LEGISLATIVE ENTRENCHMENT RULES IN THE TAX LAW

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INTRODUCTION

Can one Congress tie the hands of a later Congress? At its heart, that's the issue posed by legislative entrenchment rules.

Generally, a statute creates a legislative entrenchment rule whenever it says that a subsequent statute will be effective only if it is enacted or phrased in a specific way. For example, the War Powers Resolution (WPR) provides that no statute may authorize military hostilities unless it specifically states that it authorizes those hostilities within the meaning of the WPR.[1] If a statute merely authorizes war against Country X, that will not be enough. The statute must specifically state that the authorization follows from the WPR.

Legislative entrenchment rules come in many other forms. Some, analogous to the WPR, require a future Congress to make a specific reference to an existing statute if it wishes to amend or create exceptions from that statute.[2] Other legislative entrenchment rules impose a general, heightened clarity requirement, stating that amendments or modifications to an existing law must be made "expressly."[3] Still others state that future provisions of law that are not contained in a particular title or in a particular type of act must be disregarded.[4] The different types of legislative entrenchment rules are limited only by Congress's imagination.

Legislative entrenchment rules, if strictly applied, may nullify subsequent statutes that do not comply with their terms. Consequently, these rules may influence how Congress drafts its legislation. Suppose, for example, that an earlier Congress enacts a statute providing that "No subsequent law may impose a tax on the sale of bananas unless it specifically states that it applies to bananas." A later Congress might impose a general tax on the sale of "all fruit," intending for its rule to apply without limitation. Yet if the earlier statute is applied strictly, the later statute would not reach the sale of bananas. To accomplish its goals, the later Congress would have to specifically state that its tax applies to bananas.

This might not seem to present much of an issue. It's not especially hard to draft a law that specifically states that it applies to bananas, nor should it be difficult to comply with any legislative entrenchment rule whose requirements are clear. And Congress can always repeal a legislative entrenchment rule that it truly dislikes. But given the breadth and volume of previously enacted legislation, a later Congress can easily overlook the legislative entrenchment rules enacted by an earlier Congress. When this

1. War Powers Resolution of 1973 § 8, 50 U.S.C. § 1547(a)–(a)(1) (2006).
2. *See, e.g.*, I.R.C. § 3112 (2006), discussed *infra* Part III.B.
3. *See, e.g.*, I.R.C. § 262(a) (2006).
4. *See, e.g.*, I.R.C. § 501(c)(1)(A)(i)–(ii) (2006), discussed *infra* Part II.B.

happens and statutory conflicts arise, the laws will be unclear, leading to confusion, uncertainty, and the possibility that the later Congress's intent will not be carried out.

The problems posed by legislative entrenchment rules are not merely theoretical. In 2000, for example, the Clinton Administration addressed whether an appropriations bill providing $5 billion for Operation Allied Force (i.e., the Kosovo War) gave the President the authority to continue military hostilities in Kosovo.[5] The appropriations bill did not make the specific statement required by the WPR, but the President nonetheless concluded that Congress had authorized war by providing funding for it. Several members of Congress filed a lawsuit challenging the President's actions, but the case was dismissed on standing grounds.[6]

Legislative entrenchment rules have raised difficult interpretive issues in the tax laws, too. These issues have not involved matters of life and death, but the problems are hardly trivial. In a recent case involving over $1 billion of income, *Capital One Financial Corp. v. Commissioner*,[7] the Tax Court voided a statute because it was not codified in the manner prescribed by a legislative entrenchment rule.[8] But in other circumstances, legislative entrenchment rules have been largely ignored. The Internal Revenue Service (IRS) and the Tax Court have repeatedly concluded that § 7805(e) of the Internal Revenue Code (IRC or Code)[9] creates an exception from the Administrative Procedure Act's (APA's) requirements, even though the APA's legislative entrenchment rule seemingly prohibits this interpretation.[10]

The special statutory interpretation issues raised by legislative entrenchment rules have not received close attention from the IRS, the Tax Court, or taxpayers. Instead, these rules have been either applied strictly or cursorily dismissed without regard to the broader issues at stake. This lack of attention has led to inconsistent results and has added confusion to an already complex area of law.

This Article analyzes how legislative entrenchment rules affect the interpretation of subsequently enacted tax statutes. Part I discusses the

5. *See* Memorandum from Randolph D. Moss, Assistant Att'y Gen., to Janet Reno, Attorney Gen. (Dec. 19, 2000) (stating the Clinton Administration's legal justification for continuing the Kosovo War), http://www.justice.gov/olc/final.htm.

6. *See* Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000).

7. 130 T.C. 147 (2008), *appeal docketed*, No. 10-1788 (4th Cir. July 27, 2010); *Capital One Fin. Corp. v. Comm'r*, 133 T.C. 4111 (2009).

8. *Capital One*, 130 T.C. at 157; 133 T.C. at 56. *See infra* Part III.A.

9. References to the Internal Revenue Code (IRC or Code) are to the Internal Revenue Code of 1986, as amended.

10. *See infra* Part III.C.

relevant court cases and the academic literature regarding legislative entrenchment rules. Several Supreme Court decisions clearly establish that some types of legislative entrenchment rules do not require later Congresses to employ any specific language in enacting legislation. However, the effect of other types of legislative entrenchment rules remains uncertain. Several scholars have debated the relevant issues, and their views are summarized.

Part II argues that legislative entrenchment rules—however formulated—should not automatically nullify subsequent statutes that fail to satisfy those rules' requirements. Instead, like all other statutes, a legislative entrenchment rule should be subject to the doctrine of implied repeals. That is, if a later enacted statute irreconcilably conflicts with a legislative entrenchment rule or is intended to substitute for it, the later enacted statute should trump the legislative entrenchment rule.[11] In making this argument, Part II considers and rejects arguments made by some commentators who favor strict application of legislative entrenchment rules. Part II also considers some of the political motivations that might lead to the enactment of legislative entrenchment rules and considers their costs and benefits.

Part III examines several types of legislative entrenchment rules that have caused (or may cause) controversy in the tax laws. Section 446(e) of the Code, the provision at issue in *Capital One*, receives special attention because of the enormous number of dollars at stake and because the Tax Court construed that statute in a manner directly contrary to this Article's thesis. Part III also considers the effect of legislative entrenchment rules regarding federal instrumentalities and wealth transfer taxation. Part III next argues that the Tax Court and the IRS have given insufficient weight to the APA's legislative entrenchment rule in finding that some temporary regulations, issued without notice and comment, never expire. Some analogous issues raised by other statutes providing interpretive rules are also considered.

I. CURRENT TREATMENT OF LEGISLATIVE ENTRENCHMENT RULES

A. Types of Legislative Entrenchment Rules

Before examining the case law and academic literature, it will be useful to establish the nomenclature that this Article will use to describe some common types of legislative entrenchment rules.[12]

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11. *See* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936) (noting that in situations where there are irreconcilable conflicts between two acts or where the later act was clearly intended as a substitute, the earlier act will be repealed by implication).

12. By simply providing a definition, some statutes might be understood to entrench

An *express statement rule* is one that requires future legislation to modify existing legislation expressly. Section 559 of the APA provides one such example. It states that a subsequent statute cannot supersede or modify the APA "except to the extent that it does so expressly."[13] Under Supreme Court case law, an express statement rule like this one does not require a future statute to actually say that it is superseding existing law; it just demands that the future statute provide some express indication that it is doing so.[14] For example, a future statute can expressly supersede the APA if it contains provisions directly contrary to that statute.

A *specific statement rule*, on the other hand, requires future legislation to actually state that it modifies or supersedes existing law—direct contradiction isn't enough. Section 252 of the National Defense Authorization Act, for example, states that its provisions cannot be superseded by a future law unless that law "specifically states that such provision of law modifies or supersedes the provisions"[15] of § 252. This differs from an express statement rule because it requires a future statute to explicitly announce that it supersedes the prior statute. If § 252 merely provided an express statement rule, a later statute could trump the National Defense Authorization Act just by clearly contradicting it.[16]

A *specific reference rule* is highly similar to a specific statement rule. This type of rule requires future legislation to specifically (or clearly or explicitly, etc.) refer to a preexisting provision to modify that provision. The Religious Freedom Restoration Act of 1993 (RFRA) provides an example of a specific reference rule.[17] Section 6 of that Act states that any existing

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future legislation. Section 7701 of the IRC, for example, provides a definition of the term "corporation." Statutes that use the term "corporation" in other sections of the Code are generally understood to incorporate that definition, even if those other sections were enacted after § 7701 and even if they don't expressly reference § 7701. *See* I.R.C. § 7701(a)(3). Thus, § 7701 influences the interpretation of subsequently enacted statutes and might be interpreted as a legislative entrenchment rule if that term is defined loosely. But this Article is concerned with statutes that, by their express terms, attempt to control the interpretation of future legislation.

13. 5 U.S.C. § 559 (2006).

14. *See* Marcello v. Bonds, 349 U.S. 302, 310 (1955), discussed *infra* Part I.B.

15. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No 101-189, § 252(b)(1)(B), 103 Stat. 1352, 1404–05 (1989) (codified as amended at 10 U.S.C. § 2361(b)(1)(B) (2006)).

16. Other specific statement rules may operate slightly differently. For example, § 8(a)(1) of the War Powers Resolution (WPR), discussed earlier, *see supra* note 1 and accompanying text, does not require a future statute to specifically state that it is superseding existing legislation. Instead, it requires that a future statute specifically state that it is intended to comply with the WPR. Thus, § 8(a)(1) is not designed to control how the WPR is repealed but is instead designed to control how war powers are exercised. *See id.*

17. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb–

or future law is subject to RFRA "unless such law explicitly excludes such application by reference" to that statute.[18]

An *organizational rule* is a rule that disregards provisions of law that are not contained in a particular title or that are not contained in a specific type of act. Section 501(c)(1) of the Code provides one example. It states that, to be effective, income tax exemptions regarding some U.S. instrumentalities must be contained in the internal revenue title (i.e., the Code of 1986) or in a revenue act; others must be disregarded. Unlike with the other legislative entrenchment rules, the focus is on the location of the statute,[19] not necessarily its language.

A single statute may contain multiple types of legislative entrenchment rules. A provision in the National Emergencies Act, for example, states that no future law "shall supersede this subchapter [of the National Emergencies Act] unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter."[20] This provision thus contains both a specific reference rule ("referring to this subchapter") and a specific statement rule ("declaring that the new law supersedes the provisions of this subchapter").

The Supreme Court has indicated that express statement rules do not require future Congresses to employ any particular language to modify or supersede the provisions that those rules purport to protect.[21] Instead, express statement rules can be repealed by implication. The Court has not squarely addressed specific reference, specific statement, or organizational

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2000bb-4 (2006)), *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 532–35 (1997) (ruling the Religious Freedom Restoration Act (RFRA) of 1993 unconstitutional as applied to states, but maintaining its applicability to the federal government). RFRA was amended in 2000 to apply only to the federal government. *See* Pub. L. No. 106-274, § 7(a), 114 Stat. 803, 806 (codified as amended at 42 U.S.C. § 2000cc-2 (2006)).

18. RFRA § 6(b) (codified at 42 U.S.C. § 2000bb-3(b) (2006)).

19. Generally speaking, Congress does not codify its own legislation. Instead, the Office of the Law Revision Counsel consolidates and codifies various congressional enactments and is responsible for publishing the various titles of the U. S. Code. In some circumstances, however, Congress will enact a title of the U.S. Code into positive law or enact a set of laws as part of a single title. *See* 1 U.S.C. § 112 (2006). The federal tax laws, for example, have historically been enacted as part of an internal revenue title (the most current being the Internal Revenue Code of 1986). When § 501(c)(1) refers to the placement of a future statute in the internal revenue title, it is referring to a title of Congress's own creation—the statute is *not* saying that the effectiveness of the future statute will depend on where the Office of the Law Revision Counsel decides to codify it. *See* I.R.C. § 501(c)(1)(A)–(B) (2006).

20. Pub. L. No. 94-412 § 201(b), 90 Stat. 1255, 1255 (1976) (codified at 50 U.S.C. § 1621(b) (2006)).

21. *See* Marcello v. Bonds, 349 U.S. 302, 310 (1955), discussed *infra* Part I.B.

rules, even though Congress has enacted many of these rules.[22] But Part II will argue that these other types of rules should also be subject to repeal by implication.

B. Supreme Court Decisions

In the leading case on legislative entrenchment rules, *Marcello v. Bonds*,[23] the Supreme Court considered whether the APA's express statement rule nullified some procedural provisions of the Immigration and Nationality Act of 1952 (Immigration Act).[24] In *Marcello*, the petitioner was ordered deported after a hearing conducted under the Immigration Act. But the petitioner argued that the order was invalid because the Immigration and Naturalization Service (INS), in conducting the hearing, didn't follow the separation of functions provisions prescribed by the APA.

Section 554(d)[25] of the APA indicates that a hearing officer cannot be subject to the supervision of those engaged in the investigation and prosecution of cases. Separation of adjudicative and prosecutorial functions is meant to ensure fair and impartial hearings. However, the Immigration Act did not require the separation of functions in deportation hearings. Under § 242(b) of the Immigration Act, the INS could appoint a special inquiry officer to preside over a hearing (as it did in Marcello's case), even though those officers were generally subject to the supervision of those with investigative and prosecutorial responsibilities. (Section 242(b) also contains numerous other provisions relating to deportation hearings, some analogous to the APA's general provisions and some not.)

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22. In addition to the legislative entrenchment rules discussed in this Article, see 7 U.S.C. § 3123(g)(2) (2006) (specific reference rule regarding expenses of Department of Agriculture Advisory Board); *id.* § 7253(d)(2) (2006) (specific reference rule regarding limitations on federal milk marketing order system reports); *id.* § 7958(f)(2) (2006) (specific reference rule regarding expenses of the Peanut Standards Board); 10 U.S.C. § 401(b) (2006) (specific reference rule regarding aid to foreign countries); *id.* § 2374(b) (2006) (specific statement and specific reference rules regarding awards from certain federal agencies to nongovernmental entities); *id.* § 2534(f) (2006) (specific reference and specific statement rules regarding limits on the Department of Defense's ability to procure non-U.S. goods); 15 U.S.C. § 1012(b) (2006) (express statement rule regarding the business of insurance); 41 U.S.C. § 253(i)(2) (2006) (specific reference and specific statement rules regarding procurements by executive agencies); Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1232(a), 112 Stat. 1920, 2155 (1998) (specific reference and specific statement rules regarding Kyoto Protocol and training of U.S. Armed Forces) (not codified). For examples of some organizational rules, see *infra* note 158.

23. 349 U.S. 302 (1955).

24. *See id.* at 306–07; Pub. L. No. 82-414, § 242(b), 66 Stat. 163, 209 (codified at 8 U.S.C. § 1252(b) (2006).

25. 5 U.S.C. § 554(d) (2006).

Marcello argued that the INS's appointment of a special inquiry officer invalidated the deportation order. He acknowledged that, standing alone, § 242(b) permitted the INS to use special inquiry officers. But he argued that the APA's express statement rule nullified § 242(b). Section 559 of the APA provided that a "[s]ubsequent statute may not be held to supersede or modify [certain provisions of the APA] . . . except to the extent that it does so expressly."[26] The express statement rule in this statute, Marcello argued, effectively required that the INS follow APA procedures, including those found in § 554(c). Although § 242(b) of the Immigration Act stated that it provided "the sole and exclusive" procedures for deportation hearings, nothing in the Immigration Act expressly referred to the APA.

The Supreme Court rejected Marcello's arguments. The Immigration Act's "detailed coverage"[27] of deportation hearings showed that Congress was "setting up a specialized administrative procedure applicable to deportation hearings."[28] If the Court were to hold that the APA applied to deportation hearings, notwithstanding the Immigration Act's specific and detailed provisions, Congress's "painstaking efforts"[29] in drafting the Immigration Act would be rendered "completely meaningless."[30]

The Court acknowledged that in light of the APA's express statement rule, "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed."[31] However, § 242(b)'s statement that it provided the "sole and exclusive" procedures for deportation hearings provided a "clear and categorical direction [that] was meant to exclude the application of the Administrative Procedure Act."[32] Perhaps Congress could have specifically cited the APA in drafting the Immigration Act, but the Court declined to place undue emphasis on the presence or absence of any specific language: "Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act."[33]

Other Supreme Court decisions also suggest that "magical passwords" are not required to modify or supersede express statement rules. In *Great Northern Railway Co. v. United States*,[34] decided almost fifty years prior to

26. *Id.* § 559.
27. *Marcello*, 349 U.S. at 308.
28. *Id.*
29. *Id.* at 309.
30. *Id.*
31. *Id.* at 310.
32. *Id.* at 309.
33. *Id.* at 310.
34. 208 U.S. 452 (1908).

