

The State of the Federal Income Tax System: Poor

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I. Introduction

I believe that the state of the federal income tax system² is poor, and that the situation is the worst it has been for at least the 50 years I have been practicing tax law. I also believe matters have gotten even worse since early June of this year, when an earlier version of this article (the **Original Article**) was published.³ This situation arises from a confluence of factors relating to the courts, Congress, and the Executive Branch.

The major reasons for my conclusion include:

- The legislative process to enact tax legislation, forcing reliance on the budget reconciliation process, is clearly very flawed, as illustrated by the recent enactment of the so-called One Big Beautiful Bill Act (**OBBBA**).⁴
- OBBBA has, in my view made the tax system worse by, among other things, (i) increasing situations where taxpayers in similar or identical economic positions are taxed

²Compare U.S. Constitution, Article II, section 3, providing that the president “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”

³Michael L. Schler, *The State of the Federal Income Tax System: Poor*, Tax Notes Federal, June 2, 2025, p. 1643.

⁴Pub. L. 119-21, signed by the President on July 4, 2025.

differently, (ii) adopting new tax rules that are temporary, and (iii) creating mismatches between income and deductions.

- It is almost impossible, both as a practical matter and as a result of the reconciliation rules, for Congress to fix unintended errors or ambiguities in tax legislation, including those allowing for unintended tax benefits.
- *Loper Bright*⁵ has greatly exacerbated problems with the tax system by, among other things:
 - generally restricting the ability of Treasury to adopt regulations of all kinds that are consistent with *Loper Bright*,
 - in particular, making it more difficult for Treasury or the courts to correct unintended errors in tax legislation,
 - making it more likely that different courts will interpret the Code in different ways, resulting in different tax laws being in effect in different parts of the country,
 - creating serious questions about the validity of many existing tax rules, including those that have long been considered routine by both taxpayers and Treasury, and
 - increasing the likelihood of whipsaw against the government by taxpayers choosing to follow regulations of newly uncertain validity only when the regulation helps them.
- The tax system is seriously unbalanced in favor of taxpayers and against the fisc in one important respect.
 - Taxpayers can freely go to court to challenge anti-taxpayer regulations or administrative positions as inconsistent with the Code.
 - No one has standing to challenge pro-taxpayer regulations or administrative positions. This permits the Treasury Department to issue pro-taxpayer regulations, or the IRS to take pro-taxpayer administrative positions, even if such regulations or positions are inconsistent with the Code.
 - This imbalance is made worse by *Loper Bright* because there is still no standing to challenge pro-taxpayer positions as violations of *Loper Bright*, but there is an increased likelihood of winning a challenge to anti-taxpayer positions.
 - In particular, every new statute has pro- and anti-taxpayer errors. In TCJA, Treasury tried to fix both anti-taxpayer statutory errors with pro-taxpayer regulations, and pro-taxpayer statutory errors with anti-taxpayer regulations. After *Loper Bright*, Treasury can still do the former (even if the result is more pro-taxpayer than *Loper Bright* would allow) but much more restricted in doing the latter (because those regulations can be challenged by taxpayers under *Loper Bright*).

⁵*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

- The standing issue also means that the integrity of the tax system depends very strongly on the ability of the Treasury and IRS to apply the *Loper Bright* standard of validity to past and future regulations and administrative positions without regard to whether they are pro- or anti-taxpayer. This will be very difficult to do as a practical matter.
- The IRS is in turmoil, and its ability to police aggressive tax planning has been seriously curtailed.
- In recent years, there has been a risk of the appearance, if not the reality, of politization of the tax system.

I believe these circumstances create a serious threat to the integrity of the income tax system. This is particularly unfortunate in an era of exploding budget deficits. This article discusses the causes and possible consequences of this situation, first in the context of Congress, then the courts, and finally the executive branch.

II. Congress

A. The Need to Enact Most Tax Legislation Through Budget Reconciliation

In recent years, the enactment of tax legislation has become extremely difficult because of the close split in numbers of the Republican and Democratic members of Congress, the major ideological differences between the parties, and the Senate filibuster. The Senate filibuster rule generally requires 60 votes to pass a bill, except for budget reconciliation acts that can pass with a majority vote. As a result, aside from pandemic relief legislation in 2020--the exception that proves the rule--the only major tax legislation in recent years has been:

- the American Taxpayer Relief Act of 2012, which was a bipartisan compromise to deal with expiring tax provisions in the President George W. Bush tax cuts from 2001 and 2003, which had been passed under reconciliation;
- the so-called Tax Cuts and Jobs Act of 2017 (**TCJA**), which was enacted when Republicans controlled the presidency and both chambers of Congress, and which passed under reconciliation with no Democratic votes in either the House or Senate;
- the American Rescue Plan Act of 2021 and the Inflation Reduction Act of 2022 (**IRA**), both of which passed under reconciliation with Democrats in control of the presidency and both chambers of Congress, and with no Republican votes in either chamber; and
- OBBBA, signed into law on July 4, 2025, after passage under reconciliation with Republicans in control of the presidency and both chambers of Congress, and with no Democratic votes in either chamber.

The need to rely on reconciliation to enact tax legislation is not good for the tax system. I am far from the first to say this.⁶

⁶See, e.g., Howard Gleckman, *It is Time To Repeal Congress's Budget Rules And Start Over*, Tax Policy Center, June 18, 2025.

1. Practical problems of reconciliation

As a practical matter, a reconciliation bill is only possible when the same party controls the Presidency, the House, and the Senate. This makes significant tax legislation very difficult if not impossible for potentially long periods of time when this condition does not exist. When it does exist, the party in power is well aware that this position could change in the next biennial election, and so there is an urgency to incorporate all of the party's legislative priorities quickly into reconciliation. Since only one reconciliation bill is allowed with respect to each fiscal year, the result is reconciliation bills that are quite massive, covering tax as well as nontax matters.

Moreover, if the controlling party has only a small majority in either the House or Senate, as was the case in 2022 and 2025, a correspondingly small number of House or Senate members in that majority can effectively have veto power over the entire bill and can exert enormous influence over the final product. As a result, the bill might represent a series of compromises within the majority party that may not be fully satisfactory to many members of the party, and certainly not the majority of the entire House or Senate.⁷ The bill may also be the only chance for individual members of Congress to get their favored tax provisions enacted, and consequently it may also contain a series of narrowly targeted tax breaks supported by individual members designed to get their votes.⁸ The resulting process that led to OBBBA has been strongly criticized, including by Republicans.⁹

2. Technical problems of reconciliation

As a technical matter, the rules for reconciliation, which are based on the Congressional Budget Act of 1974 and the so-called Byrd Rule, are quite restrictive.¹⁰ First, a reconciliation bill cannot be projected to lose more revenue during the specified budget window, historically 10 years after enactment, than is specified by the relevant Congressional committees. It also cannot be projected to lose any revenue after 10 years. Yet legislators usually want as many new tax cuts as possible within the stated revenue limitation. The inevitable result is the phase-in and phase-out of various provisions that gain or lose revenue, with new revenue-losing provisions lasting no more than 10 years. This is why many TCJA provisions were scheduled to expire no later than the end of 2025.

⁷See, e.g., Benjamin Guggenheim, *Updated megabill includes key compromises on taxes and Medicaid*, Politico, June 28, 2025; Alexander Bolton, *Taxes emerge as major sticking point with Sinema*, The Hill, Aug. 4, 2022.

⁸See, e.g., Brian Faler, *GOP megabill littered with special tax breaks*, Politico, July 4, 2025; Jeff Stein et al., *\$75 billion firm wins carve-out in tax bill after lobbying push*, Washington Post, June 14, 2025 (referring to Virgin Islands tax break); Nina Lakhani, *Schumer and Manchin's 'dirty side deal' to fast-track pipelines faces backlash*, The Guardian, Sept. 22, 2022.

⁹See, e.g., Brendan Buck, *Is This Really How We're Legislating Now?*, N.Y. Times, July 4, 2025 ("The legislative stew that resulted is not fine-tuned policy, nor does it offer a cohesive purpose. It's just good enough for a Congress that doesn't particularly care about being any better than good enough."). Enactment of the IRA also required political compromises, including one that led to CAMT.

¹⁰For a summary of the rules, see Congressional Research Service, *The Budget Reconciliation Process: The Senate's "Byrd Rule"*, updated Sept. 28, 2022, <https://www.congress.gov/crs-product/RL30862>; Richard Kogan et al., *Introduction to Reconciliation*, Center on Budget and Policy Priorities, updated May 6, 2022, <https://www.cbpp.org/research/introduction-to-budget-reconciliation>.

This lack of permanence results in considerable uncertainty and instability in the tax system. It also reduces the stimulus effect of provisions intended as tax incentives, particularly toward the end of the statutory period, because taxpayers cannot count on an extension. The periodic need for extensions also results in a windfall for tax lobbyists and for the campaign funds of members of Congress on the tax-writing committees.¹¹

Moreover, the deemed revenue loss from an extension of an expiring tax provision has historically been determined under a so-called “current-law baseline,” *i.e.*, by comparing future revenues with and without the new legislation. This means that an extension of an expiring tax cut is deemed to result in a revenue loss during the extension period, and such an extension cannot be for more than 10 years. As a result, all the negative consequences of the initial adoption of these provisions, with phase-ins, phaseouts, and a new 10-year limitation, continue each time an extension from a prior reconciliation bill is required. These consequences would have arisen, for example, if OBBBA had extended the expiring TCJA provisions using a current-law baseline.

By contrast, the use of a so-called “current-policy baseline” in a reconciliation bill means that the base for determining revenue loss is the tax law in effect when that bill is adopted, even if that law was already scheduled to expire by its terms. The result is the same as under a current-law baseline for an entirely new provision, since in that case, current law is the same as current policy (nothing in both cases). However, under the current-policy baseline, an expiring provision can be extended permanently at no stated tax cost, either in the first 10 years or thereafter.

The theory of the current-policy approach is that an extension of an existing tax benefit would not be viewed by taxpayers as a tax cut, but rather the *failure* to extend would be viewed by taxpayers as a tax *increase* because their tax payments will in reality go up. This approach, as applied to the extension of an expiring tax provision, avoids the need for continuing the phase-ins and phaseouts and the lack of permanence arising from the continued use of a current-law baseline.

However, a current-policy baseline obscures the true cost of tax cuts and allows permanent tax cuts through reconciliation, both clearly contrary to the purposes of the restrictions on reconciliation bills. To illustrate, a new tax cut could be enacted under either a current-law or current-policy baseline, lasting for only a year or two, with a resulting small stated revenue loss. At the expiration of the period, the tax cut could be extended permanently under current-policy reconciliation, with no nominal tax cost because it is merely an extension of existing policy. The overall result could be a large permanent tax cut with only a small tax cost from the first bill ever counting against the reconciliation limitations. As a result, the use of a current-policy base line to extend expiring provisions has been strongly criticized.¹²

¹¹See, e.g., Doug Sword, *Campaign Cash Surged for House Taxwriters as OBBBA Advanced*, Tax Notes Federal, Aug. 25, 2025, p. 1303; Zach C. Cohen et al., *Tax Writers in Congress See Fundraising Boost as Tax Cliff Looms*, Bloomberg Tax, April 18, 2025.

¹²See, e.g., Committee for a Responsible Federal Budget, “*Current Policy Baseline*” Gimmick Could Explode the Debt, Feb. 27, 2025, <https://www.crfb.org/blogs/current-policy-baseline-gimmick-could-explode-debt>; Martin A. Sullivan, *Jettison the Current-Policy Baseline*, Tax Notes Federal, March 17, 2025, p. 1955.

The enactment of OBBBA illustrates these points. Many provisions of TCJA were permanently extended under a current-policy baseline. The reduction in revenue arising from these extensions—and, of course, the actual decrease in revenue compared to current law is the same regardless of the accounting method used to enact the legislation—did not show up in the revenue estimate for either TCJA or OBBBA. The combination of the two bills allows a result that no one reconciliation bill could achieve, namely a permanent tax cut without the limitation on the allowed size of tax cuts intended to be provided by the reconciliation process. The staff of the Joint Committee on Taxation (JCT) estimated that the extension of most of the individual and business tax provisions of TCJA, as in effect on January 1, 2025, would have a ten-year tax cost of \$4.6 trillion.¹³

As another example of the difference in baselines, consider the individual state tax deduction under section 164. Simplifying, TCJA limited the deduction to \$10,000 per year until the end of 2025, at which point the prior unlimited deduction would be restored. OBBBA permanently extended this cap except for an increase in 2025-2029 to \$40,000 for taxpayers below an income threshold. This resulted in (1) a revenue increase under a current-law baseline, because of the new limits on the otherwise unlimited deduction that would have been allowed after 2025 under current law, but (2) a revenue cost under a current-policy baseline because of the temporary increase in the \$10,000 limit that was included in the base. See the chart below.

But there is more. OBBBA was enacted under rules even more inconsistent with the purposes of reconciliation. Under a current-policy baseline, a *new* tax cut would logically be treated as a 10-year expense, even if it phased out in a shorter period, and there would be no reason to phase out. After all, a later extension would be viewed as having no tax cost under the same baseline, so the full cost would logically be taken into account on the initial adoption of the provision. Yet the revenue estimate for OBBBA in the Senate used a current-policy baseline to extend the TCJA provisions at no nominal cost, but a current-law baseline to reduce the stated cost of new provisions that will phase out in less than 10 years.

This combination is internally inconsistent and has been even more strongly criticized than a consistent use of current-policy baseline.¹⁴ The staff of the JCT has estimated that the cost through 2034 of extending the temporary tax reductions in OBBBA would be \$787 billion.¹⁵ If those temporary provisions are extended under reconciliation using a current policy baseline, the \$787 billion will not show up as an expense under either reconciliation bill.

The following chart illustrates the vast differences in evaluating OBBBA under a current-law or current-policy baseline. The chart is based on a detailed analysis issued by the Congressional Budget Office (CBO) after enactment of OBBBA:

¹³Staff of the Joint Committee on Taxation, *Letter to Senator Whitehouse and others*, April 3, 2025, https://www.finance.senate.gov/imo/media/doc/wyden_merkley_neal_boyle_release_new_estimate_of_republican_tax_planpdf.pdf.

¹⁴Committee for a Responsible Federal Budget, *Policymakers May Double Down on Baseline Manipulation*, April 23, 2025, <https://www.crfb.org/press-releases/policymakers-may-double-down-baseline-manipulation>.

¹⁵Congressional Budget Office, *letter to Ranking Member Merkley*, Aug. 4, 2025, <https://www.cbo.gov/system/files/2025-08/61466-DebtService.pdf>.

| Portion of OBBBA | Cost (savings) under current law, billions¹⁶ | Cost (savings) under current policy, billions¹⁷ |
|--|--|---|
| | | |
| All¹⁸ | 3,383 | (380) |
| All tax provisions (§§ 70101-70606) | 4,610 ¹⁹ | 848 |
| Extension of reduced individual tax rates (§ 70101) | 2,193 | 73 |
| Revised state deduction limits (§ 70120) | (946) | 142 |

The chart demonstrates that, remarkably, even though the statute as a whole will lose about \$3.4 trillion over 10 year under a current law baseline, it actually raises \$380 billion under a current policy baseline. The provisions that are extended, illustrated by the reduced individual rates, are very expensive under a current law baseline, but have only nominal cost under a current policy baseline. The state tax deduction changes, as noted above, save money under a current law baseline of unlimited future deductions, but cost money under a current policy baseline of a \$10,000 future deduction for everyone. Overall, the cost of the tax provisions is more than 5 times as high under a current law baseline, the primary cost of the current policy baseline being new tax cuts that are not part of current law. These very anomalous results are further evidence that the current-policy baseline is not good for the tax system.

The second restriction on reconciliation is that each provision in the bill must be intended to increase or decrease revenue. A strict application of this rule under a current-policy baseline would prohibit a simple extension of an expiring provision because, under the calculation, the extension by definition has no revenue effect. As a result, every extended provision would need to be tweaked to create a revenue effect.²⁰ In fact, the House-passed version of OBBBA made

¹⁶Congressional Budget Office, *Estimated Budgetary Effects of Public Law 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to CBO's January 2025 Baseline*, <https://www.cbo.gov/publication/61570>.

¹⁷Congressional Budget Office, *Estimated Budgetary Effects of Public Law 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to the Budget Enforcement Baseline for Consideration in the Senate*, <https://www.cbo.gov/publication/61569>.

¹⁸This is the total change to the on-budget deficit from the lower right of the first (summary) page of the CBO reports.

¹⁹This represents increased outlays of \$117B and decreased revenues of \$4493B from the CBO tables for Subtitle A of Title VII. The other numbers that follow in the table are calculated in the same manner. On-budget numbers are used.

²⁰See Maureen Leddy, *One Tax Reform Hurdle to Watch*, Thomson Reuters Checkpoint, April 9, 2025.

several very minor changes to the international tax rates (such as a change from 10% to 10.1%) that are hard to explain except for this reason.²¹

The final version of OBBBA made more substantive changes in many of the expiring provisions. In fact, one provision (relating to gambling losses) made a seemingly small change to section 165(d) that was clearly intended to comply with this rule, but the consequences of the modification were quite adverse to taxpayers and likely unintended.²² On the other hand, OBBBA did make some temporary TCJA provisions permanent without further change, such as the disallowance of miscellaneous itemized deductions in section 67(g).²³ It is possible that these provisions were allowed in the final bill because no one objected on the Senate floor. However, if current-policy reconciliation requires a change to every extended provision, the resulting artificial tweaking will create unnecessary complexity and is not good for the tax system.

Third, the rule requiring a revenue effect for each provision of a reconciliation bill may prevent the adoption of technical corrections to prior legislation, under either a current-law or current-policy baseline. The staff of the JCT, which provides the official revenue estimates for tax provisions, does not consider technical corrections to have a revenue effect.²⁴ Rather, it views a technical correction as merely assuring that the revenue estimate for the original legislation was correct. On the other hand, under either a current-law or current-policy baseline for reconciliation, it could be argued that the baseline for the technical correction should be the uncorrected version of the original bill.

In fact, OBBBA does contain a few technical corrections to TCJA, including changes to three clearly incorrect cross-reference.²⁵ Again, perhaps this was allowed solely because no one objected in the Senate floor. Yet the vast majority of technical corrections identified as needed by the so-called Blue Book on TCJA published by the staff of the JCT (see discussion below) were not included.

Fourth, while not relevant to OBBBA, the rules for revenue estimating under reconciliation can lead to completely uneconomic if not absurd results for new provisions without regard to the baseline. For example, the rules take account of the revenue cost of an increase in the IRS's budget, or the reduced costs from a decrease in the IRS's budget, but not

²¹Jonathan Curry, *House Adds Head-Scratching Tweaks to International Tax Regime*, Tax Notes Federal, May 26, 2025, p. 1535.

²²The overall purpose was to make permanent the TCJA allowance of 100% of gambling losses to the extent of winnings. In order to comply with reconciliation, only 90% of losses were allowed in the final bill. It is not clear whether anyone focused on the fact that exactly offsetting gains and losses could result in tax liability. See Jasmine Li, *Lawmakers Try to Reverse Tax Increase on Gamblers*, Wall St. J., July 10, 2025.

²³OBBBA § 70110(a).

²⁴Staff of the Joint Committee on Taxation, *Revenue Estimating*, <https://www.jct.gov/operations/revenue-estimating/> (“The Joint Committee staff does not provide estimates of the revenue effect of technical corrections. This convention stems from the view that the original revenue estimate reflects the intent of the legislation. Therefore, an estimate of the correcting provision would be a double counting of the effect of the original policy.”) See also Marc J. Gerson, *Technically Speaking: The Art of Tax Technical Corrections*, Tax Notes, March 5, 2007, p. 927.

²⁵OBBBA § 70311(b). Inexplicably to me, although possibly related to the reconciliation requirements, those corrections were made prospectively, starting in 2026. OBBBA § 70311(c). The uncertainty for past periods is not good for the tax system.

any changes in tax collections that might result.²⁶ As a result, a decrease in the IRS's budget is shown as a cost savings that can allow an additional tax cut in the same amount, with no net charge against the net allowed revenue loss in reconciliation. Yet the true effect of the decrease in IRS funding could well be a net revenue loss after taking into account decreased collections. So one provision that loses net revenue allows another provision that loses revenue, with no charge against the reconciliation target.

Likewise, an increase in the IRS's budget counts as a cost, discouraging its inclusion in a reconciliation bill. Yet the actual net effect might well be a revenue increase, taking into account increased tax collections. These consequences of reconciliation are not good for the tax system.

Another example of quite unintuitive and unjustified results from revenue estimation arose in the House-passed version of OBBBA, which included a new retaliatory tax on non-U.S. persons under proposed section 899. The tax was never intended to be collected, but rather to discourage foreign countries from imposing certain taxes on U.S. persons. Clearly, the best tax policy would have been to make imposition of the tax discretionary on the part of the Treasury, to allow negotiation with foreign countries over imposition of the tax. However, the tax had to be mandatory to obtain a positive revenue estimate (\$100 billion in the first 5 years) because no revenue credit would be given for the possibility of future discretionary actions by Treasury.

Even worse, the revenue estimating process disregards possible changes in law by foreign countries in response to a new U.S. tax. Therefore, the revenue estimate assumed that all such existing foreign laws would remain in effect and the full retaliatory tax would be collected. This assumption was directly contrary to the very purpose of section 899 to cause those foreign taxes to be repealed. Thus, the bill contained a mandatory tax that no one wanted to be mandatory in order to obtain a revenue estimate that everyone knew was unrealistic, all in order to satisfy the rules for reconciliation.²⁷ Fortunately, the provision was dropped before final enactment of OBBBA.

3. Collateral consequences of reconciliation

Regardless of whether a current-law or current-policy baseline is used for reconciliation, the special procedures and time pressures for the enactment of a reconciliation bill often result in little or no legislative history. OBBBA is an example of this, and the lack of history can make it difficult to discern Congressional intent. This may not matter very much after *Loper Bright*, which focuses on the statute itself, and the fact that courts now generally give less weight to legislative history. However, in a close case, if a statute is truly ambiguous, a court might give legislative history some weight in interpreting the statute or in determining the validity of a Treasury regulation. An additional consequence is that the only evidence for legislative intent may be the Blue Book on the legislation written by the staff of the JCT. This is not true

²⁶Congressional Budget Office, *CBO Explains Budgetary Scorekeeping Guidelines* (Jan. 2021) (see Guideline 3, excluding anticipated indirect changes to revenue from changes in discretionary funding of an agency), www.cbo.gov/publication/56507; Congressional Budget Office, *Summary of Estimated Budgetary Effects of Public Law 117-169*, p. 4, para. (c) (Sept. 7, 2022) (disregarding increased tax collections from increased funding of IRS), <https://www.cbo.gov/publication/58455>.

²⁷Dylan Moroses, *4 Big Questions Raised By International Retaliatory Tax In GOP Bill*, Law360, May 28, 2025.

legislative history, is not issued until long after enactment of the legislation, and can be subject to post-enactment lobbying pressure.

Finally, Treasury regulations are not subject to the revenue constraints that apply to reconciliation. This creates an incentive for pro-taxpayer positions with significant revenue loss to be adopted by regulations rather than legislation. Moreover, because taxpayers have no standing to challenge the validity of pro-taxpayer regulations, a pro-taxpayer regulation that might violate *Loper Bright* could be used to avoid the constraints of reconciliation. For example, a new regulation could reduce the tax otherwise payable under a particular Code provision in lieu of the provision being repealed or modified under reconciliation. I am not aware of this happening in the past, but the incentive to do so is not good for the tax system.

B. Substantive Results of the Tax Legislative Process

1. Tax benefits intended by Congress

Commentators may strongly debate the policy merits of tax benefits in the Code that were expressly intended by Congress. To be sure, political considerations may play a big role in the adoption of these provisions. Nevertheless, these benefits are not within the scope of this article. For example, although I have my views on the policy merits of almost every provision in the Code, in the context of this article I do not view the state of the federal income tax system to be better or worse because of, say, the step-up in basis on death or the tax exemption for interest on municipal bonds. The same is true for provisions of OBBBA that, for example, (i) increased the gift and estate tax exclusion, (ii) allowed expensing of equipment, buildings, or R&D, (iii) compromised on the ability of individuals to deduct state taxes, (iv) favored fossil fuels over alternative energy, (v) expanded and made permanent the tax benefits of investments in qualified opportunity zones, (vi) provided a 100% tax credit for eligible individuals making contributions to certain scholarship granting organizations, or even (vii) increased the regressivity of the tax system.²⁸ Taking these kinds of provisions into account would require considering the entire tax code from scratch in evaluating the state of the tax system.

