

ADMINISTERING TAXES DEMOCRATICALLY?

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ABSTRACT

This Article queries how the administrative tax guidance used to implement the Tax Cuts and Jobs Act of 2017 has met the normative commitment to democratic legitimacy that often animates general administrative law. This Article argues that several reforms to the tax administrative process that came to fruition in recent years have failed to advance democratic tax administration.

This argument is made by analyzing each piece of administrative guidance issued to implement the Tax Cuts and Jobs Act, as compared to similar guidance issued to implement tax cuts in 2001, as well as the Tax Reform Act of 1986. To do this, we created a database of 864 guidance documents issued across six total years in three time periods: 1986–1988, 2001–2003, and 2017–2019. Our examination shows that although tax procedures may now better conform to procedures applied by other administrative agencies, these changes have in some respects set back the pursuit of democratic legitimacy in tax administration.

The changing practices identified here have important implications for democratic engagement and accountability in tax administration. For example, this Article critiques a specific change that our study reveals has had stark effects—tax administrators have almost totally abstained from using so-called temporary regulations. While this move has been promoted by scholars specifically as a way to address democratic legitimacy concerns related to transparency and participation in the tax rulemaking process, this Article argues on doctrinal and normative grounds that avoidance of temporary regulations is misplaced and should (and can) be reversed in part so as to better realize democratically legitimate tax administration.

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INTRODUCTION

After the Tax Cuts and Jobs Act (TCJA)¹ was signed into law,² there was widespread agreement that implementing it would require an exceptional effort by the Department of Treasury (“Treasury”) and the Internal Revenue Service (IRS).³ This was

1. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

2. The 2017 tax legislation is referred to in this paper as the Tax Cuts and Jobs Act or the TCJA, although its official title is “[a]n Act [t]o provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.” *Id.*

3. See, e.g., KPMG, NEW TAX LAW (H.R. 1) - INITIAL OBSERVATIONS 10 (2017), <http://home.kpmg/content/dam/kpmg/us/pdf/2017/12/tnf-new-tax-law-dec22-2017.pdf> [<http://perma.cc/CV46-J7F6>] (“Given the sheer size of the new law and the rapid pace of developments from the start of the Ways and Means Committee’s markup to enactment, clarifications and corrections can be expected to be needed for some provisions.”); Steven M. Rosenthal, *Can Treasury Rewrite the New Tax Bill?*, TAX POL’Y CTR. (Feb. 26, 2018), <http://www.taxpolicycenter.org/taxvox/can-treasury-rewrite-new-tax-bill> [<http://perma.cc/597L-UTYA>] (“[W]ithout hearings and time for careful drafting and analysis, the enacted statute is riddled with glitches and loopholes, which the Treasury and IRS now are scrambling to address.”); Brent J. McIntosh, Gen. Couns., Dep’t of Treasury, Statement Before the U.S. Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management (Apr. 12, 2018), <http://home.treasury.gov/news/press-releases/sm0346> [<http://perma.cc/M6KM-BYE6>] (“Swift and successful implementation of tax reform through guidance is critical to unlocking the full economic benefits of the law and

on account of timing as well as substance—the law was largely scheduled to take effect just nine days after enactment, and it consisted of a number of new provisions in which Congress delegated significant policymaking decisions to Treasury and the IRS.⁴

The implementation challenges for Treasury and the IRS also presented a test for the new administrative law context in which the law was to be implemented. Back in 1986—when Congress enacted the last major tax reform legislation⁵—the contemporary general administrative law framework for judicial review of agency decisionmaking was in its infancy.⁶ At that time, the Administrative Procedure Act (APA)⁷ was often an afterthought in tax administration.⁸ By 2017, the APA was looming over tax administration and an anti-“tax exceptionalism” movement was well-established, with scholars calling to reform tax administration practices to make them consistent with other agencies.⁹ Bringing tax administration more in line with the broader administrative state

carrying out the will of Congress.”); Daniel J. Hemel, *The Living Anti-Injunction Act*, 104 VA. L. REV. ONLINE 74, 74 (2018) (describing anticipation of a “slew of new regulations”); Amandeep S. Grewal, *The Charitable Contribution Strategy: An Ineffective SALT Substitute*, 38 VA. TAX REV. 203, 247 (2018) (describing one set of regulations as placing the IRS “in the middle of a brutal political fight”).

4. See Shu-Yi Oei & Leigh Ososky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209, 209 (2019) (“In 2017, Congress passed major tax legislation at warp speed. After enactment, it fell to the Treasury Department to write regulations clarifying and implementing the new law.”); Jim Tankersley & Alan Rappeport, *G.O.P. Rushed To Pass Tax Overhaul. Now It May Need To Be Altered*, N.Y. TIMES (Mar. 11, 2018), <http://www.nytimes.com/2018/03/11/us/politics/tax-cut-law-problems.html> [<http://perma.cc/3EKN-R8J3>]; Jesse Drucker & Jim Tankersley, *How Big Companies Won New Tax Breaks from the Trump Administration*, N.Y. TIMES (Dec. 30, 2019), <http://www.nytimes.com/2019/12/30/business/trump-tax-cuts-beat-gilti.html> [<http://perma.cc/M9JV-87NP>] (describing intensive lobbying efforts focused on the implementation process).

5. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (referred to throughout as “TRA 1986”).

6. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (promoting judicial deference to agency decisionmaking); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (imposing particular procedural requirements on agencies in the form of “hard look” review).

7. 5 U.S.C. §§ 551–59, 701–06.

8. 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, 1795–99 (2007) [hereinafter Hickman, *Coloring Outside the Lines*] (describing a historical IRS perspective on APA compliance); Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 299 (2012).

9. E.g., Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1730–31; Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1589 (2006) [hereinafter Hickman, *The Need for Mead*]; 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, 1157–59 (2008) [hereinafter Hickman, *A Problem of Remedy*]; Amandeep S. Grewal, *Foreword: Taking Administrative Law to Tax*, 63 DUKE L.J. 1625, 1625–26 (2014) (foreword to *Duke Law Journal* symposium issue on general administrative law applied to tax administration); Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 547–60 (2012); Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 224–27 (2014); Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1893 (2014) (arguing that there is no special standard of review for federal courts of appeals reviewing Tax Court decisions). *But see* James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1073–74 (2015) (describing declarations of the end of tax exceptionalism as premature and justifying tax exceptionalism based on features of tax administration).

would respond to normative concerns regarding democratic legitimacy, which underlies much of general administrative law—encompassing democratic values such as participation, transparency, political accountability, responsiveness, and adherence to the rule of law.¹⁰ The U.S. Supreme Court’s 2011 decision in *Mayo Foundation for Medical Education & Research v. United States*¹¹ seemed to affirm this tax administration transformation, bringing mature versions of various general administrative law doctrines to bear more fully in judicial review of Treasury’s tax regulations.¹² Subsequently, the Trump administration connected an anti-tax exceptionalism agenda with a broader anti-administrative state agenda. The administration sought political control over tax administration, similar to the control it imposed over other agencies, and targeted rollbacks of existing administrative guidance.¹³

This Article examines what happened when Treasury and the IRS turned to the task of implementing the Tax Cuts and Jobs Act. We created a database of 864 guidance documents used to implement the last three major pieces of tax legislation issued across six years total (1986–1988, 2001–2003, and 2017–2019). Using that database, this Article queries how the guidance documents produced by tax administrators have reflected—and failed to reflect—normative commitments to democratic legitimacy. This Article argues that the reforms that came to fruition from 2017 to 2019 failed to advance democratic legitimacy in tax administration. This is particularly true for one of the starkest reforms observed: Treasury nearly totally abstained from using temporary regulations.¹⁴ Contrary to the arguments espoused by critics of tax exceptionalism, this Article makes the case—through our data and through specific examples drawn from our review—that using temporary regulations can help to improve democratic legitimacy.

10. See *infra* Part I.A.

11. 562 U.S. 44 (2011).

12. See *Mayo Found.*, 562 U.S. at 57–58.

13. *E.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (requiring that each agency repeal at least two regulations for every one new regulation proposed). Although it was not initially clear whether the “1-in-2-out” rule applied to Treasury tax regulations, administration officials subsequently specified that Treasury was not exempt. See Jonathan Curry, *Treasury Still Subject to 2-for-1 Rule, White House ‘Regulatory Czar’ Says*, TAX NOTES (Jan. 29, 2018), <http://www.taxnotes.com/tax-notes-today-federal/tax-cuts-and-jobs-act/treasury-still-subject-2-1-rule-white-house-regulatory-czar-says/2018/01/29/26trx> [<http://perma.cc/XQB8-LPFA>]; see also Exec. Order No. 13,789, 82 Fed. Reg. 19,317 (Apr. 21, 2017) (directing that the Treasury Secretary produce a report for the president with targets to “reduce the burden [of] existing tax regulations”); Memorandum from Brent J. McIntosh, Gen. Couns. of the Dep’t of the Treasury, & Neomi Rao, Adm’r of the Off. of Info. & Regul. Affs. (Apr. 11, 2018), <http://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf> [<http://perma.cc/B99X-FVF8>] (providing for Office of Information and Regulatory Affairs review of certain Treasury tax regulations). Relevant to the discussion in Section III, it is unclear whether a temporary regulation—required by statute to be accompanied by a proposed regulation—would thus count as two new regulations and in turn require four to be repealed; this (inane) question is one way in which treating a “regulation” as a unit of measurement is somewhat absurd.

14. See DEP’T OF TREASURY, POLICY STATEMENT ON THE TAX REGULATORY PROCESS (2019) [hereinafter TREASURY, POLICY STATEMENT], <http://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process-3-4-19.pdf> [<http://perma.cc/KU54-9WC6>] (limiting the circumstances in which Treasury would use temporary regulations and committing to invoke the good cause exception to the APA for any such use; as discussed in Section III, *infra*, the reduction in temporary regulations we observed predated this policy statement).

The case is made in part by analyzing each piece of administrative guidance issued for two years in response to the TCJA and comparing the results with similar analyses we undertook for periods in the early 2000s following the last major tax cut,¹⁵ as well as in the 1980s following the last major tax reform act.¹⁶ Reviewing those documents, we looked at how Treasury and the IRS provided public notice of their implementing decisions, how frequently and to what extent the public was given an opportunity to comment, and other aspects of how tax administrators provided guidance to taxpayers in ways that might foster or stymie democratic legitimacy.¹⁷

There is little basis to argue that the democratic values that have animated major changes to tax administrative practices over the past decade have been enhanced by the changes imposed from 2010 through 2020.¹⁸ Yes, tax procedures may now better conform to procedures applied by other administrative agencies. But our examination of those procedures suggests that this conformity, in combination with the significant challenges presented by the TCJA, has set back the pursuit of more democratically grounded tax administration. Indeed, democratic goals may have been better served by approaching tax guidance in ways that Treasury has in the past, before the anti-tax exceptionalism reforms were instituted.¹⁹

Consider three shifts our review uncovered.²⁰ First, from 2017 to 2019, Treasury and the IRS produced significantly longer guidance documents than from 1986 to 1988,

15. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in scattered sections of 26 U.S.C.) (referred to throughout as the “2001 Tax Cuts”). The 2001 Tax Cuts, like the TCJA, were a product of Congress’s reconciliation procedures. These procedures allow the Senate to vote on certain types of legislation without the possibility of a filibuster, meaning that a simple majority is sufficient for passage. See JAMES V. SATURNO, CONG. RSCH. SERV., R46468, A BRIEF OVERVIEW OF THE CONGRESSIONAL BUDGET PROCESS 3 (2020), <http://sgp.fas.org/crs/misc/R46468.pdf> [<http://perma.cc/N6V2-WP3M>].

16. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (referred to throughout as “TRA 1986”).

17. We recognize that each piece of legislation is enacted in unique circumstances and raises unique challenges for Treasury and the IRS as well as for taxpayers. Our work here builds on Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014) [hereinafter Hickman, *Administering the Tax System*], in which she evaluates proposed, temporary, and final regulations published over a five-year period from 2008 through 2012, as well as her prior earlier pioneering work in *Coloring Outside the Lines*, identifying and showing empirically the extent of IRS inconsistency with the dictates of general administrative law. See generally Hickman, *Coloring Outside the Lines*, *supra* note 8.

18. See *infra* Section II.

19. This observation is somewhat at odds with the significant body of scholarship regarding so-called presidential administration, which justifies significant delegations by Congress to the executive branch as fostering political accountability by way of the duly elected President. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001). Recent scholarship and specific recent administrative actions have helped to underscore that even as broad congressional delegations are well-justified in our constitutional structure, political accountability for administrative decisionmaking can be fostered but should not be assumed. See, e.g., Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021) (explaining an “accountability-forcing” focus in recent Supreme Court interventions in response to Administrative Procedure Act challenges to agency action); Nicholas R. Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021) (contesting recent nondelegation doctrine scholarship grounded in originalist reasoning by showing an extensive and open-ended delegation by Congress in the form of a federal property tax enacted in 1798).

20. See *infra* Parts II.B.–D.

suggesting that Congress did indeed push a greater number of significant and complex policymaking issues to be dealt with administratively rather than legislatively (just as conventional wisdom anticipated).²¹ The second shift observed was in the types of guidance that Treasury and the IRS produced.²² Comparing the 1986–1988 and 2017–2019 periods, the number of proposed and final regulations decreased 42.4%,²³ while the number of “temporary regulations”²⁴ went down from fifty-seven to just one.²⁵ A third development further speaks to potential limitations on public participation in tax administration.²⁶ In implementing the Tax Reform Act of 1986 (“TRA 1986”),²⁷ 95.7% of proposed regulations included a comment period of at least forty-five days. In contrast, from 2017 to 2019, just 78.9% had a comment period of forty-five days or more, and nearly 11% permitted just thirty days of public comment.²⁸

These changing practices have important potential implications for democratic engagement and political accountability in tax administration. For example, shorter comment periods may reduce transparency and participation in regulatory tax policymaking and may alter who is able to participate in the process. This in turn may change who drafters are responsive to in the resultant final regulations. As discussed in Section III, the changing practice concerning the use of temporary regulations has striking implications for how, and the extent to which, taxpayers are informed about how the law is to be implemented. It also has implications for how taxpayers could engage with the administrative policymaking process connected with implementation.

This Article defends temporary regulations as normatively desirable to promote democratic legitimacy through transparency, participation in the tax rulemaking process, and establishing political accountability, among other democratic values. This Article also argues that temporary regulations are consistent with the Administrative Procedure Act and congressional intent in other statutes prescribing tax administration, responding

21. From 2017 to 2019, there were twenty documents over thirty-five pages, including ten substantive documents that were in excess of fifty pages. In the 1980s period, there were just five documents that were longer than thirty-five pages in the Internal Revenue Bulletin, with the longest guidance document registering at fifty-one pages. See *infra* Part II.B for a discussion about how regulatory preambles grew significantly in this period. See *supra* note 3 for conventional wisdom at the time the TCJA was enacted.

22. See *infra* Part II.C.

23. Treasury issued ninety-two proposed and final regulations from 1986 to 1988, compared to fifty-three from 2017 to 2019.

24. See *infra* Section III.

25. See *infra* Appendix A, row 285, T.D. 9865; *infra* Parts II.E., III.D (describing the one temporary regulation and another final regulation that amended a temporary regulation that was originally promulgated in 1988); cf. Kristin E. Hickman, *245A and T.D. 9865: Two Steps Forward, One Step Back for Temporary Treasury Regulations?*, 11 COLUM. J. TAX L. (2020) [hereinafter Hickman, *Two Steps Forward, One Step Back*], <http://journals.library.columbia.edu/index.php/taxlaw/announcement/view/287> [<http://perma.cc/NR96-QFB2>] (explaining and lauding the lower numbers of temporary regulations).

26. See *infra* Part II.D.

27. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (referred to throughout as “TRA 1986”).

28. As elaborated in Part II.D, in the 1980s the standard comment period for proposed regulations was sixty days, and just three out of seventy-one proposed regulations implementing the Tax Reform Act of 1986 allowed for a comment period of forty-five days or less. In contrast, from 2017 to 2019, nearly one-fifth (eight out of thirty-eight) of proposed regulations had comment periods of forty-five days or less, with four remaining open for public comment for just thirty days.

to scholars who have been critical of temporary regulations²⁹ and whose recommendations were adopted in implementing the TCJA.³⁰

The Article proceeds as follows: Section I describes the normative commitments that have animated both general administrative law and the debates in courts and among scholars regarding tax exceptionalism. The discussion is divided into two categories: (1) democratic legitimacy concerns related to participation, transparency, and accountability; and (2) consistency concerns related to conforming judicial review and other aspects of tax administration to the practices and norms developed in other areas of administrative law. Section II describes the findings of our study of administrative tax guidance from three time periods following the enactment of significant tax legislation, and offers some observations on the differences and similarities of guidance in those time periods. While it appears that the shifts experienced from the 1980s through 2019 did address some consistency concerns identified in Section I, we argue that these shifts did little to address more important democratic considerations. Section III turns to the specific issue of temporary regulations, defending their use on democratic legitimacy grounds, and by way of some examples from the implementation of the TCJA that show democratic accountability has been lacking when Treasury has avoided using temporary regulations.

I. WHAT SHOULD TAX ADMINISTRATION'S NORMATIVE ASPIRATIONS BE?

Our tallies of the various types of guidance can help inform some ongoing debates about how Treasury and the IRS should go about implementing the tax laws. This Section begins by briefly outlining the stakes at play in tax administration—why might it matter what different types of guidance are used to implement tax laws, and what might be gained (or lost) by using one type or another? In recent debates about tax exceptionalism—which have spanned scholarship and judicial opinions—there are two (related) categories of claims. The first is focused on promoting democratic legitimacy, a goal that underlies administrative procedures well beyond the tax system.³¹ The second is focused on promoting consistency between the procedures used in tax administration and those used in other subject areas and by other agencies.³² These categories are overlapping in that some of the arguments regarding consistency are grounded in democratic concerns. Congress, the pro-consistency argument goes, has prescribed a baseline set of procedures via the APA; adherence to those procedures produces better

29. See Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 *TAX LAW* 343, 344 (1991) [hereinafter Asimow, *Public Participation*]; Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 *ADMIN. L. REV.* 703, 716–20 (1999) [hereinafter Asimow, *Interim-Final Rules*] (same, along with a critique of “interim-final” rules issued by other agencies); Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1759–86.