Marcello, the Supreme Court considered the prospective effect of the U.S. Code's general savings clause. That clause indicates that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide."[35] This clause thus provides an express statement rule: a person cannot be freed from liability incurred under a repealed statute unless the repealing statute expressly says so.

The Court pointed out that the general savings clause "has only the force of a statute"[36] and that "its provisions cannot justify a disregard of the will of Congress."[37] If through "express declaration or necessary implication"[38] the legislature's intent would be "set at naught"[39] by applying the general savings clause, the Court would not apply it. Great Northern argued that a later statute did in fact supersede the general savings clause, but the Court rejected its argument. The later statute was "in no way repugnant"[40] to the general savings clause, so the Court could give effect to both.[41]

In two subsequent cases, *Hertz v. Woodman* and *Warden v. Marrero*, the Court used language similar to *Great Northern*'s when interpreting the general savings clause, finding that a later statute could supersede the clause through "plain implication"[42] or "fair implication."[43] Each of those cases indicates that an express statement rule cannot nullify a subsequent statute merely because the later statute fails to employ any specific language. But *Marcello*, *Great Northern*, *Hertz*, and *Marrero* do not squarely address other types of legislative entrenchment rules (that is, specific statement rules, specific reference rules, and organizational rules).

Recently, in *Lockhart v. United States*,[44] the Supreme Court had a chance to

35. *Id.* at 465.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 466.

41. The petitioner in *Great Northern* argued that the savings clause in the so-called Hepburn Act prevented the government from prosecuting it under the Elkins Law, a statute repealed by the Hepburn Act. *See id.* at 453. The Hepburn Act's specific savings clause indicated that, although all laws that conflicted with the Hepburn Act were repealed, cases currently pending in the courts could proceed under the repealed laws, including prosecutions pending under the Elkins Law. Great Northern was charged for violating the Elkins Law only *after* the Hepburn Act's enactment. Thus, the Hepburn Act's savings clause did not apply to it. But the Court concluded that the U.S. Code's general savings clause continued to apply and was not overridden by the specific savings clause in the Hepburn Act, since it was possible to give effect to both. *See id.* at 469.

42. Hertz v. Woodman, 218 U.S. 205, 218 (1910).

43. Warden v. Marrero, 417 U.S. 653, 659 n.10 (1974).

44. 546 U.S. 142 (2005).

address the effect of a specific reference rule but passed on the opportunity. In that case, the Court addressed whether the government could offset Social Security benefits, otherwise payable to the petitioner, to collect a student loan debt that had been outstanding for over ten years. Section 207(a) of the Social Security Act provided a general anti-attachment rule that protected benefits from "execution, levy, attachment, garnishment, or other legal process."[45] Section 207(b) purported to protect the anti-attachment rule with a specific reference rule, stating that no previously enacted or subsequently enacted statute could be "construed to limit, supersede, or otherwise modify the provisions of [the anti-attachment rule] except to the extent that it does so by express reference"[46] to § 207.

The Court found that it "need not decide the effect of [specific]-reference provisions"[47] to decide the petitioner's case. Although Lockhart argued that the anti-attachment rule prevented the government from offsetting his Social Security benefits, the Court observed that the Debt Collection Improvement Act (the statute authorizing offsets)[48] provided "exactly the sort of express reference that the Social Security Act says is necessary to supersede the anti-attachment provision."[49] That statute provided that notwithstanding any other provision of law, including § 207, all payments due an individual under the Social Security Act would be subject to offset.[50] Since this statute specifically referenced § 207, the Court did not need to address whether the Social Security Act's general anti-attachment rule could be superseded or modified by a subsequent statute that did not expressly refer to § 207. The Court consequently affirmed the lower court's decision in favor of the government without providing any general guidance on legislative entrenchment rules.

Justice Scalia wrote a concurring opinion stating that he joined the opinion of the Court because it did not imply that § 207(b)'s requirement was binding.[51] But Justice Scalia would have preferred to "go further . . . and say that it is not."[52] He acknowledged that express statement or

45. Social Security Act, Pub. L. No. 74-271, § 208, 49 Stat. 620, 625 (1935) (amended as § 207 by Social Security Act Amendments of 1983, Pub. L. No. 98-21, § 335(a), 97 Stat. 65, 130) (codified as amended at 42 U.S.C. § 407(a) (2006)).

46. 42 U.S.C. § 407(b) (2006).

47. *Lockhart*, 546 U.S. at 145.

48. Debt Collection Act of 1982, Pub. L. No. 97-365, § 10(2), 96 Stat. 1749, 1754 (section authorizing offsets codified as amended at 31 U.S.C. § 3716(a) (2006)).

49. *Lockhart*, 546 U.S. at 145.

50. *See* 31 U.S.C. § 3716(c)(3)(A)(i)–(i)(I) (2006) ("Notwithstanding any other provision of law (including [§ 207])," with a limited exception, "all payments due to an individual under . . . the Social Security Act . . . shall be subject to offset under this section.").

51. *Lockhart*, 546 U.S. at 147 (Scalia, J., concurring).

52. *Id.*

specific reference provisions "may function as background canons of interpretation of which Congress is presumptively aware,"[53] but that Congress has "the power to make its will known in whatever fashion it deems appropriate—including the repeal of preexisting provisions by simply and clearly contradicting them."[54] Because the Debt Collection Improvement Act unambiguously authorized the collection of student loan debts through administrative offset, the statute "flatly contradicted, and thereby effectively repealed, part of § 207(a) of the Social Security Act."[55] Under Scalia's approach, even if the Debt Collection Improvement Act did not specifically refer to § 207, the outcome of the case would be the same.

Justice Scalia's concurring opinion concludes that a later Congress can impliedly repeal statutes protected by legislative entrenchment rules. But no other justice joined Scalia's concurrence, and the Court explicitly declined to address the effect of these rules. Lower courts have acknowledged, post-*Lockhart*, that the effect of legislative entrenchment rules remains uncertain.[56]

Marcello, *Great Northern*, *Hertz*, and *Marrero* show that express statement rules can be repealed through implication, but Supreme Court guidance on other types of rules is lacking. Several scholars have debated whether legislative entrenchment rules are constitutional and whether they should be applied strictly. The next section briefly summarizes the academic commentary.

C. Academic Commentary

Although Congress enacted legislative entrenchment rules as early as 1871,[57] only recently have scholars considered the special statutory interpretation issues raised by these rules.[58] The relevant scholarship reflects two competing approaches. Under the first approach, legislative

53. *Id.* at 148.

54. *Id.*

55. *Id.* at 149 (Scalia, J., concurring).

56. *See, e.g.*, United States v. Novak, 476 F.3d 1041, 1054 n.12 (9th Cir. 2007) (noting that whether Congress can validly enact legislative entrenchment rules remains an "open question"); Robinette v. Comm'r, 439 F.3d 455, 460 (8th Cir. 2006) ("[w]hether or not the Congress of 1946 may bind the Congress of 1998," in the context of an alleged conflict between the Administrative Procedure Act (APA) and a Code provision, is an open issue).

57. *See* Act of Feb. 25, 1871, ch. 71, § 1, 16 Stat. 431, 431 (codified at 1 U.S.C. § 109 (2006)).

58. For other articles on rules of statutory construction enacted by Congress, see Adam W. Kiracofe, Note, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz's* Federal Rules of Statutory Interpretation, 84 B.U. L. REV. 571 (2004); Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333 (2004).

entrenchment rules are considered constitutionally infirm because they impermissibly add to the Constitution's procedural requirements for enacting legislation and because they bind future Congresses. Under the second approach, strict application of legislative entrenchment rules is considered interpretatively equivalent to the well accepted practice of interpreting one statute against the background of preexisting legislation. These rules thus pose no constitutional problems under this approach and they can validly control the interpretation of subsequent statutes.

Part II will argue that neither of these approaches provides the correct framework for analyzing legislative entrenchment rules. But some further elaboration on the existing academic approaches will help place the key issues in context.

1. Constitutional Infirmity

In a substantive footnote to his treatise, *American Constitutional Law*,[59] Laurence Tribe addresses the constitutionality of legislative entrenchment rules. He recites the generally accepted principle that "the power of Congress *legislatively* to bind subsequent Congresses is limited"[60] and that any statute that purported to do so could be repealed.[61] But "[m]ore difficult is the question of Congress' power to limit the effects of future statutes, absent contrary provision in those measures."[62] Focusing on RFRA,[63] Tribe concludes that applying its legislative entrenchment rule would "raise serious constitutional questions"[64] because doing so "would in

59. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-3 n.1 (3d ed. 2000).

60. *Id.* at 125; *see also* Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years."). One pair of commentators has argued that the entrenchment of legislation poses no constitutional problems. *See* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002) ("Our claim is that the rule barring legislative entrenchment should be discarded; legislatures should be allowed to bind their successors . . . ."). Those commentators admit that their approach conflicts with the universal understanding of the issues. *See id.* at 1665–66. *See also* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1776 (2003) ("[Posner and Vermeule] freely acknowledge that legal philosophers, judges, and modern legal scholars have rejected the idea that one legislature, through ordinary legislation, should be allowed to bind future legislatures . . . . They assert that, despite the virtually unanimous views of everyone who has ever thought or written about the issue, we should be open to the idea of entrenchment as a normative matter.").

61. *See* TRIBE, *supra* note 59, § 2-3 n.1 at 125.

62. *Id.*

63. RFRA applies to all future legislation unless the future law "explicitly excludes such application by reference to [RFRA]." 42 U.S.C. § 2000bb-3(b) (2006).

64. TRIBE, *supra* note 59, § 2-3 n.1 at 125.

a sense permit an earlier Congress to add to art. I's requirements for the enactment of laws by a later Congress."[65] Tribe thus concludes that RFRA's legislative entrenchment rule (and other such rules) should not control the interpretation of subsequent legislation and must yield, when appropriate, to "other interpretive indicia."[66]

Larry Alexander and Saikrishna Prakash share Tribe's concerns and argue that Congress has no power to prescribe mandatory, prospective rules of interpretation.[67] Legislative entrenchment rules of this sort unlawfully "add to the constitutional requirements for passing federal legislation,"[68] and "binding rules of interpretation of whatever sort must be ignored"[69] in favor of an approach that gives subjective intentions controlling weight in determining the meaning of statutes. Alexander and Prakash also argue that, if one blindly follows an artificial rule of construction, she is not engaged in interpretation at all.[70]

2. *Interpretative Equivalence*

Nicholas Rosenkranz and Jonathan Mitchell, in their respective articles, argue that strict application of legislative entrenchment rules is constitutionally valid.[71] They argue that because courts generally interpret a statute with reference to preexisting legislation, there should be no constitutional objection to attributing knowledge of legislative entrenchment rules to Congress.[72] Strictly applying legislative

65. *Id.* at 125–26. Tribe does not believe that legislative entrenchment rules should be completely ignored. Like Justice Scalia, Tribe acknowledges that courts should "bear in mind Congress' familiarity" with these rules. *Id.* at 126. Thus, in ambiguous cases, such as where it is unclear whether RFRA applies to a statute, Tribe would presumably find that the statute's legislative entrenchment rule supports RFRA's application. But "automatically" applying RFRA whenever a subsequent statute lacks the specific words called for by RFRA's legislative entrenchment rule should be avoided. *Id.*

66. *Id.* at 125.

67. Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003).

68. *Id.* at 109.

69. *Id.* at 99.

70. *See id.* at 97 ("Suppose an imperious woman announces that, henceforth, she will construe the sentences of others as completely meaningless unless each sentence is preceded by the obsequious question 'Mother May I?' When this domineering woman proceeds to ignore sentences that do not begin with 'Mother May I' because she deems them to be gibberish, is she really engaged in any recognizable form of 'interpretation'? We think not.").

71. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002); Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1071–72 (2009).

72. *See* Rosenkranz, *supra* note 71, at 2118 ("[E]very act of Congress changes the text

entrenchment rules is interpretatively equivalent to applying the Congressional awareness canon to ordinary statutes.

Rosenkranz and Mitchell each dismiss the argument that legislative entrenchment rules violate the Constitution. Because these rules can be repealed at any time through the normal legislative process, these rules do not "bind" future Congresses.[73] They may affect the interpretation of a later Congress's enactments in the sense that they provide background interpretive rules, but every statute alters the "status quo"[74] or the "default position"[75] against which Congress legislates. To Rosenkranz and Mitchell, there is no qualitative difference between a statute providing a generally applicable definition and a statute providing a legislative entrenchment rule.[76]

Rosenkranz acknowledges some limits to this approach. In his view, legislative entrenchment rules must provide "*some* ascertainable and otherwise unobjectionable text that would achieve every legislative goal."[77] Thus, "a statute providing that 'laws of the United States, including this one, may be repealed only by the words "Mother, May I?"' would be unobjectionable . . . ."[78] Any Congress could continue to "exercise the full

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that a future Congress must pass to achieve its goals, by changing the status quo against which that future Congress legislates. Interpretive statutes do not bind future Congresses in any qualitatively different sense."); Mitchell, *supra* note 71, at 1072 ("To claim that [the War Powers Resolution's specific statement rule] violates the Constitution for that reason is to imply that the Constitution forbids *any* constraints on the language that future legislators must use to authorize executive-branch actions, requiring statutes to be construed in a vacuum without any regard to previously enacted legislation. That would not be a plausible interpretive theory, much less one that the Constitution requires, as it would forbid interpreters from applying even the ordinary presumption against implied repeals.").

73. *See* Rosenkranz, *supra* note 71, at 2117–18 ("[A legislative entrenchment rule] does not 'in a sense permit an earlier Congress to add to art. I's requirements,' because the rule itself may be suspended or repealed by an act that comports with Article I, Section 7." (citation omitted)); Mitchell, *supra* note 71, at 1071 ("[C]laims that [legislative entrenchment rules] 'bind' future Congresses are meritless when legislators remain free to repeal the statute through the ordinary bicameralism-and-presentment process . . . .").

74. Rosenkranz, *supra* note 71, at 2118.

75. Mitchell, *supra* note 71, at 1071.

76. *See* Rosenkranz, *supra* note 71, at 2118 ("[E]very act of Congress changes the text that a future Congress must pass to achieve its goals, by changing the status quo against which that future Congress legislates. Interpretive statutes do not bind future Congresses in any qualitatively different sense."); Mitchell, *supra* note 71 at 1072 ("Section 8(a)(1) [of the War Powers Resolution] does constrain future legislators by limiting the scope of statutory language available to those who wish to authorize military hostilities some . . . laws allow for a broader range of statutory language than others, but that is a difference only of degree.").

77. Rosenkranz, *supra* note 71, at 2118 (citations omitted).

78. *Id.*

panoply of legislative power"[79] by either using the words "Mother, May I?" in subsequent legislation or by using those words to repeal the legislative entrenchment rule itself. A legislative entrenchment rule imposing a more burdensome requirement—such as one that called for repealing statutes to be drafted in ancient Greek or one that required legislatures to announce that "Republicans are evil" before repealing any law—might, however, be objectionable and therefore constitutionally infirm.[80]

Aside from their views on the constitutionality of legislative entrenchment rules, Rosenkranz and Mitchell believe that strict application of these rules provides attractive benefits. Rosenkranz emphasizes that strict application will reduce uncertainty in statutory interpretation: Legislative entrenchment "provisions eliminate all hard cases by telling Congress precisely what to say to achieve a specific legislative goal."[81] Mitchell believes that strict application of legislative entrenchment rules could discourage the President from engaging in unlawful acts relating to war and national security. Mitchell also believes that legislative entrenchment rules should be buttressed by other measures, so as to ensure that the intent reflected in a legislative entrenchment rule is fully honored.[82]

II. VALIDITY OF LEGISLATIVE ENTRENCHMENT RULES

This Part argues that the implied repeals doctrine provides the appropriate framework for analyzing conflicts arising between legislative entrenchment rules and subsequently enacted statutes. It uses the conflict between I.R.C. § 501(c)(1) and the Agricultural Credit Act of 1987 (Farm Credit Act) as a vehicle to rebut the approach advocated by Rosenkranz and Mitchell. It concludes that legislative entrenchment rules are constitutional, but that they are nonetheless ineffective to the extent they purport to categorically control the meaning of future legislation. Some of the possible political motivations and costs/benefits regarding legislative entrenchment rules are also considered.

