Note

Rejecting Tax Exceptionalism: Bringing Temporary Treasury Regulations Back in Line with the APA

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"Under general administrative law doctrines, it would seem unimaginable that the IRS could bypass notice-and-comment procedures, offer no required 'good cause' explanation, promise to take comments into account but ignore them and then, more than a decade later, adversely invoke its temporary regulation against a taxpayer."[1] Such action might seem on its face to be unimaginable, but this exact situation was recently before the Court of Appeals for the District of Columbia.[2] At issue was whether a temporary Treasury regulation[3] promulgated without following the Administrative Procedure Act (APA) informal rulemaking requirements[4] and left on the books for

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1. Replacement Brief for the Appellee, Petaluma FX Partners, L.L.C. v. Comm'r, No. 12-1364, slip op. (D.C. Cir. June 26, 2015), 2014 WL 2601469, at *18–19.

2. *Petaluma FX Partners, L.L.C. v. Comm'r*, No. 12-1364, slip op. (D.C. Cir. June 26, 2015), was decided by the D.C. Circuit on June 26, 2015. The Replacement Brief for the Appellant was filed May 12, 2014. The Replacement Brief for the Appellee was filed June 10, 2014, and the Replacement Reply Brief for the Appellant was filed July 10, 2014. Oral arguments took place on November 18, 2014.

3. The temporary regulation in question is Temp. Treas. Reg. § 301.6233-1T (1999). Replacement Brief for the Appellee, *supra* note 1, at 6. For the publication of this rule, see Miscellaneous Provisions Related to the Tax Treatment of Partnership Items, 52 Fed. Reg. 6779 (proposed March 5, 1987).

4. *See* Administrative Procedure Act, 5 U.S.C. § 553(b)–(c) (2012) (requiring "notice of proposed rulemaking" and "an opportunity to participate in the rule making").

over fourteen years should be binding on a taxpayer.[5] History seems to imply, perhaps surprisingly, that the answer to this question has always been yes,[6] but should that continue to be the case?

The Treasury Department (Treasury) has broad general rulemaking power[7] and has historically used this power to create new regulations promulgated under APA notice-and-comment procedures.[8] However, out of supposed necessity, in the 1980s the Treasury began increasingly using temporary regulations, which follow no such promulgation procedure, yet have the force of law when published.[9] While Congress statutorily recognized[10] the use of temporary regulations with the passage of 26 U.S.C. § 7805(e),[11] it also expressed concerns[12] about regulations that might become "permanently temporary"[13] and tacked on a three-year sunset provision.[14] However, the provision was not given retroactive application, effectively grandfathering in all temporary regulations issued prior to its enactment.[15]

Few cases have challenged Treasury non-compliance with the APA, but the problem is getting harder to ignore. Courts

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5. Replacement Brief for the Appellee, *supra* note 1, at 7, 9. The Court of Appeals for the District of Columbia avoided this issue by holding that a later-enacted final regulation, Treas. Reg. § 301.6233-1 (2001), was applicable to the case, making the validity of the temporary regulation in question irrelevant. *See Petaluma*, slip op. at 13–15.

6. Replacement Brief for the Appellee, *supra* note 1, at 15 ("We have not found any case where a court has invalidated a temporary regulation for the IRS's failure to follow the dictates of the APA . . . .").

7. *See* 26 U.S.C. § 7805(a) (2012) (giving the Treasury the power to "prescribe all needful rules and regulations . . . in relation to internal revenue").

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

9. *Id.*

10. For a discussion of what Congress actually meant by the passage of § 7805(e), see *infra* Part II.C.

11. 26 U.S.C. § 7805(e).

12. *Compare* S. REP. NO. 100-309, at 7 (1988) (proposing, initially, a two-year limitation), *with* H.R. REP. NO. 100-1104, at 217–18 (1988) (Conf. Rep.) (settling on a three-year limitation).

13. *See* Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 HOUS. BUS. & TAX L.J. 248, 254 (2003).

14. *See* 26 U.S.C. § 7805(e)(2).

15. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6232(b), 102 Stat. 3734, 3735 (1988) (applying the three-year expiration date only to regulations issued after the enactment of the Act).

have started hinting that such procedural failings might invalidate a temporary regulation.[16] In the past five years, courts have also definitively held that the Internal Revenue Service (IRS) is subject to the APA[17] and expressly rejected the idea of tax exceptionalism—the belief that tax is special, or more specifically, that in law, tax should be given special treatment.[18] Defenders of temporary regulations have, therefore, turned to new arguments, claiming that such regulations are exempt from procedural requirements for good cause,[19] because they are interpretive rules,[20] or because § 7805 trumps the APA.[21] Each of these arguments can be refuted, especially as they apply to grandfathered temporary Treasury regulations.

This Note argues that the IRS should no longer be able to treat temporary Treasury regulations as legally binding on taxpayers if they were promulgated in violation of the APA, but it recognizes that invalidating all temporary regulations overnight would cause more problems than it solves. Part I of this Note describes the historical development of temporary regula-

16. *See* Burks v. United States, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (stating that allowing notice and comment after a temporary regulation was enacted was "not an acceptable substitute for pre-promulgation notice and comment"); Tedori v. United States, 211 F.3d 488, 491 n.9 (9th Cir. 2000) ("No explanation has been forthcoming from the government as to why such a 'temporary regulation,' issued in 1987 shortly after enactment of the Tax Reform Act of 1986, should remain 'temporary' well over a decade later . . . ."); Kikalos v. Comm'r, 190 F.3d 791, 796 (7th Cir. 1999) (noting that because it has not been subjected to procedural scrutiny, a temporary regulation may be "entitled to no more deference than a proposed regulation"); Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211, 245–48 (2010), *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012) (Halpern & Holmes, JJ., concurring) (arguing that temporary Treasury regulations are not "special" and should be subject to the APA's procedural requirements).

17. *See* Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc).

18. *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 56 (2011) ("We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."); *infra* Part I.C.

19. *See* 5 U.S.C. § 553(b)(B) (2012) (providing an exception to the APA's notice-and-comment procedures required for rule making when an agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

20. *See id.* § 553(b)(A) (providing an exception to the APA's notice-and-comment procedures required for interpretive rules).

21. *See* Amandeep S. Grewal, *Legislative Entrenchment Rules in the Tax Law*, 62 ADMIN. L. REV. 1011, 1051 n.194 (2010) [hereinafter *Legislative Entrenchment*] ("[T]he IRS has frequently argued that § 7805(e) excuses the Treasury from the APA's notice-and-comment requirements when it issues temporary regulations.").

tions, the movement away from tax exceptionalism, and the increasing interplay between administrative and tax law. Part II examines the arguments defending and condemning the validity of temporary Treasury regulations and how the *Mayo*[22] decision has further complicated the debate. Finally, Part III addresses potential solutions for bringing the Treasury back in line with the APA without destabilizing the tax system. This Note maintains that the Supreme Court's explicit rejection of tax exceptionalism creates considerable doubt about the enforceability of temporary Treasury regulations promulgated in violation of the APA. Therefore, this Note proposes several judicial and legislative actions that could be taken to correct the procedural invalidity of temporary regulations and to make future Treasury promulgation policy administratively acceptable.

I. UNCERTAINTIES SURROUNDING THE VALIDITY OF TEMPORARY TREASURY REGULATIONS

Although temporary regulations have been used by the Treasury for more than thirty years, only recently has their validity been cast into doubt. This Part outlines the development and current status of temporary Treasury regulations. Section A provides background on why temporary regulations came into existence. Section B discusses the procedural requirements imposed by the APA on all agencies engaging in rulemaking activities. Section C explains the Supreme Court's decision in *Mayo* to reject tax exceptionalism. Finally, Section D summarizes current scholarly, judicial, and Treasury views on temporary regulations.

A. THE RISE OF THE TEMPORARY TREASURY REGULATION

The use of temporary Treasury regulations increased dramatically starting in the 1980s, when the Treasury was struggling to provide timely guidance on new and complex tax laws,[23] especially in the wake of the Tax Reform Act of 1986.[24] By 1988, the practice had caught the attention of Congress.[25] Recognizing that "[g]enerally, temporary regulations are effec-

22. *Mayo*, 562 U.S. at 44. For more information on *Mayo*, see *infra* Part I.C.

23. *See* Asimow, *supra* note 8.