Yet once these kinds of tax benefits are in the Code, either permanently or on a temporary basis, they become part of basic tax planning techniques, they often involve very large amounts of money, and consequently they are difficult if not impossible as a practical matter for Congress to reconsider. Even if reconsideration occurs, generally because of an impending expiration, the "default" position, and by far the easiest position to adopt politically, is generally to extend expiring provisions and to keep permanent provisions in place. This is inherent in the realities of the political process, including the desires of members of Congress to get reelected. On the contrary, I believe a good tax system would require a serious periodic review of the policy arguments for and against these provisions, without the presumption for continuation.

²⁸Emily Badger, et al., *Trump's Big Bill Would Be More Regressive Than Any Major Law in Decades*, New York Times, June 12, 2025; Jamie Tarabay et al., *Rich Gain, Immigrants Pay: Who Won and Lost in Trump Tax Bill*, Bloomberg Tax, July 3, 2025; Jarrell Dillard, *Trump Tax Law Squeezes Poor, Boots Income for Wealthy*: Bloomberg Tax, Aug. 11, 2025; Staff of the Joint Committee on Taxation, *Distribution of the Estimated Revenue Effects Relative To The Present Law Baseline Of The Tax Provisions in Public Law 119-21*, July 29, 2025, JCX-37-25.

Moreover, even accepting the broad policy decisions of Congress as a given, at a more granular level, the tax system is improved if different parts fit together coherently, and taxpayers in similar positions are treated similarly.²⁹ In some respects I believe OBBBA was good for the tax system in this respect, such as by making some of the temporary TCJA provisions permanent and rationalizing some of the foreign tax provisions of TCJA.

However, under my test, I believe that overall, OBBBA made the tax system worse. The provisions of OBBBA that I think are bad for the tax system include the following:

- OBBBA made permanent the section 199A deduction of 20% of the income of a “qualified trade or business.” I think the existence of this deduction is extremely bad for the tax system. I do not know of any justification for the income of such a business to be taxed to individual owners of the business at less than the regular rate that is applied to all employees earning salaries, and all owners of ineligible trades or business (*e.g.*, doctors and, of course, lawyers). The distinctions between industries, and between owners and employees, greatly complicates the tax system and I do not believe can be justified on policy grounds.³⁰

The lower rate cannot be justified on the basis that some businesses prefer to operate for nontax purposes in the legal form of an LLC or partnership, and should not be penalized for competitive reasons with a tax rate much higher than the corporate rate. In fact, any business operated in LLC or partnership form can retain its legal form, if it so desires, and “check the box” on a tax free basis to be treated as a corporation solely for tax purposes. It can thereby compete on an equal tax basis with “true” corporations, without the need for section 199A.

Likewise, the lower rate cannot be justified on the alternative ground that an LLC or partnership should be able to retain its status as a pass-through business for tax purposes, yet still have its owners pay a tax rate lower than the normal individual rate in order to be better able to compete with corporations. I believe this is an unjustified cherry-picking of the best features of pass-through tax status (*e.g.*, no double tax on earnings, no owner- or entity-level tax on distributions of assets, no owner tax on contributions of assets, step-up in tax basis of underlying assets on death or to buyers of outstanding equity) and the best features of corporate tax status (the lower current tax rate).

- OBBBA did not eliminate the tax benefits of carried interest, even though both President Biden in his term, and President Trump this year, supported the elimination.³¹ I do not know of any reason that income for the service of managing other people’s money should be taxed at long term capital gains rates just because the compensation is paid in the form

²⁹I readily acknowledge that it may be difficult if not impossible in some cases to distinguish between broad policy decisions and “more granular” decisions made by Congress, and views may differ on whether any such distinction is even relevant to the state of the tax system.

³⁰*See, e.g.*, Justin Fox, *Opinion: The Most Uselessly Expensive Part of GOP Budget Bill*, Bloomberg Tax, June 30, 2025 (“{I}t’s hard to find any tax expert of any political leaning not in the employ of the pass-through industrial complex who thinks the qualified business income deduction is a good idea.”)

³¹*See, e.g.*, Tobias Burns, *Republicans weigh ending Wall Street’s favorite tax break*, The Hill, Feb. 12, 2025.

of a partnership interest and is dependent on future gains in the portfolio. Cash compensation measured in the same manner would of course be ordinary income, as it should be.

- OBBBA increased and made permanent the gift and estate tax exclusions (to \$15 million for individuals and \$30 million for a married couple). While I believe that is a policy issue for Congress, I believe the tax system was made much worse because in doing so, OBBBA (1) retained the step-up in basis at death, and (2) failed to eliminate the many well-known techniques to avoid gift, estate, and generation-skipping transfer taxes.³² The result was an enhanced ability to have unrealized gain at death permanently escape all income and estate tax. It is one thing to treat the existing step-up in basis at death as part of the underlying tax system, but it is something else for Congress to make it even more valuable.
- OBBBA adopted several revenue losing provisions on a temporary basis, in order to limit the revenue costs under reconciliation. In general, temporary tax provisions are bad for the tax system as discussed above. However, I believe some of these tax cuts are bad for the tax system whether on a temporary or permanent basis. In particular, I believe the exemptions for tip income and overtime pay, and deductibility of car loan interest, are bad for the tax system. There is no policy justification to treat these categories of income or deduction differently than other kinds of service income or personal interest expense. In addition, these special rules greatly complicate the system and help only a small percentage of taxpayers.³³
- OBBBA greatly expanded the tax benefits in section 1202 of investing in qualified small business stock, by among other things increasing the maximum exclusion of gains from \$10 million to \$15 million (or, in both cases, up to 10 times the initial investment if greater). That is a policy decision I do not discuss here.³⁴ However, OBBBA made no attempt to curb some of the extreme and probably unintended uses of that provision. One advisor said that so-called “stacking” “is the biggest game in town.” His clients “typically set up six or seven trusts, each benefiting a different family member, to get up to \$60 million or \$70 million in tax-free gains rather than just \$10 million.”³⁵ It is bad for the tax system for Congress to increase an already-generous statutory limit without also curbing these techniques.

³²See, e.g., Jesse Drucker, *How One of the World's Richest Men Is Avoiding \$8 Billion in Taxes*, N.Y. Times, Dec. 5, 2024; Akcan S. Balkir et al., *How Much Tax Do US Billionaires Pay? Evidence From Administrative Data*, NBER Working Paper 34170 (August 2025) p. 10 (single decedents among the top 400 wealthiest taxpayers had gross estates equal to 39% of *Forbes* estimate of their wealth).

³³Howard Gleckman, *The Budget Law's Tax Cuts For Overtime and Tips Are Popular, But Few Will Benefit*, Tax Policy Center, Aug. 4, 2025 (deductions for tipped income and overtime pay benefit 3% and 9% of households, respectively).

³⁴But see Andrew Duehren, *How Republicans Supersized Silicon Valley's Favorite Tax Break*, N.Y. Times, July 16, 2025 (quoting Victor Fleischer as saying “[i]t’s everybody’s worst picture of the tax code...created and exploited by the very richest people with the very best advisers”).

³⁵Ben Steverman, *Silicon Valley Rich In Line for \$17 Billion Win in GOP Tax Bill*, Bloomberg Tax, June 27, 2025.

- OBBBA expanded expensing of tangible assets, some buildings, and R&D. Expensing is a policy decision I do not discuss. However, OBBBA also restored the higher original TCJA limits on interest deductions. As is well-known, the combination of expensing and interest deductions can give rise to negative effective tax rates. The Congressional Research Service estimates that the marginal corporate effective tax rate on debt financed property will decrease under OBBBA, compared to the 2025 rules under TCJA, from minus 11% to minus 21% for equipment, and from minus 44% to minus 59% for all intangible assets (including from minus 114% to minus 155% for R&D).³⁶ I think such high negative tax rates are bad for the tax system.
- OBBBA implicitly accepted the “pass-through entity tax” regime (PTET) endorsed by Notice 2020-75. (Provisions of earlier versions of the bill that would have imposed limits were not included in the final bill.) The regime involves the state imposing an income tax on the entity and giving a 100% tax credit to the individual owners. The substantive effect is to allow the owners to deduct all the personal state income taxes they would have owed on income of the entity. This is in contrast to the strict limits imposed on individuals directly paying state income taxes without the intermediation of a pass-through entity.

I do not think it is good policy to allow owners of pass-through businesses to be entitled to a larger deduction for state income taxes than all other taxpayers, including employees, sole proprietors, and even individual investors receiving investment income. In every case, state income taxes either are, or are not, properly considered the cost of earning the underlying income, so deductibility should be the same. It is argued that pass-through businesses need this deduction to compete with corporations that can freely deduct state income taxes, but this is the same cherry-picking I reject above in the context of section 199A; in any event, the dollar amounts are much smaller here. Moreover, as I have stated elsewhere, PTET taxes on the entity are in substance withholding taxes for the owners, and state PTET regimes give results that are more favorable than were likely contemplated by the Notice.³⁷ Another bad result for the tax system.

- OBBBA made permanent the TCJA denial of miscellaneous itemized deductions in section 67(g). This continues the disallowance of many deductions that are directly attributable to the earning of income, such as investment management fees or legal fees for personal suits for damages. This mismeasurement of income is not consistent with a good tax system.
- OBBBA provides in amended section 904(b)(5) that when a U.S. parent corporation owns a CFC, interest expense of the parent does not have to be allocated to the income of the CFC for foreign tax credit purposes. That provision standing alone is a policy decision I do not discuss. However, because of certain interactions, the result is that the parent corporation is more likely to get the benefit of the interest deductions at the regular

³⁶Congressional Research Service, *Marginal Effective Tax Rates: Changes in P.L. 119-21, the 2025 Reconciliation Act*, Aug. 14, 2025, p. 7.

³⁷Michael L. Schler, *Pushing the Passthrough Entity Tax Envelope*, Tax Notes Federal, June 10, 2024, p. 1991.

21% corporate rate. This means that the parent can borrow money, contribute it to the CFC, deduct the interest at 21%, and yet report the resulting income from the CFC at the lower rate for net CFC tested income (the new OBBBA name for what was formerly GILTI). This arbitrage opportunity is not good for the tax system. Logically, the rule concerning foreign tax credits would have been accompanied by a restriction on the full deduction of interest allocable to net CFC tested income.

2. Difficulty of enacting technical corrections

The most obvious case of good tax legislation is technical corrections. Major tax bills are complicated and often passed in a rush, without the opportunity for review by outsiders. They inevitably have scrivener errors, create unintended ambiguities, and allow for unintended results, both pro- and anti-taxpayer, because of fact patterns and interrelationships among provisions that the drafters did not think of.

In the good old days, technical corrections were routine, although sometimes delayed. For example, the Tax Reform Act of 1986 contained extensive technical corrections to the Tax Reform Act of 1984,³⁸ the Technical and Miscellaneous Revenue Act of 1988 made technical corrections to the TRA 1986 and other legislation, and the Tax Technical Corrections Act of 2007 contained corrections of tax legislation going back to 1998.³⁹

The need for technical corrections in more recent legislation is confirmed by the JCT Blue Books. The Blue Book summary of the TCJA says in more than 70 places that a technical correction may be necessary to carry out the intent of Congress.⁴⁰ Then-Ways and Means Chair Kevin Brady proposed a technical corrections bill for the TCJA in 2019 consisting of 90 pages of legislative text.⁴¹ Similarly, a Blue Book refers to the need for 25 technical corrections for legislation passed by the 117th Congress in 2021-2022.⁴² Almost no action has been taken on any of these, and OBBBA no doubt created the need for many more corrections.⁴³

Technical corrections are particularly important today because of the increased focus on a literal reading of statutes. In the past, Treasury fixed many technical errors in the Code by regulation, without much controversy. Treasury tried to fix some of the errors in the TCJA

³⁸Staff of the Joint Committee on Taxation, *Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation*, JCS-11-87 (May 13, 1987).

³⁹Staff of the Joint Committee on Taxation, *Description of the Tax Technical Corrections Act of 2007*, JCX-109-07 (Nov. 16, 2007).

⁴⁰Staff of the Joint Committee on Taxation, *General Explanation of Public Law 115-97*, JCS-1-18 (Dec. 20, 2018).

⁴¹For the text of the proposal, see https://republicans-waysandmeansforms.house.gov/uploadedfiles/tax_technical_and_clerical_corrections_act_discussion_draft.pdf. The proposal is described in Staff of the Joint Committee on Taxation, *Technical Explanation of the House Ways and Means Committee Chairman's Discussion Draft of the 'Tax Technical and Clerical Corrections Act*, JCX-1-19 (2019).

⁴²Staff of the Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 117th Congress*, JCS-1-23 (2023).

⁴³See, e.g., Doug Sword, *Get Ready for a Parade of Technical Corrections on Tax Bill*, Tax Notes Federal, Aug. 11, 2025, p. 965.

identified in the Blue Book by regulation. However, regulations that are anti-taxpayer and contrary to the literal language of the Code are not faring well in court when challenged by taxpayers, especially after *Loper Bright*. As a result, there are many gaps in the Code not fixable by Treasury or the courts. Unless they are fixed by Congress, some of them will continue to have, as they have in the past, enormous and unexpected revenue costs to the government.⁴⁴

Yet technical corrections are virtually impossible to enact today. Because recent legislation has been enacted entirely by one party under reconciliation, the other party has no incentive to fix the former party's errors. As a result, a new reconciliation bill by the same party may be the only possibility, but as discussed above, technical corrections are not generally permitted in a reconciliation bill unless no one objects on the Senate floor.

As a practical matter, the result is that statutory mistakes may stay in place for a long time, if not forever. So far, this is true of almost all the errors in TCJA. The failure or inability to make such corrections, by reconciliation or otherwise, results in bad tax policy. Until a correction is made, no one knows what the law is, taxpayers will take advantage of any uncertainty, and the government is whipsawed. Moreover, the longer that an error that provides taxpayers with an unintended benefit stays in place, the more that the benefit becomes part of the normal tax landscape, and the greater the taxpayer opposition to fixing the error.

3. Difficulty of eliminating unintended tax benefits

Even aside from technical errors in the Code, over time taxpayers often find techniques to take advantage of tax provisions in a manner that most everyone would agree were not intended by Congress. This can result in enormous revenue costs to the government. In the absence of corrective legislation, this problem is exacerbated by the increased emphasis on literalism under *Loper Bright*.

Many of these techniques have been known for decades, and many have been referred to in so-called Treasury green books listing proposed legislation, Congressional studies, and even bills introduced in Congress that go nowhere. Still, just as in the case of originally intended tax benefits or technical errors, they become part of the general tax landscape that taxpayers routinely rely on and for which a proposed repeal is viewed as a tax increase. Moreover, these techniques mostly benefit high-income taxpayers. Because there is no real constituency for tax reform, it becomes politically difficult to take action to eliminate these techniques and Congress rarely does so. The only exception is when revenue is needed for a budget reconciliation bill.

The techniques I would put in this category include:

- partnership transactions such as basis shifting, shifting allocations among related parties, disguised sales, and use of the ceiling rule, among many others;

⁴⁴As an example, § 1061(c)(4)(A) excludes partnership interests held by a corporation from the adverse rules of § 1061. The exclusion literally applies to partnership interests held by an S corporation even though that was clearly not the intent. Reg. § 1.1061-3(b)(2)(i) would take S corporations out of the exception to § 1061, but the validity of that regulation is not clear, especially after *Loper Bright*. The literal interpretation would make it trivially easy to avoid § 1061 in many cases by using an S corporation.

- as noted above, gift, estate and generation-skipping transfer tax avoidance techniques, including valuation discounts, family partnerships, grantor-retained annuity trusts, dynasty trusts, and taking advantage of the different definitions of grantor trusts for income tax and gift and estate tax purposes;
- avoidance of the Self-Employed Contributions Act tax by active limited partners attempting to rely (subject to current IRS challenges) on the limited partner exception in section 1402(a)(13) and by shareholders in S corporations being paid inadequate compensation;
- the narrowness of the wash sale rules and techniques to avoid those rules;
- private placement life insurance and variable annuities used, in reality, to hold investment assets specified by the insured;
- partnership swap funds that avoid being investment companies under section 351 by holding sufficient non-listed assets;
- the use of section 852(b)(6) by regulated investment companies, which has greatly expanded recently in ways intended to allow indefinite deferral of capital gain on portfolio securities⁴⁵ and even to convert underlying dividend and interest income on securities into deferred capital gain.⁴⁶
- section 302 basis shifting;
- use of so-called *Granite Trust* transactions and section 304 to generate tax losses;⁴⁷
- ownership of Roth IRAs of enormous size based on undervaluation of contributed assets; and
- donor-advised funds, especially when used to avoid private foundation limits.

Opinions on the policy justification (or lack hereof) of any of these particular matters may differ, in some cases strongly. Yet many, if not most, tax lawyers will agree that many transactions should be in this category. The point here is not to debate the policy justification for any particular transaction, but rather to emphasize the large number of unintended statutory results that Congress has not addressed for long periods. This is not good for the tax system.

C. Failure to Fund the IRS

The IRA added \$80 billion of long-term funding to the IRS and permitted the agency to begin hiring additional experienced professionals to audit complex tax returns. However,

⁴⁵See, e.g., Jeffrey M. Cohen, *The Black Hole of Capital Gains: ETF Swap Funds*, July 2025, SSRN # 5364015; Justina Lee, *Capital Gains Vanish Into 'Black Holes' in Latest ETF Tax Trick*, Bloomberg Tax, July 22, 2025.

⁴⁶Vildana Hajric, *Wall Street Builds S&P 500 'No Dividend' Fund in New Tax Dodge*, Bloomberg Tax, July 7, 2025; Katie Greifeld, *Wall Street's Dividend Tax Dodge Arrives in Fixed-Income ETFs*, Bloomberg Tax, Aug. 14, 2025. The technique is for the ETF to invest in underlying mutual funds that pay dividends once a year, and for the ETF to sell the fund at a gain just before the dividend record date for the fund (deferring that gain using the usual gain deferral technique) and buy back the fund or a similar fund thereafter.

⁴⁷See, e.g., Duncan H. Hardell et al., *More Cracks in the Bedrock: Section 304 Transactions Beyond Granite Trust*, Tax Notes Federal, June 2, 2025, p. 1621.

subsequent legislation has clawed back a significant portion of these funds, the rest will likely be clawed back soon, and many if not most of the new hires are gone. This has had very negative effects on the IRS's ability to collect taxes. This subject is discussed further below.

D. The Congressional Review Act

The Congressional Review Act⁴⁸ (**CRA**) allows Congress, with the approval of the President, to disapprove a federal agency regulation or rule (broadly defined)⁴⁹ within a specified time after its adoption. No filibuster is allowed in the Senate. After a regulation is disapproved, it has no force or effect. The agency is then prohibited from writing the same rule or a different rule that is substantially similar, unless specifically authorized by subsequently adopted legislation.

The act is mostly used to overturn regulations issued near the end of one Administration when the new President is of the other party and both chambers of the new Congress have majorities in that other party. This avoids the need for the new Administration to reverse the regulations, if it desires to do so, with the time-consuming notice and comment procedure of the Administrative Procedure Act (**APA**). As a practical matter, it gives taxpayers adversely affected by a regulation another venue to overturn it. The CRA was recently used, with significant Democratic support, to overturn final regulations adopted at the end of the Biden Administration that would have required reporting of gross proceeds of cryptocurrency transactions by decentralized exchanges.⁵⁰

The immediate result of Congress's use of the CRA is that no regulation is then in effect. To put a new regulation in place, Treasury must then go through the usual notice and comment procedure required by the APA. However, Treasury is then subject to the additional limitation that any new regulation must not be substantially similar to the old regulation, an issue that would not have arisen if Treasury had revised the old regulation by itself.

The CRA is a legitimate exercise of Congressional power. However, it results in no regulation being in effect for a period of time, puts a burden on Treasury to promptly issue new regulations regardless of its other priorities, and limits what can go in a new regulation. It is not clear whether the result is an overall benefit to the tax system.

Further, the version of OBBBA (then H.R. 1) that was reported to the House on May 20 contained a considerable expansion of the CRA.⁵¹ These provisions were removed from the bill

⁴⁸5 U.S.C. §§ 801(b)(2) and 802(a).

⁴⁹As to breadth, the Senate recently overruled its parliamentarian and voted that a Biden Administration statutory waiver allowing California to enforce stricter air quality standards for automobiles was a "rule" subject to the Act because as a practical matter, auto manufacturers would have to follow it nationally, so it set national policy. Lisa Friedman et al., *Senate Republicans Kill California's Ban on Gas-Powered Cars*, N.Y. Times, May 22, 2025. Query if the same reasoning would apply to an IRS policy of issuing, or even not issuing, PLRs on a particular subject.

⁵⁰H.J. Res. 25, signed by President Trump April 10, 2025, disapproving regulations issued under T.D. 10021.

⁵¹H.R.1, § 70200(c). See Andres Picon, *GOP May Be Closer Than Ever to Enacting a Massive Rule-Busting Bill*, Politico, May 5, 2025; Hailey Fuchs and Mia McCarthy, *It Was Supposed to Be a Tax and Border Bill. It Could Also Hand Trump Vast New Executive Powers*, Politico, April 29, 2025.

immediately before passage by the House and were not included in OBBBA, apparently because of concerns about compliance with the Senate rules on reconciliation.⁵² However, the provisions are still relevant because future consideration is possible, including in a subsequent reconciliation bill later this year.

Under the proposal, a major regulation that increases revenue would not take effect unless it was affirmatively enacted into law within a specified period. This reverses the existing rule allowing such a regulation to go into effect absent a Congressional veto. However, approval of a regulation in this manner would only determine that it properly went into effect, and objections to the regulation such as under the APA or *Loper Bright* would not be affected.

It is unclear how this proposal would apply to tax regulations. For example, it is unclear whether a revenue estimate would be required for every regulation in scope to determine whether it would increase revenue, or whether the baseline for revenue would be the revenue if the statute were in place with no regulation at all.

In any event, the proposal could significantly and adversely affect the tax system. As a practical matter, except perhaps if both chambers of Congress were controlled by the same party as the President, every new tax regulation within the scope of the bill would have to be negotiated with the Congressional tax staffs of both parties before promulgation.

This would, at a minimum, greatly slow down the rulemaking process. It could also politicize the process, weaken the ability of Treasury and IRS officials to write regulations and preambles that they truly believe in, and prevent major regulations from being issued at all. Courts might also give less *Loper Bright* deference to regulations and the supporting rationales in the preambles if they (correctly or not) view regulations as subject to political influence rather than being solely the best judgment of Treasury and the IRS.

In addition, H.R. 1 would have required that all regulations and other agency guidance now in effect must be submitted to Congress for review within four years of enactment of the legislation. Failure of Congress to approve the rules submitted by an agency would mean the rules will have no effect and cannot be enforced by the agency, and any existing rule not approved within five years of enactment would automatically cease to have effect at that time.

These requirements would have applied to the entire Code of Federal Regulations and all subregulatory guidance. Thus, all existing Treasury and IRS guidance would potentially have been at risk of not obtaining future Congressional approval. This could retroactively invalidate much existing guidance that taxpayers, Treasury, and the IRS have relied on, and make it impossible for taxpayers to rely on any existing or future guidance until Congressional approval is obtained. None of these results would be good for the tax system.

III. The Courts

As discussed above, legislation inevitably creates errors in the Code that need fixing, and as a practical matter, Congress is unable to fix those errors. The resulting negative effect on the

⁵²Amelia Davidson, *Why House Republicans stripped a regulatory overhaul from their megabill—for now*, Politico, May 22, 2025.

tax system is greatly exacerbated by the increasing literalism of the courts. This prevents both the courts and Treasury from fixing errors by considering the intent of Congress if different from the specific statutory language.

A. Before *Loper Bright*

Before *Loper Bright*, the courts granted agencies what was called *Chevron*⁵³ deference. Under that analysis, (1) if the language of a statute is clear, that is the end of the inquiry (generally referred to as ***Chevron step 1***), but (2) if the statute is “silent or ambiguous” on the precise question, then the court must defer to the agency’s interpretation “if it is based on a permissible construction of the statute” (***Chevron step 2***).

Courts have increasingly followed the literal language of statutes under *Chevron* step 1, without regard to legislative history or likely Congressional intent. For example, in the tax context:

- In *Gitlitz*,⁵⁴ the Supreme Court interpreted the subchapter S rules to allow what it acknowledged was a “double windfall” to taxpayers: “Because the Code’s plain text permits the taxpayers here to receive these benefits, we need not address this policy concern.”
- In *Wisconsin Central*,⁵⁵ the Railroad Retirement Tax Act provided that railroads had to pay employment tax on “any form of money remuneration.” The Supreme Court held (5-4) that the tax was not payable on income resulting from the exercise of employee stock options, even if the employee elected a cashless exercise, put up no money, and received the spread in cash. Moreover, the statute was held to be so clear that it survived the government’s contrary interpretation in reliance on *Chevron* step 2.
- In *Summa Holdings*,⁵⁶ the Sixth Circuit allowed the taxpayer to avoid the Roth IRA contribution limits by combining a Roth IRA with a domestic international sales corporation. Clearly Congress had never contemplated this combination, and the Tax Court had adopted the government’s substance-over-form argument. The Sixth Circuit reversed in a strongly worded opinion, saying that the literal language of the Code must be followed regardless of Congressional intent.⁵⁷ The First Circuit in *Benenson* then

⁵³*Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁵⁴*Gitlitz v. Commissioner*, 531 U.S. 206 (2001). The result was later reversed by legislation.

