Bridging Exceptionalism and Anti-Exceptionalism with the JCT Canon

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Clint Wallace, *Congressional Control of Tax Rulemaking,* 71 **Tax L. Rev.** 179 (2017), available at SSRN.

In its 2011 decision in Mayo Foundation for Medical Education and Research v. United States, the Supreme Court held that most if not all general authority Treasury regulations carry the force of law and, thus, are eligible for judicial review and deference under the *Chevron* standard. In reaching that conclusion, the Court reiterated its general presumption in favor of "maintaining a uniform approach to judicial review of administrative action" and, correspondingly, rejected "an approach to administrative review good for tax law only." But the Court qualified that presumption at least a bit—noting the taxpayer's failure to "advance[] any justification for applying a less deferential standard of review to Treasury Department regulations," and thereby suggesting that good reasons for tax exceptionalism might exist on another occasion. With *Congressional Control of Tax Rulemaking*, Clint Wallace advocates at least some amount of tax exceptionalism in judicial review of Treasury/IRS regulatory interpretations of the Internal Revenue Code. Or does he?

In the wake of *Mayo*, scholars writing about tax administration have divided loosely into exceptionalist and anti-exceptionalist camps. The exceptionalists may not reject *Mayo*'s particular holding, but they otherwise prefer the pre-*Mayo* status quo and seek to justify tax exceptionalism from one or many administrative law requirements, doctrines, or norms. The anti-exceptionalists see independent value in bringing tax administration more into line with general administrative law, so they would impose a higher bar—e.g., an affirmative statement of congressional intent—before permitting tax exceptionalism. Obviously, this characterization is over-generalized, as it is more accurate to portray exceptionalism and anti-exceptionalism as two ends of a continuum rather than a pure binary choice. Still, much scholarship in this area adopts a tone and reflects assumptions and preferences that clearly lean one way or the other. And yet, although Wallace's article advances an exceptionalist argument, to the eye of this anti-exceptionalist writer, his reasoning and analysis suggest that the two camps may not be so far apart after all—at least not with respect to statutory interpretation.

Moreover, regardless of which camp one falls into, it is undeniable that exceptions from general administrative law principles abound across the administrative state. Every agency is at least somewhat unique. Preventing rampant exceptionalism from completely undermining the general policy of administrative law uniformity requires comparative evaluation of which differences—whether in terms of statutory requirements and responsibilities, agency design, or administrative practices—should matter and which should not. Undertaking that sort of comparative evaluation requires identifying the differences (and recognizing the similarities) among agencies in the first place. Relatively little legal scholarship exists to serve that function. Wallace's article helps to fill that void, most especially in its discussion of the role of the Joint Committee on Taxation in the tax legislative process.

Wallace starts with the premise that the first goal of general administrative law requirements, doctrines, and norms is to promote political accountability in the modern administrative state. He then focuses on two particular doctrines—*Chevron* and State Farm—that judges use in evaluating agency regulations, and two key aspects of tax administration that he says make tax administration unique and justify approaching judicial review of Treasury regulations differently.

First, Wallace examines and emphasizes the role of the Joint Committee on Taxation and its staff in the tax legislative process and, relatedly, in helping Congress provide an unusual level of guidance to tax administrators in the form of greater statutory specificity and more elaborate legislative history. As a result, and citing a study by David Epstein and

Sharyn O'Halloran, he posits that Congress delegates less discretionary authority to Treasury and the IRS than it does to other government agencies. Thus, Wallace concludes, "the JCT facilitates congressional control of tax rulemaking, which can provide political accountability, allows for reliance on expertise in policy formulation, and can provide benefits in terms of certainty for taxpayers."

Second, Wallace examines public participation in notice-and-comment rulemaking in the tax context—documenting and evaluating public comments received in response to 106 notices of proposed rulemaking issued by the Treasury Department in 2013, 2014, and 2015. Most of the proposed Treasury regulations received few comments, and a quarter received no comments at all. When comments were received, the commenters "were heavily weighted towards private interests" as determined based on their identity, although Wallace acknowledges "[s]cholars have found—and expressed concerns about—low public interest participation in rulemaking undertaken by other agencies." Also, citing anecdote, he suggests also that comments from taxpayers "describe the effects of" proposed Treasury regulations "in service of avoiding higher tax liability" rather than providing "useful data or insights to inform the rulemaking process." From this evidence, Wallace concludes that "the notice and comment process does not elicit broad and diverse participation" and "is most often a poor mechanism for achieving key normative goals of administrative law in the tax regulatory process."

