I. Introduction

The central perspective of this Conference and the theme that animates it is taxpayer’s rights as experienced by the taxpayer. We now want to suggest that there is another side to the taxpayer experience coin, and that failing to look carefully at that side produces a lack of transparency that threatens the legitimacy of the tax system and the agency that administers it. That other side of the taxpayer experience coin is the role of those who mediate the taxpayer’s experience with the tax law. We refer here to the thousands of tax scholars, judges, lawyers, accountants, administrators, and other professionals, whose view of the tax law shapes and is shaped by the taxpayer experience. These individuals mediate the taxpayer experience by interpreting and framing the system in both formal and informal ways. Their views of the tax system are reflected in opinions, guidance, scholarly publications and even the accounts of the tax system that appear in the popular press. Their views also inform the way they explain the system to clients and the advice they give. Together, these communications create a picture of the tax system that affects how it is perceived by taxpayers, regardless of whether the taxpayer receives the communications directly, as do the over 70% of taxpayers who receive some professional assistance in tax preparation, or indirectly through the portrayal of the tax system in media accounts.

That tax professionals serve as mediators who both shape and are shaped by the taxpayer’s experience is important. If tax professionals view the tax system and its administrators as illegitimate, they will likely convey that view to taxpayers and those taxpayers will, in turn, be less likely to be fully compliant. Legitimacy is vital to any legal institution, but in the case of the IRS legitimacy has been discussed and analyzed only in the face of catastrophic assaults. These include attempts by a President to use the IRS to persecute political enemies.

---

1 IRS Strategic Plan 2014-2017, at 7 (June 2014), available at https://www.irs.gov/pub/irs-pdf/p3744.pdf (finding more than 75.6 million electronically-filed individual returns were submitted to the IRS through paid preparers, accounting for 64% of all individual income tax e-filers and similarly, in FY 2012, 43.5 million individual taxpayer returns were completed using software, an increase from 39.6 million in 2011); Nat’l Taxpayer Advocate Serv., 2014 Ann. Rep. to Congress: Executive Summary: Preface & Highlights 11 (2014), available at http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report-to-Congress-Executive-Summary.pdf (finding VITA and TCE programs prepared 3,472,696 returns in FY 2014, an increase of about 27 percent over the FY 2009 level and VITA and TCE sites that received funding from the IRS alone prepared more than 1.4 million and 1.3 million returns, respectively, during FY 2014).
allegations of serious abuse of taxpayers by IRS agents, which led to Senate Finance Committee hearings involving witnesses with electronically disguised voices testifying behind security screens and ultimately to the Reform and Restructuring Act of 1998; and most recently allegations that conservative organizations seeking section 501(c)(4) status were disproportionately singled out for intrusive scrutiny and delay.

While these instances have posed significant threats to the agency’s legitimacy, what we explore is more subtle, more pervasive, and hence, more invidious and threatening. It is the way in which the unexamined assumption of tax exceptionalism – the idea that tax is different – has produced a situation in which the tax law and its administrators are viewed by tax professionals, and eventually by the taxpaying public, as behaving in ways that are not understood and are therefore misperceived and ultimately judged illegitimate.

In this paper we explore tax exceptionalism and the manner in which it threatens the legitimacy of the IRS. We also offer a suggested path to the reclamation of legitimacy. In a nutshell, our claim is that if tax professionals abandon the notion that tax is objectively exceptional and accepts that tax is Everylaw, no different in any fundamental way from any other law, it will follow that the IRS is an agency like any other, possessing the same powers and subject to the same constraints as any other. This recognition can free the IRS to be transparent in its actions, stating clearly when it is interpreting the law, when it is declining to enforce the law (exercising prosecutorial discretion) for reasons consistent with the values important in the tax law, and when its actions reflect aspects of both interpretation and enforcement. We begin by exploring tax exceptionalism.

II. Tax Exceptionalism

A. What is it?

Taxpayers experience the tax law as different from other areas of law. One important reason for this is that tax law is complex and its impact pervasive. It imposes multiple reporting requirements and requires annual or more frequent accountings. And it requires arithmetic – lots of arithmetic. No other field of law is thought to be so complex or to compel so many regularly to bare their financial souls to the government just to be in compliance with the law. You cannot just mind your own business and stay out of the way of the tax law; you have to account to the government, and in many cases, you have to pay. Through the tax system, the government is in your face. The approach of April 15 produces an annual ritual that surpasses national holidays in its impact because for most taxpayers there is no choice but to participate, in some way, at some time. It is therefore not surprising that taxpayers experience the tax law as exceptional, different from other areas of law.