⁵⁵*Wisconsin Central Ltd. v. United States*, 585 U.S. 274 (2018).

⁵⁶*Summa Holdings Inc. v. Commissioner*, 848 F.3d 779 (6th Cir. 2017).

⁵⁷The “purpose [of the statute] must be grounded in text. It cannot save the statute from itself. . . . The Commissioner cannot fault taxpayers for making the most of the tax-minimizing opportunities Congress created.” The results “may be an unintended consequence of Congress’s legislative actions, but it is a text-driven consequence no less.” If Congress sees the result in the case “as an improper loophole, it should fix the problem. . . . The last thing the federal courts should be doing is rewarding Congress’s creation of an intricate and complicated Internal Revenue Code by closing gaps in taxation whenever that complexity creates them.” *Id.*

agreed (with a dissent), even after acknowledging that some may call the transaction “clever” and others may call it “unseemly.”⁵⁸

- In *Rite Aid*,⁵⁹ a consolidated return regulation disallowed a loss on the sale of stock of a consolidated subsidiary to prevent a duplication of the same economic loss on the subsequent sale of the subsidiary’s assets. Section 1502 granted the secretary very broad authority to write regulations to clearly reflect the income tax liability of a group and prevent avoidance of that tax liability. Still, the court of appeals invalidated the regulation on the ground that section 165 would allow the loss and could not be overridden by the regulation.⁶⁰

B. *Loper Bright*

Loper Bright overrules *Chevron* and says that courts cannot defer to administrative agencies as in *Chevron* step 2. Rather, they must use their independent judgment to determine the “single, best meaning” of the statute. *Corner Post*⁶¹ in effect treats *Loper Bright* as applying retroactively to the substantive validity of all existing regulations.

This decision changes the inflection points for determining whether a regulation is valid. Under *Chevron*, the inflection points were 100 percent certainty of the meaning of the statutory language (to determine the applicability of *Chevron* step 1) and, say, 20 percent likelihood of a statutory interpretation (to allow a regulation taking that position to be valid under *Chevron* step 2 as a plausible reading of the statute even if not the best reading).

Loper Bright sweeps all this away and creates a single inflection point of 51 percent. The effect is to considerably reduce the ability of Treasury to issue regulatory interpretations of the Code. For example, suppose the 80 percent most likely interpretation of a statutory provision is X, but a weak but plausible interpretation (20 percent likely) is Y. Under *Chevron* step 2, regulations adopting either position X or position Y would be valid. Now, only a regulation adopting position X would be valid.

Under *Loper Bright*, in determining the best meaning of a statute, a court may be aided by “careful attention to the judgment of the Executive Branch” and should take into account the agency’s “body of experience and informed judgment.” The Court refers several times to the *Skidmore*⁶² standard of deference that applied before *Chevron*. In a later decision upholding a regulatory restriction on ghost guns, the Court cites *Loper Bright* for the proposition that “while courts must exercise independent judgment in determining the meaning of statutory provisions,

⁵⁸*Benenson v. Commissioner*, 887 F.3d 511 (1st Cir. 2018). The Second Circuit then reached the same result in *Benenson Jr. v. Commissioner*, 910 F.3d 690 (2d Cir. 2018).

⁵⁹*Rite Aid Corp. v. United States*, 255 F.3d 1357 (Fed. Cir. 2001).

⁶⁰Congress later reversed this holding by adding the current last sentence of § 1502, allowing regulations that differ from the normal Code provisions.

⁶¹*Corner Post Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799 (2024). See also Saul Mezei et al., *Hitching Your Tax Wagon to Corner Post*, Tax Notes Federal, March 24, 2025, p. 2201.

⁶²*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

the contemporary and consistent views of a coordinate branch of government can provide evidence of the law’s meaning.”⁶³

However, it is not clear what actual level of deference courts will give administrative agencies like Treasury in determining the best meaning of a statute. For example, in *National Muffler*,⁶⁴ a pre-*Chevron* case, the Court gave considerable deference to Treasury in upholding a regulation saying that an exempt business league must represent an industrywide line of business and not only the nationwide franchisees of a single corporation. Likewise, in *Mayo*,⁶⁵ the Court relied on *Chevron* to uphold a regulation saying that the FICA exemption for students regularly attending classes at a school does not apply to individuals who regularly work at least 40 hours a week for the employer.

Those cases may well have come out differently under *Loper Bright*. In fact, when the D.C. Circuit upheld a whistleblower regulation under *Loper Bright* after previously upholding it under *Chevron*,⁶⁶ the case was criticized for appearing “to have misapplied *Loper Bright* or, arguably, to have not applied it at all.”⁶⁷

Moreover, under *Loper Bright*, courts must respect a statutory delegation of authority to an agency consistent with constitutional limits. The Code contains many delegations of authority to Treasury. These range from the very broad delegation in section 1502 authorizing results different from those otherwise provided in the Code, to the general authority in section 7805(a) “to prescribe all needful rules and regulations for the enforcement of this title,” and everything in between.⁶⁸ It is unclear what weight the courts will give to any such level of delegation. Most significantly, since most sections of the Code does not contain their own delegation of authority, it is not clear what if any weight will be given to the delegation under section 7805(a).

Much can be written on these questions, and some already has been.⁶⁹ At least in theory, a more specific grant of authority in a particular Code section might result in a greater level of

⁶³*Bondi v. Vanderstok*, 604 U.S. ____ (2025), slip op. p. 20-21.

⁶⁴*National Muffler Dealers Association Inc. v. United States*, 440 U.S. 472 (1979).

⁶⁵*Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011).

⁶⁶*Lissack v. Commissioner*, 125 F.4th 245 (D.C. Cir. 2025). The Supreme Court granted certiorari on the original decision and then remanded for reconsideration in light of *Loper Bright*.

⁶⁷Amish M. Shah et al., *Lissack II and Future Energy Tax Controversy — Is Chevron Really Dead?*, Tax Notes Federal, April 7, 2025, p. 91. See also *McGowan v U.S.*, 6th Circuit, July 9, 2025, stating in *dicta* in its last paragraph that a prior decision based on a § 301 regulation that would have been valid under *Chevron* would not necessarily come out the same way after *Loper Bright*.

⁶⁸See New York State Bar Association Tax Section, *Report on Legislative Grants of Regulatory Authority*, Report No. 1121 (Nov. 3, 2006). For a 50-page list of delegations, see Donald B. Susswein et al., *A List of Vague Regulatory Delegations*, Tax Notes Federal, Nov. 11, 2024, p. 1143.

⁶⁹See, e.g., NYSBA Tax Section, *Comment on Tax Implications of Loper Bright*, Report No. 1508 (March 7, 2025); Kristin E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 Duke L.J. 111 (March 2025); Hickman et al., *Harmonizing Delegation and Deference After Loper Bright*, N.Y.U. L. Rev. (forthcoming 2025; SSRN no. 5175305); Andrew Velarde et al., *IRS Asserts General Reg Authority Is ‘Robust Delegation.’* Tax Notes Federal, Dec. 23, 2024, p. 2454; Ellen P. Aprill, *The Implications for Tax of the Most Important Paragraph in Loper Bright*,

deference. In fact, *Mayo* notes that before *Chevron*, greater deference was given to a regulation authorized by a specific grant of authority than when it was issued under section 7805(a). On the other hand, it is unlikely that more weight would be given to the language of section 7805(a) if Congress amended the Code to separately include it in each section.

In at least one older case the Court appeared to give considerable weight even to section 7805(a) standing alone. In *Bob Jones University*,⁷⁰ in relying in part on a revenue ruling to deny tax-exempt status to a racially discriminatory university, the Court said:

Yet ever since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems. Indeed, as early as 1918, Congress expressly authorized the Commissioner “to make all needful rules and regulations for the enforcement” of the tax laws. . . . The same provision, so essential to efficient and fair administration of the tax laws, has appeared in Tax Codes ever since, see 26 U.S.C. section 7805(a); and this Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code.

Loper Bright itself involved a delegation of authority similar to that in section 7805(a). However, the weight to be given to that delegation was not before the Court, since *certiorari* was only granted on the question of whether *Chevron* should be reversed. Other recent nontax cases have given little or no weight to statutory delegations of authority:

- In the ghost gun case referred to above, the Court upheld the regulation in question but seemed to give no weight to a delegation of authority very similar to that in section 7805(a).⁷¹
- In a recent Clean Water Act case, the Court (by a 5-4 vote) invalidated an administrative requirement by the EPA that was based on a broad grant of authority. The Court made an extensive determination of the best reading of the statute and only a brief reference to the rule that administrative guidance in conflict with that reading is invalid.⁷² Neither the majority nor the dissent discussed the possible scope of delegation of authority to the EPA. In substance, the only relevant issue to all the Justices was the best reading of the statute.
- In an immigration case, the Sixth Circuit declined to give deference to the agency. In its view, deference is triggered only if the statute pairs the substantive language in the statute with “words that expressly empower the agency to exercise judgment” as to the meaning of that language. “Before we defer to the agency, we must find that the statute expressly

ABA Tax Times, Spring 2025 issue, June 26, 2025; Blaine G. Saito, *Tax Regulations in a Loper Bright Light* (2025), SSRN no. 5266177.

⁷⁰*Bob Jones University v. United States*, 461 U.S. 574 (1983), relying in part on Rev. Rul. 71-447.

⁷¹See Mitchell M. Gans, *Has the Supreme Court Already Resolved How Loper Bright Applies to Section 7805 Regulations?*, Tax Notes Federal, May 12, 2025, p. 1069.

⁷²*City and County of San Francisco v EPA*, 604 U.S. ____ (2025). See slip op. p. 19.

confers discretion on the agency. For example, Congress must empower an agency to regulate in accordance with its ‘judgment’ or ‘opinion,’ or when the agency ‘finds’ some condition to hold true.” Moreover, “the actual delegation of authority to the agency must be clear: imprecise wording alone won’t cut it.”⁷³

Other courts have given various levels of deference in nontax cases to agency positions.⁷⁴ These cases do not bode well for grants of authority in the Code, especially section 7805(a), to be given much weight by the courts.

The problem the courts are struggling with is the fact that there is an inherent inconsistency in the “best reading” rule in *Loper Bright* and applying deference under *Skidmore* or pursuant to a delegation of authority. This was well stated in the *Skidmore* context in the recent nontax case of *Robert Mayfield*:

One might ask what work *Skidmore* deference can do given the Supreme Court’s statements that (1) statutes have a “best reading . . . the reading the court would have reached if no agency were involved,” and (2) “[i]n the business of statutory interpretation, if it is not the best, it is not permissible.” . . . Taking these statements together, it seems that either the agency’s interpretation is the best interpretation (in which case no deference is needed) or the agency’s interpretation is not best (in which case it lacks persuasive force and is not owed deference).⁷⁵

I believe exactly the same issue arises in considering the scope of a delegation of authority. Unless a delegation specifically authorizes regulations to override the statutory text, a regulation that departs from the best reading of the statute does not seem consistent with *Loper Bright*. As will be seen below, subsequent case law strongly supports this position.

As a result, I think that the particular statutory formulation of delegation, or the specific test that a court claims to be applying in determining the amount of deference to give Treasury, will not make much difference in practice. If a court determines that a substantive rule in the statute could be read more or less equally in two ways, there might be deference to Treasury in determining the better reading, regardless of the exact formulation of the delegation or the test the court claims to be applying. This is not because of section 7805(a), but because of *Skidmore*.

At the other extreme, if a court thinks that one reading of a statute is clearly better than the one adopted in regulations, it will likely interpret *Loper Bright* to mean that Treasury loses, again regardless of the language of delegation or the test the court says it is applying. Recent cases of this type supporting this view are described in the next section below. Most situations

⁷³*Moctezuma-Reyes v Garland*, 124 F.4th 416 (6th Cir. 2024), discussed in Stephen Obermeier et al., *6th Circ. Ruling Paves Path Out of Loper Bright’ Twilight Zone*, Law360, March 12, 2025.

⁷⁴Robert Iafolla, *Appeals Courts Wrestling With Agency Leeway After Chevron’s End*, Bloomberg Business & Practice, July 14, 2025.

⁷⁵*Robert Mayfield v Dept. of Labor*, 117 F.4th 611 (5th Cir. 2024).

that involve Treasury trying to fix statutory glitches or prevent unintended statutory results are almost by definition in this category.

Finally, in some cases there is no underlying substantive statutory provision, and therefore no possible best reading of a substantive rule. For example, there might only be a grant of authority to write regulations on a particular topic, or to define a particular term, or to write regulations that are contrary to a specific Code provision. Then the only issue is whether the regulations are within the grant of authority (and that the grant is constitutional).

OBBBA clearly takes *Loper Bright* into account in attempting to validly delegate regulatory authority to Treasury. Many of the new tax provisions specifically authorize regulations necessary⁷⁶ (or in some cases necessary or appropriate)⁷⁷ to carry out the purposes of the particular section. However, even if these delegations are considered valid, query whether a court might construe “necessary” as being narrower than “necessary or appropriate,” particularly since both formulations are adopted in the same legislation. A taxpayer might argue that a regulation is not authorized because, even though it may be “appropriate,” it is not “necessary.”

Another approach was taken by Republican Senator Eric Schmitt, who led a “Post-Chevron Working Group” of Republican Senators. He released a lengthy report consisting of proposed responses to *Loper Bright*,⁷⁸ largely focusing on drafting precise statutory language and limiting the delegation of authority to administrators. OBBBA does not appear to have taken these recommendations into account,⁷⁹ which in my view is fortunate for the tax system.

C. Case Law After *Loper Bright*

The sole focus of *Loper Bright* is the best meaning of the statute. There is no discussion of a court taking into account the purpose, legislative history, or Congressional intent relating to the statute. This reinforcement of literalism by the Supreme Court will make it even more difficult than it was under *Chevron* for Treasury to make technical fixes to an imperfectly drafted Code provision. I believe this is a bad result for the tax system and one of the worst consequences of *Loper Bright*.

To be sure, a few courts have upheld tax regulations after *Loper Bright* on fact patterns in which there was no clear inconsistency between the statute and regulations.⁸⁰ For example, the

⁷⁶See, e.g., new § 45F(g), relating to employer-provided child care credits.

⁷⁷See, e.g., new § 225(f), relating to qualified overtime compensation.

⁷⁸Bennett Roth, *GOP Senators Map Plan to Curb Agency Clout After Chevron’s Death*, Bloomberg Tax, June 5, 2025. The text of the report is in Sen. Eric Schmitt, *Post-Chevron Working Group Report*, *Harvard Journal of Law & Public Policy: Per Curiam*, No. 13, Summer 2025, <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2025/07/Schmitt-Working-Group-vf-1.pdf>.

⁷⁹Nathan J. Richman, *Senate Tax Draft Regulatory Approach Bucks GOP Project Goals*, Tax Notes Federal, June 30, 2025, p. 2525.

⁸⁰See, e.g., *Hamel v. Commissioner*, T.C. Memo. 2025-19 (a regulation involving partnership reporting, previously upheld under *Chevron*, was also valid under *Loper Bright* because, although the statute is unclear, after giving due deference to Treasury, the regulation adopts the best interpretation); *Express Scripts Inc. v. United States*, No. 4:21-cv-00737 (E.D. Mo. March 18, 2025) (upholding a regulation under § 199, saying, “Legislative delegation of

Second Circuit in *State of New Jersey*⁸¹ recently upheld a regulation disallowing a charitable contribution deduction to the extent a state gives a tax credit for the amount of the contribution (*i.e.*, the regulation prevents an end run around the limitation on deductions for state taxes under section 164). The question was whether the regulation properly interpreted the statutory term “contribution or gift” to include an implicit prohibition on *quid pro quo* offsets. The District Court upheld the regulation under *Chevron*. The Second Circuit affirmed under *Loper Bright*. It briefly refers to *Skidmore* deference, without even a reference to section 7805(a), and most of the lengthy analysis is an independent determination of the best reading of the statute.

Nevertheless, as noted above, *State of New Jersey* did not involve a direct conflict between a Code provision and the regulation in question. In contrast, taxpayers have been very successful in challenging regulations that contradict the literal language of the Code. Most of these cases have involved regulations designed to prevent tax benefits that are literally allowed by the Code but were clearly not intended by Congress.⁸² I am not aware of any case after *Loper Bright* upholding such a regulation.

To be sure, some of these regulations might have been held invalid even under *Chevron* step 1. However, *Loper Bright* is a strong and recent reinforcement of the spirit of literalism. This may have the effect of encouraging the lower courts to follow literalism even more strongly than before, playing it safe rather than taking a significant risk of reversal. The result is unintended tax benefits to taxpayers, sometimes involving enormous sums of money.

Recent cases holding for the taxpayer include the following:

In *Varian*,⁸³ the Tax Court, in a unanimous reviewed decision, invalidated reg. section 1.78-1(c). The regulation was designed to close a technical glitch in the TCJA that would in effect allow a taxpayer with a 2017-2018 fiscal year to obtain both a credit and a deduction for the same foreign taxes.

authority within reasonable bounds is permitted [under *Loper Bright*] and is sometimes the best reading of statutory language.”); *Rockwater Inc. v. United States*, 121 F.4th 1287 (11th Cir. 2024) (citing § 7805(a) as authority for a regulation, although in a case in which the validity of the regulation was not challenged and *Loper Bright* was not mentioned); *Facebook, Inc. v. Commissioner*, 164 T.C. No. 9 (May 22, 2025), upholding a § 482 regulation on cost sharing arrangements; *Weston v. Commissioner*, T.C. Memo 2025-16 (upholding a regulation stating that a theft loss deduction is not allowed so long as there is a reasonable prospect of recovery; both the best reading of the statute and consistent with a prior decision under *Chevron*).

⁸¹*State of New Jersey, et al v Bessent*, 2nd Circuit, August 13, 2025.

⁸²*State of New Jersey* states that “specific tax provisions must be analyzed and construed within the framework of the Internal Revenue Code and against the background of Congressional purposes [citing the Bob Jones case].... It was not arbitrary for the IRS to consider the whole of the tax code and its various revenue-raising provisions when promulgating the Final Rule.” Taken in isolation, this language would be helpful in validating regulations closing unintended statutory gaps as consistent with *Loper Bright*. However, this discussion in the case was not in the context of determining the best meaning of the statute under *Loper Bright*, but rather in determining that the regulation was not “arbitrary and capricious” under the APA notwithstanding appellant’s claim that the IRS had improperly relied on the “unrelated and irrelevant” § 164.

⁸³*Varian Medical Systems Inc. v. Commissioner*, 163 T.C. No. 4 (2024).

The court completely rejected policy arguments, what it called “speculation about Congressional intent,” or “Congress’s overarching purpose.” Rather, it relied strictly on the statutory text. In fact, it used the preamble to the final regulation, saying that the regulation was needed to avoid the double benefit, as an admission by Treasury of the meaning of the statutory text.⁸⁴ Billions of dollars of tax are at stake on this issue.⁸⁵

Varian also demonstrates that the “absurd results doctrine” is not likely to help Treasury in defending gap-filling regulations. Under that Supreme Court doctrine, as quoted in *Varian*, the language of the statute can be disregarded if “the result would be so gross as to shock the general moral or common sense” or “if it is quite impossible that Congress could have intended the result. . . . and if the alleged absurdity is so clear as to be obvious to most anyone.”

The government did not even claim to be invoking the doctrine in *Varian*. The court agreed that the doctrine did not apply, quoting language from other cases saying that “a result that may seem odd is not absurd” and “a statute is not absurd if it is at least rational, and the bar for rational is quite low.” If the unintended double benefit in *Varian* does not trigger application of the doctrine, it is not likely that other statutory glitches (except maybe a mistaken cross-reference) might trigger it.

JM Assets,⁸⁶ another unanimous reviewed decision by the Tax Court, also invalidates a regulation but goes even further than *Varian* in two significant respects. First, *Varian* involved a completely unambiguous statute. Here, the regulation adopted what I believe was a plausible reading of the statute, and prevents some highly anomalous results.⁸⁷ Yet the court rejected it based on an extremely literal reading of the statute. Second, *Varian* did not involve a specific grant of regulatory authority. Here, the court summarily dismissed the relevance of a broad statutory grant of authority for the particular provision by stating that “even where Congress expressly delegates broad rulemaking authority, that authority does not extend to contradicting statutory text.”⁸⁸

FedEx,⁸⁹ a District Court case decided before *JM Assets*, was similar. The court had previously invalidated under *Chevron* step 1 a regulation that disallowed foreign tax credits on certain GILTI income that was not subject to tax. The government claimed that *Loper Bright* was more favorable for the government than *Chevron* because it specifically authorized delegations of regulatory authority that were present in this case. While that argument was itself quite a

⁸⁴*Id.* at n. 22.

⁸⁵Michael Rapoport, *Cisco, Booking Get Big Tax Benefits From Varian Court Ruling*, Bloomberg Tax, Dec. 2, 2024.

⁸⁶*JM Assets, LP v Commissioner*, 165 T.C. No. 1 (2025).

⁸⁷The case involved the time for the running of the statute of limitations for the IRS making adjustments to partnerships. Under the literal reading of the provision adopted by the court, the beginning of the period for the statute to run could only be determined retroactively based on subsequent actions or inactions by the taxpayer. See Jenni Black, *Hindsight is 20/20: JM Assets and the Blow to Tax Certainty, Part 1*, Tax Notes Federal, July 14, 2025, p. 263, pointing out that the interpretation of the statute adopted by the court “puts the IRS between a rock and a hard place” and creates uncertainty for both taxpayers and the IRS. *Id.* p. 265.

⁸⁸*JM Assets, LP*, slip op. p. 14.

⁸⁹*FedEx Corp. v. United States*, 768 F.Supp.3d 912 (W. D. Tenn. 2025).

stretch, the court said that a delegation of authority does not allow a regulation to contradict the plain language of the statute or the single best meaning of the statute. The government is appealing the case to the Sixth Circuit.

These cases do not bode well for the future of regulatory authority. They strongly support the proposition discussed above that if the statute is sufficiently clear, any debate about the scope of *Skidmore* deference or delegation of authority is irrelevant. More victories for literalism.

Additional pending cases involving *Loper Bright* include the following:

- 3M Co. is challenging the validity of the section 482 regulation that disregards some foreign legal restrictions on blocked income in determining an allocation to the U.S. parent. In a reviewed decision before *Loper Bright*, the Tax Court rejected the taxpayer's argument based on *Chevron* step 1 and upheld the regulation under *Chevron* step 2.⁹⁰ The case is on appeal to the Eighth Circuit⁹¹ and oral argument was held last October, so the decision may come down soon.
- Abbott Labs⁹² and McKesson Corp.⁹³ are challenging the validity of the section 482 regulation that takes stock-based compensation into account for cost-sharing arrangements.⁹⁴ The issue had been decided favorably for the government in *Altera*⁹⁵ based on *Chevron* step 2, over a strong dissent. Enormous amounts of money are at stake.⁹⁶

⁹⁰*3M Co. v. Commissioner*, 160 T.C. 50 (2023).

⁹¹The Tax Court relied on the holding in *3M* to uphold the same regulation in *The Coca-Cola Co. v. Commissioner*, T.C. Memo. 2023-135, which is on appeal to the 11th Circuit.

⁹²See Petition, *Abbott Laboratories v. Commissioner*, No. 15235-24 (T.C. Sept. 19, 2024), Tax Analysts Doc. 2024-27664.

⁹³See Alexander F. Peter, *Altera Redux: McKesson Files Cost-Sharing Agreement Refund Suit*, Tax Notes Federal, May 12, 2025, p. 1121.

⁹⁴The issue is discussed in Ryan Finley, *Does Loper Bright Help McKesson's Regulatory Validity Challenge?*, Tax Notes Federal, June 16, 2025, p. 2015.

⁹⁵*Altera Corp. v. Commissioner*, 926 F.3d 1061 (9th Cir. 2019), *reh'g denied with dissent*, 941 F.3d 1200 (9th Cir. 2019), *cert. denied*, No. 19-1009 (June 22, 2020).

⁹⁶Altera's loss reportedly triggered a \$1.1 billion book expense for Meta Platforms Inc. and \$418 million for Alphabet Inc. Caleb Harshberger, *McKesson's Transfer Pricing Suit Seeks to Bring Back Tax Breaks*, Bloomberg Tax, May 9, 2025.

