An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Statutory Solution

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AN IRS DUTY OF CONSISTENCY:
THE FAILURE OF COMMON LAW MAKING AND
A PROPOSED LEGISLATIVE SOLUTION

STEVE R. JOHNSON

The IRS should endeavor to treat similarly-situated taxpayers similarly, but
does this aspiration rise to the level of a judicially enforceable duty? If the IRS
takes a position on Taxpayer B that is correct under the law but is inconsistent
with a position the IRS took on similarly-situated Taxpayer A, should the IRS’s
position on Taxpayer B fail simply because of the inconsistency? These
questions implicate important themes, such as fairness, the rule of law,
separation of powers, administrative exigencies, the role of common law
making in a highly positivistic system, and the sustainability of legal regimes.

A constitutional standard applies to the most egregious cases, but the
overwhelming majority of cases present subconstitutional, rather than
constitutional, issues. Since there is no controlling statute, these issues have
been addressed as a matter of common law. Unfortunately, this exercise in
common law making has failed badly. Despite over half a century of decisions,
there is no settled rule. Judicial inconsistency has been the response to IRS
inconsistency—at least six different approaches have been suggested by courts
and commentators. There is no perceptible movement towards coalescence
around any of these approaches, and few cases have undertaken a searching
examination of the variety of views, the main precedents, and the powerful
conflicting values at issue.

Given the failure of common law making in this area, this article argues
that a statutory solution is necessary. Crafting the solution is challenging,
however, due to a clash between the head and the heart. Viewed solely as a
matter of legal doctrine, the right answer is that there should be no judicially
enforceable duty of tax consistency on the Government. This answer is
supported by a number of compelling rationales based on the separation of
powers principle and the exigencies of administering a tax system involving
billions of points of contact between taxpayers and the IRS.

On the other hand, the cold logic of those rationales does not satisfy our
cherished and deeply held notions of fairness. Considering the claims of
justice, it would be unrealistic to believe that judges and legislators could
muster the intellectual discipline to adhere over the long term to a “no
judicially enforceable duty of consistency” position.

Thus, the challenge is to achieve a solution that balances the needs of the
system with the needs of the conscience in ways that are both sound and

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sustainable. This article proposes to achieve this delicate balance by amending the Internal Revenue Code to permit abatement of interest on tax understatements—but not abatement of the understatements themselves—when the taxpayer relied on a high-level Treasury or IRS interpretation that the IRS later disregarded.

In many cases, interest is a substantial component of the total tax liability. Accordingly, excusing the taxpayer from interest liability would both meaningfully benefit the taxpayer and meaningfully punish the IRS for its inconsistency. However, the requirement of reliance and the fact that the taxpayer would not be relieved of the underlying deficiency would prevent windfalls and preserve the substantive liability rules enacted by Congress. An approach that provides meaningful correction, but not overcorrection, would produce the least harm to tax administration and offer the best prospects for sustainability. As an additional benefit, the proposal builds on statutory trends regarding interest liability on tax underpayments.

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I. INTRODUCTION

The IRS strives for positional consistency, and substantial coordination and review mechanisms are in place to foster this objective. Nonetheless, the IRS sometimes takes a position that is less favorable to a taxpayer than the position the IRS previously took with a similarly-situated taxpayer. Conflicting values then come into play in deciding whether and how to address these inconsistencies.


Similarly, the IRS attempts through its Office of Servicewide Penalties to improve consistency in the assertion of tax penalties. But see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-567, TAX ADMINISTRATION: IRS SHOULD EVALUATE PENALTIES AND DEVELOP A PLAN TO FOCUS ITS EFFORTS (June 2009) (challenging the effectiveness of the IRS’s penalty coordination efforts and suggesting the creation of a focused plan).
For example, assume that Adam and Eve engage in essentially identical transactions that they report identically on their separate federal tax returns. The IRS accepts Adam’s reporting of the transaction; however, it later challenges Eve’s identical reporting and determines that Eve owes a significant amount of additional taxes.

This example is an easy case if the courts determine that the IRS’s position for Eve is incorrect under the substantive law. The IRS will lose the case and, after judicial review, the tax system will treat Adam and Eve equally. The matter becomes thornier if the reviewing court concludes that the IRS’s position on Eve was a proper application of the substantive law. Then, a choice must be made between consistency and correctness. If, in Eve’s case, the court disregards the inconsistency and holds for the IRS, Eve will pay the “correct” amount of tax. However, Adam and Eve will have been treated differently by the tax system—Adam more favorably, Eve less favorably—despite the fact that they engaged in identical transactions and reported them identically. If, on the other hand, the court holds for Eve on consistency grounds, the tax system will have treated Adam and Eve identically, but at the price of both Adam and Eve—not just Adam alone—receiving the benefit of the IRS’s error and underpaying their taxes.

Part II of this article indexes the significance and persistence of the controversy for a judicially enforceable duty of consistency on the IRS. Treasury and IRS positions take many forms, differing in formality, status, and degree of administrative review. These differences are significant in comparing the competing approaches to consistency. Thus, Part II describes the different types of tax guidance and positions that emanate from both Treasury and the IRS.

Part III explores the constitutional, statutory, and case law dimensions of the consistency controversy. Constitutional responses apply to only a few
instances of the most egregious IRS inconsistencies. Thus, the most important
issues are subconstitutional. Because no current statute controls, consistency
questions are under the domain of case law. Unfortunately, the result of
common law making\footnote{This article will borrow the definition of “federal common law” from previous
articles. “[F]ederal common law” . . . refer[s] to any rule of federal law created by a court . . .
when the substance of that rule is not clearly suggested by federal enactments—constitutional or
Harv. L. Rev. 881, 890 (1986) (emphasis omitted) (footnote omitted); see also Thomas W.
“federal common law” similarly).} has been doctrinal chaos. Multiple views have emerged
from inadequately reasoned cases. Some cases find no judicially enforceable
consistency duty on the IRS, whereas some say there is one. Still, other cases,
as well as commentary and IRS guidance, take various intermediate positions.

Part IV evaluates these competing views. It acknowledges that there are
strong arguments, based principally on fairness and rule of law values,
supporting an enforceable duty of consistency. Nonetheless, Part IV maintains
that the arguments against this duty—mainly separation of powers and
administrability concerns—are even more powerful. In addition, no
intermediate view adequately balances the relevant considerations.
Accordingly, Part IV contends that, from a purely doctrinal standpoint, the best
view is that there should be no judicially enforceable duty of consistency on the
IRS.

Part V bows to reality. The theoretically superior “no enforceable duty”
view is unlikely to be installed and maintained over the long term, certainly not
in a context that continues to rely on case-by-case decision making. Because
different judges inevitably weigh the values differently, none of the competing
views is likely ever to become settled doctrine. Indeed, far from the consistency
doctrine coalescing as decisions have multiplied, there is now more divergence
of thought regarding IRS consistency than ever before. In particular, doctrinal
arguments lack the power to fully escape the gravitational pull of fairness.
Thus, although theoretically superior, the absolute “no duty” view is unlikely to
be sustainable over the long term. We must seek a solution to the consistency
dilemma in a new and more balanced approach.

Part VI proposes this approach. Due to the manifest failure of common law
making in this area, the solution must be statutory. The solution also must have
enough force to meaningfully punish the IRS for its inconsistency and
meaningfully help wronged taxpayers—only such an approach can satisfy the
demands of fairness enough to be sustainable. And yet, the solution must not
have so much force that it confers windfalls on taxpayers or undercuts effective
tax administration.

The approach in Part VI sufficiently satisfies these criteria. Under an
amendment to the Internal Revenue Code, relief would be available to
taxpayers who show that they relied on high-level Treasury or IRS positions—
regulations, revenue rulings, revenue procedures, or notices—which the IRS
later contradicted or disregarded. These taxpayers would be relieved of interest liability on their tax deficiencies, but not of liability for the deficiencies themselves. Because interest is a large component of total tax liabilities in most cases, this measure would both significantly punish the IRS and significantly help deserving taxpayers. However, because relief would depend on proof of reliance and because liabilities for the underlying deficiencies would not be erased, the measure would avoid windfalls and preserve essential aspects of tax administration. Furthermore, the proposed solution comports with trends of the Internal Revenue Code’s treatment of interest on tax understatements.

II. THE CONSISTENCY CONTROVERSY

A. The Persistence and Significance of the Controversy

It is impossible to know how often the IRS takes inconsistent positions. Most transactions between taxpayers and the IRS are subject to privacy rules and do not become matters of public record. Furthermore, given the sheer volume of interactions between taxpayers and the IRS, “perfection in the administration of such vast responsibilities cannot be expected.” Nonetheless, it is clear that inconsistencies occur often enough to constitute a substantial problem. One of the leading administrative law scholars of a prior generation remarked on this reality:

Of all the agencies of the government, the worst offender against sound principles in the use of precedents may be the Internal Revenue Service.

... Its basic attitude is that because consistency is impossible, an effort to be consistent is unnecessary; therefore it need not consider precedents, and it may depart from precedents without explaining why.7

The consistency issue has been litigated for generations, and as shown by the numerous cases cited in this article, it has been litigated frequently.

6. Sirbo Holdings, Inc. v. Comm’r, 509 F.2d 1220, 1222 (2d Cir. 1975). A non-tax opinion agreed: “The variety of problems dealt with [by agencies] make absolute consistency, perfect symmetry, impossible. And the law reflects its good sense by not exacting it.” Mary Carter Paint Co. v. FTC, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., specially concurring), rev'd on other grounds, 382 U.S. 46 (1965). However, the opinion went further: “[L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.” Id.
7. 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 8:12 (2d ed. 1979). Professor Davis, in his capacity as a taxpayer, lost cases against the IRS. See infra text accompanying notes 124–28.
Presumably, many more consistency questions arise in cases that do not result in published opinions.\(^9\)

Despite the abundance of litigation, there is no settled rule regarding IRS inconsistency. For example, a recent case involved conflicting complex IRS regulations on transfer pricing among related companies.\(^10\) Application of the general standard favored the taxpayer, while application of a more transactionally specific rule favored the IRS.\(^11\) In the circuit court's original disposition of the case, the dissenting judge raised the possibility (but ultimately did not urge) that the taxpayer could prevail on consistency-related grounds.\(^12\) The majority, however, eschewed this approach, holding for the IRS on the basis of the constructional canon that, in cases of conflict, a specific provision trumps a more general provision.\(^13\)

The persistency and difficulty of this issue was demonstrated by a well-publicized but ultimately unsuccessful effort by a former Chief Counsel of the IRS to curb positional inconsistency. In 2002, responding to criticism in a tax court case,\(^14\) then IRS Chief Counsel B. John Williams issued a notice instructing IRS attorneys never to argue that the IRS is not bound by its own rulings.\(^15\) It is not clear whether Government lawyers always followed the notice even during Williams' tenure. In any event, Williams resigned not long thereafter.\(^16\) The notice has been largely inoperative since then, as evidenced by the fact that consistency litigation has continued since 2002.\(^17\)

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9. For example, one commentator identified consistency controversies involving three large corporations—GlaxoSmithKline, Black & Decker, and Bristol-Myers Barceloneta—which have been resolved without judicial opinions. Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. Cin. L. Rev. 531, 532–34 (2005).

10. *Xilinx, Inc. v. Comm'r*, 567 F.3d 482, 486–88 (9th Cir. 2009), rev'g 125 T.C. 37 (2005); *id* at 497 (Noonan, J., dissenting) (“The Commissioner of Internal Revenue has issued regulations that are irreconcilable.”). Ultimately, however, the circuit court withdrew its original decision and issued a new decision affirming the Tax Court. *Xilinx, Inc. v. Comm'r*, 598 F.3d 1191 (9th Cir. 2010).


12. *Id. at 497* (Noonan, J., dissenting) (stating that one decisional alternative would be to “[h]old that when the Commissioner talks out of both sides of his mouth, his speech is unintelligible and his regulations are unenforceable”)

13. *Id. at 496* (majority opinion). The circuit court's ultimate decision in the case, however, rejected the “specific controls over general” canon and resolved the ambiguity based on the perceived dominant purpose of the regulations. *Xilinx, 598 F.3d at 1196*


17. See, e.g., Temple v. Comm'r, 62 F. App'x 605, 609 (6th Cir. 2003) (stating that the
The frequency with which consistency questions have been addressed in commentary also underscores the importance of the issue. Articles on the subject by academics, tax administrators, and tax practitioners go back several generations, and the topic is now more popular than ever before. Unfortunately, the solutions offered in the commentary thus far do not suitably balance the many dimensions of this complex area.

B. Types of Treasury and IRS Pronouncements

Not all utterances and actions by personnel of the Treasury Department or the IRS are of equal weight. Some are subject to elaborate, multi-level reviews before issuance, while others are reviewed with less scrutiny or none at all. Some require approval by top agency officials, while others do not, and some are definitive, while others are only suggestive. As will be developed in Part IV, these differences matter for consistency purposes. The argument for holding the IRS accountable to a duty of consistency is stronger when it pertains to high-level actions as opposed to low-level guidance. To lay a foundation for that discussion, here are brief descriptions of the modalities through which Treasury and the IRS take positions on tax issues. They include the following:

(1) Treasury regulations: Regulations are issued by Treasury after extensive review within both Treasury and the IRS. Duty of consistency applies only to the taxpayer and not to the IRS; Fears v. Comm'r, 97 T.C.M. (CCH) 1317, 1319 (2009); Rowe v. Comm'r, 128 T.C. 13, 20–26 (2007) (Gale, J., concurring) (stating that petitioner should be able to rely on a previous ruling); Oman v. Comm'r, 92 T.C.M. (CCH) 372 (2006).


20. See infra text accompanying notes 21–50.


authorities among administrative positions in tax, and, in general, they have "force of law" status.

(2) Revenue rulings, revenue procedures, and IRS notices: Revenue rulings are second in weight to regulations and they receive substantial administrative review. The IRS states that revenue rulings have less weight than regulations but nonetheless may be used as precedents by taxpayers. In theory, revenue rulings address matters of substance, while revenue procedures deal solely with matters of procedure. However, revenue procedures do sometimes concern substance. The IRS views its notices as equivalent in stature to revenue rulings and revenue procedures.

(3) IRS announcements: Announcements are issued by the IRS to inform the public about actions or positions that the IRS intends to take in future cases. They "are somewhat less formal than revenue rulings, revenue procedures, and notices."

(4) Internal IRS guidance: The IRS Chief Counsel's Office—and to a lesser extent other IRS offices—issue guidance intended only for other IRS functions and not for persons outside the agency. Such guidance takes a variety of forms, including general counsel memoranda, field service and other advisories, and the Internal Revenue Manual.