---

2 Provide authority.
3 Provide some authority – cite to hearings, background, and cite for RRA ’98.
4 Provide cite to something that summarizes the recent 504(c)(4) matter. Note DOJ decision not to prosecute, at http://online.wsj.com/public/resources/documents/IRS1023.pdf, and Commissioner impeachment proceedings.
This experience of difference – tax exceptionalism – is so prevalent that it extends to the way that tax scholars, most of whom are also taxpayers, think of the tax law. And it has led them to think of tax as different from other fields of law and, in some cases, even as something separate from law. For example, Louis Kaplow and Steven Shavell, two respected and prolific scholars at the Harvard Law School, distinguished the “legal system” from “the income tax” in such a profound way that the distinction appears in the title of an important article,5 (Why the Legal System is Less Efficient than the Income Tax in Redistributing Income), and that distinction is repeated in the scholarly dialog that ensued.6 Other scholars have examined ways in which the characterization of tax as different affects its role in the law school curriculum and its attraction as an area of practice.7

Tax exceptionalism is not a specific idea. Rather, it is a way of conceiving of tax or, still more loosely, an attitude toward tax. At its simplest, tax exceptionalism is “the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.”8 As former Treasury officials have put it:

Federal tax statutes and the legislative process that produces them differ from other legislation in such degree that the difference is tantamount to a difference in kind. The unique nature of the Internal Revenue Code is widely acknowledged . . . .9

But nowhere has tax exceptionalism had such profound effects and been subject to greater scrutiny than in in the area of administrative law. For decades Treasury and the IRS had taken the position that unlike regulations in other areas of law, tax regulations were not subject to the notice and comment process provided by the Administrative Procedure Act, and tax regulations were thought to merit a lesser level of judicial deference than other regulations.10

---

5Louis Kaplow and Steven Shavell, Why the Legal System is Less Efficient than the Income Tax in Redistributing Income, 23 J. LEGAL STUD. 667 (1994).
6Subsequent work leaves no doubt that Kaplow and Shavell were invoking the tax system as a whole. The opening sentences of a subsequent article state that: “In prior articles, we demonstrated in a natural model that legal rules should not be adjusted to favor the poor in order to further redistributive objectives. The reason is that the income tax and transfer system is a superior instrument for redistributing income.” (Emphasis added, footnote omitted). Louis Kaplow and Steven Shavell, Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income, 29 J. LEGAL STUD. 821 (2000). And Kaplow and Shavell are not alone in their treatment of the tax system as different from the ‘legal’ system. Chris Sanchirico challenges some of their claims in an article tellingly titled Taxes versus Legal Rules as Instruments for Equity: A More Equitable View. Chris William Sanchirico, Taxes versus Legal Rules as Instruments for Equity: A More Equitable View, 29 J. LEGAL STUD. 797 (2000).
8Lawrence Zelenak, Maybe Just a Little Bit Special, After All? 63 DUKE L.J.1897, 1901 (2014).
10See, e.g. Kristen E. Hickman, The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference, 90 MINN. L. REV. 1537 (2006) (discussing, and then arguing against, the reasons for different deference standards in the tax
Then, in 2011 the United States Supreme Court seemed to kill tax exceptionalism when it held in *Mayo* that tax regulations were entitled to the same degree of deference as any other regulations.\(^{11}\) Many rejoiced and a new era promised to dawn. Yet tax exceptionalism has refused to die.\(^{12}\)

### B. Two Types of Exceptionalism

We believe that the stubborn persistence of tax exceptionalism is due to an important but previously unidentified and unexplored feature—namely, that tax exceptionalism has two distinct aspects: a visceral aspect and an objective aspect. The visceral aspect is what we described above: tax is experienced as exceptional—exceptionally complex, intrusive, and pervasive. We do not challenge the reality or the intensity of that experience; indeed, we offer explanations for it. But we believe that the experience of difference has been reified, so that tax law is thought to be *really* different—objectively different in kind from other fields of law or, as we said earlier, perhaps not even law at all. It is this second aspect of tax exceptionalism—the objective aspect—that we want to challenge, for its powerful influence on tax scholarship, administration, and adjudication threatens the legitimacy of the tax law and of the agency that administers it.

This where our perspective differs from that of other participants in this Conference: our argument is directed at those who interact with the tax system, not as taxpayers but as tax scholars, judges, lawyers, and other professionals. As described earlier, these individuals mediate taxpayer’s understanding of the tax system and IRS action. How those actors view the tax system therefore plays a crucial role in how taxpayers experience that system; whether in the public or private sector, these actors occupy the space between Congressional enactments and the taxpayer’s experience of the tax system. They are the priests who administer religion to the masses not only through direct advice but also through commentary in the media, and how those priests view and portray the religion matters.