- The partnership antiabuse rule,⁹⁷ which has no explicit statutory basis, is being challenged in the Tax Court and the Seventh Circuit.⁹⁸ In the Seventh Circuit, the government is relying solely on section 7805(a).⁹⁹
- In *Schwarz*,¹⁰⁰ the taxpayer lost a hobby loss case in the Tax Court. At the taxpayer's request, the court asked for detailed briefing on the validity of the underlying section 183 regulation in light of *Loper Bright*.¹⁰¹
- Siemens is challenging the regulation on “extraordinary dispositions,”¹⁰² designed to close a glitch in the effective date provisions of the TCJA that allowed income of a fiscal-year CFC to be exempt from GILTI and also to be returned tax-free as a dividend under section 245A.¹⁰³ Previously, Liberty Global challenged this regulation, but the court did not reach the *Loper Bright* issue because it held that the temporary regulation in question was invalid as a violation of the APA.¹⁰⁴ It later held¹⁰⁵ that the same transaction violates the statutory economic substance doctrine (ESD).¹⁰⁶ Nevertheless, that case is on appeal, and the validity of the regulation under *Loper Bright* will no doubt be decided in one forum or another.

Other final and proposed anti-taxpayer regulations, including some designed to prevent transactions Treasury considers abusive, are also likely to be challenged by taxpayers under *Loper Bright*. Some examples are:

- The regulation on “extraordinary reductions,”¹⁰⁷ fixing an erroneous statutory formula in TCJA that resulted in the exclusion of GILTI when the stock of a CFC is sold in the middle of the year. This issue, unlike the transition issue of extraordinary dispositions, was a permanent issue with major ongoing revenue implications. While OBBBA fixed

⁹⁷Reg. §§ 1.701-2(a) through -2(d). Reg. § 1.701-2(e), concerning the treatment of partnerships as entities or aggregates, should not be subject to challenge because it is based on the legislative history of the 1954 Code and is not contrary to any explicit Code provision.

⁹⁸*Otay Project LP v. Commissioner*, Docket No. 6819-20 (T.C.); *Tribune Media Co. v. Commissioner*, No. 23-1135 (7th Cir.).

⁹⁹Letter from Norah E. Bringer, attorney for the commissioner, to Christopher G. Conway, clerk of the court, in *Tribune Media*, No. 23-1135 (July 10, 2024).

¹⁰⁰*Schwarz v. Commissioner*, T.C. Memo. 2024-55.

¹⁰¹For the issues on which the Tax Court judge asked for briefing, see Jasper L. Cummings, Jr., *Literalism vs. the Economic Substance Doctrine*, Tax Notes Federal, March 17, 2025, p. 2023, 2036-2037.

¹⁰²Reg. § 1.245A-5(c).

¹⁰³Kat Lucero, *Siemens Contests Nix of \$315M Foreign-Dividend Tax Break*, Law360 Tax Authority, Aug. 7, 2025.

¹⁰⁴Order on Plaintiff's Motion for Summary Judgment, *Liberty Global Inc. v. United States*, No. 1:20-cv-03501 (D. Colo. April 4, 2022).

¹⁰⁵Order on Cross-Motions for Summary Judgment, *Liberty Global*, No. 1:20-cv-03501 (D. Colo. Oct. 31, 2023).

¹⁰⁶§ 7701(o).

¹⁰⁷Reg. § 1.245A-5(e).

the formula for the future,¹⁰⁸ the validity of the regulation is relevant for all TCJA years through 2025.

- The proposed regulation under the 1 percent excise tax on stock buybacks that would impose the tax when a U.S. subsidiary funds a buyback made by its foreign parent.¹⁰⁹
- The regulation treating partners in a partnership that are S corporations as subject to the carried interest rule in section 1061,¹¹⁰ even though that section excludes corporate partners from its scope.
- The regulations adopted in 2022 that impose new limits on foreign tax credits, although those are not yet in effect.¹¹¹
- The regulation providing that a pledge of two-thirds of the stock of a CFC by a U.S. shareholder can be considered an indirect pledge of the assets of the CFC, resulting in an income inclusion under section 956.¹¹²
- The regulation under section 385 saying that a corporate debt instrument issued to an affiliate as a dividend is generally treated as equity, and the related per se funding rule that automatically treats a debt instrument issued to an affiliate for cash as equity if certain conditions are satisfied.¹¹³
- Notice 2025-42, interpreting the statutory requirement that to avoid the repeal by OBBBA of certain wind and solar energy credits, the “beginning of construction” of a facility must be within one year after the date of enactment. The Notice requires that, by such date, there must be “physical work of a significant nature” excluding certain preliminary activities.¹¹⁴ The guidance could affect hundreds of planned projects, has been criticized by a leader in solar energy as a “blatant rejection” of the statute, and has been supported by others.¹¹⁵

Other authors have also questioned the validity of (1) several additional regulations that significantly affect major industries,¹¹⁶ (2) the anti-chaining regulations concerning renewable

¹⁰⁸New § 951(a)(2), effective for taxable years beginning after December 31, 2025.

¹⁰⁹Prop. reg. § 58.4501-7(e).

¹¹⁰Reg. § 1.1061-3(b)(2)(i).

¹¹¹Notice 2023-80, § 5.04.

¹¹²Compare § 956(d) with reg. § 1.956-2(b)(2).

¹¹³Reg. §§ 1.385-3(b)(2), (3).

¹¹⁴See Executive Order 14315, *Ending Market Distorting Subsidies For Unreliable Foreign Controlled Energy Sources*, July 7, 2025, ordering the Treasury to issue a regulation requiring that “a substantial portion of a subject facility has been built” by specified dates, if the Treasury deems it “appropriate and consistent with applicable law.”

¹¹⁵Kelsey Tamborrino et al., *Trump administration deepens crackdown on solar and wind tax credits*, Politico, Aug. 15, 2025; Caitlin Reilly, *Trump Treasury Weighs Fate of Hundreds of Wind, Solar Projects*, Bloomberg Tax, Aug. 14, 2025.

¹¹⁶Doron Narotzki, *Chevron Unraveled, Tax Law Unleashed*, 86 *Ohio St. L.J. Online* (2025), also available as SSRN no. 4953589. The article lists, among other things, regulations or rulings (1) imposing taxes on various cryptocurrency transactions such as the treatment of hard forks, (2) limiting types of expenses for which energy tax credits can be claimed, (3) limiting the definition of qualified research for tax credit and § 174 purposes, (4) limiting

energy tax credits,¹¹⁷ (3) the recently adopted branch currency regulations under section 987,¹¹⁸ and (4) conditions imposed by the section 6724 regulations for satisfying the reasonable cause defense under that section.¹¹⁹

Some of the regulations concerning inversion transactions under section 7874 might also violate *Loper Bright*. However, the tax penalties for having a taxable inversion are so great that taxpayers are not likely to knowingly violate the regulations based on a belief in that invalidity. Because the regulations cannot be challenged in advance of a transaction because of section 7421 (the anti-injunction act), they have an *in terrorem* effect. This inability to challenge this type of significant anti-taxpayer regulation in advance is itself bad for the tax system.

Another regulation I originally put on this list was the “disregarded payment loss” (DPL) rule under section 1503(d), finalized in January 2025. That rule applies the dual consolidated loss (DCL) rules to locally deductible payments from a disregarded foreign subsidiary to its U.S. parent.¹²⁰ The deductions do not exist for U.S. tax purposes, and the statute does not explicitly prevent the use of hybridity to obtain a local deduction that is not subject to the statutory DCL restrictions. On August 20, 2025, the Treasury announced in Notice 2025-44 that it was withdrawing the DPL regulation.

Finally, *Bob Jones University*,¹²¹ discussed above, denied section 501(c)(3) status to a racially discriminatory university, partly in deference to Rev. Rul. 71-447. The ruling states that a racially discriminatory private school is not eligible for exemption because racial discrimination violates federal public policy. While the Court also relied on other factors, it is not clear whether the result would be the same after *Loper Bright*. In fact, Justice Rehnquist dissented, in language not so different from the court in *Varian*, on the ground that only Congress could add this public policy condition to the statute. In any event, the holding should still be valid because *Loper Bright* states that it does not overrule prior cases. This *Loper Bright* issue even came to the attention of *The Wall Street Journal* editorial board in the context of Harvard University.¹²² It may continue to be relevant in light of the current Administration’s threat to remove the tax exempt status of Harvard and other universities.

D. The Economic Substance Doctrine After *Loper Bright*

Even though *Loper Bright* has limited the ability of Treasury to close gaps in a statute by regulation, taxpayers are still subject to antiabuse rules such as the ESD. Those rules are now

the deduction of expenses for regulatory compliance, (5) requiring capitalization of expenses of telecommunications companies, and (6) disallowing the deduction of certain cannabis-related expenses.

¹¹⁷See Shah et al., *supra* note 67.

¹¹⁸Ken Brewer, *Perfect Storm Threatens Long-Awaited Branch Currency Regulations*, Tax Notes Federal, April 21, 2025, p. 521.

¹¹⁹Justin L. Campolieta et al., *Does Loper Bright Provide a Reason to Rethink Reasonable Cause?*, Tax Notes Federal, May 26, 2025, p. 1439.

¹²⁰Reg. § 1.1503(d)-1(d).

¹²¹*Bob Jones University v. United States*, 461 U.S. 574 (1983).

¹²²Editorial Board, *Should Harvard Be Tax Exempt?*, Wall St. J., April 23, 2025.

more important than ever to the IRS to prevent taxpayers from taking advantage of the literal terms of the Code in ways unintended by Congress, with the potential for enormous revenue loss. For example, Rev. Rul. 2024-14 applies the ESD to contrived transactions intended to result in partnership basis shifting that complies with the literal terms of the Code. There are reportedly “dozens and dozens of audits” currently in progress concerning these transactions.¹²³

To be sure, the ESD is a second-best tool for the IRS. Many gaps in the Code provide unintended tax benefits to taxpayers not going out of their way to take advantage of the benefit, and no antiabuse rule will prevent that result. Even when taxpayers plan into a benefit unintended by Congress, application of the ESD requires a detailed and time-consuming examination of the facts in each case, and taxpayers always claim a business purpose for each step in a transaction.

Despite the increased importance of doctrines such as the ESD, it is possible that future court decisions will cite *Loper Bright* as a reason to weaken those doctrines. To be sure, nothing in *Loper Bright* even hints that the best meaning of a statutory provision is to be determined without regard to common-law doctrines such as step transaction or substance over form.

There is even less reason for *Loper Bright* to affect the preexisting application of anti-abuse rules in the Code itself, such as the ESD. Congress expressly put the ESD on an equal footing with all other Code provisions, and clearly intended to discourage taxpayers from violating the doctrine by adding significant penalties for violation. In addition, even *Chevron* step 1, which gave precedence to clear statutory language over contrary regulations, did not prevent ESD from being used to override clear statutory language. In fact, ESD is only needed when a transaction complies with the literal requirements of the Code, so an exemption for literal satisfaction of the Code would read the ESD entirely out of the Code.

Still, the thrust of *Loper Bright* and the literalism approach generally are to take away the power of regulatory agencies to use their discretion to make law. Courts could use this general approach to narrow the scope of doctrines such as the ESD. A weakening of the ESD by the courts in light of *Loper Bright* seems possible.¹²⁴

Judicial decisions concerning the scope of the ESD may come relatively soon, since several courts are currently considering the issue. As discussed above, the District Court in *Liberty Global*¹²⁵ upheld application of the ESD to the facts described above, and the case is currently on appeal to the 10th Circuit. The Tax Court is also considering the issue in several

¹²³Kristen A. Parillo, *Basis-Shifting Guidance Repeal May Force IRS to Adjust Strategy*, Tax Notes Federal, May 12, 2025, p. 1106.

¹²⁴Several commentators agree. See Cummings, *supra* note 101, p. 2036 (“Recall that the premise of this article is that the Supreme Court’s literalism, as illustrated by the *Loper Bright* opinion, will lead to the demise of the ESD.”). He continues: “The Supreme Court’s literalism and disdain for regulations will bring an entirely new day to the federal tax law” and “the fate of the ESD will be just a sideshow to the larger tax concerns of the United States in the coming years.” *Id.* p. 2037. See also Nathaniel S. Pollock, Stephen M. Judge, and Tiernan B. Kane, *Trumping the Economic Substance Doctrine With Varian*, Tax Notes Federal, April 28, 2025, p. 693, arguing that reliance on Congressional intent under the ESD is inconsistent with the literalism approach of *Loper Bright* and *Varian*.

¹²⁵*Liberty Global, Inc. v U.S.*, D. Colo., Oct. 31, 2023.

cases. In *Otay*,¹²⁶ the Commissioner is using the doctrine to disallow a partnership basis-shifting transaction giving rise to a \$867 million basis increase in assets. In *Patel*,¹²⁷ *Farmers and Merchant Bancshares*,¹²⁸ and *Kadau*,¹²⁹ the issue is whether the ESD can be used to recharacterize premiums paid to captive insurance companies.

A key issue in the cases is how to interpret the statutory requirement that the ESD only applies when it is “relevant.” This requirement on its face seems circular. However, the possible interpretations are: (1) the ESD is automatically relevant whenever the taxpayer fails the substantive statutory tests that require a business purpose and change in economic position; (2) the ESD is relevant if, and only if, the result is unintended by Congress; and (3) the ESD is never relevant if the tax results of the transaction are determined by a clear statutory provision.

Several courts are considering this question. The District Court in *Liberty Global*¹³⁰ upheld application of the ESD to particular facts by relying on interpretation (1). The taxpayer in *Otay* is arguing for interpretation (3):

Respondent attempts to negate the plain text of section 743(b) by relying on the economic substance doctrine. Where, as here, the tax consequences are mandated by the clear terms of the law that Congress enacted, respondent cannot deploy the economic substance doctrine to override that law to achieve his preferred outcome.¹³¹

I believe that interpretation (2) is clearly correct and reflects the best reading of the Code under *Loper Bright*. Interpretation (1) reads the relevance requirement out of the Code, and interpretation (3) reads the entire ESD out of the Code. As to *Liberty Global*, while I disagree with the court’s application of interpretation (1), I believe the holding was correct under interpretation (2) and should be upheld on appeal on that basis.

The commentary on *Otay* raises another interpretative question concerning the scope of the ESD. Eric Sloan and others believe that the case was “not even close” to the line for application of the ESD because there was a real underlying business transaction. Moreover, he says, the allegedly “unnecessary” steps that gave rise to the tax benefit and that did not have independent economic substance cannot be considered in isolation.¹³² I responded that the ability

¹²⁶*Otay Project*, Docket No. 6819-20.

¹²⁷*Patel v. Commissioner*, Docket No. 24344-17 (T.C.); see Kat Lucero, *Tax Court’s Economic Substance Foray May Clarify Limits*, Law360 Tax Authority, Aug. 7, 2024.

¹²⁸*Petition, Farmers and Merchant Bancshares Inc. v. Commissioner*, Docket No. 3394-25 (T.C. March 13, 2025), described in Lucero, *Md. Bank Disputes IRS Denial of Captive Tax Perk*, Law360 Tax Authority, March 25, 2025.

¹²⁹*Curtis K. Kadau v Commissioner*, T.C. Memo. 2025-81, holding against the taxpayer on the merits but deferring a ruling on the application of the economic substance doctrine.

¹³⁰*Liberty Global, Inc. v U.S.*, D. Colo., Oct. 31, 2023.

¹³¹See *Answering Brief for Petitioner* p. 220, *Otay Project*, No. 6819-20 (T.C. April 11, 2025), Tax Analysts Doc. 2025-11788; see also Kristen A. Parillo, *Tax Advisers’ Opinions Highlighted in Otay Briefs*, Tax Notes Federal, Feb. 10, 2025, p. 1165.

¹³²Eric B. Sloan et al., *What a Long, Strange Trip It’s Been: The Economic Substance Doctrine at 90*, Tax Notes Federal, Aug. 4, 2025, p. 751, 769-70.

to bifurcate a transaction for ESD purposes is compelled by the legislative history of codification of ESD and is “absolutely critical” to proper application of the doctrine. Otherwise, every normal business transaction could freely add extra steps with no purpose other than to save taxes and without application of ESD.¹³³ Walter Schwidetzky further responded that that “*Otay* involved a naked attempt to game the tax system...that should fail,” and if ESD does not apply in that case, “it is hard to create real-world fact patterns to which it would apply.”¹³⁴

I believe a judicial narrowing of the ESD along these lines would not be the best reading of the Code under *Loper Bright* and could lead to enormous revenue losses from tax arrangements with little or substance. This would be an extremely unfortunate result for the tax system.

E. Taxpayer Reliance on Pro-Taxpayer Regulations After *Loper Bright*

Another issue raised by *Loper Bright* is whether a taxpayer can rely on a regulation that is more favorable to it than the best reading of the statute. The issue did not come up in *Loper Bright*, where the only issue was the amount of deference to be given to an administrative agency in interpreting the underlying statute. As a result, it might be assumed that despite *Loper Bright*, the government would be estopped from challenging the application of its own regulation to a taxpayer on the basis that the regulation was too taxpayer-favorable and therefore invalid under *Loper Bright*.

However, that assumption may be incorrect. In *Memorial Hermann*,¹³⁵ the taxpayer claimed tax exemption under section 501(c)(4) based on the “primary purpose” test in the regulations. The court instead concluded that the exemption did not apply because the stricter standard in the statute was not satisfied. The court said that under *Loper Bright*, it was no longer required to give *Chevron* deference to Treasury’s interpretation of the statute, and “the IRS’s embrace of a legal standard cannot supplant our independent interpretation of statutory text.”

This conclusion was technically an alternative holding because a footnote at the end of the opinion said that the taxpayer would not have satisfied the regulation anyway. However, the focus of the opinion was on the taxpayer’s failure to satisfy the statute. It does not appear that the taxpayer even claimed that the government was bound by the more taxpayer-favorable regulation on the basis of estoppel.

Similar to *Memorial Hermann*, the decision in *Centro de Trabajadores Unidos*, discussed below, states that *Loper Bright* allows the court to disregard the government’s alleged prior plaintiff interpretation of a statute in favor of looking solely to the statute itself. This language is *dicta* or an alternative holding because the allegedly pro-plaintiff position that the government was disavowing was only stated in the Internal Revenue Manual, and taxpayers clearly cannot

¹³³Michael L. Schler, *In Defense of the Economic Substance Doctrine*, Letter to the Editor, Tax Notes Federal, Aug. 11, 2025, p. 955, 956.

¹³⁴Walter D. Schwidetzky, *The Otay Sham*, Letter to the Editor, Tax Notes Federal, Aug. 18, 2025, p. 1285, 1286.

¹³⁵*Memorial Hermann Accountable Care Organization v. Commissioner*, 120 F.4th 215 (5th Cir. 2024).

rely on the Manual.¹³⁶ Nevertheless, the language used by the court might have broader implications.

Before *Loper Bright*, it was clear that the IRS cannot take a position contrary to a revenue ruling,¹³⁷ and a regulation should be even more binding on the IRS. There is also no reason to think that *Loper Bright* changed prior law on estoppel. Therefore, taxpayers should logically still be able to rely on a regulation.

To be sure, taxpayers cannot rely on a revenue ruling (or a regulation) after the underlying statute has been changed. For an existing regulation that was valid solely on account of *Chevron*, it could be argued that *Loper Bright* is analogous to a change in law that would prevent a taxpayer from placing future reliance on the regulation as opposed to the best reading of the statute. This argument would not apply to a regulation that had been specifically upheld under *Chevron*, because *Loper Bright* says that those cases were not overruled.¹³⁸

However, a significant portion of current tax practice, followed by taxpayers and accepted by the IRS and Treasury, is based on regulations that may or may not be the best reading of the Code, and few of those have been subject to a *Chevron* review. If *Loper Bright* allows the government to disregard its own pro-taxpayer regulations and impose tax based on a less-taxpayer-favorable statute, significant portions of routine nonabusive tax planning and tax practice will be thrown into chaos.

Among other things, every action by taxpayers and every tax opinion will have to be based on a determination of whether a favorable regulation intended to be relied on by the taxpayer is consistent with the best reading of the Code. In many cases the answer may be unclear or no. Even *Memorial Hermann* itself raises uncertainty about the permissible percentage of the activities of a section 501(c)(4) organization that can be devoted to nonexempt political campaign activities, since the regulation would allow more than the statute.¹³⁹

The inability to rely on outstanding tax regulations would not be good for the tax system. There is also no need for Treasury to have the power to override outstanding regulations in this manner. Treasury is already undertaking a review of outstanding regulations and can revoke those it considers invalid under *Loper Bright*. As a result, I hope *Memorial Hermann* is an outlier that will not be followed by other courts when the estoppel argument is raised.

¹³⁶*Centro de Trabajadores Unidos v Bessent*, D.D.C., May 12, 2025. The plaintiffs objected to disclosure of tax information to the Department of Homeland Security on the ground, among others, that disclosure was inconsistent with the Internal Revenue Manual. The court said that even if that was true, and in addition to the fact that the Manual does not have the force of law, “the Court is not obligated to defer to the IRS’s interpretation of the statute [citing *Loper Bright*]. The Court instead must independently interpret the statute’s plain meaning.” Slip op. p. 12.

¹³⁷See, e.g., *Rauenhorst v. Commissioner*, 119 T.C. 157 (2002).

¹³⁸*Loper Bright*, 603 U.S. at 375.

¹³⁹Ellen P. Aprill, 2025 *Erwin N. Griswold Lecture Before the American College of Tax Counsel: Memorial Hermann: Rejecting Pro-Taxpayer Regulations Under Loper Bright* (2025), SSRN # 5396494.

F. The Scope of the Nondelegation Doctrine

Loper Bright says that when a statute delegates discretionary authority to an agency, the role of the court is to “effectuate the will of Congress subject to constitutional limits.”¹⁴⁰ This is said to involve, among other things, “recognizing constitutional delegations.”¹⁴¹ Again, Congress may confer discretionary authority on agencies “subject to constitutional limits.”¹⁴² And again, as part of the conclusion, “when a particular statute delegates authority to an agency consistent with constitutional limitations, courts must respect the delegation.”¹⁴³

These consistent references to constitutional delegations naturally raise the question of when a delegation of authority to an agency might be unconstitutional. To the extent a delegation is unconstitutional, Treasury would at least nominally receive less deference from courts in writing regulations. In my view, a significant constitutional limitation on delegations would be bad for the tax system.

The long-standing Supreme Court rule adopted in 1928 has been that a delegation is constitutional if it provides the agency with an “intelligible principle” to follow.¹⁴⁴ Under this test, the more general the delegation, and the fewer standards for an agency like Treasury to apply, the more likely that a court will hold that the delegation has no intelligible principle and is unconstitutional. In fact, however, the only Supreme Court case ever to hold that a delegation was unconstitutional was in 1935.¹⁴⁵

The “intelligible principle” standard was recently reaffirmed by the Supreme Court in *FCC*.¹⁴⁶ In fact, the repeated references to the constitutional limitation in *Loper Bright* are a clear precursor to the decision in *FCC*.

FCC upheld as constitutional a delegation of authority to the FCC to set the amount of fees payable by common carriers to a fund used to subsidize universal telecommunications service.¹⁴⁷ The statute provides several principles for the FCC to use in defining universal service and therefore for determining the fees that will be necessary to fund the services. The list of principles is followed by the catchall, “such other principles as [it] determines are necessary

¹⁴⁰*Loper Bright*, 603 U.S. at 395.

¹⁴¹*Id.*

¹⁴²*Id.* at 404.

¹⁴³*Id.* at 413.

¹⁴⁴*J.W. Hampton Jr. and Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

¹⁴⁵*Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁴⁶*FCC v Consumers’ Research*, 606 U.S. ____ (2025).

¹⁴⁷For a discussion of the case, see Katie Buehler, *Supreme Court Eyes Its ‘Next Frontier’ in FCC Delegation Case*, Law360, Jan. 31, 2025.

and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.”¹⁴⁸

The “good news” for those who favor the constitutionality of broad delegations in the Code is the reaffirmation of the “intelligible principle” standard. Moreover, the Court specifically upheld this test for delegations of taxing authority, rejecting the claim of plaintiffs that (viewing the fees in question as taxes) taxing statutes “have to satisfy a special nondelegation rule” because the Constitution specifically delegates the taxing power to Congress.¹⁴⁹

However, I believe the case was a relatively easy case for the government because the statute laid out in some detail the factors that the FCC was required to consider in setting the rates. As a result, the case may be of limited value in supporting the constitutionality of many delegations in the Code.

In fact, the decision may hurt supporters of the constitutionality of broad delegations in the Code. The Court emphasized that in evaluating a delegation, the Court has generally assessed whether Congress has made clear the general policy the agency must pursue, the boundaries of delegated authority, and the standards that enable the courts and the Congress to determine whether the agency has followed the law.¹⁵⁰ The detailed analysis in the case of the standards provided in the statute will likely encourage lower courts to do the same in future cases.