30. See TREASURY, *POLICY STATEMENT*, *supra* note 14 (formally limiting the use of temporary regulations). Professor Hickman served as an advisor in the Office of Management and Budget from April 2018 to April 2019. See Allyson Versprille, *Tax Scholar Leaves White House Regulatory Review Office*, *BLOOMBERG TAX* (May 11, 2019, 9:34 AM), <http://news.bloombergtax.com/daily-tax-report/tax-scholar-leaves-white-house-regulatory-review-office> [<http://perma.cc/F9AR-LN6A>].

31. See *infra* Part I.A.

32. See *infra* Part I.B.

administrative decisions and is consistent with legislative intent, and arguably assists judges mediating challenges to acts of administrative discretion.³³ However, we are skeptical to some extent: this consistency rationale sometimes seems to come at the expense of democratic legitimacy.

We agree with scholars and courts that democratic legitimacy encapsulates a set of values that should be paramount in tax administration, namely transparency, participation, responsiveness, accountability, and adherence to the rule of law. Consistency is straightforward enough to diagnose as lacking, given that it is an exercise of comparing and contrasting, and it is true that inconsistency may indicate a lack of adherence to procedures that promote democratic legitimacy in other contexts. But we argue that our tallies (showing some substitution effects, for example³⁴) and the import of democratic values reveal consistency to be a wanting normative commitment when it is not connected to other considerations. Nonetheless, consistency does have practical appeal, particularly in the context of judicial review by courts of general jurisdiction. For federal district or circuit court judges, it is surely helpful not to have a separate set of precedents dealing with review of tax cases. However, judicial review of tax administrative actions is already limited (by Congress),³⁵ and many of the changes we identify in Section II have little to do with judicial review. Thus, democratic values and substantive content are of much greater relative importance than consistency, particularly when democratic values animate the procedures with which consistency is sought. The two Parts that follow discuss democratic legitimacy and consistency in further detail.

A. *Democratic Legitimacy* . . .

Fostering democratic legitimacy is foundational to general administrative law.³⁶ The goal, in the most general terms, is effective decisionmaking and policy implementation through mechanisms that are congruous with the democratic constitutional structure—governance by the bureaucracy in ways that maintain

33. As Professor Hickman helpfully noted, there is sometimes a presumption in judicial opinions and in administrative law scholarship that adherence to APA procedures will produce better regulations. *See infra* notes 85–86 and accompanying text.

34. *See infra* notes 144–148 and accompanying text.

35. *See generally* Hemel, *supra* note 3, at 74–76 (describing the Anti-Injunction Act, I.R.C. § 7421, which disallows many pre-enforcement court challenges to tax administrative actions).

36. We use the phrase “general administrative law” to refer to the laws and precedents governing executive branch administration across federal departments and agencies, largely rooted in the Administrative Procedure Act. 5 U.S.C. §§ 551, 553–559, 701–706.

democratic legitimacy.³⁷ This pursuit is a central concern in administrative law scholarship and jurisprudence.³⁸

Various aspects of democratic legitimacy animate the variety of requirements and practices that facilitate administrative decisionmaking and agency implementation of laws. For example, the APA provides for public participation in executive branch decisionmaking and requires transparency by agencies as to how and why an agency makes a decision.³⁹ Judicial review has developed to support these purposes and to ensure that agencies respond to public input, adhere to policies adopted by Congress, and exercise discretion to make their own policies only where Congress has provided for such discretion via statute.⁴⁰ And, indeed, the move by the Supreme Court in *Mayo Foundation*—to give *greater* deference to tax rulemaking by extending *Chevron*⁴¹ deference to the tax sphere—connects tax administration to the democratically oriented justifications for judicial deference that are hallmarks of general administrative law jurisprudence and scholarship.⁴²

Thus, at a moderate level of generality, the goals for tax administration are no different than for any other administrative agency. The procedures employed in

37. See JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 10–11 (2018) (arguing that administrative decisionmaking is centrally concerned with transparency, responsiveness, accountability, and adherence to the rule of law—and offering “reason-giving” as a source of democratic legitimacy by these measures in the context of delegations from elected representatives, and with the prospect of judicial review by appointed judges); cf. Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 DEEDUS 155, 155–56 (2021) [hereinafter Walker, *Constraining Bureaucracy*] (summarizing schools of thought among administrative law scholars, much of which revolve around different conceptions of constitutional constraints on delegation from the legislature to the executive branch bureaucracy).

38. See, e.g., MASHAW, *supra* note 37; Walker, *Constraining Bureaucracy*, *supra* note 37; Kagan, *supra* note 19, at 2331–34 (turning to “core democratic values” of accountability, transparency and responsiveness to defend her vision of tight presidential oversight of the administrative state); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517–18 (emphasizing the importance of “participation” and “political accountability” in administrative decisionmaking that follows from broad congressional delegations).

39. 5 U.S.C. §§ 553(b)–(c), 702 (requiring, respectively, public notice of proposed rules, opportunity for affected parties to comment on proposals, and redress via the courts).

40. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 978–79 (1992) (describing the Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as introducing democratic theory to judicial review of agency decisionmaking and explaining that “the most apparent objective . . . was to maximize the role of democratically accountable institutions in the process of legal interpretation”). Other examples include *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–41 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977), which protects rule-of-law concepts by establishing a presumption of judicial review, including pre-enforcement review to ensure agency actions adhere to congressional standards prior to enforcement, and *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41 (1983), which requires agencies to consider relevant inputs in administrative decisionmaking, including submissions from concerned parties during the notice and comment process. See Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1243 (1989) (describing a “democratic model of the administrative state,” that incorporates the primary features of judicial review including *Chevron* deference, *State Farm*, and so on).

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

42. See *supra* notes 6–10, 39 and accompanying text for a summary on how tax administration has not, in the past, conformed to the same procedures or received the same sort of judicial oversight as is applied in other areas of law and policy.

administering the tax system and the triggers present for judicial review are—as in other contexts—ineluctably grounded in democratic concerns.⁴³ Professor Kristin Hickman—a leading administrative law scholar with a particular interest in tax administration—identifies a potential trade-off in tax administration between “prioritizing revenue collection” and prioritizing “democratic legitimacy,” at least in day-in, day-out decisionmaking and short-term policy objectives.⁴⁴ This sort of tension could presumably map onto any agency’s pursuit of its legislative purpose (e.g., environmental regulation or regulating capital markets) in ways that could be at odds with democratically minded processes that may slow any agency’s substantive work. At the same time, democratic procedures can enhance legitimacy and confidence in the substantive decisions an agency makes, including tax administration.⁴⁵ The following Parts review the democracy-focused normative considerations that undergird general administrative law, which have often been invoked by courts and scholars considering tax administration.⁴⁶

1. Transparency

The procedural requirements imposed on executive branch agencies via the APA and related judicial precedents are designed to promote some degree of transparency.⁴⁷ Important transparency-oriented procedures include the notice requirement that an agency disclose and explain a proposed rule so affected parties and the public can consider it, that an agency explain and justify what it is doing, and the requirement that preambles to final regulations address significant comments received in response to a proposed rule.⁴⁸ The basic idea is that for decisionmaking to be consistent with democratic governance, institutions should “make information about their activities available to the general public or other outside monitors.”⁴⁹ Ideally, a fulsome notice of a proposed agency action would “make manifest the trade-offs generated by its

43. *E.g.*, Hickman, *A Problem of Remedy*, *supra* note 9, at 1204 (labeling broad delegations as “antidemocratic” and describing Congress’s purpose in the APA as addressing this deficiency by requiring agency decisionmaking to be connected directly to the public and to be subject to judicial review).

44. *Id.* at 1206. Over the longer term, democratic legitimacy is an important aspect of effective revenue collection. *See id.* (describing how public participation can mitigate “public cynicism about the tax system’s legitimacy”).

45. *See id.*

46. *E.g.*, Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1807 (before Treasury began to conform tax administration to general administrative law norms, writing that “Treasury’s practices at least contradict the democratic impulses driving the APA”); Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1324 (2017) [hereinafter McMahon, *Pre-Enforcement Litigation*] (emphasizing the importance of democratic commitments in tax rulemaking and judicial review of tax rulemaking).

47. *E.g.*, *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

48. *Id.* (calling for “reasoned analysis” to justify policy changes by an agency); 5 U.S.C. § 553(b) (requiring notice of a proposed rulemaking in so-called informal rulemaking processes); *Id.* § 553(c) (requiring a “concise general statement of . . . basis and purpose”); *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (elaborating that the agency must “consider and respond to significant comments received during the period for public comment”); *Home Box Off. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphasizing that the agency must respond to “significant points” raised via comment).

49. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 104 (2018).

rulemaking.”⁵⁰ When decisions and their parameters are made public, are clearly specified and explained, and the decisionmaker is identified, the decision satisfies the transparency condition that underlies democratic legitimacy.⁵¹

Transparency has been a frequent concern for tax scholars considering ways to reform the tax administrative process to combat tax exceptionalism. In tax, Professor Hickman has emphasized that Congress (in the APA) and the courts (in shaping judicial review) have sought to ensure transparency, but in her view, “U.S. tax administration has moved away from the balance that [they] have achieved for other areas of administrative law.”⁵² Patrick Smith urged that “hard look” review should be a regular feature of post-*Mayo Foundation* judicial oversight of tax regulatory actions, as the Supreme Court suggested in another context.⁵³ Professors Alice Abreu and Richard Greenstein made explicit the importance of transparency to the democratic legitimacy of the tax system.⁵⁴ Among other examples, they describe an IRS enforcement decision communicated via written guidance, in the form of a Notice, as making “the decision transparent, and thus, subject to the democratic process.”⁵⁵ Taking a less skeptical approach to tax exceptionalism, Professor Stephanie Hunter McMahon has expressed concerns that the ways that many sophisticated taxpayers make informal contact with the IRS in the rulemaking process may not satisfy democratically grounded transparency concerns in tax administration.⁵⁶

2. Participation

Another standard precept of general administrative law is to promote participation in decisionmaking, at least by those parties who are affected by the decision and perhaps even participation by the general public.⁵⁷ In particular, the “comment” portion of the

50. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. UNIV. L. REV. 141, 149 (2012).

51. See generally Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 16–17 (2018) (identifying four elements of transparency: obligation (what is the rule), justification (what is the reason for the rule), publicity (who is informed), and attribution (who is making the rule or decision)). See also Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 78 (2006) (measuring perceived transparency of various aspects of White House oversight of EPA activities, as a way to gauge political accountability).

52. Kristin E. Hickman, *The Promise and the Reality of U.S. Tax Administration*, in THE DELICATE BALANCE: TAX, DISCRETION AND THE RULE OF LAW 39, 41 (Chris Evans et al. eds., 2011) [hereinafter Hickman, *The Promise and the Reality*].

53. Patrick J. Smith, *The APA’s Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271, 273–75 (2012) (noting that the Supreme Court seemed to integrate *State Farm*’s “hard look” review into its deferential *Chevron* review, and that taxpayers could take advantage of pushing courts to do the same in the tax context).

54. See Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 TAX LAW. 493, 501, 503 (2016).

55. *Id.* at 507–08.

56. Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax’s Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 562–63 (2016); see also Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1799 (reporting the same, based on discussions with tax practitioners involved in tax rulemaking).

57. Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 UNIV. CHI. L. REV. 976, 986–87 (1982) (“The intended function of increased participation is to promote political accountability by producing

APA's notice and comment procedures requires that as part of informal rulemaking, "interested persons" must be given an opportunity to submit responses to proposed rules.⁵⁸ This sort of participation is a precondition to some of the other democratic goals for administrative decisionmaking—participation alone is insufficient to ensure democratically legitimate outcomes.⁵⁹ Participation is thought to bolster responsiveness and accountability (each discussed below) and to ground administrative decisions in the fundamental tenet of democratic decisionmaking, i.e., that decisions be driven by the people.⁶⁰

Tax scholars who have urged that tax procedures conform with general administrative law have called attention to the democratic significance of participation in Treasury rulemaking.⁶¹ For example, Professor Leslie Book has argued that the participation prompted by APA notice and comment procedures would—if extended to more Treasury tax decisionmaking—level the playing field for low-income taxpayers who are otherwise often ignored.⁶² Professor Hickman describes the kinds of issues that temporary tax regulations (discussed in Section III) often address as “the sort of complex and challenging matters for which public participation is most warranted and desirable.”⁶³ In contrast, Professors Shu-Yi Oei and Leigh Osofsky have been more critical of expecting democratic legitimacy to necessarily flow from the notice and comment process for tax regulations.⁶⁴ Their critique is based on a quantitative and qualitative analysis of who participated in a recent notice and comment process and how different types of participants were able to engage through varied means and with varied effectiveness.⁶⁵

policies that correspond to the will of the public as a whole, or at least to the full range of interests affected by regulatory decisions.”).

58. 5 U.S.C. § 553(c).

59. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985) (“[C]ourts have recognized that merely ensuring the *participation* of all affected interests will not ensure the *protection* of those for whom Congress has expressed special solicitude.”).

60. E.g., Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 308 (2016) (“[T]oo much independence on the part of unelected agency representatives threatens the ideal of democratic representation.”). Hickman and Thomson cite various D.C. Circuit opinions that cite back to the legislative history of the APA to explain, for example, that “[t]he essential purpose of . . . notice and comment [rulemaking procedures] is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.” *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

61. E.g., McMahon, *Pre-Enforcement Litigation*, *supra* note 46, at 1377 (connecting participation in the notice and comment process for tax regulations with the democratic value of accountability).

62. Book, *supra* note 9, at 530.

63. Hickman, *The Promise and the Reality*, *supra* note 52, at 52.

64. Oei & Osofsky, *supra* note 4, at 220, 224–50.

65. *Id.*; cf. Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 217–24 (2017) [hereinafter Wallace, *Congressional Control*] (finding generally low participation in the notice and comment rulemaking process for tax regulations, with participants most often consisting of organizing private interest groups and not individuals or public interest perspectives).

3. Responsiveness

A responsive government makes decisions that are representative of the preferences of the democratic community.⁶⁶ In the administrative decisionmaking context, responsiveness can be fostered through the requirement that an agency must at least pay attention to, if not act on, the comments submitted during the notice and comment process.⁶⁷ When an agency receives information or expressions of opinions from the public or parties potentially affected by its decisions, it should—consistent with its statutory mandate—make decisions that reflect that input.⁶⁸ Responsiveness is “predicated on the prior emission of messages” from these parties, which requires some degree of transparency and opportunity for participation, as discussed above.⁶⁹

Professor Hickman emphasizes responsiveness in her writing that is critical of tax exceptionalism, noting that part of the benefit of participation is that it “introduces different ideas and perspectives into the rulemaking process,” which in turn yields better substantive rules.⁷⁰ Striking a somewhat different note, Professors Kyle Logue and James Hines argue that delegating tax authority to Treasury might facilitate responsiveness to “changes in circumstances that affect the majority of Americans,” but that sometimes it might result in *over* responsiveness when tax policy calls for consistency over time.⁷¹ There have been a number of stinging critiques of the federal government’s responsiveness to the urgent problem of economic inequality, which clearly (though not explicitly) implicates the tax system in general, and tax rulemaking in particular. For example, Larry Bartels and, separately, Martin Gilens have shown that the U.S. Congress is most responsive to the policy preferences of the rich. In other work, we have shown that sophisticated and well-represented taxpayers are most likely to participate in the tax regulatory process.⁷² Responsiveness, therefore, can undermine democratic legitimacy if effective participation is concentrated with only a few at the expense of the majority.

66. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 243–46 (1987) (“A central problem of representative democracy is how to ensure that policy decisions are responsive to the interests or preferences of citizens. . . . [M]uch of administrative law . . . is written for the purpose of helping elected politicians retain control of policymaking.”).

67. *E.g.*, 5 U.S.C. § 553 (informal rulemaking); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) (requiring that an agency explain a decision that runs counter to the evidence presented during the notice and comment process); see Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 577 (2003) (considering the challenge of democratic legitimacy in agency action as directly tied to responsiveness, and querying different ways in which responsiveness might be satisfied).

68. See DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 4 (Adam Przeworski et al. eds., 1999) (“[A] key characteristic of a democracy is the continued responsiveness of the government to the preferences of its citizens.” (citation omitted)).

69. *Id.* at 9.

70. Hickman, *The Promise and the Reality*, *supra* note 52, at 57.

71. James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 261 (2015).

72. *E.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GUILDED AGE 261 (2008) (showing empirically that Senators are most responsive to high-income groups and least responsive to low-income groups); MARTIN GILENS, AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 84–85 (2012) (similar); Wallace, *Congressional Control*, *supra* note 65, at 189.

4. Accountability

In order for decisionmakers to be responsive, there must be some mechanism for the democratic community to “sanction” them for what they have done if it does not comport with the community’s preferences.⁷³ Professor Gillian Metzger describes accountability as “administrative law’s central obsession.”⁷⁴ Presidential oversight of agency action is said to provide political accountability for the unelected administrative personnel who carry out the work of the executive branch.⁷⁵ There are two channels for this accountability via the president: personnel appointed by the president who then work to further the president’s agenda,⁷⁶ and oversight of specific administrative actions through the Office of Management and Budget.⁷⁷

One of the central justifications for the Trump administration’s decision to begin submitting Treasury’s tax regulations to the Office of Management and Budget’s Office of Information and Regulatory Affairs was to enhance political accountability for these tax rules by way of the president.⁷⁸ Anti-tax exceptionalism scholarship that focused on judicial review prior to *Mayo Foundation* regularly invoked democratic accountability as one of the justifications for *Chevron* deference.⁷⁹ Accountability remains a concern among scholars critiquing ongoing procedural differences in tax as compared to other contexts.⁸⁰

73. DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 68, at 10.

74. Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBS. 129, 129–30 (2015); cf. Sunstein, *supra* note 57, at 987 (describing administrative law mechanisms to create “surrogate safeguards for the original protection afforded by . . . electoral accountability”); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075–77 (2005) (questioning the efficacy of oft-provided mechanisms for establishing agency political accountability).

75. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (describing the indirect political accountability agencies have via the President as making agencies better positioned to make policy decisions than are the courts); Kagan, *supra* note 19, at 2332.

76. See Bressman & Vandenberg, *supra* note 51, at 51 (explaining that “whether an elected official supervises agency decisionmaking” is a key element of political accountability); cf. Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State”*, 105 MICH. L. REV. 1497, 1503 (2007). She notes that a dictionary definition of accountability seems to be satisfied if an “elected official supervises agency decision-making,” which would mean focusing on the *product* of a decisionmaking process. *Id.*

77. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1260–62 (2006).

78. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE (2016), <http://www.gao.gov/assets/gao-16-720.pdf> [<http://perma.cc/NKN6-EKNS>]; Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 457 (2018).

