NOTE

GOOD GOVERNANCE IS TAXING: THE IMPLICATIONS OF TAX POLICY FOR SEPARATION OF POWERS AND THE MAJOR QUESTIONS DOCTRINE

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Abstract

Among the significant developments of the Roberts Court so far has been the announcement of the major questions doctrine, which conditions "major" agency action on a clear statement from Congress. Much of the commentary on the doctrine has framed it as a tool for reprimanding perceived agency overreach. This Note challenges that framing by focusing on tax policy, an area of governance in which several broad assertions of agency power have not been challenged by courts on separation of powers grounds. This Note argues that this phenomenon is due to Congress's own engagement in the realm of tax policy. First, Congress takes note of agency action and acts correctively where it disagrees. Second, Congress is more active in passing tax legislation than it is in passing other types of legislation. Third, Congress frequently makes piecemeal edits to individual code sections specifically in response to taxpayer behavior. This Note ultimately concludes that congressional inaction rather than agency overreach is to blame for the current imbalance of executive to legislative power to which the major questions doctrine purports to respond. Thus, the appropriate response to the doctrine lies not in reigning in administrative action, but in finding fixes to legislative gridlock.

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I. Introduction

The major questions doctrine requires a clear statement from Congress before an agency may take "major" action.[1] Much of the commentary on the major questions doctrine frames the doctrine as a judicial tool for reprimanding agency action.[2] However, this framing rests on the background

[1] *See infra* notes 44–45 and accompanying text.

[2] *See, e.g.*, Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 484 (2021) (characterizing the "strong version" of the major questions doctrine as "forbidding the agency from seizing on ambiguous language to aggrandize its own power"); Natasha Brunstein & Richard L. Revesz, *Regulatory Comments and the Major Questions Doctrine*, Regul. Rev. (Nov. 15, 2021), https://www.theregreview.org/2021/11/15/revesz-brunstein-regulatory-comments-major-questions-doctrine [https://perma.cc/WAV7-9AT7] (arguing that "the Trump Administration routinely relied on [the major questions] doctrine in service of its deregulatory assault on the administrative state"); Blake Emerson, *The Real Target of the Supreme Court's EPA Decision*, Slate (June 30, 2022), https://slate.com/news-and-politics/2022/06/west-virginia-environmental-protection-agency-climate-change-clean-air.html [https://perma.cc/2VTH-H5X7] (describing the doctrine as a "one-way deregulatory ratchet that rejects broad assertions of regulatory power but does not question failures to vigorously enforce

understanding that, as a practical matter, gridlock and dysfunction have made today's Congress nearly incapable of passing legislation on most policy matters.[3] If the essence of "legislative power" is the ability to sit and vote on bills,[4] Congress itself has, in many areas of policy, not exercised this unique authority in many years.[5] One implication of this background understanding—coupled, crucially, with the assumption that the current state of gridlock cannot, or at

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the law"). This view does accord with another line of recent cases, in which the Supreme Court has also taken aim at the structure of particular administrative agencies and declared them invalid. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (finding the structure of the Consumer Financial Protection Bureau, with a single director removable only for cause, violated separation of powers); Collins v. Yellen, 141 S. Ct. 1761 (2021) (similar, but as applied to the Federal Housing Finance Agency); Lucia v. SEC, 138 S. Ct. 2044 (2018) (finding the process for selecting administrative law judges at the SEC to violate the Appointments Clause).

[3] This gridlock has been extensively covered in the press for over a decade. *See, e.g.*, Jonathan Weisman, *Congress Ends 'Horrible Year' With Divisions as Bitter as Ever*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/2021/12/18/us/politics/congress-gridlock-democracy.html [https://perma.cc/EV57-4CCW]; Lee Drutman, *How Much Longer Can This Era Of Political Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2021), https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last [https://perma.cc/V7ER-ZDF8]; Thomas E. Mann, *Admit It, Political Scientists: Politics Really Is More Broken Than Ever,* ATLANTIC (May 26, 2014), https://www.theatlantic.com/politics/archive/2014/05/dysfunction/371544 [https://perma.cc/55M2-PNCW]. For an empirical treatment, comparing current division to prior Congresses, see generally Sarah Binder, *Polarized We Govern*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS (May 2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTableRev.pdf [https://perma.cc/XGK7-M9WW] (finding that 2014 levels of political division outpaced historical trends).

[4] Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) ("To be clear about our thesis, we agree that the Constitution bars the 'delegation of legislative power.' In our view, however, the content of that prohibition is the following: Neither Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other *de jure* powers of federal legislators.").

[5] One clear example of this is in environmental law, where the key environmental protection statutes were almost uniformly passed in the 1970s, including the National Environmental Policy Act (1970), 42 U.S.C. § 4321, the Clean Air Act (1970), 42 U.S.C. § 7401, the Clean Water Act (1972), 33 U.S.C. § 1251, the Endangered Species Act (1973), 16 U.S.C. § 1531, the Safe Drinking Water Act (1974), 42 U.S.C. § 300f, the Toxic Substances Control Act (1976), 15 U.S.C. § 2601, and the Resource Conservation and Recovery Act (1976), 42 U.S.C. § 6901. An even more extreme example, from the natural resources context, is the General Mining Act of 1872, 30 U.S.C. §§ 22–42, which still today controls prospecting and mining of both metallic and non-metallic hard rock minerals on public lands. *See About Mining and Minerals*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT. (last visited Sept. 27, 2023), https://www.blm.gov/programs/energy-and-minerals/mining-and-minerals/about [https://perma.cc/96DK-D4YP]. Likewise, the prosecution of unfair mergers and business practices depends on statutes that are over one hundred years old, including the Sherman Act (1890), 15 U.S.C. §§ 1–38, the Federal Trade Commission Act (1914), 15 U.S.C. §§ 41–58, and the Clayton Act (1940), 15 U.S.C. §§ 12–27. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/T895-X4SW]. Food and drugs are regulated under the only slightly more recent Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 301. *See 80 Years of the Federal Food, Drug, and Cosmetic Act*, U.S. Food and Drug Administration (July 11, 2018), https://www.fda.gov/about-fda/fda-history-exhibits/80-years-federal-food-drug-and-*cosmetic*-act [https://perma.cc/SX8S-H74M]. The above list is not at all exhaustive, and in fact represents just a sampling of current policies governed by statutes that are at least fifty years old. *See generally* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

least will not, change—is that the only way to adjust the balance of power between the executive and legislative branches is to reduce agency power to parallel the low level of power exerted by Congress.[6]

This Note seeks to challenge that assumption by pointing to tax policy as an example of how agency action—even aggressive agency action—does not raise separation of powers concerns when coupled with an active and functioning Congress. In particular, this Note highlights efforts by the Internal Revenue Service ("the IRS") and the Department of the Treasury ("the Treasury") to exert authority through an intricate and multi-layered infrastructure of regulatory and sub-regulatory guidance accompanying the Internal Revenue Code ("the Code").[7] It argues that such authority has largely gone unchallenged because Congress itself regularly acts in response to particularly common or problematic types of taxpayer abuse.[8] One implication of this argument is that

[6] This discussion of how to fix the balance of power of course takes for granted a concern with separation of powers. Alternatively, some defenders of the administrative state apply a similar background understanding of congressional dysfunction as a functionalist justification for agency action. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *see also* Freeman & Spence, *supra* note 5, at 5 (arguing that "atypical congressional dysfunction puts tremendous pressure on agencies to do *something* to address new problems," making the challenge of updating old statutes more acute). However, in doing so, such defenders effectively concede the imbalance of executive to legislative power, leaving themselves vulnerable to constitutional critique.

[7] In addition to regulations issued by the Treasury and the IRS through notice-and-comment rulemaking and published in the Federal Register, the IRS publishes six distinct different types of administrative guidance. *See Understanding IRS Guidance - A Brief Primer*, INTERNAL REVENUE SERV. (May 31, 2022), https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer [https://perma.cc/2UE7-532Y].

[8] Tax regulations have been challenged on other procedural grounds, especially noncompliance with the Administrative Procedure Act. *See* David A. Weisbach, *Against Anti-Tax Exceptionalism* 2 n.6 (Coase-Sandor Working Paper Series in Law and Economics, Paper No. 967, 2023)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4328821 [https://perma.cc/9PL4-AMNG] (listing recent challenges). But until recently, a thorough search of major questions challenges in both state and federal courts yielded a lone challenge to tax policy, albeit a relatively famous one: in King v. Burwell, 576 U.S. 473 (2015), petitioners challenged a Treasury regulation interpreting a provision of the Code established by the Affordable Care Act ("ACA"), which made tax credits available to those participating in any health care marketplace established through either state or federal government. *Id.* at 473–74 (citing 26 CFR § 1.36B–2). However, in addition to the low volume of major questions challenges in tax, the policies challenged in *King* are not archetypal of tax policy writ large. First, in acknowledgement that the tax regulations passed pursuant to the ACA were outside of Treasury/IRS expertise, they were passed jointly with the Department of Health and Human Services. *Id.* at 59. Additionally, these tax provisions were of unusual public interest, as exemplified by the fact that they received a higher volume of comments during the notice and comment period than is typical of tax regulations generally. *Id.* at 54. However, in December 2023, plaintiffs invoked the major questions doctrine in challenging IRS Notice 2021-20. *See* Complaint for Injunctive Relief, S. Cal. Emergency Med. Inc. v. Werfel, No. 5:23-cv-02450 (C.D. Cal. Dec. 1, 2023). The Notice curbed the availability of the Employee Retention Credit, a COVID era credit first passed as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2301, 134 Stat. 347–51 (2020), and subsequently extended through the Relief Act of 2021, the American Rescue Plan Act of 2021, and the Infrastructure Investment and Jobs Act. *See Employee Retention Credit - 2020 vs 2021 Comparison Chart*, INTERNAL REVENUE SERV. (Jan. 30, 2024),

in other areas of policy congressional inaction rather than agency overreach is to blame for the current imbalance between executive and legislative power to which the major questions doctrine purports to respond.

While other scholarship critiques the nondelegation and major questions doctrines on theoretical[9] as well as historical grounds, demonstrating that delegation was widely considered permissible at the founding and in the early years of the republic,[10] this Note attempts to address *why* such delegation is today subject to skepticism from the Court. This Note suggests that unprecedented congressional dysfunction may offer a partial explanation for such skepticism, and uses tax policy to show how, if Congress regularly acts as a check on agency overreach, major delegations to administrative agencies need not raise separation of powers concerns.

The appropriate response to the major questions doctrine lies in finding fixes to legislative gridlock, not in reigning in administrative action. Legislative gridlock, while intractable, is not inevitable. Proposed solutions to current legislative gridlock are myriad. Some solutions are piecemeal, for example proposals to eliminate the filibuster, a mechanism that is now routinely invoked with the effect of increasing the number of required votes in the Senate to sixty in order to pass a bill.[11] More imaginatively, Congress could create other methods of expediting the passage of particular laws, as it has with the Congressional Review Act ("the CRA"), which is used to expeditiously

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https://www.irs.gov/newsroom/employee-retention-credit-2020-vs-2021-comparison-chart [https://perma.cc/7J95-B62G]. The plaintiffs argued in their complaint that since "[u]nder the ERC program, the IRS presides over billions of dollars in emergency relief funding[,] [a]n IRS rule that substantially narrows that statutory scheme implicates the major questions doctrine." Complaint for Injunctive Relief ¶ 109.

[9] *See generally* Posner & Vermeule, *supra* note 4 (arguing that the text of the Constitution places virtually no limit on the amount of delegation Congress may engage in short of adjourning Congress).

[10] *See id.* at 1735 (compiling congressional delegations previously recounted in Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719–20 (1969)). While proponents of a strict nondelegation doctrine have attempted to explain away these early historical delegation as carve-outs for "factual determination[s]" by administrative agents or decisions within the realm of national security, *see, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 78–80 (2015) (Thomas, J., concurring), these carve-outs have failed to encompass all the early-American administrative delegations uncovered by recent historical work. *See, e.g.*, Nicholas R. Parrillo, *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, 1302–04 (2021) (presenting evidence of a "direct tax," levied in 1798 that imposed a liability on "every farmer, homeowner, and slaveholder in every state of the Union" and required multiple layers of administrative officials for implementation).

[11] *See, e.g.*, Andy Sullivan, *Explainer: Why Does Joe Biden Want to Scrap the U.S. Senate's 'Filibuster' Rule?*, REUTERS (Jan. 11, 2022), https://www.reuters.com/legal/government/us-senate-democrats-mull-ending-filibuster-pass-voting-rights-reform-2022-01-11 [https://perma.cc/ZNS4-7MGM]; EZRA KLEIN, WHY WE'RE POLARIZED 208–13 (2020). In fact, one possible reason why Congress is more active in the realm of tax policy than in other areas of policy is that tax policy is commonly passed according to the Congressional Budget Act of 1974, which has been interpreted to preclude application of the filibuster to budget bills. *See infra* notes 316–319 and accompanying text.

overturn agency action within a circumscribed period after a rule is passed.[12] While the CRA itself only allows Congress to *reverse* agency action,[13] Congress could establish a similar mechanism in response to the major questions doctrine, as Professor Christopher Walker has proposed, enabling it to quickly pass the necessary clear statements approving agency action.[14] If, as this Note suggests, the problem the major questions doctrine seeks to address is rooted in legislative inaction rather than executive overreach, legislative gridlock demands a set of remedies quite apart from those aimed at minimizing administrative action.[15]

This Note proceeds as follows. Part II provides an overview of the nondelegation and major questions doctrines. It identifies the separation of powers critique underlying both doctrines while contending that the major questions doctrine provides more space than the nondelegation doctrine for increased congressional activity to rectify the power imbalance between the branches. Part III

[12] *See generally* Maeve P. Carey & Christopher M. Davis, R43992, U.S. Cong. Rsch. Serv., The Congressional Review Act (CRA): Frequently Asked Questions (2018). In addition to the CRA, Congress has on occasion created expedited processes for accomplishing particular objectives on an ad hoc basis. For example, the Budget Control Act of 2011 established the bipartisan Joint Select Committee on Deficit Reduction, which it charged with developing a plan to reduce the deficit by $1.5 trillion over ten years. *See* Budget Control Act of 2011, Pub. L. No. 112-25, § 401, 125 Stat. 259–263 (2011). Approval of the Committee's plan was subject to expedited consideration in Congress, including limitations of debatable motions, limitations on amendments, and waiver of points of order against the plan or its consideration. *Id.* § 402.

[13] As Professors Jody Freeman and Matthew Stephenson have proposed, the current CRA could be used to validate agency action through a "choreographed two-step" in which the agency first issues an interpretive or legislative rule taking the opposite position of what it actually wants, which Congress could then disapprove using the CRA's fast-track procedures. *See* Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of The Congressional Review Act*, 59 Harv. J. on Legis. 279, 288–89 (2022). However, Professors Freeman and Stephenson identify several potential issues with this method, including "choreography breakdowns," in which the anticipated disapproval might not be forthcoming due to "a miscalculation or an unexpected change in the political landscape," as well as resistance to the maneuver itself from both legislators and bureaucratic staff. *Id.* at 315–17. Additionally, while Professors Freeman and Stephenson claim that "because the product of two negatives is a positive, in language as well as arithmetic, the CRA as written can be used to accomplish [fast-track approval]," *id.* at 288, it is not clear that courts will view such *disapproval* as the clear statement necessary to validate agency action for major questions purposes.

[14] *See* Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 Harv. J.L. & Pub. Pol'y 773 (2022). Importantly, this solution is only responsive to the majority's articulation of the major questions doctrine in *West Virginia v. EPA*, which would permit delegation if accompanied by a clear statement from Congress. *See infra* text accompanying notes 44–45. It is not compatible with the version of the doctrine proposed by Justices Gorsuch and Alito, which sounds more squarely in nondelegation themes. *See infra* text accompanying notes 63–68.

[15] Along with calling into question agency action in general through the major questions doctrine, the Supreme Court has also recently taken aim at the structure of particular administrative agencies, declaring them invalid. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (finding the structure of the Consumer Financial Protection Bureau, with a single director removable only for cause, violated separation of powers); Collins v. Yellen, 141 S. Ct. 1761 (2021) (similar, but as applied to the Federal Housing Finance Agency); Lucia v. SEC, 138 S. Ct. 2044 (2018) (finding the process for selecting administrative law judges at the SEC to violate the Appointments Clause).

provides several examples wherein the agencies enacting tax policy—the Treasury and the IRS—took actions that were "major" under the standards outlined in other cases invoking the major questions doctrine, but have thus far avoided judicial reprimand. Part IV.A considers various explanations for this inconsistency, including lack of taxpayer standing and tax exceptionalism, before concluding that these justifications are incomplete. Instead, Part IV.B argues that corollary congressional action in tax policy helps maintain the balance of power between the legislative and executive branches, thus avoiding major questions challenges to the agencies administering the Code. Part V concludes.

II. Major Questions Doctrine and its Precedents: The Nondelegation Doctrine and the Underlying Separation of Powers Critique

One of the most significant developments of the Roberts Court has been the announcement of the major questions doctrine.[16] The doctrine has roots both in earlier nondelegation cases[17] and in prior cases using a version of the doctrine as an interpretive tool *within* the *Chevron* framework.[18] However, the Roberts Court has invoked the doctrine much more frequently,[19] and, as other

[16] The Roberts Court first announced the doctrine in a case that went to oral argument in West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (arguing that the major questions doctrine constitutes a "distinct" approach from other cases involving statutory interpretation). However, earlier in the term, the Court invoked the major questions doctrine in a per curiam opinion. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 668 (2022) ("The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate."). Moreover, in a separate, earlier decided per curiam opinion, the Court stopped short of explicitly invoking the major questions doctrine but did note that "the sheer scope of the [agency's] claimed authority" required explicit congressional authorization. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021). Subsequently, the Court in *West Virginia* identified *Alabama Association of Realtors* as a major questions case. *See West Virginia*, 142 S. Ct. at 2610.

[17] *See infra* notes 62–64.

[18] In *West Virginia*, the Court itself insisted that the "major questions" label emerged from "an identifiable body of law" that developed from several earlier cases, including *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), *King v. Burwell*, 576 U.S. 473 (2015), and *Gonzales v. Oregon*, 546 U.S. 243 (2006). *See West Virginia*, 142 S. Ct. at 2609.

[19] The Court has thus far invoked the doctrine in the cases mentioned *supra* note 16 and in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). *See also infra* notes 69–71. However, justices have also mentioned the doctrine in oral argument. Recently—and surprisingly, given the bankruptcy rather than administrative context—Chief Justice Roberts mentioned that a bankruptcy court's use of a catch-all provision in the Bankruptcy Code to include a third-party in a bankruptcy plan was "a fairly clear case for the application of what is called our major questions doctrine." Transcript of Oral Argument at 9–10, Harrington v. Purdue Pharma (No. 23-124). Justice Kavanaugh echoed this sentiment later in the argument. *See id.* at 84–85.

scholars have noted,[20] has applied the doctrine wholly apart from the *Chevron* framework.[21]

This Part notes the separation of powers critiques running through both the nondelegation doctrine and major questions doctrine. Additionally, this Part argues that, by thus far embracing the major questions doctrine rather than the nondelegation doctrine, the Court has left open the possibility of broad delegation, as long as it is accompanied by a more active Congress.