This outcome would be unfortunate to the extent that courts would otherwise have been willing to rely on delegations in the Code. The result could be much more tax litigation and different tax rules in different parts of the country. Future tax legislation would have to be much more detailed and provide for extensive and specific grants of authority to Treasury. Yet the more detailed the legislation, the more room there is for technical errors that need correction.¹⁵¹ The more detailed a grant of authority, the greater the chance that something will be missed. I believe these results would not be good for the tax system.

FCC could be particularly important in evaluating the validity of tax regulations that are based on a very general delegation of authority in the Code. The most general delegation in the Code is section 7805(a), authorizing “all needful rules and regulations for the enforcement of this title.” In 1940 a leading commentator discussed the constitutionality of the predecessor of this provision:

The great majority of the regulations issued by the Treasury Department are based upon the general rule-making power of Section 62. It will be noted that this section contains no Congressional standard or guide of any kind, nor does the income tax title of the Code

¹⁴⁸47 U.S.C. § 254(b)(7).

¹⁴⁹*FCC*, slip op. beginning at p. 13.

¹⁵⁰*FCC*, slip op. p. 11.

¹⁵¹See Walter D. Schwidetzky, *Hyperlexis and the Loophole*, 49 Okla. Law. Rev. 403 (1996) (“Complexities are piled on top of complexities. Attempts to eliminate ambiguities rarely succeed; a law that resolves one ambiguity typically spawns many more. This whole process stems, I think, from the deluded belief that it is possible to have a perfect legal system. It is not.”).

anywhere set forth a standard for administrative action to which Section 62 might be related. If this section were to be construed as conferring on the Commissioner an unlimited power to make rules having the force and effect of law, *it would be a plainly unconstitutional delegation of power.*¹⁵² [Emphasis added.]

Of course, this view was stated a mere five years after the Supreme Court had invalidated a regulation for the first time, without the knowledge that there would be no further invalidation for the next 85 years. Moreover, it can be argued that the tax law is so complicated and specialized that a very general delegation in that area is more constitutionally justified than in other areas. Even the Court in *FCC* acknowledged that a delegation is more acceptable if it “addresses a narrow, technical issue” (such as the definition of a grain elevator) as opposed to an issue that will “affect the entire national economy.”¹⁵³ In fact, the Tax Court in *Foster*¹⁵⁴ upheld the constitutionality of the very general delegation provided in section 482. That provision allows the reallocation of income if “necessary in order to prevent evasion of taxes or clearly to reflect the income” of related parties. The court said that this was a “meaningful standard.”¹⁵⁵

On the other hand, the commentator may have been prescient. In the words of the Court in *FCC*, section 7805(a) does not provide for a particular policy, or boundaries of delegated authority, or standards to determine whether its boundaries have been complied with. Moreover, the court in *Loper Bright* downplayed the need for judicial expertise in interpreting statutes. Further, *Foster* was decided before *FCC* and in any event can be distinguished because the court relied in part on the fact that the Commissioner’s exercise of discretion under section 482 is judicially reviewable. That argument makes sense in the context of a grant of authority to make a specific proposed allocation under section 482, but it would not be easily applied in determining the constitutionality of a grant of authority to write regulations.

If the delegation in section 7805(a) is not constitutional, Treasury will have no valid delegation to issue regulations over large portions of the Code. This could limit the courts’ willingness to defer to Treasury regulations. On the other hand, as discussed above, it is not clear how much additional deference would result from even a valid delegation of authority, except perhaps when the statute is truly ambiguous.

Other broad delegations of authority in the Code might also raise a constitutional issue. For example:

¹⁵²Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 Colum. L. Rev. 252, 260 (1940).

¹⁵³*FCC*, slip op. p. 11.

¹⁵⁴*Foster v. Commissioner*, 80 T.C. 34, 141 (1983). A decision on appeal did not affect this holding.

¹⁵⁵*Airlines for America v. Department of Transportation*, No. 24-60231 (5th Cir. Jan. 28, 2025), upheld the constitutionality of a nontax delegation to issue regulations that the agency considered necessary to carry out the “purposes of this part.” 49 U.S.C. § 40113(a). While this language is similar to that in § 7805(a), the basis for the decision was that the underlying statutory provision itself gave discretion that was specific enough to satisfy the test. As a result, this case is not significant support for the constitutionality of § 7805(a).

- Section 224(d)(2)(C), enacted by OBBBA, allows a deduction for “qualified tips.” A number of conditions must be satisfied, including “such other requirements as may be established by the Secretary.”
- Section 337(d) authorizes regulations necessary or appropriate to carry out the purposes of *General Utilities*¹⁵⁶ repeal.
- Section 385(b) authorizes regulations to provide factors (literally without limit) to distinguish debt from equity. Regulations have interpreted this authority very broadly.
- Section 1275(d) authorizes modification of the usual statutory rules concerning original issue discount and related provisions if, by reason of certain identified circumstances or “other circumstances,” the statutory rules do not carry out the purposes of the subpart. Treasury has interpreted this authority very broadly.¹⁵⁷
- Section 7701(l) authorizes regulations to recharacterize multiparty financing transactions as being directly between two or more of the parties “if appropriate to prevent avoidance of any tax imposed by this title.”
- Section 482 may or may not be considered to involve a delegation of authority.¹⁵⁸
- Section 1502 authorizes consolidated return regulations, including regulations that are different from the rules for nonconsolidated corporations, to clearly reflect the income of the group.

In the first five instances, the consequence of a finding of unconstitutionality would presumably be the invalidation of one or more particular regulations, but the related provisions would remain coherent. In the section 482 situation, presumably a court would have to determine the proper transfer price by giving limited or no deference to the regulations or the IRS’s position. In the consolidated return situation, there are no underlying Code provisions, and the Supreme Court would face a real dilemma concerning the consequences of a holding that the delegation of authority was unconstitutional.

An issue not resolved in *FCC* is the constitutionality of the Code or another statute granting regulatory authority to third parties. In the case, the FCC relied on a third party to recommend the level of fees, and it generally followed the recommendations. Consequently, if the fees are treated as taxes, the case raised the question of whether Congress can allow a nongovernmental third party to determine (legally, or as a practical matter) federal income tax liabilities. This issue is relevant for any Code section that bases income tax liability on book income, including the corporate alternative minimum tax and section 451(b) (requiring certain income inclusions not later than their book inclusions). Likewise, sections 831 and 832 impose

¹⁵⁶*General Utilities & Operating Co. v. Helvering*, 296 U.S. 200 (1935).

¹⁵⁷For example, reg. § 1.1275-4(b)(6) treats all gain on the sale of a contingent payment debt instrument as ordinary interest income, regardless of the reason for the gain, and any loss exceeding prior interest income as capital loss. Likewise, reg. § 1.1275-2(k) allows a qualified reopening of an issue of debt instruments to achieve fungibility of the new debt with the old debt, even if there was no plan to issue the new debt at the time the old debt was issued.

¹⁵⁸See Thomas D. Bettge et al., *Does Transfer Pricing Have a Loper Bright Problem?*, Tax Notes Federal, March 31, 2025, p. 2383.

tax on insurance companies based on financial statements approved by the National Association of Insurance Commissioners.

This issue was not decided in *FCC* because the Court accepted the government’s position that there was no delegation to the third party because the party’s recommendations were not binding on the FCC. However, the government’s reply brief contained the following language:

The government agrees there would be a nondelegation problem if an agency empowered a private actor to adopt rules without the agency’s approval. Indeed, *empowering that private actor to adopt binding rules governing private conduct on a continuing basis would make that actor an officer of the United States subject to the Appointments Clause*, U.S. Const. Art. II, section 2, Cl. 2. But the FCC has not granted such authority to the Administrator, whose projections “must be approved by the Commission before they are used to calculate the quarterly contribution factor.”¹⁵⁹ [Emphasis added.]

If an agency’s subdelegation of authority to a private third party would violate the Appointments Clause, the logic would mean that Congress could not do so directly. It would then be unclear whether Congress can allow tax liabilities to be determined in part by the Financial Accounting Standards Board definition of book income, although arguably this would be permissible based on the SEC’s relationship with FASB.

It could also be argued that federal tax law deferring to FASB is no different than deferring to, say, a foreign country setting its own tax rates that determine the federal FTC, or to a state that sets the state taxes that are deductible for U.S. tax purposes. In all those cases, the third party is not directly determining federal income tax liability but rather making a determination for nonfederal income tax purposes that Congress has chosen to incorporate into the Code.

G. Practical Consequences of Implementing *Loper Bright*

Loper Bright is likely to increase uncertainty and instability in the tax system for several reasons. There is a wide divergence of views on the case’s likely overall effect on the tax system.¹⁶⁰ But in any event, it has clearly increased the likelihood of many regulations being invalidated, even those already vulnerable under *Chevron* step 1. As a result, taxpayers now have a much stronger basis for taking the position on their tax returns that a variety of regulations are invalid. If taxpayers take that position and are audited, they will likely obtain a better settlement with the IRS and have less risk of penalties, even if the regulation would ultimately be upheld by a court.

¹⁵⁹*FCC v Consumers’ Research*, Docket No. 24-354, *Reply Brief for the Federal Petitioners*, March 2025, p. 19; https://www.supremecourt.gov/DocketPDF/24/24-354/352087/20250313170329875_24-354reply.pdf.

¹⁶⁰*Compare Cummings, supra* note 101, p. 2023 (“Eventually, the enforcement of the income tax could become so fraught that even Democrats will agree it should be replaced or at least supplemented with a VAT”) with Tracey M. Roberts, *The Tax Trench Deepens*, 28(2) Fla. Tax. Rev. (forthcoming 2025; also available on SSRN #5180981, concluding that “to the extent that the Court continues to observe the separation of powers in respect of their relationship with the legislature and legislative prerogatives, the tax system is likely to remain resilient”).

The risk of audit is also reduced because of the current reduction in the size of the IRS's audit division. It is not surprising that current news reports indicate that taxpayers intend to take more positions contrary to adverse regulations, and if necessary, to challenge their validity in court.

Moreover, many regulations help some taxpayers and hurt others compared with the best reading of the statute.¹⁶¹ A taxpayer benefiting from a regulation in the future can follow it, and a taxpayer hurt by the regulation can claim it is invalid. This is a whipsaw against the government and is bad for the tax system. Of course, the same result could have arisen to a challenge to a regulation made before *Loper Bright*, but *Loper Bright* exacerbates the situation. More regulations are at least *arguably* now invalid, whether or not they will actually be found to be invalid, so taxpayers are freer to reasonably take contrary positions.

In fact, the whipsaw problem exists and is very significant even for past years. *Loper Bright* says it does not overrule prior cases upholding a “specific agency action” (i.e., adoption of a regulation) based on *Chevron*. This means that *Loper Bright* is in effect retroactive, applying to all existing regulations for all past years, except for a regulation that was challenged and upheld by a court under *Chevron*. However, relatively few regulations were challenged in the past because of the likelihood they would be upheld under *Chevron*, and even fewer of those cases were decided in any particular taxpayer's home jurisdiction where a court would feel bound by such a decision under *Chevron*. As a result, any taxpayer that was adversely affected by almost any regulation in any past open year, even if the regulation would clearly have been upheld as valid under *Chevron* if it had been challenged at the time (but was not), is now free to file an amended tax return claiming that the regulation is retroactively invalidated under *Loper Bright*.

A list of some regulations that are commonly relied on but are vulnerable under *Loper Bright* are described in Part IV.A.2 below. For example, regulations under section 355(e) and section 1001 provide tax free treatment for shareholders exchanging stock in certain spinoffs or debtholders engaging in certain debt swaps, respectively. The regulations help the majority of taxpayers that have gains, may well be valid under *Chevron*, and to my knowledge have never been challenged under *Chevron* by a taxpayer with losses.

Yet now, anyone with a gain in an open year can still rely on the regulations, but anyone with a loss can file an amended return and claim the loss on the ground that the applicable regulation is invalid under *Loper Bright*. There is also a large random element to this result, since a regulation that was challenged and upheld under *Chevron* in Jurisdiction 1 would be even less likely have been challenged again in a different jurisdiction, and so only the unlucky taxpayers in Jurisdiction 1 are unable to file these amended returns. None of this is good for the tax system.

Even worse for the tax system, taxpayers will now be able to take advantage of the uncertain validity of a newly issued regulation for many years after issuance. After a regulation is published in final form, it can easily take five years or even much longer for a final determination of validity. The process is lengthy: The taxpayer files a return claiming invalidity of the regulation; the return is audited; perhaps the issue is reviewed in the IRS Office of

¹⁶¹As one example, the GILTI high-tax election (now the net CFC tested income election) can be made by a majority of shareholders of a CFC, even though a minority might be adversely affected.

Appeals; the IRS issues a notice of deficiency; a lower court issues a decision; a court of appeals issues a decision; and possibly there is a petition for rehearing en banc in the court of appeals and a petition for certiorari.

In the meantime, many taxpayers will have continued to take the position of invalidity, again with less risk of audit and penalties. Even if the regulation is eventually upheld, years will have gone by without any collection of the correct amount of tax, and it will be impossible for the IRS to go back and collect taxes from all the taxpayers who took contrary positions. The result is more whipsaw against the government for regulations that help some taxpayers and hurt others.

Further, there is likely to be an increase in the number of courts reaching different conclusions on validity. This is because more cases will be litigated, and there is likely to be much less agreement on whether a regulation is the best reading of the statute under *Loper Bright* than there was on whether a regulation is a reasonable interpretation under *Chevron*.

In addition, a court not bound by a prior decision under *Chevron* is not likely to give it much weight in deciding cases under *Loper Bright*. This will further increase the number of circuit splits even when there is no disagreement on the best meaning of the statute. For example, suppose a regulation adopts an interpretation of a statute that everyone agrees is plausible but not the best meaning. A circuit court deciding the validity of the regulation before *Loper Bright* would have upheld the regulation under *Chevron*, and that holding remains binding precedent in that circuit. However, a different circuit first deciding the case after *Loper Bright* might reject the validity of the regulation under the “best meaning” test.

The Supreme Court will not have the ability or interest to decide all or possibly any of these circuit splits, especially because *Loper Bright* is not limited to tax. As a result, different regions of the country may eventually be subject to different tax laws. This will also greatly increase electivity by taxpayers in circuits that have not decided the particular issue, because taxpayers will reasonably be able to follow either the regulation or the courts in other circuits. The Tax Court, which follows the law of the circuit to which an appeal lies, will likely also be deciding more cases in different ways depending on the location of the particular taxpayer.

It is also unclear whether a court such as the Tax Court that upheld a regulation previously under *Chevron* will follow its own precedent, or whether it will apply the *Loper Bright* standard to a new case. *Loper Bright* authorizes it to follow the precedent, but an appeal will go to a court that will not be bound by the lower court precedent and that will consider the case solely under *Loper Bright*. The Tax Court is now facing this issue.¹⁶² Alternatively, if there is no regulation and different courts have interpreted the Code differently, it is less likely under *Loper Bright* than under *Chevron* that a regulation could resolve the disagreement.

¹⁶²Nathan J. Richman, *Collection Suit Parties Debate Loper’s Effect on Precedent*, *Tax Notes Federal*, May 12, 2025, p. 1123. By contrast, in *Facebook, Inc. & Subsidiaries v Commissioner*, 164 T.C. No. 9 (2025), where an appeal would go to the Ninth Circuit, the court upheld a § 482 regulation by relying in part on the analysis of the arm’s length standard in *Altera* (a Ninth Circuit case), even though *Altera* had decided a different § 482 issue under *Chevron*. Slip op. p. 118 n. 118.

Finally, suppose a regulation has previously been upheld under *Chevron*, and the regulation is now amended in part. It is not clear whether the *Loper Bright* test applies to (1) the entire new regulation, which could invalidate the entire regulation notwithstanding the supposed continuing validity of part under *Chevron*, (2) none of the new regulation, which is inconsistent with applying *Loper Bright* to current regulatory actions, or (3) only the amended portion of the regulation, which could be challenging and lead to unintended results if the court believes the original regulation is not the best reading of the statute.¹⁶³

These factors could result in an enormous amount of taxpayer uncertainty and electivity and a considerable revenue loss to the government, even for regulations that are eventually upheld. Again, while these consequences can arise today, they are more likely to arise under *Loper Bright*'s stricter test of validity. Even if *Loper Bright* turns out not to materially increase the number of regulations that are held invalid, it will be many years before this is determined. In the meantime, taxpayers will be able to claim that more regulations are invalid under the *Loper Bright* standard, with the same electivity and other adverse consequences to the tax system.

H. More Burdensome Requirements on Treasury to Issue Regulations

Loper Bright and recent court decisions have imposed burdens on Treasury that make it much more difficult for it to issue regulations in a timely manner. I believe this is bad for the tax system.

First, *Loper Bright* increases the burden on Treasury to write expansive preambles to proposed and final regulations. The lack of *Chevron* deference means that a court is likely to determine whether a regulation is the best reading of the statute by taking into account the preamble to determine Treasury's rationale for a regulation. *Skidmore* says that the weight to be given an agency's interpretation depends on factors including "the thoroughness evident in its consideration" and "the validity of its reasoning." As a result, preambles are now likely to be written like briefs for the government. Thus, *Loper Bright* will likely slow the regulation process and greatly expand the length of preambles to proposed and final regulations.¹⁶⁴

Second, the APA requires that issuance of final regulations be accompanied by "a concise general statement of their basis and purpose."¹⁶⁵ This has been interpreted in recent years to require the agency to respond to all significant comments on the proposed regulations. For example, the Tax Court decision in *Altera* invalidated a regulation in a reviewed decision with no dissents.¹⁶⁶ One of the stated reasons for invalidation was Treasury's failure to respond to significant comments. While the holding was reversed on appeal on the ground that the response was adequate, a dissent made the same point, and the Tax Court might stick to its position in

¹⁶³The continued precedential value of a prior case upholding a "specific agency action" under *Chevron* to a new case involving a related agency action is currently before the Supreme Court in a petition for certiorari. Jeff Overley, *Loper Bright Neutered in 6th Circ., Tenn. Tells Supreme Court*, Law360, Aug. 12, 2025.

¹⁶⁴As the most prominent recent example, the proposed regulations on the corporate alternative minimum tax, with preamble, were 603 typewritten pages and 182 pages in the *Federal Register*.

¹⁶⁵5 U.S.C. § 553(c).

¹⁶⁶*Altera Corp. v. Commissioner*, 145 T.C. 91 (2015), *rev'd*, 926 F.3d 1061, *reh'g denied with dissent*, 941 F.3d 1200, *cert. denied*.

cases involving appeals to other circuits. The Tax Court also invalidated a regulation on conservation easements for the same reason in another reviewed decision, *Valley Park Ranch*.¹⁶⁷ It said that the regulation was “procedurally invalid under the APA because Treasury failed to respond to a significant comment.”

By contrast, as noted above, *3M* involves the validity of a regulation involving blocked foreign income under section 482. The taxpayer claimed an APA violation because of comments to the regulation proposed in 1993 that Treasury considered but for which it claimed Treasury did not give an adequate response. While the Tax Court rejected these arguments, six judges issued a strong dissent on this issue and the case is on appeal.

Thus, even aside from *Loper Bright*, Treasury is now justifiably concerned that any comment it does not specifically respond to may invalidate the relevant portion of a regulation. This has placed an enormous burden on Treasury to track comments and ensure that it responds to each one. The problem is exacerbated by the fact that taxpayers will soon be able to use artificial intelligence to easily send in comments — if they are not doing so already. The coherence of the comments might not even matter. In theory, massive numbers of comments could be submitted in bad faith to make it impossible, as a practical matter, for Treasury to respond to all the comments and issue the final regulations.

Moreover, most existing regulations were adopted before case law within the last 15 years determined that the APA fully applies to all tax regulations and that preambles must be very detailed. Previously, preambles were much shorter and often very general, based on Treasury’s position that the APA did not apply to interpretative as opposed to legislative regulations. Therefore, the ability to challenge old regulations based on subsequently developed standards could adversely affect the validity of many past regulations, even though Treasury was acting in good faith at all times.

For example, in *3M*, the proposed regulation was issued in 1993. The dissent would have invalidated the regulation in 2023 on the ground of inadequate responses to comments, even after acknowledging that the case law requiring detailed responses did not exist until 2011 (the *Mayo* case). The dissent acknowledges that this puts Treasury in an “unfortunate predicament” that “may seem unfair,” but says that this is a problem to be resolved by “Congress (or perhaps the Supreme Court).”¹⁶⁸

So now, any taxpayer unhappy with a regulation can search through the comments to see if there was a comment on an issue relevant to the taxpayer that did not give rise to an adequate response. With any luck, the taxpayer will find one and have a legitimate procedural challenge under the APA.

This windfall to taxpayers makes little sense. Taxpayers should not be substantively affected by the existence or nonexistence of a sentence or two in a preamble to a final regulation that they were not even aware of until they began searching. Of course, Treasury should not be able to freely avoid compliance with the APA without penalty. However, except in cases of bad

¹⁶⁷*Valley Park Ranch LLC v. Commissioner*, 162 T.C. 110 (2024).

¹⁶⁸*Id.* p. 370.

faith, such as intentional noncompliance by Treasury or the IRS, I do not believe that allowing such a challenge is good for the tax system.

In that regard, it is not clear under *Corner Post* whether an APA challenge to a regulation can be made at any time, or whether it must be made within six years of the regulation's promulgation. For a claim that a regulation violates *Loper Bright*, the case holds as a practical matter that the injury that begins the six-year statute of limitations in the APA can occur at any time. But a footnote leaves open the possibility that the injury for a violation of a procedural requirement of the APA in promulgating a regulation might arise on promulgation.¹⁶⁹ To avoid the adverse effects on the tax system of an unlimited statute of limitations for procedural APA challenges, I hope that future case law will hold that the statute begins on the promulgation of the regulation.

Third, at least one court has shown unrealistic expectations about Treasury's ability to write timely regulations, further burdening the regulation-writing process. Section 7805(b)(3) allows regulations to be retroactive to the date of enactment of legislation if they are issued within 18 months of enactment. A few days before the end of that period for the TCJA, Treasury issued temporary regulations to prevent fiscal-year CFCs from having income that would be both exempt from GILTI and not taxable when paid as a dividend to shareholders.

Treasury relied on the "good cause" exception in the APA to issue the temporary regulations without the usual notice and comment period. The good cause was the pending expiration of the 18-month period and the need for retroactivity to eliminate the gap in the statute.

Even if final regulations are made retroactive after notice and comment, temporary regulations issued when final regulations are first proposed are necessary for Treasury to quickly stop transactions it considers abusive. Taxpayers can rely on a statute and disregard a regulation that is only proposed when they file their tax returns, and there is no obligation to file an amended return even if the regulation is finalized retroactively. Moreover, proposed regulations disclose transactions to taxpayers otherwise unaware of them, so they can also engage in transactions before the proposed regulations are finalized. A temporary regulation issued simultaneously with the proposal of the final regulation avoids these possibilities.

Nevertheless, in *Liberty Global*,¹⁷⁰ the court rejected the good cause argument and invalidated the regulation on the ground that it violated the APA. The court said that 18 months after enactment was plenty of time to propose and finalize a regulation under the usual APA procedures. Moreover, even though Treasury did not find out about the relevant transactions until seven months after enactment, the remaining portion of the 18-month period should have been enough time for the normal process. As the court said, "If the deadline could not have been

¹⁶⁹See Mezei and Bond, *supra* note 61, pp. 2207-209 (arguing that there should not be a six-year limitation to APA challenges); Susan C. Morse, *How Late Is Too Late to Challenge Old Tax Regs?*, Tax Notes Federal, Aug. 12, 2024, p. 1235.

¹⁷⁰Order on Plaintiff's Motion for Summary Judgment, *Liberty Global Inc. v. United States*, No. 1:20-cv-03501 (D. Colo. April 4, 2022).

met if an opportunity for notice and comment had been given, and retroactivity would thereby have been lost, I would find that to be good cause. However, that has not been shown.”

This holding shows no appreciation for the process of drafting an entirely new proposed regulation and preamble with coordination between Treasury and IRS, publishing it in the *Federal Register*, receiving many lengthy comments, reviewing comments, writing a new regulation and preamble with coordination between Treasury and IRS, obtaining internal approvals, and getting the final regulation published in the *Federal Register*. Rarely, if ever, has this been done in seven months.

To be sure, section 7805(b) has another exception allowing retroactivity if necessary to prevent abuse, and this should satisfy the good cause exception in the APA also. However, the scope of that provision is unclear, and abuse may not include the case of taxpayers taking advantage of clear gaps in the statute. Perhaps for that reason, Treasury did not rely on that exception in promulgating the temporary regulation in *Liberty Global*. Further, courts such as the *Liberty Global* court might conclude that even this exception cannot be relied on if there is sufficient time to go through the usual procedure. As a result, the issuance of temporary regulations to obtain retroactivity under the 18-month rule may become impossible as a practical matter. Another bad result for the tax system.