79. E.g., Hickman, *The Need for Mead*, *supra* note 9, at 1589–90 (describing part of “the normative case” to apply *Chevron* deference in the tax context as that opinion’s focus on the “political accountability of agencies over courts”).

80. E.g., McMahon, *Pre-Enforcement Litigation*, *supra* note 46, at 1377–78 (noting the pre-enforcement challenges to tax regulations—generally barred by statute and standing doctrine—would enhance democratic accountability for tax regulations, in particular for “favorable” regulations that benefit a particular group of taxpayers).

5. Rule of Law

Administrative decisionmaking should yield decisions that are consistent with the law as enacted, including both the substantive statute and the APA.⁸¹ Judicial review is designed to ensure legality—and thus protect the rule of law—by policing whether agencies exercise authority within the delegations Congress has provided via statute.⁸² The courts have developed two related frameworks to carry out this sort of review. First, they carry out substantive review as to whether an agency has acted within the scope of any delegation from Congress, usually working through one of the doctrines of judicial deference to agency decisionmaking.⁸³ Second, courts carry out “hard look” review to ensure that an agency has adhered to procedural requirements imposed by the APA, such as notice and comment procedures.⁸⁴

Leading scholars focused on tax administration have emphasized the importance of these functions of judicial review with regard to tax administration.⁸⁵ Professor Hickman has observed that the concept of the rule of law can be “ill-defined,” although regardless of the particular definition, she views “public participation, transparency, and accountability” as “contribut[ing] meaningfully” to safeguarding the rule of law in administrative decisionmaking.⁸⁶ She expressly approaches the rule-of-law value as part of what is “police[d]” as nonarbitrariness by courts reviewing agency action, which leads to her concerns regarding the lack of preenforcement review of tax regulations.⁸⁷ She has also noted that the congressionally sanctioned Treasury practice of retroactive tax rulemaking may in some instances violate rule-of-law norms.⁸⁸

81. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994) (describing judicial review as protecting the rule of law and, in turn, providing “security and predictability”); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1985 (2015) (describing five principles of rule of law in “administrative governance”: “authorization, notice, justification, coherence, and procedural fairness”).

82. E.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

83. *Chevron*, 467 U.S. at 843–44; *Skidmore*, 323 U.S. at 139.

84. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

85. E.g., Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency’s Explanation of a Tax Decision Is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 12–18 (2014); Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1806 (reviewing APA requirements that she advocates should be applied more stringently to tax rulemaking, and summarizing that “[j]udicial review serves to enforce adherence to these procedures and guard against arbitrary and capricious agency action”); see also Charlotte Crane, *The Income Tax and the Burden of Perfection*, 100 NW. UNIV. L. REV. 171, 177–78 (2006) (arguing more broadly that the conceptual grounding of the income tax gives it an “image as grounded heavily in the rule of law,” which in turn further elevates the importance of rule-of-law values such as consistency and predictability in tax administration).

86. Hickman, *The Promise and the Reality*, *supra* note 52, at 59–60.

87. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 520 (2013); Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1687 (2017) (describing judicial review as “an important check against agency arbitrariness”).

88. Hickman, *Administering the Tax System*, *supra* note 17, at 1758–60 (expressing concern about retroactive regulations, particularly in that they are a departure from administrative law norms, but also noting that some limited retroactive rulemaking is prescribed circumstances such as within a short time of newly enacted legislation, I.R.C. § 7805(b), is not problematic from a rule-of-law perspective and makes sense to, for example, combat abusive tax shelters).

Promoting these democratic values is seen as a central pursuit of administrative procedures, and various requirements, practices, and norms have been introduced in administrative decisionmaking to this end.⁸⁹

Of course, the role of and justifications for the administrative state in the constitutional structure have long been highly contested.⁹⁰ Recently there has been growing interest among progressive scholars in improving the democratic bona fides of administrative decisionmaking.⁹¹ Conversely, there has been a sustained push by some Republican-nominated judges⁹² and a handful of Federalist Society–connected legal scholars to assert the nondelegation doctrine in the name of democratic legitimacy.⁹³ Such an assertion has the potential to severely limit the extent to which Congress can make delegations to administrative agencies.⁹⁴

Even setting those debates aside, the foregoing discussion shows that, in tax administration, these normative values have received heightened attention over the last several decades. Along with the scholarship described above, courts have started to develop extensive precedents regarding judicial review of certain types of tax administrative decisionmaking in the Tax Court,⁹⁵ federal district courts, and circuit

89. There are, to be sure, competing visions as to why these democratically oriented normative goals are important. Compare Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63, 63 (2005) (interest representation model, in which administrative processes allow competing interest groups to argue the merits of their position), with Seidenfeld, *supra* note 50, at 144–45 (civic republican model, in which administrative processes facilitate well-informed and conscientious decisionmaking by bureaucrats insulated from political influences).

90. See generally Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) [hereinafter Metzger, *Foreword*].

91. See generally Katharine Jackson, *What Makes an Administrative Agency “Democratic”?*, L. & POL. ECON. PROJECT (Nov. 11, 2020), <http://lpeproject.org/blog/what-makes-an-administrative-agency-democratic/> [http://perma.cc/AD86-A3D2]; K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017).

92. Cf. Walker, *Constraining Bureaucracy*, *supra* note 37, at 156 (“A growing number of federal judges and members of Congress (again, largely conservative and libertarian) have called for administrative law reform. For example, they have argued for . . . reinvigorating the non-delegation doctrine to strike down as unconstitutional broad statutory grants of lawmaking authority to federal agencies.”).

93. E.g., *Gundy v. United States*, 139 S. Ct. 2116, 2139–40 (2019) (Gorsuch, J., dissenting) (supporting a reinvigorated nondelegation doctrine in a dissent joined by Justices Thomas and Roberts); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (responding to scholars who have contested the originalist case for the nondelegation doctrine); see also, Kristin E. Hickman, *Foreword: Nondelegation as Constitutional Symbolism*, 88 GEO. WASH. L. REV. (forthcoming 2021) [hereinafter Hickman, *Foreword*] <http://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/06/Hickman-Nondelegation-As-Constitutional-Symbolism.pdf> [http://perma.cc/9DEN-JNGS] (describing some of the long history of scholarship on nondelegation, which includes significant work that predates the rise and influence of the Federalist Society).

94. See Metzger, *Foreword*, *supra* note 90, at 6–7, 88–89 (describing the views of nondelegation doctrine advocates, including Justice Thomas, as “anti-administrativist” and predicting that this view of nondelegation would not gain further support on the Supreme Court, a view that appears much less certain four years later). But see Hickman, *Foreword*, *supra* note 93 (arguing that only Justice Thomas would embrace a version of nondelegation aggressive enough to overturn the whole administrative state, and that the more likely future of administrative reform is incremental).

95. E.g., *Altera Corp. & Subsidiaries v. Comm’r*, 145 T.C. 91, 114–15, 134 (2015) (following *Mayo Foundation* by applying *State Farm* to a Treasury rulemaking process from 2003 and holding IRS regulations as arbitrary and capricious for lacking reasoned explanation), *rev’d sub nom.* *Altera Corp. v. Comm’r*, No. 16-70496, 2018 WL 3542989 (9th Cir. July 24, 2018), *opinion withdrawn*, 898 F.3d 1266 (9th Cir. 2018), and *rev’d sub nom.* *Altera Corp. & Subsidiaries v. Comm’r*, 926 F.3d 1061 (9th Cir. 2019), *cert. denied*, 141 S. Ct.

courts.⁹⁶ Democratic legitimacy is a recurring theme, but, as discussed below, it is not the only hallmark of scholarship and judicial review working to reform tax administration.

B. . . . or Merely Consistency with Other Areas of Law?

Scholarship and commentary on general administrative law and tax administration have frequently called for *consistency* between the two—that is, the requirements established by administrative law in general should also apply for tax administration specifically.⁹⁷ This argument is grounded in Section 559 of the APA, which (as discussed in detail in Part III.B) provides that APA procedures should apply across all agencies absent an express exception enacted by Congress in a subsequent statute.⁹⁸ With this backdrop, Professor Hickman and others have argued that Treasury and the IRS are subject to a policy of uniformity in administrative law absent clear congressional command to the contrary.⁹⁹ The Supreme Court’s application of *Chevron* deference to a tax regulation in *Mayo Foundation*, and Chief Justice Roberts’s concise pronouncement against tax exceptionalism (“we are not inclined to carve out an approach to administrative review good for tax law only”¹⁰⁰) caused some commentators to extol consistency as the new standard for tax administration.¹⁰¹

This argument for consistency is convincing and logical as applied to doctrines shaping judicial review by courts of general jurisdiction: it facilitates adjudication for those courts to apply the same basic framework to the same sorts of disputes without

131 (2020); *SIH Partners LLLP v. Comm’r*, 150 T.C. 28, 42 (2018), *aff’d*, 923 F.3d 296 (3d Cir. 2019); *Oakbrook Land Holdings, LLC v. Comm’r*, 154 T.C. 180, 198 (2020).

96. *E.g.*, *Altera Corp. & Subsidiaries v. Comm’r*, 926 F.3d 1061, 1079–80 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 131 (2020); *Good Fortune Shipping SA v. Comm’r*, 897 F.3d 256, 261–66 (D.C. Cir. 2018) (applying the *Chevron* framework and denying deference to a Treasury Regulation).

97. *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011) (“[T]he very essence of administrative law as a concept presumes the existence of a body of generally applicable legal principles and doctrines concerning administrative agencies.”). This flavor of consistency is distinct from the consistency sometimes invoked in the rule-of-law context: that consistency goes to applying laws consistently so that similarly situated people are treated similarly. *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1466–67 (2010).

98. 5 U.S.C. § 559.

99. *See, e.g.*, Hickman & Thomson, *supra* note 60, at 322–23 (offering prudential justifications for a single standard for courts to adopt for harmless error, from lack of notice and comment, which would apply across subject matter areas, and commenting that “[i]deally, the criteria on which the courts settle will be uniform”).

100. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011).

101. *E.g.*, Amandeep S. Grewal, *Foreword: Taking Administrative Law to Tax*, 63 DUKE L.J. 1625, 1626 (2014) (“By so rejecting tax exceptionalism in the regulatory-deference context, the Court may have brought general administrative-law doctrines to several areas of tax administration, with possibly adverse consequences for the government.”); David Berke, *Reworking the Revolution: Treasury Rulemaking & Administrative Law*, 7 MICH. J. ENV’T & ADMIN. L. 353, 361, 393 (2018) (noting that the longstanding basis for the “specific/general authority distinction” for distinguishing legislative and interpretive regulations was one area where consistency was historically lacking prior to *Mayo Foundation* and describing *Mayo Foundation* as “portend[ing] the beginning of the end for tax exceptionalism”).

regard for underlying subject matter.¹⁰² But some arguments that construe *Mayo Foundation* as dictating consistency broadly across judicial *and* administrative practices may be overstating the case.¹⁰³ The Court in *Mayo Foundation* was focused on *judicial review* of administrative actions and adopted a policy of uniformity in the doctrine of judicial deference to agency actions.¹⁰⁴ It is true that the APA was indeed justified by a desire for consistency.¹⁰⁵ Still, the APA also recognizes that Congress may find it appropriate to provide different procedures for specific agencies. The APA allows for Congress to establish context-specific, *modified* procedures if it does so “expressly”—that is, the APA requirements serve as default for procedural requirements in administrative decisionmaking, but do not necessarily represent the only permissible procedures.¹⁰⁶ The contours of the “express” exception are examined in further detail in Section III, as applied to specific procedures prescribed by Congress in the tax code.

This Article makes the case that the consistency concern should at least be contextual. The reasoning underlying consistency and the extent to which it might be required as applied to various aspects of tax administration depend on the specific administrative procedures at issue, and the extent to which those procedures have been prescribed by Congress. Consistency with regard to agency-specific, statutorily prescribed procedures is best approached as complementary to the clear and persistent goal of democratic legitimacy.¹⁰⁷

II. ADMINISTRATIVE TAX GUIDANCE: 1986, 2001, AND 2017

In response to legal changes in which Treasury and the IRS work to implement tax laws enacted by Congress,¹⁰⁸ how have Treasury’s practices and norms changed? And do those changes address the democratic legitimacy concerns or the consistency concerns described above? This Section details our study of administrative tax guidance issued by Treasury and the IRS, tallying the modes of guidance produced by Treasury and the IRS recently (from December 2017 through December 2019) as compared to earlier time

102. See Levy & Glicksman, *supra* note 97, at 499 (describing the agency in which an administrative law issue arises as “incidental” in the “iconic administrative law decisions” addressing judicial review, including *Chevron*, *State Farm*, *Chenery*, and others).

103. See, e.g., Grewal, *supra* note 101, at 1630 (describing the *Mayo Foundation* court’s “clear and unanimous rejection of tax exceptionalism”).

104. *Mayo Found.*, 562 U.S. at 55 (“*Mayo* has not advanced a justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only.”); see also Hickman & Thomson, *supra* note 60, at 323 (offering prudential justifications for a single standard for courts to adopt applying across subject matter areas, and commenting that “[i]deally, the criteria on which the courts settle will be uniform”).

105. See *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (“The APA was meant to bring uniformity to a field full of variation and diversity.”); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 230–31 (1986) (describing the chair of the Senate Judiciary Committee describing the APA prior to enactment as “offer[ing] a hopeful prospect of achieving a reasonable uniformity and fairness in administrative procedures”).

106. 5 U.S.C. § 559.

107. See *infra* Part III.B.

108. See *supra* notes 6–13 and accompanying text.

periods. This Section also discusses how those changes have affected the implementation of significant tax laws.

Part II.A briefly describes our review process. Parts II.B, II.C, and II.D describe our key findings. Part II.E addresses open questions and avenues for potential further examination and research.

A. Process and Overview

To undertake this assessment, we created a comprehensive database of guidance issued to implement the TCJA, the 2001 Tax Cuts,¹⁰⁹ and the TRA 1986.¹¹⁰ Reviewing each piece of guidance issued in the first two years following the enactment of each of those laws (from October 1986 to October 1988, June 2001 to June 2003, and December 2017 to December 2019), we traced how Treasury and the IRS went about implementing each major tax law.

To identify guidance, we primarily relied on the publications in the IRS's weekly Internal Revenue Bulletin.¹¹¹ For the earlier two time periods, we used the combined volumes of the IRS Cumulative Bulletin for each year.¹¹² We supplemented this record by also reviewing the IRS website¹¹³ and Tax Analysts' public digital archives¹¹⁴ for informal guidance that was not published in the Internal Revenue Bulletin, primarily News Releases and Announcements (which are both very informal forms of IRS guidance).¹¹⁵

109. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in scattered sections of 26 U.S.C.) (referred to throughout as the "2001 Tax Cuts").

110. See *supra* notes 2, 15–16 for the official names of each law as enacted.

111. *Internal Revenue Bulletins*, IRS, <http://apps.irs.gov/app/picklist/list/internalRevenueBulletins.html> [<http://perma.cc/4HTY-6F7C>] (last visited Nov. 1, 2021).

112. As the Service explains:

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner for the announcement of official rulings, decisions, opinions, and procedures, and for the publication of Treasury decisions, Executive orders, tax conventions, legislation, court decisions, and other items pertaining to internal revenue matters. It is the policy of the Internal Revenue Service to publish in the Bulletin all substantive and procedural rulings of importance or general interest, the publication of which is considered necessary to promote a uniform application of the laws administered by the Service.

Treas. Reg. § 601.601(d)(1) (as amended in 1987). This regulation also references the publication of the semi-annual Cumulative Bulletin as a compendium of Internal Revenue Bulletins. See *infra* note 121 for a description of some issues regarding how we dealt with the different publications.

113. The IRS website includes News Release dating back to November 2002. *News Release and Fact Sheet Archive*, IRS, <http://www.irs.gov/newsroom/news-release-and-fact-sheet-archive> [<http://perma.cc/T9ZF-KDZ3>] (last visited Nov. 1, 2021).

114. We used date ranges and narrowed down the results based on document types, along with sometimes narrowing the results using the statute titles. We also relied on the Hein Online database titled "Taxation and Economic Reform in America Parts I + II," which contains full print copies of the 1986–1988 Cumulative Bulletins—particularly important since there was no contemporaneous electronic release of documents at that time, so digitized copies of the physical Cumulative Bulletin publications were a vital resource for our research.

115. Our review did not include written determinations that provide information to a single taxpayer and are made available to the public in redacted form. While undoubtedly an important element of implementing the tax law, these are generally treated as nonprecedential. See I.R.C. § 6110; *IRS Written Determinations*, IRS, <http://apps.irs.gov/app/picklist/list/writtenDeterminations.html> [<http://perma.cc/F9EJ-645L>] (last visited Nov. 1, 2021).

Our review included so-called Treasury Decisions, which are binding regulations, including both final regulations that were the product of the full notice and comment process and temporary regulations, which are effective without notice and comment.¹¹⁶ Our review also included proposed regulations published in the Federal Register, other types of guidance that the IRS understands to have precedential value (such as Revenue Rulings and Notices), less formal types of guidance (such as Revenue Procedures), and highly informal guidance (such as Announcements, Frequently Asked Questions documents and webpages, and press releases). We counted only the guidance documents issued in conjunction with the specific laws we were focused on—the 2017 TCJA, the 2001 Tax Cuts, and the TRA 1986. In each time period—particularly in the 2001 period—there were additional guidance projects and documents issued arising from other laws or circumstances.¹¹⁷

Some of our qualitative conclusions are based on our subjective interpretations of the meanings and purposes of the documents; these interpretations are explained at least in part in the short summaries of each document in the appendices. Some of our quantitative findings also hinge on subjective determinations; we have sought to explain any interpretive decisions either in the analysis that follows or in the appendices in the short description of each document reviewed. All the documents we reviewed are listed in Appendix A (1986–1988), Appendix B (2001–2003), and Appendix C (2017–2019).¹¹⁸ The appendices include the key categorization decisions we made and short summaries of each document we reviewed.

B. *Volume of Guidance Documents*

To start, there is the question of volume, which is a double-edged sword in terms of democratic legitimacy. As represented in Figure 1, we counted 347 guidance documents implementing the TCJA in the two years following its enactment, compared to 93 following the 2001 Tax Cuts, and 424 following the TRA 1986.¹¹⁹ At first blush, those numbers are not particularly surprising. The 2001 Act was most significant for its adjustment of rates, leaving in place the basic structure enacted in 1986 and amended through the 1990s. In contrast, the 2017 law was more similar to the 1986 reform, although 1986 still stands apart as the most substantial and far-reaching reform. Interpreted in view of the substantive heft of the underlying legislation, the breakdown we found between the 1986 and 2017 pieces of reform legislation makes sense: the 1986

116. The “Treasury Decision” designation generally applies to Final and Temporary regulations per internal guidance. *Internal Revenue Manuals* § 32.1.5.3.4, IRS, http://www.irs.gov/irm/part32/irm_32-001-005 [<http://perma.cc/QMB5-X3PS>] (last updated Nov. 21, 2019).

