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Congressional Control of Tax Rulemaking

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I. Introduction

In his seminal article, *The Reformation of American Administrative Law*, Richard Stewart critiqued the modern administrative state's lack of political accountability.[1] He described the "transmission belt" model—legislative policymaking followed by agency execution, with judicial review to ensure that agency actions closely hewed to congressional dictates—as no longer operative, because of the reality that Congress relies on broad delegations to agencies.[2] Stewart thus questioned the legitimacy of agency-level decisionmaking, which he argued raises a host of issues for how bureaucrats could be made politically or legally accountable.[3]

Stewart observed, however, that "the example of taxation shows that Congress is capable of gearing up for detailed legislation (and frequent revision) if there are strong political incentives to do so. . . ."[4] This aside about tax law suggested that, because tax policy was uniquely the province of Congress, his evaluation may have less bite with regard to tax. But the insight has received little attention from administrative law scholars, perhaps because the purportedly transsubstantive procedures, practices, and norms of the administrative state—the system that Stewart was flogging as ill-equipped for the challenges of modern administration—have often *not* extended to tax

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1 Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975).

2 Id. at 1675-76, 1684.

3 See generally id. at 1802-13.

4 Id. at 1695 n.127.

administration. Rather, until recently, tax-specific administrative procedures, practices, norms, and precedents governing judicial review have shaped tax administration.[5]

Then, in 2011, the Supreme Court made a significant move to assimilate tax with the rest of the administrative state with its unanimous opinion in *Mayo Foundation for Medical Education and Research v. United States*.[6] The Court stated that it was "not inclined to carve out an approach to administrative review good for tax law only," absent some "justification" for treating tax law differently than other areas of law.[7] The Court explained that its longstanding normative commitments in judicial review of agency action—most prominently, to promoting political accountability and deferring to agency experts—"apply with full force in the tax context."[8]

Scholars and courts have taken *Mayo* as a mandate to end the era of tax-specific administrative procedures, practices, and norms, of which there are many. One study found that over 40% of Treasury rulemaking projects sampled violated the Administrative Procedure Act's (APA) notice-and-comment requirements.[9] Even when Treasury did engage in notice-and-comment rulemaking, 80% of proposed rules were accompanied by an explicit assertion by Treasury that notice and comment was not required under the APA.[10] Further, when Treasury issues final regulations, it often does not provide the sort of detailed

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[5] See notes 36–37 and accompanying text.

[6] 562 U.S. 44 (2011) (Justice Kagan did not participate in consideration of the case). In *Mayo*, the Court applied the *Chevron* two-step analysis to hold that the statutory language at issue did not directly address the question at hand, and then deferred to Treasury's regulation as a "reasonable construction" of the statute. Id. at 60. The issue was whether medical residents, for example, medical school graduates in training to become doctors, are required to pay Social Security and Medicare taxes. Id. at 47. Congress enacted an exception for certain "students," but Treasury regulations provided that medical residents working full-time did not qualify for the student exception. Reg. § 31.3121(b)(10)-2(d)(3).

[7] *Mayo*, 562 U.S. at 55.

[8] Id. at 45. More precisely, the Court provided that "the principles underlying *Chevron* apply with full force in the tax context." Id. *Chevron* is predicated on keeping the judiciary out of policymaking, with the court explicitly providing that such decisionmaking should be made by "either political branch of the Government" and not by nonpolitical judiciary, and that Congress might appropriately rely on "those with great expertise and charged with responsibility for administering the provision," rather than judges who are not experts. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[9] 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, 1748–51 (2007) (finding that Treasury regularly defers notice and comment on tax regulations until *after* a regulation has taken effect—36.2% of Treasury's tax regulations were initially issued as temporary regulations, with notice and comment occurring after the rule was already in effect, and another 4.7% were issued as final rules without *any* notice and comment).

[10] See id. at 1778. Treasury has regularly included the following disclaimer in its preambles: "It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation." See, e.g., T.D. 9782, 2016-36 I.R.B.

explanation of its reasoning, nor the sort of responses to comments received, that have become the norm for agencies that have been regularly subject to judicial review under *State Farm*.[11] Rather, the preambles for final tax rules often have an instructional tone and are mostly explanatory, nothing like the sort of adversarial prelitigation document that is familiar in other rulemaking contexts.[12]

But focusing on the mechanics of procedures and processes in the tax rulemaking process elides the normative considerations that the Supreme Court expressly emphasized in *Mayo*—political accountability, and deference to agency expertise. With these principles in mind, this Article returns to a question that Richard Stewart hinted at in 1975: Does the behavior of Congress, the wellspring of substantive authority for all agency actions, distinguish tax law from other areas of law in a way that is relevant for our conception of how the tax system should interact with general administrative law, doctrinally and normatively?

This Article claims that Congress controls tax rulemaking to an unappreciated extent, and in a manner that often makes tax rulemaking distinct from the sort of broad congressional delegation to agency decisionmakers that has come to typify the modern administrative state in scholarship and case law. I argue that this "congressional control" model of tax rulemaking promotes political accountability and reliance on expertise, as well as taxpayer certainty, which is an especially valued attribute for tax policy. As such, I argue that congressional control of tax rulemaking should be embraced—not because tax law or tax administration should be kept separate from the doctrine and principles that constitute administrative law more generally, but rather because congressional control highlights features of tax rulemaking that are relevant for fitting general administrative law to tax law in a way that achieves common normative goals.

As part of the argument in support of congressional control, this Article makes two descriptive contributions to scholars' and courts' consideration of how tax regulations are produced. First, I show that Congress has special institutional capacity—in the form of the Joint

301, 305. See generally Hickman, note 9, at 1778–86 (explaining and critiquing this practice).

11 Motor Vehicle Mfrs Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 403 U.S. 29 (1983); see Patrick J. Smith, The APA's Arbitrary and Capricious Standard and IRS Regulations, 136 Tax Notes 271, 274–75 (July 16, 2012) (noting that the Internal Revenue Manual included an explicit statement that preambles to tax regulations need not justify rules or describe what alternatives were considered, which is incongruous with the requirements of *State Farm*; the statement has since been removed).

12 See Daniel Shaviro, The Farce of "Arm's Length" Transfer Pricing and "Cost Sharing," Start Making Sense Blog (Oct. 5, 2015, 12:09 PM), http://danshaviro.blogspot.com/2015/10/the-ludicrous-farce-of-arms-length.html.

Committee on Taxation (JCT)—that allows Congress to enact tax legislation that consists of detailed statutory directives that can leave few issues to be resolved by Treasury.[13] These detailed tax statutes are often accompanied by legislative history that explicitly directs the substance of tax regulations.[14] I make the case that these products of the tax legislative process often limit Treasury's policymaking discretion, and I detail instances of this sort of limited delegation.[15]

Second, I show that the notice-and-comment process for regulations, which is a mechanism for establishing political accountability as a check on agency decisionmaking, has been generally ineffective for this purpose with tax regulations. I survey three years of recently proposed tax regulations and show that there has been very close to zero participation in most notice-and-comment processes—fully one-third of the time, no one participated. Further, I show that the few participants have been heavily weighted towards private interests, often sophisticated business taxpayers seeking to reduce tax liability in ways that were wholly predictable and anticipated when Congress addressed the issue, while public interest groups are mostly absent from the process. Private interests—for example, business taxpayer organizations and their representatives—commented on approximately two-thirds of all proposed regulations from 2013 through 2015. In contrast, public interest groups commented on less than 24% of proposed regulations.[16] While a few proposed regulations appeared to garner extensive attention from public and private interests, in most cases with run-of-the-mill regulations, private interests far exceeded public interests, with an average of over seven comments per regulation for private interests versus just over one comment per regulation for public interest groups, and a median number of comments of 2.5 per regulation for private interests and zero for private interests.[17]

Of course, lopsided notice-and-comment processes exist in various contexts, and Congress can always enact detailed statutes and produce legislative history that instructs an implementing agency how to proceed. This Article focuses attention on the special capacity that Congress has developed that allows it to regularly produce tax legislation in this manner.

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[13] See Subsection III.A.1.

[14] See Subsection III.A.3.

[15] This Article uses the phrase "highly constrained delegation" to describe delegations of authority from Congress to Treasury that limit the policymaking discretion given to Treasury personnel, as described further in subsection III.A.1. The opposite of a highly constrained delegation is a broad delegation that provides significant policymaking discretion to agency personnel. See notes 63-64 and accompanying text.

[16] See notes 188-85 and accompanying text.

[17] See Table 2.

The central institutional arrangement that facilitates congressional control is that tax legislation is produced under the watchful eye of the JCT. The JCT is a singular congressional institution: bicameral, nonpartisan, with a staff of lawyers and economists whose expertise facilitates almost every delegation of authority in the Code. The JCT staff assists with devising and drafting legislation, and, importantly, produces revenue estimates of every tax provision and prepares explanations of revenue-raising legislative proposals that Congress relies on throughout the legislative process.[18] These explanations inform legislators and become the legislative history that directs the substance of many tax regulations. Through these and other activities, the JCT contributes to what this Article calls "pre-emptive gap-filling" by Congress, filling the sort of gaps that typically are delegated to agency personnel and that can provide fertile ground for APA-based challenges in other substantive areas of law. By making clear how tax provisions should be constructed, and addressing the minutiae of tax rules, detailed tax statutes and legislative history enhance Congress' accountability for subsequent tax regulations while also making room for expertise to come to bear on the design of tax rules. Thus, the institutional arrangements and practices detailed here are precisely the type that courts look for *agencies* to apply in the regulation-writing process.

The congressional control model of tax rulemaking presented here may complicate the debate between anti-tax exceptionalists who have pushed for tax administration to conform to general administrative law procedures and norms, and (pro-)tax exceptionalists who have defended existing Treasury and IRS practices on the grounds that tax administration is different than other contexts for contemplating administrative law. The congressional control model may provide a middle ground: Tax is, in some instances, different than other areas of law in a way that is relevant for consideration of how to achieve the normative goals of administrative law. Moreover, the focus on Congress suggested in this Article connects tax law with a long-running debate on statutory construction. This Article proposes that Treasury, the IRS, and courts should give greater attention to the intricacies of the legislative process, and proposes a new presumption in the interpretation of tax statutes, the "JCT Canon." The JCT Canon would direct that regulation-writers and courts, when confronted with an ambiguous statutory provision, should follow the construction adopted by the JCT for its revenue estimates and in its explanations of statutory provisions. Indeed, this is most often already the accepted practice within Treasury, which frequently coordinates with the JCT staff. Explicit

[18] See Subsection III.A.1.

use of the JCT Canon by courts would create consistency across administrative and judicial interpretation and bolster the taxpayer-certainty benefits of congressional control, which is especially important in a system of self-assessment.

The Article proceeds as follows. Part II describes the general requirements for rulemaking prescribed by the APA and related judicial doctrines, and how those conventions were applied to tax rulemaking prior to *Mayo*. This Part also describes scholars' and courts' normative commitments to political accountability and reliance on expertise in agency policymaking. Part III introduces the congressional control model of tax rulemaking, and argues that congressional control of tax rulemaking promotes rules that are the product of relevant expertise, and facilitates political accountability. Part IV provides the results of an original survey of the notice-and-comment process for tax rulemaking, based on a review of participants in the notice-and-comment processes for proposed tax regulations from 2013 through 2015. Part V introduces the JCT Canon, and explores the implications of congressional control tax administration in the wake of *Mayo*. Part VI concludes.

II. Administrative Law and Tax Rulemaking

Tax administration developed separately and independently from the general administrative law, at least in part because the system of tax administration developed long before the APA was enacted in 1946.[19] Nonetheless, the modern administrative state and federal rulemaking practices can be traced back to the earliest workings of the federal tax system, when Alexander Hamilton directed tax collection through a variety of missives to tax collectors and taxpayers across the country.[20] These "instructions and rulings" from the 1790's are "the predecessors of the thousands of pages of IRS regulations and revenue rulings with which every modern tax attorney is familiar."[21] Even the Treasury's regulation-writing function has a long history—in 1917,

[19] See Bryan T. Camp, A History of Tax Regulation Prior to the Administrative Procedure Act, 63 Duke L.J. 1673 (2014) (reviewing the development of tax administration before the APA).

[20] Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 56 (2012). Gillian Metzger summarized the history of tax administration in her investigation of the pre-twentieth century administrative state, and noted tax administration's deep roots: "The Treasury Department was a major hub of early federal administration, with Alexander Hamilton crafting the first iterations of federal administrative law in his oversight of revenue generation and customs collection." Gillian Metzger, Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation, 78 Law & Contemp. Probs. no. 3, 2015, at 129.

[21] Mashaw, note 20, at 56.

shortly after the income tax was first enacted, Congress provided grants of regulatory authority to Treasury that have continued in the statute ever since.[22]

This Part focuses on agency rulemaking, first describing the procedures and requirements for rulemaking in general, which are imposed by the APA and judicial doctrine, and corresponding tax-specific rules and precedents. Second, this Part discusses the normative underpinnings of these procedures and requirements, which focus on accountability and deference to agency experts.

A. Doctrine

The APA generally requires that regulations be adopted in accordance with so-called informal "rulemaking" procedures.[23] This consists of a three-step process: (1) The agency must provide notice of the proposed rule; (2) the agency must accept comments from the general public on the proposed rule; and, (3) agency personnel must consider the comments in finalizing the rule and include with the final rule a "concise general statement" of the basis for the rule.[24]

Regulations that are adopted via this three-step notice-and-comment process can carry the "force of law," meaning that these rules are legally binding on regulated parties.[25] Such legally binding rules that are adopted via the notice-and-comment process may, if challenged under the APA, receive *Chevron* deference from a reviewing court.[26] Under *Chevron*, courts defer to agency rules that fall within

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[22] War Revenue Act of 1917, Pub. L. No. 62-254, § 1005, 40 Stat. 300, 326; Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 571 (2002) (discussing grants of regulatory authority in the 1917 Act, and similarities and continuity with current Code delegations).

[23] Informal rulemaking procedures are distinguished from the so-called formal rulemaking procedures, which may be required by Congress and which must include an on-the-record evidentiary hearing. 5 U.S.C. §§ 553(c), 556 (2012). Formal rulemaking must be supported by "substantial evidence." 5 U.S.C. § 706(2)(E) (2012).

[24] 5 U.S.C. § 553(b), (c) (2012). The APA requires that a final rule must be published at least thirty days before its effective date. 5 U.S.C. § 553(d) (2012); see also Richard J. Pierce, Jr., Administrative Law Treatise § 7.1, at 557 (2d ed. 2010).

[25] See Kristin E. Hickman, Unpacking the Force of Law, 66 Vand. L. Rev. 465, 476-77 (2013). Rules that carry the force of law are sometimes deemed "legislative" rules whereas rules that do not carry the force of law are referred to as "interpretive" rules. Id. at 473, 473 n.26. There is ambiguity as to precisely what "force of law" means, and the meaning may be contextual, but the central inquiries are whether there is "evidence of a congressional delegation of power to act with legal force" and whether there is "agency intent to utilize that authority." Id. at 510. See United States v. Mead Corp., 533 U.S. 218, 229-35 (2001).

[26] *Mead*, 533 U.S. at 226-27. An agency's adherence to the procedures established by the APA and the elaborations on those procedures established by courts generally can be challenged in court under the APA. 5 U.S.C. § 706(2)(A), (D) (2012). A procedurally invalid agency action cannot qualify for *Chevron* deference. Encino Motorcars, LLC v.

the authority delegated by Congress, and that are otherwise reasonable, even if the court could determine there is a better policy or an alternative construction of the authorizing statute.[27]

If the preceding paragraphs were the whole story, agency regulations and judicial challenges to those regulations would be quite complex. There is, however, play in each joint: how precisely the APA dictates are satisfied, whether a rule carries the force of law, whether *Chevron* deference is warranted, and whether or not a challenged regulation should be upheld by a court. And the story is actually much more complex, especially with tax regulations.

First, although *Chevron* is ubiquitous in judicial review of regulations, courts have applied it inconsistently,[28] and the precise nature and scope of the *Chevron* inquiry is often ambiguous. There is ongoing back-and-forth among academics and in the courts about how to apply *Chevron*—both "step one," which questions whether the regulation falls within the statutory grant of authority, and "step two," under which courts determine whether the regulation is reasonable.[29]

Most recently courts have started to integrate another important aspect of judicial review of regulations, *State Farm* "hard look" review, into the *Chevron* inquiry.[30] Under *State Farm*, an agency must

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Navarro, 136 S. Ct. 2117, 2125 (2016) (*Chevron* deference is "not warranted" where "the agency errs by failing to follow the correct procedures in issuing the regulation.").

[27] *Chevron* involves a two-step analytical process for courts to determine whether to uphold an agency regulation. The first step consists of determining whether Congress has addressed the "precise question at issue." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). If it has, then the agency and the court are bound by Congress' mandate. Id. If the statute is ambiguous, step two consists of the court determining whether the agency's decision is reasonable. If it is, then the court will defer to the agency. Id. at 843.

[28] See Kent Barnett & Christopher J. Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1 (2017).

[29] See, e.g., Matthew C. Stephenson & Adrian Vermeule, Chevron Has Only One Step, 95 Va. L. Rev. 593 (2009) (criticizing *Chevron* for artificially dividing one inquiry into two steps); Kenneth A. Bamberger & Peter L. Strauss, *Chevron*'s Two Steps, 95 Va. L. Rev. 611 (2009) (defending *Chevron*'s two-step analysis against Stephenson & Vermeule, supra); Michael Herz, *Chevron* is Dead; Long Live *Chevron*, 115 Colum. L. Rev. 1867 (2015) (arguing that *Chevron* is a self-regulating doctrine that appropriately allocates decisionmaking responsibility among the three branches).

[30] Motor Vehicle Mfrs. Ass'n of U.S., v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); see, e.g., *Encino Motorcars*, 136 S. Ct. at 2127; Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699, 2706 (2015); Pikes Peak Broad. Co. v. Fed. Communications Comm'n, 422 F.2d 671, 682 (D.C. Cir. 1969) (Leventhal, J.) (originating the phrase "hard look" to describe the court's review of agency decisionmaking). Courts and scholars are currently deliberating whether and the extent to which *Chevron* should require agencies to satisfy *State Farm*. The Supreme Court suggested that *Chevron* step two requires satisfying *State Farm*. Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011); Encino Motorcars, 136 S. Ct. at 2127. The Tax Court adopted this position in Altera Corp. v. Commissioner, 145 T.C. 91, 116-20 (2015), appeal docketed, Nos. 16-70496, 16-70497 (9th Cir. Feb. 23, 2016) (discussed in notes 45–49 and accompanying text).

engage in "reasoned decision making," which demands that agency personnel "examine the relevant data and articulate a satisfactory explanation" for the agency action.[31] The agency's explanation of the rule must show that it considered the "relevant factors" intended by Congress.[32] To adequately explain its rationale and reasoning, the APA-required "concise general statement," most often must be detailed and thorough.[33] The Supreme Court has signaled that hard look review should be part of a court's review for *Chevron* deference—meaning that judicial deference may be predicated on agency action conforming to the reasoned decisionmaking standard.[34] But it is unclear how, exactly, *State Farm* fits into *Chevron*.[35] This melding of doctrines has already started to unsettle the tax regulatory world, with the Tax Court holding that an important regulation on transfer pricing is invalid under *State Farm*, even though that regulation may well have been reasonable under a less expansive *Chevron* step two analysis.[36]

Second, additional complexity exists for prospectively applying these rules to tax regulations, because there is little precedent for courts to look to when applying this murky doctrine to tax rules and procedures.[37] For decades prior to *Mayo*, courts often followed the Supreme Court's tax-specific *National Muffler* opinion to determine whether or not to defer to Treasury's tax regulations.[38] But that precedent provided a convoluted set of factors that proved problematic for the courts: Judges did not always apply the *National Muffler* factors, and when they did, it was a fountainhead of inconsistent jurispru-

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[31] *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines Inc. v. United States, 371 U.S. 156, 168 (1962)).