(5) IRS rulings on tax issues to particular taxpayers: Taxpayers seeking additional comfort for the proper reporting of their transactions may submit a private letter ruling request to the IRS. A favorable response from the IRS binds the IRS, but only for that taxpayer. Letter rulings may not be relied upon or cited as precedents by other taxpayers. Determination letters are requested by taxpayers regarding their qualification for tax-exempt or other favored statuses. Technical advice memoranda are requested from the National Office by IRS personnel for complex legal issues during audits and administrative appeals regarding particular taxpayers' returns. Like private

24. See infra text accompanying notes 323-42.
27. See supra note 25, at 121, 124.
28. See, e.g., RICHMOND, supra note 22, at 157.
30. See supra note 25, at 121, 132.
31. RICHMOND, supra note 22, at 158.
32. See supra note 25, at 121, 132-33.
33. See id.
34. See id. at 126.
35. See id. at 127.
37. See supra note 25, at 128.
38. See id. at 127.
letter rulings, they are directed to the particular situation and are not precedential.39

(6) Expressions of agreement or disagreement with court decisions: When the IRS loses a significant court case, it evaluates the outcome. It may agree or disagree with the decision, and it sometimes publishes its view of the case in mediums such as acquiescences, nonacquiescences, and actions on decisions.40 These publications are indicators of whether the IRS is likely to continue to litigate similar cases in the future.41

(7) Oral and written return preparation guidance: In addition to private letter rulings, the IRS provides extensive guidance to taxpayers preparing their returns. This guidance includes instructions for IRS forms, numerous publications on topics of frequent importance, and answers by taxpayer service representatives to telephonic inquiries.42 Sometimes, this advice is misleading or simply wrong,43 and it is clear that these errors do not absolve taxpayers of the liabilities they are subject to under the law.44

(8) Positions taken on an audit: The IRS takes substantive positions in auditing taxpayers’ returns. The overwhelming majority of returns are not audited at all, and, when audit occurs, it usually is confined to a few return items, rather than all or most line items.45 An unaudited issue has no estoppel effect.46

(9) Positions taken in briefs or oral arguments during litigation: The positions taken in briefs and oral arguments in important cases may reflect considerable thought, review, and coordination. Generally, in administrative law cases, the courts have steered an uneven course on the degree of deference accorded to agency positions expressed in briefs and oral arguments. Some cases treat them deferentially;47 others do not.48

39. Id.
40. Id. at 130.
42. See Raabe, supra note 25.
43. See id.
44. I.R.C. Proc. § 601.201(k)(2) (as amended in 2002).
45. See infra text accompanying notes 203–05. This is true even for large corporations under Limited Issue Focused Examinations. See RICHARDSON, BORISON & JOHNSON, supra note 1, at 100.
46. E.g., Wagner v. United States, 387 F.2d 966, 972 (Ct. Cl. 1967).
48. E.g., Matz v. Household Int’l Tax Reduction Inv. Plan, 265 F.3d 572, 574–75 (7th Cir. 2001); cf. Christensen v. Harris County, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.”).
(10) Settlements reached by the IRS or the Department of Justice in controverted cases.\textsuperscript{49} Parties, including the Government, are driven by numerous considerations in deciding how to settle cases. Not all of those considerations reflect the perceived merits of the issues. Accordingly, courts typically hold that other parties cannot demand identical terms to those on which the Government settled other, similar cases.\textsuperscript{50}

One of several key questions in defining the contours of any IRS duty of consistency: Which of the above would be triggers for application of the duty? Establishing only high-level Treasury and IRS positions as triggers would limit the scope of the duty, whereas making all or most Treasury and IRS positions consistency triggers would escalate the risk of excessive interference with tax administration. Regrettably, proponents of consistency duties do not always clearly address this question. This will be further explored in Parts IV and VI of this article.

III. CONSTITUTIONAL, STATUTORY, AND CASE LAW DIMENSIONS

A constitutional standard applies to the most egregious cases. These cases are rare, however, so the subconstitutional dimension is of principal significance. No current statute provides an anchor for a general consistency duty. Thus, consistency questions have been relegated to resolution under federal common law making.

Unfortunately, no settled rule has emerged from this approach. Numerous cases have espoused a "no duty" view, that is, that there is no judicially enforceable obligation on the IRS to treat similarly-situated taxpayers similarly.\textsuperscript{51} Indeed, for a number of decades, the "no duty" view predominated.

\textsuperscript{49} The IRS Chief Counsel's Office represents the IRS in tax court, while the Department of Justice represents the IRS in all other courts. See United States Department of the Treasury, http://www.ustreas.gov/offices/general-counsel/chief-counsel/irs.shtml. The Justice Department and the IRS coordinate closely, but they occasionally disagree. \textit{E.g.}, Campbell v. Comm'r, 59 T.C.M. (CCH) 236 (1990), rev'd, 943 F.2d 815 (8th Cir. 1991) (noting that the IRS Chief Counsel's Office won the case in the tax court; on appeal, Justice renounced the successful theory below, offered a different theory, and lost). When they do disagree, Justice has the final call in cases that have been referred to it. See I.R.C. § 7122(a) (2006) (terminating the IRS's ability to settle a civil or criminal case once it has been referred to Justice for prosecution or defense).

\textsuperscript{50} \textit{E.g.}, Bunce v. United States, 28 Fed. Cl. 500, 510–11 (1993), \textit{aff'd per curiam}, 26 F.3d 138 (Fed. Cir. 1994); Fears v. Comm'r, 97 T.C.M. (CCH) 1317, 1319 (2009); see also Grant, Konvalinka & Harrison, P.C. v. United States, No. 1:07-CV-88, 2008 WL 4865566, at *2–3 (E.D. Tenn. Nov. 10, 2008) (upholding the confidentiality of IRS settlements in part because of Fed. R. Evid. 408, which renders compromises, offers to compromise, and statements and conduct incident to settlement negotiations as inadmissible evidence).

\textsuperscript{51} "No duty" is convenient shorthand, but it is a bit imprecise. Even if consistency is not judicially enforceable, it should remain an administrative priority, which the IRS should attempt to advance through internal review processes.
Yet, there also are numerous cases supporting the contrary "strong duty" view, that is, that IRS inconsistency is a basis on which the courts can resolve a case adversely to the IRS, exonerating the taxpayer from liability of any sort (deficiency, interest, and penalties) with respect to the pertinent issue. The "strong duty" view appears to have somewhat increased its sway in recent years.

Like well-matched and resilient opponents, neither the "no duty" nor the "strong duty" view has gained clear ascendancy. This stalemate has created a partial vacuum, allowing other views to enter. These additional views are intermediates between the "no duty" and "strong duty" positions. As such, they may be called "weak duty" views because, compared to the "strong duty" position, they either operate less frequently or impose on the IRS a sanction smaller than the loss of the entire case. A variety of "weak duty" views have been suggested by cases and commentary.

A. Constitutional Dimensions

The Equal Protection and Due Process components of the Fifth Amendment bear on governmental consistency. The Equal Protection Clause of the Fourteenth Amendment acts as a shield for taxpayers, which is evident in its purpose:

The purpose of the equal protection clause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents . . . [However,] mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.\(^5\)

The number of persons in a class is immaterial for equal protection purposes.\(^5\) \(^{53}\) A successful equal protection claim may be brought by a "class of one" if that one was "intentionally treated differently from others similarly situated . . . [without a] rational basis for the difference in treatment."\(^5\)\(^4\)

Equal Protection and Due Process interrelate in ways that defy easy characterization. The concepts are neither "mutually exclusive" nor "always interchangeable[];"\(^5\)\(^5\) however, they both "stem[] from our American ideal of

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\(^5\)\(^4\) Id.

fairness,” and “discrimination may be so unjustifiable as to be violative of due process.”

In both tax\textsuperscript{57} and non-tax criminal prosecutions,\textsuperscript{58} defendants have sometimes complained of selective prosecution in violation of Fifth Amendment guarantees. These claims are subject to a high standard and rarely succeed.\textsuperscript{59} The defendant must satisfy the following burden:

In order to make out a claim of selective prosecution the defendant must show: first, that others similarly situated generally have not been prosecuted; and second, that the Government’s prosecution of him is selective, invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights.\textsuperscript{60}

This standard has been borrowed from the criminal context and applied to selective enforcement challenges to civil determinations by the IRS.\textsuperscript{61}

Thus, although IRS inconsistency can be challenged on constitutional grounds, these challenges are subject to a demanding standard and are unlikely

\textsuperscript{56} Id.
\textsuperscript{57} E.g., United States v. Stout, 601 F.2d 325, 328 (7th Cir. 1979); United States v. Swanson, 509 F.2d 1205, 1208 (8th Cir. 1975); United States v. Malinowski, 472 F.2d 850, 860 (3d Cir. 1973); see Steve R. Johnson, The Selective Enforcement Defense in Civil and Criminal Tax Cases, A.B.A. Sec. of Tax’n News Q., Winter 2008, at 14, 14.
\textsuperscript{59} See sources cited supra notes 57–58.
\textsuperscript{60} United States v. Kahl, 583 F.2d 1351, 1353 (5th Cir. 1978).
\textsuperscript{61} Penn-Field Indus. v. Comm’r, 74 T.C. 720, 723 (1980) (the key case); see also Estate of Campion v. Comm’r, 110 T.C. 165, 170 (1998), aff’d sub nom. Tucek v. Comm’r, 198 F.3d 259 (10th Cir. 1999), and aff’d sub nom. Drake Oil Tech. Partners v. Comm’r, 211 F.3d 1277 (10th Cir. 2000) (stating that the IRS is not required to offer the same settlement terms to similarly situated taxpayers absent proof of “disparate treatment based on impermissible considerations” and contractual agreements to the contrary); Norfolk S. Corp. v. Comm’r, 104 T.C. 13, 58–59, supplemented by 104 T.C. 417 (1995) (holding that the IRS is not required to offer the same settlement in this situation as offered to another taxpayer); Fresoli v. Comm’r, 55 T.C.M. (CCH) 1624, 1626 (1988) (finding no evidence of offers being based upon impermissible considerations or arbitrary classification); Avers v. Comm’r, 55 T.C.M. (CCH) 678, 693 (1988) (taxpayer must demonstrate that “discriminatory selection was based on impermissible considerations or an arbitrary classification”); Davis v. Comm’r (Davis II), 65 T.C. 1014, 1022 (1976) (treatment of other taxpayers is irrelevant in determining liability of taxpayer).
Therefore, the key questions center on the possible existence and contours of a subconstitutional duty of consistency on the IRS. \(^{63}\)

### B. Statutory Dimensions

A few tax statutes address consistency in very limited circumstances. \(^{64}\) However, there currently is no comprehensive statutory answer to the consistency controversy. Below, candidate statutes within and outside the Internal Revenue Code are examined, and found wanting.

#### 1. Tax Statutes

Only one tax statute—§ 7805(b) of the Internal Revenue Code—has been suggested as a general anchor for an IRS duty of consistency. The question of when Treasury regulations and IRS rulings may be applied retroactively has garnered considerable attention over the decades. \(^{66}\) For many years, the governing statute was former § 7805(b): "The Secretary [of the Treasury or his delegate] may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." \(^{66}\)

In 1996, the section was significantly revised. \(^{57}\) Now, § 7805(b)(1)–(7) provides that, with stated exceptions, tax regulations typically are effective only prospectively. \(^{68}\) The essence of the pre-1996 provision survives for rulings, however, under current § 7805(b)(8). \(^{59}\) Section 7805(b)(8) provides that the IRS "may prescribe the extent, if any, to which any ruling . . . relating to the internal revenue laws shall be applied without retroactive effect." \(^{70}\) This

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62. This is as it should be. Statutory, not constitutional, law should generally provide the framework for resolving tax administration controversies.

63. Hereinafter, unless otherwise indicated, references to the duty of consistency in the text are to a subconstitutional duty.

64. E.g., I.R.C. § 6224(c)(2) (2006) (allowing taxpayers to receive settlements of certain partnership issues consistent with settlements received by other partners).


69. See id. § 7805(b)(8).

70. Id. Other portions of § 7805(b) prescribe more detailed rules for the retroactivity of
language suggests, and the courts have confirmed, that the presumption is in favor of retroactive application of rulings, but taxpayers may challenge IRS decisions under § 7805(b) on an “abuse of discretion” standard.

Former § 7805(b) was the basis of one of the most widely debated IRS consistency cases: the decision of the former Court of Claims in International Business Machines Corp. v. United States. At the time, IBM and Remington Rand were the sole competitors in the computer industry. Remington Rand asked for and received from the IRS a private letter ruling stating that certain of its transactions were exempt from excise tax. Within a few months, IBM sought a similar letter ruling. The IRS delayed for two years, then denied IBM’s request and revoked—but only prospectively—the ruling granted to Remington Rand. The denial and the revocation were correct: as a matter of substantive law, the excise tax did apply to the transactions.

Remington Rand and IBM were now in the same position, except that the former had benefitted from six years of improper exemption. IBM brought suit in the Court of Claims seeking refund of the excise tax it had paid for those six years. A divided court held for the taxpayer, IBM, concluding that the IRS had abused its discretion under § 7805(b) by retroactively applying the denial of IBM’s ruling request.


71. E.g., Manocchio v. Comm’r, 710 F.2d 1400, 1403 (9th Cir. 1983).
72. E.g., Lesavoy Found. v. Comm’r, 238 F.2d 589, 593–94 (3d Cir. 1956). The courts have looked to a variety of factors in determining whether retroactive revocation constitutes an abuse of discretion. These include the period of the retroactivity, the extent of notice the taxpayer received, the harm the taxpayer would suffer, and whether the taxpayer reasonably relied on the revoked rule when entering into the transaction or filing their return. E.g., Dixon v. United States, 381 U.S. 68, 75–76 (1965).
74. Id. at 915–16.
75. Id. at 916.
76. Id.
77. Id. at 916–17.
78. Id. at 916. In addition to the two years between the letter rulings, Remington Rand had received a refund for the taxes paid on the transaction for the three years prior to their letter ruling, and the correct ruling was not applied to Remington Rand for almost another year. Id.
79. Id. at 917.
80. Id. at 921.
It is "highly dubious" that IBM was correctly decided, even on its narrow facts. In any event, the case does not establish § 7805(b) as a foundation for a general duty of IRS consistency. In fact, the decision itself disclaimed this possibility. The holding depended on the peculiar facts—the replication of which would be exceedingly rare—of significant competitive effects between two direct competitors. Recognizing the dubious quality of IBM and its unusual circumstances, most subsequent cases have essentially limited the decision to its facts. That is, the case—if it has any force at all—is applicable if two conditions are present:

[I]t applies only where: (i) two or more taxpayers in direct economic competition have each applied for a ruling and only one has received a favorable ruling; and (ii) the taxpayer denied the favorable ruling is arguing that the Commissioner abused his discretion under section 7805(b) by failing to apply a new legal position only prospectively.

2. Non-Tax Statutes

Outside the Internal Revenue Code, the natural place to seek a statutory basis for an IRS duty of consistency is the Administrative Procedure Act ("APA"). APA § 706(2)(A) allows courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Section 706(2)(A) rarely appears in tax jurisprudence. Although it may deserve a more prominent role in tax, the consistency doctrine is not...
the right stage for this increased capacity. As described in Part I, the hard consistency cases are those where the IRS's second position is the accurate interpretation of the Code.\textsuperscript{88} It is hard to label a position as arbitrary, capricious, or an abuse of discretion when that position is correct under the governing substantive statute.