24. *See generally* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 1 et seq.) (making significant changes to the tax code).

25. S. REP. NO. 100-309, at 7 (1988) ("The IRS also issues some regulations as temporary regulations.").

tive immediately upon publication and remain in effect until replaced by final regulations," the Senate expressed concern "about the length of time that some regulations remain in temporary form."[26] Responding to these concerns, Congress enacted 26 U.S.C. § 7805(e),[27] which requires that all temporary regulations be simultaneously issued in proposed form and which sets a three-year expiration period.[28] The statute, however, was not given retroactive application and, therefore, only applies to temporary regulations issued after November 20, 1988.[29]

The IRS has taken the position that temporary regulations issued prior to that date, which in this Note shall be referred to as grandfathered temporary regulations,[30] technically never expire.[31] Generally, courts have agreed that in limiting the effective date of the sunset provision of § 7805(e)(2) Congress exempted all regulations already on the books at that time from mandatory expiration.[32] While temporary regulations issued today are binding on taxpayers for no more than three years unless properly promulgated into final regulations, some grandfathered temporary regulations have arguably had the force of law for over twenty-five years.[33]

B. INFORMAL RULEMAKING PROCEDURE AND EXCEPTIONS

The Treasury's power to issue regulations, like that of any other agency engaging in rulemaking, is based on a statutory

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26. *Id.*

27. *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6232(b), 102 Stat. 3734, 3734 (1988).

28. 26 U.S.C. § 7805(e)(1)–(2) (2012).

29. Technical and Miscellaneous Revenue Act of 1988 § 6232(b); *see* Lyszkowski v. Comm'r, 69 T.C.M. (CCH) 2751, at 2759 n.2 (1995) ("Sec. 7805(e) applies to temporary regulations issued after the date which is 10 days after the date of enactment of [the Technical and Miscellaneous Revenue Act of 1988, which was enacted on] . . . Nov. 10, 1988.").

30. Some other scholars cleverly refer to such regulations as "permanently temporary." *See* Vasquez & Lowy, *supra* note 13.

31. *See Legislative Entrenchment*, *supra* note 21, at 1053–54.

32. *See, e.g.*, Garnett v. Comm'r, 132 T.C. 368, 372 n.11 (2009) (noting that the temporary regulations at issue in the case were more than three years old but still in force because "[t]he temporary regulations involved herein [Temp. Treas. Reg. § 1.469-5T] were issued Feb. 19, 1988, before the effective date of sec. 7805(e)").

33. *See, e.g.*, Temp. Treas. Reg. § 1.163-9T (1987) (regulating personal interest); Temp. Treas. Reg. § 1.71-1T (1984) (regulating alimony and separate maintenance payments). For a discussion on whether temporary regulations carry the force of law, see Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013) [hereinafter *Force of Law*].

delegation of power from Congress. While numerous provisions of the Internal Revenue Code (IRC or the Code) provide specific authority,[34] the Secretary of the Treasury has also been endowed with the general authority to "prescribe all needful rules and regulations for the enforcement" of the IRC.[35] However, with such power comes the responsibility to abide by the procedural requirements imposed by APA § 553.[36]

For informal rulemaking, the APA requires that an agency publish a general notice of proposed rulemaking in the Federal Register detailing the time, place, and nature of the public proceedings; referencing the relevant legal authority invoked; and providing a description of the issue.[37] An agency must then provide sufficient time, generally thirty to ninety days, to "give interested persons an opportunity to participate" by submitting written comments.[38] After considering and addressing all significant comments, an agency can issue final regulations with legally binding force, provided they incorporate a "concise general statement of [the regulations'] basis and purpose."[39] The final regulations can then become effective no sooner than thirty days after publication.[40] Thus, the APA mandated process is publication of non-binding proposed regulations, acceptance of public comment, and then, but only then, promulgation of a final binding regulation.

The requirements of APA § 553 are "[k]nown collectively as notice-and-comment rulemaking" and must be utilized unless one of the predefined exceptions apply.[41] Generally, interpretive rules, procedural rules, and statements of policy are exempt from notice-and-comment rulemaking.[42] The APA, how-

34. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1735 (2007) [hereinafter *APA Rulemaking*] ("In fact, the I.R.C. contains several hundred specific authority grants.").

35. 26 U.S.C. § 7805(a) (2012).

36. Administrative Procedure Act, 5 U.S.C. § 553(b)–(d) (2012).

37. *See id*. § 553(b).

38. *Id.* § 553(c); *see also APA Rulemaking*, *supra* note 34, at 1732–33; *The Federal Register Tutorial*, FED. REG., http://www.archives.gov/federal-register/tutorial/online-html.html (last visited Nov. 2, 2015) (stating that the notice-and-comment comment period "usually runs 30, 60 or 90 days from date of publication").

39. 5 U.S.C. § 553(c).

40. *See id.* § 553(d).

41. *APA Rulemaking*, *supra* note 34, at 1734.

42. *See* 5 U.S.C. § 553(b)(A).

ever, does not define "interpretive," "procedural," or "policy statement," so such rules are hard to distinguish from legislative or substantive rules, which must be properly promulgated.[43] Similarly exempt are rules for which the agency can prove it had good cause to bypass any or all of the APA § 553 requirements because such procedures were "impracticable, unnecessary, or contrary to the public interest."[44] However, to invoke the good cause exemption, an agency must justify its claim with specificity and particularity.[45]

C. *MAYO* AND THE DOWNFALL OF TAX EXCEPTIONALISM

For years scholars have believed in the idea of tax exceptionalism—that, for one reason or another, tax is special in the eyes of the law.[46] Some commentators hold this belief because of the tax system's inherent complexities,[47] arguing that courts are ill prepared to deal with tax controversies, so deference should be given to the Tax Court or agency experts.[48] Others focus on the importance of tax revenue to the government's ability to function[49] or on the fact that tax "touches human activities at so many points."[50]

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43. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (detailing a four-part test to distinguish between interpretive and legislative rules); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (laying out a two-part test to distinguish between policy statements and legislative rules).

44. 5 U.S.C. § 553(b)(B).

45. *See APA Rulemaking*, *supra* note 34, at 1780.

46. *See* Gene Magidenko, *Tax Exceptionalism: Wanted Dead or Alive*, 1 U. MICH. J.L. REFORM 26, 27 (2011) (noting that, historically, Treasury regulations were evaluated under a different standard than regulations promulgated by other agencies).

47. *See* Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1903 (2014); *see also id.* at 1907 ("Albert Einstein is frequently quoted—including on the IRS website—as having said, 'The hardest thing in the world to understand is the income tax.'" (citing *Tax Quotes*, IRS, http://www.irs.gov/uac/Tax-Quotes (last visited Nov. 2, 2015))).

48. Amandeep S. Grewal, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625, 1629 (2014) ("Although federal appellate courts usually review legal questions decided by a trial court *de novo*, the Supreme Court, in *Dobson v. Commissioner*, granted deference to the Tax Court on questions of tax law.").

49. *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1596 (2006) [hereinafter *Need for Mead*] ("The primary function of Treasury tax personnel and the IRS is to collect government revenues . . . ."); Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 GEO. WASH. L. REV. 1558, 1567 (2011) ("Due to the importance of collecting revenue for the government, [the IRS and Treasury] have extensive power and discretion relative to other federal agencies." (footnote omitted)); *see also* Bull v. United States, 295 U.S.

Whatever the reason, attitudes toward tax exceptionalism have begun to change. Scholars are now questioning whether tax is really unique and whether special treatment is actually warranted.[51] However, the Supreme Court has already taken a stance against special treatment. In its 2011 case *Mayo Foundation for Medical Education and Research v. United States*, the Court was asked to determine what level of deference should be given to a Treasury regulation that implicitly made the wages earned by medical residents subject to Federal Insurance Contribution Act (FICA) taxes.[52] The Court unanimously[53] held that it could find no "justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency" and that "[i]n the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only."[54] It could be argued that all *Mayo* stands for is the fact that Treasury rules and regulations are now subject to *Chevron* deference,[55] but most in the tax community have taken it to mean more—that the Supreme Court has decidedly rejected the idea of tax exceptionalism.[56]

247, 259 (1935) ("[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need."); *Tax Quotes*, *supra* note 47 ("'The power of taxing people and their property is essential to the very existence of government.' — James Madison, U.S. President.").

