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# Administering the Tax System We Have

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# ADMINISTERING THE TAX SYSTEM WE HAVE

KRISTIN E. HICKMAN†

## ABSTRACT

*Traditional perceptions of tax exceptionalism from administrative-law doctrines and requirements have been predicated at least in part on the importance of the tax code’s revenue-raising function. Yet, Congress increasingly relies on the Internal Revenue Service to administer government programs that have little to do with raising revenue and much more to do with distributing government benefits to the economically disadvantaged, subsidizing approved activities, and regulating outright certain economic sectors like nonprofits, pensions, and health care. As the attentions of the Treasury Department and Internal Revenue Service shift away from raising revenue and toward these other matters, the revenue-based justification for tax exceptionalism from general administrative-law norms fades. To demonstrate the shift, the Article incorporates empirical analysis of Treasury Department and Internal Revenue Service regulatory activity over time.*

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## INTRODUCTION

In *Mayo Foundation for Medical Education & Research v. United States*,<sup>1</sup> the Supreme Court rejected tax exceptionalism from administrative-law requirements and doctrines absent justification.<sup>2</sup> Yet, many tax-administrative practices do not comport precisely with general administrative-law norms.

Some differences are most likely due to a combination of specialization, cloistering, path dependence, and litigation strategy, as attorneys have failed to recognize or declined to mention tax departures from general administrative-law norms and generalist judges have relied on attorneys' briefs.<sup>3</sup> For example, tax lawyers and administrators have a longstanding habit of labeling general authority regulations issued by the Department of the Treasury (Treasury) as "interpretative rules," even though such regulations are legally

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

2. *See id.* at 713 (“[W]e are not inclined to carve out an approach to administrative review good for tax law only.”).

3. *See* Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. SEE ALSO 89, 92 (2011) (identifying litigation strategy as a partial explanation for tax departures from general administrative-law norms); *see also* Paul Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 531–89 (1994) (highlighting several areas, including tax administration, in which a “tax is different” mindset has yielded tax exceptionalism in the law). *See generally* Robert Glicksman & Richard Levy, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011) (describing how specialization, cloistering, and path dependence lead to judicial divergence from administrative-law norms, with tax as one example).

binding and thus “legislative” in general administrative-law parlance.<sup>4</sup> As a result, for many years prior to *Mayo*, generalist courts and tax litigants talked past each other, and briefs in tax cases regularly failed to alert courts to the disagreement over whether the tax-specific *National Muffler Dealers Ass’n v. United States*<sup>5</sup> standard of review<sup>6</sup> survived the Supreme Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>7</sup> leading to a jurisprudential mess.<sup>8</sup> The same habit of terminology has caused Treasury to claim routinely that most of its regulations are not subject to notice-and-comment rulemaking procedures under the Administrative Procedure Act<sup>9</sup> (APA), even as the regulations bind taxpayers and the Internal Revenue Service (IRS) alike—a circumstance that is currently causing jurisprudential mischief.<sup>10</sup>

Other tax deviations from general administrative-law norms are the result of congressional choice. For example, administrative-law doctrine interprets the APA as requiring a presumption in favor of judicial review for legal challenges against final agency actions.<sup>11</sup> In the tax context, Congress has deliberately limited judicial review with the Anti-Injunction Act,<sup>12</sup> Internal Revenue Code (I.R.C.) § 7421, although the full scope of that limitation is unclear. Retroactive rulemaking typically is not an option for other agencies.<sup>13</sup> By

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4. See Glicksman & Levy, *supra* note 3, at 520 (observing the habit). See generally 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 (2007) (examining the incidence and legal validity of characterizing Treasury regulations as exempt from APA notice-and-comment rulemaking requirements).

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

6. *Id.* at 477.

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

8. Brief of *Amicus Curiae* Professor Kristin E. Hickman in Support of Respondent at 16–19, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011) (No. 09-837), 2010 WL 3934618, at \*16–19; see also Glicksman & Levy, *supra* note 3, at 516–26 (connecting the legislative and interpretative terminology discrepancy with pre-*Mayo* judicial confusion over whether Treasury regulations were *Chevron* eligible); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1556–59, 1563–89 (2006) (documenting the origins of the pre-*Mayo* judicial confusion at greater length).

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

10. See generally Glicksman & Levy, *supra* note 3 (observing this condition); Hickman, *supra* note 4 (documenting this position empirically).

11. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

12. Anti-Injunction Act, I.R.C. § 7421 (2012).

13. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (rejecting retroactive rulemaking by agencies absent express congressional authorization).

comparison, Congress has explicitly given Treasury broad authority to adopt retroactively applicable regulations in I.R.C. § 7805(b).<sup>14</sup> Further, in response to claims that Treasury's use of temporary regulations violates APA notice-and-comment rulemaking requirements, the government has argued that I.R.C. § 7805(e) expressly authorizes it to do so.<sup>15</sup>

Whatever the origins of the differences between tax-administrative practices and general administrative-law norms, courts and scholars often invoke the importance of revenue raising to explain or defend tax exceptionalism. Long before *Mayo*, in *Bull v. United States*,<sup>16</sup> the Supreme Court justified special limitations on a taxpayer's ability to challenge tax assessments and collections on the ground that "taxes are the life-blood of government, and their prompt and certain availability an imperious need."<sup>17</sup> Professor Steve Johnson has identified the "revenue imperative" as the claimed justification for "several features of tax administration that uniquely advantage" the IRS, including the Anti-Injunction Act limitation on judicial review of Treasury and IRS actions.<sup>18</sup> Writing for the Court in *Bob Jones University v. Simon*,<sup>19</sup> Justice Powell similarly concluded that "the principal purpose" of the Anti-Injunction Act is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference."<sup>20</sup> Citing several cases, Nina Olson, the National Taxpayer Advocate, has linked the revenue-raising function to judicial reluctance to impose common procedural due process requirements upon IRS revenue-collection efforts.<sup>21</sup> Some tax

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14. I.R.C. § 7805(b) (2012).

15. See Brief for the United States at 29, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012) (No. 11-139), 2011 WL 5591822, at \*29 (citing I.R.C. § 7805(e) as "granting the Treasury Department authority to issue temporary regulations"); Brief for the Appellant at 51–52, *Intermountain Ins. Serv. of Vail, LLC v. United States*, 650 F.3d 691 (D.C. Cir. 2011) (No. 10-1204), 2010 WL 6210551, at \*51–52 ("If the absence of notice and comment could deprive temporary regulations of validity, then § 7805(e) is meaningless.").

16. *Bull v. United States*, 295 U.S. 247 (1935).

17. *Id.* at 259–60.

18. Steve Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 279–80 (2012); see also Nina E. Olson, Nat'l Taxpayer Advocate, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Taking the *Bull* by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection (Jan. 23, 2010), in 63 TAX LAW. 227, 232 (2010) (making a similar connection regarding the Anti-Injunction Act).

19. *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974).

20. *Id.* at 736.

21. Olson, *supra* note 18 at 230–33.

scholars have invoked Treasury's authority to promulgate retroactive tax regulations as an important tool for protecting the fisc from "abuse."<sup>22</sup> Somewhat ironically, prior to *Mayo*, the American Bar Association Tax Section's Task Force on Judicial Deference cited the IRS's revenue-raising role as the most important argument in favor of denying rather than extending *Chevron* deference to most Treasury regulations, claiming that "[t]his function of the IRS may encourage the agency to issue rulings or to promulgate regulations that test the outer limits of reasonableness."<sup>23</sup>

Anecdotally, defenders of tax exceptionalism often emphasize the difficulty that Treasury and the IRS face in keeping up with sophisticated and aggressive tax planners and tax shelter promoters whose schemes defy the spirit of the tax laws, or in combatting outright scofflaws who would delay or avoid paying their taxes by tying up the government in frivolous lawsuits. Certainly such groups exist, consume scarce administrative resources, and threaten the fisc. But the government's reliance on tax collection notwithstanding, it does not necessarily follow that raising revenue is the only, or even the primary, focus of the contemporary U.S. tax system and those charged with administering it.<sup>24</sup> The I.R.C. now contains hundreds of

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22. Edward A. Morse, *Reflections on the Rule of Law and "Clear Reflection of Income": What Constrains Discretion?*, 8 CORNELL J.L. & PUB. POL'Y 445, 487–88 (1999); see also Marvin A. Chirelstein & Lawrence A. Zelenak, Essay, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1956–57 (2005) (advocating retroactive rulemaking as a means of combatting abusive tax shelters); Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 232–35 (2003) (same).

23. IRVING SALEM, ELLEN P. APRILL & LINDA GALLER, ABA SECTION OF TAXATION: REPORT OF THE TASK FORCE ON JUDICIAL DEFERENCE, in 57 TAX LAW. 717, 724–25 (2004).

24. In discussing the U.S. tax system, I am contemplating the I.R.C.—Title 26 of the U.S. Code—as administered by Treasury and the IRS. One could argue instead that tax-system administration concerns revenue assessment and collection efforts across agencies. Many other federal government agencies are responsible for administering taxes, tariffs, levies, fees, penalties, and other payments that contribute to the fisc. For example, U.S. Customs and Border Protection (CBP), an agency within the Department of Homeland Security, is responsible for administering duties and fines on imported goods. See generally J.F. Chester & Sophilia Hsu, *Going Global: A Legal Primer for Innovation- and Knowledge-Based Companies*, CURRENTS: INT'L TRADE L.J., Summer 2012, at 3 (describing the CBP's role in administering import laws); *International Fashion Trends: The Business of International Fashion Law*, 21 CARDOZO J. INT'L & COMP. L. 795, 820 (2013) (comparing the CBP to the IRS). Also, for a particularly interesting article criticizing the U.S. Department of Agriculture's administration of a user fee levied by the Animal and Plant Health Inspection Service, see Charles E. Smith, *Air Transportation Taxation: The Case for Reform*, 75 J. AIR L. & COM. 915, 927–35 (2010). Nevertheless, I think most evaluations of the U.S. tax system and U.S. tax administration as such concern the I.R.C., Treasury, and the IRS. Also, the instances of tax exceptionalism from administrative-law norms that I discuss in this Article concern the I.R.C., Treasury, and the IRS.

tax expenditure items representing more than \$1 trillion of indirect government spending each year. Former Joint Committee on Taxation Chief of Staff Edward Kleinbard has called tax expenditures “the dominant instruments for implementing new discretionary spending policies.”<sup>25</sup> As further observed by former Assistant Secretary of the Treasury for Tax Policy Pamela Olson,

The continual enactment of targeted tax provisions leaves the IRS with responsibility for the administration of policies aimed at the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, health care, child care, welfare, corporate governance, export promotion, charitable giving, governance of tax exempt organizations, and economic development, to name a few.<sup>26</sup>

Following a similar theme, several former IRS Commissioners recently advised the D.C. Circuit that “Congress has decided to administer an increasingly wide variety of government assistance programs through the federal income tax system, including assistance for low income families, health care, education, and homebuyers.”<sup>27</sup>

Congress may perceive the non-revenue-raising aspects of the I.R.C. to be minor and peripheral to the I.R.C.’s core revenue-raising function; so, for that matter, may defenders of tax exceptionalism who focus their gaze on those taxpayers who resort to aggressive measures to avoid paying taxes. But what if that perception is no longer accurate? As the former IRS Commissioners observed, “Congress’s willingness to use its taxing power to effectuate public policies in areas such as health care has fundamentally changed the roles of the tax return and tax return preparers.”<sup>28</sup> If the efforts of tax administrators are likewise increasingly focused on programs, purposes, and functions other than raising revenue, then what ought to be the implications for instances of tax exceptionalism in administration that are premised on the revenue-raising function?

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25. Edward D. Kleinbard, Professor of Law, Woodworth Memorial Lecture: The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes (May 7, 2009), *in* 36 OHIO N.U. L. REV. 1, 3 (2010).

26. Pamela F. Olson, Woodworth Memorial Lecture: And Then Cnut Told Reagan . . . Lessons from the Tax Reform Act of 1986, (May 6, 2010), *in* 38 OHIO N.U. L. REV. 1, 12–13 (2011) (citations omitted).

27. Brief *Amici Curiae* of Former Commissioners of Internal Revenue in Support of Defendants-Appellants at 22, *Loving v. IRS*, No. 13-5061 (D.C. Cir. Apr. 5, 2013), 2013 WL 1386248, at \*22.

28. *Id.* at 4.

Drawing from a much larger and ongoing empirical study of tax administration and Treasury regulations, this Article offers a preliminary snapshot of the extent to which the efforts of contemporary tax administrators focus on programs, purposes, and functions other than raising revenue.<sup>29</sup> The Article focuses on Treasury regulations—proposed, temporary, and final—promulgated by Treasury’s Office of Tax Policy with the help of members of the IRS Chief Counsel’s Office between January 1, 2008, and December 31, 2012. To provide context for the empirical analysis, Part I of this Article offers a qualitative discussion of the different goals, purposes, and functions of the contemporary U.S. tax system. Turning to the empirical study, Part II outlines study methodology and reports the results. Specifically, the study classified major Treasury regulation documents by subject matter and evaluated them both document by document and project by project, outright and based on relative page length. Across measures, between 30 percent and 40 percent of observations fell into subject matter categories that are most clearly oriented toward programs, purposes, and functions other than traditional revenue raising. Another 25 percent of observations fell into subject matter categories that arguably serve dual functions. In short, a lot—maybe even a majority—of the effort that Treasury and the IRS spend promulgating Treasury regulations concerns programs, purposes, and functions other than raising revenue. In light of the study’s findings, Part III of the Article suggests that Congress ought to reconsider, or at least adjust, some of the statutory exceptions from administrative-law requirements that it has adopted in the tax context. Alternatively, or in addition, where the scope of some of those exceptions is in doubt, courts ought to consider construing the relevant statutory language in a manner that minimizes its deviation from general administrative-law norms.

### I. THE TAX SYSTEM’S COMPETING FUNCTIONS

Raising revenue is obviously a key function of any tax system. As the saying goes, “Taxes are what we pay for civilized society . . . .”<sup>30</sup> Taxes provide the funds needed for the government to do all of the things that we, as citizens, ask it to do to make our society more

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29. Distinguishing revenue raising from other programs, purposes, and functions is not always obvious, easy, or even possible. *See infra* Parts I and II.B.

30. *Compañía Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).



civilized: building roads and supporting schools; shielding consumers from adulterated food and mislabeled pharmaceuticals; enforcing safe workplaces and protecting the environment; and providing a basic social safety net. The guiding purpose of the U.S. tax system historically has been, and to some extent still is, to raise revenue. The culture, practices, and procedures of the IRS, in particular, are oriented toward the mission of raising revenue.<sup>31</sup> Nina Olson has described the IRS as “the federal government’s accounts receivable department.”<sup>32</sup> As Figure 1 demonstrates, the tax administration efforts of Treasury and the IRS yield a lot of revenue for the government—mostly, though not exclusively, from the individual income tax and employment taxes.