Arguments for a statutory duty of consistency might also be made under other portions of the APA. For example, APA § 706(2)(D) empowers courts to overturn actions taken by agencies "without observance of procedure required by law."\textsuperscript{89} One could argue that "law" for this purpose includes common law. Thus, if the courts create a consistency duty and the IRS doesn't conform, the IRS's action would be taken "without observance of procedure required by law." However, this would not itself be a statutory duty of consistency; rather, at best, this would be a statutory channel for a judicial duty of consistency. Still, the key questions would remain whether, taking the case law as a whole, the courts have created the duty and, if they have, whether the creation was legally valid and prudent.

The concept of ratification also should be considered. In the absence of an explicit statute, one might argue for some legislative pedigree for the consistency duty based on the inaction canon. Congress has not acted to affirmatively repudiate a consistency duty, and courts sometimes read inaction as evincing the legislature's approval of the status quo.\textsuperscript{90}

This argument would have little force, however. The inaction canon is among the weakest of statutory interpretation precepts, in part because ascertaining a legislature's motive for acting "more often than not [is] impossible. ... [It is even harder] to evaluate why the legislature failed to take action. Such a question is fundamentally unanswerable."\textsuperscript{91} Moreover, there are almost as many cases rejecting an IRS consistency duty as cases upholding one—making it impossible to determine which status quo Congress putatively ratified through its silence.\textsuperscript{92}
Without an applicable current statute, the courts have responded to consistency controversies in a common law manner, and they have been aided by an extensive body of literature on federal common law. "The topic . . . is particularly difficult because the label falsely implies that a coherent body of legal principles exists. Quite to the contrary, federal common law has developed in an ad hoc fashion in a number of different areas." 

Common law making is something of an anomaly in tax. Taxation is highly positivistic, and no one is liable for tax absent statutory command. The legislature's undoubted primacy in establishing the substantive rules of taxation has led some to suggest that the legislature should also be the exclusive source of the procedural rules of taxation. Such a resolution, of course, would exclude a non-statutory duty of IRS consistency. However, so stark a view has not gained the ascendency. There are important common law aspects of federal taxation. The question that manifests is whether the common law for a governmental duty of tax consistency has served society well. Unfortunately, the doctrinal chaos described below reveals the failure of common law making in this area.

Three principal views of the consistency duty have been offered through cases and commentary: the "strong duty," the "no duty," and the "weak duty." More accurately, the "weak duty" encompasses a set of views due to the numerous varieties that have been advanced.

1. "Strong Duty" View

The "strong duty" view offers that: (1) a governmental duty of tax consistency should and does exist, and (2) the remedy for IRS inconsistency should be complete victory for the taxpayer, i.e., the IRS's determination or adjustment should fail entirely. Some cases have used consistency as the rationale for holding against the IRS. For example, in one case, members of

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93. "The source or sources of the consistency requirement are not entirely clear. It is probably best understood as a doctrine of administrative common law." Zelenak, supra note 81, at 413.
94. See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION 363-64 & n.1 (5th ed. 2007).
95. Id. at 368.
96. E.g., DeArmond v. Dep't of Revenue, 14 Or. Tax 112, 117-18 (Or. T.C. 1997), aff'd, 968 P.2d 1280 (Or. 1998).
98. E.g., Estate of McLendon v. Comm'r, 135 F.3d 1017, 1025 (5th Cir. 1998); Powell v. United States, 945 F.2d 374, 377-78 (11th Cir. 1991); see also Hoffer, supra note 19, at 340-41 (discussing the Court's use of private letter rulings as precedent in the face of § 6110(k)(3)). Some of the cases have recognized an exception for situations where the IRS takes inconsistent positions to avoid being "whipsawed"—to prevent the fisc from losing on both ends, the IRS is
the taxpayer's family occasionally occupied seats on an airplane owned by the taxpayer's company that otherwise would have been empty during business flights. The IRS maintained that the value of the family members' flights constituted income taxable to the taxpayer. At trial, the tax court found the IRS's position "very logical . . . under the broad definition of income in [I.R.C.] section 61." Nonetheless, the court rejected the IRS's position because the parties had agreed that the IRS had not made this type of adjustment for similar taxpayers: "We do not here determine the validity of [the IRS's] argument if [its] longstanding practice were changed as to all taxpayers. We merely hold that [the IRS's] practice . . . should be applied to [this taxpayer] on the same basis as it is applied to other taxpayers.

Other cases have stated in dictum that the IRS is subject to a judicially enforceable duty of consistency but have not felt the need to describe it with particularity. Weakest by way of support, yet still worth noting, are cases where the courts could have declared the non-existence of an IRS consistency duty, but refrained from doing so. For example, in Hernandez v. Commissioner, the IRS determined that payments made to the Church of Scientology for "auditing" and related services did not qualify for income tax deduction as charitable contributions. The Scientologists responded, in part, that these payments were indistinguishable from payments made to other religions that the IRS had accepted as charitable contribution deductions. The Hernandez dissent accepted this argument, but the majority rejected it and held for the IRS on the disingenuous ground that comparability of the various payments was not feasible because the record was insufficiently developed. One might allow to take inconsistent positions to combat inconsistent treatment of a transaction by the two taxpayers who were the parties to the same transaction. See Sirbo Holdings, Inc. v. Comm'r, 476 F.2d 981, 988 n.7 (2d Cir. 1973).

100. Id. at 129–30.
101. Id. at 129.
102. Id. at 129–30.
105. Id. at 701.
106. Id. at 707–13 (O'Connor, J., dissenting).
107. Id. at 702–03 (majority opinion).
108. Id. at 700–03. Nearly a decade after prevailing in Hernandez, the IRS gave its victory away in a closing agreement with the Scientologists. See Internal Revenue Serv., Closing Agreement Between IRS and Church of Scientology, 97 Tax Notes Today 251–24 (Dec. 31, 1997). Some have speculated that the IRS did so because it realized that it would lose in future litigation where fully developed records would reveal that the payments to other faiths that the IRS had accepted as deductible are in fact not distinguishable from the payments to Scientology. See William D. Popkin, Introduction to Taxation 222–23 (5th ed. 2008).
have thought—especially given the weakness of the rationale—that the majority would have expressly stated that "the IRS is under no duty of consistency" had it genuinely believed that to be the state of the law.\(^\text{109}\)

The "strong duty" view appears to be gaining momentum in some quarters. For example, older tax court decisions usually rejected the notion that the IRS is subject to a judicially enforceable consistency duty.\(^\text{110}\) Yet, several recent tax court opinions have upheld this duty or something very comparable.\(^\text{111}\)

However, choosing the "strong duty" position only disposes of the threshold question for resolving the consistency problem. Once it is concluded that the courts can force the IRS to treat similar taxpayers similarly, it must then be decided whether particular taxpayers are in fact similarly situated in ways that are relevant to the tax system. The courts have sometimes drawn fine distinctions in holding situations to be dissimilar.\(^\text{112}\)

At times, agency inconsistency has entered non-tax cases incident to statutory interpretation rather than as part of a formal consistency doctrine. An example is the Supreme Court's Brown & Williamson decision holding that the FDA lacks authority to regulate normal use of tobacco products.\(^\text{113}\) The FDA asserted this authority to regulate in 1996 after having expressly and repeatedly disavowed the power from the agency's inception.\(^\text{114}\) The Supreme Court acknowledged, as it had in Chevron,\(^\text{115}\) that "an agency's initial interpretation of a statute that it is charged with administering is not 'carved in stone[.]'" and

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109. However, negative inferences are often unreliable guides. E.g., Burns v. United States, 501 U.S. 129, 136 (1991); III. Dep't of Pub. Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983) ("Not every silence is pregnant . . . ."). Moreover, the special nature of Hernandez might dispel any negative inference. For First Amendment reasons, treating taxpayers differently on account of their religious affiliations is more disturbing than treating taxpayers differently for no affiliational reason. Hernandez may reflect no more than the special context where the arguable inconsistency took place. See Hernandez, 490 U.S. at 707 (O'Connor, J., dissenting); Powell v. United States, 945 F.2d 374, 377–78 (11th Cir. 1991).


111. E.g., Rowe v. Comm'r, 128 T.C. 13, 21–26 (2007) (Gale, J., concurring); id. at 27–28 (Goeke, J., concurring); Rauenhorst v. Comm'r, 119 T.C. 157, 170–71 (2002) (stating that while revenue rulings are not binding on the Court or other federal courts, they may be in tax court proceedings).

112. E.g., Sklar v. Comm'r, 549 F.3d 1252, 1264–65 (9th Cir. 2008); Sklar v. Comm'r, 282 F.3d 610, 615–18 (9th Cir. 2002) (both cases holding that those making payments to schools that provide both secular and religious instruction are situated differently than those making payments to organizations providing religious services exclusively); Bookwalter v. Brecklein, 357 F.2d 78, 79, 84 (8th Cir. 1966) (holding that taxpayers engaged in similar transactions were situated differently because one requested a private letter ruling and the other did not).


114. Id. at 125.

that "agencies 'must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances."'\textsuperscript{116}

Nonetheless, as a matter of statutory construction, the agency's prior position weighed against its new position, and the Court concluded that Congress did not intend to empower the FDA with the asserted authority through any of the agency's enabling acts.\textsuperscript{117} The Court wrote that by "adopting each statute, Congress has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority . . . to regulate tobacco absent claims of therapeutic benefit by the manufacturer. . . . Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction . . . ."\textsuperscript{118} Thus, a consistent and well-known agency position led to statutory construction adverse to the newly asserted agency position.

2. "No Duty" View

The opposite of the "strong duty" notion is the view that the IRS is under no subconstitutional duty of consistency at all—or at least that any duty is only moral and not judicially enforceable. Under this view, aggrieved taxpayers are not afforded any relief. Moreover, there is abundant support in the case law for this view as well.\textsuperscript{119}

Many of the "no duty" cases arose out of discovery disputes such as two disputes between the IRS and Kenneth Culp Davis, a leading administrative law scholar, and his spouse, in their capacities as taxpayers.\textsuperscript{120} The first case involved business expense deductions that the Davises claimed were education costs incurred by Mrs. Davis.\textsuperscript{121} The taxpayers sought to discover private letter rulings and technical advice memoranda issued by the IRS for similar deductions\textsuperscript{122} to support the argument that the IRS had treated similarly-situated taxpayers differently.\textsuperscript{123}

Although it acknowledged the conflicting values at work, the court rejected the taxpayers' discovery demands as irrelevant to the substantive issues:

\textsuperscript{116} Brown & Williamson, 529 U.S. at 156–57 (citations omitted). An important question is the extent to which the IRS should be treated like other administrative agencies for \textit{Chevron} and other purposes. For discussion of this question, see Steve R. Johnson, \textit{The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable}, 77 OR. L. REV. 235, 276–86 (1998).

\textsuperscript{117} Brown & Williamson, 529 U.S. at 144.

\textsuperscript{118} Id.


\textsuperscript{120} See Davis v. Comm'r (\textit{Davis II}), 69 T.C. 716 (1978); Davis v. Comm'r (\textit{Davis I}), 65 T.C. 1014 (1976).

\textsuperscript{121} \textit{Davis I}, 65 T.C. at 1016.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 1021.
It has long been the position of this Court that our responsibility is to apply the law to the facts of the case before us and determine the tax liability of the parties before us; how the Commissioner may have treated other taxpayers has generally been considered irrelevant in making that determination. Any change in that position would have widespread ramifications in the administration and application of the Federal tax laws and in the conduct of our work.\textsuperscript{124}

In a subsequent case, the Davises again tested the viability of the consistency doctrine when they were alleged to have claimed improper income inclusions and charitable contribution deductions.\textsuperscript{125} The taxpayers again sought to discover private letter rulings issued to other taxpayers to probe whether the IRS had operated inconsistently.\textsuperscript{126} The court acknowledged that some courts had recognized an IRS consistency duty,\textsuperscript{127} but it again rejected the discovery demands as it expressed “serious doubts about the validity of [a consistency] claim in ordinary tax deficiency cases which are tried de novo in this Court.”\textsuperscript{128}

There also is a \textit{sub silencio} version of this view. Many cases reasonably presenting consistency questions have been decided for the IRS with little or no discussion of those issues.\textsuperscript{129} Perhaps this implies the rejection of a duty’s existence. More likely, it reflects the fact that the court did not recognize or did not wish to address the inquiries.

3. “Weak Duty” Views

Between the two polar views, various intermediate positions have been advocated. These intermediate positions suggest that the IRS is under some enforceable consistency duty but that either (1) the duty applies in less than all situations, or (2) the sanction for violating the duty is something less than the IRS losing the case. At least four “weak duty” views have been offered thus far by courts, the IRS, or commentators.

\textsuperscript{124} Id. at 1022–23 (citations omitted).
\textsuperscript{125} Davis II, 69 T.C. at 716.
\textsuperscript{126} Id. at 718.
\textsuperscript{127} Id. at 721.
\textsuperscript{128} Id. at 721 n.9 (citing Davis I, 65 T.C. at 1021–23; Teichgaeber v. Comm’r, 64 T.C. 453, 456 (1975)).
\textsuperscript{129} In one case, the Court of Federal Claims rejected the Government’s contention that the so-called “open transaction” doctrine had been interred in 1957. Fisher v. United States, 82 Fed. Cl. 780, 791 (2008). The court stressed that cases since 1957 had continued to invoke the doctrine. Id. It also noted that the IRS itself had continued to assert the doctrine after 1957. Id. However, it did not construct a duty of consistency argument from this fact but merely mentioned it incidentally. See id.
a. A Duty if the IRS Has Discretion

One view is that any consistency requirement should be stronger when the IRS’s actions or interpretations are in an area of tax law where it has discretion.130 A principal objection to a governmental duty of consistency is that Congress writes the tax laws and the IRS cannot change the law by malfeasance.131 This objection has diminished significance to the extent the IRS has discretion on how to apply the tax law.

The traditional view is that the IRS has minimal discretion: the Internal Revenue Code sets out definite rules for the determination of tax liabilities, and the IRS’s job is simply to apply those rules. This view is correct in the main, but there are significant pockets of administrative discretion within the generally non-discretionary system. Here are some examples:

1. Nearly three hundred provisions in the Code expressly grant to Treasury and the IRS the power to write regulations in order to implement or prevent the abuse of particular sections.132 It is widely accepted that these so-called “specific-authority” regulations qualify for Chevron deference.133 A premise of this deference is that Congress expressly or impliedly delegated authority for the purpose of crafting substantive rules.134 It is difficult to successfully challenge the validity of specific-authority regulations;135 thus, fortifying the idea that Treasury and the IRS have significant (though far from unlimited)136 law making discretion in these areas.

130. “In exercising its interpretive discretion, the IRS might have the discretion to decide whether or not an item is taxable, but once that decision is made, it must be applied equally to all taxpayers.” Bunce v. United States, 28 Fed. Cl. 500, 509 (1993) (dictum), aff’d per curiam, 26 F.3d 138 (Fed. Cir. 1994); see also Estate of McLendon v. Comm’r, 135 F.3d 1017, 1024 n.15, 1025 (5th Cir. 1998) (stating that “the Commissioner will be held to his published rulings in areas where the law is unclear”); Silco, Inc. v. United States, 779 F.2d 282, 286 (5th Cir. 1986) (holding that taxpayer may rely on prior rulings to determine actual ownership of dividends); Cohen & Harrington, supra note 19, at 707–09 (discussing judicial developments relaxing the harsh rule of Manhattan General).