I. Universal Lack of Standing to Challenge Pro-Taxpayer Regulations

It is well established that no one has standing to challenge a pro-taxpayer tax regulation--that is, to bring a court case claiming that a regulation is invalid because it allows other taxpayers not to pay the taxes that the Code itself requires them to pay. The rationale is that the increased taxes that Congress might choose to impose on Taxpayer A to offset the ability of Taxpayer B to save taxes because of an invalid pro-taxpayer regulation is too speculative and indirect a harm to Taxpayer A to give it standing to challenge the regulation.¹⁷¹ Even aside from the standing issue, it is hard to imagine courts around the country invalidating regulations under the APA because they are too pro-taxpayer under *Loper Bright* and thereby requiring the Treasury to collect taxes it does not want to collect.

The result is a one-way street in favor of taxpayers and against the fisc. Anti-taxpayer regulations intended to fix unintended pro-taxpayer results in the statute can be challenged by taxpayers and will now be invalidated by courts if contrary to the best reading of the statute. Pro-taxpayer regulations, either fixing unintended anti-taxpayer results in the statute or otherwise granting benefits beyond the best reading of the statute, remain in place unless Congress or Treasury acts.

¹⁷¹See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) and cases cited therein. It has been suggested that Congress could give taxpayers as a group standing in the Tax Court to challenge a pro-taxpayer regulation, because that court is not an article 3 court subject to judicial limitations such as standing. If the group won, taxpayers relying on the pro-taxpayer regulation held invalid would then have real standing to appeal to a circuit court. Reuven Avi-Yonah, *Can Congress Give Unaffected Taxpayers Standing?*, Tax Notes Federal, Nov. 4, 2024, p. 981. I am extremely skeptical.

As a policy matter, there is no more reason to permit Treasury to collect less tax revenue than specified by Congress than there is to permit Treasury to require taxpayers to pay more taxes than specified by Congress. Yet the standing rule allows the former but not the latter.

This unbalanced system is also inconsistent with the rationale of *Loper Bright*, which was based on the APA's rule that courts are to be the ones to determine the best reading of a statute. Obviously, the APA does not distinguish among statutes depending on which party is helped or hurt. Moreover, the Court objected to "the deference that *Chevron* requires of courts reviewing agency action."¹⁷² In fact, the lack of taxpayer standing means that, in practice, Treasury still has more than *Chevron* deference on the pro-taxpayer side of the ledger, just as it did before *Loper Bright*.

Likewise, *Loper Bright* rejects the position that statutory ambiguities are implicit delegations to agencies.¹⁷³ Yet the lack of taxpayer standing results in an implicit delegation as long as the regulations stay on the pro-taxpayer side of the best reading of the statute.

Similarly, *Loper Bright* says that *Chevron* fosters unwarranted instability and undermines the rule of law because it allows agencies to change course even in the absence of new legislation.¹⁷⁴ Yet this is still true under *Loper Bright* as long as the result of any change is no worse for taxpayers than the best reading of the statute. For example, regulations that are the best reading of the statute can be changed to be more pro-taxpayer. Regulations that are more pro-taxpayer than the best reading of the statute can be changed in either direction as long as the result for taxpayers is no worse than the best reading of the statute.

In a real-world example, Treasury clearly tried to fix some of the unintended pro- and anti-taxpayer errors in TCJA. The result is that taxpayers will now get the best of both worlds. They can keep the unintended statutory benefits because they can successfully challenge the contrary regulations. They can avoid the unintended statutory detriments because they can rely on the invalid pro-taxpayer regulations that no one has standing to challenge.

I have long considered this lack of balance a major problem in the tax system and have written about it elsewhere.¹⁷⁵ *Loper Bright* makes the problem much worse by heightening the standard for validity. More anti-taxpayer regulations can and will be challenged under the new standard, but pro-taxpayer regulations still cannot be challenged. The potential gap between the two positions and the unjustified loss to the fisc is thereby increased.

¹⁷²*Loper Bright*, 603 U.S. at 396.

¹⁷³*Id.* at 450-451.

¹⁷⁴*Id.* at 455-456.

¹⁷⁵Michael L. Schler, *Tax Regulations and the Rule of Law*, Tax Notes, Feb. 4, 2019, p. 531 (Schler 1); Michael L. Schler, *More on Tax Regulations and the Rule of Law*, Tax Notes Federal, Aug. 3, 2020, p. 879 (Schler 2); Michael L. Schler, *Still More on Tax Regulations and the Rule of Law*, Tax Notes Federal, Dec. 7, 2020, p. 1633 (Schler 3); Michael L. Schler, *Loper Bright and Pro-Taxpayer Regulations*, Tax Notes Federal, Sept. 2, 2024, p. 1865 (Schler 4).

IV. Executive Branch

Treasury now has several issues to consider and decisions to make, partly in light of *Loper Bright*. In my view, some of the possible outcomes would improve the state of the tax system, but others would substantially worsen it. Time will tell.

A. Review of Existing Regulations

1. Procedure

Shortly after *Loper Bright*, several Republican members of Congress wrote to then-Treasury Secretary Janet Yellen asking for a list of all the Biden Administration regulations that might be affected by *Loper Bright* if they were challenged in court. I wrote that if that review were undertaken by the current or a future Administration, the review should cover all past regulations rather than being limited to Biden Administration regulations, and should include both pro-taxpayer and anti-taxpayer regulations.¹⁷⁶ Sure enough, in light of subsequent developments, my proposal may come to pass, although that is probably wishful thinking.

First, on February 19, 2025, the president issued Executive Order 14219, “Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative.” The EO requires every agency to identify outstanding regulations that are based on (1) anything other than the best reading of the underlying statutory authority or prohibition, or (2) unlawful delegations of legislative power. Notably, there is no limitation on when a regulation was issued or whether it helps or hurts taxpayers.

Within 60 days of the EO (which is now long passed), a list of these regulations was to have been provided to the Office of Information and Regulatory Affairs (**OIRA**) in the Office of Management and Budget (**OMB**). OIRA will then consult with agency heads to develop a regulatory agenda “that seeks to rescind or modify these regulations, as appropriate.” The EO also directs “de-prioritizing actions to enforce regulations that are based on anything other than the best reading of the statute,” and possibly terminating enforcement proceedings in these cases.

Second, on April 4, Treasury and the IRS issued Notice 2025-19, their annual request to the public for recommendations for items to be included on the 2025-2026 priority guidance plan. The request says that Treasury and the IRS will consider whether the recommendations relate to regulations potentially described in EO 14219, including those based on anything other than the best reading of the statute or an unlawful delegation of legislative power. Comments were due by May 30.

Third, a White House memorandum (**White House memorandum**) was issued April 9, titled “Directing the Repeal of Unlawful Regulations.” It says that after the end of the 60-day period stated in EO 14219, agencies will immediately take steps to repeal any regulation that “clearly exceeds the agency’s statutory authority or is otherwise unlawful.”

¹⁷⁶See Schler 4, *supra* note 175.

Moreover, agencies are instructed to finalize that repeal without the notice and comment normally required under the APA. The rationale is that the good cause exception to notice and comment requirements in the APA applies, because in the case of a facially unlawful regulation, those procedures would be unnecessary and contrary to the public interest. Further, within 30 days after the end of the review period, the agency must identify to OIRA any “unlawful or potentially unlawful regulations” that have not been targeted for repeal.

Fourth, on April 14, the IRS issued Notice 2025-22 in reliance on EO 14219. It revokes nine published guidance documents on the ground that they are obsolete, and says that Treasury and the IRS “anticipate revoking or obsoleting hundreds of similar guidance documents in the near future.”

Finally, on April 15, Treasury published a final rule, without a preceding proposed regulation, “Eliminating Unnecessary Regulations.” The final rule announced the removal of several nontax regulations on the stated ground that they are no longer necessary or applicable. The regulations are to be repealed effective June 16, unless significant adverse comments were received by May 15, in which case the repeal would not take effect.

These directives raise several issues.

First, they do not distinguish pro- and anti-taxpayer regulations. Thus, at least in principle, recommendations for the revision of both categories of regulations that are invalid under *Loper Bright* will be considered and acted on. Under the White House memorandum, any pro-taxpayer regulations that violate *Loper Bright* and are not to be withdrawn must be identified to OIRA with a reason for their nonwithdrawal.

In fact, Notice 2025-19 requested recommendations for regulations to be withdrawn. It was possible that bar associations and other public interest groups would respond with balanced suggestions on the validity of both pro- and anti-taxpayer regulations. Unfortunately, as far as I can tell, www.regulations.gov only contains 14 comments in response to Notice 2025-19. Almost all are from industry groups or industry representatives, and none appears to suggest the withdrawal of any pro-taxpayer regulations. While that is not surprising, Treasury should use its best efforts to ensure that its obligations under the directives are carried out in a balanced manner.

Moreover, many regulations clearly help some taxpayers and hurt others. Even a regulation that appears to be entirely pro-taxpayer may hurt some taxpayers in unexpected ways.¹⁷⁷ A taxpayers hurt by such a “mixed” regulation can challenge it in court under *Loper Bright*. Thus, if such a regulation clearly violates *Loper Bright*, it would be good for the tax system if Treasury revoked it and avoided the need for litigation.

Second, EO 14219 and the White House memorandum required Treasury to review, in a very short period that is already over, thousands of pages of tax regulations to determine which

¹⁷⁷For example, reg. § 1.956-1(a)(2), referred to in Part IV.A.2 below as possibly violating *Loper Bright*, is generally a pro-taxpayer regulation because it allows § 245A to reduce § 956 inclusions. However, it could adversely affect taxpayers that would prefer the full inclusion in order to be permitted to use FTCs that would not be available if § 245A applied.

ones are not the best reading of the Code. It is not clear how this could have been done, even in a much longer period. Every regulation would have to be compared with the underlying statutory language, with considerable thought required in many cases about possible inconsistencies.

It is possible this work could be assisted by AI. The U.S. DOGE Service is reportedly currently using a “DOGE AI Deregulation Decision Tool” to analyze 200,000 federal regulations and determine an estimated 50% that can be eliminated. While not entirely clear, presumably the tool would try to identify not only “unnecessary” regulations but those that would be invalid under *Loper Bright*. The claim is that the tool is able to save 93% of the human labor involved in the entire process of eliminating a regulation, which today is said to require 36 work-hours (a number that seems extraordinarily low). Elimination of the regulations is projected to save the government and the private sector \$3.3 trillion a year, and the goal is to have the project completed by January 20, 2026.¹⁷⁸

The underlying PowerPoint presentation is quite extraordinary.¹⁷⁹ It does not focus specifically on tax, does not take account of the fact that taxpayers often prefer to have “unnecessary” regulations in order to achieve tax certainty, and does not take account of the fact that elimination of regulations can have significant consequences to the nature of the tax system.¹⁸⁰ In any event, the entire AI project has generated considerable skepticism about whether it can work.¹⁸¹ More generally, the extent to which Treasury has made to comply with all the requirements of EO 14219 is not publicly known.

Third, the White House memorandum concerning the procedure for eliminating regulations has been criticized as a very aggressive use of the good cause exception to the notice and comment requirement in the APA.¹⁸² However, it is not clear anyone could challenge this use of the exception. If this is correct, the result would not be good for the tax system.

A taxpayer benefited by the withdrawal of a regulation would have no standing to challenge the withdrawal as a violation of the APA. A taxpayer hurt by the withdrawal — that is, that benefited from the withdrawn regulation — might challenge the withdrawal as a violation of the APA. However, presumably the withdrawal would be prospective. Then, to win on the merits, the taxpayer would be claiming the ability to rely on the then-outstanding regulation, even after the government had tried to withdraw it on the basis that it violated *Loper Bright* and the withdrawal had failed solely for procedural reasons.

¹⁷⁸Hannah Natanson et al, *DOGE builds AI tool to cut 50 percent of Federal Regulations*, Washington Post, July 26, 2025; Coral Davenport, *Behind the Rush to Discard Rules and Reshape Life*, N.Y. Times, April 17, 2025.

¹⁷⁹ See https://www.washingtonpost.com/documents/857b6c65-0690-4b3c-b438-e3dc1dc87340.pdf?itid=lk_inline_manual_33.

¹⁸⁰See, e.g., NYU Tax Law Center, *Beware of “deregulatory” efforts that add to deficits and tilt the tax system to the wealthy*, March 25, 2025

¹⁸¹Ian Kullgren, *DOGE’s AI Plan to Kill 100,000 Rules Has a Bark Bigger Than Bite*, Bloomberg Tax, Aug. 12, 2025.

¹⁸²Robert Iafolla, *Trump’s Deregulatory Moon Shot Stretches Rulemaking Authority*, Bloomberg Business & Practice, April 21, 2025.

Assuming the regulation did in fact violate *Loper Bright*, this does not seem like a winning argument. The usual conditions for estoppel against the government do not exist, because the government has announced its position that the regulation is invalid, even though the procedure for withdrawal was defective. If this is correct, the taxpayer would lose whether or not there was an APA violation, so the taxpayer is not hurt by the APA violation and might not have standing to claim that violation.

Fourth, even aside from the APA, it is better for the tax system if taxpayers have an opportunity to comment before “hundreds” of regulations are withdrawn. Regulations may have effects on taxpayers that are not apparent to Treasury. For example, a long-standing pro-taxpayer proposed consolidated return regulation was recently withdrawn without notice on the theory that it was redundant, but the withdrawal created uncertainties, so a new, similar proposed regulation had to be issued.¹⁸³

Similarly, Notice 2025-22 obsoleted Rev. Rul. 91-32, concerning the treatment of a foreign partner of a U.S. partnership as deadwood because of a subsequent statutory change. Yet some U.S. taxpayers reportedly had continued to rely on the ruling.¹⁸⁴ While that information might not have caused Treasury to change its decision, it should at least have the relevant information.

The April 15 final rule allows Treasury to obtain the benefit of comments by providing a period for comments before the withdrawal of a regulation becomes effective. On the other hand, Notice 2025-22 revokes prior guidance immediately without any opportunity for comments. The former approach is better for the tax system.

2. Substance

We now turn to what regulations might be on Treasury’s list to be withdrawn. Many outstanding regulations, both pro- and anti-taxpayer, were adopted in reliance on *Chevron* deference and in many cases are likely not the best reading of the statute. Several of the anti-taxpayer regulations potentially in this category have been discussed, and are being litigated or are likely to be litigated.

One anti-taxpayer proposal has already been withdrawn by Treasury on the basis of EO 14219. Notice 2024-54 stated an intent to issue proposed regulations to prevent the shifting of basis between related parties using partnerships. The regulations were intended to stop multibillion-dollar transactions between related parties that have resulted in enormous revenue losses. However, the regulations would have been vulnerable under *Loper Bright*. Notice 2025-23 withdraws the proposal, as well as related disclosure requirements that would have identified the transactions for the IRS. Likewise, as noted above, Notice 2025-44 stated that Treasury would withdraw final DPL regulations, after receiving comments that they are inconsistent with the statute.

¹⁸³The new proposal is REG-134420-10. The preamble describes the history of the regulation.

¹⁸⁴Monisha Santamaria, *Deregulatory Actions Hit the Tax World in Real Time*, Bloomberg Tax, April 24, 2025.

Many pro-taxpayer regulations are also highly vulnerable under *Loper Bright*. Many were even clearly vulnerable under *Chevron*.¹⁸⁵ Examples of these regulations under TCJA include:

- The GILTI (now, net CFC tested income) high-tax election;¹⁸⁶
- the availability of section 199A in cases in which the regulations very narrowly interpret the statutory exclusions (1) in cases in which the principal asset of the business is the reputation and skill of employees, and (2) for brokerage services;¹⁸⁷
- the allowability of expensing under section 168(k) upon the purchase of leased property, even though the statute excludes property previously used by the taxpayer;¹⁸⁸
- the addback to the section 163(j) limit on interest deductions based on EBITDA for notional depreciation that is in fact capitalized into the basis of inventory;¹⁸⁹ and
- an exception to the BEAT tax in section 59A, which is based on the amount of payments to foreign affiliates, for payments to foreign related-party banks on loss-absorbing capacity securities,¹⁹⁰ in the absence of a corresponding statutory exception.

Further, many pre-TCJA regulations and rulings that are long-established and routinely relied on by taxpayers might violate *Loper Bright*. These include, among many others:

- the rule in Rev. Proc. 93-27 that a partnership interest transferred for services is valued at its liquidation value (the carried interest rule) rather than at its fair market value as is required by section 83;
- the regulation treating a qualified intermediary in a section 1031 exchange as not being an agent of the taxpayer,¹⁹¹ even though the intermediary clearly is an agent and has no substance;
- the check-the-box regulations,¹⁹² particularly as they allow an actual domestic or foreign partnership to elect to be taxed as a corporation, or an actual foreign corporation to elect to be taxed as a partnership;

¹⁸⁵See Schler 1 through Schler 4, *supra* note 175.

¹⁸⁶Reg. § 1.951A-2(c)(7). See Schler 2, *supra* note 175. As noted previously, the income in question was referred to as “global intangible low-taxed income” (GILTI) under TCJA, and OBBBA changed the terminology to “net CFC tested income,” but this issue is unchanged.

¹⁸⁷See Schler 1 and Schler 4, *supra* note 175.

¹⁸⁸Compare former § 168(k)(2)(E)(ii)(I), renumbered by OBBBA as § 168(k)(2)(E)(i)(I), with reg. §§ 1.168(k)-2(b)(3)(iii)(B)(1) and -2(b)(3)(vii)(F), Example 6. See also Schler 1, *supra* note 175.

¹⁸⁹Compare § 163(j)(8)(A), unchanged by OBBBA, with reg. § 1.163(j)-1(b)(1)(iii). See also Schler 3, *supra* note 175.

¹⁹⁰Reg. § 1.59A-3(b)(3)(v). See Schler 4, *supra* note 175.

¹⁹¹Reg. § 1.1031(k)-1(g)(4).

¹⁹²Reg. §§ 301.7701-1 to -3.

- the “super safe harbor” under section 355(e) automatically deeming there to be no plan for an acquisition of stock if some simple conditions are met, contrary to a statutory presumption that there is a plan;¹⁹³
- the rather arbitrary rules for determining whether there has been a realization event upon a modification of a debt instrument;¹⁹⁴
- the regulation treating all real estate as like-kind with all other real estate for purposes of section 1031 exchanges, no matter how different the properties are;¹⁹⁵
- the regulation saying that an organization meets the section 501(c)(3) test of being organized exclusively for charitable purposes even if its articles expressly authorize other activities that are “an insubstantial part of its activities”;¹⁹⁶
- the regulation saying that a U.S. shareholder’s inclusion under section 956 (which is not a dividend) is reduced by the amount that would have been allowed as a deduction under section 245A if the inclusion had in fact been a dividend;¹⁹⁷
- the regulation treating the source of income from a notional principal contract as the location of the taxpayer, so a U.S. payer to a foreign payee has a U.S.-source deduction and the payee has foreign-source income exempt from withholding tax;¹⁹⁸
- Rev. Rul. 66-365, saying that the “solely for voting stock” requirement for a B reorganization is satisfied even if the acquirer pays cash for fractional shares directly to the target shareholders;
- Rev. Rul. 2003-51, saying that the control requirement of section 351 is satisfied on particular facts even though the transferer was under a binding contract to dispose of the shares of the transferee corporation; and
- Notice 2024-16, and the proposed regulations on previously taxed earnings and profits, both saying that when one CFC receives a dividend from another CFC, the former CFC has an increased basis in the latter for multiple purposes, even though section 961(c) provides for that increased basis “but only” for one specific purpose.

Because of the lack of taxpayer standing to challenge pro-taxpayer regulations, only Treasury can bring balance to the system by applying *Loper Bright* equally to pro- and anti-taxpayer regulations. This approach should be supported by those (including the Supreme Court majority in *Loper Bright*) who believe that administrative agencies have been usurping Congressional power. After all, it is equally a usurpation if the agency is imposing either too

¹⁹³Compare § 355(e)(2)(B) with reg. § 1.355-7(b)(2) (first sentence).

¹⁹⁴Reg. § 1.1001-3.

¹⁹⁵Reg. § 1.1031(a)-1(b) and (c).

¹⁹⁶Reg. § 1.501(c)(3)-1(b)(1)(iii). Likewise, § 501(c)(4), discussed in connection with *Memorial Hermann*, requires that the organization be operated exclusively for the promotion of social welfare, but reg. § 1.501(c)(4)-1(a)(2)(i) requires only that the organization be “primarily engaged” in those activities. Compare the “solely for voting stock” requirement for a B reorganization, for which there is no de minimis exception.

¹⁹⁷Reg. § 1.956-1(a)(2).

¹⁹⁸Reg. § 1.863-7(b)(1).

much or too little tax compared with what Congress wrote in the statute. Perhaps this is why EO 14219, by its terms, applies equally to all regulations (although it is hard to imagine that the drafters even thought about tax, let alone this issue).

In fact, it would be difficult for Treasury to eliminate only anti-taxpayer regulations. Many regulations hurt some taxpayers and help others, often in unexpected ways. It would generally not be possible to carve up a regulation to retain a benefit to some taxpayers and avoid a detriment to others. Moreover, Treasury might not even know both groups exist, because it would more likely hear complaints from taxpayers hurt by a regulation than praise from taxpayers helped by it.

In any event, it may be politically difficult for Treasury to eliminate pro-taxpayer regulations with the same strictness it might use in eliminating anti-taxpayer regulations. If that turns out to be correct, the result will be a tax system that in this respect continues to be extremely unbalanced in favor of taxpayers.¹⁹⁹

A better result for the tax system would be if Treasury followed EO 14219 equally for all regulations, with a lead time for eliminating some or all of the older pro-taxpayer regulations that taxpayers have relied on. This would force Congress to confirm legislatively, if it wished to do so, the pro-taxpayer regulations that violate *Loper Bright*. I hope, at the same time, it would also confirm legislatively the anti-taxpayer regulations that violate *Loper Bright* but close unintended loopholes. No doubt this is wishful thinking, but the result would be a much more balanced tax system that is fair to both taxpayers and the fisc.

Such a balanced approach would also minimize the serious risk to the government of whipsaw in the future. As discussed above, many regulations help some taxpayers and hurt others. As long as a regulation is outstanding, those who are helped can presumably rely on it, and those who are hurt can take the position it is invalid. Moreover, there is no way the government can challenge everyone claiming a regulation is invalid, and litigate each case. As a result, in reality, taxpayers have the best of both worlds on any regulation of uncertain validity. The only way for the Treasury to minimize this potential for whipsaw is to stick to what it believes is the best reading of the statute, both in evaluating old regulations and in issuing new ones.

B. Adoption of New Regulations

1. Procedure

The new Administration has adopted new government-wide procedural requirements for all new regulations:

- EO 14219 requires every agency to consult with its DOGE team leads as well as with OIRA on potential new regulations as soon as possible.

¹⁹⁹For further discussion of issues facing Treasury under EO 14219, see Monte A. Jackel, *Trump's Revocation of 'Unlawful' Regulations Is a Legal Quagmire*, Tax Notes Federal, May 19, 2025, p. 1155.

- EO 14192, dated January 31, requires all regulatory proposals to be approved by the director of OMB and included in a unified regulatory agenda. The director of OMB may also require additions to the agenda. The EO also reinstates the requirement from the first Trump Administration that all material tax regulations be reviewed and approved by OIRA before promulgation. Finally, the EO says that “it is important that for each new regulation issued, at least 10 prior regulations be identified for elimination” (although it is unclear whether the requirement is intended to apply to regulations with no revenue effect, such as interpretative tax regulations). These rules apply to all official guidance, presumably including revenue rulings and revenue procedures.

These new requirements have the potential to significantly slow down the guidance process, which is not in the interest of taxpayers or the government. If the 10-for-1 rule is intended to apply to tax regulations, it is difficult to see how many new regulations could be issued, unless only meaningless deadwood is eliminated. The requirements concerning OIRA also have the potential to politicize the regulatory process and give more opportunities for lobbying by taxpayers, although this was reportedly not the case for regulations previously sent to OIRA.²⁰⁰

2. Substance

I believe there are major problems with the tax regulatory process for several additional reasons. First, taxpayers constantly discover new loopholes in the Code; that is, using Code provisions to achieve tax benefits in unexpected ways not originally intended by Congress. Treasury for decades has been incapable of eliminating these transactions by regulation, at least within a reasonable time, even when it had *Chevron* authority to try to do so. The prospects for valid regulations of this type are even further reduced after *Loper Bright*.