A. *Nondelegation Doctrine*

Though ostensibly a barrier to Congress transferring its legislative power to another branch of government,[22] the nondelegation doctrine has been used to overturn an agency decision on only two occasions: in *A.L.A. Schechter Poultry Corp. v. United States*[23] and *Panama Refining Co. v. Ryan*.[24] Though the fact that both cases were decided in the same year—1935—has led some to conclude that the nondelegation doctrine's practical import is relatively minor, nothing more than "a local aberration."[25] However, the doctrine never fully retreated to obsolescence.

In the intervening years, the Court has on at least two occasions considered whether to apply the nondelegation doctrine in cases where there was no clear limiting principle constraining an agency's decision. First, in a concurrence to *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[26] Justice Rehnquist argued the Court "ought not to shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority."[27] However, Justice Stevens, writing for the plurality, instead found that the relevant agency, the Occupational Safety and Health Administration

[20] *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1036 (2023) (distinguishing recent "major questions" cases from earlier cases identified as such, based on the fact that it operates primarily outside of the *Chevron* framework rather than constituting a factor to consider within that framework); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) ("While ostensibly applying existing major questions case law, the [recent major questions cases] in actuality altered the doctrine of judicial review of agency action in its method and content . . . To begin with, the quartet unhitched the major questions exception from *Chevron*, which has been silently ousted from its position as the starting point for evaluating whether an agency can exert regulatory authority.").

[21] For further explanation, see *infra* notes 45–50.

[22] *Gundy*, 139 S. Ct. at 2121.

[23] 295 U.S. 495 (1935).

[24] 293 U.S. 388 (1935).

[25] Posner & Vermeule, *supra* note 4, at 1722; *see also* Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (noting the limited success of the nondelegation doctrine by pointing out that it has had "only one good year" in over two hundred years of attempts to apply it in order to strike down agency action).

[26] 448 U.S. 607 (1980).

[27] *Id*. at 686 (Rehnquist, J., concurring).

("OSHA"), had exceeded its authority for the technical reason that it set a minimum exposure level for benzene without first making a "threshold finding that a place of employment [was] unsafe."[28] More recently, in *Gundy v. United States*,[29] Justice Gorsuch argued in dissent that the Sex Offender Registration and Notification Act ("SORNA") impermissibly delegated authority to the Attorney General to determine the application of the Act to pre-Act offenders. In his view, the fact that SORNA provided "more than 20 pages" of detailed instructions for registration of sex offenders convicted *after* the Act's passage,[30] but included only one sentence providing the Attorney General with the "authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter," endowed the Attorney General with "vast" authority.[31] While Justice Kagan, writing for a plurality, reached the opposite result, finding the Act definitively applied to pre-Act offenders,[32] she did so not by defending the permissibility of broad delegations but instead by carefully construing the statute to emphasize the limits on the Attorney General's discretion.[33]

The debate in *Gundy* highlights the separation of powers critique underlying the nondelegation doctrine. Justice Gorsuch argued that the Framers intended to vest each branch with "distinct content," which, in the case of the legislative branch, they "understood . . . to mean the power to adopt generally applicable rules of conduct governing future actions by private persons."[34] Exercising a version of constitutional avoidance, Justice Kagan did not squarely address the constitutionality of broad delegation. Instead, she found the delegation warranted through application of the "intelligible principle" test the Court

[28] *Id*. at 641–42.

[29] 139 S. Ct. 2116 (2019).

[30] *Id*. at 2132 (Gorsuch, J., dissenting) (referencing U.S. Code).

[31] *Id*. Justice Gorsuch's dissent further emphasized the aspects of the statute's administration that remained within the Attorney General's discretion, as well as the ways in which the statutory provision was applied differently across different administrations. *Id*.

[32] Specifically, she asserted that the Act definitively applied to pre-Act offenders because, in her view, (1) failure to include pre-Act offenders would be a sufficiently large omission that SORNA would not meet its goal of establishing a "comprehensive" national sex offender registry, *id*. at 2126–27, and (2) the Act's use of past tense in defining the subjects of regulation indicates its intention to reach pre-Act offenders, *id*. at 2127.

[33] *Id*. at 2127–28. She argued that SORNA § 20913(d) granted the Attorney General "only time-limited latitude to excuse pre-Act offenders from the statute's requirements" and merely allowed for additional time to "fill in the gaps" created by the statute's failure to anticipate that many pre-Act offenders would have already concluded their prison sentences. *Id*. at 2128. This emphasis on gap-filling could plausibly be interpreted as responsive to Justice Rehnquist's concurrence in *American Petroleum Institute*, which suggested that even under a more muscular nondelegation doctrine, "fill[ing] in the blanks" would constitute a permissible amount of agency discretion. *Am. Petroleum Inst.*, 448 U.S. at 675 (1980) (Rehnquist, J., concurring).

[34] *Gundy*, 139 S. Ct. at 2133.

had applied "time and time again"[35]—albeit not until 1928[36]—and thus formed the justification for much of the current government structure.[37] In addition to this stare decisis rationale, Justice Kagan also justified the intelligible principle test based on necessity, given the complexity of the administrative state.[38]

While the Court in *Gundy* left open the possibility that it would revisit the nondelegation doctrine, it has thus far refrained from doing so, instead expressing a similar separation of powers critique via the major questions doctrine.[39] This may be largely a function of the specific preferences of the current Supreme Court justices.[40] In particular, Justice Alito concurred in the judgment in *Gundy* on the basis that it would be "freakish" to reverse the long-held precedent of the intelligible principle test without support from the majority of the Court, but signaled that he would be open to reconsidering the precedent.[41] For his part, Justice Kavanaugh, who joined the Court shortly after the argument in *Gundy*,[42] has indicated that he would prefer to limit delegation via the major questions doctrine.[43] This appetite likely explains why the Court has heard a flurry of major questions cases in recent terms. The next subpart describes these cases and also explains how the major questions doctrine both follows and diverges from the nondelegation doctrine.

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[35] *Id.* at 2123.

[36] The earliest case she cited is J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928). *See id.* at 2123.

[37] *Id.* at 2130 ("[I]f SORNA's delegation is unconstitutional, then most of Government is [also] unconstitutional.").

[38] *Id.* at 2123 (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)). This is another example of a functionalist justification for the administrative state. *See supra* note 6.

[39] However, the Supreme Court heard a case last term in which one of the questions presented was "[w]hether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine." Petition for Writ of Certiorari, SEC v. Jarkesy, 34 F.4th 446 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023).

[40] Other than Justices Alito and Kavanugh, *see infra* notes 41–43, the other justices have not stated their preferences explicitly. However, Chief Justice Roberts has embraced both the major questions doctrine and the nondelegation doctrine, writing the majority opinions in both *West Virginia* and *Nebraska* and joining Justice Gorsuch's dissent in *Gundy*, and Justices Kagan and Sotomayor likewise have shown themselves to be opposed to both doctrines in these three cases. As the most recent justices to join the Court, the preferences of Justices Barrett and Jackson are the least clear: while Justice Barrett joined both *West Virginia* and *Nebraska* and Justice Jackson dissented in *Nebraska*, neither justice was on the Court when *Gundy* was decided.

[41] *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring). Justice Gorsuch specifically responded to this point in his dissent, noting that he "would not wait." *Id.* at 2131 (Gorsuch, J., dissenting).

[42] The argument was heard on October 2, 2018, and Justice Kavanaugh was confirmed four days later, on October 6, 2018. *See Gundy v. United States,* OYEZ, https://www.oyez.org/cases/2018/17-6086 [https://perma.cc/A936-XCCS]; Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [perma.cc/K4DK-7Q9V].

[43] *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Mem.) (Kavanaugh, J., respecting the denial of certiorari) (writing separately to express that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases," but noting that he would prefer to do so using the major questions doctrine).

B. Major Questions Doctrine

At its most basic, the major questions doctrine announced by the Roberts Court in *West Virginia v. EPA* requires "clear congressional authorization" when an agency claims to possess a power sufficiently "major" to warrant skepticism from the Court.[44] The Court asserted that a clear statement is needed in these circumstances because Congress would not have delegated such an important decision "in so cryptic a fashion."[45]

As noted above, the Court's recent uses of the major questions doctrine, in contrast to the earlier cases to which it traces its lineage, imply that the doctrine is incompatible with, or at least antecedent to, the *Chevron* framework of statutory analysis. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,[46] the Court situated its analysis within *Chevron* step one, claiming to interpret the "unambiguous[] intent of Congress."[47] Likewise, in *Utility Air Regulatory Group v. EPA*,[48] the Court placed its analysis[49] within *Chevron* step two, professing to evaluate the reasonableness of the agency's statutory interpretation.[50] By contrast, the Roberts Court has *started* with the inquiry of whether Congress intended for an issue to be decided by an agency at all before turning to whether the statutory question at issue is ambiguous.[51]

Much of the discussion post-*West Virginia* concerns the scope of the doctrine, or what constitutes majorness.[52] By its own terms, the Court has found

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[44] *See West Virginia*, 142 S. Ct. at 2614 (citing Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[45] *Id.* at 2608 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 160 (2000)).

[46] 529 U.S. 120 (2000).

[47] *Id.* at 125–26 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

[48] 573 U.S. 302 (2014).

[49] *See infra* notes 148–158 for an extended exposition of the Court's analysis in *Utility Air*.

[50] *Utility Air*, 573 U.S. at 321.

[51] *See, e.g.*, *West Virginia*, 142 S. Ct. at 2609 (asserting that the Court "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies'") (internal citation omitted).

[52] *See, e.g.*, Jared B. Fish, *The Major Questions Doctrine's Shifting Landscape: An Exercise in Identifying the Factors That Really Matter*, AM. BAR ASS'N (Nov. 1, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2023-2024/november-december-2023/major-questions-doctrines-shifting-landscape [https://perma.cc/UWC4-N2M5BT7B-Q365]; Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. 693, 698–700 (2022); Daniel Farber, *Major Questions About the Major Questions Doctrine*, CTR. FOR PROGRESSIVE REFORM (Nov. 4, 2021), https://progressivereform.org/cpr-blog/major-questions-about-major-questions-doctrine [https://perma.cc/ZD68-PBT2WZ7L-VZJC]; Kevin O. Leske, *Major Questions About The "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479 (2016).

the clear statement rule applicable to "agency decisions of vast 'economic and political significance.'"[53]

Many of the major questions cases parrot language from *Brown & Williamson*, describing the actions considered as ones of "economic or political significance."[54] The majority opinion in *West Virginia* expounded on this point by reference to prior applications of the doctrine:

> In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" *such a sweeping and consequential authority* "in so cryptic a fashion." In *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of" disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "*the sheer scope of the CDC's claimed authority*," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so.[55]

On its own, this description of majorness is not especially instructive because nearly all agency policies have significant economic effects in the aggregate, given the number of individuals bound by agency rules.[56] Thus, commentators have attempted to parse the cases in which the Court has invoked the major questions doctrine to identify criteria that the Court would consider "major."[57] Potential factors include agency action pursuant to a statute that does not directly fit the circumstances to which it is responding;[58]

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[53] *West Virginia*, 142 S. Ct. at 2605 (citing *Utility Air*, 573 U.S. at 324 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 160 (2000))).

[54] *Id.* at 2605 (internal citations omitted).

[55] *Id*. at 2608 (emphasis added) (internal citations omitted).

[56] Solicitor General Elizabeth Prelogar made a similar point in the oral argument for *Biden v. Nebraska*. *See* Transcript of Oral Argument at 12, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506) ("[I]f the Court were to just look at costs alone, it would take the major questions doctrine outside of that extraordinary case because national policies these days frequently do involve more substantial costs or trigger political controversy.").

[57] *See supra* note 52.

[58] *See generally* Freeman & Spence, *supra* note 5, at 4 (discussing the problem of "statutory obsolescence" and agency updating).

agency action outside its expertise[59] or traditional boundaries;[60] and agency action that Congress considered but failed to take.[61]

More fundamentally, however, the current justices on the Supreme Court appear to disagree about the relationship between the major questions doctrine and separation of powers. By extension, they seem to have different views about the degree to which the major questions doctrine diverges from the nondelegation doctrine.

Justice Gorsuch, in particular, has taken pains to identify the major questions doctrine as "closely related" to the nondelegation doctrine,[62] and to emphasize the separation of powers concerns that, in his view, undergird both doctrines. Writing separately in *West Virginia*, he suggested that the major questions doctrine was incorporated within the Article I Vesting Clause.[63] He also identified *American Petroleum Institute* as a major questions case, and concluded that the doctrine provides courts with a needed tool to prevent "inadvertent" unconstitutional statutory delegation by Congress to administrative agencies.[64]

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[59] *See, e.g.*, *West Virginia*, 142 S. Ct. at 2612–13 (pointing to EPA's lack of comparative expertise in analyzing "system-wide . . . trends in areas such as electricity transmission, distribution, and storage"); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) (arguing issues of "public health more generally . . . fall[] outside of OSHA's sphere of expertise"); King v. Burwell, 576 U.S. 473, 486 (2015) (arguing a large delegation of authority to the IRS would be implausible given its lack of "expertise in crafting health insurance policy"); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (finding the Attorney General's claimed authority in regulating the use of a drug for assisted suicide to be "beyond his expertise").

[60] In particular, the Court has noted where an agency has claimed authority under a rarely used statutory provision. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021) ("Originally passed in 1944, this provision has rarely been invoked—and never before to justify an eviction moratorium."); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666 ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."); *West Virginia*, 142 S. Ct. at 2613 ("Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d)."); Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023) ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope.").

[61] *See, e.g.*, *West Virginia*, 142 S. Ct. at 2610 ("[T]he Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."); *Brown & Williamson*, 529 U.S. at 159–60 ("Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area."); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486 ("When the eviction moratorium expired in July, Congress did not renew it. Concluding that further action was needed, the CDC decided to do what Congress had not."); *Nebraska*, 143 S. Ct. at 2373 ("The Secretary's assertion of administrative authority has 'conveniently enabled [him] to enact a program' that Congress has chosen not to enact itself.").

[62] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring); *see also* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (referencing the major questions doctrine).

[63] *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).

[64] *Id.*

Even more strikingly, Justice Gorsuch's *West Virginia* concurrence analogized the major questions doctrine to other clear statement rules that, in his telling, are needed precisely to override unconstitutional delegations. For example, he compared the major questions doctrine to the clear statement rule for statutes with retroactive effect, noting that the "Constitution *prohibits* Congress from passing laws imposing various types of retroactive liability,"[65] and that courts should "struggle hard" against such a statutory construction.[66] He analogized the major questions doctrine to the rule requiring such a clear statement before abrogating sovereign immunity, because "the Constitution also incorporates the doctrine of sovereign immunity."[67] Interestingly, Justice Gorsuch did not explain how such delegations, if unconstitutional, could be saved by clear statement rules.[68] Nevertheless, the most logical inference to draw from the use of these examples is that, in Justice Gorsuch's view, the major questions doctrine, too, prevents an unconstitutional delegation.

Only Justice Alito joined Justice Gorsuch's *West Virginia* concurrence, suggesting the majority of the Court has yet to embrace such a strident version of the major questions doctrine. While the majority opinions in both *West Virginia* and *Nebraska*[69] justified invoking the major questions doctrine on separation of powers grounds,[70] both opinions affirmatively found that a clear statement from Congress could "overcome . . . skepticism" directed at agency action.[71] The majority's indication that Congress could act correctively to remedy such separation of powers concerns implies that an active Congress may be sufficient to address aggressive agency action.[72]

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[65] *Id.* at 2616 (emphasis added).

[66] *Id.* (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).

[67] *Id.* at 2616–17.

[68] Justice Barrett's concurrence in *Nebraska* pointed out this logical tension. *See Nebraska*, 143 S. Ct. at 2377 n.2 (arguing that such strong-form substantive canons—like the rule against retroactivity—"advance constitutional values by imposing prophylactic constraints on Congress—and that is in tension with the Constitution's structure").

[69] *West Virginia*, 142 S. Ct. 2587 (2022); *Nebraska,* 143 S. Ct. 2355 (2023). Chief Justice Roberts wrote both majority opinions, and in both cases Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

[70] *West Virginia*, 142 S. Ct. at 2609 ("[B]oth separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there.") (citing Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *Nebraska*, 143 S. Ct. at 2375 (arguing that suits concerning the provision of government benefits fall under the doctrine because "[i]t would be odd to think that separation of powers concerns evaporate simply because the government is providing monetary benefits rather than opposing obligations").

[71] *West Virginia*, 142 S. Ct. at 2614 ("[T]he Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner."); *Nebraska*, 143 S. Ct. at 2375 ("[W]e would not assume that Congress entrusted that task to an agency without a clear statement to that effect . . . [because] '[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'") (citing *West Virginia*, 142 S. Ct. at 2613).

[72] The idea that Congress can rectify statutory ambiguity with a clear statement rule does not necessarily require an "active Congress" in the sense of a Congress recently engaged on the topic. While recent congressional action would likely be sufficient to clarify statutory meaning,

Finally, writing separately in *Nebraska*, Justice Barrett[73] offered a still weaker view of the doctrine. She argued that the doctrine is merely "an interpretive tool" for determining whether Congress delegated authority and renouncing the need for a clear statement that "authoriz[es] the *precise* agency action under review."[74] In Justice Barrett's view, "a system of separated powers" means only that "a reasonably informed interpreter would expect Congress to legislate on 'important subjects,' while delegating away only 'the details,'" and does not provide a "normative rule . . . *discourag[ing]* Congress from empowering agencies."[75] Justice Barrett made this point through extended analogy to the relationship between parents and a babysitter, arguing that while the parents (i.e., the legislative branch) remain "in charge," they should not be "discourag[ed] . . . from giving significant leeway to the babysitter [i.e., administrative agencies]."[76] Like a clear statement rule suggesting an active Congress, this analogy implies that as long as Congress is actively participating in the legislative process in some manner, delegation is permissible. Contrasting Justice Barrett's and Justice Gorsuch's perspectives, which present nearly opposite views on whether Congress may delegate power to agencies, demonstrates the diversity of viewpoints even among the members of the Court who endorse the major questions doctrine.

Any theory of why the IRS has so far resisted major questions challenges must be caveated by an acknowledgment that the Court is not unified on when to invoke the doctrine or what the consequences of doing so may mean for the agency action in question. That said, both the doctrine as espoused in the *West Virginia* majority and as expressed by Justice Barrett in *Nebraska* open the door to the idea that, if properly balanced by an active Congress, broad delegation to administrative agencies may be permissible. The section that follows provides several examples in which the Treasury and the IRS exercised significant discretion, which in another context might have been subject to major questions challenges. Part IV then posits that such activity may have

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on its face a clear statement rule does not require that such a clear statement be issued by a recent Congress. That said, recent major questions cases imply that in order to satisfy the clear statement rule, Congress must have spoken *directly* to the issue in a way that would be difficult to do decades in advance without clairvoyance. For example, as Justice Kagan's dissent highlighted, "generation shifting" as defined by the Clean Power Plan effectively constituted a cap-and-trade system. *West Virginia*, 142 S. Ct. at 2630 (Kagan, J., dissenting). However, the *West Virginia* majority held that it did not qualify as a "system of emission reduction" under Clean Air Act § 111(d) because to define system in this way would reduce the word to "an empty vessel." *Id.* at 2614 (majority opinion). A clear statement rule that demands such an exact match between statutory text and agency action effectively requires that a Congress recently engaged on the topic has spoken to the issue.

[73] Justice Barrett joined the majority in both cases invoking the major questions doctrine since she has been on the bench, *West Virginia* and *Nebraska*, and declined to dissent in the two per curiam opinions invoking the doctrine, *Alabama Association of Realtors* and *National Federation of Independent Businesses.*

[74] *Nebraska*, 143 S. Ct. at 2378 (emphasis in original).