131. See infra Part IV.B.1.


133. E.g., Carlos v. Comm’r, 123 T.C. 275, 280 (2004); Square D Co. v. Comm’r, 118 T.C. 299, 307 (2002), aff’d, 438 F.3d 739 (7th Cir. 2006).


136. Even specific-authority regulations are invalid if they are in tension with the statute or
(2) Even when particular sections do not confer specific authority on Treasury and the IRS to write rules and regulations, Code § 7805(a) provides general authority to draft rules and regulations, authority that extends to all parts of the Code. Although it is not yet fully settled whether Chevron deference attaches to “general-authority” tax regulations, these regulations receive substantial deference from the courts—in theory somewhat less deference than “regulation[s] issued under a specific grant of authority.” Treasury and the IRS have often made what clearly are major substantive choices through general-authority regulations, suggesting a wide scope of law making discretion.

A prominent example involves the so-called “check the box” general-authority regulations. Different rules govern the taxation of partnerships and corporations, making principles defining these categories necessary. A 1935 Supreme Court case and subsequent cases established classificatory criteria, and, in 1960, Treasury and the IRS promulgated general-authority regulations that largely incorporated these case law principles. However, the popularity of hybrid entities such as limited partnerships and limited liability companies created classificatory uncertainties. In 1996, Treasury and the IRS radically revised the regulations to make entity classification largely elective for

go beyond the scope of the delegation. Specific-authority regulations have been held invalid by the courts surprisingly often. E.g., Rite Aid Corp. v. United States, 255 F.3d 1357, 1360 (Fed. Cir. 2001); Phillips Pet. v. Comm’r, No. 94-9021, 1995 WL 699026 (10th Cir. Nov. 28, 1995); Am. Standard, Inc. v. United States, 602 F.2d 256, 269 (Cl. Cl. 1979); Tate & Lyle, Inc. v. Comm’r, 103 T.C. 656, 671 (1994), rev’d, 87 F.3d 99 (3d Cir. 1996) (noting that regulation invalidated by tax court but validated on appeal); Estate of Bullard v. Comm’r, 87 T.C. 261, 281 (1986).

137. As to the distinction between specific-authority and general-authority tax regulations, see Steve R. Johnson, Swallows as It Might Have Been: Regulations Revising Case Law, 112 TAX NOTES 773, 780–81 (2006) [hereinafter Johnson, Swallows as It Might Have Been].
138. See infra text accompanying notes 32–32.
139. See, e.g., United States v. Cartwright, 411 U.S. 546, 550 (1973) (stating that regulations must be upheld if “found to ‘implement the congressional mandate in some reasonable manner’” (citation omitted)).
141. See, e.g., Treas. Reg. § 301.7701-1 to -3 (2009).
144. E.g., United States v. Kintner, 216 F.2d 418, 421–24 (9th Cir. 1954); Larson v. Comm’r, 66 T.C. 159, 172 & n.8 (1976).
many entities. Eligible entities can now choose whether to be treated as partnerships or as corporations for federal tax purposes. The revised regulations are known as the "check the box" rules due to the element of choice.

This dramatic change of direction was controversial from the beginning. Some commentators maintained that the new regulations were invalid, although most thought to the contrary. To date, the cases have upheld the regulations. Thus, Treasury and the IRS have been permitted to shift an important set of rules from a mandatory regime based on Supreme Court and other case law to an elective regime—all without essentially changing the underlying statute. This suggests a substantial range of administrative discretion.

(3) At the subregulation level, the IRS often has made substantive rules that are not clearly mandated by the applicable Code sections. Frequently, these are taxpayer-friendly or simplifying rules. Even when these rules are not controversial, they nonetheless represent the exercise of administrative discretion.

(4) It is no secret that some Code sections are exceedingly complex or regrettably ambiguous. As a practical matter, Treasury and the IRS probably require greater discretion in application of these sections, especially when deference doctrines are considered.


149. E.g., Susan Kalinka, Littriello: Are the Check-the-Box Regulations Valid?, TAXES, Sept. 2007, at 17, 17 (reviewing the history and concluding that the new regulations are valid).


153. For discussion of doctrines of deference in tax, see Johnson, Swallows as It Might
For these reasons, the IRS probably has more discretion in making the tax law than traditionally has been acknowledged. The first "weak duty" view would impose a duty of consistency on the IRS in situations where it possesses this discretion.

b. A Duty of IRS Factual Representations Only

The second "weak duty" view is one the IRS acknowledged in a low-level internal memorandum. Under it, the IRS would have a consistency duty when (1) the IRS makes a representation of fact for one year, (2) the taxpayer acquiesces in or relies on that representation, and (3) the IRS changes that representation in a later year after expiration of the statute of limitations for the earlier year. This approach is patterned on the elements that are widely used when a duty of consistency is applied against taxpayers.

c. A Duty to Explain or Repudiate

The third "weak duty" view is the "explain or repudiate" approach. That is, the IRS would be held to its earlier position unless the IRS provided a cogent explanation. An explanation could include (1) that the earlier and current positions are not inconsistent, (2) that the positions are inconsistent but the agency had good reasons for changing its position, or (3) a forthright admission by the IRS that its prior position was wrong. The principal support for this approach comes from non-tax administrative law cases, but some tax cases also have adopted it.


155. Id.

The *Sirbo* cases provide good examples. In *Sirbo I*, the taxpayer sought preferential long-term capital gain treatment with respect to an alleged involuntary conversion of property. The IRS opposed the requested treatment despite not opposing it in a prior case involving a different taxpayer. The tax court agreed with the IRS, but the Second Circuit vacated and remanded, in part on consistency grounds. The circuit court stated:

[T]he Commissioner has a duty of consistency toward similarly situated taxpayers; he cannot properly concede capital gains treatment in one case and, without adequate explanation, dispute it in another having seemingly identical facts which is pending at the same time. That the Commissioner’s seeming inconsistency may have arisen from the right hand’s ignorance of the posture of the left is little solace to taxpayers who are entitled to a non-discriminatory administration of the tax laws by him, much less to a taxpayer like Sirbo who is disadvantaged by the discrimination in its case.

On remand, in *Sirbo II*, the tax court reaffirmed its holding. The IRS explained that its contrary position in the prior case “was not considered policy but rather was an error.” The Second Circuit accepted this explanation and affirmed: “While even-handed treatment should be the Commissioner’s goal, perfection in the administration of such vast responsibilities cannot be expected. The making of an error in one case, if error it was, gives other taxpayers no right to its perpetuation.”

Despite the appeal of doctrinal symmetry, the “explain or repudiate” approach is unlikely the answer to the consistency problem. The courts have had ample opportunity to fully embrace this position in tax but have failed to do so. The principal argument for this approach was set forth in a 1985 article by a leading tax academic in a prominent tax journal. In the ensuing decades,
however, the idea has gained limited traction in tax cases and has been acknowledged largely in passing by most of the commentary.

\[d. \text{A Duty Under Amended § 7805(b)}\]

For the reasons described in Part III.B.1, no current section of the Internal Revenue Code can serve as the statutory foundation for a general duty of IRS consistency. That includes § 7805(b), the basis of the much discussed, albeit dubious, IBM decision. As a result, one commentator, Professor Pietruszkiewicz, has proposed amending § 7805(b) to make it a more viable vehicle for imposing a consistency duty. The thrust of his proposal is to broaden the scope of review under the section and to adopt a uniform standard of abuse of discretion applicable to consistency cases. Specifically, the proposal would grant relief to taxpayers who satisfy both parts of a two-prong test. First, the taxpayer would have “to demonstrate that another similarly situated taxpayer received more favorable treatment, despite the taxpayer’s request for the same treatment. Second, the IRS must have abused its discretion under § 7805(b) when it used irrational or arbitrary classifications to differentiate among similarly situated taxpayers.”

IV. THEORETICAL SUPERIORITY OF THE “NO DUTY” VIEW

A. Arguments for a “Strong Duty”

1. Fairness

“[T]he notion of equal justice has strong appeal in our society . . . .” Courts and the IRS itself have repeatedly acknowledged that horizontal

168. See, e.g., Cohen & Harrington, supra note 19, at 679 & n.26; Hofer, supra note 19, at 339; Pietruszkiewicz, supra note 9, at 532.
169. See, e.g., Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States, 129 F.3d 195, 200–01 (D.C. Cir. 1997) (rejecting a consistency argument based on § 7805(b)).
171. Pietruszkiewicz, supra note 9, at 534–35.
172. Id.
173. Id. at 573.
174. Id.
175. Davis v. Comm’r (Davis I), 65 T.C. 1014, 1023 (1976).
176. See, e.g., Comm’r v. Sunnen, 333 U.S. 591, 599 (1948) (“[C]ollateral estoppel must be used with its limitations carefully in mind so as to avoid injustice.”); Burnet v. Harmel, 287 U.S. 103, 110 (1932) (explaining that tax legislation generally “is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation”).
177. The IRS commits itself to “applying the tax law with integrity and fairness to all.” I.R.S. Mission, 2007-2 C.B. ii; see also I.R.M. 1.2.13.1.5 (Dec. 23, 1960) (directing IRS agents to determine correct tax liability “without favoritism or discrimination as between taxpayers”).
equity—that is, treating similarly-situated taxpayers similarly—is an important
goal of our tax system. Justice Holmes long ago cautioned that citizens “must turn square corners when they deal with the Government[]” but “[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people.”

Congress delegated extensive authority to the Department of the Treasury to “prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code].” This broad delegation is premised in part on the need to “ensure that in ‘this area of limitless factual variations,’ like cases will be treated alike.”

Additionally, in recent decades, Congress enacted a series of taxpayer rights measures, including the Taxpayer Bill of Rights in 1988, the Taxpayer Bill of Rights 2 in 1996, the Taxpayer Bill of Rights 3 in 1998, and a number of more limited measures. Thus prodded, the IRS implemented other taxpayer rights changes administratively.

However, fairness is but one of many goals. The actions of IRS agents “should be reasonable within the bounds of law and sound administration,” and the IRS has the obligation of “correctly applying the laws enacted by Congress.” Rev. Proc. 64-22, 1964-1 C.B. 689. Moreover, the courts typically have not enforced the aspirational language in the IRS’s policy statements. E.g., Adams v. Comm’r, 37 T.C.M. (CCH) 654, 669 (1978).


St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting). Justice Black’s retort has frequently been cited by the Court. E.g., United States v. Winsett Corp., 518 U.S. 839, 886 n.31 (1996); see also Comm’r v. Lester, 366 U.S. 299, 306 (1961) (Douglas, J., concurring) (“[T]he Government in moving against the citizen should also turn square corners.”). In an equitable estoppel case, a circuit court remarked, “[i]t has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to receive, ordinary fair play from tax officials.” Stockstrom v. Comm’r, 190 F.2d 283, 289 (D.C. Cir. 1951). However, the Supreme Court soon thereafter disapproved of that decision. See Auto. Club of Mich. v. Comm’r, 353 U.S. 180, 183–84 (1957) (“The doctrine of equitable estoppel is not a bar to the correction by the [IRS] of a mistake of law.”).


See generally Charles O. Rossotti, Modernizing America’s Tax Agency, 83 TAX NOTES 1191 (1999) (providing “an overview of the entire process of change that the IRS is
perception that federal tax administration was unfair, in some instances to the point of oppression.  

Hence, general fairness and, in particular, horizontal equity, are important goals of our tax system. The realization of these goals is frustrated when the IRS treats taxpayers inconsistently.

Having acknowledged that there are genuine fairness concerns regarding IRS inconsistency, one fairness argument that lacks merit should be dispelled. Although its contours have been drawn somewhat differently by various courts, it is settled that there is a duty of consistency on taxpayers. If taxpayers have to be consistent, shouldn’t the Government bear a reciprocal obligation? Not necessarily; the words “duty of consistency” have different meanings in the two contexts. The taxpayer duty of consistency is individual, while the governmental duty of consistency considered in this article is comparative. The taxpayer duty prevents a taxpayer from assuming a position on a later-year return inconsistent with a position taken on an earlier-year return, particularly when the earlier-year return is closed to correction because of a statute of limitations or other legal bar. Naturally, the perspective is individual to that taxpayer, not comparative to other taxpayers. The fact that each taxpayer bears a bilateral (the individual taxpayer relative to the IRS) duty of consistency does not require, as a condition of fairness, that the IRS bear a multilateral (the IRS relative to all taxpayers) duty of consistency.

2. Rule of Law

Rule of law considerations overlap to some degree with the fairness considerations discussed above, but there are shades of difference as well. Rule of law theory has been explored in many classic and not-so-classic works, undertaking").


188. Consistency in taxation shares some rationales with stare decisis in judicial decisions. See, e.g., Anastasoff v. United States, 223 F.3d 898, 904–05 (8th Cir. 2000), vacated & remanded on other grounds, 235 F.3d 1054 (8th Cir. 2000) (discussing the desirability for courts to justify their departures from judicial precedents).


190. See I.R.C. § 6501 (2006); RICHARDSON, BORISON & JOHNSON, supra note 1, at ch. 5.

191. Such as the doctrine of res judicata.

192. But see Hoffer, supra note 19, at 344–46 (maintaining that the values served by the taxpayer duty of consistency also argue for an IRS duty of consistency).

193. E.g., LOI L. FULLER, THE MORALITY OF LAW (rev. ed. 1977); Margaret Jane Radin, Reconsidering the Rule of Law, 89 B.U. L. REV. 781 (1989); Antonin Scalia, The Rule of Law
and it has enjoyed a revival of attention in recent years.\textsuperscript{194} These explorations have made their way into tax-law scholarship.\textsuperscript{195}

Rule of law is an "elusive but vital conception."\textsuperscript{196} It is elusive because the phrase is not confined to one or even a few generally understood elements or premises. In fact, there are versions of rule of law, sometimes known as "thin versus thick" or "normal versus extravagant."\textsuperscript{197} Generally, though, "The rule of law is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed."\textsuperscript{198}

Some commentators view limiting the discretion of administrative agencies as an important aspect of the rule of law.\textsuperscript{199} That idea is of limited relevance to IRS consistency, however. As we have defined the problem,\textsuperscript{200} when the IRS takes a position incompatible with an earlier position, it is not acting out of discretion; it is acting in conformity to the statute.

Conversely, two other rule of law notions do relate to IRS consistency. First, Government treating similarly-situated citizens similarly is itself often identified as a component of the rule of law.\textsuperscript{201} Second, the idea of reliance is significant: "Those with business interests need reliable rules in order to achieve certainty and predictability in their operations."\textsuperscript{202} To the extent a taxpayer knew about an earlier position taken by the IRS and relied on it in structuring transactions and reporting their effects, the case becomes stronger for preventing the IRS from retracting its position for that taxpayer.