---


\(^{12}\) See Kristen E. Hickman, *Administering the Tax System We Have*, 66 Duke L.J. 1717, 1719 (2014) (explaining that even post *Mayo*, tax lawyers and administrators continue to label general authority Treasury regulations as “interpretive rules” even when those regulations are legally binding and are actually legislative rules, and claim that such rules don’t require notice-and-comment rulemaking procedures under the APA; see also Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?* 89 Tex. L. Rev. 92 (2011) (suggesting deliberate ignorance of the difference between general and agency-specific precedents to avoid having to comply with general administrative law doctrine); Kristen E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 496 (2013) (citing Public Inspection of Material Relating to Tax Exempt Organizations, T.D. 9581, 77 Fed. Reg. 12,202-01, 12,203 (Feb. 29, 2012), which claims that APA § 553(b) is inapplicable to regulations issued under I.R.C. § 7805 general authority).
Our central claim is that when tax is viewed as objectively exceptional – that is, when tax is thought to be fundamentally different in kind from other fields of law – it is deprived of the analytical tools and vocabulary commonplace in other fields of law. That constraint makes tax law appear opaque and the operation of the IRS inscrutable, creating a shroud of mystery and murkiness and contributing to taxpayers’ visceral experience of tax exceptionalism, thereby promoting the cycle. Unmasking and then abandoning that objective aspect of tax exceptionalism, therefore, has significant implications for tax law, tax administration, and the legitimacy of the IRS. It will allow the IRS to exercise both interpretive authority and enforcement discretion in ways that are open and transparent and that communicate to the public precisely what it is doing and why it is doing it. We begin by illustrating the clarifying power of the open exercise of interpretive authority.

III. Interpretation and Enforcement

The pervasiveness of taxation, the structure of the income tax system, which invites taxpayers to engage in specific transactions in specific ways to produce a specific tax result, and the need to account to the government on a regular basis, combine to generate a powerful desire for certainty and predictability. Accordingly, our visceral experience of tax exceptionalism includes a longing for rules, for a strictly limited interpretive role for the IRS, and for a rejection of any kind of robust enforcement discretion on the part of that agency. Standards, interpretive authority, and enforcement discretion feel like the enemies of certainty and predictability. But a conclusion that tax is objectively exceptional need not follow from this visceral experience. That is, just because many, if not most, taxpayers and tax professionals long for certainty and predictability, for good reasons, it does not follow that tax law really consists almost entirely of rules and that the IRS really lacks strong interpretive authority and enforcement discretion. We argue that tax law and tax administration are not exceptional in this way. That is, we believe that tax is law and as such is composed of rules as well as standards, and the IRS has the powers all administrative and enforcement agencies have.

A. Interpretive Authority

We turn first to the matter of rules and standards and their relationship to the IRS’s interpretive authority, with an example will help to explain what we have in mind. One of the ways in which tax is thought to be objectively exceptional manifests itself in the assumption that the tax law is composed exclusively of rules. Of course, certain features of the tax law invite that assumption: the existence of a massive, detailed, and complicated codification, the need to reduce tax liability to a specific number, and the importance of treating similarly situated taxpayers similarly, all seem to demand the clarity and consistency which are the hallmark of rules. In addition, the frequency with which taxpayers turn to tax professionals for a prediction of how the tax law will apply makes those professionals long for clear, consistent rules.
Nevertheless, nothing in the theory or policy of taxation demands that the tax law be composed exclusively of rules when other fields of law are acknowledged to be composed of both rules and standards, or, more accurately, of provisions that lie at various points in the rules/standards continuum. If the criminal law can deprive an individual of life and liberty based on provisions that are acknowledged to be standards, why not the tax law? The criminal law has rules, but ‘reasonable doubt’ – that’s a standard.

We believe that like the criminal law, the tax law employs both rules and standards. The failure to acknowledge that impedes analytical clarity. In prior work we’ve claimed that the unexamined assumption that the tax law is composed only of rules has led to much handwringing over the definition of income.\(^\text{13}\) As all tax lawyers know, the statute provides that “except as otherwise provided . . ., gross income is income from whatever source derived . . .”\(^\text{14}\) and the United States Supreme Court in Glenshaw Glass,\(^\text{15}\) put meat on those bones by explaining that income consisted of “all undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”\(^\text{16}\) Yet, the IRS has asserted that government transfer payments are not income,\(^\text{17}\) although they are clearly accessions to wealth, clearly realized, and nothing in the statute excludes them. However sensible this “general welfare exclusion”\(^\text{18}\) may be as a matter of policy, the technical and theoretical rationale for it has befuddled scholars and commentators: If all accessions are income unless excluded by statute, how can the IRS categorically maintain that such a broad and economically significant category of accessions is not income absent a statutory exclusion? How can the receipt of cash, not as a gift, not be income?