[75] *Id.* at 2380–81 (emphasis in original).

[76] *Id.* at 2381.

been tolerated because it was properly balanced by congressional activity in this policy area.

III. Tax Policy As A Model Of Expansive Delegation

The Treasury and the IRS collectively supplement the tax Code with rules pertaining to nearly every aspect of the economy, often addressing highly specific situations. Moreover, they often use different types of administrative rulings, each of which by convention demands its own level of deference.[77] As a result, deciphering any particular area of the Code requires both effort—to sift through a large volume of regulations and guidance interpreting the Code—and expertise—to determine how the different parts fit together. This combination of effort and expertise makes tax policy extraordinarily difficult for the "ordinary citizen" to comprehend.[78]

Comparison between modern tax policy and the National Industrial Recovery Act ("NIRA")—a scheme struck down under the nondelegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*[79]—makes clear just how much power the Treasury and the IRS possess.[80] In finding the NIRA an "unconstitutional delegation of legislative power" under the Commerce Clause,[81] Petitioners bemoaned the unfettered discretion the statute gave the President to promulgate, at his discretion, industry-specific rules governing sales[82] and labor[83] practices and to delegate power to "various commissions, bureaus, officers, and other agencies" within the executive branch.[84] This complex delegation, they claimed, made it "impossible for an ordinary citizen to know what these laws are," since "nowhere can be found a comprehensive

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[77] *See supra* note 7.

[78] *Cf. infra* text accompanying note 83 (similar complaint from the *Schechter* court with regard to the National Industrial Recovery Act).

[79] 295 U.S. 495, 537 (1935).

[80] Some commentators have previously taken the absence of recent nondelegation opinions to indicate that *Schechter* is less relevant today in evaluating the permissibility of administrative action. *See supra* note 25. However, several members of today's court have signaled willingness to revisit the nondelegation doctrine. *See supra* notes 30–31 (Gorsuch), 41 (Alito), 43 (Kavanaugh). Justice Gorsuch even cited *Schechter* favorably in his *Gundy* dissent. Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting). Moreover, the Supreme Court heard a nondelegation case this term in which one of the questions presented involved delegation of administrative authority. *See supra* note 39.

[81] *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 548 ("[H]ours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a state and there dealt in as a part of its internal commerce.").

[82] *Id.* at 550.

[83] The Live Poultry Code at issue in *Schechter*, promulgated by the President under NIRA § 3, imposed requirements relating to maximum hours, minimum wages, minimum working age, collective bargaining rights, and minimum number of employees. *Id.* at 523–24.

[84] *Id.* at 505.

collection of the thousand and one enactments which are almost daily ground out by these agencies."[85]

While these critiques were levied at the NIRA, they could just as easily refer to modern tax policy. Documenting the many types and uses of tax regulation would fill (and has filled) volumes.[86] Instead, this Part will focus on several discrete examples that underscore two particular features of modern tax policy that would ordinarily make it vulnerable to major questions challenges: (1) the "economic and political significance"[87] of tax-related administrative action and (2) the way in which tax-related administrative guidance may conflict with the text of the Code it purports to interpret.

A. Tax Policy's "Economic and Political Significance"

As mentioned above, a key factor to consider in invoking the major questions doctrine is the majorness of the action. As the following examples demonstrate, however, it is difficult to imagine a more "sweeping and consequential authority" than that exercised by the Treasury and the IRS.[88] The first example demonstrates the economic impact of tax-related administrative action, while the second highlights the breadth of tax-related regulation and guidance, and consequently, its importance to tax practitioners.

1. Carried Interest

This section details how Revenue Procedure 93-27,[89] and subsequent administrative guidance building on it, unilaterally created a regime in which so-called carried interest[90] could be taxed at lower long-term capital gains rates,[91] resulting in a windfall to private equity and hedge fund managers.[92] A Revenue Procedure is "an official statement of a procedure that affects the rights or

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[85] *Id.*

[86] For a non-exhaustive list, *see, e.g.*, Joseph Bankman, Daniel N. Shaviro, Kirk J. Stark & Edward D. Kleinbard, Federal Income Taxation (19th ed. 2023); Howard E. Abrams & Don A. Leatherman, Federal Income Taxation of Corporations and Partnerships (6th ed. 2019); Laura Cunningham & Noël Cunningham, The Logic of Subchapter K, A Conceptual Guide to the Taxation of Partnerships (6th ed. 2019); Martin D. Ginsburg, Jack S. Levin & Donald E. Rocap, Mergers, Acquisitions, & Buyouts 2021 (2022).

[87] *West Virginia*, 142 S. Ct. at 2605 (citing Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 160 (2000))).

[88] *West Virginia,* 142 S. Ct. at 2608 (internal citations omitted).

[89] Rev. Proc. 93-27, 1993-27 C.B. 343.

[90] The Revenue Procedure refers to "profit interest," which is usually colloquially referred to as carried interest. *See, e.g.*, Howard E. Abrams, *Taxation of Carried Interests: The Reform that Did Not Happen*, 40 Loy. U. Chi. L.J. 197, 201 (2009); Thomas J. Brennan & Karl S. Okamoto, *Measuring the Tax Subsidy in Private Equity and Hedge Fund Compensation*, 60 Hastings L.J. 27, 40 (2008).

[91] Long-term capital gains are taxed at roughly half the rate of ordinary income: for a top tax-bracket taxpayer, the marginal rate on long-term capital gains is 20%, 26 U.S.C. § 1(h), while the marginal rate on ordinary income is 39.6%, *id.* § 1(a)–(d).

[92] *See infra* notes 115–118 and accompanying text.

duties of taxpayers or other members of the public,"[93] and is normally used to prescribe relatively mundane process instructions, such as how to report specific information to the IRS[94] or which discount rates to use.[95] Revenue Procedures do not require notice and comment since they are intended to announce information that the IRS deems "a matter of public knowledge."[96] By using such an informal guidance document to create such a consequential policy, the Treasury and the IRS not only took major action absent congressional intervention, but even evaded traditional doctrines of administrative law requiring notice and comment to promulgate substantive, legally binding rules.[97]

In order to understand the mechanics of Revenue Procedure 93-27, some background on partnership taxation is necessary. A business may elect to be taxed either as a corporation or a partnership.[98] A key reason to select the partnership form is it provides for pass-through taxation, meaning partners will pay only one layer of tax.[99] Mechanically, to determine the tax burden of each partner, tax is first computed at the entity level[100] and then allocated to each partner.[101] A partnership determines gain or loss relative to the fair market value of the assets, just as an individual would,[102] but each partner must also maintain a "capital account" to which she can compare her basis to determine the amount of gain or loss she shall recognize at liquidation.[103] While partners

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[93] *Understanding IRS Guidance - A Brief Primer*, *supra* note 7.

[94] *See, e.g.*, Rev. Proc. 2023-38, 2023-51 I.R.B. 1544 (2023).

[95] *See, e.g.*, Rev. Proc. 2023-41 (Dec. 7, 2023).

[96] *Understanding IRS Guidance - A Brief Primer*, *supra* note 7.

[97] The scope of exemptions to notice-and-comment requirements under 5 U.S.C. § 553 is admittedly the subject of considerable judicial and scholarly confusion and debate. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108–09 (D.C. Cir. 1993) (quoting case law describing the distinction between exempt and non-exempt rules as "enshrouded in considerable smog" and "fuzzy"). However, the Supreme Court endorsed the view that "an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted," Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 95 (2015), and the D.C. Circuit held that "agency action[s] that purport[] to impose legally binding obligations or prohibitions on regulated parties . . . [are] legislative rule[s]" subject to notice-and-comment. Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.).

[98] With the exception of certain *per se* corporations classified as such under state or federal law, 26 C.F.R. § 301.7701–2(b), an "entity with at least two members can elect to be classified as either an association (and thus a corporation under [26 C.F.R.] § 301.7701–2(b)(2)) or a partnership." *Id.* § 301.7701-3(a). In the absence of such an election, a domestic eligible entity with at least two members will be classified as a partnership. *Id.* § 301.7701-3(b)(i).

[99] By comparison, corporations are said to pay two layers of tax. This refers to the fact that the corporation *itself* pays tax at the entity level, 26 U.S.C. § 11; then, if a manager wants to extract value from the entity, such as through a dividend, he/she must again pay tax on the distribution as an individual, *id.* §§ 1, 301; *see also* Holger Spamann, Scott Hirst & Gabriel Rautenberg, Corporations 11 (3rd ed. 2022).

[100] 26 U.S.C. § 703.

[101] *Id.* §§ 702, 704.

[102] *Cf. id.* § 1001.

[103] 26 C.F.R. § 1.704-1-(b)(2)(ii)(b)(2) ("Upon liquidation of the partnership (or any partner's interest in the partnership), liquidating distributions are required in all cases to be made in accordance with the positive capital account balances of the partners.").

may allocate tax items between themselves however they wish,[104] one limitation on the flexibility of partnership allocations is that each partner must maintain her capital account according to particular rules.[105] These rules, inter alia, provide that a partner's capital account shall be increased by the fair market value of money or property she *contributed* to the partnership, as well as any subsequent allocations of partnership income or gain.[106]

Revenue Procedure 93-27 provided that carried interest—that is, interest received in exchange for "the provision of services to or for the benefit of a partnership . . . "—is generally not taxable to the partnership or its partners.[107] By assigning carried interest a value of zero at the time of contribution, the only tax is on its *appreciation* at the time of disposal. The Revenue Procedure further explains that, as long as the partner waits two years to sell the interest,[108] any appreciation shall be taxed at long-term rather than short-term capital gains rates.[109]

The IRS was motivated at least by the administrative complexity of valuing carried interest.[110] This is clear from the Revenue Procedure's circumscribed definition of carried interest, which is limited to interests that would not entitle the holder to receive a share in the partnership's assets in case of liquidation, i.e., would not be reflected in the partner's capital account,[111] and

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[104] *Id.* § 704(a). Relatedly, they may also choose to do so either item-by-item or via the so-called bottom-line allocations after netting particular items against one another. *Id.* § 704(b)(1); 26 C.F.R. § 1.704-1(b)(1)(vii) and may even choose to allocate items retrospectively up until the time of filing. 26 U.S.C. § 761(c).

[105] Stated more precisely, the flexible allocations allowed under the partnership agreement are permissible as long as they have a "substantial economic effect." 26 U.S.C. § 704(b)(2). Under the three-part test for "economic effect," the first requirement is proper "determination and maintenance of the partner's capital accounts." 26 C.F.R. § 1.704-1(b)(2)(ii)(b)(1); *see also id.* § 1.704-1(b)(2)(iv) ("[A]n allocation of income, gain, loss, or deduction will not have economic effect . . . and will not be deemed to be in accordance with a partner's interest in the partnership . . . unless the capital accounts of the partners are determined and maintained throughout the full term of the partnership in accordance with the capital accounting rules of this paragraph (b)(2)(iv).").

[106] 26 C.F.R. § 1.704-1(b)(2)(iv)(b). Inversely, the partner's capital account shall be decreased by the fair market value of money or property the partnership *distributed* to the partner (net of liabilities), as well as allocations of partnership expenditures, losses, and deductions. *Id.*

[107] *See* Rev. Proc. 93-27, 1993-2 C.B. 344, § 4.01. Rev. Proc. 2001-43, 2001-2 C.B. 191, further extended this treatment to nonvested partnership interests, i.e., interests that are not yet exercisable (for a contractually specified amount of time). *See* Rev. Proc. 2001-43 at § 4. Moreover, Rev. Proc. 2001-43 noted that, since Rev. Proc. 93-27 provided that characterization of an interest should occur at the time of receipt, Rev. Proc. 93-27 § 2.01, the vesting of the interest is not taxable. Rev. Proc. 2001-43 § 3.

[108] 26 U.S.C. § 1222; Rev. Proc. 93-27 § 4.02(2).

[109] Rev. Proc. 93-27 § 4.02(2). The effect of 26 U.S.C. § 1061 therefore, *see infra* note 124, is to theoretically classify carried interest disposed within two to three years as short-term capital gain.

[110] Multiple tax academics have drawn this conclusion regarding the motivation for the Revenue Procedure. For a fulsome accounting of scholarship on this topic, *see* Darryll K. Jones, *Sophistry, Situational Ethics, and the Taxation of the Carried Interest*, 29 NW. J. INT'L L. & BUS. 675, 685 n.30 (2009).

[111] Rev. Proc. 93-27 § 2.

excludes interests "relate[d] to a substantially certain and predictable stream of income."[112] Proponents of taxing carried interest at capital gains rates have also analogized to treatment of other assets under the Code; under this view, carried interest is simply money invested in other companies, and the Code does not normally tax appreciation on investments.[113] Finally, while administrability and internal consistency of the Code undoubtedly motivated the Revenue Procedure to some extent, many commentators have also noted that the private equity industry has devoted enormous resources to lobbying against changes to the current treatment.[114]

Regardless of the intention behind the Revenue Procedure, it amounts to a huge payout to private equity fund managers given the typical compensation structure employed in the industry.[115] In 2018, the Joint Committee on Taxation estimated that this policy of not taxing carried interest as ordinary income would cost the Treasury $14 billion over a ten year period.[116] Moreover, a rigorous 2008 mathematical study by tax Professors Thomas Brennan and Karl Okamoto found that private equity fund managers earn 8.2 percentage points more per year relative to other workers even after accounting for the volatility

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[112] *Id.* § 4.02(1). The other exceptions in this subsection similarly pertain to cases in which valuation would be easier, including where the interest was disposed of immediately, *id.* at § 4.02(2), or was an interest in a publicly traded partnership, *id.* at § 4.02(3).

[113] *See, e.g.*, David A. Weisbach, *The Taxation of Carried Interests in Private Equity*, 94 Va. L. Rev. 715, 717 (2008); Brennan & Okamoto, *supra* note 90, at 36, 42, 44–45 (explaining that both start-up founders and corporate executives may elect under the Code to defer compensation on equity investments in their firms and noting that defenders of carried interest treatment argue hedge fund and private equity fund managers should be treated similarly to these other "capitalists"). As a note, research for Professor Weisbach's paper was funded by the Private Equity Council, a lobbying organization. *See* Weisbach, *supra*, at 715.

[114] *See, e.g.*, Alan Rappeport, Emily Flitter & Kate Kelly, *The Carried Interest Loophole Survives Another Political Battle*, N.Y. Times (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/business/carried-interest-senate-bill.html [https://perma.cc/9JPM-LFHJ] ("Lawmakers' inability to address a tax break that Democrats and some Republicans have called unfair underscores the influence of lobbyists for the finance industry and how difficult it can be to change the tax code."); Robert Reich, *This Tax Loophole Costs $180bn A Decade. Why Won't Democrats Close It?* The Guardian (Dec. 14, 2021), https://www.theguardian.com/commentisfree/2021/dec/14/carried-interest-tax-loophole-close-it [https://perma.cc/2QWM-ARR3] (blaming lobbying as the "sole reason" the carried interest "loophole" remains in the Code); Julie Bykowicz & Miriam Gottfried, *How the Private-Equity Lobby Won—Again*, Wall St. J. (Aug. 7, 2022), https://www.wsj.com/articles/how-the-private-equity-lobby-wonagain-11659834467 [https://perma.cc/GH3B-ALX8] (favorably describing the lobbying effort by the Private Equity Council and others); Brennan & Okamoto, *supra* note 90, at 31 n.18 (noting lobbying efforts dating back to 2007).

[115] Private equity managers are usually paid a management fee annually (typically two percent of assets under management) and carried interest equivalent to twenty percent of profits realized once the fund is wound down. Brennan & Okamoto, *supra* note 90, at 40; *see also* Alan S. Blinder, *The Under-Taxed Kings of Private-Equity*, N.Y. Times (July 29, 2007), https://www.nytimes.com/2007/07/29/business/yourmoney/29view.html [https://perma.cc/CN55-MZ3S] (explaining the compensation structure in private equity).

[116] *Tax Carried Interest as Ordinary Income*, Cong. Budget Off. (Dec. 13, 2018), https://www.cbo.gov/budget-options/54795 [https://perma.cc/PW3U-N3FW] (citing the Joint Committee for the estimate).

of their income.[117] Of this amount, they estimated that ninety-three percent was attributable to the preferential tax treatment of carried interest.[118]

Revenue Procedure 93-27 also demonstrates how tax guidance is often completely devoid of textual underpinning. While the Code discusses partnership allocations generally in section 704 and contemplates the treatment of services provided by a partner "acting *other* than in his capacity as a member of the partnership" in section 707(a)(2)(A)(iii),[119] it is silent regarding treatment of a partner's contribution of services in exchange for a partnership interest.[120] Revenue Procedure 93-27 therefore represents a strong assertion of lawmaking power by a regulatory agency: rather than merely clarifying points of textual ambiguity, it effectively established out of whole cloth new rules with highly consequential economic effects. Despite the boldness of the IRS's action at the time it was passed, settled expectations have arguably cemented favorable treatment of carried interest in law. Most recently, in May 2023, the U.S. Tax Court[121] even further expanded the definition of carried interest to cover situations in which the relationship between the entity in which the carried interest was received and the entity for which the services were performed was more attenuated.[122] Notwithstanding the lack of process underlying the Revenue Procedure, both taxpayer and Tax Commissioner in the

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[117] Brennan & Okamoto, *supra* note 90, at 36.

[118] *Id.*

[119] 26 U.S.C. §§ 704, 707(a)(2)(A)(iii) (emphasis added). Campbell v. Comm'r, 943 F.2d 815 (8th Cir. 1991), which immediately preceded Revenue Procedure 93-27 and which was cited therein, Rev. Proc. 93-27 § 3, incorrectly offered this as one of several justifications for not taxing profit interests. *Campbell*, 943 F.2d at 822.

[120] *See* ABRAMS & LEATHERMAN, *supra* note 86, at 767.

[121] The U.S. Tax Court was originally founded as the Board of Tax Appeals by the Revenue Act of 1924, Pub. L. No. 68-176, tit. IX, § 900, 43 Stat. 336–38 (1924) [hereinafter "Revenue Act of 1924"]. The tribunal was intended to provide taxpayers with an impartial forum in which to dispute tax assessments, as opposed to administrative hearings before representatives of the IRS. *See* Walter W. Hammond, *The United States Board of Tax Appeals*, 11 MARQ. L. REV. 1 (1926). The Board was initially devised as an independent agency within the executive branch, Revenue Act of 1924 § 900(k), and continued to be so even after it was renamed the Tax Court and codified by 26 U.S.C. § 7441 as part of the comprehensive revision of the Tax Code in 1954. *See* Internal Revenue Code of 1954, Pub. L. No. 591, ch. 736, 68A Stat. 879 (1954). However, subsequent revisions clarified that the Tax Court was independent of the executive branch. *See* Pub L. No. 91-172, § 951, 83 Stat. 730 (1969) (revising the description of the Tax Court to remove language indicating its presence within the executive branch); Pub. L. No. 114-113, pt. 3, § 441, 129 Stat. 3126 (2015) (inclusion of explicit clarificatory language). For a comprehensive history of the Tax Court, see generally HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS (2d ed. 2014), https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf [https://perma.cc/D94A-9UG4].