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79. *Id.*; *see also* Mitchell, *supra* note 71, at 1071–72 ("So long as it remains formally possible for future legislators to change that default position by majority vote, the mere fact that a preexisting statute makes that course of action politically difficult cannot present constitutional problems.").

80. Rosenkranz, *supra* note 71, at 2118 nn.138–39.

81. *Id.* at 2118 n.140.

82. *See* Mitchell, *supra* note 71, at 1104 (arguing that Congress should include point-of-order mechanisms in national security statutes to prevent itself from enacting vague statutes that the executive might invoke to elide legislative entrenchment rules).

A. *Implied Repeals Doctrine*

The status of most legislative entrenchment rules remains uncertain. The Supreme Court addressed only express statement rules in *Marcello* and declined to provide any further guidance regarding other types of rules in *Lockhart*. The active academic debate further highlights the difficult interpretive problems posed by legislative entrenchment rules.

But the relevant Supreme Court cases suggest a straightforward solution to these problems: courts should use the implied repeals doctrine to resolve any conflicts between legislative entrenchment rules and subsequent statutes. Under this doctrine, courts will find that a later statute impliedly repeals an earlier statute when the two statutes irreconcilably conflict, or when the later statute covers the whole subject of the earlier statute and is thus clearly intended as a complete substitute for it.[83]

The Court did not explicitly state in *Marcello*, *Great Northern*, *Hertz*, or *Marrero* that the implied repeals doctrine resolves conflicts caused by legislative entrenchment rules. But those cases contain language suggesting as much. In *Great Northern*, *Hertz*, and *Marrero*, the Court stated that the legislative entrenchment rules at issue could be superseded through "necessary implication,"[84] "clear implication,"[85] or through "fair implication."[86] And in condemning "magical passwords," the Court in *Marcello* suggested that a later Congress could supersede prior legislation without conforming to the criteria purportedly required by that prior legislation (that is, the later Congress's enactment could impliedly repeal the earlier enactment).[87]

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83. *See* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936) ("Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.").

84. Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908).

85. Hertz v. Woodman, 218 U.S. 205, 218 (1910).

86. Warden v. Marrero, 417 U.S. 653, 659 n.10 (1974).

87. Marcello v. Bonds, 349 U.S. 302, 310 (1955). Some lower courts have, in fact, relied on *Marcello* to apply the implied repeals framework when construing legislative entrenchment rules. *See, e.g.*, Maldonado v. Fasano, 67 F. Supp. 2d 1170, 1179 (S.D. Cal. 1999) ("An example of repeal by implication can be observed in *Marcello v. Bonds* . . . ."); *see also* Passamaquoddy Tribe v. Maine, 75 F.3d 784, 790 (1st Cir. 1996) (not specifically mentioning *Marcello*, but applying the implied repeals framework to a conflict between a legislative entrenchment rule and a subsequently enacted statute). Mitchell argues that because *Marcello* involved only an express statement rule, its principles do not extend to other types of legislative entrenchment rules. *See* Mitchell, *supra* note 71, at 1080 n.84. But that reading is too narrow. The Court concluded that the Immigration Act expressly

The relevant Court decisions sensibly indicate that issues regarding legislative entrenchment rules should be resolved through principles of statutory, not constitutional, interpretation. Legislative entrenchment rules might not expressly contemplate that a future Congress will have the power to ignore or impliedly repeal them, but that hardly takes away the general power of future Congresses to do so.[88] (Taking that power away would be unconstitutional.)[89] Thus, Tribe, Alexander, and Prakash rush too quickly to constitutional concerns in arguing that legislative entrenchment rules unlawfully bind future Congresses and add to Article I's procedural requirements.[90]

Rosenkranz and Mitchell's approach suffers from more serious problems, including a fundamental inconsistency. Rosenkranz and Mitchell argue that for purposes of constitutional analysis, legislative entrenchment rules are just like ordinary statutes and should be safe from attack. At the same time, they conclude that legislative entrenchment rules should be able to nullify future statutes, something that ordinary statutes cannot do. Rosenkranz and Mitchell thus treat legislative entrenchment rules as ordinary statutes for some purposes but as special statutes for other purposes.

Legislative entrenchment rules should be treated as ordinary statutes for all purposes. That is, while these rules pose no constitutional problems, they should (like any other statute) be subject to the doctrine of implied repeals. To find otherwise would lead to bizarre results, especially in the tax area.[91] And strict application of legislative entrenchment rules cannot

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superseded the APA because to hold otherwise would render Congress's "painstaking" legislative efforts regarding the Immigration Act "completely meaningless." *Marcello*, 349 U.S. at 309. The Court was thus concerned with the consequences of nullifying a later Congress's legislation. This concern, although articulated in a case involving only one type of legislative entrenchment rule, is equally present when other types of rules are at issue. Stated differently, it's doubtful that the Court would have dismissed its concerns and ignored the Immigration Act if § 559 of the APA contained a stricter legislative entrenchment rule.

88. *See* Manigault v. Springs, 199 U.S. 473, 487 (1905) ("As this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended or disregarded by the legislature which enacted it."). Nothing in the language of any legislative entrenchment rule considered here comes close to suggesting that a future Congress cannot repeal the rule.

89. For a discussion of the temporal limits on each Congress's power, see Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379 (1987).

90. Tribe, at least, seems to retreat somewhat from his primary constitutional argument and acknowledges that legislative entrenchment rules may play some background role in statutory interpretation. *See supra* note 65.

91. *See infra*, Part II.B.

be reconciled with the fundamental goal of any theory[92] of statutory interpretation: determining the legislature's intent.[93]

Rosenkranz and Mitchell's arguments might provide some superficial appeal.[94] But an examination of an actual conflict between a legislative entrenchment rule and a subsequent statute will help illustrate those arguments' infirmities. The next section presents one such conflict, discussing the legislative entrenchment rule in § 501(c)(1) of the Code and a subsequent statute that clearly failed to satisfy its requirements.

B. Section 501(c)(1) and the Farm Credit Act

Section 501(a) generally exempts some entities from federal income taxes, including corporations described in I.R.C. § 501(c). Section 501(c)(1), amended to its current form in 1984,[95] contains a special rule that

92. Theorists differ significantly regarding *how* to determine legislative intent, but they share the same fundamental goal. *See, e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353 (2005) ("Textualists and intentionalists alike give every indication of caring . . . about the meaning intended by the enacting legislature . . . ."). While intentionalists tend to determine legislative intent based on subjective criteria, a textualist looks "for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*." Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997). Some doubt the claim that textualists share the same basic goal as intentionalists. *See generally* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 142 (2009) (challenging commentators who conclude that textualists and intentionalists share the same goals and stating that "textualists do not seek . . . to discern and implement legislative intent"). But whatever doubts one might have regarding a textualist's respect for legislative intent, Justice Scalia's *Lockhart* concurrence should resolve those doubts in this particular context. Justice Scalia (the unofficial leader of the textualist movement) specifically pointed to the frustration of legislative intent in concluding that legislative entrenchment rules are ineffective. *See* Lockhart v. United States, 546 U.S. 142, 149–50 (2005) (Scalia, J., concurring) ("[I]t might seem more respectful of Congress to refrain from declaring the invalidity of the [legislative entrenchment rule at issue]. I suppose that would depend upon which Congress one has in mind: the prior one that enacted the provision, or the current one whose clearly expressed legislative intent it is designed to frustrate. In any event, I think it does no favor to the Members of Congress, and to those who assist in drafting their legislation, to keep secret the fact that such [specific]-reference provisions are ineffective.").

93. *See infra* note 154.

94. *See* Mark Tushnet, *The "Constitution Restoration Act" and Judicial Independence: Some Observations*, 56 CASE W. RES. L. REV. 1071, 1077 n.27 (2006) (citing Rosenkranz with approval).

95. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1079, 98 Stat. 494, 1056 (codified at I.R.C. § 501(c) (2006)).

applies to corporate instrumentalities of the federal government.[96] Generally, a federal instrumentality is an entity created or chartered by Congress to serve a public purpose, like the Federal Reserve Banks or the Federal Deposit Insurance Corporation.[97] An entity may be a federal instrumentality even though it is privately owned, like a federal credit union.[98]

Under § 501(c)(1), a federal instrumentality is exempt from income taxes only if its tax exemption existed prior to July 18, 1984, or if it is specifically exempted from that tax by a provision in the Code or in a revenue act. Section 501(c)(1) indicates that any other statute is irrelevant; § 501(a) must be applied "without regard to any provision of law which is not contained in this title and which is not contained in a revenue Act."[99]

Section 501(c)(1) thus provides a legislative entrenchment rule (an organizational rule).[100] A future Congress can exempt a U.S. instrumentality from the federal income tax only if it places the exempting statute in the Code or in a revenue act. As the Joint Committee on Taxation explained, the 98th Congress enacted § 501(c)(1) to "allow more effective monitoring of statutory tax exemptions for U.S. instrumentalities, which have increased in number in recent years."[101] This purpose seems hardly controversial and § 501(c)(1)'s requirements should be easy to meet,

96. "[T]here is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a[n] . . . instrumentality . . . ." Dep't of Emp't v. United States, 385 U.S. 355, 358–59 (1966). Frequently, however, an entity's enabling act will indicate that it qualifies as an instrumentality of the U.S. government and the Internal Revenue Service (IRS) will treat it as such. Also, the IRS has issued a Revenue Ruling that describes some of the factors that it will consider in determining whether an entity organized under state law is an instrumentality of that state. Presumably, some or all of these factors would, by analogy, be relevant in determining whether an entity organized under federal law is an instrumentality of the U.S. government. *See* Rev. Rul. 57-128, 1957-1 C.B. 312 (listing six factors the IRS takes into consideration).

97. *See* Rev. Rul. 57-128, 1957-1 C.B. 312.

98. For a slightly dated but still useful list of privately owned federal instrumentalities, see Note, *A Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches*, 51 FORDHAM L. REV. 991, 1013 n.124 (1983).

99. I.R.C. § 501(c)(1)(A)(ii) (2006).

100. The actual rule is specifically contained in I.R.C. § 501(c)(1)(A)(ii), but for ease of exposition this Article will refer more generally to I.R.C. § 501(c)(1).

101. *See* STAFF OF THE J. COMM. ON TAXATION, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 1206 (J. Comm. Print 1984). One might also speculate that the congressional tax writing committees worked to add § 501(c)(1) as a means of protecting their turf. If tax exemptions can only come from revenue bills, then the tax-writing committees will carry the most influence over whether those exemptions are enacted since those committees retain primary jurisdiction regarding revenue bills. As one might expect, nothing in the published legislative history actually supports this speculation.

at least in theory.

But in 1988, the 100th Congress enacted a law that did not comply with § 501(c)(1)'s requirements. Responding to a severe recession in the farm community, the 100th Congress enacted the Farm Credit Act.[102] The Farm Credit Act contains numerous provisions to provide credit assistance to farmers and to strengthen the farm credit system. As part of the Farm Credit Act, Congress granted a broad tax exemption to farm credit banks[103] and apparently also to Agricultural Credit Associations (ACAs).[104]

In *United States v. Farm Credit Services of Fargo, ACA*,[105] the taxpayer, an ACA, argued that the tax exemption in the Farm Credit Act validly exempted it from federal income taxes.[106] The government disagreed, pointing to § 501(c)(1)'s requirement that tax exemptions for federal instrumentalities (like farm credit banks and ACAs) must be contained in the Code or in a revenue act to be effective. Since the tax exemption in the Farm Credit Act satisfied neither of those requirements, the taxpayer allegedly could not rely on that statute to shield itself from federal income taxes.

The district court acknowledged that § 501(c)(1) was intended to prevent new federal instrumentalities from enjoying a tax exemption unless that exemption was set out in either the Code or in a revenue act. But § 501(c)(1)'s organizational rule could not bind the Congress that enacted the Farm Credit Act:

> [T]he language of 26 U.S.C. § 501(c) cannot be regarded as controlling here since it is fundamental that a general law is not binding upon a subsequent Congress, which can change the law by amendment, and has done so

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102. Pub. L. No. 100-233, 101 Stat. 1568 (1988).

103. *See* 12 U.S.C. § 2023 (2006).

104. Under the Farm Credit Act, Congress authorized the merger of Federal Land Bank Associations and Production Credit Associations. The resulting entities would become ACAs. Under the statute, these ACAs would possess all the powers previously granted to the Federal Land Bank Associations and Production Credit Associations, *see* 12 U.S.C. § 2279c-1(b)(1)(A) (2006). Federal Land Bank Associations enjoyed a tax exemption, *see id.* § 2098 (2006) (containing language similar to 12 U.S.C. § 2023 (2006)), but Production Credit Associations did not. *See id.* § 2077 (2006) (granting tax exemption only regarding obligations issued by Production Credit Associations, and not to the association itself). In *United States v. Farm Credit Services of Fargo, ACA*, No. CIV A3-97-29, 1998 WL 1776582 (D.N.D. Sept. 29, 1998), the government first argued that the taxpayer did not succeed to the tax exemption enjoyed by the Federal Land Bank Association whose merger resulted in the formation of the taxpayer. *Id.* at *2. The court rejected the government's argument and then considered the government's contention that, even if the ACA succeeded to the tax exemption previously enjoyed by the Federal Land Bank Association, the tax exemption did not satisfy § 501(c)(1) and was thus void. *Id.* at *3.

105. 1998 WL 1776582.

106. *Id.* at *1, *4.

> here. *See United States v. Winstar Corp.*, 518 U.S. 839, 873 & n. 19 (1996) ("'[A] general law . . . may be repealed, amended or disregarded by the legislature which enacted it, . . . [and] is not binding upon any subsequent legislature['"]) (quoting *Manigault v. Springs*, 199 U.S. 473, 487 (1905)).[107]

In the court's view, § 501(c)(1) acquired no special status. It was a "general law"[108] that could be amended or disregarded by the subsequent Congress, if it so desired. And because the Farm Credit Act "explicitly authorize[d]"[109] a federal income tax exemption for ACAs, the court rejected the government's arguments and held in favor of the taxpayer.[110]

The *Fargo* opinion was not published and carries limited (if any) precedential weight.[111] But the court's holding makes eminent sense. "Congress mean[t] to provide financial assistance to the agricultural industry, not create obstacles,"[112] when it enacted the Farm Credit Act. Nothing in the statute's plain language suggests that the federal income tax exemptions granted to the economically depressed farming sector were illusory, and the court appropriately refused to disregard these exemptions. Subject to constitutional limits, the 100th Congress was free to address the farming crisis in whatever manner it deemed fit. Why should a legislative entrenchment rule enacted by the 98th Congress impede the 100th Congress's efforts? Professors Mitchell and Rosenkranz offer several possible explanations, but their explanations are difficult to accept.

Under Mitchell's approach, the strict application of a legislative entrenchment rule would not actually thwart the intent of the later Congress. Instead, the later statute could be treated as "an aspirational statement of congressional beliefs" for "something to which Congress lacks the wherewithal to give legal force, rather than as an attempt to alter or supersede the interpretive default rule in Congress's framework

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107. *Id.* at *4.

108. *Id.*

109. *Id.* at *5.

110. Because the government ultimately agreed to an industry-wide settlement with ACAs, no appellate court addressed the issues raised in that case. *See* Comptroller v. Colonial Farm Credit, ACA, 918 A.2d 514, 517–18 (Md. Ct. Spec. App. 2007) ("After the creation of ACAs by Congress, disputes arose between ACAs and the [IRS] regarding whether lending activities that would have previously been conducted by [Federal Land Bank Associations (FLBAs)] remained tax exempt after the merger of an FLBA into an ACA . . . . [T]he *Fargo* decision resulted in 'closing agreements' between the IRS and all ACAs . . . .").