[32] Id.

[33] See Richard J. Pierce, Jr., Rulemaking and the Administrative Procedure Act, 32 Tulsa L.J. 185, 192-93 (1996).

[34] *Encino Motorcars*, 136 S. Ct. at 2127; *Michigan*, 135 S. Ct. at 2706.

[35] Daniel J. Hemel & Aaron J. Nielson, *Chevron* Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 781 (2017); see also Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise 29-31 (Supp. 2017).

[36] Altera Corp. v. Commissioner, 145 T.C. 91, 133 (2015), appeal docketed, Nos. 16-70496, 16-70497 (9th Cir., argued on Oct. 11, 2017).

[37] See generally Camp, note 19, at 1684 (The movement to assimilate tax administrative doctrine risks "distorting the proper relationship between tax administration and general administrative-law principles. . . . An understanding of that history is necessary for a proper understanding of the relationship between administrative law and tax.").

[38] See Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979). *Mayo* makes clear that *National Muffler* is no longer relevant for determining what sort of deference tax regulations should receive; rather, the general precedents Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), and Skidmore v. Swift & Co., 323 U.S. 134 (1944), should apply. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011). *Skidmore* provides for varying degrees of deference for "interpretative" rules depending on the persuasiveness of the rule. *Skidmore*, 323 U.S. at 140; see generally Pierce, note 24, at 442-47.

dence.[39] Further, review of tax regulations is often presented to courts in a different posture than typical APA-based challenges to regulations: The Tax Anti-Injunction Act generally prohibits pre-enforcement review of tax regulations.[40] This means that even procedural challenges to tax regulations can only emerge in the courts in connection with an actual taxpayer's specific dispute, and only once that taxpayer has concluded the administrative review (audit) process and decided to challenge an IRS determination in Tax Court or federal District Court. Among other effects, this creates significant lag time between the promulgation of a regulation and the opportunity for courts to review the substance of the regulations or the procedures used to produce the regulation.[41]

The *Mayo* opinion and the move to integrate *State Farm* with *Chevron* are making procedural challenges to tax regulations especially attractive to taxpayers. Taxpayers have started to cite *Mayo* when challenging perceived procedural deficiencies in Treasury's rulemaking practices. One of the most significant court opinions applying *Mayo* is *Altera Corp. v. Commissioner*, decided in the Tax Court and currently on appeal to the Ninth Circuit.[42] The Tax Court held en

[39] For example, before the Supreme Court's opinion in *Mayo*, the same substantive issue arose in various federal district courts; some judges in those courts cited *National Muffler*, others cited *Chevron*, and others cited neither case. See, e.g., Mayo Found. for Med. Educ. & Research v. United States, 503 F. Supp. 2d 1164, 1170–71 (D. Minn. 2007) (citing *National Muffler*), rev'd, 568 F.3d 675 (8th Cir. 2009); Univ. of Chicago Hosp. v. United States, 2006 WL 2631974 (N.D. Ill. 2006) (citing *Chevron*), aff'd, 545 F.3d 564 (7th Cir. 2008); United States v. Detroit Med. Ctr., 2006 WL 3497312 (E.D. Mich. 2006) (citing neither), aff'd in part, vacated in part, 557 F.3d 412 (6th Cir. 2009). As one scholar summarized prior to *Mayo*, the "disparate approaches to tax deference are consistent . . . in their insistence that, whatever *Chevron* may mean for other areas of the law, tax is different and should be treated thus." Kristin E. Hickman, The Need for *Mead*: Rejecting Tax Exceptionalism in Judicial Deference, 90 Minn. L. Rev. 1537, 1563 (2006).

[40] IRC § 7421(a); see Florida Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065 (D.C. 2015) (holding that the Tax Anti-Injunction Act barred a challenge to a reporting requirement imposed by regulation because violation of the regulation subjected the reporting agent to a penalty; to sustain the challenge, the reporting agent would have to abstain from the requirement, pay a penalty, and then sue for refund). But see Direct Mktg. Association v. Brohl, 135 S. Ct. 1124 (2015) (narrowly construing the Tax Injunction Act, which is similar to the Anti-Injunction Act but which applies to state tax provisions).

[41] For example, the regulation at issue in *Altera* was finalized in 2003, and the litigation, which yielded a Tax Court opinion in 2015, concerned Altera's 2004, 2005, 2006, and 2007 taxable years. *Altera*, 145 T.C. at 94. In part because of this long lag time, taxpayers have not often mounted procedural challenges to tax regulations, and the Tax Court is particularly inexperienced in handling procedural challenges. See Hickman, note 5, at 1764–65. For example, as of this writing, the Tax Court has cited *State Farm* in just eleven opinions (including both Tax Court reported decisions and Tax Court Memorandum Decisions), and four of those instances have occurred in the past two years.

[42] *Altera*, 145 T.C. 91.

banc that an anti-abuse regulation issued by Treasury[43] was invalid because Treasury failed to meet the requirements of *State Farm*, that is, Treasury did not engage in a "reasoned decisionmaking" process and failed to respond adequately to comments submitted during the notice-and-comment process.[44] The regulation at issue in *Altera* received comments solely from sophisticated taxpayers facing significant tax liability under the proposed rule; no parties with broader or contrary interests participated in the notice-and-comment process.[45] Consequently, when Treasury proceeded to finalize the rule—in the same form as originally proposed, despite the comments and information it received from taxpayers—Treasury appeared to be disregarding a consensus in opposition to the rule.[46] Notably for the arguments presented in this Article, the Tax Court in *Altera* largely dismissed the possibility that Congress may have mandated the substance of the regulation at issue by way of legislative history published by the JCT that accompanied the relevant statutory provision; as discussed below, the court may have come to a different conclusion if it had afforded greater weight to legislative history.[47] These developments—*Mayo* and the introduction of hard look review—are of particular concern for the stability of tax administration, because if applied retrospectively, they could make almost all past tax regulations appear to be procedurally deficient because they were uniformly drafted and promulgated without consideration of hard look review.[48] And this is potentially problematic for the fisc, because it could hamper revenue-collection efforts that are based on practices that were, until recently, widely seen as settled and uncontroversial.

Thus, scholars and courts are now grappling with how tax administration should conform to the requirements of the APA and related

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[43] The regulation was issued to carry out § 482, which provides the IRS with authority to "distribute, apportion, or allocate gross income, deductions, credits, or allowances" between two related organizations (for example, a parent corporation and its subsidiary) in order to "prevent evasion of taxes or clearly to reflect the income of any of such organizations," and also provides that for transactions involving the transfer or license of intangible property, "the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible." IRC § 482; Reg. § 1.482-7(d)(2).

[44] *Altera*, 145 T.C. at 133.

[45] As discussed in Section IV, sophisticated taxpayers dominate the notice-and-comment processes for tax rulemaking.

[46] In concluding that Treasury violated *State Farm*'s reasoned decisionmaking standard, the Tax Court held that the regulation Treasury adopted ran "contrary to all of the evidence before it." *Altera*, 145 T.C. at 133.

[47] See notes 148–52 and accompanying text (describing legislative history that directly addressed the issue in the *Altera* litigation); see also Section IV.A. (discussing the implications of the arguments in this Article for judicial review under *State Farm*).

[48] Hickman, note 25, at 471 (acknowledging "significant potential difficulties for the stability of the federal income tax system" based on doctrinal analysis under general administrative law).

judicial doctrine. Some scholars—who oppose tax exceptionalism in administrative law—have focused on specific requirements of general administrative law that Treasury has arguably failed to satisfy.[49] Other scholars—defending tax exceptionalism, at least in part—have offered pragmatic defenses of existing Treasury rulemaking practices, arguing that the APA and related judicial doctrine should be reformed post-*Mayo* to reflect special administrative demands of tax rulemaking.[50]

B. Normative Aspirations

Reactions to Mayo often have not featured normative goals. Administrative law generally, and rulemaking in particular, is focused on political accountability—it is described as the "obsession" of administrative law,[51] and it animates the rules and judicial doctrine described in the previous Section.[52] The basic precept of political accountability

[49] See e.g., Amandeep S. Grewal, Mixing Management Fee Waiver with *Mayo*, 16 Fla. Tax Rev. 1 (2014) (critiquing "phantom regulations," that is, regulations that Congress has instructed Treasury to issue, but that Treasury has not yet promulgated); Hickman, note 25, at 492–98, 502–09, 530–31; Kristin E. Hickman & Mark Thomson, Open Minds and Harmless Errors: Judicial Review of Post-Promulgation Notice and Comment, 101 Cornell L. Rev. 261, 308 (2016); Kristin E. Hickman, The Promise and the Reality of U.S. Tax Administration, in The Delicate Balance: Tax, Discretion and the Rule of Law 471 (Chris Evans, Judith Freedman & Richard Krever eds., 2011) (arguing that some sub-regulatory guidance has the force of law and should be subject to notice and comment, and that more Treasury and IRS procedures should be subject to pre-enforcement judicial review).

[50] See, e.g., Stephanie Hunter McMahon, The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process, 35 Va. Tax Rev. 553, 580, 585-86 (2016) (discussing ossification and capture); Richard Murphy, Pragmatic Administrative Law and Tax Exceptionalism, 64 Duke L.J. Online 21, 23, 35 (2014) (urging courts to "give weight to tax's particular history and needs in order to justify a generous, flexible approach to" the extent to which standard notice-and-comment procedures must apply to tax regulations); Richard J. Pierce, Jr., Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision Is Adequate?: A Response to Steve Johnson, 64 Duke L.J. Online 1, 12–18 (2014) (discussing ossification); James M. Puckett, Structural Tax Exceptionalism, 49 Ga. L. Rev. 1067, 1090 (2015) (arguing that certain administrative provisions of the Code supplant APA procedures); Lawrence Zelenak, Maybe Just a Little Bit Special, After All?, 63 Duke L.J. 1897 (2014) (mounting a limited defense of tax exceptionalism).

[51] Metzger, note 20, at 130; see Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1751 (2007).

[52] See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 50–51 (2006); Lloyd N. Cutler & David R. Johnson, Regulation and the Political Process, 84 Yale L.J. 1395, 1413-14 (1975); Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 523 (1985); Mashaw, note 20, at 10 ("[T]he recognition that agencies are also monitored and instructed by political principals, runs like a leitmotif through contemporary judicial opinions review."); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J. L. Econ. & Org. 243, 243, 246 (1987); Richard J. Pierce, Jr., The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469, 520 (1985) ("Policy decisions should be made

is that policy should be set by "political principals," and these principals direct actions taken by otherwise unaccountable personnel, for example agency bureaucrats.[53] Political accountability works through the ballot box as "voters reward elected officials for good records by voting for them, and punish officials for bad records by voting against them."[54] At a very abstract level, sufficient political accountability for agency actions will ensure that "democratic will is effectively implemented."[55]

Of course, this conception of accountability leaves many questions—what is democratic will, how is it expressed, how do political principals translate that will into policy, and so on—and many unsatisfactory answers.[56] There are various conceptions as to what type and degree of control by political principals is necessary to make agency decisionmakers sufficiently politically accountable.[57] I set aside these many underlying issues for the purposes of this Article and, for now, accept the Supreme Court's (contestable) premise that political accountability is achieved when policymaking discretion lies in a political branch (that is the executive branch or the legislative branch) and

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by the most politically accountable institution available."); Mark Seidenfeld, The Irrelevance of Politics for Arbitrary and Capricious Review, 90 Wash. U. L. Rev. 141, 149 (2012) ("[O]ne role of hard-look review is to facilitate political accountability by demanding that an agency make manifest the trade-offs generated by its rulemaking."); Cass R. Sunstein, Participation, Public Law, and Venue Reform, 49 U. Chi. L. Rev. 976, 986-87 (1982).

53 Jerry L. Mashaw, Structuring a "Dense Complexity": Accountability and the Project of Administrative Law, Issues in Legal Scholarship, no. 4, 2005, at 1, 16-21; Jerry L. Mashaw, Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development, 6 J. L. Econ. & Org. 267, 279-84 (1990).

54 Nicholas O. Stephanopolous, Discounting Accountability, An Elective Perspective: Judicial Regulation of Politics in an Election Year 8 (Kentucky L.J., Election Law Symposium (Mar. 2016)), http://www.law.nyu.edu/sites/default/files/upload_documents/16_10_10%20Nicholas%20Stephanopoulos_Discounting%20Accountability.pdf.

55 Mashaw, note 20, at 8. This suggests that "the policy the bureaucracy implements" should be "the policy that a majority of the electorate would select if the issue were put to a vote." Matthew C. Stephenson, Optimal Political Control of the Bureaucracy, 107 Mich. L. Rev. 53, 65 (2008).

56 See Stephanopolous, note 54, at 17-26 (critiquing various mechanisms the Supreme Court has relied on to achieve political accountability).

57 See, e.g., Bressman, note 51, at 1751; Bressman & Vandenbergh, note 52, at 51 ("[W]hether an elected official supervises agency decision making" is a key element of political accountability); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2332 (2001); Sally Katzen, A Reality Check on an Empirical Study: Comments on "Inside the Administrative State," 105 Mich. L. Rev. 1497, 1504 (2007) (critiquing one formulation of political accountability as demanding responsiveness, transparency, and substantive outcomes that "represent[ ] public preferences and resist[ ] factions or parochial pressures"); Metzger, note 20, at 130; Stephenson, note 55, at 57 ("[M]uch of the existing literature advocating extensive political control of the bureaucracy" accepts "that majoritarianism is a legitimate and coherent institutional goal.").

the decisionmaker acts at the direction of an elected official (that is, the President or members of Congress).[58]

This sort of conception of political accountability has given rise to various related and subsidiary normative goals that have become hallmarks of administrative law jurisprudence and academic literature. In order for decision-makers to be held politically accountable, the public must be able to discern who the decisionmakers are and what decisions they have made, that is, decisionmaking and control must be transparent.[59] Similarly, accountability suggests the important rule-of-law constraints on agency action: Agency personnel should act only when granted power to do so, which can be checked through public notice that power has been granted, and public explanations when power is exercised.[60]

Historically, Congress was considered to be the primary political principal involved in the rulemaking process. In Stewart's transmission belt model, Congress acts through legislation to direct agency actions, and agency actions are subject to review by courts to ensure agencies adhere to congressional commands.[61] But, as identified by Stewart, that model fell apart with the rise of the modern administrative state, typified by broad delegations of authority from Congress to agencies that place minimal constraints on agency action.[62] Accountability derived from Congress is lacking when congressional delegations give agency personnel expansive policymaking discretion, perhaps even by enacting "empty standard[s]" that are "literally meaningless."[63] Legislation taking this approach might direct an agency to adopt "reasonable" regulatory policies. For example, the Federal Energy Regulatory Commission is required to establish "just and reasonable" rates for natural gas pipelines, but "'just and reasonable' describes any result the agency can explain."[64] These sorts of

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[58] See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984); Kagan, note 57, at 2332 (describing a "link" between administrators and the voting public through the President).

[59] See Kagan, note 57, at 2332.

[60] See Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 496 (2003); Kevin M. Stack, An Administrative Jurisprudence: The Rule of Law in the Administrative State, 115 Colum. L. Rev. 1985, 1992–93 (2015) (citing Lon L. Fuller, The Morality of Law 46–90 (rev. ed. 1969)).

[61] Stewart, note 1, at 1672–76.

[62] Id. at 1681–84.

[63] Pierce, note 24, § 2.6, at 100. Pierce describes other ways that Congress delegates without constraint as well, including enacting "unranked decisional goals," and enacting "contradictory standards." Id. § 2.6, at 99-100.

[64] Id. § 2.6, at 100. This standard was subsequently replaced by an equally vacuous standard requiring that rates be "fair and equitable." See id. § 2.6, at 101. A recent Supreme Court opinion illustrates another empty standard. In City of Arlington v. FCC, 569 U.S. 290 (2013), the Court reviewed regulations issued by the Federal Communications Commission under a statutory mandate to grant broadcast licenses "if public convenience, in-

broad delegations have become a regular and accepted feature of the modern administrative state.[65]

There are various mechanisms for establishing accountability that are available to supplement, or perhaps replace, the mechanisms found in the transmission belt model. Under the presidential administration model, the President directs agency actions, taking policymaking responsibility where Congress makes broad delegations that appear to leave agencies unaccountable.[66] Another set of alternatives, the interest group models, envision procedural constraints on agency actions that foster pluralistic deliberations to guide agency decisionmakers.[67] This, in turn, stimulates direct accountability by agencies to parties that are affected by agency decisionmaking, thus supplementing oversight from political principals. Similarly, reliance on agency expertise may be seen as consistent with political accounta-

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terest, or necessity will be served thereby," 47 U.S.C. § 307(a), requiring action "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), and using general regulatory authority to issue "such rules and regulations as may be necessary in the public interest," 47 U.S.C. § 201(b).

[65] E.g., Michael Asimow, On Pressing McNollgast to the Limits: The Problem of Regulatory Costs, Law & Contemp. Probs., Winter 1994, at 127, 137 ("Broad and vague delegations of rulemaking power to agencies are an inevitable part of modern political life."); McCubbins et al., note 52, at 272 ("[L]egislation typically delegates to agencies vague mandates accompanied by broad grants of authority to the agency to define the 'public interest.'"). The Supreme Court has not demanded more as a matter of constitutional law, requiring only that delegations be guided by an "intelligible principle." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). Scholars generally agree that this requirement does little to limit the breadth of congressional delegations. See Bressman, note 60, at 517.

[66] See James F. Blumstein, Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues, 51 Duke L.J. 851, 863-64 (2001); Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 83-86 (1995); Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. Rev. 1075, 1075-76 (1986); Kagan, note 57, at 2332; Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 97-99 (1994); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965, 967-69 (1997). Although the presidential administration model is dominant among contemporary scholars, it is also contested. See, e.g., Bressman & Vandenbergh, note 52, at 50, 69, 83 (concluding that White House oversight is "unsystematic" and does not appear linked to preferences of the national electorate); Thomas O. McGarity, Administrative Law as Bloodsport: Policy Erosion in a Highly Partisan Age, 61 Duke L.J. 1671, 1679-82 (2012) (describing the influence of regulated parties as at times overpowering presidential oversight).

[67] See Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 18-19 (1997); Garland, note 52, at 510; Ernest Gellhorn, Public Participation in Administrative Proceedings, 81 Yale L.J. 359, 359-61 (1972); Sunstein, note 52, at 986-87 (stating that participation in agency decisionmaking processes is important "to promote political accountability by producing policies that correspond to the will of the public as a whole."). But see Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1514–15, 1559–62 (1992) (advocating for public input in agency decisionmaking so that it is "informed by the values of the entire polity" but expressing skepticism about the effectiveness of the notice-and-comment process).

bility by way of Congress: Agency personnel, given an "ascertainable goal" by Congress, determine which policy option fits to the objectively relevant facts, which, it is argued, makes agency discretion "more apparent than real."[68]

Nonetheless, when congressional delegations do not strictly limit agency discretion, policy may be set in ways that are not responsive to—or do not act with appreciation of responses from—the body politic or affected parties. In the tax context in particular, political accountability is important but it is not clear how it is best established.[69] Richard Pierce has advocated for presidential oversight of tax regulations to provide greater political accountability and more consistent oversight than judicial review,[70] notwithstanding the fact that oversight of tax regulations has been a rarity.[71] Kristin Hickman and others have advocated greater deference for Treasury regulations, with the aim of reducing judicial intervention in tax policy.[72] Political accountability and reliance on expertise emerge in Hickman's argument in that "Treasury officials are more democratically accountable, are better positioned to respond through regulations to changes in taxpayer behavior and tax policy trends, and possess significantly more expertise over the complexities of tax laws than most judges."[73] But on the other hand, Hickman has argued that if there is no notice-and-comment process for tax regulations, it raises the concern that "too much independence on the part of unelected agency representa-

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[68] Stewart, note 1, at 1678.

