had "a plain or common meaning in other contexts."<sup>166</sup> Rather, the court held:

[The language of the Code] must be construed in context, and when the context is a provision of the Internal Revenue Code, a Treasury Regulation interpreting the words is nearly always appropriate. We hold that the statute is silent or ambiguous on the question whether a medical resident working for the school full-time is a "student who is enrolled and regularly attending classes" for purposes of 26 U.S.C. § 3121(b)(10).<sup>167</sup>

In effect, the court held that because the statute in question was the Internal Revenue Code, ordinary tools of statutory interpretation, such as the plain meaning rule, were unavailable to it when faced with judging the validity of a Treasury regulation. The Eighth Circuit seemed to say that Code language is intrinsically ambiguous because it is in the Code—it is tax. And because of that, the court could not assume that the meaning of the Code's language would match the plain meaning of such language "in other contexts."<sup>168</sup>

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on that language would defeat the plain purpose of the statute"), and *King v. Burwell*, 135 U.S. 2480, 2488–89 (2015) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (noting the importance of "context" and "overall statutory scheme" in determining the meaning of Code provisions).

162. 568 F.3d 675 (8th Cir. 2009).

163. *Id.*

164. Treas. Reg. § 31.3121(b)(10)–2(d)(3)(iii) (2006). The issue ultimately decided by the Supreme Court in *Mayo* has a long history, summarized by the Eighth Circuit. 568 F.3d at 678–79.

165. *Mayo Found. for Med. Educ. & Res. v. United States*, 503 F. Supp. 2d 1164, 1169–77 (D. Minn. 2007).

166. *Mayo*, 568 F.3d at 680.

167. *Id.*

168. *Id.*

By regarding the Code as intrinsically ambiguous, the Eighth Circuit polevaulted over step one of the *Chevron* test for deference to administrative regulations.<sup>169</sup> Faced now with the application of step two, which the court described as entitling the Regulation to deference “so long as it is reasonable,”<sup>170</sup> the Eighth Circuit engaged in a careful, granular analysis of whether the Regulation was a permissible interpretation of the Code.<sup>171</sup>

Although it affirmed the Eighth Circuit’s judgment, the Supreme Court adopted a very different analytical approach. Rather than assuming that there was something unique about tax law that required the rejection of analytical tools used to determine deference to regulations in other fields of law, the Court started with the opposite presumption. In the absence of a special justification, the Court refused “to carve out an approach to administrative review good for tax law only.”<sup>172</sup> Instead, it engaged in the careful analysis of *Chevron* step one, which the Eighth Circuit had omitted. For *Chevron* step two the Court applied the test derived directly from *Chevron*, rather than the old *National Muffler* test.<sup>173</sup>

We believe that the Supreme Court’s analytical approach is the correct one and that it should be followed by scholars as well. In the next section we

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

170. *Mayo*, 568 F.3d at 681.

171. But even here the Eighth Circuit seemed to be under the sway of tax exceptionalism. Although it invoked *Chevron*, the court actually applied the analytical framework from *National Muffler Dealers Ass’n v. United States*, 440 U.S. 472 (1979), to determine whether the Treasury Regulation was entitled to deference. *National Muffler* was a pre-*Chevron* case that specifically involved the question of deference to tax regulations. Even after the Supreme Court decided *Chevron*, both courts and scholars continued to apply the *National Muffler* framework to tax cases. See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1579 (2006) (noting that “[s]ince deciding *Chevron*, the Court has cited *National Muffler* and *Chevron* each twice in majority opinions, and it has cited *National Muffler* three times to *Chevron*’s two in separate concurring or dissenting opinions.”). Compare *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 576 (1993) (Souter, J., dissenting) (citing *Chevron*), and *United States v. Burke*, 504 U.S. 229, 242 (1992) (Scalia, J., concurring) (same), with *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 840 (2001) (Stevens, J., dissenting) (citing *National Muffler*), and *Comm’r v. Estate of Hubert*, 520 U.S. 93, 120, 127 (1997) (O’Connor, J., concurring and Scalia, J., dissenting) (same). Why? Apparently because they continued to think that tax is different and that it is exceptional. If tax were exceptional there would be no good reason to think that the test the Supreme Court had crafted for judicial deference in a tax case would be replaced by a test designed to apply to regulations generally. Allegiance to *National Muffler* in tax cases persisted until the Supreme Court decided *Mayo*. For a graphic representation of the effect of *Mayo* on *National Muffler*, see Appendix A.