We believe that untangling this conundrum is easy. It only requires acknowledging that the tax law, like other fields of law, is composed of both rules and standards and that the definition of income is a standard, constructed by the values that inform that field of law. Treating government transfer payments as income would run counter to the values important in taxation, so of course it should not be done. Analyzing the definition of income as a standard, which allows the IRS to interpret the term so as to reach a sensible result that comports with the values that animate the tax law, explains the law as administered. If the IRS acknowledged that it is exercising its interpretive authority in defining income, its actions would be transparent and legitimate. Appearing to create an exclusion in that face of statutory language confining


\(^{14}\) IRC § 61(a).


\(^{16}\) Id.

\(^{17}\) Examples are payments under the Temporary Aid to Needy Families (TANF) program, medical and hospitalization services provided by Medicaid and Medicare, and public education.

exclusions to the ambit of the statute seems lawless and illegitimate; interpreting a term as a standard the application of which results in a conclusion of no income in a particular case offers transparency and legitimacy.

Transparency would also make the tax law more predictable. It tax advisors, and eventually taxpayers, know that the IRS interprets ‘income’ as a standard informed by tax values that implicate what it is reasonable and administratively feasible to include in the tax base they can more accurately predict whether the IRS would likely interpret a particular item as constituting income. For example, with income-as-standard, the kerfuffle over the tax treatment of caught record breaking baseballs need not have occurred. Although the breadth of the Glenshaw Glass definition allows the IRS to interpret ‘income’ narrowly when warranted, and more expansively where that is appropriate, if income is a standard it would not follow that because the indisputably valuable baseball is a realized accession, it must be income. The valuable baseball would only be income if interpreting the term to include it would be consistent with the values important in taxation, including administrability and community expectations.

It is the myth of income-as-rule that leads to the conclusion that catching the valuable baseball produces income, and it is the assumption of tax exceptionalism that leads to the myth of tax law as a compendium that consists only of rules. If the Glenshaw Glass definition of income were not viewed as a rule, the conclusion that catching the valuable baseball produced income would not have been seen by so many tax professionals, inside and outside the IRS, as inevitable. A more nuanced analysis could have been undertaken from the start, and the calls

---

19 As we explained in Defining Income, in the late 1990’s “baseball players began to threaten long established home run records [in the late 1990’s], it was clear that any ball that broke such a record would become a collector’s item worth substantial amounts of money. When the records began to be broken and a fan caught the record-breaking ball, the tax controversy erupted. Practitioners, academics, and former IRS Commissioners all agreed that catching the ball, like finding old currency in a used piano, which was held to be income in a case known to virtually every student of taxation, resulted in the realization of income. But the public and Congressional outcry at such a prospect was fierce. . . Scholarly articles were written and the question was debated, but the IRS’s position remains unknown.” Defining Income, supra n. 8 at 319 (footnotes omitted). The receipt and retention of the baseball is clearly a realization event because it changes the legal relationship of the recipient to the baseball, giving the recipient something she did not have before. Cottage Savings v. Comm’r, 499 U.S. 554 (1991); Helvering v. Bruun, 309 U.S. 461 (1940). See, Lawrence A. Zelenak & Martin J. McMahon, Jr., Taxing Baseballs and Other Found Property, 84 TAX NOTES 1299, at 1300 (1999) (reporting former IRS Commissioner Donald Alexander’s opinion that a record-breaking baseball is income when caught by a fan, documenting that Alexander’s opinion was “universally shared among tax experts,” and attributing the “unanimity of expert opinion” to its reliance on the literal language of Treas. Reg. §1.61-14). See also Joseph M. Dodge, Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the “Claim of Right Doctrine” to Found Objects, Including Record-Setting Baseballs, 5 FLA. TAX REV. 685, 691 (2000).

20 Explain that conformity with community expectations is part of administrability, as interpretations that run counter to community expectations are necessarily more difficult to administer and enforce.

21 It was the answer given by an IRS spokesperson to a question posed by a NYTimes reporter that set of the maelstrom of controversy. Cite to Wall street Journal piece by Tom Herman and Lawrence A. Zelenak & Martin J. McMahon, Jr., Taxing Baseballs and Other Found Property, 84 TAX NOTES 1299, at 1300 (1999) and Joseph M. Dodge, Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the “Claim of
for Congressional action and the introduction of legislation could have been averted. The IRS could have simply stated that it was construing the term income so as to not include caught baseballs because doing so would be contrary to important tax values, like administrability and community expectations.