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31. *E.g.*, John F. Coverdale, *Legislating in the Dark: How Congress Regulates Tax-Exempt Organizations in Ignorance*, 44 U. RICH. L. REV. 809, 837–38 (2010) (“The IRS is essentially a tax collection agency, and its culture reflects that reality.”); Francine J. Lipman, *Access to Tax Justice*, 40 PEPP. L. REV. 1173, 1195–96 (2013) (describing the mismatch between the IRS’s collection-oriented culture, practices, and procedures, and the needs of low-income taxpayers claiming the earned income tax credit (EITC)); Shu-Yi Oei, *Getting More by Asking Less: Justifying and Reforming Tax Law’s Offer-in-Compromise Procedure*, 160 U. PA. L. REV. 1071, 1119 (2012) (suggesting that the IRS’s “fundamental collection mission” and “enforcement culture” get in the way of its administering the Offer In Compromise program).

32. NAT’L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., 1 2012 ANNUAL REPORT TO CONGRESS 40 (2012), available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Volume-1.pdf>.

Figure 1. IRS Revenue Collections by Type of Tax, Fiscal Year 2012<sup>33</sup>  
 (Money amounts in thousands of dollars)

Type of Tax	Gross Collections	% of Total
Individual and estate and trust income taxes <sup>[a]</sup>	1,387,836,515	55.0
Employment taxes: Old-Age, Survivors, Disability, and Hospital Insurance (OASDHI), Federal Insurance Contributions Act (FICA), Self-Employment Contributions Act (SECA), unemployment insurance, railroad retirement	784,396,853	31.1
Business income taxes <sup>[b]</sup>	281,461,580	11.1
Excise taxes	56,174,937	2.2
Estate and gift taxes	14,450,249	0.6
Total	2,524,320,134	100.0

<sup>[a]</sup> Includes \$37.3 million in Presidential Election Campaign Fund contributions.

<sup>[b]</sup> Includes \$496 million from the unrelated business income tax imposed on tax-exempt organizations, which is less than .05 percent of total collections.

The I.R.C. is not and probably could never be entirely value neutral. For example, Congress seems doomed to choose between disfavoring single individuals or married couples in determining the income tax rate brackets and the standard deduction.<sup>34</sup> Further, many longstanding features of the I.R.C. deliberately pursue social welfare or regulatory goals in the course of raising revenue. The progressive structure of the individual income tax is frequently justified at least partly as a remedy for societal inequality.<sup>35</sup> Although the estate tax was adopted largely to raise revenue, combatting inequality was a driver there also,<sup>36</sup> and contemporary defenders of the estate tax

33. The information in Figure 1 derives from the IRS Data Book for the fiscal year ended September 30, 2012. See INTERNAL REVENUE SERV., DEP'T OF THE TREAS., INTERNAL REVENUE SERVICE DATA BOOK, 2012, at 3 (2013), available at <http://www.irs.gov/pub/irs-soi/12databk.pdf>.

34. Tax experts have been debating this issue for decades. See generally, e.g., Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651 (2010); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000).

35. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM IN FISCAL POLICY 15–19 (1938); Meredith R. Conway, *Money, It's a Crime. Share It Fairly, but Don't Take a Slice of My Pie!: The Legislative Case for the Progressive Income Tax*, 39 J. LEGIS. 119, 130–32 (2013).

36. Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875, 882 (2010).

continue to invoke that concern as a rationale for its retention.<sup>37</sup> Historical evidence suggests that Congress enacted the corporate income tax not only to raise revenue but also to provide a mechanism by which the government could regulate corporate activity and constrain corporate political power.<sup>38</sup>

Indeed, taxes are routinely recognized as a tool in the regulatory toolbox.<sup>39</sup> The federal income tax is littered with provisions that are not based on anyone's conception of an ideal tax base, but rather are motivated by a desire to encourage some behaviors and discourage others. For example, the I.R.C. authorizes income tax deductions for charitable contributions<sup>40</sup> and denies income tax deductions for bribes,<sup>41</sup> political lobbying,<sup>42</sup> and excessive compensation.<sup>43</sup> Excise taxes are another example, and the I.R.C. contain dozens.<sup>44</sup> Although they are now actually collected by the Bureau of Alcohol, Tobacco,

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37. See generally, e.g., Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax To Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013) (invoking societal inequality as a rationale for retaining the estate tax).

38. STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT 43–44 (2010) (acknowledging that regulatory goals were present but considering them secondary); Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Income Tax*, 90 VA. L. REV. 1193, 1217–20 (2004) (citing historical evidence in justifying the continuation of the corporate income tax on regulatory grounds). See generally Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53 (1990) (documenting regulatory goals driving the Corporate Excise Tax of 1909 as a precursor to the modern corporate income tax).

39. See, e.g., STEVEN SHAPELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 277–78 (1987) (recognizing taxation as a tool for controlling risk); Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 581 (1979) (discussing tax as a regulatory tool).

40. I.R.C. § 170 (2012). This deduction has been part of the individual income tax since 1921. See Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 227, 241.

41. I.R.C. § 162(c). Deductions for “improper” payments to foreign officials or employees were disallowed in 1958. Technical Amendments Act of 1958, Pub. L. No. 85-866, § 5, 72 Stat. 1606, 1608. In 1969, Congress expanded I.R.C. § 162(c) and adopted language that more closely resembles the current provision. Tax Reform Act of 1969, Pub. L. No. § 91-172, § 902(b), 83 Stat. 487, 710.

42. I.R.C. § 162 (e).

43. *Id.* § 162(m). The deduction limitations for political lobbying and excessive compensation were both adopted in 1993. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13211(a), 13222(a), 107 Stat. 312, 469–71, 477–79 (codified as amended at I.R.C. § 162(e), (m) (2012)).

44. See generally INTERNAL REVENUE SERV., DEP'T OF THE TREAS., PUBLICATION 510 (2013), available at <http://www.irs.gov/pub/irs-pdf/p510.pdf> (describing a few dozen excise taxes in the I.R.C.).

and Firearms, “sin taxes” on liquor<sup>45</sup> and cigarettes<sup>46</sup> have been part of the I.R.C. for several decades—whether to discourage their use, to offset the cost of their negative social consequences, or both. The I.R.C. taxes crude oil and petroleum products, ozone-depleting chemicals, and gas-guzzling vehicles to protect the environment,<sup>47</sup> and vaccines to fund the National Vaccine Injury Compensation Program and compensate the families of children adversely affected by vaccination,<sup>48</sup> among other excise tax examples.

Even some longstanding deductions that we now regard as serving primarily non-revenue-raising goals at one time may have been considered relatively value neutral or definitionally essential in computing net income. In writing about tax incentives, Professor Stanley Surrey described several tax provisions that “are now defended on incentive grounds” as having “cloudy” origins.<sup>49</sup> The deduction for home mortgage interest is illustrative. Individual taxpayers have been able to deduct home mortgage interest since Congress first enacted the income tax in 1913.<sup>50</sup> Today, tax experts consider the deduction for home mortgage interest to be a tax expenditure item aimed at promoting homeownership.<sup>51</sup> Yet, the Revenue Act of 1913<sup>52</sup> did not mention home mortgage interest

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45. See, e.g., I.R.C. § 5001 (imposing taxes on distilled spirits and wines produced in or imported into the United States). These taxes have existed since at least 1958. Excise Tax Changes Act of 1958, Pub. L. No. 85-859, § 201, 72 Stat. 1275, 1313–14 (1958) (codified as amended at I.R.C. §§ 5001–5693 (2012)).

46. See I.R.C. § 5701 (imposing taxes on cigars, cigarettes, and other tobacco products manufactured in or imported into the United States). These taxes have existed since at least 1954. See Internal Revenue Code of 1954, ch. 52, § 5701, 68A Stat. 1, 705 (1954) (codified as amended at I.R.C. § 5701 (2012)).

47. I.R.C. §§ 4064, 4611–4612, 4681–4682. See generally Janet E. Milne, *Environmental Taxation in the United States: The Long View*, 15 LEWIS & CLARK L. REV. 417 (2011) (discussing existing environmental taxes as a tool for protecting the environment).

48. I.R.C. §§ 4131–4132; see Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL’Y & L. 59, 62 (1999) (describing the relationship between the vaccine excise tax and the National Vaccine Injury Compensation Program).

49. STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* 127 (1973).

50. See Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 114, 167; CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* 49 (1997).

51. See S. COMM. ON THE BUDGET, 112TH CONG., *TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS* 358 (Comm. Print. 2012) (Cong. Research Serv.) [hereinafter 2012 CRS COMPENDIUM] (“For taxpayers who can itemize, the home mortgage interest deduction encourages home ownership by reducing the cost of owning compared with renting.”).

52. Revenue Act of 1913, ch. 16, 38 Stat. 114.

specifically, but merely authorized a deduction for interest payments of any kind.<sup>53</sup> Congress permitted taxpayers to deduct consumer interest as well as business interest for administrability reasons, which made sense in a more agrarian era in which business and personal expenses were often commingled, nonfarm consumer debt was low, and most homeowners were not subject to the income tax in any event.<sup>54</sup> Congress only began contemplating the deductibility of home mortgage interest as an incentive for home ownership after World War II, when homeownership, mortgage debt, and the reach of the income tax had all expanded.<sup>55</sup> In 1986 and 1987, Congress revamped the interest deduction—denying a deduction for consumer interest generally, but authorizing a specific deduction for most home mortgage interest to promote homeownership.<sup>56</sup> In short, a deduction that was once relatively value neutral is now perceived as merely an indirect financial subsidy to mostly middle-class homeowners and the real estate industry.

Although the tax system has always served multiple goals, recent decades have seen a dramatic escalation in tax programs and provisions serving purposes other than traditional revenue raising. First and foremost, Congress has dramatically expanded its use of tax expenditures—various exclusions, deductions, credits, deferrals, and preferences that, by definition, represent the exact opposite of revenue raising.<sup>57</sup> Not long after Stanley Surrey coined the tax

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53. See *id.* § II(B), 38 Stat. at 167; see also HOWARD, *supra* note 50, at 53–54 (“Included in these expenses was interest paid on all indebtedness, including but not limited to home mortgages.”); Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 240–44 (2010) (discussing the history of home mortgage interest deductions in the early internal revenue laws).

54. See HOWARD, *supra* note 50, at 53–54; Ventry, *supra* note 53, at 241–42.

55. See Ventry, *supra* note 53, at 252–59 (recounting 1950s criticism of the deduction for home mortgage interest as well as Congress’s continued support for using the tax code to promote home ownership).

56. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2246–48 (1986) (codified as amended at I.R.C. § 163(h)(1)–(3) (2012)); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330, 1330–85 (codified as amended at I.R.C. § 163(h)(1)–(3)); see also Ventry, *supra* note 53, at 274–76 (discussing how qualified residence interest was designed to boost homeownership).

57. See 2012 CRS COMPENDIUM, *supra* note 51, at 1031–35 (documenting types of tax expenditures). A daunting array of articles addresses the topic of tax expenditures, including but not limited to debate over the precise definition of the concept. For one helpful summary of the scholarly discussion of tax expenditures, including disagreement over the definition, see Eric T. Laity, *The Corporation as Administrative Agency: Tax Expenditures and Institutional Design*, 28 VA. TAX REV. 411, 421–29 (2008). For an explanation of the methodology used by the Joint Committee on Taxation for compiling its list of federal tax expenditures and noting areas of

expenditures term in the 1960s,<sup>58</sup> the federal tax expenditure budget listed sixty items totaling somewhere between \$60 billion and \$65 billion.<sup>59</sup> By comparison, the most recent biennial compendium of tax expenditures prepared by the Congressional Research Service lists two hundred and fifty such items totaling well over \$1 trillion,<sup>60</sup> and even that extensive list does not purport to be comprehensive.<sup>61</sup> Some tax expenditures are small and, sometimes, short-lived, like recent credits for first-time homebuyers and purchasers of electric vehicles.<sup>62</sup> Others are large, longstanding, and complicated—like the exclusions for employer contributions for employee health coverage and retirement plans, or the aforementioned deduction for home mortgage interest.<sup>63</sup>

What may be underappreciated, however, is the extent to which tax expenditures require the IRS to serve programs, purposes, and functions that look less like traditional revenue collection and more like the regulatory and social welfare programs of other, nontax agencies.<sup>64</sup> Congress increasingly utilizes refundable tax credits rather than direct subsidies to alleviate poverty and support working

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disagreement, see STAFF OF J. COMM. ON TAXATION, 112TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2011–2015, 3–10 (Comm. Print 2012).

58. See SURREY, *supra* note 49, at vii (describing Surrey's introduction of the term in a 1967 speech and his development of the tax expenditure budget in 1968 as Assistant Secretary for Tax Policy in the Treasury Department).

59. *Id.* at 7–11.

60. 2012 CRS COMPENDIUM, *supra* note 51, at 1, 11.

61. The Compendium draws its data from tax expenditure estimates compiled by the Joint Committee on Taxation (JCT). *Id.* at 1. The JCT, in turn, acknowledges that it does not include de minimis items that fall below \$50 million or items for which quantification is unavailable. STAFF OF THE J. COMM. ON TAXATION, *supra* note 57, at 27–30.

62. The tax expenditure estimates compiled by the JCT in 2012 documented more than thirty items valued at less than \$50 million each. See STAFF OF THE J. COMM. ON TAXATION, *supra* note 57, at 27–28. The same report included seventy-six tax expenditure items that expired in 2010 and 2011, including, for example, the I.R.C. § 36 first-time homebuyer credit of (available for homes purchased between April 9, 2008, and May 1, 2010) and the I.R.C. § 30 credit for purchasing a plug-in electric vehicle (available for vehicles purchased between February 18, 2009, and December 31, 2011). See *id.* at 28.

63. According to the 2012 Congressional Research Service compendium, the amounts in 2011 for these three expenditures, respectively, were \$109.3 billion, \$105.3 billion, and \$77.6 billion. 2012 CRS COMPENDIUM, *supra* note 51, at 5.