[122] *See* ES NPA Holding, LLC v. Comm'r, T.C.M. (RIA) 2023-055 (T.C. 2023). The facts in this case involved carried interest *indirectly* between Joshus Landy and National Processing of America, Inc. ("NPA") mediated through a convoluted chain of subsidiaries. Landy was previously the sole shareholder of NPA. *Id.* at 1. In order to effectuate a sale of seventy percent of his interest, Landy created two limited liability companies, IDS and NPA, LLC. *Id.* at 2. NPA contributed substantially all of its assets to NPA, LLC in exchange for all the units of its three classes of stock, which it in turn contributed to IDS in a meaningless gesture transaction. *Id.* at 3. Subsequently, a limited liability company known as ES NPA formed by Landy along with two other individuals received carried interest in one class of the units sold to IDS in return for services performed in service of NPA. *Id.*

case took the guidance document as law, arguing over its applicability rather than its validity.[123] Additionally, nearly three decades later, Congress finally weighed in on the matter in 2017 by passing section 1061, which recharacterized carried interest sold within three years as short-term capital gain.[124] While this provision was passed to curtail capital gains treatment of carried interest,[125] it instead had the perverse effect of codifying[126] the very specialized treatment it sought to constrain.[127] In short, capital gains treatment of carried interest, though initiated by the IRS for administrative convenience, is likely here to stay for the foreseeable future, to the detriment of those not receiving this preferential treatment.

2. *Dividend Characterization*

Much has been written about the carried interest regulations[128] because of their scope, but the true power of the Treasury and the IRS lies not in one or two extraordinary instances of overreach, but rather in the sheer breadth of guidance and regulations impacting and governing tax behavior. The Treasury and the IRS may issue guidance in order to clarify ambiguity[129] or respond to perceived exploitation.[130] Yet, modest as each of these individual regulations or guidance

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[123] *Id*. at 3.

[124] Pub. L. No. 115-97, § 13309, 131 Stat. 2130–32 (Jan. 1, 2018) (codified as 26 U.S.C. § 1061); *see also* Abrams & Leatherman, *supra* note 86, at 767.

[125] *See* H.R. Rep. No. 115-409 at 277 (2017) (explaining that section 1061 was passed due to "concern[] about Federal tax issues arising from the use of carried interests in asset management businesses").

[126] The regulations implementing section 1061 also included coordinating amendments to the regulations implementing section 702 (income and credits of a partner), section 704 (contributed property) and section 1223 (holding periods). *See* 86 Fed. Reg. 5480, 5493–94.

[127] The legislative history suggests one reason for this perverse treatment, explaining that the extension of the holding period for applicable partnership interests was intended to "strike[] the right balance for economic growth and fairness without stifling investment." *See* H.R. Rep. No. 115-409 at 277 (2017).

[128] A 2008 article by Professor Victor Fleischer catapulted the topic of carried interest into the public discussion. *See generally* Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. Rev. 1 (2008). For a list of other academic work discussing the topic, see Jones, *supra* note 110, at 679 n.11.

[129] This is often done "in response to a written request submitted by a taxpayer" in the form of Private Letter Rulings ("PLRs"), which expresses the IRS's official position with respect to a particular scenario and "bind[s] . . . the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described." *Understanding IRS Guidance - A Brief Primer*, *supra* note 7. While PLRs do not have precedential value, they are made public and may be treated in future litigation as indication of the IRS's administrative practice or used as evidence that the IRS Commissioner abused his discretion if contrary PLRs were issued to direct competitors. Amergen Energy Co., LLC *ex rel.* Exelon Generation Co., LLC v. United States, 94 Fed. Cl. 413, 419 (2010) (citing Vons Companies, Inc. v. United States, 51 Fed. Cl. 1, 12 (2001)). The very existence of Private Letter Rulings is a unique administrative function, which demonstrates the scope of administrative authority delegated to the IRS.

[130] For example, the IRS issued IRS Advice Memo 2020-005 in direct response to particular transactions it observed "that purport to result in holding periods for corporate stock that are longer than the period of economic investment." IRS Adv. Mem. 2020-005 at 1.

memos may be on their own, together they create a maze of interlocking rules that demand careful study and expertise to both interpret and harmonize.

This subsection will focus on the example of dividend characterization precisely because it is banal: this is the first analysis any corporation must undertake in determining whether and when to distribute funds to its shareholders.[131] Individual (non-corporate) shareholders may prefer that a distribution merely reduce their basis in the stock,[132] rather than have it be characterized as a dividend, since they owe taxes on dividends.[133] Corporate shareholders may actually prefer dividend treatment, since corporations may deduct 50% of dividends received from all other corporations, 65% of dividends received from corporations in which they own at least a 20% stake, or 100% of dividends from affiliated corporations.[134]

In order to understand whether a distribution will be characterized as a dividend, corporate taxpayers must track the intricacies of and interactions between the Code, official regulations, and two different types of sub-regulatory guidance. Additionally, they must keep track of both current and accumulated earnings and profits ("E&P"), a metric of available funds for distribution.[135]

Generally, section 316(a) provides that all dividends must come out of current or accumulated E&P,[136] and the accompanying Treasury Regulation section 1.316-2 specifies that dividends should come first from current E&P and second from accumulated E&P.[137] The application of the Code is straightforward where both current and accumulated E&P are positive: the distribution will be characterized as a dividend to the extent of the sum of both amounts, after which it may still be distributed but will be recognized instead as capital

[131] Beyond the scope of this Note, a corporation may also consider *how* to distribute such funds. This Note assumes a dividend of "property," which, for the purposes of this section, is broadly defined to include cash and other types of real property, but not stock. 26 U.S.C. § 317(a). However, if the analysis in this section suggests shareholders would find such a distribution unfavorable—as the above emphasizes, itself a subjective analysis—a corporation may decide to issue a stock dividend, which, generally speaking, is not taxed if distributed pro rata to all shareholders. *Id.* § 305(a).

[132] If a distribution is not characterized as a dividend, the shareholder's basis—essentially his/her value—in the stock is reduced proportionally. *Id.* § 301(c)(2). It is only to the extent that the distribution exceeds the shareholder's basis that he/she recognizes gain in the stock. *Id.* § 301(c)(3). For a more extensive discussion of the concept of basis, see *infra* note 138.

[133] 26 U.S.C. § 61(a)(7).

[134] *Id.* §§ 243, 1504.

[135] While not defined clearly anywhere in the Code, Abrams & Leatherman, *supra* note 86, at 117, E&P is calculated according to rules laid out in § 312 and accompanying regulations. *See* 26 U.S.C. § 312; 26 C.F.R. § 1.312-6.

[136] 26 U.S.C. § 316(a).

[137] This order can arguably be inferred from the language in § 316(a), which provides that generally, "every distribution is made out of earnings and profits to the extent thereof, and from the *most recently* accumulated earnings and profits," *id.*, but is further clarified by the regulations, *see* 26 C.F.R § 1.316-2(a). As a note, putting aside the underlying logic of drawing on short-term reserves before long-term reserves, there is not necessarily anything normatively correct about this order. This regulation merely serves as an example of administrative agencies prescribing many of the rules that govern taxpayers' day-to-day behavior.

gain to the extent that it exceeds the shareholder's basis in the stock.[138] It is similarly straightforward where both current and accumulated E&P are negative: none of the distribution is characterized as a dividend.[139] The order specified in Regulation section 1.316-2 also provides guidance where current E&P is positive while accumulated E&P is negative: since the dividends are drawn first from current E&P and there would not be any accumulated E&P from which to draw under this scenario, the distribution would be recognized as a dividend only to the extent of current E&P.[140]

However, the Code and Regulation section 1.316-2 do not address how to proceed where current E&P is negative and accumulated E&P is positive. Regulation section 1.316-2 stated that if "the actual earnings and profits to the date of a distribution within any taxable year . . . cannot be shown, the earnings and profits for the year (or accounting period, if less than a year) in which the distribution was made shall be prorated to the date of the distribution not counting the date on which the distribution was made."[141] Revenue Ruling 74-164 in turn interpreted this second clause to mean that, where current E&P was negative, the amount characterized as a dividend is equal to the accumulated E&P plus the current E&P (a negative number) multiplied by the percent of the year that had passed at the time the dividend was issued.[142] In detailing the mechanics of the proration method, however, Revenue Ruling 74-164 made no mention of the first clause, leading some taxpayers to conclude that they *must* prorate on a daily basis, even if they can close their books at the time the distribution is issued, thereby showing "actual earnings and profits to the date of a distribution within any taxable year."[143] The IRS thus clarified in Field Service Advice Memorandum 200225014 that taxpayers may elect to either produce an interim estimate or close their books in the middle of the year.[144]

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[138] 26 U.S.C. §§ 301(c)(1)–(3), 306(c)(1)–(3). Basis is a basic concept in tax, which enables a taxpayer to track his/her/its value in an asset, and thus calculate gain or loss. *Id.* § 1012. In the case of stock, basis is often the purchase price, or, if acquired at the corporation's inception (e.g., by the founder), may be equal to zero.

[139] This is a straightforward application of § 316(a). *See supra* note 136 and accompanying text.

[140] This situation is also addressed directly in Situation 2 of Revenue Ruling 74-164. *See* Rev. Rul. 74-164, 1974-1 C.B. 74.

[141] 26 C.F.R. § 1.316-2(b).

[142] *See* Rev. Rul. 74-164, 1974-1 C.B. 74 (Situation #3). In addition to imposing a novel rule, the interpretation in Revenue Ruling 74-164 also potentially interpreted the language of Regulation § 1.316-2 in a novel way: the regulation refers to situations in which current E&P "cannot be shown," which Revenue Ruling 74-164 applies to situations in which current E&P is negative. *Id.*

[143] *See* Field Service Advice Memorandum 200225014 (2002) at 2 ("If the calculations are examined in isolation, one might conclude that the revenue ruling mandates that a taxpayer must prorate its operating losses on a daily basis. Without regard to whether the taxpayer can show the actual amount of interim earnings and profits, such an approach would indeed be inconsistent with the regulation that indicates that the taxpayer must prorate if it cannot show the amount of interim earnings and profits available to the date of the distribution.").

[144] *Id.*; *see also* Abrams & Leatherman, *supra* note 86, at 119.

This example illustrates, first and foremost, the complex web of regulations and interpretive guidance that many taxpayers must navigate to make basic business decisions. In the aggregate, these rules have great "economic and political significance" to the decision-making process of corporate taxpayers. According to the U.S. Bureau of Economic Analysis, corporations paid nearly $2 trillion in net dividends in 2022 alone, or $14.5 trillion in the ten-year period from 2012–2022.[145]

Moreover, it provides yet another example of the IRS providing actionable rules with minimal process. The rules applied here primarily come from a Revenue Ruling and Field Service Advice Memo, which represent official IRS interpretations of the Code and regulations as applied to specific facts but which are not published in the Federal Register or subject to notice and comment.[146]

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These examples together demonstrate the extraordinary influence the Treasury and the IRS exercise over tax policy. As Revenue Procedure 93-27 demonstrates, a single guidance document may have enormous economic effect.[147] The various regulatory and sub-regulatory documents that explain how to characterize dividends under certain circumstances additionally demonstrate the breadth of tax guidance, showing its importance to understanding the impact of the tax code in areas large and small. Nevertheless, despite the authority exercised by the Treasury and the IRS, they have so far largely escaped challenges under the major questions or nondelegation doctrines on the basis of separation of powers concerns.

B. Tax Policy's Conflict with the Text

In what is now frequently cited as an early major questions case,[148] the Supreme Court in *Utility Air Regulatory Group v. EPA*[149] found that the EPA had exceeded its mandate in interpreting a section of the Clean Air Act ("CAA")[150] regulating stationary sources in areas deemed noncompliant with the National Ambient Air Quality Standards ("NAAQS").[151] Specifically, while the EPA felt

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145 U.S. Bureau of Economic Analysis, *Net corporate dividend payments (B056RC1A027N-BEA)*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/B056RC1A027NBEA [https://perma.cc/Q6N7-LZ7F].

146 *See Understanding IRS Guidance - A Brief Primer*, *supra* note 7.

147 *See supra* note 89.

148 For examples of recent major questions cases citing *Utility Air* as a foundational major questions case, see West Virginia v. EPA, 142 S. Ct. 2587, 2605–14 (2022) (seven distinct citations); King v. Burwell, 576 U.S. 473, 475 (2015); U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Louisiana v. Biden, 55 F.4th 1017, 1029 (5th Cir. 2022).

149 573 U.S. 302 (2014).

150 42 U.S.C. §§ 7401–7675.

151 *Id*. §§ 7408–7409.

"compelled" to regulate greenhouse gases for stationary sources,[152] the threshold emissions level triggering regulation under the CAA[153] made sense for conventional pollutants such as particulate matter and carbon monoxide[154] but "would be inconsistent with—in fact, would overthrow—the [CAA]'s structure and design."[155] The EPA thus proposed a novel—and atextual—way to "make its interpretation [that it was compelled to regulate greenhouse gases under the CAA] reasonable": in an interpretive rule known as the Tailoring Rule, it declared "a new threshold of *100,000* tons per year for greenhouse gases,"[156]—i.e., one thousand times the statutory threshold.[157] The Supreme Court "conclude[d] that EPA's rewriting of the statutory thresholds was impermissible."[158]

According to the *Utility Air* Court, the majorness of the EPA's action turned largely on the fact that "it would bring about an enormous and transformative expansion in the EPA's regulatory authority without clear congressional authorization."[159] *Utility Air* diverged from other cases typically grouped under the major questions doctrine in that it concerned a judgment made by an agency with the appropriate expertise[160] under a statute that was on point.[161] Instead, the Court's analysis focused on the EPA's position that, in order to "make its interpretation reasonable," it needed to issue a regulation directly

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[152] *See* Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 315 (2014). Specifically, EPA believed that the Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which permitted the regulation of greenhouse gases under the CAA, "compelled" it to regulate greenhouse gases for stationary sources as well as automobiles. *Id.*

[153] The CAA regulations applied to all stationary sources emitting at least one hundred tons per year of a pollutant regulated under the NAAQS. *Id.* at 322.

[154] The "criteria air pollutants" normally covered by the NAAQS include carbon monoxide, lead, ground-level ozone, nitrogen dioxide, particulate matter, and sulfur dioxide, all of which cause harmful side effects when released at the low threshold stipulated under the CAA. *See Criteria Air Pollutants*, U.S. Env't Prot. Agency (July 20, 2023), https://19january2017snapshot.epa.gov/criteria-air-pollutants_.html [https://perma.cc/V8XL-5ENA].

[155] *Utility Air*, 573 U.S. at 321–22. EPA estimated extending this threshold to greenhouse gases would increase the number of permits required from 15,000 to 6.1 million and administrative costs from $62 million to $21 billion. *Id.* at 322.

[156] *Id.* at 325 (emphasis in original).

[157] *See supra* note 153.

[158] *Id.* at 325.

[159] *Id.* at 324.

[160] *See supra* note 59.

[161] The Court has also noted in several major questions cases that the provision or act under which the agency claimed authority had rarely been invoked. *See supra* note 60. By contrast, it was uncontested in *Utility Air* that EPA had frequently invoked its regulatory authority under the provisions relating to Prevention of Significant Deterioration under the statute. *Utility Air,* 573 U.S. at 308 (noting EPA's longstanding interpretation that "the PSD provisions to apply to sources located in areas that are designated attainment or unclassifiable for any NAAQS pollutant," thus making "all stationary sources . . . potentially subject to PSD review"). Additionally, *Utility Air* did not concern an agency attempting to assert its authority through creative application of an old statute or provision: as the Court acknowledged, the EPA earnestly believed that the Clean Air Act's unambiguous language compelled regulation of the greenhouse gases under the PSD program. *Id.* at 315–16.

contrary to the text of the statute.[162] The Court saw this as further evidence that Congress could not have meant to delegate to the EPA the authority it assumed it had under the statute.[163]

The examples that follow parallel *Utility Air* in that they provide evidence of the Treasury and the IRS similarly promulgating regulations and issuing guidance in contradiction to the text of the statute. However, thus far such contradictions between the text of the statute and exercises of regulatory authority have gone unchallenged in the realm of tax policy.

1. Reporting Third-Party Network Transactions

Closely paralleling the situation in *Utility Air*, the IRS recently declared in a press release that it would impose a different threshold than that clearly prescribed in the Code for an information requirement applying to so-called gig-economy workers.[164] This press release followed Notice 2023-74[165] and Notice 2023-10,[166] in which the IRS unilaterally declared it would delay implementation of the threshold imposed by the Code. As in *Utility Air*, the IRS cited administrability concerns in choosing to implement a provision in conflict with the Code.[167]

In addition to dictating what constitutes taxable income,[168] the Code contains a series of provisions that stipulate when a payor must send the payee a form indicating the amount of the money received for specific transactions over the course of the year.[169] Most commonly, section 6041A requires that a company employing freelancers or other independent consultants provide a

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[162] *Id*. at 325.

[163] *Id*. at 328 ("[T]he need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.").

[164] *IRS Announces Delay in Form 1099-K Reporting Threshold for Third Party Platform Payments in 2023; Plans for a Threshold of $5,000 for 2024 to Phase in Implementation*, Internal Revenue Serv. (Jan. 8, 2024), https://www.irs.gov/newsroom/irs-announces-delay-in-form-1099-k-reporting-threshold-for-third-party-platform-payments-in-2023-plans-for-a-threshold-of-5000-for-2024-to-phase-in-implementation [https://perma.cc/SA7M-NL8P] [herein *IRS § 6050W Press Release*].

[165] Notice 2023-74, 2023-51 I.R.B. 1484 (2023).

[166] Notice 2023-10, 2023-3 I.R.B. 403 (2023).

[167] *See IRS § 6050W Press Release* ("Taking this phased-in approach is the right thing to do for the purposes of tax administration, and it prevents unnecessary confusion as we continue to look at changes to the Form 1040. It's clear that an additional delay for tax year 2023 will avoid problems for taxpayers, tax professionals and others in this area.").

[168] *See* 26 U.S.C. § 61 (defining gross income).

[169] *See generally id*. §§ 6041–6050Z.

1099-NEC[170] form if they make $600 or more in a given year.[171] The Housing and Economic Recovery Act of 2008[172] introduced a new reporting requirement for gig-economy workers, requiring companies to issue returns to contractors who received income via payment apps such as Venmo, PayPal, and Stripe.[173]

This requirement, codified as section 6050W, had the potential to impact millions of gig economy workers in the U.S.[174] To mitigate the potential administrability challenge this posed, the original provision contained a de minimis requirement exempting companies from issuing returns to contractors that either earned less than $20,000 that year through such third-party payments or conducted fewer than 200 transactions.[175] However, the American Rescue Plan Act of 2021 amended the de minimis requirement to require the company to file returns for all contractors earning more than $600, and

[170] From 1983 to 2020, payors instead issued payees 1099-MISC, indicating the amount of nonemployee compensation received over the course of the year in Box 7. *See* Kemberley Washington, *Why Did I Receive Form 1099-NEC Instead of Form 1099-MISC This Year?* FORBES (Apr. 2, 2021), https://www.forbes.com/advisor/taxes/received-form-1099-nec-instead-of-form-1099-misc [https://perma.cc/4GX3-GPKK]; *see also About Form 1099-MISC, Miscellaneous Information*, INTERNAL REVENUE SERV. (Oct. 4, 2023), https://www.irs.gov/forms-pubs/about-form-1099-misc [https://perma.cc/FA8A-SQEK]. The switch to the 1099-NEC, actually a reintroduction of a Reagan-era reporting form, was intended to be simplifying, *id.*, since the 1099-MISC was also used to provide taxpayers with information about items as diverse as royalties, purchases of fish for resale, and attorney fees, as required by other provisions. *See, e.g.*, 26 U.S.C. §§ 6050N (royalties), 6050R (fish), 6045(f) (attorney fees).