50. Dobson v. Comm'r, 320 U.S. 489, 494–95 (1943); *see* Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269, 271 (2012) ("In its impact on our lives, the tax law is the single greatest medium of interface between our government and our citizens.").

51. *See* Leandra Lederman, *(Un)appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1879–80 (2014). *See generally Need for Mead*, *supra* note 49 (arguing that Treasury interpretations should not be given special judicial deference).

52. 562 U.S. 44, 51 (2011).

53. The case was actually decided 8-0 as Justice Kagan took no part in the consideration or decision. *Id.* at 60.

54. *Id.* at 55.

55. *Chevron* deference is the standard of judicial review established in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* It requires a court to defer to an agency's interpretation of a statute if "the statute is silent or ambiguous with respect to the specific issue" and "the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

56. *See* Niki R. Ford, *Easy on the* MAYO *Please: Why Judicial Deference Should Not Be Extended to Regulations that Violate the Administrative Procedure Act*, 50 DUQ. L. REV. 799, 826 (2012) (describing the decision in *Mayo* as "a devastating blow to the tax exceptionalists").

D. THE CURRENT STATUS OF TEMPORARY TREASURY REGULATIONS

Views on temporary regulations are shifting in the wake of *Mayo*, so this Section outlines the current arguments and positions of scholars, courts, and the Treasury. Subsection 1 discusses the present judicial acceptance of temporary regulations, but also summarizes recent opinions reflecting the courts' increasing skepticism. Subsection 2 then explains the Treasury's current practices and its modern approach to defending the validity of temporary regulations.

1. Judicial Reactions to Temporary Regulations

Even before *Mayo* scholars were growing skeptical of the validity of temporary regulations. Michael Asimow raised the issue as early as 1991, questioning whether the "frequent use of temporary regulations is good policy."[57] Courts, however, have been slower to follow suit. In 1999, the validity of Temporary Treasury Regulation § 1.163-9T(b)(2)(i)(A), which stated that the interest on underpayments of tax was personal interest and not deductible by a taxpayer, was brought before the Seventh Circuit.[58] Although the court decided the case on other grounds, it noted that the seemingly permanent nature of the temporary regulation at issue was an interesting "wrinkle" in the case.[59] The court also hinted that if either party had questioned the temporary regulation, the court might have been inclined to hold that it was "entitled to no more deference than a proposed regulation."[60] The following year, the Ninth Circuit was faced with a similar question and merely footnoted that "[n]o explanation has been forthcoming from the government as to why such a 'temporary regulation,' issued in 1987 shortly after enactment of the Tax Reform Act of 1986, should remain 'temporary' well over a decade later."[61]

More recently, in 2010, the Tax Court found that Temporary Treasury Regulations §§ 301.6229(c)(2)-1T and 301.6501(e)-1T were invalid and "not entitled to deferential

57. Asimow, *supra* note 8, at 343.

58. Kikalos v. Comm'r, 190 F.3d 791, 792 (7th Cir. 1999).

59. *Id.* at 795. The court questioned the temporariness of the regulation as it had been on the books since 1987, and the court could find no evidence that it had been through notice-and-comment procedures in the twelve-year period between promulgation and the decision. *Id.* at 795–96.

60. *Id.* at 796.

61. Tedori v. United States, 211 F.3d 488, 491 n.9 (9th Cir. 2000).

treatment."[62] The majority held the temporary regulations invalid because they were "unambiguously in conflict with the statute."[63] Taking a different view, and only concurring in the result, Judges Halpern and Holmes held that the regulations were "procedurally invalid under the Administrative Procedure Act" because they were legislative in nature, but did not go through the notice-and-comment process, nor did the Treasury properly invoke an exception from APA procedure.[64] Additionally, the concurrence specifically rejected the idea that § 7805(e) is in conflict with the APA and, therefore, Congress implicitly meant to waive the notice-and-comment requirement for all temporary regulations.[65]

If the validity of temporary regulations is a functional argument, why are there so few cases raising it? Some commentators have argued that lawyers simply do not know that the argument is out there,[66] or that taxpayers have little to gain from a procedural challenge.[67] Others have pointed out that even if a court believed a temporary regulation was procedurally invalid, a taxpayer may still lose their case because of the harmless error rule.[68] Whatever the reason, scholars have started pointing out cases where the validity of the temporary regulation at issue likely should have been raised. For example, Professor Andy Grewal[69] argued that in *United States v. Woods* the parties could have questioned the Court's subject-matter jurisdiction to hear the case, because such jurisdiction rested solely on a temporary regulation issued in 1987 and not finalized until after the taxpayer's transaction more than twelve

62. Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211, 224 (2010), *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012).

63. *Id.* at 227 (Halpern & Holmes, JJ., concurring).

64. *Id.* at 238–39.

65. *Id.* at 245–46.

66. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1155 (2008) [hereinafter *Problem of Remedy*] ("Maybe tax lawyers are simply unaware of the procedural arguments available. Some degree of tax community ignorance of nontax administrative law principles undoubtedly contributes to the paucity of procedural challenges.").

67. *See id.* at 1156 ("[S]tatutory and doctrinal limitations combine in the tax context to deter taxpayers from pursuing APA compliance claims.").

68. *See APA Rulemaking*, *supra* note 34, at 1791–92.

69. Andy S. Grewal is an Associate Professor of Law at the University of Iowa specializing in the interaction between tax and administrative law.

years later.[70]

2. The Treasury's Position on Temporary Regulations

While courts have rarely required the IRS to defend the validity of temporary regulations, the Treasury's position on temporary regulations can be gleaned from its practices. Even though the Treasury acknowledges that it is subject to the APA,[71] it fails to use traditional APA procedures on a regular basis. A study conducted by Professor Kristin E. Hickman[72] on the Treasury's compliance with the APA revealed that 40.9% of regulations issued over a three year period failed to follow the notice-and-comment process.[73] For those issued as temporary regulations—36.2% of all projects—the Treasury claimed that APA § 553 did not apply 96.43% of the time.[74] Although the Treasury occasionally bases its claim on the good cause exception,[75] its default inapplicability argument appears to be that temporary Treasury regulations are interpretive.[76]

The Internal Revenue Manual actually explains that the "[Internal Revenue] Service will generally rely on the necessity of immediate guidance as good cause" and prescribes language that should be included in the preamble of any regulation claiming such exemption.[77] Similarly, the IRS takes the position that "most IRS/Treasury regulations will be interpretative regulations because they fill gaps in legislation or have a prior existence in the law"[78] or are promulgated based on a general

70. *See* ANDY S. GREWAL, THE MISSED JURISDICTIONAL ARGUMENT IN "*U.S. V. WOODS*" 1 (2014), http://ssrn.com/abstract=2369512.

71. *See APA Rulemaking, supra* note 34, at 1729; *see also* Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011) (en banc) (exemplifying a court's refusal to shield the IRS from suits under the APA).

72. Kristin E. Hickman is the Harlan Albert Rogers Professor in Law at the University of Minnesota Law School and teaches primarily tax and administrative law as well as statutory interpretation.

73. *APA Rulemaking*, *supra* note 34, at 1748 (analyzing 232 regulatory projects published in the Federal Register between 2003 and 2005).

74. *Id.* at 1748, 1750 tbl.2a.

75. *See id.* at 1750 tbl.2a (detailing that the good cause exception is alleged 17.86% of the time while no real reason is provided 78.57% of the time).

76. *See* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 32.1.5.4.7.5.1 (2014), http://www.irs.gov/irm/part32/irm_32-001-005.html [hereinafter INTERNAL REVENUE MANUAL] ("[M]ost IRS/Treasury regulations are interpretative, and therefore not subject to the notice-and-comment provisions of the APA . . . .").

77. *Id.*

78. *Id.*

grant of authority.[79] Taking a slightly different approach, the Treasury has also made the broader assertion that Congress exempted all temporary regulations from APA requirements by enacting § 7805(e).[80] Additionally, there has been some discussion that, even if improperly promulgated, temporary regulations should be given *Chevron* deference just like any final Treasury regulation.[81]

Temporary regulations have become a mainstream presence in the tax world over the last thirty years and have been given significant deference by courts out of respect for the IRS. However, times are changing. The Treasury's arguments that temporary regulations are exempt from notice-and-comment procedures were perhaps persuasive when tax exceptionalism was alive and well, but in today's administrative law environment they leave something to be desired. What remains to be seen is when and how courts and the Treasury will respond.