\textsuperscript{194} E.g., Brian Z. Tamanaha, \textit{How an Instrumental View of Law Corrodes the Rule of Law}, 56 DePaul L. Rev. 469 (2007).


\textsuperscript{197} See, e.g., Kenneth Culp Davis, \textit{Discretionary Justice: A Preliminary Inquiry} 28-33 (1969) (arguing that "American law has decisively rejected the extravagant version of the rule of law").


\textsuperscript{200} See supra text accompanying notes 2–3.

\textsuperscript{201} E.g., Richard A. Epstein, \textit{What Do We Mean by the Rule of Law?} 2–3 (2005); Jeffrey L. Jowell, \textit{Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action} 12–13 (1975).

\textsuperscript{202} Jowell, supra note 201, at 13.
3. Tax Administration

Part IV.B.4 will describe how too robust a consistency duty could impede efficient and effective operation of our tax system, but tax administration arguments are not all on one side of the ledger. An IRS consistency duty might fortify the system in three specific ways.

First, the IRS cannot audit all of the millions of tax returns it receives each year.\(^{203}\) Indeed, current audit rates are at or near historic lows.\(^{204}\) That being so, self-reporting—the accuracy of tax liabilities reported by taxpayers on their returns—is the bedrock of our system.\(^{205}\) Dependable self-reporting requires a high level of citizen confidence in, or at least acceptance of, the system's fairness. If the IRS erodes that confidence or acceptance through maladministration, including IRS inconsistency, the soundness of self-reporting could be threatened.\(^{206}\)

Second, the nation's tax laws are administered not only by the IRS but also by the tens of thousands of tax lawyers and tax accountants who advise their clients in planning, structuring, and reporting transactions. For tax professionals to do their jobs properly, they must be able to ascertain the law and predict its application with reasonable certainty. Positional changes by the IRS frustrate responsible tax planning and undermine taxpayers' confidence in their advisors.

Third, hard cases make bad law,\(^{207}\) and judges who have no identifiable doctrinal path to reach the result they desire sometimes carve out new and twisted avenues, doing mischief to doctrinal clarity.\(^{208}\) Judges occasionally engage in these contortions in cases presenting IRS inconsistency.\(^{209}\) The availability of a recognized duty of consistency with defined contours might provide judges with a method to satisfy their tropism towards fairness without violently wrenching other doctrines.

\(^{203}\) For fiscal year 2008, the IRS received over 250 million tax returns of all types, a 6.3% increase from the previous year. Internal Revenue Ser. Data Book, 2008 4 (Publ’n 55B 2009).


\(^{206}\) "[I]t is widely believed that taxpayers are more likely to comply voluntarily if they believe that the tax code is implemented fairly and consistently across taxpayers." U.S. Gov’t Accountability Office, supra note 1, at 8.

\(^{207}\) See United States v. Clark, 96 U.S. 37, 49 (1878) (Harlan, J., dissenting) ("[I]t is the duty of all courts of justice to take care . . . that hard cases do not make bad law.").

\(^{208}\) E.g., Wolpaw v. Comm’r, 47 F.3d 787, 792–93 (6th Cir. 1995) (contorting the rule under I.R.C. § 6110 that private letter rulings are not precedential in order to give a particular private letter ruling essentially precedential effect).

\(^{209}\) E.g., Walker v. Comm’r, 101 T.C. 537, 550 (1993) (treating a prior revenue ruling inconsistent with the IRS’s current litigating position as a “concession” by the IRS in the case at bar).
Other arguments beyond those stated here could be asserted, but I have doubts about them. For example, it is sometimes suggested that the IRS's knowledge that it would be consistently held to its positions would encourage it to think those positions through more carefully before taking an initial stance. That sounds plausible, but I doubt its "real world" viability. Extensive internal controls and reviews are already in place within the IRS, and the IRS is well aware of the professional and political heat it endures when it takes controversial positions. Despite these, of course, the IRS does sometimes "get it wrong," but that is rarely because it was cavalier or felt insufficient incentive to try to get it right. In short, I suspect that the extent to which a rigorous consistency doctrine would actually increase the clarity of the IRS's initial analysis would be at or near zero.

B. Theoretical Superiority of the "No Duty" View to the "Strong Duty" View

The appeal of the "strong duty" view derives from deeply felt and ennobling conceptions of fairness. Human beings naturally aspire to see justice prevail, and only those who are morally dead can view with unruffled serenity instances where the IRS treats similarly-situated taxpayers differently. Thus, opponents of the "strong duty" view bear the burden of showing that a robust and judicially enforceable duty of IRS consistency would entail such grave harms that they override the fairness arguments.

It may well be, however, that this burden can be met. Sometimes the head must overrule the heart. The Roman maxim "let justice be done though the heavens should fall" is exhilarating, but it is merely aspirational and never has been nor will be an operational principle of any modern legal system. Many features of our legal system—statutes of limitations for example—undoubtedly thwart justice in many cases but nonetheless persist because other policy considerations situationally trump fairness.

210. This idea derives from a comparable rationale for the contra proferentem canon for interpreting contracts. See, e.g., Banks v. Banks, 648 So. 2d 1116, 1121 (Miss. 1994).

211. To take a parallel, textual or literal approaches to statutory interpretation are sometimes defended on the ground that legislatures—knowing that the courts will not bail them out of drafting mistakes—will engage in better drafting. Although this notion has been around for a long time, see, e.g., THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 314 (2d Pomeroy ed. 1874), there seems to be little historical confirmation of this effect.

212. Moreover, in some instances, too much deliberation may be almost as bad as too little. See, e.g., Sam Young & Lee A. Sheppard, Financial Products Official Wants Faster Letter Ruling Process, 17 TAX NOTES 209, 209 (2007) (noting complaints that IRS rulings for financial products and transactions often arrive too late to be useful).

213. See supra Part IV.A.1.

214. "Fiat justitia, ruat coelum."

215. This is true in all areas of law, certainly including tax. "Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities."
There are four arguments against a "strong duty" position: (1) a judicially-created and enforced consistency doctrine may be constitutionally illegitimate as violative of the separation of powers principle; (2) the consistency doctrine can overcorrect, giving taxpayers not justice but windfalls; (3) a fully robust consistency duty would undercut effective tax-law administration; and (4) resolving cases on consistency grounds could deprive the system of substantive contributions by the courts.

1. Separation of Powers

There are two questions in every legal dispute: (1) what is the good or right outcome?; and (2) is the particular body hearing the matter empowered to decree that outcome? Even if one were to conclude that fairness trumps all countervailing policies, one would still have to ask whether it is constitutional for courts to impose a fairness-based rule to alter the result that would otherwise occur under the tax statutes enacted by Congress.

It is not easy to reconcile a judicial consistency doctrine with the separation of powers principle. Under our Constitution, Congress is authorized to make the tax laws, not the courts.\(^{216}\) The Treasury Department is authorized to engage in interstitial tax law making, but only as a result of congressional delegation of power.\(^{217}\) If, because of the judicially-created consistency doctrine, a taxpayer wins a case that they would have lost under the statute, the court has altered the outcome that Congress decreed. This result is hard to reconcile with the legislature’s undoubted primacy in taxation.\(^{218}\)

The consistency doctrine bears a familial relationship to the doctrine of equitable estoppel. But “it is well settled that the Government may not be estopped on the same terms as any other litigant.”\(^{219}\) Although the Supreme Court has “barely” left the door open “that estoppel might be available in the

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\(^{216}\) States v. Brockamp, 519 U.S. 347, 352 (1997). A softer view of the matter was offered by an early circuit court case: “Taxation is a matter of statutes, and equitable considerations cannot override the provisions of the statutes, nor always supply their omissions. Nevertheless honesty, good faith, and consistency are due in tax accounting. The right and wrong of things and equitable principles have a place in tax matters.” Alamo Nat’l Bank v. Comm’r, 95 F.2d 622, 622–23 (5th Cir. 1938) (citations omitted).

\(^{217}\) Either under specific delegations, such as I.R.C. §§ 385(a), 469(I), and 1502, or under the general delegation of I.R.C. § 7805(a). See also I.R.C. § 7801(a) (2006) (delegating to the Treasury Department authority to administer and enforce the Internal Revenue Code).

\(^{218}\) See, e.g., Am. Auto. Ass’n v. United States, 367 U.S. 687, 697 (1961) (referring to “the long-established policy of the Court in deferring, where possible, to congressional procedures in the tax field”).

"rare case," it "has never upheld a lower court opinion that applied equitable estoppel . . . against the government, and it has come close to saying that equitable estoppel is never available against the government." Specifically, many courts have held that equitable estoppel is rarely, if ever, available against the IRS.

The Supreme Court's decision in Office of Personnel Management v. Richmond, a non-tax case, is instructive. A retired Navy employee was receiving a disability annuity from the Government, and to remain eligible, he needed his other income to stay below a statutory ceiling. The retiree received erroneous oral and written information from Navy employee relations personnel, and as a result of following it, his income exceeded the ceiling and he was ruled ineligible for continued receipt of the annuity. He appealed the ruling, and the circuit court ruled in his favor based on equitable estoppel.

Ultimately, the Supreme Court reversed. Although it "[left] for another day whether an estoppel claim could ever succeed against the Government," the Court noted that "[f]rom our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants" and that "we have reversed every finding of estoppel that we have reviewed. Indeed, no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims."

Importantly, the Richmond Court anchored its holding in a separation of powers provision. The Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law, and Congress, of course, makes those appropriations. Under the applicable statute, the retiree was not entitled to the annuity, and the Court held

221. See, e.g., Dixon v. United States, 381 U.S. 68, 72–76 (1965); Auto. Club of Mich. v. Comm'r, 353 U.S. 180, 183 (1957); Estate of Carberry v. Comm'r, 933 F.2d 1124, 1127 (2d Cir. 1991); Estate of Guenzel v. Comm'r, 258 F.2d 248, 253 (8th Cir. 1958); Willis v. Dep't of Treasury, IRS, 848 F. Supp. 1127, 1130 (S.D.N.Y. 1994). A number of lower court cases have held that equitable estoppel may be asserted against the IRS. E.g., Tonkonogy v. United States, 417 F. Supp. 78, 80 (S.D.N.Y. 1976); In re Hollenbeck, 166 B.R. 291, 295–96 (Bankr. S.D. Tex. 1993). These cases are controversial, however. See generally Saltzman, supra note 87, ¶ 1.06[4] (discussing equitable estoppel in tax).
223. Id. at 416.
224. Id. at 417–18.
225. Id. at 418.
226. Id. at 434.
227. Id. at 423.
228. Id. at 419.
229. Id. at 422.
230. Id. at 423–24.
231. U.S. Const. art. I, § 9, cl. 7.
232. See Richmond, 496 U.S. at 424.
that "judicial use of the equitable doctrine of estoppel cannot grant [the retiree] a money remedy that Congress has not authorized."\(^{233}\)

The logic of \textit{Richmond} also applies to a judicially-created and enforced duty of consistency on the IRS. As seen in the Adam and Eve example in Part I,\(^{234}\) a duty of consistency matters only in cases where the IRS's adjustment for the second taxpayer is correct under the substantive law. For a court to nonetheless hold for the taxpayer would override the tax statute as surely as finding in favor of the retiree in \textit{Richmond} would have overridden the annuity statute. The separation of powers principle is traduced equally in the two contexts.

2. Windfalls to Taxpayers

The duty of consistency can be a blunt instrument, overcorrecting so that taxpayers are not simply made whole but receive windfalls. When a taxpayer prevails in court on consistency grounds, they win the whole case. The taxpayer will have to pay neither the deficiency nor interest on the deficiency for the item at issue.

This can overcorrect in two ways. First, two classes of taxpayers occupy different situations regarding IRS inconsistency. One class consists of taxpayers who were aware of the IRS's initial position and specifically relied on it in planning their transactions. The other class was unaware of the initial position and did not rely on it; taxpayers of this class discovered the IRS's inconsistency only as a happy accident during trial preparation.

The fairness argument is stronger for the reliance based class than the non-reliance based class\(^{235}\) because the fairness concern is most significant when reliance is present.\(^{236}\) Yet, as usually framed, the consistency duty does not consist of a reliance element. Thus, taxpayers in the non-reliance class could prevail just as often as those in the reliance class. For taxpayers in the former, their victory would more resemble a windfall than a necessary concomitant of justice.

Second, there is an aspect of windfall even for taxpayers who acted in reliance on the IRS's initial position. In consistency situations, the IRS's initial position presumably was wrong under the substantive law, whereas its

\(^{233}\) \textit{Id.} at 426; \textit{see also} INS v. Pangilinan, 486 U.S. 875, 883 (1988) ("[I]t is well established that courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." (quoting Hedges v. Dixon County, 150 U.S. 182, 192 (1893))).

\(^{234}\) \textit{See supra} text accompanying notes 2–3.

\(^{235}\) \textit{See, e.g.,} Bookwalter v. Brecklein, 357 F.2d 78, 84 (8th Cir. 1966) (distinguishing, for consistency purposes, between taxpayers who had applied for and received IRS rulings and taxpayers who had not).

\(^{236}\) \textit{Cf.} Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 n.12 (1984) (noting "the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests").
subsequent, inconsistent position was correct. Had the second taxpayer properly followed the law (instead of the IRS’s erroneous initial interpretation of the law), their filed return would have reported a higher tax liability and, therefore, entailed no deficiency. Thus, excusing the taxpayer’s deficiency as a result of a consistency based decision would place the taxpayer in a better position than the law intended.

3. Tax Administration

A rule of consistency would be particularly troublesome if it was triggered by lower-level IRS actions and positions—those lower in status than regulations, revenue rulings, revenue procedures, and notices. If a judicial consistency duty were recognized, a choice would have to be made on the types of actions and positions that would trigger the duty. Would the IRS be precluded from taking a later position at variance with any type of action or position?

Most supporters of a judicially enforceable consistency duty would allow some lower-level IRS actions and positions to act as consistency triggers. There are at least three problems with extending a consistency duty to those lower levels. First, lower-level IRS actions do not have precedential status. Why then should they be consistency triggers? For example, in a non-tax case, the Supreme Court rejected a complaint that the current position of a federal agency was inconsistent with prior positions taken in low-level agency pronouncements. The Court stated in part that the prior positions were too informal “to establish a binding agency policy.”

Second, the effect of a consistency requirement on the IRS’s willingness to provide guidance should be considered. To take a parallel, the general rule is that the courts, in reviewing IRS determinations, will ignore defects in following the Internal Revenue Manual leading up to these determinations. The courts reason that to hold otherwise would discourage the IRS from instituting procedures in the first place. It is better that the IRS establishes internal rules that it usually follows than be deterred from establishing rules at all. The number of annual rulings issued by the IRS is already at a low level

237. For description of the types of Treasury and IRS actions and positions, see supra Part II.B.
238. E.g., Zelenak, supra note 81, at 433–48 (arguing that private letter rulings should be used as triggers).
241. Id.
243. See id. at 756.
244. See, e.g., id.; Riland v. Comm’r, 79 T.C. 185, 200–02 (1982); see Steve Johnson, A Residual Damages Right Against the IRS: A Cure Worse than the Disease, 88 Tax Notes 395,
according to historical standards.\textsuperscript{245} Requiring private letter rulings and other types of guidance to be sources of required consistency might make them less attractive and exacerbate the situation. These sources of guidance are important to the health of the system. Thus, a strong consistency rule could establish incentives adverse to sound tax administration.