[171] *Id.* § 6041A. Technically, a taxpayer is required to report income whether or not they received a 1099. Robert W. Wood, *If You Don't Get Form 1099, Is It Taxable, Will IRS Know? (Hint: 'If A Tree Falls In The Forest. . .')*, FORBES (Nov. 22, 2021), https://www.forbes.com/sites/robertwood/2021/11/22/if-you-dont-get-form-1099-is-it-taxable-will-irs-know-hint-if-a-tree-falls-in-the-forest/?sh=342d53ff56cb [https://perma.cc/32SX-3KKT]. However, increased information reporting to the IRS is an important factor in tax compliance. *See generally* Bibek Adhikari, James Alm & Timothy F. Harris, *Small Business Tax Compliance Under Third-Party Reporting*, 203 J. PUB. ECON. 1 (2021), https://doi.org/10.1016/j.jpubeco.2021.104514 [https://perma.cc/75JN-F33P]; J. COMM. ON TAXATION, TAX GAP: OVERVIEW OF FEDERAL TAX PROVISIONS AND ANALYSIS OF SELECTED ISSUES 14–17 (2021), https://www.jct.gov/CMSPages/GetFile.aspx?guid=76d87c01-bee0-44a2-adb4-6c453baf1c8b [https://perma.cc/WYW5-J5XG].

[172] Pub. L. No. 110-289, 122 Stat. 2654 (2008).

[173] *Id.* at 122 Stat. 2908–11 (codified as 26 U.S.C. § 6050W). Specifically, the Code applies to "third party network transactions," defined as those settled via a network (A) "involv[ing] the establishment of accounts with a central organization by a substantial number of persons who . . . (i) are unrelated to such organization, (ii) provide goods or services, and (iii) have agreed to settle transactions for the provision of such goods or services pursuant to such agreement or arrangement, (B) which provides for standards and mechanisms for settling such transactions, and (C) which guarantees [payment for] persons providing goods or services" on the network. 26 U.S.C. § 6050W(c)(3), (d)(3). Less relevant to gig economy workers, the provision also applies to transactions made via "payment card." *See id.* § 6050W(c)(2). However, even where the end user enters his/her credit card information, most apps partner with Stripe or similar companies to provide the payment infrastructure. *See Customers*, STRIPE, https://stripe.com/customers [https://perma.cc/R2CE-DSV2] (Jan. 27, 2024) (Stripe's lengthy customer list, ranging from Amazon and Google to Instacart and Alaska Airlines).

[174] *See generally* Anat Bracha & Mary A. Burke, *Informal Work and Official Employment Statistics: What's Missing?* (Fed. Rsrv. Bank of Boston, Working Paper No. 23-15, 2023) (providing data on the potential number of gig workers in the U.S. economy).

[175] *See* Pub. L. No. 110-289, 122 Stat. 2910 (2008) (codified as 26 U.S.C. § 6050W(e)).

eliminated the transaction threshold.[176] The Joint Committee on Taxation estimated that decreasing the threshold would increase revenue by $8.4 billion over ten years due to increased tax compliance.[177] The IRS announcement responded to this change, first declaring the original threshold in effect and then declaring that, at least for 2024, it would apply a $5,000 threshold—rather than the $600 dictated by the Code—as a "phase-in."[178] While the IRS cited practical reasons for these actions,[179] it did not cite any authority to act contrary to the statute.

2. *Net Operating Losses*

In 2008, at the height of the financial crisis, the IRS issued Notice 2008-83,[180] which, contrary to the text of the Code, changed the extent to which corporations may offset taxable income with unrecognized net operating losses ("NOLs")[181] when purchasing a financial institution. Section 382 of the Code restricts the degree to which corporations may offset taxable income with NOLs incurred before an acquisition or significant change in equity ownership.[182] The Notice explicitly overrode this restriction for banks with NOLs attributable to "losses on loans or bad debts," stating that "[f]or purposes of section 382(h) . . . [such NOLs] shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date."[183] Substantively, the Notice allowed a company acquiring a bank that had written off a substantial portion of loans made to subprime borrowers to apply all of these losses to offset its taxable gains.

The IRS's issuance of Notice 2008-83 offers a clear parallel to the EPA's assertion of authority to regulate greenhouse gases in the realm of tax policy.

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[176] Pub. L. No. 117-2, § 9674, 135 Stat. 185 (2021).

[177] Anthony A. Cilluffo, IF12095, U.S. Cong. Rsch. Serv., Payment Settlement Entities and IRS Reporting Requirements 2 (2022) (citing the Joint Committee for the estimate).

[178] *See supra* notes 164–167 (describing the announcement in broad terms); *IRS § 6050W Press Release* (noting the $5,000 proposed phase-in).

[179] *See supra* note 167.

[180] Notice 2008-83, 2008-42 I.R.B. 905 (2008).

[181] Notice 2008-83 § 2. A Notice is "a public pronouncement that may contain guidance [and] that involves substantive interpretations of the Internal Revenue Code or other provisions of the law." *Understanding IRS Guidance - A Brief Primer*, *supra* note 7. Notices are often used to clarify a section of the Code prior to issuing a regulation. *Id.* In this way, though unique to tax law, Notices play a similar role as that played by "Interim Final Rules" ("IFRs") in other areas of law. *Cf.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020) (finding IFRs compliant with § 553 of the APA).

[182] *See* 26 U.S.C. §§ 382(a), 382(g). The provision provides that "[t]he amount of the taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed the section 382 limitation for such year," 26 U.S.C. § 382(a), generally defined as "the value of the old loss corporation, multiplied by the long-term tax-exempt rate," *id.* § 382(b)(1). Section 382(h) specifically extends the treatment of pre-change losses to NOLs. *Id.* § 382(h)(1)(B).

[183] Notice 2008-83 § 2.

While the Notice purported to interpret section 382,[184] its interpretation, like that of the EPA in *Utility Air*, directly contradicted the text of the statute and would "overthrow . . . [its] structure and design."[185] Moreover, unlike in *Utility Air*—but as in many other "major questions" cases[186]—the Notice achieved what members of Congress had repeatedly tried and failed to pass via legislation.[187] Finally, as in *Utility Air*, the economic consequence of this diversion from the statute was enormous,[188] costing an estimated $105-140 billion dollars in total.[189] In particular, the Notice played a critical role in facilitating high profile M&A activity involving banks struggling under the weight of mortgage debts during the financial crisis.[190] In the sale of Wachovia assets to Wells Fargo,[191] experts estimated the Notice alone resulted in $20 billion savings off the final purchase price.[192]

Congress eventually overruled Notice 2008-83 in the American Recovery and Reinvestment Act of 2009,[193] declaring the Notice "inconsistent with

[184] The phrasing opening section of the Notice provided that the IRS and Treasury were studying proper treatment of banks "*under* section 382(h) of the Internal Revenue Code (Code)," suggesting the interpretation was meant to be an interpretation of the application of the Code itself. Notice 2008-83 § 1 (emphasis added). *See also* Albert H. Choi, Quinn Curtis & Andrew T. Hayashi, *Crisis-Driven Tax Law: The Case of Section 382*, 23 FLA. TAX REV. 1, 5 (2019) (stating that the Notice was "styled as an interpretation of an obscure and convoluted provision of corporate tax law").

[185] Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014); *see infra* text accompanying note 183 (describing how the Notice overrode the statute, effectively editing § 382(h)).

[186] *See supra* note 61.

[187] Daniel L. Simmons, *Net Operating Losses and Section 382: Searching for a Limitation on Loss Carryovers*, 63 TUL. L. REV. 1045, 1051 (1989).

[188] *See supra* note 155.

[189] Amit R. Paley, *A quiet windfall for U.S. banks*, NBC NEWS (Nov. 10, 2008), https://www.nbcnews.com/id/wbna27635885 [https://perma.cc/M9ZR-Z6UP]. The law firm Jones Day, which provided an estimate at the high end of the range, subsequently published commentary clarifying that its earlier estimate was meant to be "extrapolative" rather than "authoritative." *Revisiting Notice 2008-83*, JONES DAY, at 1 (2008), https://www.jonesday.com/-/media/files/publications/2008/12/revisiting-notice-2008-83/files/revisiting-notice/fileattachment/revisiting-notice.pdf [https://perma.cc/9894-WLX8]. Interestingly, this subsequent commentary also took pains to reconcile the Notice with existing statutory law, characterizing it as "an appropriate and timely exercise of executive authority." *Id.* at 1–2. Congress itself eventually rejected this conclusion. *See infra* notes 193–195.

[190] *See* Choi et al., *supra* note 184, at 37 (presenting experimental evidence that surviving corporations of mergers that happened during the 3.5 month period between issuance of the Notice and its eventual repeal showed lower income growth relative to peers, suggesting the acquisitions were motivated more by tax considerations than operational synergies).

[191] Wells Fargo had reportedly walked away from the deal two days prior to the Notice being issued and subsequently resumed negotiations after its issuance. *See* Binyamin Appelbaum, *After Change In Tax Law, Wells Fargo Swoops In*, WASH. POST (Oct. 4, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/10/03/AR2008100301042.html [https://perma.cc/R7VR-HZD7].

[192] Dan Freed, *How Wells Fargo Won the Tax-Dodging Trophy*, THE STREET (Nov. 10, 2011), https://www.thestreet.com/investing/stocks/how-wells-fargo-won-the-tax-dodging-trophy-11306521 [https://perma.cc/6NYL-5JHC].

[193] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1261, 123 Stat. 115, 343 (2009).

[] congressional intent"[194] and concluding that "[t]he legal authority to prescribe Internal Revenue Service Notice 2008-83 [was] doubtful."[195] Nevertheless, in a gesture indicating the significant authority Congress has provided to the Treasury and the IRS to clarify tax policy through regulatory and sub-regulatory guidance,[196] Congress nonetheless justified its decision to disallow the Notice's application only prospectively based on the judgment that "taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury."[197]

Notice 2008-83 provides one example of tax guidance directly contravening the statute, despite the Court's explicit rejection of this practice in other contexts.[198] Much has been written about Notice 2008-83's brazenness.[199] However, as the following example demonstrates, it is in fact relatively routine for the agencies implementing tax policy to promulgate regulations unmoored from, and potentially in conflict with, the Code as written by Congress.

3. Application of the Remedial Method in Partnership Allocations

The "remedial method"[200] established through Treasury Regulation section 1.704-3(d) is another regulation arguably in conflict with the Code,[201] closely paralleling the Tailoring Rule at issue in *Utility Air*. The Treasury itself acknowledged this tension in the Final Regulations establishing the remedial method.[202]

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[194] *Id.* § 1261(a)(2).

[195] *Id.* § 1261(a)(3).

[196] As with many statutes, the Code contains many references to items to be clarified through regulation. For example, § 382 alone contains twenty-two sub-provisions that apply "to the extent" of or subject to exceptions in regulations to be promulgated. *See id.* § 382. More uniquely, however, the Code also contains a general grant of authority to the Treasury to "prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue," unless explicitly delegated to another official. *Id.* § 7805.

[197] *Id.* § 1261(a)(4). *But see* Coady v. Comm'r, 33 T.C. 771, 775, 775 n.2 (1960) (finding against the Commissioner despite express regulations supporting the government's position).

[198] From one perspective, the IRS has taken advantage of this broad delegation of authority by continuing to write regulations and offer guidance in tension with the text of the statute. *See, e.g.*, 26 C.F.R. § 1.351-1(a)(1) (regulation in contravention to the bright-line rule in a statutory provision it purports to interpret, surrounding what constitutes sufficient "control" over a corporation to qualify a taxpayer for nonrecognition when contributing property to a newly established corporation).

[199] *See, e.g.*, Choi et al., *supra* note 184; Nathaniel Cushman, Comment, *The Impact of Illegal Tax Guidance: Notice 2008-83*, 62 TAX LAW. 867 (2009); Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 TAX LAW. 493, 510–12 (2015). For a summary of other scholarship concerning the impact of Notice 2008-83, *see id.* at 511 n.57.

[200] 26 C.F.R. § 1.704-3(d).

[201] ABRAMS & LEATHERMAN, *supra* note 86, at 641 ("Because the remedial allocation method violates the ceiling limitation, it arguably is inconsistent with § 704(c)(1)(A).").

[202] Allocations Reflecting Built-in Gain or Loss on Property Contributed to a Partnership, 59 Fed. Reg. 66724, 66725 (1994) ("One comment questioned the Secretary's authority to issue

As mentioned above, partnerships have great flexibility to allocate tax items within the partnership.[203] However, the amount a partner receives upon liquidation—determined by his capital account[204]—must accurately reflect the economic substance of the underlying transactions performed between the partner and the partnership.[205] One implication of this is that, over the life of the partnership, a partner's basis in the assets of the partnership and his capital account should equalize.

The Code's treatment of property contributed by a partner to the partnership with built-in gain or loss provides one such example of this principle. When a partner contributes property to the partnership, no gain is recognized on the transfer by either the partner or the partnership,[206] and the partner's "outside basis" is the same as his basis in his asset before the transfer.[207] Meanwhile, the capital account reflects the fair market value of the contributed property,[208] giving rise to a temporary disparity. However, section 704(c)(1)(A) of the Code attempts to redress this disparity over time[209] by mandating that "income, gain, loss, and deduction with respect to property contributed . . . shall be shared among the partners so as to take account of the variation between the basis of the property to the partnership and its fair market value at the time of contribution."[210] That is, upon sale of the property, the differential between the fair market value and outside basis—in other words, the built-in gain or loss remaining in the property—shall be "trued up."[211]

The remedial method is one of three methods devised via regulation to address the unique situation in which the property turns around in value after it is contributed, resulting in a *loss* for accounting purposes but a *gain* for tax purposes. This is best illustrated through an example (*see* Table 1). Imagine Taxpayers A and B formed Partnership AB, and each contributed cash or property with value of $20,000: Taxpayer A contributed $20,000 cash while Taxpayer B contributed property with basis of $10,000 and fair market value

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regulations allowing partnerships to create notional tax items in order to make allocations under section 704(c)."); *see also infra* notes 217–218.

[203] *See supra* notes 103–109 and accompanying text.

[204] *See supra* note 103 and accompanying text.

[205] *See supra* note 105 (describing the "substantial economic effect" test that a partner must meet in order to receive a specific tax allocation).

[206] 26 U.S.C. § 721.

[207] *Id.* at § 722.

[208] 26 C.F.R. § 1.704-1(b)(2)(iv)(d).

[209] Congress further explained in the legislative history that the policy was intended to "prevent an artificial shifting of tax consequences between the partners with respect to pre-contribution gain or loss," particularly between partners in different tax brackets. H.R. Rep. No. 98-432, pt. 2, at 1209 (1984).

[210] 26 U.S.C. § 704(c)(1)(A).

[211] The same applies to annual depreciation deductions reflecting the decline in property value over its useful life. While all partners will share pro rata in the deduction on their capital accounts, any excess depreciation will then be allocated to the partner that contributed the property under this provision. 26 C.F.R. § 1.704-1(b)(2)(iv)(d).

of $20,000. If the property was subsequently sold for $14,000, there would be a $6,000 accounting loss; if Taxpayers A and B are equal partners according to the partnership agreement,[212] they would each realize an accounting loss of $3,000. Under section 704(c)(1)(A), Taxpayer B would recognize $4,000 in tax gain, but this only goes so far in correcting the disparity between the accounting totals and tax totals; in fact, after this allocation, *both* partners have disparities.

Table 1: Disparity Created by Sale of Property with Built-In Gain at a Loss

	A		***B***	
	Capital Account	**Outside Basis**	**Capital Account**	**Outside Basis**
Start	$20,000	$20,000	$20,000	$10,000
Book Loss	($3,000)	$0	($3,000)	$0
Tax Gain	$0	$0	$0	$4,000
Final	$17,000	$20,000	$17,000	$14,000

The remedial method proposes to correct this disparity with made-up numbers. In the above example, Taxpayer B would decrease her basis by $3,000, while Taxpayer A would increase her basis by an equal and offsetting $3,000. Thus, both partners would end up with a balance of $17,000 in both their capital accounts and outside bases (Table 2).

Table 2: Use of Remedial Method to Overcome the Accounting/Tax Disparity

	A		***B***	
	Capital Account	**Outside Basis**	**Capital Account**	**Outside Basis**
Start	$20,000	$20,000	$20,000	$10,000
Book Loss	($3,000)	$0	($3,000)	$0
Tax Gain	$0	$0	$0	$4,000
Pre-Remedial	$17,000	$20,000	$17,000	$14,000
Remedial	$0	($3,000)	$0	$3,000
Final	$17,000	$17,000	$17,000	$17,000

While this solution is computationally neat, it has no textual underpinning. In fact, in the Treasury's own interpretation, "the total income, gain,

[212] This is a simplifying assumption but need not be true. The partners may allocate tax items however they wish under the partnership agreement. *See supra* note 104.

loss, or deduction allocated to the partners for a taxable year with respect to a property *cannot exceed the total partnership income, gain, loss, or deduction with respect to that property for the taxable year*."[213] This so-called "ceiling rule"[214] appears directly in conflict with the remedial method, which involves adding tax items that are not based in "income, gain, loss, or deductions with respect to property" (from that year or otherwise).[215] Moreover, in promulgating the regulations, the Treasury not only noted taxpayer objections on this basis,[216] but, in an extraordinary admission, disclaimed the authority of the IRS to order a company to use the remedial method[217] on the basis that the regulation potentially conflicted with the statute.[218]

The Treasury's explanation of its approach to the remedial method suggests still another parallel to the Tailoring Rule at issue in *Utility Air*: the agency's failure to defend its regulations on textual grounds. The Treasury in the regulations justified its "solution" of making the remedial method voluntary on weak textual grounds, noting only that "Congress gave the Secretary [of the Treasury] broad authority to permit allocations that correct ceiling rule distortions," and citing to a House Report from the Ways and Means Committee issued in the lead up to the passage of present-day section 704(c)(1)(A).[219] Putting aside the fact that legislative history is not itself the law, and is therefore far from anything resembling a "clear statement" that could authorize such discretion, the language of the legislative history itself provided less than the ringing endorsement suggested by the language in the regulations. The authors of the House Report noted only that they "anticipated that the regulations [implementing section 704(c)(1)(A) would] permit partnerships to agree to a more rapid elimination of disparity among partners than required by the new rules by substituting items not described in section 704(c) for items described in section 704(c) and vice versa, provided there is no tax avoidance potential."[220] While ambiguous, the most plausible interpretation of the word "item" is to refer to something that already exists. Thus, the House Report's phrasing is most intuitively read to anticipate another method offered in the Final Regulations for addressing the problem created by the ceiling limitation,

[213] 26 C.F.R. § 1.704-3(b)(1) (emphasis added).

[214] *Id.*

[215] The regulations themselves acknowledge—in fact, "emphasize"—"that the remedial allocation method involves the creation of notional tax items by the partnership and is not dependent upon the actual tax items recognized by the partnership." Allocations Reflecting Built-in Gain or Loss on Property Contributed to a Partnership, 59 Fed. Reg. 66724, 66725 (1994).

[216] *See supra* note 202 and accompanying text.

[217] 26 C.F.R. § 1.704-3(d)(5)(ii).