172. *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 55 (2010).

173. For a more detailed description of the Court’s rejection of *National Muffler* and embrace of *Mayo*, see *supra* and text accompanying note 13.

discuss five scholarly works, point out the way in which the analytical approach adopted does, or does not, follow the Court's approach in *Mayo*, and discuss some collateral benefits of the *Mayo* Court's approach.

### B. *Scholarly Examples*

The five scholars whose work we discuss in this section all identify ways in which tax differs from other fields of law. The first two, Professors Larry Zelenak and James Puckett, invoke the concept of tax exceptionalism in addressing the differences between tax and other fields of law. The remaining three, Professors Daniel Hemel, Andy Grewal, and Kristin Hickman also explore differences between tax and other fields of law, but they do so without grounding their analysis in tax exceptionalism.

As we explained in the Introduction, tax exceptionalism is “the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.”<sup>174</sup> It is the view that the tax law is “special,”<sup>175</sup> “unique,”<sup>176</sup> “differen[t] in kind,”<sup>177</sup> and “fundamentally different,”<sup>178</sup> from other law. The question we have tried to answer in this Article is whether the concept of tax exceptionalism is useful.

We begin with the work of Professor Larry Zelenak. In *Maybe Just a Little Bit Special, After All?*,<sup>179</sup> Professor Zelenak seeks to make sense of what he calls “the rhetorical war between the tax exceptionalists and their opponents.”<sup>180</sup> On one side of this rhetorical war are the scholars, like Professors Paul Caron and Kristin Hickman, who reject the concept of tax exceptionalism.<sup>181</sup> On the other side are the many scholars who have written “law review articles arguing, for example, that particular characteristics of the tax laws justify the existence of tax-specific rules for determining the validity of regulations, or require a tax-specific approach to statutory interpretation . . . .”<sup>182</sup>

However, as Professor Zelenak observes, those alleged exceptionalists are not really exceptionalists. They are not treating tax law as “deeply different” from other law. Rather they are pointing out “particular characteristics of the tax laws [that] justify the existence of tax-specific rules.” In other words,

174. Zelenak, *supra* note 2, at 1901.

175. *Id.*

176. Johnson, *supra* note 1, at 20.

177. Ferguson et al., *supra* note 3, at 806.

178. Caron, *supra* note 2, at 531.

179. Zelenak, *supra* note 2.

180. *Id.* at 1900.

181. Caron, *supra* note 2; Hickman, *supra* note 171.

182. Zelenak, *supra* note 2, at 1900.

they are analyzing particular differences between tax and other fields of law.

But as we have now said many times, pointing out the ways in which tax law is different from other fields of law does not show tax to be exceptional. Identifying and examining those differences is the heart and soul of standard legal analysis. Indeed, if tax were truly different in kind, comparison between tax and other fields of law would be impossible. It would be like comparing apples and lampposts. The fact that alleged exceptionalists are able to make interesting and important observations about differences between tax and other fields demonstrates that tax is not exceptional.

Professor Zelenak recognizes this point. Indeed, he cites the *Mayo* Court's refusal to apply a special rule of deference in tax cases because of "the absence of [a] justification" as evidence that sometimes it is appropriate for tax to operate under "different rules."<sup>183</sup> Of course, he is right. Sometimes it is appropriate to treat tax differently—just as sometimes it is appropriate to treat criminal law differently by, for example, imposing a uniquely high burden of proof on prosecutors. As noted above, all fields of law are necessarily different in certain respects from other fields of law, and those differences will in some instances justify different rules. In such instances, Professor Zelenak suggests that:

[E]xceptionalism would be accidental or contingent, in the sense that if the same circumstances . . . could be shown to exist in some nontax context, then the [different] standard would apply just as much in that context as in the tax context. Whether this would still be exceptionalism (tax-and-something-else exceptionalism) is a question of labels, not of substance. . . . Whether one describes that as exceptionalism or as the application of general principles to a set that happens to have only one member, the treatment would still be justified.<sup>184</sup>

But labels matter. We have argued that tax exceptionalism is not a useful concept because it addresses no problem in the tax law and, therefore, does no useful work. Of course, if uselessness were the only consequence of tax exceptionalism, we might think of the concept as superfluous but benign. However, the concept of tax exceptionalism can cause harm. If we think about the ways that tax might be different from other fields of law as indications that tax is exceptional, that characterization may well affect a judge's or scholar's analysis, and not likely for the better. That, in fact, seems to have been just what sent the Eighth Circuit down the wrong track in its analysis in *Mayo*. That court used tax exceptionalism as a substitute for a detailed analysis of the specific issue.<sup>185</sup>

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183. *Id.* at 1913–14.