111. *See, e.g.*, Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc., 227 F. App'x 239, 247 (4th Cir. 2007) ("[A]n unpublished district court opinion is . . . of questionable precedential value.").

112. *Farm Credit Servs. of Fargo*, 1998 WL 1776582, at *3.

legislation."[113] In Mitchell's view, if a later statute seems to contradict a legislative entrenchment rule without invoking the right magical passwords, that would merely "reflect[] an inability or unwillingness to overcome the burden of inertia established"[114] by the legislative entrenchment rule.

Applying Mitchell's approach to the Farm Credit Act, although Congress seemingly granted a federal income tax exemption to some participants in the farming industry, the statute, properly interpreted, merely indicates that Congress only aspired to do so. Congress "lack[ed] the wherewithal"[115] to enact the respective tax exemptions, so it deliberately enacted statutes that failed to comply with § 501(c)(1). Congress could not "overcome the burden of inertia established"[116] by § 501(c)(1), so it chose to enact tax exemptions that were ineffective.

This approach seems odd. Nothing in the language or legislative history[117] of the Farm Credit Act even hints that the federal income tax exemptions granted to Farm Credit Banks and ACAs were meant to be merely aspirational or otherwise illusory. On the contrary, the relevant statutes were drafted in clear language and contained detailed exceptions,[118] suggesting that Congress acted deliberately. Mitchell's argument—that subsequently enacted statutes that directly conflict with legislative entrenchment rules can be treated as mere aspirational statements—makes no sense here.

Rosenkranz's approach is similarly difficult to accept. Under

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113. Mitchell, *supra* note 71, at 1075–76. Mitchell makes these arguments in the context of the War Powers Resolution, positing that "Congress enacts a statute that specifically authorizes the President 'to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia,' but omits the express reference to the War Powers Resolution." *Id.* at 1073. He concludes that the hypothetical statute could be dismissed as an aspirational statement, rather than as congressional authorization for war.

114. *Id.* at 1075.

115. *Id.* at 1076.

116. *Id.* at 1075.

117. *See generally* H.R. REP. NO. 100-295(I) (1987), *reprinted in* 1987 U.S.C.C.A.N. 2723. Of course, one may object to the use of legislative history materials in determining the meaning of a statute. *See* City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law . . . ."). The Farm Credit Act's legislative history is mentioned for the sake of those who place interpretive weight on those materials. It is not meant to suggest that legislative history should be given authoritative weight in interpreting statutes.

118. The statutes granting tax exemptions to Farm Credit Banks and to Federal Land Bank Associations (whose tax exemption the ACAs succeeded to) each carved out some real estate taxes. *See* 12 U.S.C. §§ 2077, 2098. These statutes also specify circumstances under which a holder of an obligation issued by a Farm Credit Bank or Federal Land Bank Association will be subject to tax on the income regarding those obligations.

Rosenkranz's approach, as long as there is an unobjectionable way for Congress to comply with or repeal a legislative entrenchment rule, such a rule can nullify future statutes. And under Rosenkranz's criteria, § 501(c)(1) likely qualifies as an unobjectionable legislative entrenchment rule. Viewed in isolation, there is nothing controversial or objectionable about requiring tax exemptions to be contained in the Code or in a revenue act.

But Rosenkranz's emphasis on how a legislative entrenchment rule purports to control the interpretation of future statutes is misplaced. Even if a legislative entrenchment rule imposes a superficially innocuous requirement, it remains objectionable because (if the rule is strictly applied) future legislators must become actually aware of the rule to comply with it. This will often prove exceptionally difficult, given the volume and breadth of previously enacted legislation.

The Farm Credit Act nicely illustrates this point. That Act was passed by the 100th Congress on January 6, 1988,[119] only three and a half years after the 98th Congress added a legislative entrenchment rule to § 501(c)(1).[120] The 100th Congress included many of the same legislators as the 98th Congress, but the 100th Congress failed to comply with a legislative entrenchment rule that many of its members previously approved.[121]

Perhaps this should be taken as an opportunity to cast aspersions on legislators for inattention to their own enactments.[122] But it would be better to use the Farm Credit Act to consider the practical difficulties posed by legislative entrenchment rules. Even when a legislator has previously voted on a statute creating a legislative entrenchment rule, he or she may (as the Farm Credit Act illustrates) find it difficult to comply with that rule. Legislators should not be required to comb through every single provision in the Statutes at Large in search of obscure provisions that may nullify the intended effects of their laws, especially when they are drafting bills that respond to economic crises. And "Congress always has the power to

119. Agricultural Credit Act of 1987 (Farm Credit Act), Pub. L. No. 100-233, 101 Stat. 1568 (1988).

120. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1079, 98 Stat. 494, 1056 [hereinafter DRA '84].

121. *Compare* 130 CONG. REC. 19,066–67 (1984) (listing the 268 members of the House who voted for the DRA'84), *and id.* at 19,305 (listing the eighty-three members of the Senate who voted for the DRA '84), *with* 133 CONG. REC. 36,467 (1987) (listing the 365 members of the House who voted for the Farm Credit Act), *and id.* at 36,537 (listing the eighty-five members of the Senate who voted for the Farm Credit Act).

122. *See, e.g.*, Stephanie Condon, *Will Congress Read Bills Before Voting?*, CBS NEWS (June 24, 2009, 5:33 PM), http://www.cbsnews.com/blogs/2009/06/24/politics/politicalhotsheet/entry5110850.shtml.

amend, repeal or ignore legislation passed by earlier congresses . . . ."[123]

To be sure, some legislative entrenchment rules (like the WPR) may be of such prominence that many legislators will be actually aware of them. But many legislative entrenchment rules are less prominent. For example, the Code contains legislative entrenchment rules regarding the registration of tax-exempt bonds,[124] the Leaking Underground Storage Tank Trust Fund,[125] and qualified military benefits,[126] to name a few. These are obscure provisions that are, in all likelihood, unfamiliar to most legislators. Even the legislators and congressional staffers who draft tax legislation are probably unfamiliar with many of the Code's legislative entrenchment rules, which might explain why the Farm Credit Act's tax exemptions failed to comply with § 501(c)(1).[127]

Of course, courts generally "presume that Congress is aware of the legal context in which it is legislating."[128] Thus, one might argue, strictly imputing knowledge of all legislative entrenchment rules would simply be another application of this largely noncontroversial interpretive principle. But "the presumption that Congress was aware of the background law 'is just that—a presumption, which, like all presumptions used in interpreting statutes, may be overcome . . . .'"[129] Courts do not strictly assume that Congress is aware of background law, because like other canons that are based on legal fictions, the congressional awareness canon has its limits.[130] The congressional awareness canon thus should not automatically impute

123. Peterson v. U.S. Dep't of the Interior, 899 F.2d 799, 808 (9th Cir. 1990). *See also* Manigault v. Springs, 199 U.S. 473, 487 (1905) ("As this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended or disregarded by the legislature which enacted it.").

124. *See* I.R.C. § 149(c)(1) (2006).

125. *See* I.R.C. § 9508(e).

126. *See* I.R.C. § 134(b)(2).

127. Another possible explanation is that the Farm Credit Act was drafted without consultation of the Joint Committee on Taxation. As a general matter, the Joint Committee on Taxation is actively involved in the drafting of tax legislation, and members of its staff might have actual knowledge of tax-related legislative entrenchment rules. But since the Farm Credit Act was not a revenue act, the Joint Committee on Taxation might not have been consulted regarding that Act's tax provisions.

128. Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979)); *see also* Bowen v. Massachusetts, 487 U.S. 879, 896 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates").

129. Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric., 573 F.3d 815, 829 (D.C. Cir. 2009) (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984)).

130. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) ("[C]anons are not mandatory rules. They are guides that 'need not be conclusive.'") (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).

knowledge of legislative entrenchment rules to future Congresses.

Rosenkranz and Mitchell defend strict application of legislative entrenchment rules in another way. They concede that these rules may categorically control the interpretation of future legislation, but they argue that these rules do not impermissibly tie the hands of future Congresses because legislative entrenchment rules may always be repealed by a simple majority vote. Legislative entrenchment rules might make it harder to pass some legislation by requiring specific magical passwords, but this cannot be a problem. Every statute alters the "status quo"[131] or the "default position"[132] against which Congress legislates; legislative entrenchment rules just do this in a slightly different way.[133]

But the situations are not interpretatively equivalent. Ordinary statutes may change the background against which Congress legislates, but those statutes can be repealed through implication. They thus pose a relatively small procedural obstacle to the exercise of legislative power. But under the approach advocated by Mitchell and Rosenkranz, legislative entrenchment rules could not be repealed through implication. These rules would thus do far more than provide the backdrop against which future Congresses legislate—they would purport to nullify later legislation even in cases of direct conflict and even when it is otherwise clear that the later statute is intended to supplant or override preexisting law.

Rosenkranz and Mitchell's strict approach is inconsistent with another case involving a legislative entrenchment rule. In *Forrest City Production Credit Ass'n v. United States*,[134] the court found that when Congress enacts a statute that explicitly disregards future law, that statute cannot nullify the intentions of a later Congress.[135] In *Forrest City*, the court addressed whether a tax exemption granted under the Farm Credit Act of 1933 (the 1933 Farm Act) allowed the taxpayer to avoid paying employment taxes. Under the 1933 Farm Act, Congress provided that credit associations, like the taxpayer, "shall be exempt from all taxation now or hereafter imposed by the United States."[136] Six years later, Congress added the statutory predecessor to § 3112 to the Code.[137] That statute removed employment tax exemptions for all U.S. instrumentalities, including credit associations,

131. Rosenkranz, *supra* note 71, at 2118.

132. Mitchell, *supra* note 71, at 1071.

133. *See supra* notes 71–76 and accompanying text.

134. 300 F. Supp. 609 (E.D. Ark. 1969), *aff'd per curiam*, 426 F.2d 819 (8th Cir. 1970).

135. *See id.* at 613–14.

136. *See* 12 U.S.C. § 1138c (1964) (since repealed and superseded).

137. *See* Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 202(a), 64 Stat. 477, 524 (codified as amended at I.R.C. § 3112 (2006) (adding § 1412 to the Internal Revenue Code of 1939, 53 Stat. i, 176)).

providing that "[n]otwithstanding any other provision of law," no instrumentality will be exempt from employment taxes.[138] The taxpayer nonetheless argued that it was immune from employment taxes because the 1933 Farm Act disregarded all future laws, regardless of how they were phrased,[139] including § 3112. But the court hardly paused in finding that § 3112 "overrode" the 1933 Farm Act.[140]

Forrest City indicates that even a statute that explicitly disregards all future laws cannot automatically nullify the enactments of a later Congress. Yet Mitchell and Rosenkranz argue that less demanding statutes (that is, statutes that admit for some exceptions, albeit only with the invocation of "magical passwords") should be honored fully. Thus, even if a court agrees with Rosenkranz and Mitchell as a purely theoretical matter,[141] *Forrest City* and *Fargo* counsel against strict application of legislative entrenchment rules in the tax context.

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138. *Id.*

139. If legislative entrenchment rules applied strictly in this context, § 3112's use of the phrase "notwithstanding any other provision of law" would not create an exception from the 1933 Farm Act. The 1933 Farm Act simply disregards future laws, no matter how they are phrased, with no exception for future statutes that apply notwithstanding any other provision. This shows that strict application of legislative entrenchment rules takes another tool away from Congress—the ability to repeal or override prior statutes by flatly stating that a new enactment applies notwithstanding any previous law. This would be inconsistent with case law that suggests that "notwithstanding" clauses usually trump all conflicting provisions, without regard to what those provisions say. *See* Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.").

140. *Forrest City*, 300 F. Supp. at 613 (explaining that Congress specifically overrode the exemption from taxation under the 1933 Farm Act when it created § 1412 of the I.R.C. of 1939).

141. Rosenkranz presumably believes that the strict application of the 1933 Farm Act would not be problematic because it would remain formally possible for a future Congress to exercise all of its legislative powers (that is, the future Congress would simply have to repeal the statute that says that all future laws are void). *See* Rosenkranz, *supra* note 71, at 2118 ("[A]n interpretive rule may change the *text* that a future Congress must pass to achieve a legislative goal; but so long as there is *some* ascertainable and otherwise unobjectionable text that would achieve every legislative goal, and that text need only pass the strictures of Article I, Section 7, then there is no constitutional objection.") (citations omitted). Mitchell's approach is less strict. Mitchell would allow a later statute to trump a legislative entrenchment rule by either complying with that rule's terms *or* by prescribing a new rule of construction for itself. *See* Mitchell, *supra* note 71, at 1074–75. Under Mitchell's approach, § 3112 might be viewed as prescribing a new rule of construction for itself, by trumping "any other provision of law." *See* I.R.C. § 3112.

C. Political Motivations and Costs/Benefits

Given the potential dangers posed by legislative entrenchment rules, one may wonder why Congress does not repeal all of these rules in one fell swoop.[142] In many cases, the strict application of these rules may rob a legislator of a hard fought victory. For example, a legislator who successfully obtains a tax exemption for one of her constituents will be understandably upset if a court nullifies that exemption because of § 501(c)(1)'s legislative entrenchment rule. And given the harsh realities of the legislative process, a legislator cannot reasonably expect that her colleagues will immediately reenact a provision that a court treats as a dead letter.[143] Thus, the legislators in the current Congress might wish to repeal all legislative entrenchment rules to ensure that the enactments of a prior Congress do not thwart the intended effects of their legislation.

But legislative entrenchment rules also offer benefits to the current Congress. Applied strictly, these rules allow legislators to shield their statutes against implied repeals. All else being equal, this would tend to increase the lives of their enactments. Future Congresses would have to be specifically aware of the current Congress's enactments to repeal them. Otherwise, they would not be able to meet the requirements imposed by the respective legislative entrenchment rules and the statutes protected by these rules would remain on the books.

Some existing legislative entrenchment rules may have in fact been enacted to artificially prolong the life of legislation. But Congress can also use these rules for noble ends, like fostering certainty in the interpretation and application of the laws. For example, if the WPR or I.R.C. § 501(c)(1) applies strictly, courts will not have to wrestle with whether a statute authorizes military hostilities or grants a federal income tax exemption to an instrumentality. Instead, the respective legislative entrenchment rules would provide quick, easily applied tests to determine whether the

142. Depending on how legislative entrenchment rules are construed, repealing all of them may or may not be burdensome. Under Rosenkranz's approach, if a statute provides that a specific statement must be made to repeal that statute, a future Congress *must* make that statement. Simply enacting a statute that "hereby repeals all legislative entrenchment rules" would not be enough. Even in the age of Lexis and Westlaw, tracking down every legislative entrenchment rule may be difficult and time consuming since these rules are phrased in many different ways. Under Mitchell's approach, the sitting Congress might be able to void all legislative entrenchment rules by making a blanket statement that all such previously enacted rules are ineffective. *See supra* note 141 and accompanying text.

143. The modern process for passing a bill is extremely complex, risky, and time consuming. *See generally Tying It All Together: Learn about the Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, http://www.house.gov/house/Tying_it_all.shtml (last visited Nov. 4, 2010).

subsequently enacted statutes have those effects.[144]

Legislative entrenchment rules might also be used to shame future Congresses who pursue dubious policy goals. Section 7203(a)(2) of the Federal Acquisition Streamlining Act of 1994[145] was probably drafted with this goal in mind. Section 7203 states that some federal agencies must award contracts through merit-based selection procedures,[146] and that these agencies "should not be required by legislation to award a new contract to a specific" private party.[147] Section 7203(a)(2) contains a legislative entrenchment rule designed to discourage a future Congress from circumventing these goals:

> A provision of law may not be construed as requiring a new grant to be awarded to a specified [private party] unless that provision of law—
>
> (1) specifically refers to this subsection;
>
> (2) specifically identifies the [private party] involved; and
>
> (3) specifically states that the award to that particular [private party] is required by such provision of law in contravention of the policy set forth in [this provision].[148]

Under this rule, if a future Congress wishes to earmark a contract for a specific private party, that party must be named. Additionally, the future Congress must specifically state that it is contravening the merit-based policies of § 7203(a)(2).