Instead, the agency had to scramble to come up with a rationale that would produce the obviously sensible no-income result while not acknowledging that what it was doing was interpreting the Glenshaw Glass definition as a standard.\textsuperscript{22} The rationale it came up with (an agency theory) plausibly resolved the question in the initial incident that began the kerfuffle (caught baseball immediately returned to the batter), but left open the question of the treatment of other situations (caught baseballs kept by the fan). It did succeed in quelling the popular uproar and that made legislation unnecessary, but the reason the IRS has not simply said that caught baseballs are not income remains shrouded in mystery. But the absence of an answer to the question why a valuable caught-and-kept baseball should not be treated as an accession to wealth caused a subsequent IRS Chief Counsel to cover his head with his hands and plead “Please don’t ask me that.” \textsuperscript{23}

The drama over caught baseballs could have been avoided completely if the IRS had felt it could state transparently what it seems to us it was clearly doing: interpreting the definition of income as a standard, to be operationalized by the application of relevant values, such as administrability and community expectations. Had it done that, its actions would not have seemed extreme, out of touch, and in need of Congressional correction. The predictability of the law would have been enhanced, as advisors could have clearly told the fortunate fans who catch valuable baseballs what the tax consequences of the happy event would be– no income until sale. The legitimacy of the agency’s actions would have been enhanced.

Similarly, if the definition of income is acknowledged to be a standard, pronouncements like Ann. 2015-22 (assuring taxpayers that the IRS will not treat as income identity protection services provided to victims of identity theft by employers or other organizations),\textsuperscript{24} would not be regarded as surprising exercises of administrative largesse. They would be just as lawful and legitimate exercises of the administrative function.

\textit{Right Doctrine” to Found Objects, Including Record-Setting Baseballs}, 5 FLA. TAX REV. 685 (2000), and the Rossotti autobiography.
\textsuperscript{22} Cite to Rosotti autobiography.
\textsuperscript{23} Cite to WSJ article with picture of Don Korb.
\textsuperscript{24} Ann. 2015-22, 2015 IRB 344, provides that

“The IRS will not assert that an individual whose personal information may have been compromised in a data breach must include in gross income the value of the identity protection services provided by the organization that experienced the data breach. Additionally, the IRS will not assert that an employer providing identity protection services to employees whose personal information may have been compromised in a data breach of the employer’s (or employer’s agent or service provider’s) recordkeeping system must include the value of the identity protection services in the employees’ gross income and wages. The IRS will also not assert that these amounts must be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to such individuals.”
The key to this more transparent, predictable, view of tax administration is accepting that tax is just law. This, in turn, requires abandonment of the objective aspect of tax exceptionalism. Stripped of its exceptionalist cloak, tax law becomes just law and the IRS just an administrative agency, subject to the same constraints, but able to exercise the same powers, as other agencies.

B. Enforcement Discretion.

Under the more nuanced analysis that we propose – tax as Everylaw – the public view of the administering agency can change, and otherwise obscure agency actions can become clear. Not only could the IRS use openly the interpretive authority that it, like other administrative agencies, has, but it could also exercise openly its enforcement discretion, even if that exercise takes the form of categorical nonenforcement. The IRS could explain and hence legitimize. A recent example illustrates this point.

In Notice 2014-23,\textsuperscript{25} the IRS announced that a married individual who could not and did not file a joint return and whose only filing option under the relevant statutory provisions was to file a separate return, would nevertheless be treated as having filed a joint return. Specifically, the Notice provided that an individual would

\begin{quote}
“satisfy the joint filing requirement of § 36B(c)(1)(C) if the taxpayer files a 2014 tax return using a filing status of married filing separately and the taxpayer [indicates on his or her 2014 income tax return that the taxpayer . . . is living apart from the individual’s spouse at the time the taxpayer files his or her tax return [and] . . . is unable to file a joint return because the taxpayer is a victim of domestic abuse . . .”
\end{quote}

Hence, pursuant to the Notice, some separate returns will be treated as if they were joint returns. For us, the crucial questions are: why and where does the IRS get the authority to say that a separate return is a joint return? Nowhere in the statute does it say that under some circumstances a separate return will be treated as a joint return, or even that the IRS has the specific authority to treat some separate returns as under some circumstances.