184. Zelenak, *supra* note 2, at 1915.

185. *But see* McMahon, *supra* note 20, at 603, 611 (arguing in favor of a "mental shortcut," namely a "heuristic that tax is different").

And the danger of using the exceptionalism label as a substitute for analysis is even broader. If Judge Wisdom was correct in *Henderson Clay Products*—if tax exceptionalism leads to understanding the tax law as lacking “equities” and countenancing “illogic”—then tax exceptionalism will lead to the sacrifice of qualities needed to make law just. A field of law indifferent to justice would be exceptional indeed.<sup>186</sup>

Contrasting the exceptionalist label with a label from a different field of law that is not only useful but helpful reveals the uselessness of tax exceptionalism. That useful and helpful label is sexual harassment. Labeling a particular constellation of behaviors sexual harassment has proven useful in at least two related ways. First, by grouping together various instances of workplace conduct that “unreasonably interfere[] with an individual’s work performance or create[] an intimidating, hostile or offensive work environment,”<sup>187</sup> the label revealed how many types of behavior that were previously thought by many people to be benign were, in fact, harmful. That is, the label enabled us to see clearly—sometimes for the first time—that certain types of workplace conduct were inconsistent with our social values. Second, by bringing this harm and its inconsistency with our values into focus, the label paved the way for changing social norms and designing legal doctrines to prevent and remedy sexual harassment.

By contrast, the invocation of tax exceptionalism when describing differences between tax and other fields of law reveals nothing new. Each of the differences between tax and other fields of law can be fully evaluated by considering them in light of tax values and values associated with law generally. The label “tax exceptionalism” gives us no new understanding about how these differences promote or conflict with relevant values. It is not useful.

The second piece of scholarship we want to discuss illustrates these points. In *Structural Tax Exceptionalism*, Professor James Puckett identifies differences between the administration of tax and other bodies of federal law.<sup>188</sup> He points out, for example, that the IRS and Treasury depart from the usual notice-and-comment rulemaking prescribed by the APA.<sup>189</sup> In addition, Professor Puckett notes that section 7805(b) of the Code permits the retroactive

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186. See also Parker, *supra* note 98 (arguing that “tax law consists of highly technical, often formalistic, and sometimes inequitable and illogical rules”).

187. Sexual harassment also includes conduct “when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment.” See 32-24 MISS. CODE R. § 11.04 (LexisNexis 2015) (providing language for this general principle); see also *Facts About Sexual Harassment*, THE U.S. EQUAL OPPORTUNITY COMMISSION (June 27, 2002), <https://www.eeoc.gov/facts/fs-sex.html> (same).

188. Puckett, *supra* note 21.

189. *Id.* at 1070–71.

application of tax regulations, again in contrast to the usual approach under the APA,<sup>190</sup> and that because of the Anti-Injunction Act and the Declaratory Judgment Act taxpayers ordinarily can “challenge Treasury Regulations only post-enforcement.”<sup>191</sup> Finally, he observes that by contrast to the general practice under the APA, the IRS’ assertions of tax liability receive no special deference in litigation.<sup>192</sup> He claims that these differences constitute “structural tax exceptionalism,” arguing that the structure of the tax law makes it exceptional.<sup>193</sup>

We believe that Professor Puckett’s article makes important points and we agree with him that a one-size-fits-all approach to the administration of federal tax law would be unwise. However, despite his use of the phrase “tax exceptionalism” in the title and in the article itself, Professor Puckett is not treating tax law as “deeply different” from other law. He is not treating tax as exceptional. Rather, his article is within the category of articles that Professor Zelenak refers to as identifying “particular characteristics of the tax laws [that] justify the existence of tax-specific rules.” This raises the question of whether the use of the term “exceptionalism” adds anything to his analysis. We believe that it does not.

Contrasting Professor Puckett’s use of the label “tax exceptionalism” and the label “sexual harassment” shows why the exceptionalism label is not useful. As noted above, the sexual harassment label was useful in that it revealed a new way of understanding the workplace behaviors in question and changed both the normative and legal norms applicable to those behaviors. By contrast, Professor Puckett’s use of the label “tax exceptionalism” adds nothing to his analysis of each of the specific differences he identifies regarding tax administration. It neither gives us additional understanding of these particular differences nor contributes to changing the normative or legal environment in which these differences operate. In short, the label “tax exceptionalism” does no useful work: Professor Puckett’s analysis would be the same if he had never mentioned it.