II. THE TREASURY'S DEFENSES OF PROCEDURALLY INVALID TEMPORARY REGULATIONS ARE SIGNIFICANTLY WEAKENED BY THE REJECTION OF TAX EXCEPTIONALISM

The Treasury has successfully defended its temporary regulations using a variety of alternative arguments, but in the wake of *Mayo* these arguments may no longer be enough. This Part discusses how the Supreme Court's rejection of tax exceptionalism could strengthen taxpayer attacks on the validity of temporary regulations promulgated in violation of the APA. Section A analyzes why the *Mayo* Court was correct in refusing to recognize a separate standard of administrative review for tax purposes only. Section B then describes why APA § 553 exemptions, like those for interpretive rules[82] and good cause,[83]

79. *See Force of Law*, *supra* note 33, at 475 ("When Congress enacted the APA, the general consensus among courts and scholars held that the only rules properly characterized as legislative were those promulgated pursuant to a narrow and specific grant of authority to fill an explicitly identified statutory gap . . . .").

80. *See* Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211, 245 (2010) (Halpern & Holmes, JJ., concurring), *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012).

81. *See* Hosp. Corp. of Am. & Subsidiaries v. Comm'r, 348 F.3d 136, 144 (6th Cir. 2003) ("The fact that the temporary regulation was not subject to notice and comment does not, moreover, require us to eschew *Chevron* deference . . . .").

82. *See* 5 U.S.C. § 553(b)(A) (2012).

83. *See id.* § 553(b)(B).

should generally be considered inadequate defenses to complaints that the Treasury has failed to follow proper notice-and-comment rulemaking procedures. Section C argues that temporary regulations should not be upheld on the belief that Congress intended § 7805(e) to trump the APA. Finally, Section D takes a closer look at how the above arguments apply in the grandfathered temporary regulation context.

A. MAYO WAS CORRECT TO REJECT TAX EXCEPTIONALISM

Two of the main arguments in favor of tax exceptionalism are that tax law is uniquely complex and that tax is special because of its relation to government funding. Although it is true that the tax system is complicated and that the government could not function without the revenue generated through taxation,[84] is that enough to justify special judicial treatment for all questions of tax law? The Supreme Court said no,[85] and was correct in doing so for two principal reasons.

First, the IRC may consist of numerous, somewhat daunting volumes, but in reality it is not unique in its complexity. In fact, "[i]t's mostly nontax people who think tax is special."[86] Just as tax may seem complex to nontax accountants and lawyers, the rules surrounding the administration of social security benefits, environmental protection regulations, or anti-trust laws may seem overwhelming to individuals not practicing in those fields. Many scholars cite complexity as the reason courts not specializing in tax should defer to agency expertise,[87] but unlike other technical areas where non-legal training might be necessary to understand the law, interpreting the Internal Revenue Code rarely requires scientific expertise.[88] And "despite their generalist profile, appellate courts are particularly adept at interpreting statutes,"[89] so it stands to reason that judges should be capable of tackling questions of tax law using the same standard of review they apply in other cases.

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84. *See supra* notes 46–50 and accompanying text.

85. *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 60 (2011).

86. Zelenak, *supra* note 47, at 1906; *see also* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 519–28 (1994) (explaining that the belief that tax is uniquely complex is perpetuated by references to tax in law schools, the legal profession, and popular culture).

87. *See supra* note 48 and accompanying text.

88. *See Need for Mead*, *supra* note 49, at 1599.

89. *Id.*

Second, today's tax system does much more than simply generate revenue.[90] Congress frequently uses the IRC to incentivize socially acceptable or desirable behavior and to deliver various forms of poverty relief.[91] For example, the IRC permits a single taxpayer to exclude from her calculation of taxable income up to $250,000 of gain from the sale of her principal residence if certain qualifications are met[92] and to deduct interest on up to $1.1 million of indebtedness related to a qualified residence.[93] Both of these provisions are clearly not generating revenue, but, rather, were adopted to promote homeownership. Similarly, the IRC also contains a provision providing certain low income taxpayers with a dollar for dollar reduction in their tax liability (even below zero, resulting in a refund) based on a percentage of their qualifying earned income.[94] This provision has little to do with revenue acquisition and everything to do with furthering the social policy in favor of providing welfare support to the impoverished. By recognizing that the current tax code governs vast topics and behaviors, not just revenue collection, it is easier to understand why a tax exceptionalism argument that focuses solely on the unique revenue generating aspect of tax must fail. As Professor Leslie Book[95] recently pointed out, "[t]he justification for [tax exceptionalism] . . . becomes less compelling as the Code takes on other roles beyond pure revenue collection."[96] For example, why should poverty re-

90. *See* Susannah Camic Tahk, *Everything is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 67–68 (2013) ("[T]he tax code has recently come to incorporate 'policies aimed at the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, health care, child care, welfare, corporate governance, export promotion, charitable giving, governance of tax exempt organizations, and economic development, to name a few.'") (quoting Pamela F. Olson, Laurence Neal Woodworth Memorial Lecture: And Then Cnut Told Reagan . . . Lessons from the Tax Reform Act of 1986 (May 6, 2010) http://law.onu.edu/sites/default/ files/Olson.pdf.

91. *See generally* Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 793 (2014) (articulating how the "war on poverty has moved into the tax code" and why the "federal government anchors many of its anti-poverty initiatives in the nation's tax code").

92. *See* 26 U.S.C. § 121 (2012).

93. *See* 26 U.S.C. § 163(h)(3) (Supp. I 2013); Rev. Rul. 2010-25, 2010-44 I.R.B. 571.

94. This provision is known generally as the Earned Income Tax Credit. *See* 26 U.S.C. § 32 (2012).

95. Leslie Book is a Professor of Law and the Director of the Graduate Tax Program at Villanova University School of Law.

96. Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 540 (2012).

lief imbedded in the tax code be given special treatment when poverty relief governed by other agencies is not? In carving out all of tax law for special treatment, tax exceptionalists ignore the fact that some, and in fact a significant portion, of tax law has nothing to do with revenue.

B. THE TREASURY'S UNPERSUASIVE USE OF APA EXEMPTIONS

Understanding some of the justifications for rejecting tax exceptionalism helps explain why current Treasury actions often violate the APA and why the Treasury's arguments defending procedurally invalid temporary regulations are now unpersuasive. The APA has exemptions to its notice-and-comment procedures for a reason,[97] but the exemptions must be properly invoked. As Professor Hickman's study noted, a three-year sampling revealed that over 40% of Treasury regulations are noncompliant with the APA, and when issuing temporary regulations the Treasury almost always claims that notice-and-comment rulemaking procedures do not apply.[98] While the Treasury is not alone in avoiding APA informal rulemaking requirements,[99] such a high rate of exemption should raise red flags because it appears the exception has swallowed the rule.

The Treasury's default response to claims that its temporary regulations deviated from proper APA procedure is usually to assert that the regulation is exempt either because it is interpretive in nature or it qualifies under the good-cause exception.[100] Many scholars have written extensively on the merits of these claims in general,[101] but how does the analysis change in light of the Supreme Court's rejection of tax exceptionalism?

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97. By exempting things like interpretive rules and regulations issued to correct a clerical error, the APA is recognizing that following proper notice-and-comment procedure can be a drain on resources that is unwarranted if little would be gained by following such procedure. *See* 5 U.S.C. § 553(b)(A)–(b)(B) (2012).

98. *See supra* notes 73–74 and accompanying text.

99. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012), http://www.gao.gov/assets/660/651052.pdf ("Agencies did not publish a notice of proposed rulemaking (NPRM), enabling the public to comment on a proposed rule, for about 35 percent of major rules and about 44 percent of nonmajor rules published during 2003 through 2010."). The GAO report studied the 568 major rules (those having an annual impact on the economy generally exceeding $100 million) and over 30,000 nonmajor rules published by U.S. agencies between 2003 and 2010. *Id.*; *see also id.* at 9 fig.1.

100. *See, e.g.*, INTERNAL REVENUE MANUAL, *supra* note 76, § 32.1.5.4.7.5.1.

101. *See generally* Asimow, *supra* note 8; *Problem of Remedy*, *supra* note 66; *APA Rulemaking*, *supra* note 34; Vasquez & Lowy, *supra* note 13.