64. See Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 67 (2013) (“For the past twenty-five years, Congress has been relying increasingly on the tax code to accomplish goals beyond raising revenue.”).

families.<sup>65</sup> Amounts expended by the government on the earned income tax credit (EITC) and the child tax credit each surpassed those for Temporary Assistance for Needy Families and its predecessor, Aid to Families with Dependent Children, years ago.<sup>66</sup> In other words, the IRS is now one of the government's principal welfare agencies, on par with the Department of Health and Human Services (HHS) and the Social Security Administration.<sup>67</sup> Other scholars have documented some of the administrative challenges posed by this arrangement, as the tax system's traditional revenue-raising orientation clashes with the objectives of the refundable credits.<sup>68</sup>

Anecdotally, Treasury and IRS officials bemoan the amount of time they spend implementing the Patient Protection and Affordable Care Act (ACA). Enacted in 2010,<sup>69</sup> the ACA is a complicated and massive piece of legislation that endeavors to expand health insurance coverage and control health care costs through various mandates, regulations, and subsidies administered by a combination of federal and state agencies.<sup>70</sup> The ACA contains several revenue-raising components, including new excise taxes on indoor tanning services<sup>71</sup> and medical devices,<sup>72</sup> a new insurance policy "fee,"<sup>73</sup> and an

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65. See Lipman, *supra* note 31, at 1180–84 (describing the history of the EITC as a mechanism for alleviating poverty); *EITC & Other Refundable Credits*, IRS, <http://www.eitc.irs.gov> (last visited Mar. 21, 2014) (highlighting and facilitating claims to the EITC and other refundable tax credits). See generally David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 *YALE L.J.* 956 (2004) (discussing Congress's integration of spending programs into the I.R.C., comparing the EITC and food stamp programs); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 *UCLA L. REV.* 1867 (2005) (comparing and contrasting the EITC, Temporary Assistance for Needy Families, and food stamps).

66. NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., 2009 ANNUAL REPORT TO CONGRESS: VOLUME TWO: RESEARCH AND RELATED STUDIES 78 (2009), available at [http://www.irs.gov/pub/irs-utl/09\\_tas\\_arc\\_vol\\_2.pdf](http://www.irs.gov/pub/irs-utl/09_tas_arc_vol_2.pdf).

67. Lipman, *supra* note 31, at 1173.

68. See generally Michelle Lyon Drumbl, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 *PITT. TAX REV.* (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2338161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338161); Lipman *supra* note 31, at 1184–98. *But see* Zelenak, *supra* note 65, at 1915 (arguing that the tax system is better at administering welfare programs than other agencies).

69. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29 and 42 U.S.C.).

70. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (noting the ACA's goals and size).

71. I.R.C. § 5000B (2012).

72. *Id.* § 4191.

73. *Id.* § 4375.

expanded Medicare tax.<sup>74</sup> The ACA's infamous individual mandate may also yield some revenue, but the I.R.C. and ACA label the mandate a "shared responsibility payment" and a "penalty" rather than a tax.<sup>75</sup> Regardless, the core aims of the ACA are health care access and cost controls, not raising revenue, and the roles that Treasury and IRS officials play in ACA implementation extend far beyond the legislation's revenue-raising components.<sup>76</sup> Since the ACA's enactment, Treasury and the IRS have worked with HHS and the Department of Labor (Labor) to draft regulations that, among other things, accommodate religious organizations that object to mandatory contraceptive coverage;<sup>77</sup> elaborate the extent to which group health plans are precluded from denying coverage to individuals with preexisting health conditions;<sup>78</sup> and identify ways in which health insurance providers may or may not offer incentives for participating in wellness programs.<sup>79</sup> The ACA's medical loss ratio provisions, its requirement that health insurers accept all eligible applicants irrespective of preexisting conditions, and its standards for coverage and pricing—all of which Treasury and the IRS are involved in implementing—essentially convert health insurance companies into public utilities, much like providers of telecommunications services (regulated by the Federal Communications Commission) or electricity transmission services (regulated by the Federal Energy Regulatory Commission).<sup>80</sup> In short, in the context of implementing

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74. *Id.* § 1401(b).

75. *Id.* § 5000A; *see also Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2582–84, 2600 (holding that the individual mandate is not a tax for purposes of I.R.C. § 7421(a), even though the mandate is constitutional as an exercise of Congress's power to lay and collect taxes).

76. For a list of ACA tax provisions and discussion of Treasury and IRS responsibilities with respect to the ACA, *see Affordable Care Act Tax Provisions*, IRS, [www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions](http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions) (last visited Mar. 21, 2014).

77. Group Health Plans and Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (T.D. 9578) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

78. Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, T.D. 9491, 2010-32 I.R.B. 186, 188–89.

79. Notice of Proposed Rulemaking, Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77 Fed. Reg. 70,620 (Nov. 26, 2012) (to be codified at Treas. Reg. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pts. 146, 147).

80. *See* Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 668–71 (2013) (making this comparison); Richard A. Epstein & Paula M. Stannard, *Constitutional Ratemaking and the Affordable Care Act: A New Source of Vulnerability*, 38 AM. J.L. & MED. 243, 261–67 (2012) (comparing and contrasting the constitutional posture of health insurers under the ACA with that of public utilities); Sara Rosenbaum, *Realigning the Social Order: The*



the ACA, at least, Treasury and the IRS seem indistinguishable from other, more traditional regulatory agencies.

Although the ACA has expanded and brought renewed attention to Treasury and IRS involvement in the health care sector, those agencies' participation in administering health and welfare programs is not new. Long before Congress enacted the ACA, it assigned Treasury and the IRS a leading role in administering health care as well as pension benefits governed by the Employee Retirement Income Security Act of 1974 (ERISA).<sup>81</sup> Congress enacted ERISA to protect participants in certain employee pension and welfare plans, including health coverage plans, by imposing various participation, vesting, funding, reporting, and disclosure requirements on the employers and unions that sponsor them.<sup>82</sup> The role of Treasury and the IRS in administering the pension aspects of ERISA largely corresponds to provisions in the I.R.C. that exclude qualifying pension contributions and earnings from taxable income<sup>83</sup>—acknowledged tax expenditure items.<sup>84</sup> By contrast, Treasury and IRS responsibilities for administering ERISA health coverage requirements (as opposed to ACA health coverage requirements) relate most closely to a financial penalty, styled as an excise tax, imposed by the I.R.C. on nonconforming group health

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*Patient Protection and Affordable Care Act and the U.S. Health Insurance System*, 7 J. HEALTH & BIOMEDICAL L. 1, 25 (2011) (describing the ACA as adopting “a public utility approach”).

81. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

82. See STEVEN J. SACHER, JAMES I. SINGER & TERESA M. CONNERTON, *EMPLOYEE BENEFITS LAW* 22–35 (2d ed. 2000) (describing ERISA's purposes and coverage); Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 163–66 (2013) (same). Although historical accounts of ERISA focus primarily on pension reform, Congress drafted ERISA to cover a broader array of employee welfare plans, including employer-sponsored health insurance plans. See SACHER ET AL., *supra*, at 28 (including insurance coverage among list of welfare plans covered by ERISA).

83. *E.g.*, I.R.C. §§ 401–407, 410–418E, 457 (2012). Many of these provisions have parallel provisions in ERISA, and Treasury claims interpretive jurisdiction over both. See COLLEEN E. MEDILL, *INTRODUCTION TO EMPLOYEE BENEFITS LAW* 95–96 (3d ed. 2011) (listing I.R.C. provisions and corollary ERISA provisions); see also Mortality Tables for Determining Present Value, T.D. 9419, 2008-40 I.R.B. 790, 791 n.1 (asserting jurisdiction to adopt mortality tables for determining present value and making other computations for purposes of applying pension funding requirements under I.R.C. §§ 412 and 430 as well as ERISA § 302); Diversification Requirements for Certain Defined Contribution Plans, T.D. 9484, 2010-24 I.R.B. 748, 748–49 (adopting regulations concerning diversification requirements for defined contribution plans holding publicly traded employer securities under both I.R.C. § 401(a)(35) and parallel provision 29 U.S.C. § 204(j)).

84. 2012 CRS COMPENDIUM, *supra* note 57, at 963.

plans.<sup>85</sup> Regardless, as with the ACA, Treasury and IRS administrative efforts in the ERISA area have virtually nothing to do with raising revenue. Instead, Treasury and the IRS have worked in recent years, again with HHS and Labor, to adopt regulations concerning the length of hospital stays for new mothers and their newborn infants<sup>86</sup> and ensuring that the mental health and substance abuse disorder benefits provided by group health plans enjoy parity with those plans' medical and surgical benefits.<sup>87</sup>

The exempt organization sector represents yet another area in which Treasury and IRS regulation has expanded far beyond the revenue-raising function. Charities have been exempt from the corporate income tax from its origin in 1913,<sup>88</sup> and Congress authorized the deduction for individual contributions to eligible charities not long after that.<sup>89</sup> Exempt organizations with certain types of income now pay an unrelated business income tax.<sup>90</sup> Neither the exemption from the corporate income tax, nor the deduction for charitable contributions, however, contributes to revenue raising in any way; rather, both are means by which the federal government indirectly subsidizes exempt organizations.<sup>91</sup> In the century since

85. Specifically, for any group health plan that fails to meet the requirements of I.R.C. chapter 100, I.R.C. § 4980D imposes an excise tax upon a sponsoring employer of one hundred dollars per day, per individual affected. I.R.C. § 4980D. Chapter 100, in turn, imposes an array of portability, access, and renewability requirements, as well as benefit requirements for mothers and newborns and for mental health, among other things. I.R.C. §§ 9801–9802, 9811–9812 (imposing group health plan requirements); *see also* MEDILL, *supra* note 83, at 354–55 (discussing the “excise tax penalty” adopted to enforce group health plan requirements).

86. Final Rules for Group Health Plans and Health Insurance Issuers Under the Newborns’ and Mothers’ Health Protection Act, T.D. 9427, 2008-47 I.R.B. 1179, 1181.

87. Interim Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, T.D. 9479, 2010-18 I.R.B. 618, 622–26.

88. The Revenue Act of 1913, which established the modern income tax, exempted charities from the levy imposed on corporate earnings. *See* Revenue Act of 1913, ch. 16, § II.G(a), 38 Stat. 114, 172 (exempting, *inter alia*, “any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes”).

89. Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 227, 241.

90. I.R.C. §§ 511–514 (2012); FRANCIS R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS* ¶ 21.01 (2002) (describing the unrelated business income tax). For documentation of the IRS collection of \$496 million in unrelated business income tax in fiscal year 2012, *see* Figure 1.

91. *See e.g.*, 2012 CRS COMPENDIUM, *supra* note 57, at 5 (identifying charitable contribution deduction as a tax expenditure item); Daniel Halpern, *Is Income Tax Exemption for Charities a Subsidy?*, 64 *TAX L. REV.* 283, 311–12 (2011) (concluding that both exempt status and the charitable contribution deduction are subsidies for exempt organizations). *But see* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Corporations from Federal Income Taxation*, 85 *YALE L.J.* 299, 304 (1976) (concluding that early legislative perceptions

Congress first exempted charitable organizations from the corporate income tax, the nonprofit sector has expanded dramatically in both size and complexity.<sup>92</sup> Current Treasury and IRS administration efforts in this one area now involve an entire IRS division (out of only four) monitoring more than 1.6 million tax exempt organizations<sup>93</sup> across a few dozen separate statutory classifications that encompass universities with billion-dollar endowments and tiny religious schools teaching a few dozen students in a small town; large hospitals and small, free health clinics; labor unions; chambers of commerce; the National Football League; churches, big and small; the Metropolitan Opera and tiny, rural theater companies; the local Elks Lodge; and your Aunt Sadie's garden club.<sup>94</sup> Defining which organizations are eligible for exempt status and, separately, which may receive tax deductible contributions is complicated.<sup>95</sup> Evaluating applications for exempt status and monitoring existing organizations for continued compliance with eligibility requirements are even more difficult. Tax administrators in this sector routinely make decisions implicating issues as varied as free speech, politics, and religion;<sup>96</sup> election law and

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“that nonprofit organizations are not suitable targets for an income tax . . . was a sound judgment deserving more attention and respect than it has received from tax scholars”).

92. HILL & MANCINO, *supra* note 90, ¶ 1.01; James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303, 303–04 (2006).

93. See *At-a-Glance: IRS Divisions and Principal Offices*, IRS, <http://www.irs.gov/uac/At-a-Glance-IRS-Divisions-and-Principal-Offices> (last visited Mar. 21, 2014) (listing four primary IRS divisions: Wage and Investment; Large Business and International; Small Business/Self-Employed; and Tax-Exempt and Government Entities); *Tax Exempt & Government Entities Division at a Glance*, IRS, <http://www.irs.gov/uac/Tax-Exempt-&-Government-Entities-Division-At-a-Glance> (last visited Mar. 21, 2014) (describing the work of the TE/GE division and noting “this sector is not designed to generate revenue, but rather to ensure that the entities fulfill the policy goals that their tax exemption was designed to achieve”).

94. I.R.C. §§ 501(c)(1)–(29), (d)–(f) (describing different exempt organization types); see also Charles A. Borek, *Decoupling Tax Exemption for Charitable Organizations*, 31 WM. MITCHELL L. REV. 183, 201–07 (2004) (describing a spectrum of exempt organizations); Fishman, *supra* note 92, at 303–05 (same).

95. Only some exempt organizations can receive tax deductible contributions. Compare I.R.C. § 501 (listing types of exempt organizations), with *id.* § 170(c) (listing organizations eligible to receive deductible contributions).

96. See generally Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447 (2009); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001).

campaign finance;<sup>97</sup> and, again, health policy and hospital governance.<sup>98</sup> For a prime example of the difficulties Treasury and the IRS face in assessing an organization's exempt status, one need look no further than recent regulations, proposed in the wake of the IRS–Tea Party scandal, attempting to identify for I.R.C. § 501(c)(4) social welfare organizations exactly which activities are candidate-related political activities.<sup>99</sup>

Speaking of politics and campaigns, how many tax experts realize that the I.R.C. has an entire subtitle dedicated to the financing of presidential election campaigns? Tax experts who prepare their own or others' individual income tax returns will no doubt recall the box on the Form 1040 asking taxpayers whether they want three dollars from some unidentified source to fund presidential election campaigns.<sup>100</sup> I.R.C. § 6096 authorizes individual taxpayers to allocate three dollars of federal funds to the Presidential Election Campaign Fund.<sup>101</sup> Subchapter H, in turn, governs eligibility to receive the funds, authorizes audits of campaign expenses, requires reports to Congress, and penalizes noncompliance.<sup>102</sup> The Federal Election Commission (FEC) is primarily responsible for administering Subchapter H,<sup>103</sup> but

97. Demonstrating the issues that the IRS faces in this area, in 2011, the *Election Law Journal* published an entire volume on this topic. For just a few of the contributions to that volume, see, for example, Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337 (2011); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407 (2011); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427 (2011).

98. See, e.g., Jessica Berg, *Putting the Community Back into the "Community Benefit" Standard*, 44 GA. L. REV. 375, 377 (2010) (discussing IRS-developed "community benefit" criteria that nonprofit hospitals must satisfy to maintain exempt status).