To be clear, we are not saying that Professor Puckett’s identification of the differences between tax and other fields of law and his arguments in support of the proposition that those differences justify different treatment of tax are not useful. Our argument is that *labeling* those differences tax exceptionalism is not useful because it does not contribute to his analysis. It can also hamper

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190. *Id.* at 1073–74, 1095–1100.

191. *Id.* at 1074. *But see* Daniel Jacob Hemel, *The Living Anti-Injunction Act*, 104 VA. L. REV. ONLINE 74 (2018); Kristin E. Hickman and Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683 (2017).

192. Puckett, *supra* note 21, at 1111.

193. *Id.*

future analysis if the label becomes a substitute for engaging in the nuanced examination of each difference that Professor Puckett himself engages in.

Our last three examples of scholarship illustrate our thesis that differences between tax and other fields of law can be fully explored without using the idea of tax exceptionalism. In his provocatively titled *The President's Power To Tax*,<sup>194</sup> Professor Daniel Hemel points out an important anomaly of federal tax law. In most fields of law new regulations reveal their costs and benefits directly, so the President can be reasonably confident that the political benefits will offset the political costs of the regulations. However, that is not the case in tax. Some tax regulations curb perceived abuses, thereby raising revenue. Regulations like these have a political cost because they increase taxes. The regulations promulgated under section 385 are one example.<sup>195</sup> The President, whose administration is responsible for the tax increase will bear that political cost, but he will not reap all of the possible political benefit of the increased spending made possible by the new revenue. Because only Congress can enact spending measures, even if Congress used the new revenue to send a check to every taxpayer, at least some of the credit for that benefit would go to Congress. Hence, the political costs of such regulations, which fall entirely on the President, cannot be fully offset by the benefits provided by increased revenue. This, Professor Hemel argues, means that the incentives generally weigh against unilateral revenue raising through tax regulations.<sup>196</sup> And the infrequency with which the Executive exercises this revenue raising power testifies to that.<sup>197</sup>

If, as Professor Hemel maintains, it is the case that executive power that is routinely exercised in non-tax contexts is rarely exercised in the tax context, then tax is, in this sense, different from other fields of law. Therefore, like Professor Puckett, Professor Hemel identifies a difference between tax and other fields of law. Moreover, like Professor Puckett, Professor Hemel seems to see the difference as “another example of ‘tax exceptionalism.’”<sup>198</sup> But unlike Professor Puckett, Professor Hemel makes no overt use of tax exceptionalism in his analysis. Instead, he turns to game theory and develops a model to

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194. Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633 (2017).

195. *Id.* at 683–84 (discussing I.R.C. § 385 and Treas. Reg. § 1.385-1 *et seq.*).

196. *Id.* at 706–07.

197. Stephen E. Shay, *Mr. Secretary, Take the Juice Out of Corporate Expatriations*, 144 TAX NOTES, 473 (2014); see Robert Rizzi, *Proposed Regulations on Debt-Equity: Beyond Inversions*, 43 J. CORP. TAX'N 26 (2016) (providing the history of § 385); Stephen E. Shay, J. Clifton Fleming, Jr. & Robert J. Peroni, *Treasury's Unfinished Work on Corporate Expatriations*, 150 TAX NOTES 933 (2016) (arguing that Treasury should use section 385 to restrict foreign parent tax advantages and counter tax avoidance).

198. Hemel, *supra* note 194, at 654 n.92.



understand the difference between the President's exercise of his authority in tax and his exercise of that authority in other fields of law.<sup>199</sup> That difference matters, but the concept of tax exceptionalism plays no role in his analysis.<sup>200</sup> While we wish he had resisted the temptation to invoke the concept of tax exceptionalism as a gateway to his observations, we catalogue his work with that of the non-exceptionalists because, like them, he does not employ the concept as a substitute for analytical rigor.

Like Professors Puckett and Hemel, Professor Andy Grewal identifies a difference between tax and a specific field of law—criminal law. In *Why Lenity Has No Place in the Income Tax Laws*,<sup>201</sup> Professor Grewal examines whether lenity—a canon of statutory construction pursuant to which ambiguities should be resolved in favor of criminal defendants—should apply in construing provisions of Subtitle A of the Code, in cases where criminal liability may be at stake.<sup>202</sup> His conclusion is that it should not, and the reason is that the provisions of Subtitle A differ from those of criminal statutes in an important way.