This Section will argue that the tides have shifted in favor of those claiming that certain temporary regulations are procedurally invalid. This Section will first analyze interpretive rule assertions in the new post-*Mayo* administrative environment and then examine claims of good cause.

1. Temporary Regulations Are Not Usually Interpretive

The APA provides no explanation of what it means by "interpretive." In most circuits, therefore, an agency's assertion that a rule is interpretive rather than legislative is evaluated under the standard established by the D.C. Circuit in A*merican Mining Congress v. Mine Safety & Health Administration*.[102] The court's four-part test asks (1) "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action"; (2) whether the rule has been published in the Code of Federal Regulations; (3) whether the agency used its general legislative authority to promulgate the rule; and (4) "whether the rule effectively amends a prior legislative rule."[103] An affirmative answer to any of these inquiries establishes that the regulation has legal effect and should, therefore, be considered legislative and not interpretive.[104] This test, while applied regularly to actions of other agencies, is rarely used to analyze Treasury regulations. Courts seem to resolve tax cases on other grounds or simply accept the Treasury's argument that a temporary regulation is interpretive. This Note argues that this phenomenon should be attributed to tax exceptionalism and should persist no longer.

To illustrate this point, take the recent tax case *Beard v. Commissioner*.[105] Appealing from the Tax Court's grant of summary judgment in favor of the taxpayers, the Commission-

102. 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see* Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211, 241 (2010) *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012) (Halpern & Holmes, JJ., concurring) (explaining that the *American Mining* test has become the "dominant standard" and has been adopted by at least six circuits (citing 1 PIERCE, ADMINISTRATIVE LAW TREATISE § 6.4, at 454 (5th ed. 2010))); *APA Rulemaking*, *supra* note 34, at 1766.

103. *Am. Mining Cong.*, 995 F.2d at 1112.

104. *See id. But see* Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994) (rejecting the idea that publication in the Federal Register is dispositive of whether a regulation is legislative or not); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 947 n.8 (D.C. Cir. 1987).

105. 633 F.3d 616 (7th Cir. 2011), *vacated*, 132 S. Ct. 2099 (2012). The temporary regulation in question was Temp. Treas. Reg. § 301.6501(e)-1T(a)(1)(iii) (1999). *Id.* at 623.

er of the IRS spent a good portion of the appellant brief recognizing that "[a]ppellees can be expected to argue that the regulations are procedurally invalid for failure to satisfy the APA's notice-and-comment requirements"[106] and then detailing the IRS's position that the regulation was interpretive and therefore exempt.[107] Rather than referencing the *American Mining* test, the Commissioner argued that any regulation promulgated by the Treasury in accordance with its general rulemaking authority granted by § 7805(a) should be considered interpretive.[108] Similarly, the brief cites two Seventh Circuit cases holding that regulations having a substantial impact on regulated parties or altering a party's rights are not necessarily legislative.[109] The Court's opinion on this issue merely noted that "[m]uch ink has been spilled in the briefs" about the level of deference to grant to the temporary regulation at issue, but "we need not reach this issue."[110] Nevertheless, the Court did note that it would be inclined to "grant the temporary regulation *Chevron* deference" whether it was interpretive or not, presumably because the regulation later went through the notice-and-comment process and was replaced by nearly identical final regulations.[111]

The Supreme Court granted certiorari, vacated the Seventh Circuit's judgment, and remanded the case for reconsideration[112] in light of its holding in *Home Concrete*.[113] Admittedly, *Beard* was probably not the right case for an in-depth discussion of the validity of temporary regulations. However, it would have been interesting if the Supreme Court had taken this opportunity to address the question of how to treat the interaction between the APA and temporary Treasury regulations in the wake of its *Mayo* decision. It could be argued that the case

106. Brief for the Appellant, *Beard*, 633 F.3d 616 (7th Cir. 2011) (No. 09-3741), 2010 WL 3950613, at *32.

107. *Id.* at 32–38.

108. *Id.* at 33 (citing Boeing Co. v. United States, 537 U.S. 437, 448 (2003)).

109. *Id.* at 36 (citing Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1375–77 (Fed. Cir. 2001); Metro. Sch. Dist. v. Davila, 969 F.2d 485, 493 (7th Cir. 1992)).

110. *Beard*, 633 F.3d at 623.

111. *Id.*

112. Beard v. Comm'r, 132 S. Ct. 2099, 2099 (2012).

113. *See generally* United States v. Home Concrete & Supply, L.L.C., 132 S. Ct. 1836 (2012) (holding that the same Treasury regulation at issue in *Beard* was invalid and not entitled to *Chevron* deference because a prior Supreme Court case, *Colony, Inc. v. Comm'r*, 357 U.S. 28 (1958), had found the statute in question unambiguous and provided the only binding interpretation).

would have turned out the same, with a remand to the lower court. In rejecting tax exceptionalism, the Supreme Court in *Mayo* stated that it was "not inclined to carve out an approach to administrative review good for tax law only."[114] By invalidating the Treasury's interpretation of a statute at *Chevron* step one,[115] because congressional intent was clear as the statute was unambiguous on its face, the Seventh Circuit in *Beard* treated the Treasury the same as any other agency.[116] On the other hand, if the Seventh Circuit had applied the *American Mining* test, it might have found that the regulation was procedurally invalid. The regulation at issue stated that an overstatement of basis in ownership interests is an omission of income, therefore, triggering a six-year statute of limitations.[117] Arguably, in the absence of this regulation there would not be an adequate legislative basis for enforcement since the default statute of limitations is only three years, making the regulation legislative under the first prong of the *American Mining* test. It follows, then, that as a legislative rule, the regulation is not exempt from APA requirements and is procedurally invalid because it was not promulgated pursuant to notice-and-comment procedures. This leads to the same end result, but would have sent a very different message to the Treasury—that tax exceptionalism will no longer be tolerated.[118]

2. Treasury Claims of Good Cause Need Better Substantiation

APA § 553 also provides an exemption from notice-and-

114. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011).

115. *Chevron* step one is questioning whether a "statute is silent or ambiguous with respect to the specific issue" and if not, then to "give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

116. *Beard*, 633 F.3d at 617.

117. *See id.*

118. This Note is not arguing that all temporary Treasury regulations should be considered legislative, but merely that with the Supreme Court's rejection of tax exceptionalism courts should judge the Treasury's actions under the same level of review as that used with other agencies. As pointed out by Judges Halpern and Holmes, this means recognizing that "the Administrative Procedure Act (APA) draws the line between legislative and other regulations differently [than tax law]." Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211, 240 (2010) (Halpern & Holmes, JJ., concurring) (citing Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of* National Cable*,* Swallows Holding*, and Other Developments*, 61 TAX LAW. 479, 484–85 (2008, *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012).

comment procedure for "good cause."[119] Like the interpretive exemption, agencies claim they have good cause for bypassing APA procedures on a regular basis. In fact, the Government Accountability Office (GAO) revealed that over an eight-year period, agencies used the "good cause" exception for "77 percent of major rules and 61 percent of nonmajor rules [published] without [a notice of proposed rulemaking],"[120] so the Treasury is certainly not alone when making such an assertion. Tax exceptionalism remains prevalent in the level of deference courts give to the Treasury's good cause claims despite the fact that such claims are often unsupported.

The APA's only guidance on what is "good cause" is to note that the exemption can be invoked when an agency finds that notice and comment would be "impracticable, unnecessary, or contrary to the public interest."[121] Given this lack of statutory guidance, courts often look to the Attorney General's Manual on the Administrative Procedure Act,[122] which provides a fairly narrow interpretation of good cause but does give agencies some "flexibility in dealing with emergencies and typographical errors, plus the occasional situation in which advance notice would be counterproductive."[123] Most courts have become increasingly skeptical of good cause claims and, therefore, have started demanding that an agency provide more than a cursory explanation of their need to skip notice and comment. For example, in the D.C. Circuit case, *Mack Trucks, Inc. v. Environmental Protection Agency*, the Court came down hard on the EPA's attempt to invoke the good cause exemption to avoid APA procedures when promulgating an interim-final rule protecting a single noncompliant engine manufacturer.[124] In its quite quotable opinion, the Court held that "[w]e have repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced'"[125] and that "the

119. *See* 5 U.S.C. § 553(b)(B) (2012).

120. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 99, at 15 fig.5.

121. 5 U.S.C. § 553(b)(B).

122. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter ATTORNEY GENERAL'S MANUAL]; *see APA Rulemaking*, *supra* note 34, at 1759 n.119 (noting that the Attorney General's Manual is "generally regarded as an authoritative interpretation of the APA").

123. *APA Rulemaking*, *supra* note 34, at 1782; *see* ATTORNEY GENERAL'S MANUAL, *supra* note 122, at 30–31.

124. 682 F.3d 87 (D.C. Cir. 2012).

125. *Id.* at 93 (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 754 (D.C. Cir. 2001)).

exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim."[126] In a similarly critical opinion, the Temporary Emergency Court of Appeals held that "[i]t is axiomatic that a mere recital of good cause does not create good cause. Similarly, a desire to provide immediate guidance, without more, does not suffice for good cause."[127]

On the other hand, when the Treasury issues temporary regulations, it frequently gets by merely reciting the language suggested by the Internal Revenue Manual—"[t]hese regulations are necessary to provide taxpayers with immediate guidance. Accordingly, good cause is found for dispensing with notice and public comment . . . ."[128] In the wake of *Mayo*, such cursory language should no longer suffice. Rejecting tax exceptionalism and applying the *Mack Trucks* or *Mobil Oil* opinions to any such Treasury regulation would likely lead to invalidation of the temporary regulation for violating the APA and force the Treasury to provide a much more compelling and fact-specific reason for its need to bypass APA procedures.

C. SECTION 7805(E) DOES NOT TRUMP THE APA

If the *Mayo* opinion weakens most Treasury claims of APA exemption for good cause or interpretive rules, what is left in the Treasury's arsenal? The most intriguing argument might be that in enacting § 7805(e) Congress intended to trump the APA and exempt all temporary regulations from notice-and-comment procedure.[129] In some sense, this is a much stronger argument for the Treasury because if a court were to adopt such a position, then the Treasury would not have to prove its regulation satisfied any of the enumerated APA exemptions. Rather, all temporary regulations would simply be beyond the

126. *Id.* (quoting Am. Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)).

127. Mobil Oil Corp. v. Dep't of Energy, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979).

128. INTERNAL REVENUE MANUAL, *supra* note 76, § 32.1.5.4.7.5.1; *see also APA Rulemaking*, *supra* note 34, at 1781 ("Several projects studied asserted good cause using only this language, or something closely resembling it.").

129. *See, e.g.*, Reply Brief for the Appellant at 6, Salman Ranch, Ltd. v. Comm'r, 647 F.3d 929 (10th Cir. 2011), *vacated*, 132 S. Ct. 2100 (2012), No. 09-9015, 2010 WL 2397312 ("The provisions of § 7805(e) . . . show that Congress authorized Treasury to issue temporary regulations without notice and comment . . . ."); Respondent's Brief in Support of Motion to Vacate Order and Decision at 20, Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211 (2010), No. 25868-06, 2010 WL 6754791 ("Section 7805(e) provides a specific statutory exemption to the general statutory requirements of the APA.").

reach of notice-and-comment requirements. This is a dangerous road for courts to start down for three principal reasons.

First, despite some views to the contrary,[130] § 7805(e)'s legislative history does not support the assertion that § 7805(e) was enacted to free temporary tax regulations from all notice-and-comment procedures, and APA § 559[131] in particular should dispel such a claim. The Treasury's chief argument along these lines is that § 7805(e) conflicts with APA § 553 and in the face of such conflict "a specific statute controls over a general one 'without regard to priority of enactment.'"[132] While the specific versus general distinction is generally true, the APA is specifically protected from such claims by APA § 559, which provides that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly."[133] As Judges Halpern and Holmes put it, "exceptions to the APA's terms cannot be inferred—much less inferred from an absence in the legislative history."[134] Since nothing in the statutory language of § 7805(e), or in its sparse legislative history, even mentions the APA, it seems farfetched to claim that Congress expressly superseded or modified the APA by enacting § 7805(e).[135]

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130. *See, e.g.*, Reply Brief for the Appellant, *supra* note 129, at 6 (arguing that the legislative history of § 7805(e) supports the assertion that "Congress authorized [the] Treasury to issue temporary regulations without notice and comment by requiring any temporary regulation to be issued also as a proposed regulation").

131. Administrative Procedure Act, 5 U.S.C. § 559 (2012).

132. Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961) (quoting Townsend v. Little, 109 U.S. 504, 512 (1883)).

133. 5 U.S.C. § 559; *see* Dickinson v. Zurko, 527 U.S. 150, 155 (1999) (articulating support for the express statement requirement created by APA § 559 because "[t]he APA was meant to bring uniformity to a field full of variation and diversity" and "[i]t would frustrate that purpose to permit divergence on the basis of a requirement 'recognized' only as ambiguous"). It is also worth noting that APA § 559 was last amended in 1978, so § 7805(e), which was added to the IRC in 1988, would qualify as a subsequent statute.

134. Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211, 246 (2010) (Halpern & Holmes, JJ., concurring), *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012).

135. *Id.* at 245; *see Legislative Entrenchment*, *supra* note 21, at 1054–58; *see also Intermountain*, 134 T.C. at 244 ("The legislative history does note that the Secretary [of the Treasury] commonly issued temporary regulations with immediate effect, but this alone hardly suggests Congress meant to waive notice and comment for all temporary regulations."). *But see* Reply Brief for the Appellant, *supra* note 129, at 6–7 (asserting that the legislative history of § 7805(e) does support such a position because it stated that Congress intended for the temporary nature of a regulation not to affect its validity if finalized in accordance with the three year sunset provision and arguing that "[i]f the

Second, the APA and § 7805(e) can be interpreted to be complimentary rather than conflicting with one another. In a persuasive amicus brief, Professor Hickman urged the Court to hold that rather than authorizing the Treasury to forego notice-and-comment procedures for all temporary regulations, § 7805(e) actually imposes extra requirements.[136] Such a cooperative reading essentially argues that *if* a regulation is exempt from APA rulemaking procedures under APA § 553, *then* the Treasury may issue the regulation in temporary form, but only if it also issues it in proposed form and finalizes it within three years as required by § 7805(e). The converse argument being, if the regulation is not exempt under APA § 553, then it cannot be issued in temporary form and § 7805(e) simply does not apply. Not only does this position resolve the argument that § 7805(e) trumps the APA, for if the statutes are in harmony the Treasury can no longer claim that the specific trumps the general, but it also reconciles nicely with § 7805(e)'s legislative history and is a step towards ending tax exceptionalism. One of the few things Congress noted when enacting § 7805(e) was that "[t]he committee is also concerned about the length of time that some regulations remain in temporary form."[137] If a temporary Treasury regulation satisfies one of the APA § 553 exemptions, then, strictly looking at the APA, it could remain on the books in temporary form indefinitely. Because the Treasury frequently asserts such exemptions, it makes sense that by adopting § 7805(e) and imposing the additional constraint that the Treasury must finalize every temporary regulation within three years of its promulgation,[138] Congress was actually attempting to force the Treasury to stop avoiding notice-and-comment procedures.[139] Furthermore, this cooperative interpretation of the APA and § 7805(e) fits nicely into a post-*Mayo* administrative law world. It recognizes that the APA applies in full force to the Treasury just like any other agency and that courts do not have to "carve out an approach to administrative

absence of notice and comment could deprive temporary regulations of validity, then § 7805(e) would be meaningless, violating the canon of construction that 'a legislature is presumed to have used no superfluous words'" (quoting Bailey v. United States, 516 U.S. 137, 145 (1995))).

136. Prof. Kristin E. Hickman as Amicus Curiae Supporting Respondents at 16, United States v. Home Concrete & Supply, L.L.C., 132 S. Ct. 1836 (2012), No. 11-139, 2011 WL 6813230.

137. S. REP. NO. 100-309, at 7 (1988).

138. *See* 26 U.S.C. § 7805(e)(2) (2012).