Third, the effect the consistency requirement would have on the manageability of tax litigation also merits consideration. If all types of IRS actions qualified as consistency triggers, taxpayers' counsel would have a large incentive to routinely and exhaustively seek information on prior IRS actions during discovery. Judges would have to wade through consistency debates in discovery disputes collateral to the underlying substance of the tax issues.\textsuperscript{246} Limiting consistency triggers to a small and defined set of sources would curb both litigation costs and inconvenience to the parties and the courts.

4. Judicial Contributions to the Development of Substantive Tax Law

Resolving a tax case solely on the procedural ground of IRS inconsistency would eliminate the necessity of reviewing the substantive merits of the parties' positions. In some instances, eradicating the court's view could hamper the sound development of substantive tax law. Here are five examples:

(1) In \textit{Haley Bros. Construction Corp. v. Commissioner}, the tax court considered rules governing eligibility for S corporation status.\textsuperscript{247} The court noted that the IRS's position in the case was inconsistent with prior revenue rulings.\textsuperscript{248} Nonetheless, the court held for the IRS because it concluded that the rulings were incorrect under the statute.\textsuperscript{249} The IRS has since acknowledged and discussed \textit{Haley} in subsequent guidance and rulings.\textsuperscript{250}


\textsuperscript{246} Most courts have been unreceptive to consistency-motivated taxpayer demands for discovery. \textit{See, e.g.}, United States v. Stout, 601 F.2d 325 (7th Cir. 1979); Vons Cos. v. United States, 51 Fed. Cl. 1, 4–5 (2001); Penn-Field Indus. v. Comm'r, 74 T.C. 720, 720–21 (1980); Davis v. Comm'r (\textit{Davis I}), 69 T.C. 716, 719–20 (1978); Davis v. Comm'r (\textit{Davis II}), 65 T.C. 1014, 1021–22 (1976); \textit{see also supra} text accompanying notes 124–28.

\textsuperscript{247} \textit{Id.} at 516–17.

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} \textit{Id.}

(2) In Commissioner v. Schlieer, the Supreme Court revisited § 104(a)(2), which excludes damages received due to physical injury from gross income.\textsuperscript{251} Previously, this provision had produced many irreconcilable and unsatisfactory decisions.\textsuperscript{252} A major cause of the problem was an outdated, but still in-effect, regulation.\textsuperscript{253} Holding the Government to its prior position on the regulation would likely have led to a decision for the taxpayer\textsuperscript{254}—and perpetuated the unsatisfactory status quo. Unfazed by the consistency concern,\textsuperscript{255} the Court held for the Government\textsuperscript{256} after accepting its "reinterpretation" of the regulation, and gave hope that § 104(a)(2) law could develop in a more satisfactory direction. Indeed, the following year, Congress amended and improved § 104(a)(2).\textsuperscript{257}

(3) In Dickman v. Commissioner, the Supreme Court considered whether no-interest or low-interest loans can give rise to federal gift tax liability.\textsuperscript{258} The taxpayer argued that prior to 1966 the IRS had not asserted this liability and that its revised position was an impermissible departure from its prior practice.\textsuperscript{259} After briefly remarking that it was not certain that the IRS had changed its position, the Court rejected the taxpayer's consistency argument as a matter of law.\textsuperscript{260} Thus, free to consider the merits, the Supreme Court held for the IRS.\textsuperscript{261} This closed a loophole in the gift tax and was one of the catalysts for the enactment of Code § 7872, which comprehensively addresses the income, estate, and gift tax effects of low-interest loans.\textsuperscript{262}

(4) When a taxpayer fails to pay duly-determined tax liabilities, § 6321 provides that the unpaid amounts "shall be a lien in favor of the [Government]
upon all property and rights to property, whether real or personal, belonging to [the taxpayer].\textsuperscript{263} Despite the sweeping language of § 6321,\textsuperscript{264} and the fact that state law exemptions do not limit federal tax collection,\textsuperscript{265} nearly unanimous lower-court case law held that the tax lien did not attach to tenancy-by-the-entirety interests when state law exempts these interests from the reach of private creditors.

This rule never made doctrinal sense,\textsuperscript{266} and the Supreme Court overruled it in United States v. Craft.\textsuperscript{267} The strongest argument advanced by the Craft dissenters was that the IRS itself had accepted the old rule in a number of its manuals, advisories, and bulletins.\textsuperscript{268} Thankfully, the Craft majority ignored this fact. Had the Court ruled adversely to the IRS on consistency grounds, the old, anomalous, and undesirable rule would have continued to confound federal tax collection.\textsuperscript{269}

(5) Section 162(a)(2) allows taxpayers away from home in pursuit of trade or business to deduct their reasonable travel expenses, including meals and lodging.\textsuperscript{270} In Rosenspan v. United States, the Second Circuit considered deductions for meal and lodging expenses incurred on the road by a traveling salesman who had an office but did not have an abode.\textsuperscript{271} For many years, the IRS had interpreted "home" for § 162(a)(2) purposes as one's tax home, \textit{i.e.}, one's principal place of business.\textsuperscript{272} The salesman argued that based on that definition he should prevail.\textsuperscript{273}

However, the Second Circuit held against the taxpayer.\textsuperscript{274} The court correctly observed that the IRS’s “tax home” position ran contrary to traditional canons of statutory interpretation\textsuperscript{275} and violated sound policy.\textsuperscript{276} Accordingly,
the court held that the statutory term “home” means “abode,” not “business headquarters.” At the margins, this area of deductions remains controversial, but Rosenspan continues to be a key case in generating thought about the area and administering the deductions.

The contributions of cases like Haley Bros., Schleier, Dickman, Craft, and Rosenspan to the positive evolution of the substantive tax law would not have occurred had these cases been resolved adversely to the Government on a consistency rationale. This implicates what has been called the collaborative approach to statutory interpretation. Good taxation is an art—an exceedingly difficult art involving numerous fiscal, economic, social, and political complexities. Legislators and administrators (as well as taxpayers’ advisors) play the principal roles, but the quality of our tax rules can be improved through judges’ intellectual contributions. We should preserve this possibility.

C. Theoretical Superiority of the “No Duty” View to Current “Weak Duty” Views

Part III.C.3 identified four “weak duty” views that have been offered in cases, IRS guidance, or commentary. All have disadvantages that disqualify them as general solutions to the consistency conundrum.


276. The court noted that the purpose of the deduction is to alleviate the burden of duplicative expenses. Rosenspan, 438 F.2d at 912. Since Rosenspan had an office but was not paying for a house or apartment, his hotel expenses were not duplicative housing costs. Id.

277. The court explained its reasoning: “Proper analysis of the problem has been beclouded, and the Government’s position in this case has been made more difficult than it need be, by the [IRS’s] insistence that ‘home’ means ‘business headquarters,’ despite the Supreme Court’s having thrice declined to endorse this, and its rejection by several courts of appeals.” Id. at 910–11 (citations omitted).

278. See, e.g., Stokes v. Comm’r, 63 T.C.M. (CCH) 2886 (1992), aff’d, 22 F.3d 1098 (11th Cir. 1994); Kennedy v. Comm’r, 54 T.C.M. (CCH) 332 (1987).


As previously mentioned, one suggested approach is to require IRS consistency in those situations where the IRS has discretion in making or applying the tax law, but not require consistency where it lacks discretion.\textsuperscript{281} More often than not, the tax law is non-discretionary, but the IRS probably has more discretion than is usually acknowledged.

Nonetheless, linking mandatory consistency to the degree of administrative discretion would be problematic. First, a distinction should be drawn between rulemaking discretion and rule-application discretion. Most of the examples of administrative discretion described in Part III.C.3.a entail discretion available to Treasury when drafting regulations. Once regulations have been written, they typically have the force of law and the IRS does not have discretion to flout or revise them during an audit, administrative appeal, or litigation of any taxpayer’s case.\textsuperscript{282}

Second, this approach is an invitation to both unproductive wrangling over collateral issues and grave unpredictability. Discretion is not a binary concept. It is not the case that Treasury and the IRS either have discretion or don’t; rather, each has greater or lesser degrees of discretion in various contexts. Therefore, under this approach, courts would first have to quantify the degree of discretion in a given situation and then hold the IRS to a matching degree of mandatory consistency along a spectrum from “very great discretion therefore very great consistency” to “no discretion therefore no required consistency,” with untold numbers of calibrations in between. As a practical matter, litigants could not confidently predict where the courts would come out in actual cases. One of the worst aspects of the status quo is its unpredictability, which this approach would only perpetuate.

2. A Duty of IRS Factual Representations Only

In a low-level internal memorandum the IRS accepted that it is subject to a duty of consistency mirroring the elements of the taxpayer duty of consistency for representations of fact.\textsuperscript{283} This was neither a generous concession nor a worthwhile solution to the consistency problem.

The IRS rarely makes representations of fact to taxpayers. Because the taxpayers were parties to the transactions at issue, they are the ones in a position to make factual representations. The IRS rarely has first-hand knowledge of the relevant events, and, thus, cannot and will not make factual representations. IRS inconsistencies typically involve interpretations of law, and this approach would provide no relief in these situations. A “no duty” position at least forthrightly states that IRS inconsistency is not actionable. This

\begin{itemize}
\item \textsuperscript{281} See supra Part III.C.3.a.
\item \textsuperscript{282} See infra text accompanying notes 333–38.
\item \textsuperscript{283} See supra Part III.C.3.b.
\end{itemize}
is preferable to a “no duty” result accomplished “through the back door”—
acknowledging a duty that has no practical application or real weight behind it.

3. A Duty to Explain or Repudiate

Another alternative is to generally apply to the IRS the rule that applies to
administrative agencies.284 That is, when inconsistency is alleged, the IRS
would be required to explain why its positions are consistent or to provide a
good reason for departing from the earlier position, such as a reasoned change
of policy or repudiation of the earlier position as erroneous.

There are appealing aspects of this approach. The tax world—like most
specialties, I suppose—occasionally trends towards undesirable exceptionalism.
I believe that rules of tax procedure should parallel rules of procedure
generally, absent some substantial reason for departure.285

However, there probably are good reasons for departure in this context.
First, I have described “explain or repudiate” as a “weak duty” view, but a
“hybrid” view may be more accurate. When the explanation or repudiation is
not given, this approach morphs into a “strong duty” view since the entire IRS
adjustment is defeated. But, when the explanation or repudiation is given, it
morphs into a “no duty” view because the taxpayer receives no relief, except,
perhaps, some sense of moral vindication. Thus, in every case, this approach
will exhibit the disadvantages of one of the polar views.

Second, the press of litigation is not a good scenario for the Government to
undertake comprehensive reevaluations of tax policy—and only reevaluations
of this quality offer “explain or repudiate” appeal. Careful policy reappraisals
should be made in a reflective and, if needed, unhurried fashion, not under
court imposed deadlines during progressive litigation. An explanation or
repudiation that emerges from a rushed or incomplete analysis could hinder the
coherence of the tax law rather than help it.

Third, allowing taxpayers to discover private letter rulings and comparable
documents as ammunition for consistency arguments would create serious
privacy concerns. There is a strong policy in favor of preserving the

284. See supra Part III.C.3.c.
285. Compare David A. Hyman, When Rules Collide: Procedural Intersection and the
Rule of Law, 71 Tul. L. Rev. 1389 (1997) (arguing that general law concepts should more fully
inform the rules on IRS summonses), with Leo P. Martinez, The Summons Power and the Limits
of Theory: A Reply to Professor Hyman, 71 Tul. L. Rev. 1705, 1724-27 (1997) (maintaining
that Hyman’s approach pays insufficient heed to important differences between tax and other
contexts). See also Kristin E. Hickman, The Need for Mead: Rejecting Tax Exceptionalism in
Judicial Deference, 90 Minn. L. Rev. 1537 (2006) (arguing that tax does not and should not
have a different deference standard than all other administrative law); Leo R. Martinez, The
Summons Power and Tax Court Discovery: A Different Perspective, 13 Va. Tax Rev. 731, 733
(1994) (arguing that all “information obtained pursuant to legitimate exercise of the summons
power should be allowed in the Tax Court”).
confidentiality of taxpayer information, a policy codified in several sections of the Internal Revenue Code.\textsuperscript{286}

Privacy protections could create a dilemma under a consistency duty. In at least some cases, redacted information could be significant in deciding whether the taxpayer seeking the information is truly situated similarly to the taxpayer in the ruling. Withholding the information could make it difficult for the taxpayer to plausibly assert that there is a consistency issue or, conversely, could deny the IRS the means to explain why two ostensibly similar situations actually are distinguishable. On the other hand, exposing the redacted information would undercut the established policy of confidentiality, compromising the privacy of a taxpayer who is oblivious to the instant controversy,\textsuperscript{287} and, in turn, possibly undercutting voluntary compliance.\textsuperscript{288}

Fourth, the analogy between tax cases and non-tax administrative law cases—the grounds from which “explain or repudiate” sprouts—is inexact. Many of the non-tax administrative law cases involve the application of both agency policy and discretion; situations where the agency has effectively made the law.\textsuperscript{289} In contrast, although Treasury and the IRS have greater latitude for action than is sometimes acknowledged,\textsuperscript{290} it remains true that the IRS is usually applying law made by Congress rather than law made by itself. In these cases, if the IRS cannot satisfactorily “explain” and is “bound” to its previous position, it is the will of Congress—the constitutionally responsible actor—that is being thwarted by application of a judicial consistency rule.

4. A Duty Under Amended § 7805(b)

Again, as previously described, Professor Pietruszkiewicz has proposed amending § 7805(b) to broaden the scope of review and adopt a uniform standard of abuse of discretion applicable to consistency cases.\textsuperscript{291} If I read his proposal correctly, it has some common ground with the proposal advanced in Part VI of this article. Both proposals involve amending portions, albeit different portions, of the Internal Revenue Code. This would avoid the

\begin{itemize}
\item \textsuperscript{286} E.g., I.R.C. §§ 6103, 6105, 6110(c), 7213A, 7216 (2006).
\item \textsuperscript{287} See, e.g., Grant, Konvalinka & Harrison, P.C. v. United States, No. 1:07-CV-88, 2008 WL 4865566, at *2–3 (E.D. Tenn. Nov. 10, 2008) (rejecting on § 6103 grounds an attempt to discover settlement documents between the IRS and third parties, specifically rejecting the attempt to expand an exception to confidentiality under § 6103(h)(4)(C)).
\item \textsuperscript{289} See, e.g., INS v. Yang, 519 U.S. 26, 32 (1996); Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491–93 (1947).
\item \textsuperscript{290} See supra Part III.C.1.
\item \textsuperscript{291} See supra notes 170–74.
\end{itemize}
separation of powers problem and the futility of continued reliance on common law. Also, both proposals are premised on the belief that some of the "strong duty" cases have gone too far and that a "weak duty" approach offers the best prospects of success.

