

## Situating the Tax Law: Exceptions, Not Exceptionalism

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Alice Abreu & Richard Greenstein, [Tax: Different, Not Exceptional](#), 71 *Admin L. Rev.* 663 (2019).

Level-headed approaches are rare in discussions of how the administration of tax law should fit into the larger body of administrative law. [Alice Abreu](#) and [Richard Greenstein](#)'s *Tax: Different, Not Exceptional* is one of those rare exceptions. All too often, advocates have portrayed the question as having an all or nothing answer, coded as whether tax is "exceptional." If yes, then the norms of administrative law don't apply; if no, then they all apply. (And, for many, if these norms all apply, the vast bulk of the work product of the Treasury and the IRS is tainted and should be questioned by the courts.) Abreu and Greenstein persuasively point out that this approach is simply useless.

Careful observers should always have appreciated that neither position is supported by the existing statutory framework. For some aspects of tax administration, there are exceptions in the Administrative Procedure Act itself, and additional exceptions are provided in other titles of the United States Code. But as Abreu and Greenstein point out with reference to [Sorites Paradox](#), a heap of exceptions is often only just that, a heap of discrete exceptions. Even if each of those exceptions is well-founded, they do not necessarily mean anything about the other items that could be removed from the pile, or even about the nature of the pile itself. The questions that remain, given this reality, relate to how these discrete exceptions should be interpreted, and whether these exceptions have any implications for items not covered by their specifics. *Tax: Different* should go a long way toward establishing this approach to answering these administrative law questions.

Abreu and Greenstein usefully outline some of the sources that would treat tax law as exceptional. One of the best features of their presentation is that the reader cannot always anticipate the context or implications of the original assertions, such as when Erwin Griswold advocated a separate tax court. At the time, he was motivated not by cases in which taxpayers bamboozled federal district courts, but by the fact that the Supreme Court had in recent cases all too readily succumbed to the government's arguments in cases like [Higgins v. United States](#), 312 U.S. 212 (1941), which prompted an immediate Congressional response on behalf of taxpayers. As a result of this historical context argument, the reader is likely to understand many well-known assertions about the tax law in unexpected ways.

One strand they emphasize seems to have dominated recent discussions. This is the possibility that tax law should be all and only about revenue-raising. This approach finds support in many older authorities establishing some of the different treatments of tax matters (especially the judicial and statutory authorities severely limiting the courts' ability to provide pre-enforcement relief). Ironically, this source of exceptionalism has been turned inside out. Since tax law has been recognized more and more as a legitimate tool in the pursuit of other legislative goals, the revenue imperative should no longer be accepted as a reason for tax exceptionalism.

Another strand identified by Abreu and Greenstein is the pervasiveness of tax law; virtually everyone is affected by the tax law, and as a result even the most prosaic issues can be the basis for a politically charged challenge. This aspect of tax law cannot be overestimated. To be sure, the institutions through which the roots of tax exceptionalism were established were concerned about revenue raising. Their own salaries and budgets depended upon it. But they also were protective of their own capital as political institutions. Therefore they were careful not to act in ways that would be perceived as anti-taxpayer—and did not let themselves be drawn into disputes that could be resolved through other acceptable procedures. They also were concerned for their own resources, and thus looked for ways to avoid being pulled into the maelstrom that tax politics can generate. The judiciary need not worry too much about the executive getting out of hand given the scrutiny that the legislature will almost certainly eventually provide.

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