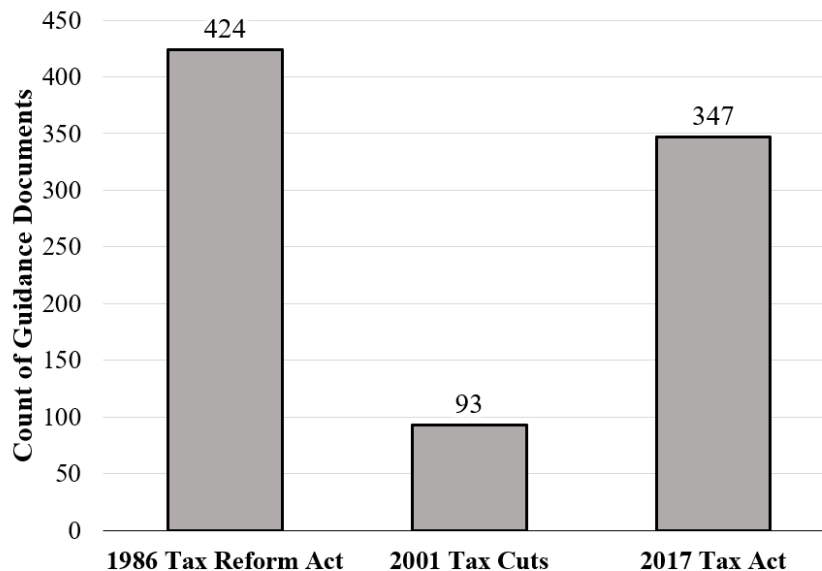
117. In 2001–2003, in addition to the ninety-three documents implementing the 2001 Tax Cuts we counted 117 guidance documents that had to do with other legislation or issues unrelated to the 2001 Tax Cuts law. That is, Treasury and the IRS were able to continue to carry out work on pre-exiting regulatory and guidance priorities even as they implemented the 2001 Tax Cuts. In the periods following 1986 and 2017, essentially the only additional guidance consisted of routine and necessary documents—for example, inflation adjustments—with everything else set aside to focus on implementing those pieces of legislation.

118. Due to their length, the appendices are not included in the print version of this Article but can be found on *Temple Law Review*’s website at the following navigation: Archive > Past Volumes > Volume 94, No. 1, Fall 2021 > Articles > *Administering Taxes Democratically?* Appendices, available at <http://www.templelawreview.org/archive/> [<http://perma.cc/BY5Z-8TZ7>].

119. See *infra* Appendices A–C.

Act was more substantial than the 2017 Act in terms of the extent to which it rewrote old rules and created new rules. We found 77 more pieces of guidance in the period from 1986 to 1988 than we did from 2017 through 2019.

FIGURE 1: NUMBER OF GUIDANCE DOCUMENTS PUBLISHED



Despite the different number of distinct documents, there were remarkably similar overall volumes of guidance produced in the two periods as measured by pages of the Internal Revenue Bulletin. The TCJA guidance filled 2,150 pages of the Internal Revenue Bulletin, as compared to the 1,831 pages of Cumulative Bulletin filled regarding the 1986 Tax Reform Act (to be clear, this page count leaves out informal guidance, which is discussed in Part II.C below).¹²⁰ Because there were more distinct documents published following the 1986 Tax Reform Act, the average document length

120. We reviewed the Cumulative Bulletin for 1986–1988 and the Internal Revenue Bulletin for 2001–2003 and 2017–2019. The Cumulative Bulletin ceased production in 2008. *See* Treas. Reg. § 601.601(d)(2)(ii) (as amended in 1987). We sampled some documents that were printed in both the Cumulative Bulletin and the Internal Revenue Bulletin to compare number of pages in each and found them to be the same. In some instances, there were publications that were not included in the Internal Revenue Bulletin or Cumulative Bulletin but were only printed in the Federal Register. *See, e.g., infra* Appendix A, row 18, LR-132-86; Appendix C, row 341, Reg. 105495-19. For purposes of analyzing page numbers, we used the number of pages in the Federal Register for these documents only. Our review of recent documents that we were able to locate in both publications indicates that the Federal Register tends to be slightly *more* condensed, i.e., fifty pages in the Federal Register would convert to something like sixty pages in the Internal Revenue Bulletin and thus in the Cumulative Bulletin. *See, e.g.,* Base Erosion and Anti-Abuse Tax, 84 Fed. Reg. 66,968 (Dec. 6, 2019) (to be codified at 26 C.F.R. pt. 1) (totaling seventy-eight pages in the Federal Register and ninety-one pages in the Internal Revenue Bulletin); Information Reporting for Certain Life Insurance Contract Transactions and Modifications to the Transfer for Valuable Consideration Rules, 84 Fed. Reg. 58,460 (Oct. 31, 2019) (to be codified at 26 C.F.R. pt. 1) (totaling thirty pages in the Federal Register and thirty-nine pages in the Internal Revenue Bulletin).

was shorter compared to other time periods. The average document length between 1986 and 1988 was 5.3 pages, compared to the average document lengths of 10.1 and 13.4 for the 2001–2003 and 2017–2019 time periods, respectively. The median length was 4 pages in 2017 versus 2 pages in the 1980s and 4.5 pages in the early 2000s.

The increased mean length in 2017–2019 is in part a product of differences at the high end, i.e., among the lengthiest pieces of guidance published in the Internal Revenue Bulletin.¹²¹ From 1986 to 1988, there were just five documents that were longer than 35 pages. The other long documents implementing the TRA 1986 were three temporary regulations (coming in at 51 pages,¹²² 39 pages,¹²³ and 38 pages¹²⁴), one Proposed Regulation that was 49 pages,¹²⁵ and one white paper Congress requested recommending policy options to address challenges in the transfer pricing regime.¹²⁶ From 2017 to 2019, however, there were more long documents: twenty documents over 35 pages, including ten substantive documents that were in excess of 50 pages.¹²⁷ Those ten documents included five Final Regulations (with lengths of 70 pages,¹²⁸ 87 pages,¹²⁹ 91 pages,¹³⁰ 91 pages,¹³¹ and 102 pages¹³²) and a proposed regulation—not finalized during the two-year period we reviewed—running 134 pages.¹³³

121. Types of guidance that are generally shorter, for example Revenue Rulings and Revenue Procedures, remained more consistent in length. From 2017 to 2019, Revenue Rulings averaged 2.8 pages per document, while for the TRA 1986, they averaged 2.1 pages per document. On the other hand, average length per Revenue Procedure was slightly higher under the TRA 1986, coming in at 4.95 per document, compared to 4.69 under the TCJA.

122. See *infra* Appendix C, row 275, T.D. 8175.

123. See *infra* Appendix C, row 55, T.D. 8126.

124. See *infra* Appendix C, row 401, T.D. 8228.

125. See *infra* Appendix C, row 123, EE-113-82.

126. I.R.S. Notice 88-123, 1988-2 C.B. 458; TREASURY DEP'T & IRS, A STUDY OF INTERCOMPANY PRICING (1988), http://ia902205.us.archive.org/9/items/studyofintercomp00unit/studyofintercomp00unit_bw.pdf [<http://perma.cc/NMN3-NQRK>]. The white paper was a study of transfer pricing issues, and was produced at Congress's direction, as communicated in legislative history produced in conjunction with the TRA 1986. See Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 VA. TAX REV. 89, 91 (1995) (discussing the legislative history requesting that Treasury produce the white paper, H.R. Conf. Rep. No. 99-841, 99th Cong., 2d Sess. II-638 (1986)). The white paper notice was released on October 20, 1988—two days shy of the two-year anniversary of the enactment of the TRA 1986—but was not included in the Internal Revenue Bulletin until December of that year. Despite the late Internal Revenue Bulletin publication date, we decided it should be included in our two-year study.

127. There was one additional Notice that was 187 pages in length—by far the longest document in any of the time periods examined—but that document consisted entirely of reporting the census tracts that state governments had designated as qualified opportunity zones under Section 1400Z-2. I.R.S. Notice 2018-48, 2018-28 I.R.B. 9. Thus, it is essentially a reference document for would-be investors, rather than a communication of any typical sort of regulatory guidance.

128. See *infra* Appendix A, row 204, T.D. 9847.

129. See *infra* Appendix A, row 203, T.D. 9846.

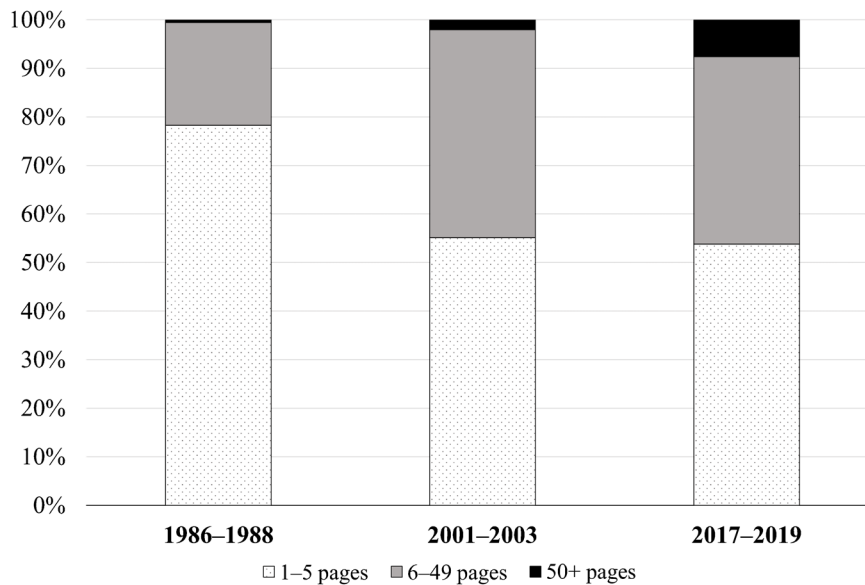
130. See *infra* Appendix A, row 291, T.D. 9866.

131. See *infra* Appendix A, row 345, T.D. 9885.

132. See *infra* Appendix A, row 342, T.D. 9882.

133. See *infra* Appendix A, row 192, Reg. 106089-18.

FIGURE 2: PORTION OF GUIDANCE THAT IS SHORT, MEDIUM, OR LONG



Creating fewer discrete documents, each with a high volume of pages, may diminish transparency because longer documents that cover more issues are harder to digest. In turn, discrete issues that are subsumed in longer documents may be easily missed by the interested public.¹³⁴ However, the longer overall lengths more recently are in part because of a move to longer *preambles* in some guidance documents.¹³⁵ Using word counts to compare Treasury Decisions (i.e., including both final and temporary regulations), we found that the additional length from 2017 to 2019 includes substantially

134. See *infra* note 152 discussing anecdotal evidence that longer guidance documents may have been advantageous to certain sophisticated interest groups that were able to gain concessions from Treasury in the notice and comment process. As Professor Emily Cauble helpfully noted, a shorter, less detailed regulation that leaves open questions that ultimately have to be answered by a court might result in a rule that is further removed from politically responsive decisionmakers as compared to a more detailed rule produced by Treasury officials who serve at the pleasure of the (elected) President, although there are many possible ways that alternative processes could play out hypothetically. On another note, one interesting avenue for future research in this area raised by Professor Stephanie Hoffer is the question of how changing technology has affected the ability of interested parties to participate, and whether technology alone may help overcome challenges in volume or length of documents in recent years as compared to the 1980s. Along similar lines, administrative law scholars have noted that electronic means of participation in the notice and comment process presents some novel issues. See Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1344-46 (2011).

135. See *supra* note 48 and accompanying text for a discussion of how the “concise general statement” requirement in the APA has blossomed into demanding requirement that agencies respond to comments received in robust regulatory preambles. See Daniel Shaviro, *Three Further Thoughts on the Altera Appeal*, START MAKING SENSE (Feb. 24, 2016, 10:37 AM), <http://danshaviro.blogspot.com/2016/02/two-further-thoughts-on-altera-appeal.html> [http://perma.cc/Z27P-5N5Z] (expressing the concern that imposing the general administrative law demands for preambles on tax guidance will result in regulatory preambles that are written “as if they [a]re litigating documents”).

longer preambles. The nine longest preambles among all Treasury Decisions reviewed are all from 2017 to 2019, as are 11 of the 18 longest preambles; conversely, 19 of the 20 shortest preambles are from 1986 to 1988. At the same time, 6 of the 10 longest actual regulations (i.e., the length of the regulation without the preamble) are from 2017 to 2019. The average word length of the regulation (nonpreamble) part of Treasury Decisions in 1986–1988 was 8,996 words, whereas in 2017–2019 it was 20,532 words. Preambles showed a similar difference: from 1986 to 1988, the average preamble length was 2,332 words, whereas from 2017 to 2019 it was 20,599 words.

The consistency in overall page count suggests that the IRS and Treasury’s capacity to produce tax guidance has remained essentially unchanged across forty years, even as the Tax Code, and scope and reach of the tax rules, have expanded significantly. Over that time period, Congress has cut the IRS budget and the number of chief counsel personnel, which may suggest diminished responsiveness.¹³⁶ These differences also may be confirmation that Treasury and the IRS’s discretion in developing substantive guidance under the TCJA was, indeed, exceptional. They produced a larger volume of significant regulations that would potentially constitute Treasury undertaking more legislative-type activity than it confronted in the earlier time periods.¹³⁷ They also produced substantially longer regulatory preambles, which has both democratic benefits—explanations of what the rules consist of and why they might be helpful to taxpayers—but also contributed to the increased volume of long guidance documents.

C. *Different Types of Guidance*

The form and types of the guidance were significantly different from 2017 to 2019 as compared to earlier periods. Some of this change appears to be due to the internet revamping how guidance can be released to the public and generally facilitating more guidance that is less formal. In turn, the changes in how guidance is released may be affecting taxpayers’ opportunities to participate in the process of drafting guidance, and

136. In 2019, there were 2,038 employees in the chief counsel’s office, including all lawyers and non-lawyers, compared to over 2,400 lawyers alone (not including support staff) in 1986. *See* IRS, SOI TAX STATS: TABLE 33. INTERNAL REVENUE SERVICE AND CHIEF COUNSEL LABOR FORCE, COMPARED TO NATIONAL TOTALS FOR FEDERAL AND CIVILIAN LABOR FORCES, BY GENDER, RACE/ETHNICITY, DISABILITY, AND VETERAN STATUS, FISCAL YEAR 2019 (2019), <http://www.irs.gov/statistics/soi-tax-stats-internal-revenue-service-labor-force-compared-to-national-totals-for-federal-and-civilian-labor-forces-irs-data-book-table-33> [<http://perma.cc/5T5C-9Y9C>] (last visited Nov. 1, 2021) (select “2019”); OFF. PUB. AFFS., IRS, INTERNAL REVENUE SERVICE 1986 ANNUAL REPORT 64 tbl.25 (1986), <http://www.irs.gov/pub/irs-soi/86dbfullar.pdf> [<http://perma.cc/UF4H-FEVE>]. Note that in both time periods, only some IRS counsel worked on tax guidance; others handled tax court litigation and other matters. The deleterious effects of IRS budget cuts on enforcement and collections are well-documented, but the effects on implementation and guidance have received less attention. *E.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., REDUCED BUDGETS AND COLLECTION RESOURCES HAVE RESULTED IN DECLINES IN TAXPAYER SERVICE, CASE CLOSURES, AND DOLLARS COLLECTED (2015), http://www.treasury.gov/tigta/auditreports/2015reports/201530035_oa_highlights.html [<http://perma.cc/B8PA-9F7E>].

137. As we have explored elsewhere, in the past, significant tax regulations have been aided by direct and detailed guidance from Congress in the form of conference reports that were the product of deep consideration of the details of tax provisions undertaken prior to enactment. *See* Wallace, *Congressional Control*, *supra* note 65, at 201. For the TCJA, little was developed in Congress along these lines, and at the same time Congress left significant details unaddressed in the text of the statute. *Cf.* Oei & Osofsky, *supra* note 4, at 218.

thus may harm the responsiveness and accountability aspects of implementing the tax law. On the other hand, the shift towards more informal guidance, particularly towards guidance published on the internet, may have salutary effects on transparency and, from a rule-of-law perspective, in helping provide information that enhances the coherence and predictability of the tax system for some taxpayers.¹³⁸

From 2017 to 2019, the Internal Revenue Bulletin included 138 guidance documents implementing the new legislation, while 202 documents were published directly on the IRS website as informal guidance or were released directly to news organizations as well as on the IRS website. These non-Bulletin documents included a variety of document types that were uncommon (and in some cases unknown) in the 1980s, including Frequently Asked Questions,¹³⁹ Statements,¹⁴⁰ Fact Sheets,¹⁴¹ Tax Tips,¹⁴² as well as Publications and News Releases.

In contrast, from 1986 to 1988, the Bulletin included 345 guidance documents, while just 80 documents were published by other means as informal guidance (and which, obviously, were not disseminated via the internet). The non-Bulletin documents in the 1980s were limited to 24 News Releases and 56 IRS Publications.¹⁴³ Those types of publications continued to be produced in the 2017–2019 time period, but in different proportions: there were 88 News Releases and just 5 IRS Publications. That is, there were eleven times as many Publications in the two years after the TRA 1986 as there were from 2017 to 2019.

This apparent shift—toward more informal, non-Bulletin guidance and away from Publications—signals a change in how taxpayers receive information and may also indicate differences in the type of information received. Publications are generally written in plain language and do not include citations to legal authority, and courts have established that taxpayers cannot rely on Publications to justify tax return positions.¹⁴⁴

138. See *supra* note 78 and accompanying text.

139. See, e.g., *Frequently Asked Questions: Alimony, Child Support, Court Awards, Damages*, IRS, <http://www.irs.gov/faqs/interest-dividends-other-types-of-income/alimony-child-support-court-awards-damage-s/alimony-child-support-court-awards-damages-1> [<http://perma.cc/C2ZQ-79PK>] (last updated Aug. 16, 2021) (providing guidance on tax treatment of child support and alimony payments, which were impacted by the TCJA).