However, the "amend § 7805(b)" approach apparently would use lower-level IRS positions, such as private letter rulings, as consistency triggers, which would absolve the taxpayer of all liability—deficiency as well as interest. These aspects would render this approach susceptible to three of the problems inherent in the "strong duty" view as described in Part IV.B. First, elimination of the entire deficiency would give the taxpayer a windfall compared to taxpayers who properly reported their liabilities. Second, this elimination on the procedural ground of consistency would deprive the system of useful contributions by the courts to the development of the substantive tax law. Third, designating private letter rulings and other lower-level IRS guidance as consistency triggers would create a disincentive for the IRS to provide guidance, imperiling an important avenue for taxpayer service and responsible tax planning.

V. THE UNSUSTAINABILITY OF THE "NO DUTY" VIEW

In Part IV, I asserted that, from a purely theoretical or doctrinal perspective, the "no duty" view is the best view to the consistency problem among the approaches that have been offered to date. But public policy is not a matter solely of theory and doctrine. The lesson of experience is clear that no single view, including the "no duty" view, is likely to become and remain settled doctrine as long as tax consistency remains a province of the common law.

Exploring the reasons for this state of affairs will help us to craft a better solution. Three reasons predominate: (1) the ingrained habits of American judges; (2) time and resource limitations on lawyers, judges, and their clerks; and (3) the inherent difficulty of the consistency issues, especially insofar as they entail conflict between the head and the heart.

A. Ingrained Judicial Habits

One of the enduring themes of law is the push-and-pull between clarity and nuance. The struggle plays out on well-worn fields such as "defined elements versus all facts and circumstances" and "rules versus standards." Of course,
reasonably clear rules do sometimes emanate from common law judging, but it remains true that American judges often exhibit fear of commitment—reluctance to unequivocally embrace firm rules. At least part of the reason for this reluctance is the desire of judges to retain maximum freedom of maneuver, that is, to avoid laying down a rule in today’s case that may prove an obstacle in reaching the result the judge may desire in tomorrow’s case.

Against this background, reluctance to commit to a firm IRS consistency rule is no more surprising than judges’ behavior in other contexts. In Part IV.B.1, we rehearsed the Supreme Court’s bringing itself to the brink of declaring that equitable estoppel cannot be applied against government agencies but being unwilling to cross that Rubicon.

A similar battle with a similar result was waged in Chevron Step Zero. Justice Scalia has repeatedly urged the Court to adopt a clear rule for when Chevron applies and when it does not. He has been unsuccessful. Writing for the majority in a key post-Chevron case, Justice Souter summarized his attempts: “Justice Scalia’s first priority over the years has been to limit and simplify. The Court’s choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference . . . .” Justice Scalia bemoaned his defeat: “The Court has largely replaced Chevron . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ ol’ ‘totality of the circumstances’ test.”

B. Time and Resource Limitations

Most of the consistency decisions—regardless of which view they ultimately espouse—are of distressingly low quality. The barren sands are relieved by relatively few oases. Most of the cases do not acknowledge


298. This is part of the explanation for the fuzziness of appellate review standards. For discussion of these standards in tax, see Christopher M. Pietruszkiewicz, Conflating Standards of Review in the Tax Court: A Lesson in Ambiguity, 44 HOUS. L. REV. 1337 (2008) (tracing the history of the standard of review in tax court and arguing for a more traditional approach); Christopher M. Pietruszkiewicz, Economic Substance and the Standard of Review, 60 ALA. L. REV. 339, 360–65 (2009).

299. See supra text accompanying notes 219–35.

300. The question of whether Chevron applies to a given case is logically anterior to Chevron’s two steps and, thus, has been called “Step Zero.” E.g., Cass R. Sunstein, Chevron Step Zero, 92 VA. L. REV. 187, 191 (2006).


302. Id. at 241 (Scalia, J., dissenting).

(much less carefully evaluate) the numerous cases reaching different results, nor do they identify (much less deeply analyze) more than one or two of the competing values discussed in Part IV.

Particularly striking is the failure of many "strong duty" cases to explain their result in light of earlier Supreme Court decisions. In a 1936 case, the Supreme Court held that the IRS could effectively make a new regulation retroactive that increased tax liability above that created under a prior regulation because the old regulation was an erroneous interpretation of the statute.\(^{304}\) The Court explained its decision:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.\(^{305}\)

If a prior IRS position incorrectly applying the Internal Revenue Code is "a mere nullity," it is hard to comprehend how it can be the basis on which the IRS’s subsequent correct application of the Code will be estopped.

Later, a 1957 case dealt with the IRS’s retroactive revocation of erroneous rulings on which the taxpayer had relied to its detriment.\(^{306}\) The taxpayer argued that the IRS should be equitably estopped from this practice.\(^{307}\) The Court disagreed: "This argument is without merit. The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law."\(^{308}\)

In 1965, the Supreme Court endorsed these previous cases.\(^{309}\) It stated that "the Commissioner’s acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due,"\(^{310}\) and noted that this principle, applicable to regulations, "applies with even greater force" to IRS positions below the level of regulations.\(^{311}\)

Finally, in a 1984 case, the taxpayers complained that the IRS had not previously interpreted the Code to impose gift tax liability on interest-free loans.\(^{312}\) The taxpayers argued that it was "manifestly unfair to permit the

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305. Id. at 134.
307. Id. at 183.
308. Id.
310. Id. at 73.
311. Id. at 75.
Commissioner to impose the gift tax on the transactions challenged here.\textsuperscript{313} Citing the 1957 and 1965 cases described above, the Supreme Court rejected this argument:

\begin{quote}
[It]t is well established that the Commissioner may change an earlier interpretation of the law, even if such a change is made retroactive in effect. This rule applies even though a taxpayer may have relied to his detriment upon the Commissioner's prior position. The Commissioner is under no duty to assert a particular position as soon as the statute authorizes such an interpretation.\textsuperscript{314}
\end{quote}

Frankly, it is hard for me to see how the "strong duty" view squares with this tetralogy of Supreme Court cases, although motivated counsel surely would attempt more or less plausibly to distinguish them.\textsuperscript{315} In any event, I am making a more modest point here, a point about the quality (or lack thereof) of recent opinions written in consistency cases. These are the Supreme Court's most nearly relevant decisions.\textsuperscript{316} One would expect that a court claiming to have the power to void statutorily correct IRS positions based on a common law doctrine would feel compelled to deal in some way with the Supreme Court's position. Yet many of the "strong duty" cases mention only in passing or even entirely ignore the Supreme Court tetralogy.\textsuperscript{317}

Perhaps the most benign explanation for these omissions is overwork. The briefs written in consistency cases by busy lawyers with increasingly cost-conscious clients may fail to cite all the relevant case law and busy judges and their busy clerks dealing with burgeoning case loads may lack the ability to rectify the lawyers' omissions. If this is indeed the explanation, we can hardly expect marked improvement in the quality of consistency decisions in the future. The trends in both client constraints and workloads run in the opposite direction.

\begin{itemize}
\item[313.] Id. at 342–43.
\item[314.] Id. at 343 (citations omitted). For additional discussion of Dickman, see supra text accompanying notes 258–62.
\item[315.] For instance, one could point to changes in the delegation doctrine since 1936 and assert contextual differences for the Auto Club, Dixon, and Dickman cases.
\item[316.] In contrast, the best Supreme Court support for the "strong duty" view is a brief passage in a concurring opinion coming three years after the 1957 decision, five years before the 1965 decision, and 24 years before the 1984 decision. United States v. Kaiser, 363 U.S. 299, 208 (1960) (Frankfurter, J., concurring).
\end{itemize}
C. The Inherent Difficulty of the Issue

Even if future consistency cases were immaculately briefed, one could not feel confident that all judges would reach the same result and settle upon a firm rule. To an appreciable degree, choice among the competing views becomes a value judgment, and not all human beings assign the same weights to various values. In my constellation of values, the arguments favoring “no duty” are stronger than those favoring a “strong duty,” but others of at least equal intelligence, moral sensitivity, and learning could discover that their scales of values tip differently from mine.\(^{318}\)

This is well illustrated by the case law. Cases that have reflected on the multiple conflicting policies plaguing the consistency issue have been marked by vacillation, not resolution, as is exemplified by this excerpt from a tax court consistency decision:

> It has long been the position of this Court that our responsibility is to apply the law to the facts of the case before us and determine the tax liability of the parties before us; how the Commissioner may have treated other taxpayers has generally been considered irrelevant in making that determination. . . . Any change in that position would have widespread ramifications in the administration and application of the Federal tax laws and in the conduct of our work. . . . Although the implementation of [a consistency duty] . . . would present many problems, those problems may not be insurmountable, and the notion of equal justice has strong appeal in our society and might lead to the conclusion that [a consistency duty] should ultimately be adopted. Yet, a full appreciation of the ramifications of this matter makes abundantly clear that it should be approached cautiously. In accordance with sound judicial administration, such a matter should only be considered when necessary to do so in order to decide the case before us.\(^{319}\)

In short, the inherent difficulty of the issues is too great to reasonably expect that courts will blindly apply the “no duty” view or any other single view. When the task involves making value judgments, Congress, not the individual judge, is the more appropriate representative of society. If we are to hope to eventually settle the IRS consistency controversy, we must look to

\(^{318}\) For example, Professor Hoffer supports a “strong duty” view because she believes that “justice demands it.” Hoffer, supra note 19, at 348–49. See generally Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987) (rejecting the view that legality and empathy are mutually exclusive concepts).

\(^{319}\) Davis v. Comm’r (Davis I), 65 T.C. 1014, 1022–23 (1976) (citations omitted); see also Avers v. Comm’r, 55 T.C.M. (CCH) 678, 693 (1988) (stating that equal protection violations through inconsistent settlement offers only occur where “discriminatory selection was based on impermissible considerations or an arbitrary classification”); Jaggard v. Comm’r, 76 T.C. 222, 226–27 (1981) (citing Davis I, 65 T.C. 1014) (stating that like Davis I, it is unnecessary to decide whether there is a duty of consistency).
statutes, not common law, and to an approach that achieves reasonable balance among the competing considerations.

VI. PROPOSAL

A. Criteria for an Effective Solution

The answer to the IRS consistency problem must be statutory. In an area as positivistic as tax law, statutory mechanisms are generally preferable to judicially-created regimes. In the consistency context, that general preference is strongly reinforced by the failure of common law making to produce any settled rule, much less a good rule. Furthermore, a statutory rule will avoid the separation of powers concerns that arise from the Judicial Branch holding that malfeasance by the Executive Branch trumps the tax outcomes decreed by the Legislative Branch.

The contents of the statutory solution must take into account the competing policies and values explored in Part IV and the sustainability concern addressed in Part V. Thus, an effective statutory answer should advance rule of law values and provide relief to taxpayers who deserve it, but not overcorrect by benefitting undeserving taxpayers or benefitting deserving taxpayers in excessive amounts. A sound statutory solution also should minimize any adverse impact on tax administration and preserve the opportunity for courts to contribute to the development of the substantive tax law. Finally, an effective statutory answer must balance the competing concerns well enough to offer a fair hope of sustainability.

B. Description of the Proposal

My proposal involves relief in appropriate instances from interest liability on tax underpayments. Code § 6601(a) provides that, in addition to the principal amount of the deficiency and any applicable penalties, the taxpayer is liable for interest on tax underpayments. Interest is compounded daily, and the rate broadly corresponds to prevailing market rates of interest. However, interest is not automatic. Section 6404 specifies a number of circumstances

320. See Johnson, The Taxpayer’s Duty of Consistency, supra note 189, at 573 (suggesting that statutory mitigation rules of I.R.C. §§ 1311–1314 should be applied over judicial duty of consistency when both could apply to a given case); cf. Benenson v. United States, 385 F.2d 26, 32–34 (2d Cir. 1967) (reaching the same result when mitigation rules and judicial doctrine of equitable recoupment could overlap).

321. I.R.C. § 6601(a) (2006). Penalties typically would not be in play in these cases. The Code’s accuracy-related penalties do not apply if there was reasonable cause for the return position taken by the taxpayer and the taxpayer acted in good faith. I.R.C. § 6664(c)(1) (2006). This standard surely is met when a taxpayer relied on an unrevoked regulation, revenue ruling, or revenue procedure.

322. See I.R.C. §§ 1274 (d), 6621(a)–(b) (2006).
under which taxpayers may be relieved of interest liability on tax underpayments. None of the current circumstances cover the IRS inconsistency addressed in this article.

I advance the following proposal. Congress should amend Code § 6404 to create a new circumstance where a taxpayer’s liability for interest will be abated. The amendment would provide for abatement of interest on any tax underpayment when (1) the taxpayer’s return position was consistent with a regulation, revenue ruling, revenue procedure, or IRS notice on which (2) the taxpayer relied in taking the return position, and that (3) the IRS withdrew or chose not to follow after the return was filed. The amendment also would provide that refusal by the IRS to effect this abatement is judicially reviewable under a de novo standard.

One definitional nuance of this proposal involves regulations as consistency triggers. A current area of major controversy involves the extent to which Treasury regulations receive deference under the Chevron standard. It is generally agreed that specific-authority tax regulations are Chevron-qualified, but courts disagree on whether general-authority regulations are so qualified or, instead, are governed by the putatively less deferential Skidmore standard. The majority view and the current trend is to treat general-authority Treasury

323. See infra text accompanying notes 369–72.
324. Although § 6404(f) addresses the abatement of penalties due to erroneous written advice, it is only applicable to advice written to the individual taxpayer and not to prior rulings or advice given to a different taxpayer.
328. For description of specific-authority and general-authority tax regulations, see supra text accompanying notes 132–40.
regulations as Chevron-qualified, however, some opinions are to the contrary. Federal deference doctrine is hardly a model of clarity, but whether a given administrative position is Chevron-eligible probably depends on whether the position has "force of law" status.

Thus, the nuance. If a regulation has force of law status, it should not be a consistency trigger. The IRS surely should lose the case, but it should lose on the right ground. To the extent the regulation is law and the IRS's position is contrary to it, the IRS should lose because its position is contrary to law, not because it is inconsistent. Whenever possible, the focus should be on the substance of the law, not on the nature of the IRS's application of the law.

For example, the Woods Investment case involved application of Treasury's "consolidated return" regulations. These are specific-authority regulations, and unquestionably possess force-of-law status. The IRS's position in the case was contrary to the regulations. The tax court properly held for the taxpayer and used the correct rationale. The court applied the regulation as written, binding law, rather than invoke a consistency rationale.

Accordingly, the proposal would designate only those regulations without the force of law as consistency triggers. There is no need for a comparable nuance for revenue rulings, revenue procedures, and notices. At one time, the


335. Thus, for example, the courts are reluctant to "look behind" an IRS notice of deficiency to fathom the IRS's motives but instead look to the notice itself as the legally significant statement. E.g., Greenberg's Express, Inc. v. Comm'r, 62 T.C. 324, 327–30 (1974).