Based upon these two aspects of tax legislation and administration, Wallace proposes the courts adopt a "'JCT Canon' for construing congressional delegations to Treasury." The proposed JCT Canon calls upon both Treasury and the courts to follow or give extra weight to JCT-produced legislative history as "a good indicator of how members of Congress resolved and understood various issues" and as evidence of "congressional directive" in interpreting the Internal Revenue Code. Wallace contends that reliance upon the JCT Canon would better provide the political accountability that administrative law seeks.

Wallace's article is tremendously useful for its elaboration of the tax legislative process and its analysis of who participates in commenting on proposed Treasury regulations. And, as suggested above, despite Wallace's exceptionalist tone, his conclusions may be less exceptionalist than they appear at first blush for several reasons.

Whether tax or nontax, if the meaning of a statute is clear, *Chevron* step one calls for courts and agencies alike to respect the clearly expressed intent of Congress. Where JCT involvement in tax legislative drafting yields clearer and more specific statutory text, *Chevron* step one would call for courts to follow that text and, correspondingly, to uphold any Treasury regulations that reiterates it. Additionally, courts sometimes utilize subject matter specific canons—e.g., those favoring veterans or Native Americans—in conjunction with *Chevron* analysis. Even in its strongest application, Wallace's JCT Canon would be consistent with that strand of *Chevron* jurisprudence.

Textualists likely will be skeptical of treating JCT-produced legislative history as completely synonymous with legislative intent, and few judges will embrace a JCT explanation that seems in conflict with statutory text. But all but the most ardent textualists take legislative history into account to some degree in evaluating statutory meaning. A couple of circuits will only consider legislative history in assessing reasonableness at *Chevron* step two, but most courts will consider legislative history in evaluating statutory clarity at *Chevron* step one. As Victoria Nourse has argued, one cannot really properly evaluate legislative history without a solid appreciation of how the legislative process actually works. To the extent that the tax legislative process deviates at least somewhat from the norm for other types of legislation, courts ought to be made aware of that deviation. Wallace's article serves that function. Again, however, this suggestion seems consistent with a nuanced understanding of *Chevron* analysis, rather than a deviation from it.

Where the statutory text is less than clear, *Chevron* step two calls for courts to defer to reasonable agency interpretations thereof. The Supreme Court has never clearly explained exactly what makes an agency's interpretation reasonable or unreasonable for this purpose. *State Farm* doctrine requires agencies to contemporaneously document the justifications for their actions. Some courts have invoked *State Farm* in conjunction with *Chevron* step two, looking for agencies not only to adopt interpretations that statutory text, history, and purpose can plausibly accommodate but

also to explain their reasons for choosing one permissible interpretation over another. Other courts limit *Chevron* step two to whether statutory text, history, and purpose can plausibly accommodate the agency's interpretation, and evaluate *State Farm*'s reasoned decisionmaking requirement as a completely separate issue.

Regardless of whether *Chevron* step two and *State Farm* analysis are separated or combined, if JCT-produced legislative history elaborates ambiguous statutory text, and Treasury regulations incorporate that explanation, then unless the legislative history flatly contradicts the statute's text (and why would it?), courts are likely to look favorably upon consistency between the JCT's account and the regulations. Correspondingly, if Treasury regulations are inconsistent with the JCT-produced legislative history, then courts are likely to expect Treasury and the IRS to explain and justify the discrepancy in evaluating reasonableness under either *Chevron* step two or *State Farm* (and rightly so!). In sum, irrespective of whether they use the JCT Canon label, courts are likely to approach *Chevron* and *State Farm* analysis in a manner consistent with Wallace's JCT Canon.

Lastly, Wallace is absolutely right to be concerned about the quality and scope of public participation in the rulemaking process. Administrative law scholars and specialists across the regulatory spectrum fret about underparticipation by members of the general public in the rulemaking process. They look for ways to facilitate and encourage broader participation. They also contemplate whether and how agency decisionmaking should be influenced by or take into account the breadth and caliber of public participation. Wallace's empirical analysis adds meaningfully to that discussion. Even in the context of *State Farm* analysis, courts have been less inclined to take these issues into account in evaluating agency reasonableness. Perhaps Wallace is correct that they should give such issues more weight in evaluating agency action. Again, however, as Wallace acknowledges, it is far from clear that tax is exceptional in this regard.

Exceptionalism versus anti-exceptionalism aside, *Congressional Control of Tax Rulemaking* is simply a wonderful addition to the tax administration literature and well worth reading for both tax and nontax scholars alike. Wallace's article gives me hope that exceptionalists and anti-exceptionalists can find common ground as tax administration continues down the path of greater integration with general administrative law requirements, doctrines, and norms.

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