99. Notice of Proposed Rulemaking, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1). For comprehensive coverage of the IRS–Tea Party scandal through April 5, 2014, including but not limited to reaction to the proposed regulations, see Paul Caron, *The IRS Scandal, Day 331*, TAXPROF BLOG (Apr. 5, 2014), [http://taxprof.typepad.com/taxprof\\_blog/2014/04/the-irs-scandal-5.html](http://taxprof.typepad.com/taxprof_blog/2014/04/the-irs-scandal-5.html).

100. INTERNAL REVENUE SERV., DEP'T OF THE TREAS., FORM 1040 (2013), available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf> (offering opportunity to authorize contributions in the upper right-hand corner of the first page).

101. I.R.C. § 6096; see also Presidential Election Campaign Fund Act of 1966, Pub. L. No. 89-809, § 302(a), 80 Stat. 1587–90 (codified as amended at I.R.C. § 6096 (2012)) (establishing the fund).

102. I.R.C. §§ 9001–9042.

103. See *id.* § 9009(b) (authorizing the FEC to promulgate regulations "as it deems necessary to carry out the functions and duties imposed on it by" chapter 95, consisting of

Treasury and the IRS play secondary roles that require coordination and cooperation with the FEC and, occasionally, regulations to govern those administrative efforts.<sup>104</sup> Again, however, Subchapter H serves no revenue-raising function whatsoever.

## II. EMPIRICAL STUDY

None of these observations about the contemporary U.S. tax system's scope are especially novel. All are well recognized within the tax policy literature. Nevertheless, my own informal impression is that many tax experts view the administrative burdens of these additional programs, purposes, and functions as small and tangential relative to the revenue-raising function. Although this may be true provision by provision or program by program, when considered collectively, these non-revenue-raising items add up. My goal with this project is to obtain at least a preliminary sense of the extent to which contemporary tax administration is dedicated to social welfare and regulatory programs, purposes, and functions, rather than more traditional revenue raising. To achieve this goal, the Article evaluates Treasury regulations—proposed, temporary, and final—promulgated during the five-year period between January 1, 2008, and December 31, 2012.

### A. *Why Study Treasury Regulations?*

If the goal is to evaluate the full picture of tax administration, studying Treasury regulations alone may seem like a rather limited place to start. Several government agencies and offices are responsible for administering different aspects of the U.S. tax system. Although the Treasury's Office of Tax Policy and the IRS Chief Counsel's Office work closely in promulgating regulations, they represent separate agencies that perform different administrative functions.<sup>105</sup> Treasury's regulatory preferences and priorities may not

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§§ 9001–9013); *id.* § 9039(b) (authorizing the FEC to adopt regulations “which it determines to be necessary to carry out its responsibilities under” chapter 96, consisting of §§ 9031–9042).

104. Treas. Reg. § 702.9006-1 (2008); Treas. Reg. § 702.9037-1 (2008); Treas. Reg. § 702.9037-2 (2008).

105. The Internal Revenue Manual discusses this relationship. IRM 32.1.1.3, 32.1.1.3.1, 32.1.1.4.4, 32.1.1.4.5 (Sept. 23, 2011) (discussing involvement of Office of Chief Counsel and Office of Tax Policy personnel in regulation projects); *see* LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES* § 1.03 (3d ed. 2008) (comparing Treasury and IRS involvement in regulation drafting); MICHAEL I. SALTZMAN, *IRS PRACTICE & PROCEDURE* ¶ 1.02 (1991) (describing the Treasury and IRS roles in the tax system).

always align precisely with those of the IRS or the Department of Justice Tax Division, which also plays a prominent role in tax enforcement.<sup>106</sup> Moreover, the Chief Counsel's Office is only one part of a much larger IRS bureaucracy with many offices and divisions pursuing a wide range of processing, enforcement, educational, and other administrative tasks.<sup>107</sup>

Nevertheless, studying Treasury regulations is a worthwhile first step. Among the various documents published by Treasury and the IRS in administering the tax system, Treasury regulations are the most authoritative.<sup>108</sup> Treasury often undertakes regulation projects in response to recent legislation.<sup>109</sup> Congress has tended in recent years to ask the tax system to do more rather than less, and that trend shows no sign of abating.<sup>110</sup> Therefore, although this study does not aim to be predictive in any way, determining the extent to which Treasury regulation projects over the past five years arguably pursued ends other than raising revenue may give us some idea of what we might expect from future Treasury and IRS regulatory agendas.

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106. GERALD A. KAFKA & RITA A. CAVANAUGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES ¶ 1.09 (describing different functions of IRS and Department of Justice attorneys in tax cases).

107. SALTZMAN, *supra* note 105, ¶ 1.02.

108. See, e.g., Mitchell Rogovin & Donald Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, TAXES, Aug. 2009, at 21, 22 (describing Treasury regulations as “the primary source for guidance as to the IRS’s position regarding the interpretation of the [I.R.C.],” and discussing their legal weight).

109. This proposition should be self-evident. For example, as discussed in Part I above and documented in Part II.C below, a substantial percentage of Treasury regulation projects undertaken and documents published in the past five years have concerned the ACA—a massive piece of legislation that nevertheless required extensive implementing regulations. Moreover, although the summary of study findings below does not address this topic in detail, as part of the larger study from which this paper derives, I have coded each regulation project studied for whether Treasury adopted new regulations or amended old regulations in response to legislation. Of the 262 regulation projects discussed as part of this paper, 118 contained some reference to legislation that Treasury was acting to implement. For additional examples supporting the proposition that Treasury promulgates regulations in response to legislation, see, for example, T.D. 9533, 2011-33 I.R.B. 139, 139 (acting to implement new requirements imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act); T.D. 9464, 2009-48 I.R.B. 692, 692 (adopting temporary regulations in response to statutory changes made by the Genetic Information Nondiscrimination Act of 2008); T.D. 9422, 2008-42 I.R.B. 898, 899 (implementing changes made to rules governing S corporations by the American Jobs Creation Act of 2004 and the Gulf Opportunity Zone Act of 2005).

110. See *supra* Part I; see also, e.g., Brief *Amici Curiae* of Former Commissioners of Internal Revenue in Support of Defendants-Appellants, *supra* note 27, at 3–7 (describing the expansion of congressional use of the tax system for functions other than traditional revenue raising).

Also, some of the express and supposed statutory exceptions from administrative-law norms in the tax context focus importantly on Treasury regulations more than other tax agency actions. As already noted, one example is Congress's explicit authorization in I.R.C. § 7805(b) of retroactive Treasury regulations with no limitation for subject matter. Another is the Anti-Injunction Act, which at least arguably precludes pre-enforcement judicial review of Treasury regulations under the APA.<sup>111</sup> In litigation, the government has argued in recent years that I.R.C. § 7805(e) authorizes the issuance of temporary Treasury regulations with only postpromulgation notice and comment and without a contemporaneous claim of good cause—an approach to notice-and-comment rulemaking that is inconsistent with general administrative-law requirements.<sup>112</sup>

Finally, although IRS administrative activities do not fully align with Treasury's regulatory agenda, a certain symbiotic relationship does exist between Treasury regulations and IRS guidance and enforcement activity. An IRS that helps draft and must enforce new Treasury regulations in individual cases is likely to expend its own resources in interpreting and applying those regulations. Relatedly, IRS enforcement actions in turn prompt Treasury to promulgate new regulations as the need for clarification arises. Thus, while Congress should not rely solely on a study of Treasury regulations in contemplating the need for IRS organizational reform, the close relationship between Treasury Department and IRS activities makes Treasury's regulatory emphasis at least relevant to such discussions.

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111. The scope of the Anti-Injunction Act as a limitation on judicial review in the tax context has been the subject of recent litigation. *E.g.*, *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc); *Halbig v. Sebelius*, No. 13-623, 2014 WL 129023 at \*8-11 (D.D.C. Jan. 15, 2014); *Fla. Bankers Ass'n v. U.S. Dep't of Treasury*, No. 13-529 (JEB), 2014 WL 114519, at \*6 (D.D.C. Jan. 13, 2014). *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) (discussing this issue).

112. *See supra* note 15 and accompanying text. To date, the only judicial opinion to address the issue—a concurring opinion by Judges Halpern and Holmes of the U.S. Tax Court—squarely rejected the government's interpretation of I.R.C. § 7805(e) as inconsistent with the plain text of that provision and as contrary to congressional intent regarding the APA. *See Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 134 T.C. 211, 245-46 (2010) (Halpern & Holmes, JJ., concurring in the result), *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012); *see also* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 496-99 (2013) (discussing this issue at greater length).

## B. Methodology

Like most agencies, Treasury and the IRS promulgate regulations using notice-and-comment rulemaking.<sup>113</sup> For virtually all Treasury regulation projects, Treasury and the IRS will publish a notice of proposed rulemaking (NOPR) with background, explanation, and proposed regulatory text.<sup>114</sup> After affording interested members of the public an opportunity to submit comments regarding the proposed regulations, Treasury and the IRS will publish a Treasury Decision (TD) containing final regulations along with further background and explanation.<sup>115</sup> In many instances, Treasury and the IRS publish a TD with legally binding temporary regulations simultaneously with the NOPR and then replace or withdraw the temporary regulations with the TD that contains the final regulations.<sup>116</sup> This Article evaluates Treasury regulation activity by considering major rulemaking documents—mostly, but not exclusively, TDs and NOPRs—published between January 1, 2008, and December 31, 2012.<sup>117</sup>

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113. See 5 U.S.C. § 553(b)–(d) (2012) (describing notice-and-comment rulemaking procedures generally); IRM 32.1.2.3(3) (Sept. 23, 2011) (describing the process of referencing the APA and asserting that “the IRS usually publishes its [Notices of Proposed Rulemaking] in the Federal Register and solicits public comments”).

114. IRM 32.1.1.2.2 (Sept. 23, 2011) (describing IRS NOPRs). Occasionally, Treasury publishes a TD containing final regulations without first publishing a NOPR. See, e.g., T.D. 9586, 2012-22 I.R.B. 960, 960 (withdrawing existing final regulations without first publishing a NOPR after Congress repealed the associated I.R.C. provision).

115. IRM 32.1.1.4, 32.1.1.5 (Sept. 23, 2011) (describing TDs and the process of issuing final regulations).

116. *Id.* 32.1.1.3 (Sept. 23, 2011) (describing IRS use of temporary regulations). Whether Treasury and IRS use of temporary regulations complies with the APA’s notice-and-comment rulemaking requirements is an open and debated question. See, e.g., Hickman, *supra* note 112, at 492–502 (detailing the controversy).

117. For many regulations, Treasury and the IRS also publish one or more minor documents—for example, to schedule or cancel public hearings, or to correct typographical errors in TDs or NOPRs. See, e.g., Fees on Health Insurance Policies and Self-Insured Plans for the Patient-Centered Outcomes Research Trust Fund; Hearing Cancellation, 77 Fed. Reg. 47,573 (Aug. 9, 2012) (canceling a previously scheduled public hearing); Health Insurance Premium Tax Credit; Correction, 77 Fed. Reg. 41,048 (July 12, 2012) (to be codified at 26 C.F.R. pt. 1) (documenting corrections to regulatory preamble contained in T.D. 9590). These documents tend to be brief and routinized, but they generally are not published in the Internal Revenue Bulletin and can be easy to miss in the Federal Register. Sometimes Treasury will publish two separate documents with individual correcting amendments in the same edition of the Federal Register. On other occasions, Treasury will combine several correcting amendments in the same Federal Register document. Some minor notices address more than one project. In sum, including these minor technical documents in the study would have been more distortive than meaningful.



1. *Identifying the Documents.* Treasury and the IRS typically publish TDs and NOPRs in both the Federal Register and the Internal Revenue Bulletin. Consequently, major rulemaking documents were identified in three ways. First, I looked at the documents listed in the “Highlights of This Issue” and “Finding List of Current Actions on Previously Published Items” sections of each issue of the Internal Revenue Bulletin during the relevant time period. Second, because TDs are numbered sequentially, I ascertained which were published in the Federal Register during the relevant time period. Finally, to be certain that I had identified all of the relevant documents, I searched in Westlaw’s Federal Register database for the Regulation Identifier Number (RIN) and Counsel Automated Systems Environment Management Information System (CASE-MIS) number assigned to each of those documents already located.<sup>118</sup>

During the five years under study, Treasury and the IRS published 449 major rulemaking documents in the Federal Register or the Internal Revenue Bulletin: 241 TDs,<sup>119</sup> 199 NOPRs,<sup>120</sup> and 8 additional, highly substantive documents labeled as an advanced NOPR,<sup>121</sup> a request for information,<sup>122</sup> or a solicitation of comments.<sup>123</sup>

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118. For further discussion of RIN and CASE-MIS numbers, see Appendix 1.

119. Although Treasury and the IRS typically publish all TDs in both the Federal Register and the Internal Revenue Bulletin, publication in the Internal Revenue Bulletin typically occurs some weeks after publication in the Federal Register. Consequently, the study includes several TDs published in the Federal Register but not the Internal Revenue Bulletin during the study period, and vice versa. The study also includes one TD that was published in the Federal Register but was never published in the Internal Revenue Bulletin. For further details, see Appendix 2.

120. Although Treasury and the IRS typically publish all NOPRs in both the Federal Register and the Internal Revenue Bulletin, publication in the Internal Revenue Bulletin typically occurs some weeks after publication in the Federal Register. Consequently, the study includes several NOPRs published in the Federal Register but not the Internal Revenue Bulletin during the study period, and vice versa. The study also includes one NOPR that was published in the Federal Register but was never published in the Internal Revenue Bulletin. For further details, see Appendix 2.

121. Treasury and the IRS do not often publish advanced NOPRs. Typically, the IRS uses revenue procedures or notices published in the Internal Revenue Bulletin but not in the Federal Register to notify taxpayers that it is contemplating a regulation project and to seek public comment regarding preliminary thinking about conceptual aspects. Nevertheless, in the time period covered by the study, Treasury published three advanced NOPRs in the Federal Register that were sufficiently substantive to warrant inclusion in the study. One described preliminary proposals for regulating the marketing by tax return preparers of tax refund anticipation loans and other similar products. *See generally* Advanced Notice of Proposed Rulemaking, Guidance Regarding Marketing of Refund Application Loans (RALs) and Certain Other Products in Connection with the Preparation of a Tax Return, 73 Fed. Reg. 1131 (Jan. 7, 2008) (to be

Having identified these 449 documents, I then categorized them by subject matter and recorded other data for each as follows.