Many would agree that this provision represents a sensible policy decision. Earmarks[149] are a sad reality of the legislative process,[150] and

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144. *See* Rosenkranz, *supra* note 71, at 2118 n.140 ("[T]he RFRA provision and the 'Mother, may I?' provision have one powerful argument to recommend them: They are entirely determinate. They leave no difficult middle cases. Whether a statute repeals or suspends another by implication is one of the most vexing questions of statutory interpretation.").

145. Pub. L. No. 103-355, § 7203(a)(2), 108 Stat. 3243, 3380 (codified as amended in 10 U.S.C. § 2374 (2006)).

146. Other provisions of the Federal Acquisition Streamlining Act of 1994 contain similar language. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7203, 108 Stat. 3243 (codified, in part, at 41 U.S.C. §§ 253(i), 266(a) (2006)).

147. *Id.* § 7203(a)(2) (codified as amended at 10 U.S.C. § 2374(a) (2006)).

148. *Id.* (codified as amended at 10 U.S.C. § 2374(b)–(b)(3)).

149. For a description of earmarks, see *Earmarks*, OFFICE OF MGMT. & BUDGET, http://earmarks.omb.gov/earmarks_definition.html (last updated Apr. 13, 2010) (defining "earmarks" as "funds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process").

150. *See, e.g.*, Eric Egland, Op-Ed., *Earmark Folly*, WASH. TIMES (July 2, 2008, 4:30 AM),

attempts to reduce their prevalence, however modest, should be applauded.[151] Yet if a future Congress clearly communicates its intent to earmark a contract,[152] a court should not hesitate to give full effect to that intent, even if the future Congress doesn't jump through § 7203(a)(2)'s hoops. Legislators are not required to issue a mea culpa when enacting legislation (however much we might want them to). Legislative intent controls the interpretation of statutes, even when that intent is ugly.[153]

Returning to the main point, whether legislative entrenchment rules are, as a policy matter, good or bad should not determine their validity. Whatever their merits, these rules are inimical to the central goal of statutory interpretation—determining the intent of the legislature.[154] Because these rules (if applied strictly) may require the disregard of a later legislature's enactments, they are incompatible with that goal. The court in *Fargo,* for example, could have accepted § 501(c)(1)'s bright-line rule, and doing so may have discouraged future litigation over whether a particular statute granted a tax exemption. But the court could reach this result only by ignoring the 100th Congress's clearly expressed intent. And when it comes to statutory interpretation, legislative intent, not judicial economy, is the lodestar.

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http://www.washingtontimes.com/news/2008/jul/02/earmark-folly.

151. *See generally* Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 542–48 (2009) (providing an overview of how earmarks are obtained).

152. To be safe, a future Congress might consider repealing § 7203(a)(2). But repealing a rule that encourages awards of contracts based on merit might itself be politically costly. Thus, the future Congress might prefer to communicate its intent through a specific earmark that clearly contradicts § 7203(a)(2) (i.e., through a statute that impliedly repeals it).

153. *See, e.g.*, Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 483–84 (1992) ("It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness.").

154. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (explaining that canons of statutory construction "are designed to help judges determine the Legislature's intent"); Malley v. Briggs 475 U.S. 335, 342 (1986) ("We reemphasize that our role is to interpret the intent of Congress . . . ."); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983) ("[O]ur task is to ascertain Congress' intent in enacting the federal statute at issue."); Flora v. United States, 357 U.S. 63, 65 (1958) ("In matters of statutory construction the duty of this Court is to give effect to the intent of Congress . . . ."); United States v. Bitty, 208 U.S. 393, 401 (1908) ("All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute."); Dewey v. United States, 178 U.S. 510, 520 (1900) ("Of course, our duty is to give effect to the will of Congress touching this matter."); United States v. Goldenberg, 168 U.S. 95, 102–03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used."); Schooner Paulina's Cargo v. United States, 12 U.S. 52, 60 (1812) (Marshall, C.J.) ("In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature . . . .").

D. Summary

Although legislative entrenchment rules should not automatically nullify future legislation when their requirements go unmet, these rules should not necessarily be ignored. They are evidence of congressional intent, no different from other legislation that forms the backdrop against which Congress acts. Ordinary statutes, through the congressional awareness canon, usually receive significant weight in interpreting the enactments of a future Congress and legislative entrenchment rules are entitled to no less weight.[155]

But they are entitled to no more weight. To sum up the arguments made in this Part, courts generally interpret a later Congress's enactment in light of the body of law that previous Congresses have enacted. But that is because courts presume that the later Congress intended its laws be read that way, not because the laws of a prior Congress have independent influence over the meanings of a later Congress's enactments. When a later Congress's intent is flatly inconsistent with an earlier Congress's, one can no longer fairly infer that the later Congress intended to adopt or incorporate the enactments of the prior legislature.[156]

None of this suggests that legislative entrenchment rules are constitutionally invalid. These rules may be repealed at any time and consequently do not bind future Congresses or impermissibly add to Article I's procedural requirements. Rosenkranz and Mitchell correctly reject Tribe's arguments on this point, but they go too far in their analysis—the constitutionality of a legislative entrenchment rule does not justify its strict application. Instead, traditional canons of construction, especially the implied repeals doctrine, should be employed to determine how legislative entrenchment rules influence the interpretation of subsequently enacted statutes. The next Part applies this approach to examine conflicts that legislative entrenchment rules have caused in the tax laws.

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155. This approach is admittedly less strict than the First Circuit's approach in *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996), which accorded a preexisting statute extra weight because it was protected by a legislative entrenchment rule. *See id.* at 791. Justice Scalia, however, in his *Lockhart* concurrence suggested that (consistent with this Article's thesis) legislative entrenchment rules "may add little or nothing to our already-powerful presumption against implied repeals." *See* Lockhart v. United States, 546 U.S. 142, 149 (2005) (Scalia, J., concurring).

156. *See* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979)).

III. LEGISLATIVE ENTRENCHMENT TAX RULES

Using the implied repeals framework, this Part examines several types of legislative entrenchment tax rules and considers whether and to what extent they should influence the interpretation of subsequently enacted tax legislation. This Part also considers analogous issues by some other statutes that provide interpretive rules.

A. Organizational Rules

Organizational rules are those that disregard provisions of law that are not contained in Code or in another specific location. Section 501(c)(1), discussed above, provides one such example. Other Code provisions contain language similar to § 501(c)(1), stating that their rules apply "without regard to any provision of law which is not contained in [the Code or] in a revenue Act."[157] For the reasons set forth earlier (regarding § 501(c)(1) and the Farm Credit Act), courts should not apply these rules such that they automatically nullify subsequent legislation. Future Congresses can legislate however they see fit, without having to place their laws in specific types of acts or specific titles.

But some organizational rules are even stricter than § 501(c)(1), and one may wonder whether these rules should be honored. These relatively narrow rules (generally relating to various trust funds created by Congress) not only state that provisions outside of the Code or revenue acts are ineffective, but go on to state that this limitation applies "whether such provision of law is a subsequently enacted provision or directly or indirectly seeks to waive the application"[158] of the limitation. These rules thus leave no doubt about their intentions—future Congresses cannot bypass their requirements.[159]

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157. *See, e.g.*, I.R.C. §§ 134(b)(2)(B), 149(c)(1) (2006).

158. I.R.C. §§ 7652(h)(2) (Distilled Spirits Trust Fund); 9502(f)(1)(B) (Airport and Airways Trust Fund); 9503(b)(6)(A)(ii) (Highway Trust Fund); 9504(d)(1)(B) (Sport Fish Restoration and Boating Trust Fund); 9508(e)(1)(B) (Leaking Underground Storage Tank Trust Fund); 9510(b)(3)(B) (Vaccine Injury Compensation Trust Fund); *see also* 19 U.S.C. § 2497a(b)(3)(B) (Supp. II 2009) (providing a similar rule regarding the Agricultural Disaster Relief Trust Fund). For a description of these trust funds, which are funded from taxes specifically earmarked for them, see Susannah Camic, *Earmarking: The Potential Benefits*, 4 PITT. TAX REV. 55, 60–63 (2006).

159. By requiring trust fund amendments to be contained in the Code or a revenue act, these legislative entrenchment rules perhaps were also intended to aggrandize the congressional tax-writing committees at the expense of other committees. The House Committee on Ways and Means, in particular, exercises great control over tax bills. If amendments to the trust fund provisions must be contained in a tax bill, then the Ways and Means Committee will always enjoy significant influence over those amendments. The

Notwithstanding their exceptionally restrictive language, these rules should not automatically nullify future laws. An ineffective legislative entrenchment rule does not turn into an effective one by becoming even *more* restrictive. If a later Congress enacts a rule that directly or by necessary implication waives the requirements imposed by a trust fund's legislative entrenchment rule, the two statutes will irreconcilably conflict and the doctrine of implied repeals should apply.

In the end, though, the problems posed by the legislative entrenchment rules regarding congressional trust funds are mostly theoretical. The reported cases and IRS rulings do not suggest that they have caused any actual conflicts, and the substantive scope of those statutes is fairly narrow.

The legislative entrenchment rule found in I.R.C. § 446(e) poses far more significant issues. Under § 446(e), "[e]xcept as otherwise expressly provided" in Chapter 1 of the IRC,[160] a taxpayer cannot change its method of accounting unless it first seeks the consent of the IRS. The case law establishes § 446(e)'s broad scope: taxpayers must obtain consent even when they are required by statute to change from one accounting method to another, or even when they are changing from an incorrect method to a correct one.[161] The consent requirement helps prevent distortions of income that frequently accompany changes to a taxpayer's method of accounting.[162] Without it, the government would face the risk of serious revenue loss and significant administrative burdens.[163]

Given its obvious importance, it is not surprising that the consent requirement is protected by a legislative entrenchment rule. As noted above, under § 446(e), consent is required "[e]xcept as otherwise expressly

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requirement that these types of amendments must be placed in a tax bill might also have other implications regarding internal rules of congressional procedure. There's likely an interesting story about how and why the legislative entrenchment rules regarding trust funds ended up being enacted, but the available legislative history is regrettably sparse. For a good discussion of the constitutional issues raised by statutized rules of congressional procedure, see Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of the Proceedings Clause*, 19 J.L. & POL. 345 (2003).

160. I.R.C. § 446(e).

161. *See* Comm'r v. O. Liquidating Corp., 292 F.2d 225, 231 (3d Cir. 1961) ("It is not dispositive that taxpayer's former consistent method of reporting the insurance dividends in the instant case was not correct under the accrual accounting system since it could not be changed without the Commissioner's prior consent.").

162. *See* Capital One Fin. Corp. v. Comm'r, 130 T.C. 147, 154 (2008) ("The purpose of the section 446(e) consent requirement is to assure consistency in the method of accounting used for tax purposes and thus prevent distortions of income which usually accompany a change of accounting method and which could have an adverse effect upon the revenue.").

163. *See* FPL Group, Inc. v. Comm'r, 115 T.C. 554, 574 (2000) (describing the policies advanced by § 446(e)); *see also* Diebold, Inc. v. United States, 16 Cl. Ct. 193, 208 (1989), *aff'd*, 891 F.2d 1579 (Fed. Cir. 1989) (describing benefits that § 446(e) provides to the IRS).

provided in" Chapter 1 of the IRC. Section 446(e) is thus similar to the express statement provision in *Marcello*: later statutes must expressly modify § 446(e) to create exceptions from it.

But § 446(e) goes further and also requires that any exceptions be provided in Chapter 1 of the Code.[164] At first glance, this language suggests that if a later Congress creates an express statutory exception from § 446(e) that is outside of Chapter 1, the exception will be ineffective. But it is hardly clear that § 446(e) is actually intended to nullify provisions outside of that chapter. Unlike § 501(c)(1), § 446(e) does not say that it must be applied "without regard to any provision of law" that is not codified in Chapter 1. And there are strong reasons, discussed later, to question whether a statute that contemplates exceptions in another location is actually intended to nullify exceptions outside of that location.

The Tax Court addressed this issue in *Capital One Financial Corp. v. Commissioner*,[165] and, finding for the government, concluded that § 446(e) nullifies provisions outside of Chapter 1.[166] In *Capital One*, the taxpayer was a credit card issuer that had calculated its interchange fee income and its late fee income (types of credit card income) under general accrual method accounting principles. Interchange fee income is earned by a credit card issuer every time a cardholder makes a purchase with a card. Late fee income is derived when a cardholder fails to make timely payments.

In 1997, Congress amended the tax accounting rules regarding credit card income in a manner favorable to credit card issuers, in effect permitting more deferral than previously available.[167] Under the new statute, § 1272(a)(6)(C)(iii), credit card issuers like Capital One would no longer calculate their interchange and late fee income under general accrual method accounting principles. Instead, they would treat interchange fee income and late fee income as creating original issue discount.[168] This new method of accounting would allow Capital One and

164. Chapter 1 comprises §§ 1–1400T of the Code.

165. 130 T.C. 147 (2008), *appeal docketed*, No. 10-1788 (4th Cir. July 27, 2010). Some technical issues regarding interchange fee income were actually considered in a later proceeding. *See* Capital One Fin. Corp. v. Comm'r, 133 T.C. 4111 (2009). However, the Tax Court resolved the change in method of accounting issue in the 2008 opinion.

166. The facts in *Capital One* have been simplified to highlight the legislative entrenchment issues in the case.

167. *See* Taxpayer Relief Act of 1997 § 1004, 111 Stat. 788, 911 (codified as amended at I.R.C. § 1272(a)(6) (2006)).

168. The original issue discount provisions are highly complex, but for present purposes, all one needs to know is that treating interchange fee and late fee income as creating an original issue discount provided a significant timing advantage to Capital One. For an illustration of the technical details, see *Capital One*, 130 T.C. at 152 (providing an example regarding grace period interest, an item subject to the same tax accounting rules as late fee

similarly situated taxpayers to defer enormous amounts of income that would otherwise be taxed currently under the general accrual method of accounting principles. (In 2008, industry-wide interchange fees alone totaled $48 billion, and at issue in *Capital One* was more than $1 billion of income.)[169] This new accounting method was highly favorable to Capital One and the company obviously wanted to take advantage of it.

Capital One, however, apparently failed to obtain the IRS's consent to change its method of accounting.[170] But it argued that the IRS's consent was unnecessary. Section 1004(b)(2) of the Taxpayer Relief Act of 1997 contained a provision (not codified) stating that a taxpayer using the new method would be treated as if it had the consent of the IRS:

> In the case of any taxpayer required by this section to change its method of accounting for its first taxable year beginning after the date of the enactment of this Act—
>
> (A) such change shall be treated as initiated by the taxpayer,
>
> (B) such change shall be treated as made with the consent of the [IRS].[171]

In light of this provision, Capital One argued that it did not need actual consent from the IRS under § 446(e).[172]

The Tax Court rejected Capital One's arguments. The court concluded

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income and interchange fee income).

169. *See* Ryan J. Donmoyer & Peter Eichenbaum, *Capital One Wins 'Significant' Tax Victory on Fees*, BLOOMBERG (Sept. 22, 2009, 5:49 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aUMdYsVhg2P0. The article refers to Capital One's "victory" because, although Capital One lost on the consent issue, it won on some other important issues.

170. Capital One filed a Form 3115 with the IRS stating that it intended to "change its method of accounting for interest and original issue discount that are subject to the provisions of Section 1004 of the Taxpayer Relief Act of 1997 (Pub. L. 105-34)." *Capital One*, 130 T.C. at 162. The Tax Court dismissed this seemingly concise language as "ambiguous and vague." *Id.* at 163. Like its interpretation of § 446(e), the Tax Court's interpretation of the taxpayer's Form 3115 is probably incorrect. In any event, a resolution of this issue and some other issues critical to the court's ultimate holding is beyond the scope of this Article—the present focus is on the legislative entrenchment issue only.

171. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1004(b)(2), 111 Stat. 788, 911 (not codified).