[69] See notes 167-70 and accompanying text. James Hines and Kyle Logue have argued that Congress should *insulate* tax policy from political winds by making broader delegations of taxing authority. James R. Hines Jr. & Kyle D. Logue, Delegating Tax, 114 Mich. L. Rev. 235, 238 (2015) (suggesting broad delegation of tax policymaking authority to an independent agency, like the Federal Reserve).

[70] See Pierce, note 50, at 12–18 (suggesting Office of Information and Regulatory Affairs (OIRA) oversight as an alternative to judicial review and arguing that existing limitations on judicial review of tax regulations make tax regulations well-suited to his proposal). Daniel Hemel argues that presidential power to raise revenue unilaterally is strengthened by the promise that courts will review Treasury actions under *Mayo*. Daniel J. Hemel, The President's Power to Tax, 102 Cornell L. Rev. 633, 644 (2017).

[71] Since 1983, there has been an agreement in place between the Office of Management and Budget and Treasury limiting OIRA oversight of most tax regulations. Memorandum of Agreement: Treasury and OMB Implementation of Executive Order 12291 (Apr. 29, 1983), https://www.treasury.gov/FOIA/Documents/OMB%20MOA%2083-93.pdf.

[72] See e.g., Hickman, note 39, at 1542.

[73] Id. On the other hand, Steve Johnson has expressed concern that judicial deference in the tax rulemaking context could give Treasury administrators a "carte blanche to adopt their own policy preferences under the guise of rulemaking," without limits on their discretion. Steve R. Johnson, Preserving Fairness in Tax Administration in the *Mayo* Era, 32 Va. Tax Rev. 269, 297 (2012) (quoting Jeremiah Coder, IRS Official Explains, Defends Rulemaking Process, 134 Tax Notes 1229, 1230 (Mar. 5, 2012)).

tives threatens the ideal of democratic representation."[74] As explored in Part IV, the notice-and-comment process for tax regulations often falls short of the archetype that is defended in other contexts. The challenge of establishing political accountability in tax rulemaking remains very much unresolved.

III. THE CONGRESSIONAL CONTROL MODEL OF TAX RULEMAKING

As the previous Part illustrates, political accountability, incorporating reliance on expertise, is an important goal underlying the APA and judicial review doctrine, and there are concerns that tax rulemaking, by failing to follow standard procedures, may compromise these goals. This Part responds to these concerns, introducing the congressional control model of tax rulemaking. This Part argues that the role of Congress has been elided in consideration of how tax regulations can achieve the goals of general administrative law.

Section A describes the congressional control model: Congress is able to control tax rulemaking through detailed statutes and explicit legislative history. Although these mechanisms may be available to Congress in other contexts, this Section argues that Congress is able to control tax rulemaking because it has established unique institutional capacity and expertise—in the JTC staff and in practices and norms surrounding tax legislation—that are brought to bear on tax legislation and the accompanying legislative history.[75] Section B argues that congressional control of tax rulemaking should satisfy administrative law's demand for political accountability, and also argues that con-

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[74] Hickman & Thomson, note 49, at 308 ("Providing for direct, meaningful public involvement through prepromulgation notice and comment procedures inserts an element of democracy into the rulemaking process and thereby legitimates resulting rules.").

[75] Other mechanisms for congressional control, which are available to Congress with regard to tax and other areas of law, include direct advocacy to influence regulatory agenda-setting and policy decisions, and setting agency structure and procedures. See generally Bressman, note 51 (summarizing and integrating the contributions of positive political theory scholars, who have focused on congressional use of administrative procedures as means to influence agency action); McCubbins et al., note 52 (presenting *procedural* requirements imposed on agencies by Congress as producing satisfactory *substantive* outcomes similar to what Congress can achieve by imposing substantive constraints); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431 (1989) (advancing the discussion of procedural requirements leading agencies to make decisions consistent with congressional preferences). In addition to the mechanisms described above, scholars have debated various ex post mechanisms that Congress can use to influence agencies, including oversight (hearings and investigations) and the threat of cutting funding. Compare J.R. DeShazo & Jody Freeman, The Congressional Competition to Control Delegated Power, 81 Tex. L. Rev. 1443, 1456 (2003) (summarizing ex post methods of control), with McCubbins et al., supra, at 433 (reviewing ex post methods and concluding that "effective political control of an agency requires ex ante constraints on the agency").

gressional control allows for reliance on expertise and provides certainty in tax policy, each of which can be beneficial for taxpayers and the tax system.

A. How Congressional Control Works

1. Congress' Special Institutional Capacity: The Joint Committee on Taxation

Congressional direction of tax rulemaking, described in the following Subsections, is facilitated by the JCT. The JCT is a unique institution within Congress, designed to bring special expertise, insights, and consistency to the tax legislative process.[76] The JCT is bicameral—its membership includes Senators and Representatives—and its staff of approximately sixty-five people consists of nonpartisan tax experts, primarily lawyers and economists with expertise in specific areas of tax legislation.[77] The JCT staff plays a central role in the tax legislative process. It provides technical assistance to Congress in devising tax policy proposals, using its understanding of substantive tax issues and analysis to help members of Congress be well-informed about the meaning and potential effects of these proposals. This expert input

[76] See George K. Yin, Codification of the Tax Law and the Emergence of the Joint Committee on Taxation, 71 Tax L. Rev. (forthcoming 2018), manuscript at 5 fn.18, (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2017-39, 2017) (quoting an article written shortly after the JCT completed its first codification of the Code, which described the significant benefits of the JCT "giv[ing] Congress experienced and technical help in the preparation of tax bills," quoting Roy G. Blakely & Gladys C. Blakey, Founders and Builders of the Income Tax, 18 Taxes 271, 274 (1940)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008878. In some ways the JCT is similar to the Congressional Budget Office (CBO) and the Offices of Legislative Counsel, see notes 108–112 [x] and accompanying text, although neither is as consistently involved as the JCT staff is throughout the legislative process. The JCT "is closely involved with every aspect of the tax legislative process, including . . . development and analysis of legislative proposals . . . [p]reparing official revenue estimates of all tax legislation considered by Congress . . . [and] [d]rafting legislative histories for tax-related bills." Overview, Joint Comm. on Tax'n, https://www.jct.gov/about-us/overview.html (last visited Aug. 23, 2017) [hereinafter About JCT]. See IRC §§ 8021-8023 (providing the JCT with authority to hold hearings, issue subpoenas, take testimony under oath, and charging the JCT with investigating the "operation and effects" of tax laws, and the administration of those laws).

[77] John M. Samuels, The Staff of the Joint Committee on Taxation—From the Outside Looking In 5–7 (2016), http://uschs.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Samuels.pdf; How the Joint Committee Fulfills Its Statutory Mandate, Joint Comm. on Tax'n, https://www.jct.gov/about-us/mandate.html (last visited Aug. 23, 2017). The policy staff is organized into subject-matter teams (for example, domestic business taxation). See Samuels, supra, at 8-9; About JCT, note 76. The membership consists of five members of the House Ways and Means Committee (three from the majority, two from the minority), and five members of the Senate Finance Committee (again, three from the majority, two from the minority). Samuels, supra, at 4.

assists Congress in making precise delegations and limiting Treasury's policymaking discretion.[78]

The JCT staff helps Congress to direct regulatory tax policy by intervening at several important junctures in the legislative process. First, the JCT is often involved in devising tax legislation, with Congress members' personal staffs and legislative committee staff encouraged to consult with the JCT staff as tax legislation is initially conceived.[79] For example, it is common for committee or personal staff to approach the JCT staff with a policy goal, and seek counsel on how best to accomplish that goal.[80] The JCT staff may provide various options, and describe the advantages and disadvantages of different approaches.[81] This assistance is not limited to the JCT membership, nor to members of the tax legislating committees. Any member of Congress can make use of the JCT's services, which means that tax legislation can be subject to expert quality control at the earliest stages, even if it is initiated by members of Congress who do not sit on the Ways and Means or Finance committees.[82] As a proposal is shaped, the JCT remains engaged, providing assistance with drafting tax legislation by working closely with the staff of the Offices of Legislative Counsel (there are separate offices for the House and Senate).[83] As a result, the statutory language is informed by JCT experts, and therefore the drafting process can address details that may be beyond

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78 See James J. Brudney & Corey Ditslear, The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law, 58 Duke L.J. 1231, 1280-83 (2009) (emphasizing the value of JCT explanations of proposed tax legislation for members of Congress); Joint Committee Role in the Tax Legislative Process, Joint Comm. on Tax'n, https://www.jct.gov/about-us/role-of-jct.html (last visited Aug. 23, 2017).

79 Samuels, note 77, at 6.

80 Id. at 13.

81 Id.

82 See id. at 16. It is the policy of both the JCT and the CBO that cost-estimating and revenue-estimating services are available for any measure drafted by any member of Congress, but in practice it may be difficult for junior members and for members who are not on relevant legislating committees to gain access to these services. Anecdotally, the resource constraints (and thus the availability of the services to less influential members of Congress) are greater at the CBO than at the JCT.

83 See Daniel M. Berman & Victoria J. Haneman, Making Tax Law 118 (2014). Historically, drafting sessions started with the JCT staff "explaining to the lawyer from the Office of Legislative Counsel what the purpose of the legislation is, how it was developed, and what the legislation is meant to achieve. They will then discuss the way in which this is best structured into legislative language." Id. The JCT's involvement contributes to the quality of tax legislation as well, providing "important continuity in the legislative process" that helps it to proceed more "smoothly and efficiently" than the process for other types of legislation, which often involves multiple drafters operating in isolation and fumbled handoffs between houses of Congress and between different committees and staffs. Samuels, note 77, at 7–8.

the capacity of congressional staff in other contexts.[84] This expert involvement at the outset of the legislative process allows for early consideration of the minutiae of proposed legislation, which can contribute to producing detailed delegations of regulatory authority.

The second way that the JCT helps Congress to control tax rulemaking is by providing Congress with revenue estimates for tax legislation.[85] When the JCT staff prepares a revenue estimate, it generally also prepares a written summary of the proposed measure.[86] Revenue estimates have become especially important over the last two decades because of the particular procedural rules attached to them,[87] including budget reconciliation rules and Pay-as-You-Go (PAYGO) rules, which require that tax cuts and increases in mandatory spending be revenue neutral (for example, a spending increase must be offset by a tax increase, or a tax cut accompanied by a spending cut).[88] JCT revenue estimates are required for any tax proposal that is considered on the floor of either house of Congress (just as the CBO is required to provide cost estimates for nontax legislation).[89] As a result, even when legislation is proposed by leadership

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[84] In contrast, typical (nontax) legislation generally is shaped exclusively by a legislator's personal staff or by political staff on a legislating committee. See generally Lisa Schultz Bressman & Abbe R. Gluck, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II, 66 Stan. L. Rev. 725 (2014) (describing the relevant influences on the drafting process that are outside the Court's interpretive rules). Although political staff often work with legislative counsel and CBO staff, the political staffers often lack the experience and subject-matter expertise of the JCT staff. See Samuels, note 77, at 5–6 (noting that bipartisan staff is unique for congressional committees). The legislating committees in each house have professional staff that are associated with either the majority or minority party (and change in size and composition each Congress when power shifts), and thus do not serve as a repository for institutional knowledge in the same manner that the JCT does.

[85] See Walter J. Oleszek, Congressional Procedures and the Policy Process 92 (9th ed. 2014). A revenue estimate is the "score" of a tax proposal, that is, the projected revenue to be collected as compared to an estimate of future revenue collections if existing policy remains unchanged. See id. at 72.

[86] Samuels, note 77, at 16–17; JCT Legislative Process, note 78; see notes 92–96 and accompanying text.

[87] See Elizabeth Garrett, Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process, 65 U. Chi. L. Rev. 501, 525–26 (1998). Importantly, revenue estimates can be kept confidential if the requesting member of Congress so desires, and often are kept confidential. This facilitates JCT involvement in the formulation of revenue-raising policy because members of Congress and their staffs know that they can test ideas and check the revenue effects of alternative proposals without any publicity, but it makes the JCT's early involvement opaque. See Berman & Haneman, note 83, at 120 (also noting that these revenue requests are not subject to the Freedom of Information Act).

[88] See id. at 507–14 (describing the 1990 version of PAYGO); David Kamin, Risky Returns: Accounting for Risk in the Federal Budget, 88 Ind. L.J. 723, 726 n.13 (2013) (describing the current PAYGO rules and related annual caps on discretionary spending).

[89] See Congressional Budget and Impoundment Control Act of 1974 as amended, 2 U.S.C. § 602(g) (requiring the CBO to estimate the costs of federal mandates in certain circumstances), § 653 (directing the CBO to prepare cost estimates for all bills of a public

unilaterally (and even when this occurs on an extremely expedited basis), the JCT is usually consulted in the policy formulation and drafting process, and provides a revenue estimate.[90] The JCT also prepares basic distributional analysis of tax provisions, which allows Congress to anticipate the effects of tax legislation on different groups of taxpayers.[91]

There are two recent prominent examples of legislation that were devised by congressional leadership under extreme time constraints, for which the JCT staff nonetheless prepared revenue estimates and explanations of the provisions that were used by Congress prior to enactment: (1) the Protecting Americans From Tax Hikes (PATH) Act of 2015,[92] which extended various temporary tax provisions, and (2) the American Taxpayer Relief Act (ATRA) of 2012,[93] which is the so-called "fiscal cliff" legislation that made permanent some of the Bush-era tax cuts and permanently indexed the Alternative Minimum Tax. The PATH Act was accompanied by revenue estimates and extensive legislative history prepared by the JCT, detailing each provision of the law.[94] The ATRA was accompanied by revenue estimates, but no JCT or committee reports providing technical explanations of

character reported out of almost any Committee of Congress) (2012); Samuels, note 77, at 16. The JCT has a devoted staff of approximately twenty economists who focus on revenue estimates. Staff of Joint Comm. on Tax'n, 115th Cong., www.jct.gov/about-US/current-staff.html (last visited Oct. 5, 2017). The Byrd Rule in the Senate and the PAYGO rules further increase the importance of revenue and cost estimates in the legislative process. See Cheryl D. Block, Pathologies at the Intersection of the Budget and Tax Legislative Processes, 43 B.C. L. Rev. 863 (2002) (describing a prior incarnation of the PAYGO rules). A new version of PAYGO was enacted in 2010. See Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8.

90 When proposed legislation is enacted in a particularly hurried manner, Congress may act with less input from the JCT than is provided under the idealized tax legislative process.

91 The JCT prepares distributional analysis that accounts for taxes paid. This analysis does not include analysis of the distributional effects of the corporate income tax, estate tax, or gift tax. Staff of Joint Comm. on Tax'n, 109th Cong., JCX-1-05, Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation 22–29 (Feb. 2, 2005), http://www.jct.gov/x-1-05.pdf.

92 See Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).

93 Pub. L. No. 112-240, 126 Stat. 2313 (2013).

94 See Staff of Joint Comm. on Tax'n, 114th Cong., JCX-144-15, Technical Explanation of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R.2029 (Comm. Print 2015), https://www.jct.gov/publicatioins.html?func=startown&is=4861 [hereinafter PATH Act Explanation]; Staff of Joint Comm. on Tax'n, 113th Cong., JCX-143-15, Estimated Budget Effects of Division Q of Amendment #2 to the Senate Amendment to H.R. 2029 (Rules committee print 114-40), "protecting Americans From Tax Hikes Act of 2015" (2015), https://www.jct.gov/publications.html?func=tartdown&id-4860.

the provisions.[95] However, the JCT did prepare explanations for some of the provisions in ATRA when those provisions were considered by the legislating committees as parts of earlier legislative proposals, and it is possible to trace the legislative language back to those explanations.[96] That is, the JCT had previously been involved in the formulation of the some of the provisions that were added to ATRA.

The third way that the JCT helps Congress to control tax rulemaking is in the various ways that JCT staff are involved in consideration and negotiation of tax legislation by the House Committee on Ways and Means and the Senate Finance Committee. JCT staff participates in meetings and hearings, markups,[97] and conference committee negotiations.[98] When one of the legislating committees is preparing for a markup, the JCT staff usually produces explanations of the provisions in the initial legislative proposal to be considered by the committee.[99] Often these "conceptual" summary explanations are prepared in conjunction with drafting statutory language and producing revenue estimates.[100] The committees generally base their markup on these

[95] See Cong. Budget Office, Detail on Estimated Budgetary Effects of Title VI (Medicare and Other Health Extensions) of H.R. 8, the American Taxpayer Relief Act of 2012, as passed by the Senate on Jan. 1, 2013 (Jan. 9, 2013), www.cbo.gov/sites/default/files/112th-congress-2011-2012/costestimate/senatehr8-titlevi00.pdf.

[96] E.g., Staff of Joint Comm. on Tax'n, 112th Cong., JCX-69-12, Description of the Chairman's Modification to the Proposals of the "Family Business Tax Cut Certainty Act of 2012" (Aug.2, 2012), www.jct.gov/publications.html?func=startdown&id4481 (describing a special basis recovery provision for "motorsports entertainment complexes," a provision that was incorporated in the ATRA).

[97] The markup is the process through which committee members amend and agree upon the content of a bill to be approved by the committee. See Oleszek, note 85, at 131. In an idealized legislative process, a tax bill is introduced in the House, and then referred to the Ways and Means Committee, which holds a hearing on the bill, calling in experts to testify about various aspects of the proposal. Next the committee members devise amendments to the proposed bill. The markup can take different forms, but it might be carried out as a meeting among the committee members whereby the members discuss each proposed amendment and vote on them, one by one. Once all amendments have been considered, the committee can vote to report the bill out of committee, so that it can be considered by the full House. See Jeffrey H. Birnbaum & Alan S. Murray, Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform 121–26 (1988) (describing colorfully a Ways and Means markup of what would become the Tax Reform Act of 1986).

[98] Joint Comm. on Tax'n, note 78. A conference committee is an "ad hoc joint committee" with membership from both the House and the Senate, convened to resolve differences between competing versions of legislation passed by each house. Oleszek, note 85, at 332. The conference committee negotiates final legislation that is then sent to each house for approval, and can be signed into law by the President. Id. Conference committee reports are prepared by some combination of JCT staff and legislating committee staff working at the direction of conference committee members, and are (generally) provided to the members of each house before the final vote.

[99] Joint Comm. on Tax'n, note 78.

[100] See Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 968 (2013) (describing "conceptual" explanations as the basis for

descriptions along with "one-pagers," prepared by the JCT staff describing proposed amendments to be considered during the markup.[101] The committees use these materials to debate and adopt committee drafts rather than reviewing actual statutory language.[102] These materials are also relied upon when a bill reaches a conference committee, as well as with bills that are brought straight to the floor.[103]

The JCT's expertise allows for Congress consistently to legislate at a level of detail uncommon to other areas of statutory law, accomplishing a sort of preemptive gap-filling. That is, rather than leaving gaps for Treasury to fill-in via regulation, Congress addresses many details itself and articulates directives to Treasury in the form of detailed statements and precise legislative history.[104] At each juncture as tax policy is formulated and enacted, the JCT helps members of Congress and their staffs continue to enhance the precision and detail of tax delegations in this manner. By bringing technical expertise to this policymaking and drafting process—helping develop initial concepts, formulating statutory language, providing technical expertise during committee work, and preparing explanations and revenue estimates—the JCT staff helps Congress and members' personal staffs work through the details of delegations to Treasury. This contributes to members of Congress developing a more precise conception, prior to enactment, of what Treasury should do to carry out a delegation of tax authority.