2. *Subject Matter Categories.* Although it is easy to recognize that the tax code serves multiple goals, it is impossible to code meaningfully the full panoply of I.R.C. provisions and Treasury

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codified at 26 C.F.R. pt. 301). Another requested comments in response to six questions concerning potential modifications to the new markets credit program of I.R.C. § 45D and was published contemporaneously with a NOPR containing proposed regulations implementing that same provision. *See generally* Advanced Notice of Proposed Rulemaking, New Markets Tax Credit Non-Real Estate Investments, 76 Fed. Reg. 32,882 (June 7, 2011) (to be codified at 26 C.F.R. pt. 1). The third advanced NOPR posed questions and offered preliminary proposals and alternatives to address religious objections to contraceptive coverage under the ACA. *See generally* Advanced Notice of Proposed Rulemaking, Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

122. Treasury published four requests for information in the five-year time period covered by the study. *See* Medical Loss Ratios; Request for Comments Regarding Section 2718 of the Public Health Service Act, 75 Fed. Reg. 19,297 (Apr. 14, 2010) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pts. 146, 148); Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5253 (Feb. 2, 2010); Request for Information Regarding the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, 74 Fed. Reg. 19,155 (Apr. 28, 2009); Request for Information Regarding Sections 101 Through 104 of the Genetic Information Nondiscrimination Act of 2008, 73 Fed. Reg. 60,208 (Oct. 10, 2008). Each of these documents announced Treasury's intention to embark upon a regulation project, described the issues to be addressed by the project, and posed various questions with respect to which Treasury was seeking public comment. For example, one request for information contained a list of thirty-nine questions aimed at helping Treasury and Labor to evaluate "what steps, if any, they could or should take, by regulation or otherwise, to enhance the retirement security of participants in employer-sponsored retirement plans and IRAs by facilitating access to, and use of, lifetime income or other arrangements designed to provide a stream of lifetime income after retirement." Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5253, 5255 (Feb. 2, 2010). Building upon the answers to these questions, Treasury subsequently issued proposed regulations governing longevity annuity contracts purchased under tax-qualified defined contribution plans. Notice of Proposed Rulemaking and Notice of Public Hearing, Longevity Annuity Contracts, 77 Fed. Reg. 5443 (proposed Feb. 3, 2012) (to be codified at 26 C.F.R. pt. 1).

123. On August 22, 2011, Treasury, HHS, and Labor together published proposed standards for benefit and coverage summaries and glossaries provided by health insurance providers to their customers pursuant to the ACA. Summary of Benefits and Coverage and the Uniform Glossary, 76 Fed. Reg. 52,442 (proposed Aug. 22, 2011) (to be codified at 26 C.F.R. pts. 54, 602, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147). On the same day, these same agencies published a separate document containing and seeking comments regarding proposed templates for a summary of benefits and coverage and a uniform glossary that would comply with the proposed regulations. *See* Summary of Benefits and Coverage and Uniform Glossary-Templates, Instructions, and Related Materials Under the Public Health Service Act, 76 Fed. Reg. 52,475 (proposed Aug. 22, 2011) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). Although not labeled a TD or NOPR, this accompanying document, which exceeded fifty pages in length, seemed sufficiently substantive to be included in this study.

regulations as serving an exclusively revenue raising, social welfare, or regulatory purpose. As outlined in Part I, individual tax code provisions and programs, together with their related regulations, often reflect two or even all three of these emphases at once. Nevertheless, categories of tax provisions are readily identifiable as being more or less heavily oriented toward non-revenue-raising functions. As discussed in Part I, tax expenditures are obvious. One might quibble over whether a particular tax expenditure item serves social welfare purposes or regulatory purposes (or both simultaneously), but tax expenditures cannot be said to raise revenue for the government. Regulations implementing the ACA and ERISA, governing the exempt organization sector, or administering the Presidential Election Campaign Fund are likewise heavily weighted, if not completely oriented, toward purposes and functions other than revenue raising. By contrast, given that Social Security and Medicare taxes represent the second largest source of government revenue and remain substantially free of tax expenditures, regulations concerning these taxes are perhaps the most heavily weighted toward the revenue-raising function. Given the mixed justifications for the corporate income tax, the estate tax, and various non-ACA excise taxes, regulations concerning these taxes arguably fall somewhere in the middle.

Accordingly, I coded each document according to a list of subject matter categories that offer at least some sense of the extent to which Treasury's regulatory efforts are focused on purposes other than revenue raising. The categories are as follows:

- Tax expenditures
- Affordable Care Act
- ERISA
- Exempt organizations
- Corporate/international that is primarily corporate
- Individual/not obviously corporate
- Gifts, trusts, and estates
- Partnerships and other non-T&E pass through
- Employment taxes
- Non-ACA excise taxes
- Campaign finance
- Administration and procedure

Most or all of these categories should be familiar and unobjectionable to tax experts. For the most part, the listed categories are drawn directly from large and specifically identifiable programs administered by the IRS; from I.R.C. subtitles, chapters, and subchapters; and from government documents reporting taxes collected and returns filed.<sup>124</sup> The campaign finance category corresponds to Subtitle H provisions concerning the financing of presidential election campaigns.<sup>125</sup> Nevertheless, a few additional points of explanation regarding the subject matter categories may be helpful in assessing the study's findings.

First, to add objectivity given differences of opinion among tax experts concerning the definition of tax expenditures, the study relied on the 2006, 2008, 2010, and 2012 biennial compendia prepared by the Congressional Research Service in assigning documents to the tax expenditures category.<sup>126</sup> In other words, if a document implemented a tax provision discussed by one of the biennial compendia, then the document was coded as belonging to the tax expenditure category. Even if some might argue that a particular tax provision does not really represent a tax expenditure, so long as one of the biennial compendia discussed the provision, then a document interpreting that provision was coded as belonging to the tax expenditures category. Correspondingly, even if some might consider a particular tax provision to represent a tax expenditure item, if none of the biennial compendia discussed the provision, then a document implementing the provision was not coded as belonging to the tax expenditure category.

That said, some provisions in the I.R.C. that were not cited by one of the biennial compendia nevertheless exist solely to elaborate the parameters of tax expenditure items. For example, the various compendia list I.R.C. §§ 401–407, 410–418E, and 457, but not I.R.C. § 430, as providing an exclusion from an individual's income for

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124. *E.g.*, INTERNAL REVENUE SERV., *supra* note 33, at 3 tbl.1.

125. I.R.C. §§ 9001–9042 (2012). For further discussion of Subchapter H, see *supra* notes 102–04 and accompanying text.

126. 2012 CRS COMPENDIUM, *supra* note 51; S. COMM. ON THE BUDGET, 111TH CONG., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS (Comm. Print 2010) (Cong. Research Serv.); S. COMM. ON THE BUDGET, 110TH CONG., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS (Comm. Print 2008) (Cong. Research Serv.); S. COMM. ON THE BUDGET, 109TH CONG., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS (Comm. Print 2006) (Cong. Research Serv.).

certain employer contributions to employee pension plans.<sup>127</sup> I.R.C. § 430 imposes funding requirements for some qualifying plans and defines a term contained in I.R.C. § 412—one of the listed provisions—which also imposes funding requirements for qualifying plans.<sup>128</sup> In short, for some taxpayers, the exclusion will only be available if their employers comply with I.R.C. § 430. Accordingly, documents promulgating regulations that interpret I.R.C. § 430 were coded as belonging to the tax expenditures category, even though I.R.C. § 430 itself was not listed in any of the biennial compendia.

Second, I assigned each document to a single subject matter category. Yet, perhaps inevitably, the categories sometimes overlap in ways that cause a degree of subjectivity in coding certain documents. For example, Treasury's administrative responsibilities under ERISA overlap considerably with the tax expenditure excluding employer contributions to employee pension plans from an employee's income. Indeed, many TDs and NOPRs interpreting the I.R.C. provisions relevant to that tax expenditure also mention ERISA. In some instances, Treasury and the IRS note explicitly that relevant provisions in the I.R.C. and ERISA are parallel and that Treasury has interpretative jurisdiction over both. I coded such documents based on my assessment of their dominant concern.

Also, some ACA provisions modify ERISA, so several of the documents written to implement the ACA mention ERISA as well. Also, the ACA imposes excise taxes—for example, on medical devices and indoor tanning services. Still other ACA provisions raise revenue but under some other label like “fee” or “penalty.”<sup>129</sup> Whatever the label, the ACA's revenue-raising provisions are often inextricably intertwined with other aspects of the legislation. Accordingly, rather than try to code ACA-related documents as separate subcategories, I gave the ACA its own category and coded all documents that claimed to implement provisions of the ACA as such.

Lastly, most documents that fall in the administration and procedure category implicate tax professionals or taxpayers across several categories. Occasionally, however, Treasury and the IRS

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127. *E.g.*, 2012 CRS COMPENDIUM, *supra* note 51, at 963.

128. *See* I.R.C. § 430 (defining the term “minimum required contribution” including for purposes of I.R.C. § 412(a)(2)(A)).

129. For discussion of the ACA revenue-raising provisions, see *supra* notes 71–75 and accompanying text.

promulgate a procedural regulation that is limited to a particular substantive I.R.C. section. In such cases, although the regulation addresses procedural matters, it would not exist but for the substantive provision. I coded documents fitting this description as belonging to the relevant substantive category, rather than to the more general administration and procedure category.

3. *Additional Variables Coded.* While I considered each of the 449 documents coded to be sufficiently substantive for inclusion, those documents were not equal in length or complexity. Several were more than fifty pages long, while many others were limited to a single page. A one-page TD or NOPR must satisfy all of the same procedural, circulation, and review requirements as a fifty-page TD or NOPR.<sup>130</sup> In that sense, all of the documents were equal, irrespective of their page length. Also, page length is not a precise proxy for complexity or the amount of time Treasury and IRS personnel spent drafting a document. Nevertheless, to provide a more thorough basis for evaluating the 449 major rulemaking documents studied, and to avoid overweighting short documents and underweighting long ones, I recorded the page length of each in addition to recording its subject matter.

Also, in addition to considering the 449 major rulemaking documents individually, I evaluated them on a project-by-project basis by grouping together those documents that are part of the same rulemaking project.<sup>131</sup> Individual documents are likely better indicators of time dedicated to task than entire projects for two reasons. First, preparing each document takes time, and Treasury and IRS personnel must satisfy many procedural, circulation, and review requirements document by document. Second, although most regulation projects consist of one TD and one NOPR, some regulation projects contain three, four, or even five such documents. Evaluating individual documents avoids overweighting smaller projects and underweighting larger ones. Nevertheless, many procedural steps are performed project by project rather than document by document, and the substantive and rhetorical overlap of documents within a single regulation project undoubtedly offers some

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130. Section 32, Chapter 1 of the Internal Revenue Manual offers detailed requirements for drafting, circulating, and reviewing regulation documents. IRM 32.1.2.1–32.1.9.5 (Sept. 23, 2011).

131. For more detail on this aspect of the methodology, see Appendix 1.

efficiency of production.<sup>132</sup> Consequently, assessing the documents project by project as well as individually offers a more thorough approach to measuring how Treasury and IRS personnel spend their time.

Altogether, the 449 major rulemaking documents published by Treasury during the five years covered by the study represent 262 individual regulation projects. Of those projects, 65 contain regulations that are or were only proposed. Some of the proposed regulations remained outstanding at the end of the study period, while others had been withdrawn in lieu of further action. Another 32 projects include temporary and proposed regulations that remained outstanding at the end of the study period. The remaining 165 projects were finalized during the study period.

Just as I recorded the length of each of the 449 major rulemaking documents studied, I also added together the page lengths of all of the documents that were part of a single project. Because some Treasury regulation projects with documents published during the study period were initiated prior to that period, however, grouping the documents studied into projects involved pulling additional documents that predated the study period. Consequently, although the findings presented below include the subject matter breakdown of large Treasury regulation projects based on their total pages, the page totals for those projects do not correlate precisely with the tables evaluating individual documents.

### *C. Results*

The following figures present the study results in different ways. First, the figures report the results of the document, project, and page counts for each subject matter category individually. Thus, for example, one can compare the tax expenditures and ACA categories with the administration and procedure category using each of those measures.

Second, the figures group the categories into subsets based on the analysis in Part I. One subset consists of the five categories with the weakest relationship to the tax system's traditional revenue-raising function: tax expenditures, ACA, ERISA, exempt organizations, and campaign finance. As also discussed in Part I, however, other subject matter categories beyond those five possess

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132. IRM 32.1.2.1–32.1.9.5.

histories and features that arguably support thinking about them in social welfare or regulatory terms. These categories tie closely to taxes that raise revenue but are also strongly associated with social welfare and regulatory objectives: the corporate category, which corresponds to the corporate income tax; the gifts, trusts, and estates category, which relates to the estate tax; and the non-ACA excise tax category. Both of the two subsets of categories are, in turn, subtotaled to the side of each figure. The third and final subset consists of categories that, with the possible exception of the administration and procedure category, enjoy the strongest relationship with the revenue-raising function.

The administration and procedure category is particularly difficult to characterize as either more or less concerned with revenue raising than other subject matter categories. The administration and procedure category includes procedural regulations governing the filing of returns and the withholding, assessment, and collection of taxes, as well as penalties for noncompliance and other matters directly associated with revenue raising. The administration and procedure category also includes regulations governing the professional behavior of tax practitioners, implementing the IRS whistleblower program, and safeguarding taxpayer privacy.<sup>133</sup> None of these matters pertains precisely to revenue raising, yet at the same time, they all do. As a result, characterizing documents and projects addressing these issues as either more or less oriented toward raising revenue seems especially debatable. To be conservative, the following figures group the administration and procedure category among those with the strongest relationship to the revenue-raising function.

With that windup, as presented in Figure 2, a straight count of the major rulemaking documents studied shows that a substantial portion of those documents addresses programs and provisions other than traditional revenue raising.

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133. For a breakdown of the administration and procedure category, see Appendix 3, Figure A3.3.



*Figure 2. Straight Count of Major Rulemaking Documents*

Category	Count	Percent
Tax expenditures	80	17.8
Affordable Care Act	41	9.1
Exempt organizations	13	2.9
ERISA	11	2.4
Campaign finance	3	.7
Corporate/international that is primarily corporate	89	19.8
Gifts, trusts, and estates	21	4.7
Non-ACA excise taxes	6	1.3
Administration and procedure	98	21.8
Individual/not obviously corporate	64	14.3
Partnerships and other non-T&E pass through	18	4.0
Employment taxes	5	1.1
Total	449	99.9 <sup>[a]</sup>

} 32.9%  
} 58.7%

<sup>[a]</sup>This column does not total precisely 100 percent due to rounding.

Shifting the analysis from individual documents to regulation projects yields similar results, as shown in Figure 3.