139. *See* Brief of Prof. Kristin E. Hickman as Amicus Curiae Supporting Respondents, *supra* note 136, at 18.

review good for tax law only."[140]

Third, a court should consider the broader implications of interpreting § 7805(e) as overriding APA requirements for temporary regulations. As the Fifth Circuit pointed out, "[t]he purpose of notice-and-comment rulemaking is to 'assure[] fairness and mature consideration of rules having a substantial impact on those regulated.'"[141] Allowing the Treasury to skip notice-and-comment procedures on all temporary regulations dilutes this purpose by allowing the exception to swallow the rule. It is also important to note that "our system of taxation depends on a high degree of citizen 'buy in.'"[142] The IRS "audits only a small percentage of the hundreds of millions of returns filed each year,"[143] so taxpayers who self-report are the primary source of government revenue. This revenue could be at risk because voluntary compliance could decline if taxpayers lose faith in the validity of Treasury regulations, especially if taxpayers feel they have been deprived of the opportunity to comment on and influence a regulation before it becomes binding. Notice-and-comment rulemaking, therefore, gives legitimacy to Treasury actions and helps ensure future public participation.

D. PUTTING IT ALL TOGETHER FOR GRANDFATHERED TEMPORARY REGULATIONS

Many of the arguments for finding current temporary regulations procedurally invalid apply in full force against grandfathered temporary tax regulations and might even be more persuasive in that context.[144] For starters, any claim that § 7805(e) trumps APA § 553, thereby exempting Treasury regulations from notice and comment, must fail on its face. By definition, the grandfathered rules were promulgated before § 7805(e) was

140. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011).

141. United States v. Johnson, 632 F.3d 912, 931 (5th Cir. 2011) (quoting Pennzoil Co. v. Fed. Energy Regulatory Comm'n, 645 F.2d 360, 371 (5th Cir. 1981)); *see also* Asimow, *supra* note 8, at 366 (explaining the democratic purposes of notice-and-comment procedures by commenting "the undemocratic power of rulemaking is alleviated by allowing the persons affected to have a say about the rules and by requiring the agency to read and respond to their comments").

142. Johnson, *supra* note 50, at 290–91.

143. *Id.* at 291.

144. *See Legislative Entrenchment*, *supra* note 21, at 1057 ("Many temporary regulations issued prior to November 21, 1988, are likely now invalid because of the Treasury's failure to allow the public to comment on them.").

enacted, and as § 7805(e) was given only prospective application it cannot be an argument here. That leaves the Treasury with the classic APA exceptions. Admittedly, there might be some grandfathered temporary tax regulations that would properly qualify for an interpretive rule or good cause exemption, but it is equally likely that courts at that time merely deferred to the Treasury's assertions that it had complied with the APA. For example, in *Petaluma FX Partners, LLC v. Commissioner*, the court dealt with a grandfathered temporary regulation enforced against a taxpayer more than ten years after it was promulgated.[145] The appellee argued that there would be no jurisdiction for the case but for the invocation of the procedurally invalid temporary regulation.[146] If such an assertion is true, then it appears that the first prong of the *American Mining* test could be used to argue that the temporary regulation was legislative because in its absence "there would not be an adequate legislative basis for enforcement action."[147] Similarly, in enacting Temporary Treasury Regulation § 301.6233-1T, the Treasury did not include a contemporaneous assertion of good cause or explain its reasoning with any specificity, but simply cited its need to provide "immediate guidance to partners and partnerships affected and to the Internal Revenue Service in the conduct of partnership examinations."[148] In the wake of *Mayo*, a mere reference to immediate guidance likely would be insufficient to qualify for the good cause exemption. Likewise, it should be noted that a claim of immediate guidance seems much less compelling more than a decade after a rule's promulgation.

Throughout this Part, this Note argues that, despite the Supreme Court's holding in *Mayo*, tax exceptionalism is still alive and well in the temporary Treasury regulation context. Despite the Treasury's frequent claim that it uses temporary regulations to provide immediate guidance, the practice only causes more confusion as it clashes with Supreme Court precedent and generally applicable administrative procedures. This Note does not suggest that the Treasury must use notice-and-comment procedures *every time* it acts, rather, it argues that

145. *See supra* notes 1–3 and accompanying text.

146. Replacement Brief for the Appellee, *supra* note 1, at 5.

147. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

148. Replacement Brief for the Appellee, *supra* note 1, at 8–9 (quoting Miscellaneous Provisions Relating to the Tax Treatment of Partnership Items, 52 Fed. Reg. 6779, 6780 (Mar. 5, 1987)).

the Treasury should no longer receive special treatment from the judicial system.

III. SOLUTION: ENDING TAX EXCEPTIONALISM SURROUNDING TEMPORARY TREASURY REGULATIONS

The Treasury must comply with the APA like any other agency, but the question now becomes how to get it to comply without destabilizing the tax system. This Note suggests that judicial or congressional action is needed to finally end the tax exceptionalism practices surrounding temporary Treasury regulations. Section A briefly addresses why maintaining the status quo or immediately invalidating all temporary regulations are not practical solutions. Section B then proposes potential avenues courts and Congress can take to bring the Treasury back in line with APA mandated procedures.

A. EXTREME SOLUTIONS ARE NOT THE ANSWER

If *Mayo* rejected tax exceptionalism almost four years ago, why is the Treasury not treated like any other agency by now? One answer might be that changing precedent through the court system is a slow process, but in the case of tax exceptionalism other factors are in play. For starters, based on current trends, the issue is simply not in front of courts enough to result in any real impact.[149] Then, even if the procedural invalidity of a regulation makes it into a taxpayer's brief, it is usually one of numerous alternative arguments and rarely gets much discussion by the court.[150] Additionally, the Treasury has little incentive to change its practices. In the current administrative law climate, temporary regulations promulgated without notice-and-comment procedures are treated as binding on taxpayers, so the added enforcement benefit of complying with the APA is basically nonexistent. It is most likely true that the Treasury does not avoid such administrative procedure out of

149. For a discussion of why such cases rarely make it to the courts, see *supra* notes 66–68 and accompanying text; *see also Problem of Remedy*, *supra* note 66, at 1157 ("In other words, statutory provisions and the courts' own jurisprudence combined discourage procedural challenges against Treasury regulations to the point of denying taxpayers an adequate judicial remedy to vindicate procedural rights granted in the APA.").

150. *Compare* Brief for the Appellant, *supra* note 106 (arguing extensively against procedural invalidity), *with* Beard v. Comm'r, 633 F.3d 616 (7th Cir. 2011), *vacated*, 132 S. Ct. 2099 (2012) (dedicating only one cursory paragraph to the issue and deciding the case on other grounds).

some conniving or malicious intent,[151] but, just like any other agency, it would rather not use its limited resources on APA compliance if it does not have to.[152] Therefore, if no action is taken by the courts or judiciary, the Treasury will likely maintain the status quo, which leaves all temporary regulations binding on taxpayers despite their noncompliance with the APA.

At the other extreme, any Supreme Court or congressional action that simply declares that all temporary Treasury regulations are invalid would be a similarly poor solution. Taxpayers rely heavily on the stability of the Code for planning purposes and fully expect that the Treasury regulations on the books are, at a minimum, reliable guidance. The instability that would be caused by such invalidation could be detrimental to the tax system both because it could alienate taxpayers, potentially reducing voluntary compliance and therefore revenue, and because it would compel the Treasury to hurriedly fill the gaps in tax law previously dealt with by such regulations.[153] A declaration that temporary regulations are invalid could also implicate the validity of regulations originally issued in temporary form, but later finalized with post-promulgation notice and comment.[154] Furthermore, such action would be hard to reconcile with the legislative history of § 7805(e), which specifically notes that "[t]he expiration of temporary regulations at the end of this [three]-year period is not to affect the validity of those regulations during the [three]-year period."[155] Given the problems with these solutions, it is clear that another approach is necessary.

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151. *See APA Rulemaking*, *supra* note 34, at 1799 ("APA noncompliance [is] the unanticipated and unintended consequence of the well-intentioned pursuit of alternative priorities.").

152. *See, e.g.*, Patrick J. Smith, *Life After* Mayo*: Silver Linings*, 131 TAX NOTES 1251, 1264 (2011) ("For temporary regulations issued after the effective date of section 7805(e), the IRS generally attempts to issue final versions before the end of the three-year expiration period. However, there appears to be no corresponding effort to issue final versions of the older temporary regulations.").

153. *See* Asimow, *supra* note 8, at 373.

154. *See Force of Law*, *supra* note 33, at 471 ("But if the temporary regulations were procedurally defective, at least some courts may feel bound to find final regulations with temporary origins to be similarly invalid.").