Further, the JCT's explanations, prepared at various points throughout the legislative process, are the basis for the compilations of highly detailed legislative history that are circulated to members of Congress prior to final enactment of tax legislation.[105] The close con-

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action undertaken by the Senate Finance Committee, as well as the House Budget Committee); Michael Livingston, Congress, The Courts, and the Code: Legislative History and the Interpretation of Tax Statutes, 69 Tex. L. Rev. 819, 833-35 (1991) (describing the Senate Finance Committee and House Ways and Means Committee as relying on "conceptual" descriptions of legislation prepared by the JCT staff); Bradford L. Ferguson, Frederic W. Hickman & Donald C. Lubick, Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process, 67 Taxes 804, 809–10 (1989) (describing how the "committees make their mark-up decisions on the basis of general concepts and descriptions").

101 Berman & Haneman, note 83, at 118.

102 See note 100.

103 Sometimes, as with the PATH Act, described in note 94, the JCT issues explanations of provisions of legislation that are not reported out of a legislating committee or are not the product of a conference committee. See, e.g., Joint Comm. on Tax'n, PATH Act Explanation, note 94.

104 Gap-filling refers to congressional delegations to elaborate and fill in details of a statute. See Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44, 58 (2011); United States v. Mead Corp., 533 U.S. 218, 227 (2003).

105 See, e.g., Joint Comm. on Tax'n, PATH ACT Explanation, note 94.

nection between the development of this legislative history and the legislative process and revenue estimates that shape particular tax provisions, along with Congress' reliance on conceptual summaries to shape and enact tax legislation, makes this legislative history particularly insightful as to how tax provisions are expected to be construed and the particular content of anticipated regulations contemporaneous with the enactment of the legislative provisions.[106]

For example, the Conference Report to the Tax Reform Act of 1986 is rife with statements like, "the conferees expect that the Treasury Department will promulgate regulations regarding . . . ." and "[u]nder grants of regulatory authority in the conference agreement, the conferees expect the Treasury Department to publish regulations disregarding . . . ."[107] That is, rather than leaving open issues to be hashed out solely by Treasury personnel, Congress is able to direct what Treasury should do on particular issues, and members of Congress can benefit from this understanding prior to voting on final legislation.

The role of the JCT is in some ways similar to the roles played in nontax legislation by the CBO and the Offices of Legislative Counsel. The CBO is a nonpartisan office of Congress that provides analysis on the budget effects of proposed legislation, as well as other budgetary analysis, to both houses of Congress.[108] The CBO's primary involvement in the legislative process is through cost estimates for proposed legislation.[109] The CBO relies on JCT analysis for revenue estimates of tax legislation, so in some respects the CBO staff and JCT staff jointly produce work product for Congress. CBO cost estimates have been recognized as critically important to the legislative process, and legislation is sometimes crafted around the CBO's cost estimates, in consultation with CBO staff.[110] But the CBO does not help devise and shape legislation in the same manner that the JCT does, nor does

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[106] Cf. Robert A. Katzmann, Judging Statutes 26 (2014) (describing tax committee reports as "essential guidance" to Treasury). Legislative history is recognized by judges, scholars, and policymakers as a key—if at times controversial—way for Congress to influence administrative decisionmaking. See Bressman & Gluck, note 84; Katzmann, supra, at 11–22. But see, e.g., John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419 (2005) (arguing that Congress cannot have a cohesive intent, and that as such the only product of the legislative process that courts should rely on in construing a statute is the "public meaning" of the statutory language).

[107] H.R. Rep. No. 99-841, pt. 2, at II-173 (1986) (Conf. Rep.).

[108] See Cong. Budget Office, An Introduction to the Congressional Budget Office (July 2016), https://www.cbo.gov/sites/efault/file/cbofiles/attachment/2016-IntroToCBO.pdf.

[109] Id.

[110] See Bressman & Gluck, note 84, at 764 (describing congressional staff reports that statutory language is crafted to achieve specific cost estimates, often requiring tweaking and repeated back and forth with the CBO staff focused on fitting within particular budget constraints); Abbe R. Gluck, Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying To Do, 84 U. Chi. L. Rev. 177, 182 (2017).

the CBO prepare explanations of statutory provisions in the way that the JCT does.[111] The Offices of Legislative Counsel also perform a role that is in some ways similar to the JCT. These offices consist of nonpartisan staff that assist member staff and committee staff with drafting statutory language. These staff primarily serve a technical role in crafting the actual legislative language, and their expertise comes to bear on virtually all legislation.[112] The task of drafting tax legislation and analyzing proposed tax legislation directly inspired the creation of the Offices of Legislative Counsel, and the JCT was a precursor to the CBO as well.[113] Today, those offices in some ways replicate the functions of the JCT, but the JCT also augments the capacity of the CBO and Offices of Legislative Counsel, and is more comprehensively involved in the legislative process for tax legislation than CBO or the Offices of Legislative Counsel are for nontax legislation.

2. *Constrained Statutory Delegations to Treasury*

Facilitated by the JCT, which focuses on details of tax legislation throughout the legislative process, congressional delegations of tax rulemaking authority very often leave little policymaking discretion as compared to the sorts of broad delegations that are prevalent in the modern administrative state. Whereas the paradigmatic "meaningless standard" gives agency personnel plenary policymaking discretion,[114]

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[111] For example, unlike the JCT, the CBO does not draft statutory language and is not directly involved in drafting sessions with the Offices of Legislative Counsel, does not does not participate in committee markups, and does not meet with constituents concerning legislation on behalf of members of Congress. Compare Cong. Budget Office, note 108 (describing the CBO's role as limited to scoring legislation and providing reports commissioned by Congress), with Joint Comm. on Tax'n, About Us: Joint Committee Role in the Tax Legislative Process, https://www.jct.gov/about-us/role-of-jct. html (describing the JCT's role as including helping with developing, analyzing, drafting, and preparing descriptions of bills). The CBO sometimes provides comments on proposed legislation, indicating what elements of the legislation are affecting cost estimates, whereas the JCT is a direct participant in drafting and markup sessions. Id.; see Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, Unorthodox Lawmaking, Unorthodox Rulemaking, 115 Colum. L. Rev. 1789, 1825 (2015).

[112] Within the Offices of Legislative Counsel tax drafting is recognized as an advanced specialty and is reserved as a promotion for experienced drafters. Cf. Samuels, note 77, at 12-14.

[113] The Offices of Legislative Counsel initially came to exist to assist with tax legislation after the House Ways and Means Committee sought outside assistance drafting early income tax bills, and the offices were formalized under the Revenue Act of 1918. Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057; see Jarrod Shobe, Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting, 114 Colum. L. Rev. 807, 820 (2015). The CBO was created as part of the overhaul of the congressional budget process in 1974, decades after the JCT was put in place. See Cong. Budget Office, History, https://www.cbo.gov/about/history (last visited Oct. 5, 2017).

[114] See notes 63–65.

delegations in the tax context are often characterized by specific directives embedded in comprehensive statutory schemes that leave few discretionary policy choices for Treasury regulation writers.[115]

The phenomenon of limited delegations in tax legislation was identified in work by David Epstein and Sharyn O'Halloran. They created a metric to measure the breadth of executive branch discretion, and using several different data sets they determined that tax laws confer among the least discretion to the executive branch, that is, tax laws involve the most constrained delegations.[116] One data set included legislative enactments from 1947 to 1986, which were divided into forty-three issue categories.[117] Tax legislation delegated the third lowest level of discretion (that is, Congress gave the Executive Branch greater discretion in forty other issue areas).[118] A second data set covered laws enacted from 1946 to 1995, categorized by the committee that was assigned the legislation in the House.[119] This data showed that legislation from the Ways and Means Committee, the committee responsible for tax legislation (among many other areas), conferred the fourth lowest level of discretion among nineteen committee categories.[120] Additionally, an analysis of particular pieces of legislation found that several tax bills were among the legislation with the lowest level of discretion, including the Tax Reform Act of 1986, which had the lowest overall discretion.[121] A third data set of legislation enacted from 1789 through 1988 showed that legislation involving "tax rates" had the lowest discretion among fifty-four issue categories.[122] In sum,

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[115] See Pierce, note 24, § 2.6, at 100 ("[m]eaningful substantive standards reflect policy decisions that Congress makes and imposes on an agency").

[116] David Epstein & Sharyn O'Halloran, Delegating Powers 196–206 (1999). The authors constructed a "discretion index" that calculated overall discretion based on the extent to which statutes delegated authority to the executive branch, and the extent to which that authority was constrained. Id. at 86–120. The extent of delegation is measured through a combination of a quantified measure of delegations (for example, provisions that authorize "discretionary rulemaking authority," allow the agency to "modify or change decision-making criteria," allow an agency to allocate money or benefits with the amounts or recipients at the discretion of the agency, or allow for the agency to provide for waivers or exemptions from generally applicable rules), along with a quantified measure of constraints on delegations (for example, time limits, requirements for legislative action, requirements for public hearings or particular procedures, or consultation or reporting requirements).

[117] Id. at 198.

[118] Id. at 199 tbl.8.1 (summarizing data showing that only Congress' copyright and social security laws granted less discretion than tax laws).

[119] Id. at 200–01.

[120] Id. at 205 fig.8.2.

[121] Id. at 96 tbl.5.3 (also noting the legislation with the highest levels of discretion, which included several pieces of environmental and public health legislation).

[122] Id. at 200, 202 tbl.8.2. This is the only data set that focused particularly on "tax rates." The term is not further elaborated, but it is possible that the legislation included is limited to revenue-raising legislation that includes tax rate changes, which would make this

Congress often maintains control of the details of tax delegations rather than cede policymaking discretion to Treasury, and does so to a greater extent with tax authority than with other types of legislation. This is not to say that highly constrained delegations are unique to tax, but such delegations seem to be more prevalent in tax than in other areas of law.[123]

There are many examples of highly detailed tax statute provisions that require or have resulted in regulations, but leave very little discretion to Treasury. To take one, in 1986 Congress amended § 382 to limit the use of net operating loss (NOL) carryforwards by a corporation that changes ownership.[124] NOLs are valuable to profitable companies because they can be used to offset taxable income, thus reducing income tax liability. In the early 1980's, corporate transactions were sometimes driven by profitable corporations' desire to acquire corporations with unused NOLs. Congress decided to limit the value of NOLs to new owners to discourage tax-driven transactions. The statute Congress enacted, § 382, is very precise. It provides that use of NOLs will be limited when there is an "ownership change."[125] The term "ownership change" is defined in another subsection to include any "owner shift involving a 5-percent shareholder or any equity structure shift," if either such shift results in an increase by fifty percentage points or more in the percentage of stock owned by 5% shareholders during the "testing period."[126] The terms "owner shift" and "equity structure shift" are each defined in detail,[127] as is the term "testing period."[128] Many other particulars are specified as well—the statute runs approximately sixteen pages in a bound copy of the Code.[129] Because Congress created a comprehensive scheme in the statute, providing many details about how the scheme should function, the regulations issued under § 382 are focused on implementing the very specific policy set by Congress.[130]

Not all delegations of tax rulemaking authority are as constrained as § 382. But, even when Congress makes broad delegations, its tax-

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data not particularly illuminating (in that Congress has not ceded rate setting authority to Treasury, even as it has granted discretion in other respects).

[123] See Subsection III.A.1 (discussing Congress' institutional capacity, unique to tax, that facilitates this).

[124] Tax Reform Act of 1986, Pub. L. No. 99-514, § 621, 100 Stat. 2085, 2254.

[125] IRC § 382(a), (d).

[126] IRC § 382(g)(1).

[127] IRC § 382(g)(1), (2), (3).

[128] IRC § 382(i).

[129] CCH, Internal Revenue Code: Income Taxes §§ 1-860G 1430-46 (2017).

[130] See notes 144–46 (describing regulations proposed under § 382, including regulations proposed in 2015, summarized in Appendix II, and describing how Congress provided explicit directions in the legislative history that accompanied § 382 as to what the regulations should include).

ing authority is limited in comparison to other congressional powers. The Supreme Court recently described Congress' taxing power as highly proscribed in comparison to the Commerce Clause power under which Congress acts in other regulatory pursuits. On the one hand, once the Court "recognize[s] that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear."[131] In contrast, however, "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more."[132]

There are, of course, some prominent counterexamples to the highly constrained delegations of tax authority, which show Treasury and the IRS acting with significant discretion in determining how to require taxpayers to determine tax liability. Section 7805(a) provides general authority for Treasury to issue regulations elaborating on any provision of the Code. It empowers Treasury to issue "all needful rules and regulations for the enforcement of" the Code.[133] On first blush, this appears to be a very broad and standardless grant by Congress of rulemaking authority to Treasury. Additionally, there are several tax provisions[134] that consist of broad delegations that are similar to § 482, which provides Treasury with authority to combat some abusive tax practices between related entities.[135] Scholars and courts have often referred to § 482 as among the broadest delegations of authority in the Code.[136] These statutes make clear that Congress does not control *all* tax rulemaking. Sometimes Congress enacts broad tax

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131 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573 (2012). In theory, any regulatory mandate could be carried out as a tax—a 100% tax, for example, is extremely coercive—but the Supreme Court has held that this sort of penalty would not pass muster under Congress' taxing power. See id. at 565–66 (citing Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922)).

132 Id. at 574; see also Mariano-Florentino Cuéllar, Coalitions, Autonomy, and Regulatory Bargains in Public Health Law, in Preventing Regulatory Capture 326, 360 (Daniel Carpenter & David A. Moss eds., 2014) (identifying that the IRS "wield[s] limited authority" in comparison to the Food and Drug Administration).

133 IRC § 7805(a). Prior to *Mayo*, there was a widely held view in the tax community that regulations issued under § 7805(a) were "interpretative" rules that did not carry the force of law and need not be subject to notice-and-comment rulemaking. See Mitchell Rogovin & Donald L. Korb, The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within, Tax Mag., Aug. 2009, at 21, 22. *Mayo* dispensed with this distinction; whether Treasury issues a regulation under specific authority or under the general § 7805(a) authority has no bearing on how that regulation should be treated for judicial review. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57-58 (2011).

134 E.g. §§ 1502, 367(b)(1)

135 See note 43. Regulations issued under § 482 rely on the authority provided under § 7805(a); § 482 does not include a specific grant of authority to promulgate regulations.

136 See, e.g., Hines & Logue, note 69, at 251 (referring to § 482 and § 1502, the latter of which is a similar provision applying to corporations filing consolidated returns, as "unusually broad tax delegation[s]").

statutes that do not limit Treasury's discretion, or do not limit Treasury's discretion as to all future circumstances in which Treasury might exercise delegated power.[137]

But even when Treasury uses its general authority to issue regulations for the broadest provisions of the Code, Treasury's discretion may be constrained relative to the discretion Congress typically has granted in other areas of law. First, even authority granted in § 482 is still a far cry from an environmental or public health delegation that empowers an agency to use its "judgment" or to act "reasonably."[138] A tax corollary to the sort of "empty standard" that is commonplace in other contexts might call for Treasury to collect "reasonably adequate revenue to fund government operations," or something equally vague,[139] but Congress has not adopted this approach in its delegations of tax authority.[140] Second, as discussed in the next Subsection, Treasury's discretion under the Code is constrained and controlled by Congress through another mechanism: explicit legislative history that accompanied amendments to the Code.[141]

3. *Explicit Legislative History Produced by the JCT*

Tax legislative history, produced with the aid of the JCT staff, frequently provides explicit directions as to how Treasury should exercise its authority to issue tax regulations, which limits its policymaking discretion.[142] This explicit tax legislative history can take various forms. Legislative history can be so precise and explicit that it becomes, verbatim, the text of a tax regulation proposed by Treasury. For instance, Congress essentially wrote the regulations under § 382, described above,[143] through the legislative history that accompanied this provision. The legislative history includes some twenty-five specific examples detailing how the statutory language should apply in specific circumstances, and these examples (and the much of the same language from the legislative history) were adopted in Treasury's regula-

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137 See Part V, discussing implications of congressional control of tax rulemaking, and also considering statutes and regulations that do not result from the workings of congressional control.

138 These are examples of the sort of "empty standards" that Richard Pierce reports have proliferated in nontax contexts. See Pierce, note 24, § 2.6, at 100-02; notes 63–65 and accompanying text.

139 Cf. Hines & Logue, note 69, at 237, 272 (proposing that Congress make broad delegations of taxing authority to Treasury).

140 Id. at 273.

141 See notes 148–52 and accompanying text (describing the legislative history of § 482 that governed the regulation at issue in *Altera*).

142 See Katzmann, note 106, at 26.

143 See notes 125–28 and accompanying text.

tions.[144] These examples limit Treasury's discretion to interpret § 382 in any ways that are contrary to the examples.

Alternatively, legislative history can explain congressional intent as to how a statute should be interpreted so as to limit Treasury's range of options in drafting a tax regulation. For example, a separate provision of § 382 (distinct from the provisions described above) requires reference to an interest rate to calculate the amount of the loss limitation; the legislative history explained the purpose of the rate and what the value of the rate should be in relation to market rates.[145] This directive required Treasury to develop an actual method for calculating the rate on an ongoing basis, but Treasury had very little discretion because Congress was clear as to what Treasury should accomplish via regulation.[146]

Further, legislative history can expressly incorporate (or overrule) statutory interpretations made by courts or by Treasury. For example, when Congress enacted § 707(a), which provides rules for transactions between a partnership and a partner in that partnership who is acting in a nonpartner capacity (for example, a partner acting as an employee and receiving payment for services), the legislative history ex-

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[144] See H.R. Rep. No. 99-841, pt. 2, at 170-96 (1986) (Conf. Rep.); see, e.g., Reg. § 1.382-2T(e)(1)(iii)(Ex. 2) (tracking H.R. 99-841, at 175 example 3); Reg. § 1.382-2T(j)(1)(vi)(Ex. 2) (tracking H.R. 99-841, at 181 example 17); text accompanying notes 125–130 (describing § 382).

[145] Section 382 limits the annual use of NOLs by the new owners to the value of the loss corporation multiplied by the "long-term tax-exempt rate." IRC § 382(b), (f). The long-term tax-exempt rate is defined later in the statute as the "Federal long-term rate," which is defined in § 1274(d) as the average rate of long-term Treasury notes, which then must be "adjusted for differences between rates on long-term taxable and tax-exempt obligations." IRC § 382(f). The legislative history that accompanied § 382(f) prescribes that the long-term tax-exempt rate should be lower than the federal long-term rate, and explains that otherwise the NOL could be worth more in the hands of an acquirer than in the hands of a loss corporation, which could sell its assets, invest in long-term Treasury notes, and use income from the Treasury notes to absorb the NOL. H.R. Rep. No. 99-841, note 144, at 188. This legislative history further specifies that the long-term tax-exempt rate should fall between the long-term federal rate and that rate *multiplied* by one *minus* the corporate tax rate, but the legislative history does not prescribe the exact method Treasury should use to achieve this result. Id.