140. See, e.g., *IRS Statements – Withholding for 2018*, IRS, <http://www.irs.gov/newsroom/irs-statements-withholding-for-2018> [<http://perma.cc/PD67-YW9A>] (last updated Jan. 22, 2021) (keeping taxpayers informed on immediate impacts of the TCJA, specifically discussing impacts on changes to withholding).

141. See, e.g., *Know the Tax Facts About Renting Out Residential Property*, IRS, <http://www.irs.gov/newsroom/know-the-tax-facts-about-renting-out-residential-property> [<http://perma.cc/TE38-3544>] (last updated May. 25, 2021) (informing taxpayers of differential treatment that results from using a primary residence to produce income).

142. See, e.g., *Taxpayers with Children, Other Dependents Should Check Withholding ASAP*, IRS, <http://www.irs.gov/newsroom/taxpayers-with-children-other-dependents-should-check-withholding-asap> [<http://perma.cc/E7RZ-A2X4>] (last updated May 25, 2021) (furnishing information on how the TCJA may have impacted tax treatment of children and dependents).

143. See *infra* Appendix A for summaries of these documents. Another informal type of guidance, Announcements, was published in the Cumulative Bulletin.

144. See generally Michael I. Saltzman & Leslie Book, *Other Forms of Guidance*, in IRS PRACTICE AND PROCEDURE ¶ 3.04 (2020) (explaining that Publications do not offer protection against the imposition of accuracy-related penalties).

In contrast to the newly developed, even less formal forms of guidance, Publications provide comprehensive treatment of tax topics and are intended to fully facilitate taxpayer compliance with various issues.¹⁴⁵ Some of the guidance-producing effort that is no longer focused on Publications may have been channeled into a form of guidance that is not reflected in our study: the Interactive Tax Assistant, which provides dynamic advice to specific taxpayer inquiries.¹⁴⁶ It is unclear whether the refocusing of efforts from creating Publications to creating dynamic guidance—along with Tax Tips and other piecemeal forms of instruction—is helpful or hurtful to taxpayers overall. The effects on the democratic legitimacy of tax administration are unclear as well.

The shift towards more types of informal guidance and more numerous informal guidance documents has been accompanied by a shift in the nature of formal guidance that is published in the Internal Revenue Bulletin. As mentioned above, there was a higher number of long guidance documents from 2017 to 2019 than from 1986 to 1988. The types of long guidance issued also varied significantly. Implementing the TRA 1986, the IRS issued 71 proposed regulations, as compared to 38 for the TCJA (and, less comparably, just 5 for the 2001 Tax Cuts). As discussed below, this shift means that taxpayers were afforded fewer opportunities to comment on TCJA guidance than on the TRA 1986 guidance.¹⁴⁷ There were also fewer final regulations between 2017 and 2019—i.e., fewer regulations were the final product of the notice and comment process—with 21 final regulations issued in 1986–1988 compared to 15 final regulations in 2017–2019.

Other types of guidance varied significantly as well. To implement the TRA 1986, Treasury issued 57 temporary regulations, as compared to just 1 temporary regulation from 2017 to 2019 (in 2001, there was 1 temporary regulation as well).¹⁴⁸ The discrepancy in final regulations described above exists *despite* the fact that in 1986–1988, Treasury made liberal use of the flexibility available with temporary regulations in that era—a time when temporary regulations stayed on the books indefinitely without a final regulation ever being issued.¹⁴⁹ There was also a precipitous drop in the issuance of Revenue Rulings, with 33 used to implement the TRA 1986, and just 5 used to implement the TCJA. The use of Notices also decreased more modestly, from 82 in the 1980s period

145. See *Publications Online*, IRS, <http://www.irs.gov/publications> [<http://perma.cc/NAZ6-7CAE>] (last visited Nov. 1, 2021) (listing all current IRS publications).

146. *Interactive Tax Assistant (ITA)*, IRS, <http://www.irs.gov/help/ita> [<http://perma.cc/L9FD-TJC8>] (last visited Nov. 1, 2021). See Joshua D. Blank & Leigh Osofsky, *Automated Legal Guidance*, 106 CORNELL L. REV. 179, 202–04 (2020) (detailing the ITA and providing comparisons with traditional publications). See generally Joshua D. Blank & Leigh Osofsky, *Simplicity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 196–204 (2017) (describing the challenges and considerations involved in producing IRS publications).

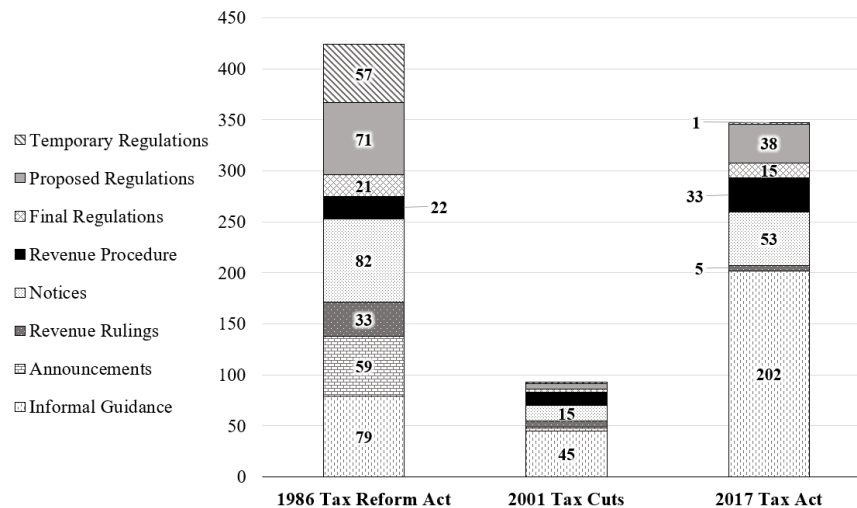
147. See *infra* Part II.D.

148. As discussed in more detail below, *infra* Part III.A, in 2019 the Treasury Department adopted a policy of avoiding the use of temporary regulations. See TREASURY, POLICY STATEMENT, *supra* note 14. Professor Hickman found in a study of IRS guidance covering 2003 through 2005 that 36.2% of tax regulations were issued as temporary regulations. Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1749. For comparison, our study finds 44.8% of regulations published as temporary regulations from 1986 to 1988 and 1.7% from 2017 to 2019.

149. See *id.*; *infra* Part III.A (describing changing practices and statutory context surrounding the use of temporary regulations).

to 53 following the TCJA. Revenue Procedures increased from 22 in 1986–1988 to 33 in 2017–2019.

FIGURE 3: DIFFERENT TYPES OF GUIDANCE



Again, however, the number of documents veils some potentially important differences. Despite similar total numbers of discrete final regulations, the regulations finalized between 2017 and 2019 totaled 524 pages in the Internal Revenue Bulletin, whereas the regulations finalized between 1986 and 1988 filled just 222 pages in the Cumulative Bulletin.¹⁵⁰ This anomaly is also present in proposed regulations and Notices during the same time periods. Under the TRA 1986 there was close to double the number of proposed regulations as compared to 2017–2019, but there were substantially more pages of proposed regulations in the Internal Revenue Bulletin for 2017–2019, totaling 980 pages compared to the 345 pages found in the Cumulative Bulletins in 1986–1988. In addition, there were 29 more Notices issued in 1986–1988, but there were 392 pages of Notices in the Internal Revenue Bulletins of 2017–2019, compared to 339 pages in the Cumulative Bulletin in 1986–1988.

The reduced number of discrete proposed and final regulations in combination with significantly longer documents (including numerous, very long substantive documents that are not subject to notice and comment) may mark a troubling turn for democratically legitimate tax administration. Lack of notice and comment reduces opportunities for participation and shields rulemakers from even the possibility of being responsive to public input.¹⁵¹ Furthermore, longer documents, whether subject to notice and comment,

150. See *supra* note 111 for comparisons of page numbers between the Internal Revenue Bulletin and Cumulative Bulletin and a discussion on the issue of regulations not published in the Internal Revenue Bulletin or Cumulative Bulletin.

151. Critics of temporary regulations surely see the steep reduction in temporary regulations as a victory for public participation, as one of their concerns about temporary regulations is that postpromulgation notice and

may provide advantages for sophisticated taxpayers and, conversely, disadvantages for the less sophisticated. Indeed, it appears that some provisions of the TCJA lost substantial additional revenue—beyond what Congress anticipated at the time of enactment—through implementation decisions that came in the form of enormous guidance documents. Examples include Section 199A¹⁵² and Opportunity Zones,¹⁵³ each of which was implemented by way of regulations that loosen revenue safeguards and thus likely reduce revenue in ways that are advantageous to well-resourced taxpayers.¹⁵⁴ The fact that these provisions were shaped in the regulatory process and cost the government more revenue than Congress anticipated suggests that the way the guidance-writing process unfolded favored the benefitting taxpayers. This outcome is also in part a result of the policies’ (that Congress adopted) being malleable in ways that sophisticated taxpayers would have tried to benefit from by influencing Treasury, regardless of what particular type of guidance Treasury decided to use.¹⁵⁵

comment is ineffective to change rules that are already in force. *See generally* Hickman & Thomson, *supra* note 60. As elaborated in Section III, we view postpromulgation notice and comment as superior to no opportunity for comment, which our review shows is a feature of the new tax administration, with fewer proposed regulations and no temporary regulations.

152. According to news reports, for example, trust and estate practitioners received many items they were looking for in the final Section 199A regulations such as softening of the family attribution rules for aggregating the Section 199A deduction and allowing trusts and estates to take into account any distribution deduction under Sections 651 or 661 to get to taxable income for the Section 199A threshold. Jonathan Curry, *Trust and Estate Practitioners Notch Wins in 199A Regs*, 162 TAX NOTES 428, 428–29 (2019). In their intensive study of the Section 199A regulation-writing process, Professors Oei and Osofsky observed that Treasury accepted significant input *before* the proposed regulation was released, and made only minor adjustments to the proposal in light of comments actually received in the notice and comment process. *See* Oei & Osofsky, *supra* note 4, at 253–55. The Section 199A proposed regulations were fifty-one pages long and parties were given forty-six days to comment on the proposal. *See infra* Appendix A, row 91, Reg 107892-18.

153. Final opportunity zones regulations gave taxpayer benefits in the form of allowing taxpayers to invest the entire amounts of gains from the sale of business property without regard to losses, allowing gains to be excluded from tax when sold at the subsidiary Opportunity Zone business level rather than requiring it to be sold at the fund level, and allowing triple net leases as part of a business to be treated as conducting an active trade or business in certain situations. Stephanie Cumings, *Final O-Zone Regs Include Several Taxpayer Wins*, 165 TAX NOTES 1989, 1990 (2019).

154. The Joint Committee on Taxation has nearly doubled its estimate of the cost of Opportunity Zones as implementation played out. Final regulations that allow more types of gains to qualify for tax breaks, require fewer improvements for opportunity zone property, and allow businesses to hold cash longer are likely to increase this cost. Samantha Jacoby, *Final Opportunity Zone Rules Could Raise Tax Break’s Cost*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 3, 2020, 2:00 PM), <http://www.cbpp.org/blog/final-opportunity-zone-rules-could-raise-tax-breaks-cost> [<http://perma.cc/C7TM-SBBJ>].

155. If the TCJA represents the “new normal” for tax legislation—whereby Congress moves quickly and delegates significant policy making discretion to Treasury and the IRS—then administrative procedures that result in significant revenue leakage (i.e., base erosion as compared to what members of Congress believed they were enacting) may require additional attention, for example by introducing revenue estimates into the notice and comment process. *Cf.* Wallace, *Congressional Control*, *supra* note 65, at 225–30 (proposing a “JCT Canon” of statutory interpretation to be wielded by Treasury and courts so as to hem tax regulations closer to congressional intent as expressed in revenue estimates produced during the legislative process).

D. *Less Opportunity for Public Engagement*

When Treasury and the IRS propose a tax regulation, the APA requires that the public have an opportunity to comment on the proposal.¹⁵⁶ The opportunities for such public comment were reduced in 2017–2019 as compared to 1986–1988 because of the shift away from proposed regulations—which fell 40% in the more recent time period.¹⁵⁷ Even when public comment was permitted, comment periods for proposed regulations were shorter in 2017–2019 as compared to earlier periods. From 1986 to 1988, the standard comment period for proposed regulations was 60 days, with 65 proposed regulations having comment periods of 60 days or greater and just 3 out of 71 proposed regulations having comment periods of 45 days or less.¹⁵⁸ From 2001 to 2003, 4 out of 5 proposed regulations had comment periods of 90 days or greater, with only 1 proposed regulation’s comment period lasting 60 days. From 2017 to 2019, there were only 27 comment periods of 60 days or greater, whereas 8 out of 38 proposed regulations had comment periods of 45 days or less, and 4 lasting just 30 days—the minimum permissible under the APA.¹⁵⁹

These shorter periods may make participation harder for parties that are indirectly affected by a proposed rule or that do not have the resources to engage professional representation for their interests. Although significant technological developments in the past forty years may generally make it easier to engage in the notice and comment process, even with shorter comment periods,¹⁶⁰ in the recent past, Treasury has *extended* comment periods in order to facilitate public engagement.¹⁶¹ Shorter comment periods may also suggest that Treasury is doing more work prior to releasing a proposed regulation, and thus anticipates making fewer changes to the proposed regulation in response to comments received during the public comment process.¹⁶²

156. 5 U.S.C. § 553(c).

157. *See supra* notes 147–148 and accompanying text.

158. The three proposed regulations allowing the shortest public comment period are as follows: LR-132-86, LR-133-86, and LR-115-86. *See infra* Appendix A, row 18, LR-132-86; Appendix A, row 376, LR-133-86; Appendix A, row 176, LR-115-86.

159. 5 U.S.C. § 553(d). The four proposed regulations allowing thirty days for comments are as follows: Reg. 103474-18, Reg. 114540-18, Reg. 107163-18, and Reg. 103163-18. *See infra* Appendix C, row 73, Reg. 103474-18; Appendix C, row 149, Reg. 114540-18; Appendix C, row 160, Reg. 107163-18; Appendix C, row 168, Reg. 103163-18.

160. We thank Professor Stephanie Hoffer for noting that the shorter comment periods may not limit participation in comparative terms, given how much easier it is to access proposed regulations via the internet as compared to via a physical copy of the Internal Revenue Bulletin, as well as submitting comments electronically versus in hard copy.

161. In 2015, Treasury introduced a proposal to limit the use of “management fee waivers” by investment fund managers, which allowed those managers to convert certain ordinary income into capital gains. *See Disguised Payments for Services (REG-115452-14)*, REGULATIONS.GOV, <http://www.regulations.gov/docket?D=IRS-2015-0036> [<http://perma.cc/K6EU-5EQQ>] (last visited Nov. 1, 2021). Treasury had planned on a ninety-day comment period, possibly to be followed by a public hearing, but extended the comment period by thirty days citing “intense public interest.” *Disguised Payments for Services; Extension of Comment Period*, REGULATIONS.GOV (Oct. 13, 2015), <http://www.regulations.gov/document/IRS-2015-0036-0031> [<http://perma.cc/2ANB-2DDN>].

162. *Cf. Oei & Osofsky, supra* note 4, at 253–55 (as discussed *supra* note 152).

E. *Open Questions and Issues*

The data presented above raise a host of additional questions. If opportunities for public participation seem to be reduced, what about actual participation? That is, how many people are offering comments on proposed regulations, and who are those people? From 2017 to 2019 there were five proposed regulations that had greater than 120 comments, and there was just one “mass comment” event among the proposed regulations, attracting 7,763 comments.¹⁶³ Of these five proposed regulations, three had 60 or greater days for comments with the remaining two having 46 or fewer days to comment. Perhaps surprisingly, the “mass comment” event occurred during a comment period of only 44 days, suggesting that sometimes commenters can mobilize even in a short period of time.¹⁶⁴

If shorter comment periods and fewer proposed regulations simply mean that well-resourced taxpayers are paying their lawyers and accountants to move more quickly to offer comments, and if the taxpayers are maintaining the same level of engagement as when they were given more time and more opportunities to weigh in, then the changes observed above may not be meaningful. On the other hand, if the marginal time and opportunities are preventing participation, and in particular if the differences are preventing participation from perspectives that are not otherwise represented in the regulatory process, then the changes would be problematic from a democratic decisionmaking perspective, as discussed below.

The budget effect of the proposed and final rules is also unknown. One of the legacies of the TRA 1986 is that its premise of “revenue neutrality” turned out to be false: the tax cuts for individuals were balanced out by some hundreds of billions of supposed corporate tax increases that were enacted, but ultimately underdelivered in terms of revenue.¹⁶⁵ Thus, the legislation, overall, actually gave more people *and* businesses a tax cut than claimed. The TCJA was enacted without even the semblance of revenue neutrality,¹⁶⁶ but nonetheless it was designed to meet specific budget benchmarks so it could be enacted through the reconciliation process.¹⁶⁷ As discussed above, it appears that additional revenue was lost due to concessions made in the rulemaking process that caused the final rules to be more taxpayer friendly than Congress anticipated at the time of enactment. An example of this is seen in the implementation of Section 199A and the Opportunity Zone provisions.¹⁶⁸ The extent of revenue loss from

163. See *infra* Appendix A, row 96, Reg. 112176-18, 2018-37 I.R.B. (Sept. 6, 2018).

164. See *infra* Appendix A, row 96, Reg. 112176-18, 2018-37 I.R.B. (Sept. 6, 2018).

165. The TRA of 1986 was projected to raise corporate taxes upwards of \$120 billion over the period of 1986–1991; however, actual receipts fell well short of this number. Corporate tax receipts were projected to be \$101 billion in 1987 with actual receipts of \$84 billion, \$119 billion in 1988 with actual receipts of \$94 billion, and \$126 billion in 1989 with actual receipts of \$103 billion. James M. Poterba, *Why Didn't the Tax Reform Act of 1986 Raise Corporate Taxes?*, 6 TAX POL'Y & ECON. 43, 46 (1992), <http://core.ac.uk/download/pdf/6807191.pdf> [<http://perma.cc/97VL-VW7S>].

166. See William G. Gale, *Did the 2017 Tax Cut—the Tax Cuts and Jobs Act—Pay for Itself?*, BROOKINGS (Feb. 14, 2020), <http://www.brookings.edu/policy2020/votervital/did-the-2017-tax-cut-the-tax-cuts-and-jobs-act-pay-for-itself/> [<http://perma.cc/YX8K-BTLX>].