Examples of this phenomenon are legion. A footnote includes some of the items that I believe could be fixed by regulations even after *Loper Bright*.²⁰¹ However, the particular items on my list are less important than the fact that everyone will have a list. Even regulations that have recently stopped abusive transactions have taken a very long time to be adopted.²⁰² It is not good for the tax system that Treasury cannot correct these problems in a reasonable time.

Second, the lack of standing by taxpayers to challenge pro-taxpayer regulations means that Treasury is the only party with the ability and responsibility to fairly administer the tax laws under *Loper Bright*, including without pro-taxpayer bias. Still, the lack of standing means the

²⁰⁰Richman, *Tax Watchers Predict New Admin’s Regulatory Imprint in 2025*, Tax Notes Federal, Feb. 10, 2025, p. 1132.

²⁰¹Partnership disguised sales, misuse of the partnership ceiling rule and other partnership allocation issues, unintended results of check-the-box regulations, conversion of private equity fees into carried interest, misuse of grantor-retained annuity trusts and other estate planning techniques, uses of § 304 to achieve unintended benefits, non-implementation of § 482 rules for clear reflection of income, elective application of § 382(h) under Notice 2003-65, the technique endorsed by Notice 2020-75 to allow deduction of state income taxes by owners of passthroughs and S corps (see Schler 3, *supra* note 175), and lack of regulations under § 337(d).

²⁰²*E.g.*, regulations limiting the benefits of cost-sharing were first proposed in 1966, but effective regulations were not finalized until 2011. Elizabeth J. Stevens and H. David Rosenbloom, *Original Sin: Cost Sharing in the United States*, Tax Notes Federal, Nov. 11, 2024, p. 1197.

Treasury has the unrestricted power to issue pro-taxpayer regulations inconsistent with *Loper Bright*.²⁰³ I believe the integrity of the tax system depends upon Treasury administering the system, including the application of *Loper Bright*, in a neutral pro- and anti-taxpayer manner. I also do not believe that the exclusive reliance on Treasury (of either political party) to do so without the possibility of judicial review is good for the tax system.

Significantly, the power of Treasury to adopt pro-taxpayer regulations is not limited to fixing errors in the statute or preventing abusive transactions. In some cases, justifiable or not, it has been used to improve the administrability of the tax law, such as the check-the-box regulations and regulations allowing qualified intermediaries under section 1031.

More recently, the American Rescue Plan Act amended section 6050W(e) to reduce from \$20,000 to \$600 the threshold for Form 1099-K, “Payment Card and Third Party Network Transactions,” reporting to individuals by third-party settlement organizations (for example, Venmo), effective for calendar year 2022. Treasury delayed and modified this reporting obligation several times, most recently in Notice 2024-85. Congress eventually repealed the increase (retroactively) in OBBBA,²⁰⁴ but there was no statutory basis for the administrative deferral, and no one had standing to object.

Arguably these pro-taxpayer rules that relate to tax administration are justifiable as a policy matter, despite their inconsistency with the Code and the fact that comparable anti-taxpayer rules would be invalidated by the courts. However, I think that other, more extreme, cases could seriously undermine the integrity of the tax system and the role of Congress as lawmaker. For example, Treasury overrode specific rules in section 382 in order to preserve the value of enormous amounts of bank tax losses during the 2008 financial crisis.²⁰⁵

As to the future, surely Treasury could not write a regulation providing for a tax rate that is lower than the statutory rate, or allowing interest deductions without regard to section 163(j), or allowing tax benefits in full without regard to a phaseout under a reconciliation bill. But Treasury could adopt other, less extreme pro-taxpayer positions in regulations that would violate (or at least be questionable under) *Loper Bright*. These actions would be bad for the tax system and would call the integrity of the system into question.

For example, Treasury could finalize outstanding proposed regulations, or replace recently withdrawn regulations, with very pro-taxpayer regulations that would be difficult if not impossible to justify under *Loper Bright*.²⁰⁶ Likewise, Treasury and the IRS could withdraw Revenue Ruling 2024-14, relating to the ESD, as it has been asked to do by 20 of the 26

²⁰³In fact, under Executive Order 14215, *Ensuring Accountability for All Agencies*, § 7 (Feb. 18, 2025), the final authorities on all legal interpretations of law are the President and Attorney General.

²⁰⁴OBBBA § 70432.

²⁰⁵See Notices 2008-83 and 2010-2; Albert H. Choi et al., *Crisis-Driven Tax Law: The Case of Section 382*, 23 Fla. Tax Rev. 1 (2019).

²⁰⁶See, e.g., Michael Rapoport, *Book-Tax, Double-Dipping Rules Among Top Candidates for Rollback*, Bloomberg Tax, Aug. 1, 2025 (quoting a prominent practitioner as stating that “I expect more guidance on CAMT that could go in a different direction from the last administration”).

Republican members of the House Ways and Means Committee,²⁰⁷ several other industry groups,²⁰⁸ and private practitioners.²⁰⁹ As discussed in Part III.D above, I believe the ruling reflects the best reading of the Code under *Loper Bright* and that such a withdrawal would be very bad for the tax system.

Similarly, as noted above, Notice 2025-44 removes the DPL regulation that was of questionable authority. Fair enough. But in addition, the Notice states that an anti-abuse rule in the DCL regulations would be amended “so that the rule does not apply to structures that would have been addressed by the DPL rules.” This invites taxpayers to engage in the very same structured transactions that Treasury stated in the preamble to the final DCL regulations resulted in “an avoidance of the DCL rules [that] is an unintended consequence of the check-the-box regulations.”²¹⁰ It is one thing to acknowledge that the literal language of the statute does not cover a transaction it was likely intended to cover. It is going much further to exempt such transactions from an anti-abuse rule that by its terms covers transactions “engaged in with a view to avoid the purposes of the rules of this section.”²¹¹ This is not good for the tax system.

Finally, suppose Treasury issues a regulation to allow indexing of tax basis for inflation. The validity of that regulation has been discussed at least since 1992. Treasury and the Department of Justice under President George H.W. Bush concluded that such a regulation would be invalid. However, some argued for this approach in 2017-2018 during the first Trump Administration,²¹² and Conservative organizations are reportedly encouraging the current Administration to do the same.²¹³

I believe that this regulation would clearly be invalid even under *Chevron* step 1 and that *Loper Bright* would completely eliminate any argument for validity. Under section 1012, the basis of an asset is its “cost.” However, just as Treasury did with Form 1099-K reporting, section 382, or the check-the-box regulations, Treasury could issue this regulation under whatever theory it might have. Taxpayers could then follow the regulation without regard to its validity. I think this would be a terrible result for the tax system.

Of course, the standing requirement is not a complete bar to a challenge to the validity of all pro-taxpayer regulations. Many regulations help some taxpayers and hurt others. A court could invalidate a regulation in a case brought by a taxpayer in the latter category. However, even in that case, short of a Supreme Court decision invalidating a regulation, Treasury or the IRS could non-acquiesce in the decision and still allow taxpayers to continue to follow the regulation if they wanted to. Taxpayers would then, in effect, have an election on whether to

²⁰⁷Kathy Larsen, *Republicans Call on IRS to Nix Guidance on Economic Substance*, Bloomberg Tax, July 24, 2025.

²⁰⁸Kristen A. Parillo, *Businesses Push IRS to End Basis-Shifting Audit Strategy*, Tax Notes Federal, June 9, 2025, p. 1960.

²⁰⁹Eric B. Sloan, *supra* note 132.

²¹⁰TD 10026, 90 Fed. Reg. 3003, 3004-5, Jan. 14, 2025.

²¹¹Reg. § 1.1503(d)-1(f).

²¹²This history is described in Daniel Hemel et al., *The False Promise of Presidential Indexation*, 36 Yale J. Regul. 693, 694-698 (2019).

²¹³Jeff Stein, *Conservatives are asking Trump for another big tax cut*, Washington Post, July 10, 2025.

follow it. This would be even more favorable for taxpayers (and worse for the tax system) than the situation in which a court invalidates a regulation and Treasury remains silent.

C. Enforcement of the Tax Laws

There are two important aspects to tax enforcement: enforcement policies and the ability to enforce the tax laws.

1. Enforcement policy

Similar to Treasury's unrestricted power to issue pro-taxpayer regulations without challenge, the same power exists for pro-taxpayer administrative enforcement of the Code and regulations. Treasury and the IRS theoretically have the unrestricted power to administratively fail to enforce anti-taxpayer provisions of the Code, or to provide other pro-taxpayer benefits not authorized by the Code. No one would have standing to object. In addition, the Supreme Court has held that an agency decision not to enforce a violation of the underlying statute is presumptively unreviewable as a claimed violation of the APA, even by a taxpayer with extremely clear standing.²¹⁴

There are practical limitations on this power, just as there are on the regulation-writing power. Surely Treasury could not issue a revenue procedure saying that it would accept tax returns filed with payment of tax at a rate lower than the statutory rate, or with interest deductions taken without regard to section 163(j), or with tax benefits claimed without regard to a statutory phaseout. But the IRS could announce that it would apply antiabuse rules such as the ESD very narrowly on audit as it has done in the past under industry pressure,²¹⁵ disavow past pro-government judicial victories in lower courts such as on the ESD or section 1402(a)(13), or fail to appeal and acquiesce in judicial losses even when an appeal would have substantial merit.

In that regard, EO 14219 directs agencies, after proper consultation and on a case-by-case basis and consistent with applicable law, to terminate enforcement proceedings "that do not comply with the Constitution, laws, or Administration policy." While the reference to Administration policy is not entirely clear, the requirement to act consistent with applicable law could be interpreted to require continued enforcement of clear statutory or regulatory requirements unless there is a good claim of unconstitutionality. On the other hand, in the nontax area, the Administration has stopped or slowed enforcement of laws and regulations that it considers to be inconsistent with Administration policy,²¹⁶ and stated that it was "irrevocably

²¹⁴*Heckler v. Chaney*, 470 U.S. 821 (1985) (rejecting challenge by inmates on death row to the FDA's refusal to take enforcement action against the state's use of a drug for a lethal injection).

²¹⁵See Spencer Woodman, *Under industry pressure, IRS division blocked agents from using new law to stop wealthy tax dodgers*, International Consortium of Investigative Journalists, Aug. 29, 2024.

²¹⁶Maxine Joselow et al., *Trump Orders the Government to Stop Enforcing Rules He Doesn't Like*, The Washington Post, May 18, 2025; The White House, *Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security*, Feb. 10, 2025.

relinquishing” (supposedly binding even a future Administration) any legal claim for violations of a statute.²¹⁷

It would not be good for the integrity of the tax system if Treasury or the IRS were to apply EO 14219 in a pro-taxpayer manner that gives priority to Administration tax policy over the *Loper Bright* interpretation of the Code, or if they otherwise failed to apply *Loper Bright* in a neutral pro- and anti-taxpayer manner. Such actions, of course, could only be pro-taxpayer because of judicial limitations on anti-taxpayer rules.

2. IRS ability to enforce the tax law

The IRS is currently on its sixth commissioner since the start of the current Administration (seventh since January 1).²¹⁸ These include five acting commissioners, of which the current one is also very busy in his role as Secretary of the Treasury. The Senate-confirmed commissioner, who remained in office just over 50 days,²¹⁹ had twice co-sponsored bills in the House to eliminate the IRS and replace the income, employment and estate taxes with a national sales tax.²²⁰ In addition, roughly two-thirds of the IRS’s top leadership positions are currently either vacant or have someone serving in an acting capacity.²²¹ Many of the most experienced managers have left, making it very difficult for the IRS to have a long-term and consistent enforcement policy.²²²

Reduced levels of IRS employment are also a serious problem for enforcement. Before the IRA, over the years there was a significant decrease in the IRS’s enforcement workforce, the number of auditors of sophisticated tax returns, and the audit rate of high-income taxpayers.²²³ The IRA authorized the IRS to spend \$80 billion of extra funding over time, the majority on enforcement. The CBO estimated that this funding would have led to a revenue increase (net of the additional spending) of \$180 billion over 10 years, although estimates vary widely, and the Budget Lab at Yale estimated \$637 billion over 10 years.²²⁴

²¹⁷Charles Savage, *Trump Claims Sweeping Power to Nullify Laws, Letters on TikTok Ban Show*, N.Y. Times, July 3, 2025.

²¹⁸For a listing by date, see Brent D. Griffiths et al., *Trump is burning through IRS heads at a rate of almost 1 a month. Here’s who’s held the job, and why they left*, Business Insider, Aug. 8, 2025.

²¹⁹Erin Slowey, *IRS Chief’s Gaffes, Sudden Exit Roil the Fractured Tax Agency*, Bloomberg Tax, Aug. 10, 2025; Andrew Duehren et al., *The Auctioneer and the Treasury Chief: Billy Long’s Quick Fall at the I.R.S.*, N. Y. Times, Aug. 14, 2025.

²²⁰H.R. 25, 113th Cong. (2013-2014); H.R. 25, 115th Cong. (2017-2018).

²²¹Erin Slowey, *Acting or Vacant: The New Status Quo for Leadership Roles at IRS*, Bloomberg Tax, Aug. 20, 2025; Slowey and Schilling, *IRS’ Core Mission in Doubt as Trump Policies Push Leaders Out*, Bloomberg Tax, April 28, 2025; Erin Slowey, *supra* note 219.

²²²See, e.g., Erin Schilling et al., *Leadership Void Leaves Tax Practitioners Blind to IRS Priorities*, Bloomberg Tax, Aug. 21, 2025.

²²³See, e.g., Chuck Marr, *Targeting the IRS Shows DOGE’s Stated Purpose Is Just a Pretext*, Bloomberg Tax, March 19, 2025.

²²⁴Libin Zhang, *Revenue Projections All the Way Down*, Tax Notes Federal, Sept. 18, 2023, p. 2109; The Budget Lab at Yale, *The Revenue and Distributional Effects of IRS Funding* (updated April 24, 2025).

Then-Secretary Yellen directed the IRS to focus the additional enforcement resources on high-end noncompliance, in particular on large corporations, high-net-worth individuals, and complex passthroughs. She pointed out that the IRS could then audit only 7,500 of these taxpayers annually out of 4 million returns received, and that each hour spent on auditing someone making more than \$5 million annually generates an average of \$4,500 in additional taxes.²²⁵

The IRS then actively began hiring new examiners. However, Congress has since eliminated most of the \$80 billion of extra funding, and almost nothing is left of those funds for enforcement.²²⁶ Concerning the future, the Administration's proposed budget for fiscal 2026 would cut IRS funding by 20 percent from fiscal 2025, from \$12.3 billion to \$9.8 billion, and enforcement by 33%, from \$5.4 billion to \$3.6 billion. This would leave the funding at about the level for 2002, despite 70 percent inflation since then.²²⁷ The cutback is said to be necessary to prevent "weaponized enforcement and overzealous rules against the American people."²²⁸ The House appropriations committee, whose recommendations have not been enacted in the past, proposed a 23% cut in the overall IRS budget and a 45% cut in the enforcement budget.²²⁹

Consequently, thousands of IRS examiners have recently been fired or encouraged to retire, and few if any will be hired in the future. This leaves the IRS with a severely reduced number of experienced examiners and the apparent inability to hire more.

The process used to terminate IRS employees has also left much to be desired. For example, all probationary employees not deemed mission critical or otherwise exempt (7,315 employees) were sent government-wide form letters that terminated them. Probationary employees include recently hired employees with special expertise as well as recently promoted employees. The letters uniformly cited their performance as a reason for termination, even though there was no individual review (in violation of agency procedures) and only about 40 of them actually had low performance ratings in their file. In addition, some mission critical employees who were mistakenly terminated were asked to return. A court order (later stayed) then required that all terminated employees be reinstated. Reinstated employees were first placed

²²⁵Letter from Treasury Secretary Janet L. Yellen to IRS Commissioner Charles P. Rettig (Aug. 10, 2022), <https://home.treasury.gov/news/press-releases/jy0918>.

²²⁶Cady Stanton et al., *The Final Clawback? Republicans Eye Paths to Nix IRS Funds*, Tax Notes Federal, May 12, 2025, p. 1096 (\$21 billion of IRA funding is available but may soon be eliminated, and in any event, less than \$1 billion of enforcement dollars remain).

²²⁷Cady Stanton et al., *Detailed Trump Budget Request Would Slash IRS Enforcement Funds*, Tax Notes Federal, June 9, 2025, p. 1936; Doug Sword et al., *Trump Proposes Slashing IRS Funding to Lowest Level Since 2002*, Tax Notes Federal, May 12, 2025, p. 1086.

²²⁸White House fact sheet, *Ending Weaponization of the Federal Government*, May 2, 2025 ("The President's Budget restores IRS as a neutral arbiter that will no longer use weaponized enforcement and overzealous rules against the American people. The Budget proposes to use spending reform to disempower the targeted harassment of conservatives by the IRS."), <https://www.whitehouse.gov/wp-content/uploads/2025/05/Ending-Weaponization-of-the-Federal-Government-Fact-Sheet.pdf>.

²²⁹Doug Sword, *House Appropriators Would Cut IRS Beyond White House's 20 percent*, Tax Notes Federal, July 28, 2025, p. 637.

on administrative leave and then restored to full work status (with instructions to return to work in four days), and more than half of those then decided to leave voluntarily.²³⁰

This process was hardly likely to give much comfort about job security to any IRS employees. But the uncertainty and confusion continues even today. After the IRS lost 6,000 contact representatives in call centers to resignations and other separations, it recently posted an offer to hire 3,500 people in such positions.²³¹ In addition, at least some employees who accepted deferred resignations effective September 30 received an email on August 22 offering them the chance to rescind their resignations to fill “critical vacancies.” However, they were only given 5 days to respond, and even then, expressing an interest in returning was no guarantee that the resignation would be undone.²³²

It is reported, however, that Treasury Secretary Bessent has told IRS executives that there will be no more reductions in force at the IRS “in the foreseeable future.”²³³ Given the recent turmoil and changes in plans, both at the IRS and throughout the Federal government, it is not clear how much comfort such an announcement will give to IRS employees.

In addition, an Executive Order on Inauguration Day this year adopted a hiring freeze. This caused the IRS to rescind all offers to third year law students who would start in the fall of 2025, even if the offers had already been accepted.²³⁴ By the time of the rescission, many students may have turned down other job opportunities that were no longer available, or not even looked for other opportunities. This rescission of offers was clearly a negative event not only for the students directly affected, but potentially for the ability of the IRS to make credible offers to students (or anyone else) in the future. This is not good for the tax system.

While the numbers are regularly updated, the IRS had approximately 103,000 employees in February 2025. As of May 2025, the workforce had been reduced by about 25% to 77,000. The drops included 27% (4,180) of all tax examiners, 26% (3,070) of all revenue agents, 19% (1,331) of the Large Business and International Division (LB&I), and 35% (8,669) of the Small Business/Self Employed (SB/SE) division.²³⁵ LB&I employees audit the largest corporations and partnerships and bring in the highest return on investment.²³⁶ By June 4, 2025, the total reduction

²³⁰Treasury Inspector General for Tax Administration, *IRS Terminated Probationary Employees Without Following Internal Procedures and Considering Individual Performance*, August 14, 2025, Report Number: 2025-IE-R028.

²³¹Lauren Loricchio et al., *IRS Posts Thousands of Jobs Amid Workforce Reductions*, Tax Notes Federal, Aug. 25, 2025, p. 1313. Nine Olson is quoted in the article as saying that “[t]his just signals chaos to me.”

²³²Benjamin Valdez, *Treasury Looks to Undo Some IRS Resignations*, Tax Notes Federal, Sept. 2, 2025, p. ____.

²³³Erin Schilling, *IRS Has No Reduction in Force Planned for Now, Bessent Says*, Bloomberg Tax, Aug. 21, 2025.

²³⁴Benjamin Valdez, *Federal Hiring Freeze Quickly Hits Prospective IRS Attorneys*, Tax Notes Federal, Jan. 27, 2025.

²³⁵Treasury Inspector General for Tax Administration, *Snapshot Report: IRS Workforce Reductions as of May 2025*, July 18, 2025, Report Number 2025-IE-R027.

²³⁶Andy Kroll, *How DOGE's Cuts to the IRS Threaten to Cost More Than DOGE Will Ever Save*, ProPublica, March 5, 2025 (also citing a GAO report from 2024 finding savings of \$13,000 for every hour spent auditing very wealthy taxpayers).

in personnel, as well as in LB&I, had increased by about another 1%.²³⁷ Not surprisingly, morale in LB&I is low.²³⁸

It should be noted that the number of IRS employees during the 2015-2020 period was about 75,000,²³⁹ so the current decrease in employment restores the prior level of employment. However, the number and complexity of returns has gone up, audit levels of sophisticated taxpayers such as partnerships had been very low, and the IRS had been trying to increase audit levels of these taxpayers.

In that connection, the Passthrough Entities office, which audits complex partnerships, is reported to have lost 27 percent of its workforce this year. The Global High Wealth office, which has the most experienced agents and audits the wealthiest taxpayers, has lost 38 percent of its employees this year (353 down to 220), and current agents report their teams “as being in a state of near paralysis.”²⁴⁰

Consequently, the IRS reportedly has dropped investigations of high-net-worth corporations and individuals because of a lack of resources.²⁴¹ There are also reports of audit delays and audits being dropped midway without further investigation because of the lack of auditors,²⁴² and money being “left on the table” in large complex cases by departing agents trying to close cases by “agreeing to things that the IRS would never have agreed to before.”²⁴³ One agent reports that “these cases are going to be closed and we’re going to look like idiots. . . . There is no one left to work them. The remaining agents have full caseloads.”²⁴⁴

Regarding the future, the expectation of reduced audit levels on high-income taxpayers is likely to encourage aggressive tax positions. One practitioner recently suggested that “undoubtedly there’ll be another cycle of abusive tax shelters that use partnerships.”²⁴⁵

²³⁷National Taxpayer Advocate, *Fiscal Year 2026 Objectives Report to Congress*, released June 25, 2025, p. 19.

²³⁸Lauren Loricchio, *White House Pressure Forces Some LB&I Employees Out*, Tax Notes Federal, May 5, 2025, p. 940.

²³⁹Internal Revenue Service, *IRS Budget and Workforce*, <https://www.irs.gov/statistics/irs-budget-and-workforce>. Under the chart in the top left, hit “XLSX”.

²⁴⁰Spencer Woodman, *The IRS Unit That Audits Billionaires Has Lost 38 Percent of Its Employees Since January, New Data Shows*, International Consortium of Investigative Journalists, March 28, 2025.

²⁴¹Jacob Bogage, *Tax Revenue Could Drop by 10 Percent Amid Turmoil at IRS*, The Washington Post, March 22, 2025.

²⁴²Erin Schilling, *More Fallout From IRS Cuts: Audit Delays, Do-Over Risks, Stress*, Bloomberg Tax, March 25, 2025.

²⁴³Stephen K. Cooper, *IRS Cuts May Delay Taxpayer Help Beyond 2025 Filing Season*, Law360, March 25, 2025.

²⁴⁴Spencer Woodman, *After Mass Firings, the IRS Is Poised to Close Audits of Wealthy Taxpayers, Agents Say*, International Consortium of Investigative Journalists, March 3, 2025.

²⁴⁵Kristen A. Parillo, *IRS Layoffs Could Spark Use of Abusive Tax Shelters, Tax Pro Says*, Tax Notes Federal, April 7, 2025, p. 208. See also David P. Weber et al., *Forced Attrition Will Make Tax Evasion Great Again*, Tax Notes Federal, April 7, 2025, p. 57.

At lower income levels, the IRS is reported to have noticed “an uptick in online chatter” from individuals saying they won’t pay taxes this year or will claim improper credits or deductions, hoping not to be audited.²⁴⁶ Other reports indicate that, because of the perception that there will be a reduced risk of audit, many individuals are less concerned about making mistakes on their tax returns or are considering not filing tax returns this year.²⁴⁷ In fact, tax return filings this past season were up slightly, although top IRS leaders who have left the agency say that they wouldn’t expect changes in filing season results until next year.²⁴⁸

Of course, reports of some taxpayers not paying their taxes cause other taxpayers to take a chance and not pay. Partly as a result of these factors, Treasury and IRS officials predicted the possibility of more than a 10 percent drop in tax receipts (\$500 billion) by April 15 of this year compared with last year.²⁴⁹ The Budget Lab at Yale estimates that a reduction in the IRS workforce of 22% (approximately the result so far) would have a revenue cost over 10 years (net of the cost savings from the reduction) of at least \$198 billion and possibly as much as \$1.9 trillion, depending on the amount of increased noncompliance.²⁵⁰ Former Treasury Secretary Larry Summers recently predicted a likely loss of more than \$1 trillion.²⁵¹

In reality, reduced enforcement is likely to benefit higher-income taxpayers more than lower-income taxpayers. Lower-income taxpayers are more likely to have their income subject to tax reporting and to claim the standard deduction, making it much harder to omit income or benefit from questionable or made-up deductions. Further, the cutback in auditors is likely to result in more correspondence audits and fewer field audits. Correspondence audits are cheaper and mostly affect low-income taxpayers claiming the earned income and child tax credits, while field audits take more time and mostly affect high-income taxpayers.²⁵²

As to criminal enforcement, the Tax Division of the Justice Department is being eliminated and its enforcement work and employees are being transferred to the civil and criminal divisions of the Department. The stated goal is to provide more oversight of tax enforcement, but some see it as a way to weaken tax enforcement. In addition, the Division will not have its own Senate-confirmed leader, which could give it less clout in obtaining internal support for the funding of tax enforcement. It might also lead to less experienced attorneys

²⁴⁶Bogage, *supra* note 241.