[146] In 1986, Treasury adopted a method for calculating this rate that consisted of multiplying the long-term federal rate by a fraction that consisted of the rate for "the highest-grade tax-exempt obligations available" over the "composite yield of U.S. Treasury obligations with maturities similar to those of the tax exempt obligations." Prop. Reg. §§ 1.382-12, 1.1288-1, 80 Fed. Reg. 11,141, 11,142 (Mar. 2, 2015). But from 2008 onward, the yield on these tax-exempt obligations sometimes has been *higher* than the yield on U.S. Treasuries, which meant that the long-term tax-exempt rate for § 382 purposes sometimes was *higher* than the federal long-term rate, thus defeating Congress' policy objective. Id. Treasury proposed a regulation that provided a new method for calculating the rate, consistent with congressional policy as provided in the legislative history. Id. at 11,413. The regulation was finalized in 2016. Reg. § 1.382-12.

plicitly adopted a position previously taken by Treasury in a Revenue Ruling.[147]

Finally, legislative history can address a specific scenario that Congress anticipates will arise, and direct how regulations should address that scenario. For example, the *Altera* case concerns how a new provision of § 482 should apply to "cost-sharing agreements."[148] The court focused on a regulation that followed from legislative history that accompanied Congress' enactment of the second sentence of § 482, which applies to "intangible property."[149] In making its determination, the court turned to a detailed legislative history directing how the new provision, should apply in this circumstance.[150] Congress specified in the legislative history that it did not intend to alter the existing practice of using cost-sharing agreements, which allow related taxpayers to share proportionally the costs and proceeds of developing intangible property, so long as the agreements account for "all research and development costs."[151] Treasury promulgated a regulation that required cost-sharing agreements to include stock-based compensation for employees who developed intangible property (among other costs), carrying out the mandate from Congress provided in the legislative history (although this is being disputed in the ongoing litigation).[152]

Thus, Congress can employ various methods to control tax rulemaking through legislative history. Legislative history allows Congress to make clear how enacted provisions should be construed for purposes of tax regulations, and limits Treasury's discretion; when Treasury's tax regulations conform to that construction, the resultant rules can be traced directly back to Congress.

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147 S. Comm. on Fin., 98th Cong., Deficit Reduction Act of 1984, Explanation of Provisions Approved by the Committee on March 21, 1984, vol. I, at 230 (Comm. Print. 1984); see also Prop. Reg. § 1.707-1, -9, 80 Fed. Reg. 43,652, 43,652-53 (July 23, 2015) (summarizing Rev. Rul. 81-300 and Rev. Rul. 81-301 and Congress' adoption thereof). Interestingly, the proposed regulation directs that *prior to* the rule being finalized, the statute will be applied "on the basis of the statute and the guidance provided regarding that provision in the legislative history . . . ." Id. at 43,661 (citing the Senate Report and other legislative history).

148 Altera Corp. v. Commissioner, 145 T.C. 91, 92 (2015), appeal docketed, Nos. 16-70496, 16-70497 (9th Cir., argued on Oct. 11, 2017); see notes 42–46 (describing the *Altera* case).

149 Reg. § 1.482-7(d)(2); IRC § 482; see note 43 (quoting § 482).

150 Altera Corp., 145 T.C. at 96-98 (citing H.R. Rep. No. 99-426, at 423-26 (1985); H.R. Conf. Rep. No. 99-841 (Vol. II), at II-637 through II-638 (1986)).

151 H.R. Rep. No. 99-841, note 144, at 638.

152 Reg. § 1.482-7A(d)(2); see notes 42–46 and accompanying text (discussing the ongoing *Altera* litigation and Treasury's alleged failure to follow the appropriate rulemaking process for § 482 of the Code). Brief of 19 Tax Law and Administrative Law Professors, Altera Corp. v. Commissioner, Nos. 16-70496, 16-70497 (9th Cir.).

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In summary, Congress can control tax rulemaking both through highly detailed legislation that effectively constrains Treasury's discretion in tax rulemaking, and through explicit legislative history that directs the content of tax regulations. The JCT's expertise provides powerful institutional support for Congress to be able to dictate precise tax policy prescriptions to Treasury.

B. The Normative Case for Congressional Control

Political scientists and legal scholars have recognized the potential for Congress to provide politically accountable supervision of the administrative state.[153] Some scholars have even advocated for a "congressional control" model of the administrative state.[154] And constitutional law scholars have developed these claims in arguing that reinvigorating the nondelegation doctrine[155] would shift policymaking—and accountability for policy decisions—back to Congress.[156] But these arguments for shifting power to Congress and

[153] See, e.g., Stewart, note 1, at 1693-94; Mashaw, note 20, at 9-10; 314 (describing statutes that are detailed and specific as satisfying "electoral democracy"); Bressman & Gluck, note 84, at 772-73 (surveying congressional staff and identifying legislative history as a tool used by Congress to influence agency interpretation of statutes); Kagan, note 57, at 2255 ("Congress, however, proved over time either unable or unwilling to legislate consistently" with "detailed and limited grants of authority to administrative bodies."); Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich. L. Rev. 2073, 2076 (2005) ("[M]ore detailed and definitive legislation would place agencies under greater Congressional control and thus detract from the president's ability to guide these agencies in furtherance of his policy objectives."); Seidenfeld, note 67, at 1515; Mark Seidenfeld, Bending the Rules: Flexible Regulation and Constraints on Agency Discretion, 51 Admin. L. Rev. 429, 442–44 (1999). But see Stewart, note 2, at 1695 n.127 (suggesting that tax legislation may constitute an exception to his general critique of the transmission belt model); Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61 (2006) (providing a comprehensive overview of ex ante and ex post mechanisms for congressional control of administration).

[154] Beermann, note 153, at 158; see generally Epstein & O'Halloran, note 116, at 232 (arguing that in situations where the political benefits exceed the political costs, Congress maintains control rather than delegating to agencies, and vice versa); McCubbins et al., note 52, at 243-46; McCubbins et al., note 75, at 432-33.

[155] The nondelegation doctrine provides that Congress cannot delegate the powers it has been granted under Article I of the Constitution. Pierce, note 24, § 2.6, at 98–99. But the Supreme Court has not enforced the nondelegation doctrine in more than eighty years, despite routine and extensive delegations by Congress of its legislative power. Id. at 104–05 (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

[156] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 17 (1993) (arguing that broad delegation by Congress "severs the link between the legislator's vote and the law, upon which depend both democratic accountability and the safeguards of liberty provided by Article I"); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 63–66 (1982) (advocating for tighter application of the nondelegation doctrine to

away from agencies have gained little traction in the real world because, in reality, Congress makes broad delegations to agencies, and courts have proven reluctant to curtail this practice.[157]

As the prior Section details, tax legislation, and thus tax rulemaking, proceeds differently—Congress has the capacity to take control, and does so through the normal course of enacting tax laws. This Section argues that congressional control of tax rulemaking is normatively desirable in three respects: It provides political accountability, it allows for reliance on expertise in tax policymaking, and it provides certainty for taxpayers. The first two conditions, political accountability and reliance on expertise, are hallmarks of existing justifications for rulemaking procedures and current approaches to judicial review of agency decision-making. The final condition, certainty, is widely viewed as important in tax policymaking.[158]

1. Political Accountability

When Congress makes policy decisions directly, without delegating to the executive branch, members of Congress can be held accountable for those decisions.[159] Highly detailed statutes establish a link between citizens and policies—it is clear that Congress is responsible for a policy that follows from a detailed statute, and citizens can express their views of Congress members' actions at the ballot box or by petitioning members of Congress directly. Detailed statutes limit the range of permissible interpretations of the statute, which satisfies the rule of law elements of political accountability by providing notice (of what rules apply) and promoting consistency (so that all taxpayers are

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reduce the private benefits that Congress can confer via broad delegations, requiring "legislative specificity" so that "opponents of a regulation will know whom to hold responsible at the polls"). Ronald Krotoszynski argues that the nondelegation doctrine is particularly relevant and necessary when Congress exercises the power to tax. Ronald J. Krotoszynski, Jr., Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine, 80 Ind. L.J. 239, 246 (2005).

157 Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

158 E.g. David A. Weisbach, Formalism in the Tax Code, 66 U. Chi. L. Rev. 860, 861 (1999) ("A common reaction to anti-abuse rules is horror. Anti-abuse rules seem to eliminate certainty and reliability in the tax law.")

159 See, e.g., Stewart, note 4, at 1672 (stating that the doctrine against delegation of legislative powers to the executive "appears ultimately to be bottomed on contractarian political theory running back to Hobbes and Locke, under which consent is the only legitimate basis for the exercise of the coercive power of government"); Beermann, note 153, at 77 ("A key formal method Congress employs to control executive discretion is to nip discretion in the bud by legislating with precision."); Mashaw, note 20, at 314.

subject to the same rules applied in the same manner).[160] Further, statutory language is a public and transparent way of communicating these details. Tax statutes can seem complex and inscrutable, but for tax experts, detailed statutes can make clear exactly what policy Congress is pursuing.[161] This constrained sort of delegation matches the "transmission belt" model of administrative law that described rulemaking prior to the rise of the modern administrative state.[162]

Along the same lines, congressional directives via legislative history contribute to political accountability, linking congressional decisionmaking with tax policy as carried out via regulations. Explicit legislative history in the form of explanations of tax provisions produced by the JCT prior to enactment promotes transparency—making clear that Congress has directed tax regulations—and provides notice of Congress' policy decisions because legislative history is publicly available. Greater consistency by Treasury and the courts in following congressional directives—when those directives result from JCT analysis and preemptive gap filling that Congress has relied on in the legislative process—would strengthen this line of political accountability, and is further contemplated in Part V.

Political accountability by way of Congress is particularly well suited to tax policymaking, because equity is a fundamental consideration in tax policymaking. Evaluating and managing equity is not susceptible to clinical, objective analysis; as Louis Kaplow pointedly observed, the criterion of equity in tax policy is "guided largely by intuition."[163] If decisionmaking is in the hands of Congress, that intuition becomes "a political decision about whose constituents will pay how much to the Treasury."[164] The cynical view of congressional decisionmaking in tax policy matters is that it is driven by, and therefore serves, powerful special interests.[165] But the alternative view is that

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[160] See note 60 and accompanying text (discussing nonarbitrariness and rule of law considerations); Bressman, note 60, at 462-68; Stack, note 60, at 1992-93.

[161] See note 59 and accompanying text (discussing transparency); Kagan, note 57, at 2332.

[162] Stewart, note 1, at 1676.

[163] Louis Kaplow, The Theory of Taxation and Public Economics 38 (2008); cf. Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391, 398 (1987) (stating that "[o]nce some redistributions of income are accepted as legitimate governmental goals, the line-drawing problem becomes impossible for courts").

[164] Richard L. Doernberg & Fred S. McChesney, Doing Good or Doing Well? Congress and the Tax Reform Act of 1986, 62 N.Y.U. L. Rev. 891, 896 (1987) (reviewing Jeffrey H. Birnbaum & Alan S. Murray, Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform (1987)).

[165] See, e.g., Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U. Penn. L. Rev. 1, 64–111 (1990) (describing public choice theory and critiquing it as incomplete); Linda

Congress can effectively aggregate constituent preferences in a way that is desirable.[166]

Particularly compared to the alternatives, Congress is uniquely well positioned to adopt tax policies that are fair (recognizing that there are many competing visions of what constitutes fair tax policy), and to adjust those policies in a satisfactory way based on pressure from the electorate.[167] The legislative process for tax legislation is designed to recognize explicitly the trade-offs involved in raising revenue. Revenue estimates and distributional analysis from the JCT are the best and most transparent information available on the effects of tax policy decisions.[168] This sort of analysis is not currently replicated in the regulatory process. And the omnibus nature of tax legislation, addressing many different tax provisions at once, offers advantages for political accountability as compared to the regulatory process in which distinct provisions are considered independently. Congress can make trade-offs between competing taxpayer groups, and can do so on distributional or fairness grounds (rather than shrouding distributional decisions in technical justifications). The PAYGO rules and budget reconciliation framework forces these trade-offs into the legislative process as well.

Further, Congress is designed to be responsive to the electorate—no other constitutional body is closer to voters—and tax legislation receives special constitutional treatment attempting to make it responsive to popular sentiments.[169] Fairness is front and center in most

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Sugin, Invisible Taxpayers, 69 Tax L. Rev. 617, 665 (2016) ("[T]he political process is unlikely to resolve the problems faced by invisible taxpayers.").

166 See Nina A. Mendelson, Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives, 78 N.Y.U. L. Rev. 557, 578 (2003) (describing the potential for Congress to be responsive to the "popular will"). Sugin does not endorse Congress as the preferable institution for setting tax policy, but she notes that the millions of "little people" who are "economically indispensable" as taxpayers generally do not have "enforceable rights in the administrative or judicial structure." Sugin, note 165, at 617. Of course, these people are (or can be) voters.

167 Cf. Edward A. Zelinsky, James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions, 102 Yale L.J. 1165, 1178 (1993) ("[T]ax committees and agencies with more numerous and diverse constituencies are less likely to be captured than direct expenditure institutions subject to fewer and more homogeneous pressures.").

168 See, e.g., notes 85-91 and accompanying text; Staff of Joint Comm. on Tax'n, 108th Cong., JCX-1-05, Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation 2-8 (2005), http://www.jct.gov/x-1-05.pdf (providing a summary of the JCT's revenue-estimating responsibilities).

169 The Origination Clause, U.S. Const. art. I, § 7, cl. 1, requires that tax legislation be adopted first by the House of Representatives (rather than the Senate) because the Founders agreed that revenue raising-legislation is particularly sensitive, and decided that revenue raising must be controlled by the more democratically accountable part of the legislature. See 1 Annals of Cong. 361 (Joseph Gales ed., 1789). It is generally accepted that today this is a matter of minor inconvenience for House and Senate leadership rather

tax policy debates and is a perennial issue in elections,[170] so there are good reasons to think that Congress is attentive to fairness in tax policy. If Congress is known to be responsible for the details of tax policy as well as the broad overall policies, that is, if congressional control as described in this Article is accepted by courts and commentators, it would bolster congressional accountability to constituents.

Analysis of tax regulations at the agency level narrows the focus as compared to congressional consideration: Each proposed regulation is viewed in isolation and the overall trade-offs may be unclear.[171] This silo effect of regulatory policymaking is particularly problematic given the long-term nature of tax policy decisions. The revenue raised by each distinct tax regulation can affect how much the government can spend, and how much it must borrow and tax in the future. Therefore, each tax provision affects taxpayers and government policy beyond the immediate and obvious impact on the taxpayers who are subject to the proposed regulation.[172] In contrast, it makes sense for Congress to consider details of tax policy with the benefit of revenue estimates and in the form of omnibus tax legislation that deals with many different tax provisions all at once.

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than a real impediment to tax policymaking occurring in the Senate. Rebecca M. Kysar, The "Shell Bill" Game: Avoidance and the Origination Clause, 91 Wash. U. L. Rev. 659, 659 (2014). Scholarly investigation of tax legislation is grounded in an understanding of the tax legislative process that does not vary from the legislative process for other types of legislation. Scholars have, at time explicitly, "assume[d] that tax legislation is not meaningfully different from nontax legislation." Michael Doran, Tax Legislation in the Contemporary U.S. Congress, 67 Tax L. Rev. 555, 572 (2014) (describing this assumption by Richard Doernberg and Fred McChesney, and characterizing it as "sensibl[e]"). But see Susannah Camic Tahk, Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking, 50 Harv. J. Legis. 67, 82 (2013) ("Congress's procedures and rules treat tax laws differently than other laws.").

[170] See, e.g., David M. Herszenhorn, House G.O.P. Leader Signals He's Open to Obama Tax Cut, N.Y. Times (Sept. 12, 2010), http://www.nytimes.com/2010/09/13/us/politics/13cong.html?mcubz=1 (in advance of the 2010 mid-term election); President's Advisory Panel on Federal Tax Reform, Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System (2005), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Fix-Tax-System-2005.pdf; Nat'l Comm'n on Fiscal Responsibility & Reform, The Moment of Truth 6 (2010), momentoftruthproject.org ("The President and the leaders of both parties in both chambers of Congress asked us to address the nation's fiscal challenges in this decade and beyond. We have worked to offer an aggressive, fair, balanced and bipartisan proposal . . . ."); see Sugin, note 165, at 655-56 (stating that fairness is a common consideration in public debates about tax policy).

[171] One aspect of political accountability for an agency's actions is to "make manifest the trade-offs generated by its rulemaking." Seidenfeld, note 52, at 149.

[172] See notes 205–04 and accompanying text (discussing the challenge of representing the interests of future taxpayers in the notice-and-comment process).

2. *Reliance on Expertise*

Another common justification for congressional delegations to agencies is that agencies have a "comparative advantage" over Congress "in terms of expertise."[173] This reliance on agency expertise is also used to justify judicial deference to agencies under *Chevron*.[174] But the JCT gives Congress unusual technical expertise that it can apply to tax legislation. As detailed in the previous Section, the JCT helps Congress formulate policy at the earliest planning stages, helps draft statutory language, provides technical expertise during committee work, prepares explanations, and generates revenue estimates and distributional tables.[175] In the assessment of two former Treasury officials, "[t]he Joint Committee staff has maintained over the years a level of institutionalized expertise that, though analogous to the Treasury within the executive branch, is quite unusual within Congress."[176] Thus the typical policymaking tension—between congressional decisionmaking that lacks expertise, and agency decisionmaking that benefits from expertise but requires political accountability from some other source—is moderated by Congress' unusual tax expertise housed in the JCT.

Further, this expertise consistently comes to bear on tax policymaking in Congress, because the details of tax legislation are so important for revenue estimates, and revenue estimates are an inextricable feature of the tax legislative process. Broad delegations make revenue estimates difficult, but detailed directives to agencies that leave little question about what policy Treasury and the IRS will implement are much more conducive to revenue estimates. As the JCT works with legislators and their staffs to produce tax legislation, they fill in gaps that might—absent congressional capacity to perform the work, and absent the necessity for purposes of estimating revenue—be left to agency personnel in another context.

3. *Taxpayer Certainty*

Congressional control promotes certainty in tax policy, particularly as compared to models of administration where political accountability flows from other sources. Certainty for taxpayers is an important

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173 Hines & Logue, note 69, at 261.

174 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (explaining that congressional delegations may be motivated by the understanding "that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so").

175 See Subsection III.A.1.

176 George P. Schultz & Kenneth W. Dam, Economic Policy Beyond the Headlines 63 (1977).

feature of federal tax law because administering the tax system relies on self-assessment by taxpayers. The rules, thus, anticipate taxpayers arranging their affairs to comply with the laws. Certainty in tax administration encapsulates both (1) clarity as to the meaning of tax laws, and (2) consistency as to how those laws are applied over time.

Highly detailed statutes and explicit legislative history contribute to clarity because as soon as a bill is enacted, taxpayers and tax practitioners can have a clear view of the meaning and planned application of specific provisions. Often the legislative history accompanying tax legislation provides the most easily understood explanation of the intended meaning of a statutory provision.[177]

Further, these statutes and legislative history contribute to consistency over time because they are immutable post-enactment; they each contribute to a fundamental stability in the tax system. In contrast, if the tax system were characterized by broad delegations that could be recast as political winds shifted, tax administration might take on a much different character and certainty would be undermined.[178] Consistency has potential downsides as well, though. For example, requiring Treasury to adhere to congressional mandates as contemplated here may reduce dynamism and flexibility to adjust to changing circumstances, because congressional control is carried out through the legislative process. Perhaps if Congress legislated in broad delegations, Treasury could be more responsive to changing circumstances, and maybe broad delegations would lead to a less complex scheme of tax regulations.[179]

IV. What About Notice-and-Comment Rulemaking?

Arguments that administrative agencies should yield to Congress have been around for a long time under the auspices of the nondelegation doctrine; a regular retort to nondelegation critiques is that the notice-and-comment process (or something like it) is preferable to congressional control on normative grounds.[180] The argument is that

[177] Indeed, the IRS regularly includes committee reports based on JCT explanations in the Internal Revenue Bulletin, a regular publication featuring guidance (mostly produced by Treasury and the IRS) on tax laws and procedures. IRS Online Bulletins, https://www.irs.gov/irb (last visited Nov. 14, 2017).