167. KPMG, *supra* note 3.

168. See *supra* notes 151–154 and accompanying text.

particular administrative decisions is unclear because revenue estimates are not part of the regulation-writing process.¹⁶⁹ Indeed, overall, revenue over the first two years following the enactment of the TCJA was significantly lower than anticipated.¹⁷⁰

Another query is the extent to which public input and political oversight have an effect on the substance of final rules. Journalists and commentators have attempted to track the extent to which proposed tax regulations subject to review by the White House Office of Management and Budget's Office of Information and Regulatory Affairs have changed as a result of that review, but the conclusions are murky.¹⁷¹ There is even more murkiness regarding how rules are shaped at other junctures in the process. For example, in the initial drafting stage, who have IRS personnel met with and accepted input from? Has the nature of these meetings and the extent of access changed over time?¹⁷²

Another potentially interesting element of tax guidance that is not reflected in the documents examined for this study is the release of new tax forms. The TCJA had a particularly inane series of developments in this area. Responding to political leaders' assertions that the bill allowed for a "postcard" sized tax return, the IRS redesigned Form 1040 by removing lines and relegating some information to new schedules.¹⁷³ For the 2019 tax year, the IRS reverted to something closer to the old form.¹⁷⁴ The efforts that

169. See Wallace, *Congressional Control*, *supra* note 65, at 183 (arguing for greater attention to budget effects).

170. CBO revenue projections for 2018 were \$3.37 trillion and actual revenue was \$3.33 trillion. CONG. BUDGET OFF., *THE ACCURACY OF CBO'S BASELINE ESTIMATES FOR FISCAL YEAR 2018*, at 1–2 (2018), http://www.cbo.gov/system/files/2018-12/54872-Analysis_of_Actuals.pdf [<http://perma.cc/9APC-8HQ7>]. CBO revenue projections for 2019 were \$3.49 trillion and actual revenue was \$3.46 trillion. CONG. BUDGET OFF., *THE ACCURACY OF CBO'S BASELINE ESTIMATES FOR FISCAL YEAR 2019*, at 1–2 (2019), <http://www.cbo.gov/system/files/2019-12/55927-CBO-Accuracy-of-Estimates.pdf> [<http://perma.cc/4EPM-WP68>]. Before the TCJA was passed, the Joint Committee on Taxation projected revenues from 2018 to 2027 would total \$43.016 trillion—they have since adjusted this estimate to \$41.409 trillion. Benjamin R. Page, *Revisions to Revenue Projections Suggest That the TCJA Cost More than Expected*, TAX POL'Y CTR. (Nov. 5, 2019), <http://tpc.io/2NhwDsM> [<http://perma.cc/C8NP-AVQR>].

171. See, e.g., Tax Analysts, *Before and After OIRA Review Versions Provided for O-Zone Investment Regs.*, TAX NOTES (May 1, 2019), <http://www.taxnotes.com/research/federal/proposed-regulations/before-and-after-oira-review-versions-provide-d-for-o-zone-investment/29fs9> [<http://perma.cc/KQ7Y-GNRY>] (comparing draft versions of the proposed opportunity zone regulations).

172. See Oei & Ososky, *supra* note 4, at 253 (describing the heavy reliance on pre-proposed regulation input in designing the § 199A regulations, as indicated in part by explanations in the preamble to the proposed and final regulations).

173. Naomi Jagoda, *Mnuchin: Tax-filing 'Postcard' To Be Released Next Week*, HILL (June 20, 2018, 3:59 PM), <http://thehill.com/policy/finance/393323-mnuchin-tax-filing-postcard-to-be-released-next-week> [<http://perma.cc/Y8WQ-XN6S>]; Jim Tankersley, *The New Tax Form Is Postcard-Size, but More Complicated Than Ever*, N.Y. TIMES (June 25, 2018), <http://www.nytimes.com/2018/06/25/your-money/1040-income-tax-postcard.html> [<http://perma.cc/S4ZQ-LGJ8>]; *IRS Working on a New Form 1040 for 2019 Tax Season*, IRS (June 29, 2018), <http://www.irs.gov/newsroom/irs-working-on-a-new-form-1040-for-2019-tax-season> [<http://perma.cc/7AGD-5T24>].

174. Kelly Phillips Erb, *Everything Old Is New Again as IRS Releases Form 1040 Draft*, FORBES (July 15, 2019, 9:26 AM), <http://www.forbes.com/sites/kellyphillipserb/2019/07/15/everything-old-is-new-again-as-irs-releases-form-1040-draft/?sh=7d75668a2f75> [<http://perma.cc/8UZC-QR2D>]; Darla Mercado, *The IRS Revamps Its "Postcard-Sized" Tax Return, Drafts a New One for 2019*, CNBC (Aug. 1, 2019, 3:31 PM),

were focused on changing Form 1040 and its instructions, and then changing it again, were significant and might have been turned towards other implementation challenges. Were there comparable exercises in earlier areas—either political imperatives that were deemed untenable, or, more generally, efforts expended that were so clearly counterproductive that they were quickly reversed? Do administrators' interests in satisfying the public commitment made by elected leaders to alter the forms in this particular way—notwithstanding that the political leaders failed to enact a law that made this feasible—suggest enhanced democratic responsiveness, or do they highlight a disconnect that might undermine democratic legitimacy?

Further examination of the changing nature of tax guidance over the decades, and of the current state of tax guidance practices, might confront these questions. The answers may bear on how to interpret the information we have presented above and the implications with regard to temporary regulations that we draw below.

III. THE CASE OF TEMPORARY REGULATIONS

This Section turns to a specific mode of tax guidance that highlights how the movement in recent years towards consistency may have come at the expense of values that establish democratic legitimacy in some specific instances. Our focus here is temporary regulations, a form of tax guidance that stands out as inconsistent with the practices of other agencies and potentially (according to critics) deviates from the requirements of the APA.¹⁷⁵ Beyond consistency, there is shared sentiment among many administrative law scholars that final rules that have not been subject to notice and comment are not democratically legitimate.¹⁷⁶

Unlike proposed regulations, temporary tax regulations become effective immediately upon publication in the Federal Register and they are understood to carry the force of law like final regulations.¹⁷⁷ Treasury has treated temporary regulations as authoritative and binding until replaced by a final regulation that has been subject to notice and comment.¹⁷⁸ This approach has been accepted by numerous courts over the

<http://www.cnbc.com/2019/08/01/the-irs-drops-its-postcard-sized-tax-form-creates-new-one-for-2019.html>
[<http://perma.cc/9GHJ-NXA9>].

175. See Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1759; Hickman, *The Promise and the Reality*, *supra* note 52, at 50–55 (describing temporary regulations as one of the three ways in which tax administration deviates as a matter of course from other agency decisionmaking that complies with the APA; the second and third are other subregulatory guidance not subject to notice and comment, and limited judicial review).

176. This concern extends to some similar procedures used outside of the tax context that have also been subject to criticism. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 906–07 (2001) (discussing several instances outside of the tax context in which the Supreme Court applied *Chevron* deference to interim final rules); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 646–47 (2017) [hereinafter Walker, *Modernizing*] (summarizing a report he helped produce for the Administrative Conference of the United States recommending that Congress amend the APA to forbid expressly most “interim final rulemaking”).

177. Temporary regulations are published as Treasury Decisions, giving them the weight of law. See generally Treas. Reg. § 601.601(a), (d) (describing some internal procedures for tax regulations including Treasury decisions).

178. See *infra* Appendix A, row 10, T.D. 8112; Appendix C, row 285, T.D. 9865.

years, although not in the post-*Mayo Foundation* era.¹⁷⁹ As discussed below, scholars have long criticized the use of temporary regulations, and in 2019 Treasury announced a policy to limit the use of temporary regulations.¹⁸⁰

Based in part on our analysis in Section II, we offer a defense of temporary regulations, which deserve further attention as pragmatic mechanisms to promote democratic legitimacy in tax administration. Although we agree with critics that temporary regulations were relied on perhaps *too* heavily in the implementation of the TRA 1986, we argue that the reaction of essentially abandoning their use in recent years misses out on important benefits. Temporary regulations can serve as a useful medium for communicating binding rules while giving taxpayers an opportunity to engage with the policy prospectively. Our study helps to establish that in practice the use of temporary regulations to implement tax laws may actually address concerns that have been directed at “interim final rules” in other (non-tax) contexts.¹⁸¹ Further, we make the doctrinal case that temporary tax regulations—unlike interim final rules—are permissible by statute based on specific amendments Congress made to the tax code.

Part A of this Section reviews the history of temporary regulations, explaining the statutory and practical backdrop that resulted in the stark contrast in our tally between the use of temporary regulations in the 1980s as compared to recent years. Part B describes the critiques of temporary regulations that have been advanced, in particular by Professors Hickman and Michael Asimow.¹⁸²

Part C defends the use of temporary regulations on doctrinal grounds, responding to Hickman’s and Asimow’s arguments that temporary regulations violate the APA. Part C further argues that the apparent inconsistency with standard administrative law practices is not grounds to disavow the use of temporary regulations. Rather, the best way to read Section 7805(e) together with the “good cause” exception in the APA is that the two allow the liberal use of temporary regulations in the sort of circumstances that effective tax administration regularly demands.

Part D returns to the review of guidance and examines more closely the one temporary regulation issued to implement the TCJA, along with a set of Notices that might have been issued as temporary regulations in the past. We make the case that abstaining from the use of temporary regulations has set back the democratic goals of tax administration discussed in Section I. Finally, Part E argues that temporary regulations are just one flashpoint in debates that might affect the democratic legitimacy of tax administration.

179. Prior to *Mayo Foundation*, federal circuit courts periodically accepted and sometimes defended the validity of temporary regulations. *E.g.*, *Kikalos v. Comm’r*, 190 F.3d 791, 795–96 (7th Cir. 1999) (extending *Chevron* deference to a 1987 temporary regulation that was accompanied by a proposed regulation that was never finalized, and noting that other circuits had done the same); *E. Norman Peterson Marital Tr. v. Comm’r*, 78 F.3d 795, 798 (2d Cir. 1996) (“Until the passage of final regulations, temporary regulations are entitled to the same weight we accord to final regulations.”); *Truck & Equip. Corp. of Harrisonburg v. Comm’r*, 98 T.C. 141, 149–50 (1992) (noting that an “interpretive” temporary regulation is “entitled to the same weight as final regulations” and extending deference under the *National Muffler* framework, *National Muffler Dealers Association, Inc. v. United States*, 440 U.S. 472, 477 (1979), which predated *Mayo Foundation*).

180. TREASURY, POLICY STATEMENT, *supra* note 14.

181. See Walker, *Modernizing*, *supra* note 176, at 651–52.

182. See generally Asimow, *Public Participation*, *supra* note 29; Asimow, *Interim-Final Rules*, *supra* note 29, at 717–26; Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1759–86.

A. *The Evolving Use of Temporary Tax Regulations*

There have been three distinct phases of use of temporary regulations—before November 1988, late 1988 until 2017, and current practices seen since the enactment of the TCJA in December 2017. Prior to November 1988, Treasury regularly issued temporary regulations without notice and comment, and without a set expiration date, although these were generally accompanied by a proposed regulation subject to notice and comment.¹⁸³ In many instances final regulations were never issued, resulting in essentially final (temporary) regulations that had never been amended nor subject to notice and comment.¹⁸⁴ Thus, there are a number of important and oft-relied upon tax regulations that remain “temporary” (as demarked by a “T” in the citation) and have never been subject to notice and comment.¹⁸⁵ In the 1986–1988 period of our study discussed in Section II, we found 57 temporary regulations. Although most of them (49 out of 57) invoked the good cause exception, sometimes the invocation was a perfunctory statement that did not provide a contextual explanation of why notice and comment was impracticable.¹⁸⁶ While most temporary regulations (50 out of 57) were accompanied by proposed regulations providing for notice and comment,¹⁸⁷ some were not.¹⁸⁸ None of the 57 had expiration dates.¹⁸⁹

Concern about the increasingly regular use of temporary regulations and the lack of public input that could result from this practice—particularly when no final

183. See *supra* note 148 and accompanying text for a reporting of our tally of 57 temporary regulations from 1986 to 1988. Examples from our study include the following: T.D. 8112 (Appendix A, row 10) and LR-144-86 (Appendix A, row 11); T.D. 8114 (Appendix A, row 16) and INTL-88-86 (Appendix A, row 15); and T.D. 8231 (Appendix A, row 410) and LR-77-88 (Appendix A, row 409).

184. See, e.g., Temp. Treas. Reg. § 1.469-5T, T.D. 8175, 53 Fed. Reg. 5725 (Feb. 25, 1988) (Appendix C, row 37).

185. *Id.* As Professor Mirit Eyal-Cohen helpfully noted, these lingering temporary regulations remain a source of consternation and uncertainty, particularly among corporate tax lawyers.

186. Every temporary regulation included a statement along the following lines, often under the header “Need for Temporary Regulations”: “These regulations are necessary to provide taxpayers with immediate guidance in the application of changes made to” a specific section as provided in the TRA 1986. *E.g.*, T.D. 8211, 1988-2 C.B. 214 (Appendix A, row 359). Some, however, provided more specific and convincing reasons. For example, T.D. 8220 states that the new temporary regulations are

[I]n order to provide immediate guidance as to the transition rules for branches that used a profit and loss method of accounting under old law and do not elect (or are not required) to use the United States dollar approximate separate transactions method described in § 1.985-3T for taxable years beginning after December 31, 1986. These regulations will remain in effect until superseded by final regulations on this subject. Immediate guidance is needed by taxpayers who will report under the profit and loss method under section 987 for a taxable year beginning in 1987. For this reason, it is found impracticable to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

T.D. 8220, 1988-2 C.B. 292 (Appendix A, row 386).

187. *E.g.*, T.D. 8117, 1987-1 C.B. 345 (Appendix A, row 17) and LR-132-86 (Appendix A, row 18); T.D. 8228, 1988-2 C.B. 136 (Appendix A, row 401) and INTL-952-86 (Appendix A, row 402).

188. *E.g.*, T.D. 8123, 1987-1 C.B. 137 (Appendix A, row 45); T.D. 8132, 1987-1 C.B. 350 (Appendix A, row 68); T.D. 8218, 1987-1 C.B. 325 (Appendix A, row 378).

189. *E.g.*, T.D. 8158, 1987-2 C.B. 3 (Appendix A, row 144).

regulations were ever issued—led Congress to enact Section 7805(e) in 1988.¹⁹⁰ This enactment gave rise to the second phase of temporary regulations. From that time onward, the tax code has required that if a temporary regulation is not finalized within three years after its issuance, the temporary regulation expires and no longer has any effect.¹⁹¹ Additionally, temporary regulations must be accompanied by proposed regulations, thus working to facilitate—not circumvent—notice and comment rulemaking.¹⁹²

Under this rule, until recently, temporary regulations were generally issued in ways that we believe could enhance democratic legitimacy. The prototypical scenario is when there is some degree of exigency—when providing prompt guidance immediately carries some advantages, perhaps to the government or perhaps to taxpayers, as compared to waiting three or more months to propose and then finalize regulations in the usual manner. In our study, the explicit justification for the sole temporary regulation issued in 2001 (which, although it was just one, constituted fully 20% of the regulations used to implement the 2001 Tax Cuts) was to *increase* participation in the rulemaking process.¹⁹³ The preamble states, “[i]n order to allow taxpayers to comment on these changes, the section of the regulations governing defined benefit plans and annuities is being issued as temporary and proposed regulations rather than final regulations.”¹⁹⁴ On its face, this is not the antidemocratic attempt to avoid notice and comment that critics of temporary regulations might expect.

Recently, a new third stage in the use of temporary regulations began. Since the TCJA was enacted, temporary regulations have been a rarity. This abstention from using temporary regulations was formalized by Treasury’s May 2019 policy statement,¹⁹⁵ and our study suggests that there must have been a concerted effort to avoid using temporary regulations even before that policy was issued publicly.¹⁹⁶ This avoidance seems to have been prompted by the *Mayo Foundation* opinion, litigation in a federal district court in the Fifth Circuit that struck down a temporary regulation as violative of the APA,¹⁹⁷ and persistent criticisms levied against tax exceptionalism practices in Treasury.¹⁹⁸

B. Criticisms on Democratic and Consistency Grounds

Criticism of temporary regulations has featured both democratic legitimacy concerns and consistency objections. On democratic grounds, the leading scholarship critical of temporary regulations argues that temporary regulations “chill[] public participation, and thus undermine[]” goals of notice and comment rulemaking that are

190. See *infra* Part III.C.

191. I.R.C. § 7805(e)(2).

192. *Id.* § 7805(e)(1).

193. See *infra* Appendix B, row 58 (T.D. 8987, 2002-19 I.R.B. 852).

194. See *infra* Appendix B, row 58 (T.D. 8987, 2002-19 I.R.B. 852).

195. See TREASURY, POLICY STATEMENT, *supra* note 14.

196. See *generally infra* Appendix C (showing zero temporary regulations issued to implement the TCJA between its enactment in December 2017 and the issuance of the anti-temporary regulation policy statement in March 2019).

197. Chamber of Com. v. IRS, No. 1:16-CV-944-LY, 2017 WL 4682049 (W.D. Tex. Sept. 29, 2017), *amended*, No. 1:16-CV-944-LY, 2017 WL 4682050 (W.D. Tex. Oct. 6, 2017).

198. See *supra* notes 9, 100–101 and accompanying text.

intended to promote democratic legitimacy, specifically by limiting transparency and accountability.¹⁹⁹

This is an empirical claim that may deserve further examination if opponents of temporary regulations continue to rely on it as a justification for ending their use in the tax context. Given the generally low participation in tax rulemaking and the tendency for participants to be sophisticated and have well-represented interests,²⁰⁰ this concern—as applied to tax rulemaking specifically—may be misplaced. Further, the possible replacement of temporary regulations with Notices and other sub-regulatory guidance for which there is *no* structured public notice and comment process²⁰¹ suggests that the claim that temporary regulations may result in less public participation than proposed regulations is off target. Rather, the appropriate comparison is the extent of public participation facilitated by temporary regulations as compared to Notices and other subregulatory guidance that might similarly serve as a preface to a proposed regulation but that are not subject to notice and comment. Additionally, this particular flavor of concern about temporary regulations is undermined by the current feature of the tax administrative process whereby sophisticated parties are able to provide comments and influence proposed regulations *before* the normal APA notice and comment process without any publicity requirements.²⁰²

If this practice continues, temporary regulations may seem like a *better* alternative to proposed regulations. They could be deployed to funnel pre-notice-and-comment input to a public forum if temporary regulations allow Treasury and the IRS to quickly formulate proposed rules without extensive behind-the-scenes, out-of-public-view input from certain interested parties. And, regardless, regulating and shining light on the pre-proposed rule-input process seems an important target—more important, we believe—for reformers concerned about democratic legitimacy.