172. The actual facts were somewhat convoluted. Capital One did not immediately change to the new method of accounting for its 1998 tax year, as it should have. Instead, it continued to compute its credit card income under general accrual method accounting principles for its 1998 and 1999 tax years. It sought to amend its 1998 and 1999 returns on the grounds that § 1004(b)(2) granted automatic consent to do so and also on the grounds that it could, without the Commissioner's consent, fix the errors on its 1998 and 1999 returns. After holding that § 446(e) nullified § 1004(b)(2), the Tax Court held that Capital One had adopted an incorrect method of accounting that would require the IRS's consent to change. *See* 130 T.C. at 164–70.

that because § 1004(b)(2) of the Taxpayer Relief Act of 1997 was not codified (and thus was not codified in Chapter 1 of the Code), it had no effect:

> Section 446(e) begins with the qualification: "Except as otherwise expressly provided in this chapter". Nothing in Section 1272(a)(6)(C)(iii) expressly provides that a taxpayer is not required to receive consent to change its method of accounting. [Section] 1004(b)(2) was not codified and therefore does not qualify as an exception to Section 446(e).[173]

The court went on to hold that Capital One consequently lacked the required consent from the IRS, and its attempts to change its method of accounting were void. Capital One thus had to include over $1 billion in income that it would have otherwise been able to defer.

The Tax Court, in reaching its conclusion, did not consider any of the Supreme Court cases regarding legislative entrenchment rules. Nor did it consider any of the academic literature discussing those rules. Instead, it cursorily dismissed the taxpayer's arguments based on its unstated assumption that § 446(e) could categorically nullify uncodified statutes.[174]

Capital One thus holds that statutes which, literally read, allow for exceptions only in a particular location automatically nullify any exceptions outside of that location. It's doubtful, though, that § 446(e) or similarly worded provisions were intended to operate this way.[175] Many, if not most, statutes are drafted such that they establish a broad general rule, subject to exceptions. Probably for the convenience of the reader, these statutes usually point to the location of the exceptions. A particularly common drafting approach involves articulating a broad general rule in subsection (a) of a statute but warning that the stated rule applies "except as otherwise

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173. *Id.* at 157.

174. The court also made the bizarre assertion that, even if § 1004(b)(2) were codified, it could not trump § 446(e). *See id.* at 157 (if § 1004(b)(2) "had been codified, [Capital One] would still be required to follow the applicable procedures in order to effect a change in accounting method"). Courts and commentators have wrestled with whether a subsequent statute that does not comply with a legislative entrenchment rule's requirements can be disregarded, but no one has suggested that a statute that *does* comply with those requirements can be. In fairness to the Tax Court, though, the legislative entrenchment issue apparently was not briefed by the parties and the Department of the Treasury has also ignored the plain language of an automatic consent provision. *See* 130 T.C. at 157–58 (discussing Treasury regulations that plainly contradict the automatic consent provision found in § 448(d)(7)).

175. For example, the IRS has acknowledged that uncodified automatic consent provisions have force. *See* Rev. Rul. 97-39, 1997-2 C.B. 62, 66 (concluding that some taxpayers could receive automatic consent under § 13223(c)(2) of the Omnibus Budget Reconciliation Act of 1993).

provided in this section."[176] This alerts the reader that the statute's general rule is not unqualified and that the reader should carefully examine the rest of the section to determine the scope and limitations of the general rule. Unlike statutes such as § 501(c)(1), which explicitly announce that some provisions of law must be disregarded, statutes that merely refer to exceptions in a particular place (a particular chapter, subchapter, subtitle, title, etc.) most likely are not intended to provide controlling rules of interpretation. They should not even be treated as legislative entrenchment rules in the first place.

But perhaps the Tax Court was right, and § 446(e) was intended to nullify provisions outside of Chapter 1 of the Code. In other words, perhaps § 446(e) provides an organizational legislative entrenchment rule similar to that found in § 501(c)(1). If that is so, does § 446(e) validly nullify provisions outside Chapter 1 of the Code?

For the reasons discussed in Part II, the answer is an unequivocal "no." Admittedly, *Capital One* provides authority contrary to this conclusion. But the absurd implications of the Tax Court's holding actually show why organizational rules should not be applied strictly.

Section 446(e) was originally enacted in 1954.[177] Since § 446(e)'s enactment, the 95th, 98th, 100th, 103rd, 105th, and 107th Congresses have each enacted statutes—not codified in Chapter 1—that grant automatic consent for a taxpayer's change in a method of accounting.[178] In

176. So many statutes (tax and nontax) follow this format that citing even one is pointless.

177. Section 446(e) first appeared in the Internal Revenue Code of 1954, which was later renamed the Internal Revenue Code of 1986. *See* Internal Revenue Code of 1954, Pub. L. No. 83-591, § 446(e), 68A Stat. 3, 152. Courts sometimes mistakenly state that the Internal Revenue Code was *reenacted* in 1986. *See, e.g.*, Tex. Apartment Ass'n v. United States, 869 F.2d 884, 886 n.1 (5th Cir. 1989) ("Congress reenacted the relevant provisions of the Internal Revenue Code of 1954 (26 U.S.C.) in the Internal Revenue Code of 1986 under the same section numbers."). Actually, in 1986, Congress changed the name of the internal revenue title. It did not reenact it. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 2(a), 100 Stat. 2085, 2095 ("The Internal Revenue Title enacted August 16, 1954, as heretofore, hereby, or hereafter amended, may be cited as the 'Internal Revenue Code of 1986.'"). Whether the Code was enacted in 1954 or 1986 may be critical whenever one must determine which of two conflicting provisions was enacted later.

178. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 403(b)(2), 116 Stat. 21, 41; Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 7001(b)(2), 112 Stat. 685, 827; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1088(b)(2), 111 Stat. 788, 959; Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-06, § 13223(c)(2), 107 Stat. 312, 484; Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 10201(c)(2), 10204(b)(2)(B), 101 Stat. 1330, 1388, 1394; Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 44(e)(2), 98 Stat. 494, 559–60; Revenue Act of 1978, Pub. L. No. 95-600, § 701(*l*), 92 Stat. 2763, 2906.

establishing these exceptions from § 446(e)'s requirements, these Congresses addressed the consequences of their decisions. Specifically, these Congresses prescribed rules regarding the so-called § 481 adjustment that typically accompanies a change in a method of accounting.

A § 481 adjustment is a transition mechanism designed to ensure that income is not included twice and deductions are not taken twice. The adjustment must be made whenever a taxpayer changes its method of accounting. The IRS, in reviewing a taxpayer's request to change its method of accounting, will review the taxpayer's § 481 adjustment to ensure that it is computed properly. The required computations can be extremely complex, hence the statutory bias in favor of obtaining the IRS's consent. But the 95th, 98th, 100th, 103rd, 105th, and 107th Congresses were aware of this and specified how they wanted taxpayers to apply § 481. Some said that, even though the taxpayer could change its method without obtaining the IRS's consent, the § 481 adjustment would have to be determined under Department of the Treasury (Treasury Department or Treasury) regulations.[179] Other Congresses allowed taxpayers to compute the § 481 adjustment on their own, prescribing specific periods over which the adjustment would be taken into account.[180] These technical and detailed provisions strongly suggest that these Congresses acted deliberately in providing exceptions to § 446(e).[181] (Why would these Congresses

179. *See, e.g.*, Revenue Act of 1978 § 701(*l*), 92 Stat. at 2906 (noting that the § 481 adjustment would be determined "under regulations prescribed by the Secretary of the Treasury").

180. *See, e.g.*, Taxpayer Relief Act of 1997 § 1004(b)(2)(C), 111 Stat. at 911.

181. The significant congressional efforts regarding exceptions to § 446(e)'s consent requirement illustrate a weakness in Rosenkranz's arguments. Under Rosenkranz's approach, "[m]eaning is derived from an act of Congress by bringing interpretive rules to bear upon it." Rosenkranz, *supra* note 71, at 2119. In Rosenkranz's view, many of "these rules are not inevitable," so an interpreter generally is not compelled to apply any specific rule. *Id.* Applying Rosenkranz's approach here, the organizational rule contained in § 446(e) can trump other basic interpretive rules because those rules are not "inevitable." *Id.* Consequently, the various enactments of the 95th, 98th, 100th, 103rd, 105th, and 107th Congresses actually have no meaning; whatever interpretive rules that one would have otherwise applied to determine the meaning of those enactments have been validly displaced by § 446(e). That these numerous, detailed enactments actually have no judicially recognizable meaning whatsoever seems implausible and absurd. It's far more sensible to find that the later Congresses, in exercising their legislative powers, either impliedly repealed or simply ignored § 446(e)'s apparent limitation. That is, to put it in Rosenkranz's terms, a court must "inevitably" recognize a given legislature's ability to impliedly repeal or ignore the enactments of previous Congresses, and a statute cannot displace judicial recognition of this basic constitutional principle. For a discussion of the temporal limits on each Congress's power, see generally Eule, *supra* note 89. *See also* Newton v. Comm'rs, 100 U.S. 548, 559 (1879) ("Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification

address the consequences of granting a taxpayer automatic consent for a change to its method of accounting unless they meant to override § 446(e)?) The Tax Court was wrong to treat uncodified automatic consent provisions as dead letters, and (ironically) the bizarre consequences of its opinion actually help show why legislative entrenchment rules are ineffective to the extent they purport to categorically control the interpretation of subsequent legislation.

Phrased in the terms of the implied repeals doctrine, the uncodified automatic consent provisions irreconcilably conflict with § 446(e). There is no way to give effect to both. Section 446(e) requires actual consent and the uncodified provisions say consent is automatically granted. In these circumstances, the implied repeal doctrine's requirements are met and the uncodified provisions should trump § 446(e).

This is not to say that § 446(e) should be ignored. Whenever it is ambiguous whether a particular provision allows a taxpayer to change its method of accounting without the IRS's consent, the strict requirements of the implied repeals doctrine will not be satisfied. In these circumstances, it would be perfectly appropriate for a court to hold that § 446(e) governs, and that the taxpayer must seek consent to change its accounting method. This result follows not because § 446(e) creates a binding legislative entrenchment rule, but because Congress is rebuttably presumed to be aware of existing laws when it passes legislation. Absent evidence that rebuts this presumption—such as when the later law irreconcilably conflicts with or entirely replaces a previously enacted statute—courts should give effect to both provisions. Similar principles should apply to all organizational legislative entrenchment rules.

B. Specific Reference and Specific Statement Rules

Unlike organizational rules, which disregard statutes that are not codified in a particular location, specific reference and specific statement rules require future statutes to refer to a particular statute or make a particular statement to take effect.

The Code contains a few specific reference and specific statement rules. Section 3112 states that no preexisting or future provision of law can exempt an instrumentality of the U.S. government from certain employment taxes under § 3111 unless that "other provision of

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which the former had of enactment, neither more nor less. . . . A different result would be fraught with evil." (involving a state legislature)). *Cf.* Alexander & Prakash, *supra* note 67, at 106–07 (applying subjective intentionalist approach and concluding that "the implicit rule that Congress may use whatever means that it wishes to express itself is a 'constitutional mandatory rule' of interpretation").

law . . . grants . . . a specific exemption [from certain employment taxes], by reference to section 3111."[182] Thus, under § 3112, Congress must refer to § 3111 if it wants to grant an employment tax exemption to an instrumentality.[183] Section 3308 provides a similar specific reference rule for other types of employment taxes.[184]

It's unclear whether §§ 3112 or 3308 have caused actual controversies between taxpayers and the IRS.[185] Even without §§ 3112's and 3308's specific reference rules, most privately owned government instrumentalities would be unambiguously subject to employment taxes—their tax exemptions generally relate only to *income* taxation.[186] Some government instrumentalities receive a broad exemption from all federal taxation, but these instrumentalities are usually those that are wholly owned by the U.S. government. One would not expect to find reported decisions addressing whether the U.S. government must pay employment taxes to itself.[187]

A specific reference rule regarding wealth transfer taxes (that is, the federal estate, gift, and generation-skipping transfer taxes) also has not resulted in any reported conflicts between taxpayers and the IRS, but the circumstances leading to its enactment may provide some additional insight regarding Congress's reasons for enacting legislative entrenchment rules. The statute, § 641 of the Deficit Reduction Act of 1984, provides that no future law can exempt any property from wealth transfer taxation "unless it refers to the appropriate provisions of the Internal Revenue Code . . . ."[188]

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182. I.R.C. § 3112 (2006).

183. Other sections of the Code impose employment taxes as well. *See, e.g.*, I.R.C. § 3301.

184. *See* I.R.C. § 3308 (mandating that an "instrumentality shall not be exempt from the tax imposed by section 3301 unless such other provision of law grants a specific exemption, by reference to section 3301 . . . from the tax imposed by such section").

185. Section 3112 was at issue in *Forrest City*, discussed supra Part II.B. But that case did not address whether § 3112 could require specific references from future legislation. It addressed only § 3112's effect on prior legislation. That a legislative entrenchment rule (or any statute) can alter the meaning of or nullify previous legislation is beyond dispute. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass . . . . The correctness of this principle, so far as respects general legislation, can never be controverted.").

186. *See, e.g.*, I.R.C. § 501(*l*) (listing various instrumentalities that are exempt from federal income taxes).

187. In some cases, a statute granting a tax exemption to an instrumentality wholly-owned by the federal government will acknowledge the limitations imposed by §§ 3112 and 3308. *See, e.g.*, 29 U.S.C. § 1302(g) (granting a broad tax exemption to the Pension Benefit Guaranty Corporation, but specifically stating that the exemption does not relate to employment taxes and referencing appropriate statutes).

188. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 641(a), 98 Stat. 494, 939.

Even a statute that broadly exempts property from "all taxation" will not meet § 641's requirements; the transfer of that property will remain subject to wealth transfer taxes unless the required references are made.

Congress enacted § 641 in response to the Seventh Circuit's decision in *Haffner v. United States*.[189] In *Haffner*, the court held that a tax exemption for project notes (short term obligations of public housing agencies) in the United States Housing Act of 1937 (Housing Act) exempted the transfer of those notes from wealth transfer taxes.[190] Section 5 of the Housing Act provides that project notes are "exempt from all taxation now or hereafter imposed by the United States . . . ."[191] The Seventh Circuit, agreeing with the District Court, concluded that this exemption from "all taxation" included wealth transfer taxation, creating a possible loophole. If a taxpayer had, for example, $10 million in cash that would otherwise be subject to the estate tax, she could use that cash to purchase project notes. Upon her death, the notes would pass to her beneficiaries on a tax-free basis. Section 641 of the Deficit Reduction Act of 1984 nullified this opportunity.

Section 641 is designed to ensure that *Haffner*, the case that nearly brought down the wealth transfer tax system, never happens again. The statute's policy is easy to see and to support—if a court holds that the transfer of widely traded securities is exempt from wealth transfer taxes, those taxes can be easily avoided. One might thus favor strict application of § 641 on policy grounds, such that no statute can create an exemption from wealth transfer taxes unless § 641's specific reference requirements are met.

Nonetheless, even § 641 should be subject to the doctrine of implied repeals. If a later statute explicitly exempts obligations issued by an entity from wealth transfer taxation, that exemption should not be nullified merely because the statute does not make the specific references required by § 641. It is not clear whether a current statute actually exempts property from taxation in this manner, and a review of every tax exemption granted by Congress is outside the scope of this Article. But it is well within a future Congress's prerogative to grant exemptions from the estate tax and the legislature need not employ any "magical passwords" to do so.[192]

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189. 585 F. Supp. 354 (N.D. Ill. 1984), *aff'd per curiam*, 757 F.2d 920 (7th Cir. 1985). *Haffner* was later abrogated by the Supreme Court. *See also United States v. Wells Fargo Bank*, 485 U.S. 351 (1988)

190. *See Haffner*, 585 F. Supp. at 361.

191. United States Housing Act of 1937, Pub. L. 75-412, § 5(e), 50 Stat. 888, 890 (codified as amended at 42 U.S.C. § 1437i(b) (2006)).

192. As a practical matter, courts tend to construe tax exemptions narrowly, so provisions like § 641 are frequently unnecessary. That is, a court may find reasons to limit

C. *Express Statement Rules*

Unlike the other legislative entrenchment rules, express statement rules do not describe the particular requirements they impose on subsequent legislation. These rules most commonly state that their provisions apply "except as otherwise expressly provided," merely imposing a heightened clarity requirement on futures statutes.

Although express statement rules appear in several Code sections,[193] they generally have not caused significant interpretive difficulties in the tax laws. But the interaction between the APA's express statement rule and the Code presents a continuing source of conflict between taxpayers and the IRS, especially regarding the validity of some temporary regulations.[194] The IRS has repeatedly concluded that § 7805(e) of the Code, which contemplates the issuance of temporary regulations, trumps the APA's rulemaking

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an exemption even in the absence of a specific reference or specific statement rule. But these types of legislative entrenchment rules are far more significant outside of the tax context. *See* Mitchell, *supra* note 71, at 1067–77 (discussing various types of legislative entrenchment rules, including specific reference and specific statement rules, in the national security context).