*Figure 3. Straight Count of Regulation Projects*

Category	Count	Percent
Tax expenditures	50	19.1
Affordable Care Act	18	6.9
Exempt organizations	9	3.4
ERISA	5	1.9
Campaign finance	1	0.4
Corporate/international that is primarily corporate	50	19.1
Gifts, trusts, and estates	12	4.6
Non-ACA excise taxes	3	1.1
Administration and procedure	57	21.8
Individual/not obviously corporate	40	15.3
Partnerships and other non-T&E pass through	14	5.3
Employment taxes	3	1.1
Total	262	100.0

} 31.7%  
} 56.5%

As Figures 2 and 3 demonstrate, between one-sixth and one-fifth of the documents and projects studied concerned obviously non-

revenue-raising tax expenditure items. Roughly another one-sixth concerned the relatively regulatory ACA, exempt organization, ERISA, and campaign finance categories. Taken together, almost one-third of the documents and projects studied—hardly a negligible proportion—addressed the programs and provisions least associated with traditional revenue raising.

Shaded in Figures 2 and 3, the subset of categories that raise at least some revenue but are also strongly associated with social welfare and regulatory goals represent another one-fourth of the documents evaluated by this study. If one accepts the argument that the corporate income tax, the estate tax, and excise taxes exist as much or more to serve social welfare and regulatory purposes than to raise revenue, then the total number of documents and projects least associated with traditional revenue raising rises to well above half.

Interestingly, the individual category, which consists principally of individual income tax matters that are not tax expenditures, and the employment taxes category together represented less than one-sixth of the documents and regulation projects studied. When one considers that the individual income tax and employment taxes represent more than 85 percent of gross revenue collected by the IRS, the number of documents and projects associated with those taxes seems strikingly small.

Lastly, it is notable that the administration and procedure category was the largest, representing more than one-fifth of the major rulemaking documents and regulation projects studied. In an informal conversation, one former Treasury official with whom I shared these results suggested that the relatively large number of documents and projects addressing administrative and procedural matters represents a substantial shift from twenty years ago. In fact, he was somewhat dismayed that administrative and procedural matters, rather than substantive interpretation, seem to consume such a large percentage of Treasury and IRS time and resources. If he is right in suggesting that this category has expanded over time, then one is left to wonder the reasons why.

Evaluating the major rulemaking documents studied in terms of pages published yields results that are similar yet even more dramatically weighted toward the primarily non-revenue-raising categories.

*Figure 4. Page Count of Major Rulemaking Documents*

Category	Count	Percent
Tax expenditures	575	17.2
Affordable Care Act	526	15.8
Exempt organizations	121	3.6
ERISA	138	4.1
Campaign finance	4	0.1
Corporate/international that is primarily corporate	612	18.4
Gifts, trusts, and estates	243	7.3
Non-ACA excise taxes	11	.3
Administration and procedure	568	17.0
Individual/not obviously corporate	434	13.0
Partnerships and other non-T&E pass through	71	2.1
Employment taxes	31	0.9
Total	3,334	99.8 <sup>[a]</sup>

<sup>[a]</sup>This column does not total precisely 100 percent due to rounding.

According to Figure 4, the percentage of pages published in connection with tax expenditures roughly correlates with the number of documents and the number of projects. The percentages for pages published with respect to the relatively regulatory ACA and ERISA categories, however, went up—substantially so for the ACA category. Taken together, fully two-fifths of the pages published addressed programs and provisions that most obviously stand apart from the traditional revenue-raising function. Adding the three shaded categories brings that total up as well to two-thirds of the pages published.

It might have been foreseeable that the largest difference between the counts for individual documents or projects and pages published comes from the ACA category. The ACA was enacted in 2010, in the very middle of the period studied.<sup>134</sup> Given the size and complexity of that legislation and the central role played in its implementation by Treasury and the IRS, it is unsurprising both that Treasury and the IRS have dedicated a significant part of their regulatory agenda since then to implementing that legislation and that many of the resulting NOPRs and TDs are especially lengthy. Whether Treasury and IRS efforts to administer the ACA will

134. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29 and 42 U.S.C.).

displace revenue raising or other social welfare and regulatory programs, purposes, and function to such a degree on an ongoing basis remains to be seen.

Nevertheless, notwithstanding its recent enactment and complexity, the ACA was not the only category with large projects.

*Figure 5: Finalized Projects Over 50 Pages*<sup>135</sup>

Project subject	Category	Pages
Use of actuarial tables in valuing annuities (§ 7520)	Gifts, trusts, and estates	157
Methods to determine taxable income in connection with a cost sharing arrangement (§ 482)	Corporate/international that is primarily corporate	156
Treatment of services; allocation of income and deduction from intangibles; stewardship expense (§ 482)	Corporate/international that is primarily corporate	137
Measurement of assets and liabilities for pension funding purposes (§§ 430, 436)	Tax expenditures	129
Summary of benefits and coverage, glossary for group health plans (§ 9815)	Affordable Care Act	128
Unified rule for loss on subsidiary stock (§§ 358, 362, 1502)	Corporate/international that is primarily corporate	110
Special rules to reduce § 1446 withholding (§ 1446)	Administration and procedure	79
Tax return preparer penalties (§§ 6694, 6695)	Administration and procedure	73
Source rules involving U.S. possessions and other conforming changes (§ 937(b))	Corporate/international that is primarily corporate	71
Basis reporting by securities brokers (§§ 1012, 6045)	Administration and procedure	68
Implementation of Form 990 (§§ 6033, 6043)	Exempt organizations	56

135. To avoid comparing apples with oranges, all of the projects presented in Figure 5 were taken from the 165 regulation projects for which Treasury and the IRS have published final regulations. Nevertheless, three projects that were still ongoing at the end of 2012 were already larger than some of those listed in Figure 5. Those three projects concerned the following topics: the deduction and capitalization of expenditures related to tangible property under I.R.C. § 263, categorized as individual/not obviously corporate; group health plans and health insurance issuers, implementing the ACA; and health insurance exclusions for preexisting conditions, also under the ACA.

Project subject	Category	Pages
Religious accommodation for contraceptive coverage (§ 9815)	Affordable Care Act	54
Application of separate limitations to dividends from noncontrolled § 902 corporations (§ 904)	Corporate/international that is primarily corporate	51
Gain recognition agreements with respect to certain transfers of stock or securities by U.S. persons to foreign corporations (§ 367)	Corporate/international that is primarily corporate	51

As Figure 5 demonstrates, of the fifteen completed regulation projects totaling more than fifty pages, only two concern the ACA. Fully six of the twelve subject matter categories are represented among the largest projects, including tax expenditures and exempt organizations as well as the corporate and administration and procedure categories. On the other hand, the individual and employment tax categories were not represented. Overall, the average page count among the 165 final projects was slightly less than 20 pages; only 46 projects, or less than 30 percent, were longer than that average. The categorization of those 46 projects resembles the other findings.

*Figure 6: Breakdown of 46 Final Projects Larger than Average*

Category	Total	Percent
Tax expenditures	8	17.4
Affordable Care Act	6	13.0
Exempt organizations	2	4.3
ERISA	1	2.2
Corporate/international that is primarily corporate	12	26.1
Gifts, trusts, and estates	2	4.3
Administration and procedure	8	17.4
Individual/not obviously corporate	5	10.9
Partnerships and other non-T&E pass through	1	2.2
Employment taxes	1	2.2
Total	46	100.0

} 36.9%  
 } 67.3%

In summary, whether the focus is on documents, projects, or page counts, it is apparent that Treasury and the IRS commit substantial resources to adopting regulations that interpret, elaborate, and implement tax provisions aimed primarily at regulatory and

social welfare programs, purposes, and functions rather than raising revenue. Indeed, depending on how one perceives the corporate income tax, the estate tax, and non-ACA excise taxes, one could argue that Treasury and the IRS dedicate less of their regulatory effort to raising revenue than to other programs, purposes, and functions. At a minimum, Treasury and IRS expend comparatively little effort promulgating regulations concerning the revenue-raising aspects of the individual income tax and employment taxes, notwithstanding that those taxes together represent the vast majority of collections. Anecdotally, Treasury regulation drafters have been swamped for the past few years with implementing the massive ACA. The ACA is landmark legislation and thus may skew the data artificially away from revenue raising and yield anomalous results for the period studied. Nevertheless, as the above analysis indicates, ACA regulations do not dominate the other categories so dramatically as to leave other social welfare and regulatory efforts negligible relative to revenue raising.

### III. POTENTIAL IMPLICATIONS OF THE STUDY

The study documented by this Article provides merely a limited snapshot of Treasury and IRS tax administration efforts. More extensive study—covering a longer time frame or evaluating other aspects of IRS administration, for example—will provide a more comprehensive understanding of the extent to which the attentions of Treasury and the IRS are focused on pursuing goals and administering programs with only a tangential relationship to the U.S. tax system's traditional revenue-raising mission.

Nevertheless, this study at least offers a fair indication of the contemporary mix of issues that drafters of Treasury regulations spend their time addressing. Like the I.R.C. itself, Treasury regulations carry the force and effect of law. Promulgating Treasury regulations is one of the most legally consequential actions that Treasury and the IRS undertake in administering the tax system. As noted, some instances of tax exceptionalism from general administrative-law norms and doctrines particularly concern Treasury regulations. Specifically, statutory provisions arguably limit pre-enforcement judicial review of Treasury regulations and explicitly authorize retroactive effective dates for new Treasury regulations. Although I have addressed pre-enforcement review in prior work and will save more complete consideration of retroactivity for the future, I

would like to take the opportunity here to offer a few thoughts regarding the potential implications of this study in those areas.

*A. Pre-enforcement Judicial Review for Treasury Regulations*

The Anti-Injunction Act, I.R.C. § 7421(a), provides generally that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”<sup>136</sup> Correspondingly, the Declaratory Judgment Act (DJA) contains a tax exception that prevents courts from providing declaratory relief for controversies “with respect to Federal taxes.”<sup>137</sup> Courts generally have interpreted these provisions as operating coextensively<sup>138</sup> and as substantially limiting judicial review of tax cases outside of statutorily authorized refund and deficiency actions.<sup>139</sup>

That said, most of the cases interpreting I.R.C. § 7421 and the DJA concern either tax protesters raising frivolous legal arguments already rejected by the courts<sup>140</sup> or taxpayers asserting technicalities to avoid levies or property seizures for taxes clearly owed.<sup>141</sup> In the

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136. Anti-Injunction Act, I.R.C. § 7421(a) (2012).

137. 28 U.S.C. § 2201(a).

138. *See, e.g.*, *Cohen v. United States*, 650 F.3d 717, 727–31 (D.C. Cir. 2011) (en banc) (analyzing the issue and holding in favor of coextensive interpretation); *Ambort v. United States*, 392 F.3d 1138, 1140 (10th Cir. 2004) (“In practical effect, these two statutes are coextensive . . . .”); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 299 (4th Cir. 2000) (“[T]he two statutory texts are, in underlying intent and practical effect, coextensive.” (quoting *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996) (quotation mark omitted))).

139. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 748–50 (1974) (reading I.R.C. § 7421(a) and the DJA as precluding judicial review of an IRS threat to withdraw an organization’s exempt status on the ground that allowing the suit could have an indirect effect of reducing the tax burdens of the organization’s contributors); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (identifying the purpose of I.R.C. § 7421(a) and the DJA as “permit[ting] the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund”).

140. *See, e.g.*, *Shrock v. United States*, No. 95-3927, 1996 WL 414177, at \*1 (7th Cir. July 22, 1996) (calling tax protestor’s claims “frivolous” and “repeatedly rejected”); *Gassei v. Dep’t of Justice*, No. 91-6400, 1992 WL 149981, at \*2 (10th Cir., Nov. 2, 1992) (rejecting taxpayer’s argument as clearly contrary to controlling circuit precedent); *Purk v. United States*, Nos. 89-37989, 89-3790, 1990 WL 12188, at \*1 (6th Cir. Feb. 13, 1990) (observing that “other courts have rejected similar claims” to that raised by the taxpayer).

141. *See, e.g.*, *Weiler v. United States*, No. 94-56465, 1996 WL 169254, at \*4 (9th Cir. Apr. 10, 1996) (finding the record “replete with evidence” that IRS assessments were valid); *Nuttle v. IRS*, No. 95-2089, 1995 WL 643106, at \*2 (10th Cir. Nov. 2, 1995) (declining to enjoin the collection of taxes recognized as due by the Tax Court so that the taxpayer could avoid posting an appeal bond); *Knight v. United States*, No. 93-35039, 1993 WL 140589, at \*2 (9th Cir. May 4,

1970s, the Supreme Court cited I.R.C. § 7421 and the DJA in declining to consider constitutional challenges to IRS ruling letters denying or revoking exempt organization status under I.R.C. § 501(c)(3).<sup>142</sup> In response, Congress adopted a statutory exception for such rulings.<sup>143</sup> The Court also cited I.R.C. § 7421 in declining to consider the merits of a Vietnam War–era constitutional challenge by war protesters to income tax withholding in which the taxpayers conceded that they would likely lose a refund action and that they merely wanted the opportunity to decline to pay their taxes and to require the government to levy.<sup>144</sup>

By contrast, case law regarding whether I.R.C. § 7421 and the DJA preclude pre-enforcement judicial review of Treasury regulations is both limited and mixed. The Supreme Court has never addressed the question. In *California v. Regan*,<sup>145</sup> the Ninth Circuit decided that regulations requiring third-party reporting of pension-plan data would “*have an impact on the assessment of federal taxes*” by enabling the IRS to evaluate individual beneficiaries’ claims to favorable tax treatment and thus could not be reviewed pre-enforcement.<sup>146</sup> Similarly, in *Foodservice & Lodging Institute v. Regan*,<sup>147</sup> the D.C. Circuit concluded that regulations governing how restaurant employers allocate and report tip income among employees “*plainly concern[ed] the assessment or collection of*” those employees’ federal taxes and were thus unreviewable pre-enforcement.<sup>148</sup>

Also in *Foodservice & Lodging Institute*, however, the D.C. Circuit concluded that I.R.C. § 7421 and the DJA did not preclude a pre-enforcement challenge to a regulation that required restaurants to report tips received so that the IRS could evaluate tip compliance in the restaurant industry, reasoning that regulation “[did] not relate to the assessment or collection of taxes.”<sup>149</sup> More recently, in *Cohen v.*

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1993) (refusing to enjoin the collection for lack of deficiency notice because the I.R.C. did not require notice).

142. *Alexander v. “Americans United” Inc.*, 416 U.S. 752, 761–63 (1974); *Bob Jones Univ.*, 416 U.S. at 736–48.

143. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1306(a), (b)(8), 90 Stat. 1520, 1717, 1719–20 (1976) (codified as amended at I.R.C. § 7428(a) (2012) and 28 U.S.C. § 2201(a)).

144. *United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10–12 (1974) (per curiam).

145. *California v. Regan*, 641 F.2d 721 (9th Cir. 1981).

146. *Id.* at 722 (emphasis added).

147. *Foodservice & Lodging Inst. v. Regan*, 809 F.2d 842 (D.C. Cir. 1987).

148. *Id.* at 844 (emphasis added).