155. H.R. REP. NO. 100-1104, at 218 (1988) (Conf. Rep.). The original Senate Report called for a two-year sunset provision, which was later changed to three years by the conference agreement. *Id.*

B. RECOGNIZING THAT TAX EXCEPTIONALISM IS DEAD

Rejecting the two extremes—maintaining the status quo and affirming all temporary regulations or invalidating all temporary regulations—still leaves some more balanced approaches that could be used to transition the Treasury away from tax exceptionalism and back to APA compliance. Rather than proposing one solution, this Note suggests several options that could be used alone or in tandem with each other.

First, courts could simply be less deferential to unsupported Treasury claims that any given temporary regulation is exempt from APA procedure. The invalidation of even a few temporary regulations accompanied by a judicial opinion explicitly noting the lack of substantiation for avoiding notice and comment could be the push the Treasury needs to start supporting its exemption assertions with specificity and particularity like other agencies. The Treasury does not want to go through all the work of promulgating a temporary regulation just to have it invalidated.[156] Once the Treasury realizes that courts will no longer be satisfied by an assertion of "the need for immediate guidance," it should have sufficient motivation to change and maybe even update the Internal Revenue Manual. Two downfalls of this approach are that it could prove slow and would only be effective if implemented consistently. Courts can only take such a position if they hear cases properly raising the issue and, currently, such cases are few and far between.[157] To achieve the most expansive results with this approach, it would be best for the Supreme Court to grant certiorari to a relevant case, hold that the temporary regulation in question is invalid, and articulate that the regulation would have been legally binding if promulgated in accordance with the APA or if an exception from the APA had been properly invoked. Then lower courts could follow suit and cite the Supreme Court case as binding precedent.

Second, courts could adopt the position suggested in Professor Hickman's amicus brief to *Home Concrete*[158] and explicitly hold that requirements imposed by § 7805(e) are additions, not alternatives, to APA notice-and-comment rulemaking pro-

156. *C.f. Force of Law*, *supra* note 33, at 533 ("By the time that it issues proposed regulations, Treasury has already accomplished much of the work of promulgating final regulations.").

157. *See supra* notes 66–68 and accompanying text.

158. *See* Prof. Kristin E. Hickman as Amicus Curiae Supporting Respondents, *supra* note 136, at 15–19.

cedures for the Treasury. Alone or paired with the first suggestion, this could be an effective means of increasing Treasury compliance with the APA. It still allows the Treasury to promulgate temporary regulations, just like any other agency, but only when it possesses valid and persuasive reasons for doing so. Additionally, it addresses congressional concerns about the length of time Treasury regulations remain temporary by reaffirming the three-year sunset provision of § 7805(e)(2). However, like the first solution, this option suffers from the need for the right case to be brought before the courts.

Third, courts could embrace what the Seventh Circuit hinted at in *Kikalos v. Commissioner*—that procedurally invalid temporary regulations should be "entitled to no more deference than a proposed regulation."[159] Standing alone, this suggestion would encourage the Treasury to become more administratively compliant, because it establishes a bright-line test between what would be legally binding on taxpayers and what would be deemed unenforceable guidance. After application by a few courts, the Treasury would understand that to be given the force of law by courts a regulation must be promulgated in accordance with the APA. Paired with the first two solutions, this option is also a good alternative to hasty invalidation of all temporary regulations. It would allow temporary regulations that have not gone through full notice-and-comment procedure and that do not otherwise properly qualify for an APA § 553 exemption to still be used as guidance, but not to be negatively invoked against a taxpayer. In essence, they would have the same power as a proposed regulation or other informal IRS guidance and any penalties imposed by them would be unenforceable until post-promulgation notice-and-comment procedures were completed.[160] By adopting this position, courts would also incentivize the Treasury to use APA procedures on a more frequent basis for any temporary regulation it intends to be legally binding. Again, this option would be most effective if adopted in a Supreme Court opinion, so as to prevent inconsistent application by lower courts, which would cause more confusion than it would resolve.

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159. 190 F.3d 791, 796 (7th Cir. 1999).

160. Concerns about the validity of regulations made final only through post-promulgation are beyond the scope of this Note, but see Ford, *supra* note 56, at 836 n.265 ("[T]he promulgation of temporary regulations concurrent with notices of proposed rulemaking violates the APA, because post-promulgation notice-and-comment is not a valid substitute for statutorily required pre-promulgation notice-and-comment.").

Fourth, a more sweeping possibility would be for Congress to amend the APA to include a section explicitly detailing its position on interim and temporary regulations. The Treasury is not the only agency increasing its use of temporary regulations,[161] so additional congressional guidance might be warranted for all agencies. Such a provision could speak to the amount of deference courts should grant to interim rules, could impose an expiration period for temporary regulations similar to the one imposed by § 7805(e), or could address the validity of only using post-promulgation notice-and-comment procedures. The benefit of this solution is that its effect could be far-reaching and it would resolve many issues currently plaguing the courts. However, the problem with this option is that congressional action takes time. Unlike the gradual, but immediate, change that could be achieved through judicial action, if Congress tried to implement new policies, the tax community might not see any change for a few years.[162]

Finally, to deal with any outstanding grandfathered temporary regulations, this Note proposes two alternative options. Courts could apply the same degree of deference discussed in the third solution—deference equivalent to that accorded to proposed regulations—or Congress could add to § 7805(e) and invoke a sunset provision for grandfathered regulations. The latter option could mimic § 7805(e) and explicitly state that any temporary regulation issued prior to November 22, 1988 will expire within three years. The goal being to give the Treasury time to finalize through notice and comment any regulations it desires to continue to enforce and to give taxpayers time to adjust their plans accordingly.

While any of these solutions alone would be a step towards the end of tax exceptionalism, this Note suggests that a combination of the first three proposals would be the most effective in bringing the Treasury in line with the APA without destabilizing the tax system and, importantly, could be plausibly implemented. By applying the first suggestion and refusing to give deference to unsubstantiated claims of exemption from the APA, courts would push the Treasury to act like other agencies

161. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 99, at 42 fig.10.

162. *C.f.* Independence Hall Association, *How a Bill Becomes a Law*, USHISTORY.ORG, http://www.ushistory.org/gov/6e.asp (last visited Nov. 2, 2015) (explaining that "less that [sic] 10% of proposed bills actually become laws" and that "[m]any people criticize Congress for its inefficiency and the length of time that it takes for laws to be passed and enacted," but also noting that such a lengthy process is intentional and allows for proper deliberation).

and articulate its need to bypass notice-and-comment procedures. This in turn would make it easier for courts to determine if a regulation is properly exempt. If so, then a court could apply the second suggestion and require the Treasury to also comply with § 7805(e). If not, or if the Treasury failed to satisfy the requirements of § 7805(e), then a court can apply the third suggestion and hold that the regulation at issue is unenforceable against a taxpayer, but may nonetheless still represent valuable guidance. Even if the lower courts are slightly inconsistent in their application, if they adopt any combination of these three approaches, the Treasury will be forced to become more administratively compliant to ensure its temporary regulations are legally binding. Together these approaches also provide stability to the tax system because they would be implemented gradually, one temporary regulation at a time, as cases are raised before the courts. Thus, they would allow taxpayers and the IRS sufficient time to adapt, unlike the fourth option—congressional action—which might lead to an abrupt systemwide change and leave taxpayers scrambling to adjust. Additionally, with proper education of taxpayers and lawyers about the availability of the argument of procedural invalidity, we should see more cases where courts could actually implement this change. While these suggestions may not end all instances of tax exceptionalism, at the very least they should push the Treasury in the desired direction of being more compliant with the APA.

CONCLUSION

Despite the Supreme Court's rejection of tax exceptionalism, the belief that tax should be afforded special treatment remains prevalent, especially in Treasury practices and court decisions surrounding temporary tax regulations. With few cases challenging the validity of temporary regulations and even fewer courts tackling the issue head on, this problem is likely to persist. As long as the judicial system continues to allow the Treasury to operate in its own administrative environment, making conclusory assertions of good cause and claiming statutory exemption from APA procedure for all temporary regulations, the Treasury has no incentive to change its ways.

Therefore, taxpayers and the courts should take a stance against tax exceptionalism. Taxpayers need to raise claims asserting that temporary regulations promulgated without notice-and-comment procedures should no longer be legally binding.

Then courts can insist on proper substantiation, require a complementary reading of § 7805(e) and APA § 553, and give little deference to noncompliant regulations. Such judicial action will force the Treasury to bring temporary regulations back in line with the Administrative Procedure Act.