[218] *See* Abrams & Leatherman, *supra* note 86, at 641. The reasoning behind this limitation can be discerned from the language in the Final Regulations that "[o]ffering partnerships a *voluntary* method of correcting ceiling rule distortions by creating notional tax items is consistent with this congressional grant of authority." 59 Fed. Reg. at 66725.

[219] 59 Fed. Reg. at 66725 (citing H.R. Rep. No. 98-432, pt. 2 at 1209 (1984)).

[220] H.R. Rep. No. 98-432, pt. 2 at 1209 (1984).

known as the "curative method."[221] This alternative method allows partnerships to adjust the tax allocation of other *existing* income, loss, or deductions in order to correct the accounting/tax disparity.[222]

Given the lack of textual grounding, it seems the true motivation for the remedial method is functional—just as the EPA sought to "make its interpretation [of authority] reasonable" through "alternation of statutory requirements."[223] The remedial method importantly "ensures that the contributing partner will bear the tax consequences of pre-contribution built-in gain" in that it involves making "allocations that precisely offset ceiling-limited items in amount and character."[224] Additionally, the regulations identify particular circumstances in which use of the remedial method would curb abuse because allowing the accounting/tax disparity to persist[225] would "shift[] a significant amount of taxable income to a partner with a low marginal tax rate and away from a partner with a high marginal tax rate."[226] Under such circumstances, the fact that the IRS may not order use of the remedial method[227] is problematic, particularly if the company has no other income, loss, or deductions with which to correct the disparity under the curative method.[228] However, notwithstanding the functional merit of the remedial method, *Utility Air* clearly states that "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[229] Despite this statement, the continued prevalence of the remedial method suggests that in tax law agencies remain willing to flout the statutory text in promulgating rules and regulations.

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[221] *See* 26 C.F.R. § 1.704-3(c).

[222] *Id.*

[223] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325–26 (2014); *see also supra* notes 153–154 and accompanying text.

[224] Karen C. Burke, *Bristol-Myers' Disappearing Gain*, 76 TAX LAW. 1, 12 (2022) (explaining the advantages of the remedial method).

[225] This is known as the "traditional method." *See* 26 C.F.R. § 1.704-3(b).

[226] *See id.* (Example 2).

[227] *See supra* note 217 and accompanying text.

[228] *See supra* note 222 and accompanying text (explaining the curative method). The regulations require that all "allocations must be made using a reasonable method that is consistent with the purpose of section 704(c)," 26 C.F.R. § 1.704-3(a)(1), and define allocations as "not reasonable if the contribution of property (or event that results in reverse section 704(c) allocations) and the corresponding allocation of tax items with respect to the property are made with a view to shifting the tax consequences of built-in gain or loss among the partners in a manner that substantially reduces the present value of the partners' aggregate tax liability," *id.* § 1.704-3(a)(10). Arguably, this would provide authority for the IRS to order correction under the curative method if the company had the income or loss streams to do so, but if not, it is unclear whether the IRS has any means of enforcing its own regulatory anti-abuse rules.

[229] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325 (2014).

IV. The Unique Balance of Power Involved in Tax Policy

As the previous Part shows, the IRS exercises far more power in the realm of tax policy compared to agencies acting in other areas of law.[230] Part IV.A considers—and ultimately rejects—two alternative explanations for why tax policy has thus far mostly avoided challenges on major questions grounds: (1) taxpayers' lack of standing to bring such challenges, and (2) tax exceptionalism. Part IV.B then argues that the lack of such challenges is due not to the nature of tax policy *itself*, but rather to the unique relationship between the executive branch and Congress in this area.

A. Alternative Explanations

1. Lack of Standing

Under modern standing doctrine, a plaintiff must show that it suffered "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'"[231] While concrete injuries may be intangible or tangible, they must be "'de facto'; that is, [they] must actually exist."[232] The particularization requirement further requires the plaintiff to show injury "in a personal and individual way."[233] Finally, the imminence prong, while "concededly a somewhat elastic concept," requires the plaintiff to show at least that injury will occur with high probability at a definite time in the future and regardless of the plaintiff's own actions.[234]

Modern standing doctrine presents a significant obstacle to taxpayers challenging policies that diverge from the Code in ways that benefit them. As Professor Lawrence Zelenak notes, deviations by the Treasury and the IRS from "the clear dictates of the Internal Revenue Code" are "always pro-taxpayer for the simple reason that taxpayers could and would successfully challenge in court any administrative attempt to deviate from the statute in an antitaxpayer direction."[235]

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[230] For a fuller discussion of Congress's failure to legislate in other policy realms, see *supra* note 5.

[231] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted) (internal quotations omitted). Though less emphasized by the Court, and less relevant in the context of bringing challenges to tax policies, the test for standing further requires that a plaintiff show "a causal connection between the injury and the conduct complained of," as well as a high likelihood that "the injury will be 'redressed by a favorable decision.'" *Id.* at 560–61 (citation omitted).

[232] Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016).

[233] *Id.* at 339 (citations omitted).

[234] *Lujan*, 504 U.S. at 564 n.2; *see also* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013) ("[Plaintiffs] cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.").

[235] *See* Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 Duke L.J. 829, 833 (2012). Professor Zelenak also describes such deviations as "customary" and an "established practice." *Id.*

Conceptually, this point fits within the larger argument that modern standing doctrine provides the *objects* of regulation more protection than regulatory *beneficiaries*,[236] potentially leading to "capture" by regulated industry.[237] Despite the Supreme Court's pronouncements that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III,"[238] this feature of standing is a relatively recent invention: as Professor Cass Sunstein documents, as late as 1970, the "legal injury" requirement of standing was understood "to allow standing for beneficiaries, who often faced statutory harm . . . by virtue of inadequate regulatory action."[239] The effort to confine standing to objects of regulation alone through the rigid "injury in fact test"[240] was "embodied in a private law model of standing," which sought to "define[] modern public law by reference to common law principles that appear nowhere in the Constitution . . . [and] seemed to be foreclosed by democratic judgments following the New Deal."[241] As this history recounts, the distinction drawn by the Court conferring standing primarily

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[236] In the case of tax regulations, the objects of regulation are taxpayers, while the beneficiaries are—at least theoretically—members of the public that benefit from the additional tax revenue.

[237] *See* Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 183–84 (1992) (noting the popularity, particularly in the 1960s and 1970s, of the view that standing doctrine primarily benefits objects of regulation).

[238] *Lujan*, 504 U.S. at 560. The Supreme Court commonly frames standing doctrine as a direct outgrowth of the Article III case and controversies requirement, minimizing the role of judicial interpretation. *See, e.g.*, *Spokeo*, 578 U.S. at 337–38 ("Standing to sue is a doctrine rooted in the traditional understanding of a[n Article III] case or controversy."); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) ("From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation, we have deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'") (citation omitted).

[239] *See* Sunstein, *supra* note 237, at 184. This theory was part of the New Deal effort to "adapt traditional administrative doctrines to the nature and aspirations of modern government," and persisted in the "language and framework" of the Administrative Procedure Act ("APA"). *Id.* at 184, 187.

[240] In Professor Sunstein's account, the "injury in fact" test began as a "misreading" by Professor Kenneth Culp Davis of the language in the APA providing standing to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," subsequently given authoritative weight by the Supreme Court in 1970 in Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970). Sunstein, *supra* note 237, at 185–86; *see* 5 U.S.C. § 702 (relevant language from the APA); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 152 ("The first question [in determining if a plaintiff has standing] is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.").

[241] Sunstein, *supra* note 237, at 187. The Supreme Court most recently espoused this view in TransUnion v. Ramirez, 594 U.S. 413 (2021), finding intangible harms concrete—"[c]hief[ly] . . . injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* at 425. The dissent interpreted—and derided—this statement as making "legislatures . . . constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this *Court thinks looks close enough to rights existing at common law*." *Id.* at 453 (Thomas, J., dissenting) (emphasis added).

to objects of regulation is far more recent than the Court's insistence on the link between modern standing doctrine and the Constitution would suggest.[242]

However, even taking for granted the traditional confines of modern standing doctrine, which would typically preclude suits by beneficiaries of a given tax policy, certain parties would nevertheless have standing to bring challenges against *generally* pro-taxpayer policies under specific circumstances.[243] As the Court noted in *Biden v. Nebraska*,[244] "administrative action resulting in the conferral of benefits" is not categorically exempt from major questions challenges.[245] For instance, minority investors in corporations or partnerships would have standing to challenge policies that affect them negatively, even if the policy benefits the majority investors.[246] A good example of this is the remedial method of partnership allocations mentioned in Part III.B.3, which the partnership would presumably only elect to use if the partners agreed that it was beneficial to do so.[247] However, limited liability companies ("LLCs") are taxed as partnerships under the Code[248] and frequently include investments from minority members that do not have a say in negotiating the LLC agreement.[249] If the LLC chose to use the remedial method against the best interest of the minority investor, the minority investor could

[242] While it does not explain the absence of challenges to tax regulations and guidance so far, the Court in Biden v. Nebraska, 143 S. Ct. 2355 (2023), recently signaled a willingness to reconsider the distinction between beneficiaries and objects of regulation, *id*. at 2374–75, which may bear on future challenges. At oral argument, the Solicitor General noted that "the distinction between regulation and benefits really [makes] a difference . . . [a]nd actually tracks some of the concerns that have been raised about standing and the Chief Justice's questions about who could actually sue on this plan and what role there is for the judiciary." Transcript of Oral Argument at 61, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506). *Nebraska* directly responded to this comment, stating it had "never drawn th[at] line . . . for good reason," and emphasizing the importance of Congress's control of the purse. *Id*. at 2375 (citing Transcript of Oral Argument at 61).

[243] In addition to the examples in this paragraph, Professor Zelenak provides an example in which a taxpayer who failed to report a certain tax item in one year in accordance with a "customary deviation" in which the IRS has systematically decided not to enforce such reporting; under the example, if the taxpayer subsequently wishes to sell the item and have the gain reflect the basis he *should* have, had he reported his income originally, he would conceivably have standing to challenge the IRS's policy of underenforcement despite it being generally beneficial to taxpayers. Zelenak, *supra* note 235, at 849. However, Zelenak undermines this example by noting that various "mitigation" provisions in the Code would apply in most circumstances. *Id*. Such provisions would disincentivize the taxpayer to bring this challenge by allowing for a resolution in which the taxpayer could claim the basis as if he originally reported the item and the IRS could collect the earlier-year tax. *Id*.

[244] 143 S. Ct. 2355 (2023).

[245] *Id*. at 2375 (citing West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (emphasis added)); *see also supra* note 242 (explaining the context surrounding this dicta).

[246] Such a pocketbook injury would satisfy even the strictest formulations of injury in fact. *See TransUnion*, 594 U.S. at 425 (defining injury in fact to include "any physical, *monetary*, or cognizable intangible harm traditionally recognized as providing a basis for a lawsuit in American courts") (emphasis added).

[247] As noted above, the IRS has explicitly disclaimed its ability to order use of the remedial method. *See supra* note 217.

[248] 26 U.S.C. § 761(a).

[249] *See generally* Elizabeth Seyle Fenton, *Representing Minority Members of an LLC in Negotiating an LLC Agreement*, Am. Bar Ass'n (Aug. 14, 2018), https://www.americanbar.org/

bring suit to challenge the policy. Additionally, in specific circumstances, a competitor might be able to sue under the APA to challenge a tax policy in the context of merger-related litigation.[250] For example, though no such suit was brought in practice,[251] a competitor to Wells Fargo conceivably would have had standing to challenge Notice 2008-83[252] if it had considered the purchase of Wachovia prior to issuance of the Notice but had dropped out of the process or lost on price because it did not account for carryover of the NOLs.[253] Finally, a short seller[254] would have standing to challenge a policy that *improved* a corporation's stock performance for the same reason a stockholder would have standing to challenge a policy that negatively impacted performance: the short seller would face a clear pocketbook injury[255] and should be able to satisfy the causation and redressability prongs of standing so long as she can

groups/business_law/resources/business-law-today/2018-august/representing-minority-members-of-an-llc [https://perma.cc/2YCC-TDV5].

[250] *Cf.* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970) (finding standing for competitors); *see also* 5 U.S.C. § 704 (providing judicial review for "final agency action for which there is no other adequate remedy in a court"). While the competitors would also need to show that they "fall within the zone of interests protected by the law invoked," this test is "not 'especially demanding,' . . . 'foreclos[ing] suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that' Congress authorized the plaintiff to sue." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129–30 (2014) (citing *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. 150; Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012)).

[251] In fact, Citigroup *did* bring suit after the Notice enabled Wells Fargo to submit a bid nearly seven times the size of Citigroup's earlier $2.2 billion bid for Wachovia. *See* Eric Dash, *Weekend Legal Frenzy Between Citigroup and Wells Fargo for Wachovia*, N.Y. Times (Oct. 5, 2008), https://www.nytimes.com/2008/10/06/business/06bank.html [https://perma.cc/8ETQ-4C64]. However, the lawsuit was targeted not at the IRS but rather at Wachovia for allegedly violating the terms of the standstill provision preventing it from negotiating an alternative deal with another bidder within a given time frame. *Id*. While Citigroup initially sought $60 billion in damages, it eventually settled with Wells Fargo for $100 million. Maria Aspan & Jonathan Stempel, *Wells Fargo to Pay Citi $100 Million over Wachovia*, Reuters (Nov. 19, 2010), https://www.reuters.com/article/idUSTRE6AI471 [https://perma.cc/HP68-5L74].

[252] *See supra* note 191 and accompanying text (explaining the impact of Notice 2008-83 on Wells Fargo's purchase of Wachovia).

[253] While a competitor to Wells Fargo would likely satisfy the "injury in fact" requirement, they would face an additional hurdle in showing "that the injury will be 'redressed by a favorable decision.'" *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992). In order to satisfy this prong of the test, the competitor would at a minimum need to sue before the merger closed and before the Notice was repealed, and it would need to demonstrate that Wells Fargo was likely to revise its bid if the Notice was not in place. While the redressability requirement is admittedly difficult to meet in this scenario, it is not difficult to imagine another scenario in which the challenged regulation or guidance provides an ongoing benefit, rather than a benefit that is only effective for a limited time, making redressability easier to meet.

[254] "Short selling" is a practice that allows a trader to profit from a decline in stock value through borrowing it at its current value, selling it, repurchasing the stock at the lower value, and then repaying the loan. *See generally* Lee Bohl, *Short Selling: The Risks and Rewards*, Charles Schwab (Aug. 9, 2022), https://www.schwab.com/learn/story/ins-and-outs-short-selling [https://perma.cc/3HR6-NFSY].

[255] Again, pocketbook injuries satisfy the strictest formulations of injury in fact. *See supra* note 246.

show that the improvement in the company's performance is "fairly traceable" to the change in policy.[256]

In conclusion, while standing likely does provide a barrier to challenges of tax policies that generally benefit taxpayers, it is not an insurmountable obstacle, both because of the fluctuating nature of standing doctrine itself and the fact that generally beneficial policies may harm certain stakeholders.

2. *Tax Exceptionalism*

Other than standing, another set of explanations for why broad assertions of authority by tax agencies have largely gone unchallenged fall under the umbrella heading of tax exceptionalism. Broadly speaking, these explanations seek to justify disparate treatment of tax agencies versus other agencies by pointing to the uniqueness of tax policy itself compared to other types of administrative action.

An originalist perspective that looks strictly to the views of the Founders contains thin support for tax exceptionalism. The Taxing and Spending Clause[257] and the Origination Clause[258] both plainly indicate that the Founders viewed the raising and apportionment of tax revenue as inherently legislative acts, and the Founders' early writings suggest that they viewed such power as generalizable to other types of legislative authority. In defending the Necessary and Proper Clause of the Constitution,[259] Alexander Hamilton assumed the power to collect taxes and used this presumption to defend Congress's ability to make needed laws more generally, asking rhetorically, "[w]hat is the power of laying and collecting taxes, but a legislative power, or a power of making laws, to lay and collect taxes?"[260] In Federalist No. 10, James Madison famously defended representative politics as a means of "secur[ing] the public good and private rights against the danger of [a majority] faction, and at the same time . . . preserv[ing] the spirit and the form of popular government."[261] While the majority of the treatise is devoted to effective legislating generally,

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[256] *See Lujan*, 504 U.S. at 560–61 (1992). However, it may also be difficult to isolate the effect of a given regulation or guidance document on company performance from other factors, including overall market conditions, inflation changes in supply or demand, and unrelated changes to the business model. *See* John Egan, *How Are Stock Prices Determined: The Factors that Affect Share Prices of Listed Companies*, Time (Jan. 5, 2024), https://time.com/personal-finance/article/how-are-stock-prices-determined [https://perma.cc/DG7X-ZX45].

[257] U.S. Const. art. I, § 8, cl. 1 (providing Congress with the "Power To lay and collect Taxes, Duties, Imposts and Excises").

[258] *Id.* § 7, cl. 1 (requiring "All Bills for raising Revenue" to originate in the House).

[259] *Id.* § 8, cl. 18.

[260] The Federalist No. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Parrillo, *supra* note 10, at 1316.

[261] The Federalist No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961); *see also* Philip A. Wallach, Why Congress 26 (2023).

Madison uses the apportionment of property taxes as a characteristic example of a "legislative act" vulnerable to the whims of "clashing interests."[262]

Legal and historical precedent also counsels against tax exceptionalism. The Supreme Court has repeatedly refused to rule that tax is exceptional within administrative law. The Court held tax unexceptional with regard to the delegation of legislative authority in *Skinner v. Mid-American Pipeline Co*.[263] Additionally, the Court held that *Chevron* deference applied to tax regulations in *Mayo Foundation for Medical Education & Research v. United States*.[264] Writing for a unanimous Court,[265] Chief Justice Roberts reasoned that the Court was "not inclined to carve out an approach to administrative review good for tax law only," suggesting that the holding in *Mayo* could apply more broadly to other doctrines of administrative review.[266] Most recently, in another unanimous opinion, *CIC Services, LLC v. IRS*[267] extended the logic from *Mayo* to uphold a pre-enforcement challenge under the Administrative Procedure Act against a Notice issued with insufficient notice and comment.[268]

Nevertheless, proponents of tax exceptionalism have advanced several theories, which warrant serious consideration despite the Roberts Court's disavowal of tax exceptionalism in *Mayo* and *CIC Services*. Refusal to *acknowledge* tax exceptionalism does not necessarily negate its application in practice. Moreover, as the Supreme Court appears poised to overturn or limit *Chevron* this term,[269] it is not clear how broadly to extrapolate from *Mayo*'s conclusion that *Chevron* should apply equally to tax policy as to other administrative actions.[270] This section thus considers three distinct arguments for tax exceptionalism based on key features of tax policy—its complexity, its constitutional grounding, and its importance to government functioning—but ultimately concludes that none of these arguments sufficiently support different administrative rules for tax authorities.

[262] The Federalist No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961); *see also* Parrillo, *supra* note 10, at 1316.

[263] 490 U.S. 212, 214 (1989) (holding that a provision of the Consolidated Omnibus Budget Reconciliation Act of 1985 directing the Secretary of Transportation to establish a fee schedule does not constitute "an unconstitutional delegation of the taxing power by Congress to the Executive Branch").

[264] 562 U.S. 44 (2011).

[265] Justice Kagan abstained.

[266] *Id*. at 55.

[267] 141 S. Ct. 1582 (2021).

[268] *Id*. at 1590–91.