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199. *Id.* at 698–710.

200. Hemel, *supra* note 20. Professor Hemel engages in a similar analysis in a more recent blog post in which he considers ways in which *Bullock v. IRS*, 2019 U.S. Dist. LEXIS 126921 (D. Mont. July 30, 2019) was “the latest in a series of cases that might be seen as auguring the end of ‘tax exceptionalism.’” Hemel, *supra* note 20. In the post, as in the article discussed above, Professor Hemel uses the term tax exceptionalism. He defines it as “the long-held view that general principles of administrative law—such as *Chevron* deference for agency statutory interpretations and the notice-and-comment requirement for agency rules—do not apply in the tax domain.” *Id.* He additionally notes that “[t]he effort to end tax exceptionalism scored a major victory in January 2011 when Chief Justice John Roberts, in the case of *Mayo Foundation for Medical Education and Research v. United States*, said that the Court was ‘not inclined to carve out an approach to administrative review good for tax law only.’” *Id.* But despite his use of the term, in the blog post, Professor Hemel once again makes no overt use of the concept of tax exceptionalism in his analysis. Instead, he focuses on one particular difference between tax and other fields of law to suggest why treating tax differently in administrative law could be salutary. The difference that he identifies is that in tax, unlike in other areas of law, the alignment of interest groups is asymmetrical. He fears that if tax is not treated differently, “the administrative law of tax will become a one-way ratchet: any IRS action that increases tax liabilities or compliance costs will trigger litigation, while any action that reduces liabilities or relieves compliance burdens will go unchallenged.” *Id.* We agree with Professor Hemel that the asymmetry he identifies might well justify treating tax differently in certain cases—indeed it might have persuaded the *Mayo* Court to decline to extend *Chevron* deference to tax if it had been pointed out. But our point is not that tax should always be treated the same as other fields of law but that the analysis should involve the precise evaluation of the import of the particular difference identified. While we might wish that he would also avoid resort to the term, the important point for us is that he does not actually treat tax as exceptional.

201. Andy Grewal, *Why Lenity Has No Place in the Income Tax Laws*, 81 MO. L. REV. 1045 (2016).

202. *Id.*

As Professor Grewal points out, criminal statutes proscribe specific behavior. Therefore, where there is an ambiguity, the lenient interpretation can be easily determined. By contrast, the provisions of Subtitle A of the Code do not prohibit specific behavior; rather they impose tax consequences on specific behavior. As a consequence, the lenient interpretation cannot be easily determined *ex ante*. An example illustrates the difficulty:

Most taxpayers might prefer to exclude an item from gross income under § 61, but other taxpayers might favor inclusion. Also, most taxpayers might prefer to immediately deduct expenses under § 162, but other taxpayers might prefer to capitalize those expenses. In other words, the income tax laws do not yield a single lenient interpretation—what might be good for one taxpayer might be bad for another.<sup>203</sup>

Because it is impossible to determine what the lenient interpretation of Subtitle A provisions should be, Professor Grewal concludes that lenity should not apply to those provisions.

But Professor Grewal does not stop with his analysis of Subtitle A. He is careful to point out that his identification of a profound difference between the provisions of Subtitle A and criminal statutes “does not mean that the rule of lenity has no place in the tax laws.”<sup>204</sup> For example, he considers the provisions of Subtitle F, which “create requirements for taxpayers (including obligations to file returns, pay taxes, and withhold on amounts transferred and . . . often are enforced by both civil and criminal sanctions),”<sup>205</sup> and reaches a different conclusion with respect to the application of the rule of lenity. Here, he concludes that the rule of lenity should apply.

What is striking about Professor Grewal’s analysis is its nuance. He not only resists the temptation to jump from the identification of a difference between tax and criminal law to the pronouncement of tax as exceptional, but he goes even further. He cautions that the Supreme Court’s apparent rejection of the concept of tax exceptionalism in *Mayo* could lead to the reflexive assumption that tax should never be treated differently from other fields of law. He fears that *Mayo* will be read only as a manifesto against tax exceptionalism, heralding the victory of the anti-exceptionalists and ending any inquiry into whether tax deserves special treatment. This worry is a reminder that when the Supreme Court in *Mayo* refused to “carve out an approach to administrative review good for tax law only,” it did so because the taxpayer had “not advanced any justification” for doing so.<sup>206</sup> When such a justification is provided, tax should be treated differently.