193. *See, e.g.*, I.R.C. § 262(a) (2006) ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."); I.R.C. § 4907 ("Any special tax imposed by this subtitle . . . shall apply to any agency or instrumentality of the United States unless such agency or instrumentality is granted by statute a specific exemption from such tax."); I.R.C. § 6804("Except as otherwise expressly provided in this title, the stamps referred to in section 6801 shall be attached, protected, removed, canceled, obliterated, and destroyed, in such manner and by such instruments or other means as the Secretary may prescribe by rules or regulations."). I.R.C. § 446(e) contains an express statement rule, but the confusion regarding that statute in *Capital One* related to its organizational reference to Chapter 1, not its requirement that exceptions be made expressly.

194. Aside from the confusion regarding pre-1988 temporary regulations, discussed below, courts have wrestled with whether the APA's scope and standard of review provisions govern the Tax Court's ability to examine materials other than the IRS's records. *Compare* Robinette v. Comm'r, 439 F.3d 455, 460 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004) ("Whether or not the Congress of 1946 may bind the Congress of 1998 to make an 'express' statement, . . . [n]othing in the text or history of the Restructuring and Reform Act of 1998 clearly indicates an intent by Congress to permit trials *de novo* in the Tax Court when that court reviews decisions of IRS appeals officers under § 6330."), *with* Comm'r. v. Neal, 557 F.3d 1262, 1270–74 (11th Cir. 2009) (acknowledging the APA's express statement rule, but concluding that the Code supersedes the APA and the Tax Court can thus go beyond the agency record in § 6015 innocent spouse relief hearings). Also, the IRS has frequently argued that § 7805(e) excuses the Treasury from the APA's notice-and-comment requirements when it issues temporary regulations. For an extensive rebuttal of this position, see Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1759–95 (2007). *See also infra* note 204.

provisions. As shown below, this presents a scenario opposite from *Capital One*: here, a legislative entrenchment rule has been largely ignored, not slavishly followed.

Section 559 of the APA states that a subsequent statute cannot supersede or modify the APA "except to the extent that it does so expressly." Section 553 of the APA, one of the provisions protected by § 559's express statement rule, prescribes procedural requirements regarding an agency's rulemaking activities. With some exceptions,[195] an agency must notify the public whenever it plans to issue regulations and must allow the public to comment on the regulations it proposes to issue. If the agency properly invokes a particular statutory exception (the good cause exception) and issues a regulation without public input (a temporary regulation), the agency is generally obliged to undertake notice-and-comment procedures soon after the regulation is issued.[196]

Section 7805 of the Code contains a few special provisions regarding the Treasury Department's rulemaking authority. Section 7805(e)(1) states that any temporary regulation must also be issued as a proposed regulation. This ensures that the public will be able to comment on temporary regulations as soon as they are promulgated. Section 7805(e)(2), most relevant here, indicates that any temporary regulation will expire within three years after the date of its issuance.[197] Section 7805(e)(2), like

195. 5 U.S.C. § 553(b)(3)(A)–(B) (2006) provides the limited exceptions to § 553's notice-and-comment requirements. Subparagraph (A) exempts interpretive rules, general statements of policy, and rules of agency organization from the requirements of § 553. Subparagraph (B) provides the good cause exception: an agency can forgo notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This Article is concerned with pre-1988 temporary regulations that the IRS issued under the good cause exception. The Treasury does not need to seek either pre- or post-publication comment on interpretive rules, general statements of policy, or rules of agency organization.

196. *See* Mid-Tex Elec. Coop., Inc. v. FERC, 822 F.2d 1123, 1132 (D.C. Cir. 1987) ("We recognize that court tolerance of 'temporary' measures installed without a public airing may give the agency an apparent incentive to proceed with its permanent rulemaking at a leisurely pace; we emphasize, therefore, that the agency must convince us, as FERC has done here, that it is not engaging in dilatory tactics during the interim period."); Nat'l Fed'n of Fed. Emps. v. Devine, 671 F.2d 607, 613 (D.C. Cir. 1982) ("The validity of [a temporary] regulation . . . is conditioned on expeditious conduct of notice and comment procedures in good faith."); Am. Fed'n of Gov't Emps., AFL-CIO v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981) ("Common sense suggests that any administrative action taken in a rare 'emergency' situation . . . while perhaps necessarily 'immediately effective,' need only be temporary, pending public notice-and-comment procedures.").

197. Section 7805(e)(2) was likely enacted to combat the Treasury's practice of issuing temporary regulations and allowing them to sit on the books indefinitely. *See* I.R.S. Field Serv. Adv. 003260 (Sept. 28, 1998, updated Jan. 31, 2005), 1998 WL 1984758 ("The Senate

§ 7805(e)(1), applies only to regulations issued after November 20, 1988.[198]

Burdened by significant amendments to the tax laws during the 1980s, the Treasury issued many temporary regulations to quickly provide guidance to taxpayers.[199] Although more than twenty years have passed since their promulgation, many of these regulations (issued before § 7805(e) took effect) remain on the books. The public has never had a meaningful opportunity to comment on many of them, even though some have been issued as long ago as 1977. Nonetheless, the IRS continues to enforce these regulations as if they were promulgated in accordance with APA procedures. The Tax Court has repeatedly blessed the IRS's enforcement efforts, rejecting taxpayers' contentions that these regulations have expired because of the Treasury and IRS's failure to allow the public to comment on them.[200]

The IRS and the Tax Court generally conclude that, because § 7805(e)(2) provides an expiration date only for regulations issued after November 20, 1988, any temporary regulation issued before that date never expires.[201] Putting the APA aside, this is not necessarily an unfair

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Finance Committee was 'concerned about the length of time that some regulations remain in temporary form' and proposed a two-year sunset period for temporary regulations which was not to affect the validity of the regulations during this period. The Senate amendment was adopted, with the modification that 'temporary regulations are permitted to remain in effect for no more than three years after the date of their issuance.' (citing S. Rep. No. 100-309, at 7 (1998); H.R. REP. NO. 101-1104, 100th Cong., 2d Sess. 218 (1988).").

198. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6232(b), 102 Stat. 3342, 3735 (codified in scattered sections of 26 U.S.C.).

199. *See* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 343 (1991).

200. *See, e.g.*, Newell v. Comm'r, 99 T.C.M. (CCH) 1107, 1009 n.6 (2010) ("[Section 7805(e)(2)] applies to any temporary regulation issued after Nov. 20, 1988 . . . . The sec. 469 temporary regulations were issued on Feb. 19, 1988, before the effective date of sec. 7805(e)."); Garnett v. Comm'r, 132 T.C. 368, 372–73, 372 n.11 (2009) (providing a similar statement regarding Temp. Treas. Reg. § 1.469-5T(e)(1) (1988)); Symonette v. Comm'r, No. 13403-06S, slip op. at 6 & n.13 (T.C. June 8, 2009) (providing a similar statement regarding Temp. Treas. Reg. § 1.274-5T(b)(6)(i)(B) (1986)); Mitchell v. Comm'r., 88 T.C.M. (CCH) 574, 576 n.4 (2004) (providing a similar statement regarding Temp. Treas. Reg. § 301.6404-2(b)(1) (1988)); Stussy v. Comm'r, 86 T.C.M. (CCH) 220, 222 (2003) (providing a similar statement regarding Temp. Treas. Reg. § 1.163-9T (1988)); Robinson v. Comm'r, 119 T.C. 44, 66–67 (2002) (providing a similar statement regarding Temp. Treas. Reg. §§ 1.163-8T, 1.169-9T (1988)); Char-Lil Corp. v. Comm'r, 76 T.C.M. (CCH) 1082, 1095 (1998) (providing a similar statement regarding Treas. Reg. § 1.469-2T (1988)); Lyszkowski v. Comm'r, 69 T.C.M. (CCH) 2751, 2757 (1995) (providing a similar statement regarding Treas Reg. § 7.6041-1 (1977)).

201. *See, e.g.*, Release of Lien or Discharge of Property, 72 Fed. Reg. 1301, 1302 (Jan. 11, 2007) ("Since the temporary regulations relevant here were issued prior to [Nov. 20, 1988], they are not subject to the three-year statutory limit."); I.R.S. Tech. Adv. Mem.

inference. Usually, the inclusion of one thing in a statute implies the exclusion of the other.[202] By setting a maximum three-year expiration period for temporary regulations issued after November 20, 1988, § 7805(e)(2) arguably grants temporary regulations issued before that date an indefinite expiration period, even though the APA would generally prohibit this.

But the APA should not be swept aside so easily. Although no "magical passwords" are required to trump the APA, exceptions from the APA must not be lightly presumed, either. *Marcello* and related cases[203] show that a subsequent statute creates an exception from the APA only 1) when the later statute irreconcilably conflicts with the APA or 2) if the later statute is intended as a substitute for it.

Nothing in § 7805(e)'s text or history suggests that this is the case. Section 7805(e)(2) is, in fact, easily reconciled with the APA: regulations issued after November 20, 1988, enjoy a maximum three-year expiration period, and general APA principles determine the expiration of temporary

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200752036 (Dec. 28, 2007) (Treas. Reg. § 1.925(a)-1T not subject to expiration); I.R.S. Non-Docketed Serv. Adv. Rev. 10697, at n.7 (Mar. 6, 2000) (Treas. Reg. § 301.6231(a)(1)-1T not subject to expiration); I.R.S. Non-Docketed Serv. Adv. Rev. 11108, at n.1 (Jan. 24, 2000) (Treas. Reg. § 301.6231(a)(1)-1T not subject to expiration); I.R.S. Non-Docketed Serv. Adv. Rev. 5667, at n.5 (Nov. 5, 1996) ("I.R.C. section 7805(e)(2) provides that temporary regulations expire after three years. However, that section is not applicable to regulations promulgated before 1988. The section 367 temporary regulations cited were promulgated in 1977.").

202. *See, e.g.*, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*"). However, the *expressio unius* canon, like other canons, has its limits and should not be applied rigidly. *See, e.g.*, United Dominion Indus., Inc. v. United States, 532 U.S. 822, 836 (2001) (declining to apply the canon); Ford v. United States, 273 U.S. 593, 612 (1927) (criticizing overreliance on the canon); Cheney R.R. Co. v. ICC, 902 F.2d 66, 68 (D.C. Cir 1990) ("Scholars have long savaged the *expressio* canon."). Thus, even without the APA's express statement rule, a court could properly conclude that § 7805(e)(2) was not intended to shield pre-1988 temporary regulations from public notice and comment.

203. In *Asiana Airlines v. FAA*, for example, the D.C. Circuit concluded that only "when Congress sets forth specific procedures that 'express[] its clear intent that APA notice and comment procedures need not be followed,' [may] an agency . . . lawfully depart from the normally obligatory procedures of the APA." 134 F.3d 393, 398 (D.C. Cir. 1998) (citation omitted). The court ultimately held that the statute at issue (prescribing procedures regarding some Federal Aviation Administration rulemaking) created an exception from the APA because "Congress specified procedures . . . that cannot be reconciled with [APA's] notice and comment requirements." *Id. Asiana Airlines* illustrates the relatively high bar set by *Marcello* for finding an exception from the APA. *See also* Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 686 (D.C. Cir. 1984) ("[T]he import of the § 559 instruction is that Congress's *intent to make a substantive change* be clear.").

regulations issued before that date.

Section 7805 also does not provide a complete substitute for the APA's rulemaking provisions.[204] By way of comparison, the Court in *Marcello* concluded that the Immigration Act superseded the APA's hearing provisions because that Act specifically announced that it provided the "sole and exclusive" procedures for deportation hearings and provided "detailed coverage of the same subject matter dealt with" in the APA's hearing provisions.[205] This led the Court to conclude that Congress intended the Immigration Act as a substitute for the APA, insofar as the APA's hearing provisions were concerned.

Section 7805 provides a hodgepodge of special rules regarding the Treasury Department's rulemaking,[206] but it does *not* provide "detailed

204. Although this Article focuses on the validity of pre-1988 temporary regulations, analogous issues are raised by the IRS's views on temporary regulations generally. The IRS frequently argues that § 7805(e) waives the APA's notice-and-comment requirements for all temporary regulations. *See, e.g.*, Intermountain Ins. Serv. of Vail, LLC v. Comm'r, 134 T.C. (CCH) 4587, 4602 (2010) (Halpern & Holmes, JJ., concurring in the result only) ("[The Commissioner] says that Congress implicitly okayed [skipping the notice-and-comment requirements] by limiting the temporary regulations to 3 years and ensuring that the Secretary issued [proposed regulations] at the same time. . . . We do not agree."); *see also* Reply Brief for the Appellant, Salman Ranch, Ltd. v. Comm'r, No. 09-9015, 2010 WL 2397312, at *6 (10th Cir. June 3, 2010) ("The provisions of § 7805(e), added to the Code in 1988, show that Congress authorized Treasury to issue temporary regulations without notice and comment by requiring any temporary regulation to be issued also as a proposed regulation." (citation omitted)); Brief for the Appellant, Grapevine Imps., Ltd. v. United States, No. 08-5090, 2010 WL 2416251, at *23 (Fed. Cir. May 25, 2010). Essentially, the IRS believes that the good cause exception is automatically met for any temporary regulation, and notice-and-comment procedures thus need not be observed. This argument is wrong for the same reasons that the IRS's arguments regarding pre-1988 temporary regulations are wrong. Section 7805(e) does not impliedly repeal the APA's generally applicable rulemaking provisions. That is, § 7805(e) is not meant to provide a complete substitute for the APA, nor does it irreconcilably conflict with that statute. As one commentator succinctly stated: "[S]ection 7805(e) can be readily explained: it applies to situations in which the APA does not require pre-adoption notice and comment procedure." Asimow, *supra* note 199, at 363 (emphasis removed). Section 7805(e) merely requires that the Treasury follow the case law interpreting the APA, under which an agency must let the public comment on regulations issued in temporary or interim form. *See supra* note 196. Generally applicable notice-and-comment requirements are not displaced. *See* Hickman, *supra* note 194, 1738–40.

205. *See* Marcello v. Bonds, 349 U.S. 302, 307–09 (1955) (listing detailed provisions under the Immigration Act and comparing them to the APA).

206. Aside from § 7805(e)'s provisions regarding temporary regulations, § 7805(a) provides a general grant of rulemaking authority to the Treasury, § 7805(b) describes situations under which the Treasury can issue retroactive regulations, § 7805(c) indicates that the Treasury must distribute copies of instructions, forms, and so on, § 7805(d) grants the Treasury the authority to prescribe how taxpayers may make elections under the Code, and § 7805(f) establishes procedures under which Treasury regulations must be reviewed for

coverage of the same subject matter dealt with" in the APA's rulemaking provisions, nor does it state that it provides sole and exclusive procedures. In fact, § 7805 is silent on several significant aspects of agency rulemaking.[207] This strongly suggests that § 7805 was not intended as a complete substitute for APA rulemaking procedures, but was instead intended to complement it, offering a few slight modifications to the generally applicable rules.

The IRS has also argued that § 7805(e) trumps the APA because, when two statutes conflict, the more specific statute usually controls.[208] The principle that the IRS relies on is sound,[209] but it does not apply here. Section 7805(e) does not specifically say *anything* about whether temporary regulations are exempt from the APA. It merely imposes an additional requirement on these regulations[210] and specifies an expiration period for

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their impact on small businesses.

207. Section 553 of the APA describes the basic contents of notices of proposed rulemaking, describes situations under which notice and comment procedures need not be followed, prescribes methods under which interested persons can comment on proposed rules, prescribes how the agency must respond to comments, and gives interested persons the right to petition for the issuance, amendment, or repeal of a rule. *See* 5 U.S.C. § 553 (2006). Section 7805 is silent on these fundamental matters.