338. Woods Investment, 85 T.C. at 279 (citing Ga.-Pac. Corp. v. Comm'r, 63 T.C. 790, 801–02 (1975)).

339. Woods Investment, 85 T.C. at 256, acq., 1986-12 I.R.B. 26 (noting that the IRS disagreed with Woods Investment but did not appeal the decision and no longer advanced its position pending a change in regulations).

340. Id. at 282; see also CSI Hydrostatic Testers, Inc. v. Comm'r, 103 T.C. 398, 403–07, 410 (1994) (following Woods Investment on a similar issue).
Chevron-eligibility of revenue rulings and revenue procedures was seriously debated. By now, however, very few cases have held that these pronouncements have force-of-law status, and the current authority of those prior decisions is doubtful. It is essentially settled that revenue rulings and revenue procedures lack force-of-law status.

A second nuance would involve a cut-off date or event for relief from interest liability. If the amendment provided for relief without a time restriction, taxpayers would have an incentive to protract their proceedings as long as possible, and to drag out administrative appeals, tax court litigation, and circuit court appeals. If interest were not accruing, the taxpayers would essentially have an interest-free loan from the Government in the amount of the deficiency throughout the pendency of proceedings.

Thus, relief from interest liability should cease as of some time or event. Candidate cut-off dates could be the date that the IRS issues a notice of deficiency or assesses the tax in question, or a stated number of days after this issuance or assessment. Another alternative for the cut-off event could be


345. Taxpayers may litigate in tax court without paying the deficiency asserted by the IRS. In contrast, full payment usually is a jurisdictional prerequisite for litigating in district court or the Court of Federal Claims. Flora v. United States, 362 U.S. 145, 177 (1960).

346. A taxpayer pursuing this strategy would want to consider I.R.C. § 6673(a)(1), which allows the tax court to impose damages on taxpayers who institute or maintain proceedings that are frivolous, groundless, or primarily for delay. See also Fed. R. App. P. 38 (allowing courts of appeals to penalize parties bringing frivolous appeals). However, § 6673 is used almost exclusively against tax protesters. It is not a deterrent to a taxpayer who has a reasonably arguable position.

347. The IRS cannot legally collect a tax until it has been assessed. I.R.C. §§ 6201–6203, 6303, 6321, 6331 (2006). In general, before it can legally assess deficiencies in income, gift, estate, and certain kinds of excise taxes, the IRS must issue a notice of deficiency, which triggers the opportunity for tax court review. I.R.C. §§ 6211–6213 (2006).

348. For instance, abatement of interest could end twenty-one days after the date of notice and demand for payment, which would coordinate with the date interest begins to run on unpaid tax penalties. See I.R.C. § 6601(e)(2) (2006).
when the IRS first contacts the taxpayer in writing regarding the alleged deficiency. This event is already used with respect to interest abatement under § 6404(e)(1). However, within reasonable limits, the setting of any cut-off date or event is more important than the precise date or event that is chosen.

The amendment adopting this proposal would further provide—either expressly in the statute or in accompanying legislative history—that interest abatement and other statutory mechanisms are the sole remedies available to taxpayers for IRS inconsistency. In particular, it would state that inconsistency may not be a ground on which a reviewing court rejects the principal amount of the deficiency asserted by the IRS.

For example, assume that the IRS has determined a deficiency of $600 and that the interest thereon through the cut-off date is $500. In this situation, a successful inconsistency defense would relieve the taxpayer of liability for the $500, but not liability for the $600. It also would not relieve the taxpayer of liability for any interest accruing after the cut-off date.

C. Measuring the Proposal Against the Criteria of Effectiveness

1. In General

The new statutory solution must have enough “punch” that it has a noticeable impact on the IRS and relieves or compensates the aggrieved taxpayer to a meaningful degree. And yet, the response must avoid unduly complicating sound tax administration. The proposal strikes an appropriate balance between these conflicting values.

The proposed solution would both sting the IRS and meaningfully help the taxpayer. Interest can accumulate to large amounts due to the many years that can elapse between the filing of the original tax return and the payment of the deficiency. Taxpayers’ representatives encounter many cases in practice where the interest nearly equals or even exceeds the deficiency by the time the case is resolved. Accordingly, not receiving the interest would be a blow to the
IRS, and not having to pay the interest would be meaningful relief to the taxpayer.

Significantly, however, the proposed solution would not overcorrect the problem. Taxpayers would get an excessive benefit—a windfall—if inconsistency defeated the entire adjustment, including the deficiency. Had the taxpayer correctly followed the law upon initially filing their return they would have paid more tax than they did. That “more” is the amount of the deficiency. Typically, when a taxpayer detrimentally relies on an erroneous prior IRS position and then has to pay up, all the taxpayer really is “out”—compared to a correct initial filing—is the interest paid on the deficiency. Thus, relief from that interest is what a reasonable remedy would provide.

To take a parallel, “investors” disappointed in tax shelters often sue the shelter promoters when the desired tax benefits do not materialize. Some courts hold that damages recoverable in these suits do not include the back taxes the investors paid to the IRS when the scheme came a cropper. The rationale is that, had they not participated in the shelter and claimed tax benefits from it, the investors “would still have had to pay the taxes in question, based on their overall income situation. The fact that they ultimately did so does not suggest that they suffered an out-of-pocket ‘loss’ as a result of their investment.”

Allowing shelter investors to recover damages on account of their tax deficiencies would amount to windfalls, and allowing victims of IRS inconsistency to avoid their deficiencies would result in windfalls as well. Relief from interest liability is a more appropriately tailored remedy.

Furthermore, as a “weak duty” approach, the proposed solution would entail fewer disadvantages than more extreme remedies. The proposed solution would apply only to inconsistency with regulations, revenue rulings, revenue procedures, and notices, and it would relieve the taxpayer only of interest (not

353. The taxpayer is not out even the deficiency if he or she invested the tax saving between the time of the original return and the time of payment of the tax liabilities, thereby generating investment earnings. I would ignore that fact. Americans typically spend their tax refunds, not invest them; however, investment might be the norm for wealthy individuals and corporations. On that basis, a case could be made for limiting the proposed relief based on net worth or similar criteria. For example, wealthy individuals and large entities already are excluded from the fee-shifting and burden-of-proof reversal provisions in the Code. See I.R.C. §§ 7430(c)(4)(A)(ii), 7491(a)(2)(C) (2006); Steve R. Johnson, A Modest Proposal to Improve Tax Compliance: Means-Testing the “Reliance” Penalty Defense, 10 FLA. TAX REV. (forthcoming 2010) (describing present means-tested features of the tax law and proposing their extension). Although a limitation of this kind has some appeal, I would omit it from the proposed statutory provision to promote simplicity.


355. DCD Programs, Ltd. v. Leighton, 90 F.3d 1442, 1447 (9th Cir. 1996); see also Ducote Jax Holdings LLC v. Bradley, 335 F. App’x 392, (5th Cir. 2009) (not selected for publication) (noting that damages not awarded where taxpayer did not show his tax assessment would have otherwise been deviated or eliminated).
the deficiency) and only in cases of reliance. As a result, the solution would avoid or reduce problems identified in Part IV.B. Specifically, these shortcomings will be negated in the following ways:

(1) Because deficiencies would still be recoverable, courts would still need to consider the substantive merits, preserving their contributions to development of the substantive tax law.\textsuperscript{356}

(2) The willingness of the IRS to issue guidance at levels below revenue rulings and revenue procedures would not be chilled by the fear that this guidance could hurt the IRS in other cases. There likely would be little chilling for regulations, revenue rulings, revenue procedures, and notices as well—first because the bite (loss of interest but not deficiencies) would be moderated, and, second, because these types of rules and guidance already are subject to multiple levels of review within Treasury and the IRS.\textsuperscript{357}

(3) Less time and money would be expended during administrative appeals and litigation on discovery “fishing expeditions” and other matters collateral to the underlying merits because only the major types of pronouncements would be consistency triggers and only taxpayers who could show reliance would qualify for relief.\textsuperscript{358}

2. Sustainability

It would be a step forward if Congress were to enact this proposal or a similar amendment, but enacted legislation is not impervious to the winds of change. The sustainability question is pertinent to a statutory regime as well as to a common law regime.

For example, many established and sound features of federal tax procedure were modified—often unwisely—by one blow in 1998.\textsuperscript{359} One may take some comfort in the fact that the 1998 legislation resulted from “perfect storm” conditions. The chair of the Senate Finance Committee was facing a difficult reelection campaign, so he held sensational hearings; however, the testimony was later largely discredited\textsuperscript{360} to improve his visibility and popularity. The nation was enjoying peace and prosperity, which led to “slow news days” for the media to fill with coverage of the hearings. Also, the federal budget was essentially in balance, so fears of revenue loss did not cool enthusiasm to punish the IRS. The then Commissioner of Internal Revenue had been selected because he was an outsider to the tax world. Thus, he lacked the knowledge

\textsuperscript{356.} See supra text accompanying notes 247–80.

\textsuperscript{357.} See supra text accompanying notes 242–47.

\textsuperscript{358.} See supra text accompanying note 246.


and confidence to refute inaccurate perceptions that were being treated as facts. The then President practiced a strategy of "triangulation" to preempt possible campaign issues, so he joined the parade instead of opposing it.619

Perfect storms occur only rarely, but tax is a hot button political issue, so another perfect storm cannot be ruled out. Is there reason to hope that a statutory solution to the consistency problem could endure future misplaced reformist zeal?

Of course, nothing can be guaranteed in politics, but two considerations inspire cautious optimism. First, the solution proposed in this article pays much more heed to the fairness consideration than does the "no duty" view. Indeed, it relieves taxpayers as fully as fairness legitimately demands. Fairness requires that taxpayers who reasonably relied on authoritative Treasury and IRS guidance be held harmless to the extent they were harmed, and this proposal accomplishes that objective. The IRS is punished; deserving taxpayers are helped; but overcompensation and serious interference with tax administration are avoided. No fortification is impregnable, but these are good ramparts from which to defend a statutory provision. Second, even if a good statutory solution were weakened by subsequent amendment, there would at least still be a single controlling rule. An imperfect statute would have the advantage of uniformity over the chaotic common law regime that currently prevails.

D. Consonance with the Evolving Interest Regime

This proposal reflects the significant evolution of the nature of interest under the Internal Revenue Code. Originally, interest was conceived simply as "compensation for the use or forbearance of money."362 Because of the underpayment, the taxpayer had the use of money that the Government should have had the use of, and payment of interest was the recompense therefor.363 However, that original purpose has changed substantially over time. Moralistic and pragmatic concerns have increasingly affected interest rules. Here are five examples:

(1) Until eliminated in 1989,364 former Code § 6621(c) provided for an increased interest rate for deficiencies attributable to "tax motivated


363. E.g., Avon Prods., Inc. v. United States, 588 F.2d 342, 343 (2d Cir. 1978).

transactions,” i.e., tax shelters.\textsuperscript{365} Extra interest was, in essence, an additional penalty.

(2) Current Code § 6621(c) provides for a 2\% higher interest rate for large underpayments by corporations.\textsuperscript{366} The Government’s economic loss is no greater because of the taxpayer’s identity,\textsuperscript{367} so the best explanation for this differential is to afford additional deterrence against corporations trying to “game” the tax system or to penalize them if they do.

(3) From the mid-1980’s until 1998, the rate of interest paid by taxpayers to the Government on account of tax underpayments was 1\% higher than the rate paid by the Government to taxpayers on account of tax overpayments.\textsuperscript{368} This was purely fiscally driven, a sneaky attempt to try to reduce the budget deficit.

(4) There already are some interest abatement provisions in the Code. For example, the IRS may abate interest when ministerial or managerial acts on its part result in unreasonable delay in concluding a case,\textsuperscript{369} when the IRS waits too long in starting or ending an audit,\textsuperscript{370} when the IRS gave erroneous written advice on which the taxpayer reasonably relied,\textsuperscript{371} or when there has been a filing extension because the taxpayer is in a presidentially declared disaster area.\textsuperscript{372}

(5) A bill considered by Congress in 2000, but not enacted, would have gone further than current abatement provisions. The Taxpayer Bill of Rights 2000\textsuperscript{373} was passed by the House but died in the Senate.\textsuperscript{374} Section 104 of the bill would have expanded the IRS’s authority to abate interest, including for situations of “gross injustice,” non-ministerial IRS delay, and reliance on a

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\textsuperscript{366} I.R.C. § 6621(c) (2006).
\textsuperscript{367} However, the taxpayer’s investment gain may vary by identity: sometimes corporations can get a better rate of return than individuals. Then again, some corporations have made some pretty dumb investments.
\textsuperscript{369} I.R.C. § 6404(e) (2006). This means things like misplacing the file so a bill cannot be mailed or a payment cannot be posted. It is clear that § 6404(e)(1) does not cover policy decisions or litigating positions taken by the IRS. E.g., Treas. Reg. § 301.6404–2(b) (1998); Nelson v. Comm’r, 87 T.C.M. (CCH) 958, 960 (2004) (“There can be no abuse of discretion . . . for failure to abate interest if the statute that applies does not give the Commissioner discretion to abate the interest.”).
\textsuperscript{370} I.R.C. § 6404(g) (2006).
\textsuperscript{371} I.R.C. § 6404(f).
\textsuperscript{372} I.R.C. § 7508A(a)(2).
\textsuperscript{373} Taxpayer Bill of Rights 2000, H.R. 4163, 106th Cong. (2000).
\end{center}
written statement by the IRS that was in response to a specific written request from a taxpayer.\textsuperscript{375}

As the foregoing demonstrates, the interest rules have moved far beyond the original compensatory purpose. Interest is now viewed as a fit vehicle to punish or deter bad acts by taxpayers or by the IRS, as well as to further other purposes, both fair and foul. Abatement of interest to compensate for IRS positional inconsistency would be commensurate with the evolving nature of the Code’s interest rules.

VII. CONCLUSION

The status quo of a governmental duty of tax consistency is unsatisfactory. Numerous thinly reasoned decisions have produced doctrinal chaos, which is likely only to continue until a statutory solution is imposed.

The responses to IRS inconsistency that have been suggested in cases and commentary thus far include a “strong duty” view, a “no duty” view, and various “weak duty” views. Among these, the “no duty” view is the most solvent as a technical, doctrinal matter. However, the power of fairness and other considerations is such that the technically superior answer has proved unsustainable. A new approach—meaningful, balanced, and thus hopefully sustainable—is needed.

The statutory solution should provide meaningful sanctions and relief, but not at the cost of undermining sound tax administration and stunting the development of the substantive tax law. The solution that best balances these competing values would entail abatement of interest on tax deficiencies when the taxpayer relied on a then-effective regulation, revenue ruling, revenue procedure, or notice and the IRS adjustment ran counter to that authority.

Beyond addressing the specific problem, the larger issues raised by this article entail the role of common law making in taxation, the clash of fairness and administrative necessity, and achieving sustainable reforms of the tax system. I intend to continue to explore these “meta” themes in future articles, and I look forward to the light that other scholars, practitioners, and jurists will shine on them through their own work.

\textsuperscript{375} H.R. 4163, § 104(a)–(b), (d).