²⁴⁷Jason Bramwell, *Survey: Some Americans Might Roll the Dice on Not Filing Their Taxes This Year Due to IRS Job Cuts*, CPA Practice Advisor, March 26, 2025; Wes Kosova, *Trump’s DOGE Cuts at IRS Are Tempting Taxpayers to Cheat*, BNA Daily Tax Report, March 28, 2025.

²⁴⁸Erin Slowey, *IRS Touts ‘Successful’ Tax Season Amid Slashed Workforce, Chaos*, Bloomberg Tax, May 31, 2025.

²⁴⁹Bogage, *supra* note 241.

²⁵⁰The Budget Lab at Yale, *supra* note 224.

²⁵¹Christopher Anstey, *Summers Says ‘Attack’ on IRS May Risk a \$1 Trillion Revenue Hit*, Bloomberg Tax, April 22, 2025.

²⁵²Erin Schilling, *IRS Effort to End Racial Bias Threatened by Trump DEI Mandate*, Bloomberg Tax, March 18, 2025.

handling tax cases and result in less deterrent effect against taxpayers who “feared” the Tax Division.²⁵³

However, Justice Department officials say that both the civil and criminal divisions of the Department will have a tax section, tax enforcement will continue much as today, and the reorganization will result in additional levels of review to prevent unjustified prosecutions of taxpayers.²⁵⁴ Time will tell whether this reorganization is good or bad for the tax system.

Also regarding criminal enforcement, 250 IRS agents in the Criminal Investigation Division (out of 2,290 special agents) have been deputized to work for the Department of Homeland Security (DHS) on immigration enforcement.²⁵⁵ Reportedly, “[t]hey have primarily helped establish a perimeter during raids and other operations.”²⁵⁶ This obviously is not putting their skills to good use and reduces the Division’s ability to conduct criminal tax investigations.

It is hard to imagine a worse set of affairs for the fair and effective collection of taxes from taxpayers at all income levels. This is yet another big negative for the state of the tax system.

D. IRS Relations With Taxpayers

Workforce reductions and other issues have affected ongoing IRS relations with taxpayers in addition to matters involving enforcement. None of these results are good for the tax system.

1. IRS taxpayer services

The Taxpayer Advocate Service is losing up to 25 percent of its workforce, increasing the burden on the remaining employees that already work 150 to 200 cases each.²⁵⁷ The Taxpayer Experience Office, which was created to oversee the IRS’s strategic direction to improve the taxpayer experience when dealing with the IRS, was eliminated.²⁵⁸ Staffing in the group dealing

²⁵³Erin Schilling, *DOJ Division Breakup Stokes Concern of Weakened Tax Enforcement*, Bloomberg Tax, June 18, 2025.

²⁵⁴Erin Schilling, *DOJ Tax to Retain Similar Oversight After Planned Reorganization*, Bloomberg Tax, June 27, 2025; Kat Lucero, *DOJ Tax Division to Split Criminal, Civil Units Official Says*, Law360 Tax Authority, June 27, 2025.

²⁵⁵Tarini Parti and Richard Rubin, *DHS Seeks to Deputize IRS Officers to Help With Deportation Effort*, *The Wall Street Journal*, Feb. 10, 2025; Erin Schilling, *IRS Has 250 Criminal Agents Assisting With Immigration Crackdown*, Bloomberg Tax, June 27, 2025.

²⁵⁶Eric Katz, *Feds from IRS agents to refugee officers are deploying to assist ICE conduct raids*, Government Executive, as updated June 16, 2025.

²⁵⁷Erin Schilling, *IRS Taxpayer Advocate Service Struggles as 400 Workers Depart*, Bloomberg Tax, May 21, 2025.

²⁵⁸Treasury Inspector General, *supra* note 235, p. 7.

with identity theft is so low that taxpayers, many with low incomes, are waiting an average of 20 months for their cases to be resolved and almost two years to receive their refunds.²⁵⁹

The IRS is also considering eliminating all taxpayer services it now provides in non-English languages, including phone assistance, tax forms, foreign-language web sites, and social media accounts. This is based on an Executive Order treating English as the official language of the U.S. Expanding multilingual assistance was a priority in the first Trump Administration, and in 2021 there were 90 million visits to the non-English pages on the IRS web site.²⁶⁰ A letter from 26 Democratic senators to the Secretary of the Treasury expresses alarm about this prospect and points out that it would make it difficult for non-English speaking individuals to file their tax returns and could reduce voluntary tax compliance.²⁶¹ Surely it would be bad for the tax system for non-English speaking taxpayers did not have the ability to easily communicate with the IRS and fill out their tax forms.

An Executive Order²⁶² requires all agencies to terminate all programs or activities concerning diversity, equity, inclusion, and accessibility. This is likely to require the IRS to end or substantially curtail its attempts to reduce racial bias in audits.²⁶³ As of May 2025, 9 out of 13 positions in the IRS Office of Equity, Diversity, and Inclusion had been eliminated.²⁶⁴

2. Unauthorized disclosure of tax information to the public

Section 6103 provides civil and criminal penalties for unauthorized disclosure of tax information by the IRS to third parties. An IRS government contractor was recently sentenced to five years in prison for accessing tax information on “thousands of the nation’s wealthiest individuals” and illegally disclosing the information to the press.²⁶⁵ The sentence is currently on appeal by the individual. The disclosures, which were extensively covered by the press, reportedly covered returns of over 400,000 taxpayers, including Donald Trump and Elon Musk.²⁶⁶ The GAO has also identified numerous weaknesses in IRS systems designed to protect taxpayer information from unauthorized disclosure.²⁶⁷

²⁵⁹Lauren Loricchio, *Staff and Budget Cuts Could Exacerbate Identity Theft Delays*, Tax Notes Federal, Aug. 25, 2025, p. 1308.

²⁶⁰Jacob Bogage, *IRS considers eliminating non-English language tax services*, The Washington Post, July 24, 2025.

²⁶¹Padilla, Schumer, Wyden Urge IRS to Maintain Vital Multilingual Services for Taxpayers, Aug. 15, 2025, <https://www.padilla.senate.gov/newsroom/press-releases/padilla-schumer-wyden-urge-irs-to-maintain-vital-multilingual-services-for-taxpayers/>.

²⁶²Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, Jan. 31, 2025.

²⁶³Schilling, *supra* note 252.

²⁶⁴Treasury Inspector General, *supra* note 235, p. 7.

²⁶⁵U.S. Department of Justice Press Release, *Former IRS Contractor Sentenced for Disclosing Tax Return Information to News Organizations*, Jan. 29, 2024, available at <https://www.justice.gov/archives/opa/pr/former-irs-contractor-sentenced-disclosing-tax-return-information-news-organizations>.

²⁶⁶Bernie Becker, *IRS: Contractor leaked more than 400k returns*, Politico, Feb. 25, 2025.

²⁶⁷United States General Accountability Office, *Security of Taxpayer Information: IRS Needs to Address Critical Safeguard Weaknesses*, August 2023.

Early versions of OBBBA would have substantially increased the criminal penalties for illegal disclosure of tax information. However, this was dropped in the final bill, possibly because under the Byrd rule, the revenue component of a provision in a reconciliation bill cannot be “merely incidental” to the nonbudgetary aspects of the provision. It is not good for the tax system if taxpayers are at risk of having their confidential tax information disclosed to the public.

3. Disclosure of tax information to DHS

Section 6103(i)(2) provides an exception to the nondisclosure rules for disclosure by the IRS of tax information to employees of other agencies who are “personally and directly engaged in...any investigation which may result in a [criminal] proceeding.” On this basis, a recent agreement between Treasury and DHS requires the IRS to provide DHS with tax return data for undocumented immigrants under criminal investigation.²⁶⁸

DHS reportedly expects to request information on 7 million individuals under this agreement, and the IRS is reportedly building a computer program that would allow “massive automated data sharing” with DHS. This goes far beyond any disclosure that has been made before, has raised significant concerns within the IRS about compliance with section 6103(i)(2), and has led to resignations of some IRS officials.²⁶⁹ The agreement was challenged by immigrant groups on the ground, among others, that DHS could not plausibly have the resources to conduct individualized criminal investigations of so many people, and that the data would in fact be used to facilitate civil deportation proceedings. However, the court allowed disclosure based on the government’s representation that this would not be the case.²⁷⁰

In 2023, undocumented immigrants are reported to have paid federal taxes of about \$66 billion, two-thirds of which is payroll taxes (including employer FICA) for Social Security and Medicare benefits that they are not entitled to receive.²⁷¹ The agreement with DHS may make those individuals fearful of filing tax returns and could result in a significant revenue loss to the federal government.

One estimate of the resulting revenue loss, including from increased self-employment and “under the table” employment arrangements, is \$12 billion to \$39 billion in 2026 and \$147 billion to \$479 billion in 2026-35.²⁷² In fact, tax return preparers in immigrant communities report that the number of their tax return filings by April 15 were in many cases much lower than

²⁶⁸*Memorandum of understanding between Treasury and the Department of Homeland Security for the exchange of information for nontax criminal enforcement*, April 7, 2025. See <https://storage.courtlistener.com/recap/gov.uscourts.dcd.278147/gov.uscourts.dcd.278147.30.1_1.pdf>.

²⁶⁹See, e.g., William Turton et al., *The IRS Is Building a Vast System to Share Millions of Taxpayers’ Data With ICE*, ProPublica, July 15, 2025; Jacob Bogage et al., *IRS, White House clashed over immigrants’ data before tax chief was ousted*, Washington Post, Aug. 9, 2025; Jacob Bogage et al., *Acting IRS chief to quit over deal to share data with immigration authorities*, Washington Post, Aug. 9, 2025.

²⁷⁰*Centro de Trabajadores Unidos v Bessent*, D.D.C., May 12, 2025, <https://storage.courtlistener.com/recap/gov.uscourts.dcd.278147/gov.uscourts.dcd.278147.67.0.pdf>, slip op. pp. 6-7. The case is on appeal to the D.C. circuit.

²⁷¹The Budget Lab at Yale, *The Potential Impact of IRS-ICE Data Sharing on Tax Compliance*, April 8, 2025.

²⁷²*Id.*

last year, including by legal immigrants who did not want to call attention to undocumented relatives.²⁷³

The revenue loss has been defended on the ground that it is a legitimate policy decision by the Administration to have stricter immigration enforcement notwithstanding the expected revenue loss. However, it has also been noted that there is a broader societal cost of discouraging compliance with the tax laws and undermining civic engagement of immigrants with the federal tax system.²⁷⁴ In any event, the result is bad for the tax system notwithstanding any nontax justifications.

4. Attendance at conferences

Treasury and IRS officials have long said they benefit from contact with taxpayer groups, including meetings at tax conferences or in private sessions, and reviewing reports from bar associations and other public interest groups. The opportunity to interact and exchange ideas is beneficial to both the taxpayer community and government officials.

For a time after the change in Administration, Treasury and IRS officials were not participating in panels or, at least in some cases, scheduling meetings with taxpayer groups.²⁷⁵ Treasury and IRS officials are again participating in bar association and similar activities. However, it is reported that in at least some cases, fewer IRS officials are attending conferences, in part because they “didn’t feel comfortable that they were going to have a job the next day.”²⁷⁶ It is also possible that, for the same reason, Treasury and IRS officials who do attend will be less willing to openly engage in constructive dialog with practitioners. This might be either because of direction from superiors to “lay low” or because of the risk of finding themselves unemployed for saying the wrong thing.²⁷⁷ Full open and constructive dialog clearly makes for better tax regulations and a better tax system.

E. Politization of the Tax System

Any politization of the administration of the tax system, or even the appearance of politization, is obviously bad for the system. Several recent developments raise concerns in this regard.

First, actions have recently been taken against senior career officials of the IRS for their past work activities that were allegedly partisan, although that is strongly disputed. According to

²⁷³Lauren Kaori Gurley et al., *Deportation fears trigger decline in tax filings in immigrant communities*, Washington Post, May 19, 2025.

²⁷⁴*Id.* The latter point is made by Kyle Pomerleau at the American Enterprise Institute.

²⁷⁵Rebecca Chen, *Private Sector Prioritizes Tax Rule Comments to Shrinking IRS*, BNA Daily Tax Report, March 13, 2025 (stating that the American Institute of CPAs has not been able to schedule its semiannual call with the IRS to discuss tax guidance and issues).

²⁷⁶Erin Schilling, *supra* note 222.

²⁷⁷See Richard Rubin, *Treasury Official, Critical of Parts of Tax Law, Quits*, Wall St. J., Feb. 23, 2018.

the IRS Commissioner in the first Trump Administration, the actions are “unconscionable” and “will have a chilling effect on the overall IRS operations going forward.”²⁷⁸

Second, a Treasury official is reported to have initiated contact with the IRS concerning audits of two individual taxpayers.²⁷⁹ These facts, if true, give at least the appearance of politization and are not good for the tax system.²⁸⁰

Third, concerns have been expressed about the “dangerous precedent” that would be set from “weaponizing the IRS and the tax code to attack the president’s ideological opponents” such as Harvard. Such attacks have been said to represent an “existential threat to the entire nonprofit sector.”²⁸¹ Even the appearance of selective enforcement or nonenforcement of the Code for or against particular taxpayers for political reasons is obviously very bad for the tax system. This has been an issue for both political parties.²⁸²

The enactment or failure to enact tax legislation with the purpose of penalizing political opponents would be equally concerning.²⁸³ In all these situations, even the appearance of partisanship is bad for the tax system.

Fourth, a “senior White House official” is reported to have stated that “the West Wing has created a scorecard that rates 553 companies and trade associations on how hard they worked to support and promote [OBBBA].” The possible ratings are “strong, moderate or low,” and the factors in the rating include “social media posts, press releases, video testimonials, ads, attendance at White House events, and other engagement related to [OBBBA].” The scorecard would reportedly be taken into account by the White House in considering future corporate requests.²⁸⁴

I am not aware of any denial of this report. If true, the result is an incentive, perhaps effectively a mandate, to support particular tax legislation without regard to a belief in its actual merits, in order to obtain government support for unrelated requests. This would obviously be

²⁷⁸Erin Slowey, *Decade-Old Tea Party Case Looms Over IRS Probe of Career Leaders*, Bloomberg Tax, Aug. 4, 2025.

²⁷⁹See Jacob Bogage, *Trump appointee asked IRS to review audit of MyPillow CEO Mike Lindell*, Washington Post, April 17, 2025; Andrew Duehren, *Trump Official Asked I.R.S. About Audit of ‘High-Profile Friend of the President,’* New York Times, April 17, 2025.

²⁸⁰[reserved].

²⁸¹April Rubin, *Trump’s tax fight with Harvard sends chill through nonprofit sector*, Axios, May 5, 2025; see also Gregory Svirnovskiy, *Trump floats going after more schools’ tax exempt status*, Politico, May 7, 2025.

²⁸²See, e.g., Richard Rubin, *GOP Accused Democrats of Politicizing IRS. Now Trump Wants It to Punish Harvard*, *Wall St. J.*, April 17, 2025.

²⁸³See, e.g., Andrew Duehren, *Republicans Harness Tax Code to Punish Trump’s Political Nemeses*, N. Y. Times, May 23, 2025 (referring to provisions in the House-passed bill, only some of which were finally enacted).

²⁸⁴Mike Allen, *Scoop: White House loyalty rating for companies*, Axios, Aug. 15, 2025. See also Kate Sullivan, *Trump Aides Create Loyalty List Ranking Corporations By Support*, Bloomberg Tax, Aug. 15, 2025.

bad for the tax system. It would also mean that public expressions of support might not be based on true conviction and should be evaluated accordingly.

Fifth, a conservative organization recently issued two public reports individually listing leaders in the (1) IRS commissioner and deputy commissioner offices,²⁸⁵ and (2) LB&I.²⁸⁶ Each employee is listed by name and, in cases where information is available, identified as “Democrat,” “Liberal,” “Trump Critic,” or (in only two cases) “Republican.” Almost all the categorizations are based solely on voter registrations, political contributions, and social media posts (including repostings and “likes”), and including in some cases activities of spouses. Many of the social media postings are reprinted in full. The lists include basic errors, such as stating in some cases that an employee “voted Democrat” just because the person is a registered Democrat and is shown in the election files as having voted.

The reports are intended to demonstrate that Republicans are a small minority of the total officials in top IRS positions (which seems likely true), and, as stated in the subject line of one of the reports, “Democrats Abuse Power in IRS to Entrench Partisanship.” Yet in all but a very small number of cases, there is not even a reference to any official action taken by an employee, let alone a claim that an employee took any official action based on political considerations. So there is an enormous factual gap between the premise and the conclusion.

My first reaction was not to take these lists too seriously. However, at least two officials identified on these lists as “Democrat” were recently removed from their positions at the IRS.²⁸⁷ The president of the organization publishing the list stated that “[w]e’re incredibly excited about this,”²⁸⁸ although there is no indication of a connection between the departures and the list. More seriously, many individuals at other government agencies placed on similar public lists by the same organization have lost their jobs and have otherwise had their lives very seriously disrupted, including from harassment and concerns about physical safety.²⁸⁹

The threat of being on such a list could therefore have a very serious chilling effect on IRS management employees just trying to do their job, and on those who might be contemplating future management service with the IRS. It could also make taxpayers suspicious of the motives of IRS employees that they are dealing with, who might be trying to avoid getting on the lists. None of this is good for the tax system.

²⁸⁵American Accountability Foundation, *Memorandum to Treasury Secretary Scott Bessent, Re: Democrats Abuse Power in IRS to Entrench Partisanship*, April 8, 2025, <https://www.washingtonexaminer.com/wp-content/uploads/2025/04/IRS-Leadership-Final-Report-1-1-1.pdf>.

²⁸⁶American Accountability Foundation, *Large Business & International Division Research Report*, April 22, 2025, <https://www.washingtonexaminer.com/wp-content/uploads/2025/05/IRS-LBI-Research-Report-Final-1.pdf>.

²⁸⁷Jacob Bogage et al., *Bessent ousts 3 more IRS executives, asserting greater control*, Washington Post, Aug. 15, 2025.

²⁸⁸*Id.*

²⁸⁹Linda So et al., *Pro-Trump group wages campaign to purge ‘subversive’ federal workers*, USA Today, Aug. 7, 2025.

Finally, there have been a number of well-publicized pardons by Presidents of both parties of well-connected persons who committed tax crimes.²⁹⁰ These tend to put the tax system in disrepute and cause honest taxpayers to wonder why they should pay their own taxes.

V. Conclusions

For all the stated reasons, I believe the state of the tax system is poor. But the Constitution requires a state of the union address to include recommendations that are necessary and expedient.

Unfortunately, most or all of the negative elements of the current tax system will likely continue. Congressional gridlock will persist, tax legislation will have technical errors, Treasury will continue to have the power to fix (at most) only anti-taxpayer errors in the Code, no one will have standing to challenge pro-taxpayer regulations or administrative positions that are inconsistent with *Loper Bright*, and courts will give only limited deference to Treasury regulations taking anti-taxpayer positions. As a result, litigation will likely proliferate concerning anti-taxpayer regulations, uncertainty about the tax law will increase, and the law may be different in different parts of the country.

The tax system will remain inherently unbalanced in this respect in favor of taxpayers, and the ultimate responsibility and power to create as much balance as possible will remain with Treasury, acting within its statutory and constitutional limits. Yet if Treasury truly tries to reevaluate all past regulations in light of *Loper Bright*, it will be forced to withdraw numerous regulations that taxpayers routinely rely on in a nonabusive fashion. Alternatively, if only the past anti-taxpayer regulations violating *Loper Bright* are withdrawn, either by Treasury or as a result of taxpayer challenges, the pro-taxpayer bias in the system will continue.

To relieve some of the initial uncertainties resulting from *Loper Bright*, perhaps Congress could pass legislation saying that all existing Treasury regulations will be considered valid from their date of publication. It could make specific exceptions and provide any desired rule in lieu of those regulations. There would be no unconstitutional delegation to the Treasury, because there is no delegation of authority at all but rather a ratification of specific past actions of Treasury.

The result would be a much more balanced system and would avoid a large amount of litigation likely to arise under *Loper Bright*. Taxpayers would dislike this approach to the extent that they would prefer that anti-taxpayer regulations be withdrawn or overturned in court, rather than ratified. Taxpayers would like this approach to the extent that they prefer having pro-

²⁹⁰See, e.g., Kenneth P. Vogel, *Trump Pardoned Tax Cheat After Mother Attended \$1 Million Dinner*, N.Y. Times, May 27, 2025; Asha Glover, *Trump Pardons Former NY Rep. Convicted of Tax Crime*, Law360, May 29, 2025; Michael D. Shear et al., *Biden Issues a 'Full and Unconditional Pardon' of His Son Hunter Biden*, N.Y. Times, Dec. 1, 2024 (after guilty plea on tax charges); Britni de la Cretaz, *Trump Actually Made One Last Pardon Before Leaving Office — As A Favor To Jeanine Pirro*, Refinery29, Jan. 21, 2021 (referring to her husband convicted of tax evasion); Dafna Linza, *The Shadow of Marc Rich*, ProPublica, Dec. 3, 2011 (relating to pardon by President Clinton of fugitive indicted for tax fraud).

taxpayer regulations ratified rather than possibly be withdrawn by Treasury or disregarded by a court.

In addition, Treasury could take the position that unless Congress acts to ratify past regulations, it will ruthlessly withdraw on a prospective basis any regulations that it believes do not conform to *Loper Bright*, regardless of whether they are pro- or anti-taxpayer. Likewise, it could announce that all future regulations would be strictly based on *Loper Bright* and that any complaints by taxpayers should go to Congress. This would be fully consistent with EO 14219 and the rationale of *Loper Bright*. The burden would then be on Congress to amend the Code in any way that it desired to codify any existing regulation so withdrawn by Treasury, to make future technical corrections, or to fill any unintended gaps in the current or future statute.

Congress could also take more modest steps to facilitate the operation of the tax system. It could amend the APA to relieve some of the pressure on Treasury to write expansive preambles for every regulation, to make it easier for Treasury to adopt temporary regulations as contemplated by section 7805(b), and to reverse the result in *Corner Post* (a 6-3 decision) by having the statute of limitations on all challenges to the validity of a tax regulation begin when the regulation is adopted rather than when the taxpayer is injured by it. Congress could clarify that the ESD is relevant whenever the tax result of a transaction is inconsistent with Congressional intent. It could increase funding for the IRS to allow fair enforcement of the tax laws at all income levels.

As to delegations, Congress could enact the *Chevron* standard into law, at least for tax regulations, because *Loper Bright* was an APA case rather than a constitutional case. On the other hand, even *Chevron* deference might now be subject to challenge as an unconstitutional delegation. In any event, at a minimum, all new tax laws should have delegations that are tailored to the *FCC* standards for constitutional delegations, and existing delegations in the Code could be modified accordingly. It is good for the tax system that OBBBA provides for specific tax delegations in some cases.

Finally, to deal with circuit splits on tax issues, Congress could create a national court of tax appeals, just under the Supreme Court, to take appeals when there is a conflict among circuits.

Aside from more specific tax delegations, do I think any of this is likely to happen, or even reasonably possible? Of course not. Most likely, the tax system will just continue to muddle through somehow.

But now the good news! The tax system is just about money. Its problems are fixable, except maybe the lack of taxpayer standing. Congress still has the power to raise taxes, close loopholes, adopt antiabuse rules, increase the funding of the IRS, and oversee the Treasury and IRS to be sure they act in a balanced and nonpolitical way. If revenue collections are inadequate, Congress will be forced raise taxes or cause better enforcement of current rules in order to prevent unsustainable debt loads. Taxpayers subject to withholding or that receive information returns will not have much choice but to pay. The others can be encouraged to pay by increased enforcement and penalties, possibly using AI. And even without Congress, Treasury has the power to administer the tax system in a balanced way that is fair to all taxpayers and the fisc.

By contrast, the adverse consequences of environmental degradation, global warming, inadequate medical care, inadequate early childhood education, and the like are not so easily reversed. If I was giving a true State of the Union address, I might not even have time to discuss the state of the tax system.