[178] But see Hines & Logue, note 69 (arguing that Congress should insulate tax policy from political winds by making broader delegations of taxing authority).

[179] Or maybe not. Some scholars have critiqued the tax legislative process as gridlocked. See, e.g., Daniel Shaviro, When Rules Change: An Economic & Political Analysis of Transition Relief and Retroactivity 86–87 (2000); Doran, note 169, at 556-57.

[180] See notes 72-74; see also Hickman & Thomson, note 49, at 308 ("Providing for direct, meaningful public involvement through prepromulgation notice and comment procedures inserts an element of democracy into the rulemaking process and thereby legitimates resulting rules.").

the notice-and-comment process is a mechanism for establishing political accountability as a check on agency decision making, and for stimulating information for agency experts to use in shaping regulatory policies.[181] Advocates of interest group models—that is, forms of administrative decision making that rely on input from stakeholders—argue that "[t]he best way to constrain discretion is to encourage competition among interest groups in rule making."[182] But achieving those normative benefits through notice and comment is not guaranteed—it demands robust and diverse participation in the process, which appears to be lacking in tax rulemaking, as discussed below.

This Part provides an empirical snapshot—the first in the post-*Mayo* era—of the participants in notice-and-comment processes for tax regulations.[183] This data analysis reveals that notice and comment for tax regulations has not elicited broad or diverse input, and thus has not been a forum for soliciting reliable information for Treasury experts to rely on in shaping tax regulations. Rather, there often has been very close to zero participation in most notice-and-comment processes. Further, the data show that the few participants have been heavily weighted towards private interests, often sophisticated business taxpayers seeking to reduce tax liability in ways that were wholly predictable and anticipated when Congress addressed the issue.

In order to understand who participates in the notice-and-comment process, I reviewed all of Treasury's proposed tax regulations from 2013, 2014, and 2015, and analyzed who commented on each, with particular attention to comments submitted by organized interest groups. The findings are summarized in Table 1, below. The analysis of each proposed regulation and commenter is described in further detail in Appendix I, and each proposed regulation included in this study is summarized in Appendix II.

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181 See Catherine M. Sharkey, *State Farm* "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight, 89 N.Y.U. L. Rev. 1589, 1591 (2014) (describing the information-producing function of administrative procedures).

182 See Freeman, note 67, at 18. Freeman does not subscribe to this argument, noting that it relies on the unquestioned assumption that agency discretion should be constrained. See id.

183 Hickman conducted a study of the substantive focus of tax regulations to shed light on the extent to which the regulations are focused on tasks other than raising revenue; this study covered regulatory activity before and after *Mayo*, and did not include analysis of who participates in the notice-and-comment process. Hickman, note 9.

TABLE 1
Number of Comments Received on Proposed Tax Regulations, 2013-2015

Category	*Number of Proposed Rules*	*Total Number of Comments*	*Mean Number of Comments*	*Median Number of Comments*	*Mode Number of Comments*	*Range*
Proposals Receiving 500+ Comments	6	315,196	52,533	26,076.5	-	555 – 175,885
Proposals Receiving Less Than 500 Comments	100	1540	15.4	3	0 (26 instances)	0 – 210

TABLE 2
Who Commented on Proposed Rules Receiving 500 or Fewer Comments, 2013-2015

	Private Interest[184]	*Private Individual*[185]	*Public Interest*[186]	*Government*[187]
Total Comments	733	543	137	127
Share of Total	47.6%	35.2%	8.9%	8.2%
Mean (comments per project)	7.3	5.4	1.4	1.3
Median	2.5	0	0	0
Mode	0 (35 instances)	0 (58 instances)	0 (81 instances)	0 (86 instances)
Range	0 - 74	0 - 144	0 – 57	0 - 58

184 Private interests consist of taxpayer organizations (for example, business entities) who are directly affected by a proposed rule, or their representatives. See Appendix I.

185 Private individuals consist of individuals, who often are taxpayers affected by a proposed rule, and although they are interested citizens not directly affected by a proposed rule.

186 Public interest consist of nongovernmental organizations with public interest missions, educational or policy organizations (or individuals affiliated with such organizations), and general membership advocacy organizations, among other categories, and persons affiliated with such organizations. As described in further detail in Appendix I, lawyers' groups like the American Bar Association have been categorized as public interest group submissions or private interest group submissions based on the substantive content of the comment (often these comments align with client interests). See note 235 (discussing the categorization of the American Bar Association).

187 Government includes members of Congress, state and local elected representatives, and officials from federal, state, and local units of government; some are publicly inter-

In tax rulemaking, most proposed rules received very few comments. Over the three-year period, only six proposed rules, 5.6% of the total, received more than 500 comments, whereas 76% of proposed rules received twenty or fewer comments. Of six high-comment proposed regulations, three dealt with nontax rules, that is, addressed regulation of behavior that was not really related to the core Code function of raising revenue.[188]

As elaborated in Table 2, in the other 95% of proposed rules more than one quarter received zero comments, and the median rule received just three comments. Further, the commenters were heavily weighted towards private interests. Almost half of all comments were submitted by taxpayer organizations (for example, business entities or trade groups) that were directly affected by a proposed rule, or representatives of these organizations. These types of organizations participated in 65% of the rulemakings (65 out of 100, and 71 out of 106 overall).[189]

On the other hand, public interest groups—nongovernmental organizations with public interest missions, educational or policy organizations (or individuals affiliated with such organizations), and general membership advocacy organizations, among other categories, and persons affiliated with such organizations—participated in just 19% of rulemakings receiving 500 or fewer comments (19 out of 100), and 24% overall (25 out of 106). These organizations submitted 8.9% of all comments, but those comments were not evenly distributed: 91 out of the 137 total public interest comments were submitted in response to two proposed rules. One of those rules was a proposal to allow states to set up tax-free accounts to benefit disabled individuals, which prompted comments from a number of disability rights advocacy organizations.[190] The other rule dealt with rules for hospitals to assess "community health needs" under the Affordable Care Act.[191] Removing those two rules from consideration, public interest groups submitted just 3.5% of the comments on the other proposed regulations

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ested, and some are addressing rules that affect a particular constituent group or government operations. See Appendix I.

[188] Tax rules that relate to raising revenue might define the tax base, facilitate the reporting of income, or establish rules to prevent the avoidance of tax liability. In contrast, the three proposed rules referenced above dealt with (1) regulating political activities of social welfare organizations, Prop. Reg. § 1.501(c)(4)-1; (2) regulating multi-employer pension plans, Prop. Reg. § 1.432(e)(9)-1 (2015); and (3) establishing health coverage requirements for the employer mandate penalty enacted as part of the Affordable Care Act, Prop. Reg. § 54.4980H-1 to H-6 (2013).

[189] Although I did not tally the total numbers of participants for projects receiving over 500 comments, I spot checked and confirmed that different categories of potential participants did in fact take part in the notice-and-comment process for each project.

[190] Prop. Reg. § 1.529A.

[191] Prop. Reg. § 1.501(r) (2013).

(ninety-eight proposed regulations in total). Thus, the bulk of comments from public interest groups addressed regulations that are unrelated to the core Code function of raising revenue; these public interest groups were nearly totally absent from commenting on substantive tax regulations.

Scholars have found—and expressed concerns about—low public interest participation in rulemaking undertaken by other agencies. For example, a study of EPA air pollution regulations found that public interest groups submitted 4% of comments and participated in 48% of notice-and-comment processes.[192] A study of forty rules proposed by the Department of Labor and the Department of Transportation found that public interest groups submitted 6% of comments.[193] Other studies have made similar findings.[194]

In general most tax rulemaking appears to have very low salience with public interest groups, which sets up a dynamic that James Q. Wilson anticipated in his theoretical work on group dynamics in regulatory government.[195] Wilson divides the "politics of regulation" into a four-part typology based on whether the policy has diffuse or concentrated costs and benefits.[196] He predicts imbalanced participation in the regulatory process when there are concentrated costs and diffuse benefits.[197] Traditional tax rulemaking—oriented towards raising revenue—fosters an imbalanced group dynamic on both sides of the ledger. On one side, small groups can face enormous potential costs,

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[192] Wendy Wagner, Katherine Barnes & Lisa Peters, Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards, 63 Admin. L. Rev. 99, 128–29 (2011) (in contrast, industry interests submitted 81% of comments).

[193] Jason Webb Yackee & Susan Webb Yackee, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. Pol. 128, 133 (2006) (noting that industry interests submitted over 57% of comments).

[194] For example, another study examined the participants in the notice-and-comment process for eleven rules total, three issued by the Department of Housing and Urban Development, three by the EPA, and five by the National Highway Traffic Safety Administration in the early 1990's. It found that of the rules with more than one comment, 50% of rules elicited a public interest group commenter, and public interest groups constituted 4.8% of all comments. Marissa Martino Golden, Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?, 8 J. Pub. Admin. Res. & Theory 245, 251, 253-55, exhibits 2A-C (1998). Mariano-Florentino Cuéllar's case study of three proposed rules—one addressing privacy of financial information proposed by Treasury's Financial Crimes Enforcement Network, one issued by the Nuclear Regulatory Commission, and one issued by the Federal Election Commission—found *no* public interest commenters for the financial privacy rule, a result that was replicated many times over in the regulations reviewed in the study for this Article. Mariano-Florentino Cuéllar, Rethinking Regulatory Democracy, 57 Admin. L. Rev. 411, 443 (2005); see notes 203–204, and accompanying text (discussing new public interest groups focused on financial regulations).

[195] James Q. Wilson, The Politics of Regulation, in The Politics of Regulation 357 (James Q. Wilson ed., 1980).

[196] Id. at 367–71.

[197] Id. at 370.

and can have homogenous interests; for example, businesses in a particular industry or using similar tax planning techniques will be affected by proposed rules in the same ways (and businesses already constitute a form of organized interest). This is typical of regulation that adversely affects any business interest (for example, environmental regulations or financial industry regulations). On the other side, the parties that stand to benefit from *other taxpayers'* funding of government operations are extremely diffuse, in a way that sets revenue raising apart from other regulatory pursuits (at least in degree, if not in kind).[198] The interests that come to bear in tax rulemaking are discussed in further detail below.[199]

Because of the enormous monetary value of some of these tax regulations to distinct taxpayers, the incentives are such that any rational taxpayer should be willing to spend vast sums to change or defeat a proposed regulation. Rationality in the tax context requires a significant degree of sophistication: Taxpayers must engage in tax planning, which is best done using advisors who are experienced with the transactions and structures at issue, and perhaps even using nonpublic information about how best to structure deals to take advantage of particular tax rules. And sophisticated taxpayers know that enormous tax benefits will hinge on highly technical interpretations of the Code. For example, in the recent *Dominion Resources* case, a regulation (requiring taxpayers to capitalize a particular cost rather than expense it) increased a single taxpayer's taxable income by $3.3 million.[200] Even more extreme examples arise with multinational corporations that have current tax rates approaching zero for income that is excluded from the U.S. income tax base (compared to a much higher marginal tax rate for income that is included in the U.S. income tax base).[201]

To counteract the interests of well-organized groups facing concentrated costs, Wilson looks to "[p]olicy entrepreneurs," individuals who work to galvanize public interest positions despite the coordination problems of organizing in support of diffuse benefits.[202] And, indeed,

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198 See Susannah Camic Tahk, Public Choice Theory and Earmarked Taxes, 68 Tax L. Rev. 755, 755, 761-63 (2015) (connecting Wilson's theory to tax policy, and summarizing that "income tax proceeds go into a pool of general revenues, whose funds benefit the large and yet diffuse and amorphous U.S. public as a whole. As a result of this arrangement, no particular beneficiary group has an incentive to prevent the tax base from shrinking . . . .").

199 See notes 205-04 and accompanying text.

200 Dominion Resources, Inc. v. United States, 681 F.3d 1313, 1314 (Fed. Cir. 2012). The taxpayer successfully challenged the regulation at issue. See id. at 1319 (stating that the regulation was invalid).

201 See Richard Rubin, Alphabet Is in Line as Winner in IRS Case, Wall St. J., Feb. 29, 2016, at B6 (stating that Google could gain $3.5 billion in an international tax dispute with the IRS); see also note 206 and accompanying text.

202 Wilson, note 195, at 370.

it seems possible that interest groups could emerge in the tax rulemaking context. This is precisely what has occurred in recent years with financial regulations: Commentators had anticipated that financial regulations (like tax regulations) might have particularly low interest group participation, but the response to Dodd-Frank regulations gives "reason to believe that new mobilization forces could alter the status quo."[203] Two public interest groups in particular—Better Markets Inc. and Americans for Financial Reform—have taken an active role in financial regulation rulemaking, submitting well over 100 comment letters each on proposed rules since 2012.[204] But there are no analogues to these organizations to be found in tax rulemaking processes, meaning that there are no groups that frequently and consistently submit public interest comments that are substantively sophisticated and benefit from familiarity with all the tax benefits to be derived from structuring details to benefit from specific tax rules.

As between current and future taxpayers, taxes are a zero-sum game: A failure to raise revenue currently implies a tax increase on future taxpayers.[205] However, future taxpayers are particularly poorly positioned to have organized groups representing their interests. To use the *Altera* case as an example, if opponents of the regulation prevail (meaning that the Tax Court's holding is affirmed by the Ninth Circuit), the government will lose approximately $3.5 billion in tax collections from prior tax years from Google alone.[206] That would mean that the government would have to come up with an additional $3.5 billion (and much more when lost revenue from other taxpayers is considered) to fund its future operations. But the ultimate bearer of

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[203] Sharkey, note 181, at 1649 n.259. While the author stated that financial regulations, like tax regulations, were unlikely to elicit a diversity of viewpoints through the notice-and-comment process, she described as a counterexample a 300-page public interest group submission in response to the SEC's proposed Volcker Rule in 2012, prepared by a newly-formed group called Occupy the SEC. Id.; see Occupy the SEC, Comment Letter, Prohibitions and Restrictions on Proprietary Trading and Certain Interests in and Relationships with, Hedge Funds and Private Equity Funds (Jan. 13, 2012), https://www.sec.gov/comments/s7-41-11/s74111-230.pdf.

[204] See Better Markets, http://www.bettermarkets.com/rulemaking (last visited Nov. 14, 2017) (listing Better Markets Inc.'s comment letters); Americans for Financial Reform, ourfinancialsecurity.org/category/regulatory-comment-letters/ (last visited Nov. 14, 2017) (listing Americans for Financial Reform's comment letters to regulators).

[205] See William G. Gale & Peter R. Orszag, An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004, 45 B.C. L. Rev. 1157, 1176 (2004) ("[T]ax cuts are not simply a matter of returning unneeded or unused funds to taxpayers. Tax cuts represent a choice by current voters either (1) to require future taxpayers to pay for current spending, or (2) to cut spending."); Daniel N. Shaviro, Reckless Disregard: The Bush Administration's Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap, 45 B.C. L. Rev. 1285, 1334 (2004).

[206] Rubin, note 201; see Altera Corp. v. Commissioner, 145 T.C. 91 (2015), appeal docketed, Nos. 16-70496, 16-70497 (9th Cir., argued on Oct. 11, 2017).

liabilities for debt accrued *now* is determined by *future* tax policy decisions. Therefore, when an attempt to raise revenue *currently* is derailed, it is unknown who will actually bear the burden in the future.

Further, future taxpayers are even less well-suited to be represented currently than are diffuse future interests in other policy areas. This dynamic sets tax rulemaking apart from financial regulations and other typical regulations, and makes the notice-and-comment process for tax rulemaking especially prone to a dearth of public interest group participation. Consider two alternative regulations that would cost a large financial institution $100 million per year. The first regulation would increase the financial institution's cost of capital by limiting the amount of leverage the bank can take on. The second regulation would levy a flat tax on the financial institution. One would expect that the financial institution will oppose—equally vehemently—the alternative regulations. With the financial regulation, organized public interest groups might naturally represent the interests of both current and future citizens: Consumer-oriented regulation adopted today (protecting the stability of financial markets) may confer benefits on current consumers and on future consumers.

But with the tax regulations, the connection between current and future interests is more attenuated, and it makes less sense for interest groups focused on current taxpayers also to take up the mantle of future taxpayers. Other current taxpayers will not immediately foot the bill if the financial institution defeats the regulation; instead, the liability will be borne by future taxpayers, based on future tax policy decisions. Thus, unlike the financial regulation, with the tax regulation there is not an immediate beneficiary, even a diffuse one.[207] Instead, the trade-off implicates the interest of future taxpayers who do not have any natural allies in the current regulatory process because they have interests that diverge from similarly situated current taxpayers. Moreover, the future taxpayers who will actually have increased taxes are unidentifiable when the notice-and-comment process takes place, because future tax liability generally depends on future decisions by Congress.[208]

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[207] There is a degree of path dependence in tax policy: Tax policy decisions today become existing tax policies for tomorrow, which suggests that raising revenue from future taxpayers requires raising revenue currently from similarly situated taxpayers. As discussed further in Section IV, the rulemaking process is not set up to confront these sorts of trade-offs. Subsection III.B.1. argues that Congress is better suited to this task.

[208] There are other barriers to publicly interested participation in Treasury's tax policymaking as well. For one, Treasury can abstain from enforcing laws, and typically has done so in ways that reduce tax collections (thus imposing a burden on other or future taxpayers). See, e.g., Lawrence Zelenak, Custom and the Rule of Law in the Administration of the Income Tax, 62 Duke L.J. 829, 834 (2012); Leigh Osofsky, The Case for Categorical Nonenforcement, 69 Tax L. Rev. 73, 85 (2015). A second barrier is limits on

Another important feature of the archetype notice-and-comment process is also missing from responses to many proposed tax regulations: These rules often do not seem to prompt useful data or insights to inform the rulemaking process. This conclusion is anecdotal, but it was exceedingly rare for taxpayers to provide actual information about the rule. More commonly, taxpayers describe the effects of a rule, but often when industry groups were opposed to a proposal, the descriptions were transparently in the service of avoiding higher tax liability. For example, in the regulation at issue in the *Altera* case, organizations representing *Altera* and other similarly situated taxpayers submitted thirteen comments, all of which opposed the proposal.[209] The thirteen private comments focused on statutory and regulatory interpretation,[210] clearly aimed at defeating a proposal that would cost the affected parties significant money. No public interest groups participated.

The survey presented here shows that, over a recent three-year period the notice-and-comment process did not elicit broad and diverse participation for most tax rulemaking. The dynamics explored above suggest that the lack of diversity of perspectives observed in the notice-and-comment process for almost all tax regulations is indicative of an endemic challenge in tax rulemaking. The skewed levels of participation as between private interests and public interests is rooted in the organizational capacities of the parties (sophisticated taxpayers on the one hand, facing off against diffuse future taxpayers). Further, to the extent that the notice-and-comment process is producing information that is used by Treasury personnel to inform tax regulations, they may be ending up with a "lopsided view of the universe."[211] And very often, the process produces so few substantive comments that it cannot be a useful source of information or a useful gauge of stakeholder preferences. Thus, the notice-and-comment process is most often a poor mechanism for achieving key normative goals of administrative law in the tax regulatory process.

This Part explores what congressional control of tax rulemaking means for application of the Administrative Procedure Act (APA) and judicial review doctrine to tax regulations, and for the broader

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taxpayer standing to raise claims in court. While a concentrated interest that is subject to a tax regulation can challenge the regulation in court (subject to a few limitations, such as the tax Anti-Injunction Act, see IRC § 7421; notes 40-41 and accompanying text), taxpayers or public interest groups cannot. See Sugin, note 165, at 652 (referring to the burdens placed on "invisible taxpayers" who are unable to defend their interests in the judicial process).