We do not quarrel with, and indeed, we endorse, the policy objective that generated this result. Notice 2014-23 addressed the plight of victims of domestic abuse and abandonment who for a number of reasons cannot and in many cases emphatically should not, file a joint return, but nevertheless would not qualify for the Head of Household (“HOH”) status that allows married individuals to file as not married.\textsuperscript{26} Because the statute allows otherwise qualifying married individuals to obtain the health insurance “Premium Tax Credit” only if they file a joint return, a married individual who cannot file jointly as a result of domestic abuse or abandonment would necessarily forfeit the credit. That is a demonstrably unfair result, likely not contemplated by the drafters of statute.

\textsuperscript{25} 2014-16 I.R.B. 942
\textsuperscript{26} Section 7703(b).
Nevertheless, the statute does not contain an explicit safety valve. It has no provision for a waiver of the joint return requirement when such filing is precluded by exigent circumstances. It also has no provision specifically delegating to the Secretary of the Treasury the authority to promulgate regulations specifying circumstances under which a separate return may satisfy the statutory joint return requirement, even though numerous statutory provisions do provide analogous grants of regulatory authority. Although the result achieved by the Notice, and confirmed and extended by the subsequent proposed and temporary regulation is clearly correct as a matter of policy, there is no apparent theoretical justification for it under traditional tax analysis.  

The statute contains explicit, detailed provisions setting forth the very limited circumstances when a filing status other than married will be available to an individual who is married under state law. Therefore, saying that an individual who does not meet the statutory requirements for HOH status and hence must and does file as a separate return has filed a joint return cannot reasonably be said to be an interpretation. A separate return cannot reasonably be interpreted to be a joint return.

If the analysis were to stop there, the IRS’s issuance of Notice 2014-23, however equitable and welcome by taxpayers, would have to be regarded as lawless. Nevertheless, we do not think such a conclusion is warranted. The reason is that when the tax law is not seen as objectively exceptional, but is seen as Everylaw, another lawful, and even rather ordinary explanation reveals itself. That explanation is that the IRS was exercising the enforcement discretion that all administrative agencies possess. It was simply deciding not to enforce the law under circumstances that made enforcement unfair or unwarranted. And it was performing an important public function by announcing its decision ex ante. That action brings certainty and predictability to the law.

In short, in Notice 2014-23 the IRS was behaving like a District Attorney who announces that he will not prosecute individuals accused of possessing less than 30 grams of marijuana. In such a situation the positive law has not changed and the prosecutor is not purporting to interpret

27 Cite to Proposed Reg.
that law to no longer forbid possession of marijuana.\textsuperscript{29} He is simply exercising prosecutorial discretion. Although the wisdom of that exercise can reasonably be debated, the very possibility of open debate lends it legitimacy because debate makes the decision subject to the democratic process.

Our claim is that the IRS should behave likewise. But it can only do so by embracing its status as an administrative agency, no more or less endowed than any other. Abandoning the objective aspect of tax exceptionalism allows that, and the resulting benefits are transparency and legitimacy. When the agency can articulate its motives clearly, those motives can be understood, debated, and accepted or rejected. Moreover, if tax advisors and other professionals can understand and explain the agency’s actions to the taxpayers affected by them, those taxpayers can have increased confidence in the agency itself and in the legitimacy of its actions. Respect for the system and increased compliance should result.

Put another way, taxpayer rights should include the right to be informed not only about the position the IRS has taken, but also why it has taken it. Abandoning tax exceptionalism will give the IRS the freedom it needs to exercise the powers it has, and to bring that exercise to light, where full debate can occur.

We are not suggesting that the IRS relinquish its right to keep necessary secrets, such as the DIF score and other criteria for selecting returns for audit.\textsuperscript{30} Nor are we suggesting that it should not be permitted privacy in its deliberations. What we are saying is that when the IRS exercises its interpretive authority or its enforcement discretion it is exercising its legitimate powers as an agency and should, accordingly, be forthright about what it is doing.\textsuperscript{31}

We recognize that we are treading on very controversial ground here. Recent Presidential announcements of non-prosecution and other high-profile executive enforcement decisions have brought the subject of “categorical non-enforcement” to the forefront of both the public and academic agenda, and a rich literature has developed around it.\textsuperscript{32} Nevertheless, bringing the

\textsuperscript{29} In the case of the announcement by the Philadelphia District Attorney discussed in n. 17, \emph{supra}, the reaction of the police, which refused to stop making arrests because the criminal status of the action had not changed, illustrates this vividly. \url{http://www.nbcphiladelphia.com/news/local/-Dont-Flush-That-Dime-Bag-DA-Says-Its-a-Fine-89927182.html} (2010), note 18, \emph{supra}.