Because temporary regulations must now be accompanied by proposed regulations, the more troubling charge by critics of temporary regulations is not that temporary regulations limit opportunities for public participation but rather that public participation is less meaningful when there is already a regulation in place that carries the force of law.²⁰³ Critics of temporary regulations (and of the similar nontax regulatory tool, interim final rules) make the case that when agency personnel are drafting something that will be immediately binding, they devote more time and focus to it, and they become more entrenched in their view that the rule should not be changed.²⁰⁴ This too is a claim that could be tested empirically. But again, this concern seems modest in context given that under Section 7805(b), Congress has allowed that *proposed* regulations can be written so that the subsequent final regulations have an effective date as of the date of publication

199. Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondents at 6, 11, *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012) (No. 11-139); see Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1801–03.

200. Wallace, *Congressional Control*, *supra* note 65, at 182.

201. See *infra* Part III.D.

202. See Oei & Osofsky, *supra* note 4, at 253–55 (as discussed *supra* note 152).

203. Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1801.

204. See Hickman & Thomson, *supra* note 60, at 262–63.

of the proposed regulation.²⁰⁵ In effect, this provision *already otherwise* allows Treasury to impose a binding regulation carrying the force of law prior to notice and comment without using a temporary regulation.

The final critique of temporary regulations on democratic grounds is one that we agree with but that can be resolved through administrative discretion. That is the problem of serial temporary regulations, which Professor Hickman identified in multiple case studies of temporary regulations from the early 2000s.²⁰⁶ The issue of serial temporary regulations stifling participation occurs when Treasury issues a temporary regulation and then repeatedly amends the regulation, replacing it with a new temporary regulation. This practice made it difficult for would-be commenters to participate, and to the extent that changes were the result of feedback, that feedback may be outside of the public view, thus exacerbating some of the problems described above. We did not see examples of this sort of serial temporary regulation in any of the time periods examined, so this may have been an example of overzealous use of temporary regulation in a prior era—one that should be avoided in a reinvigorated temporary regulations regime in the future.

On consistency grounds, scholars have argued that temporary regulations should be used rarely and only when they fit into the “good cause” exception to notice and comment rulemaking that is specified in the APA.²⁰⁷ Under this analysis, Treasury’s use of temporary regulations in the past, which has often occurred without invoking good cause and when good cause is mentioned without providing a fulsome explanation,²⁰⁸ violated the APA requirements that an agency rule provide notice of proposed rulemaking and an opportunity for parties to comment on any proposed rule before the rule takes effect.²⁰⁹ We take up the issue of the good cause exception in the next Part.

C. Doctrinal Defense: Temporary Regulations Are Permissible

This Part presents a doctrinal defense of temporary regulations under current law. Our analysis is simple: the statutory provision Congress enacted to regulate temporary regulations in 1988—Section 7805(e)—is best read in light of *both* the APA’s good cause

205. See I.R.C. § 7805(b)(1) (providing for retroactive effect for final tax regulations back to the date on which a proposed regulation is published in the Federal Register).

206. Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1803–04 (describing four iterations of temporary regulations implementing rules under Section 108, and six “piecemeal” temporary regulations issued in response to a litigation outcome with which the government disagreed).

207. 5 U.S.C. § 553(b)(3)(B); e.g., Asimow, *Public Participation*, *supra* note 29, at 344; Asimow, *Interim-Final Rules*, *supra* note 29, at 719–20; Amandeep S. Grewal, *Legislative Entrenchment Rules in the Tax Law*, 62 ADMIN. L. REV. 1011, 1051–57 (2010) [hereinafter, Grewal, *Legislative Entrenchment*]; Hickman, *A Problem of Remedy*, *supra* note 9, at 1159; 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, 252–54 (2003).

208. There is fair debate to be had about what constitutes a sufficient invocation of good cause. Professor Hickman was skeptical in her 2007 study that it was sufficient simply to use the phrase “good cause” with an assertion of urgency, as was the practice with the temporary regulations she describes as summarized *supra* note 206. See Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1803–04. The content of a good cause statement is discussed further *infra* notes 212–215, 275–278 and accompanying text.

209. Asimow, *Public Participation*, *supra* note 29, at 349–50; Hickman, *A Problem of Remedy*, *supra* note 9, at 1158; Hickman, *Administering the Tax System*, *supra* note 17, at 1720.

exception to the use of notice and comment²¹⁰ and its express modification requirement for procedures that deviate from what the APA provides.²¹¹ This approach is grounded in a close reading of the legislative history that accompanied the enactment of Section 7805(e). Viewing these statutes together and in this context, they are best understood to authorize, and indeed (as compared to current practices) encourage, more liberal use of the good cause exception in tax administration, so long as its use conforms to the specific requirements imposed on temporary regulations as provided by Congress in Section 7805. This argument is strengthened when we also consider the goal of democratic legitimacy, which is addressed in Part III.D.

Professors Hickman and Asimow have argued that temporary regulations must fit within the “good cause” exception, like regulations in other contexts that are made effective prior to notice and comment.²¹² Good cause is available only when an agency makes a “finding” and provides a “brief statement” explaining the reasons “that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”²¹³ Specific reasons that might justify good cause include statutory deadlines that do not allow time for notice and comment, or substance in a rule that obviates providing advance notice to those who will be subject to the rule.²¹⁴ Professor Hickman has noted that good cause claims “tend to be highly contextual.”²¹⁵

Hold onto that thought for a moment, and consider Section 559 of the APA, which allows for agency-specific modification of APA procedures if such modification is done “expressly” by Congress in a statute enacted after the APA.²¹⁶ Courts have provided various formulations as to what “expressly” means. The guiding inquiry in the United States Court of Appeals for the D.C. Circuit—most relevant to challenging administrative agency action—comes from the *Asiana Airlines v. Federal Aviation Administration*²¹⁷ opinion.²¹⁸ It describes the question as “whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm.”²¹⁹ That court held that a statute expressly modified the usual notice and comment procedures by requiring a rule to be issued as an “interim final rule” without pre-promulgation notice and comment because there was no way to harmonize that statutory requirement with the APA while giving effect to both.²²⁰

Now turning back to the tax code, when Congress enacted Section 7805(e) in 1988, it was, like the statute at issue in *Asiana Airlines*, a subsequent statute—the

210. 5 U.S.C. § 553(b)(3)(B).

211. *Id.* § 559.

212. See Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1739; Asimow, *Public Participation*, *supra* note 29, at 363–64.

213. 5 U.S.C. § 553(b)(3)(B).

214. JARED P. COLE, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 4–8 (2016).

215. Hickman & Thomson, *supra* note 60, at 268.

216. 5 U.S.C. § 559.

217. 134 F.3d 393 (D.C. Cir. 1998).

218. *Asiana Airlines*, 134 F.3d at 398–99.

219. *Id.* at 397.

220. *Id.* at 398.

Administrative Procedure Act was more than forty years old at that time.²²¹ Under the header “Temporary regulations,” Congress imposed on Treasury two limitations: first, a temporary regulation must “also be issued as a proposed regulation,” and second, a temporary regulation “shall expire within 3 years” after Treasury issues it.²²²

The legislative history for Section 7805(e) shows that members of Congress understood how Treasury used temporary regulations and suggests that the provision was intended to sanction that practice. There are three primary pieces of pre-enactment legislative history that Congress relied on in enacting the accurately named Technical and Miscellaneous Revenue Act of 1988,²²³ which included several provisions originating from the Senate as the Taxpayer Bill of Rights: (1) a Senate report issued prior to the Senate voting on the initial legislation,²²⁴ (2) a Joint Committee on Taxation report released after the Senate passed its version but prior to the conference committee,²²⁵ and (3) the final Conference Report released prior to enactment by either house of the conference-produced compromise legislation.²²⁶

Each of these documents addresses Section 7805(e), and each conveys the same essential message, which makes clear the context and purpose for the congressional action. The Joint Committee Report describes the context into which Congress was legislating as follows: “Before final regulations are promulgated, proposed regulations are issued and comments are invited from the public and Government agencies. The IRS also issues some regulations as temporary regulations, which generally are effective upon publication and remain in effect until replaced by final regulations.”²²⁷ The report then goes on to explain that under the new Section 7805(e), “[e]ach time the IRS issued temporary regulations, it would be required to simultaneously issue those regulations in proposed form. Temporary regulations would be permitted to remain in effect for no more than two years after issuance.”²²⁸ The only change to this provision made by the conference committee was that the expiration period was extended to three years in the final legislation, rather than two years.²²⁹ Because there was no substantive change, the conference report did not address the provision, leaving the Joint Committee Report as the only authoritative explanation prior to enactment.²³⁰

That legislative history should be read in the context of the subsection that follows Section 7805(e), which was enacted at the same time. Section 7805(f) addresses review

221. See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59).

222. I.R.C. § 7805(e)(1), (e)(2); cf. Grewal, *Legislative Entrenchment*, *supra* note 207, at 1053–54, 1057.

223. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988); I.R.C. § 7805(e) (limiting temporary regulations to have a three-year expiration date if not subject to notice and comment during that time; enacted in November 1988).

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

225. STAFF OF JOINT COMM. ON TAX’N, JCX-28-88, EXPLANATION OF FINANCE COMMITTEE AMENDMENT TO S. 2238 (TECHNICAL CORRECTIONS ACT OF 1988, AS REPORTED) 46 (1988).

226. H. REP. NO. 100-1104, at 217–18 (1988) (Conf. Rep.). There was also a House report on a measure that was combined into the final bill, but the House’s initial legislation did not include amendments to Section 7805 so that other House report does not address section 7805.

227. STAFF OF JOINT COMM. ON TAX’N, *supra* note 225, at 46.

228. *Id.*

229. *Id.*

230. See *id.*

of temporary regulations and other regulations by the Small Business Administration, and it sheds further light on how those rules were meant to coordinate with the APA.²³¹ There, the statute distinguishes temporary regulations from final regulations that “do[] not supersede a proposed regulation.”²³²

For a final regulation that does not supersede a proposed regulation to be *different than* a temporary regulation, it must be a regulation that is permitted to have permanent effect but not required to go through notice and comment. Thus, there are four categories established by both additions to Section 7805 and elaborated in the legislative history: (1) proposed regulations subject to notice and comment, (2) final regulations that follow notice and comment, (3) temporary regulations, and (4) final regulations given permanent effect without notice and comment. The only way to give effect to all of these categories is to recognize that temporary regulations must be different than final regulations issued without notice and comment. If temporary regulations do not denote a specific category of regulations as provided in Section 7805(e), then the distinction in Section 7805(f) is rendered meaningless. As described below, the D.C. Circuit has disfavored an approach to statutory interpretation that results in statutory surplusage.²³³ Further, this approach facilitates a sort of sliding scale whereby good cause can be ramped up or down depending on whether Treasury allows for post-promulgation notice and comment.

The court in *Asiana Airlines* embraced the mode of interpretation adopted in the preceding paragraphs, explaining that it must construe the organic statute “so that no provision is rendered inoperative or superfluous, void or insignificant.”²³⁴ Where such an interpretation means that the organic statute provides procedures that are at odds with the APA, the court held that Congress had “expressly” created an exception as contemplated under Section 559.²³⁵

With Section 7805(e), it appears that Congress has expressly endorsed the use of temporary regulations, although it is clear that temporary regulations do not precisely mesh with the basic APA provisions requiring notice and comment, nor the good cause exception that dispenses with notice and comment. Rather, there is an opportunity to understand temporary regulations as a way to harmonize the tax code with the APA—a method to delay notice and comment, even as Congress allows it to be dispensed with entirely.²³⁶

231. I.R.C. § 7805(f).

232. *Id.* § 7805(f)(3). The provision addresses special requirements for review of tax regulations by the Small Business Administration and requires that “any final regulation (other than a temporary regulation) which does not supersede a proposed regulation” must be submitted to the Small Business Administration for review at least four weeks prior to promulgation. *Id.*

233. *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998).

234. *Id.*

235. *Id.*

236. An alternative interpretation offered by Professor Hickman is that Congress, at the time of enactment, accepted the IRS position that most of its regulations were not legislative and thus notice and comment was not required. In that case, Section 7805(e) went *beyond* what the APA required, because it required eventual notice and comment, rather than leaving it to the discretion of Treasury and the IRS as was the case with most proposed rules. While we agree that this is a plausible interpretation, it does not effectively give meaning to the entirety of both statutes—Section 7805 of the Tax Code and Section 559 of the APA—as each is understood today. We suggest our interpretation, without discounting that Professor Hickman’s description of

Given that Congress did not address good cause directly in Section 7805, the way to read the provisions for maximum consistency is that good cause should be invoked in order to make use of the allowance for delayed notice and comment that accompanies temporary regulations. It might follow that this approach should suggest additional flexibility in what constitutes good cause, such that a very brief statement of the possibility of tax avoidance inconsistent with congressional intent is sufficient.²³⁷ That is, unlike a final regulation issued without notice and comment—which is generally what the good cause exception to notice and comment is oriented towards and permits—an approach that recognizes two distinct categories of good-cause-requiring regulations could be more forgiving as to what is demanded when there will eventually be a notice and comment process.

This type of approach could also offer a compromise of sorts that reflects the divergent approaches different courts and judges have taken to temporary regulations. As Professor Hickman and Mark Thomson detail, the basis overstatement statute of limitations cases provided an opportunity for the Tax Court, along with numerous federal courts of appeals, to confront temporary regulations offered without invoking the good cause exception.²³⁸ The results varied widely, from two judges on the Tax Court along with a Fifth Circuit panel declaring that temporary regulations violated the APA, even with post-promulgation notice and comment,²³⁹ to the Tenth Circuit, D.C. Circuit, and Federal Circuit finding that post-promulgation notice and comment saved the temporary regulations from any APA violation, despite no invocation of good cause.²⁴⁰

The interpretation suggested here would represent a compromise of sorts between these varied approaches. It would also be consistent with Treasury's current stated approach in the Internal Revenue Manual (i.e., the directive that remains in place despite the policy decision to abstain from using temporary regulations), where it provides that the good cause exception can be invoked by including in the regulation preamble "a description of the need for immediate guidance" along with a statement citing the APA.²⁴¹ This proposed interpretation would also help bridge a gap in that approach because the Manual does not explicitly state that good cause should be invoked for the use of temporary regulations.²⁴²

how Section 7805 may have come into existence, reflects the general understanding at the time that tax procedures were not subject to all of the requirements of the APA.

237. See, e.g., *supra* note 194 and accompanying text (discussing the slight exigency and interest in public engagement that was used to justify the use of a temporary regulation in 2001).

238. See Hickman & Thomson, *supra* note 60, at 281–85.

239. See *id.* at 283–84 (citing and describing cases).

240. See *id.* at 284–85 (citing and describing cases).

241. *Internal Revenue Manuals* § 32.1.5.4.7.4.1(7), IRS, http://www.irs.gov/irm/part32/irm_32-001-005 [<http://perma.cc/QMB5-X3PS>] (last updated Nov. 21, 2019). The Internal Revenue Manual includes the language for the statement, which reads: "These regulations are necessary to provide taxpayers with immediate guidance. Accordingly, good cause is found for dispensing with notice and public comment pursuant to 5 U.S.C. 553(b) and (c) and with a delayed effective date pursuant to 5 U.S.C. 553(d)." *Id.*

242. In a paragraph shortly after the discussion of good cause described in the previous note, the Manual provides that "IRS/Treasury temporary regulations are generally issued when there is a need to provide taxpayers with immediate guidance. The need for immediate guidance should be explained." *Internal Revenue Manuals* § 32.1.5.4.7.4.1(8), IRS, http://www.irs.gov/irm/part32/irm_32-001-005 [<http://perma.cc/QMB5-X3PS>] (last updated Nov. 21, 2019). The sentence that follows should be excised from the Manual; it indicates that temporary

D. *Democratic Defense: Recent Guidance*

The doctrinal case laid out above is supported by the normative case that procedures should be oriented towards establishing democratic legitimacy in tax administration. Section II described that our comparison of the 1986–1988 and 2001–2003 periods with the 2017–2019 period seems to suggest that Treasury has replaced temporary regulations (used frequently in the earlier period, but barely at all in the later) with other types of guidance that are not subject to notice and comment (which we found a greater volume of in the later period).²⁴³

This Part examines three regulatory projects that were undertaken in the implementation of the TCJA in greater detail to examine how democratic engagement has been realized and subverted by Treasury’s changing uses of temporary regulations. Each project arose from a newly enacted provision of the Internal Revenue Code. Each provision involved significant delegations of authority by Congress. Each required prompt guidance from Treasury to help taxpayers comply with the new laws in 2018 (i.e., the first year that the TCJA was in effect), and in each case, Congress produced little in the way of legislative history to guide Treasury’s implementation, thus leaving few democratically grounded constraints on the regulations Treasury would eventually produce.²⁴⁴

In the three examples that follow, Treasury twice avoided temporary regulations—though in different ways—and once used a temporary regulation under the good cause exception to the APA’s notice and comment requirement.

1. *Curtailing Carried Interests: Section 1061*

Congress included in the TCJA a provision that is purportedly intended to limit the benefits of so-called carried interests.²⁴⁵ But there was apparently an error made in drafting the provision where it provides that the more stringent treatment would not apply to interests held by any “corporation.”²⁴⁶ On its face, this is logical because the character of any carried interest cannot flow through to the shareholder of a C corporation, so expressly exempting C corporations simply makes clear that using a C corporation is a way to avoid compliance issues that might arise with the new provision. However, the error is that Congress apparently neglected to consider the treatment of S corporations, which are taxed as pass-throughs and thus—under the law as enacted—could be used to

regulations are “interpretive” but also have the “force and effect of law,” which is an (incorrect) holdover from an earlier era. *Id.* § 32.1.5.4.7.4.1(9).

243. *See supra* Part II.C.

244. This practice is in contrast to prior practices, whereby Congress often included extensive legislative history that was the basis for regulations promulgated by Treasury. *See* Wallace, *Congressional Control*, *supra* note 65, at 205–07 (discussing specific examples of detailed legislative history produced in conjunction with the TRA 1986 that shaped the substance of subsequent tax rulemaking).

245. I.R.C. § 1061. This provision was prompted by the common practice of hedge fund and private equity fund managers using carried interests as part of their compensation for management, which allowed the managers to receive capital gains treatment amounts received that would otherwise have been subject to the ordinary income tax rates. *See generally* Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1 (2008) (defining “carried interest” as a percent share of the future profits of the fund—a profits interest).