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203. *Id.* at 1051.

204. *Id.* at 1055.

205. *Id.*

206. *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 55 (2011).

Forgetting this caveat is just as much a mistake as its opposite—believing in tax exceptionalism. The beauty of Professor Grewal’s analysis is that he makes neither mistake. In other words, the question of difference must remain an important part of the analysis, unencumbered by baggage involving tax exceptionalism.<sup>207</sup>

Professor Kristin Hickman, the pre-eminent champion of anti-tax exceptionalism,<sup>208</sup> provides our final example of scholarship that examines the implication of differences between tax and other fields of law. In *Administering*

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207. And if the *Chevron* deference that was at issue in *Mayo* continues to be assailed, as some scholars have predicted, adopting the analysis we are advocating will be even more important. See, e.g., Jones, *supra* note 32, at 19.

208. Professor Hickman’s early work tackled precisely the question the Supreme Court eventually answered in *Mayo*, advocating the position the Court eventually embraced. Hickman, *supra* note 171. She submitted an amicus brief in *Mayo*, consistent with the position she had taken in her scholarship. Her approach was to engage in a detailed examination of the issue, Kristin E. Hickman & Matthew D. Krueger, *In Search of the ‘Modem’ Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007), at one point even questioning whether the Government’s criminal prosecutions of tax shelter promoters might bring the rule of lenity to bear on deference decisions, thereby weakening the argument for deference. Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905 (2007). She also examined the particular question of the deference to be accorded other IRS guidance. Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. (2009). Professor Hickman also conducted important empirical work on Treasury’s claims and practices in promulgating regulations and found many regulations “susceptible to legal challenge[s]” for failure to adhere to APA rulemaking requirements. Hickman, *supra* note 21, at 1795. More recently, Professor Hickman has lauded the Tax Court’s application of the APA in *Altera*. Kristin E. Hickman, *The Tax Court Delivers An APA-Based Smackdown*, LAW PROFESSOR BLOG NETWORK: TAXPROF BLOG (July 28, 2015), [https://taxprof.typepad.com/taxprof\\_blog/2015/07/hickman-altera-corp-subs-v-commissioner-the-tax-court-delivers-an-apa-based-smackdown.html](https://taxprof.typepad.com/taxprof_blog/2015/07/hickman-altera-corp-subs-v-commissioner-the-tax-court-delivers-an-apa-based-smackdown.html). In a recent amicus brief in the *Florida Bankers* case, she also urged the Supreme Court to hear the taxpayer’s appeal from the DC Circuit’s decision that the Anti-Injunction Act precluded pre-enforcement review of a Treasury regulation. See Brief of Amicus Curiae Professor Kristin E. Hickman In Support of Petitioners, *Florida Bankers Ass’n v. US Dep’t of the Treasury*, 136 S. Ct. 2429 (2016), No. 15–969, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2739989](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739989). Professor Hickman has also served as an amicus to the Supreme Court in the appeals of other important cases, such as *Home Concrete*. See Brief of Amicus Curiae Professor Kristin E. Hickman In Support of Respondents, *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012), No. 11–139, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1989098](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989098), and *Quality Stores*, see Brief of Professor Kristin E. Hickman As Amicus Curiae in Support of Neither Party, *United States v. Quality Stores, Inc.*, 572 U.S. 141 (2014), No. 12–1408, [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/12-1408\\_np\\_amcu\\_keh.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-1408_np_amcu_keh.pdf), and to the Court of Appeals for the Ninth Circuit

the *Tax System We Have*,<sup>209</sup> Professor Hickman explains that the differing treatment of tax is grounded in a concern for protecting the revenue-raising function of the Code. But she points out that the current tax system contains many provisions that do not have as their principal policy objective raising revenue—those provisions which Stanley Surrey long ago identified as tax expenditures. Indeed, she shows that over a five-year period the number of proposed and final regulations involving tax expenditures constituted between thirty and forty percent; adding regulations on matters involving both objectives brings the number of final and proposed regulations that do not have raising revenue as their sole objective to sixty-five percent.<sup>210</sup> Professor Hickman sees in this data an argument against general exceptionalism in the administration of the tax law, which, she observes, is “premised on the revenue-raising functions” of tax.<sup>211</sup>

Professor Hickman considers some specific statutory provisions, including the Anti-Injunction Act and Declaratory Judgment Act, discussed above,<sup>212</sup> and provisions of the Code permitting retroactive application of Treasury regulations. In her analysis, these provisions, which treat tax differently from other fields of law, derive from the underlying belief that tax is exceptional—again, a belief based on the assumption that tax is fundamentally concerned with revenue-raising.<sup>213</sup> Professor Hickman argues that since the policy objective of these provisions is protection of the revenue-raising function of tax, their application ought to be limited accordingly.<sup>214</sup> She urges abandonment of the one-size-fits-all approach to these provisions.