\textsuperscript{30} The DIF score is the “discriminant index function” which the IRS develops and uses for selecting some returns for audit. Internal Revenue Manual § 4.1.3.2, (Aug. 10, 2012), http://www.irs.gov/irm.

\textsuperscript{31} We recognize that the concepts of interpretive authority and enforcement discretion are not necessarily binary or clearly distinct, but are often ends of a spectrum. \textit{See}, Alice G. Abreu and Richard K. Greenstein, \textit{The Rule of Law as the Law of Standards: Interpreting the Internal Revenue Code}, 64 DUKE L. J. ONLNE 53, 81-86 (2015), \url{http://dlj.law.duke.edu/2015/01/the-rule-of-law-as-a-law-of-standards-interpreting-the-internal-revenue-code/} (hereafter, “\textit{Law of Standards}”). Nevertheless, we believe that at a minimum, in those cases in which the distinction can be made, the IRS should be open and forthright about making it.

\textsuperscript{32} \textit{See}, e.g. Leigh Osofsky, \textit{The Case for Categorical Non-Enforcement}, 67 TAX L. REV. forthcoming, (2015)(hereafter “\textit{Categorical Non-Enforcement}”). These include the President’s action with respect to immigration – DACA, the Deferred Action for Childhood Arrivals program, and DAPA, the Deferred Action for Parental Arrivals program – the Department of Justice’s decision to let states who have legalized marijuana for medicinal or
actions of the IRS within that larger discussion is precisely our point. There is no question that the IRS exercises enforcement discretion, and sometimes it does so forthrightly, but those instances are rare and often criticized as lawless.\footnote{See e.g., Lawrence A. Zelenak, Custom and the Rule of Law in the Administration of the Income Tax, 62 DUKE L. J. 829, 851 (2012).}

For example, when the IRS announced in 2002 that it would not “assert” that frequent flier miles accumulated on business travel were income when received or used for personal travel – a clear exercise of enforcement discretion – it did so not only publicly but also forthrightly, explaining the reasons for its decision.\footnote{IRS Ann. 2002-18, 2002-1 C.B. 621. In Ann. 2002-18 the IRS explained: Questions have been raised concerning the taxability of frequent flyer miles or other promotional items that are received as the result of business travel and used for personal purposes. There are numerous technical and administrative issues relating to these benefits on which no official guidance has been provided, including issues relating to the timing and valuation of income inclusions and the basis for identifying personal use benefits attributable to business (or official) expenditures versus those attributable to personal expenditures. Because of these unresolved issues, the IRS has not pursued a tax enforcement program with respect to promotional benefits such as frequent flyer miles. Consistent with prior practice, the IRS will not assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel. Any future guidance on the taxability of these benefits will be applied prospectively.} This did not insulate it from criticism,\footnote{See Categorical Non-Enforcement, supra, n.21 at n. 213.} but the robust debate that ensued and continues today, is salutary.

A final, contrasting, example will illustrate our point. Most tax lawyers recall many of the events surrounding the collapse of the financial markets seven years ago, in the Fall, 2008, when some institutions were deemed to be “too big to fail.” Among those was Wachovia Bank. It turned out that Wells Fargo was willing to acquire Wachovia and thus save it from collapse or the need for a government-funded rescue, but as it is usually the case, willingness to acquire depended on the price of acquisition. In this case the problem was that section 382, which was enacted to provide clear rules limiting the use of pre-acquisition net operating losses subsequent to an acquisition, would have prevented Wells Fargo from using Wachovia’s very substantial losses after the acquisition. If Wells Fargo could not use the Wachovia losses to offset future tax liabilities it might not have been willing to buy Wachovia, or it might not have been willing to offer enough to make the transaction possible – use of the losses meant that a portion of the purchase price would be recovered through lower future tax payments. The problem was that section 382, which applied to “corporations,” would have prevented that, since banks are corporations and nothing in the statutory language exempted them from the operation of section 382.

Then the IRS issued Notice 2008-83.\footnote{Notice 2008-83, 2008-2 C.B. 195.} In that Notice the IRS proclaimed, without any explanatory rationale, that it was studying the application of section 382 to banks and that until
further notice, section 382 would not apply to banks. Commentators reacted swiftly and negatively, pointing out that nothing in the text or legislative history of section 382 even remotely suggested that the provision should not apply to corporations that happened to be banks.37 Of course, Wells Fargo and Wachovia likely rejoiced, for the acquisition proceeded, but the issuance of the Notice, and a similar one that followed in 2010 regarding the sale of the Government’s stake in General Motors,38 left distrust of the agency’s action in its wake. Eventually, Congress stepped in to undo the effect of the Notice, at least prospectively.39 The IRS action hardly looked legitimate.