149. *Id.* at 846. The D.C. Circuit went on to uphold the regulation as reasonable. *Id.* at 847.



*United States*,<sup>150</sup> the D.C. Circuit allowed an APA procedural challenge against an IRS notice to proceed outside the usual channels of refund and deficiency actions.<sup>151</sup> The *Cohen* case did not involve a pre-enforcement challenge, precisely, as the taxes at issue had already been paid, and the *Cohen* court was careful to restrict its justiciability determination to the case's facts and circumstances.<sup>152</sup> Nevertheless, much of the *Cohen* court's reasoning could be extended to allow other APA procedural challenges to proceed pre-enforcement. Since the D.C. Circuit decided *Cohen*, at least one district court has declined to apply I.R.C. § 7421 to dismiss a pre-enforcement APA challenge to the validity of a Treasury regulation. In *Florida Bankers Ass'n v. United States Department of Treasury*,<sup>153</sup> the district court allowed a pre-enforcement APA challenge against information reporting regulations implementing the Foreign Account Tax Compliance Act to proceed notwithstanding the Anti-Injunction Act, citing the D.C. Circuit decisions in both *Foodservice & Lodging Institute* and *Cohen*.<sup>154</sup> Also in the D.C. Circuit, the government did not even raise the question of reviewability in *Loving v. IRS*<sup>155</sup>—a pre-enforcement challenge to the validity of Treasury regulations that would impose competency testing, continuing education, and ethics requirements on tax return preparers.<sup>156</sup>

Nevertheless, in *Halbig v. Sebelius*,<sup>157</sup> another district court held that I.R.C. § 7421 precluded judicial review of a pre-enforcement APA challenge to Treasury regulations concerning health insurance premium tax credits under the ACA.<sup>158</sup> Also citing *Cohen*, the *Halbig* court concluded that because the credits would, in turn, would trigger certain assessments on employers under I.R.C. § 4980H, and those

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

151. *Id.* at 734 (“Allowing judicial review of Appellants’ APA suit is consistent with the APA’s underlying purpose . . . .”)

152. *Id.* at 725–26.

153. *Fla. Bankers Ass’n v. U.S. Dep’t of Treasury*, No. 13-529 (JEB), 2014 WL 114519 (D.D.C. Jan. 13, 2014).

154. *Id.* at \*6–7.

155. *Loving v. IRS*, No. 13-5061, 2014 WL 519224 (D.C. Cir. Feb. 11, 2014).

156. *See generally* Brief for the Appellants, *Loving v. IRS*, No. 13-5061, 2014 WL 519224 (D.C. Cir. Mar. 29, 2013), 2013 WL 1282685 (failing to address reviewability); Defendants’ Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 12-cv-00385-JEB), 2012 WL 8133439 (same).

157. *Halbig v. Sebelius*, No. 13-623 (PLF), 2014 WL 129023 (D.D.C. Jan. 15, 2014)

158. *Id.* at \*8–11.

assessments served a revenue-raising function, the Anti-Injunction Act precluded the employers' suit.<sup>159</sup>

The relevant statutory text is sufficiently open to interpretation, and case law in the area is so limited, that courts have some latitude in deciding whether to interpret I.R.C. § 7421 and the DJA to allow pre-enforcement judicial review of Treasury regulations. Focusing on the importance of the IRS's revenue-raising function, the Supreme Court in the 1960s and 1970s embraced a broad construction of what it means to restrain tax assessment and collection that would seem to preclude just about any tax case outside of statutory refund or deficiency actions. By contrast, at least some of the more recent court opinions have adopted narrow interpretations of "assessment" and "collection" to allow APA challenges to proceed.<sup>160</sup>

The leading Supreme Court case supporting a broad application of I.R.C. § 7421—*Enochs v. Williams Packing & Navigation Co.*,<sup>161</sup> decided in 1962—emphasized the IRS's revenue-raising function: "The manifest purpose of [I.R.C. § 7421] is to permit the United States to assess and collect taxes alleged to be due without judicial intervention . . ." <sup>162</sup> If courts perceive that an increasing number of new Treasury regulations are more oriented toward non-revenue-raising programs and goals, however, they may be more inclined to construe pre-enforcement challenges to those regulations as unrelated to the assessment and collection of taxes, and thus beyond the scope of I.R.C. § 7421.

Regardless of what the courts do, Congress should revisit the scope of I.R.C. § 7421 and the DJA. Although protecting the fisc is an important goal, Congress has previously signaled its recognition that some circumstances warrant extending pre-enforcement judicial review. As noted above, Congress adopted an exception from I.R.C. § 7421 and the DJA in response to Supreme Court decisions precluding judicial review of IRS rulings denying or revoking exempt

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159. *Id.* at \*11.

160. *Fla. Bankers Ass'n*, 2014 WL 114519, at \*6; *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc); see *Hibbs v. Winn*, 542 U.S. 88, 100–02 (2004) (interpreting similar language in 28 U.S.C. § 1341). *But see Halbig*, 2014 WL 129023, at \*9 (applying I.R.C. § 7421 to preclude judicial review of pre-enforcement APA challenge to a regulation governing a tax credit because the plaintiffs' ultimate goal was to "restrain" the IRS from assessing a related excise tax).

161. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962).

162. *Id.* at 7.

organization status.<sup>163</sup> Congress could again contemplate adopting language that would further narrow the scope of I.R.C. § 7421 and the DJA to bring judicial review of Treasury regulations in closer alignment with administrative-law norms.

### *B. Retroactivity*

For space reasons, this study did not attempt to evaluate regulations' effective dates; I instead chose to save a more thorough examination of that issue for future work. Nevertheless, this study demonstrates the merits of considering in greater depth the ability of Treasury and the IRS to adopt retroactive Treasury regulations.

I.R.C. § 7805(b) authorizes Treasury to make final regulations apply retroactively to the date Treasury published a related proposed or temporary regulation in the Federal Register, and to make both final and temporary regulations apply retroactively to the date Treasury or the IRS issued a public notice substantially describing the regulation's expected contents.<sup>164</sup> I.R.C. § 7805(b) goes on to offer several additional circumstances in which Treasury is authorized to adopt retroactively effective regulations, including when Treasury adopts a regulation within eighteen months after Congress enacts the related statutory language;<sup>165</sup> when Treasury seeks "to prevent abuse";<sup>166</sup> or when Treasury endeavors to correct procedural defects.<sup>167</sup>

Notwithstanding its breadth, the current language of I.R.C. § 7805(b) represents a contraction of Treasury's authority to adopt retroactive regulations. Prior to 1996, Treasury regulations were presumed to apply retroactively to the date that Congress enacted the related statutory language unless Treasury exercised its discretion to provide otherwise.<sup>168</sup> In 1996, Congress substantially amended I.R.C. § 7805 to remove that presumption and to authorize retroactivity only

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163. See *supra* note 143 and accompanying text.

164. I.R.C. § 7805(b)(1) (2012). The same provision gives Treasury the third and obvious option of making final and temporary regulations apply as of the date on which Treasury files them in the Federal Register, but doing so would not make said regulations retroactive.

165. *Id.* § 7805(b)(2).

166. *Id.* § 7805(b)(3).

167. *Id.* § 7805(b)(4).

168. See BORIS I. BITTKER, MARTIN J. MCMAHON & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 46.04[3] (2002) (documenting the history of Treasury's authority to adopt regulations with retroactive effect).

under specified circumstances, which as noted nevertheless remain quite broad.<sup>169</sup>

Prior to 1996, courts reviewed Treasury's decision to apply its regulations retroactively for abuse of discretion based on the several factors, such as whether the regulation in question changed the law, whether the taxpayer had justifiably relied on prior pronouncements, and whether retroactively applying the regulation would yield overly harsh results.<sup>170</sup> Since 1996, courts have had few opportunities to consider the scope of Treasury's authority to adopt retroactively effective regulations. A few cases discuss what it means for a regulation to prevent abuse, but they all concern a single regulation—Treasury Regulation § 1.752-6—which requires a partner to reduce its basis in a partnership interest when the partnership assumes certain liabilities of the partner.<sup>171</sup> Although one court addressing this issue concluded both that Congress authorized retroactivity and that the regulation would prevent abuse,<sup>172</sup> another district court and the Court of Federal Claims have found that retroactive effect was neither authorized nor a proper exercise of preventing abuse.<sup>173</sup> The continued vitality of pre-1996 factors for assessing abuse of discretion remains undetermined.<sup>174</sup>

169. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101(a), 110 Stat. 1452, 1468 (1996) (codified as amended at I.R.C. § 7805). The amended statute applies only to regulations relating to statutory provisions enacted on or after July 30, 1996. *Id.* § 1101(b).

170. *E.g.*, *Gehl Co. v. Comm'r*, 795 F.2d 1324, 1332–34 (7th Cir. 1986); *Baker v. United States*, 748 F.2d 1465, 1467 (11th Cir. 1984); *Wilson v. United States*, 588 F.2d 1168, 1173 (6th Cir. 1978); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 981 (5th Cir. 1977); *Chock Full O'Nuts v. United States*, 453 F.2d 300, 302 n.6 (2d Cir. 1973); *see Dixon v. United States*, 381 U.S. 68, 80 (1965) (“Congress has seen fit to allow the Commissioner to correct mistakes of law, and in § 7805(b) has given him a large measure of discretion in determining when to apply his corrections retroactively. In the circumstances of this case we cannot say that this discretion was abused.”); *John S. Nolan & Victor Thuronyi, Retroactive Application of Changes in IRS or Treasury Department Position*, 61 TAXES 777, 783 (1983) (“More recently, courts have taken the approach that any retroactive application of a regulation may be reviewed for abuse of discretion, although such abuse is rarely found.”).

171. *Treas. Reg. § 1.752-6* (2005).

172. *Maguire Partners-Master Invs., LLC v. United States*, No. CV 06-07371-JFW(RZx), 2009 WL 4907033, at \*19 & n.4 (C.D. Cal. Dec. 11, 2009) (“[T]he Treasury Department simply applied the pre-existing rule contained in Revenue Ruling 88-77 to address the possibility of abuse . . . .” (emphasis added)).

173. *Sala v. United States*, 552 F. Supp. 2d 1167 (2008), *rev'd on other grounds*, 613 F.3d 1249 (10th Cir. 2010); *Murfam Farms, LLC v. United States*, 88 Fed. Cl. 516 (2009); *Stobie Creek Invs., LLC v. United States*, 82 Fed. Cl. 636 (2008).

174. For an interesting discussion of judicial review of Treasury regulation retroactivity under the current I.R.C. § 7805(b), *see generally* Shannon Weeks McCormack, *Tax Abuse According to Whom?*, 15 FLA. TAX REV. 1 (2013).

As noted in the Introduction, Treasury's authority to adopt retroactive regulations is unusual among administrative agencies. The administrative-law norm against retroactive rulemaking is rooted in popular notions regarding fair notice and the rule of law.<sup>175</sup> Retroactive rulemaking may still make sense in the tax context as a mechanism for combating tax shelters or other abuses. Given the extent to which Treasury regulates in areas less obviously related to the tax system's traditional revenue-raising mission, however, further study is warranted to assess how Treasury and the IRS exercise their discretionary authority under I.R.C. § 7805(b). Rather than leaving Treasury and the IRS with such broad authority to make all of their regulations retroactive, Congress could and perhaps ought to consider further curtailing that power. For example, authorizing retroactivity only to counter abusive transactions could protect the revenue-raising function while bringing other, less revenue-oriented aspects of the tax system into closer alignment with general administrative-law norms. In the meantime, however, greater judicial awareness of the scope of Treasury and IRS administrative efforts in other, non-revenue-raising areas may prompt the courts to examine Treasury and IRS decisions to adopt retroactive regulations with a more critical eye.

### C. *IRS Reform*

Although the study documented in this Article evaluated only Treasury regulations rather than IRS resource utilization more broadly, the division of Treasury's priorities has implications for the IRS that are worth at least preliminary consideration. In particular, despite occasional nods to customer service and a spiffy, separate website focused on the EITC and other refundable tax credits,<sup>176</sup> the IRS's cultural orientation toward raising revenue and collecting taxes may risk undermining the effectiveness of programs and provisions aimed at alleviating poverty and providing financial support to working families.<sup>177</sup> But aspects of that culture, too, may make the IRS less than ideal choices to serve a wide array of regulatory functions that have historically fallen to other, more traditional administrative agencies.

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175. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

176. *EITC & Other Refundable Credits*, *supra* note 65.

177. For acknowledgement of scholarly debate over this issue, see *supra* note 64 and accompanying text.

As David Weisbach and Jacob Nussim have argued, the decision to utilize the tax system to implement government spending programs is fundamentally a choice about institutional design.<sup>178</sup> To date, Congress seems not to have thought too deeply about the matter, instead simply seeing the IRS as an existing and convenient bureaucracy for administering many seemingly small, as well as some rather large, nontax programs. As a result, the IRS has transitioned over time from a mission-driven agency that collects taxes to an omnibus agency that does many things, without careful consideration of the administrative consequences of that transition. Is it too much to ask the IRS to maximize congressional goals of serving low-income families, providing health care, protecting pensions, monitoring the nonprofit sector, and encouraging economic growth while simultaneously serving as the federal government's accounts receivable department? At a minimum, applying the old revenue-collection toolbox in pursuing all of these government programs, purposes, and functions seems likely to achieve suboptimal outcomes. Although this study alone may not impel a restructuring of the IRS, and I will leave further thoughts about IRS reform for future work, it at least seems plausible at this point to suggest that the tax system may be reaching an organizational tipping point of being stretched too thin between too many, arguably competing goals—not just in terms of raw resources, but with respect to institutional capacity.

#### CONCLUSION

It is important to underscore that this study offers only a preliminary analysis of the allocation of Treasury and IRS administration efforts between raising revenue and other programs, purposes, and functions. In particular, the IRS does much more than help Treasury draft regulations. Further study is warranted.

Nevertheless, the outcome of this study ought at least to give some pause to defenders of tax exceptionalism who base their arguments on the importance of raising revenue and protecting the fisc from abusive transactions and structures. Courts should approach such arguments skeptically, and Congress should contemplate more seriously the potential administrative-law implications of situating nontax programs in the IRC.

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178. See Weisbach & Nussim, *supra* note 65, at 957 (“[T]he tax expenditure decision, which we will also call the integration decision or the decision to combine tax and spending programs, is solely a matter of institutional design.”)