Regarding the Anti-Injunction and Declaratory Judgment Acts, Professor Hickman advises that:

[i]f courts perceive that an increasing number of new Treasury regulations are more oriented toward non-revenue-raising programs and goals, . . . [courts] may be more

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in *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011). Brief of Professor Kristin E. Hickman As Amicus Curiae in Support of Plaintiffs-Appellants on Rehearing En Banc, 650 F.3d 717 (D.C. Cir. 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1646543](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646543). Nevertheless, despite the decidedly anti-exceptionalist perspective of her work, Professor Hickman’s analysis is nuanced; she recognizes that in some cases there are rational and deliberate reasons for agency-specific deviations from general administrative law doctrinal norms. See Kristin E. Hickman, *Response Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy*, 89 TEX. L. REV. 89, 93 (2010).

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

210. *Id.* at 1723.

211. *Id.* at 1722.

212. *Supra* note 15 & notes 190–191 and accompanying text.

213. Hickman, *supra* note 209, at 1753–58.

214. Professor Hickman also argues that her findings may have implications for the organizational structure of the IRS. Hickman, *supra* note 21, at 1760–61.

inclined to construe pre-enforcement challenges to those regulations as unrelated to the assessment and collection of taxes, and thus beyond the scope of [the Anti-Injunction Act]. . . . Regardless of what the courts do, Congress should revisit the scope of [the Anti-Injunction Act and the Declaratory Judgment Act].<sup>215</sup>

And regarding retroactivity, Professor Hickman proposes that:

[Congress consider curtailing the] broad authority of [Treasury and the IRS] to make all of their regulations retroactive. . . . For example, authorizing retroactivity only to counter abusive transactions could protect the revenue-raising function while bringing other, less revenue-oriented aspects of the tax system into closer alignment with general administrative-law norms. In the meantime, however, greater judicial awareness of the scope of Treasury and IRS administrative efforts in other, non-revenue-raising areas may prompt the courts to examine Treasury and IRS decisions to adopt retroactive regulations with a more critical eye.<sup>216</sup>

Like the analyses offered by Professors Hemel and Grewal in the articles discussed above, Professor Hickman's discussion in *Administering the Tax System We Have* are incisive and nuanced. They represent precisely the kind of issue-by-issue analysis that we believe should be applied to the questions when tax should be treated like other fields of law and when tax should be treated differently. This contextual analysis should replace the knee-jerk invocation of tax exceptionalism.

#### CONCLUSION: TAX IS LAW

Tax is different from other fields of law, just as any field of law is different from others. But the proposition that tax is exceptional claims more than difference—it claims that tax is different in kind, that it is unique.

The belief that tax is exceptional is ancient; its roots go back at least as far as the jurisprudence of the Roman Empire. In the context of modern United States tax theory, we have suggested that the foundation of tax exceptionalism is the dogma that tax is essentially about revenue-raising, which alienates tax from the pursuit of social justice central to other fields of law. Moreover, protecting the revenue-raising function of the tax law from contamination by the competing policy goals of tax expenditures has led to a demand for hyperclarity, which in turn has led to a jurisprudence of tax that would reduce tax to crystalline rules. But as scholars like Professors Kristin Hickman<sup>217</sup> and Reuven Avi-Yonah<sup>218</sup> have argued, tax embraces social policy goals in addition to the goal of revenue-raising. And as we have argued in previous scholarship, the idea of tax as a compendium of rules interpreted according to their

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215. Hickman, *supra* note 209, at 1757.

216. *Id.* at 1760.