209 See *Altera*, 145 T.C. at 104-06.

210 T.D. 9088, 2003-42 I.R.B. 841 (Oct. 20).

211 Sharkey, note 181, at 1649.

discourse on political accountability and the balance of power between Congress, the executive branch, and the judiciary in tax policymaking. I propose adopting a "JCT Canon" for construing congressional delegations to Treasury. Agency personnel and courts should construe ambiguous tax provisions to conform to gap-filling performed by JCT in conjunction with its role in the tax legislative process—helping formulate and draft bills, and producing revenue and distributional estimates—as memorialized in JCT explanations that are incorporated in legislative history.

The JCT Canon is related to and similar to the recently introduced CBO Canon.[212] Under the JCT Canon, courts (and Treasury and IRS personnel) should construe ambiguous tax statutes in the same manner as the JCT did in producing revenue estimates and other analysis and explanations for the statute. Like the CBO Canon, this interpretive tool has "democratic bona fides" in that JCT analysis has been generated—and required—by Congress itself, and that analysis is front and center in congressional debates about proposed legislation.[213] And, as discussed in Section III.A, the JCT goes a step beyond the CBO by actually producing technical explanations of tax provisions, which serve to inform revenue estimates and become a part of the legislative history for enacted bills. In this respect, the JCT Canon may be even more useful for construing tax statutes than is the CBO Canon for other types of legislation, because the interpretive conclusion is publicly memorialized contemporaneously by the JCT staff.

The JCT Canon actually reflects an important practice that is central to federal tax administration: Taxpayers and their advisors frequently rely on JCT-produced legislative history to construe tax statutes and to anticipate future Treasury regulations. Longstanding Treasury regulations that govern how tax penalties are determined and how taxpayers may protect against certain penalties explicitly allow that taxpayers may look to "congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book)."[214] Taxpayer-driven statutory interpretation is especially important given the system of self-assessment that underlies federal in-

[212] The CBO Canon is "the concept that ambiguous statutes should be interpreted in accordance with the reading of the statute adopted by the Congressional Budget Office (CBO) in calculating its budgetary impact." Gluck, note 110, at 182.

[213] Id. at 188.

[214] Reg. § 1.6662-4(d)(3)(iii).

come taxation, and it is common practice to place significant emphasis on JCT insights and construction.

As a matter of statutory interpretation by courts, it may only be necessary to apply the JCT Canon in instances where the statutory language is ambiguous. Thus, when the congressional control model has produced a highly detailed statute that limits Treasury's rulemaking discretion even without regard to legislative history, the JCT Canon should not be relevant. However, in instances where the JCT-produced legislative history clarifies or informs the specific meaning of a statute, and, as is often the case, directs the substance of tax regulations, the JCT Canon will prove important. It also suggests a simple method for distinguishing certain tax legislative history from run-of-the-mill legislative history that does not necessarily provide democratic legitimacy in the same manner—for example, committee statements, colloquies, and so on.[215]

As suggested by the recent introduction of the CBO Canon by Abbe Gluck and Lisa Bressman, scholars have begun to explore the implications of the legislative process on rulemaking and accountability, suggesting that the realities of how Congress and agencies interact should be reflected in statutory interpretation.[216] To the extent that the characteristics of tax legislating that contribute to congressional control are not limited to tax—or need not be: Congress *could* limit the breadth of its delegations in other areas of law—the JCT Canon and focus on Congress in the regulatory process could have broader applicability. To that point, interpretation of regulations has received significant scholarly attention recently.[217]

There is extensive debate about the types of authorities judges should consult in construing statutes, including the extent to which it is appropriate to rely on legislative history at either step one or step two of *Chevron* (which connects to *State Farm* because courts and scholars are currently deliberating whether *State Farm* review is necessarily part of *Chevron* step two, that is, whether satisfying the rea-

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[215] There are many familiar critiques to judicial reliance on legislative history that I do not fully delve into here. See, e.g., Manning, note 106 (examining the textualist's view of legislative intent in the legislative process).

[216] Bressman & Gluck, note 84, at 764; see, e.g., Gluck, note 110, at 182 (elaborating on the CBO Canon and congressional-process based perspectives on statutory interpretation); Bressman & Gluck, note 84, at 969; Gluck et al., note 111, at 1839–44. Long before *Mayo*, Michael Livingston addressed some particulars of statutory interpretation and the use of legislative history to interpret tax statutes. See Livingston, note 100, at 833-35; Michael Livingston, Practical Reason, "Purposivism," and the Interpretation of Tax Statutes, 51 Tax L. Rev. 677, 678-79 (1996).

[217] Compare Kevin M. Stack, Interpreting Regulations, 111 Mich. L. Rev. 355 (2012) (arguing for purposive interpretation of regulations), with Jennifer Nou, Regulatory Textualism, 65 Duke L.J. 81 (2015) (arguing for textualist interpretation of regulations).

soned decisionmaking standard is necessary in order for courts to defer to agency action under *Chevron*).[218] The value of legislative history is discounted by some because it is not part of and subject to the constitutional enactment process, or it may be a means for judges to increase their discretion, or it may not reflect Congress' understanding of the statute, or it may be subject to manipulation.[219] In short, legislative history is suspect because in various ways it is an unreliable way to discern congressional intent.

But the process for producing legislative history for delegations of tax authority should allay some of these concerns. The production of legislative history in conjunction with tax delegations of authority is interwoven with the enactment process and with the production of revenue estimates.[220] Because committee reports are regularly derived from the explanations that the JCT has prepared in connection with revenue estimates and as part of the legislative process, this form of legislative history provides reliable insight as to Congress' understanding of the legislation when enacted. Thus, legislative history produced for tax legislation (in addition to being explicit and specific[221]) can be more reliable—that is, a good indicator of how members of Congress resolved and understood various issues—for construing tax delegations of regulatory authority than is legislative history for other types of regulatory delegations.

The JCT Canon is especially important following *Mayo* because now, for the first time, courts are expected regularly to apply general administrative law precedents to judicial review of tax regulations.[222] Scholars have viewed this as potentially disruptive to tax administration, because almost all tax regulations were drafted prior to *Mayo*, at a time when Treasury, courts, and taxpayers did not understand that all elements of the APA and general administrative law precedent might apply to tax rulemaking.[223] A key issue in judicial review of previously issued tax regulations is Treasury's decisionmaking process,

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218 See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Jerry L. Mashaw, Richard A. Merrill, Peter M. Shane, M. Elizabeth Magill, Mariano-Florentino Cuéllar & Nicholas R. Parrillo, Administrative Law: The American Public Law System 1011–12 (7th ed. 2014) ("[A] majority of the Court has occasionally been willing to find lack of clarity, not only by looking at legislative and statutory history, but by implicitly inverting the *Chevron* steps to consider Step 2 as a way of understanding whether there is clarity at Step 1."); note 30; note 27 (outlining the *Chevron* two-step analysis).

219 See Katzmann, note 106, at 40–42 (summarizing textualists' critiques of legislative history).

220 See Subsection III.A.3.

221 See id.

222 See Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44 (2011); Sections II.A and II.B.

223 See note 48 and accompanying text.

analyzed under *State Farm*'s "reasoned decision making" standard.[224] In *State Farm* the Court indicated that an agency decision would be arbitrary and capricious either if it "relied on factors which Congress has not intended it to consider" or if it "runs counter to the evidence before the agency."[225] If a reviewing court can determine that the content of a tax regulation was directed by Congress, and Treasury has construed the statute via regulation as directed through a detailed statute scheme or through explicit legislative history, that should be sufficient to satisfy the "relevant factors" inquiry of *State Farm* review.

For example, in *Altera* the regulation followed a congressional directive communicated via legislative history, but organizations representing Altera and other similarly situated taxpayers submitted thirteen comments, all of which opposed the proposal.[226] The comments included evidence (of questionable relevance) that Treasury's position was inconsistent with other regulations (regulations that, while similar, were not the subject of the same congressional directive). Treasury's final regulation either had to contradict the congressional directive, or contradict the "evidence" submitted during the notice-and-comment process. The Tax Court held that Treasury's explanation based on legislative history was inadequate because Treasury did not respond extensively to the comments it received.[227] Under the JCT Canon, the legislative history providing a congressional directive could be given greater emphasis, and Treasury would not be required to build an administrative record defending against comments where Congress contemplated the issue during the legislative process and limited Treasury's discretion. This approach would

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[224] The government appears to be concerned about *State Farm* review: Recently the IRS has taken the position in litigation that "[w]here an agency rule does not require fact-finding or empirical analysis, the data-based factors under *State Farm* do not apply." Brief for Respondent at 18, 3M Co. v. Commissioner, No. 5816-13 (T.C. June 29, 2016); see also note 30 (describing the Supreme Court's recent opinions addressing the extent to which *State Farm* is integrated with *Chevron* step two).

[225] Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); notes 31–32 and accompanying text. Recall that under *State Farm*, an agency rule must be "rational, based on consideration of the relevant factors." *State Farm*, 463 U.S. at 42. The Court explained that

> [n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43; cf. note 46 (describing the Tax Court's holding that Treasury failed to meet each of these requirements when it promulgated the regulation at issue in *Altera*).

[226] Altera Corp. v. Commissioner, 145 T.C. 91, 104-06 (2015), appeal docketed, Nos. 16-70496, 16-70497 (9th Cir., argued on Oct. 11, 2017); notes 148-52.

[227] *Altera*, 145 T.C. at 130.

allow for *Chevron* deference only when Treasury has engaged in the notice-and-comment process and adhered to the understanding of the provision developed by the JCT contemporaneous with enactment—even if some other aspects of "reasoned decision making" appear to be wanting—recognizing that Congress has directed Treasury's (or some other agency's) decisionmaking process.[228]

For regulations that Treasury proposes in the future, an approach to judicial review under *State Farm* that relies on the JCT Canon (and thus on legislative history) means that Treasury should be mindful in its preambles to explain the basis for the rule in terms of the statute and legislative history, and particularly to indicate when Congress used JCT analysis in the legislative process to limit the range of policymaking discretion granted to Treasury. This would constitute only a minor shift in emphasis for Treasury's practices for undertaking the notice-and-comment process and drafting preambles. As traditionally composed, preambles to tax regulations are an important tool for helping taxpayers understand the purpose and potential applications of tax regulations. Treasury has recently indicated that it will begin drafting its preambles with *State Farm* in mind.[229] It is unclear what precisely this change will entail: An approach modeled on other areas of law might place greater emphasis on building an administrative record with evidence to respond to comments. But if Treasury's preambles become the sort of adversarial litigation documents that agencies produce to defend other types regulations, it might undermine the utility of preambles for taxpayers and tax practitioners seeking to understand a statute and regulations.[230]

For existing regulations, the JCT Canon would provide some stability in the tax system: Courts reviewing regulations that predate *Mayo* should interpret regulations in a manner that is consistent with *State*

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[228] Some recent challenges to Treasury regulations indicate that judicial review still has bite even if a court considers only whether Treasury acted within the authority delegated by Congress. In two opinions since *Mayo*, courts have held against the government in disputes regarding regulations as matters of statutory interpretation. United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 489-90 (2012) (holding invalid a Treasury regulation because Congress had directly spoken to the question at hand); Dominion Resources v. United States, 681 F.3d 1313, 1318-19 (Fed. Cir. 2012) (holding that the statute and legislative history indicated that Congress did not intend to allow the regulation as promulgated by Treasury). These opinions both side-step the issues that courts confront under *State Farm*, although had these cases commenced after *Mayo* it seems likely that the taxpayers would have included claims of procedural deficiencies under *State Farm*. See Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondents, United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012) (No. 11-139), http:/papers.ssrn.com/sol3/papers.cfm?abstract_id=1989098.

[229] See Ryan Finley, Changes to Foreign Goodwill Rules Will Steer Clear of *Altera*, 152 Tax Notes 498 (July 25, 2016).

[230] See Shaviro, note 12.

Farm, but also consistent with Treasury practices that generally reflect attentiveness to the legislative process and the existence and role of the JCT. Where Treasury has failed to construe statutes consistent with JCT interpretations and has not otherwise provided a satisfactory justification for an existing rule, courts should invalidate regulations or—especially for regulations that predate *Mayo*—direct Treasury to explain its position more thoroughly (an extraordinary action that could be justified by the interest of stability in tax administration).[231]

This connects to a related issue: How should Treasury and courts approach tax regulations that do not feature the hallmarks of congressional control? For example, § 385 provides broad authority for regulations that distinguish between debt and equity, and Congress provided very little substantive guidance about how this authority might be wielded.[232] Where tax statutes consist of broad delegations to Treasury to set policy via regulation with little substantive guidance from Congress, the existence of the JCT has no bearing on Treasury's course of action, nor on judicial review of resultant regulations. In these instances, there will likely be a true lack of political accountability in most instances, with the notice-and-comment process yielding zero or very little participation. The congressional control model presented in this Article does not provide guidance for how to treat these other regulations, but the issue requires further consideration.

VI. Conclusion

At this important moment for tax administration, this Article makes the case that Congress has special capacity to control tax rulemaking by limiting Treasury's policymaking discretion through detailed statutory directives and explicit legislative history. The congressional control model described here helps avoid potentially disruptive consequences presented by other avenues for assimilating tax rulemaking with general administrative law. And congressional control fosters political accountability, allows for appropriate reliance on expertise in the policymaking process, and provides certainty for taxpayers. By recognizing Congress' capacity for preemptive gap filling, the JCT Canon would integrate the congressional control model with existing judicial review doctrine. Thus, congressional control of tax

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231 I am suggesting that some form of remand without vacatur would be appropriate, although the manner in which this remedy might map onto judicial review of tax regulations deserves further attention.

232 The Obama administration used § 385 authority to limit the benefits that corporations can derive from so-called inversion transactions, a context that Congress certainly did not anticipate when it enacted § 385 in 1969. See Prop. Reg. § 1.385-1, -2, -3; S. Rep. No. 91-552, at 137-39, reprinted in 1969-3 C.B. 423.

rulemaking is consistent with the "principles" of general administrative law that the Supreme Court emphasized in *Mayo*, and responds to the Court's request for justifications, grounded in administrative law, for taking a particularized approach to administrative review of tax law.

APPENDIX I
EXPLANATION OF RULEMAKING STUDY

The analysis of notices of proposed rulemaking (NPRMs) undertaken for this Article consisted of the following: With the help of a research assistant, I reviewed each tax-related notice of proposed rulemaking issued by Treasury in 2013, 2014, and 2015, covering a total of 106 distinct rulemaking projects, each of which is described in Appendix II.[233] Six projects elicited so many comments that I could not complete full analysis of the participants in those notice-and-comment processes. For each other NPRM, I categorized the substance of the proposed rule, categorized the identity of each commenter, and tallied the number of each type of commenter.

I categorized each comment submitted during the notice-and-comment process by commentator type as follows:

- *Private interests*, which consist of taxpayers (or their representatives) who are directly affected by a proposed rule, for example business entities that expect to pay additional tax, or persons or groups advocating on behalf of such entities. This category includes businesses, organizations with limited membership and specific subject interests, and trade organizations (for example, chambers of commerce, or industry-specific groups).
- *Public interests*, which consist of nongovernmental organizations with public interest missions, including policy organizations, think tanks, general membership advocacy organizations, and charitable organizations commenting as part of their public interest missions (that is, not in relation to their own tax liability).[234]
- *Private individuals*, which includes persons who submit reactions to the rule or sign petitions joining a comment on a rule (although petition signatures and form submissions are aggregated where possible). Note that the individual comments submitted in

[233] Using regulations.gov, I initially reviewed 171 docket folders identified as tax-related "proposed rules." Some items identified as proposed rules did not include actual NPRMs (for example, some of these docket folders contained notices that solicited input in advance of drafting a proposed rule). My initial review yielded 119 NPRMs, which consisted of 106 distinct regulatory projects (several projects involved more than one NPRM, so for purposes of this analysis, comments addressing the same substantive rule but split among multiple NPRMs are aggregated to a single project). Each distinct regulatory project is identified in Appendix II by an eight-character Regulation Identifier Number (RIN) as used on regulations.gov, which for rules administered by the IRS (that is, all the rules analyzed here) begins with 1545. A few NPRMs were not assigned an RIN, in which case they are identified by the IRS docket number, which consists of "IRS-" followed by an eight-digit number.

[234] Cf. Cuéllar, note 194, at 434 (distinguishing public interest participants in a similar manner in a study of participants in notice-and-comment processes).

response to tax NPRMs affecting corporations are almost universally not substantive (and very often even incoherent).

- *Government*, including members of Congress, state and local elected representatives, and state or local government departments or enterprises that have administrative obligations in connection with a tax measure (for example, Affordable Care Act provisions), or have an interest in the matter directly (for example, rules related to tax-exempt bonds).

Comments submitted by the American Bar Association and similar lawyers' groups are categorized as either private interest or public interest depending on the content of submission.[235]

[235] Despite often including disclaimers stating that lawyers who contribute to these comment letters are not working on behalf of any client, it appears to me that comments submitted by ABA-type groups often align with client interests. In some ways this makes sense: One would not expect lawyers who generally work on behalf of power plants to submit comments supporting environmental regulations detrimental to those clients, for example. But this bears further consideration, because these comments—and some of the comments provided by private interest groups—provide very useful insights and suggestions for technical corrections that Treasury often uncontroversially heeds. Cf. Michael Asimov, Public Participation in the Adoption of Temporary Tax Regulations, 44 Tax Law. 343, 366 (1991) (distinguishing the virtues of political accountability that result from the notice-and-comment process from the practical purpose of creating "better rules."). Of the twenty-six comments submitted by ABA-type groups in total over the three-year study, ten of those comments were publicly interested in substance, and sixteen comments were promoting private interests.

APPENDIX II
SUMMARY OF NPRMS REVIEWED

The table that follows summarizes all of the NPRMs reviewed in this study. Each entry in this Appendix includes a brief description of the purpose of the provision, and the number of each type of commenter.