[269] *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (March 27, 2023). The Supreme Court's decision to narrowly grant certiorari on the question of "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency," *id*., indicates its interest in reconsidering the scope of the *Chevron* doctrine.

[270] *See* Weisbach, *supra* note 8, at 9 (arguing that "[u]nless *Mayo Foundation* is read to be about other issues in administrative law, it may have little meaning because its central holding may be defunct," and noting the difficulties inherent in extrapolating from the Court's interpretation of *Chevron* to define the bounds of as yet undetermined administrative law doctrines).

First, some argue that the technical and complex nature of tax policy demands an agency with substantial expertise.[271] However, while lack of agency expertise is often invoked as a rationale for invoking the major questions doctrine,[272] the Court has not found the presence of technical expertise sufficient to prevent major questions challenges. As Justice Kagan pointed out in *Kisor v. Wilkie*,[273] the Food and Drug Administration ("FDA") must make significant technical judgments;[274] however, this did not preclude a major questions challenge to the FDA in *Brown & Williamson*.[275] Similarly, in *Utility Air*,[276] the nature of the review process at issue, which the EPA described as "complicated, resource-intensive, time-consuming, and sometimes contentious,"[277] was nonetheless subject to a major questions challenge.

Alternatively, others have advanced a constitutional theory for tax exceptionalism, which relies on the different authority ostensibly provided to Congress under the Taxing and Spending Clause versus the Commerce Clause. Chief Justice Roberts noted the different congressional power afforded to the different clauses in *National Federation of Independent Business v. Sebelius*.[278] He explained that while Congress may "bring its full weight to bear"[279] under the Commerce Clause[280] and "simply command individuals to do as it directs,"[281] the authority Congress derives under the Taxing and Spending Clause[282] is "limited to requiring an individual to pay money into the Federal Treasury, no more."[283] While Chief Justice Roberts does not cite any authority for this particular dicta, it is potentially extrapolated from *United States v. Butler*,[284] a *Lochner*-era decision cited in another part of the opinion, which held that the taxing power could not be used pretextually to exercise federal regulatory authority disavowed at the time the case was decided.[285] A potential

[271] *See, e.g.*, Gene Magidenko, Comment, *Tax Exceptionalism: Wanted Dead or Alive*, 45 U. MICH. J. L. REFORM CAVEAT 26, 29 (2012) (noting the substantive detail and complexity of the tax code).

[272] *See supra* note 59.

[273] 139 S. Ct. 2400 (2019).

[274] *Id.* at 2410, 2413.

[275] 529 U.S. 120, 156 (2000).

[276] 573 U.S. 302 (2014).

[277] *Id.* at 323.

[278] 567 U.S. 519 (2012).

[279] *Id.* at 573.

[280] U.S. CONST. art. I, § 8, cl. 3.

[281] *Sebelius*, 567 U.S. at 573.

[282] U.S. CONST. art. I, § 8, cl. 1, *amended by* U.S. CONST. amend. XVI.

[283] *Sebelius*, 567 U.S. at 574.

[284] 297 U.S. 1 (1936).

[285] *Id.* at 70. *Butler* in turn relied on several other cases—also from the *Lochner* era—all of which rejected the use of the taxing power to effectuate federal regulatory authority disavowed at the time. *Id.* (citing Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (rejecting use of taxing power to regulate intrastate manufacturing and trade); Hill v. Wallace, 259 U.S. 44 (1922) (same); Linder v. United States, 268 U.S. 5 (1925) (rejecting use of taxing power to regulate the practice of a profession); United States v. Constantine, 296 U.S. 287 (1935) (rejecting use of taxing power to impose sanctions for violation of a state liquor law)).

implication of Chief Justice Roberts's characterization of congressional power under the two clauses—though not an implication drawn explicitly by Chief Justice Roberts himself—is that Congress's taxing power impinges less on individual liberty and thus should be less vulnerable to a "major questions" critique.[286]

However, this constitutional argument for tax exceptionalism is, at a minimum, underdeveloped. First, the premise on which it rests—that Congress's power under the Taxing and Spending Clause and Commerce Clause power are inherently different—is far from unequivocal. Chief Justice Roberts's dicta is without attribution and, if based on *Butler*, the connection is tenuous. *Butler* did not explicitly disavow *all* authority to regulate personal behavior under the taxing power, but instead dismissed uses of taxing power to assert federal authority already considered unconstitutional at the time of the decision.[287] Chief Justice Roberts's own characterization of *Butler* as disallowing use of the taxing power to "regulate behavior otherwise regarded at the time as beyond federal authority" seems to admit this.[288] Moreover, even taking as true the implication that Commerce Clause authority might have *more* impact on individual liberty, it does not follow that the taxing power could not have such an effect. Indeed, Chief Justice Roberts refrained from drawing any explicit conclusions from his comparison of the two clauses and took pains "not [to] make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose."[289]

A final argument for tax exceptionalism, put forth by Professor Carlton Smith in an amicus brief to the *Mayo* Court, is that the IRS's unique mission to raise revenues for the government makes the agency inherently less of a "neutral arbiter" than other agencies.[290] One practical manifestation of this sort of mission-driven tax exceptionalism is the traditional interpretation of the Anti-Injunction Act—which bars suits "for the purpose of restraining the assessment or collection of any tax"—to prevent challenges to tax assessments before the taxes are paid.[291] This interpretation "protects the Government's ability to collect a consistent stream of revenue."[292] However, it constitutes a type of tax exceptionalism by effectively barring challenge to all tax rules and regulations, which are generally entitled to a presumption of judicial review under normal administrative principles.[293]

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[286] *See also* Magidenko, *supra* note 271, at 28 (arguing without additional explanation that the different histories of the two clauses, and the differences in the analyses applied to each, might justify tax exceptionalism).

[287] *See supra* note 285 (detailing the examples of illegal taxing power cited in *Butler*).

[288] *Sebelius*, 567 U.S. at 572.

[289] *Id*. at 574.

[290] Brief of Tax Professor Carlton M. Smith as Amicus Curiae Supporting Petitioners at 36, Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44 (2011) (No. 09-837).

[291] Pub. L. No. 39-169, § 10, 14 Stat. 475 (Mar. 2, 1867) (codified today at 26 U.S.C. § 7421(a)).

[292] *See Sebelius*, 567 U.S. at 543.

[293] *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 140–41 (1967).

However, two recent Supreme Court cases cut against the notion of mission-driven tax exceptionalism. First, concurring in *Polselli v. IRS*,[294] Justice Jackson expressly rejected Professor Smith's assertion that the IRS's mission made it exceptional.[295] Interpreting a statutory provision that on its face appeared to grant the IRS broad authority to issue unnoticed summons,[296] she declared that, "while the need for efficient tax administration is certainly important and Congress has given the agency lots of attendant authority," "the statute's balancing of interests" should counsel against interpreting the provision as a "blank check."[297] Second, in *CIC Services*, mentioned above,[298] the Supreme Court upheld a regulatory challenge to an IRS Notice, rejecting the IRS's argument that, since violation of the Notice would have resulted in a tax penalty, the suit was barred by the Anti-Injunction Act.[299] *CIC Services* thus narrowed the exception provided by the Anti-Injunction Act, eliminating its function as a bar to regulatory challenges, at least in several circumstances commonly met by tax regulations.[300]

In conclusion, since tax has not been found exempt from administrative law writ large, it is necessary to look to principles of administrative law to explain the deference afforded to the IRS and Treasury to conduct tax policy through regulatory and sub-regulatory means.

B. Reconciliation: Tax Policy as a Model of Congressional Oversight

This Note posits another possible explanation for why the Treasury and the IRS have thus far largely avoided major questions challenges: while they exert similar or greater power to other agencies, the exercise of that power is balanced out by a more active Congress in this policy realm, thus mitigating separation of powers concerns. One reading of the major questions doctrine fundamentally turns on the balance of power: that is, the doctrine allows for a strong executive branch insofar as it is accompanied by a strong legislative branch. Under this framing, it is not agencies seizing power but rather Congress failing to pull its weight that has upset the balance of power. Thus, in the realm of tax policy, in which Congress remains active, the executive and

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[294] 598 U.S. 432 (2023).

[295] *Id.* at 445–48 (Jackson, J., concurring) (Justice Gorsuch joined Justice Jackson's concurrence).

[296] 26 U.S.C. § 7609(c)(2)(D)(i) (exempting from the requirement to provide notice to summoned third parties such summons "issued in aid of the collection of . . . an assessment made or judgment rendered against the person with respect to whose liability the summons is issued").

[297] *Polselli*, 598 U.S. at 445–46 (Jackson, J., concurring).

[298] *See supra* notes 267–268 and accompanying text.

[299] *CIC Services*, 141 S. Ct. 1582, 1589 (2021).

[300] Specifically, the Court in *CIC Services* found the tax regulation at issue was not subject to the Anti-Injunction Act restriction where the regulation (1) "inflict[ed] costs separate and apart from the statutory tax penalty," including compliance costs, (2) resulted in a statutory tax penalty "several steps removed" from the obligations imposed by the regulation, and (3) contained criminal penalties for noncompliance in addition to tax penalties. *Id.* at 1591–92.

legislative branches remain balanced, which in turn permits stronger agency action without triggering major questions challenges.

Though Congress delegates significant authority to the Treasury and the IRS to make tax policy,[301] Congress also exercises its authority in several distinct ways, mollifying separation of powers concerns that tax agencies exercising power may otherwise raise.

First, in the realm of tax policy, Congress often takes note of agency action and acts correctively. The altered treatment of net operating losses during the financial crisis provides a strong example of this dynamic.[302] While Congress chose to act prospectively to maintain taxpayer confidence in agency action,[303] it nevertheless acted as a check on what it viewed as agency discretion gone too far. Another example pertains to a transaction known as a "Reverse Morris Trust,"[304] in which a corporation completes a tax-free reorganization of a subsidiary with another corporation by first spinning off the subsidiary in a tax-free spin-off[305] and then subsequently combining the subsidiary with the other corporation in a tax-free reorganization.[306] The IRS initially disallowed these transactions under Revenue Ruling 70-225,[307] but Congress subsequently passed section 368(a)(2)(H)(ii) condoning such transactions and, thus, effectively reversing the Revenue Ruling.[308]

Second, Congress is more active in passing tax legislation than it is in passing other types of legislation.[309] In recent years, Congress has passed comprehensive tax reform with Public Law 115-97, commonly referred to as the Tax Cut and Jobs Act of 2017.[310] Moreover, several other recent

[301] *See supra* notes 194–197.
[302] *See supra* Part III.
[303] *See supra* note 197.
[304] The name "Morris Trust" refers to a case in which the Fourth Circuit condoned a similar transaction. Comm'r v. Morris Tr., 367 F.2d 794, 799 (4th Cir. 1966). The reverse moniker refers to the fact that the transaction at issue in *Morris Trust*—now called a forward Morris Trust—involved a tax-free spin-off, followed by a merger of the *remaining* company rather than the company that was spun off.
[305] *See* 26 U.S.C. § 368(a)(1)(D) (permitting tax-free reorganizations that involve acquiring a subsidiary (permitted under § 354), disposing of a subsidiary (permitted under § 355), including ones of either type where the acquirer pays with non-stock consideration (under § 356)); *id.* § 355(a) (describing the requirements for a tax-free divisive reorganization, colloquially known as a "spin-off").
[306] *Id.* § 368(a)(1)(A) (permitting tax-free treatment of a "statutory merger").
[307] 1970-1 C.B. 80.
[308] 26 U.S.C. § 368(a)(2)(H)(ii) (allowing the tax-free spin-off to still qualify as such regardless of whether the "shareholders of the distributing corporation dispose of part or all of the distributed stock, or . . . the corporation whose stock was distributed issues additional stock").
[309] *See e.g.*, Magidenko, *supra* note 271, at 29 (finding through a search of the Library of Congress portal that the Code is the most popular target for amendments during each session of Congress).
[310] Pub. L. No. 115-97, 131 Stat. 2054 (2017); *see also Tax Cuts and Jobs Act: A Comparison for Businesses*, Internal Revenue Serv. (July 11, 2022), https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-businesses [https://perma.cc/283F-7WYK] (describing the changes made by the TCJA for corporate taxpayers); *Individuals: Tax Reform Provisions that Affect Individuals*, Internal Revenue Serv. (Feb. 28, 2023), https://www.irs.gov/newsroom/

pieces of legislation meant to address manufacturing,[311] climate change,[312] or healthcare[313] in substance provided significant edits to the Code.[314] As observed by numerous scholars,[315] this propensity to use the Code to make substantive policy in other areas is largely attributable to the budget reconciliation process established by the Congressional Budget and Impoundment Control Act of 1974.[316] This Act created an expedited process for passing policies affecting spending and revenue.[317] Subsequent acts of Congress also established the so-called "Byrd rule," [318] which narrowed the scope of what could

individuals [https://perma.cc/5KSQ-D8Q4] (describing changes made by the TCJA affecting individual taxpayers). As a note on terminology, the bill passed the House with the title Tax Cuts and Jobs Act, but this name was officially dropped from the final version that passed the Senate because Senator Bernie Sanders objected that the clause supplying this short name was extraneous under the Byrd Rule. *See* Eli Watkins, *Senate Rules Force Republicans to go with Lengthy Name for Tax Plan*, CNN (Dec. 19, 2017), https://edition.cnn.com/2017/12/19/politics/tax-bill-name-delay/index.html [https://perma.cc/FKM7-DGZY]. For a more extensive discussion of the Byrd Rule, *see infra* notes 318–319 and accompanying text.

[311] *See, e.g.*, Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022, Pub. L. No. 117-167, § 107, 136 Stat. 1393 (2022) (codified as 26 U.S.C. § 48D) (establishing the "advanced manufacturing investment credit," providing a credit for qualified investments in facilities or equipment for semi-conductor manufacturing).

[312] *See, e.g.*, Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80402(c)–(f), 135 Stat. 1334–35 (2021) (amending 26 U.S.C. §§ 146(g), 141(b)(6), and 45Q(f), in order to provide incentives for carbon sequestration and storage); Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 13401–04, 136 Stat. 1954–62 (Aug. 16, 2022) (amending existing Code provisions or establishing new provisions in order to implement credits for new, used, and commercial electric vehicles); *id.* §§ 13101–03, §§ 13701–03 (modifying the structure of existing tax credits for solar and wind development).

[313] *See, e.g.*, *Affordable Care Act Tax Provisions*, Internal Revenue Serv. (Nov. 16, 2022), https://www.irs.gov/affordable-care-act/affordable-care-act-tax-provisions [https://perma.cc/PTW6-FBKE] (cataloguing the tax provisions in the Affordable Care Act, which established "Obamacare").

[314] *See also* Weisbach, *supra* note 8, at 59 ("As is well-known, a large number of 'non-tax' programs are implemented through the tax system (non-tax is in scare quotes because if they are implemented through the tax system, they are tax in some basic sense).").

[315] *See, e.g.*, Wallach, *supra* note 261, at 162, 166 (contending that "both parties now see [budget reconciliation] as the best vehicle for implementing any part of their agenda related to taxing and spending" and noting ways in which the use of the maneuver has diverged from the vision espoused by its drafters); Freeman & Stephenson, *supra* note 13, at 323 (noting the broad uses of budget reconciliation, unanticipated by its drafters, ranging from the Affordable Care Act to the expansion of oil and gas drilling in the Arctic National Wildlife Refuge); Walker, *supra* note 14, at 778 (observing Congress has used budget reconciliation "aggressively" in recent years).

[316] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 310, 88 Stat. 315–16 (1974).

[317] In particular, the Act eliminates the filibuster for bills passed through budget reconciliation, imposes time limitations on debate, and prohibits amendments. *Id.* §§ 305, 310(e). The Act is thus itself a good example of the type of fix Congress could impose to reduce legislative gridlock. *See supra* notes 11–14 and accompanying text.

[318] The Byrd rule, named after its key proponent, Senator Robert C. Byrd, was first passed as a temporary provision through Amendment No. 878 to the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 390–91 (1986). The Omnibus Budget Reconciliation Act of 1990 subsequently made the Byrd rule permanent and incorporated it into the Congressional Budget and Impoundment Control Act of 1974. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13214, 104 Stat. 1388–621 (1990) (codified

be passed through reconciliation to changes that would directly alter outlays or revenues, or the terms under which such revenue is collected.[319] Though perhaps as distortionary as it is expeditious—as observed by American Enterprise Institute Senior Fellow Phillip Wallach, "senators tie themselves into pretzels attempting to comply with the Byrd Rule"[320]—one upshot is an increase in policymaking through tax bills, which fit squarely within the boundaries drawn by the Byrd rule.

However, in addition to those passed via Reconciliation, Congress has also recently passed bipartisan tax bills. For example, in 2019 and 2022, Congress overwhelmingly passed two bipartisan bills that modified the requirements for 401(k) plans and other tax-favored saving accounts.[321] Additionally, at the time of writing, the Senate is considering a $79 billion bill, which would both extend certain business-friendly tax credits initially included in Public Law 115-97 and expand the Child Tax Credit.[322] The bill garnered bipartisan support in the House, ultimately passing 357 to 70.[323]

Third, in addition to passing comprehensive tax legislation, Congress has frequently made piecemeal edits to individual Code sections in response to taxpayer behavior, demonstrating its capacity to iteratively edit the tax

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as 2 U.S.C. § 644). *See also* ROBERT KEITH, RL30862, CONG. RSCH. SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 2–3 (2022).

[319] *See* Keith, *supra* note 318, at 4 (2022); Daniel Hamel & David Herzig, *The Art of the (Budget) Deal*, YALE J. ON REGUL. NOTICE & COMMENT (Dec. 2, 2016), https://www.yalejreg.com/nc/the-art-of-the-budget-deal-by-daniel-hemel-and-david-herzig [https://perma.cc/8K9Z-SSJP] (expanding on the Byrd rule requirements).

[320] WALLACH, *supra* note 261, at 162.

[321] A version of the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Pub. L. No. 116-94, 133 Stat. 3137 (2019), passed the House 417 to 3. *See Roll Call 231 | Bill Number: H.R. 1994*, U.S. HOUSE OF REPS. (May 23, 2019), https://clerk.house.gov/Votes/2019231 [https://perma.cc/74N9-K8YT]. However, it was subsequently combined with another version in the Senate and the final version was incorporated into the Further Consolidated Appropriations Act of 2020, which passed the House 297 to 120 and the Senate 71 to 23. H.R. 1865, 116th Cong. (2019). *H.R.1865 - Further Consolidated Appropriations Act, 2020*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/1865/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D [https://perma.cc/HDQ3-YYWX]. SECURE 2.0 passed as part of a $1.65 trillion spending bill passed the House 225 to 201 (along party lines) and the Senate 68 to 29 (with bipartisan support). *See* Alex Ortolani, *Congress Passes SECURE 2.0*, PLANSPONSOR (Dec. 23, 2022), https://www.plansponsor.com/congress-passes-secure-2-0 [https://perma.cc/M6XN-6GUN]; Paul Mulholland, *With SECURE 2.0 Through the Senate, Retirement Experts Widely Endorse House Approval*, PLANSPONSOR (Dec. 22, 2022), https://www.plansponsor.com/secure-2-0-senate-retirement-experts-widely-endorse-house-approval [https://perma.cc/9NW5-JTFY].