208. *See Intermountain*, 134 T.C. (CCH) at 4602 (Halpern & Holmes, JJ., concurring in the result only) ("[The Commissioner] argues that section 7805(e) conflicts with the APA, and in the battle of the statutes, a specific statute trumps a general one." (citation omitted)). In *Intermountain*, the IRS relied on the specific-versus-general canon in connection with its argument that § 7805(e) trumps the APA and waives notice-and-comment requirements for temporary regulations. The IRS would presumably invoke the same canon regarding the expiration period of temporary regulations issued prior to November 21, 1988, and argue that § 7805(e)(2) supplants any otherwise applicable APA provisions. For a discussion of the broader implications of the *Intermountain* decision, see Steve R. Johnson, Intermountain *and the Importance of Administrative Law in Tax Law*, 128 TAX NOTES 837 (2010).

209. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007) (noting that when statutory provisions are inconsistent, "normally the specific governs the general"). Of course, the specific-versus-general canon is only one interpretive tool that courts may use to construe legislation. The canon, like any other canon, can be overcome by other indicia of congressional intent. *See supra* note 130. In particular, when the general statute is protected by a legislative entrenchment rule, a court may be hesitant to find that a specific, later-enacted statute trumps it. *See* Great N. Ry. Co. v. United States, 208 U.S. 452 (1908), and discussion of the facts of that case, *supra* note 41; *cf.* Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996) (finding that the Maine Indian Claims Settlement Act of 1980, which does not address Indian gaming, trumps the subsequently enacted Indian Gaming Regulatory Act, emphasizing the earlier statute's express statement rule).

210. *See* I.R.C. § 7805(e)(1) (2006) (stating that the Treasury must issue proposed regulations simultaneously with the issuance of temporary regulations). Although § 7805(e) is silent on whether temporary regulations are exempt from the APA (and regarding the expiration period for pre-1988 regulations), it obviously specifically addresses when and whether the Treasury must issue proposed regulations. In these circumstances, § 7805(e)(1)

those issued after November 20, 1988. Nothing in the statute specifically states that temporary regulations are shielded from the APA or specifically addresses the expiration period of regulations issued before November 21, 1988.

Many temporary regulations issued prior to November 21, 1988, are likely now invalid because of the Treasury's failure to allow the public to comment on them. Taxpayers should accordingly consider challenging these regulations when appropriate.[211] Although the Tax Court seems comfortable with applying decades-old temporary regulations against taxpayers, other federal courts might not be. At least one appellate court has, in fact, expressed skepticism regarding the IRS's position.[212]

None of this is to say that the APA inextricably binds the Treasury Department or the IRS. *Some* parts of § 7805 irreconcilably conflict with APA procedures and in these circumstances § 7805 controls. For example, under § 7805(b)(2), any regulation issued within eighteen months of the date of the enactment of the statutory provision to which the regulation relates may be effective retroactively. The APA, however, generally prohibits retroactive regulations, with no exception for regulations issued promptly

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trumps any contrary indication in the APA that would allow an agency to delay issuing proposed regulations. Stated differently, § 7805(e)(1) impliedly repeals the APA to the extent that the APA would allow the Treasury to delay the issuance of proposed regulations.

211. For a number of reasons, taxpayers have frequently been reluctant to challenge regulations on procedural grounds. *See generally* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153 (2008) (describing various reasons); *see also* Hosp. Corp. of Am. v. Comm'r, 348 F.3d 136, 145 n.3 (6th Cir. 2003) (observing that the taxpayer did not challenge the temporary regulations at issue on procedural grounds, so the issue was not reached). Even if a court invalidates a temporary regulation, it might nonetheless defer to the IRS's interpretation of a statute. *See* Hickman, *supra*, at 1199 ("Odd as it may seem, a court that invalidates a regulation on procedural grounds may nevertheless defer to the substantive interpretation of the I.R.C. contained in that regulation."). But if a temporary regulation implements a statute that becomes effective only upon the issuance of regulations, then invalidation of the regulation should prevent the IRS from applying the statute adversely against a taxpayer. Temporary regulations issued under a statute of this type should thus be carefully scrutinized. Regarding the difficult issues posed by statutes that call for regulations (but for which no valid regulations are in effect), see generally Phillip Gall, *Phantom Tax Regulations: The Curse of Spurned Delegations*, 56 TAX LAW. 413 (2003), and Amandeep S. Grewal, *Substance Over Form? Phantom Regulations and the Internal Revenue Code*, 7 HOUS. BUS. & TAX L.J. 42 (2006).

212. *See* Tedori v. United States, 211 F.3d 488, 491 n.9 (9th Cir. 2000) ("No explanation has been forthcoming from the government as to why such a 'temporary regulation,' issued in 1987 shortly after enactment of the Tax Reform Act of 1986, should remain 'temporary' well over a decade later. But we need not address any doubts raised by that factor, for our analysis rejects the Government's position on the merits." (citation omitted)).

after a statute's enactment.[213] But § 7805(b)(2) would be a dead letter if the Treasury were bound by this general requirement. In these circumstances, it would be entirely appropriate to conclude that the Treasury can issue retroactive regulations in circumstances beyond those contemplated by the APA.[214] This does not mean that § 7805 entirely supplants the APA, but only that it modifies general APA procedures in a few respects, to the extent that the two statutes irreconcilably conflict.

D. A Short Detour—Interpretive Directives

The legislative entrenchment rules discussed above establish rules of statutory construction that a court probably would not otherwise apply.[215] For example, it's doubtful that a court would decide, on its own, that a particular tax exemption must be ignored because it's not contained in the Code or in a revenue act.[216] And it's also doubtful that a court would demand that any statute that repeals another statute begin with the phrase "Mother May I?," to borrow one of Rosenkranz's examples.[217]

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213. *See* 5 U.S.C. § 553(d) (2006) (stating that substantive regulations must be published at least thirty days before their effective date).

214. *Accord* Redhouse v. Comm'r, 728 F.2d 1249 (9th Cir. 1984) (dealing with a prior version of § 7805(b), which remains effective for statutes enacted before July 30, 1996); *see* Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 758 (D.C. Cir. 1987) ("Although Congress has expressed a clear intention in the APA not to authorize retroactive agency rulemaking, Congress may—subject to any applicable constitutional constraints—override the general terms of the APA by explicitly authorizing retroactive regulations in an agency's organic statute." (footnote omitted)), *aff'd*, 488 U.S. 204 (1988); Wendland v. Comm'r, 79 T.C. 355, 380–81 (1982), *aff'd per curiam*, 739 F.2d 580 (11th Cir. 1984).

215. This generalization might not apply to express statement rules. These rules can be viewed as a mere reiteration of the implied repeals doctrine. But at least one court has given an express statement rule extra weight, beyond that required by the implied repeals doctrine, in determining the effect of a subsequent statute. *See supra* note 155.

216. A court might, under its general methods of interpretation, be hesitant to find tax exemptions in non-tax statutes. But it's doubtful that a court would create the categorical rule established by § 501(c)(1).

217. Courts have adopted so-called clear statement rules and other substantive canons of construction in various contexts. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406–27 (2010) (discussing justifications for those rules and scholarly debate regarding those rules); *see also* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 155–66 (2004) (discussing the Spending Clause and related clear statement rule). To the extent that these rules follow from some historical, statutory, or constitutional principle, they are not analogous to the entirely artificial rules of construction created by some legislative entrenchment rules. In fact, the application of these rules may be required. For example, regarding the rule of lenity, to the extent that this rule flows from the due process principles of the Fifth Amendment, a court may be required to apply this rule when construing a criminal statute. But if a court applies a clear statement rule or

But Congress sometimes enacts "interpretive directives" that attempt to displace or enhance rules of construction that a court might otherwise use. For example, § 7806(b) of the Code states that "[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section" of the Code, and that any descriptive matter (like titles or headings) shall not "be given any legal effect." This directive purportedly prevents a court from drawing inferences from some contextual information that it might otherwise find useful in statutory interpretation.[218] Other federal laws contain different types of interpretive directives, like ones instructing that a particular statute should be read broadly or ones directing that some items of legislative history may or may not be considered.[219]

Interpretive directives and legislative entrenchment rules belong in the same family. They each provide rules regarding statutory interpretation, and their differences relate more to degree than kind.[220] But interpretive directives differ from legislative entrenchment rules in one important

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similar rule without any historical, statutory, or constitutional basis, one can properly question whether the court is appropriately exercising its judicial power. A court does not have carte blanche authority to invent whatever rules of interpretation it might prefer. Instead, it must take and interpret a congressional enactment as it finds it, without creating artificial roadblocks to the discernment and effectuation of legislative intent. *See* Alexander & Prakash, *supra* note 67, at 102–05. Otherwise, the court is not engaged in the interpretation of a statute, but the disregard of one. *See id.* Some judicially created rules of interpretation regarding the tax laws, in particular, do seem suspicious. Courts are fond of saying, for example, that a tax deduction "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). The eligibility for a deduction should not depend on some judicially imposed heightened clarity requirement, but instead on the objective meaning of the statute. *See generally* Erwin N. Griswold, *An Argument Against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1943). The opposite principle, applied by other courts, that "statutes imposing a tax should be interpreted liberally in favor of the taxpayer," seems equally dubious. Limited, Inc. v. Comm'r, 286 F.3d 324, 335 (6th Cir. 2002). Tax disputes should be decided neutrally, without using interpretive rules to load the dice in favor of either the government or the taxpayer.

218. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)).

219. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b)(2), 105 Stat. 1071, 1075 (including an interpretive directive regarding legislative history in an uncodified portion of the statute's text). *See generally* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211 (1994).

220. A legislative entrenchment rule can, for example, be viewed as an interpretive directive that simply displaces most or all of the tools of statutory construction that a court might otherwise use.

respect. These directives focus primarily on the process of interpretation, generally describing *how* a court should interpret a statute, as opposed to describing strict requirements that a future statute must meet to take effect. Interpretive directives are thus geared primarily toward courts, not future Congresses.

Interpretive directives, like legislative entrenchment rules, generally raise no difficulties to the extent that they provide rules of construction for previously or concurrently enacted statutes.[221] If Congress enacts a tax statute and wants courts to ignore descriptive matter, surely it is within Congress's prerogative to say as much. While courts may sometimes look to titles and headings, they do so as a guide to legislative intent.[222] If Congress explicitly says that its descriptive matter does not provide any indication of legislative intent, the basis for examining that material goes away and courts should disregard descriptive matter.[223]

The application of interpretive directives to subsequently enacted statutes raises far more difficult issues. Although the implied repeals doctrine provides a useful framework for examining conflicts between legislative entrenchment rules and subsequently enacted statutes, that doctrine may provide little help for interpretive directives. How would a later Congress impliedly repeal an earlier statute calling for the disregard of descriptive matter?[224] By using *very* descriptive headings? And how could a later statute overcome a preexisting interpretive directive stating that future laws should be read "broadly," or "narrowly," or "leniently," and so on?

All of this being said, the generally applicable principles of statutory interpretation discussed earlier can help determine how interpretive

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221. I say "generally" because one can easily posit some types of interpretive directives that might raise constitutional problems. For example, an interpretive directive stating that "courts must interpret this Act in bad faith and in such a manner as to confuse the public" would probably implicate constitutional concerns regarding interference with the court's exercise of the judicial power. But interpretive directives are generally far more benign.

222. *See, e.g.*, United States v. Nader, 542 F.3d 713, 717 (9th Cir. 2008) ("Titles are also an appropriate source from which to discern legislative intent." (citation omitted)).

223. For the provocative (but questionable) argument that many interpretive directives reflect unconstitutional encroachments on the judiciary's core functions, see Linda D. Jellum, *"Which Is To Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. Rev. 837 (2009) (subclassifying interpretive directives into further categories and providing an analysis of each under major separation of powers theories).

224. The issue becomes even more confounding when one recognizes that titles and headings, although sometimes used as a last resort measure to resolve hopeless ambiguities, generally are not given any significant weight in statutory interpretation. *See* Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (noting that the title of a statute must yield to its text). Thus, even aside from § 7806(b), it's unclear what weight, if any, a statute's descriptive matter should receive in determining the meaning of a statute.

directives influence the meaning of subsequently enacted statutes. That is, when determining the meaning of a statute, a court should be guided by legislative intent and also should take into account the limits of the congressional awareness canon. More specifically, as was the case with legislative entrenchment rules, interpretive directives should not automatically determine how a court interprets a later enacted statute. Doing so may lead to the frustration of legislative intent and would reflect a cramped understanding of the congressional awareness canon.

Consider, for example, an interpretive directive providing that "a court shall interpret all tax acts to mean the exact opposite of what they say." If a later Congress enacts a statute that would be rendered nonsensical or meaningless through application of the directive, it would be fair to infer that the Congress either was not aware of the directive or simply disregarded it. A general principle of statutory interpretation—that Congress does not intend to pass meaningless[225] or absurd acts—likely provides a better guide to the Legislature's intent than does the bizarre interpretive directive.[226]

This hypothetical regarding an "opposite" interpretive directive presents a relatively easy case. But interpretive directives are more frequently phrased like § 7806(b), and strict application of these directives most likely will not lead to wholesale nullification of congressional enactments. These directives thus cannot be swept aside so easily and they leave courts with a difficult issue to consider: which interpretive rules provide a better guide to determining legislative intent—the ones commonly employed by courts, or the ones laid out by previous Congresses?[227] This question remains unresolved, and the discussion here barely scratches the surface of the

225. *See* Corley v. United States, 129 S. Ct. 1558, 1566 (2009).

226. This result should follow whether one follows an intentionalist approach or a textualist approach to statutory interpretation. An intentionalist would likely look askance at rules of construction that reflect a departure from the meaning actually intended by the speaker (here, Congress). *See* Alexander & Prakash, *supra* note 67, at 100–01. Absent some indication in the legislative history that the later Congress intended to enact a nonsensical statute, an intentionalist would likely dismiss the "opposite" interpretive directive. A textualist would likely dismiss strict application of the directive because the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." United States v. Fausto, 484 U.S. 439, 453 (1988) (Scalia, J.). That is, to make sense of the later statute, the "opposite" interpretive directive must yield. A textualist would thus consider not only the literal language of the statute, but their order of enactment.

227. One appellate court has declined to apply § 7806(b), instead favoring the general interpretive principles previously set forth by the Supreme Court. *See* Sec. State Bank v. Comm'r, 214 F.3d 1254, 1257-58 (10th Cir. 2000). Other courts, however, have followed § 7806(b)'s rule. *See* Grapevine Imps., Ltd. v. United States, 71 Fed. Cl. 324, 331 (2006).

many issues raised by interpretive directives.[228] But when wrestling with these issues, a court can draw from some of the principles discussed here regarding legislative entrenchment rules.

CONCLUSION

At first glance, legislative entrenchment rules seem to bind future Congresses. They may place strict or unusual conditions on future enactments, and some scholars have consequently challenged the constitutionality of these rules. But regardless of the conditions set forth in legislative entrenchment rules, a later Congress always has the power to repeal or ignore them. When this basic power is taken into account, constitutional concerns regarding legislative entrenchment rules should disappear.

But then another question arises: what effect *do* legislative entrenchment rules enjoy over subsequently enacted statutes? Some scholars have argued that strict application of these rules would be interpretatively equivalent to applying the congressional awareness canon and that any statute that fails to satisfy a legislative entrenchment rule's requirements can be properly disregarded. But that approach takes the canon too far and inappropriately discounts the later Congress's intent.

Traditional principles of statutory interpretation, including the implied repeals doctrine, should guide the resolution of any conflicts between legislative entrenchment rules and subsequently enacted statutes. Courts have plenty of experience in dealing with statutory conflicts—statutory construction often is like putting together a jigsaw puzzle whose pieces don't fit together neatly—and there is little reason to abandon general interpretive principles when legislative entrenchment rules are at issue.

The tax law suffers from an uninformed approach to legislative entrenchment rules. Sometimes, these rules have been applied such that a later enacted statute is completely nullified. Yet at other times, as with the APA, legislative entrenchment rules have been almost entirely overlooked. This Article advocates a more balanced approach that should reduce some of the confusion regarding legislative entrenchment rules in the tax laws.

228. For a discussion of the various approaches that different state courts have taken to interpretive directives, see Abbe R. Gluck, *Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010). For another good discussion of interpretive directives, see Roskenkranz, *supra* note 71. (Although this Article challenges Rosenkranz's arguments regarding legislative entrenchment rules, his discussion of legislative entrenchment rules constitutes only one part of an exceptionally thoughtful article on numerous issues central to statutory interpretation theory.)