	RIN	*NPRM Date*	*Issue and Proposed Regulation Cite*	*Total Number of Comments*	*Number of Private Interest Comments*	*Number of Private Individuals*	*Number of Public Interest Comments*	*Number of Gov't Comments*
1	1545-BL81	11/29/13	Guidance to tax-exempt social welfare organizations on political activities related to candidates that will not be considered to promote social welfare. Prop. Reg. § 1.501(c)(4)-1.	175,885				
2	1545-BM69	04/24/15	Limiting use of foreign reinsurance companies to shield investment income. Prop. Reg. § 1.1297-4.	84,508				
3	1545-BL94	09/17/15	Requirement for charitable organizations to provide substantiation or report donations over $250 in value. Prop. Reg. § 1.170A-13.	38,033				
4	1545-BL68	03/04/15	Regulations regarding the filing of information returns to report winnings from bingo, keno, and slot machines. Prop. Reg. § 1.6041-10.	14,120				
5	1545-BM66	06/19/15	Rules for underfunded multiemployer plans to reduce and suspend benefits under Multiemployer Pension Reform Act. Prop. Reg. § 1.432(e)(9)-1.	2095				
6	1545-BL33	01/02/13	"Shared responsibility payment" for employers under Affordable Care Act. Prop. Reg. §§ 54.4980H-1, -2, etc.	555				

	RIN	*NPRM Date*	*Issue and Proposed Regulation Cite*	*Total Number of Comments*	*Number of Private Interest Comments*	*Number of Private Individuals*	*Number of Public Interest Comments*	*Number of Gov't Comments*
7	1545-BM68	06/22/15	Tax expenditure: Requirements for states to set up "ABLE" accounts to benefit disabled individuals with no taxable gift. Prop. Reg. §§ 1.529A-1, -2, etc.	210	12	111	57	30
8	1545-BM12	07/23/15	Rules on disguised payments for services from partner to partnership. Prop. Reg. §§ 1.707-1, -9, etc.	160	10	144	5	1
9	1545-BM43	05/06/15	Rules for treating publicly-traded partnerships with income from minerals and natural resources activities as corporations. Prop. Reg. § 1.7704-4.	137	47	90	0	0
10	1545-BL26	09/09/13	Affordable Care Act: Information reporting by large employers regarding 4980H compliance (employer shared responsibility requirements). Prop. Reg. §§ 301.6011-9, 301.6056-2.	104	39	4	3	58
11	1545-BL30	04/05/13	Affordable Care Act: Guidance on community health needs assessments for charitable hospitals. Prop. Reg. §§ 1.501(r)-1, -2, etc.	100	50	9	34	7
12	1545-BL20	03/04/13	Affordable Care Act: Fee on health insurance providers. Prop. Reg. §§ 57.1, 57.2, etc.	86	74	7	0	5

	RIN	*NPRM Date*	*Issue and Proposed Regulation Cite*	*Total Number of Comments*	*Number of Private Interest Comments*	*Number of Private Individuals*	*Number of Public Interest Comments*	*Number of Gov't Comments*
13	1545-BL36	01/31/13	Affordable Care Act: Rules for "shared responsibility payment" for individuals not maintaining coverage. Prop. Reg. §§ 1.5000A-1, -2, etc.	66	43	20	2	1
14	1545-BM86	09/02/15	ERISA: Administering vote of plan participants before suspending benefits under Multiemployer Pension Reform Act. Prop. Reg. § 1.432(e)(9)-1.	52	3	49	0	0
15	1545-BL43	05/03/13	Affordable Care Act: Health insurance premium tax credit - guidance for employers. Prop. Reg. §§ 1.36B-2, -3, etc.	51	36	9	5	1
16	IRS-2012-0002	12/05/13	Payments to foreign investors treated as dividend equivalents for withholding purposes. Prop. Reg. §§ 1.871-14, -15. (Corporate)	48	45	0	1	2
17	1545-BL72	03/06/14	Reporting and withholding requirements for foreign financial entities under Foreign Account Tax Compliance Act. Prop. Reg. §§ 1.1471-1, -2, etc. (Corporate)	41	40	0	0	1
18	1545-BL31	09/09/13	Affordable Care Act: Guidance to health care providers for reporting requirements. Prop. Reg. § 1.6055-1, -2.	35	34	0	0	1

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19	1545-BH38	09/16/13	Tax expenditure: Regulations of certain aspects of tax-exempt bonds. Prop. Reg. §§ 1.141-1, -2, etc.	25	11	0	0	14
20	1545-BM05	05/14/14	Clarifying definition of real property for REIT purposes. Prop. Reg. § 1.856-10.	23	11	12	0	0
21	1545-BM70	12/23/15	Administration: Implementing template for information reporting as adopted by OECD BEPS project (country-by-country reporting). Prop. Reg. § 1.6038-4.	20	10	0	10	0
22	1545-BM85	09/01/15	Affordable Care Act: Determining whether employer-sponsored plans provide "minimum value" for premium tax credit eligibility. Prop. Reg. § 1.36B-6.	19	11	6	1	1
23	IRS-2009-0030	08/27/15	Tax expenditure: 9% bonus deduction for qualified production activities related to oil and for qualified films. Prop. Reg. §§ 1.199-1, -2, etc.	19	19	0	0	0
24	1545-BM23	07/28/14	Affordable Care Act: Health insurance premium tax credit - guidance for individuals. Prop. Reg. §§ 1.36B-2, -3, etc.	17	10	2	5	0

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25	1545-BJ56	09/18/15	Defining options for purposes of withholding under Foreign Account Tax Compliance Act. Prop. Reg. §§ 1.871-15, 1.441-1. (Corporate)	17	13	3	1	0
26	1545-BL87	09/16/15	Rules for non-recognition treatment on outbound transfers of intangible property (goodwill). Prop. Reg. §§ 1.367(a)-1, -2, etc. (Corporate)	16	15	1	0	0
27	1545-BM10	10/23/15	Amending regulations to treat marriages of same-sex couples the same as opposite-sex couples. Prop. Reg. §§ 1.7701-1, 20.7701-2, etc.	15	5	8	2	0
28	1545-BL47	12/02/13	Guidance on computation of net investment income tax. Prop. Reg. §§ 1.1411-3, -4, etc.	15	11	4	0	0
29	1545-BL55	08/26/13	Affordable Care Act: Tax credit for small employers offering health insurance. Prop. Reg. §§ 1.45R-1, -2, etc.	14	3	11	0	0
30	1545-BM38	08/27/14	Affordable Care Act: Procedures for providing information about contraceptive coverage for organizations with eligible religious objections. Prop. Reg. § 54.9815-2713A.	14	12	2	0	0

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31	1545-BL62	09/19/14	ERISA: Guidance on adjustments to interest rates for calculating benefits under hybrid retirement plan. Prop. Reg. § 1.411(b)(5)-1.	14	14	0	0	0
32	1545-BJ43	09/10/15	Gifts, trusts, and estates: Tax on U.S. citizens who receive certain gifts from "covered expatriates." Prop. Reg. §§ 28.2801-1, -2, etc.	14	3	11	0	0
33	1545-BL91	01/27/14	Affordable Care Act: Requirements for "minimum essential coverage" (related to shared responsibility payment). Prop. Reg. §§ 1.5000A-2, -3, etc.	13	8	2	3	0
34	1545-BL42	07/02/13	Affordable Care Act: Reporting requirements for exchanges (related to health insurance premium tax credit). Prop. Reg. § 1.36B-5.	13	7	1	1	4
35	1545-BJ16	01/07/13	Administration: Establishing truncated Taxpayer Identification Numbers for certain reporting purposes. Prop. Reg. §§ 1.6042-4, 1.6042-4, etc.	11	7	4	0	0
36	1545-BJ31	01/29/13	Administration: Requirements for employers paying employment taxes. Prop. Reg. § 31.3504-2.	11	3	8	0	0

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37	IRS-2013-0027	09/06/13	Tax expenditure: Refining definition of research and experimental expenditures for section 174 deduction. Prop. Reg. § 1.174-2.	11	8	3	0	0
38	1545-BM49	08/13/15	Administration: Changing rules for extensions for filing Form W2. Prop. Reg. § 1.6081-8.	11	10	1	0	0
39	1545-BK88	04/02/13	Limiting deduction for remuneration to certain highly-compensated employees of health insurance company. Prop. Reg. § 1.162-31.	9	9	0	0	0
40	1545-BL61	11/15/13	Special rules for remuneration to Indian tribe members in connection with fish rights. Prop. Reg. § 1.415(c)-2.	9	8	1	0	0
41	IRS-2015-0002	01/20/15	Tax expenditure: Guidance on credit for increasing research activities and delineating computer software developed for internal use. Prop. Reg. § 1.41-4.	9	8	1	0	0
42	1545-BK29	01/30/14	Rules on disguised sales of property to a partnership and treatment of recourse liabilities. Prop. Reg. §§ 1.707-2, -3, etc.	7	5	1	1	0

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43	1545-BM59	03/13/15	Amending rule requiring broker reporting of customer's basis in securities transactions. Prop. Reg. §§ 1.6045-1, 6045A-1, 6049-10. (Corporate)	7	7	0	0	0
44	1545-BK66	12/31/13	Ownership rules and filing requirements for passive foreign investment companies. Prop. Reg. §§ 1.1291-1, 1.1298-1, etc.	6	4	2	0	0
45	1545-BI82	11/20/15	Rules regarding innocent spouse relief and res judicata. Prop. Reg. §§ 1.6015-1, -2, etc.	5	3	1	1	0
46	1545-BM04	07/28/14	Changes to method of accounting for gains and losses from money market funds. Prop. Reg. § 1.446-7.	5	5	0	0	0
47	1545-BK51	08/13/13	Requirements for requesting innocent spouse relief / joint and several liability. Prop. Reg. § 1.6015-5.	4	0	1	3	0
48	1545-BK96	08/02/13	Rules to coordinate controlled group rules with regulated investment company rules. Prop. Reg. § 1.851-5. (Corporate)	4	4	0	0	0
49	1545-BL17	03/06/14	Coordinating rules for withholding and reporting under Foreign Account Tax Compliance Act. Prop. Reg. §§ 1.871-14, 1.1441-1. (Corporate)	4	4	0	0	0

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50	1545-BJ48	09/02/15	Adjusting treatment of certain loans by controlled foreign corporations. Prop. Reg. §§ 1.956-1, -2, etc. (Corporate)	4	4	0	0	0
51	1545-BL05	05/13/13	Affordable Care Act: Computing medical loss ratio. Prop. Reg. § 1.833-1.	4	4	0	0	0
52	1545-BE14	12/13/13	Tax expenditure: Coordinating credit for increasing research activities with controlled group rules. Prop. Reg. § 1.41-6.	4	4	0	0	0
53	IRS-2007-0134	03/24/14	Administration: Eliminating deadwood on information reporting related to use of credit cards. Removing Treas. Reg. § 31.3406(g)-1(f).	4	4	0	0	0
54	1545-BM01	10/15/14	Administration: Eliminating automatic reporting requirement for discharge of indebtedness based on 36-month non-payment testing period. Prop. Reg. § 1.6050P-1.	4	4	0	0	0
55	1545-BK99	08/02/13	New method for accounting for unrealized gains and losses for certain "straddle" positions. Prop. Reg. §§ 1.1092(b)-3, -6. (Corporate)	3	3	0	0	0

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56	1545-BM61	05/08/15	Technical rules for certain payments under derivatives contracts (coordinating with Dodd-Frank). Prop. Reg. § 1.446-3. (Corporate)	3	3	0	0	0
57	1545-BK08	09/19/14	ERISA: Rules related to distributions from Roth accounts in retirement plans. Prop. Reg. § 1.402A-1.	3	3	0	0	0
58	1545-BM24	06/18/14	Management: Allowing service providers contracting with IRS to take summons interviews and materials on behalf of IRS. Treas. Reg. § 301.6103(n)-1(a).	2	1	0	1	0
59	1545-BK65	01/31/13	Rules for late-filing of gain recognition agreements. Prop. Reg. § 1.367(a)-3. (Corporate)	2	2	0	0	0
60	1545-BF39	03/08/13	Penalty: Implementing rules for penalty for failure to make available a list of advisees with respect to a reportable transaction. Prop. Reg. § 301.6708-1. (Corporate)	2	2	0	0	0
61	1545-BF43	09/09/13	Limiting use of nonrecogntion transfers to import built-in loss property. Prop. Reg. §§ 1.332-6, 1.334-1, etc. (Corporate)	2	2	0	0	0

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62	1545-BE98	01/16/14	Rules for transfer of built-in loss property to a partnership. Prop. Reg. § 1.704-3.	2	1	1	0	0
63	1545-BL54	08/30/13	Administration: Requiring certain employee benefit plans to file returns and statements electronically (on "magnetic media"). Prop. Reg. §§ 301.6057-3, 301.6059-2.	2	2	0	0	0
64	1545-BL92	11/29/13	Administration: Rules for voluntary withholding agreements. Prop. Reg. § 31.3402(p)-1.	2	0	2	0	0
65	1545-BJ92	02/06/14	Rules for unrelated business income tax for certain mechanisms for funding employee benefits. Prop. Reg. § 1.512(a)-5.	2	2	0	0	0
66	1545-BL79	06/03/14	Tax expenditure: Alternative method for calculating increased research activities credit. Prop. Reg. § 1.41-9.	2	2	0	0	0
67	1545-BM08	06/06/14	Administration: Electronic filing and other changes to information return of 25% foreign-owned U.S. corporation (Form 5472). Prop. Reg. §§ 1.6038A-1, 6038A-2, 6038A-4.	2	0	2	0	0

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68	1545-BL59	07/15/14	Administration: Allowing disclosure of specified return information to the Census Bureau. Prop. Reg. § 301.6103(j)(1)-1.	2	0	2	0	0
69	1545-BM26	07/28/14	Affordable Care Act: Fee for branded prescription drugs. Prop. Reg. §§ 51.2, 51.11.	2	2	0	0	0
70	1545-BM51	02/26/15	Affordable Care Act: Definition of covered entity for health insurance provider fee. Prop. Reg. §§ 57.2, 57.10.	2	2	0	0	0
71	1545-BK06	04/22/15	Excise Taxes: Implementing rule for 2% tax on foreign persons receiving certain payments from the U.S. government. Prop. Reg. §§ 1.5000C-1, -2, etc.	2	1	0	0	1
72	1545-BH89	02/05/13	Rules for treatment of noncompensatory partnership option (i.e., option in a partnership interest). Prop. Reg. §§ 1.761-3, 1.1234-3.	1	0	0	1	0
73	1545-BG21	11/05/14	Rules for partnership distributions treated as sales or exchanges. Prop. Reg. §§ 1.704-1, 1.751-1, etc.	1	1	0	0	0

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74	1545-BK15	12/23/14	Recognition of gain or loss related to transfer of an installment obligation that satisfies that obligation. Prop. Reg. §§ 1.453B-1, 1.351-1, 1.361-1, etc. (Corporate)	1	0	1	0	0
75	1545-BJ08	05/20/15	Rules for banks and other lenders to include income and reduce tax attributes in connection with receiving federal financial assistance. Prop. Reg. § 1.597-1. (Corporate)	1	0	1	0	0
76	1545-BM35	06/12/15	Requiring recognition of gain by corporate partner on certain contributions and distributions to/from partnership. Prop. Reg. §§ 1.337(d)-3, 1.732-1. (Corporate)	1	0	1	0	0
77	1545-BK62	08/28/15	Penalty: Amount of penalty for failure to include information on reportable transactions required under section 6011. Prop. Reg. § 301.6707A-1.	1	1	0	0	0
78	1545-BL37	08/30/13	Administration: Adjusting fee for processing installment agreements and offers in compromise (collections activity). Prop. Reg. §§ 300.1, 300.2, etc.	1	0	1	0	0

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79	1545-BK80	09/16/13	Tax expenditure: Recovery of arbitrage rebate overpayments on tax exempt bonds. Prop. Reg. §§ 1.148-3, -11, etc.	1	0	1	0	0
80	1545-BL50	02/24/14	Affordable Care Act: Limitation to 90-days for waiting period for health plan to become effective. Prop. Reg. §§ 54.9815-2708, 2590.715-2708.	1	1	0	0	0
81	1545-BL88	11/13/14	Management: Measuring and reporting performance within IRS. Prop. Reg. § 801.5.	1	0	1	0	0
82	1545-BL77	04/03/15	Tax expenditure: Allocating credit for increasing research activities among corporations under common control. Prop. Reg. §§ 1.41-6, 1.45G-1, 1.280C-4.	1	1	0	0	0
83	1545-BK09	05/11/15	Gifts, trusts, and estates: Modified carryover basis rules referencing section 1022 for 2010 decedents. Prop. Reg. §§ 1.48-12, 1.83-4, etc.	1	0	1	0	0
84	1545-BL28	01/04/13	Allowing deduction for certain bond premium carryforward. Prop. Reg. § 1.171-2(a)(4)(i)(C). (Corporate)	0	0	0	0	0

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85	1545-BJ74	03/19/13	Eliminating exception to require recognition of gain in certain outbound asset reorganizations. Prop. Reg. § 1.367(a)-3. (Corporate)	0	0	0	0	0
86	1545-BL24	09/05/13	Debt instruments linked to value of foreign currency etc. can be part of "straddle." Prop. Reg. § 1.1092(d)-1. (Corporate)	0	0	0	0	0
87	1545-BL52	09/19/13	Rules for disposition of a component of property subject to accelerated depreciation. Prop. Reg. §§ 1.168(i)-1, -7. (Corporate)	0	0	0	0	0
88	1545-BL06	12/09/13	Deductibility of certain startup expenses for partnerships following technical termination. Prop. Reg. §§ 1.195-2, 1.708-1, etc.	0	0	0	0	0
89	IRS-2013-0041	12/16/13	Rules for recourse liabilities of a partnership with related partners. Prop. Reg. §§ 1.752-2, -4, etc.	0	0	0	0	0
90	1545-BL00	01/17/14	Determining stock to include for application of anti-inversion rules. Prop. Reg. §§ 1.7874-4, -5. (Corporate)	0	0	0	0	0

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91	1545-BL80	05/07/14	Eliminating rule allowing acquiring corporation to use subsidiary to elect location of earnings and profits of target. Prop. Reg. § 1.381(a)-1. (Corporate)	0	0	0	0	0
92	1545-BM20	03/02/15	Adjusting method for calculating interest rates to impose section 382 limitation on use of net operating losses. Prop. Reg. §§ 1.382-12, 1.1288-1. (Corporate)	0	0	0	0	0
93	1545-BM14	03/06/15	Rule for end of tax year for departure of corporation from consolidated group. Prop. Reg. §§ 1.1502-76, -13, etc. (Corporate)	0	0	0	0	0
94	1545-BJ29	06/11/15	Rule for adjustments to consolidated net operating losses on disposition of member of group. Prop. Reg. §§ 1.1502-11, -12, etc. (Corporate)	0	0	0	0	0
95	1545-BM48	06/12/15	Rules for basis adjustments in connection with distribution of corporate stock to a corporate partner. Prop. Reg. § 1.732-3. (Corporate)	0	0	0	0	0
96	1545-BJ34	08/03/15	Allocating cash basis of partnership assets in tiered partnership structures. Prop. Reg. §§ 1.706-2, -3, etc.	0	0	0	0	0

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97	1545-BK18	08/27/15	Residence rules for U.S. possessions. Prop. Reg. § 1.937-1.	0	0	0	0	0
98	1545-BL57	08/15/13	Affordable Care Act: Filing requirement for hospitals failing to meet community health needs assessment requirement. Prop. Reg. §§ 53.6011-1, 53.6071-1.	0	0	0	0	0
99	1545-BL90	12/24/13	Affordable Care Act: Benefits exempt from certain ACA requirements (portability, nondiscrimination). Prop. Reg. §§ 54.9831-1, 2590.732, 146.145.	0	0	0	0	0
100	1545-BJ42	01/17/14	Gifts, trusts, and estates: Basis in tax exempt trusts. Prop. Reg. § 1.1014-5.	0	0	0	0	0
101	IRS-2014-0020	07/02/14	Administration / Tax expenditure: Streamlined process for recognizing tax exempt status. Treas. Reg. §§ 1.501(a)-1), 1.501(c)(3)-1, etc.	0	0	0	0	0
102	1545-BM18	07/31/14	Administration: Excluding from new section 382 rule assets acquired by Treasury Department under Emergency Economic Stabilization Act of 2008. Prop. Reg. § 1.382-3.	0	0	0	0	0

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103	1545-BM39	08/27/14	Affordable Care Act: Allowing accommodations for certain religious employers providing coverage for certain preventive care services. Prop. Reg. §§ 54.9815-2713A, 2590.715-2713A, 147.131.	0	0	0	0	0
104	1545-BM44	12/23/14	Affordable Care Act: Additional benefits exempt from certain ACA requirements. Prop. Reg. § 54.9831-1.	0	0	0	0	0
105	1545-BM63	07/17/15	Administration: Eliminating requirement to file copy of 83(b) election (due to problem with e-filing). Prop. Reg. § 1.83-2.	0	0	0	0	0
106	1545-BN02	10/30/15	Administration: Adjusting fee for tax preparer identification number (PTIN). Prop. Reg. § 300.13.	0	0	0	0	0

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TAX LAW REVIEW

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