217. Hickman, *supra* notes 208–216 and accompanying text.

218. Avi-Yonah, *supra* note 60.

plain meaning, is both descriptively and normatively false, constrains the development of a robust jurisprudence of tax, threatens the legitimacy of the IRS, and likely contributes to the relative lack of diversity in the tax bar.<sup>219</sup>

In this Article we have attempted a more comprehensive examination of tax exceptionalism by taking on what we think is at the heart of the tenacity of the concept: The feeling that tax is different from other areas of law in many ways. Even those who do not agree that tax exceptionalism is affirmatively harmful should be able to agree that the concept is useless and should be abandoned on that ground alone. We have posited that if the proposition that tax is exceptional is true, then invoking tax exceptionalism should be useful; it should add significantly to the analysis of the various ways that tax is different. However, the proposition that tax is exceptional in fact adds nothing to the analysis of difference. As evidence we have proffered two judicial opinions (Judge Wisdom's opinion in *Henderson Clay Products*<sup>220</sup> and the Eighth Circuit opinion in *Mayo*<sup>221</sup>) and two works of scholarship (by Professors Zelenak<sup>222</sup> and Puckett<sup>223</sup>) that have invoked tax exceptionalism, and we have sought to show that the concept ends up playing no constructive analytical role. By contrast, we have examined the work of three scholars (Professors Hemel,<sup>224</sup> Grewal,<sup>225</sup> and Hickman<sup>226</sup>), who have engaged in nuanced scrutiny of a variety of ways in which tax is different from other fields of law without making any significant analytical use of the proposition that tax is exceptional.

That is precisely the analysis the Supreme Court employed in *Mayo*. In *Mayo* the Court began by observing that the taxpayer had “not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency.”<sup>227</sup> It then concluded that: “*In the absence of such justification*, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly ‘[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.’”<sup>228</sup>

The Court's analysis in *Mayo* provides the correct template. It neither denies that tax differs from other fields of law nor endorses the application of

219. See *supra* notes 5, 7–8 and accompanying text.

220. *Supra* notes 155–161 and accompanying text.

221. *Supra* notes 162–171 and accompanying text.

222. See Zelenak, *supra* notes 179–184 and accompanying text.

223. See Puckett, *supra* notes 188–193 and accompanying text.

224. See Hemel, *supra* notes 194–200 and accompanying text.

225. See Grewal, *supra* notes 201–207 and accompanying text.

226. See Hickman, *supra* notes 208–216 and accompanying text.

227. *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 55. (2011).

228. *Id.* (emphasis added) (citations omitted).

a different level of deference to tax. Instead, the Court finds the Goldilocks solution: Case-by-case determination of whether different treatment of tax is warranted. We think that other courts and scholars should do likewise.

The liberation of courts and scholars from the unhelpful meta-question of whether tax is exceptional will have at least two salutary consequences. First, it will allow them to focus their attention on important, specific questions about how tax is like, or different from, other fields of law in order to determine whether and how a particular doctrine should apply to tax. Second, freed from the distraction of the useless concept of tax exceptionalism courts and scholars can bring to bear on tax the analytical methods and techniques developed for law generally.<sup>229</sup>

In sum, we do not deny that tax is different from other fields of law. What we claim is that each difference should be evaluated in a specific context to determine if tax should be treated differently in that context as a result of the difference.

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229. For example, Professor (now Dean) Paul Caron has lamented that exceptionalists often ignore trends in statutory construction and legislative process theory developed mainly in nontax areas. Caron, *supra* note 2, at 538. But if tax scholars put aside the idea that tax is exceptional, they will be able to apply to tax the interpretive and process theories germane to law generally, ending the “bankruptcy of tax parochialism.” Johnson, *supra* note 1, at 20.

## APPENDIX A

## Goodbye National Muffler\*\*\*



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\*\*\* The cartoon reproduced above was the brainchild of now-Judge Ronald L. Buch of the U.S. Tax Court. It was shown as the last slide on a panel discussion held at the meeting of the Committee on Administrative Practice held at the Midyear Meeting of the Tax Section of the American Bar Association on January 21, 2011. The panel consisted of Gilbert S. Rothenberg, Acting Deputy Assistant Attorney General; Kathryn A. Zuba, Special Counsel, IRS Office of Chief Counsel; and Ronald L. Buch, then at Bingham McCutchen LLP, and was moderated by Christopher Rizek, partner at Caplin and Drysdale. Kudos to Judge Buch for the cartoon, and for having the wit to make the initials on the jubilant dancer's shirt be GSR—Gilbert S. Rothenberg, who participated in much of the *Mayo* litigation on behalf of the Government. The cartoon is reproduced with the permission of Judge Buch and Mr. Rothenberg.