[322] *See* Cady Stanton & Doug Sword, *Big House Tax Vote Could Lead Senate to Skip Usual 'Razzmatazz,'* TAX NOTES (Feb. 1, 2024), https://www.taxnotes.com/tax-notes-today-federal/tax-policy/big-house-tax-vote-could-lead-senate-skip-usual-razzmatazz/2024/02/01/7j4tg [https://perma.cc/ZLT9-PX8C]. Though the coverage and scoring of the bill largely focuses on these two provisions, the bill would also expand the low-income housing credit and authorize the administration to devise a bilateral tax agreement with Taiwan through the Code. *Id*.

[323] *Id*. Interestingly, the assents and dissents were also split by party, with forty-seven Republicans and twenty-three Democrats dissenting. *See Roll Call 30 | Bill Number: H. R. 7024*, U.S. HOUSE OF REPS. (Jan. 31, 2024), https://clerk.house.gov/Votes/202430?RollCallNum=30&BillNum=H.R.7024 [https://perma.cc/JSR4-TMWH].

Code through legislation. In its annual report summarizing tax legislation passed by the current Congress,[324] the Joint Committee of Taxation[325] has recently listed isolated changes—for example, changes to the definition of income for purposes of determining tax-exempt status of co-op telephone or electric companies[326] or tax exemptions for telehealth services[327]—alongside many of the comprehensive bills listed above. In fact, Professors Thomas Brennan and David Schizer have argued that in the tax context Congress often favors one-off "Band-Aid" solutions to fundamental reforms.[328] They use the example of section 1260, enacted in 1999 and subsequently revised in 2004 and 2007,[329] which was intended to address the practice of investment banks offering investors derivatives that track hedge fund returns without triggering short-term gain.[330]

In addition to these recent examples, students of taxation will observe that some of the largest tax cases of the twenty-first century have triggered an immediate congressional response. Congressional responses to two landmark Supreme Court tax cases—*Eisner v. Macomber*[331] and *General Utilities & Operating Co. v. Helvering*[332]—demonstrate Congress's attentiveness both to judicial rulings and to taxpayer behavior. In each case, Congress adjusted the Code to reflect, but not fully codify, the Court's ruling. In *Eisner*, the Court held that a pro rata stock dividend from Standard Oil—colloquially, a "stock split"—should not be taxed, since no income was actually received.[333] In 1954, Congress codified this holding as section 305(a) of the Code.[334]

However, Congress did not give the same unbounded permission provided by *Eisner*, instead cabining the provision in two ways. First, it passed section 306 in response to a common scheme used by taxpayers to extract

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[324] *See generally* Joint Comm. On Taxation (last visited Feb. 1, 2024), https://www.jct.gov/publications/?category_name=Bluebooks&pg=2 [https://perma.cc/YX4W-9683].

[325] In order to effectively craft tax policy, Congress relies in part on the nonpartisan Joint Committee on Taxation, which assists the Senate Finance Committee and Chairman of the House Ways and Means Committee with "development and analysis of legislative proposals; [p]reparing official revenue estimates of all tax legislation considered by the Congress; [d]rafting legislative histories for tax-related bills; and [i]nvestigating various aspects of the Federal tax system." *See Overview*, Joint Comm. on Tax'n, U.S. Cong., https://www.jct.gov/about-us/overview [https://perma.cc/68LP-W4JF].

[326] Joint Comm. on Taxation, General Explanation of Tax Legislation Enacted in the 116th Congress, at 259–60 (2022).

[327] Joint Comm. on Taxation, General Explanation of Tax Legislation Enacted in the 117th Congress, at 158–60 (2023).

[328] *See* Thomas Brennan & David Schizer, *Transaction-Specific Tax Reform in Three Steps: The Case of Constructive Ownership*, 15 Colum. J. Tax L. 1, 5 (2024).

[329] *See* Pub. L. 106-170, title V, § 534(a), 113 Stat. 1931 (1999); Pub. L. 108-357, title IV, § 413(c)(23), 118 Stat. 1509 (2004); Pub. L. 110-172, § 11(a)(23), (24)(B), 121 Stat. 2486 (2007).

[330] Brennan & Schizer, *supra* note 328, at 7.

[331] 252 U.S. 189 (1920).

[332] 296 U.S. 200 (1935).

[333] *Eisner*, 252 U.S. at 202–03.

[334] Internal Revenue Code of 1954, 68A Stat. 90 (1954) (codified as 26 U.S.C. § 305(a)).

value from corporations at low tax rates by issuing preferred stock and subsequently selling it to third-parties in return for cash.[335] Section 306 provided that while such preferred stock would not be taxed at the time of distribution, it would be taxed at the time of sale to a third party.[336] Second, Congress updated the Code[337] to include a long list of exceptions to the application of *Eisner* in section 305(b)–(c).[338] In *General Utilities*,[339] the Supreme Court held that a taxpayer corporation need not realize gain on appreciated property when it distributes the property to shareholders.[340] As with *Eisner*, Congress originally codified this holding in the 1954 Code, as section 311(a).[341] However, taxpayers predictably took advantage of the provision to avoid paying tax on sales of appreciated property by first distributing the property to shareholders and then contracting with a third party to buy it directly from the shareholders.[342] In reaction, Congress revised the Code in 1986 to require corporations to realize gain when distributing appreciated property.[343]

Demonstrating similar attention to lower court holdings, Congress also responded to *Kimbell-Diamond Milling Co. v. Commissioner*[344] by first codifying the holding of the Tax Court, then subsequently revising the Code to curb taxpayer abuse. The Court in *Kimbell-Diamond* held that a purchase of a company with a high basis in a particular asset, followed by liquidation of that company, should functionally count as an asset purchase from the perspective of the purchaser.[345] Four years later, Congress passed section 334(b)(2), codifying the holding.[346] However, both the Tax Court and the subsequently passed provision were silent on the tax treatment to the *seller*. Taxpayers successfully

[335] *See* Chamberlain v. Commissioner, 207 F.2d 462 (6th Cir. 1953) (example of this scheme, known as a "preferred stock bailout"). Under this scheme, any gains would be taxed at the capital gains rate, which is roughly half the rate paid on ordinary income. *Id.* (discussing the pre-§ 306 scheme); *supra* note 91 (detailing capital gains rates).

[336] Internal Revenue Code of 1954, 68A Stat. 90–93 (1954) (codified as 26 U.S.C. § 306).

[337] Internal Revenue Code of 1969, Pub. L. No. 91-172, 83 Stat. 614–15 (1969) (codified as 26 U.S.C. § 305(b)–(c)).

[338] Section 305(b) provides that distributions in lieu of money, distributions that create a disproportionate interest for some shareholders, distributions of common and preferred stock on common stock, distributions on preferred stock, and distributions of convertible preferred stock are taxed, 26 U.S.C. § 305(b), while § 305(c) empowers the Secretary of the Treasury to promulgate regulations treating other transactions as disproportionate and thus taxable, *id.* at § 306(c). That only § 305(b)(1) appeared in the 1954 version of the Code, with the remainder added in 1969, suggests that the added provisions were responsive to specific taxpayer schemes.

[339] 296 U.S. 200 (1935).

[340] *Id.* at 206 ("Both tribunals below rightly decided that petitioner derived no taxable gain from the distribution among its stockholders of the Islands Edison shares as a dividend.").

[341] Internal Revenue Code of 1954, 68A Stat. 94 (1954) (codified as 26 U.S.C. § 311(a)).

[342] In *General Utilities*, the taxpayer used this transaction to avoid paying taxes on over one million dollars of profit (in 1928) from appreciated stock that it sold to a third party. *General Utilities*, 296 U.S. at 203.

[343] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2272 (1986) (codified as 26 U.S.C. § 311(b)).

[344] 14 T.C. 74 (1950), *aff'd*, 187 F.2d 718 (5th Cir. 1951).

[345] *Id.* at 80.

[346] Internal Revenue Code of 1954, ch. 736, 68A Stat. 105 (Aug. 16, 1954).

exploited this silence, arguing that it implied the seller need not recharacterize the transaction and may continue to treat it as a sale of stock, while the purchaser could be taxed as if it had purchased assets.[347] In response, Congress replaced section 334(b)(2) with section 338 in 1982,[348] allowing taxpayers to jointly elect to treat a purchase of at least eighty percent of the outstanding stock (within a twelve-year period) as an asset purchase, but requiring that such treatment apply to both purchaser and seller.[349]

Congress has also been willing to respond to taxpayer behavior it deemed abusive even where not first flagged by the courts. One example of this is section 358(h), passed by Congress in response to a transaction in which Black & Decker took advantage of the rules surrounding liabilities that give rise to a deduction once paid.[350] Generally, the Code provides that gain or loss shall not be taxed on property transferred to a corporation for stock if the transferor retains at least eighty percent control after the transfer.[351] The Code further extends this treatment where the taxpayer would also assume a liability that would give rise to a deduction once paid (e.g., accounts payable, savings for future health care payments). That is, no gain is recognized under such circumstances,[352] and the taxpayer's basis (i.e., its value for tax purposes)[353] in the asset is also not reduced.[354] One way a corporation can take advantage of this tax provision is by setting up a subsidiary containing the liabilities and cash of a similar value; the economic value of this subsidiary is low (equal to the difference between the cash and the value of the liabilities), but the basis remains high. The corporation can then sell shares in the subsidiary, recognizing a (potentially substantial) loss that can be used to offset any other taxable gains the corporation may have. Black & Decker undertook precisely

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347 *See, e.g.*, Pittsburgh Realty Inv. Tr. v. Comm'r, 67 T.C. 260 (1976) ("While under Kimbell-Diamond or section 334(b)(2), its statutory counterpart, petitioner's purchase of the CHI stock and subsequent liquidation of CHI may be considered a purchase of CHI's assets, neither authority warrants recharacterization of the transaction for other than basis purposes."); Fox & Hounds, Inc. v. Comm'r, 21 T.C.M. 1216 (1962) ("The parties are in apparent agreement, no issue being raised or argument made to the contrary, that though as to the [seller] the transaction between them and the [purchaser] was a sale of Restaurant Company stock, it was for the [purchaser] a purchase of the business and assets of Restaurant Company."); *see also* Kass v. Comm'r, 60 T.C. 218 (1973) (post *Kimbell-Diamond* and pre-§ 338 instance of taxpayer resisting characterization of the transaction as a tax-free reorganization because this would preclude asymmetric treatment of the seller and purchaser).

348 The legislative history is explicit that the reason for the change was to discourage asymmetric treatment of an acquisition by purchaser and seller. *See* S. Rep. No. 97-494, Vol. 1, 97th Cong., 2nd Sess., at 192 (1982) ("[I]nconsistency is inherent in permitting a continuation of the acquired corporation's tax attributes for up to 5 years after a stock purchase while also treating the transaction as though assets had been purchased.").

349 26 U.S.C. §§ 338(a), (g), (h)(10).

350 Black & Decker Corp. v. United States, 436 F.3d 431 (4th Cir. 2006) (describing the transaction).

351 26 U.S.C. § 351(a). The purpose of this provision is to encourage business incorporation.

352 *Id.* § 357(c)(3).

353 For more information on basis, see *supra* note 138.

354 *Id.* § 358(d).

this transaction in 1998.[355] Two years later, Congress reacted by passing section 358(h), requiring that basis be reduced by the assumed liability in most circumstances.[356]

Another example of Congress responding directly to taxpayer behavior is section 1059(e)(1)(A)(iii)(I), passed by Congress in response to an abusive transaction by Seagram, Co. In determining whether a distribution in exchange for property is "essentially equivalent to a dividend"[357] and should be taxed as such, the Code considers the change in ownership level as a result of the distribution, and characterizes the distribution as a dividend if the shareholder's holdings immediately *after* the distribution are at least eighty percent of its holdings immediately *before* the distribution.[358] Furthermore, section 302(c)(1) of the Code explicitly provides that for the purpose of calculating ownership, the Code should apply rules that, inter alia*,* consider the taxpayer to "constructively" own the stock underlying any options or warrants it holds.[359] However, in 1997,[360] Congress added section 1059(e)(1)(A)(iii)(I), reversing this constructive ownership calculation with regard to options and warrants.[361] A Joint Committee on Taxation report explicitly stated that this change was made in reaction to a widely publicized transaction by Seagram, Co.,[362] in which the company purchased out-of-the-money[363] warrants in DuPont stock

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[355] *See Black & Decker*, 436 F.3d at 433–34. Though this case was tried in 2006, the transaction itself took place eight years earlier, and thus the pre-2000 Code was applied. *Id*.

[356] Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 309, 114 Stat. 2763A-638 (2000) (codified as 26 U.S.C. § 358(h)). The provision does come with two caveats: (1) basis may not be reduced below fair market value, and (2) the reduction shall not be applied if the liabilities are transferred in conjunction with a trade or business. *Id*. The latter exception is presumably meant to protect asset sales, in which liabilities are transferred alongside legitimately related assets.

[357] This language is found at *id.* § 302(b)(1). However, courts have applied this provision as a catch-all for determining whether a distribution qualifies for redemption treatment even if it fails the other four tests explicitly laid out in § 302(b)(2)–(5). United States v. Davis, 397 U.S. 301, 305 (1970). From this application, it can be extrapolated that the purpose of § 302(b) as a whole is to draw a dividing line between transactions warranting dividend versus redemption treatment.

[358] The eighty-percent test is found in 26 U.S.C. § 302(b)(2). The implementation of dividend treatment based on the results of the test are found at *id.* § 302(a), (d).

[359] Specifically, § 302(c)(1) applies the constructive ownership rules found in § 318(a). *Id.* § 302(c)(1). Section 318(a) provides that numerous arrangements shall be deemed to constitute stock ownership, including ownership of stocks and warrants. *Id.* § 318(a)(4).

[360] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1011, 111 Stat. 912–13 (1997).

[361] *Id.* § 1059(e)(1)(A)(iii)(I).

[362] *See* Staff of Joint Comm. on Taxation, General Explanation of Tax Legislation Enacted in 1997, at 195 n.217 (1997).

[363] An option or warrant gives the holder the option to purchase stock at a later date at a specific exercise price. The pricing of this instrument is complex but depends in part on the likelihood that the holder will find it economically attractive to purchase the underlying stock at the exercise price by the given date. In financial terminology, the option or warrant is considered "out of the money" if the exercise price is significantly higher than the trading price, in which case most purchasers would be unlikely to exercise the option. *See* Ivo Welch, Companion to Corporate Finance 396–401 (2013). Given their low expected value, out-of-the-money warrants are usually very cheap relative to "in the money" options, though the constructive ownership rules in § 318(a)(4) of the Code do not draw a distinction based on exercise price. 26 U.S.C.

before selling back to DuPont a substantial portion of actual stock it held in the company.[364] Seagram still "owned" a substantial portion of the DuPont stock both before and after the distribution, since it did not dispose of the warrants. It thus claimed that it met the eighty percent test and should receive dividend treatment.[365] Due to a separate provision allowing corporations to deduct dividends,[366] Seagram effectively did not pay taxes on the distribution.

These examples reflect the substantial history of Congress monitoring taxpayer behavior and enacting legislation in response. Thus, while Congress may use the Treasury and the IRS as its "eyes on the ground" to discover and initially respond to taxpayer behavior,[367] it has not entirely abdicated its authority. Furthermore, as the examples of section 305(b) (cabining *Eisner*), section 311(b) (effectively overruling *General Utilities*), and section 338 (filling a gap left by *Kimbell-Diamond*) show, Congress is willing to reach a different result than the courts, thus acting as a check on the judiciary—just as it occasionally acts as a check on the Treasury and the IRS, as seen by the repeal of Notice 2008-38 by legislation.

V. Conclusion

This Note argues that Congress both delegates significant power to the Treasury and the IRS to make policy and plays an especially active role in passing tax-related legislation. As explained in Part III, the Treasury and the IRS exercise power that in other circumstances might give rise to challenges under the major questions doctrine, including taking actions of both "economic and political significance," as well as actions that effectively contradict or rewrite statutory provisions. However, this assertion of agency power is offset by equally assertive action by Congress in the realm of tax policy: Part IV

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§ 318(a)(4). Thus, Seagram was able to shield itself from tax at a lower price by purchasing the out-of-the-money DuPont options.

[364] *See* Allan Sloan, *For Seagram and Dupont, a Tax Deal That No One Wants to Brandy About*, Wash. Post (Apr. 11, 1995), https://www.washingtonpost.com/archive/business/1995/04/11/for-seagram-and-dupont-a-tax-deal-that-no-one-wants-to-brandy-about/b2301630-18ce-42f3-b8c9-779071157bc5 [https://perma.cc/LVJ3-A6A7].

[365] *Id.* DuPont also avoided taxes on the transaction since corporations need not pay tax on transactions in their own stock. 26 U.S.C. § 1032.

[366] *See supra* note 134 and accompanying text.

[367] *See* 26 U.S.C. §§ 6011, 6707A (empowering the Secretary of the Treasury to promulgate a list of transactions that it has "determine[d] as having a high potential for tax avoidance or evasion," which a taxpayer must report if it plans to engage in at the threat of substantial penalties). Similarly, in other provisions, the Code empowers the Secretary of the Treasury to disallow certain tax benefits formally permitted under the plain text of the Code but which, in the Secretary's judgment, constitute tax avoidance. *See, e.g.*, *id.* § 269 (disallowing carryover of net operating losses after an acquisition or change of control if the Secretary determines "the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax"); *id.* § 357(b) (disallowing nonrecognition for assumption of another party's liability if "it appears that the principal purpose of the taxpayer with respect to the assumption . . . was a purpose to avoid Federal income tax on the exchange").

provides several examples in which Congress either responded directly to perceived taxpayer abuse of the Code or codified (often with amendments) judicial responses to taxpayer behavior.

At first glance, it may seem paradoxical that Congress both delegates significant power to the Treasury and the IRS to make policy and plays an especially active role in passing tax-related legislation. However, this Note argues that it is precisely *because* of Congress's activity in this sphere that it can delegate to the administrative agencies responsible for tax policy without running afoul of separation of powers critiques: while there is a high degree of delegation, Congress has distinctly avoided abdication in the realm of tax policy. In this light, congressional delegation appears less like passing on authority and more like supervising a team of first responders that can react quickly and nimbly to changing facts on the ground.

Reinvigorating the role of Congress in other policy arenas in order to correct the balance of power will require directed solutions. Budget reconciliation and the Congressional Review Act present two examples of legislative solutions that have so far enabled Congress to respond with haste to urgent problems. Similarly creative fixes are needed to further empower Congress. Devising procedures similar to the Congressional Review Act to enable Congress to expeditiously provide the clear statements demanded by the Court in major questions challenges, as Professor Christopher Walker has proposed, is one possible procedural solution in this vein. Additionally, empowering Congress need not be limited to making procedural changes: just as the Joint Committee of Taxation helps members of all parties devise effective tax policy,[368] so too could Congress create committees to help it draft effective policies on other topics. The possible solutions are wide-ranging and beyond the scope of this paper.

This Note does not purport to solve the problem of legislative gridlock, but instead seeks to recast the major questions doctrine as a reaction to legislative abdication. In doing so, this Note seeks to provide one possible answer as to why delegation to administrative agencies has come under increasing criticism in recent decades. Additionally, by highlighting one area of policy—tax policy—in which administrative agencies continue to enjoy significant discretion despite judicial crackdown in other areas, this Note provides a counterargument to the view that the major questions doctrine exists solely to discipline agency action. Under this view, while the major questions doctrine indeed raises a separation of powers critique, a possible way forward is improving lawmaking capacity rather than decreasing regulatory authority.

[368] *See supra* notes 324–327.