246. I.R.C. § 1061(c)(4)(A).

maintain carried interest treatment. Because the statute exempts *all* corporations, the rule seems to permit the use of S corporations to avoid the new limitations on carried interests imposed by Section 1061.²⁴⁷

Section 1061 includes a broad and explicit delegation to Treasury to “issue such regulations or other guidance as is necessary or appropriate to carry out the purposes of this section.”²⁴⁸ Treasury used this authority in March 2018 to address the “corporation” issue, declaring via a Notice that for purposes of Section 1061 only, the term “corporation” does not include S corporations.²⁴⁹ This Notice also announced that the rule introduced therein would be effective as of the current tax year (2018), and that Treasury would publish proposed regulations addressing the issue in the future.²⁵⁰ The Notice stated that the future proposed regulations would have retroactive effect, applying back to tax year 2018.²⁵¹ As subregulatory guidance, the Notice was not subject to the APA prescribed notice and comment process. Although no allowance was made for parties to submit comments, the contact information for those people was included in the Internal Revenue Bulletin, providing a route for some parties to give input.²⁵² But unlike the public notice and comment process, any submissions or contacts made in response to the Notice would not necessarily be made public.²⁵³

Proposed regulations were not issued until more than two years later, in August 2020.²⁵⁴ Those proposed regulations allowed that any comments submitted in response to the substance of the Notice would be considered in the issuance of the final regulation.²⁵⁵ Still, the result was that taxpayers were given no opportunity to comment on *de facto* regulations—i.e., the substance of the Notice—that provided a legally binding rule for two tax years. Final regulations were issued five months after that, in January 2021.²⁵⁶ By that time, there were three different potential rules that taxpayers might have applied: first were the rules in the statute and the Notice in 2018 and 2019, second were the retroactive rules in the proposed regulation issued in 2020, and third was

247. See I.R.C. § 1361. Arguably, this was not an oversight but by design: the whole provision is a very weak response to the carried interest issue, and thus a built-in loophole could be viewed as consistent with congressional intent to enact window dressing without actually changing outcomes.

248. The sentence as enacted had no period at the end of it—presumably a drafting error—indicative of the haste with which the TCJA was enacted.

249. I.R.S. Notice 2018-18, 2018-12 I.R.B. 443. The notice was issued on March 1, 2018, though it did not appear in the Internal Revenue Bulletin until a few weeks later. See Press Release, IRS, IRS Plans To Issue Regulations Clarifying Limitations on Carried Interest (Mar. 1, 2018), <http://www.irs.gov/newsroom/irs-plans-to-issue-regulations-clarifying-limitations-on-carried-interest> [<http://perma.cc/T5Q9-XG7M>]. See *infra* Appendix C, row 18 (Notice 2018-18, 2018-12 I.R.B. 443).

250. I.R.S. Notice 2018-18, 2018-12 I.R.B. 443.

251. *Id.* (“The Treasury Department and the IRS intend to provide that regulations implementing section 3 [i.e., the substantive rule] of this notice will be effective for taxable years beginning after December 31, 2017.”).

252. *Id.*

253. *Id.*

254. Prop. Treas. Reg. §§ 1.1061-0–1061-6, 85 Fed. Reg. 49,754 (Aug. 14, 2020), <http://www.govinfo.gov/content/pkg/FR-2020-08-14/pdf/2020-17108.pdf> [<http://perma.cc/JDG9-J3T5>].

255. *Id.*

256. T.D. 9945, Guidance Under Section 1061, 86 Fed. Reg. 5452, 5473 (Jan. 19, 2021) (to be codified at 26 C.F.R. pt. 1), <http://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00427.pdf> [<http://perma.cc/MZ5L-8KMW>].

the final regulation enacted in 2020 with retroactive effect.²⁵⁷ This convoluted process and serially issued sets of guidance are similar to processes that drew Professor Hickman's critique as a symptom of temporary regulations in the mid-2000s.²⁵⁸

The lag time between the notice and the proposed regulations also runs afoul of the provision barring certain retroactive regulations.²⁵⁹ That rule provides that regulations generally cannot be made effective to any tax year in the past that ends before the date on which a final or proposed regulation is published in the Federal Register, or the date of publication (not in the Federal Register) of "any notice substantially describing the expected contents of" a subsequently forthcoming regulation.²⁶⁰ The March 2018 Notice was Treasury's stake in the ground to ensure that subsequent regulations would be effective for the 2018 tax year.²⁶¹ Another retroactivity rule allows that any regulation filed within eighteen months of the enactment of the applicable statute can be effective retroactive to the date of enactment.²⁶² If Treasury had *not* issued the March 2018 Notice, the August 2020 proposed regulation would have come too late to be effective for any taxpayers with tax years ending in 2018 or noncalendar tax years ending in early 2019. And it is not clear that the 2018 Notice satisfies the statutory requirement that subregulatory guidance that preserves retroactive effect must describe "substantially" the future regulation.²⁶³ The Notice was less than one page and did not engage the numerous issues that would arise later in the guidance process.

In the past, this was the sort of scenario that Treasury might have responded to by issuing a temporary regulation. The S corporation issue demanded a quick response, and a temporary regulation would have allowed for a response that was timely and part of a legally binding comprehensive regulatory structure.²⁶⁴ By avoiding temporary regulations, Treasury created a guidance mess, and arguably one that circumvented the letter and spirit of the APA by avoiding notice and comment and providing no other opportunity for public engagement, while also imposing a binding legal rule. Arguably, this approach circumvented one clear directive from Congress in Section 7805(e): taxpayers should not be left in limbo by being required to adhere to temporary guidance with the prospect of final regulations, and no opportunity to provide input. If Treasury had used a temporary regulation instead of a notice, taxpayers would have had an opportunity to comment starting in 2018, and there may have been much less uncertainty in the nearly three-year period before the final regulations were issued.

Thus, in this example, avoiding the use of temporary regulations seems to have liberated the IRS. The agency avoided issuing a proposed regulation in 2018, and delayed

257. *Id.* (under the "Applicability Dates" header the final rule describes how different parts of the final rule apply at different times and describes the alternative rules).

258. See Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1803–04.

259. I.R.C. § 7805(b).

260. *Id.*

261. See I.R.S. Notice 2018-18, 2018-12 I.R.B. 443.

262. I.R.C. §§ 7805(b)(1)–(2).

263. See *infra* Part III.D.2 for an example in which a more developed, intricate, and lengthy notice preceded a proposed regulation.

264. Admittedly, Treasury may not have had time and resources to produce a temporary regulation in this case, and may have made the conscious decision to try to get by with a barebones notice as a matter of resource management.

commencing notice and comment for some two years, even as it adopted a legally binding rule that was ultimately incorporated into final regulations and made effective retroactive to the tax year in which the notice was issued.

2. Limitations on Compensation for Exempt Organization Officers: Section 4960

When Congress enacted Section 4960 as part of the TCJA, they left Treasury and the IRS with significant issues to address in implementation. The law established a new special excise tax on “excess” compensation paid to certain executives at tax-exempt organizations. This new Code section was similar to another preexisting rule,²⁶⁵ but it also left Treasury and the IRS with significant issues to address in implementation, expressly directing rulemakers to “prevent avoidance of such tax through the performance of services other than as an employee or by providing compensation through a pass-through or other entity to avoid such tax.”²⁶⁶ That is, Congress identified some problematic potential issues that would arise in practice and authorized Treasury and the IRS to come up with rules and policies to address those issues.

The IRS and Treasury set about doing this and in December 2018 issued a twenty-six-page Notice, titled “Interim Guidance Under Section 4960.”²⁶⁷ In contrast to the Section 1061 Notice described above, the Section 4960 Notice included a few additions that made it more satisfactory through the lens of democratic considerations described in Section I. First, the Notice very clearly laid out a full range of substantive issues that would eventually be addressed in comprehensive regulations, providing significantly more transparency and clarity to taxpayers in the period preceding the release of any proposed regulations. Second, the 4960 Notice expressly requested comments, including a solicitation of responses for a variety of specific substantive issues that Treasury was apparently wrestling with as it prepared a proposed regulation. To that end, the Notice was posted on the federal electronic rulemaking portal, Regulations.gov, allowing for comments to be submitted and shared transparently.²⁶⁸

The applicability dates of the proposed and final regulations were curious, however. The proposed regulation was eventually published in June 2020,²⁶⁹ but Treasury made

265. For example, § 162(m) imposes a limitation on the deductibility of compensation for certain highly paid executives of for-profit businesses, and new § 4960 followed some key elements of this law. Compare I.R.C. § 162(m) (defining “covered employee” to mean the five highest compensated employees), with I.R.C. § 4960(c)(2) (same).

266. I.R.C. § 4960(d).

267. I.R.S. Notice 2019-09, 2019-04 I.R.B. 403.

268. See IRS, *Interim Guidance Under Section 4960 (Notice 2019-09)*, REGULATIONS.GOV, <http://www.regulations.gov/docket?D=IRS-2019-0001> [<http://perma.cc/NB22-PFRY>] (last visited Nov. 1, 2021). Over the course of eleven months after the notice was released, Treasury received eleven comments via Regulations.gov. *Id.* (showing thirteen comments: one was a withdrawn duplicate, and another was from an individual who was attempting to contact the IRS about another matter).

269. Prop. Treas. Reg. §§ 53.4960-0–53.4960-5, 85 Fed. Reg. 35,746 (June 11, 2020), <http://www.govinfo.gov/content/pkg/FR-2020-06-11/pdf/2020-11859.pdf> [<http://perma.cc/5RQ6-9NHD>]. The proposed regulation allowed sixty days for comments to be submitted; during that time, eleven comments were received, and four more were submitted after the deadline. See IRS, *Tax on Excess Tax-Exempt Organization Executive Compensation*, REGULATIONS.GOV (June 11, 2020), <http://www.regulations.gov/document/IRS-2020-0017-0001> [<http://perma.cc/H2LC-MGQG>].

clear in the Notice that it did not intend to apply any rules retroactively.²⁷⁰ Rather, when Treasury published the final regulation in January 2021, it made the final rules effective for tax years starting the following calendar year, 2022.²⁷¹ Further, it gave the taxpayers the option of applying (1) the Notice, (2) the proposed regulation, or (3) the final regulation to all of 2018, 2019, 2020, and 2021.²⁷² In effect, the 4960 Notice became a stand-in for a final regulation effective prior to notice and comment that applied for up to four years, although taxpayers were given the option to apply post notice and comment regulations if they so preferred.

Thus, with the Section 4960 guidance, Treasury avoided temporary regulations, but essentially accomplished the same thing under another name, and without invoking the good cause exception to the APA notice and comment requirement.

3. Limitation of Dividends Received Deductions for Controlled Foreign Corporations: Section 245A

The final example explores Section 245A of the tax code, which in June 2019 gave rise to the *only* temporary regulation that was issued in the implementation of the TCJA.²⁷³ The temporary regulation dealt with a tricky potential snag in the rules allowing a “dividends received” deduction for distributions from certain foreign corporations, which interacted with certain other provisions of the new law creating the possibility of wholly untaxed foreign income.²⁷⁴

The preamble to the temporary regulation included an extensive statement acknowledging the various reasons that good cause can be invoked to allow a regulation to take effect without notice and comment, and claimed that all of those reasons applied to the Section 245A regulation.²⁷⁵ Importantly, one of the reasons provided was that publishing the rules in advance of their effective date would allow taxpayers to “achieve . . . tax avoidance results” that the rules intended to prevent.²⁷⁶ Additionally, Treasury obliquely referenced the other procedures that would ensure democratic legitimacy of the regulatory project: temporary regulations would be subject to concomitant notice and comment as proposed regulations, and, in any event, the temporary regulations would expire.²⁷⁷ Finally, Treasury noted that under Section 7805(b), the temporary regulations could be made effective as of the date of enactment

270. I.R.S. Notice 2019-09, 2019-04 I.R.B. 403 (“Until further guidance is issued, taxpayers may rely on the rules in this notice for purposes of section 4960 effective from December 22, 2017 (the date of enactment). Further guidance will be prospective and will not apply to taxable years beginning before the issuance of such guidance.”).

271. Tax on Excess Tax-Exempt Organization Executive Compensation, 86 Fed. Reg. 6196 (Jan. 19, 2021) (to be codified at 26 C.F.R. pt. 1, 53), <http://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00772.pdf> [<http://perma.cc/MM4S-2RNR>].

272. *Id.*

273. I.R.C. § 245A; Temp. Treas. Reg. § 1.245A-5T (2019); *see also* Limitation on Deduction for Dividends Received from Certain Foreign Corporations and Amounts Eligible for Section 954 Look-Through Exception, 84 Fed. Reg. 28,426 (June 18, 2019) (referencing and incorporating the temporary regulation and requesting comments within sixty days).

274. Temp. Treas. Reg. § 1.245A-5T (2019).

275. *Id.*

276. *Id.*

277. *Id.*

of the TCJA, which would not be the case if there were further delay to wait for notice and comment.²⁷⁸ These reasons are in accordance with the doctrinal case for temporary regulations described in Part III.C: the requirements of Section 7805(e) help to establish good cause for purposes of APA Section 553.

However, Professor Hickman was critical of the statement of good cause provided to justify this use of temporary regulations.²⁷⁹ Although she notes that the prospect of preventing tax avoidance²⁸⁰ and abuses²⁸¹ may be sufficient for good cause, she objects to the other justifications offered. In particular, she argues that the looming retroactivity deadline is not the sort of thing that courts have been receptive to in other contexts.²⁸² Further, Hickman argues that the fact that Treasury was “too busy with other TCJA-related regulations, forms, etc., to complete the § 245A regulations sooner” is not a sufficient justification for rushing to meet the deadline.²⁸³ It remains unclear how robust the justification for good cause should be to pass muster with courts or with critics—supportive or skeptical.²⁸⁴

E. *Fostering Democratic Tax Administration*

Does concern for conformity come at the expense of democratic values? We believe that context matters. In the tax administration context, Congress has provided specific ways to balance the substantive imperatives of tax administration with procedural imperatives to establish and maintain democratic legitimacy. The statutory scheme in Section 7805 can be read to sanction the use of temporary regulations, and it can be

278. This is because of the rule in Section 7805(b)(2) providing that regulations, including temporary regulations, can be given retroactive effect back to the date of enactment of the underlying statute if the regulation is published within eighteen months of the date of enactment. The section 245A regulation was published just within the eighteen-month period. *See supra* note 262.

279. Hickman, *Two Steps Forward, One Step Back*, *supra* note 25.

280. *Id.* at n.13.

281. *Id.* at n.27.

282. *Id.* at nn.24–25 (citing cases challenging claims of good cause by the Environmental Protection Agency and the Department of Health and Human Services).

283. *Id.* at n.26 (citing a Second Circuit holding against the National Highway Traffic Safety Administration that the agency’s own delay cannot contribute to the circumstances justifying good cause).

284. See *supra* note 208 and accompanying text for a description of current internal IRS guidance on invoking good cause. A relatively barebones assertion may be adequate. For example, in one temporary regulation that Professor Hickman examined from 2003, *Coloring Outside the Lines*, *supra* note 8, at 1803, Treasury described the situation as follows:

These temporary regulations are necessary to provide taxpayers with immediate guidance regarding the application of section 108 when a member of a consolidated group has discharge of indebtedness income that is excluded from gross income. Current circumstances have made the application of section 108 in the consolidated group context an issue that needs to be addressed at this time. In addition, consolidated groups may be taking positions that are inconsistent with the policies underlying section 108 and the principle enunciated by the Supreme Court in *United Dominion Indus., Inc. v. United States*, 532 U.S. 822 (2001). Accordingly, good cause is found for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and with a delayed effective date pursuant to 5 U.S.C. 553(d)(3).

Guidance Under Section 1502; Application of Section 108 to Members of a Consolidated Group, 68 Fed. Reg. 52,487, 52,490 (Sept. 4, 2003).

construed in a way that is consistent with the limitations on agencies imposed by the Administrative Procedure Act generally, and the good cause exception in particular. As explained in Part III.C, the good cause exception as applied to tax administration procedures should be understood in light of Section 7805, rather than independent of it.

With that understanding, Treasury should resume more frequent use of temporary regulations, rather than continuing the current practice of essentially eliminating their use in recent years, as shown in our study.²⁸⁵ But it should be done with an eye towards democratic values—the piecemeal approach that Professor Hickman identified and critiqued nearly two decades ago should not be rekindled.²⁸⁶ Nor, per Congress, should the Wild West days of pre-1988 return—a time when temporary regulations meant no public input at any time. Today, in some circumstances, temporary regulations can facilitate transparency, participation, and responsiveness. Conversely, using alternative forms of guidance, as occurred in the implementation of the TCJA, can limit those democratically oriented benefits.²⁸⁷

Temporary regulations are just one tool used by tax administrators that can be employed in ways that might foster or hinder democratic legitimacy and are just one flashpoint in the ongoing debate about tax exceptionalism. Our study in Section II shows that anti-tax exceptionalists succeeded in prompting a dramatic decline in the use of temporary regulations during the Trump administration. The examples in Section III reveal that if those changes were driven by the pursuit of democratic legitimacy, then the venture has not wholly succeeded. On the other hand, the pursuit of conformity may prove to be unfulfilling if it is not carried out with attention to democratic legitimacy.

CONCLUSION

Despite many recent changes to the tax administrative process that have been justified as advancing values and features of democratic legitimacy, the implementation of the TCJA as dissected here did not advance the democratic legitimacy of tax administration. Indeed, our study of how Treasury implemented three major tax laws over several decades augurs poorly for the democratic legitimacy of tax administration in the years ahead. Fewer and longer guidance documents, fewer opportunities to participate in the public comment process, and less time to participate all potentially hamper democratically responsive tax administration.

Thus, the current state of tax administration leaves much to be desired on democratic grounds. From a legislative viewpoint, the TCJA may be the new normal as Congress's capacity to act may rely on moving quickly and delegating significant tax policymaking responsibility to Treasury and the IRS. That, in turn, means that Treasury and the IRS may need to do more to foster democratic engagement, lest tax policy become even further removed from democratic accountability of any kind. Democratic legitimacy has been and remains a fundamental tenet of general administrative law. The possibility of reforming tax administrative practices with an eye toward what works and does not work—with other areas of administrative law as models, and with attention to democratic legitimacy in the tax context specifically—offers opportunities for positive

285. See *supra* notes 139–142 and accompanying text.

286. See Hickman, *Coloring Outside the Lines*, *supra* note 8, at 1803–04.

287. See *supra* Parts III.D.1–D.2.

democratic reforms, particularly as the Biden administration considers whether to reject, reform, or continue new tax administration practices adopted during the Trump administration.