But consider an alternative narrative, one in which the IRS felt free to acknowledge what many, and we, believe it was doing: exercising enforcement authority to suspend the application of section 382 because exigent circumstances—the prevention of wholesale economic collapse—required it. In other words, imagine what might have happened if the IRS had been able to behave openly like any other enforcement agency which has the ability to exercise enforcement discretion. We believe that if the IRS had acted with such candor and forthrightness, saying precisely what it was doing and why, it would not have been subject to the level of criticism that followed the issuance of the Notice. While such an action would not have been uncontroversial, it would have been transparent. The real question, whether extraordinary financial conditions not anticipated by Congress when it enacted the section 382 limitations justified suspension of those limitations in the case of an acquisition of a failing bank by another bank as long as the financial crisis lasted, could have been debated openly. The duration of the position taken in the Notice could then have been limited to the duration of the financial crisis, and the Congressional action

37 See See Lee A. Shepard, Technical Objections to the Bailout, Part 2, 121 TAX NOTES 359 (Oct. 27, 2008) (claiming that issuance of Notice 2008-83 was an illegal use of IRS power to interpret the law and that “section 382 is not a well-drafted provision…but it is the law, and the Constitution says Congress makes the law”); See also Built-In Loss Limit Rules: Didn't Congress Get the Memo?, 121 TAX NOTES 627 (Nov. 3, 2008) (describing the decision to not inform Congress about Notice 2008-83 and abide by the Congressional Review Act as a “blindside”); Paul Caron, Tax Lawyers Decry Financial Bailout NOL Tax Break for Banks, TAXPROF BLOG (Nov. 10, 2008), http://taxprof.typepad.com/taxprof_blog/2008/11/tax-lawyers-decry-financial-bailout-nol-tax-break-for-banks.html (quoting George K. Yin, the former Chief of Staff of the Joint Committee on Taxation, about the issuance of Notice 2008-83, “Did the Treasury Department have the authority to do this? I think almost every tax expert would agree the answer is no”); Citizens for Tax Justice, New IRS Ruling on Bank Acquisitions Imposes Major Federal Corporate Tax Cuts—And Will Hurt States Too, (Nov. 7, 2008), available at http://www.ctj.org/pdf/irsruling20081106.pdf (claiming by issuing Notice 2008-83 the IRS “unsurped the legislative role of Congressional tax writers” and the IRS had no power to make such substantive changes to the law).

See also Sunil ShenoI, Undoing Undue Favors: Providing Competitors with Standing to Challenge Favorable IRS Actions, 43 U. Mich. J.L. 531 (2010) (arguing there is “no textual basis” for providing an exception to §382 for banks and that the notice was inconsistent with the text of section 382); Lawrence Zelenak, Can Obama's IRS Retroactively Revoke Massive Bank Giveaway? 122 TAX NOTES 889 (Feb. 16, 2009); see also Victor Fleischer, NOLs and the Rule of Law, TAXPROF BLOG (Nov. 23, 2008), http://taxprof.typepad.com/taxprof_blog/2008/11/nols-and-the-rule-of-law.html (suggesting that it is unlikely that “Congress delegated lawmaking authority to the Treasury to make [a] new exception to the statutory language”).

38 I.R.S. Notice 2010-2, 2010-1 C.B. 25. We believe that Notice 2010-2 implicates somewhat different considerations than Notice 2008-83; we discuss these in Law of Standards, supra n. 21, at n. 144.

39 American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111-5, § 1261(a) (stating that the IRS lacked authority to exempt “particular industries or classes of taxpayers” from section 382 and that Notice 2008-83 was “inconsistent with the congressional intent” with regard to section 382).
against the IRS action may well have been averted. Abandoning tax exceptionalism and acknowledging the IRS to be an agency like any other would permit such openness and the attendant transparency and legitimacy gains.

IV. Conclusion

We are not unmindful of the magnitude of the change we are calling for. The IRS has long thought of itself and of the tax law as exceptional and we know that changing longstanding habits of thought and action will require a herculean effort. But we think that the transparency and legitimacy gains are well worth that effort. Although the job of a tax collector is hardly likely to allow the IRS to win a ‘most popular Federal agency award,’ the suspicion and distrust with which the IRS is viewed in some quarters today poses a grave threat to the integrity of the tax system. That alone justifies consideration of a shift in behavior. We propose that abandoning the objective aspect of tax exceptionalism be an integral part of that shift.

40 See note 7, supra and accompanying text.