APPENDIX 1:  
METHODOLOGY—DEFINING A TREASURY REGULATION PROJECT

As noted in Part II of the Article, for most Treasury regulation projects, Treasury and the IRS will publish at least one NOPR and one TD. A standard regulation project will contain only one of each, as Treasury and the IRS first propose a set of regulations and then finalize them after giving the public an opportunity to comment. For many other projects, Treasury and the IRS publish a TD with legally binding, temporary regulations simultaneously with the NOPR, and then replace or withdraw the temporary regulations with a second TD that contains the final regulations.<sup>179</sup> Sometimes, Treasury and the IRS will publish more than one TD with temporary regulations and more than one NOPR before issuing a final TD. On very rare occasions, Treasury and the IRS publish a TD with final regulations without also publishing a NOPR or allowing an opportunity for public comment. Some NOPRs, and even certain TDs with temporary regulations, are withdrawn without ever being finalized. Some NOPRs remain open, seemingly in perpetuity. As previously documented, Treasury occasionally publishes documents with other titles that nevertheless contribute substantively to a regulation project.<sup>180</sup> In short, a single Treasury regulation project may contain anywhere from one to several major documents.

The most useful way of identifying which major rulemaking documents constitute a single project is to compare one or both of the CASE-MIS number and the RIN listed on each document.<sup>181</sup> The Internal Revenue Manual instructs IRS attorneys to obtain a CASE-MIS number when opening a regulation project and to continue using that project number until Treasury publishes a final regulation or closes the project without issuing regulations. Most NOPRs include the project's CASE-MIS number in their title sections, although most TDs do not. Most TDs do, however, mention the project's CASE-MIS number when referring to the associated NOPR in the

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179. See IRM 32.1.1.3 (Aug. 11, 2004) (describing IRS use of temporary regulations).

180. For discussion of other major rulemaking documents evaluated in the study, see *supra* notes 121–23 and accompanying text.

181. See IRM 32.1.2.2 (Aug. 11, 2004) (explaining the purpose of the CASE-MIS); *id.* 32.1.2.2.5 (Aug. 11, 2004) (instructing drafting attorneys to obtain an RIN for each regulation project from the Regulatory Information Service Center of the General Services Administration).

background section of the preamble text. Separately, the Internal Revenue Manual instructs IRS attorneys to use the RIN in the heading of any regulation published in the Federal Register and also to use that same RIN for both final regulations and their associated NOPRs.<sup>182</sup>

With a very straightforward project that contains a single NOPR and TD, all of the documents will bear the same RIN. The Internal Revenue Manual goes on to instruct, however, that if a single NOPR leads to more than one TD containing final regulations, new RINs should be obtained for the later TDs.<sup>183</sup> Also, when Treasury publishes a TD with temporary regulations and simultaneously publishes a NOPR that proposes those same regulations by cross-referencing the TD, the Internal Revenue Manual calls for the TD and the NOPR to have different RINs.<sup>184</sup> Consequently, it is not uncommon for a Treasury regulation project with one or more sets of temporary regulations to bear multiple RINs. Often, references to the CASE-MIS number remain consistent throughout, thereby facilitating grouping.

Nevertheless, even with the CASE-MIS numbers and RINs, idiosyncrasies occasionally present additional grouping challenges. For example, Treasury and the IRS sometimes will pursue simultaneously more than one project interpreting a particular I.R.C. section. Even if different Treasury and IRS attorneys work on these simultaneous projects, one would expect them to confer with one another. Should two projects that overlap with respect to both timing and I.R.C. section, but do not cross-reference one another in their NOPRs and TDs, be treated as a single project? If Treasury formally identified the documents as comprising two separate projects, for example by assigning different CASE-MIS numbers, I did as well.

Also, Treasury and the IRS sometimes will publish a TD with final regulations that explicitly leaves open a particular issue and then, on the same day or shortly thereafter, will publish another NOPR, or even a TD with temporary regulations, addressing that same issue and discussing the first TD as part of its background section. Again, the two successive projects presumably are staffed by the same Treasury and IRS attorneys who might reasonably consider the latter NOPR or TD as simply continuing a larger project that

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182. *Id.* 32.1.2.2.5.

183. *Id.*

184. *Id.*



includes the earlier documents. On other occasions, it may be months or even years before Treasury and the IRS issue a NOPR or TD with temporary regulations to address an issue left open by an earlier TD. The longer the break between the two events, the less likely it seems that the same team of attorneys were involved. Yet, the later NOPR or TD may still cross-reference and describe the earlier regulation project. Should two successive projects that address related issues and cross-reference one another in this way ever be combined? If so, then is there some point at which too much time has passed between projects to consider them so related? Again, I have generally followed the government's lead: where Treasury and the IRS formally classified the documents as separate projects, for example by assigning different CASE-MIS numbers, so did I. On at least one occasion, however, Treasury and the IRS finalized one set of temporary and proposed regulations in the same TD as it adopted a new, second set of temporary regulations, which it then simultaneously proposed with a NOPR in the same edition of the Federal Register. In that case, because Treasury and the IRS combined the two, arguably separate projects into a single TD, I treated these efforts as a single project.

APPENDIX 2:  
DETAILS REGARDING TDS AND NOPRS INCLUDED IN THE STUDY

Although Treasury and the IRS typically publish all TDs in both the Federal Register and the Internal Revenue Bulletin, publication in the Internal Revenue Bulletin typically occurs some weeks after publication in the Federal Register. Consequently, as listed in Figure A2.1, the study includes seven TDs published in the Federal Register in 2007, but in the Internal Revenue Bulletin in 2008.

*Figure A2.1. TDs Included Despite 2007 Federal Register Publication*

Treasury Decision	Internal Revenue Bulletin Cite	Federal Register Cite
T.D. 9374	2008-10 I.R.B. 521 (Mar. 10, 2008)	72 Fed. Reg. 74,175 (Dec. 31, 2007)
T.D. 9373	2008-8 I.R.B. 463 (Feb. 25, 2008)	72 Fed. Reg. 74,192 (Dec. 31, 2007)
T.D. 9372	2008-8 I.R.B. 462 (Feb. 25, 2008)	72 Fed. Reg. 73,261 (Dec. 27, 2007)
T.D. 9371	2008-8 I.R.B. 447 (Feb. 25, 2008)	72 Fed. Reg. 72,592 (Dec. 21, 2007)
T.D. 9370	2008-7 I.R.B. 419 (Feb. 19, 2008)	72 Fed. Reg. 72,606 (Dec. 21, 2007)
T.D. 9369	2008-6 I.R.B. 394 (Feb. 11, 2008)	72 Fed. Reg. 72,929 (Dec. 26, 2007)
T.D. 9368	2008-6 I.R.B. 382 (Feb. 11, 2008)	72 Fed. Reg. 72,582 (Dec. 21, 2007)

Also, as listed in Figure A2.2, the study includes six TDs published in the Federal Register in 2012, but in the Internal Revenue Bulletin in 2013.

*Figure A2.2. TDs Included Despite 2013 Internal Revenue Bulletin Publication*

Treasury Decision	Internal Revenue Bulletin Cite	Federal Register Cite
T.D. 9608	2013-3 I.R.B. 274 (Jan. 14, 2013)	77 Fed. Reg. 76,400 (Dec. 28, 2012)
T.D. 9607	2013-6 I.R.B. 469 (Feb. 4, 2013)	77 Fed. Reg. 76,380 (Dec. 28, 2012)
T.D. 9606	2013-11 I.R.B. 586 (Mar. 11, 2013)	77 Fed. Reg. 75,844 (Dec. 26, 2012)
T.D. 9605	2013-11 I.R.B. 587 (Mar. 11, 2013)	77 Fed. Reg. 76,382 (Dec. 28, 2012)
T.D. 9603	2013-3 I.R.B. 273 (Jan. 14, 2013)	77 Fed. Reg. 72,923 (Dec. 7, 2012)
T.D. 9601	2013-10 I.R.B. 533 (Mar. 4, 2013)	77 Fed. Reg. 66,915 (Nov. 8, 2012)

Similarly, although Treasury and the IRS typically publish all NOPRs in both the Federal Register and the Internal Revenue Bulletin, publication in the Internal Revenue Bulletin typically occurs some weeks after publication in the Federal Register. Consequently, as

listed in Figure A2.3, the study includes eight NOPRs published in the Federal Register in 2007, but in the Internal Revenue Bulletin in 2008.

*Figure A2.3. NOPRs Included Despite 2007 Federal Register Publication*

CASE-MIS Number	Internal Revenue Bulletin Cite	Federal Register Cite
REG-111583-07	2008-4 I.R.B. 319 (Jan. 28, 2008)	72 Fed. Reg. 74,233 (Dec. 31, 2007)
REG-139236-07	2008-9 I.R.B. 491 (Mar. 3, 2008)	72 Fed. Reg. 74,215 (Dec. 31, 2007)
REG-147290-05	2008-10 I.R.B. 576 (Mar. 10, 2008)	72 Fed. Reg. 74,213 (Dec. 31, 2007)
REG-104946-07	2008-11 I.R.B. 596 (Mar. 17, 2008)	72 Fed. Reg. 73,680 (Dec. 28, 2007)
REG-104713-07	2008-6 I.R.B. 409 (Feb. 11, 2008)	72 Fed. Reg. 72,970 (Dec. 26, 2007)
REG-141399-07	2008-8 I.R.B. 470 (Feb. 25, 2008)	72 Fed. Reg. 72,646 (Dec. 21, 2007)
REG-114126-07	2008-6 I.R.B. 410 (Feb. 11, 2008)	72 Fed. Reg. 72,645 (Dec. 21, 2007)
REG-147832-07	2008-8 I.R.B. 472 (Feb. 25, 2008)	72 Fed. Reg. 74,246 (Dec. 21, 2007)

Also, as listed in Figure A2.4, the study includes three NOPRs that were published in the Federal Register in 2012, but in the Internal Revenue Bulletin in 2013.

*Figure A2.4. NOPRs Included Despite 2013 Internal Revenue Bulletin Publication*

CASE-MIS Number	Internal Revenue Bulletin Cite	Federal Register Cite
REG-155929-06	2013-11 I.R.B. 650 (Mar. 11, 2013)	77 Fed. Reg. 76,426 (Dec. 28, 2012)
REG-141066-09	2013-3 I.R.B. 289 (Jan. 14, 2013)	77 Fed. Reg. 74,798 (Dec. 18, 2012)
REG-122707-12	2013-5 I.R.B. 450 (Jan. 28, 2013)	77 Fed. Reg. 70,620 (Dec. 18, 2012)

Finally, although Treasury publishes most TDs and NOPRs in both the Federal Register and the Internal Revenue Bulletin, as listed in Figures A2.5 and A2.6, one TD and one NOPR published in the

Federal Register seem inadvertently to have missed publication in the Internal Revenue Bulletin.

*Figure A2.5. TD Not Published in Internal Revenue Bulletin*

Treasury Decision	Internal Revenue Bulletin Cite	Federal Register Cite
T.D. 9578	n/a	77 Fed. Reg. 8725 (Feb. 15, 2012)

*Figure A2.6. NOPR Not Published in Internal Revenue Bulletin*

CASE-MIS Number	Internal Revenue Bulletin Cite	Federal Register Cite
REG-101826-11	n/a	76 Fed. Reg. 32,822 (June 7, 2011)

APPENDIX 3:  
BREAKDOWNS OF LARGEST CATEGORIES

The following tables supplement Figures 2, 3, and 4 of the Article by elaborating the makeup of the three largest categories.

*Figure A3.1. Breakdown of Tax Expenditures Category*

Subcategory subject	Major Rulemaking Documents: Jan. 2008 – Dec. 2012		Number of Regulation Projects (All Studied)
	Number of Documents	Document Pages	
Net exclusion of pension contributions and earnings plans for employees and self-employed individuals	26	307	19
Items falling under the general business credit	16	73	10
Items related to state and local government bonds, including exclusion of interest on public purpose bonds and credit to holders of qualified zone activity bonds	5	29	4
Deferral and ratable inclusion of income arising from business indebtedness discharged by the reacquisition of a debt instrument	4	29	2
Deduction for certain qualified film and television products	4	12	2
Deduction for domestic production activities	2	21	2
Special tax rate for nuclear decommissioning funds	3	38	1
Election to expense certain refineries	3	12	1
Amortization of business start up costs	3	10	1
Income averaging for farmers and fishermen	3	8	1
Deduction for mortgage interest on owner-occupied residences	3	5	1
Exclusion for health savings account contributions	2	9	2
Deduction for small refiners with capital costs associated with EPA sulfur regulation compliance	2	6	1
Exclusion of damages on account of personal physical injury	2	3	1
Deduction for charitable contributions	1	11	1
Disaster relief provisions	1	3	1
Totals	80	576 <sup>[a]</sup>	50

<sup>[a]</sup>The total for this column differs from the corresponding item in Figure 4 due to rounding.

*Figure A3.2. Breakdown of Corporate/International That Is Primarily Corporate Category*

Subcategory subject	Major Rulemaking Documents: Jan. 2008 – Dec. 2012		Number of Regulation Projects (All Studied)
	Number of Documents	Document Pages	
Affiliated and controlled groups (§§ 267, 382, 1502, 1561, 1563)	24	161	14
Subchapter C corporate/shareholder transactions and corporate reorganizations (§§ 301–368, 381)	22	131	15
Transfer pricing (§ 482)	6	159	3
Subchapter I insurance companies (§§ 801–848)	2	8	2
Source rules relating to foreign income (§§ 861–863)	5	8	2
Tax on income of foreign corporations/branch profits tax (§§ 881–884)	4	16	3
Foreign tax credits (§§ 901–909)	1	23	1
Controlled foreign corporations (§§ 951–965, 1248)	14	69	5
Information return for taxpayers filing Form 5472—25% foreign owned U.S. corporations or foreign corporations engaged in U.S. trade or business (§ 6038A)	2	3	1
Classification of foreign business entities (§ 7701)	3	3	1
Expatriated entities and their foreign parents (§ 7874)	6	30	3
Total	89	611 <sup>[a]</sup>	50

<sup>[a]</sup>The total for this column differs from the corresponding item in Figure 4 due to rounding.

*Figure A3.3. Breakdown of Administration and Procedure Category*

Subcategory subject	Major Rulemaking Documents: Jan. 2008 – Dec. 2012		Number of Regulation Projects (All Studied)
	Number of Documents	Document Pages	
Regulation of tax practice (including Circular 230)	16	98	9
Tax return preparer penalties	4	81	2
Third party information reporting and withholding:			
• Basis reporting by securities brokers	3	76	2
• Other withholding matters	12	67	6
• Other third party information reporting	7	45	4
Assessment and collection matters	9	43	7
Filing and reporting matters	17	68	11
Taxpayer penalties	9	27	4
Whistleblower program	6	26	3
Taxpayer privacy	11	24	6
Awards of administrative costs and attorneys fees	1	8	1
Taxpayer assistance orders	2	6	1
Measuring organizational and employee performance inside the IRS	1	1	1
Total	98	570 <sup>[a]</sup>	57

<sup>[a]</sup>The total for this column differs from the corresponding item in Figure 4 due to rounding.